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Integrating Labor and Environmental Concerns into the North American Free Trade Agreement: A Look Back and a Look Ahead

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INTEGRATING LABOR AND ENVIRONMENTAL CONCERNS INTO THE NORTH AMERICAN FREE TRADE AGREEMENT: A LOOK BACK AND A LOOK AHEAD

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This, in other words, is not a simple debate.
Then-Governor Bill Clinton[1]

INTRODUCTION

The central obligation of international trade law is non-discrimination. For example, under the General Agreement on Tariffs and Trade, commonly known as the GATT, nations are required to treat foreign products as favorably as they treat domestic products.[2] Article 24 of the GATT, however, allows nations who have formed free trade areas to favor the products of the acceding nations.[3]

Certain sectors of the trade community are concerned that expanded trade under regional free trade agreements weakens the international trading system.[4] Despite these concerns, and with the emergence of rival trading blocs, a more integrated European Community,[5] and the possible

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1. A.L. May, *Clinton Still Not Firm on Free-Trade Pact; Endorsement Has Strings Attached*, ATLANTA J. & CONST., Oct. 5, 1992, at A8.

2. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, art. III, 61 Stat. A3, 55 U.N.T.S. 187 [hereinafter GATT].

3. *Id.* art. XXIV (8)(b). GATT defines a free trade area as:

> [A] group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV, and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

Id.

4. *See* Michael Aho, *More Bilateral Trade Agreements Would Be a Blunder: What the New President Should Do*, 22 CORNELL INT'L L.J. 25, 25 (1989) (outlining the harm caused by increased regional trade agreements). Other sectors of the trade community actively support expanded regional trade, arguing that such regional trade aids the growth of the international trading system. *See* C. Michael Hathaway & Sandra Masur, *The Right Emphasis for U.S. Trade Policy for the 1990s: Positive Bilateralism*, 8 B.U. INT'L L.J. 207, 211-16 (1990) [hereinafter *Positive Bilateralism*] (discussing U.S. trade policy particularly since World War II). Advocates of this approach note that the GATT system of international trade itself grew out of a series of bilateral agreements negotiated by the United States, including in particular the 1935 and 1938 agreements with Canada. *Id.*; Trade Agreement Nov. 15, 1935, 49 Stat. 3690, E.A.S. 91, 168 L.N.T.S. 355; Trade Agreement Nov. 17, 1938, 53 Stat. 2348, E.A.S. 149, 199 L.N.T.S. 91 (setting forth the above mentioned agreements).

5. *See* Single European Act, Feb. 28, 1987, 30 O.J. Eur. Comm. (No. L 169) 1 (1987) (liberalizing trade even further within the European Community). *See also* Stefan A. Riesenfeld, *The Single European Act*, 13 HASTINGS INT'L & COMP. L. REV. 371 (1990) (describing the effects of the Single European Act on the internal markets

Association of Southeast Asian Nations (ASEAN) free trade area,[6] the United States has pursued a policy of bilateral and regional free trade.[7] Most recently, the United States has pursued this policy by entering into the North American Free Trade Agreement (NAFTA or the Agreement) with its neighbors, Canada and Mexico.[8]

The creation of a North American free trade area, extending from the polar extremes of the Yukon to the coral reefs of the Yucatan, has proven to be extremely contentious. Although trade agreements have historically engendered lively debates (because various sectors of the participating nations' economies profit more than others from such agreements), NAFTA has proven uniquely difficult. The debate over the approval of NAFTA has, for the first time, linked expanded free trade with social ramifications attendant to trade (i.e., environmental impact). While critics are concerned with a wide range of social issues in regard to NAFTA, their principal social concerns fall into two spheres: labor concerns and environmental concerns.[9] This article provides a discussion of NAFTA as it relates to these two spheres of concern.

I. THE HISTORY OF NAFTA, LABOR AND THE ENVIRONMENT

A. THE HISTORY OF NAFTA / THE FAST TRACK DEBATE

In June of 1990, U.S. President Bush and Mexico's President Salinas began joint efforts to enter into a free trade agreement.[10] On February

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of Europe).

6. *See ASEAN Endorses Free Trade Area*, WALL ST. J., Oct. 9, 1991, at A12 (describing the establishment of a regional free trade area in Southeast Asia).

7. *See Positive Bilateralism*, *supra* note 4, at 225-28 (examining U.S. trade policy in the 1990s).

8. United States-Canada-Mexico, North American Free Trade Agreement, *signed* Dec. 17, 1992, text released Oct. 7, 1992 [hereinafter NAFTA]. *See also President Bush Signs NAFTA at OAS Ceremony*, Int'l Trade Daily (BNA), Dec. 18, 1992 (discussing Dec. 17, 1992 signing of NAFTA); *Bush Signs NAFTA Accord*, FIN. TIMES, Dec. 18, 1992, at 4 (describing the signing ceremony). The United States has existing free trade agreements with Israel and Canada. United States-Canada Free Trade Agreement, Dec. 22, 1987, 27 I.L.M. 281 (1988) [hereinafter CFTA]; United States-Israel Free Trade Agreement, Apr. 22, 1985, 24 I.L.M. 653 (1985).

9. In addition to labor and environmental concerns, serious issues have been raised regarding human rights in Mexico. *See* ROBERT A. PASTOR, INTEGRATION WITH MEXICO: OPTIONS FOR U.S. POLICY 65-67 (1993) (discussing allegations of human rights violations in Mexico).

10. *See* CONGRESSIONAL RESEARCH SERVICE, NORTH AMERICAN FREE TRADE AGREEMENT: ISSUES FOR CONGRESS, Mar. 25, 1991, at 1 [hereinafter ISSUES FOR

5, 1991, after Canada expressed a desire to join the negotiations, the bilateral talks with Mexico grew into the trilateral talks that led up to NAFTA.[11] On March 1, 1991, in response to heightened pressures from Mexico to negotiate a free trade agreement, President George Bush, pursuant to the 1974 Trade Act as amended by the 1988 Omnibus Trade Act,[12] requested an extension of fast track negotiating authority until June 1, 1993. An extension of fast track would allow the President to continue the ongoing negotiations of both the Uruguay Round of GATT and the free trade agreement talks with Mexico and Canada.[13] The fast track procedures limit congressional input into the negotiation of trade agreements.[14] These procedures balance the constitutionally mandated need for Congressional input into trade agreement negotiations with the need for efficiency in these negotiations (and the perception that full Congressional participation in such agreements is overly cumbersome).[15] Proponents of fast track argue that without the grant of such authority to the President, and the concurrent limits on Congressional powers, the United States would never be able to reach a free trade agreement.[16]

CONGRESS] (outlining the preparatory meetings).

11. *See* Executive Office of the President, Response of the Administration to Issues Raised in Connection with the Negotiation of a North American Free Trade Agreement, May 1, 1991, at 1 [hereinafter May 1 Plan] (describing Canada's desire to join the negotiations and the willingness of the United States and Mexico to proceed with three-way talks).

12. Trade Act of 1974, §§ 101-102, 151, Pub. L. No. 93-618, 88 Stat. 1978, 1982, 2001 (1975) (codified at 19 U.S.C. §§ 2101, 2111-2112, 2191 (1988)); Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107, 1102-1103 (codified at 19 U.S.C. §§ 2902-2903). *See also* Alan F. Holmer & Judith H. Bello, *The Fast Track Debate: A Prescription for Pragmatism*, 26 INT'L LAW. 183, 184 (1992) (discussing the pros and cons of presidential fast track powers).

13. 137 Cong. Rec. S2615 (daily ed. 1991); 137 Cong. Rec. H1330 (daily ed. 1991).

14. *See* Edmund Simm, *Derailing the Fast-Track for International Trade Agreements*, 5 FLA. INT'L L.J. 471, 493-517 (1990) (detailing methods for modifying the fast track procedures).

15. *See* I.M. DESTLER, AMERICAN TRADE POLITICS: SYSTEM UNDER STRESS 32-33 (2d ed. 1992) (stating that the perception that Congress is unable to overcome its protectionist impulses, and so its participation in trade agreements must be minimized, stems from the Smoot-Hawley Tariff fiasco). Under the Constitution, the President's power to enter into trade agreements is checked by the delegation of the authority to Congress to implement agreements affecting international commerce. U.S. CONST. art. II, §§ 2-3; art. I, § 8, cl. 3.

16. *See Derailing the Fast-Track for International Trade Agreements*, *supra* note 14, at 521-22 (describing the benefits fast track has offered the United States in inter-

Opponents of fast track argue that limits on Congressional powers in trade negotiations have gone too far and that the process has become an undemocratic mechanism through which the President can advance a personal agenda that conflicts with democratically enacted domestic legislation.[17]

When it became apparent that President Bush would request an extension of fast track authority, a series of interest groups lobbied Congress to disapprove such a request. Labor and environmental organizations were among the most vocal of these groups. During the fast track debate, labor groups argued that a free trade agreement with Mexico would erode U.S. wages and encourage industrial flight to Mexico, thereby costing U.S. jobs.[18] Environmental and consumer organizations argued that a free trade agreement would increase unsustainable growth in Mexico, and compromise the ability of the United States to enact and maintain adequate environmental, health, and safety laws.[19] Together, these two communities joined to advance a regulatory competitiveness argument against the fast track extension, arguing that Mexico's failure to enact and enforce a host of labor, worker protection, environmental, health, and safety laws would provide companies operating in Mexico

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national trade negotiations).

17. *See* Holmer & Bello, *supra* note 12, at 192 (discussing congressional opposition to fast track extensions and quoting Rep. Robert F. Smith as saying extending fast track was like granting the Executive the "keys to the store").

18. *See AFL-CIO Official Blasts Proposed FTA in Testimony Before Senate Finance Committee*, 8 Int'l Trade Rep. (BNA) 232 (1991) (reprinting the opinions of the labor movement to the proposed free trade agreement); *The North American Free Trade Agreement: Sending U.S. Jobs South of the Border*, 17 N.C. J. INT'L L. & COM. REG. 489, 491 (1992) [hereinafter *Sending Jobs South of the Border*] (illustrating the potential harm the free trade agreement could cause to U.S. jobs).

19. *See* Bruce Stokes, *Greens Talk Trade*, NAT'L J. 863, Apr. 13, 1991, at 862 (describing the environmental damage the free trade agreement could cause, particularly to the U.S.-Mexico border region) [hereinafter *Greens Talk Trade*]; ISSUES FOR CONGRESS, *supra* note 10, at 47-48 (outlining general environmental concerns). Not all environmental groups, however, opposed the extension of fast track. Most notably the National Wildlife Federation (NWF), the Environmental Defense Fund (EDF), and the Natural Resources Defense Council (NRDC) came out in support of the extension. Colin Isaacs, *Mexico Deal Finds Ecological Friends*, FIN. POST, Dec. 13, 1991, at 20. One report states that the EDF, the World Wildlife Fund, the National Audobon Society, the Nature Conservancy, and the NRDC's support for fast track was secured when they traded access to a White House briefing on NAFTA for a written pledge that they would not oppose fast track. Mark Dowie, *American Environmentalism: A Movement Courting Irrelevance*, 9 WORLD POL'Y J. 67, 87-88 (1991-1992).

with a competitive advantage over U.S. industries.[20] Relying upon these arguments, many groups formed coalitions to petition Congress to reject fast track and to further consider the ramifications of a trade agreement that fast track would allow.[21]

With the powerful labor and environmental coalitions arguing against the extension of fast track authority, a number of congressional leaders stepped forward and asked President Bush for assurance that a free trade agreement with Mexico and Canada would address the concerns raised by the labor and environmental coalitions.[22] President Bush responded to these requests with his May 1 Plan.[23] The May 1 Plan established the Bush Administration's "parallel track" approach, whereby environmental and labor concerns would be dealt with separately from NAFTA negotiations. These assurances, which won the support of several environmental groups including the National Wildlife Federation (NWF), the Environmental Defense Fund (EDF), and the Natural Resources Defense Council (NRDC), splintered the larger environmental community.[24] In the end, having divided the opposition, President Bush's request for the extension of fast track was approved.[25]

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20. *See generally Greens Talk Trade*, *supra* note 19, at 864 (expressing concern over the lower costs for industries on Mexican soil).

21. *See generally Greens Talk Trade*, *supra* note 19, at 864 (describing the coalition's lobbying efforts against fast track).

22. *Two Key Lawmakers Request 'Action Plan' from President Bush on Mexico Trade Talks*, 8 Int'l Trade Rep. (BNA) 377 (1991) (describing requests of Sen. Lloyd Bentsen and Rep. Dan Rostenkowski).

23. *See* May 1 Plan, *supra* note 11, at 8-12 (setting forth the Administration's reply to the environmental and labor concerns); John E. Yang & Guy Gugliotta, *Bush Seeks to Allay Hill Fears on Free Trade Pact*, WASH. POST, May 2, 1991, at A27 (portraying President Bush's response to legislative concerns over NAFTA).

24. *See supra* note 21 and accompanying text (discussing environmentalist groups' response to fast track). At the time, Jay Hair, president of NWF, stated:

> While Mr. Bush's position is not all that many environmentalists might want, the ideal should not be the enemy of the good. His word is his marker . . . . His commitment should be reciprocated by Congress; it should grant fast-track authority to begin the free trade negotiations with Mexico in earnest.

Jay D. Hair, *Nature Can Live with Free Trade*, N.Y. TIMES, May 19, 1991, at D17.

25. Gary Lee, *Fast Track Sprint*, WASH. POST, May 23, 1991, at A21; 137 Cong. Rec. H3588 (daily ed. May 23, 1991); 137 Cong. Rec. S6829 (daily ed. May 24, 1991).

B. OVERVIEW OF LABOR AND ENVIRONMENTALIST CONCERNS

1. Labor Concerns

Proponents of NAFTA argue that the Agreement will stimulate economic development and increase employment by expanding the opportunities for trade among the parties through the removal of trade barriers.[26] Others, such as the labor coalition, believe that NAFTA will have precisely the opposite effect on the economy. Labor argues that lower wage levels, diminished union activity, and minimal enforcement of labor and environmental laws will entice increased NAFTA-driven investment in Mexico, resulting in continued erosion of investment and jobs in the United States. Labor believes that U.S. workers will pay the ultimate costs of any NAFTA-driven economic expansion.

Proponents who believe that NAFTA will provide for job growth in the United States rely on a study, which states that by 1995, U.S. jobs supported by exports to Mexico will exceed one million, and that NAFTA-related job gains in the United States are likely to reach somewhere between 130,000 and 175,000.[27] Because economic analyses

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26. *See* Douglas Harbrecht, *NAFTA*, BUS. WK., Sept. 13, 1993, at 26-29 (reporting arguments for and against U.S. approval of NAFTA); *Report of the Administration on the North American Free Trade Agreement and Actions Taken in Fulfillment of the May 1, 1991 Commitments*, Sept. 18, 1992, at 17-65 [hereinafter *Report of the Administration*] (outlining President Bush's position on NAFTA); President Bush, Statement by the President, Aug. 12, 1992, at 1; Sidney Weintraub, *The Case for Free Trade with Mexico: Why Progressives Should Support a North American Free Trade Area*, PROGRESSIVE POLICY INST. 9, Apr. 1991, at 7-10 (expressing optimism over the proposed free trade area).

27. GARY C. HUFBAUER & JEFFREY J. SCHOTT, NORTH AMERICAN FREE TRADE: ISSUES AND RECOMMENDATIONS, INSTITUTE FOR INTERNATIONAL ECONOMICS 57-60 (1992) (presenting an economic analysis of NAFTA); *Report of the Administration, supra* note 26, at 60. This study has been criticized for the assumptions used in its job analysis. JEFF FAUX & THEA LEE, THE EFFECT OF GEORGE BUSH'S NAFTA ON AMERICAN WORKERS: LADDER UP OR LADDER DOWN?, Economic Policy Institute (Briefing Paper) July 1992, at 9-10. Faux and Lee note that the conclusions in the Hufbauer and Schott study require the United States to maintain a continuous and expanding trade surplus with Mexico by exporting "huge amounts of productive capital without having to import the manufactured consumer goods that the capital goods will produce." *Id.* at 9. Faux and Lee counter that this assumption may be invalid given Mexico's explicit strategy of using expanded exports to pay off its foreign debt. *Id.* Faux and Lee also criticize the Hufbauer and Schott study for its assumption that Mexico will not develop the ability to produce its own capital goods for sale at home and export to the United States. *Id.* They also note that Hufbauer and Schott

are, in great measure, dependent upon the strength of their underlying assumptions,[28] the estimates of NAFTA job gains upward of 130,000 are countered with estimates of net U.S. job losses due to NAFTA in the range of 900,000.[29] The most recent official study released by the U.S. International Trade Commission (USITC or ITC) predicts that certain U.S. employment sectors will gain jobs and that others will lose jobs, with a net gain of up to .08% in employment.[30]

Labor is also concerned that, through competitive wage pricing undertaken to keep companies from relocating to Mexico, NAFTA will cause wages in the United States to decline.[31] Proponents of NAFTA

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indirectly incorporate the flawed assumptions that additional investment in Mexico will come from third party investors and not come at the cost of additional investment in the United States, and that the value of the peso will continue to expand. *Id.* at 9-10.

The Faux and Lee study also attacked the other "computable general equilibrium" (CGE), economic studies that the Bush Administration relied on in its defense of NAFTA. *Id.* at 5-8. Faux and Lee point out that these CGE studies are premised on the assumption that the economies of the NAFTA countries will "enjoy full employment and smoothly adjusting labor markets regardless of how trade changes between them." *Id.* at 5. Faux and Lee provide that "[t]his obviously does not describe reality." *Id.* In general, Faux and Lee note that using these models to predict the effect of NAFTA "is like predicting clear weather for tomorrow with a statistical model whose program does not recognize the possibility of rain." *Id.* at 10.

The Bush Administration in turn criticized the Faux and Lee job loss estimate of 550,000 inaccurate because of its extreme assumptions. *Report of the Administration, supra* note 26, at 62. In particular, the Administration responded that the Faux and Lee study presumed that investments in Mexico could only come at the cost of investment in the United States. *Id.*

28. *Report of the Administration, supra* note 26, at 62.

29. *Report of the Administration, supra* note 26, at 62.

30. *See* USITC, *Impact on the U.S. Economy and Selected Industries of the North American Free Trade Agreement*, Report to the Committee on Ways and Means of the United States House of Representatives and the Committee on Finance of the United States Senate on Investigation No. 332-337, Under Section 332 of the Tariff Act of 1930, USITC Pub. 2596 (1993). *See also* Asra Q. Nomani, *Mexico Is Viewed as the Clear Winner From Trade Pact in Study by ITC*, WALL ST. J., Feb. 3, 1993, at A2 (quoting an ITC study stating that the greatest beneficiary of NAFTA would be Mexico).

31. *See Sending Jobs South of the Border, supra* note 18, at 498 (asserting that United States workers may be forced to accept lower wages in order to prevent companies from relocating to Mexico); ISSUES FOR CONGRESS, *supra* note 10, at 35-36 (analyzing the possible effects of NAFTA on U.S. and Mexican wages). A comparison of relative wages between the U.S. and Mexico reflects the origins of labor's concern here. In 1988, the average hourly wage for "maquiladora" or factory workers was $0.98 in low wage, low skill jobs and $1.99 in selected non-maquiladora national

counter that NAFTA's reduction of trade barriers will result in increased Mexican demand for U.S. products, causing higher productivity and ultimately increasing wages in the United States.[32] Proponents further note that, because U.S. tariffs are already generally low, U.S. labor is already competing with Mexican labor.[33] Therefore, NAFTA's strong provisions, such as the rules of origin sections, will only level the playing field for labor to compete more effectively.[34] Proponents also note that the more educated and productive U.S. workforce will not be threatened by Mexico's lower-wage workforce.[35] Under the "job support" theory, some lower paying jobs may go to Mexico, but these jobs will support greater numbers of higher paying jobs in the United States.[36] Labor critics counter these arguments by questioning the purchasing power for higher value goods and services of a Mexican market comprised of predominantly low-wage workers.[37] Proponents of NAFTA respond that Mexican wages will increase as NAFTA-driven growth creates higher demand for workers and increases the number of higher wage jobs.[38] The experience, however, with maquiladora[39] growth and

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industries. *Id.* at 35. *See also infra* note 39 (more fully defining maquiladora). The average manufacturing wage in the United States in 1988 was $13.85 per hour, with an average hourly wage of $6.20 in manufacturing sectors comparable to those in the maquiladora program in Mexico. *Id.*

32. *Sending Jobs South of the Border, supra* note 18 at 498.

33. *See Report of the Administration, supra*, note 26, at 70 (stating that NAFTA will provide for the immediate reduction of Mexican tariffs to allow labor to compete on a level playing field).

34. *Report of the Administration, supra* note 26, at 70.

35. *See* Weintraub, *supra* note 26, at 13-18 (arguing that the higher paid U.S. workforce is likely to be more competitive than Mexico's workforce).

36. *See* Peter Morici, *Free Trade with Mexico,* 87 FOREIGN POL'Y 88, 104 (explaining that the United States, like Japan, must allow loss of low-skill factory jobs in order to expand its pool of high-skill, knowledge intensive jobs).

37. *Sending Jobs South of the Border, supra* note 18, at 498.

38. *Conference Board's Labor Experts Predict High Unemployment, Small Wage Gains in '92,* DAILY REP. FOR EXECS. (BNA), Nov. 18, 1991, at A15. Improved foreign investment in Mexican businesses has been a factor in creating improved wages. *Sending Jobs South of the Border, supra* note 18, at 499.

39. *See Maquiladoras and the Border Environment Prospects for Moving from Agreements to Solutions,* 3 COLO. J. INT'L ENVTL. L. & POL'Y 683, 683 (1992) (explaining that a maquiladora is a Mexican factory, usually owned by a U.S. parent corporation, that imports materials to Mexico duty-free and exports generally to the United States finished or partially finished products at a reduced duty on only the value added to the product not the total product cost).

wages does not bear this assumption out.[40] Although the number of jobs in maquiladoras has expanded from 100,000 to over 500,000, there has been no corresponding increase in wage rates.[41]

Labor is also concerned that the threat to U.S. jobs is exacerbated by the different regulatory climates under which companies operate in Mexico and the United States.[42] Critics of NAFTA argue that regardless of the relative stringency of Mexico's labor and workplace health and safety laws, the enforcement of these laws in Mexico remains erratic at best.[43] Business sector NAFTA proponents generally discount this fear by arguing that U.S. companies operating abroad have increasingly adopted the same standards and technologies relied upon in the United States.[44] Although many companies may self-police their workplaces, the underlying issue of Mexico's commitment to enforcing labor rights and workplace safety remains. Thus, labor critics argue that absent a commitment on the part of Mexico to enforce these rights and laws, bad actors remain free to violate the law without fear of punishment and, therefore, gain a competitive advantage.[45]

Concerns over NAFTA-related job loss are not unique to the United States. For many Mexican industries, the ability to take advantage of post-NAFTA expanded export opportunities will be determined by their success at modernizing their plants, downsizing their production facilities and workforces, and emphasizing quality control.[46] In the end, Mexican

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40. *See Sending Jobs South of the Border*, *supra* note 18, at 499 (providing that, although the number of Mexican workers employed at maquiladoras has increased dramatically, wage increases have not followed suit).

41. *Sending Jobs South of the Border*, *supra* note 18, at 499.

42. *See Sending Jobs South of the Border*, *supra* note 18, at 499 (indicating that the relative lack of environmental and other regulatory measures in Mexico will heighten Mexican competitiveness).

43. *See Unions, Employers, and Federal Government Debate Effect of NAFTA on U.S. Safety Rules*, Daily Labor Rep. (BNA), Nov. 24, 1992, at A8 (noting that NAFTA does not ensure the enforcement of health and safety laws).

44. *See id.* (quoting Nancy Johnson of DuPont who has stated, "[a]t least in the plants I've seen in Mexico, standards in occupational safety and health improve because DuPont has a practice of following the same policies around the world"). This view is also shared by Dick Boggs, the Vice President of Organization Resource Counselors, who insists "[m]ajor corporations don't want something that happens in Mexico to give them a bad name." *Id.*

45. *See id.* (discussing a University of Lowell study finding *inter alia* that workplace chemical exposures are common in manufacturing plants located in Mexico).

46. Morici, *supra* note 36, at 100.

workers in cities such as Mexico City, Monterrey, and Guadalajara, may find that their plight is not so unlike the plight of U.S. manufacturing workers across the border in cities such as Southern Pines, North Carolina and Owosso, Michigan.[47]

2. Environmental Concerns

Environmentalists are also apprehensive about the effects of NAFTA on U.S. environmental, health, and safety standards. Like labor advocates, they argue that NAFTA standards could be used to compromise the ability of the federal, state and local governments of the United States to adopt more stringent protections.[48] They point to the decision in the GATT Tuna/Dolphin case as grounds for their concerns.[49] On August 16, 1991, in a case initiated by Mexico, a GATT dispute panel issued its draft opinion finding that a U.S. embargo of Mexican tuna and tuna products, pursuant to the Marine Mammal Protection Act (MMPA),[50] violated the rules of GATT.[51] Although the MMPA provi-

47. Morici, *supra* note 36, at 100. For 30 years, Hamilton Beach/Proctor Silex was the largest employer in Southern Pines, North Carolina. AFL-CIO, Goodbye to Southern Pines, Fact Sheet #4, 1992 (reprinted excerpts of a National Public Radio Broadcast of Feb. 11, 1992). In February of 1991, the company moved its factory to Riaz, Mexico. *Id.* Owosso, Michigan is located between the former industrial centers of Flint and Lansing. *See AFL-CIO, If You Ain't Got Hope,* BUS. WK., Mar. 16, 1992. In 1991, five of Owosso's auto-parts makers closed their plants, costing the city 720 jobs, 58% of which were moved to Mexico. *Id.*

48. Center for International Environmental Law, Preliminary Overview of Environmental Concerns Arising from the NAFTA, Aug. 12, 1992, at 1 (submitted on behalf of the Center for International Environmental Law, Public Citizen, Sierra Club, Friends of the Earth, the Natural Resources Defense Council, Defenders of Wildlife, The Humane Society of the United States, Monitor, Society for Animal Protective Legislation, Earth Island Institute, International Fund for Animal Welfare, and the International Wildlife Coalition) [hereinafter Preliminary Overview of Environmental Concerns]; Testimony of Michael McCloskey Before the Senate Committee on Foreign Relations, Mar. 22, 1991, at 4-10 [hereinafter Testimony of Michael McCloskey]; PUBLIC CITIZEN, DOES NAFTA MEASURE UP? YOU BE THE JUDGE, at 1-2 (undated) [hereinafter DOES NAFTA MEASURE UP?].

49. *United States—Restrictions on Imports of Tuna* (adopted Sept. 3, 1991) (Panel Report No. DS21/R) [hereinafter GATT Panel Report].

50. 16 U.S.C. §§ 1361-1407 (1988).

51. *See generally* Robert F. Housman & Durwood J. Zaelke, *The Collision of the Environment and Trade: The GATT Tuna/Dolphin Decision,* 22 ENVTL. L. REP. 10268 (1992) (describing the controversy and its ramifications to other U.S. environmental laws). The panel's decision analyzed both the MMPA's direct embargo provisions, 16 U.S.C. § 1371(a)(2)(B), and the secondary embargo provisions, 16 U.S.C. §

sions in question did contain elements of protectionism, the statute's underlying and primary purpose was to preserve and protect the dolphin, a highly intelligent species for which Americans have a particular affinity; the intent was not to advantage the U.S. tuna industry.[52] When the decision, which under GATT rules was supposed to be confidential, was leaked to and printed in *Inside U.S. Trade*, a furor erupted.[53] Both environmentalists and the U.S. public questioned whether Mexico was as environmentally sound a trading partner as the Bush and Salinas Administrations had portrayed it to be, given that Mexico had challenged what many viewed as sacrosanct environmental protection.[54] The GATT Tu-

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1371(a)(2)(C), as well as the provisions of the Pelly Amendment, 16 U.S.C. § 1371(a)(2)(D), and the Dolphin Protection Consumer Information Act's Labelling Standard, 16 U.S.C. § 1385(d). *Id.* at 10271. *See also* Jeffrey L. Dunoff, *Reconciling International Trade with Preservation of the Global Commons: Can We Prosper and Protect?*, 49 WASH. & LEE L. REV. 1403, 1409-21 (1992) (detailing the GATT Tuna/Dolphin decision-making process).

