Policy Analysis

Cato Institute Policy Analysis No. 198: NAFTA's Green Accords: Sound and Fury Signifying Little

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Executive Summary

The North American Free Trade Agreement has come under well-deserved fire from a coalition of free-trade conservatives for introducing environmental policy considerations into international trade relations. Although the green language of NAFTA is certainly objectionable on its face, some of the free traders' warnings about national sovereignty and the upward harmonization of environmental law are clearly overwrought and premised upon a fundamental misunderstanding of NAFTA.

Although the treaty encourages high environmental standards and the harmonization of environmental statutes, the sovereign right of nations to set their own levels of environmental protection is repeatedly and explicitly reaffirmed in the treaty. The supranational bureaucracy established to oversee the enforcement of domestic environmental law is an intentionally cumbersome body whose mission is both tightly controlled and narrowly defined. And the environmental goals and objectives outlined in the treaty are just that--goals that for the most part few would argue with. The means of achieving those goals are left for each country to decide.

Neither the Clinton administration nor the environmental community, however, believes that NAFTA will grant the federal government or international bureaucracies the power to impose a new green policy agenda on signatories to the treaty. Indeed, no reasonable reading of the treaty warrants the concerns expressed by conservative anti-NAFTA critics. Although some of NAFTA's environmental language is, in fact, vague and full of potential mischief, the clauses at issue are hermetically sealed within a wall of qualifications, exceptions, loopholes, and countermanding language.

Introduction

The North American Free Trade Agreement has called forth heated words from both the left and the right ends of the political spectrum. Although opposition from protectionists and anti-growth environmentalists was perhaps to be expected, conservative opposition to NAFTA has been mounting since the release of the environmental side agreement last September. According to an unusual coalition of free traders and conservative protectionists, passage of the treaty would entail a major surrender of American sovereignty and freeze in place onerous environmental regulations, preventing legislators from ever enacting needed reforms.

In truth, the environmental language in NAFTA and its side agreement is far from benign. It commits the United States, Canada, and Mexico to the enforcement of environmental statutes that are at times better left unenforced because of the economic damage they could inflict. Another supranational bureaucracy is established in a world awash

with such institutions. Finally, and perhaps most important, it reinforces the belief that an environmentally level playing field must be in place before nations can enter fairly into economic competition. No wonder a number of environmental lobbies prefer NAFTA to the status quo.[1]

This paper is an examination of the language of NAFTA and the environmental side agreement and the charges leveled by conservative critics of the treaty. The conclusion reached is that the green language of NAFTA will have little practical impact on domestic environmental law or on the sovereignty of nations. Although the environmental language of NAFTA is by and large objectionable, it is a minor irritant, not a crippling deformity, of the treaty.

NAFTA and National Sovereignty

Perhaps the conservative critics' most common and politically potent argument against NAFTA is that the treaty fundamentally violates the sovereignty of federal, state, and local governments. "How can conservatives who believe in federalism," asks columnist Pat Buchanan, "sign on to a treaty that supersedes the rights of 50 states to write their own laws for business and labor? . . . As Maastricht is the vehicle through which the sovereign rights of Europe's nations to set their own environmental, labor, welfare, and tax policies are being surrendered . . . NAFTA is the legal instrument of piecemeal surrender of American sovereignty."[2]

It is undeniably true that NAFTA does restrict the government's freedom of action. By its very nature, any treaty requires all parties to agree to refrain from certain actions, to their mutual benefit. American sovereignty is curtailed under NAFTA to the degree that certain protectionist actions are discouraged or prohibited.

For the most part, domestic environmental laws and regulations are challengeable under NAFTA only if they fail to have a "legitimate objective" and arbitrarily exclude goods of another country that meet legitimate objectives.[3] "Legitimate objectives" are defined under the treaty as "(a) safety, (b) protection of human, animal, or plant life or health, the environment, or consumers, including matters relating to quality and identifiability of goods or services, and (c) sustainable development."[4]

In a few circumstances, domestic environmental and health protection laws are required to have a scientific justification. "Scientific justification" is a factor to be considered when judging whether a law has a "legitimate objective" under Chapter 9 and is a test that must be met for domestic sanitary and phytosanitary standards.[5]

In any case, laws found to be "NAFTA-illegal" by dispute-resolution panels cannot be directly overturned under the treaty. If NAFTA-illegal statutes remain on the books after such a finding, countries affected by those statutes are allowed to impose countervailing duties on imports protected by those statutes.[6] Although the Washington-based Competitive Enterprise Institute suggests that, because the treaty will have the force of federal law, "the individual states may be compelled to comply with [NAFTA's] provisions in federal courts," such concerns are unwarranted.[7] Implementing legislation for past trade agreements has, without exception, specifically stipulated that nothing in the trade agreement will lead to the overturn of a U.S. law or the creation of a private right to challenge an existing law under the treaty, and the Clinton administration intends to incorporate a similar clause in NAFTA's implementing legislation.[8]

Allowing trading partners to impose countervailing duties in retaliation for certain protectionist federal, state, or local laws (a mechanism alleged by some to be a dagger pointed at the heart of American sovereignty) has actually been part of international law for more than 45 years under the General Agreement on Tariffs and Trade, to which the United States is a signatory. GATT's language, as a matter of fact, makes it more difficult to defend against such a challenge than does the language provided under NAFTA.[9] Given that NAFTA, Article 103, provides that the treaty is to take precedence over inconsistent GATT provisions, and that NAFTA, Article 2005.3, states that a country can insist that any matter addressed by both treaties be transferred from a GATT to a NAFTA dispute panel, it is clear that passage of NAFTA will actually make domestic environmental laws less open to challenge by international trade panels.

It might be argued that, should a law or regulation be deemed NAFTA-illegal, irresistible political pressure would build to repeal the statute in question. The international experience under GATT, however, belies that concern. No domestic law of any country has ever been overturned as the result of a GATT finding even though hundreds of statutes have been declared "GATT-illegal."[10]

For example, a GATT panel's preliminary finding that the U.S. Marine Mammal Protection Act (a statute that penalized tuna imports from countries that failed to adequately protect dolphins during tuna harvests) was inconsistent with GATT has come to nothing. The decision was never made final; the restrictions on tuna imports were not only kept on the books but were actually strengthened in the 1992 Dolphin Conservation Act, and Mexico never attempted to enforce the decision by imposing countervailing duties.

Finally, free-trade skeptics of NAFTA should be reminded that "American sovereignty" (defined as the freedom of action allowed the federal or even state and local government) is not the ultimate aim of policy. The U.S. Constitution and the writings of our Founders make clear that the most important aim of policy is the sovereignty of the individual and that governmental sovereignty is, by definition, achieved at the expense of individual sovereignty. The right of two parties to freely exchange goods or services is more fundamental than some dubious "right" of the government at whatever level to interfere in the economic activities of consenting adults.

In any case, charges that NAFTA poses an unprecedented threat to American (governmental) sovereignty are specious and unsupported by the facts.

Upward Harmonization of Environmental Law

It has often been alleged that various provisions of NAFTA require the upward harmonization of environmental standards while preventing such standards from ever being relaxed. "Pass NAFTA," warns Pat Buchanan, "and we lose forever the opportunity to roll back Big Government."[11] James Sheehan of the Competitive Enterprise Institute argues likewise that nations like Mexico, Argentina and Chile have been liberalizing their economies by deregulating over- burdened sectors of the economy. Various provisions of NAFTA, however, expressly forbid such deregulations. Article 1114, for example, prohibits the relaxation of environmental regulations in order to attract foreign investment. In fact, Article 756 commits the signatories to "upward harmonization" of regulations. These provisions will now be vigorously enforced by NAFTA's supranational entities.[12]

An examination of those and other suspect articles of the treaty, however, reveals that such conclusions are unfounded and without merit.

