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Reconciling Trade and the Environment: Lessons from the North American Free Trade Agreement

By Robert Housman

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Environment and Trade 3

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This paper provides an overview of the integration of trade and environment in the North American Free Trade Agreement. The paper focuses on the lessons that the North American Free Trade Agreement can provide for further efforts directed at reconciling trade and environment.

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Foreword

The 1992 "Earth Summit" found common ground upon which human development can be put on an environmentally sustainable footing. In 1993, completion of negotiations for the Uruguay Round set the course for a further liberalisation of international trade. One of the most pressing and complex challenges facing our generation is the search for a workable synthesis of the two, of economic relations and environmental realities.

We must embark upon this course, not because it is easy, but because it is necessary. Our planet's ecological vital-signs continue to warn us of an accelerating rate of degradation -- depletion of the ozone layer that shields us from harmful solar radiation, erosion of productive soils needed to grow food, contamination of freshwater with hazardous wastes, depletion of fish stocks, the massive loss of biodiversity, the threat of climate change and global warming.

An important challenge identified at the Earth Summit is ensuring that trade and environment are "mutually supportive." It is hoped that this series, providing analysis on selected environmental issues of relevance to the environment - trade debate, will contribute to the search for solutions now underway.

Elizabeth Dowdeswell
Executive Director

The Authors

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For further information contact:

CIEL
1621 Connecticut Ave., N.W.,
Suite 300
Washington, D.C. 20009-1076

Phone: 202-332-4840
Fax 202-332-4865
E-Mail: cielus@igc.org.

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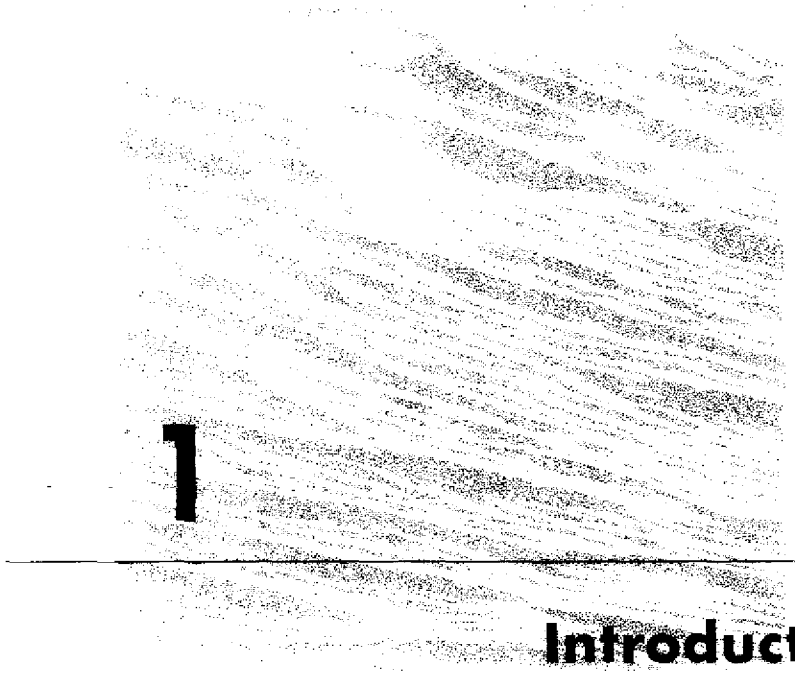


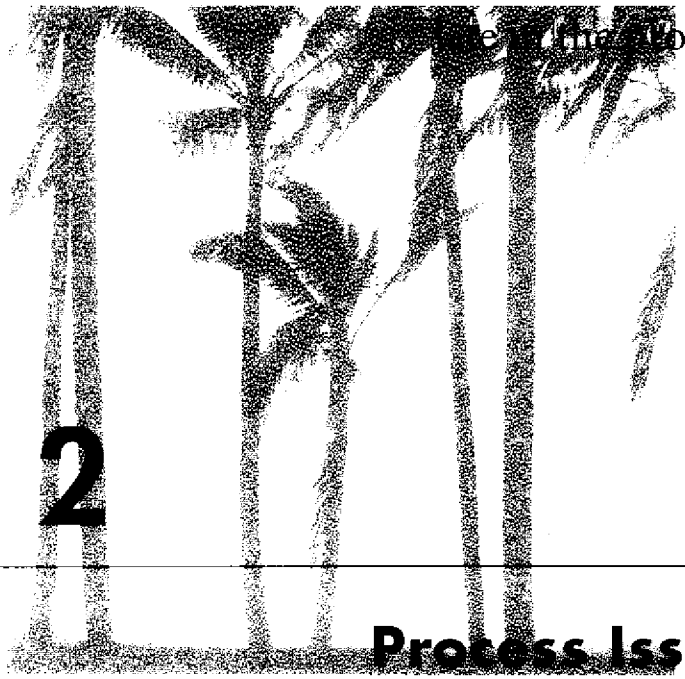
1 Introduction

THE NORTH AMERICAN FREE TRADE AGREEMENT[1] (THE NAFTA) creates a free trade zone that stretches from the Yukon to the Yucatan, encompassing Mexico, Canada and the United States. The NAFTA has been touted as creating a $6 trillion market made up of some 360 million consumers - the world's largest.[2]

While these numbers were the primary driving force behind the agreement, the NAFTA's importance is not limited

solely to the size of its market or the number of its consumers. As the first major free trade agreement adopted after the recent attention to the integration of trade and environmental policies, the NAFTA, and the process by which it was negotiated, provide many valuable lessons for future trade agreements and other efforts that will address trade and environment.[3] This paper summarizes these lessons. Part II discusses the process of the NAFTA's creation. Part III discusses the substantive environmental issues related to the NAFTA.

"On one level, the NAFTA process shows that a trade agreement can integrate trade and environmental issues, however [illegible] process."



2 Process Issues

The Role of Regional Trade Agreements in the Integration of Trade and Environmental Policies

Although some may fear the negative impact of regional trade agreements on the international trading system,[1] the confluence of regional interests clearly played a major role in allowing the parties to achieve the environmental gains provided by the NAFTA package. This dynamic is of particular note when

one considers the disparate political, social, and economic situations of the three NAFTA parties.

The importance of the NAFTA and other regional trade agreements as a testing ground for addressing environmental concerns can be seen in the NAFTA-inspired advances in the final Uruguay Round text[2] of the General Agreement on Tariffs and Trade (the GATT).[3] The NAFTA parties were able to bring to the GATT table environmental provisions that were demonstrably workable. This, coupled with U.S. political pressure and green pressure from within Europe, allowed the NAFTA gains to be accepted at the wider international level.[4]

Integration of Environmental Issues Within the NAFTA Process

How to integrate environmental and trade issues into a coordinated and cohesive policy making framework is central to the trade and environment debate. Closely related is the question of when such integration between trade and environmental issues should occur. The NAFTA experience speaks to both questions.

Environmental issues related to the NAFTA first rose to prominence during the U.S. Congressional debate over the granting of "fast track"[5] authority to the President to commence formal negotiations over a free trade agreement with Mexico and Canada.[6] In order to secure the votes necessary to obtain fast track authority then-President Bush was compelled to provide Congress with a plan to address the environmental ramifications of the NAFTA.[7]

During the early stages of the NAFTA negotiations, and following the Bush environmental response, the three parties agreed that environmental discussions related to the NAFTA would occur on a parallel track separate from the actual trade negotiations.[8] The parties argued the parallel track approach

was necessary to keep the trade negotiations as streamlined and straightforward as possible.[9] During this early stage environmental issues were raised directly in the trade agreement negotiations only within the discussions over the NAFTA's standards provisions - an area where the parties acknowledged such linkage was inherently unavoidable.

The decision to address environmental issues separate and apart from trade issues was widely criticized by the environmental communities of all three nations.[10] Environmental groups argued that placing environmental issues on a parallel track would seriously limit the parties' ability to make the cross-track trade offs necessary to "green" the NAFTA.[11]

As pressure continued to grow from environmental groups and members of the U.S. Congress, environmental issues began to take on greater significance for the agreement's chances of obtaining Congressional approval in the United States. Environmental efforts gained further momentum through alliances among environmental groups, labor, and consumer organizations.[12] Groups outside the United States began extensive efforts with their governments as well.[13] These trilateral efforts ultimately caused the distinctions between the environmental and trade tracks to implode. A number of environmental issues then made their way onto the trade track and some of these, in turn, ultimately made it into the trade agreement's text.[14]

While environmental changes to the agreement occurred, in principal, during the tenures of Messrs. Bush, Salinas and Mulroney, some of the most important NAFTA-related trade and environment integration efforts came after the change of presidential administrations in the United States. During the 1992 U.S. presidential campaign, the NAFTA's impacts on both labor and the environment were important issues.[15] Recognizing the difficulties the agreement faced, particularly

in the U.S. Congress, candidate Clinton called for supplemental agreements to address at least some of the outstanding labor and environmental concerns.[16] Candidate Clinton's NAFTA position was straightforward; there would be no NAFTA without these supplemental agreements.[17]

Shortly after the U.S. election, representatives of the Clinton Administration, and their counterparts from Mexico and Canada, began working in earnest on developing the labor and environmental supplemental agreements. Completed on September 14, 1993, these supplemental agreements,[18] coupled with other NAFTA-related environmental efforts, became the NAFTA parallel environmental package.

Although the parallel track approach was intended to ease the NAFTA process, ultimately it had the opposite effect. The failure to integrate trade and environmental issues from the outset created obstacles to a final agreement both during negotiation and Congressional consideration. During the negotiations it became clear that environmental issues would have to be dealt with to some degree in the agreement itself, and new and unanticipated issues had to be added to an already extensive negotiating docket.

Had these emerging issues been on the negotiation docket from the outset they could have been handled more effectively and deliberately. Instead, their late addition caused difficult eleventh hour negotiations that delayed and threatened passage of the agreement as a whole.[19] At the Congressional stage, the fact that the environmental supplemental agreement was not part of the NAFTA proper raised serious concerns as to the side agreement's effectiveness.[20] Congressional members questioned the binding qualities of the supplemental agreement, and the commitment of each party to its mandates.[21] These concerns made the process of building early Congressional support for the NAFTA package unnecessarily

difficult.[22] In the end, however, the relative weaknesses of the supplemental agreements may have allowed more Republicans in the U.S. House of Representatives to support the agreement.[23]

The NAFTA's lessons here are two fold. On one level, the NAFTA process shows that a trade agreement can integrate trade and environmental issues, however late in the process. On a second level, the difficulties caused by the NAFTA parallel track approach suggest that both from a trade perspective and an environmental perspective, it would have been far better to integrate trade and environmental concerns from the outset.

Finally, despite its positive lessons for integrating trade and environment, the NAFTA also suggests the difficulties that face broad-based integration of trade and environment. While the NAFTA was successful at addressing relatively discrete environmental issues (e.g. the effect of certain standards provisions on certain environmental laws),[24] the process was less successful at dealing with larger macro-issues that were raised during the debate (e.g. the environmental effects of NAFTA driven agriculture).[25] This aversion to complex macro-issues seems to plague the trade and environment debate generally. The NAFTA, however, suggests the value of parcelling the trade and environment debate into issues or issue groups that are easier to handle. Parcelling may even assist the debate to more easily deal with the macro-issues that must be addressed at the outset of any meaningful integration effort.

Participation by Environmental Agencies in the Formal NAFTA Process

One of the most important examples of the NAFTA success in integrating environmental and trade issues was the high degree of participation by the federal environmental agencies

of each of the parties. This sharply contrasts with prior efforts on trade and environmental issues, where the trade (or, at times, environmental) agency with primary jurisdiction over a matter traditionally operated without the degree of consultation found during the NAFTA process.[26]

Not only did the environmental agencies of all three parties lead efforts on the parallel track, but, in addition, they all played substantial roles in developing the NAFTA's sections on environmental issues.[27] For example, in the United States, the Environmental Protection Agency and the Food and Drug Administration served as co-chairs of the U.S. delegation to two of the three standards-negotiating sub-groups.[28]

Without the involvement of both the trade and environment agencies the NAFTA could not possibly have addressed the complex interactions of trade and environment as successfully as it did. Thus, the NAFTA's lesson here is the value of blending regulatory expertise in coming to grips with trade and environment issues. The NAFTA experience argues strongly for involving from the outset both trade and environment agencies as co-equals in efforts to address the linkages between trade and the environment.

Participation of Environmental Groups in the Formal NAFTA Process

In addition to the significant role played by the environmental agencies, non-governmental environmental groups also played an expanded role in the U.S. and Canadian formal NAFTA trade advisory processes. In Canada, environmental representatives were appointed to the International Trade Advisory Committee and to eight of the Sectoral Advisory Groups on International Trade.[29] Similarly, as part of his NAFTA environmental package, U.S. President Bush placed five representatives of national environmental groups on com-

mittees within the Private Sector Advisory Committee System. As private advisors with government clearance, both the Canadian and U.S. environmental representatives enjoyed access to confidential negotiating texts, and were able to provide direct input into the NAFTA environmental process.

