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“Green” Language in the NAFTA: Reconciling Free Trade and Environmental Protection

The complex legal regimes governing environmental protection and international trade evolved along relatively separate paths over the last twenty years. Trade and environmental issues began to collide with increasing frequency, however, in the early 1990s.¹ In 1991, a General Agreement on Tariffs and Trade² (GATT) panel issued a proposed report in which United States Marine Mammals Protection Act (MMPA)³ restrictions on the importation of Mexican tuna caught using fishing techniques harmful to dolphins were found to be inconsistent with GATT article XI.⁴ In 1990, the United States banned certain French wines because they were fermented from grapes treated with procymidone—a Japanese pesticide not properly registered for use in the United States.⁵ The French Government quickly charged that the U.S. action was not motivated by legitimate health and

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1. See generally OFFICE OF TECHNOLOGY ASSESSMENT, TRADE AND ENVIRONMENT: CONFLICTS AND OPPORTUNITIES, REP. OTA-BP-ITE-94 (May 26, 1992).

2. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1987, 61 Stat. A3, 55 U.N.T.S. 187 [hereinafter GATT].

3. 16 U.S.C. §§ 1361–1407 (1988).

4. General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, Aug. 16, 1991, 30 I.L.M. 1594. The panel decision was not appealed to the GATT Council. Instead, Mexico moved to comply with the U.S. law that it had challenged successfully before the GATT panel. Mexico's sudden, radical change in tactics appears to be motivated by a desire to reduce U.S. concerns over the environmental impact of the NAFTA and, thereby, increase the chances that the trade agreement will be ratified. Additionally, a second case has now been brought against the United States by the European Community attacking the “secondary embargo” provisions of the MMPA.

5. See Procymidone Residues in Wine; Request for Comment on Potential EPA Actions under Federal Food, Drug and Cosmetic Act, 55 Fed. Reg. 39,171 (1990).

environmental concerns, but was instead merely a subterfuge to protect domestic wine producers.

Against this backdrop of controversy, environmental issues were destined to play a significant role as the United States, Mexico, and Canada moved to liberalize regional trade through negotiation of a North American Free Trade Agreement (NAFTA).⁶ Accordingly, when President Bush sought an extension of the U.S. Trade Representative's authority to negotiate trade agreements on a fast track,⁷ Congress demanded assurances that the agreement would not weaken any current environmental laws, regulations, or standards.⁸ The landmark trade agreement that emerged from the fourteen months of negotiations, completed on August 12, 1992, contains a number of highly innovative provisions that may shape environmentally sensitive language in future international trade agreements.

This article briefly catalogues and explains the ground-breaking nature of certain "green" provisions in the NAFTA. Thereafter, the article discusses some of the most common criticisms leveled at the NAFTA for its treatment of environmental concerns and what actions the new administration might undertake to respond to these complaints. Finally, the article assesses how the NAFTA's "green" language may impact future trade negotiations, with particular emphasis on the renegotiation of the GATT.

I. The "Greening" of the NAFTA

The NAFTA's "green" provisions can be readily separated into six categories: (1) preamble provisions, (2) standards-related measures, (3) sanitary and phytosanitary measures, (4) dispute resolution/forum selection procedures, (5) preservation of trade measures in international environmental agreements, and (6) environmentally sensitive investment provisions. This article examines each in turn—concentrating on the most novel and innovative provisions in each area.

6. North American Free Trade Agreement [hereinafter NAFTA]. All references to the NAFTA are to the October 7, 1992, draft. The fundamental goal of the NAFTA is to liberalize international trade in services, goods, and investment among Mexico, Canada, and the United States. The means selected to reach this goal include the eventual dismantling of tariff and nontariff barriers to trade among the NAFTA partners.

7. In order to allow time for the negotiation of the NAFTA, Congress on May 24, 1991, extended the fast-track procedures originally enacted in the Trade Act of 1974, 19 U.S.C. § 2101 (1988), to any trade agreement signed before July 1, 1993. Among other things, fast-track procedures require the President to give Congress formal notice of his intent to enter into the agreement. President Bush took this step on September 18, 1992. The 1974 Trade Act authorized the President to sign the agreement 90 calendar days after giving notice to Congress, and President Bush signed the NAFTA on December 17, 1992. At any time after signing, the President may submit legislation to Congress implementing the trade agreement. The fast-track rules then require that both houses of Congress vote on the agreement as submitted (without amendments) within 90 session days.

8. On May 1, 1991, President Bush sent a letter to Congress pledging, among other things, that the NAFTA would not weaken any current U.S. law, regulation, or standard relating to the environment. See Dennis Eckart, *Free Trade Shouldn't Mean Pollution*, 9 ENVTL. F. 24 (1992).

