

REVIEW OF THE NAFTA ENVIRONMENTAL SIDE AGREEMENT: DOES IT MEET EXPECTATIONS?

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ABSTRACT

This article conducts a side-by-side analysis of the initial positions of the Mexican and U.S. governments and environmental organizations on the environmental side agreement to NAFTA with the agreement text as it emerged from final negotiations. The analysis focuses on thirteen key issues to demonstrate where and how the final agreement accords or diverges from these positions, with the result seeming to suggest that the negotiation process was strongly influenced by NAFTA's political fortunes rather than a determination to establish a well-structured trilateral institution.

RESUMEN

Este artículo compara las posiciones originales que tomaron los gobiernos mexicano y estadounidense y las organizaciones ambientalistas con respecto a los acuerdos suplementarios al TLC, con el texto final de las negociaciones. El análisis se enfoca sobre trece puntos para demostrar dónde el acuerdo final se asemeja o diverge de las posturas originales. Los resultados sugieren que el proceso de negociación fue fuertemente influido por consideraciones políticas, y no por un deseo de crear instituciones transnacionales tripartitas.

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THIS analysis compares the negotiating positions of the U.S. and Mexican governments and seven national environmental organizations with the final text of the environmental side agreement to the North American Free Trade Agreement. Thirteen key issues have been selected for this comparison:

1. The Basic Structure and Function of the Trilateral Commission
2. The Role of the Public Advisory Board
3. Reporting Functions of the Trilateral Commission
4. Consequences for Lax Environmental Law Enforcement
5. Public Access and Public Participation
6. Citizen Submission Process
7. Right-to-Know Laws
8. Dispute Settlement Panels (for NAFTA Text Challenges)
9. Effect of NAFTA on Domestic Environmental Laws
10. Relationship of International Environmental Agreements to NAFTA
11. Citizen Access to Domestic Remedies for Environmental Problems
12. Legal Status of the Environmental Side Agreement
13. Funding

The analysis examines how the final text of the environmental side agreement fulfills, or does not fulfill, the expectations of various pre-agreement negotiating positions. Key provisions of the final text are compared with the initial negotiating positions of the U.S. and Mexican governments¹ and with the position of the seven environmental groups who released their demands for the side agreement in a May 4, 1993, letter to U.S. Trade Representative Mickey Kantor.²

Of course, the essential nature of negotiation is compromise. Nevertheless, it is illustrative to understand how the final text

1 These positions were taken from negotiating texts printed in the trade publication *Inside U.S. Trade* (B.N.A.), Special Report, May 21, 1993. The Canadian government's position is not analyzed, but the author recognizes that Canada's great reluctance to negotiate a strong environmental side agreement was a substantial factor in the outcome.

2 Letter of May 4, 1993, from World Wildlife Fund, Nature Conservancy, Defenders of Wildlife, National Audubon Society, Environmental Defense Fund, Natural Resources Defense Council and National Wildlife Federation. On September 15, five of these groups endorsed the side agreement, based on the text of the agreement and reported verbal promises from the U.S. Administration. Defenders of Wildlife and Nature Conservancy did not participate in the recent endorsement.

deviates from the initial negotiating position of the U.S. and Mexican governments and from the position of the national environmental organizations who have now endorsed the side agreement and NAFTA. By some measures, it indicates that the side agreement was hastily concluded, driven more by the political fortunes of NAFTA than by a studied analysis of the best structure for a new trilateral institution.

Issue 1: Basic Structure and Function of the Trilateral Commission

U.S. NEGOTIATING POSITION: A Council of environment ministers with a relatively independent Secretariat (permanent staff) to prepare annual reports on various topics and “receive and consider” submissions from any person or non-governmental organization (NGO) regarding environmental matters. The Secretariat was proposed to have a fairly high degree of independence in initiating reports and gathering information from NAFTA countries. The list of prioritization factors for investigations by Secretariat in response to citizen complaint included consideration of whether harm to person or organization claimed.

MEXICAN NEGOTIATING POSITION: A Council of environment ministers with a Secretariat (with national sections) to prepare annual reports. No independent authority for Secretariat to act. No investigations by the Council or Secretariat contemplated—only authority to request a response from the country on allegations of failure to enforce environmental laws.

