TRADE AND FOREIGN INVESTMENT LIBERALIZATION AND SUSTAINABLE DEVELOPMENT IN MEXICO

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ABSTRACT

This thesis analyses the interface between sustainable development and trade openings and the liberalization of foreign investment in Mexico. The position to be argued throughout this thesis is that the Mexican legal framework, crafted to avoid further degradation of the environment as required by sustainable development, has proven to be limited in meeting the objectives established in the North America Free Trade Agreement and its side accord, the North American Agreement on Environmental Cooperation. This thesis analyses the provisions intended for the protection of the environment within the North American Free Trade Agreement (NAFTA) and the outcome of NAFTA's Chapter 11 investors dispute resolution mechanism and the North American Agreement on Environmental Cooperation (NAAEC) citizens' submission process concerning Mexico.

RÉSUMÉ

Une analyse des rapports entre le développement soutenable et les ouvertures commerciales ainsi que la libéralisation de l'investissement à l'étranger au Mexique forme le sujet de cette thèse. La thèse démontrée dans ce mémoire est que le commerce et la libéralisation des investissements à l'étranger au Mexique sont très restreints vis-à-vis des actions requises par le développement soutenable afin d'éviter toutes atteintes à l'environnement. Cette thèse donne une analyse de la prise des dispositions nécessaires pour protéger l'environnement dans le contexte de l'Accord de Libre-Échange Nord-Américain (ALÉNA) et les résultats du processus du chapitre 11 de l'ALÉNA, dans la résolution des contestations par les investisseurs, ainsi que le processus de l'Accord Nord-Américain de Coopération dans le Domaine de l'Environnement (ANACDE) concernant la soumission des plaintes des citoyens du Mexique

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INTRODUCTION

Attaining sustainable development in Mexico is an economic, social, and environmental challenge. The process of economic liberalization experienced by the nation in recent decades has brought along with it a profound concern over the possibilities of generating growth, reversing the impoverishment of large sectors of the society, and avoiding further degradation of the environment. A population of 94 million is characterized by deep inequalities between rich and poor, urban and rural communities, and disproportionate suffering from public health problems and dreadful environmental conditions. Under these circumstances two societies coexist in a dual economy: one developed and the other poor.

The position to be argued throughout this thesis is that the Mexican legal framework crafted to avoid further degradation of the environment as required by sustainable development, has proven to be limited in meeting the objectives established in the North America Free Trade Agreement and its side accord the North American Agreement on Environmental Cooperation.

The case of Mexico is particular because it is the first developing country to sign a free trade agreement with provisions intended to protect the environment. The negotiation process, the current implementation of the agreement, and the outcome of the claims submitted to the dispute resolution mechanisms for protection of the environment may prove instructive to other Latin American developing countries that are intending to accomplish sustainable development by liberalizing their economies.

Chapter One describes, on the one hand, how Mexico's domestic legal framework for the creation, implementation, monitoring and enforcement of domestic environmental law was primarily motivated by compromises reached within the United Nations (UN) system. On the other hand, this chapter describes how trade and foreign investment liberalization within the North American context, another external influence, came to bring together two disciplines that at both the domestic and the international levels have been traditionally treated separately by the Mexican government. The chapter seeks to demonstrate that the evolution of Mexican environmental law as required by sustainable development was mainly an external influence and as such was dissociated from the social and environmental requirements of the population. Furthermore, only with the advent of trade

and foreign investment liberalization did the enormity of the task of providing environmental protection as required by sustainable development become a growing concern, especially when the limitations of the Mexican environmental legal framework became evident. To demonstrate this the chapter is divided in four parts. The first part examines the relation between economic development, social growth and environmental protection and reviews the two landmark conferences on environment and development: the 1972 UN Conference on the Human Environment and the 1992 UN Conference on Environment and Development. The second part examines the relation of trade and foreign investment liberalization and the protection of the environment as required by sustainable development. The third part reviews the issues of sustainable development, poverty, and environmental protection in Mexico and the relatively recent regulations created to protect the Mexican environment. This part defines the problem by analysing Mexico's urge to attain economic growth by relying on trade aperture and foreign direct investment and provides an assessment of Mexico's environmental commitments and accomplishments. The final part examines environmental protection and sustainable development as included in North American Free Trade Agreement and the difficulty of reconciling trade and environmental objectives.

Chapter Two reviews the North American Agreement on Environmental Cooperation and its citizens' submission process. The idea behind this chapter is to examine the outcome of the NAAEC dispute resolution mechanism in relation to Mexico and how the citizens' submission process has revealed major Mexican limitations for providing sustainable development under the current environmental law. This chapter identifies three situations related to Mexico: first, the ineffectiveness of the Popular Complaint remedy for the enforcement of Mexican environmental regulations; second, the discretionary powers invested in the Mexican environmental civil servants to investigate and take action against violators; and third, the lack of accountability of the Mexican environmental authorities. Each of these situations is manifested in the main citizens' complaints submitted against the Mexican government. To demonstrate the limited capacity of the Mexican government to provide environmental protection as required by NAAEC this chapter is divided in three parts. The first part studies the party-to-party dispute resolution mechanism and the processes involved in appealing to Articles 14 and 15 through which non-governmental organizations ("NGOs") or persons may file a submission alleging that a member country is not

enforcing its environmental law effectively. The second part analyses the outcomes of the citizens' submission process while the final part surveys the positive contributions of the citizens' submission process and suggests some modest proposals for the achievement of environmental protection in Mexico as required by sustainable development.

Chapter Three studies the outcomes of NAFTA's Chapter 11 investor-State dispute resolution mechanism, particularly the right of investors to challenge laws and regulations or their application, including those pertaining to public health and the environment of the host state, which represent negative economic impacts for foreign investors. The idea behind this chapter, in a way similar to the purpose of Chapter Two, is to demonstrate Mexico's limitations to provide environmental protection as required by sustainable development. However, this chapter analyses how foreign investment liberalization sponsored by the Mexican central government may generate a climate of environmental regulatory inaction, inhibit the devolution of environmental authority to Mexican sub-national governments, and eventually misrepresent local environmental interests in Chapter 11 international arbitrations. For this purpose the first part of this chapter reviews the particular conditions of investment liberalization in Mexico. The second part examines the substantial and procedural issues recognized by Chapter 11 and the interpretative statement concerning Chapter 11 released by NAFTA's Free Trade Commission. The third part analyses two disputes submitted to Chapter 11 arbitration panels: Methanex v. United States, a dispute still pending resolution that indirectly supports concerns about the capability of the Mexican government to provide legitimate regulations to protect the environment, and Metalclad v. Mexico, the only complete NAFTA Chapter 11 decision to date, in which the Tribunal decided in favour of the investor on the question of expropriation and made a compensatory award. Finally, I will evaluate the likelihood of enhancing or reducing the achievement of sustainable development in Mexico through NAFTA's Chapter 11 provisions.

Chapter Four is divided in three parts. The first part reviews the international and domestic considerations that have been characteristic of Mexico's aggravated condition in regard to social development, public health, and environmental protection. The second part surveys the consequences of Chapter 11 provisions in an underdeveloped country like Mexico and how NAFTA's substantive issues interpreted with a unilateral scope of obliga-

tions have been a limitation on the attainment of sustainable development. The final part of this chapter links the analysis of Chapter 11 and the NAAEC. The objective of this chapter is to present modest proposals for change: on the one hand, domestically, by suggesting devolution to Mexican local governments in environmental matters as a means to enhance investor and public trust in the regulation of economic activities in an environmental sound manner; and on the other hand, internationally, by proposing a closer integration between NAAEC's Commission for Environmental Cooperation and NAFTA's Free Trade Commission to provide legitimacy, transparency and accountability to the Chapter 11 process. The idea is that due to the difficulty of reopening NAFTA, this integration would represent an indirect approach to overview Chapter 11 claims when either social welfare or environmental protection as required by sustainable development is at stake.

CHAPTER 1. SUSTAINABLE DEVELOPMENT, MEXICO AND NAFTA

The complexity of attaining sustainable development is a consequence of the interactive elements involved in its accomplishment. The harmonious relations between economic growth, social development, and environmental protection (sustainable development) change according to the industrialization of a given society and the value attributed by individuals to each of the issues involved. There is a long-standing study of the relations between economic development and social growth and how the law and the legal institutions have been regulating wealth accumulation and income redistribution. But when the regulation of economic enterprises that generate wealth and eventually provide social equity are conditioned to the consequences of such activities on the environment, an already multifaceted regulatory framework becomes more complicated.

The overall objective of this chapter is to demonstrate that Mexico's enactment of regulations intended to protect the environment has been mainly in response to external influences. Notwithstanding the inclusion within Mexico's domestic legal framework of international environmental commitments such as those signed with the United Nations and recently with the NAFTA parties, there has been a limited implementation by the Mexican federal government of regulations intended to arrest the environmental problems associated with development. To analyse this situation this chapter is divided into three sections. The first section reviews briefly the economic, social and environmental elements involved in the attainment of sustainable development. This section then traces the evolution of sustainable development in environmental law from the 1972 Stockholm Conference on Human Environment through the post-Rio Declaration era. The idea behind this review is to demonstrate that the relatively recent advent of trade and foreign investment liberalization as the main strategies to drive economic growth has become a dominant factor in the attainment of environmental protection as required by sustainable development. The second section of this chapter describes the incorporation of the concept of sustainable development within Mexico's environmental regulations. It describes how Mexico's enactment of regulations to protect the environment has been mainly in response to international commitments. The external nature of these legal influences has created a highly centralized

system for environmental policy making and environmental justice with a limited capacity to regulate the effects of development on the environment. The third section of this chapter analyses the original NAFTA provisions aimed at regulating the potential environmental consequences of expanded trade and foreign investment liberalization and the difficulty of applying environmental rules because of their tendency to function as trade barriers.

A. The Need for Economic Development, Social Growth, and Environmental Protection

The satisfaction of human needs and aspirations is the major objective of development. Since human needs and aspirations are satisfied by the transformation of resources provided by the environment and the allocation of these resources on our planet is uneven, we face a problem with the equitable distribution of these assets among the poor and the rich, the developed and the developing countries, and the present and future generations. To overcome these inherited conditions the system places trust in economic development.[1]

Economic development has been associated with narrowing the equity gap between the rich and the poor, not by lowering the income of wealthy individuals but by raising the living standards of those with fewer resources ("enriching the poor"). However, this situation is different between a developed and a developing country, for example the fragility of wealth held by elites in many developing countries, as the various economic crises in Latin America over the last decade suggest.[2]

Economic development depends on growth to reduce poverty; moreover, the smooth functioning of our economic system relies on growth. Without the hope of growth, capitalists would not invest. Without growth in production, productivity increases would cause unemployment. Without growth, redistribution to the less well off becomes more compli-

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[1] See generally V. L. Urquidi, "El Desarrollo Sustentable, Economía y Medio Ambiente" in A. Glender and V. Lichtinger, ed., *La Diplomacia Ambiental, México y la Conferencia de las Naciones Unidas sobre Medio Ambiente y Desarrollo* (México: Secretaría de Relaciones Exteriores y Fondo de Cultura Económica, 1994) at 66.

[2] The recent 1994 Mexican financial crisis eroded the growing expectations that Mexican and foreign investors had about the positive impact of NAFTA on the Mexican economy. "The crisis also provoked a terrible recession, the end of which is still not in sight. Consequently, the premise (namely, economic liberalization) and the promise (long-term economic growth) under which the Mexican government sold NAFTA to the Mexican society is facing a serious predicament." See generally I. Morales, "Nafta Revisited: Expectations and Realities: The Mexican Crisis and the Weakness of the NAFTA Consensus" (1997) 550 Annals 130. Also see E. R. Carrasco and R. Thomas, "Encouraging Relational Investment and Controlling Portfolio Investment in Developing Countries in the Aftermath of the Mexican Financial Crisis" (1996) 34 Colum. J. Transnat'l L. 539, suggesting that "[i]nvestors will shift capital into developing countries that adopt macroeconomic policies to ensure stable, high rates of effective return. However, if returns drop, or are eroded by inflation, investors can withdraw billions of dollars of capital almost overnight, wrecking the local economy. In many instances, even if the developing countries follow domestic policies conducive to foreign investment, capital can still shift suddenly to other markets because of changes in world economic conditions, leaving behind economic chaos."

cated. Growth by itself, however, does not change the redistribution of income. The alleviation of poverty depends on the proper allocation of the additional income generated by growth. So the sustainability of economic development depends on the equitable distribution of the wealth generated by growth in such a way that the benefits of growth spread throughout the social group, benefiting as many individuals as possible.[3]

Economic growth and development, by definition, involve a modification of the physical ecosystem. Not every ecosystem everywhere can be preserved intact. Settled agriculture, the extraction of minerals, the emission of noxious gases to the atmosphere, the concentration of population in urban areas, the generation of waste, and the exploitation of watersheds are examples of human exploitation of natural resources. Evaluating whether this influence is positive or negative depends on the scale of human intervention during the course of development. If a watershed or a forest is used over its physical limits the rate of exploitation of the natural resource is beyond natural recovery. To avoid the degradation of a natural resource beyond reasonable recuperation, development must sustain the natural resources that support the current and future potential to meet human needs and aspirations. Development and environmental protection must go hand-in-hand; ideally the guiding principle of economic activity should be sustainable development.[4]

Poverty itself is a cause of environmental degradation. A world where poverty and restricted opportunities for development are prevalent will always be prone to environmental and economic disasters. Developing societies that are trying to overcome poverty are inclined to deploy their resources as a way to obtain short-term economic gains. Once natural assets have been exploited to exhaustion, no further means of subsistence will be left for sustaining future populations. On the one hand, sustainable development requires meeting the basic needs of food, clothing, shelter, and jobs for all and extending to the coming gen-

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[3] The World Bank's most detailed-ever investigation of global poverty, "World Development Report 2000/2001: Attacking Poverty", states that economic growth is crucial but often not sufficient to create conditions in which the world's poorest people can improve their lives. As countries become richer, on average the incidence of income poverty falls and other indicators of well being, such as average levels of education and health, tend to improve as well. For these reasons economic growth is a powerful force for poverty reduction. See generally *World Development Report 2000-1: Attacking Poverty*, online: World Bank homepage, http://www.worldbank.org/poverty/wdrpoverty/index.htm (date accessed: June 17, 2002).

[4] "Research based on 'Kuznets curves' has demonstrated an association between an increase in per capita wealth and a decrease in some types of pollution. When the amount of pollution is plotted against per capita GNP, a curve shaped like an inverted 'U' – ∩ – results. As economic activity grows, the argument goes, air and water pollution first increase. Then, possibly because basic needs such as food and shelter have been addressed, pollution control is implemented and pollution decreases." See generally J. Salzman, "Seattle's Legal Legacy and Environmental Reviews of Trade Agreements" (2000) 31 Envtl. L. 501. Also D. Hunter, J. Salzman & D. Zaelke, *International Environmental Law and Policy*, (New York: Foundation Press, 1998) at 50 [hereinafter: *D. Hunter, J. Salzman & D. Zaelke*].

erations the possibility of a better quality of life. On the other, sustainable development requires that the negative impacts on the quality of air, water, and other natural elements be minimized in order to sustain the ecosystem's overall integrity. Therefore, development can only be pursued in accordance with the limits of the environment and development's contribution to a more just and equitable social order.

In summary, the dynamic interaction among the process of industrialization to attain economic growth, the generation of employment and wealth redistribution, and the protection of the environment requires a flexible and encompassing implementation of public policies directed towards the accomplishment of sustainable development.

Sustainable development is an ideal; and like all ideals, probably could never be entirely accomplished. This does not mean that economic growth and its consequences should be left to the free forces of the market, as many advocates of economic growth conclude. Narrowing the gap between the rich and the poor and protecting the environment for the benefit of future generations still is a major concern of many governments. In the case of industrialized countries the debate over making development sustainable assumes that these countries, comparatively, have already dealt with the problems of social inequity and poverty.[5] Then, when social justice is a condition that has already been improved, the importance of an effective protection of the environment becomes relevant. Indeed, in developed nations the concept of sustainable development is often assumed to be synonymous with environmental protection. In a narrow interpretation, the concept is conceived as a restricted domestic issue and adopted as a euphemism for environmental protection.[6]

a. The Evolution of Sustainable Development in Environmental Law

The concept of sustainable development as a goal for countries throughout the world can be traced to a 1987 report issued to the United Nations by the World Commission on

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[5] Every year since 1990, the United Nations Development Programme has commissioned the Human Development Report by an independent team of experts to explore major issues of global concern. The Report looks beyond per capita income as a measure of human progress by also assessing it against such factors as average life expectancy, literacy and overall well-being. The Human Development Report 2001 ranks Canada in 3rd place, the United States in 6th, and Mexico in 51st. See *Human Development Report 2001*, online: United Nation Development Programme homepage, http://www.undp.org/hdr2001/presskit.pdf (date accessed: June 17, 2002).

[6] See generally M. McCloskey, "The Emperor Has No Clothes: The Conundrum of Sustainable Development" (1999) 9 Duke Env L & Pol'y F 153. Michael McCloskey, Chairman of the Sierra Club, examines whether equity concerns serve as a conceptual link between sustainable development and environmental justice. Mr. McCloskey argues that social equity is a separate goal, divorced from the definition of sustainable development. See also G. D. Meyers & S.C. Muller, "Ethical Implications, Political Ramifications and Practical Limitations of Adopting Sustainable Development as a National and International Policy" (1996) 4 Buff. Envt'l L.J. 1, where the concept of sustainable development is limited to ecologically sustainable development.

Environment and Development entitled "Our Common Future"—also known as the "Brundtland Report" after the Commission's Chairman, Gro Harlem Brundtland. In this report, the World Commission said, "humanity has the ability to make development sustainable—to ensure that it meets the needs of the present without compromising the ability of future generations to meet their own needs."[7] Many governments, international organizations, scientific communities, conservation groups, labour unions, industry groups, the public, and multiple regional and global agreements have adopted this concept. The problem with this definition is that its interpretation is ambiguous, mainly because a given community has a changing perception of what kind of "needs" are currently important for the society and which economic, social, and environmental requirements should be fulfilled in the future. The traditional definition of sustainable development can be adjusted to fit the particular goals of any given society, independently of the intrinsic value or significance of such goals.[8] However, the current process of globalization has stressed the relevance of environmental protection within the framework of sustainable development as a main concern.

The United Nations ("UN") has been historically the first and major supporter of the protection of the environment. The foundations of global efforts to achieve a more sustainable way of life can be traced back to the organization by the UN of the Conference on Human Environment held in Stockholm in 1972 where representatives of 113 countries met to "consider the need for a common outlook and common principles to inspire and guide the peoples of the world in the preservation and enhancement of the human environment."[9] As early as this meeting the Declaration of the United Nations Conference on Human Environment recognized different environmental needs in accordance with the

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[7] See The World Commission on Environment and Development, *Environment Perspective to the Year 2000 and Beyond*, UN GAOR, 96th Plen. Mtg., UN Doc. A/RES/42/186, (1987), online: http://www.un.org/documents/ga/res/42/ares42-186.htm See also, The World Commission on Environment and Development, *Report of the World Commission on Environment and Development*, UN GAOR, 96th Plen. Mtg., UN Doc. A/RES/42/187, (1987), online: http://www.un.org/documents/ga/res/42/ares42-187.htm (date accessed: June 17, 2002).

[8] There is an abundant bibliography related to the definition of sustainable development. David Pearce, an advisor for the World Trade Organization, in his 1989 book *Blueprint for a Green Economy* states: "definitions of sustainable development abound. There is a truth in the criticisms that it has come to mean whatever meets the advocacy of the individual concerned." The author and his colleagues in a report to the British government stated that sustainable development is characterized by "a substantially increased emphasis on the value of natural, built and cultural environments, greater concern with the long-term consequences of economic activity, and an emphasis on improving quality both within (intragenerational) and across (intergenerational) generations." See D. W. Pearce, A. Markandaya and E. B. Barbier, *Blueprint for a Green Economy* (London, Earthscan, 1989) at 1-2.

[9] See *Declaration of the United Nations on the Human Environment*, UN GAOR, U.N. Doc. A/Conf.48/14/Rev. (1973) online: UNEP homepage, http://www.unep.org/Documents/Default.asp?DocumentID=97&ArticleID=1503 (date accessed: June 17, 2002).

level of development of each country: "[i]n the developing counties most of the environmental problems are caused by underdevelopment. Millions continue to live far bellow minimum levels required for a decent human existence... In the industrialized countries, problems are generally related to industrialization and technological development."[10] The Stockholm Conference led to the establishment of The United Nations Environment Programme[11] ("UNEP"), headquartered in Nairobi, Kenya. UNEP was intended to act as a catalyst for the protection of the environment through the United Nations system, but its means were modest compared with the dimensions of its tasks. Over the years UNEP has launched a significant number of international agreements. But despite the rapidly evolving condition of environmental law, its nature is still not clearly defined.[12]

It soon became obvious that the Stockholm Conference's focus on the environment without due concern for development was not enough for the long-term advancement of the international environmental agenda. In 1985 the UN established the World Commission on Environment and Development that issued its report, "Our Common Future," in 1987.[13] This report first articulated the concept of sustainable development systematically and became the basis for a major review of all international environmental activities in the United Nations through the United Nations Conference on Environment and Development ("UNCED"), popularly known as the "Rio Earth Summit."

The 1992 Earth Summit gathered more than 100 heads of state representing 179 national governments in Rio de Janeiro, Brazil. The end of the Cold War, along with the integration of the rich nations in trading blocs, brought new conditions to the relation between the northern industrialized countries and the southern underdeveloped ones. The

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[10] The Stockholm Declaration reflected the conditions prevailing in 1972 when some countries were starting their process of industrialization and the developed nations' concerns over industrial pollution were incipient. Without using the term "sustainable development" the Stockholm Declaration helped to lay the foundation for the subsequent acceptance of the concept. In summary, the Declaration emphasises the importance of integrating environment and development, of reducing and eliminating pollution, and of controlling the use of renewable and non-renewable resources, but no mention of trade, foreign investment liberalization or sustainable development is made in the document. *Ibid.*

[11] UNEP is still the primary UN organ with general authority over environmental issues and the mission to: "provide leadership and encourage partnership in caring for the environment by inspiring, informing, and enabling nations and peoples to improve their quality of life without compromising that of future generations." See generally United Nations Environment Programme homepage, online: UNEP homepage http://www.unep.org/ (last visited: June 17, 2002).

[12] International environmental law has evolved through a number of international agreements and treaties, but there is no institution to administer this law. There are more than 200 multilateral agreements which contain provisions dealing with one or more aspects of environmental law, ranging from toxic substances to the protection of elephants, from air pollution to biodiversity, and from regional and sub-regional to global environmental issues. "To many observers, the non-participatory, consensus-based nature of the international law system hinders efforts to formulate an effective international response to our global environmental crisis." See *D. Hunter, J. Salzman & D. Zaelke*, *supra* note 4 at 1518-1524 and 199.

[13] See *Report of the World Commission on Environment and Development*, *supra* note 5.

UNCED brought together different perceptions of development and environmental protection. On one side, the industrialized nations with economic development relatively high, strong social indicators such as literacy and health, a well-organized civil society, including effective environmental organizations, where environmental and related sciences are advanced allowed their foreign affairs officials to set the international agenda with respect to global environmental issues. On the other side, the underdeveloped southern nations, less wealthy in economic terms, with large and mainly poor populations hardly surviving at or below the poverty line, and experiencing social problems of illiteracy, malnutrition, and lower life expectancy expressed their opposition to the environmental agenda proposed by the industrialized world, arguing that global environmental agreements would slow their development and unreasonably limit their economic growth in order to respond to problems caused predominantly by the insatiable consumption of the North.[14]

During the UNCED the northern countries expressed their sense of urgency to solve global environmental problems such as climate change, forest conservation, and biodiversity. In contrast, the developing countries expressed a sense of urgency to redirect the global economy so as to overcome the cycle of poverty. In addition, the southern nations argued that environmental protection as proposed by the industrialized nations was a luxury that should be addressed later; it was viewed at present as a potential drag in the engine of growth, especially when an incipient process of industrialization in certain developing nations was beginning to cause serious environmental problems.

At the end of the conference, the Rio Earth Summit reached agreements on the Rio Declaration on Environment and Development;[15] Agenda 21,[16] an 800-page "blueprint" for sustainable development in the 21st century; and the creation of the Commission on Sustainable Development[17] ("CSD") intended to monitor the implementation of the Rio Agreements and Agenda 21.

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[14] See M. Strong, *Where on Earth are we Going?* (Canada: Vintage, 2001) at 1-4.
[15] See *Report of the United Nations Conference on Environment and Development*, UN GAOR, UN Doc. A/CONF.151/26 (Vol. I), (1992), [hereinafter: *Rio Declaration Principles*] online: http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm (date accessed: June 17, 2002).
[16] See *Agenda 21*, UN GAOR, UN Doc. A/CONF.151/26 (Vol. I, II, III), (1992), online: http://www.un.org/esa/sustdev/agenda21.htm (date accessed: June 17, 2002).
[17] See Commission on Sustainable Development, *Programme for the Further Implementation of Agenda 21*, UN GAOR, 9th Spec. Sess., UN Doc. A/RES/S-19/2 (1997), online: http://www.un.org/documents/ga/res/spec/aress19-2.htm (date accessed: June 17, 2002).

The Rio Declaration on Environment and Development includes many emerging legal principles in the field of environmental law that are particularly important in the context of trade and foreign investment. For instance, Principle 2 states the sovereign right of national governments to regulate the use or exploitation of natural resources and the responsibility associated with the movement of hazardous wastes. Principle 10 states that the national governments should provide transparency, public participation, and adequate judicial or administrative proceedings to address the irregularities related to environmental protection. Principle 12 established the obligation by national states to avoid the imposition of unilateral trade measures based in environmental considerations. Principle 14 recommends cooperation among states to discourage the relocation of activities or substances dangerous for the environment or human health. Principle 15 recognizes that scientific certainty often comes too late to design effective legal and policy responses for preventing environmental threats. Finally, Principle 16 established that States should take those actions necessary to ensure that polluters and users of natural resources bear the full responsibility and social cost of their activities.[18]

Agenda 21 provides a framework for evaluating the progress of governments in achieving the integration of environment and development. Agenda 21's comprehensiveness provides a way of determining whether a particular government is doing all it can to foster sustainable development. The forty chapters, many of which are divided into subchapters, as well as the variety of recommended actions in each chapter or subchapter, provide a comprehensive inventory of activities necessary for sustainable development.[19] Agenda 21 also sets forth a context-specific meaning for sustainable development. By identifying what sustainable development means for specific economic sectors (e.g., agriculture), natural resources (e.g., forestry) and problems (e.g., solid waste, production and consumption patterns), Agenda 21 puts in place a better point of departure than abstract formulas.

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[18] "Rio marked a turning point. It transcended the apparent contradiction between environment and development, established an integrated framework called 'sustainable development,' and, in this process, introduced a number of new concepts, both legal and normative, into the international debate." See M. P. Williams Silveira, "International Legal Instruments and Sustainable Development: Principles, Requirements, and Restructuring" (1995) 31 Willamette L. Rev. 239.

[19] For a synthesis of Agenda 21 see generally J. C. Dernbach, "Sustainable Development as a Framework for National Governance" (1998) 49 Case W. Res. 1.

Concerning trade and the environment, Agenda 21 recognizes the importance of trade for the creation of greater international cooperation to accelerate sustainable development in developing countries. It recommends that the developing countries should avoid taking protectionist measures under the guise of environmental protection and should provide access to markets.[20] It also recommends the progressive reduction of export subsidies in developing countries.[21] Taken together, the policy context of UNCED as it relates to trade and the environment can be characterized thus:

> i) trade measures, particularly unilateral trade measures associated with environmental protection, are discouraged;
>
> ii) the special needs of developing countries are explicitly recognized;
>
> iii) national environmental standards and laws should be allowed to differ and may reflect different stages of economic development; and
>
> iv) capacity-building by technology transfer and development assistance is part of the process of achieving sustainable development.[22]

As already mentioned, the Commission for Sustainable Development was created in December 1992 to ensure effective follow-up of UNCED and to monitor and report on the progress of the agreements at the local, national, regional and international levels. The CSD programmed annual sessions to review the advances of the proposals and stipulated that a five-year review of the Earth Summit improvement was to be done in 1997. This meeting, held by the UN General Assembly to review the implementation of Agenda 21, was known as Rio-Plus-5.[23] The Special Session confirmed limited success in improving the conditions of the global environment or the application of policies provided by Agenda 21.[24] The process of globalization—a clear trend since the beginning of the decade—was incidentally mentioned during this session.[25] It was not until the 8th session in the year 2000

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[20] "Regulations should address the root causes of environmental degradation so as not to result in unjustified restrictions on trade. The challenge is to ensure that trade and environment policies are consistent and reinforce the process of sustainable development. However, account should be taken of the fact that environmental standards valid for developed countries may have unwarranted social and economic costs in developing countries." *Rio Declaration Principles supra* note 15. at 2.2.

[21] "The removal of existing distortions in international trade is essential. In particular, the achievement of this objective requires that there be substantial and progressive reduction in the support and protection of agriculture—covering internal regimes, market access and export subsidies—as well as of industry and other sectors, in order to avoid inflicting large losses on the more efficient producers, especially in developing countries." *Ibid.* at 2.7.

[22] See S. Vaughan, "Trade and the Environment: Some North South Considerations" (1994) 27 Cornell Int'l L.J. 591.

[23] See Programme for the Further Implementation of Agenda 21 *supra* note 16.

[24] "Five years after the United Nations Conference on Environment and Development, the state of the global environment has continued to deteriorate ... and significant environmental problems remain deeply embedded in the socio-economic fabric of countries in all regions." *Ibid.* at 9-10.

[25] "The five years that have elapsed since the United Nations Conference on Environment and Development have been characterized by the accelerated globalization of interactions among countries in the areas of world trade, foreign direct investment and capital markets. Globalization presents new opportunities and challenges. It is important that national and international environmental and social policies

that the General Assembly and the CSD recognized that "the impacts of globalization on human well-being and environmental quality have to be taken seriously." The CSD stated that:

> The deregulation of domestic markets in the last decade and their opening up to international competition have created expectations of faster growth and convergence of incomes at the global level, greater income equality at the national level, primarily in the developing countries, and increased economic stability. Contrary to these expectations, there have been a number of negative developments such as unsatisfactory economic growth, greater instability of growth, income insecurity, and increasing income gaps within and across nations. There is an urgent need to redress low growth and the marginalization of a large number of developing, and especially least developed, countries.[26]

The outcome of Agenda 21 leads to the conclusion that one of the primary products emanating from a convocation billed as decisively significant for the future health of the planet fell considerably short of expectations. Originally, the framers of the concept failed to observe that the liberalization of international trade and foreign investment would represent a growing proportion of the global economic activity and concentrated their analysis instead on the differences between the industrialized North and the underdeveloped South. Now, when the urgent desire for more investment and better trade opportunities is widely shared among developed countries, the achievement of sustainable development—especially in the South—cannot be accomplished without substantial economic growth and changed patterns of trade and foreign investment.

b. Trade and Foreign Investment Liberalization and the Protection of the Environment

Trade and investment are important drivers to achieve the economic growth that could make sustainable development and the protection of the environment possible. At the same time, not every kind of economic growth supports sustainable development. Indeed, the apparent disregard of the trade policy community for the harmful effects of trade-generated growth is one of the sources of tension with the environmental and development communities. The same could be said for foreign direct investment; appropriate investment can

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be implemented and strengthened in order to ensure that globalization trends have a positive impact on sustainable development, especially in developing countries." *Ibid.* at 7.

[26] See Commission on Sustainable Development, *Economic Growth, Trade and Investment,* UN ESCOR, 8th Sess. U.N. Doc. E/CN.17/2000/4 (2000), online: http://www.un.org/documents/ecosoc/cn17/2000/ecn172000-4.htm at 1 (date accessed: June 17, 2002).

stimulate sustainable development, but in many instances the investment has been environmentally, socially, and often economically questionable.[27]

Environmentalists, development specialists, and trade economists engage in the trade-environment debate from different contexts. The diverse hypotheses and worldviews they start with and their different technical languages can be important barriers to significant dialogue and solutions. Unfortunately, owing to political purposes, the trade and environmental debate is often polarized. Arguments facing "environmentalists" and "free traders" generate one-dimensional responses. On the one side, the free trade advocates allege that because trade creates wealth that could be used to increase human well-being, national governments should respond to local industries' preserving domestic markets from foreign competition and protecting national producers against "costly" environmental demands. On the other side, the environmental supporters claim that because the trade activity seriously threatens the ecosystem, the public has to subsidize the profits of domestic firms by paying the cost of environmental degradation.[28]

Developed and developing countries already have well-established positions over trade and foreign investment liberalization and its consequences for the environment. On the one hand, the Northern environmentalists' concerns are focused on inter-generational, long-scale, long-term environmental problems such as global warming and ozone depletion. Northern nations criticize the Southern nations for their irresponsible use of their natural resources and the collateral damages on the environment produced by their overpopulation. On the other hand, Southern nations focus on more immediate, intragenerational problems such as the depletion of soil and water resources. Southern nations criticize Northern nations for the exhaustion of local resources to attain their actual wealth and the collateral damages on the environment produced by their over-consumption.[29]

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[27] For a balanced pronouncement concerning trade and sustainable development, see generally *IISD Statement on Trade and Development*, online: International Institute for Sustainable Development homepage, http://www.iisd.org/pdf/tsenglish.pdf (date accessed: June 17, 2002).

[28] For an analysis of the different perspectives concerning the relations between trade, environment, and development, see United Nations Environmental Programme & International Institute for Sustainable Development, *Environment and Trade – A Handbook*, (Winnipeg: UNEP & IISD, 2000) at 1-5, online: International Institute for Sustainable Development homepage, http://iisd.ca/pdf/envirotrade_handbook.pdf (date accessed: June 17, 2002).

[29] "[I]t is still fair to say that initiatives to integrate environmental issues with trade are largely seen by the South as originating from and reflecting Northern country priorities. Given the threat they potentially pose to the important economic benefits developing countries expect from trade liberalization, many developing countries view amending trade rules to accommodate developed country environmental priorities with considerable caution." See, S. Vaughan *supra* note 22.

In the case of Mexico, concerns about the potential effects of trade and foreign investment liberalization on the environment accompanied the NAFTA debate. On the one hand, the Mexican environmental legal framework was inspired by the commitments reached within the UN. On the other hand, the Mexican authorities decided to entrust national development to trade and foreign investment liberalization. Two issues that traditionally were treated separately, both at the domestic and the international level, became intertwined with NAFTA's objectives. Consequently, domestic environmental concerns inspired by the notion of sustainable development that have just recently begun to play a minimal role in Mexico's development decisions became closely associated with the idea of free trade and foreign investment liberalization as proposed by NAFTA. The following sections analyse the specific characteristics of both the Mexican environmental legal framework and the original environmental commitments signed with NAFTA.

B. Sustainable Development, Poverty, and Environmental Protection in Mexico

The main question concerning sustainable development in Mexico is how to overcome poverty without causing environmental damage The problem supposes that overcoming poverty is the priority and that doing so would require maintaining economic growth, but such growth ought to be qualitatively distinct, reducing its impacts on the environment by using new forms of production in which the technologies applied avoid further degradation of the environment. It is beyond the scope of this thesis to speculate over specific solutions to the problem of economic development and poverty in Mexico. It is, however, precisely the historic evolution of Mexican development policy toward economic growth, along with the liberalization of the system and the opening of the legal framework to external influences, which ultimately explains the incorporation of the concept of sustainable development within Mexico's environmental regulations.

a. Development Policies and Liberalization in Mexico

In the decades following World War II, Mexico's domestic policy—as in most Latin American nations—was shaped on an import substitution model. This policy became associated with the "structuralism school" of international trade and development advanced by the United Nations Economic Commission for Latin America (ECLA), now the Economic Commission for Latin America and the Caribbean (ECLAC). In the 1950's, the Mexican government, relying on domestic market demand, created a "closed" system. This inward-

turning economy was characterized by the imposition of protective measures to facilitate the expansion of "infant" industries and the internal protection of the national producers via import-substitution policies that sought to replace imported manufactures with domestically produced goods.[30] Based on the model provided by the developed countries, reinforcing the specialization of large-scale manufacturing industries appeared as the solution to attain growth and "catch up" with the North.

