THE NEGLECTED LESSONS OF THE NAFTA ENVIRONMENTAL REGIME

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The environmental provisions in the North American Free Trade Agreement ("NAFTA")[1] and its side agreements[2] establish an international regime—that is, a set of "principles, norms, rules, and decision-making procedures around which actor expectations converge in a given issue-area."[3] The most obvious goal of the regime is to address environmental objections to increased economic integration, but the attention given to that purpose should not obscure two other important ways of understanding it: it is also an extension of earlier efforts to reduce transboundary environmental harm in North America and a path-breaking attempt to promote sustainable development throughout the continent, particularly in Mexico.

The NAFTA environmental regime is now fifteen years old, and its performance has been the subject of many detailed studies.[4] As a

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1. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 & 605 (1993) [hereinafter NAFTA].

2. North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., Sept. 14, 1993, 32 I.L.M. 1480 [hereinafter NAAEC]; Agreement Concerning the Establishment of a Border Environment Cooperation Commission and a North American Development Bank, U.S.-Mex., Nov. 16–18, 1993, T.I.A.S. No. 12,516 [hereinafter BECC/NADBank Agreement Original]. The BECC/NADBank Agreement was amended in 2004. Protocol of Amendment to the Agreement Concerning the Establishment of a Border Environment Cooperation Commission and a North American Development Bank, app. 1, Nov. 25–26, 2002, http://www.cocef.org/files/document_80.pdf [hereinafter BECC/NADBank Agreement Amended] (entered into effect Aug. 6, 2004).

3. *See* Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, 36 INT'L ORG. 185, 185 (1982), *reprinted in* INTERNATIONAL REGIMES 1, 1 (Stephen D. Krasner ed., 1983).

4. *See, e.g.*, Comm'n for Envtl. Cooperation [CEC], Joint Pub. Advisory Comm., *Lessons Learned: Citizen Submissions Under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (June 6, 2001), *available at* http://www.cec.org/files/pdf/ABOUTUS/rep11-e-final_EN.PDF; CEC, Ten-Year Review & Assessment Comm., *Ten Years of North American Environmental Cooperation*, (June 15, 2004), *available at* http://www.cec.org/Storage/79/7287_TRAC-Report2004_en.pdf [hereinafter CEC, *Ten Years*]; KEVIN P. GALLAGHER, FREE TRADE AND THE ENVIRONMENT: MEXICO, NAFTA, AND

result, it is possible to draw conclusions about how well it has succeeded at fulfilling each of these three purposes. As an attempt to solve "trade-and-environment" problems, it is undoubtedly a failure. From that perspective, it either addresses baseless concerns or is ineffective. As an effort to tackle transboundary environmental harm, the NAFTA regime has had mixed results. It has helped to decrease transboundary water pollution along the U.S.-Mexico border but otherwise has added little to the many bilateral institutions already directed at border environmental issues. The regime has had its greatest success as a regional effort to promote sustainable development. It has contributed to stronger environmental protections, especially in Mexico. Even in this light, however, its achievements appear minor when compared to the scale of the problems it faces.

The idea of including environmental elements in a trade agreement was innovative when NAFTA was negotiated in the early 1990s, but it has since become a cornerstone of U.S. trade policy. Each of the twelve U.S. free trade agreements negotiated since NAFTA includes environmental provisions.[5] In effect, the United

BEYOND (2004); JONATHAN GRAUBART, LEGALIZING TRANSNATIONAL ACTIVISM: THE STRUGGLE TO GAIN SOCIAL CHANGE FROM NAFTA'S CITIZEN PETITIONS (2008); GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION (David L. Markell & John H. Knox eds., 2003) [hereinafter GREENING NAFTA]; GARY CLYDE HUFBAUER & JEFFREY J. SCHOTT, NAFTA REVISITED: ACHIEVEMENTS AND CHALLENGES 153–98 (2005); PIERRE MARC JOHNSON & ANDRÉ BEAULIEU, THE ENVIRONMENT AND NAFTA: UNDERSTANDING AND IMPLEMENTING THE NEW CONTINENTAL LAW (1996); LINKING TRADE, ENVIRONMENT, AND SOCIAL COHESION (John J. Kirton & Virginia W. Maclaren eds., 2002); Randy L. Christensen, *The Citizen Submission Process Under NAFTA: Observations After 10 Years*, 14 J. ENVTL. L. & PRAC. 165 (2004); Joseph F. DiMento & Pamela M. Doughman, *Soft Teeth in the Back of the Mouth: The NAFTA Environmental Side Agreement Implemented*, 10 GEO. INT'L ENVTL. L. REV. 651 (1998); Chris Wold, *Evaluating NAFTA and the Commission for Environmental Cooperation: Lessons for Integrating Trade and Environment in Free Trade Agreements*, 28 ST. LOUIS U. PUB. L. REV. 201 (2008); Tseming Yang, *The Effectiveness of the NAFTA Environmental Side Agreement's Citizen Submissions Process: A Case Study of* Metales y Derivados, 76 U. COLO. L. REV. 443 (2005). In addition, the U.S. National Advisory Committee has maintained a running commentary on the performance of the Commission for Environmental Cooperation, the institution created by the North American Agreement on Environmental Cooperation ("NAAEC"), from its inception. The reports and advice letters of the Committee are available at http://www.epa.gov/ocem/nac. (I should disclose that I chaired the Committee for several years, until 2005.)

5. *See* Agreement on the Establishment of a Free Trade Area, U.S.-Jordan, art. 5, Oct. 24, 2000, 41 I.L.M. 63 (2002) [hereinafter Jordan FTA]; Free Trade Agreement, U.S.-Sing., ch. 18, May 6, 2003, http://www.ustr.gov/trade-agreements/free-trade-agreements/singapore-fta [hereinafter Singapore FTA]; Free Trade Agreement, U.S.-Chile, ch. 19, June 6, 2003, http://www.ustr.gov/trade-agreements/free-trade-agreements/chile-fta [hereinafter Chile FTA]; Free Trade Agreement, U.S.-Austl., ch. 19, May 18, 2004, http://www.ustr.gov/trade-agreements/free-trade-agreements/australian-fta [hereinafter Australia FTA];

States requires its trading partners to accept an embedded environmental regime as a condition to entering into a free trade agreement.[6]

The post-NAFTA environmental provisions closely resemble one another, so much so that they were evidently negotiated on the basis of a common template. This template varies in important respects from the original NAFTA regime. One might expect that the changes reflect the lessons learned from experience with that regime, especially since the post-NAFTA trade agreements were negotiated years after NAFTA and its side agreements entered into force.[7] The United States could have negotiated new agreements that dropped the provisions aimed at baseless trade-and-environment concerns, for example, and strengthened the elements promoting sustainable development. Instead of improving on the original, however, the United States has done just the opposite. The post-NAFTA agreements copy elements from the NAFTA agreements that have proven ineffective, and they fail to include, much less strengthen, more promising provisions. As a result, the environmental provisions in the later agreements are weaker than the NAFTA environmental regime, and they are far weaker than

Free Trade Agreement, U.S.-Morocco, ch. 17, June 15, 2004, http://www.ustr.gov/trade-agreements/free-trade-agreements/morocco-fta [hereinafter Morocco FTA]; Dominican Republic–Central America–United States Free Trade Agreement, ch. 17, Aug. 5, 2004, http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-domincan-republic-central-america-fta [hereinafter CAFTA-DR]; Agreement on the Establishment of a Free Trade Area, U.S.-Bahr., ch. 16, Sept. 14, 2004, http://www.ustr.gov/trade-agreements/free-trade-agreements/bahrain-fta [hereinafter Bahrain FTA]; Agreement on the Establishment of a Free Trade Area, U.S.-Oman, ch. 17, Jan. 19, 2006, http://www.ustr.gov/trade-agreements/free-trade-agreements/oman-fta [hereinafter Oman FTA]; Trade Promotion Agreement, U.S.-Peru, ch. 18, Apr. 12, 2006, http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa [hereinafter Peru TPA]; Trade Promotion Agreement, U.S.-Colom., ch. 18, Nov. 22, 2006 (not in force), http://www.ustr.gov/trade-agreements/free-trade-agreements/columbia-fta [hereinafter Colombia TPA]; Trade Promotion Agreement, U.S.-Pan., ch. 17, June 28, 2007, http://www.ustr.gov/trade-agreements/free-trade-agreements/panama-tpa [hereinafter Panama TPA] (not in force); Free Trade Agreement, U.S.-Korea, ch. 20, June 30, 2007 (not in force), http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta [hereinafter Korea FTA]. Some of the agreements also have side letters or understandings on environmental issues. The three most recent trade agreements—with Columbia, Panama, and South Korea—have not received congressional approval and have not entered into force.

6. This Article examines U.S. bilateral and regional free trade agreements, not multilateral trade agreements under the umbrella of the World Trade Organization. The most recent round of multilateral trade negotiations, which has been stalled for years, does not appear likely to incorporate significant environmental protections.

7. NAFTA and the NAAEC entered into force on January 1, 1994. The next U.S. free trade agreement, with Jordan, was signed in October 2000; the rest were signed between May 2003 and June 2007. *See supra* notes 1, 2, 5.

they could have been had its lessons been taken into account.

Part I of this Article describes the NAFTA environmental regime and the lessons learned from its experience. Part II explains how the United States has failed to incorporate those lessons in its post-NAFTA free trade agreements. The Article concludes by briefly suggesting possible reasons for this failure.

I. THE NAFTA ENVIRONMENTAL REGIME

Most of the components of the NAFTA environmental regime are in the two environmental side agreements to NAFTA: the North American Agreement on Environmental Cooperation ("NAAEC"), to which all three NAFTA countries belong,[8] and the U.S.-Mexico agreement creating a Border Environment Cooperation Commission ("BECC") and a North American Development Bank ("NADBank").[9] The Clinton administration negotiated the agreements as supplemental agreements to NAFTA, which had already been negotiated and signed by the first Bush administration.[10] The NAAEC and the BECC/NADBank Agreement responded to environmental criticisms of NAFTA, but NAFTA itself has a few provisions that address environmental concerns. The NAFTA environmental regime, as I use the term, comprises elements from all three agreements.

The following Subparts separately analyze those elements that comprise (a) a trade-and-environment regime designed to address environmental concerns with international trade, (b) a continuation of long-standing bilateral efforts to combat transboundary environmental harm in North America, and (c) a regional effort to promote sustainable development.

A. Trade and the Environment

A vast literature describes environmental concerns with trade in general[11] and with NAFTA in particular.[12] Three overriding concerns have been (1) the threat of a regulatory "race to the bottom," (2) legal conflicts between trade agreements and

8. NAAEC, *supra* note 2.

9. BECC/NADBank Agreement Amended, *supra* note 2.

10. *See* John H. Knox & David L. Markell, *The Innovative North American Commission for Environmental Cooperation*, *in* GREENING NAFTA, *supra* note 4, at 1, 7–8.

