Reviews

Integrating Environmental Protection and North American Free Trade

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The North American Free Trade Agreement (NAFTA) represents significant developments in both regional trade liberalisation and environmental protection. Pre-agreement negotiations offered non-government organisations (NGOs) considerable opportunity to reduce areas of potential conflict between these two objectives. The Agreement deals with both boundary problems and common standards without dictating uniformity of standards or impinging greatly on each nation's sovereign control over matters within its own borders. The introduction of this practical strategy into the international trade arena could be the most significant feature of the NAFTA in shaping future regional and international trade negotiations.

1. Introduction

On January 1, 1994, Canada, the United States, and Mexico began to further integrate their economic affairs through a new regional trade pact created by the North American Free Trade Agreement (NAFTA). This historic setting offers an opportunity to examine how the growing interdependence among these sovereign nations might contribute to solving the difficult problem of environmental degradation.

In particular, is there a convergence of interests involving international trade and social values that can be used to design a strategy that will allow the trading partners to achieve higher levels of environmental protection? Or, will the specific objectives of free traders and environmental advocates result only in unproductive confrontations? Answers to these questions are important in North America and in a variety of international settings.

During the NAFTA debate, trade and environment issues emerged in a controversial manner, with much attention paid to the conflicts between trade and environmental policies. The two policy regimes are ripe for conflict because the disciplines are themselves highly complex and because they are managed by specialists with widely differing expectations of what is attainable. While such conflicts can easily be exaggerated, there are several points at which trade and environmental regimes might be reconciled.

Success or failure in this endeavor will be determined by a host of economic, political and cultural factors. But, if a successful strategy can be found it could build on the fact that both trade liberalization and environmental regulation have as their principal goal the more efficient use of available resources (Repetto). Indeed, if they can be adopted, policies that promote economic growth and environmental quality among trading partners would provide a stable base for international cooperation and more sustainable development.

The purpose of this paper is to describe the role environmental issues and interest groups played in shaping the NAFTA and its related agreements. It outlines specific environmental problems that were raised during the negotiation of the trade agreement and documents steps that were taken to address these problems. This may help in understanding implementation of the NAFTA and in dealing with issues that were not fully resolved in the negotiation process. It may also have implications for future trade and environmental agreements beyond North America. The need to reconcile trade and environmental policy was emphasized at the 1992 "Earth Summit" in Rio de Janeiro and is likely to confront governments for many years.

The paper proceeds by first describing some general characteristics of North American trade and the NAFTA. The second section documents four cate-

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gories of concerns that were raised by environmentalists in the debate. The third section explains how trade negotiators and political leaders responded to problems raised by environmentalists. The paper ends with brief comments on how the NAFTA might influence what happens next as trade and environment agenda interact.

2. What Is The NAFTA?

Cross-border trade in North America is substantial and growing, and it is dominated by trade involving the United States. In 1992, U.S. - Canadian two-way trade (imports and exports) accounted for about 73 percent of the region’s total trade in merchandise, U.S. - Mexican for about 26 percent, and Canadian - Mexican for about one percent (Congressional Budget Office). While trade with Canada and Mexico is a significant share of all U.S. trade, the United States does not depend on their trade to the same extent that Canada and Mexico depend on trade with the United States.

The United States and Canada enjoy strong trade and investment links, but they also share a long history of commercial disputes. In 1989, they entered into the U.S.-Canada Free Trade Agreement. This trade agreement was negotiated, in large measure, to resolve frictions that have marred commercial relations between the two countries in areas such as energy, investments, softwood lumber and automotive products. It was also seen as a vehicle to move regional trade liberalization ahead of slower multilateral trade talks. Many aspects of the U.S. - Canada Free Trade Agreement are included in the NAFTA.

Despite broad public support for the environment and a host of U.S. - Canadian natural resource controversies, environmental concerns did not play a significant role in shaping the U.S. - Canadian trade negotiations. However, environmental concerns were not entirely absent, especially in Canada. Although unsuccessful in modifying the trade agreement, Canadian environmental groups did make a vigorous case against free trade using many arguments that again surfaced in the NAFTA debate (Pearson).

Since 1965, the United States and Mexico have shared a partial "free trade" experiment called the Border Industrialization Program (U.S. Congress, OTA). This program liberalized foreign ownership restrictions on land and other assets in Mexico and granted special trade status to businesses that export their products. Typically, the Mexican-based plants, called "maquiladoras," import manufacturing materials and machines free of duty into Mexico and export finished or semi-finished products to the U.S. subject to a small value-added duty. Initially, the maquiladoras were allowed to operate only in the border area. But since the early 1970s, special trade status has been granted, with a few exceptions, to companies located elsewhere in Mexico.

In the mid-1980s, the Mexican government adopted an outward-looking and market-oriented agenda, representing a major break with past economic and foreign policy. Along with domestic programs of fiscal discipline, deregulation and privatization, Mexico also joined the General Agreement on Tariffs and Trade (GATT) in 1986. This was accompanied by the removal of some restrictions on foreign investment, relatively large reductions in tariffs, and the elimination of certain requirements for import licenses.