While serious concerns were voiced, particularly in the United States, about the small number of environmental advisors and the narrow scope of constituencies and views they represented, these advisors arguably played a significant role in the NAFTA's environmental efforts.[30]

The NAFTA lesson here is that non-governmental environmental groups can play an important role in shaping trade agreements without compromising the ability of the parties to negotiate effectively. This experience provides the foundation for incorporating additional non-governmental environmental consultation into future trade negotiations.

Participation by Sub-Federal Entities

Because all of the NAFTA parties have federal systems of government, and many of their environmental protection responsibilities are delegated to the sub-federal level,[31] the role of sub-federal governmental entities in the NAFTA process is also important. Concerns over the NAFTA's effects on the ability of sub-federal governments to enact and implement environmental protections were heightened because of two recent challenges by Canada to U.S. state practices: (1) a challenge to Puerto Rico's milk safety laws[32] and (2) a GATT's panel decision finding that U.S. state practices related to beer violated the United States' GATT obligations.[33] Environmentalists, analogizing developments within the NAFTA process to the GATT case and the milk challenge, expressed serious concerns over the NAFTA's effects on state, provincial, and local environmental protections.[34]

In response to these concerns all three parties attempted to coordinate developments in the NAFTA process with affected sub-federal authorities to ensure that their views and needs were considered. For example, Canada formed a Federal-Provincial Committee on the NAFTA at both the ministerial and staff levels.[35] This committee met regularly during the course of the NAFTA process to ensure that Provincial officials had a voice in the NAFTA developments.[36]

Also of interest is the degree to which sub-federal environmental efforts related to the NAFTA were coordinated internationally. For example, the California Environmental Protection Agency worked with the environmental protection authorities from the neighboring Mexican State of Baja California Norte to, inter alia: (1) increase enforcement capacity in the two states; (2) adopt protocols and procedures for information sharing; and (3) address air pollution from Tijuana.[37] These sub-federal efforts designed to address the localized impacts of the NAFTA provide an important model for ensuring greater local input into future trade agreements.[38]

The NAFTA's lesson here is that sub-federal entities can and must play a role in addressing any potential impacts of trade agreements. First, sub-federal entities must play a role because they often have legally mandated responsibilities that must be integrated into the framework of any trade agreement. Second, sub-federal entities have a unique ability to ameliorate the localized impacts of such agreements.[39]

Participation by the Public in the NAFTA Process

The NAFTA also proved notable because of the general and widespread interest the agreement generated throughout the North American citizenry.[40] Although sub-sectors of the private industry typically are involved in developing specific provisions of trade agreements that could affect their pecuniary

interests (for example, French agriculture or the American film industry), the public interest in the NAFTA process was decidedly different in several respects.

First, public interest in the NAFTA extended to the grassroots level.[41] Local groups throughout all three nations significantly affected the course of the NAFTA.[42] Local efforts on the NAFTA were uniquely strong in the U.S.-Mexico border region where special trade rules have already caused serious local environmental threats.[43]

Second, public interest in the NAFTA process involved significant coordination of non-governmental activities across national borders. Here again, the efforts were particularly strong in the U.S.-Mexico border region, but also existed among the nationals of all the parties.[44]

Third, while public interest in the NAFTA at times stressed the specific impacts of select NAFTA provisions, in general this interest focused on larger trade policy issues, such as the NAFTA's potential effects on: sustainable development and environmental protection; democracy; sub-federal environmental protections; industrial relocation and investment flight; and employment.

Fourth, public participation in the NAFTA process was unique because it was actively facilitated by the parties. Nothing demonstrated this more than the nationally televised debate held in the United States between Vice President Gore and Texas billionaire and NAFTA naysayer Ross Perot.[45] In addition to this highly publicized debate, the parties conducted a range of activities designed to build public support for the NAFTA. For example, the United States conducted a series of hearings both within the border region and beyond concerning the Border Plan, where testimony was provided by more than 650 witnesses.[46]

Governmental responses to public attention to the NAFTA, however, were not uniform.[47] For example, the Mexican gov-

ernment has been criticized for its failure to engage the general public in a debate over the NAFTA.[48] Although the Mexican approach may have enabled the government to streamline negotiations of the NAFTA, this approach is already raising questions as to how the agreement will be received by the Mexican people when implemented.[49]

The nature of public interest in the NAFTA highlights an important trend for trade policy-making. As economic development increasingly emphasizes expanded international trade, international and domestic public interest in these new policies is likely to continue expanding. Additionally, increasing public attention to trade matters is also likely to continue to place heavy emphasis on how these newly emerging trade policies will affect non-economic interests. Faced with growing public pressure from the grassroots level, it will be difficult for trade negotiations to continue shading themselves from the spotlight of public attention.

The NAFTA experience here has two central lessons for public participation in trade and environment. First, with rising public interest in trade agreements, the public will increasingly demand to participate in crafting these agreements.[50] The failure to provide for such participation will only serve, in the long term, as an impediment to the acceptance of any trade agreement.[51] Thus, it is in the best interests of the involved parties to ensure that this participation is informed, and considered in the decision-making process. Second, the NAFTA holds an important lesson for environmental proponents: international alliances among environmental groups are vital to advancing an environmental agenda in trade fora.

Environmental Assessments of NAFTA

Although public interest in the NAFTA was intense, effective public participation in the NAFTA debate required informa-

tion about the potential environmental impacts of the NAFTA. This raised the issue of whether environmental assessments must be prepared for the agreement.

In general, environmental assessments are designed to provide information to government decision-makers (both negotiators and parliamentarians) and the public, to assist in understanding the environmental effects of proposed policies and projects, thereby allowing adverse impacts to be eliminated or minimized or the action in question rejected.[52] From a trade perspective, some argue that the public disclosure required in an environmental assessment process conflicts with the need of each party in trade negotiations to keep its own negotiating positions secret.[53] The NAFTA process not only displays this tension, but it also shows how this tension can be reduced.

The NAFTA parties took different approaches to environmental assessments. At the beginning of the NAFTA process in the United States a number of environmental groups petitioned the Bush administration to prepare an Environmental Impact Statement (EIS) for the NAFTA in accordance with the U.S. National Environmental Policy Act of 1969 (NEPA).[54] The Bush administration refused this request, but did prepare a very limited "Environmental Review" of the agreement.[55] Despite its limitations, the Review did identify environmental problems with the NAFTA, which in some instances, enabled the three parties to alter the agreement to address these concerns.[56]

The Bush administration's Review admittedly did not satisfy the legal requirements of NEPA, causing three environmental groups (Public Citizen, Sierra Club, and Friends of the Earth) to use judicial means to require the United States to comply with NEPA as it applied to the NAFTA.[57]

With the change of administrations in the United States,

further attention was focused on the application of NEPA to the NAFTA. Although the Clinton administration continued fighting the application of NEPA in the courts, the new administration did recognize that the environmental information remained incomplete and inadequate.

Even though a U.S. Court of Appeals held that the administration could not be required to comply with NEPA for the NAFTA,[58] in an effort to address the need for more complete environmental information the Clinton administration prepared and submitted to Congress along with the NAFTA a "Report on Environmental Issues."[59] While the Report came late in the NAFTA process, it proved to be one of the most detailed and balanced environmental overviews of the agreement. Most notably, the Report dealt with both the macro-effects of the NAFTA on the hemispheric environment and the environmental impacts on the entire U.S. Mexico border region, although it did not focus on discrete domestic environmental impacts of the NAFTA.[60]

Each of the other two NAFTA parties also took its own distinct approach to the NAFTA environmental review process. On the one hand, the Canadian government also refused to prepare a formal Environmental Impact Assessment (EIA) for the NAFTA, sparking debate within the Canadian House of Commons.[61] However, the Canadian government moved more quickly to address the root cause of the debate the need for environmental information pertaining to the agreement. Acting on its own initiative, the Canadian government prepared an "Environmental Review" for the NAFTA.[62] By initiating this review, the Canadian government avoided the somewhat bitter battle in the United States over whether to prepare an environmental assessment. Instead, the major issue in Canada focused on the limited public consultation process provided in formulating the environmental review.[63]

On the other hand, although Mexico prepared environmental studies for the NAFTA, it never released a public environmental review for the agreement.[64] Mexican environmental groups sought to use the administrative means provided by Mexican law to force the government to prepare an environmental statement on the NAFTA.[65] However, the limited access citizens enjoy to the Mexican courts allowed Mexico largely to avoid the public scrutiny that accompanied the U.S. decision not to apply NEPA to the NAFTA.

Although the Mexican and Canadian processes both avoided the tension over an environmental assessment that marked the U.S. process, the results of each of these alternative processes were markedly different. Because Canada chose to prepare and release an environmental assessment for the NAFTA, Canadian citizens had access to environmental information specific to their interests that allowed for a more informed debate. In contrast, Mexican citizens had more limited access to such information.[66] Much of the NAFTA environmental information available in Mexico was "imported" from Canada and the United States.[67] The limited access of Mexican citizens to such information hindered their effective participation.[68]

There are several lessons suggested by the different approaches to an environmental assessment taken by each of the parties. At the most basic level these assessments show that it is possible to successfully craft basic environmental assessments of trade agreements.[69] More importantly, they illustrate that environmental assessments can be useful policy tools, which can actually lead to environmental improvements of a given trade agreement without fundamentally altering the process of trade negotiation or compromising the agreement or the benefits sought from the agreement. Moreover, the NAFTA experience demonstrates that the failure to comply

with procedural laws, such as NEPA, can needlessly endanger the underlying trade treaty.[70] The NAFTA's environmental assessment efforts, however, represent only the first steps in the process of determining how such assessments for trade agreements may best be conducted. The NAFTA environmental assessment efforts leave unanswered a range of questions concerning the scope, timing, and justiciability of such assessments. For example, in the United States, despite two separate lawsuits and appeals, the NAFTA process left unanswered whether and how NEPA's EIS requirements apply to trade agreements.[71]

Despite these uncertainties, the NAFTA's overall lesson on environmental assessments is that it is not only possible to prepare such assessments for trade treaties, but it is preferable to prepare them early and on the government's own initiative.

"The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety, or environmental measures."

NAFTA Article 1114.2

3

Substantive Issues

THE HEIGHTENED ATTENTION TO THE ENVIRONMENTAL ASPECTS of the NAFTA resulted in an agreement that breaks new environmental ground both within the agreement's provisions, and through the developments on the parallel track. While many of the NAFTA's environmental efforts are modest, others are truly ambitious. Each offers insights into the path that future trade agreements are likely to follow on environmental issues.

Provisions of the NAFTA Text

A. Preamble

The central and self-proclaimed goals of most modern trade agreements are directed at trade liberalization. Coming on the wake of the United Nations Conference on Environment and Development, the NAFTA differs somewhat from previous trade agreements in that it places the goal of trade liberalization in the context of the over-arching goal of sustainable development. To this end the NAFTA's preamble specifically provides that the agreement is intended to:

> *Contribute to the harmonious development of world trade . . . in a manner consistent with environmental protection and conservation; . . . promote sustainable development . . .; [and] strengthen the development and enforcement of environmental laws and regulations.*[1]

Although this preambulatory language is without binding effect, the basic premise that trade should advance sustainable development remains important.[2]

B. Investment

The NAFTA's approach to environment-driven industrial relocation and investment flight is one example of how the agreement seeks to implement its commitment to sustainable development. Throughout the NAFTA process various interests feared that Mexico's nascent environmental protection and enforcement system, relative to the systems of its NAFTA partners, provided businesses operating in Mexico a competitive advantage vis-a-vis their American and Canadian competitors.[3] This, in turn, fueled concerns that lower environmental costs of operation in Mexico could contribute to both industrial relocation and investment flight to Mexico by

Northern industries.[4] Although the actual impact of differences in the environmental costs of doing business on industrial relocation and investment flight remains a hotly debated topic, the NAFTA parties sought to address this issue within the agreement.

To this end, Canada proposed that a party's lowering or waiver of an environmental protection standard to encourage investment should be an actionable violation of the NAFTA.[5] Although this proposal would have provided a significant incentive to the parties to avoid officially lowering or waiving standards to encourage investment, it suffered from a number of significant shortcomings.

First, the proposal would have applied only where a party officially waived or lowered an existing standard. Thus, the proposal did not cover the far more common instances where the waiver or lowering was not provided through the "official" regulatory or legislative process. For example, the provision would not have applied where the regulatory body provided tacit approval of an action or inaction that violated an environmental law.[6]

Second, it was feared that the proposal's emphasis on tightly binding the parties to existing laws and rules, without addressing a party's failure to regulate, could inhibit the enactment of new environmental protections. Without an incentive to act a party might refrain from regulating in fear of binding itself into a rigid legal requirement.

While the NAFTA did not adopt the Canadian proposal, it did adopt a provision designed to address the issue of investment flight. Article 1114.2 of the NAFTA provides that:

> *The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety, or environmental measures. Accordingly a Party should not waive or otherwise derogate*

from or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion, or retention in its territory of an investment of an investor.[7]

If a party believes that another party has violated this prohibition, the party may request official consultations with the party whose actions are in question.[8] These consultations are to be conducted with a view towards avoiding the waiver or derogation from the environmental protection at issue.[9]

Article 1114.2 differs from the Canadian proposal in that it applies to a far greater range of activities aimed at encouraging investment at the expense of environmental protection. In exchange for its expanded scope, article 1114.2, however, limits an aggrieved party's recourse to consultations and publicity.[10] Article 1114.2's lack of enforcement measures has raised serious questions regarding the provision's ultimate ability to discourage investment flight.[11] In addition, even if Article 1114.2 proves effective in dealing with future problems, it fails to address pre-existing differences in regulatory programs that may encourage industrial relocation or investment flight. In effect, Article 1114.2 simply preserves the legal status quo.

