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Enforcement of Environmental Laws under a Supplemental Agreement to the North American Free Trade Agreement

William Snape, *American University Washington College of Law*

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ROBERT HOUSMAN*
PAUL ORBUCH**
WILLIAM SNAPE***

I. INTRODUCTION

Enforcement of environmental laws is one of the key issues in the debate over the relationship between trade and environment in the North American Free Trade Agreement (NAFTA).[1] Without uniformly strong enforcement in all three NAFTA nations, there is the potential for increased migration of "dirty" industries to nations with lax enforcement, and for increased environmental degradation. Furthermore, industries subject to lax enforcement do not have to internalize environmental compliance costs and so have a competitive advantage over their international rivals. This article discusses various approaches to encouraging enhanced enforcement of environmental laws as one component of a supplemental agreement to the NAFTA. The article focuses on the enforcement approach advocated by the Center for International Environmental Law and the Defenders of Wildlife. First, this article sets forth the enforcement proposals put forward by the governments of the three Parties, by the U.S. Congress, and by the environmental community. The article then analyzes the two basic approaches to enforcement found in these proposals, concluding with suggestions for the most effective ways to incorporate environmental enforcement provisions in NAFTA side agreements.

Throughout the debate over NAFTA, much attention has been focused on the relative quality or stringency of the environmental laws of the United States, Canada, and Mexico. In part because Mexico is still a developing nation joining a common market with two developed nations,

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* Staff attorney, Center for International Environmental Law; Adjunct Professor of Law, Washington College of Law, American University.

** Staff attorney, Center for International Environmental Law; Adjunct Professor of Law, Washington College of Law, American University.

*** Associate Counsel, Defenders of Wildlife; Adjunct Professor of Law, University of Baltimore Law School.

1. North American Free Trade Agreement Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States (1992) [hereinafter NAFTA].

and in part because of the appalling environmental conditions present in the U.S.-Mexico border region, much of this attention has focused on the quality of Mexico's environmental laws.[2]

In an effort to ameliorate environmental fears over NAFTA, the United States government undertook a survey of Mexico's environmental laws that concluded that by and large, Mexico's laws were on a par with those of its proposed NAFTA partners.[3] Rather than eliminating environmental fears, however, the study's conclusion served to refocus environmentalists' concerns. Many within the environmental community questioned how the environmental situation in the border region could be so deplorable if Mexico maintained a credible system of environmental laws. Naturally, attention was directed at the pattern of enforcement of environmental laws within Mexico. Early indications provided substantial evidence that although Mexico had a developed system of environmental laws, enforcement of these laws was almost nonexistent.[4]

Driven at least in part by fears that its poor record of environmental enforcement could jeopardize the negotiation and approval of a NAFTA, Mexico undertook substantial efforts to develop enhanced enforcement capabilities and to begin the process of actual environmental law enforcement. For example, Mexico closed, at least temporarily, approximately 200 factories for environmental violations at a critical juncture in the NAFTA process.[5]

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2. This is not to suggest that the environmental enforcement records of the United States and Canada are stellar. In fact, as environmentalists have sought to avoid the appearances of eco-imperialism by also examining the enforcement records of the United States and Canada, these records have shown themselves to be woefully below what would be expected from developed nations.

3. *See* U.S. GENERAL ACCOUNTING OFFICE, U.S.-MEXICO TRADE: INFORMATION ON ENVIRONMENTAL REGULATIONS AND ENFORCEMENT 5-6, GAO/NSIAD-91-227 (May 1991) [hereinafter GAO, ENVTL. REG. & ENFORCEMENT]; William K. Reilly, Environmental Protection Agency (EPA) Administrator, EPA, Free Trade and the Environment: Tools for Progress, Remarks at a Meeting of the U.S. Chamber of Commerce 2 (Mar. 23, 1992) ("Mexico has a set of laws that are fully equivalent to what we have in the United States"). *But see* Tod Robberson, *Cloud Over Trade Pact — Texas Too*, WASH. POST, June 22, 1993, at A1 [hereinafter *Cloud Over Trade*] (discussing transboundary air pollution from a power plant on the Mexican side of the border, and noting that the plant meets Mexican standards that are significantly lower than U.S. standards).

4. *See* GAO, ENVTL. REG. & ENFORCEMENT, *supra* note 3.

5. *About 20 Percent of Plants Closed for Pollution Problems Allowed to Reopen*, 14 Int'l Env't Rep. 282, 282 (1991). Betty Ferber de Arijidis, spokesperson for the Group of 100, Mexico's main environmental group, has noted the temporal linkage between heightened Mexican enforcement activities and the U.S. Congress' consideration of Fast Track negotiating authority for NAFTA. *See* Jan Gilbreath Rich, *FTA Prompts Overhaul at Ecology Secretariat*, EL FINANCIERO INTERNATIONAL, Aug. 26, 1991, at 13 (quoting Betty Ferber de Arijidis), *quoted in* ROBERT PASTOR, INTEGRATION WITH MEXICO: OPTIONS FOR U.S. POLICY 60 (1993). While the 200 plus plant closure figure appears on its face substantial, semantic differences in the term "plant closure" may undercut this figure. For example, a "plant closure" in Mexico can include the closure of a plant for a period of hours while a plant gets its papers in order, or a closure of a valve within a

Despite Mexico's efforts to step up environmental law enforcement, serious concerns remain regarding the ability of *all three NAFTA Parties* to fully enforce their environmental laws.[6] These concerns manifest themselves on at least two levels: 1) concerns for the physical health and well being of the NAFTA Parties' citizens and the North American environment; and 2) the competitive abilities of the NAFTA Parties to compete economically on a level playing field.

Economic development in the U.S.-Mexico border region has occurred largely without enforcement of environmental law by either the United States or Mexico, and the region provides a vivid warning as to the environmental consequences of uncontrolled industrial growth. Simply put, virtually every medium (water, land and air) in the border region has been in someway significantly degraded by unfettered growth. The region's surface waters are veritable sewers, thick with human feces and industrial toxins.[7] The subsurface water tables, upon which the arid region is highly dependent for both human and industrial consumption needs, are similarly compromised.[8] Toxic hot spots, areas where industrial and often hazardous and/or toxic wastes have been disposed of without regard for law or the environment, dot the region's landscape.[9] Hazardous wastes are routinely burned by landfill operators, releasing dangerous levels of toxic compounds into the region's air.[10] The human costs of these environmen-

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production facility. *See* Michael Gregory, *Environment, Sustainable Development, Public Participation and the NAFTA: A Retrospective*, 7 J. ENVTL. L. & LIT. 99, 164 (1992); Tod Robberson, *Mexico's Environmental Dilemma*, WASH. POST, Apr. 4, 1993, at A36 (discussing violations of environmental laws by thousands of small businesses in Mexico).

6. *See, e.g.*, HILARY FRENCH, WORLDWATCH PAPER NO. 113, COSTLY TRADEOFFS: RECONCILING TRADE AND THE ENVIRONMENT 32 (Mar. 1993) (citing estimate by Mexican enforcement official that only 35% of all U.S. owned maquiladoras comply with Mexican toxic waste laws).

7. *See, e.g.*, Robert Tomsho, *Environmental Posse Fights Lonely War Along Rio Grande*, WALL ST. J., Nov. 10, 1992, at A1; Michael S. Feeley & Elizabeth Knier, *Environmental Considerations of the Emerging United States-Mexico Free Trade Agreement*, 2 DUKE J. COMP. & INT'L L. 259, 262 (1992); Robert Suro, *Border Boom's Dirty Residue Imperils U.S.-Mexico Trade*, N.Y. TIMES, Mar. 31, 1991, at A1; Paul Salopek, *Soup of Toxins Simmers in Rio Grande*, EL PASO TIMES, May 15, 1991, at 1A, 4A (noting that the laundry list of harmful industrial contaminants found in the Rio Grande includes chromium, selenium, lead, manganese, barium, zinc, arsenic, nickel, nitrates, sulfates, DDT, and chlordane).

8. Feeley & Knier, *supra* note 7, at 259 n.70.

9. *See generally* Elizabeth C. Rose, *Transboundary Harm: Hazardous Waste Management Problems and Mexico's Maquiladoras*, 23 INT'L LAW. 223, 229 (1989); Dr. Lilia Albert, Hazardous Industrial Wastes in Mexico, Remarks to the Forum on Mexican Environmental and Health Issues: Options for North American Solutions, *cited in* Natural Resources Defense Council, Environmental Elements of the NAFTA Package, Testimony Before the Committee on Environment and Public Works, United States Senate 4 (Mar. 16, 1993) (on file with NRDC) [hereinafter NRDC Testimony].