As a result of these actions by Mexico and a relatively open U.S. market, trade between the two countries has expanded rapidly in recent years. Today, Mexico - with an economy amounting to five percent of U.S. gross domestic product - is the United States’ third-largest trading partner after Canada and Japan. And, Mexico’s economy is very heavily dependent on the United States. Two-thirds of all Mexican exports are sold in the U.S. and 70 percent of Mexican imports are purchased in the U.S. Similarly, two-thirds of all new direct foreign investment in Mexico originates in the U.S. (Congressional Budget Office).

In early 1990, President Salinas de Gortari approached President Bush to negotiate a bilateral free trade agreement. Expanded to include Canada in January 1991, the proposed trade agreement - while very controversial in many quarters - enjoyed the support of political leaders at the highest levels from the beginning.

The NAFTA, which entered into force on January 1, 1994, will create the largest free trade area in the world, with 370 million people and an annual gross national product totalling over $6 trillion. Net economic benefits are expected to flow from the new trade agreement, but they are limited by the current low level of trade and investment barriers between the United States and Canada, and the relatively small size of the Mexican economy (Hufbauer and Schott, 1993; Krugman).
The trade and investment liberalizing objectives of the NAFTA will affect nearly every aspect of business activity in North America. It provides for the phased elimination of tariff and most nontariff barriers on regional trade within ten years, although a few import-sensitive products will have a 15-year transition period. It also contains rules for converting nontariff barriers to tariff barriers; rules for determining the origin of trade goods; special provisions for intellectual property, services, investment, and government procurement; a variety of dispute settlement provisions; and numerous exceptions to the general terms and conditions of the agreement. A country may withdraw from the NAFTA six months after it provides a written notice of withdrawal to the other countries (North American Free Trade Agreement, 1993).

Investment provisions of the NAFTA are noteworthy because they eliminate many performance requirements and will substantially liberalize restrictions on financial activities in Mexico. For some products, this will result in more rational economic choices about where to locate factories as firms are able to supply Mexican markets from the U.S. and Canada rather than moving to Mexico to meet local manufacturing requirements. However, as in the case of the tariff reduction schedules, Mexico is granted exceptions that provide longer time periods to comply with investment liberalizing provisions than in the United States or Canada. This concession reflects Mexico’s less developed status and relatively more closed economy.

One sector in which the NAFTA does not liberalize investments is petroleum. For national sovereignty reasons, Mexico will maintain most of its existing restrictions on energy resources. Foreign investment will continue to be prohibited in petroleum exploration and development, and U.S. and Canadian firms will not be able to enter the Mexican retail gasoline market.

Unlike the U.S. - Canada Free Trade Agreement and the GATT, the NAFTA deals in a significant way with the environment (Weintraub). Key environmental provisions found in the NAFTA’s text, a trilateral side accord on North American environmental issues, and U.S. - Mexico border environmental clean-up initiatives, are discussed in the third section of this paper.

In addition to a side accord on the environment, there are also side accords on labor issues and on import surges. The side accords supplement, but do not amend, the rights and obligations contained in the NAFTA. They promote compliance with national laws and regulations and seek to solve problems before they develop into trade disputes.

In an effort to avoid a drift away from freer multilateral trading, the NAFTA seeks consistency with provisions of the GATT throughout and leaves prospective new membership open to all countries without geographic limitation. However, there are reasons to be concerned about the treatment of non-member countries. First, because certain preferential provisions, such as industry-specific rules of origin, may have adverse effects on third-country trade. Second, because the trade agreement - which requires unanimous approval to join - does not spell out the application procedures or the criteria that new members would have to meet (Hufbauer and Schott 1993).

The NAFTA has been favorably described as the most comprehensive free trade pact (short of a common market) ever negotiated between regional trading partners, and the first reciprocal free trade pact between a developing country and industrial countries (Hufbauer and Schott 1993). For Mexico, it could "lock in" recent economic reforms, guarantee it access to export markets in the U.S. and Canada, and help it to attract foreign capital needed for modernization. For Canada, participation in the NAFTA helps secure its presence and influence in U.S. and Mexican markets and in any larger free trade area that might arise in the future. Finally, for the U.S., it will be much easier to conduct business in Mexico and there is an expectation that continued growth of the Mexican economy will provide long term economic and political benefits.

3. The Environmental Side of North American Trade

In contrast to the U.S. - Canada Free Trade Agreement, the environment was very prominent in the NAFTA negotiations. The proposed entry of Mexico, a developing nation, into a trade agreement with the United States and Canada, two highly developed nations, raised new questions about the environmental consequences of further industrialization and resource utilization. In all three countries, environmentalists can point to serious trade-related problems that need to be solved. But, greater differences in Mexico’s level of economic development and ability to enforce
laws protecting the environment directed much of the attention south.