A. PREAMBLE

The preamble of the NAFTA sets out the principles and aspirations upon which the Parties base the agreement. The NAFTA opens with an express recognition of the importance of environmental concerns. In the preamble the Parties resolve that trade liberalization and commercial expansion will be undertaken in an environmentally sound manner.⁹ The NAFTA text identifies the improvement of trade "in a manner consistent with environmental protection and conservation" as one of the agreement's primary goals.¹⁰ The Parties also commit to promote "sustainable development" within their countries.¹¹ This pledge reflects a recognition that increased trade and investment under the NAFTA should be consciously structured to avoid harm to the environment. Finally, the preamble expresses the Parties' resolve to encourage the further development of environmental laws and regulations, as well as to strengthen enforcement of environmental standards in each NAFTA country. These general goals—all novel elements of a trade agreement—are given concrete expression in specific provisions of the NAFTA text discussed below.

B. STANDARDS-RELATED MEASURES

The Standards-Related Measures or "Technical Standards" chapter is the centerpiece of the "green language" in the NAFTA. This chapter applies to all human health, safety, and environmental standards (other than sanitary and phytosanitary standards), technical regulations, and conformity assessment procedures in effect in the United States, Canada, and Mexico. Environmental, health, and safety standards can function as inadvertent barriers to free trade. Goods manufactured in one nation may contain constituents (for example, CFCs or pesticide residues) that render the product unfit for sale under another nation's standards. To minimize the interference with commerce, trade interests have sought to harmonize environmental, health, and safety standards across borders. This effort at uniformity has excited fears in the environmental community that industrial interests will employ trade pacts to revisit and weaken domestic environmental standards. Confronted with this tension, the NAFTA's Technical Standards chapter (and the Sanitary and Phytosanitary Measures subchapter discussed later) contains strong language encouraging harmonization of domestic and international environmen-

9. NAFTA, *supra* note 6, preamble. Environmental concerns have been an important element of the U.S. negotiating position in NAFTA talks since the very beginning of discussions. In February 1992 the Office of the U.S. Trade Representative publicly released an environmental review of the NAFTA that it had undertaken voluntarily in conjunction with other U.S. government agencies, including the Environmental Protection Agency. The review examined the likely environmental effects in the United States and Mexico of a NAFTA. In any future trade pact negotiations, environmental groups will almost certainly press for a similar environmental review that results in formal recommendations to the U.S. negotiators.

10. NAFTA, *supra* note 6, preamble.

11. *Id.*

tal, health, and safety standards, but also clarifies that the NAFTA parties have broad residual discretion to reject harmonization if necessary to ensure that the NAFTA will not interfere with the integrity of domestic regulatory systems.

Article 905 of the NAFTA forcefully encourages the Parties to use international measures when setting domestic standards that impact trade. Indeed, article 905(1) essentially *requires* the use of international standards when these standards exist or are in the final stages of development. Moreover, any Party employing an international standard as a domestic technical measure enjoys the benefit of a presumption that its use of the standard is consistent with the basic NAFTA obligations and is not an improper attempt to utilize a technical standard to create an unnecessary obstacle to trade.¹²

Article 906(2) further encourages each Party to act in the future to harmonize its governmental regulations with the standards of the other NAFTA trading partners. To facilitate this effort toward compatibility article 913 creates a Committee on Standards-Related Measures. The NAFTA Parties also must undertake reasonable efforts to encourage domestic nongovernmental standard-setting bodies to pursue comparability of their requirements with the standards and procedures of other NAFTA nations.

Despite this strong language encouraging harmonization, the NAFTA takes great pains to guarantee that trade expansion does not come at the expense of the environment. First, article 905(3) ensures that any Party, or its political subdivisions, can maintain domestic regulatory standards that it believes result in higher levels of protection than would be provided under controlling international measures. Accordingly, this provision eliminates any risk that the NAFTA could lead to a "harmonization down" of domestic standards. Indeed, the Parties' obligation to harmonize existing domestic standards is expressly conditioned on the understanding that this can be achieved *without* "reducing the level of . . . protection of . . . animal or plant life or health, [or] the environment"¹³ Once in effect this provision will have a powerful positive impact on the North American environment because it creates a one-way ratchet driving a "harmonization upward" of all three nations' environmental standards.

Second, article 904(1) of the Technical Standards chapter expressly affirms each country's basic right to maintain and enforce its own health, safety, and environmental protection standards. This authority is, of course, a necessary corollary of each of the NAFTA nation's ability to adopt domestic standards that are more protective than international measures. As a means of implementing article 904(1) rights the NAFTA expressly protects each nation's ability to prohibit the importation of products that fail to meet domestic standards or that have not yet completed the domestic approval process.

Third, the agreement authorizes Parties to depart from international standards

12. *Id.* art. 905(2).

13. *Id.* art. 906(2).

in instances where those standards would be "ineffective" or "inappropriate."¹⁴ Article 905 maintains maximum flexibility for the United States by recognizing that otherwise relevant international standards might be inappropriate for a particular NAFTA Party because of climatic, geographic, technologic, scientific, or infrastructure reasons.