10. Rose, *supra* note 9, at 236; Dr. Lilia Albert, Hazardous Industrial Wastes in Mexico, Remarks to the Forum on Mexican Environmental and Health Issues: Options for North American Solutions, *cited in* NRDC Testimony, *supra* note 9, at 2.

tal tragedies are only now beginning to be recognized.[11]

To a lesser degree, the United States-Canada border shares many of these same environmental ill effects caused by North American economic activity in the absence of sufficient environmental protections. A recent study conducted by the Sierra Club found that the Great Lakes were a "toxic soup" of more than 500 chemicals.[12] In 1990, U.S. companies alone dumped more than 680 million pounds of toxic chemicals into the Great Lakes.[13] In addition to the environmental costs, environmental degradation of the Great Lakes is estimated to threaten 2.9 million jobs, valued at more than $76 billion on the U.S. side of the border alone.[14]

Beyond the physical consequences of environmental degradation attendant to lax environmental enforcement, a great deal of attention has recently been focused on the competitiveness aspects of lax environmental enforcement. In the context of NAFTA, those concerned with "pollution havens" believe that lax enforcement, most often in Mexico, allows companies to externalize environmental costs that they would otherwise be forced to internalize through environmental compliance costs. As industries seek to cut their costs of production, allowing companies to externalize environmental costs is believed to encourage industrial flight to countries with lax enforcement.[15] Despite intense debate over the validity of the pollution haven theory, the experience within the wood finishing industrial sector has demonstrated that industrial migration can indeed be motivated by environmental regulatory costs.[16]

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11. *See, e.g.,* Gaynell Terrel, *Tragic Puzzle Grips Families on the Border*, HOUSTON POST, May 17, 1992, at A1, A19 (discussing links between chemicals, including xylene and toluene, used by industrial plants in Matamoros, Mexico, and incidence of anencephalitis (babies born with incomplete or no brains) in Brownsville, Texas); Paul Salopek, *Crowded Border Imports High Rate of Disease*, EL PASO TIMES, May 14, 1991, at 1A (noting population around the Nogales sister cities is infected with hepatitis at a rate 20 times the U.S. national average).

12. Kelly McParland, *Lakes Cleanup Put at US$76B*, FINAN. POST, June 24, 1993, at 8 (quoting Brett Husley, director of Sierra Club's Great Lakes Program).

13. Lois Sweet, *Toxic Lake Water Called "Frightening,"* TORONTO STAR, June 14, 1993, at C3.

14. McParland, *supra* note 12, at 8.

15. *See, e.g.,* Senator Max Baucus, *NAFTA Needs Environmental Side Agreements*, 10 ENVTL. F. 30, 30 (1993).

16. *See* GAO, U.S.-MEXICO TRADE: SOME U.S. WOOD FURNITURE FIRMS RELOCATED FROM LOS ANGELES TO MEXICO, REPORT TO THE CHAIRMAN, COMM. ON ENERGY, HOUSE OF REPRESENTATIVES 1-4, GAO/NSIAD-91-191 (Apr. 1991). Roughly forty Southern California furniture makers relocated to Mexico to avoid the Southern California Air Quality District's stringent air emissions standards. *Id. See also* Duane Chapman, Environmental Costs and NAFTA, Testimony Before the U.S. International Trade Commission (Nov. 18, 1992) ("Environmental and worker protection may indeed be significant factors in industrial location"); FRIENDS OF THE EARTH, RELEASE, STANDARDS DOWN, PROFITS UP! (Jan. 1993). *But see* UNITED STATES TRADE REPRESENTATIVE'S OFFICE, MYTHS & REALITIES: THE NORTH AMERICAN FREE TRADE AGREEMENT 2 (Oct. 1992) (arguing that Mexico will not become a pollution haven because: 1) Mexico's environmental laws are comparable to those of the United States; 2) enforcement is improving in Mexico; and 3) the cost of complying with existing U.S. environmental law is too small to induce companies to move to

Moreover, examining solely the issue of industrial flight may be viewing the true nature of environmental regulatory effects on competitiveness too narrowly. While the cost of environmental regulatory compliance alone may not be high enough to prompt widespread industrial flight, once a company has made the decision to relocate, the failure to comply with environmental laws can be used to gain higher profit margins and, therein, increase competitiveness. One study by the environmental group Friends of the Earth has found that companies can increase profit margins by more than two hundred percent by not meeting environmental laws.[17] Companies that can, without the specter of enforcement, increase their profit margins by over two hundred percent obviously enjoy a competitive advantage over their competitors who pay to comply with environmental laws.

In addition to concerns about competitive advantages, serious political concerns exist over NAFTA-driven pollution haven job loss. In fact, the mere perception that NAFTA allows an industry to gain a competitive advantage through lax environmental enforcement could significantly harm the chances of Congressional approval of NAFTA.[18]

II. APPROACHES OF THE EXECUTIVE BRANCHES

Given this backdrop, it was not unexpected that in his October 1992 campaign speech on NAFTA, then-Governor Bill Clinton emphasized that a NAFTA supplemental agreement must, *inter alia*, provide a mechanism to ensure that each NAFTA Party enforces its own environmental laws.[19]

Mexico to avoid these costs); Patrick Low & Alexander Yeats, *Do "Dirty" Industries Migrate?, in* INTERNATIONAL TRADE AND THE ENVIRONMENT 89, 89-104 (Patrick Low ed., 1992) (arguing that pollution migration does not occur).

17. FRIENDS OF THE EARTH, *supra* note 16.

18. *See* Jane Bussey, *Trade Pact Doomed if It Ignores Labor, Environment, Critics Warn*, MIAMI HERALD, Apr. 4, 1993.

19. *Remarks by Governor Bill Clinton at the Student Center at North Carolina State University, Raleigh, North Carolina*, at 13-14, Federal News Service, Oct. 4, 1992, *available in* LEXIS, Nexis Library, Executive File. Clinton remarked:

> I think the new Congress should pass legislation to provide for public participation in crafting our position and ongoing disputes, and to give citizens the right to challenge objectionable practices by the Mexicans or Canadians. . . .
>
> Before implementing the agreement, we must establish an environmental protection commission with substantial powers and resources [that will] encourage the enforcement of each country's own environmental laws through education, training and commitment of resources, and provide a forum to hear complaints.
>
> Such a commission would have the power to provide remedies, including money damages and the legal power to stop pollution. As a last resort, a country could even be allowed to withdraw.
>
> If we don't have the power to enforce the laws that are on the books, what good is the agreement?
>
> We must have some assurances on this. This is a major economic as well as environmental issue.

Id.

After his inauguration, President Clinton's commitment to ensuring environmental enforcement became one of the most heated areas of debate concerning the supplemental environmental negotiations.

Early in his tenure, United States Trade Representative Mickey Kantor sought to set the terms of the debate around the goal of encouraging national enforcement of national laws. As a means of developing a framework for this approach, Ambassador Kantor pointed to NAFTA's provisions on the protection of intellectual property rights (IPR) as a model for encouraging enforcement of national environmental laws.[20] This approach was finally adopted by the U.S. when it tabled its negotiating text in late May 1993 in Ottawa. However, the U.S. negotiating text also included a provision that would use trade sanctions in certain circumstances.[21]

In order to "promote effective enforcement of the environmental laws of each Party,"[22] the U.S. supplemental environmental proposal creates two complementary, and not mutually exclusive, legal mechanisms. As to national enforcement, Article 6 states that "[e]ach Party shall ensure that persons with a legally cognizable interest in the particular matter have appropriate access to administrative or judicial procedures for the enforcement of the Party's environmental laws."[23] Theoretically, therefore, a harmed U.S. citizen, as well as Mexican and Canadian citizens, could use the Mexican court system to remedy an environmental violation in Mexico. The U.S. proposal would also provide "fairness and transparency" by, *inter alia*, requiring the proceedings and decisions to be public, ensuring certain evidentiary safeguards, and mandating certain cost and time limits.[24]

Second, Article 16 of the U.S. proposal would allow either a Party or the

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20. *See, e.g.*, Testimony of Ambassador Mickey Kantor, United States Trade Representative, Before the Subcommittee on International Trade, Committee on Ways and Means, U.S. House of Representatives, at 5-6 (Mar. 11, 1993) [hereinafter Kantor Testimony]. Ambassador Kantor's written testimony provides:

> In thinking about ways to improve [environmental] enforcement, it is noteworthy that all NAFTA parties committed in Articles 1714-16 of the NAFTA, to a significant set of principles and administrative and judicial procedures for the domestic enforcement of intellectual property rights. We will review these provisions to assess their applicability for environmental and labor issues. Procedures like these to promote due process, judicial review, and citizen access to judicial and administrative bodies can contribute to improved enforcement of the law, as well as increased public confidence in the law.

Id.

21. *See* U.S. Negotiating Text, Inside U.S. Trade (May 21, 1993) [hereinafter U.S. Negotiating Text]. The U.S., Mexican and Canadian proposals were leaked to this publication. *See also* Mexican Negotiating Text, Inside U.S. Trade (May 21, 1993) [hereinafter Mexican Negotiating Text]; Canadian Negotiating Text, Inside U.S. Trade (May 24, 1993) [hereinafter Canadian Negotiating Text].

22. U.S. Negotiating Text, *supra* note 21, art. 1(e).

23. *Id.* art. 6(1).

24. *Id.* art. 6.

