NEWS & ANALYSIS

DIALOGUE

NAFTA: An Analysis of Its Environmental Provisions

by Steve Charnovitz

In negotiating a comprehensive trade accord, the governments of Canada, Mexico, and the United States have taken an important step to link and boost their economies. Although many believe the new pact—the North American Free Trade Agreement (NAFTA)—would benefit the United States, NAFTA may run into formidable opposition in Congress on ecological grounds.[1] This opposition has been brought to light by numerous environmental and consumer groups which have questioned whether NAFTA does enough to protect the environment and public health.

No disagreement, however, exists on the proper goal. Indeed, there is a strong consensus, shared by the Clinton administration, that NAFTA should seek to improve environmental quality. Last year, U.S. Trade Representative Carla A. Hills told the congressional House Committee on Ways and Means, "This agreement does more to improve the environment than any other agreement in history."[2]

This Dialogue examines how well NAFTA achieves its environmental goals. The analysis is split into two parts. First, does NAFTA safeguard existing environmental standards? Second, will NAFTA raise the future level of environmental protection? The first question asks whether the agreement is sufficiently permissive; the second question asks whether it is sufficiently prescriptive. Following this analysis, an overall assessment of NAFTA's environmental provisions is offered and some matters that are not yet addressed by the agreement are discussed.

Preserving the Status Quo

President Bush announced the historic trade agreement, declaring, "NAFTA maintains this nation's high environmental, health, and safety standards."[3] The accuracy of this statement can be judged by examining how NAFTA restrains domestic standards. The two key chapters are Sanitary and Phytosanitary (S&P) Measures and Standards-Related Measures.[4] The purpose of these chapters is to reduce non-tariff barriers to trade. In analyzing the main disciplines to be imposed by NAFTA, this Dialogue makes some comparisons to the rules in the General Agreement on Tariffs and Trade (GATT),[5] the draft Uruguay Round agreement,[6] and the Canada-U.S. Free Trade Agreement (FTA) of 1988.[7]

Sanitary and Phytosanitary Measures

NAFTA Article 712.2 reserves to each party the "right" to set its "appropriate level of protection"[8] for human, animal, or plant life or health. This right is established "notwithstanding any other provision" of the S&P chapter,[9] save for two disciplines. The first discipline is that each party "shall, with the objective of achieving consistency in such levels, avoid arbitrary or unjustifiable distinctions in such levels in different circumstances";[10] but this applies only "where such distinctions result in arbitrary or unjustifiable discrimination against a good of another Party or constitute a disguised restriction on trade."[11] Second, when dealing

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1. Congress must pass implementing legislation in order for NAFTA to enter into force. See Omnibus Trade and Competitiveness Act of 1988, §1103(a)(1), 19 U.S.C. §2903(a)(1) (1988).
2. *Hearing on North American Free-Trade Agreement Before the House Comm. on Ways and Means*, 102d Cong., 2d Sess. (Sept. 9, 1992) (prepared testimony of Ambassador Carla A. Hills) [hereinafter *Hearing on North American Free Trade*].
3. Remarks Announcing the Completion of Negotiations on the North American Free Trade Agreement, 28 WEEKLY COMP. PRES. Doc. 1422 (Aug. 12, 1992).
4. North American Free Trade Agreement, Oct. 7, 1992, (on file at USTR) [hereinafter NAFTA]. Please note that all references herein to NAFTA are to this particular text. The S&P provisions are in Chapter 7 (Agriculture), Subchapter B. The Standards' provisions are in Chapter 9. The Sanitary measures relate to humans and animals, while Phytosanitary measures relate to plants.
5. *See* General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 [hereinafter GATT]. The current version can be found in GATT, 4 BASIC INSTRUMENTS AND SELECTED DOCUMENTS 1 (1969). GATT is an international agreement governing trade restrictions and distortions.
6. GATT, *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, GATT Doc. MTN.TNC/W/FA, Dec. 20, 1991 [hereinafter Dunkel Text]. The Uruguay Round is still under way, having missed several "deadlines" for completion.
7. Canada-U.S. Free Trade Agreement, Jan. 2, 1988, 27 I.L.M. 281 [hereinafter Canada-U.S. FTA].
8. The phrase "level of protection" is not well defined in NAFTA. The Dunkel Text, *supra* note 6, suggests that the term is synonymous with "level of risk."
9. As with the S&P Decision in the Uruguay Round, NAFTA's S&P chapter applies to the protection of life or health only within the territory of the standard-setting country.
10. NAFTA, *supra* note 4, art. 715.3(b).
11. *Id.*

with animal or plant pests or disease, each party shall take into account "where relevant . . . the cost-effectiveness of alternative approaches to limiting risks." [12]

Neither of these disciplines presents a threat to public health. [13] A straight requirement to avoid distinctions in risk levels would have constituted a threat, by dictating domestic consistency, but NAFTA's sharp delimitation averts this problem. [14] Moreover, by leaving each party the ability to determine its own level of protection, NAFTA does not threaten national standards that protect against a very low probability risk, for example 10^{-9}, or that require zero impurity.

