

The Environmental FORUM[®]

Advancing Environmental Protection Through Analysis • Opinion • Debate



Trade and Treaties: Meeting in the Middle

Civil Rights

*An Agency and a
Tale of Two Sections*

NYC v. EPA

*Clean Water
Infrastructure*

Sustainable Cities

*Harnessing Urbanization
to Achieve Social Goals*

Trade and Treaties

The effectiveness of the environmental safeguards in free trade agreements in the Americas depends on adequate implementation and funding of the oversight and enforcement mechanisms and of the environmental cooperation initiatives



Victor M. Tafur is an environmental law practitioner, based in Mamaroneck, New York. He is Visiting Professor of Environmental Law at Bard College, Center for Environmental Policy, and Adjunct Faculty at Pace Law School, Center for Environmental Legal Studies.

After the break down of negotiations for a Free Trade Area of the Americas — or FTAA, the ambitious hemispheric proposal based on NAFTA — the United States began a series of bilateral dialogues. These culminated in the Central America Free Trade Agreement, which encompasses the Meso-American countries and the Dominican Republic and is known as CAFTA-DR, and free trade agreements with Chile, Peru, Colombia, and Panama. As a result, the United States has created a semi version of an FTAA, comprising 10 Latin American countries, counting Mexico within NAFTA. Notably, the agreements themselves include an environmental chapter, modeled on provisions in NAFTA's environmental side agreement.

Environment provisions in CAFTA-DR and the bilateral FTAs seek high standards of environmental governance, including safeguards to maintain levels of protection, effective enforcement, and procedural guarantees, but offer little incentives to do so. Certainly, while the intention is straightforward, several provisions are plainly unenforceable. The efficacy of the remaining environmental safeguards are contingent on adequate implementation of the oversight and enforcement mechanisms and procedures incorporated in the agreements. Thus, the pivotal question is the effectiveness of the various environmental provisions, taken together and singly.

These agreements are built on the foundation of the World Trade Organization accords, and are framed under the U.S. Trade Act of 2002 that includes the presidential fast-track negotiation of trade promotion authority. The Trade Act establishes five key environmental objectives — some of which may seem impracticable or unachievable but are worth mentioning for purposes of the discussion. They are: to seek trade and environmental policies that are mutually supportive; to strengthen the protection of the environment and enhance the international means of doing so; to ensure that the parties do not weaken or reduce the protections afforded in domestic environmental laws; to reduce or eliminate government policies that unduly threaten sustainable development; and, to gain market access for U.S. environmental technologies and services.

Accordingly, while recognizing a party's right to exercise discretion with respect to regulatory, prosecutorial, and compliance matters and to prioritize allocation of resources for enforcement, the Trade

Act establishes two main environmental requirements for the U.S. trading partners: to effectively enforce their environmental laws, and to ensure that environmental, health, or safety policies and practices do not arbitrarily or unjustifiably discriminate against U.S. exports or serve as disguised barriers to trade. On the other hand, the Trade Act provides for the adoption of cooperation mechanisms to enhance the U.S. trading partner's capacity to protect the environment. These legislative purposes have translated into environmental safeguards that include effective enforcement requirements, procedural guarantees, public submission procedures, dispute settlement mechanisms, resolution of investment-related environmental matters, as well as institutional arrangements for implementation and cooperations initiatives.

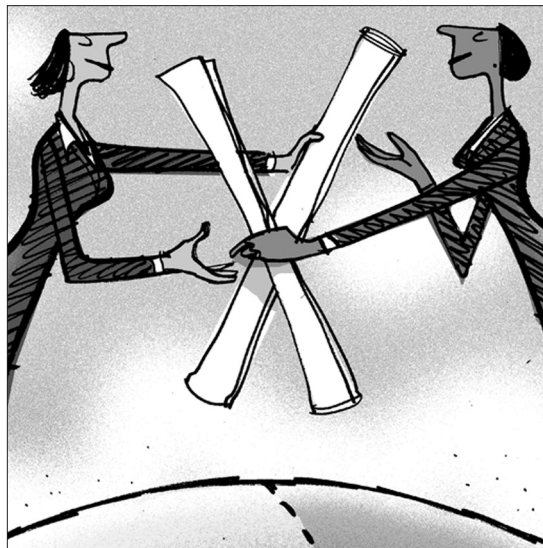
Effective requirements encourage enforcement of a nation's environmental laws, in particular to ensure that parties do not waive or otherwise derogate from environmental laws in order to attract trade or investment. Procedural guarantees require making judicial, quasi-judicial, or administrative proceedings available to remedy or sanction violations of environmental laws, and to ensure that such proceedings comply with due process of law — that they are fair, equitable, and transparent — and are open to the public. Other provisions call for market-based incentives and voluntary measures to protect the environment. Chile's FTA includes a provision that encourages voluntary corporate stewardship principles, which is not replicated in other agreements, but does not mention market-based incentives. Nonetheless, Chile is well-known for embracing market-based approaches.

