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William J. Snape III

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WILLIAM J. SNAPE, III*

What will happen to the critters: NAFTA's potential impact on wildlife protection

ABSTRACT

On September 16, 1993, United States President Bill Clinton and his counterparts in Mexico and Canada signed the environmental supplement to the North American Free Trade Agreement (NAFTA). This environmental agreement addresses two main issues: enforcement of domestic environmental laws through possible trade sanctions and environmental cooperation among the three Parties—both to be implemented by a newly created Commission on Environmental Cooperation (CEC). Although increased environmental cooperation possesses no legal mandate per se and has been characterized by some as "green window-dressing," the CEC's authority to examine virtually any environmental issue related to trade is precedent setting. For example, the CEC will be able to study trade liberalization's profound effect upon land use practices and habitat conservation.

The main NAFTA text, apart from the Clinton supplemental agreements, is a 2000-page document that establishes rules for more liberalized trade in most goods and services, protection of intellectual property rights, and various investment and procurement decisions. As part of its effort to reduce tariff and non-tariff barriers to trade, the main NAFTA text establishes highly technical disciplines for judging trade-based environmental laws. The environmental supplement does not affect these disciplines, much to the chagrin of many environmentalists. The environmental supplement also does not address United States-Mexico border funding, which will be dealt with in a separate multi-billion dollar financial package and domestic appropriations.

To date, NAFTA's potential impact on wildlife protection has been overshadowed by the past and future pollution problems spurred by increased investment and trade. Although pollution prevention and control are certainly important, and have an impact upon wildlife, ignoring conservation problems under NAFTA would be extremely foolish. Not only are scientific experts esti-

*Professor Snape has a B.A. from the University of California, Los Angeles; J.D. Georgetown Washington University; Wildlife Counsel, Defenders of Wildlife; Adjunct Professor, University of Baltimore School of Law. The author thanks Dan Esty, Steve Charnovitz, and Paul Orbuch for comments on earlier drafts of this article.

mating that planet Earth could be losing hundreds of species per day, but United States trade-based wildlife laws are the most likely to be attacked under NAFTA as "illegal" non-tariff barriers to trade. In addition, with global natural resources already severely overexploited, it is vital to better define and integrate the concept of sustainable development into the international trading regime. Despite the temptation by conservationists to shoot arrows at NAFTA and other global trade agreements, the most productive course may be to establish rules that properly govern the relationship between international trade and the protection of all living natural resources.

INTRODUCTION

Traditionally, conservationists and trade professionals have worked in different worlds, focused on different concerns, and communicated in different languages. Although the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES")¹ came into force in 1975, its focus is obviously limited to trade in wildlife and wildlife parts. Now, whether they like it or not, the worlds of environmentalists and traders are colliding on all international trading fronts. In 1991, two events permanently changed the way each would regard the legal disciplines of international trade and the environment. The first, as discussed by Judge Musgrave separately in this issue, was an arbitral panel decision under the auspices of the General Agreement on Tariffs and Trade ("GATT"), which stated that certain tuna embargoes required under the United States Marine Mammal Protection Act ("MMPA") were GATT-inconsistent.² The second was Congressional renewal of fast track authority³ for President Bush to negotiate

1. 27 U.S.T. 1087 (1973); T.I.A.S. no. 8249; 12 I.L.M. 1085.

2. MMPA, 16 U.S.C. § 1361 (1988); *Earth Island Inst. v. Mosbacher*, 746 F.Supp. 964 (N.D.Cal. 1990); General Agreement on Tariffs and Trade (GATT), Oct. 30, 1947, 61 Stat. A11, A1365 (1947), T.I.A.S. No. 1700, 55 U.N.T.S. 194; GATT, U.S. Restrictions on Imports of Tuna, Panel Report No. DS21/R (Sept. 3, 1991). See generally R. Housman & D. Zaelke, *The Collision of the Environment and Trade: The GATT Tuna/Dolphin Decision* 22 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10,268 (1992).

3. Whenever U.S. legislation will be changed by a trade agreement, the President must seek "fast track" authority if he does not want the agreement or its implementing legislation altered by Congressional action. Since 1974, the executive branch has claimed that fast track is necessary in order to negotiate successful trade agreements. After entering into a trade agreement under fast track authority, the President must submit to Congress the agreement, a draft implementing bill (usually written in consultation with Congress), other related legislation, a statement of implementing administrative action, and supporting information. After receiving these documents, Congress must vote "yes" or "no" on the implementing legislation within 60, or in some instances 90, legislative days from introduction. U.S. Trade Act of 1974 (codified as amended at 19 U.S.C. § 2191 (1988)).

the proposed North American Free Trade Agreement ("NAFTA")⁴, which was granted only after environmental safeguards were promised by the executive branch.⁵

Thus, under NAFTA, political conditions relating to the environment were hoisted on United States trade negotiators for the first time ever. Despite gaining fast track authority approval from some environmental groups, and eventually from Congress, many other groups remained opposed to the executive's fast track authority. One major reason for the remaining opposition was the proposal by the Bush Administration to pursue trade and environment issues "parallel" to the trade negotiations, instead of integrating such concerns directly into NAFTA.⁶ Subsequently, in February 1992, the Bush Administration released two documents: a Review of United States-Mexico Environmental Issues⁷ and the Integrated Border Plan.⁸ Although these documents contained useful information, many environmental groups criticized the former as devoid of specific impact analysis and the latter as basically unenforceable. When the negotiated NAFTA was finally released to the American public on September 6, 1992, only a handful of environmental groups offered support for the document.

Then-candidate Clinton grasped NAFTA's environmental deficiencies during the campaign, and called for improved mechanisms to ensure enforcement of environmental standards, as well as for greater public participation in the dispute resolution process.⁹ Significantly, however, Clinton stated that he would not seek to renegotiate the text

4. North American Free Trade Agreement ("NAFTA"), released by the Office of the United States Trade Representative (USTR), Sept. 6, 1992. This text was subsequently "scrubbed" by lawyers from the three Parties, and a final text was released in Dec. 1992.

5. Response of the Administration to Issues Raised in Connection with the Negotiation of a North American Free Trade Agreement, May 1, 1991. The fundamental policy argument in favor of NAFTA environmental safeguards is that by gaining increased access to U.S. markets, which will attract foreign investment of all kinds, Mexico must not harm U.S. environmental or competitive interests by virtue of a weak environmental regime. See *Trail Smelter Arbitration*, 3 R. Int'l Arb. Awards 1911 (1941) ("[N]o state has a right to use or permit the use of its territory in such a manner as to cause injury . . . to the territory of another or the properties or person therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.").

