Environmental Standards within NAFTA: Difference by Design and the Retreat from Harmonization

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Professor Atik argues that NAFTA, in legitimating regulatory differences among the NAFTA parties, represents a repudiation of standard harmonization. He states that while NAFTA and its environmental side agreement "have been described as the 'greenest' trade agreement to date," it marks a significant retreat from efforts to harmonize global environmental standards. This rejection is a product of "a jealous retention of sovereignty" by the NAFTA parties, as well as the careful maintenance of the parties' distinct production roles and specialities. Thus, Professor Atik argues that a convergence of standards will likely remain elusive within NAFTA. Both high-standard and low-standard parties may prefer the maintenance of differentials. While there may be efficiency gains from non-harmonized standards, other interests, including environmental quality, may well be compromised. Institutions charged with enforcement will further legitimate differentiated environmental standards. Professor Atik states that at least for the time being, Mexico will be able to maintain lower environmental standards than either Canada or the United States and Mexico. He does conclude, however, that despite NAFTA's maintenance of divergent standards, the agreement does allow for the joint determination of environmental standards, and institutions established by NAFTA are available to both monitor and adjust standards (especially Mexico's) to appropriate levels. Clearly, as Professor Atik points out, NAFTA represents a "new experiment in regional organization," which may result in a "cleaner" United States, but leaves Mexico's environmental fate in greater doubt.
I. INTRODUCTION

Although NAFTA and the NAFTA environmental side agreement (Environmental Side Agreement) have been described as the "greenest" trade agreements to date, neither calls for any particular level of environmental quality nor sets any environmental standards. Indeed, these accords signal a retreat from regional and global efforts to cause standards to converge, rejecting harmonization. Instead, NAFTA and the Environmental Side Agreement provide that each party will maintain its respective national standards in the area of the environment.

4. Environmental Side Agreement, supra note 2, art. 3, 32 I.L.M. at 1483. The Environmental Side Agreement does call for "high levels of environmental protection," but it neither defines "high levels" nor sets any standards. Id.
6. According to NAFTA, supra note 1, art. 906(2), 32 I.L.M. at 387, "[T]he Parties shall to the greatest extent practicable, make compatible their respective standards-related measures, so as to facilitate trade in a good or service between the Parties." This call to harmonization, however, is "without prejudice to the rights of any Party . . . ." Id. In other words, harmonization is subject to each party's unilateral right to establish standards. Furthermore, this reference to harmonization applies to product standards only; there is no reference to harmonizing process or production standards, where most environmental regulation lies.
7. Many observers feel that NAFTA will eventually embrace harmonization. See, e.g., Abbott, supra note 5.
8. Each party's right to set standards is set forth within the standards-related measures chapter of NAFTA:
   Article 904: Basic Rights and Obligations
   
   Right to Take Standards-Related Measures
   1. Each Party may, in accordance with this Agreement, adopt, maintain or apply any standard-related measure, including any such measure relating to safety, the protection of human, animal or plant life or health, the environment or consumers, and any measure to ensure its enforcement or implementation . . . .

   Right to Establish Level of Protection
   2. Notwithstanding any other provision of this Chapter, each Party may, in pursuing its legitimate objectives of safety or the protection of human, animal or plant life or health, the
The existence of markedly different environmental standards among the NAFTA parties raises alarms in both the trade and environmental communities. NAFTA constitutes a significant departure from earlier regional groupings, such as the European Union, in that it supports sharply diverging production conditions within its territory. NAFTA will create a single, fairly well-unified consumer market, while maintaining three distinct production environments. The maintenance of different environmental standards by Mexico, Canada, and the United States is more than a jealous retention of sovereignty by each of these nations; standards are an important part of the implicit specialization of production that is fundamental to NAFTA's design.

This structure of economic specialization may not be apparent on a facial review of the NAFTA instruments. NAFTA avoids creating special rights and speaks neutrally of generic "Parties." NAFTA is formally reciprocal in its obligations. The reality of NAFTA, however, is one of U.S. economic dominance.

NAFTA represents more than a failure of nerve on the course to regional integration. Rather it links three economies along neo-mercantilist lines, where resources (including labor) are drawn from economic satellites but are generally commanded by the center. This organization has a strong spatial aspect. Given the diverging structure of the three national economies, as well as regulatory differentials, heavy industrial production will be placed largely outside the United States. In a manner reminiscent of so many U.S. towns, "dirty" activities will be located across the NAFTA tracks.

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evironment or consumers, establish the levels of protection that it considers appropriate in accordance with [provisions concerning risk assessment].

NAFTA, supra note 1, 32 I.L.M. at 387.

Article 3 of the Environmental Side Agreement also recognizes the right of each NAFTA party to establish its own levels of domestic environmental protection and to adopt its own environmental laws and regulations. Environmental Side Agreement, supra note 2, 32 I.L.M. at 1483.

Furthermore, the Environmental Side Agreement provides that "[n]othing in this Agreement shall be construed to empower a Party's authorities to undertake environmental law enforcement activities in the territory of another Party." Environmental Side Agreement, supra note 2, art. 37, 32 I.L.M. at 1494. Thus, non-interference is an expected NAFTA norm.

8. There are instances of departure from neutral treatment in the NAFTA structure. For example, Canada may not be subjected to trade sanctions under the Environmental Side Agreement for "persistent failure" to enforce its environmental laws. Environmental Side Agreement, supra note 2, annex 41(5), 32 I.L.M. at 1498. See C. O'Neal Taylor, Fast Track, Trade Policy, and Free Trade Agreements: Why the NAFTA Turned into a Battle, 28 GEO. WASH. J. INT'L L. & ECON. 1 (1994).