GROUP OF SEVEN NEGOTIATING POSITION³: A Council of environment ministers with a permanent Secretariat staff. The Secretariat was proposed to have “independent power to prepare reports and conduct investigations.” Investigations could be conducted by the Secretariat on the initiative of the Council or in response to citizen complaints; citizen complaints would have received priority on the basis of alleged

³ The phrase “Group of Seven” refers to those seven national environmental organizations who co-signed the May 1993 letter. Although these groups were not part of the official side agreement negotiations, their position is termed “negotiating” because it was intended to set out their conditions for endorsing the side agreement and NAFTA.

harm to the environment, the extent of transboundary pollution impacts or whether the firm against whom allegations were made was engaged in trade between the countries.

FINAL TEXT: *A Council of environment/cabinet level ministers to serve as a "forum for discussion" of environmental matters and promote cooperation. A long list of matters on which the Council "may" develop recommendations.⁴*

The Secretariat (without national sections) does have some degree of independence from the Council and NAFTA governments, but it cannot initiate investigations without a 2/3 vote of the Council. The Secretariat's investigations in response to NGO or citizen complaints can only go towards developing a "factual record," and this action can only proceed after the country involved in the complaint has been asked for a response and after the Secretariat has received a 2/3 vote of the Council allowing the development of the factual record to proceed. A country can block even preparation of the factual record by asserting that the matter is the subject of any pending Judicial or administrative procedure (not limited to enforcement procedure-can be any type of procedure⁵). The final agreement also contains stringent restrictions on the factors to be considered in accepting citizen submissions.

Issue 2: Role and Composition of the Public Advisory Board

U.S. NEGOTIATING POSITION: Advisory Board with 6 NGO representatives from each country, appointed by the Council. The Board would be able to look at a wide range of matters, but would serve a strictly advisory role.

MEXICAN NEGOTIATING POSITION: National public advisory boards (not joint) with three members to be "drawn from" the public interest groups, scientific, professional, economic and business associa-

4 Article 2(2) of the final text states that "each party shall consider Implementing in Its law any recommendations developed by the Council under Art. 10(5)(b)" [related to "appropriate limits for specific pollutants, taking into account differences in ecosystems"]. Singling out only one area in which the recommendations of the Council must be considered by the countries for implementation clearly implies, according to standard judicial principles of statutory interpretation, that the countries have no obligation to consider implementing recommendations of the Council in any other of the myriad areas in which it may make recommendations.

5 Article 45(3).

tions, with appropriate expertise. The national advisory board would have the sole function of providing advice to the nation's environment minister serving on Council.

GROUP OF SEVEN NEGOTIATING POSITION: Public Advisory Board with 2 of 6 members from each country representing non-profit environmental, conservation or health & safety organizations and 1 of 6 members representing "border group." Secretariat would select 1 of 6 members for each country.

FINAL TEXT: *Advisory Board with 5 members from each country. The Board has purely advisory functions and there is no specification of the Interests to be represented. The Board can only see a "factual record" developed by Secretariat in response to a citizen complaint if authorized to do so by a 2/3 vote of the Council.*

Issue 3: Reporting Functions of the Commission

U.S. NEGOTIATING POSITION: Specific reports by the Council would have been required, including: an annual report on environmental enforcement and a periodic report on the state of the environment in NAFTA countries. On its own initiative, the Secretariat could have prepared a report on "any matter of substantial importance within the scope of the Agreement."

MEXICAN NEGOTIATING POSITION: Proposed an annual report on "developments and progress" of Council itself.

GROUP OF SEVEN NEGOTIATING POSITION: Specific reports have been required of the trinational commission 2 years after NAFTA became effective, including: (1) an evaluation of environmental law enforcement in all three countries; (2) a report on implementation of NAFTA and side agreements; (3) an analysis of the relationship between trade and natural resources, biodiversity, energy and agriculture; (4) a report on border environmental issues; (5) a report on the status of "upward harmonization" of environmental laws. Annual reports on enforcement, state of the environment and implementation of NAFTA and side agreements would have been required.

