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Colin Crawford

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ARTICLE

SOME THOUGHTS ON THE NORTH AMERICAN FREE TRADE AGREEMENT, POLITICAL STABILITY AND ENVIRONMENTAL EQUITY

*Colin Crawford**

I. INTRODUCTION

In light of two recent global political phenomena, this Article will consider the contribution of environmental protection to social stability. The first event was the election of Ernesto Zedillo Ponce de León as President of Mexico¹ on August 21, 1993. Mr. Zedillo's election caused many to breathe a sigh of relief, not the least of whom were the many Wall Street investors² worried about the stability of new United States investment in Mexico³ since the North American Free Trade

* Instructor of Law, Brooklyn Law School. I would like to thank Caroline Holland, a third-year student at Brooklyn Law School, for her very able research assistance. Elizabeth Umlas provided invaluable substantive and editorial comments. I would also like to thank Dean Joan Wexler and Brooklyn Law School for their support. Work on this article was supported with a grant from the Brooklyn Law School Faculty Fund.

1. While two of the state signatories to the North American Free Trade Agreement are federated republics, namely the United States of America and the United Mexican States, this Article will adopt the United States practice of referring to the United States of America as the U.S. and the United Mexican States as Mexico.

2. See, e.g., Allen R. Myerson, *Mexico Again Calls U.S. Investors*, N.Y. TIMES, Aug. 26, 1994, at D2 ("United States corporations and investors are poised for a new round of ventures in Mexico after the ruling party's recent victory in an election they regarded as clean enough, at least, to be valid Plans for Mexican investment [are] being pulled out of the drawers and off the shelves where they have been put when the party, known as P.R.I., faltered early this year with the peasant rebellion in the southern Mexican state of Chiapas and the assassination of P.R.I.'s initial presidential candidate, Luis Donaldo Colosio.").

3. For example, the new policy will open an annual \$7.2 billion market, with

Agreement (NAFTA) went into effect. They had good reason to worry. On December 8, 1993, President Clinton signed NAFTA.⁴ Three weeks later, on January 1, 1994, the Agreement went into effect, and on that very day a group of armed Indian peasants in the poor, southern Mexican state of Chiapas staged an insurrection against the government of the Institutional Revolutionary Party (PRI).⁵ Among the reasons for their revolt, the Chiapas rebels⁶ cited the passage of NAFTA as a "death sentence" for Indians, a gift to the rich that will destroy the divide between narrowly concentrated wealth and mass misery, destroying what remains of their indigenous society.⁷ The rebels' violent insurrection began by

up to forty-nine percent comprised of money from foreign telecommunications firms seeking places in the potentially lucrative Mexican market. See *Mexico Prepares to Open 7.2 Billion Telecommunication Market*, 11 Int'l Trade Rep. (BNA) 1100 (July 13, 1994). The easing of trade restrictions promised to make an already extensive trading relationship between the U.S. and Mexico even stronger. Nearly three-fifths of Mexico's foreign investment comes from U.S. companies; seventy percent of Mexico's imports come from the U.S., and eighty-five percent of Mexico's exports go to the U.S. See M. Delal Baer, *North American Free Trade*, 70 FOREIGN AFF. 132 (Fall 1991); Allen R. Myerson, *U.S.-Mexico Trade Advances Sharply Under New Accord*, N.Y. TIMES, June 6, 1994, at A1.

Environmentally-related expenses are among the largest areas for potential foreign investment, in the forms of development of pollution abatement and treatment infrastructure. Both the U.S. and Canada possess expertise Mexico will require in areas such as site cleanup, waste water treatment and air emission control. *Report Cites Market Opportunities Available to Canadian Industry in Mexico*, 17 Int'l Env't. Rep. (BNA), No. 6 at 318 (April 6, 1994); see also Timothy Noah, *Cleaning Up: Environmental Companies Stand to Make a Bundle from the Trade Pact*, WALL ST. J., Oct. 28, 1994, at R8.

4. Marc Sandalow, *Clinton Signs NAFTA, Looks Ahead to GATT*, S.F. CHRON., Dec. 9, 1993, at A8.

5. *Mexican Difficulties in 1994*, 4 Mex. Trade & L. Rep. (Int'l Trade Info. Corp.) No. 4 (Apr. 1, 1994), available in LEXIS, BUSFIN Library, MTLR File.

6. The rebels fashioned themselves the Zapatista National Liberation Army, or "Zapatistas" for short, after the Mexican revolutionary hero, Emiliano Zapata. *Id.*

7. Noam Chomsky, *Time Bombs*, IN THESE TIMES, Feb. 21, 1994, at 14 (adding that "the Zapatista 'declaration of war' stated [that] [t]he struggle today is 'for work, land, housing, food, health care, education, independence, freedom, democracy, justice and peace.'").

The Zapatista's "Declaration of War" stated six points. The first five related to a plan of war, directing how it should be conducted, with particular attention to the role of individual troops. The sixth point, however, must be read as a substantive demand. It ordered that the Mexican government "[s]uspend the looting of our natural resources in areas controlled by the [Zapatistas]." See also *Population Urged to Overthrow 'Dictator'*, THE GUARDIAN, Jan. 5, 1994, at 11; see *Peasant Guerilla Army in Chiapas State Declares War on Federal Government* (BBC Summary of World Broadcasts, Jan. 3, 1994).

taking hostage the seventy-year old former Governor of Chiapas.⁸ The rebels agreed to a cease-fire on January 10, and they eventually released the former governor. The rebels then entered into peace negotiations with President Salinas' government although the talks remain unresolved at this writing.⁹

The rebels subsequently promised to disrupt the August 1994 national elections.¹⁰ In the end, the Chiapas rebels and their defiant leader, known only as Subcommander Marcos, presented no serious obstacle to the conduct of the election,¹¹ which was initially and primarily judged to be fair and without the widespread voter fraud that characterized earlier elections.¹² As expected, the PRI's candidate, Mr. Zedillo, was chosen by a comfortable margin to head the nation for the next six years, as his party has done for the past sixty-five years.¹³

President-elect Zedillo has promised that he will aim in his tenure to conciliate differing political interests.¹⁴ Never-

8. *Id.*

9. Anthony DePalma, *Mexican's Offer to Rebels: Turn in Guns and He'll Quit*, N.Y. TIMES, Dec. 8, 1994, at A14. On the early phase of the rebellion, see *Mexican Rebels Free Ex-Governor*, CHI. TRIB., Feb. 17, 1994, at 22. On the negotiations between the government and the rebels, see Tim Golden, *Rebels in Mexico Spurn Peace Plan From Government*, N.Y. TIMES, June 13, 1994, at A1; Tim Golden, *Mexican Rebels Gather to Rule on Government's Peace Offer*, N.Y. TIMES, June 1, 1994, at A1.

10. Ingrid Peritz, *Hoping for a Fair Vote*, GAZETTE (Montreal), Aug. 13, 1994, at B2.

11. The rebels had promised to retaliate if the election results were fraudulent, as was widely believed to have been the case in 1988. See Anthony DePalma, *Mexican Rebels Warn of Retaliation if Vote is Fixed*, N.Y. TIMES, Aug. 11, 1994, at A8.

12. It was widely believed, for example, that the left-of-center opposition candidate, Cuauhtémoc Cárdenas, would have won the 1988 presidential election against Carlos Salinas de Gortari had the computerized voting system not mysteriously broken down in the middle of the election. See, e.g., Alan Riding, *Letter From Mexico: How Peasants Lit the Fires of Democracy*, N.Y. TIMES, Feb. 27, 1994, at A5; Raúl M. Sanchez, *Mexico's Governmental Human Rights Commissions: An Ineffective Response to Widespread Human Rights Violations*, 25 ST. MARY'S L.J. 1041, 1045 (1994).

However, in just over a month, reports of larger scale voter fraud began to surface. See, e.g., Anthony DePalma, *Mexican Election Loses Some Luster as Fraud is Uncovered*, N.Y. TIMES, Sept. 27, 1994, at A12 (stating that results in at least three states had been overturned due to fraud, and adding that "[c]onflict has continued in Chiapas State in the south where the victory of the governing party candidate for Governor has been accepted by state election officials but rejected by opposition leaders, who maintain there was widespread fraud").

13. John Bailey, *Mexico's Moment*, N.Y. TIMES, Nov. 30, 1994, at A23; Peritz, *supra* note 10.

14. Tim Golden, *Winner in Mexico Calls for "Dialogue" With Other Parties*,

theless, even after the election, the Chiapas rebels have yet to discontinue their rebellion and to agree to a truce with the government.¹⁵ This fact, among others, has caused some observers to suggest that the relatively peaceful election may not necessarily bring domestic tranquility.¹⁶

The second political phenomenon prompting these reflections is really a series of events, first in the central African nation of Rwanda and, more recently, in Cuba. The link between these two wildly disparate nations is, of course, the tide of refugees, in the case of Rwanda,¹⁷ escaping political turmoil, and in the case of Cuba,¹⁸ escaping long-endured political repression and economic hardship. Although the circumstances that culminated in both of these tragic tides of refugees are dissimilar, they nonetheless serve to remind us with frightening force of the consequences of domestic unrest, not only in these politically troubled nations, but also upon the neighboring states and, indeed, entire regions.

The Cuban refugee problem, in which would-be emigres to the U.S. embark on a dangerous journey on makeshift rafts across the Florida straits,¹⁹ is particularly alarming for people in the United States. If Cuban leader Fidel Castro has his way, the surge of refugees resettled in camps on the United States' base at Guantanamo Bay will force the Administration to re-evaluate its thirty-two year economic embargo of the socialist

N.Y. TIMES, Aug. 24, 1994, at A1. *But see* Anthony DePalma, *New President is Snubbed by Opposition in Mexico*, N.Y. TIMES, Sept. 8, 1994, at A11.

15. *See, e.g.*, DePalma, *supra* note 9; Gerardo Tena, *Tension in Southern Mexico as New Governor to be Sworn in*, AGENCE FRANCE PRESSE, Dec. 5, 1994, available in LEXIS, News Library, CURNWS File.

16. *See, e.g.*, Dick J. Reavis, *Mexico's Perilous Second Act*, N.Y. TIMES, Aug. 24, 1994, at A17 (suggesting that future political stability in Mexico depends upon large numbers of people being brought back into the political mainstream after decades of "electoral and political abuses," even at the risk of widespread social unrest by radical revolutionary groups as happened in the United States' civil rights movement following the assassination, in 1968, of the Reverend Dr. Martin Luther King, Jr.).

17. John-Thor Dahlburg, *Rwandan Government Outraged Over Sluggish Pace of Inquiry Into Genocide*, L.A. TIMES, Sept. 14, 1994, at A6; S. Frederick Starr, *It's Up to Us to Defuse the Rwandan Time Bomb*, WASH. POST, Sept. 6, 1994, at A17.

18. Mike Williams, *Refugees at Our Doorstep: A Growing Reality*, ATLANTA J. & CONST., Aug. 19, 1994, at A10.

19. *See, e.g.*, Maria Newman, *Flight From Cuba: The Scene; and Still Cubans Flee: 1,300 More Picked Up*, N.Y. TIMES, Aug. 31, 1994, at A10; Daniel Williams, *U.S., Cuba Interrupt Migration Discussion; Negotiator to Consult Castro on Limits of Talks*, WASH. POST, Sept. 8, 1994, at A32.

island state.²⁰

The devastating effects of domestic disquiet underscore the need to re-examine NAFTA. The Chiapas rebels' complaints about NAFTA revived anxious discussions about the Agreement's possibly destabilizing effects on Mexico, and particularly its effect on labor, as manufacturing, goods and services move more freely between the United States, Mexico, and Canada.²¹ However, although environmental concerns figured prominently in the debates preceding NAFTA,²² they have

20. Steven Greenhouse, *Flight From Cuba: In Washington, U.S. Rejects Castro's Proposal for Talks*, N.Y. TIMES, Aug. 26, 1994, at A12 (stating that President Clinton was resisting calls to engage in discussions with President Castro on changes in the U.S.-Cuban trade embargo); see *Cuba Allows Farmers Open Market Selling; It is Another Step From Communism*, HOUS. CHRON., Sept. 18, 1994, at A26 (referring to the 32-year duration of the embargo).