Despite its limitations, the NAFTA investment provision may have a significant impact internationally. As more nations require their domestic industries to adopt increasingly stringent environmental measures, it is likely that the investment flight and environmental competitiveness concerns that drove the NAFTA's investment provision will spread.[12] The NAFTA investment provision is one of the first instances where a group of nations has determined that the failure of environmental protection is an unacceptable means of encouraging investment and development, and has addressed this objectionable behavior in a trade agreement. Clearly, there are more effective ways to thwart investment flight and industrial

relocation than those provided in the NAFTA, however, the NAFTA provisions are a first step in this direction.[13]

Ironically, while environmental attention to the NAFTA's investment provisions has focused on the relative merits or flaws of article 1114.2, the more traditional investment provisions of the chapter may be equally important for environmental protection. The vast majority of the NAFTA investment chapter sets forth protections that the NAFTA parties agree to extend to foreign investors to provide them with the confidence necessary to invest throughout the NAFTA trade block.

Although these more traditional investment provisions are not generally thought of as having a positive environmental impact, these provisions are important for providing the environmental goods and services industry and other environmentally sound investors with the security needed to invest abroad and bring their technologies and expertise with them. Coupled with the NAFTA's basic trade obligations (i.e., national treatment)[14], these investment security provisions may assist the diffusion of environmental technologies and expertise to take place at a faster pace.[15] In addition, the investment provisions can be expected to promote a stronger role, especially in Mexico, for law in general and the judiciary in particular essential conditions for further environmental protection.

C. International Environmental Agreements

The NAFTA's approach to the inter-relationship between international environmental agreements ("IEAs") and trade rules is one of the agreement's most aggressive attempts to advance the trade and environment debate. Throughout the trade and environment debate a great deal of emphasis has been placed on the preference for multilateral solutions to

multilateral environmental problems. Thus, it follows that there has been considerable support for protecting the trade provisions of certain widely accepted IEAs from trade challenges.[16]

Article 104 and its annexes attempt to realize this protection.[17] These provisions of the NAFTA list three multilateral agreements[18] and two bilateral agreements[19] for protection. (The parties have subsequently agreed to list two other bilateral treaties once the NAFTA takes effect.[20]) Article 104 then provides that in the event of an inconsistency between the NAFTA and the trade provisions of these listed IEAs, the obligations of a party under the IEA "shall prevail to the extent of the inconsistency, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is least inconsistent with the other provisions of [the NAFTA]."[21] Although the parties fully believe that article 104 preserves their ability to take actions that would otherwise be inconsistent under the NAFTA, environmentalists fear that article 104's "least inconsistent" language can be used to challenge such actions.[22]

The NAFTA also provides that the parties may add other existing and future IEAs to the protected list through the unanimous consent of the NAFTA parties.[23] Environmental groups have expressed concern that the requirement of unanimity to add additional IEAs[24] may unnecessarily hinder the ability of the parties to list other IEAs. Although the requirement of unanimous consent raises serious concerns, the parties have succeeded in adding at least two bilateral treaties to this list.[25] In the future, however, if the parties prove less successful in adding additional IEAs to the protected list, the flaws of this listing approach will become apparent. In the meantime, there is the danger that listing certain treaties

leaves all unlisted treaties open to challenge without any additional protection.

Despite the limitations of article 104's protection for IEAs, the ramifications of the provision cannot be easily discounted. The NAFTA parties' ability to agree on article 104 serves as important notice that the provisions of certain IEAs must and can be protected from challenge. More broadly, the provision also affirms the belief of three important nations within the world trade system that there are instances where trade restrictions are both necessary and proper to advance environmental goals.

Moreover, the fact that the NAFTA parties were able to reach agreement on this provision may also provide much needed stimulus to move similar protection for IEAs forward at the international level, where widespread agreement has yet to translate into any concrete protection. The NAFTA's lesson here is that it is possible to provide added protections from trade challenges for IEAs without undercutting the goals of a trade agreement.

D. Standards Provisions

Within the trade and environment debate, many of the most difficult issues revolve around standards, the requirements a party imposes on its domestic products and also on products in international commerce when they enter its market. The difficulty here lies in the tension that exists between the trade community's desire to eliminate unnecessary trade barriers[26] and the environmental community's desire to preserve the rights of each nation to enact and implement needed environmental protections.[27]

The frictions that exist in the area of standards can be divided into three general categories: (1) frictions over the role of the harmonization of standards; (2) frictions over the trade

rules that will be used to determine when an environmental standard violates a trade obligation; and (3) frictions over the right or ability of a party to use standards that discriminate between products because of differences in their production process methods.

The NAFTA standards provisions are arguably the first systematic attempt to develop, within a trade agreement, a comprehensive set of standards rules that address environmental concerns.[28] Thus, the NAFTA's standards provisions provide valuable lessons for balancing trade and environmental concerns.

The NAFTA's standards provisions are set forth in chapters 7 and 9 of the agreement. Chapter 7, section B, establishes sanitary and phytosanitary (SPS) measures. Chapter 9 sets forth rules on all other standards-related measures (SRM), except those covered under the SPS and government procurement rules. The standards rules set forth in both chapters 7B and 9 are unique in a number of respects important to environmental protection.

i. Right to Set Appropriate Levels of Protection

First, both the SPS and SRM rules begin with the basic premise that all the NAFTA parties have the right to establish their own "appropriate levels of protection."[29] Thus, if a party determines that the risks from a given product or service are too great, the party can choose to ban that product or service outright set a zero risk standard and so long as that ban is implemented in a non-discriminatory fashion, the ban cannot violate the NAFTA.[30]

Thus, while the NAFTA generally requires that scientific evidence support the finding of a potential risk to the environment, health or safety, the social value judgement as to what level of risk is acceptable is left solely to each party without

any requirement of scientific justification.[31] In insulating the risk management decisions of the parties from trade challenges the NAFTA differs sharply from what has been, prior to the close of the Uruguay Round, the emerging practice under GATT.[32]

ii. Right to Apply Standards

Despite the NAFTA's gains in recognizing the right of a party to set its own appropriate levels of protection, the NAFTA still leaves environmentalists concerned over disciplines on the manner in which a party may apply their standards once a level of protection has been selected. The NAFTA SPS text requires a party to apply its standards "only to the extent necessary to achieve its appropriate level of protection, taking into account technical and economic feasibility."[33] The SRM text similarly requires parties not to create "unnecessary obstacles" to trade in applying their standards.[34]

Environmentalists believe that this "necessary" language is subject to interpretation under GATT jurisprudence, which could require environmental standards to be "least trade restrictive" as applied.[35] Such a reading could seriously hinder the abilities of the parties to enact and implement environmental protections. The NAFTA parties, however, do not believe that this test lends itself to the development of a least trade restrictive jurisprudence under the NAFTA.[36]

The NAFTA standards provisions are also notable because they avoid the concept of proportionality where the environmental gains of a measure must be proportional to the trade burdens the measure imposes.[37] While the NAFTA requires disciplines on a party's application of its standard, it does not require that the burdens of application be proportional to the ends; so long as the standard satisfies all other tests its burdens are irrelevant.

iii. Role of Science

The NAFTA also differs in the requirement imposed on a party \to advance a scientific justification for its standard. Under NAFTA's SPS rules a party does not need to prove a scientific justification for its measures. It must only show that its standards are "based on scientific principles"[38] and the product of an acceptable risk assessment process.[39]

Similarly, under chapter 9's SRM rules a party need not conduct a risk assessment before setting a standard.[40] Nor does the SRM text require a party to advance a scientific rationale for its standard; all a party must do is ensure that the "demonstrable purpose" of its standard is to advance the legitimate goals of, inter alia: "safety"; "protection of human, animal or plant life or health, the environment, or consumers"; or "sustainable development."[41] While the NAFTA requires that environmental, health and safety decisions are informed by scientific evidence,[42] the NAFTA leaves the value laden process of risk management up to the domestic experts.[43] Once a risk has been identified (not proven) by a NAFTA party, that party is free to decide how much of that risk is acceptable (e.g., a 1 in 100 risk of cancer versus a 1 in 10 risk).

Thus, the NAFTA SRM and SPS provisions attempt to prevent "duelling science" from serving as a justification to find an environmental, health or safety measure inconsistent with the NAFTA's standards obligations. These provisions are among the NAFTA's most important accomplishments in dealing with environmental protections. They provide a valuable lesson about the important role science can play in trade and environmental decision-making without unduly burdening the ability to preserve and protect country's standards.

Although the NAFTA makes progress in eliminating the problem of "dueling science," the somewhat rigid risk assessment requirements of the NAFTA SPS text could inadvertently

serve as an obstacle to enhanced environmental, health and safety protection.[44] A technical reading of the SPS text would require that a risk assessment must be available to the actual decision-makers prior to the enactment of a standard. Such a reading raises four concerns.

First, it is unclear how such a requirement would apply where a standard is adopted as a political decision, without a prior risk assessment, but a subsequent risk assessment confirms the risk addressed by the standard.

Second, it is unclear how such a requirement would apply to environmental standards adopted by referendum or popular vote. These unanswered questions place at potential risk a wide range of environmental, health, and safety protections especially at the sub national (state, provincial and local) level in the United States.

Third, the human and fiscal costs associated with requiring a risk assessment before any SPS measure is taken may have a chilling effect on future environmental, health and safety measures, especially at the sub federal level.

Fourth, the NAFTA's risk assessment requirement may also place at risk environmental standards that are based on consumer preference (such as Europe's leghold traps law) and not scientific data.

iv. Harmonization

The NAFTA also attempts to chart a new path for the harmonization of standards. First, the NAFTA seeks to ensure that the harmonization of standards will not occur in a downward fashion towards a lowest common denominator. To this end, the NAFTA's SPS rules explicitly provide that any harmonization is to occur "without reducing the level of protection of human, animal or plant life or health."[45]

In addition, although the NAFTA maintains clear prefer-

ence for the increased harmonization of environmental, health and safety standards,[46] the NAFTA seeks to address the threat of downward harmonization by concentrating on alternative means of encouraging voluntary harmonization. Internationally, the drive to harmonize standards has focused largely on either mandatory rules aimed at requiring the use of international standards, or rules that provide significant incentives to adopt international standards at the cost of domestic standards.[47]

The NAFTA's harmonization efforts rely principally on technical cooperation and increased transparency to facilitate: (1) the actual harmonization of standards and (2) where technical standards may be different but provide similar protections, equivalency determinations.[48] Thus, while the NAFTA encourages harmonization and the use of international standards,[49] it does so with the explicit recognition of each party's right to exceed the protections of such international standards.[50]

v. Precautionary Principle

The standards provisions of the NAFTA also break new ground for trade policy-making by explicitly recognizing the precautionary principle of environmental law.[51] Articles 907.3 of the SRM text and 715.4 of the SPS text each allow the NAFTA parties leeway to adopt environmental, health and safety measures where the scientific evidence is insufficient to determine the actual risk posed by a given product or service.[52] Whereas the other NAFTA standards provisions, discussed above, provide leeway for environmental protections where the science is conflicting,[53] these precautionary provisions provide leeway where the science in incomplete. A party must, however, revisit a precautionary standard once adequate information becomes available and eliminate the standard if no scientific basis can be found for it.[54]

These provisions allow the domestic authorities of each party to adopt measures aimed at avoiding environmental, health and safety risks before real, and often times irreversible, harms actually occur. Thus, for example, although some may still question the environmental risks associated with global climate change, even in the absence of perfect science the NAFTA parties remain free to take measures aimed at addressing the threats from climate change.

vi. Production Process Methods

Negotiations over restrictions based on production process method (PPMs) proved more difficult than in other standards areas. The essential issue in the NAFTA and other PPM negotiations is determining when a party may restrict trade in products based upon the PPMs of the products in question.[55] Given the United States and Mexico's history on PPM issues,[56] the difficulties encountered during the PPM negotiations should come as no surprise.

Going into the NAFTA negotiations a number of U.S. environmental groups sought to have the NAFTA provide disciplines on PPM-based SRMs that would differentiate between allowable and disallowable restrictions (as opposed to the current GATT framework, which generally disallows all PPM-based restrictions). Although PPM-based restrictions were the topic of much discussion, in the end the NAFTA text did not adopt this approach.