FINAL TEXT: *Requires an annual report (draft not available to public, only the final report) dealing with the activities of the trinational commission, data on environmental enforcement, "relevant views and information submitted by NCOs or individuals" and recommendations made by the Council. The Secretariat may prepare a report on any*

matter within the annual program of the Commission, with the annual program subject to Council approval. In addition, the Secretariat may prepare a report on “any other matter related to the cooperative functions” of the agreement unless the Council objects by a 2/3 vote.

Issue 4: Consequences for Lax Environmental Law Enforcement (Sanctions)⁶

U.S. NEGOTIATING POSITION: The U.S. proposed consultation and dispute resolution, with reliance on dispute resolution procedures of Ch. 20 of NAFTA text (with the addition of public hearings for dispute resolution panels). Sanctions were proposed to be allowed for “persistent and unjustifiable pattern of non-enforcement of a country’s environmental law”; NAFTA benefits could be suspended if a country failed to comply with a dispute panel decision on sanctions.

MEXICAN NEGOTIATING POSITION: Two of three countries could request that for prospective “unjustifiable, persistent and systematic failure to enforce domestic law in order to attract or retain investment,” the country against which allegations were made would have to make a full report to the Council. The Council could then have recommended “further action.” No trade or other sanctions were contemplated in the negotiating position.

GROUP OF SEVEN NEGOTIATING POSITION: If any NAFTA country believed that another had “engaged in a pattern of failing to comply with recommendations” in a commission action plan or failed to comply with the Secretariat’s requests for information (i.e., to aid in an investigation of a citizen complaint), then the country could initiate dispute resolution under Ch. 20 of NAFTA. Art. 2019 sanctions could be Imposed if dispute panel found a pattern of violation of commission recommendations or failure to respond to requests for information (see related position on Issue 8, below).

FINAL TEXT: *Complex, drawn-out procedure of consultation that must be initiated by governments. Process mirrors Ch. 20 panels, but with many hurdles to ever reach the dispute panel stage. No public access or participation in proceedings. The test for potential sanctions*

⁶ Much of the debate surrounding the side agreement has focused on whether a NAFTA country should be subject to sanctions -trade-related or otherwise- for failure to enforce its environmental law.

is whether there is a “persistent pattern of failure to effectively enforce” domestic environmental laws. Lax enforcement can only be raised in situations involving companies or sectors that produce goods or services that are “traded” between the countries or that produce goods or services that compete with similar products imported into the country complained against by firms in other NAFTA countries, “Effective enforcement” defined to exclude those instances where the government claims a “reasonable exercise” of prosecutorial discretion or a lack of resources. “Persistent pattern” is defined to apply only to situations arising after NAFTA goes into effect.

Issue 5: Public Access and Public Participation⁷

U.S. NEGOTIATING POSITION: All meetings of the Council would have been open to the public except by *unanimous* agreement for a closed session. The negotiating position contained fairly strong provisions for access to the documents and decisions of the Council and the Secretariat, including requirements that most decisions and reports be made public at an early stage. Public access was the rule rather than the exception in the negotiating position. The Secretariat would have been authorized to gather information from public hearings.

MEXICAN NEGOTIATING POSITION: The Council of ministers would have had the discretion to open its meetings to the public or to make certain documents available. No “public hearings” contemplated.

GROUP OF SEVEN NEGOTIATING POSITION: The Secretariat would make all of its reports and responses to citizen complaints available to the public. The position did not contain any provisions allowing countries to vote to keep documents secret. The groups acknowledged the need for confidential treatment of business records in accordance with domestic laws, but would have required that the Secretariat’s notices and requests for information would be made public except where there was a *certification* by country that making such documents public would interfere with an ongoing civil or criminal enforcement investigation. The Secretariat would have been

⁷ This aspect of proposed Commission operations is more than a mere side-light—It is critical to the effectiveness of any commission, for without strong public access/participation procedures, the countries can agree behind closed doors to keep sensitive issues or data from the public, undermining the very essential “oversight” role originally contemplated for this new trilateral body.

authorized to hold public hearings in connection with preparation of reports or the investigation of citizen petitions.