In the import-substitution model, the government in parallel to many Mexican private investors played a major role as an economic agent in the financial, industrial, and commercial activity. The state also controlled a network of state-owned enterprises that included national private companies and multinational corporations. Finally the use of high tariffs, import quotas, exchange controls, and subsidized financing measures sheltered domestic markets and provided such strong incentives that few producers found it worthwhile to enter markets, especially foreign markets, in which they would be likely to confront competition.[31]

By the end of the 1970's the Mexican import-substitution model showed continuous failures to generate economic growth. In response, a dramatically opposed theory was developed to deal with the prevailing conditions. This new approach was called the "dependency theory" and explained that countries like Mexico remained economically and socially backward due to the complicity between the local power elites and the forces of developed countries' capitalism. This theory proposed that under early stages of industrialization, multinational corporations in alliance with the local corrupted elites would build branch plant facilities, but without contributing to development through significant technology transfer or training of local workforces. Under these assumptions the advocates of the dependency theory proposed that the development of depending countries in Latin America,

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[30] "Prior to the 1930s, Latin American countries pursued outward-oriented free trade policies. They exported primarily agricultural and mineral raw materials in which they had a comparative advantage, and they imported primarily manufactured goods from Europe. The severe drop in export earnings during the worldwide depression of the 1930s, however, emphasized to these countries the vulnerability of their exports (and hence their economic development) to global trade cycles induced by the industrialized countries." For a detailed discussion of the history and policies of the import-substitution model in Latin America, see E. R. Carrasco, "Law, Hierarchy, and Vulnerable Groups in Latin America: Towards a Communal Model of Development in a Neoliberal World" (1994) 30 Stan. J. Int'l L.

[31] "The state used its financial regulatory regime to perform the temporary protective function needed to transform Latin American countries into industrialized states. High tariffs and nontariff barriers such as import quotas and licensing requirements provided protection from the external sphere. Central banks in Latin America along with ministries of finance became critical to the industrial transformation. In addition to controlling the monetary base, reserve requirements, and interest rates, central banks also supervised exchange controls and provided subsidized financing for state-guided investments." *Ibid.*

including Mexico, was "impossible" under capitalism.[32] Therefore, it was necessary to subtract depending countries from the capitalist international market, and only then would it be possible to initiate an inward-oriented policy of real development.[33]

At the beginning of the 1980's, adjustments in the world economic environment compelled a change of direction in the Mexican development model. The accumulation of unresolved internal problems made it necessary to apply severe adjustment programmes—designed, promoted and monitored by international organizations such as the International Monetary Fund (IMF) and the World Bank. The programmes in question included anti-inflationary policies, currency devaluation, and liberalization of prices and foreign trade. The Mexican government stabilized the economy and implemented structural reforms largely by executive decree and administrative regulation. Moreover, its one-party rule by the Institutional Revolutionary Party (PRI) ensured quick legislative compliance with the demands of the executive, the IMF, and the World Bank.

Economic chaos and the limited capacity of the Mexican industrial infrastructure prompted Mexico to look beyond its borders. The 1981 collapse of oil prices initiated in Mexico an urgent need to attract foreign investment to satisfy the country's rapidly expanding workforce, which was increasing by over one million workers a year. Between 1982 and 1987, the government devalued the currency, liberalized exchange controls, and privatized hundreds of state-owned enterprises. In 1985, Mexico accelerated efforts to liberalize its trade and investment regime. It joined the General Agreement on Tariffs and Trade (GATT) in 1986. Both trade and investment regimes would be further liberalized under the NAFTA and membership in the OECD.[34]

The entrance of Mexico into GATT represented the watershed where the liberalization of the Mexican economy was going to be reflected in the internal legal framework. These

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[32] According to Blomström & Hettne the following ideas are common to the majority of the proponents of the dependency school: "Development and underdevelopment are different aspects of the same universal process. Underdevelopment cannot be considered as the original condition in an evolutionary process. Dependency is, however, not only an external phenomenon but is also manifested in different ways in the internal (social, ideological, and political) structure." See generally M. Blomström & B. Hettne, *Development Theory in Transition*, 2nd ed. (London: Zed Books, 1987) at 12.

[33] "The policy implications were a general continuation of import-substitution policies but with a new emphasis on control of the multinational corporation, support for democratization movements, and guarantees that developed countries would not interfere with the sovereignty of developing nations." See M. J. Trebilcock & R. Howse, *The Regulation of International Trade*, 2nd ed.,(New York: Routledge, 1999) at 382.

[34] See generally Jesus Silva and Richard K. Dunn, "A Free Trade Agreement between the United States and Mexico: The Right Choice?" (1990) 27 San Diego L. R. 937.

transformations were in response to changes in the international context and initiated a process of adapting external influences or "opening" of Mexico's law and legal institutions to the globalization process.[35]

b. The Internationalization of the Mexican Legal Framework

To a closed economy corresponded a closed legal framework. Mexico decided to change its development policy by integrating the domestic economy into the international markets through multilateral liberalization and regional trade agreements, especially with developed countries. These transnational legal influences were reflected in three fields: international trade law, human rights, and environmental protection.

In the case of international trade law the reforms where extensive.[36] The interaction with the international market forces led to a renovation of the traditional Mexican regulations that eventually would allow normative and institutional elements to stabilize exchanges and to make them foreseeable. The changes in the laws relating to the economic, financial, trade, and service sectors were practically complete. Also, an important number of new agencies were created to enforce the execution of the new legislation.[37] In relation to the interaction between trade liberalization and the protection of human rights the relation is complex, but it would be safe to believe that both processes tend to complement and support each other. Economic reform requires this because there is a growing awareness of the intimate link between the climate of social certainty that the rule of law can provide and

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[35] "There are already several concepts on what globalization may mean in connection with the law, such as the following:
1) the unification of the law at the world level;
2) the increasing relevance of law for the coordination of social behavior everywhere on the planet;
3) the process of transnationalization of the law--where mechanisms of creation and application of the law increasingly escape the control of nation-states;
4) the 'Americanization' of law—the worldwide spreading of the legal rules and practices of the United States. All these visions reflect real phenomena and capture undoubtedly an important part of the relation between the law and the different aspects of globalization." For a discussion over the concepts of globalization and transnationalization of the law in Mexico, see H. Fix-Fierro & S. Lopez-Ayllon, "The Impact of Globalization on the Reform of the State and the Law in Latin America" (1997) 19 Hous. J. Int'l L 785.

[36] Perhaps transnationalization of the law is more evident in international trade law. The successive rounds of GATT negotiations that led finally to the agreement creating the World Trade Organization (WTO) have widened both the matters subject to regulation—which now include trade in services and intellectual property rights. The agreements of the Uruguay Round have been incorporated into the Mexican domestic legal system. See World Trade Organization, The Legal Texts, The Results of the Uruguay Round of Multilateral trade Negotiations (Cambridge: Cambridge University Press, 2000) *Marrakesh Agreement Establishing the World Trade Organization*, Apr. 15, 1994 at 3. Annex 1B, *General Agreement on Trade in Services* at 284. Annex 1C, *Agreement on Trade-Related Aspects of Intellectual Property Rights* at 320.

[37] Between December 1982 and April 1996, out of a total of 198 existing federal laws, 99 were newly enacted, 57 were amended (in some cases extensively), and only 42, mostly obsolete laws, remained unchanged. In other words, nearly eighty percent of the Mexican national legislation was newly enacted or modified during the last fifteen years. See H. Fix-Fierro & S. Lopez-Ayllon *supra* note 35.

long-term economic growth.[38] Since the 1980's, Mexico has enacted legislation for the creation of constitutional courts and chambers, ombudsmen, and institutions of electoral justice. Finally the emergence of environmental regulations was a reflection within the domestic legal framework of the diplomatic efforts meant to present Mexico to the UN system as a nation with high environmental standards.[39]

The implementation of these external legal influences was an uneven process. First, since the financial and governmental efforts were toward economic liberalization, the opening of the Mexican legal system to the influence of trade related regulations appeared as a requisite to provide an international environment for doing business in Mexico. So the reforms were straightforward. The nation—in those days ruled by an elite of economists educated in American universities—decided that the future of Mexican development should be oriented to the attraction of foreign investment and gaining access to developed nations' markets. Since the former political system relied on an authoritarian president with overwhelming political powers over the Congress, the approval of legislation related to intellectual property, foreign investment, anti-trust regulations, and international trade was enacted in a matter of days. Furthermore, the specialized agencies to oversee the implementation of the new regulations were extensively funded and publicized. In the case of the second transnational legal influence, the protection of human rights, the creation of legislation and legal institutions was preceded by significant pressure from a wide array of governments and international organizations that eventually led to the first equitable and democratic elections in nearly 90 years. Finally, the legislation to protect the environment neither experienced the evolution of business-oriented regulations nor the extensive legislative changes that allowed democratic participation. Instead, the enactment of legislation for the protection of the environment and the effective application of the law continues to be constricted by a lack of funding and centralization of policy making.

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[38] See, R. G. MacLean, "Algunas Consideraciones Sobre los Efectos de la Administración de Justicia en la Propiedad y los Contratos" *La Reforma del Estado Estudios Comparados* (Universidad Nacional Autónoma de México-Dirección General de Asuntos Jurídicos de la Presidencia de la República, México, 1996) at 527-537.

[39] For an analysis of Mexico's outward efforts to gain international recognition, see generally A.I. Glender Rivas, "Las Relaciones Internacionales del Desarrollo Sustentable" in A. Glender and V. Lichtinger, ed., *La Diplomacia Ambiental, México y la Conferencia de las Naciones Unidas sobre Medio Ambiente y Desarrollo* (México: Secretaría de Relaciones Exteriores y Fondo de Cultura Económica, 1994) at 254.

c. Mexican Environmental Law

Environmental law in Mexico is the authority that includes the Constitution, laws, regulations to implement each law,[40] executive orders, and standards known as Normas Oficiales Mexicanas ("NOMS") (Official Mexican Standards) that govern environmental matters. In 1987, Mexico's Constitution was amended to give Congress new powers, including the power to enact legislation designed to support the participation of federal, state, and local authorities in environmental policy. As a result, on March 1, 1988 the General Law on Ecological Equilibrium and Environmental Protection (LGEEPA) (Ley General del Equilibrio Ecológico y la Protección al Ambiente) was introduced.

In 1998, a key paragraph was added to Article 4 of the Mexican Constitution, which now contains the words "all persons have the right to an environment appropriate for their development and well-being." This set of laws and agreements constitutes a "first tier" of jurisdiction, that is, the jurisdiction conferred upon the federal government.

The federal government exercises its jurisdiction over environmental matters through the Federal Public Administration, which, in turn, delegates authority to the Secretariat of the Environment and Natural Resources (SEMARNAT).[41] The Secretariat is divided into four decentralized departments that oversee specific areas of environmental law.[42] The five departments are the Instituto Nacional de Ecología (INE)[43] (National Institute of Ecology),

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[40] Including, without limitation, laws such as the *Ley General del Equilibrio Ecológico y la Protección al Ambiente* (LGEEPA) [General Law of Ecological Equilibrium and Environmental Protection], *Ley de Aguas Nacionales* (LAN) [Law Governing National Waters], *Ley Forestal* (LF) [Forestry Law], *Ley de Pesca* (LP) [Fishery Law], *Ley Federal del Mar* (LM) [Federal Law of the Sea] and the *Ley Minera* (LM) [Mining Law] and any other legislation related to the environment enacted by the Mexican government.

[41] SEMARNAT is primarily responsible for the following matters:
-Oversight and enforcement of the laws and standards concerning the environment;
-Administration of Mexico's renewable and non-renewable natural resources and the protection of the environment;
-Support of sustainable development programs in Mexico;
-Protection, restoration, and conservation of natural resources and environmental welfare to ensure the adequate development of health and general well being of the population;
-Establishment of NOMS for the preservation and restoration of environmental ecosystems, use of natural resources including aquatic flora and fauna, wastewater, and environmentally safe management of hazardous materials and non-hazardous waste, air pollution, and noise;
-Granting of contracts, licences, permits, and authorizations in the areas of air, water, forestry, ecology, fishery, mining, exploitation of flora and fauna, beaches, and other marine zones mostly through its decentralized agencies. See *Ley Orgánica de la Administración Pública Federal*, D.O., December 29, 1976, online: Secretaría de Desarrollo Social homepage, http://www.sedesol.gob.mx/informa/ley_organica_federal.pdf (date accessed: June 17, 2002). See also Secretaría del Medio Ambiente y Recursos Naturales, online: SEMARNAT homepage, http://www.semarnat.gob.mx/ (date accessed: June 17, 2002).

[42] Official decentralization is administrative. No vertical decentralization (devolution) to the local sphere.

[43] INE, one of SEMARNAT's largest administrative departments, is responsible for ecological matters and the protection of the environment. INE develops environmental programmes, issues administrative orders and standards, determines the adequacy of environmental impact statements, coordinates the development of environmental programmes with state agencies, and grants federal approval on environmental impact studies. See generally, Instituto Nacional de Ecología, online: INE homepage, http://www.ine.gob.mx/ (date accessed: June 17, 2002).

the Comisión Nacional del Agua (CNA)[44] (National Water Commission), the Instituto Mexicano de Tecnología del Agua (IMTA)[45] (Mexican Institute of Water Technology), and the Procuraduría Federal de Protección al Ambiente (PROFEPA) (Federal Agency for the Protection of the Environment).[46]

A second tier encompasses state governments, whose jurisdiction stems from their individual constitutions and from environmental laws passed by their respective Congresses. Although the federal government authorized the delegation of many environmental functions to the states in the LGEEPA, these duties have not been delegated in all states because some states may not have the necessary local laws and/or administrative agencies needed to carry out these environmental functions. LGEEPA states that SEMARNAT is responsible for enforcing environmental laws in the states that have not yet enacted environmental laws.[47]

Lastly, the third tier, established in Article 115 of the Mexican Constitution,[48] is that of municipal governments. It covers municipal parks, sewage services, solid waste, slaughterhouses, cemeteries, street cleaning, drinking water and wastewater, soil use, and all other activities not reserved for the federal or state governments.

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[44] CNA is responsible for the administration and safekeeping of the national waters and related real property such as wetlands, marshes, and beaches. In addition, CNA oversees compliance with the Ley de Aguas Nacionales (LAN) (Law of National Waters) and its regulations, and issues orders necessary to ensure the preservation and quality of the national waters. CNA also oversees concessions and waste water discharge permits affecting national waters for the drilling of water wells, and for water use pursuant to the provisions of the LAN. Further, CNA maintains a public registry of wastewater and inspects and verifies the measurement mechanisms for water consumption. See generally, Comisión Nacional del Agua, online: CNA homepage, http://www.cna.gob.mx/ (date accessed: June 17, 2002)

[45] IMTA is responsible for the promotion and development of water technology including the management and use of water, research, and technological development. See generally, Instituto Mexicano de Tecnología del Agua, online: IMTA homepage, http://www.imta.mx/ (date accessed: June 17, 2002).

[46] PROFEPA, created in 1992, is the enforcement branch of SEMARNAP. PROFEPA is in charge of enforcing the law, is responsible for investigations and inspections of facilities, and presides over administrative appeals of companies who have been sanctioned for failure to comply with the law. PROFEPA is also responsible for reporting violations of the Federal Criminal Code to the Ministerio Público Federal (Federal Prosecuting Attorney) who is in charge of the prosecution of environmental crimes. See generally Procuraduría Federal de Protección al Medio Ambiente, online: PROFEPA homepage, http://www.profepa.gob.mx/ (date accessed: June 17, 2002).

[47] LGEEPA provides that the following authority is delegated to the states: "establishment, regulation, administration and oversight of protected natural reserves as provided by local law, with the participation of municipal governments (Art. 7. V.); the regulation of collection, transport, storage, handling, treatment and final disposition of solid and industrial waste considered non-hazardous (Art. 7. VI); and the prevention and control of pollution generated by noise emission, vibrations, thermal energy, light, electromagnetic radiation or odors that negatively affect the ecological balance and the environment (Art, 7.VII)." See *Ley General del Equilibrio Ecológico y la Protección al Ambiente*, D.O., January 28, 1988, online INE Hompeage, http://www.ine.gob.mx/uaj/lgeepa/articulo7.html# (date accessed: June 17, 2002) [hereinafter: *LGEEPA*].

[48] The Mexican Constitution declares in Article 115. "For their internal government, the States shall adopt the popular, representative, republican form of government, with the free Municipality as the basis of their territorial division and political and administrative organization." See *Constitución Política de los Estados Unidos Mexicanos* D.O. 17 Febrero 1917. online: Poder Legislativo Federal homepage, http://www.camaradediputados.gob.mx/marco/constitucion/ (date accessed: June 17, 2002) [hereinafter: *Mexican Constitution*] For an English version see 1917 Constitution of Mexico, online: Illinois State University homepage, http://www.ilstu.edu/class/hist263/docs/1917const.html (date accessed: June 17, 2002).

d. Mexican Policymaking and Enforcement of Environmental Regulations

Before analysing the characteristics of Mexican policymaking and enforcement of environmental regulations, it is important to remark that most of the regulations enacted in Mexico aimed to protect the environment were a result of external influences, specifically the multiple compromises signed by the Mexican government with the UN. The evolution of environmental policymaking and the concomitant legislation was largely a unilateral effort implemented by Mexican diplomacy's looking to improve its international image. Only with the emergence of strong opposition to NAFTA by American and Canadian environmental NGOs did their Mexican counterparts find the political leverage to compel the government to apply the regulations already enacted to protect the environment. International support was indispensable to provide Mexican NGOs with the information, analytical capacity, and organizational basis required to criticize Mexican non-enforcement of environmental laws.[49] Paradoxically, both the enactment and the enforcement of environmental regulations were the result of external influences.

The problem with environmental protection in Mexico is related to three prevailing situations: first, the lack of enforcement of Mexican environmental regulations consequent to the centralization of environmental policymaking and environmental justice; second, Mexico's absence of environmental priorities related to the process of industrialization; and third, the comparative underdevelopment of environmental and related sciences in Mexico.

The first prevailing situation is related to the centralization of policymaking and environmental justice in Mexico and its consequences in the non-enforcement of environmental regulations. The text of the Mexican Constitution suggests that the country has a federal system, but the contents of the law and the current enforcement and implementation of its provisions are quite different. Political power has been so heavily centralized in the national government, particularly in the executive, that the states have minimal autonomy.[50] In theory, federalism has been the Mexican form of political organization since the

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[49] See D. Barkin, "Las Organizaciones No Gubernamentales Ambientalistas en México," in A. Glender and V. Lichtinger, eds., *La Diplomacia Ambiental, México y la Conferencia de las Naciones Unidas sobre Medio Ambiente y Desarrollo* (México: SER y FCE, 1994) at 358.

[50] Historically, all real political power was concentrated in the federal government and, more precisely, in the hands of the president and the Partido Revolucionario Institucional (PRI), which for more than 70 years ruled as virtually a single political party. It operated as a

country's first Constitution in 1822. Article 40 of the Mexican Constitution characterizes the country as a representative, democratic, and federal republic formed by free and sovereign states in all manners concerning their internal governments, but united in a stabilized federation.[51] Article 124, modelled on the 10th Amendment of the U.S. Constitution, provides that the powers of the federal government are limited to those specifically delineated, the remainder being reserved for the states.[52] But a good part of the federated states' autonomy is under central will. In this fashion, what really exists in Mexico is a centralized government with some decentralized aspects.[53]

Environmental enforcement efforts in Mexico have remained primarily centralized in the federal government through SEMARNAT. The LGEEPA provides that local governments may take the initiative to develop their own environmental standards so long as they are not less stringent than the federally promulgated regulations. This creates an avenue for possible decentralization. However, most of the Mexican municipalities lack the resources necessary to implement their own enforcement mechanisms, so they leave the task almost entirely to SEMARNAT. At present, the most critical problem of environmental decentralization is financial. Without sufficient financial independence, state autonomy quickly disappears.[54] Effective federalism requires that both the federal and state governments have adequate and independent tax bases. Some aggrandizement of federal power through attaching conditions to federal grants to the states is inevitable, but limits on such conditional spending are necessary in a genuine federal system.[55]

The non-enforcement of environmental regulations in Mexico and the dissociation of public policies aimed to protect the environment from realistic goals insert themselves within the wider problem of legal institutions and legitimacy of policymaking characteris-

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so-called "rotating dictatorship," staying in power and thriving through electoral fraud that generates favours. This political peculiarity was called "Presidencialismo" and allowed the president in office, who also figured as the head of the PRI, to designate state governors who to a large degree served to gratify the President, despite the federal system of government provided for by the Constitution.

[51] The Mexican Constitution declares in Article 40: "It is the will of the Mexican people to organize themselves into a federal 'democratic, representative Republic composed of free and sovereign States in all that concerns their internal government' but united in a Federation established according to the principles of this fundamental law." See *Mexican Constitution supra* note 48.

[52] The Mexican Constitution declares in Article 124: "The powers not expressly granted by this Constitution to federal officials are understood to be reserved to the States." *Ibid.*

[53] See generally K.S. Rosenn, "Federalism in the Americas in a Comparative Perspective" (1994) 26 U. Miami Inter-Am. L. Rev. 1.

[54] "In Mexico, the federal government distributes to the states and municipalities only 19 percent and 1 percent respectively of the federal tax revenues, keeping 80 percent for itself." *Ibid.*

[55] "The more serious federalist concern in the economic area has been the enormous growth in the power of the central governments over the states and provinces through the federal taxing and spending powers ... the states are far more heavily dependent upon federal subsidies, which inevitably come with federal controls." *Ibid.*

tic of Mexico. A rather moderate team of legal experts has concluded in one of the studies published on the subject of the rule of law in Mexico that:

> In our country, the legal order and justice suffer grave problems. To start with, we can assert there is a lack of a body of legal principles that is clear and respected by everyone. Much to the contrary, the rules are generally disobeyed both by authorities and by private citizens, which results in there being no certainty in social relations. The laws, which govern Mexican society, are in some cases contradictory and in others obsolete. The citizens do not have efficient defence remedies, or remedies that are economically accessible to all. Disputes among individuals are solved, in general, outside of the law and, if they are taken to court, it is often necessary to fight the decision, because of its poor quality, at a second or third appellate level. The Executive branch exercises improper and excessive influence over the administration of justice and over the Judiciary in general. The Supreme Court has not been able to fully perform its function in the scheme of division of powers, that is, the function of controlling the constitutionality and legality of the acts of the other powers. The deficiencies in our legal system are evident starting with the Constitution itself, which is the Supreme Law that governs the Mexican State, and passing through the simplest mercantile contracts between individuals, and laws and regulations that are often mutually contradictory. We have a Constitution that is more a listing of intentions than a regime that governs society and the State. Due to this, there exists a notable divergence between the formal constitutional rules and the practice of authorities; between the formal federal system and the reality of centralism; or between the formal division of powers and the reality of a hegemonic Executive which legislates and judges as a quasi-functional power.[56]

The previous testimony includes the problem of environmental justice in Mexico. Although, an initial analysis of the substantive environmental provisions in Mexican legislation is quite similar or even more sophisticated than the one applied in Canada or the United States,[57] the lack of environmental justice is part and parcel of the precarious situation of democracy in the country, the bitter realities of non-empire, the ineffectiveness of the rule of law, and the extremely poor quality of administration of justice in Mexico.[58]

Federalism requires an independent judiciary to regulate the system. Even though it possesses formal guarantees of judicial independence,[59] Mexico's judiciary historically has been far too dependent upon the Executive to perform this function adequately. It also has had considerable difficulty in adequately protecting the environment, in part because of the heavy centralization of power and the filtering of complaints by the "Executive's parallel

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[56] See H. Fix-Fierro, "Judicial Reform and the Supreme Court of Mexico: The Trajectory of Three Years" (1998) 6 U.S.-Mex. L.J. 1, 2, See also H. Fix-Fierro y S. Lopez-Ayllon "!Tan Cerca y Tan Lejos! Estado de Derecho y Cambio Jurídico en México", Instituto de Investigaciones Jurídicas Universidad Nacional Autónoma de México, online: Infojus homepage, http://info.juridicas.unam.mx/publica/rev/boletin/cont/97/art/art3.htm (date accessed: June 15, 2002).

[57] D. Aguilar, "Is the Grass any Greener on the Other Side of the Rio Grande? A look at NAFTA and its Progeny's Effects on Mexican Environmental Conditions" (2001) 10 Currents Int'l Trade L.J. 44.

[58] See generally A. Szekely, "Democracy, Judicial Reform, The Rule of Law and Environmental Justice In Mexico" (1999) 21 Hous. J. Int'l L 385.

[59] The Mexican Constitution declares in Article 49: "The supreme power of the Federation is divided, for its exercise, into legislative, executive, and judicial branches..." See *Mexican Constitution supra* note 48.

courts". Rather than strengthening and freeing the judiciary, the government embarked on establishing its own parallel jurisdictional system through so-called "administrative tribunals" (tribunales de lo contencioso administrativo). The tribunals have a more than questionable constitutional foundation and have been set up to deal with specialized legal cases, including environmental justice. These tribunals, whose procedural rules are usually extremely cumbersome, are primarily under the executive's control and are not given sufficient enforcement powers. Consequently, entrusting the adjudicative function to the federal executive has led to a massive centralization of power in the federal government at the expense of the states, placing the decision-making process and the application of adequate environmental enforcement mechanisms far away from the origin of the problems.

In addition to the centralization of environmental policymaking the access to environmental justice in Mexico is extremely limited due to the discretionary power invested in the SEMARNAT. Citizens can complain about environmental violations through a process called "Denuncia Popular"[60] (Popular Report); however, actual enforcement is left solely to SEMARNAT's discretion. Therefore, under Mexico's legal scheme, if a Mexican citizen has a complaint regarding SEMARNAT's failure to enforce Mexico's environmental laws, the citizen's only recourse is to vent that complaint to SEMARNAT. The success of this scheme is questionable, because without the threat of citizen suits, SEMARNAT has no legal incentive to enforce its own laws.

Although Mexican citizens cannot sue the government for failure to enforce its environmental laws, they can theoretically sue polluting companies or individuals on a variety of environmentally related torts, such as negligence, strict liability, and various forms of intentional torts. These procedures are cumbersome and only render obligations among private individuals, ignoring the social implications of environmental degradation.[61]

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[60] See *LGEEPA supra* note 47 arts. 198-202.

[61] There is another judicial mechanism called the amparo writ. However, The amparo writ only renders obligations against acts of a public authority that have violated one or more of the garantias individuales established in the Mexican constitution, The right to an adequate environment is established in article 4 of the Mexican constitution along with the right to protect public health, the equality between man and women, children's rights, and the right to housing. However the rights established in article 4 are programmatic rather than auto applicative. The concept behind article's 4 so-called individual rights or garantias individuales is that the state should provide for the consecution of these ideals rather than, as with the judicial individual rights provided in article 14 and 16, to impose limits to the state powers. See *Mexican Constitution supra* note 48. See also R. Brañes, *Manual de Derecho Ambiental Mexicano,* 2nd ed. (México: Fundación Mexicana para la Educación Ambiental y Fondo de Cultura Económica) at 253-258.

A second problem pertaining to the protection of the environment in Mexico is the absence of environmental priorities related to the incremental industrialization of the country. At the present time, governmental efforts are concerned mainly with the protection of wildlife, such as monarch butterflies, whales, and sea turtles, which due to their particular beauty, size, or human appeal, represent attractive features for the government's social communication apparatus. Awareness of the grave consequences of emitting industrial wastes, atmospheric pollution, groundwater deployment, and the contamination of watersheds, gains fewer considerations. Perhaps the reason why the federal authorities prioritize the conservation of wildlife is because the solution to these problems is a long-term objective that requires detailed implementation. As a result, the effects and consequent evaluation of the government's actions are deferred to the remote future.[62] Furthermore, the protection of wildlife is a cause that enjoys support among the general population and generates funding from the private and other sectors. Another explanation could be that confronting the problems related to the incremental generation of industrial and municipal waste would bring SEMARNAT face to face with powerful interests in the federal, state, and municipal governments, and with other administrative ministries or federal agencies, especially Petroleos Mexicanos (PEMEX) and the Compañía Federal de Electricidad (CFE), which are respectively oil and energy governmental monopolies.

A third problem of the enforcement of environmental regulations in Mexico is related to scientific uncertainty. Science is the starting point of all environmental policy without science we have no way of knowing what is happening in the natural environment. Science reveals the conditions of the environment beyond what our senses tell us. The structure of environmental law and policy must reflect the particular structure of the problems being addressed. Scientifically based assessments of environmental development must provide the foundations of a legal regime for a number of reasons. First, the regimes must respond to changing scientific information about the environment; second, the regimes must adapt themselves to the changing perceptions about the significance of this information; and third, in support of their objectives, the regimes must constantly get feedback from the

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[62] SEMARNAT has proposed a 25-year period to accomplish its environmental goals. See generally SEMARNAT *Programa Nacional de Medio Ambiente y Recursos Naturales 2001-2006*, online: SEMARNAT homepage, http://www.semarnat.gob.mx/programas/medio_ambiente.shtml (date accessed: June 17, 2002).

successes and failures of the measures adopted.[63] However, the scientific method does not always generate precise information for policymaking; and even when science is quite certain, the implications for policy can be ambiguous.[64] The risk of imposing unnecessary burdens on economic activity may damage the whole productive cycle and lead to regulatory inaction, especially when the decision-making process is invested in the discretion of the federal authorities, whose priorities are mainly concerned with economic growth. Notwithstanding the problem with scientific uncertainty, the detrimental effects of increased economic growth on environmental conditions are widely recognized. Any economic growth that is created by the increment in the production of goods and services, or directed to increase the volume of trade, necessarily requires the use of renewable and non-renewable resources that will generate greater amounts of waste. Also, any social growth by means of migration, demographic explosion, urban expansion, concentration of people in the cities, and the growing inequalities that come along with these occurrences, contributes to an incremental consumption of goods and services, the subsequent generation of waste, and finally an accentuated detriment of environmental conditions.[65] In the case of Mexico, both conditions of industrialization and urbanization have been increasing since the country started the process of trade and foreign investment liberalization that finally led to the implementation of NAFTA.

C. NAFTA, Environmental Protection and Sustainable Development

In December 1992, the United States, Canada, and Mexico concluded the North American Free Trade Agreement [66] ("NAFTA"). NAFTA's primary goals are to achieve economic growth through the gradual elimination of trade barriers over a fifteen-year period and to create a financial environment that encourages investment while fully protecting industrial and intellectual property rights.[67]

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[63] See generally V. L. Urquidi, "Los Problemas del Medio Ambiente en las Relaciones Mexico-Estados Unidos" (1997) Foro Internacional, online: Hemerodigital UNAM homepage, http://www.hemerodigital.unam.mx/ANUIES/colmex/foros/148/sec_3.htm (date accesed: June 15, 2002).

[64] For an analysis of the interplay between science, uncertainty, and policy within the framework of environmental law, see J. M. Stonehouse and J. D. Mumford, "Science, Risk Analysis and Environmental Policy Decisions" (1994) United Nations Environment Programme, online: Robinson Rojas homepage, http://www.rrojasdatabank.org/risks.htm (date accessed: June 15, 2002).

[65] See P. P. Moncayo & J. Woldenberg eds., *Desarrollo, Desigualdad y Medio Ambiente*. 3ed (México: Cal y Arena ed. 1999) at 45-47.

[66] See North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States, 17 December 1992, (entered into force 1 January 1994), [hereinafter: *NAFTA*].

[67] See generally B. Appleton, *Navigating NAFTA,* (Canada: Carswell, 1994).

The environmental concerns about NAFTA, for the most part, were discussed among the United States' environmentalist groups; Mexico played a minimal role in the discussions. Many of the concerns raised were about the potential environmental effects of expanded trade enabled by NAFTA. Among the most important issues related to the trade-environment debate were the following. First, it was felt that freer trade would lead to significantly expanded economic activity, with a corresponding increase in environmental degradation. Second, environmentalists feared that NAFTA represented a threat to the United States' sovereignty and that the commitment in international agreements to remove non-tariff barriers to trade would undermine the ability of the United States as a whole and the individual states to implement and upgrade their environmental laws and regulations. Third, environmentalists asserted that NAFTA does not provide specific protections for the environment because its ambiguous language gives rise to too many questions and provides too few answers. Fourth, environmentalists feared that Mexico would provide a "pollution haven" for United States businesses to relocate to, taking jobs away from U.S. workers. Companies would be attracted to Mexico because of the perception that its environmental laws are less stringent than those of the United States. Sixth, they feared that increased industrialization in Mexico would result in increased environmental contamination in both Mexico and the United States.[68]

Contrastingly, the Mexican government's environmental concerns were non-tariff barriers that might eventually restrict access on the part of Mexican goods to the United States. Mexico's concerns followed closely on the controversial tuna-dolphin decisions under GATT.[69] Another concern raised by Mexican officials was that if the level of development among commercial partners is different, so would be the level of protection afforded within the three countries for the protection of the environmental. The rationale behind this argument was that Mexico would be more likely to address its environmental problems

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[68] See P. M. Johnson & A. Beaulieu, *The Environment and NAFTA: Understanding and Implementing the New Continental Law*, (Washington, D.C.: Island Press, 1996) at 8.

[69] See United States - Restrictions on Imports of Tuna: Report of the Panel, (1993) B.I.S.D., 39th Supp. 155. And United States - Restrictions on Imports of Tuna (II): Report of the Panel, (1994). GATT Doc. DS29/R. The American tuna measure was ruled inconsistent with GATT obligations because it only restricted imports of Tuna that were caught using non-dolphin-friendly means. If the United States banned all tuna, then GATT would likely have upheld its measure. For an overview of the tuna-dolphin case, see Robert Housman & Durwood Zaelke, "Trade, Environment and Sustainable Development: A Primer", (1992) 15 Hastings Int'l & Comp. L. Rev. 535. And, Robert Housman & Durwood Zaelke, "The Collision of the Environment and Trade: The GATT Tuna/Dolphin Decision", (1992) 22 Envtl. L. Rep 10268-78.

once it had amassed sufficient economic resources to address those problems. The idea of "environmental protection through economic growth," or "grow now, clean up later," demonstrated that "Mexico's current business first attitude brings with it legitimate scepticism of whether Mexico will readily embrace the idea of slowing economic growth when necessary to preserve the environment." [70]

As originally drafted, NAFTA was similar to the revised GATT that was emerging simultaneously from the Uruguay Round Negotiations.[71] The secrecy of the negotiating process generated protests among environmentalists and pressured the administration of President George Bush to include environmental protections.[72] President Bush formally signed NAFTA on behalf of the United States in December of 1992. The future President Clinton, during the 1992 election campaign, criticized NAFTA for not dealing adequately with environmental issues and committed to negotiate supplemental agreements on both the environment and labour.

Later, President Clinton, honouring promises made during his presidential campaign, strengthened the environmental provisions by including a supplemental environmental agreement, the North American Agreement on Environmental Cooperation[73] ("NAAEC"). The NAAEC, also known as the "Environmental Side Agreement," was created to promote environmental cooperation, increase citizen participation in environmental protection, and ensure that each party effectively enforces its environmental laws.

Environmental protection is not the primary purpose of NAFTA. NAFTA is a mercantile agreement with incidental reference to the environment. Neither the environmental provisions in the NAFTA text nor the attachment of the NAAEC were part of the original NAFTA negotiating text.

a. The Original NAFTA Environmental Provisions

NAFTA itself does not contain any special chapter on environmental measures. Instead, it contains provisions throughout its 22 chapters that deal with the environment. In particu-

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[70] See P. L. Stenzel, "Can Nafta's Environmental Provisions Promote Sustainable Development?" (1995) 59 Alb. L. Rev. 423.
[71] See B. Appleton *supra* note 67 at 3.
[72] See *D. Hunter, J. Salzman & D. Zaelke, supra* note 4 at 1222.
[73] See North American Agreement on Environmental Cooperation between the Government of Canada, the Government of Mexico and the Government of the United States, 13 September 1993 (entered into force 1 January 1994) [hereinafter: *NAAEC*].

lar, the Agreement deals with the environment in six areas: Preamble; relationship with other agreements; Sanitary and Phytosanitary Measures sub-chapter (Chapter 7B); Technical Barriers to Trade chapter (Chapter 9); Investment chapter; and dispute resolution provisions. NAFTA does not address issues such as the enforcement of domestic environmental laws or issues of transboundary pollution. These concerns are addressed in the Environmental Side Agreement.

1. Preamble

The environment and the pursuit of sustainable development are mentioned in NAFTA. The preamble states that one of its primary purposes is to:

> Contribute to the harmonious development and expansion of world trade ...in a manner consistent with environmental protection and conservation; ...promote sustainable development; ...[and] strengthen the development and enforcement of environmental laws and regulations.[74]

However, the Statement of Objectives within the body of NAFTA does not mention sustainable development.[75] Thus, the language about sustainable development in the Preamble provides only a goal and a statement of concern on the part of the United States, Mexico, and Canada. NAFTA does not require pursuit or attainment of that goal.

2. International Environmental Agreements

NAFTA Article 104 lists seven international environmental agreements ("IEA's"), and agrees that they will trump NAFTA in the case of disagreement: the Convention on International Trade in Endangered Species of Wild Fauna and Flora, the Montreal Protocol on Substances that Deplete the Ozone Layer, the Basle Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, the Agreement between the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Waste and the Agreement between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area.[76]

The domestic laws resulting from these agreements must be those "least inconsistent with the other provisions of [NAFTA]."[77] Therefore, a party would have to show that a

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[74] *NAFTA supra* note 66 Preamble.
[75] *Ibid.* art. 102.
[76] *Ibid.* art. 104 and annex 1041.
[77] *Ibid.* art. 104.

challenged measure could not have been somehow "better" or more consistent with NAFTA. The more NAFTA-consistent alternative does not, however, need to be politically or economically feasible.

