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ENVIRONMENTAL PROTECTION IN REGIONAL TRADE AGREEMENTS: REALIZING THE POTENTIAL

SANFORD E. GAINES*

When the debate over trade and the environment moved from dim academic backwaters to political center stage in the early 1990s, it took on an ideological flavor that still lingers. The political spotlight was especially strong and the ideological divide especially sharp in the debate over the North American Free Trade Agreement (NAFTA), which the United States Congress voted to approve in November 1993.¹ Over the ensuing fifteen years, a richer, more nuanced academic literature has grown up analyzing the relationship between the liberalization of trade and protection of the environment from many different perspectives, fortified by empirical studies, particularly in North America, of specific environmental changes associated with changes in trade relationships. Meanwhile, the political spotlight has shifted away from trade, and the ideological debate has moderated to some extent. With world trade liberalization initiatives at an impasse² and regional agreements on the rise,³ it is timely to reassess the particular environmental protection risks and opportunities presented by regional trade agreements like NAFTA.

This essay will begin by setting forth an analytical framework for considering the trade-environment relationship and the policy tools that can be deployed to reduce environmental risks and capture trade-environment synergies. It will then consider whether those tools are more available or less available within a regional trade agreement system than in the multilateral trade agreement framework of the World Trade Organization (WTO). Finally, it will examine the variety of different structures and arrangements used in regional systems and identify the circumstances that best capture the positive elements of the relationship and contain the negative elements.

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1. See ROBERT E. BALDWIN & CHRISTOPHER S. MAGEE, CONGRESSIONAL TRADE VOTES: FROM NAFTA APPROVAL TO FAST-TRACK DEFEAT 5–9 (2000).

2. Stephen Castle & Mark Landler, *After 7 Years, Talks Collapse on World Trade*, N.Y. TIMES, July 30, 2008, at A1.

3. Roberto V. Fiorentino et al., *The Changing Landscape of Regional Trade Agreements: 2006 Update 1–2* (WTO, Paper No. 12, 2007).

I. THE RELATIONSHIP OF TRADE LIBERALIZATION TO ENVIRONMENTAL PROTECTION

Commentators have remarked that the interaction between trade liberalization and trade law on the one hand and environmental conditions and environmental law on the other can take several different forms. One classic formulation identifies four different challenges that trade may present for environmental protection: regulatory effects, competitiveness effects, scale and composition effects, and limits on the use of trade measures in pursuit of environmental protection goals.⁴ The first two challenges draw attention to possible effects of trade rules on national environmental regulation, the third focuses on the direct effects on the physical environment of economic activity stimulated by the open trading system, and the fourth points to a trade law doctrine that continues to be controversial in some quarters.

A. *Regulatory Effects*

The proposition that trade law can affect a nation's environmental regulations has two complementary facets. One concern is that because fundamental principles of trade law prohibit a nation from erecting regulatory barriers that discriminate against imported goods, trade rules may oblige a country to accept products that do not meet its own environmental or health standards. This concern is especially acute with respect to regulations known as sanitary or phytosanitary standards, which seek to prevent the introduction of agricultural pests and diseases or food and drug contaminants. Trade law requires that such standards be based on scientific evidence and an assessment of risks.⁵ A case in point is the challenge to Europe's regulation prohibiting the import of beef from cattle raised using growth hormones. The United States and Canada prevailed in the WTO adjudication of their trade dispute on the ground that Europe could supply no scientific evidence showing any human health risk from eating such beef.⁶

The complementary facet of the feared regulatory effect is that a nation's choice among several regulatory options to address a particular environmental harm might be constrained by trade law. The fear arises from the core trade law principles that a nation should choose the "least trade restrictive" measure among the regulatory options reasonably available to it and should not arbitrarily or unjustifiably discriminate against foreign products. The latter test

4. See DANIEL C. ESTY, GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE 42 (1994).

5. Agreement on the Application of Sanitary and Phytosanitary Measures, arts. 2, 5, Apr. 15, 1994, 1867 U.N.T.S. 493.

6. Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products*, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) (adopted Feb. 13, 1998).

has been rather strictly applied. For example, the WTO ruled that a United States ban on the import of gasoline from Venezuela and Brazil was inconsistent with trade obligations because the United States had not explored “adequately” the alternative of cooperation with the exporting countries or fairly considered the costs of its ban on gasoline from the foreign refiners, even though it was pursuing the legitimate objective of protecting its air quality.⁷

B. *Competitiveness Effects*

The alleged competitiveness effect of trade on environmental protection is identified by a number of colorful descriptors: “pollution havens,” the “race to the bottom,” and H. Ross Perot’s infamous “giant sucking sound” of jobs supposedly going to Mexico under NAFTA.⁸ Logically, the competitiveness effect is a two-step process. It begins with the proposition—unassailable in theory though generally not observed in the real world⁹—that domestic producers required to meet high environmental standards will be at a cost-of-production disadvantage, and therefore a price disadvantage when competing with foreign producers facing lower environmental standards.¹⁰ The second step transmits that commercial competitive pressure to the political system, strengthening opposition from domestic producers to higher environmental standards in the name of protecting domestic businesses and domestic employment. This political consequence of international trade competition is described as exerting downward pressure on domestic environmental standards or as having a chilling effect on environmental agencies considering new regulatory initiatives or higher regulatory standards. Although some anecdotal cases seem to show such chilling of environmental regulation, the effect is notoriously difficult to document. There is no evidence that it occurs on a broad scale.

7. Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Apr. 20, 1996).

