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Strengthening Multilateral Environmental Governance through Bilateral Trade Deals

Jean-Frédéric Morin and Corentin Bialais

Key Points

- Multilateral environmental agreements (MEAs) are increasingly referred to within trade agreements. The range of MEAs cited in trade agreements is also expanding.
- MEAs within trade agreements are referred to for different reasons, including to provide contextual information for interpretative purposes, to determine hierarchy between agreements, to promote the ratification of MEAs or to demand their implementation.
- Using data obtained from the Trade and Environment Database (TREND), this policy brief shows that the practice of referencing MEAs in trade agreements creates significant political and legal opportunities for enhanced MEA effectiveness.

Introduction

This policy brief examines how trade deals have contributed to the effectiveness of the MEA. Over the past decade, multilateral environmental governance has yielded modest results.¹ Multilateral negotiations appear increasingly slow and polarized. Even established multilateral agreements are weakened by the withdrawal — and threat of withdrawal — of some countries. As a result of this sluggishness, the number of new environmental agreements concluded every year is declining and membership to existing agreements has plateaued.² Existing MEAs have greatly contributed to environmental protection and remain central to global environmental governance, but they are no longer the new frontier of international environmental regulations.

In contrast, bilateral and regional trade agreements are rapidly proliferating. Every year, more than a dozen comprehensive trade agreements are concluded. Since Mongolia signed a bilateral trade agreement with Japan in 2015, every member of the World Trade

1 The most significant contributions were the conclusion of the Nagoya Protocol on access to genetic resources (2010); the Minamata Convention on the adverse effects of mercury (2013); and the Paris Agreement on mitigating climate change (2015).

2 Ronald B Mitchell, "International Environmental Agreements (IEA) Database Project" (Version 2017.1), online: <<http://iea.uoregon.edu/>>.

About the Authors

Jean-Frédéric Morin is a senior fellow with CIGI's International Law Research Program (ILRP), effective May 2016. He is also associate professor at Laval University, where he holds the Canada Research Chair in International Political Economy.

At CIGI, Jean-Frédéric is contributing to the ILRP's research themes on international intellectual property and environmental and trade laws by building large databases, sponsored by the Canada Foundation for Innovation, CIGI and Laval University. These databases will document institutional interactions among trade, investment and environmental institutions. It will enable Jean-Frédéric and other CIGI researchers to study the emergence, variation, diffusion, implementation and effectiveness of hundreds of different provisions found in thousands of multilateral, regional and bilateral agreements.

Before being invited to hold the Canada Research Chair in International Political Economy, Jean-Frédéric was a professor of international relations at Université libre de Bruxelles from 2008 to 2014. He has an interdisciplinary training in law and political science, and has taught in law and political science programs. He is currently conducting research in the fields of trade policy, investment law, global environmental politics and international intellectual property law, with a particular interest in studying how transnational networks shape the interactions of international institutions.

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Organization is now part of at least one preferential trade agreement.³ Moreover, the scope of these agreements is increasing, as measured by either their degree of commitment toward liberalization or the economic size of the free trade zone they create.⁴

This policy brief argues that the dynamism of the trade regime can be leveraged to strengthen multilateral environmental governance. At first, this might appear as an audacious claim. Several analysts portray trade liberalization and environmental protection as two conflicting objectives.⁵ They condemn trade agreements, which favour production and long-distance transportation, for causing additional pollution. They also fear that trade agreements can limit the regulatory capacity of political leaders to enact environmental regulations that frustrate the interest of exporters and investors.⁶ Moreover, bilateralism is often considered to undermine multilateral governance. Bilateral arrangements can create a complex web of inconsistent rules and exacerbate power imbalances, in contrast to a more coherent, integrated and fairer multilateral order.⁷ This policy brief does not directly address these claims on trade/environment and bilateralism/multilateralism antagonisms. More modestly, it argues that the increasing

3 Todd Allee, Manfred Elsig & Andrew Lugg, "Why do some international institutions contain strong dispute settlement provisions? New evidence from preferential trade agreements" (2016) 11:1 *Rev Intl Organizations* 89.

4 Andreas Dür, Leonardo Baccini & Manfred Elsig, "The design of international trade agreements: Introducing a new dataset" (2014) 9:3 *Rev Intl Organizations* 353.