NAFTA also provides that the parties may add other existing and future IEAs to the protected list through the unanimous consent of the NAFTA parties. Although the requirement of unanimous consent raises serious concerns, the parties have succeeded in adding at least two bilateral treaties to this list: the Convention on the Protection of Migratory Birds and the U.S.- Mexico Convention for the Protection of Migratory Birds and Game Mammals. No additional IEAs have been added to the protected list.[78]

3. Investment: Chapter 11

NAFTA attempts to address a concern that governments could engage in competitive social dumping, that is, attracting investment by lowering their health, safety or environmental standards or enforcement. NAFTA's Article 1114.2 states:

> The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.[79]

Other parts of Chapter 11 strive to ensure that foreign NAFTA investors will be safe from harassment by host governments. They do not allow expropriation without due process, for example, and in general oblige host governments to follow the same standards for foreign investors as they do for domestic ones. Recent research has shown, however, that these provisions have been defined in unintended ways and have been used to attack environmental laws in all three countries.

In the nine years of NAFTA at least 26 investors have invoked the investor-State arbitration provisions of Chapter 11 to pursue claims against one of the three governments for compensation for discriminatory treatment or effective expropriation of their investments.

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[78] "In an effort to secure the support of the U.S.-based National Audubon Society, the Clinton administration was able to obtain the consent of Canada and Mexico to place these bilateral treaties on the list of protected IEAs. This process, however, occurred at a time when the leverage for environmental gains was at its highest. Whether the parties will be able to agree on future IEAs absent that leverage remains to be seen." See R. Housman, "The North American Free Trade Agreement's Lessons for Reconciling Trade and the Environment" (1994) 30 Stanford J. Int'l L' 379.

[79] *NAFTA supra* note 66 art. 1114 (2).

Of these claims 8 have been submitted against Mexico, with 3 cases involving activities by the investors or actions by the Mexican government related to environmental issues.[80]

These cases have motivated contrasting views about the investor protection provisions of the NAFTA and the investor-State arbitration process. The main concern in relation to Mexico has been the possibility of a cooling effect on the ability of federal, state/provincial, and local governments to protect environmental interests. From the standpoint of a developed nation, the following excerpt reviews the consequences of local environmental issues confronted by federal economic interests:

> Because state/provincial and local government actions may give rise to an investor's claim while the federal government is the defending entity, the states and localities are unable to fight their own battles to protect their environmental actions against foreign investors. They fear that the federal governments, influenced more strongly by economic and foreign policy considerations, may not aggressively or effectively represent their interests. In short, constitutions give significant rights to sub-federal governments, whereas under NAFTA it is up to the federal authorities to defend those rights against attack by foreign investors. Ultimately, will national economic policy trump state environmental measures?[81]

If the previous situation between federal and local authorities is a matter of concern in a developed nation such as the United States where environmental policy making and effective enforcement at the local level are comparatively advanced, the suspicions in Mexico are further aggravated. As already mentioned the centralization of environmental policy-making in Mexico is evident, this situation exacerbates the unwillingness to devolve, finance, and endorse the effective enforcement of local environmental regulations that would eventually harm or discourage foreign investment in Mexico.[82]

4. Standards: Chapters 7 and 9

NAFTA deals with sanitary and phytosanitary (SPS) measures in Chapter 7, and all other standards-related measures (SRM), including environmental standards, in Chapter 9. These two chapters outline how the parties should establish their respective levels of pro-

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[80] The submissions concerning environmental issues are: Robert Azinian (Desona), 19 million claim in relation to a contract breach on waste management services; Metalclad, $65 million claim, $16.7 million award in relation to permission to operate a waste management facility; and Waste Management 1 & 2, $60 million claim. See K. P. Gallagher and F. Ackerman, "The Fiscal Impacts of Investment Provisions in United States Trade Agreements" Tax Payers for Common Sense homepage, online: http://www.taxpayer.net/chapter11/index.htm (date accessed: 02 August 2002).

[81] See S. E. Gaines, "Nafta Chapter 11 as a Challenge to Environmental Law Making — One View from the United States"(EnviReform, First Annual Conference) University of Toronto (16-18 November 2000) online: http://www.envireform.utoronto.ca/envireform/pdf/Conference/Gaines.pdf (date: accessed: 02 August 2002).

[82] The particular consequences of NAFTA's Chapter 11 in Mexico are analysed in Chapter 3 of this thesis.

tection,[83] set the standards which achieve those levels of protection, and base those standards on science. For both kinds of standards, NAFTA gives parties the right to establish the levels of protection they find appropriate. Parties may take measures, but cannot use standards as disguised restriction on trade.[84]

All SPS measures must also avoid differences in levels of protection in different cases, where those differences would result in discrimination against foreign-produced goods. A party could not, for example, set low levels of protection on the fruits that it grows, and high levels on those it must import. Having established the appropriate level of protection, the parties must draft legislation to achieve it. The SPS text requires that any measure be "necessary" to achieve the level of protection the party has chosen.[85]

NAFTA differs with the World Trade Organization's Technical Barriers to Trade ("TBT") in the requirement imposed on a party to advance a risk assessment for its standard. Article 2.2 of the TBT specifies, "technical regulations shall not be more trade restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create."[86] Under NAFTA's SPS rules a party does not need to prove a risk assessment for its measures. It must only show that its standards are "based on scientific principles" and the product of an acceptable risk assessment process.[87] Similarly, under Chapter 9's SRM rules, a party need not conduct a risk assessment before setting a standard.[88] NAFTA also attempts to chart a new path for the harmonization of standards. First, NAFTA seeks to ensure that the harmonization of standards will not occur in a downward fashion towards a lowest common denominator. To this end, NAFTA's SPS rules explicitly provide that any harmonization is to occur "without reducing the level of protection of human, animal or plant life or health."[89]

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[83] *NAFTA supra* note 66 art. 712 (1).
[84] *Ibid.* art. 712 (6).
[85] *Ibid.* art. 715 (2).
[86] WTO, *The Legal Texts, the Results of the Uruguay Round of Multilateral Trade Negotiations, Agreement on Technical Barriers to Trade* (Cambridge: 2000) p.121, at 2.2.
[87] See *NAFTA supra* note 66 art. 712 (2).
[88] *Ibid.* art. 907 (1).
[89] *Ibid.* art. 713 (1).

NAFTA's SRM test provides that a standard may include rules that apply to" goods or related processes and production methods."[90] A process and production method (PPM) is the way in which a product is made. Many products go through a number of stages, and therefore a number of PPMs, before they are ready for market. Although Article 915.1 of the SRM text recognizes PPM restrictions as standards, neither Article 907 nor Article 915 explicitly includes PPM-based restrictions as "legitimate objectives" that are protected from challenge.

The NAFTA text fails to deal with trade measures based on the way goods are produced or processed. By failing to establish criteria affecting the use of trade measures based on PPMs. Specifically, the concern is that goods will tend to be produced in and imported from Mexico that impose less stringent PPMs because goods are less expensive to produce under Mexico's less stringent environmental regulations. From that perspective, foreign investment liberalization increases the probability that production will be located in Mexico, since liberalization means that goods produced there will face lowered barriers to their export to the United States and Canada. Furthermore, due to the lack of regulations by NAFTA such goods as well as services would be protected from challenge. However, there is interpretative room for this hypothesis. Recently, amending a previous decision of a WTO Panel, the WTO Appellate Body found that carcinogenic chrysotile asbestos is not the same as its substitutes and that a French ban does not violate international trade laws.[91] Upholding the Panel's finding on the application of the health exception, the Appellate Body confirmed that it is up to each member government, in this case France, to decide on the level of protection it wants to provide for its people. Having chosen to provide absolute protection from cancer-causing asbestos, the Appellate Body confirmed that France had no reasonably available alternative to the ban. The Appellate Body added that, in setting health policy, member governments are not obliged to follow majority scientific opinion.[92]

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[90] *Ibid.* art. 915.

[91] Workers in the shipbuilding and construction industries who installed friable asbestos insulation materials were severely affected by dust levels 100 to 200 times higher than those permitted by current standards. In addition ninety percent of the world production of chrysotile is used in the manufacture of chrysotile cement, in the form of pipes, sheets and shingles. See WTO Upholds French Ban on Asbestos, *Environment News Service* online: http://ens.lycos.com/ens/mar2001/2001L-03-13-10.html (date accessed: 25 September 2002).

[92] The Appellate Body overtly acknowledges that in adopting measures to protect human life or health, a State "may also rely, in good faith, on scientific sources which, at that time, may represent a divergent, but qualified and respected, opinion. A Member is not obliged, in setting health policy, automatically to follow what, at a given time, may constitute a majority scientific opinion." See *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* (Canada, Appellant) (2001), WTO Doc

Because domestic environmental regulations on PPMs abound, it makes sense to be able to discriminate at the border between otherwise similar goods that were produced in clean or dirty ways. In practice, however, allowing discrimination based on PPMs would present some difficulties for the trading system. It would give governments greater opportunity in their struggle to protect their industries unfairly against foreign competition. Motivated not by environmental but by economic considerations, a government might conduct an inventory of the environmentally preferable PPMs used by its domestic industries and make new regulations penalizing those producers (that is, foreigners) not using them. NAFTA's inability to resolve the PPM issue reflects the issue's inherent difficulty.[93] The only exception to this statement is with regard to the PPM-based restrictions provided for in the IEAs listed under Article 104 of NAFTA. By protecting the PPM provisions of these IEAs, NAFTA has essentially recognized certain internationally agreed-upon PPMs.

5. Dispute Resolution

NAFTA provides that in disputes among its parties concerning IEAs or an environmental, health, or safety measure, the challenged party has the right to have the case heard exclusively under the substantive and procedural provisions of NAFTA.[94] As in all NAFTA disputes, there is a general obligation to consult before any other formal NAFTA dispute resolution is initiated.[95] NAFTA dispute panels do not have the power to strike down laws or to compel environmental enforcement. However, they can lead to trade retaliation if appropriate action is not taken.[96]

The greatest concern in dispute panel procedures is the desire of the contending parties for secrecy and the consequent exclusion of public opinion Under NAFTA's dispute resolution provisions, interested members of the general public and non-governmental organizations cannot participate in, or have access to, the hearings or consultations conducted during a dispute. Nor can these individuals and groups obtain the filings of the parties in a

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WT/DS135/AB/R at para. 178 (Apellete Body Report), online: http://www.wto.org/english/tratop_e/dispu_e/135abr_e.doc (date accessed: 29 August 2002).

[93] For a discussion on PPMs and non-tariff barriers see, W. J. Snape III and N. B. Lefkovitz, "Searching for GATT's Environmental Miranda: Are `Process Standards´ getting Due Process?" (1994) 27 Cornell Int'l L.J. 777.

[94] See *NAFTA supra* note 66 arts. 2005 (3), 2005(4).

[95] *Ibid.* art. 2006 (5).

[96] For an analysis of NAFTA's dispute resolution mechanisms see generally, D. Lopez, "Dispute Resolution under NAFTA: Lessons from the Early Experience" (1997) 32 Tex. Int'l L.J. 163.

dispute.[97] Similarly, in certain instances the public can even be denied access to the panel's final decision.[98] Article 2012 calls for the Commission overseeing panel operations to establish procedures that assure that "the panel's hearings, deliberations and initial report, and all written submissions to and communications with the panel shall be confidential."[99] In addition, the process also severely restricts scientific input into an evaluation process that is inherently scientific. As long as neither party objects, Article 2015(1) permits the panel or a disputing party to request "a written report of a scientific review board on any factual issue concerning environmental, health, safety or other scientific matters raised by a disputing Party."[100] If this article is applied to limit scientific input to a fact-finding report, then the panel will be left to decide the scientific legitimacy of a health or environmental regulation without a scientific evaluation of its merits. Unfortunately, since the entire panel process, including the selection of a scientific board is carried out in secrecy, one may never know if the scientific input was merely fact reporting, rather than interpretation of the environmental facts at issue. Furthermore, the degree to which the panel relies on scientific input in reaching its decision will remain secret.

Recently, amicus curiae briefs have been received by a number of WTO panels and the Appellate Body, raising disagreement from many WTO Members [101] and calls by others for the creation of criteria to guide their use.[102] In addition, in a NAFTA Chapter 11 dispute, Methanex Corporation and United States of America, a NAFTA panel decided to accept amicus curiae briefs on the case at hand.[103] These cases demonstrate that current trends in dispute resolution point to wider transparency and participation of interested members of the public and non-governmental organizations.

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[97] *Ibid.* art. 2012.1 (b).
[98] *Ibid.* art. 2017 (4).
[99] *Ibid.* art. 2012.
[100] *Ibid.* art. 2015 (1).
[101] "Detractors of amicus briefs at the WTO ... do have reason to be concerned. The idea of repeat non-state actors at the WTO being able to influence the outcome of cases is abhorrent to those states who want to protect state prerogatives in international organizations." For an analysis of the history of amicus briefs submitted to the WTO and its probable consequences see A. Kupfer, "Institutional Concerns of an Expanded Trade Regime: Where Should Global Social and Regulatory Policy be Made?: Unfriendly Actions: The Amicus Brief Battle at the WTO" (2001) 7 Wid. L. Symp. J. 87.
[102] See generally G. Marceau and M. Stillwell, "Practical Suggestions for Amicus Curiae Briefs before WTO Adjudicating Bodies" (2001) 4JIEL1.
[103] See *infra* Chapter 3.

b. The Difficulty of Environmental Rules as Trade Barriers

NAFTA's environmental provisions are performing valuable functions but are insufficient to arrest pressures on the environment arising from increased trade and foreign investment. NAFTA left pending a considerable margin of uncertainties. First, efficient regulations for the exploitation of natural resources are missing. Second, the Agreement provides few mechanisms for internalization of environmental costs. Third, there is an absence of provisions to evaluate the implementation and enforcement of national laws. Fourth, NAFTA's lack of provisions to regulate PPMs leaves this issue uncertain. Finally, the trade-environment relation is still difficult, particularly regarding sanctions. The application of sanctions, so far, is more a normative assumption than a reality.

Trade and environmental policies have traditionally been developed separately. In the case of Mexico, this has been on both the domestic and international levels. However, the growing international concern over environmental issues and the increasing volume of international trade have dramatically increased the potential for direct conflict between these interests.[104] As the previous analysis demonstrates, matching the divergent interests of free trade and environmental protection in a single document is a formidable task that frequently results in confused and contradictory provisions. Moreover, the difficulties encountered by the negotiators of NAFTA are merely local manifestations of a worldwide problem. The reason for NAFTA's failure to adequately address trade and foreign investment liberalization and the protection of the environment in Mexico is almost certainly due to the extent of the project. Comparatively speaking the stage of development of Canada and the United States presents an insurmountable obstacle to identifying trends in common with Mexico.

Demonstrating that trade and foreign investment liberalization has brought along a detriment on the Mexican environment is beyond the scope of this thesis. To prove such a

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[104] See E. Brown Weiss "Trade and Environment: Environment and Trade as Partners in Sustainable Development: A Commentary" (1992) 86 A.J.I.L. 728. Brown Weiss highlights the existing and potential conflict between free trade and environmental concerns by stating that: "[t]rade is not an end in itself; rather, it is a means to an end. The end is environmentally sustainable economic development...[T]here are legitimate constraints on trading patterns and practices that are necessary to ensure that the 'instrument of trade' leads to environmentally sustainable development. Measures needed to protect the environment cannot be forsworn simply because they may adversely affect free trading relationships." See also H. Mann, "NAFTA and the Environment: Lessons for the Future" (2000) 13 Tul. Envtl. L.J. 387, establishing that "[t]he very success of trade law underlies its importance in expanding the capacity of trade officials to consider trade law, not as an end on itself, but as a part of a broader, multifaceted international law geared toward achieving sustainable development."

situation would require extensive economic studies of empirical nature. For instance, assessing the impacts on the environment of a particular product would require a complete analysis throughout the life cycle of the good; this includes production methods, consumption patterns and final disposal. In addition, the enormous task of assessing the rational exploitation of the natural resources employed in the elaboration of the good and the impact on the environment of the services (wastewater and solid waste disposal, sources of energy, transportation, fumigation, packaging and refrigeration to name the few) provided during the life cycle of the product would further complicate this appraisal. However, in a recent environmental performance review developed by the Organization for Economic Co-operation and Development ("OECD") a group of experts examined Mexico's results concerning sustainable development, economic growth and the protection of the environment. The report stated as follows:

> Overall, no decoupling between environmental pressures and GDP is yet taking place. Energy indicators are rising in line with GDP, and traffic-related indicators are growing at even faster rates. Municipal waste generation is outstripping population growth. In a number of instances, stocks of renewable natural resources are decreasing as a consequence of overexploitation...In terms of trends in environmental pressures the current situation is generally not favourable. While there are relatively few signs to indicate that Mexico is on a totally sustainable development path, however, there have been encouraging efforts since 1994 to reverse this trend.[105]

Regardless of the difficulty in establishing the conditions of the environment before and after NAFTA/NAAEC, the implementation of these agreements demonstrated the limited capacity of Mexico's environmental law to succeed in the goal of attaining sustainable development as established in both international commitments. Mexican limitation resulted from the legal antinomy between the NAFTA/NAAEC international environmental provisions and the Mexican domestic environmental provisions. On the international side, NAFTA/NAAEC established specific substantive issues and, more importantly, procedural issues to provide transparency and broader participation of the concerned actors. On the domestic side, while substantive issues are similar or even more stringent than those established in NAFTA/NAAEC, Mexican procedural issues are non-transparent and neglect participation of the concerned actors in an effective implementation of environmental law. After almost eight years of trade and foreign investment liberalization the claims submitted

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[105] OECD, Group on Environmental Performance, *Environmental Performance Reviews. Mexico*, OECD Code 971998011P1 (April, 1998) [hereinafter: *OECD Environmental Review*]

to the NAAEC and NAFTA's Chapter 11 dispute resolution processes have demonstrated important shortcomings on the implementation of Mexico's environmental regulations.

The Mexican record concerning NAFTA's environmental regulations is imperfect. However, it makes more sense to tackle the shortcomings than lament the existence of a free trade agreement.

As a means to identify common trends and possible causes of conflict between the international and the domestic levels, the following chapters analyse the characteristics of the NAAEC and NAFTA's Chapter 11 processes and the main cases filed against the Mexican government.

CHAPTER 2. SUSTAINABLE DEVELOPMENT AND THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION

In addition to the gradual elimination of trade barriers as reflected in the main body of NAFTA, the United States, Mexico, and Canada simultaneously reached an agreement for the protection of the mutual environment. This accord is set forth in the North American Agreement on Environmental Cooperation[106] ("NAAEC"), also known as the "Environmental Side Agreement."[107] The NAAEC provides a legal framework ensuring that NAFTA countries enforce their environmental laws and open the political, administrative and judicial processes to the public. It provides that discussions on environmental policies are open and that the laws are enforced fairly and regularly. The NAAEC brought together the dichotomy between Northern and Southern environmental concerns with a specific mandate to "establish institutional and substantive linkages between the development and implementation of trade law, and the development and implementation of national or international law."[108] NAAEC also seeks "to promote sustainable development based on cooperation and mutually supportive environmental and economic policies."[109]

Strong opposition from environmental groups characterized the negotiations leading to the adoption of NAFTA. The negotiations came close to being derailed, in part because of concerns about poor environmental performance by one of the signatory partners: Mexico. During NAFTA's negotiation the Mexican government was not forthcoming in engaging NGOs and the public in the NAFTA debate. Mexico did not stress environmental issues in the negotiations as a means of improving its position to gain more benefits.[110] Additionally, by the time of considering NAFTA Mexico had already taken major steps to improve its

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[106] See *NAAEC supra* note 73. The Agreement, as well as many of the CEC-generated documents are available on the CEC homepage, http://www.cec.org (date accessed: March 13, 2002) [hereinafter *CEC homepage*].

[107] "Despite its origins as something of a palliative measure to those concerned about the environmental implications of enhanced trade, the NAAEC's reach extends far beyond the trade and environment arena. As a result, some observers urge that the NAAEC is far more than a "side agreement . . . but instead is a complete and vital agreement in its own right." See D. L. Markell, "The Commission for Environmental Cooperation's Citizen Submission Process" (2000) 12 Geo. Int'l Envtl. L. Rev. 545. Professor Markell's article provides a very useful overview of the procedure from his point of view since he was then the Director of the North American Commission for Environmental Coopertion ("NACEC") Submissions Unit. [hereinafter: *Markell*].

[108] See *NAAEC supra* note 73 pream.

[109] *Ibid.* art.1 (b).

[110] For an extensive review of the trade vs. environment debate during NAFTA's negotiations see *e.g.*, P. S. Kibel "The Paper Tiger Awakens: North American Environmental Law After the Cozumel Reef Case" (2001) 39 Colum. J. Transnat'l L. 395; and J. F. Dimento & P. M. Doughman, "Soft Teeth in the Back of the Mouth: The NAFTA Environmental Side Agreement Implemented" (1998) 10 Geo. Int'l Envtl. L. Rev. 651; see also R. Housman, *supra* note 77.

record on the environment.[111] However, there remained a perception in each of the Parties that Mexican non-enforcement of its own environmental laws was one of the central reasons for pursuing an environmental agreement.[112] Ultimately, NAAEC was adopted on January 1, 1994.

This chapter reviews the outcome of the NAAEC dispute resolution mechanism in relation to Mexico and its limitations in attaining sustainable development under Mexican environmental law. The first part studies the party-to-party dispute resolution mechanism and the Articles 14 and 15 process through which non-governmental organizations ("NGOs") or persons may file a submission alleging that a member country is not enforcing its environmental law effectively. The second section analyses the citizens' submission process outcome. The final part analyses the positive contributions of the citizens' submission process and suggests some modest proposals for the achievement of environmental protection in Mexico as required by sustainable development. The objective of this chapter is to demonstrate how CEC's citizens' submission process has shown the limited capacity of the Mexican government for compliance, monitoring and dispute resolution of the players that cause environmental problems. This chapter concludes that the citizens' submission process requires adequate reforms to impose specific remedial plans to bind Mexico or any other Party to overcome the non-enforcement of environmental regulations.

A. The Commission for Environmental Cooperation

To supervise the NAAEC, the NAFTA parties created a Commission for Environmental Cooperation ("CEC").[113] The CEC consists of a Council, a Secretariat, and the Joint Public Advisory Committee ("JPAC").[114] The Council comprises cabinet level officials of the three countries, meets at least once annually, and makes all decisions by consensus (unless instructed not to do so).[115] The Secretariat, which is located in Montreal, Canada, with a li-

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[111] N. Kublicki, "The Greening of Free Trade: NAFTA, Mexican Environmental Law, and Debt Exchanges for Mexican Environmental Infraestructure Development" (1994) 19 Colum. J. Envtl. 59.
[112] See K. Raustiala, "International 'Enforcement of Enforcement' under the North American Agreement on Environmental Cooperation" (1996) 36 Va. J. Int'l L. 721, noting that a "driving factor" for the adoption of the NAAEC was the "great concern—primarily on the part of U.S. environmental groups—that Mexican environmental law... was inadequately implemented and enforced" and continuing that: "In return for their political support of NAFTA, several major U.S. environmental organizations, joined by similar groups in Canada and Mexico, demanded the negotiation of a companion agreement creating a North American Commission on Environmental Cooperation."
[113] See *NAAEC supra* note 73 at art. 8 (1).
[114] *Ibid.* art. 8 (2).
[115] *Ibid.* art. 9(1), (3) (a), (6).

aison office in Mexico City, provides technical and operational support to the Council as well as to committees and groups established by it. The Secretariat is composed of professional staff who implement initiatives and conduct research in core programme areas on topics relevant to the North American environment. The JPAC is composed of fifteen members, five from each of the three countries, who are appointed by their respective governments. Its members act independently and their responsibility is to provide the Council, which is composed of the environment ministers of each country, with their advice on all matters within the scope of the NAAEC. The Chair is elected for a one-year term and by rotation from among the JPAC members appointed for each country.[116]

The Council is charged with the duty of overseeing the implementation of the Agreement and of addressing disputes between the parties regarding its interpretation or application.[117] The most significant CEC responsibility is to implement a "citizen submission" process whereby citizens may file "submissions" asserting that any of the three signatory countries is not enforcing its environmental laws effectively.[118]

B. The Environmental Side Agreement's Dispute Resolution Process

The most extensive section of NAAEC deals with settlement of disputes. The agreement sets forth two distinct dispute resolution systems for enforcement matters. The first, the citizen's submission process is contained in Articles 14 and 15 and applies when a government fails to enforce effectively its environmental law. The second is the party-to-party dispute resolution mechanism contained in Part V of the Agreement.[119]

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[116] *Ibid.* art. 16 (1). Mexican JPAC members have a range of backgrounds. However, four of the five Mexican members of the JPCS live in Mexico City. This fact is important to address because it illustrates the traditional centralization of Mexican government. CEC's home page provides biographical information on each JPAC member. It also contains the JPAC Vision Statement and the Rules of Procedure that govern JPAC's work. See generally Joint Public Advisory Committee, online: *CEC homepage*, http://www.cec.org/jpac (date accessed: March 1, 2002).

[117] *Ibid.* art. 10 (1) (b), (d).

[118] Some observers suggest that the NAAEC's primary orientation is toward enhancing enforcement of domestic environmental law. See e.g., K. Raustiala, *supra* note 112, suggesting that "the NAAEC, though covering a number of important trade and environmental issues, is centrally concerned with strengthening the enforcement of domestic environmental law"; A.L.C. de Mestral, "The Significance of the NAFTA Side Agreements on Environmental and Labour Cooperation" (1998) 15 Ariz. J. Int'l & Comp. Law 169, suggesting that "[A]rticle 14 is the core provision of the NAAEC"; B. Bugeda "Is Nafta Up to Its Green Expectations? Effective Law Enforcement Under The North American Agreement on Environmental Cooperation" (1999) 32 U. Rich. L. Rev. 1591, stating that the citizen submission process is "perhaps the most important function of the Secretariat of the CEC, and definitely the one that has captured the most attention."

[119] See *NAAEC supra* note 73 at art. 22 to 36.

a. The Party-to-Party Dispute Resolution Mechanism

The party-to-party dispute resolution mechanism may be invoked only if a government has engaged in a "persistent pattern" of failure to effectively enforce its environmental law.[120] A "persistent pattern" means a "sustained or recurring course of action or inaction beginning after the date of entry into force of agreement."[121] The dispute resolution mechanism is limited to "situations involving workplaces, firms, companies, or sectors that produce goods or provide services."[122] The NAAEC specifically refers to: (a) goods or services that are traded between the territories of the governments involved; or, (b) companies that compete in the territory of the government against which the complaint has been made, with goods or services produced or provided by individuals from a different country.[123] This is the only section in the NAAEC in which there is a direct link between trade and the environment.

The dispute resolution process is complicated and, since it has never been invoked, underutilised. Pursuant to Article 22, any other party may request consultations with the offending party.[124] If the consulting parties fail to reach a mutually satisfactory resolution, any disputant may request a special session of the Council[125] "to resolve the dispute promptly."[126] If the Council fails to settle the controversy it shall convene an arbitral panel "to examine whether there has been a persistent pattern...and to make findings, determinations and recommendations."[127] Ordinarily, the panel's recommendations should be in the form of a proposed "action plan" that the offending party is to adopt and implement.[128]

The final role of the environmental dispute resolution process is to implement the panel's final report. At least three situations may arise during the implementation stage. First, the disputants may agree on a "mutually satisfactory action plan" that the offending party proceeds to fully implement.[129] If this situation occurs, the controversy ends and no further oversight is required. Second, the disputants may agree on an action plan but the

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[120] *Ibid.* art. 22 (1).
[121] *Ibid.* art. 45 (1) (b).
[122] *Ibid.* art. 24.
[123] *Ibid.*
[124] *Ibid.* art. 22 (1).
[125] *Ibid.* art. 23 (1).
[126] *Ibid.* art. 23 (3).
[127] *Ibid.* art. 31 (2).
[128] *Ibid.* art. 31 (2)(c).
[129] *Ibid.* art. 33.

offending party may fail to fully implement it.[130] If this situation arises, the complaining party may request that the environmental panel be reconvened.[131] The panel shall determine whether the action plan is being fully implemented and, if it is not, shall impose a "monetary enforcement assessment" upon the offending party.[132] Third, the disputants may be altogether unable to agree on an action plan.[133] If the third situation arises then the complaining party may request that the panel be reconvened.[134] The panel is to establish an action plan "sufficient to remedy the pattern of non-enforcement" and may impose a monetary enforcement assessment on the offending party.[135]

No NAFTA country formally has alleged that another country has engaged in a persistent pattern of failure to effectively enforce its environmental laws; thus, the elaborate dispute settlement mechanism that begins with Article 22 consultations remains untested.

At the beginning of NAFTA, cooperation was needed among the parties as a means to succeed in trade liberalization. Consequently, accusing each other of environmental violations would have been an obstacle to the achievement of free trade objectives. Also, because NAFTA started as an experiment, certain important sectors within the three countries would have liked to see a major breakdown in the early implementation; therefore, political pressure may have guided government officials reluctant to engage in conflicts that would have only worsened an already stressed situation. Moreover, because complaints may only be referred to arbitration by a two-thirds vote of the Council, a complaining party would have to convince another party to approve the referal—an extremely unlikely possibility. It is perhaps contradictory to assign a commission governed by a council of environment ministers to assess objectively the effectiveness of the environmental regulatory systems in their own countries. Self-assessments are not necessarily the most appropriate.

The dispute settlement mechanism contained in Articles 22-36 of the NAAEC should be revised so that the provisions actually address persistent patterns of non-enforcement. The present procedures make it very difficult to invoke these clauses (the time length to invoke

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[130] *Ibid.* art. 34 (1).
[131] *Ibid.* art. 34 (1).
[132] *Ibid.* art. 34 (5).
[133] *Ibid.* art. 34 (5).
[134] *Ibid.* art. 34 (1) (2).
[135] *Ibid.* art. 34 (a).

the clauses is at least two years). Apparently, the provisions are designed to be undeveloped. The parties' view of the likelihood that the procedure will ever be used may be indicated by the fact that as of March 12, 2002, eight years after the entry into force of the Agreement, they have yet to negotiate the model rules of procedure necessary for dispute resolution under Part V to take place.

b. The Citizens' Submission Process

According to Article 14, "any non-governmental organization or person" may submit a petition to the Environmental Secretariat alleging that a NAFTA country is "failing to effectively enforce its environmental law."[136] Assuming the Secretariat "accepts" the submission, its aim is to determine whether a formal response from the country complained against is warranted. To be acceptable, a submission must be written in an appropriate language (Spanish, French, or English), clearly identify the Submitter, provide sufficient information to allow the Secretariat to review the submission, be designed to promote enforcement rather than harass industry, reflect that the matter has been communicated in writing to the party complained against, and be filed by a person residing or established in one of the three countries.[137] If thereafter the Secretariat concludes that the submission merits developing a "factual record," the Secretariat is to inform the Council.[138] "The Secretariat shall prepare a factual record if the Council, by a two-thirds vote, instructs it to do so."[139] Also by a two-thirds vote of the Council, the final factual record and related comments from any NAFTA country may be made public.[140] This is where the dispute settlement process ends in cases involving a country's mere failure to effectively enforce its environmental laws.

The Council adopted Guidelines in October 1995 in order to provide additional guidance concerning this process.[141] The Council approved revisions to these Guidelines during its June 1999 annual meeting in Banff, Canada.[142]

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[136] *Ibid.* art. 14 (1).
[137] *Ibid.* art. 14 (1) (a)-(f).
[138] *Ibid.* art. 15 (1).
[139] *Ibid.* art. 15 (2).
[140] *Ibid.* art. 15 (7).
[141] See CEC Council Resolution 95-10 (Oct. 13, 1995), available at *CEC homepage supra* note 106.
[142] See CEC Council Resolution 99-06 (June 28, 1999) Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation (June 28, 1999), available at *CEC homepage supra* note 106. [hereinafter: *Guidelines*]. The Guidelines, for example, provide details on how submissions must be submitted: in writing, in a language desig-

c. Procedural issues

To provide a basis for the analysis of the claims for non-enforcement submitted against the Mexican government, it is important to clarify certain procedural issues related to the citizen's submission process provided by the NAAEC.

1. Admissibility.

A submission must first meet admissibility requirements set forth in Article 14(1). The most important requirement is that the submission asserts that a state party "is failing to effectively enforce its environmental law."[143] The Agreement defines "environmental law" to include laws whose primary purpose is "the protection of the environment, or the prevention of a danger to human life or health..."[144] With respect to "effectively enforce", perhaps the most common assertion to date has been that one or more regulated parties are violating environmental requirements and the government is failing to enforce effectively those requirements because of allegedly inadequate inspection practices, prosecution-related efforts, or both.[145] The other admissibility requirements are relatively uncomplicated: the submission must be in a designated language of the state against which it is directed; it must identify the Submitter; it must provide enough background information to allow the Secretariat to review it; it must indicate that the matter has been communicated in writing to the state; and it must be from a person or organization residing or established in the territory of a state party. [146]

2. Requesting a Response

Article 14(2) states that "in deciding whether to request a response, the Secretariat shall be guided by four provisions." The first provision is whether "the submission alleges harm to the person or organization making the submission."[147] The Guidelines indicate that the harm should be due to the asserted failure of enforcement. Further, the harm should relate to protection of the environment or prevention of danger to human life or health. Guideline no. 7.4 provides as follows:

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nated by one of the Parties, not exceeding 15 pages in length, excluding supporting information. The guidelines agreed upon a set of criteria, namely, accessibility, transparency, independence of the Secretariat, balance/parity between party and Submitter, impartiality, discretionality and conformity to the NAAEC.

[143] See *NAAEC supra* note 73 at art. 14 (1).

[144] *Ibid.* art. 45 (2) (a).

[145] See *Markell, supra* note 107.

[146] See *NAAEC supra* note 73 at art. 14 (a) (b) (c) (d) (e) (f).

[147] *Ibid.* art. 14 (2) (a).

> In considering whether the submission alleges harm to the person or organization making the submission, the Secretariat will consider such factors as whether:
>
> (a) the alleged harm is due to the asserted failure to effectively enforce environmental law; and
>
> (b) the alleged harm relates to the protection of the environment or the prevention of danger to human life or health (but not directly related to worker safety or health), as stated in Article 45(2) of the Agreement.[148]

The Secretariat's broad interpretation of the "harm" issue, allows an evaluation of the importance and character of the resource affected.

The second provision is whether "the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of this Agreement."[149] According to David L. Markell, former Director of the NACEC Submissions Unit: "[A]rticle 14(2)(b) should help the CEC to keep in mind its status as an international institution with a continental reach as the Secretariat addresses individual submissions and makes judgments as to which warrant further review under this process."[150]This consideration provides a margin of discretionary power to the CEC. The Secretariat may filter out complaints that meet all other procedural requirements, but whose examination would not further the goals of the Agreement.

The third provision is whether "private remedies available under the Party's law have been pursued."[151] According to the Guidelines, the Secretariat's consideration of whether private remedies available under the Party's law have been pursued will be guided by whether:

> (a) requesting a response to the submission is appropriate if the preparation of a factual record on the submission could duplicate or interfere with private remedies that are being pursued or have been pursued by the Submitter; and,
>
> (b) reasonable actions have been taken to pursue such remedies prior to initiating a submission, bearing in mind that barriers to the pursuit of such remedies may exist in some cases.[152]

This consideration repeats the exhaustion-of-remedies requirement. The NAAEC softens in two ways the traditional rule that remedies be exhausted. First, it changes the rule from a requirement that must be met to a factor to be taken into account by the Secretariat. Second, it asks not whether remedies have been exhausted, but only whether they have

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[148] See *Guidelines supra* note 142 at no. 7.4.
[149] See *NAAEC supra* note 73 at art. 14 (2) (b)
[150] See *Markell supra* note 107.
[151] See *NAAEC supra* note 73 at art. 14 (2) (c)
[152] See *Guidelines supra* note 142 at no. 7.5.

been pursued. This consideration allows a valid claim to be heard at the international level without working its way through domestic procedures that might prove futile in the end, either because of domestic courts' reluctance to address conflicts where government is involved, or because the burdens associated with years of litigation could make the claimants withdraw the complaint before it makes its way through domestic procedures.

The fourth provision is whether "the submission is drawn exclusively from mass media reports."[153] This consideration may be motivated by the necessity to withdraw frivolous submissions. Media reports represent a subjective evaluation; this subjectivity may bias the impartiality of the report. Additionally, the complex interaction between facts and the law that characterizes an environmental problem requires a scientific and legal approach; media reports may represent a general assessment rather then an in-depth investigation. Finally, submissions that are drawn exclusively from mass media reports are probably less likely than others to warrant further consideration, under similar circumstances.

3. Recommending a Factual Record

Having completed the review of the submission, the Secretariat has two options. First, it may unilaterally dismiss a submission. If it does not do this, the Secretariat may decide to request a response from the party. The next phase involves the Secretariat's consideration of the response, as well as the submission under Article 15(1) to determine whether to recommend to the Council the development of a factual record.