Furthermore, the tuna-dolphin dispute between Mexico and the U.S. under the GATT made international trade a concern for many environmentalists who had never before thought of trade as an environmental issue. Mexico challenged a U.S. ban on imports of Mexican tuna. The ban was based on the number of dolphin incidentally killed by Mexican tuna fishermen. In September, 1991, a GATT panel ruled for Mexico, in part because the import restriction was based on the process by which the product was harvested, not the quality of the product itself. The panel also held that the U.S. could not use unilateral trade measures to protect animal life outside of its territory and stated that the U.S. should have relied on less trade restrictive methods of protection such as international agreements and product labeling. Although this ruling has not been implemented (because the U.S. and Mexico were able to resolve the issue), it greatly worries environmentalists who see import restrictions based on the method of production as a powerful tool for advancing international environmental protection (Berlin and Lang).

While the motives of a few environmentalists may have been to block the trade agreement, most who participated in the NAFTA debate seem to favor a pragmatic approach. As a group, they are concerned that trade liberalization and economic growth in the absence of careful planning and policies that correct for externalities and property rights failures will increase environmental degradation. They also recognize that a growing economy is far more likely to raise environmental standards than a stagnant or declining one, and that successful trade negotiations can be used to raise the level of environmental protection among the trading countries. Major problems that environmentalists put forth in the NAFTA debate are summarized below under four headings.

3.1 Transboundary Pollution

U.S. - Canadian environmental problems are numerous and persistent, but they are dwarfed by the unhealthy living conditions along the U.S. - Mexico border. In 1990, an American Medical Association group described parts of the U.S. - Mexico border as "a virtual cesspool and breeding ground for infectious diseases" (Council on Scientific Affairs). Pressing environmental problems include water contamination from raw sewage and toxic wastes, air pollution caused by daily gridlock at border crossings, degradation of aquifers, unregulated disposal of hazardous materials, and loss of wildlife habitat (U.S. EPA).

The environmental problems of the U.S. - Mexico border are mostly the result of industrialization and rapid population growth due to the maquiladoras; coupled with poor enforcement of existing regulations and grossly inadequate infrastructure facilities. The border region demonstrates what happens when public policies succeed in stimulating economic growth but fail to provide the necessary environmental and public health infrastructure to support growth.

While the NAFTA eliminates the special trade status granted to the maquiladoras, industrialization and population growth are expected to continue on the border as trade and investment barriers are removed. This raises serious concerns since U.S. and Mexican border communities do not have the governance mechanisms and financing to accommodate added strain on their environmental and health systems, and they have often been ignored by their respective federal governments (Border Environmental Plan Advisory Committee).

3.2 Pollution Havens

In the NAFTA debate, it was argued that weak environmental laws and/or lax enforcement of potentially effective environmental laws would provide an incentive for businesses to relocate to Mexico - a "pollution haven" - to avoid tougher laws and higher pollution control costs in the United States and Canada. Because of the possibility of business relocation and attendant loss of jobs to Mexico, the pollution haven fear created an opportunity for a coalition between some environmentalists and U.S. and Canadian labor groups threatened by lower wages in Mexico. It was also argued that business relocation would both destroy the environment in Mexico and undercut political support for tough environmental standards in the U.S. and Canada.

The question of whether business relocation is likely to occur under the NAFTA solely because countries have differing environmental standards and levels of enforcement is problematic. A 1991 study by the United States Government Accounting Office found that during a three year period, between 11 and 28 furniture manufacturers in the Los Angeles area relocated all or part of their manufacturing operations to Mexico (Hufbauer and Schott 1992). These manufac-
turers cited "the high cost for workers’ compensation insurance and wages and the stringent air pollution emission control standards" as major factors in their decision to relocate. It has also been reported that certain copper smelters, petroleum refineries, asbestos plants and ferroalloy plants have been constructed abroad rather than in the United States for environmental reasons (Globerman).

Nevertheless, other studies show that for many production processes, environmental costs are only a small fraction of the firm’s total expenses and that, historically, environmental factors have not been a major determinant in how companies allocate their investments among countries (Pearson). Finally, it was argued that the likelihood of business relocation with the NAFTA was overstated in light of the small share of costs in most industries due to pollution abatement and the already low level of U.S. tariffs in industries facing high pollution abatement costs (Office of the U.S. Trade Representative).

3.3 Health, Safety and Environmental Standards

Environmentalists were concerned about the effect of the NAFTA on product and process standards. Product standards regulate the health, safety and environmental impacts of the good itself (i.e., pollution emissions from automobiles, or chemical residues in food). Process standards regulate the impacts of the process by which the good is produced (i.e., the air pollution caused by a factory, or the killing of dolphins during the harvest of tuna). Differences between the product or process standards of trading partners become an issue when one partner enforces its standard at the border (by barring imports that do not meet the standard) or when the partners try to agree on common standards.