8. See ROSS PEROT & PAT CHOATE, *SAVE YOUR JOB, SAVE OUR COUNTRY: WHY NAFTA MUST BE STOPPED—NOW!* 41 (1993); Brian R. Copeland & M. Scott Taylor, *Trade, Growth, and the Environment*, 42 J. ECON. LITERATURE 7, 29 (2004).

9. Copeland, *supra* note 8, at 34. A recent review of the literature concludes: “While there is evidence of a pollution haven effect, it is only one of many factors that determine trade patterns, and there is no evidence that it is the dominant factor.” *Id.* at 67. See generally, Sanford E. Gaines, *Rethinking Environmental Protection, Competitiveness, and International Trade*, 1997 U. CHI. LEGAL F. 231 (1997) (reviewing in detail the empirical economics literature on competitiveness).

10. The dominant explanation why the competitiveness effect does not show up in the real world is “that the costs imposed by environmental regulation are small relative to other considerations. . . . [T]here are large cost differences between locations due to factors such as transport, infrastructure and economic policy.” WORLD BANK, *GLOBALIZATION, GROWTH, AND POVERTY: BUILDING AN INCLUSIVE WORLD ECONOMY* 132 (2002).

C. *Scale and Composition Effects*

The principal argument in favor of a new trade agreement is that the liberalization of trade will enhance economic efficiency and productivity in all trading partners, allowing increases in net production and resulting increases in national wealth.¹¹ Other factors being equal, increased production of goods and services means an increase in the scale of economic activity, including increased consumption of natural resources and possibly increased pollution. In addition to increasing the scale of production, trade liberalization also intends to increase the volume of goods being exchanged across borders. Thus the scale of transportation will also increase, with further environmental consequences from transport operations and the construction of additional transport infrastructure.

Any change in the terms of trade between two countries will not only increase the volume of goods and services in international trade, but will also likely bring about a change in the composition of that trade in terms of the particular goods and services being produced and traded as the trading partners specialize in terms of their comparative advantage. Whether the composition effect will increase or decrease environmental harms will depend, of course, on the particular changes that occur, but specifying the composition effect as a separate factor serves as an important reminder that *what* is produced and traded is often more important from an environmental perspective than the value or volume of trade in gross terms. Environmental change through the composition effect can occur in the country of import as well as in the producing, or export, country. For example, the increased access of very efficient U.S. corn producers to the market in Mexico under NAFTA has had ramifications for both countries, increasing chemical-intensive corn production slightly in the United States and tending to reduce the biological diversity of corn production in Mexico.¹²

11. See Agreement Establishing the World Trade Organization, Dec. 15, 1993, 33 I.L.M. 13, 1867 U.N.T.S. 154 (noting the recognition of the parties that their relations “should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services”).

12. Frank Ackerman et al., *Free Trade, Corn, and the Environment: Environmental Impacts of US-Mexico Corn Trade Under NAFTA* 1–2 (Global Dev. and Env’t Inst., Working Paper No. 03-06, 2003), available at <http://ase.tufts.edu/gdae/Pubs/wp/03-06-NAFTACorn.pdf>. Cf. STEVEN ZAHNISER & WILLIAM COYLE, U.S. DEP’T OF AGRIC., U.S.-MEXICO CORN TRADE DURING THE NAFTA ERA: NEW TWISTS TO AN OLD STORY 3–4 (2004), available at <http://www.ers.usda.gov/publications/FDS/may04/fds04D01/fds04D01.pdf>.

D. Limits on the Use of Trade Measures for Environmental Purposes

The effect of trade law in restricting use of trade measures to advance environmental policy was especially controversial in the early years of trade-environment policymaking. As recent trade cases have made clear, there was never a substantial danger that trade rules would prevent nations from maintaining their own domestic environmental and health protections with respect to imported products.¹³ More problematic are trade measures directed, not at the product itself, but at some aspect of how the product was harvested or manufactured, often referred to in trade terminology as “processes or production methods” measures, or PPM measures for short.

The notorious “Tuna/Dolphin” case that established the trade-environment relationship as a political question in 1991 was such a PPMs case. Motivated by the U.S. Marine Mammal Protection Act of 1972 (MMPA),¹⁴ the U.S. State Department conducted a program to work with Latin American nations to reduce the mortality of dolphins in the tuna fishery of the Eastern Tropical Pacific. Because of earlier disputes with the United States over tuna fishing, however, Mexico refused to cooperate with this initiative. An environmental organization brought suit under the MMPA resulting in a court order requiring the U.S. government to invoke the statutory prohibition on imports of tuna from countries whose tuna fleets had dolphin mortality rates higher than those of the U.S. fleet.¹⁵

Mexico challenged the resulting ban on the import of Mexican tuna into the United States under the General Agreement on Tariffs and Trade (GATT), which was the predecessor to the WTO.¹⁶ A GATT dispute settlement panel ruled that the U.S. embargo on Mexican tuna was impermissible, articulating a general premise that it is inappropriate to ban import of a product on the basis of how that product was harvested, not because of any intrinsic characteristic of the product itself.¹⁷ Because the tuna caught by U.S. boats and Mexican boats was the same product, allowing one to be sold and banning the other constituted arbitrary discrimination.¹⁸ This holding prevented the invocation of Article XX of GATT, which otherwise authorizes an exception to GATT

13. See generally, e.g., Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (Mar. 12, 2001) (affirming French ban on the import of chrysotile asbestos as an appropriate product regulation).

14. Pub. L. No. 92-522, 86 Stat. 1027 (1972).

15. Section 101(a)(2) of the MMPA required the import ban. *Id.* The court decision mandating the ban on Mexican tuna is *Earth Island Inst. v. Mosbacher*, 929 F.2d 1449 (9th Cir. 1991).

