

ENVIRONMENTAL CONSIDERATIONS OF THE EMERGING UNITED STATES-MEXICO FREE TRADE AGREEMENT

MICHAEL SCOTT FEELEY*
ELIZABETH KNIER**

I. INTRODUCTION

Carlos Fuentes reminded the 1983 Harvard commencement that "the clocks of all men and women, of all civilizations, are not set at the same hour."¹ The Mexican writer warned of the dangers in forcing United States standards, born of a unique set of circumstances and development, onto Mexico, a nation that operates from a different economic, political, and historical perspective.² For 150 years, Mexico has felt threatened by the United States and, in a real sense, Mexico's self-image is defined in opposition to the colossus to the north. In 1847, the United States Army overran Mexico City and forced Mexico to renounce all claims to Texas and to sell what is now California, Nevada, Utah, Arizona, and New Mexico to the United States for a mere \$15 million.³ In addition to armed invasions and political interference by the United States government, businessmen from the north earned a reputation for exploiting Mexican resources and hampering Mexican development.⁴ Mexico perceives its history and condition as being largely created by the actions, policies, and pressures of the United States.

In an effort to repel continued domination by the United States, the Mexican Constitution of 1917 was amended to curtail foreign involvement, ownership, and investment in the country.⁵ This led to the nationalization of industry and to a protectionist and isolationist stance that has characterized Mexico until very recently.⁶ Mexico's foreign

* A.B., Dartmouth College; J.D., Harvard Law School; M.St., Oxford University. Mr. Feeley practices environmental law with Latham & Watkins in Los Angeles and is chairman of the International Environmental Law Subsection of the Los Angeles County Bar Environmental Section.

** B.A., U.C.L.A.; J.D., University of Chicago Law School. Ms. Knier practices law with Latham & Watkins in Los Angeles.

1. CARLOS FUENTES, A Harvard Commencement, in *MYSELF WITH OTHERS: SELECTED ESSAYS* 199, 199 (1988).

2. *Id.* at 200-01.

3. ROBERT RYAL MILLER, *MEXICO: A HISTORY* 229 (1985). All references to currency are in United States dollars.

4. *See id.* at 266-78.

5. MEX. CONST. art. 27, paras. 9-11 (as amended Jan. 6, 1960); MILLER, *supra* note 3, at 306. Mexico's decisive loss in the Mexican-American War constituted "a psychological blow that shattered the nation's honor and dignity. In addition, it engendered a deep feeling of 'yankeephobia' that still persists, openly as well as below the surface." *Id.* at 229.

6. Jesus Silva & Richard K. Dunn, *A Free Trade Agreement Between the United States and Mexico: The Right Choice?*, 27 *SAN DIEGO L. REV.* 937, 945-53 (1990).

policy has opposed the capitalist free market approach of the United States and has served as an irritant between the two nations.⁷

The disparity in the development of these two countries, coupled with a history of distrust, friction, and violent conflict, seems an inauspicious context for significant free market economic cooperation. However, despite their complex relationship, the United States and Mexico are deeply entwined economically. Mexico is the third largest trading partner of the United States.⁸ In 1989, the United States accounted for 62 percent of all foreign direct investment in Mexico, totalling an estimated \$7.1 billion.⁹ In 1990, total United States-Mexico trade reached a record \$59 billion.¹⁰ Last year alone, United States exports to Mexico were worth \$28.4 billion, including \$2.5 billion in agricultural products, \$3 billion in consumer goods, and \$9.5 billion in capital goods.¹¹

The changing realities of the global marketplace have spurred flexibility in the United States and reforms in Mexico. The increasing economic dominance of Japan and the economic integration of Europe, the Pacific Rim, and Latin America present formidable concerns for the United States. Meanwhile, Mexico has undertaken substantial reform in the last few years to liberalize trade and investment restrictions to attract more business. Since 1985, Mexico has lowered its average tariff rate to 10 percent, reduced inflation from 100 percent to 15-20 percent, privatized many state-owned companies, repealed some restrictions on foreign investment, and eliminated many nontariff trade barriers.¹² This more attractive Mexican commercial climate, in concert with the United States' competitive concerns, tilled the ground for a trilateral North American Free Trade Agreement (NAFTA) between Mexico, the United States, and Canada.¹³

The plan is not without its opponents, however, and popular criticism of NAFTA is growing in Mexico and the United States. In Mexico, critics argue that American economic domination will return.¹⁴

7. See ALAN RIDING, *DISTANT NEIGHBORS: A PORTRAIT OF THE MEXICANS* 319 (1984).

8. Christopher Cox, *Free Trade: An Orange County Opportunity*, L.A. TIMES, Mar. 15, 1992, at B9.

9. U.S. DEPARTMENT OF COMMERCE, *NORTH AMERICAN FREE TRADE AGREEMENT: GENERATING JOBS FOR AMERICANS 7-8* (Update May 1991) [hereinafter DEPARTMENT OF COMMERCE UPDATE].

10. *Id.* at 7.

11. *Id.* at 5.

12. Tom Brown, *Mosbacher Predicts Huge Increase in U.S.-Mexico Trade*, Reuters, Mar. 30, 1990, available in LEXIS, Nexis Library, Omni File.

13. INTERAGENCY TASK FORCE, OFFICE OF THE U.S. TRADE REPRESENTATIVE, *REVIEW OF U.S.-MEXICO ENVIRONMENTAL ISSUES*, Executive Summary 2 (1992) [hereinafter ENVIRONMENTAL REVIEW].

14. See Andrew LePage, *Critics Blast U.S.-Mexico Plan on Environment*, SAN DIEGO BUS. J., Sept. 30, 1991, at 3.

In the United States, much of the controversy concerns the two nations' disparate environmental standards and differing levels of environmental regulatory enforcement. A primary consideration pertains to the potential increase of imported goods into the United States that are subject to less stringent health and safety standards than those that apply within the United States.¹⁵ In addition, environmentalists fear that increased industrial activity will worsen Mexico's air and water contamination and, as a result, will increase the amount of pollution coming into the United States.¹⁶ Critics feel that these environmental considerations are being supplanted by the fervor to establish a free trade agreement. In the rush to conclude economic negotiations, they argue that long-term environmental safeguards should not be forgotten.¹⁷

This article examines the potential environmental consequences of NAFTA and proposes ways of addressing the concerns. Part II describes the structure, scope, and aims of NAFTA. Part III sets out the potential environmental consequences of the Free Trade Agreement, including a discussion of *maquiladora* industries which are central to the United States-Mexican commercial relationship. Part IV provides an overview of the Mexican environmental regime, and Part V explores proposed solutions to perceived detrimental environmental consequences of the Agreement. This analysis affords practical insights into approaching the vexing issues of regulatory harmonization, enforcement, and funding in the context of the United States-Mexican economic and environmental relationship.

II. NORTH AMERICAN FREE TRADE AGREEMENT

A. Background to the Negotiations

The worldwide economic and political changes of the 1980s have spurred the United States to take aggressive economic action. In particular, United States officials and business leaders have grown alarmed at the formation of regional trade blocks.¹⁸ These trade

15. ENVIRONMENTAL REVIEW, *supra* note 13, at 70.

16. *Id.* at 69.

17. TEXAS CENTER FOR POLICY STUDIES, A RESPONSE TO THE BUSH ADMINISTRATION'S ENVIRONMENTAL ACTION PLAN FOR FREE TRADE NEGOTIATIONS WITH MEXICO 2 (1991) [hereinafter TCPS RESPONSE].

18. See *Experiences Learned from U.S.-Canada F.T.A. Will Help Talks with Mexico*, Official Says, 8 Int'l Trade Rep. (BNA) No. 4, at 121, 122 (Jan. 23, 1991). For example, the European Community (EC), consisting of twelve member nations, is currently engaged in a process of economic integration that is scheduled for completion at the end of 1992. Michael Scott Feeley & Peter M. Gilhuly, *Green Law Making: A Primer on the European Community's Environmental Legislative Process*, 24 VAND. J. TRANSNAT'L L. 653, 654 (1991). The integration will establish a common market for the EC's 342 million inhabitants. *Id.* It is the largest market in the world,

alliances, combined with the Japanese trade challenge and economic competition from the nascent markets of Eastern Europe and the former Soviet Union, convinced the United States to forge a free trade zone for its own continent.¹⁹

Mexico, however, has been historically cool to any arrangement that might lead to the economic dominance of the United States within Mexican borders.²⁰ This posture has changed as the economic situation of the country has become critical. Mexico is struggling with a massive foreign debt, the inability to obtain further loans, and a burgeoning population needing jobs.²¹ Unemployment in 1990 stood at an estimated 15 to 18 percent and President Salinas' administration has experienced difficulty in obtaining loan assistance.²² As a result, the government is making radical departures from its traditional protectionist policies in order to increase the nation's prosperity.

After the collapse of oil prices in 1981, Mexico began to seek out foreign investment.²³ President Salinas initially concentrated on attracting the European and Japanese capital markets, but met with little success.²⁴ In the summer of 1990, Mexico and the United States agreed to explore the possibility of a free trade agreement involving the three North American nations. On September 25, 1990, President Bush notified Congress of his decision to begin free trade negotiations with Mexico, and on February 5, 1991, Presidents Bush and Salinas, and Canadian Prime Minister Brian Mulroney announced their intention to enter a trilateral free trade agreement.²⁵ On May 23 of that year, the United States House of Representatives voted 231 to 192 to extend until June 1, 1993 President Bush's authority to negotiate NAFTA under the fast-track rules.²⁶

with some \$4 trillion in output, and it will constitute the United States' largest trading partner.
Id.

The EC, however, is not the only threat to the vitality of United States trade. The Pacific Rim nations of Indonesia, Malaysia, Philippines, Singapore, and Thailand, for example, make up ASEAN. Association of South East Asian Nations Declaration, 6 I.L.M. 1233 (1967). Brunei joined in 1984. FAR EASTERN ECONOMIC REVIEW, ASIA YEARBOOK 1989, at 90 (1989). In addition, the Latin American Integration Association unites Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay, and Venezuela. Treaty of Montevideo Establishing the Latin-American Integration Association, Mar. 18, 1981, 20 I.L.M. 672 (1981).

19. Silva & Dunn, *supra* note 6, at 941-42.

20. *See id.* at 945. *See also supra* note 4 and accompanying text.

21. Jerry Seper, *85¢ an Hour Feeds Family*, WASH. TIMES, May 23, 1990, at B8. Mexico is a developing nation whose population climbed to 85 million in 1989 and is growing at a rate of 1.5 million per year. It will reach an estimated 100 million by the year 2000. DEPARTMENT OF COMMERCE UPDATE, *supra* note 9, at 8.

22. CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK 1991, at 205 (1991).

23. RIDING, *supra* note 7, at 64.

24. Silva & Dunn, *supra* note 6, at 944.

25. Peter Truell, *U.S., Canada and Mexico to Negotiate a North American Free-Trade Pact*, WALL ST. J., Feb. 6, 1991, at A7.

26. Congress created fast-track procedures as a vehicle for trade negotiations, recognizing

B. NAFTA

The main goal of the proposed free trade agreement is to promote economic growth through expanded trade and investment by allowing for a staged elimination of barriers to the flow of goods and investment.²⁷ Additionally, the United States intends to achieve a liberalization of services, including data processing, communications, banking, finance, and medical services; adopt regulations limiting benefits of NAFTA to signatory nations; eliminate nontariff barriers, such as restrictions on domestic content of products assembled in the three nations; and remove regulations and controls in the automobile manufacturing industry.²⁸ As envisioned by the United States, NAFTA would create the largest market in the world, consisting of over 360 million consumers and a 6-trillion dollar output.²⁹ The free trade negotiations are being held without the actual proposed terms of the agreement being made public.

The types of provisions that are being discussed include provisions for the rapid elimination of tariffs, quotas, and licensing barriers; the reduction or elimination of Mexican restrictions on foreign ownership; competition by United States companies against Mexican state-owned or heavily regulated industries; the elimination of "production requirements" on goods produced in Mexico, which restrict how manufacturers may buy materials and sell their finished products; the promulgation of uniform laws on intellectual property rights enforcement; the establishment of workable "rules of origin" requirements to protect the United States and Canada from competition by non-NAFTA countries taking advantage of Mexico's free trade status; and the inclusion of President Salinas' free market decrees within

that delicate negotiations between heads of state can be undermined by congressional input and revision prior to adoption. See DEPARTMENT OF COMMERCE UPDATE, *supra* note 9, at 15. While fast-track ensures Congress meaningful participation during the negotiations and a vote on implementing legislation within a fixed time period, the procedure denies Congress the ability to amend the agreement prior to adoption. *Id.* The fast-track procedures are located at 19 U.S.C. § 2191 (1988).

