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The Puzzling Relationship Between Trade and Environment: NAFTA, Competitiveness, and the Pursuit of Environmental Welfare Objectives

ILEANA M. PORRAS*

The North American Free Trade Agreement (NAFTA) is often claimed to be a "promising beginning" for the reconciliation of trade and environment. Professor Porras, however, suggests that the form that "reconciliation" takes in NAFTA is extremely problematic. Harmonization of standards to facilitate the free flow of trade is a familiar trade goal. NAFTA's provisions regarding environmental standards, however, are not a straightforward requirement to harmonize standards. Rather, NAFTA recognizes state autonomy in standard setting, on the one hand, while requiring a form of upward harmonization, on the other. According to Professor Porras, the result of such an arrangement is the perpetuation of economic and political inequality among states. States with low environmental standards are not given the opportunity to set their environmental standards in accordance with their own values, capacities, and priorities, but must instead divert resources to achieve the standards that are deemed appropriate by states with higher environmental standards. Professor Porras argues that the dual choice of "autonomy" and "upward harmonization" in NAFTA reflects the desire of environmentalists in high-standard states to safeguard both their environmental standards and their standards of living. States with lower standards are made to raise their standards so that their comparatively lower standards do not enable them to gain a competitive advantage to the detriment of the high standard states' economies. Professor Porras suggests that in choosing "upward harmonization," environmentalists in high-standard states are responding to the perceived link between environmental protection and the nation's economic health. In selecting a mechanism which tends to perpetuate existing economic inequalities between states, however, NAFTA fails to give equal attention to the demands of "sustainable development" in poorer countries.

* Associate Professor, University of Utah College of Law. This piece should be read as a small part of an ongoing project which examines various facets of the evolving relationship between the fields of international trade and environmental protection. I am very grateful to the Indiana Journal of Global Legal Studies for the opportunity to air my thoughts during the symposium on "International Environmental Laws and Agencies: The Next Generation" and would like to thank all participants for a very useful exchange of ideas.

I. INTRODUCTION

Until quite recently, the activities of environmental protection¹ and international trade² were imagined to be taking place in quite distinct spaces. While the disciplines and practice of both “trade” and the “environment” were undergoing rapid expansion and transformation, they were never understood to share either history, philosophy, practices or institutions. Meetings on trade matters were as unlikely to address environmental concerns as environmental gatherings were likely to discuss trade policy. Yet, in the last few years, these once autonomous fields have experienced, what we might term without exaggeration, a relational revolution. Starting from an initial stance of mutual disregard, the disciplines of environmental protection and international trade passed through three phases; first through a stage of mutual awareness, in which they recognized the unwelcome if inescapable relationship between their two enterprises, to a phase of reciprocal hostility with strident claims of irreconcilable differences, until finally, through the exertions of well-meaning conciliators, they arrived at the present point of accommodation.³

Today, the prevailing view is that trade and the environment are not necessarily at loggerheads. To the contrary, much of the recent scholarship claims that the relationship between trade and environment is entering a new

1. The concept “environmental protection” encompasses a bewildering array of often contested environmental welfare objectives and the piecemeal governmental regulation of domestic economic and noneconomic human activities that are thought to contribute to a given environmental problem. “Environmental protection” refers to *inter alia*: the protection, conservation and restoration of natural habitats and species; the protection of human health and safety through the provision of safe water and clean air; the reduction or elimination of toxic and other hazardous substances from the human environment (including the workplace); the safe handling and disposal of harmful substances; the rational exploitation, use, and management of renewable and nonrenewable natural resources including ores, minerals and oil, but also fish, wildlife, water and trees; and the protection or preservation of unique landscapes and habitats, through their designation as national parks or other protected status.

2. International trade—the exchange of goods across national borders—has generally been considered to be a vital economic activity, engaged in by a group of specialized traders (usually but not always private economic actors). Traditionally, the purpose of trade has been twofold: First, to make a wider array of goods available to consumers; and, second, to produce wealth for the traders and their respective nations.

