

Environmental Implications of the North American Free Trade Agreement

Sustainable development is ' . . . a strategy for improving the quality of life while preserving the environmental potential for the future, of living off interest rather than consuming natural capital . . . The key element of sustainable development is the recognition that economic and environmental goals are inextricably linked.'¹

I. INTRODUCTION

By its very nature, environmental policy collides head-on with international trade goals. Environmental regulations seek to conserve the earth's resources while international trade goals seek to exploit them.² This inherent conflict has come to the surface during recent trade negotiations on the North American Free Trade Agreement (NAFTA) among Canada, Mexico, and the United States, and the Uruguay Round of GATT talks.

NAFTA would create a six trillion dollar free trade zone, stretching from the Arctic Circle to below the Tropic of Cancer, with a combined marketplace of over 360 million consumers.³ Creation of such a trading bloc is consistent with recent trends in international trading regionalism, such as the formation of the EC and current moves toward alignment by Pacific rim nations.⁴

The idea of "free trade" presumes a trade environment free from regulation, where market forces are the controlling factors. Environmental policy presumes a high degree of regulation from broad schemes to specific details. Synthesis of these two concepts comes only after meticulous negotiation and compromise.

1. "National Commission on the Environment Recommends Major Policy Changes" 15 FOCUS 1 [World Wildlife Fund, Inc.] Jan./Feb. 1993 (quoting "Choosing a Sustainable Future" National Commission on the Environment).

2. Robert Houseman & Durwood Zaelke, *Trade, Environment, and Sustainable Development: A Primer*, 15 HASTINGS INT'L & COMP. L. REV. 535, 602 (Summer 1992).

3. THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, THE NORTH AMERICAN FREE TRADE AGREEMENT (News Release) 1 Fact Sheet (August 12, 1992) [on file at office of IND. INT'L & COMP. L. REV., IU School of Law at Indianapolis].

4. Terry Wu & Neil Longley, A. *U.S.-Mexico Free Trade Agreement: U.S. Perspectives*, 25 J. OF WORLD TRADE 5 (June 1991).

Many environmental questions arise in the context of a free trade area, such as which health standards will apply under health and safety import/export laws, whether environmental laws of one nation may be construed as trade barriers against another, and whether lax enforcement of environmental regulations in one country will attract relocation of businesses from another country.

Likewise, many international trade questions arise in the context of heavy environmental regulation, such as how free trade can be achieved with layers of environmental regulation, whether it is possible to harmonize environmental laws between nations as trade laws are harmonized, and whether new wealth from free trade must be used to bring lower environmental standards of one nation up to the higher standards of a chief trading partner over time.

This note focuses on the potential conflict and possible resolution of environmental policies with international trade goals under the North American Free Trade Agreement. Although this article discusses the international free trade agreement among the U.S., Canada, and Mexico, it will concentrate primarily upon the bilateral industrial and environmental relationship between the U.S. and Mexico. The environmental and trade issues center around this bilateral relationship, and Canada's physical distance from these problems precludes its inclusion in the core analysis of this article.

II. POLLUTION PAST & PRESENT

The history of the current free trade area between Mexico and the United States has been one of intense environmental degradation and abuse. This free trade area exists along the U.S.-Mexican border⁵, where duty-free assembly plants operate. The border region has been correctly described by the American Medical Association as a "virtual cesspool,"⁶ where 206 million liters of raw sewage pour each day into the Tijuana, New, and Rio Grande rivers.⁷ This environmental mess was not present a quarter of a century ago.⁸ It came with the advent

5. The border region, as recognized in the 1983 U.S.-Mexico Border Environmental Agreement (the La Paz Agreement), is "an area 100 kilometers on each side of the [U.S.-Mexican] international boundary." U.S. ENVIRONMENTAL PROTECTION AGENCY ET AL., PUB. NO. 8764-C1, INTEGRATED ENVIRONMENTAL PLAN FOR THE MEXICAN-U.S. BORDER AREA (First Stage 1992-1994) I-1 (April 1992) [hereinafter IEP].

6. Jan Gilbreath Rich, *Bordering on Trouble*, THE ENVIRONMENTAL FORUM, May/June 1991, at 26, 27.

7. *Id.*

8. *Id.* at 26.

of the "maquiladora" industry,⁹ inspired by regulation-free international trade goals.

A. *The Maquiladora Problem*

The Maquiladora program was established under Mexican presidential decree in 1965.¹⁰ The focus was on border development, and the goal was an increase in trade and foreign investment by allowing foreign companies to own Mexican assembly plants, known as "maquiladoras."¹¹ The maquiladora industry has been the chief economic and trade link between Mexico and the United States.¹²

Most maquiladora assembly plants are wholly-owned subsidiaries of U.S. companies.¹³ The U.S. parent corporation ships components and machinery temporarily to the maquiladora, duty-free, on contract.¹⁴ The maquiladora then assembles the components and returns the finished product to the American company.¹⁵ This process of component assembly is very attractive to American parent corporations for several reasons: low minimum wages for Mexican workers, easy access to Mexico, low transportation costs compared to overseas assembly, and the duty-free entry of equipment and components.¹⁶

The maquiladora relationship is profitable to both Mexican and American economies. Nearly 200 maquiladora plants¹⁷ employ over 482,000 Mexican workers.¹⁸ In 1990, maquiladora exports made up

9. *Id.*

10. Cheryl Schechter & David Brill, Jr., *Maquiladoras: Will the Program Continue?*, 23 ST. MARY'S L.J. 697, 701 (1992).

11. *Id.* at 702.

12. William R. Leighton & T. Richard Sealy III, *Federal Income Tax Issues in the Organization, Financing, and Operation of Maquiladoras*, 23 ST. MARY'S L.J. 721, 722 (1992).

13. Daniel I. Basurto Gonzalez & Elaine Flud Rodrigues, *Environmental Aspects of Maquiladora Operations: A Note of Caution for U.S. Parent Corporations*, 22 ST. MARY'S L.J. 659, 661 (1991).

14. *Id.*

15. *Id.*

16. *Id.* It is suggested that recent increases in minimum wages of Far Eastern countries may also contribute to the increased interest of U.S. companies in using maquiladora plants.

17. Schechter, *supra* note 10, at 699 (citing figures taken from the January-May 1991 report of the Secretary of Commerce and Industrial Development, *Direccion General de la Industria Mediana y Pequena y de Desarrollo Regional*).

18. Gonzalez, *supra* note 13, at 661 (citing Monthly Score Board, 5 Twin Plant News, May 1990, at 72).

about one-quarter of Mexico's total exports.¹⁹ That same year, U.S.-Mexican bilateral trade rose to \$59 billion, which made Mexico the United States' third largest trading partner.²⁰ The U.S. currently supplies 70% of Mexico's imports.²¹ The maquiladora industry is an embodiment of international free trade goals and ideals.²²

However, this economic success did not come without a heavy burden on the surrounding environment. The environmental devastation wrought by the largely unregulated expansion of the maquiladora program is an outgrowth of the population explosion in the area beyond the capacity of the sanitary infrastructures to cope.²³

For example, the population of Tijuana was less than 200,000 in 1960, compared to over 1 million today.²⁴ Sanitation services have not kept up with the huge population growth of Mexicans attracted to jobs that maquiladoras provide²⁵ (the average maquiladora worker is paid about \$10 per day).²⁶ Many of these new border residents live in "colonias" - slums without drinking water, electricity, or sewage.²⁷ In fact, one journalist who visited the area reported: "Barrels that once carried toxic materials and still bear the warning labels are commonly sighted in slums, where they are used for drinking water."²⁸

B. *Transboundary Pollution*

Unfortunately, the pollution generated by the maquiladora plants and surrounding colonias does not respect international borders. Pollution problems have had a significant impact on American cities north of the border. Air and water serve both as the receptacles and the carriers of pollutants from Mexico into the United States.

1. *Air Pollution*

The EPA has cited no less than nine cities on the American side of the border that currently exceed United States National Ambient

19. Schechter, *supra* note 10, at 699.

20. Leighton, *supra* note 12, at 722 (citing U.S. DEP'T OF COMMERCE, NORTH AMERICAN FREE TRADE AGREEMENT: GENERATING JOBS FOR AMERICANS 50 (May 1991)).