Although there is little discipline on the level of protection that a party sets, the S&P chapter does regulate trade measures used to achieve such protection. For example, the measure must be "necessary" for the protection of human, animal, or plant life or health and can be applied only to the extent "necessary" to achieve the party's chosen level of protection. [15] These rules are being criticized by environmentalists on the ground that the term "necessary" has been interpreted very narrowly in GATT adjudication. [16] Because NAFTA incorporates GATT's obligations by reference, [17] there is a possibility that this parochial interpretation could be insinuated into NAFTA adjudication.

NAFTA also requires that a measure be "based on scientific principles" and "not maintained where there is no longer a scientific basis for it." [18] Because some U.S. health and environmental measures may lack a firm scientific basis, [19] this rule could lead to challenges of U.S. standards. [20] In addition, the way in which NAFTA's treatment of trade discrimination would tighten the existing GATT discipline could raise a hurdle for environmental measures. GATT precludes arbitrary or unjustifiable discrimination where the "same" conditions prevail, [21] but NAFTA goes further, forbidding such discrimination where "identical *or similar* conditions prevail." [22] Finally, the definition of an S&P measure seems to omit regulations covering genetic engineering. [23]

Despite the need for clarifications, the S&P chapter is, for several reasons, more environmentally friendly than the Uruguay Round S&P Decision. [24] First, the Uruguay Round requires S&P measures to be the "least restrictive to trade, taking into account technical and economic feasibility." [25] NAFTA does not do this. [26] Second, NAFTA abandons the enigmatic stance of the Uruguay Round toward achieving consistency in a nation's level of protection by taking into account the "exceptional character of human health risks to which people voluntarily expose themselves." [27] According to consumer advocates, the fact that some people voluntarily go bungee jumping should have nothing to do with setting risk levels for food safety. Third, though both require that the cost-effectiveness of alternative approaches to limiting risks be considered, NAFTA applies this rule only to animals and plants whereas the Uruguay Round appears to apply it also to human health. [28] Fourth, NAFTA loosens the stipulation in the Uruguay Round regarding the scientific basis for a trade measure. In the Uruguay Round, measures should not be "maintained against available scientific evidence," [29] whereas under NAFTA, the existence of "*a* scientific basis" appears to be sufficient, even if it is inconsistent with other scientific evidence. [30]

Standards-Related Measures Chapter

The Standards' chapter [31] gives each party the "right" to establish the level of protection that *it* considers appropriate, if done in pursuit of a "legitimate" objective. [32] Although NAFTA augments the Canada-U.S. FTA list of legitimate objectives to include "sustainable development" as a specific goal, this expanded definition does not appear to be significant, because the only permissible trade regulations are those involving "product *characteristics* or their *related* processes and production methods." [33] In other words, countries would not be able to establish process standards that

12. *Id.* art. 715.2.
13. *But see infra* at p. 3.
14. *See supra* text accompanying note 11. This delimitation does not exist in the Uruguay Round S&P Decision. It calls on parties to avoid arbitrary or unjustifiable distinctions "if such distinctions result in discrimination or a disguised restriction on international trade." *See* Dunkel Text, *supra* note 6, §L, pt. C, S&P Decision, para. 20. Trade discrimination occurs when "like" products from different countries are not treated equally.
15. *Id.* arts. 709, 712.1, and 712.5.
16. The problem is GATT Article XX(d). For a discussion of the issue, see Steve Charnovitz, *GATT and the Environment: Examining the Issues*, 4 INT'L ENVTL. AFF. 203, 212-15 (Summer 1992).
17. NAFTA, *supra* note 4, art. 103.1.
18. *Id.* art. 712.3.
19. *See, e.g.*, U.S. EPA, SAFEGUARDING THE FUTURE: CREDIBLE SCIENCE, CREDIBLE DECISIONS, (1992) (Report of the Expert Panel on the Role of Science at EPA).
20. For example, is there a scientific basis for inferring a carcinogenic risk to humans based on an animal test using a very high dosage?
21. *See* GATT, *supra* note 5, Article XX (headnote).
22. NAFTA, *supra* note 4, art. 712.4 (emphasis added).
23. *Id.* art. 724 (definitions). If so, such measures might be covered under the Standards' chapter.
24. For a detailed discussion of the environmental provisions in the GATT Dunkel Text, *supra* note 6, see Steve Charnovitz, *Trade Negotiations and the Environment*, 15 Int'l Envtl. Rep. (BNA) 144 (Mar. 11, 1992).
25. Dunkel Text, *supra* note 6, §L, pt. C, S&P Decision, para. 21.
26. NAFTA Article 715.3(a), however, declares that parties "*should* take into account the objective of minimizing negative trade effects." (Emphasis added.) This provision is similar to a requirement in the Uruguay Round. *See* Dunkel Text, *supra* note 6, §L, pt. C, S&P Decision, para. 19.
27. Dunkel Text, *supra* note 6, §L, pt. C, S&P Decision, para. 20.
28. *Id.* para. 18. U.S. Department of Agriculture officials have indicated that this provision is not meant to apply to human health.
29. *Id.* para. 6.
30. NAFTA, *supra* note 4, art. 712.3(b) (emphasis added).
31. According to NAFTA Article 901.1, the Standards' chapter applies to any standards-related measure other than those covered by the S&P subchapter. It is unclear how NAFTA's rules apply to dual standards, that is, those aimed at protecting both the ecosystem and domestic health. An example would be certain pesticide regulations.
32. NAFTA, *supra* note 4, art. 904.2. NAFTA loosens the requirement in the Canada-U.S. FTA that standards must be aimed at achieving a "legitimate *domestic* objective." Canada-U.S. FTA, *supra* note 7, art. 603 (emphasis added). Under NAFTA Article 904.2, a "legitimate objective" is sufficient. Although one might argue that this revision permits standards aimed at protecting the international environment, it seems doubtful that NAFTA's authors intend such an interpretation. Furthermore, it is unclear whether a labeling requirement to denote the method of production, for example dolphin-safe, would fall under the terms of the Standards' chapter. *See* NAFTA, *supra* note 4, art. 915 (definition of "technical regulation").
33. NAFTA, *supra* note 4, art. 915 (emphasis added). Thus, a process standard can only be related to the characteristics of a product.

