AFTA After NAFTA: Regional Trade Blocs and the Propagation of Environmental and Labor Standards

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I.
INTRODUCTION

The North American Free Trade Agreement (NAFTA) is now seen as more than a hemispheric agreement. Its afterglow is regional free trade, as a prospect in virtually all areas of the planet.[1] It lights a horizon both in the Middle East, where the current peace process is seen to depend on economic development, and in Africa, whose strongest, most diverse and highly developed economy is no longer paralyzed by apartheid. It is the Pacific Basin area, however, that shows the most immediate prospect of movement towards the institutionalization of a significant new trade bloc.

The phenomenon of regional free trade is proving self-propagating; it is generated by the fear of trade protectionism as much as by any promised benefits of free trade. It was the spectre of NAFTA, added to the existing free trade regime of the European Union, that caused Asia-Pacific nations to mold out of the amorphous collection of their joint institutions the basis for a new free trade organization. Such an Asia-Pacific grouping is of the greatest potential importance for the United States. Projections estimate that by the year 2000 the value of U.S. Pacific trade will be double that of Atlantic trade, and will constitute about forty percent of all U.S. trade.[2]

The political and economic dynamics of a potential Asia-Pacific grouping are significantly different than for NAFTA. The region features many economies that are heavily export-driven, though their long term importance for the United States may prove to be greater as markets for U.S. products and serv-

1. *See* Heinz G. Preusse, *Regional Integration in the Nineties, Stimulation or Threat to the Multilateral Trading System?*, J. WORLD TRADE, Aug. 1994, at 147, 148 n.2 (stating that NAFTA was viewed as "a turning point in international trade relations confirming the shift toward regional blocs"). *See generally* Joseph L. Brand, *The New World Order of Regional Trading Blocs*, 8 AM. U.J. INT'L L. & POL'Y 155 (1992).

2. COUNCIL OF ECON. ADVISORS ANN. REP., ECONOMIC REPORT OF THE PRESIDENT 232 (1994); *See also*, Hobart Rowan, *The Promise of Trade With Asia*, WASH. POST, May 27, 1993, at A25.

ices.[3] There is presently no dominant party playing a role similar to that of the United States vis-a-vis NAFTA. At present, the three major potential players—the United States, China and Japan—have relations to the other Pacific Basin states that generate a variety of tensions working against a leadership role, whether due to past imperialism, current economic competition, or ideological and cultural differences. The extreme variation in the degree of economic development of the region's states further complicates matters, as do other trade inhibitions, such as the structural barriers to market penetration exemplified by the Japanese economy. As a result of these diverse factors, the possible organizational forms for an Asia-Pacific grouping are multiple and in flux.

Nevertheless, significant signs point to regional free trade in the Pacific basin. When the members of the forum on Asia Pacific Economic Cooperation (APEC), meeting at the Bogor summit in November 1994, proclaimed a commitment to "complete the achievement of our goal of free and open trade and investment" for industrialized economies by 2010 and for developing economies by 2020,[4] the U.S. Trade Representative predicted that "this process will move much more quickly than anyone expects."[5] There is evidence this prediction is correct. Indeed, by May 1996, all eighteen members of APEC had already submitted crucial plans to remove trade barriers and improve the investment climate in the region.[6]

The United States has declared its commitment to regional free trade as part of a multi-track approach to trade liberalization.[7] The Clinton Administration has further stated the intention to link free trade agreements to guarantees of "core rights"—such as establishing occupational health and safety standards and prohibiting slave and child labor[8]—as well as environmental protection. Yet a Pacific Basin grouping may be a relatively difficult arena for United States leadership in linking regional free trade with social policy. At the Uruguay Round of GATT, Asian negotiators were among those most resistant to a "green

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3. *See id.*

4. *Bogor Declaration of APEC Leaders*, JAPAN ECON. NEWSWIRE, Nov. 15, 1994, *available in* LEXIS, ASIAPC Library, JEN File [hereinafter *Bogor Declaration*].

5. Pete Engardio, *This Trade Deal May Have Been Too Painless*, BUS. WK., Nov. 28, 1994, at 17.

6. *2nd Meeting of '96 APEC Senior Officials Ends*, JAPAN ECON. NEWSWIRE, May 25, 1996 *available in* LEXIS, ASIAPC Library, JEN File; Ray Heath, *Early Apec Submissions Speed Up Push to Reduce Trade Tariffs*, S. CHINA MORNING POST, May 23, 1996, at 12. This was aimed at a consolidation of all the plans for the 1996 action plan for APEC (MAPA '96) to implement the 1995 Osaka action, which provides a road map for the 1994 Bogor declaration. *See APEC Senior Officials' Meeting Opens in Cebu*, XINHUA NEWS AGENCY, May 22, 1996, *available in* LEXIS, ASIAPC Library, XINHUA File.

7. In embarking on this approach in 1988, Treasury Secretary James Baker stated:

> We need to enhance the resiliency of the trading system by promoting liberalization on a number of fronts. While we normally associate a liberal trading system with multilateralism, bilateral or minilateral regimes may also help the world move toward a more open system.

James A. Baker, A New Trade Policy Strategy for the United States, Address Before the Canadian Importers Association (June 22, 1988), *in* 11 THE WORLD ECON. 215, 216 (1988).

8. *Canadian, U.S. Officials Endorse Labor Accord*, 151 Lab. Rev. Rptr. (BNA) 353 d24 (Mar. 25, 1996).

GATT," and Asian countries have been accused by European and American competing industries of some of the worst abuses of labor welfare, especially in the production of textiles.[9] The United States has engaged in rancorous disputes concerning child labor, prison labor and other labor rights with its Asian trade partners, particularly the huge economies of China and Indonesia.[10] All of this points to the special difficulty of managing the linkage of free trade with labor welfare and environmental protection across the Pacific Basin. But it also indicates how critical the linkage will be in the politics of Asia-Pacific regional free trade.

This Article argues that, despite the differences between various regional free trade groupings, regional development of this linkage presents distinct advantages over the GATT model of global, multilateral standards. It examines the regional model that evolved as a product of controversies over NAFTA, and demonstrates how this model can be drawn upon to facilitate constructive linkage of trade liberalization with environmental and labor welfare for the difficult task of developing a Pacific Basin free trade area.

A. The Origins of AFTA

The idea of regional free trade for the Asia-Pacific is still swimming in an alphabet soup of acronyms, including ASEAN, AFTA, APEC, CEPT and EAEC,[11] but a foundation is now in place for what is likely to be the next major development of regional free trade. In January 1992, the Association of Southeast Asian Nations (ASEAN)[12] proposed the creation of an ASEAN Free Trade Agreement (AFTA).[13] The ASEAN members were clear that this was a response to the perceived threat of protectionism from the existing European Union free trade bloc and the proposed NAFTA.[14] NAFTA, in particular, presented ASEAN members with the immediate prospect of loss of investment relocating to Mexico, which combined cheap labor with proximity to the American market.[15] Fear of the European and North American trading blocs was further accentuated, initially, by the perceived possibility that the GATT might

9. Shada Islam, *Goodbye GATT, Asia Welcomes Creation of a New World Trade Body,* FAR E. ECON. REV., Dec. 30, 1993, at 79.

10. James A. Kelly, *U.S. Security Policies in East Asia: Fighting Erosion and Finding a New Balance*, WASH. Q., Summer 1995, at 21.

11. Representing the following designations: "AFTA" - The ASEAN Free Trade Area, "APEC" - the forum for Asia Pacific Economic Cooperation, "CEPT" - the Agreement on the Common Effective Preferential Tariff, and "EAEC" - the East Asia Economic Caucus.

12. ASEAN is the acronym for this regional grouping which includes: Indonesia, Singapore, Malaysia, the Phillippines, Thailand, Vietnam and Brunei Darussalam.

13. Framework Agreement on Enhancing ASEAN Economic Cooperation, Jan. 28, 1992, Brunei Darussalam -Indon.-Malay.-Phil.-Sing.-Thail., *reprinted in* 31 I.L.M. 506, 508 (1992).

14. *See* Paul Blustein, *Southeast Asia Joins the Bloc Party; Six Nations Figure Best Trade Defense is a Zone of Their Own*, WASH. POST, Nov. 10, 1992, at B1; Michael Di Cicco, *Trade Bloc May Fall Short As Answer to Nafta and EC*, J. COM., Mar. 26, 1993, at 5B.

15. *See* Raphael Pura & Masayoshi Kanabayashi, *Watching and Waiting: Asian Nations Hope NAFTA Isn't a Sign of Rising Trade Barriers*, WALL ST. J., Sept. 24, 1992, at R20; *Asian Nations Fear Reduced Exports to North America*, BANGKOK POST, Aug. 14, 1992, at 21; Gene Linn, *ASEAN Exporters Fear NAFTA Will Hurt Sales*, J. COM., April 7, 1992, at 4A; *Southeast Asia Expects Exports to Suffer After NAFTA*, J. COM., Nov. 24, 1992, at 2A.

collapse.[16] When the Uruguay Round of GATT succeeded, the concern remained that the reduction of most-favored-nation duties under GATT would make preferential tariffs among the ASEAN countries less effective, rendering the ASEAN market less attractive to foreign investment.[17]

There were, and continue to be, contrary views among Asian countries as to how an Asian free trade bloc should be organized, and there has been little consensus on defining a formal legal structure on the order of the European Union or NAFTA. This reflects the fact that AFTA arose less from a community vision for the future of Pacific Basin trade than from a shared fear of diversion of trade and investment away from Asia. The prospect of enhanced bargaining leverage vis a vis Europe and North America, however, was enough to move the Asian nations towards their own regional trading bloc.[18]

AFTA also came into being without the kind of controversy about its impacts on labor and the environment that resulted in the NAFTA Side Agreements.[19] AFTA was more simply conceived as a regional deepening of international trade liberalization as it had proceeded under GATT.[20] Yet notwithstanding its lack of detail, AFTA, like NAFTA, demonstrates the congenital tendency of regional free trade to evolve within a policy context that requires discussion of its environmental and labor welfare implications. As established at the Singapore summit of ASEAN member states in 1992, AFTA is part of a broadly declared Asia-Pacific initiative to promote economic cooperation, including related social and environmental concerns.[21] Regional free trade, even in the embryonic context of the Asia-Pacific region, appears to naturally relate trade policy to social policy issues.

B. Linkage in Regional Versus Global Trade Liberalization

This natural linkage distinguishes regional free trade from the GATT regime of global multilateral trade liberalization. The legal and political processes of GATT historically have emphasized trade primacy, considering national protection of the environment and labor welfare in terms of assessment of negative impacts on trade. The outstanding recent example is GATT's handling of the

16. *See* Peter B. Necarsulmer, *Global Economic Cooperation at a Crossroads,* S. F. BUS. MAG., Sept. 1992, at 14.

17. *See* Phua Kok Kim, *AFTA May Have to Speed Reform in Wake of GATT Agreement, Says Dhanabalan*, STRAITS TIMES, Dec. 17, 1993, *available in* LEXIS, News Library, Strait File; *Thailand, Singapore Urge Faster Implementation of ASEAN Trade Zone*, U.P.I., Dec. 27, 1993, *available in* LEXIS, News Library, UPI File.