6. Another reason for opposition to fast-track is the feeling by some that congressional delegation of negotiating authority was, and still is, an unnecessary grant of power to the executive branch. Others, however, view fast-track authority simply as a necessary legislative/executive compromise, borne from the lessons of the 1930 Smoot-Hawley Tariff Act.

7. Office of the U.S. Trade Representative, Review of U.S.-Mexico Environmental Issues (1992).

8. U.S. Environmental Protection Agency & Secretaria de desarrollo Urbano y Ecologia (Sedue), Integrated Environmental Plan for the Mexican-U.S. Border Area (First Stage, 1992-94) (1992).

9. Governor Bill Clinton, Expanding Trade and Creating American Jobs, Address Presented at N.C. State U., Oct. 4, 1992.

of NAFTA.¹⁰ In the months since President Clinton's inauguration, the Office of the United States Trade Representative ("USTR") and other federal agencies have been attempting to first develop, and then negotiate, an environmental supplement to NAFTA that would meet the President's stated goals. Simultaneously, the wide spectrum of United States environmental groups have attempted to balance the economic and environmental opportunities of the agreement with the unsustainable development dangers NAFTA poses.¹¹

This article does not attempt to describe the litany of environmental issues raised by NAFTA.¹² Rather, it will focus specifically upon NAFTA's presumed effect upon wildlife protection—an issue that has received relatively little attention in comparison to the serious pollution and human health concerns raised by increased investment in Mexico and relaxation of border barriers. Yet, as is well-acknowledged by biologists, the plight of other species and the degradation of their natural habitats is a crucial barometer of *homo sapiens'* well-being.¹³ In this context, it is vital to not only gauge the NAFTA impacts on wildlife, but to also proffer solutions to potential conservation problems.

NAFTA's Impact on United States Wildlife Laws

Perhaps the most pervasive threat to wildlife posed by NAFTA is its potential ability to threaten the myriad environmental and conservation laws of the United States, Mexico and Canada. Although an arbitral panel could find that a standard is contrary to NAFTA, it would not possess the sovereign authority to change a national law.¹⁴ NAFTA provides for suspension of trade benefits with "equivalent effect."¹⁵ A

10. See, e.g., Ambassador Michael Kantor, Testimony before the Senate Environment and Public Works Committee, USTR (Mar. 16, 1993).

11. See, e.g., Letter from seven environmental groups to Ambassador Michael Kantor (May 4, 1992); *Sierra Club Reiterates NAFTA Position—Calls For Greater Environmental Protection in Trade Agreement*, press release, May 4, 1993; Letter from eight border environmental groups to Ambassador Kantor (May 18, 1993) (on file with author). Canadian and Mexican groups are also not in unanimity on NAFTA.

12. See, e.g., S. Charnovitz, *NAFTA: An Analysis of Its Environmental Provisions*, 23 *Env'tl. L. Rep.* 10,067 (1993); Letter from 25 environmental groups to Ambassador Michael Kantor (Mar. 4, 1993); R. Housman & P. Orbach, *Integrating Labor and Environmental Concerns Into NAFTA*, 8 *Am. U. J. Int'l L. & Pol'y.*

13. See E. Wilson, *Is Humanity Suicidal?* N.Y. Times, May 30, 1993; E. Wilson, *The Diversity of Life* (1992). Certainly one viable way to assess the NAFTA's profound effect upon biodiversity conservation would be through an environmental impact statement under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4331 (1988) See *USTR v. Public Citizen*, No. 93-5212 slip op. (D.C. Cir Aug. 24, 1993).

14. U.S. Trade Act of 1974, 19 U.S.C. § 2504 (1988). The same protection for state and local environmental standards is not ensured. See NAFTA art. 105 ("The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments.").

15. NAFTA art. 2019. This remedy can have highly negative consequences by placing undue burden on legitimate conservation laws, and chilling state and Congressional attempts to create adaptive legislative solutions to serious ecological problems.

party's only recourse would be to allege that a standard violates either NAFTA's Chapter 7B provisions on sanitary and phytosanitary measures (SPS) (relating to, for example, food contaminants and pesticide residues) or Chapter 9's provisions on technical barriers to trade (TBT) (other environmental standards, including conservation and pollution laws).¹⁶ Also, because of NAFTA's close relationship to GATT, it is uncertain whether certain trade-based conservation measures adopted by the parties are safe from attack, particularly those measures relating to "process standards" and "extraterritorial" protection.¹⁷

Many problems also exist with the dispute settlement provisions of the NAFTA. All dispute panel deliberations are closed to the public, briefs by the parties are unavailable to the public, and citizens cannot make public comments.¹⁸ In addition, the parties to a dispute can actually keep the panel's final report from the public.¹⁹ Opening the dispute process to public participation is not only desirable for democratic reasons, but would also alleviate substantive concerns about the agreement.

Given this backdrop of secrecy, serious substantive concerns remain as to how, and with what degree of deference, NAFTA dispute panels will judge various conservation laws under Chapter 9 of NAFTA. Although Article 904(2) gives each party the "right" to establish "legitimate" standards to protect "human, animal, or plant life or health, the environment, or consumers" that the party itself "considers ap-

16. See NAFTA art. 2004 ("[T]he dispute settlement provisions . . . shall apply with respect to the avoidance or settlement of all disputes between the parties regarding the interpretation or application of this Agreement or wherever a Party considers that an actual or proposed measure of another Party is or would be inconsistent with the obligations of this Agreement or cause nullification or impairment"). While Greenpeace and others have argued that art. 2004, in conjunction with ch. 3 of NAFTA, could be used to limit the authority of governments "to limit the export of vital natural resources," alternative legal analyses dispute this claim. See Greenpeace, *How a Log Export Ban Became an Unfair Trading Practice*, release, May 25 & June 2, 1993; but see Memorandum from Winthrop, Stimson, Putnam & Roberts, Response to Greenpeace Letter (May 25, 1993) (on file with author). Nonetheless, as Greenpeace points out, NAFTA guarantees subsidies for oil and gas exploration is environmentally suspect *at best*. No such subsidies exist for clean or renewable sources of energy. NAFTA art. 608.2.

17. Because of NAFTA's general incorporation of it, GATT jurisprudence will be of prime relevance to NAFTA analyses. See art. 2101 ("GATT Article XX and its interpretive notes, or any equivalent provision of a successor agreement to which all Parties are party, are incorporated into and made part of this Agreement"). Art. XX of the GATT provides several environmental exceptions to basic trade rules. See also *supra* note 2 and *infra* note 23. In addition, NAFTA art. 103 provides that "The Parties affirm their existing rights and obligations with respect to each other under the General Agreement on Tariffs and Trade and other agreements to which such Parties are party. In the event of any inconsistency between the provisions of this Agreement and such other agreements, the provisions of this Agreement shall prevail to the extent of the inconsistency, except as otherwise provided in this Agreement."