The Agreement identifies one circumstance under which the Secretariat may not proceed further: if the state concerned advises the Secretariat that, "the matter is the subject of a pending judicial or administrative proceeding."[154] The Agreement defines "judicial or administrative proceeding" as "a domestic judicial, quasi-judicial or administrative action pursued by the Party in a timely fashion and in accordance with its law," including "mediation or arbitration" or "an international dispute resolution proceeding to which the Party is party."[155]

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[153] See *NAAEC supra* note 73 at art. 14 (2) (d).
[154] *Ibid.* art. 14 (3) (a).
[155] *Ibid.* art. 45 (a) (b).

4. Council Approval

If the Secretariat considers that a factual record is warranted, it so advises the Council and provides its reasons.[156] The Council then votes whether to direct the Secretariat to develop such a record. The Agreement specifically requires a two-thirds vote,[157] so that the state party concerned may not block a factual record by itself.

If the Council decides not to direct development of a factual record, the Secretariat's last action on the submission is to notify the Submitter and inform the Submitter that the submission process is terminated. [158]

5. Preparing a Factual Record

If the Council approves the request, the Secretariat proceeds to prepare the factual record. The Agreement authorizes the Secretariat to consider "any relevant technical, scientific or other information" that is:

> (a) publicly available;
>
> (b) submitted by interested non-governmental organizations or persons;
>
> (c) submitted by the Joint Public Advisory Committee; or
>
> (d) developed by the Secretariat or by independent experts.[159]

In addition, the Agreement provides that the Secretariat shall consider any information furnished by a party. The Secretariat then submits its draft factual records to the Council for review. The Guidelines specify that draft factual records shall include:

> (a) a summary of the submission that initiated the process;
>
> (b) a summary of the response, if any, provided by the concerned Party;
>
> (c) a summary of any other relevant factual information; and
>
> (d) the facts presented by the Secretariat with respect to the matters raised in the submission.[160]

The Agreement provides that "any Party may provide comments on the accuracy of the draft within forty-five days thereafter."[161] The Secretariat is to incorporate, "as appropriate," any such comments in its final factual record and submit the final version to the Council.[162]

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[156] *Ibid.* art. 15 (1).
[157] *Ibid.* art. 15 (2).
[158] See *Guidelines supra* note 142 at no. 10.4.
[159] See *NAAEC supra* note 73 at art. 15 (4)
[160] See *Guidelines, supra* note 142 at no. 12.1.
[161] See *NAAEC supra* note 73 at art. 15 (5).
[162] *Ibid.* art. 15 (6).

The Council then determines, by a two-thirds vote, whether to make the final factual record publicly available.[163]

The Council has approved the publication of three factual records prepared to date. Public objections could result from a Council resolution to suppress a final report relevant to compliance by one of the state parties with an obligation to effectively enforce. In the words of John H. Knox: "Given the number of people who would have knowledge of the report in and out of the three governments, it would be extraordinarily difficult in any event to keep a factual record truly confidential. As a result, it seems unlikely that the Council would ever decline to make a factual record public."[164]

C. The Citizens' Submission Process and Sustainable Development in Mexico

A total of thirty-four submissions have been filed since the Agreement went into effect in January 1994.[165] Of these, fifteen involve Mexico, eleven involve Canada, and eight involve the United States. Of the fifteen submissions involving Mexico one has been recently resubmitted, three have been dismissed, three have been withdrawn, one is waiting a response from Mexican authorities, five are undergoing factual record development, and two factual records have been completed and published.

As August 2002 the Secretariat has informed the Council that the Secretariat considers that seven submissions by against the non-enforcement of Mexican environmental regulations warrant the development of a factual records. This is striking in comparison to a single factual record involving Canada and none for the United States. It is important to consider the effects of the NAAEC on the future of Mexican environmental policy within the framework of sustainable development. The performance of Mexico concerning the enforcement of its environmental law shows a disparate situation in comparison with the rest of North America. In light of the accumulation of factual records, the Mexican government is going to be forced to redefine its relation with the Secretariat. The possibility of Mexico's withdrawing support from the NAAEC is remote. Recent political changes and the commitments manifested in other international agreements (OECD, the Free Trade

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[163] *Ibid.* art. 15 (7).
[164] See J. H. Knox, "A New Approach to Compliance with International Environmental Law: The Submissions Procedure of the Nafta Environmental Commission" (2001) 28 Ecology L.Q. 1.
[165] This update is until November 2002.

Agreement with the European Union, and NAFTA itself) show a Mexican government looking to abide by its international obligations.

The following section reviews the NAAEC's citizens' submission process in relation to Mexico's enforcement of its environmental law. The first part analyses the main obstacle presented by Mexican domestic legal framework to succeed in the goal of attaining sustainable development as required by NAAEC. This part criticizes the discretional power invested in Mexico's central authorities and the lack of accountability of Mexico's environmental civil servants. Both conditions are clearly manifested in the ineffectiveness of the only remedy provided by LGEEPA's: the Popular Complaint. The second part analyses the contributions of NAAEC to attain sustainable development in Mexico by reviewing the effectiveness of factual records within Mexican society, the potential of the cooperative mechanism provided by NAAEC to attain sustainable development, and finally the reasons why imposing monetary assessments or trade sanctions would contribute to the enforcement of Mexican environmental regulations.

a. Centralism, Discretion, Lack of Accountability and the Inefficiency of the Popular Complaint Remedy

The only remedy provided to Mexican citizens by the LGEEPA is the Popular Complaint. According to the law, this remedy allows any person to denounce the environmental authorities' alleged violations of environmental laws and regulations or harm they are committing to the environment. It requires the government, among other things, to consider the complaint, take action if applicable, and inform the petitioner of any resolution on the matter. However, the LGEEPA does not grant citizens the right to sue the government to enforce its environmental laws.[166] In the case that a Mexican citizen has a complaint regarding SEMARNAT's failure to enforce environmental laws, the realization of this enforcement is problematic because the only way enforcement will materialize is if SEMARNAT, by its discretion and through its enforcement body, PROFEPA, decides to enforce the law against itself. Thus, the Popular Complaint will most likely be denied because there is no legal incentive for SEMARNAT to grant the individual's request. In addition, governments —federal, local, or municipal, depending on the jurisdiction— do not

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[166] See *supra* notes 59-60 and accompanying text.

take action against polluters because they are not merely the regulators: they also own, operate, finance, or patronize the polluting industries. Governments are therefore in conflict of interest. If they decide to curb sewage pollution by attending to Popular Complaints, they will have to pay the price.[167]

The purpose of this section is to demonstrate three situations: first, the ineffectiveness of the Popular Complaint remedy for the enforcement of Mexican environmental regulations; second, the discretion invested in the Mexican environmental civil servants to investigate and take action against violators; and third, the lack of accountability of Mexican environmental authorities.

The discretion and lack of accountability of Mexican environmental authorities are manifested in all the petitions submitted to the CEC. However, these conditions become aggravated when at least one of the following situations is presented: first, if the offending party is a public entity —either federal, local or municipal; second, if the offended party is a poor community that depends closely on their surrounding environment to maintain their way of life; third, if there is a conflict between the social interests of the community and the economic interests of either the state governor or the federal government; fourth, when the assessment of scientific evidence or the establishment of environmental impact is left solely to SEMARNAT's officers and the offending industry; and fifth, when the economic activity liable for environmental damage is monopolistic or organized as a cartel.

Another situation worth mentioning, although not the subject of this thesis, is the prevalent pattern of corruption affecting Mexico. While empirical evidence of corrupt conduct involving PROFEPA's inspectors is difficult to adduce,[168] three arguments lead one to suspect that the conditions obtain to generate corrupt conduct. First, in Mexico there is a widely recognized belief in corruption among enforcement-level regulatory officers. Since the collection of traffic fines, renewal of permits, issues of authorization, and inspections

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[167] PROFEPA, through its public affairs office, declares that out of the 5,488 Popular Complaints submitted between January and November of 2001, 1,621 were pending resolution and 3,867 were concluded. However, no information concerning critical activities directed to Popular Complains, specific environmental violations, decisions resulting from inspection visits, sanctions imposed for alleged violations, or remedial actions is provided by PROFEPA. See generally, "Atención a la Denuncia Ambiental" Programa de Procuración de Justicia Ambiental, online: PROFEPA homepage, http://www.profepa.gob.mx/comsoc/programas/V_DENUNCIAS.pdf (date visited August 2, 2002).

[168] For an analysis of corruption, with an emphasis on Latin America see, I. Bannon, "The Fight against Corruption: A World Bank Perspective" (1999) Inter American Development Bank homepage, online: http://www.iadb.org/regions/re2/consultative_group/groups/transparency_workshop6.htm (date accessed: August 2, 2002).

are known to be subject to manipulation, a citizen may expect environmental enforcement activity to incorporate the same kind of corrupt behaviour. Second, domestic and foreign investors recognize that the price for doing business in Mexico is paid through political contributions, entry fees, and "greased palm" bribes. Regularly, an individual firm finds bribes a helpful way to reduce the red tape it faces. Third, in Mexico the investigation, inspection, and prosecution of environmental offenders is discretionary and monopolized by non-transparent central authorities. Monopoly plus discretion minus accountability equal corruption.[169] SEMARNAT and PROFEPA meet the three requirements of the equation.

The incidence of these situations is not present in all the petitions submitted to the CEC; however, those petitions more likely to reach the final stages of the submission process and to warrant the development of a factual record are imbued with a combination of them. The more significant examples to date of the incidence of such distortions are the following submissions: Mexico City Airport (SEM-02-002); Tarahumara (SEM-00-006); Aquanova (SEM-98-006); Molymex II (SEM-00-05); Rio Magdalena (SEM-97-002); Cozumel (SEM-96-001); Metales y Derivados (SEM-98-007) and Cytrar II (SEM-01-001).[170]

1. Mexico City Airport (SEM-02-002)[171]

On February 7, 2002, neighbours in the area surrounding the Mexico City International Airport (Aeropuerto Internacional de la Ciudad de México, "AICM") asserted that Mexico is failing to effectively enforce its environmental laws with respect to the noise emissions originating from that airport. The submission asserts that Mexico's failure to effectively enforce its environmental law has resulted in the AICM neighbours suffering hearing loss, various negative effects due to loss of sleep, and lessened academic performance of the

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[169] See R. Klitgaard "International Cooperation Against Corruption"(1998) Finance & Development, at pp. 3-6, International Monetary Fund homepage, online: http://www.imf.org/external/pubs/ft/fandd/1998/03/pdf/klitgaar.pdf (date accessed: August 2, 2002).

[170] Information concerning each submission is available in the Registry of Submissions on Enforcement Matters [hereinafter: *Registry of Submissions*], online: *CEC homepage supra* note 106, online: http://cec.org/citizen/index.cfm?varlan=english (date accessed March 17, 2002). All quotations related to the Mexican citizens' submissions, the Mexican government's responses, and the facts presented by the Secretariat have been drawn from the Registry of Submissions. The CEC Registry is a compilation of all publicly filed documents in each proceeding under Articles 14 and 15 of the Agreement. It includes submissions, responses of parties, procedural decisions of the Secretariat, and factual records. The Secretariat assigns each "Submission on Enforcement Matters" (or SEM) a number, which it uses to identify all documents filed with the Secretariat concerning that submission. The first part of the number is the last two digits of the year in which the submission was filed, and the second part refers to its sequence within that year. SEM 96-001, for example, is the number assigned to the first submission filed in 1996. Submissions are often identified by their subject or submitter, rather than by the submitter's name versus a state. SEM 96-001 concerned a proposed pier in Cozumel, and is therefore known as the Cozumel.

[171] See Mexico City Airport (SEM-02-002), *Registry of Submissions*, online: *CEC homepage*, http://cec.org/citizen/submissions/details/index.cfm?varlan=english&ID=78 (date accessed: March 25, 2002)

children in the area, whose classes are interrupted by an airplane passing approximately every seven minutes.

The circumstances involved in the AICM case are particular. Mexico City's current airport, a 91-year-old facility on the eastern edge of town, cannot be expanded because it is bordered on three sides by dense urban development. Critics say the new six-runway, US $2.3 billion airport planned for Texcoco will extend urban sprawl and harm an area that is crucial to regulating floodwaters and is the home to migrating birds. Also, *Campesinos* (peasants) in the area will lose an estimated 11,000 acres to the project.[172]

The relocation of the AICM has been the cause of a highly politicized debate between the federal executive, who supports the Texcoco site, and the local governor of Mexico City, who supports the Tenayuca site in the neighbouring state of Hidalgo. Demonstrations against the project have been constant since the federal government decided to relocate the airport. The new airport would use land belonging to 13 *ejidos* (communal properties).[173] According to the state government, only two of the *ejidos* oppose the plan, although the other 11 are demanding a higher price for their land than they are currently being offered.[174] The *campesinos* are also seeking an injunction, and the Texcoco municipal government has filed a challenge on constitutional grounds with the Mexican Supreme Court ("SCJN") in relation to the AICM plan.[175]

In the AICM response to the Secretariat, the Mexican federal authorities[176] gave ample explanations concerning Mexico's NOM regulating airplane noise limits and how the Popular Complaint remedy was expediently attended to. Compared with other of Mexico's government responses, this one is unusually clear and properly supported by scientific and legal facts. This prompt and clear response raises serious doubts about the unusually cooperative attitude of SEMARNAT. Apparently, this petition is distracting attention away

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[172] "Protestan por aeropuerto" *La Jornada* (November 30, 2001).
[173] *Ejido*, pronounced (a-he-tho) is a form of communal ownership of the land that has its roots in pre-Columbian indigenous cultures. For several decades after the Mexican Revolution, land was redistributed and the modern ejido was formed. Much of Mexico's indigenous population lives in ejidos or communities, but without the autonomy granted to North American indigenous peoples on reservations. It is common for ejidos to be ethnically mixed.
[174] "Protestan por aeropuerto" *La Jornada* (December 1, 2001).
[175] *Ibid.* (January 12, 2001).
[176] The current minister of the environment at the federal level is Victor Lichtinger. He was the executive director for the North American Commission for Environmental Cooperation for four years and is someone quite familiar with the Article 14-15 citizen submission process.

from the real problem: the relocation of AICM to an environmentally sensitive area and the seizure of communal properties belonging to *campesinos*.

The supporters of the *ejidos* are waiting for the decision of the SCJN on the constitutional controversy against the federal government. In case the authentic AICM problem should be submitted under the current circumstances to CEC, it would surely be dismissed according to NAAEC 14(3)(a), since it is still pending judicial resolution by the SCJN. However, once the decision of the SCJN is final, whatever may happen, there is still the recourse of submitting the case at the international level. The leadership of the Mexican *Partido Verde Ecologista* (Ecological Green Party) has already declared its intention to "take to the international level the AICM relocation problem."[177]

The relocation of the AICM neatly depicts the trade vs. environment debate. In addition to being the largest entry port to Mexico, the AICM is by and large the major customs clearance office in the country. On one side, the AICM is a public entity and represents the front gate for trade liberalization in Mexico. As a consequence of the incremental trade experienced in recent years its current location is not appropriate anymore. On the basis of an inconclusive analysis realized by the prestigious Universidad Nacional Autónoma de México (UNAM),[178] the federal government rejected the proposed site in the neighbouring community of Tenayuca, Hidalgo, and decided upon Texcoco, apparently because of its proximity to Mexico City, the political and economical centre of the nation. On the other side, the expropriation of *ejidos* from the *campesions*, who depend completely on their communal forms of production, has been done under discriminatory circumstances. The compensation for the expropriation of the *ejidos* lands is far from just. The indemnity payments have been below the market value of the properties; the government is paying 7 *pesos* per square metre (70¢ U.S.) when the value for future purchasers is 600 or 700 *pesos* per square metre ($600 or 700 U.S.).[179] Also, no specific aid plan or relocation scheme has been proposed to ameliorate the negative effects on the *campesinos* communities. Finally,

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[177] See E. Baltasar, "Analizan especialistas la propuesta alterna al aeropuerto en Texcoco" *La Jornada* (January 30, 2002) online: La Jornada homepage, http://www.jornada.unam.mx/2002/ene02/020130/039n1cap.php?origen=capital.html (date accessed: June 26, 2002).

[178] Universidad Nacional Autónoma de México, *Resumen ejecutivo. Evaluación ambiental para ubicación del nuevo Aeropuerto de la Ciudad de México*, online: SEMARNAT homepage, http://www.semarnat.gob.mx/programas-informes/aero/intro.shtml (date accessed: June 26, 2002)

[179] See "El impacto ambiental, político y económico del proyecto Aeropuerto-Texcoco" (March 4, 2002) online: Universidad Iberoamericana homepage, http://www.uia.mx/ibero/noticias/nuestracom/02/nc26/3.html (date accessed: June 26, 2002).

no environmental assessment establishing the remediation plan for the affected areas has been issued.

The AICM problem demonstrates how a publicly owned enterprise with a monopolistic activity discretionally supported by the federal government and relying on an inconclusive scientific assessment affects the interests of poor communities that depend on their environment for subsistence. The AICM relocation problem shares the major characteristics of Mexican citizens' complaints to CEC.

2. Tarahumara (SEM-00-006)[180]

The Submitters of this case allege a failure by Mexico to enforce effectively its environmental law by denying access to environmental justice to indigenous communities in the Sierra Tarahumara in the State of Chihuahua. In particular, they assert failures to effectively enforce environmental law relative to the Popular Complaint process, to alleged environmental crimes, and also to alleged violations with respect to forest resources and the environment in the Sierra Tarahumara.

On November 6, 2001, the Secretariat determined that the submission was not based on the environmental damages ground of the Popular Complaints, but rather on the presumption that Mexico has omitted the application of the Popular Complaint as a tool for environmental justice. Moreover, the supposed denial of access to the Popular Complaint procedure and the ineffective application of the criminal law for the protection of the forest resources represented a harm to the indigenous peoples and other groups in the Sierra Tarahumara by way of restricting their legitimate right to participate in the protection of the environment as provided by the LGEEPA.

The CEC Secretariat established a number of arguments. First, the Secretariat stated that NAAEC objectives would be promoted by reviewing this petition, given that it is directly related to participation in the protection of the environment by a sector of Mexican society that has been historically neglected. Then, the Secretariat determined that the contribution of the indigenous peoples to the protection of that region of forests was fundamental for their subsistence. As a third argument, the Secretariat recognized that in light of the multi-

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[180] See Tarahumara (SEM-00-006), *Registry of Submissions*, online: *CEC homepage*, http://cec.org/citizen/submissions/details/index.cfm?varlan=english&ID=57 (date accessed: March 25, 2002)

ple intents reported in the submission to use the Popular Complaint mechanism and other resources, the Secretariat considered that "a reasonable effort has been made to resort to them and that it is not reasonable that more could be made."

Mexico filed its response on February 15, 2002, asserting that all 173 citizens complaints have been attended to in an opportune manner, in a just, open, and impartial process. Also, Mexico argued that the refusal to charge on criminal grounds environmental offenders was a discretionary practice based on Article 418 of the Federal Code of Criminal Procedure, which allows the authority to conditionally discharge environmental offenders. Finally, Mexico argued that the two criminal accusations submitted to the federal prosecutor, as presented by the submitters, were the subject of an administrative procedure and pending resolution; therefore, according to NAAEC 14(3)(a), the Mexican government requested a dismissal of those allegations. On August 29, 2002, the Secretariat informed the Council that the Secretariat considers that the submission warrants development of a factual record. As November 2002 the factual record is being elaborated.

The Tarahumara submission demonstrates that the discretionary power invested in the Mexican central authorities might be abused for the following reasons. First, this could occur through a perversity of will in favour of the logging companies who ultimately are the ones with the economic capacity to bid for exploitation permits. In SEMARNAT's response to the Secretariat, there is no hesitation to admit openly that the expedition of logging exploitation permits, the criminal prosecution of environmental offenders, and the due diligence of the Popular Complaint process are within their particular idea of discretionary power. It is widely recognized that the expedition of logging permits is handled under non-accountable procedures and usually bestowed on third parties or intermediaries with null environmental or social consideration.[181] A second reason is the possible defiance of good judgment in relation to Popular Complaints. In its response, SEMARNAT accepts the admission of 122 Popular Complaints concerning the illegal exploitation of forest resources, but no explanation whatsoever has been given in relation to any relief to the submitters. The complaints filed by the indigenous peoples and other groups of the Sierra Tarahumara

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[181] See "El 50% de la madera que se trabaja en México viene de tala ilegal" *Notimex* (13 September 2001) online: Vetas homepage, http://www.vetas.com/notas/notas.cgi?NOTA=re015_es (date accessed: June 27, 2002).

were not processed as prescribed by the LGEEPA. The Secretariat in its recommendation to the Council to develop a factual record states the situation as follows:

> [E]ven though the response of the Party does provide information on the processing of the citizen complaints filed by the indigenous peoples and communities of the Sierra Tarahumara that are referenced in the submission. For the majority of the specific cases discussed in the submission, the communications and decisions attached to Mexico's response do not resolve the matters raised in the submission as to whether the relevant authorities took proper enforcement actions as prescribed by the LGEEPA.[182]

Questions persist as to whether the authorities failed to carry out one or more of the specific actions comprising the procedure, or if these actions were carried out but not within the period prescribed by law.

A third reason is the apparent ignorance by SEMARNAT in relation to indigenous peoples' needs. In general, the social neglect of indigenous communities generally corresponds to the government's failure to study the effects that lumber production has had on the ecosystem and indigenous culture in the Sierra Tarahumara. Inadequate forest studies, coupled with the liberalization of Mexican laws, have exacerbated the problems of the region and given rise to unfettered natural resource depletion.[183] Because of increased outside activity in the region, conflicts have resulted, as indigenous groups seek to protect their cultural and social relationship to the land. The Tarahumara people now struggle to maintain their traditional way of life in the *ejido*, which is intimately related to the isolated and rugged land they occupy. The following transcript reveals SEMARNAT's ignorance in relation to indigenous peoples' needs:

> We want our dissatisfaction to go on the record. We also want others to know that a lot of people in the Sierra feel the same way about what we, and our forests have to put up with. We are tired of all the illegal logging financed by those who buy and transport stolen wood, and we're disgusted that has been tolerated by PROFEPA, SEMARNAT, The State Judiciary Police, and some of the Public Ministries.[184]

The Tarahumara submission demonstrates that granting logging permits under non-accountable procedures affects the interests of poor communities that depend on their environment for their subsistence. Also, it reveals that SEMARNAT's claims of prompt resolu-

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[182] See Tarahumara – Notification to Council A14/SEM/00-006/28/ADV *CEC homepage*, online: http://cec.org/files/pdf/sem/00-6-ADV-E.pdf (date accessed: August 29, 2002) at 19.

[183] See generally M.T. Guerrero, C. Reed and B. Verger, *The Forest Industry in the Sierra Madre of Chihuahua: Social, Economic, and Ecological Impacts* (Austin, Texas and Chihuahua City, Chihuahua, México: Texas Center for Policy Studies and Comisión de Solidaridad y Defensa de los Derechos Humanos A.C, 2000) at 2, online: Texas Center for Policy Studies homepage, http://www.texascenter.org/publications/forestry.pdf (date accessed: June 27, 2002).

[184] Letter signed by the Commissaries of the Ciénaga de Guacayvo, Retiro, Guméachi and Los Volcanes Ejidos sent to the State Congress of Chihuahua protesting the government's inaction. *Ibid.* at 2.

tion of Popular Complaints are false due to the fact that the remedy has proven to be limited in addressing the problems at issue. Finally, it makes apparent the situation that the facts and the law applicable to environmental crimes in the Sierra Tarahumara do not justify SEMARNAT's avoidance of prosecuting environmental offenders on the basis of a putatively unlawful exercise of its discretionary power.

3. Aquanova (SEM-98-006)[185]

On October 20, 1998, the Grupo Ecológico Manglar, A.C., filed a submission alleging that Mexico was failing to effectively enforce its environmental laws with respect to the establishment and operation of Granjas Aquanova S.A. ("Aquanova"), a shrimp farm in Isla del Conde, Nayarit, Mexico. Specifically, Mexican authorities failed to enforce provisions (1) protecting jungles and tropical rainforests, (2) regulating wastewater discharge, (3) preventing and controlling water pollution and use, and (4) relating to fisheries and the introduction of non-native species. The Submitter further alleged that Mexican authorities failed to prosecute Aquanova for its environmental offences. In addition, the Submitter asserted that Mexico failed to follow up on administrative procedures contained within an agreement between the authorities and Aquanova to access damages and remediation measures. Lastly, the Submitter contended that Mexico failed to protect migratory species and wetlands, as mandated by diverse international conventions.

In its response to the Secretariat, Mexico alleged that the Submitter failed to exhaust all available legal remedies, reiterated that a Popular Complaint is not a remedy, and stated that, in any case, Mexico had not yet completed its review of the one filed by the Submitter. Mexico maintained that it was effectively enforcing its environmental laws and that inspection visits, working meetings, and collateral actions through a CNA report against Aquanova culminated in the signing of an agreement with the company.

The Secretariat, on its determination, argued that the statements in the response are not supported by information that would enable an understanding of how, in addition to being legitimate, the inspections and other actions that culminated in the agreement with the company amount to the effective enforcement of Mexican environmental law. The Secre-

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[185] See Aquanova (SEM-98-006), *Registry of Submissions*, online: *CEC homepage*, http://cec.org/citizen/submissions/details/index.cfm?varlan=english&ID=68 (date accessed: March 25, 2002).

tariat also pointed out that neither the CNA report nor the Party's response served to verify compliance by Aquanova with its obligations concerning wastewater discharge monitoring and treatment and water use. Likewise, regarding fisheries, the Party's response did not provide data that could have shown compliance by Aquanova with the effective protection of fisheries in connection with the introduction of a new species. In addition SEMARNAT indicated that it considered that the Popular Complaint contemplated in the LGEEPA was not a private remedy, but a mechanism to inform the government on environmental matters.

The Aquanova submission demonstrates a number of irregularities. First, it can be seen that SEMARNAT reaches agreements of doubtful legitimacy with environmental offenders under obscure circumstances. Second, SEMARNAT's supervision of those agreements is virtually non-existent. Third, the central government's leniency concerning Aquanova's environmental crimes brings reasonable suspicions of corruption. Fourth, the interpretation of the Popular Complaint remedy expressly demonstrates the irrelevance that SEMARNAT authorities confer on the letter of the law. Finally, the facts and the law applicable to environmental crimes in Aquanova's case do not justify SEMARNAT's avoidance of prosecuting environmental offenders on the basis of an unlawful exercise of its discretionary power.

On November 16, 2001, the Secretariat considered the development of a factual record to be warranted in relation to the effective enforcement of Mexico's environmental law. In February 2002, the Secretariat made public a document requesting information for preparation of a factual record. By means of this document, the Secretariat is seeking information relevant to matters to be addressed in the factual record. As November 2002 the elaboration of the factual record was in progress.

4. Molymex II (SEM-00-05)[186]

The Submitters alleged that Mexico failed to effectively enforce the LGEEPA in relation to the operation of the company Molymex, S.A. de C.V. ("Molymex"), in the town of Cumpas, Sonora, Mexico. The company processes residues generated in the smelting of

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[186] See Molymex II (SEM-00-05), *Registry of Submissions*, online: *CEC homepage*, http://cec.org/citizen/submissions/details/index.cfm?varlan=english&ID=54 (date accessed: March 25, 2002)

copper by national and foreign companies to produce molybdenum trioxide, presumably causing damage and loss to human health and the environment. Specifically, the Submitters alleged that Mexico failed to effectively enforce the LGEEPA with respect to (1) operation without environmental impact authorization, (2) land use which is incompatible with the cattle raising and use in the area, (3) preservation and sustainable use of the land, (4) zoning for contaminating industries in Cumpas, (5) the return to the country of origin of hazardous waste generated under the rules of temporary importation, (6) the importation of dangerous materials without ensuring compliance with the LGEEPA and liability for potential harm and damages.[187]

In its response Mexico argued that Molymex, when it commenced operating in 1979, was not required to obtain an environmental impact authorization, since such an obligation was not prescribed by any legal provision in the Mexican legal system at that time. Moreover, obligating the company to submit to an environmental impact assessment procedure at present would amount to retroactive application of a law with prejudice to Molymex. Mexico further contended that an environmental impact assessment is exclusively a preventive procedure. Mexico stated that the Molymex expansion project submitted for approval in 1998 was subjected to an environmental impact assessment procedure, since at that time the LGEEPA did in fact require it. Additionally, Mexico stated that it did not default on its obligation to define a zone where polluting facilities might be sited, as prescribed by the LGEEPA Article 112(II), since the municipalities are the level of government empowered by Mexican law to define such zones and the Municipal President and Secretary of Cumpas issued a zoning permit to Molymex on September 7, 1998. This, argued Mexico, implies that, by means of this permit, the zone in which the company was permitted to situate its facility was defined. Finally, Mexico stated that the company has not violated the maximum contaminant limit for sulphur dioxide in ambient air established by the standard, and further stated that at the Cumpas sampling point, the limit was not exceeded during any 24-hour period between 1995 and 2000.

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[187] The Secretariat determined that the submission does not provide sufficient information in regard to alleged failures to effectively enforce LGEEPA Articles 198 and 153, concerning the return to the country of origin of hazardous waste generated under the rules of temporary importation and the importation of dangerous materials.

In light of Mexico's response, the Secretariat determined that since the submission raises matters of effective enforcement that are not resolved by Mexico's response, a factual record would provide clarification on the following matters. First, the response asserts that the environmental impact procedure is purely a preventive instrument that cannot be applied retroactively and states that the environmental authority has other instruments at its disposal with which to control any impacts that may occur. The matter of retroactivity vis-à-vis environmental impact is not resolved by the Party's response. Second, the response does not clarify the matter of whether there exists a definition, based on general criteria, of the zones in Cumpas in which polluting facilities may be sited, nor where Molymex is located with respect to that general zoning. Finally, Mexico's response asserts that the company has not violated the maximum contaminant limit for sulphur dioxide in ambient air, but it does not include information on the specific measures taken in regard to the company (for example, any inspection reports or any reports on perimeter monitoring which the company allegedly filed with the authorities) to support that assertion. The Secretariat decided that in light of the foregoing, the three arguments adduced by Mexico in its response do not convincingly address the assertion that Mexico is failing to effectively enforce the environmental impact assessment procedure in regard to the Molymex plant. Therefore, the Secretariat considered the development of a factual record to be warranted in respect of Molymex's operations.

The Molymex submission demonstrates SEMARNAT's overwhelming discretion to apply any regulation within its jurisdiction. Emphatically, SEMARNAT affirms that:

> [A]t all times, SEMARNAT has the power to control all the works and activities within its sphere of jurisdiction that may generate or are generating environmental impacts, using such instruments as licenses, permits, standards, economic instruments, registers, etc., above and beyond the environmental impact.[188]

This situation is grave under because SEMARNAT's activities "within its sphere of jurisdiction" are non-transparent. Based on the poor documentary evidence provided by Mexico leads one to conclude that the environmental impacts, licences, permits, standards, economic instruments, and inspection registers that allegedly were done or given were flawed by irregularities. In addition, no further commitment by SEMARNAT to carry out

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[188] See *Registry of Submissions*, online: *CEC homepage*, http://cec.org/files/pdf/sem/00-5-adv-e.pdf (date accessed: March 25, 2002) at 10.

an inspection or require an updated environmental assessment from Molymex was proposed. The main findings drawn from the Molymex case are that there seems to be a complete lack of awareness by Mexican authorities of the legitimate requirements of public health in the Cumpas community. Moreover, due to the facts that SEMARNAT's response was plagued with poor legal technique, lack of documentary proof, weak assumptions and a selective ignorance of widespread notions of the Mexican legal tradition, it can be implied that there was a lack of respect for the CEC Secretariat as an institution.

5. Rio Magdalena (SEM-97-002)[189]

On March 15, 1997, the Comité Pro Limpieza del Rio Magdalena filed a submission against Mexico. The submission alleged that the municipalities of Imuris, Magdalena de Kino, and Santa Ana, located in the Mexican State of Sonora, were discharging untreated wastewater into the Magdalena River. The Submitters maintained that these discharges violated the LGEEPA, as well as Sonora's Ecology Law and Water Law.

Mexico filed its response on July 29, 1998. The federal government argued that most of the facts contained within the submission occurred prior to the date the NAAEC came into force. As a result, according to Mexico, the Secretariat could not legally consider such facts. It also contended that the Submitters failed to exhaust available legal remedies prior to filing their submission. Mexico further maintained that in cooperation with the State of Sonora, it was working to improve the condition of the Magdalena River despite budgetary constraints. The federal government explained its reasons in the following terms:

> [T]he treatment of wastewater from the country's various population centres is a goal that the Mexican government has not been able to fully attain, and ... the progress in this area is subject to the availability of budgetary resources. Given the foregoing, it should be noted that, despite the existence of a general obligation to treat wastewater from the population centres under both federal and state laws, the economic limitations faced by the country still make it impossible to fully enforce this provision, while the corresponding government plans now set a clear strategy for the gradual solution of the nationwide problem of wastewater treatment.[190]

Finally, in response to the statutory violations alleged by the Submitters, Mexico asserted that it was effectively enforcing its environmental laws. Given the complexity of the matter, and to better understand some aspects of the legal and administrative framework

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[189] See *Registry of Submissions*, online: *CEC homepage*, http://cec.org/citizen/submissions/details/index.cfm?varlan=english&ID=36 (date accessed: March 25, 2002).

[190] See *Registry of Submissions, Response of Mexico* at p. 35, online: *CEC homepage*, http://cec.org/files/pdf/sem/97-2-adv-e.pdf (date accessed: March 25, 2002).

referenced in Mexico's response, the Secretariat, relying on NAAEC Article 21(1)(b),[191] requested but did not receive additional information from the Party.[192]

The Rio Magdalena submission demonstrates a failure of the three levels of government to attend to and solve the stated problem. The Submitter states:

> Who controls whom? The municipalities do NOT (sic) have the official classification of a receiving body for the Magdalena River for this purpose, nor the defined parameters that by law must be had along with the official legal authorizations in order to dispose of such duly treated wastewater. However, without regard to law or authority, the municipalities of Imuris, Magdalena de Kino, and Santa Ana in Sonora, Mexico, continue to blatantly dump into the receiving body of the Magdalena River, illegally mixing polluted waters with water that has historically been used as a source of drinking water for human consumption, for the irrigation of farmlands, and as regional family sustenance.[193]

Apparently, the municipalities do not have the leverage of legal sanctions imposed by the central authorities for the effective enforcement of environmental law. Despite the fact that the Submitter demonstrated that sufficient funds do exist to attend to these matters, that the municipalities collect 35% on each monthly bill for drinking water consumption, drainage and sewer, and that the money is spent on works that the Submitter deems unnecessary, no penalty or fine was imposed by SEMARNAT on the offending municipalities and no measures for the effective enforcement of water pollution have been taken. Parenthetically, it could be argued, however, that who decided how the money was to be spent might have been a better indicator of the "legitimacy" of the choice than the fact that the Submitter considered the expenditures to be unnecessary. This is the situation, even when the information provided in Mexico's response confirms that the municipalities in question discharge their wastewater into the Magdalena River and that they do not have the corresponding discharge permits.

The Rio Magdalena submission also illustrates the lack of investment in wastewater infrastructure. In Mexico the decisions concerning how municipal wastewater fees are invested in infrastructure projects resides with the municipal council (*Ayuntamiento*). Until recently, wastewater treatment plants, like any other component of a municipal water supply and sewage disposal system, were financed by governments or by government agen-

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[191] See *NAAEC supra* note 73 at art. 21 (b) establishing that, "[O]n request of the Council or the Secretariat, each Party shall, in accordance with its law, provide such information as the Council or the Secretariat may require, including…taking all reasonable steps to make available any other such information requested."

[192] The requests were sent on September 13, 1999, January 13, 2000, and October 23, 2000.

[193] See *Registry of Submissions*, online: *CEC homepage*, http://cec.org/files/pdf/sem/97-2-adv-e.pdf (date accessed: March 25, 2002).

cies. In 1992 the CNA promulgated regulations that permitted cities with a population exceeding eighty thousand to construct plants under new public-private schemes. The municipality in which a facility will be located acts through a new legal entity called an operating body (*Organismo de Agua*), which is responsible for the bidding, contracting and subsequent administration of the wastewater treatment plant. The municipal government, through its operating body, is also a signatory to the contract with the private company that receives the concession for the plant. CNA's involvement in the project is limited to general oversight through their work with local authorities in selecting winning bids. So, despite the public, private or mixed nature of the wastewater management facility, the decision of how the municipal fees are invested depends upon the municipal council's discretion.[194] Furthermore, the political nature of the municipal councils may be affected by electoral needs. Since public works dealing with wastewater infrastructure have been traditionally disregarded since wastewater lacks appeal to the constituency, priority is given to public works more "visible" that will eventually represent political gains for municipal councils.

The Rio Magdalena submission also proves the ineffectiveness of the Popular Complaint as a remedy. Mexico confirmed that in 1997 the PROFEPA received a Popular Complaint filed by the Submitter denouncing the problems of the Magdalena River. As of June 28, 2002, the processing of the Popular Complaint had not yet been concluded. In its response, the Mexican authorities diminished the importance of the Popular Complaint and recommended alternate legal remedies, such as appellate review, a nullification suit before the Federal Tax Court, a suit for an injunction, or an Amparo writ, all characterized as mostly cumbersome, expensive, lengthy, and ultimately ineffective procedures against a federal authority.

