Regional Trade and the Environment: European Lessons for North America

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I.
INTRODUCTION

Regional economic integration has become an increasingly important policy issue in international trade. Although its formal origins can be traced back to the establishment of the European Coal and Steel Community in 1952, it was not until the mid-1980s that regional integration activities increased significantly.[1] Three important though unrelated events are typically seen as responsible for sparking interest in regional economic integration: the floundering of the Uruguay Round talks of the General Agreement on Tariffs and Trade (GATT),[2] the laying of plans by the European Community (EC) to complete a Single European Market,[3] and the movement towards a Canada-United States Free

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1. By September 1993, there were 85 regional trading arrangements in existence, 28 of which had been created since 1992. General Agreement on Tariffs and Trade Press Release No. 1596, Sept. 16, 1993, at pp. 1-2 (remarks of Peter Sutherland, Director General of GATT).

2. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 55 U.N.T.S. 187, Basic Instruments and Selected Documents 1 (4th Supp. 1969) [hereinafter GATT]. The GATT was brought into effect on a provisional basis on January 1, 1948 (*see* Protocol of Provisional Application, Jan. 1, 1948, Basic Instruments and Selected Documents 77 (4th Supp. 1969)) as a result of the U.S. Congress' failure to ratify the Havana Charter, which would have established an International Trade Organization (*see Final Act of the United Nations Conference on Trade and Employment*, U.N. Doc. E/Conf.2/78 (1948)).

3. *See* Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S 3 (1958) [hereinafter Treaty of Rome], *amended by* the Single European Act, 1987 O.J. (L 169) 1 [hereinafter SEA]. The Treaty of European Union, Feb. 7, 1992, 1992 O.J. (C 227) 1, *reprinted in* 31 I.L.M. 247 (1992) [hereinafter TEU], made further changes to the Treaty of Rome. These changes were incorpo-

Trade Agreement (FTA, and subsequently a North American Free Trade Agreement (NAFTA)).[4] Faced with the prospect of an international economic order dominated by two powerful trading blocs rather than one based on the continued pursuit of multilateral trade liberalization, non-EC and non-FTA nations have, in the last decade, sought to either establish regional trade blocs of their own or join the European or North American arrangements. The establishment of new regional trade blocs and the accession by states to existing regional integration arrangements (RIAs) will most certainly continue to be a significant issue in international trade in the coming years.[5]

Another significant development in world trade policy has been the growing concern about the environmental implications of trade liberalization. The link between free trade and the environment was first made apparent by a 1991 GATT dispute settlement panel ruling (the *Tuna-Dolphin* case) which found unlawful a United States trade ban[6] aimed at preventing the incidental killing of marine mammals by commercial fishers.[7] This ruling mobilized environmentalists to become involved in trade policy to ensure that the progressive opening of markets did not infringe on the ability of states to establish and maintain their own national environmental protection laws. The increasing attention given to the environmental implications of trade liberalization arrangements (TLAs)[8] is evidenced by the efforts of environmental

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rated into the Treaty Establishing the European Community, Feb. 7, 1992, 1 C.M.L.R. 573 (1992). Koen Lenaerts, *The Principle of Subsidiarity and the Environment in the European Union: Keeping the Balance of Federalism*, 17 FORDHAM INT'L L.J., 846, 846-47 & nn.1-2 (1994).

4. REGIONAL INTEGRATION AND THE GLOBAL TRADING SYSTEM 1-2 (Kym Anderson & Richard Blackhurst eds., 1993).

5. On June 7, 1995, Chile began formal negotiations to join the North American Free Trade Agreement. *NAFTA Members Open Negotiations to Admit Chile into Free Trade Accord*, CHRON. LATIN AM. ECON. AFF., June 15, 1995, *available in* WESTLAW, LATNEWS database. Furthermore, the European Commission released a White Paper, see *infra* note 56 and accompanying text, to further the accession of the countries of central and eastern Europe to the EC.

6. Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1407 (1988), *amended by* U.S.C.A.§§ 1361-1407 (West 1994)[hereinafter MMPA].

7. United States—Restrictions on Imports of Tuna, GATT Doc. DS21/R (Report of the Panel)(Sept. 3, 1991), *reprinted in* 30 I.L.M. 1594 (1991)[hereinafter *Tuna-Dolphin*].

8. For purposes of this paper, TLAs shall refer generally to any *arrangement* (being composed not only of the trade agreement itself but also any ancillary legislation, documents and institutions created pursuant to the trade agreement) between two or more nations to promote freer trade, which encompasses large multinational agreements such as the GATT, as well as RIAs, whether in the form of customs

lobby groups in North America during the negotiation of the NAFTA, and the recent establishment of the World Trade Organization's[9] Committee on Trade and the Environment.[10] The increasing importance placed by the public on environmental protection, coupled with the progressive movement towards global and regional trade liberalization ensure that the trade-environment debate will remain a fixture in the development of trade policy.

While a great deal has been written about both regional economic integration and the trade-environment debate, there has been surprisingly little discussion of the link between the two issues. The purpose of this article is twofold: first, it offers a comparative look at how the world's two most economically significant RIAs deal with circumstances in which environmental policy and trade liberalization interact (and sometimes conflict); and second, it attempts to draw some insight from this comparison as to whether (and why) the *particular form* of RIA (i.e., a free-trade area such as NAFTA or a common market such as the EC) influences how trade-environment interactions are reconciled.

The remainder of this article is divided into four Parts. The first three Parts each deal with one of three key areas in which trade policy and environmental protection policy interact—environmental laws as non-tariff barriers to trade (NTBs), lax environmental standards as indirect subsidies, and the harmonization of environmental standards. The Introduction to each of the next three Parts will outline the potential environmental impacts associated with each of these areas, and how any negative environmental impacts might be nullified. Following this, the regimes of the EC and NAFTA with respect to each area will be detailed and compared. Part V of this article offers some thoughts as to why the EC approach to regional integration will likely be more successful than the NAFTA approach in terms of both negating the adverse environmental impacts of freer trade and improving regional environmental protection efforts in general.

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unions/common markets such as the EC or the North American Free Trade Agreement. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex. (entered into force Jan. 1, 1994), *reprinted in* 32 I.L.M. 605 [hereinafter NAFTA].

9. Agreement Establishing the WTO, Dec. 15, 1994, *reprinted in* 33 I.L.M 13 (1994).

10. Established by the Ministerial Decision on Trade and Environment, Apr. 14, 1994, *reprinted in* 33 I.L.M. 1267 (1994).

II.
ENVIRONMENTAL REGULATIONS AS NTBS

A. *Introduction*

All TLAs will have as a central objective the reduction or elimination of tariffs in order to allow for the free movement of goods in accordance with the principle of comparative advantage.[11] To prevent negotiated tariff reductions from being undermined, states participating in a TLA will also seek to eliminate those measures which have tariff-equivalent effects. As a result, TLAs will typically contain two provisions to eliminate NTBs: a clause prohibiting quantitative restrictions on the import or export of goods, and a clause requiring national treatment for internal taxes or charges on foreign and domestic products.

Environmental regulations such as packaging laws or green taxes[12] in an importing country have the potential to operate in a tariff-equivalent manner. Environmentalists, therefore, want to ensure that their domestic environmental protection measures are not deemed inconsistent with the quantitative prohibition or national treatment provisions of TLAs. Proponents of free trade might agree with environmentalists that legitimate environmental protection regulations should be safeguarded, but are worried that states will use environmental regulations as disguised trade barriers, or that ineffective regulations which yield only modest environmental benefits will impose a disproportionate burden on the free flow of goods.[13]

In order to accommodate the concerns of environmentalists *and* allow for the free movement of goods, the key will be to draft the agreement so as to enable bodies charged with the responsibility of interpreting it to distinguish legitimate environ-

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11. See the explanation of the Heckscher-Ohlin model of trade in PAUL R. KRUGMAN & MAURICE OBSTFELD, INTERNATIONAL ECONOMICS: THEORY AND PRACTICE ch.4 (1991).

12. One could imagine a country imposing a tax on all automobiles (foreign and domestic) not meeting certain fuel efficiency guidelines, in order to improve national energy efficiency. If such a tax (notwithstanding its legitimate environmental purposes) operated in such a way that the tax was imposed more often on foreign automobiles than on domestically-produced automobiles, it could be challenged as a discriminatory internal measure and thereby in contravention of the national treatment principle. This scenario arose in a recent GATT dispute between the United States and the EC. United States—Taxes on Automobiles (Report of the Panel, restricted)(Sept. 29, 1994), *reprinted in* 33 I.L.M. 1397 (1994)[hereinafter *CAFE Standards*].

13. Jagdish Bhagwati, *The Case for Free Trade*, SCI. AM., Nov. 1993, at 42-49.

mental protection measures from both trade barriers masquerading as environmental regulations and trade-restrictive measures whose environmental benefits are far outweighed by the burden placed on the free flow of goods.[14] This balance is normally struck by providing general exceptions to allow states to maintain quantitative restrictions and internal charges for legitimate domestic objectives, such as protection of the environment. When faced with an NTB challenge, the preservation of legitimate domestic environmental protection measures will, therefore, depend upon the wording of the exemptions and the interpretation given to them by trade dispute panels. More specifically, the exceptions should read broadly enough to encompass environmental protection regulations, and should provide guidance to decision-makers in determining the legitimacy of environmental regulations. In addition, dispute settlement bodies responsible for interpreting the TLA should have the mandate and possess the scientific knowledge required to ensure that the environmental objectives of the regulations are given due consideration when assessing their trade-restrictiveness. As demonstrated below and discussed in Part V of this article, the ability of dispute settlement bodies to put trade liberalization and environmental protection on an equal footing will also depend on the nature of the body of law available for dispute settlement bodies to draw upon.

