THE "GIANT SUCKING SOUND" REVISITED: A BLUEPRINT TO PREVENT POLLUTION HAVENS BY EXTENDING NAFTA’S UNHERALDED “ECO-DUMPING” PROVISIONS TO THE NEW WORLD TRADE ORGANIZATION

I. HISTORICAL BACKGROUND OF THE “POLLUTION HAVEN” CRISIS

Ursula Garza de Garza has no problem keeping her dogs clean of fleas. She simply dunks them in the murky canal that flows by her house and the fleas are gone. “All the hair falls off, too,” she laments. “But gradually it comes back on.”1 Garza lives in Matamoros, Mexico, a few bleak miles from the Texas border. Matamoros is home to ninety-five maquiladoras:2 factories that import raw materials duty-free into Mexico, use cheap Mexican labor for assembly, and export the goods subject only to a low value-added tax.3 As trade barriers continue to crumble between the United States and Mexico, increasing numbers of U.S. companies are establishing factories in Mexico.4

One memorable moment from the 1992 Presidential campaign was candidate Ross Perot’s dire warning of the “giant sucking sound” of jobs leaving the United States for Mexico if the North American Free Trade Agreement were implemented.5 Perot lost, and NAFTA was ratified by

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1 Jeannie Ralston, Among the Ruins of Matamoros, AUDUBON, Nov. 1993, at 86.
2 The term “maquiladora” stems from the Spanish word “maquila”, which refers to the amount of corn paid by a farmer as a fee to the miller for the grinding of corn. Elizabeth C. Rose, Transboundary Harm: Hazardous Waste Problems and Mexico’s Maquiladoras, 23 INT’L LAW 223 (1989). In its modern usage, the word “maquila” refers to the labor provided by a worker, and the word “maquiladora” refers to the factory itself. Id.
3 “Value added” refers to the portion of the industrial product that was enhanced by Mexican resources. This extremely modest tax considers use of local labor, rent, utilities, and raw materials. ELLWYN R. STODDARD, MAQUILA: ASSEMBLY PLANTS IN NORTHERN MEXICO 74 (1987). See also BUSINESS INTERNATIONAL CORPORATION, HOW TO USE MEXICO’S IN-BOND INDUSTRY 1 (1986) [hereinafter BUSINESS INTERNATIONAL CORPORATION]; Cheryl Schechter & David Brill, Jr., Maquiladoras: Will the Program Continue?, 23 ST. MARY’S L.J. 697 (1992).
4 STODDARD, supra note 3, at 74.
5 Ross Perot, 1992 Presidential Debate #3, East Lansing, Michigan (October 19, 1992). Perot suggested, “You implement NAFTA, the Mexican trade agreement, where they pay people a dollar an hour, have no health care, no retirement, no pollution controls, et cetera, et cetera, et cetera, and you’re going to hear a giant sucking sound of jobs being pulled out
Congress on November 20, 1993. So far, there has been no detectable loss of American jobs to Mexican-based industry. But there has been a "giant sucking sound" of another sort, as air and water quality along the U.S.-Mexico border continue to be degraded by American maquiladoras.

By failing to enforce strong environmental standards for U.S. industry south of the border, Mexico has, for a decade, been making itself a "pollution haven" to attract industrial development. This is accomplished by internalizing environmental costs to artificially lower the price of maquiladora-made products. These costs are internalized in innumerable ways. Mexican workers bear a disproportionate burden of keeping production costs low by living in squalor among polluted air and water. Further, the low production costs are absorbed by the environment itself—not only in Mexico, but also in the United States, wherever wind and water flow northward across the border.

Fortunately, NAFTA allows its members to protect against this very
situation. Under NAFTA, artificial price depression is defined as "dumping" and is considered a prohibited trade practice.\(^{11}\) This "eco-dumping" may be met with a countervailing duty or tariff to deny the producer the benefit of the unfair subsidy.\(^{12}\) No nation has ever imposed such an "eco-tariff."\(^{13}\) This is because an eco-tariff, while probably legal under NAFTA,\(^{14}\) is prohibited under the General Agreement on Tariffs and Trade (GATT).\(^{15}\) If the United States tried to pioneer an eco-dumping measure, using NAFTA as authority, there would certainly be a challenge by other GATT signatories. Such a measure, however, is a necessary check on the unsustainable development that can result from free trade.

On December 1, 1994, the world held its breath as the United States Senate ratified the controversial Final Act of the Uruguay Round negotiations. The GATT has now been transformed into a "World Trade Organization" (WTO) with binding authority to enforce free trade.\(^{16}\) The members that will hold the balance of power in the new WTO view U.S. imposition of environmental trade measures as an affront to their sovereignty.\(^{17}\) Consequently, if the United States ratifies the Uruguay Round without negotiating the incorporation of environmental restraints on trade, then the world will see the emergence of large numbers of "pollution havens" like the Mexican border area.\(^{18}\) As the new WTO begins to dissolve trade barriers...

\(^{11}\) NAFTA, supra note 6, at art. 1902.


\(^{13}\) Telephone interview with Justin Ward, Natural Resources Defense Council (NRDC), Sept. 16, 1994 [hereinafter Ward Interview].

\(^{14}\) Because no nation has used an eco-tariff, the issue has never been tested in dispute resolution. Authority for such a measure seems implied, however, by NAFTA chapters 11 and 19, discussed infra note 117.


\(^{16}\) The WTO is born, GATT FOCUS (GATT/Information and Media Relations Division), May 1994. The WTO is scheduled to be established on January 1, 1995. The U.S. Congress has not yet voted on ratification of the Final Act of the Uruguay Round. Id.


throughout the world, a blueprint must be formulated to allow the imposition of countervailing duties to prevent eco-dumping.

A. The Border Industrialization Program (BIP)

The Mexican dictator Porfirio Diaz once lamented, “Poor Mexico, so far from God and so close to the United States.”¹⁹ No two neighboring countries have a greater economic disparity than Mexico and the United States.²⁰ Yet the economic fortunes of the two nations have always been linked.²¹ The great westward expansion of the United States began when Mexico ceded California after its 1848 defeat in the Mexican War.²² Mexicans have freely crossed the border for many generations, legally and illegally, in search of work.²³ During World War II, the United States opened the border to migrant workers, filling the void left by American farm workers drafted to fight in Europe.²⁴ This bracero program created work for over four million Mexican workers until it was abruptly terminated by the United States in December 1964.²⁵