21. *Id.* at 722-23.

22. *Id.*

23. Rich, *supra* note 6, at 27.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 28.

28. *Id.* at 27.

Air Quality Standards.²⁹ The primary source of air pollution in U.S. cities along the border seems to be Mexico.³⁰ One of the major concerns in the region is the emission of volatile organic compounds by maquiladora plants in Mexico.³¹

Very old automobiles, discarded by Americans, with emission control devices stripped off by the Mexicans that drive them, are another significant source of air pollution drifting north into the United States.³² Additional sources of air pollution floating over the border come from Mexican city dumps, which regularly catch fire, sending plumes of black smoke into the air, and the bonfires of the Mexican homeless, who burn anything to generate heat during the winter.³³

Geography can also play a role, such as in El Paso and Juarez, where the Franklin and Juarez mountains prevent the smothering air pollution from dispersing.³⁴ Other contributors include long lines of trucks idling their engines for hours while waiting at border crossings,³⁵ and U.S. factories moving to the Mexican Border region to avoid strict pollution-control laws.³⁶ In fact, the General Accounting Office issued an April 1990 report finding that "78% of the furniture manufacturers relocating from Los Angeles to Mexico did so because of California's stringent pollution-control laws."³⁷

The EPA has compared what polluting emissions over the next ten years would be with NAFTA and without NAFTA. Their findings are that with NAFTA in place, together with a controlled Mexican

29. Michael Scott Feely & Elizabeth Knier, *Environmental Considerations of the Emerging United States-Mexico Free Trade Agreement*, 2 DUKE J. COMP. & INT'L L. 259, 274 (Spring 1992) (citing the August 1991 draft version of the INTEGRATED ENVIRONMENTAL PLAN FOR THE U.S.-MEXICO BORDER AREA III-30, National Ambient Air Quality Standards [NAAQS] are set by the EPA Administrator for the allowable levels of pollutants in the air. 42 U.S.C.A. §§ 7409-7410 (West Supp. 1991). The U.S. border communities exceeding the NAAQS are: San Diego and Imperial Co.'s, CA; El Paso Co., TX; Yuma, Puma, Santa Cruz, and Cochise Co.'s, AZ; and Dona Anci Co., NM. *Id.*

30. J. Michael Kennedy, *On Texas Border, Outlook for Air Quality Is Murky*, L.A. TIMES, November 20, 1991, at A1.

31. Feely, *supra* note 29, at 274-75.

32. Kennedy, *supra* note 30, at A1.

33. *Id.*

34. *Id.*

35. *Id.* Indications are that a North American Free Trade Agreement would significantly increase the transborder trucking, and thus the transborder air pollution as well.

36. *Id.*

37. *Id.*

regulatory environment, emissions would increase 0% to +165%.³⁸ With no NAFTA, but with a controlled Mexican regulatory environment, emissions would increase -10% to +125%.³⁹ Thus, it appears that NAFTA would affect the air quality of the border region negatively, even with a controlled Mexican regulatory environment.

2. *Water Pollution*

Rapid population growth in the region has also outpaced the ability of existing wastewater treatment sites to service the communities.⁴⁰ Consequently, the water quality of the border region has degenerated significantly. For example, the New River, originating south of Mexicali, carries raw and partially treated sewage, and industrial and agricultural waste north into California, where agricultural runoff enters the river, causing further contamination.⁴¹ The root of the problem is the insufficiency of Mexicali's wastewater treatment system to deal with all of the wastewater generated.⁴²

In Ciudad Juarez, a ditch has been dug which feeds millions of gallons of raw domestic and industrial sewage per day into the Rio Grande.⁴³ The Rio Grande picks up more sewage as it flows on until, when it reaches Nuevo Laredo, the fecal contamination level of the river is 1,000 times greater than the Texas limit.⁴⁴ An Austin journalist discovered that, as a result, "90% of adults thirty-five years or older in the shanty towns near San Elizario, Mexico, contract hepatitis sometime during their lifetime."⁴⁵

The EPA found that less than 1% of the Texas colonias have any wastewater collection and treatment systems.⁴⁶ In fact, U.S. Border Patrol agents wear rubber gloves to guard against infection as they frisk Mexican detainees still wet from illegal border crossings.⁴⁷ Sanitary

38. U.S. TRADE REPRESENTATIVE ET AL., REVIEW OF U.S.-MEXICO ENVIRONMENTAL ISSUES [hereinafter REVIEW] 88 (table 4) (February 1992).

39. *Id.*

40. *Id.* at 107. It is reported that the population increase has put pressure not only on wastewater treatment facilities, but also on water sources as well.

41. *Id.* at 109.

42. *Id.*

43. Feeley, *supra* note 29, at 273.

44. *Id.*

45. *Id.* (citing James Garcia, *Border River Laden with Wastes*, AUSTIN AMERICAN-STATESMAN, Sept. 29, 1991, at A1, A17).

46. REVIEW, *supra* note 38, at 110.

47. Juanita Darling, Larry B. Stammer, & Judy Pasternak, *Can Mexico Clean Up Its Act?*, L.A. TIMES, November 17, 1991, at A1.

development is the only answer to these problems, and the cash to accomplish this has not been forthcoming from the corporations which own the border region subsidiaries. This in turn has degraded the surrounding environment both directly through emissions and discharges, and indirectly through population attraction.

The potential effect of NAFTA is inescapable. Industrial and population growth will continue to rise dramatically under the proposed NAFTA.⁴⁸ The EPA has concluded that "[t]he current conditions concerning the effects on public health from poor water quality would be exacerbated by an increased rate of growth along the U.S.-Mexican border."⁴⁹

C. *Hazardous Waste Dumping*

The hazardous waste⁵⁰ dumping problem is twofold. First, the U.S., as the largest generator of hazardous waste in the world,⁵¹ ships most of its waste to Mexico,⁵² whence it never returns to the U.S.⁵³ Second, maquiladoras along the Mexican border have been identified by both governments as major sources of hazardous waste pollution.⁵⁴

NAFTA is designed to increase the industrial base of North America.⁵⁵ This, in turn, will bring an increase in hazardous waste generation.⁵⁶ One of the major problems with hazardous waste disposal is transportation to approved dump sites. NAFTA will bring increased trade traffic onto an already overburdened transportation system.⁵⁷ What

48. REVIEW, *supra* note 38, at 113.

49. *Id.* at 112.

50. Typical industrial hazardous wastes may include acids, bases, liquids containing heavy metals, metal-plating wastes, organic solvents, and cyanide wastes. REVIEW, *supra* note 38, at 123. [for purposes of this article, the term hazardous waste also includes toxic waste, such as chemicals and pesticides].

51. Barbara Scramstad, *Transboundary Movement of Hazardous Waste from the United States to Mexico*, 4 TRANSNAT'L LAW. 253 (Spring 1991). Estimates of U.S. generation of hazardous waste range from 60 to 247 million tons per year. (citing FRONTLINE: *Global Dumping Ground* (PBS television broadcast, October 1990)) *Id.* at 255.

52. *Id.* at 256. U.S. companies find it cheaper to pay the import duties and ship their hazardous waste to Mexico than to comply with many of the stringent U.S. federal hazardous waste disposal regulations. *Id.*

53. *Id.*

54. *Id.* at 258.

55. U.S. TRADE REPRESENTATIVE, HIGHLIGHTS OF THE NORTH AMERICAN FREE TRADE AGREEMENT, Market Access: Goods, 1-2 (On file at IND. INT'L & COMP. L. REV. office).

56. Feeley, *supra* note 29, at 276.

57. *Id.*

will this mean for the increased hazardous waste transportation?

Without proper transportation infrastructure development, an increased number of trucks carrying hazardous waste on more congested roads means that there is a higher risk of catastrophe. The current emergency response systems in place are not equipped to handle even the present level of traffic.⁵⁸ More hazardous waste trucking, in more traffic, on the same inadequate roads, is a disaster waiting to happen.

III. COMPARATIVE REGULATORY STRUCTURES

Against the preceding background of unregulated industrial development and environmental degradation, it is useful to compare and contrast the environmental regulatory structures and enforcement mechanisms of the U.S. and Mexico.

