THE NORTH AMERICAN FREE TRADE AGREEMENT: GREEN LAW OR GREEN SPIN?

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Throughout the debate in the United States on the North American Free Trade Agreement (NAFTA)[1], the environmental implications of the NAFTA have loomed as an important factor.[2] Because the NAFTA was viewed as environmentally inadequate by the Clinton administration, the three parties negotiated a side agreement, the North American Agreement on Environmental Cooperation (NAAEC).[3] The NAFTA and the NAAEC both came into force on January 1, 1994, after a bruising battle in the U.S. Congress.[4] Many of those lobbying for NAFTA's approval by the Congress, including the Clinton administration, trumpeted NAFTA's "greenness" as a key reason for adopting the trade agreement. The convoluted politics of the NAFTA made for strange bedfellows. Many members of Congress and interest groups not normally known for strong environmental advocacy highlighted the environmental benefits of the two agreements. For example, Congressman David Dreier (R-Calif.) stated that the "NAFTA is a pro-environment, free trade agreement, not a trade agreement hijacked by extremist interest groups."[5] Conversely, some public officials and interest groups that *were* known for strong environmental advocacy denied that the NAFTA or the NAAEC would deliver significant environmental benefits.[6]

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1. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex. (entered into force Jan. 1, 1994). The text of the NAFTA is also reprinted at 32 I.L.M. 605 [hereinafter NAFTA].

2. *See* John Chafee, *Facts, Not Fears: NAFTA Will Help the Environment*, ROLL CALL, Sept. 27, 1993, at 26. Senator Chafee states that "[f]rom the very onset of the NAFTA discussions, the environment has been key to an extent never before seen in trade negotiations . . . ." *Id.*

3. North American Agreement on Environmental Cooperation, Sept. 13, 1992, 32 I.L.M. 1480 [hereinafter NAAEC].

4. For a review of the costs of this battle to the American taxpayer, see Charles Lewis, *The NAFTA-Math*, WASH. POST, Dec. 26, 1993, at C2. *See also* Sarah Anderson & Ken Silverstein, *Oink Oink*, NATION, Dec. 20, 1993, at 752.

5. Memorandum from Rep. David Dreier to members of the House of Representatives, NAFTA Fact #17, (Oct. 18, 1993)(on file with *Law & Policy in International Business*). In 1993, Congressman Dreier had a League of Conservation Voters rating of 20 (out of 100). The national average for House members was 55.

6. For example, see the advertisement, *8 Fatal Flaws of NAFTA*, N.Y. TIMES, Sept. 22, 1993, at A17, sponsored by several groups including Sierra Club, Friends of the Earth, and the Humane Society.

The purpose of this Article is to analyze the main environmental issues involved in the debate, by examining several critical questions such as: (1) Is the NAFTA really green, or did NAFTA proponents spin the environmental provisions far out of proportion? (2) Does the NAFTA break new ground in incorporating an environmental dimension into trade agreements, or are the so-called environmental "rights" in NAFTA just a reaffirmation of the status quo?[7] (3) Did the federal government "sell" the NAFTA to the American public in an honest manner?

After examining these questions, the Article concludes that there is very little that is "green" about the NAFTA. This conclusion differs from the conclusions reached by most other commentators who have studied the environmental aspects of the NAFTA. In this author's opinion, the NAFTA is a good trade agreement that will economically benefit the United States. But since the Clinton administration pointed to the NAFTA's environmental provisions as a key reason to support the NAFTA, it is useful to analyze these arguments to determine their veracity. The Article concludes that much of the Administrations's rhetoric was false.

The analysis will proceed in the following manner: Part I will explain the rules of the General Agreement on Tariffs and Trade (GATT),[8] as they relate to the environment, in order to provide a baseline for judging the significance of the NAFTA. Part II will examine some of the environmental claims made, in the words of NAFTA proponents, and compare them to the actual terms of the Agreement. This Part will focus mainly on the NAFTA rather than the NAAEC, because the Canadian, Mexican, and U.S. governments devoted considerable effort to keeping most environmental issues on a track separate from the NAFTA (the so-called parallel track),[9] so it would seem inappropriate to merge them after the fact. Moreover, the agreements are legally separate. Part III will discuss two post-NAFTA developments: the environmental side

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7. The NAFTA's explicit recognition of such "rights" is not original. For example, the Argentina-U.S. Sanitary Convention of 1935 stated that "[e]ach contracting party recognizes the right of the other party to prohibit the importation of animal or plant products. . .until it has been proven to the satisfaction of the party exercising such right that such territory or zone of the other party is free from such contagion or infestation." Sanitary Regulations Concerning Plant and Animal Products, art. III, *in* 7 UNPERFECTED TREATIES OF THE UNITED STATES OF AMERICA 1776–1976, 259, 261 (Christian L. Witkor ed., 1991).

8. The GATT is an international agreement setting rules on trade restrictions. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. pts 5–6, 55 U.N.T.S. 187 [hereinafter GATT]. The current amended version of the GATT appears at 4 Vol. B.I.S.D. 1 (1969).

9. *See, e.g.*, Evelyn Iritani, *Social Issues Pact Doesn't Belong in Trade Agreement, Hills Argues,* SEATTLE POST-INTELLIGENCER, Aug. 21, 1991, at B5.

agreement (NAAEC) negotiated by the Clinton administration and the conclusion of the Uruguay Round. Part IV will put these issues in a broader political context and attempt to draw some conclusions.

I. GATT'S ENVIRONMENTAL BASELINE

A. *Selecting the Baseline*

Part I will offer a brief primer on the main GATT rules affecting environmental measures. Since my purpose is to provide a baseline for analyzing the NAFTA, only those GATT rules relating to NAFTA's environmental provisions will be discussed.[10] Besides the GATT, there are other relevant baselines which could be used in analyzing the NAFTA. For instance, the NAFTA could be compared to the GATT Agreement on Technical Barriers to Trade of 1979 (known as the "Standards Code") which all three NAFTA parties have joined.[11] The NAFTA could also be compared to the U.S.-Canada Free Trade Agreement of 1988.[12] Instead of using the GATT as a baseline, one could also contrast NAFTA's environmental provisions to those in the contemporary drafts of the Uruguay Round trade agreement.[13] Finally, since the NAFTA may be a first step toward continental economic integration, one could also compare it to the environmental provisions in the treaty establishing the European Economic Community.[14]

Some reviewers of this Article have suggested that a better baseline would be the draft Uruguay Round text because that was what the Bush administration's negotiators used as a model.[15] Using that baseline would cast the NAFTA in a greener light because the Uruguay Round draft was more environmentally constraining than the NAFTA.[16] But in

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10. Although the NAFTA has very few provisions relating to taxes, Part I discusses GATT's rules on domestic taxes because they intersect with GATT's rules on domestic regulations.

11. General Agreement on Tariffs and Trade, Agreement on Technical Barriers to Trade, 26 Supp. B.I.S.D. 8 (1980) [hereinafter Standards Code]. GATT members are under no obligation to join the Standards Code.

12. U.S.-Canada Free Trade Agreement, Jan. 2, 1988, 27 I.L.M. 281 [hereinafter FTA].

13. The NAFTA negotiations coincided with the Brussels Text of December 1990 and the Dunkel Text of December 1991. The Brussels Text is the Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, GATT Doc. MTN.TNC/W/35/Rev. 1 (Dec. 3, 1990). The Dunkel Text is the Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, GATT Doc. MTN.TNC/W/FA (Dec. 20, 1991).

14. *See* TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY].

15. For example, Daniel Esty, a Bush administration NAFTA environmental negotiator, made this suggestion.

16. For a comparison of the NAFTA to the draft Uruguay Round, see Steve Charnovitz, *NAFTA: An Analysis of Its Environmental Provisions*, [1993] 23 Envtl L. Rep. (Envtl L. Inst.) 10,067 (Feb. 1993).

this author's opinion, the draft Uruguay Round text is a false baseline for several reasons. First, the GATT was the status quo during the NAFTA negotiations. After the NAFTA entered into force in January 1994, it was the GATT's rules that were superseded. Second, as will be shown below, many government officials and environmentalists compared the NAFTA to the GATT during the debate over congressional approval. Third, there was nothing inevitable about the completion of the Uruguay Round. Its outcome was in doubt until December 15, 1993, the final day of fast-track authority for the United States. Moreover, the draft Uruguay Round provisions were subject to change. Indeed, several provisions related to the environment were changed in the final weeks of the Round.[17]

It is true that when the Uruguay Round goes into force in 1995, it will have tighter disciplines on environmental measures than the NAFTA.[18] But that does not retroactively green the NAFTA; it simply makes the Uruguay Round more brown than the NAFTA.

Fourth, while some would portray the U.S. GATT negotiators as the "bad cop" and the U.S. NAFTA negotiators as the "good cop," such a portrayal makes no sense. If the Bush administration thought the Uruguay Round draft was too constraining on the environment, they could have sought to change it. Moreover, many of the U.S. negotiators for the GATT and for the NAFTA were the same individuals. They should be commended for not repeating the same mistakes in NAFTA that they made in the early Uruguay Round. But one cannot give them "green credit" for the environmental sovereignty they retained in the NAFTA, compared to what they gave away in the Uruguay Round.

Fifth, the relative ease with which the three governments tightened disciplines on environmental measures in the NAFTA may have set the stage for the further tightening that was approved in the Uruguay Round. If the NAFTA had failed because of environmentalists' objections to the new disciplines, the Clinton administration surely would not have agreed to further tightening in the GATT. From this perspective, the NAFTA not only "un-greened" trade rules in North America, but also contributed to the "un-greening" of world trade rules.

B. *GATT Rules*

There are no rules in the GATT regarding the kind of environmental protection a member country may have. The GATT neither requires nor

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17. *See infra* notes 405 (Bush Administration's proposed changes) and 406 (Clinton Administration's proposed changes).

18. *See infra* text at 71–73.

forbids high environmental standards, nor does it require or forbid low environmental standards. GATT rules come into play when a country wants to apply its internal environmental standards to products in international trade. Although GATT rules affect both imports and exports, this Article will focus on imports, since there is little in the export provisions of the NAFTA that is relevant for the environment.

The discussion will proceed as follows: first, the GATT rules on imports; second, the GATT rules on domestic taxes and regulations applied to imports; third, the GATT exceptions for the environment (i.e., Article XX); and fourth, the GATT's dispute settlement procedures. Readers unfamiliar with the GATT may find this section complicated. Yet it is important that one understand what the GATT does so that one can see how the NAFTA changes (or does not change) it.

1. Rules on Imported Products

GATT Article XI bars quantitative prohibitions or restrictions on the importation of any product. For example, an import ban on ivory constitutes a quantitative restriction and thus violates Article XI. There are three exceptions within Article XI, but they are generally not viewed as relevant for environmental purposes.

GATT Article II bars "duties or charges of any kind" on imported products in excess of bound tariff rates, except for charges equivalent to an internal tax, antidumping or countervailing duties, or certain customs fees.[19] This is the provision that would disallow a country from levying a social dumping tariff or an ecological countervailing duty.

GATT Article I requires parties to adhere to the Most-Favored-Nation (MFN) principle. This means that any advantage or favor granted to one nation for a particular product must be granted to all GATT members for that product. Furthermore, such MFN treatment must be granted unconditionally to every party. In other words, a country cannot predicate its tariff treatment on the commercial or other government policies followed by a trading partner.[20] Moreover, a trade restriction cannot meet Article I by applying a special condition to *all*

19. GATT, *supra* note 8, art. II:1b,II:3, 4 B.I.S.D. at 3–4.

20. The leading GATT case is Belgian Family Allowances, General Agreement on Tariffs and Trade, Report Adopted by Contracting Parties on Belgian Family Allowances (Allocations Familiales), 1 Supp. B.I.S.D. 59 (1953) [hereinafter Belgian Family Allowances]. *See also* General Agreement on Tariffs and Trade, Reports Adopted by the Contracting Parties on the Council of Representatives, Accession of Hungary, Report of the Working Party, ¶12, 20 Supp. B.I.S.D. 34 (1974).

countries on the rationale that none is being treated worse than the other.[21]

2. Rules on Domestic Taxes and Regulation

Although GATT rules are typically murky, the rules on the application of domestic taxes and regulations to imports are among the most murky. This ambiguity results from the vague terms in the Agreement and from the lack of decisions (especially on product standards) that might have clarified these terms. The GATT's rules on internal measures are found in Article III, which states:

> 1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products. . . should not be applied to imported or domestic products so as to afford protection to domestic production.
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> 2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.
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> . . .
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> 4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. . . .[22]

Although the GATT does not mandate symmetry between its disciplines on taxes (Article III:2) and on regulations (Article III:4), the

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21. This would be conditional MFN. The GATT requires unconditional MFN. *See* GATT, *supra* note 8, 4 B.I.S.D. at 2.

22. GATT, *supra* note 8, art. III, 4 B.I.S.D. at 6–7.

wording of the two provisions would suggest that they be implemented in a parallel fashion.[23]

It is important to recognize that Article III imposes *disciplines* on GATT members.[24] Since the GATT is a contract mainly of negative undertakings, actions not specifically prohibited by the GATT are unregulated by the GATT.[25] For instance, as noted above, the GATT has no rules on internal measures as such. It is only when an internal measure is applied to an imported or exported product that GATT rules are engaged.[26]

The fact that the GATT does not explicitly grant countries the "right" to utilize internal measures has led some observers to perceive the GATT as more restrictive than other agreements, such as the NAFTA, that appear to accord such rights. This is a misperception. The GATT does not grant these rights to its members because they preexist as an inherent aspect of nationhood.[27] Indeed, it is inconceivable that a treaty could grant rights to all of its parties.[28]

Although Article III generally relates to the taxation and regulation

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23. While Article III:2 prohibits taxes on imported products "in excess of those applied" to like domestic products and Article III:4 prohibits regulations on imported products "less favourable" than regulations on domestic products, these two prohibitions would seem to be commensurate. GATT, *supra* note 8, art. III:2,4, 4 B.I.S.D. at 6. *See also* General Agreement on Tariffs and Trade, Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, ¶5.13, 39 Supp. B.I.S.D. 155 (1993) [hereinafter Dolphin I Report]. This report has not been adopted by the GATT Council.

24. Both GATT articles I and III provide the discipline of equality of treatment. For MFN, the equality is vis-à-vis the foreign nation given the most favors. For national treatment, the equality is vis-à-vis domestic sellers. *See supra* note 21 and accompanying text.

25. It is sometimes said that actions not prohibited by the GATT are permitted by the GATT. But this is not strictly accurate since no permission is needed by sovereign nations.

26. *See* General Agreement on Tariffs and Trade, Conciliation Panel Report on United States Imports of Certain Automotive Spring Assemblies, ¶ 56, 30 Supp. B.I.S.D. 107 (1984).

27. One of the early commentators on the GATT, William Adams Brown, Jr. (who attended the U.N. Conference on Trade and Employment), does characterize certain aspects of the GATT and the ITO Charter as "reserved rights." He defines these as "primary rights of members that are not subject to qualification or limitation by the action of other members or of the Organization." WILLIAM A. BROWN, JR., THE UNITED STATES AND THE RESTORATION OF WORLD TRADE 388 (1950). Yet the only parts of Article III that Brown characterizes as rights are the *exemptions* from the national treatment discipline. *Id.* at 441–42. The underlying practice of applying internal taxes and regulations to imports was viewed as so basic that Brown does not even characterize this as a "right" under the GATT.

28. Treaties may transfer rights (e.g., territory) from one party to another. Treaties can also grant membership rights, such as the right of MFN or the right to invoke GATT panels. But the GATT does not accord any rights to members to take domestic actions. It should also be noted that treaties can grant rights to individuals.

of products that have been imported, Article III can also be used to justify applying taxes or regulations at the border.[29] Depending on the tax or regulation, this may result in the non-admission or non-importation of a product. For example, if Country A bans the sale or possession of opium, it could refuse entry to opium at the border. In such a case, Country A must refuse entry from all countries.[30]

It can be argued that a regulation preventing the importation of a product may be justifiable under Article III yet still be a violation of Article XI. But a different stance has been taken in GATT adjudication so far.[31] A ban on the domestic sale of a product applied to prevent the importation of that same product is viewed as coming under Article III rather than Article XI. For example, Singapore bans the domestic sale and importation of chewing gum in order to maintain the cleanliness of its urban environment.[32] Such a ban would appear to meet the requirements of Article III and is therefore GATT-legal.

The simplest possible Article III case would be a tax or regulation based on the "nationality of the product."[33] Such a tax would be a prima facie violation of Article III. When a tax or regulation is based on other distinctions, the situation gets more complex.

One explanation of what Article III means is that any tax or regulation applied domestically can be applied, *paripassu*, to imports. This explanation has the advantage of clarity, but it is nonetheless wrong.[34] A main purpose of Article III, according to one GATT panel, is to ensure that the parties' internal charges and regulations do not frustrate the effect of tariff concessions granted under Article II.[35] Applying a tax or regulation equally to imported and to domestic products could achieve this purpose. But an origin-blind law may not be sufficient under GATT

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29. *See* GATT, *supra* note 8, art. III headnote, 4 B.I.S.D. at 6.

30. *Id.* art. I:1, 4 B.I.S.D. at 2.

31. *See* General Agreement on Tariffs and Trade, Conciliation Panel Report on Canada - Administration of the Foreign Investment Review Act, ¶ 5.14, 30 Supp. B.I.S.D. 140 (1984) [hereinafter Foreign Investment Report].

32. William Branigin, *No Chew Ways About It,* WASH. POST, Feb. 4, 1992, at D1.

33. *See* GATT, *supra* note 8, art. III:4, 4 B.I.S.D. at 6 (second sentence, not quoted above).

34. *See* JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS, 192–93 (1989) [hereinafter WORLD TRADING SYSTEM]; John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 WASH. & LEE L. REV., 1227, 1236–37 (1992) [hereinafter *World Trade Rules*].

35. General Agreement of Tariffs and Trade, Dispute Settlement Panel Report on United States Measures Affecting Alcoholic and Malt Beverages, ¶ 5.30, 39 Supp. B.I.S.D. 206 (1993) [hereinafter Alcoholic Beverages Report].

rules. As one GATT panel explained:

> [T]here may be cases where application of formally identical legal provisions would in practice accord less favourable treatment to imported products and a contracting party might thus have to apply different legal provisions to imported products to ensure that the treatment accorded them is in fact no less favourable.[36]

Another way of viewing GATT rules is that in addition to prohibiting de jure discrimination, the GATT also prohibits certain de facto discrimination.[37] De facto discrimination can occur even when there is no de jure discrimination.[38]

One of the most difficult conceptual issues in Article III adjudication is whether the imported and domestic products being compared are "like" products. The Article III disciplines relate only to "like" products. Consequently, if two products are not like products, a country may apply different taxes or regulations to them. It should be noted that Article III:2 on taxes is stricter in one way than Article III:4 on regulations. Article III:2 applies not only to like products, but also to "directly competitive or substitutable" products.[39] For example, apples and oranges are not like products, but they are substitutable products.[40]

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36. General Agreement on Tariffs and Trade, Conciliation Panel Report on United States Section 337 of the Tariff Act of 1930, ¶ 5.11, 36 Supp. B.I.S.D. 345 (1990) [hereinafter Section 337 Report]; *see also* General Agreement on Tariffs and Trade, Conciliation Report on Italian Discrimination against Imported Agricultural Machinery, ¶ 12, 7 Supp. B.I.S.D. 60 (1959); General Agreement on Tariffs and Trade, Conciliation Panel Report on United States Taxes on Petroleum and Certain Imported Substances, ¶ 5.1.9, 34 Supp. B.I.S.D. 136 (1988); General Agreement on Tariffs and Trade, Dispute Settlement Panel Report on Canada Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies, ¶ 5.6, 39 Supp. B.I.S.D. 27 (1993) [hereinafter Canadian Alcohol Import Report].

37. This is similar to U.S. adjudication under the commerce clause. *See, e.g.,* Minnesota v. Barber, 136 U.S. 313, 326 (1890) ("... a statute may, upon its face, apply equally to the people of all the States, and yet be a regulation of interstate commerce which a State may not establish.").

38. It is interesting to note that some states require that public restrooms for women have at least twice as many toilets as restrooms for men so as to achieve de facto "potty parity." *See* Junda Woo, *'Potty Parity' Lets Women Wash Hands of Long Loo Lines,* WALL ST. J., Feb. 24, 1994, at A1.

39. GATT, *supra* note 8, art. III, 4 B.I.S.D. at 6.

40. General Agreement on Tariffs and Trade, Dispute Settlement Panel Report on Japan Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages, ¶ 3.4, 34 Supp. B.I.S.D. 83 (1987) [hereinafter Labelling Report]. *See* WORLD TRADING SYSTEM, *supra* note 34, at 282–83.

The term "like product" is not actually defined in the GATT.[41] The same term had been used in trade treaties for many years before the GATT, and it was recognized that no single definition sufficed.[42] The term "discrimination" is also undefined in the GATT. But in the traditional use of the term, Country A *discriminates* against Country B if it treats a product from B less favorably than a like product from Country C. Thus, the terms "discriminatory" and "non-discriminatory" are only meaningful with reference to "like" products. In other words, their technical meaning in trade law differs from their ordinary usage in other contexts.[43] For example, the term "facially non-discriminatory" is sometimes used to describe a regulation that applies identically to a like product from different countries.[44] But if the regulation results in the product from one country having a de facto advantage over the product from another country, that regulation may be "discriminatory" in the GATT sense of the word.

Determinations as to the likeness of products are made by the GATT on a case-by-case basis. The following factors have been applied by various panels to determine likeness: the nature of the product; product quality, properties, physical characteristics, end-use, tariff classification;[45] consumers' tastes; and public policy purposes.[46] On the other hand, different geographic origins of two products does not make them "unlike."[47]

The caselaw on "like" products so far has not yielded predictability. For example, the Japan Customs Duties panel found wines with high

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41. A panel report suggesting that "like product" meant "more or less the same product" was criticized as too narrow in the GATT Council and not adopted. *See* GATT Doc. C/M/152, at 16.

42. *See* Steve Charnovitz, *Green Roots, Bad Pruning: GATT Rules and Their Application to Environmental Trade Measures*, 7 TUL. ENVTL. L.J. 299, 305–08, 316–19 (1994).

43. Even GATT panels sometimes use the terms imprecisely. *See, e.g.*, General Agreement on Tariffs and Trade, Dispute Settlement Panel Report on United States Taxes on Petroleum and Certain Imported Substances, ¶ 5.19, 34 Supp. B.I.S.D. 136 (1987) [hereinafter Petroleum Report].

44. For further discussion of the difference between facially neutral and facially discriminatory statutes, see Damien Geradin, *Free Trade and Environmental Protection in an Integrated Market: A Survey of the Case Law of the United States Supreme Court and the European Court of Justice*, 2 J. TRANSNAT'L L. & POL'Y 141 (1993).

45. General Agreement on Tariffs and Trade, Report of the Working Party on Border Tax Adjustments, ¶18, 18 Supp. B.I.S.D. 97 (1970) [hereinafter Border Tax Report]; Labelling Report, *supra* note 40, ¶3.3, 34 Supp. B.I.S.D. at 92.

46. Labelling Report, *supra* note 40, ¶3.3, 34 Supp. B.I.S.D. at 92; Alcoholic Beverages Report, *supra* note 35, ¶¶5.24–5.26, 5.74, 39 Supp. B.I.S.D. 206.

47. General Agreement on Tariffs and Trade, Dispute Settlement Panel Report on Spain Tariff Treatment of Unroasted Coffee, ¶4.6, 28 Supp. B.I.S.D. 102 (1981) [hereinafter Coffee Report].

and low raw-material content to be like products.[48] But the U.S. Alcoholic Beverages panel found liquor with high and low alcohol content to be unlike products.[49]

"[O]nce products are designated as like products," explained the U.S. Alcoholic Beverages panel, "a regulatory product differentiation, e.g. for standardization or environmental purposes becomes inconsistent with Article III. . . ."[50] Specifically, regulatory differentiations that deny "effective equality of opportunities" for imported products (vis-à-vis domestic products) violate Article III.[51] Furthermore, GATT panels may look beyond the actual consequence of the tax or regulation in dispute and consider the "potential impact" of that domestic tax or regulation on the imported product.[52] Hence, a regulation that may in practice give an imported product less marketplace opportunity than a "like" domestic product may be considered by the GATT to be discriminatory.

