The Heritage Foundation Backgrounder

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ASSESSING THE NAFTA SIDE AGREEMENTS

INTRODUCTION

With the signing of supplemental agreements on labor and environmental issues on September 14, the North American Free Trade Agreement (NAFTA) has now been completed and awaits congressional consideration. These side agreements had been proposed by President Bill Clinton during his presidential campaign last year to address concerns raised by organized labor and environmental groups. Although they were originally aimed at bolstering NAFTA's fortunes by persuading reluctant Democrats to support the agreement, they have had an opposite effect: alienating free market Republicans and Democrats while failing to win over any protectionists.

The Clinton Administration is largely to blame for this result. By proposing a vast array of regulatory powers for the international commissions to be established under these side agreements, the Administration frightened supporters of free trade, who feared that the NAFTA would be turned into a powerful protectionist device that would impose significant new burdens on U.S. businesses and greatly expand government regulation of the economy. Also understandable were concerns for the effect these international commissions would have on U.S. federal and state sovereignty.

Despite its efforts, the Clinton Administration was unable to persuade Mexico and Canada to agree to provisions that, they realized, would reduce their sovereignty. As a result, the U.S. negotiating team had to settle for face-saving agreements that contained little more than vague language, including monitoring commissions with little or no power of enforcement. Although, for political reasons, the Administration has tried to portray these agreements as substantial additions to government regulation, they have won no converts among the protectionists, who correctly see the commissions created under the accords as largely powerless to raise protectionist trade barriers. But, ironically, they have managed to convince a sizeable portion of conservatives and supporters of the free market that the free trade provisions of the NAFTA have been significantly eroded and that U.S. sovereignty has been surrendered to the supranational bureaucracies.

In truth, although these side agreements are troublesome and establish worrisome precedents, the protectionists are correct: they are largely meaningless. However, that message has yet to be understood by many conservative and free market critics of the NAFTA, most of whom continue to base their critique on the Clinton Administration's original proposals. A close reading should be sufficient to dispel most of the remaining objections, especially those regarding sovereignty. Among the most common are:

Objection #1: The side agreements undermine U.S. sovereignty by creating trinational commissions that can force the federal, state, and local governments to change their health, safety, environmental, and labor laws. In addition, the dispute panels created by the councils can force national, state and local governments to adopt "action plans" the council has created. These plans can supersede federal, state, and local government laws.

Facts:

The side accords establish a Commission for Environmental Cooperation (CEC) and a Commission for Labor Cooperation (CLC). Each commission would be run by a council made up of representatives of the U.S., Mexico, and Canada. Under the CEC, a Secretariat and a Joint Advisory Group (JAG) made up of non-governmental organizations assists the council in its activities. A Secretariat and a National Administrative Office (NAO) in each country performs a similar function under the CLC.

These organizations have no legal power to compel the U.S. government or the states to do anything. Under no circumstances can the commissions or councils override U.S. or state laws. Their function is restricted to serving as a public forum for discussing environmental and labor issues of mutual concern, monitoring the enforcement of existing national laws, investigating complaints, and recommending fines or sanctions. A long and cumbersome process must be followed before either fines or sanctions can be resorted to, with many safeguards limiting any potential action.

If requested by a member country, the environmental and labor councils can appoint a panel made up of representatives from the three countries. This panel will be responsible for investigating complaints regarding a "persistent pattern of failure...to effectively enforce [a country's] environmental law [and occupational safety and health, child labor or minimum wage technical labor standards]."[1] If a panel decides that such a complaint is valid, it can issue fines and ultimately allow an offended country to impose sanctions in the form of tariffs. The fines are levied against the national governments—not against businesses or individuals —while sanctions are imposed against the specific industry sector concerned.

However, neither fines nor sanctions can be imposed until after a long and arduous process of consultations between the countries has failed to resolve the dispute. More important, any country is free to reject the decision of the tribunals along with the fine, and the panel has no power to collect it. If a country chooses not to pay the fine, the other member countries can impose sanctions in the form of tariffs, but those tariffs are limited to levels currently in existence. In other words, even in the worst case, no country would be worse off than it is now.

It is true that the labor and environmental councils can authorize the creation of an action plan, but only if such a plan is "consistent with the law of the Party complained against." This action plan is established only after a panel has decided there has been consistent nonenforcement of an environmental or labor law. However, this action plan is not enforceable. If the country or state decides to reject the plan, the panel can issue a fine against the federal government, but not against a state, business, or individual. If it so wishes, the federal government

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1 *North American Agreement On Environmental Cooperation (NAAEC)*, Final Draft, Article 22; *North American Agreement on Labor Cooperation (NAALC)*, Final Draft, Article 33 (The NAFTA: Supplemental Agreements, September 13, 1993).

can choose to ignore the fine, in which case the offended country can levy tariffs to compensate for the alleged damage resulting from non-enforcement, but only up to pre-NAFTA tariff levels.