B. *Environmental Protection and NTBs in the European Community*

Article 30 of the Treaty of Rome prohibits quantitative restrictions on imports: "Quantitative restrictions on imports and all measures having equivalent effect shall . . . be prohibited between [the] Member States."[15] Article 36, however, lists a number of exceptions to the general prohibition in Article 30:

> The provisions of Articles 30 to 34 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial or commercial property. Such prohibitions or restrictions shall not, however, con-

14. DANIEL C. ESTY, GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE 5 (1994).

15. Treaty of Rome art. 30.

> stitute a means of *arbitrary discrimination or a disguised restriction on trade* between Member States.[16]

Although "environmental protection" is not listed as a category in Article 36, the European Court of Justice (ECJ) in the *Cassis de Dijon* case[17] stated that the categories listed in Article 36 were not exhaustive and that the protection of Article 36 could be extended to any national measure that was a "mandatory objective" of the EC, provided that: (i) no Community legislation exists in relation to the subject matter; (ii) the measure applies equally to domestic and imported goods (i.e., the measure must be non-discriminatory); and (iii) the measure is "proportional" to the objective to be achieved.[18]

The leading ECJ case dealing with the use of Article 36 to protect an environmental regulation is the *Danish Bottles* case.[19] The case dealt with Danish legislation which established: (i) a mandatory deposit-return scheme for soft drink and beer containers; and (ii) a container approval system. No corresponding legislation existed at the Community level. The Commission brought an action on behalf of importers of soft drink and beer, arguing that the legislation violated Article 30. Denmark sought to justify the legislation on conservation grounds via Article 36. With respect to the non-discrimination requirement, the ECJ sided with Denmark in finding that the Danish legislation was not discriminatory as between domestic and foreign products, but did not go into any detail as to how it arrived at such a finding. With respect to the proportionality requirement, the ECJ found that the deposit-return scheme was "an indispensable element of a system intended to ensure the re-use of containers and therefore appears to be necessary to achieve the aims pursued by the contested rules."[20] However, in considering the application of the proportionality test to the approval scheme, the ECJ stated that while a container approval scheme would result in a

16. Treaty of Rome art. 36 (emphasis added).

17. Case 120/78, Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein, 1979 E.C.R. 649.

18. *Id.* at 662-64. Although environmental protection was not, prior to the passage of the SEA amendment, see *supra* note 3, identified in the Treaty of Rome as an objective of the EC, the ECJ in Case 240/83, Procureur de la République v. Association de défenses des brûleurs d'huiles usagées, 1985 E.C.R. 531, found that environmental protection was an "essential objective" of the EC.

19. Case 302/86, Commission v. Denmark, 1988 E.C.R. 4607.

20. *Id.* at para. 13.

higher level of environmental protection, it was disproportionate to the objective pursued.

The relationship between Articles 30 and 36 and environmental protection arose again in the *Wallonian Waste* case.[21] The case dealt with a decree issued by the Walloon Regional Executive prohibiting the storage, tipping or dumping of waste in the Belgian Region of Wallonia. The decree applied to all types of waste, from both foreign countries and other regions of Belgium. At the time there was an EC Directive dealing with the transfrontier movement of *hazardous* waste,[22] which the ECJ found in *Wallonian Waste* to be a comprehensive system of Community harmonization in relation to that type of waste, and thus the decree's prohibition was illegal as it regarded hazardous waste.[23] With respect to *ordinary* waste (not governed by the EC Directive), the ECJ stated that in order to determine whether the prohibition was discriminatory, it was necessary to take into account the unique nature of waste and the principle that environmental damage should be rectified at its source.[24] Relying on this principle, and drawing on international environmental law,[25] the ECJ concluded that:

> [I]t is for each region, commune or other local entity to take appropriate measures to receive, process and dispose of its own waste. Consequently waste should be disposed of as close as possible to the place where it is produced in order to keep the transport of waste to the minimum practicable. . . .
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> It follows that, having regard to the differences between waste produced in one place and that in another and its connection with the

21. Case C-2/90, Commission v. Belgium, 1992 E.C.R. 4431.

22. Council Directive 84/631 EEC, 1984 O.J. (L 326) 31, modified several times, most notably by Council Directive 87/112 EEC, 1987 O.J. (L 48) 31.

23. *Belgium*, 1992 E.C.R. at 4477.

24. See Treaty of Rome art. 130r(2), which provides that: "Action by the Community relating to the environment shall be based on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source, and that the polluter should pay. Environmental protection requirements shall be a component of the Community's other policies."

25. The ECJ supported its finding by pointing to the codification of the proximity principle in the 1989 Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989 Basle Convention), to which the EC was a party. At the time of the decision, the 1989 Basle Convention was not yet binding upon the EC. *See* Martin Coleman, *Environmental Barriers to Trade and European Community Law*, *in* ENVIRONMENTAL REGULATION AND ECONOMIC GROWTH 131 (A.E. Boyle ed., 1994).

place where it is produced, the contested measures cannot be considered to be discriminatory.[26]

The Treaty of Rome's national treatment clause is found at Article 95, which provides: "No Member State shall impose, directly *or indirectly*, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products."[27] The leading case on the use of Article 95 to prevent the discriminatory effects of an internal tax is *Humblot v. Directeur des services fiscaux*,[28] wherein a French road tax was challenged as contrary to Article 95. The tax in question applied on a graduated scale for cars below a certain horsepower rating (16CV) up to a maximum of 1,100 French francs; cars above the 16CV horsepower rating were assessed a flat tax of 5,000 French francs. Humblot purchased a car with a rating above 16CV and was required to pay the higher flat tax. The key point in the challenge was the fact that France produced no cars with a rating above 16CV horsepower, and thus, although the tax on its face discriminated according to size of the engine, its effect was to discriminate against imported cars. The ECJ agreed with Humblot, finding the tax contrary to Article 95.[29]

A tax having an indirectly discriminatory effect under Article 95, however, may be considered lawful if the purpose of the internal tax scheme falls within an objective justification recognized by EC law. For example, in the case of the road tax above, if France could show that it taxed larger cars at a higher rate in order to promote energy conservation, then the taxation scheme might have survived notwithstanding the fact that foreign cars attracted the higher tax more often than domestic cars. The ECJ, faced with such an argument, would hear the environmental protection justification argument, then weigh the discriminatory effects of the tax against the conservation objectives behind Article 36.[30] The test under Article 95, then, is similar to that under Ar-

26. Case C02/90, Commission v. Belgium, 1992 E.C.R. 4431, paras. 34 & 36. The ECJ curiously did not go on to do a proportionality test.

27. Treaty of Rome art. 95 (emphasis added). Whereas Article 12 of the Treaty of Rome deals with charges which apply at the border, Article 95 seeks to ensure that the application of internal taxes do not discriminate between imported and domestic goods. Case 10/65, Deutschmann v. Federal Republic of Germany, 1965 E.C.R. 469.

28. Case 112/84, 1985 E.C.R. 1367.

29. *See id.* at 1370-71, para. 3.2.

30. Massimiliano Danusso & Ross Denton, *Does the European Court of Justice Look for a Protectionist Motive Under Article 95?*, *in* 1990/91 LEGAL ISSUES EUR. INTEGRATION 67.

ticle 30, except that the tax, in order to fall within Article 95 and not Article 12, will first have to be shown to be part of an internal tax scheme and not a tax only on imports.[31]

C. *Environmental Protection and NTBs in the NAFTA*

NAFTA Articles 301(1) and 309(1) adopt the quantitative restriction prohibition and national treatment clauses of the GATT.[32] Likewise, NAFTA Article 2101 incorporates the general exceptions of the GATT:

> GATT Article XX and its interpretive notes . . . are incorporated into and made part of this Agreement. The Parties understand that the measures referred to in GATT Article XX(b) include *environmental* measures necessary to protect human, animal or plant life or health, and that GATT Article XX(g) applies to measures relat-

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31. An interesting question is whether this environmental justification would be available to a country seeking to impose a ban on goods that are not produced domestically (e.g., tropical timber or agricultural products farmed in an unsustainable manner), because it would presumably be difficult to show that such a tax was part of a general internal taxation regime (and therefore caught by Article 95) and not a charge equivalent to a customs duty under Article 12. This issue came before the ECJ in Case 90/79, Commission v. France, 1981 E.C.R. 283, in relation to a French tax on photocopiers sold in France. The overwhelming majority of photocopiers were produced outside France, and the Commission argued that the tax violated Article 12. The ECJ, however, stated that a tax on a product that is produced entirely outside the taxing country may nevertheless form part of a general system of taxation within the meaning of Article 95 (and not within Article 12) provided that the charge was related to "a general system of internal dues applied systematically to categories of the products." Importantly, the ECJ took special note of the fact that the proceeds of the tax were used to support literature and thus to aid writers who were financially injured by the use of photocopiers (i.e., the ECJ acknowledged that the tax was designed to address the problems associated with the type of product subject to the tax). STEPHEN WEATHERILL & PAUL BEAUMONT, EC LAW 361 (1993), *citing* Commission v. France, 1981 E.C.R., at para. 14. One can see how this same approach would be useful for a nation seeking to exclude products such as tropical timber from its market on environmental protection grounds.

32. The quantitative restriction provision in the GATT is found at Article XI, which states:

> No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

GATT, *supra* note 2, at art. XI.

The national treatment principle in the GATT is found at Article III(2), which provides as follows: "The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products." *Id.* at art. III(2).

ing to the conservation of *living and non-living* exhaustible natural resources.[33]

Article XX of the GATT states that:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of *arbitrary or unjustifiable discrimination* between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by a contracting party of measures:
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> . . .
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> (b) *necessary* to protect human, animal or plant life or health;
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> . . .
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> (g) *relating* to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption[.][34]

In order to evaluate the potential environmental implications of Article 2101 of the NAFTA it is first necessary to examine the jurisprudence related to Articles XX(b) and (g) of the GATT.