3. While neither practice nor scholarship fits perfectly into such a linear account, the tale of the relational progression of trade and environment is intended to capture the lived experience of most practitioners and academics in these fields. It seeks to convey the sense of surprise still felt, by those in the worlds of trade and environment, at the sudden omnipresence of the coupling of “trade and environment.” This coupling is made even more surprising when we recognize the extent to which it has overshadowed the linkage of environment and development; a linkage which was consecrated by the promulgation of the concept of “sustainable development” at the 1992 United Nations Conference on Environment and Development.

and promising era, an era of compatibility and mutual reinforcement.⁴ It is also an era for which the North American Free Trade Agreement (NAFTA)⁵ is often read as a precursor or model—a “good beginning.”

NAFTA—a notable accomplishment from a trade perspective promoting as it does regional free trade in both goods and services—has also been hailed as the most environmentally sensitive trade agreement. While cynics might point out that the competition was not hard to beat, it is important to examine how NAFTA achieves this distinction. How is the reconciliation between trade and environment achieved in NAFTA? The framing of this question suggests at least two related lines of inquiry: First, given that NAFTA is unabashedly a trade agreement, how does NAFTA in fact “take the environment into account?” Second, to the extent that NAFTA responds to or reflects the concerns and choices of the “environment,” what conclusions can we begin to draw about the transformative effect on the practices, institutions, and objectives of the environment, of its willing association with trade?

In this paper, I suggest that NAFTA is a dangerous model. I argue that the driving objective of environmentalists in high-standard states as they undertook to associate with “trade” in NAFTA, was first and foremost to safeguard their own high environmental standards (and their continued ability to raise them). In order to achieve this end, they sought NAFTA’s recognition of sovereign prerogative in standard setting. Responding to a national trade claim that comparatively high standards could lead to a loss of competitiveness

4. For a representative sampling see JAGDISH BHAGWATI, *Trade and the Environment: The False Conflict?*, in TRADE AND THE ENVIRONMENT: LAW, POLICY AND ECONOMICS 159-90, (Durwood Zaelke et. al. eds., 1993); Steve Charnovitz, *Free Trade, Fair Trade, Green Trade: Defogging the Debate*, 27 Cornell Int'l L.J. 459 (1994); Jeffrey L. Dunoff, *Reconciling International Trade with Preservation the Protection of the Global Commons: Can We Prosper and Protect?*, 49 WASH. & LEE L. REV. 1407 (1992); Richard Eglin, *Enlisting the Support of Liberal Trade for Environmental Protection and Sustainable Development*, 23 ENVTL. L. 697 (1993); DANIEL C. ESTY, GREENING THE GATT: TRADE, ENVIRONMENT AND THE FUTURE, (1994); Robert F. Housman & Durwood J. Zaelke, *Making Trade and Environmental Policies Mutually Reinforcing: Forging Competitive Sustainability*, 23 ENVTL. L. 545 (1993); John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 WASH. & LEE L. REV. 1227 (1992); Peter L. Lallas et. al., *Environmental Protection and International Trade: Toward Mutually Supportive Rules and Policies*, 16 HARV. ENVTL. L. REV. 271 (1992); J. Owen Saunders, *NAFTA and the North American Agreement on Environmental Cooperation: A New Model for International Collaboration on Trade and the Environment*, 5 COLO. J. INT'L ENVTL. L. & POL. 273 (1994); Richard B. Stewart, *The NAFTA: Trade, Competition, Environmental Protection*, 27 INT'L L. 751 (1993).

5. North American Free Trade Agreement, done Dec. 17, 1992, Can.-U.S.-Mex., 32 I.L.M. 605 (entered into force Jan. 1, 1994) [hereinafter NAFTA]. In the environmental context, NAFTA also refers to the related North American Agreement on Environmental Cooperation, done Sept. 14, 1993, Can.-U.S.-Mex., 32 I.L.M. 1480 [hereinafter NAAEC]; Agreement Concerning The Establishment of a Border Environment Cooperation Commission and a North American Development Bank, Nov. 16-18, 1993, Mex.-U.S., 32 I.L.M. 1545 [hereinafter Border Agreement].

and a consequent lowering of standards, environmentalists in high-standard states sought to preserve their nation's economic position by reducing any comparative advantage that might be gained from lower standards. This was achieved by adopting a structure that seeks standard "compatibility," enhancement of protection levels, and non-derogation of existing standards, which I take to be functionally equivalent to the goal of "upward" harmonization.