18. Soogil Young, *Globalism and Regionalism: Complements or Competitors, in* PACIFIC DYNAMISM AND THE INTERNATIONAL ECONOMIC SYSTEM 123 (C. Fred Bergsten & Marcus Noland eds., 1993).

19. *See* Canada-Mexico-United States: North American Agreement on Environmental Cooperation, Sept. 8, 9, 12, 14, 1993, *reprinted in* 32 I.L.M. 1480 (1993) [hereinafter NAAEC] and Canada-Mexico-United States: North American Agreement on Labor Cooperation, Sept. 9, 12, 14, 1993, *reprinted in* 32 I.L.M. 1499 (1993) [hereinafter NAALC].

20. *See* Deborah A. Haas, Note and Comment, *Out of Others' Shadows: ASEAN Moves Toward Greater Regional Cooperation in the Face of the EC and NAFTA*, 9 AM. U. J. INT'L L. & POL'Y 809 (1994).

21. *See supra* pp. 1-2.

controversy over United States restrictions on imports of tuna, intended to protect dolphins but determined by GATT panels to constitute an impermissible trade restriction.[22] Regional free trade, on the other hand, has developed a contrary prioritization. Free trade within the European Union is, of course, joined by design to a broad social agenda. And while NAFTA began exclusively as a free trade endeavor, it quickly became embroiled in, and molded by, the politics of its social and environmental implications. It was only after the Clinton administration negotiated the Side Agreements on labor and the environment that NAFTA became politically viable in the United States. Indeed, Clinton as presidential candidate, withheld support for NAFTA conditional on achieving these Agreements.[23]

Because regional free trade often includes economies of radically diverse stages of development, it can involve serious disequilibriums of labor welfare and environmental protection, resulting in deep tensions. Developing countries express hostility to linkage of trade with environmental and labor issues, calling it eco-imperialism.[24] The common reaction in developed countries, conversely, is a call for protectionism, as exemplified in the United States by Ross Perot's rhetoric about the "sucking sound" of U.S. jobs disappearing to Mexico. Perot's phrase did encapsulate a principal economic concern motivating the linkage of trade with labor and environmental values—that production will tend to move to the nation with the lowest costs of labor and the least environmental regulation.[25] Free traders argue, to the contrary, that regulation is unnecessary, because the increased wealth resulting from liberalization makes possible greater expenditures on environmental and social welfare by the participating less developed states.[26] There is, of course, no guarantee the expenditures will be made, and this justification ignores the permanent damage that may arise before such expenditure. But it does include the important perception that the linkage question must be examined in light of the different stages of development of the national economies that make up a free trade organization. It also includes the view that it is unrealistic and unfair to demand that less developed states implement standards of environmental regulation and labor welfare which are the luxuries of advanced economies.

There are other facets of the economic debate. Environmentalists, rejecting both the protectionists of developed economies and the rationalizations of the free traders, focus the issues in terms of developmental inequities. They argue,

22. General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, Aug. 16, 1991, *reprinted in* 30 I.L.M. 1594 (1991).

23. Bill Clinton, Expanding Trade and Creating American Jobs, Address at North Carolina State University (Oct. 4, 1992), *in* 23 ENVTL. L. 683, 684 (1993).

24. *See, e.g.*, Daniel P. Blank, *Target-Based Environmental Trade Measures: A Proposal for the New WTO Committee on Trade and Environment*, 15 STAN. ENVTL. L.J. 61, 87 (1996); Bartram S. Brown, *Developing Countries in the International Trade Order*, 14 N. ILL. U. L. REV. 347, 377 (1994).

25. The Trade & Env't Comm'n of the Nat'l Advisory Council for Envtl. Pol'y and Tech., THE GREENING OF WORLD TRADE: A REPORT TO THE EPA 35 (Jan C. McAlpine et al. eds., 1993).

26. *See* Daniel C. Esty, *GATTing the Greens, Not Just Greening the GATT*, FOREIGN AFFAIRS, Nov.-Dec. 1993, at 32, 35.

for example, that environmental damage is positively correlated with income, especially in relation to the global commons.[27] Their claim is illustrated, for example, by the damage resulting from higher energy costs from the transportation of goods involving increased development, air emissions and damage from accidents of transport such as oil spills.

In sum, the economic debate is many-sided, and the question of whether trade liberalization negatively or positively impacts environmental regulation and labor welfare as between developed and developing states involves complex economic analysis of multiple variables.[28] Much of the argument pro and con depends on how the empirical data is marshaled—and on speculation. What is clear, however, is that in bringing together into a regional free trade grouping economies of different levels of development, the issues of environmental protection and labor welfare do become manifest, and can no longer be avoided by politicians and policy makers.

C. The Status of Linkage at the Global Level

The extent to which the linkage has not been accepted at the level of global institutionalization of trade policy thus appears anomalous, in light of current economic realities and social values. Indeed, the increasing clamor coming from social critics and environmentalists is forcing some movement towards accommodation at the GATT, reflected in the results of the Uruguay Trade Round, including its creation of the World Trade Organization (WTO).[29] A course now has been set for institutions at the global level to become more responsive to concerns about the environment and labor. When the WTO agreement was signed on April 15, 1994, the Ministers declared "that there should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other." In outlining the agenda for the new WTO "Committee on Trade and the Environment," the Ministers emphasized making trade and environmental policies "mutually supportive."[30]

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27. Patrick Low & Raed Safadi, *Trade Policy and Pollution*, draft paper prepared for International Trade Division, World Bank, Washington, D.C. (May, 1991), *in* THE GREENING OF WORLD TRADE, *supra* note 25.

28. *See generally* Kym Anderson, *Economic Growth, Environmental Issues, and Trade, in* SYSTEMIC IMPLICATIONS OF PACIFIC DYNAMISM 341, 351-57 (C. Fred Bergsten & Marcus Noland eds., 1993).

29. For a close review and evaluation of the differences between the new GATT/WTO and the pre-WTO GATT related to environmental protection, see Jennifer Schultz, *The GATT/WTO Committee on Trade and the Environment—Toward Environmental Reform*, 89 AM. J. INT'L L. 423 (1995).

30. Decision on Trade and Environment, Apr. 15, 1994, *reprinted in* 1 Law & Practice of the World Trade Organization, Booklet 5, Release 95-1, at 53 (issued Mar. 1995). The Ministers referred to the terms of reference for the Committee on Trade and Environment, which provide in part: (a) to identify the relationship between trade measures and environmental measures, in order to promote sustainable development; (b) to make appropriate recommendation on whether any modifications of the provisions of the multilateral trading system are required, compatible with the open, equitable and non-discriminatory nature of the system, as regards, in particular: (i) the need for rules to enhance positive interaction between trade and environmental measures, for the promotion of

Nevertheless, the new WTO agreement, like the GATT, is conspicuously silent about labor issues. Currently GATT Article XX(e), which permits member countries to restrict the importation of goods produced by prison labor, is and continues to be the only provision connecting fair labor standards to trade benefits.[31] With the exception of Article XX(e), the GATT is otherwise silent on labor; indeed, it actually prohibits member countries from restricting trade on the basis of labor violations.[32]

The failure of both the Uruguay round talks and of the subsequent preparatory meeting of the WTO to incorporate provisions for fair labor standards occurred despite significant pressure to do so, especially from the United States.[33] At the GATT Preparatory Committee meeting in June 1986, the United States delegation raised the issue of worker rights in the form of a "social clause" and requested other parties to "consider possible ways of dealing with worker rights issues in the GATT so as to ensure that expanded trade benefits all workers in all countries."[34] Yet worker rights were not addressed in the Ministerial Declaration which initiated the Uruguay Trade Round.[35] Subsequently the United States, along with Canada and the European Parliament, has continued to press for a "social clause" to be introduced either directly to the WTO or by way of

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sustainable development, with special consideration to the needs of developing countries, in particular those of the least developed among them; (ii) the avoidance of protectionist trade measures, and the adherence to effective multilateral disciplines to ensure responsiveness of the multilateral trading system to environmental objectives set forth in Agenda 21 and the Rio Declaration, in particular Principle 12; (iii) the surveillance of trade measures used for environmental purposes, of trade-related aspects of environmental measures which have significant trade effects, and of effective implementation of the multilateral disciplines governing those measures.

Specifically, the Ministers agreed that the Committee on Trade and Environment would initially address the following issues: (a) the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements; (b) the relationship between environmental policies relevant to trade and environmental measures with significant trade effects and the provisions of the multilateral trading system; (c)the relationship between the provisions of the multilateral trading system: (i) charges and taxes for environmental purposes; and (ii) requirements for environmental purposes relating to products, including standards and technical regulations, packaging, labeling and recycling; (d) the provisions of the multilateral trading system with respect to the transparency of trade measures used for environmental purposes and environmental measures and requirements which have significant trade effects; (e) the relationship between the dispute settlement mechanisms in the multilateral trading system and those found in multilateral environmental agreements; (f) the effect of environmental measures on market access, especially in relation to developing countries, in particular to the least developed among them, and environmental benefits of removing trade restrictions and distortions; and (g) the issue of exports of domestically prohibited goods.

31. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, art. XX(e), 61 Stat. pts. 5,6, T.I.A.S. No. 1700, 55 U.N.T.S. 187.

32. *See* Julie Stensland, *Internationalizing the North American Agreement on Labor Cooperation*, 4 MINN. J. GLOBAL TRADE 141, 148-49 (1995).

33. Steve Charnovitz, *The Influence of International Labour Standards on the World Trading Regime*, 126 INT'L LAB. REV. 565 (1987). The United States, at the April Marrakesh conference, did succeed in getting the WTO Preparatory Committee to at least discuss the labor issue. *GATT: U.S, Other GATT Countries Agree to Discuss Link Between Labor, Trade*, 11 Int'l Trade Rep. (BNA) 15 d6 (Apr. 13, 1994).

34. Charnovitz, *supra* note 33, at 565.

35. *Id.*

the International Labour Organization (ILO).[36] The pressure for such standards has met with fierce opposition; diverse parties, from the European Commissioner for External Economic Affairs[37] to various developing countries, have opposed such clauses.[38] Although the ILO has recently begun to recognize the linkage between trade and labor welfare[39], and in the future may put pressure on the WTO, at present the WTO member nations are still debating whether or not labor issues belong on their agenda.[40]

Thus far at the global level, little of substance appears to have been accomplished with regard to environmental protection, and nothing has been accomplished so far with regard to labor welfare. It seems somewhat paradoxical that such reluctance has been demonstrated at the WTO/GATT level of trade liberalization in roughly the same time frame that NAFTA has been elaborated to include its detailed and innovative Side Agreements on the environment and labor.[41] That discrepancy, however, suggests the most intriguing question about the evolution of trade liberalization and its linkage to environmental and labor regulation. Are regional groupings more likely to successfully integrate trade liberalization with environmental and social welfare considerations than multilateral global organizations? If so, what are the reasons? This Article examines the linkage of regional free trade with environmental protection and labor welfare, to discern why this linkage has developed as a characteristic of regional agreements, and what this may instruct for the future legal structure of regional free trade.

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36. *Labor: Reich Calls for Guidelines on World Trade-Labor Practices*, 11 Int'l Trade Rep. (BNA) 24 d 16 (June 15, 1994); Robert Evans, *U.S. to Pursue Trade-Labor Link in WTO*, REUTER BUS. REP., Apr. 4, 1995, *available in* LEXIS, World Library, REUBUS File; *Parliament Urges Social Clause Be Included on GATT Accord*, EUROWATCH, Feb. 21, 1994; *U.S. to Press for Trade-Labour Link at WTO*, REUTER NEWS SERVICE, Nov. 16, 1994, *available in* LEXIS, News Library, Txtnws File.