In contrast with NAFTA, it is noteworthy that these agreements are not subordinated to other multilateral environmental agreements. Under the Peru, Colombia, and Panama FTAs, parties commit to adopt and implement laws and all other measures to fulfill obligations under

a specified agreement. Listed agreements relate to trade in endangered species (CITES), wetlands (RAMSAR), substances that deplete the ozone layer (Montreal Protocol), pollution from ships, environmental management in Antarctica, and the protection of whales and tropical tuna. Under CAFTA-DR and the Chile FTA, the parties simply recognize the importance of multilateral environmental agreements, and acknowledge the ongoing negotiation in the WTO regarding such accords.

The Peru FTA sets out additional enforceable provisions regarding forest sector governance, as a result of pressure by U.S. environmental organizations. These provisions establish mechanisms to promote legal trade in timber products, including procedures for regular audits of producers and exporters and verifications to ensure compliance with CITES and Peruvian legislation. In 2009, by presidential memorandum, the United States established an interagency committee to carry out these requirements. Two years later, its organization, functions, and internal procedures were adopted, and, importantly, allow public submissions on failures to comply with these mechanisms. For its part, in 2011, Peru passed a new forestry law to accord with FTA provisions. Thus, there has been a considerable effort to put these additional rules into practice, but their actual effect remains to be seen.

The Peru FTA also includes a provision intended to enhance the protection of biological diversity; however, the language simply recognizes its importance and affirms a commitment to encourage its conservation and to promote public participation in this respect. The Colombia FTA contains a similar provision, coupled with a complementary understanding on obtaining informed consent from the appropriate authority prior to accessing genetic resources, equitably sharing the benefits arising from the use of traditional knowledge, and satisfying adequate patentability conditions. These safeguards are weak and devoid of any mechanisms for achieving the stated goals. Strikingly, both Peru and Colombia are subject to Andean Community



law on these matters, and have ratified the Convention on Biological Diversity's Nagoya Protocol on Access and Benefit-sharing, which will enable such tools for certainty and transparency. As these countries implement the protocol, such tools may be recognized as viable means to comply with FTA provisions as well.

There are three key bodies mentioned in institutional arrangements for administering each agreement. The first is a Free Trade Commission — made up by trade cabinet-level officials from each state party — responsible for administering the agreement generally. The second is an Environmental Affairs Council — composed of senior-level officials with environmental duties from each party — to oversee the application of the environmental safeguards. The third is an Environmental Commission — also composed of environmental officials from the parties — to coordinate and review environmental cooperation activities. These bodies meet annually unless the parties agree otherwise, and take decisions by consensus — except certain decisions about the public submission process discussed below.

The council convenes to perfect the environmental mechanisms and procedures and to resolve differences between the parties regarding any environmental provision, when direct consultations fail to arrive at a mutually satisfactory resolution. In addition, the council is required to submit periodical reports to the Free Trade Commission regarding the implementation of the environmental provisions. A chief concern, however, is due consideration of environmental matters by the commissions, as nothing of the sort is contemplated in the agreements. The council also must provide recommendations to the third body, and take into account input received from this body, concerning collaboration initiatives, which encourages coordination between the two environmental bodies.

Although requirements vary, the council must provide for public participation, including input in setting the agenda. For instance, under the Chile FTA, meetings “shall include a public session, unless the parties agree otherwise”; the Colombia FTA simply calls for “an opportunity to meet with the public.” Further, while not specifically required to do so, the council must publish its decisions. In this respect, the CAFTA-DR's council is setting the standard by posting its decisions on a dedicated website. Other councils have yet to develop such outreach tools. The Organization of Ameri-

can States maintains a web-accessible database on hemispheric FTAs that includes some decisions, but not all.