9. Although Germany is often said to dominate the European Union, its economy is dwarfed by the combined economies of the other European Union (EU) member states. See RALPH H. FOLSOM, EUROPEAN UNION LAW 25-26 (2d ed. 1995).
The NAFTA parties are seen as having distinctive roles. According to the prevailing caricature, Canada is to be a provider of natural resources; the United States is to be the locus for product development and centralized management; and Mexico is to be a substitute for other newly industrialized country (NIC) export platforms as the source for high-labor-content industrial goods. These assignments are not spelled out, yet it is hard to imagine how any one of the NAFTA parties could develop into a different economic identity. The United States will remain the dominating center, the focus of the principal binary relationships for both Mexico and Canada. As such, Mexico and Canada must occupy economic niches ceded by the United States in order to secure a share of NAFTA’s economic benefits.

II. A RETREAT FROM HARMONIZATION

A. Designing Difference within NAFTA

Harmonization of standards is an enormously powerful and effective technique, and has played a key role in regional integration and in the construction of the world trading system. Harmonization permits formal regulatory authority to remain devolved at the national or subnational level, while providing consistent rules throughout a broader trading area. Through harmonization, regional or international economic disciplines are translated to national laws and regulations; harmonizing measures cause differing national standards to converge. Harmonization can be applied to product standards, permitting goods to trade across borders, and can be exerted on process standards, such as labor and environmental regulation, under which goods and services are produced. 10

In Europe, harmonization has been the central legislative tool used to create a common internal market. 11 The convergence of standards provided by harmonization has been essential to the European project of economic


integration. Both product and process standards have been harmonized, as the European economy has been restructured to more rationally distribute production.

NAFTA represents a sharp break from the European experience. Whereas the European Community treaty calls for "approximation" of member state laws and regulations generally in order to bring about the "ever closer Union," NAFTA institutionalizes sharp regulatory gradients, repudiating among other things, any pretense of universal harmonization.

NAFTA is designed to distribute industrial production among three countries with strikingly different production conditions; it does not seek to equalize production conditions. Recognizing this, one might wonder if NAFTA represents economic integration as that term is commonly understood. Indeed, establishing a single production market (as opposed to a single consumer market) may not be one of NAFTA's goals.

Distinctive production conditions are of course a source of gains-of-trade and are arguably desirable. To a large extent, distinctive production conditions cannot be avoided; they may reflect differences in fundamental national endowments. Canada may possess a relative natural advantage in the production of timber that would overwhelm any regulatory barrier placed by another NAFTA party.

For many goods and services, however, these differences are more artificial than, say, Costa Rica's "natural" advantage for producing bananas.

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14. EEC Treaty, supra note 11, arts. 2, 3(h), 298 U.N.T.S. at 100.
15. Id. pmbl., 298 U.N.T.S. at 14.
16. Harmonization in specific sectors, such as intellectual property rights, has been embraced within NAFTA.
or California's for oranges. If the key to NAFTA is difference, and not uniformity, or even the approximation, of production conditions, then it is no surprise that harmonization and regulatory convergence will play a lesser role.

NAFTA fails to remove existing restrictions limiting cross-border movement of important categories of factors of production. These artificial barriers will lead to markedly different production environments in each of the three NAFTA parties. NAFTA's embrace of differentiated production conditions is clearly apparent in its treatment of labor. NAFTA permits each party to maintain national labor standards. Critics of NAFTA have often pointed out the negative impact of lower Mexican labor standards within the NAFTA structure. These objections have focused on health and safety standards, rights to organize, lower minimum wages, and other aspects of the employment relationship.

The most salient feature of NAFTA's labor policy, however, is the use of strict migration controls in order to perpetuate the existence of three distinct labor markets: one Mexican, one Canadian, and one of the United States. This solution is wildly different from the European model, where the free movement of workers has been a cornerstone principle. Even if labor standards were harmonized within NAFTA, labor costs likely would not equalize given the maintenance of border controls.

NAFTA also permits significant limitations on the movement of capital, another important factor of production. There is no talk of a common

20. But California's comparative advantage for oranges is arguably artificial, as it results from enormous irrigation projects, a regulatory artifact with important ecological and trade implications.
23. See Taylor, supra note 8, at 79-84.
24. NAFTA permits movement only to a restricted category of workers, and then only on a temporary basis. NAFTA, supra note 1, ch. 16, 32 I.L.M. at 663.
25. EEC Treaty, supra note 11, arts. 48, 49. See also BERMANN ET AL., EC LAW, supra note 12, at 466-517.
26. NAFTA Article 2104 generally permits a Party to restrict capital transfers where a Party experiences serious balance-of-payment difficulties. NAFTA, supra note 1, 32 I.L.M. at 700-01. But see Taylor, supra note 8, at 73.
27. Note again the contrast with the European Union, where the free movement of capital is assured. See EEC Treaty, supra note 11, art. 73, 298 U.N.T.S. at 44; See also BERMANN ET AL., EC LAW, supra note 12, at 617. Investment controls were abolished by the Right of Establishment. EEC Treaty, supra note 11, art. 52, 298 U.N.T.S. at 37-38. See also BERMANN ET AL., EC LAW at 543-49. Exchange controls on passive investment have been eliminated in recent years. Id. at 615-17.
NAFTA currency, be it the U.S. dollar or otherwise. Indeed, the current Mexican financial crisis, and the reluctance of the U.S. Congress to support monetary intervention, demonstrate the extent of Mexico's dependence on its own limited financial resources.\textsuperscript{28} NAFTA permits Mexico and Canada to maintain investment controls,\textsuperscript{29} further demarcating the separateness of production environments.