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¹⁹ ROSE, supra note 3.
²¹ Id.
²² THE CONCISE COLUMBIA ENCYCLOPEDIA 128 (Judith S. Levy & Agnes Greenhall eds., 1983). Gold was discovered in California at Sutter’s Mill during the same year, spurring thousands of settlers to move to the new territory, which became the 31st state in 1850. Id.
²⁴ Throughout the century, and continuing today, the American economy has relied on unskilled, low-wage Mexican workers to solve labor shortages, particularly in western states. Judith Ann Warner, The Sociological Impact of the Maquiladoras, in FATEMI, supra note 20, at 183. These Mexicans replaced “Okie” workers from Oklahoma, Arkansas, and other Southern states who traveled west looking for agricultural jobs after they were driven off their lands during the Great Depression. Bob Secter & Ronald B. Taylor, New Wave of Cheap Labor Seen; Alien Farm Workers Fear Immigration Law Change, L.A. TIMES, Oct. 22, 1985, at A1.
²⁵ The program employed a few thousand workers in the early 1940s, swelling to around 400,000 workers annually by 1964. By then, there were more workers attempting to cross the border than jobs available, and large numbers of illegal aliens began to supplement the bracero workers. The bracero migrants were treated practically as slave labor by employers,
Overnight, unemployment plagued large border towns that had grown at an unprecedented rate to service the bracero program. Oil exports, which had been the largest industry in Mexico since the 1930s, began a slow decline continuing to this day.\textsuperscript{26} Drastic action was needed to put the bracero workers in northern Mexico back to work.\textsuperscript{27} The maquiladora and the squalor of their condition forced the United States to cancel the program. Warner, supra note 24, at 183. There are conflicting opinions whether maquiladora workers are treated any better. When director Michael Moore, host of TV Nation, visited Mexico (ostensibly to decide whether to relocate his show to take advantage of NAFTA), he got the foreman of a Whirlpool factory to admit that his workers earned 75 cents an hour and could not afford to buy the washing machines they made. Moore rattled the American by asking him, "How would you say in Spanish, 'As soon as you get your arm out of that machine, you're fired'?" TV Nation (NBC television broadcast, July 19, 1994). The pro-industry BUSINESS INTERNATIONAL CORPORATION, however, notes that American factories pay relatively generous fringe benefits to combat high worker turnover rates. BUSINESS INTERNATIONAL CORPORATION, supra note 3, at 33.

\textsuperscript{26} STODDARD, supra note 3, at 2. For a half century, Mexico's vast, nationalized petroleum reserves seemed to be the one domestic resource that the nation could always count on. In 1938, President Lázaro Cárdenas confiscated the Republic's rich oilfields from foreign companies and nationalized the petroleum industry. Id. For decades, oil provided a steady stream of revenue that reduced trade deficits and was distributed throughout the nation in the form of generous subsidies on food and public services. Since that time, there has been a slow but steady decline in Mexico's oil reserves. This decline was sharply but ephemerally reversed in 1973, when the OPEC oil embargo created havoc around the world. Id. Most Americans remember gas lines around the block as oil prices increased 400 percent around the world. See Paul W. Valentine & Art Harris, Easy Tankful Becoming Harder to Find, WASH. POST, June 15, 1979, at A1; Isabelle Clary, UPI, Aug. 17, 1990, available in LEXIS, News Library, ARCNWS File. In the mid-1970s Mexico suddenly claimed to have discovered vast new oilfields as large as those in Saudi Arabia. Although these reports were wildly inflated, the country was flush with capital for about five years. See Fatemi, supra note 20, at 8, 9. In 1982, the bottom fell out of the oil boom. Re-estimation of Mexico's actual oil reserves revealed the inaccuracy of the earlier reports. Then, with the end of the OPEC embargo, oil prices collapsed from $30 per barrel to under $15. Mexico's nationalized oil company, PEMEX, was forced to reduce its work force by 40,000 jobs, and the industry has been slowly denationalized. STODDARD, supra note 3, at 2. Still, Mexico is ranked sixth in the world in production of petroleum and derivative products, and is ranked eighth in hydrocarbon reserves. Terzah N. Lewis, Environmental Law in Mexico, 21 DENV. J. INT'L L. & POL'Y 159 (1992).

\textsuperscript{27} Almost fifty percent of Mexico's workers are either unemployed or grossly underemployed. Ironically, Mexico's insistent drive towards becoming a modern industrialized nation is contributing to this crisis. For example, as Mexico streamlined its inefficient banking system over the past decade, 17,000 bank employees have been thrown out of work. STODDARD, supra note 3, at 73.
program was the result. This centerpiece of the Border Industrialization Program (BIP) of 1965 has turned Mexico towards a strategy of export-focused industrialization fueled by foreign investment and technology. \(^{28}\) Mexico has a long history of lowering trade barriers to encourage economic growth. \(^{29}\) The BIP program, however, institutionalized free trade on an unprecedented scale. \(^{30}\) It signified a realization by protectionist Mexico that the economic giant to the north—long seen as a threat—could also be used to induce economic opportunity. \(^{31}\) Foreign investors were encouraged to

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\(^{29}\) Mexico’s first zona libre (border free trade zone) was established in 1861 to stem a flood of emigration to prosperous Texas. During the American Civil War, the Confederate army took advantage of this policy to smuggle supplies into the United States after the Union cut off trade with the South. STODDARD, supra note 3, at 16. Between 1933 and 1939 the Mexican government attempted to nurture economic development in the border zone by declaring zonas libre in Tijuana and Ensenada, then in Baja California and part of Sonora. The protectionist leaders of the Republic hoped to encourage the flow of products from the central part of the country. Predictably, the program instead further opened the door to U.S. markets and only contributed to Mexico’s trade imbalance with its neighbor. SKLAIR, supra note 20, at 28. Some observers disagree, suggesting that this program was representative of a dual policy: a strict protectionist program for the national economy, but an open border for a strictly defined zone in the North, cultivating interdependency with the United States. See STODDARD, supra note 3, at 16.

\(^{30}\) The BIP program had three objectives: (1) to speed the process of industrialization in the border region; (2) to attract foreign industry to create a market for Mexican parts and materials; and (3) to fight unemployment in the border towns after the cancellation of the bracero program. STODDARD, supra note 3, at 17.

\(^{31}\) President Díaz Ordaz signaled this change in 1965, declaring, “Let us make our country economically free so that it may be politically free.” Quoted in ANTONIO J. BERMUDEZ, RECOVERING OUR FRONTIER MARKET: A TASK IN THE SERVICE OF MEXICO 142 (Edward Fowlkes trans., 1968). Mexico’s economy is centered around vast Mexico City, far to the south of the U.S. border. A major challenge of the BIP program was to force Mexican elite industrialists to “wake up to the fact that there were substantial profits to be made along the border, but that it was the U.S. and not the Mexican business community that was reaping
establish factories along the border. Attracted by cheap wages and the generous duty-free zone, twelve *maquiladora* factories, employing 3,000 people, were established in 1966.32

B. *Maquiladora* Growth Since 1982

The great increase in *maquiladora* growth came after 1982, when Mexico suffered a sudden and deep recession.33 One million people lost their jobs that year, and the country sank $83 billion into debt.34 While the economy reeled in all other respects, the single bright spot in the economy was the *maquiladora* program, which grew 2.6 percent in 1982.35 The government turned to the eighteen-year old program, hoping to make it the centerpiece of an economic recovery.36 On August 14, 1983, Mexican President Miguel de la Madrid arranged a highly public meeting with President Ronald Reagan to announce Mexico's renewed commitment to border industrialization.37 The next day, de la Madrid released his *Presidential Decree for Development and Operation of the In-Bond Assembly Industry Program*.38

The decree relaxed restrictions on *maquiladora* plants designed to encourage them.” SKLAIR, *supra* note 20, at 29.