In view of the these precedents, it is not at all clear how the GATT would rule on the Article III consistency of many common environmental measures even when applied symmetrically to domestic and foreign products.[53] Consider, for example:[54]

*a regulation setting a minimum lobster size for interstate commerce,
*a regulation requiring a minimum content of recycled paper in newsprint;
*a regulation requiring recyclable rather than disposable bottles;
*a regulation setting a zero limit on a certain pesticide residue in food;
*a regulation prohibiting the sale of beef produced with hormones;
*a regulation requiring that ten percent of the sales of domestic and foreign automakers must be zero-emission vehicles;
*a regulation requiring that products be encased in biodegradable packaging;

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48. Labelling Report, *supra* note 40, ¶5.9d, 34 Supp. B.I.S.D. at 120.

49. Alcoholic Beverages Report, *supra* note 35, ¶5.75, 39 Supp. B.I.S.D. at 295.

50. *Id.* ¶5.72, 39 Supp. B.I.S.D. at 294.

51. Section 337 Report, *supra* note 36, ¶5.11, 36 Supp. B.I.S.D. at 386.

52. *Id.* ¶5.13, 36 Supp. B.I.S.D. at 387.

53. *See* General Agreement on Tariffs and Trade, Dispute Settlement Panel Report on Canada/Japan: Tariff on Imports of Spruce, Pine, Fir (SPF) Dimension Lumber, ¶5.9, 36 Supp. B.I.S.D. 167 (1989) [hereinafter Lumber Report].

54. For another list of difficult issues, see *World Trade Rules, supra* note 34, at 1233–35.

*a vehicle tax based on the pollution emitted by a motor vehicle; or
*a tax on beer cans but not beer bottles.

Most, if not all, of these measures would probably meet the requirements of Article III. But any one could fail depending upon the facts of the case.

Besides Article III:2 and III:4, there is an additional requirement in Article III:1 which states that internal taxes and regulations should not be applied to imported or domestic products so as to afford protection to domestic production.[55] By using "should," the provision is precatory rather than mandatory.[56] Because Article III:1 is incorporated by reference into Article III:2, the issue of "affording protection" is often considered in cases involving internal taxes. Indeed, when there is no substantial domestic production of the product being taxed, GATT panels may deem such a tax as a violation of Article III:2.[57] For example, if Norway were to impose an excise tax on the sale of kiwi, a GATT panel might find that since Norway does not produce any kiwi, and since kiwi is "substitutable" for other fruit, that this "internal" tax affords protection to domestic agribusiness. This precatory Article III:1 provision has never been used to disallow a domestic regulation.[58] However, GATT panels have applied it to taxes through Article III:2 and III:5, which incorporate III:1 by reference and thus make it mandatory.

All of the discussion so far has involved domestic taxes or regulations concerning product characteristics. But many countries also apply environmental regulations relating to the *process* by which a product is made.[59] It is unclear whether Article III:4 disallows regulations specify-

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55. It is unclear what, if any, substantive difference there is between this prerequisite and the "disguised restriction" prerequisite in Article XX. For a discussion of the term "afford protection," see EDMOND MCGOVERN, INTERNATIONAL TRADE REGULATION: GATT, THE UNITED STATES AND THE EUROPEAN COMMUNITY 247 (1986). *See also* THE WORLD TRADING SYSTEM, *supra* note 34, at 192–93. For a discussion of the term "disguised restriction," see KENNETH W. DAM, THE GATT: LAW AND THE INTERNATIONAL ECONOMIC ORGANIZATION 194–95 (1970).

56. *See* Christopher Thomas & Greg A. Tereposky, *The Evolving Relationship Between Trade and Environmental Regulation*, 27 J. WORLD TRADE 23, 37–38 (1993).

57. Labelling Report, *supra* note 40, ¶3.11, 34 Supp. B.I.S.D. at 103. *See also* DAM, *supra* note 55, at 129–31.

58. The Alcoholic Beverages panel applied it to state regulations, but did not find any inconsistency with Article III:2. *See* Alcoholic Beverages Report, *supra* note 35, ¶5.76, 39 Supp. B.I.S.D. at 295.

59. *See* Steve Charnovitz, *A Taxonomy of Environmental Trade Measures*, 6 GEO. INT'L ENVTL. L. REV. 1 (1993); *see also id.* note 153 and accompanying text.

ing a production process.[60] The U.S. government argued that it did not in the initial *Tuna/Dolphin* dispute (Dolphin I), but the GATT panel rejected that argument.[61] This panel report has not been adopted by the GATT Council, however.

Although urged to do so by Mexico, the Dolphin I panel did not rule that tuna from countries harvesting dolphin in an unsafe way was a like product to tuna from countries harvesting dolphin in a safe way.[62] Instead, the panel went outside conventional Article III jurisprudence to find that the U.S. regulation used to prohibit tuna products from Mexico was *not* an internal regulation within the meaning of Article III:4 since it did not relate to tuna "as a product."[63] Had the panel relied upon a traditional interpretation, it might have taken note of a previous panel's finding that the "manufacturing processes of products" could be taken into account in ascertaining "likeness."[64] It is also interesting to note that the GATT Standards Code permits developing countries to retain standards "aimed at preserving indigenous technology and production methods and processes compatible with their development needs."[65] This provision places development needs over market access.

Before turning to Article XX, it will be useful to summarize the analysis so far. The GATT imposes disciplines on taxes and regulations applied to imports. Although these disciplines can certainly snag a legitimate environmental measure, they are typically utilized to stop measures which treat imported and domestic products differently. To quote the GATT Secretariat, "non-discriminatory environmental policies ordinarily would not be subject to any GATT constraints."[66] How-

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60. An argument could be made based on consumers' tastes and public policy purposes for treating, for example, dolphin-safe tuna as an *unlike* product to dolphin-unsafe tuna. In the Alcoholic Beverages case, the panel found that beer produced from large and small breweries was "like." *See* Alcoholic Beverages Report, *supra* note 35, ¶ 5.19, 39 Supp. B.I.S.D. at 275.

61. *See* Dolphin I Report, *supra* note 23, ¶ 3.19–3.20, 5.11–5.15, 39 Supp. B.I.S.D. at 164.

62. *Id.* ¶ 3.16.

63. *Id.* ¶ 5.14–5.15, 39 Supp. B.I.S.D. at 195.

64. Labelling Report, *supra* note 40, ¶5.7, 34 Supp. B.I.S.D. at 116–17. However, in an earlier case, the panel found that differences in "cultivation methods" did not justify differentiation in the tariff on unroasted coffee by Spain. *See* Coffee Report, *supra* note 47, ¶4.6, 28 Supp. B.I.S.D. at 112. For an interesting discussion, not directly tied to the definition of like product, see the United States-Canada Free Trade Agreement, Panel Review in the Matter of Lobsters from Canada, ¶7.20, USA 89–1807-01, 1990 FTAPD Lexis 11, available in LEXIS, ITRADE Library, USCFTA File [hereinafter Lobster Report].

65. Standards Code, *supra* note 11, art. 12.4, 26 Supp. B.I.S.D. at 8. The Uruguay Round retains this provision.

66. *Trade and the Environment*, *in* 1 INT'L TRADE 20 (1992). For a contrasting view, see Jon R. Luoma, *GATTzilla the Trade Monster*, WILDLIFE CONSERVATION, May/June 1993, at 74–75.

ever in some situations, a geography-blind measure can be considered discriminatory by the GATT.

3. GATT Article XX

In pertinent part, GATT Article XX states:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> . . .
>
> (b) *necessary to protect human, animal or plant life or health;*
>
> . . .
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. . . .[67]

If an environmental import restriction violates GATT Articles I, II or XI, the country can rely upon Article XX to justify the restriction.[68]

If a domestic environmental tax or regulation violates Article III, the country can rely upon Article XX to justify the measure. For example, one GATT panel averred that if a ban on all cigarette advertising (for domestic and foreign cigarettes alike) were deemed a violation of Article III, it would nonetheless be allowable under Article XX.[69]

It should be noted that Article XX provides an exception to other GATT disciplines[70] including the "like product" test.[71] Article XX is not an independent discipline. Thus, a panel would not normally consider

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67. GATT, *supra* note 8, art. XX, 4 B.I.S.D. at 37–38.

68. General Agreement on Tariffs and Trade, Dispute Settlement Panel Report on Uruguayan Recourse to Article XXIII, ¶J.3, 11 Supp. B.I.S.D. 95 (1962) [hereinafter Article XXIII Report].

69. General Agreement on Tariffs and Trade, Dispute Settlement Panel Report on Thailand Restrictions on Importation of and Internal Taxes on Cigarettes, ¶78, 37 Supp. B.I.S.D. 200 (1990) [hereinafter Cigarette Report].

70. Note that there is one discipline in GATT Article III:1 regarding the affording of protection that is not overridden by Article XX. The "disguised restriction" proviso in the Article XX headnote seems to repeat this discipline. GATT, *supra* note 8, art. XX, 4 B.I.S.D. at 37–38.

71. *See* Labelling Report, *supra* note 40, ¶5.13, 34 Supp. B.I.S.D. at 124.

Article XX unless a disputed trade measure is found to violate a GATT rule. Article XX is a last resort to achieve GATT legality.

During its past several years of "judicial" activism, the GATT has narrowed the scope of Article XX for environmental standards.[72] The Thai Cigarette panel declared that Article XX(b) can only be used for a measure that "entails the least degree of inconsistency with other GATT provisions."[73] The Canada Herring and Salmon panel declared that Article XX(g) can only be used for a measure that is "primarily aimed at" rendering domestic conservation restrictions effective.[74] The Dolphin I panel declared that neither Article XX(b) nor (g) can be used for measures that are "extrajurisdictional."[75] It is interesting to note that GATT panels have been broadening the disciplines in Article III while narrowing the exceptions in Article XX.

Notwithstanding the tightening of Article XX(b) in recent years, there is considerable interest in tightening it further. Canada has argued that when less trade restrictive measures are available to meet legitimate policy goals, those measures must be pursued.[76] The European Union has argued that Article XX(b) already requires that parties use the least trade restrictive option to achieve the environmental goal.[77] Since no GATT panel has yet found a trade-restrictiveness requirement in Article XX(b),[78] it appears that the European Union (EU) is attempting to insinuate its own internal least-trade-restrictive test into the GATT. It should be noted that the GATT does contain a requirement to avoid unnecessary commercial damage in Article XII

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72. This study addresses only subsections (b) and (g). The U.S. government has used the argument that subsection (d) may shield environmental measures, but this author fails to see any merit to such argument. For an early utilization of this argument, see Section 337 Report, *supra* note 36, ¶3.61, 36 Supp. B.I.S.D. at 374.

73. Cigarette Report, *supra* note 69, ¶74, 37 Supp. B.I.S.D. at 223.

74. General Agreement on Tariffs and Trade, Canada Measures Affecting Exports of Unprocessed Herring and Salmon, ¶4.6, 35 Supp. B.I.S.D. 98, 114 (1989)[hereinafter Canada Herring Report].

75. Dolphin I Report, *supra* note 23, ¶¶5.27–5.32, 39 Supp. B.I.S.D. at 199–201. The panel did not define "extrajurisdictional." Presumably the term refers to the environment outside one's national border.

76. *See* United States-Canada Free Trade Agreement, Panel Review in the Matter of Puerto Rico Regulations on the Import, Distribution and Sale of U.H.T. Milk From Quebec, ¶4.17, USA-93–1807-01, 1993 FTAPD Lexis 18, *available in* LEXIS, ITRADE Library, USCFTA File [hereinafter U.H.T. Milk Report].

77. *See EC Proposal on Trade and Environment*, INSIDE U.S. TRADE, Nov. 27, 1992, at S2, S5.

78. See GATT Doc. TRE/W/16/Rev. 1, October 14, 1993, for a review of the concepts of "least trade restrictive" and "proportionality" in GATT instruments and jurisprudence.

(Restrictions to Safeguard the Balance of Payments).[79] The drafters of the GATT could have included the same requirement in Article XX, but did not.

The Dolphin I panel's objection to extrajurisdictionality has implications not only for national environmental standards, but also for international standards prescribed in treaties. The import prohibitions on chlorofluorocarbons required by the Montreal Protocol[80] are a clear violation of GATT Articles I and XI, so they can only be GATT-legal if Article XX permits discrimination based on the environmental policy of the exporting country (i.e., whether it has ratified the Montreal Protocol). So far, no GATT member has challenged trade measures taken pursuant to this treaty.

It should be noted that Article XX is no more tolerant of multilateral environmental standards than it is of unilateral environmental standards. The same disciplines apply to both. However a treaty obligation can supersede the GATT (as between parties) if it meets the "later in time" rule under international law.[81]

4. Dispute Settlement

When a GATT member believes that a trade measure of another member country violates the GATT, it can lodge a complaint under GATT Article XXIII. The complaint is heard by a temporary panel appointed from a roster of persons "qualified in the field of trade relations, economic development, or other matters covered by the General Agreement."[82] There is no requirement that panels considering environmental disputes be composed of panelists with expertise on environmental matters. But environmentalists are eligible to be named to GATT rosters by member nations.

If a panel needs input from other than the governments who are parties to the dispute, it may "seek information and technical advice

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79. *See also* GATT, *supra* note 8, art. XVIII:10, 4 B.I.S.D. at 31. One panel has found a trade restrictiveness requirement in Article XI. *See* General Agreement on Tariffs and Trade, Reports Relating to the Review of the Agreement, ¶ 67, 3 Supp. B.I.S.D. 170, 189 (1955).

80. Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, art. 4, 26 I.L.M. 1541, 1554–55 (entered into force Jan. 1, 1989).

81. Vienna Convention on the Law of Treaties, art. 30, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) (It is interesting to note that the Final Act of the Uruguay Round specifically alludes to the Vienna Convention).

82. General Agreement on Tariffs and Trade, Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillances, ¶13, 26 Supp. B.I.S.D. 210, 212 (1980)[hereinafter Dispute Settlement Understanding].

from any individual or body which it deems appropriate."[83] Panels rarely use this power in environmental or health disputes. The one notable exception occurred in the Thailand cigarette case, where the panel consulted with the World Health Organization at the suggestion of Thailand.[84]

Concerned members of the public, including non-governmental organizations, have no right to submit briefs to GATT panels presiding over environmental disputes. During the Dolphin I case, the Earth Island Institute tried to make a presentation to the panel, but was rebuffed.[85] When a complaint involves a subnational unit of government, that government (e.g., California) has no ability to defend itself before a GATT panel since it is not a GATT member. GATT panel deliberations are also required to be confidential.[86]

There is no rule in the GATT specifying which side bears the burden of proof in a GATT dispute. Generally, the complaining country has assumed this burden.[87] In a few cases, panels have explicitly assigned an Article I or XI burden to the complaining party (i.e., the plaintiff).[88] For a few areas of the GATT, dispute panels have followed the opposite approach by assigning the burden of proof to the defendant country. This occurs with respect to the Protocol of Provisional Application,[89] the exceptions in Article XI,[90] and the exceptions in Article XX.[91] (In one non-environmental case, a panel appeared to assign an Article III burden of proof to the defendant country.[92]) Thus, in a typical environmental case, the plaintiff will have the burden of proof of showing a

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83. *Id.* ¶15, 26 Supp. B.I.S.D. at 213.

84. Cigarette Report, *supra* note 69, ¶50, 37 Supp. B.I.S.D. at 216.

85. David Phillips, *Dolphins and GATT*, *in* RALPH NADER ET AL., THE CASE AGAINST FREE TRADE 135 (1993).

86. Dispute Settlement Understanding, *supra* note 82, Annex, ¶6(viii), 26 Supp. B.I.S.D. at 218.

87. Commenting on the Dunkel Text, U.S. Trade Representative Carla Hills explained that "if another GATT Contracting Party were to challenge a particular U.S. sanitary or phytosanitary measure as being inconsistent with our obligations under the SPS draft text, the burden of proof, as it is in GATT dispute settlement in general, is on the challenging party to demonstrate that the U.S. measure is inconsistent." *See Hills Letter on Trade and Environment*, INSIDE U.S. TRADE, July 10, 1992, at S3.

88. *See* Lumber Report, *supra* note 53, ¶5.10, 36 Supp. B.I.S.D. at 198; Canadian Alcohol Import Report, *supra* note 36, ¶5.3, 39 Supp. B.I.S.D. at 74–75.

89. Belgian Family Allowances, *supra* note 20, ¶6, 1 Supp. B.I.S.D. at 61.

90. General Agreement on Tariffs and Trade, Panel Report on Canada's Import Restrictions on Ice Cream and Yogurt, ¶62, 36 Supp. B.I.S.D. 68, 85 (1990).

91. Foreign Investment Report, *supra* note 31, ¶5.20, 30 Supp. B.I.S.D. at 164. This has occurred with Article XX since 1984 even though there is nothing in the GATT negotiating history suggesting that the framers intended countries invoking this Article to bear the burden of proof.

92. Section 337 Report, *supra* note 36, ¶5.11, 36 Supp. B.I.S.D. at 386. *See also* Article XXIII Report, *supra* note 68, ¶A(4)(c), 11 Supp. B.I.S.D. at 105.

violation under Article III, and then the burden will shift to the defending country to defend itself under Article XX.

When a GATT panel rules against an environmental measure, the defendant country is under no obligation to change the ETM before the panel report is adopted by the GATT Council.[93] Since current GATT practice permits any member country to block a report,[94] implementation of the panel's recommendation is essentially voluntary. Even after a report has been adopted, a defendant country has considerable leeway as to whether or not it will change its law or compensate the other party. Complainant countries who do not receive satisfaction are *not* allowed to retaliate with economic sanctions without prior approval of the GATT Council.[95] Such approval has only been granted once in the 46-year history of the GATT.[96]

Using this brief survey of the GATT as a basis, this Article will now turn to a discussion of the environmental dimensions of the NAFTA.

II. HOW GREEN IS THE NAFTA?

It would be delightful if one could measure the greenness of trade agreements with a special colorimeter. If such a device existed, it would probably first measure the environmental effects of the new economic growth engendered by the agreement.[97] The colorimeter might then measure the extent to which a trade agreement prevents environmentally bad trade (e.g., spill-prone hazardous waste movements) or insists that trade be based on sustainability principles. One would also use the colorimeter to measure the regulatory aspects of the trade agreement—that is, the extent to which it imposes constraints on national environmental standards.[98]

Unfortunately, no such colorimeter exists. In its absence, it is difficult to analyze the environmental effects of new trade.[99] It is also difficult to

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93. GATT, *supra* note 8, art. XXIII: 2, 4 B.I.S.D. at 39–40.

94. 29 B.I.S.D. 13, pt. *x*.

95. 14 B.I.S.D. 18, [P] 9.

96. *See* DAM, *supra* note 55, at 260.

97. *See* William G. Watson, *Environmental and Labor Standards in NAFTA*, 57 C.D. HOWE INST. COMMENTARY 7 (1994) (noting the contradiction in the anti-NAFTA views that economic growth worsens the environment and that the NAFTA will transfer economic growth from Canada and the United States to Mexico).

98. For further discussion, see ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, THE ENVIRONMENTAL EFFECTS OF TRADE 16–17 (1994).

99. But some commentators can do this. *See* Thomas J. Schoenbaum, *The North American Free Trade Agreement (NAFTA): Good for Jobs, for the Environment, and for America*, 23 GA. J. INT'L & COMP. L., 461, 485 (1993) ("There is no doubt that NAFTA will enhance environmental quality.")

foresee whether the increased national income generated by the NAFTA will be spent on environmental remediation. But one can examine the second and third points above by looking at the terms of the trade agreement. This approach will be attempted here.

The NAFTA is built upon the GATT; it affirms GATT rules generally and incorporates specific GATT rules by reference.[100] Just as the GATT is an agreement among countries for self-discipline in the use of trade restrictions or distortions, the NAFTA serves a similar function. The NAFTA starts with the GATT's disciplines and adds to them. It is important to keep this architecture in mind because there has been a tendency in public debate to misperceive the NAFTA's loose language about "rights" as transforming the NAFTA into something different from the GATT.[101] Although some commentators imply that the NAFTA is the Magna Carta for national environmental sovereignty, that is not true. NAFTA constrains national environmental sovereignty, but only moderately.

Almost all of the "environmental" provisions in the NAFTA are in Chapter 7 (Agriculture) relating to sanitary and phytosanitary measures or in Chapter 9 (Technical Barriers to Trade) relating to regulations and standards, including environmental standards. For purposes of simplification, the Chapter 7 provisions will be called "SPS" and the Chapter 9 provisions will be called "environmental standards." As a matter of definition, SPS measures are distinct from environmental standards. The GATT disciplines in Article III are incorporated into NAFTA Article 301.1. The GATT disciplines in Article XI are incorporated into NAFTA Article 309.1. The GATT exceptions in Article XX are incorporated into NAFTA Article 2101.

The foundation for the NAFTA's disciplines on environmental standards are the GATT rules in Article III.[102] With a few very minor exceptions (to be discussed below), the NAFTA does not legalize any national environmental standard that would be deemed inconsistent with the GATT. Instead, the NAFTA adds to the GATT disciplines. Thus, there could easily be national environmental standards that would be permitted under the GATT, but that would be illegal under the

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100. *See* NAFTA, *supra* note 1, arts. 103, 301.1 and 2101.1, 32 I.L.M. at 297, 299–300 and 699. These articles incorporate GATT articles, but not necessarily GATT caselaw. Yet a similar provision in the Canada-U.S. Free Trade Agreement (Article 1201) has led to a routine use of GATT panel reports as precedent. *See, e.g.*, Lobster Report, *supra* note 64.

101. *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, 407 (1994) (characterizing the NAFTA as providing more protection for environmental laws than the GATT).

102. NAFTA, *supra* note 1, arts. 301.1, 903, 904.3, 32 I.L.M. at 299–300, 387.

NAFTA.[103] For example, the GATT has no disciplines on services, but the NAFTA does.[104] This new regulatory exposure is significant because many services, such as transportation and energy, may have serious environmental impact. The NAFTA does not extend GATT XX(g) to services at all, and Article XX(b) is extended only in an attenuated form.[105]

The situation with NAFTA's disciplines on SPS measures is more complicated. The NAFTA does not incorporate GATT Articles III or XI for SPS measures.[106] Instead, the NAFTA imposes a more comprehensive discipline. To take one example, under the GATT, imported products must be accorded treatment no less favorable than accorded to "like" domestic products. When an SPS measure violates this constraint—for example, by failing to give an equivalent competitive opportunity—the Article XX(b) exception is available.

The NAFTA disallows a government utilizing an SPS measure from claiming a GATT Article XX(b) exception.[107] Rather, the NAFTA folds the exception into the rest of disciplines imposed by Chapter 7.[108] As a result, the governments under the NAFTA will face different, and generally tougher, constraints on SPS measures than governments under the GATT.[109] Although the GATT recognizes (but does not grant) the "right" to apply a domestic measure to an import, the NAFTA accords this "right" only for domestic measures based on

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103. There could also be environmental taxes on exports that would be permitted under GATT Article II and III, but precluded under the NAFTA. *See* NAFTA, *supra* note 1, arts. 314, 604, 32 I.L.M. at 303, 365. The NAFTA prohibits most taxes on exports that do not apply to domestic consumption. *See id.* art. 314(b). The GATT has no comparable discipline.

104. The GATT relates only to goods (but some transportation services may be included in the national treatment provision of GATT Article III:4). The Uruguay Round will include a new agreement on services. See NAFTA Chapters 12, 13, and 14 for the rules on services. Chapter 9 also applies to services. See NAFTA Article 1018.2(b) for NAFTA's single environmental exception regarding government procurement. NAFTA, *supra* note1, 32 I.L.M. at 605.

105. NAFTA, *supra* note 1, art. 2101.1, 32 I.L.M. at 699. It is interesting to note that the Uruguay Round would fully apply Article XX(b) to services.

106. NAFTA, *supra* note 1, art. 710, 32 I.L.M. at 377.

107. *Id.*

108. *Id.* art. 712.1, 32 I.L.M. at 377. In other words, the Article XX criteria became an obligation rather than an affirmative defense.