preclude trade in products that were grown, harvested, or manufactured using "unsustainable" methods.[34]

Nevertheless, the Standards' chapter is a major improvement over the draft Uruguay Round, which requires that standards "shall not be more trade restrictive than necessary to fulfill a legitimate objective."[35] Because this least-trade-restrictive test is based on the concept of "proportionality," it may be employed by GATT panels to weigh commercial factors against ecological ones.[36] Such a test could be a threat to environmental regulation. NAFTA drops this requirement.

Impact on Federal Laws

The U.S. Trade Representative, Carla Hills, asserted that NAFTA "explicitly [] maintains our right to enforce existing U.S. health, safety, and environmental standards."[37] Because the validity of this assertion is critical to the political debate on NAFTA's implementation, a careful examination is needed. The simplest way to maintain explicitly the existing environmental standards would be to "grandfather" them.[38] But NAFTA does not do this.[39] Under NAFTA, current environmental laws will be reviewable by dispute settlement panels. Thus, the statement that NAFTA maintains U.S. laws is a prediction about the outcome of future challenges, not a description of any right enshrined in the agreement.

It is unclear what evidence Hills has to support her statement. The U.S. Trade Representative staff could have done an analysis of the hundreds of U.S. regulations governed by the S&P and Standards' chapters and determined, in each instance, that the laws met NAFTA disciplines; but no such systematic analysis has been released, and apparently none exists. Instead, the Bush administration seemed to be suggesting that NAFTA's disciplines are too weak to interfere with environmental laws. While this is probably true for the Standards-Related Measures chapter (with the exception of process standards), the S&P rules do have teeth.

Impact on State Laws

According to the Bush administration, NAFTA "explicitly . . . allows the parties, including states and cities, to enact environmental or health standards that are tougher than national or international norms."[40] While this statement seems reassuring, it elides a significant problem. States and cities are *not* parties to the agreement and, thus, have no rights under NAFTA.

NAFTA is a complex, interlocking set of obligations of the central governments of Canada, Mexico, and the United States. One of these obligations is to take "all necessary measures" to give effect to the provisions of NAFTA, "including their observance . . . by state and provincial governments."[41] Comparing NAFTA to GATT indicates what this provision may portend. GATT requires each party to "take such reasonable measures as may be available to it to ensure observance" by regional and local governments.[42]

On its face, NAFTA appears to apply a tighter obligation on the federal government to impose the new disciplines on the states.[43] Yet in practice, the differences are not as great as they seem. In a series of recent decisions by GATT panels, GATT has narrowed its federal-state clause considerably. In 1992, the Bush administration agreed to the adoption of GATT's notorious "Beer II" decision, which suggests that GATT's rules can preempt U.S. state law.[44]

In contemplating the potential impact of NAFTA on state laws, it is useful to consider a hypothetical example. Assume that California enacts a food safety measure that is more stringent than either international or federal government standards. Furthermore, this measure effectively excludes certain agriculture from Mexico. In response, Mexico lodges a complaint. Consider the following issues:

- Can California rely on NAFTA Article 712.2 to declare that the food standard is "its appropriate level of protection"? No, California cannot, because this right is only available to parties.[45] To extend such a right to California, NAFTA would have to be amended to define states and provinces as "parties" for the purpose of Article 712.2.
- Can the United States, which is a party, declare that the California standard is the ap-

34. *See* Government of Canada, *North American Free Trade Agreement Canadian Environmental Review*, Oct. 1992, at 20 (Agreement would not provide for direct verification of whether mandatory process-related environmental standards were being enforced in another country) [hereinafter Government of Canada].