The United States and Cuba eventually reached a compromise that left the embargo intact. Paul Lewis, *Cuba Vows to End Exodus in Return for a Rise in Visas*, N.Y. TIMES, Sept. 10, 1994, at A1; Stanley Meisler, *Castro Lifts Key Obstacle in U.S. Talks*, L.A. TIMES, Sept. 4, 1994, at A1. However, many remained of the opinion that the incident opened the way for future discussions. See, e.g., Steven Greenhouse, *Critics Warn That Immigration Pact Leaves Many Cuban Issues Unresolved*, N.Y. TIMES, Sept. 10, 1994, at A4.

21. See, e.g., *Martin Assures House Panel That Labor Concerns Under NAFTA Will Be Addressed 'Expediently'*, Daily Lab. Rep. (BNA) No. 180, at A-10 (Sept. 16, 1992). These particular debates were a central feature of the tumult in this country surrounding passage of NAFTA, especially on the part of organized labor. Labor groups feared that free trade would encourage businesses to move to Mexico for lower environmental, wage and safety standards than those required in the U.S., thus eliminating U.S. jobs. See generally *The Association of the Bar of the City of New York, Report on the North American Free Trade Agreement*, (Oct. 28, 1993) (on file with author) [hereinafter *Association Report*]; Alan Reynolds, *NAFTA's Victory: The Future Triumphs over the Past*, SAN DIEGO UNION-TRIB., Nov. 21, 1993, at G-1. Labor groups also argued that, in order to compete, facilities in the U.S. would have to lower wages. *Id.* Conversely, supporters argued that NAFTA would offset any loss of jobs through substantial increases in U.S. exports and the creation of new jobs. Secretary of State Warren Christopher, *NAFTA: A Bridge to a Better Future for The United States and the Hemisphere*, Statement Before the Senate Finance Committee (Sept. 15, 1993), in *DEPT ST. DISPATCH*, Sept. 13, 1993, at 625.

22. See, e.g., Keith Schneider, *Environment Groups Are Split on Support for Free-Trade Pact*, N.Y. TIMES, Sept. 16, 1993, at A1; *Environmental Catastrophe, Canada to Mexico: 8 Fatal Flaws of NAFTA*, N.Y. TIMES, Nov. 15, 1993 (full-page advertisement by coalition of national environmental groups); *Environmental Group Coalition Issue Five Point Criticism of NAFTA*, 10 INSIDE U.S. TRADE (Inside Wash. Publ., Davis, Polk, & Wardwell No. 35), Aug. 28, 1992 (detailing the criticisms of NAFTA by 12 major environmental groups, including the Natural Resources Defense Council and the Sierra Club); Response of Environmental and Consumer Organizations to the September 6, 1992 Text of The North American Free Trade Agreement (NAFTA) (Oct. 6, 1992) (outlining objections to NAFTA

been strangely absent since the new concern about the Agreement's implications in the wake of the Chiapas uprising.²³ This is particularly surprising in view of the fact that the rebels' demands included controlling the invasion of foreign capital and manufacturing facilities,²⁴ as well as the urgent need for land reform, issues that both have serious environmental implications.

This Article will focus on NAFTA and NAFTA's supplemental environmental side agreement—the North American Agreement on Environmental Cooperation (Supplemental Agreement)²⁵—in light of recent events. In doing so, it will suggest that recent events in Chiapas demand a re-evaluation of NAFTA's environmental protections. This is not at all to suggest that stronger environmental protection alone would avert future Zapatista insurrections. The inequities of Mexican land distribution and the poverty of southern Mexican states such as Chiapas have historical roots that will hardly be rectified by more vigorous enforcement of environmental laws.²⁶

draft by seventeen not-for-profit groups) (unpublished manuscript, on file with author).

23. One notable exception is June Nash, *The Challenge of Trade Liberalization to Cultural Survival on the Southern Frontier of Mexico*, 1 IND. J. GLOBAL LEGAL STUD. 367, 370 (1994) (arguing, soon after NAFTA's passage, "that the most effective control over the predatory incursions of large, agro-industrial enterprises, oil exploration and refineries, and tourist meccas that are the principal cause of most of the current environmental deterioration, could be exercised by small plot cultivators and artisans who draw on centuries of experience and knowledge in their exploitation of resources.").

However, Professor Nash's comments were prepared for an April 1994 conference and so were unable to take account of developments since the Chiapas uprising.

24. See Chomsky, *supra* note 7; *Peasant Guerilla Army in Chiapas State Declares War on Federal Government*, *supra* note 7; *Population Urged to Overthrow 'Dictator'*, *supra* note 7.

25. North American Agreement on Environmental Cooperation, Dec. 8, 1993, U.S.-Can.-Mex., 32 I.L.M. 1480 [hereinafter Supplemental Agreement]. The agreement was ratified by the U.S. Congress on November 17, 1993, signed by leaders of the three nations on December 8, 1993, and became effective January 1, 1994. For a discussion of the Supplemental Agreement, see *infra* subpart II.A.2.

26. On the economic and political isolation of Chiapas, see Nash, *supra* note 23, at 371-93. Of course, the situation leading to popular revolt is complicated. But it is worth stressing the extent to which unfettered economic development can be a major factor in social turmoil. See, e.g., Nathaniel C. Nash, *Latin American Speedup Leaves Poor in the Dust*, N.Y. TIMES, Sept. 7, 1994, at A1 (noting that "[t]he uprising in January of peasant Indians in the Mexican state of Chiapas . . . sent shock waves through many [Latin American] capitals, [and] was viewed as a result of Mexico's inattention to rural poverty and delays in land reform.").

This Article does propose, however, that environmental protection under NAFTA is one of several areas that deserves a stricter review in light of recent events. Given the desire of all NAFTA signatories not to experience the sort of tragic social disruption recently witnessed in Rwanda and Cuba, reform of NAFTA should center both on elevating living standards, as well as preventing some of the socially unsettling consequences of industrial and commercial development that will attend the increased trade among the Agreement's signatories.²⁷ In doing so, the NAFTA signatories will thus help appease at least some of the concerns of the Chiapas rebels (and of others who are likely to follow their example). The risk of not doing so is that, in ten or in twenty years, the United States will face further refugee crises along its southern border, crises exacerbated by, among other possible triggers, environmental malfeasance.²⁸ The importance of re-evaluating NAFTA's weak environmental safeguards was underscored by the recent announcement that the U.S. government will seek to expand the trade pact throughout the Americas.²⁹

27. In other words, it will be necessary to amend NAFTA. NAFTA Article 2202 provides for amendment:

Article 2202: Amendments

1. The Parties may agree on any modification of or addition to this Agreement.

2. When so agreed, and approved in accordance with the applicable legal procedures of each Party, a modification or addition shall constitute an integral part of this Agreement.

North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., art. 2202, 32 I.L.M. 289, 605, 702 [hereinafter NAFTA].

28. The urgency of this suggestion was recently revealed by preliminary judgments that the Supplemental Agreement is proving ineffective. See, e.g., Allen R. Myerson, *Trade Pact Side Deal Bears Little: Mexico, U.S. Contest Environmental Pact*, N.Y. TIMES, Oct. 17, 1994, at D1 (quoting, *inter alia*, Sierra Club Executive Director Carl Pope to the effect that "[t]here has been very little progress During the debate [on NAFTA], we kept saying that unless trade is contingent on progress [in environmental regulation], progress won't occur."). Moreover, the suggestion of insurrection triggered by environmental malfeasance has recently been documented elsewhere in the world. Todd Lappin, *Can Green Mix with Red?*, THE NATION, Feb. 14, 1994, at 193, 195 (reporting environmental riots in the People's Republic of China).

29. James Brooke, *U.S. and 33 Hemisphere Nations Agree to Create Free-Trade Zones*, N.Y. TIMES, Dec. 11, 1994, at A1 (noting that Rep. Newt Gingrich wrote to President Clinton offering support for "fast track" negotiating authority on a trade treaty in exchange for withdrawal of environmental and labor conditions from trade bills); David E. Sanger, *U.S. Envisions an Expansion of Free Trade in Hemisphere*, N.Y. TIMES, Dec. 8, 1994, at A14.

The argument is divided into two main parts. In the first part, this Article will re-examine the provisions in NAFTA and the Supplemental Agreement. NAFTA may represent, in former U.S. Environmental Protection Agency Administrator William Reilly's oft-repeated phrase, "the most environmentally sensitive trade . . . agreement ever negotiated anywhere."³⁰ However, this re-examination will suggest that, in light of recent events, its environmental sensitivities are likely to be insufficient if the larger goal is both increased trade and social stability. A subsidiary aim of this section will be to identify those provisions that most compromise the goal of environmental equity. That is, the section will endorse reconsideration of NAFTA in light of the idea that the most environmentally burdensome and potentially dangerous activities ought first to be minimized and second, where unavoidable, these activities should be distributed equally throughout a society or, in this case, several societies.³¹ In the second part, this Article will look at principles of international environmental law that could be relied upon to shape the future under NAFTA. The focus of this section will be to identify principles that would more truly link trade and environmental goals so as to help ensure economic growth, environmental protection and political stability.

30. News Conference with William Reilly, EPA Administrator, in FED. NEWS SERV., Aug. 13, 1992, available in LEXIS, Nexis Library, Omni File.

31. The literature on environmental equity, much of it written in the past couple of years, is voluminous. A good introductory bibliography appears in Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 791 n.14 (1992); see also Center on Race, Poverty & the Environment, Environmental Justice Course Syllabi (June 1994) (available from the California Rural Legal Assistance Foundation, San Francisco).

On environmental equity in an international context, see R.S. Pathak, *International Trade and Environmental Development: A View From India*, 1 IND. J. GLOBAL LEGAL STUD. 325, 334-38, 340 (1994) (repeating the widely held view of developing countries that "[r]estructuring [of the international economic system] is imperative if 'an open, equitable, secure, non-discriminatory and predictable multi-lateral trading system . . . of benefit to all trading partners is to be established.'"") (quoting *Report of the United Nations Conference on Environmental Development, Rio de Janeiro, June 3-14, 1992*, 46th Sess., Annex II at 14, U.N. Doc. A/CONF.151/26 (1992)).

II. NAFTA AND THE ENVIRONMENT

Consider the following hypothetical. Since the passage of NAFTA, a large U.S.-based petrochemical manufacturer has expanded the scale of one of its *maquiladora*³² operations by 100%. The company further plans, within the next two years, to turn it into a full-scale chemical and pesticide manufacturing operation. The manufacturer is, under the terms of current law, required to ship its hazardous waste back to the U.S. for proper treatment and disposal.³³ However, like the vast majority of U.S.-based *maquiladora* operators, the manufacturer fails to do so.³⁴

One day, as a result of employee error, thousands of gallons of hydrofluoric acid³⁵ are inadvertently discharged into a

32. The *maquiladora* program was established by the Mexican government in 1965. "It allows duty-free imports of manufacturing components to Mexico for processing or assembly of products that must then be exported from Mexico unless special approval is given to sell them in the Mexican market." U.S. GENERAL ACCOUNTING OFFICE, PUB. NO. GAO/GGD-92-113, U.S.-MEXICO TRADE: ASSESSMENT OF MEXICO'S ENVIRONMENTAL CONTROLS FOR NEW COMPANIES 1 n.1 (1992). Shortly before NAFTA was submitted to the U.S. Congress for discussion, there were just under 2,000 *maquiladoras* along the border between the United States and Mexico. See Stephen L. Kass & Michael B. Gerrard, *The North American Free Trade Agreement*, N.Y. L.J., Nov. 27, 1992, at 3. The literature on the problems associated with the *maquiladoras* and NAFTA is considerable. For an introduction, see David Voight, Note, *The Maquiladora Problem in the Age of NAFTA: Where Will We Find Solutions?*, 2 MINN. J. GLOBAL TRADE 323 (1993).