Article 756

Subchapter 756.1 provides, Without reducing the level of protection of human, animal, or plant life or health, the Parties shall, to the greatest extent practicable and in accordance with this Subchapter, pursue equivalence of their respective sanitary or phytosanitary measures.

"Sanitary or phytosanitary measures" are defined in NAFTA as standards that "protect human or animal life or health in [a country's] territory from risks arising from the presence of an additive, contaminant, toxin, or disease- causing organism in a food, beverage, or feedstuff."[13] The operative language of Article 756 is, therefore, dedicated to ensuring that domestic food safety standards are met by imported goods and that those standards are not actually disguised trade barriers.[14] There is nothing objectionable here. "Equivalency" of food safety standards is rightly encouraged because equivalent standards would facilitate trade.

If a sanitary or phytosanitary measure is challenged as a barrier to trade, the challenging country must show that the measure is not based on scientific principles and has the effect of creating a disguised trade barrier, but NAFTA gives each country the right to interpret scientific evidence as it sees fit.[15]

Equivalence of national sanitary or phytosanitary standards is not an absolute requirement, for the text qualifies it by the phrase "to the greatest extent practicable." Moreover, Article 712.5 implicitly recognizes the right of countries to ultimately set sanitary and phytosanitary standards at levels that are appropriate for each nation.[16] Despite Sheehan's use of quotation marks around the phrase "upward harmonization" in his discussion of Article 756, the phrase does not appear in the article nor anywhere else in the treaty or the environmental side agreement.

Article 906

Subchapter 906.1 says, Recognizing the crucial role of standards-related measures in promoting and protecting legitimate objectives, the Parties shall, in accordance with this Chapter, work jointly to enhance the level of safety and of protection of human, animal, and plant life and health, the environment, and consumers.

Subchapter 906.2 further states that "without prejudice to the rights of any Party under this Chapter," countries shall "make compatible their respective standards-related measures so as to facilitate trade" to "the greatest extent practicable" (emphasis added).

The text of Article 906, then, commits the signatories to make compatible and enhance environmental standards while explicitly reaffirming the right of countries to set their own levels of environmental and health protection. Subchapter 906.6 underscores that by requiring conformity only "whenever possible." The law firm of Winthrop, Stimson, Putnam & Roberts, retained to examine NAFTA at the behest of pro-NAFTA environmental groups, concludes that "there are likely to be no grounds [on] which a U.S. environmental law could be challenged successfully under Chapter 9 (providing of course that the standards-related measure meets the requirement in NAFTA Articles 301 and 1202 that the imported goods [be] provided the same treatment as nationally produced goods, and provided that they receive treatment no less favorable than goods or services from any other country)."[17]

Article 1114

The operative language of Article 1114 is contained in Subpart 2.

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

Note that Article 1114.2 states that it is "inappropriate" to relax environmental measures to encourage investment, not that it is NAFTA-illegal to do so. Nor is the admonition that countries "should not" do so the same as a statement that countries are prohibited from doing so. Note also that Article 1114.2 only discourages relaxation of environmental laws if done solely to encourage investment. Relaxation of environmental laws to correct for needless overregulation or duplication, or to acknowledge new scientific evidence (or even, as one wag puts it, to help get reelected), is clearly unchallengeable under Article 1114.2.

Finally, the only recourse provided for a country that feels that another country is "inappropriately" relaxing health or environmental standards is to "request" a consultation "with a view to avoiding such encouragement." Not even a NAFTA dispute-resolution panel is provided for by the language of the article. As Stephen Chapman of the Chicago Tribune recently observed, "I suspect American sovereignty will somehow survive."[18]

A few final observations about Articles 756, 906, and 1114. First, the Bush administration, which negotiated those three articles, never understood them to mean what conservative critics of the treaty are now alleging they do. Environmental Protection Agency administrator William Reilly testified before Congress in the fall of 1992 that if a country chose to relax environmental standards to attract investment, "we would have no direct recourse" under NAFTA. No one in Congress or the environmental community contested that understanding of the treaty.[19] In fact, it was largely because of the toothless nature of those articles that an environmental side agreement was demanded by the environmental lobby.

Second, NAFTA critics on the right have even conceded occasionally that those articles cannot be considered treaty crippling. The Competitive Enterprise Institute's Sheehan, for example, one of the most prolific and oft-cited critics of NAFTA, recently told Investor's Business Daily that "NAFTA was palatable before the side agreements because we thought it would create more trade than it would destroy. We think the side agreements tip the scales overwhelmingly against the treaty."[20]

Article 3

Critics of NAFTA have also expressed alarm about Article 3 of the environmental side agreement, which states, Recognizing the right of each Party to establish its own levels of domestic environmental protec- tion and environmental development policies and priorities, and to adopt or modify accordingly its environmental laws and regulations, each Party shall ensure that its laws and regulations provide for high levels of environmental protection and shall strive to continue to improve those laws and regulations.

On the face of it, there can be no doubt that Article 3 clearly underscores the right of nations to establish and modify their own levels of environmental protection. Once again, the statement that a country must "ensure that its laws and regulations provide for high levels of environmental protection" is mere exhortation. Should a country object to another country's "low" level of environmental protection, that country can cite the introductory clause of Article 3 and be done with it. Nor is a "high" level of environmental protection ever defined.

Should there be any doubt, the preamble to the side agreement further reaffirms "the sovereign right of States to exploit their own resources pursuant to their own environmental and development policies."

Clearly, no reasonable reading of Articles 756, 906, or 1114 of NAFTA, or Article 3 of the environmental side agreement, can possibly lead one to conclude that upward harmonization of environmental law is required by those parts of the treaty. And even if such verbal gymnastics could be convincingly performed and enforced, they would scarcely affect American environmental law; our standards are already the most costly and onerous of the three countries', and any such harmonization would merely bring Mexican and Canadian standards up to our level. That might not be good for eco nomic growth in Canada and Mexico, but that would be for their governments to worry about.

A possible finding of "inappropriate relaxation" of environmental standards should not be feared. The most likely road to environmental regulatory reform is the substitution of market-based structures for command-and-control regulation, and that policy direction is explicitly encouraged by Article 1(b) of the side agreement, in which nations are directed to "promote economically efficient" environmental measures, and Article 2.1(f) of the side agreement, under which nations are obligated to "promote the use of economic instruments for the efficient achievement of environmental goals."

Finally, as noted earlier, even if NAFTA dispute-resolution panels were to run roughshod over guarantees of domestic sovereignty provided for again and again in the treaty, the worst that could happen would be the imposition of relatively minor countervailing duties, not the forced abrogation or adoption of domestic standards.

A North American, Supranational EPA?

Another charge from the NAFTA critics on the right is that the environmental side agreement provides for an intrusive North American "Super-EPA" with broad, undefined athority and sweeping investigatory and legal powers. According to Sheehan, the environmental side agreement provides for an "alphabet soup of tri-national bureaucracies" that are "granted unprecedented power to conduct investigations, issue comprehensive reports, and facilitate cooperation between national governments for the purpose of harmonizing worker safety and environmental regulations. Unlike free trade, NAFTA's international red tape could easily entangle business."[21]

Once again, the charge bears little relationship to the facts, which are presented in the following subsections.