16. Report of the Panel, *United States—Restriction on the Import of Tuna*, DS21/R (Aug. 16, 1991) (unadopted), reprinted in 30 I.L.M. 1594.

17. *Id.* at 1622–23.

18. *Id.* at 1622.

rules for measures designed to conserve exhaustible natural resources. Adding insult to injury, the panel was clearly antagonist to the idea that one country seeking to protect a resource outside its own jurisdiction could use trade restrictions to pressure another country into protecting that same resource.

The Tuna/Dolphin decision's severe limitation on unilateral trade restrictions to protect the environment or natural resources beyond national jurisdiction created a firestorm of environmental protest against GATT, carried over in less virulent terms to the WTO and other trade agreements. Perhaps in response to the outrage, the Tuna/Dolphin report, which was never officially adopted,¹⁹ has been significantly relaxed through later decisions of the dispute settlement system under the WTO. In a case very similar to Tuna/Dolphin, the WTO Appellate Body allowed the United States an exception under GATT Article XX for a regulatory program restricting imports of shrimp from certain Asian countries in order to protect endangered sea turtles from shrimp trawling operations by those countries that did not use U.S.-mandated turtle-excluder devices or comparably effective turtle protection strategies.²⁰

E. *Summation*

Which among these four possible effects of trade on environmental policy are of practical significance? In terms of the regulatory and competitiveness effects, challenges by foreign producers to domestic rules typically arise in two contexts. First are challenges to sanitary regulations relating to food products. There is a long history of countries using food regulations with doubtful scientific support as a way to exclude imports of products that compete with domestic producers—such as U.S. restrictions on Mexican avocados or Japanese restrictions on U.S. apples. However, these issues are usually resolved through the WTO dispute settlement²¹ or through negotiations. Accumulated studies of what has actually happened in terms of trade flows and investment flows over the past forty years of environmental regulation clearly show that competitiveness effects of differences in environmental standards arise only in isolated incidents and are dwarfed by other factors affecting competition.²² In short, if one looks at the overall performance of trade and the way a country like the United States makes changes to environmental laws and

19. Mexico, by that time deeply engaged in negotiating NAFTA with the United States, never asked the GATT Council to formally adopt the report findings. *Id.* at 1594.

20. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products—Recourse to Article 21.5 of the DSU by Malaysia*, ¶ 116, 154–55, WT/DS58/AB/RW (Oct. 20, 2001).

21. *See generally, e.g.*, Appellate Body Report, *Japan—Measures Affecting the Importation of Apples*, WT/DS245/R (Nov. 26, 2003) (finding fault with Japan's assessment of risks from U.S. apples).

22. *See discussion supra* Part B.

regulations, the regulatory and competitiveness effects of trade are almost imperceptible.²³ It should also be noted that regional trade agreements do not present a different situation in this respect; most of them contain the same or similar language to WTO agreements on these product regulation matters.

In contrast, the scale and composition effects of trade on the environment are real. Increasing volumes of trade and changes in patterns of production go hand-in-hand with growing amounts of resource extraction, energy production, manufacturing and transport, all of which have significant environmental consequences. That said, these environmental effects are logically the consequence of private economic activity and public economic policy in general, not trade agreements specifically. Trade-liberalizing agreements undoubtedly enhance the effects, but they do not drive them. Consequently, managing the scale and composition effects of trade is largely beyond the direct control of trade policy or trade litigation. A Nobel laureate economist, Trygve Haavelmo, observed many years ago: "Although many positive things can be said about liberalizing and thus increasing trade, the structure of trade, as we know it at present, is a curse from the perspective of sustainable development."²⁴ In other words, it is the accumulation of decentralized, mostly private, decisions about what and how much to produce and to trade, not the act of trading itself, that presents the most serious environmental threats. As will be developed below in section II.B this implies that the significant environmental effects of trade agreements are not amenable to management through trade provisions themselves but arise from local and

23. Another trade mechanism that many environmental groups mention as a threat to domestic regulation is the investor-State arbitration procedure under which foreign investors can challenge local regulations that impair the value of their investments. In the only such arbitration process that is being actively used, NAFTA Chapter 11, a close examination of the facts involved in the several environment-related arbitrations leads to the conclusion that investors have succeeded only where there were clear patterns of differential treatment between foreign and domestic firms or clear efforts to protect a domestic business from competition. SANFORD E. GAINES, ENVIRONMENTAL POLICY IMPLICATIONS OF INVESTOR-STATE ARBITRATION UNDER NAFTA CHAPTER 11 36–38 (2006) (report for the North American Commission for Environmental Cooperation), available at http://www.cec.org/pubs_docs/documents/index.cfm?varlan=english&ID=1825. Challenges to bona fide environmental regulations applied in an even-handed manner have been dismissed by the arbitration panels. See generally Sanford E. Gaines, International Decisions Note, *Methanex Corp. v. United States*, 100 AM. J. INT'L L. 683 (2006) (discussing how the arbitral tribunal dismissed Methanex's challenge to California regulation of gasoline additives in its entirety and even awarded arbitration costs to the United States). So even in the investment context, environmental concern over regulatory effects are arguably driven more by abstract or misdirected fears rather than any pattern of results in actual cases.

24. Trygve Haavelmo & Stein Hansen, *On the Strategy of Trying to Reduce Economic Inequality by Expanding the Scale of Human Activity*, in ENVIRONMENTALLY SUSTAINABLE ECONOMIC DEVELOPMENT: BUILDING ON BRUNDTLAND 41, 46 (Robert Goodland et al. eds., 1991).

national decisions that could effectively address the national environmental policy and administrative apparatus of the nations participating in the trade agreement.