109. One of these constraints might appear to be less restrictive. To wit, since there is no pure national treatment requirement, a legitimate SPS measure that discriminated against imports could be inconsistent with GATT Article III, but consistent under NAFTA Chapter 7. *See* GATT *supra* note 8, art. III, 4 B.I.S.D. at 6–7. However, since such a provision could be legalized by GATT Article XX, the overall NAFTA discipline is not really less restrictive than the overall GATT discipline. *See* GATT *supra* note 8, art. XX, 4 B.I.S.D. at 37–38; NAFTA, *supra* note 1, ch. 7, 32 I.L.M. at 376–79.

international standards.[110] In other words, the GATT is predicated on *national* treatment while the NAFTA is predicated on *international* treatment.[111]

SPS measures not based on international standards can only be consistent with the NAFTA if certain tests are met. For example, the NAFTA provides the "Right to Take Sanitary and Phytosanitary Measures," but only when done "in accordance with this [the SPS] Section."[112] The NAFTA also provides the "Right to Establish [a nation's own appropriate] Level of Protection,"[113] but this must be done in accordance with the disciplines in Article 715 (to be discussed below).[114]

Although GATT Article XX(b) is folded into the NAFTA, some of its disciplines are tightened in comparison to the GATT. GATT Article XX(b) permits measures "necessary to protect human, animal or plant life or health." But the NAFTA permits a Party to apply SPS measures "only to the extent necessary to achieve its *appropriate* level of protection, taking into account technical and economic feasibility.[115] The NAFTA establishes disciplines in Article 715 on what is an "appropriate" level of protection for a party to have.[116]

Before proceeding, it should be noted that GATT rules do not require free trade agreements to curtail national use of environmental standards. Although a free trade agreement must eliminate tariffs on "substantially all the trade" between the territories, the GATT specifi-

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110. NAFTA, *supra* note 1, art. 713.2, 32 I.L.M. at 378. Such a measure is "presumed" to be consistent with NAFTA Article 712. Because the GATT Article III "like product" test is not incorporated into NAFTA chapter 7, a measure based on an international standard would escape this GATT criterion. Some might view this NAFTA discipline as less stringent than the one in GATT. But legitimate international environmental standards should qualify under GATT Article XX. GATT, *supra* note 8, art. XX, 4 B.I.S.D. at 37–38.

111. GATT, *supra* note 8, art. XX, 4 B.I.S.D. at 37–38. By international treatment, the author means that governments can apply international standards to imports. Compare to national treatment whereby governments can apply national standards to imports. GATT provides exceptions to national treatment in Article XX. The NAFTA provides exceptions to international treatment in Chapters 7 and 9.

112. NAFTA, *supra* note 1, art. 712.1, 32 I.L.M. at 377.

113. *Id.* art. 712.2, 32 I.L.M. at 378. According to negotiators, the NAFTA distinguish between levels of protection and measures to achieve those levels. But the terms are not well defined. For instance, see NAFTA Article 724. *Id.* art. 724, 32 I.L.M. at 382. In some provisions, this distinction blurs. For example, see NAFTA Article 713.1. *Id.* art. 713.1, 32 I.L.M. at 378.

114. *Id.* art. 715, 32 I.L.M. at 378–79.

115. NAFTA, *supra* note 1, art. 712.5, 32 I.L.M. at 378 (emphasis added). The phrase "taking into account technical and economic feasibility" is apparently meant to permit technical and economic considerations, but not political ones. There is no comparable limitation in the GATT.

116. *See id.* art. 715.2, 715.3, 32 I.L.M. at 378. *See also id.* art. 724, 32 I.L.M. at 382.

cally permits free trade agreements to keep the Article XX exceptions in place.[117] Nevertheless, the NAFTA does not do this.

A. *NAFTA and Federal Laws*

"Unlike other trade treaties," opines the *Atlanta Constitution*, "NAFTA cannot be used to gut or weaken U.S. environmental laws."[118] The Clinton administration's *Report on Environmental Issues* states that "[p]rovisions of the NAFTA itself ensure that the United States can maintain and enforce its existing federal and state health, safety, and environmental standards. . . ."[119] A 1992 editorial in the *New York Times* (questioning the need for the side agreements) claimed that "the [NAFTA] accord already provides unprecedented protection for Federal and state environmental regulations against challenge by Mexico and Canada."[120] The Environmental Defense Fund told the Senate Finance Committee that "[f]or the first time since the creation of the GATT, we are assured that U.S. environmental laws that apply within the United States cannot be challenged successfully by a trade panel."[121]

The NAFTA could have included specific protections for existing federal environmental laws. Several environmental groups made this suggestion as did Gary Hufbauer and Jeffrey Schott in their frequently cited study, *North American Free Trade*.[122] But the Bush administration did not seek to exclude any environmental laws from NAFTA's reach.[123]

When environmental laws are challenged under the NAFTA, their fate will depend upon the facts of the case viewed against the disciplines imposed by NAFTA.[124] The Clinton administration has promised that

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117. GATT, *supra* note 8, art. XXIV:8(b), 4 B.I.S.D. at 43.

118. *For the Environment, NAFTA*, ATLANTA CONST., Sept. 24, 1993, at A12.

119. OFFICE OF THE U.S. TRADE REPRESENTATIVE, THE NAFTA: REPORT ON ENVIRONMENTAL ISSUES 5 (1993)[hereinafter USTR NAFTA REPORT].

120. *Free Trade, But With Time Bombs*, N.Y. TIMES, Oct. 6, 1992, at A22.

121. *Labor, Business, Agriculture, and Environmental Issues Relating to NAFTA: Hearings Before the Senate Comm. on Finance*, 103d Cong., 1st Sess. 230 (1993) (statement made in a chart submitted by the Environmental Defense Fund)[hereinafter *NAFTA Hearings*].

122. GARY C. HUFBAUER & JEFFREY J. SCHOTT, NORTH AMERICAN FREE TRADE: ISSUES AND RECOMMENDATIONS 149 (1992).

123. It should be noted that Canada sought and obtained an exemption for several laws relating to the export of unprocessed fish and that both Canada and the United States secured an exemption for controls on the export of raw logs. *See* NAFTA, *supra* note 1, ann. 301.3, 32 I.L.M. at 305. These are not usually considered environmental laws.

124. *See* William J. Snape, III, *What Will Happen to the Critters: NAFTA's Potential Impact on Wildlife Protection*, 33 NAT. RESOURCES J. 1077 (1993).

all U.S. environmental laws will be safe under the NAFTA.[125] But there is no justification for the U.S. Trade Representative to predict in advance that all environmental laws will prevail against any challenge. It is interesting to note that the Office of the U.S. Trade Representative had lost both of the cases in which it claimed environmental justifications in defending a U.S. law before a GATT panel.[126]

The NAFTA imposes several disciplines on health or environmental measures applying to imports:

1. *International Harmonization*—For SPS measures, parties are to use relevant international standards as a basis.[127] But this shall be done "[w]ithout reducing the level of protection of human, animal, or plant life or health."[128] For environmental standards, parties are to use international standards, except where such standards "would be an ineffective or inappropriate means to fulfill its legitimate objectives. . . ."[129] Thus, the use of international standards is not re-

125. *See* Mickey Kantor, U.S. Trade Representative, Testimony Before the Senate Commerce Committee, Oct. 21, 1993 (on file with *Law & Policy in International Business*) [hereinafter Kantor Testimony]. Kantor states that "NAFTA's obligations do not threaten U.S. measures, because our regulatory systems already are non-discriminatory or science-based." Yet, as noted below, NAFTA requires *both* of these disciplines as well as others.

126. The two cases are *U.S. Tuna*, and *Dolphin I*. General Agreement on Tariffs and Trade, Conciliation Report on United States - Prohibition of Imports of Tuna and Tuna Products from Canada, 29 Supp. B.I.S.D. 91(1982)[hereinafter U.S. Tuna Report]; Dolphin I report, *supra* note 23, 39 Supp. B.I.S.D. 155. The United States did not defend the Superfund tax on environmental grounds. Article XX(b) was raised in both the Canada and United States Alcoholic Beverage cases, but the panel had no need to address these claims. Subsequent to the approval of the NAFTA, GATT panels handed down decisions regarding three laws that the U.S. Trade Representative defended on environmental grounds. The United States lost *Dolphin II*. *See* General Agreement on Tariffs and Trade, Dispute Settlement Panel Report on U.S. Restrictions on Imports of Tuna, 33 I.L.M. 839 (1994) [hereinafter Dolphin II Report]. For a discussion of this decision, see Steve Charnovitz, Dolphins and Tuna: An analysis of the Second GATT Panel Report, [1994] 24 Envtl. L. Rep. (Envtl. L. Inst.) 10,567 (Oct. 1994). The United States won the gas guzzler case and lost the Corporate Average Fuel Economy case. *See* General Agreement on Tariffs and Trade, Dispute Settlement Panel Report, United States—Taxes on Automobiles, DS31/R (restricted, Sept. 29, 1994), 33 I.L.M. 1397 (1994). For further discussion of this decision, see Steve Charnovitz, The GATT Panel Decision on Automobile Taxes, 17 Int'l Envtl. Rep. (BNA) 921 (Nov. 2, 1994). Part I of this Article was written many months before the *Automobile Taxes* decision. This new decision provides useful clarification, but would not change the Article's anlaysis of GATT case law. At present the *Dolphin II* and *Auto Taxes* decisions remain unadopted by the GATT council.

127. NAFTA, *supra* note 1, art. 713.1, 32 I.L.M. at 378.

128. *Id.*

129. *Id.* art. 905.1, 32 I.L.M. at 387. Environmental protection is specifically included under the definition of a "legitimate objective." *See id.* art. 915.1, 32 I.L.M. at 387.

quired.[130] But when laws have multiple objectives, as they often do, there may be a problem in showing the salience of the environmental objective.[131]

2. *Inter-Party Convergence*—For SPS measures, the NAFTA requires parties to "pursue equivalence" to the greatest extent practicable, but "without reducing the level of protection of human, animal, or plant life or health."[132] For environmental standards, the NAFTA requires parties to "make compatible their respective standards-related measures," to the greatest extent practicable, but "without reducing the level of safety or of protection of human, animal or plant life or health, the environment or consumers."[133] Thus, a complete convergence of environmental measures is not required.

3. *Internal Consistency*—In determining their national levels of protection, parties are to aim for consistency. For SPS measures, parties "shall. . .avoid arbitrary or unjustifiable distinctions in such levels in different circumstances, where such distinctions result in arbitrary or unjustifiable discrimination against a good of another Party or constitute a disguised restriction on trade between the Parties."[134] For example, if the United States establishes a certain pesticide risk standard for a food it does not produce domestically and then establishes a less commercially-constraining standard (i.e., a higher pesticide tolerance) for a food it does produce domestically, a dispute panel might view this as violative of the NAFTA if the distinctions between the risk standards are deemed "arbitrary or unjustifiable." The NAFTA has a related provision for environmental standards, but it is precatory, not mandatory.[135]

According to U.S. Trade Representative Mickey Kantor, "NAFTA safeguards the right of the U.S. Government and our states to maintain and enforce strong environmental, health and safety standards. . . ."[136] But, whatever levels of protection are enforced against imports must meet NAFTA's consistency requirement. In other words, under NAFTA, governments in the United States could lose the ability to establish inconsistent levels of protection.

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130. *See id.* art. 713.3 & 905.3, 32 I.L.M. at 378 & 387.

131. *See* IAN ROBINSON, NORTH AMERICAN TRADE AS IF DEMOCRACY MATTERED 20 (1993).

132. NAFTA, *supra* note 1, art. 714.1, 32 I.L.M. at 378.

133. *Id.* art. 906.2, 32 I.L.M. at 387.

134. *Id.* art. 715.3(b), 32 I.L.M. at 379.

135. *Id.* art. 907.2, 32 I.L.M. 388.

136. *NAFTA Hearings*, *supra* note 121, at 213 (statement of Mickey Kantor).

4. *Scientific Validity*—One discipline[137] not specifically found in the GATT is the NAFTA science test.[138] For SPS measures, NAFTA requires that they be "based on scientific principles," "not maintained where there is no longer a scientific basis for it," and be "based on a risk assessment, as appropriate. . . ."[139] In addition, an importing nation is to treat SPS measures adopted by the exporting nation "as equivalent to its own where the exporting party. . .provides the importing party scientific evidence. . .to demonstrate objectively. . .that the exporting party's measure achieves the importing party's appropriate level of protection."[140]

Although the Bush and Clinton administrations both indicated that all U.S. laws would meet this science test,[141] no analysis has been presented to buttress this point.[142] Any U.S. citizen surely can think of some regulations whose scientific validity is questionable.[143] One U.S. law that has received considerable attention in this debate is the Delaney clause, which prescribes a zero-risk standard for carcinogenic additives in processed food.[144] U.S. Trade Representative Kantor claims that the Delaney clause would be judged consistent with the NAFTA.[145]

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137. Note that the use of science is a discipline. It is not a "defense" for standards, as some commentators suggest. NAFTA, *supra* note 1, art. 712.3, 32 I.L.M. 378.

138. *See* John H. Jackson, *GATT and the Future of International Trade Institutions*, 18 BROOK. J. INT'L L. 11, 27 (1992) (GATT rules do not require any minimum standard of rationality or scientific support).

139. NAFTA, *supra* note 1, art. 712.3, 32 I.L.M. at 378. These disciplines relate only to the measure used, not to the level of protection chosen by the country. Thus, for a risk level of one out of a million, the issue under NAFTA is not whether this risk is appropriate, but rather whether the SPS standard is scientifically matched with achieving the chosen risk level. The question of whether a one out of a million risk level is appropriate (or is too high or too low) requires a value judgment, not a scientific one. *See* STATEMENT OF ADMINISTRATIVE ACTION, H.R. DOC. NO. 159, vol. I, 103d Cong., 1st Sess. 547 (1993)[hereinafter SAA]. The Statement of Administrative Action is a description submitted by the President of how the NAFTA and the implementing legislation affect U.S. law. The Congress approved this statement in the North American Free Trade Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993) [hereinafter NAFTIA].

140. NAFTA, *supra* note 1, art. 714.2(a), 32 I.L.M. at 378.

141. *See Hills Letter on Trade and Environment*, INSIDE U.S. TRADE, July 10, 1992, at S4; *NAFTA Hearings*, *supra* note 115, at 214.

142. This author requested any such analysis from the Office of the U.S. Trade Representative and was told that none was available to the public.

143. *See* Marilyn Chase, *Scientists Term Food-Pesticide Cancer Risk Overrated*, WALL ST. J., Oct. 9, 1992, at B1.

144. 21 U.S.C. §§ 376(b)(5)(B), 348(c)(3)(A) (1988).

145. *See USTR Letter on NAFTA Environmental Standards*, INSIDE U.S. TRADE, Sept. 17, 1993, at 3-4.

He may well be correct.[146] But how can one know for sure in advance? Certainly, an argument can be made that there is little scientific basis for the Delaney clause.[147] Indeed, the Clinton administration argues just that point in proposing the Delaney clause be revised.[148]

According to U.S. Trade Representative Kantor, the NAFTA requirements "do *not* involve a situation where a dispute settlement panel may substitute its scientific judgment for that of the government maintaining the S&P [SPS] measure."[149] That prediction may be accurate. Yet it is interesting to note that even though the GATT lacks any "science" requirement, Canada has already challenged the GATT-consistency of a U.S. environmental standard on asbestos (the challenge occurred in U.S. courts, not in GATT), by questioning the validity of the risk the U.S. regulation purported to eliminate.[150] According to Canada, "a ban on the importation of asbestos is not supported by the international scientific evidence, and is therefore not 'necessary' within the meaning of Article XX of the GATT."[151]

U.S Trade Representative Kantor's assurance is further undermined by practice under the U.S.-Canada Free Trade Agreement, which, like the GATT, has no science requirement. In the recent *U.H.T. Milk* case, Canada challenged a new Puerto Rican standard for U.H.T. milk on the grounds that the previous standards were adequate "to guarantee the purity of an imported U.H.T. milk supply. Such measures had indeed been employed by Puerto Rico authorities for 14 years, during which time no complaint had ever been lodged against the purity of Quebec UHT milk."[152]

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146. Nevertheless, his assurances on this point are worth very little since it would be Canada or Mexico challenging the standards, not the USTR. *See* SIERRA CLUB, ANALYSIS OF THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION 7–9 (1993).

147. *See* Christine Gorman, *Getting Practical About Pesticides*, TIME, Feb. 15, 1993, at 52.

148. Statements of Carol M. Browner, EPA Administrator, Richard Rominger, Deputy Secretary, U.S. Department of Agriculture, and David A. Kessler, Commissioner FDA; Before the Senate Comm. on Labor and Human Resources, Sept. 21, 1993.

149. *USTR Letter to NRDC on S&P Standards*, INSIDE U.S. TRADE, Sept. 17, 1993, at 5 (emphasis in original).

150. *See* Brief *Amicus Curiae* of the Government of Canada, Corrosion Proof Fittings v. EPA, 947 F.2d 1201 (5th Cir. 1991)[hereinafter Canada Brief]. For a discussion of the case, see David A. Wirth, *A Matchmaker's Challenge: Marrying International Law and American Environmental Law*, 32 VA. J. INT'L. LAW, 377, 411–12 (1992).

151. Canada Brief, *supra* note 150, at 17.

152. U.H.T. Milk Report, *supra* note 76, ¶4.17. It is interesting to note that there are similar regulations in the continental United States, but that Puerto Rico had adopted its regulations recently under pressure from the U.S. Food and Drug Administration. *See id.* ¶¶3.7–3.18. Thus,

Thus, Canada called on the panel to second-guess Puerto Rico's scientific judgment. Although the panel reached no decision on the scientific point, it did find that the United States had nullified or impaired trade benefits to Canada by closing its Puerto Rican market to U.H.T. milk before Canada had an opportunity to prove that its milk production standards were functionally equivalent.[153]

In the Canadian Salmon and Herring dispute, the panel concluded that even though Canada believed that a 100% landing requirement was necessary to collect accurate conservation data, the benefits of the higher sampling rate did not outweigh the commercial inconvenience to the United States.[154] Among its many conclusions on this matter, the panel found that "reliable sampling data can be obtained without requiring access to 100% of the catch. . . ."[155] However one feels about the merits of the panel's scientific judgment, it seems undeniable that the panel substituted its judgment for that of Canada. Thus, since scientific second-guessing is already occurring in trade agreements that do not even have a formal discipline regarding science, adding such a discipline to the NAFTA would probably accelerate rather than halt this trend. Given this experience, it is hard to see how the U.S. Trade Representative can so confidently predict the opposite outcome for the NAFTA.

5. *Trade Restrictiveness*—Contrary to the statements of some opponents to the NAFTA, there is no explicit Least-Trade-Restrictive test in the NAFTA. The closest one gets is the precatory provision[156] regarding an SPS level of protection which states that parties "*should* take into account the objective of minimizing negative trade effects."[157] Some environmentalists had claimed that the use of the term "necessary" in NAFTA would carry with it the GATT Article XX(b) interpretation of necessary which requires a least trade restrictive test. The NAFTA Statement of Administrative Action indicates that "it was specifically agreed by the three NAFTA governments that this obligation would not

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Puerto Rico was not being challenged because its standard was higher than the federal standard. It was being challenged because it had recently harmonized its standard upward.

153. *Id.* ¶¶ 5.62–5.63.

154. *In the Matter of: Canada's Landing Requirement for Pacific Coast Salmon and Herring*, (Oct. 16, 1989) ¶¶5.04, 7.35–7.36, *reprinted in* WORLD TRADE MATERIALS, March 1990, at 78, 95, 128 [hereinafter *Canada Landing Report*].

155. *Id.* ¶7.29, *reprinted in* WORLD TRADE MATERIALS, March 1990, at 124.

156. It is interesting to note that the Statement of Administrative Action characterizes this as a "minimal discipline." *See* SAA, *supra* note 139.

157. NAFTA, *supra* note 1, art. 715.3(a), 32 I.L.M. at 379 (emphasis added).

be included."[158] Moreover, as noted above, the GATT has not yet imposed this test under Article XX(b). On the other hand, some U.S. negotiators had claimed that the NAFTA "removed" the GATT concept of "least trade restrictive."[159] But since the GATT does not have such a concept, there was nothing to remove.[160]

6. *Non-Discrimination*—Two leaders of national environmental groups stated that the NAFTA "protects. . .nondiscriminatory local, state and Federal environmental laws."[161] While the NAFTA will "protect" some non-discriminatory standards, it may not protect all of them. For environmental standards, the NAFTA imposes the normal GATT rules on national treatment.[162] This means that there can be situations in which an environmental standard applied without regard to whether a product is imported or domestic will be deemed a GATT violation. For example, California law requires that glass containers have a minimum percentage of recovered glass in their composition. This law applies to all glass containers sold in California regardless of origin. Nevertheless, the European Commission has alleged this law to be a GATT violation.[163]

A GATT violation, in such a situation, would be ipso facto a NAFTA violation. For SPS measures, the non-existence of arbitrary or unjustifiable discrimination is just one of several requirements. Thus, a measure

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158. SAA, *supra* note 139, at 544. It is interesting to compare this issue, where the United States offered a unilateral interpretation, to the issue of water trade, where NAFTA governments made a joint statement. Because environmental groups in both Canada and the United States were worried that the NAFTA might prevent restrictions on transboundary shipments of water, all three governments issued a joint public statement on December 2, 1993, that "[t]he NAFTA creates no rights to the natural water resources of any Party to the Agreement." Before the NAFTA vote, the Canadian Embassy issued a statement that water in its natural state was not covered by the agreement. *USTR Assures Congress on Water Exports to Gain NAFTA Support*, INSIDE U.S. TRADE, Nov. 19, 1993, at S12. No joint statement was made regarding the NAFTA necessary test. *Id.*; *Statement by the Governments of Canada, Mexico and the United States: Future Work on Antidumping Duties, Subsidies and Countervail*, INSIDE U.S. TRADE, Dec. 3, 1993, at 18.

159. *See* Daniel C. Esty, *Integrating Trade and Environment Policy Making: First Steps in the North American Free Trade Agreement*, *in* TRADE AND THE ENVIRONMENT: LAW, ECONOMICS, AND POLICY 52 (Durwood Zaelke et al., eds., 1993)[hereinafter Esty, *Integrating Trade*].

160. *See* SAA, *supra* note 139, at 557 (noting the common but inaccurate belief that under GATT Article XX, the term "necessary" means "least trade restrictive").

161. Fred Krupp & Peter A.A. Berle, *Good for Environment*, N.Y. TIMES, Oct. 3, 1993, at A14 (letter to the editor). The authors are the executive director of the Environmental Defense Fund and the president of the National Audubon Society. *See also NAFTA Hearings*, *supra* note 121, at 10 (stating "(t)he NAFTA asks only that these measures be applied non-discriminatorily").

162. NAFTA, *supra* note 1, art. 904.3, 32 I.L.M. at 387.

163. *See* EUROPEAN COMMISSION, REPORT ON UNITED STATES BARRIERS TO TRADE AND INVESTMENT 57 (1994).

can be fully non-discriminatory and yet be a NAFTA violation if other conditions are violated.

Many commentators note that the GATT so far has not posed much of a threat to environmental laws. At the time of the NAFTA debate, only three true environmental laws had been challenged and fully litigated, and, of those, only two were found to violate the GATT.[164] Since the NAFTA is only moderately tougher than the GATT on environmental laws, its "conviction rate" against environmental laws should not be much higher than two-thirds.[165] Yet according to Jay Hair, the President of the National Wildlife Federation, "NAFTA makes substantial improvements over the GATT, and reduces the probability of successful challenges to our laws to near zero. . . ."[166]

Finally, let us return to the *New York Times* editorial quoted above which suggested that the NAFTA's protections were unprecedented. Actually, the U.S. trade agreement with Canada of 1935 and the U.S. trade agreement with Mexico of 1942 provided *more* protection for both federal and state environmental regulations since neither of these agreements contained the NAFTA's new disciplines.[167] Moreover, the current U.S.-Canada Free Trade Agreement is less environmentally constraining than the NAFTA.[168] So in actuality, the NAFTA set a prece-

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164. The three laws were challenged in Petroleum Report, *supra* note 43, 34 Supp. B.I.S.D. 136; Canada Herring and Salmon Report, *supra* note 74, 35 Supp. B.I.S.D. 98; Dolphin I Report, *supra* note 23, 39 Supp. B.I.S.D. 155. This does not count the Cigarette Report, *supra* note 69, 37 Supp. B.I.S.D. 200; U.S. Tuna Report, *supra* note 129, 29 Supp. B.I.S.D. 91; Canadian Alcohol Import Report, *supra* note 36, 39 Supp. B.I.S.D. 27, 89, as environmental disputes. If one counts them, then the same percentage of laws—four out of six or 67%—were found to violate the GATT.