The Commission on Environmental Cooperation

The main provision of the side agreement is the establishment of the North American Commission on Environmental Cooperation (CEC). Directing the CEC is a council consisting of a cabinet-level or equivalent officer or designee of each of the three countries. The council will appoint an independent secretariat headed by an executive director who is charged with selecting the CEC's staff. The council and the secretariat will be advised by a 15-person joint public advisory committee.[22]

In brief, the council is charged with serving as a forum for discussion of environmental matters, overseeing the secretariat, and addressing questions and differences that may arise between Mexico, Canada, and the United States.[23]

The secretariat is charged with providing technical, administrative, and operational support to the council as well as preparing an annual program, budget, and report.[24] The secretariat may prepare a report addressing virtually any environmental issue within the scope of the approved annual program, yet the council may block the preparation of any given report.[25] The secretariat may not, however, independently report on any issue related to whether a country has failed to enforce its environmental laws and regulations.[26]

Most important, however, the secretariat may consider a submission from any nongovernmental organization or person asserting that a country is failing to effectively enforce is environmental law as long as the submission meets certain criteria.[27] The secretariat may then seek a response from the accused country and thereafter may recommend that a factual record be assembled subject to agreement by the council.[28] If the matter is the subject of a pending judicial or administrative proceeding, however, the secretariat may not pursue it.[29] Once a factual record is assembled, the role of the secretariat comes to an end. It is now up to one of the parties to the treaty to initiate action (described below) if the matter is to be further pursued.

The secretariat, then, can only issue reports and conduct investigations with the approval of the tripartite council; the fear that it will lose all accountability and run amuck is unfounded.

Dispute Resolution

The dispute-resolution procedure laid out in the environmental side agreement is intentionally cumbersome, time consuming, and unwieldy. Only after numerous procedural hoops have been passed through can an accusation of nonenforcement be considered by an arbitration panel appointed by the CEC.[30]

The arbitration panel may consider an accusation of nonenforcemnt leveled by one country at another only if the alleged persistent pattern of failure by the Party complained against to effectively enforce its environmental law relates to a situation involving workplaces, firms, companies, or sectors that produce goods or services (a) traded between the territories of the Parties, or (b) that compete, in the territory of the Party complained against, with goods or services produced by persons of another Party.[31]

Furthermore, it is not within the jurisdiction of the arbitral panel to consider the enforcement of any statute "the primary purpose of which is managing the commercial harvest or exploitation, or subsistence or aboriginal harvesting, of natural resources."[32] Thus, a great number of enforcement issues are removed from consideration before the process even begins.

The environmental side agreement, moreover, ensures that, to the extent possible, members of the arbitration panel are noninterested individuals, not a stacked deck of environmental "hanging judges."[33]

Unless the disputing countries agree otherwise, the charge of the panel shall be to examine, in light of relevant provisions of the Agreement . . . whether there has been a persistent pattern of failure by the Party complained against to effectively enforce its environmental law, and to make findings, determinations, and recommendations.[34]

Thus, it is impossible for the arbitration panel to pursue matters beyond enforcement (such as upward harmonization) without the consent of both disputing countries. Its prescribed scope is narrow and exact.

Moreover, a country is not subject to penalty if its failure to effectively enforce its environmental law (a) reflects a reasonable exercise of [its] discretion in respect of investigatory, prosecutorial, regulatory, or compliance matters; or (b) results from bona fide decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities.[35]

That is an important loophole in the agreement. Given that resources for enforcement are always limited, nations are inevitably forced to prioritize environmental enforcement activities. It is difficult to envision nonenforcement practices

that would not pass through the loophole.

Yet Matthew Hoffman and Sheehan fairly ask: "Should we allow a supranational commission to determine what constitutes 'effective' enforcement of our own laws? If we effectively enforced our misguided 'wetland' policies, which have the potential to shut down development on millions of acres of land, what would the impact be?"[36]

Clearly, free traders dislike incorporation of questions such as those into international trade agreements. But if arbitral panels eventually went to that ridiculous length to impose their vision of environmental policy on a country, then in all likelihood the country in question would ignore the panel and simply pay the (relatively paltry) $20-million fine. If that sum were out of the question, there would be nothing to prevent the country from simply accepting pre-NAFTA trade restrictions (today's trade status quo) or rewriting its law so that enforcement was no longer a question.

Sanctions and Penalties

If the arbitral panel indeed finds that a country has shown a "persistent pattern of failing to effectively enforce" its domestic environmental law, the disputing nations are to agree on an action plan to correct the nonenforcement.[37] If such a plan cannot be agreed upon, the arbitral panel proposes one, if necessary, and also sets a monetary penalty.[38]

If a country believes that the country complained against is not fully implementing the action plan or has not paid the monetary penalty levied by the panel, the arbitral panel is reconvened to examine the charge and, if it finds in the affirmative, may suspend the application of NAFTA benefits in an amount no greater than the monetary enforcement assessment imposed by the panel.[39] Once the arbitral panel finds that fines have been paid and the approved action plan has been implemented, however, the pre-NAFTA barriers are again removed.[40]

If Canada is the country found negligent in enforcing its domestic environmental laws, the arbitral panel, through the auspices of the council, may seek enforcement of the monetary penalty in Canadian courts of law but cannot impose pre-NAFTA trade sanctions.[41] The Canadian exemption was approved because Canadian courts have the unique power to enforce international orders on a priority basis without the possibility of appeal. Canadian courts have never failed to enforce such an order in 132 years.[42] As a senior U.S. trade official notes, Canada might well have the toughest terms of the three countries "because it would be forced by courts to pay fines and enforce its laws, while Mexico and the U.S. would only suffer the loss of NAFTA benefits."[43]

Investigatory Reach

Conservative critics of NAFTA have argued that the side agreement allows the CEC and the arbitral panels unprecedented investigative power, complete with search and seizure authority over domestic businesses. Yet general reports and fact-finding investigations by the secretariat can be based only on information that is publicly available; submitted by interested nongovernmental organizations and persons; submitted by the Joint Public Advisory Committee; furnished by a country; gathered through public consultations (such as conferences, seminars, and symposia); or generated internally by the secretariat or independent experts under contract to the secretariat.[44] The secretariat or the council is authorized to request information from a country, but the country may deny such a request if it is excessive or otherwise unduly burdensome.[45]

In any case, the CEC has no direct investigatory power. At most, the CEC can request that a country provide it with specific information, but accumulating such information is up to the country in question, not the CEC. Nor does any country have the right to undertake enforcement activities or judicial proceedings in the territory of another country.[46]

Similarly, an arbitral panel investigating domestic enforcement practices "may seek information and technical advice from any person or body that it deems appropriate, provided that the disputing Parties so agree and subject to such terms and conditions as such Parties may agree" (emphasis added).[47] Further, "unless the disputing Parties otherwise agree, the panel shall base its report on the submissions and arguments of the Parties" and any information gathered subject the prior agreement of the countries involved.[48]

Thus, arbitral panels are limited in their investigative power to those arenas agreed to by the countries involved in a

dispute. It is highly unlikely, therefore, that a country would agree to a panel investigation that would violate the rights of its citizens, particularly when that country had committed to defend them by being party to the arbitration process in the first place.

In sum, the power and authority of the CEC are well defined and not subject to misinterpretation. It may pursue an annual program and issue reports on relevant environmental issues subject to council approval, so in that sense, its potential scope of activity is wide. But it has the power of a quasi-governmental "think tank" to pursue topical interests, not the power of a quasi-governmental environmental police force to pursue businesses or governments.