II. REGIONAL TRADE AGREEMENTS: A SPECIAL CASE?

This symposium addresses the social, political and environmental implications of regional trade agreements (RTAs). With the above framework of the potential environmental implications of trade agreements in mind, the particular question for this essay, then, is whether (and if so, how) RTAs present an environmental protection challenge that differs from world-trade liberalization under the WTO umbrella. That is, do RTAs present any particular hazard of greater environmental harm or any particular opportunities for mitigating any adverse environmental consequences of trade? This part of the essay will argue that RTAs are no more environmentally hazardous than other trade agreements. Rather, they present politically and geographically appropriate opportunities for the parties to RTAs to attend to their common environmental concerns.

A. *Defining and Classifying Regional Trade Agreements*

1. What is an RTA?

Commentaries on RTAs often cite a figure of about 400 agreements, a tally based on official notifications of such agreements to the WTO.²⁵ A closer look at the WTO data, however, reveals that only half are still in force.²⁶ Moreover, there is a substantial element of double counting in the data, since many agreements have been notified to the WTO both as free trade agreements (FTAs) and as agreements under the WTO's enabling clause or Article V of the General Agreement on Trade in Services. Parsing the data, the tally of separately identifiable agreements still in force is much closer to 100 than 400.²⁷

25. WTO: Regional Trade Agreements, http://www.wto.org/english/tratop_e/region_e/region_e.htm (last visited Sept. 30, 2008). The website gives a figure of "close to 400 RTAs which are scheduled to be implemented by 2010." The same page also gives a figure of 380 RTAs in force as of July, 2007. The data are graphed and tabulated at http://www.wto.org/english/tratop_e/region_e/regfac_e.htm. See also, Fiorentino et al., *supra* note 3, at 5.

26. In many cases this is because an earlier agreement, such as the Canada-U.S. FTA, has been superseded by a later agreement; in that case NAFTA. See, Fiorentino et al., *supra* note 3, at 2-3.

27. WTO: Regional Trade Agreements, *supra* note 25. This is another useful tabulation by the WTO which lists thirty-five separate area groupings of trade agreements. Even this listing contains several overlaps. For example, the Baltic Free Trade Area (Estonia, Latvia and Lithuania) has since been absorbed into the European Community (EC), and the Overseas Countries and Territories agreement extends most of the trading preferences of the EC to the

What kinds of agreements are comprised in these 100 or so? Nearly half are agreements within Europe, such as agreements between the EC and non-EC European trading partners like Norway, Andorra and Albania, and agreements between two European countries outside the EC framework, such as a trade agreement between Switzerland and the Faroe Islands.²⁸ If all of those agreements are lumped together to define the commercial zone of Europe, the number of separate geographically based RTAs falls even further.

The non-European RTAs in the WTO database comprise multilateral agreements, bilateral agreements between neighboring states and bilateral agreements between states that are geographically distant. Examples of the first type include NAFTA and the more recent U.S. initiative, the Dominican Republic–Central America Free Trade Agreement (DR-CAFTA).²⁹ These are RTAs in the truest sense of the term, embracing an entire region in a common trade arrangement. The second type, bilateral trade agreements between neighboring states, is also distinctly regional in character. Indeed, there are some clusters of bilateral agreements that collectively approximate a multilateral regional agreement. For example, Mexico has bilateral trade agreements with Guatemala, Nicaragua and Honduras.³⁰

The third category, bilateral agreements with distant trading partners, does not merit the characterization “regional” in any meaningful sense. Agreements between the United States and Israel, the European Free Trade Area and Lebanon, or the United States and the Republic of Korea (pending approval) are negotiated for political as well as commercial or economic advantage. The United States has been especially active over the last ten years in negotiating such bilateral accords with willing partners around the globe, including Israel, Jordan, Australia, Singapore, Morocco, Bahrain and Korea (pending approval).³¹ Only a few of the bilateral FTAs with Latin American partners (Chile, Peru, Colombia and Panama) arguably fall within a true “regional” classification. The WTO is rightly concerned that the proliferation of bilateral FTAs not linked to geographical proximity may weaken the resolve of major trading partners to maintain the integrity of the WTO system. From an environmental perspective, however, there is very little to distinguish these agreements from the multilateral regime. The additional liberalization of trade

overseas countries and territories of EC members. The MERCOSUR countries (Argentina, Brazil, Paraguay and Uruguay) are also members of the broader trading group known as the Latin American Integration Association.

28. Fiorentino et al., *supra* note 3, at 13–14.

29. Office of the United States Trade Representative (USTR): Trade Agreements Home, http://www.ustr.gov/Trade_Agreements/Section_Index.html (last visited Sept. 26, 2008).

30. Foreign Trade Information Systems (SICE): Mexico Trade Agreements, http://www.sice.oas.org/ctyindex/MEX/MEXAgreements_e.asp (last visited Oct. 2, 2008).

31. Office of the United States Trade Representative, Trade Agreements Home, *supra* note 29 (providing a full list of agreements).

tends to be narrowly focused on key sectors in the particular bilateral trade relationship. The US-Korea FTA, for example, is meant to pry open the Korean market for increased U.S. exports of beef and automobiles.