11. For an overview, see Chris Wold, *Taking Stock: Trade's Environmental Scorecard After Twenty Years of "Trade and Environment*," 45 WAKE FOREST L. REV. 319 (2010).

12. *See, e.g.*, JOHN J. AUDLEY, GREEN POLITICS AND GLOBAL TRADE: NAFTA AND THE FUTURE OF ENVIRONMENTAL POLITICS (1997); BARBARA HOGENBOOM, MEXICO AND THE NAFTA ENVIRONMENT DEBATE: THE TRANSNATIONAL POLITICS OF ECONOMIC INTEGRATION (1998); JOHNSON & BEAULIEU, *supra* note 4; DiMento & Doughman, *supra* note 4; Knox & Markell, *supra* note 10.

environmental laws, and (3) trade-led environmental degradation.[13] The following sections describe how the NAFTA agreements responded to each of those concerns and how successful those responses have been.

1. Pollution Havens and the Race to the Bottom

When NAFTA was negotiated, many environmentalist critics believed that it would lead U.S. and Canadian companies to move their operations to Mexico to take advantage of lower Mexican environmental standards.[14] Treating Mexican sites as "pollution havens" would obviously be bad for the Mexican environment; in addition, it would put pressure on the U.S. and Canadian governments to lower their own environmental standards to keep companies at home. The result would be a regulatory "race to the bottom." NAFTA addresses the fear of pollution havens in its Article 1114, which states only that parties "should not" lower their domestic environmental (or health or safety) standards to encourage foreign investment.[15] This extraordinarily weak language imposes no real legal obligation on the parties.

A primary purpose of the NAAEC was to strengthen protections against pollution havens.[16] By the time President Clinton took office, U.S. government officials and outside observers more or less agreed that the weakness of Mexican environmental standards arose not from the standards as written, which were comparable to those of the United States, but rather from the lack of compliance with the laws in practice.[17] As a result, the NAAEC was designed to improve environmental enforcement. To that end, the agreement includes five elements which, together with NAFTA's Article 1114, can be considered the "Pollution Haven Package" of the NAFTA environmental regime.

Two of the elements in the NAAEC recast the hortatory language of Article 1114 in legally binding terms. One of the obligations takes on ineffective enforcement directly by requiring each of the three parties to "effectively enforce its environmental laws."[18] To prevent a party from evading the intent of this obligation by weakening its laws (thus making it easier to "effectively enforce" them), another provision requires each party to

13. These concerns are often called competitiveness effects, regulatory effects, and scale and compositional effects, respectively. *See* Wold, *supra* note 11, at 323–24. Critics have also emphasized the lack of transparency in the resolution of conflicts between trade liberalization and environmental protection. *See, e.g.*, *id.* at 324–25. This Article includes this concern in its discussion of legal conflicts. *See infra* Part I.A.2.

14. HOGENBOOM, *supra* note 12, at 149.

15. NAFTA, *supra* note 1, art. 1114, para. 2.

16. *See* Knox & Markell, *supra* note 10, at 1, 11.

17. *Id.* at 5.

18. NAAEC, *supra* note 2, art. 5, para. 1.

"ensure that its laws and regulations provide for high levels of environmental protection and [to] strive to continue to improve those laws and regulations."[19]

Another element of the Pollution Haven Package provides for cooperation among the parties to promote effective enforcement. The NAAEC establishes an international organization, the Commission for Environmental Cooperation ("CEC"), whose governing body, the Council, is composed of the parties' environmental ministers or their designates.[20] The NAAEC specifically enjoins the Council to encourage effective enforcement of and compliance with domestic environmental laws.[21]

Alone, these elements cannot ensure compliance by the parties with their obligation to enforce their environmental laws. The NAAEC therefore establishes two mechanisms designed to increase pressure on the parties to comply. One is a procedure through which any person or nongovernmental organization[22] residing in one of the NAFTA countries may file a complaint with the CEC Secretariat alleging that any of the NAFTA parties is failing to effectively enforce its environmental laws.[23] The Secretariat reviews the submission to see if it meets certain basic requirements; if it does, the Secretariat requests the concerned party file a response and, on that basis, decides whether the submission warrants an investigative report.[24] By shining a spotlight on instances of noncompliance, this citizen submissions procedure may embarrass countries into raising their levels of enforcement.[25]

The other compliance mechanism, created by Part Five of the NAAEC, is an intergovernmental dispute resolution procedure under which any party may accuse another of engaging in "a persistent pattern of failure . . . to effectively enforce its environmental law."[26] The Council may convene an arbitral panel to hear the complaint and, under certain circumstances, the panel has the authority to establish an "action plan" to remedy the problem

19. *Id.* art. 3.

20. *Id.* arts. 8–9, para 1.

21. *Id.* art. 10, para. 4(a)–(b).

22. The term "non-governmental organization" is defined to include "any scientific, professional, business, nonprofit, or public interest organization or association which is neither affiliated with, nor under the direction of, a government." *Id.* art. 45, para. 1(b).

23. *Id.* art. 14, para. 1.

24. *Id.* arts. 14–15.

25. *See* John H. Knox, *A New Approach to Compliance with International Environmental Law: The Submissions Procedure of the NAFTA Environmental Commission*, 28 ECOLOGY L.Q. 1, 75 (2001); David L. Markell, *The Commission for Environmental Cooperation's Citizen Submissions Process*, 12 GEO. INT'L ENVTL. L. REV. 545, 571–72 (2000); Kal Raustiala, *Citizen Submissions and Treaty Review in the NAAEC*, *in* GREENING NAFTA, *supra* note 4, at 256, 261.

26. NAAEC, *supra* note 2, art. 22, para. 1.

and to impose fines on a recalcitrant party.[27] If the party does not pay, the complaining party may suspend NAFTA benefits.[28]

How successful has the Pollution Haven Package been at ensuring effective enforcement of domestic environmental laws? Critics argued from the outset that the two compliance mechanisms would have little or no ability to deter the creation of a Mexican pollution haven that would attract U.S. and Canadian firms.[29] The Secretariat report that results from the submissions procedure is not only nonbinding, it is merely a "factual record" that does not even include a clear conclusion as to whether a party has violated its obligations under the NAAEC.[30] While the Part Five procedure offers the possibility of more serious sanctions, it sets out many hurdles that must be overcome before an arbitral panel could decide whether a party has engaged in a persistent pattern of ineffective enforcement.[31]

Worse, both mechanisms are under the control of the very governments whose conduct would be in question, which have every incentive not to allow the mechanisms to operate in a way that would force them to change their behavior. While the citizen submissions go to Secretariat officials, who should be independent of party control,[32] only the Council, by a two-thirds vote, may authorize preparation of a factual record.[33] Only a state party may trigger the Part Five procedure, and again a two-thirds vote of the Council is necessary to convene an arbitral panel.[34]

Experience with the compliance procedures has borne out these criticisms in different degrees. The sanctions offered by Part Five do appear to be illusory. No government has ever brought a complaint to dispute resolution under Part Five, and the NAFTA parties have never even negotiated the rules of procedure for the arbitral panels.[35] In contrast, the citizen submissions procedure has been significantly more successful. It has attracted a steady stream of submissions, and the Council has approved nearly every Secretariat request for a factual record.[36] But the Council has

27. *Id.* arts. 24, 33–34.

28. *Id.* art. 36. In place of the suspension of trade benefits against it, Canada agreed that decisions of arbitral panels may be enforced directly in Canadian court. *Id.* Annex 36A.

29. *E.g.*, Jay Tutchton, *The Citizen Petition Process Under NAFTA's Environmental Side Agreement: It's Easy to Use, but Does It Work?*, 26 ENVTL. L. REP. 10,031, 10,031 (1996).

30. *See* CEC, About Submissions on Enforcement Matters, http://www.cec.org/Page.asp?pageID=122&ContentID=921&SiteNodeID=536 (last visited May 7, 2010).

31. *See* NAAEC, *supra* note 2, arts. 22–33.

32. *See id.* art. 11, para. 4.

33. *Id.* art. 15, para. 2.

34. *Id.* art. 24, para. 1.

35. Geoff Garver, *Tooth Decay*, 25 ENVTL. F. 34, 35, 38 (2008).

36. *See* John H. Knox, *The 2005 Activity of the NAFTA Tribunals*, 100 AM.

limited the effectiveness of the procedure by delaying approval of factual records and restricting their scope.[37]

In the context of the concern these provisions were intended to address, however, there is a much more fundamental problem. Studies, including those prepared under the auspices of the CEC itself, have consistently indicated that the fear of pollution havens is largely baseless. The marginal costs of abating pollution in developed countries, such as the United States, are simply not high enough to induce companies to move their operations abroad in search of lower costs in countries with lower environmental standards.[38] As a result, whether the Pollution Haven Package is strong enough to avert an environmental race to the bottom is moot; no such race is occurring. This is undoubtedly good news for those concerned about the implications of trade agreements for environmental protection. It means that the NAFTA countries can raise their environmental standards without worrying about driving away private companies.[39] But it is bad news for the utility of the NAFTA environmental regime. To the extent that its elements are designed to prevent companies from fleeing their home countries in search of pollution havens, it addresses a nonexistent problem.

2. Potential Legal Conflicts Between Trade Agreements and Environmental Protection

In the 1990s, environmental critics of trade agreements particularly feared that the agreements would give rise to legal conflicts with domestic and international environmental rules, and that such conflicts would be decided by trade tribunals biased toward free trade and closed to outside influence. These fears had been raised by the 1991 *Tuna-Dolphin* decision, in which an arbitral panel convened under the General Agreement on Tariffs and Trade ("GATT") agreed with Mexico that a U.S. law restricting imports of

J. INT'L L. 429, 439 (2006); David L. Markell, *The Role of Spotlighting Procedures in Promoting Citizen Participation, Transparency, and Accountability*, 45 WAKE FOREST L. REV. 425, 454–55 (2010).

37. Garver, *supra* note 35, at 35–38; Markell, *supra* note 36, at 440–51.

38. CEC, *Free Trade and the Environment: The Picture Becomes Clearer*, at 13 (2002), *available at* http://www.cec.org/Storage/47/3994_FreeTrade-en-fin.pdf; GALLAGHER, *supra* note 4, at 25–33; HÅKAN NORDSTRÖM & SCOTT VAUGHAN, TRADE AND ENVIRONMENT 38 (1999), *available at* http://www.wto.org/english/news_e/pres99_e/environment.pdf; Claudia Schatan, *The Environmental Impact of Mexican Manufacturing Exports Under NAFTA*, *in* GREENING NAFTA, *supra* note 4, at 133, 146–48; Wold, *supra* note 4, at 223–24. "A related explanation is that many firms are simply too large and cumbersome to move to another location, and they need to stay close to their product markets." GALLAGHER, *supra* note 4, at 31. Of course, companies may have economic incentives to move overseas for other reasons, such as lower labor costs, which make up a much higher proportion of most firms' costs of production.