32 BUSINESS INTERNATIONAL CORPORATION, *supra* note 3, at 1. The average daily wage among border region industrial workers in 1964 was 24.4 pesos, or $1.95 per day. By 1988, the guaranteed minimum wage was 8,000 pesos, or $8.00 per day. SKLAIR, *supra* note 20, at 37-39.

33 This recession was caused when world oil prices fell, snuffing out the wild economic growth sparked by Mexico's petroleum exports during the 1970s. *See supra* note 26 and accompanying text. Mexico's economy grew about six percent per year between 1950 and 1980, but experienced negative growth from 1982 (with the collapse of the oil industry) through 1987. Kovarik, *supra* note 8, at 61.


35 SKLAIR, *supra* note 20, at 68. Admittedly, this year marked the weakest growth in the history of the BIP. In the preceding few years of the program, 1978-1980, the number of plants had grown 16.5%. FATEMI, *supra* note 20, at 4.

36 *See generally* WILSON, *supra* note 28 (presenting wealth of tabular data on composition of the *maquiladora* industry).

37 Meeting with President de la Madrid of Mexico, 19 WEEKLY COMP. PRES. DOC. 1135 (Aug. 14, 1983). President Reagan noted after the meeting, “We have a 2,000 mile common border. I prefer not to look on it as a border, but instead as a meeting place. . . . We agree that the Maquiladora . . . program make[s] a contribution to the economies of both our nations by increasing jobs and promoting economic activity, especially at the border.” *Id.*

38 BUSINESS INTERNATIONAL CORPORATION, *supra* note 3, at 3.
Along with the decree, de la Madrid drastically devalued the peso, resulting in a great decline in Mexican wages in dollar terms. Suddenly, Mexican wages were competitive with high-growth Asian markets like Hong Kong, Malaysia, and Korea. The policy succeeded wildly at encouraging U.S. companies to build factories in Mexico rather than Pacific Rim countries. At the end of 1993, there were 2,195 maquiladoras employing one-half million workers.

C. Environmental Conditions in the Border Area

American folk history mythologizes the rugged beauty of the Southwest. Louis L’Amour described a visit to a typical border town in this way:

[F]rom the crest of a ridge he could see far and away the smoke of a train. The air was very clear and fresh, and he breathed deeply. Off to the north he could see two mesas lifting their square rock shoulders against the sky. . . . It was a lovely country, and too bad he had so little time left to enjoy it.

39 Id. For the first time, the maquiladoras were allowed to sell a percentage (up to 20%) of their products within the Mexican market. Ken Flynn, Mexican Industrialists Happy Over Twin-Plant Ruling, UPI, Sept. 6, 1983, available in LEXIS, News Library, ARCNWS File. Further, de la Madrid agreed to encourage placement of new factories within the interior of the country, a legal, but discouraged, practice since 1971. BUSINESS INTERNATIONAL CORPORATION, supra note 3, at 13. Both actions made a maquiladora operation increasingly attractive to U.S. investors.


42 Maquiladora Sector Statistics, 1993, SourceMex Economic News & Analysis on Mexico, Mar. 30, 1994, available in WESTLAW, PTS-NEWS database. The number of plants has soared geometrically, even before de la Madrid made maquiladora growth a priority in 1983. In 1970, there were 160 plants, with 20,327 workers. SKLAI, supra note 23, at 54. In 1975, there were 454 plants, with 67,214 workers. Id. at 63. In 1980, there were 620 plants, with 119,546 workers. Id. at 68. In 1985, there were 760 plants, with 211,968 workers. Id.

43 LOUIS L'AMOUR, FLINT 29 (1960).
In 1994, a visit to a border town is not recounted using such pastoral words. A reporter visiting Nogales, Mexico, this year described it in this way:

The huge municipal dump used by the maquilas is a Dickensian nightmare. Squatters sift through pools of greenish slime looking for copper wire that they can sell. Pigs, who will later be eaten, forage through mounds of garbage. And the dump, filled with rubber and plastic, regularly catches fire and sends noxious plumes of white smoke hundreds of feet into the air.\(^4^4\)

There are recent signs that the Mexican government is taking environmental protection seriously.\(^4^5\) This largely began due to fear that the environmental issue would derail U.S. approval of NAFTA, a prospect Mexico desperately wanted to avoid.\(^4^6\) Consequently, in the past two years, former President Carlos Salinas reduced lead content of petroleum (a step taken by the United States in 1973),\(^4^7\) forced the closure of over one hundred oil refineries and other installations, and ordered some power generators to replace smog-causing fuel oil with clean natural gas.\(^4^8\) The Secretariat of Social Development (SEDESOL), the Mexican ministry of ecology, recently announced a $263 million urban renewal plan that would include funding for

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\(^4^5\) See Gene M. Grossman & Alan B. Krueger, *Environmental Impacts of a North American Free Trade Agreement*, in *THE MEXICO-U.S. FREE TRADE AGREEMENT* 13-56 (Peter M. Garber ed., 1993). Grossman and Krueger conclude that "a more liberal trade regime and greater access to the U.S. market is likely to generate income growth in Mexico." *Id.* at 47. They present data suggesting that economic growth works to reduce pollution problems when per capita income reaches about $4,000 to $5,000. *Id.* at 47-48. Mexican per capita income has now reached $5,000, which suggests that any further economic growth generated by NAFTA will create Mexican consumer demand for stronger enforcement of environmental laws. *Id.*


sewage treatment plants in the border area. In 1988, Mexico passed a "General Law of Ecological Equilibrium and Environmental Protection" that addresses air and water pollution, hazardous waste, toxins, pesticides, and resource conservation. Mexico has multiplied its budget for environmental protection tenfold since 1989, and the U.S. Environmental Protection Agency (EPA) is cooperating with Mexico to train SEDESOL personnel to address problems related to air pollution, pesticides, and hazardous wastes. In 1991, former EPA Administrator William K. Reilly released an Integrated Environmental Plan for the Mexico-U.S. Border Area, establishing a tough enforcement program against illegal exporting of hazardous waste. Reilly subsequently insisted that the United States and Mexico "are determined to move aggressively against polluters in order to improve public health and the environment along both sides of the border." In the first prosecution under the Integrated Environmental Plan, on June 3, 1992, the EPA announced seventeen "enforcement actions"—seeking over $2 million in penalties—on maquiladoras that violated U.S. laws regulating cross-boundary shipments of hazardous wastes and toxic substances. The same day, Mexico announced punitive measures against