A *U.S. Environmental Regulations*

1. *Environmental Statutes*

The environmental statutes of the United States have been recognized as some of the most rigorous in the world.⁵⁹ Most of our environmental protection statutes were promulgated in the late 1960's and 1970's.⁶⁰ The basic structure of these statutes remain essentially unchanged today.⁶¹

U.S. environmental laws tend to be area specific rather than multi-area "umbrella" statutes, such as are common in Mexico.⁶² A brief overview of U.S. environmental law reveals the range and variety of subjects statutorily covered:

The Clean Air Act (CAA)⁶³ provides uniform federal standards for specific pollutants and controls emissions from motor vehicles as well as new sources of pollution. The 1990 amendments also regulate substances which deplete the ozone and those which contribute to acid rain.⁶⁴

58. *Id.*

59. Beth Burrows & Andrea Dubrin, *Fast Track: Trading Away Food Safety and Environmental Rules*, SEATTLE TIMES, April 24, 1991, A7 (quoting U.S. Representative James Scheuer, D-N.Y.).

60. REVIEW, *supra* note 38, at 17.

61. *Id.*

62. Gonzalez, *supra* note 13, at 667.

63. 15 U.S.C.A. § 12 et seq. (1992).

64. REVIEW, *supra* note 38, at 17.

Section 815 of these amendments specifically recognized the need for air quality monitoring and remediation in the border region.⁶⁵ Under this section, the EPA Administrator is authorized to negotiate with representatives of Mexico to develop and implement an air quality monitoring program.⁶⁶

While § 815 does not provide a specific enforcement mechanism, other provisions of the CAA allow citizens to bring a civil action against any other person or entity in violation of the CAA or against the EPA Administrator himself if he has not proceeded with program implementation in a timely fashion.⁶⁷

The Clean Water Act (CWA)⁶⁸ regulates discharge into surface water, establishes minimum water quality standards developed by the states, and restricts discharge of dredged or fill material into U.S. waters and wetlands.⁶⁹ A related law is the Safe Drinking Water Act⁷⁰ which establishes national standards for the purity of drinking water which are applicable to any public water system serving more than 25 people.⁷¹

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),⁷² also known as Superfund, authorizes hazardous waste clean-up, imposes liability on hazardous waste generators and polluters for clean-up costs and natural resource damage, and taxes petroleum and chemical products to finance hazardous waste clean-up projects.⁷³

Recent case law interpreting CERCLA has found that a parent corporation may be responsible for the acts of its subsidiary.⁷⁴ Extrapolated extraterritorially, then, U.S. companies which typically own

65. Malissa Hathaway McKeith, *The Environment and Free Trade: Meeting Halfway at the Mexican Border*, 10 PAC. BASIC L.J. 183, 198 (1991).

66. *Id.* "Congress has provided, subject to appropriations, a statutory framework for funding personnel and equipment for purposes of monitoring and remediation projects in Mexico." *Id.* (citing Pub. L. No. 101-549, § 815(b)(2), 104 Stat. 2694 (1990)).

67. *Id.* at 198-199.

68. 33 U.S.C.A. § 1251 et seq. (1992).

69. REVIEW, *supra* note 38, at 18.

70. 42 U.S.C.A. § 201 et seq. (1992).

71. REVIEW, *supra* note 38, at 18.

72. 42 U.S.C.A. § 9601 et seq. (1992).

73. REVIEW, *supra* note 38, at 18. The Emergency Planning and Community-Right-To-Know Act, which is a related statute, makes the magnitude of toxic emissions public. *Id.*

74. McKeith, *supra* note 65, at 196.

100% of their maquiladora subsidiaries may be held liable for acts in violation of CERCLA by those subsidiaries. CERCLA defines itself as operating within the jurisdiction of the United States, including that jurisdiction granted through an "international agreement to which the United States is a party."⁷⁵ Thus, although it has not been pursued, extraterritorial application of CERCLA is not entirely out of the question.

The Resource Conservation and Recovery Act (RCRA)⁷⁶ establishes a "cradle-to-grave" paper trail to ensure proper generation, management, and disposal of hazardous waste.⁷⁷ Under this scheme, the EPA knows who the generators, transporters, and disposers of hazardous waste are, thus enabling the EPA to track any lost or illegally dumped waste back to the last person who had it.

RCRA also requires hazardous waste exporters to notify the EPA of intent to export sixty days prior to export. The EPA then notifies the State Department of the intended export. In turn, the State Department directs the U.S. Embassy in the country of intended import, Mexico for example, to notify the foreign government of the intended import.⁷⁸

The Mexican embassy then communicates Mexico's acceptance or refusal of the import to the State Department. This translates into an approval or rejection by the EPA of the exporter's intended export. If approved, the export is accompanied by another paper trail of manifests for each shipment at each step of the export/import process.⁷⁹

The National Environmental Policy Act (NEPA)⁸⁰ requires an environmental impact analysis, in the form of an "environmental impact statement" (EIS), of major federal agency actions before they are undertaken.⁸¹ After review of the draft EIS by the public and other agencies, corrections in the federal action may be made.⁸² Publication of EIS's assures the public that federal agencies have considered environmental concerns in their decisionmaking process.⁸³

75. *Id.* at 196 (quoting CERCLA, 42 U.S.C. §§ 9601-9675 at 9601(19) (1988)).

76. 42 U.S.C.A. § 6901 et seq. (1992).

77. REVIEW, *supra* note 38, at 18. RCRA also establishes a demonstration program which tracks medical waste from generation to ultimate disposal. *Id.* at 19.

78. Scramstad, *supra* note 51, at 265-6.

79. *Id.*

80. 42 U.S.C. § 4321 et seq. (1988).

81. REVIEW, *supra* note 38, at 19. "Draft EIS's are circulated for interagency and public review and comment." *Id.* at 20.

82. M. Diane Barber, Comment, *Bridging the Environmental Gap: The Application of NEPA to the Mexico-United States Bilateral Trade Agreement*, 5 TUL. ENVTL. L.J. 429, 435-6 (1992).

83. *Id.*

Although President Carter attempted to extend the applicability of NEPA by executive order to govern federal actions taken abroad,⁸⁴ the courts have not been willing to interpret it that way. Thus, it remains questionable whether NEPA has any significant extraterritorial application.⁸⁵

The Endangered Species Act (ESA)⁸⁶ compiles a scientific listing of species of flora and fauna which are considered in danger of extinction. Actions by federal agencies must not jeopardize listed species. Taking of listed species for any purpose by both private and public entities is prohibited. Portions of this statute also implement the Convention on International Trade in Endangered Species (CITES).⁸⁷

Species listed as endangered include both domestic and foreign species.⁸⁸ A species may still be protected under ESA, even if it is not protected in its habitat country.⁸⁹ The import/export bans on endangered species may indeed conflict with free trade obligations of member nations to the General Agreement on Tariffs and Trade (GATT).⁹⁰

The Marine Mammal Protection Act (MMPA)⁹¹ imposes a moratorium, with certain exceptions, on the domestic taking of marine mammals and the importation of marine mammals or parts or products thereof. This act is designed to reduce the mortality of marine mammals, resulting from domestic and foreign commercial fishing.⁹² MMPA protects marine mammals extraterritorially and extrajurisdictionally via import/export bans which have recently been challenged by GATT member nations.⁹³

2. EPA Enforcement

There are a variety of ways in which the EPA may enforce U.S. environmental laws. Most of the preceding statutes empower the EPA

84. Exec. Order No. 12, 114 3 C.F.R. 356 (1979), 42 U.S.C. § 4321 (1982).

85. Barber, *supra* note 82, at 461-62.

86. 16 U.S.C. § 1531 et seq. (1988).

87. REVIEW, *supra* note 38, at 20.

88. Houseman, *supra* note 2, at 595.

89. *Id.*

90. *Id.* For the ESA to comply with GATT, it must fall within article XX, which is an exception for some endangered species. However, article XX has not been held to apply extraterritorially; so the ESA provisions protecting species not found within the United States would seem to violate GATT. *Id.* at 595-596.

91. 16 U.S.C. § 1361 et seq. (1988).