39. GALLAGHER, *supra* note 4, at 32–33.

Mexican tuna caught in a manner that harmed dolphins was in violation of U.S. obligations under the trade agreement.[40] Although the decision was not legally binding, its reasoning called into question the compatibility of trade agreements with other domestic environmental laws and even multilateral environmental agreements that used trade restrictions to further environmental ends.[41] The Uruguay Round of global trade negotiations, in progress at the same time, intensified environmentalists' concerns by readopting the GATT provisions on which the *Tuna-Dolphin* panel had relied, adding agreements with new restrictions on domestic regulation, and strengthening the dispute resolution procedure in ways that made the decisions of trade tribunals much more difficult to ignore or evade.[42]

It became clear early in the negotiation of NAFTA that it would repeat much of the language from GATT and the new Uruguay Round agreements that most troubled environmental advocates. As a result, they argued that NAFTA should also include other elements, a kind of "Legal Conflicts Package," to protect domestic and international environmental laws from trade-related challenges. Substantively, the critics wanted the agreement to include language that would give environmental concerns more weight in such disputes and that would make clear that in some cases, at least, environmental laws would trump trade rules.[43] Procedurally, they wanted to shift trade-and-environment disputes from trade tribunals to more neutral forums, or at least to ensure that the procedures for resolving such disputes would be open to environmental concerns raised by experts and nongovernmental organizations.[44]

In the end, the environmentalists were unsuccessful. The NAFTA environmental regime includes very few elements of their proposed Legal Conflicts Package. NAFTA itself does state, in its

40. Report of the Panel, *United States — Restrictions on Imports of Tuna*, WT/DS21/R (Sept. 3, 1991), GATT B.I.S.D. (39th Supp.) at 155, 205 (2003).

41. *See* Jeffrey L. Dunoff, *Reconciling International Trade with Preservation of the Global Commons: Can We Prosper and Protect?*, 49 WASH. & LEE L. REV. 1407, 1415 (1992); John H. Knox, *The Judicial Resolution of Conflicts Between Trade and the Environment*, 28 HARV. ENVTL. L. REV. 1, 5–13 (2004); Chris Wold, *Multilateral Environmental Agreements and the GATT: Conflict and Resolution?*, 26 ENVTL. L. 841, 856–57 (1996).

42. Knox, *supra* note 41, at 14–25.

43. *Id.* at 13–15; *see also* DANIEL C. ESTY, GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE 52–56 (1994); Dunoff, *supra* note 41, at 1449–50.

44. ESTY, *supra* note 43, at 211–13; Jeffrey L. Dunoff, *Resolving Trade-Environment Conflicts: The Case for Trading Institutions*, 27 CORNELL INT'L L.J. 607, 622–25 (1994); Knox, *supra* note 41, at 24–25.

Article 104:

> In the event of any inconsistency between this Agreement and the specific trade obligations set out in [certain listed environmental agreements[45]], such obligations shall prevail to the extent of the inconsistency, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement.[46]

This language is not as protective of the environmental agreements as it might first appear. It is highly unlikely that any of the NAFTA parties would argue that conduct *required* by a binding international agreement whose obligations it has accepted would violate NAFTA obligations that it has also accepted.[47] Even if one did, general norms of treaty law would already provide strong counterarguments that NAFTA should not be read to override more specific obligations in another agreement binding the NAFTA parties.[48] Article 104 does not address more difficult issues, such as those that might arise with respect to actions arguably *authorized* but not *required* by an environmental agreement.[49]

At least NAFTA makes some effort, however feeble, to protect multilateral environmental agreements. It includes no equivalent provision protecting domestic laws, such as the law restricting

45. The listed agreements are: the Convention on International Trade in Endangered Species of Wild Fauna and Flora, March 3, 1973; the Montreal Protocol on Substances That Deplete the Ozone Layer, September 16, 1987; the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, March 22, 1989 (but only after its entry into force for all three parties); the Agreement Between the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Waste, October 28, 1986; and the La Paz Agreement Between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area, August 14, 1983. NAFTA, *supra* note 1, art. 104, para. 1 & Annex 104.1.

46. NAFTA, *supra* note 1, art. 104, para. 1.

47. *See* Steve Charnovitz, *The North American Free Trade Agreement: Green Law or Green Spin?*, 26 LAW & POL'Y INT'L BUS. 1, 45–46 (1994).

48. Robert Hudec, *GATT Legal Restraints on the Use of Trade Measures Against Foreign Environmental Practices*, *in* 2 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE? 95, 121 (Jagdish Bhagwati & Robert E. Hudec eds., 1996); Knox, *supra* note 41, at 18; Wold, *supra* note 41, at 912–13.

49. For more sanguine views of Article 104, see Robert Housman, *The North American Free Trade Agreement's Lessons for Reconciling Trade and the Environment*, 30 STAN. J. INT'L L. 379, 398–400 (1994); Richard H. Steinberg, *Explaining Similarities and Differences Across International Trade Organizations*, *in* THE GREENING OF TRADE LAW: INTERNATIONAL TRADE ORGANIZATIONS AND ENVIRONMENTAL ISSUES 277, 283 (Richard H. Steinberg ed., 2002).

imports of tuna that led to the *Tuna-Dolphin* GATT panel decision. More surprisingly, perhaps, neither do the supplemental agreements negotiated by the Clinton administration. The obvious place to incorporate such a provision would have been in the NAAEC, which binds all three NAFTA parties. But the NAAEC includes no substantive provision insulating domestic environmental laws from challenge under NAFTA.

Fears that trade agreements would conflict with environmental laws decreased as the result of several decisions by the Appellate Body of the World Trade Organization ("WTO") in the late 1990s and early 2000s. By 2001, the Appellate Body had indicated that it would interpret trade agreements in ways that were less likely to run afoul of domestic and multilateral environmental rules than critics had feared. In the course of considering challenges to laws on environmental protection and human health and safety, the Appellate Body has rejected virtually all of the reasoning of the *Tuna-Dolphin* panel, incorporated many of the suggestions made by environmental critics, and upheld some of the challenged laws.[50]

Nevertheless, the Appellate Body's jurisprudence has not done away with concerns over legal conflicts between trade and environmental rules. For one thing, the WTO trade tribunals have not upheld *all* of the challenged laws; they have decided that some high-visibility regulations, including European Union restrictions on hormone-treated beef and genetically modified organisms, are inconsistent with trade norms.[51] For another, the Appellate Body's approach, while taking nontrade concerns into account, is far from completely predictable: in considering potential conflicts with GATT, it has adopted an ad hoc balancing test that leaves it enormous discretion to decide whether trade law or environmental law prevails.[52] Observers disagree even on which factors the Appellate Body has taken into account in resolving such conflicts,[53] and its

50. Appellate Body Report, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, paras. 115, 192, WT/DS135/AB/R (Mar. 12, 2001); Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products (Recourse to Article 21.5 of the DSU by Malaysia)*, paras. 122–23, 153, WT/DS58/AB/RW (Oct. 22, 2001); *see also* Knox, *supra* note 41, at 29–48.

51. Appellate Body Report, *EC Measures Concerning Meat and Meat Products* (*Hormones*), paras. 246, 255, WT/DS26/AB/R (Jan. 16, 1998); Panel Report, *European Communities — Measures Affecting the Approval and Marketing of Biotech Products*, 7.1272, WT/DS291/R, WT/DS292/R, WT/DS293/R (Sept. 29, 2006); *see* Wold, *supra* note 11, at 328.

52. Knox, supra note 41, at 35–37.

53. *Compare id.* at 37–39 (arguing that the Appellate Body in the *Shirmp-Turtle* cases effectively required an effort to negotiate an internal agreement on sea-turtle conservation), *with* Howard F. Chang, *Environmental Trade Measures, the* Shrimp-Turtle *Rulings, and the Ordinary Meaning of the Text of the GATT*, 8 CHAP. L. REV. 25, 28–30 (2005) (arguing that it only required the United States not to *discriminate* in the negotiation of an international

most recent decision in a trade-and-environment dispute underscores its interpretive freedom.[54] The forum for resolving these disputes remains a *trade* forum, not the independent or environmental forum that many environmental critics would prefer. And the Appellate Body's approach may or may not prove persuasive to tribunals interpreting trade agreements outside the purview of the WTO, such as the U.S. bilateral and regional free trade agreements.

Moreover, new concerns have arisen since the early 1990s involving potential legal conflicts between environmental laws and international investment treaties, including investment provisions in free trade agreements such as NAFTA. Starting with NAFTA itself, U.S. free trade agreements have incorporated protections for foreign investors, such as requirements that each party to the agreement treat investors from other parties according to certain minimum standards, including freedom from expropriation and discriminatory treatment.[55] Investors claiming that their rights have been violated may take the governments to arbitration.[56] Many of the claims brought by investors under NAFTA have argued that environmental regulations have effectively expropriated their investments. In one of these "regulatory expropriation" cases, *Metalclad Corporation v. United Mexican States*, the arbitral tribunal adopted a broad standard that, if taken literally, would mean that almost any regulation that significantly restricts the use of property would be an expropriation.[57] Although a later tribunal adopted a standard much more protective of nondiscriminatory regulation,[58] many critics remain concerned that environmental and

agreement).

54. *See* Appellate Body Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, paras. 224–26, WT/DS3332/AB/R (Dec. 3, 2007).

55. *See* NAFTA, *supra* note 1, arts. 1101–14; *see, e.g.*, CAFTA-DR, *supra* note 5, arts. 10.1–.14; Peru TPA, *supra* note 5, arts. 10.1–.14.

56. NAFTA, *supra* note 1, art. 1117, para. 1.

57. Metalclad Corp. v. United Mexican States, ICSID ARB(AF)/97/1, para. 103 (Aug. 30, 2000) ("[E]xpropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure . . . but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property."); *see also* United Mexican States v. Metalclad Corp., [2001] 89 B.C.L.R.3d 359, 2001 BCSC 644, para. 99 (Can.) (noting that the tribunal's definition of expropriation would "include a legitimate rezoning of property").

