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## FREE TRADE AND THE ENVIRONMENT — CAN NAFTA RECONCILE THE IRRECONCILABLE?

James E. Bailey\*

“What will decide the fate of [the North American Free Trade Agreement in Congress] . . . will not be the commercial trade side, will not be intellectual property rights, or banking, or many of the other bilateral issues that have been negotiated extensively over the past two or three years. What will decide the passage of the free trade agreement in the Congress . . . will be the issue of the environment.”

— Rep. Bill Richardson of New Mexico<sup>1</sup>

“[The North American Free Trade Agreement] is the most environmentally sensitive, the greenest free trade agreement ever negotiated anywhere.”

— William Reilly, Environmental Protection Agency Administrator during the Bush Administration<sup>2</sup>

“What we have here is a failure to communicate.”

— Strother Martin to Paul Newman in *Cool Hand Luke* (1967)

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1. NAFTA Will Be Defeated If Cleanup Plan Is Unsatisfactory, Rep. Richardson Says, 9 Int'l Trade Rep. (BNA) 1122 (July 1, 1992) [hereinafter Cleanup].

2. News Conference with William Reilly, EPA Administrator Re: North American Free Trade Agreement (NAFTA), FED. NEWS. SERV., Aug. 13, 1992, available in LEXIS, Nexis Library, OMNI file [hereinafter Reilly].

## INTRODUCTION

In December of 1992, President George Bush sent to the Senate and House for ratification the North American Free Trade Agreement (NAFTA), which if ratified will have profound implications for the future of both United States environmental law and world trade. By creating the largest free trade area in the world without including detailed provisions for environmental protection, NAFTA establishes priority of economic development over international environmental safeguards and threatens to alter radically U.S. domestic environmental law.

### I. BACKGROUND

#### A. NAFTA'S ORIGINS

In the summer of 1990, the United States and Mexico began tentative discussions of a free trade agreement that would expand upon the U.S.-Canada Free Trade Agreement,<sup>3</sup> and encompass all of North America. On September 25, 1990, President Bush notified Congress of his intention to begin free trade negotiations with Mexico.<sup>4</sup> In accordance with U.S. law,<sup>5</sup> President Bush requested extension of fast-track authority in March 1991 to discuss the trade agreements.<sup>6</sup> Five months later, President Bush, Mexican President Carlos Salinas de Gotari, and Canadian Prime Minister Brian Mulroney agreed to negotiate a North American free trade agreement.<sup>7</sup> On May 23, 1991, the U.S. House of Representatives voted 329-85 to grant continuation of fast-track until

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3. United States-Canada Free Trade Agreement, 27 I.L.M. 293 (March 1988) [hereinafter CFTA].

4. See *The Year in Trade: Operation of the Trade Agreements Program*, 43d Report, 1991, USITC PUB. 2554, 3-5 (Aug. 1992) [hereinafter *Trade*] (discussing the progress of NAFTA negotiations).

5. 19 U.S.C. § 2112 (a)-(e) (1988). Fast-track authority permits the President to negotiate trade agreements with the understanding that Congress will either ratify or reject without modification within 90 days of its transmission to Congress. *Id.* Fast-track rules require the President to work with Congress and keep Congress informed as the negotiation of the treaty progresses so that ratification without modification is a realistic possibility. *Id.*

6. *Trade*, *supra* note 4, at 1.

7. See Michael Scott Feeley & Elizabeth Knier, *Environmental Considerations of the Emerging United States-Mexico Free Trade Agreement*, 2 DUKE J. COMP. & INT'L L. 259, 262 (1992) [hereinafter Feeley & Knier] (discussing the background to the NAFTA negotiations).

June 1, 1993.<sup>8</sup> The ratification procedures for NAFTA formally commenced on October 7, 1992, when trade ministers of the United States, Mexico and Canada signed the treaty.<sup>9</sup>

### B. ECONOMIC INCENTIVES

In 1991, the Bush administration, citing compelling economic reasons, promoted the creation of NAFTA since it would create a market of 360 million consumers with a total output of \$6 trillion.<sup>10</sup> In addition, the shift from world-wide economic integration through the General Agreement on Tariffs and Trade (GATT)<sup>11</sup> to regional trading blocs such as the European Economic Community, the Association of South-east Asian Free Trade Area, the United States-Canada Free Trade Association, and several Central and South American trade agreements<sup>12</sup> created added impetus for the United States to establish its own multinational trading bloc.<sup>13</sup>

To remain competitive in the world market amidst the rising tide of regional integration, the United States has few options other than forming an association that would combine high-priced United States technology with cheap Mexican labor.<sup>14</sup> Indeed, President Bush's En-

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8. *Id.* at 262. The next day the Senate defeated a resolution opposing the extension of fast-track authority 59-36. Trade, *supra* note 4, at 1-2.

9. See *Trade Ministers Initial NAFTA, Setting Stage for Approval Process*, 9 Int'l Trade Rep. (BNA) 1756 (Oct 14, 1992) (reporting the signing of NAFTA).

10. Trade, *supra* note 4, at 2.

11. General Agreement on Tariffs and Trade, *opened for signature*, Oct. 30, 1947, 61 pt. 5 Stat. A3, 55 U.N.T.S. 187, T.I.A.S. 1700, Vol. 1 [hereinafter GATT].

12. See e.g. Shirley Christian, *Argentina and Brazil Sign Pacts*, N.Y. TIMES, July 31, 1986 at D18 (describing the signing of Mercosur, the free trade market agreement of the Southern Cone of South America). The members of Mercosur are Argentina, Brazil, Paraguay and Uruguay. *Id.* The Andean Pact nations include Columbia, Ecuador, Bolivia, Peru and Venezuela. *The Advisory Practice of the Inter-American Human Rights Courts*, 79 AM. J. INT'L L. 1, n.3 (1985).

13. Leslie Alan Glick, *NAFTA: Touchstone for 21st Century Prosperity*, 1 TERRA NOVA 21 (1992) [hereinafter Glick]. Japan has also steadily increased its economic influence over the newly industrialized nations of Taiwan, South Korea and Singapore. *Experience Learned From U.S.-Canada FTA Will Help Talks with Mexico*, Official Says 8 Int'l Trade Rep. (BNA) 121 (Jan. 23, 1991) (positing that a free-trade agreement between the United States and Mexico could the shared production facilities between Japan and its developing neighbors). Additionally, the recent proliferation of regional trading blocks has created considerable pressure for the United States to follow suit or be left alone. *Id.*

14. Glick, *supra* note 13, at 25.

terprise for the Americas Initiative ultimately envisioned the creation of a trade area comprising the entire Western Hemisphere.<sup>15</sup> Also, given the possibility that the trading system embodied in GATT may collapse if the Uruguay Round fails,<sup>16</sup> NAFTA would provide considerable security for the United States, Mexico and Canada in the ensuing trade agreement vacuum. NAFTA would also establish the necessary foundation for an even larger trading area linking North America and the European Economic Community.<sup>17</sup>

Economic turmoil and a need to look beyond its borders for economic growth prompted Mexico's interest in NAFTA. The 1981 collapse of oil prices initiated Mexico's interest in a free trade agreement with the United States.<sup>18</sup> Mexico's rapidly expanding workforce, which increases by over one million workers a year, has forced Mexico to leap into the international competition for foreign investment.<sup>19</sup>

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15. See Stuart Auerbach & Lewis H. Diuguid, *Bush Signs Three More Latin American Trade Pacts*, WASH. POST, June 28, 1991 at A15 (detailing the Bush administration's success of signing three Latin American trade pacts which are part of the Enterprise for the Americas Initiative).

16. See *Dunkel Calls GATT Situation Critical*, 9 Int'l Trade Rep. (BNA) 1919 (Nov. 11, 1992) (explaining that Arthur Dunkel, Director General of GATT, has warned that the failure to negotiate a trade agreement will defeat the multi-lateral trade system, which is the basis of the Uruguay Round); see also *GATT Talks Top U.S. Agenda*, Int'l Trade Daily (BNA), Jan. 10, 1991, available in LEXIS, Nexis Library, BNAITD file (relating that the Uruguay Round talks failed because the European Community and the United States could not reach a consensus regarding agricultural reform measures); *Executives Regret Collapse of GATT Negotiations*, WALL ST. J., Dec. 13, 1990 at A2 (citing responses from several private sector executives regarding their opinion of the success or failure of the GATT talks); Boris Johnson, *The GATT Crisis*, SUNDAY TEL., Nov. 8, 1992, at 24 (discussing why the European Political Union has failed to agree upon the GATT).

17. See David Gardner & Lionel Barber, *Maastricht — The French Vote: A Battle is Won, but not yet the War*, FIN. TIMES, Sep. 21, 1992, available in LEXIS, Nexis Library, CURRNT file (reporting that in 1992, French voters narrowly approved the Maastricht Treaty, Danish voters rejected the Maastricht Treaty, and the United Kingdom's Labour and Conservative Parties have yet to conclude the debate). The Maastricht Treaty establishes the framework for European monetary and political union. *Id.*

18. See Feeley & Knier, *supra* note 7, at 262 (noting that following the 1991 collapse in oil prices Mexico began seeking foreign investment).

19. See Jesus Silva & Richard K. Dunn, *A Free Trade Agreement Between the United States and Mexico: The Right Choice?*, 27 SAN DIEGO L. REV. 937, 990 (1990) (explaining that without obtaining foreign investment capital, Mexico will face difficulties creating the one million new jobs it needs annually to employ its growing population).

Additionally, the growing interdependence of the Mexican and United States economies increased NAFTA's attractiveness.<sup>20</sup> Not only is Mexico the fastest-growing major market for United States exports,<sup>21</sup> but by 1990 United States exports to Mexico totalled \$28.4 billion.<sup>22</sup> Currently, trade between the United States and Mexico is approximately \$60 billion per year.<sup>23</sup>

By expanding the United States and Canada's free trade movement to include Mexico, NAFTA would create the world's largest free trade bloc.<sup>24</sup> In short, the economic and political circumstances both internationally and domestically are right for a trade agreement connecting the three nations of North America.

### C. THE GOALS OF NAFTA

NAFTA's primary goals are to achieve economic growth through the gradual elimination of trade barriers over a fifteen year period and

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20. See generally John M. Vernon & Enrique A. Gonzalez Calvillo, *Planning for Free Trade: Taking Advantage of the Transition*, 23 ST. MARY'S L.J. 673 (1992) (citing several regulatory changes which boost Mexico's economy).

21. See *Trade*, *supra* note 4, at 9. (stating that the United States' exports to Mexico have increased at an average annual rate of 23 percent since 1987, making Mexico the fastest-growing major market for U.S. exports) The export of United States capital goods to Mexico has grown from \$5 billion to about \$9.5 billion. *Id.* Similarly, U.S. exports of consumer goods has tripled, from \$1 billion to \$3 billion. *Id.* In 1991 Mexico was the United States' third-largest single trading partner. *Id.*

22. See Roger Wallace, *North American Free Trade Agreement: Generating Jobs for America*, Apr. 8, 1991, available in LEXIS, Itrade Library, BUSAMR file (detailing trade patterns between Mexico and the United States including the fact that \$28.4 billion in United States exports to Mexico included \$2.5 billion in agricultural products). In fact, the steady, rapid increase in trade and investment between the two nations has been phenomenal; U.S. investment in 1989 comprised sixty-two percent of all foreign direct investment in Mexico, an estimated \$7.1 billion. *Id.* One year later, U.S.-Mexico trade reached \$59 billion. *Id.*

23. Ralph Schusler, *Border Boom Town*, BUS. MEXICO, Nov. 1991, available in LEXIS, Nexis Library, CURRNT file; see also *Mexican Negotiator Touts Free Trade Pact*, L. A. BUS. J., July 6, 1992, available in LEXIS, Nexis Library, CURRNT file (supplying other successful economic figures attributed to Mexico's free trade).