The most insightful interpretation of the preamble to the exceptions in Article XX is found in the *Automotive Spring Assemblies* decision.[35] In that case, Canada challenged a U.S. International Trade Commission exclusion order banning the imports of certain automotive spring assemblies which allegedly infringed U.S. patent laws. The GATT Panel found that the exclusion order did not constitute a means of "arbitrary or unjustifiable discrimination" since it applied to assemblies produced in all foreign countries and not only Canada.[36] The Panel also found that the exclusion order was not a "disguised restriction on international trade" because notice of the order was published in the Federal Register and the order was enforced by U.S. customs officials at the border.[37] From this decision, then, we can conclude that so long as a measure is transparent and does not single out the products of one or two specific countries, it is likely to meet the conditions in Article XX's chapeau. The specific exceptions listed in Article XX, however, have been interpreted in a far more restrictive manner.

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33. NAFTA, *supra* note 8, at art. 2101 (emphasis added).

34. GATT, *supra* note 2, at art. XX (emphasis added).

35. United States—Imports of Certain Automotive Spring Assemblies, GATT Doc. L/5333 (Report of the Panel)(May 26, 1983), *reprinted in* Basic Instruments and Selected Documents 107, 124-28 (30th Supp. 1984).

36. *Id.* at 125, para. 55.

37. *Id.* at 125, para. 56.

With respect to Article XX(b), two cases are informative: the *Thai Cigarettes* case[38] and the *Tuna-Dolphin* case.[39] In the *Thai Cigarettes* case, Thailand had refused to grant import licences for cigarettes in order to achieve its stated public health objective of reducing smoking. The key point in the Panel's Report centered on the interpretation of the word "necessary" in Article XX(b).[40] The Panel in the *Thai Cigarettes* case adopted a previous Panel's interpretation of the word necessary:

> [A] contracting party cannot justify a measure inconsistent with other GATT provisions as "necessary" in terms of Article XX(b) *if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it.* By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, *that which entails the least degree of inconsistency with other GATT provisions.*[41]

Thus, the measure sought to be justified must meet a "least trade restrictive" test. In the *Thai Cigarettes* case, Thailand could have achieved its public health objectives (protecting the public from harmful additives in imported cigarettes and reducing domestic consumption of cigarettes) through less restrictive means, namely

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38. Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes (Report of the Panel) (Nov. 7, 1990), *reprinted in* 30 I.L.M. 1122 (1991)[hereinafter *Thai Cigarettes*].

39. *Tuna-Dolphin*, *supra* note 7. The GATT Panel ruled that the MMPA, *supra* note 6, which restricted the importation of tuna caught by fishers not meeting certain dolphin-kill rates, violated the national treatment provision in the GATT, and did not fall under the GATT Article XX exceptions. The MMPA sought to prevent the incidental killing of dolphins by tuna fishers in the eastern tropical Pacific Ocean by requiring the dolphin-kill rates of tuna fishers meet certain levels. *Tuna-Dolphin*, *supra* note 7, at 191-205, paras. 5.1-7.3.

40. The Panel began its decision, however, by seeking to situate the measure within the Article XX(b) exception. The Panel stated that it had concluded that smoking was a serious risk to human health and that "measures designed to reduce the consumption of cigarettes fell within the scope of Article XX(b)." *Thai Cigarettes*, *supra* note 38, at 222-23, para. 73. In the *Tuna-Dolphin* case, however, no such initial attempt to link the measure to a public health objective took place; the Panel instead stated that each GATT contracting party had the right to set its own human, animal or plant life or health standards. *Tuna-Dolphin*, *supra* note 7, at 199, para. 5.27. This latter approach seems to suggest that if a country sought to justify a trade-restrictive environmental measure under Article XX(b), the Panel will not question the goal of the national policy sought to be protected.

41. *Thai Cigarettes*, *supra* note 38, at 223 (*quoting* United States—Section 337 of the Tariff Act of 1930, GATT Doc. L/6439 (Report of the Panel) (Nov. 7, 1989), *reprinted in* Basic Instruments and Selected Documents 345 (36th Supp. 1990) (second emphasis added)).

non-discriminatory labelling and a ban on cigarette advertising and smoking in public places. The ban on imports, then, was struck down by the Panel.

In the *Tuna-Dolphin* decision the Panel's finding that the U.S. measure could not be justified under Article XX(b) turned on the Panel's conclusion that the measure sought to regulate extra-territorially. The Panel did, however, comment on the "necessity" requirement in Article XX(b):

> The Panel considered that the United States' measures, even if Article XX(b) were interpreted to permit extrajurisdictional protection of life and health, would not meet the requirement of necessity set out in that provision. The United States had not demonstrated to the Panel . . . that it had exhausted all options reasonably available to it to pursue its dolphin protection objectives through measures consistent with the General Agreement, in particular through the negotiation of international cooperative arrangements, which would seem to be desirable in view of the fact that dolphins roam the waters of many states and the high seas.[42]

With respect to Article XX(g), no "necessity" or "least trade restrictive" test is required.[43] Instead, the measure must be *related to* the conservation of exhaustible natural resources. The most important GATT Panel case interpreting this provision is the 1988 *Salmon-Herring* case.[44] In that case, the United States challenged a Canadian regulation that imposed export restrictions on unprocessed herring and salmon. Canada argued that the measure (which required fishing vessels to land all catches of salmon and herring in Canada to determine total catches) was

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42. *Tuna-Dolphin*, *supra* note 7, at 199-200, para. 5.28. The Panel went on to state that the import prohibition also failed to meet the "necessity" requirement because the dolphin-kill rate to be met was linked to the dolphin-kill rate recorded by U.S. fishers for the same period:

> Consequently, the Mexican authorities could not know whether, at a given point of time, their policies conformed to the United States' dolphin protection standards. The Panel considered that a limitation on trade based on such unpredictable conditions could not be regarded as necessary to protect the health or life of dolphins.

Id.

Thus, the GATT Panel seems to incorporate a test for vagueness into the "necessity" requirement. Any environmental measure sought to be justified under GATT, then, cannot be a general prohibitory-type regulation requiring any level of discretion but rather a specific standard.

43. This is confirmed by the GATT Panel ruling in the *CAFE Standards* case, *supra* note 12.

44. Canada—Measures Affecting the Exports of Unprocessed Herring and Salmon (Report of the Panel) (Mar. 22, 1988), *reprinted in* Basic Instruments and Selected Documents 98 (35th Supp. 1988).

required to conserve salmon and herring stocks.[45] The GATT Panel interpreted the words "related to" to mean "primarily aimed at" and struck down the Canadian regulations, concluding they were not primarily aimed at conservation efforts because the data could be collected at U.S. stations and passed on to Canadian officials.[46]

Both the "least trade restrictive" and the "primarily aimed at" tests, as iterated and applied by GATT Panels to date, set a high standard for states seeking to justify environmental protection measures that have trade restrictive effects. The last sentence in Article 2101 of the NAFTA would seem to add little to soften these two tests. The statement that Article XX(b) includes environmental measures does no more than to say environmental protection regulations can fall within Article XX(b); however, it does not alter the Article XX(b) test. Similarly, the statement that Article XX(g) relates to the conservation of living and nonliving exhaustible natural resources does no more than confirm that environmental protection provisions made to conserve nonliving exhaustible natural resources (such as petroleum and minerals) could fall within Article XX(g)—it does not in any way alter the "primarily aimed at" test.

Although the wording of Article 36 of the Treaty of Rome and Article 2101 of the NAFTA (and by incorporation Article XX of the GATT) are similar, the EC jurisprudence demonstrates a far greater sensitivity to the environmental objectives of challenged measures. The legal tests established by the ECJ and GATT Panels under the exception provisions are different. The ECJ has focused on the legislation itself when applying the Article 36 test whereas GATT Panels have emphasized the trade-restrictiveness of the measure.[47] The danger of the latter approach is that it affords too little consideration to the environmental objectives of a measure. In other words, the GATT test will not involve a true balancing of environmental and trade objectives. The result has been, as demonstrated by the jurisprudence, that GATT Panels are less likely to accept restrictions on the free movement of goods. As stated above, the alterations to GATT Article XX

45. *Id.* at 101-02, paras. 3.3-3.6. The effect of this measure was to discourage the processing of salmon and herring in the United States because to do so would require unloading and reloading in Canada and unloading for a second time in the United States.

46. *Id.* at 111-15, paras. 4.1-5.3.

47. PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 704 (1995).

made by NAFTA Article 2101 would seem to do little to alter the traditional GATT test.

III.
LAX ENVIRONMENTAL STANDARDS AS INDIRECT SUBSIDIES

A. *Introduction*

Direct governmental subsidies for the production of certain goods are obviously trade distorting, because the price of the good will not accurately reflect the cost of its production. Most TLAs, therefore, have tried to regulate subsidies in one way or another.[48] Subsidies, however, have been a difficult subject-matter to regulate in part because of their vagueness. Subsidies can take the form of soft loans or loan guarantees provided by government or tax breaks for certain industries. Some environmentalists, together with industrialists and political leaders in countries with high environmental standards, have contended that lax environmental standards amount to an indirect subsidy because the goods produced in that country do not bear the full costs of production.[49] While environmentalists and industrialists in nations with high environmental standards find themselves on the same side of the fence on this issue, their reasons for opposing low environmental standards abroad are quite different. Industrialists are concerned that the costs of more stringent environmental regulations make them uncompetitive in relation to foreign firms not held to the same standards. Environmentalists oppose low standards because such standards fail to internalize the environmental protection costs of producing goods. Environmentalists also oppose the idea of trading partners with lower standards because the environmentalists fear lower standards will slow the development of their own countries' environmental protection laws (as a result of their governments' fears of making their domestic industry less competitive).[50]

48. TLAs such as the GATT, for example, have not prohibited subsidies *per se*, but rather have sought to regulate subsidies by allowing nations that import subsidized goods to impose countervailing duties against such goods.

49. In the alternative, it has been argued that less stringent requirements violate anti-dumping laws. Richard B. Stewart, *Environmental Regulation and International Competitiveness*, 102 YALE L.J. 2039, 2048-49 (1993). *See also* SANDS, *supra* note 47, at 722-23.