49 Mexican Environment Unit to Spend $263 Million on Sewage, Other Projects, 16 INT’L ENV’T REP. (BNA) 623 (Aug. 25, 1993).
50 Ley General de Equilibrio Ecologico y de Proteccidn al Ambiente, 412 DIARIO OFICIAL (Jan. 28, 1988).
52 Id.
53 Water Pollution Called Biggest Problem in Region of United States/Mexico Border, 24 ENV’T REP. (BNA) 1080 (Oct. 8, 1993). Buck J. Wynne, EPA Region VI Administrator during the Bush administration, has likened Mexican environmental protection to the state of U.S. environmental enforcement at the founding of the EPA. He suggested, "Whether we have a North American Free Trade Agreement or not, there are serious environmental problems along the border that people living on both sides will demand to be cleaned up."
55 Barrage of Actions Filed by EPA, Mexico Focusing on Law Violations in Border Areas, 23 ENV’T REP. (BNA) 599 (June 5, 1992).
56 Id.
There are unfortunate signs that some of this "enforcement" has been merely cosmetic. A 1992 Congressional investigation surveyed several maquiladora plants at random, and discovered that none of them complied with Mexico's tough 1988 environmental law. Further, only five percent of the factories met the licensing requirement that they return hazardous wastes to the United States for disposal. SEDESOL's $263 million urban renewal project seems impressive until one measures the need: a joint Mexico-U.S. business committee estimates that $6.5 billion is needed merely to reach internationally acceptable standards for water, sewage, and hazardous and solid waste disposal within the next decade. The dozens of prosecutions trumpeted by Mexican authorities only mask the hundreds or thousands of violations suggested by the 1992 Congressional study. Unlike U.S. residents, private citizens in Mexico are virtually precluded from bringing a "toxic tort" or "citizen suit" to demand enforcement of environmental laws. Furthermore, maquiladora pollution tends to be worse than...
that of U.S. industrial sites contaminated by wrongful disposal of hazardous wastes. No site in the United States compares to Ojo de Agua, east of Tijuana, where a fire at the battery factory owned by American company Alco Pacific burned for months underneath 700,000 cubic feet of batteries, trash, lead, sulfuric acid, and dirt, too powerful to be extinguished by firefighters.\(^6\) There can be no doubt that the environmental cost of "business as usual" in the Mexican border area is intolerably high.

II. LEGALITY OF ECO-PROTECTIONIST MEASURES

A. NAFTA and the Environmental Side Agreement

The basis of NAFTA is straightforward: within ten years, almost all restrictions on manufacturing trade between the United States, Canada, and Mexico will disappear.\(^6\) True free trade will exist within fifteen years, when any remaining tariffs and quotas on agricultural products are scheduled to end.\(^6\) While Canada and the United States already have a practically open border, NAFTA is significant because it forces Mexico to abandon a legacy of protectionism and economic nationalism.\(^6\)

Malissa Hathaway McKeith, a Los Angeles attorney who represents several maquiladoras, suggests, "There really aren't any provisions in NAFTA that impact the day-to-day operations of U.S. businesses from an spectator." \(^{Id.}\)


\(^{64}\) Hustis, supra note 9.

\(^{65}\) See ORME, supra note 46, at 5. Orme suggests that Canada is ultimately a bystander to the North-South rapprochement that Nafta represents. . . . Americans didn't need to overcome ethnocentrism or fears of dollar-an-hour labor to sign a trade pact with Canada. A few provisions of the U.S.-Canadian agreement would be simplified by Nafta; others would be liberalized further. Overall, however, the status of U.S.-Canadian commerce—already largely free, and representing fully a fifth of American global trade—would be little altered.

\(^{Id.}\) See also THE MEXICO-U.S. FREE TRADE AGREEMENT, supra note 45.
environmental perspective.\textsuperscript{66} Still, NAFTA won support from environmentalists because the Clinton administration grafted on broad, general provisions for environmental protection.\textsuperscript{67} NAFTA’s environmental provisions can be placed into eight categories. The first six “green” categories are straightforward and, although important, are unexceptional as they serve principally to preserve the viability of the U.S. environmental regime: (1) “philosophical” provisions in the preamble;\textsuperscript{68} (2) standards-related measures;\textsuperscript{69} (3) sanitary and phytosanitary measures;\textsuperscript{70} (4) dispute resolution/forum selection procedures;\textsuperscript{71} (5) preservation of existing international environmental agreements despite NAFTA’s general pre-emption power;\textsuperscript{72} and (6) the environmental “side agreement”\textsuperscript{73} negotiated prior to signing of the NAFTA document.\textsuperscript{74}

Two further NAFTA chapters, though, are exceptional—even more so than the tepid environmental side agreement. Although little-heralded, these two chapters present the most powerful tool that the U.S. has to maintain environmental quality both domestically and abroad. Chapter 11 (“Investment”) contains language designed to prevent nations from using investment practices to attract industry through eco-dumping.\textsuperscript{75} The investment chapter is given muscle by Chapter 19 (“Antidumping and Countervailing Duty

\textsuperscript{66} Cross-Border Commerce, supra note 48, at 1317. See also Michael Scott Feeley & Elizabeth Knier, Environmental Considerations of the Emerging United States-Mexico Free Trade Agreement, 2 DUKE J. COMP. & INT’L L. 259 (1992). Feeley and Knier quote writer Carlos Fuentes, who spoke at the 1983 Harvard commencement on the difficulty of enforcing U.S. standards in the developing Mexican economy. Fuentes suggested that “the clocks of all men and women, of all civilizations, are not set at the same hour.” Id.

\textsuperscript{67} Ward interview, supra note 13. This support has not been universal. The environmental groups Public Citizen, Sierra Club, and Friends of the Earth sued the United States Trade Representative (USTR) in 1993 to force the USTR to prepare an environmental impact statement before the treaty was submitted for ratification by Congress. Public Citizen v. United States Trade Representative, 822 F. Supp. 21 (D.D.C.), rev’d, 5 F.3d 549 (D.C. Cir. 1993).

\textsuperscript{68} See infra notes 75-80 and accompanying text.

\textsuperscript{69} See infra notes 81-92 and accompanying text.

\textsuperscript{70} See infra notes 93-97 and accompanying text.

\textsuperscript{71} See infra notes 98-103 and accompanying text.

\textsuperscript{72} See infra notes 104-108 and accompanying text.

\textsuperscript{73} See infra notes 109-116 and accompanying text.