Fourth, articles 909 and 1802 of the NAFTA contain "transparency" procedures that will facilitate both international commerce and public participation in environmental regulation. These provisions require that the NAFTA Parties give public notice before adopting or modifying any environmental, health, and safety measure (including sanitary and phytosanitary measures) that may affect trade. All standards must be published and centrally available from a designated institution.¹⁵ The broad availability of such information should enhance environmental protection by making it easier for industry to discover, understand, and comply with relevant standards. Additionally, these procedural protections should address environmentalists' fears that any NAFTA nation might quietly ease regulations as a means of surreptitiously attracting investment.

Finally, the Technical Standards chapter maintains the Parties' flexibility in conducting risk assessments—a fundamental building-block to environmental regulation. The NAFTA directly acknowledges each Party's right to determine the level of risk that it considers acceptable when pursuing legitimate objectives of protecting human health, environment, conservation, or safety.¹⁶ The NAFTA also specifically preserves important aspects of U.S. risk assessment procedures. For example, the agreement recognizes the NAFTA nations' ability to consider ecological risk as a relevant element of risk assessment. Additionally, the NAFTA addresses the difficult problem of scientific uncertainty in risk assessment. In the absence of adequate scientific information to make an informed risk assessment, a Party remains free to adopt provisional regulations based on available information.

C. SANITARY AND PHYTOSANITARY MEASURES

Subchapter B of chapter 7 of the NAFTA addresses the development, adoption, and enforcement of sanitary and phytosanitary (SPS) measures. Generally, these measures are undertaken to protect humans, animals, or plants from risks arising from animal or plant diseases and from dangers attendant to food additives or contaminants. In these provisions the NAFTA again safeguards each Party's right to regulate to protect human health and the environment, while simultaneously seeking to prevent the abuse of such standards as disguised restrictions on trade.

The NAFTA takes several bold steps to ensure that the U.S. sanitary and

14. *Id.* art. 905(1).

15. *Id.* art. 909.

16. *Id.* arts. 904(2), 907.

phytosanitary standards are not compromised. First, the NAFTA explicitly confirms each Party's right to establish the level of protection that it considers appropriate and to enact measures that are even more stringent than relevant international standards.¹⁷ Moreover, the NAFTA preserves the authority of a nation's governmental subentities (states, counties, and municipalities) to adopt environmental measures more protective than national or international standards. Each NAFTA partner can enforce its directed level of environmental protection by prohibiting the entry of goods that do not satisfy relevant standards.

In an approach similar to that adopted in the Technical Standards chapter, the NAFTA also encourages the Parties to harmonize their SPS measures with accepted international standards, without lowering their level of environmental protection.¹⁸ For example, the NAFTA Parties pledge to promote the work of several recognized organizations that review and develop international SPS standards.¹⁹ Similarly, each NAFTA nation must accept the SPS measures of its partners as equivalent to its own, but only after the exporting country demonstrates that the foreign standards achieve the importing nation's selected level of protection.²⁰ Finally, the NAFTA creates a Committee on Sanitary and Phytosanitary Measures to facilitate these "harmonization" and "equivalence" efforts.²¹ The agreement also charges the committee with advancing technical cooperation and consultations between the NAFTA Parties.²²

SPS measures involve complex technical issues and might prove to be a fertile field for disputes among the NAFTA partners during implementation. NAFTA article 723 recognizes this potential for conflict and provides a dispute settlement mechanism for sanitary and phytosanitary matters. In that dispute resolution process, the NAFTA places the burden of proof squarely on the Party challenging the protective measure.²³

Viewed collectively, the Sanitary/Phytosanitary Standards and the Technical Standards chapters negotiated in the NAFTA evidence a strong commitment that the agreement will not compromise domestic public health, safety, and environmental regulations. Properly implemented, they will serve as a potent engine for enhanced environmental protection—driving upward harmonization of environmental standards, yet preserving each NAFTA nation's authority to respond to local conditions and concerns by adopting more protective environmental measures.

17. *Id.* arts. 712(1), 713(3).

18. *Id.* art. 712(1).

19. *Id.* art. 713(5).

20. *Id.* art. 714.

21. *Id.* art. 723.

22. *Id.* art. 723(2).

23. *Id.* art. 723(6).

D. DISPUTE SETTLEMENT

Timing and fate conspired to guarantee that the dispute resolution process employed when trade liberalization collides with environmental or conservation regulations was certain to be a sensitive topic in the NAFTA negotiations. Just as serious NAFTA discussions commenced, Mexico and the United States became deeply embroiled in an acrimonious dispute concerning the application of U.S. dolphin conservation legislation in a manner that restricted importation of Mexican tuna. A GATT panel ultimately heard the dispute and issued a very controversial decision, which has been extensively criticized by American environmental interests.²⁴ Against this backdrop the NAFTA partners sought to fashion dispute settlement procedures that would be expeditious and effective, but also highly responsive to environmental concerns.