The only coercive power allowed the CEC, the dispute- resolution mechanism described earlier, is well defined and narrow in scope. Article 28.3 is explicit in restricting the scope of an arbitral panel's investigation to matters relating to the enforcement of domestic environmental law. The implementing legislation for NAFTA will likewise provide, according to Mickey Kantor, "that there is no private right of action under the treaty, so that no individual or other non-governmental entity such as corporations or firms will have the ability to invoke the provisions of the NAFTA to challenge state or local law in either federal or state courts."[49]

General Environmental Obligations and Mandates

The final charge levied by the anti-NAFTA conservatives is that the environmental side agreement commits the countries to a plethora of environmental initiatives and enforcement practices. For example, the Competitive Enterprise Institute contends that the Agreement on Environmental Cooperation also requires each signatory to "effectively enforce its environmental laws and regulations." Such "effectiveness" is apparently the equivalent of draconian and invasive procedures, including "providing for search, seizure, or detention," "administrative orders, including orders of a[n] . . . emergency nature," "requiring record-keeping and reporting," and "environmental audits." The Agreement also explicitly requires the signatories to "develop and review environmental emergency preparedness measures," "promote education in environmental matters," and "assess, as appropriate, environmental impacts."[50]

That charge is leveled primarily against three articles of the side agreement, Articles 1, 2, and 5. Article 1 lists the objectives of the side agreement, which include general goals such as environmental protection and improvement, sustainable development, enforcement of environmental laws, and pollution prevention.[51]

First, note that, as objectives, there is not much to argue with here; most of the objectives are shared by liberals and conservatives, environmentalists and the business community. The means by which those objectives could be met are left for each nation to decide. All of the objectives, it should be noted, can be met by initiatives promoted by free-market environmental advocates.

Second, there are no mechanisms provided in the side agreement to ensure that the objectives are actually pursued or met by signatories to the treaty.

Similarly, Article 2 spells out general commitments, such as promoting environmental education, research, and the use of economic instruments for the efficient achievement of environmental goals.[52] Once again, however, no mechanism is provided to ensure that those commitments are actually met by the three countries. Moreover, if those commitments could be strictly enforced under NAFTA, subparagraph (f) would appear to dictate the adoption of a whole host of market-oriented initiatives that are promoted by free-market environmentalists.

Finally, Article 5.1 commits each signatory to the treaty to "effectively enforce its environmental laws and regulations through appropriate governmental action," such as on-site inspection, monitoring devices, environmental audits, and requiring licenses and permits.[53] Article 5.3 further stipulates that "sanctions and remedies provided for a violation of a Party's environmental laws and regulations shall, as appropriate," consider such things as the nature and gravity of the violation, the economic benefit derived from the violation, and the economic condition of the violator.[54]

Note first that Article 5.1 simply stipulates that if environmental standards are placed on the books, reasonable measures must be taken to see that they are enforced. The phrase "as appropriate" in Article 5.3 provides an escape from any overzealous calls for penalization. Second, the stipulations of Article 5.3 are not entirely objectionable; when laws are being violated, it is not outrageous to provide for punishment. The nature of its domestic laws and the levels

of its environmental protection are entirely up to each country. All Article 5.3 stipulates is that once those laws are on the books, sanctions and remedies must be provided. In any case, U.S law could certainly survive any examination under Article 5: we have on the books all those stipulations and more.

In sum, the various clauses providing for obligations and commitments of treaty signatories are literally toothless and of little consequence. Even if they were somehow rammed down America's throat, those articles do not specify how such obligations and commitments are to be met and do not require any initiative or undertaking not already provided for in U.S. domestic law.

Give Them an Inch and They Will Take a Mile

Anti-NAFTA conservatives ultimately maintain that, regardless of the actual language of the treaty, NAFTA will mean whatever the environmentalists want it to mean, given their political muscle. Thus, clauses that on their face appear to be mere puffery for the sake of political window- dressing become out-of-control dictates that will ultimately take on a life of their own like some kind of Frankenstein's monster, smashing every concrete limitation, qualification, and exception provided for in the treaty.[55] Tom Bethell of National Review recently summarized the argument well.

As the example of Maastricht has shown, the powers such transnational bodies feel free to exercise within a few years of their creation can only be described as uncertain. . . . "Thatcher declared she had been hoodwinked as prime minister into letting Britain slide toward a federal-type Europe," AP reported. "Yes, we got our fingers burned," she said, "accusing the EC of using a 1986 act that demolished trade barriers to sneak in regulations on everything from labor rights to water standards."[56]

Although it is certainly true that incorporating vague language and undefined requirements into legislation or international treaties is asking for trouble, NAFTA is not Maastricht, and the two treaties must be examined on their own merits. Virtually all legislation and international treaties are decorated with political windowdressing; one must learn to tell the difference between political exhortation and purposeful finesse if one is to reach an intelligent conclusion about the meaning and potential ramifications of the law.

In NAFTA's case, there is virtually no realistic way for the various environmental exhortations to become mean ingful policy dictates. And despite the dubious evidence to the contrary marshalled by the treaty's critics, both the Clinton administration and the environmental community seem fully aware of that fact.

NAFTA as Interpreted by Mickey Kantor

One of the main reasons that critics of NAFTA are agitated about the treaty's environmental stipulations is various statements made recently by U.S. Trade Representative Mickey Kantor. The environmental side agreement, Kantor maintained on August 13, ensures that "no nation can lower environmental standards, only raise them, and all states or provinces can enact even more stringent measures."[57] On August 17, Kantor again maintained that, under NAFTA, "no country in the agreement can lower its environmental standards--ever."[58] And as late as September 2, Kantor opined, in an exchange with John Maggs of the Journal of Commerce, that NAFTA prohibits countries from ever lowering their environmental standards and compels the upward harmonization of environmental law.[59]

Critics of NAFTA consider those statements by Kantor the true, authoritative interpretation of the treaty.

Well, is Kantor a liar? And if he is, why don't the NAFTA champions have the nerve to challenge him directly, instead of hammering at his conservative critics? Until Kantor's claims are dismantled, NAFTA's crusaders are in no position to savage conservative foes of the accord.[60]

Perhaps the best rebuttal to Kantor (besides the earlier factual analysis of NAFTA) is provided by Kantor himself. In the September 23, 1993, New York Times, he wrote:

> Under NAFTA, each Government continues to decide what health and safety standards (referred to technically as "sanitary and phytosanitary measures") are appropriate for its people. This right is explicitly affirmed in Article 712 . . . furthermore, Article 712 affirms the rights of each Government to establish the

> level of protection of human, animal or plant life or health that the Government determines appropriate.[61]

Moreover, in the previously mentioned letter to John Adams of the NRDC, Kantor contended that NAFTA "addresses how a health law or regulation is applied. It does not address the validity of the underlying health law or regula tion itself, or the level of protection afforded by those laws."[62] If NAFTA truly froze in place current environmental standards or provided for mandatory upward harmonization, one would have expected Kantor to crow about it in his letter.