The NAFTA's SRM text provides that a standard may include rules that apply to "goods or related processes and production methods."[57] Although, article 915.1 of the SRM text recognizes PPM restrictions as standards, neither articles 907 nor 915 explicitly include PPM-based restrictions as "legitimate objectives" that are protected from challenge.[58] Thus, it appears that while an environmental PPM-based

restriction may be considered a standard, it may not be able to receive the additional protections the SRM text typically provides for other environmental SRMs. The effect of this duality may be to leave PPMs essentially in the same posture as they are under the GATT: at risk in all instances.[59]

The NAFTA's inability to resolve the PPM issue reflects the issue's inherent difficulty. From an environmental perspective, the manner in which a product is produced is an essential element of the product that cannot be parceled off in determining how a given product is to be treated at market. This perspective finds support in the fact that the greatest environmental impacts of most products often occur not at the consumer or post-consumer stages, but at the production stage.

The trade perspective, however, views PPMs as the proverbial slippery slope allowances for regulating environmental PPMs will open the door for restrictions on a vast array of issues related to production (e.g., labor standards) that will completely disrupt international trade.[60] The NAFTA's inability to resolve the PPM issue simply reflects the incredible difficulties this issue will pose for future trade negotiations.

vii. The Impact of NAFTA's Standards Provisions

The NAFTA's standards provisions have already begun to affect international trade decision-making. In the final days of the Uruguay Round many of the premises underlying the NAFTA SPS provisions were incorporated into the Final Uruguay Round SPS text.[61] For example, the final Uruguay Round SPS text incorporates the basic premise behind NAFTA's affirmation of the right of the parties to adopt their own appropriate levels of protection, even where such levels exceed international standards.[62] Similarly, the Uruguay Round SPS text on harmonization acknowledges the NAFTA's premise that any harmonization should not compromise the

protections afforded by a party's chosen level of protection.[63]

Although the final Uruguay Round text adopted many of the NAFTA SPS changes, the parties refused to adopt a similar set of changes proposed by the United States for the Technical Barriers to Trade text (the GATT equivalent to the NAFTA SRM text).[64]

While the NAFTA standards rules are likely to play a substantial role in future standards rule-setting efforts, it is likely that the NAFTA's standards rules are only an intermediary step. The failure of the Uruguay Round to incorporate the SRM rules suggest that the NAFTA provisions are not the last word and future negotiations will be needed to address the unresolved environmental issues. The remaining shortcomings of the NAFTA text also show that additional refinements will be needed to the NAFTA framework before the proper trade and environment balance can be found.

That the NAFTA's standards rules may serve an interim function is, however, not to downplay the effect these rules will have on future trade negotiations. The NAFTA's rules are already playing a major role in setting the terms of the debate for future efforts in this area and this is likely to continue at least for the foreseeable future.[65] Moreover, assuming that the NAFTA rules are applied fairly and rationally, they will be refined and the weight accorded these rules in international circles is likely to increase. Thus, while the NAFTA standards rules do not solve all the standards issues in the trade and environment debate, they are a substantial step forward.

E. Dispute Resolution

The NAFTA's dispute resolution provisions also attempt to move the trade and environment debate forward. First, the NAFTA provides that in disputes among the NAFTA parties concerning IEAs or an environmental, health or safety mea-

sure, the challenged party has the right to have the case heard exclusively under the substantive and procedural provisions of the NAFTA.[66] This provision secures the added protections the NAFTA provides to environmental measures by preventing the challenging party from undercutting these protections by bringing the dispute under GATT where no such protections exist.[67]

The NAFTA also explicitly provides that a NAFTA party challenging another NAFTA party's environmental, health or safety standards bears the burden of proof in the dispute.[68] The Canadian government has summarized the effect of this provision: "in the event of a dispute, the environment would be given the benefit of the doubt."[69] The degree of protection actually provided by these burden shifting provisions is, however, unclear because the NAFTA text is silent as to the level of burden imposed on the challenging party (e.g., prima facie or reasonable doubt).[70]

In addition, the NAFTA clarifies the role of experts in trade disputes and seeks to provide dispute panels with greater access to such experts. Trade panels are typically made up solely of international trade experts. Thus, the panel members' access to environmental expertise in disputes concerning environmental issues is of great importance to environmentalists. The NAFTA provides two different mechanisms for panels to receive environmental expertise. First, subject to the terms and conditions set by the parties to a dispute, dispute panels can request formation of an independent Scientific Review Board to prepare a "written report on any factual issue concerning environmental, health, safety and other scientific matters raised" in a dispute.[71] Only if both parties disapprove this request can the panel be denied access to such a Review Board.[72] The Review Board's membership is selected by the panel in consultation with the parties.[73] Second, on request of

a party, or at its own initiative, a NAFTA panel "may seek information and technical advice from any person or body that it deems appropriate subject to the approval of, and conditions set by, the parties to a dispute. . . ."[74]

Following the NAFTA model the final Uruguay Round text also provides for access of panels to outside expertise. This movement in the Uruguay Round suggests that the NAFTA's increased access for panels to outside expertise has already influenced other international trade fora.[75]

Despite the advances made in the NAFTA dispute resolution provisions, these provisions have come under strong criticism for their failure to provide greater public participation and transparency in trade disputes. Under the NAFTA's dispute resolution provisions interested members of the general public and non-governmental organizations cannot participate in or have access to the hearings or consultations conducted during a dispute.[76] Nor can these individuals and groups obtain the filings of the parties in a dispute.[77] Similarly, in certain instances the public can even be denied access to the panel's final decision.[78]

The NAFTA's failure to reflect greater transparency and participatory rights in trade disputes will diminish the long-term viability of the NAFTA procedural rules as a framework for future trade agreements.[79] For example, although the Final Uruguay Round text is itself weak on transparency and public participation, the text does surpass the NAFTA's by providing that, at the request of one of the parties to a dispute, the parties must make their briefs, or summaries of their briefs, available to the general public. The NAFTA's lesson for transparency then seems to be that while increased transparency and access to trade decision-making seems inevitable, it is likely to be an incremental process.[80]

Elements of the Parallel Track

Although the NAFTA text breaks new ground in the trade and environment debate, many of the most interesting NAFTA trade and environment developments occurred on the parallel environmental track.

A. The Mexican-U.S. Border Plan

From the outset of the NAFTA process the deplorable environmental situation on the U.S.-Mexico border was one of the most pressing issues confronting further hemispheric economic integration. "Driven by the commencement of the Maquiladora Program, a program of U.S. trade incentives . . . , and the liberalization of Mexican trade rules in 1987, industrial development in the [b]order [r]egion has turned the area into a 'virtual cesspool and a breeding ground for infectious disease.'"[81]

In an effort to deal with the border's problems, in February of 1992 the environmental ministers of the United States and Mexico released the Integrated Environmental Plan for the Mexican-U.S. Border Area (the Border Plan).[82] The Border Plan focuses on four major objectives: (1) cooperative efforts to strengthen the enforcement of environmental laws relating to polluting activities; (2) increases in investments for pollution control efforts; (3) cooperative efforts to increase the understanding of pollution problems confronting citizens in the border region; and (4) cooperative efforts in environmental education and training.[83]

Although the Border Plan makes an effort to deal with the region's environmental problems, the plan was criticized for failing to provide: (1) sufficient financing to conduct the actions called for;[84] (2) adequate enforcement strategies to deal with polluters who use the border as a shield from prosecution; and (3) effective means to deal with the region's tremendous

water quality and supply problems.[85]

The Border Plan provides at least two important lessons. First, despite its shortcomings, the plan provides a model for future economic integration among parties that share common borders. While the severity of the environmental problems on the U.S.-Mexico border may be somewhat unique, where economic integration occurs over a shared border, the environmental effects of such integration tend to concentrate at border crossings. The Border Plan provides one strategy for dealing with the concentrated environmental effects of economic expansion. Future efforts at addressing similar concentrated impacts would do well, however, to learn from the NAFTA experience and avoid the sometimes substantial flaws in the plan.

Second, and more importantly, the plan's shortcomings stand as a vivid example of why environmental protection must occur contemporaneously with economic development. Despite the added growth obtained through the largely unregulated economic expansion in the region, the resources now available appear insufficient to correct the current environmental situation. Thus, the border region is an apt reminder that when it comes to environmental issues "an ounce of prevention is truly worth a pound of cure."

B. The North American Agreement on Environmental Cooperation

The North American Agreement on Environmental Cooperation (the NAAEC) supplements the NAFTA and commits the NAFTA parties to a series of obligations and institutions intended to advance both environmental protection and the environmental sustainability of NAFTA-related trade. Specifically, the NAAEC's stated goals include the promotion of sustainable development, support for the environmental

objectives of the NAFTA, and the promotion of transparency and public participation in the development and enhancement of environmental protections.[86]

i. General Obligations

Under the NAAEC, the parties are obligated, inter alia, to: (1) ensure high levels of environmental protection and strive to improve these levels;[87] (2) effectively enforce their environmental laws;[88] and (3) ensure that the procedures for developing and implementing their environmental laws are impartial, transparent, and equitable.[89]

One of the most important commitments secured by the NAAEC is the agreement of the parties to provide citizens access to judicial and administrative procedures for the enforcement of environmental laws.[90] While this provision does not guarantee that citizens will have actual standing in domestic courts to secure the enforcement of environmental laws, it does ensure that, consistent with a party's laws, citizens will have the right to petition their governments to enforce these laws. This provision also requires the parties to provide citizens who have suffered real damages because of an environmental harm the right to sue the person or legal entity that caused the harm.[91]

ii. The Commission for Environmental Cooperation

The NAAEC also establishes a new trilateral Commission for Environmental Cooperation (the CEC).[92] The CEC is a continent wide institution that is intended to complement existing bilateral environmental institutions in North America. The CEC is headed by the environmental ministers of the three parties who sit as the governing Council of Ministers.[93] The day-to-day affairs of the CEC will be directed by an independent Secretariat serving an Executive Director selected by the

Council of Ministers.[94] The Secretariat and the Council of Ministers will also have input from a Joint Public Advisory Committee made up of five non-governmental individuals from each of the member states.[95]

Although the CEC has a wide range of responsibilities related to environmental protection, for the purposes of this paper its most important responsibilities are those that relate directly to the NAFTA. These NAFTA-related responsibilities fall into two general categories: (1) the CEC's responsibilities towards the NAFTA institutions and (2) the CEC's responsibilities directed at ensuring effective enforcement of environmental laws.

a. NAFTA Activities

The CEC is charged with a number of responsibilities that relate directly to the NAFTA. The CEC is responsible for serving as a point of public inquiry and comment concerning the fulfillment of the NAFTA's environmental goals.[96] Additionally, the CEC may be called upon to provide information when under article 114.2 of the NAFTA a party seeks consultations with another party concerning the alleged derogation from environmental laws for the purposes of attracting or securing investment.[97]

The CEC is also charged with helping to avoid environmental trade disputes under the NAFTA. To this end the CEC shall provide recommendations to the NAFTA Free Trade Commission, the trilateral NAFTA oversight body, as to how such disputes may be avoided.[98] The CEC is also responsible for identifying experts to assist NAFTA panels hearing trade disputes that involve environmental matters.[99]

b. Enforcement Activities

The CEC will also play a role in encouraging the enforcement

of national laws. One of the principal motivations for the creation of the CEC was the need to address the potential that the NAFTA would encourage industrial flight as companies seek to avoid environmental laws and regulations. Although, for the most part, all three NAFTA countries have similar environmental regulatory requirements, serious concerns were raised concerning the failure to enforce those requirements.[100] Absent effective environmental enforcement in all the NAFTA parties, some feared the NAFTA could encourage industrial flight and investment displacement as companies relocate to avoid the costs of environmental compliance.[101] The fear that NAFTA might become an instrument for environmental degradation lead the NAFTA parties to provide the CEC with ground-breaking responsibilities and powers to oversee environmental enforcement.

The NAAEC establishes, under the auspices of the CEC, a dispute resolution procedure to help ensure that the parties effectively enforce their environmental laws.[102] Under this procedure, a party may request an arbitral panel be formed:

> *where the alleged persistent pattern of failure by a Party complained against to effectively enforce its environmental laws relates to a situation involving workplaces, firms, companies or sectors that produce goods or services:*
>
> *(a) traded between the territories of the Parties; or*
>
> *(b) that compete, in the territory of the Party complained against, with goods or services produced or provided by persons of another Party.*[103]

This request for a panel requires a two-thirds vote of the CEC.[104]

Article 45.1 of the NAAEC provides guidance regarding

what constitutes effective enforcement for the purposes of the NAAEC:

> *a Party has not failed to "effectively enforce its environmental laws" . . . where the action or inaction in question by agencies or officials of that Party:*
>
> *(a)reflects a reasonable exercise of their discretion in respect of investigatory, prosecutorial, regulatory or compliance matters; or*
>
> *(b)results from bona fide decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities[.]*[105]

Panels will be made up of five members selected from a previously agreed upon roster of independent and objective experts with experience in environmental law and its enforcement or the resolution of international disputes.[106] Once a panel is formed, it shall review the information provided to it by the parties to the dispute and any other interested NAAEC party. Additionally, on the approval of the parties to the dispute, an arbitral panel "may seek information and technical advice from any person or body that it deems appropriate."[107]

After hearing all the evidence in a dispute, the panel will furnish an initial report to the parties.[108] If after receiving and consulting on the initial report the parties are still unable to resolve the dispute, then the panel shall prepare a final report to the parties and the CEC.[109] This final report shall be made public five days after its submission to the CEC.