This essay goes into some detail in this analysis to set the terms of the discussion that follows. For purposes of this essay, the author will restrict the use of the term “regional trade agreement” to those agreements, whether bilateral or multilateral, that bind geographically proximate states having, at least in principle, common interests in their shared natural environment. Linking trade liberalization with environmental protection is most plausible, and most important, among countries that share ecologies, especially countries close enough to each other that environmental behavior in one country may have a direct effect on another. For the same reason, I will exclude from further consideration the cross-regional agreements. Trading partners thousands of miles apart on separate continents are unlikely to have environmental issues of mutual interest beyond those of global scope. Linking environment and trade in this context, though laudatory in the abstract, would have little practical effect.³²

2. Structural Classification of RTAs

Limiting the agreements to be studied to bilateral or multilateral trade agreements among geographically proximate countries is only the first step in the analysis. An understanding of the ramifications of RTAs for environmental protection must also consider the different types of trade agreements, which have correspondingly different possibilities for environmental harm and environmental collaboration.

Trade typology differentiates between customs unions and FTAs. In a customs union, the member states establish a single tariff and customs regime vis-à-vis non-members and eliminate all international trade formalities among members of the union. The United States itself can be considered a customs union, with very tight restrictions on the power of the individual states to act in a way that affects commerce between the states or commerce with other nations. The other customs union paradigm is the “single market” of the EC. In an FTA, by contrast, each member state retains its separate customs and tariff systems, but the members agree that all or most trade among them will be

32. Indeed, I would suggest that it was only because environmental issues are so inconsequential between the United States and Jordan that the United States chose to use that agreement as the first occasion to write into the trade agreement itself a provision that failure to enforce national environmental regulations against producers of traded goods could be the basis for withdrawal of trade benefits. Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, U.S.-Jordan, art. 5.3, Oct. 24, 2000, 41 I.L.M. 63 (2002). Of course, this provision has not yet been invoked by either party.

free of tariffs. NAFTA is a free trade agreement; cross-border trade within North America is still subject to customs formalities but is almost entirely tariff free.

The trade distinction between customs unions and FTAs mirrors a parallel distinction in the non-trade aspects of the economic relationship among the trading partners. Customs unions tend to be characterized by deep integration of economic policy, touching not just trade in goods, but also the movement of people, tax systems and a drive towards uniformity in “domestic” regulatory arenas like environmental policy that may have some influence on competitive equivalence from one member to another within the “single market.” The United States and the EC exemplify deep integration.

FTAs, by contrast, are typically strictly commercial in nature and do not attempt to coordinate the policies of the participating governments on issues other than trade. The preference for shallow integration was explicit in the negotiation of NAFTA; the countries self-consciously limited themselves to trade matters and left issues such as immigration, labor policy and tax policy to separate negotiation.³³ The United States Congress and the administration of George H.W. Bush flagged environmental policy as a factor requiring attention in the NAFTA context, but it was largely put on a parallel track rather than integrated into negotiation of the trade agreement text.³⁴

B. Environmental Ramifications of RTAs

The concern about RTAs in trade terms is that the economic and social benefits of equal, most favored nation treatment for all trading partners through a single set of rules under the WTO will be diminished or dissipated in the complex network of differing rules and special preferences for one trading partner or another across multiple RTAs. For environmental policy, the corresponding concern about RTAs has two distinct elements. First, would uniformity of environmental rules and practices throughout the world have similar theoretical benefits to the uniformity of trade law? In other words, is the WTO, or an environmental counterpart to the WTO, the “first-best” approach to international environmental policy, at least insofar as it is linked with international trade in goods and services? Or do regional environmental agreements have advantages over a worldwide set of rules and practices? The second element of concern for RTAs is whether, in principle and in practice,

33. See generally, Frederick M. Abbott, *The North American Integration Regime and Its Implications for the World Trading System* (Jean Monnet Center, Working Paper No. 2/99, 1999), available at <http://www.jeanmonnetprogram.org/papers/99/990201.html>.

34. Letter to Congressional Leaders on Fast Track Authority Extension and the North American Free Trade Agreement, 27 WEEKLY COMP. PRES. DOC. 536-37 (May 1, 1991) (expressing the intent to expand cooperative environmental programs with Mexico “in parallel with the free trade talks”).

environmental policy coordination between countries can be effectively achieved or enhanced by linking bilateral or multilateral agreements and cooperation on environmental policy to the trade policy impetus behind RTAs.

As trade agreements, RTAs are in all environmentally relevant elements virtually indistinguishable from the WTO agreements governing trade in goods. Indeed, many of them use WTO agreement language more or less verbatim and acknowledge that the WTO agreements (as well as the RTA) continue to apply to trade relations between the parties. Thus, in terms of the four possible effects of trade on the environment outlined in part I, RTAs and the WTO agreements are fundamentally interchangeable. What distinguishes RTAs from the WTO agreements are the special provisions for tariff-free treatment of products being imported from an RTA member country and certain special quotas or preferences for products that are still not fully liberalized under the WTO system, especially agricultural goods. These special preference provisions may divert trade away from non-member countries to RTA member countries (which explains the WTO concern about the proliferation of RTAs), but those trade preferences have no significant bearing on how RTAs might affect the environment or environmental regulation. So the issue with respect to RTAs and the environment does not depend on the trade terms of RTAs, but on the differences in the political context in which the WTO and RTAs operate and the corresponding ramifications of those differences for transnational environmental policy coordination and collaboration.