18. NAFTA art. 2012(1)(a),(b) ("The panel's hearings, deliberations and initial report, and all written submissions to and communications with the panel shall be confidential.").

19. *Id.* art. 2017(4).

appropriate," it is unclear whether this protection extends to "process" standards, or how a product is made.²⁰ In addition, this protection has not been extended to United States conservation laws that protect natural resources outside the territorial jurisdiction of the United States; under NAFTA Article 2005, disputes over these standards are explicitly allowed to occur in a heretofore hostile GATT. United States laws, therefore, that seek to control trade in fish and wildlife products obtained in an objectionable fashion, from high-seas driftnet fishing to ivory from poached elephants, could easily fall outside Article 904's "legitimate" rubric and be subject to NAFTA or GATT dispute processes.²¹

If not protected under Chapter 9, the wide array of United States trade-based conservation and environmental standards will then have to fit within the general exceptions of NAFTA Article 2101 if the United States is to avoid retaliatory trade penalties.²² Given GATT's recent treatment of Article XX, NAFTA's incorporation of GATT environmental exceptions is highly problematic.²³ Two questions immediately leap to mind. First, can a country's wildlife laws restrict trade in

20. See *id.* art. 907(2) and 915. Process-related standards are central to effective environmental and wildlife protection. GATT does not allow distinctions between like products, based on production methods. The trade principle of "comparative advantage" should not be allowed to include advantage gained from weak environmental stewardship. Although the parties endeavor "to promote sustainable development" in NAFTA, there is no mention of either the "polluter pays" principle or the "precautionary" principle, both of which were embraced by Agenda 21 at the 1992 Earth Summit. Furthermore, "sustainable development" remains an elusive concept to define. For an example of an economic debate on the topic, see J. Dean, *Trade Policy and the Environment: Developing Country Concerns* (Mar. 1992) (paper prepared for OECD Environment Directorate, on file with author); M. Sagoff, *Environmental Economics: An Epitaph*, in *Resources for the Future* No. 111 (Spring 1992).

21. See, e.g., MMPA, 16 U.S.C. § 1371(a)(2) ("The Secretary of the Treasury shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards"); International Dolphin Conservation Act of 1992 (Pub. L. No. 102-523, 106 Stat. 3425 (1992)); High Seas Driftnet Enforcement Act of 1992 (Pub. L. No. 102-582, 106 Stat. 4901 (1992)); Wild Bird Conservation Act of 1992 (Pub. L. No. 102-440, 106 Stat. 2225 (1992)); African Elephant Conservation Act, 16 U.S.C. § 4221 (1988); Lacey Act, 16 U.S.C. § 3372 (1988); Pelly Amendment to Fishermen's Protective Act of 1967, 22 U.S.C. § 1978 (1988); Packwood Amendment to the Magnuson Fishery Conservation and Management Act, 16 U.S.C. § 1821(e)(2) (1988); 1989 Commerce and Related Agencies Appropriations Act (shrimp/sea turtles) (Pub. L. No. 101-515, 104 Stat. 2101 (1990)).

The MMPA's "comparability" standard, the center of the tuna/dolphin dispute, has also been invoked in non-tuna/dolphin contexts. For example, in May 1992, Defenders of Wildlife filed a petition with the Secretary of the Treasury to ban imports of crabs and crab products from Chile because of evidence that Chilean fishermen deliberately kill marine mammals for use as crab bait. Interestingly enough, Chile is often cited as the next signatory to NAFTA. See, Bush, *Chilean President Meet, But Trade Talks Uncertain*, J. Commerce, May 14, 1992.

22. See *supra* note 17.

23. See, e.g., Tuna/Dolphin Report, *supra*, note 2; GATT, *Thailand Restrictions on Importation of and Internal Taxes on Cigarettes*, Panel Report No. DS10/R (1990). See generally S. Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, 25 J. World Trade 5 (1991).

products that were produced in an objectionable manner? Second, can a country's wildlife laws restrict trade in certain products in order to protect natural resources outside the territorial jurisdiction of that country? Under "Tuna/Dolphin I,"²⁴ the answer to both these questions is "no." Neither the Bush Administration's NAFTA, nor Clinton's proposed environmental supplement adequately address these two questions.²⁵

NAFTA's Effect Upon International Wildlife Agreements

Another standards-based concern with NAFTA is its potential impact on international environmental agreements ("IEA's"). Under the September 1992 NAFTA, only five IEA's are granted protection: CITES; the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer; the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal; the 1986 Agreement Between Canada and the United States Concerning the Transboundary Movement of Hazardous Waste; and the 1983 Agreement Between the United States and Mexico on Cooperation for the Protection and Improvement of the Environment in the Border Area (the "La Paz Agreement").²⁶

The reason given by the Bush Administration for this short list of five agreements was that only these IEA's contain explicit trade provisions. This assertion is incorrect. The Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere ("Western Hemisphere Convention")²⁷, for example, regulates trade in "protected"

24. As a result of the MMPA's intermediary tuna embargoes, the European Community filed a GATT challenge in 1992. Known as Tuna/Dolphin II, a GATT panel decision is expected in late 1993.

25. The Clinton Administration's original proposal to Mexico and Canada on the supplemental environmental agreement to NAFTA, as well as Mexico's proposal, was leaked to the press in May 1993, and is presumed to be similar to the eventual site agreement. See *Inside U.S. Trade*, May 21, 1993. Because of its penchant for gaining access to classified documents, many now call the weekly trade publication "Inside USTR."

26. NAFTA art. 104. Although the obligations under these agreements prevail to the extent of any inconsistency with NAFTA, the NAFTA text adds that "where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions" of NAFTA. In addition, entering into future IEAs does not automatically qualify it under NAFTA. Rather, if the Parties wish to include either amendments to listed agreements or other IEAs, they are required to "agree in writing to modify Annex 104.1."

27. 56 Stat. 1374, U.S.T. 981, 161 U.N.T.S. 193. The 1940 Western Hemisphere Convention ("WHC"), signed by 21 countries, is a remarkable document for its time. It seeks to protect species of "special urgency and importance" by protecting habitat in order "assure them from becoming extinct." Its trade provisions served as a model for CITES (though Haiti has signed and ratified the WHC, but not CITES). In addition, the WHC does not exempt specimen transit from permit requirements as CITES does. Among present NAFTA parties, Mexico and the U.S. have ratified the WHC, while Canada has not even signed it. See also H.R. 869, 103d Cong., 1st Sess. (1993) (on Feb. 3, 1993, Rep. Robert G. Torricelli (D-NJ) introduced "A Bill to promote biological diversity conservation and cooperation in the Western Hemisphere").

species.²⁸ Further, as the United States attempts to create a western hemisphere trading block, through the Enterprise for the Americas Initiative, the Western Hemisphere Convention's habitat protection provisions could provide an effective and simultaneous mechanism for checking unsustainable trade.