5 Ken Conca, "The WTO and the Undermining of Global Environmental Governance" (2000) 7:3 *Rev Intl Political Economy* 484.

6 For a discussion on environmentalists' criticisms of free trade, see Jagdish Bhagwati, "The case for free trade" (1993) 269:5 *Scientific American* 42. On the issue of the regulatory capacity of states involved in trade negotiations, see Robert E Hudec, "Circumventing Democracy: The Political Morality of Trade Negotiations" (1992) 25 *NYUJ Intl L & Pol* 311.

7 See e.g. Jagdish Bhagwati, *Termites in the Trading System: How Preferential Agreements Undermine Free Trade* (New York, NY: Oxford University Press, 2008).

practice of referring to MEAs in trade deals has the potential of consolidating MEAs' effectiveness.⁸

This policy brief builds on TREND, created in part thanks to the support of CIGI.⁹ TREND includes 285 different types of environmental provisions contained in 689 trade agreements signed between 1947 and 2016.¹⁰ Using this data set, the policy brief shows that an increasing number of trade agreements refer, in different ways, to a wide diversity of MEAs. Although there are still variations between world regions, the practice of referencing MEAs in trade agreements creates significant political and legal opportunities for enhanced MEA effectiveness.

Selection of MEAs

This policy brief looks at MEAs that are primarily focused on environmental issues and have a universal scope. Agreements that are not primarily environmental, such as the United Nations Convention on the Law of the Sea, as well as those that are regional in scope, such as the Convention for the Establishment of an Inter-American Tropical Tuna Commission, are not considered as MEAs for the purpose of this policy brief.

Based on this definition, Figure 1 shows the MEAs that are the most frequently mentioned

in trade agreements. They are, in order of frequency: the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (1973); the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention) (1989); the Convention on Biological Diversity (1992); the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol) (1987); the Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto Protocol) (1997); the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (1998); the United Nations Framework Convention on Climate Change (UNFCCC) (1992); the International Convention for the Prevention of Pollution from Ships (MARPOL) (1973); the Stockholm Convention on Persistent Organic Pollutants (2001); the Convention on Wetlands (Ramsar Convention) (1971); the Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR) (1980); the International Convention for the Regulation of Whaling (Whaling Convention) (1946); the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (Nagoya Protocol) (2010); and the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Cartagena Protocol) (2000). (See Figure 1.)

The most frequently mentioned MEAs are not necessarily the most consensual ones, but rather those that are focused on trade: CITES governs the trade of endangered species and the Basel Convention concerns the trade of hazardous waste. In addition, the third and fourth most frequently mentioned MEAs include significant trade-related provisions: the Convention on Biological Diversity addresses access to genetic resources by foreign investors and the Montreal Protocol restricts the export of ozone-depleting substances. Trade deals often refer to these agreements to mitigate the risk of legal conflicts between trade commitments and international environmental obligations.