Many environmental concerns transcend national boundaries, and there is a broad consensus that international solutions to international environmental problems are preferable to a patchwork of unilateral national actions. This consensus applies to such urgent questions as forest management, fisheries management, protection of the marine environment, endangered species protection and climate change, to mention only the most prominent examples. Closer to the issue of trade in manufactured goods, there has also been extensive international cooperation on management of industrial chemicals, pesticides and ozone-depleting substances, hazardous waste management and long-range transport of air contaminants. To the extent that the international trading system has been seen as an impediment to some of these environmental initiatives, a number of scholars have called for the creation of a more robust international environmental organization that would have stature and political clout comparable to the WTO.³⁵ Yet it is not apparent that international environmental cooperation has been significantly impeded by trade rules. As

35. See, e.g., Daniel C. Esty, *The Value of Creating a Global Environmental Organization*, in ENV'T MATTERS 13, 13-14 (2000); Steve Charnovitz, *A World Environment Organization*, 27 COLUM. J. ENVTL. L. 323, 324 (2002); C. Ford Runge, *A Global Environmental Organization (GEO) and the World Trading System*, 35 J. WORLD TRADE 399, 422-23 (2001).

this author has argued elsewhere,³⁶ weaknesses in international environmental policy and the difficulty of engaging the WTO's serious interest in environmental matters reflect the general imbalance between economic and environmental policy seen in governments around the world. Thus, the struggle to resolve tensions between trade and environment is really a struggle within nations to bring a higher profile to environmental concerns and to press for integration of the environment into trade policy at the national level. Once this is accomplished, WTO policy, which reflects the collective will of national governments, will follow. It is far from clear, then, that the WTO (and a counterpart World Environmental Organization (WEO)) would be the most effective avenue for managing the environmental effects of trade, especially for environmental matters of pollution, land use, habitat protection and resource extraction that are predominately local or national in character.

RTAs may well be the better vehicle to enhance environmental protections. A commitment on the part of two or more governments to negotiate an RTA provides an excellent political opportunity for environmental interests within each country to press their governments to pay attention to common environmental interests as they are discussing closer economic coordination and mutual economic benefit through the RTA. Moreover, the argument that the nations involved have common environmental concerns is much easier to make for a small number of countries in one region than for all 150 members of the WTO. At the regional level, it is easier to identify specific issues that should be addressed and to devise and agree on specific solutions or specific mechanisms for addressing those issues collaboratively. As described in more detail below, the negotiation of the North American Agreement for Environmental Cooperation (NAAEC), in conjunction with the final approval of NAFTA, illustrates how the linkage between an RTA and environmental issues can be made.³⁷

III. REALIZING THE POTENTIAL

The previous section argued that the negotiation of an RTA presents a special opportunity to strengthen environmental protection programs among the parties. The challenge is to realize that potential. This depends on two broad factors: mutuality of environmental interest and the political will of the parties. Mutuality of environmental interest is, to some extent, to be assumed among countries that are engaged in a true RTA based on geographic proximity. Nevertheless, that mutuality of interest needs to be identified and

36. See Sanford E. Gaines, *The Problem of Enforcing Environmental Norms in the WTO and What to Do About It*, 26 HASTINGS INT'L & COMP. L. REV. 321 (2003).

37. See generally, North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., Sept. 14, 1993, 32 I.L.M. 1480 [hereinafter "NAAEC"]; North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289.

politically validated. The matter of political will is less predictable and less susceptible to generalization, but just as with national environmental statutes and agencies, the effectiveness of environmental programs depends on sustained levels of funding and administration and enforcement of program requirements over many years.

The prime example of a positive combination of mutual environmental interest and political will is the accumulation of environmental regulatory authority at the European Union (EU), advancing environmental protection measures throughout Europe in tandem with the deepening economic integration of the EU's commercial and trade aspect, the EC. The EC grew out of modest beginnings of economic cooperation on coal and steel production among France, Germany and the Benelux countries in the 1950s to its current embrace of a comprehensive "single market" for all goods and services among twenty-seven European nations.³⁸ As the economic cooperation deepened, the tripartite administrative structure of the EU—the European Commission, the European Court of Justice and the European Parliament—took shape as part of a cooperative program to deal with all the factors that influenced the single market, specifically including protection of the environment.

With many transnational river basins and rapid transport of air pollution from one country to another in the relatively confined spaces of Europe, there was no controversy about the mutuality of interest in the condition of the environment. What gave political impetus to Europe-wide environmental regulation was the underlying and powerful political commitment to the single market. This political will gained expression over time in the renegotiation of the treaties that bind the EU and EC together, with environmental protection now specifically mentioned as a matter of European concern as well as national concern.³⁹

Few RTAs follow the deep integration model of Europe. Much more common is the shallow integration of a regional FTA, in which the agreement focuses almost exclusively on trade issues and leaves all other policy areas to be worked out among the parties through separate arrangements. The leading example of an RTA accompanied by a robust structure for environmental cooperation is NAFTA and its associated NAAEC.⁴⁰ The NAAEC was, and remains, a pioneering agreement, the first agreement among nations for environmental cooperation across a broad range of issues with an independent administrative structure and a budget. The NAFTA parties may have

38. Europa, The EU at a Glance, The History of the European Union, http://europa.eu/abc/history/index_en.htm (last visited Sept. 26, 2008).

39. Consolidated Version of the Treaty Establishing the European Community, arts. 2, 174–76, 2006 O.J. (C 321) 37.

40. NAAEC, *supra* note 37.

eschewed the “deep” integration of Europe, but the politics of NAFTA gave a strong political impetus to environmental cooperation.

Because environmental organizations in the United States and their allies in Congress had political leverage over the approval of NAFTA, they were able to persuade trade officials and political leaders to give serious consideration to environmental issues in the NAFTA context.⁴¹ But, with a few exceptions, the trade negotiators were not willing to introduce environmental considerations into NAFTA itself. Instead, interested parties explored parallel mechanisms for addressing environmental concerns.