24. See Maria Puente, *Congress: Trade Pact "A Danger"*, Aug. 13, 1992, USA TODAY at News, 4A (articulating that even though NAFTA would create positive economic potential in the United States, Congress fears NAFTA's effect on American jobs); see also *North American Free Trade Zone Would Top EC In Population Output*, *Mexican Official Says*, 8 Int'l Trade Rep. (BNA) 51 (Jan. 9, 1991) (specifying that NAFTA would create a trade zone encompassing over 350 million people whose combined gross national product exceeds \$5 trillion).

to create a financial environment which encourages investment while fully protecting industrial and intellectual property rights.<sup>25</sup> Specifically, NAFTA aims to eliminate nontariff trade barriers, remove local content requirements and liberalize access to data processing, communications, banking, finance, and medical services within the free trade area.<sup>26</sup> Despite the undisputed economic benefits of a comprehensive trade agreement, questions remain about whether NAFTA was wisely negotiated and whether it sacrificed environmental security for modest economic gains.

## II. THE NEED FOR SPEED?

### A. THE URGENCY OF THE NEGOTIATIONS

Despite the legitimate reasons for creating NAFTA, the speed with which the Bush administration initiated, negotiated and signed NAFTA is troublesome. From the date the three leaders expressed their desire for a free trade agreement to the date negotiations were essentially completed, barely 18 months had passed.<sup>27</sup> The rapidity of the process triggered fears that rushed negotiations could lead to inadvertent errors that would do more political and economic harm than good.<sup>28</sup>

Two facts conflict with the Bush administration's insistence on quickly concluding a trade agreement with Mexico: (1) the United States

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25. See U.S. Dep't of State, *Gist: North American Free Trade Agreement* Dep't of State Dispatch (June 24, 1991) (citing NAFTA's goals in an effort to open the flow of trade); see also Robert Housman & Durwood Zaelke, *Trade, Environment, and Sustainable Development: A Primer*, 15 HASTINGS INT'L AND COMP. L. REV. 535, 573 (1992) (discussing the balance between market efficiency and environmental policy); Feeley & Knier, *supra* note 7, at 263 (examining NAFTA's goals).

26. Wallace, *supra* note 22, at 991.

27. See *Canada Will Join United States and Mexico in Negotiations for Free Trade Agreement*, 8 Int'l Trade Rep. (BNA) No. 6 at 184 (Feb. 6, 1991) (announcing the three countries' intent to enter into negotiations to develop a North American Free Trade Agreement); see also *NAFTA Summary*, 9 Int'l Trade Rep. (BNA) No. 34 at 1450 (abridging the official NAFTA text released in August, 1992). The unofficial draft of the text was leaked to the public in February, 1992, and though it contained numerous bracketed sections, it was not altered significantly in the official draft released over six months later. See *NAFTA Citizen Groups Say Leaked NAFTA Draft Would Undermine U.S. Standards*, Int'l Trade Daily (BNA) (Mar. 26, 1992) (expressing criticisms citizen groups directed at the leaked NAFTA draft).

28. Silva & Dunn, *supra* note 19, at 991. Some opponents of the Salinas government do not attack his economic reforms or NAFTA but do challenge the speed of negotiations, since hasty decision-making may foster mistakes. *Id.*

had already secured a free trade agreement with Canada — an economy far more compatible with the U.S. economy than that of Mexico and (2) Mexico stands to gain far more from NAFTA than does the United States.<sup>29</sup> While these facts do not detract from NAFTA itself, the speed at which the United States negotiated and signed the treaty may prove unwise.<sup>30</sup> One reason for haste, revealed in a detailed examination of NAFTA, may have been a desire to advance the interests of free trade over the interests of more rigorous environmental protection.

#### B. THE EFFECT OF HASTE ON ENVIRONMENTAL ISSUES

The major casualty of the hastily conducted negotiations was environmental protection. In order to conclude NAFTA quickly, important and pressing environmental issues were intentionally excluded from the negotiations and the final text.<sup>31</sup> However, since increased trade among the three NAFTA countries would likely contribute to already deteriorating environmental conditions on the border between the United States and Mexico, and throughout North America in general, pressure to include environmental protection in NAFTA mounted as negotiations raced ahead.<sup>32</sup>

To allay the fears expressed by several Congressmen and environmental groups, the Bush administration committed itself to an examination of United States-Mexico environmental issues during the NAFTA negotiations, but decided to develop a bilateral plan parallel to, but separate from, NAFTA itself.<sup>33</sup> The commitment of the U.S. to the development of a parallel environmental agreement with Mexico, rather

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29. See *Economic Models Estimate U.S. GDP Rise of 0.5 Percent Under NAFTA*, ITC Says, 9 Int'l Trade Rep. (BNA) 1010 (June 10, 1992) (commenting that while Canada, the United States and Mexico will reap benefits from NAFTA, Mexico will gain the most); see also *Trade Effects of Proposed NAFTA Are Called "Grossly Exaggerated"*, 9 Int'l Trade Rep. (BNA) 1858 (Oct. 26, 1992) (asserting that NAFTA will have minor trade effects, particularly for the United States).

30. Silva & Dunn, *supra* note 19, at 991. Although some argue that a hemispheric free trade agreement, with NAFTA as a necessary first step, is the only way to ensure U.S. economic potency in international trade in the 21st century, this fails to justify the urgent nature of the negotiations. Glick, *supra* note 13, at 23.

31. See e.g., *Critics of North American Free American Trade Pact Say Environment, Labor Safeguards Needed*, 8 Int'l Trade Rep. (BNA) 1294 (Aug. 28, 1991) (recording the dissatisfaction of labor and environmental proponents regarding these NAFTA provisions).

32. *Trade*, *supra* note 4, at 120-121.

33. *Trade*, *supra* note 4, at 122.



than including specific environmental provisions, placed NAFTA on an unavoidable collision course with environmental concerns. As this article points out, "separate but parallel" is not equal to "single and consistent".<sup>34</sup>

### III. NAFTA'S INHERENT ANTI-ENVIRONMENT BIAS

#### A. A COMMITMENT TO SUSTAINABLE DEVELOPMENT?

Since negotiations ended, officials from the three nations have stressed "sustainable development" as an objective of NAFTA,<sup>35</sup> as stated in NAFTA's Preamble.<sup>36</sup> The parties to NAFTA also asserted this commitment in subsequent sections of the treaty, citing sustainable development as a "legitimate objective"<sup>37</sup> equal in importance to ensuring safety and the quality of all life forms, the environment, and consumer goods and services.<sup>38</sup>

Although sustainable development is not defined in NAFTA, the Declaration of Principles of the United Nations Conference on Environment and Development established the term as "development [which] must be fulfilled so as to equitably meet developmental and environmental needs of *present and future* generations."<sup>39</sup> Further, the repeated

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34. See *NAFTA Will Be Modified Before Vote, Riegle Says*, 9 Int'l Trade Rep. (BNA) No. 41, 1771 (Oct. 14, 1992) (drawing attention to NAFTA's environmental deficiencies which mandate modification before ratification).

35. See, e.g. Reilly, *supra* note 2 (affirming the importance of promoting sustainable development concurrently with environmental protection). The description of NAFTA prepared by the parties restates the Preamble's intention unequivocally: "The Preamble . . . affirms the [parties'] commitment to promoting employment and economic growth in each country . . . in a manner that protects the environment. The Preamble confirms the resolve of the NAFTA partners to promote sustainable development . . . ." Description of the Proposed North American Free Trade Agreement, Prepared by the Governments of Canada, the United Mexican States and the United States of America (August 12, 1992). Although the Introduction to the Description states that it is not intended as a binding *interpretation* of the treaty, the Description nonetheless must be considered as at least an attempt by the parties to accurately summarize its provisions. *Id.*

36. North American Free Trade Agreement, Oct. 7, Preamble, *available in* LEXIS, Genfed Library, Extra file [hereinafter NAFTA]. The Preamble states: "The Government of Canada, the Government of the United Mexican States and the Government of the United States of America, resolved to . . . promote sustainable development." *Id.*

37. NAFTA, *supra* note 36, art. 915(1), 904(2).

38. See NAFTA, *supra* note 36, art. 915(1) (setting life, the environment and the economy as priorities).

39. Declaration of Principles of the United Nations Conference on Environment

references throughout the 27 Principles of the Rio Declaration leave no doubt that sustainable development means that economic growth and preservation of the environment must be coextensive. Thus, the practice or policy of "grow first, clean up later"<sup>40</sup> is irreconcilable with the promotion of sustainable development espoused by NAFTA's Preamble and Chapter Nine.

Despite this apparent commitment to sustainable development, NAFTA does not contain any provision for setting aside funds for environmental concerns or infrastructure improvement that would assure protection of the environment for future generations.<sup>41</sup> The signatories designed NAFTA so that addressing environmental concerns could be postponed until the nations sustain an acceptable level of economic growth.<sup>42</sup>

Thus, NAFTA aspires to sustained development but fails to consider the consequences of growth. This oversight creates a conceptual flaw in the treaty which makes interpretation and application of its provisions highly problematic. Because a treaty's preamble establishes the conceptual foundation for the specific provisions that follow, subsequent provisions must be construed so as to avoid internal conflict. In accordance with the Vienna Convention on the Law of Treaties, the NAFTA Preamble's declaration that the promotion of sustainable development is a primary goal of NAFTA not only must be considered in any interpretation of NAFTA's provisions, but that sustainable development must be applied as a term with special meaning.<sup>43</sup> That special meaning is the

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and Development, Principles 1 and 3, at 8, U.N. Doc. A/Conf.151/26 (1992) (emphasis added).

40. See Feeley & Knier, *supra* note 7, at 261 (recognizing the potential for conflict between economic growth and environmental concerns); see also Housman and Zaelke, *supra* note 25, at 573-75 (analyzing the many facets of the NAFTA and the environment debate).

41. See Response of Environmental and Consumer Organizations to the September 6, 1992 Text of the North American Free Trade Agreement (NAFTA) (Oct. 6, 1992) 2 (embodying the reaction of several groups to NAFTA) [hereinafter Response]. The following coalition of environmental and consumer groups contributed to the report: American Cetacean Society, Arizona Toxics Information, Border Ecology Project, Center for International Environmental Law, Defenders of Wildlife, Earth Island Institute, Fair Trade Campaign, Friends of the Earth, Humane Society of the United States, Public Citizen, and the Sierra Club. *Id.*

42. See e.g., Housman & Zaelke, *supra* note 25, at 264-67 (disclosing United States-Canada plans for an independent environmental program for the border area between the two countries).

43. Vienna Convention on the Law of Treaties, opened for signature May 23,

meaning given to sustainable development at the Rio Conference which coincided with the NAFTA negotiations.

Including a term with special meaning in the Preamble as a goal of NAFTA indicates that the subsequent provisions of NAFTA should be interpreted so as to accomplish that stated goal. As indicated below, however, the operation of NAFTA's specific provisions are often apparently contrary to this goal. The result is a treaty set against itself.

#### B. THE PRESSURE TO HARMONIZE DOWNWARD

Although NAFTA's Preamble ostensibly commits its signatories to promoting sustainable development, the specific provisions that follow the Preamble are not clearly dedicated to that goal. In fact, NAFTA's specific articles probably will do little to prevent a lowering of United States and Canadian health and environmental standards to the level of Mexico's standards. This pressure to harmonize downward will arise even though several of the provisions permit increasing environmental standards.

Article 1114 states that any party may adopt "any measure" promoting investment which is also environmentally sound.<sup>44</sup> Although this provision ostensibly permits the parties to retain and even raise their separate environmental standards, it actually allows the parties to do as they wish with regard to lowering these standards. The second paragraph of Article 1114 merely entreats the parties to maintain their environmental standards rather than prohibiting the parties from lowering such safeguards to attract investment.<sup>45</sup>

When a party acts "inappropriately" it is subject to receiving a request for non-binding "consultations" about the matter.<sup>46</sup> Originally Canada called for a provision allowing the parties to return tariffs to

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1969, U.N. Doc. A/CONF. 39/27, art. 31, at 289 (1969). The Convention states in part:

(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

(2) The context for the purpose of the interpretation of a treaty shall comprise . . . text, . . . preamble and annexes . . . .

(4) a special meaning shall be given to a term if it is established that the parties so intended.