The Bush Administration's rationale for IEA inclusion or exclusion in NAFTA was also flawed. Contrary to its thinking, whether an IEA contains actual trade provisions is really irrelevant. What is determinative are the legal obligations engendered by the IEA and the tools, including those relating to trade, used by countries to enforce the IEA. There is no sound legal or policy reason why a country cannot limit access to its markets based upon legitimate and well-enunciated conservation standards, whether established by an IEA it has ratified or by domestic law.²⁹ Trade "sanctions" should be defined as penalties applicable to unrelated products, and should be treated as distinctly different from trade bans on specific products (either because the product itself is objectionable or the process from which it is made is objectionable).³⁰ Nonetheless, trade sanctions are often the most effective means of ensuring compliance with IEA's or other established conservation standards.³¹

The Biological Diversity Treaty,³² completed at the 1992 U.N. Earth Summit, and now signed by all three NAFTA signatories³³, pro-

28. WHC, arts. VIII, IX.

29. See, e.g., B. Clinton & A. Gore, Putting People First (1992) ("No trade agreement should preclude the U.S. from enforcing nondiscriminatory laws and regulations affecting health, worker safety, and the environment."); S. Charnovitz, Remarks at the Council on Foreign Relations (May 6, 1993) ("Unless standards are protectionist, the lawmaking decision should be left up to each country . . . Each country should be able to pursue policies that reflect its own values").

30. NAFTA art. 309, like GATT Article XI, generally disallows trade prohibitions or restrictions "other than duties, taxes, or other charges." In other words, quantitative trade limitations, like quotas and embargoes, are NAFTA-illegal unless they fall under one of the exceptions.

31. See generally S. Charnovitz, *The Environment vs. Trade Rules: Defogging the Debate*, 23 *Env'tl. L.* 475, 492 (1993). Perhaps the most significant conservation sanction tool is the Pelly Amendment, *supra* note 21, as amended by the High Seas Driftnet Fisheries Enforcement Act, *supra* note 21, which allows the President to embargo any product from a country that "diminishes the effectiveness" of an international fishery conservation program or an international program for endangered or threatened species. The Pelly Amendment's certification process has been invoked, for example, to address commercial whaling in contravention of the International Whaling Convention. See also T. Kenworthy, *U.S. Pressures China, Taiwan on Animal Trade*, Washington Post, June 10, 1993. The Driftnets Act itself requires the President to prohibit the import of "fish and fish products and sport fishing equipment" against those countries "identified" as having nationals conducting large-scale driftnet fishing beyond the exclusive economic zone of any country.

32. See International Negotiating Committee for a Convention on Biological Diversity, U.N. Environmental Programme, 5th Sess., U.N. Doc. ST/LEG/SER.E/10/Supplement (1993).

33. Former President Bush, of course, refused to sign the treaty. The present U.S. Ambassador to the United Nations, Madeline Albright, signed the treaty on June 4, 1993—the last day on which the U.S. could still be an original signatory.

vides many potential examples of the IEA trade-enforcement principle. According to the treaty, contracting parties are required, *inter alia*, to establish a system to conserve "the variability of living resources" within so-called "protected areas," as well as regulate and manage resources outside protected areas.³⁴ Thus, if Mexico began a government-sponsored program of agricultural conversion, by clearing forests and employing large-scale pesticide application, there would be a convincing argument that Mexico was violating the convention's biodiversity conservation provisions. Consequently, the United States should possess the right, without threat of NAFTA-inconsistency, to embargo these agricultural products made in contravention of the treaty. Under the present NAFTA, however, the biodiversity convention is not protected and, even if it were, it would probably run afoul of NAFTA's bias against both "process" standards and extra-jurisdictional regulation.³⁵

Increased Trade and Investment Under NAFTA: Its Impact on Wildlife and Habitat

While many disagree over the overall social efficacy of "free trade," it is difficult to dispute the notion that increased trade and investment under NAFTA will induce certain environmental stresses on the land, air, and water of the North American continent.³⁶ The challenges, therefore, are how to best utilize the economic gains of free trade to the benefit of the environment, and how to best mitigate any negative environmental impacts that will occur.

34. See generally G. Porter, *The United States and the Biodiversity Convention: the Case for Participation* (1992); J. Fitzgerald, *The Biological Diversity Treaty of UNCED*, 9 *Endangered Species Update*, nos. 9 & 10 (1992).

35. On June 1, 1993, the National Audubon Society and six other environmental groups sent a letter to Trade Representative Mickey Kantor asking that at least 23 other IEAs be added to NAFTA Appendix 104.1. Specific wildlife agreements listed include the International Convention on Whaling, the Convention(s) for the Protection of Migratory Birds and Game Mammals, the Western Hemisphere Convention, the Agreement on Conservation of Polar Bears, the Convention on Biological Diversity, the Convention on the Conservation of Antarctic Marine Living Resources, certain bilateral agreements concerning fishing (e.g. salmon), the International Convention for the Conservation of Atlantic Tunas, U.N. General Assembly Resolution 46/215 (establishing a moratorium on large-scale high-seas driftnet fishing), and the Law of the Sea Convention. In addition, Friends of the Earth has identified the International Tropical Timber Agreement and the International Plant Protection Agreement as worthy of protection. Omitted from both lists was the 1975 Convention on Wetlands (Ramsar). See generally S. Lyster, *International Wildlife Law* (1985).

36. See U.S. Fish & Wildlife Serv. ("FWS"), *Implementation of the North American Free Trade Agreement (Draft)* (1993); see also American Rivers, *The Nation's Ten Most Endangered Rivers for 1993* (1993). At the top of the list was the Rio Grande/Rio Concho River "due to its extensive degradation from headwaters-to-mouth degradation and to pollution by newly developed industrial plants along the Mexican side of the border formed by the river."