33. Annex III to the Agreement on Cooperation for the Protection and Improvement of the Environment in the Border Area, Nov. 12, 1986, U.S.-Mex., art. XI, T.I.A.S. No. 11,269. The underlying agreement on the border area is the Agreement to Cooperate in the Solution of Environmental Problems in the Border Area, Aug. 14, 1983, U.S.-Mex., T.I.A.S. No. 10,827.

34. Association Report, *supra* note 21, at 49 ("Under current law, these [U.S.-based, *maquiladora*-operating] firms . . . ship their hazardous waste back to the U.S., obligations ignored by as many as 8 out of 10 *maquiladoras*."); see also U.S. Environmental Protection Agency, et al., Integrated Environmental Plan For The U.S.-Mexico Border Area, at III-25 (Working Draft, Aug. 1, 1991) ("In practice, the actual fate of waste generated by industry and the extent of the return of such wastes to the U.S. have not been monitored."). The final border plan was released by EPA and SEDUE on February 25, 1992.

35. This is an exaggerated version of an actual situation. At a *maquiladora* partially owned by DuPont, the company regularly compensated farmers around the Química Fluor plant in Matamoros, Mexico for crop damage caused by contamination from the substance. See Jane Jeuffer, *Clouds of Concern Near Toxic Plants*, S.F. CHRON., Nov. 16, 1988, at 2/Z1; Council on Economic Priorities, DuPont: A Report on the Company's Environmental Policies and Practices DD-44 (1991) (on file with author). In fact, concern over a Bhopal-style disaster led President Salinas to declare an Intermediate Safeguard Zone in January 1991. The Zone

tributary of the Rio Grande, on the banks of which the *maquiladora* operates. The tributary is the principal water supply for drinking, bathing, cooking and washing of the cluster of poor towns nearby, many of whose residents work at the *maquiladora* for low wages. As the people of the towns continue to use the water, at first unaware of the danger, there is resulting widespread illness and several dozen fatalities. Because neither NAFTA nor the Supplemental Agreement incorporate the "polluter pays" principle,³⁶ the company denies responsibility and it is unclear whether Mexican or U.S. taxpayers or both will be responsible for the clean-up and the health-related costs. In the ensuing publicity, a regional affiliate³⁷ of Subcommander Marcos declares that the environmental disaster is a demonstration of NAFTA's failure to protect the environment and the health and the lives of the Mexican people. This affiliate then calls for a widespread, violent campaign against "imperialist, neo-colonial foreign firms doing business in Mexico with the blessing of the tyrannical, PRI-led government."

Following this announcement, a series of violent clashes with police erupt all across the country. They become most serious at the *maquiladoras*, along the U.S.-Mexican border, where foreign-owned firms continue to be concentrated. Several assembly facilities are severely sabotaged, and the government responds with a terrifying show of force and intimidation to quell the disruptions. Skirmishes escalate into a populist revolt along the border region, and whole towns catch fire, resulting in the unanticipated migration of tens of thousands of people into Texas border towns like Del Rio, El Paso and McAllen; the San Diego area also suddenly finds itself without sufficient resources to handle the overwhelming influx of Mexican immigrants,³⁸ and squalid refugee camps emerge all along the U.S.

prohibits settlement within a one-fourth mile radius of Química Fluor, forcing the evacuation of 10,000 families. Patrick McDonnell, *Mexicans Fear Plant Could Cause 'Next Bhopal'*, L.A. TIMES, Nov. 20, 1991, at A21. Química Fluor claims there have been no serious leaks since a release in 1980 that killed two workers and injured five others. See also Lappin, *supra* note 28.

36. See *infra* subpart III.A.

37. In fact, in the spring of 1994, peasant guerrilla groups, like those overseen by Subcommander Marcos, were active in Chiapas and other Southern Mexican states, such as Oaxaca and Yucatán, and elsewhere in the southern and central portion of the state. See Ilan Stavans, *Mexico: Things Fall Apart*, IN THESE TIMES, Apr. 18, 1994, at 21.

38. This is not a far-fetched notion. During the flow of desperate immigrants

side of the border. A cholera outbreak is suddenly feared by representatives of the Red Cross and of the international medical relief group, Doctors Without Borders. Dysentery is widespread, causing worries among U.S. citizens in the border towns that their health and well-being are imperilled as well. In an election year, the crisis becomes the focus of the President's ability to govern.

When President Clinton took office and aggressively worked in his first months to advocate free trade, this scenario might have seemed far-fetched. But the Chiapas rebellion, which demonstrated the very direct consequences on domestic politics of regional treaty commitments, shows how quickly events can alter our perceptions. The question then is whether NAFTA and the Supplemental Agreement provide guidance to help insure that situations like the one described above do not occur.

An important attempt to answer this question has come, since the early 1980s, from the environmental equity movement.³⁹ This effort, which brings together disparate groups of people opposing environmental hazards to which they claim they are disproportionately subject because of their poverty

from Cuba in August 1994, detention centers for the migrants had to be established in Texas because the Florida centers were filled to capacity. *Flight From Cuba: The Arrivals; As Florida Center is Filled, Cubans Are Taken to Texas*, N.Y. TIMES, Aug. 26, 1994, at A13. Not only can this situation create a national and international crisis, it can create domestic interstate tension as well. See Deborah Sontag, *Illegal Aliens Put Uneven Load on States, Study Says*, N.Y. TIMES, Sept. 15, 1994, at A14.

The pollution in the *maquiladora* corridor has already reached severe proportions. Students of the area report that industrial wastes are routinely disposed of in local sewer systems, and hazardous waste drums are often dumped in the desert or in someone's backyard. Recycled waste drums have been sold to Mexican citizens, who in turn use them to store their drinking water. A "disturbing number" of babies born near Brownsville, Texas have been born with partial or no brains; the childhood leukemia rate there has increased from one in 1990 to seven in 1992. No firm evidence of the cause is available, but many blame these developments on the area's high percentage of toxins. Michael Scott Freeley & Elizabeth Knier, *Environmental Considerations of the Emerging United States-Mexico Free Trade Agreement*, 2 DUKE J. COMP. & INT'L L. 259, 266 (1992).

39. The growing environmental equity/environmental justice legal literature is vast. For a good basic introduction to the issue, see Lazarus, *supra* note 31; Pathak, *supra* note 31; Center on Race, Poverty, & the Environment, *supra* note 31. For a description of the slightly different ideological connotations of the phrases "environmental justice," "environmental equity" and "environmental racism," see Colin Crawford, *Strategies for Environmental Justice: Rethinking CERCLA Medical Monitoring Lawsuits*, 74 B.U. L. REV. 267, 268 n.1 (1994).

and race or ethnicity, observes no national boundaries.⁴⁰ In light of the recent events in Mexico adverted to above, it is wholly appropriate to revisit these issues with respect to NAFTA. Given Mexico's comparative poverty next to the U.S. and Canada, it is especially appropriate to do so with environmental equity concerns in mind.

A. NAFTA's Environmentally-Related Protections

On September 15, 1993, the day after President Clinton signed NAFTA's Supplemental Agreement dealing with the environment and labor, Secretary of State Warren Christopher addressed the Senate Finance Committee.⁴¹ Secretary Christopher asked the Committee to consider various NAFTA-related issues, including, *inter alia*, "the relationship between NAFTA and illegal immigration" and the problem of cross-boundary pollution.⁴² "Like illegal immigration," he noted, "pollution does not observe political boundaries."⁴³ The Secretary's comments strikingly fail to link the two problems of illegal immigration and the environment.

The Secretary, and those who likewise support his position, view the problem of illegal immigration as springing from a lack of economic opportunity, rather than being a response to a broader range of factors.⁴⁴ Thus, the Secretary observed, stating a widely held, pro-business view: "As Mexico's economy prospers, higher wages and greater opportunity will reduce the pressure for illegal migration to the United States."⁴⁵ By contrast, although he viewed pollution control as desirable, it was

40. See, e.g., Xavier Carlos Vasquez, *The North American Free Trade Agreement and Environmental Racism*, 34 HARV. INT'L L.J. 357, 379 (1993) (expressing concern, "that the lives and health of individuals affected by NAFTA should not be subsumed by purely economic concerns.").

41. Secretary of State Warren Christopher, *supra* note 21.

42. *Id.*

43. *Id.*

44. This arguably reflects a weakness of NAFTA in general, namely the fact that every related issue is viewed through the prism of its trade effects, rather than trade being one issue that needs to be addressed in cementing solid international relations. See, e.g., Daniel A. Seligman, *Sierra Club Analysis of The North American Free Trade Agreement and North American Agreement on Environmental Cooperation* 6 (Oct. 6, 1993) (on file with author) ("NAFTA, in effect, regards environmental measures not as legitimate in their own right, but as potential impediments to trade.").

45. *Id.*

described by Secretary Christopher as having neither a social nor an immigration-related dimension:

Unlike any previous trade agreement, NAFTA explicitly links trade with the environment and that is an important achievement in itself. The side agreement just negotiated will improve the enforcement of environmental laws and increase cross-border cooperation to curb pollution.⁴⁶

On close examination of the text of both NAFTA and the Supplemental Agreement, what is striking about the Secretary's statement is his confidence. That the Supplemental Agreement was an important achievement—and a rare one—in the context of a free trade negotiation is indisputable, but there is absolutely no certainty that the Supplemental Agreement “will improve” either enforcement or cooperation to curb pollution.⁴⁷ On the contrary, NAFTA's environmentally related provisions are highly general in character, and dispute resolution for environmental concerns is both secretive and largely closed to the public. Moreover, a review of the Agreements' environmentally related provisions confirms that they guarantee little in terms of a cleaner environment, and may in fact make natural resource exploitation, one of the central concerns of the Chiapas rebels, as likely as the trade pact's many critics alleged. Conceivably, the Agreements' inattention to environmental equity questions could therefore have widespread, disastrous consequences.

1. NAFTA's Text

Two of NAFTA's articles are commonly agreed to constitute the Agreement's key provisions affecting the environment. Other provisions may also affect questions of environmental protection.

a. Sanitary and Phytosanitary Measures

The first NAFTA provision relating to the environment is Article Seven, which pertains to sanitary and phytosanitary measures.⁴⁸ A review of Chapter Seven confirms that

46. Secretary of State Warren Christopher, *supra* note 21, at 625.

47. *Id.*

48. The phrase “sanitary and phytosanitary measures is the arcane term used

NAFTA's signatories agreed to few measures that would guarantee a healthy and habitable environment.

Article Seven undertakes "to establish a framework of rules and disciplines to guide the development, adoption and enforcement of sanitary and phytosanitary measures," and "applies to any such measure of a party that may, directly or indirectly, affect trade" among NAFTA's signatories.⁴⁹ From the perspective of one who recognizes tougher environmental standards as serving the long-term goals of economic growth and political stability, Chapter Seven's particular provisions governing the establishment of sanitary and phytosanitary measures are frustratingly vague. Thus, NAFTA parties are allowed to adopt any measure that is "necessary" for the "protection of human, animal, or plant life or health . . . , including a measure more stringent than an international standard, guideline or recommendation."⁵⁰ Moreover, the agreement provides that, notwithstanding any other provision in Chapter Seven, a party may "establish its appropriate level of protection in accordance with Article 715,"⁵¹ which pertains to risk assessment.⁵² Article 715 describes the factors that must be taken into account in conducting a risk assessment, including, for example, "relevant scientific evidence"⁵³ and "relevant ecological and other environmental conditions."⁵⁴

Once again, the clear worry raised by these provisions is

in GATT [the General Agreement on Tariffs and Trade,] for environmental protection." Kass & Gerrard, *supra* note 32, at 29. "Phyto" is a Greek root indicating plants. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 888 (1986).

