NAFTA'S SOCIAL DIMENSION: LESSONS FROM THE PAST AND FRAMEWORK FOR THE FUTURE

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A continental accord for free trade and secure investment is an important achievement. The NAFTA side agreements on environmental and labor issues could make it even better. While these agreements remain a work in progress, it is not too early to draw lessons from the negotiations and to suggest a future framework for social issues related to trade.[1]

The article is divided into four parts. Part I discusses the historical context of regional concerns about environmental and labor standards. This background is helpful for judging the significance of what was included in the NAFTA as well as what was purposefully left out. Part

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The views herein are those of the author only. The author thanks Jeffrey Schott for his helpful comments.

[1]This article will emphasize the environment but labor rights will be covered to a limited extent. Other labor issues, such as worker retraining, job creation, and immigration, will not be covered here. Other aspects of the social dimension—such as the impact on legal systems, the role of women, or popular culture—will likewise not be covered here.

II assesses the environmental provisions in the NAFTA and reviews the negotiations in the Bush era (1990–1992). Part III assesses the supplemental accords being raised in the Clinton era (1992–1993). Part IV suggests ways to gain more from the coordination of trade, environment, and labor policies in North America. Adding a social dimension to the NAFTA would increase the potential benefits of the trilateral pact.

The reader will be spared the usual litany of environmental horror stories about Mexico (or for that matter, about Canada and the United States).[2] Suffice it to say that the border zone and parts of Mexico have become ecological disaster areas, but this situation is now improving.[3] The environmental camp has argued that these improvements would not have occurred had environmental activists not barged into the NAFTA debate. The commercial camp has argued that it is Mexico's growing economy that has led to these favorable changes. Both views contain some truth.

NAFTA has permanently changed the dialogue about trade and the environment. Environmentalists know a lot more about the economic benefits of trade and the purpose of trade agreements than they knew 3 years ago. Trade gurus know a lot more about food safety, toxic waste dumping, sustainable development, and environmental enforcement than they knew 3 years ago. Just as the NAFTA is breaking down the commercial walls between countries, it is also breaking down the intellectual (and professional) walls between environmentalists and trade specialists.

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[2]Some of the stories are amusing. For example, in 1991, one entrepreneur in Mexico City opened oxygen booths in local malls to sell breaths of fresh air. See Matt Moffett, "Best Things in Life Aren't Always Free in Mexico City," *The Wall Street Journal*, May 8, 1991, at A1.

[3]For a discussion of these improvements, see Gary Clyde Hufbauer and Jeffrey J. Schott, *North American Free Trade: Issues and Recommendations*, Washington: Institute for International Economics, 1992, at 131–153.

The NAFTA debate has also provided a needed reality check to those in business and government who have argued that raising U.S. environmental standards will cause employers to relocate production abroad. It has now become conventional wisdom that environmental compliance costs are generally too small a fraction of total costs to have any major disemploying effect.[4] One exception is the *National Review*, which argues that Mexico's lax enforcement "will put U.S. exporters at a competitive disadvantage." This conservative journal recommends that "U.S. business groups should seize this moment to push for relief at home."[5]

I. HISTORICAL CONTEXT: THE WORLD BEFORE 1990

In considering the environmental labor aspects of NAFTA, it should be recognized that much of the debate was based on two widely held but false assumptions: first, that proposals for a North American environmental policy were typical examples of overreaching by Greens; and second, that social issues have traditionally been kept independent of trade talks. Both assumptions are discussed below.

Regional Environmental Cooperation

Environmental cooperation between the governments of Canada, Mexico, and the United States began with the North American Conservation Conference of 1909. The conference (which was held at the ministerial level) produced a comprehensive and forward-looking "Declaration of Principles" that is as relevant today as it was then.[6]

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[4] For example, see Roberto Salinas-Leon, "The 'Green Herring' of NAFTA," *Journal of Commerce*, June 25, 1993, at 6A.

[5] "After NAFTA," *National Review*, May 24, 1993, at 14.

[6] Shortly before he died in 1946, Gifford Pinchot noted that the Declaration (which he coauthored) was as "pat to the moment" then as it was in 1909.

The conference concluded that

> Natural resources are not confined by the boundary lines that separate Nations. We agree that no Nation acting alone can adequately conserve them, and we recommend the adoption of concurrent measures for conserving the material foundations of the welfare of all the Nations concerned.[7]

Among the recommendations agreed to by the three governments were the following:

- Immediate action is necessary to prevent further pollution, mainly by sewage, of the lakes, rivers, and streams throughout North America.[8]
- Taxation of timber and timber land should be adjusted in such a manner as to encourage forest conservation and forest growing.[9]
- Needed actions include putting game protection under regulation, the creation of extensive game preserves, and special protection for such birds as are useful to agriculture.[10]

Many of the principles advocated by this conference were acted on in future years.[11] For example, in 1911 Canada (Great Britain) and the United States negotiated a treaty to curb hunting and trade in fur seals.[12] In 1936, Mexico and the United States negotiated a treaty to

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[7]For the full text, see Loomis Havemeyer (ed.), *Conservation of our Natural Resources*, New York: Macmillan, 1938, Appendix II, at 535.

[8]*Id.*, at 536. The "trade school" of the trade and environment debate often cites pollution in a foreign lake as a matter about which other countries have no legitimate stake.

[9]*Id.*

[10]*Id.*, at 540.

[11]A month before the Conference, Canada (Great Britain) and the United States had signed a Boundary Water Treaty wherein the parties agreed that such waters "shall not be polluted on either side to the injury of health or property on the other." See 36 Stat. 2448, Article IV.

[12]37 Stat. 1538 (no longer in force).

curb hunting and trade in migratory birds and mammals.[13] In the Mexico–U.S. Water Utilization Treaty of 1944, the two countries agreed "to give preferential attention to the solution of all border sanitation problems."[14] In the Mexico–U.S. Agreement of 1983 (known as the La Paz Accord), the two countries agreed "to adopt the appropriate measures to prevent, reduce and eliminate sources of pollution in their respective territory which affect the border area of the other."[15]

In addition to wildlife conservation, the three countries also considered common health standards. For example, the Seventh Pan American International Conference of 1933 recommended that member nations incorporate "pertinent regulations" for food and drugs into their domestic sanitary legislation. The conference also declared that food and drug exports "shall comply with the laws and sanitary regulations of the country of destination."[16] Sixty years later, the problem of the safety of food in international commerce remains.[17] But the issue today is whether the country of destination has a right to apply its food safety standards to imports. Another current issue is whether nations should be able to apply more stringent food standards than promulgated by the international Codex Alimentarius Commission. In contrast to 1933, only the boldest progressive today would suggest that all countries commit themselves to attaining international food safety standards in domestic production.