The treatment of environmental regulation under NAFTA and the Environmental Side Agreement confirms this analysis.\textsuperscript{30} Harmonization of environmental standards is unequivocally rejected. The Environmental Side Agreement recognizes "the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental laws and regulations . . . ."\textsuperscript{31}

B. Convergence of Environmental Standards

Convergence to harmonized environmental standards may or may not be beneficial from the view of an affected nation, depending in part on the policy involved and in part on the direction of convergence. To the extent a nation can identify an efficient internal level of environmental regulation, that nation can be expected to resist any forced movement away from that level in order to converge with harmonized standards.\textsuperscript{32}

Consider air pollution.\textsuperscript{33} Unsurprisingly, the United States and Mexico have vastly different notions about the appropriate level of factory emissions.


\textsuperscript{29} For a discussion of NAFTA's treatment of national controls on foreign direct investment, see Jeffery Atik, Fairness and Managed Foreign Direct Investment, 32 COLUM. J. TRANSNAT'L L. 1, 17-23 (1994).


\textsuperscript{31} Environmental Side Agreement, supra note 2, art. 3, 32 I.L.M. at 1483.

\textsuperscript{32} Some environmentalists would argue that, due to the inordinate influence of producing firms in political systems, standards are systematically low in all jurisdictions. For a discussion of political failure, see DANIEL C. ESTY, GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE 73-77 (1994).

Enlightened political leaders would embrace external requirements which raise domestic standards to more appropriate levels.\textsuperscript{33}

\textsuperscript{33} Air pollution is an interesting example because different standards are tolerated even within the United States. See Kal Raustiala, The Political Implications of the Enforcement Provisions of the NAFTA Environmental Side Agreement: The CEC as a Model for Future Accords, 25 ENVTL. L. 31, 50 (1995) (citing Alexander K. Wang, Southern California's Quest for Clean Air: Is EPA's Dilemma Nearing an End?, 24 ENVTL. L. 1137 (1994)).
In part these differences might arise from the differing abilities of the U.S. and Mexican environments to absorb marginal emission. In part, however, these standards reflect very different social cost assessments. This is of course the pre-NAFTA and current condition.

If an optimal level of sulfur dioxide emissions exists in a nation, for example, both upward and downward movement away from this optimum are costly. While certain environmental sympathizers might resist the notion, environmental standards can be set so high that the marginal benefits to the environment do not justify the additional expense to society. On the other hand, converging moves by other countries towards a nation’s optimal environmental standards are usually welcome. The United States would derive several types of benefits from rising environmental standards in Mexico. First, given the inevitable transboundary effects, the U.S. environment would benefit from reduced environmental stresses. Second, U.S. standards would be liberated from the undercutting effect of the presence of less-costly Mexican products.

The country that moves away from its natural regulatory level is in some sense transferring wealth to its counterparts. The country’s diminished environment (resulting from downward moves) or its excessive compliance costs (resulting from upward moves) may or may not be made up by benefits realized in the counterpart economy; these may be net loss games. The fixing of harmonized environmental standards within a region, despite its technical aspect, and even when mediated through supranational institutions, is an instance of international redistribution; it is also an exercise of national power. This being understood, one can ask who gains and who loses by converging environmental standards within NAFTA, and by how much?

Individual nations may feel ambivalent about particular harmonization initiatives, depending in part on whether the direction of convergence is towards or away from their optimal internal levels. Consideration of the entire globe, or a region within it such as North America, may suggest an appropriate overall direction for harmonization movements of the constituent nations. The global or regional optimal common standard may serve as a convergence

34. See Stewart, supra note 10, at 2052-53.
35. But the U.S. environment could suffer if industrial production previously located in Mexico is displaced by the imposition of higher Mexican standards and is shifted to the United States.
36. Low standards may result from a prisoners’ dilemma. Unless all (or nearly all) nations cooperate to reduce CFC emissions, for example, no country gains from reducing its emissions.
target for each jurisdiction. 37 If, for example, global welfare is enhanced by controlling greenhouse gasses, then upward harmonization is a fairly clear policy choice for each jurisdiction.

Environmentalists are likely to view convergence favorably where environmental quality standards across many nations are improving. Of course, an optimal common standard for a region such as NAFTA is likely to depart from the optimal national standard for either Canada, Mexico, or the United States. 38 Furthermore, the efficient common regional standard may well be a middle ground, suggesting a mix of upward and downward convergence by the various constituent countries. Of course, legitimization of downward moves is alarming for anyone who believes environmental concerns are systematically undervalued in national and regional politics. The notion of optimal environmental standards is itself controversial; 39 it is dependent on many factors, including a nation’s or region’s level of development.

NAFTA signifies a missed opportunity for an immediate upward convergence of environmental standards. Raising North American standards now would have limited negative consequences from an environmental perspective for Mexico, and, given transborder effects, would improve environmental quality throughout the region. However, higher harmonized standards would impose costs, which the NAFTA parties were unwilling or unable to pay. 40

C. Harmonization within Trade Agreements

From a free trade point of view, however, all movement towards convergence of standards is positive, 41 whatever its direction (upward or downward) and without respect to which country makes the move. The

37. Note that in many cases, common standards are inefficient. See Esty, supra note 32, at 173. Pesticides are an example where different growing conditions and consumption patterns suggest differing tolerances are appropriate. Id. at 175. See also Bartlett P. Miller, The Effect of the GATT and the NAFTA on Pesticide Regulation: A Hard Look at Harmonization, 6 Colo. J. Int’l Envtl. L. & Pol’y 201, 202 (1995) (arguing NAFTA’s diverging standards are a better solution than harmonization).

38. An optimal regional standard can be achieved through a mix of different local standards, some dirtier and some cleaner. Market solutions are likely to generate mixed responses.

39. By this view, fixing standards is a technical process, not a political one.

40. Some funds have been dedicated to environmental clean-up and infrastructure, mainly in the U.S.-Mexico border area. See Lawrence J. Rowe, Note, NAFTA, the Border Area Environmental Program, and Mexico’s Border Area: Prescription for Sustainable Development?, 18 Suffolk Transnat’l L. Rev. 197, 214 (1995).