Secretariat of the proposed North American Commission on the Environment (NACE)[25] to convene a special session of the NACE Council to address "a persistent and unjustifiable pattern of non-enforcement" of any Party's environmental laws.[26] The Secretariat would possess the authority to obtain any enforcement or compliance information from a Party, subject to that Party's law, and "[i]f a Party does not make available any such information . . . it shall promptly furnish a written statement of its reasons to the Secretariat."[27] After the Secretariat prepared an enforcement report, if two of the three Parties so agreed, the Council could convene an arbitral panel under NACE to consider the matter.[28] Unlike dispute settlement under Chapter 20 of the NAFTA itself, the NACE panel's proceeding would be open to the public.[29] If the panel made an affirmative finding of nonenforcement, then the Council would have 30 days "to resolve the matter," after which the complaining Party could "suspend an appropriate level of benefits under the NAFTA" in order to encourage enforcement.[30]

Throughout the discussions of the NAFTA supplemental environmental agreement, including the enforcement component, Mexico's approach has been largely reactive, watching developments within the United States and reacting to proposals. From the outset of the supplemental process, however, Mexico has repeatedly stated that any NAFTA supplemental agreement must observe three general rules: 1) no reopening of the NAFTA

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25. The role of the proposed NACE is outlined in Articles 8 and 10:

> 1. The Parties hereby establish the Commission on the Environment, whose mandate shall be to facilitate the achievement of the objectives of this Agreement.
> 2. The Commission shall be composed of:
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> (a) a Council, comprising [cabinet-level environmental ministers] of the Parties or their designees;
> (b) a Secretariat; and
> (c) a Public Advisory Committee.

Id. art. 8. The U.S. proposal would allow the NACE to

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

Id. art. 10.

26. *Id.* art. 16.
27. *Id.* art. 12.
28. *Id.* art. 16.
29. *Id.*
30. *Id.*

text; 2) no creation of supranational institutions with powers over national governments; and 3) absolute respect for each NAFTA nation's sovereignty.[31] Mexico's concern over the interplay of sovereignty and NAFTA-related enforcement issues is not without reason. One need only look at the recent *Alvarez-Machain*[32] case to understand Mexico's sensitivity in the area of enforcement.[33]

Accordingly, the Mexican negotiating proposal differed substantially from that of the U.S. with regard to an approach to enforcement. Mexico's proposal does not provide for the use of trade sanctions of any type. Rather, its censure mechanism would make public, "unless otherwise agreed by the Parties," any NACE Executive Committee (NACE Council) "recommendations" for remedying failures to enforce environmental laws, along with the response of the culpable Party.[34] These recommendations would be made by the NACE only if two Parties allege "unjustifiable, persistent and systematic failure to enforce domestic environmental law in order to attract or retain investment, occurring after the entry into force of this Agreement."[35] The Mexican proposal would allow a Party to justify its nonenforcement for a number of reasons.[36] Mexico advocates a role for public entities only within the context of proposed National Advisory Councils.[37]

The Mexican proposal additionally includes a section on national enforcement of environmental laws. "Each Party shall ensure that any person with legal standing under its environmental law has recourse to procedures for the enforcement of environmental laws."[38] The proposal also calls for expediency and procedural fairness.[39]

The Canadian proposal for a supplemental environmental agreement also does not contemplate the use of trade sanctions, but it does set forth

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31. *See, e.g.,* Jane Bussey, *Official Tells What Mexico Won't Accept*, MIAMI HERALD, Apr. 3, 1993 (quoting Mexico's Deputy Foreign Minister Andres Rozental).

32. United States v. Alvarez-Machain, 112 S.Ct. 2188, 119 L.Ed.2d 441 (1992) (upheld Bush Administration's forcible abduction of a Mexican citizen from Mexican territory for purposes of a criminal trial in the United States).

33. *See* Bussey, *supra* note 31 (quoting Mexican Senator Portifiro Munoz Ledo jokingly stating that Mexico will not accept the creation of an "ecological [Drug Enforcement Administration]"); *see also* David C. Scott, *US Court Ruling Provokes Heated Mexican Retort*, CHRISTIAN SCI. MONITOR, June 17, 1992, at 1; Ambler H. Moss, Jr., *A Democratic Party Approach to Latin America*, 34 J. INTERAM. STUD. & WORLD AFF. 1, 3-4 (1992) (discussing the effects of *Alvarez-Machain* on Latin America's view of the United States); Daniel Williams, *U.S. & Mexico Plan Talks on Extradition*, WASH. POST, June 22, 1993, at A15 (discussing efforts to negotiate a legally binding solution to abductions by the U.S.).

34. Mexican Negotiating Text, *supra* note 21, art. 9.

35. *Id.*

36. *Id.*

37. *Id.* art. 6.

38. *Id.* art. 8.

39. *Id.*

detailed provisions for national enforcement of environmental laws. According to the Canadian proposal, if consultation between two Parties fails to resolve differences over "a consistent pattern of violations of the obligations" of the agreement, then two Parties may call for the establishment of an "Enquiry Committee."[40] The Committee would consist of at least two environmental experts, and would investigate the matter and publicly report findings and recommendations, "including suggested stages and time tables for the implementation of its recommendations."[41] To establish "a consistent pattern of violations" would require "a pattern of reliably documented violations."[42]

The Canadian proposal also promotes national enforcement by requiring the Parties to provide their citizens access to judicial, quasi-judicial and administrative procedures necessary to promote implementation and enforcement of domestic environmental laws.[43] These procedures include the right to request an investigation, the right to sue, the right to seek court injunctions, the right to initiate private prosecutions, and the right to seek correction of administrative actions.[44]

Two additional provisions of the Canadian proposal are noteworthy. First, as to transboundary pollution, the proposal provides that within five years of the entry into force of the agreement, the Parties shall work toward ensuring that a person in the jurisdiction of another Party will have "the same rights and remedies" for addressing transboundary pollution effects as a citizen of the Party itself.[45] Second, the Canadians seek a provision which would allow "the territorial units [of a Party] in which different environmental laws are applicable" to opt out of the environmental agreement.[46] Canadian provinces wary of the powers of the national government are the likely impetus for this clause.

III. CONGRESSIONAL ENFORCEMENT PROPOSALS

Unwilling to sit idly by, a number of influential members of the United States Congress also have set benchmarks for environmental enforcement. These proposals were intended to assist the Clinton Administration in developing its own enforcement approach so that the Administration proposal would receive political support in Congress and from the environmental community.

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40. Canadian Negotiating Text, *supra* note 21, art. 19.
41. *Id.*
42. *Id.*
43. *Id.* art. 13.
44. *Id.*
45. *Id.* art. 14.
46. *Id.* art. 22.

A. ENFORCEMENT PROPOSAL OF SENATOR BAUCUS

Senator Max Baucus, a third-term Democrat from Montana and Chairman of the Senate Environment and Public Works Committee and of the Subcommittee on International Trade of the Senate Finance Committee, set forth his version of enforcement of environmental laws in the NAFTA context in a speech on January 29, 1993.[47] The structure of an enforcement mechanism would include a North American Commission on Environment (NACE) with both consulting and investigative powers.[48] The consulting arm would include technical experts capable of advising government and business on compliance with regulations, available environmental technology and necessary financing, while also working with enforcement officials to prove environmental violations. The other main function of the NACE would be to evaluate and investigate environmental complaints.[49]

In a subsequent floor speech, Senator Baucus suggested that environmental complaints targeting firms not in compliance with the domestic environmental laws be filed with the NACE.[50] A NACE panel of experts will screen the complaint based on whether the firm is engaging in trade under NAFTA and whether the complaint itself has merit. Thereafter, a validated complaint will be investigated by the NACE using procedures like the EPA's. If searches or subpoenas are necessary, the NACE will act through the national environmental enforcement body.[51] If NACE identifies "a pattern of non-compliance or non-enforcement," NACE notifies the domestic trade enforcement body of its findings and that entity is to act on the findings using its normal procedures. At the same time, the NACE consulting arm is to work with the offender to identify compliance measures.[52] After a four month "grace period," the investigative arm of NACE is to conduct an inquiry to determine whether progress towards compliance has been achieved.[53] The results of this investigation are reported to the national government, which may impose a penalty if there has been insufficient movement towards correcting the environmental problem.

Possible penalties mentioned by Senator Baucus include "snapback" or

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47. Senator Baucus was the major Senate environmental voice during the NAFTA negotiations.

48. Senator Max Baucus, Remarks to the American Bar Association National Institute on the North American Free Trade Agreement (Jan. 29, 1993) (on file with authors).

49. *Id.; see also* Memorandum from American Law Division, Congressional Research Service, to Senate Committee on Environment and Public Works, Constitutional Questions Involving Proposed North American Commission on the Environment (Apr. 15, 1993) (on file with authors) (analyzing favorably the constitutional issues with respect to NACE's on-site investigatory and subpoena powers).

50. CONG. REC. S2980 (daily ed. March 17, 1993).

51. *Id.*

52. *Id.*

53. *Id.*

"punitive" tariffs,[54] or denial of a company's right to export to its NAFTA neighbor.[55] If penalties are approved by the national government, a NAFTA dispute panel may rule on their "fairness" and also determine whether the enforcement procedure set forth in the side agreement was followed. The entire NACE complaint process is designed to take no more than twelve months.[56]

B. ENFORCEMENT PROPOSAL OF CONGRESSMEN WYDEN AND RICHARDSON

Congressmen Ron Wyden and Bill Richardson, Democrats from Oregon and New Mexico respectively, introduced their vision of a NACE and of NAFTA environmental enforcement in March 1993. Their NACE would establish a process to improve enforcement of environmental laws, standards and regulations that are not subject to NAFTA dispute settlement but that affect one of the following three areas: trade or investment patterns, global commons, or transboundary environmental conditions.[57]

The Congressmen call for an enforcement process that includes public hearings, consultations between the parties and the NACE, and annual reports on the status of enforcement measures. Thereafter, consultations regarding enforcement shortcomings identified by the NACE would take place between the parties with an eye to "resolv[ing] outstanding issues in a timely fashion."[58] If the issues are not resolved in a timely fashion, the parties may request that the NACE consider sanctions authorizing the requesting party to levy a charge of not more than one percent *ad valorem* on all imports from the offending country. The funds collected from such a charge would be dedicated to an environmental protection fund administered by the NACE which would be used to fund improved enforcement and environmental remediation. Additionally, the size of the import charge should be linked to the amount of funds needed to adequately finance enforcement programs.[59]

C. ENFORCEMENT PROPOSAL OF CONGRESSMAN GEORGE BROWN

Congressman George Brown, a Democrat from California, introduced

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54. Snapback tariffs are provisions in trade agreements or legislation which allow a nation to withdraw previously made tariff concessions under specific circumstances. Thus, the tariffs "snap back" to a previous, higher level.