For product standards, the concern was that high standards would be challenged as protectionist measures by trading partners with lower standards, or voluntarily reduced to harmonize them with the standards of the other countries. For instance, a stringent U.S. food quality standard applied to Mexican vegetables or Canadian fruit at the borders could be either challenged as a disguised barrier to trade, or bargained away by government officials in an effort to harmonize standards. This is a concern for at least three reasons. First, scientists and governments do not agree on acceptable levels of exposure for many chemicals, making it possible to argue that a standard does not have a sound scientific basis. Second, producers in a country with higher standards will argue that they are at a competitive disadvantage relative to other producers. And, third, individual states and localities in all three NAFTA countries may set standards stricter than their federal governments, which might be challenged as impediments to trade.

Process standards to restrict imports are not commonly specified in trade agreements. Proponents argue that high process standards are needed to protect the environment and that weaker process standards, or their lax enforcement, are objectionable subsidies. Opponents, including some environmentalists, argue that applying process standards to most imports would be exceedingly complex. It could also impede the opportunity to address domestic pollution problems according to timetables and methods that reflect differences in income, social preferences, and capacities to absorb pollution.

Even environmentalists who oppose the use of process standards to regulate imports of industrial products were disturbed by the GATT tuna-dolphin decision. They argued that trade agreements should allow the use of import process standards to protect fish and wildlife, particularly in the global commons. Such protection is distinguishable from industrial regulation on various grounds, such as the migratory nature of species, the belief that they are part of our common heritage, and the difficulty of protecting them through national measures alone (Berlin and Lang). Measures to protect fauna in the global commons are necessitated by the lack of effective international agreements or property rights, and do not impose on another country’s sovereign control of its own territory.

Challenges to standards affecting trade are carried out through consultation and dispute resolution processes in the trade agreement. In the NAFTA, environmentalists sought to open these processes to public participation and sought the right to intervene in dispute resolution hearings in defense of health, safety and environmental standards. They reason that increased public participation will make the proceedings more responsive to environmental and other social interests. In the U.S. and Canada, state and provincial governments also joined environmentalists in seeking to participate in international proceedings that would settle disputes involving their own laws.
3.4 Adverse Global Impacts

The broadest concern raised by environmentalists was the fear that additional economic growth resulting from the NAFTA may not be sustainable; instead causing permanent harm to the world's environment and natural resources. As barriers to trade and investment are removed, it is argued that increased resource utilization, production and consumption will strain the environment not only through local and transborder damage, but also through adverse global impacts such as climate change, ozone depletion, and loss of biological diversity.

Some sustainable development advocates opposed the NAFTA based on their conviction that the world has already reached the "limits of growth" and that further economic growth will increase environmental costs faster than benefits (Daly). Yet, other sustainable development advocates supported trade liberalization to achieve greater efficiency in the use of resources and believe that economic growth is compatible with sustainable development. They argue for policies to internalize environmental costs and recognize that protectionism often contributes to poverty and abuse of the environment (Mikesell, Hudson).

3.5 Role of Environmental Groups

In the United States, the Bush Administration's need to secure an extension of special negotiating authority from Congress in the Spring of 1991, provided a major opportunity for environmentalists to press for inclusion of environmental measures in the NAFTA and related agreements. Working with supporters in the U.S. Congress, they succeeded in convincing the Administration to add environmental representatives to several NAFTA review committees. The Administration also committed to work jointly with Mexico to carry out a "parallel plan" to improve public health and the environment along the border.

During the negotiation of the NAFTA, environmentalists participated in legislative and administrative hearings and numerous conferences. They also met regularly with trade negotiators and elected officials in all three countries. The final text of the trade agreement responds, with varying degrees of success, to some of the environmentalists' concerns.

In September 1992, Presidents Bush and Salinas de Gortari and Prime Minister Mulroney signed the NAFTA. However, the U.S. Congress did not pass the legislation needed to implement the trade agreement until November 1993 - one year after President Clinton's election. During his campaign, Mr. Clinton assured Mexico and Canada that he would not seek to renegotiate the NAFTA's text. He did, however, call for trilateral side accords on the environment and labor.

Prior to negotiating the environmental side accord, the new Clinton Administration sought recommendations from a broad range of experts in environmental groups, business, academia and government. Several environmental interest groups that ultimately supported the NAFTA worked together in a loose coalition to prepare detailed proposals on enforcement, regional cooperation, and U.S. - Mexico border funding. As provisions responding to environmental concerns became clear in the side accord negotiations and as plans were developed to cleanup the U.S. - Mexico border region, the environment became less of an issue in the remaining months of the debate.

By the fall of 1993, nearly all environmental groups in Mexico strongly supported the NAFTA, while urging their government to continue strengthening its environmental programs. In Canada, most environmental groups opposed the NAFTA, raising many of the fears that had first surfaced in the U.S.-Canada Free Trade Agreement. And, in the U.S., the major environmental groups split due to differences of opinion concerning the NAFTA's text, the adequacy of government funding, and the likelihood of renegotiation. To increase their political strength, the anti-NAFTA environmentalists joined with a group of anti-growth advocates, traditional protectionists and conservatives already working against the trade agreement.