The NAFTA contemplates a three-step dispute resolution process. The first step is formal consultation.²⁵ Each Party has the right to prompt consultation on any matter that could affect the Party's NAFTA rights.²⁶ In the event that consultation fails to resolve the matter within forty-five days, any Party has the right to call a meeting of the Free Trade Commission with all three Parties participating.²⁷ The Commission must act promptly to seek settlement using whatever means of dispute resolution that it believes is appropriate.²⁸ If a mutual settlement still proves impossible, any nation involved in the dispute may initiate an arbitral panel proceeding.²⁹ Usually a panel will make findings of fact, determine whether the challenged action is inconsistent with NAFTA obligations, and recommend a specific resolution of the dispute.³⁰ The panel will present a final report to the Commission for publication within fifteen days.³¹ After reviewing the panel report the disputing Parties must agree to a resolution of the matter, which ordinarily will be consistent with the recommendations of the panel.³²

The NAFTA takes three very significant steps to guarantee that this dispute settlement process is environmentally sensitive. First, the NAFTA sanitary and phytosanitary provisions place upon the complaining nation the burden of proving that a challenged environmental or health measure is inconsistent with the

24. The panel decision has not yet been formally adopted by the GATT Council. In any event, the decision would not override the domestic law because GATT rules allow the United States to offer other trade concessions and to continue to enforce the offending statutory trade restrictions.

25. NAFTA, *supra* note 6, art. 2006(1).

26. *Id.*

27. *Id.* art. 2007(1)(b).

28. *Id.* art. 2007(4).

29. *Id.* art. 2008(1).

30. *Id.* art. 2016(2).

31. "Unless the Commission decides otherwise, the final report of the panel shall be published 15 days after it is transmitted to the Commission." NAFTA, *supra* note 6, art. 2017(4). The U.S. environmental community has expressed concern that the Free Trade Commission may elect not to make public a final panel report.

32. *Id.* art. 2017.

agreement.³³ In this regard the NAFTA process differs from traditional GATT rules, which place upon the Party defending a domestic SPS regulation the burden of establishing that its regulatory provision, though inconsistent with the GATT, should qualify for an article XX exemption and is not an improper obstacle to international trade.³⁴

Second, the NAFTA Parties recognized that disputes concerning environmental regulation often involve highly technical, scientific evaluations and require complex fact-finding. To address this problem the NAFTA ensures that arbitral panels have meaningful access to expert advice and interested Parties. The dispute settlement panel, on its own initiative or at the request of a disputing Party, may request a written report from an independent scientific review board or seek the views of nongovernmental groups.³⁵ This provision creates, for the first time in a trade agreement, a formal mechanism that provides trade experts facing an environmental issue with the scientific and environmental expertise that they require to make a fully informed decision. The NAFTA obligates the panel to take the report into account in reaching its final decision and to release the report in conjunction with a publicly available final decision.³⁶

Third, the NAFTA adopts a special forum selection provision for environmental disputes arising under chapters 7 and 9 or those related to the mandatory trade provisions of certain specified international environmental or conservation agreements. Generally under the NAFTA, the country challenging another Party's actions or standards has the opportunity either to bring its challenge within the NAFTA dispute resolution measures outlined above or to proceed before a GATT panel.³⁷ If the dispute concerns environmental, health, safety, or conservation standards, however, the defending Party may force the matter into the exclusive jurisdiction of the more environmentally sensitive NAFTA settlement system.³⁸ The ability of the Party defending an environment-based obstacle to international trade to vest jurisdiction in the NAFTA dispute resolution regime marks a significant departure from previous trade pacts. The U.S.-Canada Free Trade Agreement, for example, grants the complaining nation unfettered discretion to select the GATT forum. Guaranteeing the Party defending an environmental measure access to the more environmentally sensitive NAFTA dispute resolution provisions ensures that the burden of proof stays on the complaining nation and allows full use of scientific review boards. In short, these three unprecedented

33. *Id.* art. 723(6).

34. GATT, *supra* note 2, article XX authorizes countries to impose environmental, health, and safety measures otherwise inconsistent with the GATT, so long as these measures are not arbitrary, are not a disguised trade barrier, or do not unjustifiably discriminate against foreign products.

35. NAFTA, *supra* note 6, arts. 2014, 2015.

36. *Id.* art. 2015.

37. *Id.* art. 2005(1).

38. *See id.* arts. 2003–2020.

innovations ensure that environmental concerns are carefully evaluated along with trade issues during dispute settlements.