A senior trade official recently reported that progress on the NAFTA negotiations may slow down due to lack of resources stemming from the intensification of the Uruguay Round of the GATT negotiations. *International Trade, Uruguay Round May Slow Progress on NAFTA Pact*, Daily Rep. for Execs. (BNA) No. 206, at A-13 (Oct. 24, 1991). Furthermore, the official stated that no timetable has been set for completing the NAFTA talks. *Id.* This information supports the view expressed by Representative Jim Kolbe that the Bush administration will delay NAFTA because of the political climate going into the presidential elections. *Kolbe Believes Administration Will Delay NAFTA Because of Election-Year Politics*, 8 Int'l Trade Rep. (BNA) No. 46, at 1695 (Nov. 20, 1991) [hereinafter *Administration Delay*].

27. DEPARTMENT OF COMMERCE UPDATE, *supra* note 9, at 3.

28. *Summary: Free Trade Agreement Negotiations & Related Developments, October 11-November 1*, SourceMex (Nov. 6, 1991), available in LEXIS, Nexis Library, SrcMex File.

29. DEPARTMENT OF COMMERCE UPDATE, *supra* note 9, at v. This is a market 20 percent larger than that of the European Community. *Id.*

NAFTA to prevent subsequent Mexican administrations from overturning these reforms.³⁰ Many of these provisions apparently have already been worked out.³¹

C. The Border Plan

NAFTA, however, remains silent on environmental issues. To deflect criticism of this omission, the Bush and Salinas administrations are relying on a separate and distinct environmental plan for the boundary zone between the two countries.³² At the behest of Presidents Bush and Salinas, the United States Environmental Protection Agency (EPA) and the Mexican Ministry for Urban Development and Ecology (SEDUE) have been meeting since December of 1990 to develop a "comprehensive" border plan (Border Plan) aimed at solving the pollution problems in the border area.³³

Based largely on the La Paz Agreement,³⁴ the Border Plan is divided into several stages. For the first stage (1992-94), the objectives are to delineate the environmental characteristics of the area and describe the current state of the area's major environmental issues.³⁵ The parties will also outline the "cooperative border environmental accomplishments . . . by binational, national, state, and local environmental agencies."³⁶ Further, the plan should establish priorities and develop mechanisms for mobilizing the joint efforts of the governmental and nongovernmental sectors in seeking solutions to the border area's environmental problems.³⁷

30. See Wesley Smith, *Guidelines for U.S. Negotiators at the Trade Talks with Mexico*, Heritage Foundation Rep., Oct. 18, 1991, available in LEXIS, Nexis Library, Omni File [hereinafter *Guidelines*].

31. One issue remaining is the coverage of a dispute-resolution mechanism which has become important to both sides in the wake of a recent GATT panel ruling on the United States tuna embargo. Nancy Dunne, *Political Worries May Force Bush to Delay NAFTA Deal*, FIN. TIMES, Nov. 26, 1991, at 9. For a discussion of the GATT decision and its impact on free trade, see *infra* note 82 and accompanying text. For a more detailed treatment of the GATT decision and the Marine Mammal Protection Act, see David J. Ross, Note, *Making GATT Dolphin-Safe: Trade and the Environment*, 2 DUKE J. COMP. & INT'L L. 345 (1992).

32. Michael Scott Feeley, *The New Border Plan: Will it Appease NAFTA's Critics?*, SONREEL Newsletter (forthcoming May, 1992) (on file with author).

33. U.S. ENVIRONMENTAL PROTECTION AGENCY ET AL., INTEGRATED ENVIRONMENTAL PLAN FOR THE U.S.-MEXICO BORDER AREA I-1 (working draft, Aug. 1, 1991) [hereinafter IEP DRAFT]. The border area is defined as "an area 100 km on each side of the [U.S.-Mexican] international boundary." *Id.*

34. Agreement Between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area, Aug. 14, 1983, U.S.-Mex., 22 I.L.M. 1025 (1983) [hereinafter La Paz Agreement]. For a discussion of the La Paz Agreement, see *infra* notes 174-75 and accompanying text.

35. IEP DRAFT, *supra* note 33, at I-1.

36. *Id.* at I-2.

37. *Id.*

Although the Border Plan attempts to cover a wide range of environmental problems, many of the implementation strategies rely on the cooperative efforts of the SEDUE and the EPA to develop concrete solutions for the problems they identify.³⁸ There is little practical discussion in the Border Plan, however, on how to implement its goals.³⁹ Moreover, the Border Plan points out that a lack of funding has hampered Mexico's enforcement efforts.⁴⁰

In response to these concerns, the Secretary of SEDUE announced on October 28, 1991, a \$460 million commitment to protect the environment in the border area⁴¹ and asserted that "no new domestic or foreign investment project will be accepted if it does not fully comply with the environmental protection criteria" set out by SEDUE.⁴² The SEDUE border investment package includes investment in sewage and solid waste systems and waste water treatment plants, as well as road construction and public transportation.⁴³ Enforcement of environmental laws will also be strengthened along the border by a team of two hundred SEDUE inspectors, a two-fold increase from 1991.⁴⁴ In addition, SEDUE plans to equip all of its border work stations with computers and data banks to expedite intra-agency communication.⁴⁵

Opponents in the United States are unsatisfied, however, and they criticize the Border Plan as being one that "plans to plan"⁴⁶ Many have also noted that the plan lacks any mention of increased funding, and that it fails to target specific areas of environmental protection and enforcement for the necessary funds.⁴⁷

Several members of Congress who voted to extend fast-track authority for NAFTA are criticizing the draft Border Plan for these same reasons. As of November, 1991, forty members of Congress who voted

38. See *id.* at I-5.

39. The Natural Resources Defense Council notes that "[t]he draft's chapter on 'implementation' offers various nebulous commitments, with scant detail of how and when environmental protection will be accomplished." Justin R. Ward, *Environmental Protection in the North American Free Trade Agreement*, Statement of the Natural Resources Defense Council, Presented in Connection with the Hearings Before the Office of the U.S. Trade Representative, Washington, D.C., 7 (Sept. 3, 1991) [hereinafter NRDC Statement].

40. IEP DRAFT, *supra* note 33, at IV-2.

41. *Government Announces Plan to Protect Environment Along U.S.-Mexico Border*, 14 Int'l Env'tl. Rep. (BNA) No. 22, at 594 (Nov. 6, 1991).

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Economist Proposes that NAFTA Include Trinational Superfund for Environment*, Daily Rep. for Execs., (BNA) No. 212, at A2 (Nov. 1, 1991), available in LEXIS, Nexis Library, Omni File [hereinafter *Superfund*]. Diane Takvorian, Executive Director of the Environmental Health Coalition, characterized the Integrated Border Plan as "[a]n insult from conception to delivery." Patrick J. McDonnell, *Doubts Voiced About U.S.-Mexico Plan*, L.A. TIMES, Sept. 24, 1991, at A1. See also LePage, *supra* note 14.

47. See, e.g., *Superfund*, *supra* note 46.

for fast-track authority⁴⁸ had signed a letter that calls for a concurrent environmental agreement addressing the environmental problems which could arise in the context of free trade with Mexico.⁴⁹ The proposed Border Plan does not address the issue of change under free trade and the proposed free trade agreement does not confront environmental issues, yet the government is offering both documents as integral components of a free trade system.⁵⁰

The Bush administration is attempting to address the issue of environmental protection in the NAFTA negotiations by referring to the Border Plan and existing bilateral agreements. On May 1, 1991, the United States government released the executive response to issues raised in connection with negotiations.⁵¹ The Bush administration made several commitments to protect the environmental laws of the United States that might be weakened as a result of the trade agreement.⁵² Partially influenced by the widespread concern in Congress and the public sector that NAFTA will significantly weaken United States regulations, the Bush administration has promulgated several principles to guide the NAFTA negotiations.

First, the United States will not allow NAFTA to weaken United States environmental and health laws or regulations.⁵³ Second, the United States will maintain "existing U.S. pesticide, energy conservation, toxic waste, [and] health and safety standards," and will continue their enforcement.⁵⁴ Third, the United States will protect the right of each party to undertake within its own territory those verification measures needed to allow "the enforcement of technical regulations and standards that protect human health and the environment, consistent with principles of non-discrimination."⁵⁵ Fourth, the United States will maintain the integrity of its regulatory process, which relies on available scientific evidence, allows public input, and observes the principle of

48. See *supra* note 26 and accompanying text.

49. Letter from Rep. Ron Wyden and Rep. Richard Gephardt to Carla Hills, U.S. Trade Representative, cited in *Env't Rep.* (BNA) No. 214, at A-1 (Nov. 5, 1991). The original letter to Hills, signed by Sander Levin, Richard Gephardt, Ron Wyden, Donald J. Pease and Jim Moody, was condensed and sent to President Bush on November 1, 1991, with forty signatures.

50. Environmental groups have noted with concern the complete lack of any mention of the NAFTA in the Border Plan. *Superfund*, *supra* note 46. This caused concern because the Environmental Review of NAFTA, prepared by the U.S. Trade Representative's Office and the EPA, relies heavily on the Integrated Border Plan. See generally ENVIRONMENTAL REVIEW, *supra* note 13, at 31-35 (discussing the Border Plan and its goals).

51. Response of the Administration to Issues Raised in Connection with the Negotiation of a North American Free Trade Agreement, Transmitted to Congress by the President, May 1, 1991 (on file with author) [hereinafter Administration Response].

52. *Id.* tab 4, at 9-10.

53. *Id.* tab 4, at 9.

54. *Id.*

55. *Id.*

nondiscrimination.⁵⁶ Fifth, the United States will protect its right "to limit trade in items or products controlled by international treaties to which the U.S. is party . . ." ⁵⁷ Sixth, the United States and Mexico will cooperate in enhancing environmental, health, and safety standards for products, and will strive to reach a common basis for these standards. To make this possible, the countries will share scientific and technical information and will ensure public involvement in the process.⁵⁸ Most importantly, the United States will protect its right to prevent the importation of products that do not meet United States "health, safety, pesticide, food and drug, and environmental regulations."⁵⁹

The Bush administration, however, has placed qualifications on these commitments, which render the guarantees vague and open to diverse interpretations. The government, for example, insists that the regulations must be based on "sound science,"⁶⁰ a term that is not sufficiently defined. Furthermore, the regulations cannot arbitrarily discriminate against imports and cannot constitute a disguised trade barrier.⁶¹ These qualifications, unless they are better defined, may effectively defeat many standards established by the United States. The executive response also sets forth a commitment to "work together [with Mexico] to promote improved enforcement of standards" in connection with NAFTA.⁶² It does not, however, contain concrete enforcement requirements or suggestions of how to fund stepped-up enforcement.

The government's attempt to shore up NAFTA's omission of environmental provisions by seizing on the Border Plan as an essential companion measure to NAFTA is unlikely to satisfy critics: the Border Plan lacks treaty status, enforcement mechanisms, and adequate funding. Indeed, the Bush administration's Border Plan qualifications cast doubt on the scope and effectiveness of the government's commitment. Moreover, the Border Plan addresses only the 100 kilometer stretch of land on either side of the international dividing line; it does not cover regions in the interior of Mexico. In the wake of this and in light of the potentially overwhelming environmental consequences of NAFTA for both nations, skepticism over the administration's reliance on the Border Plan is widespread.

56. *Id.*

57. *Id.* These conventions include, *inter alia*, the Convention on International Trade in Endangered Species of Wild Flora and Fauna, July 1, 1975, 27 U.S.T. 1087, 993 U.N.T.S. 243 [hereinafter CITES], and the Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1541 [hereinafter Montreal Protocol]. See Administration Response, *supra* note 51, tab 4, at 10.