In summary, the Rio Magdalena submission demonstrates a number of irregularities: first, the abuse of discretion by SEMARNAT; second, the protection of the water and wastewater monopoly held by municipal authorities; third, the diminishment by SEMAR-

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[194] See generally D. W. Eaton, "Transformation of the Maquiladora Industry: The Driving Force Behind The Creation of a Nafta Regional Economy" (1997) 14 Ariz. J. Int'l & Comp. Law 747.

NAT of the Popular Complaint remedy; and finally and most importantly, the non-existence of a remedial plan to abate the current problem.

On February 2, 2002, the Secretariat informed the Council that the development of a factual record was warranted on the effective enforcement of some of the provisions invoked by the submission. On April 16, 2002, the Secretariat made public a document requesting information for preparation of a factual record. By means of this document, the Secretariat is seeking information relevant to matters to be addressed in the factual record. As November 2002 the elaboration of the factual record was in progress.

6. Cozumel (SEM-96-001)[195]

On January 18, 1996, the Centro Mexicano de Derecho Ambiental (Mexican Centre for Environmental Law) and two other environmental organizations, the Comite para la Protección de los Recursos Naturales (Natural Resource Protection Committee) and the Grupo de los Cien Internacional (International Group of One Hundred), filed a submission against Mexico. The submission concerned the construction of a cruise ship pier (the Consorcio pier) on the island of Cozumel, located in the Mexican State of Quintana Roo. The Submitters alleged that the construction and operation of the cruise ship pier would have a significantly adverse environmental impact on nearby coral reef ecosystems, of which the best known is the Paraiso ("Paradise") Reef. For this reason, the Submitters argued that under Mexico's national ecology law, work on the cruise ship pier ought to be halted until a proper environmental impact assessment could be completed.

In its response of March 20, 1996, Mexico asserted that all of the incidents of alleged non-enforcement occurred prior to January 1, 1994. According to Mexico, the Secretariat could not legally consider such facts. Mexico also argued that the Submitters had not suffered any direct injury as a result of the alleged failure to enforce the environmental impact assessment provisions of the LGEEPA. The federal government contended that the Submitters failed to exhaust available legal remedies prior to filing their submission. Finally, in response to the statutory violations alleged by the Submitters, Mexico offered two primary arguments. First, it alleged that the Consorcio pier and the port terminal project were

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[195] See Cozumel (SEM-96-001), *Registry of Submissions*, online: *CEC homepage*, http://cec.org/citizen/submissions/details/index.cfm?varlan=english&ID=32 (date accessed: March 25, 2002).

not subject to the environmental impact assessment requirements of Article 28 of the LGEEPA because the language of Article 28 refers only to "those works or activities which utilize animals, forest resources, aquifers or the subsurface as necessary raw materials, or which propose to directly extract such resources." Second, Mexico disagreed with the Submitters' position that the pier and terminal were indivisible parts of one larger project and that the donation of federal land in the 1993 concession amounted to approval of the larger Puerta Maya Project.

In light of Mexico's response the Secretariat determined that events or acts concluded prior to January 1, 1994, might create conditions or situations that give rise to current enforcement obligations. It follows that certain aspects of these conditions or situations may be relevant when considering an allegation of a present, continuing failure to enforce environmental law. In reviewing Mexico's argument concerning legal standing and direct injury, the Secretariat recognize that while the submitters may not have alleged the particularized, individual harm required to acquire legal standing to bring suit in some civil proceedings in North America, the especially public nature of marine resources brings the submitters within the spirit and intent of Article 14 of the NAAEC.

On the requirement of exhaustion of remedies, the Secretariat concluded that the submitters attempted to pursue local remedies, primarily by availing themselves of the Popular Complaint remedy.

On June 7, 1996, the Secretariat recommended that the Council order the preparation of a factual record. On August 2, 1996, the Council adopted the recommendation and instructed the Secretariat to prepare a factual record.

The factual record, which was completed and released to the public on October 24, 1997, provided a detailed account of the Mexican laws relating to the protection of Cozumel's reefs and of Mexico's apparent disregard of those laws in its effort to approve and complete the Cozumel pier project. Two of the key issues that the Secretariat addressed were the ecological risks to Cozumel's reefs and whether Consorcio pier comprised an integral part of the Puerta Maya Project.

With respect to the latter, the CEC set forth the factual basis for the contrasting interpretations maintained by Mexico and the Submitters. In support of Mexico's position, the fac-

tual record noted that in the 1993 Concession, donation of the federal land for "real estate tourism development" was expressly contingent upon the completion of an environmental impact assessment. The factual record also noted that on December 20, 1996, the INE expressly notified Consorcio that it had not authorized the construction of works for tourist-commercial use in the 1993 Concession. The CEC summarized Mexico's position that the real estate tourism development had not been previously approved and that the government was still reviewing the environmental impacts of the Puerta Maya Project.

In support of the Submitters' position, the factual record made note of evidence that suggested that both Consorcio and the Mexican government perceived the pier as an integrated part of the Puerta Maya Project. This evidence included the Secretaria de Comunicaciones y Transportes (Ministry of Communications and Transportation [SCT]) 1990 document approving the Consorcio pier, which stated that the project was complemented by 43.3 hectares of real estate and tourism development, and a 1993 letter from Consorcio to the SCT, which stated that the pier was only the first stage of the Puerta Maya Project. The factual record also quoted extensively from a 1994 television news story in which Consorcio's Director of Project and Construction discussed his company's plans in Cozumel. According to Consorcio's Director, construction of the Project would take place in four stages. The first stage was to consist of construction of the cruise ship pier, a means of access to it and its port area, a maritime federal zone on land, with infrastructure, and a village, which would include services such as shops, restaurants, bars, a hotel zone, etc. The second stage was to include a golf club with villas and a clubhouse, a third stage was to include a high-rise luxury hotel, and the fourth stage a world-class spa.

Even though the Secretariat's factual record did not set forth conclusive findings or specific recommendations, the document did establish two points that call Mexico's actions into question. First, the factual record confirmed that there was credible scientific evidence indicating that the Consorcio pier would severely damage Cozumel's reefs. Second, the factual record confirmed that there were numerous documents and statements indicating that Consorcio and the Mexican government envisioned the proposed pier as the first stage of a larger on-shore tourist development.

Cozumel was the first petition submitted by Mexican citizens to the CEC Secretariat that warranted the elaboration of a factual record. It is important to note that the characteristics of the Cozumel submission and the factual record itself are not considered exemplary of the environmental problems prevailing in Mexico. Indeed, the NGOs that submitted Cozumel are inhabitants of Mexico City; and in a way similar to the traditional behaviour of SEMARNAT and PROFEPA, they disregarded the interests of the local communities on the remote Island of Cozumel. Compared with the other recent submissions from Mexican citizens to the Secretariat, the Cozumel submission appears motivated by purely ecological concerns. While the protection of coral reefs is important for the conservation of marine biodiversity, the submission appears much more to be a good opportunity to test the citizens' submission process and incidentally to demonstrate at the international level the arbitrariness and discretionary powers of the Mexican authorities. Apparently, the Submitters achieved their goal since multiple international comments where published in relation to this submission.[196] However, the Cozumel factual record demonstrates, on the one hand, a situation in which environmental advocates concentrated their efforts exclusively on the ecological component of the problem at issue. On the other hand, the foreign investment supporters as represented by the central government concentrated their efforts exclusively on the economic component of the problem at issue. No reference to the well-being of the local communities has ever been addressed in the whole submission process. Apparently, Mexico's central NGOs decided to submit the first international claim based on the non-enforcement of Mexican environmental law in regard to the construction of a pier almost 2000 kilometres away. This decision seems odd, or at least frivolous, when considering the severe problems of environmental degradation and public health experienced in the shanty-towns of Mexico City, within just blocks of the NGOs headquarters. No matter what the conception of environmental protection these organizations share, it is impossible to neglect the trivial nature of their ecological priorities, especially when compared with the immeasurable environmental and public health problems generated in Mexico by poverty.

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[196] See *e.g.*, B. Bugeda *supra* note 118; see also J. Tutchton, "The Citizen Petition Process Under NAFTA's Environmental Side Agreement: It's Easy to Use, But Does It Work?" (1996) 26 Envtl. L. Rev. 32; and P. S. Kibel *supra* note 110.

None of the participants was satisfied with the final outcome of the Cozumel factual record. On one side, the Mexican Minister of the Environment said in an interview that she had agreed to the investigation out of a sense of "solidarity and cooperation," but felt that the issue involved a factual circumstance that arose before NAFTA was in force and was an inappropriate choice for the CEC's first factual probe because it had to do with Mexico's interpretation of its own legal procedures.[197] On the other side, the environmental groups described the factual record as a "beautiful" report accepting that Mexico failed to enforce its environmental laws to attract investment to Cozumel, but it did not made a single recommendation, nor did it censure the government. Ultimately, by the time the factual record was issued nearly two years later, the pier was completed.

Cozumel demonstrated similar irregularities to the rest of the submissions that followed: first, the abuse of discretion by SEMARNAT; second, the devaluation of the Popular Complaint remedy; third, the diminished importance invested in environmental assessments; and fourth, a clear tendency to disregard the interests of local communities by prioritizing the central government's economic values over the protection of the environment.

7. Metales y Derivados (SEM-98-007)[198]

On October 23, 1998, the Environmental Health Coalition ("EHC") and Comité Pro Restauración del Cañón del Padre, A.C., filed a submission asserting that Mexico was failing to enforce its environmental law effectively in the case of the abandoned lead smelter known as Metales y Derivados, located in Tijuana, Baja California, Mexico. They asserted that the San Diego-based company, New Frontier Trading Corporation, did not return the hazardous waste generated by its Mexican subsidiary, Metales y Derivados, S.A. de C.V., to the United States as required by Mexican law and the La Paz Agreement. Instead, those responsible for the company abandoned the *maquiladora*[199] following its shutdown in 1994

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[197] See J. F. Dimento & P. M. Doughman, *supra* note 110.

[198] See Metales y Derivados (SEM-98-007), *Registry of Submissions*, online: *CEC homepage*, http://cec.org/citizen/submissions/details/index.cfm?varlan=english&ID=67 (date accessed: March 25, 2002).

[199] Maquiladoras unite cheap Mexican labour with foreign capital and technology in labour-intensive operations. In sum, this programme allows the importing of raw materials and equipment without tariffs for the purpose of setting up manufacturing plants that would then export components to factories in the United States, where they would be assembled into final products. Basically the U.S. Company sends its component parts to Mexico. The parts enter essentially duty-free and the machinery also enters duty-free. As long as the good is re-exported, no duties are paid. When it comes back into the United States, instead of being taxed at a full rate on the total value, the tariffs are only declared upon the value added by the labour process. There is an abundant bibliography concerning the United States-Mexico border and the maquiladora problem. See e.g. D. S. Perwin, "Maquila Problems and Governmental Solutions BECC and NADBANK: Can They Stop the Destruction?" (1998) 23 Thur. Mar L. Rev. 195; D. W. Eaton, "Transformation of the Maquiladora Industry:

and returned to the United States after an arrest warrant was issued in 1995 against the owner of the company. The Submitters indicated that the site where the smelter operated is contaminated with approximately 6,000 metric tons of battery acid, lead, arsenic and other toxic substances. The Submitters asserted that this contaminated site poses a major health risk to the neighbouring communities and the environment, particularly the residents of Colonia Chilpancingo. According to the Submitters, the risk was exacerbated by the fact that the waste was exposed to wind and rain, because the tarps that covered part of the waste had deteriorated, and by the fact that the site was not marked with warnings nor secured in such a manner as to prevent entrance to the site and dispersal of the pollutants.

On June 1, 1999, the Government of Mexico filed a response[200] arguing that it "shares the submitters' concerns as to the grave situation existing at the Metales y Derivados site." The response describes the actions taken by the Government of Mexico in regard to the activities of the company and the abandoned site; these included initiation of a criminal prosecution against the owners of the company for environmental crimes, various inspection visits, the ordering of technical measures, several temporary shutdown orders, and a permanent shutdown. The response indicated that the environmental authority considered transferring the waste to an authorized management facility and performing soil remediation studies, but that it did not possess the necessary resources to do so. Mexico asserted that the environmental situation existing at the site was not due to a failure to effectively enforce the environmental law, but "to causes that surpass its scope of authority." On March 6, 2000, the Secretariat informed the Council that the submission warranted development of a factual record.

The Driving Force Behind the Creation of a Nafta Regional Economy" (1997) 14 Ariz. J. Int'l & Comp. Law 747; E. A. Ellis, "Bordering On Disaster: A New Attempt To Control The Transboundary Effects of Maquiladora Pollution" (1996) 30 Val. U.L. Rev. 621; E. V. Pirozzi, "Resolution of Environmental Disputes in the United States-Mexico Border Region and the Departure from the Status Quo" (1997) 12 J. Envtl. L. & Litig. 371; I. Coronado,"The Environmental Side Agreement: Legal Solutions vs. Environmental Realities: The Case of The United States-Mexico Border Region"(1995) Conn. J. Int'l L. 281; J. S. Harbison and T. L. McLarty, "A Move Away From the Moral Arbitrariness of Maquila and NAFTA-Related Toxic Harms" (1995) UCLA J. Envtl. L. & Pol'y 1; N. Mikulas, "An Innovative Twist on Free Trade and International Environmental Treaty Enforcements: Checking in on NAFTA's Seven-Year Supervision of the U.S.-Mexico Border Pollution Problems" (1999)12 Tul. Envtl. L.J. 497; E. J., The Maquiladora Industry and Environmental Degradation In The United States-Mexican Borderlands, online: National Law Center for Inter-American Free Trade homepage, http://www.natlaw.com/pubs/williams.htm (date accessed: February 24, 2002).

[200] Originally Mexico filed its response, but designated it as confidential. At that time it did not explain the reasons for this determination, since it was impossible to do so without revealing information. However, Mexico withdrew the confidentiality designation on June 28, 2001, recognizing that the designation had no legal foundation. See, Unilateral Decision of Mexico, announced by Victor Lichtinger, Minister of the Environment and Natural Resources, at the Annual Session of the Council of the Commission for Environmental Cooperation held in Guadalajara, Jalisco, Mexico, June 28-29, 2001.

In the Metales y Derivados factual record the Secretariat established that the abandoned site is a case of soil contamination by hazardous waste in relation to which measures taken to date either did not prevent the dispersal of pollutants or impeded access to the site. They also revealed that, in fact, no actions were undertaken to restore the soil to a condition in which it could be used in the industrial activities corresponding to the zoning of the area. The toxicologists' reports show levels of lead pollution in surface soil at the site that are 551 times higher than U.S.'s Environmental Protection Agency limits for contaminated residential soil. In addition, soil more than a mile away from the site shows contamination at rates up to 55 times higher than EPA-permitted levels, according to testing. The Secretariat record also states that the toxic waste at Metales is not secured to prevent any person from entering the site, nor have provisions been made to avert direct human contact with the pollutants. The pollutants are not contained in a manner to prevent their dispersal. It is easy for anyone, including children, to enter the site and come into direct contact with the hazardous waste, both the lead slag piles and the waste kept in sacks and drums.

The Metales y Derivados factual record linked the submission with a myriad of non-enforcement situations along the U.S.-Mexico border. According to the information provided for the elaboration of the factual record by U.S. EPA the Metales y Derivados case exemplifies a critical public policy issue in the border region: the use of the border as a shield against enforcement. According to the EPA, PROFEPA informs the EPA with "alarming regularity" of abandoned *maquiladoras* on the Mexican side of the border. "The parent companies may abandon their Mexican operations, including their hazardous waste, because of enforcement against them by the Mexican authorities or, more commonly, because the maquiladora is not doing well financially."[201]

At the U.S.-Mexico border, air, water, and waste pollution associated with the maquiladora industry is quite serious. The proliferation of trade-sponsored economic activity as represented by the maquiladoras is concentrated in small municipalities that lack the proper infrastructure or the financial means to afford the regulation and enforcement of the centrally sponsored industry. For example, under Mexican law, hazardous wastes gener-

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[201] See Metales y Derivados Factual Record at p. 45, *Registry of Submissions*, online: *CEC homepage*, http://cec.org/files/pdf/sem/98-7-FFR-e.pdf (date accessed: February 24, 2002).

ated by maquiladora plants from U.S. raw materials must be exported to U.S. management.[202] Despite this "nationalization" programme, one quarter of the hazardous waste generated at the maquiladora zone has an unknown end, amounting to about 14,000 tons of hazardous waste that remain unaccounted for each year. Only 70 of 352 maquilas surveyed in 1995 in Ciudad de Juarez reported proper disposal.[203] According to Mexican commentators: "each year, seven million tons of toxic waste are, without control, illegally dumped in drains and marine waters."[204] In addition, "the inspection of the maquiladora industry is virtually non-existent, which is a great environmental problem for Mexico."[205]

In comparison with other submissions, however, the Mexican government recognized the existence of a problem, but they alleged financial constraints to remedy the situation. What remains uncontested is how many similar situations actually prevail across the more than 3000 kilometres of U.S.-Mexico border. In the Metales y Derivados submission, environmentalists at the University of San Diego provided strong support.[206] It seems dubious that without this legal support the impoverished residents of Colonia Chilpancingo would have ever been able to succeed in such an action. Unfortunately, the same condition of ignorance and impotence against trade-related environmental harms remains unattended to; and the Mexican government, ultimately, has not offered tangible solutions for cleaning up the toxic wastes that plague northern communities.

The Metales y Derivados factual record outcome left a general climate of scepticism concerning the capacity of the Secretariat to compel Mexico to effectively enforce its environmental regulations. Residents of Colonia Chilpancingo and activists on both sides of the border had hoped that the Secretariat's submission might offer tangible solutions for cleaning up the toxic waste contaminating their community. But after four years of deliberation,

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[202] There is an abundant bibliography concerning the ongoing environmental irregularities at the US-Mexico border. See e.g. B. Dunn, "The Mexicali Tire Pile: Smoke on the Horizon?" (2001) 14 Geo. Int'l Envtl. L. Rev. 40; Elia V. Pirozzi, "Compliance Through Alliance: Regulatory Reform and the Application of Market-Based Incentives to the United States-Mexico Border Region Hazardous Waste Problem" (1997) 12 J. Envtl. L. & Litig. 337; J. S. Harbison and T. L. McLarty, *supra* note 189; L.T. Belenky, "Cradle to Border: U.S. Hazardous Waste Export Regulations and International Law" (1999) 17 Berk. J. Int'l Law 95.

[203] See NAFTA's Broken Promises: The Border Betrayed (1996) online: Public Citizen homepage, www.citizen.org/pctrade/nafta/reports/enviro96.htm (date accessed: June, 28 2002).

[204] See United States-Mexico Chamber of Commerce, The North American Free Trade Agreement (NAFTA) at Five Years: What It Means for the U.S. and Mexico, online US-Mexico Chamber of Commerce homepage, www.usmcoc.org/naftafor.html (date accessed: June, 28 2002).

[205] *Ibid.*

[206] See Gina Clark-Bell *D. Hunter, J. Salzman & D. Zaelke* ak, "Using Extradition to Hold Environmental Polluters Accountable: The Case of Metales y Derivados" (1999) online: Borderlines homepage, http://www.us-mex.org/borderlines/1999/bl61/bl61case.html (date accessed: June, 28 2002).

the Secretariat has told them what they already knew, leaving them wondering how much longer they will have to wait before the poisonous landscape at the abandoned Metales site is cleansed.

In summary, the Metales y Derivados factual record demonstrates a number of irregularities. First, despite the investigations realized by the Mexican authorities, no reference in any inspection record or environmental assessment was rendered to the Secretariat in relation to potentially dangerous repercussions on public health and the environment of the substances allegedly present on the site. Second, the excuse of lack of financial and human resources for investigating maquiladoras at the border leaves the impoverished border municipalities with all the burdens and few of the benefits of trade and foreign investment liberalization. Finally and most importantly, the non-existence of a remedial plan to ameliorate the current problem of abandoned maquiladoras along the United States-Mexico border remains as an example of unsustainable patterns of trade-generated growth and their legacy of environmental degradation.

8. Cytrar II (SEM-01-001)[207]

The Submitters asserted that Mexico failed to effectively enforce its environmental law in relation to the hazardous waste landfill known as Cytrar, located near the city of Hermosillo in the state of Sonora, Mexico, and also in relation to the right to environmental information concerning this landfill. The landfill has not been in operation since in 1998 when the environmental authority denied renewal of operating authorization to Cytrar, S.A. de C.V.

The submission makes five separate assertions concerning the effective enforcement of environmental law by Mexico in relation to the Cytrar landfill. The Submitters assert that the Mexican government failed to effectively enforce the LGEEPA, concerning the hazardous waste landfill known as Cytrar, through its failure to require an environmental impact statement prior to the performance of works and activities at the landfill site, and by allowing the persons subsequently responsible to operate the landfill without the appropriate authorization. The submission also asserts that the environmental authority failed to

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[207] This is the second submission filed on this matter. The first submission may be reviewed under Cytrar I (SEM-98-005) See *Registry of Submissions*, online: *CEC homepage* http://cec.org/citizen/submissions/details/index.cfm?varlan=english&ID=58 (date accessed: June, 28 2002).

effectively enforce the LGEEPA Regulation on Hazardous Waste, which prohibit the importation of hazardous waste for final disposal and require the repatriation of hazardous waste generated under the temporary import regime because in 1997 the Cytrar landfill received contaminated soil and other hazardous waste abandoned by the company Alco Pacífico, S.A. de C.V. for final disposal, when this waste should allegedly have been returned to the country of origin. According to the Submitters, the hazardous waste landfill did not observe the specifications of Mexican Official Standard NOM-057-ECOL-1993 establishing the requirements for the design, construction and operation of controlled hazardous waste landfill cells with regard to the construction of the cells, and the Mexican government did not sanction this alleged violation of its environmental law. The submission asserts that the Party failed to effectively enforce Article 415 of the Federal Criminal Code by failing to bring a criminal action following the report of the facts filed by the Submitters on 8 December 1997 and the additional information provided by the Submitters on 3 December 1998. Finally, the Submission asserts that by refusing to provide to the Submitters various kinds of environmental information relating to Cytrar, the Mexican government violated the right to environmental information contemplated in LGEEPA.

On June 4, 2001, the Mexican government asserted that the Government of Mexico was not legally able to respond to the matter in question, since it was the subject of an arbitration proceeding to settle an international dispute with the company Técnicas Medioambientales Tecmed, S.A.[208] (an investment partner of Cytrar S.A. de C.V.) presumably arising from alleged non-compliance with the Acuerdo para la Promoción y Protección Recíproca de Inversiones (APRI) with Spain. The Party requested that the Secretariat proceed no further with its consideration of submission SEM–01–001, pursuant to the provisions of NAAEC 14(3)(a).

On June 13, 2001, the Secretariat determined that the fact that there is an investment relationship between the company that initiated the international proceeding to which Mexico is a Party (Técnicas Medioambientales Tecmed S.A.) and the company whose operations are asserted by the submission to be related to failures to effectively enforce the law

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[208] *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States* (2000) Case No. ARB(AF)/00/2, International Centre for Settlement of Investment Disputes, President: Horacio A. Grigera Naón (Argentina); Arbitrators: José Carlos Fernández Rozas (Spain) Carlos Bernal Verea (Mexico).

(Cytrar, S.A. de C.V.) does not necessarily imply that the subject of the international dispute is the same of that of the submission.

Mexico filed its response on July 19, 2001. In terms similar to its first response, Mexico asserted that there was a connection between Tecmed and Cytrar and that, consequently, both cases were based on the same matter. Once again the Mexican government required a dismissal.

No responses in relation to the merits of the Cytrar submission were ever made by the Mexican government. However, the evidence provided by the submitters demonstrates the discretionary powers and lack of accountability characteristic of the Mexican authorities. Concerning the discretionary powers, three situations are clear. First, PROFEPA authorized illegal imports of waste from the United States for final disposal in Cytrar. Second, PROFEPA allowed Cytrar to operate without an environmental impact assessment. Third, PROFEPA never sanctioned Cytrar for disposing of the illegal waste in a facility lacking the requirements established by Mexican environmental law. Fourth, PROFEPA never brought a criminal action against the environmental offenders responsible for the operations of the Cytrar landfill. Concerning the lack of accountability, PROFEPA never provided information to justify the former irregularities. Furthermore, the petitioners, in an unusual commitment to justice under Mexican circumstances, submitted a series of amparo writs for the violation by PROFEPA and SEMARNAT of the right to environmental information contemplated in LGEEPA. A final amparo sentence from a federal judge in Mexico City ordered PROFEPA to disclose the required information. However, as of August 2002, PROFEPA has not done it.

In a way similar to the Metales y Derivados submission, the Cytrar II submission demonstrates the non-transparent practices preformed by PROFEPA. In both cases, these practices relate to the cross-boundary movement of hazardous wastes originally intended for recycling processes at maquiladora facilities. Despite the fact that in 1993 U.S. and Mexican environmental officials teamed up to create a bi-national computerized waste tracking system for the border known as HAZTRAKS, there is still a generalized ignorance of toxic substances in the border region. This is basically because PROFEPA's HAZTRAKS database is confidential. Likewise, information generated through the permissions process for

new facilities in Mexico, such as the kinds or amounts of hazardous materials used, is not available to the public.[209]

Rather like EPA's declaration in the Metales y Derivados submission, the OECD's Environmental Review states as follows concerning the regulation of cross-boundary movements of hazardous wastes:

> Hazardous waste generated in Mexico is often disposed of in uncontrolled landfills. In 1996 it was estimated that only 12 per cent of the 8 million tonnes of hazardous industrial waste generated in Mexico each year receives proper treatment. Many potentially dangerous disposal sites exist in Mexican border states; part of the waste concerned originated during the 1980s in the United States or is technically the responsibility of US firms, notably waste from maquiladoras, which is supposed to be disposed of in the United States. In 1991, only 200 out of 1 855 maquiladoras sent their hazardous waste to the United States under the 1987 bilateral agreement regulating Mexico-US waste movements. The situation has improved considerably with a new recording system called HAZTRAKS, and in 1996 the compliance rate was 86 per cent for industries in the northern border areas. Suspicion remains, however, that a number of maquiladoras illegally dispose of their waste in illegal dumps near the border in Mexico.[210]

On July 29, 2002, the Secretariat determined that termination of the process of the submission was not warranted because the matter raised in the submission is not subject to a pending proceeding, and they informed the Council that the Secretariat considered that the submission warranted development of a factual record.

b. Positive Achievements of NAAEC Concerning Mexico

The preceding analysis demonstrates that despite the impeccable record of transparency and public participation in the Environmental Side Agreement, a general climate of scepticism prevails about the capability of the citizens' submission process to generate sustainable development in Mexico. It is, however, relatively early to address final conclusions in relation to the effectiveness of the citizens' submission process in Mexico, especially when one considers that the Mexican citizens are just starting to realize the powerful political leverage that an authorized international body can have on Mexico's central authorities. The final part of this chapter addresses three considerations that have proven constructive for attaining sustainable development in Mexico: first, the effectiveness of factual records to provide an encompassing approach to an environmental problem; second, the potential

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[209] See generally T. Faulkner and K. Jun, "Free Trade Hazardous Waste" (1997) online: Borderlines homepage, http://www.us-mex.org/borderlines/1997/bl36/bl36haz.html (date accessed: August 2 2002).
[210] See *OECD Environmental Review supra* note 105.

use of the cooperative mechanism within NAAEC; and third, the imperative to provide the Secretariat with the capacity to enforce its decisions.

1. The Effectiveness of Factual Records

The elaboration and publication of factual records contribute to the attainment of sustainable development in Mexico for a number of reasons. The first reason relates to the capacity of a factual record to present an all-encompassing appreciation of the problem. Compared with adjudicatory mechanisms where the admissible evidence is limited to facts with a probative value, the factual record extends its scope to the analysis of the economic, social, and environmental facts involved in the problem, just as prescribed by the notion of sustainable development. For example, the Cozumel pier factual record was concerned with the non-enforcement by Mexican authorities of regulations intended to protect coral reefs. Consequently, the fact-finding capacity was mainly aimed at specific environmental considerations such as the protection of marine habitat and, in a lesser degree, to social and economic issues. But in the Metales y Derivados case the factual record scope took into account the whole notion of sustainable development. Three elements can be recognized in the problem. First, the economic issue was established by demonstrating the proliferation of NAFTA's sponsored maquiladoras along the U.S.-Mexico border. Then, a social issue was demonstrated by showing the lack of cooperative mechanisms between the two countries to sanction environmental offenders. Finally, the harmful consequences on public health of Mexico's non-enforcement of its environmental regulations demonstrated the environmental side of the problem.

The economic, social, and environmental categories can be applied to virtually all of the submissions presented to the Secretariat. Furthermore, the determinations, recommendations, and the analyses of the Parties' responses also provide an all-inclusive study of the issues. For instance, the Tarahumara submission, even though awaiting authorization for the elaboration of a factual record, exposes a situation where the social and environmental conditions prevailing at the Sierra Tarahumara are one and the same. The relation of the indigenous peoples with their environment is so close that the line between environmental protection and the observance of human rights gets blurred. In the Tarahumara Recommendation to the Council, the Secretariat synthesized a textbook case of sustainable development. The Recommendation clearly depicts an unsustainable pattern of commercial ex-

ploitation as a result of uncontrolled economic activity. Then, the social side of the problem is represented by the isolation of the Sierra Tarahumara communities and the Party's denial of environmental justice. Finally, the environmental issue rounds out the sustainable development characteristics of the problem by representing the communities' helpless condition to remedy the devastation of the forest that supports their way of life. Certainly, the Secretariat cannot extend its judgment to each of the facts established, but the fact-finding powers invested in the Secretariat provide the flexibility to bring to light situations where the complex interaction between facts and substantive law are exposed.

The second reason is related to the capacity of a factual record to establish the interaction between substantive provisions and technical or scientific facts. Behind every environmental problem lies a technical or scientific consideration. The plain appreciation of the observable facts can determine neither whether human activity is endangering public health and damaging the environment nor the amount of human activity an ecosystem can sustain. For example, in the overall plan for gathering relevant facts to develop a factual record of the Metales y Derivados submission, the Secretariat's aim was to "[d]evelop, through independent experts, relevant information and data on the situation of contamination at the Metales y Derivados site and its surroundings, and on the dangerous repercussions on public health, particularly in Colonia Chilpancingo."[211] The underlying objective of this scientific assessment was to generate insight into the opposing views on the issues in dispute. Simply put, it was to establish a scientific, neutral version of what went on before deciding who caused those events. Without the intervention of the Secretariat, the development of this information would have been nearly impossible.

The third argument relates to the capacity of the Secretariat to take full advantage of its fact-finding capacity for the elaboration of a factual record. In relation to the timeframes of the citizens' submission process, the unwillingness of the Mexican government to cooperate has been demonstrated. This reluctance extends from designating its responses confidential without a legal reason right through to limiting its support for the elaboration of a factual record. The Secretariat's capacity to generate respect, exhibit credibility and main-

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[211] See Metales y Derivados (SEM-98-007) factual record at p. 68, *Registry of Submissions* online: *CEC homepage*, http://cec.org/files/pdf/sem/98-7-FFR-e.pdf (date accessed: April 25, 2002).

tain a sensitive objectivity allows it to overcome this obstruction by opening the process to NGOs, the JPAC and other Parties to the NAAEC.

2. Cooperative Mechanisms under the NAAEC

The potential of the NAAEC to develop cooperative relations in search of sustainable development remains isolated from the citizens' submission process. Perhaps the legal background of NAAEC commentators prompts them to analyse the Citizens' submission process as a quasi-adjudicational mechanism isolated from other non-legal NAAEC provisions. The Council's cooperative programme could strengthen the effectiveness of the submissions procedure by providing a means to follow up problems identified in factual records.

For instance, Article 13 allows private parties to request and the Secretariat to prepare reports in areas that fall outside the purview of the submissions procedure, and it allows those reports to be more comprehensive and less confrontational than the factual records the submissions procedure produces. In particular, Article 13 enables the Secretariat of the CEC to "prepare a report for the Council on any matter within the scope of the annual program." One interesting aspect of this kind of report is that nongovernmental organizations or individuals can ask the Secretariat to prepare a report on any environmental matter about which they are concerned. If the environmental matter is related to the annual program, the Secretariat can prepare a report without the Council's authorization. If the issue raised is not within the scope of the program, the Council decides by a two-thirds vote if the report will be prepared. An example of this type of report is the one developed by the Secretariat regarding the death of massive numbers of migratory birds which occurred in 1994 at the Silva Reservoir located in the Mexican state of Guanajuato.[212] Using a similar approach, the petitioners in the Cytrar II and Tarahaumara submissions appealed to Article 13 reports as alternatives to complement the Articles 14-15 submission procedure. This possibility can bring an integrated approach to compliance with the NAAEC.

In addition to Article 13, much of the work of the CEC takes place in cooperative programme approved by the Council and carried out by the state parties, the Secretariat, and

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[212] See Silva Reservoir Report, online: *CEC homepage*, http://www.cec.org/files/pdf/silv-e_EN.pdf (date accessed: August 2, 2002).

working groups. The programme fall within one of four general areas: (1) Environment, Economy and Trade; (2) Conservation of Biodiversity; (3) Pollutants and Health; and (4) Law and Policy.[213] Since 1995, the Law and Policy area has included an ongoing programme on "Enforcement Cooperation" whose general goals include providing a forum for North American cooperation in environmental enforcement and compliance, supporting capacity building in effective enforcement, and facilitating specific trilateral enforcement cooperation programme.[214]

The Council could expand the mandate of the programme to address possible enforcement problems identified through the submissions procedure. For example, in the Rio Magdalena determination the Mexican government declared that there are deficiencies in the treatment of wastewater discharged into the Magdalena River. The response indicates that the economic conditions of the municipalities, state and federation limit the execution of action plans for the construction of sanitation systems. However, the position expressed by the Mexican government demonstrates that some failures to effectively enforce environmental regulations may be due to lack of will, but it seems likely that the pollution of the Magdalena River also results from lack of financial or technical capacity. By linking the submission procedure with the Enforcement Cooperation Program, in this case with the Pollutants and Health area, the Council would be able along with the Mexican government to identify solutions for the efficient collection and management of water fees. According to the Mexican government, this situation is a prevailing problem across the nation; linking the factual record with a working group appointed by the Council would provide for a cooperative means of promoting compliance.

Another example of providing compliance through cooperative means could be to link the factual record with the Pollutant Release and Transfer Register (PRTR). The PRTR is a register of amounts of specific chemical substances released into air, water and land and transferred off-site from industrial facilities. As stated in NACEC Council Resolution 00-07, PRTRs are valuable tools:

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[213] See North American Agenda for Action: 2001-2003 A Three Year Program Plan for the North American Commission for Environmental Cooperation, August 2000, online: *CEC homepage*, http://www.CEC.org/files/english/PP01-03e.pdf (date accessed: April 25, 2002).
[214] *Ibid.* at p. 96.

> [F]or the sound management of chemicals, for encouraging improvements in environmental performance, for providing the public with access to information on pollutants released and transferred into and through their communities, and for use by governments in tracking trends, demonstrating progress in pollution reduction, setting priorities and evaluating progress achieved through environmental policies and programs.[215]

Each country has its own reporting system. The United States employs the US Toxic Release Inventory (TRI [579 substances]); Canada, the Canadian National Pollutant Release Inventory (NPRI [245 substances]); and Mexico, the Registro de Emisiones y Transferencia de Contaminantes (Pollutant Release and Transfer Register [RETC]). Mexico's RETC's first reporting year was 1997, covering 100 substances from facilities in 11 industrial sectors under federal jurisdiction.[216]

RETC has received strong criticism from Mexican NGOs because it is not mandatory, it is not publicly available, and the substance scope is minimal compared with other North American PRTRs. If the government has no record of who's emitting toxics—and where, when, in what volume, and of what kind—it cannot enforce laws controlling them. And if the public has no access to the information, it cannot pressure for concrete steps to be taken to protect public health and the environment.

The National Institute of Ecology has coordinated a pilot project in the central state of Querétaro to implement a voluntary RETC. A similar strategy could provide a cooperative solution in submissions like the Molymex II (currently undergoing factual record development) where, among other issues, the Mexican government has failed to provide specific information concerning the emissions by the company of SO^2 into the ambient air. The implementation of a RETC by the Mexican government to monitor company emissions would have allowed promoting compliance in a cooperative way.

Another programme provided by the CEC also functions on a grassroots level. The North American Fund for Environmental Cooperation (NAFEC) has distributed approximately $1 million per year to more than 100 community projects ranging from projects aimed at protecting farmers from pesticide use to marketing environmentally certified for-

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[215] See *North American Pollutant Release and Transfer Register*, online: *CEC homepage*, http://www.cec.org/files/pdf/POLLUTANTS/331_e_EN.PDF (date accessed: April 25, 2002).
[216] *Ibid.*

est projects. Since 1995 the CEC has provided funds to non-governmental organizations and community based organizations within North America.[217]

Recently, there has been an increment on the grants awarded to projects related to the release and transfer of pollutants. Apparently, awareness of the right to access environmental information is growing among Mexican citizens. However, the capacity to exercise this right and make effective use of the information is still limited. Mexican NGOs have been pushing for the application of the environmental management principle that "what gets measured gets managed," and the Mexican government has already realized the increased importance invested by the citizens in the implementation of a reliable and enforceable pollutant release and transfer register.