58. Final Award of the Tribunal on Jurisdiction and Merits, Methanex Corp. v. United States, (NAFTA Arbitral Trib., 2005), *available at* http://www.state.gov/documents/organization/51052.pdf ("[A]s a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the

other social regulations are at risk of successful challenge under the investment provisions in NAFTA and later agreements.[59]

The failure to include clear protections for environmental laws in the NAFTA environmental regime would have been ameliorated had the regime included a transparent process to consider how such protections could be developed in the future. The Legal Conflicts Package falls short of this ideal. Article 10(6) of the NAAEC states that the CEC Council shall

> contribut[e] to the prevention or resolution of environment-related trade disputes by:
>
> (i) seeking to avoid disputes between the Parties,
>
> (ii) making recommendations to the Free Trade Commission [composed of the NAFTA parties' trade ministers] with respect to the avoidance of such disputes, and
>
> (iii) identifying experts able to provide information or technical advice to NAFTA committees, working groups and other NAFTA bodies.[60]

Although this provision leaves disputes involving potential conflicts with environmental laws to be resolved by trade tribunals under NAFTA, with no formal avenues of input from environmental groups, it does raise the possibility that the Council might find a way to create such avenues. It has not been used to that effect, however. Despite regular attempts by the members of the CEC Council to meet with its counterparts from the trade ministries, a joint session of high-ranking trade and environmental officials has never taken place.[61]

In sum, the Legal Conflicts Package of the NAFTA environmental regime has only two elements: Article 104 of NAFTA, which provides minimal protection to specified international agreements, and Article 10(6) of the NAAEC, which requests the NAFTA parties' environmental officials to try to convince their counterparts in the trade ministries to open dispute resolution to environmental concerns. The failure to include clear substantive guidance addressing such conflicts represents a lost opportunity. The failure of the procedural mechanisms designed to produce such guidance indicates that, if not resolved by the text of an agreement itself, such issues will continue to be left to trade tribunals.

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government would refrain from such regulation.").

59. *See, e.g.*, Stepan Wood & Stephen Clarkson, *NAFTA Chapter 11 as Supraconstitution*, 9–11 (CLPE Research Paper 43/2009, 2009), *available at* http://ssrn.com/abstract=1500564.

60. NAAEC, *supra* note 2, art. 10, para. 6(c).

61. Knox, *supra* note 41, at 27.

3. Environmental Concerns with Trade-Led Economic Growth

One of the most controversial trade-and-environment issues is whether trade-led economic growth is good or bad for the environment. At the time of the NAFTA debate, this dispute occurred at a macro level, with some arguing that freer trade would increase Mexico's ability to devote resources to environmental protection and others arguing that it would further stress Mexico's environmental infrastructure and regulatory capability.[62] The latter camp pointed to the effects of the Mexican *maquiladora* program, whose limited experiment with free trade had caused economic growth in northern Mexico that had outstripped capacity for water and wastewater treatment and solid-waste disposal.[63]

The NAFTA environmental regime addresses environmental concerns over "scale" effects of free trade in two ways. First, it includes a bilateral agreement between the United States and Mexico, the BECC/NADBank Agreement, designed to clean up the U.S.-Mexico border environment by financing "environmental infrastructure projects."[64] Politically, this agreement responds to concerns over environmental problems caused by free trade in the past, but it is not limited to such concerns. Instead, the agreement addresses the need to improve environmental infrastructure without drawing any conclusions as to the precise connection between that need and past efforts to liberalize trade. The agreement's lack of focus on trade-led economic growth, as well as its roots in previous bilateral efforts to address shared border problems, suggest that it can be better understood as an effort to promote transboundary environmental cooperation or, more broadly, sustainable development, than as a response to the environmental degradation caused by past efforts at trade liberalization.

Second, the NAAEC instructs the CEC Council to consider the environmental effects of NAFTA "on an ongoing basis,"[65] a compromise that each side in the debate over the macro effects of trade on the environment believed would work in its favor by demonstrating that NAFTA did (or did not) benefit the environment. Pursuant to this mandate, the CEC has commissioned studies that examine the effects of increased trade in detail at the micro level—that is, at the level of specific localities and sectors.[66] Significantly, these studies have found that the scale effects of increased trade "may outstrip the available physical infrastructure and/or the ability of governments to monitor and regulate or prevent adverse

62. *See* AUDLEY, *supra* note 12, at 74–78.
63. *See id.* at 50–51.
64. BECC/NADBank Agreement Amended, *supra* note 2, ch. I, art. 1, § 1(b).
65. NAAEC, *supra* note 2, art. 10, para. 6(d).
66. Mary E. Kelly & Cyrus Reed, *The CEC's Trade and Environment Program: Cutting-Edge Analysis but Untapped Potential*, *in* GREENING NAFTA, *supra* note 4, at 101, 109.

environmental effects."[67] At the same time, they have found "little evidence to support the notion that greater revenues arising from trade expansion will be moved to bolster the resources of environmental authorities in order to address trade-related scale effects."[68]

As a result, scale effects may be particularly dangerous shortly after the entry into force of a trade agreement, during the period of transition to closer economic integration. During this transition period, "demand for, and access to, nonreplenishable resources increases, but government monitoring and regulatory budgets do not."[69] For example, opening an already poorly managed forest or fishery to increased exploitation may have sharply detrimental effects if adequate safeguards are not already in place. The danger, in other words, may be more of a "race to the trees" than a race to the bottom. Moreover, increased trade may also lead directly to increased environmental harm as a result of greater use of transportation pathways.[70]

The primary lesson from these studies is that it is impossible to conclude at a macro level that trade either always benefits or always harms the environment. Increased trade may well have adverse effects on specific sectors, however, especially in the period just after barriers to trade and investment are lowered. To avoid such impacts, the parties to a trade agreement should prepare for them in advance. Before opening their resources to increased trade and investment, they should assess specific areas of vulnerability in order to ensure that the necessary resources are devoted to protecting those areas, including through enforcing and improving relevant environmental standards. To ensure that the assessments address the concerns of those most directly affected, the parties must include opportunities for public engagement.[71]

* * *

In sum, the NAFTA environmental regime is a weak effort to address trade-and-environment concerns. Its primary focus is on

67. *Id.* at 109.

68. CEC, *supra* note 38, at 26.

69. Greg Block, *Trade and Environment in the Western Hemisphere: Expanding the North American Agreement on Environmental Cooperation into the Americas*, 33 ENVTL. L. 501, 523–24 (2003); *see also* CEC, *supra* note 38, at 3 ("[T]he effectiveness of environmental regulations is of pivotal importance, especially during transitional periods when countries open markets to international competition, streamline regulations and standards to reduce administrative costs, and move to restructure markets through the deregulation of competition policies.").

70. For example, the CEC has found increased air pollution in border areas as a result of growing freight transportation and new pathways for invasive alien species as a result of growing marine transportation. *See* CEC, *supra* note 38, at 12–14.

71. *See id.* at 11.

preventing a regulatory race to the bottom that has turned out to be a nonexistent problem, it almost completely ignores the possibility of legal conflicts, and, while it does respond to possible scale problems along the U.S.-Mexico border, it does not link its response, even there, to trade-led economic growth. Its most important contribution to the trade-and-environment nexus of problems has probably been to create an institution, the CEC, with a mandate to study the problems further. By carefully examining the effect of NAFTA on particular areas, the CEC has indicated how the United States and its trading partners might better protect the environment from possible detrimental effects of future trade agreements.

B. Transboundary Environmental Harm

Although the primary impetus for the NAFTA environmental regime was undoubtedly NAFTA itself, the regime also reflects the long history of environmental cooperation among the three North American countries. Before NAFTA, that cooperation had always been bilateral and aimed at transboundary or border concerns. Canada and the United States on the one hand and Mexico and the United States on the other had entered into agreements on boundary water quality,[72] cross-border movement of hazardous waste,[73] and transboundary air pollution,[74] for example. Although the NAFTA environmental regime addresses a broader array of issues, several of its elements focus on transboundary environmental harm in ways that echo or build on the earlier bilateral agreements.

The most important example is the agreement creating the BECC and NADBank and giving them a mandate to support environmental infrastructure in the U.S.-Mexico border region, initially defined as the area within 100 kilometers of the border.[75]

72. Treaty Relating to the Boundary Waters Between the United States and Canada, U.S.-Gr. Brit., Jan. 11, 1909, 36 Stat. 2448; Treaty Respecting Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, U.S.-Mex., Feb. 3, 1944, 59 Stat. 1219; Agreement on Great Lakes Water Quality, U.S.-Can., Nov. 22, 1978, 30 U.S.T. 1383.

73. Agreement Concerning the Transboundary Movement of Hazardous Waste, U.S.-Can., Oct. 28, 1986, T.I.A.S. No. 11,099; Agreement of Cooperation Regarding the Transboundary Shipments of Hazardous Wastes and Hazardous Substances, U.S.-Mex., Nov. 12, 1986, T.I.A.S. No. 11,269 (Annex III to Agreement on Cooperation for the Protection and Improvement of the Environment in the Border Area, U.S.-Mex., Aug. 14, 1983, 35 U.S.T. 2916 [hereinafter La Paz Agreement]).

74. Agreement of Cooperation Regarding Transboundary Air Pollution Caused by Copper Smelters Along Their Common Border, U.S.-Mex., Jan. 29, 1987, T.I.A.S. No. 11,269 (Annex IV to La Paz Agreement, *supra* note 73); Agreement on Air Quality, U.S.-Can., Mar. 13, 1991, 30 I.L.M. 676.

75. BECC/NADBank Agreement Original, *supra* note 2, ch. III, art. V. The agreement defines "environmental infrastructure project" as "a project that will

The BECC provides technical expertise to communities for projects within the border region (and, with the approval of the two governments, for other projects that would remedy a transboundary environmental problem) and "certifies" projects that meet certain environmental, technical, and financial requirements. The NADBank prepares funding packages for projects certified by the BECC.[76]

As already noted, one way of seeing the BECC and NADBank is as a response to concerns over the environmental consequences of earlier attempts at free trade. Another perspective, however, is that their focus on the U.S.-Mexico border region, an area with shared environmental problems, is an example of the countries' long-standing tradition of bilateral cooperation to address transboundary environmental concerns. The failure of cities along the border to treat wastewater leads to the pollution of shared bodies of water, such as the Rio Grande. Inadequate solid-waste facilities threaten shared underground aquifers. Studies in the early 1990s indicated that the cost of building the necessary water, wastewater, and solid-waste facilities amounted to several billion dollars.[77] The need was not just on the Mexican side of the border; indeed, the U.S. side included some of the poorest communities in the United States.[78]

The BECC began receiving applications for assistance and certification in 1995. In the fifteen years since then, the BECC has certified 161 projects (83 in Mexico and 78 in the United States), the NADBank has contracted more than $1.03 billion to support the implementation of 130 of the projects, and, of those funds, nearly $900 million have already been disbursed.[79] Many of these projects, such as wastewater-treatment plants along the Rio Grande, improve the shared environmental resources of both countries.[80] The

prevent, control or reduce environmental pollutants or contaminants, improve the drinking water supply, or protect flora and fauna so as to improve human health, promote sustainable development, or contribute to a higher quality of life." BECC/NADBank Agreement Amended, *supra* note 2, ch. V. art. II.

76. BECC/NADBank Agreement Original, *supra* note 2, ch. I, art. I, § 2. Although the BECC and NADBank were initially governed by two separate boards of directors, the agreement was amended in 2004 to provide for one unified ten-member board. Each country is represented by three federal officials, one border state official, and one resident of the border region. BECC/NADBank Agreement Amended, *supra* note 2, ch. I, art. III, § 3.