If the final panel report finds that the challenged party has persistently failed to enforce its environmental laws effectively, then the parties may agree upon a corrective "action plan."[110] If the parties cannot agree on a plan, then the panel may impose one.[111]

Panels are also empowered under article 34.4 of the NAAEC to impose a "monetary enforcement assessment" against the party found to have failed to enforce its laws.[112] For the first year after the entry into force of the NAAEC these assessments are limited to $20 million (U.S.).[113] Thereafter, no single assessments can exceed .007 percent of the total trade in goods between the parties in the most recent year for which data is available. Monies obtained through an assessment are paid into a fund established under the CEC, and the CEC is directed to expend these monies to improve or enhance enforcement of environmental law in the party complained against.[114]

If a party fails to pay a monetary assessment or continues in its failure to enforce its environmental laws, the complaining party or parties may suspend annually the application of the NAFTA benefits (i.e., tariff reductions) in an amount no greater than the monetary assessment imposed by the panel.[115] The suspension of benefits provisions of the NAAEC is not applicable to Canada. Instead, if the Canadian government fails to pay an assessment, the CEC, on the request of the complaining party, will collect the assessment through a summary proceeding before a Canadian court of competent jurisdiction.[116] The different direct collection approach for Canada was necessitated because of provisions within the Canadian constitution. Because this approach uses the power of the domestic judiciary, it may prove more effective in securing compliance over the long-term.

While the dispute resolution provisions of the NAAEC are ground breaking they suffer from important limitations. First and foremost, the dispute proceedings are government-to-government; the public is not accorded any role in these proceedings nor is the public entitled to obtain information from these proceedings. Second, the range of disputes that may be

brought to an arbitral panel is limited. For example, the definition of effective enforcement eliminates entire classes of potential disputes from these proceedings. Third, the standard for what disputes may be heard is high in that it requires a "persistent pattern" of non-enforcement. Fourth, the definition of what constitutes enforcement also allows the parties tremendous leeway to avoid having a dispute brought to a panel. Fifth, the entire dispute process is unnecessarily time consuming and convoluted, raising serious concerns as to whether the process will ever result in environmental gains.

In addition to the dispute resolution procedures set up under the NAAEC, the Secretariat of the CEC is also charged with a special role in ensuring enforcement. Under article 14 of the NAAEC, the Secretariat "may consider a submission from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental laws."[117] The Secretariat then will determine, on the basis of a number of explicitly delineated criteria, whether the submission warrants a request for a response from the party complained against.[118] If the Secretariat finds that a response is warranted, then the Secretariat shall ask for such a response and provide the party with the submission and any supporting materials. The party must then provide a reply to the Secretariat.

If, after the party's reply, the Secretariat believes that the submission deserves further consideration, then the Secretariat may request authorization from the CEC to prepare a "factual record."[119] Such authorization requires a two-thirds vote of the CEC in favor of the Secretariat's request.

Once approval is granted by the CEC, the Secretariat then prepares a factual record from publicly available information, information submitted by the public, information developed by or for the Secretariat, and information provided by the party or

parties.[120] Upon completion of its efforts, the Secretariat submits a draft and then a final factual record to the CEC.[121] This final factual record may be made public by a two-thirds vote of the CEC. These factual reports, however do not necessarily trigger any process to correct any problems identified. This is a significant shortcoming in the CEC structure.

While these factual records do not necessarily lead to anything more than a report, they do offer two advantages for NAFTA-related environmental protection. First, they allow the public to focus attention on the behavior of the NAFTA parties. Second, these factual records can be used to identify "persistent patterns" of non-enforcement that can lead to formal dispute resolution proceedings as described above.

The Secretariat inquiry process is not without limitations, or in the eyes of others, checks. For example, the Secretariat can be prevented from developing a factual record if two-thirds of the Commission vote against allowing the Secretariat to proceed.[122] Similarly, the party complained against can preclude further inquiry by the Secretariat if the party asserts that the "matter is the subject of a pending judicial or administrative proceeding...."[123] Whether or not these limits will detract from the value of the Secretariat's role in ensuring enforcement of environmental laws remains to be seen.

The U.S.-Mexico Border Environment Cooperation Agreement: The Funding Package

Throughout the NAFTA process a great deal of attention was focused on the serious environmental problems present in the U.S.-Mexico border region. Although a number of bilateral agreements exist that are aimed at addressing elements of these border problems, these agreements have been unable to stem the tide of environmental degradation that plagues the region.

Building upon the U.S.-Mexico Border Plan, and in an effort to address the environmental plight of the border region, the United States and Mexico agreed to the U.S.-Mexico Border Environment Cooperation Agreement (the BECA).[124] The BECA establishes two new institutions dedicated to rectifying the environmental problems of the border: The Border Environment Cooperation Commission (the BECC); and, the North American Development Bank (the NADBank).[125]

i. The BECC

The BECC is intended to work with local communities and state governments to coordinate and facilitate environmental infrastructure (such as sewage treatment plants) development in the region. The BECC will be headed by a binational Board of Directors drawn from both government and non-governmental sectors.[126] On major issues the Board is required to consult with an Advisory Council drawn predominantly from the border area and representing community, business and environmental interests. The Advisory Council will consult on issues regarding the project certification process, general guidelines, and environmental criteria. The BECA also provides that the BECC must give the public notice and an opportunity to comment on important decisions.[127]

The BECC will not develop projects itself, instead it will work with interested governmental and non-governmental groups and entities on implementing the projects they determine are necessary. One important element of the BECC is its coordination function. The BECC will assist in coordinating border efforts to help ensure that the most effective solutions are brought to bear on environmental problems. This is of particular importance because many of the problems present in the region straddle the border, thus necessitating interna-

tionally coordinated efforts to address them effectively.

The BECC will also play an important role in developing the financing necessary to implement these infrastructure projects. The BECC will help in the financial planning of projects and will assist project sponsors to obtain public and private funding. To this end, the BECC is authorized to certify projects for NADBank funding.[128]

For a project to obtain NADBank certification, the project must meet all environmental requirements of the applicable jurisdictions. In certifying a project the BECC must also determine, in consultation with affected states and localities, whether the project will provide a significant level of environmental protection.[129]

ii. The NADBank

The NADBank is designed to address the environmental impacts of prior unregulated and concentrated economic activity in the border region.[130] The NADBank is intended to supplement other sources of financing for the border, in particular national government assistance and World Bank and Inter-American Development Bank funding. All told the two countries estimate that approximately $7-8 billion (U.S.) will be made available for environmental projects in the border region.

The NADBank will be capitalized and governed equally by the United States and Mexico.[131] The NADBank's principal purpose is to provide the financial resources needed to carry out projects certified to it from the BECC.[132] The total initial paid in capital of the NADBank is $450 million (U.S.), and its callable capital amounts to $4.55 billion (U.S.). Based on these capital contributions, Mexico and the United States believe that the NADBank will be able to provide roughly $2 billion (U.S.) for loans and guarantees to infrastructure projects, with

an upper limit of $3 billion (U.S.).

While the funding package for the border includes a substantial sum of money and provides perhaps the most publicly accountable institutions in the entire NAFTA package, the funding package is not without its limitations. First, the package only really attempts to deal with infrastructure projects, such as sewage treatment plants, most of which are over the long-term revenue generating. The package does not seriously address the costs of environmental cleanup of existing problems, such as toxic hot spots, which do not generate revenue.

Second, the overall cost of rectifying the border's environmental problems is estimated by some experts as up to $20 billion (U.S.). Assuming that the financing package is capable of generating $8 billion (U.S.), if these cost estimates prove accurate, that leaves a shortfall of $12 billion (U.S.) in needed additional funding. Thus, while the NADBank will play a major role in funding environmental activities related to the NAFTA, it cannot be looked at as the sole environmental funding source for the environmental needs of the border region.

D. Impact of Efforts on the Parallel Environmental Track

One of the most interesting features of the entire NAFTA process is the relative success of the efforts on the parallel track. Although each of the institutions and processes created on the parallel track has its flaws, these institutions without question break new ground. The success of the parties in developing these institutions may be a result of the mix of institutions that were created. The ability of the parties to agree on a CEC with both monetary assessment and trade sanction powers seems to have been aided by the offer of a substantial funding package aimed at solving some of the worst environmental problems shared by at least two of the

parties. This combination of carrots and sticks provided each party with incentives necessary for accepting the least appealing elements of the package. Now, as the NAFTA is implemented, it will be interesting to see what effect any shift in the balance between carrots and sticks will have on the efficacy of the parallel track efforts.

In addition to the process-based lessons of the parallel track as a whole, the efforts on the parallel track are also each important in their own respect. For example, the linkages in the CEC between the failure to provide adequate environmental protection, the competitiveness impacts of this failure, and the ability of a country to use a trade measure to address these impacts are important steps in the trade and environment debate. If the CEC's dispute resolution processes, as implemented, can function in a non-discriminatory, non-protectionist fashion that results in increased environmental protection, then these processes will serve as an important model for future trade and environment efforts.

Similarly, the NAFTA funding package provides an important lesson in how developed nations can provide assistance to developing nations to enable them to conduct trade more sustainably. These incentives for environmentally sound trade may, in the long run, prove equally or more important to environmental protection than the coercive elements of the package.

Moreover, the NAFTA's approach of linking the funding incentives to binding responsibilities backed by sanctions is also informative. While this approach is less coercive than the pure sanctions approach, it avoids the perception that plagues the pure positive incentive approach that every environmental gain must be purchased. This carrot and stick model may hold the solution to many of the most difficult issues at play in the trade and environment debate.

Although the specific structures and functions of the NAFTA parallel track institutions are perhaps best suited to the particular circumstances of the NAFTA, the basic premises behind each of these institutions are important for charting the course of future trade and environment efforts.

4 Conclusion

THE ENVIRONMENTAL PROVISIONS OF THE NAFTA ALL HOLD important lessons for future trade and environment efforts. As these provisions are implemented, their successes and shortcomings will serve as an important laboratory for cultivating solutions to many issues in the trade and environment field.

Endnotes

1. Introduction

1. North American Free Trade Agreement Between the Government of the United States, the Government of Canada and the Government of the United Mexican States, Dec. 17, 1992, 32 I.L.M. 289 (1993) (preamble to chapter 10); 32 I.L.M. 605 (1993) (chapter 10 to Errata table)[hereinafter NAFTA].

2. Actually, the Canada-U.S. market, alone, reached the $6 trillion mark in 1990 operating under the 1988 Canada-United States Free Trade Agreement. See William A. Orme, Jr., Myths Versus Facts; The Whole Truths About the Half Truths, 72 For. Affairs 2, 3-4 (1993). The NAFTA both brings Mexico into the fold and expands the range of areas (such as financial services) covered by the hemispheric trade rules. In fact, however, claims as to the NAFTA's market are often misleading. Id. For example, the NAFTA does not create the world's largest market. Id. When fully implemented, the European Union, which entered into effect November 1, 1993, will be more integrated and larger than the NAFTA zone. See generally Peter Ludlow, The Maastricht Treaty and the Future of Europe, 15 Wash. Q. 119 (1992). Although the accords setting up the Union do include certain environmental provisions, they are less comprehensive and require less integration of trade and environment than occurred in the NAFTA.

3. See Ambler H. Moss, Jr., Free Trade and Environmental Enhancement: Are They Compatible in the Americas?, in Durwood Zaelke, et al., eds., Trade and the Environment: Law, Economics and Policy, 109, at 116 (1993) ("It necessarily follows that environmental concerns should be integrated into the actual text of future free trade agreements. The model to follow is NAFTA....").

2. Process Issues

1. See Michael Aho, More Bilateral Trade Agreements Would Be a Blunder: What the New President Should Do, 22 Cornell Int'l L.J. 25, 25 (1989) (arguing that bilateral agreements harm international trade system). But see C. Michael Hathaway & Sandra Masur, The Right Emphasis for U.S. Trade Policy for the 1990's: Positive Bilateralism, 8 B.U. Int'l L.J. 207, 211-16 (1990) (arguing that bilateral agreements can help extend and develop international trade system).

2. See infra notes 135-37 (discussing NAFTA-like changes in Uruguay Round final text); see also Trade Negotiations Committee, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Dec. 15, 1993, MTN/FA-UR-93-0246 [hereinafter Uruguay Round Final Act].

3. General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187.

4. See supra notes 135-37 and accompanying text (discussing NAFTA-inspired changes in Uruguay Round of GATT).

5. Trade Act of 1974, §§ 101-102, 151, Pub. L. No. 93-618, 88 Stat. 1978, 1982, 2001 (1975) (codified at 19 U.S.C. §§ 2101, 2111-2112, 2191 (1988)); Omnibus Trade and Competitiveness Act

of 1988, Pub. L. No. 100-418, 102 Stat. 1107, 1102-03 (codified at 19 U.S.C. §§ 2902-2903). Fast track procedures limit Congressional input into the negotiation of trade agreements to ease the President's ability to enter into such agreements. See Alan F. Homer & Judith H. Bello, The Fast Track Debate: A Prescription for Pragmatism, 26 Int'l Law. 183, 184 (1992).