41. See Esty, supra note, 32, at 172-74.
elimination of regulatory gradients continues to be the primary seduction of harmonization.\textsuperscript{42} Harmonization presumes a hierarchy of values, in which trade interests enjoy an enhanced and, at times overweening, status.

Additionally, harmonization can operate within a regional organization to promote solidarity and interdependence. Common standards enhance a common political identity. By asking what is the appropriate “European” or “North American” standard, political actors move away from narrow parochialism and disabling national identities. Harmonization represents a threat to notions of self-determination and legitimacy where national identities remain important.

Harmonization appears in two distinctive forms in international trading regimes. The first and milder of these, which I will term “Accorded Harmonization,” results when nations jointly adopt consistent standards. The resulting harmonized standards are not necessarily uniform; the relevant test is whether differing national standards operate to distort trade. Accorded Harmonization, the legislative technique-of-choice during the early development of European Union law, through which laws of member states were “approximated,”\textsuperscript{43} remains a long-run possibility under NAFTA.\textsuperscript{44} Accorded Harmonization requires each nation to agree to accept the changes in its respective internal order. National sensibilities and national preferences are always respected, at least nominally. When agreement fails, or when concessions are not yielded, Accorded Harmonization grinds to a halt and progressive convergence is stymied.

Harmonization was transformed during the 1970s and 1980s by the rise of so-called non-tariff barriers (NTBs): complex, newly-enacted national laws and regulations, often concerning worker safety, consumer protection and the environment.\textsuperscript{45} A new form of harmonization evolved in response to NTBs, which I will call “Coercive Harmonization,” and is well-illustrated by \textit{Cassis}
Under Coercive Harmonization, approximation of standards is carried out over the objection of the nation maintaining the standard, often by effectively substituting the standard of the nation making the challenge. 47

In the cause of eliminating trade barriers, enormous pressures are placed on political units to demonstrate that the social benefits which arise from their particular laws, regulations, and practices outweigh their negative impact on trade. This test has come to be known as the Principle of Proportionality: policy justifications are balanced against their trade costs, and are upheld only if: (i) benefits exceed costs and (ii) the adopted measure is the least restrictive alternative with respect to trade for an equivalent benefit. Thus, in Cassis de Dijon, German consumer protection standards which prohibited the sale of the French liqueur were struck down. Labeling would have been a less restrictive means of protecting German consumers. 48

Coercive Harmonization reflects a deep skepticism about all laws and standards which happen to be distinctive; it sees parochialism, if not protectionism, everywhere. Thus, the German Beer Purity Law, in place for hundreds of years, was swept away by higher EU values. 49 Similarly, Canada used Coercive Harmonization in the General Agreement on Tariffs and Trade (GATT) to attack Puerto Rico’s regulation of UHT Milk. 50 And, most famously, Mexico challenged the U.S. “dolphin safe” tuna import restrictions imposed by the Marine Mammal Protection Act. 51

Two parallel notions of distortion are embedded in Coercive Harmonization. The first is the trade distortion created by the presence of a national standard. By impeding trade, NTBs move economic activity away

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46. Case 120/78, Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon), 1979 E.C.R. 649. See also the discussion in BERMANN ET AL., EC LAW, supra note 12, at 356-58; ESTY, supra note 32, at 262.

47. This is known as the doctrine of mutual recognition in European Union jurisprudence.

48. ESTY, supra note 32, at 262.


from those countries possessing "comparative advantage," depriving foreign producers of markets and consumers of more favorable prices. Second, the establishment of NTBs evidences political failure within the countries imposing them. Here the story is one of capture of political institutions by local producers pursuing protectionist agenda. Free trade predicts that the aggregate social benefit of open markets exceeds the negative impact on local producers. By exploiting collective action advantages, interested domestic producers "purchase" NTBs from political institutions and frustrate the realization of a superior social result. From this view, the Marine Mammal Protection Act protects the U.S. fishing industry far more than it protects dolphins.

NAFTA and the Environmental Side Agreement have evoked considerable pessimism and alarm in the environmental advocacy community. In part, environmentalists fear the values of the free-trade juggernaut. It is hard to imagine giving greater offense to environmentalists than by labeling hard-fought environmental gains, such as the Marine Mammal Protection Act, as mere non-tariff barriers and dismiss them as such.

In part, this fear of NAFTA was a fear of the potential reach of harmonization within the North American triad. Accorded Harmonization threatens U.S. environmental standards, since the U.S. Trade Representative (USTR) and other trade advocates might bargain away environmental quality in exchange for other goals. Accorded Harmonization, involving resource-poor Mexico, would inevitably be downward for the United States. Still more frightening was the prospect of an expanded use of Coercive Harmonization by Mexican and Canadian exporters to strike down U.S. environmental laws as disguised restraints on trade. This precise specter had already arisen within U.S.-Mexican economic relations in Tuna-Dolphin.

53. Notions of political failure are pushed two ways. Exporters see domestic producer dominance leading to protective standards; environmentalists see producer dominance generating lax or non-existent standards.
55. See Stewart, supra note 10, at 2054.
56. This was the suspicion of the GATT panel in Tuna-Dolphin, supra note 51.
57. Magraw & Charnovitz, supra note 30. See also Esty, supra note 32, at 27-28.
58. According to Jerry Brown, NAFTA will cause, "a slide to the bottom in terms of wage levels and environmental standards as the United States links itself to Mexico, where . . . environmental laws are unenforced and unions remain captive to the state and . . . a political system profoundly different from our own." Jerry Brown, Is NAFTA a Chance for U.S. to Trade Up or Down? For Workers, Environment? Sacramento Bee, Nov. 16, 1993.
59. See Taylor, supra note 8, at 105.
While Accorded Harmonization of standards remains more of a long-term possibility, nothing in these agreements provides for immediate harmonization of anything in the environmental area, and it is not clear when, or if, environmental harmonization negotiations might proceed. This contrasts strikingly with NAFTA’s approach in the intellectual property area, in which harmonization was used to require significant Mexican reforms, lifting Mexico’s intellectual property law to “higher” U.S. and Canadian standards. Moreover, NAFTA erects strong bulwarks against Coercive Harmonization. NAFTA and the Environmental Side Agreement provide that each party may maintain its respective national standards as a continuing proposition and grant substantial immunity to these standards from trade-restraint challenge.