E. PROTECTION OF INTERNATIONAL ENVIRONMENTAL AGREEMENTS (IEAs)

Article 104 clarifies the relationship between the NAFTA and current international environmental and conservation agreements. Generally, the NAFTA takes priority over other international agreements to the extent that there is any conflict.³⁹ However, article 104(1) provides an exception to that general rule. This article ensures that the NAFTA does not interfere with the existing mandatory trade provisions—including trade sanctions and restrictions—contained in several important international environmental agreements. This exemption specifically extends to: (1) the Convention on the International Trade in Endangered Species (commonly known as CITES);⁴⁰ (2) the Montreal Protocol (concerning ozone-depleting substances);⁴¹ (3) the Basel Convention (concerning hazardous substances);⁴² and (4) two enumerated Basel-compatible bilateral waste agreements between the United States and each of Canada and Mexico. The agreement also allows for an exchange of letters among the Parties as a simple mechanism to bring within the scope of the exemption any future international environmental or conservation agreement.⁴³

Article 104 guarantees the supremacy of the trade obligations of these agreements even when they directly conflict with the NAFTA. However, the NAFTA obligates the Parties, in implementing the trade-related provisions of these agreements, to select the implementation alternative least inconsistent with the NAFTA, so long as the options under consideration are all "equally effective and reasonably available."⁴⁴ This condition ensures that the enumerated international environmental or conservation agreements—while fully enforced—are implemented, where there is a choice, in a manner that minimizes the disruption of the NAFTA's regional trade system.

F. ENVIRONMENTAL CONSIDERATIONS IN INVESTMENT

The NAFTA is expected to generate considerable investment throughout North America by removing many existing investment barriers. The agreement contains a special section on the relationship between investment and environmental re-

39. *Id.* art. 103.

40. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243.

41. Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1550, *amended and adjusted*, 30 I.L.M. 539 (1991).

42. Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 28 I.L.M. 657. It is noteworthy that the Basel Convention is listed in the NAFTA, but the United States has not yet formally ratified this international agreement.

43. NAFTA, *supra* note 6, art. 104(2).

44. *Id.* art. 104(1)

quirements.⁴⁵ In that article the NAFTA takes several steps to advance environmentally sensitive investment and to discourage the relaxation of environmental standards as a means of attracting investment.

First, article 1114(1) affirms the Parties' understanding that the NAFTA should not be construed to prevent government intervention to encourage environmentally sensitive investment. Accordingly, the Parties remain free to adopt and enforce measures to ensure that investors consider environmental concerns.⁴⁶ For example, the NAFTA preserves the Parties' ability to require environmental impact statements for any new investment. However, the agreement commits the exact nature of the protective measures to be adopted, if any, to the discretion of each NAFTA nation.⁴⁷ The sole significant qualification on the Parties' authority is that environmental measures enacted or enforced by the Parties must apply with equal force to both domestic and foreign investors.

Second, the NAFTA text expresses tripartite agreement that it is "inappropriate to encourage investment by relaxing domestic health, safety or environmental measures."⁴⁸ Consistent with this understanding, the NAFTA Parties further undertake not to entice investment by waiving or otherwise derogating existing environmental laws or standards.⁴⁹ As a means of enforcing this trilateral commitment against the creation of "pollution havens," the NAFTA partners pledge to consult if any Party feels a prohibited environmental subsidy has been granted or offered.⁵⁰

Although a violation of article 1114 does not trigger formal dispute resolution procedures under the NAFTA, the inclusion of environmentally sensitive language in the Investment chapter of a trade agreement is unprecedented. In combination these provisions should provide the NAFTA nations with a strong impetus to utilize the investment that trade liberalization will naturally generate to advance environmental protection.

II. But Not "Green" Enough?

Despite the many environmentally sensitive provisions outlined above, significant elements of the U.S. environmental community have roundly criticized the NAFTA as inadequate in its response to the environmental risks posed by liberalized trade with Canada and Mexico. President Clinton has responded to these attacks by conditioning his support for the NAFTA on the adoption of a supplemental agreement further addressing environmental issues among the three na-

45. *Id.* ch. 11.

46. *Id.* art. 1114(2).

47. *Id.* art. 1114(1).

48. *Id.* art. 1114(2).

49. *Id.*

50. *Id.*

tions.⁵¹ The exact contours of any supplemental agreement are not clear at this time. It is possible, however, to identify several of the most common environmental criticisms of the NAFTA text and to evaluate likely responses by the Clinton administration.

A. FAILURE TO ENSURE STRONG ENVIRONMENTAL ENFORCEMENT IN MEXICO

In early 1991 the U.S. Environmental Protection Agency's Office of General Counsel evaluated Mexico's environmental laws and regulations. The EPA expert legal analysis concluded that Mexico's environmental laws, regulations, and standards are in many respects similar to those in the United States and could readily provide "an effective framework for a meaningful environmental protection program in Mexico."⁵² This review also determined, however, that U.S. and Mexican Government practices differ most significantly in the area of compliance, monitoring, and enforcement.⁵³ Thus, the environmental protection challenge facing Mexico is not so much one of enacting strong environmental laws, but instead one of enforcing and implementing the laws already on the books.