6. See Robert F. Housman & Paul M. Orbuch, Integrating Labor and Environmental Concerns Into the North American Free Trade Agreement: A Look Back and a Look Ahead, 8 Am. U. J. Int'l L. & Pol'y 719, 724-25 (1993) (discussing role of environmental issues in the fast track debate).

7. Executive Office of the President, Response of the Administration to Issues Raised in Connection with the Negotiation of the North American Free Trade Agreement, May 1, 1991.

8. See Unions, Employees, and Federal Government Debate Effect of NAFTA on U.S. Safety Rules, Daily Labor Rep. (BNA) A8 (1992) (discussing parallel tracks).

9. Id.

10. David Marchick & Amit K. Misra, Trade Wars, Atl. Const., Apr. 11, 1991, A19.

11. Housman & Orbuch, supra note 9, at 768.

12. See Bruce Stokes, Greens Talk Trade, Nat'l J. 863, Apr. 13, 1991, at 864.

13. See, e.g., Regina Barba, NAFTA and NACE: A Mexican Perspective, in Sarah Richardson, ed., Shaping Consensus: The North American Commission on the Environment And NAFTA, May 1993, 10, 10-12 (discussing Mexican efforts); Steven Shrybman, Trading Away the Environment, 9 World Pol'y J. 93, 93-110 (Winter 1991-1992) (Mr. Shrybman served as Counsel to the Canadian Environmental Law Association).

14. See Housman & Orbuch, supra note 9, at 768.

15. See James Risen, Dynamite Deal; Trade Pact Could Backfire on Bush in the Rust Belt, L.A. Times, Aug. 7, 1992, at B5-B6.

16. See Governor Clinton Expanding Trade and Creating American Jobs, Remarks of Governor William J. Clinton at North Carolina State University (Oct. 4, 1992). While certain aspects of the supplemental environmental agreement were discussed on the parallel track, the election fundamentally changed the direction of these negotiations. For example, prior to the U.S. election, a North American Commission on the Environment had been agreed to in principle. See NRDC Warns Administration Not to Rush Creation of NAFTA Environmental Body, Inside U.S. Trade, Oct. 30, 1992, at 14. However, the Commission as envisioned during the Bush administration bears little resemblance to the one ultimately created.

17. See Governor Clinton, supra note 19.

18. See North American Agreement on Environmental Cooperation Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States, Sept. 13, 1993, 32 I.L.M. 1480 (1993) [hereinafter NAAEC]; North American Agreement on Labor Cooperation Between the Government of the United States of America, the Government of Canada, and the Government of the United Mexican States, Sept. 13, 1993.

19. See Administration to Release NAFTA Text Next Week as Officials Scramble to Finish, Inside U.S. Trade, Sept. 4, 1992, at 1, 11.

20. See Gephardt Criticizes NAFTA Side Accord as 'Not Supportable', Inside U.S. Trade, Aug. 16, 1993, at S-5, S-6.

21. Id. For example, the failure of the supplemental agreement's withdrawal clause to include a penalty to inhibit parties from dropping out from their environmental responsibilities but continuing to participate in the NAFTA's trade benefits was a subject of much concern. See Janet Perez, Opponents Voice Fears on NAFTA, Phoenix Gazette, Nov. 6, 1993, at E1; Peter Behr, U.S. Tells Canada, Mexico Side Agreements are Vital, Wash. Post, Oct. 30, 1993, at A4.

22. See Gephardt Criticizes, supra note 23.

23. Cf. Letter from Ambassador Kantor, U.S. Trade Representative to the Honorable Bill Archer, reprinted in, Inside U.S. Trade, Oct. 22, 1993, at 16-17.

24. See, e.g.,infra notes 100-37 and accompanying text (discussing the NAFTA's advances in the standards area).

25. See, e.g., Mark Ritchie, Free Trade versus Sustainable Agriculture: The Implications of NAFTA, 22 Ecologist 221 (1992).

26. See generally Jan C. McAlpine & Pat LeDonne, The United States Government, Public Participation, and Trade and Environment, in Durwood Zaelke, et al., eds., Trade and the Environment: Law, Economics and Policy, at 203 (1993). This criticism is more commonly directed at trade agencies, which tend to hold greater sway in many government decision-making fora related to trade and the environment. Id.

27. Peter L. Lallas, NAFTA and Evolving Approaches to Identify and Address "Indirect" Environmental Impacts of International Trade, 5 Geo. Int'l Envtl. L. Rev. 519, 543 (1993). (Mr. Lallas is an Attorney Advisor with the U.S. Environmental Protection Agency's Office of the General Counsel; he also served as a member of the EPA's NAFTA delegation.)

28. Id.

29. Government of Canada, North American Free Trade Agreement: Canadian Environmental Review, Oct. 1992, at 1.

30. See Daniel C. Esty, Integrating Trade and Environment Policy Making: First Steps in the North American Free Trade Agreement, in Durwood Zaelke, et al., eds., Trade and the Environment: Law, Economics and Policy, 45, 48 (1993).

31. See Anne L. Alonzo, Mexico, 15 Loyola of Los Angeles Int'l & Comp. L. J. 87, 89 (1992) (discussing Mexico's environmental regulatory system) (Ms. Alonzo is an attorney with the U.S. Environmental Protection Agency, at the American Embassy in Mexico City, Mexico); M. Paul Brown, Environment Canada and the Pursuit of Administrative Decentralization, 29 Can. Pub. Admin. 218 (1986); D. Selmi & K. Manaster, State Environmental Law (1989).

32. See In re Ultra-High Temperature Milk from Quebec, No.USA-92-1807-02 (1992)(appearing before a panel convened pursuant to Chapter 18 of the CFTA) (Puerto Rico is a commonwealth of the United States and for the purposes of both setting standards and trade

challenges to these standards it functions similar to a state). The milk case involved a Canadian challenge to the testing and certification standards imposed on facilities manufacturing ultra-high temperature processed milk for sale in Puerto Rico. Id. The standards in question required, inter alia, the use of certified inspectors and laboratories to test the milk's safety, and periodic (as opposed to one time) certification of all manufacturing facilities. Id. All manufacturers of ultra-high temperature milk are required to meet these standards. Id. Canada argued that the standards were an unnecessary and discriminatory trade barrier.

33. See GATT, United States Measures Affecting Alcoholic and Malt Beverages, Report of the Panel (Feb. 7, 1992). Prior cases have raised similar problems that federal systems face with regard to the actions of their sub federal entities. See Canada Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies, (adopted Mar. 22, 1988), BISD (35th Supp.) 37 (1988); Springfield Rare Coin Galleries, Inc. v. Johnson, 115 Ill.2nd 221, 503 N.W.2d 300 (1986). The proximity in time of the beer and milk cases to the NAFTA, however, caused them to play special roles in the NAFTA process.

34. See, e.g., Kate Tambour, NAFTA's Cloud Over the States, 9 Policy Alternatives on the Environment - A State Report, 1992, at 1, 5.

35. Canadian Environmental Review, supra note 32, at 6.

36. Id.

37. Gail Severns, NAFTA Prompts Environmental Cooperation on California Border with Mexico, 2 EnviroMexico, Dec. 1993, at 4.

38. See Scott McCallum, Local Action in a New World Order, 23 Envtl. L. 623, 623-634 (1992) (discussing the important role cross-border state-to-state coordination must play with the increasing internationalization of commerce). (Mr. McCallum is the Lieutenant Governor of the U.S. State of Wisconsin.)

39. See McCallum, supra note 41.

40. See George E. Brown, Jr., J. William Goold & John Cavanagh, Making Trade Fair, 9 World Pol'y J. 309, 315 (1992) (discussing development of public participation in U.S., Canada and Mexico on trade issues).

41. See Lori Wallach, Panel Discussion: Environmental Standards, Enforcement and NAFTA, 5 Geo. Int'l Envtl. L. Rev. 568, 569 (1993) (noting that the U.S. "Congress received a monumental 20 million postcards" in the wake of the Tuna/Dolphin case).

42. Id. at 573 (discussing role of a citizens trade network made up of 40 million citizens in all 50 of the United States).

43. See, e.g., Texas Center for Policy Studies, NAFTA and the U.S./Mexico Border Environment: Options for Congressional Action, Sept. 1992; Letter to Ambassador Kantor, U.S. Trade Representative, from Texas Center for Policy Studies, Southwest Voter Research Institute, Mexican American Legal Defense and Education Fund, Border Ecology Project, Udall Center for Public Policy, Arizona Toxics Information, International Transboundary Research Center, and Domingo Gonzales, May 18, 1993 (regarding U.S.-Mexico border issues).

44. See, e.g., supra note 46, Coalition for Justice in the Maquiladoras, Annual Report 1990 1991, at 19 (listing diverse membership including groups from all of the NAFTA countries); North American Institute, The North American Environment: Opportunities for Trinational Cooperation by Canada, the United States, and Mexico Report and Recommendations, Feb. 12 14, 1993 (trilateral colloquium report). These cross-border efforts build upon similar efforts between U.S. and Canadian groups aimed at the environmental effects of the Canada U.S. Free Trade Agreement. See, e.g., Steven Shrybman, 9 World Pol'y J. 93, 93-110 (Winter 1991-1992).

45. See, e.g., Nancy Dunne, Gore Up Front and Deals in the Backrooms What Turned the Tide in the Fight for NAFTA, Fin. Times, Nov. 19, 1993, at 6.

46. See Lallas, supra note 30, at 543. The Border Plan is discussed more fully at notes 155-59 and accompanying text.

47. See, e.g., Regina Barba, Nafta and NACE: A Mexican Perspective, in Sarah Richardson, ed., Shaping Consensus: The North American Commission on the Environment and NAFTA, Apr. 7, 1993, 10, 10-12; Adolfo Aguilar Zinser, Authoritarianism and North American Free Trade, in Ricardo Grinspun & Maxwell A. Cameron, eds., The Political Economy of North American Free Trade, 205, 205-11 (1993).

48. See Zinser, supra note 50, at 207. One critic summarized the Mexican government's approach to the NAFTA as giving the "negotiations equivalent status of a national security affair, keeping information almost a state secret, preventing any meaningful public debate, maintaining a close vigilance on its opponents, and transmitting only general propaganda messages to the public." Id. The lack of public debate in Mexico produced startling results. For example, one survey of Mexican citizens found that 45.8 percent of those interviewed supported the NAFTA because it would make it easier for Mexicans to get jobs in the United States. Jorge G. Castañeda, Can NAFTA Change Mexico, 72 For. Affairs 66, 74 (1993).

49. See, e.g., Tod Robertson, How Mexico Brewed a Rebellion, Wash. Post, Jan. 9, 1994, A31 (discussing the NAFTA as a root cause of the Chiapas uprising).

50. See Wallach, supra note 44, at 571-72; See also David B. Hunter, Toward Global Citizenship in International Environmental Law, 28 Willamette L. Rev. 547, 552 (1992) (discussing need to democratize international institutions). This trend toward public involvement in trade decision-making reflects a general trend in international law toward the recognition of non-governmental organizations and persons. See John H. Barton & Barry E. Carter, International Law and Institutions for a New Age, 81 Geo. L.J. 535, 538 (1993).

51. See Nancy Dunne, Clinton Woes Environmentalists: Washington Seeks Support in Congress for GATT Accord, Fin. Times, Dec. 22, 1993, at 4 (discussing U.S. opposition to Uruguay Round).

52. See World Bank, Environmental Assessment Source Book, Vol. I, 1 (1991); UNEP, Concepts and Principles in International Environmental Law: An Introduction, Jan. 1994,

26-27.

53. See Brief of Amici Curiae American Automobile Manufacturers Association, et al., Public Citizen v. United States Trade Representative, No. 92-2102 (CRR), at 27-29.

54. 42 U.S.C. §§ 4321-4370c.

55. See Interagency Task Force Coordinated by the Office of the United States Trade Representative, Review of U.S.-Mexico Environmental Issues (Feb. 1992).

56. For example, the Review recommended that the NAFTA "respect existing international agreements to which the U.S. is a party." See id. at 217. This recommendation provided a framework for the agreements' protections provided to certain international environmental agreements. See infra, notes 91-99 and accompanying text (discussing NAFTA article 104).

57. See Public Citizen v. United States Trade Representative, 782 F. Supp. 139 (D.D.C.), aff'd, 970 F.2d 916 (D.C. Cir. 1992) (finding that plaintiffs' claims were not yet ripe for review because no agreement existed at that time).

58. See Public Citizen v. United States Trade Representative, 5 F. 3d 549 (D.C. Cir. 1993) (holding that because the President submitted the NAFTA to Congress there was no "final agency action" upon which plaintiffs could seek review of the decision not to prepare an EIS). No U.S. federal court has held that NEPA does not apply to trade agreements. The cases involving the NAFTA merely discuss the procedural impediments to judicial review of the decision not to apply NEPA to the NAFTA. Id.

59. U.S. Trade Representatives Office, NAFTA: Report on Environmental Issues, Nov. 1993 [hereinafter Report on Environmental Issues].