37. *Trade Policy : Brittan Warns of Protectionist Risk in Mixing Trade with Labor, Environment*, 11 Int'l Trade Rep. (BNA) 92 (January 19, 1994). Commissioner Brittan agreed that the WTO should start work on "a series of priority topics" including labor standards, but noted the difficulty in defining such standards and the unreasonableness in asking developing countries to "apply the highest level of standards that we have only recently introduced after 100 years of development without these standards."

38. Sonali Desai, *Asian Opinion Divided on Labour-Trade Link at WTO*, REUTERS, Apr. 25, 1996, *available in* LEXIS, News Library, Txtnws File. Malaysia's International Trade and Industry Minister Rafidah Aziz said that labor standards and social clauses were not trade related and did not belong in the WTO; "[t]hat is the consensus (in Southeast Asia)."

39. *ILO Panel Agrees to Continue Talks About World Trade, Social Progress*, Int'l Bus. & Fin. Daily (BNA) (Apr. 12, 1995).

40. Desai, *supra* note 38; *European Union: Commission Meeting to Consider WTO Talks on Labor Standards*, 11 Int'l Trade Rep. (BNA) 12 d52 (Mar. 23, 1994); *see also Quadrilateral Meeting Will Allow EU, USA, Japan and Canada to Discuss Follow-Up to Uruguay Round*, Sept. 9, 1994, REUTERS TEXTLINE, *available in* LEXIS, World Library, Txtlne File.

41. Schultz, *supra* note 29, at 432-34.

II.
THE ADVANTAGES OF REGIONAL FREE TRADE FOR LINKAGE WITH ENVIRONMENTAL PROTECTION AND LABOR WELFARE

Evaluating the comparative effectiveness of regional versus global trade organization as a means to address social policy concerns involves a complex intersection of legal, political and economic factors. A compelling case can be made, however, for the advantages of the regional approach. Fundamentally, the case is that free trade at the regional level serves as both a bigger carrot and a bigger stick than at the global level. Relevant statistics show that free trade blocs generate, even short term, huge increases in trade among the partners to a bloc.[42] All of this follows from the more focused, intense and complete commitment that is signified by the transition to regional free trade. The regional development of free trade blocs, exemplified by NAFTA and the European Union, affords greater leverage to promote adherence to environmental and labor standards than the incremental liberalization process of the global/multilateral GATT/WTO system. It also lessens the risk of the use of labor and environmental standards for trade protectionism.

A. The Stick of Trade Sanctions and the Carrot of Trade Concessions

Disputes over linkage of trade with environmental protection and labor welfare, whether at the global/multilateral or regional level, generally concern the compliance mechanism of trade sanctions. But sanctions have a different relationship to environmental protection and labor welfare at the regional than at the global level of trade liberalization. Under the legal process of GATT, trade sanctions are invoked negatively, to dissuade parties from domestic lawmaking or enforcement that global competitors may view as unilateral protectionism.[43] Consequently, the GATT/WTO has been widely criticized, particularly by environmentalists, for failing to "recognize and protect the crucial role trade sanctions can play in enforcing and inducing participation in international environmental agreements."[44] However, this affirmative role for sanctions has been embodied in the regional approach, particularly by the NAFTA Side

42. Brand, *supra* note 1, at 168. In the first three months after the enactment of NAFTA on January 1, 1994, the United States exported nearly ten percent more goods to Mexico than in the last three months of 1993. Bob Davis, *The Outlook: NAFTA Success May Aid New Trade Accords*, WALL ST. J., June 13, 1994, at 1. In the first year of NAFTA, U.S. exports and imports with Mexico increased at twice the rate of the increase with the rest of the world. *Trade Pact Anniversary - for Better or Worse*, CHRISTIAN SCI. MONITOR, Jan. 3, 1995, at 1. The impact is especially notable when compared to results of U.S. trade with other major trading partners. U.S. exports to Mexico grew by 22 percent in 1993, though U.S. exports to Europe and Japan fell. Vincent J. Schodolski, *NAFTA Gives U.S. Exports Lift*, CHI. TRIB., Apr. 18, 1994, at 1.

43. This is notwithstanding GATT's acceptance that countries may restrict imports to protect their domestic environment, provided such restrictions are non-discriminatory and the principle of national treatment is maintained. *See* Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, 25 J. WORLD TRADE 37 (1991).

44. *GATT: GATT in "Head-On" Conflict with Treaties on the Environment, Worldwatch Report Says*, 10 Int'l Trade Rep. (BNA) 560 (Mar. 31, 1993). *See also, Official Defends Environmental Policy, Says GATT Rules Give Scope for Protection*, Int'l Envtl. Daily (BNA) (Sept. 23, 1992).

Agreements. The Side Agreements provide a legal process for dispute resolution, including arbitration, but one that focuses exclusively on whether a party has failed to effectively enforce its own labor or environmental laws.[45] The aim is to optimize the incentives for non-contentious resolution through party self-correction, spurred by the threat of lost trade benefits and the ensuing political embarrassment that may entail. Thus NAFTA produced a new synthesis of two distinct economic means of protecting environmental and labor concerns. The possible stick of sanctions puts the carrot of tangible, immediate trade benefits at risk—but only after a lengthy process of arbitration replete with opportunities for compromise and voluntary agreement. It offers a fusion of legal and political modalities to maintain the structure of regional free trade, while addressing the concerns of environmental protection and labor welfare.[46]

The affirmative use of the threat of trade sanctions to further environmental protection and labor welfare, characteristic of regional trade organization, is often criticized as antithetical to free trade. Free trade advocates argue that trade sanctions distort and undercut the efficient allocation of resources by market forces.[47] Environmentalists and social activists counter that trade sanctions are a cost-effective means of securing compliance with otherwise difficult to enforce standards and agreements.[48] The truth is more complex than either camp would have it. Trade sanctions used to support environmental protection or labor welfare can have, in practice, negative as well as positive effects on the very interests they are meant to protect. For example, while trade sanctions may be used to limit exports of agricultural products whose production causes environmental harm, the net effect if compliance does not result is to intensify environmental and social pressures, by inflating returns to input use, leading to more intensive farming, inducing soil erosion, chemical runoff, and loss of biological diversity and ecosystems. Similarly, trade restrictions might limit the use of child labor or unsafe labor practices in developing nations yet, as a consequence, they lower the incomes of already impoverished workers, raise consumer prices in developed countries, and force developing countries to intensify exports of natural-resource based commodities.[49] Thus the problem with expecting the simple imposition of trade sanctions to secure environmental protection and labor welfare is that sanctions may result in costs disproportionate to the benefits generated, especially if applied unilaterally by one country with relative market power. The problem is manifest in its most ironic form when rich countries seek, through sanctions, to change the environmental policies of poor countries, since it is well established that rich countries are the major contributors to global environmental problems.[50]

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45. *See infra* pp. 14-16.

46. Jack I. Garvey, *Trade Law and the Quality of Life—Dispute Resolution Under the NAFTA Side Accords on Labor and the Environment*, 89 AM. J. INT'L L. 439, 439-40 (1995).

47. Esty, *supra* note 26, at 35.

48. THE GREENING OF WORLD TRADE, *supra* note 25, at 72.

49. *Id.* at 78-79.

50. *Id.* at 100.

By contrast, the use of trade concessions to obtain gains for environmental regulation and social welfare generally entails net benefits. There are significant complementarities, such as the increases in income resulting in increased living standards and availability of funding for environmental protection. More importantly, a natural calculus of self-benefit operates when environmental or labor protection is secured through a voluntary agreement. Voluntary agreement implies that each party calculates that the benefits of such agreement exceed the costs.[51] The NAFTA negotiators capitalized on this: The anticipated gains from trade and investment enticed Mexico to agree to the Side Agreements' disputes process. Sanctions were relegated to the limited role of supporting concessions, and this gives the Side Agreements their greatest potential for actually securing environmental protection and labor welfare.

The creation of the NAFTA Side Agreements was first and foremost a response to the unavoidable impact that free trade would have on the environment and labor welfare. The principal U.S. political constituencies—both for and against NAFTA—had each focused their arguments on the existing threat of losing jobs to Mexico; one side maintained that NAFTA would stanch this loss, while the other felt it would exacerbate it. It was also generally recognized that the problem was not the lack of labor and environmental laws in Mexico, but the failure of enforcement[52] and that this resulted from the lack of institutional resources for the necessary inspection and enforcement. Mexico's top-heavy political culture characterized by power of the executive branch,[53] its lack of an independent judiciary, and endemic corruption were understood as the problem. The NAFTA Side Agreements were tailored precisely to target these deficiencies. Their central innovation was to set forth as the legal standard of the Side Agreements, not substantive labor and environmental laws, but a consultation and disputes process that inquires whether a party has persistently failed to effectively enforce its own environmental or labor laws.[54]

The Side Agreements frame a process, as much political as legal, to direct pressure to upgrade the environmental and labor situation in Mexico. On the environmental side it includes a Commission for Environmental Cooperation (CEC), which has a Council composed of the chief environmental officials of the United States, Mexico, and Canada, an international Secretariat, and a broad mandate to address environmental concerns throughout North America. On the labor side, the structure is similar. The Side Agreement created a Commission for Labor Cooperation (CLC) composed of a Council, a Secretariat, and a Na-

51. *Id.* at 99.

52. *See* Robert F. Housman & Paul M. Orbuch, *Integrating Labor and Environmental Concerns Into the North American Free Trade Agreement: A Look Back and a Look Ahead*, 8 AM. U. J. INT'L L. & POL'Y 719, 729 (1993); Robert Houseman et al., *Enforcement of Environmental Laws Under a Supplemental Agreement to the North American Free Trade Agreement*, 5 GEO. INT'L ENVTL. L. REV. 593, 594-96 (1993).

53. As a Mexican attorney recently explained it to the author of this article, "Yes, in Mexico we have division of three powers of the Government. We have the Executive, and the Executive, and the Executive".

54. NAAEC, *supra* note 19, art. 22, 32 I.L.M. at 1490 and NAALC, *supra* note 19, art. 27, 32 I.L.M. at 1509. *See also* Garvey, *supra* note 46, at 443-44.

tional Administrative office (NAO) of each party.[55] Under both agreements, in the event of the charge that a party is failing to enforce its environmental or labor laws, the process begins with consultation; if consultation is not successful, it proceeds through an arbitration process designed to arrive at an action plan agreed to by the parties, but ultimately backed by the sanction of suspension of trade benefits.[56]

With its design of a binding arbitration process ventilated by provisions for consultation and expert input, the Side Agreements process is unique in the regimes of international trade law. The innovation lies not in the severity of likely damages by way of "snap back" duties—since duties among the parties were not very high to begin with—but in the political dynamic for negotiated resolution generated by a highly transparent process of consultation and evaluation through arbitration. Multiple provisions in both Side Agreements provide for expert input, and this is not limited to trade expertise, as has been true (with rare exceptions[57]) of trade panels under the GATT.[58] While the GATT/WTO provides panels with access to outside expertise, these rules do not allow disputing members to independently call experts to present information to panels as does NAFTA, both in the Side Agreements and the NAFTA treaty itself.[59] Moreover, NAFTA puts the burden of proof on a party challenging an environmental or health and safety measure. Under GATT/WTO the burden is on the Party establishing the measure.[60] Finally, in contrast to GATT/WTO, NAFTA makes an explicit commitment to make final reports of disputes panels available to the public,[61] though NAFTA does contain significant limits on public access to the disputes resolution procedure, both in terms of participation and information.[62]

Thus, in response to environmental and labor welfare critics of NAFTA, the Side Agreements were molded to utilize a relatively transparent legal process to create a pragmatic tableau for trade concession politics. The result ap-

55. NAALC, *supra* note 19, art. 8(2), 32 I.L.M. at 1504.

56. NAAEC, *supra* note 19, Part Three, 32 I.L.M at 1485-89 and Part Five, 32 I.L.M at 1490-94. NAALC, *supra* note 19, Part Four, 32 I.L.M. at 1507-09 and Part Five, 32 I.L.M. at 1509-13.

