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NAFTA AND THE ENVIRONMENT: AN UPDATE

Janine Ferretti[†]

INTRODUCTION

I was asked by Professor King to focus on three questions: whether trade and environment are irreconcilable; what the experience has been in North America with the North American Free Trade Agreement (NAFTA); and what the future holds in terms of environment and trade challenges in North America.

These questions, interesting in and of themselves, take on even more relevance as we begin to approach the tenth anniversary of NAFTA.¹ These questions are not merely interesting or academic, but rather go to the very heart of the globalization debate, and we are hearing and seeing more of this debate as people take to the streets – whether it be in Seattle during the World Trade Organizations meeting, at Quebec City during the Summit of the Americas; or, as I am told, most likely, this weekend in Washington, D.C. So whether we speak of global trade talks or hemispheric free trade negotiations in the Americas, some of the underlying questions being posed by people have to do with the links between trade and the environment. Do they exist? If so, how should they be managed?

NAFTA AND ENVIRONMENTAL MANAGEMENT

In this context, North America becomes the perfect place to go in search for the answers to these questions. North America is, after all, a pioneer on the trade and environment policy frontier. It is here on this continent that we actively pursue regional environment cooperation in the contexts of trade and globalization. As many of you recall during the NAFTA debates back in 1992-1993, the positions were very much polarized; there were those who argued that free trade would automatically lead to a “race-to-the-bottom” in

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¹ The North American Free Trade Agreement was signed on December 17, 1992, and was in effect January 1, 1994. See *SICE: Foreign Trade Information System*, at <http://www.sice.oas.org/tradec.asp#NAFTA>.

terms of environmental regulations and create pollution “havens,” resulting in an overall increase in environmental degradation.² Others argued that there were no links whatsoever, and that any attempt to link the two issues together was really a disguised way of trying to install protectionist policies.³

Ten years later, it is surprising to see that many of the positions that were taken a decade ago remain much the same today; what is changed is *where* they are being discussed. They have moved from the North American stage to the multilateral stage. In fact, North America has become a proving ground to test these environment-and-trade hypotheses.

The three countries directly responded to the environmental concerns voiced during the NAFTA debate in two ways. First, they did so by incorporating environmental language into NAFTA itself;⁴ and, second, they negotiated an environmental side agreement: the North American Agreement for Environmental Cooperation (NAAEC).⁵ The Agreement established a framework for addressing environmental concerns and trade-and-environment issues related to NAFTA on a regional basis. Furthermore, the NAEC created the North American Commission for Environmental Cooperation (CEC),⁶ charging it with the task of monitoring the effects of NAFTA on the environment,⁷ facilitating cooperation with the Free Trade Commission,⁸ as well as promoting environmental cooperation among the three countries. By doing this, North America moved very quickly from the debate about whether or not there were links between trade and the environment (by essentially acknowledging that there are links) and establishing, in essence, a basic set of assumptions that underlie the basis for regional trade and environmental cooperation to manage those links. They are: (1) that liberalized trade offers the potential for economic prosperity and growth, (2) that environmental protection is an important – indeed, critical – underpinning of that prosperity, and (3) that liberalized trade can generate the resources necessary to improve and protect the environment.⁹

² For further explanation, see, e.g., Teresa Edwards, Note, *The Relocation of Production and Effects on the Global Community*, 13 COLO. J. INT'L ENVTL. L. & POL'Y 183, 190-191 (2002).

³ Many of those arguments have been pressed by developing countries in other contexts, including the WTO. See Clyde Summers, *The Battle in Seattle: Free Trade, Labor Rights and Societal Values*, 22 U. PA. J. INT'L ECON. L. 61, 62 (2001).

⁴ See, e.g., North American Free Trade Agreement, Can.-U.S.-Mex., Dec. 17, 1992, art. 104, annex 104.1, 32 I.L.M. 289, 297-298 [hereinafter NAFTA]; *id.*, Ch. 11, art. 1106(6), 32 I.L.M. at 640.

⁵ North American Agreement for Environmental Cooperation, Can.-U.S.-Mex., Sept. 14, 1993, 32 I.L.M. 1480 [hereinafter NAAEC].

⁶ *Id.*, art. 8, 32 I.L.M. at 1485.

⁷ *Id.*, art. 10(6)(d), 32 I.L.M. at 1486.

⁸ *Id.*, art. 10(6).