Punitive tariffs do not necessarily bear any relation to previous tariff levels; they can be set at a level which effectively denies market access.

55. CONG. REC. S2980 (daily ed. March 17, 1993).

56. *Id.*

57. *See* H.R. Con. Res. 63, 103d Cong., 1st Sess. (1993).

58. *Id.*

59. *Id.*

two pieces of comprehensive legislation on March 24, 1993, linking NAFTA and future Western Hemisphere trade agreements with threshold labor, environmental and agricultural standards, and implementing enforcement of these standards.[60] In the North American context, Congressman Brown and his co-sponsors call for the establishment of a trinational commission, which has the authority to investigate, adjudicate, and issue binding judgments in a timely manner.

The areas of environmental quality that would be within the enforcement jurisdiction of the commission include: a) protection of environmental quality and ecosystems; b) disclosure of information on toxic chemical and hazardous substance discharges; c) prevention of export of toxic and hazardous substances that are banned in the country of origin; d) prevention of the export of products produced in an environmentally unsound manner that undermine counterpart standards in the importing country; and e) requirements that industry decrease its pollution discharges and upgrade control technology.[61]

Petitions alleging violations of the environmental standards and requesting action by the commission would be filed by any signatory nation or informed person within a signatory nation. After public proceedings and a public determination, the trinational commission could authorize an aggrieved NAFTA party to: a) suspend, withdraw or prevent NAFTA benefits; b) impose proportionate duties or offsetting fees or restrictions; or c) enter into binding agreements that eliminate the environmentally harmful practice, eliminate burdens or restrictions on NAFTA trade, provide compensatory trade benefits or provide financial arrangements to remedy the damage.[62]

IV. ENFORCEMENT PROPOSALS OF THE ENVIRONMENTAL COMMUNITY

Each of the Congressional proposals was an important part of the NAFTA debate on trade and environment, and the environmental community was pleased to assist in the formulation of these ideas. Nonetheless, environmentalists, hoping to advance the Clinton Administration's agenda beyond the solely national enforcement model, were contributing their own plans for effective enforcement mechanisms early on.

While U.S. legislators and the NAFTA countries toiled to develop official positions on a supplemental agreement concerning *inter alia* enforcement, the U.S. environmental community aggressively sought not only to respond to the Clinton Administration's advances, but also to define a

60. *See* H.R. 1445, 103d Cong., 1st Sess. (1993); H.R. 1446, 103d Cong., 1st Sess. (1993).
61. *See* H.R. 1445, 103d Cong., 1st Sess. (1993).
62. *Id.*

range of proposals that the NAFTA parties could use in crafting a mechanism to encourage enforcement of environmental laws.[63] This approach was made possible, in great measure, by the "constructive engagement/wait and see" posture most of the environmental community adopted towards NAFTA under President Clinton.[64]

Given the profusion of delicate and complex issues at play (e.g. national sovereignty), the debate within the environmental community was at times heated as efforts were made by many groups to develop a consensus enforcement approach to present to the Administration. While the environmental community has not yet been able to speak with a single voice, the community, in its dealings with both the executive branch and the Congress, has been able to develop two general, and not mutually exclusive, approaches to enforcement of environmental laws attendant to NAFTA. The first of these approaches is built upon Ambassador Kantor's idea of using the IPR sections of NAFTA as a model for encouraging national enforcement of national laws.[65] Both the Natural Resources Defense Council and the Environmental Defense Fund have aggressively pushed for this option as a means of encouraging enforcement.[66]

The second approach to enforcement sought to use the newly proposed North American Commission on the Environment (NACE) to authorize a party to use trade sanctions where the NACE found that the failure of environmental enforcement was causing an injury to another party. This approach was advanced by a coalition of twenty-five groups in a letter to Ambassador Kantor,[67] and was most vigorously advocated by the Center for International Environmental Law (CIEL) and the Defenders of Wildlife (Defenders). While certain groups have argued more stridently on behalf of one of these two approaches, the environmental community in general has recognized that neither of these approaches to enforcement is a replacement for the other; in order to fully address the environmental enforcement concerns attendant to NAFTA, both domestic citizen suit provisions and trade measures are necessary. Since the use of citizen suits

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63. *See, e.g.*, Letter from Defenders of Wildlife, Center for International Environmental Law, et al., to United States Trade Representative Mickey Kantor, at 9-12 (Mar. 4, 1993) (authored jointly by 22 environmental and consumer groups or coalitions) (on file with authors) [hereinafter Letter of March 4, 1993]; STEWART J. HUDSON & RODRIGO PRUDENCIO, NATIONAL WILDLIFE FEDERATION, THE NORTH AMERICAN COMMISSION ON THE ENVIRONMENT AND OTHER SUPPLEMENTAL ENVIRONMENTAL AGREEMENTS: PART TWO OF THE NAFTA PACKAGE (Feb. 4, 1993).

64. The leeway given to President Clinton in the NAFTA process may have been a product of his political affiliation with the Democratic Party. *See* Seth Cagin & Philip Dray, *Are the Greens Turning Yellow?*, N.Y. TIMES, May 25, 1993, at A23 (discussing environmentalists' deferential approach). The sagacity of this deference remains to be seen.

65. *See* Kantor Testimony, *supra* note 20.

66. *See* NRDC Testimony, *supra* note 9, at 4 (testimony of Justin Ward and Jacob Scherr).

67. Letter of March 4, 1993, *supra* note 63.

was being pursued by the administration in conjunction with USTR Kantor's IPR model, groups like CIEL and Defenders have devoted more attention to the use of trade measures. It must also be noted that the environmental community has, by and large, recognized that in order to play an effective enforcement oversight role, the NACE must also have the powers and resources to conduct independent monitoring and investigative activities.[68]

The common themes present in the enforcement proposals of the Congressional leaders and the environmental community reflect far more than mere coincidence. In fact, environmentalists worked closely with Congressional leaders, both in assisting these members to develop their proposals, and in crafting the proposals coming from the environmental community. Assuming that any sort of effective supplemental enforcement provisions ultimately result, the coordinated efforts of the environmental community and Congressional leadership will have been instrumental in guiding the Clinton Administration in this endeavor.

V. OVERVIEW OF ENFORCEMENT PROPOSALS

The enforcement proposals set forth by the Parties, by U.S. legislators, and by environmentalists have all relied heavily on either the use of citizen suit provisions as in IPR enforcement, or on use of trade sanctions, or some combination of the two. These two models for enforcement would each bring different strengths and weaknesses to the NAFTA.

A. THE IPR APPROACH

NAFTA's chapter 17 provides that "[e]ach Party shall provide in its territory to the nationals of another Party adequate and effective protection and enforcement of intellectual property rights, while ensuring that measures to enforce intellectual property rights do not themselves become barriers to legitimate trade."[69] Given the NAFTA Parties' commitment in chapter 17 to enforcement of an obligation only indirectly related to traditional free trade precepts, combined with a commitment that the enforcement of these obligations shall not hinder "legitimate" free trade, it should be no surprise that the IPR provisions of NAFTA have been looked at by many influential individuals and groups, including United States Trade Representative Kantor, as a model for NAFTA-related environmental enforcement.[70]

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68. *See, e.g., id.*

69. NAFTA, *supra* note 1, art. 1701.1.

70. *See* Kantor Testimony, *supra* note 20; *see also* G. Foy, *Environmental Protection Versus Intellectual Property: The U.S. Mexico Free Trade Agreement Negotiations*, 4 INT'L ENVTL. AFF. 323,

Chapter 17 sets out extensive substantive and procedural protections that each NAFTA country is required to provide holders of intellectual property rights. Perhaps the most important commitment to IPR enforcement occurs in Article 1715, which requires the parties to provide nationals of the other NAFTA parties access to, and fair procedures in, civil judicial and administrative proceedings to enforce their rights.[71] The essence of these provisions is that IPR holders have the right to take their cases to the domestic administrative and judicial tribunals of each Party,[72] and these tribunals have an obligation to provide them with a fair hearing.[73] If a tribunal finds that their IPR rights have been violated, the tribunal has the authority and obligation to provide the IPR holder with substantial forms of relief as set out in the chapter.[74] By way of analogy, the IPR sections of the NAFTA provide right holders with essentially what are under United States environmental laws citizen suit provisions,[75] coupled with the traditional civil procedure and constitutionally mandated due process rights that attach in cases before U.S. courts.[76]

In envisioning how an IPR model for enforcement could be applied in the area of environmental enforcement, two different schemes have been developed. The fundamental difference between these two schemes lies in whether the right to sue to force domestic enforcement of environmental laws would be extended in all cases to non-nationals. Under one approach, each NAFTA country would provide citizens from all other NAFTA

323-337 (1992).