58. Administration Response, *supra* note 51, tab 4, at 10.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

III. POTENTIAL ENVIRONMENTAL CONSEQUENCES OF THE FREE TRADE AGREEMENT

Only in the last twenty-five years have industrial and postindustrial nations acknowledged the need to remediate past environmental damage and to regulate current operations.⁶³ Cleanup and regulation, however, are costing hundreds of billions of dollars.⁶⁴ A national and international debate rages concerning the value of such measures in light of the staggering price and the potential for concurrent economic stagnation.⁶⁵

In light of the high cost of environmental controls, developing nations disapprove of the attempts by industrialized countries to hold them to environmental standards that were not observed during the formation and development of the industrialized world. Nations like Mexico argue that they cannot afford to abide by rigorous environmental regulation and should not be expected to attain environmental standards set by the United States until they have achieved similar economic success.⁶⁶ This argument notwithstanding, members of Congress, public interest groups, and a broad cross section of commentators, have pointed to the environmental consequences of NAFTA and have insisted that the environmental safeguards imposed in the United States be observed in Mexico.⁶⁷

The relegation of environmental concerns to the province of the Border Plan alone — an agreement limited in scope and with questionable practical value — highlights the potential dangers of NAFTA. By neglecting to address environmental issues directly in NAFTA negotiations, many fear that neither government considers environmental control as a serious subject that is integral to the commercial compact.⁶⁸ Environmental criticism of NAFTA is divided into two broad categories: first, there is concern that a free trade

63. For example, the United States did not pass its first comprehensive piece of environmental legislation, the National Environmental Policy Act, until 1969. More recently, the Republic of China has elected to commit billions of dollars to clean up Taiwan. The island grew prosperous while neglecting environmental protection, and it now seeks to remediate the destructive consequences of its industrial policy. See Michael Scott Feeley, *Reclaiming the Beautiful Island: Taiwan's Emerging Environmental Regulation*, 27 SAN DIEGO L. REV. 907 (1990).

64. Environmental regulation alone costs the United States annually an amount equal to 2 to 2.5 percent of the gross national product. *OECD Urges U.S. to Make Greater Use of Market Mechanisms to Address Problems*, Int'l Envtl. Rep. (BNA) No. 24, at 649, 649 (Dec. 4, 1991).

65. See generally Günther Handl, *Environmental Protection and Development in Third World Countries: Common Destiny - Common Responsibility*, 20 N.Y.U. J. INT'L L. & POL. 603 (1988) (arguing that third world development should be maintained, but only with concurrent management of the risks of industrial pollution).

66. See Stephen L. Kass & Michael B. Gerrard, *International Trade*, N.Y. L.J., Jan. 24, 1992, at 29.

67. See *infra* notes 188-92 and accompanying text.

68. Feeley, *supra* note 32.

agreement will increase the number of goods coming into the United States that are held to different health and safety code standards or prepared by practices which violate United States policies or laws; and second, it is feared that NAFTA will translate into increased physical degradation of Mexico and the United States-Mexican border area.

A. Imported Goods Held to Different Health and Safety Standards

Without adequate provisions, liberalized trade under NAFTA will result in an increase of imported goods and foodstuffs into the United States that are subject to substantially less stringent health and safety standards than those observed domestically.⁶⁹ For example, agricultural products from Mexico, especially fruits and vegetables, are expected to flood United States markets under NAFTA. This poses risks to the health and safety of consumers in the United States for several reasons. First, in many areas, the fields may be fertilized or irrigated with sewage and sewage water.⁷⁰ Second, pesticide regulations in Mexico are less stringent and cover fewer substances than those in the United States.⁷¹ Third, environmental regulations that do exist are largely unenforced.⁷²

Although the United States has pledged to retain the right to exclude any product not meeting national health or safety requirements,⁷³ the United States might not be able to prevent these goods from entering the country. Even when countries are at similar levels of industrialization and environmental commitment, free trade agreements can result in a downward harmonization of standards and pressures to justify or change existing regulations.

This has occurred repeatedly in the context of the United States-Canada Free Trade Agreement.⁷⁴ United States meat, for example, is

69. ENVIRONMENTAL REVIEW, *supra* note 13, at 70.

70. Leslie Kochan, *Maquiladoras and Toxics: The Hidden Costs of Production South of the Border* 7 (Feb. 1989) (unpublished pamphlet, on file with author). In Juarez, Mexico, for example, waste from this city of more than 750,000 bordering El Paso, TX, flows into a canal used for crop irrigation. Although waste water is not supposed to be used for fertilizer or irrigation, there is no monitoring of these canals. *Id.* Furthermore, wells drilled in Juarez to handle increased water demand are contaminated with bacterial pollution that has seeped from local drainage ditches. *Id.*

71. *Id.* For information regarding the issue of pesticides in food imported into the United States, see U.S. GENERAL ACCOUNTING OFFICE, PESTICIDES: BETTER SAMPLING AND ENFORCEMENT NEEDED ON IMPORTED FOOD: REPORT TO THE HONORABLE FRANK HORTON, HOUSE OF REPRESENTATIVES 23-26 (1986) (giving results of FDA monitoring of imported foods from Mexico).

72. Kochan, *supra* note 70, at 7.

73. ENVIRONMENTAL REVIEW, *supra* note 13, Executive Summary, at 2; Administration Response, *supra* note 51, at 9.

74. United States-Canada Free Trade Agreement, Jan. 1, 1989, 27 I.L.M. 281 (1988). See UNITED STATES-CANADA FREE TRADE AGREEMENT: COMMUNICATION FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE FINAL LEGAL TEXT OF THE U.S.-CANADA FREE TRADE

rejected at the Canadian border at a rate ten times higher than that of Canadian meat entering the United States; this is due to differences in safety regulations.⁷⁵ The goal of the United States-Canada Agreement, however, is to enhance each country's access to the other's markets by eliminating trade inhibiting import barriers.⁷⁶ As a result, Canadian standards may drop. Under Article 708, for example, Canada and the United States pledged to harmonize their technical regulations in order to eliminate those that operate as trade restrictions.⁷⁷ United States agricultural interests have argued that Canada's "safety assessment" for pesticides operates as a barrier to United States agricultural goods and, therefore, should be harmonized with the lower United States standard.⁷⁸

Similarly, United States environmental regulations have been challenged under the United States-Canada Agreement. For example, Canada has contested the application of the EPA Asbestos Phase-Out Plan which serves to block products made with asbestos from import into the United States.⁷⁹ Phase I, which took effect on August 27, 1990, would have banned the manufacture, importation, and processing of goods containing asbestos.⁸⁰ Thus, despite the relative similarities between the levels of regulation in nations such as the United States and Canada, social and economic pressures under a free trade agreement frequently compel a downward harmonization of regulatory standards. This problem may prove even more acute under a free trade agreement with Mexico.

Because the level of industrialization and environmental commitment in Mexico is much lower than that in the United States or Canada and because the potential trade distortions resulting from widely divergent environmental regulations will be high, the pressures to harmonize

AGREEMENT, THE PROPOSED U.S.-CANADA FREE TRADE AGREEMENT IMPLEMENTATION ACT OF 1988 AND A STATEMENT OF ADMINISTRATIVE ACTION, PURSUANT TO 19 U.S.C. 2112(e)(2), 2212(a), H.R. DOC. NO. 216, 100th Cong., 2d Sess. (1988) [hereinafter U.S.-Canada FTA].

75. *CATO Institute Forum*, Fed. News Serv., May 9, 1991, available in LEXIS, Nexis Library, Omni File [hereinafter *CATO Institute*].

76. U.S.-Canada FTA, *supra* note 74, at 8. See also H.R. REP. 816 Part I, 100th Cong., 2d Sess. 5 (1988).

77. U.S.-Canada FTA, *supra* note 74, at 30-31.

78. See *Cato Institute*, *supra* note 75. A primary example is the dispute over a pesticide, atachlor, which is banned in Canada but allowed in the U.S. *Id.*

79. See Warren E. Leary, *Appeals Court Strikes down Major Parts of Federal Asbestos Ban*, N.Y. TIMES, Oct. 22, 1991, at A20. The Asbestos Phase-Out Plan has recently been struck down by the Fifth Circuit Court of Appeals on the ground that the EPA did not consider less-burdensome alternatives. See *Corrosion Proof Fittings v. Env'tl. Protection Agency*, 947 F.2d 1201, 1229-30 (5th Cir. 1991).

80. *EPA Challenges Court Decision Overturning Asbestos Ban*, Daily Rep. for Execs. (BNA) No. 221, at A-7 (Nov. 15, 1991).

standards downward to accommodate Mexico's enforcement ability will be tremendous. A GATT panel recently concluded, for example, that the United States embargo on Mexican tuna caught by methods that violate the Marine Mammal Protection Act⁸¹ violates GATT.⁸² In so ruling, the GATT panel held that GATT requires equal treatment of products regardless of how they are produced.⁸³

This conclusion suggests that a country can use trade measures to protect only its own territorial area, not the area beyond its borders. Protective measures which might be disallowed under this reasoning include acts to protect the ocean, biological diversity, whales, elephants, fisheries, forests, migrating birds, and other endangered species.⁸⁴ Moreover, any international treaties applied through national laws that employ trade measures are implicated as well,⁸⁵ including the Montreal Protocol⁸⁶ and CITES.⁸⁷ Under this reasoning, the United States could not remain true to the provisions of GATT and still refuse to allow entry of goods produced in Mexico using production methods that do not meet United States health, safety, or environmental standards.

B. Increased Physical Degradation of the United States-Mexico Border Area

The second major environmental issue under NAFTA concerns the impact of the expected increase in Mexican industrial and commercial activity on the United States-Mexico border area. In the review of United States-Mexico environmental issues, the Bush administration identified two possible industrial growth scenarios for Mexico and the border area under NAFTA. Under the first scenario, Mexican exports to the United States will increase and will translate into one to two percent annual border area economic growth over the next ten years.⁸⁸ Under the second scenario, the relative economic advantage of the Mexican border region over areas in the interior may be considerably less than it

81. Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-1407 (1988), as amended 16 U.S.C.A. §§ 1361-1407 (West Supp. 1992). The law was enacted in 1972 to protect marine mammals from activities which unnecessarily endanger them. Included in its provisions are sections requiring importing countries to provide the U.S. with reasonable proof that tuna being imported was not harvested using means which result in an average rate of incidental dolphin kills greater than that allowed by U.S. vessels. *Id.* § 1371(a)(2).

82. *United States - Restrictions on Imports of Tuna, Report of the Panel*, GATT Doc. DS21/R (Sept. 3, 1991) (on file with the Office of the U.S. Trade Representative); Jessica Mathews, *Dolphins, Tuna and Free Trade*, WASH. POST, Oct. 18, 1991, at A-21; *Guidelines*, *supra* note 30.

83. Mathews, *supra* note 82.

84. *Id.*

85. *Id.*

86. Montreal Protocol, *supra* note 57.

87. CITES, *supra* note 57.

88. ENVIRONMENTAL REVIEW, *supra* note 13, at 66-67.

is for the current *maquiladora* system.⁸⁹ This could lead to relatively more investment in the Mexican interior and to a decrease in the pressures on the border area environment.⁹⁰ The administration noted, however, that "[r]egardless of which of the above projections proves to be most accurate, the number of Mexican pollutant-emitting facilities will increase; this will prompt Mexican commercial and residential pollutant increases that will affect the United States and will prompt concomitant increases in United States sister cities as well."⁹¹ Under either projection, Mexico's increased pollution generation under NAFTA threatens both nations.⁹²

1. *Physical Infrastructure.* The NAFTA environmental debate calls into question how Mexico can address the escalation of the pollution problem resulting from a free trade agreement when it cannot handle its present commercial and residential needs in an environmentally sound manner.⁹³ The nation lacks sewage systems, waste disposal facilities, pollution control equipment, water treatment stations, and other basic structural components, let alone mechanisms to enforce their installation or proper use.⁹⁴ Moreover, residential housing and community facilities

89. *Id.* at 67-68. *But see Former International Trade Commission Chairman Predicts Benefits of North American Free Trade Agreement on U.S. Border States' Businesses*, Bus. Wire, Nov. 25, 1991, available in LEXIS, Nexis Library, Omni File (arguing that increased trade between the U.S. and Mexico will result in greater industrial demands along the border, such as transportation, distribution, and warehousing). An increase in demand would cause an influx of businesses and workers taking advantage of the new opportunities and would place added pressure on the already over-taxed border area infrastructure.

90. ENVIRONMENTAL REVIEW, *supra* note 13, at 69.

91. *Id.* at 85.

92. Absent NAFTA, border area economic growth is expected to continue at the rate of 5 to 15 percent annually. *Id.* at 66. Moreover, without NAFTA, the border area environment will continue to be exploited by other investors, such as the Japanese, who will use the relatively low tariffs for Mexican-made goods to take advantage of the American market. Currently, "Japanese and other Asian investors can skirt certain U.S. tariffs by investing in" *maquiladoras* along the border. Eduardo Garcia-Aguilar, *Asia's Interest in Mexico Overshadowed by Proposed Free-Trade Accord*, Agence France Presse, Nov. 24, 1991, available in LEXIS, Nexis Library, Omni File. These investors bring in component parts, use low-wage labor to assemble them, and then import them to the U.S. under a "made in Mexico" label. *Id.* Due to the availability of the Mexican workforce, Japanese investment in Mexico has doubled since June of 1990, reaching \$3.2 billion by the end of 1990. *Id.* Without NAFTA to lock in regulations relating to the tariff rate for products "made in Mexico" of component parts, the border area environment most likely will continue to be exploited under the *maquiladora* program. See *White House Fact Sheet: Review of Environmental Effects of Free Trade with Mexico Released by the Office of the Press Secretary*, Federal News Serv., Feb. 25, 1992, available in LEXIS, Nexis Library, Omni File.