49. NAFTA, *supra* note 27, art. 709.

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

51. *Id.* art. 712(2).

52. *Id.* art. 715 (Risk Assessment and Appropriate Level of Protection).

53. *Id.* art. 715(1)(b).

54. *Id.* art. 715(1)(f). The merits of risk assessment continue to be debated. For example, in his recent book, Stephen Breyer argued that risk assessment can serve a key role in solving many of the inadequacies of current regulatory policy in areas such as environmental regulation. Breyer contends that the current regulatory scheme creates a "vicious circle [of] diminishing public trust in regulatory institutions . . . [that] inhibit[s] more rational regulation." STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION*. The way to break this circle is, he says, to create a "self-reinforcing institutional change" in the form of a more centralized approach to risk regulation, the centerpiece of which would be risk assessment. *Id.* at 55. Breyer's views of the merits of risk assessment strategies have been criticized as overly narrow and unable to take account of a variety of human motivations. See, e.g., Victor B. Flatt, Book Review, *Should the Circle Be Unbroken?*, 24 ENVTL. L. 1001 (forthcoming 1994).

that the meaning of what is "necessary" or "relevant" is at best open to wide interpretation. At worst, some NAFTA critics have argued, the precedents for interpretation of vague phrases like "necessary" under GATT (the likely model for resolution of NAFTA disputes) have disfavored stricter environmental controls as impediments to free trade.⁵⁵ Furthermore, as critics have failed to note, the sanitary and phytosanitary measures contemplated by Chapter Seven appear to be directed primarily to adverse effects on plant and animal life by "pest or disease," such as threats to agricultural products.⁵⁶ Thus, a risk assessment that took a conservative approach to environmental protection could easily be deemed outside the scope of the sanitary and phytosanitary measures contemplated by Article Seven.⁵⁷

55. See Seligman, *supra* note 44.

56. Article 715 refers consistently to risk assessments being conducted, for instance, to eradicate "the pest or disease" in a party's territory. NAFTA, *supra* note 27, arts. 715(1)(e), 715(2), 715(2)(b). The focus on pests and disease is not confined to this provision, but appears elsewhere in Chapter Seven. See, e.g., *id.* art. 716.

Signatories to other international trade agreements have also incorporated provisions on risk assessment. The European Economic Community, for example, has ordered risk assessment of "any new substance placed on the market" so as "to avoid disparities between Member States which not only affect the functioning of the internal market but also do not guarantee the same level of protection of man and the environment throughout the Community" Commission Directive 93/67/EEC of 20 July 1993 Laying Down the Principles for Assessment of Risks to Man and the Environment of Substances Notified in Accordance with Council Directive 67/548/EEC 1993 O.J. (L 227). The Communities' risk assessment guidelines are quite detailed. *Id.*

57. For example, a risk assessment on a sanitary or phytosanitary measure drafted to protect human, plant, and animal life from the threat of hazardous substances might be found to exceed the scope of Article 715 because of the Article's focus on pests and disease. NAFTA, *supra* note 27, art. 715. One possible response would be to focus on Article 104, which concerns NAFTA's "Relation to Environmental and Conservation Agreements." *Id.* art. 104. Article 104 provides that any inconsistency between NAFTA and "the specific trade obligations set out in," *inter alia*, the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal, United Nations Environmental Programme Document I6.80/3, Mar. 22, 1989, shall be resolved in favor of the earlier convention. *Id.* However, the interpretation of such inconsistencies is extremely uncertain, since Article 104 adds cryptically that "such obligations [meaning those in the earlier treaty] shall prevail [only] to the extent of the inconsistency" between NAFTA and the other agreement. *Id.* Article 104 continues: "where a Party has a choice among equally effective and reasonably available means of complying with such obligations [again meaning those imposed by the other treaties], the Party chooses the alternative that is the least inconsistent with other provisions of this Agreement." *Id.* Phrases like "equally effective" and "reasonably available" are, of

Moreover, in determining the appropriate level of protection indicated by a risk assessment, a NAFTA party is required, "with the objective of achieving consistency in such levels, [to] avoid arbitrary or unjustifiable distinctions in such levels in different circumstances, where such distinctions result in arbitrary or unjustifiable discrimination against a good of another Party or constitute a disguised restriction on trade between the Parties."⁵⁸ This provision, with its injunction against "arbitrary or unjustifiable" acts and "disguised restrictions" on trade, could easily be used to force a downward harmonization of laws with respect to the level of environmental protection required by parties to the free trade pact.⁵⁹

In free trade disputes, claims about arbitrary action have resulted in successful challenges to higher environmental standards.⁶⁰ The possibility of downward harmonization is made

course, the lawyer's weasel words, and permit wide disagreement.

58. NAFTA, *supra* note 27, art. 715(3)(b).

59. The worry about downward harmonization has been of central concern to NAFTA's critics, and is hardly a sensationalist one. See, e.g., James E. Bailey, *Free Trade and the Environment—Can NAFTA Reconcile the Irreconcilable?*, 8 AM. U. J. INT'L L. & POL'Y 839, 856 (1993); Farah Khakee, *The North American Free Trade Agreement: The Need to Protect Transboundary Water Agreements*, 16 FORDHAM INT'L L.J. 848, 872 (1993); Walter R. Mead, *Bushism Found: A Second-Term Agenda Hidden in Trade Agreements*, HARPER'S, Sept. 1992, at 37, 39-40.

One worry in the U.S. about downward harmonization concerns the so-called Delaney Clause, codified at 21 U.S.C.A. § 379(e)(b)(5)(B) (West Supp. 1994), which provides that color additives,

shall be deemed unsafe, and shall not be listed, for any use which will or may result in ingestion of all or part of such additive, if the additive is found . . . to induce cancer when ingested by man or animal, or if it is found . . . , after tests which are appropriate for the evaluation of the safety of additives for use in food to induce cancer in man or animal,

Id. The worry is that the Delaney Clause's strict prohibition on the use of carcinogenic food additives will be challenged under NAFTA. See Robert F. Housman & Paul M. Orbuch, *Integrating Labor and Environmental Concerns into the North American Free Trade Agreement: A Look Back and a Look Ahead*, 8 AM. U. J. INT'L L. & POL'Y 719, 736 (1993). In any event, the Clinton Administration has threatened to allow certain de minimus percentages of carcinogens in food additives, thus amending the Delaney Clause. See *Public Citizen v. Young*, 831 F.2d 1108 (D.C. Cir. 1987).

60. The best known example was the U.S.-Mexico tuna dolphin case. See *Earth Island Inst. v. Mosbacher*, 929 F.2d 1449 (9th Cir. 1991) (enjoining the importation of yellowfin tuna from Mexico because it was caught in purse seine nets, which also take in dolphins, in violation of the U.S. Marine Mammal Protection Act). This result puts U.S. law in direct conflict with the GATT. See *United States: Restrictions on Imports of Tuna*, GATT Doc. D521/R (Sept. 3, 1991). Similar conflicts have arisen within the European Communities in the so-called "Danish

even more likely by other portions of Article Seven, which repeat the requirement that phytosanitary measures be non-discriminatory,⁶¹ and designed "only to the extent necessary to achieve its appropriate level of protection,"⁶² and prohibiting any "disguised restriction on trade."⁶³ NAFTA's relevant definition section for this provision is completely unhelpful, providing only that the "appropriate level of protection means the level of protection of human, animal or plant life or health in the territory of a Party that the Party considers appropriate."⁶⁴ Although this might be read as a bow to each party's desire to maintain its national sovereignty,⁶⁵ its tautological definition (*vis.*, what a party says is appropriate is appropriate) does nothing to resolve the likely eventuality of challenges claiming that a measure is a trade impediment. Furthermore, and of significance to the argument advanced in this Article, it does not encourage private companies to observe higher environmental standards as a means to advance their shared interest in economic and political stability.

Admittedly, Chapter Seven insists that a measure resulting "in a level of sanitary or phytosanitary protection different from that which would be achieved by a measure based on a relevant international standard, guideline or recommendation shall not for that reason alone be presumed to be inconsistent" with other provisions.⁶⁶ However, the fact that a measure is not presumed to be inconsistent is likely to prove of little help in establishing higher environmental standards if it can otherwise be shown to impede free trade. In the case of hazardous materials, for instance, some science is going to be available to "prove" that there is no short-term risk to sanitation or phytosanitation, even if the "precautionary principle" (the notion that where there is scientific uncertainty about the

Bottles" and "Wallonian Waste" cases. See Marina Wheeler, *Greening the EEC Treaty*, in GREENING INTERNATIONAL LAW 85, 90-96. (Philippe Sands ed., 1993).

61. NAFTA, *supra* note 27, art. 712(4).

62. *Id.* art. 712(5).

63. *Id.* art. 6.

64. *Id.* art. 724.

65. Typically, NAFTA's conservative critics are seriously concerned with national sovereignty. See Jerry Taylor, *NAFTA's Green Accords: Sound and Fury Signifying Little*, POL'Y ANALYSIS Nov. 17, 1993, at 1. Taylor's article is a publication of a conservative think tank, the Cato Institute.

66. NAFTA, *supra* note 27, art. 713(2).

environmental effect of an act, the appropriate response is the most conservative one) would argue against taking the risk.⁶⁷

A NAFTA party may further request an explanation in writing of the reasons for a sanitary or phytosanitary measure that the challenging party believes adversely affects trade.⁶⁸ The international standards against which any such challenged regulation would be judged are those contained in documents such as the Codex Alimentarius, which has routinely been criticized by consumer and environmental groups as offering insufficient protection to individuals and favoring corporate

67. The precautionary principle is discussed more fully *infra* part III.B; see also James Cameron, *The GATT and the Environment*, in GREENING INTERNATIONAL LAW, *supra* note 60, at 100, 117-19. Barry Commoner, the scientist and social critic, has eloquently advocated increased emphasis on pollution prevention as a means of implementing appropriate precautions. Commoner stresses that new technologies are central to preventing ecological devastation. He writes: "Prevention succeeds because it is directed at the *origin* of the pollutant in the production process itself—the vast and varied machinery of industry, agriculture, transportation and manufacturing. We can then see that each of the few successful environmental improvements has been achieved by altering the technology of production." BARRY COMMONER, *MAKING PEACE WITH THE PLANET* 44 (1992) (emphasis in original). He goes on to discuss, for example, technological change that allowed reductions in mercury poisoning of Lake Erie. *Id.* Commoner further helps explain the logical extension of the precautionary principle, namely a re-examination of the environmental effect of current modes of production. This could mean, for instance, a realization that,

[u]nlike the steel, auto, or electric power industries, the petrochemical industry — at least on its present scale — is not essential. Nearly all of the products of the petrochemical industry are substitutes for perfectly serviceable preexisting ones. Plastics substitute for paper, wood, and metals; detergents for soap; nitrogen fertilizer for soil organic matter and nitrogen-fixing crops . . . [;] pesticides for the insects' natural predators.

Id. at 53.

An example of a case where application of the precautionary principle might have helped avoid a current crisis is in the introduction of massive chemical pesticides and fertilizers to the developing world, which "represent[s] the cutting edge of the green revolution [in India in the 1960's], which has led to the devastation of the soils [in India]." *Morning Edition: Indians Destroy American-Based Seed Company*, National Public Radio broadcast, Nov. 15, 1993, available in LEXIS, News Library, NPR File. The speaker was commenting on the reasons for riots in southern India against multi-national U.S. hybrid seed producers. High-yield hybrid seeds could only be effective when used in combination with heavy—and expensive—doses of chemical pesticides and fertilizers, thus attracting the farmers' ire. See also *All Things Considered: Searching for Solutions—India and Food Production*, National Public Radio broadcast, Aug. 15, 1994, available in LEXIS, News Library, NPR File (The reporter talked with Minindra Phal, a south Indian farmer who stopped spraying with pesticides because they made him sick. Phal successfully proved that he could have better yields without the use of chemical fertilizers.).