92. REVIEW, *supra* note 38, at 21. This act also regulates Outer Continental Shelf development; and, in 1988, MMPA was amended "to require observer coverage on domestic fishing vessels in fisheries where a high level of interaction between fishing operations and marine mammals is expected." *Id.*

93. Houseman, *supra* note 2, at 596.

to issue compliance orders. They also allow for civil and criminal actions to be brought, for which fines or imprisonment may result.⁹⁴ The EPA has not refrained from referring cases to the Department of Justice for prosecution. Since 1988, EPA has referred 1,111 cases stemming from violation of U.S. environmental laws to the Department of Justice.⁹⁵

One highly publicized action by the EPA recently occurred along the U.S.-Mexico border. In May 1992, "Sbicca of California Inc., and three of its employees, . . . [were indicted by a grand jury] . . . for attempting to illegally export hazardous waste to Mexico."⁹⁶ Sbicca is a U.S. company which manufactures polyurethane shoe soles. Solvents used to clean the shoe mold produce toxic waste.⁹⁷

The defendants, Sbicca's vice-president, its general manager, and its Tijuana maquiladora plant manager, "were charged with one count of conspiracy to transport hazardous waste without a manifest," one count of illegal transportation of hazardous waste, and one count of illegal export of hazardous waste.⁹⁸ "Each count carries a maximum penalty of two years [imprisonment] or a fine of \$50,000 per day of violation."⁹⁹

The indictment alleges that company officials sought a site in Mexico to dispose of the solvents. Sbicca's general manager allegedly gave the maquiladora plant manager \$900 to accomplish this. The plant manager then allegedly drove a truck carrying the hazardous waste to the border crossing and offered a bribe to a Mexican Customs official to allow him through without a manifest describing the type and quantity of waste.¹⁰⁰

According to Assistant U.S. Attorney, Melanie Pierson, "This is the first time an employee of a U.S. Company has been prosecuted

94. REVIEW, *supra* note 38, at 35-6. Each environmental statute provides for a different variety of enforcement mechanisms, and each separately empowers the EPA, or other federal agency to enforce the law; however, most of the provisions are similar in substance.

95. *Id.* at 37.

96. United States v. Sbicca of California, Inc., No. 92-610R (S.D. Cal. May 14, 1992), cited in *Barrage of Actions Filed by EPA, Mexico Focusing on Law Violations in Border Area*, [Current Report] Int'l Envtl. Rep. (BNA) 399, 400 (June 17, 1992).

97. The spent solvents are composed of 1,1,1-trichloroethane, which is considered toxic waste. *Id.*

98. *Id.* Dominic Sbicca is the company's vice-president, Eduardo Reyna is the company's general manager, and Juvenal Cabrera Cruz is the manager of Sbicca's Tijuana maquiladora plant.

99. *Id.*

100. *Id.* The paper trail of manifests and approvals mandated by RCRA was not followed by Sbicca.

for allegedly offering a bribe to a Mexican Customs official in order to transport toxic wastes."¹⁰¹ This case demonstrates the variety of actions that can be brought by the EPA to enforce U.S. environmental law domestically, yet still have an impact extraterritorially.

3. *Regulations Threatened by International Free Trade*

Many stringent U.S. environmental regulations which have import/export restrictions written into them are open to challenge as barriers to free trade. Those who wish to challenge these laws generally do so through the General Agreement on Tariffs and Trade (GATT), which largely governs international free trade.¹⁰² Although the U.S. Senate has never ratified GATT, nor has the Supreme Court recognized it, the Executive Branch conducts trade policy under GATT rules and several state courts have upheld GATT as a legitimate international agreement which preempts inconsistent state law.¹⁰³

As the environmental action group Greenpeace put it, "Under [GATT] . . . , U.S. efforts to label tuna as dolphin-safe, Denmark's ban on the use of polyvinylchloride food containers, British rules on labeling irradiated food, and West German law requiring beverage containers to be recyclable, could all be attacked as nontariff trade barriers" ¹⁰⁴ This view was reiterated by the Center for Policy Alternatives, which analyzed the effects that the draft Uruguay Round of GATT would have on state legislation.¹⁰⁵ The report concluded that state environmental laws challenged as trade barriers could be easily preempted, and that the disputes would be settled through confidential dispute settlement procedures in which the federal government would represent the states.¹⁰⁶ The tuna/dolphin dispute, adjudicated by GATT, between the U.S. and Mexico, serves as an example of how an en-

101. *Id.*

102. John P. Manard, Jr., *GATT and the Environment: The Friction Between International Trade and the World's Environment—The Dolphin and Tuna Dispute*, 5 TUL. ENVTL. L.J. 373, 376-78 (May 1992).

103. Jeffrey Jay Clark, *The United States Proposal for a General Agreement on Trade in Services and its Preemption of Inconsistent State Law*, 25 B.C. INT'L & COMP. L. REV. 75, 75 n.2, 96-7 (Winter 1992).

104. Burrows, *supra* note 59.

105. Katherine Tammaro, *Why The States Should Worry About Gatt*, 9 STATE REPORT ON THE ENVIRONMENT, (Center for Policy Alternatives), August 1992, at 7.

106. *Id.* at 13.

vironmental protection law may successfully be construed as a nontariff trade barrier.¹⁰⁷

In August, 1990, the U.S. government was compelled by court order, under the Marine Mammal Protection Act (MMPA), to impose an embargo on all yellowfin tuna and tuna products from Mexico and other nations whose tuna harvesting methods kill excessive numbers of dolphin.¹⁰⁸ Mexican, Venezuelan, and other tuna fleets use purse sein nets to catch yellowfin tuna; however, the dolphin which swim above the tuna are commonly caught and drowned as well.¹⁰⁹ MMPA was passed in 1972 to protect against the needless killing of marine mammals, especially dolphins.¹¹⁰ The District Court's decision was upheld in February, 1991, by the Ninth Circuit on appeal.¹¹¹

Subsequently, Mexico filed a challenge to the U.S. embargo with GATT.¹¹² GATT then convened a dispute resolution panel¹¹³ which found in favor of Mexico.¹¹⁴ The panel declared the U.S. embargo to be a trade barrier in opposition to U.S. GATT obligations regarding free trade.¹¹⁵ The panel reasoned that the U.S. law could not be applied extraterritorially and remain consistent with GATT.¹¹⁶ It should be noted that there is no interface between international conventions on environmental protection and the GATT.¹¹⁷

107. John H. Jackson, *Dolphins and Hormones: GATT and the Legal Environment for International Trade After the Uruguay Round*, 14 U. ARK. LITTLE ROCK L.J. 429, 434-35 (Spring 1992).

108. *Earth Island Institute v. Mosbacher*, 746 F. Supp. 964, 975-76 (N.D. Cal. 1990).

109. *Id.* at 966-67. The area where most of the damage to dolphin herds has occurred is the Eastern Tropical Pacific. *Id.*

110. *Id.* at 967. Judge Thelton E. Anderson eloquently summarized the intent of Congress: "The statute (MMPA) was intended to use access to the United States market as an incentive for foreign nations to reduce marine mammal deaths. . . . Simply put, the continued slaughter and destruction of these innocent victims of the economics of fishing constitutes an irreparable injury to us all, and certainly to the mammals whom Congress intended to protect. Indeed, for those species now threatened with extinction, the harm may be irreparable in the most extreme sense of that overused term." *Id.* at 975.

111. *Earth Island Institute v. Mosbacher*, 929 F.2d 1449, 1450 (9th Cir. 1991).

112. Manard, *supra* note 102, at 391.

113. The panel was composed of three individuals from Hungary, Switzerland, and Uruguay. *Id.*

114. Joel P. Trachtman, Note, *GATT Dispute Settlement Panel*, 86 AM. J. INT'L LAW 142, 143 (1992).

115. *U.S. Embargo on Mexican Tuna Violates GATT Rules, Panel Finds*, 8 Int'l Trade Rep. (BNA) 1288 (August 28, 1991).

116. Manard, *supra* note 102, at 415.

117. *GATT Official Assesses Tuna Decision's Impact on Link Between Environment, Trade*, 8 Int'l Trade Rep. 1505 (October 16, 1991).