On December 6, 2001, the Mexican Congress approved reforms to Mexican environmental legislation transforming the country's RETC from voluntary to obligatory and making it publicly available. Unfortunately, under the Mexican legal system this reform does not guarantee the implementation of the provision. As with other private remedies provided by LGEEPA, the enactment of legislation in Mexico does not necessarily mean its enforcement and compliance. Only through the creation of an autonomous and decentralized institution, with predominant citizen representation on the directive board and available funding to guarantee its continuance, could the implementation and enforcement of the RETC be possible. The creation of a regulatory agency entitled and funded to manage the RETC would represent the single most important development toward the achievement of sustainable development ever enacted by the Mexican government.

3. Lack of Enforceability of a Factual Record

Certain commentators have criticized the citizens' submission process for its lack of coercive enforcement mechanisms. It is clear what the process is and what it is not. It offers the possibility of drawing attention to domestic enforcement practices. The citizens' submission process does not, however, provide for sanctions. The idea of imposing trade sanctions or monetary assessments to effectively enforce Mexico's environmental regulations seems appropriate for a number of reasons.

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[217] See *Grants for Environmental Cooperation*, online: *CEC homepage*, http://cec.org/grants/about/index.cfm?varlan=english (date accessed: April 25, 2002).

First, a dispute settlement mechanism is as good as the possibilities to enforce its decisions. There is an urgent need to provide the citizens' submission process with the power to bind Mexico or any other Parties to overcome the non-enforcement of its environmental law through a specific action plan or otherwise to impose monetary sanctions.

Second, the CEC allows a valid claim to be heard at the international level without working its way through domestic procedures that might prove futile in the end, either because of Mexican courts' reluctance to address conflicts where government is involved, or because the burdens associated with years of litigation could make the claimants withdraw the complaint before it makes its way through domestic procedures. However, Mexican citizens capacity to bring claims to an international body so far has proven limited to effectively enforce Mexican environmental law. Eventually Mexican citizens will realize that CEC's submission procedure is as futile as domestic remedies, and for Mexico's government complacence petitioners will finally give up submitting complaints. Only by raising the legal status of CEC resolutions to the same characteristics of the other dispute resolution bodies of NAFTA would the citizen submissions process reach its full potential and encourage citizens' participation in a meaningful way.

Third, the imposition of sanctions can be conditioned on the implementation of a specific action plan elaborated in accordance with one of the cooperative programme provided by NAAEC. However, this accord will confer the CEC with the power to bind alike the Mexican authorities, the companies, or the local governments involved in the environmental violations. Strict timeframes should be imposed for the completion of particular commitments. Additionally, the rights bestowed in the agreement would only render its effects on the particular case. Any other submission with similar characteristics should necessarily be subject of a separate accord. Obviously in the case of breach of the accord the imposition of the sanction would be immediately effective.

Finally, the CEC should possess autonomy from the governments of NAFTA. This independence will permit the Commission to investigate individual problems that may reflect authentic environmental consequences of trade liberalization. The CEC is to a certain extent supranational, and its fact-finding and citizens complaint investigations could improve the implementation of NAFTA's environmental provisions.

NAAEC Article 6 provides that the CEC shall cooperate with the NAFTA Free Trade Commission to achieve the environmental goals and objectives of NAFTA. A joint statement concerning the attainment of sustainable development in Mexico would represent an important advancement to measure the implementation of one of the original objectives of NAFTA.

CHAPTER 3. NAFTA'S CHAPTER 11 AND SUSTAINABLE DEVELOPMENT IN MEXICO

NAFTA's Chapter 11 is designed to protect the interests of foreign investors and to liberalize international investment within the NAFTA region. This chapter analyses Chapter's 11 implications in a developing country like Mexico and its consequences for the protection of the environment within the framework of sustainable development. The first part of this chapter reviews the particular conditions of investment liberalization in Mexico. The second part examines the substantial and procedural issues recognized by Chapter 11 and the interpretative statement concerning Chapter 11 released by NAFTA's Free Trade Commission. The third part analyses two disputes submitted to Chapter 11 arbitration panels. The first is Methanex v. United States,[218] a dispute still pending resolution that indirectly supports the concerns over the capacity of the Mexican government to provide legitimate regulations to protect the environment. The second is Metalclad v. Mexico,[219] the only complete NAFTA Chapter 11 decision to date in which the Tribunal decided in favour of the investor on the question of expropriation and made a compensatory award.

The argument to be established in the final part of this chapter is that the provisions of Chapter 11 when applied to the conditions of a developing country like Mexico do not contribute to improving environmental protection as required by sustainable development. This argument concludes with two interrelated issues: the reluctance of the Mexican federal government to decentralize environmental policy-making and the consequent denial of the right of local governments to establish their own level of protection against risks of environmental harm.

For purposes of this analysis it is important to clarify that the debate over the use of NAFTA's Chapter 11 provisions differs as between the NAFTA parties. The debate in the United States and Canada is concerned with the misuse of Chapter 11 and its compatibility with relatively long-established institutions to protect the environment. In the case of Mex-

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[218] Full texts of the preliminary awards in the Methanex v. United States can be found in the United States of America Department of State homepage, online: http://www.state.gov/documents/organization/8772.pdf Also at Methanex homepage, online: http://www.methanex.com/investorcentre/MTBE.htm (date accessed: June 8, 2002).

[219] *Metalclad Corporation v. United Mexican States, Award of the Tribunal*, ICSID Case No. ARB(AF)/97/1(February 17, 2000) online: ICSID Cases homepage, http://www.worldbank.org/icsid/cases/mm-award-e.pdf (date accessed: June 8, 2002) [hereinafter: *Metalclad*].

ico the concerns are oriented to the mere success of developing such institutions. In other words, the debate is not about what Chapter 11 has done to the Mexican government; rather, it is about what Chapter 11 has been impeding Mexican government from doing.

In comparison with Canada and the United States, Mexico is just beginning to recognize within its legal framework the harmful effects of human activities on the environment and the connection between environmental health and human well-being. This recognition, however, remains invested in the federal authorities. This chapter aims to demonstrate that Chapter 11 provisions contributed in a significant manner to inhibiting Mexican central authorities from devolving onto local governments jurisdiction to regulate protection of the environment. This reluctance is based on the federal government's concern that local control over environmental policy-making could eventually collide with the interests of NAFTA's investors and restrain potential investors from establishing themselves in Mexico. Additionally, this chapter seeks to prove that NAFTA's Chapter 11 outcome reveals the necessity for increased transparency in environmental policy-making and the need to improve the information that citizens have about what NAFTA's institutions do, allowing those who are affected by the policies to have a greater say in their access to information.

A. International Investment Liberalization and Mexico

International investment liberalization provisions supported by 1980's free-market economic theories found their way into Mexico's ruling class through an authoritarian group of economists known as the "technocrats". These economists headed by former president Carlos Salinas de Gortari supported a neoliberal economic policy. Under Salinas' administration, Mexico had been promoting more open markets and a liberalization of the foreign investment regime. The main critique of NAFTA's investment liberalization regime has been that the negotiation of the treaty was made under secrecy by the technocrats' administration. Indeed, the predictable consequences of investment liberalization within Mexico were scarcely measured or addressed by the negotiators of the investment chapter.[220] The social, cultural, and political costs of investment liberalization were not taken into account

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[220] "Investment liberalization, NAFTA-style, has been pursued without regard for the need to legitimize FDI to the Mexican people... investment liberalization has been pursued without a vision of social justice, without real democratic legitimacy, and without concern for the historical record of FDI." See J. E. Alvarez, "Critical Theory and the North American Free Trade Agreement's Chapter Eleven" (1997) 28 U. Miami Inter-Am. L. Rev. 303.

by the economists' models that produced this treaty. In the event, the swift implementation of economic adjustment measures in Mexico increased poverty, enlarged the gap between rich and poor, and contributed to the abrupt decline of the 70-year-old political regime.[221]

Historically, Mexico has been reluctant to include within its legal framework provisions to protect foreign investors. The Mexican legislation was drafted to protect the domestic or state-owned companies from competition by foreign investors. The Mexican foreign investment code required either prior approval for or complete prohibition of the establishment of foreign investment. This protection was oriented to exclude foreign investors from particular economic sectors (manufacturing, mining, oil extraction and production, and communications, among others) and established performance requirements that attached conditions to investment activity. In addition, private property rights in Mexico are governed by Article Twenty-Seven of the Mexican Constitution, which provides, in relevant part, that "ownership of the lands and waters within the boundaries of the national territory is vested originally in the Nation, which has had, and has, the right to transmit title thereof to private persons, thereby constituting private property."[222] Article Twenty-Seven further provides that "private property shall not be expropriated except for reasons of public use and subject to payment of indemnity."[223] However, the government is free to impose restrictions upon the use of private property, short of actual transfer of ownership to the state, without incurring liability for associated loss of use. The government may limit the use of private property "to ensure a more equitable distribution of public wealth, to conserve [natural resources], to attain a well-balanced development of the country and improvement of the living conditions of the rural and urban population."[224] Consequently, private property rights in Mexico are not absolute but rather serve "a social function" and are of "a derivative character" and subject to limitation by the state.

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[221] "These [neo-liberal] policies have led to growing wealth for a few political elite at the expense of the people and a restructuring of these states' political systems into entities that more greatly resemble agents of the IMF than sovereign governments. This rapacious pattern of disorganization and lawlessness by the Latin American financial elite is a result of the restructuring of markets and capital worldwide." See M. E. Padua, "Mexico and Neoliberalism: Birth Pangs of a New State" (2000) 6 U.C. Davis J. Int'l L. & Pol'y 131.
[222] See *Mexican Constitution* tit. I, art. 27, *supra* note 48.
[223] *Ibid.*
[224] *Ibid.*

The Mexican legal framework concerning foreign investment is inspired by the Calvo Doctrine,[225] under which foreign concessionaries and investors have routinely been required, as a condition for being allowed to proceed with investments, to renounce all remedies other than those provided by the domestic law of Mexico and to waive any right of diplomatic protection.[226] Although some theorists may argue that the Calvo Doctrine is consistent with NAFTA's Chapter 11, Article 1102 (national treatment), there remains the problem of determining just what national treatment actually means in Mexico. Currently, some judges who depend on nepotistic members of the executive power not only for nomination, but also for the right to remain in power can apply even clear-cut rules unfairly: "justice in Mexico continues to favour the highest bidder and every class of crime is being committed with increasing impunity."[227]

During NAFTA negotiations, one of the concerns that gave rise to the Chapter 11 process was the fear of expropriation and other interference by Mexico in U.S. investments. The United States approved NAFTA's investor-State process because U.S. companies would no longer face an uneven playing field in an investment dispute with the Mexican government but could instead seek arbitration outside of Mexico by an independent body. Mexico's wavering treatment of foreign investors has consisted of repeated oscillations between periods of market openness punctuated by cycles of reaction and nationalization. The signing of NAFTA represents one turn in these cycles.[228] Even though Mexican domestic law was changing at the time, U.S. investors wanted to include in NAFTA an extensive range of protections and market access guarantees that could not be easily reversed by subsequent administrations. Indeed, the inclusion of the NAFTA investment chapter, which

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[225] Carlos Calvo (1824-1906), Argentine specialist in international law, established in his doctrine that people living in a foreign nation should settle claims and complaints by submitting to the jurisdiction of local courts and not by using either diplomatic pressure or armed intervention from their own government. Calvo justified his doctrine as necessary to prevent the abuse of the jurisdiction of weak nations by more powerful nations. See generally C. K. Dalrymple, "Politics and Foreign Direct Investment: The Multilateral Investment Guarantee Agency and the Calvo Clause" (1996) 29 Cornell Int'l L.J. 161.

[226] Article 27 of the Mexican constitution requires foreign investors to "consider themselves as nationals in respect to such property and bind themselves not to invoke the protection of their governments in matters relating thereto; under penalty ... [in the event of noncompliance] of forfeiture of the acquired property to the Nation." See *Mexican Constitution* tit. I, art. 27, *supra* note 48.

[227] See J. Witker & R. Robins, "Post-1994 Elections Mexican Foreign Investment Regulatory Scheme" in S. J. Rubin, D. C. Alexander, ed., *NAFTA and Investment* (The Hague; Boston: Kluwer Law International) at 115.

[228] For an analysis of Mexican policy toward foreign investment see A. Chua, "The Privatization-Nationalization Cycle: The Link Between Markets and Ethnicity in Developing Countries" (1995) 95 Colum. L. Rev. 223.

traditionally had been opposed by nationalistic Mexico,[229] emerged as an opportunity to present the nation as a new safe place to do business.

a. Background and General Provisions for Investment in Chapter 11

The background of Chapter 11 provisions can be found initially in the development of bilateral investment treaties (BIT's) that sought to reduce investors' risks by requiring host governments, especially in developing countries, to treat foreign owned companies as favourably as domestic companies.[230] BIT's present themselves as essentially liberal documents. The typical BIT cites two goals in its preamble: the creation of favourable conditions for investment by nationals and companies of one party in the territory of another party, and increased prosperity in both states. BIT's affirm the basic liberal doctrine that free movement of capital will yield greater productivity.[231]

The immediate antecedent to Chapter 11 is the Canada–United States Free Trade Agreement, concluded in 1988, which contained provisions on investor protection and investment liberalization. However, the Canada-U.S. Agreement did not include a dispute settlement mechanism between foreign investors and the host State. Clearly, NAFTA's Chapter 11 was intended to protect Canadian and U.S. investments from arbitrary or discriminatory conduct of the Mexican government. Daniel Price, one of the United States' NAFTA negotiators, asserts that Chapter 11 was a decided success for the United States because it resolved major issues in United States-Mexican relations. The United States and Canadian negotiators never thought that their own governments might violate NAFTA's Chapter 11 and attract claims. Apparently, the main response of government officials who negotiated Chapter 11, or acted on the government side of disputes, was that "we did not

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[229] Mexico presents an historical and cultural hostility toward foreign investors. For example, the official history textbook compulsory for all Mexican students refers to the nationalization of the petroleum industry (a national holiday commemoration) in the following terms: "The foreign companies did everything possible to avoid paying the taxes established by the law. They did not want to improve the salaries of Mexican workers, which were much lower than those paid to foreign workers. The Mexican workers called a strike; after studying their case, the Supreme Court decided that the increase they requested was fair, and ordered payment to be made. However, since the oil companies did not obey the Court ruling, President Cárdenas decided to expropriate them." See *Historia Sexto Grado*, Secretaría de Educación Pública homepage, online: http://www.sep.gob.mx/wb/distribuidor.jsp?seccion=932&urlwb=http://www.sep.gob.mx/libros/g6/histo/090.htm (date accessed: June 10, 2002).

[230] Although the first bilateral investment treaty was concluded in 1959, more than two-thirds of the agreements have been signed since 1990. The International Centre for Settlement of Investment Disputes separately compiled a list of more than 1100 treaties involving 155 countries. See generally Bilateral Investment Treaties, International Centre for Settlement of Investment Disputes homepage, online: http://www.worldbank.org/icsid/treaties/treaties.htm (date accessed: June 10, 2002).

[231] "In short, the avowed purpose of a BIT may be distilled into five words: increased prosperity through foreign investment." For an extended analysis of BIT's see K. J. Vandevelde, "The Political Economy of a Bilateral Investment Treaty" (1998) 92 A.J.I.L. 621.

intend NAFTA to mean that."[232] Most BIT's were concluded with developing countries that have very little investment either in the United States or Canada. These rules and mechanisms were thus perfectly acceptable to the U.S. when invoked against the laws and actions of developing countries. Now NAFTA has come along and said to the United States and Canada, "You too can be a defendant." And as a result, these very same rules and procedures are seen as threats to sovereignty and democracy. "The shoe is on the other foot, and it is not as comfortable."[233]

b. The Substantive Issues

The definition of "measures" or government actions subject to review by Chapter 11 includes any law, regulation, procedure, requirement or practice adopted by national, state or provincial legislations.[234] In essence, any new governmental act, at any level of government, that impacts on an investor may fall within what is covered.[235] The term investment is broadly defined in Article 1139 and embraces virtually all forms of ownership and interest in a business enterprise, including majority and minority interests and intangible property and contractual investment interests.[236] According to Article 1138, only claims to money and sales of goods and services or credit associated with such sales are specifically excluded.

Chapter 11 states five obligations or disciplines (as they are called in trade law) to which the parties must adhere: national treatment, most-favoured nation treatment, minimum international standard of treatment, prohibitions against certain performance requirements on investors, and provisions governing expropriation.

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[232] "This is the element of NAFTA Chapter 11 that has irritated the Canadian and US governments the most. They do not like being told that international law means something other than what politics dictates." See I. A. Laird, "NAFTA Chapter 11 Meets Chicken Little" (2001) 2 Chi. J. Int'l L. 223.

[233] See D. M. Price, "NAFTA Chapter 11 Investor-State Dispute Settlement: Frankenstein or Safety Valve?" (2001) 26 Can.-U.S. L.J. 1.

[234] See *NAFTA supra* note 66 at art. 201 (2).

[235] "The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance ... by state and provincial governments." *Ibid.* art. 105.

[236] "Investment includes a business ('enterprise'); shares in a business; a debt security in a business in some cases; a loan to a business; interests entitling the holder to a share of profits; income or the proceeds of a dissolution of a business; real estate bought for business purposes; and a very broad concept of 'interests' arising from the commitment of financial or human resources to economic activity. This definition includes direct investments in a business facility such as a factory or retail store or distribution center, as well as portfolio investments such as stocks or bonds." See International Institute for Sustainable Development and World Wildlife Fund U.S., *Private Rights, Public Problems. A guide to NAFTA's Controversial Chapter on Investors Rights*, (Manitoba: International Institute for Sustainable Development) at 23, online: IISD homepage, http://www.iisd.org/pdf/trade_citizensguide.pdf [hereinafter: *Private Rights, Public Problems*] (date accessed: June 10, 2002).

1. National Treatment and Most-Favoured Nation Treatment

Canada, Mexico, and the United States have agreed, under Article 1102 of NAFTA, to accord "national treatment" to investors of another Party. National treatment means treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

Article 1103 provides that one Party must treat investors of another Party no less favourably than it does, in like circumstances, investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. This is referred to as "most-favoured-nation treatment."

The key to establishing how these principles will work in any agreement is the meaning of the stipulation that "in like circumstances" no less favourable treatment must be granted. The concept "in like circumstances" has been defined in laws covering trade in goods and has come to be judged by the commercial substitutability of the goods,[237] but such a comparison when related to long-term investment may prove impossible. In the case of environmental regulations imposed on investors, certain factors such as the environmental impacts of production and the consumption and disposal of goods have necessarily to be considered. For example, since environmental regulations often include maximum levels of pollution in local air or watersheds, the same physical limits on the environment may limit the installation of more operations. On the former point, consider four factories on a stream whose emissions are regulated so that the stream is at capacity for receiving pollution. If the government denied a foreign investor permission to set up a fifth operation in the same place, would that violate national treatment? The firm would in fact be receiving treatment worse than that accorded the existing firms. This obligation is more complex for investment than it is for trade in goods. Under the scope of the national treatment requirement imposing higher environmental standards on new industries–or denying the permission to

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[237] Possibly, there is an analogy to the "like products" debate that is the subject of frequent disputes in GATT, where determining the meaning of "like products" depends on the particular circumstance of the case. See generally *Japan – Taxes on Alcoholic Beverages (Complaints by the European Communities, Canada and the United States)* (1996) WT/DS8,10,11/AB/R 9 (Appellate Body Report), online: WTO homepage, http://www.wto.org/wto/dispute/distab.htm (date accessed: June 10, 2002).

operate or expand–would constitute less favourable treatment than that accorded to existing domestic or foreign investors.

2. Minimum International Standards

Like most bilateral investment agreements, Chapter 11 contains provisions requiring host countries to treat foreign investors in a way that meets minimum international standards. This requirement is expressed in Article 1105 in very general language as "treatment in accordance with international law, including fair and equitable treatment and full protection and security." This clause is understood to encompass, among other matters, minimum standards of administrative and due process. However, under this approach, any international trade obligation, and potentially any international law obligation, is also open to dispute between investors and States under Chapter 11. Article 1112 states that in the event of any inconsistency between Chapter 11 and another Chapter, the other Chapter shall prevail to the extent of the inconsistency. This leads to a broad interpretation of the Chapter 11 obligations.

3. Expropriation

The provision on the protection from expropriation is found in Article 1110 (1). Thus:

> 1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:
>
> (a) for a public purpose;
>
> (b) on a non-discriminatory basis;
>
> (c) in accordance with due process of law and Article 1105(1); and
>
> (d) on payment of compensation in accordance with [subsequent paragraphs specifying valuation of expropriations and form and procedure of payment].

Note that all four conditions must be satisfied. That is, even a national measure for a public purpose applied through due process of law and without discrimination may rise to a claim for compensation if its result is "tantamount to expropriation." The critical question about Article 1110(1) is what government acts constitute a measure "tantamount to expropriation" of property by a government and therefore create the need for compensation.

An important source of international law on government measures that are "tantamount to expropriation" is the American constitutional jurisprudence on uncompensated "regula-

tory takings" under the Fifth and Fourteenth Amendments of the U.S. Constitution. In the United States, this question has caused a heated debate arising from the constitutional protection of private property; it has a particular significance for environmental laws because of their impact on land and property use.[238] The uncertainty around the threshold definition of expropriation and measures tantamount to expropriation will be just as legally complex as the decision on claims for just compensation for environmental regulatory "takings" in U.S. law.

Another important issue that has become the subject of debate is the way Article 1110 relates to what is called the exercise of "police powers". Police power is the exercise of the sovereign right of a government to promote order, safety, security, health, morals and general welfare within its constitutional limits and is considered to be an essential attribute of government. This definition would seem to include measures to protect the environment as well as human health, and hence to exclude such regulations from being subject to compensation.

The "tantamount to expropriation" debate has been assimilated to the debate on the question of whether a non-discriminatory general regulatory measure, a measure promulgated under a state's "police powers", can be considered an expropriation that must be compensated. A continuum can be recognized in relation with this debate. On one extreme are those who argue that the black letter of NAFTA Article 1110 (1) is effectively a no-fault provision and that police powers are compensatable. A plain reading of NAFTA Article 1110 (1) supports the position that it is in fact a no-fault provision. In the middle position are those who argue that even if the measure is a general regulatory measure, at the minimum, if that measure is discriminatory, arbitrary, or a disguised restriction on investment or trade, an expropriation is compensatable. This type of argument is reflected in GATT Article XX (b).[239] Similarly, NAFTA Article 1101(4), titled "Scope and Coverage",

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[238] "The debate encompasses both philosophical and legal differences that pit private property rights against societal rights to environmental integrity. The debate also reveals that US law in this area continues to maintain divisions between interference with the physical possession of property, deprivations of the full use of the property for economic purposes, and regulation of impacts on the environment and the public from the use of the property." See H. Mann and K. von Molke, *NAFTA's Chapter 11 and the Environment. Addressing the Impacts of the Investor - State Process on the Environment.* (Manitoba: International Institute for Sustainable Development, 1999) at 39, online: IISD homepage, http://www.iisd.org/pdf/nafta.pdf (date accessed: June 10, 2002).

[239] "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: . . . (b) necessary to protect

could provide a balancing of interests, although the expropriation provisions would still be applicable.[240] On the opposite extreme, supporters of a State's unrestrained sovereignty say that a police power measure should never be compensated. Independently of the interpretation of what is a measure "tantamount to expropriation", what remains uncontested is that a Chapter 11 arbitral tribunal in a confidential non-transparent procedure will decide the reach of this concept in each particular case.[241]

The fact that arbitral panels' decisions are made through a confidential procedure and that they are increasingly litigating important issues of public interest is the main critique levelled against Chapter 11. The issue of what government acts constitute a measure "tantamount to expropriation" of property by a government and therefore create the need for compensation is left to be determined behind closed doors by a Chapter 11 tribunal in a non-transparent and secretive process. The vagueness around the concept of expropriation or measures tantamount to expropriation could have a significant impact on the freedom of governments to enact strong regulations to protect the environment as well as other aspects of public welfare. As of March 2001, there were 10 cases[242] (out of a total of 17) brought against environmental and natural resource management measures, including cases involving hazardous waste management decisions, maintenance of clean drinking water, and gasoline additives banned in other jurisdictions. After all, as noted by the Sierra Club of Canada, "one man's environmental regulation is another man's non-tariff trade barrier."[243]

4. Environmental Provisions

The language relating to the environment in Chapter 11 is contained in Article 1114 and has two provisions. The first holds that nothing in Chapter 11 prevents a country from

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human, animal or plant life or health." See *The General Agreement on Tariffs and Trade*, 30 October 1947, 58 U.N.T.S. 187, (entered into force 1 January 1948) at art. XX.

[240] "Nothing in this Chapter shall be construed to prevent a Party from providing a service or performing a function such as law enforcement, correctional services, income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care, in a manner that is not inconsistent with this Chapter." *NAFTA supra* note 66 at art. 1110 (4).

[241] In relation to transparency and Chapter 11 see *infra* notes 248 and 353 and accompanying text.

[242] The current cases submitted are: Signa S.A. v. Government of Canada; Metalclad Corp. v. United Mexican States; DESONA v. United Mexican States; Waste Management, Inc. v. United Mexican States; Sun Belt Water Inc. v. Government of Canada; S.D. Myers, Inc. v. Government of Canada; Ethyl Corp. v. Government of Canada; Pope & Talbot, Inc. v. Canada; Methanex Corporation v. United States of America. In the absence of a comprehensive Chapter 11 web site hosted by the NAFTA Secretariat or any NAFTA government, the most up-to-date –sources are two private websites maintained by attorneys active in litigating Chapter 11 cases, http://www.naftalaw.org and http://www.appletonlaw.com (date accessed: June 10, 2002).

[243] See E. May, "Examining Canada's Priority Interests at the WTO/FTAA Negotiations: How Not to Promote Environmental Protection" (1999) Sierra Club of Canada, online: Sierra Club of Canada homepage, http://www.sierraclub.ca/national/trade-env/wto-brief-jul99.html (date accessed: May 28, 2002).

adopting or maintaining an environmental measure that is otherwise consistent with the chapter. In the event of a conflict between Article 1114 (1) and Article 1110 (1), the expression "any measure otherwise consistent with this Chapter" in Article 1114(a), it would appear, is designed to subordinate Article 1114(a) to Article 1110 (1).[244]

The second paragraph of Article 1114 states that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. Unlike the investor protection provisions of Chapter 11, there is no mechanism under NAFTA for private Parties to seek enforcement of Article 1114, or for governments to engage in binding dispute settlement with regard to it.

c. The Procedural Issues

International commercial arbitration was conceived as a means of addressing private matters between businesses or between business and government. Historically, individual investors, in dealing with a foreign state, have been constrained in their ability to seek relief directly. Instead, such investors have had to enlist the assistance of their own governmental authorities to present their claims against the foreign state. Thus, international commercial arbitration has been secluded within the domains of international diplomacy, specifically the application of diplomatic protection.

The Subchapter B provisions are intended to overcome problems that have been encountered in connection with foreign investment disputes. The investor-State dispute resolution mechanisms that govern NAFTA Chapter 11 arbitrations, such as the International Centre for Settlement of Investment Disputes ("ICSID") and United Nations Centre for International Trade Law ("UNCITRAL"), were created to remove investment disputes from the heated political arena.[245] These procedures aim to remove investment disputes from the

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[244] "This is not particularly meaningful when it is unscrambled: it simply means that nothing in the chapter prevents you from doing what the chapter does not prohibit you from doing." See *Private Rights, Public Problems supra* note 236 at 12.

[245] Under NAFTA, disputes can be referred to ICSID, a legal Secretariat housed at the World Bank's Washington headquarters, or the Vienna-based UNCITRAL. ICSID was established under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, which came into force on October 14, 1966. ICSID has an Administrative Council and a Secretariat. The Administrative Council is chaired by the World Bank's President and consists of one representative of each State that has ratified the Con-

troubled political scenario characteristic of state-to-state disputes to the self-controlled and, one might optimistically conjecture, more knowledgeable, stage of an expert tribunal. The rules in each process give Chapter 11 tribunals a significant amount of ability to manage their own proceedings to fit the needs of the case at hand. Through the concerns raised by Chapter 11 and other BIT's the public has just begun to realize the particular nature of investor-State dispute resolution mechanisms.

The fact that investments or investors have nationality differentiates the analysis of trade and investment disputes. On one side, trade agreements, typically, protect flows, not traders themselves. On the other side, investment agreements protect specific enterprises or specific investors. Reduced to the basic difference: goods have origin and investments have nationality. According to classic doctrines of public international law an investor, or the investment, is bestowed by its State of nationality with a little piece of the nation's sovereign power. Hence, an injury to an alien or its property without proper remediation is an injury to the State of that investor.

The linkage between trade and investment occurred for the first time multilaterally in NAFTA. The inclusion of Chapter 11 procedural remedies has demonstrated that relief for trade-related disputes are different from those to remedy host State violations of investor rights. NAFTA's trade-related arbitral panel awards, as inspired by the WTO agreements, require countries violating the agreement to bring their measures into compliance with the obligation. Also, NAFTA's trade-related dispute resolution mechanisms provide for prospective awards among sovereign nations. In contrast, NAFTA's Chapter 11 dispute resolution process limits the sovereign power of a nation by placing host governments in the same legal condition of private investors. As well, NAFTA's Chapter 11 process provides for retrospective awards by requiring the payment of compensation by the host State in case of a breach of the obligation. These distinctions have proven to be important since no set of procedural issues has ever been developed on multilateral agreements to protect private interests against legitimate actions of host governments.

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vention. Annual meetings of the Council are held in conjunction with the joint Bank/Fund annual meetings. ICSID is an autonomous international organization. However, it has close links with the World Bank. See generally *International Center for the Settlement of Investment Disputes*, online: ICSID homepage, http://www.worldbank.org/icsid/ (date accessed: June 10, 2002).

Chapter 11 is the only portion of NAFTA that allows foreign investors to sue their host governments directly through a secretive procedure. The original reasoning for allowing such actions was most likely to protect against arbitrary and unreasonable government actions against foreign investors. Governments make mistakes and sometimes they intentionally create measures that discriminate against foreign investors. As a means of recourse, foreign investors should be compensated for unfair and discriminatory treatment, and they should be assured that they can operate in a predictable business environment based on the rule of law. That, in a nutshell, is the story of international investment disputes. However, given the vague language of the Chapter 11, investors have been able to abuse this process.

1. Overview of the Investor-State Dispute Resolution Process

Subchapter B of Chapter 11 sets out a comprehensive code for resolution of investment disputes involving a breach or alleged breach of NAFTA investment rules by a host government. Investors (who are not themselves a party to NAFTA) who wish to make claims against other NAFTA Parties by way of arbitration may either seek monetary damages through binding investor-State arbitration or remedies that are available in domestic courts of the host country.

The first step of the process is to issue a notice of intent to submit a claim to arbitration. This is followed by a consultation and cooling down period of at least 90 days before the claimant who is sending a "notice of arbitration" to the NAFTA Party can start the actual arbitration. When sending the notice of arbitration, the investor chooses one of three internationally recognized arbitration processes operating under UNCITRAL or ICSID.

Article 1123 provides that unless the disputing parties otherwise agree, the arbitration tribunal is to consist of three arbitrators, one to be appointed by each of the disputing parties, and the third, who will preside over the arbitration, to be appointed by agreement of the disputing parties. According to Article 1124, if a Party fails to appoint an arbitrator or the disputing parties are unable to agree upon the presiding arbitrator, the Secretary General of ICSID shall make the necessary appointment from a list of 45 presiding arbitrators agreed upon by the parties. Neither NAFTA nor any of the arbitration procedures that may be elected pursuant to Chapter 11 stipulates that arbitrators must be nationals of the disputing parties. Once the Tribunal is chosen, it operates under the rules of procedure of the IC-

SID or UNCITRAL process chosen by the investor. In either case, the rules are similar, allowing for the filing of legal arguments, presentation of evidence, cross-examination of witnesses, oral arguments, and finally the decision of the Tribunal.

In relation to the finality and enforcement of awards, NAFTA Article 1135 (1) provides that an award made by a tribunal under Subchapter B is binding on the disputing parties, but otherwise does not have any precedence effect. Under Article 1135 (5), each Party undertakes to provide enforcement of the award in its territory. Should a Party fail to abide by, or comply with, the terms of the final award, a Chapter 20 panel may be established. This panel may be requested to determine that the other Party's failure to abide by the terms of the final award is inconsistent with obligations under NAFTA and to recommend that the defaulting Party abide by the terms of the final award.

NAFTA Article 1136 contemplates that an award by a tribunal will be final and enforceable, but also leaves open the possibility of a request by one party to the courts at the "seat" of the arbitration for revision to set aside or annul the award under the review procedures specified in the national law of the seat of the arbitration. Consequently, Chapter 11 may allow limited review by national courts, either in a direct attack upon the award or as a defence to enforcement, primarily to deal with situations in which the tribunal allegedly was improperly constituted, there was corruption among the arbitrators, basic violations of due process occurred, or where the arbitrators manifestly exceeded their powers.[246]

2. The North American Free Trade Commission's Interpretative Statement on Chapter 11

The role of interpretative statements in treaty construction is recognized in Chapter 11 of NAFTA, which provides that "an interpretation by the [Free Trade] Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section."[247] Therefore, unlike the decisions of arbitral panels, an interpretative statement con-

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[246] See *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, Mar. 18, 1965, *17 U.S.T. 1270*, 575 U.N.T.S. 159, online: ICSID homepage, http://www.worldbank.org/icsid/basicdoc/27.htm (date accessed: June 10, 2002). In addition, the rules of the ICSID Additional Facility provide only that "the award shall be final and binding on the parties." art. 53 (4). This offers very limited protection against outside court review in accordance with national (or provincial) law relating to court review of arbitral awards, because it is the law of the situs that governs actions to set aside the award. See generally C. C. Pearce & J. Coe, Jr., "Arbitration Under NAFTA Chapter Eleven: Some Pragmatic Reflections Upon the First Case Filed Against Mexico" (2000) 23 Hastings Int'l & Comp. L. Rev. 311.

[247] *NAFTA supra* note 66 at art. 1131 (2).

struing the scope of Chapter 11 Investor-State provisions would be binding upon future panels considering such issues.[248]

On July 31, 2001, the Trade Ministers of Canada, the United States and Mexico announced that they had agreed to the interpretation of certain provisions of Chapter 11. The statement says that there is nothing in the NAFTA rules (with limited exceptions) that restricts Parties from releasing, or that compels them to keep confidential, any documents submitted to or issued by a Chapter 11 tribunal. It further says that nothing in the rules of arbitration imposes such restrictions. Finally, it pledges that the Parties to a Chapter 11 dispute will "make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal." This pledge is subject to three possible exceptions, one of which is vitally important: the exception of "information which the Party must withhold pursuant to the relevant arbitral rules, as applied." Clearly, the intent of the Ministers was to impose openness on the proceedings, but their statement does not specifically direct tribunals to adopt open procedures in the future.[249]

In relation to Article 1105 the statement says that the NAFTA Parties should treat investors of other Parties "in accordance with international law, including fair and equitable treatment ..." This statement clarifies an important issue. It declares that the obligation for a "minimum standard of treatment" is no more onerous than that granted under customary international law. It further says that a breach of some other NAFTA provision, or of the provisions of some other international agreement, does not necessarily constitute a breach of Article 1105.[250]

The statement is important because it addresses areas of Chapter 11 that need adjustment. However, the statement covers only one of the four problematic Chapter 11 provi-

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[248] Under NAFTA Article 1131(2) a formal "interpretative statement" adopted by the three Parties acting as the Free Trade Commission bind all future Chapter 11 tribunals. The Commission's statement is available at www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-e.asp. (date accessed: June 10, 2002).

[249] "The statement addresses only the issue of public access to documents after the arbitration is commenced. There is a need to ensure access to documents created before the arbitration even begins, in particular the notices of intent to arbitrate." See International Institute for Sustainable Development, "Note on NAFTA Commission's July 31, 2001, Initiative to Clarify Chapter 11 Investment Provisions" (August 2001) online: IISD homepage, http://www.iisd.org/pdf/2001/trade_nafta_aug2001.pdf (date accessed: June 10, 2002).