Objection #2: The side agreements mandate ever-increasing government regulation regarding labor and environmental issues.

Some free market organizations, such as the Washington-based Competitive Enterprise Institute, oppose the NAFTA, and especially its side agreements, because they believe these will require increasingly restrictive environmental and labor standards. According to the CEI, "the NAFTA side agreements mandating the 'upward harmonization' of domestic regulations between the signatories will impose foreign regulations on the United States, and heap costly new regulations on the impoverished citizens of Mexico, thereby lessening free trade."[2] According to Llewellyn Rockwell, Jr., of the Auburn, Alabama-based Ludwig von Mises Institute, the accords will "please regulators, union bosses, and environmentalists, but prevent future Republican presidents from enacting free-market reforms."[3] And commentator and former presidential candidate Patrick Buchanan has said, "If NAFTA passes, the dream of a conservative-libertarian counterrevolution, to roll back Big Labor's special interest laws, and to reverse Congress' capitulations to the Greens, is gone — forever."[4]

Facts:

Free market critics of the NAFTA vastly exaggerate the power of the commissions to bring about such "upward harmonization" to the point of invention. Despite its ritual incantation by critics, nowhere in the text of the NAFTA or the side agreements does the phrase "upward harmonization" appear. Article 756 of the NAFTA does recommend that the three countries "pursue equivalence of their respective sanitary and phytosanitary standards." In other words, to avoid disputes from arising between countries regarding the preparation and processing of food products that are traded, the three countries pledge to harmonize these processes "to the extent feasible." However, neither the NAFTA nor the side agreements provides an enforcement mechanism for this commitment if a country chooses not to abide by it.

Article 1114 of the NAFTA text says it is "inappropriate" for a country to relax standards to encourage foreign investment from another North American country. Again, there is no enforcement mechanism for this provision, the countries being encouraged to pursue "consultations" if a violation of this article occurs. Articles 1114 and 756 are non-binding recommendations, intended to encourage cooperation between governments, and cannot reasonably be interpreted as an infringement on national or state sovereignty.

Part of the confusion regarding these provisions stems from the rhetoric of the Clinton Administration, which is keen to portray the NAFTA side agreements as more substantive than they really are. For example, U.S. Trade Representative Mickey Kantor has said on several occasions that the side accords will guarantee that no country or state lowers its standards. Most recently, Kantor wrote in the *Wall Street Journal*, "the supplemental agreements will help en-

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2 "A Declaration of Independence on NAFTA," Competitive Enterprise Institute, August 1993.

3 Llewellyn Rockwell, Jr., "Risk of the Side Deals," *The Washington Times*, September 7, 1993, p. E3.

4 Patrick Buchanan, "GOP's Drift," *The Washington Times*, September 10, 1993, p. F1.

sure... that no nation will lower labor or environmental standards, only raise them. Of course, all states or provinces can enact more stringent standards."[5]

Kantor is speaking more as an advocate of the agreement than an objective observer. Although the agreements encourage each country to maintain high standards, there is absolutely no enforcement provision if a country fails to do so. Fines and sanctions are applicable only for countries that do not enforce the laws they themselves have chosen to enact, a process over which they retain complete control.

Objection #3: The side accords promote a radical environmental and labor agenda that is anti-business. Murray Rothbard of the Ludwig von Mises Institute calls the side accords "international socialism camouflaged in the fair clothing of freedom and free markets. Populists are right to view it with deep suspicion."[6]

Facts:

In the labor and environmental side agreements, there is a call for each government to "promote sustainable development,... promote education in environmental matters... prepare... reports on the state of the environment," and "assess environmental impacts." However, these are all nonbinding recommendations and carry no enforcement mechanism. Usually unnoticed by critics is the obligation "to promote the use of economic instruments for the efficient achievement of environmental goals." In other words, the market is to be used to address environmental problems—a far cry from a single-minded effort to increase government environmental regulation.

Article 3 of the environmental accord does call for each member country to ensure that its "laws and regulations provide for high levels of environmental protection." But this nonbinding recommendation carries no provision for enforcement, including either fines or sanctions. In fact, it is preceded by a declaration that explicitly reaffirms each country's sovereignty and freedom of action by recognizing "the right of each Party [member country] to establish its own levels of domestic and environmental protection... and to adopt or modify accordingly its environmental laws and regulations."[7]

Objection #4: The NAFTA and the side accords will force state and local governments to lower their standards in order to harmonize standards among the three countries.