I seek to demonstrate that while harmonization of standards is a familiar trade goal, the goal of "upward" harmonization is distinctively the result of the intervention of high-standard environmentalists in the trade treaty-making process. It is the result, in other words, of the much-heralded "reconciliation" of trade and the environment. I then argue that "upward" harmonization is a mechanism which is likely to perpetuate economic and political inequalities between states. Low-standard states are not "free" to choose their preferred standards in accordance with their values and priorities and are kept in a perpetual state of having to catch-up to high-standard states (who are free to choose ever higher standards). I then suggest that adopting an environmental mechanism which perpetuates inequality does not seem consonant with environmental values or the recognition of the link between environment and development. In their association with trade, I conclude, environmentalists become cognizant of economic issues to the extent that they affect their own environmental interests. In their engagement with trade, we might then claim that environmentalists become partisans of their own state's economic interests, so long as they can keep their own standards intact.

II. NAFTA "TAKES THE ENVIRONMENT INTO ACCOUNT"

The preambular pieties declare that the anticipated development and expansion of world trade is to be undertaken "in a manner consistent with environment protection and conservation," specifying the goals of "promot[ing] sustainable development [and] strengthen[ing] the development and enforcement of environmental laws and regulations."⁶ Beyond these, the main thrust of the environmental provisions in NAFTA is standards oriented. NAFTA endorses the sovereign right of each Party to establish its preferred environmental standards, subject to certain limitations intended to prevent the

6. NAFTA, *supra* note 5, at 297.

adoption of measures which are protectionist in intent.⁷ It recognizes that while such standards may sometimes conflict with other NAFTA obligations, each Party should be free to maintain them so long as they are applied in a non-arbitrary manner.⁸ While NAFTA embraces state autonomy in standard setting, it nevertheless discourages Parties from lowering standards in order to attract foreign investment.⁹ Plus, it exhorts them to work jointly to enhance levels of environmental protection and to make their standards-related measures compatible so as to facilitate trade.¹⁰

While the related environmental side agreement creating the North American Commission for Environmental Cooperation (NAAEC)¹¹ has elicited a great deal of favorable commentary, it could also be characterized as being primarily concerned with safeguarding the sovereign rights of each Party to establish its preferred environmental standards while working toward compatibility of standards. The procedures established under NAAEC,

7. NAFTA, *supra* note 5, at 368-83, 386-93. In both cases NAFTA recognizes the right of each Party to adopt national environmental standards which reflect legitimate choices concerning appropriate levels of protection. Such choices, however, are made subject to scientific scrutiny. In the case of agricultural, sanitary and phytosanitary standards, Parties are further required to take various economic factors into account and work toward consistency in order to minimize negative trade effects. In the case of standards-related measures, Parties are directed to work to enhance levels of protection and to make their standards compatible.

8. NAFTA like the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO) is organized around the dual principle of non-discrimination and national treatment between Parties. NAFTA also incorporates GATT Article XX, which creates specific exceptions to trade obligations, but departs from current GATT practice by expressly interpreting Article XX(b) to "include *environmental measures* necessary to protect human, animal or plant life or health" and Article XX(g) to apply "to measures relating to the conservation of *living* and non-living exhaustible natural resources." NAFTA, *supra* note 5, at 699 (emphasis added). Further, provisions of Chapter Twenty--Institutional Arrangements and Dispute Settlement Procedures--require that trade disputes between the Parties concerning environmental measures be considered under NAFTA dispute settlement procedures rather than taken to GATT panels for resolution. NAFTA Parties thereby undertake to resolve their environment-trade disputes from within a regime which explicitly acknowledges that there may be legitimate environmental objectives which require deviation from trade rules. Finally, NAFTA Article 104 sets out guidelines for reconciling trade obligations under specified environmental and conservation agreements with NAFTA obligations. While limited in nature, Article 104 responds to the fear of environmentalists, following recent GATT jurisprudence, that if implemented, trade obligations under international environmental agreements might be challenged as inconsistent with GATT or the WTO.