[250] "Article 1105's key problem seems to have been repaired. In several Chapter 11 cases the argument has been made that because a government breached rules in other parts of NAFTA, or even in non-NAFTA law such as the WTO's Technical Barriers to Trade Agreement, it has automatically breached its obligations on minimum standards of treatment. The statement puts an end to this. It brings us back to an interpretation of minimum standards of treatment that corresponds to customary international law, which has generally reflected basic rights of fairness and due process" *Ibid.*

sions. The three left to address are: Article 1110: Expropriation, Article 1102: National Treatment, and Article 1106: Performance Requirements. The broad language of Chapter 11 combined with the lack of precedence leaves regulators with little choice but to respond to the threat of arbitration by regulatory inaction. This situation is often referred to as "regulatory chill," whereby countries refrain from enacting stricter environmental standards out of fear of losing a competitive edge.[251] Increased political reluctance to address environmental problems may be based on undocumented non-action by governments. However, definitive empirical proof of government inactivity does not exist.[252]

B. Environmental Measures, Chapter 11 and Sustainable Development

The second section of this chapter analyses the consequences on the attainment of sustainable development in Mexico of two cases brought to Chapter 11 arbitral tribunals: Methanex v. United States and Metalclad v. Mexico. The review of the Methanex case, even though a challenge from a Canadian investor against the U.S. and the state of California, demonstrates how a legitimate environmental regulation can be challenged through a Chapter 11 tribunal. Afterwards, the Metalclad case illustrates how an investment liberalization strategy orchestrated by a monolithic central authority confronts the opposition of local governments charged with the burdens but not the benefits of foreign investment.

The relation of these cases to the attainment of sustainable development in Mexico is two-fold. First, both demonstrate that a foreign investor seeking relief from bona fide actions of local governments could impugn local environmental regulations and consequently threaten the ability of local legislatures to decide prospective levels of environmental protection. Second, both cases demonstrate that foreign investors can and have overreached the original goals of the investor-State dispute resolution process by intending to subordinate domestic law to international economic law.

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[251] See H. Nordström and S. Vaughan, *Trade and the Environment*, (Geneva: WTO publications, 1999) at 44-45, online: WTO homepage http://www.wto.org/wto/english/tratop_e/envir_e/environment.pdf (date accessed: August 2, 2002).

[252] "Some evidence is brought forward on regulatory chill in developing countries. For example, Brazilian tanneries specializing in low quality products, are trapped between being unable to compete with better quality competitors in Europe and the lower-cost producers in Asia. As a result, local authorities are unwilling to enforce more stringent regulations due to a concern for loss of employment and lower tax revenues. Another case they raise occurs with the phosphate industry in Morocco and Tunisia, where the governments have been reluctant to increase the level of regulation partly out of fear that other destinations will become more attractive." See OECD, Environment Policy Committee, Environmental Issues in Policy Based Competition for Investment: a Literature Review. ENV/EPOC/GSP(2001)11/FINAL (April 2002) at 8.

a. Methanex v. United States

Methanex, a Canadian Corporation, has brought an action against California and the United States under NAFTA Chapter 11.[253] The basis of the claim is an Executive Order in which the State of California directed the removal of a gasoline additive known as MTBE[254] by no later than December 31, 2002.[255] The California action was taken based in large part on a study published by the University of California that reported that MTBE had leaked into as many as 10,000 groundwater sites. The study suggested that MTBE might cause cancer if ingested by humans in large quantities and concluded that "[o]n balance, there is significant risk to the environment from using MTBE in California."[256]

Methanex concedes that MTBE is a polluter of underground aquifers and that remediation should be achieved through a better control of underground storage tanks. It argues, however, that there is no scientific proof that exposure to MTBE at "reasonably expected exposure levels" is dangerous to human health.[257] There is considerable research that indicates that there is apparently no conclusive evidence that drinking water with small traces of MTBE is dangerous to human health. Nevertheless, MTBE easily seeps into the groundwater from underground tanks storing gasoline because MTBE is extremely corrosive. For California's local authorities, cleaning up contaminated wells has been extremely costly.[258] Additionally, MTBE is released into surface water through recreational boating (two stroke engines emit up to one third of their fuel unburnt into the water).[259] When MTBE escapes from underground gasoline storage tanks into the soil, its chemical properties enable it to move readily through soil into groundwater. MTBE imparts an undesirable odour to the water that is noticeable to consumers and appears to penetrate underground

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[253] Methanex, News Release, "Methanex Seeks Damages under Nafta for California MTBE Ban"(June 15, 1999) online: Methanex homepage, http://www.methanex.com/investorcentre/newsreleases/nafta.pdf (date accessed: June 8, 2002).
[254] MTBE (short for methyl tertiary butyl ether) is a gasoline component that has been used since the 1970s as a source of octane, and more recently as an oxygenate to reduce vehicle emissions. Oil refiners and chemical manufacturers manufacture MTBE from methanol and isobutylene. See Methanex, "Q&A Background on Methanex's NAFTA Claim and MBTE" (June 2000) online: Methanex homepage, http://www.methanex.com/investorcentre/mtbe/naftaQ&A.pdf (date accessed: June 8, 2002).
[255] See California Energy Commission homepage, *Executive Order D-5-99 of the State of California* (Mar. 25, 1999), online: http://www.energy.ca.gov/mtbe/index.html (date accessed: June 8, 2002).
[256] See Health and Environmental Assessment of MTBE, Report to the Governor and Legislature of the State of California as Sponsored by SB 521, online: University of California Toxic Substances Research and Teaching Program homepage, http://tsrtp.ucdavis.edu/mtberpt/ (date accessed: June 8, 2002).
[257] See Q&A Background on Methanex's NAFTA Claim and MBTE *supra* note 254.
[258] See P. Morton, "Damage Claims Upset NAFTA: Methanex Action May Boost Plan to Limit Damage Suits" Nat'l Post, (17 June 1999).
[259] "[E]ven in extremely small amounts, the chemical can make water smell and taste like turpentine. Hundreds of millions of dollars have been spent removing MTBE from the nation's soil and water." *Ibid.*

aquifers more quickly and pervasively than other chemicals found in motor fuels. Finally, the MTBE problem is further complicated by the fact that most of the substitutes, such as ethanol, create other environmental and human health problems.

Methanex is the world's largest producer and marketer of methanol, the principal ingredient of MTBE. Methanex claims that the measures taken by California will effectively end Methanex's methanol sales in California.[260] In addition Methanex claims that the measure constitutes a "substantial interference and taking of Methanex U.S.'s business and Methanex's investment in Methanex U.S. These measures are both directly and indirectly tantamount to expropriation."[261] Consequently, Methanex claims a violation of NAFTA Articles 1105 (fair and equitable treatment) and 1110 (expropriation), and seeks damages in the amount of $970,000,000.[262] The damages are based in part on a decline in Methanex's stock price between October 1997 and the announcement of the California ban in March 1999.

In February 2001, Methanex sought the permission of the Tribunal to amend its grounds for the claim.[263] Methanex's decision to amend is the result of information it discovered in the fall of 2000 indicating that Archer-Daniels-Midland ("ADM"), a competitor that manufactures Ethanol, a product that stands to gain from the MTBE ban, contributed to the campaign of the now Governor of California as part of a successful lobbying effort to achieve the MTBE ban, thereby creating a discriminatory process and outcome. However, Methanex specifically states that it is not asserting that either ADM or the Governor in any way violated U.S. law, but that the latter's judgment lacked fairness and independence because of the political contributions.[264] Additionally, Methanex argues that the actions banning MTBE resulted from a flawed process in which the company was denied due process and a fair hearing as required by Article 1105,[265] leading to a failure to consider alternatives to banning MTBE. In the draft amended claim, they add two arguments to the grounds

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[260] Methanex Notice of Intent to Submit a Claim to Arbitration under Article 1119, Section B, Chapter 11 of the North American Free Trade Agreement, online; Methanex homepage, http://www.methanex.com/investorcentre/mtbe/noticeofintent.pdf (date accessed: June 8, 2002).
[261] *Ibid.* at 3.
[262] *Ibid.* at 4.
[263] See *Methanex Corporation's Draft Amended Claim*, February 12, 2001, online: Methanex homepage, http://www.methanex.com/investorcentre/mtbe/draft_amended_claim.pdf (date accessed: June 8, 2002).
[264] "The issue, however, is not whether Governor Davis' and ADM's actions were legal in the United States, but whether they were so unfair, inequitable, and discriminatory that they violate NAFTA and international law." *Ibid.* at 2.
[265] *Ibid.* at 53.

claimed for violations of this obligation: first, that unfair and non-transparent lobbying is the foundation of the decision;[266] and second, that the measure was a disguised restriction on trade and was not the least trade restrictive action available.[267] Finally, Methanex claims that the actions taken to ban MTBE go far beyond what was necessary to protect the public interest, failed to consider the legitimate interests of Methanex, and resulted from a failure to enforce other environmental laws. These failures led to a substantial interference and taking of their business and a violation of Article 1110.[268]

In its Statement of Defense[269] the United States Government has strongly challenged Methanex's assertions. Basically, it contends that the basis of Methanex's claim is false in the following terms:

> Methanex's claim does not remotely resemble the type of grievance for which the States Parties to the NAFTA created the investor-State dispute resolution mechanism of Chapter 11. Methanex's case is founded on the proposition that, whenever a State takes action to protect the public health or environment, the State is responsible for damages to every business enterprise claiming a resultant setback in its fortunes if the enterprise can persuade an arbitral tribunal that the action could have been handled differently. Plainly put, this proposition is absurd. If accepted by this Tribunal, no NAFTA Party could carry out its most fundamental governmental functions unless it were prepared to pay for each and every economic impact occasioned by doing so. The NAFTA Parties never intended the NAFTA to bring about such a radical change in the way that they function, and Methanex cannot show otherwise.[270]

In addition, the United States contests the jurisdiction of the Tribunal on the grounds that there has been no final regulation in California banning MTBE; that the impact of the impending ban is too indirect, since Methanex manufactures only methanol, not MTBE; that the injuries are not actionable because they have been suffered only by Methanex's subsidiaries, while the claim is brought by a shareholder on its own right; that the firm has not provided a valid waiver of municipal remedies; that there is no expropriated "investment" under Article 1110 (expropriation); and that the Article 1105 (denial of fair and equitable treatment) claim is inadmissible because no customary international legal standard governs the process by which States make legislative or executive decisions.[271]

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[266] *Ibid.* at 21.
[267] *Ibid.* at 48.
[268] *Ibid.* at 70.
[269] See *Statement of Defense of Respondent United States of America*, online: US State Department homepage, http://www.state.gov/documents/organization/7379.doc (date accessed: June 8, 2002).
[270] *Ibid.* para. 2.
[271] *Ibid.* paras. 3-4.

As part of its legal strategy, Methanex filed a submission under Article 14 of the North American Agreement on Environmental Cooperation petitioning the Commission for Environmental Cooperation to review California's enforcement of underground storage tank and water protection laws.[272] Methanex claimed that if these laws were enforced, as well as laws on the performance of small two-stroke motors, then there would be no need to address MTBE. In January 2000, a second Canadian mixer of MTBE initiated a second submission on this same issue.[273] Both of these were reviewed by the Secretariat to see if they meet initial criteria for acceptance, after which a response from the U.S. government was requested by the Secretariat as part of its procedure on the submissions. However, by the operation of Articles 14(3) and 45(3) of the NAAEC, no factual records can be prepared here because the subject matter is being considered in an international law proceeding, and such duplication is not permitted in the submission process. Both submissions have therefore been terminated.

The Methanex case was the first environment-related case brought against the U.S. by a foreign investor. This has meant a much higher level of public awareness of the issues being raised under Chapter 11 by foreign investors. Based on the available facts, there seems to be little doubt that California's action is for a public purpose to protect the public from possible contamination of the water supply. There is no evidence that the ban is discriminatory; it applies to MTBE regardless of the manufacturer or the source of the methanol used to make the MTBE, and California is not a major producer of the corn used to manufacture ethanol. However, a decision by the arbitral panel concerning these issues was still pending as of July 17, 2002.

b. The Metalclad Corp. v. Mexico

Metalclad Corporation first entered the Mexican market in 1991. Three years later, it bought the Mexican firm Química Omega, which had worked in the processing and recycling of hazardous industrial waste since 1981. Química Omega recovers waste from industry and processes it into supplemental fuel that is then used by the prosperous Mexican

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[272] See Methanex Corporation, (SEM-99-001) *Registry of Submissions*, online: *CEC homepage*, http://www.cec.org/citizen/submissions/details/index.cfm?varlan=english&ID=66 (date accessed: June 8, 2002).
[273] See NESTE Canada Inc. (SEM-00-002) *Registry of Submissions*, online: *CEC homepage*, http://www.cec.org/citizen/submissions/details/index.cfm?varlan=english&ID=44 (date accessed: June 8, 2002).

cement industry in its production process. In the early 1990's, Metalclad thought the conditions existed in Mexico to make new investments aimed at further integrating and expanding its activities in the market for industrial waste handling. In 1992, it was estimated that Mexico produced six million tons of industrial waste. Only 5% of that was adequately treated according to international environmental standards, with only one facility in the northern state of Nuevo Leon offering the service with proper technology. A substantial amount of the remaining 95% was stored on site, or dumped into sewers or in illegal sites. Part of it was also temporarily stored before being sent to proper treatment or landfill facilities.[274] While most waste generated by the U.S.-Mexico border industries must be returned to the United States for proper disposal, most of the rest is disposed of illegally. Conditions have not changed since the early 1990's, and many people in the government, industry, and national and international environmental organizations agree that waste treatment and disposal is one of the most urgent national development problems.[275]

1. The Facts

The subject matter of the Metalclad v. Mexico Award[276] is a site (the "Site") in La Pedrera, a valley located within the municipality of Guadalcazar, in the State of San Luis Potosi ("SLP"), Mexico. The Site is approximately 70 kilometres away from the city of Guadalcazar and approximately 800 people live within 10 kilometres of it.[277]

The Site has been owned at all material times by a company incorporated under the laws of Mexico, Confinamiento Técnico de Residuos Industriales, S.A. de C.V. ("COTERIN"), or its shareholders. Mexican nationals who sold COTERIN to a subsidiary of Metalclad in 1993 initially owned the Site and COTERIN. Metalclad was the operating mind and decision maker for COTERIN. Municipal permits for this purpose had previously been denied to the vendor. A state-level permit was subsequently granted for the construction of the landfill, subject to certain technical requirements being met, but without prejudice to other

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[274] See generally A. B. Tamayo, "The New Federalism, Internationalization and Political Change in Mexico: A Theoretical Analysis of the Metalclad Case" online: http://www.geocities.com/aborja2/newfed.html (date accessed: June 8, 2002).
[275] See generally, C. Schatan, "Mexico's Manufacturing Exports and the Environment Under NAFTA" (2000), online: First International Symposium of Understanding the Linkages Between Trade and the Environment, http://www.cec.org/symposium/index.cfm?varlan=english&id=3 (date accessed: June 8, 2002).
[276] *Metalclad supra* note 219.
[277] *Ibid.* para. 28.

authorizations that might be required.[278] The federal government in Mexico issued the required permits expressly from the federal level.[279] Acting on this and assurances by the Mexican government that all permits either were issued or would be issued without a problem, construction was initiated.[280]

COTERIN applied to the Municipality for a permit to construct a hazardous waste landfill at the Site in 1991. The application was refused at the time and the refusal was confirmed when a newly elected municipal government came into office in 1992. In 1993, COTERIN received three permits in respect of a hazardous waste landfill at the Site. Two of the permits were environmental impact authorizations issued by the National Institute of Ecology,[281] an agency of Mexico's Secretariat of the Environment, in respect of the construction and operation of the landfill. The environmental assessment "confirmed" that the site was suitable for a hazardous waste landfill, subject to certain engineering requirements being met. Plans were also required for site remediation work to take place during the first three years of commercial operation.[282] The third permit was a land use permit issued by the State of SLP.[283] COTERIN commenced construction activities at the Site in the absence of a municipal construction permit. After the construction began, COTERIN received a further construction permit from the federal authorities; it was issued in January 1995 and authorized the construction of the final aspects of the facility.[284]

On October 26, 1994, the Municipality issued a stop-work order due to the absence of a municipal permit. COTERIN applied for a municipal construction permit on November 15, 1994. The Municipality officially denied this application over a year later, on December 5, 1995,[285] thus ending the final construction and preventing any entry into operation of the landfill site. Metalclad was not notified of the town meeting where the permit was denied,

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[278] *Ibid.* para. 31.
[279] *Ibid.* para. 29.
[280] *Ibid.* para. 33.
[281] *Ibid.* para. 29.
[282] *Ibid.*
[283] *Ibid.* para. 31.
[284] *Ibid.* para. 43.
[285] *Ibid.* para. 50.

thus not being given a chance to be heard at this meeting, and their request for reconsideration was denied.[286]

In the meantime, COTERIN continued with construction of the landfill facility at the Site. It was completed by March 1995. On March 10, 1995, COTERIN held an opening or facility tour and demonstrators blockaded the Site for several hours. The landfill facility was not actually opened, nor has it subsequently been operated.[287]

Metalclad entered into further negotiations with federal authorities regarding the operation of the landfill facility. The negotiations resulted in an agreement called the Convenio.[288] It was entered into by Metalclad on November 25, 1995 with two sub-agencies of the Secretariat of the Environment. The Covenio contained numerous provisions, the most important of which were that Metalclad would be permitted to operate the landfill for an initial period of five years and that it would remediate the previous contamination during the first three years of this period. After the Convenio was entered into, the federal authorities issued a further permit to COTERIN; it was issued in February 1996, while increasing the annual permitted capacity of the facility from 36,000 tons to 360,000 tons[289]

It was shortly after the Convenio was entered into that the Municipality formally denied COTERIN's application for a construction permit on December 5, 1995.[290] The considerations taken into account by the municipal council in denying the application were that COTERIN had been denied a construction permit in 1991/2, that COTERIN had commenced construction before applying for the permit and finished the construction while the permit application was pending, that there were environmental concerns, and that a great number of the Municipality's inhabitants were opposed to the granting of the permit.[291]

The Municipality then challenged the Convenio by first making an administrative complaint to the Secretariat of the Environment and by subsequently filing a writ of amparo (a constitutional challenge to the actions of officials) with the Federal Court in January 1996.

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[286] *Ibid.* para. 54.
[287] *Ibid.* paras. 45-46.
[288] *Ibid.* para. 47.
[289] *Ibid.* para. 57.
[290] *Ibid.* para. 90.
[291] *Ibid.* para. 91.

In the amparo proceeding, the Municipality obtained an injunction in respect of the Convenio in February 1996. The amparo proceeding was ultimately dismissed in May 1999.[292]

Further negotiations were not fruitful and Metalclad delivered a Notice of Intent to Submit a Claim to Arbitration under Article 1119 of NAFTA to Mexico in October 1996.[293] It commenced the arbitration proceeding by filing a Notice of Claim in January 1997 with the ICSID Secretariat and Metalclad selected the Additional Facility Rules.[294]

After the arbitration proceeding was under way, but before the hearing in the arbitration was held, Horacio Sanchez Unzueta, the Governor of the State of SLP, issued an ecological decree on September 20, 1997, which was three days prior to the expiry of the Governor's term. The ecological decree declared an area of 188,758 hectares within the Municipality, which included the Site, to be an Ecological Reserve for the stated purpose of protecting species of cacti.[295]

Once the Site was closed Metalclad sought arbitration under Chapter 11. Metalclad claimed violations of two main provisions. First, Metalclad charged that the actions of the federal, state and local governments, including but not limited to the lack of transparency of the requirements for authorization of the site, constituted a denial of fair and equitable treatment as required under Article 1105 of NAFTA.[296] Second, Metalclad charged that it was deprived of all use of the property, which constituted expropriatory action under Article 1110.[297]

2. The Tribunal's Ruling

The Tribunal stated the three objectives it believed were relevant to interpreting the provisions of Chapter 11: first, to increase transparency in government regulations and activity; second, to substantially increase investment opportunities; and third, to ensure a predictable commercial framework for investors.[298] Since Chapter 11 has no such refer-

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[292] *Ibid.* para. 56.
[293] *Ibid.* para. 7.
[294] *Ibid.*
[295] *Ibid.* para. 59. See also *Decreto Reserva Estatal Real de Guadalcazar*, D.O.S.L.P, September 6 1997 online: Secreatría de Ecología y Gestión Ambiental del Estado de San Luis Potosí homepage, http://www.segam.gob.mx/ (date accessed: July 22, 2002).
[296] See *Metalclad supra* note 219 at paras. 72-74.
[297] *Ibid.* para. 59.
[298] *Ibid.* paras. 70-75.

ences specific to itself, the Tribunal applied an extremely broad interpretation of Chapter 11 obligations.

In relation to Article 1105 (Minimum Standards of Treatment), the Tribunal decided that Mexico had failed to comply with "fair and equitable" treatment in accordance with international law. This aspect of the decision focused largely on the totality of circumstances that demonstrated a lack of "transparency" of the mix of federal, state and local requirements for authorizing hazardous waste facilities.[299] Moreover, the decision focused on the fact that Metalclad had reasonably relied on assurances by the federal authorities that state and local permits were not needed or, if needed, could not properly be denied under Mexican law. Among other things, the Tribunal considered it important that Metalclad's local permits were denied without notifying Metalclad of the relevant town meeting concerning its permit. In addition, ruling against the Mexican government's legal experts, the Tribunal held that the municipality exceeded its own legal functions by requiring a municipal permit or, if one was required, by extending its reach to the use of the facility.[300]

The Tribunal summed up its findings by saying that Mexico failed to provide a transparent, predictable framework for business planning and investment, and demonstrated a lack of orderly process and timely disposition in relation to an investor.[301]

What was never really established by the Tribunal was the extent to which Metalclad knew they needed a municipal permit. Metalclad was aware that according to Mexican law, a municipal construction permit was required (traditionally, this is not denied once federal or state authorization has been given). In November 1994, after it had already begun construction based on the federal authorization, the corporation officially requested that the municipal government of Guadalcazar grant a construction permit.

According to Article 115 of the Mexican Constitution reproduced in the Constitution of the State of San Luis Potosi as Article 114 (V):

> The Municipalities, on the basis of the applicable Federal and State law, have the power to elaborate, approve and administer the zoning and development plans for Municipal urban development; to participate in the establishment and administration of their territorial reserves; to

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[299] *Ibid.* paras. 76-92.
[300] *Ibid.* para. 54.
[301] *Ibid.* para. 99.

> control and supervise within their jurisdiction the use of land; to participate in the regulation of urban property; to grant licenses and permits to construct; and to participate in the establishment and administration of environmental reserves.[302]

Also Article 5 of the Ecological and Urban Code of San Luis Potosi regulates the jurisdiction of the local governments by establishing that:

> The Executive of the State and the Ayuntamientos [Municipalities] are empowered to establish restrictions on the use of land and on any kind of construction as required by urban development and ecological balance within the state territory.[303]

Finally, Article 17 of the Treasury Law for the Municipalities of the State of San Luis Potosi provides that:

> The licenses, permits, certificates or titles issued by the municipal authorities shall be valid for the corresponding fiscal year and for the exclusive use of the persons, places, activities or business to whom they were granted. The municipal authorities are empowered to revoke them for public utility, social interest reasons or on the basis of serious and justified causes.[304]

According to SLP legislation the municipality was entitled to deny the permit to Metalclad. Given the Mexican tradition of political centralism, Metalclad was probably counting on the incapacity of the population of Guadalcazar and the local authorities to oppose the federal government. Besides, once the corporation had secured federal authorization, it could reach a compromise with the municipal government regarding the conditions under which the new facility would operate.

When Metalclad realized that no agreement had been reached with the state authorities, it decided to seek stronger support from the federal authorities, hoping that a de facto situation would eventually have to be accepted by the local authorities. Hence, in August 1994, despite the fact that a closure order of 1991 had never been revoked, the federal authority allowed Metalclad to conduct maintenance and remedial works. The company, however, started construction on the new facilities. In the aftermath of the denial of the construction permit, Metalclad made unsuccessful legal attempts in the Mexican courts to revoke the decision. Paradoxically, Metalclad then filed a claim under Chapter 11, demanding com-

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[302] See *Constitución Política del Estado Libre y Soberano de San Luis Potosí*, D.O.S.L.P, February 11, 1943 (translation is ours) online: Instituto de Investigaciones Jurídicas de la Universidad Nacional Autónoma de México, http://info4.juridicas.unam.mx/adprojus/leg/25/1822/1.htm?s= (date accessed: July 22, 2002).

[303] See *Código Ecológico y Urbano*, D.O.S.L.P, July 3 1990, (translation is ours) online: Secreatría de Ecología y Gestión Ambiental del Estado de San Luis Potosí http://www.segam.gob.mx/ (date accessed: July 22, 2002).

[304] See *Ley de Hacienda para los Municipios del Estado de San Luis Potosí*, D.O.S.L.P, June 10 1998, (translation is ours) online: Secreatría de Ecología y Gestión Ambiental del Estado de San Luis Potosí http://www.segam.gob.mx/ (date accessed: July 22, 2002).

pensation in the amount of $90 million from the Mexican federal government, which had been its close ally in the dispute with the local authorities.

In relation to Article 1110(1), the Tribunal determined that expropriation could take one of two forms. Initially, expropriation included "open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State."[305] However, expropriation also included "covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use of reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State."[306] Based on these arguments the Tribunal determined that the federal government had the exclusive authority for permitting hazardous waste fill sites.[307] Initially, with respect to Guadalcazar, the Tribunal noted that the few procedures Guadalcazar had in place with respect to municipal construction permits were inappropriate and disorderly.[308] Furthermore, no other entity had been required to procure a construction permit prior to commencing construction in the municipality.[309] The Tribunal also noted that Guadalcazar's denial of the construction permit, "without any basis in the proposed physical construction or any defect in the site, and extended by its subsequent administrative and judicial actions regarding the Convenio, effectively and unlawfully prevented [Metalclad's] operation of the landfill."[310] Finally, the Tribunal determined that in light of the denial of fair and equitable treatment under Article 1105, as well as the fact that the exclusive authority for siting and permitting resided in the federal government, Mexico had taken a measure tantamount to expropiation under Article 1110(1).[311]

Although unnecessary for its conclusion with respect to the issue of expropriation, the Tribunal almost as an afterthought decided, "that the implementation of the Ecological Decree would, in and of itself, constitute an act tantamount to expropriation."[312]

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[305] See *Metalclad supra* note 219 at para. 103.
[306] *Ibid.*
[307] *Ibid.* para. 105.
[308] *Ibid.* para. 107.
[309] *Ibid.* para.108.
[310] *Ibid.* para. 106.
[311] *Ibid.* paras. 104-105.
[312] *Ibid.* para. 111.

In relation to the environmental concerns raised by the landfill, the Tribunal concluded that the Municipality's denial of permits could not be justified under Article 1114 on environmental grounds. The Tribunal recognized that environmental factors were legally only a federal issue and hence could not be used as a basis for denying a municipal permit. Guadalcazar's denial of the construction permit was deemed to be without "any basis"[313] or "consideration of, or specific reference to, construction aspects or flaws of the physical facility."[314] Rather, the Tribunal held that the project had passed federal inspection and demonstrated that the Mexican authorities were "satisfied that this project was consistent with, and sensitive to, environmental concerns."[315] The Tribunal did not identify any further sources for its conclusions.

The Award demonstrates that there were serious divergences concerning environmental protection between the local and municipal administration and the federal authorities. The disagreement between the federal and the local authorities was so harsh that SLP and Guadalcazar were excluded from the negotiation and arbitral process. Furthermore, there was never a definitive environmental impact assessment that could determine with scientific evidence that the Guadalcazar landfill was affecting the area. The report of Metalclad and the federal government was opposed to the one by the local authorities. Indeed, the fact-finding capacity of the disputing parties to establish scientific basis regarding the substantive risk represented by the landfill was absent from the process.

In addition, the Tribunal refused to consider the environmental concerns raised by Mexican government officials with respect to the landfill. Rather, the Tribunal deemed the motivation or intent of the state and municipal governments irrelevant. In so holding, by implication it dismissed the duties of such governments to serve their populaces and the public policy reasons underlying their actions. In addition, the Tribunal ignored local opposition to the landfill; but by the moment the dispute mechanism was established it did not matter anymore: the SLP governor single-handedly in an abrupt political decision expropriated the zone encompassing the landfill. Clearly, San Luis Potosi Governor Horacio Sanchez's designation of the area around the plant as an ecological reserve can be viewed

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[313] *Ibid.* para. 106.
[314] *Ibid.* para. 93.
[315] *Ibid.* para. 98.

as an ill-considered ploy to prevent Metalclad from operating the plant without having to compensate the company for its investment and as a final defiance to the federal authorities concerning their jurisdiction in local matters.

In relation to the compensation awarded to Metalclad, the Tribunal rejected the concept of a discounted cash flow analysis, taking into account that the landfill had no operating history.[316] Instead, it adopted a figure of $16,685,000, based on Metalclad's total investment of $20,474,528, with certain downward adjustment and non-retroactive interest at 6 percent.[317]

Neither party to the Metalclad Arbitration was satisfied with the outcome. Regardless of its vindication, Metalclad characterized the Tribunal's decision "as pyrrhic a victory as any [it had] experienced."[318] Metalclad criticized the amount of the award as "a token amount of money that doesn't really reflect the value of the project."[319] The company noted that "the biggest losers of all [were] the people of Mexico who continue to have to live in a country that produces ten million tons of hazardous waste a year and has only one facility in the whole country to handle it."[320] Mexico expressed disappointment that the Tribunal did not accept its contention with respect to the necessity of a municipal construction permit.[321] Mexican officials insisted that the Tribunal's conclusion dismissing the necessity of such a permit intruded upon "the constitutional right of municipalities to require permission for what happens in their territory."[322] Nevertheless, Mexican officials maintained that NAFTA's investment provisions were operating to their satisfaction and that Mexico would resist any amendment of these provisions out of fear of encouraging demands for reopening other parts of the Agreement.[323] In conclusion, nobody won in the Metalclad v. Mexico claim: first, there is a landfill in the middle of the desert completely abandoned; second, the central government has to compensate the expenses for a direct expropriation by a local

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[316] *Ibid.* paras. 121-122.
[317] *Ibid.* paras. 123-125, 128, 131.
[318] See A. DePalma, "Mexico is Ordered to Pay a U.S. Company $ 16.7 Million" N.Y. Times, (Aug. 31, 2000), quoting Grant S. Kesler, president and chief executive officer of Metalclad, online: NY Times homepage, http://www.nytimes.com/library/financial/083100mexico-trade.html (date accessed: June 10, 2002).
[319] *Ibid.*
[320] See D, Knight, "Mexico Ordered to Pay U.S. Company $ 17 Million", Inter Press Serv., online; IGC homepage, http://www.igc.org/globalpolicy/socecon/envronmt/nafta.htm (date accessed: June 10, 2002).
[321] See J. F. Smith, "Mexico Appeals Decision on Metalclad" L.A. Times (Sept. 1, 2000).
[322] *Ibid.*
[323] See "Mann & von Molke" *supra* note 238 at 48.

government; and finally and most importantly, tons of industrial waste that could have been properly disposed of being dumped on illegal sites.

c. The Petition for Review and Appeal

In October 2000, Mexico initiated a petition to the Supreme Court of British Columbia ("BCSC") seeking review of, or appeal from, the Tribunal's ruling.[324] This petition was initiated in British Columbia because the legal location of the Tribunal was in that province (Vancouver). Under NAFTA, the courts of the seat of arbitration–in this instance the courts of British Columbia–have limited authority to review and ultimately set aside arbitral determinations.[325] The BCSC initially determined that the review would take place under the province's International Commercial Arbitration Act rather than its Commercial Arbitration Act. This ruling was significant because of the narrower standard of review of the former.[326] The Court reviewed the Tribunal's opinion and effectively reversed the Tribunal on a substantial portion of its determination, while ultimately permitting one of the bases for the Tribunal's finding of expropriation to stand.[327]

The Metalclad Tribunal's mistake, according to the Court, was to treat as a violation of Article 1105 the lack of transparency in the Mexican domestic legal process for permitting hazardous waste sites when lack of transparency is neither a violation of customary international law nor of NAFTA Chapter 11. (While Chapter 18 of NAFTA does require transparency, Chapter 11 makes no mention of the concept as a requirement of Section A.) Thus, if there is any recourse against a lack of transparency under NAFTA, it is in government-to-government arbitration under Chapter 20, not investor-host State arbitration under Chapter 11.[328] Accordingly, the Tribunal's finding of a violation of Article 1105 based on a lack of transparency would be considered to be beyond the scope of the submission to arbitration.[329]

Interestingly, the BCSC decided that the error in finding a violation of Article 1105 also "infected its analysis of Article 1110" as it related to the Tribunal's finding that Mexico's

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[324] *United Mexican States v. Metalclad* 2001 BCSC 664, (2001) online: http://www.courts.gov.bc.ca/jdb-txt/SC/01/06/2001BCSC0664.htm [hereinafter *BCSC Metalclad*] (date accessed: June 10, 2002).
[325] See *NAFTA supra* note 66 at art. 1136 (3) (b).
[326] See *BCSC Metalclad supra* note 324 at para. 49.
[327] *Ibid.* para. 84.
[328] *Ibid.* paras. 68-72.
[329] *Ibid.* para. 73.

actions were tantamount to expropriation.[330] Since that finding was also based on the improper conclusion that a denial of transparency was a violation of customary international law, that aspect of the decision was also beyond the scope of the submission to arbitration.[331] While the Court professed that its actions "should not be taken as holding that there was no breach of Article 1105 and no breach of Article 1110 until the issuance of the Ecological Decree,"[332] this was in effect the result of its decision.

The BCSC held on the Tribunal's reference to the action of SLP in declaring the Site an ecological preserve. The BCSC declared it to be "an alternative finding of expropriation on the basis of the Decree, which alternative finding becomes the governing finding in the event the primary finding is set aside," and, consequently, the Tribunal committed no error in finding an expropriation under Article 1110 based on the Ecological Decree.[333] Moreover, that determination "stands on its own and is not based on a lack of transparency."[334] Finally, the BCSC refused to set aside the Tribunal's award of compensation, suggesting only that the interest portion should be calculated from the date of the Ecological Decree, rather than from the actions which had been the basis of the finding of a breach of Article 1105.

On October 28, 2001, the Mexican government paid $15 million in damages to Metalclad. The amount awarded by the Canadian court was US $1.7 million lower than the US $16.7 million approved by the NAFTA dispute-resolutions panel. In an official statement, Mexico emphasized that it "honors its international obligations, even when it does not agree with the findings of the international tribunal nor with the way the tribunal works."[335]

C. The Outcome of Chapter 11 and the Consequences for Sustainable Development in Mexico

The fact that Mexico depends largely on foreign investment to overcome the recurrent economic crises characteristic of the last 30 years separates the analysis of Mexico from the particular circumstances of Canada and the United States. Comparatively, Mexico

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[330] *Ibid.* para. 78.
[331] *Ibid.* para. 79.
[332] *Ibid.* para. 136.
[333] *Ibid.* paras. 84-91.
[334] *Ibid.* para. 94.
[335] See Mexico Solidarity Network Weekly News Summary, News Release 10/31/01; New York Times 10/29/01 online: http://www.mexicosolidarity.org/index.html (date accessed: June 10, 2002).

needs to disperse the persistent corporate memories of its general historic reputation of capricious and unfair treatment of foreign investors. Mexico is very clear today that direct foreign investment is an essential component of the country's development, offering new jobs and training, increased capital flows, current technologies, and infrastructure. Attracting such vital investment depends upon a stable "investment-friendly" climate, with no hint of market access restrictions, fear of expropriation, or interference in business operations. NAFTA's Chapter 11 provides reasonable certainty and a predictability that can inspire investor confidence. However, to maintain its attractiveness to foreign investors, Mexico requires a centralized command of the economic variables that may affect the interest of potential investors. After all, despite the economic growth of certain sectors of the economy, Mexico remains an underdeveloped country with weak sub-national governments and corrupt practices, as the Metalclad case demonstrates.

The facts surrounding the Metalclad case illustrate the power struggle between the local and federal governments for control under Mexican law. The tradition in Mexico is that the federal authorities retain most of the legal authority to make final decisions. The incipient Mexican democratic institutions, as embodied by the federal and state legislatures, still present serious constraints in their ability to initiate and enact regulations independently of the central government. For many years, the Mexican political system has been characterized by a strong presidential figure with vast powers over the legislatures and governors. Recent political changes have diminished the traditional presidential authority and permitted state authorities to gain autonomy from the central government. Once the local governments are outside the influence of the central government, the implementation of new regulations, as demonstrated in the Metalclad case, could affect the interests of private investors, making the latter more liable to reach for protection under Chapter 11.

The Methanex case raises an important question concerning the reach of Chapter 11 to state and provincial laws. The arguments in the Methanex draft amended claim suggest that other levels of government cannot oppose a measure supported by federal law. Within the specific context of Mexico, this issue raises particular considerations. As already mentioned, Mexico still remains highly centralized in relation to environmental policy-making. This is an important difference because, compared to the other NAFTA states, an insignificant amount of environmental legislation takes place at the local level. In general, the

Mexican local governments have not even enacted the most basic functions of regulatory power characteristic of similar governments in developed countries. For instance, zoning regulations that determine the value of property, tax legislation that requires some people to pay more, environmental regulations that can oblige firms to undertake additional expenses for pollution control equipment, consumer regulations aimed to protect the health of individuals, and the wide array of licences, quotas and rent controls typical of self-ruling local governments have not been created. Enacting sub-national regulations will eventually alter the situation and opportunities for individuals and firms, and consequently for foreign investors.