Congress has since passed a bill allowing the importation of tuna from Mexico and Venezuela, provided that they make efforts to reduce their dolphin kill rates.¹¹⁸ As Bush Administration EPA Administrator, William K. Reilly, put it, "This (ruling) has sent a shudder of fear through American conservationists."¹¹⁹

This precedent is dangerous for several reasons. NAFTA constitutes a free trade area formed under GATT and its member nations, Mexico, the U.S., and Canada, must all abide by GATT rules and obligations.¹²⁰ GATT's demonstrated willingness to use these rules and obligations to strike down domestic environmental laws as trade barriers, coupled with its lack of interface with international environmental agreements, sets the stage for a wholesale slaughter of environmental regulations which may in some aspect interfere with free trade.

B. *Mexican Environmental Regulations*

1. *Environmental Statutes*

Mexico's environmental statutes are comparable to those of the United States;¹²¹ however, enforcement of these statutes is the main problem.¹²² Mexico is a civil law jurisdiction, as opposed to the common law systems of both the U.S. and Canada.¹²³ Therefore, the bulk of environmental law in Mexico can be handled administratively, rather than legislatively or judicially.¹²⁴ Unlike the environmental law of the U.S., which is reflected in several subject specific statutes, the environmental law of Mexico is laid down in one far-reaching environmental statute.¹²⁵

This statute, known as The General Law of Ecological Equilibrium and Environmental Protection (General Law),¹²⁶ superseded several

118. *House Approves Bill That Would End Tuna Embargoes Against Mexico, Venezuela*, Int'l Env. Daily (BNA) 5 (Sept. 28, 1992).

119. Darling, *supra* note 47, at A1.

120. North American Free Trade Agreement [hereinafter NAFTA], preliminary text September 6, 1992, U.S.-Mexico-Canada, part 1 art. 103, 1-2 (WESTLAW, NAFTA database).

121. William K. Reilly, *Free Trade and the Environment: Tools for Progress*, Address before the U.S. Chamber of Commerce, Washington, D.C. (March 23, 1992) reprinted in EPA Fact Sheet, EPA 175-F-92-001, September 1992.

122. *Id.*

123. Gonzalez, *supra* note 13, at 662-63.

124. *Id.* at 667.

125. Adam L. Moskowitz, comment, *Criminal Environmental Law: Stopping the Flow of Hazardous Waste to Mexico*, 22 CAL. W. INT'L L.J. 177-78 (1991).

126. *Ley General del Equilibrio Ecologico y Proteccion del Ambiente*, 1 Gaceta Ecologica 2-60 (June 1989). McKeith, *supra* note 65, at 189, n.27.

attempts by various Mexican governments to successfully construct a comprehensive national environmental law.¹²⁷ The General Law regulates air pollution, water pollution, soil erosion, natural resources, and hazardous waste and materials.¹²⁸ The environmental enforcement agency of Mexico, equivalent to the U.S. EPA, is the Secretaria de Desarrollo Urbano y Ecologia (SEDUE),¹²⁹ which was formed in 1982.¹³⁰

Under the General Law, each industrial production facility must comply with the following requirements:

- (1) Obtain an Environmental Operating license from SEDUE;
- (2) File an Environmental Impact Statement (EIS), completed by a SEDUE registered environmental consultant;
- (3) Obtain from SEDUE a Residual Water Discharge Registration;
- (4) Obtain a Hazardous Waste Generator Registration from SEDUE;
- (5) Acquire and issue Ecological Manifests for every shipment of hazardous waste or raw materials;
- (6) Gain approval of hazardous waste storage facilities; and,
- (7) Report and keep records of any changes in the information provided to SEDUE in the applications for any of the above licenses or registrations.¹³¹

While the General Law is comprehensive in scope and sets relatively high ecological standards, compliance is minimal because enforcement is lacking. "SEDUE estimates that 52% of the nation's 1,963 maquiladoras have generated hazardous waste, only 307 generators have obtained basic operating licenses and only 19% reportedly are returning waste to the country of origin."¹³² The compliance rate is dismal at

127. Feeley, *supra* note 29, at 280-81. The General Law was passed in 1988. This comprehensive act superseded several attempts at a national environmental statute. In 1971, the Federal Law to Prevent and Control Environment Pollution was promulgated. In 1982, the Portillo administration passed the Federal Law on Environmental Protection. And, in 1983, President Miguel de la Madrid adopted the National Development Plan. *Id.*

128. McKeith, *supra* note 65, at 189, n.28.

129. REVIEW, *supra* note 38, at Executive Summary-2.

130. *Id.* at 28. SEDUE is subdivided into three sub-secretariats: Urban Development, Environment, and Housing. The Environment sub-secretariat is organized into four management units focusing on: (1) technical standards, guidelines and procedures, and environmental impact of new sources; (2) conservation; (3) regulations and enforcement; and (4) environmental education. *Id.*

131. McKeith, *supra* note 65, at 190-91.

132. *Id.* Much like RCRA, Mexico's hazardous waste laws are based on the "cradle-to-grave" tracking concept; however, consistent enforcement of manifests has yet to occur. *Id.*

best. With NAFTA encouraging the multiplication of even more industrial production facilities, this problem will become even more unmanageable.

2. *SEDUE Enforcement*

Currently, Mexico simply has neither the manpower, training, nor financial resources to adequately enforce its comprehensive General Law.¹³³ Indeed, this very situation was the basis for the Bush administration's argument that only through increased revenue generated by NAFTA would Mexico be able to afford to clean up its environment and begin enforcing its General Law.¹³⁴ This argument has been the cornerstone of the U.S. government's view toward the environmental impact of NAFTA.

However, the Bush administration's argument did not reflect the lack of political will on the part of the Mexican government to command SEDUE enforcement. Aggressive enforcement by SEDUE is not encouraged because doing so would hinder industrial expansion in Mexico.¹³⁵ As a third world country, Mexico's desire for increased economic growth has overshadowed enforcement of environmental standards against industrial polluters.

Beyond the foregoing reasons for the lack of environmental law enforcement by SEDUE, there is little economic gain to be had by prosecuting maquiladora polluters. Since all equipment, machinery, components, and raw materials which the maquiladoras use are typically owned by their U.S. parent corporations, the maquiladoras themselves have few, if any, tangible assets with which to satisfy a judgment against them.¹³⁶ Only liability of the parent corporation would yield any economic justification for litigation, and again, this would impede investment.

The numbers reflecting this lack of environmental law enforcement are appalling. For example, eight out of ten assembly plants in Mexico

133. Moskowitz, *supra* note 125, at 179.

134. Karen Tumulty, *Free Trade Talks Raise Questions That Alarm Environmentalists*, L.A. TIMES, November 17, 1991, at A19.

135. Moskowitz, *supra* note 125, at 179. While the Mexican government seems to recognize the danger of environmental damage, the impetus remains on economic growth first. For example, in an effort to boost their industrial sector, Mexico invited U.S. asbestos companies to relocate to Mexico from the U.S. *Id.* at n.171 (citing Rose, *Transboundary Harm: Hazardous Waste Management Problems and Mexico's Maquiladoras*, 23 INT'L LAW 223 (1989)).

136. Gonzalez, *supra* note 13, at 682-83.

are out of compliance with environmental laws¹³⁷ and, less than one-third of the dangerous liquid waste produced by Mexico City factories is disposed of properly. The remaining two-thirds are unaccounted for and probably dropped into the city's sewer system.¹³⁸

SEDUE's budget in 1990 was only \$3.1 million compared to the \$50 million that Texas alone spends per year to protect the air and water.¹³⁹ In fact, SEDUE's per capita budget is 48 cents compared to EPA's \$24.40.¹⁴⁰ Mexico hired an additional 100 compliance inspectors in 1991, largely to put the best face on Mexican environmental enforcement during NAFTA negotiations, which brought the total number of inspectors available to monitor the entire country's factories up to 255.¹⁴¹ This is about the same number of inspectors fielded to regulate just air quality in four countries of the Los Angeles area.¹⁴²

NAFTA will provide even more companies for SEDUE to regulate and, thus, will increase the stress on an already overworked compliance staff. Even though Mexico's General Law is laudable in its goals and provisions, without adequate enforcement, it lies as impotent on the books as a paper tiger.