Finally, when queried directly by Rep. Bill Archer (R- Tex.) about the conservative anti-NAFTA interpretation of the treaty, Kantor forthrightly rejected the entire analysis. Regarding the sovereignty question, Kantor argued:

> U.S. sovereignty is fully protected in these agreements. We insisted that no supranational body could usurp the right of each country to set its own laws, nor could such a body enforce our laws in place of federal, state, or local authorities. We retain all our legislative, judicial, and administrative prerogatives for creating and enforcing our own laws. . . . Finally, nothing in the NAFTA automatically preempts federal or state law--even when a NAFTA panel determines that a measure may be inconsistent with the agreement. The NAFTA makes clear that a government may choose to allow another country to suspend trade benefits (such as tariff concessions) against it following an adverse panel report, in lieu of changing its domestic law.[63]

Kantor also rejected the arguments that NAFTA will provide an environmental regulatory floor below which standards cannot drop and that upward harmonization is anywhere mandated in the treaty.

The NAFTA explicitly affirms the right of each country (including states and localities) to establish its own levels of safety and of protection of human, animal or plant life or health, the environment or consumers, and it explicitly affirms the right of each government to take measures to achieve those levels of protection. The supplemental agreements also make explicit that each country is free to determine its own levels of environmental and labor protection for its citizens.[64]

The environmental side agreement is further explained as follows.

The supplemental agreements unequivocally affirm these [sovereign national] rights. They make it explicit that each country is free to determine its own levels of environmental and labor protection for its citizens. . . . In sum, in the agreements the United States, Canada, and Mexico have committed themselves to ensuring that their laws and regulations provide for high levels of environmental protection and high labor standards; however, each country is free to establish its own laws and to modify them.[65]

Regarding the charge that the CEC has power akin to that of some kind of "Super-EPA," Kantor pointed out:

> In both the environmental and labor agreements, we took steps to ensure that the commissions created would not preempt local, state and national enforcement authority. The Commission's role in enforcement is to determine whether a government has engaged in a pattern of nonenforcement. Neither the Commission nor its Secretariat can directly or indirectly enforce national or state and local laws.[66]

Finally, regarding the investigatory powers of the CEC, Kantor noted:

The Secretariats do not under any circumstances have the power to subpoena or otherwise compel information from a private company or individual. Both Secretariats can examine any information they receive and may have recourse to publicly available sources of information.[67] If Mickey Kantor is one's ultimate authority on what NAFTA does and does not mean (or how it will or will not be interpreted), one is faced with a quandary: which Kantor are we to believe?

The most reasonable explanation for the two faces of Mickey Kantor rests on the nature of politics. Kantor was in all likelihood overselling the environmental benefits of the side agreement to secure broad public support for the treaty.

That politicians would indulge in overstatement should not shock or surprise. As the NAFTA debate matured, however, Kantor repaired to a more sober analysis of the treaty typified by specific citations and careful arguments. It is indeed significant that Kantor's sweeping claims of environmental protection under NAFTA were brief, vague, unsupported, and made to the general public while his communications with the environmental community have been far more careful and restrained. If NAFTA and the side agreements truly had planted green mandates as alleged by the anti-NAFTA conservatives, one would think that Kantor and the administration would be using them to sell the agreement to the environmental community, but that clearly has not been the case.

Environmentalists Letting Down Their Hair?

The second source of concern for critics of NAFTA is several environmental groups' reports and studies that supposedly justify fears about the probable interpretation of various articles. The first, from the National Wildlife Federation (NWF), argues,

> Rather than seeking the lowest level, the NAFTA text commits the Parties to an upward harmonization of standards in North America, in essence establishing a process where ever-higher floors, rather than too-low ceilings, will be adopted in the NAFTA trade area.[68]

As discussed earlier, it is true that NAFTA encourages signatories to harmonize certain sanitary, health, and environmental standards, but that encouragement is qualified in the text by the phrase "to the greatest extent practicable" (NAFTA, Articles 756.1 and 906.2) and by repeated acknowledgment of the right of countries to establish their own levels of environmental protection. The NAFTA text "commits the Parties to an upward harmonization of standards" only to the extent that they agree to pursue harmonization; they are explicitly permitted to discard the principle whenever it proves inconvenient. The phrase "upward harmonization" is not even in the treaty. Thus, NWF's representation of those articles is not strictly accurate.

Nevertheless, NWF immediately continues,

Given [that] the Parties agree to a process of upward harmonization, a critical deficiency re- mains that the text fails to establish a timetable and process by which the upward movement of stan- dards can occur.[69]

Exactly the point! Even if those articles are misin- terpreted as "requiring" upward harmonization of environmen- tal standards, there is nothing in NAFTA to enforce that alleged requirement. NWF argues that the side agreements should provide for timetables and enforcement mechanisms for the "commitment" to harmonize, but of course, the side agreement provided for no such thing.[70]

Moreover, the NWF report observed that Article 1114.21

commits the NAFTA countries to avoid creating pollution havens, but requires only consultation when this commitment is violated. . . . In addition, Article 1114.2 deals only with situations where countries derogate from existing standards in order to attract or maintain investment, and it does nothing to deal with cases where the lack of existing standards might also lead to the creation of pollution havens. . . . That phrase is intended to refer to the relaxed enforcement of environmental laws and regulation, and not just a parliamentary or legislative change (emphasis in the original).[71]

NWF also approvingly cites an analysis of NAFTA, undertaken by Gary Hufbauer and Jeffrey Schott of the Institute for International Economics, that concludes that "NAFTA establishes that a party is free to choose its own level of protection" and that NAFTA "falls short" because it "encourages countries to harmonize their process standards upwards but does not provide an explicit plan for the countries to achieve this goal."[72]

The second environmental report cited by the conservative critics of NAFTA was written by Peter Emerson, senior economist for the Environmental Defense Fund (EDF), and Robert Collinge, an economist at the University of Texas. Emerson and Collinge are quoted to the effect that "Chapter 11 (Investment) contains an important provision that would formally discourage a government from lowering its own environmental standards for the purpose of encouraging investment."[73] As the earlier discussion of Article 1114 indicated, that statement is true; NAFTA

"discourages," but does not prohibit, relaxation of environmental standards to increase investment. Conveniently ignored, however, is Emerson and Collinge's more telling analysis of Chapter 11: "A weakness is that the agreement does not provide an enforcement mechanism to ensure that the parties are complying with this provision."[74]

Emerson and Collinge are quoted further. "It [Chapter 9] would require the three countries to work jointly on enhancing the level of environmental protection, and prohibits downward harmonization."[75] Again, there is less here than meets the eye. Under Article 906, countries are required to work together to enhance environmental protection ("to the extent practicable"), and forced downward harmonization is prohibited simply because, as Emerson points out in the sentence before the supposedly incriminating quote, "Chapter 9 (Standards Related Measures) would protect the right of a NAFTA country to determine the level of environmental protection that it considers appropriate."[76]

Apparently, the first sentence was found too inconvenient for the critics to include in their misinterpretation of Emerson and Collinge's analysis of NAFTA. Nor do the critics of NAFTA find convenient Emerson and Collinge's take on Chapter 7 (particularly Article 756), in which they conclude that the chapter "would permit a NAFTA country to establish the level of protection that it considers appropriate to protect human, animal or plant life or health within its respective territories."[77]

Moreover, the EDF subsequently issued a press release in support of NAFTA, which claimed that "environmentalists have also won guarantees that non-discriminatory local, state, and Federal environmental laws are protected from challenge on trade grounds."[78]

The final document cited to justify fears of NAFTA is ostensibly a legal brief written by the Natural Resources Defense Council. Hoffman and Sheehan declare that

> NAFTA's free-trade supporters are clinging to the hope that the environmental side accord will not be enforced as written. But organizations like the Natural Resources Defense Council (NRDC), a major environmental litigation group, are now celebrating a hard-fought victory with NAFTA. NRDC's 36-page review of the accord verifies that NAFTA's three-nation environmental bureaucracy would be granted "sweeping responsibilities that provide it with the opportunity to have a major impact" on North American trade.[79]

First of all, the NRDC did not write that "36-page review"; it was written by the Washington, D.C., law firm of Winthrop, Stimson, Putnam & Roberts, which was retained by the World Wildlife Fund. Second, the firm's analysis of NAFTA, as noted earlier, is entirely consistent with the analysis provided in this paper. For example, the argument that NAFTA opens U.S. laws to legal challenge is dismissed bluntly.