52. GATT Panel Report, *supra* note 49, at 46. The GATT Panel focused on the manner in which the standard for Mexican dolphin takings was set. *Id.* The MMPA set the incidental takings standard for other nations' fleets over a given period of time by multiplying the unweighted average number of takings by the U.S. fleet in the eastern tropical Pacific Ocean, over that same period of time, by 1.25. 16 U.S.C. § 1371 (a)(2)(B) (1988). The end result of this method of setting the takings standard was twofold: 1) the U.S. fleet could drive the takings standard for the Mexican fleet down by moving their operations out of the Eastern Tropical Pacific Ocean; and, 2) the *ex post facto* nature of the standard prevented the Mexican fleet from knowing in advance what standard they had to meet for any given period. GATT Panel Report, *supra* note 49, at 46.

Despite elements of protectionism, the MMPA's principle purpose is the protection of marine mammals including, in particular, the dolphin. H.R. Rep. No. 707, 92d Cong., 2d Sess., *reprinted in* 1972 U.S.C.C.A.N. 4144. *See* 16 U.S.C. § 1371(a)(2) (1988) (stating that the goal of the MMPA is to reduce "the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations . . . [to] insignificant levels approaching a zero mortality and serious injury rate"); *See also* Ted L. McDorman, *The GATT Consistency of U.S. Fish Import Embargoes to Stop Driftnet Fishing and Save Whales, Dolphins and Turtles*, 24 GEO. WASH. J. INT'L L. & ECON. 477, 490-93 (1991) (stating that the United States was concerned primarily with the incidental taking of dolphins by fishermen using nets); George Cameron Coggins, *Legal Protection for Marine Mammals: An Overview of Innovative Resource Conservation Legislation*, 6 ENVTL. L. 1, 10-15 (1975) (discussing public outrage at the harm to dolphin from fishing practices).

53. INSIDE U.S. TRADE, Sept. 6, 1991, 1-8. *See Divine Porpoise*, ECONOMIST, Oct. 5, 1991, at 49 (describing the reaction within the U.S. government to the printing of the tuna/dolphin decision).

54. *See Divine Porpoise*, ECONOMIST, Oct. 5, 1991, at 49 (indicating that the

na/Dolphin decision brought to the forefront environmentalist concerns that NAFTA's standards could be used by a trading partner to undermine U.S. environmental, health, and safety laws, just as Mexico had done in the Tuna/Dolphin case.[55]

In addition to concerns regarding environmental protection, environmentalists worry about the effects of NAFTA on the obligations of the United States, Canada, and Mexico under existing and future international environmental agreements, such as the Montreal Protocol[56] and the Convention on International Trade on Endangered Species.[57] Further, environmentalists fear that lack of effective enforcement of environmental laws in Mexico will allow unsustainable NAFTA-driven industrial development.[58] They argue that such development may cause Mexico to become a "pollution haven," where dirty industries will locate in order to avoid strict U.S. environmental laws.[59]

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decision's effect was to throw NAFTA into "turmoil"); *The Collision of Environment and Trade*, 22 ENVTL. L. REP. 10268, 10277 (1992) (stating that the Mexican government may not be as environmentally aware as had been previously thought by the United States).

55. *See, e.g.*, George H. Mitchell & J. Patrick Adcock, *A Decision that Rocks the Boat; Imports: Global Trade Rules Become A Threat to Environmental Sensibility*, L.A. TIMES, Sept. 23, 1991, at B5 (stating that the GATT, in the Tuna/Dolphin case, presented an obstacle to environmental sustainability); Keith Schneider, *Balancing Nature's Claims and International Free Trade*, N.Y. TIMES, Jan. 19, 1992, at E5 (asserting that forcing underdeveloped nations to strengthen their environmental laws to the level of those in industrialized countries could lead to greater pollution and poverty).

56. The Montreal Protocol on Substances that Deplete the Ozone Layer, *adopted and opened for signature* Sept. 16, 1987, *entered into force* Jan. 1, 1989, 26 I.L.M. 1541 (1987).

57. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 (entered into force July 1, 1975).

58. *See* ISSUES FOR CONGRESS, supra note 10, at 47 (stating that rapid industrialization of the Mexican border area would result in severe environmental degradation); Preliminary Overview of Environmental Concerns, *supra* note 48, at 1 (stating that strict enforcement of environmental protection standards is essential to NAFTA); Testimony of Michael McCloskey, *supra* note 48, at 9 (stating that SEDUE, Mexico's environmental agency, will not be able to meet the demands of rapid industrialization); *Does NAFTA Measure Up?*, *supra* note 48, 1-2 (arguing that the border environment plan is insufficient in scope and enforcement).

59. *See* ISSUES FOR CONGRESS, *supra* note 10, at 47 (explaining that Mexican border development has occurred faster than government regulation implementation); American Cetacean Society, et al., Response of Environmental and Consumer Organi-

Proponents of NAFTA dismiss this argument by noting that environmental compliance costs are generally not significant enough to encourage industries to relocate solely to avoid the application of environmental protection laws.[60] This response, however, fails to recognize that in certain pollution intensive industries-those industries that would have the greatest detrimental effect on the environment if left unregulated-environmental costs are substantial enough to encourage relocation.[61] Moreover, even if environmental compliance costs do not play a determinative role in industrial siting decisions, they do play a role as part of a broader set of compliance cost issues, including the cost of compliance with labor laws. Companies must incorporate such costs into the pricing of their products, which will affect their ability to compete effectively on international markets. Although these costs may only cause the price of a U.S.-made product to exceed the cost of a Mexican-made product by a few cents, that alone may place U.S. industries at a competitive

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zations to the September 6, 1992 Text of the North American Free Trade Agreement (NAFTA), Oct. 6, 1992, at 3 [hereinafter Response of Environmental and Consumer Organizations] (citing the U.S. firms located in Mexico as contributing to environmental degradation in the border area).

60. *See* Patrick Low, *Trade Measures and Environmental Quality: The Implications for Mexico's Exports, in* WORLD BANK DISCUSSION PAPERS, INTERNATIONAL TRADE AND THE ENVIRONMENT, 105, 112 (1992) (stating that the "pollution intensity" of Mexican exports is not affected by U.S. trade policy); Robert E.B. Lucas, David Wheeler & Hemamala Hettige, *Economic Development, Environmental Regulation and the International Migration of Toxic Industrial Pollution: 1960-88, in* WORLD BANK DISCUSSION PAPERS, INTERNATIONAL TRADE AND THE ENVIRONMENT 67, 68 (1992) (suggesting that lesser developed countries' technologies create less pollution than commonly presumed); Patrick Low, *Do "Dirty" Industries Migrate? in* WORLD BANK DISCUSSION PAPERS, INTERNATIONAL TRADE AND THE ENVIRONMENT 89, 103 (1992) (concluding that the location of polluting industries cannot be fully explained by the relative stringency of environmental standards). Looking only at the current costs of compliance, however, fails to take into account a number of important factors, including: 1) the myriad business benefits provided by a free trade agreement that also encourages businesses to relocate to areas where environmental enforcement is nonexistent; and 2) the fact that, given the trend towards higher environmental standards, current compliance costs do not necessarily reflect the costs of compliance in future years.

61. GENERAL ACCOUNTING OFFICE, U.S.-MEXICO TRADE: SOME U.S. WOOD FURNITURE FIRMS RELOCATED FROM LOS ANGELES TO MEXICO, REPORT TO THE CHAIRMAN, COMM. ON ENERGY AND COMMERCE, HOUSE OF REPRESENTATIVES, GAO/NSIAD 91-191, at 1-4 (Apr. 1991). *See* Robert Reinhold, *Mexico Proclaims an End to Sanctuary for Polluters*, N.Y. TIMES, Apr. 18, 1991, at A20 (stating that Southern California air quality standards have caused about 40 furniture makers to move to Mexico since 1988).

disadvantage.[62] Further, the total cost of regulatory compliance in the United States, as opposed to Mexico, may be far more substantial still.

II. NAFTA'S PROVISIONS ON THE ENVIRONMENT AND LABOR

Given the wide reach of NAFTA's provisions, it is almost impossible to address every section of the Agreement that could potentially effect environmental or labor concerns. This limitation aside, the following section discusses certain NAFTA provisions of significant concern.

A. THE NAFTA TEXT AND THE ENVIRONMENT

The Bush Administration accurately characterized NAFTA as the "greenest" trade agreement ever negotiated.[63] This statement, however, must be viewed in the context of international trade agreements that, historically, have had little regard for environmental protection. Thus, NAFTA should be evaluated with respect to the environmental protection and the health and safety standards it does or does not provide. Vague and unenforceable promises, such as those in NAFTA's preamble that refer to sustainable development and strengthening enforcement of environmental laws, should not be seen as substitutes for mandatory requirements.[64]

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62. *See* Friends of the Earth, Standards Down, Profits Up!, Jan. 1993 (finding that the failure to comply with environmental laws can increase some industries' profit by upwards of 200%). *See also* Robert F. Housman, *A Kantian Approach to Trade and the Environment*, 49 WASH. & LEE L. REV. 1373, 1384-85 (1992) (discussing the benefits of a scheme of environmental countervailing duties as a means of addressing international disparities in environmental compliance costs); Thomas K. Plofchan Jr., *Recognizing and Countervailing Environmental Subsidies*, 26 INT'L LAW. 763, 780 (1992) (stating that countervailing duties and recognizing environmental subsidies will be important in improving market efficiency); Michel Prieur, *Environmental Regulations and Foreign Trade Aspects*, 3 FLA. INT'L L.J. 85, 86 (1987) (stating that countervailing duties are possible in certain situations under Article VI of GATT).

63. *See, e.g., The Role of Science in Adjudicating Trade Disputes Under the North American Free Trade Agreement, Hearing before the House Committee on Science, Space, and Technology*, 102d Cong., 2d Sess. 77 (1992) (testimony of Charles Roh, Assistant U.S. Trade Representative for North American Affairs) (stating that "[t]his agreement does more to improve the environment than any other agreement in history").

64. *See* NAFTA, *supra* note 8, Preamble (stating that the parties resolve to "promote sustainable development" and "strengthen the development and enforcement of environmental laws and regulations").

Environmentalists have focused mainly on the following issues in analyzing NAFTA's actual "shade of green": standards and standards-related measures (sanitary, phytosanitary and technical standards measures); dispute settlement procedures; energy; water; investment; NAFTA's relation to environmental and conservation agreements; and the accession of other countries to NAFTA framework. Also of concern to environmentalists are several issues not addressed in NAFTA. These include, but are not limited to the funding of infrastructure on the border and in the interior of Mexico; the enforcement of environmental, health, and safety regulations in Mexico,[65] and; the formation and powers of a trilateral environmental commission.[66]

1. Standards and Standards-Related Measures

Historically, the United States has adopted health and safety standards regarding the environment, workplace and marketplace, that are stricter than those enforced by its international trading partners.[67] Currently, a number of fora are attempting to harmonize these standards, out of fear that divergent policies will otherwise inhibit international trade.[68] Congress has recognized the danger that trade agreements can conceivably pose to its own high standards:

> The Congress will not approve legislation to implement any trade agreement including [GATT and NAFTA] if such agreement jeopardizes United States health, safety, labor, or environmental laws (including the Federal Food, Drug, and Cosmetic Act and the Clean Air Act).[69]

Partly because Congress and environmental groups stressed the importance of setting and enforcing high standards during the course of the NAFTA negotiations,[70] the resultant NAFTA provisions are, from an

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65. *See infra* notes 309-19 and accompanying text (discussing funding and enforcement concerns for the Integrated Environmental Plan for the Mexican-United States Border Region).

66. *See infra* notes 418-28 and accompanying text (discussing the formation of a trilateral environment commission to address environment concerns).

67. Ralph Nader, *A Deal That's Hazardous to Health*, L.A. TIMES, Aug. 6, 1992, at A11.

68. CONGRESSIONAL RESEARCH SERVICE, SANITARY AND PHYTOSANITARY MEASURES PERTAINING TO FOOD IN INTERNATIONAL TRADE NEGOTIATIONS, Sept. 11, 1992, at 1.

69. H.R. Cong. Res. 246 § 2, 102d Cong., 2d Sess., 138 Cong. Rec. H7699 (Aug. 6, 1992).

70. *See, e.g.*, Environmental Safeguards for the North American Free Trade

environmental perspective, perhaps the strongest sections of the Agreement.[71] Nevertheless, the provisions are not without flaws and ambiguities that could be magnified by NAFTA's secretive dispute resolution provisions. The flaws in these provisions are discussed below.

Chapter 7, section B, of NAFTA establishes sanitary and phytosanitary (S & P) standards.[72] Chapter 9 sets forth rules on standards-related measures, other than those covered in the S & P rules or in the government procurement rules of Chapter 10, but including such topics as technical requirements for children's toys, aircraft parts and product labelling requirements.[73]

Agreement, June 1992, at 5-6 [hereinafter Environmental Safeguards] (joint statement of 13 environmental groups) (on file with the authors) (criticizing standards provisions in the current draft of the NAFTA and suggesting alternative language).

71. *The Role of Science in Adjudicating Trade Disputes Under the North American Free Trade Agreement 1992, Hearing Before the House of Representatives Committee on Science, Space, and Technology*, 102d Cong., 2d Sess. 22 (1992) (statement of Robert F. Housman) [hereinafter Housman Statement]. *See* Steve Charnovitz, *NAFTA: An Analysis of its Environmental Provisions*, 23 ENVTL. L. REP. 10067, 10069 (1993) [hereinafter *NAFTA Analysis*] (stating that NAFTA standards provisions are a "major improvement" over the GATT Dunkel text).

72. NAFTA, *supra* note 8, ch. 7, § B. S & P measures are defined by NAFTA Article 724 as follows:

> 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 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,
>
> 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 or 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 or animals or plants or with material necessary for their survival during transportation;

Id. art. 724.

73. NAFTA, *supra* note 8, art. 901. Article 915 limits technical regulations to "product characteristics or their related processes and production methods, or for services or operating methods, including the applicable administrative provisions," thus preventing the regulation of some products based strictly on environmentally damaging

These rules encompass state and local standards and, under certain circumstances, standards set by non-governmental entities.[74] They were, however, negotiated with only federal standard-setting procedures in mind, and not those of the myriad state, local, and non-governmental entities.[75] Although state and local governments were generally excluded from the NAFTA negotiations, the United States could confront claims by Mexico or Canada that it is discriminating against their exports because those exports do not meet the standard established by a state or local government.[76]

The threat to state standards is real. For example, the Administrator of the U.S. Federal Highway Administration has issued a final rule that is now being challenged in federal court, preempting states from requiring or issuing licenses to foreign commercial drivers operating in the United States.[77] This rule appears to diminish substantially the ability of

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production processes. *See NAFTA Analysis, supra* note 71, at 10068-10069 (discussing failure to allow production standards as a limitation on the NAFTA's purported goal of promoting sustainable development).

74. NAFTA, *supra* note 8, arts. 105, 709, 711, 902. Article 711 requires a Party to ensure that any non-governmental entity on which it relies in applying an S & P measure complies with NAFTA's S & P rules. *Id.* art. 711. Article 902 requires the Parties to ensure that state, local, and non-governmental standardizing bodies comply with the substantive rules on standards-related measures (Articles 904 through 908), but they need not ensure compliance by such parties with the remaining procedural rules of Chapter 9 (Articles 909 through 912). *Id.* art. 902. The requirement that the parties ensure compliance by non-governmental entities for all substantive standards-related measures could, for example, force engineering associations and consumer organizations, such as Good Housekeeping and Green Seal, to comply with NAFTA's rules. Housman Statement, *supra* note 71, at 28.

75. *See* Housman Statement, *supra* note 71, at 24, 28 (discussing the financial hardships that NAFTA may impose on state and local standard setting authorities).

76. In fact, such a trade dispute case has recently been initiated under the CFTA. *See* In re Ultra-High Temperature Milk from Quebec, No. USA-92-1807-02 (1992) (appearing before the Panel Convened Pursuant to Chapter 18 of CFTA). The case is extremely significant in that it will interpret the rights and obligations of the United States and Canada with respect to enforcing technical standards designed to protect public health and safety, while also marking the first time that a food safety standard has been challenged under the CFTA. Moreover, the ability of a subfederal entity to set its own consumer safety standards is being challenged because of the terms agreed to in a trade agreement by the federal government. *See also* Kate Tambour, *NAFTA's Cloud Over the States*, 9, POLICY ALTERNATIVES ON ENVIRONMENT - A STATE REPORT, 1992, at 1, 5 (explaining that "the S & P's section does not contain specific exclusions for state and local law").

77. *See Commercial Driver's License Reciprocity With Mexico*, 57 Fed. Reg. 31,454 (1992) (to be codified at 49 C.F.R. 383) (stating that Mexican commercial

states to use licensing requirements to impose regulations designed *inter alia* to ensure the safety and proper monitoring of their roads.[78] Moreover, the process by which this rule came about is also informative as to the role of states in NAFTA decisions affecting their standards. The commercial driver's license rule was adopted to implement a Memorandum of Understanding between the United States and Mexico, and was enacted without notice and comment rulemaking.[79]

Furthermore, if a party "relies" on a non-governmental entity in "applying" an S & P measure, the party "shall ensure" that the entity acts in accordance with NAFTA's S & P rules.[80] Because the text fails to define the meaning of these terms, it is unclear what degree of involvement by a non-governmental entity, in a typical setting, requires adherence to NAFTA rules. These ambiguities may force a wide range of non-governmental entities involved in the standard-setting process to strictly adhere to the S & P dictates of NAFTA.[81]

Article 712.1 establishes the right of a party to take S & P measures and to set its own "appropriate level of protection" with respect to human, animal, plant life or health.[82] This right applies to protect one's own citizens, although it is not mandated in the case of domestically-grown products that are then shipped out of the country.[83] Moreover, Article 712.1 fails to eliminate the distinction between standards regulating the finished product and standards regulating the process of produc-

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drivers license will be recognized in the United States); International Bhd. of Teamsters v. Peña, No. 92-1413 (D.C. Cir. filed Sept. 14, 1992) *petition for review*, 4 (arguing that the final rule was issued without proper notice and comment).

78. *See* International Bhd. of Teamsters v. Peña, No. 92-1413 (D.C. Cir. filed Sept. 14, 1992), *petition for review*, 4 (noting that a federal rule preempts states age limits for obtaining driver's licenses and endorsements for specific equipment).

79. *Id.*

80. NAFTA, *supra* note 8, art. 711.

81. Housman Statement, *supra* note 71, at 24-25.

82. NAFTA, *supra* note 8, art. 712.1.

83. NAFTA, *supra* note 8, art. 712.1. The application of NAFTA Article 712.1 is limited to the territory of the party, thus failing to recognize the need for nations to consistently monitor the safety of those products shipped abroad as well as those consumed internally. *See also The Role of Science in Adjudicating Trade Disputes Under the North American Free Trade Agreement: 1992 Hearing Before the House of Representatives Committee on Science, Space, and Technology*, 102d Cong., 2d Sess. 38, 53 (statement of David A. Wirth) [hereinafter Wirth Testimony] (discussing ramifications of the territorial limitation focusing on the ability of the United States to take measures to protect the environment outside of its borders in order to limit environmental damage that may effect U.S. territory).

tion. This failure would restrict the ability of the United States to exclude products produced abroad in a manner damaging to the environment.[84]

Article 712.2 requires a party to establish a single, across-the-board "level" of protection in setting S & P measures.[85] The requirement of a single level of protection (as opposed to "levels") could significantly hinder standard setting procedures in the United States, where different areas often adopt different levels of protection based on particular socio-political facts.[86] Under a single level test, the United States may be precluded from employing different levels of risk in entirely unrelated areas of regulation. For example, allowing certain levels of salmonella in chicken, as opposed to zero tolerance for carcinogenic food additives, could violate NAFTA's textual ban on more than one "level" of protection.[87]

According to Article 712.3, S & P standards must be "based on scientific principles taking into account relevant factors."[88] NAFTA fails to provide any guidance as to the meaning of these terms, thus permitting a NAFTA trade dispute panel to determine whether an S & P standard satisfies NAFTA requirements. Article 712.3 also requires that an S & P standard be "based on a risk assessment."[89] The "risk assessment" requirement could undermine the enforceability of some U.S. laws. The Delaney Clauses of the Federal Food, Drug, and Cosmetic Act,[90] for

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84. *See* Housman Statement, *supra* note 71, at 25 (citing the GATT Tuna/Dolphin decision as an example of such a hindrance to United States law).

85. NAFTA, *supra* note 8, art. 712.2.

86. *See* Housman Statement, *supra* note 71, at 25. *Compare*, NAFTA, *supra* note 8, art. 904.2 *with* United States-Canada-Mexico, North American Free Trade Agreement, *signed* Dec. 17, 1992, art. 904.2 (text released Sept. 8, 1992) (noting this discrepancy). The September 8th text of NAFTA article 904.2, Right to Establish Level of Protection, regarding standards-related measures, was originally drafted to allow permissible "levels" in Article 904.2 protection. NAFTA, *supra* note 8, art. 904.2. In the October text, the term "levels" became "level" in Article 904.2. It is unclear whether this amendment was substantive or in response to a typographical error.

87. PUBLIC CITIZEN, WHY VOTERS ARE CONCERNED: ENVIRONMENTAL AND CONSUMER PROBLEMS IN GATT AND NAFTA, BRIEFING BOOK FOR THE 103RD CONGRESS, Nov. 1992, at 24 [hereinafter BRIEFING BOOK].

88. NAFTA, *supra* note 8, art. 712.3.

89. NAFTA, *supra* note 8, art. 712.3.

90. *See* Wirth Testimony, *supra* note 83, at 50-51 (noting that "it is more than plausible to conclude that a total ban on . . . a color additive is not 'based on' a risk assessment," thus possibly invalidating the Delaney anti-cancer clauses" in the Federal Food, Drug, and Cosmetic Act); Center for Policy Alternatives, Policy Alter-

example, ban any amount of carcinogenic additives in food and any amount of carcinogenic pesticide residues in processed foods. Congress has decided to impose a "zero" risk standard for carcinogens in the food supply, rather than undertake a risk assessment to determine the amount of carcinogens in food that are politically acceptable.[91] The Delaney Clauses, therefore, appear to be susceptible to challenge by Canada or Mexico as "unlawful" trade barriers under NAFTA because they fail to utilize a risk assessment.

Article 712.4 of the S & P standards forbids arbitrary or discriminatory treatment between "like" products of another party, or between domestic and any "like" imported products "where identical or similar conditions prevail."[92] The S & P also assures non-discrimination for "like goods" under the standards-related measures in Article 904.3(b).[93] The S & P standards provide no guidance as to the basis for distinguishing between domestic products and their "like" imported counterparts. Thus, it is unclear when the S & P standards for non-domestic goods can be applied to "like" imported products without violating the non-discrimination provision.[94] Article 712.4 may further limit the use of S & P standards by expanding the GATT's non-discrimination provision from a "same conditions prevails" standard to an "identical *or similar* conditions prevails" standard.[95]

Article 712.5 obligates the parties to apply S & P measures "only to the extent necessary to achieve its appropriate level of protection, taking

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natives on the Environment - A State Report, Dec. 1992, 5 (noting that the Delaney Clause is subject to challenge under the risk assessment requirement of Article 904.2). *See also* Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 348 (c)(3)(A), 376 (b)(5)(B), 409 (c)(3), 706 (b)(5)(B) (1988) (establishing the "absolute risk" requirement that prevents the FDA from approving even minimal use of carcinogenic food additives).

91. *See* Les v. Reilly, 968 F.2d 985 (9th Cir. 1992) (affirming the Delaney Clause's "absolute zero" risk requirement); Public Citizen v. Young, 831 F.2d 1108 (D.C. Cir. 1987), *cert. denied sub. nom.*, Cosmetic Toiletry & Fragrance Ass'n v. Public Citizen, 485 U.S. 1006 (1988).

92. NAFTA, *supra* note 8, art. 712.9.

93. NAFTA, *supra* note 8, art. 904.3(b).

94. *See* Housman Statement, *supra* note 71, at 26 (citing the GATT Tuna/Dolphin decision, which used a "like" product finding not involving an S & P standard as a linchpin to rule against the trade embargo imposed by the United States on Mexican tuna under the Marine Mammal Protection Act. *See also* Housman & Zaelke, *supra* note 51, at 10269 (suggesting that the GATT Tuna/Dolphin decision will force a reevaluation of the compatibility of trade restrictions and other environmental treaties).

95. NAFTA, *supra* note 8, art. 712.4; *NAFTA Analysis*, *supra* note 71, at 10068.

into account technical and economic feasibility."[96] Article 904.4 obligates the parties to avoid using a standards-related measure to create an "unnecessary obstacle" to trade.[97] The GATT has interpreted the term "necessary" to preclude a trade restrictive regulation unless that restriction is the "least trade restrictive available" to attain the end sought.[98] The GATT's interpretation of "necessary" could become part of NAFTA jurisprudence, given that NAFTA explicitly affirms the parties "existing rights and obligations with respect to each other" under the GATT, and given that no S & P provision precludes use of the GATT interpretation.[99] The GATT's interpretation of "necessary" has already been utilized by Canada, a leading producer of asbestos, to argue against an EPA rule that banned the importation of many products containing asbestos.[100] An additional test in Article 754.5, requiring evaluation of the technical and economic feasibility of an S & P measure, may also provide a dispute panel with an opportunity to rule that a U.S. safety standard is too complex or costly for our NAFTA trading partners.[101]

Although a party may establish its own level of S & P protection as provided in Article 712.2, no party may adopt, maintain, or apply an S & P measure with "a view to, or the effect of, creating a disguised

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96. NAFTA, *supra* note 8, art. 712.5.

97. NAFTA, *supra* note 8, art. 904.4. Article 904.4 defines "an unnecessary obstacle" as follows:

> An unnecessary obstacle to trade shall not be deemed to be created where: (a) the demonstrable purpose of the measure is to achieve a legitimate objective; and (b) the measure does not operate to exclude goods of another Party that meet that legitimate objective.

Id. art. 904.4(a),(b). Legitimate objectives include safety, the protection of human, animal or plant life or health, protection of the environment and consumers, and sustainable development. *Id.* art. 915. These objectives appear to be a rational approach to protecting and improving the current U.S. standards regime. However, by using the phrase "demonstrable purpose," an aggrieved Party is virtually invited to seek a dispute resolution hearing on whether its NAFTA trading partner can prove that a trade-restricting standard achieves a legitimate objective. *Id.* art. 904.4(a),(b). The "necessary" test also appears in Article 908.3(a) on conformity assessments of standards-related measures. *Id.* art. 908.3(a).

98. *See* Wirth Testimony, *supra* note 83, at 48 (discussing problems that have arisen with respect to the word "necessary" in the GATT context).

99. *See* NAFTA, *supra* note 8, art. 103.1 (affirming the parties' existing rights and obligations under the GATT).

100. *See* Wirth Statement, *supra* note 83, at 49-50 (citing Brief for Amicus Curiae Government of Canada at 17-19, Corrosion Proof Fittings v. Environmental Protection Agency, 947 F.2d 1201 (5th Cir. 1991)).

101. Housman Statement, *supra* note 71, at 26.

restriction on trade."[102] It would seem that a dispute panel would have a difficult time reconciling these two provisions because a legitimate S & P measure taken by one party could certainly be viewed by another as a measure which has the effect of creating a disguised trade restriction.[103]

After a party performs a NAFTA-prescribed risk assessment in the establishment of a standards-related measure, Article 907.2 disallows arbitrary or unjustifiable distinctions in the level of protection between "similar goods or services." The requirement that "similar" goods of a NAFTA trading partner be examined in establishing levels of risk increases the number of goods that can be claimed to have been discriminated against, therefore increasing the possibility of a dispute panel ruling against a U.S. standard.[104]

In performing an assessment of health, safety, or environmental risks when setting an S & P measure, NAFTA mandates that the parties consider economic and trade restricting factors in their analysis, as well as scientific and other evidence needed to assess the levels of risk.[105] The United States has consistently used the public health as its sole criterion when performing risk assessments of proposed S & P measures.[106] Economic and trade factors would seem to be misplaced in

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102. NAFTA, *supra* note 8, art. 712.6.

103. *See* Housman Statement, *supra* note 71, at 26 (discussing the disguised restriction prohibition in Article 754.6). The "disguised restriction" dilemma also appears in the risk assessment provisions of both the S & P and standards-related measures chapters. NAFTA, *supra* note 8, art. 715.3(a) and art. 907.2(b).