68. NAFTA, *supra* note 27, art. 713(4).

interests.⁶⁹ Moreover, parties are exhorted, "to the greatest extent practicable"⁷⁰ to "pursue equivalence of their respective sanitary or phytosanitary measures."⁷¹

In sum, the environmental provisions in Chapter Seven reflect the fact that environmental and trade concerns were generally conceived of as antagonists, rather than as part of a comprehensive approach to promoting the economic health and security of people as citizens, workers and consumers; this fact bodes ill for potential environmental crises, particularly given the current, unstable Mexican political situation.⁷²

There is, however, one provision in Chapter Seven that opens a possible means for using NAFTA to serve environmental, economic, and social cooperation at once. Article 721(1) provides as follows:

Each Party shall, on the request of another Party, facilitate the provision of technical advice, information and assistance, on mutually agreed terms and conditions, to enhance that Party's sanitary and phytosanitary measures and related activities, including research, processing technologies, infrastructure and the establishment of national regulatory bodies. Such assistance may include credits, donations and

69. *Id.* art. 713(5). For a brief description of the Codex Alimentarius, see Daniel G. Partan, Note & Comment, *International Administrative Law*, 75 AM. J. INT'L L. 639, 642-43 (1981) (citing DAVID LEIVE, INTERNATIONAL REGULATORY REGIMES: CASE STUDIES IN HEALTH, METEOROLOGY AND FOOD, at xx (1976)); C. Ford Runge, *Trade Protectionism and Environmental Regulations: The New Nontariff Barriers*, 11 J. INT'L L. BUS. 47 (1993) (criticizing the fact that although "[a] special technical working group at the GATT Secretariat in Geneva is attempting to use [the Codex Alimentarius] . . . as the basis for harmonizing member countries' regulations . . . there are no agreed-upon standards except for a few items, and none are regarded as binding in law. With the exception of the beleaguered GATT working group, the issue has not been given priority by international institutions."). *Id.* at 59.

70. NAFTA, *supra* note 27, art. 756(1).

71. *Id.*

72. Despite Mr. Zedillo's election, many Mexico-watchers remain concerned that the political and social situation remains extremely unsettled. See Reavis, *supra* note 16; DePalma *supra* note 9.

The fact that NAFTA did not view trade and environmental concerns—in addition to labor concerns—as part of a unified trade strategy was a routine concern of the Agreement's early critics, a fact lost on many of their opponents, who labeled the environmental—and labor—critics as wild-eyed radicals. See, e.g., *Nightline: The Environmental Movement's Latest Enemy* (WABC television broadcast, Feb. 4, 1992) available in LEXIS, News Library, ABC File (broadcast featured conservative commentator Rush Limbaugh); Chethan Lakshman, *NAFTA Will Offset U.S. Power: Godsoe*, FIN. POST, Sept. 23, 1992, at 5.

grants for the acquisition of technical expertise, training and equipment that will facilitate the Party's adjustment to and compliance with a Party's sanitary or phytosanitary measure.⁷³

This provision is potentially significant because, in the jargon of international law, it directs that "technology transfer" occur.⁷⁴ The obvious problem is that, despite the imperative direction that parties "shall . . . facilitate"⁷⁵ the provision of advice and assistance, the command is weakened by the qualification that this happen only on mutually agreed terms, which "may"⁷⁶ include credits, donations and grants.⁷⁷ Moreover, subsequent sections of the provision make it quite clear that it should not be understood as forcing any technology or economic transfers whatsoever.⁷⁸ Nonetheless, the provision remains an important statement as to the appropriate direction for a more

73. NAFTA, *supra* note 27, art. 721(1).

74. The literature on technology transfer is vast. See, e.g., THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE 76 (1991) ("Global poverty cannot be reduced by the governments of poor countries acting alone. At the same time, more aid and other forms of finance, while necessary, are not sufficient. Projects and programmes must be designed for sustainable development."), National Science and Technology Council, Technology for a Sustainable Future: A Framework for Action 20 (1994) (on file with author) (stating intention of U.S. government to, *inter-alia*, "foster technology cooperation that incorporates assessment of needs, information exchange, training and technical assistance, capacity building, and technology development."). The basic concern, as stated by the Vice President and General Counsel of The World Bank, is that "a host state concerned with the transfer of technology and skills is obviously interested in maximizing the local proportion of personnel." IBRAHIM F.I. SHIHATA, LEGAL TREATMENT OF FOREIGN INVESTMENT 81 (1993). Not only does the host state want to keep local personnel but also, Mr. Shihata might have added, the host state has an interest in keeping control over who shares their technology and how. On these and related questions of technology transfer, see GOVERNMENT OF JAPAN, ACTION PLAN TO ARREST GLOBAL WARMING, DECISION MADE BY THE COUNCIL OF MINISTERS FOR GLOBAL ENVIRONMENT CONSERVATION 15-17 (1990); Jonathan D. Westreich, *Regulatory Controls on United States Exports of Weapons and Weapons Technology: The Failure to Enforce the Arms Export Control Act*, 7 ADMIN. L. J. AM. U. 463 (1993).

75. NAFTA, *supra* note 27, art. 721(1).

76. *Id.*

77. For one exploration of the possible use of NAFTA to promote a "greener" free trade regime, see Nicolas Kublicki, *The Greening of Free Trade: NAFTA, Mexican Environmental Law, and Debt Exchanges for Mexican Environmental Infrastructure Development*, 19 COLUM. J. ENVTL. L. 59 (1994).

78. "Nothing in this section shall be construed to require a Party to . . . furnish any information the disclosure of which would . . . prejudice the legitimate commercial interests of particular enterprises." NAFTA, *supra* note 27, art. 172(b).

comprehensive trade plan that links trade and environmental concerns.

b. Standards-Related Measures

The second provision relating to the environment is contained in NAFTA's Chapter Nine, which concerns the creation of standards-related measures that may directly and indirectly affect trade among NAFTA's signatories.⁷⁹ NAFTA's standards-related measures are important to the goal of environmental protection because they relate to a party's right to enact laws and regulations that may affect imports by another signatory.⁸⁰

At first glance, Chapter Nine appears to give NAFTA signatories the sovereign right to implement environmental and health-related laws and regulations, providing, for instance, that: "[e]ach party may, in accordance with this Agreement adopt, maintain and apply standards-related measures, including those relating to safety, the protection of human, animal and plant life and health, the environment and consumers, and measures to ensure their enforcement or implementation."⁸¹ However, Chapter Nine has been criticized for promoting trade at any cost. For instance, "[e]nvironmentalists sought, but failed, to secure an understanding that U.S. laws regulating production processes would not be considered trade barriers under the GATT."⁸² Because Chapter Nine fails to protect production process-related laws and regulations, NAFTA signatories continue to be bound by GATT's prohibition on any such measures that discriminate with respect to trade.⁸³ Thus, the

79. *Id.* art. 901(1).

80. *Id.* chap. 9.

81. *Id.* art. 904(1).

82. Association Report, *supra* note 21, at 53. The call for both process and production standards was loud and widespread in advance of NAFTA's passage. See, e.g., GARY C. HUFBAUER & JEFFREY J. SCHOTT, NAFTA: AN ASSESSMENT 100-01 (rev. ed. 1993).

83. NAFTA, *supra* note 27, art. 103(1); cf. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Dec. 15, 1993, Annex 1A, art. 1.3, Hein's No. KAV 3778, at 2 (Temp. State Dep't No. unreleased). The new Annex provides, in relevant part, that

[m]embers shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfill a legiti-

right to enact strict environmental and health-related controls is less liberal than initially appears to be the case.

Moreover, Chapter Nine contains many of the vague and ill-defined terms that give legitimate cause for worry in Chapter Seven. Like Chapter Seven, Chapter Nine's provisions relating to environmental standard-setting respect a party's sovereignty,⁸⁴ permitting signatories to implement any standards-related measure and to establish any level of protection it considers "appropriate."⁸⁵ One NAFTA party cannot challenge another's adoption of a higher standard unless that standard represents an "unnecessary obstacle" to trade.⁸⁶ Thus, Chapter Nine reiterates many of Chapter Seven's ambiguities.

Notably, however, Chapter Nine also contains some provisions that might be interpreted as requiring the challenging party to show that the challenged party lacks a "legitimate objective" for enacting a standard.⁸⁷ This opportunity for interpretation offers a potentially significant means to enact standards that would force upward harmonization towards stricter environmental standards. By contrast to GATT, which automatically assumes that a higher standard is a trade barrier,⁸⁸ NAFTA thus allows room for NAFTA's signatories to engage in a dialogue about the necessity and appropriateness of more environmentally-protective standards. This does not, however, address the ability of states to implement stricter standards, a concern addressed more fully in Part 2 below.

Furthermore, although Chapter Nine, like Chapter Seven, has occasioned the criticism that it could easily lead to downward harmonization,⁸⁹ it is at least marginally more clear

mate objective, taking account of the risks non-fulfillment would create. Such legitimate objectives are, *inter alia*, . . . protection of human health or safety, animal or plant life or health, or the environment[.]

Id. art. 2.2.

Although a departure from previous restrictions, it remains to be seen how this language will be applied.

84. NAFTA, *supra* note 27, art. 906.

85. *Id.* art. 904(2).

86. *Id.* art. 904(4).

87. *Id.* art. 904(4)(a).

88. See Bailey, *supra* note 59, at 852, 856.

89. *Id.* Some commentators believe that these concerns are overstated. See, e.g., Kublicki, *supra* note 77, at 63-64; Association Report, *supra* note 21, at 64 ("we believe that the overall approach of NAFTA and, in particular, the Supplemental and Border Agreements promises significant environmental benefits to the U.S., as well as to Mexico and Canada"); see also *supra* note 59 and accompanying

about what constitutes a necessary obstacle to trade. Regrettably, however, the instruction that "[a]n unnecessary obstacle to trade shall not be deemed to have been created" where the measure's "demonstrable purpose" is to achieve a legitimate objective, and so long as it "does not operate to exclude goods of another Party that meet that legitimate objective"⁹⁰ is far from clear at first glance; it appears likely that what exactly constitutes a "legitimate objective" in practice would be as difficult to ascertain as the "unnecessary obstacle" it set out to define. The term "legitimate objective" is further defined, however, to include the safety and protection of human, animal or plant life or health, and the environment or consumers, including matters relating to quality and identifiability of goods or services and sustainable development.⁹¹

Thus, despite some of the vagueness that typifies most treaty-writing, Chapter Nine does allow for a reasoned defense of a measure's long-term environmental purpose. The focus on sustainable development, a notion that received widespread attention at the United Nations Conference on Environment and Development,⁹² is especially noteworthy. Although the notion of what constitutes "sustainable" development remains controversial, the phrase is nonetheless associated with business practices that seriously take environmental concerns into account.⁹³ As the meaning of this term is further fleshed out in coming years, it may well provide a means to argue for linking heightened environmental protection with the free trade practices made possible under NAFTA.

It would be a mistake, however, to characterize Chapter Nine as ensuring any such linkage; its ambiguities are of greater concern than its promise in this regard. For instance, the chapter calls for the parties to make standards-related

text for discussion on downward harmonization.

90. NAFTA, *supra* note 27, art. 904(4).

91. *Id.* art. 915.

92. Commonly known by its acronym, UNCED. The Conference was held in Rio de Janeiro, Brazil, in June 1992 and resulted in the adoption of a voluminous document known as Agenda 21, two treaties (the conventions on Biological Diversity and Climate Change) and a statement of principles on forests. See Marc Pallemmaerts, *International Environmental Law from Stockholm to Rio: Back to the Future?*, in GREENING INTERNATIONAL LAW, *supra* note 60, at 1.