[There is] no real basis for this fear. In fact, this argument cannot be based on the text of NAFTA since the remedy for a violation for NAFTA standards is trade retaliation, not the overturning of U.S. law. . . . The only real argument that opponents can make about standards is that an adverse panel decision will lead to political pressure to repeal a U.S. law. There are many reasons, however, why this is unlikely to happen."[80]

Regarding the argument that Article 906 would require the upward harmonization of environmental standards, the firm concludes that "it will be virtually impossible to overturn an environmental standard under Chapter 9."[81] Regarding national health and environmental standards, the firm concludes that Chapter 7 "gives each Party discretion to decide the level of protection or risk it considers appropriate."[82]

The NRDC did, however, issue a press release on September 14, 1993, that declared that "the Administration has also provided assurances and clarifications to satisfy us that the rights of federal and state governments to establish health and environmental standards will be protected under NAFTA." Peter Berle, president of the National Audubon Society, in a press release of the same date, agreed. "We are convinced that state and local environmental laws, including those that are more stringent than federal standards, will not be threatened by NAFTA."

Thus, no evidence has yet been unearthed by the antiNAFTA conservatives to justify their contention that the environmental community interprets the treaty the same way they do. The position of the NWF, the NRDC, and the EDF, in particular, has been blatantly misrepresented; their understanding of NAFTA is entirely consistent with the

analysis provided in this paper.[83]

Further, Mickey Kantor's earlier hortatory statements about NAFTA are not particularly convincing, given that he has since issued far stronger and infinitely more detailed statements that echo the understanding of the treaty outlined in this paper. Relying on Kantor's early statements to understand NAFTA is akin to relying on an administration press release to understand the president's health care reform package. One is always best advised to read the original and take the surrounding political rhetoric with a grain of salt.

If NAFTA actually promised to usher in even half of the "parade of horribles" alleged by the anti-NAFTA conservatives, it would be incomprehensible that any environmental group would oppose the treaty, whereas many, in fact, do. Moreover, one would expect the pro-NAFTA environmentalists to tout those aspects of the treaty to justify their support of NAFTA to anti-NAFTA environmentalist groups that, according to NRDC staff, are gaining significant money and membership at the expense of pro-NAFTA environmental lobbies.[84]

Finally, environmentalists already have enough levers to continue regulating the economy and enough fuzzy legal language to give cover to those efforts with or without NAFTA. Although Fred Smith of the Competitive Enterprise Institute disagrees, claiming that "in international affairs, they have not had those powers," the treaties signed at Rio make the fuzzy language of NAFTA look positively conservative.[85]

Ultimately, however, the debate about the environmentalists' interpretation of NAFTA is largely irrelevant. NAFTA's provisions and side agreements are clear to anyone who reads the relevant articles. Any run-away interpretation must be agreed to not only by the U.S. government but also by the governments of Mexico and Canada, and it is highly unlikely that those nations (particularly Mexico) would accept the worst-case interpretation of NAFTA, given the massive assault on national sovereignty entailed by such distorted readings of the treaty. Moreover, the worrisome fuzzy language cited by critics of NAFTA is hermetically sealed within walls of qualifications, exceptions, loopholes, and countermanding language. And even if the fuzzy language in question were to break through those obstacles, there is absolutely no enforcement mechanism to provide it with any practical meaning.

Conclusion

The foregoing examination of the green accords of NAFTA makes clear that the treaty will have little direct impact on environmental policy. That does not, however, render the green language of the treaty harmless. It sets a potentially dangerous precedent: only if there is a level environmental playing field can trade between nations be deemed "fair." Moreover, it provides for yet another international bureaucracy with the not insubstantial power to publicly campaign for "greener" national planning. The economic gains of NAFTA are less than they might be because of the qualifications and exceptions in the treaty that can and will be used to regulate trade in particular circumstances. No 1,000-page document can truly be called "free trade," and it is certainly fair and absolutely correct for the freetrade critics of NAFTA to point out that unilateral elimination of U.S. trade barriers is far more attractive economically and politically than are the messy attempts at multilateral trade negotiation that have characterized modern free-trade policy. Not only is highly objectionable politi cal baggage (such as domestic environmental and labor practices) brought in, but such multilateral approaches also reinforce the unfortunate "nuclear arms analogy" according to which trade barriers are protective deterrent measures: one party can safely lower import barriers only if the other party does likewise, for if barriers are lowered without corresponding international concessions, an entire economy is put at risk.

Nevertheless, the benefits of NAFTA are substantial, and any honest examination of the treaty finds that NAFTA liberalizes trade and generates economic growth in all participating countries.[86] Do the objectionable side agreements offset the gains in trade liberalization? Although the answer remains a judgment call, there is little reason to believe that the green language of NAFTA will be of any domestic consequence.

It is an unfortunate fact of political life that legislation often requires one step backward for every two steps forward. This is one such instance, and free traders should accept that political reality and not allow the best, so to speak, to be the enemy of the better.

Notes

[1] Environmental groups supporting NAFTA include the National Wildlife Federation, Conservation International, the Natural Resources Defense Council, the World Wildlife Feder ation, the National Audubon Society, and the Environmental Defense Fund. Opposing NAFTA are Public Citizen, Sierra Club, Friends of the Earth, Greenpeace, Public Interest Research Group, and the Rainforest Action Network.

[2] Pat Buchanan, "GOP's NAFTA Divide," Washington Times, August 23, 1993, p. E1.

[3] NAFTA, Articles 915 and 904.4, respectively

[4] NAFTA, Article 915.

[5] NAFTA, Article 712.3. For a statute to have a "scientific basis," it must be based on recognized risk assessment practices, which are broadly laid out in Article 757.

[6] NAFTA, Article 2019.

[7] Matthew Hoffman and James Sheehan, "The Free Trade Case against NAFTA," Competitive Enterprise Institute, Washington, September 23, 1993, p. 7.

[8] See, for example, 19 U.S.C. 2504(d).

[9] NAFTA, Article 904.4 states that "no Party may prepare, adopt, maintain, or apply any standard-related measure with a view to or with the effect of creating an unnecessary obstacle to trade between the Parties." Yet the definition of an "unnecessary obstacle" under NAFTA is far more constrained than under GATT, for NAFTA Article 904.4 further states that no unnecessary obstacle shall be deemed to be created if "the demonstrable purpose of such measure is to achieve a legitimate objective and such measure does not operate to exclude goods of another Party that meet that legitimate objective." In other words, if a measure has a legitimate objective, it will not constitute an unnecessary obstacle under NAFTA and thus cannot be challenged. No such "legitimate objective" clause exists under GATT.

[10] The law firm of Winthrop, Stimson, Putnam & Roberts, "The NAFTA Environmental Agreements," Washington, undated, p. 19.

[11] Pat Buchanan, "NAFTA: Dubious Deal," Washington Times, August 11, 1993, p. F4.