3. *The Money Problem - No Pesos for Protection*

Mexico's cash-strapped budget clearly cannot cope with the expenses of environmental enforcement, even if the political will to enforce environmental laws were to exist. The Mexican government is paying \$100 million of the \$78 billion national budget for public relations to promote NAFTA.¹⁴³ Mexico is the developing world's second largest debtor nation, and as such, it is under pressure to drastically reduce government spending as well.¹⁴⁴

While the idea that NAFTA will generate greater financial resources for Mexico to clean up its environment and enforce its General Law

137. Larry Williams, *Fears of a Trade 'Cesspool'*, CHI. TRIB., January 13, 1992, at C15.

138. Juanita Darling, *Report Sees U.S. Trade Pact as Mexico Pollution Threat*, L.A. TIMES, July 17, 1991, at A1.

139. Bruce Stokes, *Greens Talk Trade*, 23 NAT'L J. 862, 865 (April 13, 1991).

140. Darling, *supra* note 47, at A1.

141. *Id.* SEDUE had a staff of seven people to assess the environmental impact of roughly 700 to 900 construction projects in 1992. *Id.*

142. *Id.*

143. *Id.*

144. "Over the last decade, the federal budget deficit has been slashed from 16% of the economy to less than 1%, with cuts in social services, as well as the sale of government-owned industries to the private sector." *Id.*

is appealing, the reality is that environmental protection will have intense competition with other national priorities for those financial resources. NAFTA does not force Mexico to use any new wealth generated from NAFTA for environmental protection. Indeed, with a staggering national debt over its head, Mexico may well decide to begin paying off some of its debt burden.

Alternatively, new money could be used for health care, social services, infrastructure and transportation development, agricultural technology, reinvestment in industrial technology, and many other areas which demand just as much attention from the Mexican government as does environmental protection, and which undoubtedly have greater and more influential constituencies.

Thus, the conundrum is that even though Mexico does not currently have the financial resources now to deal with the environmental problems they face, there is no guarantee, nor even any solid commitment, that Mexico would use new wealth from NAFTA to address its environmental problems in the face of other competing national priorities.

IV. THE NORTH AMERICAN FREE TRADE AGREEMENT

On August 12, 1992, the White House announced the completion of negotiations on NAFTA.¹⁴⁵ Under NAFTA, all trade barriers and tariffs would be eliminated, with barriers to trade on \$250 million of U.S. exports lifted immediately and tariffs on an additional \$700 million in textile and apparel exports eliminated in six years.¹⁴⁶

NAFTA, along with the Uruguay Round of GATT, was negotiated under 'Fast Track' authority granted to the President by Congress. Congress' grant of power to the President is necessary because it is Congress' constitutional responsibility to regulate foreign commerce.¹⁴⁷ With fast track power, the President can negotiate agreements in confidentiality and then submit them to Congress for an up or down vote without the possibility of amendment.¹⁴⁸

Under fast track procedures, the President may sign the agreement 90 days after he officially notifies Congress of his intent to enter into

145. WHITE HOUSE, *supra* note 3, at 1.

146. *Id.* at 2.

147. *Fast Track Authority and North American Free Trade Agreement: Hearings Before the Subcomm. on Economic Development of the House Comm. on Public Works and Transportation, 102nd Cong., 1st Sess. VI (1991) (Memo to the Members of the Subcommittee on Economic Development from the Committee Staff).*

148. *Id.* at VI-VII.

the agreement. In this case, President Bush notified Congress of his intent to enter NAFTA on September 18, and he signed NAFTA on December 17.¹⁴⁹ Congress must now vote either for or against the agreement within 90 days of the President's signing and introducing implementing legislation,¹⁵⁰ unless an extension of fast track negotiating authority is granted to President Clinton.

A. *International Environmental Treaties Recognized*

NAFTA specifically recognizes three international environmental agreements, but with the condition that if any of the participating countries has an alternate, yet equally effective, means of complying with any of those environmental agreements which is more compatible with the principles of free trade, that country must choose the means most compatible with free trade.¹⁵¹

Article 104 of NAFTA provides in relevant part:

1. In the event of any inconsistency between this Agreement and the specific trade obligations set out in:

(a) *Convention on the International Trade in Endangered Species of Wild Fauna and Flora*, done at Washington, March 3, 1973;

(b) the *Montreal Protocol on Substances that Deplete the Ozone Layer*, done at Montreal, September 16, 1987, as amended June 29, 1990;

(c) *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, done at Basel, March 22, 1989, upon its entry into force for Canada, Mexico, and the United States; or

(d) the agreements set out in Annex 104.1,

such obligations 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 the least inconsistent with the other provisions of this Agreement.¹⁵²

149. *President Bush Signs NAFTA at Ceremony*, 9 Int'l Trade Rep. (BNA) 2162 (December 23, 1992).

150. *NAFTA: Bush Notifies Congress of Intent to Sign NAFTA*, 9 Int'l Trade Rep. (BNA) 1632 (September 23, 1992).

151. NAFTA, *supra* note 120, at 1-2.

152. *Id.* Annex 104 contains a 1986 bilateral hazardous waste movement agreement between the U.S. and Canada as well as the 1982 La Paz agreement on environmental protection between the U.S. and Mexico. *Id.* at 1-4.

1. *Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)*¹⁵³

CITES guards against threats to the earth's biodiversity through controls or moratoriums on trade in animal and plant species which are threatened with extinction.¹⁵⁴ The level of trade restriction that CITES places on any given species is proportional to the degree of threat to that species.¹⁵⁵ CITES operates on a system of appendices, each of which contain a listing of species assigned a certain degree of endangeredness, which mandate varying levels of trade restrictions.¹⁵⁶

Appendix I prohibits all commercial trade in listed species which are currently threatened with extinction. Non-commercial trade is allowed only upon a showing that moving the species is not detrimental to their survival.¹⁵⁷ Appendix II includes species which may easily become threatened without strict trade regulation. Again, commercial trade is only allowed upon a showing that moving the species is not detrimental to their survival.¹⁵⁸ Appendix III allows any party to protect a species that has been locally classified as threatened through the establishment of quota systems for trade regulation.¹⁵⁹

As to the effects of NAFTA on endangered species in the border region, a U.S. government study has cautioned that growth along the border could affect roughly fifty endangered species and over 100 "candidate" endangered species. Increased use of water for industry, residences, and agriculture would alter rivers, wetlands, and remove brush habitat. The report also noted that the increases in commerce that NAFTA would bring could disguise an increase in illegal trade of endangered wildlife.¹⁶⁰

2. *The Montreal Protocol on Substances That Deplete the Ozone Layer (Protocol)*¹⁶¹

The Protocol provides for the elimination of substances harmful to the ozone layer, such as chlorofluorocarbons (CFC's), by the year

153. *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, March 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 [hereinafter CITES].

154. *REVIEW*, *supra* note 38, at 30.

155. Houseman, *supra* note 2, at 581.

156. *Id.*

157. *Id.* Commercial trade in species under CITES includes trade in species-derived products.

158. *Id.*

159. *Id.* at 581-82.

160. *NAFTA Negotiators Should Facilitate Trade in Clean Fuels*, *Environment Review Says*, 8 Int'l Trade Rep. (BNA) 1527, 1528 (Oct. 23, 1991).

161. *The Montreal Protocol on Substances that Deplete the Ozone Layer*, Sept. 16, 1987, *entered into force* Jan. 1, 1989, 26 I.L.M. 1541 (1987) [hereinafter Protocol].

2000.¹⁶² It is believed that significant ozone depletion will result in increased incidents of cataracts and skin cancer, as well as a reduction in food crop yields.¹⁶³ The Protocol restricts trade in CFC's among Protocol parties and non-parties, and between Protocol parties.¹⁶⁴

The Protocol also provides for assistance to developing member nations in meeting their Protocol objectives by lengthening their CFC and CFC product phase-out timetables, offering financial assistance, and providing technology transfer incentives.¹⁶⁵

3. *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal* (Basel)¹⁶⁶

On August 11, 1992, the U.S. Senate ratified The Basel Convention (Basel), which went into effect on May 5 after Australia became the twentieth signatory.¹⁶⁷ Basel is "designed to prohibit the shipment of hazardous waste to countries lacking appropriate facilities for such material."¹⁶⁸

Basel was drafted by the United Nations Environment Programme (UNEP), and provides an international forum for Lesser Developed Countries (LDC's) to collaborate with industrialized nations in controlling the transportation of hazardous waste.¹⁶⁹ The ultimate goal of Basel is to actually make transboundary shipment of hazardous waste so inconvenient and expensive that industry will be forced to reduce and recycle its waste domestically.¹⁷⁰

162. Houseman, *supra* note 2, at 578.

163. *Id.* (citing WORLD RESOURCES INSTITUTE, *WORLD RESOURCES 1990-1991*, at 62-63 (1990)).