50. A classic illustration of this "political drag" concern is the EC's ongoing struggle to put in place a carbon dioxide emission tax. The first drafts of the Community legislation conditioned the introduction of the tax on similar measures being taken

Free traders argue that states may have lower standards for good reasons[51] and ought to be able to take advantage of the comparative advantage gained from lower standards *provided that* there are no pollution spillovers.[52] Most often, states have low standards because they cannot afford to establish and maintain an appropriate environmental protection regime. The debate, then, is over a contentious, developed versus developing country issue.

There are a number of ways to deal with the problem of disparate environmental standards among trading partners, such as imposing countervailing duties on foreign producers that do not have to comply with environmental standards ("ecoduties"), allowing for border tax adjustments to compensate for environmental taxes imposed on domestic industries, harmonizing environmental standards among participating states, and transferring technology or financial aid to developing states. Countervailing duties do little to remedy environmental problems or practices in the sanctioned state,[53] especially if the reason for the low standards is a low level of economic development. Border tax adjustments pose the same problems, at least in relation to imports. The process of harmonization of standards, often encouraged or mandated in TLAs, is the ideal solution. But as demonstrated below, such harmonization is often difficult to

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by other OECD nations. *See EC Unveils Energy Tax Proposal Conditioned on Adoption by Other Industrialized Nations*, 15(10) INT'L ENV'T REP. (BNA) 283 (May 20, 1992).

51. Standards may be low in certain countries because of differences in climate, weather patterns, existing pollution levels, population density, or risk preferences. ESTY, *supra* note 14, at 156-57. *See also* RICHARD N. COOPER, ENVIRONMENT AND RESOURCE POLICIES FOR THE WORLD ECONOMY 29-30 (1994).

52. Some environmentalists will find this argument unpersuasive, noting that environmental degradation even if contained wholly in a foreign jurisdiction, should be prevented. See the discussion of "psychological spillovers" in Richard Blackhurst & Arvind Subramanian, *Promoting Multilateral Cooperation on the Environment*, *in* THE GREENING OF WORLD TRADE 247 (Kym Anderson & Richard Blackhurst eds., 1992).

53. In the GATT, for example, to avail itself of the right to impose such countervailing duties, an importing country must show that its domestic competing industry is *materially injured* by the subsidy. Thus, country *A* may be able to prevent the unsustainably-produced forest products of country *B* from reaching its markets by imposing countervailing duties, but it can do nothing about sales of such products from country *B* to country *C*. This problem is enhanced if country *A* produces the same forest products but does not subsidize its domestic producers, as country *C* in such circumstances will likely prefer to trade with country *B*, which can supply the products at lower prices. *See* John J. Barceló III, *Countervailing Against Environmental Subsidies*, 23 CAN. BUS. L.J. 3 (1994).

achieve even in countries with similar levels of environmental protection, and is virtually impossible to achieve in countries with significantly disparate levels of environmental protection without significant financial aid or technology transfer. Another way to remedy the problem of disparate standards is to force participating states with low standards to establish and enforce higher standards by giving rights to third parties (foreign nationals, foreign countries or supra-national bodies) to challenge the non-enforcement of national environmental standards. Again though, such an option only seems fair if aid or technology is provided to poorer countries to enable them to comply with the more stringent standards. Thus, the traditional economic/trade responses to the problem of indirect environmental subsidies (i.e., ecoduties, border tax adjustments and harmonization) may often be inappropriate.

It has come to be recognized in the negotiation of multilateral environmental agreements that the only equitable way to avoid the environmental consequences of economic growth in developing countries is to provide financial and technical assistance to developing countries to aid in establishing and maintaining higher environmental standards. As shown below, this premise holds true in the context of TLAs that encompass wealthy and poor nations.

B. *Environmental Subsidies in the European Community*

Prior to the second and third enlargements of the EC (which saw the accession of less-industrialized, poorer nations),[54] the EC had not seriously confronted the issue of environmental subsidies. Currently, the plans for accession by the countries of central and eastern Europe (CEECs) raise the same concerns. However, accession to the EC requires that potential members accept the entire legislation of the Community (the *acquis communautaire*), and thus, all of the EC's environmental legislation.

54. Greece applied for EC membership in 1975 (EC Bulletin 1975, No. 6, points 1201-12). The Commission recommended acceptance of the application via an opinion dated January 28, 1976 (EC Bulletin 1976, No. 1, points 1101-11), and the Acts relating to Greece's accession were signed on May 28, 1979 in Athens. Greece became the tenth Member State of the EC on January 1, 1981. Prior to Greece's accession, Spain and Portugal also applied for EC membership. The Commission's opinions recommended acceptance in both cases (EC Bulletin 1978, No. 5, points 1.1.1-1.1.6; EC Bulletin 1978, No. 11, points 1.1.1-1.1.8), and the accession documents were signed in Lisbon and Madrid on June 12, 1985. Spain and Portugal joined the EC on January 1, 1986.

In order to bring poorer states up to speed with Community law, the EC has recognized that these states require both financial and technical assistance. As part of the CEECs' pre-accession process, the EC Member States have made available vast sums of money to help the CEECs attract investment, train workers and improve environmental standards.[55] In addition, the EC Commission has recently[56] committed the EC to providing specialized technical assistance to the CEECs via the establishment of a Technical Assistance Information Exchange Office, which will assist not only in the approximation of legislation but in the establishment of implementation and enforcement mechanisms and institutions to support the new legislation.[57] Moreover, once the CEECs do accede, they will likely qualify for regional aid under the EC's Structural and Cohesion Funds, created to narrow the gap in regional economic disparity.[58] A total of 2.3 billion Ecu (approximately $2.9 billion) was allocated for environmental pro-

55. This financial aid has been provided in conjunction with the other OECD countries under the PHARE program (Poland and Hungary: Aid for the Restructuring of Economies). The program, run by the European Commission, was initially intended to assist only Poland and Hungary but now provides aid to eleven countries. Aid takes the form of subsidies and loans in the fields of technical assistance, training, feasibility studies, pilot projects (particularly those relating to infrastructure) and activities in connection with the reorganization of institutions and regulatory endeavors. The European Union is the main source of aid to the CEECs. By 1994 the European Union had committed a total of 4.3 billion Ecu ($5.4 billion) to the PHARE program. EUROSTAT, EUROPE IN FIGURES 390 (4th ed. 1995).

56. Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union: White Paper from the Commission to the European Council, COM(95)163 final [hereinafter *White Paper*].

57. One of the strong points of the *White Paper* is its emphasis on the need for adequate implementation and enforcement mechanisms:

> Aligning with the Union's internal market legislation goes further than the economic reforms necessary to put in place a market economy.... It will require more time both for legislating and for building the institutions needed to ensure the actual implementation of new laws and to monitor progress.... Without the necessary institutional changes, the adoption of internal market legislation could result in a merely formal transposition of rules. This would not be an adequate basis for the mutual confidence between all participants on which the internal market demands. Nor would it achieve the real economic impact and benefits which the associated countries are seeking.

Id. at para. 1.12.

58. J.M.C Rollo, *The EC, European Integration and the World Trading System, in* TRADE BLOCS? THE FUTURE OF REGIONAL INTEGRATION 35, 51 (Vincent Cable & David Henderson eds., 1994). At the Edinburgh Summit, it was agreed that the EC's Structural Funds would be increased to 27.4 billion Ecu (approximately $34.2 billion) by 1999 while the Cohesion Funds (designed to aid the poorer Member States to meet the expenses of greater economic integration) will rise to 2.6 billion Ecu (approximately $3.25 billion) by 1999. ALLAN M. WILLIAMS, THE EUROPEAN COMMUNITY: THE CONTRADICTIONS OF INTEGRATION 176-77 (2d ed. 1994).

tection expenditures in the 1994 Community budget, the bulk of this amount being channelled through the Structural Funds.[59] In July 1992, a smaller Community fund was established to provide financial support for specific environmental initiatives such as pilot projects and technical demonstration programs.[60]

Once a country becomes a full member of the EC, the commission keeps in check the Member State's enforcement of EC environmental legislation, and both the Commission or another Member State may bring an action for failure to comply with its environmental obligations.[61] Since 1980, the EC Commission has brought more than fifty cases to the ECJ alleging failure to comply with environmental obligations, most of which have been successful.[62]

C. *Environmental Subsidies in the NAFTA*

Environmentalists in Canada and the United States were particularly concerned about the disparity in environmental standards between their nations and Mexico. Consequently, Mexico's lower environmental standards became the main focus of the trade-environment debate during the negotiation of the NAFTA and more significantly, the subsequent North American Agreement on Environmental Cooperation (commonly referred to as the Environmental Side Agreement (ESA)).[63] The environmental and labor concerns surrounding the final NAFTA text increased public opposition to the NAFTA, compelling the then newly elected Democratic and Liberal governments of the United States and Canada to conclude the ESA and a side agreement on labor. The ESA's approach to lowering environmental standards is fundamentally different from that of the EC.

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59. David Wilkinson, *Using the European Union's Structural and Cohesion Funds for the Protection of the Environment*, 3(2/3) REV. EUR. COMMUNITY & INT'L ENVTL. L. [RECIEL] 119, 125 (1994). Environmental spending from the Structural Funds has been severely criticized because of different Member States' definition of what constitutes an "environmental project," and the lack of spending supervision or monitoring carried out by the Commission. For a critique of Structural Fund spending see JOANNE SCOTT, DEVELOPMENT DILEMMAS AND THE EUROPEAN COMMUNITY 80-89 (1994). The EC recently passed Structural Fund Regulations in order to more closely govern spending.