*Id.*

44. NAFTA, *supra* note 36, art. 1114.

45. NAFTA, *supra* note 36, art. 1114.

46. NAFTA, *supra* note 36, art. 1114.

pre-NAFTA levels as a sanction against encouraging investment by lowering environmental or health standards; however, even though Mexico agreed to Canada's position, the United States prevailed against its inclusion.<sup>47</sup> By not prohibiting lower standards as an enticement to investment and relocation, NAFTA's inevitable effect will be to create considerable pressure on its parties to harmonize their health and environmental standards down to the lowest common denominator.<sup>48</sup>

Concern over Mexico's deficient enforcement ability is reinforced by Mexico's lax enforcement attitude.<sup>49</sup> Businesses in the United States and Canada have already warned that the unfair competition resulting from lower Mexican environmental and safety standards will force them to either convince their governments to harmonize downward or the firms would relocate to Mexico.<sup>50</sup>

Concerns over the pressure to harmonize downward are supported by the experience of CFTA. According to some reports, after two years of operation, the CFTA resulted in a general undermining of safety standards, sustainable development, and environmental protection — particularly in the area of pesticide regulation.<sup>51</sup>

Even if one assumes that downward harmonization will not result from NAFTA, the conclusion is inescapable that the treaty will nonetheless be a powerful inhibitor to raising health and environmental standards in the United States and Canada. Once NAFTA is ratified, the current alliance between business and environmentalists opposed to NAFTA will likely dissolve. Business will point to NAFTA's permissive

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47. *North American Free Trade Agreement Greeted with Suspicion by Environmental Groups*, Int'l Trade Daily, (BNA), Sept. 10, 1992, available in LEXIS, Nexis Library, BNAITD file; Norma Greenaway, *U.S. Set to Unveil Trade Deal With Canada, Mexico*, MONTREAL GAZETTE, Aug. 12, 1992 at A10.

48. See Feeley & Knier, *supra* note 7, at 270-71 (proposing that because business will be attracted by Mexico's lower environmental and industrialization standards, the United States and Canada will be strongly pressured to harmonize standards downwards in order to compete).

49. See *infra* notes 106-130 and accompanying text (discussing concerns over businesses moving to Mexico because of that country's lax environmental regulation and protection).

50. Mark Ritchie, *The Green Lobby Raises a Red Flag on Agreement; Would Pact Usher in Lower Ecological Standards?*, WORLDPAPEER, Nov. 1991, at 15.

51. See *id.* (relating that Steven Shrybman, general counsel of the Canadian Environmental Law Association, concluded that the Canada-United States Free Trade Agreement had adversely affected consumer safety, environmental protection and natural resources conservation). In particular, the agreement had weakened pesticide regulation which led to attacks on sustainable agriculture and forestry. *Id.*

regime as the reason why the United States and Canada dare not strengthen existing environmental laws — every elevated standard will be one more incentive for investment to head south. Thus, while some are concerned that NAFTA does not provide for regulatory disparity resulting from one nation raising its standards beyond those of the others,<sup>52</sup> the far more likely result is that NAFTA will foreclose the possibilities of both “upwardly mobile” regulatory disparity as well as the hoped for “upward harmonization”.<sup>53</sup>

### C. ADDITIONAL ANTI-ENVIRONMENTAL PROVISIONS

#### 1. Sanitary and Phytosanitary Provisions

Disincentives to increasing environmental and health standards are evident in Chapter Seven, Section B of NAFTA which addresses sanitary and phytosanitary measures.<sup>54</sup> Chapter Seven permits but strongly discourages the parties from adopting measures that exceed international standards.<sup>55</sup> This discouragement is implicit in the extensive requirements with which a party must comply if it desires to exceed international standards. According to Article 712, a party may adopt sanitary and phytosanitary measures<sup>56</sup> more stringent than international stan-

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52. Response, *supra* note 41, at 3.

53. See NAFTA, *supra* note 36, art. 105 (diminishing reliance on tougher state and local laws by stating that the parties shall ensure that all necessary measures are taken in order to give effect to the provisions to the Agreement, by state and provisional governments).

54. See NAFTA, *supra* note 36, art. 274 (defining a sanitary or phytosanitary measure as one meant to protect humans, animals, or plants from diseases, pests or toxins).

55. See NAFTA, *supra* note 36, art. 713 (encouraging the parties to adopt measures no stricter than international standards and to provide such standards with a presumption of consistency with NAFTA).

56. NAFTA, *supra* note 36, art. 724. Article 724 defines a sanitary or phytosanitary measure as:

a measure that a Party adopts, maintains or applies to:

- (a) protect animal or plant life or health in its territory from risks arising from the introduction, establishment or spread of a pest or disease,
- (b) protect human or animal life or health in its territory from risks arising from the presence of an additive, contaminant, toxin or disease-causing organism in a food, beverage or feedstuff,
- (c) protect human life or health in its territory from risks arising from a disease-causing organism or pest carried by an animal or plant, or a product thereof,

dards<sup>57</sup> provided that the measure adopted is based on currently defensible scientific principles and a risk assessment.

The risk assessment required by Article 712(3)(c) and described in Article 715 has ten additional criteria which require, *inter alia*, consideration of international risk assessment methodologies, relevant scientific evidence, relevant production methods, and the economic effects of the new measure.<sup>58</sup> The intentionally subjective nature of these crite-

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(d) prevent or limit other damage in its territory arising from the introduction, establishment or spread of a pest, including end product criteria; a product-related processing or production method; a testing, inspection, certification or approval procedure; a relevant statistical method; a sampling procedure; a method of risk assessment; a packaging and labelling requirement directly related to food safety; and a quarantine treatment, such as a relevant requirement associated with the transportation of animals or plants or with material necessary for their survival during transportation.

*Id.*

57. NAFTA, *supra* note 36, art. 712(1). Article 712 reads:

1. Each Party may, in accordance with this Section, adopt, maintain or apply any sanitary or phytosanitary measure necessary for the protection of human, animal or plant life or health in its territory, including a measure more stringent than an international standard, guideline or recommendation.

*Id.*

58. NAFTA, *supra* note 36, art. 715. Article 715 states, in part:

1. In conducting a risk assessment, each Party shall take into account:

- (a) relevant risk assessment techniques and methodologies developed by international or North American standardizing organizations;
- (b) relevant scientific evidence;
- (c) relevant processes and production methods;
- (d) relevant inspection, sampling and testing methods;
- (e) the prevalence of relevant diseases or pests, including the existence of pest-free or disease-free areas or areas of low pest or disease prevalence;
- (f) relevant ecological and other environmental conditions; and
- (g) relevant treatments, such as quarantines.

2. Further to paragraph 1, each Party shall, in establishing its appropriate level of protection regarding the risk associated with the introduction, establishment or spread of an animal or plant pest or disease, and in assessing the risk, also take into account the following economic factors, where relevant:

- (a) loss of production or sales that may result from the pest or disease;
- (b) costs of control or eradication of the pest or disease in its territory; and
- (c) the relative cost-effectiveness of alternative approaches to limiting risks.

3. Each Party, in establishing its appropriate level of protection:

- (a) should take into account the objective of minimizing negative trade effects; and
- (b) shall, with the objective of achieving consistency in such levels, avoid arbitrary or unjustifiable distinctions in such levels in different circumstances, where

ria, though, renders the extent and application of Article 715 vague at best.

Adding to the ambiguity surrounding the operation of these articles is the requirement in Article 712(5) that the party adopting a new standard must ensure that it applies "only to the extent necessary to achieve its appropriate level of protection."<sup>59</sup> By itself, this paragraph is not unreasonable. In fact, no other standard seems possible when attempting to mesh the laws of totally separate nations.<sup>60</sup> But when Article 712 is combined with the other provisions of Chapter Seven, the cumulative effect will be to seriously inhibit the adoption of higher standards. This result is unavoidable because while Article 715, on risk assessment and protection levels, and Article 724, defining sanitary and phytosanitary measures, ineffectively attempt to establish objective criteria for evaluating a new regulation, Article 712 mandates that any evaluation of new standards will be subjectively evaluated. Considering the deficiencies of NAFTA's dispute resolution process,<sup>61</sup> reducing evaluation of higher standards to a subjective test does not inspire confidence that higher standards ultimately will prove acceptable under NAFTA. Moreover, the problems posed by these articles are of immediate concern because some United States standards, such as for food, already exceed international standards.<sup>62</sup>

Article 723(6) of NAFTA appears to be an improvement over similar provisions in the General Agreement on Tariffs and Trade (GATT) because it places the burden of demonstrating that a particular standard is inconsistent with NAFTA on the challenging party.<sup>63</sup> This could be a useful safeguard for regulations that exceed international standards as long as the enacting party has already complied with the requirements of scientific studies, economic evaluations and risk assessment. A moment's

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such distinctions result in arbitrary or unjustifiable discrimination against a good of another Party or constitute a disguised restriction on trade between the Parties.

*Id.*

59. See NAFTA, *supra* note 36, art. 712(5) (stating that sanitary and phytosanitary measures shall be applied only to the extent necessary to secure "an appropriate level of protection taking into account technical and economic feasibility").

60. Cf. GATT, *supra* note 11, art. XX; CFTA, *supra* note 3, art. 708 (recognizing that both agreements contain admonishments similar to NAFTA, art. 712(5)).

61. See *infra* text accompanying notes 98-101 (drawing attention to the possible dearth of legal expertise in NAFTA's dispute resolution panels).

62. Response, *supra* note 41, at 6.

63. NAFTA, *supra* note 36, art. 723(6).

reflection, however, reveals that placing the burden of proof on the challenger does little to protect higher standards.

Initially, the challenging party need only demonstrate that the challenged standard exceeds internationally accepted levels.<sup>64</sup> This burden would be easily carried by simply comparing the challenged standard with the accepted international standard. The burden of proof then shifts from the challenger to the enacting party almost immediately.<sup>65</sup> The enacting party must show that it has complied with the numerous NAFTA requirements for adopting standards that acceptably exceed those international standards.<sup>66</sup> Given the detailed requirements for justifying higher standards, merely producing a black binder purporting to contain the required studies is not likely to be sufficient to carry this burden of proof. The enacting party would at least have to show that it made a good faith effort to comply with the requirements of Articles 715 and 724. This must be so; otherwise, new regulations would be afforded the equivalent of a presumption of validity. The inclusion of this standard in Article 713(2) demonstrates that, had the parties intended to create such a presumption they would have done so.<sup>67</sup>

Once the enacting party carries the burden of proof, the burden would shift back to the challenging party to demonstrate that the studies and risk assessments undertaken by the enacting party were incorrectly performed or were inadequate. Only at this point does burden allocation operate to safeguard higher regulations.<sup>68</sup> Admittedly, this shift is procedurally significant, but it is of little practical import since it does not ease the enacting party's burden of establishing the scientific validity of a higher standard. Article 723 does nothing to eliminate the subjective evaluation of the adequacy of the enacting party's efforts to justify the new standard.

The ambiguity surrounding challenges to and defenses of higher standards described in the preceding paragraph is compounded when one notes that the dispute resolution process is conducted before a panel, not a court.<sup>69</sup> While the dispute settlement procedures are discussed in de-

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64. NAFTA, *supra* note 36, art. 723(6).

65. NAFTA, *supra* note 36, art. 723(6).

66. NAFTA, *supra* note 36, arts. 712-15, 723.

67. See NAFTA, *supra* note 36, art. 713(2) (stating that a measure not conforming to international standards shall not be presumed inconsistent).

68. NAFTA, *supra* note 36, art. 723(6).

69. See *infra* notes 98-101 and accompanying text (discussing the dearth of legal expertise of NAFTA's dispute resolution panels).



tail below,<sup>70</sup> the lack of both established evidentiary procedures and a settlement panel with legal experience may cloud the question of which side bears what burden of proof at any particular point in the proceedings. As a result, precisely how Article 723(6) will operate in the context of Chapter Seven's other provisions remains unclear.

## 2. Technical Barriers to Trade Provisions

Other obstacles to the improvement of environmental and health standards can be found in Chapter Nine of NAFTA located in Part Three: Technical Barriers to Trade. Article 905 exhorts, but apparently does not require, the parties to use established international standards as the basis for all standards-related measures.<sup>71</sup> Article 905 allows the parties to disregard international standards where climate, geography, technology, or infrastructure make reliance on them unworkable.<sup>72</sup> Yet, Article 905 also permits parties to disregard standards which clash with the level of protection that the nation deems appropriate.<sup>73</sup> This last phrase appears to undercut all of the article's more rigorous requirements. Article 905 establishes detailed requirements in the event a party enacts standards exceeding established international standards, but permits the enacting party itself to be the ultimate judge of the validity of those higher standards. If this is a correct reading of Article 905, then none of the other articles in Chapter Nine that call for scientific justification would ever be applicable. However, interpreting Article 905 so that it renders large parts of the rest of the Chapter superfluous, would be contrary to the Vienna Convention of the Law of Treaties.<sup>74</sup> Therefore, Chapter Nine must be read as intending to establish a means by which parties to NAFTA may adjust their health and environmental standards. Consequently, Chapter Nine is a serious obstacle to increased environmental protection.