9. NAFTA *supra* note 5, at 639-49. Article 1114(1) allows, but does not require, a Party to take otherwise consistent measures, "that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns." However, Article 1114(2) recognizes "that it is inappropriate to encourage investment by relaxing domestic health, safety, or environmental measures" and goes on to provide that "a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor." *Id.*

10. NAFTA, *supra* note 5, at 386-93.

11. NAAEC, *supra* note 5.

allowing one Party's citizens to complain about the non-enforcement of environmental laws by another Party, are limited under the terms of the agreement to cases in which non-enforcement is claimed to have a negative trade effect.¹² The side agreement, in accordance with the demands of the environmental sector (and in contrast to the usual practice of the trade sector), allows for a high degree of public participation, openness, and transparency of decision making processes. While NAFTA does not provide for a similarly improved access to the trade policymaking institutions at the national or regional levels, it could be argued that NAFTA has moved the expectation of future practice forward in that direction. After NAFTA, at least in the United States, it is probable that no large-scale trade agreement will be negotiated in the absence of some involvement by both consumer and environmental groups. NAFTA's checkered course through the legislative process in the United States will likely make trade policymakers sensitive to the need to address environmental concerns. It is precisely this new availability of the international trade process to those asserting the interests of environmental protection which has led to much of the optimism concerning the future promises of the trade and environment reconciliation. It is also this new availability which gives urgency to the need for reflection on the impact on environmental thinking of the sudden and attractive availability of trade mechanisms to further environmental objectives.

Reconciliation under NAFTA seems to be based on an apparently contradictory dual gesture. First, an explicit recognition and preservation of each state's prerogative in setting environmental standards gestures toward the environment since it enables the state to protect its domestic environment through self-selected standards, even in the face of a trade based challenge. This is accompanied, however, by pressure toward overall harmonization of standards through the subjection of such state choices to scientific scrutiny,

12. *Id.* NAAEC appears to establish a mechanism to bind Parties to environmental compliance by threatening sanctions if they persistently fail to enforce their own environmental laws. The possibility of sanctions for a persistent failure to enforce, however, only becomes available, pursuant to the decision of an arbitral panel, and such a panel becomes available only under limited circumstances. *Id.* at 1490. Failure to enforce must relate "to a situation involving workplaces, firms, companies or sectors that produce goods or provide services: (a) traded between the territories of the Parties; or (b) that compete, in the territory of the Party complained against, with goods or services produced or provided by persons of another Party." *Id.* Thus it seems that in order to be an "interested" party able to bring a claim or join the complaint there must be an allegation of "an effect on competitiveness" rather than a claim of environmental harm *per se*. See also NAAEC, *supra* note 5, at 1497 (further suggesting that the main concern is effect on competitiveness). What we have here is the equivalent of a "green" countervailing duty, that is, however, to be managed by an international body.

principles of non-arbitrariness, and the pursuit of compatibility--a gesture toward trade since the purpose of harmonization is to ease and facilitate trade by eliminating potential trade barriers.¹³ While these two gestures might be thought to be equivalent, the conciliation of trade and the environment in NAFTA can also be characterized as a promise to respect state choices concerning environmental protection--so long as those choices conform to the overall goal of regional harmonization. Not surprisingly, given that we are examining a trade agreement, the overall goal of promoting trade remains supreme even within the context of the environmental provisions.

An argument might be made that while NAFTA does impose pressure toward regional harmonization of environmental standards in order to promote trade, it at least intervenes in favor of the environment by ensuring that the pressure is applied in an upward direction rather than allow a more natural downward harmonization. From this perspective, NAFTA Articles 906(1) and 1104, while placing limits on state autonomy in standard setting, are pro-environment provisions since they are intended to prevent the downgrading of standards, which is "good" for the environment.¹⁴ Read as an environmental instrument, NAFTA recognizes that safeguarding state autonomy, in the form of granting an absolute license for states to choose their own levels of protection, would not necessarily lead to "good" environmental decisions. Given an absolute freedom to choose, some states might choose to ignore or forego environmental protection altogether. Thus, from this perspective, NAFTA appropriately constrains state choices by imposing limits on the lowering of standards.

