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WISDOM ACROSS THE ATLANTIC: North America and the European Experience

by Paul Stanton Kibel

Human rights and environmental protection were among the most controversial issues discussed during the national debate over ratification of the North American Free Trade Agreement (NAFTA).¹ Many of NAFTA's critics feared that the agreement would encourage NAFTA nations to attract and retain investment by lowering the cost of doing business.² According to NAFTA's critics, this would result in downward harmonization of worker and environmental standards, and a race to the bottom. To lure investors, labor unions would be suppressed to keep wages down, worker safety standards would be reduced, and environmental protection requirements would be relaxed or ignored.³

Although NAFTA was ratified in December 1993, many of its critics' predictions have proven true. In 1995, the Washington D.C. based Institute for Policy Studies (IPS) released a comprehensive report entitled NAFTA's First Year. IPS reported that, since the agreement's adoption, there has been a demonstrable decline in environmental protection and workers' rights in all of NAFTA's countries, including the United States. In the United States, perhaps the most visible sign of this decline has been the recent Congressional effort to lower environmental standards to increase "international competitiveness."⁴

As Canada, the United States, and Mexico confront the human rights and environmental consequences of NAFTA, they might seek guidance from another regional trade regime - the European Union (EU). As an older trade regime, the EU has already encountered and attempted to resolve many of the problems currently facing NAFTA. The European experience teaches one basic lesson. To achieve just and sustainable trade policies, international regimes must possess the authority to implement human rights and environmental measures.⁵ Unfortunately, NAFTA now lacks this authority.

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NAFTA's Narrow Focus

In its present form, NAFTA is primarily an agreement, not a political institution. It is a document that seeks to protect and promote the unregulated transnational trade of goods among Canada, the United States, and Mexico. It does so by prohibiting certain types of trade restrictions, such as subsidies, import tariffs, and quantitative import restrictions.⁶ The institutions created to implement NAFTA, such as dispute resolution panels, possess only negative powers. These tribunals can determine that a NAFTA signatory is in violation of the agreement, but they cannot propose or adopt new international standards.⁷ Moreover, formal complaints can only be brought by national governments, not by private citizens or non-governmental organizations.⁸

NAFTA's side agreements on labor and the environment suffer similar and even more pronounced institutional weaknesses. Under the North American Agreement on Labor Cooperation (NAALC)⁹ and the North American Agreement on Environmental Cooperation (NAAEC),¹⁰ interna-

tional commissions are established to determine whether NAFTA's signatory countries are suppressing labor rights or lowering environmental standards to attract investment. Such actions are prohibited under the terms of the side agreements.

As with the NAFTA dispute panels, however, the NAALC and NAAEC commissions cannot propose or adopt new international standards. Their power is limited to investigating alleged violations. In some respects, these commissions are even weaker than NAFTA's panels. They are not even empowered to directly impose penalties, issue injunctions or revoke free trade privileges when a violation has been identified.¹¹

In short, NAFTA and its side agreements are all focused on one primary goal — to preserve unregulated transnational trade. There are no institutions under NAFTA capable of moving proactively, of creating new binding standards that could bring human rights and environmental concerns into the regional economic planning process. The narrowness of the NAFTA regime has hindered the creation of a just and sustainable trade policy in North America. Recent developments in Canada and Mexico illustrate the regime's shortcomings.

In Canada, the temperate rainforests of British Columbia (B.C.) are being logged at an environmentally unsustainable pace, degrading watersheds and destroying critical habitat for numerous endangered species.¹² In the North American environmental community, there is widespread recognition that this logging is in violation of B.C., federal Canadian and international environmental law.¹³ B.C. unwillingness to enforce its own environmental laws, which lowers the Canadian timber industry's

business costs, is also placing pressure to lower forest protection standards here in the U.S.

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Current forest practices in British Columbia would appear to constitute a violation of both NAFTA and the NAAEC. NAFTA states that it is inappropriate "to encourage investment by relaxing health, safety or environmental measures."¹⁴ NAAEC requires that each country "effectively enforce its environmental laws and regulations."¹⁵ While these guaran-

tees sound good on paper, there are no institutions to effectively implement these provisions. Under NAFTA and the NAAEC, the most environmentalists can do is request that a side agreement commission undertake an investigation.

In Mexico, the 1994 Chiapas uprising illustrates the NAFTA regime's impact on human rights.¹⁶ For several decades, indigenous groups in Mexico have been struggling to maintain their communities and traditional farming rights from encroachment by the Mexican national government. In 1982, the Mexican government launched a program to modernize agriculture, and began leasing formerly traditional farmland to the highest bidder. This often meant indigenous communities were displaced by large multinational agribusiness operations. Indigenous efforts to organize themselves as legitimate labor, humans rights, and political groups were routinely suppressed by the Mexican government.

On January 1, 1994, the same day that NAFTA went into effect, the Zapista Army of National Liberation occupied several towns in Chiapas, Mexico. They issued a declaration calling NAFTA a "death sentence for indigenous people." Although the Chiapas uprising was put down, many unan-

swered questions remain.¹⁷ Should U.S. business interests be a party to the Mexico's continuing suppression of labor and human rights? Should there be new North American institutions or provisions to ensure that foreign investment does not lead to the extinction of indigenous cultures? The NAFTA regime, with its focus on preserving free trade, is ill-equipped to ask, let alone answer, these questions.