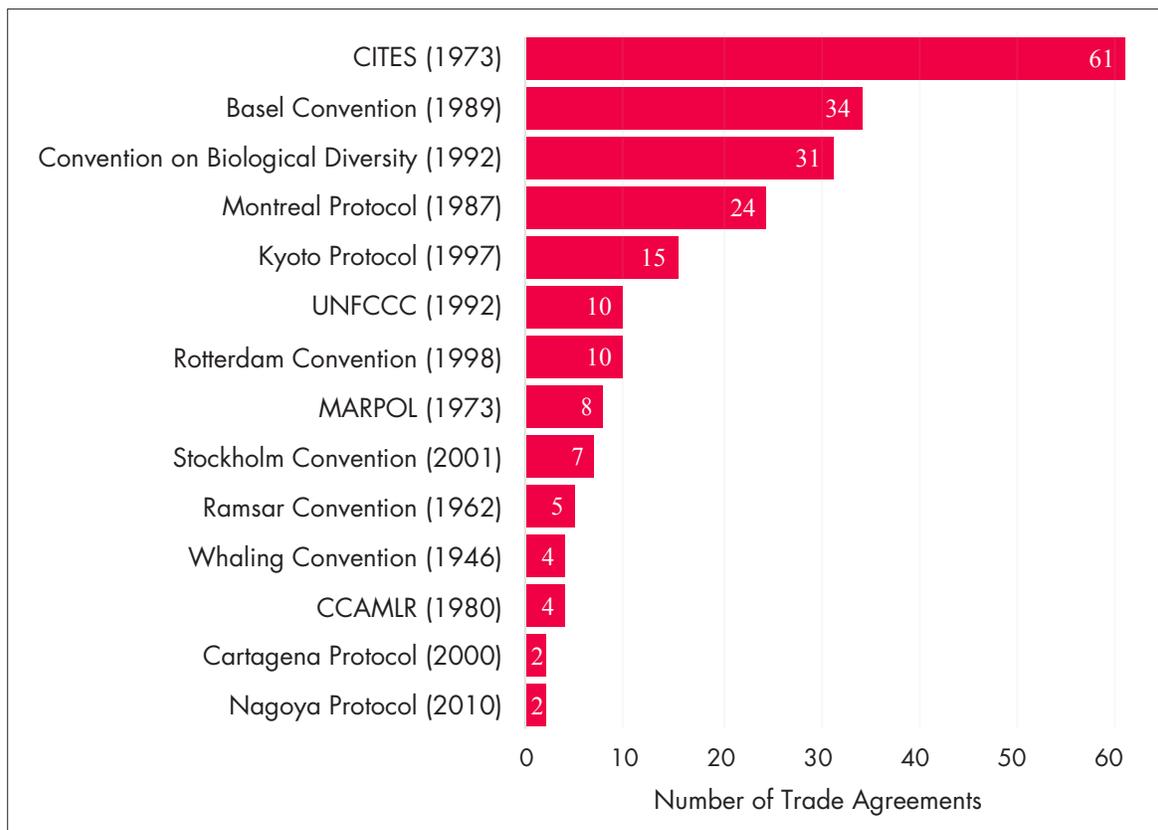
As one could expect, the most recent environmental agreements are less frequently mentioned in trade deals. They include the 2010 Nagoya Protocol on access to genetic resources, the 2013 Minamata Convention on Mercury and the 2015 Paris Agreement on

8 The authors of this policy brief are not the first to make this claim. See Sikina Jinnah, "Strategic Linkages: The Evolving Role of Trade Agreements in Global Environmental Governance" (2011) 22:2 *J Env & Dev* 191; Elisa Morgera, "Bilateralism at the service of community interests? Non-judicial enforcement of global public goods in the context of global environmental law" (2012) 23:3 *Euro J Intl L* 743; Gerda van Roozendaal, "The inclusion of environmental concerns in US trade agreements" (2009) 18:3 *Envtl Pol* 431; Gracia Marin-Duran & Elisa Morgera, *Environmental Integration in the EU's External Relations: Beyond Multilateral Dimensions* (Portland, OR: Hart, 2012).

9 Jean-Frédéric Morin and his team within the Canada Research Chair in International Political Economy built this data set with the support of CIGI, the Social Sciences and Humanities Research Council, Laval University's Centre for Interdisciplinary Studies in International Trade and Investment, and the Canada Foundation for Innovation. Trade agreements were borrowed from the Design of Trade Agreements project, online: <www.designoftradeagreements.org>.

10 For a comprehensive presentation of TREND, see Jean-Frédéric Morin, Andreas Dür & Lisa Lechner, "Mapping the Trade and Environment Nexus: Insights from a New Dataset" (2018) 18:1 *Global Environmental Politics* 122. The full codebook of TREND is available online: see Canada Research Chair in International Political Economy, "TRade & ENvironment Database", online: <www.trend.ulaval.ca>. For each agreement, two encoders have coded present norms independently and manually. The discrepancies were arbitrated by a third person.

Figure 1: The Most Frequently Mentioned MEAs in Trade Agreements



Source: Authors.

climate change. They are simply too recent to have found their way into several trade deals.

The absence of established MEAs is more puzzling. This includes the omission of the 1994 United Nations Convention to Combat Desertification; the 1985 Vienna Convention for the Protection of the Ozone Layer; and the 1979 Convention on Migratory Species. Yet, despite these odd omissions, the set of MEAs mentioned in trade agreements appears relatively wide and diverse.