164. *Id.*

165. *Id.*

166. *Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, *opened for signature* March 22, 1989, 28 I.L.M. 649 (1989) [hereinafter *Basel*].

167. *Hazardous Waste: Senate Ratifies Basel Convention on Transboundary Shipments of Waste*, 23 *Env. Rep.* (BNA) 1255 (August 21, 1992).

168. *Id.* Richard Fortuna, of the Hazardous Waste Council, noted the importance of completing the implementing legislation since NAFTA negotiations had already been completed, "NAFTA could remove trade barriers that keep hazardous waste operations inside the United States, where environmental standards are high NAFTA may cause Mexico or Canada to increase their import of hazardous wastes from the United States, which would mean a loss of both jobs in the hazardous waste industry and the incentive to prevent pollution." *Id.*

169. Scramstad, *supra* note 51, at 281.

170. *Id.* at 282-3.

B. *Integrated Environmental Plan for the U.S.-Mexico Border*

While environmental responsibility and the concept of sustainable development¹⁷¹ are encouraged throughout the NAFTA document, nowhere is there an environmental enforcement mechanism or provision. Instead of pressing for inclusion of environmental enforcement provisions in NAFTA, the U.S. opted for a parallel agreement with Mexico addressing solely the environmental issues of the border region. This bilateral focus ultimately produced the Integrated Environmental Plan for the U.S.-Mexico Border Area (IEP).¹⁷² The IEP is not tied to NAFTA, it is considered by both governments a separate agreement wholly outside NAFTA provisions.

The IEP grew out of an interagency Review of U.S.-Mexico Environmental Issues, coordinated by the U.S. Trade Representative, which "while conceding that increased trade and development [under NAFTA] could worsen existing pollution problems along the 1,550-mile border, presented a predominantly optimistic view, claiming that economic growth could help raise the funds needed to solve those problems."¹⁷³ The Review basically catalogues the environmental problems that exist in the U.S.-Mexico border area.

The IEP attempts to deal with the problems identified in the Review through joint EPA/SEDUE consultations and information/technology exchange, but, like NAFTA, contains no environmental enforcement provisions.¹⁷⁴ Environmentalists cite few concrete suggestions for environmental improvement and no funding requirements as crippling weaknesses of the document.¹⁷⁵ Diane Takvorian of the San Diego-based Environmental Health Coalition characterized it as "[a]n insult from conception to delivery," and Naachiely Lopez Hurtado of the

171. Sustainable development contemplates the use of natural resources to meet the needs of the current generation, without jeopardizing the resource base for future generations. Alex Hitle & Scott Nilson, eds., *RESPONSE OF ENVIRONMENTAL AND CONSUMER ORGANIZATIONS TO THE SEPTEMBER 6, 1992 TEXT OF THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA)*, 1 (Oct. 6, 1992) [on file at the IND. INT'L & COMP. LAW REV. office, hereinafter *RESPONSE*]. As a sub-part of sustainable development, 'sustainable trade' is trade and trade policies which meet the needs of the current generations without jeopardizing the resource base for future generations. Houseman, *supra* note 1, at 611, n.373.

172. IEP, *supra* note 5.

173. Amy Wallace, *U.S.-Mexico Trade Pact Foes Assail Environmental Study*, L.A. TIMES, October 19, 1991, at A23.

174. IEP, *supra* note 5.

175. Patrick McDonnell, *Doubts Voiced About U.S.-Mexico Plan*, L.A. TIMES, September 24, 1991, at A3.

Tijuana-based Mexican Ecologist Party commented, "We don't think this is a real plan."¹⁷⁶

Although there are no funding requirements in IEP, both the Mexican and American governments gained much publicity with their announcements in February 1992 that the U.S. will spend \$379 million over the next two years on border clean-up while Mexico plans to spend \$466 million.¹⁷⁷ Beyond these initial monetary promises, there is nothing in the IEP to guarantee future funding. It is unclear what effect the Clinton administration will give this financial commitment, considering the cost-cutting approach that the new administration is taking toward government funding. Vice President Gore will provide the environmental conscience of this administration, and much depends upon his advice to President Clinton on this matter.

There is clear reason, however, to believe that Mexico's commitments on the environment may be dubious.¹⁷⁸ President Carlos Salinas does not want environmental issues to scuttle NAFTA and, along with it, Mexico's access to the U.S. market.¹⁷⁹ To that end, Salinas ordered plant closings, over 200 along the U.S.-Mexico border, when it became clear that the environmental enforcement capabilities of Mexico were going to be an issue with the American public.¹⁸⁰

A case in point involves the great fanfare that was generated by Salinas' decision to shut down a large government-owned oil refinery in the middle of Mexico City.¹⁸¹ The closure cost some \$500 million, small change compared to what NAFTA would bring to the Mexican economy.¹⁸² However, evidence of Mexico's duplicity on environmental issues lies in the fact that the plant was later quietly reassembled in Salamanca with absolutely no new pollution controls.¹⁸³

In the absence of environmental enforcement provisions in NAFTA and IEP, Mexico may continue to play such shell games with the U.S. to gain the necessary public approval for passage of NAFTA. Indeed, under the current version of NAFTA, Mexico may continue to challenge

176. *Id.*

177. *President Announces Three-Year Program to Clean Up, Prevent Pollution at Mexican Border*, 22 *Env. Rep. (BNA)* 2427 (Feb. 28, 1992).

178. Darling, *supra* note 47.

179. *Id.*

180. REPORT OF THE ADMINISTRATION ON THE NORTH AMERICAN FREE TRADE AGREEMENT AND ACTIONS TAKEN IN FULFILLMENT OF THE MAY 1, 1991 COMMITMENTS, Tab 7, 19-20 (Sept. 18, 1992) [hereinafter REPORT].

181. Darling, *supra* note 47.

182. *Id.*

183. *Id.*

our domestic environmental laws as nontariff trade barriers. The Mexican government has demonstrated its willingness to engage in both of these games.

C. *Opposition to NAFTA*

Intense opposition to NAFTA has come from many quarters such as from labor, agriculture, consumer, human rights, religious, and environmental groups.¹⁸⁴ This section will concentrate on opposition to NAFTA based upon environmental principles.

1. *Non-Governmental Organizations*

Opposition to NAFTA by environmental non-governmental organizations (NGO's) was very intense during the White House campaign to gain fast track negotiating authority from Congress. Thus, to split the NGO coalition working against them in their lobbying effort, President Bush initiated the interagency Review of Environmental Issues, pledged to include environmental NGO's in the advisory process, and agreed to produce a parallel environmental agreement, the IEP.¹⁸⁵

These commitments effectively divided the NGO coalition into one group lead by the National Wildlife Federation, which endorsed the White House compromises, and another group led by the Sierra Club, which demanded inclusion of environmental provisions in NAFTA itself.¹⁸⁶ The end results were that the White House got its fast track authority, and the environmental lobby was fractured.

Since NAFTA's completion, the NGO's remaining in opposition to NAFTA base their main argument on NAFTA's lack of "mechanisms to guarantee that an appropriate share of the wealth it [NAFTA] may generate will go towards environmental and infrastructural improvement"¹⁸⁷ Another point of contention is that, with regard to the international environmental agreements that NAFTA recognizes in Article 104, NAFTA itself becomes the sole arbiter of what is, and what is not, allowed under the treaty.¹⁸⁸

Also, environmental NGO's are unconvinced that NAFTA will not lead to lower environmental standards. Justin Ward, of the Natural

184. Edmund W. Sim, *Derailing the Fast-Track for International Trade Agreements*, 5 FLA. INT'L L.J. 471, 482 (1990).

185. REPORT, *supra* note 180, at Tab 7, 1-2.

186. Tumulty, *supra* note 134.

187. RESPONSE, *supra* note 171, at 2.

188. *Id.* at 8. As noted earlier, NAFTA recognizes CITES, the Montreal Protocol, and the Basel Convention.