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[13] 50 Stat. 1311. In 1920, the U.S. Senate had enacted a resolution calling upon the President to negotiate bird protection treaties with Latin American countries. See *Congressional Record*, Vol. 58, at 500 and Vol. 59, at 2635.

[14] 59 Stat. 1219, Article 3.

[15] Public Papers of the Presidents of the United States: Ronald Reagan, 1983, Article 2, at 1168.

[16] U.S. Department of State, Conference Series No. 19, 1934, Appendix 51, at 220.

[17] For example, see Hobart Rowen, "Are Food Imports Safe?" *The Washington Post*, May 31, 1990, at A23.

The desirability of coordinating labor standards also was given consideration in the early twentieth century. For example, the First Pan American Scientific Conference of 1908 recommended an International Labor Bureau composed of representatives from each national labor ministry.[18] The purposes of the bureau were to collect data, to "formulate and encourage American labor legislation," and to "promote a new Pan-American economic social Congress."[19] Only the first two purposes were accomplished to any extent.

Social Provisions in Trade Agreements

Proponents of public policy innovation invariably face a dilemma. Should they buttress the legitimacy of their idea by noting the precedents for it? Or should they ignore the past in order to emphasize their creativity? Most participants in the NAFTA debate chose the latter course.

At the beginning, the environmentalists took the position that trade agreements have always been oblivious (or hostile) to the environment, and therefore the NAFTA had to break new ground. By the summer of 1992, the Bush administration had caught on and put forward the view that, by adding a little language about the environment, the three governments had accomplished a historically significant deed. According to the White House "Fact Sheet":

> The NAFTA marks the first time in the history of U.S. trade policy that environmental concerns have been directly addressed in a comprehensive trade agreement.[20]

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[18] See *Bulletin of the International Union of the American Republics*, April 1909, at 580.

[19] *Id.*, at 590.

[20] *Weekly Compilation of Presidential Documents*, 1992, at 1425.

In reality, both views are exaggerated. During the three decades before the GATT came into being, many countries negotiated bilateral treaties or trade agreements to impose disciplines on import prohibitions and discriminatory tariffs. Virtually all of these agreements included an exception for restrictions aimed at protecting life and health.[21] For example, the Canada–U.S. trade agreement of 1935 provided an exception for restrictions "designed to protect human, animal or plant life."[22] The Mexico–U.S. trade agreement of 1942 provided an exception for restrictions "designed to protect human, animal or plant life or health."[23] The Canada–Mexico trade agreement of 1946 provided a comprehensive exception for restrictions

> imposed for the protection of plants or animals, including measures for protection against disease, degeneration or extinction as well as measures taken against harmful seeds, plants or animals.[24]

This 1946 language makes clear that the scope of the exception goes far beyond sanitary measures. Moreover, the coverage of import measures relating to "extinction" would seem to imply an "extra-jurisdictional" character for this exception.

The linkage between labor and trade goes back even earlier. One of the little-noted ironies of the "worker rights" debate is that the first trade agreement between Mexico and the United States, the treaty of 1828, failed to pass the Mexican Senate out of concern for worker

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[21] For a discussion of the history of the environmental exception in trade agreements, see Steve Charnovitz, "Exploring the Environmental Exceptions in GATT Article XX," *Journal of World Trade*, October 1991, at 37.

[22] 49 Stat. 3960, Article XII (no longer in force).

[23] 57 stat. 833, Article XVII (no longer in force).

[24] 230 U.N.T.S. 184, Article VI.

rights *in the United States*. Although this episode has been chronicled elsewhere, the basic facts are worth repeating here.[25]

In 1828, Mexico and the United States negotiated a Treaty on Amity, Commerce, and Navigation that provided unconditional most-favored-nation treatment and a limited form of national treatment.[26] This treaty was approved by the U.S. Senate. But it was rejected in Mexico's Senate, mainly over moral objections to the provision giving American slave holders the right to recover fugitive slaves fleeing to Mexico.[27] Three years later, a new treaty, without the slave recovery provision, was approved by both countries.[28] In 1859, the two countries negotiated their first *free* trade agreement.[29] But this treaty was rejected by the U.S. Senate.[30]

The problem of unfair trade arising from foreign labor conditions was examined thoroughly in 1946–1948 at the U.N. Conferences that wrote the Charter for the International Trade Organization (ITO). Mexico, the United States, and a few other countries drafted an article on fair labor standards which in the final version declared that

> [the Members] recognize that unfair labour conditions, particularly in production for export, create difficulties in international trade, and, accordingly, each Member shall take

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[25] See William R. Manning, *Early Diplomatic Relations Between the United States and Mexico*, Baltimore: Johns Hopkins Press, 1916, at 229–51.

[26] The treaty is reprinted in Christian L. Wiktor (ed.), *Unperfected Treaties of the United States of America*, Dobbs Ferry: Oceana, 1976, at 83.

[27] *Id.*, Article 33. This provision is analogous to the intellectual property provision in NAFTA.

[28] 8 Stat. 410. (This treaty remained in force until 1881.)

[29] *Unperfected treaties*, *supra* note 26, at 171.

[30] A similar free trade agreement was negotiated in 1883 and ratified by both countries. But it never went into force because the U.S. Congress failed to pass the needed implementing legislation. See Alfred Eckes, "US–Mexican Trade, 1880s Style," *Journal of Commerce*, Sept. 10, 1992, at 8A.

whatever action may be appropriate and feasible to eliminate such conditions within its territory.[31]

Controversies about foreign labor standards were eligible for dispute settlement under the ITO's rules. The ITO never came into existence, however, because of opposition to U.S. membership within the Congress and the business community.

II. NEGOTIATING THE NAFTA

The environmental aspects of NAFTA went through three phases during the Bush era—denial, adaptation, and hyperbole. Each is reviewed below.

Denial

The initial stance of the Bush administration was to deny that environmental or labor provisions had any place in the NAFTA.[32] The Mexican government adopted a similar line calling for the environment to be covered only in "parallel" talks. There was advice from the Congress that the administration was underestimating the depth of concern by environmental and public interest groups. Some recommended to USTR that they establish an advisory committee on the environment to get better input. But USTR decided against doing so on the grounds that such a committee would "add legitimacy" to environmental complaints.

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[31] U.N. Doc. E/CONF.2/78, Article 7.

[32] For example, see "Oil Exploration, Environment, Immigration Should Not Be in FTA, Mexican Official Says," *International Trade Reporter*, October 31, 1990, at 1637 and "USTR Reluctance to Debate Social Aspects of Mexico Pact Worries FTA Backers," *Inside U.S. Trade*, January 4, 1991, at 8.

Adaptation

The second phase was the adaptation to political reality, namely, that fast-track extension was in trouble in the U.S. House of Representatives. Working closely with key NAFTA supporters in the Congress, the White House sent a deftly written report (the May 1, 1991 letter) to the Congress that appeared to deal with many of the environmental and labor concerns being raised.[33] This strategy was successful in preserving fast track, but served as a sedative rather than an antidote to the underlying disagreements.