57. An exception was the *Thai Cigarettes* case in which the GATT dispute panel consulted with the World Health Organization. *See* General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on Thai Restrictions on Importation of and Internal Taxes on Cigarettes, *reprinted in* 30 I.L.M. 1122 (1990); *Unions, Employers, and Federal Government Debate Effect of NAFTA on U.S. Safety Rules*, 227 Daily Lab. Rep. (BNA) A8 (Nov. 24, 1992).

58. NAAEC, *supra* note 19, art. 30, 32 I.L.M. at 1492 and NAALC, *supra* note 19, art. 35, 32 I.L.M. at 1511.

59. Canada-Mexico-United States: North American Free Trade Agreement, Dec. 8, 11, 14, 17, 1992, *reprinted in* 32 I.L.M. 289 (part 1), 605 (part 2), arts. 2014, 2015 at 697 [hereinafter NAFTA]; art. 2015 states: "On the request of a disputing Party or, unless the disputing Parties disapprove, on its own initiative, the panel may request a written report of a scientific review board on any factual issue concerning environmental, health, safety or other scientific matters raised by a disputing Party in a proceeding . . . . " *See* Schultz, *supra* note 29, at 431.

60. *See* Schultz, *supra* note 29, at 431.

61. *Id.*

62. Under the NAFTA, interested members of the public and Non-Governmental Organizations cannot participate in the hearings or consultations conducted during a dispute, NAFTA, art. 2012.1(b), 32 I.L.M. at 696, nor can they obtain the filing of the parties to a dispute, *id.*, and in some circumstances can be denied access to a final decision. NAFTA, art. 2017.4, 32 I.L.M. at 697. *See* Garvey, *supra* note 46.

pears sufficiently successful. By capitalizing on trade concessions, the approach to the linkage between trade liberalization and environmental and labor regulation embodied in the Side Agreements proved positive enough to placate, if not satisfy, NAFTA's loudest critics. This is instructive on how a design of confluence of politics and law can optimize the process of trade liberalization. The legal disputes resolution model accomplished NAFTA's key political and legal objectives. It avoided affront to Mexican sovereignty by conceding environmental and labor regulation to be a matter of national law and national cultures. And it allowed the North American free trade regime to go forward, despite the differences of environmental and labor regulation between the parties. There is already evidence that the risk of publicity presented by the transparency of the process has caused companies to improve their behavior in relation to environmental and welfare concerns.[63]

B. Upwards Harmonization

A big carrot and big stick are not yet in place for the Asia-Pacific trading area. AFTA, as the only existing Asian trade bloc, was originally composed of Singapore, Thailand, Malaysia, Indonesia, the Phillippines, Vietnam and Brunei. The weight of trade sanctions and concessions is therefore relatively small within AFTA. Access to world markets by these export-oriented states, being so much more important than increased trade between the member states, diminishes the economic and political leverage available to use regional free trade as an engine for progress on environmental and labor welfare fronts.

The principal membership of a Pacific Basin free trade organization, however, is still unresolved. The addition of one or more of the larger Asia-Pacific economies, such as that of Japan, China, or the United States—a prospect which is being heavily promoted—would geometrically increase the capacity of AFTA to promote environmental protection and labor welfare. One lesson to be learned from NAFTA is that the degree of achievement in these areas will depend on the values and politics of a dominant member of the regional bloc. Accordingly, an Asia-Pacific free trade organization weighted towards the mature economy and legal standards of the United States presents a much more promising picture for the environment and labor than a bloc dominated by a developing economy like China's, still striding the environmental and social debris of its own rapid modernization and marketization. China has in the past supported Malaysia's proposal for an East Asia Economic Caucus (EAEC),[64] which would exclude the United States and Australia by restriction to ethnically Asian countries. Malaysia has also been a strident critic of Western attempts to link China's human rights record to trade.[65] These positions are surely recipro-

63. *NAOs Deterring Labor Law Violations, Official Says*, 150 Lab. Rel. Rep. (BNA) 257 d285 (Oct. 30, 1995).

64. Kieran Cooke, *How Malaysia Discarded Its Fear of China: A New Alliance is Emerging to Counter Western Influence*, FIN. TIMES, Feb. 10, 1995, at 4, *available in* LEXIS, Asiapc Library, Fintme File.

65. *Id.*; *See* Philip Shenon, *Boycott in Order, Malaysian Says*, N.Y. TIMES, Nov. 21, 1993, at 15.

cal. Both are related to the central fact that regional free trade—to the extent that it joins parties of different levels of development—is perceived as generating upward pressure on social welfare standards.

Exclusion of the United States would probably render non-feasible a significant Pacific Basin free trade area. Even Malaysia, the foremost proponent of the EAEC, enjoys more investment from the United States than even from Japan.[66] The United States is the primary market for exports from Singapore, Thailand, and the Phillippines,[67] and is now the biggest trading partner with, and investor in, Malaysia.[68] The United States government has opposed development of the EAEC as an attempt to shut it out of Asian markets,[69] and it appears to have been successful. It is now generally acknowledged that the U.S. must be part of any Asia-Pacific regional free trade grouping that can function effectively in relation to the other regional free trade groupings of the EC and NAFTA.[70] Thus an Asian regional free trade grouping will in all probability contain the dynamic of upwards harmonization generated by the United States.

This points to the utility of regional free trade for propagating higher standards of environmental protection and labor welfare. During the negotiation of regional free trade, the fear is always expressed that harmonization will lead to downward pressure on environmental and labor conditions, on the assumption that cheaper, less regulated economies will attract investment and jobs. The reality dictated by the politics of regional free trade, however, is quite the opposite. Because the state with the higher standards is naturally the more developed, wealthier and politically stronger partner to the agreement, political and economic power works in the direction of harmonization upwards, both in the context of the original agreement and its implementation over time.

NAFTA illustrates this. The Agreement was criticized as leading to downward harmonization,[71] in light of the differences in actual operating standards between the U.S. and Mexico. To be sure, some of the literal provisions of

66. *Aimless in Seattle*, ECONOMIST, Nov. 13, 1993, at 35.

67. 4 U.S. DEP'T OF STATE DISPATCH No. 31, FACT SHEET: U.S. ECONOMIC RELATIONS WITH EAST ASIA AND THE PACIFIC (Aug. 2, 1993).

68. *Aimless in Seattle*, *supra* note 66, at 35.

69. Shenon, *supra* note 65, at 15.

70. Given the economic interests at stake, it is perhaps not so surprising that Malaysia's finance minister has taken issue with the Malaysian Prime Minister, stating that an emphasis on ethnically Asian nations for organization of regional free trade is a view that is out of date with economic realities. *See, Aimless in Seattle*, *supra* note 66, at 35. Typical of the views of most senior Asian officials, executives and experts, is the comment by Fuji Xerox Chairman Yotaro Kobayashi made prior to the Singapore Declaration establishing AFTA, "Regional economic integration around the world is increasing in intensity. That alone should force Asia to think about forming some sort of new organization, not necessarily to compete with the EC or a North American free-trade agreement, but to maintain a balance in negotiations. Still, no one in his right mind would think of excluding the U.S. from such a group." *Will Japan Rule a New Trade Bloc*, FORTUNE, Oct. 5, 1992, at 131, 132.

71. *See, e.g.*, James E. Bailey, *Free Trade and the Environment—Can NAFTA Reconcile the Irreconcilable?*, 8 AM U. J. INT'L L. & POL'Y 839, 856 (1993); Farah Khakee, Comment, *The North American Free Trade Agreement: The Need To Protect Transboundary Water Resources*, 16 FORDHAM INT'L L.J. 848, 872 (1993); Walter R. Mead, *Bushism, Found: A Second-Term Agenda Hidden in Trade Agreements*, HARPER'S, Sept. 1992, at 37, 39-40.

NAFTA seemed to open the free trade relationship between the United States and Mexico to downward pressure. This is suggested particularly by provisions in Article 7 prohibiting "unjustifiable discrimination"[72] and "disguised restriction"[73] and that phytosanitary measures be designed "only to the level necessary to achieve its appropriate level of protection."[74] Overall, though, the operative dynamic is unmistakably upward. On the labor side, there is a general commitment to "improve" working conditions and living conditions in the three countries.[75] This commitment is one of the primary objectives of the Agreement,[76] and is expressed in the form of labor principles contained in Annex 1 to the agreement.[77] For the environment, NAFTA specifically addresses the question in the context of the Sanitary and Phytosanitary rules, providing that any harmonization must occur "without reducing the level of protection of human, animal or plant life or health."[78] While NAFTA supports the use of international standards,[79] it also provides that each party has the right to exceed international standards.[80] The Clinton Administration has pointed to upward harmonization as the principal achievement of its work in modifying NAFTA by way of the Side Agreements. Upon signing it, President Clinton declared, "The environmental and labor side agreements negotiated by our administration will make this agreement a force for social progress as well as economic growth."[81] The other partners to NAFTA expressed similar views that the overarching goal of

72. NAFTA, *supra* note 59, art. 712(4), 32 I.L.M. at 378; *see also* NAFTA, *supra* note 59, art. 712(5), 32 I.L.M. at 378.

73. *Id.*, art. 715(3)(b), 32 I.L.M. at 379.

74. *Id.*, art. 712(5), 32 I.L.M. at 378.

75. NAALC, *supra* note 19, art. 1, 32 I.L.M. at 1503.

76. *Id.*, art. 8(2), 32 I.L.M. at 1504.

77. *Id.*, Annex I, 32 I.L.M. at 1515-16. Annex I contains the eleven labor principles of the Side Agreement to which the Parties are "committed to promote, subject to each Party's domestic law". The principles include freedom of association and protection of the right to organize, the right to collective bargaining and to strike, prohibition of forced labor, protections for children and young persons, minimum employment standards, most notably a minimum wage, elimination of employment discrimination, equal pay for women and men, occupational safety measures, including prevention of injury and worker compensation, and finally, equal legal protection for migrant workers, respecting work conditions, as that afforded the Parties' own nationals.

78. NAFTA, *supra* note 59, art. 713.1, 32 I.L.M. at 378.

79. *Id.*, art. 713, 32 I.L.M. at 378; art. 905, 32 I.L.M. at 387.