77. *See* John H. Knox, *Border Issues*, in TEXAS ENVIRONMENTAL LAW (1994).

78. *See id.*

79. BORDER ENVIRONMENTAL COOPERATION COMMISSION, NORTH AMERICAN DEVELOPMENT BANK, JOINT STATUS REPORT 1 (2009), http://www.cocef.org/files/document_252.pdf [hereinafter JOINT STATUS REPORT].

80. For example, in June 2008, the NADBank confirmed the completion of the first phase of the first wastewater-treatment plant in Matamoros, Tamaulipas, a town of more than 400,000 people located across the Rio Grande from Brownsville, Texas. The plant currently treats more than 5.7 million gallons of sewage a day before its discharge into the shared waters of the Rio Grande. NORTH AMERICAN DEVELOPMENT BANK, ANNUAL REPORT 2008 15 (2008),

NADBank's most important source of grant money, the Border Environment Infrastructure Fund ("BEIF"), comes from the U.S. Environmental Protection Agency, which requires that the funds provide at least some benefit to the U.S. side of the border.[81] The effect is that BEIF money only goes to Mexican projects with significant transboundary benefits. In 2008, for example, the NADBank approved six new grants of BEIF funds totaling $19.4 million, all for projects that will reduce discharges of untreated wastewater by Mexican communities into the Rio Grande and other bodies of water along the U.S.-Mexico border.[82]

The other elements of what might be called the "Transboundary Environmental Package" are found in Article 10(7)–(9) of the NAAEC, which requires the CEC Council to consider transboundary environmental impact assessments and reciprocal access to domestic legal remedies for transboundary harm.[83] In addition, the Council has a general mandate to "consider, and develop recommendations regarding . . . transboundary and border environmental issues."[84] In practice, however, the CEC has done very little to address transboundary problems. Although it has encouraged a trilateral agreement on transboundary environmental impact assessments, the negotiations stalled years ago, and the CEC has done little to encourage reciprocal access to domestic remedies beyond preparing a report describing the obstacles to such access.[85] The chief difficulty may be that most issues concerning transboundary environmental harm in North America are inherently bilateral and therefore not well-suited to resolution by a trilateral organization.[86]

C. Sustainable Development

A third perspective on the NAFTA environmental regime is that it is an effort to strengthen environmental protection, and thereby promote sustainable development, throughout North America. This perspective differs from the previous two by highlighting elements of the regime that are neither tied to trade nor to transboundary environmental harm but that aim to promote environmental

available at http://www.nadb.org/pdfs/pubs/AR%202008%20WEB%20Eng.pdf [hereinafter NADBANK 2008 REPORT].

81. North American Development Bank, Border Environment Infrastructure Fund, http://www.nadb.org/programs/descriptions/beif.html (last visited May 7, 2010).

82. NADBANK 2008 REPORT, *supra* note 80, at 6. Since 1997, the NADBank has contracted for $539.5 million in BEIF grants for seventy-five water and wastewater projects. *Id.* at 7.

83. NAAEC, *supra* note 2, art. 10, paras. 7–9.

84. *Id.* art. 10, para. 2(g).

85. *See generally* John H. Knox, *The CEC and Transboundary Pollution*, *in* GREENING NAFTA, *supra* note 4, at 80, 84–89.

86. *Id.* at 89–93.

protection more generally.[87] Five elements of this "Sustainable Development Package" are particularly important.

First, the NAAEC provisions that require each party to ensure that its environmental laws provide for "high levels" of protection, to try to improve those laws, and to effectively enforce them, set out an important legal commitment to environmental protection.[88] As explained above, those provisions resulted from fears of a regulatory race to the bottom that have turned out to be largely baseless.[89] But, unlike Article 1114—the original NAFTA provision encouraging countries not to lower their environmental standards to attract foreign investment[90]—the NAAEC requirements are not tied to concerns over the consequences of increased trade and investment. Their lack of any such limit better suits them to an effort to promote sustainable development.

The second set of elements in the Sustainable Development Package is a wide array of mandates to the CEC Council aimed at improving environmental regulation and compliance. Article 10(2) of the NAAEC lists an enormous variety of topics on which the Council may develop recommendations. Article 10(3) instructs the Council to "strengthen cooperation on the development and continuing improvement of environmental laws and regulations." Article 10(4) states that the Council shall encourage effective enforcement of and compliance with environmental laws, as well as technical cooperation between the parties. Also, under Article 10(5), the Council may make recommendations on "public access to [environmental] information" and on "limits for specific pollutants."[91] The net effect of these provisions is to establish a strong basis for intergovernmental cooperation on a host of environmental problems.

In practice, much of this cooperation has taken place through intergovernmental working groups tasked with addressing particular issues. An example is the Sound Management of Chemicals ("SMOC") program, which has created North American Regional Action Plans ("NARAPs") for the management and control of toxic chemicals. The SMOC program has resulted in the phaseout and elimination of several toxic chemicals that had been in widespread use in Mexico, including chlordane, polychlorinated biphenyls ("PCBs"), and dichlorodiphenyltrichloroethane ("DDT").[92]

87. These elements may also ameliorate the adverse environmental effects of trade-led economic growth and thus address the "scale effects" discussed above, but they are not linked in any way to those effects. As a result, considering them as efforts to further sustainable development generally is appropriate. *See generally supra* notes 67–68 and accompanying text.

88. NAAEC, *supra* note 2, arts. 3, 5.

89. *See supra* notes 38–39 and accompanying text.

90. NAFTA, *supra* note 1, art. 1114, para. 2.

91. NAAEC, *supra* note 2, art. 10.

92. *See* Greg Block, *The CEC Cooperative Program of Work: A North*

Another example of successful cooperative work has been the encouragement of national pollutant release and transfer registers ("PRTRs"), which helped lead to the adoption of the first Mexican PRTR program.[93] Much of the success in these and similar initiatives has resulted from the exchange of technical information with the view of raising environmental standards, especially in Mexico, the least developed of the three NAFTA countries.

A third element of the NAFTA environmental regime provides financial support to efforts to strengthen environmental protection. The bulk of this support has occurred through the BECC/NADBank structure.[94] In addition to funding projects directly, the BECC and NADBank provide technical assistance and training for environmental infrastructure.[95] As noted above, many of the projects supported by the BECC and NADBank have reduced environmental harm to transboundary, shared resources.[96] With the exception of the BEIF program, however, the mandates of the BECC and NADBank are not limited to such projects or even to projects in the immediate vicinity of the border. Their purpose is to assist communities within the "border region," but their charter was broadened in 2004 to define that region to include communities within 300 kilometers of the border on the Mexican side.[97] Moreover, while the institutions' primary focus remains on water, wastewater, and solid-waste facilities, they can and do support a much broader array of environmental projects.[98] As a result, the BECC and NADBank support sustainable development generally, not just with respect to transboundary environmental harm.

The CEC initially devoted part of its annual budget to funding small grants for social and environmental projects throughout the continent. Before it was discontinued in 2003, its North American Fund for Environmental Cooperation ("NAFEC") disbursed over $9 million in nearly 200 grants,[99] many of which resulted in concrete environmental benefits. For example, a 1998 grant of $50,000 enabled several U.S. and Mexican nongovernmental organizations to

American Agenda for Action, *in* GREENING NAFTA, *supra* note 4, at 25, 30–32.

93. *Id.* at 32–33.

94. *See supra* notes 64, 75–76 and accompanying text.

95. Together, they have authorized more than $60 million for technical assistance to hundreds of communities on both sides of the border. *See* JOINT STATUS REPORT, *supra* note 79, at 1.

96. *See supra* notes 77–82 and accompanying text.

97. BECC/NADBank Agreement Ammended, *supra* note 2, ch. V, art. II.

98. *See* N. Am. Dev. Bank, *Expansion of NADB Sectors of Activity*, Board Res. 2000-10 (Nov. 16, 2000). For example, the BECC has certified, and the NADBank has approved financing for, several pilot projects aimed at improving energy efficiency and renewable energy, including a biodiesel production plant in El Paso, a methane capture project for a large dairy farm in Chihuahua, and a residential solar-panel program in Baja California. NADBANK 2008 REPORT, *supra* note 80, at 12, 14.

99. CEC, *Ten Years*, *supra* note 4, at 41.

investigate the use of toxic chemicals at three *maquiladoras* and publicize their findings.[100] As a result, the organizations negotiated with the firms to reduce their emissions and implement pollution-prevention strategies.[101]

A fourth element of the "Sustainable Development Package" has been the independent monitoring mechanisms created by the NAAEC. The NAAEC gives the CEC Secretariat authority to prepare three types of reports: an annual report, which describes "the actions taken by each Party in connection with its [NAAEC] obligations" and periodically assesses the state of the environment in North America; independent reports prepared on the Secretariat's own initiative on virtually any environmental issue; and the factual records on citizens' allegations of ineffective enforcement that are described above.[102] The overall effect, especially of the factual records, has been to increase pressure on the governments to maintain their environmental standards.[103] These monitoring mechanisms have had some success despite their significant weaknesses, which include the ability of governments to delay reports and limit their scope, the lack of authority of the Secretariat to reach legal conclusions, and the absence of any consistent mechanism to follow up reports.[104]

Finally, the NAFTA environmental regime includes many opportunities for the public to participate in efforts to promote technical cooperation, provide financial support, and monitor implementation. As already noted, the CEC citizen submissions procedure allows individuals and nongovernmental organizations to complain about government failures to comply with their obligations to enforce their laws.[105] The NAAEC also creates a Joint Public Advisory Committee ("JPAC")—a kind of collective ombudsman composed of citizens from the three NAFTA countries—which sees its role as ensuring that the CEC remains transparent and open to public input, and which has been particularly important in protecting the submissions procedure from interference by the governments.[106] The BECC/NADBank agreement provides for

100. Kevin P. Gallagher, *The CEC and Environmental Quality: Assessing the Mexican Experience*, *in* GREENING NAFTA, *supra* note 4, at 117, 127.

101. *Id.* In addition, a revolving CEC "pollution prevention" fund has directly helped medium-sized and small businesses to reduce their pollution. Block, *supra* note 69, at 516–17; Gallagher, *supra* note 100, at 117, 126.

102. NAAEC, *supra* note 2, arts. 12–15; *see supra* notes 21–24, 35–36 and accompanying text.

103. *See* GRAUBART, *supra* note 4, at 101–37; Gustavo Alanís Ortega, *Public Participation Within NAFTA's Environmental Agreement: The Mexican Experience*, *in* LINKING TRADE, ENVIRONMENT, AND SOCIAL COHESION, *supra* note 4, at 183, 186.

104. *See* Garver, *supra* note 35, at 35–38; Markell, supra note 36, at 432, 449–50; Wold, supra note 4, at 228–32.