165. The U.S.-Canada Free Trade Agreement is also a useful benchmark because its disciplines are slightly tougher than the GATT's. Only three environmental laws have been challenged under the FTA and of those, only two (67%) were found to be FTA-inconsistent. The three cases were: Canada Landing Report, *supra* note 154, *reprinted in* WORLD TRADE MATERIALS 78; U.S. Lobster Report, *supra* note 100, 1990 FTAPD Lexis 11; U.H.T. Milk Report, *supra* note 76, at 54.

166. *NAFTA and Environmental Concerns: Hearings on H.R. 3450 Before the House Committee on Merchant Marine and Fisheries*, 103d Cong., 1st Sess. 141 (1993) (testimony of Jay D. Hair, President of the National Wildlife Federation)[hereinafter *Merchant Marine Hearings*]. According to U.S. Trade Representative Kantor, "[u]nder NAFTA those U.S. laws are less likely to be challenged" than under GATT and when challenged, the challenge is "even less likely to succeed" than it would under GATT. 139 CONG. REC. 9964 (daily ed. Nov. 17, 1993).

167. Reciprocal Trade Agreement Between the United States and Canada, 49 Stat. 3960 (presidential proclamation, signed November 15, 1935) (no longer in force); Trade Agreement Between the United States and Mexico, 57 Stat. 833 (presidential proclamation, signed Dec. 23, 1942) (no longer in force).

168. For a discussion of how the U.S.-Canada FTA regulates environmental standards, see Steve Charnovitz, *The Regulation of Environmental Standards By International Trade Agreements*, 17 Intl. Envtl. Rep. (BNA), at 633–34 (Aug. 25, 1993).

dent in providing *less* protection for environmental standards than any previous U.S. trade agreement. As EPA Administrator Carol Browner (unwittingly) explained: "This is the first time an international trade agreement has talked about the environment in the way that NAFTA talks about the environment."[169]

In summary, federal environmental laws are not immune from challenge under the NAFTA. The new NAFTA disciplines are not extremely onerous, but they are new hurdles. None of these disciplines exist in the GATT. Thus, it is difficult to understand how the president of the National Wildlife Federation could state that if NAFTA were defeated, "[i]nternational and domestic environmental laws would not be subject to the progressive provisions of the NAFTA, but would be addressed instead by the harsher provisions now contained in the General Agreement on Tariffs and Trade (GATT)."[170]

Even before coming into force, the NAFTA was put into service to downwardly harmonize several U.S laws. The NAFTA implementing legislation, drafted by the Clinton administration, amended five U.S. health-related import bans that were out of conformity with NAFTA.[171] Four of these provisions loosened food safety and agricultural laws only for Canada and/or Mexico, and one applied to all countries. All of these laws are legal under the GATT.

The action by the Clinton administration to change these laws contradicts its representations to the Congress. For example, on September 29, 1993, U.S. Trade Representative Kantor told a congressional committee that "we do not believe that the NAFTA requires the United States to change its existing health, environmental, or safety laws. . . ."[172] In addition, Kantor declared that "all current standards are consistent with the NAFTA. Accordingly no changes to U.S. food safety standards are needed or proposed to implement the NAFTA."[173] It is unclear why

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169. *North American Free Trade Agreement (NAFTA) and Supplemental Agreements to the NAFTA: Hearings Before the House Comm. on Ways and Means*, 103d Cong., 1st Sess. 42 (1993) (testimony of Carol M. Browner, U.S. Environmental Protection Agency).

170. *Environmental Leaders Say NAFTA Accelerates Progress*, WASH. POST, Oct. 26, 1993, at B3 (advertising supplement).

171. NAFTIA, *supra* note 139, § 361, 107 Stat. at 2122. For further discussion of these provisions, see Steve Charnovitz, *No Time For NEPA: Trade Agreements and the Fast Track*, 3 MINN. J. GLOBAL TRADE 195, 218–20 (1994).

172. *North American Free Trade Agreement Implementation Act*, H.R. REP. NO. 361, Pt. III, 103d Cong., 1st Sess. 133, 142 (1993), *reprinted in* 1993 U.S.C.C.A.N. 2863, 2872 (testimony of Michael Kantor).

173. *Id.* at 151, *reprinted in* 1993 U.S.C.C.A.N. at 2881.

the U.S. Trade Representative would misrepresent the Administration's intention regarding the impending changes in U.S. food safety laws.

It is true that none of the amendments directly lowered the level of protection for U.S. consumers. Instead, they gave the Secretary of Agriculture the discretion to allow otherwise illegal imports, if judged to be safe by him.[174] But it is difficult to reconcile the need for these amendments with the continued statements by the Administration that U.S. laws were already in conformance with the NAFTA or that the NAFTA would not encroach on U.S. environmental regulation. Even as it was sending the conforming amendments to the Congress, the Administration released its Report on NAFTA Environmental Issues which reassuringly declared that "it should be noted that U.S. systems for SPS and standards-related measures are not protectionist and *already conform* to the NAFTA disciplines."[175]

B. *NAFTA and State Laws*

According to a brochure about the NAFTA distributed by the Clinton administration, "[n]o existing Federal or state regulation to protect health and safety will be jeopardized by the NAFTA. In fact, NAFTA rules allow the participating countries (and their states and provinces) to enact tougher environmental standards."[176]

According to USA*NAFTA, a pro-NAFTA business group, the NAFTA "specifically confirms the right of each country, state, and locality to maintain and strengthen its own consumer and environmental protection laws."[177] Both of these statements are misleading. The NAFTA does nothing to favor state environmental laws.[178]

It should be noted that in implementing the U.S.-Canada Free Trade Agreement, the Congress specifically provided that the Agreement

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174. For a discussion of the use of administrative discretion by the Secretary of Agriculture in the Clinton administration, see Michael Kramer, *How the Chicken Got Loose*, TIME, July 25, 1994, at 29.

175. USTR NAFTA REPORT, *supra* note 113, at 93 (emphasis added).

176. OFFICE OF THE U.S. TRADE REPRESENTATIVE, THE NAFTA: EXPANDING U.S. EXPORTS, JOBS, AND GROWTH 8 (1993).

177. USA*NAFTA, NAFTA: OUR ECONOMY, OUR FUTURE 5 (1993).

178. According to the Statement of Administrative Action, the use of the plural "levels" in Article 712.2 demonstrates that each country may have a multiplicity of levels due to differences among the subnational governments. *See* SAA, *supra* note 139, at 551. For that to be persuasive, the term "levels" would need to be used consistently throughout the SPS text, but it is not. *See* NAFTA, *supra* note 1, arts. 712.5, 713.1, 713.2, 714.1, 714.2, 715, 716.5, 724, 32 I.L.M. at 378, 379, 382.

would prevail over any conflicting state law.[179] Several states asked the Clinton administration not to carry forward this practice into the NAFTA,[180] and it did not. This was a useful step. Nevertheless, the NAFTA implementing legislation affirms the right of the federal government to bring suits against state laws inconsistent with the NAFTA.[181]

Although the NAFTA grandfathers certain state laws relating to investment and trade in services,[182] the NAFTA does not grandfather any state environmental laws. Nor does the NAFTA have any explicit provisions allowing state or local governments to maintain or strengthen their environmental standards.[183] Rather, the NAFTA declares that the three parties "shall ensure that all necessary measures are taken" to give effect to the NAFTA's provisions, including their observance, by state or provincial governments.[184] This requirement does not apply to standards. For standards, the parties "shall seek, through appropriate measures, to ensure observance" of the NAFTA disciplines by state or provincial governments.[185]

This language—shall ensure or shall seek to ensure—may appear to offer some leeway to a federal government. But the language needs to be considered in connection with the GATT's *Alcoholic Beverages* decision which interpreted the subnational clause in the GATT. The *Alcoholic Beverages* decision involved the meaning of the GATT provision that each party "shall take such reasonable measures as may be available to it to ensure observance of the provisions" of the GATT by state or local governments.[186] According to the panel, this provision requires parties to achieve observance by subnational governments unless the disputed matter falls outside the constitutional jurisdiction of the national govern-

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179. 19 U.S.C. 2112, § 102(b)(1)(A). The GATT Standards Code does not prevail over state law. *See* 19 U.S.C. 2533(a).

180. *State Attorneys General Say NAFTA Should Not Preempt State Law*, Daily Report for Executives (BNA), A208 (Oct. 29, 1993).

181. NAFTIA, *supra* note 139, § 102(b)(2), 107 Stat. at 2062. *See also NAFTA Upholds Federal Right to Sue States For Compliance*, INSIDE U.S. TRADE, Nov. 12, 1993, at 3.

182. NAFTA, *supra* note 1, arts. 1108.1, 1206.1, and 1409.1, 32 I.L.M. at 640, 650 and 659. *See also* Karen James Chopra, *'Don't Tread on Me': NAFTA Respects States' Rights*, BUS. AM., Oct. 18, 1993, at 28–29.

183. Some commentators have suggested that just as Article 105 imposes obligations on the states, it also accords "rights" to them. But it would be hard to infer that from the language of Article 105 even if NAFTA generally accorded rights, which it does not.

184. NAFTA, *supra* note 1, art. 105, 32 I.L.M. at 298. States and provinces are not NAFTA parties.

185. NAFTA, *supra* note 1, art. 902.2, 32 I.L.M. at 386.

186. GATT, *supra* note 8, art. XXIV:12, 4 B.I.S.D. at 44.

ment.[187] So if the nebulous language of the GATT requires full observance up to the limit of central government authority, then the NAFTA language would appear at least as strong.[188] As the Government of Canada has explained, this provision

> was negotiated to ease the problems that Canadians had in dealing with U.S. state regulations. The sheer number of standards-setting organizations in the United States at the state and municipal level poses a large potential non-tariff barrier unless procedures are put in place to address problems as they arise.[189]

Therefore, the NAFTA requires federal governments to use their full constitutional power to assure that subnational governments follow NAFTA rules. Since the Congress is fully competent to preempt state environmental legislation,[190] and the President is able to seek a court order to force states to comply with a trade agreement,[191] the states may be forced to comply with all NAFTA disciplines. Since some NAFTA disciplines are more rigid than those in the GATT, it is hard to understand how U.S. Trade Representative Kantor can suggest that the NAFTA "in no way" diminishes or impairs the rights of states.[192]

To say that the NAFTA provisions apply to state governments is not to say that state environmental laws are necessarily threatened. The NAFTA is no tougher on state environmental laws than it is on federal

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187. Alcoholic Beverages Report, *supra* note 35, ¶5.79, 39 Supp. B.I.S.D. at 296. For a critique of this decision and of the surprising action of the Bush administration to accept it, see Steve Charnovitz, *The Environment vs. Trade Rules: Defogging the Debate*, 23 ENVTL. L. 475, 501–10 (1993).

188. The Statement of Administrative Action differs from the interpretation here. The Clinton administration states that NAFTA Article 902.2 "was deliberately drafted" to differ from GATT Article XXIV:12, "prompted by a dissatisfaction with recent interpretations of that GATT Article." *See* SAA, *supra* note 133, at 573. Thus, according to the Administration, NAFTA Article 902.2 "reflect[s] a lesser level of obligation than that found in GATT Article XXIV:12." *See id.* But the Administration offered no evidence for that statement such as corroboration from Canada and Mexico. On its face, the statement seems rather counterintuitive since the caselaw in question derived from a complaint by Canada. Canada continues to press for U.S. implementation of the *Alcoholic Beverages* decision.

189. EXTERNAL AFFAIRS AND INTERNATIONAL TRADE CANADA, NAFTA: WHAT'S IT ALL ABOUT? 55 (1993).

190. As U.S. Trade Representative Kantor notes, "ultimately, the federal government, through its Constitutional authority, retains the authority to overrule inconsistent state law through legislation or civil suit." *See* Kantor Testimony, *supra* note 125 (on file with *Law & Policy in International Business*).

191. *See* SAA, *supra* note 139, at 461 (characterizing this federal power as a "last resort").

192. U.S. Trade Representative Mickey Kantor, Testimony before the House Committee on Energy and Commerce, Sept. 29, 1993, at 12.

environmental laws. But since the NAFTA permits less environmental sovereignty than the GATT, the states are placed in a less favorable position than they are under GATT rules. There are three ways in which state laws may, in practice, be more vulnerable than federal laws.

First, the SPS provision regarding internal consistency may make it difficult for states since there are probably many "arbitrary and unjustifiable" distinctions between state laws.[193] In the *Alcoholic Beverages* case, the panel concluded that since some states did not maintain discriminatory distribution systems, the ones that did maintain them did not need to do so.[194] Thus, a NAFTA panel might find that a California health standard which exceeded the Oregon standard (or the federal standard) constitutes an arbitrary or unjustifiable distinction.[195]

Second, some state laws are enacted by popular initiative, particularly in California. If the U.S. government chose to defend a California law in a NAFTA dispute, there could be difficulty in demonstrating that the law was based on scientific principles or based on an appropriate risk assessment.[196] In other words, a purely democratic process like an initiative would field little evidence to show that scientific principles were taken into account in drafting a law.

Third, if a state law is found to violate the NAFTA, the state may be put in a more difficult position than the federal government would be if a federal law were found to violate the NAFTA. When the federal government loses a case, it has the freedom to determine whether to change a law in response. But a state government might not have that freedom since the federal government could bring a lawsuit against the state to force it to change its law, or could perhaps issue a preempting regulation.[197] It should be noted, however, that adverse panel reports do not automatically trigger federal pre-emption efforts.

Since states are not parties to the NAFTA, they have no ability to defend their laws before a NAFTA panel. A state must depend on the U.S. Trade Representative to defend its law. But, as the Sierra Club

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193. *See* NAFTA, *supra* note 1, art. 715.3(b), 32 I.L.M. at 378–79.

194. Alcoholic Beverages Report, *supra* note 35, ¶5.43, 39 Supp. B.I.S.D. at 283. It is unclear why the Bush administration accepted this report with such alacrity. Perhaps it was because the Administration saw it as leverage against diverging state standards.

195. Given the strictness of the adjudication under the Commerce Clause of the U.S. Constitution, state laws that violate the NAFTA may well violate the Commerce Clause too. But the state alcohol laws found to violate the GATT are presumably consistent with the Commerce Clause.

196. *See* Lori Wallach, *How NAFTA's Trade Challenges Would Work*, PUB. CITIZEN, Nov./Dec. 1993, at 12.

197. *See* Patti Goldman, *The Legal Effect of Trade Agreements on Domestic Health and Environmental Regulation*, 7 J. ENVTL. L. & LITIG. 11, 53–55 (1992).

points out, the federal government and the state may not agree on the merit of the state law.[198] It should be noted that the NAFTA implementing legislation does not obligate the federal government to defend the state law before a NAFTA panel.[199]

NAFTA and Process Standards

The discussion above of NAFTA's disciplines on environmental laws relates only to domestic laws involving product "characteristics or their *related* processes and production methods."[200] Many health and environmental laws are included under this definition, but many environmental laws are not. Those applying process standards that are deemed to be *unrelated* to the product characteristics are not covered by the NAFTA's disciplines on SPS and environmental standards (i.e., chapters 7 and 9). Moreover, many process-related import restrictions are not covered.

From a holistic point of view, any process regulation can relate to the product. For example, many consumers of tuna would consider the fishing practices used to catch the tuna to be a relevant product characteristic. Nevertheless, the NAFTA does not adopt this broad view. There is a difference between regulations which affect the health of a consumer in a non-exclusive way (e.g., the air she breathes) and regulations which affect the health of the consumer in an exclusive way (e.g., what she eats). In the former category, the NAFTA excludes those regulations unrelated to the product.[201] For example, a regulation on the pollution emitted by a vehicle would be covered. But a regulation on the pollution emitted in producing the vehicle would not be covered. In the latter category, the NAFTA includes all regulations.

Non-coverage by the NAFTA does not mean that such a regulation is forbidden in North American trade.[202] Rather, it means that the NAFTA does not apply its new disciplines to such measures. Instead, the NAFTA would apply the regular GATT rules.[203]

As discussed in Part I, many people believe that GATT rules prohibit

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198. SIERRA CLUB, *supra* note 146, at 11.

199. *See* NAFTIA, *supra* note 139, 107 Stat. at 2062–63.

200. NAFTA, *supra* note 1, art. 915, 32 I.L.M. at 391–92 (emphasis added). The SPS definition is slightly different. *See id.* art. 724, 32 I.L.M. at 382.

201. *Id.* art. 915, 32 I.L.M. at 391–92.

202. *See* Steve Charnovitz, *NAFTA: An Analysis of Its Environmental Provisions*, [1993] 23 Envtl. L. Rep. (Envtl. L. Inst.) 10067, 10067–69 (1993). This article discusses a number of technical points regarding the NAFTA that are not covered here.

203. For a different view, see Jessica Mathews, *Green Smoke Screen*, WASH. POST, Nov. 11, 1993, at A23 (NAFTA is the first trade agreement to recognize governments' right to use such measures to protect the environment).

U.S. environmental laws based on process standards. If so, then the NAFTA would prohibit it too. Given this situation, it is interesting to note that a representative of the National Wildlife Federation recently testified in the Congress that

> None of the U.S.'s environmental laws are disallowed under [the] NAFTA, despite the allegations made by environmentalists who criticize trade. Conservation laws that are non-discriminatory have been successfully defended by the U.S. government for some time and, under the NAFTA, can be successfully defended from challenge. To claim that they are "disallowed" by the NAFTA is intentionally misleading.[204]

It is not clear what cases the Federation refers to in suggesting that conservation laws have been successfully defended for some time. Only one true U.S. conservation law, the Marine Mammal Protection Act, has been challenged and defended under the GATT, and the U.S. government was not successful before either of the two GATT panels that considered the case.[205] One U.S. conservation law, the lobster size requirement, has been challenged under the U.S.-Canada Free Trade Agreement. Although the U.S. government won the case, it may have been because the terms of reference prevented the panel from considering whether the measure was indeed non-discriminatory.[206]

Many environmental groups had hoped that the NAFTA would deal affirmatively with the issue of process standards. Two options were possible. One was to establish a special rule for North American trade which overrode the regular GATT disciplines on process standards. The three countries apparently did not consider this option. Had they done so, the NAFTA could have fluoresced greenness.

Although some commentators have suggested that the NAFTA expands the General Exceptions in comparison to the GATT, the language in NAFTA Article 2101 is merely more specific, not more expansive. For example, the NAFTA states that Article XX(b) "include[s] environmen-

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204. *North American Free Trade Agreement (NAFTA) and Supplemental Agreements to the NAFTA: Hearings before the House Comm. on Ways and Means*, 103d Cong., 1st Sess. 373 (1993) (statement of Stewart J. Hudson, Legislative Representative for the International Programs Division, National Wildlife Federation).

205. *See* Dolphin I Report, *supra* note 23, 39 Supp. B.I.S.D. 155; Dolphin II Report, *supra* note 126, 33 I.L.M. 839. The MMPA is a discriminatory conservation law.

206. U.S. Lobster Report, *supra* note 64, ¶¶ 5.3, 11.1.1.

tal measures."[207] Yet as the Government of Canada correctly explains, "The NAFTA *incorporates the GATT exemption* that allows governments to protect their environment. . . ."[208] It is interesting to note that the National Wildlife Federation has stated that "NAFTA allows for conservation measures affecting both living and non-living natural resources, a significant improvement over the General Agreement on Tariffs and Trade—the worlds' global trading agreement. Countries will have greater flexibility to defend their own conservation measures."[209] In actuality, there has never been a GATT decision limiting conservation measures to non-living resources, so there is neither real improvement nor greater flexibility over the status quo.

It should also be noted that in one area the NAFTA explicitly curtails the exceptions provided in GATT Article XX(g). Under the NAFTA, a party may restrict export of an energy or petrochemical good only if that restriction does not reduce the proportion of the total export shipments available to the other party in a base period.[210] This condition does not exist in the GATT.

The second option was to use the NAFTA to develop a process for negotiating minimum environmental process standards for the region. For example, Hufbauer and Schott suggested a procedure whereby a higher-standard country would negotiate with a lower-standard country to convince it to raise its standards.[211] If agreement could not be achieved within a reasonable time, the higher-standard country would be permitted by the NAFTA to impose a compensating duty on imports of the product in question.[212] This option also was apparently not considered.

Because the NAFTA contains no special rules on environmental process standards, a trade complaint—for example, a Mexican complaint about the U.S. Marine Mammal Protection Act—would be adjudicated either within the NAFTA using GATT rules or within the GATT

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207. NAFTA, *supra* note 1, art. 2101.1, 32 I.L.M. at 699.

208. EXTERNAL AFFAIRS AND INTERNATIONAL TRADE CANADA, *supra* note 189, at 16 (emphasis added). Note the quaint Canadian view that countries have individual environments.

209. NATIONAL WILDLIFE FEDERATION, EIGHT REASONS WHY NAFTA IS GOOD FOR THE ENVIRONMENT 2 (1993).

210. NAFTA, *supra* note 1, art. 605, 32 I.L.M. at 365. This provision does not apply to Mexico. *See id.* It was meant to continue in place a concession the United States had obtained from Canada in an earlier negotiation. *See* FTA, *supra* note 12, art. 904, 27 I.L.M. at 344.

211. HUFBAUER & SCHOTT, *supra* note 122, at 152–53.

212. *Id.* Although the authors would apply a commercial injury test, they do not call it a "countervailing" duty. They also suggest that any monies collected be paid to the exporting country. *Id.* at 153.

using GATT rules.[213] The choice would be up to Mexico.[214] Mexico might prefer the GATT as the venue as there would be no panelist from the United States.[215] Or it might prefer the NAFTA as the venue since a favorable panel decision could not be blocked by the United States as it can in the GATT.[216] Another advantage of the NAFTA venue is that, assuming Mexico wins the case, it may impose a trade sanction against the United States until the Congress changes the Marine Mammal Protection Act, or the U.S. president awards compensation to Mexico.[217] Thus, the NAFTA's dispute provisions contain real teeth.

For dolphins, as well as other resources affected by process-based laws, it is important to recall that NAFTA panels do not preempt U.S. laws. As the Office of the U.S. Trade Representative explains: "The NAFTA does not change U.S. ability to implement these laws. Rather, its implementation will facilitate resolution of these PPM issues."[218] Thus, the Clinton administration seems to suggest that the NAFTA will make it easier to convince the Congress to make legislative changes in instances where the United States loses a NAFTA case.

B. *NAFTA and GATT Compared*

As explained above, the GATT does not pretend to grant rights to its members to take domestic actions. Some commentators have given the NAFTA "green credit" for according such rights, but this stance is an odd one.[219] The NAFTA does not really accord such rights.[220] The

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213. NAFTA Article 2005.1 clarifies that this choice will also continue under the new GATT agreement negotiated in the Uruguay Round. NAFTA, *supra* note 1, art. 2005.1, 32 I.L.M. at 694.

214. *Id.* art. 2005, 32 I.L.M. at 694. Although the country whose environmental law is being challenged would normally have the right to select NAFTA as the forum, this does not apply to disputes beyond Article 104 and chapters 7 and 9. *Id.* art. 2005.4(a), 32 I.L.M. at 694.

215. In a NAFTA panel, there would normally be two panelists from the United States. *Id.* art. 2011, 32 I.L.M. at 695.

216. This advantage of the NAFTA over the GATT will disappear once the Uruguay Round agreement comes into force since it also prevents one party from blocking the adoption of a report. Agreement on Technical Barriers to Trade, *in* GENERAL AGREEMENT ON TARIFFS AND TRADE, URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 118 (1994) [hereinafter TBT AGREEMENT].

217. NAFTA, *supra* note 1, art. 2019, 32 I.L.M. at 697–98.

218. USTR NAFTA REPORT, *supra* note 119, at 98.

219. If the NAFTA actually provided the rights, then the three countries would not have had them before NAFTA, yet they did.