\textsuperscript{75} NAFTA, supra note 6.
Matters"), a safeguard against more traditional and straightforward trade subsidies. While not explicitly an *environmental* provision, a side-by-side reading of the antidumping chapter with the sustainable investment chapter suggests that eco-dumping can be combatted with countervailing tariffs under NAFTA.

1. "Green" Provision #1: The NAFTA Preamble

The NAFTA Preamble insists that trade development must only occur "in a manner consistent with environmental protection and conservation." It further advocates "sustainable development," an ethic that economic development must look to long-term survival and not merely short-term profits. The preamble then proposes "strengthen[ing] the development and enforcement of environmental laws and regulations" in the three nations. Three of the fifteen general goals of the NAFTA preamble are environmental; a fourth goal promises to "improve working conditions and living standards," a necessary part of sustainable development.

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76 Id., preamble.
77 Id.
78 "Sustainable development" is most notably expounded upon in HERMAN E. DALY & JOHN B. COBB, JR., FOR THE COMMON GOOD (1989). Daly is a former senior economist at the World Bank, and Cobb is a theologian. They argue that conventional economics has "transformed the character of the planet" to the brink of ecological ruin. Id. at 3. Traditional economic theory, Daly and Cobb believe, suffers from "the fallacy of misplaced concreteness," by depending on a "scientific" model of behavior (economics) which underestimates the irrationality and self-destructive behavior of human actors. Id. at 35. See also DAVID W. ORR, ECOLOGICAL LITERACY (1992). Orr suggests that there are really two versions of sustainability: "technological" and "ecological." The former is short-term, describing evolutionary changes to promote human survival. "Ecological sustainability," however, reflects a revolutionary shift, repudiating "individualism, anthropocentrism, patriarchy, mechanization, economism, consumerism, nationalism, and militarism," to be replaced by a post-modern survival ethic of environmental sanity. Id.
79 NAFTA, *supra* note 6, preamble.
80 Id.
2. "Green" Provision #2: Environmental Standards

The chapter on standards-related measures\(^\text{81}\) is considered by many observers to be the "centerpiece of the 'green language' in NAFTA."\(^\text{82}\) The section addresses concerns that a free trade agreement will allow other nations to challenge U.S. environmental provisions as unfair trade barriers. This was undoubtedly spurred by a recent successful challenge of U.S. environmental laws under GATT, the "Tuna/Dolphin dispute."\(^\text{83}\) In May 1993, a GATT dispute settlement panel ruled that a U.S. boycott under the Marine Mammal Protection Act\(^\text{84}\) of Mexican tuna caught using methods that killed dolphins was inconsistent with GATT.\(^\text{85}\) NAFTA Article 906(2) requires the signatories to "make compatible" their environmental laws. This coerced cooperation on environmental protection is commonly referred to as "harmonizing." To this end, NAFTA mandates creation of a tri-lateral Committee on Standards-Related Measures to follow up on the development and enforcement of harmonized measures.\(^\text{86}\) However, NAFTA explicitly prohibits downward harmonization, as represented by the tuna/dolphin decision. The obligation to harmonize standards is limited to the extent that harmonization will not "reduc[e] the level of safety or of protection of

\(^{81}\) Id. at chapter 9.

\(^{82}\) Ludwiszewski, supra note 74.


\(^{84}\) Marine Mammal Protection Act of 1972 (MMPA), 16 U.S.C.A. § 1371 (1972). For two decades, the MMPA required a boycott of yellowfin tuna caught by any country whose average catch of dolphins in tuna nets exceeded an agreed-upon limit for that year. Tuna Panel Report, supra note 83. Although Mexico won its trade suit against the United States, Mexico chose to settle the matter, and the GATT ruling body never adopted the report. RUNGE, supra note 7, at 74. It must be noted that in mid-1993 Mexico was lobbying for American passage of NAFTA. Surely Mexico only backed off on their tuna victory in order to salvage NAFTA (which, hunted by Ross Perot, was even more endangered in 1993 than the dolphins were).

\(^{85}\) Tuna Panel Report, supra note 83. In response to the ruling, Public Citizen's Lori Wallach commented, "It was helpful for GATT to reveal its hand again and make vividly clear what is in store for U.S. environmental and consumer laws. . . . Many laws will be found GATT-illegal and then Congress must either eliminate the laws or face perpetual trade sanctions." Nancy Dunne, US Test for a 'Dead Fish' Theory—Uruguay Round Ratification Brings Congress Another 'Crisis', FIN. TIMES, May 25, 1994, at 7.

\(^{86}\) NAFTA, supra note 6, at ch. 9.
human, animal or plant life or health, the environment or consumers.\(^{87}\)
This provision alone could have a powerful and positive impact on the environment. As a "one-way ratchet,"\(^{88}\) it drives environmental standards of all three countries upward. The chapter expressly protects the right of each country to enforce greater environmental protection than the harmonized standards if it desires. NAFTA guarantees this by protecting each party's right to ban imports that are below domestic standards. This has caused tension. For example, U.S. health rules prohibit importation of Mexican milk (which is not date-stamped for freshness), while U.S. milk is freely exportable to Mexico. A "milk war" has erupted in border towns, where drivers delivering milk from El Paso to Juarez have been beaten and their trucks burned.\(^{89}\) Mexican dairy farmers allege that U.S. concern over food safety is merely a front for protectionist policies to protect domestic producers.\(^{90}\) This is an inevitable result of a free trade pact, suggests Jeffrey E. Garten, the Clinton administration's Undersecretary of Commerce for International Trade: "The history is that as tariffs are reduced, nontariff barriers are raised to substitute. Then nontariff barriers are reduced. But it takes a long time."\(^{91}\) As a means of addressing this issue, NAFTA requires that standards more stringent than harmonized levels must further "legitimate objectives"\(^{92}\) such as safety, health, and protection of the environment. Such tensions must be ironed out, but inclusion of this provision is an essential, and unprecedented, hallmark of a sustainable trade relationship.

3. "Green" Provision #3: Sanitary and Phytosanitary Measures\(^{93}\)

NAFTA permits each nation to protect human, animal, or plant life at a discretionary level within its territory.\(^{94}\) Like the chapter on standards, above, this chapter permits a party to set a higher level of protection than

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\(^{87}\) Id. at art. 906(2).

\(^{88}\) Ludwiszewski, supra note 74.

\(^{89}\) Allen R. Myerson, New Limits Are Seen to Freer Trade, N.Y. TIMES, Sept. 6, 1994, at D1.

\(^{90}\) Id.

\(^{91}\) Id. at D4.

\(^{92}\) NAFTA, supra note 6, at arts. 904, 905.

\(^{93}\) "Sanitary", in this context, means "occupied with measures or equipment for improving conditions that influence health." WEBSTER'S 3D NEW INT'L DICT. 2012 (1981). "Phytosanitary" refers to measures taken to sustain plant life. Id. at 1708.