Resources Defense Council, commented " 'We do not have the same level of confidence as the administration' that NAFTA will not lead to lower environmental standards in the United States."¹⁸⁹ The EPA did admit, at a briefing on August 15, 1992, that NAFTA provisions do not allow any action to be taken against a member nation that attracts investment or relocation via reduction of environmental or health standards.¹⁹⁰

NGO's have even resorted to litigation in order to intervene. Public Citizen filed suit in January 1992 in the U.S. District Court for the District of Columbia to force the Office of the U.S. Trade Representative (USTR) to conduct an Environmental Impact Statement (EIS), as required under the National Environmental Protection Act (NEPA).¹⁹¹ The District Court found that Public Citizen did not have standing to sue, and dismissed the case. The Circuit Court also dismissed the case on appeal, holding that the federal agency action complained of was not a final action, and therefore the agency was not required by NEPA to issue an EIS.¹⁹² Public Citizen refiled its action to bring USTR into compliance with NEPA on September 15, 1992.¹⁹³

2. Congressional Concerns

Many of these criticisms and concerns have found their way to Capitol Hill. House Majority Leader Richard Gephardt recently stated, "My review of the [NAFTA] accord indicates that under this agreement, substandard environmental conditions that exist on both sides of the U.S.-Mexican border will remain static or grow worse. A properly negotiated NAFTA would make them better."¹⁹⁴ Representative Gephardt's view reflects the opinion of many members of Congress who are in favor of the a free trade agreement in principle, but not necessarily NAFTA, due in large part to its labor and environmental deficiencies.

189. *North American Free Trade Agreement Greeted with Suspicion by Environmental Groups*, (Special Report), Int'l Env. Daily (BNA) 17 (Sept. 10, 1992).

190. *Id.* at 19.

191. *Public Citizen v. Office of the United States Trade Representatives*, 782 F. Supp. 139, 144 (D.D.C. 1992).

192. *Public Citizen v. Office of the United States Trade Representatives*, No. 92-5010, 1992 U.S. App. LEXIS 17947, at *22-23 (D.C. Cir. 1992).

193. *Suit on EIS Preparation for NAFTA Refiled by Public Citizen*, 16 Chem. Reg. Rep. (BNA) 1133 (September 18, 1992).

194. *Gephardt Says Bush Should Give Up on Congressional Approval for NAFTA*, 16 Chem. Reg. Rep. (BNA) 1060 (Sept. 11, 1992). Rep. Gephardt went on to observe that, "A properly negotiated NAFTA would halt the use of environmental gamesmanship as a factor for companies deciding where to locate their plants." *Id.*

Representative Ron Wyden, chairman of the House Subcommittee on Regulation, Business Opportunities, and Energy, noted the lack of a link between the IEP and NAFTA,¹⁹⁵ and called the administration's argument for revenue generation followed by environmental protection "trickle-down environmentalism."¹⁹⁶ In a letter to then-U.S. Trade Representative Carla Hills, Representative Wyden wrote, "You describe this proposed agreement as 'the greenest in history,' but the fact is that much of it is more brown than green."¹⁹⁷

The lack of an environmental enforcement mechanism in NAFTA itself has drawn considerable criticism from Congress. In response to the admission of Bush's EPA Administrator, William Reilly, that NAFTA would not allow the U.S. to impose trade sanctions on Mexico to enforce its environmental laws, Representative Robert Matsui, of the House Ways and Means Committee, argued that NAFTA needs an "environmental hammer clause" which should include provision for the U.S. to use tariffs as an enforcement mechanism.¹⁹⁸ Part of the concern in this area is centered around the fear that U.S. companies complying with stricter environmental standards would be at a competitive disadvantage with Mexican companies or U.S. companies operating in Mexico.¹⁹⁹

D. *Possible Solutions to the NAFTA Problem*

Short of adopting an "environmental hammer clause," there are several solutions which have been proposed from various sectors to address the environmental deficiencies of NAFTA. The National Wildlife Federation has proposed a 1% "Green Tax" on investment in Mexico to be earmarked for ecological budgets.²⁰⁰ This would ensure that some of the new revenue generated by NAFTA would go directly toward environmental protection and clean-up.

195. *Protecting the Environment in North American Free Trade Agreement Negotiations: Hearings Before the Subcomm. on Regulation, Business Opportunities, and Energy of the House Comm. on Small Business*, 102nd Cong., 1st Sess. 69 (1991) (Statement of Hon. Ron Wyden, Chairman, Subcomm. on Regulation, Business Opportunities, and Energy).

196. *Id.* at 60 (Statement of Hon. Ron Wyden, Chairman, Subcomm. on Regulation, Business Opportunities, and Energy).

197. *Congress Examines NAFTA Provisions to Ensure Enforcement of Environmental Laws*, 23 *Env. Rep. (BNA)* 9999 (Sept. 25, 1992).

198. *Id.*

199. *Id.*

200. Darling, *supra* note 47.

The Economic Strategy Institute (ESI) has proposed the creation of a "Trinational Superfund" to help clean up hazardous waste.²⁰¹ This proposal would be funded initially by the U.S. and Canada, by assessments on polluters, and by Mexican purchases of outstanding Mexican debt, which would be treated as face-value contributions to the superfund.²⁰² ESI's superfund proposal would empower the fund with inspection authority as well as the power to impose fines for past pollution.²⁰³

Legal experts of the International Bar Association have discussed creation of separate environmental courts both at the national and international levels.²⁰⁴ Lord Chief Justice Harry Woolf, of the Court of Appeal in London, cited the example of the New South Wales Land and Environmental Court in Australia as a model of how an environmental court could work: "This specialized court, which has been in existence for 10 years, has been able to hear cases 'within a time scale of three months' and provides expert assessments through the technical expertise of its judges."²⁰⁵

Applied to NAFTA, a separate environmental court could be empaneled with environmental experts from the U.S., Canada, and Mexico who are familiar with the laws of each nation as well as with the provisions of NAFTA and the international agreements which it embodies.

VI. CONCLUSION

The myriad environmental problems surrounding NAFTA call into question the wisdom of allowing such a far reaching trade agreement to be entered into without ensuring that all of these environmental issues will be addressed. While it is a step forward that an international trade agreement actually recognizes environmental issues within its text, NAFTA does not go far enough to impact these problems in a positive way.

President Clinton has decided not reopen NAFTA negotiations to discuss inclusion of environmental and labor provisions due to the

201. *ESI Proposes that NAFTA Include Trinational Superfund for Environment*, 8 Int'l Trade Rep. (BNA) 1619.

202. *Id.*

203. *Id.*

204. *Governments Seen Making Greater Use of Criminal Law in Environmental Cases*, Int'l Env. Daily (BNA) 5 (Sept. 29, 1992).

205. *Id.* at 7.

adamant opposition to renegotiation by both Mexico and Canada.²⁰⁶ The President has instead offered to negotiate ancillary agreements to NAFTA in these areas.²⁰⁷ Since passage of these agreements would not be a prerequisite to NAFTA implementation, it is doubtful that ancillary agreements strict enough to be effective would be passed by all three legislatures. The U.S. is the largest market in the world; and if Mexico and Canada want free access to it, they could be made to reopen NAFTA negotiations for inclusion of these vital provisions.

In a speech on "American Taxation" in 1774, Edmund Burke said, "It is the nature of all greatness not to be exact, and great trade will always be attended with considerable abuses."²⁰⁸ Clearly, it is time for environmental abuses in the name of free trade to end. Economics and environmental protection can be successfully synthesized into a regime of sustainable development, but only through intense negotiation and considerable compromise on both sides.

In this spirit, I urge the Clinton administration to reopen the NAFTA negotiations and press for inclusion of environmental safeguards in the agreement itself. Only through NAFTA will the marriage between economics and environmental protection be consummated. Only through international free trade that is sensitive to environmental considerations will sustainable development flourish. And, only through sustainable development will the environment for future generations be preserved.

*Michael J. Kelly**

206. *President Bush Signs NAFTA at Ceremony, supra* at 149.

207. *Id.*

208. Edmund Burke, *Speech on American Taxation (1774)*, reprinted in *THE OXFORD DICTIONARY OF QUOTATIONS*, 3rd ed., Oxford University Press, New York, 1980.

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