93. Christopher D. Stone, *Deciphering "Sustainable Development,"* 69 CHI-KENT L. REV. 977 (1994).

measures "compatible."⁹⁴ On the one hand, this could be read as an opportunity for upward harmonization, since parties are given considerable room to defend any "legitimate objective."⁹⁵ But this is far from certain. A party could equally insist that compatibility is only possible by observing minimum standards, in order to achieve NAFTA's larger purpose.⁹⁶ Indeed, pro-business critics of the accord have found little cause for concern with these provisions as a means to achieve upward harmonization.⁹⁷ Furthermore, the glacial pace of change in international lawmaking does not bode well for the short-term environmental protections possibly achievable in light of this language.

c. Other Provisions

Other provisions in NAFTA provide some support for the goal of stricter environmental protection. Some defenders of NAFTA argue that the Agreement's objectives, as stated in its Preamble and Article One, will help environmental concerns.⁹⁸ Admittedly, this language is encouraging. The Preamble reaffirms the 1972 Stockholm Declaration on the Human Environment and the 1992 Rio Declaration on Environment and Development (Rio Declaration), both of which endorsed notions such as sustainable development.⁹⁹ In stating its objectives,¹⁰⁰ NAFTA's Article One consistently links environmental and economic improvement. Even more encouragingly, the Article states that the signatories are committed to "transparency," the buzzword referring to the international legal equivalent of domestic sunshine laws.¹⁰¹ However, the introductory commitments to transparency have since been criti-

94. NAFTA, *supra* note 27, arts. 906(2), 908(1).

95. *Id.* art. 904(4)(a).

96. Such as those stated in NAFTA's Statement of Objectives. *Id.* arts. 102(1)-(2).

97. Taylor, *supra* note 65, at 5.

98. Daniel McGraw & Steve Charovitz, *NAFTA's Repercussions: Is Green Trade Possible?*, 36 ENV'T 14 (1994).

99. *Adoption of Agreements on Environment and Development, The Rio Declaration on Environment and Development*, UN Conference on Environment and Development, Annex, Agenda Item 9, Principle 1, at 1, U.N. Doc. A/CONF.151/5/Rev.1 (1992) [hereinafter *Rio Declaration*].

100. *See, e.g.*, NAFTA, *supra* note 27, arts. 1(a)-(b), (g).

101. *Id.* art. 1(h).

cized by those who point out that the proceedings of the actual dispute resolution panels created by NAFTA will be conducted in private, with virtually no public scrutiny.¹⁰² In sum, therefore, the introductory statements about NAFTA's environmental and economic linkages cannot be viewed as anything but aspirational.

This is confirmed by Article 1114, which specifically concerns "Environmental Measures." Article 1114 states only that it is "inappropriate to encourage investment by relaxing domestic health, safety or environmental measures." The Article concludes by saying that a NAFTA signatory may request consultations with another signatory if the first signatory believes any such encouragement was offered.¹⁰³ Then U.S. Environmental Protection Agency Administrator William Reilly acknowledged the toothlessness of this Article. In testimony to

102. Seligman, *supra* note 44, at 14.

[T]he NAFTA dispute process remains an unacceptable forum for resolving trade and environment conflicts. First, there is no requirement that NAFTA panels hearing challenges to environmental laws have environmental experts on them (NAFTA, Article 2009.2). Proceedings are not open to the public. Environmental or other public interest groups are not permitted to submit arguments and evidence in proceedings as "friends of the court."

Id.

There is, however, the possibility for limited intervention if a party claims it has a "substantial interest" in a matter. NAFTA Articles 2008.3 and 2008.4 provide in full as follows:

3. A third Party that considers it has a substantial interest in the matter shall be entitled to join as a complaining Party, on delivery of written notice of its intention to participate to the disputing Parties and its Section of the Secretariat. Such notice shall be delivered at the earliest possible time, and in any event no later than seven days after the date of delivery of a request by a Party for the establishment of a panel.

4. If such Party does not join as a complaining Party in accordance with paragraph 3, it normally shall refrain thereafter from initiating or continuing:

(a) a dispute settlement procedure under this Agreement; or

(b) a dispute settlement proceeding in the GATT on grounds that are substantially equivalent to those available to that Party under this Agreement, regarding the same matter in the absence of a significant change in economic or commercial circumstances.

NAFTA, *supra* note 27, art. 2008(3)-(4).

As with so many provisions in NAFTA, the crucial term affecting these sections, "substantial interest," is undefined.

103. *Id.* art. 1114(2). Chapter 11 relates to Investment, Services, and Related Matters. The Article's Scope and Coverage is outlined in Article 1101. *Id.* art. 1101; see also Taylor, *supra* note 65, at 6-7 (discussing Article 1114).

Congress in late 1992, he admitted that the U.S. "would have no direct recourse" if it believed that relaxation of health, safety or environmental matters had occurred.¹⁰⁴

2. The Text of the Supplemental Environmental Agreement.¹⁰⁵

Even more than NAFTA's Preamble, the Supplemental Agreement's Preamble exhorts the signatories to observe the highest possible standards of environmental protection by means of cooperative action.¹⁰⁶ When it refers to actual levels of protection, the Supplemental Agreement does so in the loftiest terms:

Recognizing the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental laws and regulations, each Party shall ensure that its laws and regulations provide for high levels of environmental protection and shall strive to continue to improve those laws and regulations.¹⁰⁷

On the one hand, this provision is encouraging because it requires that signatories "shall ensure" high levels of environmental protection. It must be viewed as an achievement that, for example, the provision lacks reference to a NAFTA party's being able to justify environmental protectionist measures with reference either to scientific proof or a "legitimate objective."¹⁰⁸ At the very least, the absence of such qualifications indicates a theoretical willingness to effect high levels of envi-

104. *The North American Free Trade Agreement: Hearings Before the House Ways and Means Comm. and its Subcomm. on Trade*, 102d Cong., 2d Sess. 147 (1992); see also Keith Schneider, *Trade Pact vs. Environment: Clash at a House Hearing*, N.Y. TIMES, Sept. 16, 1992, at D1.

105. The Supplemental Agreement is summarized in full in John J. Kim & James P. Cargas, *The Environmental Side Agreement to the North American Free Trade Agreement: Background and Analysis*, [1993] 23 Env'tl. L. Rep. (Env'tl. L. Inst.) 10720-33 (Dec. 1993); see also Steve Charnovitz, *NAFTA: An Analysis of its Environmental Provisions* [1993] 23 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,067-73 (Feb. 1993).

106. See, e.g., Supplemental Agreement, *supra* note 25, art. 1(b) ("The objectives of this Agreement are to: . . . promote sustainable development based on cooperation and mutually supportive environmental and economic policies.").

107. *Id.* art. 3.

108. See, e.g., *supra* text accompanying note 90.

ronmental protection required in the wake of increased trade and the development that is sure to follow it in Mexico.

On the other hand, however, this provision is typical of the Supplemental Agreement's failure to indicate what institutional mechanism will make achievement of these goals possible. The Supplemental Agreement leaves enforcement of this goal largely to the individual governments, although it does list examples of the kinds of actions signatories may take (e.g. "promoting environmental audits").¹⁰⁹ The non-binding character of this list only reinforces the impression of the Supplemental Agreement's toothlessness. As in NAFTA, the language reflects the drafters' concern to respect sovereignty. In international treaty-making, this is, of course, an important goal. What is less comprehensible is why the drafters, in contravention of the "transparency" endorsed by NAFTA itself, established a dispute resolution mechanism that can be conducted mostly in secret.¹¹⁰

The Supplemental Agreement also creates a tri-partite Commission for Environmental Cooperation, composed of a Council, a Secretariat and a joint Public Advisory Committee.¹¹¹ In terms of possible public participation, the independent Secretariat, as the institutional mechanism for monitoring compliance with the terms of the Supplemental Agreement, is the most important.

Private parties and non-governmental organizations (NGOs) are granted limited standing to submit complaints¹¹² and "assert[] that a Party is failing to effectively enforce its environmental law."¹¹³ A private party or NGO may attempt to bring a claim before the Secretariat if the claim meets one of

109. Supplemental Agreement, *supra* note 25, art. 5(1)(f). Article 5 provides an extensive list of the actions governments may take, constituting mostly a catalogue of the various regulatory and enforcement measures currently pursued by U.S. lawmakers and regulators. *Id.* art. 5.

110. See *supra* note 102 and accompanying text; see also Robert Housman & Paul Orbuch, *Integrating Labor and Environmental Concerns into the North American Free Trade Agreement: A Look Back and a Look Ahead*, 8 AM. U. J. INT'L L. & POL'Y 719, 746 (1993).

111. Supplemental Agreement, *supra* note 25, art. 8(2).

112. These do not, strictly speaking, have the force of legal claims, if by that term, one understands that a party initiates a process that must result in some resolution. Some commentators have mistakenly used the term "claim" to describe the process. See, e.g., Association Report, *supra* note 21, at 57.

113. Supplemental Agreement, *supra* note 25, art. 14(1).

several criteria. The most substantive of these is the requirement that the Secretariat find that the submission "appears to be aimed at promoting enforcement rather than at harassing industry."¹¹⁴ Providing that the submission satisfies these criteria, "the Secretariat shall determine whether the submission merits requesting a response from the [NAFTA] Party."¹¹⁵ The Secretariat, in its turn, may consider several criteria to determine whether to consider the allegations, including whether private remedies have been pursued under the NAFTA Party's laws.¹¹⁶ However, the Secretariat can also be guided by factors such as whether "the submission is drawn exclusively from mass media reports."¹¹⁷ On the one hand, the rationale for such a provision is understandable. The drafters were clearly concerned that the mass media not foment dissatisfaction with sensationalized reports of possibly dangerous harms. On the other hand, however, where private individuals or NGOs often have limited resources, the mass media can serve as an essential vehicle for public information. For example, in April 1986, publicity in Europe and throughout the world was instrumental in forcing the former Soviet Union to admit to a nuclear accident at its Chernobyl, Ukraine reactor.¹¹⁸

In its discretion, the Secretariat may then determine that "the submission, *in the light of any response provided by the [NAFTA] Party*, warrants developing a factual record."¹¹⁹ The Secretariat thus enjoys extensive latitude to determine whether a submission raises appropriate questions for review, including the possibility for the Party to voice its objections-presumably with access to more information and with greater resources to document its case and refute any attacks.

This discretion is troubling for those concerned about the socially destabilizing potential of environmental harms. The

114. *Id.* art. 14(d).

115. *Id.* art. 14(2).

116. *Id.* art. 2(c).

117. *Id.* art. 14(2)(d).

118. On the disastrous consequences of the "72 hour vacuum of information about a matter of great public concern" caused by the U.S.S.R.'s unwillingness to publicize information about the accident, see PHILIPPE SANDS, *CHERNOBYL: LAW AND COMMUNICATION* 3 (1988). Sands' footnotes amply testify to the key role played by the mass media in disseminating information about the accident. *Id.*

119. Supplemental Agreement, *supra* note 25, art. 15(1) (emphasis added).

absence of procedural guarantees, such as the requirement, at least, that the Secretariat explain the reasons for a decision *not* to prepare a factual record on a submission, means that many private parties and NGOs in one of NAFTA's signatory nations may be without an effective tribunal to air their claims. This is especially likely to be the case in Mexico, where per capita spending on environmental protection is notoriously low¹²⁰ and enforcement equally lags.¹²¹ The usual argument advanced by NAFTA's supporters holds that increased trade will raise the standard of living, which in turn will raise the demand for a cleaner environment.¹²² What this argument ignores, however, is that in the process of expanding trade and commerce, environmental degradation is certain. If enforcement is unlikely at home and dismissed without explanation by the free trade regime's environmental Secretariat, the potential for popular discontent seems likely, if not certain.¹²³

120. Kathryn J. Ready, *NAFTA: Labor, Industry, and Government Perspectives*, in THE NORTH AMERICAN FREE TRADE AGREEMENT 37 (Mario F. Bognanno & Kathryn J. Ready eds., 1993) (reporting that in 1991, U.S. per capita environmental protection spending by the U.S. Environmental Protection Agency totaled \$24.40, as compared to \$0.48 per capita by its Mexican counterpart, SEDUE.).