93. Mexico is not alone in this regard. Developed nations, including members of the European Community, frequently maintain inadequate infrastructure and regulatory schemes. See Michael Scott Feeley et al., *W(h)ither Goes the EC Proposed Directive on Civil Liability for Waste*, 15 B.C. INT'L & COMP. L. REV. (forthcoming May 1992).

94. See Diane M. Perry et al., *Binational Management of Hazardous Waste: The Maquiladora Industry at the U.S.-Mexico Border*, 14 ENVTL. MGMT. 441, 445-46 (1990).

do not meet the needs of an ever increasing population that is migrating toward perceived employment opportunities along the border and in urban areas.⁹⁵ Waste and trash generated by humans is a formidable component of the pollution stream. Without this type of infrastructure, environmental regulation and enforcement are meaningless and have little practical effect on business operations. On the other hand, a governmental effort that would require businesses to develop a community infrastructure as a precondition to operation is antithetical to the encouragement of commercial activity and economic growth. The Mexican government can ill afford to mandate such action.

The lack of environmental regulation in Mexico, however, has created a serious threat to public health. The Rio Grande, for example, has become an ecological disaster. In Ciudad Juarez, a ditch that feeds into the Rio Grande carries millions of gallons a day of untreated household and industrial sewage.⁹⁶ Local residents call it *agua negra*, or black water.⁹⁷ As it flows through downtown Nuevo Laredo, the river picks up more sewage until it has a fecal contamination level that is 1,000 times greater than the Texas limit.⁹⁸ As a result, 90 percent of adults thirty-five years or older in the shanty towns near San Elizario, Mexico contract hepatitis sometime during their lifetime.⁹⁹

Of particular concern to the United States is the reality that pollution does not respect national borders. Indeed, the generation, storage, and disposal of contaminants in Mexico, particularly along the 2,000 mile United States-Mexican border, affects American land, air, and water. The Nogales Wash, for example, carries so much toxic industrial pollution and untreated sewage into Arizona that a public health emergency has been in effect in that state for six months.¹⁰⁰ The source of much of this pollution in the border area is the well-developed *maquiladora* industry.

2. *The Maquiladora Industry.* A *maquiladora* is a Mexican processing or assembly plant that receives raw materials and component parts from a foreign corporation free of import duties. Workers at the plant then assemble the goods into finished products to be exported with a tax levied only on the value added in Mexico.¹⁰¹ Many United States firms

95. See Pat O'Brien, *Young Workers Flock to Maquiladora Plants*, BUS. J., July 23, 1990, at 1, available in LEXIS, Nexis Library, Omni File.

96. James Garcia, *Border River Laden with Wastes*, AUSTIN AMERICAN-STATESMAN, Sept. 29, 1991, at A1.

97. *Id.*

98. *Id.* The river's fecal contamination level exceeds 200,000 coliform bacteria per milliliter. *Id.*

99. *Id.* at A17.

100. Robert Suro, *Border Boom's Dirty Residue Imperils U.S.-Mexico Trade*, N.Y. TIMES, Mar. 31, 1991, at A1. The incidence of hepatitis in Arizona is twenty times the national average. *Id.*

101. Silva & Dunn, *supra* note 6, at 956. The *maquiladora* program was developed in 1966

establish *maquiladoras* in order to avoid high labor and environmental costs.¹⁰² The *maquiladora* system also lures manufacturing firms away from Asia and into Mexico, where they can take advantage of relaxed tariffs.¹⁰³ Many Asian firms then set up administrative offices in the United States to serve as headquarters and distribution centers for the manufactured goods, a move that creates jobs on the United States side of the border.¹⁰⁴

After petroleum, the *maquiladora* industry is Mexico's largest source of foreign exchange, bringing in over \$3.5 billion in 1990.¹⁰⁵ There are approximately 1600 *maquiladoras* located on the Mexican side of the border area,¹⁰⁶ employing over 450,000 people.¹⁰⁷ As the *maquiladora* industry has grown, the expanded industrial activity and the increase in worker population have placed a significant strain on the border area infrastructure and the surrounding environment.¹⁰⁸ According to the EPA, for example, there are nine United States border communities currently exceeding one or more United States National Ambient Air Quality Standards.¹⁰⁹ There is no current data sufficient to characterize air quality in the Mexican border area, although monitoring efforts have begun in some areas.¹¹⁰ Since 65 percent of the *maquiladora* plants manufacture electronic materials, transportation equipment, and

to generate employment and has since become Mexico's "foreign exchange flagship." *Id.*

102. Pamela Constable, *Trade-Offs at the Border; Proposed Pact Highlights Debate on U.S. Firms in Mexico*, BOSTON GLOBE, Apr. 16, 1991, at 2.

103. Kate Callen, *Maquiladoras Bring Benefits, Problems, Experts Say*, UPI, Oct. 10, 1989, available in LEXIS, Nexis Library, UPI File.

104. *Id.*

105. Scott Armstrong, *Maquiladoras Mint Plethora of Labor Disputes*, CHRISTIAN SCI. MONITOR, May 21, 1991, at 6.

106. IEP DRAFT, *supra* note 33, at I-3; Letter from Stephen D. Benson, Director of Border Operations, GIZA Geoenvironmental, Inc., to Carolyn Frank, Office of the U.S. Trade Representative 1 (Aug. 12, 1991) (on file with author).

107. Silva & Dunn, *supra* note 6, at 958.

108. IEP DRAFT, *supra* note 33, at I-3. Other problems with the *maquiladora* program include employee turnover, cultural differences between employees and management, and the inability of small companies to obtain financing for *maquiladora* developments. Silva & Dunn, *supra* note 6, at 958.

109. IEP DRAFT, *supra* note 33, at III-30. National Ambient Air Quality Standards (NAAQS) are set by the EPA Administrator for the allowable levels of certain pollutants in the air. The EPA sets the NAAQS for each pollutant based upon criteria which will allow for an adequate margin of safety to protect the public health from known or anticipated adverse effects. Thereafter, the areas of the country that do not achieve these desired levels for one or more of the pollutants must utilize even more stringent controls in an effort to reduce emissions to achieve the NAAQS for the specified pollutants. 42 U.S.C.A. §§ 7409-7410 (West Supp. 1991). The U.S. border areas currently exceeding NAAQS are: San Diego (ozone, CO) and Imperial Counties, California (PM-10); El Paso County, Texas (ozone, CO, PM-10); Yuma, Puma, Santa Cruz, and Cochise counties Arizona (PM-10); and Dona Anci County, New Mexico (PM-10). IEP DRAFT, *supra* note 33, at III-30.

110. IEP DRAFT, *supra* note 33, at III-30. Cooperative monitoring efforts have begun in Ciudad Juarez and El Paso. *Id.*

furniture, a major concern in the border area is the emission of volatile organic compounds.¹¹¹

Growth in the United States-Mexico border area has also affected both the availability and the quantity of water supplies in cities along the border. Most of the larger communities along the border draw their water from surface supplies such as the Colorado River and the Rio Grande.¹¹² Due to industrial contaminants from *maquiladoras* and sewage from the communities surrounding them, the surface water in the border area is often highly contaminated.¹¹³ For example, the New River, which flows from Mexico into California, shows the presence of more than 100 industrial chemicals¹¹⁴ and "contains every disease known in the western hemisphere."¹¹⁵

3. *Hazardous Waste.* Typical hazardous wastes generated by *maquiladoras* include "acids, bases, liquids containing heavy metals, metal-plating wastes, organic solvents, and cyanide wastes."¹¹⁶ Mexican law requires that hazardous waste generated by *maquiladoras* either be exported or "nationalized."¹¹⁷ As of 1990, however, there were only seven recycling centers authorized by SEDUE to manage hazardous waste.¹¹⁸

The *maquiladora* program's hazardous waste disposal suffers from many problems. Of primary concern is the confusion over what is considered to be hazardous by Mexico.¹¹⁹ In addition, disposal of industrial wastes into the sewer system, sale of hazardous waste drums to small operators who then dump them in the desert or someone's backyard,¹²⁰ on site storage of hazardous waste by *maquiladoras*,¹²¹

111. ENVIRONMENTAL REVIEW, *supra* note 13, at 78.

112. *Id.* at 107. The Texas Water Commission reports that groundwater supplies are limited in the border area, which leads to an increased competition between agricultural and municipal interests for a limited amount of surface water. Kochan, *supra* note 70, at 6.

113. *Id.* at 6-8.

114. Jane Kay, *The "Toxic Dump" that Flows into California*, S.F. EXAMINER, June 22, 1986, at 7. The New River flows through California's lettuce belt and into the Salton Sea, which is the state's largest lake. *Id.*

115. *Id.*

116. ENVIRONMENTAL REVIEW, *supra* note 13, at 123.

117. Nationalization is a process through which the Mexican government decides what hazardous waste may stay in the country for recycling. Elizabeth C. Rose, *Transboundary Harm: Hazardous Waste Management Problems and Mexico's Maquiladoras*, 23 INT'L LAW. 223, 228 (1989). Mexican law allows the "donation" of hazardous wastes to charitable organizations, who then sell them to recyclers. This option is not, however, meant to apply to *maquiladoras*, but because of the lack of tracking of the wastes, it is not known whether this loophole is used to get around the waste exportation requirements. Kochan, *supra* note 70, at 6.

118. Patrick J. McDonnell, *Border Boom Feeding Hazardous Waste Ills*, L.A. TIMES, Sept. 10, 1989, at B1. Furthermore, these facilities may not meet U.S. requirements under the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6991 (1988) [hereinafter RCRA].

119. William Kistner, *The Gringo Industrial Connection*, S.F. EXAMINER, June 22, 1986, at 1.

120. Joseph LaDou, *Deadly Migration: Hazardous Industries' Flight to the Third World*, TECH.

and the sale of recycled hazardous waste drums to Mexican citizens who then use them to store water for washing and drinking, are sources of great concern to the United States.¹²² Along the United States-Mexico border, the problem is highlighted by agitated United States citizens who feel that they are living in "a virtual cesspool."¹²³

It is likely that NAFTA will bring a concomitant increase in everything from population, construction, and manufacturing, to resource extraction and transportation needs. Without installing adequate structural and regulatory systems, however, such growth portends a number of environmental problems, not only along the border, but in Mexican urban areas and other commercial centers where manufacturing occurs and where people live.¹²⁴

Under any growth scenario, NAFTA will result in increased trade traffic between the United States and Mexico.¹²⁵ Inevitably, most of the increase will occur at the border area because of the augmented trade flow. Increased transnational traffic, including transportation of dangerous chemicals and hazardous waste, will result in the exacerbation of the present border area environmental crisis. The potential increase in transportation of hazardous waste and chemicals is particularly alarming because the emergency response systems that are currently in place are not equipped to handle the present level of traffic.¹²⁶ Moreover, the existing roads, bridges, and other

REV., July, 1991, at 47, 50-51.

121. Jane Juffer, *Dump at the Border*, THE PROGRESSIVE, Oct. 1988, at 24, 28.

122. *Id.*

123. Juanita Darling et al., *Can Mexico Clean up Its Act?*, L.A. TIMES, Nov. 17, 1991, at A1, A18. According to U.S. Senator John McCain, at one point in early 1991, raw sewage was flowing from Nogales, Sonora (Mexico) "right, straight into downtown Nogales, Arizona . . . [a]nd there were kids, both Mexican and American kids, playing in that raw sewage." *Remarks by Senator John McCain (R-AZ)*, Fed. News Serv., Nov. 14, 1991, available in LEXIS, Nexis Library, Omni File.

124. Metropolitan areas throughout Mexico endure terrible environmental conditions that will grow worse with unregulated industrial activity and failure to provide municipal systems for the inhabitants. According to official statistics, "some 4.3 billion tons of pollutants are spread over Mexico City each year." *Special Committee Will Tackle Pollution Nightmare in Mexico City*, Agence France Presse, Jan. 9, 1992, available in LEXIS, Nexis Library, Omni File. Of this, many tons come from natural sources, much of which is dust carrying fecal matter from the city's vast open sewers and latrines which service over thirty percent of the city's twenty million people. Mark A. Uhlig, *Mexico City's Toxic Residue Worsens Already Filthy Air*, N.Y. TIMES, May 12, 1991, at A1, A14. In 1991, the ozone levels exceeded international standards for 290 days of the year. Damien Fraser, *Hasty Measures Fail to Lift Mexican Smog*, FIN. TIMES, Jan. 8, 1992, at 5.