Several environmental groups fear that even existing United States standards that exceed international standards would be subject to chal-

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70. See *infra* notes 88-94 (discussing dispute resolution under NAFTA).

71. NAFTA, *supra* note 36, art. 905.

72. NAFTA, *supra* note 36, art. 905.

73. Vienna Convention on Treaties, *supra* note 43, art. 31.

74. Vienna Convention on Treaties, *supra* note 43, art. 31. Although the Vienna Convention does not explicitly prohibit an assumption that treaty provisions are superfluous, this principle is implicit in the Convention's requirement that the entire text be interpreted so as to give effect to its object and purpose. *Id.*

lenge if they do not meet NAFTA's requirements.<sup>75</sup> Such United States regulations presumably would not be subject to challenge under Article 905,<sup>76</sup> though, since Article 1114 appears to protect existing standards. Should the United States raise its standards, however, it would bear the burden of establishing that this action is a legitimate objective under NAFTA.<sup>77</sup>

Raising standards above existing international norms requires the party enacting the change to comply with Articles 904, 907, and 908. Article 904(2) permits promulgation of higher standards if the enacting party complies with Article 907(2),<sup>78</sup> which requires a risk assessment that considers all relevant scientific and technical information available.<sup>79</sup> Article 908(3) mandates that the enacting party demonstrate that the new standard is no stricter than necessary to achieve a legitimate objective.<sup>80</sup>

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75. See Response, *supra* note 41, at 6.

76. NAFTA, *supra* note 36, art. 905.

77. See NAFTA, *supra* note 36, art. 905(3) (positing that the treaty should not be read to prevent any party from maintaining standards and related measures that result in protection levels higher than international standards).

78. NAFTA, *supra* note 36, art. 904(2).

79. NAFTA, *supra* note 36, art. 907(1). Curiously, Article 907(1) states that: a party *may* consider among other factors relating to a good or service:

(a) available scientific evidence or technical information;

(b) intended end uses;

(c) processes or production, operating, inspection, sampling or testing methods; or

(d) environmental conditions.

*Id.* Paragraph 2 of Article 907, however, strongly implies that a party has discretion only with regard to the individual areas listed, not as to the list *in toto*. Article 907(2) provides:

Where a Party conducting an assessment of risk determines that available scientific evidence or other information is insufficient to complete the assessment, it may adopt a provisional technical regulation on the basis of available relevant information. The Party shall, within a reasonable period after information sufficient to complete the assessment of risk is presented to it, complete its assessment, review and, where appropriate, revise the provisional technical regulation in the light of that assessment.

*Id.* art. 907(2).

80. NAFTA, *supra* note 36, art. 908(3). Article 908(3) states "[w]ith respect to a Party's conformity assessment procedures such Party shall: (a) not adopt or maintain any such procedure that is stricter, nor apply the procedure more strictly, than necessary to give it confidence that a good or a service conforms with an applicable technical regulation or standard, taking into account the risks that non-conformity would create . . . " *Id.*

The enacting party bears these burdens despite the language of Article 914(4) which places the onus of establishing that the higher standards are inconsistent with Chapter Nine on the challenger.<sup>81</sup> This situation arises because Article 905(2) states that only changes consistent with existing international standards have a presumption of validity.<sup>82</sup> Thus, as is true with challenges under Chapter Seven, the challenging party need only show that the new standards exceed existing international standards. The burden then shifts to the enacting party to show compliance with Articles 904 and 908.<sup>83</sup> The initial, minor burden placed on the challenger may be of little consequence, though, since Article 903 confirms the parties' existing rights and obligations under GATT, and GATT places the initial burden of justifying higher standards on the enacting party.<sup>84</sup>

When one examines the experiences of the United States and Canada under the CFTA, NAFTA's standards provisions seem to assure a highly litigious future. For example, Canada's efforts to obtain useful data for fisheries management by requiring that all fish caught in Canadian waters for commercial purposes be landed in Canada was ruled a nontariff trade barrier (NTB) in violation of the CFTA.<sup>85</sup> Further, under the CFTA, Canada has implemented less rigorous meat inspection standards and has harmonized downward its method of developing pesticide regulations to mesh with the less stringent U.S. inspection method.<sup>86</sup> Also, Canada's environmental regulations aimed at eliminating sources of acid rain have been challenged as NTBs by United States groups, while Canadian interests have challenged United States programs for the elimination of asbestos.<sup>87</sup> All of these challenged regulations concern

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81. NAFTA, *supra* note 36, art. 914(4). Article 914(4) states "[t]he Parties confirm that a Party asserting that a standards-related measure of another Party is inconsistent with the provisions of this Chapter shall have the burden of establishing the inconsistency." *Id.*

82. NAFTA, *supra* note 36, art. 905(2). Article 905(2) states "[a] Party's standards-related measure that conforms to an international standard shall be presumed to be consistent with Article 904(3) and (4)."

83. NAFTA, *supra* note 36, Chapter 7. This is essentially the same pattern of shifting the burden of proof that occurs in Chapter Seven. *See supra* notes 64-68 and accompanying text (discussing the shifting of the burden of proof in the adoption of a standard dealing with sanitary and phytosanitary measures which exceeds international norms).

84. GATT, *supra* note 11, arts. XIX-XXI, XXIII.

85. Housman & Zaelke, *supra* note 25, at 575.

86. Housman & Zaelke, *supra* note 25, at 576-77.

87. *Corrosion Proof Fittings v. Environmental Protection Agency*, 947 F.2d 1201

areas and issues of great importance to two nations with similar standards of living and similar environmental concerns. If the differences in standards between the United States and Canada have produced such conflict and downward harmonization pressure, one can only imagine the levels of similar pressures generated by Mexico's less developed economy and regulatory regime.

### 3. Dispute Resolution Under NAFTA

Article 2005 of NAFTA acknowledges the parties' rights and obligations under GATT.<sup>88</sup> In the event a dispute arises under both NAFTA and GATT, Article 2005(1) permits the parties to select either GATT or NAFTA dispute settlement methods.<sup>89</sup> However, Paragraph 4 of Article 2005 provides that in any dispute arising under either Section B of Chapter Seven (Sanitary and Phytosanitary Measures) or Chapter Nine (Standards-Related Measures) the responding party's selection of NAFTA's dispute resolution mechanism prevails.<sup>90</sup>

Permitting the respondent to restrict the forum to a NAFTA panel instead of a GATT panel is not very significant in terms of environmental protection since both treaties focus primarily on issues of free trade.<sup>91</sup> More interesting, however, is Article 2005(3) which provides that the *complainant's* selection of NAFTA's dispute resolution procedure prevails when the dispute involves international agreements on the

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(5th Cir. 1991).

88. NAFTA, *supra* note 36, art. 2005(1).

89. NAFTA, *supra* note 36, art. 2005(1).

90. NAFTA, *supra* note 36, art. 2005(4). Article 2005(4) states:

In any dispute referred to in paragraph 1 that arises under Subchapter Seven-B (Sanitary and Phytosanitary Measures) or Chapter Nine (Standards-Related Measures):

(a) concerning a measure adopted or maintained by a Party to protect its human, animal or plant life or health, or to protect its environment, and

(b) that raises factual issues concerning the environment, health, safety or conservation, including directly related scientific matters,

where the responding Party requests in writing that the matter be considered under this Agreement, the complaining Party may, in respect of that matter, thereafter have recourse to dispute settlement procedures solely under this Agreement.

*Id.*

91. NAFTA, *supra* note 36, art. 104(1). The primary reason a responding party would select a NAFTA panel over a GATT panel is to avail themselves of Articles 723 and 914 which place the initial burden of proof on the complaining party. However, as noted earlier, this advantage may be of little practical effect.

environment.<sup>92</sup> Article 2005(3) refers to disputes arising under Article 104 which acknowledges the obligations of the NAFTA nations under various international agreements on conservation and the environment.<sup>93</sup> Read together, Articles 2005 and 104 provide that a NAFTA panel will determine whether the course followed under the competing environmental treaty was appropriate. In essence, a NAFTA panel would interpret an environmental treaty from a free trade perspective rather than an environmental one.<sup>94</sup> Since conflicts over both NAFTA's provisions and the provisions of pre-existing environmental treaties will be decided by NAFTA panels, a detailed review of NAFTA's dispute reso-

92. NAFTA, *supra* note 36, art. 2005(3).

93. NAFTA, *supra* note 36, art. 104(1). Article 104(1) states in part:

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

(a) the Convention on International Trade in Endangered Species of Wild Fauna and Flora, done at Washington, March 3, 1973, as amended June 22, 1979;

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

(c) the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, done at Basel, March 22, 1989, on 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.

*Id.* Annex 104.1 referred to in subparagraph (d) lists the following treaties:

1. The Agreement Between the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Waste, signed at Ottawa, October 28, 1986.

2. The Agreement Between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area, signed at La Paz, Baja California Sur, August 14, 1983.

*Id.* at art. 104(1). Article 104 provides that "such [environmental] obligations shall prevail to the extent of the inconsistency [with NAFTA], 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 [NAFTA] . . . ." *Id.*

94. See *Trade*, *supra* note 4, at 93-98 (narrating the possible trade consequences of NAFTA). While the practical effect of these provisions is likely to be small, the theoretical effect is to subordinate the various environmental protection treaties to the goal of free trade — a result undeniably contrary to the goals of the environmental treaties themselves. *Id.*

lution process provides needed insight into how well NAFTA addresses environmental issues.

a. Selection of the Dispute Resolution Panel

Disputes arising between NAFTA parties are submitted to a five-member panel selected from a thirty person roster of individuals who possess "expertise or experience in law, international trade, other matters covered by this Agreement or the resolution of disputes arising under international trade agreements".<sup>95</sup> The thirty-person roster is composed in equal parts of individuals from the NAFTA parties. From that roster, the panel selection procedure requires parties to the dispute to first agree on a panel Chair and then to select two more members from the opposing party's country.<sup>96</sup> It is quite possible, therefore, to have a panel composed of individuals who have no background in either legal analysis or judicial procedure. Given the shifting burden of proof mandated by Chapters Seven and Nine of the treaty,<sup>97</sup> the effect of this deficiency could be considerable.

b. Dispute Panel Procedures

While NAFTA's failure to require at least some judicial experience on each panel is worrisome, the greatest concern in dispute resolution is the mandate of complete secrecy. Article 2012 calls for the Commission overseeing panel operations to establish procedures that assure that "the panel's hearings, deliberations and initial report, and all written submissions to and communications with the panel shall be confidential."<sup>98</sup> Secret proceedings are subject to extraordinary abuse, and in the case of the United States such abuse readily raises issues of constitutional dimensions.<sup>99</sup>

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95. NAFTA, *supra* note 36, art. 2009(2)(a).

96. NAFTA, *supra* note 36, art. 2011.

97. NAFTA, *supra* note 36, Chapters 7, 9.

98. NAFTA, *supra* note 36, art. 2012(1)(b).

99. A short hypothetical example illustrates the vast potential for abuse:

Suppose the United States Congress approves a bill that raises United States environmental standards above existing international standards. The President vetoes the bill, claiming that it would unduly burden United States business interests. Nevertheless, Congress enacts the bill into law, overriding the President's veto. Not surprisingly, the new law is challenged by another NAFTA party. The USTR, at the direction of the President, calls for a NAFTA dispute resolution panel to decide the issue.

Not only does the dispute resolution process exclude public opinion, the process also severely restricts scientific input into an evaluation process that is inherently scientific. As long as neither party objects, Article 2015(1) permits the panel or a disputing party to request "a written report of a scientific review board on any factual issue concerning environmental, health, safety or other scientific matters raised by a disputing Party."<sup>100</sup> If this article is applied to limit scientific input to merely fact reporting, rather than interpretation, then the panel will be left to decide the scientific legitimacy of a health or environmental regulation without a scientific evaluation of its merits. Unfortunately, since the entire panel process, including the selection of a scientific board,<sup>101</sup> is carried out in secrecy, one may never know the degree to which the panel relies on scientific input in reaching its decision.