A Typology of References

References to MEAs within trade agreements take multiple forms depending on their political or legal objectives. They can be grouped into four categories, from the lowest to the highest degree of commitment. The first and most superficial category brings together contextual references. These references aim to provide contextual

information for interpretative purposes. They include recitals recalling the importance of an MEA in the preamble of a trade agreement. They also include the restatement of obligations covered in an MEA, which are often placed in a footnote or an annex. For example, a footnote within Annex II of the 1993 agreement between Bulgaria and the European Free Trade Association recalls that a ban of whale products is currently in place in Liechtenstein and Switzerland “on the basis of the CITES convention.”¹¹

References in the second category aim to clarify the hierarchy of norms between trade agreements and MEAs. The first appearance of such conflict-settling clauses in favour of MEAs was in the 1992 North American Free Trade Agreement. Its article 104 provides that, “in the event of any inconsistency between this

¹¹ Agreement between the European Free Trade Association States and the Republic of Bulgaria, 29 March 1993 (entered into force 1 July 1993), online: <<http://wits.worldbank.org/GPTAD/PDF/archive/EFTA-Bulgaria.pdf>>.

agreement and the specific trade obligations set out in the [CITES, Montreal Protocol, Basel Convention and other agreements set out in Annex 104.1], such obligations shall prevail.” Several agreements subsequently negotiated by the United States, Canada and their trade partners reproduce this provision verbatim.

The third category of references regard the ratification of MEAs. Some trade agreements merely invite their parties to consider the ratification of an MEA, but others are more prescriptive and formally require it. For example, the 1993 Common Market for Eastern and Southern Africa (COMESA) provides that its parties must accede to the UNFCCC. At the time, 17 COMESA countries had not yet ratified the UNFCCC, but they all did so in the months following the conclusion of COMESA. This type of reference can be strategically inserted into a trade agreement to accelerate the entry into force of an MEA that requires a minimal number of ratifications.

The fourth and most constraining category of references are requirements to implement an MEA. For example, the 2007 agreement between the United States and Korea provides that “a party shall adopt, maintain, and implement laws, regulations, and all other measures to fulfill its obligations under [CITES, the Montreal Protocol, the 1978 protocol relating to MARPOL, the Ramsar Convention, the CCAMLR and the Whaling Convention].”¹² This last category provides additional incentive to implement an MEA, especially if this requirement is covered by the trade agreement’s dispute settlement mechanism. While many MEAs provide for relatively weak dispute settlement mechanisms,¹³ trade agreements typically include mechanisms with sharper teeth. An increasing number of countries can now use their trade agreements to unilaterally request the establishment of an arbitration panel to settle a matter relating to an MEA. In some cases, should a party fail to implement an MEA that happened to be incorporated in a trade agreement, its trade partner could ultimately be authorized to suspend some of its trade commitments in

12 *Free trade agreement between the United States of America and the Republic of Korea*, 30 June 2007 (entered into force 15 March 2012), online: <<https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta>>.

13 Several MEAs rely instead on compliance mechanisms.

response to the violation. The applicability of this trade dispute settlement mechanism represents a significant step forward to ensure the effective implementation of MEAs.¹⁴

Recent Evolution

The practice of introducing references to MEAs in trade agreements is a recent phenomenon that emerged within the last three decades.¹⁵ The first agreement to reference an MEA was the fourth Lomé Convention signed between the European Community and the African, Caribbean and Pacific Group of States in 1989. This practice took root in the early 1990s, as the end of the Cold War inspired a renewed optimism for multilateral governance, and the 1992 Rio Summit drew attention to global environmental issues.