104. Housman Statement, *supra* note 71, at 29. The "similar goods" rule seems to encompass an even broader spectrum of comparability than the "like product" rule in Article 712.4. *See supra* notes 92-95 and accompanying text (providing qualifying language for determining the Article's applicability).

105. NAFTA, *supra* note 8, art. 715.2; *Possibility of Amending GATT Sanitary Provisions Discussed,* PESTICIDE & TOXIC CHEMICAL NEWS, Nov. 18, 1992, at 28. The language of Article 715.2 is intended to allow a party to take an S & P measure to prevent large economic losses from widespread crop destruction due to inadvertently imported pestilence. NAFTA, *supra* note 8, art. 715.2. However, the language of Article 715.2 fails to limit the use of economic factors to those related to crop loss in the importing country. *Compare* NAFTA, *supra* note 8, art. 715.2(b) (allowing parties to take S & P measures to prevent economic loss) *with id.* art. 715.2(c) (providing economic factors to be looked at without domestic limitation in scope). Thus, the economic factors related to the application of the standard in the exporting country must also be examined.

106. *See* Alliance for Responsible Trade, Citizen Trade Campaign Letter to President-elect Clinton, "Citizen Concerns on NAFTA" 1, Dec. 15, 1992 (discussing risk

such an assessment. Article 714 and Article 906 require the parties to pursue "equivalence" or "make compatible" their respective standards without sacrificing the protection of animal or plant life.[107] The introduction of these "upward harmonization" principles is the most significant environmental measure in NAFTA.[108] There is a fear, however, that these attempts at harmonization of standards may lead to the "watering down" of U.S. health standards, among others.[109] If scientific evidence as to a particular threat is insufficient to complete a full risk assessment, Article 715.4 permits the adoption of temporary or provisional S & P standards.[110] This can effectively bypass the established U.S. health and safety procedures by allowing unsafe foods, which would otherwise be refused entry, admission under provisional standards.[111] Foods containing residues that have not been completely evaluated in the United States could be imported under the standards established by international standard setting bodies, such as the Codex Alimentarius.[112] These standard setting bodies generally adopt less strin-

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assessments only in regard to public health and safety concerns with NAFTA).

107. NAFTA, *supra* note 8, art. 714.1 and art. 906. Article 906.2 actually reads as follows: "[w]ithout reducing the level of safety or of protection of human, animal or plant life or health, the environment or consumers . . . the Parties shall, to the greatest extent practicable, make compatible their respective standards-related measures so as to facilitate trade in a good or service between the parties." *Id.* It also adds the additional provision that the parties "shall, in accordance with [Chapter 9], work jointly to enhance the level of safety and of protection of human, animal and plant life and health, the environment and consumers." *Id.* art. 906.1.

108. *See NAFTA Analysis, supra* note 71, at 10071 (noting the importance of harmonizing the standards). This provision is contrary to the draft GATT Uruguay Round provision which may permit the downward harmonization of standards. *Id.*

109. Bruce Stokes, *The Road from Rio*, NAT'L J., May 30, 1992, at 1286. For example, Mexican farmers continue to use DDT as a pesticide, while the United States prohibits the sale of fruits and vegetables which contain DDT residue. *Id.* Reportedly, 17 pesticides that are illegal in the United States are used in Mexican agriculture. BRIEFING BOOK, *supra* note 87, at 25. Moreover, 58 pesticides that can be used on some produce under U.S. law are used in Mexico in a manner that is illegal in the United States. *Id.*

110. NAFTA, *supra* note 8, art. 715.4.

111. *See* NAFTA, *supra* note 8, art. 907.3 (noting that when conducting risk assessments on standards-related measures, provisional measures may also be established). These provisional regulations must be reviewed and revised after sufficient scientific evidence and other information is available for a full assessment of risk. *Id. See also* BRIEFING BOOK, *supra* note 87, at 21, 23.

112. BRIEFING BOOK, *supra* note 87, at 21, 23. Codex Alimentarius (Codex) is a United Nations-affiliated standard setting group that deals with food, chemical and ag-

gent standards than the United States does.[113] Temporary or provisional measures are favorably viewed by some as an adoption of the "precautionary principle," whereby the absence of complete scientific information does not delay the adoption of an environmental protection measure.[114]

Article 722 establishes a Committee on Sanitary and Phytosanitary Measures, and Article 913 establishes a Committee on Standards-Related Measures.[115] Their responsibilities consist of facilitating the harmonization of standards, improving technical cooperation among the parties, and establishing work groups to address specific issues.[116] Although the provisions permit the committees to consult with outside experts on S & P measures, there is no requirement that they do so.[117] Moreover, there is no provision requiring the committees' procedures to be open to overview and input from the public.[118]

Both the S & P and the standards-related measures chapters contain provision that impose on the party asserting a standard is inconsistent with NAFTA, the burden of establishing the inconsistency.[119] Unfortunately, these provisions are too ambiguous as to the type of burden imposed. Is the burden a simple *prima facie* burden[120] that would shift

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ribusiness companies. *Id.* Codex, however, has no health or environmental interests represented in its negotiations, and thus has set many standards (including residues of DDT) at lower levels than those accepted by the United States. *Id.* at 21.

113. *See* BRIEFING BOOK, *supra* note 87, at 21, 23 (discussing conflicting views of the role of Codex). *Compare* John P. Frawley, *Codex Alimentarius—Food Safety—Pesticides*, 42 FOOD DRUG COSM. L.J. 168 (1987) (documenting the history of Codex and its effectiveness) *with* Daphne Wysham, NATION, Dec. 17, 1990, at 770-72 (noting leniency in Codex standards; "42 percent of Codex's standards for pesticide residues are less stringent than those of the current EPA and FDA").

114. *See* Testimony of Stewart J. Hudson, on behalf of the National Wildlife Federation, before the Subcommittee on International Trade of the Senate Committee on Finance, 102 Cong., 2d Sess. (Sept. 16, 1992) [hereinafter Hudson Testimony] (noting that Articles 757(4) and 907(8) provide protection for environmental measures).

115. NAFTA, *supra* note 8, art. 722 and art. 913.

116. NAFTA, *supra* note 8, art. 722 and art. 915.

117. NAFTA, *supra* note 8, art. 722. Article 722.3(b) states that "the Committee may draw on such experts and expert bodies as it considers appropriate." *Id.*

118. NAFTA, *supra* note 8, art. 722. *See* Housman Statement, *supra* note 71, at 27, 30 (noting that there is no mandatory inclusion of the public in committee efforts). *See also* Hudson Testimony *supra* note 114, at 5 (stating that public participation should be "a requirement and not an afterthought").

119. NAFTA, *supra* note 8, arts. 723.6, 914.4.

120. *See* Industry Policy Advisory Committee for Trade and Policy Matters Report

the actual burden to the defending party once an initial showing of inconsistency with NAFTA is made?[121] Or does the burden reach a more significant level, requiring the challenger to show by substantial evidence or by a preponderance of the evidence, that a health or safety standard is merely a disguised trade restriction?[122] Ensuring that the party challenging a standard had a substantial burden of proof was a main concern of the environmental community during the negotiations.[123]

2. Dispute Settlement

Given the ambiguities and discrepancies in the S & P and standards-related measures of NAFTA, along with other free trade and environmental protection conflicts that are discussed below,[124] the dispute settlement procedures set forth in Chapter 20 Section B are critical to the overall environmental soundness of NAFTA.[125] Most importantly,

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on the North American Free Trade Agreement, Sept. 14, 1992, at 14 [hereinafter IPAC Report on NAFTA] (stating that the S & P provisions in NAFTA have imposed a *prima facie* burden of proof on the disputing party).

121. *See* GATT, *supra* note 2, at art. XX (noting that Article XX provides that a party challenging a health standard must show only a *prima facie* violation before the burden falls to the defending party to make an affirmative defense based on GATT's natural resources provision in Article XX). *See also* Housman & Zaelke, *supra* note 51, at 546 (outlining policy exemptions in Article XX).

122. *See Possibility of Amending GATT Sanitary Provisions Discussed*, PESTICIDE & TOXIC CHEMICAL NEWS, Nov. 18, 1992, at 28 (quoting EPA Deputy Director, Policy and International Affairs Div., William L. Jordan, that the burden "could be the preponderance of evidence" but that "until an adjudication we don't know").

123. *Environmental Safeguards*, *supra* note 70, at 6. *See also* Robert Housman, *Improving the NAFTA Dispute Resolution Provisions*, CENTER FOR INT'L ENVTL. L., Aug. 1992 [on file with authors] (imploring that NAFTA incorporate public participation and increase due process protection in its dispute process). *But see*, Wirth Testimony, *supra* note 83, at 60 (noting that results in previous trade panel cases did not depend on the allocation of the burden).

124. *See supra* notes 67-123 (discussing various faults with NAFTA's S & P standards).

125. *See* NAFTA, *supra* note 8, art. 2004 (setting forth the basis for a dispute settlement). A party has recourse to dispute settlement procedures for any and all disputes between the parties on interpretation of NAFTA, whenever a party believes an actual or proposed measure of another party is inconsistent with NAFTA or would cause "nullification or impairment" in accord with Annex 2004. *Id.* The language in Annex 2004 seems to permit recourse to dispute settlement procedures in many instances. *Id.* NAFTA states that if a party "considers that any benefit it could reasonably have expected to accrue to it under any provision of [certain NAFTA chapters

NAFTA permits the party, whose S & P standards or standards-related measures are challenged, to defend its regulations before a NAFTA rather than a GATT panel.[126] This choice of forum clause, however, appears to apply only to standards affecting a party's domestic environment and not the "global commons."[127] The other main areas of contention with NAFTA's dispute procedures are, a lack of public participation, uncertainty regarding scientific input, and panel membership.[128]

Article 2012.1(a) mandates that all submissions to and communications with the panel, along with panel hearings, deliberations, and initial reports, be confidential.[129] The final report of a panel is published, but may be kept confidential if the parties wish.[130] Model Rules of Procedure for panel disputes are slated to be established at a later date, but there is no provision in the Agreement that would permit citizens and other interested parties to submit documents for consideration by the panel.[131] Moreover, Articles 2004 and 2013 specifically limit participation in the disputes to the parties.[132] This process is strikingly similar

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including S & P measures and standards-related measures] is being nullified or impaired as a result of the application of any measure that is not inconsistent with [NAFTA], the Party may have recourse to dispute settlement. NAFTA, *supra* note 8, Annex 2004.

126. NAFTA, *supra* note 8, art. 2005.4. This right to forum selection also applies to challenges to actions taken by a party which it claims are consistent with the international environmental agreements (IEAs) listed in Article 104. *Id.* art. 2005.3. *See infra* notes 172-80 and accompanying text (discussing limits of Article 104).

127. *See NAFTA Analysis*, *supra* note 71, at 10070 (discussing this limitation and how it could force the United States to defend, before a GATT panel, its recently enacted legislation regulating wild bird imports). *See also* John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 WASH. & LEE L. REV. 1227, 1242 [hereinafter *Congruence or Conflict?*] (discussing the global commons in the context of GATT jurisprudence).

128. *See NAFTA Analysis*, *supra* note 71, at 10070 (discussing environmental and procedural concerns with NAFTA).

129. NAFTA, *supra* note 8, art. 2012.1(b).

130. NAFTA, *supra* note 8, art. 2017.4. The final report is published 15 days after it is given to the Commission. *Id.*

131. NAFTA, *supra* note 8, art. 2012. *See* Response of Environmental and Consumer Organizations, *supra* note 59, at 5 (noting the strict confidentiality of NAFTA disputes).

132. NAFTA, *supra* note 8, arts. 2004, 2013. Article 2013 states: "A Party that is not a disputing Party, on delivery of a written notice to the disputing Parties and to its Section of the Secretariat, shall be entitled to attend all hearings, to make written and oral submissions to the panel and to receive written submissions of the disputing Parties." *Id.*

to the GATT dispute settlement process that has been roundly criticized for its secrecy and lack of transparency.[133] The efforts of a number of environmental groups to create a NAFTA dispute process with sufficient public participation have been rebuffed by the parties.[134]

The ability of dispute panels to obtain impartial and effective environmental information has also been a concern of the environmental community.[135] The role of experts and scientific review boards in the dispute settlement process is outlined in Articles 2014 and 2015.[136] Either the panel or a disputing party may seek information and technical advice from relevant expert entities, provided that both disputing parties agree, and subject themselves to the terms imposed by each other.[137] Conditioning the use of experts, however, may hamper their effectiveness if they are used.[138]

A report by a scientific review board is also available to a panel on request of a disputing party, but the panel itself may not request such a report unless both disputing parties permit.[139] Once established, and subject to the terms and conditions of the disputing parties, the scientific review board reports on a factual issue concerning environmental, health,

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133. *See Congruence or Conflict?*, *supra* note 127, at 1255 (suggesting that these attributes could be addressed in order to increase public acceptance of the GATT). *See also* Wirth Testimony, *supra* note 83, at 61 (discussing the closed nature of the dispute settlement process in the context of the Tuna/Dolphin case and questions regarding the vigor of the United States defense); Housman & Zaelke, *supra* note 51, at 607-08 (stating that "[e]nvironmentalists view transparency and public participation as integral to the democratic process and to rational decision-making").

134. *See* Environmental Safeguards, *supra* note 70, at 8 (suggesting more public participation in the dispute process); Pollution Probe, National Wildlife Federation, Binational Statement of Environmental Concerns Arising from the NAFTA, May 1992, at 6 [hereinafter Pollution Probe/NWF Statement] (noting various efforts to revise the dispute process). *See also* David B. Hunter, *Toward Global Citizenship in International Environmental Law*, 28 WILLAMETTE L. REV. 547 (1992) (discussing the role of citizens' rights in solving global environmental problems).

135. *Id. See also Preliminary Overview of Environmental Concerns Arising from the NAFTA*, CENTER FOR INT'L ENVTL. L. 2 (Aug. 1992) [hereinafter *CIEL Concerns*] (noting the need to incorporate environmental concerns on equal basis with free trade concerns). The GATT panel's non-use of scientific or technical expertise in the Tuna/Dolphin case is the major impetus for the concern. *Id.*

136. NAFTA, *supra* note 8, arts. 2014, 2015.

137. NAFTA, *supra* note 8, art. 2014.

138. *See* Housman Statement, *supra* note 71, at 31 (noting that one party can basically block another from using objective experts for advice and counsel, which would often occur in a dispute process due to the inherent animosity).

139. NAFTA, *supra* note 8, art. 2015.1.

safety or other scientific matters raised by a party in the proceeding.[140] Both parties may comment on the board's report, and the panel shall consider both the report and comments in its decision.[141] Because a disputing party is unlikely to agree to the use of a scientific review board's report that would prejudice its position, NAFTA cannot guarantee that a scientific review board will be established.[142] A dispute panel, therefore, may not hear the independent scientific information concerning public safety hazards, which is necessary to decide whether an S & P standard constitutes an obstacle to trade.[143] In addition to being limited by any conditions set by the parties, the review board, according to Article 2015, can only examine factual questions.[144] Accordingly, a board is not permitted to contribute its criticisms or recommendations for improvement, which are extremely important and helpful when structuring an environmentally sound decision.[145]

In addition to the obstacles facing a panel that wishes to receive environmental guidance on an issue about which they are uninformed, the panel membership rules set forth no requirement that panels consist of a member with some environmental expertise.[146] Of the five panel members appointed to hear a dispute, the required experience of these panelists is limited to law, international trade and other matters covered in NAFTA.[147]

3. Investment

Critics of NAFTA believe that the Agreement will entice U.S. companies to relocate to Mexico so that they might take advantage of lax

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140. NAFTA, *supra* note 8, art. 2015.1.

141. NAFTA, *supra* note 8, art. 2015.1.

142. *See* NAFTA, *supra* note 8, art. 2015.1 (stating the terms for use of experts in panel disputes).

143. Housman Statement, *supra* note 71, at 31. *See* Response of Environmental and Consumer Organizations, *supra* note 59, at 5 (noting confidentiality and restrictions on public involvement in the NAFTA dispute process).

144. NAFTA, *supra* note 8, art. 2015.

145. Response of Environmental and Consumer Organizations, *supra* note 58, at 5.

146. NAFTA, *supra* note 8, art. 2009. Article 2009.2 states that Panel Members shall "have expertise or experience in law, international trade, other matters covered by this Agreement or the resolution of disputes arising under international trade agreements, and shall be chosen strictly on the basis of objectivity, reliability and sound judgement." *Id.*

147. NAFTA, *supra* note 8, art. 2009.

enforcement of Mexican environmental regulations.[148] This movement would likely result in the creation of a "pollution haven," a condition that the Bush Administration claimed would not occur given the investment provisions in Chapter 11 of NAFTA.[149] The Bush Administration also claimed that NAFTA "prohibits the lowering of standards to attract investment."[150]

The NAFTA provision that attempts to address these issues reads as follows:

> The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a party considers that another party has offered such an encouragement, it may request consultations with the other party and the two Parties shall consult with a view to avoiding any such encouragement.[151]

This provision fails to prohibit pollution haven practices; it uses hortatory language, such as "should" instead of "shall." It fails to address the lax enforcement of existing environmental regulations. Furthermore, it allows only "consultations" between the parties, rather than redress under NAFTA's dispute settlement provisions if such consultations

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148. *See* Bruce Stokes, *Keeping It Green, In a Free Trade Pact, Is the Environment the Big Loser?*, WALL ST. J., Sept. 24, 1992, at R9 (reporting the concerns of environmentalists and Democratic congressman); Bruce Stokes, *Greens Talk Trade*, NAT'L J., Apr. 13, 1991, at 862, 864 (reporting environmentalist fears that NAFTA will facilitate movement of polluting industries to Mexico); CONGRESSIONAL RESEARCH SERVICE, NORTH AMERICAN FREE TRADE AGREEMENT: ISSUES FOR CONGRESS, 47-48 (1991) (summarizing environmental issues related to NAFTA); Robert Cohen & Alan Tonelson, Doing It Right - A Winning Strategy for U.S.— Mexico Trade 11 (undated) (asserting that the "rapid proliferation of *maquiladoras* plants during the 1980's indicates that U.S. companies have moved south precisely because escaping the consequences of polluting is much easier in Mexico"); Sen. Max Baucus, *Can NAFTA Make Up for Rio?*, ROLL CALL, July 27, 1992, at 29 (discussing the need to "level the playing field" tilted by low environmental standards).

149. *See Report of the Administration*, *supra* note 26, at 11-12 (arguing that NAFTA contains adequate environmental safeguards).

150. White House Press Release, The North American Free Trade Agreement, Fact Sheet No. 5 (Aug. 12, 1992).

151. NAFTA, *supra* note 8, art. 1114.2.

fail.[152] Interestingly, although NAFTA does not grant rights to dispute settlement in these circumstances, it does set forth substantial dispute settlement procedures to be used in disputes between a party and individual investors of another party.[153] A similar scheme for investment disputes could have provided substantial environmental benefits.

4. Energy

In NAFTA's energy chapter, environmentalists have found little, if any, consideration by the parties to promoting sustainable or alternative energy practices. Rather, Chapter 6 seems to enshrine current energy usage practices in most areas, and focuses primarily on lifting energy trade barriers and investment restrictions.[154] In pursuing these goals, though, NAFTA does open the previously closed Mexican energy industry to competitive bidding by the U.S. oil service industry. This could permit a gradual "greening" of Mexican refineries and other energy infrastructure.[155] Additionally, by facilitating natural gas trade from the United States to Mexico, the environment may benefit from the availability of cleaner energy sources for Mexican border communities and maquiladoras.[156]

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152. *See NAFTA Analysis, supra* note 71, at 10072 (describing the Bush Administration's rejection of a Canadian proposal to use the word "shall"); Response of Environmental and Consumer Organizations, *supra* note 59, at 4 (criticizing weak language in the NAFTA investment provision).

153. *See* NAFTA, *supra* note 8, arts. 1115-1138 (delineating procedures for resolving disputes between parties and investors).

154. *See* Letter from USTR Carla Hills to Majority Leader Gephardt, Sept. 4, 1992 (on file with the authors) (responding to Aug. 5, 1992 letter from Majority Leader Gephardt and describing NAFTA provisions); DEP'T OF ENERGY NEWS, NORTH AMERICAN FREE TRADE AGREEMENT MEANS NEW ERA FOR ENERGY MARKETS (Aug. 12, 1992) [hereinafter DEP'T OF ENERGY NEWS] (explaining how NAFTA will reduce barriers in energy trade).

155. *See Report of the Industry Sector Advisory Committee for Trade in Energy of the North American Free Trade Agreement*, Sept. 1992, at 10 [hereinafter *Report of the ISAC*] (describing the projected transition to competitive bidding for Mexican energy agency contracts); Majority Leader Gephardt Letter to USTR Carla Hills, Aug. 5, 1992 (suggesting that upgrading Mexican refining capacity can lead to cleaner products and lessening transboundary pollution); DEP'T OF ENERGY NEWS, *supra* note 154 (asserting that NAFTA opens new markets to the United States for exports of modern, efficient energy technology).

156. *See* Majority Leader Gephardt Letter to USTR Carla Hills, Aug. 5, 1992, at 2 (on file with the authors); Scott H. Segal, *The Environmental Implications of the North American Free Trade Agreement*, 23 ST. B. TEX. ENVTL. L.J. 29, 31 (1992)

These incidental environmental gains are, however, outweighed by the energy provisions' failures. Articles 603 and 604 severely limit the use of energy import and export restrictions, as well as export taxes on energy trade between the parties.[157] Critics argue that eliminating these controls prevents a party from imposing cost or quantity based conservation measures, and also facilitates construction of environmentally devastating hydroelectric projects with construction costs that may only be rationalized based on potential export earnings.[158] Moreover, NAFTA provides for continuing government subsidies and tax incentives to encourage oil and gas exploration, but fails to take any measures to redirect some investment towards energy saving measures or renewable energy sources such as solar or wind energy.[159] Canadian critics contend that Article 605 of NAFTA reaffirms Canada's flawed United States-Canada Free Trade Agreement (CFTA) commitment to supply U.S. energy needs with only limited exception, thus restricting Canada's sovereignty over its own resources.[160] Conservationists have also expressed concerns regarding the ability of the parties to utilize energy regulatory measures that restrict trade, and the effect of NAFTA on

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(arguing that U.S. natural gas may provide clean fuel for industry in Mexican border areas). *But see* CAROL ALEXANDER & KEN STUMP, THE NORTH AMERICAN FREE TRADE AGREEMENT AND ENERGY TRADE 22-23 (1992) [hereinafter NAFTA AND ENERGY] (claiming that natural gas is not a panacea for pollution and climate change).

157. NAFTA, *supra* note 8, arts. 603, 604. Articles 605 and 607 also restrict the use of import and export controls on energy. Article 603 is subject to the reservations specified in Annex 603.6, which permits Mexico to restrict import and export licenses on a number of petroleum-based products. *Id.* art. 603. Articles 605 and 607 also except Mexico in their Annexes. *Id.* arts. 605, 607. The energy chapter Annexes act to reserve a number of products and controls for Mexico on account of Mexican constitutional restrictions on foreign control of certain natural resources. *See Report of the ISAC*, *supra* note 155, at 10 (delineating energy trade provisions); *Summary of the Energy and Basic Petrochemicals Chapter of the North American Free Trade Agreement: Gejdenson Reiterates Call to Include Oil in Free Trade Talks with Mexico*, DAILY EXEC. REP. (BNA) at A13, May 5, 1992 (considering potential benefits gained by Mexico from more open energy trade).

158. *See* NAFTA AND ENERGY, *supra* note 156, at 5 (stating that the United States provides a market that makes such projects economically viable).

159. *See* NAFTA, *supra* note 8, art. 608 (providing for continued exploration incentives); NAFTA AND ENERGY, *supra* note 156, at 4-6 (criticizing lack of provisions for renewable energy resources). *See also NAFTA Analysis*, *supra* note 71, at 10072 (positing that this provision could inhibit policy reform of eliminating fossil-fuel incentives).

160. NAFTA AND ENERGY, *supra* note 156, at 6-7 (citing a Canadian report criticizing NAFTA's energy export provisions).

utilities' least cost planning and demand-side management programs.[161]

5. Water

Concern regarding NAFTA's effect on Canadian sovereignty over its tremendous fresh water resources has been muted in the United States, and has only recently begun to be heard in Canada.[162] Given that water exports were a matter of Canadian national concern during the debate over CFTA,[163] it is likely that such concern will affect Canada's debate over NAFTA.[164]

Water exports are either "small-scale" (bottled water or containerized shipments by truck, ship or rail) or "large-scale" (artificial diversions of water between river basins).[165] Canadian concerns focus on large-scale transfers of Canadian water to the Central and Southwestern United States, and the devastating environmental effects associated with such river basin diversions.[166]

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161. *See* NAFTA AND ENERGY, *supra* note 156, at 8-9, 26-35 (examining the effect of NAFTA provisions on demand-side management and least-cost planning efforts).

162. *See* JAMIE LINTON, RAWSON ACADEMY OF AQUATIC SCIENCE, NAFTA AND WATER EXPORTS 6-7 (1993) (discussing potential adverse effects of large-scale water diversions); *Canadian Water Export Could Become NAFTA Issue*, LDC DEBT REPORT, Jan. 18, 1993, at 9 (reporting on the water controversy in Canada).

163. *See Canadian Water Export Could Become NAFTA Issue*, LDC DEBT REPORT, Jan 18, 1993, at 9 (noting that the Canadian FTA implementing legislation explicitly exempted large water sales from the treaty's provisions).

164. *See* Jamie Linton, *Water Export: A Canadian Perspective*, ECODECISION, Sept. 1992, at 62 [hereinafter *Water Export*] (contending that large scale Canadian water exports are economically and environmentally unsound); Wendy R. Holm, Notes for a Submission to the B.C. Select Standing Committee on Economic Development, Science, Labour, Training and Technology on the Subject of the North American Free Trade Agreement, Jan. 15, 1993 [hereinafter Holm Notes] (advocating retention of Canadian sovereign rights over water resources); Memorandum from Ross Harvey, Canadian M.P., NAFTA and Water Export, Oct. 1992 [hereinafter Harvey Memorandum] (specifying how NAFTA would affect Canada's right to restrict water exports).

165. *Water Export*, *supra* note 164, at 62. *See also* Canada Water Preservation Act, Bill C-156, House of Commons of Canada, Aug. 25, 1988 (unratified) (prohibiting large-scale water exports defined as "where (a) the daily mean discharge of the water exported exceeds one cubic metre per second; or (b) the quantity of the water exported during a calendar year exceeds twenty thousand cubic decametres").

166. *Water Export*, *supra* note 160, at 63-64. *See also* MARC REISNER, CADILLAC DESERT, THE AMERICAN WEST AND ITS DISAPPEARING WATER 505-14 (1986) (recording the history of plans to divert Canadian water to the western United States).

Canadians who are interested in this issue believe that NAFTA facilitates large-scale water transfers to the United States through a number of its provisions. First, the inclusion of "potable" or drinkable water in NAFTA's tariff schedule permits large-scale water to be treated as any other NAFTA good.[167] Also, under the national treatment principle of NAFTA, each party must afford the same treatment to imports and exports as it does to domestic products, thus preventing Canada from inhibiting cross-border movement of large-scale water exports.[168] Furthermore, in most circumstances, NAFTA prohibits export restrictions, other export measures, such as quantitative restrictions, and export taxes that could otherwise be used to restrict large-scale water transfers across borders.[169]

The Canadian government has attempted to mollify fears of large-scale water transfers by claiming that, as was done in CFTA, Canadian implementing legislation can preclude such transfers from the NAFTA.[170] Given that the Agreement between the parties would not preclude large-scale water transfers, a Canadian position that relies on its domestic legislation to defend itself against a United States claim to Canadian water would present a NAFTA dispute panel with an interest-

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167. NAFTA, *supra* note 8, Tariff Phasing Subhead 22.01.90; Harvey Memorandum, *supra* note 164, at 4-5. *See* Holm Notes, *supra* note 164, at 2, 5, 7 (stating that the definition of "agricultural good" in Article 708 of NAFTA explicitly includes large-scale water).