In view of the fact that the Mexican federal government still retains overwhelming authority concerning foreign investment and environmental regulation, the possibility of local and municipal authorities attaining the economic means and the ability to enact regulations in accordance with their present and future environmental needs would appear to be delayed. This reluctance to devolve jurisdiction on environmental matters to the local governments further exacerbates possible interpretations of Chapter 11 that might threaten governments with paying compensation to investors for any costs or losses they might incur as a result of sub-national legislators adopting new regulations. While the Mexican federal government may declare publicly that it is prepared to devolve authority in environmental matters onto the local governments, the facts depicted in the Metalclad case demonstrate that this is not actually the case, nor are they prepared to take the risks associated with the legal uncertainties and huge claims for compensation under Chapter 11.

CHAPTER 4. TRADE AND FOREIGN INVESTMENT LIBERALIZATION AND SUSTAINABLE DEVELOPMENT IN MEXICO

The objective of this chapter is to demonstrate the position established in the introduction of the thesis: namely, that the stated intention of the Mexican legal framework to avoid further environmental degradation in line with the requirements of sustainable development proved to be of limited value in fulfilling the objectives established by the North America Free Trade Agreement and its side accord, the North American Agreement on Environmental Cooperation. This chapter is divided in three parts. The first part reviews the international and domestic considerations that have been characteristic of Mexico's aggravated condition in regard to social development, public health and environmental protection. The second part reviews the consequences of Chapter 11 provisions in an developing country like Mexico and how NAFTA's substantive issues interpreted with a unilateral scope of obligations have been a limitation in the attainment of sustainable development. The final part of this chapter links the analysis of Chapter 11 and the NAAEC in relation to Mexico and suggests modest proposals for change.

There are three main arguments in this chapter concerning Mexico and sustainable development. The first one is related to the obligation of Canada and the United States as developed countries to compel Mexico to procure sustainable development as required by NAFTA/NAAEC. Each year since the implementation of the agreement, officials in Canada, Mexico, and the United States have regularly declared NAFTA to be an unqualified success. From the government perspective, increased gross volumes of trade and financial flows in themselves testify to the agreement's economic achievements. Obviously, the official position on NAFTA's economic success has been portrayed in isolation from its effects on environmental protection in Mexico, precisely what the notion of sustainable development is intended to forestall. Under the current conditions the basic principle of equal treatment under the law has not been applied, simply because the economic, social and environmental conditions of the NAFTA contracting parties are significantly different. Mexico is a developing nation and this condition is represented by its comparatively limited industrial development. But in addition to this purely economic consideration there are

complex manifestations of legal, political, and social underdevelopment deeply embedded in Mexico's cultural and historical reality. In the past decade Mexico did not improve its economic, social or environmental conditions. Market advocates repeatedly refute this argument, alleging that without NAFTA the Mexican situation would have been worse. Despite the speculative nature of the former affirmation, it is an accepted fact that after eight years of economic deregulation, poverty and inequality are as pervasive as ever. The number of poor people has risen, and the proportion of poor people has grown in many areas.[336] The Mexican government's policy of implementing isolated economic instruments to overcome inequality, without taking into account the consequences of market fundamentalism on the less well off, has confirmed that the "invisible hand" of economic neoliberalism is ignoring the environmental repercussions of its "invisible elbow" on the poorest of the poor.

The responsibility of supporting and facilitating reforms in CEC that will compel Mexico to develop, implement and monitor effective environmental policies falls on the United States and Canada as the developed partners of the agreement. The CEC's citizens' submission process besides demonstrating the limited capacity of the Mexican government to abide by the objectives established in NAAEC also demonstrates that beneficial reforms are necessary to succeed in the original CEC mandate of attaining sustainable development in North America and eventually in Mexico. Three steps are required to support these reforms. First, CEC should receive additional financial support from the NAFTA governments in a proportional way and direct these resources to those environmental problems arising from the North American trade context. Second, when CEC has been given adequate financing and has narrowed its scope by focusing on the trade and environmental areas, a more effective citizen submission process should be implemented. Third, once a more effective citizen submission process is established the Mexican citizens and organizations will realize that a submission to CEC will generate enough pressure to justify the investment of time and energy. Eventually the actual pattern of factual records describing the

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[336] A recent study by the World Bank states that, "[w]hile there are different estimates of poverty in Mexico, there is general agreement, that poverty is widespread." The report established that at least 58% of Mexico's 97.4 million inhabitants live in poverty. In rural zones, the Bank says that 82% are poor. These figures are significantly higher than official government estimates, which claim that only 40% of the population as a whole is poor. The World Bank also stated that both poverty and inequality in Mexico rose by 8% between 1994 and 1998. See generally M. Giugale, O. Lafourcade and V. Nguyen, eds., *Mexico: A Comprehensive Development Agenda for the New Era* (Geneva: WTO, 2000).

non-enforcement of environmental regulations by the Mexican government will obtain a higher profile. Then, the United States and Canada will be further legitimated to require the Mexican government to provide Mexican citizens and organizations with the right to challenge through effective administrative or judicial proceedings acts or omissions by private persons and public authorities that contravene national law relating to the environment.

In relation to financial support, currently the annual CEC budget is US $9 million[337] contributed in equal parts by the three member countries. This may be a just share but it is not proportional, especially when compared with the volume of imports and exports of each party or their domestic environmental budget.[338] The United States and Canada can support a reform to CEC's actual financial scheme. The lack of financial resources is manifest in the CEC's limited capacity to carry out its mandate. The numerous programs managed by CEC further exacerbate the financial constraint.[339]

In addition, the United States and Canada can provide adequate support to allow CEC to focus its activities on environmental problems arising from the North American trade context. CEC can ensure ready access to the public by publishing annual reports of environmental data related to trade and foreign investment, and it can shift its publication style from long descriptive reports to comparative statistics. Once these reports are published, the NAFTA citizens and organizations whose interests are affected will have the ability to present challenges based on evidence already developed by CEC. Since Mexico lacks an effective environmental information service, these reforms can improve the ability of Mexican citizens and organizations to access environmental justice with the proper "hard" evidence.

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[337] Comparatively the total WTO budget for the year 2002 is 143 million. See *WTO Budget*, online: WTO homepage: http://www.wto.org/english/thewto_e/secre_e/budget_e.htm (date accessed: August 2, 2002).

[338] The total EPA budget for the year 2002 is 8 billion. In contrast, the total SEMARNAT budget for the year 2002 is 1.3 billion. See *EPA Annual Plan and Budget Overview*, online: Environmental Protection Agency homepage, http://www.epa.gov/ocfopage/budget/2003/2003bib.pdf and *Proyecto de Presupuesto de Egresos de la Federacion para el Ejercicio Fiscal del Año 2002*, online: Gaceta Legislativa de la Cámara de Diputados homepage, http://gaceta.cddhcu.gob.mx (date accessed: August 2, 2002)

[339] CEC performs multiple roles. Accordingly: environmental information centre, developer and controller of environmental indicators, promoter of environmental awareness and clean technology, producer of environmental reports, founder of the environmental community projects, and finally arbiter to disputes. Apparently, the enormity of the task along with the limited budget has forced CEC to play many roles without being truly effective in any of them.

Based on the accumulated evidence developed by CEC's annual environmental comparative reports, Article 13 reports, and citizens' submissions factual records, the United States and Canada governments would be further legitimated to exert political leverage on the Mexican government so that adequate access to environmental justice for citizens and organizations is enacted will be implemented. The sustainability of such a scheme is guaranteed since the proposed CEC annual environmental comparative reports would account for improvement of environmental performance resulting from Article 13 reports or citizens' submission factual records implementation.

A second argument concerning Mexico and sustainable development relates to the fact that since the implementation of NAFTA the development of the Mexican legal system has been largely submitted to purely economic interests, specifically those interpreted from the standpoint of economic neo-liberalism. The neo-liberal economic theory rests on a seeming contradiction. On the one hand, neo-liberalism dislikes state intervention in private economic arrangements. On the other hand, neo-liberalism demands a state that is willing and able to protect private contract and property rights and to correct market failures. Neoliberalism thus favours limited state intervention in private affairs, but intervention nonetheless. The neo-liberal doctrine in essence is that the state should permit the market to determine the direction of international trade and investment flows. This rationale behind trade and investment liberalization played an important role in shaping the final text of NAFTA and the concomitant reform of the Mexican legal system. There is no doubt about the importance of the law in regulating commercial and financial activities among economic agents. But when the guiding principle of regulatory reforms is submitted to criteria such as Mexico's GNP rather than equity, then the law turns into a mere regulatory instrument of economic activity that ignores the civil, political, economic and social rights of a wide array of individuals.

The neo-liberal policies implemented by the Mexican ruling class have been identified with economic measures widely known as the Washington Consensus and originally designed to deal with the problems in Latin America. Fiscal austerity, privatization, and market liberalization were the three pillars of the Washington Consensus advice from the 1980's and 1990's. Joseph Stiglitz, former chief economist of the World Bank, states in relation to the Washington Consensus that:

> The problem was that many of the policies became ends in themselves, rather than means to more equitable and sustainable growth. In doing so, these policies were pushed too far, too fast, and to the exclusion of other policies that where needed.[340]

Nowadays the international tendency toward development has shifted focus from sheer "economic growth" as a measure of the success of a country's development to a concern with sustainable development, which incorporates development theory and an awareness of the political context in which economic reform is implemented. World Bank president James Wolfensohn singles out the critical importance of an effective legal and judicial system to achieve sustainable development as follows:

> Without the protection of human and property rights, and a comprehensive framework of laws, no equitable development is possible. A government must ensure that it has an effective system of property, contract, labor, bankruptcy, commercial codes, personal rights laws and other elements of a comprehensive legal system that is effectively, impartially and cleanly administered by a well-functioning, impartial and honest judicial and legal system.[341]

Finally, Birdsall and Torres in a study focused on the reduction of poverty and the improvement of equity in Latin America established an argument they have become increasingly convinced about: "growth and equality require not only more room for market forces and private enterprise, but also the strengthening of institutions that underpin markets, including the laws and judicial procedures."[342]

All these ideas are reflecting a change through Latin American and consequently in Mexico. However, Mexico will require considerable and sustained efforts to realize that macroeconomic reforms, while necessary, are not enough to propel the nation along the road toward sustainable development.

A third argument concerning Mexico and sustainable development relates to the notion that trade liberalization and foreign investment can contribute in either a positive or a negative way to the achievement of sustainable development. In the case of Mexico, both wealth and poverty have coexisted in a pervasive and increasing pattern throughout the country; thus this notion has proven right in a conflicting way. Presently, a representative population of urban and rural poor, with staggering problems of public health caused in

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[340] See J. E. Stiglitz, *Globalization and its Discontents*, 1st. Ed (New York: W. W. Norton, 2002) at 53-54.
[341] See generally J. Wolfensohn, *World Bank's Comprehensive Development Framework*, January 21, 1999, online: World Bank homepage, http://www.worldbank.org/cdf/cdf-text.htm (date accessed: August 30, 2002).
[342] See N. Birdsall and A. de la Torre, *Washington Contentious: Economic Policies for Social Security in Latin America* (Carnegie Endowment for International Peace and Inter-American Dialogue, 2001) at 5, online: Carnegie Endowment for International Peace homepage, http://www.cgdev.org/other/WashCont.pdf (date accessed: August 30 2002).

part by environmental degradation, live along with a consumer society in a dual economy. Even though this pattern of polarization and social exclusion has been persistent throughout Mexican history, it was only with the liberalization of Mexican economy that inequality in income redistribution and the social and environmental struggles associated with it became evident.[343]

A. Dual Trends Toward Sustainable Development in Mexico

The dualism between a developed and a developing society coexisting within the same country manifests its bipolar stress on the attainment of sustainable development. The widening gap between the rich and the poor is reflected in the uneven improvement of economic conditions, social growth and environmental protection. Additionally, the vast gaps separating the different social groups are in themselves factors of exclusion, because they aggravate disregard for the most needy. On the side of the rich, the few beneficiaries of economic growth have levels of well-being similar to those of wealthy sectors in the United States or Canada. These individuals are concentrated in specific industrial sectors and privileged geographical urban areas and generally share the idea that the wealth generated by economic development will eventually reach the poor sectors of the society and benefit everyone. In other words, Mexico is just going through a preliminary stage toward the condition of the rest of North America. The problem with this assumption is that neither Canada nor the United States has ever experienced such a widespread condition of inequality. On the side of the poor, neglected populations remain isolated in rural areas or are forced to migrate and settle in shantytowns surrounding the few sprawling industrial areas. The concentration of human population around industrial areas is characterized by the proliferation of irregular settlements where vast sectors of the population do not get basic needs such as clean water and proper sanitation. This persistent pattern of migration from rural to industrial locations surpasses the capacity of impoverished local municipalities to deal with the problems associated with poverty and environmental protection.

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[343] A recent work paper published by the International Monetary Fund states that following several decades in which Mexico moved toward a more even distribution of income, Mexico's income disparities have generally widened since the 1980s. "We're not aware of changes in Mexico's education or culture during that time that would explain the growing gap. We do know, however, that this period marked the era of Mexico's economic liberalization." See A. Corbacho and G. Schwartz, "Mexico: Experiences with Pro-Poor Expenditure Policies"(2002) IMF WP/02/12, at 5, online: International Monetary Fund homepage, http://www.imf.org/external/pubs/ft/wp/2002/wp0212.pdf (date accessed: August 30 2002).

As asserted in chapter one, a closed economy corresponds to a closed legal framework. Mexico decided to change its development policy by integrating the domestic economy with the international markets through multilateral liberalization and regional trade agreements, especially with developed countries. These transnational legal influences were reflected in three fields: international trade law, human rights, and environmental protection. However, the aforementioned dualism discriminated against the implementation of these external legal influences.

In relation to international trade law, the legal disciplines required to abide by NAFTA's commitments experienced an almost total transformation. Business-oriented regulations where enacted almost immediately by the economists' ruling elite. As well, to overcome the deficiencies of a corrupt judicial system, a well-funded and technically capable set of parallel regulatory agencies was created to effectively guarantee the rights of investors and financiers. Concerning human rights the reforms were more limited, and while NAFTA did not provide for the protection of human rights, the agreement contributed in an unintended but important way to bringing transparency to Mexican elections. The opening of the economy brought with it international scrutiny; consequently, the international community became aware of the systematic electoral frauds characteristic of Mexico's past 70 years. International criticism forced Mexico to implement major democratic reforms. Contrary to the ruling class's methods, no market initiatives, economic instruments or macroeconomic models were required to apply the rule of law and punish political fraud, ballot rigging, coercive voting and, in general, to institutionalize transparent and democratic elections. Finally, the reforms toward the application of a more stringent environmental regime were significantly less functional. And while a comprehensive codification containing environmental provisions similar to those of the United States was enacted, no effective means to enforce these regulations were implemented by the Mexican authorities. Until recently environmental concerns have not played an important role in Mexico's development policies and, as a result, environmental degradation has been ignored. Notwithstanding the reforms in environmental policies and management intended to reduce pollution and foster sustainable use of natural resources, no results have yet been shown.

The influence of the Mexican elite on governmental priorities for the attainment of environmental protection within the framework of sustainable development also reflects the

prevailing dualism. On the one side, the conception shared among the Mexican elite is that the goal of development is to acquire income levels and consumption patterns similar to those of the rest of North America. This assumption is absurd, simply because under current conditions the levels of energy consumption and waste generation in the industrialized world cannot be sustained even under their standards. For example, the idea of extending the actual patterns of water and energy consumption and the concomitant generation of waste of the rest of North America to the majority of the Mexican population,[344] although impossible, would surely lead to the depletion of all the natural resources available and push the physical limits of the environment beyond its natural capacity to recover. Evidently, the classic definition of sustainable development as meeting the needs of the present without compromising the ability of future generations to meet their own needs is surpassed by the current patterns of population growth and consumption.[345] On the other side, a more realistic goal such as guaranteeing freshwater resources for future generations has been disregarded as an environmental priority. Only when the "Mexican Water Crisis," partly generated by NAFTA-induced growth along the Mexico-U.S. border, brought to the frontline the six-year accumulated water debt owed to Texas, did the Mexican authorities declare the importance of freshwater resources for Mexico's development and their intention to implement programs to sustain this resource. Currently, the programs implemented by the Mexican authorities to protect the environment are related mainly to biodiversity, global warming, protection of marine mammals and fierce or beautiful species and, generally, those issues identified with environmental protection in a developed society. Without underestimating the value of sustaining ecologically rich and diverse ecosystems, the priorities selected by the Mexican authorities appear frivolous when compared to the alarming repercussions of industrial pollution and unrestrained generation of municipal waste on the health and well being of the majority of individuals. According to the current programs

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[344] "Population policies must also take into account consumption patterns and distribution of wealth. An average person in North America and Europe consumes almost 20 times as much as a person in India or China, and 60 to 70 times more than a person in Bangladesh. It is simply impossible for the world as a whole to sustain a Western level of consumption for all. If 7 billion people were to consume as much energy and resources as we do in the West today we would need ten worlds, not one, to satisfy all our needs." See United Nations Population Information Network, *Statement of Norway, H.E. Kari Nordheim-Larsen*, 94-09-09, online: http://www.un.org/popin/icpd/conference/gov/940909221821.html (date accesed: August 30, 2002).

[345] The relation between consumption and population has experienced a pattern of development in Mexico similar to the rest of the developing world. "Consumption patterns in the South are changing. Standards of living in many developing countries aspire to consumption patterns that mirror those of the North. This level of consumption will certainly be no more sustainable in the South than in the North." See *D. Hunter, J. Salzman & D. Zaelke*, *supra* note 4 at 59.

implemented by the federal government, the Mexican authorities somehow managed to minimize the consequences of environmental degradation on public health and instead prioritized the protection of non-endangered butterflies and turtles over the health of impoverished children exposed to industrial pollutants. Clearly, the Mexican government is failing to implement objective environmental policies that could achieve realistic goals and extend the benefits of environmental infrastructure to the most needy.

Finally, governmental efforts to implement environmental polices have been dissociated from social and economic decisions. The ministry in charge of protecting the environment has remained as a second tier office isolated from the frontline economic institutions. The limited funding to implement environmental programme remains highly centralized, leaving state and municipal governments without financial autonomy for managing environmental concerns. Under current conditions it is evident that funding to abide by international trade commitments has been widely provided. On the other hand, ensuring funding and continuity to enforce international environmental commitments has not been considered an important component of development.

B. NAFTA's Chapter 11 and Sustainable Development in Mexico

In comparison to the other NAFTA Parties, Mexico depends strategically on foreign direct investment to attain development. For the past decade Mexico's plan for economic growth has been relying increasingly on NAFTA sponsored trade and foreign investment flow. Despite recent efforts to diversify its trading partners, factors such as the direction and volume of exports and imports, tariff preferences, and geographical proximity point to a closer integration with the North American economy. The Mexican government has admitted repeatedly that without an increasing flow of foreign direct investment, Mexico lacks the capacity to generate enough jobs to meet the requirements of population growth. In addition, the capacity of the Mexican federal government to attract foreign investors, generate social growth, and avoid further degradation of the environment has been constrained by the limited capacity to regulate the relations between foreign investors and local governments through a comprehensive legal framework.

Mexico's centralization of legal attributions in the federal government is a consequence of complex cultural and historical reasons. Recently, to deal with the problem of excessive

concentration of power, the government has drawn up decentralization plans. Nevertheless, the highly heterogeneous nature of the country raises serious difficulties for decentralization that would avoid bureaucratic arbitrariness against foreign investors and sanction environmental violations. The first reason is specifically the disparity of economic and technical resources among the local sub-governments. The financial capacity of the individual States varies considerably depending on the size and diversity of their economic activities. On the one side, there are States with considerable economic potential, developed internal markets, governments with technical, administrative and fiscal capabilities. On the other, there are States in which primary activities predominate and markets are poorly developed. These latter States are unable to collect sufficient taxes to assume responsibility for a range of services, including of course environmental management and protection. Decentralization would mean municipalities would have to assume functions for which local governments do not have either the competence or the financial resources.

If sustainable development is based on the harmonious relation between economic growth, social development, and environmental protection, the lack of coordination of the Mexican federal and local authorities on the Metalclad case demonstrates how to fail in each one of the requirements. Concerning economic growth, the Mexican government paid almost $16 million to the Metalclad Corporation as compensation for a direct expropriation decreed unilaterally by a local government, a decision apparently stemming from the fear of alienating foreign investors in the midst of a major recession. In relation to social development, there is an abandoned landfill in the middle of the desert and the potential revenues and jobs generated directly and indirectly by the facility are gone. Finally and perhaps the worst consequence, environmental degradation has been promoted because tons of industrial waste that could have been properly disposed of are being dumped on illegal sites.

If the Mexican government is willing to avoid further disputes like the one originating in the Metalclad case, a deep restructuring of the legal framework to regulate foreign investment will have to be implemented. So far the local communities have had all the burdens and few of the benefits associated with foreign investment. The local communities are the ones that suffer the consequences of environmental degradation, while a bureaucrat in Mexico City decides the suitability of a location hundreds and even thousands of miles away as an appropriate site for economic activity. Participation in economic decisions be-

tween the local and the federal governments is highly unequal. On one side, the municipal governments are charged with the responsibility of providing adequate public services and infrastructure to allow for the activities of foreign investors. Municipalities lack the jurisdiction to sanction environmental violations and the only benefit they earn from business activity is the land tenure tax. On the other side, the federal government collects income taxes, by far the more substantial sums, and eventually sends inspectors from Mexico City to verify if the companies are complying with environmental regulations. Clearly, if the federal government wants to attract more foreign investment, there is an imperative to devolve to local governments environmental and financial attributions. Providing a comprehensive legal framework at the local level will establish clear rules between foreign, or any investors and the local governments.

Devolution to local governments would represent several advantages to foreign investors and municipal authorities alike. First, allowing local governments to enact legislation to control air pollution, water use, hazardous waste disposal, and zoning would allow the regulations to be adequated to the particular circumstances of the region. Second, instead of a federal inspector coming from thousands of kilometres away, prone to the traditional corrupt practices of Mexican bureaucracy, and without any link or sense of responsibility to the local community, the local authorities would be in charge of managing and enforcing environmental regulations. Third, a closer relation between local authorities and foreign entrepreneurs would be mutually beneficial. Investors would be willing to generate profits and sustain their activities within a legal framework that provides certainty and security against arbitrariness of government officials. Municipal governments would be willing to attract as many investors as possible, benefit from the revenues generated by their activities, exploit their comparative advantages against other local governments, including of course a comprehensive legal framework to sustain economic activity, and finally to develop technical and financial capacity to protect the environment.

NAFTA's Chapter 11 was partially inspired by a lack of clear rules and the fear of bureaucratic arbitrariness characteristic of an underdeveloped country like Mexico. Clearly, the only instrument available to avoid aggressive uses of Chapter 11 is to overcome the uncertainty of the legal loopholes in Mexican law. Of course, there still remains the question of whether the Mexican central government is willing to share with the rest of the na-

tion the benefits of trade liberalization and foreign investment within the framework of sustainable development.

C. Sustainable Development, Chapter 11 and the NAAEC.

The conflict between foreign corporate rights as depicted by use of Chapter 11 and environmental protection within the framework of sustainable development needs to be viewed within the larger context of globalization. The world's progressive economic integration through trade and investment agreements may be conceived as an inadequate set of norms and institutions produced by the lobbying capacity of transnational corporations and the international community of trade lawyers who work for them. Indeed, the success of globalization through purely economic means in comparison to the goal of globalization where the protection of the environment and the attainment of sustainable development are embedded in a democratic culture appears to invoke diametrically opposing values.

One of the objectives of NAFTA is to "increase substantially investment opportunities in the territories of the Parties,"[346] and Chapter 11 provides the regulatory framework to protect foreign corporate interests from the arbitrariness of weak or corrupt governments looking to disguise environmental or other public measures to protect domestic industries. A rational legal analysis of the black letter of Chapter 11 proves that indeed its provisions are constructed to legitimize one of the main goals of NAFTA: increase investment opportunities. However, the same legal rationality behind Chapter 11 has proven insufficient to settle the discomfort raised at the societal level against what has been perceived as a set of rules that benefit corporate interests over traditional democratic practices of domestic policy.

From a comparative perspective, the other members of NAFTA have already started to realize this dichotomy; and concerns among Canadian and U.S. government officials have been publicized. By way of contrast, Mexican officials have assumed a hermetic position concerning Chapter 11. Mexico has reserved the right to maintain awards as confidential, access to procedural decisions has been very restricted, and the only comments in relation to Chapter 11 have been in concurrence with the other NAFTA Parties. To the extent that

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[346] See *NAFTA supra* note 66 at art. 102 (c).

the Mexican public realizes that Chapter 11 provides for secret proceedings that may possibly affect the welfare of the population, public health or the protection of the environment, it is expected that protests against the lack of democratic safeguards and public legitimacy of such practices would be directed against the government. For years, the idea of promoting foreign economic agents in the domestic economy has been perceived as compromising Mexico's sovereignty and subjecting local resources to external interests. Moreover, if local communities realize that external regulations are threatening their sovereign power to decide on public matters, a serious risk of unbounded protectionism is likely to develop. Indeed, the challenge faced by the three NAFTA governments, and especially Mexico, is to procure a situation in which the influences of international economic law remain balanced with the values protected by domestic law and to prevent a chain reaction of protectionist measures among the sub-national governments.

Despite ample criticism of the investor-host State dispute resolution process, an orthodox analysis demonstrates that Chapter 11 is the price to pay for a predictable legal framework meant to protect the sustainability of economic enterprises. The framers of Chapter 11 constructed the procedure based on international commercial arbitration, and it is precisely the nature of private arbitration that makes it difficult to open the process to public scrutiny. Backtracking on or amending Chapter 11 would only decrease the investment opportunities of NAFTA parties and reduce chances for achieving increased prosperity for the region. However, balancing trade and public welfare interests can be realized by providing legitimacy, accountability and transparency in those situations where there is uncertainty between a legitimate bona fide public measure and a discriminatory measure. Ultimately, the legal discipline has been developed to accommodate the permanent need to resolve legal uncertainties.

As currently formulated, the Chapter 11 process lacks the kind of legitimacy, accountability and transparency that are required of institutions that must balance public policy objectives. For any major change to occur in the processes, NAFTA would have to be reopened and amended to establish a custom-made NAFTA court system, with rules established by the Parties themselves. It is unlikely any of the Parties has a desire to re-open NAFTA. But it is the only way to fix the major process problems inherent in the current system. Providing transparency to the procedures on investor-State claims would enhance

investors as public trusts in this arbitration mechanism; and while not guaranteeing the execution of sustainable development, it would represent a first pragmatic step toward an indirect approach to preventing the negative impacts of Chapter 11 on welfare and the environment.

One possible avenue to implement this indirect approach is that the Commission for Environmental Cooperation recognize the special status of environmental protection under NAFTA. While the Free Trade Commission has the lead role in matters related to Chapter 11 interpretation, this does not mean it must or should have the exclusive role. Preliminary steps have already been taken in this direction. For instance in June 1999, the three NAFTA environment ministers, meeting collectively as the governing Council to the Commission for Environmental Cooperation, recognized the emerging problems in a statement that reaffirmed the sovereign right of each government to protect the environment.[347]

The environmental dimension of the Chapter 11 investor-State dispute resolution mechanism is beyond doubt. Article 10(6) of the NAAEC provides direction to the Council of the CEC to cooperate with the Free Trade Commission to help achieve the environmental goals of NAFTA. It sets out specific approaches for doing this, such as contributing to dispute avoidance and identifying appropriate experts for working with NAFTA committees and working groups. In addition, Article 10(6) includes a general clause for "otherwise assisting the Free Trade Commission in environment-related matters." This, of course, would not alter the fact that NAFTA is under the jurisdiction of the Free Trade Commission, and final decision-making power rests with that body.

Since the CEC has a mandate to assist in developing a constructive relationship between trade and environmental issues, it can in the present context provide appropriate scientific expertise to legitimate environmental, health and safety measures. The Chapter 11 framework for the resolving of investor claims enjoys the traditional benefits associated with international arbitration. However, the level of scientific expertise required for differentiating

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[347] The statement is found in the Final Communiqué, Commission for Environmental Cooperation, Annual Council Meeting, Banff, Alberta, June 28, 1999.

between a protectionist measure and a legitimate environmental regulation is absent. Moreover:

> Determining the appropriate level of protection in the face of a given risk is a fundamentally political decision that only a government that is accountable to those affected by the decision can make legitimately...It is therefore inappropriate for an outside body that is not accountable to a country's residents, such as an arbitral tribunal, to attempt to weigh competing scientific claims to determine whether there is "enough" risk to justify the measure in question, or whether the measure is supported by the "correct" or "best" or "most accepted" science.[348]

In situations where the main concern of a dispute is environmental laws or administrative decisions affecting the interest of an investor, a group of environmental experts could establish the specific nature of the measure. Bona fide actions are already defined in Chapter 9 of NAFTA and could be applied to Chapter 11 actions. Chapter 9 lists legitimate objectives designed to balance the trade effects of a provision against public interest concerns; these include safety, protection of human, animal, or plant life, the environment, consumers, and sustainable development.[349] The CEC could act as a scientific advisor assisting the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.

In addition to providing scientific expertise the CEC could involve more public participation, more accountability and more transparency in the Chapter 11 process. Moreover:

> Applying commercial arbitration rules to issues of public policy is inappropriate. Where there are significant issues at sake, the dispute settlement process should be made transparent in whole – that is, the pleadings, the hearings and the rulings should be available for public scrutiny.[350]

Initially, the parties should favour transparency and public access to the dispute resolution process in every circumstance where such an issue is committed to their discretion. For example, as stated by the Free Trade Commission in its Interpretative Statement of Chapter 11, there is no obligation within NAFTA preventing the publication of notices of claim. In addition, Article 1126(10) of NAFTA mandates public disclosure of notices of

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[348] See J. M. Wagner, "International Investment, Expropriation and Environmental Protection" (1999) 29 Golden Gate U.L. Rev. 465.
[349] Chapter 9 of NAFTA establishes standards with respect to the creation, maintenance and operation of technical regulations and sanitary measures by the parties. Among the definitions of the chapter, legitimate objectives include:
(a) safety,
(b) protection of human, animal or plant life or health, the environment or consumers, including matters relating to quality and identifiability of goods or services, and
(c) sustainable development, considering, among other things, where appropriate, fundamental climatic or other geographical factors, technological or infrastructural factors, or scientific justification.
But do not include the protection of domestic production. See *NAFTA supra* note 66 at art. 904(2), 915.
[350] J. A. Soloway, "Environmental Regulation as Expropriation: The Case of NAFTA's Chapter 11" (2000) 33 C.B.L.J. 11 at 124.

arbitration actually received by the parties by requiring delivery of such notices to the Free Trade Commission's Secretariat for placement in a public register of documents.[351] NAFTA provides that the Secretariat must maintain a public register of such documents. The CEC's proven capacity to provide transparency and public access presents the ideal forum to publicize investor-host State disputes related to environmental measures.

Another possible recourse to provide institutional representation of the interests of civil society is to allow the submission of amicus curiae briefs. In August 2000, the International Institute for Sustainable Development, a Canadian NGO, followed by the American NGO EarthJustice in September 2000, petitioned the Methanex Tribunal for amicus curiae status. The underlying basis for this petition was the inherent jurisdiction of the panel to manage its own process. At a procedural meeting on September 7, 2000, the Tribunal asked for further submissions by the two petitioning groups, the litigating Parties, and by Mexico and Canada as Parties to the NAFTA (pursuant to Article 1128 of NAFTA). Mexico opposed the amicus participation.[352] However, both the United States, in very extensive submissions, and Canada, in a very brief submission, supported the petitions and the jurisdiction of the Tribunal to accept at least written *amicus* briefs.[353]

Regardless of the options selected by the Parties, it is clear that not taking any action at all is unacceptable. There is a significant risk of sacrificing the advantages of trade and foreign investment liberalization in order to maintain current conditions. In the case of Mexico, there is an enormous requirement to establish a transparent relation with its sub-national governments and clarify the conditions where public measures and investor-State provisions may collide. Mexico represents the testing ground for trade and investment liberalization as required by NAFTA. The developed Parties of NAFTA should monitor the

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[351] *NAFTA supra* note 66 art. 1126(10). Article 1126(10) requires a disputing party to deliver a copy of the notice of arbitration to the Free Trade Commission's Secretariat within fifteen days of its receipt.

[352] There appear to be some divisions between developed and developing countries as to the support for amicus briefs: "[I]n a process that should be limited to states, permitting amicus briefs inappropriately shifts the balance of power between states and civil society. Furthermore, because many of the NGOs who have the resources to file amicus briefs will be from developed countries, developing countries worry that these NGOs will be engaging in a different type of 'ecoimperialism.' It is bad enough, a developing country might argue, that it has to defend itself against developed countries without permitting additional, and perhaps persuasive, parties to also join the fight." See A. Kupfer, "Institutional Concerns of an Expanded Trade Regime: Where Should Global Social and Regulatory Policy be Made?: Unfriendly Actions: The Amicus Brief Battle at the WTO" (2001) 7 Wid. L. Symp. J. 87.

[353] The Petitions and other documents discussed here can all be found on the Naftaclaims homepage http://www.naftaclaims.com/ (date accessed: June 12, 2002).

balance of trade interests and social interests in their developing partner, especially if they want to present this nation as the model for hemispheric integration.

CONCLUSIONS

Neither international trade nor economic growth represents an end in itself; both are means to attain welfare through the generation of wealth. The relation of wealth and welfare requires the equal distribution of income amongst the population to provide better qualitative and quantitative standards of well being for present and future generations. The idea of sustainable development seeks to achieve this process from wealth to welfare in an environmentally sustainable way.

At the most basic level, trade, foreign investment and the environment are related because all economic activity is based on the latter. Substantial increase on the scale of global economic activity has been damaging the environment, and international trade and foreign investment constitutes an increasing proportion of that growing scale. Consequently, international trade and foreign investment have been increasingly important as drivers of environmental changes. The interface between trade, foreign investment and the environment are multiple, complex, and important. Trade and foreign investment liberalization are—on their own—neither necessarily good nor bad for the environment. Its consequences on the environment depend on the possibility of balancing trade, foreign investment and environmental goals by making them mutually supportive.

The major problems of Mexico's national government and the society as a whole are still the lack of social justice and equal opportunity to overcome the deep economic inequity. Poverty in Mexico is a complex condition resulting from the combination of long-standing historic factors, explosive demographic processes, embedded cultural conditions, and insufficient economic and political projects. The dilemma is that sustainable development wants to solve the old problems of development in Mexico but with new conditions that add complexity to the task. Overcoming poverty, maintaining permanent improvement in the population's well being, and achieving greater social equality have already been objectives of development policy; now sustainable development requires that such objectives be accomplished without accelerating the destruction of the environment and even by recuperating, as far as possible, the already damaged natural systems.

Environmental degradation questions the possibility of maintaining indefinitely high economic growth. This condition brings additional difficulties to a country like Mexico

where the production of goods and services still is insufficient to satisfy the increasing demands of the population. There are no final answers to this problem for the simple reason that the specific physical limits of the environment where sustainable human intervention is possible are still ignored, mainly because they depend on the technological frontier. However, it is a fact that in many cases the limits of sustainability have been surpassed and in the future the negative consequences of economic growth might exceed the benefits to the environmental and social fields.

The NAAEC citizens' submission process has been an effective mechanism to attain sustainable development in Mexico. The Article 14-15 processes brought to the Mexican environmental groups an alternative forum with an unprecedented level of transparency and fairness for the promotion of sustainable development. It is difficult to prove whether the Mexican environment is better off since the signing of the NAAEC, but there is no doubt that the NAAEC has been working as a catalyst for the enforcement of Mexico's environmental law. The NAAEC represents for Mexican citizens a valuable alternative for moving towards a solution of environmental and public health problems, especially when compared with the limited private remedies provided by Mexican legislation.

The Metalclad v. Mexico award, as it now stands, shows that Chapter 11 can undermine efforts to enact new laws and administrative regulations in the public interest, and especially those that are consistent with the goal of sustainable development. The Tribunal's interpretation of Chapter 11 provisions raises serious doubts about whether Mexico's national or sub-national governments can regulate means to attain sustainable development without a significant risk of paying compensation to private corporations. The Metalclad case reveals environmental policy implications beyond the matter of the individual facility. Mexico's federal government is under intense pressure, given the high costs and negative publicity associated with challenges by foreign investors under NAFTA. In particular, the government needs foreign investment in its environmental industry. Since Metalclad's announcement that it was not only filing a claim, but also discontinuing its operations in Mexico, the country's appeal to be a safe market for environmental investment projects may have been either delayed or discontinued.

Without the creation of NAFTA and NAAEC, the idea of attaining similar patterns of sustainable development in Mexico as in the rest of North America would have never been considered. This may still appear to constitute a difficult task, but steps are being taken in the right direction. The impacts of NAFTA and NAAEC on domestic policy and their influence on decentralization of sustainable development policies, public participation, and creation of regulatory institutions, while exceptionally significant by Mexican standards, still remain at the initial stage. Further analysis of the consequences of NAFTA and NAAEC on the attainment of sustainable development in Mexico will be required in the coming years.

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