220. U.S. Trade Representative Kantor puts it well in stating that the NAFTA is "the most explicit international affirmation ever of our right to keep out imported products that fail to meet the standards we set for protection." *See NAFTA Hearings*, *supra* note 192, at 8.

NAFTA reiterates them.[221] It is often suggested that the NAFTA "safeguards," "defends," or "protects" environmental rights.[222] But why should the Agreement get green credit for protecting environmental laws *from the NAFTA negotiators*?

One way to compare the NAFTA with the GATT is to look for areas where the GATT imposes a discipline on environmental measures that the NAFTA does not impose (or where something could be illegal under the GATT but legal under the NAFTA). There may be a few of these, but they are trivial. First, the use of an international SPS standard is presumed to be consistent with NAFTA's SPS disciplines.[223] One might assume that this is an irrebuttable presumption, but the NAFTA does not make this clear. In addition, the use of an international environmental standard is presumed to be consistent with the NAFTA's disciplines on standards.[224] Once again, one might assume that this is an irrebuttable presumption, but the NAFTA does not make this clear.[225] It is difficult to justify awarding much greenness credit to the NAFTA for such provisions. If the international environmental standard is legitimate, it should meet the requirements of GATT Article XX. According to the GATT Secretariat, "GATT rules could never block the adoption of environmental policies which have broad support in the world community."[226]

Second, there are two provisions in the NAFTA which might be viewed as granting rights that override the other disciplines. These would seem the best potential candidates for provisions that are greener than the GATT. NAFTA Article 712.2 states that "[n]otwithstanding any other provision of this Section, each Party may, in protecting human, animal or plant life or health, establish its appropriate levels of protection in

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221. For example, Chapter 9 lists the "Right to Take Standards-Related Measures" and the "Right to Establish [a nation's own] Level of Protection." *See* NAFTA, *supra* note 1, art. 904.1, 904.2, 32 I.L.M. at 387.

222. *See, e.g., NAFTA, Jobs and the Environment: Hearings Before the Subcomm. on Commerce, Consumer Protection, and Competitiveness of the House Comm. on Energy and Commerce*, 103d Cong., 1st Sess. 199–200 (1993)(Statement of Alan Hecht, Acting Assistant Adm'r, EPA)(NAFTA defends the sovereign rights of the United States and its states and localities to determine their own levels of environmental protection).

223. NAFTA, *supra* note 1, art. 713.2, 32 I.L.M. at 378.

224. *Id.* art. 905.2, 32 I.L.M. at 387.

225. The Standards Code in the Uruguay Round provides a "rebuttable" presumption for the use of an international standard. *See* TBT AGREEMENT, *supra* note 216, at 118.

226. General Agreement on Tariffs and Trade, *Trade and the Environment*, *in* 1 GATT, INTERNATIONAL TRADE '90–'91, 22 (1992).

accordance with Article 715." Furthermore, NAFTA Article 904.2 states that

> [n]otwithstanding any other provision of this Chapter, each Party may, in pursuing its legitimate objectives of safety or the protection of human, animal or plant life or health, the environment or consumers, establish the levels of protection that it considers appropriate in accordance with Article 907(2).

But these provisions grant no "rights" to use trade measures, only to establish levels of protection. Achieving this protection through trade measures, however, is disciplined (discussed above). Moreover, even the choice of a level of protection requires adherence to articles 715 and 907.2, respectively. While the GATT does not affirm a right to establish such levels of protection, nothing in the GATT would deny such rights.

Third, the NAFTA disallows a non-violation nullification and impairment complaint against a party for services trade subject to an Article XX exception.[227] But since the GATT has no rules at all on services, non-violation nullification and impairment complaints cannot be prosecuted there. Like the GATT, the NAFTA permits non-violation nullification and impairment complaints against trade in *goods*.

Fourth, the NAFTA permits parties to exclude from patentability certain inventions "if necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to nature or the environment. . . ."[228] The NAFTA also permits parties to exclude "plants and animals other than microorganisms" and "essentially biological processes for the production of plants or animals. . ."[229] But these exclusions do not surpass the GATT since the GATT has no requirements at all for patentability.

Fifth, the U.S. International Trade Commission has stated that the NAFTA "clears the way for member states to adopt 'appropriate' measures to ensure that foreign investment is 'undertaken in a manner

227. *See* GATT, *supra* note 8, art. XXIII:1(b)–(c), 4 B.I.S.D. at 39; NAFTA, *supra* note 1, ann. 2004, 32 I.L.M. at 699. Such a complaint is based on an impairment of trade benefits rather than on a violation of any specific provision in the GATT. For example, in the recent U.H.T. Milk Case (discussed above), the Canada-U.S. panel found that the Puerto Rican health standard was a non-violation nullification and impairment of Canada's rights under the FTA. *See* U.H.T. Milk Report, *supra* note 76, ¶5.63.

228. NAFTA, *supra* note 1, art. 1709.2, 32 I.L.M. at 673.

229. *Id.* art. 1709.3, 32 I.L.M. at 673.

sensitive to environmental concerns.' "[230] But it is important to point out that GATT rules do not currently block the way for any environmental rules relating to investment. The GATT has no rules on investment.

Sixth, the NAFTA permits performance requirements that investors "use a technology to meet generally applicable health, safety or environmental requirements. . . ."[231] But this provision does not surpass the GATT since the GATT has no disciplines on investor performance requirements.

Seventh, the NAFTA permits an exception for measures "necessary to protect human, animal or plant life or health" from Chapter 10 on Government Procurement.[232] This provision does not surpass the GATT since the GATT has almost no disciplines on government procurement.[233]

In summary, there are no significant areas where the GATT imposes disciplines on environmental or health measures that the NAFTA does not impose.[234] But there are areas where the NAFTA imposes discipline that the GATT does not impose. For instance, for SPS measures, the NAFTA disallows arbitrary or unjustifiable discrimination where "identical or similar conditions prevail."[235] By contrast, GATT Article XX disallows "arbitrary or unjustifiable discrimination between countries only where the *same* conditions prevail."[236] Because the NAFTA disallows more, an SPS measure could conform to the GATT but violate the NAFTA.

Another area of difference between the NAFTA and the GATT led to public controversy in the spring of 1994.[237] Seeking to reduce cigarette smoking, Canada contemplated a law to require plain packaging of

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230. U.S. INT'L TRADE COMM'N, USITC PUB. NO. 2640, THE YEAR IN TRADE 8 (July 1993). This statement probably refers to NAFTA Article 1106. NAFTA, *supra* note 1, art. 1106.2, 1106.6(b)–(c), 32 I.L.M. at 640.

231. *Id.* art. 1106.2, 32 I.L.M. at 640. See also Article 1106.6, which in effect extends GATT Article XX to the new NAFTA disciplines. *Id.* art. 1106.6, 32 I.L.M. at 640; GATT, *supra* note 8, art. XX headnote, 4 B.I.S.D. at 37.

232. NAFTA, *supra* note 1, art. 1018.2(b), 32 I.L.M. at 620.

233. *See* GATT, *supra* note 8, art. III:8(a), 4 Vol. B.I.S.D. at 7.

234. For a different view, see D. Holly Hammonds, National Security Council, *NAFTA: Improving the Chances for Environmental Cooperation and Sustainable Development in the Region and Beyond*, International Symposium on Trade and the Environment, Minneapolis, November 10–12, 1993, at 5 (unpublished, on file with *Law & Policy in International Business*) (NAFTA also clearly takes steps beyond GATT to ensure that legitimate laws to protect the domestic environment, no matter how stringent, would be respected even if they restrict trade).

235. NAFTA, *supra* note 1, art. 712.4, 32 I.L.M. at 378. In other words, "similar" is a higher discipline than "same."

236. GATT, *supra* note 8, art. XX headnote, 4 B.I.S.D. at 37 (emphasis added).

237. *See* Canadian Center for Policy Alternatives, *NAFTA Gives Tobacco Companies Power to Block*

cigarettes.[238] The packages could list the brand name, but could not have color and design features. The U.S. tobacco industry reacted negatively to this idea. They hired Carla Hills and Julius Katz, two former U.S. NAFTA negotiators, to make the case that plain packaging would be a "blatant violation" of Canada's new obligations under NAFTA.[239] The NAFTA prevents governments from encumbering the use of trademarks.[240] While certain parts of the NAFTA are covered by a health exception,[241] the provisions on intellectual property were specifically excluded, according to Hills.[242] The contemplated action by Canada would not violate the GATT since it contains no obligations on intellectual property.[243]

C. *NAFTA and Environmental Treaties*

Article 104 of the NAFTA declares that

> [i]n the event of any inconsistency between this Agreement and the specific trade obligations set out in [the Convention on International Trade in Endangered Species, the Montreal Protocol, and the Basel Convention], such obligations 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 the least inconsistent with the other provisions of this Agreement.[244]

The treaties listed above mandate import prohibitions for environmen-

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Plain Packaging, MONITOR, June 1994, at 3 (predicting that the Canadian government would withdraw the proposal but play down the NAFTA connection).

238. *See* Charles Trueheart, *Fuming Over Cigarette Packs*, WASH. POST, May 17, 1994, at A7.

239. *See Minutes of Proceedings and Evidence of the Standing Comm. on Health*, House of Commons, 1st Sess., 35th Parl. (May 10, 1994)(statement of Julius Katz); *see also* Carla Hills, Legal Opinion With Regard to Plain Packaging of Tobacco Products Requirement Under International Agreements, May 3, 1994, at 24.

240. NAFTA, *supra* note 1, art. 1708.1, 1708.10, 32 I.L.M. at 672, 673.

241. *Id.* art. 2101.1, 32 I.L.M. at 699.

242. *See* Hills, *supra* note 239, at 11–12.

243. The Uruguay Round does contain such obligations, but it also contains a health exception. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 8, *in* GENERAL AGREEMENT ON TARIFFS AND TRADE, THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 319 (1994).

244. NAFTA Article 104.2 provides that the parties may agree to include other agreements in this list. NAFTA, *supra* note 1, art. 104.2, 32 I.L.M. at 298. In Annex 104.1, the parties have added two additional agreements, not discussed here. *Id.* annex 104.2, 32 I.L.M. at 298.

tal purposes. Such action would violate NAFTA Article 309. Although the GATT Article XX environmental exceptions incorporated into NAFTA Article 2101 might justify action under these treaties, the purpose of Article 104 apparently is to obviate recourse to Article 2101.[245] Avoiding Article 2101 would simplify things since many commentators have suggested that trade measures required by these treaties may not qualify for GATT Article XX since non-trade measures are available.[246] Moreover, according to a GATT Secretariat official, no government has taken the position in GATT's Group on Environmental Measures and International Trade that these treaties are consistent with the GATT.[247]

According to U.S. Trade Representative Kantor: "In a provision that has no precedent in trade agreements, NAFTA Article 104 expressly provides that the obligations of the NAFTA parties under international environmental agreements shall prevail over any inconsistent obligations undertaken in the NAFTA."[248]

But the NAFTA does not say that for environmental treaties. (the NAFTA does yield to tax treaties, however.[249]) Under the NAFTA, import prohibitions imposed pursuant to one of these treaties would not necessarily prevail over the NAFTA obligation in Article 309. The actual rules in Article 104 would apply. For example, if Mexico lodged a dispute against Canada for complying with the Basel Convention, the panel would have to determine whether the Canadian import control was less NAFTA-inconsistent than alternative measures, provided they were equally effective and reasonably available. The facts of the particular case would determine whether an import ban meets the terms of Article 104.

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245. An argument could be made that certain obligations under these environmental treaties could be considered technical regulations governed by NAFTA Chapter 9, since Article 903 affirms international environmental agreements. NAFTA, *supra* note 1, art. 903, 32 I.L.M. at 387. NAFTA Article 904.1 may embrace import restrictions. *Id.* art. 904.1, 32 I.L.M. at 387. While none of the environmental treaty-making bodies are accorded status under NAFTA Article 915, the parties could add them. *Id.* art. 915, 32 I.L.M. at 391–92. If that were done, recourse to Article 104 might be less necessary. *Id.* art. 104, 32 I.L.M. at 297–98. Nevertheless, there is still the problem of NAFTA Article 309. *Id.* art. 309, 32 I.L.M. at 303.

246. For example, Thomas J. Schoenbaum argues that the purpose of the Montreal Protocol trade restrictions could be accomplished "by providing financial support or transfer of technology." Thomas J. Schoenbaum, *Free International Trade and Protection of the Environment: Irreconcilable Conflict?*, 86 AM. J. INT'L L. 700, 720 (1992).

247. Richard Eglin, Remarks at Sistema Economica Latin America (SELA) Conference in Bogota, Colombia (Oct. 19, 1993) (unpublished).

248. *USTR Letter on NAFTA Environmental Standards*, INSIDE U.S. TRADE, Sept. 17, 1993, at 3–4.

249. NAFTA, *supra* note 1, art. 2103.2, 32 I.L.M. at 700.

Applying the "equally effective and reasonably available" test to a treaty already in force seems peculiar. All three of the environmental treaties *require* import prohibitions in circumstances spelled out in each treaty. Thus, a party wishing to comply with the treaty may have no choice as to the means used. There may well be equally effective and reasonably available means to accomplish the same purposes to be achieved by the treaty. But none of these treaties grant parties the right to substitute a different approach (e.g., a tax rather than an import ban) to the one required in the treaty.[250] Therefore, if a NAFTA panel disallows an import ban pursuant to one of these treaties on the grounds that equally effective and reasonably available approaches exist, the panel could undermine a party's ability to carry out its treaty obligations.

The terms "equally effective" and "reasonably available" are not defined in the NAFTA. But one may gain some insight into "reasonably available" from GATT adjudication. The GATT's subnational clause directs each party to take "such reasonable measures as may be available to it. . ."[251] As discussed above, the U.S. Alcoholic Beverages panel interpreted this provision to mean that any action permitted by the U.S. Constitution was reasonably available for use by the U.S. government in enforcing the GATT's rules among the states.[252] In the U.S. Section 337 case, the GATT panel held that the Article XX(d) exception could not be used by a country "if an alternative measure which it could *reasonably* be expected to employ and which is not inconsistent with other GATT provisions is *available* to it."[253] In applying this new test, the panel held that the U.S. law requiring that patent infringements by imports be considered by the U.S. International Trade Commission (while cases involving infringement by domestic products are considered by courts) was not "necessary" under Article XX(d) "since many countries grant to their civil courts jurisdiction over imports. . ."[254] Analogizing to the Mexico-Canada hypothetical discussed above, Mexico might argue that

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250. It is interesting to note that the NAFTA grants no participation opportunities to the organizations administering the three environmental treaties.

251. GATT, *supra* note 8, art. XXIV:12, 4 Vol. B.I.S.D at 44.

252. Alcoholic Beverages Report, *supra* note 35, ¶¶ 5.78–5.80, 39 Supp. B.I.S.D. at 296–97. *See also id.* ¶¶ 5.42–5.44, 39 Supp. B.I.S.D. at 283–84.

253. Section 337 Report, *supra* note 36, ¶ 5.26, 36 B.I.S.D. at 392 (emphasis added).

254. *Id.* ¶5.28, 36 B.I.S.D. at 393. See also the Thai Cigarette case where the panel did not accept Thailand's argument that competition between imported and domestic cigarettes would lead to an increase in total sales of cigarettes. The panel found that other methods to curb cigarette use were "reasonably available," such as price increases. *See* Cigarette Report, *supra* note 69, at 225–26.

a Canadian import control under the Basel Convention failed Article 104 if other countries (including non-parties to Basel) did not apply the same ban to Mexico. Different conservation actions by other countries would show that other alternatives were reasonably available (although they might not be equally effective).

Although Article 104 would appear to require the least NAFTA-inconsistent means available, the Clinton administration has seemingly suggested that this provision is only precatory. According to the *Report on Environmental Issues*, "[w]here a party has a choice between equally effective and reasonable available means of complying with its international environmental obligations under these agreements, it *should* choose the measure that is most consistent with the NAFTA."[255] The report presents no evidence for this interpretation, however.

Since the three environmental treaties could be accused of being inconsistent with the NAFTA, it is useful to clarify in the NAFTA where the priority lies. But U.S. Trade Representative Kantor exaggerates in suggesting that such clarification "has no precedent in trade agreements." Many years ago, it was quite common for commercial treaties to yield to international treaties relating to health or conservation. For example, the Treaty of Commerce and Navigation between Great Britain and Germany of 1924 provides that nothing shall affect measures in pursuance of "general international conventions. . .relating to the transit, export or import of particular kinds of articles, such as opium or other dangerous drugs or the produce of fisheries. . . ."[256]

Quite apart from whether Article 104 represents a precedent as one looks back in history, Article 104 can be a useful precedent for the future. For example, Daniel C. Esty has written that "[t]he protection granted under [the] NAFTA for international environmental agreements provides a useful model for the international community to consider as the same potential clash between trade provisions of environmental agreements and GATT obligations occurs."[257]

Is the NAFTA a useful model? To answer, one should first specify what the NAFTA model is.

Article 104 states, in effect, that if all parties to an agreement wish to allow an environmental treaty which is in force in all parties to trump

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255. USTR NAFTA REPORT, *supra* note 119, at 11 (emphasis added).

256. Treaty of Commerce and Navigation, Dec. 2, 1924, Gr. Brit.-Ger., art. 17, 119 B.F.S.P. 369, 376. *See also* the Convention of Commerce, Navigation and Establishment, Mar. 11, 1929, Fr.-Gr. Brit., art. 9, 95 L.N.T.S. 403, 407, which yields to all international conventions.

257. Esty, *Integrating Trade*, *supra* note 159, at 51.

the NAFTA, they can do so.[258] However, the three countries do not need Article 104 to accomplish that limited aim. Generally under international law, a more specific provision in a treaty will trump a more general provision in a conflicting treaty covering the same subject.[259] Moreover, if two countries were party to a particular environmental treaty, it is hard to imagine how one country could challenge the other under NAFTA for complying with that treaty.

If Article 104 were grafted on to the GATT, the new principle would be that if all GATT members are parties to a particular treaty (or all consent to its being included on the list), then that treaty trumps the GATT.[260] It is easy to imagine the GATT contracting parties agreeing that any environmental treaty approved by all GATT members supersedes the GATT. But how realistic would such an agreement be? The big problem with the international trade rules occur when GATT members are *not* parties to a particular treaty. Thus, the NAFTA model provides a solution to a GATT problem which does not exist. Stated differently, it does not address the GATT difficulty which does exist which is the problem of non-parties. Thus, by any reasonable green metric, Article 104 makes little progress except insofar as it acknowledges that trade agreements should state their relationship to environmental treaties.

In addition to pointing out the limits to Article 104 in practice and as a model, it is also useful to look at Article 104 in comparison to other provisions in the NAFTA regarding treaties. Article 104 is not a positive undertaking. It does not require the three parties to adhere to the international environmental treaties.[261] By contrast, the NAFTA does

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258. Actually, Article 104 does not require that treaties be in force. But for the one treaty which was not in force at the time the NAFTA was signed, the Basel Convention, NAFTA Article 104(1)(c) states that the Basel Convention will gain Article 104 status only when it goes into force in all three of the signatory countries. NAFTA, *supra* note 1, art. 104(1)(c), 32 I.L.M. at 298. *See also* Article 903 which affirms the existing rights and obligations under "all other international agreements, including environmental and conservation agreements, to which such Parties *are party*." *Id.* art. 903, 32 I.L.M. at 387 (emphasis added). Thus, the principle is not that these international treaties may trump the NAFTA. Such trumping may only occur after the three countries ratify the treaty.

259. James Cameron & Jonathan Robinson, *The Use of Trade Provisions in International Environmental Agreements and Their Compatibility with the GATT*, 1991 Y.B. OF INT'L ENVTL. L. 3, 15–18. (*Generalia Specialibus Non Derogant*).

260. The NAFTA negotiators might have permitted the parties to put treaties under Article 104 protection by a two-thirds vote, but they did not. The negotiators might also have clarified in Articles 104 and 2101 that complaining parties bear the burden of showing the NAFTA-inconsistency of import bans imposed pursuant to an environmental treaty, but they did not.

261. For a different view of Article 104, see GENERAL ACCOUNTING OFFICE, 2 NORTH AMERICAN FREE TRADE: ASSESSMENT OF MAJOR ISSUES 117 n.10 (1993) (NAFTA parties agreed to uphold the principles outlined in the three treaties).

require parties to adhere to certain treaties regarding intellectual property rights.[262]

D. *Dispute Settlement*

According to the president of the National Wildlife Federation, "if a dispute ever reaches a panel, NAFTA gives us several ways to defend our laws that are superior to those currently available under the GATT."[263] According to U.S. Trade Representative Kantor, NAFTA's dispute settlement provisions "are more environmentally sensitive than those of the GATT."[264] Kantor credits the "significant role of environmental groups in advising U.S. negotiators."[265]

These views are mistaken. The main difference between the GATT and NAFTA procedures is that under NAFTA, the adoption of a panel report would be automatic.[266] This is not necessarily pro-environment or anti-environment. But a country whose environmental law was found to be NAFTA-inconsistent would have an obligation either to change the law or compensate the other party.[267] If the defendant country failed to take either action, the plaintiff country would be free to use trade sanctions in order to coerce the defendant country to modify its environmental law.[268]

There are several aspects of the NAFTA's dispute settlement procedures that are alleged to be novel, environmentally-sensitive, or both. According to one commentator: "In [the] NAFTA, when environmental regulations are challenged on trade obstruction grounds, the burden of proof is on the accuser, not on the regulator. Under previous trade rules, the opposite was true."[269]

Since there was a common misperception that the NAFTA reversed the GATT burden of proof,[270] it is useful to discuss this issue in some detail.

It is true that under NAFTA chapters 7 and 9, the plaintiff country will

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262. NAFTA, *supra* note 1, art. 1701, 32 I.L.M. at 670–71.

263. *Merchant-Marine Hearings*, *supra* note 1 at 140.

264. 139 CONG. REC. H9963 (daily ed. Nov. 17, 1993) (statement of Michael Kantor).

265. *Id.*

266. NAFTA, *supra* note 1, art. 2018, 32 I.L.M. at 697.

267. *Id.*

268. *Id.* art. 2019, 32 I.L.M. at 697–98.

269. WILLIAM A. ORME, JR., CONTINENTAL SHIFT, FREE TRADE & THE NEW NORTH AMERICA 124 (Michael Barker ed., 1993).

270. *See, e.g., NAFTA and Related Side Agreements: Hearings on S. 1627 Before the Senate Comm. on Finance*, 103d Cong., 1st Sess. 119–20 (1993) (discussion between Fred Krupp of the Environmental Defense Fund and Senator Max Baucus).

have the burden of proof.[271] But there is nothing novel about that. Plaintiffs typically have the burden of proof. As noted above, the GATT has generally accorded the burden of proof to the plaintiff. Thus, the NAFTA cannot (and does not) "flip" this burden.[272]

Consider first NAFTA Chapter 9. If the complaining country shows that an environmental standard violates NAFTA's rules on standards, then the country with the disputed environmental standard may seek to defend itself under NAFTA Article 2101 (i.e., GATT Article XX). But it is interesting to note that the NAFTA does not "flip" the defendant's burden for Article 2101.[273] Thus, in one key area where the NAFTA *could* have created a more environmentally-sensitive "courtroom" than the GATT, it does not.[274]

This non-flip for NAFTA's General Exceptions also has implications for challenges to multilateral environmental agreements. If a treaty not listed in Article 104 violates NAFTA Article 309 (or if the treaty fails to pass the Article 104 test), then it can be reviewed under Article 2101. For any treaty requiring import prohibitions (rather than standards), NAFTA's rules on standards are inapplicable.[275] Thus, once the complaining country shows a prima facie violation of NAFTA Article 309, the country imposing the multilateral environmental trade measure will have the burden of proof for defending its import restriction under Article 2101. Of course, the NAFTA is no more environmentally unfriendly to treaties than the GATT is in this respect.

Because the NAFTA's disciplines on standards are slightly tighter (i.e., more environmentally-constraining) than those in the GATT, the plaintiff country may have an easier time proving its case.[276] For example, the complaining country wins if it can show that the measure is an "unnecessary obstacle to trade."[277] This is not a grounds for com-

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271. NAFTA, *supra* note 1, art. 723(6), 32 I.L.M. at 382; *Id.* art. 914(4), 32 I.L.M. at 391.