FINAL TEXT: *Very few provisions for public access to documents or decisions of the Council, except for some final reports (not drafts) and one annual open meeting required. In most cases, a 2/3 vote of the Council is sufficient to block the release of documents. Several provisions relate to the protection of "confidential business information" provided in response to Secretariat's requests for information. There are no specific requirements for showing why information is claimed to be confidential. The text also provides confidentiality protections for NGO and citizen submissions. The Secretariat is authorized to conduct "public consultations," which are defined to include conferences, seminars and symposia. It is not clear that this authorizes public hearings (i.e., taking testimony from full range of interested public).*

Issue 6: Citizen Submission Process⁸

U.S. NEGOTIATING POSITION: Any person or organization could submit complaints and get a response from the commission; an allegation of harm to the individual or organization was only one factor to be considered in determining whether Investigation of the complaint was warranted.

MEXICAN NEGOTIATING POSITION: Did not contemplate any citizen petition procedure.

GROUP OF SEVEN NEGOTIATING POSITION: Any person or organization could petition the Secretariat to undertake an investigation regarding a country's failure to enforce its environmental laws; to hold policy fora or to investigate allegations of damage to the environment or biodiversity as a result of trade. The proposal did not contain any standing or demonstration of "harm" pre-conditions.

⁸ Closely related to citizen participation is the ability of citizens to petition the new trinational commission regarding environmental problems that are not being adequately dealt with by *the* governments. This process is central to the notion that such a commission would actually improve environmental enforcement in North America.

FINAL TEXT: There are *stringent limits* in the *qualifying factors for citizen complaints*. Including *requirements to exhaust all administrative and private remedies and to allege harm to an individual or group* (vs. *trying to prevent harm from occurring*). *Only residents can complain against their government* (e.g., *residents of Mexico could not complain against U.S. government's failure to enforce environmental laws on U.S. side of the border*). A country can *block the Secretariat from any investigation by claiming that the matter is the subject of "a pending judicial or administrative procedure"* [not necessarily an enforcement procedure]. A *2/3 vote of Council is required for Secretariat to proceed with development of factual record.* It is not clear that complainant has any right to find out the status of its complaint, the details of a government's response, or why further investigation was blocked. Also, it is not clear that complainant even has the right to see the factual record developed or to offer a response to it (i.e., 2/3 vote of Council required to make factual record public-Art. 15(7)).

Issue 7: Right-to-Know Laws⁹

U.S. NEGOTIATING POSITION: The Council would have been mandated to develop a "right-to-know" program for each country, "subject to applicable law."

MEXICAN NEGOTIATING POSITION: Nothing contemplated re: right-to-know procedures.

GROUP OF SEVEN NEGOTIATING POSITION: countries would agree to enact "community right-to-know laws consistent with Principle 10 of the Rio Declaration."

FINAL TEXT: *The Council would "promote" and "as appropriate" develop recommendations for right-to-know programs. (Note; the governments are not bound to even consider Council recommendations in this regard.)*

⁹ The U.S. has a fairly strong law requiring that manufacturing plants report to the public on their emissions, and access to records held by environmental agencies on specific plants is generally good. In contrast, Mexico has no such "right-to-know" law *nor* does it have a tradition of access to agency information on specific companies. Many believe that such "right-to-know" provisions are essential to effective public participation and to citizens' rights to protect their health and environment.

Issue 8: Dispute Settlement Panels¹⁰

U.S. NEGOTIATING POSITION: Nothing was proposed to modify Ch. 20 dispute resolution procedures. The Council of the trinational environmental commission was proposed to serve as a possible forum for early consultation and could maintain a roster of environmental experts that might be chosen to serve on Ch. 20 panels if an environmental law or regulation was involved.

MEXICAN NEGOTIATING POSITION: Nothing was proposed to modify dispute settlement procedures. Mexico proposed that the Council could assist the NAFTA Commission in disputes under NAFTA Chs. 7, 9 and 11, if it was requested to do so by the NAFTA Commission.

GROUP OF SEVEN NEGOTIATING POSITION: NAFTA countries would enter into a *protocol* clarifying procedures for Ch. 20 dispute resolution procedures. The protocol would (1) “set forth the deference such panels will give to a Signatory country’s agency and judicial decisions”; (2) increase transparency of dispute resolution panels by providing for amicus briefs; and (3) “specify the opportunity for public participation and the use of environmental experts” in Ch. 20 dispute panels. Also, implementing legislation in the U.S. would provide for state, local and public input into the U.S. position when environmental laws were subject to Ch. 20 dispute resolution.