Significantly, a public submissions process, modeled on Articles 14 and 15 of the North American Agreement on Environmental Cooperation (NAFTA's environmental side agreement), grants members of the public an opportunity to file a petition with a designated secretariat asserting that a party has failed to effectively enforce its environmental laws. U.S. persons may not file submissions under CAFTA-DR or the other FTAs, even though they may invoke the similar process under the NAAEC. The Chile FTA does not allow for this public submission process. Instead, the effective enforcement obligation is solely discharged through the state-to-state dispute settlement provisions discussed below. All the agreements incorporate a general mandate to provide for the receipt and consideration of public submissions on matters related to the environmental safeguards. Theoretically, at least, more participatory tools could be developed.

The public submissions process begins with the filing of a petition, only after the petitioner has exhausted all domestic remedies. Upon the receipt of a petition, the secretariat reviews the submission considering specified criteria relating to the completeness of the submission, the exhaustion issue, and to make certain that the submission is not frivolous or “harassing industry.” If satisfied, the secretariat considers whether a response from the other party is warranted. A factual record is prepared, and made available to the public, if any member of the council requests that it do so. Similar to the NAAEC, the secretariat is not required to make qualitative judgments about factual conflicts nor draw conclusions about the arguments raised. Hence, it is essentially a neutral finder of facts. Nonetheless, the council can make recommendations to the respective Environmental Commission — the third body mentioned above — concerning matters addressed in the record that are relevant to potential cooperation, a requirement not expressly contained in the NAAEC. Potentially, based on a factual record, state-to-state dispute resolution procedures, discussed below, can ensue, but only if the complaining party alleges enforcement failures “through a sustained or recurring course of

action or inaction,” which is how formal NAAEC dispute settlements commence.

CAFTA-DR’s environmental secretariat is a unit within the Central American Economic Integration System. However, the environmental secretariat operates as an independent entity under the sole direction of the council to perform only functions related to the submissions process. The secretariat has published its submission procedures, and has a dedicated website with a registry of citizen submissions. To date, 22 submissions have been filed, of which about a third are active and a single submission — a 2007 petition on the failure by the Dominican Republic to protect marine turtles — advanced to a factual record that was published in 2011.

As expected, the so-called Turtle-DR factual record did not make any conclusions or judgments on the matter, and was limited to documenting the facts regarding the alleged noncompliance with environmental legislation requiring inventories of commercial and artisan establishments that possess or sell sea turtle products. To develop an ample record, the secretariat conducted interviews and field visits, in addition to reviewing filings, studies, and other information. Notably, in its response, the Dominican Republic expressed its commitment to complete the inventories as a priority. Hence, the petitioner’s main sought remedy seems to have been accomplished.

An environmental secretariat for the Peru FTA is being set up under the OAS’s Department of Sustainable Development. In 2011, the parties requested and gained consent from the secretary general of the OAS to house the secretariat under OAS-DSD as an independent entity under the orientation of the council. The parties need to provide the necessary funding for OAS-DSD to organize the administrative support for the secretariat. This scheme seems appropriate for the Colombia and Panama FTAs, which lack such features, in order to provide the same level of effectiveness, openness, and transparency.

State-to-state environmental controversies under the agreements are subject to the general dispute settlement procedures, but only after attempting amicable settlements by the respective council. Three types of dispute settlement mechanisms have been established: consultations; intervention

of the Free Trade Commission, the first body mentioned above; and, an arbitral panel, as last resort. For disputes that arise under provisions common to these agreements and other trade regimes, such as the WTO, the complaining party may choose the forum for resolving the matter, which is the exclusive venue for resolving that dispute — to be contrasted with NAFTA, which forces environmental disputes into NAFTA dispute settlement.