This concession to the environment comes at no cost to trade promotion, at least within the region. As we have seen, state autonomy in standard-setting under NAFTA is tempered by the overall goal toward standard harmonization. Whether harmonization takes place upwards or downwards, the volume of trade will not be affected, since harmonization at whatever level will eliminate any potential impediment to trade. Here, then, we might say is an ideal example of the potential mutual reinforcement of trade and environmental goals. Absent the obligations undertaken by the Parties under NAFTA, states

13. The term "harmonization" is not used in NAFTA. While harmonization or standardization cannot, therefore, be claimed as an explicit obligation under NAFTA, I argue that both chapters on standards can be read as being structured around the long-term objective of harmonization of standards. The lesser objective of "compatibility" of standards and their subjection to increasingly standardized risk assessment procedures are, on this reading, viewed as a step in the right "trade" direction--a postponement of the inevitable.

14. NAFTA, *supra* note 5, at 387, 639.

are under no obligation to maintain or raise their level of environmental protection through the implementation and enforcement of domestic standards.¹⁵ Absent the incentive of expected economic advantages to be derived from participation in a trade agreement, states would be unlikely to assent to such an obligation. That a trade instrument, such as NAFTA, could be used to impose an apparently environmentally sound obligation on states otherwise reluctant to bind themselves to environmental commitments and to achieve this result without consequent detriment to the overall trade objective of eliminating trade barriers could be seen as auguring a fine future for the trade and environment relationship. But is it so ideal?

The choice between upward and downward harmonization is not economically neutral when the starting point of each trading partner is strongly divergent. Under a regime of upward harmonization, high-standard countries need only maintain their current standards at no additional cost to their productive sectors. Low-standard countries, on the other hand, are faced with the need to undertake significant expenditures if they are to achieve the higher standards required to attain harmonization. Upward harmonization thus tends to favor the economic development of high-standard states in two ways: First, the goal of harmonization provides a counterweight to the possibility that low-standard states will gain a competitive advantage due to lower environmental standards. Second, upward harmonization imposes an additional burden on those state having to work their way up. Furthermore, assuming that state autonomy in standard setting in high-end countries allows such states to continuously “improve” environmental protection at home by raising standards, low-standard countries will be placed in a perpetual state of having to catch up. From the national economic perspective of high-standard states, potentially threatening competitors can thereby be neutralized (or at least put under a disability).

While raising environmental standards under appropriate circumstances may be a desirable environmental goal, a trade agreement which favors the economic development of richer states rather than that of poorer states is unlikely to promote the global objective of sustainable development.¹⁶

15. NAFTA Parties may have specific standard setting obligations arising from their ratification or accession to other international or regional environmental treaties, but there is as yet no general international obligation to improve (or even to maintain) a state's chosen level of environmental protection.

16. The assumption is that a strong correlation exists between economic development and levels of environmental protection. In this paper, I do not wish to address claims made by some analysts that suggest that there is an automatic relationship between rising GNP levels and attention to the environment on which we can rely. See e.g., GENE M. GROSSMAN & ALAN B. KRUEGER, ENVIRONMENTAL IMPACTS OF A NORTH

Recognizing this inequitable economic result does not suggest that downward harmonization is the preferable option. From an environmental perspective, downward harmonization is almost certainly the worst possible alternative. It does, however, reframe the question of the desirability of standard harmonization itself.

One possible environmental retort, is that “harmonization” of standards was not an environmental goal in NAFTA, but a trade goal. The choice presented was not one between harmonization and no harmonization, but a clear choice between a trade agreement which encouraged downward harmonization and one which encouraged upward harmonization. As between the two, the environmental choice was obvious.

While each of the environment provisions in NAFTA and the establishment of a Commission for Environmental Cooperation may be understood as representing progress for the environment vis-a-vis a trade agreement with no such provisions and no such commission, environmentally inclined skeptics might yet wonder at the meaning and the ramifications of the drive toward “reconciliation of trade and environment” in light of NAFTA.