71. NAFTA, *supra* note 1, art. 1715.1-1715.17. Article 1716 also requires the parties to provide judicial authorities with the power to order "provisional measures" to protect the interests of IPR holders. *Id.* art. 1716. Article 1717 also commits the parties to providing criminal enforcement of IPR at least in cases of "willful trademark counterfeiting or copyright piracy on a commercial scale." *Id.* art. 1717.1.

72. *Id.* art. 1715.1.

73. *See, e.g., id.* art. 1715.1(d) (right to present evidence); 1715.1(b) (right to independent counsel); 1715.2(a) (right of access to information in the possession of the other party).

74. *See, e.g., id.* art. 1715.2(d) (judicial authority to order infringer to pay right holder damages); 1715.2(e) (judicial authority to order infringer to pay right holder's expenses including attorney fees); 1715.2 (judicial authority to order infringer to desist from further infringement).

75. *See, e.g.,* 33 U.S.C. § 1365 (Federal Water Pollution Control Act citizen suit provision); 42 U.S.C. § 7604 (Clean Air Act citizen suit provisions); 42 U.S.C. § 9659 (Comprehensive Environmental Response, Compensation and Liability Act citizen suit provisions). Because the IPR sections of NAFTA allow for cross-border suits by non-nationals they are more closely related to the citizen suit provisions under the Solid Waste Disposal Act, *see* 42 U.S.C. § 6972. The Solid Waste Disposal Act provides that any "person" can commence a citizen suit. *Id.* § 6972(a)(1)(a). The Solid Waste Disposal Act has been held not to apply extraterritorially, *see* Amlon Metals v. FMC Corporation, 775 F. Supp. 668, 672-676 (S.D.N.Y. 1991). Nonetheless, a foreign plaintiff complaining of an injury from a violation of the statute that occurred *within* the territorial boundaries of the United States, and who fulfilled all other standing requirements, would presumably be able to invoke the protections of the statute.

76. *See, e.g.,* Simon v. Craft, 182 U.S. 427 (1901) (notice and opportunity to be heard in civil cases).

countries, as well as their own citizens, access to judicial and administrative procedures to compel enforcement of environmental law. Under the second approach, each NAFTA party would be required to provide only its own nationals with "citizen standing" to commence actions to compel enforcement.

1. The Cross-Border Citizen Suit Scheme

The cross-border citizen suit scheme would have each NAFTA country agree in a supplemental environmental agreement to allow both its nationals and non-nationals from NAFTA countries the right to bring environmental citizen suits. This model is similar to the model adopted under the Nordic Environment Convention.[77] Similarly, in the North American context, transboundary environmental standing already exists in a number of instances at the state-provincial level. Under agreements between U.S. states and Canadian provinces, environmental reciprocal access to justice statutes have already been enacted in a number of jurisdictions.[78] These statutory provisions remain largely, if not wholly, unused.[79] Additionally, the Boundary Waters Treaty between Canada and the United States provides an example of cross-border equal access provisions in the area of protection of the North American environment.[80]

The attraction of a cross-border citizen suit agreement is substantial. Citizen suits have been one of the most important factors in advancing environmental protection in the United States.[81] Properly conceived and implemented, citizen suit provisions that allow the citizens of all NAFTA nations to serve as environmental watchdogs over the actions of their governments and corporations doing business within their borders would be an important step towards the full enforcement of environmental laws.

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77. *See* Nordic Environmental Protection Treaty, Feb. 19, 1974, 1092 U.N.T.S. 279; *see also* Joel A. Galob, *The Birth of the North American Transboundary Environmental Plaintiff: Transboundary Pollution and the 1979 Draft Treaty for Equal Access and Remedy*, 15 HARV. ENVTL. L. REV. 85 (1991).

78. *See, e.g.*, Or. Rev. Stat. § 468.076 (1991) (defining reciprocating jurisdiction); § 468.078 (reciprocal access for pollution originating in Oregon); § 468.079 (reciprocal access for pollution originating in reciprocating jurisdiction); N.J. Rev. Stat. § 2A:58A-1-8 (1992) (Uniform Transboundary Pollution Reciprocal Access Law).

79. A recent survey of state attorney generals' offices failed to identify a single case brought under the statutory provisions implementing these equal access to justice agreements. In fact, the survey found that, in many states that had such statutory provisions, the attorney general's office was oblivious to their existence. Eric Gould, Center for International Environmental Law, Survey of Equal Access to Justice Amendments (Apr.-June 1993) (unpublished, on file with authors).

80. *See* Boundary Waters Treaty, art. II, Jan. 11, 1909, United States-United Kingdom, 36 Stat. 2448, T.S. No. 548. The United Kingdom signed the treaty on behalf of Canada.

81. *See* W. ROSENBAUM, THE POLITICS OF ENVIRONMENT 72 (1973); William H. Timbers & David Wirth, *Private Rights of Action and Judicial Review in Federal Environmental Law*, 70 CORNELL L. REV. 403 (1985).

Moreover, by providing citizens of Mexico with new avenues for democratic participation, this scheme might play a significant role in enhancing participatory democracy in Mexico.[82]

2. The Domestic Citizen Suit Scheme

An alternative approach to citizen suit based environmental enforcement would be to require each country to provide its own citizens with standing to challenge the acts of their government. Each country would, of course, remain free to accord similar rights to non-nationals; however, the provision of such rights would not be mandatory. Because this approach limits the right of oversight to each country's nationals, it may be perceived as less sovereignty-intrusive and less imperialistic than a cross-border approach to citizen suits.[83]

National enforcement is part of the approach favored by the U.S. and Canada in their relatively detailed supplemental environmental agreement proposals.[84] Mexico's negotiating text provides only a very general framework for national enforcement.[85] The full effect of these proposals cannot be judged until an agreement is reached and is then implemented.

3. Standing Issues

Both the cross-border and domestic citizen suit schemes raise issues with regard to the rights of citizens to bring environmental enforcement cases. Both of these approaches would require from the outset significant changes to the laws of each country. For example, Mexican law does not provide citizens with standing, or the right to independently commence legal actions to compel the government to enforce its environmental laws.[86] Both the cross-border and domestic schemes would require Mexico to completely alter its legal system. Because the cross-border scheme would also require Mexico to provide NAFTA-nationals with access to its courts, the changes required to adopt this approach would cut deeper than those required by a wholly domestic citizen suit scheme. Similarly, several

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82. For a critical discussion of Mexican democracy, see Asa Cristina Laurell, *Mexico, A Restricted Democracy*, 5 CUADERNOS CASA DEL SOL 1 (1992).

83. *See infra* notes 80-84 and accompanying text.

84. *See supra* notes 22-24, 43-44 and accompanying text.

85. *See supra* notes 38-39 and accompanying text.

86. *See* RAUL BRANES, INTER-AMERICAN DEVELOPMENT BANK, INSTITUTIONAL AND LEGAL ASPECTS OF THE ENVIRONMENT IN LATIN AMERICA, INCLUDING THE PARTICIPATION OF NONGOVERNMENTAL ORGANIZATIONS IN ENVIRONMENTAL MANAGEMENT 91-92 (1991); Tom Louderback, Oracle on the Border 17 (unpublished manuscript, on file with CIEL). Mexico's law does allow citizens to bring "complaints before a political-administrative authority. . . ." BRANES, *supra*. This right, however, should be distinguished from the ability to commence a citizen suit or action. *Id.*

United States statutes, such as "Swampbuster"[87] and "Sodbuster,"[88] that may rightfully be perceived as environmental statutes do not provide for citizen standing. These statutes would have to be amended to provide for such standing provisions.

In addition to the general standing issues raised by both the cross-border and domestic citizen suit schemes, the cross-border scheme also raises several unique standing issues. For example, many U.S. statutes that provide for citizen standing only provide such standing to "citizens" of the United States. These citizenship standing requirements would prevent a non-national from having standing to raise a claim under these statutes. Here again the standing provisions of this second category of statutes would have to be amended to broaden their standing provisions to provide standing to any "person."

Additionally, because under U.S. law a plaintiff can only claim standing based upon an injury to a protected interest,[89] absent changes to every environmental statute to define a level playing field for international trade as a protected interest, a Canadian or Mexican citizen could not potentially claim standing on the basis that they are competitively disadvantaged by the United States' failure to enforce its environmental laws. Thus, while the cross-border citizen suit scheme may be the best method of addressing physical environmental harms from NAFTA, the failure of current environmental laws to protect as justiciable the interests of foreign competitors is not properly addressed by this scheme. Moreover, absent the redefinition of injury to include competitive disadvantage, a Mexican or Canadian trying to meet existing standing requirements will also have tremendous difficulty in trying to show that they have suffered a particularized injury that is different from the injury suffered by all other members of North American society from the complained of act.[90]

Even if the U.S. Congress were to revisit every environmental statute to ensure that NAFTA nationals had the statutory right to bring cases, standing difficulties would remain. In 1992, Justice Scalia, writing for a fractured United States Supreme Court in *Lujan v. Defenders of Wildlife*,[91] narrowed the scope of standing that citizens enjoy to challenge govern-

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87. 16 U.S.C. §§ 3821-23 (producing an agricultural commodity on converted wetlands, or converting wetlands for such use, results in ineligibility for some government benefits, including certain loans, subsidies, and disaster relief).