FINAL TEXT: *Nothing modifies the NAFTA dispute settlement procedures. Apparently, some verbal commitments have been made by the U.S. administration to the endorsing environmental groups that state government views will be considered if state environmental laws become the subject of Ch. 20 dispute resolution panels. The U.S. Trade Representative has also indicated that it will make public its submissions to the dispute resolution panels.*¹¹

10 Many environmental groups had demanded that the dispute settlement procedure under NAFTA be significantly opened up to public participation, especially when environmental laws or regulations were under challenge. Under the current NAFTA text, dispute resolution is a secret process between government officials and experts.

11 Letter from U.S. Trade Representative Michael Kantor to John Adams, Natural Resources Defense Council, September 13, 1993, page 5.

**Issue 9: Effect of NAFTA on Federal, State and Local
Environmental Laws and Standards¹²**

U.S. NEGOTIATING POSITION: The Council of the trilateral commission would have been authorized to consult about “recommendations for greater compatibility of standards without reducing the level of protection.”

MEXICAN NEGOTIATING POSITION: Nothing contemplated.

GROUP OF SEVEN NEGOTIATING POSITION: The groups had several demands in this area:

(1) NAFTA countries would agree to enter into negotiations within 6 months of NAFTA becoming effective to discuss criteria for process standards (standards that regulate products based on the environmental or health effects *of how* the product is made). NAFTA countries would place a moratorium on dispute settlement challenges if the law being challenged is designed to protect fish, animals or wildlife outside territorial boundaries (e.g., Marine Mammal Protection Act).

(2) Implementing legislation in the U.S. would state that dispute panel decisions “adverse to a U.S. fish, animal or wildlife law or regulation would not result in repeal or amendment of such law or regulation.”

(3) NAFTA countries would “clarify” that Ch. 9 of NAFTA text is intended to allow challenges to an environmental standards measure *only* on the ground that the measure is discriminatory or is designed as a disguised barrier to trade.¹³

(4) With respect to NAFTA Ch. 7 [sanitary/phytosanitary standards], the countries would agree to clarify “ambiguous” language in

12 Much of the environmental debate over NAFTA has dealt with whether NAFTA could adversely affect the rights of federal, state and local governments to set and enforce stringent environmental, resource conservation and public health standards. If those standards were more stringent than “international norms” or if they had the effect, whether intended or not, of discriminating against products or services from other NAFTA countries.

13 Ch. 9 challenges are now theoretically possible on the grounds that a standard or regulation was not adopted in conformance with a host of cost-benefit and other tests.

the NAFTA text or agree that they will not bring cases challenging pesticide standards under Ch. 20 dispute resolution panels, except on the ground that the standard is discriminatory or is designed as a disguised barrier to trade.

(5) The U.S. implementing legislation would *prevent* pre-emption of or interference with state or local environmental laws or regulations on the “basis of [NAFTA] articles 105 or 902.”

FINAL TEXT: *There is nothing to address these points in side agreement. A written commitment has been made by the U.S. Administration to the effect that the implementing legislation would clarify that state standards are not “pre-empted” through NAFTA challenges. This approach may still result in laws being found to violate NAFTA, but apparently the U.S. government would either be liable for sanctions or would bring legal action against the state to overturn the measure.*¹⁴

Issue 10: International Environmental Agreements¹⁵

U.S. NEGOTIATING POSITION: Nothing contemplated in side agreement negotiating position.

MEXICAN NEGOTIATING POSITION: Nothing contemplated.

GROUP OF SEVEN NEGOTIATING POSITION: NAFTA countries would agree to add additional environmental and conservation agreements to Annex 104.1 of NAFTA (which allows environmental agreements to control over NAFTA provisions, with some limitations).

FINAL TEXT: *There is nothing in side agreement itself, but apparently there has been some verbal commitment from the U.S. Administration that 35 additional agreements would be added to Annex 104.1. It is not clear at this time whether Mexico and Canada have agreed to this, but they may have.*

¹⁴ Ch. 9 challenges are now theoretically possible on the grounds that a standard or regulation was not adopted in conformance with a host of cost-benefit and other tests.

¹⁵ The current NAFTA text protects the trade-related measures of certain international environmental agreements from challenge on the ground that they are inconsistent with NAFTA obligations. However, only 4 such agreements receive this protection under the current text.