272. The NAFTA Statement of Administrative Action is remarkably clear on this point, calling NAFTA's burden of proof "consistent with current practice under the CFTA [Canada-U.S. Free Trade Agreement] and under the GATT." SAA, *supra* note 139, at 550.

273. NAFTA Article 914(4) relates only to Chapter 9. NAFTA, *supra* note 1, art. 914(4), 32 I.L.M. at 391.

274. *But see* GOVERNMENT OF CANADA, NORTH AMERICAN FREE TRADE AGREEMENT: CANADIAN ENVIRONMENTAL REVIEW 70 (1992) (the Canadian government states that "in the event of a dispute, the environment would be given the benefit of the doubt.")

275. NAFTA, *supra* note 1, art. 915, 32 I.L.M. at 391.

276. The hurdles faced by the GATT plaintiff in Article III:4 and the NAFTA plaintiff in Article 904(3) would seem equivalent. *Compare* GATT, *supra* note 8, art. III:4, 4 B.I.S.D. at 6 *with* NAFTA, *supra* note 1, art. 904(3), 32 I.L.M. at 387.

277. NAFTA, *supra* note 1, art. 904(4), 32 I.L.M. at 387. But, an unnecessary obstacle to trade shall not be deemed to be created if the demonstrable purpose of such measure is to achieve a

plaint under the GATT (although it is under the GATT Standards Code[278]).

For SPS measures, comparing the NAFTA's burden of proof to that of the GATT is complex. Since the Article XX(b) exception does not apply, typical GATT practice would assign the plaintiff the full burden of proof.[279] The NAFTA specifically "confirms" this in Articles 723.6 (and 914.4 for standards).

For an import restriction,[280] a successful GATT defense requires that the measure be:

1) necessary for the protection of life or health,
2) not arbitrarily discriminatory,
3) not unjustifiably discriminatory,
   and
4) not a disguised restriction on trade.

The NAFTA begins with international treatment. If a measure meets this, the inquiry is over. If a measure does not, then a successful NAFTA prosecution requires that the measure be:

1) unnecessary to achieve a party's appropriate level of protection,
2) arbitrarily discriminatory,

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legitimate objective and the measure does not operate to exclude goods of another party that meet that legitimate objective. Note that this adds a hurdle which does not exist in the GATT: the legitimate objective test. Under GATT Article III:4, a measure does not have to be viewed as legitimate by an international body to qualify for national treatment.

278. Standards Code, *supra* note 11, ¶2.1, 26 Supp. B.I.S.D. at 9–10.

279. One might imagine that the plaintiff is disadvantaged under NAFTA Article 723(6) because it would be called upon to prove the existence of a "disguised restriction" while under GATT, the defendant country might have to prove the non-existence of a disguised restriction under Article XX. *Compare* NAFTA, *supra* note 1, art. 723(6), 32 I.L.M. at 382 *with* GATT, *supra* note 8, art XX, 4 B.I.S.D. at 37–38. But this situation only occurs if the regulation in dispute is otherwise NAFTA-legal—in other words, if the only issue remaining were consistency with Article 712(6). But in such a GATT case, the defendant would not need Article XX. GATT, *supra* note 8, art. XX, 4 B.I.S.D. at 37. If the regulation meets Article 712(4), then it would also meet GATT Article III:4. NAFTA, *supra* note 1, art. 712(4), 32 I.L.M. at 378; GATT, *supra* note 8, art. III:4, 4 B.I.S.D. at 6. (Recall that Article III:1 is precatory for regulations. GATT, *supra* note 8, art. III:1, 4 B.I.S.D. at 6). It is also unclear who has the burden with respect to the disguised restriction test, since no panel has ever employed it.

280. For an SPS standard, all of the following discussion applies with one additional wrinkle. The GATT defense of national treatment would not be conclusive (or helpful) in the NAFTA. On the other hand, the NAFTA defense of international treatment would not be conclusive in the GATT.

3) unjustifiably discriminatory,
4) a disguised restriction on trade,
5) not based on a level of protection which is internally consistent,[281]
6) not based on scientific principles, or maintained without a scientific basis for it,
or
7) not based on a risk assessment.

Only one of these NAFTA requirements (a disguised restriction on trade) is identical to the GATT requirement. The other NAFTA requirements are either more easily prosecutable[282] (i.e., the arbitrarily discriminatory and unjustifiably discriminatory tests), analogous but different (i.e., the unnecessary test), or have no GATT counterpart (i.e., the internal consistence, science, and risk tests) and are therefore "tougher" than the GATT. Note that the plaintiff country need only prevail in one of these NAFTA tests to win. By contrast the defendant country in a GATT case must show all four points.

Consider a hypothetical challenge to an import measure. Assuming it were up to the plaintiff, would that country prefer a GATT or NAFTA venue? Under the GATT, the country imposing the SPS standard has the burden of proof under Article XX. Under the NAFTA, the country challenging the SPS standard has the burden of proof. But since the NAFTA tests are more environmentally-constraining, a challenging country has more grounds for prosecution than it would in the GATT. Therefore, even with the burden of proof, it may be easier for the plaintiff to prevail in the NAFTA than in the GATT.[283] The exact hurdle depends on the facts of each case. Therefore, the view of some commentators that the NAFTA makes it harder than the GATT to challenge an SPS law would surely not be true all the time, and may never be true. Indeed, the opposite—that the NAFTA makes it easier to challenge an SPS law—is likely to be true.

Just as with the GATT, there is no requirement under the NAFTA that environmental disputes be heard by at least some panelists with environmental expertise.[284] Indeed, although the GATT rules list "eco-

281. *See infra* text at 23.

282. *See* note 233 and accompanying text.

283. Another way of saying this is that it is easier being a plaintiff in a NAFTA SPS case than it is being a defendant in an equivalent GATT SPS case.

284. But the NAFTA does require that financial services dispute panelists have expertise in financial services law or practice. *See* NAFTA, *supra* note 1, art. 1414(3)(a), 32 I.L.M. at 608.

nomic development" as an area of qualification for panelists, the NAFTA lists only "law, international trade, [and] other matters covered by this Agreement."[285] This is a curious listing for an agreement so putatively green; it is almost as if the drafters of the NAFTA could not bring themselves to use the word "environment." Nevertheless, as with the GATT, environmentalists can be named to rosters if any of the three countries are willing. In that context, it is interesting to note that the NAAEC does not insist that environmentalists be on NAFTA dispute panels.[286]

One advantage of NAFTA dispute settlement, it is said, is the injection of scientific expertise. According to Bruce Babbitt, Secretary of the Interior, the NAFTA "for the first time in trade history. . .establishes dispute settlement mechanisms that ensure that scientific and environmental viewpoints are heard and taken into account."[287] Yet as noted above, GATT panels currently have access to whatever input they desire. Moreover, the GATT Standards Code established a formal mechanism for the resolution of issues involving "detailed scientific judgments."[288] This provision in the NAFTA directing the panel to take into account a scientific report[289] parallels a similar provision in the GATT Standards Code.[290]

While it seems likely that scientific input would be of more use to the complaining than to the defending country, environmentalists have generally favored such scientific input. But it is interesting to note that the defending country has no right under the NAFTA to insist upon such input. It is up to the panel to solicit scientific expertise.[291] This differs from an earlier trade agreement between the United States and Mexico which allowed *either* plaintiff or defendant to call in the experts.[292]

One of the problems with the NAFTA, according to then-Governor

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285. NAFTA, *supra* note 1, art. 2009, 32 I.L.M. at 695–96.

286. *See* NAAEC, *supra* note 3, art. 10.6(c)(iii), at 11. *But see* NAFTIA, *supra* note 139, § 106(b), 107 Stat. at 2065 (United States shall "encourage" the selection of individuals with expertise in environmental issues to serve on NAFTA panels).

287. *Merchant Marine Hearings*, *supra* note 168, at 76 (statement of Bruce Babbitt, Secretary of the Interior).

288. Standards Code, *supra* note 11, ¶14.9, 26 Supp. B.I.S.D. at 23–24.

289. NAFTA, *supra* note 1, art. 2015(4), 32 I.L.M. at 697.

290. Standards Code, *supra* note 11, ¶14.17, 26 Supp. B.I.S.D. at 24 (panels shall use the report of any technical expert group).

291. Indeed, even the panel does not have free rein. NAFTA, *supra* note 1, art. 2014, 32 I.L.M. at 696 (approval of both disputing parties is needed). Under Article 2015, the Scientific Review Board is subject to such terms and conditions as the parties may agree. NAFTA, *supra* note 1, art. 2015, 32 I.L.M. at 696–97.

292. 57 Stat. 833, 841 (1942).

Clinton, was that it "contains no mechanism for public participation in defending challenges to American laws. . . ."[293] Some commentators have suggested that the NAFTA does not preclude non-governmental organizations from providing input into NAFTA panels on their own initiative.[294] But the Government of Canada has declared that "unsolicited briefs" cannot be presented to NAFTA panels.[295] In any event, the failure to provide for greater public access seems a missed opportunity to improve the adjudication of environmental disputes over those currently in place in the GATT.

The National Wildlife Federation has stated that "NAFTA dispute resolution rules are a clear improvement over those of the GATT. . . [because] public release of dispute panel final reports is allowed."[296] The NAFTA does provide for release of the panel report within 15 days unless NAFTA's Free Trade Commission decides otherwise.[297] But the GATT too releases all final reports after they are adopted by the GATT Council.[298] (In practice, they leak soon after issue and are published in *Inside U.S. Trade* well before adoption.)

It is unclear why the National Wildlife Federation thinks the NAFTA rules would be a "clear improvement" over the GATT practice. As with the GATT, panel proceedings under the NAFTA will be confidential.[299] More importantly, since the NAFTA does not require adoption of a report (as the GATT does), a party losing an environmental dispute must change its law within 30 days or face the possibility of trade sanctions by the winning country.[300] Those losing environmental disputes do not normally face that predicament under current GATT practice.

Another green claim about dispute settlement is based on the fact that the NAFTA provides the defending country the right to choose

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293. Bill Clinton, Expanding Trade and Creating American Jobs, Address Before North Carolina State University (Oct. 4, 1992), *reprinted in* BEYOND NAFTA: THE WESTERN HEMISPHERE INTERFACE 192 (Rod Dobell & Michael Neufeld eds., 1993)(reprints only part of the address).

294. Jeffrey P. Bialos & Deborah E. Siegel, *Dispute Resolution Under the NAFTA: The Newer and Improved Model*, 27 INT'L L. 603, 621 (1993).

295. GOVERNMENT OF CANADA, *supra* note 274, at 31.

296. *The North American Free Trade Agreement (NAFTA) and Supplemental Agreements to the NAFTA: Hearings on H.R. 3450 Before the House Comm. on Ways and Means*, 103d Cong., 1st Sess. 374 (1993) (testimony of Stewart J. Hudson, Legislative Representative for National Wildlife Federation).

297. NAFTA, *supra* note 1, art. 2017(4), 32 I.L.M. at 697.

298. Under NAFTA, there is no formal adoption so release occurs earlier than GATT. Decision on Derestriction of Panel Reports, *supra* note 73, 35 Supp. B.I.S.D. at 331.

299. NAFTA, *supra* note 1, art. 2012(1)(b), 32 I.L.M. at 696.

300. *Id.* art. 2019(1), 32 I.L.M. at 697.

NAFTA as the forum in environmental disputes.[301] According to William K. Reilly, the "country defending the measure can elect to have the dispute decided exclusively by a NAFTA panel, operating under the NAFTA's *more environmentally sensitive provisions*. . . ."[302] The right to choose NAFTA as the forum is only beneficial if the NAFTA does have more environmentally sensitive dispute settlement provisions than the GATT. Yet as demonstrated above, the NAFTA lacks such an advantage (except possibly for international standards).

The right of the defending country to select NAFTA as the venue does not apply to complaints about environmental import restrictions involving the global environment (unless they are required by one of the treaties in Article 104).[303] For these cases, such as the U.S.-Mexico tuna/dolphin dispute, the complaining party selects the forum. It seems likely that a complaining party would select NAFTA as the venue in such a case, but for the exact opposite reason suggested by Reilly. In other words, the NAFTA venue will be viewed as preferable by plaintiff countries because it gives parties opposing environmental standards greater leverage if they win the case. That is, they have the right to retaliate with trade sanctions.

Finally, it is argued that

> for challenges to environmental laws to occur, complaints would have to be brought by our NAFTA partners, Canada or Mexico. Some of the scare stories become even more fantastic when one realizes that Mexico and Canada are unlikely to challenge most of the laws cited by NAFTA opponents.[304]

This argument, made by the president of the National Wildlife Federation, is an interesting one. If this prediction is correct, then U.S. laws will not be vulnerable under the NAFTA because challenges can only come from Mexico or Canada. While predicting the future is difficult, studying the past is easy. Of the five challenges against U.S. environmental laws that had occurred at the time of the NAFTA vote, three (sixty percent) of them had either Mexico or Canada (or both) as

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301. The Statement of Administrative Action incorrectly characterizes the NAFTA provisions in Article 2005.3 and 2005.4 as requiring such cases to be heard under NAFTA. SAA, *supra* note 133, at 658.

302. William K. Reilly, *The Greening of NAFTA: Implications for Continental Environmental Cooperation in North America*, 2 J. ENV'T & DEV. 181, 185–186 (1993).

303. NAFTA, *supra* note 1, art. 2005(4)(a), 32 I.L.M. at 694.

304. *Merchant Marine Hearings*, *supra* note 258, at 140 (testimony of Jay Hair).

one of the co-plaintiffs.[305] One might also note that Canada has brought two environmental cases against the United States under the Canada-U.S. Free Trade Agreement.[306] Given this history, one might wonder why the National Wildlife Federation would make the bold prediction that it did.

To summarize: There is little greenery in the NAFTA provisions regulating the use of environmental standards. But that is only the negative part of the agreement; one must also consider the positive part. If the NAFTA contains important new commitments by the three countries to improve their environmental policies, it might then be considered green.

E. *Preamble*

The NAFTA's preamble notes that the three parties are "resolved" to do fifteen things—among them to "promote sustainable development" and to "strengthen the development and enforcement of environmental laws and regulations." Many Bush and Clinton administration officials have read a lot into these points, but the fixation on the preamble seems unjustified.[307] First, a preamble is not normally viewed as an operational part of an agreement.[308] Second, the parties do not explicitly commit to do the fifteen things.[309] Third, NAFTA Article 102 lists six specific objectives, none of which relate to the environment. If the environment really were central to the NAFTA, one would expect to see it mentioned

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305. U.S. Tuna Report, *supra* note 120, 29 Supp. B.I.S.D. 91 (Canada as plaintiff); Petroleum Report, *supra* note 41, 34 Supp. B.I.S.D. 136 (Canada and Mexico as co-plaintiffs); Dolphin I Report, *supra* note 23, 39 Supp. B.I.S.D. 155 (Mexico as plaintiff); Dolphin II Report, *supra* note 126, 33 I.L.M. 839 (European Economic Community and the Netherlands as co-plaintiffs), and *Auto Taxes* Report, *supra* note 126 (European Community as plaintiff). The *U.S. Tuna* case is a dubious environmental one, but the U.S government defended it on environmental grounds.

306. U.S. Lobster Report, *supra* note 64; U.H.T. Milk Report, *supra* note 76.

307. For example, EPA Administrator Carol Browner testified before Congress that "(i)n the NAFTA preamble, parties *commit* to promote sustainable development, to undertake NAFTA activities in a manner consistent with conservation and environmental protection, and to enforce environmental laws and regulations. This is the first time such *commitments* have ever been made in a trade agreement" (emphasis added). *North American Free-Trade Agreement (NAFTA) and Supplemental Agreements to the NAFTA: Hearings Before the House Comm. on Ways and Means*, 103d Cong., 1st Sess. 45, 46 (1993) (testimony of Carol M. Browner)(emphasis added).

308. But a preamble may have some interpretative force. *See* Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 31(2), 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980). *See also* David Voigt, *The Maquiladora Problem in the Age of NAFTA: Where Will We Find Solutions?*, 2 MINN. J. GLOBAL TRADE 323, 340 (1993).

309. *See also* NAFTA, *supra* note 1, art. 102(2), 32 I.L.M. at 297 (which does not mention the Preamble).

here. Fourth, although the NAFTA makes clear that "sustainable development" is a "legitimate objective" for a government to have in connection with the disciplines in Chapter 9, the NAFTA parties do not take the more meaningful step of making sustainable development a joint objective. It is interesting to note that one of the objectives of the NAAEC is to "support the environmental goals and objectives of the NAFTA."[310] This is a blunt attempt to greenwash the NAFTA after the fact. Although it seems doubtful that the NAFTA is the greenest trade agreement ever[311], the NAFTA may have the greenest preamble of any trade agreement.

F. *Upward Harmonization*

In announcing the completion of the NAFTA negotiation, President Bush stated that the agreement "encourages all three countries to seek the highest possible standards."[312] According to U.S. Trade Representative Kantor, "no country in the agreement [NAFTA] can lower its environmental standards—ever."[313] A group of House Republicans wrote President Clinton that even without side agreements, the NAFTA ". . .already [has] considerable commitment to environmental protection. . . ."[314] In response, conservatives like Tom Bethell worry that under NAFTA

> we will forever be stuck with our current level of environmental regulation. An enlightened President five or ten years from now may try to sweep away some of these rules, only to be told that NAFTA makes such deregulation impossible—at least without the consent of Mexico and Canada.[315]

There are two kinds of pressure for downward harmonization of environmental standards. First, there is intergovernmental regulatory pressure aimed at diminishing non-tariff barriers. Second, there is economic or competitiveness pressure as countries with higher stan-

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310. NAAEC, *supra* note 3, art. 1(d).

311. *See infra* text at 65.

312. President's Statement on the Completion of Negotiations on the North American Free Trade Agreement, 28 WEEKLY COMP. PRES. DOC. 1421, 1423 (August 12, 1992).

313. Mickey Kantor, *At Long Last, A Trade Pact To Be Proud Of*, WALL ST. J., Aug. 17, 1993, at A14.

314. Bill Archer et. al., *Republican Follow-On Letter to Clinton on NAFTA Side Pacts*, INSIDE U.S. TRADE, 9 n.21 (1993).

315. Tom Bethell, *Viva NAFTA?*, NAT'L REV., Oct. 18, 1993, at 34, 38.

dards try to maintain investment that might flee or be attracted to countries with lower standards. (NAFTA's response to this second issue will be discussed in the section below.)

The NAFTA's SPS chapter directs parties ". . .to the greatest extent practicable. . .[to] pursue equivalence of their respective sanitary or phytosanitary measures."[316] But this is to be done "[w]ithout reducing the level of protection of human, animal, or plant life or health. . . ."[317] In addition, this chapter directs each party to use relevant international standards as "*a* basis" for its SPS measures.[318] But this also is to be done "[w]ithout reducing the level of protection or human, animal, or plant life or health. . . ."[319] The "without reducing" clause can be viewed as a brake on the NAFTA's injunctions about equivalency and the use of international standards.[320] In other words, the obligation to harmonize in the NAFTA stops short of requiring any reduction in the level of protection.

The NAFTA discourages downward harmonization.[321] But parties can lower their SPS measures at any time for non-harmonization reasons.[322] Furthermore, parties are not required to raise their SPS measures to international levels.[323] Although one party could complain that another's standards are too low, it seems likely that most complaints will be that an importing country's standards are too high. Thus, whatever regulatory pressure the NAFTA applies is likely to be in a downward direction.

For environmental standards, the regulatory pressure is similar. The NAFTA requires that environmental "measures" be based on interna-

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316. NAFTA, *supra* note 1, art. 714(1), 32 I.L.M. at 378. Given that NAFTA tries to distinguish between the level of protection and the measure used to achieve this level, it should be noted that this provision does not contemplate upward harmonization of the levels of protection.

317. *Id.*

318. *Id.* art. 713(1), 32 I.L.M. at 378 (emphasis added). This is not the same thing as saying that national standards must be set to the international level.

319. *Id.*

320. It is interesting to note that the principle that the adoption of international social standards should not lower the existing protection in a country goes back to the Treaty of Versailles. Treaty of Peace, June 28, 1919, art. 405, 225 C.T.S. 188, 379.

321. Yet parties are not directly precluded from lowering their standards for harmonization reasons.

322. *See* NAFTA, *supra* note 1, art. 712(1)&(2), 32 I.L.M. at 377–78. In addition, Article 713.5 indicates that equivalence shall be pursued only ". . . to the greatest extent practicable." *Id.* art. 713(5), 32 I.L.M. at 378. For a different view, see GENERAL ACCOUNTING OFFICE, 2 NORTH AMERICAN FREE TRADE ASSESSMENT OF MAJOR ISSUES 109 (1993) (no country may adopt standards less stringent than international standards).

323. NAFTA, *supra* note 1, art. 712 & 713, 32 I.L.M. at 377–78. This is based on the view that Article 712.2 overrides Article 713.1 to the extent of any inconsistency.

tional standards except where such standards would be "ineffective or inappropriate."[324] The NAFTA also requires parties, "to the greatest extent practicable. . .[to] make compatible their respective standards-related measures. . . ."[325] Yet this is to be done "[w]ithout reducing the level of safety or of protection of human, animal or plant life or health, the environment or consumers. . . ."[326] As with the SPS rules, NAFTA parties can reduce the level of safety or protection of human life or health.[327] But the NAFTA makes clear that as parties undertake their responsibilities for harmonizing standards, they do not have to (and perhaps should not) reduce their level of environmental protection.[328]

There are also several general provisions in the NAFTA committing the parties to work together to raise standards. For example, the NAFTA establishes an SPS committee which "*should* facilitate: (a) the enhancement of food safety and improvement of sanitary and phytosanitary conditions. . . ."[329] The NAFTA also directs the parties to "work jointly to enhance the level of safety and of protection of human, animal and plant life and health. . . ."[330] But neither of these provisions require that environmental standards move solely in an upward direction.

It is also interesting to compare these provisions to the more straightforward provision in the NAFTA regarding competition policy: "Each party shall adopt or maintain measures to proscribe anti-competitive business conduct and shall take appropriate action with respect thereto, recognizing that such measures will enhance the fulfillment of the objectives of this Agreement."[331]

The hollowness of the NAFTA's provisions on the environment can be seen if one mentally substitutes "anti-environment" in the sentence above for "anti-competitive."

Nevertheless, by establishing inter-governmental committees to re-

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324. *Id.* art. 905(1), 32 I.L.M. at 387.

325. *Id.* art. 906(2), 32 I.L.M. at 387.

326. *Id.*

327. Article 906.2 states that the "without reducing" clause is "without prejudice to the rights of any Party under this Chapter." *Id.* Article 904.2 states that "Notwithstanding any other provision of this Chapter, each Party may . . . establish the levels of protection that *it* considers appropriate. . . ." *Id.* art. 904(2), 32 I.L.M. at 387 (emphasis added).

328. But see the analysis of Raymond B. Ludwiszewski who argues that "[o]nce in effect this provision will have a powerful positive impact on the North American environment because it creates a one-way ratchet driving harmonization upward" of all three nations' environmental standards. Raymond B. Ludwiszewski, *"Green" Language in the NAFTA: Reconciling Free Trade and Environmental Protection*, 27 INT'L LAW. 691, 694 (1993) (Ludwiszewski was General Counsel at EPA during the NAFTA negotiations).

329. NAFTA, *supra* note 1, art. 722(2), 32 I.L.M. at 381 (emphasis added).

330. *Id.* art. 906(1), 32 I.L.M. at 388.