From a wildlife perspective, the potential for NAFTA to fragment important species' habitats, particularly along the United States-Mexican border, is very real.³⁷ According to United States Fish and Wildlife Service ("FWS") estimates, at least 460 endangered, threatened, proposed, and candidate species of plants and animals are within 25 miles of the United States-Mexico border.³⁸ Many migratory birds travel within the corridors of all three NAFTA parties. As just one example of habitat degradation related to international boundaries, a present agriculture project in Sonora, Mexico already affects the springs from San Bernadino/Leslie Canyon National Wildlife Refuge in Arizona; the endangered Yaqui chub, the endangered Yaqui topminnow, and the endangered shiner are all fish species that depend upon these springs as essential habitat.³⁹

Also of immediate concern are the many bridges that will be erected between the United States and Mexico. Along the Rio Grande River, from the Gulf of Mexico to Del Rio, Texas alone, more than 20 bridges have already been proposed. As the FWS NAFTA implementation plan states, "each bridge and its approaches has the potential to destroy brush and riparian habitats; multiply human presence, lighting, noise, air pollution; and affect the management of state and federal wildlife refuges."⁴⁰ Considering that all of Texas has only four bridges connecting it to Mexico over the Rio Grande presently, these proposals for 20 additional bridges raise serious concerns.

The Federal Endangered Species Act ("ESA") currently provides some protection; in building these bridges and accompanying roads, the United States Customs Service under the Department of Treasury, the USTR, the Department of Transportation, and any other federal agency must ensure under the ESA that "any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species . . .".⁴¹ Section 7 consultation under the ESA is required when a federal action, which includes federally funding a project in whole

37. There is abundant literature linking the conservation of wildlife with habitat protection. See, e.g., E. Wilson, *supra* note 13, at 283; Endangered Species Act, 16 U.S.C. §§ 1531, 1533 (1988) ("The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved").

38. FWS, *supra* note 36, at 25.

39. *Id.* at 6.

40. *Id.* at 5.

41. ESA, 16 U.S.C. §§ 1531, 1536(a)(2). See also National Environmental Policy Act (NEPA), 42 U.S.C. § 4331; 40 C.F.R. §§ 1508.17, 18, 27; 22 C.F.R. § 161; and Council on Environmental Quality, Incorporating Biodiversity Considerations into Environmental Impact Analysis Under the National Environmental Policy Act (Jan. 1993); Clean Water Act, 33 U.S.C. § 1344 (1988); Fish and Wildlife Coordination Act, 16 U.S.C. § 661 (1988).

or in part, may affect any listed species. There is no requirement that actual harm to a listed species be shown prior to initiation of Section 7 consultation.⁴² The FWS and the United States Department of Justice must also vigorously enforce the ESA's "taking" prohibitions.⁴³ Among the threatened and endangered species that could be affected along the border by increased NAFTA traffic include the ocelot, jaguar, jaguarundi, peregrine falcon, Sonoran Pronghorn antelope, Mexican spotted owl, Mexican gray wolf, masked bob-white quail, and desert tortoise.⁴⁴

Of course, implementing existing legal tools will require adequate funding, both to clean up existing pollution and to accommodate future development activity.⁴⁵ Considering the present state of the United States budget, finding the necessary billions of dollars will not be an easy task. In addition, it is crucial to make funding and subsequent policy decisions open to public input, especially from those citizens along the borders.⁴⁶

In the interior of Mexico, NAFTA could induce and perpetuate harmful land use practices, as well as risk the long-term economic viability of its natural resources. NAFTA-driven investment will likely threaten already stressed Mexican water, animal, and plant resources. A report by Proyecto Fronterizo de Educacion Ambiental and the Border Ecology Project estimates that Mexico possesses 30,000 plant species, 1,000 bird species and 1,500 mammals, reptiles and amphibians—making it one of the most biologically diverse countries on this planet. In fact, approximately 15 percent of Mexico's plant and animal species are found nowhere else on earth. Unfortunately, Mexico's fisheries agency

42. See 50 C.F.R. § 402.14(a) ("Each federal agency shall review its actions at the earliest possible time to determine whether any action *may affect* listed species or critical habitat. If such a determination is made, formal consultation is required . . .") (emphasis added).

43. *Id.* §§ 1532, 1538, 1539.

44. See *id.* §§ 17.11-12. See also, e.g., 58 Fed. Reg. 11,821 (1993) (FWS proposal to list the Rio Grande Silvery Minnow as endangered under the ESA); 58 Fed. Reg. 19,216 (1993) (Petition to list the jaguar as endangered has been found by the FWS to be "warranted"). Furthermore, it has been reported that Monarch butterflies, whose winter home is on the mountain tops of central Mexico, are becoming homeless because of habitat destruction.

45. Rough estimates of border pollution clean-up alone range from \$5-15 billion. See, e.g., M. Curley, *Healing NAFTA's Achilles Heel*, J. Commerce, Mar. 16, 1993; see also FWS, *supra* note 36, at 46; U.S. Dep't of the Interior, Mexico-Dol Cooperative Activities (1992); Letter from The Nature Conservancy to Ambassador Kantor (May 17, 1993) ("[I]t is important to establish within the framework of the supplemental agreements direct consideration of biodiversity conservation and funding mechanisms for protection and management of natural resources."); *Funding Environmental Needs Associated With NAFTA*, Sierra Club, July 23, 1993; *The NAFTA Package: Funding Needs and Options*, Nat'l Wildlife Fed'n & Env'tl. Defense Fund, July 16, 1993.

46. See, e.g., Texas Center for Pol'y Studies, *NAFTA and the U.S. Border Environment: Options for Congressional Action* (Sept. 1992). This study addresses five intermingling border concerns: (1) Strengthening environmental law enforcement in Mexico, (2) Strengthening the framework for U.S./Mexico cooperation on border environmental issues, (3) Addressing the problems with the International Boundary and Water Commission

(SEPESCA) has a reputation for favoring commercial interests over true fisheries sustainability, and possesses no cognizable catch/effort standards. SARH, responsible for Mexico's forests, has traditionally favored timber production policies, paying less than necessary attention to the biological health of forest ecosystems (though the United States Forest Service and Canadian provinces are not irreproachable in this regard either). As a result, Mexico loses 560 million tons of fertile topsoil every year, literally causing 1500 acres of Mexican land annually to turn into desert.⁴⁷ As a potential solution, a commitment by the parties to NAFTA to revitalize the Western Hemisphere Convention would be an important opportunity for protecting wildlife and ecosystems not only in Mexico, but also in other countries in the western hemisphere that will likely eventually accede to NAFTA.⁴⁸

Habitat Opportunities Under NAFTA

Despite the multitude of dangers of wildlife habitat destruction potentially spawned by NAFTA, there also exist under NAFTA opportunities to link natural habitats that were heretofore separated by artificial political boundaries. One proposal would require each NAFTA party to appoint a group of land managers, conservationists, and other experts to a publicly accountable international panel responsible for reviewing border conservation projects.⁴⁹ Perhaps most noteworthy of border conservation projects is the Sierra Del Carmen escarpment south of Big Bend National Park, Texas, which was proposed by the Roosevelt Administration for international park status

(IBWC), (4) Providing a system for making information on the environmental impacts of U.S. companies operating in Mexico readily available to both U.S. and Mexican citizens, and (5) Confronting the need for major infrastructure improvements to handle the increasing industrialization and population growth in the U.S./Mexico border region. See also M. Gregory, *Environment, Sustainable Development, Public Participation, and the NAFTA: A Retrospective*, 7 J. Envtl. L. & Litig. 99 (1992).