III. THE ENVIRONMENT ASSOCIATES WITH TRADE

The claim that standard “harmonization” was not an environmental goal but a trade goal seems to oddly ignore the transformational consequences of the link between environmental and trade concerns. The pursuit of environmental welfare objectives¹⁷ through the implementation and enforcement of standards at the national level is certainly familiar. Under ideal circumstances, domestic standards are set in accordance with national practices of decision-making. They reflect local values, local approaches to risk, and the acceptability of trade-offs. They are based on local assessment of environmental harms, costs and benefits, and local economic, technological,

AMERICAN FREE TRADE AGREEMENT, (National Bureau of Economic Research Working Paper No. 3914, Oct. 8, 1991). It is clear, however, that the concept of “sustainable development”—the integration of environment and development—is premised on the recognition that global environmental objectives cannot be achieved without proper attention to the economic needs of the large proportion of the population living in poverty.

17. I have chosen to use the term “environmental welfare objective” in an attempt to call to mind the difficulties inherent in pursuing any “welfare objective”. There are bound to be disagreements over the source and degree of moral obligation, over the levels of care that are desirable, over the equitable distribution of costs and benefits, and over the most efficient means of achieving the agreed upon results. I have also chosen the term as a means of marking resistance to the current trend of suggesting that we must pursue environmental protection because it is the economically rational thing to do.

and institutional capacities. Consequently, differences in standards adopted by different countries reflect differences in values, approaches to risk, the acceptability of trade-offs, and so on.

It is precisely because of the direct relationship between local values and local standards, that citizens of high-standard countries want to preserve their right to choose their preferred level of environmental protection. When citizens in high-standard countries seek to shield their standards from external challenge, they are attempting to limit foreign interference in their environmental choices. It is because of the experienced relationship between values, expectations, and standards, that high-standard countries' citizens reject the proposal that domestic standards should simply be imported fully-formed from the outside.¹⁸ A standard that is not fashioned internally is mistrusted as the product of a foreign (external) decision making process and therefore reflective of foreign values. But, there is an environmental price to pay. To insist on the right of each state to establish its preferred standards and to shield them from external challenge is to accept that some countries will choose low standards. Low standards present two challenges to high-standard state environmentalists: In the first place, environmentalists in high-standard countries understandably think they have made the "right" choice. From their perspective most "high" standards are already compromised. Standard setting at the national level, they realize, already reflects trade-offs between ideal environmental objectives and the need to achieve consensus. Thus, even high standards fall short of environmentally "ideal" standards. Lower standards are therefore likely to be treated as "wrong" or "inappropriate." Thus while asserting the right of their own country to choose its preferred standards, foreign standards that are lower than domestic standards are automatically suspect.

Even outside the context of interstate economic competition, high-standard state environmentalists will seek ways to encourage other countries to raise their standards to a level at least as high as the already compromised level which the environmentalists have been able to achieve at home—simply

18. For example, despite the realization that a high degree of harmonization of national policies is required for the European Union to achieve its economic objectives, citizens of the member states objected to the commission's attempt to take over exclusive competence for environmental affairs in order to establish a single European-wide environmental policy. The concept of subsidiarity, which was adopted as a counterweight to the Commission's attempt at centralization, provides that decisions concerning the environment should be made at the lowest practicable level. While there is considerable debate concerning the meaning and relevance of the principle of subsidiarity, at the very least, it is evidence of a desire to retain the connection between local values and local standards.

because it is the environmentally right thing to do. Counterarguments which insist on returning to the different context of environmental decision-making, point out the arbitrariness of the priorities, stress that standards may be different for legitimate reasons, and refer back to the "importance" of state autonomy in standard setting, are dismissed as so many excuses to abuse and exploit the environment.