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The Executive branch controls who is placed on the roster of possible U.S. panel members. Consistent with the Executive's pro-business philosophy, the ten roster members selected by the United States reflect the philosophy of the Executive. None are environmentalists, none are scientists, none are jurists. The Executive also controls how the United States presses its case before the panel selected from that roster. Since all panel proceedings and submissions to the panel are confidential, both the substance and method of the United States defense are beyond public scrutiny. Without the threat of negative reaction from either the Congress or the United States public, the United States representatives before the panel have no pressure to present a strong case supporting the law the President vetoed.

The five member panel, two members of which were placed on the roster by an Executive branch opposed to the challenged law, rules that the new United States law violates NAFTA. The U.S. is now faced with two choices: breach the treaty by enforcing the new law or abide by the treaty by accepting international standards as the limit on U.S. law.

The effect of the panel's decision is to permit the Executive to accomplish through NAFTA what it could not accomplish under the U.S. Constitution: Executive veto of a Congressional override.

In light of the Bush Administration's opposition to environmental regulations that restrict United States business interests, the potential abuses of secret proceedings can hardly be considered far-fetched. Though one can argue over the propriety of using secret proceedings, the truth is that every administration attempts to advance its particular agenda through various means. The fault lies in the NAFTA provisions that provide a means for the Executive to circumvent the legislative process mandated by the United States Constitution.

100. NAFTA, *supra* note 36, art. 2015(1).

101. NAFTA, *supra* note 36, art. 2015(2).

#### D. THE DIFFICULTY OF ENVIRONMENTAL RULES AS TRADE BARRIERS

As the previous section demonstrates, matching the divergent interests of free trade and environmental protection in a single document is a formidable task which frequently results in confused and contradictory provisions. Moreover, the difficulties encountered by the negotiators of NAFTA are merely local manifestations of a world-wide problem.

Trade and environmental policies have traditionally been developed separately. The growing international concern over environmental issues and the increasing volume of international trade, however, have dramatically increased the potential for direct conflict between these interests.<sup>102</sup> International organizations have only recently begun to respond to this growing conflict. The GATT Council, for example, decided in the fall of 1991 to reactivate the Group on Environmental Measures and International Trade and in 1992 the Organization for Economic Cooperation and Development (OECD) reported on and continued to review the developing tensions between trade and the environment.<sup>103</sup> Considering the difficulty every international organization faces in adequately reconciling these interests, the effort to do so in NAFTA, though largely ineffective, is laudable.

Nonetheless, the reason for NAFTA's failure to adequately square trade and the environment is almost certainly due to the enormity of the project. The CFTA has demonstrated how difficult matching free trade and environmental protection is even between two nations of roughly equivalent living standards and values, and roughly similar cultural and historical backgrounds. Reconciling the interests of free trade and environmental protection between the United States and Mexico with huge disparities in all four of those areas may well be impossible. Rather than attempting such a feat, a gradual linkage of Mexico's economy and environmental protection regime to those of the United States and Canada under CFTA would have been a far better approach. By proceeding with an interim trade agreement with an environmentally responsible free trade accord as its ultimate goal, Mexico's standard of living and envi-

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102. See Thomas J. Schoenbaum, *Agura: Trade and Environment*, 86 AM. J. INT'L L. 700, 700-01, 726 (proposing that the tension existing between environmentalists and free international trade needs addressing, but may not be insurmountable); see also Edith Brown Weiss, *Environment and Trade as Partners in Sustainable Growth: A Commentary*, AM. J. INT'L L. 728, 728-35 (highlighting the existing and potential conflict between freetrade and environmental concerns).

103. *Trade*, *supra* note 4, at 71.



ronmental protection regime could be raised, in stages, to the rough equivalent of the United States' and Canada's. This approach would be similar to the incremental fusion of regulatory regimes Europe has pursued in constantly tightening the bonds of the EEC. Advancing the interests of trade and the environment in stages would avoid the enormous difficulties that arise when nations attempt to force comprehensive coverage of contrary interests into a single agreement between nations with very different economic levels.<sup>104</sup>

Virtually admitting the impossibility of meshing trade interests with protection of the environment in a single treaty, the Bush administration attempted to satisfy trade interests with NAFTA while appeasing environmental interests with a separate, parallel program. As the following section demonstrates, the "package approach" is fraught with problems.

#### IV. THE FAILURE OF THE "NAFTA PACKAGE" TO PROTECT THE ENVIRONMENT

In order to appease environmental groups and Congressmen distressed over the apparent lack of environmental protection in NAFTA, the Bush administration declared that the environment would be covered in a separate, parallel agreement with Mexico.<sup>105</sup> Numerous problems, however, surround the Bush administration's decision to provide protection through a parallel "environmental program" rather than in NAFTA itself. Examination of the problems of this parallel program approach requires consideration of: (1) the state of environmental conditions and environmental law in Mexico, (2) the sparse environmental provisions in NAFTA, and (3) the utility of an environmental program with no binding connection to the treaty it is supposed to augment.

##### A. CONCERNS OVER MEXICO'S INTEREST IN THE ENVIRONMENT

The possibility of successful NAFTA negotiations forged an alliance between the labor and environmental communities that shared closely related concerns. Activists in all three NAFTA nations fear that NAFTA would harm the environment by inducing companies to relocate

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104. *Trade*, *supra* note 4, at 72. Both the GATT Secretariat and the Organization for Economic Cooperation and Development have recognized the extraordinary difficulty of reconciling trade and the environment particularly when great disparity exists between the social and economic development of the nations involved. *Id.*

105. Response of the Administration to Issues Raised in Connection with the Negotiation of a North American Free Trade Agreement (May 1, 1991).

in Mexico where worker safety and environmental protection is less strict than in Canada and the United States.<sup>106</sup> These groups not only fear that Mexico is, and will continue to be a "pollution haven,"<sup>107</sup> but also worry that competition for investment will pressure the United States and Canada to lower their standards to the lowest common denominator rather than induce Mexico to raise its standards.<sup>108</sup> Exacerbating these concerns is a recent United States Court of Appeals decision<sup>109</sup> that dismissed the suit brought by a coalition of environmental and consumer groups.<sup>110</sup> Activists had demanded that the Office of the United States Trade Representative (USTR) file an environmental impact statement regarding the effects of NAFTA.<sup>111</sup>

The International Trade Commission has noted that Mexican environmental and labor standards have given rise to concern because in some cases they are less stringent than the United States' regulations, and in other cases, the Mexican standards are not adequately enforced.<sup>112</sup> Environmental concerns, however, stem primarily from Mexico's failure to enforce or financially support its existing laws rather than from Mexico's failure to pass environmental laws. For example, in March 1988 Mexico passed the Ecological Equilibrium and Environmental Protection Act (EEPEA) along with implementing regulations, but has not provided adequate funding for its full implementation.<sup>113</sup>

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106. *Trade*, *supra* note 4, at 22. Activists' fears are based primarily on the concern that inadequate enforcement of Mexican environmental law may encourage United States firms to relocate in order to take advantage of costs benefits obtained at a cost to the environment. *Id.* But cf. USTR's *Edson Says NAFTA Will Not Provide Incentive for Firms' Relocation*, 9 Int'l Trade Rep. (BNA) 1900 (Nov. 4, 1992) (arguing that the implementation of NAFTA will not create cost advantages which would encourage firms to migrate to Mexico).

107. *Trade*, *supra* note 4, at 22.

108. *Trade*, *supra* note 4, at 22. One possible consequence of NAFTA is that environmentally unsafe products, such as produce with high levels of pesticide, would be imported into the United States. *Id.*

109. *Public Citizen v. Office of the United States Trade Representatives*, 970 F.2d 916 (D.C. Cir. 1992).

110. *Id.* at 917, 923.

111. *Id.* at 917.

112. *Trade*, *supra* note 4, at 5.

113. *Trade*, *supra* note 4, at 30, n.218; see also Charles T. Dumars and Salvador Beltran Del Rio, *A Survey of the Air and Water Quality Laws of Mexico*, 28 NAT. RESOURCES J. 787, 812 (1988) [hereinafter *Survey*] (discussing Mexico's failure to adequately fund the EEPEA).

Unfortunately, Mexico's history of environmental regulation demonstrates that this failure to provide the means to follow through with the environmental protection ostensibly afforded by EEEPA cannot be dismissed as simply a misstep in an initial good faith effort to establish a working environmental protection regime.<sup>114</sup> Mexico passed its first significant environmental law in 1971, the Federal Law to Prevent and Control Environmental Pollution.<sup>115</sup> This was followed a decade later by the Federal Law on Environmental Protection (FLEP) which sought to protect, improve, conserve, and restore the environment by regulating contaminants.<sup>116</sup> Despite these grand goals, Mexico never established any implementing regulations under FLEP.<sup>117</sup> As a result, FLEP failed to substantially advance the 1971 legislation.<sup>118</sup> Mexico's current failure to adequately fund EEEPA, therefore, may be neither an aberration nor an oversight. Moreover, although the Mexican government has established over 5,000 health, safety, and environmental standards pursuant to EEEPA, limited public notification and lack of procedure to ensure private sector participation have resulted in a less than clear system of establishing standards and technical regulation.<sup>119</sup> Like its predecessors, EEEPA has done little to change either Mexico's laws or environment.

Agriculture is an important area in which Mexican standards are significantly below those of the United States. Not only are Mexican pesticide regulations less strict than in the United States, but Mexican farms are often fertilized and irrigated with sewage and sewage water,<sup>120</sup> and border towns are routinely supplied with polluted water for everyday use and personal consumption.<sup>121</sup> In fact, the border towns dump so much sewage into the Rio Grande that the American Medical

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114. See *infra* notes 115-19 and accompanying text (reviewing Mexico's environmental protection legislative history).

115. See *Survey, supra* note 113, at 789 (recounting the passage of the Federal Law to Prevent and Control Environmental Pollution).

116. See *Survey, supra* note 113, at 790-91 (discussing the Federal Law on Environmental Protection which sought to regulate contaminants).

117. See *Survey, supra* note 113, at 791 (detailing Mexico's failure to pass regulations which would allow for the implementation of FLEP).

118. See *Survey, supra* note 113, at 791 (recognizing that without implementing regulations, FLEP could only be enforced, if at all, through application of regulations passed pursuant to the 1971 law).

119. *Trade, supra* note 4, at 5; see also Feeley & Knier, *supra* note 7, at 286 (delineating the factors which inhibit effective implementation of the EEEPA).

120. Feeley & Knier, *supra* note 7, at 269.

121. Edward Cody, *Expanding Waste Line Along Mexico's Border*, WASH. POST, Feb. 17, 1992, at A1.

Association has described the river as a "cesspool" and a breeding area for infectious diseases such as hepatitis and tuberculosis which are now endemic to the border region.<sup>122</sup> Mexico's lower air pollution standards, and their economic effect, have also been documented.<sup>123</sup> The potential for increased degradation of the U.S. border region from Mexico's lower air and water pollution regulations is obvious.

In addition to lower environmental and safety standards in general, Mexico has traditionally not engaged in active enforcement of those environmental laws. The most prominent example of nonenforcement involves the production facilities located along the United States-Mexico border. These facilities, commonly known as "maquiladoras",<sup>124</sup> unite cheap Mexican labor with foreign capital and technology in labor-intensive assembly operations.<sup>125</sup> In August 1992, the United States Government Accounting Office (GAO) conducted a review of U.S. majority-owned maquiladoras that began operations in Mexico between May 1990 and July 1991 and found that U.S.-owned maquiladoras often fail to comply with environmental laws.<sup>126</sup> Also, despite the Mexican Secretariat for Urban Development and Ecology's (SEDUE) awareness of this situation, none of the six U.S.-owned maquiladoras investigated had prepared an environmental impact statement as required by Mexican law.<sup>127</sup> The reason for such non-compliance is that Mexico does not

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122. *MacNeil/Lehrer NewsHour: Border Business* (PBS television broadcast, Nov. 19, 1992). Over 100 million gallons of raw sewage and pesticides are dumped into the Rio Grande every day. *Id.*

123. See Ritchie, *supra* note 50 (stating that the U.S. General Accounting Office had found in a recent study covering the period of 1988 to 1990, 38 Los Angeles furniture manufacturers moved all or a portion of their plants to Mexico). These manufacturers listed air pollution standards as one of two main rationales for relocating. *Id.*

124. *The Impact of Increased United States-Mexico Trade on Southwest Border Development*, USTITC Pub. 1915, 30 (Nov. 1986) [hereinafter *Border*] (observing that the term "maquiladora" is evidently derived from the Spanish verb "maquilar" which refers to the portion of milled flour retained by the miller as payment for grinding wheat).