88. 16 U.S.C. §§ 3811-13 (producing an agricultural commodity on highly erodible land or on land designated for conservation results in ineligibility for some government benefits, including certain loans, subsidies and disaster relief).

89. *See* Lujan v. Defenders of Wildlife, 112 S.Ct. 2130, 2130, 119 L.Ed.2d 351 (1992); Warth v. Seldin, 422 U.S. 490, 508 (1975).

90. *See* Lujan v. Defenders of Wildlife, 112 S.Ct. 2130, 2130, 119 L.Ed.2d 351 (1992); Warth v. Seldin, 422 U.S. 490, 508 (1975).

91. 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

ment actions. In a discussion of a cross-border scheme, this decision poses at least two difficulties. First, the Court used the injury requirements of Article III of the Constitution to impose serious burdens on cross-border environmental plaintiffs. Second, the Court held that while Congress can by statute define what harms constitute injuries upon which standing can be based, such efforts are limited by what the Court read as the substantial limits of Article III.[92] While there is little question that Article III imposes limits to Congress' treatment of standing, it is not clear that the Article III requirements were intended to be read to impose such onerous burdens as the Court espoused in *Lujan*. Thus, under *Lujan*, while Congress could attempt to amend all the appropriate environmental statutes to provide for cross-border citizens standing, there is at least the possibility that these efforts would be judged at some future date to run afoul of Article III's requirements.

Similarly, while Canadian law provides Canadian citizens with standing to commence an action in cases where the right or duty to act falls generally upon the Attorney General, this public interest standing provision does not speak to the rights of non-nationals to undertake similar actions.[93] Thus, it is likely that an agreement requiring cross-border citizen suit provisions would require a significant change in Canadian law.

Standing issues, however, do not necessarily prevent such a cross-border scheme from playing a role in encouraging environmental law enforcement. In fact, under existing United States law, foreign parties have played a substantive role in U.S. environmental law in a number of different contexts, including in enforcement suits.[94] Standing problems can, however, limit the effectiveness of such a cross-border scheme by substantially narrowing the range of individuals who can raise environmental concerns.

4. Democratization, Repression, and Corruption

Despite Mexico's efforts at substantial political reform, serious concerns remain over the state of democratic governance in Mexico.[95] Allegations of corruption and repression continue to come from Mexican citizens against

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92. *See* Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 166, 230-233 (1992)

93. *See* Galob, *supra* note 77, at 99. Canadian law does provide non-nationals with access to its courts in "actions in personam, in respect of contracts or torts though the cause of action may have arisen abroad, and although the parties may be aliens, provided service of process can be affected according to the Rules of Court. . . ." Baxter v. Jacobs, 1 B.C.R. (pt.II) 370 (Q.B. 1889); *see also* Galob, *supra*, at 141-42.

94. *See* John N. Hanson et al., *The Application of the United States Hazardous Waste Cleanup Laws in the Canada-U.S. Context*, 18 CANADA-U.S. L.J. 137, 167-169 (1992) (discussing incidents where Canadian parties have been granted standing to challenge U.S. environmental actions).

95. *See* Representative John Lafalce, *Why I Oppose NAFTA*, ROLL CALL, Mar. 29, 1993.

their own government.[96] While a cross-border citizen suit provision would play a substantial role in democratizing Mexico's legal system, given the fears of many Mexicans that those who challenge the government may suffer reprisals, the extent to which such a system will serve as a vehicle for Mexican citizens to play a role in their government must be questioned. Regardless of the state of the environment around them, if an impoverished and politically disenfranchised Mexican citizen believes, with or without reason, that she will be harmed if she complains about her government's poor enforcement of its laws, she is unlikely to jeopardize her life and her family by commencing an action against the government.[97]

The benefit of the cross-border citizen suit approach is that, by allowing suits by American and Canadian citizens and groups, who have more experience in bringing such actions and are more removed from threats of government repression, enforcement will not be frustrated by inexperience or fear of repression. However, by relying on foreign individuals and entities to enforce the laws of each NAFTA country, the cross-border approach is open to charges, whether founded or not, of eco-imperialism. Mexico fears that if such a cross-border scheme is adopted, Mexico's court dockets will be immediately inundated with cases brought by American companies and environmental groups seeking to tell Mexico what is wrong with its system of environmental enforcement. This fear does not seem entirely unjustified; if such a system is adopted, United States citizens and companies comfortable with judicial fora are likely to use these newly available avenues.

Regardless of whose citizens will use a cross-border scheme to commence enforcement actions, the overall effectiveness of the scheme will depend in large measure on the fairness and impartiality of the judicial forums relied upon. Here again serious concerns exist over corruption within the Mexican judicial system that could undermine the effectiveness of such a cross-border citizen suit scheme.

B. THE TRADE MEASURES APPROACH

As discussed above, the Clinton Administration's negotiating draft for a supplemental environmental agreement does utilize trade measures to

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96. *See generally* Asa Cristina Laurell, *Mexico, A Restricted Democracy*, 5 CUADERNOS CASA DEL SOL 1, 11-17 (discussing electoral fraud), 18-23 (discussing increases in violent repression) (1992). Issues of democracy and human rights have also been raised by the international human rights community. *See* Paul Basken, *U.S. Group Criticizes Mexico on Human Rights*, UPI, Sept. 7, 1991, *available in* LEXIS, Nexis Library, Omni File (discussing Americas Watch report on Mexico).

97. *See, e.g.*, Andrew Reding, *How to Put Due-Process Guarantees into NAFTA*, SACRAMENTO BEE, Feb. 20, 1993, at B7; Marjorie Miller, *Killing Threats Cause Concern in Mexico*, L.A. TIMES, Nov. 23, 1992, at A17.

enforce domestic environmental law in certain circumstances.[98] The U.S. enforcement proposal has been criticized by a number of environmental groups, and by U.S. businesses, but for wholly different reasons.[99] Environmentalists are pleased that sanctions are proposed, but believe that both the standard for enforcement and the process are flawed. Attempting to sanction nonenforcement of any national environmental law may create a disincentive to establish new or more stringent laws, while also breaking the link between lax environmental enforcement and the industrial flight it engenders.[100] Additionally, environmentalists claim that the process is problematic, due to the "persistent and unjustifiable pattern of non-enforcement" standard, the two-country vote needed to convene a panel, the lack of a fixed time frame for resolution of conflicts, and the focus on country rather than company misdeeds.[101] The business community, on the other hand, opposes any use of trade sanctions to enforce environmental laws.[102] Instead, businesses favor the NACE being used as a forum for cooperation to enhance environmental protection.[103]

An alternative means of encouraging NAFTA parties to enhance their enforcement of environmental laws would be to provide for the use of trade measures in cases where a country's failure to enforce its own laws is a material cause of an injury which: a) is transboundary in nature; or b) affects the global commons; or c) distorts trade flows.[104] While there are several ways in which a scheme for applying environmentally-based trade measures could be fashioned, the following format, focusing on the North American Commission on the Environment now under negotiation, re-

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98. *See supra* notes 21-30 and accompanying text.

99. *See* SIERRA CLUB ET AL., ANALYSIS OF THE U.S. PROPOSAL FOR AN ENVIRONMENTAL SIDE AGREEMENT TO THE NORTH AMERICAN FREE TRADE AGREEMENT: OMISSIONS AND AMBIGUITIES (June 8, 1993) (endorsed by 28 environmental groups) (on file with authors) [hereinafter Side Agreement Analysis]; Letter from the Business Roundtable et al., to United States Trade Representative Mickey Kantor (endorsed by 8 business coalitions) [hereinafter Business Critique] (on file with authors).

100. *See* Side Agreement Analysis, *supra* note 99, at 4.

101. *See id.* Stewart Hudson of the National Wildlife Federation, an organization that is perceived by many as an unabashed NAFTA supporter, has stated: "[T]he route to sanctions under the Administration's plan is a tortuous one. Any reasonable analysis of the proposal . . . suggests [that] the probability of trade sanctions ever coming into play is almost nil." Stewart Hudson, *NAFTA's Environmental Struggle*, J. COMM., June 17, 1993, at 8.