60. The fund is called L'instrument financier pour l'environnement (LIFE). Wilkinson, *supra* note 59, at 121-23.

61. Treaty of Rome arts. 169-170.

62. SANDS, *supra* note 47, at 173.

63. NAFTA, *supra* note 8, at Supp. 1, *reprinted in* 32 I.L.M. 1480 (1993) [hereinafter ESA].

The ESA gives the NAFTA Parties the ability to set in motion a dispute settlement procedure against another Party for failure to enforce its environmental laws.[64] The process begins with the filing of a complaint and the initiation of consultations between the NAFTA Parties. Any NAFTA Party may request consultations with any other NAFTA Party that it believes has persistently failed to "effectively enforce its environmental law[s]."[65] If the Parties fail to resolve the issue within sixty days of the delivery of the request, they may submit the dispute to the Council of the Commission for Environmental Cooperation (CEC),[66] which shall make recommendations to the Parties in order to bring about a resolution.[67] If no resolution is reached within sixty days of referral to the Council, and the Council agrees by a two-thirds majority vote, the matter may be referred to an arbitral panel that will determine whether a Party has persistently failed to effectively enforce its environmental laws.[68] If an affirmative determination is made, the Parties to the dispute "may agree on a mutually satisfactory action plan, which normally shall conform with the determinations and recommendations of the panel."[69] In the event the parties cannot agree on an action plan or there is a question as to the efficacy of the implementation of an action plan, the panel may be reconvened and can impose an action plan or a monetary penalty against the non-enforcing Party.[70] Failure to pay the fines gives certain rights to the complaining Party to put in place tariffs and trade barriers in order to collect the amount equal to the monetary penalty.[71]

The ESA and the NAFTA create little in the way of cooperative approaches to remedying the disparity between Mexican en-

64. This ESA non-enforcement process is different from the one in the NAFTA itself, which will be used in environmental-NTB disputes.

65. ESA, *supra* note 63, at art. 22(1).

66. The CEC, located in Montreal, is composed of a Council, a Secretariat and a Joint Public Advisory Committee. *Id.* art. 8(2). The Council is comprised of senior environmental officials from all NAFTA countries and is headed by Canada's Minister of the Environment, the U.S. Environmental Protection Agency Administrator, and the Mexican Secretary for Environment, Natural Resources and Fisheries. The Secretariat acts as the CEC's headquarters and is headed by Victor Lichtinger, a Mexican-born economist. *See Structured to Meet the Challenge*, ECO REGION (Secretariat of the Comm'n for Envtl. Cooperation, Montreal, Que.), Summer 1995, at 4.

67. ESA, *supra* note 63, at art. 23(4).

68. *Id.* at art. 24(1).

69. *Id.* at art. 33.

70. *Id.* at art 34. The funds from the monetary penalty are paid into a fund to help finance environmental enforcement. *Id.* at annex 34.

71. *Id.* at art. 36.

vironmental laws and Canadian and American environmental laws. The North American Development Bank, established on January 1, 1995 and capitalized at an initial two billion dollars (funded by the United States and Mexican governments), was created to finance projects certified by the Border Environment Cooperation Commission (BECC). The BECC will provide technical and financial assistance for environmental infrastructure projects in the US-Mexico region, an area that has already suffered extreme environmental devastation.[72] The BEEC's objective here, in contrast with the EC approach, is to remedy *past* environmental harms resulting from free trade. There has been no concerted effort within NAFTA to aid Mexico in raising its level of environmental protection to comparable Canadian and American levels.

IV.

HARMONIZATION OF ENVIRONMENTAL STANDARDS

A. *Introduction*

Discerning the environmental implications of standards harmonization is not straightforward. One way to avoid the disparity in national levels of environmental regulation is to harmonize those standards related to environmental protection.[73] For this

72. The "maquiladora" program was developed in 1966, and permits Mexican manufacturers to receive raw materials and component parts from the United States free of import duties. The Mexican manufacturers assemble and ship the final products to the United States with a tax levied on the value added. Close to 2,000 maquiladoras are in operation in Mexico in the border region. *See* Richard J. King, *An Analysis of the Environmental Provisions in the North American Free Trade Agreement*, 3 J. ENVTL. L. & PRAC. 299, 314-15 (1993).

73. What constitutes an "environmental standard" can vary widely, including product standards (e.g. packaging laws or carbon dioxide emission regulations for new automobiles), production process standards (e.g. effluent discharge regulations for pulp mills), and sanitary and phytosanitary standards (SPS) (e.g. pesticide laws). The Uruguay Round of GATT saw the conclusion of two agreements aimed at supplementing the existing GATT rules relating to health and environmental protection. The first agreement covers "technical regulations" defined in Annex I of the Agreement on Technical Barriers to Trade as a "[d]ocument which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method." Agreement on Technical Barriers to Trade, *reprinted in* LAW & PRACTICE OF THE WORLD 135 (Joseph F. Dennin, ed., 1995) [hereinafter the TBT Agreement]. The second agreement is aimed at laws and regulations related to food safety. Agreement on the Application of Sanitary and Phytosanitary Measures, *reprinted in* H.R. DOC. No. 316, 103d Cong., 2d Sess. 1381 (1994) [hereinafter SPS Agreement]. For

reason, and the fact that an equivalent level of regulation among states offers greater certainty for firms operating in more than one state, proponents of free trade have long been advocates for the harmonization of regulatory standards as a solution to the trade-environment debate.

Environmentalists are not opposed to the harmonization of environmental standards *per se*, but many are concerned that harmonization efforts will result in environmental standards set at the lowest level among states participating in a given TLA, and that states will be prevented from maintaining existing (or enacting new) legislation that sets standards higher than harmonized levels. In order to avoid harmonized standards acting as a regulatory ceiling, most TLAs have sought to encourage harmonization at a baseline level, but allow states to maintain more stringent standards provided that the standards do not constitute a disguised trade barrier. These states may be required to justify their departure from the baseline according to criteria similar to those used to evaluate environmental laws challenged as NTBs, or according to objective scientific criteria (the so-called "sound science" justification).[74]

This approach may or may not be satisfactory depending upon a couple of factors. First, what level will be chosen as the basis for harmonization? Many TLAs have favored using international standards as set by certain international bodies as a basis. The danger, as environmentalists are quick to point out, is that these bodies are not accountable to an electorate, operate largely without public participation, and have been criticized as being overly influenced by large multinational chemical and food companies.[75] A more preferable approach would be for the participating states in a TLA to set their own standards in a forum that allows for public participation.

Second, the test for justification (whether an NTB-type test or a sound science test) should place the environmental objectives of higher regulations on an equal footing with the objective of

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the purposes of this paper, the phrase "environmental standards" refers to both technical regulations and SPS measures.

74. *See* Kenneth Berlin & Jeffrey M. Lang, *Trade and Environment*, 16(4) WASH. Q. 35, 41-42 (1993).

75. For example, with respect to food safety, the new WTO regime relies upon the standards set by the Codex Alimentarius Commission (CAC) and the International Office of Epizootics (IOE). *See* SPS Agreement, *supra* note 73. For a discussion of the non-accountability of organizations such as the CAC, see ESTY, *supra* note 14, at 172-73.

the free movement of goods.[76] Requiring a scientific basis for a higher environmental standard raises a special concern by assuming hard evidence supports the standard. Often environmental protection policy decisions are made in the face of considerable scientific uncertainty, yet are tolerated until such certainty is attained because of the serious consequences that might result in the absence of such standards (i.e., through application of the precautionary principle).

B. *Harmonization in the European Community*

It is safe to say that no TLA other than the EC has made considerable progress in harmonizing its environmental standards. Throughout the 1970s and early 1980s the EC pursued a policy (in all fields) of full harmonization in its enactment of secondary legislation. In the 1980s, the EC moved from a policy of full harmonization to one based on approximation and mutual recognition,[77] except in food, medicines, and potentially hazardous products,[78] where full harmonization remains the objective. Under the new approach, secondary Community legislation will set out the essential requirements for Member States, and so long as these are met, Member States must mutually recognize each other's standards. While initially this approach might seem a *carte blanche* for states to set lower standards in many areas and leave industry free to adhere to either stringent Community standards or lax national standards, the danger is not as great as it seems. As many authors have noted, the negative environmental impacts of a less-than-full harmonization strategy are tempered by the fact that industry is export-oriented and producers have a strong incentive to comply with the more stringent Community standards.[79] Also, the mutual recognition approach is

76. *See* JUSTIN WARD ET AL., ENVIRONMENTAL PRIORITIES FOR THE WORLD TRADING SYSTEM: RECOMMENDATIONS TO THE WTO COMMITTEE ON TRADE AND ENVIRONMENT 13 (1995).

77. ANTHONY I. OGUS, REGULATION: LEGAL FORM AND ECONOMIC THEORY 175 (Peter Cone et al. eds., 1994). Given the diversity of the nations comprising the EC, achieving full harmonization has been difficult. *See id.* at 176.

78. In many cases, environmental laws fall within this category and are therefore still approached with the goal of full harmonization. In addition, the bulk of Community law in existence was enacted under the full harmonization policy, and is amended and updated in this context. *See* NEILL NUGENT, THE GOVERNMENT AND POLITICS OF THE EUROPEAN UNION 276 (3d ed. 1994); *White Paper*, *supra* note 56, at paras. 2.18-.19.

79. Eckard Rehbinder & Richard Stewart, *Environmental Protection Policy*, *in* 2 INTEGRATION THROUGH LAW 1, 8 (Mauro Cappelletti et al. eds., 1985).

recognized as temporary; the intention is to replace national standards as soon as possible with standards established by Europe's two main standard-setting bodies (the European Committee for Standardisation (CEN) and the European Committee for Electrotechnical Standardisation (CENELEC)), both of which have EC countries as members and operate by a weighted voting procedure.[80]

Once harmonized standards are set,[81] the amendments to the Treaty of Rome made by the SEA permit Member States to maintain their environmental regulations if the harmonized standard falls below Member States' national levels, provided the national measures "are not a means of arbitrary discrimination or a disguised restriction on trade."[82] Thus, the concern that harmonization will lead to a downward harmonization of standards or that the harmonized level will act as a regulatory ceiling rather than a regulatory floor is largely avoided.

C. *Harmonization in the NAFTA*

The harmonization of standard-setting measures (SPS standards) in the NAFTA is covered by Article 714, which states: "Without reducing the level of protection of human, animal or plant life or health, the Parties shall, *to the greatest extent practicable . . . pursue equivalence* of their respective sanitary and phytosanitary measures."[83] Article 906 addresses technical standards: "Without reducing the level of safety or of protection of human, animal or plant life or health, the environment or consumers . . . and taking into account international standardization activities, the Parties shall, *to the greatest extent practicable, make compatible* their respective standards-related measures."[84]

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80. NUGENT, *supra* note 78, at 327-28.