35. Dunkel Text, *supra* note 6, §G, Standards Code, art. 2.2.

36. The Dunkel Text states that the least-trade restrictive test "is intended to ensure proportionality between regulations and the risks non-fulfillment of legitimate objectives would create." *See id.* art. 2.2 n.1. There are two ways to interpret this provision. One is that the regulation should match the environmental harm at issue. The other is that the cost of the regulation should be weighed against the putative gains. It is this latter interpretation of "proportionality" that the European Community seems to be adopting in administering its least-trade restrictive test. This is also the concept of "proportionality" favored by the Business and Industry Advisory Committee to the Organization for Economic Cooperation and Development. *See* "Statement on International Trade and the Environment," *reprinted in* INSIDE U.S. TRADE, Nov. 27, 1992, at S-7 (Special Report) (dispute settlement body should determine whether burden on imports is excessive in relation to environmental benefit).

37. *See* Carla Hills, *The Free Trade Pact Is Good for All of Us: Americans, Mexicans, and Canadians*, ROLL CALL, Sept. 28, 1992, at 50-51.

38. This option was recommended in a comprehensive analysis of the NAFTA negotiation. *See* GARY CLYDE HUFBAUER & JEFFREY J. SCHOTT, NORTH AMERICAN FREE TRADE: ISSUES AND RECOMMENDATIONS 149 (1992).

39. Nonetheless, NAFTA does grandfather certain laws relating to investment (Article 1108), services (Article 1206), and financial services (Article 1409). *See also* NAFTA, *supra* note 4, annex 301.3.

40. *Report of the Administration on the North American Free Trade Agreement and Actions Taken in Fulfillment of the May 1, 1991 Commitments*, Sept. 18, 1992, at 5 [hereinafter *Report of the Administration on NAFTA*].

41. NAFTA, *supra* note 4, art. 105. The Standards' chapter (Article 902) has a much weaker requirement.

42. GATT, *supra* note 5, art. XXIV:12.

43. This provision conveys obligations—"observance"—to subnational governments, but does not confer or transfer any rights to them.

44. *See* GATT, UNITED STATES—MEASURES AFFECTING ALCOHOLIC AND MALT BEVERAGES (Feb. 7, 1992) (Panel report DS/23R), at para. 5.48, *reprinted in* 4 WORLD TRADE MAT. 25 (Sept. 1992). For further discussion, see Steve Charnovitz, *The Environment Versus Trade Rules: Defogging the Debate*, 23 ENVTL. L. (forthcoming 1993, No. 2).

45. *See* NAFTA, *supra* note 4, arts. 301.2, 724 (definition of "appropriate level of protection").

propriate level for California? Yes, it can, however nothing in NAFTA compels the federal government to do so, or permits California to defend itself before a dispute panel. While it would be difficult to deal with these matters within NAFTA, both can be addressed in the U.S. implementing legislation.

- If the U.S. Trade Representative agrees to defend California's standard, will the United States automatically win? No, because the final decision depends on the facts of the case. These facts must satisfy the several disciplines discussed above. In addition, state laws run into a potential hurdle in NAFTA's requirement that parties "avoid arbitrary or unjustifiable distinctions" in levels of protection in different circumstances.[46] The U.S. government could be called upon to justify why California needs a higher standard than the other 49 states. Mexico might assert that an overprotective health standard is arbitrary.
- If a NAFTA panel rules against the United States, will California have to lower its standard? Although Ambassador Hills told the U.S. House of Representatives Ways and Means Committee that "there will be *no* preemption," that is merely one facet of the problem.[47] Whether NAFTA prevails over state law will depend upon the terms of the implementing legislation. In implementing the Canada-U.S. FTA, Congress stated that the FTA prevails over any conflicting state law.[48] Yet because no private right of action was created, only the federal government may bring an action against a state.[49] Such provisions are likely to appear again, in NAFTA's implementing legislation. Congress may want to establish a policy regarding executive branch challenges to state environmental laws determined not to conform with NAFTA.

Impact on Environmental Treaties

Many environmentalists suggest that trade treaties should always yield to environmental treaties. NAFTA yields, but does not itself go that far. It specifically affirms that certain trade obligations in three international environmental treaties will take precedence over NAFTA, "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 the least inconsistent with the other provisions of [NAFTA]."[50] This explicit statement on treaty hierarchy is a promising principle. Nevertheless, the least-NAFTA-inconsistent proviso is troubling, because a similar test—invented in 1989 by a GATT panel—has been successfully invoked against health and environmental laws.

Dispute Settlement

Several features of NAFTA's dispute resolution process have implications for the environment. First, where a party asserts that a Standards' or S&P measure violates NAFTA, the agreement places the burden of proof on this party to establish such inconsistency.[51] This is a shift of the burden from that of prior accords.[52] In GATT, a party challenging a health standard need only show a prima facie violation of GATT rules, and then the burden shifts to the defending party who must carry its affirmative defense based on the exceptions in GATT Article XX. NAFTA, in contrast, integrates environmental concerns directly into the agreement, rather than forcing parties to rely on special exceptions.