The proposal for a three-nation environmental commission was one of the ideas that emerged from discussions between trade officials and environmental leaders. A base of bilateral environmental and resource cooperation going back a century already existed between the United States and Mexico to the south and the United States and Canada to the north. Some common environmental interests of the three countries were also apparent in the contexts of migratory birds, whales and the monarch butterfly, which has become part of the logo of the North American Commission for Environmental Cooperation (CEC).⁴² The idea of a three-nation agreement and an administrative structure for environmental cooperation was thus generally well received in all three governments. The only contentious part of the negotiations was over the insistence by the United States that NAAEC include a trade-sanctions mechanism if one of the countries persistently failed to enforce its own environmental laws, a provision born out of the perceived political necessity to address the competitiveness concern surrounding NAFTA.⁴³

The CEC has undertaken interesting research, data collection and publications that demonstrate more vividly than ever before the ecological connections in North America, the long-range transport of air pollutants and the common interests of the three countries in managing toxic chemicals.⁴⁴ It

41. Frederick W. Mayer, *Negotiating the NAFTA: Political Lessons for the FTAA*, in *GREENING THE AMERICAS: NAFTA'S LESSONS FOR HEMISPHERIC TRADE* 97, 98 (Carolyn L. Deere & Daniel C. Esty eds., 2002).

42. See generally Commission for Environmental Cooperation, *North American Agenda for Action: 2003–2005* (2003), available at http://www.cec.org/files/PDF/ABOUTUS/3yp03-05_en.pdf.

43. Mayer, *supra* note 41, at 99, 104–05. For the provision, see NAAEC, *supra* note 37, at 1483–84. It is also worth noting that after nearly fifteen years, the three governments have taken no steps to implement the trade sanctions section of the agreement.

44. Commission for Environmental Cooperation, *CEC to Report on Air Pollutants*, (1996), available at http://www.cec.org/pubs_info_resources/ecoregion/eco2-4/eco2-4.cfm. See generally Secretariat to the CEC, *Environmental Challenges and Opportunities of the Evolving North American Electricity Market*, 7 (2002), available at http://www.cec.org/files/pdf/CEC_Art13electricity_Eng.pdf.

has also dealt with common concerns over biodiversity protection, green tourism, green buildings, the electric power system, enforcement of environmental laws and conservation efforts in our shared marine environments.⁴⁵ The common environmental interests among the three countries are thus firmly established and beyond political dispute. Nevertheless, the CEC has steadily lost stature and effectiveness over time. Although it started strongly with an assertive first executive director and strong political support from Washington, the political will to sustain it as a vigorous institution for environmental cooperation has faded away in all three countries over its fifteen-year history. The CEC's budget, set at \$9 million at the beginning (\$3 million from each country), has not changed since; in constant dollar terms, its budget shrinks each year.⁴⁶ With changes in political party leadership in all three countries, moreover, the personal commitment of the founding political leaders to its success is no longer a factor. For this and other reasons, what was a promising initiative throughout the 1990s has gradually become a much more modestly useful but increasingly truncated mechanism for environmental cooperation.

One politically salient element of the NAAEC that continues to be a model for U.S. RTA policy is the provision in Articles 14 and 15 of the NAAEC that allow citizens or organizations in any of the three countries to submit to the CEC a claim that a country is failing to enforce its own environmental law in some specific instance.⁴⁷ The CEC, which is an international organization independent of any of the governments, is then authorized to ask the government in question to respond to the citizen claim. Depending on the government's response, the CEC may undertake to develop a "factual record" of the case, documenting exactly what occurred with respect to enforcement or non-enforcement of the law in question.⁴⁸ With the approval of two of the three environmental ministers who constitute the governing council of the CEC, the factual record is then made public. This citizen submission

45. See generally CEC.org, Publications and Documents: Secretariat Reports, http://www.cec.org/pubs_docs/scope/index.cfm?varlan=english&ID=16 (last visited Sept. 25, 2008); CEC.org, Our Programs and Projects, http://www.cec.org/programs_projects/index.cfm?varlan=english (last visited Sept. 25, 2008).

46. Commission for Environmental Cooperation, *Looking to the Future: Strategic Plan of the Commission for Environmental Cooperation 2005-2010* 6 (June 17, 2005), available at http://www.cec.org/files/PDF/PUBLICATIONS/2005-2010-Strategic-plan_en.pdf.

47. NAAEC, *supra* note 37, at 1485.

48. Commission for Environmental Cooperation, *Bringing the Facts to Light: A Guide to Articles 14 and 15 of the North American Agreement on Environmental Cooperation* 1(2000) available at http://www.cec.org/files/PDF/SEM/Bringing%20the%20Facts_en.pdf.

procedure has been initiated sixty-five times, resulting in fifteen factual records.⁴⁹

This innovative procedure is very popular with environmental advocates and citizen organizations, but because the citizen submissions tend to be embarrassing to the governments, the unfortunate effect has been to sharply reduce the political support of the three environment ministers for the CEC. There is a substantial risk, then, that the opportunity for citizens to bring failures of environmental enforcement to an independent organization for investigation, which is now replicated in other RTAs negotiated by the United States, will undermine the governments' support for more substantive programs for environmental cooperation. The net effect might be that creating the opportunity for the occasional citizen initiative to promote environmental enforcement, with primarily localized environmental benefits, creates fundamental obstacles to more far-reaching initiatives that might bring environmental improvement to member countries on a larger scale.