125. *Id.* at 70.

126. Ellen Gameman, *GAO: New U.S. Firms Sidestepping Mexico's Environmental Controls*, Aug. 31, 1992 States News Service, available in LEXIS, Nexis Library, SNS File; see also John Maggs, *Border Plants Skirt Pollution Rules*, Aug. 11, 1992, Houston Chronicle Publishing Co., available in LEXIS, Nexis Library, CURRNT File.

127. Gameman, *supra* note 126; but cf. Cleanup, *supra* note 1 (noting that Mexico recently shut down temporarily or permanently more than 200 border facilities for environmental reasons, according to a report by EPA Administrator Reilly).

have an effective system for identifying new businesses that do not file required environmental impact statements.<sup>128</sup> The situation permits the vast majority of maquiladoras to avoid returning hazardous waste to the United States for proper disposal.<sup>129</sup> Independent toxic waste analysis around maquiladora facilities has verified high levels of toxic waste loads that indicate extensive violation of environmental laws.<sup>130</sup>

Proponents of NAFTA respond to these fears by asserting that NAFTA will speed reform of Mexican environmental laws and encourage Mexico to raise its health and safety standards. Nevertheless, even though the United States Office of Technology Assessment (OTA) concluded in a report released on May 26, 1992 that NAFTA negotiations have hastened the pace of environmental reform in Mexico, reform remains in the planning stages.<sup>131</sup>

#### B. THE BORDER REGION

The geographical area which is of greatest concern to U.S. interests is the border region. An examination of the border region provides telling insights into how ineffective Mexican environmental protection has been, how well the U.S. and Mexico have cooperated on environmental issues, and how unwise it is to omit specific environmental provisions from NAFTA. Examination of the border region and the maquiladora program not only provides a case study of the Mexican government's attitude toward environmental protection in the face of needed economic development, but it also furnishes a means of projecting the likely effectiveness of a parallel environmental plan approach.

In 1965 the Mexican government officially began to encourage foreign interests to establish maquiladora facilities in the border region. To stimulate their establishment, Mexico waived several restrictions on

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128. Gameman, *supra* note 126.

129. Response, *supra* note 41, at 3.

130. Cody, *supra* note 121, at A34. Documented, though anecdotal, evidence of official disinterest comes from border residents. *Id.* Residents of Tijuana have petitioned local, state and federal officials to investigate frequent releases of lead, copper, zinc, cadmium, and chrome wastes from nearby maquiladoras into the local supply of drinking water. *Id.* Nine years of letters and petitions elicited one response: a planned, then canceled, visit from President Salinas. *Id.*

131. OTA: *NAFTA Talks Spur Mexico Environmental Reforms*, National Journal's Congress Daily, May 26, 1992, available in LEXIS, Nexis Library, CNGDLY File. The OTA report also took notice of Mexico's limited enforcement resources. Jonathan Moore, *Report NAFTA Could Have Some Beneficial Effects for Environment*, States News Service, May 26, 1992, available in, LEXIS, Nexis Library, SNS File.

foreign investment and essentially established a free-trade zone regime which permitted components and materials used in the maquiladoras to be imported duty-free as long as the maquiladoras' output was exported from Mexico.<sup>132</sup> Ninety percent of the maquiladoras are located near the U.S.-Mexican border and their output is primarily exported to the United States.<sup>133</sup>

A natural result of the growth of maquiladora facilities in and near Mexican-U.S. border cities is the development of complementary operations on either side of the border called "twin plants".<sup>134</sup> The economic benefits of twin-plant operations can be great since the operations can take advantage of incentives under the Mexican maquiladora program and the favorable customs treatment in the United States.<sup>135</sup> Even greater economic rewards are possible if the U.S. twin is located in a free trade zone: the maquiladora-produced goods may be finished in a U.S. free trade zone and then exported to a third country without having to pay U.S. or Mexican duties.<sup>136</sup> Also, products destined for consumption outside the free trade zone may be stored until needed, thereby delaying payment of customs duties.<sup>137</sup> Many twin-plants have become so enmeshed with the local economies that they are considered essential to the continued growth of cities along the United States-Mexico border.<sup>138</sup>

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132. Border, *supra* note 124, at 8. In 1972, the Mexican government authorized establishment of maquiladora plants throughout Mexico. *Id.* at 73-74. A maquiladora is defined as "a firm that temporarily imports goods for the purposes of dedicating itself, either in whole or in part, to the business of exportation." *Id.* at 70. Both the production export requirement and border zone restriction, however, were later modified. *Id.* at 73-74.

133. Border, *supra* note 124, at 8.

134. Border, *supra* note 124, at 74-75. Once a maquiladora facility is established in Mexico, a "twin" plant is established on the U.S. side of the border. *Id.* Typically, twin-plant operations involve a maquiladora to perform the labor-intensive assembly work and a U.S. counterpart to provide finishing work or distribution, management or marketing services. *Id.*

135. See Tariff Schedules §§ 806.30, 807.00 (offering favorable tax treatment to goods produced in maquiladoras).

136. Border, *supra* note 124, at 74-75.

137. Border, *supra* note 124, at 75.

138. Border, *supra* note 124, at 75. The 14 twin city communities are: (1) San Diego-San Ysidro, CA/Tijuana, Baja California; (2) Calexico, CA/Mexicali, Baja California; (3) Yuma-San Luis, AZ/San Luis Rio Colorado, Sonora; (4) Nogales, AZ/Nogales, Sonora; (5) Douglas, AZ/Agua Prieta, Sonora; (6) Columbus, NM/Palomas, Chihuahua; (7) El Paso, TX/Ciudad Juarez, Chihuahua; (8) Presidio, TX/Ojinaga, Chihuahua; (9) Del Rio, TX/Ciudad, Acuna, Coahuila; (10) Eagle Pass,

The maquiladora plants contribute approximately twenty-five percent of Mexico's exports, benefitting both Mexico's national economy and that of the border region.<sup>139</sup> The over 1,871 maquiladora plants employ over 400,000 workers and comprise over fifteen percent of Mexico's total manufacturing labor force.<sup>140</sup> The inevitable, indeed desired, effect of NAFTA is to expand the maquiladora industry as more U.S. and Canadian companies move their production plants to Mexico.<sup>141</sup>

While maquiladora expansion resulting from NAFTA would benefit Mexico's economy,<sup>142</sup> several environmental groups have expressed uneasiness about the effect NAFTA would have on the border region since several areas along the border are already highly polluted.<sup>143</sup> In fact, environmental degradation of the border region has apparently already begun to have tragic effects on the human condition.<sup>144</sup> Yet NAFTA's great economic promise necessitates a new influx of workers into an area that is already overburdened with the surging maquiladora worker population of the past decade.<sup>145</sup>

NAFTA negotiators avoided this environmentally precarious, economically volatile situation. Instead, since legislators and environmental groups in the United States and Mexico expressed serious misgivings over the increasingly industrialized border region,<sup>146</sup> the parties agreed

TX/Piedras Negras, Coahuila; (11) Laredo, TX/Nuevo Laredo, Tamaulipas; (12) Rio Grande City, TX/Camargo, Tamaulipas; (13) Hidalgo-McAllen, TX/Reynosa, Tamaulipas; (14) Brownsville, TX/Matamoros, Tamaulipas. *Id.* at 34.

139. Cheryl Schechter and David Frill Jr., *Maquiladoras: Will The Program Continue*, 23 ST. MARY'S L.J. 697, 699 (1992).

140. *Id.* at 699-700.

141. *Id.* at 713-14.

142. *But see id.* (fearing that Mexico will never attain the long-sought maquiladora program goal of vertical integration if NAFTA is a success).

143. *Trade*, *supra* note 4, at 120-21.

144. Cleanup, *supra* note 1. An alarming number of infants in the Brownsville-Matamoros area have been born missing either all or major portions of their brains. *Id.* While the cause of this fatal birth defect has not been firmly established, many suspect that pollution from maquiladora plants in Matamoros may be a contributing factor. *Id.*; see also Cody, *supra* note 121, at A34 (reporting that pollution from maquiladoras may be the cause of fatal brain birth defects).

145. Cody, *supra* note 121, at A1. For instance, the town of Nuevo Laredo with a population of over 600,000 currently discharges roughly 27 million gallons of raw sewage a day directly into the Rio Grande River because its existing waste treatment facility is inadequate. *Id.* And although construction of a new sewage-treatment plant is scheduled, the city's population has been growing so fast that the capacity planned treatment plant will be exceeded before completion. *Id.*

146. *Trade*, *supra* note 4, at 39. The international border is 1,933 miles long,

that a border plan rather than a trade treaty was a better way of addressing the delicate issues of the region.<sup>147</sup> Thus, NAFTA does not address environmental issues in any detail, leaving the task of resolving the complex environmental issues of the border region to the Integrated Environmental Plan for the United States-Mexico Border Area (the Border Plan).<sup>148</sup>

### C. THE (IN)ADEQUACY OF THE BORDER PLAN

In February of 1992, the United States Environmental Protection Agency (EPA) and SEDUE released a "comprehensive" Border Plan intended to solve the pollution problems of the border region.<sup>149</sup> The Border Plan's objectives for 1992-1994 are modest: (1) ascertain the environmental condition of the area and describe the major environmental issues; (2) summarize past accomplishments according to binational, national, state and local agencies; (3) articulate the commitment of the United States and Mexican agencies to understand the environmental issues of the region; (4) establish priorities and mechanisms for solutions; (5) develop means for mobilizing government and nongovernment sectors to solve the region's environmental problems; and (6) establish general provisions for both funding and implementation.<sup>150</sup> The Border Plan, however, lacks any discussion of how to achieve these goals and does not require expenditure of any money.<sup>151</sup> Perhaps to deflect criticism, Mexico announced a \$460 million environmental public works program for the 1992-94 period even though the measure was not required by the Border Plan.<sup>152</sup> Despite its immediate objectives and the

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separating the states of Texas, New Mexico, Arizona, and California from the Mexican states of Tamaulipas, Nuevo Leon, Coahuila, Chihuahua, Sonora, and Baja California. *Id.*

147. See Damian Fraser, *Environment Hit by too Free Trade*, FIN. TIMES, July 2, 1992, at P4 (recounting the nations' decision to address environmental issues of the border region outside of the context of the NAFTA treaty).

148. Integrated Environmental Plan for the Mexican-U.S. Border Area (First Stage 1992-1994), U.S.E.P.A. Doc. A92-171 (1992) [hereinafter Border Plan].

149. *Id.*

150. *Id.* at I-3.

151. *Id.*; see also Feeley & Knier, *supra* note 7, at 265 (commenting on the lack of funding and implementing provisions).

152. *The Integrated Environmental Plan for the Border Area Underlines Mexico's Commitment to the Protection of the Environment*, PR Newswire, Feb. 26, 1992, available in LEXIS, Nexis Library, CURRNT File. For its part in response to criticisms of NAFTA, the United States has established a position for an EPA representa-



promise of environmental action by Mexico, critics of the Border Plan have focused on numerous deficiencies.<sup>153</sup>

First, the \$460 million pledged by the Mexican government is considered inadequate.<sup>154</sup> Moreover, since NAFTA neither provides detailed protection for the environment nor binds itself to a parallel agreement of treaty status, such announcements by the Mexican government may be motivated solely by the short-term goal of facilitating U.S. ratification of NAFTA. Without specific environmental provisions, the long-term interest of protecting the environment may not be secured by *ad hoc* pledges of funds.