⁹ See generally *id.*, art. 1, 32 I.L.M. at 1483.

How have these ideals been translated in terms of impacts on the environment? Early on, we at the CEC enlisted the help of many other institutions to develop an analytical framework that enabled us to begin developing a common starting point for asking the right questions and identifying our basic assumptions. Furthermore, because we needed data, we worked with those institutions to apply that framework on specific cases. Since we needed to have documented application of that framework, we commissioned fifteen papers, and we brought together experts from universities, the private sector, from government, and from NGOs, to present the findings.

I would like to give you a sense of what some of those findings concluded. For example, we found that increased freight transportation linked to NAFTA has led to significant air pollution at border crossings at both borders.¹⁰ Much of this, of course, is attributable to the phenomenal increase of road transportation because of NAFTA; it is also exacerbated by the fact that the infrastructure in these areas has not kept up with the growth and trade and transportation.¹¹ The many trucks and cars that idle at the border areas contribute to the degradation of the area's air quality.

Another interesting finding was that the story is not always a bad one. The NAFTA investment provisions actually enabled the Mexican steel industry to upgrade its technology, making the sector, in some ways, actually cleaner than the steel production sector in the United States and Canada.¹² Yet another thing that we found was that there has been a 400 percent increase in the import of hazardous waste from the United States to Canada since NAFTA was implemented in 1994.¹³ The significant difference in the cost of regulatory compliance, as a function of the lack of treatment requirements in Ontario and Quebec, was identified as a major factor for this

¹⁰ See generally IFC CONSULTING, COMMISSION FOR ENVIRONMENTAL COOPERATION, NORTH AMERICAN TRADE AND TRANSPORTATION CORRIDORS: ENVIRONMENTAL IMPACTS AND MITIGATION STRATEGIES 12-21 (2001), available at http://www.cec.org/files/pdf/POLLUTANTS/Trade_Corridors_Final-e1_EN.PDF.

¹¹ However, this condition will probably improve in the near future. See *id.* at 23.

¹² Due to the rapid modernization of the Mexican steel industry, the amount of energy use per ton of steel produced has fallen significantly between 1989 and 1997, from 25.5 gigajoules (GJ)/ton to 17.5 GJ/ton. See COMMISSION FOR ENVIRONMENTAL COOPERATION, MEXICO AND EMERGING CARBON MARKETS INVESTMENT OPPORTUNITIES FOR SMALL AND MEDIUM-SIZE COMPANIES AND THE GLOBAL CLIMATE AGENDA 61 (2001), available at http://www.cec.org/files/PDF/ECONOMY/CarbonMarkets-EN_EN.pdf.

¹³ According to numbers released by Environment Canada, waste shipments to Canada from the United States have increased from 132,992 metric tons (mt) in 1992 to 662,893 mt in 1999. MARISA JACOTT ET AL., TEXAS CENTER FOR POLICY STUDIES, THE GENERATION AND MANAGEMENT OF HAZARDOUS WASTES AND TRANSBOUNDARY HAZARDOUS WASTE SHIPMENTS BETWEEN MEXICO, CANADA AND THE UNITED STATES, 1990-2000 52, 54-55 (2001), available at <http://www.texascenter.org/publications/haznafta.pdf>.

increase in imports; this was found to be true even if we considered the weaker Canadian dollar.¹⁴ Those examples focus much on the potential effects of trade directly on environmental quality.

EFFECTS OF TRADE RULES ON ENVIRONMENTAL POLICY

What about the effects of trade rules on environmental policy? This is where we go back to the issue that was touched on this morning by Frank Loy: that there is a perceived regulatory clash between NAFTA's Chapter 11¹⁵ investor dispute provisions, and domestic environmental laws.¹⁶

Indeed, a number of these cases were settled before adjudications could commence. They include, for example, *Ethyl Corporation v. Canada*, over the import ban of MMT,¹⁷ a case against the United States by Methanex for California's ban of MTBE,¹⁸ and a suit against Mexico by Metalclad for refusing a hazardous waste disposal site.¹⁹ Obviously, all these cases have different merits, and I am not here to comment them. I will say that, together, these cases represent the most current and controversial areas for NAFTA today from a trade-environment perspective. While it is difficult to identify whether a regulatory "chill" is happening as a result of these cases, we know that, in the very least, it seems to confirm the fears of some of the potential for paralysis in environmental protection caused by the trumping of environmental regulation by trade rules, which was voiced so critically during the debate of NAFTA.