60. See generally id.

61. See Constance D. Hunt, A Note on Environmental Impact Assessment in Canada, 28 Envtl. L. 789 (1990).

62. See Canadian Environmental Review, supra note 32; see also Robert Page, Negotiating the Environmental Provisions of NAFTA: What Gains Were Made, in Sarah Richardson, ed., The North American Free Trade Agreement and the North American Commission on the Environment, at 10, 10-13 (1993) (prepared for the National Roundtable on the Environment and the Economy, Canada).

63. Page, supra note 65.

64. See Mark Ritchie, The Green Lobby Raises a Red Flag on Agreement, Int'l Bus., Nov. 1991, at 82, 82; Mexican Environmental Groups File Suit Challenging NAFTA, Outlook Dim, Sept. 1, 1993 Daily Exec. Rep. (BNA), at 168 d13.

65. See Mexican Environmental Groups File Suit, supra note —.

66. Cf. Zinser, supra note 50, at 207-11 (discussing lack of NAFTA information in Mexico).

67. Id. at 207 (noting that Mexicans learned that their government was negotiating a NAFTA from a leaked Wall Street Journal article).

68. Id. at 207-11.

69. In contrast, the NAFTA process shows the difficulties faced with the preparation of more in-depth environmental analyses, or EISs, for trade agreements. No party prepared either an EIS or an EIA for the NAFTA process. See supra note 61 (discussing Public Citizen case).

70. See Susan Dentzer, Hasta la Vista, In Court, U.S. News & World Rep., July 12, 1993, at 47 ("What [NEPA's application to NAFTA] means is that the proposed free-trade zone . . . could be in more limbo than ever."); Constitutional Issue Main Focus of NAFTA EIS Hearing, World Envt. Rep, July 23, 1993 (available on NEXIS, current file) ("An EIS, in fact, would put some members of Congress at ease, helping to dismiss doomsayers who say the environment will suffer tremendously as a result of [NAFTA].").

71. See supra notes 60-61 (discussing Public Citizen suits).

3. Substantive Issue

1. NAFTA, supra note 1, at Preamble, 32 I.L.M. at 297.

2. See Lallas, supra note 30, at 544. But see, John Audley, Why Environmentalists Are Angry at NAFTA, in Durwood Zaelke, et al., eds., Trade and the Environment: Law, Economics, and Policy, 191, 198 (1993) (arguing NAFTA's preambulatory language on sustainable development "is difficult to take seriously" given the environmental questions the agreement leaves unanswered).

3. See Senator Max Baucus, NAFTA Needs Environmental Side Agreement, 10 Envtl. F. 30, 30 (1993); Jane Bussey, Trade Pact Doomed if It Ignores Labor, Environment, Critics Warn, Miami Herald, Apr. 4, 1993, 28.

4. See, e.g., U.S. Government Accounting Office, U.S.-Mexico Trade: Some U.S. Furniture Firms Relocated From Los Angeles to Mexico, Report to the Chairman, Comm. on Energy, House of Representatives, 1-4, GAO/NSIAD-91-191 (Apr. 1991) (furniture firms relocated to Mexico to avoid environmental compliance costs). But See United States Trade Representative's Office, Myths & Realities: The North American Free Trade Agreement 2 (Oct. 1992) (arguing that no pollution haven problem exists).

5. See Steve Charnovitz, NAFTA: An Analysis of its Environmental Provisions, 23 Envtl. L. Rep. 10067, 10072 (1993).

6. The only scenarios where the Canadian proposal would have definitely applied were: (1) a legislature changed or eliminated a law specifically to induce investment; or (2) a regulatory agency altered a rule specifically to induce investment.

7. NAFTA, supra note 1, at art. 1114.2, 32 I.L.M. at 642.

8. Id. at art. 1114.2, 32 I.L.M. at 642.

9. Id. at art. 1114.2, 32 I.L.M. at 642.

10. Id. at art. 1114.2, 32 I.L.M. at 642; see also Michelle Swenarchuk, The Environmental Implications of NAFTA: A Legal Analysis, in Canadian Environmental Law Association, The Environmental Implications of Trade Agreements, 101, 125 (Aug. 1993) (prepared for the Ontario Ministry of Environment and Energy).

11. See Esty, supra note 33, at 53 ("There has been considerable debate over this 'pollution haven' provision because the remedy provided to a party that believes another has induced investment through a reduction in the rigor of its environmental regime is consultations and not binding dispute resolution.").

12. See Europeans May Consider Trade Sanctions for Environmental Violations, Envtl. Pol'y Alert, Oct. 27, 1993, at 39.

13. See generally, Robert Housman, Paul Orbuch & William Snape, Enforcement of Environmental Laws Under a Supplemental Agreement to the North American Free Trade Agreement, 5 Geo. Int'l Envtl. L. Rev. 593, 593-622 (1993).

14. See U.S. Government Accounting Office, Report to Congress: North American Free Trade Agreement Assessment of Major Issues, Sept. 1993, Doc. No. GAO/GGD-93-137B, Vol. 2, 21 (discussing basic obligations under the NAFTA).

15. Cf. Interagency Environmental Technologies Exports Working Group, Environmental Technologies Exports: Strategic Framework for U.S. Leadership, Nov 1993, Appendix A: Mexico, NAFTA, and Environmental Export Opportunities, at 33 (noting the NAFTA will stimulate environmental technology exports through the removal of non-tariff barriers).

16. See, e.g., Michael Smith, Afterword, in Durwood Zaelke, et al., eds., Trade and the Environment: Law, Economics and Policy, 287, at 292 (1993) ("While a recognition of environmental trade measures contained in multilateral agreements is not a panacea, it is a major and necessary first step.").

17. NAFTA, supra note 1, at art. 104, Annex 104.1, 32 I.L.M. at 297-98.

18. See id. at art 104, 32 I.L.M. at 297-98. The multilateral agreements are: (1) The Montreal Protocol on Substances that Deplete the Ozone Layer, adopted and opened for signature Sept. 16,1987, entered into force Jan. 1, 1989, S. Treaty Doc. No 100-10, 26 I.L.M. 1541 (the Montreal Protocol); (2) the Basel Convention on Transboundary Movements of Hazardous Wastes and Their Disposal, opened for signature Mar. 22, 1989, U.N. Doc. EP/16.80/3, 28 I.L.M. 649 (the Basel Convention); and (3) the Convention on International Trade in Endangered Species of Wild Flora and Fauna, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 (CITES).

19. See NAFTA, supra note 1, at art. 104, Annex 104, 32 I.L.M. at 297-98. The listed bilateral agreements are: Agreement on Cooperation for the Protection and Improvement of the Environment in the Border Area, Aug. 14, 1983, T.I.A.S. No. 10,827; Agreement Between the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Waste, signed Oct. 26, 1986, T.I.A.S. No. 1109.

20. See infra note 99; Report on Environmental Issues, supra note 62, at 11. The United States has obtained commitments from Canada and Mexico to list: The Convention on the Protection of Migratory Birds, Aug. 16, 1916, U.S.-Great Britain (on behalf of Canada) 39 Stat. 1702, T.I.A.S. No. 628 ; and The Convention Between the United States of America and the United Mexican States for the Protection of Migratory Birds and Game Mammals, Feb. 7, 1936, 50 Stat. 1311, T.I.A.S. No. 912.

21. NAFTA, supra note 1, at art. 104.1, 32 I.L.M. at 297-98.

22. Id. at art. 104.1, 32 I.L.M. at 297-98; see also Housman & Orbuch, supra note 9, at 754-55. Environmentalists argue that article 104 only protects the IEAs proper and not the domestic laws of the NAFTA parties implementing these IEAs; the

implementing laws of the parties are required to be "least inconsistent with the other provisions of [NAFTA]." Housman & Orbuch, supra. note 9, at 754-55. Thus, while the terms of a listed IEA may prevail, the law implementing the IEA may not.

23. NAFTA, supra note 1, at art. 104.2, 32 I.L.M. at 297-98.

24. Environmentalists fear that the unanimity requirement will allow one foot-dragging NAFTA party to undermine the ability of the other NAFTA parties to implement non-listed IEAs effectively. This fear is compounded by NAFTA's accession clause, which does not require acceding parties to also accede to the IEAs listed under article 104. Thus, if the list of NAFTA parties grows, the requirement of unanimity could prove increasingly troublesome.

25. The original NAFTA text failed to list for protection the Convention on the Protection of Migratory Birds and the Convention Between the United States of America and the United Mexican States for the Protection of Migratory Birds and Game Mammals. See Key Officials Address House Committee on Environmental Benefits of Agreement, Int'l Trade Daily (BNA), Nov. 15, 1993. In an effort to secure the support of the U.S.-based National Audubon Society, the Clinton administration was able to obtain the consent of Canada and Mexico to place these bilateral treaties on the list of protected IEAs. This process, however, occurred at a time when the leverage for environmental gains was at its highest. Whether the parties will be able to agree on future IEAs absent that leverage remains to be seen.

26. See, e.g., GATT, International Trade 20 (Vol. I, ch. III) (1990-1991), at 24, 31 (Report on Trade and Environment).

27. See, e.g., John Audley, Why Environmentalists Are Angry About NAFTA, in Durwood Zaelke, et al., eds., Trade and the Environment: Law, Economics, and Policy, 191, 195-96 (1993); Patti A. Goldman, Resolving the Trade and Environment Debate: In Search of a Neutral Forum and Neutral Principles, 49 Wash. & Lee L. Rev. 1278, 1292-96 (1992).

28. The NAFTA's attempt to craft "environmentally friendly" standards provisions can be traced, in large measure, to the "Waxman/Gephardt" resolution. H.R. Cong. Res. 246 § 2, 102d Sess., 138 Cong. Rec. H7699 (Aug. 6, 1992). This resolution provided that the U.S. House of Representatives:

"[would] not approve legislation to implement any trade agreement including [GATT and NAFTA] if such agreement jeopardizes United States health, safety, labor, or environmental laws (including the Federal Food, Drug, and Cosmetic Act and the Clean Air Act).

Id. Thus, the fate of NAFTA was intimately tied to the agreement's standards provision.

29. NAFTA, supra note 1, at art. 712.2, 904, 32 I.L.M. at 377-78, 387; see also Report on Environmental Issues, supra note 62, at 6, 7, 9; Lallas, supra note 30, at 545.

30. See Page, supra note 65, at 12.

31. See NAFTA, art. 712.3, 32 I.L.M. at 378; see also Report on Environmental Issues, supra note 62, at 5-6.

32. See United States Restrictions on Imports of Tuna, adopted Sept. 3, 1991 (Panel Report No.

DS21/R), at 46. The panel decision found that the U.S. restrictions were not "necessary" within the meaning of GATT article XX because the link between the restriction's means and its ends was not tight enough. See id.; see also Robert F. Housman & Durwood J. Zaelke, The Collision of Environment and Trade: The GATT Tuna/Dolphin Decision, 22 Envtl. L. Rep. 10268, 10273 (1992); infra note 130 (discussing limits of extrapolating from the Tuna/Dolphin decision).

33. NAFTA, supra note 1, at art. 712.5, 32 I.L.M. at 378.

34. Id. at art. 904.4, 32 I.L.M. at 387.

35. See Thailand Restrictions on Importation of and Internal Taxes on Cigarettes, (adopted Nov. 7, 1990), BISD (37th Supp.) 200-23, para. 74 (1990).

36. Report on Environmental Issues, supra note 62, at 6-10. Cf. Lallas, supra note 30, at 545.

37. Jeffrey L. Dunoff, Reconciling International Trade with Preservation of the Global Commons: Can We Prosper and Protect?, 49 Wash. & Lee L. Rev. 1407, 1446-48 (1992) (discussing proportionality). Cf. Lallas, supra note 30, at 545.

38. NAFTA, supra note 1, at art 712.3, 32 I.L.M. at 378. The NAFTA further provides that a "scientific basis" is "a reason based on data or information derived using scientific methods." Id. at art. 724, 32 I.L.M. at 382.

39. See id. at art. 712.3, 32 I.L.M. at 378. While this standard seeks to prevent "duelling science," it does provide discipline against protectionism by requiring that some science must support a measure (except in the case of precautionary standards, see infra notes 125-28 and accompanying text). If a party can show that no scientific basis exists for a standard, the standard would violate the NAFTA. This balance was vital to the United States in that it preserved the United States' long-standing position, as seen in the U.S.-E.C. beef hormone dispute, that standards must have some scientific basis to be proper. See Holly Hammonds, A U.S. Perspective on the EC Hormones Directive, 11 Mich. J. Int'l L. 840, 840-44 (1990).

40. See NAFTA supra note 1, at art. 907.1, 32 I.L.M. at 387-88 (a party "may" conduct a risk assessment).

41. See id. at art. 904.3 and 915.1, 32 I.L.M. at 387, 391-92. The "demonstrable purpose" requirement does provide discipline to prevent unbridled protectionism. Under this test, if a party can show that the purpose of a provision was to erect a discriminatory barrier to trade, for example where science shows that the harm the standard is predicated on is nonexistent, then the standard would violate the NAFTA.

42. See id. at arts. 712.3, 907.1,32 I.L.M. at 378, 387-88.

43. See Comment, Ellen J. Case, The Public's Role in Risk Assessment, 5 Geo. Int'l Envtl. L. Rev. 479, 494-95 (1993). While risk assessment focuses the science of identifying risks, risk management is the process of determining how to address such risk. Id. Risk management decisions must weigh not only science, but also ethical, social, political and economic considerations. Id.