331. *Id.* art. 1501(1), 32 I.L.M. at 663.

view SPS and other environmental standards, the NAFTA could lead to initiatives in all countries for upward harmonization. This is not a necessary result of the NAFTA.[332] But if the three governments take these committees seriously, one can anticipate that low-standard countries will raise their standards. Moreover, the very act of establishing a broader market may give an incentive for upward harmonization.[333]

Since many of the claims being made about the NAFTA may refer to the NAFTA-NAAEC package, it is useful to discuss the NAAEC, which also addresses the issue of upward harmonization. The NAAEC does not require upward harmonization or any raising of environmental standards. But it does contain some soft provisions on this issue. First, it directs each party to ". . . ensure that its laws and regulations provide for high levels of environmental protection . . . [and to] . . . strive to continue to improve those laws and regulations."[334] Second, it directs the Council of the Commission for Environmental Cooperation to establish ". . . a process for developing recommendations on greater compatibility of environmental technical regulations . . ."[335] This process is to be established "without reducing levels of environmental protection."[336] These provisions could lead to higher environmental standards. But the statement by U.S. Trade Representative Kantor that no country will be able to lower its standards[337] is unjustified with respect to either the NAFTA or the NAAEC.

G. *Tackling Pollution*

Neither the NAFTA nor the NAAEC contain any provisions mandating specific pollution controls or environmental standards.[338] Yet de-

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332. As U.S. Trade Representative Kantor notes, "The NAFTA harmonization process does not require that we come to agreement with Canada and Mexico on particular standards." *See* Kantor Testimony, *supra* note 125.

333. *See* DAVID VOGEL, THE GLOBALIZATION OF REGULATION, (publication forthcoming).

334. NAAEC, *supra* note 3, art. 3. A U.S. negotiator has written that this provision was known colloquially as the "anti-rollback provision." *See* Daniel Magraw, *NAFTA's Repercussions: Is Green Trade Possible*, 36 ENV'T 14, 39 (1994) (Magraw is Associate General Counsel at EPA and was a NAFTA negotiator). Thus, this provision can be viewed as complementing NAFTA Article 1114.1 (which relates to the derogation of existing standards) and the NAAEC provisions on non-enforcement of existing standards. Of course, as a discipline, NAAEC Article 3 would not prevent any rollback given the vagueness of the term "high." NAAEC, *supra* note 3, art. 3.

335. NAAEC, *supra* note 3, art. 10.3(b), 32 I.L.M. at 1486.

336. *Id.*

337. Kantor, *supra* note 313, at A14.

338. The closest NAFTA comes is in Annex 913(5)(a-1)(2) which gives the Land Transportation Standards Subcommittee the task of implementing a work program for making standards compatible on vehicle emissions by the year 1997 and transportation of dangerous goods by the year

spite this non-existence, the NAFTA is regularly applauded for such provisions. For example, the *New York Times* asserts that "[n]o previous trade agreement tackles as many pollution issues as the NAFTA does."[339] In supporting the NAFTA on the House floor, Congressman Ron Wyden (D-OR) stated that "if the NAFTA goes down, the rules of the General Agreement on Tariffs and Trade [GATT] apply and GATT rules are weaker on environmental protection than are the NAFTA standards."[340] The *Washington Post* declared that "congressmen with an interest in the environment need to remember that there are substantial environmental protections in the agreement. Voting against it won't reduce the toxic pollution in the border areas. But the NAFTA can."[341]

Jose Antonio Alonso Espinosa, a Mexican business executive, stated that "NAFTA has the most extensive environmental and labor standards of any trade agreement."[342] A full-page newspaper advertisement from Citibank states that "[t]he truth is NAFTA is the first trade agreement to embody international environmental standards."[343] According to the CBS Evening News, under NAFTA "all three countries would have to adhere to industrial anti-pollution standards so that it wouldn't be easier, cheaper, and dirtier to move a factory from one country to another."[344] Jack H. Watson Jr., chair of the ABA Task Force on NAFTA, told the House Ways and Means Committee that "NAFTA is the first trade agreement in history to incorporate labor and environmental standards into the subject matter of the agreement."[345]

There are two ways in which the NAFTA could have tackled pollution issues. First, it could have established a North American environmental enclave with all trade based on sustainable development.[346] The GATT

2000. NAFTA, *supra* note 1, ann. 913(5)(a-1)(2), 32 I.L.M. at 392. The NAAEC contains a provision directing the Council to develop recommendations "as appropriate" regarding "appropriate limits for specific pollutants. . . ." NAAEC, *supra* note 3, art. 10(5), 32 I.L.M. at 1486.

339. *NAFTA and the Environment*, N.Y. TIMES, Sept. 27, 1993, at A16.

340. 139 CONG. REC. H9901 (daily ed. Nov. 17, 1993) (statement of Rep. Wyden).

341. *Why Vote for NAFTA?*, WASH. POST, Nov. 2, 1993, at A18.

342. Jose Antonio Alonso Espinosa, *NAFTA: Not a "Shotgun Marriage"*, WASH. POST, Aug. 13, 1993, at A25.

343. WASH. POST, Oct. 24, 1993, at A40 (Citibank advertisement). In the ad, Citibank provides an 800 number for newspaper readers to call to send a "free" telegram to one's local member of Congress. Who says banks don't provide free services anymore?

344. *CBS Evening News With Dan Rather* (CBS television broadcast, Nov. 9, 1993)(transcript on file with *Law and Policy in International Business*).

345. *North American Free-Trade Agreement (NAFTA) and Supplemental Agreements to the NAFTA, Hearings on S. 103-48 Before the House Comm. on Ways and Means*, 103d Cong., 1st Sess. 570 (1993) (testimony of Jack H. Watson, Jr., Chair, ABA Task Force on NAFTA, American Bar Association).

346. In listing this possibility, the author does not mean to suggest that this should have been

would not permit such sustainability rules to been imposed on countries outside the enclave,[347] but these rules could have governed trade among the three countries. Second, the NAFTA could have established certain production standards for North America.

The NAFTA does neither for the environment.[348] But it is interesting to note that the NAFTA does require a "Minimum Standard of Treatment" for investment.[349] In addition, the NAFTA establishes certain production standards relating to intellectual property.[350] The NAFTA also requires the "Enforcement of Intellectual Property Rights at the Border."[351] Furthermore, the NAFTA requires each party to "provide for the *protection* of plant varieties through patents."[352] Of course, when the NAFTA says "protection," it does not mean action to save some of the twenty or more species that disappear each day.[353] It means protecting the patents of inventors and investors.[354]

Although the NAFTA contains no environmental or labor standards, some previous trade agreements did. For example, the Treaty of Commerce and Navigation of 1924 between Italy and the Kingdom of the Serbs, Croats and Slovenes stated that in granting concessions for the utilization of the frontier waterways, "every possible care must be taken to avoid damage to neighbouring fishing rights and the destruction of the fish."[355] The treaty also forbade the use of explosives, caustic, narcotic or poisonous substances of any kind in the frontier zones.[356] The International Convention Concerning the Export and Import of

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done. It is not realistic to demand that a trade agreement embody policies better than the ones in any of the three countries signing the agreement.

347. GATT Article XXIV(5)(b) would prevent countries from raising barriers to outsiders through a free trade agreement. GATT, *supra* note 8, art. XXIV(5)(b), 4 vol. B.I.S.D. at 42.

348. Farah Khakee, *The North American Free Trade Agreement: The Need to Protect Transboundary Water Resources*, 16 FORDHAM INT'L L.J. 848, 884–85 n.3 (1993).

349. NAFTA, *supra* note 1, art. 1105, 32 I.L.M. at 639–40.

350. *Id.* arts. 1701–02, 32 I.L.M. at 670–71.

351. *Id.* art. 1718, 32 I.L.M. at 678. To the extent that this erects new barriers to trade with non-members of NAFTA, it raises questions of consistency with the rules in GATT Article XXIV:5 regarding the establishment of a free trade agreement.

352. *Id.* art. 1709(3), 32 I.L.M. at 673 (emphasis added).

353. *See* WORLD WILDLIFE FEDERATION INTERNATIONAL, SUSTAINABLE USE OF NATURAL RESOURCES: CONCEPTS, ISSUES, AND CRITERIA 10 (1993).

354. For further discussion, see Bruce Campbell, *Globalization, Trade Agreements and Sustainability*, *in* CANADIAN ENVIRONMENTAL LAW ASSOCIATION, THE ENVIRONMENTAL IMPLICATIONS OF TRADE AGREEMENTS, 53–56.

355. Treaty of Commerce and Navigation, July 14, 1928, Italy-Serb., ann. E, art. 22, 82 L.N.T.S. 259, 305 (not in force).

356. *Id.* art. 21.

Animal Products of 1935[357] provides for free trade on certain products (e.g., hides, horns, and wool) coming from countries that have ratified the International Convention for the Campaign Against Contagious Diseases of Animals. This was the first trade treaty to be joined to a health treaty. The latter agreement commits countries to take "joint and effective action," including the enactment of legislation for control over slaughter houses, supervision of animal transport, and the prevention of contagious diseases.[358] In other words, unlike the NAAEC and NAFTA package, these treaties (signed on the same day) contained explicit commitments for health improvements. Thus, it is difficult to see how EPA Administrator Browner can state that the NAFTA "for the first time in a trade agreement, provide for parties to work jointly to *enhance* the level of health, safety and environmental protection. . . ."[359]

H. *Encouraging Investment*

Because the NAFTA contains strong provisions to protect investors,[360] it is anticipated that the NAFTA will increase opportunities for U.S. and Canadian businesses to make new investments in Mexico. Since at least some of this new investment will reduce investment in the United States or Canada, the negotiators sought to reduce the likelihood that investment flows would be distorted by special inducements to tailor environmental standards to meet the needs of individual investors. NAFTA Article 1114 provides that

> The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party *should* not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that another Party has offered such an encouragement, it may request consultations

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357. International Convention Concerning the Export and Import of Animal Products, Feb. 20, 1935, art. I, 193 L.N.T.S. 61, 63.

358. International Convention for the Campaign Against Diseases of Animals, Feb. 20, 1935, art. 1, 186 L.N.T.S. 175, 179.

359. *See North American Free Trade Agreement (NAFTA) and Supplemental Agreements to the NAFTA: Hearing Before the House Comm. on Ways and Means* 103rd Cong., 1st Sess. 47 (1993) (testimony of Carol M. Browner).

360. *See* NAFTA, *supra* note 1, ch. 11, 32 I.L.M. at 639. Indeed, from a U.S. perspective, this was the key part of the agreement. *See* HUFBAUER & SCHOTT, *supra* note 122, at 79–84.

> with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.[361]

Since this provision is considered a centerpiece of NAFTA's green language, it will be useful to discuss it in detail.

Many commentators, on the left as well as the right, have criticized this provision. For example, the Sierra Club describes it as "meaningless from a legal standpoint."[362] Jerry Taylor of the Cato Institute describes it as "puffery for the benefit of the environmental lobby."[363] But these views are too harsh.

Article 1114 is designed to respond to the competitiveness pressure discussed above and is a significant (though very weak) green provision.[364] It is an intellectual descendant of a recommendation made at the U.N. Conference on the Human Environment of 1972 that "[e]nvironmental standards should be established, at whatever levels are necessary, to safeguard the environment, and should not be directed toward gaining trade advantages."[365] There is also a labor precedent to this provision. The Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, approved by the ILO Governing Body in 1977, provides that "[w]here governments of host countries offer special incentives to attract foreign investment, these incentives should not include any limitation of the workers' freedom of association or the right to organise and bargain collectively."[366]

On the other hand, the provision is not as significant as its proponents claim. For example, U.S. Trade Representative Kantor has stated that under this provision, the parties are "renouncing the relaxing of health,

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361. NAFTA, *supra* note 1, art. 1114.2, 32 I.L.M. at 642 (emphasis added).

362. SIERRA CLUB, ANALYSIS OF THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION 9 (1993).

363. Jerry Taylor, *Baseless Fears of Accords*, WASH. TIMES, Sept. 9, 1993, at G3.

364. It is interesting to recall that the U.S. statutory negotiating objective was to "reduce or eliminate the trade distortive effects of certain trade-related investment measures" taking into account domestic objectives including, inter alia, "environmental, consumer or employment opportunity interests and the law and regulations related thereto." *See* 19 U.S.C. § 2901(b)(11)(B)(1993); 19 U.S.C. § 2902(c)(3)(A)(1993). Article 1114.2 was negotiated pursuant to this objective.

365. Declaration of the United Nations Conference on the Human Environment, June 16, 1972, Recommendation 103(e), 11 I.L.M. 1416, 1462. For further discussion, see WILLY BRANDT ET AL., INDEPENDENT COMM'N ON INT'L DEV. ISSUES, NORTH-SOUTH: A PROGRAMME FOR SURVIVAL 114–15 (1980).

366. INTERNATIONAL LABOR ORG., ILO OFFICIAL BULLETIN VOL. LXI, SERIES A, NO.1, TRIPARTITE DECLARATION OF PRINCIPLES CONCERNING MULTINATIONAL ENTERPRISES AND SOCIAL POLICY 54 (1978).

safety or environmental measures to encourage investment."[367] EPA Administrator Browner told the Congress that the NAFTA "prohibits countries from lowering their standards to attract investment."[368] But these statements seem unjustified given the weak language of the provision.

If the parties wished to renounce such "race to the bottom" behavior, then Article 1114 would have been written as mandatory, rather than as precatory.[369] Moreover, the commitment would have been made enforceable.[370] As it is written, however, there is recourse only to consultations, not to dispute settlement.[371]

It should also be noted that the provision is ambiguous on key points. For example, the provision seems to be aimed at waiving or derogating an existing law, but the meaning of "relaxing" is not clear. Thus, it would appear that parties are free to lower their laws for many reasons, but cannot provide waivers for the purpose of attracting investment. It is also unclear whether "relaxing" refers to legislative action in lowering laws (or just to administrative action). Even if it does, there seems little doubt that parties are free to relax their laws for purposes other than attracting or retaining investment. For example, they can relax laws to increase export competitiveness.

Although the federal government does not derogate environmental standards to attract investment, there have been accusations that state governments do. Article 1114, being a NAFTA discipline (albeit a light one), does apply to the states. Presumably it applies not only to attempts by states to attract foreign investment but also attempts by states to attract investments from other states. But the potential effectiveness of this commitment is undercut by the fact that the states have not agreed to this discipline. Moreover, it is unclear whether the Congress has the authority to bind the states on this point by federal law.

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367. *USTR Letter on NAFTA Environmental Standards*, INSIDE U.S. TRADE, Sept. 17, 1993, at 3.

368. *The North American Free Trade Agreement and Its Environmental Side Agreements: Hearing Before the Senate Comm. on Environment and Public Works*, 103d Cong., 1st Sess. 30 (1993).

369. Canada proposed stronger language but the United States refused, claiming that strong language would be bad for the environment. *See Hills Says Rejection of Canadian Green Language in NAFTA Helped Environment*, INSIDE U.S. TRADE, Aug. 28, 1992, at 8.

370. The issue was revisited in the supplemental negotiations, but NAAEC Article 10.6(b) provides only that the new Council will "provide assistance in consultations." Article 1114.2 is not strengthened in any way. NAAEC, *supra* note 3, art. 10.6(b), 32 I.L.M. at 1486.

371. *See* David Voigt, *The Maquiladora Problem in the Age of NAFTA: Where Will We Find Solutions?*, 2 MINN. J. GLOBAL TRADE 323, 348–49 (1993).

I. *Miscellaneous Green Claims*

The Canadian government has touted the fact that the NAFTA calls for the "elimination of all import duties on environmental goods within 10 years."[372] That is true. But, being a free trade agreement, NAFTA calls for the elimination of all tariffs (including on pollution-creating goods). With the exception of pharmaceuticals, all tariffs on industrial products will be phased out over ten years.

After examining the NAFTA carefully, Consumers Union reported that "NAFTA also creates an $8 billion fund for environmental clean-up on the U.S.-Mexican border."[373] Yet no such fund was created by the NAFTA. Secretary of the Treasury Bentsen did announce a program of $7.4 billion cobbled together from state and local governments, the World Bank, the Inter-American Development Bank, the U.S. government, the Mexican government, and $2 billion from a new financing facility.[374] But none of this activity is inherent to the NAFTA. All of these institutions would still be concerned about the environment had the NAFTA failed to go into force. It will be interesting to see whether Consumers Union prepares a follow-up report on the realization of the "$8 billion fund."

The World Wildlife Federation (WWF) released a "Fact Sheet," stating that "[the] NAFTA permits the U.S. to adopt export measures designed to conserve natural resources . . . as long as they are not in fact disguised restrictions on trade."[375] But, export measures are governed by NAFTA Article 309 which prohibits them. The NAFTA provisions on exports are no more lenient than those in the GATT (except with regard to raw logs).

It has been suggested that the provision committing an exporting

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372. CANADIAN GOVERNMENT, NORTH AMERICAN FREE TRADE AGREEMENT (1993). For a similar argument, *see* Steven Globerman, *Trade Liberalization and the Environment, in* ASSESSING NAFTA: A TRINATIONAL ANALYSIS 309 (Steven Globerman & Michael Walker eds. 1993)(tariffs on pollution abatement equipment will be eliminated over time, making this equipment substantially cheaper in Mexico).

373. Consumers Union Position on NAFTA, *reprinted in Environmental Implications of NAFTA: Hearing Before the House Committee on Merchant Marine and Fisheries*, 103d Cong., 1st Sess. 151 (1993). It is unclear whether Consumers Union used a treaty testing facility to ascertain this data.

374. *North American Free Trade Agreement and Its Enviromental Side Agreement: Hearing Before the Senate Comm. on Environment and Public Works*, 103d Cong., 1st Sess. at 55–57 (1993) (statement of Treasury Secretary Lloyd Bentsen)

375. *See* WORLD WILDLIFE FEDERATION, NAFTA Fact Sheet: The Attacks of the Critics of the NAFTA Environmental Package Have No Foundation, *reprinted in NAFTA: Energy Provisions and Environmental Implications: Hearing Before the Subcomm. on Energy and Power of the House Comm. on Energy and Commerce*, 103d Cong., 1st Sess. 204 (1993).

party to facilitate access to its territory for foreign inspectors is a novel one.[376] But this is a common provision in trade and sanitary conventions. For example, the Convention Between Romania and Yugoslavia of 1937 permitted both countries to send inspectors to the other "with or without previous notice."[377]

J. *Greener than the GATT?*

Some commentators have suggested that "NAFTA is, on the whole, *greener* than the GATT."[378] Others go even further. For example, a representative of the Environmental Defense Fund has argued that "[a]ll of the NAFTA provisions with respect to the environment have primacy over GATT mechanisms, and they are not one step better, they're a whole flight of stairs better than the GATT mechanisms."[379]

On any reasonable weighing of the relevant points, these views are erroneous. As demonstrated above, the NAFTA has tighter disciplines on environmental standards than the GATT. Its dispute settlement provisions are generally similar to the GATT's with regard to transparency and participation and much more rigorous than the GATT's regarding adoption of panel reports. For these reasons alone, it would be hard to argue that the NAFTA is greener. It is possible that the NAFTA could have so many other pro-environment provisions that they would outweigh the tighter disciplines on environmental standards. But the only significant green provision is Article 1114 and, from the perspective of this author, this provision is too exclusively hortatory to outweigh the rest.

These views are based on the legal language of the NAFTA versus the GATT. If one could visualize the future clearly, one would also compare how trade might evolve under the NAFTA with the current pattern of trade. It is certainly possible that the NAFTA could lead to new patterns of production that would be cleaner than current patterns. For example, the NAFTA could lead to a lower concentration of plants along the U.S.-Mexico border.

On the other hand, by permitting freer trade without concomitant

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376. NAFTA, *supra* note 1, art. 714.3, 32 I.L.M. at 378. An official request is required.

377. Sanitary and Veterinary Convention, May 13, 1937, Rom.-Yugo., art. 8, 197 L.N.T.S. 163, 169.

378. The author pleads guilty to this erroneous characterization. *See* Steve Charnovitz, *Achieving Environmental Goals Under International Rules*, 2 REV. EUR. COMMUNITY & INT'L ENVTL L. 45, 49 (1993).

379. *Also in the News: The Clinton administration believes . . .*, 10 Int'l Trade Rep. (BNA) No. 37, at 1596 (Sept. 22, 1993).

environmental protections, the NAFTA might lead to a worsening environment. For example, some commentators have suggested that by retaining energy subsidies, the "NAFTA will not reduce, and may even increase, the environmental degradation associated with exploration for oil and gas."[380] Furthermore, it can be argued that the NAFTA locks in anti-environment policies by committing the parties to maintain incentives for fossil fuel-based energy.[381] But the views on both sides are speculative. Thus, the assessment here of NAFTA's greenness is based only on the provisions of its text, as compared to the GATT.

K. *The Greenest Trade Agreement*

U.S. Trade Representative Carla Hills told the House Ways and Means Committee that the NAFTA "does more to improve the environment than any other agreement in history."[382] EPA Administrator Browner told the Congress that the "NAFTA creates unprecedented linkages between trade activities and environmental protection and sustainable development goals, far beyond those in any previous agreement."[383] President Clinton declared that NAFTA "will be the most sweeping environmental protection ever to be part of a trade agreement."[384]Treasury Secretary Bentsen called it the "greenest trade agreement ever negotiated."[385] Deputy U.S. Trade Representative Rufus Yerxa termed it, anthropomorphically, as "the most environmentally conscious trade agreement in history."[386] Secretary of State Warren Christopher has explained that "[u]nlike any previous trade agreement, NAFTA explicitly links trade with the environment."[387] San

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380. *See* Robert K. Kaufmann, et al., *The Effects of NAFTA on the Environment*, 14 ENERGY J., 217, 227 (1993). *See also* Elizabeth J. Rowbotham, *Dumping and Subsidies: Their Potential Effectiveness for Achieving Sustainable Development in North America*, J. WORLD TRADE 145, 164–65 (1993).

381. *See* NAFTA, *supra* note 1, art. 608.2, 32 I.L.M. at 366.

382. *North American Free Trade Agreement: Hearing Before the House Comm. on Ways and Means*, 102d Cong., 2d Sess. 22 (1992) (statement of Carla A. Hills).

383. *North American Free Trade Agreement (NAFTA) and Supplemental Agreements to the NAFTA: Hearing Before the House Comm. on Ways and Means*, 103d Cong., 1st Sess. 46 (1993) (statement of Carol M. Browner).

384. President's Remarks on Endorsements of the North American Free Trade Agreement, 29 WEEKLY COMP. PRES. DOC. 2303–2304 (Nov. 9, 1993).

385. *NAFTA and Related Side Agreements: Hearing Before the Senate Comm. on Finance*, 103d Cong., 1st Sess. 27 (1993) (statement of Treasury Secretary Lloyd Bentsen).

386. *The Great NAFTA Debate*, WASH. POST, Oct. 3, 1993, at C3.

387. WARREN CHRISTOPHER, U.S. DEP'T OF STATE, DISPATCH VOL. 4, NO. 46, NAFTA: IN THE OVERRIDING INTEREST OF THE UNITED STATES 2 (1993). One might note that the Department of State has a large office specializing in treaties.

Diego mayor Susan Golding declares NAFTA to be the "greenest treaty in the history of the world. Most treaties don't have anything about the environment in it."[388]

It is true, as Mayor Golding notes, that most treaties do not have anything about the environment in them. But environmental treaties do, and given that there are over 100 of them,[389] it seems likely that most, if not all, are greener than the NAFTA.

As far as this author knows, no one who has claimed that NAFTA is the greenest trade treaty has presented a comparative analysis of NAFTA versus other trade treaties. It would be helpful if someone were to undertake such an analysis. First, one would look at the free trade agreements that have no disciplines at all on the environment.[390] All other things being equal, they are all greener. Second, one would want to look at trade agreements that do have disciplines and compare them with the NAFTA. Since NAFTA is not even greener than the GATT, it cannot possibly be the greenest trade agreement in this group.[391]

Third, one would want to look at trade agreements that contain positive environmental provisions and compare them with the NAFTA. For example, the treaty establishing the European Coal and Steel Community of 1951 includes the objective of promoting "a policy of using natural resources rationally and avoiding their unconsidered exhaustion."[392] The treaty of Free Trade and Economic Integration Between Guatemala and El Salvador of 1951 provides that both nations shall coordinate their activities "with a view to protecting forest reserves and water resources and preventing soil erosion in the frontier regions of their respective territories."[393]

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388. *This Week With David Brinkley* (ABC television broadcast, Oct. 17, 1993).

389. U.S. INT'L TRADE COMM'N, U.S. ITC PUB. NO. 2351, INTERNATIONAL AGREEMENTS TO PROTECT THE ENVIRONMENT AND WILDLIFE vii (1991).