121. However, in advance of NAFTA's ratification, "the United States government undertook a survey of Mexico's environmental laws that concluded that by and large, Mexico's laws were on a par with those of its proposed NAFTA partners." Robert Housman et al., *Enforcement of Environmental Laws Under a Supplemental Agreement to the North American Free Trade Agreement*, 5 GEO. INT'L ENVTL. L. REV. 593, 594 n.3 (1993) (citing, *inter alia*, U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/NSIAD-91-227, U.S.-MEXICO TRADE INFORMATION ON ENVIRONMENTAL REGULATIONS AND ENFORCEMENT 5-6 (1991); see also Damian Frasier & Nancy Dunne, *Salinas and Clinton in NAFTA Talks*, FIN. TIMES, Jan. 9, 1993, at 3. The worry about enforcement by Mexican authorities was not restricted to U.S. environmentalists. Alberto Szekely, an environmental attorney in Mexico, aired the same concerns to a group of New York lawyers in early 1994. Alberto Szekely, Remarks at the Meeting of the Association of the Bar of the City of New York (Feb. 3, 1994) (notes of talk on file with author).

122. See, e.g., Association Report, *supra* note 21, at 56 ("The Bush Administration's initial response to these [environmental] concerns was to assure Congress and the public that the best antidote for pollution is economic progress and that the increased trade and investment would enable Mexico to avoid a repetition of the maquiladora experience."). But see William P. Alford, *Introduction, The North American Free Trade Agreement and the Need for Candor*, 34 HARV. INT'L L.J. 293, 295 (1993) (noting the serious dislocations that NAFTA was likely to cause for all of its signatory nations).

123. The probability of this result was recently underlined in the related issue of a labor dispute under NAFTA. In the first hearing held to enforce the trade pact's labor protections (provided for in a labor side agreement comparable to the Supplemental Agreement), a grievance panel refused to reach the merits of cases

This worry is compounded throughout the Supplemental Agreement, as exhibited in its direction for the Secretariat to safeguard: "(b) from public disclosure any information it receives from any non-governmental organization or person where the information is designated by that non-governmental organization or person as confidential or proprietary."¹²⁴ On its face, this provision might be read as protecting the private parties and NGOs who submit materials to the Secretariat for review. However, the "confidential and proprietary" language typically refers to corporate records, and so seems designed to protect from public scrutiny industries whose activities might cause environmental harm.¹²⁵

Even if the Secretariat concludes that it wishes to prepare a factual record on a submission, it cannot actually proceed unless the Council authorizes it to do so by a vote of two of NAFTA's three signatories.¹²⁶ The results in the factual record, which undergo a lengthy research and review process, can be made publicly available only by a two-thirds vote of the Secretariat.¹²⁷

Admittedly, the Supplemental Agreement establishes an elaborate committee structure designed to incorporate the views and advice of private parties and NGOs from all three states.¹²⁸ Moreover, as in most treaties, signatories may pursue disputed matters through an arbitral process designed to

brought against General Electric and Honeywell Corporations by U.S. and Mexican unions, finding that NAFTA did not cover the enforcement of Mexican labor laws by Mexican officials. The U.S. Secretary of Labor also refused to investigate. Peter White, *False Teeth*, IN THESE TIMES, Nov. 14, 1994, at 23.

124. Supplemental Agreement, *supra* note 25, art. II(8)(b). Article 8(a) keeps confidential "information it receives that could identify a non-governmental organization or person making a submission if the person or organization so requests" *Id.* art. II(8)(a).

125. Recent controversy in this connection has focused on the extent to which information collected in corporate environmental audits should be made public, and whether environmental audits need be performed by independent auditors. Proponents of more open audits contend that such auditing will allow companies to verify compliance and assess risks created by hazardous materials and practices. Michael A. Gollin, *Using Intellectual Property to Improve Environmental Protection*, 4 HARV. J.L. & TECH. 193, 210 n.179 (1991). Many companies, however, fear that such audits will lead to publication of protected information. See, e.g., Sanford Lewis, Comments Regarding EPA Audit Policy from the Director of the Good Neighbor Project for Sustainable Industries (Aug. 5, 1994) (on file with author).

126. Supplemental Agreement, *supra* note 25, art. 15(2).

127. *Id.* art. 15(7).

128. *Id.* arts. 16-18.

articulate an "action plan," and even seek to assess monetary penalties for non-compliance.¹²⁹

Cause for concern that NAFTA will create environmental harms that could lead to popular discontent nonetheless persist. The fact remains that the power to object to environmental violations remains firmly in the control and behind the doors of NAFTA's signatory governments, with little accountability to the citizens of their nations except through their domestic legal systems. By contrast, in the case of the United States, the potential for redress of grievances, through both rulemaking and other legal channels, is considerable if imperfect.¹³⁰ In Mexico, which lacks both a highly developed environmental protection infrastructure and a citizenry confident that the government of the ruling PRI has its best interests at heart,¹³¹ the likelihood is far greater that environmental grievances flowing from increased, post-NAFTA trade will not be satisfactorily resolved.

The question, then, is what modifications and additions to NAFTA might strengthen the Supplemental Agreement so as to make its free trade benefits available without potential environmental damage and related social disquiet.

III. NAFTA AND EMERGING PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW

This section will discuss three principles of international environmental law that have increasingly gained recognition and acceptance since UNCED. It is my contention that each of

129. See generally Supplemental Agreement, *supra* note 25, arts. 22-39 and Annex 34; cf., e.g., Antarctic Treaty Consultative Parties: Final Act of the 11th Antarctic Treaty Special Consultative Meeting and the Protocol on Environmental Protection to the Antarctic Treaty, art. 18, 30 I.L.M. 1455, 1468 (1991), art. 51, 27 I.L.M. 868, 892 (1988).

130. Some commentators have explored discontent with rulemaking practices, suggesting that they are especially burdensome to the poor, effectively locking them out of the process. See Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 *ECOLOGICAL L.Q.* 619, 620 (1992); Omar Saleem, *Overcoming Environmental Discrimination: The Need for a Disparate Impact Test and Improved Notice Requirements in Facility Siting Decisions*, 19 *COLUM. J. ENVTL. L.* 211 (1994).

131. See *supra* text accompanying notes 12, 16, 120, 121. On the limitations of citizen intervention in environmental law and policy-making, see Greg M. Block, *One Step Away from Environmental Citizen Suits in Mexico*, 23 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,347 (1993).

them deserves reconsideration and possible application to a redrafted NAFTA, one that systematically incorporates the goal of environmental protection into the main agreement.

A. *"Polluter Pays" Principle*

The most obvious way to begin insuring that the free trade introduced by NAFTA does not correspondingly result in environmental degradation and any resultant social unrest is to incorporate immediately some formulation of the "polluter pays" principle into NAFTA Chapter Nine, which pertains to standards-related measures.

The 'polluter pays' principle is essentially a principle of economic policy for allocating the costs of pollution, rather than a legal principle . . . [The Organization on Economic Cooperation and Development, or] OECD's definition of the principle is that the polluter should bear the expenses of carrying out measures decided by public authorities to ensure that the environment is in 'an acceptable state', or 'in other words the cost of these measures should be reflected in the cost of goods and services which cause pollution in production and or in consumption.'¹³²

In other words, the "polluter pays" principle aims simply to internalize external costs, and to eliminate what might be viewed as hidden subsidies in the form of cleanup costs that would otherwise be borne directly by the government or subsequent property owners. Although consumers are likely to end up paying these cleanup costs eventually in the form of higher product costs (as opposed to higher taxes), the notion is that the "polluter pays" principle acts as an incentive for the free trading private company to implement more environmentally efficient and responsible technologies in order to reduce its environmental cleanup costs.

For the U.S. reader, the prospect can be fearsome; the "polluter pays" principle is best known here for its incarnation as a central feature of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), generally recognized to be one of the nation's most unwieldy

132. PATRICIA W. BIRNIE & ALAN E. BOYLE, *INTERNATIONAL LAW & THE ENVIRONMENT* 109 (1992).

statutory schemes, to say nothing of the criticisms about CERCLA's indiscriminate foisting of liability on every "owner or operator" connected with a hazardous waste site.¹³³ However, it is important to recognize that CERCLA, which provides that parties may seek to apportion liability according to the extent of a party's obligation for past contamination, is an imperfect model of how the "polluter pays" principle should be formulated in a trade agreement like NAFTA.

In the NAFTA context, the "polluter pays" principle should be structured in such a way as to put industry on notice of future harms in advance of its occurrence. Of course, certain problems would have to be ironed out, such as making sure that the actual, beneficial owner is held liable and not a subsidiary or shell corporation. In addition, it would be necessary to articulate guidelines so that a dispute does not become a nationalistic fighting match.¹³⁴ However, NAFTA signatories could derive some comfort from the fact that the EEC is only one of many multinational associations that has endorsed this principle,¹³⁵ as has, generally speaking, the OECD¹³⁶; sup-

133. CERCLA is codified at 42 U.S.C.A. §§ 9601-75 (West Supp. 1994). For criticism of CERCLA, see Joan Glickman, *A Superfund Retrospective: Past, Present and . . .*, 76 PUB. MGMT. 4 (1994); *Courts to Blame for Much of Problem with Superfund, Industry Attorney Says*, 24 Env't Rep. (BNA) No. 15, at 632 (Aug. 13, 1993); Deborah Pines, *Judge Scores CERCLA Law as 'Unfair'; Ruling Refuses to Relieve Mall Owners of Liability*, N.Y. L.J., June 2, 1994, at 1.

134. For example, in Imperial County, California, and in southeastern California, county officials are trying to pursue extraterritorial application of U.S. laws to clean up New River, a waterway that has been badly polluted with chemical contamination from *maquiladora* and other waste. EPA has refused to require companies along the border to test the water but has agreed to fund state monitoring efforts. *California County's Test Rule Request Denied; EPA Offers to Help Pay for New River Monitoring*, 17 Int'l Env'tl. Rep. (BNA) No.35, at 2173 (Mar. 25, 1994).

One of the problems with the case is that it appears to some as if people in the U.S. are demanding control from Mexicans without acknowledging the U.S. role in contributing to the pollution. See, e.g., Marianne Lavelle, *Poisoned Waters Provide Early Test for NAFTA*, NAT'L L.J., Mar. 21, 1994, at A1. If the "polluter pays" principle applied equally to all three signatories, some of this finger-pointing might be avoided, so long as controls were in place to assure that the actual polluting parties were reliably identified.

On some questions related to the use of trade measures to enforce international environmental law, see Mary Ellen O'Connell, *Using Trade to Enforce International Environmental Law: Implications for United States Law*, 1 IND. J. GLOBAL LEGAL STUD. 273, 291 (1994) (concluding that countermeasures taken in response to an unfriendly or hostile act are the only effective means of enforcing international environmental law).

135. BIRNIE & BOYLE, *supra* note 132, at 110 & n.163; see, e.g., Council Direc-

port for the polluter pays concept appeared in the Rio Declaration as well.¹³⁷

B. Precautionary Principle

Quite simply, the "precautionary principle" provides that preventive measures should be taken to protect the environment in the light of uncertainty about the future consequences. In international environmental law, it is therefore commonly paired with the notion of "inter-generational equity," the notion that present generations should proceed with caution in their depletion of the world's resources, in respect of the rights of future unborn generations.¹³⁸

Principle 15 of the Rio Declaration states one version of the precautionary principle:

[T]he precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.¹³⁹

As with the references to "necessary" or "relevant" action in NAFTA's Chapter Seven, some of the language in this statement of the precautionary principle is frustratingly vague and leaves room for evading action (e.g. "widely applied, cost-effective

tive 84/631/EEC, art. 10, 1984 O.J. (L 326) 31, 35 ("In accordance with the 'polluter pays' principle, the cost of implementing the [hazardous waste shipment] notification and supervision procedure, including the necessary analyses and controls, shall be chargeable to the holder and/or the producer of the waste by the Member States concerned . . .").