47. L. Durazo et al., *Environmental and Health Issues in the Interior of Mexico: Options for Transnational Safeguards* 2-3 (1993) (working draft); see also M. Alvarado, *Despiadada destrucción de la fauna en Mexico*, *El Nacional*, Aug. 25, 1992; D. Engle, *Rare Sea Mammal is Close to Extinction*, *The News* (Mexico City), June 3, 1991; U.S., *Texas Fret Over Logging Plan*, *Big Bend Paisano*, July-Sept. 1992; K. Fuller, *NAFTA: Part of the Trade-Environment Solution*, *Wall St. J.*, July 16, 1993.

48. See Letter from nine conservation groups to Secretary of the Interior Bruce Babbitt (Apr. 15, 1993) ("We see the WHC/trade overlap as a major opportunity both to minimize the environmental impacts of new trade patterns and to promote enhanced hemisphere-wide biological diversity initiatives").

49. See Letter from National Parks and Conservation Association and seven other environmental groups to Majority Leader Richard Gephardt (May 7, 1993), which lists "border lands and resources that have potential as international parks, wild and scenic rivers, wilderness areas, or wildlife refuges" and which should be discussed as part of the Congressional NAFTA approval process.

and agreed upon in principle by Mexico in 1935; a plethora of species depend on the Sierra Del Carmen/Big Bend ecosystem of over 2 million acres.⁵⁰

NAFTA also possesses the potential to greatly expand the depth and degree of existing United States-Mexico cooperative activities in the field of conservation.⁵¹ While many of these activities are appropriately conducted on the government-to-government level, there are significant private sector opportunities, particularly in providing conservation and land use-related services in Mexico.⁵² For example, under the ESA landowners are allowed to carry out activities that may incidentally result in the killing of a protected species if a plan that, overall, conserves the habitat of the species is drafted and implemented.⁵³ Although the Mexican government is obviously not directly subject to the legal obligations of the ESA, the process of habitat conservation planning has created a large body of technical knowledge that could be imparted to interested Mexican parties. Secretary of Interior Bruce Babbitt's California gnatcatcher agreement is the latest effort to balance economic growth and effective conservation in this fashion.⁵⁴ Given Mexico's new obligations under the biodiversity convention, the American habitat conservation plan experiences could be valuable to the Mexican government and to investors in Mexico.⁵⁵

The Special Problem of Mexican Environmental Enforcement Under NAFTA

When the United States and Canada concluded their bilateral trade agreement in 1988⁵⁶, limited attention was paid to environmen-

50. There were 14 other potential international protected areas, on both U.S. borders, identified by the letter to Gephardt, including the Tijuana Slough in southern California and Baja California. Unfortunately, Tijuana National Wildlife Refuge also demonstrates the peril of increased human traffic as thousands of illegal Mexican immigrants, as well as associated garbage, have placed endangered bird species like the least Bell's vireo and light-footed clapper rail at great risk. See B. Ross & L. Kanamine, *Human Tide Endangering California Refuge*, USA Today, June 8, 1993. Seven other U.S. national wildlife refuges are within 25 miles of the Mexican border. FWS, *supra* note 36, at 15-22.

51. See Mexico-Dol Cooperative Activities, *supra* note 45; D. Scott, *Network to Help Foresters Adjust to Free Trade*, Christian Science Monitor, Apr. 29, 1993.

52. See generally *The National Environmental Trade Development Act of 1993: Hearings on H.R. 2112 Before the Subcomm. on Environment and Natural Resources of the House Comm. on Merchant Marine and Fisheries*, 103d Cong., 1st Sess. (1993) (statements of Donald Connors and William Snape, 25 May 1993).

53. ESA, 16 U.S.C. § 1539(a)(2). In short, this section allows otherwise prohibited takings if a permit applicant submits a detailed habitat conservation plan (HCP). See generally M. Bean et al., *Reconciling Conflicts under the Endangered Species Act: the Habitat Conservation Planning Experience* (1992).

54. See *Tiny California Bird is First on Protection Plan*, Associated Press, Mar. 26, 1993.

55. See NAFTA art. 1114(2) ("The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures"). This provision has been criticized for creating no legal obligations.

56. Canada-U.S. Free Trade Agreement, Jan. 2, 1988, 27 I.L.M. 281. See also Canadian Environmental Protection Act (1988).

tal standards and enforcement because the environmental regimes of the two developed countries were roughly similar. However, as NAFTA seeks to directly link the economies of developed and developing countries for the first time, increased attention has focused upon the Mexican environmental system. Weak environmental standards and enforcement in Mexico could not only result in competitive disadvantages to United States and Canadian businesses, but an unsustainable Mexican environmental regime could also create or perpetuate grave environmental dangers to the continent, particularly as increased investment flows into Mexico.⁵⁷

Mexico overhauled its environmental regime in 1988 with The General Law of Ecological Equilibrium and Environmental Protection.⁵⁸ Although this law has received general praise⁵⁹, serious doubts about its enforceability exist.⁶⁰ Lack of financial resources and technical expertise,⁶¹ as well as lingering allegations of governmental corruption⁶² are the reasons most commonly cited for lax enforcement of the law.

Nowhere is the lack of enforcement capabilities more evident than along the United States-Mexico border, where several border agreements and the International Boundary and Water Commission⁶³ have not been able to prevent abnormally high rates of death and dis-

57. A weak environmental legal regime by a trade partner, especially one with a 2000 mile shared border, can lead to both competitive and environmental injuries to a country. See D. Chapman, *Environmental Costs and NAFTA before the U.S. International Trade Commission* (Cornell Univ., Nov. 18, 1992) ("Environmental and worker protection may indeed be significant factors in industrial location"); Friends of the Earth, *Standards Down, Profits Up!*, release, Jan. 1993; Trail Smelter Arbitration, *supra* note 5; but see P. Low & A. Yeats, *Do Dirty Industries Migrate?*, in *International Trade and the Environment* (P. Low ed., 1992).