Now that some time has passed and the trade agreement is being implemented, there is no evidence of a significant split in the North American environmental community. Environmentalist from both the pro-NAFTA and anti-NAFTA camps and from all three countries are, once again, working together on issues of mutual interest and disagreeing on others.

4. Solving The Problems

Confronted with a series of environmental problems that could not be ignored, policy officials and trade negotiators sought a strategy to successfully integrate trade and environmental objectives. The results of their work are found in several provisions in the
NAFTA's text; in a trilateral side accord, called the North American Agreement on Environmental Cooperation; and in environmental clean-up plans for the U.S. - Mexico border region.

These new commitments are briefly explained and evaluated in this section. In some cases, they create rules for policy coordination and problem solving. In other cases, they merely declare the intentions of the countries to pursue a particular course of action.

4.1 NAFTA's Environmental Provisions

The NAFTA explicitly deals with environmental issues in its Preamble and in five chapters: international environmental agreements (Chapter One), sanitary and phytosanitary measures (Chapter Seven, Section B), standards-related measures (Chapter Nine), investment (Chapter Eleven), and dispute resolution (Chapter Twenty).

These provisions attempt to resolve trade and environment conflicts that relate directly to the trade agreement. They include: potential conflicts between the trade agreement and trade measures in international environmental treaties; the need to discourage product standards that are disguised barriers to trade while protecting standards with legitimate environmental purposes; and the risk that liberalized trade and investment provisions will lead to pollution havens (North American Free Trade Agreement 1993). The main source of conflict in these provisions is between trade liberalization and environmental protection, but national sovereignty is also a significant issue, especially for product standards.

International Environmental Agreements

NAFTA's Article 104 gives precedence to conflicting trade provisions in three international environmental treaties. They are: the Basel Convention on Control of Transboundary Movements of Hazardous Wastes, the Montreal Protocol on Substances that Deplete the Ozone Layer, and the Convention on the International Trade in Endangered Species. Other treaties may be added by agreement of the parties.

Under the GATT, there is no explicit basis for resolving conflicts between the trade agreement and environmental treaties. For example, the Basel Convention generally prohibits signatories from exporting hazardous waste to non-signatories. If a signatory were challenged under the GATT for refusing such exports, it could not rely on the Basel Convention because there is no GATT provision considering the effect of inconsistent environmental treaty provisions. It could only rely on the GATT's Article XX exceptions, which would leave the outcome highly uncertain. However, under Article 104, the Basel Convention would take precedence to the extent of any inconsistency with NAFTA's trade rules. Trade sensitivity in Article 104 is found in the requirement that where a party has a choice among "equally effective and reasonably available" means of meeting its environmental treaty obligations, it must choose the means that is least inconsistent with the NAFTA's trade rules.

The NAFTA is the first trade agreement to give such precedence to environmental treaties. Environmentalists are concerned, however, that the countries will not act quickly to include additional treaties that may conflict with the NAFTA. The requirement calling for the selection of the least NAFTA-inconsistent means of honoring environmental treaty obligations is a reasonable concession, as long as it is not interpreted to allow second-guessing of a country's selection.

Product Standards

One of the most complex issues is the use of product standards to limit the import of goods that may be harmful to health, safety and the environment. The NAFTA's provisions provide more protection to a country's environmental standards than either the existing or proposed GATT text. The NAFTA does this by (1) making the criteria for defending challenges more deferential to environmental measures; (2) giving dispute panels access to environmental expertise; and (3) prohibiting downward harmonization when the parties cooperate to make their standards compatible.

Criteria for Defending Challenges to Standards. The primary function of standards provisions in a trade agreement is to root out disguised barriers to trade. The NAFTA balances that function against the need to shield legitimate environmental measures. The text employs different criteria depending on whether the product standard is a sanitary and phytosanitary (S&P) standard (which deals with the risks of contaminants in food and the spread of disease and pests) or a general product standard (which includes all other environmental product standards, such as those regulating minimum fuel economy and pollution emis-
sions of automobiles). S&P standards are subject to stricter scrutiny because they have traditionally been more abused for protectionist purposes. However, both types of standards enjoy a general presumption of NAFTA compatibility if they are based upon international standards, such as those of the *Codex Alimentarius*. Thus, the following discussion considers the defense of a standard that exceeds international norms.

For both types of standards, the NAFTA shifts the burden of proof from the party defending the standard (as is the case under the GATT) to the challenging party. This means that if the dispute panel finds the evidence inconclusive, it must uphold the standard. Second, a challenged party can elect to have the dispute decided solely under the NAFTA. This prevents a country that is challenging a standard from avoiding the provisions of the NAFTA by bringing the challenge under the GATT.