80. *Id.*, art. 713.3, 32 I.L.M. at 378; art. 905.3, 32 I.L.M. at 387. Article 905 is particularly illustrative of where the balance is struck:

> 1. Each Party shall use, as a basis for its standards-related measures, relevant international standards . . . except where such standards would be an ineffective or inappropriate means to fulfill its legitimate objectives, for example because of . . . the level of protection that Party considers appropriate.
>
> 2. A Party's standards-related measure that conforms to an international standard shall be presumed consistent with (the Party's Basic Rights and Obligations).
>
> 3. Nothing in paragraph 1 shall be construed to prevent a Party, in pursuing its legitimate objectives, from adopting, maintaining or applying any standards-related measure that results in a higher level of protection than would be achieved if the measure were based on the relevant international standard.

81. *Remarks on Signing the North American Free Trade Implementation Act*, 29 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Dec. 13, 1993, Doc. 2548, *available in* LEXIS, NEWS Library, PRESDC File.

NAFTA is to improve quality of life, including working conditions, throughout North America.[82]

The thrust upwards was assured because, before the United States Congress could commit to free trade in North America, it was compelled to respond to domestic constituencies of labor and other interest groups concerned to maintain the standards of United States law. The "Waxman/Gephardt" resolution passed by Congress in 1992 provided that the U.S. House of Representatives would "not approve legislation to implement any trade agreement, including [the GATT and NAFTA], if such agreement jeopardizes United States health, safety, labor, or environmental laws [including the Federal Food, Drug, Cosmetic Act and the Clean Air Act]."[83] This set NAFTA's course for harmonization upwards.

The pressure generated for upward harmonization by regional free trade is particularly striking on issues of labor welfare. This is substantiated as well by the NAFTA experience. Mexico resisted U.S. demands that labor laws be more effective and wages increased, just as less developed countries generally seek to exploit the competitive advantage of lower wages and less regulated working conditions.[84] But United States labor organizations and their representatives in Congress kept up the pressure for upward harmonization. Thus almost immediately upon the accession of Chile being proposed, the AFL-CIO announced its opposition to extending NAFTA, arguing that it "offers nothing to the hemisphere's workers."[85] Representative Richard Gephardt, a principal in the fight over NAFTA, warned President Clinton that the Democrats would insist on stronger labor protections in future agreements.[86] The result was a step forward for labor standards when Chile subsequently announced its willingness to negotiate on the inclusion of a labor side accord as a condition of its own accession.[87]

C. *Propagation and Development of Standards*

Regional free trade is conducive to the implementation of international as well as national standards of environmental protection and labor welfare. Notwithstanding its regional focus, NAFTA specifically sought to preserve and enhance existing international environmental agreements ("IEAs") through Article 104 and its annexes listing specific IEAs.[88] An accessant must be a party to,

82. *Canadian, U.S. Officials Endorse Labor Accord*, *supra* note 8.

83. H.R. Con. Res. 246 sec. 2, 102d Cong., 2d Sess., 138 CONG. REC. H7699 (Aug. 6, 1992).

84. James M. Samples, *Labor Side Agreement Important Part of NAFTA*, MINN. STAR-TRIB., Oct. 3, 1994, at 3D.

85. Statement by AFL-CIO (Dec. 8, 1994), *in U.S. Labor Official Hopes NAFTA is 'Starting Point' for Regional Talks*, INSIDE NAFTA, Dec. 14, 1994, at 9.

86. *See Gephardt Restates Backing for Green, Labor Issues in Trade Pacts*, INSIDE NAFTA, Dec. 14, 1994, at 11.

87. *See Aninat: Chile May Make NAFTA-Level Commitments on Labor, Environment*, INSIDE NAFTA, Dec. 14, 1994, at 3.

88. NAFTA, *supra* note 59, art. 104, 32 I.L.M. at 297-298.

or otherwise in compliance with the Montreal Protocol,[89] the Basel Convention,[90] the Framework Convention on Climate Change,[91] Western Hemisphere Convention,[92] CITES,[93] and the Biodiversity Convention.[94] Similarly on the labor side, an accessant must at a minimum be a party to or otherwise in compliance with ILO Conventions No. 105 on forced labor,[95] No. 87 on freedom of association,[96] and No. 98 on the right to organize.[97] It is declared that the obligations of a party under an IEA "shall prevail to the extent of the inconsistency, provided that where a party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is 'least inconsistent' with the other provisions of [NAFTA]."[98] In critique of NAFTA it is argued that the "least inconsistent" language leaves room for challenges to environmental protection, and that it leaves particularly vulnerable domestic laws implementing IEAs, as distinguished from the protected terms of the IEAs themselves. The important point, however, is that the regional trade liberalization under NAFTA resulted in the clear declaration that international agreements shall prevail despite claims of trade restriction.

Regional free trade development has also facilitated the implementation of international standards into domestic law that otherwise would not have occurred. The European Union is the outstanding example of how law promulgated at an international level may allow governments to implement norms as

89. United Nations: Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, *reprinted in* 26 I.L.M. 1541 (1987) (entered into force Jan. 1, 1989) [hereinafter Montreal Protocol].

90. United Nations Environment Programme Conference of Plenipotentiaries on the Global Convention on the Control of Transboundary Movements of Hazardous Wastes: Final Act and Text of Basel Convention, Mar. 22, 1989, *reprinted in* 28 I.L.M. 649 (1989) (entered into force May 5, 1992) [hereinafter Basel Convention].

91. United Nations Conference on Environment and Development: Framework Convention on Climate Change, May 9, 1992, *reprinted in* 31 I.L.M. 849 (1992).

92. Convention on Nature Protection and Wildlife in the Western Hemisphere, Oct 12, 1940, 56 Stat. 1354, 161 U.N.T.S. 193 (entered into force Apr. 30, 1942).

93. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 (entered into force July 1, 1975) [hereinafter CITES].

94. United Nations Conference on Environment and Development: Convention on Biological Diversity, June 5, 1992, *reprinted in* 31 I.L.M. 818 (1992).

95. International Labour Organization, Convention 105 Concerning the Abolition of Forced Labour, June 25, 1947, 320 U.N.T.S. 291.

96. International Labour Organization, Convention 87 Concerning Freedom of Association and Protection of the Right to Organize, July 9, 1948, 68 U.N.T.S. 17.

97. International Labour Organization, Convention 98 Concerning the Application of the Principles of the Right to Organize, July 1, 1949, 96 U.N.T.S. 257.

98. NAFTA, *supra* note 59, art. 104, 32 I.L.M. at 297-298. Three multilateral agreements are listed: (1) the Montreal Protocol, *supra* note 89; (2) the Basel Convention, *supra* note 90; and (3) the CITES, *supra* note 93. Two bilateral agreements are listed: (1) Agreement Between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area, Aug. 14, 1983, 35 U.S.T. 2916, T.I.A.S. No. 10827 (entered into force Feb. 16, 1984); (2) Agreement Between the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Waste, signed Oct. 28, 1986, T.I.A.S. No. 1109. The parties subsequently agreed to list The Convention on the Protection of Migratory Birds, Aug. 16, 1916, U.S.-Great Britain (on behalf of Canada) 39 Stat. 1702, T.I.A.S. No. 628; and The convention Between the United States of America and the United Mexican States for the Protection of Migratory Birds and Game Mammals, Feb. 7, 1936, 50 Stat. 1311, T.I.A.S. No. 912.

binding domestically without going through the established domestic legislative process.[99] While this may be criticized as comprising the democratic process, it does mean additional promise for the promulgation of norms addressing matters of environmental protection and labor welfare. In the Pacific Basin context, where regional free trade is likely to include some relatively authoritarian governments, or federal systems with multiple local legislatures, this aspect of the promulgation of international norms through regional free trade can be of special value, allowing for adherence to norms which otherwise would not be politically viable.[100] Even as to norms generally considered "universal," such as prohibitions on prison or slave labor,[101] it is in the regional arena of free trade that the maximum opportunity is available to assure meaningful conformance to these norms. In this regard, the contrast with GATT/WTO is striking. Careful examination of the provisions of GATT/WTO leads to the conclusion that both the Agreement on Technical Barriers to Trade and the Agreement on Sanitary and Phytosanitary Measures "appear to have been written to avoid making international standards a base for world trade."[102]

It should be noted that the major benefits of regional trade liberalization for social policy do not stem mainly from the fact that it may be easier at the regional level to require compliance with relevant international agreements. For such agreements do not cover many important environmental and labor related subjects; to achieve consensus among many different types of parties, these are typically drafted at a level of generality that fails to address seriously many critical aspects of environmental and social degradation. Accordingly, the truly significant development in the linkage of trade liberalization with labor welfare and the environment is in relation to national law. And this is where the regional model affords the greatest advantage for linkage. NAFTA establishes, for example, as a central tenet regarding domestic law, that all NAFTA parties have the right to establish "appropriate levels of protection," and can ban a product or service so long as such ban is not discriminatory as between the parties.[103] Furthermore, the investment provisions of NAFTA explicitly require that governments should not lower or fail to enforce environmental, health and safety

99. *See* J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L. J. 2403, 2413 (1991).

100. Concerning the relatively authoritarian make-up of the Asia-Pacific nations, see Jonathan Braude, *Leading Asian Slams Autocracy*, So. CHINA MORNING POST, Dec. 3, 1994, at 5, *available in* LEXIS, Asiapc Library, Schina File, where Malaysian Deputy Prime Minister Anwar Ibrahim is quoted as referring to the "authoritarian posture of his own and other (Asian) governments".

101. Labor Secretary Robert Reich has stated, for example, that there are certain absolute labor standards which "will certainly include goods produced by prison or slave labor. Some forms of child labour - such as work by very young children - will also be found to violate universal norms, even in the poorest countries. Nor is poverty a valid pretext for restricting freedom of association and organization or the rights of employers and workers to bargain collectively". Robert Reich, U.S. Secretary of Labor, *Address at the International Labour Conference*, 81st Session, Geneva (1994), in PROVISIONAL RECORD, June 9, 1994, at 9/3.

102. Schultz, *supra* note 29, at 429.

103. NAFTA, *supra* note 59, art. 712.2, 32 I.L.M. at 378 and art. 904.2, 32 I.L.M. at 387; Office of the U. S. Trade Rep., THE NAFTA, EXPANDING U.S. EXPORTS, JOBS AND GROWTH: REPORT ON ENVIRONMENTAL ISSUES, at 6, 7, and 9, (Nov. 1993).

regulations in order to attract or maintain investment;[104] and NAFTA permits parties to impose environmental, health and safety conditions on investment so long as applied without discrimination.[105] In contrast, exemplifying the multilateral/global avoidance of linkage, the Agreement on Trade Related Investment Measures of the GATT/WTO makes no reference to the relationship between investment and pollution havens.[106] The new GATT/WTO rules may allow countries to erect "technical barriers" more trade-restrictive than international standards, if satisfying national and most-favored-nation treatment principles, but there is much uncertainty about this. For sanitary and phytosanitary measures, a country may select its preferred level of protection, so long as it is not "discrimination or a disguised restriction on international trade."[107] While NAFTA does require national legislation restricting trade to be supported by scientific evidence of the risk to the environment, health or safety, and to minimize the restriction of trade,[108] each party nevertheless has the authority under NAFTA to set its own standards and levels of protection.[109] Indeed, the "not more trade-restrictive than required" test, enshrined in the GATT/WTO rules, was specifically removed from the NAFTA treaty by negotiators.[110] On health and food safety measures, NAFTA preserves the right of importing members to judge the health safety of an import, while the GATT/WTO text does not appear to give this right.[111]

Combining the principle that each party has the authority to set its own higher standards of protection, with regional free trade's dynamic for harmonization upwards, makes for a potent mix. This legitimization of higher United States standards, amplified by the natural political dynamic favoring pact-wide extension of the standards of the dominant economy will create a strong force for upwards harmonization. As this is true for NAFTA, it will be true for any Asia-Pacific free trade grouping that includes the United States.