44. See The Role of Science in Adjudicating Trade Disputes Under the North American Free Trade Agreement: 1992 Hearing Before the House

of Representatives Committee on Science, Space and Technology, 102d Cong., 2d sess. 38, 50-51 (statement of David Wirth). Interestingly, the NAFTA's risk assessment requirement substantially buoys the discipline of risk assessment, which has faced considerable criticism within the United States. See Comment, Ellen J. Case, The Public's Role in Scientific Risk Assessment, 5 Geo. Int'l Envtl. L. Rev. 479, 480 (1993) ("The science of risk assessment has suffered from its inability to deliver a foundation and credibility for regulatory decisions and policies.").

45. See NAFTA supra note 1, at art. 713.1, 32 I.L.M. at 378.

46. See, e.g., id. at art. 906, 32 I.L.M. at 387.

47. See, e.g., Trade Negotiations Committee, Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, at art. 2.4.

48. See NAFTA, supra note 1, at art. 714.1, 32 I.L.M. at 378.

49. See id. at art. 713, 905, 32 I.L.M. at 378, 387.

50. See id. at art. 713, 905, 32 I.L.M. at 378, 387. For example, article 905 provides, in pertinent part:

1. Each Party shall use, as a basis for its standards-related measures, relevant international standards . . . except where such standards would be an ineffective or inappropriate means to fulfill its legitimate objectives, for example because of . . . the level of protection that Party considers appropriate.

2. A Party's standards-related measure that conforms to an international standard shall be presumed consistent with [the Party's Basic Rights and Obligations].

3. Nothing in paragraph 1 shall be construed to prevent a Party, in pursuing its legitimate objectives, from adopting, maintaining or applying any standards-related measure that results in a higher level of protection than would be achieved if the measure were based on the relevant international standard.

Id. at art. 905, 32 I.L.M. at 387.

51. See UNEP, Concepts and Principles in International Environmental Law: An Introduction, Jan. 1994, 25-26.

52. See NAFTA supra note 1, at art. 715.4, 907.3, 32 I.L.M. at 378-79, 387-88.

53. See supra notes 100-137 (discussing NAFTA standards rules).

54. Id. at art. 712, 715.4, 907, 32 I.L.M. at 377-79, 387-88.

55. For an excellent discussion of the PPM issues, see John H. Jackson, World Trade Rules and Environmental Policies: Congruence or Conflict?, in Durwood Zaelke, et al., eds., Trade and the Environment: Law, Economics, and Policy (1993), 219, at 226-29.

56. See United States Restrictions on Imports of Tuna (adopted Sept. 3, 1991) (Panel Report No. DS21/R) (panel decision finding U.S. Marine Mammal Protection Act failed to comply with GATT because, inter alia, it applied to the production process methods of tuna harvesting outside the territory of the United States and not to tuna as a product). While the Tuna/Dolphin decision is generally informative, its further application may be limited. Generally speaking, the

facts of the Tuna/Dolphin decision presented a bad test case. The case involved standards that applied to PPMs outside U.S. territory. In addition, these standards were arguably somewhat discriminatory. The decision has never been adopted by the GATT Contracting Parties.

57. NAFTA, supra note 1, at art. 915, 32 I.L.M. at 391-92.

58. Id. at art. 904, 907, 32 I.L.M at 387-88.

59. See Richard B. Stewart, The NAFTA: Trade, Competition, Environmental Protection, 27 Int'l Lawyer 751, 761 (1993); Housman & Orbuch, supra note 9, at 738-39. The only exception to this statement is with regard to the PPM-based restrictions provided for in the IEAs listed under article 104 of the NAFTA. See supra notes 91-99, and accompanying text (discussing article 104). By protecting the PPM provisions of these IEAs, the NAFTA has essentially recognized certain internationally agreed-to PPMs.

60. See Smith, supra note 90, at 287. Ambassador Smith eloquently summarizes this fear:

Today we will use trade to dictate to the rest of the world how many parts per million of benzene is permissible, tomorrow it will be how many hours in the day a worker can work, next, it will be the per capita number of schools a country must have. Surely, these seemingly innocent and laudable social goals will sooner or later be hijacked by protectionist interests.... We will have opened a Pandora's box of protectionism.

Id.

61. See GATT TBT Agreement Reveals Failure of U.S. to Secure Changes, Inside U.S. Trade, Dec. 24, 1993, at 11.

62. See Uruguay Round Final Act, supra note 121, at Agreement on the Application of Sanitary and Phytosanitary Measures, preamble, art. 11, 11 note 2.

63. See id. art. 11 note 2.

64. See GATT TBT Agreement Reveals Failure of U.S. to Secure Changes, Inside U.S. Trade, Dec. 24, 1993, at 11.

65. See supra notes 135-137 (discussing NAFTA's effect on the GATT Uruguay Round).

66. See NAFTA, supra note 1, at art. 2005.4, 2005.3, 32 I.L.M. at 684.

67. See Esty supra note 33, at 54.

68. See NAFTA, supra note 1, at art. 723.6, 914.4, 32 I.L.M. at 382, 391.

69. Canadian Environmental Review, supra note 32, at 70.

70. See Housman & Orbuch, supra note 9, at 744; James E. Bailey, Free Trade and the Environment Can NAFTA Reconcile the Irreconcilable, 8 Am. Univ. J. Int'l L. & Pol'y 839, 853 (1993).

71. See NAFTA, supra note 1, at art. 2015.1, 32 I.L.M. at 696-97.

72. Id. at art. 2015.1, 32 I.L.M. at 696-97.

73. Id. at art. 2015.2, 32 I.L.M. at 696-97.

74. Id. at art. 2014, 32 I.L.M. at 696.

75. A panel's access to outside expertise is not without precedent. In the Thai Cigarettes case, the GATT dispute panel consulted with and received a submission from the World Health Organization. See Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes, supra note 109, at 201, 216-20. Thus, the NAFTA related movements

in the Uruguay Round may be seen as a clarification or enunciation of the existing status of expert information under the GATT.

76. See NAFTA, supra note 1, at art. 2012.1(b), 32 I.L.M. at 696.

77. See id. at art. 2012.1(b), at 32 I.L.M. at 696.

78. See id. at art. 2017.4, 32 I.L.M. at 697.

79. Cf. Jackson, supra note 129, at 232 (discussing need for greater transparency in international trade decision-making).

80. See id. at 234 (noting that changes to GATT in the area of transparency are "longer term action[s]").

81. See Housman & Orbuch, supra note 9, at 777 (quoting American Medical Association report) (citations omitted).

82. EPA-SEDUE, Integrated Environmental Plan for the Mexican-U.S. Border Area (First Stage, 1992-1994).

83. See Timothy Atkeson, The Mexican-U.S. Border Environmental Plan, 1 J. Envt. & Dev. 143, 147 (1992).

84. Ironically, the U.S. Congress cut the already small amounts of funding that were to be made available for these efforts. See Report of the Administration on the North American Free Trade Agreement and Actions Taken in Fulfillment of the May 1, 1991 Commitments, Sept 18, 1992, at 126.

85. See Jan Gilbreath Rich, Planning the Border's Future: The Mexican-U.S. Integrated Border Environmental Plan, U.S.-Mexican Occasional Paper No. 1, Mar. 1992, at 1, 4.

86. NAAEC, supra note 21, at art. 1, 32 I.L.M. at 1483.

87. Id. at art. 3, 32 I.L.M. at 1483.

88. Id. at art. 5, 32 I.L.M. 1483-484. This obligation includes the responsibility to: appoint and train inspectors; monitor compliance with environmental laws; investigate suspected violations of environmental laws; seek voluntary compliance agreements to avoid or end violations of environmental laws; and use legal proceedings and sanctions, or otherwise seek appropriate remedies for violations of environmental laws. Id. A party's failure to fulfill its article 5 obligations can serve as grounds for dispute settlement and sanctions under the other provisions of the NAAEC.

89. Id. at art. 4, 32 I.L.M. at 1483.

90. Id. at art 5,6, 32 I.L.M. at 1483-484.

91. Id.

92. Id. at art. 8, 32 I.L.M. at 1485.

93. Id. at art. 9, 32 I.L.M. at 1485.

94. Id. at art. 11, 32 I.L.M. at 1487

95. Id. at art. 16, 32 I.L.M. at 1489.

96. Id. at art. 6(a), 32 I.L.M. at 1486.

97. Id. at art. 6(b), 32 I.L.M. at 1486.

98. Id. at art. 6(c), 32 I.L.M. at 1486.

99. Id. at art. 6(c)(iii), 32 I.L.M. at 1486.

100. See supra notes 77-78 (discussing concerns over enforcement of environmental laws).

101. The actual effect of environmental regulations on investment and industrial siting decisions is heavily disputed. Compare Friends of the Earth, Standards Down Profits Up!, Jan. 1993 (finding that the failure to comply with environmental laws can increase some industries' profits by upwards of 200%) with Patrick Low, Do Dirty Industries Migrate? in World Bank Discussion Papers, International Trade and the

Environment, 89, 103 (1992) (finding that environmental costs of compliance are too low to affect investment and siting decisions). Most economic studies tend to find that, in most instances, current environmental regulations do not alone play a major role in such decisions. See Norman A. Bailey, Foreign Direct Investment and Environmental Protection in the Third World, in Durwood Zaelke et al., eds., Trade and the Environment: Law, Economics and Policy (1993), at 133, 135-36.

102. NAAEC, supra note 21, at art. 22-36, 32 I.L.M. at 1490-94.

103. Id. at art. 24.1, 32 I.L.M. at 1490. Disputes concerning laws primarily aimed at managing natural resources are, however, excepted from these procedures. Id. at art. 45, 2(b), 32 I.L.M. at 1495.

104. Id. at art. 24.1, 32 I.L.M. at 1490.

105. Id. at art. 45.1, 32 I.L.M. at 1494-495.

106. Id. at art. 25, 32 I.L.M. at 1491.

107. Id. at art. 30, 32 I.L.M. at 1492.

108. Id. at art. 31, 31 I.L.M. at 1492.

109. Id. at art. 32, 32 I.L.M. at 1492.

110. Id. at art. 33, 34, 32 I.L.M. at 1492.

111. Id. at art. 34.4, 32 I.L.M. at 1493.

112. Id. at art. 34.5, 32 I.L.M. at 1493.

113. Id. at Annex 34.1, 32 I.L.M. at 1496.

114. Id. at Annex 36A, 32 I.L.M. at 1496-497.

115. Id. at art. 36, 32 I.L.M. at 1493-494. A party cannot without violating the NAFTA unilaterally suspend benefits; it may only do so at the direction of the CEC.

116. Id. at Annex 36A, 32 I.L.M. at 1496-497.

117. Id. at art. 14.1, 32 I.L.M. at 1488.

118. Id. at art. 14.2, 32 I.L.M. at 1488. For a submission to be considered it must: 1) be in the party's designated notification language; 2) clearly identify the individual or group making the submission; 3) provide sufficient information to allow review; 4) appear to be aimed at promoting enforcement and not harassment; 5) indicate that the matter has been raised with the party in question; and 6) be filed by an individual or group residing in a NAFTA territory. Id. at art. 14.1 (a)-(f), 32 I.L.M. at 1488. If a submission meets the above criteria, then the Secretariat is to look at the following criteria to determine if a response is appropriate: 1) does the submission allege a harm to the submitting individual or group?; 2) does the submission, alone or in conjunction with other submissions, raise issues for which further study would advance the goals of the NAAEC?; 3) have the private remedies available under law been pursued?; and 4) is the submission drawn exclusively from mass media reports? Id. at art. 14.2 (a)-(d), 32 I.L.M. at 1488.

119. Id. at art. 15, 32 I.L.M. at 1488-89.

120. Id. at art. 15.2,4, 32 I.L.M. at 1488-89.

121. Id. at art. 15.5, .6, 32 I.L.M. at 1488-89.

122. Id. at art 15.2, 32 I.L.M. at 1488.

123. Id. at art. 14.3(a), 32 I.L.M. at 1488.

124. Agreement Between the Government of the United States of America and the Government of the United Mexican States Concerning the Establishment of a Border Environment Cooperation Commission and a North American Development Bank, Nov. 16, 18, 1993, 32 I.L.M. 1545 [hereinafter BECA].

125. Id.

126. Id. at I.1.3, 32 I.L.M. at 1551.

127. Id. at I.I. 4, 32 I.L.M. at 1550.

128. Id. at I.I.3, 32 I.L.M. at 1549-50.

129. Id. at I.I. 3(c)(2), 32 I.L.M. at 1549-50.

130. But see NADBank to Start Soon—How Long Will it Last?, Bank Letter, Dec. 20, 1993, 4,4 (discussing U.S. Congressional critics attempts to limit NADBank to one year duration).

131. BECA, supra note 198, at II.II.2, II.VI.2, 32 I.L.M. at 1557, 1564.

132. In addition to its environmental component, each country can elect to have the NADBank use up to ten percent of its capital payments for community adjustment and investment.

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