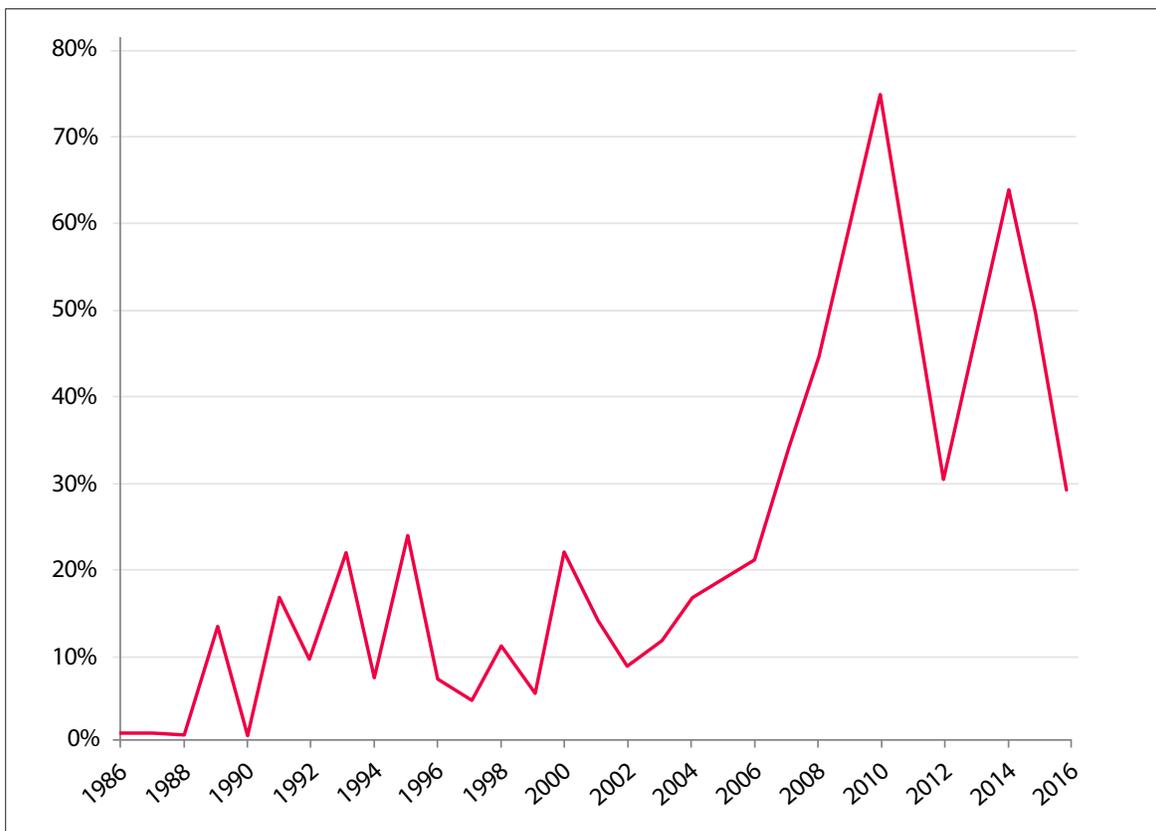
Figure 2, below, illustrates the increasing number of trade agreements that include at least one reference to an MEA. As the number of trade agreements rose rapidly from the mid-1990s, it is unsurprising that the absolute number of references also increased sharply. But Figure 2 shows that beyond this growth in absolute numbers, it is the relative share of trade agreements with at least one reference to an MEA that also increased over time. Importantly, the share continued to rise in the 2000s, exceeding, at times, 50 percent of trade agreements. (See Figure 2.)

It is not only the share of trade agreements with references to MEAs that has increased over time but also the average number of references per trade agreement. The fourth Lomé Convention of 1989 referred only to one MEA, namely the Basel Convention. It is now common that a single trade agreement will refer to six different MEAs. An extreme example is the 2012 agreement

14 So far, only trade agreements concluded by the United States ensure the implementation of environmental obligations with trade dispute settlement mechanisms. However, the European Union and Canada are considering integrating this norm in their future trade agreements. See Jean-Frédéric Morin & Myriam Rochette, “Transatlantic Convergence of PTAs’ Environmental Clauses” (2017) 19:4 *Business & Politics* 621.

15 Jean-Frédéric Morin, Joost Pauwelyn & James Hollway, “The Trade Regime as a Complex Adaptive System: Exploration and Exploitation of Environmental Norms in Trade Agreements” (2017) 22:2 *J Intl Econ L* 365.

Figure 2: The Increasing Share of Trade Agreements That Include at Least One Reference to an MEA



Source: Authors.

between the European Union, Colombia and Peru, which refers to nine different MEAs.