58. Published in the federal *Diario Oficial* on Jan. 28, 1988 and effective Mar. 1, 1988. Translation by Latin American Communications Service, Feb. 1988 [hereinafter, *General Ecology Law*]. SEDUE (Secretaria de Desarrollo Urbano y Ecologia), the chief agency responsible for implementing the 1988 law, has since been consumed by SEDESOL (Secretariat de Desarrollo Social).

59. For example, while NEPA applies only to major federal actions, Mexican environmental impact evaluations cover both public and private actions. NEPA, 42 U.S.C. § 4332; *General Ecology Law* art. 23. Under Mexican law, however, public participation is not required until after an "EIS" is filed. *Id.* art. 33. But see T. Robberson, *Cloud Over Trade Pact — Texas Too*, *Washington Post*, June 22, 1993.

60. See Clinton, *supra* note 9 ("We need a supplemental agreement which would require each country to enforce its own environmental and worker standards"). For a sobering account of worker's rights in Mexico, see J. Levinson, *World Policy Institute, Unrequited Toil: Denial of Labor Rights in Mexico and Implications for NAFTA* (1993).

61. See Snape, *supra* note 52; R. Schlickeisen, *Environmental Test for Trade: Ironclad Protections Are Needed*, J. Commerce, May 28, 1993; World Bank, *Conservation of Selva Lacandona Encouraged by Joint Mission*, *Env't Bull.* (Spring 1993).

62. See, e.g., A. Reding, *Mexico: Corruption From the Top*, *Washington Post*, June 14, 1993; T. Robberson, *Mexican Drug Dealers Cut Pervasive Path*, *Washington Post*, May 31, 1993. See also J. Calderon, *NAFTA, Sovereignty and National Development, and Mexico: Reflections About Free Trade Agreement and Democracy* (July 1993) (unpublished manuscript on file with author).

63. See *supra* note 46.

ease around the maquiladoras region.⁶⁴ Similarly, though Mexico became a party to CITES in 1991, significant illegal trade in wildlife and wildlife parts is still feared to emanate from Mexico. Increased transport and tourism under NAFTA will likely result in even more illegal trade in leather goods, furs, birds, sea turtle products, and other products.⁶⁵ United States and Mexican enforcement officials will both need additional funds to properly implement and monitor existing laws.

Of course, every commercially desirable supply is triggered by demand, and Americans have earned a reputation for consumption demand. American appetites for the endangered totoaba fish, for example, has encouraged Mexican fishermen in the Gulf of California to illegally cast gillnets for totoaba, which not only catch the targeted fish, but also incidentally snare the highly endangered vaquita porpoise.⁶⁶ When imported, United States border agents are unable to distinguish totoaba from other species of sea bass because they are both filleted, making them appear identical without DNA testing.⁶⁷ Thus, Defenders of Wildlife requested the Secretary of Commerce in May 1992 to either promulgate a regulation requiring that these fish come across the border with heads and tails intact,⁶⁸ or that the Secretary list the other species of bass as endangered under the ESA.⁶⁹ Despite the fact that such actions are wholly consistent with CITES, some Mexican and United States officials believe they might be "illegal unilateral trade measure(s)." ⁷⁰To date, the Commerce Department has not acted on Defenders' petition, although Mexican President Salinas recently made a large portion of the area, where the totoaba and vaquita interact, a Mexican "biosphere preserve."⁷¹

64. Lack of environmental enforcement has directly lead to public health dangers; see, e.g., Government Accounting Office, Pub.No. GAO/GGD-92-113, U.S.-Mexico Trade: Assessment of Mexico's Environmental Controls for New Companies, (1992) and Pub.No. GAO/NSIAD-91-227, U.S.-Mexico Trade: Information on Environmental Regulations and Enforcement (1991). See also *supra* notes 46-47.

65. See generally D. Rose, A North American Free Trade Agreement: the Impacts on Wildlife Trade (World Wildlife Fund ed., 1991). See also J. Mills & C. Servheen, The Asian Trade in Bears and Bear Parts (World Wildlife Fund ed., 1991).

66. The totoaba fishery has been illegal in Mexico since 1975. See generally V. Monks, *Baja's Periled Porpoise*, Defenders, July/Aug. 1992.

67. See Letter from John Twiss, Executive Director of the Marine Mammal Commission, to William Fox, Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration (NOAA) (Nov. 1, 1991).

68. Such action is authorized by MMPA, 16 U.S.C. § 1382(a) and ESA, 16 U.S.C. § 1533(d). Petition on file with author.

69. See ESA, *Id.* §§ 1533(e), 1539; 50 C.F.R. § 17.52.

70. Department of State Telegram from U.S. Mexican Embassy to U.S. State Department (Limited Official Use) (Jan. 1993) (on file with author).

71. See *General Ecology Law*, *supra* note 58, art. 46. Although this action by Salinas was certainly a positive one, politics, not law, compelled it. See S. Rotella, *Mexico Creates Fish Sanctuary*, Los Angeles Times, June 11, 1993. Compared to its pollution standards, Mexican law creates few conservation duties or obligations, and pales in comparison to the legal regime established by the U.S. See also ESA, MMPA, National Forest Management

The Clinton/Kantor NAFTA Enforcement Plan

In order to "promote effective enforcement of the environmental laws of each Party,"⁷² Clinton's NAFTA environmental proposal creates two complementary, and not mutually exclusive, legal mechanisms: First, Article 6 states that "[e]ach party shall ensure that persons with a legally cognizable interest in the particular matter have appropriate access to administrative or judicial procedures for the enforcement of the Party's environmental laws."⁷³ This means theoretically that a harmed United States citizen, as well as Mexican and Canadian citizens, could use the Mexican court system to remedy an environmental violation in Mexico. Responding to accusations questioning the judicial integrity of Mexican courts, the United States proposal would also provide "fairness and transparency," by, *inter alia*, requiring the proceedings and decisions to be public, ensuring certain evidentiary safeguards, and mandating certain cost and time limits.

Second, under Article 16 the United States proposal would allow either a Party or the Secretariat of the proposed North American Commission on the Environment ("NACE")⁷⁴ to convene a special session of the NACE Council to address "a persistent and unjustifiable pattern of non-enforcement" of any Party's environmental laws. The Secretariat would possess the authority to obtain any enforcement or compliance information from a Party, subject to that Party's law, and "[i]f a Party does not make available any such information . . . it shall promptly furnish a written statement of its reasons to the Secretariat."

Act (16 U.S.C. § 1601 (1988), 36 C.F.R. § 219.3), and Fishery Conservation and Management Act (16 U.S.C. 1801 (1988)), among others. See generally *General Ecology Law* arts. 44-87. Thus, for Mexican wildlife legal protection, the real issue may become the actual establishment of a conservation program(s), with legally cognizable standards, under the Biodiversity Convention. See also International Whaling Commission 44/32, Mexican Policies for the Conservation and Utilization of Natural Resources (1992).