III. HIGH STANDARDS/LOW STANDARDS

NAFTA and the Environmental Side Agreement establish a regional economic bloc that will have significant environmental protection gradients within it. This decision is a matter of no small environmental concern; the current status of the U.S.-Mexican border area has been described as “appalling” and as a “cesspool.” The environmental advocacy community would prefer that Mexico and the rest of North America be cleaned up, and that future degradation be avoided through a high level of environmental protection.

The NAFTA Environmental Side Agreement calls for each NAFTA party to “provide for high levels of environmental protection.” It is not necessarily clear what a high level of environmental protection entails; absent harmonization, the notion of high environmental standards is intrinsically a relative one. Operating within NAFTA today, high standards, understood to be those prevalent within the United States and Canada, define low standards, which in NAFTA almost certainly refers to Mexico. Relativity exclusively

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60. NAFTA Article 1701(2) requires each Party to provide effective protection of intellectual property rights by giving effect, at a minimum, to the standards contained in the Geneva, Berne, Paris, and UPOV Conventions. NAFTA, supra note 1, 32 I.L.M. at 671.
61. Robert Housman et al., Enforcement of Environmental Laws Under a Supplemental Agreement to the North American Free Trade Agreement, 5 GEO. INT’L ENVTL. L. REV. 593, 594 (1993). “Simply put, virtually every medium (water, land and air) in the border region has been in someway significantly degraded by unfettered growth. The region’s surface waters are veritable sewers, thick with human feces and industrial toxins.” Id. at 595.
63. Environmental Side Agreement, supra note 2, art. 3, 32 I.L.M. at 1483.
localizes environmental concerns to Mexico and so avoids the broader regional challenge.

If “high levels” are read to be levels currently found within NAFTA (i.e. Canada and United States), then eventual convergence must be upward and should be undertaken almost completely by Mexico. Once convergence is achieved, there would no longer remain any “high levels,” or low levels for that matter, within North America. Alternatively, high levels might refer to levels existing outside of NAFTA, in which case there is a call for continuous adjustment of environmental protection levels according to shifting norms.

Given NAFTA’s preference for difference, the move to higher standards may not necessarily involve convergence. Mexican standards may move to higher “appropriate levels of protection,”64 but never reach those in effect in the United States and Canada. Nor should we presume that U.S. standards are necessarily higher; an examination of certain environmental measures (such as energy consumed per capita) may reveal the tolerance of appallingly low “standards” within the United States.

Free trade orthodoxy comprehends environmental standards as yet another type of production standard that is reflected in the cost of a particular good. Particular environmental standards are neither good nor bad (free trade does not prescribe this, despite what some of its critics assert) so long as they are harmonized at some level. The social costs of pollution are not generally avoided by an economy through the operation of lower environmental standards; rather they are simply evaded by producing firms through shifting their burdens onto others. To the extent that it suffers environmental damage, Mexico has and will continue to “pay” for its lower standards, even if Mexican producers benefit from laxity. Of course, the evasion of costs by producer-firms does affect production decisions.

The problem from the free trade point of view results from differences in standards, not from the standards themselves. Harmonization of environmental standards, at high or low levels of protection, is the free trade prescription, through which trade distortions may be minimized.65 A problem for free trade exists in countries having markedly different environmental standards that affect production decisions.66 While low standards in Mexico

64. For example, NAFTA Article 712(5) calls for a Party to apply sanitary and phytosanitary standards “only to the extent necessary to achieve its appropriate level of protection, taking into account technical and economic feasibility.” NAFTA, supra note 1, 32 I.L.M. at 378.
65. ESTY, supra note 32, at 108.
66. Id. at 173-74.
may permit Mexican producers to produce goods more cheaply than their U.S.
and Canadian counterparts, the costs of such pollution are largely internalized
within Mexico. Analytically, low standards resemble a subsidy. However,
under current international trade norms, generally available benefits provided
by a state are permitted. By tolerating stark differences in environmental
standards, as NAFTA does, significant political tensions are created.

From a free trade perspective, “high standards” are subject to attack from
below, based on the notion that they constitute a trade distortion. NAFTA
creates several grounds by which environmental standards may be challenged.
The National Treatment provision, the provision on import and export
restrictions, and the Nullification and Impairment provision are potential
instruments for Coercive Harmonization. Using these, Mexico could attack
U.S. domestic regulations as constituting forbidden trade barriers.