In the context of economic competition, low standards present a second challenge to high-standard state environmentalists. It is believed that the existence of low-standard states places additional pressure on the high-end states' choice of standards.¹⁹ The claim is that low environmental standards contribute to lower costs of production and therefore give low-standard states a competitive advantage against high-standard states in most goods, especially in those goods which involve high levels of regulatory expenditures in high-standard states. The loss of trade competitiveness, it is then argued, will lead to a further compromise of environmental standards in high-end countries as they seek to match their competitors' prices. In other words, in the context of economic competition between low-standard and high-standard states, standards will inexorably drop further and further below the environmental "ideal."

In a world not governed by trade agreements, one solution would be to limit imports (through tariffs, quotas, or other non-tariff measures such as production standards) so that the domestic industry would at least benefit from a "captive" consumer base despite higher prices reflecting higher environmental standards. Arguably, in the absence of competition from cheaper imports, domestic prices would better reflect domestic choices concerning environmental protection. The cost of environmental protection would be apparent in consumer prices, and consumers would then be free to signal how much more they were willing to pay for added levels of

19. A number of highly interesting articles have been written concerning environmental regulation and its effect on competitiveness. See, in particular, Richard B. Stewart, *Environmental Regulation and International Competitiveness*, 102 YALE L.J. 2039 (1993) and the response of Alfred C. Aman, Jr. in *The Earth as Egg Shell Victim: A Global Perspective on Domestic Regulation*, 102 YALE L.J. 2107 (1993). Both seem to agree that harmonization or standardization of environmental standards is ultimately desirable from an environmental perspective. I do not propose in this article to examine the strength or validity of their arguments and conclusions, which are based on an extrapolation of U.S. experience with federal versus state-based standards. In fact, my argument relies on their conclusions to a limited extent: Once it is clear that environmental objectives are tied to the overall goal of continued economic growth, the temptation of environmentalists in high-end countries will be to embrace upward harmonization because it offers to make their costly environmental choices palatable at the domestic level with the promise that other states will also have to bear the burden.

environmental protection. Such choices would continue to be environmentally compromised, since environmental values would still have to compete with other domestic objectives. But at least in a closed system where imports would be prohibited, environmental values would not have to contend with external economic pressures.

There are, of course, countless difficulties in even trying to imagine the dynamics within such a "closed system." In fact, consumer prices would likely skyrocket as the domestic industry lost its export capacity and the lower per item production costs provided by the attendant economies of scale.

Further, as industry became less efficient due to the lack of real competition, product quality would likely decrease. As the national economy contracted, so too would the commitment to environmental protection. As traders and economists are quick to point out, neither the local nor the global environment is likely to benefit from a system of closed economic borders.

As environmentalists in high-standard states recognize, we are neither in a world of closed economic borders nor in a world of closed environmental systems. The challenge for high-standard environmentalists working from within a trade agreement is how to minimize the pressure on standards which they believe arises from disparate levels while retaining the maximum possible level of autonomy for their own standards. The most immediately obvious and appealing solution is to force other states to raise their standards to a level closely resembling the high-end states' standards. Thus, upward harmonization becomes the ideal toward which environmentalists naturally tend. Upward harmonization is attractive to environmentalists in high-standard states because they are attached to the connection between their values and their choices, believe their own standards are environmentally right, and are convinced that as foreign standards come to match their own, the system will have eliminated any effect that environmental standards might have on pricing and investment decisions. Eliminating the market "distorting" effect of disparate environmental standards will in its turn eliminate downward pressure on high standards.²⁰ Upward harmonization permits the retention of

20. The notion that disparate environmental regulations may distort trade flows requires one to accept the claim that there is such a thing as "normal" or "undistorted" trade flows. In the face of distortion, wise caretakers must intervene to correct the distortion so that the market can re-impose its autonomous order and allow trade to pursue its "natural" undisturbed course. For a fascinating account of the reliance of trade law and policy on the concept of "normalcy" against which "deviations" can be judged, see Daniel K. Tarullo, *Beyond Normalcy in the Regulation of International Trade*, 100 HARV. L. REV. 546 (1987). For a critique of the theory of markets functioning autonomously see also Joel R. Paul, *Free Trade, Regulatory Competition and the Autonomous Market Fallacy*, 1 COLUM. J. EUR. L. 29 (1995).