Second, even if the \$460 million pledge is accepted as a sincere effort, the Border Plan does not contain a strategy for putting those funds to effective use. The Border Plan tersely discusses how the United States and Mexico can achieve the plan's goals and does not prioritize areas of environmental protection and enforcement.<sup>155</sup> In recognition of this deficiency several environmental groups released a joint report on NAFTA and the Border Plan in October 1992 which concluded that the plan lacks both firm policy recommendations and timetables for action.<sup>156</sup>

Third, the Border Plan is severely limited geographically, covering only a 100 kilometer strip on either side of the border.<sup>157</sup> Further, the plan does not even mention the open waters of the coastal zones into which the border region's rivers empty. Fourth, the Border Plan does

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tive at the U.S. Embassy in Mexico whose responsibilities will include working with SEDUE on enforcement of environmental laws and regulations in Mexico. *Trade*, *supra*, note 4, at 125-26. Exactly how this is to be carried out and the precise role of the EPA representative with regard to SEDUE has not been elaborated. *Id.*; see also Feeley & Knier, *supra* note 7, at 266-67 (discussing the vagueness of the description of the role that the EPA representative would play).

153. See *infra* notes 154-58 and accompanying text (analyzing the deficiencies in the Border Plan).

154. See, e.g., *Texas Governor's Environmental Advisor Calls Border Plan "Disappointing"*, 9 Int'l Trade Rep. (BNA) 401 (Mar. 4, 1992); *NAFTA III: Environment Info Sketchy; Money in Question*, American Political Network, Aug. 13, 1992, available in LEXIS, Nexis Library, CURRNT File.

155. See generally Border Plan, *supra* note 148; see also Feeley & Knier, *supra* note 7, at 265 (highlighting that the Border Plan contains little discussion of the hierarchy of and implementation of the goals of the Plan).

156. See Response, *supra* note 41, at 2-3 (discussing the report issued by environmental groups which decries the Border Plan's vague policies and lack of a timetable).

157. Border Plan, *supra* note 148, at II-1.

not call for polluters to pay for the needed cleanup and instead relies on funding from U.S. and Mexican taxpayers, a move which abandons the traditional approach to funding environmental cleanup. Finally, the Border Plan depends on voluntary, rather than mandatory, compliance to accomplish its goals.<sup>158</sup>

D. THE INESCAPABLE WEAKNESS OF A PARALLEL ENVIRONMENTAL PACKAGE APPROACH

The disturbing weaknesses in the Border Plan include deficiencies of vision, funding, physical range, or practical suggestions; the most serious flaw in the plan is its lack of binding legal force.<sup>159</sup> No binding connection between NAFTA and the Border Plan exists even though the plan was devised as a complement to and as an integral part of a "green NAFTA package."<sup>160</sup> In fact, NAFTA does not even mention the Border Plan.

This absence raises concerns because, unlike NAFTA, the Border Plan is not a treaty. As a result, the plan purports to address a serious, highly complex international problem without the force of law essential to its solution. Because the Border Plan lacks treaty status, it is subject to immediate, unrestricted modification by Executive directive.<sup>161</sup> Further, without treaty status the Border Plan could easily degenerate into an annoyance to be circumvented rather than a binding trilateral agreement that cannot be ignored.

The U.S.-Canadian efforts to regulate trade and the environment illustrate the necessity of treaty status for international environmental agreements. The United States and Canada generally abide by their obligations under the CFTA, due largely to CFTA's trade enforcement provisions. Nevertheless, both countries' failure to abide by their obli-

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158. *Flaws in Free Trade, Border Plans Seen Drawing Environmentalists' Opposition*, 9 Int'l Trade Rep. (BNA) 452 (Mar. 3, 1992).

159. See Feeley & Knier, *supra* note 7, at 267 (proffering that the Border Plan will likely not quell criticism of NAFTA's failure to address environmental concerns because the Border Plan lacks treaty status and enforcement mechanisms).

160. See Feeley & Knier, *supra* note 7, at 265-66 (remarking that the Border Plan does not encompass mechanisms for change under a free trade regime and NAFTA remains silent on environmental issues while the Bush Administration tries to address the environment by referring to the Border Plan).

161. See Feeley & Knier, *supra* note 7, at 265-66 (highlighting, for instance, that the Bush administration placed a series of vague qualifications on the Border Plan, such as insisting that the Plan's regulations be based on "sound science," and thus leaving the plan open to very broad and loose interpretation).

gations under the Great Lakes Water Quality Agreement is due largely to its lack of effective enforcement provisions.<sup>162</sup> Protecting the border region environment under a free trade regime requires a treaty that provides for specific means of enforcement.

Faced with the enumerated failings of the proposed Border Plan, several members of Congress who voted in favor of fast-track authority for NAFTA negotiations expressed serious reservations regarding the lack of adequate environmental protection in both NAFTA or the Border Plan.<sup>163</sup> In reaction to these concerns the Bush Administration issued an official response.<sup>164</sup> Unfortunately, like the Border Plan, the Administration's response acknowledges specific areas of concern but does not provide clear, concrete means to address those concerns.<sup>165</sup> The Border Plan was supposed to remedy NAFTA's omission of environmental provisions while the general, nonbinding assurances of the Administration's response was intended to assuage the concerns over the numerous shortcomings of the Border Plan. The Border Plan, however, has deteriorated into whatever the latest White House press release says it is.<sup>166</sup>

The issue of NAFTA and the Border Plan contains one final oddity. While NAFTA does not encompass the Border Plan, ostensibly so that NAFTA negotiations could be completed quickly, the Border Plan was completed *before* the final NAFTA text was approved.<sup>167</sup> The

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162. See Housman & Zaelke, *supra* note 25, at 574 (raising the examples to highlight the need for environmental protection in treaty form and arguing that the lack of treaty formality leaves the later agreement effectively unenforceable).

163. See Feeley & Knier, *supra* note 7, at 265-66 (noting that by November 1991 forty members who voted for fast-track status voiced their concerns in a letter to the President calling for a concurrent environmental agreement to work in concert with NAFTA).

164. Letter to Congressional Leaders on Fast Track Authority Extension and the North American Free Trade Agreement, 27 WEEKLY COMP. PRES. DOC. 536-37 (May 1, 1991) [hereinafter Administration Response]; see also White House Fact Sheet in Response to Issues Concerning a North American Free Trade Agreement, 27 WEEKLY COMP. PRES. DOC. 546, 548-49 (May 1, 1991) (summarizing the Bush Administration's response to the criticisms on the Border Plan).

165. Feeley & Knier, *supra* note 7, at 267.

166. This article's printing deadline precluded an analysis of the latest round of assurances, criticisms and assurances over NAFTA and the environment. Since a continuing source of concern flows from the non-binding nature of the understandings, plans and desires of the Mexican and United States governments regarding the environment, inclusion of specific environmental provisions in the NAFTA treaty, however, would quell much criticism.

167. See *Texas Governor's Environmental Adviser Calls Border Plan "Disap-*

question this raises is, if the Border Plan was completed to the satisfaction of both Mexico and the United States in time to include it in NAFTA, even if only by reference or as an annex, why was the Border Plan left totally outside of NAFTA?<sup>168</sup> The question has no official answer, but the plan's exclusion from NAFTA makes one thing certain: unlike NAFTA, the Border Plan will not have treaty status.<sup>169</sup>

## V. THE FALLACY OF PROTECTING THE ENVIRONMENT THROUGH ECONOMIC GROWTH

The rationale advanced for the omission of specific environmental provisions in NAFTA is that Mexico will be much more likely to address its environmental problems once it amasses sufficient economic resources to address those problems.<sup>170</sup> In fact, after reviewing the effect a free-trade agreement would have on all aspects of the environment, the United States Trade Representative (USTR) concluded that NAFTA would probably ameliorate, rather than exacerbate, environmental conditions along the U.S.-Mexican border.<sup>171</sup> The USTR report concludes that economic growth enables companies to invest in state-of-the-art environmental protection technology.<sup>172</sup> Economic growth also generates more revenue for governments to monitor and enforce environ-

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pointing", 9 Int'l Trade Rep. (BNA) 401 (Mar. 4, 1992) (reporting that the Border Plan was released by the administration in February of 1992 while the final text of NAFTA was not released until August of 1992).

168. See *President Bush Announces NAFTA Accord, but Labor, Others Promise Renewed Attack*, 9 Int'l Trade Rep. (BNA) 1376 (Aug. 12, 1992) (detailing the dates of completion of the Border Plan and NAFTA and noting that the Border Plan was completed first). The truly modest goals of the Border Plan gives this question added force.

169. See Feeley & Knier, *supra* note 7, at 267 (noting that since the Border Plan is not part of the NAFTA treaty, it lacks adequate enforcement power).

170. See Feeley & Knier, *supra* note 7, at 285 (suggesting that NAFTA will generate needed revenues to finance infrastructure improvements towards better regulatory enforcement). NAFTA may provide the opportunity to advance resolutions of environmental concerns, but outside the NAFTA goal, Mexico lacks incentive to pursue environmental cleanup. *Id.*

171. *Trade*, *supra* note 4, at 22. The USTR report considered border pollution, air and water quality, toxic chemical control, waste, chemical emergencies, and wildlife and endangered species and concluded "that, although growth in or outside the border area as a result of a NAFTA may lead to certain adverse environmental impacts, any negative consequences will be offset by the advantages that stimulation of economic growth will have on improving environmental protection." *Id.*

172. *Trade*, *supra* note 4, at 23.

mental regulations, furnish adequate health and safety facilities, while reducing the governments' burden in the area of human services.<sup>173</sup>

The great concern of environmentalists remains that implementation of this rationale will produce two undesirable results: (1) U.S. firms will be tempted to relocate to Mexico to take advantage of less restrictive environmental controls once the trade barriers that make such a move economically unattractive are removed, and (2) U.S. relocation and increased Mexican development will only make the currently bad environmental situation in Mexico considerably worse.<sup>174</sup> Essentially, a NAFTA without environmental provisions is viewed by the extremes as either "environmental protection through economic growth" or "grow now, cleanup later." Regardless of which view is considered more accurate, the approach is irredeemably flawed.

Accurately and safely determining when sufficient economic progress has been made to permit shifting resources to environmental projects is problematic at best. Further, "grow now, cleanup later" implicitly presupposes that environmental problems will not mount faster than economic growth. Without clear empirical evidence for this assumption, however, it seems unwise to proceed as though such support does exist. Also, if the environment is worth preserving, a goal with which the "grow now, cleanup later" approach explicitly concurs, then there is no reason not to require protection of the environment contemporaneous with economic development.<sup>175</sup> Indeed, the experiences of both U.S. and Mexican industry indicate that environmental protection through economic growth is not the wisest choice.

Mexico's economic situation and recent environmental history strongly indicate that protecting the environment remains a distant concern at best. The recent economic growth in the U.S.-Mexican border region, spurred by the expansion of the maquiladora industry, not only fails to produce environmental benefits, but also unquestionably increases the area's environmental degradation.<sup>176</sup>

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173. *Trade*, *supra* note 4, at 23. The USTR states that environmental protection will be an easier issue to raise in a growing economy. *Id.*

174. See Housman & Zaelke, *supra* note 25, at 573-74 (arguing further that the same environmentalists criticized the U.S. decision to not integrate environmental issues into NAFTA but to deal with these concerns instead through parallel domestic legislation).

175. See H.R. Con. Res. 246, 102nd Cong., 2d Sess. sec. 2 (1992) (declaring the sense of Congress that the United States should not enter into the trade agreements that pursue economic development at the expense of environmental protection).