NAFTA provides certain standards with important, though limited,
immunity from this kind of challenge. First, NAFTA carves out a special
category of protected standards: those falling under the rubric of sanitary and
phytosanitary (SPS) measures. Each NAFTA party may adopt any SPS
measure “necessary for the protection of human, animal or plant life or health
in its territory, including a measure more stringent than an international
standard, guideline or recommendation.” So long as an SPS measure has a
scientific basis, it cannot be attacked for violating NAFTA’s National
Treatment provision or as constituting an import or export restriction.
Furthermore, each NAFTA party may “establish its appropriate levels of
protection.” These immunities, however, are not absolute; indeed they are
significantly undercut by remaining provisions on SPS measures which re-
introduce the possibility of a free trade-driven challenge. NAFTA requires
that SPS measures be “applied only to the extent necessary to achieve [the
party’s] appropriate level of protection.” NAFTA further provides that “[n]o
Party may adopt, maintain or apply any sanitary or phytosanitary measure with

67. These are so-called “brown” subsidies. Id. at 169. Direct funding—called “green” subsidies—may
violate both GATT and the polluter-pays principle. See id. at 169-71.
68. See Barceló, supra note 10, at 759-61.
69. NAFTA, supra note 1, at art. 301.
70. Id. art. 309.
71. Id. annex 2004.
73. Id. art. 712(1), 32 I.L.M. at 377.
74. Id. art. 712(3), 32 I.L.M. at 378.
75. Id. art. 712(2), 32 I.L.M. at 378.
76. Id. art. 712(5), 32 I.L.M. at 378.
a view to, or with the effect of, creating a disguised restriction on trade between the Parties.\textsuperscript{77} What remains, then, is a legal mess, with no clear ranking of values; major conflicts will likely be tracked out to dispute resolution for fact-specific findings.

NAFTA also privileges other standards, so-called standards-related measures (SRMs), from challenge,\textsuperscript{78} thus authorizing the maintenance of arguable trade distortions. SRMs, unlike SPS measures, must be nondiscriminatory in order to resist challenge.\textsuperscript{79} As such, those SRMs which constitute import or export restrictions are not permitted.

Where standards differ, low standards are subject to attack from above, both as a policy matter and as undercutting political support for high standards elsewhere, thus precipitating downward harmonization. NAFTA generally protects low standards as well, recognizing each nation’s privilege to assess risk and make social judgments. The Environmental Side Agreement provides, however, for various institutional mechanisms by which NAFTA parties, as well as environmental nongovernmental organizations (NGOs), can exert considerable pressure on a low standard country to raise its standards.\textsuperscript{80}

Finally, the appropriate level of environmental standards is linked to economic development;\textsuperscript{81} NAFTA may well evolve as/if Mexico grows richer and more aggressively demands convergence while driving environmental standards higher. There also remains the disturbing possibility that the United States will be obliged to “purchase” higher Mexican environmental standards.\textsuperscript{82}

Efficiency justifications for the institutionalization of different standards may exist within the NAFTA triad. In a way, all of North America will be subject to Euclidean-type zoning.\textsuperscript{83} Mexico may be “zoned” for environmentally stressful uses that would not be permitted in the United States and Canada. Recognizing the diverging economies, it may make sense to

\textsuperscript{77} Id. art. 712(6), 32 I.L.M. at 378.
\textsuperscript{78} Id. art. 904(1), 32 I.L.M. at 387. See Wirth, supra note 49, at 831-32.
\textsuperscript{79} See Saunders, supra note 5, at 281.
\textsuperscript{80} See discussion infra note 107 and accompanying text.
\textsuperscript{81} Environmental Side Agreement, supra note 2, art. 3, 32 I.L.M. 1483.
\textsuperscript{82} See Nicolas Kublicki, The Greening of Free Trade: NAFTA, Mexican Environmental Law, and Debt Exchanges for Mexican Environmental Infrastructure Development, 19 COLUM. J. ENVTL. L. 59 (1994) (suggesting that the United States should exchange Mexican debt for environmental infrastructure improvements).
\textsuperscript{83} See Village of Euclid v. Amber Realty Co., 272 U.S. 365 (1926) (upholding the exclusion of industrial establishments from residential districts). Comprehensive zoning ordinances exist in most U.S. municipalities.
export pollution to countries where it has a lower social cost, i.e. Mexico. Stated so baldly, this is a discomforting notion; it plays on the sharply lowered expectations of quality of life in Mexico and signals a diminished appreciation of Mexican humanity.

Insisting on a common NAFTA-wide social cost floor echoes the natural law justification for a dignified minimum wage. It is a call for renunciation and redistribution, which are hardly popular themes in the United States at this time. As a legal proposition, NAFTA has not set any particular minimum environmental standards and may in fact permit all three NAFTA members, should they so choose, to lower existing environmental standards.

IV. THE ROLE OF ENFORCEMENT

The NAFTA Environmental Side Agreement obliges each NAFTA party to enforce its national environmental laws, and it creates remedies, including intervention rights for private parties, for a nation's "persistent failure" to do so. The Environmental Side Agreement is a peculiar agreement with a peculiar history, a last minute add-on to win support for NAFTA's ratification in the United States which did not offend Mexican, Canadian, and (not insignificantly) U.S. feelings about sovereignty.

84. Note, congressional reaction to calls for assistance during the recent Mexican financial crisis. See supra note 28, and accompanying text.
86. The NAFTA Environmental Side Agreement calls for national enforcement of national law. This is to be contrasted with international powers to compel enforcement of international obligations. See Mary Ellen O'Connell, Enforcement and the Success of International Environmental Law, 3 IND. J. GLOBAL LEGAL STUD. 47 (1995).
88. See Charnovitz, supra note 85, at 257-59; Raustiala, supra note 33, at 35-38.
The particular political and historical reasons for this emphasis on enforcement are well-understood. During the ratification debates, Mexico claimed its recently enacted Ecology Law was a modern, comprehensive, environmental quality regime—an assessment shared by the United States government as well as several leading environmental organizations. On its face, the formal Mexican legislation was substantially above criticism. Instead, the dismal state of the Mexican environment was attributed to a lack of resources and an absence of political will to enforce existing Mexican law.

Notwithstanding this special history, a broader meaning of Environmental Side Agreement-driven enforcement may well evolve. Although each NAFTA party will maintain its respective national environmental standards, the remaining NAFTA parties are also “interested” in these standards. Setting distinct national standards may indeed be an important part of the NAFTA environmental compact. The concern for national enforcement demonstrates the NAFTA parties’ sharp interest in regulating environmental quality throughout the larger NAFTA territory, as well as the maintenance of accorded production gradients. Indeed, a NAFTA party may complain about non-enforcement by another party of an environmental standard that is higher than its own.