All of the above findings together show mixed results and may disappoint those looking for a single and clear answer to what impact NAFTA has had on the environment, but we can take from these preliminary findings some interesting lessons.

First, that in examining environmental effects of trade, other driving forces need to be taken into account, including domestic variables such as changes in interest rates or changes in business cycles. Second, while it is very useful to have broad-scale macroeconomic studies providing aggregate data on a continental or national basis, these can actually, in some cases, mask important local or regional impacts. For example, we found some studies that show, overall, that North American forest cover and fish stocks have remained stable, but we do know that in some specific areas of forest

¹⁴ See *id.* at 51.

¹⁵ North American Free Trade Agreement, Can.-U.S.-Mex., Dec. 17, 1992, Ch. 11, 32 I.L.M. 639, 1992 WL 812394 [hereinafter NAFTA Chapter 11].

¹⁶ See Frank Loy, *On A Collision Course? Two Potential Environmental Conflicts Between the U.S. and Canada*, 28 CAN.-U.S. L.J. 11, 18-26 (2002).

¹⁷ *Ethyl Corporation v. Canada*, 38 I.L.M. 708 (NAFTA Arb. Trib. 1998).

¹⁸ *Methanex Corp. v. U.S.* (NAFTA Arb. Trib. 2000), at <http://www.naftaclaims.com>.

¹⁹ *Metalclad Corp. v. Mexico*, 40 I.L.M. 36 (NAFTA Arb. Trib. 2000).

ecosystems, this is not case, and that there are individual fish species that are on the decline.²⁰ The third lesson we have learned, and perhaps the most important one, is how critical it is to maintain a constant investment in environmental infrastructure and protection. Without that, jurisdictions and governments cannot keep pace and meet the environmental challenges that emerge with increased trade, whether it be from increased production, resource exploitation, or increased transportation needs.

To ensure that trade liberalization has minimal environmental effects, it is absolutely crucial that environmental protection measures remain robust and actually increase in terms of investment over time. The studies we commissioned also show us that our three countries lack important environmental data, and how this is setting us back. Adequate environmental data is essential to be able to make the environment and economy linkages and decisions as how to best manage them. Unfortunately, little data is available from the environmental side to help us draw accurate correlations between the economic data sets and environmental effects that we see. The actual issues related to the environmental impact of trade liberalization can only be addressed by better analysis, stronger data and a stronger commitment by governments.

Essentially, what is at the heart of some of these trade-and-environment issues and about the progress made to address them has to do with the trust the public has in what they are told by governments and corporations. The public's trust is affected by transparency and public participation. These are two areas where North America has unique experience, and offers interesting innovations for ensuring and helping secure greater public trust, in particular within the governance framework set up under the North American environmental agreement

In fact, the NAAEC contains mechanisms for public participation and transparency that are unparalleled in any other international agreement or institution. They include, for example, the establishment of a Joint Public Advisory Committee (JPAC).²¹ JPAC consists of fifteen individuals, selected by their respective governments, who reflecting the views of civil society advise the three governments that make up the Council of the Commission on how to implement the side agreement and on environmental priorities for North America.²² The NAAEC also provides for the creation of National Advisory Committees (NAC) that advise each member of Council on the respective priorities and perspectives of each country. I know from

²⁰ See JANE BARR & SCOTT BROWN, COMMISSION FOR ENVIRONMENTAL COOPERATION, BOOMING ECONOMIES, SILENCING ENVIRONMENTS AND PATHS TO OUR FUTURE 3, 18 (2001), available at http://www.cec.org/files/pdf/ECONOMY/Trends-e_EN.pdf.

²¹ See NAAEC, *supra* note 5, art. 8(2), 32 I.L.M. at 1485.

²² See *id.*, art. 16, 32 I.L.M. at 1489.

my own experience of the important role they have played in influencing and shaping decisions the governments make with respect to implementing the NAAEC and meeting their obligations under it.