The NAFTA explicitly allows each party to set its own appropriate levels of protection or levels of risk (i.e., one case of cancer in a million caused by pesticides in fruit) and to achieve that level of protection by employing standards that exceed international norms (Articles 702, 904.2, 905.1). The NAFTA does, however, impose trade discipline on how the level of protection is chosen. For example, the parties are to avoid arbitrary and unjustifiable distinctions between similar goods or levels of protection where such distinctions discriminate against the goods of another party or act as a disguised barrier to trade (Articles 715.3 and 907.2).

The major difference between the NAFTA’s treatment of S&P standards and general product standards is that a country’s general standards having a “legitimate objective” do not have to meet further tests that are applied to S&P standards. A non-discriminatory general standard is essentially immune if its demonstrable purpose is to achieve a “legitimate objective,” such as sustainable development, or protection of the environment, health, and safety (Articles 904.2, 915). Thus, for example, if Canada sought to reduce greenhouse gas emissions by requiring that new cars obtain a certain level of fuel economy, it would be virtually impossible for the US or Mexico to successfully challenge the standard if it were applied equally to both domestic and foreign cars.

An S&P standard, on the other hand, is subject to several tests. For example, the standard may only be applied to the extent necessary to achieve the chosen level of protection (Article 712.5). The NAFTA negotiators specifically rejected the then current GATT requirement that the party must choose the S&P measure that is “least restrictive to trade.” The challenged party need only show that its chosen level of protection necessitates the measure, it need not counter claims that the same level of protection could be achieved by a less trade disruptive means, such as labeling or a pollution tax. The pivotal term “necessary,” however, is not defined in the text.

An S&P measure must also have a scientific basis. The NAFTA test requires only the existence of some scientific evidence supporting the measure (Articles 712.3, and 724). Thus, the challenged party need not engage in a battle of scientific experts or evidence.

From the environmental perspective, the NAFTA standards provisions are a significant improvement over those in the GATT, particularly with respect to general standards. Most environmentalists would have preferred stronger and clearer protection for S&P standards, such as a clarification of the “necessary” test.

Dispute Resolution. The NAFTA gives panels that decide challenges to standards the opportunity to seek environmental expertise in resolving disputes. They can consult with outside environmental and scientific experts or create scientific review boards, subject to veto by the disputing parties. These provisions partially respond to the concern that dispute panels would pass judgment on environmental standards without understanding scientific issues crucial to the dispute.

Environmentalists would have preferred greater access to scientific expertise, but their main criticism is that the NAFTA’s text does not increase the transparency of, and public access to, trade disputes involving standards.

Harmonization. High product standards are also threatened by the parties’ efforts to harmonize their divergent standards. The NAFTA, however, prevents “downward harmonization” by requiring that any harmonization be accomplished without lowering the level of protection (Art. 755.1, 756, 906.2). For general standards, the parties also agree to work jointly to enhance the level of environmental protection (Article 906.1). These provisions are a significant improvement over the GATT, which contains no such safeguards (Charnovitz).
Investment

The NAFTA text discourages the countries from lowering environmental standards for the purpose of gaining business investments. It states that it is "inappropriate" to use relaxed environmental regulations or enforcement to attract investment and admonishes that a country "should not" undertake such an action (Article 1114). A country may request a consultation with a trading partner if it believes that the partner has ignored the guideline.

Environmentalists are dissatisfied that this provision does not prohibit the relaxation of standards and that it merely calls for consultation. In addition, the text only addresses a portion of the pollution haven problem. It does not confront existing lax controls or the relaxation of standards for the benefit of domestic industry rather than foreign investors. Fortunately, the environmental side accord responds more broadly to these concerns and provides tools for dealing with lax enforcement.

4.2 The North American Agreement on Environmental Cooperation

While the environmental provisions of the NAFTA's text focus on issues closely related to the trade agreement, the side accord establishes a framework for cooperation on environmental matters and commits the parties to effective enforcement of their environmental laws. Many of the conflicts dealt with in the environmental side accord are not between environmental protection and trade liberalization, but between environmental protection and national sovereignty.

Commission on Environmental Cooperation

The heart of the environmental side accord is a Commission on Environmental Cooperation. Its functions include fostering cooperation and solving environmental problems before they become trade disputes; conducting research and making recommendations on complex issues such as sustainable development and process standards; and providing environmental expertise to various committees created under the NAFTA. The Commission will also resolve specific complaints by citizens and countries that a country is not effectively enforcing its environmental laws.

The Commission is directed by a Council of the environmental ministers of the three countries. The work of the Commission will be carried out by a Secretariat with advice from a trinational public advisory committee including environmentalists.

Enforcement of Environmental Laws

The side accord includes specific provisions for promoting the enforcement of each country's environmental laws. The Commission accomplishes this by examining complaints about lax enforcement from individual citizens, interest groups and countries and by requiring the accused party to respond in an appropriate manner.