Although the Bush administration prevailed in the fast-track vote, this was done without a Democratic majority in either house. Fifty-seven percent of Senate Democrats voted against fast-track extension. Over 65% of House Democrats voted against it.[34] Initiating trade negotiations without first gaining support of the majority party in Congress is like making bread without yeast. Initial superficial appearances will be deceiving.

Another problem was that the environmentalists had split among themselves leaving bruised feelings. The action by the USTR to seed six of the official advisory committees with environmentalists who had *not* opposed the fast-track extension served to intensify the cynicism about the administration's intentions.[35] Furthermore, by appointing only supporters to the advisory committees, the administration missed a chance to broaden NAFTA's environmental base.

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[33] See U.S. House of Representatives, Committee on Ways and Means, *Exchange of Letters on Issues Concerning the Negotiation of a North American Free Trade Agreement*, WMCP 102-10, May 1, 1991.

[34] Even more revealing of the intensity of opposition was that a slim majority of Democrats *opposed* the rule bringing fast track to the House Floor. This is an extremely rare event.

[35] See Michael Gregory, "Environment, Sustainable Development, Public Participation, and the NAFTA: A Retrospective," *Journal of Environmental Law and Litigation*, Vol. 7, 1992, at 99, 106–7.

A third problem was the inconsistent treatment of labor and the environment. Although the administration agreed to include environmental issues related to trade within the NAFTA, no such commitment was made for worker rights. The USTR took the position that the AFL-CIO was unalterably opposed to NAFTA and therefore any efforts would be wasted.

When the NAFTA negotiations concluded in August 1992, the administration had achieved its core environmental commitment that the "United States will not agree to weaken U.S. environmental and health laws or regulations as part of the FTA [free trade agreement]."[36] Nevertheless, it is hard to credit this as much of a victory.[37] Neither the Canadians nor the Mexicans were aiming to weaken U.S. environmental standards.[38] Indeed, the only way that this achievement could have any significance is if a different outcome were being pursued elsewhere, such as the GATT or the Uruguay Round.[39] Some observers had suggested that the Administration was seeking to use the new Uruguay Round codes to suppress domestic environmental laws,[40] but the administration had repeatedly denied that the draft Uruguay Round text would do so.[41]

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[36] *Exchange of Letters*, *supra* note 33, at 80.

[37] Indeed it may have been a defeat if the Bush administration had to give away something in order to maintain the right of the United States to keep its legislated environmental standards.

[38] Apparently, the *New York Times* thought otherwise. See "Free Trade, but With Time Bombs," *The New York Times*, October 6, 1992, at A22 (the accord already provides unprecedented protection for federal and state environmental regulations against challenge by Mexico and Canada).

[39] It should be noted that the NAFTA is not more tolerant of environmental trade measures than the GATT. But the NAFTA is more tolerant than the pending Uruguay Round agreements.

[40] For a good discussion, see Caroline Thomas, *The Environment in International Relations*, London: Royal Institute of International Affairs, 1992, at 109–11.

[41] For a discussion of the issues, see Steve Charnovitz, "Trade Negotiations and the Environment," *International Environment Reporter*, March 11, 1992, at 144.

Hyperbole

Perhaps it was the heat of the electoral campaign, but for some reason the Bush administration was not content to sell the NAFTA on its merits—namely, trade and investment liberalization. Instead, President Bush boasted that "the NAFTA contains unprecedented provisions *to benefit* the environment."[42] Ambassador Hills claimed that the NAFTA "is the first such accord to include provisions to protect and improve the environment."[43] Let us consider the accuracy of these statements as well as their political significance.

Although free trade could preserve the environment by increasing the efficiency of resource use, President Bush seemed to be suggesting more in declaring that NAFTA contains "unprecedented provisions to *benefit* the environment." On close reading, however, the provisions seem neither unprecedented nor particularly responsive to environmental concerns. For example, the administration pointed to the fact that the NAFTA would not require a lowering of U.S. standards. Yet as explained above, none of the previous trade agreements among the three countries had required such lowering.[44] The administration also pointed to the NAFTA's abstention from requiring downward harmonization of environmental standards. But the absence of antienvironment provisions does not render the NAFTA proenvironment.

Former Environmental Protection Administration (EPA) Administrator William K. Reilly suggested that a "primary purpose of the NAFTA," as indicated by language in its preamble, is to "promote

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[42] *Weekly Compilation of Presidential Documents*, 1992, at 1690.

[43] Carla Hills, "America's Free Trade 'Firsts'," *Journal of Commerce*, August 14, 1992, at 8A.

[44] The Canada–U.S. Free Trade Agreement also contained the standard life and health exception. See 27 I.L.M. 281, Articles 603, 609, and 1201.

sustainable development."[45] Yet it is unconvincing to cite three words in a preamble to a 2000-page agreement as evidence of the "primary purpose" of that agreement. Using the same logic, the GATT could be condemned as inherently antienvironment because its preamble calls for "developing the full use of the resources of the world."[46] Whether the GATT is environmentally friendly depends on its 38 articles of rules, not on its preambular rhetoric.

The Bush administration claimed that the free trade agreement "encourages the NAFTA parties to strengthen standards by harmonizing upwards."[47] That is not true. The NAFTA does not obligate or encourage its parties to move toward equivalent (or higher) levels of protection.[48] The closest it gets is an innocuous provision directing parties to "work jointly to enhance the level of safety and of protection of human, animal and plant life and health, the environment and consumers."[49] The NAFTA does have provisions suggesting more "equivalent" or "compatible" *measures*.[50] But the measure a country uses to achieve its chosen level of protection is a different matter than the environmental level (or standard) itself. In addition, the so-called

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[45] William K. Reilly, "The Greening of NAFTA: Implications for Continental Environmental Cooperation in North America," *Journal of Environment and Development*, Winter 1993, at 181, 183.

[46] GATT, *BISD* IV/1.

[47] Executive Office of the President, *Report of the Administration on the NAFTA and Actions Taken in Fulfillment of the May 1, 1991 Commitments*, at 5.

[48] The NAFTA has no provisions that discourage upward harmonization, however.

[49] North American Free Trade Agreement, 32 I.L.M. 612, Article 906.1. The administration's point might have been stronger if the NAFTA had required parties to work individually to "enhance the level of safety," etc.