[12] James Sheehan, "NAFTA--Free Trade in Name Only," Wall Street Journal, September 9, 1993, p. A21.

[13] NAFTA, Article 724.

[14] NAFTA, Article 756.2, states, "(a) Each importing party: shall treat a sanitary or phytosanitary measure adopted or maintained by an exporting Party as equivalent to its own where the exporting Party, in cooperation with the importing Party, provides to the importing Party scientific evidence or other information, in accordance with risk assessment methodologies agreed upon by those Parties, to demonstrate objectively, subject to subparagraph (b), that the exporting Party's appropriate level of protection; (b) may, where it has a scientific basis, determine that the exporting Party's measure does not achieve the importing Party's appropriate level of protection; and (c) shall, upon the request of the exporting Party, provide its reasons in writing for a deter mination under subparagraph (b)."

Article 756.3 states, "For the purposes of establishing equivalency, each exporting Party shall, upon the request of an importing Party, take such reasonable measures as may be available to it to facilitate access in its territory for inspection, testing, and other relevant procedures."

And Article 756.4 states, "Each Party should, in the development of a sanitary or phytosanitary measure, consider the relevant actual or proposed sanitary or phytosanitary measures of the other Parties."

[15] NAFTA, Article 712.3. U.S. Trade Representative Mickey Kantor explained this requirement in a September 13, 1993, letter to John Adams of the Natural Resources Defense Coun cil. "It is clear that under the NAFTA, the

requirement that measures be based on 'scientific principles' and not be maintained 'where there is no longer a scientific basis' do not involve a situation where a dispute settlement panel may substitute its scientific judgement for that of the govern ment maintaining the [sanitary or phytosanitary] measure. The question under the NAFTA in this regard is whether the government maintaining the [sanitary or phytosanitary] mea sure has a 'scientific basis' for the measure. 'Scientific basis' is defined as 'a reason based on data or information derived using scientific methods.'

"The question is also not whether the measure was based on the 'best' science or the 'preponderance' of science or whether there was conflicting science. The question is only whether the government maintaining the measure has a scien tific basis for it. This is because the NAFTA [sanitary and phytosanitary] text is based on a recognition that there is seldom, if ever, scientific certainty and consequently any scientific determination may require a judgement among dif fering scientific opinions. The NAFTA preserves the ability of governments to continue to make those judgements."

[16] NAFTA, Article 712.5, states, "Each Party shall ensure that any sanitary or phytosanitary measure that it adopts, maintains, or applies is applied only to the extent neces sary to achieve its appropriate level of protection, taking into account technical and economic feasibility." Mickey Kantor, in his letter to John Adams explains: "This provi sion addresses how a health law or regulation that is in place is applied. It does not address the validity of the underlying health law or regulation itself, or the level of protection afforded by those laws. . . . It recognizes that governments may legitimately take economic and technical factors into account in the manner in which they apply their health regulations to imported goods. Finally, the provi sion is drafted so that a government will always be able to apply its [sanitary or phytosanitary] measures in a manner that fully achieves the country's chosen level of protection."

[17] Winthrop, Stimson, Putnam & Roberts, p. 21.

[18] Stephen Chapman, "The Hard Right's Limp Case against NAFTA," Chicago Tribune, September 5, 1993.

[19] Keith Schneider, "Trade Pact vs. Environment: Clash at a House Hearing," New York Times, September 16, 1992, p. D1.

[20] Michael Fumento, "Is Free-Trade Pact a Dirty Deal?" Investor's Business Daily, September 10, 1993, p. 2.

[21] Sheehan, "NAFTA--Free Trade in Name Only."

[22] Sheehan, in "NAFTA--Free Trade in Name Only," warns that the joint advisory committee would "grant extraordinary power and influence to nongovernmental organizations" and "be able to use this privileged position to clamor for trade restrictions, acting as an inside lobby on behalf of domes tic industries seeking protection from their competitors." Yet such concerns are clearly overwrought. The joint advi sory committee can only advise. It not only has no "ex traordinary power"; it has no power at all. Government at all levels is already so awash with environmental advisory committees that it is hard to see how one more bully pulpit could make any difference.

[23] NAFTA Side Agreement of Environmental Cooperation (SAEC), Article 10.1.

[24] NAFTA SAEC, Article 11.5.

[25] NAFTA SAEC, Article 13.1.

[26] Ibid.

[27] The submission must clearly identify the person or or- ganization making the submission; provide sufficient infor mation to allow the secretariat to review the submission, including documentary evidence; be aimed at promoting en forcement rather than at harassing industry; indicate that the matter has been communicated in writing to the relevant authorities of the country and indicate the country's re sponse; and be filed by a person or organization residing the country's territory. NAFTA SAEC, Article 14.1.

[28] NAFTA SAEC, Article 15.2.

[29] NAFTA SAEC, Article 14.3(b).

[30] There are three steps that must be taken before an alle gation of nonenforcement of environmental regulations can be acted upon by the CEC. When a country believes that another country is not adequately enforcing an environmental law, notice must be officially given. The nation so advised must then undertake an investigation of the matter and respond (NAFTA SAEC, Article 20.4). If, after repeat notices, a country feels that another country has evidenced a "persis tent pattern of failure" to enforce its environmental laws, the first country may formally request a consultation with the second country (NAFTA SAEC, Article 22.1). If such a consultation does not result in a mutually satisfactory resolution of the matter, any country may then request a meeting of the council, which may then deliberate and, if warranted, make recommendations on the matter (NAFTA SAEC, Article 23.4). Only if council deliberations fail to re solve the matter may the council convene an arbitration panel to settle it (NAFTA SAEC, Article 24.1).

[31] NAFTA SAEC, Article 24.1.

[32] NAFTA SAEC, Article 45.2(b).

[33] Arbiters are generally drawn from a standing roster of 45 individuals appointed by a consensus decision of the council (NAFTA SAEC, Article 25.1). Arbiters must also be "independent of, and not be affiliated with or take instruc tion from, any Party, the Secretariat, or the Joint Advisory Committee" (NAFTA SAEC, Article 25.2). Panelists are fur ther ineligible to serve as arbiters if they (1) have served in an advisory or mediation role during earlier council deliberations or (2) have a personal or organizational in terest in the matter that may affect their judgement.

Each disputing country selects two arbiters who are citizens of the other disputing country [NAFTA SAEC, Article 27.1(c)], and a chairman is chosen by consensus [NAFTA SAEC, Article 27.1(b)]. Although an individual not on the stand ing roster of potential arbiters may be nominated by a coun try, the other country may exercise a preemptory challenge against that individual (NAFTA SAEC, Article 27.3).

[34] NAFTA SAEC, Article 28.3. Findings, determinations, and recommendations are restricted under Article 31.2 (unless the disputing parties agree otherwise) to "(a) findings of fact; (b) [the panel's] determination as to whether there has been a persistent pattern of failure by the Party com plained against to effectively enforce its environmental law, or any other determination requested in the terms of reference [subject to the agreement of both disputing par ties under 28.3]; and (c) in the event the panel makes an affirmative determination under subparagraph (b), its recom mendations, if any, for the resolution of the dispute, which normally shall be that the Party complained against adopt and implement an action plan sufficient to remedy the pat tern of non-enforcement." Article 31.3 provides that panel ists may furnish separate opinions on matters about which there is not unanimous agreement.

[35] NAFTA SAEC, Article 45.1.

[36] Hoffman and Sheehan, "The Free Trade Case against NAFTA," p. 7.

[37] NAFTA SAEC, Article 33.