102. Business Critique, *supra* note 99, at 6.

103. *Id.*

104. *See* Side Agreement Analysis, *supra* note 99, at 4. In order to ensure that a country does not lower its standards to avoid NACE actions for its failure to enforce these standards, the levels of protection in place in each country at the time of the supplemental agreement would be locked in as floors. Even with this "lock in" a country should be able to lower or eliminate a standard where the country can prove through scientific evidence that the threat the standard sought to address no longer exists, or is addressed in an equally effective manner by some alternative regulatory scheme. Deviations from locked in standards could themselves be challenged before the NACE.

flects what the authors believe is a consensus within a coalition of groups in the environmental community.[105]

In order to understand how the NACE can play a role in enforcement disputes, it is necessary to have a general understanding of the structure for the NACE that has been proposed by the environmental community. The NACE would have three essential components: 1) a commission made up of one member from each NAFTA Party, either a senior, specially appointed government official (similar in stature to a country's U.N. Ambassador), or the principal environmental agency head (in the United States, the EPA Administrator would serve as NACE commissioner); 2) an independent secretariat staffed with persons from the NAFTA countries serving in their individual capacities; and 3) a public advisory commission made up of experts in trade and environmental issues drawn from NGOs, academia, business, and subfederal level governments within the NAFTA countries.[106]

1. Who Can Bring a NACE Case, and the Screening of Cases

Under the coalition's NACE enforcement proposal, any legal citizen of a NAFTA party (including any governmental unit, non-governmental organization, corporation or individual having some particularized stake in a matter), would have the power to petition the NACE directly to begin an investigation and dispute resolution process on environmental enforcement failures. In an effort to limit the use of the NACE as a protectionist device, a number of alternative proposals have called for allowing only the federal governments to be able to petition the NACE. These proposals seek to use federal governments as a screen against frivolous and harassing NACE cases. While the goal of avoiding such cases is a laudable one, the costs of this filtration device exceed their value. NAFTA's provisions and institutions are already markedly undemocratic. For example, trade disputes under NAFTA's chapter 20 are conducted in secrecy by national governments; citizens have no voice in the proceedings and can be foreclosed from the right to have access to information and documents produced for and from these disputes. If the overall NAFTA package is to have any ability to encourage wider recognition of the values of participatory democracy, then the NACE must serve as a counterweight to NAFTA's highly undemocratic nature. Thus, the NACE must provide citizens with

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105. *See* Letter of March 4, 1993, *supra* note 63, at 9-12. This approach builds on many of the ideas of the various proposals set out above. Our thanks go to the individuals on whose work we build.

106. *See, e.g.,* Letter of March 4, 1993, *supra* note 63, at 9-12; HUDSON & PRUDENCIO, *supra* note 63. The U.S. negotiating draft adopted a similar structure. *See* U.S. Negotiating Text, *supra* note 21, art. 8.

the ability to participate directly in its affairs.

A hybrid method that might prove more acceptable to some would be to permit citizens the right to petition the NACE directly, but only after they have requested that their domestic government file a NACE complaint and that request has been denied. A requirement that the petitioner exhaust all available remedies is common in the citizen suit provisions under U.S. domestic laws, and functions relatively well.[107]

The NACE proposal put forth by the Center for International Environmental Law and Defenders of Wildlife attempts to address fears of protectionism while preserving the necessary democratic character of the NACE. Under this proposal, any citizen or group could petition the NACE, but the NACE would have the ability to screen and select the cases that should go to a formal dispute process. Again, any case selected would have to fall within at least one of the three categories for NACE review: a) transboundary effects; b) effects on the global commons; or c) distortive effects on trade flows. Subject to this limitation, cases would be selected based on the importance of the issues they raise. It might also be appropriate to provide preference to cases brought by federal and subfederal governmental entities in the selection of cases to be heard. In envisioning the workings of a NACE screening process, an analogy to the functioning of the United States Supreme Court's process and criteria for the granting of certiorari is helpful.[108]

Moreover, fears of potential protectionism are also addressed by this proposal in that NACE complaints could not be commenced against individual private citizens or entities, but instead only against the inadequacies of governmental efforts. Thus, only federal and subfederal governments could be NACE respondents for their failure to enforce their own laws. By providing a governmental veil between the complaining party and the environmental failure complained of, the threat of protectionist interests hijacking the process to harass their competitors is substantially diminished.

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107. *See, e.g.,* Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387, at § 1365(b)(1)(A), (B) (except under certain circumstances, no citizen suit can be commenced for violations of the Federal Water Pollution Control Act: prior to sixty days notice to the enforcement authorities of the violation; or if the enforcement authorities have commenced and are diligently pursuing an enforcement action); Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6992k, at § 6972(c); Endangered Species Act, 16 U.S.C. §§ 1531-1544, at § 1540(g)(2); Public Health Service Act, 42 U.S.C. §§ 300f-300j-26, at § 300j-8(b); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675, at § 9659(d)(1), (2).

108. The Supreme Court uses a writ of certiorari as a discretionary device, to choose the cases it wishes to hear. *See* 28 U.S.C. § 1257. The Supreme Court's discretion is guided by the standards set forth in the Court's own rules. *See* U.S.C.S. Sup. Ct. Rule 17 (1992).

2. The Conduct of a NACE Case

The ultimate goal of a trade measures approach is to encourage each NAFTA country to vigorously enforce its domestic environmental laws; the goal is not the creation of a new private cause of action for members of the traditional trade bar to wield in advancing the pecuniary interests of their corporate clients. That said, because corporations understand the workings of their industry, they are, in may instances, best suited for determining how environmental compliance can be effected in that industry; they should not be excluded from the enforcement process. Where a country's lax enforcement of its environmental laws creates trade distortions, the goal of vigorous domestic enforcement is best served by removing the economic incentive for lax enforcement and by counteracting the resultant competitive advantages.[109]

To support this public policy directive, the proposed procedures for the conduct of a NACE case are directed at encouraging the parties to end the dispute by ensuring that entities within their borders come into compliance with the laws in question. Once a case is brought and accepted by the NACE commissioners, the parties to the dispute would be brought together under the auspices of the NACE for consultations aimed at alleviating the complained of environmental harm (i.e., requiring enforcement of the law in question). An effective consultative process is a critical element of encouraging compliance, since it will facilitate settlement and lessen the need to use sanctions.

This consultation process should include at least two distinct components: 1) a political consultation process; and 2) a technological consultation process. The political consultation process in a NACE dispute would resemble the consultation process that is undertaken in virtually all traditional trade disputes.[110] The technological consultation process, however, has no correlative in traditional trade disputes. Directed at achieving compliance as the goal of NACE disputes, the technological consultative process would make available expertise, technology and financing information necessary to facilitate a technological solution to the complained of practice through the purchase and installation of appropriate pollution control technologies. As these procedures reflect, the hope is that the vast majority of NACE cases will be settled in the consultation stage, without recourse to trade measures. However, the threat of potential trade sanctions is necessary to bring the parties to the table to consult in good faith

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109. *See supra* notes 15-17 and accompanying text.

110. *See, e.g.*, NAFTA, *supra* note 1, art. 2006 (setting out consultation process in trade disputes).

with an eye towards compliance.[111]

If the consultation process fails to successfully resolve the dispute, the NACE itself will commence an investigation to verify the complaint and issue a report as to its findings. This report would be a public document, but procedures should be crafted to insulate national security, trade secrets, and/or business proprietary information. The matter would then be referred to a dispute panel formed under the NACE's auspices. Panel members would be selected from a standing roster of individuals with significant trade and environmental expertise. The selection process for panel members might, for example, function like the panel selection process set up for traditional trade disputes under NAFTA chapter 20.[112]

The parties to the dispute, and any other interested party, private or public, would then submit written briefs to the panel outlining their cases. These briefs would generally be publicly available, though exceptions should be crafted to protect information that falls within the realms of national security, trade secrets, or business proprietary information. After examination of the NACE report and the briefs, the Panel would hold public hearings, at which time the parties to the dispute would make oral arguments, and the panel could ask questions of the parties. In addition, the procedures for the NACE, like those of the United States Supreme Court, should allow *amici curiae* to present oral arguments where the parties and the panel agree to allow them to be heard.[113]

Assuming that the parties still cannot come to a mutually acceptable agreement to alleviate a dispute, the panel would then deliberate and come to a decision on the matter. This decision would be presented in written form and would also be made immediately available to the public. After the panel has reached a conclusion, a second consultation would begin. The makeup of this second consultation would be similar to that of the first consultation in that it would have both a political and a technological component. However, the parties would have the benefit of the panel's report during this second consultation. The time frame for second consultations should be specified in the NACE's procedures, and there should be the option of a one time extension if both the parties agree that they are

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111. *See* Letter from Donald L. Connors, Chairman, Environmental Business Council, and Rodger Schlickeisen, President, Defenders of Wildlife, to Ambassador Mickey Kantor, United States Trade Representative, Apr. 8, 1993; *see also* Alan O. Sykes, *"Mandatory" Retaliation for Breach of Trade Agreements: Some Thoughts on the Strategies Design of Section 301*, 8 B.U. INT'L L.J. 301 (1990) (discussing the effectiveness of the retaliatory measures available under Section 301 of U.S. trade law in bringing about settlements in trade disputes); Robert F. Housman, *A Kantian Approach to Trade and the Environment*, 49 WASH. & LEE L. REV. 1373, 1385-1386 (1992) (discussing the need for both trade "carrots and sticks" to encourage environmental reforms).

112. *See* NAFTA, *supra* note 1, arts. 2009-2011.

113. U.S.C.S. Sup. Ct. Rule 37 (1992).

close to forging a settlement and additional consultations would facilitate that result.

In cases where the NACE has verified the complaint, the panel has issued a report in favor of the complaining party (i.e., the failure of a party to enforce its environmental laws has resulted in a transboundary harm, a harm to the global commons, or a distortion to trade flows), and the second consultation does not result in a mutually acceptable end to the matter, the NACE would certify these findings and authorize the appropriate domestic trade agency or agencies to determine whether trade sanctions are warranted. The national governments would retain the ultimate discretion to determine whether or not to take a trade measure, but they would be required to make a public, detailed determination in a timely fashion and certify that determination to the NACE.