[50] *Id.*, Articles 713.1 and 906.2. These provisions are heavily nuanced using terms such as "to the greatest extent practicable."

upward harmonization provisions in the NAFTA apply only to product standards, not to process standards.[51]

The closest the NAFTA gets to an unprecedented environmental provision is a declaration that parties

> should not waive or otherwise derogate [from domestic environmental measures] as an encouragement for the establishment, acquisition, expansion, or retention in its territory of an investment.[52]

Although this provision is hortatory rather than mandatory, and cannot be taken to dispute settlement, it does establish a very useful principle.[53] Still, it has been criticized by environmentalists because a country could easily evade this commitment by keeping standards lower than they otherwise would be. The weakness of this provision is disappointing because, as Hufbauer and Schott note, the perception of runaway plants "plays a very large role in the U.S. public's acceptance of free trade with a poorer country."[54] Since this provision is commonly described by the three NAFTA governments as being a requirement, the NAFTA should be amended in the future to make it so.

This is not to suggest that Mexico and the United States have done little to benefit the environment. Actually, a number of important

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[51] But process standards related to the characteristics (e.g., health and safety) of a product would be covered. For example, a process standard calling for milk to be heated to a certain temperature falls under the new NAFTA rules. But a process standard calling for the cows to have a minimum amount of living space would not.

[52] NAFTA Article 1114.2.

[53] But see Patrick Low, *Trading Free the Gatt and U.S. Trade Policy*, New York: The Twentieth Century Fund Press, 1993, at 32. (In economics, the "state of environment" is often treated as an additional factor of production or as a country-specific resource endowment and as part of what determines comparative advantage.)

[54] Gary Clyde Hufbauer and Jeffrey J. Schott, *Nafta: An Assessment*, Washington: Institute for International Economics, 1993, at 96. Since almost all countries are poorer than the United States, this perception is a serious political problem.

agreements were reached in 1992.[55] But since these negotiations were intentionally kept separate from the NAFTA, it would seem inappropriate to adduce them as proof of NAFTA's environmental correctness. The bottom line is that the NAFTA has no positive provisions (i.e., telling governments what to do) on the environment. What it has is one negative exhortation. More significant is what is largely absent from the NAFTA, i.e., negative disciplines (telling governments what not to do) on environmental standards.[56]

On labor standards, the United States and Mexico established a Consultative Commission between the labor ministries of the two countries.[57] This is a useful project, but needs to be kept in perspective. The main reason why such a commission was needed in 1991 is that a similar labor cooperation program established under the Carter administration had been abolished in 1981. Thus, President Bush exaggerated in claiming that the NAFTA had "created an historic opportunity" for such cooperation.[58] At best, it was an opportunity to undo the damage done by the Reagan administration.[59]

Lessons from the Bush Era

What lessons can be learned from the Bush era that may be applicable to the NAFTA's future? First, the Bush administration bequeathed a NAFTA with serious political ailments. The Clinton admin-

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[55] See *Report of the Administration*, *supra* note 47, Tab 7.

[56] This absence is significant since the Dunkel text does have negative disciplines on environmental standards. The negative disciplines that do exist are described in Charnovitz, *infra* note 82.

[57] *Report of the Administration*, *supra* note 47, Table 5.

[58] *Id.*, at 1.

[59] The Labor Advisory Committee's official report to USTR was extremely critical of the parallel efforts on labor, stating: "the 'Action Plan' is nothing of the sort. It is merely a description of the positive aspects of Mexican labor practices." See USTR, *Report of the Labor Advisory Committee*, September 1992, at 4.

istration has to build popular support for the NAFTA that Bush failed to build. Second, the failure to establish an environmental advisory committee in 1990 or to appoint nonmainstream environmentalists to the various committees in 1991 was a missed opportunity to broaden participation and support. Third, the hyping of the NAFTA's environmental accomplishments transformed the trade and environment debate.[60] For the foreseeable future, all U.S. trade agreements are going to be evaluated for their greenness.[61] Fourth, despite the fact that most environmental trade disputes have involved North American countries, the NAFTA provides no special rules to deal with such disputes.[62] This is not a defect in the NAFTA. But it is a missed opportunity to head off conflict.[63] Fifth, although the renewed cooperative program on labor is useful, the NAFTA itself has no worker rights

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[60] For a discussion of the "NAFTA effect" on the Uruguay Round, see Steve Charnovitz, "Environmentalism Confronts GATT Rules: Recent Developments and New Opportunities," *Journal of World Trade*, April 1993, at 37.

[61] In June 1993, a federal judge ruled that the USTR must prepare an environmental impact statement on the NAFTA. Even if, as seems likely, the decision is reversed on repeal, the Congress will probably require that all future trade agreements be accompanied by an environmental assessment of some kind.

[62] The episodes were the Canada–U.S. Salmon and Herring case (in which the environmental side lost), the U.S.–Canada lobster case (in which the environmental or pseudo-environmental side won), the U.S.–Mexico Dolphin case (in which the environmental side lost), the U.S.–Canada asbestos dispute (where Canada unsuccessfully sought to invoke a trade agreement against a U.S. health standard), the ongoing Canada–U.S. beer can tax dispute (in which the commercial side retaliated), and the U.S.–Canada milk case (in which both the environmental and commercial sides won). There were also two pseudo-environment episodes: the U.S.–Canada tuna case (in which the pseudo-environment argument lost) and Canada–U.S. Beer I case (in which the pseudo-environment argument lost).

[63] The one exception may be the U.S.–Canada asbestos dispute where the NAFTA regime might yield a different result than the proposed GATT Dunkel text would.

commitments. That is one reason why there is such strong opposition to the NAFTA by organized labor in the United States.[64]

III. SUPPLEMENTING THE NAFTA

Although the Clinton Administration's NAFTA policy continues to evolve, it is useful to consider how it got to where it is today. I will start with the key decisions in the 1992 campaign and then discuss the negotiations for the North American Commission on the Environment (NACE).

Campaign Commitments

In an October 1992 speech at North Carolina State University, Governor Bill Clinton announced his support for the NAFTA, but declared that the agreement has "serious omissions" regarding the environment and labor.[65] To remedy these omissions and other "deficiencies," Clinton promised to negotiate supplemental agreements with Canada and Mexico. He also declared his intention that "we don't have to reopen the agreement."[66]

The purpose of the supplemental agreements, according to Clinton, would be to "require each country to enforce *its own* environmental and worker standards."[67] This approach came about in response to

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[64] It is interesting to note that the Bush administration's NAFTA report seems to applaud Mexico's labor law for not having a subminimum wage for youth, in contrast to U.S. law which does have such a subminimum. See *Report of the Administration*, *supra* note 47, Table 5, at 5. But the enactment of the U.S. subminimum in 1989 came at the insistence of the Bush administration. Indeed, President Bush praised the subminimum wage in signing the bill. See *Public Papers of the Presidents of the United States: George Bush*, 1989, at 1533.

[65] Bill Clinton, "Expanding Trade and Creating American Jobs," reprinted in *Environmental Law*, Vol. 23, No. 2, 1993, at 683–84.

[66] *Id.*, at 685.