105. NAAEC, *supra* note 2, art. 14.

106. NAAEC, *supra* note 2, art. 16; *see also* John D. Wirth, *Perspectives on*

public input into decisions to certify projects for funding.[107] And it goes even further than the CEC to ensure that the voice of the public will be heard; rather than creating a committee of citizens to advise its governing body, as the NAAEC does, the BECC/NADBank Agreement provides two seats directly on its governing body for members of the public who live in the border region.[108] In addition to making the other elements of the regime more effective, this pervasive emphasis on public participation has helped to introduce greater openness into Mexican domestic environmental policy.[109]

These elements of the NAFTA environmental regime have proved to be successful at promoting sustainable development. Their emphasis on strong legal standards, intergovernmental technical cooperation, financial support, independent monitoring, and public participation are all key components of improving environmental performance. In the context of a trade regime designed to further economic growth, they help to ensure that North America develops sustainably.

The NAFTA environmental regime is far from the last word in sustainable development, however. Some of its tools could be improved: the CEC citizen-submissions procedure, in particular, would be far more effective if it were less under government control, incorporated clear legal findings and recommendations, and led to regular institutional follow-up. A larger problem is that—with the important but limited exception of the BECC and NADBank—the NAFTA environmental regime has insufficient resources.[110] The CEC's annual budget is only $9 million and, because it has remained constant since 1994, it has shrunk in real terms. As Professor Kevin Gallagher has stated, "By its very nature, an institution with an annual budget of $9 million can hardly make a dent in a series of problems that cost the Mexican economy over $40 billion annually."[111] The CEC does not have the wherewithal to facilitate technical cooperation in more than a handful of areas, and in recent years it has had to cut some of its programs, including the popular and effective NAFEC.[112] Nevertheless, considered as a regional effort to promote sustainable development, the NAFTA environmental regime can point to real successes.

the Joint Public Advisory Committee, *in* GREENING NAFTA, *supra* note 4, at 199.

107. BECC/NADBank Agreement Amended, *supra* note 2, ch. I, art. II, § 4.

108. *Id.* ch. III, art. 2.

109. Block, *supra* note 69, at 516–17.

110. *Id.* at 517; Gallagher, *supra* note 100, at 129–30.

111. Gallagher, *supra* note 100, at 125.

112. North American Commission for Environmental Cooperation, *A Popular Funding Program Comes to a Close*, http://www.cec.org (follow "Features" hyperlink; then follow "Summer 2004" hyperlink; then follow "A popular funding program comes to a close" hyperlink) (last visited May 7, 2010).

II. POST-NAFTA ENVIRONMENTAL REGIMES

Since NAFTA and its environmental side agreements entered into force, the United States has negotiated twelve bilateral or regional trade agreements, each of which includes environmental provisions. This Part of the Article analyzes how these post-NAFTA environmental regimes address environmental concerns with trade, transboundary environmental harm, and sustainable development. In particular, it examines the degree to which the post-NAFTA agreements have incorporated lessons of the NAFTA environmental regime.

Those lessons strongly suggest that subsequent trade agreements should do the following:

(1) With respect to environmental concerns with trade:

a. stop focusing on the nonexistent threat of pollution havens;

b. include any necessary protections for environmental laws in the trade agreements themselves, rather than leaving their resolution to future political discussions; and

c. study potential environmental impacts of new trade agreements carefully before negotiating the agreements, and take steps to protect vulnerable sectors before any scale effects of the agreements occur.

(2) When parties share common borders, establish mechanisms to address transboundary environmental harm.

(3) Include and strengthen elements aimed at sustainable development by

a. setting out legal commitments to improve and enforce environmental laws;

b. providing adequate support for intergovernmental cooperation and technical support in order to improve environmental standards and performance;

c. incorporating resources for financial support, including devoted funds for environmental projects;

d. establishing effective mechanisms to monitor environmental performance, including opportunities for citizens to bring complaints to independent bodies; and

e. opening effective avenues for public participation, such as a public advisory body.

The post-NAFTA environmental regimes have adopted virtually none of these lessons. The failure has been bipartisan. The free trade agreement with Jordan, which was negotiated by the Clinton administration and signed in 2000, set the pattern.[113] The next seven trade agreements were negotiated by the second Bush administration and signed between 2003 and early 2006 with a wide

113. *See* Jordan FTA, supra note 5.

variety of countries: bilateral agreements with Chile, Singapore, Australia, and three Middle Eastern countries (Morocco, Bahrain, and Oman), and a multilateral agreement, the CAFTA-DR, with the Dominican Republic and five Central American countries (Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua). Despite the diversity of the countries, the environmental provisions in these agreements are virtually identical and vary only slightly from the Jordan agreement. They reflect the environmental objectives set forth in the Trade Act of 2002, which provided "trade promotion authority" to the president for agreements negotiated between August 2002 and March 2007.[114] All of the agreements focus on preventing pollution havens, include even weaker protections against legal conflicts than NAFTA, say next to nothing about problems of scale, are silent on transboundary pollution, and include weaker provisions on sustainable development, particularly with respect to funding, independent monitoring, and public participation. Only the CAFTA-DR varies from the pattern, by only including a citizen submissions procedure.

The four most recent agreements, with Peru, Colombia, Panama, and South Korea, were signed in 2006 and 2007. They include some slight improvements on the first eight agreements. After the Democratic Party took control of Congress in January 2007, the Bush administration negotiated a "Bipartisan Agreement on Trade Policy" with the new congressional leaders in order to facilitate Congress' approval of the four pending trade agreements, and those agreements were revised to include provisions called for by the deal.[115] (Only one of these agreements, with Peru, has received congressional approval and entered into force.)[116] Except

114. Trade Act of 2002, 19 U.S.C. §§ 3802–3803 (2004). Trade promotion authority, sometimes called "fast-track" authority, authorizes the President to negotiate trade agreements and bring them to Congress for an up-or-down vote. It is often considered necessary for the effective conclusion of trade agreements, since other countries are highly reluctant to negotiate with the United States if Congress may impose additional requirements after the conclusion of the negotiation as a condition for giving its approval. *See* David A. Gantz, *The "Bipartisan Trade Deal," Trade Promotion Authority and the Future of the U.S. Free Trade Agreements*, 28 ST. LOUIS U. PUB. L. REV. 115, 130–38 (2008).

115. Office of the U.S. Trade Representative, Bipartisan Agreement on Trade Policy, http://www.ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf; *see also* Gantz, *supra* note 114, at 138–39; Kevin C. Kennedy, *The Status of the Trade-Environment-Sustainable Development Triad in the Doha Round Negotiations and in Recent U.S. Trade Policy*, 19 IND. INT'L & COMP. L. REV. 529, 543–46 (2009). For a description of the bipartisan deal by one of the drafters, see Charles B. Rangel, *Moving Forward; A New, Bipartisan Trade Policy That Reflects American Values*, 45 HARV. J. ON LEGIS. 377 (2008).

116. Peru TPA, *supra* note 5; Office of the U.S. Trade Representative, *Free Trade Agreements*, http://www.ustr.gov/trade-agreements/free-trade-agreements (stating that Congress has not yet passed legislation to implement the Colombia, Panama, and Korea FTAs).

for the Korea agreement, each includes a citizen submissions procedure, and each provide stronger protections for multilateral environmental agreements. For the most part, however, these agreements closely resemble the other post-NAFTA agreements and, like them, fall well short of the standard set by the NAFTA environmental regime.

A. Trade and the Environment

Of the three sets of trade-and-environment elements of the NAFTA environmental regime, one set addresses the pollution-haven concern, another addresses potential legal conflicts, and a third addresses the scale effects of trade-led economic growth.

1. The Pollution Haven Package

The Pollution Haven Package in NAFTA has six elements: a soft exhortation in NAFTA itself that countries should not lower their environmental standards to attract foreign investment; two legal requirements in the NAAEC that countries maintain their environmental laws and effectively enforce them; a mandate to the CEC Council to help the parties improve and enforce their laws; and two mechanisms aimed at promoting effective enforcement, one triggered by citizen submissions and one by governments, the latter of which may, in theory at least, lead to sanctions.[117] As noted above, a primary lesson from NAFTA is that the fear of pollution havens has proved to be largely without basis. As a result, post-NAFTA agreements should have moved away from including elements aimed primarily at deterring pollution havens. Instead, they ignore the NAFTA lesson and retain the NAFTA elements.

For example, all of these agreements echo the exhortation found in NAFTA Article 1114 that the parties not lower environmental standards to attract foreign investment. The agreements do not use the word "should," as Article 1114 does, but they replace it with language almost as weak, requiring the parties to "strive to ensure" (rather than simply ensure) that they do not waive or derogate from such environmental laws to encourage trade and investment.[118]

To the extent that the other elements of the Pollution Haven Package are not explicitly linked to cross-border investment induced by lower environmental standards but speak to environmental

117. *See supra* notes 14–27 and accompanying text.

118. Jordan FTA, *supra* note 5, art. 5, para. 1; Singapore FTA, *supra* note 5, art. 18.2, para. 2; Chile FTA, *supra* note 5, art. 19.2, para. 2; Australia FTA, *supra* note 5, art. 19.2, para. 2; Morocco FTA, *supra* note 5, art. 17.2, para. 2; CAFTA-DR, *supra* note 5, art. 17.2, para. 2; Bahrain FTA, *supra* note 5, art. 16.2, para. 2; Oman FTA, *supra* note 5, art. 17.2, para. 2; Peru TPA, *supra* note 5, arts. 18.1, .3, para. 2; Colombia TPA, *supra* note 5, arts. 18.1, .3, para. 2; Panama TPA, *supra* note 5, arts. 17.1, .3, para. 2; Korea FTA, *supra* note 5, arts. 20.1, .3, para. 2.

standards more generally, they may promote other ends, including sustainable development. Post-NAFTA agreements might, therefore, have usefully detached those elements completely from the pollution-haven context and tied them more explicitly to the goal of furthering sustainable development. They did not do so. Instead, they narrowed the focus of the obligation to effectively enforce environmental laws, contained in the NAAEC, by allowing claims only for sustained or recurring failures to enforce that affect trade between the parties.[119] And most of the agreements drop the citizen submissions procedure, retaining only the never-used option of government-triggered dispute resolution.[120]

Virtually all of the agreements also continue to include provisions for environmental cooperation, which are discussed below. Nevertheless, the overall effect of these changes is to emphasize the least necessary aspect of the NAFTA environmental regime, by focusing even more fixedly on preventing the nonexistent threat of pollution havens.