In addition, NAFTA in most instances gives the party whose environmental law is being challenged the right of forum selection[53]—that is, the party may choose to defend its law exclusively before a NAFTA panel. This right of forum selection applies only to actions under certain environmental treaties or "domestic" environmental laws.[54] Thus, if a country has an environmental trade measure aimed at protecting the global commons, then the complaining party, rather than the defending party, chooses the forum.[55]

For example, consider the recently enacted U.S. legislation regulating wild bird imports. This law directs the Secretary of the Interior to ban or set quotas on the importation of all species of exotic birds from any country that has not implemented a management program that ensures both conservation and humane treatment of birds in transport.[56] If

46. *Id.* art. 715.3(b). This requirement occurs only when such distinctions result in arbitrary or unjustifiable discrimination against a product of another party or constitute a disguised restriction on trade between the parties. In the hypothetical posed, the differences in state levels would probably not constitute such discrimination; but Mexico might argue that the California measure is a "disguised restriction" if it is much higher than the prevailing level of protection in the rest of the United States.

47. *Hearing on North American Free Trade*, *supra* note 2 (prepared testimony of Ambassador Carla A. Hills).

48. United States-Canada Free Trade Agreement Implementation Act of 1988, §102(b)(1)(A), 19 U.S.C. §2112(b)(3), (c) (note).

49. *Id.* §102(b)(3), (c), 19 U.S.C. §2112(b)(3), (c). *See* UNITED STATES CODE CONG. & ADMIN. NEWS 1988, Vol. 5 at 2404-06.

50. NAFTA, *supra* note 4, art. 104.1. The three treaties are: Convention on International Trade in Endangered Species of Wild Fauna and Flora, *opened for signature* Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243; the Montreal Protocol on Substances That Deplete the Ozone Layer, *opened for signature* Sept. 16, 1987, 26 I.L.M. 1541, 30 I.L.M. 537 (amended in 1990); and the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal, *opened for signature* Mar. 22, 1989, 28 I.L.M. 649. The parties may by joint agreement add other environmental agreements to this list. *See* NAFTA, *supra* note 4, annex 104.1.

51. NAFTA, *supra* note 4, arts. 723.6, 914.4. *But see* REPORT OF THE INDUSTRY POLICY ADVISORY COMMITTEE FOR TRADE ON THE NORTH AMERICAN FREE TRADE AGREEMENT, Sept. 14, 1992, at 14 (challenging party must demonstrate a prima facie case of, for example, discrimination against an imported product).

52. According to the Canadian government, "in the event of a dispute, the environment would be given the benefit of the doubt." *See* Government of Canada, *supra* note 34, at 70.

53. NAFTA, *supra* note 4, arts. 2005.3, 2005.4.

54. The defending party gets to choose only for a trade measure that is meant "to protect *its* human, animal or plant life or health, or to protect *its* environment." *Id.* art. 2005.4(a) (emphasis added).

55. *Id.* art. 2005.1. But when three parties are involved in a dispute, NAFTA may be selected as the forum. *See id.* art 2005.2.

56. Wild Bird Conservation Act of 1992, Pub. L. No. 102-440, Title I, §108(a)(2)(B)(i), 16 U.S.C. §4907. The Secretary must also find that such an import ban is "necessary" for the conservation of the species or is otherwise consistent with the Act. This provision applies to birds not listed under a CITES Appendix. The Act has separate provisions dealing with exotic birds covered by CITES.

the United States bans bird imports from Mexico under this law, Mexico could choose GATT's mechanism for its complaint. Because GATT has proven a hostile venue for laws that protect natural resources outside a nation's own borders, the Bush administration missed an opportunity to negotiate, through NAFTA, a more progressive environmental regime for North America.

A third feature of NAFTA's dispute resolution process is the ability of a dispute panel to obtain scientific advice.[57] This provision is an improvement over the Canada-U.S. FTA, which requires the approval of both parties for scientific input. However, despite being touted as an innovation, this provision is hardly that. Fifty years ago, a reciprocal trade agreement between Mexico and the United States gave *either government* the right to request a "committee of technical experts" to make recommendations regarding "the application of any sanitary law or regulation for the protection of human, animal or plant life or health."[58]

One entrenched practice that NAFTA does not change relates to who presides over and judges environmental disputes. NAFTA lacks a requirement that panels hearing environmental cases have at least one member with environmental, as well as trade, expertise.[59] This omission is glaring given that NAFTA's panels will have more members (five) than GATT's panels have (three). In addition, NAFTA does not provide that panel hearings be held open to the public.