The enforcement mechanism has varying degrees of Commission involvement, ranging from simply asking a party to respond to a citizen's complaint to formal dispute panel proceedings between countries that can lead to fines and trade sanctions. As the level of Commission involvement and potential intrusion upon national sovereignty increases, so do the requirements for what may be considered and the opportunities for negotiated solutions.

At the initial stage, any citizen, environmental group or other entity of a country may complain to the Commission that any NAFTA country has failed to effectively enforce its environmental laws. Recognizing that no country is able to enforce all of its environmental laws completely, the text defines "effective enforcement" to account for the allocation of scarce resources among enforcement priorities. If a complaint meets basic requirements, the Commission may require the country to respond to the allegation. At this point there is no requirement that the allegation of lax enforcement be specifically related to trade. Depending on the country's response to the complaint, the Secretariat may prepare a factual record with the approval of two-thirds of the environmental ministers (Articles 14-15).

Formal consultations between the countries and dispute panel proceedings may be requested only by a country. The country seeking consultation must allege a "persistent pattern" of lax enforcement. If consultations fail, a dispute panel may be convened. However, this requires two-thirds approval by the Council and evidence that the lax enforcement relates to trade between the countries (Articles 22-24). If the panel finds a pattern of lax enforcement, an action plan is prepared to remedy the problem. If a country fails to follow the action plan, the panel will impose fines which are backed up either by trade sanctions against
the U.S. and Mexico, or domestic court proceedings to collect fines owed by Canada. The amount of the fine, up to $20m, is based on factors such as the extent of the enforcement failure and the country's effort to remedy it. Revenues from the fines are to be used, at the direction of the Council, to improve the environment or environmental enforcement of the country paying the fine (Articles 34-36, Annex 34).

Some environmentalists are satisfied with this enforcement mechanism, particularly the direct access of citizens to the Commission and the threat of sanctions against recalcitrant parties. However, critics complain that the scheme is too cumbersome; that the many checks and balances will greatly delay the imposition of penalties.

Strengthening Public Participation

The side accord includes several important commitments by the countries to increase public participation in domestic enforcement and in decision-making relating to the environment and public health. For example, they agree to ensure that their citizens have "appropriate access" to judicial or administrative proceedings for the enforcement of environmental laws (Article 6). The countries also agree, to the extent possible, to give advance notice of proposed laws and regulations, and to provide an opportunity for comments by interested persons (Article 4).

These commitments reflect a belief that long term integration of environmental policy requires giving the citizens of each country ready access to environmental information, decision making and remedies. Such participation may lessen the need for the Commission to act as a watchdog.

The environmental side accord contains much of what environmentalists had proposed. Some have criticized the limits on the independence of the Commission and its functions. However, this was deemed necessary because of potential intrusion on national sovereignty and the need for this experimental institution to have the flexibility to evolve.

4.3 U.S. - Mexico Border Environmental Initiatives

The introduction of U.S. - Mexico border environmental problems into the NAFTA debate focused political attention on long-neglected needs in both countries. It was seen as an opportunity to raise public consciousness about the border region and to redress its degradation. New initiatives to deal with these needs are being carried out under existing bilateral agreements and are not formally tied to the NAFTA. However, in both countries, the initiatives were proposed to win support for the trade agreement.

Three examples of "parallel" efforts to solve public health and environmental problems along the U.S. - Mexico border are described below. These efforts help border residents shape priorities for their communities, commit the federal governments to more environmental infrastructure investments, and increase private sector responsibility through user fees and property rights strategies.

First, the U.S. and Mexico worked together to prepare a multi-year environmental management plan for the border region (U.S. EPA). The first component of the plan (for 1992-94) was released in February 1992. The new plan is important because it caused the two countries to identify joint problems, to set priorities, and to allocate federal and state monies for public infrastructure facilities in the region. For example, the U.S. and Mexico promised an additional $700m, mostly for municipal wastewater treatment, during the first phase of the plan (Congressional Budget Office). However, the border plan has been widely criticized for being vague and unresponsive to local needs, and because it provides neither the governance mechanisms nor the funding needed to solve many of the region's problems (Kelly). Both countries have recently committed to prepare an "improved" border plan and to locate environmental protection offices in the border region (Browner).

Second, in response to continuing criticisms, the U.S. and Mexico agreed in 1993 to create two new binational institutions to facilitate border environmental clean-up (Agreement of November 15, 1993). A Border Environmental Cooperation Commission will assist local communities in coordinating and designing environmental infrastructure projects and in conducting environmental assessments of proposed projects. Mechanisms will be set up to ensure that the priorities of affected communities and members of the public are taken into account. The border commission will be directed by a binational board and a citizens advisory council.