168. *See* Harvey Memorandum, *supra* note 164, at 2 (arguing that national treatment in NAFTA applies to both imports and exports because Canadian exceptions to national treatment in Annex 301.3 apply to exports generally, and NAFTA has no Canadian exception regarding water exports). NAFTA's national treatment provision would otherwise apply only to imports based on its reference to GATT Article III. *Id. See also* Holm Notes, *supra* note 164, at 3 (distinguishing national treatment provisions in NAFTA and the FTA to show that the United States has not granted water rights to Mexico, while continuing to secure rights to Canadian water); David Hunter & Paul Orbuch, Interbasin Water Transfers After NAFTA: Is Water a Commodity or Ecological Resource? 13 (Dec. 1992) [hereinafter Interbasin Water Transfers] (unpublished manuscript prepared for Greenpeace) (asserting that extension of national treatment in NAFTA to services and investment limits Canadian control of large-scale water transfer projects).

169. NAFTA, *supra* note 8, arts. 309, 310, 314 and 315. *See* Harvey Memorandum, *supra* note 164, at 2-4 (interpreting NAFTA in national treatment rules); Holm Notes, *supra* note 164, at 3-4 (summarizing NAFTA export provisions).

170. *See* Holm Notes, *supra* note 164, at 6 (quoting Canadian Trade Minister Michael Wilson, and Canadian legal authorities who concluded in the context of the CFTA that domestic legislation would not alter prior commitments in a binational agreement).

ing and difficult decision.[171]

6. International Environmental Agreements

Article 104 sets forth the relationship between NAFTA and certain listed international environmental agreements (IEAs) that use international trade measures as enforcement mechanisms.[172] In the event of an inconsistency between NAFTA and the trade provisions of the IEAs, NAFTA states that the obligation of a party to use a trade measure under the IEAs "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 [NAFTA]."[173]

The parties have expressed their confidence that this provision would not diminish their rights to take trade restricting actions consistent with the listed IEAs.[174] Nonetheless, it would be a NAFTA dispute panel that would adjudicate the meaning of the phrases "equally effective," "reasonably available," and "least inconsistent." [175] For example, the

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171. *See* Interbasin Water Transfers, *supra* note 168, at 15 (characterizing NAFTA dispute resolution procedures as unlikely to disapprove large-scale water transfers).

172. NAFTA, *supra* note 8, art. 104.1. The three IEAs listed are as follows: Convention on International Trade in Endangered Species of Wild Fauna and Flora, *opened for signature* Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243; Montreal Protocol on Substances That Deplete the Ozone Layer, *opened for signature* Sept. 16, 1987, 26 I.L.M. 1541, 30 I.L.M. 537 (1990 amendment); and Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal, *opened for signature* Mar. 22, 1989, 28 I.L.M. 649. NAFTA Annex 104.1 lists two bilateral agreements between the Parties which are also subject to Article 104: *The La Paz Agreement, infra* note 292; The Agreement Between the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Waste, *signed* Oct. 26, 1986, T.I.A.S. No. 11099.

173. NAFTA, *supra* note 8, art. 104.1.

174. *See* Canada, United Mexican States, United States of America, Description of the Proposed North American Free Trade Agreement, Aug. 12, 1992, at 44 [hereinafter Joint Description] (abstracting NAFTA environmental provisions).

175. *See* Response of Environmental and Consumer Organizations, *supra* note 59, at 8 (discussing how a NAFTA panel would determine whether implementation of an IEA is consistent with NAFTA); CIEL Press Release, Oct. 6, 1992 (attached fact sheets) (outlining the shortcomings of the NAFTA dispute resolution process); *NAFTA Analysis, supra* note 71, at 10070 (commenting on the "least-NAFTA-inconsistent" proviso and GATT's use of a similar test successfully invoked against health and environmental laws); Hudson Testimony, *supra* note 114, at 6 (suggesting that the

NAFTA dispute settlement process discussed below could be used to interpret these phrases relative to a United States ban on the importation of an endangered species, if a NAFTA party chooses to argue that there is a less restrictive, alternative method for the United States to implement its IEA obligations.[176]

Additionally, NAFTA only permits the addition of other IEAs to Article 104's provisions when all the parties agree.[177] There is concern that this requirement may hinder the incorporation of other present and future IEAs into NAFTA.[178] Countries may sign an IEA, but remain unwilling to have it appended to NAFTA.[179] Furthermore, should other countries accede to the NAFTA framework under the accession clause discussed below, the present difficulty in obtaining the cooperation necessary to have an IEA added to NAFTA would be compounded.[180]

7. Accession

Any country or group of countries may accede to NAFTA, under terms and conditions agreed upon by the parties and the acceding country or countries.[181] This provision has been criticized for vagueness in

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terms imply new burden on IEA negotiators and signatories). *See also* GATT SECRETARIAT, TRADE AND THE ENVIRONMENT 31 (1992) (advance copy on file with authors) (pronouncing that trade measures taken under non-universal IEAs are discriminatory); *Congruence or Conflict?*, *supra* note 127, at 1242-45 (advocating use of GATT's waiver provision for certain "broad-based" IEAs); Steve Charnovitz, *GATT and the Environment: Examining the Issues*, 4 INT'L ENVTL. AFFAIRS 203, 216-18 (1992) (discussing several approaches to reconcile GATT and IEAs).

176. *See* CIEL Press Release, Oct. 6, 1992 (attached fact sheet) (raising the possibility of subjecting a ban on importation of endangered species to NAFTA dispute resolution procedures). Illegal trade in endangered and threatened species remains an issue between the United States and Mexico. *See Monkey Business*, WASH. POST, Feb. 1, 1993, at A18 (reporting the use of "ape-agent" to foil Mexican zookeepers' gorilla smuggling plot).

177. NAFTA, *supra* note 8, art. 104.2.

178. *See* Response of Environmental and Consumer Organizations, *supra* note 59, at 8 (commenting on the difficulty of achieving consensus among all three NAFTA parties).

179. *See supra* note 177 and accompanying text (referring to NAFTA Article 104.2).

180. *See infra* notes 181-82 and accompanying text (describing the accession provision).

181. NAFTA, *supra* note 8, art. 2204. No other guidance is provided on accession other than the need for each country to follow its applicable legal procedures for approval of a free trade agreement.

that it fails to require an adequate environmental impact assessment of acceding countries' environmental regimes.[182] It remains to be seen whether the parties' implementing legislation will flesh-out the environmental conditions of accession.

B. NAFTA'S LABOR-RELATED PROVISIONS

Although several environmental provisions were moved from the parallel track to NAFTA's mainline, labor's concerns generally failed to achieve even this limited measure of success. In fact, although the earliest mention of labor issues occurs in the preamble's laundry list of generalized goals, the Agreement does not address labor concerns until chapter eight, where such issues are indirectly discussed in the emergency action provisions.[183]

1. Emergency Action Provisions

Chapter eight of NAFTA provides bilateral and global mechanisms to protect industries from injuries caused by increased importation of directly competing products caused by tariff phase-outs.[184] Under Article 801, a NAFTA party may institute certain measures if it finds that during the NAFTA "transition period," as a result of the reduction or elimination of a duty, a like or directly competing product is being imported into its markets in such quantities, and under such conditions, that the imports of that good from the other NAFTA party alone "constitute a substantial cause of serious injury, or threat thereof . . . ."[185] A party

182. *See Sierra Club Press Release*, 4 (undated) (calling the accession clause inadequate). *See also One America — The North American Free Trade Pact May be Just the First Step Towards a Hemispheric Block*, WALL ST. J., Sept. 24, 1992, at R1 (considering the prospects of a free trade area encompassing all of the Americas).

183. *See* NAFTA, *supra* note 8, Preamble (stating that "[t]he Government of Canada, the Government of the United Mexican States, and the Government of the United States of America, resolved to . . . promote sustainable development"). The following section of this article discusses certain critical labor concerns raised by NAFTA; for additional discussion of the labor concerns with NAFTA. *See generally* Labor Advisory Committee on the North American Free Trade Agreement, Preliminary Report to the President of the United States, Sept. 16, 1992 [hereinafter Labor Advisory Committee Report] (detailing labor concerns with regard to NAFTA).

184. *See* NAFTA, *supra* note 8, art. 801 (discussing permissible bilateral actions against injurious imports); *id.* at 802 (providing for global actions as emergency measures under certain specific circumstances). *See also id.* art. 805 (defining a surge as "a significant increase in imports over the trend for a recent representative base period").

185. *Report of the Administration*, *supra* note 26, at 71; *see* NAFTA *supra* note

undertaking an emergency bilateral action "may, to the minimum extent necessary to remedy or prevent the injury": 1) suspend the further reduction of any rate of duty provided for under NAFTA; 2) increase the rate of duty on the good to the lesser of either the most favored nation rate at the time of the action or the most favored nation rate of duty in effect on the day immediately preceding the date of NAFTA's entry into force; or, 3) in the case of a duty applied on a seasonal basis, increase the rate of duty to the rate that was in effect on the good for the corresponding season immediately preceding the date of NAFTA's entry into force.[185] A party taking an emergency action must also provide to the party against whose good is effected, other trade benefits in an amount sufficient to compensate for the emergency measure.[187]

8, art. 801.1 (outlining permissible bilateral actions which may be taken against damaging imports); The Agreement defines "transition period" as:

> [T]he 10-year period beginning on January 1, 1994, except where the good against which the action is taken is provided for in the items in staging category C+ of the Schedule to Annex 302.2 of the Party taking the action, in which case the transition period shall be the period of the staged tariff elimination for that good.

NAFTA, *supra* note 8, art. 805. The term "serious injury" is defined as "a significant overall impairment of the domestic industry" and threat of serious injury as "serious injury that, on the basis of facts and not merely on allegation, conjecture or remote possibility, is clearly imminent." *Id.*

186. *See* NAFTA, *supra* note 8, art. 801.1 (a),(b),(c),(d),(e) (allowing "to the minimum extent necessary" sanctions against imports to prevent injury). NAFTA places five limitations on a party's use of an emergency measure: 1) a party instituting a proceeding that might result in an emergency measure must notify in writing any potentially affected NAFTA party, and request consultations; 2) any action must be instituted no later than one year after the commencement of the proceeding; 3) no action may be maintained for more than three years, except for actions taken on "category C+" goods, where, under certain circumstances, the action can be extended for one year, or beyond the expiration of the transition period (except with the consent of the party on whose good the measure is being taken); 4) a party may take an action against a particular good from another party only once during the transition period; and, 5) on the termination of the action, the rate of duty shall be the rate that under NAFTA's tariff schedules, would have been in effect one year after the initiation of the action, and beginning on January 1 of the following year, at the option of the party taking the action, the rate of duty shall either conform with the applicable rate set out in NAFTA's tariff schedule, or the tariff shall be eliminated in equal annual stages ending on the date set out in NAFTA's tariff schedules. *Id.* Following the transition period, a party may only take a bilateral emergency action with the consent of the other affected party or parties. *Id.* art. 801.3.

187. NAFTA, *supra* note 8, art. 801.4 (discussing compensation provided sanctioned exporting countries).

In addition, NAFTA includes a global safeguard provision that allows one of the NAFTA parties to impose an emergency action against another NAFTA party as part of a multilateral safeguard action taken under Article XIX of the GATT or any safeguard agreement to Article XIX of the GATT.[188] Under NAFTA Article 802.1(a) and 802.1(b) a party can include another NAFTA party's goods in a multilateral safeguard measure only if the imports of the offending party: 1) considered individually, account for a substantial share of total imports of the product; or 2) considered individually, or in exceptional circumstances, collectively with imports from other parties, contribute "importantly" to the serious injury or threat of injury, caused by imports.[189]

The provisions for conducting both the bilateral and global safeguard actions are set out in Annex 803.3 of NAFTA.[190] A party initiates a NAFTA safeguard proceeding at its own initiative or at the initiative of any entity that is entitled under the domestic law of a NAFTA party to commence a safeguard action.[191] Under United States trade law, organized labor has the ability to commence safeguard proceedings.[192] Thus, NAFTA does allow labor to institute a safeguard proceeding if it feels that import surges of a particular product are compromising the

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188. *See* NAFTA, *supra* note 8, art. 802.1 (a),(b) (allowing global action against a Party when imports are a "substantial share" of imports or cause serious injury). *See also Report of the Administration*, *supra* note 26, at 73 (commenting on sensitive agricultural products); GATT *supra* note 2, art. XIX (permitting contracting parties to restrict imports causing serious injury to domestic producers).

189. *See* NAFTA, *supra* note 8, art. 802.1(a),(b) (allowing global action against a Party when imports are a "substantial share" of total imports or cause serious injury). *See also id.* art. 802.2(a),(b) (setting out factors used to determine causation of injury in global actions).

190. *See* NAFTA, *supra* note 8, Annex 803.3 (detailing the administration of emergency action proceedings).

191. *See* NAFTA, *supra* note 8, Annex 803.3.1 (discussing standing required to file an emergency action).

192. *See* 19 U.S.C. § 2252(a)(1) (1988) (noting that a petition requesting action under 19 U.S.C. §§ 2251 *et seq.* in order to facilitate positive adjustment to import competition may be filed by any entity including a union or group of workers who represent an industry). *See also id.* at § 2251(a) (allowing the President to take "all appropriate and feasible action" when the International Trade Commission, under 19 U.S.C. § 2252, finds that increased importation of a good is a "substantial cause of serious injury or threat thereof" to the domestic industry or its likeness); *id.* § 2253(3) (providing that the President may *inter alia* order an imposition of a duty on the imported product, proclaim a tariff-rate quota, provide adjustment assistance, or a combination of these approaches).

domestic industry and jeopardizing U.S. jobs.

Although global and bilateral safeguard provisions do, to a certain extent, provide U.S. labor with a mechanism to address the concern that cheaper imported products from Mexico will cause job loss in the United States, they do nothing for labor in Canada or Mexico. Neither Canadian nor Mexican laws provide labor in these countries with the ability to initiate a safeguard action.[193] Moreover, it remains to be seen whether the weaknesses in these provisions undermine their ability to effectively address threats from import surges. NAFTA's safeguard language roughly parallels the language of the existing safeguard provisions of U.S. law.[194] The burden of proving that an import surge is the "substantial cause" as required by the section 201 safeguard provisions of U.S. trade law, has been so great that this section has fallen largely into disuse and aggrieved industries now rely upon the less stringent burdens of the countervailing and antidumping provisions of U.S. trade law to address injuries and threats from imports.[195] Thus, NAFTA's use of the same burden in its safeguard provisions could cause these provisions to

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193. Telephone Interview with Mr. Jorge Perez Lopez, United States Department of Commerce (Feb. 3, 1993).

194. *Compare* NAFTA, *supra* note 8, art. 801.1 (analyzing burdens of proof given an import surge) *with* 19 U.S.C. § 2251 (1988) (allowing domestic defense of threatened industries).

195. *See* Daniel K. Tarullo, *Beyond Normalcy in the Regulation of International Trade*, 100 HARV. L. REV. 546, 582-589 (1989); I.M. Destler, *supra* note 15, at 259-67 (discussing section 201 and its investigations and results); *id.* at 268-324 (analyzing several countervailing duty cases and their results); *id.* at 326-403 (delineating antidumping cases and the ensuing results). *See also* 19 U.S.C. § 2251 (b)(1) (1988) (providing that in granting relief under the escape clause provisions of United States trade law, the International Trade Commission must make a determination that increasing imports are a "substantial cause of serious injury"). *See id.* at §§ 1671, 1673 (providing that under countervailing duty and anti-dumping provisions there need only be a causal link between the unfairly traded imports and some "material injury").

The Bush Administration knew of this potential flaw in the Agreement and negotiated in the special safeguard provisions for the textile and apparel section a lesser "serious burden" standard. *See* NAFTA, *supra* note 8, Annex 300-B.4.1 (outlining permissible tariff actions in an emergency bilateral situation); *Report of the Administration*, *supra* note 26, at 74 (recognizing NAFTA's safeguards for sensitive textile and apparel products). Discussing Annex 300-B.4.1, the Administration states:

> Under this provision, an importing country may act to grant relief to a domestic industry if imports from another NAFTA country result in "serious damage" to domestic producers. This is a lower threshold than the "substantial cause of serious injury" standard of the normal NAFTA safeguard provision . . . .

NAFTA, *supra* note 8, Annex 300-B.4.1.

be equally ineffective.[196] NAFTA's requirement that the use of the safeguard provision must be "to the minimum extent necessary to remedy or prevent the injury"[197] also appears to add an additional weakness to these provisions.[198] Furthermore, the provisions in the global actions safeguard section that exempt a NAFTA country from a global safeguard action unless they are among the top five supplying nations or their imports contribute "importantly" to serious injury, could prove to be a substantial impediment to a nation using global emergency actions to protect domestic jobs.[199] Moreover, the criteria for determining when imports "contribute importantly" to an injury, may allow a party to avoid an import restriction simply because its imports did not grow at as fast a pace as the growth rate of total imports during the representative period.[200] Additionally, in its report to the President, the Labor Advisory Committee on NAFTA noted that the durational limits on safeguard measures will limit the effectiveness of the safeguard provisions.[201]

In addition to NAFTA's general safeguard provisions, the Agreement includes two other industry specific safeguard sections. Article 703.3 provides that a party may adopt and maintain a special safeguard measure, in the form of a tariff rate quota on an agricultural good, to protect domestic import sensitive agricultural industries.[202] Under this spe-

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196. *See* Labor Advisory Committee Report, *supra* note 183, at 11 (recognizing that the limitations imposed by the draft text make the finding of injury implausible but provide an illusion of possible safeguard action).

197. *See* NAFTA *supra* note 8, art. 801.1 (discussing actions permitted against injurious imports).

198. *See* Industry Policy Advisory Committee for Trade and Policy Matters, Report on the North American Free Trade Agreement, Sept. 14, 1992, at 19 (noting that while FTA's bilateral action provision has not been weakened, as requested, the recommendation of a readily available emergency relief under NAFTA has not been addressed).

199. *Id.* at 20.

200. *Id.*

201. *See* Labor Advisory Committee Report, *supra* note 183, at 11 (noting that existing law provides eight year duration limit on safeguards as opposed to the three-year limit standard in NAFTA).

202. *See* NAFTA, *supra* note 8, art. 703.3 (allowing special safeguards or tariff rates on agricultural goods listed by each party in Annex 703.3). *See also Report of the Administration, supra* note 26, at 73 (discussing agricultural safeguards). These measures may only be taken in accordance with a party's tariff schedule contained in Annex 302.2 and can only apply to goods listed in a party's section of Annex 703.3 listing special safeguard goods. For the United States, annex 703.3 lists seasonal im-

cial safeguard measure, imports of these goods of a designated quantity enter at a NAFTA preferential tariff. Once this quantity has been exceeded, the importing party can apply a tariff rate quota based on the most favored nation tariff rate in effect at the time of NAFTA's entry into force.[203] This special safeguard mechanism will remain in effect for a period of ten years.[204]

NAFTA also includes a special safeguard provision for the textile and apparel industries.[205] Annex 300-B of the Agreement states that if during the transition period, a textile or apparel product is imported from one NAFTA party to another, in such quantities that "serious damage, or actual threat thereof, to domestic industry producing a like or directly competitive good" occurs, the importing NAFTA country may "to the minimum extent necessary to remedy the damage or actual threat" of damage, do one of several things.[206] The importing NAFTA country

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port sensitive agricultural goods, including: onions, shallots, tomatoes, eggplant, chili peppers, squash, and watermelons. NAFTA, *supra* note 8, art. 703.3(c). For Canada, these goods include: freshly cut flowers (other than orchids), certain tomatoes, onions or shallots, cucumbers or gherkins, broccoli and cauliflower, and certain strawberries. *Id.* art. 703.3(a). For Mexico, the special safeguard goods include: certain live swine and swine meat, certain hams, certain potatoes, fresh apples, and extracts, essences or concentrates of coffee. *Id.* art. 703.3(b).

203. *See* NAFTA, *supra* note 8, art. 703.3(a),(b) (prohibiting agricultural tariffs or safeguards which exceed the lesser of the most-favored-nation rate as of July 1, 1991, or the prevailing most-favored-nation rate). *See also Report of the Administration, supra* note 26, at 73 (citing the duration of the special safeguard mechanism). A party cannot use the special agricultural safeguard provision and the chapter eight safeguard provision on the same product at the same time. NAFTA, *supra* note 8, art. 703.4(a),(b).

204. *Report of the Administration, supra* note 26, at 73.

205. *See* NAFTA, *supra* note 8, annex 300-B.4.1 (recognizing a lower threshold than normal NAFTA safeguards for imports that cause "serious damage" to domestic industry). *See also Report of the Administration, supra* note 26, at 74 (discussing special safeguard mechanisms for import-sensitive agricultural products). In determining whether serious damage or threat of serious damage exists in a particular case, NAFTA requires the party seeking to impose a safeguard to:

> (a) examine the effect of increased import on a particular industry, as reflected in changes in such relevant variables as output, productivity, utilization of capacity, inventories, market share, exports, wages, employment, domestic prices, profits and investment, none of which is necessarily decisive; and,
>
> (b) shall not consider changes in technology or consumer preference as factors supporting a determination of serious damage.

NAFTA, *supra* note 8, Annex 300-B.4.2(a),(b).

206. *See* NAFTA, *supra* note 8, Annex 300-B.4.1 (recognizing a lower threshold than normal NAFTA safeguards for imports that cause "serious damage" to domestic

may: suspend further reduction of any rate of duty provided for by NAFTA; or increase the rate of duty on the good to a maximum level determined by the lower of the most favored nation applied rate in effect at the time the action was taken, and the most favored nation applied rate on December 31, 1993.[207] A party may also take similar measures where import surges are injuring, or threaten to injure, a good that has been integrated into GATT pursuant to a successor agreement to the Multifiber Agreement and entered under a tariff preference level set out in Appendix 6 to NAFTA.[208] Three limitations are placed on a party's use of bilateral textile and apparel tariff emergency actions: 1) unless a party consents, actions must be limited in duration to a period of three years and cannot be maintained beyond the expiration of the transition period; 2) an action by a party against a particular good of another party can be taken only once during the transition period; and, 3) on termination of the action the party must take certain specified actions to bring their rate of duty into compliance with NAFTA's schedules.[209]

The Agreement also contains a special safeguard provision designed to prevent non-NAFTA origin textile and apparel goods shipped from Mexico or Canada from injuring U.S. producers.[210] Essentially, if either the United States and Mexico believe that a non-NAFTA-origin textile or apparel good is being imported in such absolute or relative quantities and under such conditions as to cause "serious damage," or actual threat of such serious damage, to a "domestic industry producing a like or directly competitive good in the importing party, the importing party may request consultations" aimed at eliminating the damage or threat with the other party.[211]

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industry).

207. *See* NAFTA, *supra* note 8, Annex 300-B.4.1 (establishing standards which must be met before emergency tariff actions may be used to defend domestic industry).

208. NAFTA, *supra* note 8, Annex 300-B.4.1.

209. *See* NAFTA, *supra* note 8, Annex 300-B.4.4 (a), (b), (c) (providing conditions and placing limitations on emergency actions used to protect domestic industry).

210. *See* NAFTA, *supra* note 8, Annex 300-B.5.1 (allowing bilateral emergency action against non-originating textile or apparel goods of another party); *id.* Annex 300-B, appendix 3.1.B (discussing trade between Mexico and the United States); *id.* Annex 300-B, Appendix 5.1.B (covering actions between Canada and the United States governed by the CFTA).

211. *See* NAFTA, *supra* note 8, Annex 300-B.5.1, B.5.2 (summarizing the standards by which textile and apparel industry damage may be assessed). Determinations

The special NAFTA safeguard provisions for agriculture and textiles and apparel could prove to be an important provision for labor. These industrial sectors-agriculture and textiles and apparel-are among those sectors that may face some of the most serious threats from cheaper imported products from Mexico. For example, given the low wage labor available in Mexico, U.S. textile and apparel manufacturers already find it difficult to compete with imported textile and apparel goods from Mexico.[212] Similarly, the agricultural commodities listed by the United States for special surge protection are those commodities most likely to be sensitive to threats from import surges.[213] These special safeguard provisions also provide greater protection than NAFTA's general safeguard section because their threshold standard for protection is lower than that included in the Agreement's general safeguard section.[214] De-

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of damage or threat of damage are made under the standards set out in annex 300-B.4.2. *See id.* Annex 300-B.5.4 (requiring the application of section 4(2) to determine serious damage or actual threat thereof). Consultations must begin within 60 days of a party's request for consultations and should be completed within 90 days of the request. *See id.* Annex 300-B.5.5 (requiring consultations between parties involved in the importation or exportation of damaging goods). In setting a negotiated export restraint to eliminate the complained of surge, the consulting parties must: 1) "consider the market situation in the importing party;" 2) consider the history of textile and apparel trade between the two nations; and 3) seek to ensure that the NAFTA party's good is accorded equitable treatment *vis-a-vis* like goods from non-NAFTA importers. *Id.* Annex 300-B.5.5 (a),(b),(c). If the consulting parties are unable to reach a negotiated export restraint, then the importing party may impose an annual quantitative restriction on the good, subject to certain limits on the timing and extent. *Id.* Annex 300-B.5.6, B.5.7-5.12. Absent the consent of the other exporting party, the parties are precluded from taking a bilateral emergency action after the expiration of the transition period. *Id.* Annex 300-B.5.13.

212. *See* Gregory C. Shaffer, Note, *An Alternative to Unilateral Immigration Controls: Toward a Coordinated U.S.-Mexico Binational Approach*, 41 STAN. L. REV. 187, 207 (1988) (discussing non-tariff barriers to Mexican imports and quotas under "Voluntary Restraint Agreements"). In fact, the Multifiber Agreement under GATT was created specifically to address the developed countries' fear that lower cost developing country textile and apparel goods would harm their textile and apparel industries. *See* Agreement Regarding International Trade in Textiles, Dec. 20, 1973, 25 U.S.T. 1001, T.I.A.S. No. 7840 (establishing international mechanisms for restriction of textile imports). *See generally* Giesse & Levin, *The Multifiber Agreement: "Temporary" Protection Run Amuck*, 19 LAW & POL'Y INT'L BUS. 5 (1987) (discussing the developed countries' motivations behind the agreements); Jacobs, *Renewal and Expansion of the Multifiber Agreement*, 19 LAW & POL'Y INT'L BUS. 7 (1987) (reviewing the developing countries' fear which brought on the Multifiber Agreement).

213. *See Report of the Administration*, *supra* note 26, at 73 (discussing special safeguard mechanisms for import-sensitive agricultural products).

214. *See Report of the Administration*, *supra* note 26, at 74 (comparing the "seri-

spite the advantages of these two special safeguard sections, it remains to be seen whether these safeguard provisions are strengthened to the extent that they can overcome the general disfavor with which "escape clause" measures have long been viewed.[215]

These special safeguard provisions must also be viewed in the context of NAFTA's overall effects. The presence of these special safeguard protections makes it evident that, apart from the special protections provided to workers through the efforts to protect textile and apparels manufacturers and certain agricultural sectors, there are serious limitations upon any effort to prevent the demise of the workforce of other industrial sectors.[216]

2. Tariff Phase-Outs

In addition to the use of safeguard measures to protect import-sensitive industries, NAFTA attempts to address labor concerns through the use of longer tariff transition or "phase-out" periods for certain import-sensitive products.[217] During these longer phase-out periods, tariffs will be reduced incrementally over time until they reach zero, allowing these particular industries to adjust gradually to increased competition.[218] For the most import-sensitive U.S. industries, NAFTA provides a 15-year phase-out period.[219] In contrast, NAFTA provides only a ten-year phase-out period for Mexico's most import-sensitive industries.[220] Tariffs on all but five Mexican agricultural products, including corn, dry beans, powdered milk, orange juice and sugar, are accorded this ten-year treatment; the five exceptions are accorded 15-year phase-out

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ous damage" and "substantial cause of serious injury" standards).

215. *See* Destler, *supra* note 15, at 152-53 (discussing the decline of section 201 escape clause cases).

216. *See* ROBERT A. BLECKER & WILLIAM E. SPRIGGS, MANUFACTURING IN NORTH AMERICA: WHERE THE JOBS HAVE GONE (1992) (discussing the effects of NAFTA on manufacturing jobs).

217. *Report of the Administration, supra* note 26, at 70-71. Tariff phase-out schedules were, in general, developed on a product by product basis, taking into account the relative competitiveness of the industry. IPAC Report on NAFTA, *supra* note 120, at 9.

218. *Report of the Administration, supra* note 26, at 70-71.

219. *Report of the Administration, supra* note 26, at 71; IPAC Report on NAFTA, *supra* note 120, at 9.