81. Article 100a(3) of the Treaty of Rome (as amended by the SEA, *supra* note 3), states that the Commission, in proposing environmental harmonization legislation, "will take as a base a high level of protection."

82. Treaty of Rome art. 100a(4).

83. NAFTA, *supra* note 8, at art. 714 (emphasis added).

84. *Id.* at art. 906 (emphasis added). Note that in both sections there is a qualification on the pursuit of harmonization. Also, there is a subtle but important difference between pursuing equivalence in standard-setting (SPS standards) and making compatible national standards (all standards other than SPS standards). "Make compatible" is defined as bringing "different standards-related measures of the same scope approved by different standardising bodies to a level such that they are either identical, equivalent, or have the effect of permitting goods or services to be used in place of one another or fulfill the same purpose." *Id.* at art. 915.

In setting equivalent or compatible standards, however, Parties are to use international standards as a base,[85] and are encouraged to become involved in standard-setting bodies such as the CAC and IOE. With respect to both SPS and technical standards, the NAFTA Parties are permitted to set standards more stringent than international standards.

Article 712 allows each NAFTA Party to establish SPS measures that are more stringent than international standards, provided that they:

> (i) are based on scientific principles and are not maintained where there is no longer a scientific basis for it;
> (ii) are based on a risk assessment;
> (iii) do not arbitrarily or unjustifiably discriminate between its goods and the like goods of another party;
> (iv) are applied only to the extent necessary to achieve its appropriate level of protection, taking into account technical and economic feasibility; and,
> (v) do not constitute a disguised restriction on trade.[86]

With respect to Chapter 9, Articles 904 and 907(2) allow each NAFTA Party to establish the levels of protection in its standards-related measures that it considers appropriate provided that such measures: (i) are non-discriminatory; (ii) do not constitute an unnecessary obstacle to trade; (iii) do not result in arbitrary or unjustifiable discrimination against the goods of another Party; and (iv) do not constitute a disguised restriction on trade between the Parties.[87]

With regard to both SPS and technical standards, national standards that conform to acknowledged international standards are presumed to be consistent with Articles 712, 904 and 907(2). A risk assessment is required for SPS standards that go beyond international standards. While not required for technical standards, a NAFTA Party *may* conduct a risk assessment in pursuing its legitimate objectives.[88] These provisions, taken together, would seem to indicate that the harmonization of environmental standards to any level beyond international standards is not likely to occur, and that national SPS standards that are more stringent than international standards will be seriously scrutinized. National technical standards that are more stringent than

85. *Id.* at arts. 713(1) & 905(1).
86. *Id.* at art. 712.
87. *Id.* at arts. 904 & 907(2).
88. *Id.* at art. 907(1).

international standards will have to be justified under the NAFTA NTB test.

V.
DISCUSSION

It has hopefully been demonstrated that the EC is better-suited than the NAFTA is likely to be at countering the adverse environmental consequences associated with regional trade liberalization. The next three sections offer some explanations as to the EC's success. Basically, the hypothesis is that the EC's success flows from its ability to achieve both deeper economic integration and wider political integration, as well as the fact that the European model of regional integration is one that is based upon supra-national rule-making with such rules being incorporated into (and enforced as) national and sub-national laws. Thus, the EC's success has economic, political and legal underpinnings. The final section asks whether the EC model can serve as a prototype for North American economic integration, given the asymetries in size and level of development in the North American economies. While the Community framework is likely not transferable in its entirety to North America, certain aspects of the EC regime should be adaptable to the North American regime.

A. *Deeper Integration*

Once tariffs and the more conspicuous barriers to trade have been eliminated, deeper economic integration requires the elimination of variations in national standards and rules that act as impediments to trade. Without a conscious effort on the part of the participating states to an RIA to harmonize regulatory standards, variations in national standards will seek to be leveled by judicial annulment of national standards (i.e. NTB-type challenges). Such a challenge may have two possible outcomes, both of which have adverse environmental effects. The worse result occurs if the challenge is successful, since it will be a higher standard that is challenged as an NTB.[89] The effect is equivalent to a downward harmonization. If the challenge is unsuccessful (or if no challenge is brought at all) regulatory disparities will remain. The danger with pursuing a policy of non-harmonization and accepting variations in environmental law regimes is that economic

89. Rehbinder & Stewart, *supra* note 79, at 7.

resources may be relocated to the country with the lax standards, thus accelerating economic development in the RIA's least developed areas. While this result may appear beneficial in the short term, the long term consequences of accelerated economic growth in the absence of adequate environmental standards will be devastating, as Mexico's maquiladora region demonstrates.[90]

The EC's deeper integration objectives have led it to harmonize its Member States' environmental (and other) standards. Much of the EC's earliest environmental legislation was aimed at removing trade distortions resulting from variations in national environmental laws.[91] The bulk of this legislation was passed pursuant to Article 100 of the Treaty of Rome, which allowed for the issuance of directives for the harmonization of laws.[92] Although the adoption of legislation under Article 100 required the unanimous vote of the Council, a fair amount of environmental legislation was passed.[93] When, in the mid-1980s, the Community saw that its economic integration was at a standstill and that many NTBs had not been removed, it commissioned a White Paper[94] which identified 300 measures that had to be achieved to create a Single Market, and amended the Treaty of Rome to enable harmonization legislation to be passed by qualified majority voting.[95] Only 18 of the 300 measures had not been completed by the Commission's 1992 deadline. Since the SEA's adoption the European Commission has been able to promulgate, and the Council adopt, more stringent legislation at a quicker rate.

The EC has been the only RIA to achieve any success in harmonizing its Members' environmental (and other regulatory) standards for two main reasons. First, the earliest harmonization

90. Frederick M. Abbott, *Integration Without Institutions: The NAFTA Mutation of the EC Model and the Future of the GATT Regime*, 40 AM. J. COMP. Law 917, 939-40 (1992). See *supra* note 72 and accompanying text for a discussion of Mexico's maquiladora region.

91. Frederick M. Abbott, *Regional Integration and the Environment: The Evolution of Legal Regimes*, 68 CHI.-KENT L. REV. 173, 188 (1992).

92. Treaty of Rome art. 100.

93. Between the years 1973 and 1987, over 100 environmental directives were passed. WILLIAMS, *supra* note 58, at 197.

94. WEATHERILL & BEAUMONT, *supra* note 31, at 20, *citing* Completing the Internal Market: White Paper from the Commission to the European Council, COM(85)310 final.

95. Article 8a of the SEA, *supra* note 3, committed the Member States to "adopt measures with the aim of progressively establishing the internal market on 31 December 1992." The move from unanimous to qualified majority voting facilitated the passage of legislation to achieve this goal by removing the ability of a single state to block legislation.

legislation in the field of environmental protection was passed partly due to the efforts and resolve of the European Commission, which was a vigorous proponent of deeper integration. The existence of the Commission as a non-partisan voice has been a useful counter to the Council (an institution capable of succumbing to national self-interests).[96] However, Member States were responsive to the Commission's proposals because they believed that the economic benefits that would flow from the harmonization of environmental laws (increased competition, economies of scale and economic growth) would outweigh the disadvantages associated with legislation not entirely to their liking. Second, when the harmonization process stuttered, the Member States jointly agreed to accept a partial surrender of their sovereignty over the setting of national norms[97] and establish a harmonization process based on qualified majority voting.

The harmonization of Community environmental standards has reaped significant rewards for environmental protection policy efforts in the less developed parts of Europe. Greece, Ireland, Portugal, Spain, and Italy have seen their environmental protection regimes develop from embryonic stages to very advanced levels in a short period of time. In Britain, France and Belgium, the Community's harmonization process has put pressure on the national governments to quicken their rate of policy development.[98] The NAFTA, discussed above, contains no obligations to harmonize any standards, and creates no central authority with the power to drive a harmonization process. By not pursuing a harmonization policy, Mexico and any future less developed states acceding to the NAFTA are unlikely to enjoy the same environmental rewards that were enjoyed by the poorer regions of Europe. Moreover, business' competitiveness concerns and environmentalists' political drag[99] concerns will persist in the United States and Canada.

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96. See discussion of the Commission as an integrative force in William J. Davey, *European Integration: Reflections on its Limits and Effects*, 1 IND. J. GLOBAL LEGAL STUD., 185, 188-189 (1993).

97. TRADE BLOCS? THE FUTURE OF REGIONAL INTEGRATION, *supra* note 58, at 9.

98. *Greening Europe: The Freedom to be Cleaner than the Rest*, ECONOMIST, Oct. 14, 1989, at 21; Margaret B. McKenzie, *European Community Law and the Environment*, *in* ENVIRONMENTAL REGULATION AND ECONOMIC GROWTH, *supra* note 25, at 93.

99. *See supra* note 50 and accompanying text.

B. *Wider Integration*

Following the Paris Summit of 1972, the institutions of the EC used Article 235 of the Treaty of Rome[100] as a basis for the passage of legislation in a variety of new fields, substantially expanding the jurisdiction of the Community.[101] This expansion of jurisdiction into fields previously reserved exclusively to Member States was nevertheless tolerated for a couple of reasons. In many cases the Member States condoned the expansion of jurisdiction into new areas. For example, in relation to environmental protection, all Member States consented to the adoption of the Community's Action Programmes on the Environment.[102] The promulgation of legislation has also had a "snowball" effect in that legislative expansion into new areas became necessary to effectively implement earlier legislation.[103] The amendments made to the Treaty of Rome by the SEA and the Maastricht Treaty on European Union[104] have quickened the pace at which legislation in new areas has been adopted.