[67] *Id.*, at 686.

the two conflicting points of view reaching the Clinton campaign. The NAFTA boosters were saying that Mexico was not a polluter haven because its laws on the environment were adequate. The NAFTA bashers were saying that environmental conditions in Mexico were deplorable. The common ground, seized by the skillful politician, was to find a way to improve the enforcement of Mexico's own laws.

NACE Assumptions

Although the Clinton administration did not reopen the NAFTA, its plan for the NACE opened a Pandora's box.[68] In assessing the administration's strategy, it is useful to examine four core assumptions. The main assumption underlying the NACE seems to be that the existing environmental laws in all three countries are generally adequate. What is missing, in this view, is enforcement, especially in Mexico.

That the truth is quite different can be seen by considering the United States.[69] There is little doubt that some U.S. environmental laws are too strict and costly, some are too lenient, and almost all are too complicated. Moreover, as economists have been noting for years, many U.S. environmental laws rely on inefficient "command-and-control" mechanisms that could be replaced with taxes and other economic instruments. Given this reality, it is unclear as to whether more faithful enforcement will make things better or worse.

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[68] The NACE was originally agreed to by the three countries during the Bush administration. The NAFTA also creates a Free Trade Commission (Article 2001). It is interesting to note that the environmentalists, who had initially wanted to incorporate environmental issues into the NAFTA, decided later they wanted a parallel commission to deal with their own concerns. These dueling commissions are likely to lead to problems. See *infra* note 80.

[69] Some readers might object to this line of reasoning of the grounds that NACE is not directed at the United States; it is directed at Mexico, which does have a serious enforcement problem. But it must be presumed that if an adversarial process is set up that *can* examine U.S. enforcement, it will be tasked to do so. If a new institution fails the test of being constructive when applied to the United States, that is a fatal flaw.

There is also a deeper problem. Many U.S. environmental laws are intentionally written without specificity to take into account future improvements in the best available technology.[70] This flexibility makes it very difficult to ascertain whether any particular statutory provision is being enforced. The situation is far more complex than, say, determining whether the minimum wage is being enforced.

A second assumption undergirding the NACE is even more doubtful—that environmental laws will remain adequate. The future adequacy of environmental laws is questionable not only for scientific reasons but because the NACE gives parties a *disincentive* to increase their degree of regulation. As with NAFTA's exhortation against lowering standards to attract investment, governments may avoid trouble by forgoing new domestic obligations.

A third assumption is that country A's efforts to review country B's environmental enforcement patterns will be viewed by B as less intrusive, meddlesome, or imperialistic than efforts by A to recommend stricter environmental laws for B. The validity of this assumption is dubious. Country B may not like being monitored on the adequacy of its enforcement any more than it likes being monitored on the adequacy of its laws.

A fourth assumption is that a regional commission can carry out effective surveillance of each party's enforcement practices. The reasonableness of this assumption is a function of the political "independence" of the commission. A truly independent commission would be capable of conducting objective reviews—which is why none of the three governments favor it! Without independence, one is left with a mechanism whereby the U.S. EPA, Environment Canada, and Mexico's SEDESOL carry out joint audits of their own performance. Such audits

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[70] This is a benign view. The cynic might claim that U.S. environmental laws are written to assure that major decisions will have to be settled in the courts.

are unlikely to be penetrating for the same reason that foxes are not hired to guard chicken coops.[71]

Even an independent commission would have a difficult task in secondguessing country B's enforcement because B will always be the expert on what its own laws require. The Canada–U.S. Free Trade Agreement did establish a binational panel to consider whether the other country was properly enforcing (i.e., overenforcing, not underenforcing) its antidumping or countervailing duty laws.[72] But this toolbox cannot easily be applied to the environment. One difference is that there are GATT rules on antidumping and countervailing duties. There are no GATT (or NAFTA) rules on the environment.

What to Enforce

A treaty that merely commits each party to enforce its own laws is the weakest form of international agreement. Nevertheless, this was the approach taken in the Mexico–U.S. La Paz Accord of 1983. For instance, each government committed to enforce its domestic laws and regulations concerning transboundary shipments of hazardous waste.[73] Nonetheless, these commitments proved ineffectual.[74]

The problem with the La Paz approach is not a lack of good intentions. Both governments pledged to "cooperate in the solution of the environmental problems of mutual concern in the border area."[75]

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[71] The potential effectiveness of this approach might have been tested via simulations of various episodes of the 1980s, such as the acid rain dispute, to see if a NACE might have changed the outcomes. But this was not done.

[72] Canada–U.S. Free Trade Agreement, Article 1904. See also NAFTA, Article 1904.

[73] U.S. International Trade Commission, *International Agreements to Protect the Environment and Wildlife*, Publication 2351, January 1991, at 5–66.

[74] For example, see "Poisoning the Border," *U.S. News and World Report*, May 6, 1991, at 37.

[75] *Public Papers of the Presidents of the United States: Ronald Reagan*, 1983, Article 2, at 1168.

The problem is that La Paz is all hat and no cattle. In other words, it contains no specific agreements on pollution control or environmental remediation. The question to ask about the NACE is whether the United States and Mexico need yet another "handshaking" accord. The hollowness of the NACE can be seen by comparing it to alternatives.

The most straightforward approach would have been to build on the environmental components of the existing regional border commissions.[76] For example, under the Treaty of 1909 establishing the Canada–U.S. International Joint Commission, both parties agreed that boundary waters "shall not be polluted on either side to the injury of health and property on the other."[77] It is unclear as to why the NACE's proponents showed little interest in improving the performance of the old commissions. Perhaps it is because Washington-based environmentalists dominated the NACE debate rather than the border-based environmentalists immersed in day-to-day problem solving.

A second course would have been the adoption of harmonized (or minimum) regional environmental standards. This is after all the traditional approach in international rule making on many social and technical issues such as health, labor, maritime safety, intellectual property, narcotics, and so forth. When common rules and standards have been adopted, there exists something for parties to work

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[76] For a discussion of the boundary commissions, see Sarah Richardson (ed.), *The North American Free Trade Agreement and the North American Commission on the Environment*, National Round Table (Canada) on the Environment and the Economy, March 1993, at 20–25 and Stephen P. Mumme, "New Directions in United States–Mexican Transboundary Environmental Management: A Critique of Current Proposals," *Natural Resources Journal*, Summer 1992, at 539.

[77] 36 Stat. 2448, Article IV. One of the earliest landmarks of international environmental law, the *Trail Smelter* decision, emerged from dispute settlement under this treaty.

together to enforce.[78] The absence of environmental agreements in the NAFTA makes it hard to demonstrate enforcement "with real teeth." In other words, there is nothing to chew on!