[38] NAFTA SAEC, Article 34.4. Annex 34 of the agreement stipulates that no monetary enforcement assessment may ex ceed .007 percent of the total trade in goods among the three parties during the most recent year for which data are available (currently, $20 million).

[39] NAFTA SAEC, Article 36.2.

[40] NAFTA SAEC, Article 36.4.

[41] NAFTA SAEC, Annex 36A.

[42] "Kantor Highlights Enforcement Provisions of NAFTA Side Accords," Inside U.S. Trade, Special Report, August 16, 1993, p. 1.

[43] Ibid.

[44] NAFTA SAEC, Articles 13.2 and 15.4, respectively.

[45] NAFTA SAEC, Article 21.3 states, "If a Party does not make available information requested by the Secretariat, as may be limited pursuant to paragraph 2, it shall promptly advise the Secretariat of its reasons in writing."

[46] NAFTA SAEC, Article 37.

[47] NAFTA SAEC, Article 30.

[48] NAFTA SAEC, Article 31.1.

[49] Letter from Mickey Kantor to John Adams, September 13, 1993, p. 4.

[50] Hoffman and Sheehan, "The Free Trade Case against NAFTA," p. 6.

[51] Article 1 states that "the objectives of this agreement are to: (a) foster the protection and improvement of the environment in the territories of the Parties for the well- being of present and future generations; (b) promote sus tainable development based on cooperation and mutually sup portive environmental and economic policies; (c) increase cooperation between the Parties to better conserve, protect, and enhance the environment; (d) support the environmental goals and objectives of NAFTA; (e) avoid creating trade distortions or new trade barriers; (f) strengthen coopera tion on the development and improvement of environmental laws, regulations, procedures, policies and practices; (g) enhance compliance with, and enforcement of, environmental laws and regulations; (h) promote transparency and public participation in the development of environmental laws, regulations, and policies; (i) promote economically effi cient and effective environmental measures; and (j) promote pollution prevention policies and practices."

[52] Article 2 reads, "Each Party shall, with respect to its territory: (a) periodically prepare and make publicly avail able reports on the state of the environment; (b) develop and review environmental emergency preparedness measures; (c) promote education in environmental matters, including environmental law; (d) further scientific research and tech nology development in respect of environmental matters; (e) assess, as appropriate, environmental impacts; and (f) pro mote the use of economic instruments for the efficient achievement of environmental goals."

[53] Article 5.1 provides, "Each Party shall effectively enforce its environmental laws and regulations through ap propriate governmental action . . . such as (a) appointing and training inspectors; (b) monitoring compliance and in vestigating suspected violations, including thorough on-site inspections; (c) seeking assurances of voluntary compliance and compliance agreements; (d) publicly releasing noncompli ance information; (e) issuing bulletins or other periodic statements on enforcement procedures; (f) promoting environ mental audits; (g) requiring record-keeping and reporting; (h) providing or encouraging mediation and arbitration ser vices; (i) using licenses, permits or authorizations; (j) initiating, in a timely manner, judicial, quasi-judicial or administrative proceedings to seek appropriate sanctions or remedies for violations of its environmental laws and regu lations; (k) providing for search, seizure or detention; or (l) issuing administrative orders, including orders of a preventative, curative or emergency nature."

[54] Article 5.3 stipulates, "Sanctions and remedies provided for a violation of a Party's environmental laws and regula tions shall, as appropriate; (a) take into consideration the nature and gravity of the violation, any economic benefit derived from the violation to the violator, the economic conditions of the violator, and other relevant factors; and (b) include compliance agreements, fines, imprisonment, injunctions, the closure of facilities, and the cost of containing or cleaning up pollution."

[55] See generally "Why Are Environmentalists Ecstatic about NAFTA?" Human Events, October 2, 1993, p. 3.

[56] Tom Bethell, "Viva NAFTA?" National Review, October 18, 1993, p. 36.

[57] Announcement of NAFTA Supplemental Agreements on Labor and the Environment, Statement by Ambassador Mickey Kantor, U.S. trade representative, August 13, 1993, p. 2.

[58] Mickey Kantor, "At Long Last, A Trade Pact to Be Proud Of," Wall Street Journal, August 17, 1993, p. A14.

[59] "Why Are Environmentalists Ecstatic about NAFTA?" p. 3.

[60] Ibid.

[61] Mickey Kantor, "NAFTA Maintains U.S. Environmental Stan dards," letter to the editor, New York Times, September 23, 1993, p. A26.

[62] Letter from Mickey Kantor to John Adams, p. 3.

[63] Letter from Mickey Kantor to Bill Archer, October 7, 1993, pp. 1,4.

[64] Ibid., p. 4.

[65] Ibid., pp. 1, 2.

[66] Ibid., p. 3.

[67] Ibid., pp. 3-4.

[68] Stuart Hudson and Rodrigo Prudencio, "The North American Commission on Environment and Other Supplemental Environmen tal Agreements: Part Two of the NAFTA Package," National Wildlife Federation, Washington, February 4, 1993, p. 11.

[69] Ibid.

[70] That is particularly interesting since the Competitive Enterprise Institute has alleged that "the Clinton adminis tration capitulated to all of [the environmentalists'] major demands for NAFTA side agreements." Hoffman and Sheehan, "The Free Trade Case against NAFTA," p. 5. Yet the NWF report quoted by the institute strongly urged that the side agreements provide for specific timetables for progress in achieving upward harmonization, regulations regarding green standards for industrial producing and processing, a "trans action tax" or green investment fee on all cross-border trade, and an enforcement mechanism for Article 1114.2, among other things. Hudson and Prudencio, pp. 11-16. None of those recommendations were incorporated in the final agreement.

[71] Hudson and Prudencio, pp. 14-16.

[72] Gary Hufbauer and Jeffrey Schott, NAFTA: An Assessment, Institute for International Economics, Washington, February, 1993, pp. 59, 149.

[73] "Is Mickey Kantor Lying about NAFTA?" Human Events, September 18, 1993, quoting Peter Emerson and Robert Collinge, "The Environmental Side of North American Free Trade," in NAFTA and the Environment, ed. Terry Anderson (San Francisco: Pacific Research Institute for Public Poli cy, 1993), p. 53.

[74] Emerson and Collinge, p. 55.

[75] "Is Mickey Kantor Lying about NAFTA?" p. 3.

[76] Emerson and Collinge, p. 53.

[77] Ibid.

[78] "Environmental Defense Fund Joins Groups in Support of NAFTA," press release, Environmental Defense Fund,

September 14, 1993, p. 1.

[79] Matthew Hoffman and James Sheehan, "Free Trade Fakery?" Washington Times, October 12, 1993, p. A15.

[80] Winthrop, Stimson, Putnam & Roberts, p. 2.

[81] Ibid., p. 19.

[82] Ibid., p. 24.

[83] Personal conversations of the author with Peter Emerson of the Environmental Defense Fund, Lynn Fischer of the Natu ral Resources Defense Council, and personnel at the National Wildlife Federation affirm that those organizations categor ically disagree with the Competitive Enterprise Institute's interpretation of NAFTA and the side agreement.
[84] Personal conversation with Lynn Fischer of the NRDC, October 1, 1993.

[85] Tom Bethell, "Viva NAFTA?" p. 40. See generally Mari anne Lavelle, "The Earth Summit: Building a Body of Environ mental Law," National Law Journal, June 1, 1992, p. 1.

[86] See generally Brink Lindsey, "Protectionist Racket," Reason, November 1993, pp. 46-48.