Enforcement of national environmental laws under the Environmental Side Agreement can be understood as supporting NAFTA’s goal of transparency. Where there is a high level of environmental enforcement, each NAFTA party knows what the “real” environmental standards are, as opposed to the book standards. Therefore, the party can more readily assess the degree of convergence/divergence among environmental standards and its effect among the NAFTA parties.

90. See generally, Kublicki, supra note 82, at 82-100 (describing Mexican environmental legislation).

91. See U.S. General Accounting Office, U.S.-Mexico Trade: Information on Environmental Regulations and Enforcement 5-6, GAO/NSIAD-91-227 (May 1991). According to former EPA chief William Reilly, Mexico has a set of laws that are fully equivalent to what we have in the United States. Housman et al., supra note 61, at 594 n.3 (citing William K. Reilly, Free Trade and the Environment: Tools for Progress, Remarks at a Meeting of the U.S. Chamber of Commerce 2 (Mar. 23, 1992)).

92. But see Charnovitz, supra note 85, at 279-80 (arguing that Mexican environmental laws are substantially more lax than U.S. laws even on the books).

93. See generally Housman et al., supra note 61, at 594.

94. Indeed, a NAFTA party may complain about non-enforcement by another party of an environmental standard higher than its own. Charnovitz, supra note 85, at 280.

95. See id. at 280. This suggests the importance of regulatory differentials.
Transparency has long been a trade value; many of the traditional objections to NTBs are based on the non-transparency of their effects. Furthermore, non-transparent measures are much more difficult to dislodge. Nations engaging in reciprocal bargaining are likely to overvalue the distortionary effects of the NTBs that their producers face and to undervalue the distortions created by their own NTBs. In the case of NAFTA, knowing that standards will be enforced makes future benefits from raising a standard more predictable. This, in turn, encourages the granting of concessions in intra-NAFTA bargaining. To the extent that the United States "purchases" future upward movement in environmental standards from Mexico, the enforcement requirement will function to protect these "purchased" gains from unilateral withdrawal by Mexico.

Enforcement can also be seen as a non-discrimination principle. By insisting on strictly enforced compliance, the possibility of selective applicability is reduced. This may be welcomed by Mexico, as well as the United States and Canada, as a prophylactic measure against corruption of officials. An insistence on enforcement can also be understood as preventing distortionary discrimination between new and old investment, supporting NAFTA's commitment to avoid pollution havens. Absent this nondiscrimination requirement, new investment might be enticed by local officials offering to look the other way on environmental compliance.

The comparable problem of selective enforcement might also be anticipated with respect to mobile investments—those producers established in Mexico which are credibly able to relocate. These firms might well use the implicit threat attendant to their mobility to garner less stringent review, whereas less mobile firms would be exposed to a rigorous application of the law, or even worse, an excessive application by officials in order to average down the aggregate effects of pollution within an area.

Real enforcement levels may be jointly adjusted by the NAFTA parties. Should they so choose, the United States and Canada might overlook Mexican non-enforcement during periods of crisis. This possibility may permit a more continuous standard-setting by common consent.

96. JACKSON ET AL., supra note 54, at 377-78.
97. Id.
98. Article 1114(2) of NAFTA prohibits members from waiving environmental obligations in order to attract or retain investment. NAFTA, supra note 1, 32 I.L.M. at 642.
99. NGOs may play a watchdog role and limit some of this administrative flexibility.
V. INSTITUTIONS FOR DIFFERENCE

The NAFTA Environmental Side Agreement creates the Commission for Environmental Cooperation (CEC), a series of entities charged with environmental responsibilities under the agreement. It is not yet clear what influence the CEC will ultimately have, nor whether it will lead to greater sensitivity to environmental concerns in North America. The CEC is certainly not a court; nor is it a legislature or regulatory oversight agency. The CEC cannot make or enforce environmental standards, directly or indirectly. It may, however, be an important source of influence, through which the NAFTA parties, as well as NGOs, work out the prevailing national environmental standards within NAFTA.

The CEC is charged with overseeing the national enforcement of national environmental standards. However, the CEC’s own enforcement powers are quite weak; overseeing the various national enforcers is not likely to be a primary function of the CEC. Even if formally called upon to sanction a

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100. The CEC is comprised of a Council, a Secretariat and a Joint Public Advisory Committee. Kevin W. Patton, Note, Dispute Resolution Under the North American Commission on Environmental Cooperation, 5 DUKE J. COMP. & INT’L L. 87, 102 (1994).

In addition to the CEC entities, the Border Environment Cooperation Commission and the North American Development Bank have been established by the United States and Mexico outside the NAFTA structure. See Rowe, supra note 40, at 213-15.

Within the United States, two advisory committees have been established to advise the U.S. EPA administrator in her role as the U.S. representative to the CEC Council. One committee includes members of industry, NGOs, and academics; the other is comprised by state, local, and Native American officials. NAFTA: Two Committees to Advise Administrator on North American Environmental Issues, BNA Nat’l Env’t Daily, Aug. 1, 1994, available in LEXIS, BNA Library, BNAFILE File.

101. Charnovitz, for one, doubts whether the Environmental Side Agreement adds much to pre-existing environmental cooperation among the NAFTA parties. Charnovitz, supra note 85, at 274-75.