Perhaps the most interesting innovation in terms of public participation and transparency, is one that was boldly established by the negotiators themselves: the citizen submission process. Under the process, *any* individual or organization in North America has the right to petition and request an investigation regarding an allegation of a lack of effective enforcement in one of the three countries.²³ This enables “sunshine” to be shed on concerns related to lack of effective enforcement. Although the mechanism may not have “teeth” in terms of levying fines and such, it does provide a public venue where information is brought to light, and that, in and of itself, is a very effective tool in discouraging lax enforcement. As Louis Brandeis, the U.S. Supreme Court justice, once wrote, sunshine can be the best disinfectant.²⁴

FUTURE CHALLENGE: ENVIRONMENTAL AND TRADE POLICY INTEGRATION

I would like to close by focusing on what I consider to be, perhaps, the greatest challenge that we will be facing here in North America in terms of making sure that trade and environment objectives are not irreconcilable: the integration of trade and environmental policies. Now, there are cases in which trade and environmental policies have worked in tandem, including policies that remove subsidies and other trade-distorting measures in specific sectors. In the fishery sector, for example, the removal of subsidies brought about notable environmental improvements.²⁵ However, as the economic sectors of North America become increasingly integrated, this experience has not necessarily been widespread. Establishing environmental management and protection systems at the regional level are necessary to support economic integration and to ensure that there is not a head-on collision between economic integration and environmental and health objectives in the three countries.

²³ See *id.*, arts. 6, 14-15, 32 I.L.M. at 1484, 1488-89.

²⁴ See LOUIS BRANDEIS, *OTHER PEOPLE'S MONEY* 62 (1933) (“Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”).

²⁵ This finding is consistent with a statement made by the United Nations Environmental Programme. See *First Comprehensive “Real-Time” Way To Observe State Of World’s Oceans*, at <http://www.unep.org/Documents/Default.asp?DocumentID=253&ArticleID=3081> (June 5, 2002) (“Just under a third of the world’s fish stocks are now ranked as depleted, overexploited or recovering as a result of over-fishing that is fueled by subsidies estimated at up to US\$20 billion annually”).

As an example of this, I would like to briefly present to you the case of the energy sector, and, more specifically, the electricity sector. Studies show that electricity demand is expected to grow steadily in North America, by 14% in Canada, 21% in the US, and 66% in Mexico between 2000 and 2009.²⁶ At the same time, there has been a tremendous increase in the electricity trade in North America, as demonstrated by the fact that today British Columbia supplies electricity to California, and Mexico supplies electricity to the United States. There has even been a contract for power sales between British Columbia to Mexico. To supply the U.S. market, there are new plants being built in Alberta, Ontario, Manitoba, and in Mexico. At the same time, we know that some of the environmental impacts in the electricity sector can be significant. I specifically refer to the coal-fire electricity plants, which, by volume, are some of the largest sources of pollutants that we track in North America.²⁷

Last year, Presidents Bush and Fox and Prime Minister Chrétien talked about the importance of establishing a stronger and deeper North American partnership, and developing a North American energy market was seen as a primary focus for that deepening of that relationship.²⁸ To that end, a working group was established, and it is now looking at ways in which energy policies can be converged in the three countries to help streamline and facilitate the trade of natural gas and electricity.²⁹

As governments are beginning to look very seriously into how to facilitate the cross-border trade in electricity, people are beginning to ask a question: is this going to improve or hurt the air quality or the environmental quality in my area? In California, farmers from the Imperial Valley who are concerned about the impacts of the ground-level ozone emissions from a plant being constructed right across the border in Mexico, and want to know what kind of impact those emissions might have on their crops. These are not theoretical trade and environment questions; these are “here-and-now” questions that affect the livelihood and well being of farmers.

²⁶ See SCOTT VAUGHAN ET AL., COMMISSION FOR ENVIRONMENTAL COOPERATION, ENVIRONMENTAL CHALLENGES AND OPPORTUNITIES OF THE EVOLVING NORTH AMERICAN ELECTRICITY MARKET: SECRETARIAT REPORT TO COUNCIL UNDER ARTICLE 13 OF THE NORTH AMERICAN AGREEMENT FOR ENVIRONMENTAL COOPERATION 26 (2002), available at http://www.cec.org/files/PDF//CEC_Art13_electricity_Eng.pdf [hereinafter ENERGY MARKET REPORT].

²⁷ See *id.* at 6.

²⁸ Statement from U.S. President George W. Bush, Mexican President Vicente Fox, and Canadian Prime Minister Jean Chrétien, Summit of the Americas Statement of North American Leaders (April 22, 2001) (available at <http://usinfo.state.gov/regional/ar/summit/north22.htm>).