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104. NAFTA, *supra* note 59, art. 1114, 32 I.L.M. at 642.

105. *Id.*, art. 1113, 32 I.L.M. at 642.

106. General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Agreement on Trade-Related Investment Measures, Apr. 15, 1994, GATT doc. MTN/FA.

107. NAAEC, *supra* note 19, art. 5, 32 I.L.M. at 1484.

108. NAFTA's standards provisions are set forth in chapters 7 (NAFTA, *supra* note 59, 32 I.L.M. at 368) and 9 (32 I.L.M. at 386). Chapter 7, section B establishes sanitary and physosanitary measures. Chapter 9 sets forth rules on other standards-related measures. Chapter 7 provides that a party apply its sanitary and physosanitary standards "only to the extent necessary to achieve its appropriate level of protection, taking into account technical and economic feasibility" (art. 712.5, 32 I.L.M. at 378), and Chapter 9 provides that parties should not create "unnecessary obstacles" to trade in applying their standards (art. 904.4, 32 I.L.M. at 387). NAFTA provides that environmental, health and safety regulation should be informed by and based upon scientific evidence (art. 712.3, 32 I.L.M. at 378 and art. 907.1, 32 I.L.M. at 387), but a party need only show that a purpose of its standard or its measures is, among other goals, "safety", "protection of human, animal or plant life or health, the environment, or consumers", or "sustainable development" (art. 904.4, 32 I.L.M. at 387, art. 915.1, 32 I.L.M. at 391-92 and art.712(1), 32 I.L.M. at 377).

109. *See* NAFTA, *supra* note 59, art. 712.2, 32 I.L.M. at 378.

110. *See* Schultz, *supra* note 29, at 429.

111. *Id.*

It is generally true that the implementation of standards through multilateral agreement has the advantage of neutralizing unilateral protectionist tendencies, and affording legitimacy to implementing international norms, while avoiding charges of "eco-imperialism."[112] In this regard, too, regional trade organization demonstrates a capacity for reconciling environmental and labor welfare with diverse levels of state development that is lacking at the global level. The conceptual as well as practical difficulties of global linkage tend to be insuperable because of the large number of states involved and their range of economic development. Similarly, there is at the global level, increased risk of worsening welfare through programs that, though beneficial for developed countries, may only add to environmental degradation or health problems in developing countries.[113] The scandals concerning international waste disposal provide an obvious example. Moreover, in global/multilateral fora, developing countries argue that low environmental and labor welfare standards are an entitlement that developed countries received in the early stages of their own economic growth, and on this ground they resist efforts by more developed countries to impose environmental standards. The situation is illustrated by former World Bank Chief Economist Lawrence Sumner's sardonic remark that "[t]he demand for a clean environment for aesthetic and health reasons is likely to have a very high income-elasticity."[114]

It is easier to adjust to developmental differences at the regional level not only because of the smaller number of parties, but because it is also easier to fashion and finance programs of economic support for upwards harmonization. Within regional blocs member states share greater mutual interests—not only the carrot and stick of regional free trade, plus common geographical factors, but also the reality that only a limited number of states can be the donors and beneficiaries of financing.

Regional liberalization has demonstrated this relatively significant capacity to provide the specific measures needed to bridge the gap between developed and developing economies in their ability to pay the costs of environmental and labor protection. At the global/multilateral level, by contrast, developing countries complained throughout the Uruguay round negotiations that trade liberalization was being used to impose the standards of the developed countries and to hamper their own development.[115] The GATT holds out "harmonization" as a long term objective[116]; but in the GATT context, where the reconciliation of

112. *See* Ilona Cheyne, *Environmental Unilateralism and the WTO/GATT System*, 24 GA. J. INT'L & COMP. L. 433, 464 (1995); Edith B. Weiss, *Environment and Trade as Partners in Sustainable Development: A Commentary*, 86 AM. J. INTL L. 728, 732 (1992); James Sheehan, *Most Favored Fauna Treatment*, WASH. TIMES, May 31, 1994, at A12.

113. *See GATT: Danger of 'Green Protectionism' Lurks in GATT, WTO*, INTER PRESS SERV., Aug. 5, 1994, *available in* LEXIS, Market Library, Iacnws File.

114. *See Let Them Eat Pollution*, ECONOMIST, Feb. 8, 1992, at 66; *see also* Bartram S. Brown, *supra* note 24.

115. *See GATT: Creation of Gatt Environment Panel with Decision-Making Powers Urged*, Int'l Envt. Daily (BNA) at D-5 (Mar. 4, 1994); *GATT Group Agrees to Step Up Work on Trade, Environment Coordination*, Int'l Envt. Daily (BNA) (Dec. 7, 1992).

116. THE GREENING OF WORLD TRADE, *supra* note 25, at 184.

interests must take place on a global basis if at all, "harmonization" has meant that a national environmental or labor standard affecting trade is recognized as legitimate only where an international scientific consensus exists, and also a sufficient multilateral political consensus such that all parties will conform. The net effect is to support only the lowest common denominator among the parties, without provision for recognizing developmental differences. Even as to the recent Uruguay round, the complaint persists that the GATT/WTO undermines international environmental agreements by effectively prohibiting the use of trade measures to ensure compliance with those agreements, tightening rules so that new national environmental standards may be challenged as trade restraints, and justifying automatic retaliation.[117]

Regional free trade, on the other hand, has provided tangible resources to overcome the developmental differences. While this could be expected in the context of the European Union, given its comprehensive mandate, it has occurred also in the regional free trade context of NAFTA. NAFTA was developed in conjunction with the "Integrated Environmental Plan for the Mexican-U.S. Border Area,"[118] whereby the United States and Mexico agreed to the U.S.-Mexico Border Environment Cooperation Agreement (BECA). BECA establishes two institutions to provide planning and financing for addressing the problems of the border, the Border Environment Cooperation Commission and the North American Development Bank.[119] They represent an institutional and financial commitment by the parties to integrate economic development and quality of life concerns as an element of promoting regional free trade. The politics of regional free trade conjoin the pressures for upwards harmonization with developmental assistance. The offer of substantial economic aid to solve environmental problems generated by the trade between Mexico and the United States was a significant source of leverage for obtaining the other institutional mechanisms, such as the disputes process for upwards harmonization.[120] A similar phenomenon of regional assistance is beginning to appear in the movement towards Asia-Pacific free trade. The forum on Asia Pacific Economic Cooperation (APEC), the intergovernmental organization now taking a role of leadership in this movement,[121] has already addressed the need to develop and support

117. *See, e.g., GATT: GATT in "Head-On" Conflict with Treaties on the Environment, Worldwatch Report Says, supra* note 44; Jessica Mathews, *The Great Greenless GATT*, WASH. POST, Apr. 11, 1994, at A19; *Trade: Symposium Addresses Ways New WTO Could Erase Trade, Environment Anomalies*, Int'l Envt. Daily (BNA) at D-6 (June 16, 1994); *WWF Warns New Trade Rules May Conflict with Existing Environmental Legislation*, Int'l Envt. Daily (BNA) at D-6 (June 17, 1994).

118. *Integrated Environmental Plan for the Mexican-U.S. Border Area: (First Stage 1992-1994)*, U.S. Envtl. Protection Agency and SEDUE (Feb. 1992).

119. Agreement Concerning the Establishment of a Border Environment Cooperation Commission and a North American Development Bank, Nov. 16, 18, 1993, United States-Mexico, *reprinted in* 32 I.L.M. 1545 (1993).

120. *See, e.g.*, Robert Housman, *The North American Free Trade Agreement's Lessons for Reconciling Trade and the Environment*, 30 STAN. J. INT'L L. 379, 421 (1994) (describing the Side Agreement on the Environment as a "carrot and stick" model for improving the environment under NAFTA).

121. *See infra* p. 29.

environmental infrastructure projects, as well as technical assistance funded by the richer member countries.[122]

D. Regional Free Trade as a Laboratory

Innovations concerning environmental protection and labor welfare, originating in regional trade groups, have influenced developments at the multilateral trade liberalization level of the GATT/WTO. For example, provisions on trade in services in the U.S.-Canada and Australia-New Zealand Free Trade Agreements became instructive for the Uruguay round negotiators. The NAFTA investment chapter has presented useful ideas for future negotiations in the WTO.[123] Reflecting NAFTA, the final Uruguay round text made some allowance for parties to adopt what they see as appropriate levels of protection through sanitary and phytosanitary measures, even if such levels exceed international standards.[124]

That regional measures have been adopted by the GATT/WTO raises the question why new ideas and approaches on linkage tend to originate at the regional rather than the global/multilateral level. The answer is that regional development is distinctly advantageous for innovation. Again, this is true in part because of the smaller number of parties involved. As with any institutional process, the fewer the parties, the easier to focus issues and arrive at common positions. The GATT/WTO must necessarily cater to a broader range of interests. Furthermore, because regional pacts produce deeper trade liberalization than multilateral negotiations, there is greater opportunity to produce significant agreement on the labor and environmental fronts. Countries are willing to make concessions to a few states that they are not willing to make to all. This is as true about innovation and improvements in safety, health and environmental standards, as it is with respect to trade concessions. Moreover, the fewer the parties, the greater the meaningful level of specificity that can be achieved in actually addressing environmental and social issues. It is not only easier to reach agreement, but easier to do so in greater detail and with greater clarity, the more each government must declare and explain its position on every issue instead of objecting from the sidelines and leaving the development of the debate to other participants. Also important is that each of the parties in a regional free trade grouping is fully involved in the negotiation and agreement, not only because of the lesser number of states, but because the interests of all the parties are put at risk directly and comprehensively. Thus, harmonization provisions, such as minimum standards, tend to be written into regional integration agreements—for example, provisions to reduce the risk of member countries compet-

122. Gary Hufbauer and Jeffrey J. Schott, *Toward Free Trade and Investment in the Asia-Pacific*, WASH. Q. 37, 43 (Summer 1995).

123. *Id.* at 44.

124. *See* General Agreement on Tariffs and Trade - Multilateral Trade Negotiations (The Uruguay Round): Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Dec. 15, 1993, MTN/FA-UR-93-0246, Agreement on the Application of Sanitary and Phytosanitary Measures, preamble, art. 11 n.2.

ing by undercutting each other's pollution tax rates.[125] This is also why the commitment to regional free trade and its institutions has provoked social and environmental concerns as broad policy issues, first within the EC and NAFTA, and now within AFTA.[126] This aspect of regional free trade is accentuated by its character as a geographical phenomenon, always involving principal trading partners, with shared borders, energy sources, similar weather, topography and resources.