390. For example, the first free trade agreement between the United States and Mexico of 1857 (which did not go into force) included no disciplines on the environment. *See* Treaty of Commercial Reciprocity Across the Frontier, Feb. 10, 1857, U.S.–Mex., 2 UNPERFECTED TREATIES OF THE UNITED STATES 121 (1991). The first free trade agreement between the United States and Canada of 1911 (which did not go into force) included no disciplines on the environment. *See* Reciprocal Tariff Arrangement, Jan. 21, 1911, U.S.–Can., 4 UNPERFECTED TREATIES OF THE UNITED STATES 199 (1991). At the time the statements about the NAFTA included in this article were made, the NAFTA had not gone into force, and it was uncertain whether it would go into force as scheduled.

391. *See* GATT SECRETARIAT, UNDERSTANDING THE PROPOSED GATT AGREEMENT ON SANITARY AND PHYTOSANITARY MEASURES, 8 (1993).

392. TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY [ECSC TREATY] art. 3(d).

393. 131 U.N.T.S. 133, art. XIX.

More recently, the Agreement on the European Economic Area Between the EU and the European Free Trade Association (EFTA) of 1992 provides for a free movement of goods and also contains a number of environmental commitments, including: (1) the principle of preventive action, (2) the principle that the polluter should pay, and (3) specific commitments by parties to incorporate certain regulations into their national environmental laws.[394] The Association Agreement Between the EU and Poland provides for the free movement of goods and commits the parties to "develop and strengthen their co-operation in the vital task of combating the deterioration of the environment," including actions such as the adoption of joint standards.[395] All of these trade agreements are greener than the NAFTA. In contrast to the NAFTA, their environmental or health commitments are both mandatory and explicit. So it is hard to understand how officials in both the Clinton and Bush administrations could characterize the NAFTA as the greenest trade agreement. It is also hard to understand how the press could print such misinformation without any attempts at verification.

L. *Summary*

Former President Ronald Reagan believes that NAFTA has "environmental sensitivity never before seen in the world."[396] The view taken here is that NAFTA could have been made into an environmentally sensitive agreement, but the opportunity was missed. The environment was a sideshow through most of the NAFTA negotiations. As one Mexican environmentalist explains,

> The language included in [the] NAFTA to address environmental concerns was a very superficial and ineffectual attempt to make it appear that the environmental question has finally been addressed: it was the Mexican groups that were the most unhappy with the whole thing.[397]

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394. Council on the European Communities, Agreement on the European Economic Area, 1992, arts. 1, 73, 74 (in force).

395. Europe Agreement Establishing An Association Between the European Communities and Their Member States, of the One Part, and the Republic of Poland, of the Other Part, 1993 O.J. (L348/1). Unlike the NAAEC, this agreement applies to a very broad range of environmental issues.

396. Ronald Reagan, *Tear Down the Trade Wall*, WALL ST. J., Sept. 13, 1993, at A16.

397. Regina Barba, *NAFTA and NACE: A Mexican Perspective*, in NATIONAL ROUND TABLE ON THE ENVIRONMENT AND THE ECONOMY, SHAPING CONSENSUS: THE NORTH AMERICAN COMMISSION ON THE ENVIRONMENT AND NAFTA 11 (Sarah Richardson ed., 1993).

If the three governments had really wanted to make the NAFTA green, they had 1034 pages following the preamble to do so. Instead of adding to (or hardening) GATT disciplines, as it now does, the NAFTA could have subtracted from (or softened) GATT disciplines. It may not be surprising that the governments—two of which lost their next election—chose not to do so. What is surprising is how easy it was for these governments to persuade many environmental groups (but not the less gullible Sierra Club) that the NAFTA had been greened.

III. POST-NAFTA DEVELOPMENTS

Part III will discuss two important developments in trade policy that occurred after the conclusion of the NAFTA. First, the Clinton administration negotiated the NAAEC with Mexico and Canada. Given the common view that the NAAEC corrected the environmental shortcomings of the NAFTA, this Article will discuss briefly what the NAAEC does and does not do.[398] Second, the Uruguay Round of trade negotiations was concluded. The new agreement has tighter constraints on national environmental legislation than the NAFTA, which makes the NAFTA look tamer by comparison. This Article presents a brief comparison of these two agreements.

A. *NAAEC*

In assessing whether the NAAEC improves the environmental aspects of the NAFTA, it may be useful to pose some questions. First, does the NAAEC undo any of the constraints on environmental policy established in the NAFTA? Second, does the NAAEC incorporate any environmental standards in the way that the NAFTA was alleged to do? Third, does the NAAEC improve environmental enforcement?

Since the NAAEC does not amend the NAFTA, there is no way that the NAAEC could make the NAFTA any less constraining on the environment. Thus, all of the new NAFTA disciplines discussed above on federal and state environmental and health laws remain operative under the NAAEC. In addition, the NAAEC does not strengthen NAFTA Article 1114.2 regarding investment inducements or Article 104 regarding environmental treaties.

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398. See generally Steve Charnovitz, *The Nafta Environmental Side Agreement: Implications for Environmental Cooperation, Trade Policy, and American Treatymaking*, 8 TEMP. INT'L & COMP. L. J. 257 for a more complete discussion of the NAAEC [hereinafter Charnovitz, *Implications*].

The NAAEC does not incorporate any specific environmental standards.[399] Nor does it assign a standard-setting role to the North American Commission on Environmental Cooperation. The closest it gets is the provision calling on the NAAEC Council[400] to establish a process for developing recommendations on greater compatibility of environmental technical regulations "in a manner consistent with the NAFTA."[401] Such recommendations would have to be approved by each environment minister before they could be recommended to the three governments.[402] The NAAEC does not contain any provisions to control environmentally-damaging trade. The closest it gets is the requirement that all three governments *consider* prohibiting the export to the others of a pesticide or toxic substance whose use is prohibited in the exporting country.[403]

The NAAEC has a number of provisions related to environmental enforcement. First, the NAAEC directs each party to "effectively enforce its environmental laws and regulations. . . ."[404] Second, the quality of enforcement may be subject to a "Factual Record" produced by the Commission if at least two NAAEC environmental ministers concur.[405] Third, the quality of enforcement may be subject to dispute settlement if at least two NAAEC environmental ministers concur.[406] The ensuing dispute panel may produce an action plan and if the plan is not followed, the panel may (after some delay) authorize the complaining government to impose trade sanctions.[407]

While the NAAEC enforcement provisions are often touted as tough because of the trade sanctions, it is important to consider these provisions in a broader context. The NAAEC is unique in keying on the existing domestic standards of each country. What international agreements generally do is to commit parties to adopt common standards or carry out common programs. A commitment to enforce one's own

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399. The closest it gets is the commitment of each party to ensure that its own laws "provide for high levels of environmental protection" and that parties "strive to continue to improve those laws and regulations." *See* NAAEC, *supra* note 3, art. 3, 32 I.L.M. at 1486. High level is not defined.

400. The NAAEC Council is composed of the environment ministers of the three countries. *See id.* art. 9(1), 32 I.L.M. at 1486.

401. *Id.* art. 10(3)(b), 32 I.L.M. at 1486; *see also id.* art. 10(2)(m), 32 I.L.M. at 1486.

402. *Id.* art. 9(6), 32 I.L.M. at 1486. The three governments must consider such recommendations. *See id.* art. 2(3).

403. *See id.* art. 2(3), 32 I.L.M. at 1486.

404. *Id.* art. 5, 32 I.L.M. at 1486.

405. *Id.* art. 15(2), 32 I.L.M. at 1486.

406. *Id.* art. 24(1), 32 I.L.M. at 1486.

407. *See id.* pt. V., 32 I.L.M. at 1487.

domestic standard may be the weakest form of international agreement. It remains to be seen how effective the public disclosure of a Factual Record or action plan, or the potential for trade sanctions, will be on promoting better enforcement of environmental laws.[408]

While the NAAEC enforcement provisions are often touted as engendering environmental cooperation in North America, it is important to consider these provisions in a historical context. There have been environmental cooperation agreements in North America throughout the century including the U.S.-Mexico La Paz Environmental Agreement of 1983.[409] What makes the NAAEC novel is that it creates a tripartite, semi-independent commission to organize such cooperation. This is a promising development, but one cannot give much green credit for it yet.

In summary, the NAAEC supplements the NAFTA but does not undo any of the NAFTA's environmental constraints. None of the exaggerations and misrepresentations voiced about the NAFTA (as discussed in Part II) are rendered true by taking account of the NAAEC. Indeed, the environmental supporters of the NAFTA made equally disturbing misrepresentations about what was contained in the NAAEC.[410]

B. *Uruguay Round*

Toward the end of the Bush administration, the Office of the U.S. Trade Representative realized that the Uruguay Round SPS and TBT[411] provisions were too constraining of health and environmental legislation. Thereafter, U.S. Trade Representative Hills floated a proposal in the GATT to weaken these agreements to approximately the NAFTA level.[412] The attempt by the Bush administration to complete the Round before leaving office was unsuccessful. The Clinton administration did not immediately follow up on the Hills SPS/TBT initiative. Indeed, it was not until the final weeks of the Round that the Clinton administration actively sought multilateral agreement to reform these agreements. At that point, the Administration had minimal leverage since its negotiating authority would expire on December 15, 1993. The Adminis-

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408. The first nine months were not reassuringly positive. Allen R. Meyerson, *Trade Pact's Environmental Efforts Falter*, N.Y. TIMES, Oct. 17, 1994, at D1, D7.

409. Agreement To Cooperate in the Solution of Environmental Problems in the Border Area, Aug. 14, 1983, U.S.-Mex., 22 I.L.M. 1025.

410. *See* Charnovitz, *Implications*, *supra* note 398.

411. The Agreement on Technical Barriers to Trade of the Uruguay Round is analogous to Chapter 9 of the NAFTA. *See* TBT AGREEMENT *supra* note 216.

412. *See U.S. GATT Proposal on SPS/TBT*, INSIDE U.S. TRADE, Dec. 25, 1992, at 20.

tration did succeed in making some changes, however.[413] The final Uruguay Round agreement is less environmentally constraining than the Dunkel Text, but more constraining than the NAFTA.[414]

The main differences between the NAFTA and the Uruguay Round provisions on SPS and TBT are discussed below:

1. *International Harmonization*—The NAFTA and Uruguay Round provisions are similar. The only significant difference is that the Uruguay Round does not include the NAFTA proviso that harmonization shall be done "Without reducing the level of protection of human, animal, or plant life or health."[415]

2. *Inter-party Convergence*—The Uruguay Round does not contain the "pursue equivalence" provisions of the NAFTA, but this is a very minor difference.

3. *Internal Consistency*—Under the NAFTA SPS agreement, parties "shall avoid arbitrary or unjustifiable distinctions in such levels in different circumstances, where such distinctions result in *arbitrary or unjustifiable* discrimination against a good of another Party or constitute a disguised restriction on trade between the Parties."[416] Under the Uruguay Round SPS agreement, parties "shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade."[417] The Uruguay Round provision is more constraining because it applies in all cases of discrimination.

4. *Scientific Validity*—For SPS measures, NAFTA requires that they be (1) "based on scientific principles"[418] and (2) "not maintained where there is no longer a scientific basis for it."[419] The Uruguay Round

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413. *See* Michael Bergsman, *U.S. Forces Pro-Green Changes in GATT Sanitary & Physosanitary Text*, INSIDE U.S. TRADE, Dec. 10, 1993, at 1–2.

414. But see the answers to a House subcommittee from the Department of Health and Human Services, in *North American Free Trade Agreement (Part 2): Hearings Before the Subcomm. on Commerce, Consumer Protection, and Competitiveness of the House Comm. on Energy and Commerce*, 103d Cong., 1st Sess. 264 (1993), where the Department states that "the NAFTA provisions [on food safety] are essentially the same as those in the Dunkel Text." This author believes the Department's answer to be too simplistic. But the Department's frankness should serve as a reminder not to exaggerate the extent of the differences between the Dunkel text and the NAFTA.

415. NAFTA, *supra* note 1, art. 713(1), 32 I.L.M. at 378.

416. *Id.* art. 715(3)(b), 32 I.L.M. at 378 (emphasis added).

417. Agreement on the Application of Sanitary and Phytosanitary Measures, art. 5(5), *in* GENERAL AGREEMENT ON TARIFFS AND TRADE, URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 69, 72 (1994) [hereinafter SPS Agreement].

418. NAFTA, *supra* note 1, art. 712(3)(a), 32 I.L.M. at 378.

419. *Id.* art. 712(3)(b), 32 I.L.M. at 378.

requires that measures be (1) "based on scientific principles,"[420] (2) "not maintained without sufficient scientific evidence" although a nation may use "pertinent information" when "relevant scientific evidence is insufficient,"[421] and (3) be based on a higher level of protection than an international standard only if a nation determines that the international standard is not appropriate to achieve its appropriate level of protection.[422] The two agreements are approximately the same.

5. *Trade Restrictiveness*—Unlike the NAFTA, the Uruguay Round SPS Agreement does contain a trade restrictiveness test. It requires that nations use an alternative measure if it is "significantly less restrictive to trade."[423] In addition, the alternative measure must be "reasonably available taking into account technical and economic feasibility."[424] The Uruguay Round TBT Agreement also contains a trade restrictiveness test. It requires that nations amend regulations if their ". . . objectives can be addressed in a less trade-restrictive manner."[425]

6. *Burden of Proof*—The Uruguay Round SPS and TBT Agreements are not explicit about the burden of proof in a challenge to a national standard. One might presume that the plaintiff has the burden of proof.[426] If so, they would be the same as NAFTA. For international standards, the TBT clearly assigns the burden of proof to the plaintiff.[427]

In summary, the Uruguay Round and NAFTA agreements are similar except in two areas that the NAFTA is less constraining. That is, the Uruguay Round contains a requirement on internal consistency in SPS and trade restrictiveness tests in both SPS and TBT. Instead of viewing the NAFTA as less constraining, however, some commentators portray it as more protective. For example, Daniel Magraw has suggested that the NAFTA provisions ". . . are more protective of the environment than equivalent provisions of the so-called Dunkel text. . . ."[428] Yet this is inverted logic. Neither the NAFTA nor the Dunkel Text are "protective" of the environment. Both contain constraints on how countries can

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420. SPS Agreement, *supra* note 417, art. 2(2).

421. *Id.* arts. 2(2) & 5(7).

422. *Id.* art. 3(3).

423. *Id.* art. 5(6) n.3.

424. *Id.* art. 5(6).

425. TBT AGREEMENT, art. 2(3), *supra* note 216, at 118.

426. A study by GAO concludes that the plaintiff would have the burden of proof in one type of SPS challenge. *See* GENERAL ACCOUNTING OFFICE, GAO—GGD—94–83B, THE GENERAL AGREEMENT ON TARIFFS AND TRADE URUGUAY ROUND FINAL ACT SHOULD PRODUCE OVERALL U.S. ECONOMIC GAINS 168 (1994).

427. TBT AGREEMENT, art. 2(5) *supra* note 216, at 118.

428. *See* Magraw, *supra* note 334, at 16.

protect the environment. It is true that the NAFTA's constraints are less onerous. But that does not make it *more* protective; it makes the NAFTA *less* threatening to the environment.

Assuming that the Uruguay Round agreement goes into force, there will be two trade agreements operative for Mexico, Canada, and the United States. This raises some interesting issues as to which rules will dominate. The NAFTA affirms the existing GATT, but not a future GATT.[429] While the NAFTA specifically incorporates certain GATT provisions in a successor agreement,[430] it does not do so for chapters 7 or 9.[431] Therefore, it seems clear that the NAFTA's rules on SPS and Standards were meant to survive any new GATT Agreement. In addition, the defending party gets to choose which agreement a dispute will be heard in. Therefore, the defending party could choose NAFTA over the World Trade Organization (WTO) in order to avoid more constraining disciplines.[432]

It is interesting to note that a technical argument could be made that the new WTO agreement could supersede the NAFTA as a more recent "treaty" on matters where the WTO is less tolerant of trade measures.[433] For most trade measures (e.g., tariffs), the NAFTA is less tolerant. But for some environmental measures, the WTO would be less tolerant. (In other words, the NAFTA requires freer trade but permits more trade restrictions.) It seems unlikely that any of the NAFTA parties would argue that the Uruguay Round has superseded the NAFTA.[434] But this legal point has never come up. Until the Uruguay Round, the GATT had not been amended to increase disciplines on national standards. So the interaction between a stronger GATT and existing free trade agreements has never been considered.

Another potential treaty inconsistency could arise if the NAFTA

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429. NAFTA, *supra* note 1, art. 103(1), 32 I.L.M. at 297. For a statement by U.S. Trade Representative Kantor that Article 103 applies only to preexisting agreements, see 139 CONG. REC. H9929 (daily ed. Nov. 17, 1993).

430. *See* NAFTA, *supra* note 1, arts. 301(1), 2101(1)(b), 2005(1), 32 I.L.M. at 299, 699, 694.

431. For Chapter 9, NAFTA Article 903 affirms only the "existing" TBT Agreement. *Id.* art. 903, 32 I.L.M. at 387.

432. It is unclear how the NAFTA venue selection provision will be implemented. If a NAFTA party lodges a complaint in the WTO, how will it be returned to the NAFTA Free Trade Commission?

433. *See* Vienna Convention on the Law of Treaties; *supra* note 300, art. 30, 1155 U.N.T.S. at 355.

434. But consider this example. What if a U.S. food safety restriction kept out an agricultural product from Mexico and Honduras. Imagine that Honduras complains to the WTO and wins and the U.S. admits the Honduran product. Yet the United States continues to restrain the Mexican product because NAFTA's rules give the United States more latitude. Mexico might appeal to the WTO arguing that its tighter disciplines on non-tariff barriers supersede the NAFTA.

Committee on Standards-Related Measures were to develop new environmental standards for products in North American trade.[435] Under the current GATT, the national treatment principle in GATT Article III would allow this standard to be applied to imports. But the Uruguay Round TBT Agreement supersedes GATT Article III to the extent of any inconsistency.[436] Therefore, a party outside of North America could complain to the GATT about a new NAFTA standard on the grounds that it is too trade restrictive. This situation will make it hard for regional economic agreements, such as the NAFTA, to engage in joint environmental standard setting.

IV. RHETORIC, REALITY, AND DEMOCRATIC GOVERNMENT

The NAFTA offers considerable economic benefits to the three countries.[437] In the author's opinion, the economic gains are worth the small reduction in environmental sovereignty. Other observers will have different objective functions. For those who judge the NAFTA solely on environmental grounds, it is far from clear whether the NAFTA will be good for the environment. If one looks backward and asks whether trade liberalization has been good for the environment of the border area, one would have to say no.[438] Yet if one looks at the experience over the past few years, as Mexico auditioned for a free trade agreement with the United States, one would have to say yes.[439]

Looking toward the future, one can imagine both positive and negative scenarios. On the one hand, economic development and trade can be consistent with a healthy environment if the proper environmental policies are in place. But since proper policies are not in place in the three countries, and since the NAAEC does little to remedy this, there are grounds for concern. On the other hand, a free trade agreement can raise income in all three countries and therefore make them more able to afford environmental protection. Trade liberalization can also lead to a more efficient use of natural resources. But the critical factor will be the political will of each of the governments to undertake reforms. That is unknown. As Mexican President Carlos de Salinas had noted, "[i]t is

435. *See* NAFTA *supra* note 1, art. 913.2(d), 32 I.L.M. at 390.

436. Agreement Establishing the WTO, Article XVI:3; Annex 1A (general interpretive note).

437. *See* Brink Lindsey, *Free Trade Is Its Own Reward*, J. COM., Aug. 31, 1993, at 12A.

438. There is general agreement that the maquiladora program was an environmental disaster. *See* Steve Charnovitz, *Environmental and Labour Standards in Trade*, WORLD ECON., May 1992, 335, 351–52.

439. *See generally* GOVERNMENT OF MEXICO, A BETTER MEXICO, A BETTER ENVIRONMENT (1993).

not automatic that with growth the environment will improve, but it is automatic that with poverty the environment will worsen."[440]

The Mexican Business Council declared in a recent newspaper ad that "NAFTA is a good deal for everyone who cares about the environment—and for the trees, rivers and wildlife that are part of it."[441] Yet a prominent Mexican environmentalist believes that the NAFTA would only perpetuate past anti-environment policies.[442] The same gulf of opinion exists in the United States and Canada. It is unfortunate that the NAFTA negotiators overlooked the opportunity to set up an institution to bring together business and environmental groups in the three countries.[443] The NAFTA Commission is bureaucratic and unimaginative.

NAFTA as a Package and the Packaging of the NAFTA

U.S. Trade Representative Kantor stated that the NAFTA package contains "truly path-breaking advances in the area of trade and the environment."[444] *USA Today* declared "[p]ass NAFTA, and the North American continent will grow greener."[445] The *Journal of Commerce* declared that "[e]ven a cursory reading of NAFTA shows it's a clear winner for the environment."[446] While a cursory reading might lead to that conclusion, a close reading demonstrates that many of NAFTA's putative pro-environment provisions are neutral or constraining of environmental regulation. The thesis that the NAFTA is "green" is based on a perception that merely affirming environmental sovereignty within a trade agreement is a notable achievement. This perception is unwarranted. What matters in a trade agreement are the disciplines being imposed, not the "rights" being underlined. A truly green trade treaty would assure that the newly engendered trade does not abase the environment or undermine an environmental protection regime. Neither assurance is provided by the NAFTA. While there are tiny specks of

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440. *See* WILLIAM A. ORME, JR., CONTINENTAL SHIFT, FREE TRADE & THE NEW NORTH AMERICA 106 (1993).

441. WASH. POST, Oct. 27, 1993, at A20 (advertisement).

442. Carlos A. Heredia, *Trade Pact Won't Save Mexico's Environment*, MIAMI HERALD, INT'L EDITION, July 5, 1993, at 11A.

443. For a proposal, see Steve Charnovitz, *NAFTA's Link to Environmental Policies*, CHRISTIAN SCI. MONITOR, Apr. 21, 1993, at 19.

444. Testimony before the Senate Commerce Committee, October 21, 1993.

445. *Grow Green With NAFTA*, USA TODAY, Sept. 21, 1993, at A12.

446. *Environmental NAFTA*, J. COM, Oct. 1, 1993, at A6.

greenness here and there, most of the ecological benefits to the NAFTA are only skin-deep (or rather Preamble deep).

As this study has shown, much of the green rhetoric about the NAFTA is incorrect. Admittedly, the NAFTA is complicated; so, interpretative errors can be made. But there has been an unmistakable persistent pattern of deception by the pro-NAFTA lobby, especially Clinton administration officials.[447] When environmentalists made erroneous statements of the NAFTA's greenness, no one in the Clinton administration sought to disabuse them of these notions. Equally troubling, many newspapers exacerbated the public's misunderstanding by presenting erroneous accounts of the NAFTA's provisions based on press releases from the Administration rather than on any independent or objective reporting.

So what, one might say. The anti-NAFTA camp was duplicitous too. That is true. But it does not justify other attempts to mislead the public, especially by national leaders. The NAFTA is very important for its utilitarian, economic benefits. But there was no moral exigency about the NAFTA to justify an official policy of deception. It is bad when business advocates of the NAFTA engage in inaccurate advertising because that can discredit the case for free trade. It is also bad when national environmental organizations erode their credibility with pro-NAFTA hyperbole. But it is far worse when government officials shade the truth because that gnaws at the bonds of trust between citizens and their government. No administration can afford to let that happen. A combination of maximal rhetoric and minimal substance is sure to create a credibility gap.

447. *See* Michael Kinsley, *Spin Sickness*, NEW REPUBLIC, Nov. 29, 1993, at 4 ("... Clinton seems to have the spin disease worse than most"); Robert J. Samuelson, *Clinton: Passionate Hypocrite*, WASH. POST, Jan. 19, 1994, at A19 ("Clinton's record ... is littered with exaggerations and calculated fibs"); *Distinguishing Characteristics*, NEW REPUBLIC, May 30, 1994, at 7 (pointing out that Clinton's reflexive aversion to candor has begun to amount to something close to a pathology); Ruth Marcus, *The White House Isn't Telling Us the Truth*, WASH. POST, Aug. 21, 1994, at C9 ("... the Clinton White House often seems to be following a pattern of knowing or reckless disregard of the truth").