220. *Report of the Administration, supra* note 26, at 70; IPAC Report on NAFTA, *supra* note 120, at 9.

schedules.[221] Import-sensitive manufactured products on the 15-year phase-out list include "certain household glassware, certain footwear products, ceramic tile, broomcorn brooms, and certain watches and watch movements."[222] In addition to the five Mexican commodities noted above, some agricultural and fishery products that are eligible for 15-year phase-out treatment include peanuts, sprouting broccoli, cucumbers, asparagus, dried onion powder, dried onions, dried garlic, canned tuna, cantaloupes, and other melons."[223]

The second tier of protective tariff phase-outs provides for a ten-year incremental reduction to zero tariff levels.[224] Included in the manufactured items listed on the ten-year tariff phase-out schedule are "dyes and pigments, other footwear, ball bearings, bicycles, leather goods, [certain] chemicals, crude oil and fuels."[225] Agricultural products accorded ten year treatment include "certain onions, tomatoes, eggplant, chili peppers, squash, and watermelons."[226] In addition, NAFTA's tariff schedule provides ten year protection to import-sensitive sectors of the U.S. textile and apparel industries.[227]

3. Trade in Services

Chapter 12 of NAFTA establishes certain rules for cross-border trade in services.[228] Given the decline in manufacturing jobs in the United

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221. *Report of the Administration, supra* note 26, at 70. The five Mexican agricultural commodities accorded 15-year phase-out periods are of particular importance to Mexican worker displacement concerns. For example, some estimates provide that, even with an extended phase-out period, the elimination of Mexican tariffs on corn will cause about 700,000 Mexican people to be displaced. *See* SPECIAL REPORT ON THE NORTH AMERICAN FREE TRADE AGREEMENT, TRADE MATTERS, 4 (Oct. 1992) (noting Mexican agricultural concerns). Corn is grown on 42% of all arable land in Mexico, employing one of every three rural workers. *Id.* Average corn yields in Mexico are 24 bushels per acre, compared to 102 bushels in the United States. *Id.* Thus, while Mexican consumers may benefit from lower cost American corn, rural Mexican producers are likely, at a minimum, to suffer serious displacements on account of NAFTA.

222. *Report of the Administration, supra* note 26, at 71.

223. *Report of the Administration, supra* note 26, at 71.

224. *Report of the Administration, supra* note 26, at 71.

225. *Report of the Administration, supra* note 26, at 71.

226. *Report of the Administration, supra* note 26, at 71.

227. *Report of the Administration, supra* note 26, at 71.

228. *See* NAFTA, *supra* note 8, art. 1201 (setting out the basic scope of NAFTA's services provisions).

States and the heightened emphasis in virtually all industrial sectors to provide higher value services as part of their marketing approach, these provisions are of particular importance. Moreover, as the name "services" implies, the scope and breadth of these provisions is extensive, implicating a range of occupations extending from lawyers to glider tow pilots.[229] At its heart, NAFTA extends the basic trade obligations of non-discrimination, such as national treatment and most favored nation rules, to trade-in-services.[230] Other critical trade-in-services provisions provide for increased transparency in licensing and certification of services personnel and companies,[231] liberalization of non-discrimination measures,[232] and efforts aimed at the elimination of quantitative restrictions.[233]

Given the scope of these NAFTA rules, coupled with the fact that this is the broadest application of these type of rules to the services sector ever agreed to by the United States, it is virtually impossible to analyze precisely what effect these provisions will have on the U.S. workforce, let alone the effects on the Mexican and Canadian services sectors.[234] For example, employment certification requirements and restrictions exist at the federal, state and local levels. With literally thousands of such laws and regulations, it is likely that many of these provisions will conflict with NAFTA's requirements.[235] How these conflicts will effect U.S. workers is unclear. Although the opening of Mexican service markets to U.S. workers will provide benefits to American labor,[236] the opening of U.S. services sectors to lower wage Mexican labor could cause displacement of U.S. workers, particularly in the unskilled services sectors.[237]

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229. *See* NAFTA *supra* note 8, art. 1213(2) (listing glider towing as a special aerial service). *See also id.* Annex 1210.5(B) (providing rules for professional legal services); NAFTA, *supra* note 8, art. 1201.

230. *See* NAFTA, *supra* note 8, arts. 1202, 1203 (delineating the principles of national treatment and most favored nation status). *See also* IPAC Report on NAFTA, *supra* note 120, at 26 (discussing the basic trade principles embodied in NAFTA). JOHN JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 133-48, 189-202 (3d ed. 1991) (discussing these obligations).

231. *Report of the Administration, supra* note 26, at 710.

232. NAFTA, *supra* note 8, art. 1208.

233. NAFTA, *supra* note 8, art. 1207.

234. *See* Labor Advisory Committee Report, *supra* note 183, at 12 (noting the difficulty of making predictions about NAFTA's effect on the respective workforces).

235. *See* Labor Advisory Committee Report, *supra* note 183, at 121.

236. IPAC Report on NAFTA, *supra* note 120, at 26.

237. *See* ROBERT B. REICH, THE WORK OF NATIONS 209 (1991) (noting that un-

4. Temporary Entry for Business Visitors

Labor is seriously concerned about the potential effects of NAFTA's chapter on "Temporary Entry for Business Visitors." Although the chapter's title implies that it is aimed at professional individuals who are conducting international business, its provisions may have much broader implications. Ambiguities in the rules governing the temporary entry of business visitors may permit undesirable or illegitimate purposes such as the recruitment of persons qualifying as business visitors as replacements for striking American workers.[238]

NAFTA chapter 16 provides that the parties will grant temporary entry to individuals who qualify within one of four classes: "Business Visitors";[239] "Traders and Investors";[240] "Intra-Company Transfers";[241] and "Professionals."[242] In order to gain entry under these provisions a person must only certify at the border that they meet the categorical requirements set forth in chapter 16.[243] In most instances, oral attestations or a letter from the employee's place of business is to be treated as sufficient proof of qualifications.[244] Requiring substantial documentation could create professional gridlock at the border, however, the current NAFTA minimalist approach could allow chapter 16 to become an entry loophole for illegal immigrants and replacement workers for striking Americans.[245]

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skilled labor can easily be replaced by similarly unskilled labor from low wage countries).

238. *See* Labor Advisory Committee Report, *supra* note 183, at 16-17 (discussing the problem of replacement workers).

239. *See* NAFTA, *supra* note 8, Annex 1603.A.1-2 (setting forth the qualifications for "business visitor" status). *See also* Joint Description, *supra* note 174, at 38 (1992) (describing proposed NAFTA provisions for business visitors).

240. *See* NAFTA, *supra* note 8, Annex 1603 (B)(1)(a),(b) (setting forth the qualifications for "trade and investor" status); Joint Description, *supra* note 174, at 38 (same).

241. *See* NAFTA, *supra* note 8, Annex 1603 (C)(1) (setting forth the qualifications for "intra-company transfer" status); Joint Description, *supra* note 174, at 38 (same).

242. *See* NAFTA, *supra* note 8, Annex 1603 (C)(1), appendix 1603 (D)(1) (setting forth the qualifications for "professional" status; Joint Description, *supra* note 174, at 38 (same).

243. NAFTA, *supra* note 8, Annex 1603 (A), (B), (C), (D).

244. NAFTA, *supra* note 8, Annex 1603(A)(2). An individual may also be required to obtain an entry visa as well. *Id.* at annex 1603(A)(5); 1603(B)(3); 1603(C)(3); 1603(D)(3).

245. *See* Labor Advisory Committee Report, *supra* note 183, at 16-17 (indicating

5. Accession

Any country or group of countries may accede to NAFTA, depending upon the terms and conditions as agreed by the parties and the acceding country or countries.[246] This critical provision is grounds for serious concern given its failure to require a review of the labor regime of future signatories.[247] Whether implementing legislation will flesh-out labor-related conditions for future accession and the actual effect of such unilateral legislation on the interpretation of NAFTA, remains to be seen.

C. THE PARALLEL TRACKS

From the outset, the Bush Administration sought to keep the NAFTA negotiations focused on what it believed were solely trade issues, leaving environmental and labor discussions on separate parallel tracks.[248] The Bush Administration defended this position by arguing that it did not want to clutter up an otherwise a straightforward trade treaty.[249] In the end, this arbitrary distinction imploded; eventually a range of trade related matters, including antitrust and certain environmental matters, found their way into the agreement.

As the negotiations of the NAFTA text began in earnest, so did efforts on the parallel environmental and labor tracks. The derogation of environmental and labor concerns did not endear NAFTA to labor and environmental advocates. Environmentalists and labor pointed out that by placing their issues on parallel separate tracks, the economic and political capital necessary for real gains to occur in these areas would not be available to them. Instead, this capital would be concentrated on obtain-

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grave concerns about illegal entry and worker replacement). There are particular concerns that this chapter of NAFTA could be used to circumvent, or undermine, the Immigration Nursing Relief Act of 1989. *Id.*

246. *See* NAFTA *supra* note 8, art. 2205 (providing rules for accession to NAFTA). No other guidance is provided on accession other than the need for each country to follow its applicable legal procedures for approval of a free trade agreement. *Id.*

247. *See supra* notes 181-82 and accompanying text (discussing similar concerns with the accession clause in the environmental context).

248. *See Unions, Employers, and Federal Government Debate Effect of NAFTA on U.S. Safety Rules*, DAILY LABOR REP. (BNA), A8 (discussing the separation of environmental and labor negotiations).

249. *Id.*

ing the best deal for the capital interests contained in NAFTA itself. Arguably, this fear has proven justified.

1. The Labor Parallel Track

a. The 1991 Memorandum of Understanding (MOU)

On May 13, 1991, U.S. Secretary of Labor Martin and her Mexican counterpart Secretary of Labor and Social Welfare (STPS) Farell signed a Memorandum of Understanding (MOU) calling for increased cooperation and joint action on labor issues over the following five years.[250] The MOU calls for information sharing and cooperative efforts focusing on child labor, worker health and safety; compilation of employment statistics, quality and productivity; procedures for resolving labor conflicts, social security systems and workers' credit issues; and collective bargaining agreements.[251] Additionally, since the September 9, 1991 meeting of the United States-Mexico Binational Commission's Labor Working Group, cooperative efforts have been commenced in the areas of worker rights, labor-management relations, and the informal economies.[252] The MOU was accompanied by an "Action Plan for Cooperation" listing a series of specific actions to be jointly undertaken in 1991-1992.[253] To date, these cooperative efforts have consisted largely of jointly drafted papers on workers' health and safety and child labor regulations in the United States and Mexico, a conference on health and safety in the steel industry, and a series of papers on the informal economic sector.[254]

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250. Memorandum of Understanding Regarding Cooperation between the Department of Labor of the United States of America and the Secretariat of Labor and Social Welfare of the United Mexican States, May 13, 1991, *in* May 1 Plan, *supra* note 11, at 20-24 [hereinafter MOU]. *See also Report of the Administration, supra* note 26, at 92; UNITED STATES CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, US-MEXICO TRADE: PULLING TOGETHER OR PULLING APART 49 (1992) (OTA-ITE-545) [hereinafter OTA REPORT]; *Testimony of Labor Secretary Lynn Martin Before the Senate Finance Committee*, Sept. 10, 1992, *available in* LEXIS, Nexis Library, Omni database [hereinafter *Martin Testimony*] (discussing the MOU).

251. MOU, *supra* note 250, at 22; OTA REPORT, *supra* note 250, at 49; *Report of the Administration, supra* note 26, at 92.

252. OTA REPORT, *supra* note 250, at 49; *Report of the Administration, supra* note 26, at 92.

253. *Report of the Administration, supra* note 26, at 92.

254. OTA REPORT, *supra* note 250, at 49; *Report of the Administration, supra* note 26, at 93-97. Efforts to understand and measure the informal sector are expected

b. The Safety and Health Memorandum of Understanding

Serious concerns exist as to whether Mexico has the technical capabilities to monitor and enforce its existing workplace safety laws. For example, Mexico currently has no laboratory system equipped to analyze samples of potential airborne-exposure workplace violations.[255] Operating under the MOU, the U.S. Occupational Safety and Health Administration (OSHA) and STPS entered into a separate memorandum on February 7, 1992, allowing Mexico to use OSHA laboratories to investigate occupational safety and health violations until Mexico develops its own testing capabilities.[256] In an effort to speed up STPS's ability to conduct its own health and safety monitoring and testing, OSHA has also conducted a series of efforts to provide technology assistance and training to STPS officials.[257]

c. The Labor Statistics Memorandum of Understanding

There are also concerns that Mexico lacks the technical capabilities necessary to develop statistical data needed to track the effects of NAFTA on labor. In October of 1991, under the auspices of the United States Office of Management and Budget, the United States and INEGI, the Mexican agency responsible for developing economic and demographic statistical data, entered into a Labor Statistics Memorandum of Understanding calling for greatly enhanced cooperative efforts in gener-

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to intensify as Mexican, World Bank, and United States Agency for International Development staff begin to examine linkages between Mexico's formal and informal economies, including the role of micro-enterprise; the role of the informal sector in economic development; and strategies to bring workers into the economy into existing social safety net protections. *Id.* at 97.

255. *Report of the Administration, supra* note 26, at 90. Mexico is currently in the process of developing such a laboratory. *Id.*

256. *Report of the Administration, supra* note 26, at 93. OSHA has provided STPS with its sampling and analytical methods protocols for determining compliance with maximum permissible exposure levels for airborne contaminants. *Id.* In addition, OSHA personnel have provided on-the-job training to Mexican technical personnel and a training course on industrial hygiene sampling to Mexican government and industry experts. *Id* at 93-94. Additionally, the United States and Mexico convened a conference in February of 1992 in Mexico City on health and safety issues in the iron and steel industrial sectors. *Id.* at 94.

257. *Report of the Administration, supra* note 26, at 94.

ating statistical data.[258] Since the signing of the Labor Statistics Memorandum of Understanding, the resulting principal cooperative effort is the development of training courses and materials designed to improve the collection and analysis of relevant data in Mexico.[259] Selected Mexican personnel have also participated in other training efforts provided by the United States.[260]

d. The Effectiveness of the MOU

The MOU and the other supporting memorandums of understanding between the United States and Mexico on labor issues are important steps towards developing a culture of social justice in employment practices in Mexico. The degree to which these efforts can effect real changes in Mexican employment practices, however, remains to be seen.[261] The efforts under the MOU generally avoided the most intractable labor problems in Mexico, in particular the antagonistic and adversarial relationship between the Mexican government and Mexican labor unions.[262] Although both governments claim that Mexico's labor standards are roughly on par with those in the United States, both governments generally refuse to discuss incidents like the Mexican government's seizure of labor leader Gonzalez-Cavavos during wage negotiations on behalf of maquiladora workers.[263] Further, critics argue that, although informa-

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258. *Report of the Administration, supra* note 26, at 96.

259. *Report of the Administration, supra* note 26, at 96. These courses will focus on productivity, employment and wage statistics. *Id.*

260. *Report of the Administration, supra* note 26, at 96.

261. *See* OTA REPORT, *supra* note 250, at 49 (noting that the full effects of the United States-Mexico efforts to achieve labor parity are as yet undetermined).

262. OTA REPORT, *supra* note 250, at 49.

263. *See* Jerome I. Levinson, *Free-Trade Pact Shortchanges the Rights of Mexican Workers*, STAR TRIB., Oct. 5, 1992, at 15A (reviewing Mexico's difficulties in enforcing labor standards and reporting the Gonzales incident); Christopher Whalen, *Bordering on Repression*, WASH. POST, Dec. 27, 1992, at C3 (reviewing the aggressive tactics taken by anti-labor forces and reporting the arrest and interrogation of Gonzales). Agapito Gonzalez-Cavavos, is the leader of the Union of Journeymen and Industrial Workers in Matamoros, Mexico, and he has been an aggressive advocate for better wages and working conditions for maquiladora workers. *See* Levinson, *supra*; Whalen, *supra*. During wage negotiations in 1992, management, concerned with Gonzales' aggressive style of negotiation, sent its lawyers to complain to Mexican President Salinas. *See* Levinson, *supra*; Whalen, *supra*. Following this meeting, Gonzalez was arrested and jailed for alleged tax evasion in 1988. *See* Levinson, *supra*; Whalen, *supra*. While being questioned without an attorney present, the 76 year-old man began to hyperventilate and had to be hospitalized. *See* Levinson, *supra*; Whalen,

tional cooperation efforts are an important first step, the MOU fails to address any underlying substantive labor issues that continue to plague NAFTA.[264] Moreover, there are indications that even the informational exchange and cooperation initiatives called for in the MOU are well behind schedule.[265] Although it is difficult to determine the ultimate effectiveness of these cooperative efforts, the Labor Advisory Committee on NAFTA characterized the actions taken under the MOU as "political window dressing."[266]

e. The Bilateral Labor Agreement Complementing the MOU and the Cooperative Commission on Labor

On September 14, 1992, the United States and Mexico signed the Agreement Between the Government of the United States of America and the Government of Mexico Complementing the 1991 Memorandum of Understanding on Labor Cooperation, and Regarding the Establishing of a Consultative Commission on Labor Matters (the Bilateral Labor Agreement).[267] Essentially, the Bilateral Labor Agreement extends cooperative efforts on labor matters beyond the five-year term of the existing MOU.[268] Building on the MOU and the existing Binational U.S.-Mexico Commission, the Bilateral Labor Agreement establishes a Consultative Commission on Labor Matters (the Commission).[269] The Commission will be co-chaired by the U.S. and Mexican Secretaries of Labor, or their designees, and it will have two principal purposes: 1) to provide a forum for consultation on labor issues; and 2) to manage and monitor new and ongoing cooperative efforts on labor matters.[270] As

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supra.

264. Public Citizen, *Bush's Broken Promises on Trade, the Environment and Jobs*, at 2 (undated).

265. *Id.* at 2.

266. Labor Advisory Committee Report, *supra* note 183, at i.

267. Agreement Between the Government of the United States of America and the Government of Mexico Complementing the 1991 Memorandum of Understanding on Labor Cooperation, and Regarding the Establishing of a Consultative Commission on Labor Matters, Sept. 14, 1992, *reprinted in, Report of the Administration, supra* note 26, at 101, Appendix A [hereinafter Bilateral Labor Agreement].

268. *Report of the Administration, supra* note 26, at 98.

269. *Report of the Administration, supra* note 26, at 98.

270. *See* Bilateral Labor Agreement, *supra* note 267, arts. 1, 3 (listing composition of the Consultative Commission). *See also Report of the Administration, supra* note 26, at 98, 103-4 (providing for chairing of the commission and listing its composition). The Consultative Commission will also be responsible for setting priorities for

set out in the Bilateral Labor Agreement, the Commission will meet once a year; however, it may meet more often if the parties so desire.[271] The Commission is expected to establish working groups that will meet more frequently to deal with specific topics.[272] Unless alternative arrangements are agreed to, the United States and Mexico are expected to pay for their own participation in the Commission's activities, and the Bilateral Agreement makes clear that such activities are subject to the availability of funds.[273]

Article 4 of the Bilateral Labor Agreement sets out a non-exclusive list of those topics that the Commission will exchange information on, namely: 1) labor standards, including workplace health and safety standards; 2) worker rights; 3) child labor issues; 4) procedures for resolving labor disputes; 5) labor laws and the systems of labor law in general; 6) general working conditions; 7) labor standards for migrant workers; 8) retraining programs for displaced workers; and, 9) conversion to new plant technologies.[274] In conducting these informational exchange activities the parties may make provisions to enable interested non-governmental groups from their respective countries to participate.[275] For example, the Bush Administration's report on actions taken in fulfillment of the May 1, 1991 commitments noted that the United States "intends to establish a channel for consultation with U.S. labor, business, and academic representatives on the activities and responsibilities of the [Consultative] Commission."[276] This same report also committed the United States to setting up a mechanism to receive public comments on issues before the Commission.[277]

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future cooperative efforts, and serving as a mechanism for the exchange of information on enforcement matters. Bilateral Labor Agreement, *supra* note 267, art. 3; *Report of the Administration, supra* note 26, at 104.

271. *See* Bilateral Labor Agreement, *supra* note 267, art. 3 (requiring annual meetings); *Report of the Administration, supra* note 26, at 98, 104 (noting once-a-year meeting commitment while allowing more than one meeting if desired).

272. Bilateral Labor Agreement, *supra* note 267, art. 5; *Report of the Administration, supra* note 26, at 98, 106.

273. Bilateral Labor Agreement, *supra* note 267, art. 8; *Report of the Administration, supra* note 26, at 107.

274. Bilateral Labor Agreement, *supra* note 267, art. 4; *Report of the Administration, supra* note 26, at 105.

275. *See* Bilateral Labor Agreement, *supra* note 267, art. 7; *Report of the Administration, supra* note 26, at 106.

276. *Report of the Administration, supra* note 26, at 98.

277. *Report of the Administration, supra* note 26, at 98.

As Mexico has been concerned throughout the NAFTA process over the possible loss of its sovereign rights to set and enforce its own laws, the Bilateral Labor Agreement specifically includes a provision intended to guarantee these rights.[278] Again, although the Commission is a positive step towards ensuring that labor concerns are addressed in the economic integration of North America, these somewhat shaky first steps do not go far enough in meeting this goal. Given the framework of the Commission, and the lack of any funding mechanism for its activities, there are serious and legitimate concerns that the Commission ultimately will become little more than a series of annual meetings at which government representatives will talk around the more difficult labor issues of the day. The Bilateral Labor Agreement goes to great lengths to avoid providing the Commission with powers beyond that of coordinating and consulting on labor matters.[279] Moreover, given the lack of effective public participation in the Commission's activities, it is unclear whether the Commission will have even the power of the "spotlight of public shame" behind it. These limitations substantially undercut the Commission's ability to make any real gains on such difficult issues as enforcement of workplace safety regulations.[280] Finally, the relationship of this Commission to the Labor Commission established under the NAFTA side agreements has not been elaborated on.

f. Other Mexican and United States Efforts

In addition to the efforts undertaken through the MOU and the Bilateral Labor Agreement, a number of additional efforts have been undertaken to address labor issues in Mexico. Recognizing that NAFTA

278. Bilateral Labor Agreement, *supra* note 267, art. 10. This provision states that, "[t]his Agreement does not empower one Party's authorities to undertake, in the territorial jurisdiction of the other, the exercise and performance of the functions or authority exclusively entrusted to the authorities of that other Party by its national laws or regulations." *Id.*

279. *See* Bilateral Labor Agreement, *supra* note 267, art. 10. *Report of the Administration, supra* note 26, at 107 (limiting the Commission's authority to enforce its decision).

280. *See* AFL-CIO, North American Free Trade Negotiations, A Shortcut Around OSHA, Briefing Paper No. 6, (1992) (criticizing the Commission's lack of powers). The AFL-CIO, which has been a vocal critic of NAFTA, points to the case of Julio Cesar, a sixteen year old worker in Ford Motor Company's plant in Juarez, Mexico. *Id.* According to the AFL-CIO, in October of 1990, on his fifth day of work, the child died while operating a glass crushing machine in an isolated area of the plant, for example, that without proper supervision, training or protective gear. *Id.*

would not occur absent substantial improvement in Mexican labor standards, Mexico has made a significant effort to attempt to bring its standards and their enforcement closer to parity with those of the United States and other developed countries.[281] For example, basic rights to organize workers are recognized both in the Mexican Constitution and in its federal labor law.[282] Mexico also established a privately managed system of retirement insurance to complement the social security system.[283] In an effort to encourage minors to remain in school and to join the workforce as educated adults, other advances have been made in the area of public education.[284] Mexico also took a number of steps to increase workplace safety.[285]

These Mexican efforts have been complemented by efforts in the United States to address the labor concerns attendant to NAFTA. As the 1992 presidential election in the United States increasingly became a

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281. *See Report of the Administration, supra* note 26, at 84-85; Levinson, *supra* note 263, at 15A; OTA REPORT, *supra* note 250, at 39 (noting Mexican officials' commitment to advances in labor standards). These claims of parity are complicated by the substantial differences between the manner in which United States standards and Mexican standards operate. *See U.S., Mexico Have Different Approaches to Safety Standard Enforcement*, Int'l Trade Rep. (BNA), at 1568 (Sept. 2, 1992) (noting the Mexico uses premiums to deter certain behaviors whereas the United States allows states to operate their own programs).

282. *Report of the Administration, supra* note 26, at 85.

283. *Report of the Administration, supra* note 26, at 85.

284. *Report of the Administration, supra* note 26, at 87. In May of 1992, Mexico announced the National Agreement for the Modernization of Elementary Education (NAMEE). *Id.* The NAMEE is a coordinated agreement among all levels of the Mexican government to improve the quality of basic education in Mexico. *Id.* Included in this program is the substantial increase of funding for basic education programs. *Id.* at 87-88.

285. *Report of the Administration, supra* note 26, at 89. Mexican authorities review the insurance premiums paid by individual firms and increase the premiums paid by those firms with high accident rates. *Id.* Other efforts to encourage wider compliance with workplace safety laws have included expanded STPS training for enforcement personnel. *Id.* at 90.

In addition to these Mexican initiatives, the United States government took a number of internal steps to facilitate information exchange with the Mexican authorities. *See Report of the Administration, supra* note 25, at 94-95 (easing information restrictions and requiring United States agencies to cooperate in certain matters). Most notably, the United States formed inter-agency working groups to provide the Mexican authorities with information in areas such as the linkages between education and labor, worker health and safety and the environment; *id.* at 95 (discussing EPA-OSHA and Department of Labor and Department of Education working groups).

referendum on trickle down economics and its effect on U.S. companies and workers, President Bush on August 24, 1992 made a sharp departure from his prior efforts to cut worker assistance programs by announcing his Advanced Skills Through Education and Training program, or ASETS.[286] President Bush sought to use the ASETS program to replace existing worker adjustment assistance under the Economic Dislocation and Worker Adjustment Assistance Act and the Trade Adjustment Assistance Act, with what the Bush Administration called "a new, comprehensive $2 billion per year retraining and transition assistance program."[287]

Although the ASETS program was a step in the right direction with regard to worker retraining, the program, which is now likely to be replaced with a new Clinton plan, was not without flaws. Most notably, ASETS retraining grants would have come in the form of $3,000 vouchers per-year for two years, which workers could have used to select the retraining program of their choice. A three state review by the General Accounting Office of programs under the Trade Adjustment Assistance Act, however, found that more than 20% of participants in these programs incurred costs in excess of $3,000 per year.[288] Additionally, given the current costs of higher education programs, it is difficult to see how a worker who has had only $6,000 dollars of advanced training is ready to enter the high-technology workplace that experts argue must form the basis of U.S. competitiveness in the 1990s and beyond.[289]

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286. *See Report of the Administration, supra* note 26, at 79 (discussing the ASETS program).

287. *Report of the Administration, supra* note 26, at 79. The ASETS framework would have provided universal coverage for all workers whose jobs were lost or threatened. *Id.* at 79-80. The program sought to help workers through skill grants to allow them to choose a retraining program in which to participate. *Id.* at 80. ASETS would have supplemented these skill grants with income support payments to workers in retraining programs. *Id.* at 80-81. ASETS allocated two-thirds of the $2 billion dollars per year over five years to states for programs to provide basic transition assistance and retraining programs. *Id.* at 80. The remaining one-third was allocated to the U.S. Department of Labor to assist dislocated workers resulting from NAFTA industry-wide or multiple state dislocations. *Id.* at 81.

288. *U.S. and Mexico Sign Labor Agreement to Address Concerns Quickly, Martin Says*, INT'L TRADE REP. (BNA), at 1597 Sept. 16, 1992.

289. *See generally* ROBERT B. REICH, THE WORK OF NATIONS (1991). Reich states:

> The boat containing routine producers is sinking rapidly . . . . Routine producers in the United States . . . are in direct competition with millions of routine producers in other nations. Twelve thousand people are added to the world's

2. The Environmental Parallel Track

a. The August 1 Border Plan

One of the most pressing environmental issues confronting Mexico-U.S. economic integration is the U.S.-Mexico border region (the Border Region).[290] Driven by the commencement of the Maquiladora Program, a program of U.S. trade incentives to encourage the location of industrial facilities in the Border Region, and the liberalization of Mexican trade rules in 1987, industrial development in the Border Region has turned the area into "a virtual cesspool and a breeding ground for infectious diseases."[291] Building upon the existing La Paz Agreement,[292] on

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population every hour, most of whom, eventually, will happily work for a small fraction of the wages of routine producers in the United States . . . .