Regional free trade offers additional prospects for future innovation. For example, standards are currently being developed by the International Organization for Standardization (ISO) for an ISO process addressing environmental standards, whereby firms in international trade would certify that the goods they ship comply with specific levels of protection. This would replicate the ISO system for technical, safety and management standards that has proved successful during the last decade, having been adopted by over ninety countries imposing ISO 9000 registration as a legal requirement.[127] The ISO process makes the capacity to compete in the global marketplace conditional on compliance through the private self-regulating mechanism of corporations in developed countries insisting that their suppliers be certified under a standard. Besides ISO environmental standards, it has also been suggested that at least core labor welfare concerns, such as child labor, prison labor, and unsafe working conditions, could be managed within an ISO 9000 type of process, with multinational firms certifying that the goods they ship to industrial country markets are produced compliant with standards respecting these concerns.[128] This promising concept, already proven so successful in the 9000 commercial standards, is primed and ready for transposition to environmental protection and labor welfare.[129] For all of the reasons just discussed, such standards will be much easier to implement on a regional than on a multilateral basis.

III.
LINKAGE IN THE ASIA-PACIFIC

At the Singapore Summit in 1992, the ASEAN leaders developed a comprehensive legal framework to promote cooperation in their region, through a series of three documents. The first, the Singapore Declaration of 1992, summarizes agreements reached on a broad economic and political front, and outlines a program for economic integration.[130] AFTA was established as part of the

125. Anderson, *supra* note 28, at 358 n.23.

126. *See supra* pp. 4-5, and *infra* pp. 27-31.

127. Tom Tibor, ISO 14000: A GUIDE TO THE NEW ENVIRONMENTAL MANAGEMENT STANDARDS 33 (1996); Carey A. Matthews, Note, *The ISO 14001 Environmental Management System Standard: An Innovative Approach to Environmental Protection*, 2 ENV. LAW. 817, 819 (1996).

128. Hufbauer and Schott, *supra* note 122, at 43.

129. *See generally* Matthews, *supra* note 127. *See also ISO 14000 Arrival Signals Beginning of Global Environmental Regulation*, 33 AIR/WATER POLLUTION REP. ENV'T WK., Nov. 17, 1995, *available in* LEXIS, Market Library, Iacnws File.

130. Brunei Darussalam-Indon.-Malay.-Phil.-Sing.-Thail.: Singapore Declaration of 1992, Jan. 28, 1992, *reprinted in* 31 I.L.M. 498 (1992).

larger economic integration scheme described in the second document, the Framework Agreement on Enhancing ASEAN Economic Cooperation (Framework Agreement),[131] and is to be implemented through the third document, the Common Preferential Tariff (CEPT) scheme to establish AFTA through accelerated tariff reduction.[132] The CEPT is identified in the preamble to the CEPT-AFTA Agreement as the primary vehicle for implementation of free trade, and provides a schedule for reduction of intra-ASEAN tariffs on all manufactured goods.[133]

The totality of the agreements reached at the Singapore summit has been described as a "convention-protocol system," which reserves details for later agreement.[134] The Framework Agreement sets goals and principals for cooperation on the broadest possible range of matters related to trade liberalization. While the emphasis is on economic development, the commitment to cooperative development touches on many areas involving environmental protection and labor welfare. The Agreement refers specifically to "energy . . . conservation and efficiency," "regional cooperation in the areas of manpower training, conservation and efficiency," "joint cooperation to better manage, conserve, develop and market forest resources," and "human resources development."[135]

It should be noted that the tariff reduction scheme was the only binding action plan established in this original legal framework. It was thus apparently understood that tariff reduction could be the engine to drive detailed agreement in the other areas of the convention protocol system. The need for a binding center was recognized given the mistakes of ASEAN's only previous attempt at free trade, the Preferential Trading Agreements (PTA) of February 24, 1977, which, by way of uncontrolled listings by states of products excluded from tariff reduction, ultimately limited free trade to snow plows and other Asian trade irrelevancies.[136]

Legal development of an Asia-Pacific regional free trade area may have made another fundamental stride forward with the CEPT-AFTA Agreement's provision for a ministerial level council, charged with ongoing responsibility for "supervising, coordinating, and reviewing the implementation of [the free trade] Agreement."[137] In the future, this body can manage and oversee a process within AFTA, likely to evolve along the lines of NAFTA, integrating trade issues with environmental protection and labor welfare. The CEPT-AFTA Agreement provides that if disputes cannot be settled amicably, they are to be

131. Brunei Darussalam-Indon.-Malay.-Phil.-Sing.-Thail.: Framework Agreement on Enhancing ASEAN Economic Cooperation, Jan. 28, 1992, *reprinted in* 31 I.L.M. 506, 508 (1992).

132. Brunei Darussalam-Indon.-Malay.-Phil.-Sing.-Thail.: Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (AFTA), Jan. 28, 1992, *reprinted in* 31 I.L.M. 513 (1992) [hereinafter CEPT-AFTA Scheme].

133. *Id.*, art. 2, para. 5, 31 I.L.M. at 516.

134. Peter Kenevan & Andrew Winden, Recent Developments, *Flexible Free Trade: The ASEAN Free Trade Area*, 34 HARV. INT'L L. J. 224 (1993).

135. CEPT-AFTA Scheme, *supra* note 132, art. 2, 31 I.L.M. at 516 and art. 3, 31 I.L.M. at 517.

136. GERALD TAN, TRADE LIBERALIZATION IN ASEAN 3 (1982).

137. CEPT-AFTA Scheme, *supra* note 132, art. 7, para. 1, 31 I.L.M. at 519.

submitted to the AFTA Council.[138] There is no detail concerning the arbitral role of the Council, nor have the procedural mechanisms of a dispute resolution system yet been defined. But the concept of a body at the ministerial level to supervise and monitor dispute resolution within the broad framework of agreement and understandings is apparently modeled on the European Union.[139] It is essentially similar to the design developed for NAFTA, which features a Free Trade Commission and, under each Side Agreement, a Council composed of the top governmental officials in the respective areas of environment and trade.[140] AFTA now has in place an authoritative body, drawn from the highest political level of the parties, concerned with the broad panoply of interests outlined in the Framework Agreement and charged with developing processes of dispute resolution. This Council's work may be critical to assuring momentum and continuity towards an adequate regional free trade structure.

As now appears to be characteristic of regional free trade organization, AFTA is developing within a framework of multiple goals related to trade liberalization, powered by the CEPT tariff reduction scheme under management by the AFTA Council. More broadly still, the CEPT-AFTA Agreement arose within the comprehensive institutional context of Pacific Basin cooperation, led largely by APEC, the forum on Asia Pacific Economic Cooperation, presently composed of eighteen member states.[141] The U.S. naturally favors APEC, because it includes both Asian and non-Asian members, in contrast to the Malaysia Prime Minister's promotion of an East Asian Economic Caucus that excludes non-Asian economies. It is APEC that has become most significant in framing the economic task of AFTA within a panorama that includes social issues, including environment and labor. Preceding the Seattle APEC summit of November 1993, the APEC "Eminent Persons Group" produced a report calling for the establishment of a "community of free-trading nations." At the meeting the leaders authorized the Eminent Persons Group to continue its work on developing a larger program for APEC in relation to free trade,[142] agreed on a Declaration of Trade and Investment Framework and action plan, and established a Committee on Trade and Investment to facilitate a more open environment for

138. *Id.*, art. 8, para. 3, 31 I.L.M. at 520.

139. The AFTA Council appears to be modeled on the EU Council. *See* Deborah Hass, Note, *Out of Others' Shadows: ASEAN Moves Toward Greater Regional Cooperation in the Face of the EC and NAFTA*, 9 AM. U. J. INT'L L. & POL'Y 809, 838-39 (1994).

140. NAFTA, *supra* note 59, Ch. 20, 32 I.L.M. at 693-99. The Environmental Side Agreement created a Commission for Environmental cooperation (CEC), which has a Council composed of the chief environmental officials of the United States, Mexico and Canada and an international Secretariat headed by an Executive Director. NAAEC, *supra* note 19, Part Three, 32 I.L.M. at 1485-89. The Labor Side Agreement created a Commission for Labor Cooperation (CLC), which has a Council composed of the labor ministers of the United States, Mexico and Canada and an international Secretariat headed by an Executive Director. NAALC, *supra* note 19, Part Three, 32 I.L.M. at 1504-07.

141. The membership of APEC consists of Australia, Brunei Darussalam, Canada, Chile, Hong Kong, Indonesia, Japan, Malaysia, Mexico, New Zealand, Papua New Guinea, People's Republic of China, Philippines, Singapore, South Korea, Taiwan, Thailand, and the United States.

142. Barry Wain, *APEC Still Struggling to Establish an Identity, Settles Down to Task of Further Opening Trade*, ASIAN WALL ST. J., Nov. 14, 1994, at A27.

investment.[143] Following the Seattle meeting, the Eminent Persons Group, in August 1994, released a report advocating free trade in the Asia-Pacific region along with institutional development. APEC now has ten working groups relating trade interests with other regional concerns. Environmental and labor concerns appear prominently as subjects for the working groups, which include "Trade and Investment Data," "Trade Promotion," "Investment and Industrial Science and Technology," "Human Resource Development," "Energy Cooperation," "Marine Resource Conservation," "Telecommunications," "Transportation," "Tourism," and "Fisheries."[144]

At the APEC summit in Indonesia the following year, in accordance with the recommendation of the Eminent Persons Group, the APEC nations declared their intention to move towards a free trade area by the year 2020. Given the long timetable, the big tent of APEC, and the economic as well as geographical diversity of its members, APEC itself is much less likely to be the nucleus for a regional free trade organization centered on the Asian sense of shared interests than is AFTA. Yet the APEC summit is now institutionalized as an annual meeting, something like an Asia-Pacific version of the G7 meetings. It continues to address a broad range of issues—including environmental regulation and labor welfare—that affect an Asia-Pacific free trade community, encouraging the other processes moving toward regional free trade and linkage.

The adaptability of Asia-Pacific free trade to a NAFTA-like model is not obvious, given the fact that the differences among likely parties to an Asia-Pacific grouping include differences more various and extreme than NAFTA. With probable members ranging from Japan, the United States and Singapore to Indonesia and China, the developmental disequilibrium which the NAFTA model sought to address is almost certain to be even more pronounced in the Pacific Basin context. Singapore has sophisticated environmental legislation and a comprehensive "green plan," while Indonesia has relatively negligible environmental regulation and still less enforcement.[145] The United States has enacted criminal penalties in such areas as commercial trade in rhinoceros and tigers, whose parts are used in traditional Asian medicines, and has used trade sanctions to this end.[146] On labor welfare, practices range from prison labor in China to the extraordinary employment security and employee benefits systems of the Japanese corporate culture. In the context of such differences, a disputes mechanism such as that developed under the NAFTA Side Agreements will be more difficult to achieve; yet that model remains especially promising because

143. *See Declaration on an APEC Trade and Investment Framework*, 4 U.S. DEP'T ST. DISPATCH at 832, 832-33 (Nov. 29, 1993); *Asia-Pacific Economic Cooperation (APEC)*, 4 U.S. DEP'T ST. DISPATCH 835 (Nov. 29, 1993).

144. *See APEC Ministerial Meeting Joint Statement*, 4 U.S. DEP'T ST. DISPATCH 828, 828-29 (Nov. 29, 1993).

145. *Pacific Rim: Trade Counseling Office in Singapore Opens Under U.S./Asia Environment Program*, 10 Int'l Trade Rep. (BNA) 1494 (Sept. 15, 1993).