3. Sanctions

A supplemental agreement could provide one or more types of sanctions in cases where the domestic agency determines, after authorization from the NACE, that trade sanctions are an appropriate response to the failure of another party to enforce its environmental laws. For example, the Center for International Environmental Law and the Defenders of Wildlife have suggested that in cases linked to the failure to enforce laws against a particular company or industry, the appropriate sanction would be a tariff snapback that would remove the tariff reduction benefits of NAFTA for the appropriate industrial sector.[114] Because tariffs on many goods are already, even without NAFTA, relatively low and may not serve as effective sanctions,[115] the country taking the measure should be allowed to elect to take a tariff snapback to the higher of either the tariff in place before NAFTA or the average of all domestic tariffs in place prior to NAFTA.[116]

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114. NAFTA chapter 8 already permits the use of tariff snapbacks for purposes of combatting import surges. *See* NAFTA, *supra* note 1, chap. 8. The NACE should also have authority to impose fines as a catchall sanction in cases of transboundary and global commons harms that do not also inflict trade injuries.

115. Prior to implementation of NAFTA, U.S. tariffs on goods from Mexico average only 4%. *See* REPORT OF THE ADMINISTRATION ON THE NORTH AMERICAN FREE TRADE AGREEMENT AND ACTIONS TAKEN IN FULFILLMENT OF THE MAY 1, 1991 COMMITMENTS 20 (Sept. 18, 1992) (Mexico's tariffs average 10%, which is two and a half times the U.S. average).

116. For example, assume the NACE determines that the U.S. may sanction the Mexican widget industry because its factories have not installed mandatory pollution control equipment, and therefore Mexican widgets can be sold in the U.S. at a price that undercuts U.S. manufacturers' prices. Tariffs on Mexican widgets were set at 2% before NAFTA, and were immediately phased out on the effective date of the accord. A tariff snapback would result in only a 2% duty on Mexican widgets, that being the rate prior to NAFTA's implementation. This rate may provide little incentive for the Mexican authorities or the Mexican widget industry to install the required

While it is highly draconian to sanction an entire industrial sector for the failure of a government to require a single company to comply with environmental laws, the severity of this sanction serves to encourage the country to enforce the laws against the single company, avoiding the trade sanctions all together. An acceptable alternative would be to authorize sanctions only against the offending company or companies. Any sanction taken could remain in place only so long as the other party continues to fail to enforce the law in question.

4. Sovereignty Concerns

While all of the NAFTA countries have expressed reservations about a supranational NACE armed with "guns and badges" and the powers to enter their territories, subpoena corporate or governmental records, or close factories that do not comply with certain standards, such an intrusive NACE is a far cry from the one proposed by the environmental community. The standards the NACE would seek to enforce would be the domestic, democratically constructed environmental, health, safety, and conservation laws of each respective party. If a NAFTA country does not wish to enforce its own democratically enacted laws, it seems appropriate to question first why those laws exist, and second whether such a country is an appropriate partner for a free trade agreement.

Moreover, the application of a trade measure against a country would not require a country to change its domestic enforcement practices. Rather, it would merely require the country to pay compensation for any lack of enforcement that denies its trading partners competitive benefits promised by NAFTA in the first instance. NAFTA is rife with examples of sovereignty waivers, especially in the areas of IPR, antitrust and trade regulation. Throughout the agreement, Mexico has effectively agreed to establish wholly new domestic regimes with mechanisms for the United States and Canada to enforce these provisions if necessary. Enforcement of environmental regulations should pose no more of a sovereignty threat than the other enforcement mechanisms already agreed to in NAFTA. If sovereignty concerns attendant to environmental enforcement are problematic, then the question must be asked, why is it acceptable for a NAFTA trade panel to serve as judge and jury over a party's domestic environmental, health and safety standards?[117]

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pollution control equipment. If, however, the tariff could be raised to 4%, the average of all U.S. tariffs pre-NAFTA, the Mexican authorities might find it to be more in their country's economic interest to install the equipment rather than pay the tariffs.

117. Chapter 7B and Chapter 9 of NAFTA address sanitary and phytosanitary measures and standards-related measures, respectively. These provisions could conceivably address everything

Further, sovereignty concerns regarding the creation of a supranational enforcement body are misplaced, because the NACE would not have the authority under this proposal even to implement trade sanctions. It would merely have the ability to authorize a party itself to commence a trade measure. Thus, in terms of actual powers, the NACE would have no supranational ability to independently conduct enforcement actions.

The effect of NACE actions on prosecutorial discretion is the area that gives rise to perhaps the highest degree of sovereignty apprehension. Critics of a strong NACE argue that such a NACE will diminish the ability of government authorities to determine what laws are to be enforced and how these laws are to be enforced. These concerns are not without merit. For example, government authorities in the United States often use the threat of enforcement activities to cause companies to take measures that may not immediately bring a facility into compliance, but are nonetheless directed towards that goal, and may have other beneficial social consequences that outweigh the harm caused by the lag time before full compliance is achieved. For example, a factory discharging a toxic substance can be excused from short term discharges in excess of statutory limits if the factory is putting in a closed loop system to end discharges altogether.

While this concern is a valid one, it need not be grounds for abandoning the idea of NACE authorized trade sanctions. Instead, what is necessary is a set of negotiated criteria that can be used to differentiate between prosecutorial discretion and prosecutorial abuse. Such a set of criteria would properly look at, *inter alia*: 1) whether the statute provides a mechanism for agency discretion; 2) the rationale behind the decision not to enforce in light of the goals the statute in question seeks to achieve; 3) whether the decision not to enforce is tied to a larger, environmentally beneficial plan of action; 4) whether the decision not to enforce was motivated by solely economic concerns; 5) whether the act of using discretion directly conflicts with the statute; and 6) whether the statute or the enforcement decision envisions some form of test or pilot program that places higher standards on the facilities involved. If a domestic enforcement agency's action were a permissible exercise of discretion, then absent more compelling evidence of subterfuge, the act of exercising such enforcement discretion would not constitute an actionable incident of lax enforcement.

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from carcinogens in foods to the design of child safety seats for automobiles. If regulations governing such matters were to be challenged as trade barriers, the dispute would be heard under the provisions of the NAFTA Chapter 20 dispute settlement procedure. *See* NAFTA, *supra* note 1, chaps. 7B, 9, 20.

5. Subfederal Entities and NACE Actions

Because many North American environmental protections exist at the subfederal (state and local) level, and because federal environmental protection programs are often delegated to subfederal entities to implement and enforce,[118] subfederal level enforcement patterns must be within NACE's oversight. While the applicability of NACE oversight to subfederal entities may raise concerns among such entities, several factors should serve to minimize these concerns. First and foremost, unlike in NAFTA disputes, if a state enforcement action was challenged in NACE, the state would have every right to defend its actions in NACE's open forum. Second, given the focus of the NACE and the necessary guidelines for prosecutorial discretion, states that are environmental leaders are unlikely to find their environmental enforcement actions called into question. Thus, if California's air standards are far and away more stringent than those in Canada and Mexico, as well as the rest of the United States, assuming good faith actions by California to implement these standards, it would be difficult for any party to challenge California's implementation of these standards.[119] Further, subfederal implementation of enforcement actions could potentially be shielded from review where the standard is strictly a state standard unrelated to any federal standard or program. Finally, like all democratically elected political entities, subfederal governments have a responsibility to enforce their laws, so to the extent NACE only encourages them to do so, concern over NACE's effect on their actions is diminished.

VI. CONCLUSION: FORGING A SUPPLEMENTAL ENVIRONMENTAL ENFORCEMENT AGREEMENT

Given the inherent strengths and weaknesses in both the citizen suit/IPR model and the trade measures model of NAFTA-related environmental enforcement, the best approach probably is to combine these two methods to encourage and ensure full enforcement of each country's own domestic laws. A NAFTA supplemental environmental agreement should require each country to accord its citizens the right to fair judicial and administrative procedures for challenging their own government's failure to enforce environmental laws. In addition, the supplemental agreement should provide the NACE with the ability to convene panels to hear

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118. *See, e.g.*, Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387, at § 1313(c)(2)(B).

119. Even absent enforcement, most U.S. facilities meet environmental standards well above those imposed on the industries of other trading partners. Thus, it would be difficult for a challenging party to assert that a competitive disadvantage existed just because a U.S. facility didn't meet all local standards.

environmental disputes and to recommend to the national governments, where appropriate, the right to take trade measures to address another NAFTA party's failure to enforce its environmental laws.

This combined approach has several critical advantages. The right of citizens to take legal actions against their own governments provides a wedge behind which greater democratic reforms can be driven. (However, by requiring only the domestic provision of citizen standing, this approach avoids the need for the sweeping constitutional reforms that may be necessary to provide cross-border standing to "NAFTA nationals" under all environmental laws.) Combining these benefits with the international ability of NAFTA citizens to seek recourse in the NACE diminishes the concern that the citizens may be prevented by government repression from voicing their concerns, thereby frustrating efforts to create an enforcement climate based on democracy. Moreover, the provision of an international mechanism to authorize trade sanctions for certain failures of environmental enforcement provides a substantial incentive for each country to enforce its laws, without treading too heavily upon national sovereignty.

Establishing a mechanism to ensure that environmental enforcement takes place alongside NAFTA trade liberalization will also send an important message to the rest of the world trading community, in particular the GATT negotiators. This message comes in three parts. First, enforcement of effective environmental laws plays a vital role in securing a level playing field upon which free and fair trade can take place. Second, through environmental cost internalization, trade agreements can become mechanisms for more sustainable economic development. Finally, through creative thinking, hard work and a commitment to the betterment of both human and environmental conditions, the integration of trade and environmental concerns need not wait.