2. The Legal Conflicts Package

The Legal Conflicts Package in the NAFTA environmental regime has only two elements: NAFTA Article 104, which addresses potential conflicts with a limited number of environmental agreements; and a general mandate to the CEC Council to try to work with their trade-ministry counterparts to head off conflicts between trade agreements and environmental norms, which has proven ineffective.[121] The first eight post-NAFTA agreements weaken these already feeble provisions. The Jordan Free Trade Agreement does not refer to the potential conflict with multilateral environmental agreements ("MEAs") at all; later agreements refer to it, but only to suggest that the parties may consult with one another about the relationship between MEAs and trade obligations in light of the ongoing discussions at the WTO.[122] And the post-NAFTA

119. Jordan FTA, *supra* note 5, art. 5, para. 3(a); Singapore FTA, *supra* note 5, art. 18.2, para. 1(a); Chile FTA, *supra* note 5, art. 19.2, para. 1(a); Australia FTA, *supra* note 5, art. 19.2, para. 1(a); Morocco FTA, *supra* note 5, art. 17.2, para. 1(a); CAFTA-DR, *supra* note 5, art. 17.2, para. 1(a); Bahrain FTA, *supra* note 5, art. 16.2, para. 1(a); Oman FTA, *supra* note 5, art. 17.2, para. 1(a); Peru TPA, *supra* note 5, art. 18.3, para. 1(a); Colombia TPA, *supra* note 5, art. 18.3, para. 1(a); Panama TPA, *supra* note 5, art. 17.3, para. 1(a); Korea FTA, *supra* note 5, art. 20.3, para. 1(a). This language is specifically included as one of the negotiating objectives of the Trade Act of 2002, 19 U.S.C. § 3802(b)(11) (2004).

120. Jordan FTA, *supra* note 5, art. 17; Singapore FTA, *supra* note 5, art. 18.7; Chile FTA, *supra* note 5, art. 19.6; Australia FTA, *supra* note 5, art. 19.7; Morocco FTA, *supra* note 5, art. 17.7; CAFTA-DR, *supra* note 5, art. 17.10; Bahrain FTA, *supra* note 5, art. 16.8; Oman FTA, *supra* note 5, art. 17.8.

121. NAFTA, *supra* note 1, art. 104; NAAEC, *supra* note 2, art. 10, para. 6; *see supra* Part I.A.2.

122. Singapore FTA, *supra* note 5, art. 18.8; Chile FTA, *supra* note 5, art. 19.9; Australia FTA, *supra* note 5, art. 19.8; Morocco FTA, *supra* note 5, art.

agreements do not even make a gesture, as the NAAEC does, toward further discussions between trade and environmental officials on potential conflicts between domestic environmental laws and international trade rules. Nor do the agreements safeguard environmental measures from challenge as "regulatory expropriations."[123] The effect is to leave legal conflicts between the trade agreements and environmental norms completely to the judgment of the trade tribunals convened to hear them.

The four most recent agreements do, however, include language on potential conflicts between the agreements and international environmental agreements. The agreements with Peru, Colombia, Panama, and South Korea state that in the event of an inconsistency between a party's obligations under the agreement and one of a list of specified environmental agreements, "the Party shall seek to balance its obligations under both agreements, but this shall not preclude the Party from taking a particular measure to comply with its obligations under the covered agreement, provided that the primary purpose of the measure is not to impose a disguised restriction on trade."[124] This language is arguably weaker than NAFTA Article 104, which states that the obligation of the environmental agreement "shall prevail to the extent of the inconsistency."[125] On the other hand, where a NAFTA party has a choice among equally effective and available means of compliance, NAFTA obligates it to take the alternative that is least inconsistent with NAFTA,[126] which may have a similar effect to the more recent agreements' requirement that the parties "balance" their obligations. In any event, the chance that a real conflict of this nature would ever arise is very unlikely.

The four most recent agreements also include more interesting language that marks one of their very few improvements on the NAFTA environmental regime. Each of the trade agreements

17.8; CAFTA-DR, *supra* note 5, art. 17.12; Bahrain FTA, *supra* note 5, art. 16.9; Oman FTA, *supra* note 5, art. 17.9.

123. The agreements address this concern only by providing that "[n]othing in this [Investment] Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure *otherwise consistent with this Chapter* that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns." Peru TPA, *supra* note 5, art. 10.11 (emphasis added); *see also, e.g.*, CAFTA-DR, *supra* note 5, art. 10.11. This language, which is taken verbatim from NAFTA Article 1114, para. 1, is perfectly meaningless, since it protects only those environmental measures that are "otherwise consistent with this Chapter" and therefore do not need protection.

124. Peru TPA, *supra* note 5, art. 18.13, para. 4; Panama TPA, *supra* note 5, art. 17.13, para. 3; Colombia TPA, *supra* note 5, art. 18.13, para. 4; Korea FTA, *supra* note 5, art. 20.10, para. 3. The language is pursuant to the bilateral trade deal. Gantz, *supra* note 114, at 141–42.

125. NAFTA, *supra* note 1, art. 104, para. 1.

126. *Id.*

requires its parties to adopt and implement laws and other measures to fulfill their obligations under listed environmental agreements, including the Convention on International Trade in Endangered Species ("CITES") and the Montreal Protocol on Substances that Deplete the Ozone Layer.[127] To show a violation of this obligation, a party must demonstrate that the failure affects trade or investment between the parties,[128] which suggests that the intent is again to protect against pollution havens. Whatever its purpose, however, the provision breaks new ground by offering a remedy for violations of environmental agreements that the agreements themselves rarely provide.

3. Scale Effects

The post-NAFTA agreements include no provision explicitly addressing the scale effects of trade-led economic growth, probably the most important aspect of the trade-and-environment nexus of issues. The agreements make no effort to address the past effects of trade-led economic growth, as the BECC and NADBank arguably do. And, instead of the valuable mandate given to the CEC to study the environmental effects of NAFTA, these agreements substitute a provision stating only that the parties may, if they choose, share information with one another on their own experiences in taking into account the environmental effects of international trade.[129]

The intergovernmental programs of cooperation established under the agreements can address scale effects as part of their promotion of sustainable development, which is discussed below. Those programs are generally inadequate to protect against such effects, however. They are small in comparison to the scope of the problem, and they are developed and implemented after the trade agreement has entered into force. They may therefore arrive too late to safeguard vulnerable natural resources from the rush to exploit them that the trade agreement may trigger.[130]

B. Transboundary Environmental Harm

The post-NAFTA trade agreements are all with countries that do not share common borders with the United States. Understandably, they do not address transboundary environmental harm. Nevertheless, CAFTA-DR, which includes several countries

127. Peru TPA, *supra* note 5, art. 18.2; Colombia TPA, *supra* note 5, art. 18.2; Panama TPA, *supra* note 5, art. 17.2; Korea FTA, *supra* note 5, art. 20.2.

128. Peru TPA, *supra* note 5, art. 18.2 n.1; Colombia TPA, *supra* note 5, art. 18.2 n.1; Panama TPA, *supra* note 5, art. 17.2 n.1; Korea FTA, *supra* note 5, art. 20.2 n.1.

129. Singapore FTA, *supra* note 5, art. 18.6, para. 3; Chile FTA, *supra* note 5, art. 19.5, para. 3; Australia FTA, *supra* note 5, art. 19.6, para. 3; Morocco FTA, *supra* note 5, art. 17.3, para. 6; Bahrain FTA, *supra* note 5, art. 16.7, para. 4; Oman FTA, *supra* note 5, art. 17.7, para. 4.

130. Wold, *supra* note 4, at 243.

that do neighbor one another, could have usefully provided for cooperation to address transboundary environmental problems. Although it does not do so, it does include a more general agreement on environmental cooperation, which is considered in the next Subpart.

C. Sustainable Development

The five elements of the Sustainable Development Package in the NAFTA regime are (a) legal obligations for each party to ensure that its environmental laws provide for high levels of protection, to try to improve those laws, and to effectively enforce them; (b) a strong basis for intergovernmental cooperation and technical assistance aimed at improving domestic environmental regulation and compliance; (c) financial support for efforts to strengthen environmental protection; (d) independent monitoring mechanisms; and (e) multiple avenues for robust public participation.[131] Of these elements, the only one that the post-NAFTA agreements neither weaken significantly nor drop entirely is intergovernmental cooperation.

With respect to legal obligations, each of the post-NAFTA agreements at minimum requires each party to "strive to ensure" that its laws provide for high levels of environmental protection and to continue to endeavor to improve those laws,[132] but, as noted above, they weaken the corollary duty to effectively enforce those laws by limiting claims to sustained or recurring failures to enforce that affect trade between the parties.[133] One of the agreements, the Peru Trade Promotion Agreement, goes further. To respond to concerns over high levels of illegal logging in Peru's forests, the agreement includes an Annex on Forest Sector Governance that requires Peru to take specific steps to increase the effectiveness of its enforcement of laws relating to timber harvesting and timber trade, including increasing the number of enforcement personnel, heightening penalties for criminal conduct, taking measures to combat corruption among officials overseeing the forests, and

131. *See supra* Part I.C.

132. Jordan FTA, *supra* note 5, art. 5, para. 2; Singapore FTA, *supra* note 5, art. 18.1; Chile FTA, *supra* note 5, art. 19.1; Australia FTA, *supra* note 5, art. 19.1; Morocco FTA, *supra* note 5, art. 17.1; CAFTA-DR, *supra* note 5, art. 17.1; Bahrain FTA, *supra* note 5, art. 16.1; Oman FTA, *supra* note 5, art. 17.1; Peru TPA, *supra* note 5, art. 18.1; Colombia TPA, *supra* note 5, art. 18.1; Panama TPA, *supra* note 5, art. 17.1; Korea FTA, *supra* note 5, art. 20.1.

133. Jordan FTA, *supra* note 5, art. 5, para. 3(a); Singapore FTA, *supra* note 5, art. 18.2, para. 1(a); Chile FTA, *supra* note 5, art. 19.2, para. 1(a); Australia FTA, *supra* note 5, art. 19.2, para. 1(a); Morocco FTA, *supra* note 5, art. 17.2, para. 1(a); CAFTA-DR, *supra* note 5, art. 17.2, para. 1(a); Bahrain FTA, *supra* note 5, art. 16.2, para. 1(a); Oman FTA, *supra* note 5, art. 17.2, para. 1(a); Peru TPA, *supra* note 5, art. 18.3, para. 1(a); Colombia TPA, *supra* note 5, art. 18.3, para. 1(a); Panama TPA, *supra* note 5, art. 17.3, para. 1(a); Korea FTA, *supra* note 5, art. 20.3, para. 1(a).

improving its compliance with CITES with respect to endangered trees, such as mahogany.[134]

While these specific protections are stronger than those in other trade agreements, the Peru agreement does not include any funding to help Peru implement these provisions. As Professor Chris Wold notes, "Without committed funding, these provisions may become nothing more than potential and promises unfilled."[135] The lack of funding is not unusual; none of the post-NAFTA regimes provide financial assistance for sustainable development on a level remotely comparable to that provided through the NADBank or even through the smaller NAFEC program.