\(^{94}\) NAFTA, supra note 6, at ch. 7.
other parties, although allowing a narrower basis for differentiation: each party agrees to base its sanitary and phytosanitary measures on scientific principles and risk assessment to avoid allowing these measures to become disguised protectionist measures. Each of these two provisions differs from the GATT, which prevents governments from using environmental regulations for protectionist purposes by practically forbidding their interference with trade altogether.

Most importantly, NAFTA places the burden of proof for a challenge to a sanitary or phytosanitary standard on the challenging party. This presumption that health and safety-based standards are valid is an important factor in rating NAFTA to be a "green" document.

4. "Green" Provision #4: Dispute Settlement Procedures

NAFTA's dispute settlement procedure recognizes the sensitivity of environmental concerns in trade by creating a strong presumption in favor of the legitimacy of an environmental measure challenged under authority of NAFTA. The rage sparked by the GATT Tuna/Dolphin decision guaranteed that negotiations over the dispute-resolution procedures in NAFTA would be eco-friendly. Under NAFTA, all complaints regarding protectionist measures must be submitted to a dispute settlement commission. The commission is required to consider environmental concerns in deciding whether a disputed protectionist measure violates NAFTA responsibilities.

The dispute resolution commission is also required to consult scientific experts in deciding complex environmental issues. NAFTA requires the commission to use the scientific findings in its deliberative process and to make the report available to the public. Incredible as it seems, this is the first time a trade agreement has created such a formal mechanism whereby trade mediators are provided the resources to make fully informed

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95 Id. at art. 723(2). See also Peter M. Emerson & Robert A. Collinge, The Environmental Side of North American Free Trade, in NAFTA AND THE ENVIRONMENT 45 (Terry L. Anderson ed., 1993).
96 Emerson & Collinge, supra note 95, at 54.
97 NAFTA, supra note 6, at art. 723 (2).
98 Id. at chapter 20.
99 Id.
100 Id. at arts. 2014, 2015.
101 NAFTA, supra note 6, at art. 2015.
decisions. It also presents a sharp contrast to the secretive dispute resolution procedures of the WTO.

5. "Green" Provision #5: Protection of Environmental Agreements

NAFTA pre-empts most international agreements that conflict with it. The sole exception to this rule is found in Article 104(1), which provides that NAFTA must exist in harmony with certain international environmental agreements, principally the Convention on the International Trade in Endangered Species (CITES), the Montreal Protocol on ozone protection, and the Basel Convention on hazardous substances. All Article 103 actions which impact trade, however, must conflict with NAFTA as little as possible. When a NAFTA-friendly option for eco-compliance is "equally effective and reasonably available," it must be implemented.

6. "Green" Provision #6: The Environmental Side Agreement

The "North American Agreement on Environmental Cooperation" gives some dull teeth to NAFTA's environmental provisions. This environmental "side agreement" was drafted by the Clinton Administration after environmental groups, including the National Wildlife Federation, the Audubon Society, and the Environmental Defense Fund, threatened to lobby against NAFTA unless a trilateral commission were created to enforce eco-cooperation between Canada, the United States, and Mexico, and to ensure

\[\text{Ludwiszewski, supra note 74.}\]
\[\text{NAFTA, supra note 6, at art. 103.}\]
\[\text{Basel Convention on the Control of Transboundary Movement of Hazardous Waste and Their Disposal, Mar. 22, 1989, 28 I.L.M. 657. Raymond Ludwiszewski notes, "It is noteworthy that the Basel Convention is listed in the NAFTA, but the United States has not yet formally ratified this international agreement." Ludwiszewski, supra note 74.}\]
\[\text{NAFTA, supra note 6, at art. 104(1).}\]
that environmental standards were not sacrificed to lubricate the flow of trade.\footnote{Lynn L. Bergeson, \textit{Environmental Side Agreement Has At Least One Big Loophole}, \textit{Corp. Legal Times}, Dec. 1993, at 28. During the 1992 Presidential campaign, candidate Bill Clinton opposed NAFTA in the form it was signed by President Bush, but conceded that he "would support it if certain conditions were met." \textit{Both Sides With Jesse Jackson} (CNN television broadcast, Sept. 4, 1993). After drafting environmental side agreements and another agreement on labor issues, Clinton argued that \begin{quote}Those conditions have been met as far as our agreements with the Mexicans. ... [W]e're going to have the first trade agreement in history that's got strong environmental requirements and that has Mexico committing to raise its minimum wage as its economy grows. So that—these are very encouraging and very different things.\end{quote} \textit{Id.}}\footnote{Id. at art. 45(1)(b).} The side agreement contains positive, if lukewarm, language affirming the right of each signatory to impose stronger environmental regulations than its trading partners:

\begin{quote}Recognizing the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental laws and regulations, each Party shall ensure that its laws and regulations provide for high levels of environmental protection and shall strive to improve those laws and regulations.\footnote{Ward interview, \textit{supra} note 13.} \end{quote}

The requirement that each party establish and enforce "high levels" of environmental protection is patently flimsy. The side agreement also contains a provision that any environmental regulation can be overruled by "bona fide decisions to allocate resources" to other environmental concerns with "higher priorities."\footnote{\textit{Id.} at art. 45(1)(b).} This seems to grant a great deal of discretion to each government to determine appropriate priorities. However, the NRDC's Justin Ward suggests that "[t]here is nothing to indicate that [Mexico is] walking away from the side agreement."\footnote{\textit{Id.} note 109, at art. 3.} Ward contrasts this with the "labor side agreement\footnote{North American Agreement on Labor Cooperation Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States, 10 \textit{Int'l Trade Rep.} (BNA) 1547 (Sept. 15, 1993) [hereinafter Labor Side} negotiated concurrently with the
environmental side agreement, claiming that Mexico has been "foot-dragging" on implementing those provisions. This hopeful note is a common theme among environmental observers. Washington environmental attorney Lynn Bergeson, for example, worries that "the modest gains represented by the side agreement may not be an adequate quid pro quo for the potential threat to the environment posed by relaxed trade regulations," but nonetheless suggests that the side agreement "plainly makes NAFTA the 'Green'est trade agreement ever... considered for U.S. ratification."  

B. NAFTA's Unheralded Eco-Dumping Provisions

"Adequate" quid pro quo or not, NAFTA does provide the basis for an environmentally sound trade regime in North America. Most observers seem to believe that the chapter on standards-related measures is the centerpiece of NAFTA's environmental "muscle." This is an inherently egocentric notion because it suggests that free trade's greatest danger is the threat it poses to U.S. environmental standards. Of far greater concern is the danger that a developing nation like Mexico will opt to become a giant maquiladora, trading the health and environment of its poorest citizens for economic growth. This danger has a possible remedy in NAFTA Chapters 11 and 19. 