²⁹ See *id.*

We at the CEC saw that the electricity sector as a key area where trade and environment policies need to work together to ensure that the search for reasonably priced electricity does not compromise health and environmental objectives. We decided to take a look at the issue the environmental challenges and the opportunities for the evolving North American electricity market. We asked for the assistance of people from an advisory panel, people from utilities, from NGOs, and from regulators and universities. We also invited Congressman Phil Sharp, who was involved with almost every piece of recent energy legislation in the United States to chair the advisory panel.³⁰ We looked at a number of issues. First, we looked at the fact that we have and will continue to have open borders and increasingly mobile capital. Investors are now beginning to look at those jurisdictions with the lowest environmental standards or lax enforcement. Are regulators concerned about the potential loss of investment jobs? Are they going to start to feel more reticent about improving or enhancing environmental performance standards of electricity generators? Or will free trade actually lead to wider use of newer and more efficient technologies, such as combined-cycle turbines?

We just recently submitted a report to the governments, and I am not at liberty to give you its conclusions at this point. I will, however, give you a sense of the discussion that we had with experts from the electricity and environment fields at a symposium held in San Diego last fall, and some of the interesting findings of the studies we commissioned in support of this work. To find out more about the potential environmental effects of the trend in the increasing electrical generating capacity in North America, we took account of the new electricity capacity generation under construction right now and those projects that have been announced to be built between now and 2007, which numbered 800 and 2000, respectively.³¹ We estimate that less than 40% of the announced units will likely be completed.³² Nevertheless, the projected increase in emissions of SO₂, NO_x, mercury and CO₂ associated with the increased electrical generating capacity would make it difficult for several North American jurisdictions to meet their health and environmental objectives.³³

What was most revealing about this exercise are the many constraints that environmental policymakers are under to meet the challenges of air pollution

³⁰ Phil Sharp (D-Ind.) served in Congress from 1975-1995. Currently, he serves as a senior policy advisor at Van Ness Feldman, P.C., a D.C. law firm specializing in energy and environmental law. Sharp drafted key provisions of the Energy Policy Act of 1992 and the Clean Air Act Amendments of 1991. See *Phil Sharp*, at http://www.vnf.com/content/AboutUs/Biographies/Phil_Sharp.htm (last visited June 20, 2002).

³¹ See ENERGY MARKET REPORT, *supra* note 25, at 12.

³² See *id.* at 15.

³³ See *id.* at 19.

from the electricity sector on a regional scale. For example, they often are not aware of the planned or actual construction of new facilities happening in jurisdictions across the border, even though the emissions from those new electricity-generating units might actually affect the air quality in their jurisdiction. Earlier this morning, Alan Nymark underscored that the impacts of transboundary air pollution can be significant.³⁴

There are practical solutions to address the environmental challenges in the North American electricity sector. They range from collaboration on inventories to cross-border emissions trading. However, any solution will require a great deal of collaboration among not just the countries themselves, but also between the energy and environmental policy communities. As of yet, the mechanisms are not really in place for that. There are, however, some important foundations that are being laid. For example, there is a North American Energy Working Group, composed of officials from the energy departments of the three countries, that is looking at ways to facilitate the expansion of electricity generation and transmission. On the environmental side of the equation, the CEC is sponsoring next month a meeting of the high-level chiefs of air quality in North America to look at ways to enhance cooperation on air pollution issues; this will be first meeting of its kind.³⁵ What North America needs, however, are mechanisms to facilitate the collaboration between these the electricity and environmental policy communities. Without this, it will be difficult to manage meeting the increased demand for electricity while meeting environmental and health objectives.

I raise this example to show in very real and concrete terms the need for efforts and mechanisms to integrate environment and trade policies. While we are drawing toward convergence in economic sectors, we also need to look at environmental measures that will be a necessary component of that economic cooperation. This is the key not only to preventing further environmental degradation and resolving seemingly intractable environmental problems, but also to establishing investment climate predictability and consistency. In achieving this integration, not only will we be able to demonstrate that increased trade and environment protection are really not irreconcilable goals, but also make them mutually supportive. Thank you very much.

³⁴ See Alan Nymark, *North American Environmental Cooperation*, 28 CAN.-U.S. L.J. 27, 29 (2002).

³⁵ This group met in May 2002. See CEC: *Latest News*, at <http://www.cec.org/news/index.cfm?varlan=english> (last visited June 20, 2002).