125. See ENVIRONMENTAL REVIEW, *supra* note 13, at 84; Statement of Edward K. Stimpson, Trade and Environment Specialist, National Wildlife Federation, Before the Trade Policy Staff Committee Office of the United States Trade Representative on the North American Free Trade Agreement (NAFTA) Regarding the Environmental Implications of a NAFTA 2 (Aug. 12, 1991) [hereinafter Stimpson Statement].

126. Anne Hazard, *Ambassador Says Mexico Committed to Cleaning Border Environmental Problems*, States News Serv., Nov. 13, 1991, available in LEXIS, Nexis Library, Omni File.

transportation facilities will not be able to manage any increase in border area traffic without severe congestion.¹²⁷ The increase in the number of stationary and mobile sources of pollutants guarantees that more contaminants will be released into the air.

The *maquiladora* industry currently uses and disposes of large quantities of chemicals without intensive regulation or monitoring by the Mexican government.¹²⁸ Should adequate safety standards and controls not be implemented and enforced, NAFTA could result in a significant increase in the use and abuse of toxic chemical substances in the border area and a resulting threat to human and animal health from irresponsible handling and disposal of chemicals. Indeed, the increase in hazardous waste generated by new businesses locating in Mexico could further tax the border area's limited environmental capacity for hazardous waste disposal.¹²⁹

Supporters of NAFTA might rely on the fact that the United States and Mexico are signatories to the Basel Convention, a multinational agreement that regulates the transboundary shipment of hazardous waste.¹³⁰ The purpose of the Basel Convention is to "ensure that [a country] importing hazardous waste would understand the risks . . . and would have the required disposal capacity."¹³¹ The goal is to make hazardous waste transfers "so costly and difficult that industry will find it more profitable to cut down on waste production and . . . recycle what waste they produce."¹³²

According to Mexican Ambassador Gustavi Petricioli, there are roughly 250 million crossings a year along the 2,000 mile U.S.-Mexico border. *Id.* See also ENVIRONMENTAL REVIEW, *supra* note 13, at 133-35, 182-83 (describing joint U.S.-Mexican efforts to deal with chemical emergencies and hazardous materials).

127. The risk of accident involving hazardous waste or chemicals is statistically greater with increases in transportation of these substances. To address this type of concern, Mexican Ambassador Petricioli recently indicated that Mexico would be willing to discuss "a joint effort with the United States to improve the toll road between Hermosilla, Sonora, and Nogales, Mexico," one of the most heavily utilized trade routes between the United States and Mexico. Hazard, *supra* note 126.

128. GAO *Official Says No Data Available on Toxic Chemicals from Maquiladoras*, Daily Rep. for Execs. (BNA) No. 39, at A-5 (Feb. 27, 1992).

129. See Kochan, *supra* note 70, at 6.

130. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, *opened for signature* Mar. 22, 1989, art. 25, 28 I.L.M. 649, 677 (1989) [hereinafter Basel Convention]. For a detailed treatment of the Basel Convention, see Kathleen Howard, *The Basel Convention: Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, 14 HASTINGS INT'L & COMP. L. REV. 223 (1990).

131. Blaine Harden, *Outcry Grows in Africa over West's Waste-Dumping*, WASH. POST, June 22, 1988, at A19.

132. Barbara D. Huntoon, Comment, *Emerging Controls on Transfers of Hazardous Waste to Developing Countries*, 21 LAW & POL'Y IN INT'L BUS. 291, 291 (1989) (citing *Legislation on Global Waste Control to Be Proposed by Year's End to Congress*, Daily Rep. for Execs. (BNA) No. 161, at A-7 (Aug. 22, 1989)).

Toward that end, the Basel Convention purports to restrict transboundary shipments of hazardous waste by prohibiting some transfers and placing conditions on others.¹³³ Parties to the Basel Convention may not ship hazardous waste to any state "which the exporting country has reason to believe will not manage the waste in an environmentally sound manner."¹³⁴ Further, any otherwise permissible waste transfer may only occur if: (1) the exporting state does not have the technical capacity, facilities, or disposal sites or capacity to dispose of the waste in an environmentally sound manner; or (2) "the wastes . . . are required as . . . raw material for recycling or recovery industries in the [importing country]."¹³⁵ Thus, the Basel Convention prohibits export of hazardous waste to Mexico because the United States should "have reason to believe" that Mexico cannot dispose of hazardous waste in "an environmentally sound manner."¹³⁶

The Basel Convention, however, leaves individual countries to set policies as to what treatment procedures are practicable and environmentally sound.¹³⁷ Since exporting waste is more cost-effective than compliance with strict domestic standards,¹³⁸ the Convention's prohibitions allowing shipments to a country as long as it will dispose of the waste in an "environmentally sound manner" can be very broadly construed. Thus, although the United States has the technical capacity to dispose of hazardous waste itself, waste may be exported to Mexico for recycling or reclamation. The United States continues to ship hazardous waste to Mexico despite the evidence that Mexico neither properly disposes of the waste, nor recycles it in a manner consistent with environmental protection.¹³⁹ Under NAFTA, this amount is expected to increase significantly.¹⁴⁰ Furthermore, the Convention does

133. *Id.* at 293.

134. Basel Convention, *supra* note 130, art. 6, 28 I.L.M. at 664. Exports to the Antarctic Region, to states which are not parties to the Convention, and to states which have prohibited all imports of hazardous waste are also prohibited. *Id.* art. 4, 28 I.L.M. at 661.

135. *Id.* art. 4, 28 I.L.M. at 661.

136. Julienne I. Adler, *United States' Waste Export Control Program: Burying Our Neighbors in Garbage*, 40 AM. U. L. REV. 885, 891 n.45 (1991) (citing *The Waste Export Control Act: Hearings on H.R. 2525 Before the Subcomm. on Human Rights and International Organizations and the Subcomm. on International Economic Policy and Trade of the Comm. on Foreign Relations*, 101st Cong., 1st Sess. 42 (1989) (testimony of Francis Spivy-Weber, Director, International Program, and V. Ann Strickland, Deputy Counsel and Director, Toxics Program, National Audubon Society)). The United States currently sends approximately ten to twelve percent of its exported waste to Mexico. *Id.*

137. Huntoon, *supra* note 132, at 269.

138. See F. James Handley, *Hazardous Waste Exports: A Leak in the System of International Legal Controls*, 19 ENVTL. L. REP. 10,171, 10,171-72 (1989).

139. Patrick J. McDonnell, *Foreign-Owned Companies Add to Mexico's Pollution*, L.A. TIMES, Nov. 18, 1991, at A15.

140. Stimpson Statement, *supra* note 125, at 5. The Basel Convention applies only to hazardous wastes that are to be "disposed" of, as defined in Annex IV of the Convention. Thus, the requirements may not presently apply to hazardous waste exported for reclamation

not explicitly address hazardous waste generated in Mexico as a result of in-bond processing by foreign-owned industries. That waste could be disposed of in Mexico without violating the Convention or the Resource Conservation and Recovery Act (RCRA).¹⁴¹

4. *Water Quality.* The water quality of many surface water bodies in the border area is atrocious.¹⁴² The water flowing into the United States from Mexico carries diseases, raw sewage, and large quantities of chemicals.¹⁴³ The poor water quality in the border area is due to industrial emissions and to a lack of sewage facilities for the ever increasing population on the Mexican side of the border.¹⁴⁴ The increased border area growth expected under NAFTA would result in an even larger number of people in the area and more industrial pollution sources.¹⁴⁵ Without the infrastructure and treatment facilities to handle the increased demand for water and sewage treatment, NAFTA will exacerbate an existing border area drinking water shortage.¹⁴⁶

The Gulf of Mexico, a valuable natural resource for both the United States and Mexico and a principle artery of trade, is also suffering under the current situation. The Gulf currently has 3,000 miles of dead ocean bottom.¹⁴⁷ In addition, coastal wetlands, which comprise one-half of Mexico's total wetland and are a habitat for 75 percent of the migrating water fowl from the United States, are being reduced at a rate of 50 square miles per year.¹⁴⁸ The increased trade traffic in the Gulf,

or recycling. Even the RCRA reporting regulations do not apply to an entity that is "recycling" rather than disposing of hazardous waste. 40 C.F.R. §§ 261.1-2, 261.6. Nor does RCRA provide adequate controls. While RCRA requires that the exporting company notify the EPA and the importing country of the planned shipment and the type and quantity of waste to be shipped, 42 U.S.C. § 6938(c)-(d), the EPA has no power to stop the shipment if appropriate procedures are followed. 42 U.S.C. § 6938(c). Moreover, RCRA contains no requirement that the disposal facility meet any particular standard. The EPA is merely required to forward to the importing government a notice detailing the EPA regulations applicable to the waste and to request such consent following disclosure of U.S. waste regulations. 42 U.S.C. § 6938(d)(1)-(4).

141. Rose, *supra* note 117, at 231. For a discussion of RCRA and the disposal of hazardous waste in Mexico, see *supra* note 118 and accompanying text.

142. Larry Rohter, *Canal Project Sets off U.S.-Mexico Clash over Water for Border Regions*, N.Y. TIMES, Oct. 1, 1989, at A3.

143. For example, although testing for industrial contaminants along the Rio Grande in Texas is "almost nonexistent," there is increasing evidence of severe contamination originating in Mexico. Further, there is clear evidence of high levels of fecal contaminants in both rivers. Kochan, *supra* note 70, at 6.

144. *Id.*

145. See NRDC Statement, *supra* note 39, at 4-5.

146. TCPS RESPONSE, *supra* note 17, at 15.

147. Garry Mauro, Comments on the Negotiation of a North American Free Trade Agreement 1 (Aug. 12, 1991) (unpublished letter, on file with author) [hereinafter Mauro Letter].

148. *Id.* at 2.

expected in the event of a free trade agreement, would result in a higher risk of tanker accidents than can be handled by either party.¹⁴⁹

5. *Land Degradation.* Since NAFTA is expected to result in an increase in air pollution from more vehicles and industrial emitters, an increase in soil and water pollution from a larger population, more sewage, more chemical use, and more hazardous waste generation, many delicate species of plants and animals will be threatened. Swelling economic activity may spur the exploitation of Mexico's natural resources and the elimination of wildlife habitats.¹⁵⁰ Degradation of the land and misuse of the physical assets of the country is an alarming possibility, especially in light of past and ongoing practices. Those practices indicate, however, that the Mexican environmental system may not be sufficient to adequately address the problems that will arise under NAFTA.

IV. THE MEXICAN ENVIRONMENTAL SYSTEM

The Mexican environmental regulatory scheme is under scrutiny to determine its adequacy in addressing environmental and public health issues which will mushroom under a free trade regime.¹⁵¹ While Mexico has developed a statutory environmental system and has entered into several bilateral and multilateral agreements that govern transboundary pollution and resource issues, the scope and efficacy of the Mexican domestic and international environmental system is the central concern of environmental critics.

A. Mexican National Legislation

Mexican efforts to address the devastating environmental situation and concomitant health problems began twenty years ago. In 1971, the Mexican government established the nation's first environmental law with passage of the Federal Law to Prevent and Control Environmental Pollution (LFPCCA).¹⁵² Its object was to restore environmental quality by eliminating the causes of pollution.¹⁵³ The LFPCCA applied throughout Mexico and its provisions covered all man-made pollutants

149. Kochan, *supra* note 70, at 6; Mauro Letter, *supra* note 147, at 1.

150. Some have argued, for example, that adoption of NAFTA will contribute to increased United States dependency on fossil fuels. Lori M. Rodgers, *What Will a Mexican Trade Agreement Mean to the U.S. Energy Industry?*, 128 PUB. UTIL. FORT. 35, 35 (1991).

151. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, MEXICAN ENVIRONMENTAL LAWS, REGULATIONS AND STANDARDS: PRELIMINARY REPORT OF EPA FINDINGS 1 (1991) [hereinafter EPA FINDINGS].

152. Charles T. Dumars & Salvador Beltran Del Rio, *A Survey of the Air and Water Quality Laws of Mexico*, 28 NAT. RESOURCES J. 787, 789 (1988).