Groups like Ralph Nader's Public Citizen believe that provisions like Article 756, requiring countries to "pursue equivalence of their respective sanitary and phytosanitary standards," could force federal, state, and local governments to lower standards in order to make them equivalent to lower Mexican or Canadian standards. Ross Perot has conjured up images of local authorities being compelled to lower health and safety standards under the NAFTA in order to allow for the entry of pesticide-laden Mexican produce.

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5 Mickey Kantor, "At Long Last, A Trade Pact To Be Proud Of," *The Wall Street Journal*, August 17, 1993, p. A14.
6 Murray Rothbard, "Rothbard-Rockwell Report," unpublished draft, Center for Liberal Studies, September 1993, p. 14.
7 NAAEC, Article 3.

Facts:

This fear is misplaced. The commissions are restricted to monitoring the enforcement of whatever laws a country chooses to pass; it has no power to override existing laws or impose new ones.

Article 756 is intended to help the U.S., Mexico, and Canada avoid trade-related disputes that might arise concerning the preparation and processing of food products. In the past, the U.S. and state governments have sometimes attempted to protect industries from outside competition by creating sanitary laws that had placed heavy costs on foreign and out-of-state producers. These laws usually had little relationship to consumer safety or health. They are, in fact, protectionist measures and it would be best if they were done away with altogether, but Article 756 allows for states and the federal government to continue these practices, if they wish.

There is an added protection in Article 756 that directs countries to harmonize standards only "to the extent practicable," and if it is possible to do so "without reducing the level of protection of human, animal, or plant life or health."

Objection #5: With the side accords, the NAFTA package closely resembles the European Community's Maastricht Treaty which empowers an unelected, international bureaucracy and severely limits its member countries's sovereignty over issues such as labor relations, the welfare of its citizens, tax policy, and immigration. According to NAFTA critics like Samuel Francis, "NAFTA really is 'the first vital step' toward the political ratification of a global politico-economic regime that would swallow national sovereignty."[8]

Facts:

The trading arrangement the NAFTA creates within North America is entirely different from the economic, social, and political integration Europeans set forth under the Maastricht Treaty. Under the NAFTA, the U.S., Canada, and Mexico will remove virtually all of their tariffs and other barriers to imports from one another and also give added protection to each other's investments. That arrangement is a far cry from the Maastricht Treaty and European integration in general. For example:

- ✓ Maastricht creates a uniform immigration and foreign policy, and a common monetary system. The NAFTA does not even mention these.
- ✓ In the EC, labor can move freely between member countries. Under the NAFTA, the U.S. will allow only 5,500 Mexican professionals temporary entry into the U.S. on trade-related business. In addition, the NAFTA does not establish a common labor policy in North America.
- ✓ The harmonizing of the EC's economic regulations, as well as its health and welfare laws, is being done by an international bureaucracy in Brussels. The NAFTA side agreements reaffirm each country's sovereign right to determine the laws it will create and enforce.

8 Samuel Francis, "NAFTA and the Sovereign Issues," *The Washington Times*, August 31, 1993, p. F1.

✓ The EC's bureaucratic directives are enforced through a supranational judicial system that encroaches on the sovereignty of each member country. The NAFTA will have no effect on the independence of national or state judicial systems. In addition, no private rights of action are allowed under the agreement.

There is no greater advocate of free trade, nor strenuous opponent of the EC and its international bureaucracy, than the former Prime Minister of Britain, Margaret Thatcher. Thatcher said recently in a speech to Americans:

> I agree with the North American Free Trade Area....I think Mexico is scared stiff that their people will buy from you, and you're scared stiff that you'll lose jobs to them. You'll both do well. You must have free trade, in fact, to get a very enterprising economy. Anyway, if you're good, you don't fear competition. Let's face it: America is the most scientific, most technologically advanced, most enterprising country in the world. And you have nothing to fear.

Objection #6: Canada has exempted itself from the sanctions that the U.S. and Mexico agreed to. Patrick Buchanan asks, "Can Republicans support a treaty that leaves their own country subject to trade sanctions that Prime Minister Kim Campbell found intolerable for hers?"[9] According to Jim Sheehan of the Competitive Enterprise Institute, "NAFTA subjects the U.S. and Mexico to the same trade sanctions that Canada utterly rejected as an infringement on its autonomy."[10]

Facts:

It is true that Canada refused to accept sanctions as a means of enforcing fines levied by the commissions. The effect, however, is to deny the Canadian government the right to refuse to pay any fines levied against it. In the place of sanctions, Canada proposed that fines become automatically enforceable by Canadian courts, without the right of appeal. In other words, Canada voluntarily signed away its right to refuse to pay fines. As a result, Canadian courts will be required to enforce decisions made by international panels, an infringement of sovereignty neither the U.S. nor Mexico was willing to tolerate.