102. The CEC is based in Montreal. According to its brochure, the CEC, “helps coordinate environmental initiatives and identifies ways in which the countries of North America can work more efficiently to protect, conserve, and enhance the environment. The CEC also can work to avoid trade and environmental disputes.” Commission for Environmental Cooperation, UNDERSTANDING CEC. The CEC’s current work program comprises eight areas of concentration, including NAFTA Effects and Consultation and Enforcement Issues, Environmental Laws, and Regulations. Commission for Environmental Cooperation, 1995 PROGRAM SUMMARY. Under this last category, the Program Summary states that the CEC, “facilitates sharing of information about criteria and methodologies which are employed by the three NAFTA countries when establishing environmental standards. The goal is to promote greater environmental regulatory compatibility in North America through upward harmonization.” Despite the use of the phrase “upward harmonization” in the 1995 Program Summary, a CEC official related that the term “harmonization” is not frequently used to describe CEC’s work. Informal conversation with Marc Paquin, CEC, Oct. 1995. The CEC has recently activated a Web site with current information on its activities at http://www.cec.org.

103. See Abbott, supra note 5, at 4-9; Patton, supra note 95, at 103-09.
NAFTA party for its alleged "persistent failure" to enforce its environmental laws, the CEC is very unlikely to actually impose sanctions. The CEC should be expected to exercise, in its oversight role, at least as much regulatory flexibility and discretion as practiced by the U.S. Environmental Protection Agency (EPA), the national agency charged with primary administrative responsibility for U.S. environmental law. Like the EPA, the CEC will likely indulge justifications premised on economic or technical hardship. This is not to say that the CEC's oversight does not serve a purpose; it may restrict flagrant cases of national non-enforcement to truly justifiable cases or circumstances.

The CEC may also be used to actively promote eventual changes in Mexican environmental standards in response to growing wealth, advancing technology, and a closer relationship to U.S. and Canadian standards. Mexico's right to maintain distinct standards is certainly legitimated under NAFTA. But NAFTA and the Environmental Side Agreement suggest, though perhaps subtly, that national standards are no longer entirely national prerogatives. While it could continue to set environmental standards which deviate from those operating in the United States and Canada, Mexico may no longer enjoy the pre-NAFTA freedom of action to set standards unilaterally. Rather, Mexican national standards will be a matter of joint determination of Mexico, the United States and Canada.

This suggests a possible role for the newly-created NAFTA environmental institutions. Within these institutions, respective national environmental standards may be negotiated, monitored, and adjusted by the joint action of all parties. While these new NAFTA environmental institutions are lacking in direct force, they may facilitate the exertion of influence on NAFTA parties (particularly Mexico) by other NAFTA nations and by the broader environmental community, including NGOs.

104. According to Charnovitz, the Environmental Side Agreement's enforcement teeth "barely bite." Charnovitz, supra note 81, at 269.
105. Consistent with congressional intent, the EPA has considered industry costs in enforcing U.S. environmental laws. See Raustiala, supra note 32, at 46 (citing MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION 86-87 (1988)).
106. The Environmental Side Agreement "allows a country party to defend itself against a charge of failing to enforce environmental laws on the grounds of inadequate resources, and since it may be assumed that lack of resources is at the root of many enforcement failures, this broad defense might swallow the substantive rule." Abbott, supra note 5, at 14 n.61.
107. In the Spring of 1995, the CEC launched an investigation into the death of 40,000 birds at a reservoir in northeastern Mexico. The investigation responded to a petition filed by the National Audubon Society and two Mexican NGOs. NAFTA: Commission Probes Bird Deaths at Contaminated Reservoir
VI. CONCLUSION

NAFTA reflects a new form of regional order where goods and services will circulate relatively freely, but where important categories of factors of production are confined. Borders will still impede workers who seek employment in other NAFTA territories; distinct labor markets will remain entact; the movement of capital will still be subject to significant restrictions; and each economy will largely be left to go it alone on its NAFTA-promised road to prosperity.108

In contrast to earlier regional integration initiatives, NAFTA and the NAFTA Environmental Side Agreement legitimize important regulatory-sourced differences in production conditions. Acute wage differentials—artifacts of closed borders (NAFTA provides no prospect for a freedom of movement for workers) which certainly affect the comparative cost of goods produced—are not considered a distortion giving rise to an uneven playing field, but are instead accepted as part of the natural order.

Consistent with this promotion of difference, the maintenance of diverging national environmental standards is provided as a matter of right. High environmental standards (at least within SPS and SRMs) are not to be considered trade barriers. Countries maintaining low standards should not be deemed environmentally irresponsible (even if the polluter doesn’t always pay) or as promoting industrial flight.

NAFTA reverses the usual regional prescription by expressly legitimating regulatory differences. There will be different environmental standards, and for the foreseeable future, Mexico’s will generally be lower than those in the United States and Canada. However, Mexican enforcement will be monitored to assure that Mexican standards, an important part of the NAFTA compact, are respected within flexible limits. New NAFTA institutions are available to adjust future Mexican environmental standards to NAFTA’s “appropriate”

108. There is no explicit NAFTA mechanism of regional aid. See Taylor, supra note 8, at 123; Atik, supra note 89. Rather, development assistance is haphazard, contingent, and unreliable. See Chandler, supra note 28. After the U.S. Congress balked in providing assistance to Mexico during the peso crisis in early 1995, President Clinton issued an emergency order placing $20 billion in U.S. reserves at Mexico’s disposition. The provision of any U.S. support was a matter of considerable doubt during the first few weeks of the crisis. See Chandler, supra note 28.
levels. Despite the language in NAFTA respecting sovereignty, no NAFTA nation, and particularly not Mexico, will be able to set its environmental standards unilaterally. Rather, national environmental standards, though not commonly shared, will emerge from a joint determination.

NAFTA, then, is truly a new experiment in regional organization. National authority remains, but the setting of important regulatory elements of the production environment, such as environmental standards, are coordinated. The end result may be a much cleaner United States, stemming from increased U.S. wealth and the relocation of dirty industries. The fate of the Mexican environment under NAFTA is in much greater doubt.