Issue 11: Citizen Access to Domestic Remedies for Environmental Problems¹⁶

U.S. NEGOTIATING POSITION: Proposed provisions on access to remedies similar to those under NAFTA Art. 1714 [regarding intellectual property protection].

MEXICAN NEGOTIATING POSITION: Nothing contemplated.

GROUP OF SEVEN NEGOTIATING POSITION: NAFTA countries would agree to make available to their citizens enforcement procedures similar to those provided for in intellectual property provisions of NAFTA.

FINAL TEXT: *Agreement does contain provisions somewhat similar to Art. 1714 for access by citizens to domestic environmental agencies and to judiciary, all in accordance with “domestic law.” The intellectual property provisions do not contain the “in accordance with domestic law” limitation. Instead, the NAFTA text requires that the countries change their laws if necessary to ensure that the enumerated intellectual property protection rights are provided.*

Issue 12: Legal Status of Side Agreement¹⁷

U.S. NEGOTIATING POSITION: “Agreement and its Implementation are without prejudice to other agreements and arrangements to which two or more” NAFTA countries are party.¹⁸

16 Many had argued that citizen access to administrative and judicial remedies for pollution needed to be improved in all three countries to help ensure that the environmental impacts of trade liberalization could be addressed through a variety of procedures.

17 There has been some discussion as to how the side agreement would be treated -i.e., whether it would actually be submitted with NAFTA to Congress for approval or whether it would just be treated as any other executive agreement not requiring Congressional approval.

18 Letter from Kantor to Adams, supra, at 3-4. Apparently, the Administration has also said that the NAFTA dispute panel decision would not be admissible in a court action by the federal government against the state to overturn a state measure and that only the federal government would have the right to challenge a state measure found to be inconsistent with NAFTA (I.e., no private party challenges could be brought to enforce a dispute panel decision).

MEXICAN NEGOTIATING POSITION: Other agreements would prevail if inconsistency with the environmental side agreement.

GROUP OF SEVEN NEGOTIATING POSITION: The NAFTA countries would “agree, consistent with their domestic law, to take actions that give supplemental agreements on the environment the same status and effect as the NAFTA itself.”

FINAL TEXT: *The agreement does not address legal status of side agreement In relation to NAFTA.*

Issue 13: Funding¹⁹

U.S. NEGOTIATING POSITION: NAFTA countries would contribute equal shares of commission costs.

MEXICAN NEGOTIATING POSITION: Proposed a North American Environmental Fund, initially capitalized by governments, to fund research, development, training and technology transfer work. NAFTA countries would have worked together to develop government policies and mechanisms to “attract investment in environmental infrastructure and for the conservation of natural resources.”

GROUP OF SEVEN NEGOTIATING POSITION: Demanded a *secure source of funding* for commission operations and clean-up and infrastructure along the U.S./Mexico and U.S./Canadian borders, as well as funding for biodiversity conservation in Mexico. This was supplemented by a July 16, 1993, report from National Wildlife Federation, estimating revenue needs of \$7.6 billion for environmental infrastructure in the U.S./Mexico border and recommending alternatives such as the North American Regional Development Bank and a cross-border transaction fee as one possible source of revenue.²⁰ NWF also estimated that trinational commission operations would require

19 In addition to funding for border environmental Issues; the issue of where the trinational commission would get necessary funds for its operation was raised during the debate. Inadequate funding of past efforts for U.S./Mexico cooperation under the 1983 La Paz environmental agreement has been a major contribution to that Agreement’s ineffectiveness in addressing border pollution issues.

20 This position seemed to indicate that NAFTA would prevail over the side agreement, where there were inconsistencies, but did not speak to the legal status of the side agreement in the U.S.

anywhere from \$29 million to \$73 million annually, depending on staff size.²¹

FINAL TEXT: *Equal share of Commission costs funded by each country. Border funding package proposed by U.S. Administration (details not available when analysis prepared, but somewhere between \$5 and 10 billion for water and wastewater needs along the U.S. I Mexico border-monies from U.S. states may be coming from existing state revolving loan fund monies under the federal Clean Water Act).*

21 National Wildlife Federation, *The NAFTA Package: Funding Needs and Options* (July 16, 1993).