This wider integration is important for two reasons: (i) it facilitates efforts to counterbalance the negative environmental impacts of freer trade (where trade liberalization and environmental protection are in conflict); and (ii) the structural framework necessary to achieve this wider integration can be used to address regional environmental problems beyond those directly

100. Article 235 permits the Council to take measures to attain one of the objectives of the Community in instances where the Treaty of Rome did not provide the necessary powers to do so. In 1985, the European Court of Justice (ECJ) confirmed that environmental protection was an essential objective of the EC. Case 240/83, Procureur de la République v. Association de défenses des brûleurs d'huiles usagées, 1985 E.C.R. 531.

101. John Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2445 (1991).

102. The First Action Programme on the Environment was adopted in 1973. Since then, four more Programmes have been adopted. The most recent one was endorsed by the Council in December 1992, and sets out the EC's legislative agenda with respect to the environment through 1997. *See Towards Sustainability: A European Community Programme of Policy and Action in Relation to the Environment and Sustainable Development*, FIFTH ENVNTL. ACTION PROGRAMME, May 17, 1993.

103. *E.g.*, Council Directive No. 85/337 EEC, 1985 O.J. (L 175) 40 on the assessment of the effects of certain public and private projects on the environment. *See* Philippe Sands, *European Community Environmental Law: The Evolution of a Regional Regime of International Environmental Protection*, 100 YALE L.J. 2511, 2514 (1991).

104. The SEA introduced qualified majority voting as the procedure to follow in passing environmental non-harmonization legislation. See sources cited *supra* note 3 and accompanying text for a discussion of the SEA and the Maastricht TEU.

linked to trade liberalization. Each of these will be explained now in turn.

It has been demonstrated that the removal of NTBs can negatively impact national environmental protection efforts.[105] These effects are obviously outside the sphere of trade/economic policy. Responsibility for counterbalancing these negative environmental impacts with the positive effects of trade liberalization will rest at the final stage with the dispute resolution bodies established under a TLA, and it will depend upon whether: (i) the panel possesses a mandate to address "non-trade" issues such as environmental protection; (ii) the panel has the expertise to analyze and evaluate the scientific information put before it as justification for trade-restrictive environmental protection measures; and (iii) the body of law from which such panels can draw upon to decide disputes is sufficiently broad to ensure that environmental protection objectives are given their full meaning.

With respect to the first factor, both the NAFTA and the EC dispute settlement bodies have a mandate to consider "non-trade" issues in instances where the effects of free trade adversely effect legitimate domestic public policy objectives, and both the NAFTA and the EC recognize that environmental protection constitutes such a legitimate objective. A great deal of emphasis has been placed on the second factor, both in the negotiations of the NAFTA and the Uruguay Round. While there are advantages to having dispute settlement bodies that possess scientific expertise, such advantages will depend upon what type of information is presented to the dispute settlement bodies. Most national systems with well-developed environmental protection regimes have found it prudent to give decision-making responsibility for environmental matters to the judiciary, except in circumstances when scientific expertise is particularly essential (*e.g.*, environmental assessment hearings). In the EC-NAFTA context, recall that the NAFTA dispute panels, unlike the ECJ, are required to evaluate risk assessments that incorporate highly technical and scientific information.

Likely the more important factor is the third. The ECJ, in deliberating on a trade-environment conflict will have, and has used, a variety of sources of law to arrive at a decision, such as the constituent instruments of the EC, the Community's secondary legislation (including substantive environmental laws), in-

105. *See supra* part II.C.

ternational law,[106] general principles of law,[107] and ECJ jurisprudence. In contrast, NAFTA dispute settlement bodies will be restricted to the text of the NAFTA itself, and NAFTA (and GATT) jurisprudence. The consequences of these differences are significant. Obviously, incorporating a large body of "non-trade law" into the law of the RIA can assist in giving substance to the environmental provisions in the text of the trade agreement, facilitating the balancing of the environmental interests against those of free trade.[108] Not only do NAFTA Panels have this smaller body of law to draw upon, but past GATT jurisprudence has shown that the narrowing of the body of applicable rules leads to judicial deference in favor of a strict interpretation of the trade agreement. As Professor John Jackson has pointed out, no quasi-judicial trade panel resolving a trade-environment dispute will want to interpret a trade agreement in any way that could have a significant precedential impact beyond the environmental case at hand.[109]

Outside of the judicial sphere, wider integration can enable the other institutions of the EC to counter negative environmental impacts of freer trade. The best example of this occurs when the participating states within an RIA are at different levels of economic development. To address the problem of lax environmental standards or indirect environmental subsidies, wider integration must occur. As discussed earlier, the EC has addressed this necessity by requiring any acceding nation to adopt fully the *acquis communautaire* of the Community,[110] and to provide technical and financial assistance. The EC thereby avoids competitiveness and political drag issues from becoming chronic concerns. In contrast, Mexico receives no special treatment

106. Recall the *Wallonian Waste* case, Case C-2/90, Commission v. Belgium, 1992 E.C.R. 4431, wherein the ECJ relied upon the 1989 Basle Convention to support its determination that the proximity principle formed an important part of Community law in the field of waste disposal.

107. The Treaty of Rome states that the ECJ "shall ensure observance *of law and justice* in the interpretation and application of this Treaty." Treaty of Rome art. 164 (emphasis added). Based on this Article, the ECJ in its decisions has had regard to general principles of law such as proportionality, adherence to legality, and respect for procedural rights.

108. BENEDICT KINGSBURY, *Environment and Trade: The GATT/WTO Regime in the International Legal System*, *in* ENVIRONMENTAL REGULATION AND ECONOMIC GROWTH, *supra* note 25, at 221.

109. John Jackson, *Greening the GATT: Trade Rules & Environmental Policy*, *in* TRADE & THE ENVIRONMENT: THE SEARCH FOR BALANCE 43 (James Cameron et al. eds., 1994).

110. *See supra* part III.B.

under the NAFTA, and as a result, concerns for the enforcement of Mexico's environmental protection laws will likely persist. The more cautious, measured approach of the EC is more in line with the principle of sustainable development—it addresses potential environmental concerns prior to engaging in economic growth, rather than the other way around. This approach recognizes that the implications of trade liberalization extend beyond economics and, therefore, other considerations should play a role in the establishment of a free trade regime. As one author has astutely observed:

> [A]s regards the EU's economic policies, many of these are not based solely on the non-interventionist/*laissez faire* principles that are often thought of as providing the ethos, the ideology even, of the EU. In some spheres the EU tends very much to interventionism/managerialism/regulation, and in so doing it does not always restrict itself to "market efficiency" policies. This is most obviously seen in the way in which the regional, the social, and the consumer protection policies . . . have as their precise purpose the counteracting and softening of nationally unacceptable or socially inequitable market consequences.[111]

This passage captures the fundamental difference between the customs union approach of the EC and the free-trade agreement approach of the NAFTA. While both the EC and the NAFTA are at their core agreements that primarily aim to liberalize regional trade, the EC goes beyond considerations of economics and involves a significant measure of political integration.

This wider form of integration in the EC has not only been more effective by enabling the ECJ and other Community institutions to counter the negative effects of freer Community trade, but it has also been beneficial from an environmental standpoint. The EC has used Community institutions to establish environmental laws in several areas not linked to trade effects. In some cases, the adoption of regional environmental protection has actually been preferred to national environmental protection regulation (*e.g.*, the protection of forests against the effects of atmospheric pollution).[112] In other cases, the Community environmental legislation has been part of an effort to integrate environmental considerations into other spheres of activity (*e.g.*, the

111. NUGENT, *supra* note 78, at 291-92.

112. Council Regulation 2157/92, 1992 O.J. (L 217) 1 (amending Council Regulation 3528/66).

banning of television advertising that encourages behavior prejudicial to the environment).[113]

C. *A Rule-Based System*

Compliance with the law of an RIA (whether it be the trade agreement itself, secondary legislation, or decisions of the RIA's dispute settlement bodies) requires that the RIA be rule-based rather than power-based. In the past, TLAs (in particular the GATT) have been severely criticized as regimes based on *ad hoc* decision-making dependent on the relative economic and political powers of their members, rather than based on objective decision-making in accordance with transparent rules. Prior to 1989, the establishment of a GATT panel required the approval of both parties to the dispute. Even if a panel convened and issued a report, the losing party could always block the adoption of the report at the GATT Council, where unanimity was required. This blocking power has recently been done away with in the Uruguay Round's Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).[114] Panel reports are now automatically adopted unless one of the parties appeals the report.[115] This shift from a power-based to a rule-based system of dispute settlement will hopefully lead to fairer panel reports, because their adoption will no longer depend upon how the losing party views the findings. The pendulum, however, has not completely swung. While the adoption of reports is now automatic, parties can choose not to implement the report and challenge the other party to retaliate via trade sanctions, thereby allowing more powerful parties to influence the implementation of a panel report.[116]

The EC is inherently a rule-based system—it relies on the passage of substantive legislation to further its objectives and on an effective judiciary to ensure compliance with Community law. Community legislation once adopted becomes the law of the Member States. The ECJ's development of the doctrines of di-

113. Council Directive 89/552, art. 12(3), 1989 O.J. (L 298) 23.

114. Agreement Establishing the WTO, *supra* note 9, annex 2, *reprinted in* 33 I.L.M. 112 (1994).

115. Appellate reports are to be automatically accepted by the parties. *See id.* at arts. 16(4) & 17(14).

116. Edwin Vermulst & Bart Driessen, *An Overview of the WTO Dispute Settlement System and its Relationship with the Uruguay Round Agreements: Nice on Paper but Too Much Stress for the System?*, 29 J. WORLD TRADE 131, 146-47 (1995).

rect effect[117] and supremacy,[118] together with the Community's system of judicial review, has had the effect of constitutionalizing Community law, nullifying the capacity of Member States to selectively apply elements of the *acquis communautaire* or to disregard decisions of the ECJ.[119] More specifically, the fact that national courts play a significant role in the implementation of Community law forces governments of Member States which deviate from Community legal norms to defend their conduct before their national courts or the ECJ (at the request of the Commission or a national) on legal grounds.[120] By making the conduct subject to legal review and reasoning, Member States cannot simply disregard elements of Community law unless the reasons for doing so are legitimate. Also, having the Community's legal rules adopted by national courts will likely be more successful at making governments comply with their decisions. As one author notes:

> It is an empirical fact, the reasons for which need not concern us here, that governments find it much harder to disobey their own courts than international tribunals. When European Community law is spoken through the mouths of the national judiciary it will also have the teeth that can be found in such a mouth and will usually enjoy whatever enforcement value that national law will have on that occasion.[121]

The implementation of Community law by national courts also binds non-state actors, including non-governmental organizations and private individuals, legitimizing the operation and decisions of the ECJ.[122] Finally, it should be emphasized that the Member

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117. The doctrine of direct effect, originally established by the ECJ in Case 26/62, Van Gend en Loos v. Neth. Inland Revenue Admin., 1963 E.C.R. 1, states that provisions of Community law that are clear, unambiguous and do not require further legislative measures create enforceable legal rights and obligations as between individuals and Member States.