153. *Id.*

regardless of their origin and of whether their effects on public health were direct or indirect.¹⁵⁴

In 1982, the Portillo Administration reformed the LFPCCA by passing the Federal Law on Environmental Protection (FLEP).¹⁵⁵ The new law, like the LFPCCA, has the broad objective of ensuring the protection, improvement, conservation, and restoration of the environment by controlling the contaminants that affect it.¹⁵⁶ No new implementing regulations were ever established to set standards or criteria for pollutants under this law, however.¹⁵⁷ Consequently, when the FLEP was enforced, it was done so under the regulations established in 1971 to implement the LFPCCA.¹⁵⁸

In 1983, the Mexican constitution was amended to guarantee that "every person has the right to protection of his health."¹⁵⁹ Article 73 empowers the government to protect public health by protecting the environment.¹⁶⁰ Under this provision, the administration of President Miguel de la Madrid adopted a comprehensive environmental plan, known as the National Development Plan (PND) in 1983.¹⁶¹ The PND stated that the government would pay particular attention to urban areas and establish a specific action program and standards for environmental protection.¹⁶² The de la Madrid government created new positions charged with implementing and enforcing the existing environmental laws, including SEDUE, which took over the functions that were previously vested in various subsecretariats.¹⁶³ SEDUE presently acts as the bureaucratic instrument of federal environmental policy.

These environmental efforts consisted mostly of broad policy statements and objectives with outdated and impractical implementing regulations that lacked enforcement support. In 1988, however, the Mexican government crafted a new general law on the environment which has great promise. The General Law of Ecological Equilibrium and Environmental Protection (GLEEEP) gathers prior environmental regulations in a comprehensive body and sets forth the general policy to be followed in Mexico.¹⁶⁴ Currently, the responsibility for

154. *Id.* The LFPCCA defined pollutants as all substances that when placed in the air, water, or soil (independently or in combination) alter the characteristics of the environment. *Id.*

155. *Id.* at 790.

156. *Id.* at 790-91.

157. *Id.* at 791.

158. *Id.*

159. GIBERT H. FLANZ & LOUISE MORENO, CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 7 (1988). See also Dumars & Del Rio, *supra* note 152 at 793 n.11 (citing CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS 9 (1985)).

160. MEX. CONST. art. 73, XXIX-G, tit. III, ch. II, § 3.

161. Dumars & Del Rio, *supra* 152, at 792.

162. *Id.*

163. *Id.* at 794.

164. *Id.* at 812. The basic objectives of the GLEEEP are to: (1) define general principles

environmental protection in Mexico largely rests with the Secretary of SEDUE.¹⁶⁵ However, as with previous environmental laws, the GLEEEP assigns responsibility for environmental protection under Title IV to other agencies.¹⁶⁶ Indeed, the GLEEEP suffers from the same overlapping jurisdiction and consequent inaction as did previous Mexican environmental laws.¹⁶⁷

Defenders of the Mexican regulatory system and of NAFTA argue that the GLEEEP provides an effective legal regime for protecting the environment.¹⁶⁸ If the GLEEEP provisions are implemented and enforced, the resulting system will compare favorably with that of the United States. The challenge, then, is to ensure that implementation and enforcement occur.

B. International Agreements

Transboundary pollution and resource issues are governed by various agreements between the United States and Mexico. The 1889 International Boundary Convention established the binational International Boundary Commission, which was renamed the International Boundary and Water Commission (IBWC) in 1944.¹⁶⁹ The IBWC consists of one American and one Mexican Engineer-Commissioner, each of whom heads a national section composed of engineering and legal advisers.¹⁷⁰ The IBWC is authorized to enter agreements relating to the planning, construction, operation, and maintenance of joint projects on the border area rivers, subject to joint governmental approval.¹⁷¹ The IBWC also provides water quality

and establish the instruments for their application; (2) achieve an ecological balance; (3) preserve, restore, and improve the environment; (4) protect the wilderness, wildlife, and aquatic flora and fauna; (5) promote rational enjoyment and use of natural resources; (6) promote the preservation of quality air and control the pollution of the air, water and soil; (7) promote the cooperation of the federal government, federal entities, states and municipalities; (8) promote the coordination of the various subagencies and entities of the Federal Public Administration; and (9) to encourage the participation and responsibility of society in issues of environmental protection. *Id.*

165. *Id.* at 805.

166. *Id.* at 813.

167. *Id.* at 813.

168. See EPA FINDINGS, *supra* note 151, at 3-4.

169. Convention Between the United States of America and the United States of Mexico to Facilitate the Carrying out of the Principles Contained in the Treaty of Nov. 12, 1884, and to Avoid the Difficulties Occasioned by Reason of the Changes Which Take Place in the Bed of the Rio Grande and That of the Colorado River, Mar. 1, 1889, U.S.-Mex., 26 Stat. 1512 [hereinafter 1889 Treaty]; ENVIRONMENTAL REVIEW, *supra* note 13, at 9.

170. Treaty Between the United States of America and Mexico Relating to the Utilization of the Waters of the Colorado and the Tijuana Rivers, and of the Rio Grande from Fort Quitman Texas to the Gulf of Mexico, Nov. 14, 1944, U.S.-Mex., art. 2, 59 Stat. 1219, 1220 [hereinafter 1944 Treaty]; ENVIRONMENTAL REVIEW, *supra* note 13, at 9.

171. ENVIRONMENTAL REVIEW, *supra* note 13, at 9.

monitoring and data collection of surface waters and has limited jurisdiction over ground and surface water.¹⁷² The Water Treaty of 1944 extended the IBWC's authority to address water quality, conservation, and water use issues and gave the IBWC responsibility for any border water sanitation measures or works mutually agreed upon by Mexico and the United States.¹⁷³

The 1983 Border Environmental Agreement, known as the La Paz Agreement, provides a framework for cooperation between Mexico and the United States on environmental issues.¹⁷⁴ Under the La Paz Agreement, government authorities are directed to prevent, reduce, and eliminate sources of air, water, and soil pollution in a 100 kilometer wide zone along each side of the international border.¹⁷⁵ The annexes to the La Paz Agreement set out the technical standards that are to be implemented.

In addition to the La Paz Agreement, the United States and Mexico have entered into several cooperative agreements on the environment including the 1984 agreement between the Directorate General of Natural Resources of SEDUE and the United States Fish and Wildlife Service for Cooperation in the Conservation of Wildlife,¹⁷⁶ the 1988 Memorandum of Understanding Between SEDUE and United States National Park Service on Cooperation in Management and Protection of National Parks and Other Protected Natural and Cultural Heritage Sites,¹⁷⁷ and the 1989 Agreement on Cooperation for the Protection and Improvement of the Environment in the Metropolitan Area of Mexico City (Mexico City Agreement).¹⁷⁸

Mexico and the United States are signatories to several multilateral environmental treaties as well. Those include the Basel Convention,¹⁷⁹ the Montreal Protocol,¹⁸⁰ CITES,¹⁸¹ and The Convention for the

172. *Id.*

173. 1944 Treaty, *supra* note 170, art. 3, 59 Stat. at 1223; IEP DRAFT, *supra* note 33, at IV-5.

174. La Paz Agreement, *supra* note 34.

175. IEP DRAFT, *supra* note 33, at IV-5; La Paz Agreement, *supra* note 34, art. 2, 22 I.L.M. at 254.

176. Robert B. Zoellick, Statement Before the Senate Foreign Relations Committee (Apr. 11, 1991), in DEP'T OF ST. DISPATCH, Apr. 15, 1991, available in LEXIS, Nexis Library, Omni File. According to the Senate Treaty Office there is no official source for this agreement as it is an unofficial agreement between the two agencies.

177. The memorandum is not yet in print. National parks comprise about eighteen percent of the U.S. land in the border area. *Id.* at 45. To protect park land and the animal and plant species that thrive in such areas, the United States and Mexico have entered into a bilateral agreement to protect and preserve these parks.

178. Agreement on Cooperation for the Protection and Improvement of the Environment in the Metropolitan Area of Mexico City, Oct. 3, 1989, U.S.-Mex., 29 I.L.M. 25 (1990). In October, 1989, the United States and Mexico entered into the Mexico City Agreement in which the parties agreed to cooperate in protecting the environment in the Metropolitan area of Mexico City. *Id.* art. 1, 29 I.L.M. at 26.

179. See *supra* note 130 and accompanying text.

180. See *supra* note 57 and accompanying text.

Protection and Development of the Marine Environment of the Wider Caribbean Region.¹⁸² Moreover, Mexico and the United States are both contracting parties to the General Agreement on Tariffs and Trade (GATT).¹⁸³

These agreements provide a framework under which environmental concerns relevant to both the United States and Mexico can be addressed. Indeed, the two nations are not dealing with each other in an environmental vacuum. The efficacy of these environmental agreements, as with any international compact, depends entirely on the efforts of the parties to enforce the settled terms.

Despite the improvement in Mexico's statutory system and the existence of these international agreements, the state of the Mexican environment and of Mexican environmental regulation remains far behind that of the United States. The achievement of a free trade agreement will join two nations at vastly different stages of economic and environmental development. For Mexico to attain its economic goals, environmental values may have to be sacrificed. For the United States to secure a reliable trading partner, national standards may have to be compromised.

V. POSSIBLE SOLUTIONS

Merely tallying the potential dire environmental consequences of ratification is an incomplete analysis since it neglects half of the equation. A balanced examination must consider the environmental consequences of scrapping efforts to arrive at a free trade agreement between the United States and Mexico. Without NAFTA, for example, an expected stimulus for development in the interior of Mexico would disappear.¹⁸⁴ Mexico would continue to rely on the *maquiladora* program, with its inadequate infrastructure and unreliable regulatory enforcement. As the Mexican population continues to grow rapidly, the government would likely encourage economic development and job creation at the expense of environmental considerations. In balancing ecological harm and health threats against the economic needs of an increasingly impoverished and restless citizenry, it is likely that the nation would take measures to employ its people at the expense of the environment.

181. See *supra* note 57 and accompanying text.

182. Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, Mar. 24, 1983, 22 I.L.M. 227 (1983). The United States and Mexico are both parties to the Cartagena Convention which requires parties to promote contingency plans for combating oil pollution. Currently, the parties are negotiating a potential annex to the Convention which would cover hazardous substances and land based sources of pollution. IEP DRAFT, *supra* note 33, at IV-8.

183. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 62 Stat. A3, 55 U.N.T.S. 187 [hereinafter GATT].

184. Cf. ENVIRONMENTAL REVIEW, *supra* note 13, at 69.

Moreover, Mexico would lose incentives to cooperate with the United States on the border area pollution problems affecting both nations.

A prosperous Mexico, on the other hand, is in the United States' interest. NAFTA would generate significant revenues which Mexico could use to finance infrastructure improvements, technological and scientific pollution control strategies, efficient resource management, and better regulatory enforcement. In addition, NAFTA offers a unique opportunity to bargain for the resolution of environmental issues of great consequence to the United States and Mexico. The United States would have the leverage needed to gain significant advances in regulation and enforcement south of the border, but these bargaining chips have value only in the context of establishing an improved economic matrix for Mexico. Outside of free trade negotiations, Mexico has little incentive to pursue environmental reform.

As the chorus of environmental criticism grows louder,¹⁸⁵ a variety of proposals have arisen to address the prophesied environmental consequences. To approach the problem comprehensively will require establishing a structure that involves all three North American countries and that facilitates the process of harmonizing and setting environmental regulations and standards, the designation and empowerment of specific entities or persons to make, implement, and enforce regulatory decisions, along with measures for resolving disputes, and the funding of these efforts.

A. Harmonization

Harmonization of environmental standards and enforcement bedevils economic blocks, countries, states, and localities. Regulations and priorities frequently differ based on the peculiar history, culture, and experience of each player. The essential concern from the United States' perspective is whether its standards will be unacceptably compromised by attempting to reach an agreement with Mexico;¹⁸⁶ Mexico is concerned that the United States will attempt to impose unreasonable and unrealistic requirements on a country not able to bear such strictures.¹⁸⁷

With the adoption of GLEEEP and the promulgation of specific standards and implementing regulations, Mexico has made significant progress toward a comprehensive environmental regulatory scheme.¹⁸⁸

185. Harry Bernstein, *Opposition to Free-Trade Pact Grows*, L.A. TIMES, Feb. 4, 1992, at D3.

186. Administration Response, *supra* note 51, tab 4, at 10.

187. LePage, *supra* note 14, at 3.

188. Pursuant to the GLEEEP mandate, Mexico has adopted regulations for environmental impact assessment for major governmental or commercial projects, solid waste management, air pollution control, and automobile emissions in Mexico City. Further, additional regulations are forthcoming for water pollution control and hazardous waste transportation. NRDC

However, current Mexican environmental compliance requirements fall short of similar laws in the United States.¹⁸⁹ The Natural Resources Defense Council (NRDC), for example, has criticized Mexico for lacking "cradle to grave" regulation of hazardous wastes like that of RCRA,¹⁹⁰ public reporting for industrial emissions such as United States "community right to know" provisions,¹⁹¹ and mandatory examination of alternative actions and provision for public comment concerning projects which will impact the environment such as the National Environmental Policy Act.¹⁹²

In contrast, Mexican government documents and reports generally are available to the citizenry only at the discretion of government officials.¹⁹³ There are no "community right-to-know" laws which allow community officials and citizens to monitor environmental compliance by industry in their community.¹⁹⁴ Moreover, although the GLEEEP contains a "denouncement" provision, which allows private citizens to indicate the need for enforcement action against industry, this has been "virtually ineffective due to the lack of an independent judiciary in Mexico for follow up if SEDUE fails to act."¹⁹⁵ The United States perspective dictates that Mexican standards must rise to the level of United States laws.