Each of the procedural provisions discussed—burden of proof, forum selection, scientific input, and composition of panels—may determine which country prevails in a dispute. When a party loses, NAFTA calls for it to follow the panel's recommendation "wherever possible" or face the prospect of "suspension of benefits" by the winning party.[60] To facilitate compliance with a panel decision against the United States, Congress could utilize the special fast-track procedures available for the adoption of recommendations arising under trade agreements.[61] For example, the U.S.-Canada FTA Implementation Act provided such a fast track for the first 30 months of the FTA.[62]

Improving the Environment

Arguing that NAFTA will "improve the environment," Ambassador Hills makes a forceful claim. The pro-NAFTA lobby promises that a more prosperous Mexico will upgrade its environmental protection. The anti-NAFTA lobby worries that greater commerce and development will exacerbate the current level of despoliation.[63] Neither prospect is addressed in this Dialogue. Instead, NAFTA's so-called green provisions are examined next, to see what they say, and do not say, about improving environmental protection.

Upward Harmonization

Although the text is a bit ambiguous,[64] NAFTA advances the principle that environmental standards should be harmonized upward.[65] The S&P chapter calls on parties to "pursue equivalence" and use "international standards"[66] as a basis, but "*without reducing* the level of protection of human, animal, or plant life or health."[67] The Standards' chapter has a similar provision.[68]

The introduction of the upward harmonization principle into trade rules may be the most significant environmental feature in NAFTA.[69] The lack of such a principle in the Uruguay Round has been a major criticism by environmentalists. Although the draft GATT agreement does not mandate downward harmonization, its new disciplines could push in that direction.[70]

Investment

According to a 1992 White House Fact Sheet, NAFTA "prohibits the lowering of standards to attract investment."[71] If this were factually correct, it would be a notable achievement. But it is incorrect, because NAFTA states that

57. NAFTA, *supra* note 4, art. 2015.

58. Agreement between United States and Mexico Respecting Reciprocal Trade, Dec. 23, 1942, Terminated Dec. 31, 1950, 57 Stat. 833, Article VI(5).

59. NAFTA, *supra* note 4, art. 2009.2. The roster rules do not, however, preclude it.

60. *Id.* arts. 2018-19.

61. Trade Agreements Act of 1979, §3(c), 19 U.S.C. §2504(c). These procedures are not automatically available to NAFTA; they must be specifically legislated.

62. United States-Canada Free Trade Agreement Implementation Act of 1988, §102(e), 19 U.S.C. §2112(e) (note). This fast track was not used.

63. For a brief description of the environmental problems along the U.S.-Mexico border, see U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, U.S.-MEXICO TRADE: PULLING TOGETHER OR PULLING APART?, 123-26 (1992).

64. Under NAFTA Article 712.5, each party must not raise its standard if the higher level is not its "appropriate level of protection." Thus, the view of the Canadian government that NAFTA "would mandate 'upward harmonization'" is not borne out by the text. *See* Government of Canada, *supra* note 34, at 19.

65. Unlike the Dunkel Text, *supra* note 6, and the Canada-U.S. FTA, *supra* note 7, NAFTA eschews the term "harmonization," but does call for making standards "equivalent or, where appropriate, identical." *See* NAFTA, *supra* note 4, art. 713.1.

66. International standards regarding food safety are those adopted by the Codex Alimentarius Commission. International standards regarding animal health are those developed under the auspices of the International Office of Epizootics. *See* NAFTA, *supra* note 4, art. 724 (definitions).

67. NAFTA, *supra* note 4, arts. 713.1, 714.1 (emphasis added). *Compare with* Canada-U.S. FTA, *supra* note 7, art. 708.1 (harmonization of regulations).

68. NAFTA, *supra* note 4, art. 906.2. *Compare with* Canada-U.S. FTA, *supra* note 7, art. 604.1 (compatibility of standards). In addition, NAFTA Article 906.1 states that the parties shall "work jointly to *enhance* the level of safety and of protection of human, animal and plant life and health, the environment and consumers." NAFTA, *supra* note 4, art. 906.1 (emphasis added).

69. Since 1987, the Treaty Establishing the European Economic Community has directed the Commission—in proposing measures for the "approximation" of laws concerning health, safety, environmental protection, and consumer protection—to "take as a base a high level of protection." *See* Article 100a(3). For a discussion of this provision, see Ludwig Kramer, *The Single European Act and Environmental Protection: Reflections on Several New Provisions in Community Law*, 24 COMMON MKT. L. REV. 659, 678-79 (1987).

70. The draft GATT S&P Decision mandates that all measures which result in a level of sanitary protection different from that based on international standards "shall not be inconsistent with any other provision of this decision." *See* Dunkel Text, *supra* note 6, §L, pt. C, S&P Decision, para. 11. Thus, the ability to use a standard tighter than the international one will be conditional on meeting a series of disciplines such as consistency with scientific evidence and the least-trade restrictive test.

71. White House Fact Sheet: The North American Free Trade Agreement, 28 WEEKLY COMP. PRES. DOC. 1426 (Aug. 12, 1992).

"a Party *should* not waive or otherwise derogate" from domestic health, safety, or environmental measures to encourage an investor.[72] A true prohibition would use "shall" rather than "should." Nevertheless, this is an innovative and important provision.