Id. at 209. Secretary Reich argues that the demand for "symbolic analysts"—individuals who conduct problem solving and identifying tasks, and broker other economically prosperous activities—is increasing. *Id.* at 210-11. As Labor Secretary Reich details in his book, symbolic analysts usually have, at minimum, college diplomas. *Id.* at 225-40.

290. *See* Michael Connor, Note, *Maquiladoras and the Border Environment: Prospects for Moving from Agreements to Solutions*, 3 COLO. J. INT'L ENVTL. L. & POL'Y 683, 683-5, 694-698 (1992) [hereinafter *Maquiladoras and the Border Environment*] (explaining environmental harms resulting from maquiladora industry growth). *See also* Jan Gilbreath Rich, *Financing Environmental and Infrastructure Needs on the Texas-Mexico Border: Will the Mexican-U.S. Integrated Border Plan Help?*, 1 J. ENVT. & DEV. 151, 151-157 (1992) (describing the effect of increased industrialization on natural resources and infrastructure in the border region). The border between the United States and Mexico measures approximately 1,550 miles from the Pacific Ocean to the Gulf of Mexico. EPA-SEDUE, Integrated Environmental Plan for the Mexican-U.S. Border Area (First Stage 1992-1994), II-1 (Working draft, Aug. 1, 1991) [hereinafter EPA-SEDUE]. The Border Region extends one hundred miles on each side of the international boundary. *Id.*

291. *See* Michael Satchell, *Poisoning the Border*, U.S. NEWS & WORLD REPORT, May 6, 1991, at 32, 34 (quoting American Medical Association report). *See also* Rich, *supra* note 290, at 155 (discussing Mexico's inadequate measures to protect its environment as trade increases).

292. Agreement on Cooperation for the Protection and Improvement of the Environment in the Border Area, Aug. 14, 1983, U.S.-Mexico, T.I.A.S. No. 10,827. Annexes to Agreement: Annex I, July 18, 1985, 26 I.L.M. 18 (1987); Annex II, July 18, 1985, 26 I.L.M. 19 (1987); Annex III, November 12, 1986, 26 I.L.M. 25 (1987); Annex IV, January 29, 1987, 26 I.L.M. 33 (1987) [hereinafter La Paz Agreement]. The La Paz Agreement is an extension of earlier United States-Mexico agreements on environmental cooperation. *See* Water Treaty of 1944, United States-Mexico, 59 Stat.

August 1, 1991, the U.S. Environmental Protection Agency (EPA) and the Mexican Secretaria de Desarrollo Urbano y Ecologia (SEDUE) released a draft plan for addressing the border region's environmental problems (the August 1 Border Plan).[293]

After the release of the August 1 Border Plan, EPA and SEDUE held a series of eight well-attended hearings on the plan's outlined proposals.[294] The overwhelming response from both Mexican and United States citizens present at the hearings, including certain border industry representatives, was negative.[295] The criticisms of the August 1 Plan focused on the plan's failure to: 1) address the perception by border communities that they had not been adequately consulted during the planning process;[296] 2) develop financing for the plan's objectives;[297] 3) close loopholes that would allow hazardous wastes to remain in Mexico, as opposed to being returned to the United States;[298] 4) prepare effective emergency response plans in the event of a spill or other release of toxic chemicals or wastes;[299] 5) adequately address air and wa-

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1219, T.S. No. 944; Memorandum of Understanding Between the Subsecretariat for Environmental Improvement of Mexico and the Environmental Protection Agency of the United States, June 19, 1978, United States-Mexico, 30 U.S.T. 1574, T.I.A.S. No. 9264; Mexico-United States: Agreement of Cooperation Regarding Pollution of the Marine Environment, July 24, 1980, 32 U.S.T. 5899.

293. EPA-SEDUE *supra* note 290, at I-1. SEDUE has since been merged into SEDESOL.

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

295. *Id.*

296. *See id.* at 4-5 (detailing the confusion and difficulty of gaining information). A number of those who testified at the hearings voiced their frustrations over their inability to gain information about the planning process. *Id.* One speaker at the Ciudad Juarez, Chihuahua hearing summarized these frustrations saying "I had to call Washington, D.C. to find out where this hearing was going to be held." *Id.* at 5.

297. *Id.* at 7. The plan contained an abundance of recommendations for projects to be carried out and studies to be undertaken without making reference to how the financing was to be obtained for these projects. *Id.* This left local governments wondering if they would be left to carry these financial burdens. *Id.*

298. *Id.* at 8-9. During the hearings Mexican participants voiced frustrations that the existing requirements of the La Paz Agreement, mandating that United States industries operating in Mexico return the hazardous wastes created from the use of materials brought into Mexico to the United States, are routinely ignored. *Id. See* La Paz Agreement, *supra* note 292, Annex III, art. XI (listing the La Paz requirements regarding transborder use of hazardous materials in industry).

299. *Planning the Border's Future, supra* note 294, at 9-10.

ter quality issues, including both contamination and conservation problems which currently plague the desert areas of the Border Region;[300] 6) provide for an adequate binational cooperative enforcement strategy;[301] 8) assess infrastructure needs in the region;[302] 9) address the needs of all the Border Region sister city areas;[303] 10) mandate the full application of Title III of the Superfund Amendments and the Reauthorization Act's citizens right to know provision;[304] 11) resolve

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300. *Planning the Border's Future, supra* note 294, at 10-14, 16-17. Water quality issues are critical to the economic and environmental viability of life in the border Region. *See Maquiladoras and the Border Environment, supra* note 290, at 695-97. Even absent industrial stresses, water is scarce in these regions. *Id.* Lack of adequate sanitation and industrial contamination have wreaked havoc on existing ground and surface water resources. *Id.* Stresses upon existing resources are compounded by increasing demand for "clean" water for use in agricultural and industrial production processes. *Planning the Border's Future, supra* note 294, at 10-14. Border region residents expressed serious concerns that the plan did not address either the water contamination or conservation issues. *Id.* Air contamination concerns linked to uncontrolled emissions from industrial facilities and from the high volume of vehicle traffic related to freight shipping in the region were also stressed. *Id.* at 16-17.

301. *Planning the Border's Future, supra* note 294, at 14-15. Mary Kelly of the Texas Center for Policy Studies stated during the hearings:

> The plan fails to address use of current domestic laws to solve some of the border region's environmental problems. For example, if a wastewater treatment plant is constructed in the United States to treat sewage from Mexico, can the EPA and SEDUE agree that U.S. pretreatment requirements, and jurisdiction to enforce these requirements, can be vested in the entity operating the joint treatment plant? Absent this kind of analysis of existing law or the new authority that may need to be discussed between the two countries, it is not possible to conclude that EPA and SEDUE have really explored their respective abilities to meet the commitments made in the plan.

Id. at 15 (quoting written testimony of Mary Kelly submitted to the United States).

302. *Planning the Border's Future, supra* note 294, at 18-19. The creation of properly constructed infrastructure, such as roads, sewers, and wastewater treatment plants, which are currently lacking in the region, is vital. *Id.*

303. *Planning the Border's Future, supra* note 294, at 19-20. The August 1 Border Plan identified 14 sister cities, U.S. cities with Mexican city counterparts directly across the border. *Id.* The plan, however, only focuses its programs on six of the largest sets of cities, failing to address adequately the needs of the other eight pairs. *Id.*

304. *Planning the Border's Future, supra* note 294, at 20. *See* Emergency Planning and Community Right to Know Act, 42 U.S.C §§ 11001-11050 (1992) (also known as SARA Title III). The issue of the application of SARA Title III is, on a more fundamental level, one of public access to information in both nations concerning the state of the environment around them. *Id.* Participants at the hearing wanted a wider disclosure program for SARA Title III information tailored to the needs of the

the pressing problems of environmental quality of life in squatter communities known as colonias;[305] 12) address environmental health and safety concerns pertaining to workers and those who reside near industrial areas;[306] 13) address biodiversity issues, including those related to the preservation of wetlands;[307] and, 14) recognize marine pollution problems.[308]

b. The Final Border Plan

In February of 1992, EPA and SEDUE released the final Integrated

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Border Region. *Planning the Border's Future, supra* note 294, at 14-15. The August 1 Border Plan did not address this need. *Id.*

305. *Planning the Border's Future, supra* note 294, at 21. Colonias is a term used to describe the unplanned and generally illegal squatter settlements that have been haphazardly constructed in the Border Region in response to the need for housing for the large influx of workers attracted by the maquiladoras. *Maquiladoras and the Border Environment, supra* note 290, at 697. The Colonias give rise to a wide range of public health and safety concerns the most significant of these concerns stem from the lack of potable water supplies and sanitation facilities to service these fledgling communities. *Id.* at 697; Jim Carrier, *On Both Sides of the Border, Third World Filth Festers*, DENV. POST, Oct. 20, 1991, at 1A, 8A.

306. *Planning the Border's Future, supra* note 294, at 22-24. The large volume of toxic waste transported to and utilized in the border region gives rise to serious concerns over the health of humans living in these areas. *Id.* Despite recent advances, Mexico has a history of failing to implement and enforce worker health protection provisions. Recent evidence indicates that serious threats to the health of Mexican factory workers remain. *Id.* at 22.

Similarly, inadequate enforcement of industrial discharge rules, causes serious concerns over the health risks to communities in the areas adjacent to Border Region factories. *Id.* For example, in Brownsville, Texas, which lies just across the border from the industrial city of Matamoros, Mexico, the rate of anencephaly, babies born without brains or with brain defects, is over five times the national average in the United States. This high rate defies genetic explanations. *Hunt Goes on For Cause of Brain Defects in Babies Born on Border; Anencephaly: Theories Include Chemicals Emitted by Factories, Solvents in Gulf of Mexico, or Fathers Exposed to Chemicals at Work*, L.A. TIMES, July 26, 1992, at A1.

307. *Planning the Border's Future, supra* note 294, at 24-25. Both Mexican and American witnesses focused on the loss of endangered and threatened species in the region from industrial stresses. *Id.* Experts emphasized that the plan failed to address greenbelts and other proposals to preserve the region's species. *Id.*

308. *Planning the Border's Future, supra* note 294, at 25-26. During the hearings, witnesses testified on the August 1 Border Plan's failure to address marine concerns such as the 3,000 square-mile deadzone located off of the Texas and Louisiana coasts, and the fact that 37 percent of the Gulf of Mexico's shellfish beds are now contaminated and unusable. *Id.*

Environmental Plan for the Mexican-U.S. Border Region (the Final Border Plan) for the first three-year stage of efforts on the Border.[309] This Final Border Plan differed greatly from the August 1 Border Plan.[310] The Final Border Plan focuses on four objectives: 1) cooperative efforts to strengthen enforcement of environmental laws dealing with pollution; 2) significant increases in investments for pollution control facilities; 3) cooperative efforts to "improve the understanding of pollution issues in the border region"; and 4) increased cooperative efforts in "environmental planning, training and education."[311] In addition to these generalized goals, the Final Border Plan makes an attempt to address the criticisms that had befallen the August 1 Border Plan.

Despite the efforts of EPA and SEDUE to respond to criticisms of the early draft, the Final Border Plan still contains significant shortcomings that seriously threaten the plan's ability to address the threats to the Border Region's environment resulting from expanded trade under NAFTA.[312] In a report to Congress on NAFTA, the Office of Technology Assessment, Congress' analytical arm, succinctly summarized these concerns as follows: "[t]he [Final Border] Plan is short on funding, vague on enforcement, and lacks deadlines."[313] Financing remains perhaps the most fundamental flaw of the Final Border Plan. While the Final Border Plan included a section on financing, the amounts committed by each government fail to reflect any realistic understanding of the existing needs in a region whose environment has long been neglected.[314] Additionally, the Final Border Plan makes no attempt to address

309. EPA-SEDUE, *supra* note 290.

310. *Planning the Border's Future, supra* note 294, at 26.

311. *See* Timothy Atkeson, *The Mexican-U.S. Border Environmental Plan*, 1 J. ENVT. & DEV. 143, 147 (1992).

312. *See Planning the Borders Future, supra* note 294, at 26-46 (distinguishing vast differences between the draft and revised border plans).

313. UNITED STATES CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, US-MEXICO TRADE: PULLING TOGETHER OR PULLING APART, 51 ITE-545 (1992).

314. *Planning the Border's Future, supra* note 294, at 28. The Final Border Plan's funding section includes funding commitments of $460 million from Mexico for the first three years of the plan and $380 million for years 1992 and 1993 from the United States. *See* Atkeson, *supra* note 311, at 144 (reporting on U.S. and Mexican commitments to finance an integrated border environmental plan). More realistic estimates of the cost of infrastructure and cleanup in the Border Region begin in the $6 to $9 billion dollar range. John Audley, *Why Environmentalists Are Angry About NAFTA*, *in* ZAELKE, ET. AL., EDS., TRADE AND ENVIRONMENT: LAW, ECONOMICS & POLICY 8 (Island Press 1993). Even these limited funding commitments have proven problematic. Serious Congressional concerns over the nature of the funding mecha-

how the additional expected environmental cleanup and infrastructure costs will be covered.[315] This lack of sufficient dedicated funding threatens to undermine all the environmental efforts being undertaken in conjunction with NAFTA, and would further jeopardize the Border Region's environment and the health and safety of its residents.

Enforcement is yet another shortcoming of the Final Border Plan. Although the border communities sought a binational enforcement strategy designed to ensure that polluters cannot use the border to shield them from having to meet environmental laws or face penalties, fears of treading on national sovereignty prevented any inclusion of such a strategy in the Final Border Plan.[316] Water quality issues remain as well. Although the Final Border Plan relies on the existing International Boundary Waters Commission (IBWC) to conduct widespread monitoring of groundwater quality—action that many called for in the hearings on the August 1 Border Plan[317]—the Final Border Plan provides no guidance as to the testing protocols that are to be followed, including such basic questions as the frequency of testing and what contaminating substances are involved.[318] Additionally, although the Final Border Plan places a priority on addressing water supply issues, the programs called for in carrying out this priority are not provided full funding in the Final Border Plan. Consequently, they suffer from the chronic lack of resources necessary to put words into actions.[319]

3. The Review of U.S.-Mexican Environmental Issues

NAFTA has increased concerns over the limited role played by the general public in trade negotiations. Compelled by frustration over their inability to obtain information from the Bush Administration concerning

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nisms being used caused a reduction of the EPA's requested amounts, causing the United States to fall short of its initial commitments and validated the concerns of environmentalists over the use of strict traditional budget expenditure mechanisms to fund NAFTA's parallel environmental projects. *See Report of the Administration, supra* note 26, at 126.

315. *Planning the Border's Future, supra* note 294, at 26-31.

316. *Planning the Border's Future, supra* note 294, at 31-33.

317. *Planning the Border's Future, supra* note 294, at 36. Some critics have noted that, in the past, the IBWC has failed to work well with other agencies in collecting and disseminating data, giving rise to concerns with regard to how it will carry out the new responsibilities it is given by the Final Border Plan. *Id.* at 37.

318. *Planning the Border's Future, supra* note 294, at 36.

319. *Planning the Border's Future, supra* note 294, at 40.

the direction of NAFTA negotiations, Public Citizen, Sierra Club and Friends of the Earth brought an action in the U.S. District Court for the District of Columbia to compel USTR to prepare an environmental assessment of the NAFTA negotiations,[320] pursuant to the National Environmental Policy Act (NEPA).[321] Despite the dismissal for lack of standing of the Public Citizen litigation at both the trial level and appellate levels,[322] the Bush Administration finally fulfilled one of its May 1 assurances and released both a draft and then final Review of U.S.-Mexico Environmental Issues (the Review).[323]

While the Review makes an attempt to identify the critical environmental issues raised by NAFTA, and discusses the "no NAFTA alternative," it falls far short of being the detailed NAFTA environmental impact analysis that would have been required from USTR under the environmental assessment provisions of NEPA. For example, the Review notes that approximately 50 known threatened and endangered species inhabit one part of the U.S.-Mexico Border Region that will be most directly effected by NAFTA.[324] The Review also notes that NAFTA-driven development, including certain specifically identified projects, is likely to negatively impact some of these species.[325] The only policy option presented in the Review to address this concern is the recommendation that the United States prepare a more comprehensive and careful analysis to address design modifications for bridges to ensure that spe-

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320. *See* Public Citizen v. Office of the United States Trade Representative, 782 F. Supp. 139 (D.D.C.), *aff'd*, 970 F.2d 916 (D.C. Cir. 1992). The case also sought to compel USTR to prepare an environmental assessment for the ongoing GATT Uruguay Round negotiations. *Id.* Plaintiffs refiled their action after President Bush signed NAFTA and the District Court held that NEPA applies to NAFTA. *See* Public Citizen v. Office of the United States Trade Representative, No. 92-2102 (CRR) (D.D.C. June 30, 1993) (Richey, J.).

321. 42 U.S.C. §§ 4321-4370(b) (1992).

322. Public Citizen v. Office of the United States Trade Representative, 782 F. Supp. 139 (D.D.C.), *aff'd*, 970 F.2d 916 (D.C. Cir. 1992).

323. *See* INTERAGENCY TASK FORCE COORDINATED BY THE OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, REVIEW OF U.S.-MEXICO ENVIRONMENTAL ISSUES, (Feb. 1992) [hereinafter REVIEW OF U.S.-MEXICO ENVIRONMENTAL ISSUES] (analyzing the effects of the potential NAFTA on the environment in both Mexico and the United States). *See also* Interagency Task Force Coordinated by the Office of the United States Trade Representative, Review of U.S.-Mexico Environmental Issues, Draft, Oct. 1991 (containing substantially similar draft analysis).

324. REVIEW OF U.S.-MEXICO ENVIRONMENTAL ISSUES, *supra* note 323, at 137.

325. REVIEW OF U.S.-MEXICO ENVIRONMENTAL ISSUES, *supra* note 323, at 139-40.

cies loss will be minimized.[326] The entire analysis of species loss presented in the Review is only three pages in length and is in no way comparable to the type of analysis that would have been triggered had such a finding been made during a NEPA environmental impact statement process.[327]

Despite its shortcomings, the Review did make one discernable positive contribution to the relative environmental sensitivity of NAFTA. Its final section identified a series of environmental policy options to address the concerns raised in the remainder of the Review. Among these options are a series of actions that the Review identifies for the NAFTA negotiators to undertake within the agreement itself. The Review called upon the negotiators to ensure that investment liberalization not cause countries to lower their environmental standards, or fail to implement these standards. Thus, NAFTA came to include a weak provision encouraging countries to maintain their environmental standards during investment liberalization.[328] Similarly, the Review called on the negotiators to include a provision in NAFTA to ensure that NAFTA's trade rules not endanger the provisions of certain international environmental agreements, in particular the Montreal Protocol and CITES.[329] Again, NAFTA does include a somewhat flawed attempt to protect these environmental treaties from a challenge.[330]

4. Other Mexican, United States and Canadian Cooperative Initiatives

Although environmentalists have been generally critical of NAFTA in

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326. REVIEW OF U.S.-MEXICO ENVIRONMENTAL ISSUES, *supra* note 323, at 140.

327. REVIEW OF U.S.-MEXICO ENVIRONMENTAL ISSUES, *supra* note 323, at 137-39. *Compare id. with* DANIEL J. ROHLF, THE ENDANGERED SPECIES ACT: A GUIDE TO ITS PROTECTIONS AND IMPLEMENTATION 105-136 (1989) (describing inter-agency consultation procedures under Section 7 of the Endangered Species Act). A finding in an environmental assessment that an endangered or threatened species will be harmed by a project would have triggered the extensive biological assessment requirements of the Endangered Species Act. *Id.*

328. See *supra* notes 148-53 and accompanying text (discussing the failure of the investment provision in NAFTA to adequately address fears of lowered pollution standards).

329. REVIEW OF U.S.-MEXICO ENVIRONMENTAL ISSUES, supra note 323, at 230. *See also Report of the Administration, supra* note 26, at 138 (recommending that the United States maintain the right to impose trade restrictions under existing international agreements).

330. *See supra* notes 168-69 and accompanying text (noting the potential interplay between NAFTA and other international environmental agreements).

its current form, NAFTA focused attention on the state of the environment in Mexico, and in the southwestern region of the United States. This attention has translated into a number of significant breakthroughs in environmental protection. Most notably, Mexico's desire for a NAFTA has led to a substantial strengthening of Mexican environmental laws. Although significant questions remain with regard to Mexico's ability and commitment to enforce these laws, Mexico's system of environmental law is now on relative par with the systems of the United States and Canada, and in certain areas it surpasses the protections afforded by its NAFTA partners.[331] Setting aside the question of whether Mexico's developing environmental ethic reflects a long-term commitment to sustainable development, or is merely NAFTA window dressing, Mexico is beginning to strengthen its environmental capabilities. For example, during the NAFTA process, Mexico substantially increased its environmental spending, increased the number of environmental personnel in the government, and made limited attempts, including closing certain factories, to implement an enforcement strategy.[332]

U.S. environmental efforts in the Border Region have also increased. On June 3, 1992, then EPA Administrator Reilly announced stepped-up enforcement of environmental statutes in the Border Region, with the filing of 17 federal and state actions seeking more than $2 million in penalties.[333] This first step of an ongoing enforcement program in the Border Region resulted in at least two criminal indictments, and ten

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331. See *Report of the Administration, supra* note 26, at 23-26 (providing a report on Mexican environmental laws).

332. *See Report of the Administration, supra* note 26, at 131-35 (reporting on the improved enforcement of environmental laws in Mexico). In 1992, Mexico increased its environmental enforcement budget to $68.2 million, up from $3.7 million in 1989. *Id.* at 133. Mexico increased the number of inspectors three-fold to approximately 300. *Id.* As of September 18, 1992, Mexico had permanently or temporarily closed some 200 industrial plants operating in the Border Region. *Id.* At least one report, however, provides that Mexican environmental enforcement efforts tapered off after the approval of fast track. ROBERT A. PASTOR, INTEGRATION WITH MEXICO: OPTIONS FOR U.S. POLICY 60 (1993). *See also* Todd Robertson, *Mexico's Environmental Dilemma*, WASH. POST, Apr. 4., 1993, at A36 (quoting Domingo Gonzalez of the Texas Center for Policy Studies discussing Mexican enforcement: "They [officials] are trying very hard to create a facade of enforcement without actually doing anything.") (brackets in original).

333. *See* EPA, Enforcement Actions Taken Against Polluters on U.S.-Mexico Border 1 (June 3, 1992) (press release on file with authors) (noting the various lawsuits filed by the EPA). California and Arizona state authorities also filed indictments on behalf of their respective states in these same cases. *Id.* at 3.

civil actions for violations of federal air, toxic substance, community right to know, and waste laws.[334]

Further, cooperative environmental efforts between the United States and Mexico undertaken in conjunction with NAFTA's parallel track have also advanced environmental protection in the Border Region and Mexico as a whole. One means of advancing environmental protection to this region includes the NAFTA-related efforts to encourage the transfer of environmentally sound technologies to Mexico. As part of this effort, the United States Agency for International Development (AID) committed $1 million dollars in technical assistance from 1990 to 1993.[335] Although this sum is far less than the amount needed to implement a real technology transfer program, it is a positive step in that direction. The EPA also established an Environmental and Energy Efficient Technology Transfer Clearinghouse in Mexico City, Mexico, to help Mexican decision-makers understand what technologies are available.[336] The Department of Interior has also conducted a number of cooperative efforts with Mexican officials in the areas of resource conservation and management, wildlife conservation, information gathering, and preservation of protected areas.[337] Additional cooperative efforts have also focused on providing training to Mexican environmental personnel.[338]

Cooperative efforts have also made gains in the area of enforcement. In response to an earlier U.S. General Accounting Office Report concluding that inadequate information has hampered enforcement of hazardous waste laws, EPA Region 6 has set up a joint waste tracking system for Mexican and United States environmental enforcement personnel, which will be expanded to cover the entire Border Region.[339]

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334. *Id.* at 1. Of these actions, eight were administrative enforcement indictments filed by EPA and two were judicial actions filed by the Department of Justice on behalf of EPA. *Id.* at 2.

335. *Id.* at 128.

336. *Id.*

337. *See* OFFICE OF INT'L AFFAIRS, U.S. DEPT. OF THE INTERIOR, MEXICO-DOI COOPERATIVE ACTIVITIES (1992) (setting forth Mexico-U.S. cooperative activities).

338. *See* REVIEW OF U.S.-MEXICO ENVIRONMENTAL ISSUES, *supra* note 323, at 33-34.

339. *Report of the Administration, supra* note 26, at 134. *See also* UNITED STATES GENERAL ACCOUNTING OFFICE, TESTIMONY BEFORE THE ENVIRONMENT, ENERGY AND NATURAL RESOURCES SUBCOMMITTEE, COMMITTEE ON GOVERNMENT OPERATIONS, HOUSE OF REPRESENTATIVES, U.S. AND MEXICAN MANAGEMENT OF HAZARDOUS WASTE FROM MAQUILADORAS HAMPERED BY LACK OF INFORMATION, GAO/T-RCED-92-22, (Nov. 21, 1991) (statement of Richard L. Hembra, Director, Environmental

EPA and SEDESOL (the agency that replaced SEDUE) also began cooperative efforts in the area of enforcement in specific incidences. For example, EPA and SEDESOL worked together to begin the prosecution in the United States of the illegal exporter of waste solvents to Tijuana, Mexico.[340]

Although these NAFTA-related environmental advances are commendable, it is important to note that they are just the tip of the iceberg. For example, a recent spot survey of six United States firms chosen at random, operating in Mexico found that not one of the six facilities had the necessary environmental permits for its operations.[341] If this survey is in any way indicative of the real state of Mexico's environmental capabilities, there is much more work to be done if NAFTA-driven development is to be environmentally sustainable in nature.

a. Bilateral Environmental Agreement

In September of 1992, the United States and Mexico initialed the Agreement Between the Government of the United States of America and the Government of the United Mexican States Regarding the Strengthening of Bilateral Cooperation Through the Establishment of a Joint Committee for the Protection and Improvement of the Environment (the Bilateral Environmental Agreement).[342] This agreement sought to expand the geographic scope of previous cooperative efforts under the

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Protection Issues, Resources, Community, and Economic Development Division) (discussing U.S.-Mexican efforts to manage hazardous wastes produced by companies located in Mexico).

340. *Report of the Administration, supra* note 26, at 134; EPA, Enforcement Actions Taken Against Polluters on U.S.-Mexico Border 1 (June 3, 1992) (press release on file with authors). At least one of the recently filed enforcement actions by EPA received substantial assistance from Mexican authorities in gathering the evidence necessary to take action. *Id.* In the case filed against Sbicca of California, Inc., EPA states that it was alerted to illegal operations by Mexican customs officials who had refused a bribe from company employees. *Id.*

341. UNITED STATES GENERAL ACCOUNTING OFFICE, U.S.-MEXICO TRADE: ASSESSMENT OF MEXICO'S ENVIRONMENTAL CONTROLS FOR NEW COMPANIES, REPORT TO THE CHAIRMAN, COMM. ON COMMERCE, SCIENCE AND TRANSPORTATION, U.S. SENATE, GAO/GDD-92-113, at 13 (Aug. 1992).

342. Agreement Between the Government of the United States of America and the Government of the United Mexican States Regarding the Strengthening of Bilateral Cooperation Through the Establishment of a Joint Committee for the Protection and Improvement of the Environment, *reprinted in Report of the Administration, supra* note 26, appendix C, 163 [hereinafter Bilateral Environmental Agreement].

La Paz Agreement[343] beyond the Border Region. As yet unsigned, the Bilateral Environmental Agreement would commit the two nations to cooperative efforts in the areas of: pollution prevention and control; cooperative strategies on enforcement, subject to the right of each party to exclusively enforce its laws and regulations within its own territorial jurisdiction; environmental impact assessment; pesticides; waste management; response to chemical emergencies; toxic emissions reporting; education and information exchange and dissemination; technology cooperation; and other areas agreed upon in writing by the parties.[344] The Bilateral Environmental Agreement provides that cooperative efforts within these topical areas may include: information and educational activities; cooperative visits when the parties can agree to their terms; "appropriate" cooperation on investigations; training and technical assistance; meetings; seminars; conferences; joint colloquies; exchange of personnel; consultation on domestic programs; and other forms of efforts agreed to in writing by the parties.[345]

In addition, much like the Commission set up under the Bilateral Labor Agreement,[346] the Bilateral Environmental Agreement would create a Joint Committee for the Protection and Improvement of the Environment (the Joint Committee).[347] The Joint Committee would be composed of equal numbers of Mexican and American federal officials from the relevant agencies, and would meet at least once a year.[348] It is also expected that if the Joint Committee is ever formed, it will in turn form "work groups" around specific areas for cooperative efforts.[349] Ulti-

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343. *See* La Paz Agreement, *supra* note 292.

