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NAFTA'S ENVIRONMENTAL PROVISIONS: WHAT PROBLEMS WERE THEY INTENDED TO ADDRESS?

*John H. Knox**

The title of this panel discussion is NAFTA's environmental provisions: are they working as intended and are they adequate? I am going to try to lay some groundwork for that discussion by talking about a preliminary question or two. Before we talk about whether they are working as intended, we have to talk about how they were intended to work and, in particular, what problems they were intended to solve.

In one sense, the main problem that the NAFTA environmental side agreement was designed to solve was a political problem facing then-Governor Bill Clinton in 1992. The NAFTA was finalized just as the presidential election was entering the final stretch. On the one hand, Clinton had strong reasons to oppose the agreement that had been negotiated by the Bush administration. Apart from the fact that he, like any politician, would have liked to have been able to oppose anything his opponent supported, he also wanted to draw support from the traditionally Democratic constituencies of labor and the environmental community, who had for some time made it clear that they were going to oppose NAFTA.

On the other hand, Bill Clinton was a "New Democrat," and New Democrats believe in international trade. So he wanted a way to be able to support NAFTA and oppose it at the same time. And lo and behold, a month before the presidential election, he found that way. He announced that he opposed the NAFTA as it had been signed by President Bush, but he supported it as it would be fixed by President Clinton after the election, through the addition of side agreements on labor and the environment.

After President Clinton took office, he faced another political problem: getting NAFTA through Congress. NAFTA is not a treaty under the U.S. Constitution, so it did not need advice and consent from the Senate. It did, however, have to be approved by both houses of Con-

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gress. To obtain the necessary votes from Democrats in Congress, President Clinton needed to address their labor and environmental concerns in a way that would allow at least some of them to support the agreement.

What concerns did he have to address? Although labor is not the focus of this panel, it is worth noting that the labor concerns were much more intractable than the environmental issues. There was never any chance that a labor side agreement would cause labor unions to support NAFTA, since it could not, or would not, address the unions' basic concern - the difference between Mexican and U.S. wages.

It did seem possible, however, to address at least some of the environmental concerns. In early 1993, seven major environmental groups offered President Clinton a deal: they would support NAFTA if the side agreement met their concerns.

What were those concerns? I think at the risk of oversimplification, one can divide the environmental concerns with NAFTA into three major areas. Moving from south-to-north and putting them into headline form, they are as follows: first, Mexico is a pollution haven; second, the U.S./Mexico border area is a cesspool; and third, NAFTA will destroy U.S. sovereignty by overturning U.S. environmental laws.

First is the notion that Mexico is a "pollution haven." The idea here is that Mexico, like any developing country, has lower environmental standards, at least in practice, than the United States does. Their lower standards will act as a magnet drawing U.S. companies south of the border to relocate. This, in turn, has several secondary effects: the Mexican problems with the environment get worse; U.S. jobs are lost; and there is pressure on the United States to lower its own standards in a kind of race to the bottom.

You can dispute those assertions from an economic point of view. But there is a deeper concern there, which was never addressed satisfactorily by the Bush Administration, and that is the idea that somehow it is *unfair* for U.S. companies to avoid U.S. environmental laws by shifting their operations south of the border and then selling the goods that they produce there or that their subsidiaries produce there in competition with companies that stay here and comply with U.S. standards.

How did the environmental groups propose to deal with the "pollution haven" problem? They proposed an international commission with the authority to oversee enforcement in Mexico and the other North American countries, and to impose sanctions on them if they did not adequately enforce their own laws. The second problem was the U.S./Mexico border area. This had been an area of concern for a long time among environmental groups who believed that NAFTA would

make the border environment's problems even worse. The maquiladora industry has grown at such a pace in northern Mexico that it has far outstripped the capacity of the local infrastructure, and particularly the environmental infrastructure. In addition, many communities on the U.S. side of the border, particularly the unincorporated developments called colonies, lack adequate water and waste-water facilities. Moreover, pollution from either side of the border causes harm to both sides, since border communities share common watersheds and air sheds.

The environmental groups believed that through NAFTA, the governments should take some responsibility for trying to address this problem. One proposal was to impose a tax or a tariff on goods that crossed the border, and devote the funds to cleaning up the border environment.