Lessons From the European Experience

The European trade regime began with a limited economic mandate quite similar to that of NAFTA. In 1957, the Treaty of Rome created the European Community (EC) to help reduce trade barriers and encourage regional economic development.¹⁸ Unlike NAFTA, however, the Treaty of Rome created more than a list of prohibitions. It created four new multinational political institutions: the European Commission, the European Parliament, the European Council of Ministers, and the European Court of Justice. Collectively, these institutions possessed the power not only to determine violations, but to adopt new all-European standards, called "regulations" or "directives". Under EC law, regulations are directly enforceable as national law in EC nations. Directives set forth legal obligations, but call upon EC nations to adopt their own implementing legislation.

Although the EC institutions initially focused on regulating trade and competition, they soon expanded into other related areas. EC regulations and directives were adopted relating to the rights of workers to organize politically, the labeling of hazardous substances, air pollution from industrial plants, and drinking water quality. The EC's authority to adopt these regional standards was based on two provisions in the Treaty of Rome: Article 100, which authorizes EC legislation that "directly affects the establishment or functioning of the common market", and Article 235, which authorized actions "necessary for a community objective."

In the area of labor and human rights, Europe has adopted several important measures. First, the EC's 1989 Social Charter expressly provides workers the right of association to constitute professional organizations or trade unions to defend their economic and social interests.¹⁹ The Social Charter further provides that every worker shall have the freedom to join — or not to join — such organizations without the threat of any personal or occupational disadvantage. Second, the European Convention for the Protection of Human Rights and Fundamental Freedoms protects citizens' right to free speech and assembly, and protects ethnic and religious minorities from discrimination by national governments.²⁰ These agreements are more than mere aspirational documents; they have been given teeth through implementing directives and rulings by national and international courts.

In the environmental field, the 1987 Single European Act²¹ and the 1991 Maastricht Treaty²² expanded the EC's law-making powers. These treaties also changed the EC to the European Union (EU). Article 130 of the Single European Act established several new objectives for the EU, including "to preserve, protect, and improve the quality of the environment" and to "contribute toward protecting human health." The Maastricht Treaty provided the EU with additional powers to "ensure a prudent and rational utilization of natural resources" and to "promote, at the international level, measures to deal with regional or worldwide environmental problems." Moreover, in 1991 a European Environmental Agency (headquartered in Copenhagen, Denmark) was established to collect information on environmental protection, and to help monitor national compliance with EU directives and regulations.²³

In addition to these integrative treaties, directives, and institutions, Europe has also created an effective forum to enforce human rights and environmental guarantees — the European Court of Justice

(ECJ). Unlike the trade tribunals under NAFTA or the commissions under NAFTA's side agreements, the ECJ has jurisdiction over all disputes arising under EU law.²⁴ Moreover, the ECJ grants standing not only to national governments, but to private citizens and non-governmental organizations as well.²⁵ The ECJ's broad jurisdiction and liberal standing have given teeth to the EU's human rights and environmental provisions.

For instance, in the 1987 case UNECTEF v. Heylens, the ECJ ruled that unreasonable restrictions on a worker's right to relocate and change jobs violate EU law.²⁶ As another example, in the 1988 case European Commission v. Denmark, the ECJ held that national laws promoting environmental protection are consistent with the EU's trade rules.²⁷

By expanding the types of issues it may regulate, and by creating institutions that enable the creation of new human rights and environmental standards, the EU has developed into something much more than a mere free trade agreement. From its initial inception in 1957 as a vehicle to promote unregulated transnational trade, the EU has matured into a comprehensive multinational institution. It now has the power and means to integrate human rights and environmental protection in Europe's larger economic framework.²⁸

What is needed is a North American institution with the broad objectives and legislative powers of the European Union - perhaps a North American Union (NAU).

The Quest for Just and Sustainable Trade in North America

To deal with the human rights and environmental protection issues raised by transnational trade, Canada, the United States, and Mexico need to develop an integrated, comprehensive framework. The foundation of this framework should not be an unyielding adherence to regional free trade. Rather, it should be the principle of just and sustainable economic development. Because of its narrow free trade focus and its institutional weaknesses, the NAFTA regime currently cannot provide this framework.

What is needed is a North American institution with the broad objectives and legislative powers of the European Union - perhaps a North American Union (NAU). In the context of an NAU, NAFTA would not be the regional "constitution" upon which all future efforts must comply. Rather, NAFTA would simply be one aspect, one legislative component, of the NAU's larger mandate. Under an NAU type framework, treaties like the NAALC and the NAAEC would possess the same authority as NAFTA, and would not be treated as subordinate or side agreements. Moreover, the new regime would provide an effective political forum for addressing other non-free trade issues, and for proposing new regional initiatives.