1. NAFTA Chapter 11: Environmental Investment

NAFTA's most truly significant environmental provision is contained in Article 1114(2), which explicitly forbids the creation of such a "pollution haven" to fuel investment:

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

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115 Ward interview, supra note 13. These provisions mandate the creation of a trilateral Commission for Labor Cooperation to monitor the enforcement of labor laws within each country. Each party must give "due consideration" to a demand by an employer or employee for an investigation of unfair labor practices. Labor Side Agreement, supra note 114, at arts. 2-3.

116 Bergeson, supra note 110, at 28.

117 See Ludwiszewski, supra note 74.
derogate from, such measures as an encouragement for the establishment, acquisition, expansion, or retention in its territory of an investment of such an investor.\textsuperscript{118}

This chapter formally discourages each government from lowering its own environmental standards to increase investment. If the provision is taken seriously, it will ensure that NAFTA's environmental measures will take precedence over its free trade measures.\textsuperscript{119} If good fences truly make good neighbors, then this provision should keep neighborhood harmony at a premium, as U.S. industry will have fewer incentives to ship polluting industries south of the border.

This investment provision seems to promote the "polluter pays principle" (PPP), which means that

\begin{quote}
[T]he polluter should bear the expenses of carrying out the . . . measures decided by public authorities to ensure that the environment is in an acceptable state. In other words, the cost of these measures should be reflected in the cost of goods and services which cause pollution in production and/or consumption.\textsuperscript{120}
\end{quote}

The PPP philosophy was formulated by the Organization for Economic Co-operation and Development (OECD) as a fundamental tenet of sustainable production.\textsuperscript{121}

2. NAFTA Chapter 19: Antidumping and Countervailing Duties

NAFTA allows each party to apply its own antidumping and countervailing duty laws to goods traded among the three nations.\textsuperscript{122} A countervailing duty is a tariff that is imposed to eliminate the cost advantage gained by a subsidy.\textsuperscript{123} If NAFTA has serious environmental "muscle," it can be found

\begin{footnotes}
\item[118] NAFTA, supra note 6, at art. 1114(2).
\item[119] Emerson & Collinge, supra note 95, at 55.
\item[121] Id.
\item[122] NAFTA, supra note 6, at art. 1902(1).
\item[123] See McPherson, supra note 12, at 50.
\end{footnotes}
in the unsung provisions of Chapter 19. NAFTA Chapters 11 and 19, read in tandem, suggest that countervailing duties may be levied in response to eco-dumping. A countervailing eco-tariff would be imposed when a producer prices its export goods more cheaply than their true production cost because the environmental costs of production have been internalized by the corporation, the community, or the nation of production. Internalization of environmental costs is disastrous not only for the environment of that region, but for the environment of that nation’s trading partners. The targeted nation’s producers are unable to adopt ecologically sound (and expensive) new technology, and yet stay competitive.\(^{124}\)

One serious problem exists if Chapter 19 is to be used to justify imposition of eco-tariffs: the chapter explicitly states that it is pre-empted by GATT in any contradicting details.\(^{125}\) The GATT Uruguay Round Agreement prohibits all unilateral actions taken against an unfair trade practice of another nation.\(^{126}\) This means that eco-tariffs are not currently permitted and this valuable tool for environmental protection created by NAFTA has been been eviscerated.

C. Eco-Dumping under the Proposed WTO

1. *The History and Structure of the GATT*

The current GATT was intended to be a temporary agreement. It was devised by U.S. and British diplomats as an adjunct to the Marshall Plan, which was formulated to rebuild Europe’s devastated economies after World War II.


\(^{125}\) "Each Party reserves the right to change or modify its antidumping law . . . provided that . . . such amendment . . . is not inconsistent with . . . the General Agreement on Tariffs and Trade." NAFTA, *supra* note 6, at art. 1902(1).

War II.\textsuperscript{127} The post-war economic system was to be sustained by three organizations: the World Bank, financing development in developing countries and rebuilding war-torn Europe; the International Monetary Fund (IMF), promoting currency stabilization; and an International Trade Organization (ITO), regulating trade borders. The GATT, nothing more than an agreement on tariffs and trade, was meant to become a part of the ITO, but ratification of the ITO was blocked by U.S. Senate conservatives and was never established.\textsuperscript{128} The GATT has remained, somewhat precariously, for almost half a century. It is not a treaty. Rather, it is a contract between its signatories, requiring consensus of all members to make decisions and to carry them out.\textsuperscript{129}

On December 15, 1993, the Trade Negotiations Committee of the GATT Uruguay Round concluded seven years of debate by adopting the Round's Final Act by consensus.\textsuperscript{130} The Uruguay Round was ratified by the U.S. Senate on December 1, 1994. The Uruguay Round is a startling departure from the GATT. It provides for the creation of a World Trade Organization to monitor and regulate global trade among its signatories.\textsuperscript{131} The WTO will have a "legal personality" similar to the United Nations and will have broad powers to ensure compliance with its provisions.\textsuperscript{132}

WTO members must cede a significant portion of their sovereignty over domestic trade law. The Final Act states, "Each Member shall ensure the conformity of its laws, regulations, and administrative procedures with its obligations as provided [by the WTO] agreements."\textsuperscript{133} Consequently, any U.S. law that does not conform with the WTO could be branded an illegal restraint on trade. The WTO prohibits all unilateral actions taken against another nation's unfair trade practice.\textsuperscript{134} If the United States wished to


\textsuperscript{128} \textit{Id.} at 2.


\textsuperscript{130} \textit{The WTO is born}, supra note 16, at 1.

\textsuperscript{131} Final Act, supra note 126, at art. III.

\textsuperscript{132} \textit{Id.} at art. VIII.

\textsuperscript{133} \textit{Id.} at art. XVI(4).

\textsuperscript{134} Specifically, a member nation may "not make a determination to the effect that a violation has occurred . . . except through recourse to dispute settlement in accordance with the rules and proceedings of this Understanding. . . ." \textit{Dispute Understanding, supra} note
protest an environmental subsidy such as creation of a "pollution haven," it would submit the dispute to the WTO Dispute Settlement Board.\textsuperscript{135} A dispute settlement panel would be appointed of expert judges from non-disputing nations.\textsuperscript{136} WTO courts will be secretive and confidential, far different from public U.S. courts.\textsuperscript{137} WTO findings will be "unconditionally" binding on the disputing parties; and although there is one appeal of right on issues of law, all appellate decisions are final unless rejected by all members of the WTO.\textsuperscript{138} Congress would have only two options: change the offending U.S. law, or pay compensatory trade sanctions.\textsuperscript{139}