The third area of concern was the idea that U.S. environmental laws are at risk from trade agreements. NAFTA, in particular, became the focus of this concern because it was negotiated shortly after the 1991 "tuna/dolphin" decision by a GATT panel, which indicated that the Marine Mammal Protection Act's restrictions on imports of tuna violated the United States' obligations under GATT. The tuna/dolphin decision sent a shock wave through the U.S. environmental community. For the first time, they realized that U.S. environmental laws that restricted imports from other countries for environmental reasons might run afoul of international trade agreements. And so they wanted NAFTA rewritten to protect those laws.

The Bush Administration in some ways had addressed all three of these problems. They had addressed the pollution haven problem by including a provision in the investment chapter of NAFTA in which the governments agreed that they should not lower their environmental standards to attract foreign investment. The "should" was intentionally used to avoid making this commitment a legal obligation in the way that, of course, everything else in the agreement was. The Bush Administration also had negotiated a border plan with Mexico to try to improve the U.S./Mexico border environment. And it had made some improvements in the NAFTA over the GATT to try to address possible conflicts between U.S. environmental laws and international trade regimes. None of these efforts satisfied the environmental community, however, which regarded them all as too weak.

So what did the Clinton Administration do? It spent most of the spring and summer of 1993 negotiating two environmental side agreements, each of which addresses one of these areas of concern. The main side agreement, the one that all three countries joined, addresses the problem of pollution havens. It requires the governments to effectively enforce their own environmental laws. The agreement prohibits them

from lowering their environmental standards and requires them to try to improve them. It creates a mechanism by which a new international organization, the Commission for Environmental Cooperation, can hear complaints from citizens whose governments are failing to enforce their own environmental laws.

Finally, the agreement provides for sanctions against any country that is found to have engaged in a persistent pattern of failure to effectively enforce its environmental laws. Those sanctions will probably never be used. Referring a dispute over an alleged failure to effectively enforce to an arbitral panel takes a two-thirds vote of the three members of the commission. I think it is extremely unlikely that two of the three countries will ever send a complaint against the third country to arbitration. It is barely conceivable that Mexico and Canada might join against the United States. But it is next to impossible that either Mexico or Canada would ever join with the United States to refer a complaint against the other to arbitration. The dispute resolution process, if it were invoked, is complicated and time-consuming. But it does have the possibility of sanctions, at the end of the process.

The United States and Mexico negotiated another side agreement to address the U.S./Mexico border environment. Not surprisingly, the two countries found it difficult to imagine putting a tariff on goods at the same time that NAFTA was supposed to be reducing tariffs, so that idea never really went very far. Instead, they created a new development bank called the North American Development Bank, which would be able to make loans to communities on either side of the border to help them develop their water, wastewater, and solid waste facilities. Critics pointed out that the bank could only make loans, not grants, and said that adding another institution to lend poor communities money at market rates was not useful, since these communities could not afford to use it. (However, the EPA and the Bank have recently agreed that the Bank would be able to give border communities grants for environmental infrastructure projects, with money provided by the EPA).

The third area of concern -- the conflict between trade agreements and U.S. environmental laws -- was not addressed. The tuna/dolphin case had turned, in part, on the idea that the GATT prohibited the United States from using as a basis for import restriction the way in which Mexico caught tuna. The U.S. law restricted imports of tuna that were caught in a way that was unsafe for dolphins. The GATT panel said that restrictions based on process or production methods were impermissible under GATT.

The environmentalists very much wanted the primary environmental side agreement to address this issue, or at least put it on the future

work agenda of the Commission for Environmental Cooperation. The topic was so sensitive to Mexico and Canada, however, that they would not even agree that the Commission for Environmental Cooperation could discuss "process and production methods." Instead, the parties agreed on the code words: "environmental implications of goods throughout their life cycles." And in fact, the Commission has never tried to resolve, or even discuss, the issues raised by the tuna/dolphin case.

But I do not want to close on that note. On a much more positive note, the environmental side agreement was intended to do something much more important than address NAFTA's environmental problems. It created a new institution, the Commission for Environmental Cooperation, which has as its mandate the North American environment as a whole. The side agreement is much, much broader than trade-related issues, although those are included, of course. It creates a process for the governments to be able to talk together on a regional basis about environmental issues, which in itself is extremely important. More important, it creates an independent secretariat, with the authority and the ability to prepare reports, make investigations, and hire experts to look at all kinds of issues having to do with the North American environment. That has the potential to be extremely promising. I think the Commission may add a new voice to the North American debate over environmental issues which is not beholden to governments, business, or environmental groups and which, at the same time, is respected by all of those groups. That would be extremely valuable in many ways that go far beyond NAFTA and its environmental problems.