The American environmental community recognized the absence of a well-grounded environmental enforcement tradition in Mexico and viewed the NAFTA as a vehicle to address this problem. Similarly, organized labor interests expressed concern that manufacturers would relocate jobs to Mexico to exploit its less vigorous environmental enforcement system.⁵⁴ The NAFTA's text does not, however, deal with the enforcement of environmental laws. Instead, enforcement has been addressed through a series of bilateral efforts between the United States and Mexico commonly referred to as "parallel track" activities.⁵⁵

These bilateral efforts have led the Mexican Government to significantly increase funding for environmental enforcement. For example, Mexico has increased fourfold the number of professionally trained environmental inspectors since 1989.⁵⁶ Indeed, some 200 environmental inspectors now exist in the Mexican states on the U.S. border.⁵⁷ Additionally, Mexico's principal federal environmental agency, SEDESOL, has been reorganized to establish a separate environmental

51. Remarks by Governor Bill Clinton at the Student Center at North Carolina State University, Raleigh, N.C. 15 (Oct. 4, 1992); Gerald F. Seib, *Clinton Backs the North American Trade Pact, But Candidate's Stances on Issue Aren't Clear*, WALL ST. J., Oct. 5, 1992, at A14.

52. OFFICE OF GENERAL COUNSEL, U.S. ENVIRONMENTAL PROTECTION AGENCY, EVALUATION OF MEXICO'S ENVIRONMENTAL LAWS AND REGULATIONS: INTERIM REPORT OF EPA FINDINGS at ii (Nov. 22, 1991).

53. *Id.* at ii-iii.

54. Keith Schneider, *Trade Pact vs. Environment: Clash at a House Hearing*, N.Y. TIMES, Sept. 16, 1992, at D1.

55. The name derives from the fact that these efforts have proceeded simultaneously with the negotiation of the NAFTA.

56. Environmental Plan for the Mexican-U.S. Border Area (Summary), Feb. 1992, at 21.

57. *Id.*

prosecutor's office. Not surprisingly, the reorganization and increased resources have yielded increasingly aggressive environmental enforcement activities. Between January and May of 1992 the Mexican Government inspected seventy-five industrial facilities for environmental violations—resulting in the temporary closure of thirty-five plants and the permanent shutdown of one facility.⁵⁸ In June 1992 the United States and Mexico simultaneously announced clusters of cooperative environmental enforcement actions.⁵⁹ Mexico's actions involved forty-two facility inspections, resulting in seven temporary partial plant closings, one temporary total closing, twenty-two notices of violation, and four forfeitures of surety bonds.⁶⁰

As these and other enforcement actions illustrate, Mexico is building the infrastructure and political resolve needed to impose serious penalties on companies that violate Mexican environmental laws. As the Clinton administration moves to negotiate supplemental agreements in support of the NAFTA, the United States Government will likely attempt to nurture this positive trend in Mexican environmental enforcement. To ensure against backsliding, however, some environmentalists have boldly called for the creation of a multinational commission with unprecedented, extraterritorial "authority to halt polluting activities" within the NAFTA countries and to "provid[e] appropriate remedies to those harmed" by illegal pollution.⁶¹ Since this radical approach has serious implications for the sovereignty of the NAFTA nations, its ultimate adoption seems unlikely. Instead, Congress may enact NAFTA implementing legislation that reinstates (or "snaps back") tariffs if Mexico fails to enforce aggressively its environmental laws. "Snap back" tariffs could be viewed as one mechanism to implement Vice President Gore's suggestion that "weak and ineffectual enforcement of pollution control measures . . . be included in the definition of unfair trade practices."⁶² Alternatively, any supplemental agreement might merely continue and expand the considerable, existing U.S. Government technical assistance effort to Mexican environmental enforcement authorities. During the debate on implementing legislation for the NAFTA, Congress will need to decide what, if any, specific sanctions must be available to the United States should Mexico become lax in its environmental enforcement.

B. INADEQUATE PROTECTION FOR THE BORDER ENVIRONMENT

Another common point of criticism aimed at the NAFTA centers on its failure to deal directly with the 2000-mile border between the United States and Mexico.

58. William K. Reilly, *The Greening of NAFTA: Implications for Continental Environmental Cooperation in North America*, 2 J. ENV'T & DEV. 1, 8 (Winter 1993).

59. STATE/FEDERAL ENFORCEMENT ACTIONS FOR U.S.-MEXICO BORDER POLLUTERS, EPA ACTIVITIES UPDATE, June 15, 1992, at 1.

60. *Id.*

61. Letter from the Center for International Environmental Law to Assistant Secretary of State for Oceans, International Environment & Scientific Affairs 2 (Nov. 18, 1992).

62. AL GORE, *EARTH IN THE BALANCE: ECOLOGY AND THE HUMAN SPIRIT* 343 (1993).

The NAFTA turned a spotlight on the considerable environmental problems in the border region. In the last decade, population in the border area has more than doubled as Mexican workers flocked to jobs in *maquiladora* plants.⁶³ This population explosion has severely overtaxed the border environment. In particular, the border has become spotted with *colonias*—numerous small, unofficial communities on both sides of the border that typically lack sewage treatment or adequate drinking water treatment facilities. Additionally, environmentalists allege that many *maquiladora* plants violate environmental requirements by generating excessive emissions and improperly disposing of hazardous waste.⁶⁴

Environmentalists correctly note that the text of the NAFTA itself does not contain provisions designed to remedy the environmental ills of the border region. As is the case with identified weaknesses in Mexico's environmental enforcement program, the NAFTA leaves the long-term solutions to concrete environmental problems along the border to bilateral "parallel" efforts between the United States and Mexico.