176. Housman & Zaelke, *supra* note 25, at 575.

Proponents of the "grow now, cleanup later" approach contend that the fear that U.S. firms will relocate to Mexico is unfounded because very little economic incentive in the form of savings from lower environmental standards exists.<sup>177</sup> NAFTA proponents point out that pollution abatement costs average less than two percent of value added for U.S. industries and therefore the U.S. firms lack sufficient impetus to relocate.<sup>178</sup> If one accepts these figures, however, then the rationale that Mexico's industries cannot develop if fettered with environmental costs is completely undermined. Further, these figures do not adequately address the concern that U.S. firms might relocate to a less-regulated jurisdiction upon concluding that absorbing the one-time cost of relocation is better than expending an ongoing percentage of annual revenues, regardless of how small that percentage may be.<sup>179</sup>

That Mexico will be seriously interested in environmental protection as it attempts economic reform and advancement is doubtful in light of Mexico's recent legislative initiatives which focus primarily on reversing the nation's economic condition as rapidly as possible. President Salinas' primary objective since taking office in 1988 has been to modernize both the economy and the country. The Salinas administration outlined these goals in the National Program for Modernization of Industry and Foreign Trade.<sup>180</sup> Mexico has not hesitated to make whatever changes in laws and regulations that it considered necessary to increase the attractiveness of Mexico to foreign investors and businessmen.<sup>181</sup>

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177. See generally *Mexico's Environmental Laws Seen Attracting Few Industries*, 9 Int'l Trade Rep. (BNA) 2182 (Dec. 23, 1992) (speculating that no such exodus is likely, according to Glenn Harrison, Professor of Economics at University of South Carolina, despite the fear of firms flocking to Mexico). Professor Harrison argues that the aggregate savings will be too small to encourage migrations. *Id.*

178. See *Environmental Study Admits Bevy of Border Problems*, LDC Debt Report/Latin American Markets, Mar. 9, 1992, available in LEXIS, Nexis Library, CURRNT file (reporting on a recent study of the environmental effects of NAFTA and concluding that the risks of mass relocation are few due to the high costs of exploiting potential loopholes in the regulations).

179. See *id.* (noting that the study fails to quell fears that opening the borders will sprout more maquiladora plants set up to exploit lax enforcement and tax incentives).

180. See Vernon & Calvillo, *supra* note 20, at 675 (outlining the goals of this plan as including general internationalization of the Mexican economy, promotion of exports, building a stronger domestic market, increasing technological development, and broad deregulation of economic activities).

181. See Vernon & Calvillo, *supra* note 20, at 675 (indicating Mexico's broad

Acknowledgement of Mexico's current "business first" attitude brings with it legitimate skepticism of whether Mexico will readily embrace the idea of slowing economic growth when necessary to preserve the environment. The issue is whether it is wise to put off consideration of such problems until the inevitable environmental problems generated by economic development arise. As Mary Kelly, Executive Director of the Texas Center for Policy Studies, notes, the idea that growth from NAFTA will enable Mexico to address environmental concerns has already been proven fallacious by the maquiladora situation that has steadily worsened since 1965.<sup>182</sup>

Several U.S. federal agencies have also expressed concern over the border region situation and in particular, the mystery of the high number of mothers in the Brownsville-Matamoros area giving birth to babies missing major portions of their brains.<sup>183</sup> The need for immediate attention to environmental issues prompts some environmentalists to urge that NAFTA include a trinational superfund established to clean pollution along the U.S.-Mexican border.<sup>184</sup> Attending to the environmental impact of NAFTA becomes increasingly urgent because NAFTA's economic promise intends to bring even more workers into an already overburdened region.<sup>185</sup> Thus, Mexico is already handicapped by a pollution

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changes in economic policies concerning foreign investment, technology transfers, and industrial property were made to pull Mexico out of its economic doldrums).

182. *ESI Proposes that NAFTA Include Trinational Superfund for Environment*, 8 Int'l Trade Rep. (BNA) 1619 (Nov. 6, 1991) [hereinafter *Superfund*]. But cf. Wesley R. Smith, *Protecting the Environment in North America with Free Trade*, Heritage Foundation Reports, April 2, 1992, available in LEXIS, Nexis Library, HFRPTS File (acknowledging that Mexico's environment has deteriorated over the past forty years despite economic growth but blaming the decline on the Mexican government's attempts to run a centrally planned economy).

183. Cody, *supra* note 101, at A34; see also *Cleanup*, *supra* note 1 (discussing the rising incidence rate of anencephaly which may be caused by environmental pollutants from maquiladora plants). Indicia of other current and ongoing environmental devastation in the border region include: improper disposal of waste from maquiladora plants, liver and gall bladder cancer rates significantly above the national average in communities that take their drinking water from the Rio Grande River, and increased hepatitis rates in U.S. communities. Housman & Zaelke, *supra* note 25, at 574 n.191.

184. See *Superfund*, *supra* note 182 (discussing the establishment of a superfund to finance the cleanup of the Mexico-United States border).

185. *MacNeil/Lehrer NewsHour: Border Business* (PBS television broadcast, Nov. 19, 1992). Over the past twenty years over 2,000 new facilities have been built and hundreds of thousands of jobs created at the cost of sharply decreasing the health and environmental conditions of the area. *Id.*; see also Feeley & Knier, *supra* note 7, at 275-80 (decrying the maquiladoras' degrading effects including dumping of hazardous

problem that will worsen before Mexico sees sufficient NAFTA-generated revenues that could be applied to environmental cleanup.<sup>185</sup>

Finally, the depth of the individual governments' commitment to environmental protection is subject to legitimate question. If the economic incentives for NAFTA are so great that negotiations were pushed ahead rapidly, then those economic incentives could have been used to forge a satisfactory scheme of environmental protection.<sup>187</sup> Curiously, though, any prospect of including specific environmental protection in NAFTA was eliminated by the parallel agreement approach adopted by the three nations.<sup>188</sup> If the three governments were truly as concerned about the environment as they profess, and if the economic reasons for NAFTA are as profound as those governments have claimed, then holding NAFTA hostage to a satisfactory environmental protection regime would certainly have produced far more results than the environmental negotiations produced in the absence of economic incentives.<sup>189</sup>

## VI. SOLUTIONS

Pursuit of a North American trade agreement is worthwhile not only for economic benefits, but also because it can serve as a valuable example of how to correctly combine economic growth with environmental protection. The potential rewards of such a treaty are so great that correcting NAFTA's deficiencies is far wiser than abandoning the notion of free trade in favor of rigid environmental protection. Moreover, the problems associated with NAFTA require adjustment of the treaty rather than wholesale restructuring. The following suggestions,

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waste and fouling the water quality).

186. See Feeley & Knier, *supra* note 7, at 271-80, 293 (arguing that currently Mexico cannot adequately expend the massive resources necessary to develop infrastructure to rebuild its physically degraded environment). In addition, an effective environmental plan in conjunction with NAFTA must ensure that money gets channeled into environmental protection. *Id.*

187. See *supra* notes 10-24 and accompanying text (delineating the economic advantages of NAFTA); see also *supra* notes 27-30 (outlining the history of the urgent yet hasty NAFTA negotiations).

188. See *supra* notes 31-34 and accompanying text (noting and condemning the joint U.S.-Mexico decision to follow the "separate but parallel" approach, keeping environmental issues out of NAFTA).

189. But cf. *Mexican Ambassador Warns Against Changing Anything in Proposed NAFTA*, 9 Int'l Trade Rep. (BNA) 1816 (Oct. 21, 1992) (noting Mexican Ambassador Petricoli's contention that it will be difficult to change NAFTA since it represents a very tenuous equilibrium and that change would be "like opening Pandora's box").



therefore, are tailored to stay as much as possible within the existing framework of NAFTA, rather than moving beyond NAFTA and suggesting alterations in domestic laws. Staying within the existing structure of NAFTA is important because all three nations have stated publicly their opposition to renegotiation of the treaty. Thus, correction and ratification of NAFTA requires that the adjustments be kept as modest as possible.

First, the apparent contradiction between the goal of promoting sustainable development stated in the Preamble to NAFTA and the "grow now, cleanup later" proposals requires resolution. Since development is, by definition, not possible without altering the environment, two ways to resolve the contradiction in NAFTA's provisions exist. The first would require mandatory cleanup contemporaneous with economic development. The second would include a specific reference binding NAFTA to a parallel agreement which contains requirements for environmental cleanup.<sup>190</sup> Either choice would, in addition to reconciling the Preamble and subsequent articles, solve the problems surrounding the package approach of relying on a separate environmental agreement to pacify environmental concerns. If the economic benefits of NAFTA are as great as all three nations claim, then a requirement of contemporaneous environmental cleanup would not deter trilateral acceptance of the treaty. Ensuring adequate enforcement of environmental regulations and protection of the environment could be accomplished by various means: (1) requiring a monetary commitment from each nation for a trinational superfund,<sup>191</sup> (2) establishing a cross-border tax to pay for cleanup of the border re-

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190. See *Trade*, *supra* note 4, at 22 (noting President Bush's intention to pursue a parallel but independent comprehensive environmental program). Although the Bush administration has widely touted its commitment to an agreement concerning the environment that would parallel NAFTA, NAFTA makes no reference to a parallel agreement.

191. See *supra* note 182 and accompanying text (evaluating the proposal to establish a superfund). The need for this kind of response is underscored by the following eyewitness report: "the south side of the U.S.-Mexican border has become a picture of neglect, of factories leaking foul-smelling effluent into brackish green and yellow canals, of muddy lanes connecting rows of slapdash huts where workers' children drink polluted water from drums that used to hold toxic chemicals, of culverts spewing human feces into rivers and ditches while garbage and chemical leftovers putrefy nearby in open dumps." Cody, *supra* note 121, at A34.

gion;<sup>192</sup> or (3) charging polluters for cleanup costs as is currently done in the United States.<sup>193</sup>

Another appropriate adjustment of NAFTA would permit the parties to impose pre-NAFTA tariffs if one signatory attempts to lure business and investment by lowering its environmental standards without first consulting with the other NAFTA parties. Obtaining this concession poses few difficulties, since the country most likely to oppose it, Mexico, had agreed to it during negotiations before the United States persuaded Mexico and Canada to exclude this concession from the final text.

Finally, the dispute resolution process must be amended. First, the provisions permitting secret proceedings and secret explanations of decisions from those proceedings must be eliminated. Not only does the process provide the U.S. executive branch with extraordinary opportunities to circumvent the checks of the United States Constitution, but it shields issues of great public concern from public scrutiny.<sup>194</sup> Second, every dispute resolution panel should have at least two members with legal experience to ensure that the burden of proof articles in NAFTA are applied properly.<sup>195</sup> Third, any dispute resolution that requires examination of scientific rationales for increased environmental standards must permit consideration of scientific opinion based on fact rather than merely scientific statements of fact.<sup>196</sup>

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192. See *Superfund*, *supra* note 182 (postulating possible approaches to the funding problem including taxes on transport of hazardous materials over the border and "green tax"/customs duties on U.S. imports from Mexico while returning the revenues to Mexico's environmental programs).

193. See *Superfund*, *supra* note 182 (reviewing the United States policy of charging polluters for cleanup costs).

194. See Walter Russell Mead, *Bushism Found: A Second Term Agenda Hidden In Trade Agreements*, HARPER'S, Sept. 1992, at 37, 43 (arguing that the Bush administration will hoard authority to the executive since the President negotiated most international trade agreements in secret and concluding that this scenario will result in the executive representing the United States in international trade tribunals interpreting NAFTA); cf. *Harper's Letters*, HARPER'S, Dec. 1992, at 4 ( lambasting Mead). United States Trade Representative Carla A. Hills assured readers that the fast-track procedures provide the constitutionally required degree of negotiations. *Id.*

195. See *supra* notes 95-97 and accompanying text (discussing the selection of the dispute resolution panel).

196. See *supra* notes 98-101 and accompanying text (outlining the dispute resolution procedures).

## CONCLUSION

None of the criticisms of NAFTA contained in this article are meant to suggest that consideration of a North American trade agreement should not be seriously undertaken. Indeed, an environmentally sound trade agreement would be an extremely important and valuable accomplishment particularly when one considers the conclusion in the 1992 USTR report that without a trade agreement, emissions in the U.S.-Mexico border region could increase anywhere from forty percent to 225% over the next ten years.<sup>197</sup> This possibility underscores the importance of having an environmentally sound trade agreement with treaty status.

The governments of North America must address the problem of whether a comprehensive free trade agreement is the wisest course to follow. While the interests of trade and environmental protection are often characterized as unavoidably opposed interests, this dilemma need not always exist. Recognition of the tendency of these interests to run counter to each other, nonetheless, is essential. Given the great cultural, historical, economic, and environmental disparities that separate Mexico from the United States and Canada, the wisest approach to increased trade is to establish a North American free trade area as the ultimate goal of a free trade treaty, but to move toward that goal cautiously so that the environments as well as the economies of all three nations flourish.

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197. *President Bush Announces Three-Year Plan to Cleanup Pollution at the Mexican Border*, 9 Int'l Trade Rep. (BNA) 342 (Feb. 26, 1992).