The creation of an NAU with broad powers cannot happen overnight. As the evolution of the European Union demonstrates, nations are understandably reluctant to delegate law-making authority to untested international institutions.²⁹ This delegation or sharing of legal authority is often viewed as a threat to national sovereignty. However, if international institutions are responsive to the needs of citizens, and if they lead to more just and sustainable policies, this national reluctance can be overcome. For North America, the first step is to move beyond the narrowness of NAFTA, and to lay the foundation for a more comprehensive and democratic regional regime.

Canada, the United States, and Mexico should learn from Europe's experience. As the European Court of Justice declared in the 1985 case *Procureur de la Republique v. ADBHU*, "the principle of freedom of trade is not to be viewed in absolute terms but is subject to certain limits justified by the objectives of general interest pursued by the Community."³⁰

The creation of a new North American institution with a similar broad mandate is the best means to ensure that human rights and environmental protection are part of the region's development agenda.

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NOTES

¹ North American Free Trade Agreement, reprinted in 32 I.L.M. 296 (1993) [hereinafter NAFTA].

² See Daly, *Problems with Free Trade: Neoclassical and Steady-State Perspectives* (in *TRADE AND THE ENVIRONMENT: LAW, ECONOMICS AND POLICY*, Island Press, 1993), pp. 147-159.

³ Faux, *The Failed Case for NAFTA* (1992 Report by the Economic Policy Institute, Washington DC) [on file at the Pacific Environment and Resources Center]

⁴ See generally *Breach of Faith: How the Contract's Fine Print Undermines America's Environmental Success* (February 1995 Report by Natural Resources Defense Council, Washington, DC).

⁵ Costanza et al, *Sustainable Trade: A New Paradigm for World Welfare*, 37 *ENVIRONMENT* 5 (June 1995), p. 43.

⁶ NAFTA, *supra* note 1.

⁷ See *Analysis of the North American Free Trade Agreement and the North American Agreement on Environmental Cooperation* (October 1993 Report by the Sierra Club, Washington DC), p. 22.

⁸ *Id.* at 22-24. Non-government organization may submit and request reports on environmental issues, but only NAFTA's signatory governments can seek penalties for failing to enforce environmental laws.

⁹ See *NAFTA's First Year: Lessons for the Hemisphere* (December 1994 Report by Institute for Policy Studies, Washington, DC), pp. 12-19.

¹⁰ North American Agreement on Environmental Cooperation, reprinted in 32 I.L.M. 1480 (1993)[hereinafter NAAEC].

¹¹ See Abbott, *The NAFTA Environmental Dispute Settlement System as Prototype for Regional Integration Arrangements*, 1993 *Yearbook of International Environmental Law* (Oxford University Press), p. 3.

¹² See *Forests on the Line* (Report of Vancouver's Sierra Legal Defence Fund and Natural Resources Defense Council, January 1995).

¹³ Kibel, *Use NAFTA to Enforce Canadian Environmental Law*, *National Law Journal* (February 27, 1995), p. A21.

¹⁴ NAFTA, *supra* note 1, Art. 114.

¹⁵ NAAEC, *supra* note 10, Art. 5.

¹⁶ See Ross, *Rebellion From the Roots: Indian Uprising in Chiapas* (Common Courage Press,

1995)[hereinafter Ross]; see also *Mexico: Free Markets Versus Freedom*, Multinational Monitor (April 1995), p. 28.

¹⁷ See Ross, *supra* note 16.

¹⁸ Treaty Establishing the European Economic Community (25 March 1957, Rome) 298 U.N.T.S. 11.

¹⁹ *Workers Rights in the EC Single Market, The External Impact of European Unification* (January 1990 Report by Buraff Publications), p. 13 [on file at the Pacific Environment and Resources Center]

²⁰ European Convention for the Protection of Human Rights and Freedoms (4 November 1950, Rome) 213 U.N.T.S. 221.

²¹ Single European Act (28 February 1986) 25 I.L.M. 506 (amending the Treaty of Rome).

²² See Friedberg, *Closing the Gap Between Word and Deed in European Community Environmental Policy*, 15 Loyola of Los Angeles Int'l & Comp. L. J. 2 (1993).

²³ See Westbrook, *Environmental Policy in the European Community: Observations on the European Environmental Agency*, 15 Harvard Env'tl L. R. 1 (1991).

²⁴ Selden, *Environmental Protection in the Jurisprudence of the European Court of Justice: Will A Fundamental Right Be Recognized?* (Paper presented at Regional Conference of the American Society of International Law, Golden Gate University School of Law, March 1994)[on file at the Pacific Environment and Resources Center].

²⁵ *Id.*

²⁶ Case 222/86, 1987, ECR 4098.

²⁷ Case 302/86. 1988, ECR 4607.

²⁸ See Haagsma, *The European Community's Environmental Policy: A Case Study in Federalism*, 12 FORDHAM INT'L L. J. 311 (1989).

²⁹ See Benfield, *Environmentalism in the New Europe: Reflections on a Changing Scene From Brussels to the Baltic*, THE AMICUS JOURNAL (Fall 1992), pp. 8-10.

³⁰ Case 302/86, 1988, ECR 4067.