344. Bilateral Environmental Agreement, *supra* note 342, art. 2.1; *Report of the Administration, supra* note 26, at 129-30, 164 (describing the Bilateral Environmental Agreement).

345. Bilateral Environmental Agreement, *supra* note 342, art. 2.2; *Report of the Administration, supra* note 26, at 129, 164 (describing the provisions of the Bilateral Environmental Agreement).

346. *See supra* note 342 (citing the Bilateral Environmental Agreement).

347. Bilateral Environmental Agreement, *supra* note 342, art. 3; *Report of the Administration, supra* note 26, at 129-30, 164 (describing the Bilateral Environmental Agreement).

348. Bilateral Environmental Agreement, *supra* note 342, arts. 3, 4; *Report of the Administration, supra* note 26, at 129-30, 164-65 (elaborating on the provisions of the Bilateral Environmental Agreement).

349. Bilateral Environmental Agreement, *supra* note 342, art. 5; *Report of the Administration, supra* note 26, at 130, 166-67 (describing provisions of the Bilateral Environmental Agreement).

mately, the principal task of the Joint Committee and its work groups would be to talk about cooperation between the parties on environmental matters.[350]

In an effort to provide greater public participation in these discussions, the Bilateral Environmental Agreement includes a series of provisions that seek to provide the public with the ability to participate in the Joint Committee. For example, each nation's National Coordinator to the Joint Committee can, under Article 4, request a special meeting be held to address a matter of concern raised by the public.[351] In another equally circumscribed attempt, Article 6 encourages appropriate public participation and allows the respective parties to establish channels for written submissions from the public to their own representative on the Joint Committee.[352] Further, each party would be allowed to establish advisory committees made up of nongovernmental representatives to advise their government representatives.[353] Despite these efforts to provide some degree of public access to the Joint Committee's activities, the only real requirement of public participation upon the Joint Committee would be the requirement that it must publish and make available to the public an annual report.[354]

Although the final adoption of the Bilateral Environmental Agreement would have the positive effect of extending U.S.-Mexico cooperative efforts beyond the Border Region, the attention necessary to cause the parties to sign the agreement might be better spent elsewhere, given the inherent limitations in the agreement and in the Joint Committee it would establish. This is particularly true in light of ongoing efforts among the NAFTA parties to enter into a more comprehensive environmental side agreement. In the end, the Bilateral Environmental Agreement and the Bilateral Labor Agreement[355] signed in March of 1992, are so remarkably alike that one is left to wonder why it took the two governments roughly six months to largely copy the earlier agreement,

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350. *See Report of the Administration, supra* note 26, at 129-30.

351. Bilateral Environmental Agreement, *supra* note 342, art. 4; *Report of the Administration, supra* note 26, at 130, 165-66.

352. Bilateral Environmental Agreement, *supra* note 342, art. 6; *Report of the Administration, supra* note 26, at 167.

353. Bilateral Environmental Agreement, *supra* note 342, art. 6; *Report of the Administration, supra* note 26, at 167.

354. Bilateral Environmental Agreement, *supra* note 342, art. 4; *Report of the Administration, supra* note 26, at 130, 166 (mentioning public report as only requirement of public participation in agreement).

355. Bilateral Labor Agreement, *supra* note 267, at Appendix A, 101.

replacing the word labor with environment.[356] Moreover, the similarities in the scope and nature of the provisions of the two bilateral agreements reflect their similar shortcomings. Finally, the relationship between the Joint Committee and the newly formed Commission on Environmental Cooperation has not been discussed.

b. United States-Canadian Initiatives

The environmental effects of NAFTA, and existing environmental degradation caused by CFTA, were given little, if any, attention during the NAFTA process. Instead, all three NAFTA governments chose to focus solely on the problems present in the U.S.-Mexico border region. Although the U.S.-Mexico border region is by far the more environmentally devastated of the two NAFTA border areas, the U.S.-Canada border area has also suffered environmentally from the stresses of regional economic development. For example, the Great Lakes, along with the St. Lawrence River provide drinking water for roughly 25 million Canadian and American citizens.[357] Despite the region's reliance on these water sources, and in the face of several bilateral water quality agreements, it is estimated that it will cost approximately $100 billion to restore the

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356. *Compare* Bilateral Environmental Agreement, *supra* note 342, art. 5 *and Report of the Administration, supra* note 26, at 166 *with* Bilateral Labor Agreement, *supra* note 267, art. 5 *and Report of the Administration, supra* note 26, at 106. The text of article 5 of the Bilateral Environmental Agreement provides:

> The Joint Committee may establish one or more work groups consisting of representatives of the Parties to cooperate on specific topics under this Agreement, subject to the availability of funds. The work groups shall develop work plans and shall report annually to the Joint Committee on the progress of their work. Work groups may provide recommendations on ways of further strengthening bilateral cooperation under this Agreement.

Bilateral Environmental Agreement, *supra* note 342, art. 5; *Report of the Administration, supra* note 26, at 166.

Article 5 of the Bilateral Labor Agreement provides:

> The Consultative Commission may establish one or more work groups to coordinate cooperation under this Agreement. The work groups shall develop work plans and shall report annually to the Consultative Commission on the progress of their work. Work groups may provide recommendations on ways of further strengthening bilateral cooperation under this Agreement.

Bilateral Labor Agreement, *supra* note 267, art. 5; *Report of the Administration, supra* note 26, at 106.

357. Jan Gilbreath Rich, Environment and NAFTA: Changing Our Approach to Trade Policy 9 (Dec. 2, 1992) (unpublished paper, on file with the author).

water quality of the Great Lakes.[358] Additionally, environmental critics of NAFTA have pointed to the increasing number of environmentally devastating large-scale energy projects that have been encouraged, if not caused by, the CFTA's elimination of energy export controls between the United States and Canada.[359]

Although the United States and Canada have a long history of environmental cooperation concerning border area environmental issues,[360] the existing agreements and institutions are insufficient to address the need to plan for and address future environmental threats that will stem from NAFTA. Moreover, serious issues regarding the efficacy of ongoing efforts to address issues such as transboundary air and water pollution.[361] Assuming that NAFTA will, as predicted, also increase trade flows across the U.S.-Canada border, and encourage further development along this border, these efforts are likely to fall short of achieving their goals. The failure of NAFTA parallel environmental efforts to address U.S.-Canada border issues seriously undermines confidence that NAFTA will not cause widespread environmental harms in the NAFTA North, as well as the NAFTA South.

c. The North American Commission on the Environment

As a counterpart to NAFTA, many in the environmental community have advocated the creation of a publicly accountable North American Commission on the Environment (NACE) that would have the power to monitor and enforce environmental regulations of all three parties, while also having the ability to investigate environmental violations brought to its attention by governments or citizens.[362] Others in the environmental

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358. *Id.*

359. *See* Steven Shrybman, *The Costs of Economic Integration: Trading Away the Environment*, 9 WORLD POL'Y J. 91, 96-100 (1992) (discussing deregulation of the North American energy industry).

360. *See, e.g.*, Boundary Waters Treaty, Jan. 11, 1909, U.S.-U.K., 36 Stat. 2448, T.S. No. 548 (creating rights and remedies for each nation with respect to diversion of the other's waters); Convention for Settlement for Difficulties Arising from Operation of Smelter at Trail, B.C., T.S. No. 893, 3 R. INT'L ARB. AWARDS 1905 (1941).

361. *See* Joel A. Gallob, *Birth of the North American Transboundary Environmental Plaintiff: Transboundary Pollution and the 1979 Draft Treaty for Equal Access and Remedy*, 15 HARV. ENVTL. L. REV. 85, 119 (" . . . efforts at cleaning up the Great Lakes have produced mixed results, and . . . new measures will be needed to prevent at least some significant harms to the Great Lakes in the future"); *id.* at 119-35 (discussing the failure to avoid harms from transboundary pollution).

362. Letter from John Audley, Sierra Club, to Assistant USTR Sanford Gaines,

community have sought a less powerful NACE that would provide a forum for discussion, cooperation and coordination on environmental issues, while facilitating implementation of NAFTA's environmental provisions and ensuring public participation.[363]

At a meeting of the three nations' environmental ministers on September 17, 1992 an agreement was reached to establish a NACE with a structure and powers to be subsequently negotiated.[364] The Bush Administration's vision of a NACE at that time mirrored that of those environmentalists who sought a less powerful NACE.[365] Subsequent to a State Department briefing for the environmental community on the status of the NACE negotiations, a coalition of 23 environmental groups criticized the direction of the NACE negotiations charging that the NACE being considered would have too limited a scope, no enforcement powers, inadequate funding, and few, if any avenues for public participation either in the negotiations or in the procedures of the NACE itself.[366] The election of President Clinton and his desire to conclude parallel environmental agreements with Mexico, precluded the completion of the NACE negotiations by the Bush Administration.[367]

d. NAFTA and the 1992 United States Presidential Election

As noted above, the 1992 Presidential election played a large role in NAFTA labor and environmental issues. When the need for economic renewal in the United States became a critical issue in the 1992 presi-

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(Oct. 16, 1992) (on file with CIEL); CIEL letter to Assistant Secretary of State for Oceans, International Environment & Scientific Affairs, Curtis Bohlen, (Nov. 18, 1992) [hereinafter CIEL Letter] (on file with CIEL); *see also* Lloyd J. Spivak, *Structural and Functional Models for the Proposed North American Commission on the Environment*, 8 AM. U.J. INT'L L. & POL'Y 901 (1993).

363. *See* Letter from USTR Carla Hills to Jay Hair, president, National Wildlife Federation, (Sept. 29, 1992) [hereinafter Hair Letter] (on file with CIEL) (stating that USTR adopts NWF outline for a NACE).

364. Hair Letter, *supra* note 363.

365. Hair Letter, *supra* note 363.

366. CIEL Letter, supra note 362; Environmental Groups Criticize Negotiations on North American Commission, *Inside U.S. Trade*, Nov. 20, 1992, at 17. The environmental groups also criticized the "breakneck pace" of the negotiations and endorsed President-elect Clinton's idea to vest U.S. participation in the NACE with Vice President-elect Gore. *Id.*

367. *See Clinton's Plans for the NAFTA Deal*, WASH. TIMES, Jan. 18, 1993, at E4 (noting the differing agenda for NAFTA environment negotiations proposed by the Clinton Administration).

dential election, President Bush sought to use predicted NAFTA-driven economic growth as the centerpiece of his trickle-down economic renewal package.[368] During the summer and fall of 1992, President Bush repeatedly portrayed then-Governor Clinton as anti-free trade and indebted to, what Bush characterized as, protectionist elements within the Democratic party; Bush based this portrayal on Clinton's refusal to endorse NAFTA; an odd criticism considering that Clinton at that time was not able to obtain a copy of the NAFTA text.[369]

NAFTA was considered so central to the Bush Administration's economic package that the Agreement was rushed along in a failed attempt to have it ready for the August 17, 1992 Republican National Convention.[370] The timing of criticisms aside, NAFTA did, in fact, put then-Governor Clinton in a difficult position. Although Clinton had said that he was in favor of free trade, he also wanted the support of both organized labor and the environmental community, and NAFTA was a critical issue for securing their support.[371] Looking ahead to a possible presidency, Clinton did not want to adopt a campaign position that might, in the future, endanger a NAFTA. In an attempt to balance these interests, Clinton-Gore campaign representatives consulted with both Mexican officials and members of the environmental and labor commu-

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368. James Risen, *Dynamite Deal; Trade Pact Could Backfire on Bush in the Rush Belt*, L.A. TIMES, Aug. 7, 1992, at B5-B6.

369. *Clinton Keeps "Wait and See" Stance on NAFTA, Bush Slams Democrat for Waffling*, INSIDE U.S. TRADE, Sept. 4, 1992, at 3. During Congressional hearings on the Agreement, Senator Bentsen criticized Ambassador Hills and the rest of the Bush Administration for "[thinking] Governor Clinton should sign on the dotted line — when there wasn't even a dotted line to sign." *Hearing with Ambassador Carla Hills on a North American Free Trade Agreement (NAFTA) Before the Senate Finance Committee*, 102d Cong., 2d Sess. 120 (1992) (statement of Senator Bentsen).

370. *See* Risen, *supra* note 368, at B5 (noting that the Bush Administration had hurried the negotiations in order to announce a signing of the Agreement before the fall election campaign). The strategy of rushing NAFTA along to gain support in the election arguably failed President Bush. *Cf. Administration to Release NAFTA Text Next Week as Officials Scramble to Finish*, INSIDE U.S. TRADE, Sept. 4, 1992, at 1, 11 (discussing the Bush Administration's hurry up approach to NAFTA). When the agreement was released on September 6, 1992, critics, having found out that various elements of the deal were still being hammered in "legal drafting sessions" criticized the released agreement as a half-baked, grammatically flawed failure. *Id.* at 11. Additionally, contrary to President Bush's expectations, free trade did not sell well with the electorate in several critical states. *Id.*

371. *See* Risen, *supra* note 368, at B5-6 (stating that Clinton argued the Bush Administration did not insist on strong enough environmental or labor provisions in the pact).

nities in developing Clinton's position.[372] Ultimately, Clinton adopted a compromise position in his October 4, 1992 speech given in Raleigh, North Carolina. This speech has, in the wake of Clinton's election victory, both influenced the positions of the environmental and labor communities on NAFTA, and become a standard for what NAFTA should ultimately entail.[373] Candidate Clinton's compromise approach sought to differentiate from the Bush approach by focusing additional attention on the environmental and labor concerns with NAFTA. At the same time, Governor Clinton sought to use NAFTA as part of a coordinated overall national economic strategy.[374] Rather than renegotiate the NAFTA, the Clinton plan entailed the substantial use of certain unilateral measures and "supplemental agreements" to address the perceived environmental and labor flaws.[375]

In the area of unilateral measures, then-Governor Clinton set out a five-part approach to NAFTA improvements on environmental and labor concerns. First, Clinton called for additional retraining assistance to soften the blow of NAFTA job displacements.[376] Second, Clinton sought additional funding for environmental cleanup and infrastructure prior to the implementation of NAFTA.[377] Third, the Clinton plan called for assistance to farmers, including the strict application of United States pesticide standards to imported foods, assistance to growers in shipping alternative crops, and the eligibility of dislocated farmers for transitional retraining and other assistance.[378] Fourth, Clinton called for initiatives to ensure that NAFTA would not subvert democratic processes.[379] Here, Clinton focused on the need for enhanced public participation in trade challenges to United States' environmental protections.[380] Clinton's plan for democratizing trade dispute resolution called upon Congress to pass domestic legislation to ensure the public's role in these

372. *Mexicans Hold Consultations with Clinton-Gore Campaign on Status of NAFTA*, INSIDE U.S. TRADE, Sept. 4, 1992, at 16.

373. *See* Governor Clinton, Expanding Trade and Creating American Jobs, Remarks of Governor Bill Clinton at North Carolina State University (Oct. 4, 1992) [hereinafter Clinton Speech] (on file with author) (outlining Clinton's NAFTA campaign position).

374. Clinton speech, *supra* note 373, at 8.

375. *See* Clinton Speech, *supra* note 373, at 12 (outlining candidate Clinton's proposed changes to NAFTA).

376. Clinton Speech, *supra* note 373, at 12.

377. Clinton Speech, *supra* note 373, at 13.

378. Clinton Speech, *supra* note 373, at 13.

379. Clinton Speech, *supra* note 373, at 13.

380. Clinton Speech, *supra* note 373, at 13.

processes, as opposed to focusing on the need to enhance the role of the public in the dispute resolution procedures set out in the Agreement proper.[381] The fifth prong of Clinton's unilateral measures strategy called for measures to ensure that foreign workers would not be brought into the United States to break strikes.[382] Clinton emphasized his support for a United States law banning the use of foreign workers as replacements for striking United States' workers.[383]

Then-Governor Clinton's strategy also sought to use "supplemental agreements" with the other NAFTA parties as a means of addressing the Agreement's weaknesses.[384] Clinton called for the establishment of an "environmental protection commission with substantial powers and resources . . . ."[385] According to Clinton, this environmental commission should support the enforcement of each country's own environmental laws "through education, training, and commitment of resources, and provide a forum to hear complaints."[386] Furthermore, Clinton's plan called for the environmental commission to have equitable powers to provide remedies, including money damages, and legal power to order the abatement of environmental harms.[387]

The Clinton supplemental approach to NAFTA called for a similar agreement on labor issues. The supplemental agreement on labor issues, as sketched out in his speech, would create a trilateral labor commission with "extensive powers" to educate, train and develop minimum labor standards.[388] He also called for the labor commission to have dispute resolution and remedy powers similar to those called for in the environ-

381. Clinton Speech, *supra* note 373, at 13.

382. Clinton Speech, *supra* note 373, at 13. Governor Clinton's remarks focused on the threat to professional workers, such as nurses, of the use of foreign professionals to diminish the bargaining power of U.S. labor. *Id.* He also focused on the plight of U.S.' truckers with regard to the agreement's provisions that allow foreign truckers entry into the United States without their full compliance with United States safety and training laws. *Id.* at 14.

383. Clinton Speech, *supra* note 373, at 14. Governor Clinton's plan also called for a sixth unilateral action, namely the delegation by Congress of authority to the President to continue negotiations aimed at addressing newly emerging issues related to the unanticipated effects of NAFTA. *Id.* at 15.

384. Clinton Speech, *supra* note 373, at 14.

385. Clinton Speech, *supra* note 373, at 14.

386. Clinton Speech, *supra* note 373, at 14.

387. Clinton Speech, *supra* note 373, at 14.

388. Clinton Speech, *supra* note 373, at 15.

mental commission.[389]

In setting out his agenda for the establishment of these supplemental labor and environmental commissions, then-Governor Clinton also stressed the need for each of these commissions to have a range of procedural safeguards to ensure that the public would have the right to petition their attention to a particular concern and to participate in their activities.[390] Moreover, Clinton called for these agreements to have provisions requiring each country to provide their citizens with the right to use their domestic legal systems to ensure that each nations' environmental and labor laws are being fully enforced.[391]

e. A Prescription for NAFTA's Future

(1) Introduction

The environmental and labor communities have been active in proposing "fixes" to what many believe is a fundamentally flawed NAFTA. In an attempt to synthesize many of these suggestions along with our own thoughts on the issues, this section sets forth specific ideas for improving the NAFTA package in a manner that accounts for the social concerns left out of the original NAFTA negotiations.[392] Without unraveling the Agreement, technical amendments, supplemental agreements and implementing legislation can accomplish these goals to a substantial extent.[393] In the words of then-Governor Clinton, "this . . . is not a simple debate,"[394] but it is certainly one critical to guiding increased economic interdependence in this hemisphere and beyond.

Not only will correcting for NAFTA's existing flaws be a complex task, it will also be a politically difficult, but necessary task.[395] Both

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389. Clinton Speech, *supra* note 373, at 15.

390. Clinton Speech, *supra* note 373, at 15.

391. Clinton Speech, *supra* note 373, at 15.

392. The authors wish to thank their colleagues Bill Snape, Andrea Durbin, John Audley, and Alex Hittle for their insights in developing the suggestions set out in this section.

393. A coalition of 25 environmental, consumer, animal and farm groups set forth their suggestions on these goals in a March 4, 1993 letter. *See* Letter from Defenders of Wildlife, et al. to USTR Mickey Kantor (Mar. 4, 1993) (on file with CIEL).

394. Clinton Speech, *supra* note 373, at 3.

395. *See* Harry Bernstein, *Clinton Faces Hurdles on NAFTA*, L.A. TIMES, Feb. 16, 1993 at D3 (discussing President Clinton's proposals for modification of NAFTA; *NAFTA: Controversy Over Implementing Legislation Heating Up*, DAILY REP. EXEC. (BNA) at 27, Feb. 11, 1993 (predicting that NAFTA will "prove a divisive and con-

Canada and Mexico are pushing for the speedy implementation of NAFTA in their countries and are working aggressively to limit the leeway President Clinton has in addressing, through supplement agreements, any environmental or labor issues that refer back to the original NAFTA text.[396] Although treating the NAFTA text as sacrosanct from "supplementation" will satisfy our Mexican and Canadian partners,[397] it will, however, endanger NAFTA in the United States.[398] If the Clinton Administration follows the Mexican and Canadian lead and refuses to deal properly with the environmental and labor problems in the NAFTA framework, the Clinton NAFTA package will look much like a warmed-over Bush NAFTA package. That is, a free trade agreement that fails to deal adequately with labor and environmental concerns, coupled with truly parallel, generally weak, and substantially unenforceable commitments of environmental and labor improvements.

The Democratic Clinton Administration has a substantially better chance of getting its NAFTA package through the Democratic Congress than the Republican Bush Administration stood. Unless the Clinton Administration's NAFTA package achieves the environmental and labor benchmarks expected, however, the labor and environmental communities, constituencies that strongly supported Clinton's election, may line up to oppose him on this vital issue.[399] Although the President may be able to rally enough support for the package in Congress, the fight could be bloody and will substantially harm the long-term support the President can expect from these two valuable constituencies. Further, if

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troversial issue at whatever point it is submitted").

396. *See* Deborah Charles, *Canadians, Mexicans Insist NAFTA Will Not Be Reopened*, Reuter Bus. Rep., Feb. 16, 1993, *available in* Nexis Library, Omni database; Anthony Boadle, *Canada and Mexico Seek to Expedite NAFTA Implementation*, Reuters, Feb. 15, 1993, *available in* Nexis library, Omni database; *Clinton Side Deals Could Derail NAFTA*, OTTAWA CITIZEN, Feb. 15, 1993, at C8.

397. *Accord* Deborah Charles, *Canadians, Mexicans Insist NAFTA Will Not Be Reopened*, Reuter Bus. Rep., Feb. 16, 1993, *available in* Nexis Library, Omni database (expressing Mexican and Canadian opposition to reopening NAFTA talks).

398. *See* Harry Bernstein, *Clinton Faces Hurdles on NAFTA*, L.A. TIMES, Feb. 16, 1993 at D3 (noting the political pressures on the Clinton administration to negotiate supplemental agreements); *NAFTA: Controversy Over Implementing Legislation Heating Up*, DAILY REP. EXEC. (BNA) at 27, Feb. 11, 1993 (discussing political difficulties raised by proposed supplemental agreements).

399. *See* Harry Bernstein, *Clinton Faces Hurdles on NAFTA*, L.A. TIMES, Feb. 16, 1993 at D3 (outlining labor and environmental groups' opposition to NAFTA); *NAFTA: Controversy Over Implementing Legislation Heating Up*, Daily Rep. Exec. (BNA) at 27 (Feb. 11, 1993) (same).

environmental and labor concerns are not addressed, given the grassroots political strengths of the labor and environmental movements, certain congressional members who would like to stay in lock-step with the President could find their re-election hopes weakened. Further, although the NAFTA package will probably be accepted by Congress, a NAFTA fiasco could diminish the President's ability to gain popular and congressional support for future trade agreements, including the Uruguay Round of GATT. Finally, a bloody NAFTA fight could erode the President's congressional momentum for other non-trade initiatives. All of these factors argue strongly for the President to work aggressively with our Mexican and Canadian partners, as well as with Congress, to ensure that these concerns are addressed.

In addition, the President must also be concerned with the populist, anti-NAFTA campaign of Ross Perot eroding electoral and congressional support.[400] Although the election ofDemocratic president has increased the chances of NAFTA's approval, it has had both positive and negative ramifications for environmental protection. On the one hand, environmental groups inclined to support a Democratic president have softened their rhetoric and are more trusting then they might be under a Republican president. On the other hand, the Agreement is likely to be "greener" under President Clinton then it would have been under a second-term Bush Administration.

(2) Funding

Without money, toxic rivers on the border cannot be cleaned up, and unemployed workers cannot be retrained and put back to work. Thus, many of the concerns of both labor and environmentalists revolve around the availability of monies to fund the programs necessary to address their substantive concerns.[401] The Bush Administration's NAFTA plan sought to address these fiscal needs through the standard federal budgetary mechanisms.[402] As the sole mechanism for funding NAFTA-related environmental and labor programs, this approach has a

400. *See* Keith Bradsher, *Perot Wants a Trial Run of Trade Pact*, N.Y. TIMES, Mar. 25, 1993 at D4 (describing Perot's criticism of NAFTA).

401. *See supra* notes 26-62 and accompanying text (discussing financially related labor and environmental concerns).

402. *See Report of the Administration, supra* note 26, at 126 (detailing the Bush Administration's environmental funding plan); *Martin Rejects Using Temporary Import Fee to Fund NAFTA-Related Job Loss Programs*, Daily Rep. Exec. (BNA) 177, at D24 (Sept. 11, 1992) [hereinafter *Martin Rejection*].

number of significant drawbacks. First, in the United States, budgetary monies are generally only made available on an annual basis.[403] Thus, following a budgetary approach, each year, the funding for the programs necessary to ensure that NAFTA does not jeopardize labor or environmental interests would be subject to political vagaries.[404] Essentially, labor and environmentalists would be asked to buy into NAFTA almost indefinitely with no guarantees that NAFTA's labor and environmental costs would be covered in future years. Additionally, the costs of NAFTA environmental and labor programs in the first years of the Agreement are likely to be quite substantial.[405] These costs would place additional fiscal burdens on a United States federal budget that is already billions of dollars in deficit.[406] Further, asking the public in all three NAFTA countries to use federal funds to pay the costs of private economic growth, in hopes that the benefits of these economic gains will someday trickle down, amounts to the internationalization of an economic and social policy that the United States electorate has recently rejected. Simply put, although some federal monies will undoubtedly play a role in covering the costs of NAFTA-related labor and environmental programs, these monies should not be relied upon as the principal funding mechanism for these programs.

A second approach to funding NAFTA-related environmental and labor programs would provide for a limited duration, transaction fee of perhaps .5% of value or less, to be imposed on goods traded between the NAFTA parties.[407] Based upon the General Accounting Office's

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403. Kate Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 CAL. L. REV. 595, 620 (1988).

404. *See id.* (declaring that, "by making every program vulnerable every year, the process required Congress to expend more effort on negotiation, logrolling, and the making of alliances").

405. *See supra* notes 26-62 (discussing financially related labor and environmental concerns). The five-year cost of retraining the 150,000 United States workers estimated to be displaced by NAFTA alone is approximately six billion dollars. Bruce Stokes, *Tallying the Expenses of Free Trade*, NAT'L J., Aug. 1, 1992, at 1787.

406. At the time of the editing of this article, the United States federal deficit was acknowledged to be 138.2 billion dollars. Xinhua General News Service, March 19, 1993, *available in* LEXIS, Nexis Library, Current File.

407. *See* Representative Richard A. Gephardt, Address Before the 21st Century Conference 4 (Sept. 9, 1992) (proposing a "cross-border transactional tax"); Senator Max Baucus, Baucus Outlines New Era for Trade Negotiations 5 (Aug. 11, 1992) (press release, on file with author); *Martin Rejects Using Temporary Import Fee to Fund NAFTA-Related Job Loss Programs*, DAILY EXEC. REP. (BNA) 177, at D24, Sept. 11, 1992.

figures for 1991 merchandise trade between the United States and Mexico alone, and assuming no increase, this transaction fee would yield roughly 320 million dollars per year for environmental and labor programs.[408] Monies collected from this fee would provide dedicated revenue to pay for the necessary labor adjustment assistance and environmental infrastructure and cleanup programs to accompany NAFTA. This approach has been endorsed and advanced by Hill leaders, including Representative Gephardt and Senator Baucus.[409] Moreover, if these funds are, in turn, used to leverage additional investment, the amount of available NAFTA funding could be increased by several fold.

Critics of this approach argue that the addition of a new tariff is antithetical to NAFTA's fundamental goal of eliminating all barriers to free trade.[410] Although a transaction fee would most certainly cut against the NAFTA grain, the more important issue is whether the benefits from this departure outweigh its costs. In determining the extent of the burden here, it is important to remember that NAFTA does not immediately eliminate all tariffs, some tariffs will remain in place for an additional fifteen years.[411] Furthermore, for industries benefitting from NAFTA tariff cuts ranging, on the average, from four to ten percent, the imposition of a .5% limited duration transaction fee is a *de minimus* burden.[412]

Although the burdens from a transaction fee are small, the benefits

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408. This number is calculated from the bilateral merchandise trade totals contained at United States General Accounting Office. UNITED STATES GENERAL ACCOUNTING OFFICE, U.S. MEXICAN TRADE AND INVESTMENT DATA, REPORT TO THE HONORABLE RICHARD A. GEPHARDT, MAJORITY LEADER, AND TO THE HONORABLE SANDER LEVIN, HOUSE OF REPRESENTATIVES, GAO/GGD-92-131, at 3-4 (1992). *See also* Stokes, *supra* note 405, at 1787 (asserting that a fee of 1% on all goods currently subject to a tariff would generate 500 million dollars).