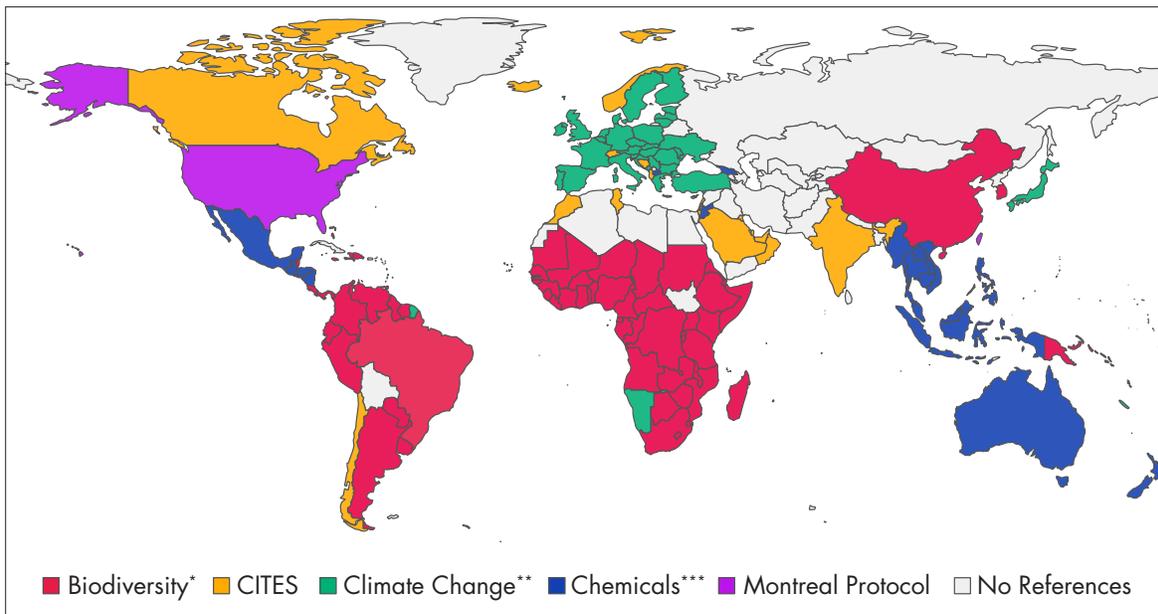
The types of references also change over time. In the early 1990s, all references were to trade-related MEAs such as CITES, the Montreal Protocol and the Basel Convention. Since then, trade agreements increasingly refer to MEAs that are not directly trade-related, such as the UNFCCC and MARPOL. Moreover, an increasing share of references to these non-related MEAs specifically call for their full implementation. Thus, there has been a progressive shift from a time where few trade agreements referred to the trade-related MEAs to the current situation where they increasingly promote the implementation of MEAs.

Geographical Variations

Behind these global trends, countries take different approaches to their referencing practice. Some of them, such as Canada and Switzerland, refer to MEAs in the vast majority of their trade agreements.¹⁶ At the other extreme, countries like Pakistan and Cuba have not signed a single trade agreement referring to an MEA. This variation is partly explained by patterns in trade negotiations. The more recently a country has signed trade agreements, the more likely it will have signed trade agreements that refer to MEAs.

¹⁶ For an overview of the Canadian practice, see Jean-Frédéric Morin, Laura Mordelet & Myriam Rochette, "The Environment in Canadian Trade Agreements", *Policy Options* (1 August 2017), online: <<http://policyoptions.irpp.org/magazines/august-2017/the-environment-in-canadian-trade-agreements>>.

Figure 3: Map of the Group of MEAs Referred to Most Frequently in International Trade Agreements



Source: Authors.

Notes: * Including the Convention on Biological Diversity and the Cartagena and Nagoya protocols. ** Including the UNFCCC and the Kyoto Protocol. *** Including the Basel, Rotterdam and Stockholm conventions.

When the number and timing of trade agreements are taken into account, it seems that democratic countries are more likely to refer to MEAs in their trade agreements than are their authoritarian counterparts. While the practice of democratic countries varies substantively, few authoritarian countries regularly refer to MEAs in their trade agreements. This observation is consistent with the well-established finding that democracies tend, on average, to be more engaged in environmental protection, *ceteris paribus*.¹⁷

There is also significant geographical variation regarding the specific MEAs that have been referenced. Figure 3 shows geographical hubs in the promotion of certain MEAs, in accordance with regional priorities for certain environmental issues. Trade agreements signed by the European Union

refer most frequently to climate change conventions, including the UNFCCC and the Kyoto Protocol.¹⁸ The United States, in contrast, is more likely than the European Union to refer to the Whaling Convention, the Montreal Protocol, CITES and the CCAMLR, which would be consistent with American environmental priorities. For their part, Latin American countries regularly refer to the Convention on Biological Diversity and the Nagoya Protocol in their trade agreements.¹⁹ This priority for biodiversity seems to be shared by several sub-Saharan countries, although these countries have signed too few trade agreements to express consistent and reliable preferences for some MEA references. (See Figure 3.)