Lessons—Clinton Era

What lessons can be learned from the Clinton era that may be applicable to NAFTA's future? First, the Clinton administration continued Bush's approach of treating the environment as a side issue to be handled in a "side agreement." But while it may be peripheral to the NAFTA, the environment is a central issue among the countries. In a good illustration of Konrad's hypothesis,[79] this important issue is being dealt with in the wrong context (NAFTA implementation), in a wrong time frame (quickly), and by the wrong people (USTR as the lead agency). The environment would never have became a big issue for the NAFTA if these problems had been dealt with in their proper setting.

Second, by relying on such a weak form of international agreement (enforcing one's own law), the administration had to overcompensate by seeking strong remedies to ensure compliance. Had the administration sought a strong agreement based on negotiated standards, the issue of enforcement would have been secondary. In other words, the administration applied the right methodology (intergovernmental su-

[78] Environmentalists have pointed out that the NAFTA does provide for enforcement of intellectual property rights. But this is based both on international standards and on explicit NAFTA standards. Analogous standards could exist for the environment, but do not as of yet.

[79] Konrad's hypothesis, named after Dartmouth Professor Konrad von Moltke, states the unmanaged environmental problems become trade problems.

pervision) to the wrong target (national enforcement of existing environmental laws).[80]

Third, it is too early to judge the administration's decision not to reopen the agreement to address the NAFTA's omissions and deficiencies. Attempting to limit the renegotiation to an environmental (and perhaps labor) protocol would have been difficult because of pressure to open up the commercial provisions too.[81] But a negotiation limited to an environmental protocol could have given the administration an opportunity to clarify some of the ambiguous NAFTA language that has been criticized by environmentalists.[82] Renegotiation could also have allowed the administration to "Clintonize" the agreement in an effort to broaden support.

The political posturing over the "bolt-on" environment and labor agreements led some congressional Republicans to revert to the "hyperbole phase" of the Bush era. In April 1993, 27 Senate Republicans sent a letter to President Clinton stating:

> Perhaps the most significant action that can be taken to improve enforcement of environmental and labor laws throughout North America is implementation of the NAFTA.[83]

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[80] The U.S. proposals imply that the NACE will deal only with the underenforcement of environmental laws. The presumption seems to be that overenforcement (e.g., overly strict Mexican environmental standards on U.S. product exports for foreign investment) will be handled by the Free Trade Commission. It is unclear as to whether bifurcation (rather than duplication) will occur and, if so, what effects this will have.

[81] One problem was that the Clinton administration also sought greater protection against import surges. This would have opened up all of the commercial sections of the Agreement.

[82] For a discussion of the ambiguities in NAFTA, see Steve Charnovitz, "NAFTA: An Analysis of its Environmental Provisions," *Environmental Law Reporter*, February 1993, at 10067.

[83] *Inside U.S. Trade*, May 7, 1993, at 22.

The most *significant* action—how can that be? Is there some secret NAFTA annex about environmental and labor enforcement? Is there some invisible hand in free trade that improves the effectiveness of regulatory agencies?

In May, a group of senior House Republicans wrote to President Clinton:

> We had hoped that the supplemental negotiations would further enhance NAFTA's already considerable commitment to environmental protection and labor rights.[84]

The Republican letter does not elaborate on what the *considerable commitment* is. Still, the hyperbole in both letters implies progress; there has been no relapse to the denial phase.

IV. FUTURE FRAMEWORK

Does a free trade agreement need to have a social dimension? There is no clear answer. The traditional view in economics has been that trade liberalization is mutually beneficial regardless of differences in wages or other social conditions.[85] But increasingly, this view is coming under attack. According to the U.S. Office of Technology Assessment, "market forces alone are not likely to produce significant social and economic rewards following a free trade agreement."[86] Indeed, the 25-year experiment with Mexican maquiladoras offers evidence for the thesis that facilitating trade can worsen the environment.

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[84] *Inside U.S. Trade*, May 28, 1993, at 9.

[85] For example, see Bela Balassa, *The Theory of Economic Integration*, Homewood, IL: Richard D. Irwin, 1961, especially chapter 10.

[86] U.S. Congress, Office of Technology Assessment, *U.S.-Mexico Trade: Pulling Together or Pulling Apart?*, October 1992, at 3.

In face of the environmental zone along the Mexico–U.S. border, NAFTA's boosters developed an argument that (1) Mexico wants a better environment, (2) the NAFTA will give Mexico more resources, and therefore (3) NAFTA will lead to a better Mexican environment. The argument is circular of course.[87] Nonetheless, it seems reasonable to anticipate (and there is some supporting statistical evidence) that a richer Mexico will become a cleaner Mexico.[88]

The better question is: Would strengthening environmental (and labor) policy coordination among the three countries enhance the benefits of the free trade agreement? Since a free trade agreement is a step toward integration, social harmonization may be desirable to avoid the economic distortions that can arise under such an agreement.[89] When two contiguous countries are as different as the United States and Mexico, the higher social standards will be put under competitive pressure.[90] Standards that pay for themselves through greater productivity will be able to survive such pressure. Standards with a more ambiguous impact on productivity may fall unless this is expressly guarded against.[91] The next two sections will propose a framework for future negotiations on environment and labor.

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[87] For example, see William H. Lash III, "'Green' Clouds Over Free Trade," *Journal of Commerce*, July 6, 1993, at 8A (NAFTA is the key to North American environmental quality).

[88] See Gene M. Grossman and Alan B. Krueger, "Environmental Impacts of a North American Free Trade Agreement," NBER Working Paper No. 3914, November 1991.

[89] See Peter Passell, "Second Thoughts on Mexico Trade," *New York Times*, May 15, 1991, at D2.

[90] This is internal pressure of process-based standards (e.g., a child labor law). It would be manifested either in political efforts to lower standards or in private efforts to ignore them. Product standards could also face a different kind of pressure, i.e., external legal pressure to lower unnecessary trade barriers.

[91] Steven Shrybman, "Trading Away the Environment," in R. Grinspun and M. A. Cameron (eds.), *The Political Economy of North American Free Trade*, New York: St. Martin's Press, 1993, at 271, 284 (trade regimes do not strengthen environmental protection unless they are carefully and deliberately designed to do so).

Environmental Issues

Because of the peculiar form of government in the United States, the Congress must convey authority to the President to continue negotiations with Canada and Mexico on the environment.[92] This could be in the form of a renewal of the President's bilateral trade negotiating authority, or a provision for accepting NAFTA amendments,[93] or new fast track authority to undertake international environmental agreements. Alternatively, the President could be directed to bring back agreements as treaties subject to the advice and consent of the Senate, as is regularly done on fishery and wildlife matters.[94] But some advance understanding needs to be obtained for how to implement any U.S. commitment to incur financial obligations or to modify U.S. law.[95]

If such authority is given to the President, the Congress is likely to establish a set of negotiating objectives. The most comprehensive proposal so far comes from Congressman George Brown, chairman of the House Science Committee.[96] The Brown bill establishes several negotiating objectives, many of which are quite far reaching. For example, one is the prevention of the export of products manufac-

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[92] The President can try to negotiate anything he wants with Canada and Mexico. The issue is what they will negotiate with him if they question his capability of fulfilling U.S. commitments.