118. Although there is no supremacy clause in the Treaty of Rome, the ECJ has consistently asserted that in the event of any conflict between Community law and the domestic law of a Member State, Community law prevails. *See, e.g., Van Gend en Loos*, 1963 E.C.R. 1; Costa v. Ente Nazionale per l'Energia Elettrica (ENEL) 1964 E.C.R. 585; Internationale Handelsgesellschaft mbH 1970 E.C.R. 1125.

119. Weiler, *supra* note 101, at 2412.

120. Joseph Weiler, *Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration*, *in* ECONOMIC AND POLITICAL INTEGRATION IN EUROPE 136 (Simon Bulmer & Andrew Scott eds., 1994).

121. *Id.*

122. The Treaty of Rome's Article 169 procedures rely heavily on complaints from individuals and non-governmental organizations for their initiation. The number of violations of EC environmental law discovered via the complaints proce-

States have accepted the existence of the EC as a whole and have surrendered considerable decision-making power to its institutions; therefore, even if the Member States dislike one particular decision, the ECJ is part of the Community package to which they have agreed.[123]

Both environmental dispute resolution procedures set up within the NAFTA regime (i.e., NAFTA's general dispute settlement procedure governing environmental-NTB challenges[124] and the ESA procedure governing environmental subsidies/non-enforcement disputes) are more power-based than rule-based. The NAFTA dispute settlement begins with consultations aimed at resolving the dispute,[125] and if these fail the matter moves to the NAFTA Commission for further negotiation.[126] If the NAFTA Commission cannot resolve the dispute either Party may request the establishment of an arbitral panel.[127] The final panel report is to contain findings of fact, determinations of inconsistency with treaty obligations, and recommendations for resolution of the dispute.[128] The report, however, does not bind the NAFTA Parties.[129] If the Party to a dispute does not like the Panel's recommendations it can simply refuse to implement them and suffer the suspension of trade benefits that the complaining state is entitled to impose.[130]

Under the dispute resolution procedure in the ESA, a two-thirds vote of the Council is required to establish an arbitral panel. This difference has significant consequences where, for example, the complainant is Canada and the respondent is the

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dure has increased by 30 percent since 1991. McKenzie, *supra* note 98, at 81. For a discussion of the role of legitimacy in evoking acquiesence to the decisions of a judicial body see James O. Gibson & Gregory A. Caldeira, *The Legitimacy of Transnational Legal Institutions: Compliance, Support and the European Court of Justice*, 39(2) AM. J. POL. SCI. 459 (1995).

123. Gibson & Caldeira, *supra* note 122, at 484.

124. Whereas most NAFTA disputes can be settled under NAFTA or GATT at the discretion of the complaining party, environmental disputes can be settled under NAFTA at the request of the responding party. Given the poor environmental record of past GATT Panels, a responding party is more likely to choose GATT and its corresponding jurisprudence as the forum of choice. *See* NAFTA, *supra* note 8, at arts. 2005(1) & (4).

125. *Id.* at art. 2006.

126. *Id.* at art. 2007.

127. *Id.* at art. 2008(1)-(2).

128. *Id.* at art. 2016(2). The final report will be published 15 days after it is transmitted to the Commission unless the Commission decides otherwise. *Id.* at art. 2017.

129. Abbott, *supra* note 90, at 934.

130. NAFTA, *supra* note 8, at art. 2019.

United States. One must inquire whether Mexico would not think carefully about its trade relationship with the United States before backing Canada's request for an arbitral panel. The end result of a non-enforcement treaty does not require compliance with an action plan on the part of the offending party, which can choose to suffer the monetary sanctions instead.

The NAFTA dispute settlement procedure provides no opportunity for public participation. The ESA provides an opportunity for non-governmental organizations and individuals to initiate a complaint that a party is failing to "effectively enforce its environmental law," but this right is limited by the requirement that the Secretariat measure the complaint against various criteria to determine whether a factual record should be prepared for the Council.[131] However, a request for consultations relating to the complaint and the establishment of a dispute settlement panel can only be made by a NAFTA Party.[132]

D. *A Prototype for North America?*

The discussion to this point has highlighted the EC's success both in counterbalancing the environmental effects of trade liberalization and aiding the progressive development of environmental protection policy in the less developed countries of Europe. However successful the EC model, it is not easily transportable in its entirety to any and all RIAs. By closely examining its successes, however, one can perhaps apply elements of the EC model to other RIAs.

The power relationships among the three NAFTA Parties make the erosions of sovereignty that have contributed to the EC's success both unfeasible and undesirable. The implications of this political reality most profoundly affect the dispute settlement procedure. The United States generally has not been receptive to the idea of subordinating the decisions of its highest judicial authorities to supra-national decision-making bodies.[133] As one author has stated:

> The ad hoc nature of the [NAFTA dispute settlement] process demonstrates again the concessions of the Side Agreements to the

131. ESA, *supra* note 63, at art. 14(1). These criteria include, *inter alia*: (i) the provision of sufficient information to allow the Secretariat to review the submission, including documentary evidence; and (ii) whether the motive is to promote enforcement rather than harass industry.

132. *Id.* at art. 22.

133. *See* Abbott, *supra* note 90, at 931-32.

> realities of economic and political power among the parties. . . . The power relationship within NAFTA, simply stated, is that the U.S. economy is ten times the size of Canada's and twenty-five times of Mexico's. . . . [T]he rejection of the proposal for a permanent tribunal was a concession to the realities of power. It was recognition that the U.S. Congress would resist this additional loss of sovereignty on international trade issues.[134]

The lack of a supra-national decision making power akin to that of the ECJ may not be so severe in relation to the ESA dispute resolution process, because its findings of non-enforcement do not require rule-making but rather further negotiation and an action plan. However, the lack of a supra-national authority will compromise the settlement of environmental-NTB disputes.

Dispute resolution panels, in interpreting the NAFTA, do have the opportunity (albeit limited) to refer to the text's environmental protection language. For instance, the NAFTA preamble states that the Parties agree to "promote sustainable development" and "strengthen the development and enforcement of environmental laws and regulations,"[135] and the definition of "legitimate objective" in Article 915 includes "protection of human, animal or plant life or health, the environment . . . and sustainable development." NAFTA's overall objectives,[136] however, are still confined to trade and do not contain any reference to environmental protection.

With respect to the ability of the NAFTA Parties to harmonize their environmental laws in the absence of a Commission-type body and a formal legislative procedure, harmonization could be undertaken by the three governments in separate harmonization treaties. Unfortunately, the NAFTA Parties have not indicated any desire to harmonize or approximate environment standards. The CEC could drive the harmonization process, yet of the $6,365,000 CEC budget for 1995, only $170,000 has been allocated to create a comparative database of relevant environmental laws and technical standards with a view to "aid in the

134. Jack I. Garvey, *Trade Law and Quality of Life: Dispute Resolution under the NAFTA Side Accords on Labour and the Environment*, 89 AM. J. INT'L L. 439, 447 (1995).

135. The Vienna Convention on the Law of Treaties states that treaties "shall be interpreted . . . in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" and that the context includes the preamble to the treaty. Vienna Convention on the Law of Treaties, *reprinted in* 8 I.L.M. 679, art. 31(1)-(2) (1969).

136. *See* NAFTA, *supra* note 8, at art. 102.

formulation of proposals for greater trilateral compatibility."[137] Similarly, there is nothing to stop the NAFTA Parties from embarking on other parallel environmental protection programs in areas beyond those areas strictly trade-related.[138]

VI.
CONCLUSION

European integration has not come easily or quickly. But by embarking on a path of extensive economic and political integration and establishing a rule-based trading regime, the EC has been able to counter the adverse environmental impacts that necessarily flow from trade liberalization. Deeper economic integration has addressed the "environmental subsidies" issue and in the process helped the poorer countries of Europe raise their environmental protection regimes to more effective levels. Wider political integration has addressed the concerns that valid domestic legislation is invalid as an NTB, and has permitted the Community to address more effectively regional environmental problems. Both deeper and wider integration require a rule-based regime not subject to undue political influence by more powerful Member States. For integration to become a reality, the Member States have had to surrender some legislative and judicial sovereignty to Community institutions (in particular the Commission and ECJ).

The NAFTA's integration goals are far more modest, incorporating only the most minor cessions of sovereignty. The prime reason for this shallower integration has been the great difference in relative economic and political power among the NAFTA Parties. As time passes and the NAFTA evolves, the countries of North America may come to view the existing NAFTA regime as unsatisfactory for addressing the environmental problems created by freer trade. This paper has hopefully brought into clearer focus those features of the EC regime that have proved successful in the field of environmental protection.

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137. *1995 Annual Program and Budget* 9, 16-17, CEC (Jan. 19, 1995)(on file with author). For further discussion on the role of the CEC, see *supra* note 66 and accompanying text.

138. The drawback of this approach (as opposed to the EC approach) is that harmonization will move slowly because the national legislative branches of each of the Parties would be involved in the formulation and implementation of legislation, and the legislative branches are divided into sectors with narrow areas of concern. If it were left wholly to executive branches, harmonization would proceed faster. Abbott, *supra* note 90, at 943-45.