Variations can also be observed at the agreement level. Records show that, as a general rule, the

17 Manus Midlarsky, "Democracy and the Environment: An Empirical Assessment" (1998) 35:3 J Peace Res 341; Eric Neumayer, "Do Democracies Exhibit Stronger International Environmental Commitment? A Cross-Country Analysis" (2002) 39:2 J Peace Res 139; J Timmons Roberts, Bradley C Parks & Alexis A Vásquez, "Who Ratifies Environmental Treaties and Why? Institutionalism, Structuralism and Participation by 192 Nations in 22 Treaties" (2004) 4:3 Global Environ Pol 22; Joel R Carbonell & Juliann E Allison, "Democracy and State Environmental Commitment to International Environmental Treaties" (2015) 15:2 Intl Environmental Agreements: Politics, Law & Economics 79.

18 Jean-Frédéric Morin, Nicolas Michaud & Corentin Bialais, "Trade negotiations and climate governance: the EU as a pioneer, but not (yet) a leader" (2016) The Institute for Sustainable Development and International Relations Issue Brief No 10/2016, online: <www.chaire-epi.ulaval.ca/sites/chaire-epi.ulaval.ca/files/publications/trade_and_climate.pdf>.

19 Jean-Frédéric Morin & Mathilde Gauquelin, "Trade Agreements as Vectors for the Nagoya Protocol's Implementation" CIGI, CIGI Papers No 115, 28 November 2016, online: <www.cigionline.org/publications/trade-agreements-vectors-nagoya-protocols-implementation>.

greater the distance between two countries, the more prone they are to include a reference to an MEA. Intercontinental trade agreements, in particular, are more likely to include references to MEAs than are intra-continental agreements. The inclination toward referencing MEAs seems to increase with the number of parties involved. These observations might result from the fact that regional agreements connecting neighbouring countries are more likely to refer to bilateral environmental agreements than to MEAs.

Furthermore, it appears that North-South trade agreements are more likely to refer to MEAs than North-North or South-South agreements. This might result from concerns expressed by some developed countries that developing countries attempt to attract foreign investors and boost exports by setting lax and poorly enforced environmental standards. To level the playing field, some developed countries insist that their trade partners from the Global South ratify and implement MEAs. Yet, even though the initial motivation for these references to MEAs is related to trade competitiveness, the consequence remains the strengthening of multilateral environmental governance.

Conclusion

Bilateral trade agreements can strengthen, rather than weaken, multilateral environmental governance in a variety of ways. Uncovering the current global trends in trade agreements' references to MEAs is crucial to grasp the influence this practice can have on both the trade and the environmental legal systems. References to MEAs within trade agreements have the potential to increase the coherence of international law by preventing inconsistencies and promoting mutual reinforcement. This practice can also reinforce multilateral environmental governance by increasing MEAs' membership, accelerating their entry into force and providing additional incentives for their domestic implementation. Despite persistent regional variations, references to MEAs within trade agreements can be used to spread global norms that are not yet universal or consensual.

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The International Law Research Program (ILRP) at CIGI is an integrated multidisciplinary research program that provides leading legal academics, government and private sector legal experts, as well as students from Canada and abroad, with the opportunity to contribute to advancements in international law.

The ILRP strives to be the world's leading international law research program, with recognized impact on how international law is brought to bear on significant global issues. The program's mission is to connect knowledge, policy and practice to build the international law framework — the globalized rule of law — to support international governance of the future. Its founding belief is that better international governance, including a strengthened international law framework, can improve the lives of people everywhere, increase prosperity, ensure global sustainability, address inequality, safeguard human rights and promote a more secure world.

The ILRP focuses on the areas of international law that are most important to global innovation, prosperity and sustainability: international economic law, international intellectual property law and international environmental law. In its research, the ILRP is attentive to the emerging interactions between international and transnational law, Indigenous law and constitutional law.

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