The arbitral mechanism consists of a three-member panel selected from an indicative or specialized roster. Under the Colombia and Peru FTAs panelists must have relevant expertise, but are drawn from a single pool. Under CAFTA-DR, the Chile FTA, and the Panama FTA, an environmental roster of expert panelists must be maintained, which seems more appropriate. Under all schemes, the arbitral panel must ensure high standards of openness and transparency, including the provision of open hearings and public release of submissions, setting clear rules for the protection of confidential information, allowing for interested third parties — such as non-governmental organizations — to submit views, and allowing interim review of draft tribunal decisions by litigants. CAFTA-DR’s implementing bodies have adopted and published rules of procedures and a code of conduct for dispute settlement procedures, which sets the norm for the other FTAs.

Once the panel renders its final report, which is made available to the public, the parties then seek to agree on how to resolve the dispute in a way that conforms to the panel’s determinations and recommendations. If a party fails to comply with an arbitral panel decision, and the parties cannot reach a mutually acceptable solution, the prevailing party has recourse to compensation, trade sanctions, or the payment of a monetary assessment. Under CAFTA-DR, the amount of the assessment is subject to a \$15 million annual cap to be paid into a fund established for environmental initiatives (such a fund also exists under the NAAEC). If the defending party fails to pay the assessment, the complaining party may take other appropriate steps, which may include suspending tariff benefits, as necessary to collect the assessment. To date, no arbitration panel has been established under CAFTA-DR (nor the bilateral FTAs), although, in August 2011, the United States requested the establishment of a panel to resolve a labor dispute regarding Guatemala’s apparent failure to enforce its labor laws, concerning the right of association, the right to organize and

bargain collectively, and acceptable conditions of work.

Investment safeguards raise some of the most controversial cases under trade agreements, typically under the investor-to-state arbitration procedures specifically for investment matters. Consequently, the investment provisions in CAFTA-DR and the bilateral FTAs seek to accommodate some flexibility for needful environmental laws and regulations, and include important clarifications with relevance to the environmental safeguards. As in NAFTA, the national treatment and Most-Favored Nation obligations apply to investors “in like circumstances.” This provision should be interpreted to mean that environmental legislation may, in furtherance of nondiscriminatory policy objectives, distinguish between domestic and foreign investors and their investments, without necessarily violating national treatment and MFN obligations. Other provisions make clear that if there is any inconsistency between the investment chapter and the environment chapter, the latter will prevail to the extent of the inconsistency, and that nothing in the investment chapter prevents a party from taking measures to regulate investments in a manner sensitive to environmental concerns, consistent with the investment chapter.

These provisions have provoked high-profile disputes under NAFTA. Notably, the Metalclad arbitration forced the Mexican government to pay \$16 million for alleged damages relating to the denial of a permission to construct a landfill. As a consequence, a few provisions were added or clarified so that panels properly apply the interplay between the investment and environmental provisions. First, to determine whether an indirect expropriation has occurred, arbitral panels are directed to examine several factors, derived from the 1978 U.S. Supreme Court decision in *Penn Central Transportation Co. v. New York City*, as follows: the economic impact of the government action; the extent to which the action interferes with distinct, reasonable investment-back expectations; and, the character of the action. Second, most significantly, a clarification that nondiscriminatory regulatory actions designed and applied to protect public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriation “except in rare circumstances,” a principle that was central to the holding in another controversial NAFTA case, *Methanex* (on the issue of whether California’s measures to ban MTBA, an additive

linked to health problems, in gasoline were tantamount to expropriation). Further, the minimum standard of treatment obligation — which requires that a state treat the foreign investor in accordance with international minimum standards — is also clarified to say that it does not require treatment in addition to or beyond that contained in customary international law, and does not create additional rights, as was stated in an interpretative note by NAFTA’s Free Trade Commission following *Metalclad*.

In conjunction with CAFTA-DR and the FTAs, parallel Environmental Cooperation Agreements were adopted that list broad areas for endeavor. ECAs identify cooperation activities on topics including environmental governance, promoting economic incentives, technology transfer, and capacity-building to promote public participation. The Environmental Commission — the third body mentioned earlier — chooses specific areas for cooperation and develops work programs that are open to public comment. The U.S. Department of State makes available and allows public comments on these work plans. For CAFTA-DR, a dedicated website has been established to inform and receive input on environmental matters and cooperation activities.