Projects approved by the border commission will be sent to a North American Development Bank for possible financing. The Bank will be initiated with
cash and loan guarantees contributed equally by the U.S. and Mexican governments. Federal funding will, in turn, be used to leverage larger amounts of money by requiring that projects be co-financed by state and local governments and through user fees paid by private firms. It is expected that the Bank will provide an increase of $2 to $3b in financing to the border region over the next ten years (Agreement of November 15, 1993). The Bank will also be directed by a binational board.

Finally, the NAFTA debate has spurred efforts to develop new binational governance institutions to solve localized transboundary pollution problems. For example, the possibility of increased economic growth and further environmental degradation under the NAFTA has caused the U.S. - Mexico border cities of El Paso, Texas, and Cd. Juarez, Chihuahua, to recognize the need for regional institutions to deal with environmental quality. Because of the combined effects of their immediate proximity in a high elevation, arid mountain valley, and because of rapid population and industrial growth related to international trade, the "sister cities" share a very serious air pollution problem. Health-based air quality standards are regularly violated in the common airshed that serves both El Paso and Cd. Juarez.

To reduce air pollution, community leaders have agreed to work cooperatively to create an international air quality management district encompassing the two cities and their surrounding area (Pasztor). The management district will monitor air quality, inventory emissions from major sources, set air quality goals, and administer incentive-based mechanisms for achieving these goals. Businesses operating in the airshed will be allowed to decide where and how to make their required reductions in pollution and will have an opportunity to earn emission reduction credits that may be traded or banked for future use.

The international air quality management district provides a governance tool needed to address transboundary air pollution. Without joint management, national clean air legislation in either country is unlikely to solve the pollution problem and would not do so in the most efficient manner possible. Allowing new and expanding businesses to make investments in pollution offsets and to earn emission reduction credits throughout the airshed helps to insure that additional economic growth due to the NAFTA will contribute to the process of cleaning up the air.

One practical consequence of cross-border pollution transactions is that U.S. businesses in higher-income El Paso, where many pollution abatement investments have already been made, will have an incentive to invest in lower-income Cd. Juarez, where fewer pollution abatement investments have been made and large reductions in pollution are possible. In addition, suppliers of clean technology and alternative fuels may enter the market to help finance these cross-border investments in exchange for a share of the emission reduction credits that are generated.

The international air quality management district - an environmental policy tool - will benefit international trade by providing an efficient means of achieving healthy air quality needed to sustain expanded trade and economic growth. Trade liberalization through the NAFTA, on the other hand, will benefit the environment by eliminating tariffs and other restrictions on the export of pollution control equipment and technical services. These complementary outcomes, which depend on the acceptance of common air quality goals and business strategies that transfer pollution-reducing technology, will benefit El Paso and Cd. Juarez by improving their environmental performance and their opportunities for future economic growth.

5. Where Do We Go From Here?

The NAFTA negotiations demonstrate that it is possible to complement a trade agreement with significant environmental commitments without subverting important goals of trade and investment liberalization. This outcome reflects a high degree of interdependence among the three countries. It is the latest step in a series of bilateral agreements and unilateral decisions - starting in the 1970s - that move toward a more open trading system in North America.

The particular reconciliation of trade and environment issues found in the NAFTA was heavily influenced by environmentalists. However, it does not dictate uniformity of standards or otherwise impinge greatly on a nation’s sovereign control over environmental matters within its own borders. Policy officials and trade negotiators were able to succeed because they rejected the view that conflicts between trade liberalization and environmental protection are insurmountable, and accepted the challenge of trying to achieve both goals.

The introduction of this practical strategy into the international trade arena may be the most significant
feature of the NAFTA in shaping what might happen next. There is now a model that recognizes each country’s right to choose appropriate levels of environmental protection, tilts toward upward harmonization, gives precedence to major international environmental treaties, and retains sufficient discipline to allow disguised trade barriers to be challenged. In creating a Commission on Environmental Cooperation, the NAFTA countries seek to achieve better enforcement of existing environmental laws. And, over a period of time, they may address process standards that regulate methods of production and develop more consistent environmental policies for the region. These commitments should help the countries achieve greater efficiency with respect to the environment and trade.

Responding to long-standing needs that were brought into the spotlight of public awareness by the trade negotiations, the U.S. and Mexico have earmarked additional government funding for the border region and have taken steps to give citizens from border communities more influence in setting priorities and solving problems. Transboundary environmental damages, such as air pollution that may be intensified by expanded trade, are dealt with through bilateral governance mechanisms that delegate significant responsibility to the private sector.

The NAFTA experiences have been taken to the GATT negotiations where environmentalists raised concerns about challenges to legitimate environmental laws and are working for the creation of a Committee on Trade and the Environment to insure post-Uruguay Round follow-up on environmental matters.

Trade liberalization will continue through regional pacts, like the NAFTA, and within the GATT. But, it will occur in the context of a much greater focus on environmental issues than has been the case in the past. Finding strategies to achieve more open trading systems and to provide ecological services needed to sustain economic growth will be a key factor in fostering greater economic and social progress in all parts of the world.

References


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