[93] NAFTA Article 2202 notes that NAFTA amendments must be approved in accordance with the applicable legal procedures of each party.

[94] Although it is commonly referred to as a treaty in the popular press, the NAFTA is not a U.S. treaty. It is an executive agreement entered into under authority from Congress and goes into force only following subsequent legislation. Treaties can be entered into without prior authority from the Congress and go into force only following approval by two thirds of the Senate and ratification by the President.

[95] Of course, if an agreement does not contain any real commitments (e.g., La Paz), the President does not need any express authority.

[96] North American Environmental, Labor, and Agricultural Standards Act of 1993, H.R. 1445, 103rd Congress. (The bill does not include any provisions regarding the President's negotiating authority.)

tured under environmental or workplace conditions that "undermine counterpart standards... in the importing country."[97]

As an alternative to providing special authority for environmental negotiations, the Congress could authorize cooperation with Canada and Mexico under the imprimatur of U.S. membership in the NACE.[98] Although most of the discussions about NACE surround enforcement, the NACE also has the goal of raising environmental quality and improving policy coordination among the three countries.[99] But there is a question as to whether NACE's role as a watchdog and prosecutor will be consistent with a role of consensus builder and problem solver.

One goal for the NACE should be the development of regional standards for both products and processes.[100] For some topics (e.g., toxic waste), there should be uniform standards. For others, a minimum standard would be a more feasible short-term goal.[101] However, not every product and process in North America needs a regional standard. Priority should be given to matters that may cause trade problems. For example, the Canadian proposal for the supplemental accord includes agreed limits on concentrations for specific pollutants, such as DDT.[102] This is the type of proposal around which future negotiations should revolve.

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[97] *id.*, §2.

[98] A fast track is unlikely, but congressional support of NACE programs could be enhanced by interparliamentary conferences of NACE countries.

[99] In addition, the NAFTA (Article 913) establishes a Committee on Standards-Related Measures. The Committee has no power, but it does have a broad scope. For example, the Committee may consider the "promotion and implementation of good manufacturing practices."

[100] Foy argues that process standards on the environment should be part of the NAFTA. See George Foy, "Environmental Protection versus Intellectual Property—the U.S. Mexico Free Trade Agreement Negotiations," *International Environmental Affairs*, Fall 1992, at 323.

[101] Some close observers of border ecology, such as Mary E. Kelly of the Texas Center for Policy Studies, argue against minimum standards on the grounds that they encourage downward harmonization.

[102] See *Inside U.S. Trade*, May 14, 1993, at S-4.

It should be recognized, however, that government-only institutions, such as the NACE, are not ideal for writing international social standards. A better approach would be to establish a tripartite environmental organization consisting of government, business, and public interest/environmentalist members.[103] This organization could also draft a voluntary *socioecological code* for North American companies.

Regional agreements also should be sought on the regulatory approaches that governments use to protect the environment. For example, the three countries could work together to apply economic instruments, e.g., a tax on inputs to toxic waste rebatable upon proper disposal. In addition, they could work together to implement the key principles of Agenda 21 and to carry out joint programs of technical assistance to industry, particularly small business.

The NACE should also address the problem of funding. While it may be true that expanded trade under the NAFTA will increase the resources available in the three countries for environmental projects, there is no guarantee that added resources will be used in this way. Just as the Mexican government cites poverty as a limiting factor to environmental remediation, so too does the United States. The best way to demonstrate to the public that freer trade will improve the environment is to channel a portion of the gains from trade into ecological projects.[104] So far, only Mexico has been willing to make major increases in public spending for the environment.

Of course, there is no economic reason why greater funding should necessarily go to these programs rather than to other govern-

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[103]For further discussion of this idea, see Steve Charnovitz, "NAFTA's Link to Environment Policies, *Christian Science Monitor*, April 21, 1993, at 19.

[104]One possibility is to impose a consumption tax on consumers, the true beneficiaries of freer trade, and dedicate these revenues for environmental projects. But such a tax would seem likely to make the NAFTA even less popular. Another option is to use a "hidden" tax such as a levy on cross-border trade. See Steve Charnovitz, "Rethinking a NAFTA Border Tax," *Journal of Commerce*, April 21, 1993, at 8A.

ment programs like housing or transportation. But there is a political reason. The NAFTA boosters are not claiming that the NAFTA will augur more spending on housing or transportation. What they are claiming is that the NAFTA's gain will trickle toward the environment. One cannot have it both ways. Either we should be agnostic as to how NAFTA's benefits will be allocated or, if it is believed that spending them on the environment is a good idea (as many NAFTA boosters seem to do), we should assure that this occurs.

Labor Issues

The preamble on page 1 of the NAFTA states that the three governments are "resolved to . . . protect, enhance and enforce basic workers' rights." But that is the end of what NAFTA says on the subject. The Clinton administration sought to remedy this omission through the North American Commission on Labor, created in parallel to the NACE and parallel (or perhaps orthogonal) to the NAFTA.

It is ironic that the issue of labor standards and the NAFTA has been overshadowed by the issue of environmental standards because historically far more attention has been given to the labor issues. For example, there has been an ongoing debate in the European Community (EC) about a European social charter. The EC's difficulties with this issue have probably offered a negative lesson to the NAFTA governments, i.e., it is not worth the effort. But the more important lesson may be that such a charter needs to be developed in concert among all major industrial countries.

The challenge in developing a social charter to devise standards that improve labor market performance and make all three countries more productive.[105] The danger is that standard setting will go in the

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[105]The Economic Policy Council of the United Nations Association suggests that NAFTA partners seek upward harmonization of minimum wage, worker safety rules, and child labor laws. See Economic Policy Council, *The Social Implications of a North American Free Trade Agreement*, 1993, at 32.

opposite direction—toward a reduction in labor market flexibility and job creation. Among the many difficulties of achieving a labor compact in North America is the fact that labor institutions and government regulation varies among the countries.[106] In some areas, the United States has lower standards even than Mexico. This has reportedly led some Mexicans to worry that NAFTA may cause their labor conditions to fall to U.S. levels.[107]

Although the labor and environmental trade issues are similar in many ways, one important difference is that there are far more extensive international standards for labor. Since 1919, the International Labour Organization (ILO) (now a U.N. agency) has been promulgating conventions that cover virtually all aspects of government–labor and labor–management relations. These 174 ILO conventions can serve as a useful basis to guide regional labor policymaking.[108]

Before any labor standards can be made part of the NAFTA or the NACE, they must be negotiated among the countries. This would be an arduous effort, but might be commenced in the following way: First, the eradication of child labor should be made a top priority.[109] Unfortunately, none of the three countries has ratified the most recent ILO convention on child labor (no. 138). One approach, suggested by

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[106] For a comparison of the English and Latin approaches, see Steve Charnovitz, "Varieties of Labor Organization," *Caribbean Review*, Spring 1985, at 14.