409. *See supra* note 407 and accompanying text (discussing cross-border transactional taxes).

410. *Martin Rejection*, *supra* note 402, at 177; *Transaction Fee Will Make Foreign Trade More Expensive, Cost Jobs, Bush Asserts*, DAILY REP. EXEC. (BNA) 168, Aug. 28, 1992.

411. *See Report of the Administration*, *supra* note 26, at 6 (explaining that tariffs for sensitive sectors will be phased out in ten years, and those for extremely sensitive sectors will be phased out in fifteen years).

412. *Martin Rejection*, *supra* note 402, at 177 (statement of Senator Max Baucus). The average tariff on American products entering Mexico is roughly ten percent and the average tariff on Mexican products entering the United States is roughly four percent. WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, NORTH AMERICAN FREE TRADE AGREEMENT FACT SHEET 2 (Aug. 12, 1992).

from this approach to NAFTA funding would be substantial. A transaction fee would remove a significant portion of the financial burdens associated with NAFTA from the NAFTA parties and would place this portion of the burden on the industries that will benefit most directly from NAFTA.[413] A transaction fee would ensure that some quantity of monies is available to fund NAFTA-related labor and environmental programs over a term greater in duration than single fiscal year budget allocations. These benefits could be further increased if the fee money is used, in part, as seed capital to encourage other investment in the NAFTA-related labor and environmental programs.

A third method of funding NAFTA programs is to form a trilateral North American Development Bank.[414] Although this approach would address the concern that monies must be dedicated for time periods of greater than one fiscal year,[415] as a principal funding mechanism for NAFTA-related labor and environmental programs it too has its drawbacks. Most importantly, investment banks lend money that must be repaid, generally with interest. Thus, the federal governments, or their political subdivisions, including states and cities, borrowing to pay for these programs would once again be paying the costs of economic integration. Thus, such a funding scheme is best applied only to capital projects, not financial loss leaders, such as environmental remediation. Additionally, the formation of an international investment bank would require the creation of an international bureaucracy, minimizing the control of the respective participating governments in setting priorities for the labor and environmental programs that receive funding.

Perhaps the best approach to funding NAFTA-related programs is a combined strategy drawing upon the strengths of each of the mechanisms discussed above. A combined strategy would use monies obtained from a relatively small, limited duration transaction fee as a dedicated funding base to pay for initiatives aimed at addressing existing harms in the Border Region and the immediate labor and environmental effects of NAFTA. For example, transaction fee monies would be appropriately spent for environmental remediation in the Border Region, and worker adjustment assistance for displaced and threatened workers.[416] Transac-

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413. *Martin Rejection*, *supra* note 402, at 177 (statement of Senator Max Baucus).

414. *See* Albert Fishlow, Sherman Robinson & Raul Hinojoso-Ojeda, *Proposal for a North American Development Bank and Adjustment Fund* Business Mexico, Apr. 1992, *available in* LEXIS, Nexis library, Omni database.

415. The parties would provide capital infusions that could be borrowed off of over a period of years.

416. *See supra* notes 409-12 and accompanying text (discussing transaction fee ap-

tion fee monies should also be used to offset the costs of the trilateral environmental and labor commissions discussed below.

At the same time, a trilateral investment bank would provide concessional loans to state and local governments to fund NAFTA-related infrastructure, or public works, projects.[417] The trilateral investment bank might also provide low- or below-rate loans to private projects aimed at improving environmental management and workplace health and safety. Funding from the transaction fee fund, and the development bank, could be supplemented with budgetary funds as the parties deem individually and collectively appropriate. This framework for the funding of NAFTA-related environmental and labor needs could be established through a supplemental agreement.

(3) Effective Trilateral Commissions on the Environment and Labor

Effective trilateral commissions with powers and responsibilities greater than monitoring and consultation are critical mechanisms for addressing a number of NAFTA-related labor and environmental concerns.[418] Trilateral labor and environmental commissions could be established through supplemental agreements among the NAFTA parties. For these commissions to be effective, their framework agreements must provide for a number of critical elements related to both their structure and the substance of their activities.

First, membership in the labor and environmental commissions must be mandatory for any NAFTA country. Structurally, the commissions should be made up of senior level representatives of the parties, and in the United States the appointment of this representative should be subject to Senate confirmation. Alternatively, the commissions could be headed by the appropriate agency heads from each party. The commissions should be staffed by a rotating secretariat, with a relatively small staff, and a secretary general, selected by a consensus vote of the parties

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proach).

417. Fishlow, *supra* note 414.

418. *See* CIEL Letter, supra note 362; *Environmental Groups Criticize North American Commission*, INSIDE U.S. TRADE, Nov. 20, 1992, at 17-18 (suggesting that in addition to monitoring and enforcement powers, the Commission should also have oversight authority, a guaranteed revenue mechanism and information gathering ability).*See also* Robert Housman, Paul Orbuch, and William Shape, *Enforcement of Environmental Laws Under a Supplemental Agreement to the North American Free Trade Agreement*, 5 GEO. INT'L ENVTL. L. REV. 593 (1993) (discussing a proposal for trilateral enforcement of environmental laws).

to a three-year term. On any matter before the commission each country would be accorded one vote and decisions would be by majority.[419] The commission should maintain an office in each NAFTA country to accept citizens' complaints.

In addition, a public advisory committee to each commission should be established. Each party should select four individuals to serve on the committee for a two-year term. These advisory committee members should be representative of the various interests effected by the activities of the committees. Thus, representatives on the environmental advisory board should be drawn from environmental organizations, border communities, industry—in particular the environmental goods and services sector—and trade experts. Substantively, the commissions should have a wide range of consultation and investigation powers designed to identify and address, respectively, North American labor problems, and North American environmental problems. Each advisory committee would elect a chair, and that chair would serve as that advisory committee's liaison to the commission and should sit as a non-voting member of the commission at all meetings including executive sessions.

The commissions should have the power to undertake an investigation of a problem at their own initiative, at the initiative of the parties, or at the urging of individual effected private citizens or groups. Matters to be addressed should be selected by the commissions by a majority vote of the appropriate commission's membership. If a matter is not selected by one of the commissions for consideration, the commission would still be responsible for proceeding on that matter if a two-thirds majority of that commission's advisory committee refers it back to the commission.

Once a problem is identified, the role of the commission should be to focus the attention of the parties and the public on the problem through public investigations, consultations and reporting. Throughout these efforts, the primary goal of the commissions should be to encourage and facilitate an agreement among the parties to address the problem at hand, with an eye towards avoiding a larger dispute. If consultations do not result in a solution of a labor or environmental problem the trilateral commissions should have the power to impose sanctions.[420]

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419. In the event of a tie, caused by an abstention, or from increase in the number of NAFTA parties through the accession clause, the secretary general would cast the deciding vote.

420. *See* Clinton Speech, *supra* note 373, at 14 (noting that the Commission must have the power and resources to encourage enforcement of a country's laws through sanctions).

On the environmental side, a NAFTA party, or an effected individual or group from a NAFTA country, should be able to petition the environmental commission to investigate whether a NAFTA party is failing to maintain or enforce an environmental standard that is a cause of injury to the domestic industry of another NAFTA party. After reviewing a complaint, if the commission makes such a preliminary finding, it will initiate consultations among the parties in an attempt to settle the dispute and eliminate the complained of act, or failure to act.[421] If consultations do not succeed in resolving the matter, the commission should authorize and require the domestic authorities of the nation in which the injured industry is located to make a determination as to whether the complained of action or nonfeasance is "a cause of material injury to the domestic producer of a like or directly competitive product."[422] Should the appropriate domestic authorities find that this standard is met, the injured NAFTA party would be authorized to utilize the emergency action provisions in chapter eight of NAFTA.[423] This protocol should make clear that the availability of tariff snap-backs in environmental safeguard actions should not be limited to the transition period of NAFTA, but should be available so long as the Agreement itself exists. The tariff snap-back in such cases should be to the rate of duty in place the day immediately preceding the date at which NAFTA enters into force. Or if the preexisting duty was zero, the tariff snap-back should be to the average of all tariffs existing immediately prior to NAFTA. Further, all monies collected from these environmental snap-backs should be directed back to the export country to assist in paying to eliminate the complained of action or failure to act.

If the commission determines that an environmental harm is occurring, but the domestic authorities find that no discernible trade injury exists to the importing country's industry, the commission should have the power to fine the offending country.[424] These fines need not be

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421. *See* Peter Behr, *New Powers Sought for Trade Pact*, WASH. POST, May 14, 1993, at D1, D3 (setting out the Clinton Administration's NACE proposal).

422. *See* 19 U.S.C. §§ 1671, 1673 (1988) (requiring the ITC to determine if a U.S. industry is materially injured or threatened with material injury by reason of imports or sale of merchandise).

423. *See* Peter Behr, *New Powers Sought for Trade Pact*, WASH. POST, May 14, 1993, at D1, D3 (setting out the Clinton Administration's NACE proposal). *See also supra* notes 184-216 and accompanying text (discussing the emergency action provisions of NAFTA).

424. *See* Clinton Speech, *supra* note 373, at 14 (stating that the Commission would have the power to provide remedies, which include money damages or, as a

excessive, but must be substantial enough to attach some real cost to the offending behavior. All fines collected by the commission would be used to remediate the complained of environmental harm.[425] The failure to pay a commission fine would also be grounds for a trade sanction.

The trilateral labor commission can function very much like the environmental commission. Thus, the labor commission should have the power to investigate and fine a NAFTA party if the party is failing to enforce its own labor standards, or to maintain minimum labor standards. As the safeguard provisions of NAFTA already provide a mechanism for labor to address import surge injuries,[426] the trilateral labor commission does not need to include additional safeguards powers. Instead, as set out below, the safeguard provisions need to be amended. Given the inadequacies of these safeguard provisions, however, the trilateral labor commission might also be provided with tariff snapback authorization powers. In addition, when the labor commission finds that a party is not enforcing its own labor laws, or is failing to maintain a minimum labor standard,[427] the labor commission should have the power to fine the offending party. All activities of the commissions will be open to the public, and all reports and documents submitted to their investigation, as well as transcripts of all their meetings, should be public documents. The only limited exception to this rule of public access and participation should be when the commissions sit in executive session, such as when the environmental commission conducts an executive session on a complaint. In considering a particular matter, the commissions should also be allowed to provide for confidentiality protections to attach to proprietary information and information affecting national security in exceptional cases.

Members of each commission should also be allowed access to documents in NAFTA chapter 20 disputes that may in some way raise, an environmental or labor issue. Once these documents are provided to the commissions, their usage should be governed solely by the rules of the commissions. Further, members of the commissions should, at their own

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last resort, penalties).

425. For example, monies from fines could also be used as capital reserves for the North American Development Bank.

426. *See supra* notes 184-216 and accompanying text (discussing emergency action procedures in NAFTA).

427. In cases where a party has no applicable minimum standard to apply, the commission should use the lower applicable standard as between the other parties as a baseline.

initiative, be allowed to observe, and where appropriate participate in, NAFTA chapter 20 disputes. When a dispute panel convened pursuant to NAFTA chapter 20 confronts an environmental or labor issue it should certify the issue to the environmental or labor commission for a preliminary judgment. In such instances, a preliminary judgment of one of the commissions should be deferred to by a NAFTA chapter 20 dispute panel unless the dispute panel makes a finding, in writing, stating the rationale for the finding, that the preliminary judgment of the commission was patently erroneous.[428]

(4) Addressing Specific Labor Concerns

(a) Safeguard Measures

As discussed above, the safeguard provisions of NAFTA place too high a burden on a party seeking to protect a domestic industry, and domestic jobs, from an import surge.[429] A protocol to NAFTA should be agreed to by the parties to lower the NAFTA safeguard burden to make this burden similar to the current test used in United States domestic countervailing duty and antidumping laws.[430] Under such a burden, a party would be required to show that, due to a NAFTA tariff reduction, a good is being imported into another NAFTA country in such quantities, or under such conditions, as to be a cause of material injury to a domestic industry of the importing party, producing a like or directly competitive product.[431] As with the use of safeguard measures in environmental cases, labor tariff snap-backs should not be limited to the NAFTA transition period and any monies obtained from these tariff snap-backs should be returned to the export country to remediate the complained of harm. In addition, a labor safeguard protocol to NAFTA should provide that labor, in all participating countries, has the right under NAFTA to commence a safeguard proceeding. Alternatively, the

428. This standard should be similar to the standard of review United States federal appellate courts use in reviewing a trial courts finding of fact. *See* FED. R. CIV. P. 52(a) (stating that findings of fact shall not be set aside unless clearly erroneous); Anderson v. Bessemer City, 470 U.S. 564, 573-76 (1985) (discussing deference given findings of fact under Federal Rules of Civil Procedure 52(a)).

429. *See supra* note 202 (discussing burdens used in countervailing duties and antidumping cases in relation to burdens used in safeguard cases).

430. *Supra* note 202.

431. *See* 19 U.S.C. §§ 1671, 1673 (1988) (permitting imposition of a countervailing duty when the ITC determines that the imports will materially injure or threaten material injury to a U.S. industry).

trilateral labor commission should be granted tariff snap-back authority.

(b) Temporary Entry

A supplemental agreement should be entered into among the NAFTA parties to make clear that nothing in the underlying NAFTA prohibits the parties from making the use of foreign imported labor to replace striking domestic labor subject to criminal or civil penalties. This supplemental agreement should also clarify the ability of any NAFTA party to require business entrants to provide written certification, signed by both the entrant and the employer, certifying both the employment and employment location for which the individual is entering. This certification must also document that the position for which the foreign business entrant was hired will not in any way, either directly or indirectly, replace a striking worker of the host country or displace a domestic worker.

This supplemental agreement should be accompanied by domestic legislation in the United States that makes it a felony to knowingly employ a foreign party as a replacement for a domestic striking worker, or to knowingly enter the United States for the purpose of replacing a striking American worker. This legislation should also make it a felony to both knowingly certify to a United States official false information regarding the status of an entering foreign employee and to knowingly present such false information to a United States official.

(c) International Labor Agreements

Although international labor agreements have not generally raised substantial conflicts with trade rules, the increasingly thorough examination of the interplay of international environmental agreements provides reason to be concerned that NAFTA's provisions may be used to undercut the obligations of one or more of the NAFTA parties' obligations under an international labor agreement that relies on trade measures to implement its goals.[432] Although NAFTA makes some attempt in Article

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432. *See* Steve Charnovitz, *Environmental and Labor Standards in Trade*, 15 WORLD ECON. 335, 341, 352-55 (1992) (noting that most labor agreements do not substantially conflict with trade). *See also* Steve Charnovitz, *The Influence of International Labor Standards on the World Trading Regime: A Historical Review*, 126 INT'L LAB. REV. 565 (1987) (noting the increasing interplay of international standards).

104.1[433] to ensure that international environmental agreements are not called into question by NAFTA's rules, there is no parallel provision for international labor agreements.[434] A protocol to NAFTA must be agreed upon by the parties to provide the parties with a mechanism to list existing and future international labor agreements that shall be presumed consistent with NAFTA. This protocol should also make clear that a party's implementation of such an agreement should be deemed consistent with NAFTA, provided, that in performing the obligations under a listed international labor agreement, a party does not arbitrarily or unreasonably discriminate against the goods or services of another party.

(d) Adjustment Assistance

In the United States, domestic legislation should be enacted to turn the monies obtained through a transaction fee or other NAFTA funding mechanism into worker adjustment assistance programs. The NAFTA opportunity should be used to develop a comprehensive worker adjustment assistance program, available to all unemployed workers regardless of cause, integrating and improving upon existing assistance programs.[435] These programs should provide federal monies to the states for certified adjustment programs. State programs should be directed at retraining workers in industrial sectors that are projected to expand over the next decade and beyond. These programs should also provide specialized assistance to subpopulations of workers with particularized needs. The most notable of these needs would include older unskilled labor, who are likely to find retraining the most difficult, and workers who now suffer physical disabilities caused by occupational accidents. The amounts provided for these programs should accurately reflect the adjustment assistance needs of American labor.

(e) Investment

A protocol agreement should also address the failure of the investment provision in Article 111.4.2 to confront labor concerns and to put weight behind the promises of Presidents Bush and Salinas that NAFTA

433. *See supra* note 172 and accompanying text (discussing art. 104.1).

434. *See generally* NAFTA, *supra* note 8 (containing no parallel provisions for international labor agreements).

435. *Labor Secretary Designate Tells Panel That NAFTA is Movement in Right Direction*, 10 Int'l Trade Rep. (BNA) 49 (Jan. 13, 1993); Morici, *supra* note 36, at 99.

countries will not lower or fail to enforce their labor standards to encourage investment.[436] A protocol to Article 111.4.2 should grant the parties full access to NAFTA's dispute mechanisms in cases where a party deliberately lowered a labor standard to encourage investment and where consultations between the parties failed to resolve the differences. Although this is a difficult burden for the complaining party to meet, this burden achieves a balance between two concerns: the concern that NAFTA will encourage investment flight; and the need to provide legislators and regulators with flexibility in appropriately setting priorities and changing regulatory programs. Any failure to enforce labor standards could also be addressed through the trilateral labor commission.

(f) Accession

The United States should enact domestic legislation requiring either that the domestic labor agency of a country wishing to join NAFTA, the trilateral labor commission, or the United States government, shall undertake a comprehensive and detailed public investigation on the labor rights and workplace health and safety regulatory regimes of any country or group of countries wishing to join NAFTA. Legislation requiring that this report be a public document is essential, and the procedures undertaken in its preparation should be subject to the notice and comment provisions of the Administrative Procedures Act.

(5) Addressing Specific Environmental Concerns

(a) Standards Issues

Either through a protocol amending the underlying NAFTA text, or through technical/legal changes to the existing text, a number of concerns with the NAFTA text on standards and standards-related measures need to be addressed. First, the language of both Article 723 and Article 914 must be clarified to provide that the burden on a challenging party to prove that another party's standards measure violates NAFTA requires a showing of preponderance of the evidence.[437] This change will prevent panels from using the lower *prima facie* burden to foist the burden of proof in a challenge to an environmental measure on to the party seeking to maintain the measure.

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436. *See* NAFTA, *supra* note 8, art. 111.4.2 (discussing labor concerns).

437. *See supra* notes 110-14 and accompanying text (discussing the standard for determining whether a party's standards are violated).

In addition, Article 201 must be clarified to include within the definition of a "product" the production process methods by which the actual product is manufactured, harvested, produced, constructed, formulated and/or generated.[438] This clarification would make clear that NAFTA parties may condition access to their markets on the relative environmental sensitivity of a product's production and use, so long as distinctions drawn between production methods for the purposes of conditioning market access are not arbitrary or unreasonable restrictions on trade.

Article 712.2 and 904.2 of NAFTA should be clarified to provide that the term "level" does not prohibit a party from setting different levels of protections with respect to dissimilar, or "unlike" products.[439] This clarification would preclude the use of these articles to force the United States, or any other NAFTA party, to set one level of protection for all of its environmental initiatives. Under the presumption created by this clarification, it would be clear that while a party may not set different risk levels for like domestic and imported products, a party is free to set different risk levels across different types of products.

Article 712.3 of NAFTA should be clarified to provide that in taking a risk management decision based upon a risk assessment, a party is free to adopt a "zero risk" standard as a precautionary measure.[440] It should also be clarified that a party is free to maintain such a zero risk standard until such time as another party can prove that the potential risk addressed by the standard does not exist. In addition, to address the potential that Article 712.3 could be used to strike down environmental protections enacted by legislation or popular referendum, the protocol must provide that, in these circumstances, a standard may be justified by a risk assessment prepared after the legislative or popular vote. The term "like" product in Articles 712.4 of the S & P text and 904.3 of the TBT text must also be clarified to provide that, where slight or even minute differences between or among products can result in significantly different environmental impacts, these products are not "like."[441]

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438. *See supra* notes 82-84 and accompanying text (discussing production processes in NAFTA).

439. *See supra* notes 81-83 and accompanying text (discussing levels of production provisions in NAFTA).

440. *See supra* notes 84-85 and accompanying text (discussing risk-management provisions in NAFTA).

441. *See supra* notes 86-87 and accompanying text (discussing environmental impact of products provisions in NAFTA).

To ensure that NAFTA compliance does not become a substantial burden on sub-federal governmental units, such as states and municipalities, the parties should agree to a protocol to the Agreement that places a threshold requirement on when a state or local standard can be challenged by another party.[442] This threshold requirement should provide that a challenge can be taken against a sub-federal standard, only when the standard places a "substantial burden" upon trade among and between the parties, relative to the total trade in the product and competing products among and between the parties. The parties to the agreement should, as part of this protocol, establish a percentage requirement for "substantial burden." A party should, however, be entitled to show a substantial burden by aggregating the trade effects of a set of essentially identical sub-federal regulations on a particular product.

Given the jurisprudential history of the term "necessary" within trade parlance, Articles 712.5 and 904.4 should be amended by protocol to make it abundantly clear that respective use of the terms "necessary" and "unnecessary" in these articles does not in any way refer back or reflect the past uses or definitions of these terms.[443] To ensure that these past uses and definitions do not get read into the Agreement by future dispute panels, the protocol on standards should provide an alternative definition for these terms. The term "necessary" in Article 712.5 should be defined as "justifiably or reasonably." The term "unnecessary" in Article 904.4 should be defined as "unjustifiably or unreasonably." Additionally, Article 712.5 should be further clarified on the issue of the use of technical and economic feasibility data in determining the desired level of protection. The standards protocol should make clear that while a party should take into account technical and economic feasibility in setting its standards, these factors are not in any way determinative of what standard is appropriate.

A standards protocol must also clarify the use of international standards in standard setting under Articles 713 and 905.[444] Although the use of an international standard may be helpful in setting or raising standards, where one of the NAFTA party's standard is higher than the international standard, the international standard can only serve to bring

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442. *See supra* notes 73-75 and accompanying text (discussing the need for a threshold requirement for challenging state or local standards).

443. *See supra* notes 88-94 and accompanying text (discussing definitional concerns in several NAFTA provisions).

444. *See* NAFTA, *supra* note 8, art. 713.405 (discussing differing international standards that exist between the parties).

down the highest standard during harmonization. Thus, Articles 713 and 905 should be clarified to provide that where one of the NAFTA party's standards already exceeds the international standard, the higher standard should be used in harmonization and standard setting.

(b) Dispute Resolution

A protocol to the dispute settlement provisions of NAFTA chapter 20 is also a critical component of any effort to address NAFTA's environmental shortcomings. In fact, reforming the dispute process such that it guarantees scientific and public input can be part of the remedy for deficiencies in the standards provisions of NAFTA.[445] Ideally, environmentalists, and strong advocates of democratic principles of government alike, would like to see the entire process opened up to public access and participation. If this bold step cannot be accomplished at this time, alternative participatory mechanisms should be created.

First, the agreement establishing the trilateral environmental commission should give the commission full participatory rights in chapter 20 disputes. The agreement establishing the commission and the dispute resolution protocol should also provide that, at the request of the trilateral commission, a dispute panel must file all documents and submissions relating to a dispute with the trilateral environmental commission. After the time of filing the use of these documents and submissions should be governed by the rules of the commission.

Additionally, the protocol on dispute resolution should provide that non-governmental parties, who have a threshold interest in a dispute before a NAFTA panel have the right to present to the panel *amicus curiae* briefs, and that the panel shall take the information contained in any such briefs into account in making its determinations. This protocol should also clarify that a panel's access to outside experts should be unfettered and that such access can be requested by either party to the dispute, or the panel itself. Whether access is requested by a party or by the panel, no party should have the right to block such access.

(c) Investment

The failure of the investment provision in Article 111.4.2 to ensure that the promises of Presidents Bush and Salinas that NAFTA countries will not lower or fail to enforce their environmental standards to encour-

445. *See supra* notes 120-43 and accompanying text (discussing deficiencies in the dispute settlement provisions of NAFTA).

age investment are kept, should also be the subject of a protocol agreement.[446] A protocol to Article 111.4.2 should grant the parties full access to NAFTA's dispute mechanisms in cases where a party deliberately lowered an environmental standard specifically to encourage investment and where consultations between the parties failed to resolve the differences. Here again, this burden achieves a balance between concerns that NAFTA will encourage environmental investment flight and the need to provide legislators and regulators with flexibility in appropriately setting priorities and changing regulatory programs. Any failure to enforce environmental standards could also be addressed through the trilateral environmental commission.

(d) Energy / Water

Given that one of the goals of free trade is to create a level playing field for trade by removing market disruptions caused by government intervention, one of the first protocols that should be adopted to NAFTA is the removal of Article 608.2 protection for subsidies to oil and gas producers.[447] Such a protocol would provide substantial environmental benefits by allowing free market forces to price nonrenewable energy resources at a level that reflects the full cost of their production, use, and scarcity. Water is another contentious resource in NAFTA. To prevent the use of NAFTA as a sword to require Canada to consent to large-scale transfers of water to the United States, a specific exemption or supplemental agreement should be agreed to by the parties to reserve the right of Canada to restrict such transfers.[448]

(e) International Environmental Agreements

To prevent the unsavory possibility that NAFTA's rules might someday be used as a tool to needlessly undercut a party's implementation of an international environmental agreement, causing extreme distress to both trade and environmental systems, a protocol to NAFTA Article 104.1 must be agreed upon to provide additional protection to the implementing legislation of the parties for these agreements. This

446. *See supra* notes 70-119 and accompanying text (discussing NAFTA's environmental standards).

447. *See supra* notes 153-55 and accompanying text (discussing continuing oil and gas subsidies in NAFTA).

448. *See supra* notes 158-67 and accompanying text (discussing Canadian transfer of water to the United States).

protocol should also make clear that a party's implementation of such an agreement should be deemed consistent with NAFTA so long as in implementing the obligations under a listed international environmental agreement, a party does not arbitrarily or unreasonably discriminate against the goods or services of another party. In addition, to facilitate the addition of other, and future international environmental agreements, this protocol should provide that the listing of international environmental agreements for the purposes of Article 104.1 shall be by majority vote of the parties.

(f) Accession

Similar to the domestic labor review legislation discussed above, the United States should enact legislation requiring that the accession of a country into NAFTA must be accompanied by a full environmental review subject to the provisions of NEPA. This assessment could be prepared by either the domestic environmental agency of a country wishing to join NAFTA working with the NAFTA parties, the trilateral environmental commission, or by the relevant United States agencies.

CONCLUSION

Whether on a regional or global basis, barriers to trade between nations will continue to diminish, adding significantly to the already interdependent nature of individual nation's economies. The pursuit of free trade is laudable and will help to insure against the trade wars and global depression of the 1930s. Few criticize these purposes for free trade. Rather, criticism of free trade comes from those who believe that a headlong rush to such an end, without accounting for wholly relevant social concerns of the effected populace, is a misplaced policy. Individuals who hold these beliefs are not protectionists in the traditional sense of those hoping to shield certain domestic industries from international competition. Instead, they recognize that the domestic economic benefit of free trade will surely be wasted or significantly diminished if subsequent remedial actions and funds are needed to address unemployment and occupational retraining and an environment degraded by misguided false economic growth.

Individuals who may not benefit directly from free trade will not support the concept if it has the effect of depriving them of their democratic rights, undermining their economic well being, or diminishing their health and safety. The rights of workers and the health of the environment are important concepts to most U.S. citizens. For the average

citizen, these values are much more closely held than the belief in relaxing international barriers to trade and investment. From these sometimes competing values arises the need to guarantee that free trade does not come at the expense of other vital interests—like healthy food on the table to feed one's family and clean water to drink. By intelligently integrating U.S. labor and environmental concerns, free trade becomes a critical policy tool for advancing long-held social and economic concepts both internationally and domestically. The successful integration of these concerns is the key to a successful NAFTA. With the proper protections put in place, NAFTA will not only increase our well-being in this hemisphere, it will also serve as a shining model for future trade agreements. It is hoped that this Article can be of assistance in this endeavor.