In the 1983 Border Environment Agreement (the La Paz Agreement) Mexico and the United States established an international structure to support an extensive program of bilateral environmental cooperation. Working within that structure, the two countries released in February 1992 a detailed, integrated plan for environmental protection and cleanup along the border.⁶⁵ The border plan initiates a wide spectrum of environmental protection initiatives, including programs to protect drinking water supplies, to improve enforcement of environmental laws, to expand wastewater treatment facilities, to improve the management of hazardous and solid waste, to facilitate emergency response, and to develop a better database on the border environment. To pursue these programs Mexico has earmarked \$460 million to address border pollution problems over the next three years.⁶⁶ The Bush administration met Mexico's pledge with a corresponding promise to more than double federal expenditures for the border in fiscal year 1993 to approximately \$241 million.⁶⁷

Border issues will almost certainly be addressed in any supplemental environmental agreements negotiated by the Clinton administration to facilitate the ratifi-

63. *Maquiladora* facilities are assembly plants that operate in a designated zone on the Mexican side of the border. Mexican law allows *maquiladora* plants to import materials into Mexico without paying duties, so long as they export the finished products.

64. See Robert Tomsho, *Environmental Posse Fights a Lonely War Along the Rio Grande*, WALL ST. J., Nov. 10, 1992, at A1 (citing a 1989 congressional study finding that only 33 of 600 *maquiladoras* operating across from Texas had registered to transport hazardous waste back into the United States for disposal, as required by law).

65. Integrated Environmental Plan for the Mexican-U.S. Border Area (First Stage, 1992-94) (Feb. 1992).

66. *News Conference with William Reilly, EPA Administrator: North American Free Trade Agreement*, Fed. News Service, Aug. 13, 1992, at 2, available in LEXIS, FEDCOM Library, FEDNEW File [hereinafter Reilly Statement].

67. Congress, however, refused to appropriate the full amount of President Bush's budget request for Border projects and, instead, reduced the amount funded by approximately \$100 million. *Id.*

cation of the NAFTA. Once again the supplemental agreement will most likely endorse the considerable efforts at bilateral cooperation already under way and pledge continued financial and political support. Additionally, any supplemental bilateral agreement might profitably clarify the NAFTA's impact on the *maquiladora* program.⁶⁸ If further steps are perceived necessary, the new administration may push Mexico into even more ambitious programs to protect shared natural resources such as the Gulf of Mexico. Some in Congress have suggested the bolder action of imposing a temporary tax on the increased cross-border commerce generated by the NAFTA and placing the proceeds in a cleanup trust fund dedicated to the U.S.-Mexico border environment.⁶⁹

III. A Model for Future Trade Agreements?

Despite these criticisms of the NAFTA's "green" provisions, the NAFTA is, as former EPA Administrator William K. Reilly has stated, "the most environmentally sensitive . . . free trade agreement *ever negotiated anywhere*."⁷⁰ Accordingly, the environmental community is profoundly committed to including the NAFTA's "green" provisions as an irreducible minimum in all future trade pacts.⁷¹ Furthermore, environmentalists can expect some support for their efforts from Vice President Al Gore, who believes that "environmental standards must be included among the criteria for deciding when to liberalize trading arrangements."⁷²

The continuing Uruguay Round of the GATT talks presents the most immediate opportunity for environmental interests to pursue their reform agenda. The existing GATT largely ignores environmental issues.⁷³ When the GATT was originally signed in 1947, environmental issues simply were not in the forefront of social concerns. GATT Parties did establish a Working Party on Environmental Measures and International Trade in 1971, but that effort lay dormant for many years until it was recently revitalized in response to heightened concerns over the environmental impacts of liberalized trade and the GATT's effect on international conservation agreements.

As GATT negotiations continue, environmentalists can be expected to press for a broad spectrum of changes to accommodate ecological issues—many of

68. See Robert Heckart & Tira Harpaz, *Critics Ask If NAFTA Is "Green" Enough*, 15 NAT'L L.J. 17, 20 & n.16 (Dec. 21, 1992).

69. 138 CONG. REC. S6642 (daily ed. May 14, 1992) (statement of Sen. Baucus); *Id.* at E3091 (daily ed. Oct. 5, 1992) (statement of Rep. Matsui).

70. Reilly Statement, *supra* note 66, at 1 (emphasis in original).

71. Cf. Robert Keatley, *Activist Groups Seek to Influence Clinton as He Starts to Shape U.S. Trade Policies*, WALL ST. J., Dec. 4, 1992, at A6.