[107] See Dianna Solis, "Mexicans, Too, Are Wary of Trade Pact, Fearing Loss of Some Worker Protections," *Wall Street Journal*, April 13, 1993, at A15.

[108] ILO conventions are binding only on the countries that ratify them. Of the three NAFTA countries, Mexico has ratified the most conventions, and the United States the least.

[109] The Inter-American Dialogue would go further and allow all domestic labor and environmental regulations to be applied to foreign *producers*. See Inter-American Dialogue, *Convergence and Community: The Americans in 1993*, Aspen Institute, 1992, at 16.

Senator Tom Harkin, is to ban all cross-border trade of goods made in whole or in part by children under age 15.[110] Such a regulation on trade in child-made products could be added to the NAFTA. As Robert Pastor has noted, "It is an unfortunate signal to working people that the three governments spent more time focusing on intellectual property rights than on workers' rights."[111]

Second, there should be a commitment by all three parties to avoid unfair labor conditions similar to the commitment contained in the ITO Charter of 1948.[112] In addition, NAFTA's exhortation against lowering environmental standards to attract investment should also be applied to labor standards. It is important to get these principles established before the countries begin to define the bounds of fair labor competition.[113]

Third, the "surest solution to the struggle for workers' rights is to support the growth of democratic institutions like free labor unions."[114] Thus, the issues of freedom of association and other human rights must not be kept off the NAFTA table as they were during the Bush era. One format for handling them, suggested by Andrew Reding, is to utilize the American Convention on Human

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[110]See "Senators to Propose Child-Labor Ban for NAFTA Labor Pact," *Inside U.S. Trade*, June 18, 1993, at 3.

[111]Robert A. Pastor, *Integration with Mexico: Options for U.S. Policy*, New York: Twentieth Century Fund Press, 1993, at 75.

[112]For other proposals to deal with unfair labor and environmental conditions, see Cuomo, Commission on Competitiveness, *America's Agenda: Rebuilding Economic Strength*, Armonk: M. E. Sharpe, 1992, at 203–48.

[113]For further discussion on the problems of distinguishing between fair and unfair competition, see Steve Charnovitz, "Environmental and Labour Standards in Trade," *World Economy*, May 1992, at 335, 351–55.

[114]Quotation from a speech by President George Bush to the AFL-CIO, in *Public Papers of the Presidents of the United States: George Bush*, 1989, at 1528.

Rights, which has already been ratified by Mexico.[115] If Canada and the United States can also ratify it, the three countries can work together to fulfill its guarantees.

V. CONCLUSION

The treaties establishing the European Coal and Steel Community and the Economic Community were designed to foster a European identity, and indeed had that effect. The NAFTA could be instrumental in developing the nascent concept of a North American identity. The core of the NAFTA is the harmonization of discriminatory (i.e., better than MFN) trade policies. Deepening the NAFTA to include environmental harmonization should improve the regional environment (if done correctly) and might also improve the regional economy.[116]

It is true that environmental (and labor) harmonization is harder to accomplish when dealing with disparate economic systems. But it is also true that the potential efficiency gains are greater from trade between rich and poor countries. An agreement between countries so different in development offers an unprecedented opportunity to demonstrate how the power of free trade can be harnessed into boosting employment conditions, sustainable development, and economic growth.

The purpose of promoting the upward harmonization of social standards is not, as one Clinton administration official suggested, to

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[115]See Andrew Reding: "Protecting Fundamental Rights," *Journal of Commerce*, February 10, 1993, at 8A; "No Rule of Law, No Free Trade," *Wall Street Journal*, March 18, 1993, at A13; and "Solving Nafta's 'Labor' Problem," *Journal of Commerce*, June 4, 1993, at 6A. The convention is reprinted in 9 I.L.M. 673.

[116]Environmental issues are so salient in the NAFTA because the countries share a long border and are at different stages of development. A free trade agreement with Israel (or Chile) presents far fewer environmental issues.

increase Mexico's costs.[117] The purpose is to prevent the wrong kind of international competition from occurring (e.g., seeing who can work the longest hours). Good labor and environment standards will strengthen North American competitiveness by boosting worker productivity and conserving natural resources. As Rodger Schlickeisen of Defenders of Wildlife explains, "Because good ecology is good economics, the goal should be to integrate the two to their mutual benefit."[118]

Integrating environmental and labor issues into the free trade agreement is also important for another reason: the need for sustainable politics. The NAFTA is only as strong as its weakest link among the three governments. If the three economies worsen following the NAFTA, then the agreement is likely to be blamed. It is easy to picture scenarios whereby the NAFTA is eroded by the U.S. government through process protectionism. A people-friendly and nature-friendly NAFTA will have a better chance of surviving a recession than a "pure" trade agreement would.

In 1909, the North American Conservation Congress laid out a far-sighted framework for regional environmental cooperation. Although there have been many significant achievements in the intervening years, the current condition of the regional environment, particularly along the U.S.–Mexico border, is not much to be proud of. By putting the spotlight on environmental protection, the NAFTA and NACE have the potential to turn things around. If, by the year 2009, the North American environment is much better than it is today, that would be a fitting monument to the visionary conservationists of the progressive era.

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[117]See John Maggs, "Kantor Walks Tightrope on Labor, Environment," *Journal of Commerce*, May 7, 1993, at 3A.

[118]Rodger Schlickeisen, "Ironclad Protections are Needed," *Journal of Commerce*, May 28, 1993, at 3A.

ADDENDUM IN PROOF

This article was written in June 1993. Although it is not possible here to discuss the developments which occurred over the past five months, a few important points can be noted. First, the Clinton team's strategy of accepting the NAFTA but supplementing it with side agreements worked. The administration deserves credit for consummating the NAFTA package. Second, to achieve the side agreements, the administration had to retreat on its initial goals. Both of these agreements lack real teeth. But given their basic mis-orientation, the absence of teeth is not so bad. Third, the side agreements failed in their political purpose. No labor union endorsed the NAFTA. Nearly all of the environmental groups that endorsed the NAFTA would have done so if the promised environmental commission had been instituted in a second Bush administration. Fourth, just as with the fast track vote in 1991, a majority of the Democrats in both the House and the Senate continued to oppose the free trade agreement. Thus, the key side deal in rescuing the NAFTA was the one between the president and the House Republican Whip who delivered over 56% of the votes needed. Fifth, there is some danger that the rhetoric used to sell the NAFTA may backfire. How will the public react if the NAFTA does not increase jobs and reduce immigration from Mexico? Finally, it will be interesting to see if the new environment commission evolves into a constructive institution. There is still a need to adopt concurrent measures for conserving the material foundations of North America.

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