Every post-NAFTA agreement does, however, provide for intergovernmental environmental cooperation, either in the trade agreement itself[136] or in a side letter or agreement.[137] The cooperation is not limited to environmental issues directly related to trade but rather promotes sustainable development more generally. Some of the agreements set out detailed plans of action. The Chile agreement, for example, commits the parties, inter alia, to work together to develop a PRTR program in Chile, help Chile to reduce mining pollution, and provide training to enhance enforcement capacity.[138] The cooperative programs often include such technical assistance.[139] Another example is the CAFTA-DR environmental regime, under which U.S. agencies are helping to train their

134. Peru TPA, *supra* note 5, Annex 18.3.4; *see* Wold, *supra* note 4, at 246–47. Wold hails these provisions as breaking the mold of previous FTAs by focusing on "problems likely to emerge or be exacerbated by liberalized trade." *Id.* at 248. They thus address possible scale effects on a micro level, as the NAAEC studies suggest that they should. He notes, however, that the safeguards in the Peru agreement must be adopted only eighteen months after its entry into force, not before, as would be preferable in order to protect the resources from the increased attention likely to follow the lowering of barriers to trade. *Id.*

135. Wold, *supra* note 4, at 248.

136. *See, e.g.*, Chile FTA, *supra* note 5, Annex 19.3; Panama TPA, *supra* note 5, Annex 17.10.

137. *See, e.g.*, Joint Statement on Environmental Technical Cooperation, U.S.-Jordan, para. 3, Oct. 24, 2000, http://www.ustr.gov/sites/default/files/uploads/agreements/fta/jordan/asset_upload_file948_8465.pdf [hereinafter U.S.-Jordan Joint Statement]; Memorandum of Understanding on Environmental Cooperation, U.S.-Bahr., Sept. 14, 2004, http://www.ustr.gov/sites/default/files/uploads/agreements/fta/bahrain/asset_upload_file117_6318.pdf; Agreement on Environmental Cooperation art. II, Feb. 18, 2005, http://www.ustr.gov/sites/default/files/DR-CAFTA%20ECA.pdf [hereinafter CAFTA-DR Environmental Cooperation Agreement].

138. Chile FTA, *supra* note 5, Annex 19.3, para. 1.

139. The Joint Statement on Environmental Cooperation between the United States and Australia says the least about technical assistance, presumably because neither government believes that it needs technical assistance from the other. *See* Joint Statement on Environmental Cooperation para. 3, U.S.-Austl., May 18, 2004, http://www.environment.gov.au/about/international/publications/statement.html.

counterparts in the region and to develop a model set of wastewater regulations.[140]

The agreements typically create bilateral bodies with the authority to agree on and oversee cooperative work plans after the agreements have entered into force.[141] None of the agreements, however, establishes an international organization like the Commission for Environmental Cooperation, with a secretariat and a set annual budget, to help administer the cooperative programs. As a result, the agreements leave implementation of their cooperative programs entirely to the governments, whose commitment to carry out the programs may wane after the political spotlight brought to bear during the negotiation and approval of the agreements has moved on to other issues.

In contrast to the relatively substantial attention the post-NAFTA agreements give to intergovernmental cooperation, most of the agreements do not provide for independent monitoring or duplicate the avenues of public participation established by the NAFTA environmental regime. The only agreements that provide for independent monitoring of any kind are the CAFTA-DR and the Peru, Colombia, and Panama agreements, all of which provide for citizen submissions procedures similar to the one established by the NAAEC. Like that procedure, they allow individuals and organizations[142] to file a claim with a secretariat alleging that a party is failing to enforce its environmental law. If the submission meets certain criteria, which are virtually identical to those set out in the NAAEC, the secretariat may consider the submission, request a response, and recommend preparation of a factual record.[143]

In light of the experience of the CEC, which has seen governments try to influence the submissions procedure to avoid embarrassing reports,[144] a key question is whether the secretariat

140. Bureau of Oceans & Int'l Envtl. & Scientific Affairs, U.S. Dep't of State, CAFTA-DR Environmental Cooperation Successes (Sept. 15, 2007), http://www.state.gov/g/oes/env/trade/caftadr/95302.htm. In fiscal year 2006, the U.S. government allocated $18.5 million toward environmental projects with CAFTA-DR countries, including the establishment of the CAFTA-DR submissions procedure. *Id.*

141. *See, e.g.*, 2008–2011 Work Program Pursuant to the U.S.-Jordan Joint Statement on Environmental Technical Cooperation, U.S.-Jordan, Mar. 3, 2009, http://www.state.gov/documents/organization/131479.pdf; *see* Wold, *supra* note 4, at 240–44.

142. The agreements refer to any "person of a Party," which is defined to include both natural persons and enterprises. Panama TPA, *supra* note 5, art. 2.1; Colombia TPA, *supra* note 5, art. 1.3; Peru TPA, *supra* note 5, art. 1.3; CAFTA-DR, *supra* note 5, art. 2.1.

143. Panama TPA, *supra* note 5, arts. 17.8–.9; Colombia TPA, *supra* note 5, arts. 18.8–.9; Peru TPA, *supra* note 5, arts. 18.8–.9; CAFTA-DR, *supra* note 5, arts. 17.7–.8; *see also* NAAEC, *supra* note 2, art. 14.

144. *See* Garver, *supra* note 35, at 35–38; Markell, *supra* note 36, at 449–50; Wold, *supra* note 4, at 227–32.

that receives the submissions and prepares the reports under these new agreements will be independent of government control. Since the agreements do not create a new international organization with a secretariat of its own, the parties have had to turn to existing organizations. The CAFTA-DR parties established the secretariat for its submissions within the Secretariat for Central American Economic Integration but under the sole direction of the council of government representatives created by the CAFTA-DR.[145] Although it is too early to tell whether the CAFTA-DR Secretariat will prove to be as independent from government control as the CEC Secretariat has been, an early sign is positive. In one of its first decisions, regarding a complaint that the Dominican Republic was failing to effectively enforce its law protecting sea turtles, the Secretariat looked to CEC precedents in deciding not to impose a strict standing requirement on the submitter.[146]

One difference between the CEC submissions procedure and those in the four post-NAFTA agreements is that while the NAAEC requires a two-thirds vote of the members of the Council to authorize preparation of a factual record, the later agreements require only that one government instruct it to do so.[147] This might suggest that factual records will be easier to obtain under these agreements than under the CEC procedure. In practice, however, a state may be reluctant to request a judgment on another's environmental record without the support of other states.[148]

Even if the CAFTA-DR Secretariat turns out to be as competent as the CEC Secretariat and the parties allow factual records to be prepared, at best the new procedures will only be as effective as the CEC procedure, rather than an improvement on it. The new procedures do not address the problems that have hampered the CEC process, including the constant temptation for governments to restrict the scope of factual records, the failure of factual records to draw clear conclusions about whether states have failed to

145. Agreement Establishing a Secretariat for Environmental Matters Under the Dominican Republic-Central America-United States Free Trade Agreement arts. 3, 5–6, July 27, 2006, http://ustraderep.gov/assets/Trade_Agreements/Regional/CAFTA/Briefing_Book/asset_upload_file803_13194.pdf.

146. CAFTA-DR Secretariat for Envtl. Matters, *Determination According to Articles 17.7.2 and 17.7.4 of the Free Trade Agreement Between the Dominican Republic, Central America and the United States of America*, Dec. 6, 2007, at 7, http://cabrera-verde.org/files/Determinacion_OriginalEng.pdf.

147. *Compare* NAAEC, *supra* note 2, art. 15, para. 2, *with* Panama TPA, *supra* note 5, art. 17.9, para. 2, Colombia TPA, *supra* note 5, art. 18.9, para. 2, Peru TPA, *supra* note 5, art. 18.9, para. 2, *and* CAFTA-DR, *supra* note 5, art. 17.8, para. 2.

148. Perhaps to avoid forum shopping between the various submissions procedures, a U.S. national is only allowed to bring a submission to the CEC. Panama TPA, *supra* note 5, art. 17.8, para. 3; Colombia TPA; *supra* note 5, art. 18.8, para. 3; Peru TPA, *supra* note 5, art. 18.8, para. 3; CAFTA-DR, *supra* note 5, art. 17.7, para. 3.

effectively enforce their laws, and the lack of a mechanism to address any problems revealed by the factual records.

With the exception of these submissions procedures, the post-NAFTA agreements provide no avenues for public participation. None of the joint intergovernmental bodies established to oversee the technical-cooperation projects are designed to allow and promote public participation, as is the CEC and the BECC. None provide for a joint public advisory committee such as the one that advises the CEC, much less for citizen representation on the governing body, as does the BECC/NADBank Agreement. As a result, the governments' implementation of their commitments under the agreements is likely to be less responsive to the concerns of the public, as well as less susceptible to public oversight.[149]

CONCLUSIONS

Fifteen years of experience with the NAFTA environmental regime provide important lessons for the design of environmental provisions in free trade agreements. Unfortunately, the United States has ignored almost all of those lessons in negotiating its post-NAFTA agreements. This result would be troubling even if the NAFTA regime were highly effective, but in light of its shortcomings, the failure of the United States to improve upon it is particularly disappointing. For environmental provisions in U.S. trade agreements to be more than greenwash, they must address environmental concerns with trade in light of the experience gained under NAFTA. The NAFTA environmental regime developed tools that can greatly help the United States and its trading partners combine economic integration with sustainable development, but only if they use and strengthen the tools rather than neglect them. To date, the record is not promising.

This Article has explained *how* the environmental regimes embedded in post-NAFTA trade agreements have fallen short of the NAFTA standard. A complete examination of *why* they have done so would require another article, but two reasons may be noted here.

First, U.S. trade negotiations have coupled labor and environmental concerns even though they raise very different issues. This has made it more difficult to focus on how best to address each set of concerns. For example, the baseless fear that U.S. corporations may move abroad in search of lower environmental costs acquires political force because of the parallel,

149. *See* Wold, *supra* note 4, at 238 ("The failure of FTAs to include an independent body like the JPAC acting as the 'intermediary between the Council and the concerned public' and the 'public conscience' of the CEC is a real loss for subsequent FTAs. The absence of anything similar to the JPAC in subsequent FTAs suggests that the United States and its trading partners want as little public oversight as possible.") (quoting CEC, *Ten Years*, *supra* note 4, at 34)).

much more justified, concern that corporations may shift operations to find lower labor costs.

Second, too much attention has been given to the threat of trade sanctions as a kind of silver bullet to improve the environmental performance of U.S. trading partners. Trade restrictions can be very useful when directed at specific environmental targets, such as reducing trade in endangered species or chemicals that deplete the ozone layer. As sticks to beat a country into better environmental performance generally, however, they are too blunt and too controversial to be effective. The only successful approach to promoting sustainable development through U.S. trade agreements is to use them as a basis for a long-term commitment to technical cooperation, financial assistance, independent monitoring, and public participation. The NAFTA environmental regime is a first step in that direction. The next step has yet to be taken.