146. *Taiwan Passes Stringent Wildlife Law to Avert Trade Sanctions*, AGENCE FRANCE PRESSE, Oct. 27, 1994, *available in* LEXIS, ASIAPC Library, AFP File; James Gerstenzang, *U.S. Will Impose Trade Sanctions Against Taiwan to Protect Wildlife*, L.A. TIMES, Apr. 12, 1994, at A7; Tom Kenworthy, *President Imposes Sanctions on Taiwan*, WASH. POST, Apr. 12, 1994, at C1.

of its exclusive focus on whether national law is being effectively enforced. Because this model finesses questions of sovereignty and adjusts for different stages of development among member states, it should be more helpful the more pronounced the national differences involved.

Though no dispute resolution process has been adopted for Asia-Pacific free trade, the CEPT scheme does call for dispute settlement among the ASEAN members, and is not unlike NAFTA in projecting a consultative process. While this may be attributable to the cultural inclination of the Pacific Basin to informal consensual process, it is also remarkably consistent with NAFTA's design. The CEPT scheme calls upon members to grant "adequate opportunity for consultations" to other parties' concerns.[147] More interesting, it shadows the concept of the NAFTA Side Agreements dispute resolution process in providing as a central mechanism that the parties in the processing of a complaint should subject themselves to proposed solutions by others, specifically providing that a member claiming breach of agreement obligations has the right to propose possible settlement details to the allegedly offending member.[148] Further, the parties are instructed that if they cannot settle their differences amicably, they are required to submit their disputes to "an appropriate body," such as the Ministerial Level council, and, if necessary, to the ASEAN Economic Ministers.[149] AFTA does therefore appear to be evolving towards a disputes process similar to NAFTA. It is similar in prioritizing amicable settlement, while recognizing the need to induce amicable resolution supervised by a ministerial level body, backed, at least implicitly, by the stake of each party in the benefits of regional free trade.[150]

Commentators at the Institute for International Economics, a think tank well-connected to the APEC Eminent Persons Group, have proposed a "GATT-plus" agreement, based on the conditional most-favored-nation principle, for an Asia-Pacific free trade area that encompasses both North America and East Asia.[151] There have been many suggestions for such a coalescence, including suggestions emanating from the Clinton Administration and the President's own speeches on the subject of Asia-Pacific free trade.[152] This proposal is given additional credibility by the fact that NAFTA contains a geographically nonspecific accession clause.[153]

147. CEPT-AFTA Scheme, *supra* note 132, art. 8, para. 1, 31 I.L.M. at 519-20. *Compared with* NAFTA, *supra* note 59, arts. 2003-06, 32 I.L.M. at 694-95.

148. *Id.*, art. 8, para. 2, 31 I.L.M. at 520.

149. *Id.*, art. 8, para. 3, 31 I.L.M. at 520.

150. *See* Kenevan & Winden, *supra* note 134.

151. Young, *supra* note 18, at 122-129. The APEC Eminent Persons Group and the Institute for International Economics have had the same Chairman and appointees among their members. C. Fred Bergsten, Director of the Institute for International Economics, was appointee of the United States to the Eminent Persons Group, and Chairperson of the Group. Dr. Saburo Okita, who was a member of the Board of Directors of the Institute, was also Japan's appointee to the Eminent Persons Group.

152. *See, e.g.*, Kassim Yang Razali, *US and ASEAN Agree to Find Linkages Between AFTA and NAFTA*, BUSINESS TIMES, July 28, 1993, at 1 *available in* LEXIS, ASIAPC Library, BUSTMS File.

153. NAFTA, *supra* note 59, art. 2204, 32 I.L.M. at 702.

Surely an extension of NAFTA to become a greater Asia-Pacific free trade regional arrangement would be a promising development for the linkage of trade liberalization with environmental protection and labor welfare. Such extension would make likely the extension of the NAFTA Side Agreements on Labor and the Environment as well; and the political constituencies that promoted those agreements for NAFTA would assuredly demand them of Asian members. It is true that the larger membership of an Asia-NAFTA grouping of states, with its greater diversity of development, would render the linkage of free trade with environmental protection and labor welfare more problematical, and would undercut the advantages to be gained for linkage in smaller regional groupings.[154] But balanced against this is the greater economic significance of a greater free trade area not so skewed towards exports as the current AFTA membership; hence a bigger carrot and bigger stick, which means additional leverage to overcome problems and meet the special challenges in the Asia-Pacific area for installing a process to assure linkage with social policy.[155]

There has been some attention to the question of dispute resolution within ASEAN,[156] and now within APEC. Both the Pacific Business Forum and the APEC Eminent Persons Group made recommendations for the establishment of dispute resolution mechanisms for Asia-Pacific trade, but only as a mediation format.[157] The APEC Eminent Persons Group report, while noting that "bilateral disputes of the intensity of the recent past could threaten the positive evolution of the [APEC] community," took the position that any APEC dispute resolution should be designed "to supplement, rather than compete" with the WTO.[158] In the Bogor declaration of November 15, 1994, the APEC Ministers agreed to examine the possibility.[159] At the trade and investment committee meeting of APEC in Japan in February 1995, it was further agreed to establish a working group to discuss the creation of a dispute settlement system. But the focus is still on mediation complementary to, not overlapping with, the World Trade Organization.[160] At the APEC senior officials meeting in the Philippines in May 1996, senior officials of the APEC membership also rejected setting up a

154. *See supra* pp. 9-10,.

155. *See supra* pp. 11-13.

156. ASEAN's Treaty of Amity and Co-operation calls for creation of a system of peaceful dispute settlement, and contains foundation for a regional legal system, recommending establishment of a High Council to recognize disputes between the parties and suggest means of settlement, though it does state ASEAN's preference for non-adversarial informal methods of dispute resolution. Treaty of Amity and Co-operation in Southeast Asia, Feb. 24, 1976, Indon.-Malay.-Phil.-Sing.-Thail., *reprinted in* 27 I.L.M. 610 (1988).

157. *See*, Pacific Business Forum, A BUSINESS BLUEPRINT FOR APEC: STRATEGIES FOR GROWTH AND COMMON PROSPERITY (1994) and APEC Eminent Persons Group, *Achieving the APEC Vision: Free and Open Trade in the Asia Pacific*, APEC Doc. 94-EP-01, (1994).

158. APEC Eminent Persons Group, *Achieving the APEC Vision: Free and Open Trade in the Asia Pacific, supra* note 157, at 23. *See also APEC, The Opening of Asia,* ECONOMIST, Nov. 12, 1994, at 23, 24.

159. Bogor Declaration, *supra* note 4.

160. *International Agreements: APEC Officials Agree on Work Groups on Dispute Resolution, Customs Barriers*, 12 Int'l Trade Reporter (BNA) 7 d26 (Feb 15, 1995).

formal dispute resolution mechanism replicating WTO mechanisms, and opted for the recommended mediatory approach.[161]

Given the limits of the WTO in extending its dispute resolution capacity to the linkage of environmental protection and labor welfare, however, there is room for a NAFTA Side Agreement-type dispute resolution mechanism for an Asia-Pacific regional grouping. That is, even if an Asia-Pacific grouping is to be more cautious than NAFTA in avoiding any potential infringement on GATT/WTO disputes process, the fact remains that the GATT/WTO process has not seriously addressed linkage. The Eminent Persons Group rejected recommending binding arbitration as provided by the WTO on the ground that arbitration would not be workable without established rules against which to judge compliance.[162] It also rejected NAFTA-type panels to review member countries' implementation of their own laws on grounds that the different legal systems of the APEC member countries are not sufficiently comparable.[163] In fact, though, developing a disputes resolution process along the lines of the NAFTA Side Agreements for addressing the linkage of free trade with protection of the environment and labor would not present the problems cited in these rationalizations. Because the NAFTA model concentrates exclusively on the question of whether national law protecting the environment and labor is being effectively enforced, its process side-steps any concern about conformance to internationally established rules. It is also not undercut by the differences between legal systems and cultures of the member states, since the question is posed as enforcement of national laws. To the extent international standards are either directly at issue by virtue of national adoption of treaties and conventions, enacted into national law, or promoted through peer pressure within an Asia-Pacific free trade organization, they may nevertheless be made effective.

IV.
CONCLUSION

Regional free trade is a form of trade liberalization now firmly set in place for future legal organization of international trade, and for dealing with inevitable impacts on labor and the environment. These impacts, being inevitable, make necessary and proper much greater attention to the advantages of regional organization for developing constructive linkage. Taking advantage will depend on what is learned from the regional models already in place. As concerns protection of the environment and the welfare of labor, the disputes resolution model originated in the NAFTA Side Agreements should be of greatest interest for the area presenting the next great challenge for linkage, an Asia-Pacific regional free trade area.

The question of the viability of a sanction-backed disputes process in managing the linkage between free trade and social policy in Asia-Pacific trade goes

161. Edward Luce, *APEC Rejects Disputes Scheme*, FINANCIAL TIMES, May 25, 1996, at 3, *available in* LEXIS, Asiapc Library, Fintme File.

162. *Id.*

163. *Id.*

beyond the popular academic distinction between the "Western legalistic view" and "Asian consensus-building consultative approach."[164] A sanction-backed disputes process, framing the question of compliance with environmental protection and labor welfare standards as a question of compliance with national law, is especially compelling in the Asia-Pacific context, where there is, among the states involved, little concession of sovereignty or culture. The model here proposed as an extrapolation of the NAFTA design embodied in its Side Agreements helps avoid confrontations over sovereignty and cultural difference, while the leverage of trade benefits, trade sanctions and related peer pressure is still fully available to serve environmental and social objectives. This disputes model is viable and important because it addresses the critical and often pervasive gap between what national laws provide and what national governments do. As the contemporary vernacular counsels, it can help assure that they will "not only talk the talk, but walk the walk."

In rejecting any formal dispute resolution for APEC at the recent meeting of senior officials in the Philippines, the head of the Chinese delegation, probably thinking of recent trade tensions with the United States, urged APEC to keep disputes out of a formal and public system, declaring, "We should stick to the spirit of APEC, the spirit of a big family. If someone cannot agree with you, it's better to wait and have more consultations."[165] As demonstrated repeatedly in the trade tensions with China and elsewhere in the Asia-Pacific region, a big family, whether Asian or Western or both, will finish consultations and reach agreement more easily when inspired by economic advantage. Utilizing a NAFTA-like model linking trade concessions to environmental and labor welfare concerns would make regional free trade organization for the Asia-Pacific a kinder kind of family. It might not be the best of all possible families, but it would be a family that could make significant progress in its economy and in the quality of the lives of its members.

164. *See* Melissa Gerardi, Comment, *Jumpstarting APEC in the Race to 'Open Regionalism': A Proposal for the Multilateral Adoption of UNCITRAL's Model Law on International Commercial Arbitration*, 15 NW. J. INT'L L. & BUS. 668, 677-81; Dr. Noordin Sopiee Datuk, *Malaysia: A 2020 Vision For APEC to Be 'The Most Free and Open*, BUS. TIMES (MALAYSIA), Sept. 1, 1994, at 18, *available in* LEXIS, World Library, Txtlne File; Kassim Yang Razali, *APEC Forum Urged to Adopt ASEAN Approach*, BUS. TIMES, June 21, 1994, at 2, *available in* LEXIS, World Library, Arcnws File.

165. Luce, *supra* note 161, at 3