Perhaps the most challenging role for this type of commission is to develop performance measures to assist in evaluating progress on the overall intended goals and the specific cooperative programs, projects, and activities. Furthermore, the commission is instructed to seek and consider input from relevant local, regional, and international organizations to assist it in monitoring the progress of the agreement and cooperative activities. These mechanisms are vitally important, but remain to be undertaken. Three additional instruments, which have proved useful under NAAEC, could be developed for CAFTA-DR and the bilateral FTAs as well: a joint public advisory committee, independent reports on environmental matters not involving law enforcement, and a fund for environmental cooperation (now defunct under NAAEC).

As with environmental safeguards, the real impact of cooperation initiatives depends on actual accomplishments and meaningful funding. The level of funding for cooperation under the ECAs is undefined, and mostly borne by the United States. For NAAEC, a \$9 million annual budget, from

equivalent contributions by each country, has been in place since its inception. In 2011, the United States announced that it had dedicated more than \$64 million to support environmental cooperation in the CAFTA-DR region, including financial assistance to the secretariat and bilateral projects. Despite this considerable amount, uncertain funding levels undermine the effectiveness of the cooperation initiatives. The ECAs have the potential to become important catalysts to achieve shared goals and objectives and help comply with the obligations undertaken in the environment provisions, but the parties need to agree on significant and stable funding sources.

CAFTA-DR and the FTAs were subject to environmental reviews in the United States, as required by Executive Order 13141 and its relevant guidelines. The purpose of such reviews was to consider reasonably foreseeable environmental impacts (both positive and negative) and shape appropriate responses to any such impacts. Not surprisingly, the reviews concluded that these agreements will not have any significant direct impacts, or may result in positive consequences, in the United States, while having small to moderate — both positive and negative — effects in the Latin American partners.

Concerning long-term effects in the Latin American countries, the findings state that the agreements will increase investment, trade, and production, which may be associated with further pressure on the environment, but are likely to contribute to growth in per capita income and, through this, to greater demand for environmental regulation over time. Also, that such investment may bring environmentally beneficial technologies and production methods, as well as higher standards for private sector environmental performance. The review further concluded that the environmental safeguards and cooperation initiatives should have positive implications for enforcement and the furtherance of environmental protection in both the United States and the Latin American parties. While these findings and conclusions may in the long-run prove accurate, the timeframe is uncertain and the underlying risks high.

The proposition that CAFTA and the FTAs provide adequate safeguards to ensure that the environmental objectives will be met remains to be proven. Their performance must be carefully monitored as increased trade and investment can amplify and

exacerbate adverse externalities. Importantly, commitments such as those to effectively enforce environmental laws should have positive results in the Latin American countries, especially when coupled with the submission procedures, but require continuous oversight to verify that they are being pursued and the mechanisms prove adequate. Proactive execution by the implementing bodies and targeted environmental cooperation activities focused on improving governance are paramount.

In this respect, establishing environmental performance benchmarking and monitoring provisions should be a priority. Moreover, an exciting proposal is to move beyond the issue of trade openness vis-à-vis environmental performance and instead recognize a more sophisticated interaction between trade flows (imports and exports of goods and services), trade policies (tariffs and subsidies, for example), governance (regulatory quality for example, and disaggregated environmental factors (such as environmental health, ecosystem degradation, and climate change, for example). The basic proposition is to use readily available indicators to understand the nuances at the interface between trade and the environment. A Yale study released in May 2011 as well as OAS-DSD ongoing projects and initiatives stress the need for these types of empirical analyses, which could be regularly undertaken by the implementing bodies of CAFTA-DR and the FTAs.

Finally, it is crucial to address concerns regarding the resources needed to fully develop and apply the mechanisms set forth in the agreements, and the funding of the activities to be undertaken through the ECAs. To be sure, whether the agreements will strengthen environmental governance and standards will depend not on economic growth and development through augmented trade and investment — at least not initially — but from successful implementation and cooperation.

Strengthening the capacity of the Latin American parties to protect the environment, promoting their sustainable development, and disseminating environmentally beneficial technologies are not spendthrift legislative mandates but in the United States' best interest. Transformational environmental diplomacy through advancing these stewardship objectives in Latin America is a momentous legal and policy move, and perhaps could even contribute to the eventual creation of the long sought Free Trade Agreement of the Americas. •