Objection #7: "Right to Work" states—those which do not allow union membership to be a prerequisite for holding a job—will be forced to rescind their laws because the North American Agreement on Labor Cooperation promotes "to the maximum extent possible, the labor principles... the right of organized workers to freely engaged in collective bargaining," and "the right of workers to strike in order to defend their collective interests."[11]

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9 Patrick Buchanan, "GOP's NAFTA Divide," *The Washington Times*, August 30, 1993, p. E1.

10 James Sheehan, "NAFTA—Free Trade in Name Only," *The Wall Street Journal*, September 9, 1993, p. A21.

11 NAALC, Article 1.

Facts:

These provisions, like most others in the side agreements, are nonbinding recommendations without enforcement mechanisms. The council can decide only whether or not a country shows a "persistent pattern of failure... to effectively enforce its occupational safety and health, child labor or minimum wage technical labor standards."[12] This language does not preclude states from adopting Right to Work laws but merely recognizes the right to organize and strike, rights already embodied in U.S. federal labor law. In addition, these provisions only promote the protection of unions, and do not in any way discourage the creation of Right to Work laws.

Objection #8: The side agreements threaten the U.S. Constitution by failing to respect federal and state prosecutorial discretion in the enforcement of labor and environmental laws.

Facts:

The councils cannot impose fines for persistent nonenforcement of labor and environmental laws in the U.S. if the government's nonenforcement (1) is based on reasonable prioirities as to what violations they will investigate and prosecute, and how they will enforce compliance generally; or (2) results from legitimate decisions to spend resources on environmental and labor matters determined to have higher priorities.[13]

Under the side agreements prosecutorial discretion is an exemption to nonenforcement of labor or environmental laws, and thus cannot be a basis for assessing fines or sanctions.

Objection #9: The side agreements will allow private parties, like the Sierra Club or industries seeking protection from foreign competition, to sue U.S. companies based on a commission finding or decision. This will lead to more, not less, litigation under the NAFTA.

Facts:

Article 38 of the environmental agreement and Article 43 of the labor agreement bar private groups from suing in federal or state courts based on any findings or decisions by the commissions.[14] In addition, no private parties can petition the councils to create a dispute panel for alleged nonenforcement of environmental or labor laws. Only the governments of each country can petition the council to create a panel to resolve a dispute arising under the agreement. Even in this process, a member country must cross many hurdles before being able to impose sanctions against another member country. The process is intended to promote consultations and cooperative efforts between the member countries, not confrontation and litigation.

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12 NAALC, Article 33.

13 NAAEC, Article 45; NAALC, Article 49.

14 Under Article 38 "No Party may provide for a right of action under its law against any other Party on the ground that another Party has acted in a manner inconsistent with this Agreement."

Objection #10: Private companies can be fined or sanctioned under the agreement, thus exposing U.S. companies to decisions by international bodies.

Facts:

Only the national governments of each country can be fined, and only entire sectors — and not individual businesses — are subject to sanctions, and only then after

- ✓ a panel created by a council has determined that they have persistently failed to enforce their own laws; and
- ✓ they have failed to create an "action plan" to remedy the nonenforcement, or have failed to implement an "action plan" which they have created themselves, or which was proposed by the council.

If a national government chooses not to pay the fine, then the country offended against can impose sanctions in the form of tariffs. However, tariffs cannot exceed pre-NAFTA levels, which U.S. companies will continue to face without the NAFTA.

CONCLUSION

Fears that the NAFTA side agreements will infringe on U.S. sovereignty and impose restrictions on state and local authorities are unfounded. Despite the Clinton Administration's original proposals, the erosion of free trade and expansion of government regulation feared by NAFTA supporters did not occur. The economic benefits that the U.S. will enjoy under the NAFTA will far outweigh any potential problems under the side agreements, a conclusion arrived at by none other than Nobel laureate economist Milton Friedman. Protectionist members of Congress still oppose this agreement because they know that it is fundamentally a free trade agreement.

Neither should there be any great concern that these side agreements will interfere with federal, state, and local law enforcement activities. Federal sovereignty is not threatened under the side agreements, and state sovereignty issues can be addressed through the implementing legislation Congress must begin drafting and which the Administration has promised to support.

The public debate over the NAFTA would be better served if facts took precedence over unfounded fears. A close reading of the side agreements will show that, despite the best efforts of the Clinton Administration, the free trade provisions of the NAFTA remain intact and that the feared erosion of sovereignty never came to pass.

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