Indeed, for many, harmonization means adoption of the United States democratic approach to environmental decision making.¹⁹⁶ Toward that end, one solution to the problem of inadequate Mexican enforcement resources is for that nation to allow public participation in environmental policymaking and to encourage public monitoring of pollution generators and SEDUE enforcement efforts. Moreover, many commentators assert that Mexico should adopt United States standing jurisprudence and allow Mexican citizens to bring complaints against industries for nonconformity with Mexican environmental laws.¹⁹⁷

Statement, *supra* note 39, at 9.

189. See Judy Pasternak, *Firms Find a Haven from U.S. Environmental Rules*, L.A. TIMES, Nov. 19, 1991, at A1, A24.

190. See *supra* note 118 and accompanying text.

191. See, e.g., Emergency Planning and Community Right to Know Act of 1986, 42 U.S.C. §§ 11,001-11,050 (1988).

192. National Environmental Policy Act, 42 U.S.C. §§ 4321-4370a (1988) [hereinafter NEPA].

193. TCPS RESPONSE, *supra* note 17, at 10.

194. *Id.*

195. *Id.* at 11 n.19.

196. *President Announces Three-Year Program to Clean Up, Prevent Pollution at Mexican Border*, 22 ENVTL. REP. (BNA) 2427, 2428 (1992).

197. House Majority Leader Richard Gephardt intends to introduce legislation that would allow stockholders to sue U.S. companies operating in Mexico for failure to comply with Mexican environmental laws. Katie Hickox, *Gephardt Plans to Introduce Legislation Allowing Stockholders to Sue*, STATES NEWS SERV., Sept. 10, 1991, available in LEXIS, Nexis Library, Omni File.

Private attorney general provisions might spur even greater compliance.¹⁹⁸

The predicate of this line of reasoning is that Mexico is incapable of establishing its own environmental regime wholly independent of, but on par with, United States environmental standards. Mexico's historic antipathy toward the United States' attempts to control Mexico's internal policies, combined with the practical reality of the vastly disparate economic and environmental levels of the two countries, might render any effort to compel Mexico rapidly to adopt American standards offensive and counterproductive. On the other hand, harmonization provisions which do not dictate a reliance on United States standards, but which merely require that the nations must work toward pollution levels that are protective of public health and safety, could mean United States laws would be diluted.¹⁹⁹ A middle-road must be forged. Toward that end, an upward harmonization of environmental standards between the two nations could be implemented to establish a more gradual process of standard setting and phase-in, while maintaining the rights of state and local governments to set higher standards should it prove politically or economically feasible.²⁰⁰ This type of graduated harmonization may be encouraged through a variety of measures.

Regulatory oversight will be supported and encouraged by sharing and assistance in technological development, bilateral aid from the United States and Canada, and multilateral development loans targeted at better implementation and enforcement of existing regulations. In addition, adoption of concrete trade sanctions can be employed when a country fails to implement or enforce environmental standards. Finally, the organization of a system for monitoring environmental compliance under NAFTA can be installed to trigger the enforcement measures.²⁰¹ Not only might these proposals ensure that standards would be harmonized, implemented, and enforced, but they could establish a framework under which future environmental improvements could be launched.

198. See, e.g., Federal Water Pollution Control Act, § 505, 13 U.S.C. § 1365 (1988).

199. Letter from Mont P. Hoyt, Esq., to Carolyn Frank, Trade Policy Staff Committee, Office of the U.S. Trade Representative 2 (Aug. 10, 1991) (on file with author) [hereinafter Hoyt Letter]. In connection with a recent resolution stating that Congress will not approve enabling legislation for GATT's Uruguay Round or NAFTA if the agreements jeopardize certain U.S. laws, Representative Henry Waxman (D-Cal) indicated that he was troubled by draft GATT rules relating to international harmonization because they could be used to bring countries down to the lowest common denominator. *Waxman Measure Urges Administration to Safeguard U.S. Laws in GATT, FTA*, Int'l Trade Rep. (BNA) No. 47, at 1740 (Nov. 27, 1991) [hereinafter *Safeguard*]. For the text of the Waxman resolution, see H.R.J. Res. 264, 102d Cong., 1st Sess. (1991) [hereinafter Waxman Resolution].

200. Hoyt Letter, *supra* note 199, at 2.

201. *Id.*

B. Enforcement

The first step to an effective bilateral environmental agreement is to develop a process for regulatory harmonization and standard setting. The next step is to give real authority to entities charged with implementing and enforcing those harmonized regulations. The enormity of the challenge requires dramatically increased personnel, greater resources, and a sincere commitment from the Mexican and United States governments. Furthermore, authority needs to be clearly delineated, respected, and employed. Under the existing regime, the implementation and enforcement authority of SEDUE, EPA, and IBWC should be strengthened and augmented to provide for a comprehensive response framework from which the pollution control measures already in place could be enforced in a meaningful way. For border area concerns, the United States and Mexico have cooperative agreements in place.²⁰² Further, the 1983 La Paz Agreement authorizes SEDUE and EPA to take joint action on air, water, and land pollution in the border region.²⁰³ In practice, however, action under this plan has been sparse and often less than adequate. For example, both agencies "admit to having little control over the disposal of hazardous wastes generated by the maquiladora plants."²⁰⁴ Similarly, the IBWC, which is charged with carrying out binational sanitation and water conservation measures, suffers from lack of progress on issues of surface water salinization and sanitation.²⁰⁵ To enhance cooperative enforcement capability, the United States and Mexico recently created the Cooperative Enforcement Working Group.²⁰⁶ The objectives of the group are laudable, but the projects are not mandatory and cannot be enforced, particularly in light of the lack of funding. The efficacy of such a venture, then, is doubtful.

202. See *supra* notes 176-78 and accompanying text.

203. See *supra* note 34 and accompanying text.

204. NRDC Statement, *supra* note 39, at 10-11.

205. Mark A. Sinclair, *The Environmental Cooperation Agreement Between Mexico and the United States: A Response to the Pollution Problems of the Borderland*, 19 CORNELL INT'L L.J. 87, 103 n.76 (1986).

206. ENVIRONMENTAL REVIEW, *supra* note 13, at 32, 43. Specific points to be addressed by the Cooperative Enforcement Strategy Working Group include:

information exchange relevant to transboundary pollution and related enforcement efforts; exploring the development of compatible computer software to facilitate [information exchange]; enhancing . . . enforcement capabilities at key border crossings . . . enhancing training efforts for inspectors and other enforcement personnel; facilitating personnel exchanges to share enforcement experiences and techniques; sharing . . . laboratory and other technical enforcement support services; and expanding cooperative interaction in the form of joint observer visits to facilities in each country's border area.

Instead of relying only on SEDUE and EPA, a new supranational entity could be established to police the efforts of the designated entities. The NRDC, for example, advocates the creation of a North American Commission on Trade and the Environment with a comprehensive mandate to address problems related to NAFTA throughout the trade region. It will also rectify the current institutional shortcomings which tend to hamper implementation and enforcement of existing environmental laws.²⁰⁷ The commission would be composed of governmental and nongovernmental experts on trade and the environment from the United States, Mexico, and Canada.²⁰⁸ It would be authorized to hear complaints from governments, nongovernmental organizations, and citizens in connection with the failure of any signatory to enforce its own environmental standards or applicable international norms on activities related to trade.²⁰⁹ Moreover, the commission could be empowered to investigate allegations of poor enforcement and to make recommendations to the parties on required enforcement actions.²¹⁰

Perhaps an even more effective enforcement tool would be a commission with powers akin to those of the GATT decision panel.²¹¹ This commission could not only review enforcement, but could make decisions about NAFTA environmental compliance. Finally, such a commission could serve the important purpose of highlighting problem areas and could be vested with power to enjoin polluting activities that were violating applicable standards.²¹²

Enforcement commissions notwithstanding, disputes will inevitably arise between the United States and Mexico regarding environmental and trade measures,²¹³ and it is necessary to establish procedures to resolve these disagreements. There are several principles which should guide the creation of any dispute resolution mechanisms negotiated as part of NAFTA.²¹⁴ The agreement should contain an explicit provision stating that legitimate environmental policy measures will be free from attack as illegal trade barriers.²¹⁵ For example, the concerns raised by

207. NRDC Statement, *supra* note 39, at 11. The NRDC's proposal for a North American Trade Commission is similar to Mont Hoyt's suggestion for a dispute resolution panel that would operate like the GATT panel, but would have a broader base of expertise and operate openly.

208. *Id.*

209. *Id.*

210. *Id.*

211. See generally GATT, *supra* note 183, art. XXIII, 61 Stat. at A64-A65, 55 U.N.T.S. at 267-68 (setting forth international dispute resolution procedures).

212. See NRDC Statement, *supra* note 39, at 11-12.

213. Hoyt Letter, *supra* note 199, at 3.

214. *Id.*

215. *Id.* NAFTA should provide that when determining the legitimacy of a particular environmental regulation or standard, the burden of persuasion should be upon the party challenging it as a trade barrier. Moreover, the "sound science" objection should be very

the GATT tuna decision must be addressed directly to avoid the weakening or invalidation of existing United States health and safety standards.²¹⁶

Additional unilateral measures under consideration in the United States include treating lesser standards in other countries as unfair trade subsidies. Senator David Boren introduced a bill entitled the International Pollution Deterrence Act of 1991 (IPDA),²¹⁷ which is currently pending before the Senate Finance Committee. The main purpose of the IPDA is to require manufacturers of imported goods to comply with reasonable environmental standards or to pay a duty representing a portion of the cost that would have been added to the imported items had reasonable environmental regulations been followed during the manufacturing process.²¹⁸ Essentially, the IPDA would bring the price of imported items in line with the price of similar items manufactured in the United States under EPA environmental standards. "The failure to impose and enforce effective pollution controls and environmental safeguards" would be considered "a bounty or grant" to the industry by its government.²¹⁹ Thus, the IPDA would treat government failure to require and enforce environmental standards as a subsidy to the uncontrolled industry.

Under Boren's plan, the amount of duty imposed by the United States on products manufactured without reasonable pollution controls would be "the cost which would have to be incurred by the manufacturer . . . of the foreign . . . merchandise to comply with the environmental standards imposed on United States producers of the same class or kind of merchandise."²²⁰ One half of the funds collected

carefully circumscribed to prevent a party from challenging environmental standards which are established to protect human health but which may or may not be based upon concrete scientific research results. *See id.* at 3-4.

216. In response to the GATT Panel's ruling on the tuna embargo, Representative Henry Waxman, Chairman of the House Energy and Commerce Subcommittee on Health and the Environment, and twenty-one co-sponsors, including House Majority Leader Richard Gephardt, introduced a resolution on November 21, 1991, stating that Congress would not approve enabling legislation for the free trade agreement with Mexico and the Uruguay Round of GATT, if either of the agreements jeopardizes U.S. health, safety, environmental, or labor laws. In order to address the potential dilution of U.S. laws under GATT or NAFTA that interprets protective U.S. laws as disguised trade barriers, the Waxman resolution asks the administration to complete negotiations to make GATT compatible with U.S. laws, including the Marine Mammal Protection Act, the Federal Food, Drug and Cosmetic Act, and the Clean Air Act. Waxman Resolution, *supra* note 211. If this does not occur, the resolution states that Congress will not approve legislation to implement any trade agreement. *Id.* The resolution is backed by a coalition of labor unions, and environmental, consumer, and agricultural groups. *Safeguard, supra* note 199, at 1740.

217. S. 984, 102d Cong., 1st Sess. (1991) [hereinafter Boren Bill].

218. *International Pollution Deterrence Act Introduced to Balance Market Competition*, Int'l Env't Daily (BNA) (May 14, 1991), available in LEXIS, Nexis Library, BNAENV File.