In drafting this exhortation, the parties considered, but could not agree on, sterner language. The Canadian government had proposed using the word "shall" so that any formal derogation of environmental standards would be eligible for dispute settlement. When the Bush administration rejected this proposal, the parties settled on consultations only.[73]

The inclusion of an enforceable investment rule in NAFTA would raise several difficult issues for the United States. One is whether the federal government has the authority to regulate state competition for investment. Another issue is whether a prohibition against lowering environmental standards to attract investment would have an unintended effect of keeping standards lower than optimal. A third issue concerns how waivers and other flexible provisions would be treated in determining when derogation occurs. It appears that more research and analysis is needed to address these and other issues.[74]

Clarifying the Environmental Exception

In incorporating GATT's exceptions into NAFTA, the parties state that GATT Article XX(b) embraces "environmental measures" and that Article XX(g) applies to living as well as non-living resources.[75] Although this is a benign clarification, it is not a "green" provision in the sense of permitting additional environmental measures. Nor does it establish any new principle in trade law. Since 1946, the Canada-Mexico Trade Agreement has included an exception for trade restrictions "imposed for the protection of plants or animals, including measures for protection against disease, degeneration or extinction."[76] This treaty is noteworthy because it demonstrates that, even 47 years ago, import restrictions aimed at preventing species extinction were considered legitimate.

Energy

In contrast to these aforementioned "green" provisions, there is one that is potentially "anti-environment." Under NAFTA, the "Parties agree to allow existing or future incentives for oil and gas exploration, development, and related activities in order to maintain the reserve base for these energy resources."[77] Perhaps this provision is intended merely to permit, rather than to require, continued incentives.[78] But as drafted, it could inhibit policy reforms to curtail fossil-fuel incentives as part of a strategy to combat global warming.[79] Moreover, NAFTA's energy chapter does not even address the issue of whether greater trade in fossil fuels is consistent with sustainable development.

Assessment and Recommendations

NAFTA is attentive to some environmental concerns. But its credibility has been undermined by the hyperbole of the Bush administration. For instance, Ambassador Hills claimed that NAFTA "is the first such accord to include provisions to protect and improve the environment."[80] Yet nearly every U.S. trade agreement in this century has respected laws relating to life and health.[81]

Nevertheless, NAFTA reflects a great improvement over the environmental provisions in the Uruguay Round. The most important reforms are:

- fewer strings on national choice of "appropriate" level of protection,
- elimination of the least-trade-restrictive test,
- a tilt toward upward harmonization,
- deference to the three major international environmental treaties, and
- hortatory language against relaxing standards to attract investment.

One issue that needs clarification is whether the stricter disciplines in the Uruguay Round would supersede NAFTA as a more recent treaty—if the Uruguay Round is ever consummated.[82]

Even with these improvements in environmental design, there are several ways in which NAFTA remains an unfinished structure. First, some of the critical provisions are vague or ambiguous. Second, the Standards' chapter leaves out process standards. This means that trade regulations aimed at the environmental externalities of production will fall under GATT, rather than NAFTA, rules. Third, NAFTA fails to recognize any rights of subnational governments. Fourth, NAFTA's list of objectives do not include any environmental goals.[83]

72. NAFTA, *supra* note 4, art. 1114.2 (emphasis added).

73. The Bush administration termed this "compulsory consultations." *See Report of the Administration on NAFTA*, *supra* note 40, Tab 7, at 9.

74. In the Clean Air Act Amendments of 1990, Congress required the President to evaluate and report on the impact on U.S. competitiveness of differing air pollution standards among our major trading partners. *See* Pub. L. No. 101-549 §811(b), 42 U.S.C. §7612(b) (note), ELR STAT. CAA 139. This report, which was due May 15, 1992, was also supposed to contain a strategy for addressing the impact through trade negotiations. Unfortunately, this report has not been submitted.

75. NAFTA, *supra* note 4, art. 2101.1.

76. Trade Agreement Between Canada and Mexico, Feb. 8, 1946, 230 U.N.T.S. 184, 190.

77. NAFTA, *supra* note 4, art. 608.1. A similar provision exists in Article 906 of the Canada-U.S. FTA.

78. This interpretation would give the provision little operational meaning, because energy subsidies are still countervailable.

79. Nevertheless, promoting natural gas over coal would be environmentally advantageous.

80. Carla Hills, *America's Free Trade 'Firsts,'* J. COM., Aug. 14, 1992, at 8A.

81. *See* Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, 25 J. WORLD TRADE, Oct. 1991, at 37-43.

82. Under NAFTA Article 103, NAFTA prevails over GATT to the extent of any inconsistency. However, this provision applies to the *existing* rights and obligations under GATT, not to new obligations under the Uruguay Round. For international rules on the supersession of treaties, see Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 8 I.L.M. 679 (Article 30).

83. The environment and sustainable development are mentioned three times in NAFTA's Preamble, but not at all in NAFTA's Statement of Objectives. *See* NAFTA, *supra* note 4, art. 102.

In response to criticism that the environmental provisions are too weak, defenders of NAFTA argue that there is a limit to how much "extraneous" matter can be added to a free trade agreement. But NAFTA is not merely a free trade agreement relating solely to the free flow of goods and services. If it were, it would run about a dozen pages, not 2,000.