Though the political will of the NAFTA parties appears to be faltering with respect to the CEC, later U.S. RTAs have pushed forward with new environmental initiatives, suggesting the continued vitality of RTAs as vehicles for environmental policy improvement. DR-CAFTA, which includes the citizen submission mechanism directly in the trade agreement, showed moderate political will and modest promise. The U.S.-Colombia agreement, not yet approved, goes another step forward, bringing directly into the trade agreement such provisions as a mutual commitment to adopt domestic legislation to implement some major multilateral environmental agreements, guarantees on public participation and access to justice, and creation, through a provision in the trade agreement itself, of a bilateral Environmental Affairs Council.⁵⁰ Like DR-CAFTA, the agreement with Colombia is also paired with a separate Environmental Cooperation Agreement, which is a slimmed-down version of the NAAEC.⁵¹

49. Citizen Submissions on Enforcement Matters, Current Status of Filed Submissions, <http://www.cec.org/citizen/status/index.cfm?varlan=english> (last visited Sept. 25, 2008).

50. United States-Colombia Trade Promotion Agreement arts. 18.4, 18.6, 18.7, US-Colom. *not ratified*, available at http://www.ustr.gov/Trade_Agreements/Bilateral/Colombia_FTA/Draft_Text/Section_Index.html.

51. U.S. INTERNATIONAL TRADE COMMISSION, U.S.-COLOMBIA TRADE PROMOTION AGREEMENT: POTENTIAL ECONOMY-WIDE AND SELECTED SECTORAL EFFECTS, 6-24 (2006) available at <http://www.usitc.gov/publications/pub3896.pdf>.

IV. CONCLUSION

The environmental effects of trade liberalization involve the consequences of increasing the scale of economic activity and changing the composition of the particular goods or services being produced and traded. In other words, the environmental effects of the economic changes induced by trade liberalization are essentially the same as the environmental effects of any national economic policy that seeks to increase production of goods and services and shift production over time to higher value goods and services where the nation has an advantage in terms of its natural, human and capital resources. The biggest environmental challenge of trade liberalization, then, is to extend and intensify national environmental programs in all trading partners to cope with the changes in production.

Nevertheless, integration of environmental and trade policy at the regional level creates a special opportunity for neighboring countries to broaden and deepen their cooperation on environmental matters of common concern or cross-border effect, issues that are otherwise often neglected. The observed practice of countries in North America and Europe confirms the hypothesis that environmental policy coordination in conjunction with trade compacts can be strong among geographic neighbors with close ecological connections.

But even when the ecological and economic ties are close, as they are in Europe and North America, deepening environmental cooperation between two or more countries demands a high level of human and financial resources over many years to yield tangible results. Collaboration takes more time and effort than unilateral action, and language and cultural differences can make international collaboration especially difficult to accomplish. Moreover, regional environmental cooperation also requires national environmental officials of all participating countries to expend the effort and take the political risk to advance changes in domestic environmental programs or laws and regulations in order to pursue internationally agreed common objectives. Similarly, with respect to financial support, for a national environmental agency to acquire a sufficient budget to implement cooperative measures at the international level is a substantial political challenge. It is even more politically difficult to get several governments to agree jointly to fund an international environmental organization to carry forward regional environmental cooperation somewhat independently of the national governments.

Regional environmental cooperation will work effectively only with strong and sustained national political leadership in all the participating countries. The single example of such robust and sustained political will for environmental cooperation in connection with trade is the EC, where environmental protection has advanced in tandem with the increasing depth and breadth of economic integration in Europe over the last forty years. North

America seemed to have a chance in the 1990s to successfully launch a different model of cooperation in conjunction with NAFTA, but the political will of the 1990s to engage in continent-wide environmental improvement has since receded in all three countries. The new environmental institution, the CEC, and its agenda of work are slowly atrophying, while the governments have reverted to sovereignty-based behaviors that are thwarting once-promising CEC initiatives.

Even so, environmental cooperation has become a staple of United States RTA trade policy. DR-CAFTA, and even more clearly the new U.S-Colombia FTA, incorporate substantial and relatively robust environmental performance requirements directly into the trade agreement, trade provisions that were considered unthinkable fifteen years ago. It remains to be seen, however, whether the texts and the environmental cooperation agreements are translated into specific environmental improvements or policy initiatives in the decades ahead.

As a final observation, only a small fraction of the work of environmental cooperation in the environmental institutions of Europe or North America is specifically linked to trade. The CEC, for example, has become a forum for information sharing and capacity building for enhanced environmental monitoring and enforcement at the national level. It established and has supervised an industry-government cooperative effort to reduce the production of persistent organic pollutants in North America under its Sound Management of Chemicals program. It has engaged in new studies on neglected issues of common concern, such as transport of air pollutants, including dioxins that are especially concentrated in the Canadian Arctic, electric power generation and transmission, and promotion of shade-grown coffee cultivation in Mexico.

The perennial quest to get environmental considerations integrated into trade policy has merit and has generated some useful reforms and some new ideas about the interaction of environment and trade. In the final analysis, though, the hard work of preventing further environmental degradation and improving environmental conditions, even in accordance with international mandates, has to be accomplished at the national and local levels. Regional trade agreements present an opportunity to bring new vigor to regional cooperation to encourage and support that national-level environmental work, but only if political leaders are prepared to seize it.

In sum, international environmental cooperation depends on and benefits from an emphasis on the environmental reality of the cooperating countries. The greatest environmental gains have come about through institutions and procedures that have no direct connection to trade or the trade agreements that initially spawned them.