219. Boren Bill, *supra* note 217, § 3(a).

220. *Id.* § 3(b)(C).

as a duty on the import of unregulated goods would be used to fund a "Pollution Control Equipment Export Fund" to "assist purchases of U.S. pollution control equipment by developing countries."²²¹ The other half of the money collected would be used to fund a "Pollution Control Research & Development Fund".²²² The administrator of the EPA would establish this fund "to provide assistance for U.S. companies in the research and development of pollution control technology and equipment."²²³

Despite the bill's clear philosophical foundation, Boren's proposal is fraught with complexity. Indeed, application of the bill's measures would almost certainly induce retaliation from other nations.²²⁴ Nonetheless, the Boren Bill is receiving wide-spread attention²²⁵ and appears to be thriving amidst the current American sentiment against restrictive trade practices abroad. It is unclear if the measure will be passed, but the seriousness with which the measure is being received testifies to the gravity of the issue.

Another, more radical, unilateral approach to augment enforcement is to ask Mexico to grant United States governmental entities limited jurisdiction over United States operations located south of the border. One way to do this would be to pass domestic legislation mandating compliance with United States environmental laws for United States companies operating abroad. Alternatively, the administration could provide for this in NAFTA by imposing sanctions on parent companies based in the United States in lieu of closing plants based in Mexico or requiring clean-up in Mexico. Under such an agreement, the EPA could enforce United States pollution control laws on United States businesses operating in Mexico. Applicable environmental standards are already in place in the United States, as are the sanctions and the technology necessary to ensure compliance.²²⁶ Under this approach, the United States could circumvent the difficulties inherent in imposing stricter pollution control standards on Mexico as a prerequisite to NAFTA.

221. *Id.* § 4(d).

222. *Id.*

223. *Id.*

224. Kyle E. McSlarrow, *International Trade and the Environment: Building a Framework for Conflict Resolution*, 21 ENVTL. L. REP. 10,589, 10,592 (1991).

225. See, e.g., Nancy Dunne, *Environment Rules Set Stage for GATT Conflicts*, FIN. TIMES, Dec. 5, 1991, at 6 (detailing debate and testimony over Boren Bill).

226. The United States has in place comprehensive legislation for various facets of the problem of environmental pollution. See, e.g., NEPA, 42 U.S.C. §§ 4321-4370a (requiring preparation of an impact statement for government projects that impact the environment); Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601 (1988); RCRA, 42 U.S.C. §§ 6901-6991 (detailing hazardous waste disposal and clean-up requirements); Clean Air Act, 42 U.S.C.A. §§ 7401-7671 (West Supp. 1991) (regulating discharges that impact ambient air quality); Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1988) (controlling the release of chemical pollutants into the nation's water).

Further, the United States could avoid concern over whether or not the standards would be enforced by Mexican authorities.

An obvious difficulty in securing such a provision would be the infringement on Mexico's inherent sovereignty by allowing the United States to enforce its environmental standards against United States companies in Mexico (assuming the nationality of a company could be determined).²²⁷ Mexico would have to agree to allow United States officials to monitor emissions and to make plant inspections in Mexico. It would also have to agree to permit United States officials to sanction companies based in Mexico in ways which would severely impact Mexico's internal control.²²⁸ Further, plant closing or CERCLA type clean-up operations would obviously impact Mexican citizens and the Mexican economy.

Additionally, while this plan may solve the problem of United States companies polluting in Mexico, it does not address the issue of other foreign companies that locate in Mexico to take advantage of the low environmental compliance costs there.²²⁹ The plan would also leave Mexican companies free to pollute in order to better compete against enterprises from the north. Indeed, Mexico would lose a core element of its attractiveness to United States business investment if the businesses were subject to the same regulations as applied in the United States. Without uniform environmental controls, Mexican business might do better, but Mexico would not.

In the final analysis, enforcement is very likely to reduce Mexico's ability and incentive to monitor actions and implement acceptable regulations. If the desire or resources to ensure regulatory enforcement are lacking, no amount of United States pressure will improve the environmental situation. The key to adequate enforcement lies in establishing an infrastructure to properly accommodate commercial and residential activities and in developing the personnel and expertise to ensure compliance with reasonable environmental regulations. To accomplish this herculean task would require substantial funding.

C. Funding

Lack of funding is the root of Mexican and United States environmental concerns. The United States spends hundreds of billions of dollars each year to protect and remediate the environment.²³⁰ The

227. See Robert E. Lutz, *The Export of Danger: A View from the Developed World*, 20 N.Y.U. J. INT'L L. & POL. 629, 638-39 (1988).

228. For example, some U.S. environmental laws could not be enforced in Mexico without considerable economic impact on Mexican citizens.

229. See *supra* notes 103-04 and accompanying text.

230. For example, the Bush administration has recently requested \$100 million for environmental projects at the U.S.-Mexican border. Douglas Jehl & Rudy Abramson, *Bush to*

cost of these efforts contributes to the difficult economic climate in many parts of the country and across many industries.²³¹ SEDUE's 1990 operating budget for pollution control activities in all of Mexico, in contrast, amounted to only six percent of the water pollution and hazardous waste budget for Texas alone.²³² At present, Mexico is not realistically able to devote major resources to environmental protection by developing the necessary infrastructure and by hiring and training personnel. In addition, SEDUE is in constant competition for limited funds with immediate concerns such as housing, food assistance, and other domestic programs that seek to address Mexico's chronic poverty and urban overcrowding.²³³ Consequently, the department is limited politically in its ability to lobby for needed appropriations. Because an effective environmental plan for NAFTA must include concrete sources of funding, ensuring that money is channeled into environmental protection becomes a major concern for the proponents of a trade agreement.

A variety of methods for raising capital are under discussion. The Bush administration and others have asserted that the increased prosperity brought by NAFTA will help Mexico solve its funding problems.²³⁴ To the extent that NAFTA could alleviate some of the constraints on Mexico's budget caused by persistent poverty and an enormous foreign debt,²³⁵ it could free up some funds for environmental protection. However, the concern that Mexico, in its struggle to compete with more efficient Canadian and United States companies, would not enforce its own environmental laws, is very real in light of the present state of the *maquiladoras* in the border area.²³⁶ Better economic times and increased pressure from the United States under a free trade agreement, however, could generate more revenues, a percentage of which could be mandated for environmental protection.

Another mechanism for providing funding is to tap foreign investors taking advantage of the free trade zone.²³⁷ Foreign investors could be

Seek \$100 Million Extra for Border Cleanup, L.A. TIMES, Jan. 23, 1992, at A1.

231. See generally Marshall Ingwerson, *Regulation Questions Divide White House*, CHRISTIAN SCI. MONITOR, Dec. 31, 1991, at 7 (describing costs of U.S. environmental regulations).

232. TCPS RESPONSE, *supra* note 17, at 9.

233. See NRDC Statement, *supra* note 39, at 13.

234. Administration Response, *supra* note 51, tab 4, at 1. Mary Kelly of the Texas Center for Policy Studies notes that the administration, in trying to overcome Mexico's "glaring lack of any significant resources to devote to environmental protection," argues that "(1) growth under the free trade agreement will provide the revenues necessary for enforcement and (2) the World Bank is about to loan Mexico \$84 million to SEDUE." TCPS RESPONSE, *supra* note 17, at 9.

235. Mexico's foreign debt reached \$100 billion in 1989. Janet Duncan, *Mexican Rate Slump Good News for Some Investors*, Reuters, Mar. 17, 1992, available in LEXIS, Nexis Library, Wires File.

236. See Hoyt Letter, *supra* note 199, at 2.

237. *Id.* at 3.

held responsible for financing measures necessary to mitigate or prevent the environmental effects of their activities. Under current forecasts of foreign investment following NAFTA, a one percent levy on all foreign direct investment would generate an annual amount of about \$70 million.²³⁸ For the levy to be an effective way to aid pollution prevention efforts, however, would require agreement within the negotiations upon how these funds would be allocated.²³⁹

Similarly, NAFTA could provide that a certain percentage of the value of goods exported under NAFTA must be allocated to pollution control implementation and enforcement. As suggested by Senator Boren, the United States and Canada could impose countervailing duties on goods not produced in compliance with reasonable pollution control standards.²⁴⁰ This would provide an incentive for businesses to comply or funnel non-complying profits back into environmental protection. Likewise, creative programs to discourage pollution generation could be negotiated such as an agreement to allow international emission offsets issued by the United States Trade Representative's staff.²⁴¹ Under this type of program, a facility in the United States border region could buy emission credits from an existing facility in Mexico which might be switching to a cleaner fuel or reducing its emissions. These emission credits would be used to offset the increase in pollutant emissions in the United States and to permit new plant construction in Mexico under the United States requirements.²⁴² This could result in lower overall emissions by distributing the right to pollute only to facilities that derive the most benefit from the activity.

Another proposed means of funding and managing the clean up of the border area is the creation of the trinational superfund that has been advocated by Economic Strategy Institute Fellow, Robert Cohen.²⁴³ According to Cohen, such an arrangement would be "dedicated to enhancing Mexican regulatory capabilities and [to cleaning up] border zone pollution"²⁴⁴ A trinational superfund "would be supported by initial contributions from North American governments, assessments on companies that pollute the border zone, and by Mexican purchases of outstanding Mexican debt [that would be] treated as special face value contributions to the fund"²⁴⁵ Indeed, the superfund would

238. *Id.*

239. TCPS RESPONSE, *supra* note 17, at 10.

240. *See* Boren Bill, *supra* note 217.

241. *See generally* ENVIRONMENTAL REVIEW, *supra* note 13, at 104.

242. *Id.*

243. *Economist Proposes that NAFTA Include Trinational Superfund for Environment*, Int'l Bus. Daily (BNA) (Nov. 1, 1991), available in LEXIS, Nexis Library, Omni File.

244. *Id.*

245. *Id.*

operate much like CERCLA.²⁴⁶ Funds would be available for cleanup of polluted areas, and the fund officials would have "inspection powers and the authority to impose fines for past pollution."²⁴⁷ The fund's trilateral support would enable a board of inspectors to oversee operations on both sides of the border and to cut off aid and trade benefits to any nation failing to meet specified goals for waste treatment and pollution control.²⁴⁸

Traditional sources of funding could be put in place under NAFTA. The free trade agreement might provide for the furnishing of multi-lateral development loans, increased bilateral aid, contributions from private industry, and cancellation or reallocation of debt to be reinvested in environmental planning and regulatory efforts.²⁴⁹ NAFTA might also establish a "Development Bank funded by debt reallocation . . . contributions from U.S. industry investing in Mexico and other sources" to deal with the lack of environmental regulation and the lack of an adequate infrastructure.²⁵⁰ With the stakes so high, there is a great need for creative measures. Trickle down environmental construction and enforcement will not occur naturally or adequately to address a systemic problem of this magnitude. Thus, it is vital that an environmental funding structure be mandated as an integral part of a free trade agreement.

VI. CONCLUSION

Together, Mexico and the United States are facing a global marketplace radically altered by new economic factors. Although occupying the same land mass, each nation is a product of very different historical and cultural experiences. As Mexican Nobel Prize winner Octavio Paz has observed, Mexico and the United States are "two distinct versions of Western civilization."²⁵¹ The goal of NAFTA is to

246. *Id.*

247. *Id.*

248. *Id.*

249. TCPS RESPONSE, *supra* note 17, at 6.

250. *Id.*

251. OCTAVIO PAZ, *Mexico and the United States*, in THE LABYRINTH OF SOLITUDE 357, 357 (Rachel Phillips Belash trans., 1985).

Our countries are neighbors, condemned to live alongside each other; they are separated, however, more by profound social, economic, and psychic differences than by physical and political frontiers. These differences are self-evident, and a superficial glance might reduce them to the well-known opposition between development and underdevelopment, wealth and poverty, power and weakness, domination and dependence. But the really fundamental difference is an invisible one, and in addition it is perhaps insuperable. To prove that it has nothing to do with economics or political power, we have only to imagine a Mexico suddenly turned into a prosperous, mighty country, a superpower like the United States. Far

ally these fundamentally different countries for the common purpose of mutual economic prosperity; the challenge is to accomplish this objective without precipitating disastrous environmental consequences. While the United States cannot compromise its health standards, Mexico cannot adopt instantly the United States' environmental regime. Indeed, a recognition of the different perspectives of the two countries is essential. The disparity, however, does not justify ignoring environmental issues. Rather, a framework to facilitate regulatory harmonization, enforcement, and funding is essential to creating a North American free trade zone that will allow the continent to compete vigorously in the new world marketplace. NAFTA provides the opportunity for, and in many ways necessitates the creation of, such a structure. The agreement, however, must navigate between the scylla of long-term environmental demands and the charybdis of contemporary global economic pressures to reach an effective and reasonable process for addressing the environmental issues that are vital to both nations.

from disappearing, the difference would become more acute and more clear-cut. The reason is obvious: We are two distinct versions of Western civilization.