136. It is not, however, binding on OECD member states.

137. *Rio Declaration*, *supra* note 99, Principle 16 ("National authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment."); *see also* Council of Europe: Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, June 21, 1993, 32 I.L.M. 1228, 1230; Convention for the Protection of the Marine Environment of the North-East Atlantic, Sept. 22, 1992, 32 I.L.M. 1069, 1076.

138. Lothar Gundling, *What Obligation Does Our Generation Owe to the Next? An Approach to Global Environmental Responsibility: Our Response to Future Generations*, 84 AM. J. INT'L L. 207, 210 (1990).

139. *Rio Declaration*, *supra* note 99, Principle 15.

tive measures").¹⁴⁰ Moreover, what constitutes scientific certainty can quickly become an ideological, more than an epistemological, question.

Nonetheless, Principle 15 validates the importance of a precautionary approach. Similar language, incorporated both into the scientific review and risk assessment provisions of NAFTA's Article 715 and into the Supplemental Agreement, would go far to redirecting NAFTA into an agreement that would promote both trade and a higher standard of health and environmental protection for the people affected by the physical manifestations of that trade. To be sure, even a weak statement of the precautionary principle¹⁴¹ would do more to help provide predictable consequences of NAFTA-related development than the vague instruction of Article 715(1)(f) - namely that a NAFTA party take into account "relevant ecological and environmental conditions" when conducting a risk assessment.¹⁴²

Again, there is a model for incorporating the precautionary principle into NAFTA, and that model comes from the revisions to the EEC treaty implemented by the Maastricht Treaty.¹⁴³ Under Article 130r of the Maastricht Treaty,¹⁴⁴ the precautionary principle is added as an essential guide for all decisions about European Community policies, rather than just as a "component."¹⁴⁵ It is worth adding in this context that the European Community began as an economic association and has gradually developed so that environmental issues are now

140. See *supra* text accompanying notes 55-57.

141. See Cameron, *supra* note 67, at 118 (noting wide variations in statements of the principle, from agreement between states to act with care and foresight in making their decisions to, "[a]t its most profound . . . dictat[ing] the institutionalization of precaution, which would itself entail the shifting of the burden of proof from those opposing environmental degradation to those engaged in the challenged activity.").

142. NAFTA, *supra* note 27, art. 715(1)(f).

143. Treaty on European Union and Final Act, Feb. 7, 1992, 31 I.L.M. 247 (entered into force Nov. 1, 1993) [hereinafter Maastricht Treaty].

144. *Id.* Article 103r(2) of the Maastricht Treaty provides, in pertinent part: "Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the [European] Community. It shall be based on the precautionary principle and the principle that preventive action should be taken" *Id.*

145. See Philippe Sands, *The "Greening" of International Law*, 1 IND. J. GLOBAL LEGAL STUD. 293, 306 (1994).

considered an "essential objective" of European Community law.¹⁴⁶

C. Common But Differentiated Responsibility

The last two principles I have identified for incorporation into a revised NAFTA and a revised Supplemental Agreement¹⁴⁷ are both subject to vast differences of interpretation about their proper scope; how much a polluter should pay or how much precaution is appropriate are questions that can lead to heated disagreement. Neither of these principles, however, is likely to cause as pronounced differences of opinion as is the principle of "common but differentiated responsibility."¹⁴⁸

The reason for the disagreement is that the principle of common but differentiated responsibility is more boldly redistributive in effect than the other two. However, the principle of common but differentiated responsibility was firmly endorsed at UNCED. Principle Seven of the Rio Declaration gave the following formulation of the principle of common but differentiated responsibility:

In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.¹⁴⁹

146. *Id.* (quoting Case 240/83, *Procureur de la Republique 51 v. Association de Defense des Bruleurs d'Huiles Usagees*, 1985 E.C.R. 531 ¶ 13).

147. Of course, one alternative would be to rework the agreements entirely, incorporating the supplemental environmental and labor agreements into the actual NAFTA. On the amendment process, see *supra* note 27.

148. See, e.g., Andrew Jordan, *Paying the Incremental Costs of Global Environmental Protection: The Evolving Role of GEF*, 36 ENV'T 13, 18 (1994).

149. *Rio Declaration*, *supra* note 99, Principle 7. As Philippe Sands notes, "[s]imilar language may be found in the 1992 Climate Change Convention." Sands, *supra* note 145, at 308 n.52; see United Nations Framework Convention on Climate Change, May 9, 1992, art. 3(1), 31 I.L.M. 849, 854. Sands describes the principle of common but differentiated responsibility as being comprised of "two elements. The first relates to the common responsibility of states for the protection of the environment, or parts of it, at the national, regional, and global levels. The second relates to the need to take account of differing circumstances, particularly in relation to each state's *contribution* to the creation of a particular environmental problem and its *ability* to respond to, and limit and prevent, the threat."

As one commentator has noted, this focus on shared efforts but different contributions, which is "likely to lead increasingly to the development and application of differing environmental standards between and among different States," is also likely to result in "increasingly contentious disputes between developed and developing countries on the appropriate level at which each should set their environmental standards."¹⁵⁰ The commentator specifically cited the GATT Mexican tuna case as an example of the difficulty of applying differential standards in the free trade context.

As regards NAFTA, incorporation of this principle would doubtless prove equally thorny. The reference to the burden developed societies place on the environment by virtue of their "technologies and financial resources" is clearly meant to indicate that a developed country like the U.S. should share its financial resources and transfer its pollution control or minimizing technologies to a less developed country like Mexico. Even assuming theoretical agreement on such a principle, working out the practical details is no simple matter. Developed countries routinely cite legitimate proprietary concerns as a way to fend off demands that their companies share technology.¹⁵¹ However, ideas for sharing technology and insuring that the owner is compensated to its satisfaction are being put into practice in related contexts, and may provide useful models for trade pacts like NAFTA.¹⁵²

Sands, *supra* note 145, at 308 (emphasis in original, citations omitted).

150. Sands, *supra* note 145, at 308 n.54. On the GATT Mexican tuna case, see *supra* note 60.

151. See *supra* note 74. Technology transfer is specifically mentioned in Agenda 21. See *Report of the U.N. Conference on Environment and Development*, U.N. GAOR, 47th Sess., Annex, Agenda 21, at 4, U.N. Doc. A/CONF.151/26/Rev. 14, (Part IV) (1992); *Rio Declaration*, *supra* note 99, Principle 9. Philippe Sands believes that "Agenda 21 signals the acceptance by the international community that intellectual property rights may limit the international transfer of technologies and thus contribute to global environmental degradation." Sands, *supra* note 145, at 317. Sands may, however, overstate the case. See *EC Ministers Welcome Clinton's Signing of Rio Agreements as Spur to International Progress*, 16 Int'l Env'tl. Rep. (BNA) No. 9, at 346 (May 19, 1993) available in WESTLAW, BNA-IED file.

152. The Costa Rican government, for example, has begun pooling its genetic resources in a gene bank. Central and South American genetic resources have been for centuries the source of many critical drugs, such as quinine, which is been derived from cinchona trees. However, these resources often have been exploited by large, foreign corporations with little return benefit to the source coun-

Furthermore, if the twin goals of stricter environmental protection and social stability are to be achieved, implementation of this principle would require additional safeguards. In the context of United States/Canadian relations with Mexico, application of this principle could have burdensome consequences for Mexico, the least developed NAFTA signatory. For instance, if the principle were articulated to require the NAFTA signatories to accept responsibility for unusual environmental burdens they created, Mexico might be obligated to clean up Mexico City's notoriously polluted air.¹⁵³ In the NAFTA context, therefore, the principle of common but differentiated responsibility would necessitate a provision that a signatory be responsible for cleaning up exceptional burdens to the extent of their financial, scientific, and technological abilities. To avoid evasion of such responsibilities and to assure

try. The gene bank allows a country such as Costa Rica to classify and characterize the local flora and fauna, often with the financial and scientific support of foreign corporations. Companies hoping to develop a new drug will send a request for a substance with certain characteristics to the gene bank, which will then return samples to the company. Payment for the gene resource can be either monetary or in the form of additional employee training or equipment provided to the bank. See Michael D. Coughlin, Jr., *Using the Merck-INBio Agreement to Clarify the Convention on Biological Diversity*, 31 COLUM. J. TRANSNAT'L L. 337 (1993).

The Convention on Biological Diversity also recognizes that intellectual property rights need to be protected before related technology is transferred. See Convention on Biological Diversity, June 5, 1992, art. 1, 31 I.L.M. 818, 823 (not in force) (Identifying the goals of "the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the use of genetic resources.").

153. In Mexico City alone, health care costs associated with air pollution have been estimated at \$1.5 billion a year. *World Bank Turns From Saving Trees to Saving Cities*, CHRISTIAN SCI. MONITOR, Sept. 27, 1994, at R13. For a description of the city's problems see also *Where the Air Was Clear*, BUS. MEX., Aug. 1994, at 36, available in LEXIS, News Library, CURNWS File.

Many developing nations like Mexico have argued that they cannot afford the cost of implementing stricter environmental standards and should not be expected to introduce them without assistance or until they achieve economic prosperity comparable to that of more developed nations like the U.S. See, e.g., UNITED NATIONS ASSOCIATION OF THE UNITED STATES OF AMERICA, ONE EARTH, MANY NATIONS 16 (1990) (In the context of carbon dioxide emissions the author stated, *inter alia*, that "some 80 percent of the annual increase in atmospheric carbon dioxide comes from the industrialized countries, which have put the entire planet at risk with their environmental recklessness over the past century; it is the countries that have grown rich polluting the atmosphere that must cut their emissions, not the poor."); Ramee Khooshie Lal Panjabi, *Can International Law Improve the Climate? An Analysis of the United Nations Framework Convention on Climate Change Signed at the Rio Summit in 1992*, 18 N.C. J. INT'L L. & COMM. REG. 491, 517 (1993).

equitable burden sharing, new treaty language would ideally clarify the specific extent of a party's obligations. There is, in fact, international treaty language that provides models for and would support such an approach.¹⁵⁴ If the goal is to allocate responsibility equally for environmental protection and cleanup, in view not only of the fact that pollution observes no boundaries but also, as recent international events have so powerfully reminded us, because political unrest observes no frontiers, this approach is essential to the smooth future operation of NAFTA.

IV. CONCLUSION

It would be absurd to suggest that failure to incorporate the principles discussed in this Article into NAFTA and its Supplemental Agreement will result in widespread social unrest in either Mexico or the U.S., at least in the short term. However, as the recent Cuban exodus reminds us, the potential for unrest on our borders—an unfamiliar notion to most U.S. citizens—is a very real one. Failure to attend to a number of cross-national interactions, including environmental protection by U.S. companies in Mexico, could possibly lead to another such disruption, one that could be costly in human and economic terms. The Chiapas rebellion clearly shows that the symbolic and real effects of NAFTA will be with us for generations. It behooves us, therefore, to take every possible step to insure smooth social relations within and among the states that signed NAFTA. Reconsideration and reformulation of NAFTA's weak environmental provisions is one way to help secure this goal, and cannot commence too quickly.

154. Convention for the Protection of the Mediterranean Sea Against Pollution, Feb. 16, 1976, art. 11(3), 15 I.L.M. 290, 292; Convention on the Prevention of Marine Pollution by Dumping Wastes and Other Matter, Dec. 29, 1972, art. II, 1046 U.N.T.S. 120 (entered into force Aug. 30, 1975).

In a directly relevant example, the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, art. 5(1), 26 I.L.M. 1541, 1555 (entered into force Jan. 1, 1989), permits developing countries to delay compliance with ozone depletion control measures if they meet certain requirements, namely that they have an annual calculated consumption of a substance controlled by the protocol of less than 0.3 kg. per capita, on the date the protocol entered into force, or any time thereafter until January 1, 1999. *See also* United Nations Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 849; United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 207, 21 I.L.M. 1261, 1310.

