

Trade and Environment—Another Chance for Reconciliation?

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NAFTA (the North American Free Trade Agreement) is dead! No, it is still alive, or might be if only Canada and Mexico would come to their senses! And the TPP (Trans-Pacific Partnership), dead last week, might also be alive, at least for a few days, if Japan really wants us in! No, on second thought, cancel that. And that new trade agreement between Mexico and the European Union (EU)—fake news even though they announced it together last week.

The public can be excused for not knowing the current status or prospects of the United States' major international trade agreements—even the future of the World Trade Organization itself—because of the weekly flip-flops by the Trump Administration as it struggles to reconcile the competing claims of different segments of U.S. industry, agriculture, Congress, the White House and Trump's own campaign promises. When the dust settles, however, I believe both economic and political logic, as well as geopolitical concerns, will lead the United States to agree to an updated NAFTA with Mexico and Canada, to try to rejoin and modify the TPP (which has now gone into effect, in simplified form, without the United States) and eventually to resume its negotiations for an expanded trade agreement with the EU. If that happens—and the NAFTA discussions are under way now—the question for environmentalists and environmental lawyers is whether the new agreements will provide an opportunity to improve and expand the kinds of environmental protection built into the new trade agreements.

I have written before about the tensions between trade and the environment within the TPP and NAFTA (for TPP, see [NYLJ Jan. 8, 2015](#), [May 1, 2015](#) and [Sept. 18, 2015](#); for NAFTA, see [NYLJ June 27, 2008](#) and [Aug. 25, 2008](#)), as well as their uneasy relationship in bilateral trade agreements with Colombia and Ecuador. For many environmental advocates (as well as labor and human rights groups), international trade agreements have simultaneously (1) threatened a "race to the bottom" for environmental, labor and human rights standards and (2) provided a hoped-for mechanism to enforce other international environmental (or labor and human rights) agreements that lack any enforcement sanctions. NAFTA sought to address the race to the bottom fear by creating a specialized body (the North American Commission on Environmental Cooperation) to report on the failure of any of its parties to diligently enforce its nominal environmental laws, though that effort has proven more useful for domestic environmental groups in Mexico and Canada than for U.S. companies concerned about lax environmental enforcement against Mexican competitors.

While the TPP sought to address the second problem rhetorically, it too lacked any real enforcement mechanism for violations of other environmental, labor or human rights agreements and was even weaker with respect to climate change commitments or responsible conduct by transnational corporations. Moreover, the TPP continued and expanded to the entire Pacific rim the U.S. pattern of requiring trading partners to agree to specialized arbitration panels, outside the purview of their domestic courts, to adjudicate investors' claims of arbitrary or confiscatory action by government regulators within host countries. Many environmental groups believed such investor dispute provisions chilled the willingness of host countries to enforce needed safeguards for their air, land, water or historic resources. Mandatory arbitration for

investor disputes is also objectionable because it inhibits the development of competent and independent judiciaries in host countries, which in my view is critical for the long-term protection of the environment, the rule of law and the world community.

Ironically, the Trump administration's rhetoric, trade flip-flops and announced withdrawal from the Paris Agreement on Climate Change have created conditions that just might provide an opportunity for progress on these long-standing tensions between trade promoters and environmentalists. To begin with, the Trump administration does not like mandatory arbitration for investor disputes either. When applied to the U.S., arbitration of foreign investors' claims is seen by Trump supporters as undermining U.S. "sovereignty," a no-no for conservative opponents of most new international agreements. This has placed the White House in the odd position of resisting the continuing demands of the business community (and the Republican Congress) and moving closer to the environmental community's resistance to extending the current NAFTA and TPP arbitration requirements.

Second, the real prospect that Democrats may gain control of the House in the 2018 mid-term elections suggests that Congressional approval of any modified NAFTA or renegotiated TPP may require inclusion in those agreements of more enforceable commitments not only for environmental protection but also for labor and human rights standards such as those contained in the U.N.'s Global Compact or the OECD's Guidelines for Multinational Corporations and their suppliers. It is also the case, not so ironically, that Mexico, Canada, the EU and virtually all current members of the TPP have ratified and are striving, with greater or lesser enthusiasm, to carry out their respective Paris commitments with respect to climate change. It is possible that one price of U.S. re-entry into the TPP, and even more assuredly an EU trade agreement, would be some form of recommitment by the United States to the goals of the Paris Agreement, a requirement that a Democratic Congress would surely embrace as well.

Third, the Trump administration's, and the American public's, ambivalence about international trade could also provide an opportunity for U.S. policymakers and their foreign counterparts to take a step back and consider both the long-term benefits and impacts of trade beyond the dislocated rust-belt factory workers in developed countries and exploited factory workers in China, Bangladesh, Vietnam and Guatemala. While international trade since World War II has undeniably helped raise hundreds of millions of people out of poverty, it has also contributed to global pollution and, as we now recognize, climate change and their resulting threats to both urban and rural life in much of the developing world. The starkest consequence of those threats, only now becoming evident on a global scale, is the forced migration of some 65 million people, of whom more than 20 million are now crossing borders as refugees and some 45 million are internally displaced within their own countries. Even if all the nations' Paris commitments are fulfilled by 2050 (an extremely unlikely assumption), climate change (and the inevitable impacts of a global marketplace) will continue to exacerbate the conditions that drive many people from their homes in the developing world.

If global trade continues to expand and shape economies throughout the world—and that is a far better prospect overall than a global recession triggered by a return to protectionist policies—it is both equitable and reasonable for new global trade agreements to recognize and help mitigate those large-scale impacts that drive millions of people (and soon perhaps hundreds of millions of people) to leave their homes and countries in a desperate search for survival. As I have described in earlier articles, there is a broad consensus as to the programs and policies required to slow this trend and permit both rural farmers and newly arrived urban migrants to build constructive lives in their home countries. What is lacking above all is an assured source of long-term funding necessary to permit developing country governments, both at the national and municipal level, to commit to and implement the necessary adaptation programs in the absence of long-term appropriations or commitments from developed country governments.

The most promising approach, in my view, to such long-term assistance is itself a direct outgrowth of global trade. As described in earlier columns, the New York City Bar Association's Climate Adaptation Task Force has suggested a small international financial transaction microtax (FTM) on international transfers of funds, with the proceeds dedicated, through the World Bank or the UN's Green Climate Fund, to helping developing countries and their cities adapt to the demands of a changing world economy and environment (such a proposal could even be extended, at some point, to the sale of some luxury goods). Depending on the size of the FTM, it could easily generate tens of billions of dollars

annually without any adverse effect on the financial marketplace (and much more if extended to luxury goods) without the need for annual appropriations from governments.

The FTM would place on the global marketplace at least part of the cost of trade's impacts on the world's most vulnerable people and would, for that reason, also be an appropriate part of any new global trade agreements. If proposed by the United States as a part of such an agreement, it could well gain support among developing countries eager to benefit from such an FTM and could fairly be seen as an effort by the United States to make the global business community, rather than developed country taxpayers, bear a portion of the cost of helping the world address a large but often unacknowledged cost of international trade.

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