72. This is the environmental enforcement goal of the Clinton NAFTA proposal. See Inside U.S. Trade *supra* note 25.

73. The concept of opening Mexican courts to Mexican and foreign citizens for environmental violations has its origins in NAFTA's provisions on intellectual property rights (IPR) in art. 17. Because environmental injuries are often not economically quantifiable, like those relating to IPR, the term "legally cognizable interest" is troubling to conservationists. See, e.g., *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130 (1992).

74. See Inside U.S. Trade, *supra* note 25 ("1. The Parties hereby establish the Commission on the Environment, whose mandate shall be to facilitate the achievement of the objectives of this Agreement. 2. The Commission shall be composed of: (a) a Council, comprising [cabinet-level representatives][the environmental ministers] of the Parties or their designees; (b) a Secretariat; and (c) a Public Advisory Committee.").

The Clinton proposal would allow NACE to "consider any matter in respect of the environment, including: (a) living natural resources, including threatened and endangered species; (b) the conservation of other renewable natural resources; (c) environmental matters as they relate to economic development, including the environmental effects of the NAFTA, (d) process and production methods, (e) general goals for enforcement programs; and (f) pollution prevention techniques and strategies."

If, after the Secretariat prepared an enforcement report, and two of the three Parties so agreed, the Council could convene an arbitral panel under NACE to consider the matter. Unlike dispute settlement under Chapter 20 of the Bush Administration NAFTA, the NACE panel's proceeding would be open to the public, though the extent of public participation remains unclear.⁷⁵ If the panel made an affirmative finding of non-enforcement, then the Council would have 30 final days "to resolve the matter," after which the complaining Party could "suspend an appropriate level of benefits under the NAFTA."⁷⁶

In assessing the relative merits of the two enforcement schemes, it is plain that each would bring different strengths. The domestic-IPR model could primarily help catalyze Mexican citizens to participate more fully in the enforcement of their own environmental and conservation laws.⁷⁷ The NACE-trade sanction model⁷⁸ would allow tri-national oversight of particularly egregious environmental degradation.⁷⁹ When examined in this light, the performance of the Mexican judicial and administrative processes, if and when a NAFTA is implemented, becomes particularly crucial in securing an environmentally healthy continent.

75. For example, though a citizen may send "submissions" to the Secretariat, and presumably to one's domestic government, nothing compels the Secretariat, under the first Clinton proposal, to convene the Council for an arbitral panel, or to take any other affirmative action. Furthermore, under the present Clinton proposal, the public cannot participate in the arbitral panel's hearing in any way.

76. The issue of NAFTA enforcement, and appropriate remedies, has received significant attention. See, e.g., R. 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 (1993); K. Berlin, Memorandum on Trade, Environment, and Enforcement (May 6, 1993) (on file with author); P. Behr, *Environmental Groups Urge Tougher Free-Trade Agreement*, Washington Post, Mar. 6, 1993. While Sen. Max Baucus (D-MT) has led the Congressional charge for tough environmental enforcement measures under NAFTA, Mexico and Canada have not been as receptive.

77. See, e.g., Statement by Homero Aridjis, Mexico's Environmental Movement and its Influence on the NAFTA Negotiations (Feb. 19, 1993) (on file with author).

78. For additional proposals to account for trade distortions and other injuries due to lax, or non-existent, enforcement of environmental law, see Charnovitz, *supra* note 31; G. Brooks, *International Economics and International Trade: An Adaptive Approach* 5 Geo. Int'l Envtl. L. Rev. 239 (1993), which discusses issues like subsidies, countervailing duties, and dumping as they relate to environmental protection. Majority Leader Gephardt, on 11 May 1993, called for a "Green and Blue 301" that would allow a stronger U.S. response to inadequate pollution control and worker protection around the world. See also U.S. Trade Act of 1974, 19 U.S.C. § 2411 (1988).

79. Although NACE's objectives include promotion of "conservation, protection, and improvement of the environment, including natural resources," and "sustainable development in each country," irrespective of direct relation to NAFTA, two factors make NACE an unlikely forum to become a truly broad and enforcement mechanism: 1) a rigorous set of legal procedures and burdens make the imposition of sanctions less likely than not, and 2) a large number of potential submissions to the NACE means that the relatively small NACE staff will not be able to address all legitimate enforcement concerns. As such, the Public Advisory Committee could receive additional powers to make the NACE more responsive to the content and number of submissions to it.

CONCLUSION

Very much like the ongoing debate over NAFTA's potential impact on jobs, the trade pact's effect upon wildlife is simply not clear. Yet, if drafted and negotiated successfully, the Clinton NAFTA environmental supplement could not only safeguard United States conservation standards and protection efforts, but also establish institutions and practices that advance wildlife protection throughout the continent. Great opportunities lie in establishing an effective development paradigm under NAFTA, which could make sustainable growth possible, as well as establish a positive example for other international institutions like the GATT, World Bank, and International Monetary Fund.

But if the Clinton Administration is to successfully complete a conservation-friendly NAFTA package, four basic requirements must be addressed by the original NAFTA and the additional legal attachments: (1) United States legal protections for wildlife and other natural resources, established by domestic or international law, must not be weakened; (2) NAFTA must not permit or encourage Mexico to become a haven for unscrupulous development; (3) adequate resources must be made available to not only clean-up existing degradation, but also provide for future infrastructure and enforcement needs; and (4) caring citizens must be able to meaningfully participate in NAFTA-related actions that affect wildlife conservation.

For better or worse, the tense politics and high stakes of NAFTA make it susceptible to dogmatic assertions by all sides of the debate.⁸⁰ And though the politics of trade agreements often cloud the substantive gains made possible by such agreements, liberalized trade can benefit sustainable and prosperous development. On the other hand, because free trade is a means and not an end, its mantra should not be allowed to trump all other societal values. Rather, on this ever shrinking planet, we must strive to advance new public policies that support, not threaten, the precious wildlife and natural resources we have all inherited.⁸¹

80. See, e.g., J. Maggs, *Kantor Walks Tightrope on Labor Environment*, J. Commerce, May 7, 1993. Negotiations on the environmental supplement to NAFTA should be completed, according to USTR, by Sept. 1993.

81. C. Ponting, *A Green History of the World: the Environment and the Collapse of the Great Civilizations* (1991); A. Leopold, *A Sand County Almanac* (1949) ("Wilderness is the raw material out of which man has hammered the artifact called civilization . . . A thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise.").