high environmental standards and high standards of living in rich states. In other words, once they take account of the economic context, and in particular, when they approach the issue of environmental protection from within a trade liberalizing context, environmentalists are likely to be actively in favor of standard harmonization—so long as it is upward harmonization. As between no harmonization and upward harmonization, they will have a marked preference for upward harmonization. It would therefore be inaccurate to claim that high-standard environmentalists were not implicated in the adoption of a strategy of standard harmonization in NAFTA and must therefore be held blameless for any resulting inequities that such a system might impose on lower-standard states. To the contrary, the choice of upward harmonization was a direct result of the meshing of the environment and trade objectives in a trade agreement. That upward harmonization constrains the autonomy of lower-standard states, while giving added protection to the autonomy of high-end states, is the direct outcome of the reconciliation of trade and the environment. Furthermore, this reconciliation is likely to impose on low-end states the costly burden of having to catch up to high-end states, giving a consequent trading advantage to high-end states whose resources are not equally diverted.

IV. CONCLUSION

High-standard state environmentalists could claim that the overall objective should be to raise world-wide standards of environmental protection. The means by which such a result is to be achieved is of only secondary concern. Whatever works, works, and should not be dismissed out-of-hand simply because it may not lead to perfectly equitable results. People in low-standard states will in any case be better-off with high environmental standards. To the extent that there is an economic development cost to higher standards, either the long-term benefits of caring for human health and the environment will compensate such states or foreign assistance may be available to facilitate the transition.

While such arguments seem compelling on their face, they are also deeply troubling. Ironically, it appears that high-standard environmentalists have accepted one of the underlying premises of “sustainable development,” which suggests that there is an indissoluble relationship between economic development and environmental protection. The attachment of high-standard state environmentalists to upward harmonization as the trade/environment

strategy of choice, results from their conviction that only an economically strong and healthy state can afford to abide by a high-level environmental commitment. In adopting upward harmonization, they are responding to the fear that economic weakness (brought about by a loss of competitiveness) would lead to the weakening of environmental standards. They deliberately choose an environmental strategy that will safeguard high domestic environmental standards and will also protect the domestic economy. In this way, high-standard state environmentalists admit to the claimed cause-and-effect correlation between a strong economy and high environmental standards and a weak economy and low environmental standards. In so doing, they recognize the link between environmental protection and economic development which the concept of sustainable development was intended to highlight.

While high-standard state environmentalists are also willing to admit to the relationship between the economy and environmental protection in low-standard states, they are only willing to take the economy of these states into account to the extent that they do not interfere with their own high domestic standards. From within a trade context, these environmentalists are unable to address or even consider central elements of sustainable development. The concept of sustainable development speaks to equity concerns, not just as between generations, but within this and every other generation. Poverty must be eradicated in order to achieve sustainable development. Sustainable development is, of course, a compromise from an environmental perspective. Nevertheless, it seems that if environmentalists are willing to consider economic concerns in high-end countries, they should be willing to consider them in low-end countries as well. It remains to be seen whether high-standard environmentalists can ever admit that a standard lower than their own may be legitimate and appropriate, taking into account the different contexts, even though this lower standard will be reflected in a lower product cost.

I would suggest that the dual gestures of protecting state autonomy in NAFTA in order to protect the domestic environment, while constraining the choices of other states in order to protect the environment abroad and the economy at home, are the inevitable result of the reconciliation of trade and environmental concerns at this juncture. Such problematic solutions must be viewed from within a national context of distrust of globalization, with its consequent loss of borders, loss of control, and identity. The strong urge to protect the state's national identity, as expressed in the relationship between local values and local standards, is set against the fear of the deterritorialized

multinational corporation's predatory practices. Predatory in that we imagine the creature will move easily and without regret, always in search of ever-better opportunities for profit. The choice of upward harmonization is intended to eliminate a basis for the possible departure of this borderless creature from the nation's soil. It is a means to keep it anchored; to keep it in the nation even though it is not of the nation. The fear of the borderless multinational is thus the fear of not being in control. In a parallel turn, harmonization is not threatening to the self, so long as the harmonization takes the form of harmonization in the self's image.