NAFTA is also a set of rules for policy coordination. Some topics, like intellectual property, are spelled out in great detail.[84] Other topics, like antitrust policy, involve only general obligations. Still others, including high technology, environment, and social policies, entail minimal or no obligations. It is interesting to note that for intellectual property, NAFTA *requires* parties to "give effect" to four listed treaties.[85] Yet for the environment, NAFTA merely *permits* parties to comply with treaties like the Montreal Protocol, and then only conditionally.[86]

One of the most serious deficiencies in NAFTA is the lack of any workable mechanism to develop environmental rules for the region. The parties are now developing plans for a new "North American Commission on the Environment" to facilitate intergovernmental cooperation.[87] While such a commission could be useful, much greater value-added might be obtained from creating an entirely new institution that is *trilateral* (Canada-Mexico-U.S.) and *with tripartite* membership (business, government, and the public). The model should be the International Labour Organization (ILO), the only surviving institution from the original League of Nations. The ILO—which is composed of employer, government, and worker representatives—writes treaties on labor standards, carries out technical assistance, and monitors working conditions.

A new North American Environment Organization (NAEO) could have an analogous function. Instead of just bureaucrats talking together, the NAEO would put business leaders, environmentalists, and government officials in the same room working together. Such an organization would have a mandate to propose new regional environmental policies—for example, better monitoring of transborder traffic in hazardous waste. Of course, the right to accept or reject any of these proposals would remain with each of the three governments.[88]

The central task of the NAEO would be to devise minimum environmental standards. This does not mean that the product and process standards in each country should be identical. There are many valid reasons why such standards might differ. But when countries share water and air and become increasingly linked in commerce, it makes sense to begin setting minimum standards for reasons of both health and fairness.

Fixing NAFTA

NAFTA was signed on December 17, 1992, and is not expected to be rewritten. But there is still time to negotiate an Environmental Protocol—both to clarify the existing pact and to add a few new measures. Protocols are used for situations like this to deal with late-breaking concerns at the end of a negotiation.

There are three compelling reasons to do a NAFTA Protocol now. First, some of the environmental provisions are nebulous and do not achieve the announced intention of protecting each country's environmental self-determination. Second, the anticipated opposition to the present agreement from some environmental groups may make it hard for the U.S. Congress to approve the implementing legislation. Third, NAFTA will likely serve as a model for future regional integration agreements, and therefore, should be the right model.[89] The key factor in a renewed negotiation is that any supplemental agreement must be completed by March 2, 1993, in order to qualify for the congressional "fast track."[90] This deadline presents a formidable challenge to the Clinton administration.[91]

A free trade agreement would bring extensive net economic benefits to the region. While the environmental features of NAFTA are not perfect, they do represent progress. With a little fine tuning, NAFTA can and should be implemented next year. Then the citizens of North America can use it to build stronger, environmentally sound economies.

84. For example, NAFTA requires each party to impose criminal penalties for copyright piracy on a commercial scale. *Id.* art. 1717.1.

85. *Id.* art. 1701.

86. *See id.* art. 104. Of course, environmental "rights" can be quite different from intellectual property rights. The latter are generally private rights.

87. This new commission would be in addition to the intergovernmental Free Trade Commission included in NAFTA. *See id.* art. 2001. The Free Trade Commission could also examine environmental issues.

88. For a futuristic reflection on regional policymaking, see Andrew Reding, *A North American Parliament?*, J. COM., Sept. 22, 1992, at 10A. *See also* M.E. SHARPE, CUOMO COMMISSION ON COMPETITIVENESS, AMERICA'S AGENDA REBUILDING ECONOMIC STRENGTH, at 235-40 (1992). Congress recently authorized the President to initiate negotiations for the establishment of a Consultative Commission on Western Hemisphere Energy and Environment. This Commission would include representatives from both government ministries and parliaments. *See* Energy Policy Act of 1992, §3020, 42 U.S.C. §13555.

89. Moreover, additional countries might join NAFTA, particularly if the Uruguay Round fails. *See* NAFTA, *supra* note 4, art. 2204 (accession).

90. *See* Omnibus Trade and Competitiveness Act of 1988, §1102-3, 19 U.S.C. §2902-3. Technically, the law merely requires the President to give notice by March 2, 1993, of his intention to enter into a trade agreement. But the agreed-upon practice has been for the President to provide a legal text of any trade agreement at the time he gives this notice. To qualify for fast track, an agreement must be entered into before June 1, 1993, and therefore, the 90-day notice must be given by March 2. A supplemental agreement that is only indirectly related to trade might not need congressional approval.

91. Notwithstanding its injection into the 1992 Presidential campaign, the pursuit of a North American Free Trade Agreement has always been a bipartisan initiative. The NAFTA process originated during the Carter administration with a study of the desirability of entering into trade agreements with North American countries. *See* Trade Agreements Act of 1979, §1104, 19 U.S.C. §2486.