72. GORE, *supra* note 62, at 343.

73. Kyle McSlarrow, *It's a Matter of Perspective*, 9 ENVTL. F. 27, 28 (1992).

which will mirror the "green" provisions of the NAFTA.⁷⁴ First, the "Dunkel Text"⁷⁵ contained a strong endorsement of international "harmonization" of environmental, health, and safety standards. Predictably, the environmental community labeled "harmonization" as an attempt to "compel the United States to weaken its [domestic] standards in these areas."⁷⁶ Environmental interests can be expected to demand that the GATT include protections against downward pressure on U.S. environmental standards similar to those found in the Standards-Related Measures and SPS chapters of the NAFTA.

Second, the GATT interpretation underlying the *Tuna/Dolphin* decision will be targeted for revision. The GATT panel decision in the *Tuna/Dolphin* matter essentially determined that unilateral trade sanctions against foreign goods produced by environmentally harmful practices were "GATT-illegal."⁷⁷ Environmentalists will seek to ensure that the GATT is reinterpreted or amended to allow countries to act unilaterally to adopt quotas, tariffs, trade sanctions, or other punitive measures to advance environmental goals.⁷⁸

Third, environmental advocates will press to deal with the tension between the GATT and the trade obligations imposed by several international conservation and environmental conventions.⁷⁹ These international conventions typically utilize discriminatory trade measures to sanction violations. GATT officials have suggested that these practices may run afoul of the *Tuna/Dolphin* panel's reasoning.⁸⁰ In order to preserve hard-fought gains in these treaties, environmentalists will almost certainly seek an express recognition that trade obligations under international conventions on the environment take precedence over contradictory GATT provisions, similar to the deference afforded these treaties under NAFTA article 104.⁸¹ Even such a broad "trumping" of the GATT by international environmen-

74. For a different perspective on the necessity of modifying the GATT, see Richard B. Stewart, *International Trade and Environmental Issues: Lessons from the Federal Experience*, 49 WASH. & LEE L. REV. 1329, 1349 (1992) ("the current GATT text provides sufficient flexibility to afford environmental values equal footing with free trade values").

75. Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, GATT Doc. MTN.TNC/W/FA (Dec. 20, 1991), reprinted in "THE DUNKEL DRAFT" FROM THE GATT SECRETARIAT (The Institute for International Legal Information ed., 1992). The "Dunkel Text" is a colloquial reference to the proposed text offered by GATT Director General Arthur Dunkel as a vehicle to conclude the Uruguay Round of the GATT discussions.

76. See Alex Hittle, *Trade and the Environment at an Impasse*, 9 ENVTL. F. 26, 27 (1992).

77. Ralf Buckley, *Trade and Environment: Will NAFTA Improve on GATT?*, 22 ENVTL. POL'Y & L. 327 (1992); John Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 WASH. & LEE L. REV. 1227, 1242-45 (1992).

78. See Hittle, *supra* note 76, at 26-27.

79. See Robert Housman & Durwood Zaelke, *Trade, Environment and Sustainable Development: A Primer*, 15 HASTINGS INT'L & COMP. L. REV. 535, 580-84 (1992).

80. Steve Charnovitz, *GATT and the Environment: Examining the Issues*, 4 INT'L ENVTL. AFF. 203, 216 (1992).

81. Daniel C. Esty, *New Linkages and Policy Challenges*, 9 ENVTL. F. 24, 25 (1992); Jackson, *supra* note 77, at 1244-45 & n.51.

tal agreements, however, leaves complex questions concerning the system's ability to interfere with the GATT rights of a nonsignatory to a specific convention.

IV. Conclusion

As a major congressional debate looms, the future of the NAFTA depends not only on the perceived adequacy of the "green" provisions within the document itself, but also on the extent to which "parallel track" initiatives are viewed as addressing the entire spectrum of environmental issues raised by the NAFTA. Regardless of the outcome, the NAFTA's permanent impact on international trade policy and law appears beyond question. The U.S. environmental community, awakened by the GATT panel decision in *Tuna/Dolphin*, has leveraged its domestic political strength to secure unprecedented "green" provisions in the NAFTA and a pledge from the new President for further environmental concessions in accompanying supplemental agreements.⁸² Emboldened by this success, ecological activists will certainly press for similar provisions in future regional trade pacts and in the ongoing GATT negotiations. The many ground-breaking "green" provisions of the NAFTA are likely to serve as a model for the intelligent integration of environmental and commercial concerns into the next century.⁸³ If this integration occurs, the NAFTA may mark not only a significant step forward in international commerce, but also remarkable progress in the wise reconciliation of conflicting environmental and trade interests.

82. See Seib, *supra* note 51 (noting Clinton's "sensitiv[ity] to . . . voices in his party [including] environmental groups worried about the treaty").

83. Recognizing the precedential nature of the NAFTA, then-EPA Administrator Reilly testified before Congress that he "firmly believe[d] that for some time to come, when other nations negotiate with their neighbors to open up markets, NAFTA will be their model for dealing with related environmental issues." *Hearing on the North American Free Trade Agreement Before the House Committee on Ways and Means*, 102d Cong., 2d Sess. 102-03 (Sept. 15, 1992) (statement of William K. Reilly).