The serious problem with this provision is that the balance of power in the WTO is held by developing nations, which are generally hostile to unilateral environmental trade actions such as eco-tariffs.\textsuperscript{140} Voting in the WTO is by "one nation, one vote,"\textsuperscript{141} not consensus as under the old GATT. Developing nations will hold eighty-three percent of the votes in the WTO.\textsuperscript{142} More than seventy-five percent of WTO members (each a developing nation) voted against the United States on over half of all votes taken in the United Nations in 1993.\textsuperscript{143}

\begin{itemize}
  \item \textsuperscript{135} Id. at art. 1.
  \item \textsuperscript{136} Id.
  \item \textsuperscript{137} Id. at art. 14.
  \item \textsuperscript{138} Id. at art. 17.14.
  \item \textsuperscript{139} Id. at art. 22.2.
  \item \textsuperscript{140} Weiss, supra note 17, at 733.
  \item \textsuperscript{141} Final Act, supra note 126, at art IX(1). The Final Act makes a weak attempt to pay homage to the virtues of consensus decision-making, stating,
    \begin{quote}
      The [WTO] shall continue the practice of decision-making by consensus followed under the GATT 1947. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. At meetings of the ... General Council, each Member of the [WTO] shall have one vote.
    \end{quote}
    \textit{Id.} This provision violates common sense. "Consensus" decision-making means that all parties must be satisfied with a result before action is taken. If a vote may be taken when consensus cannot be achieved, then \textit{every} action taken is actually legitimated by majority rule, which is far different than consensus.
  \item \textsuperscript{142} Choate pamphlet, supra note 127, at 8.
  \item \textsuperscript{143} Id.
\end{itemize}
2. The Threat Posed by the WTO to Environmental Protection

The WTO is a no-nonsense trade agreement and contains few provisions for environmental protection. Unlike NAFTA, "the WTO is not a 'green' treaty." Consider food safety laws. NAFTA permits the United States to continue regulating food. The EPA and the Food and Drug Administration have virtually unfettered discretion to use scientific data to limit chemical residues in agricultural products. This will now change. Under the WTO, harmonized food safety standards will be set by the Codex Alimentarius Commission ("Codex") in Rome, an obscure organization with much looser pesticide standards than the United States. Codex has set health "tolerances" for 3,285 pesticides, and 1,787 of them allow more pesticide residue than permitted by the EPA.

In April 1994, the European Union (E.U.) challenged U.S. food safety standards that it anticipates will be adjudged unfair restraints on trade under the WTO. The European Union wants the United States to eliminate, among other things:

- The new food labels describing nutritional contents of groceries that began appearing on shelves in 1994.
- Limits on lead concentrations in ceramics and wine.
- The U.S. Delaney Clause on carcinogenic pesticides, establishing an "absolute risk" requirement that prevents the FDA from approving even negligible levels of carcinogens on food for sale.

144 Telephone interview with Gabriela Boyer, Public Citizen (Sept. 8, 1994).
145 NAFTA, supra note 6, at art. 906(2).
147 Id.
149 Id. at 581.
150 Id. at 77.
152 E.C. Report, supra note 148, at 77.
California's Safe Drinking Water and Toxic Enforcement Act, which, among other provisions designed to protect the public from exposure to toxic chemicals, requires labels for cancer-causing substances in products for sale.

Finally, the European Union suggests that American federalism itself is a "structural impediment" to trade because it allows individual states to set their own health and safety standards. NAFTA has shown that free trade and environmental protection are not incompatible goals within the same international agreement. But untempered by "green" provisions, the new WTO poses a serious threat to the global environment because it gives license to developing nations to attract investment through environmental subsidies.

III. ANALYSIS

A. Theory and Critique of the Use of Eco-Tariffs

Vice President Al Gore has suggested that "[j]ust as government subsidies of a particular industry are sometimes considered unfair under the trade laws, weak and ineffectual enforcement of pollution control measures should also be included in the definition of unfair trading practices." The U.S. law

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154 E.C. Report, supra note 148, at 56.

155 AL GORE, JR., EARTH IN THE BALANCE: ECOLOGY AND THE HUMAN SPIRIT 343 (1992). Gore is cautiously supportive of the Uruguay Round. Nonetheless, in April 1994, he delivered a controversial speech in Marrakesh, Morocco in which he warned of the environmental danger posed by the WTO:

[N]on-compliance with environmental standards is not an acceptable way to stimulate growth. We must not damage the regenerative capacity of our ecosystems in the interests of expanded trade, or sacrifice valuable biological diversity for short term economic growth. . . . As the world moves to resolve environmental problems and strengthen environmental protection, the corresponding trade implications will have to be discussed openly in the World Trade Organization, as well as other fora.

Vice President Al Gore, address at the meeting of the GATT Plenary Committee 5, 6 (April 14, 1994) (transcript available from the White House Press Office).
regulating unfair trading practices is the Trade Agreements Act of 1979. The Act allows the Commerce Department and the International Trade Commission to label a foreign industry as dumping if the sale of its products below fair market value threatens to cause material injury to the corresponding domestic industry.

Legislating an eco-dumping law would turn this old trade practice on its head. While traditional dumping law is concerned with injury to U.S. producers, eco-dumping tariffs are principally a response to environmental degradation in other nations. Admittedly, this raises serious sovereignty concerns as a "process-based," and not a "product-based" regulation. While a product-based regulation controls importation of a product dangerous in itself, a process-based regulation controls a perfectly innocuous product because of an objection to its method of production. Understanding this distinction is crucial. Pollution havens create a process-based objection. True, the maquiladoras cause air and water pollution that crosses the U.S.-Mexican border. But the main concern raised by weak environmental standards is that such development is unsustainable. Development has intergenerational implications. When a developing nation fuels short-term development by employing an eco-subsidy, it is sacrificing long-term

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157 Id.
160 Consider a hypothetical example—the importation of Mexican jumping beans:

Product-based regulation: Suppose that the U.S. Congress acted to prohibit the sale or importation of Mexican jumping beans cultivated using carcinogenic pesticides prohibited by U.S. law. This prohibition would raise no free trade concerns because it regulates a safety and health aspect of the good itself. As long as the United States does not discriminate in its prohibition (for example, welcoming Canadian jumping beans laden with the same pesticides), no serious sovereignty question is raised.

Process-based regulation: Instead, imagine that Mexican jumping beans are not hazardous in any way. However, the vast greenhouses in which the jumping beans are raised create an extremely toxic effluent which is discharged into a local river. The process used to create this benign product is repugnant, because it internalizes a cost of production by endangering the health of downstream residents. The importing country contributes to this industrial violence by making it profitable.
development as resources are depleted and fouled, the health of workers and their children is jeopardized, and the attraction of "dirty" industry creates a cycle of pollution as non-polluting industries shy away from toxic communities.

Opponents of eco-tariffs (particularly developing nations themselves) call this "eco-imperialism". Any unilateral environmental police action by a powerful industrialized nation against a developing nation (outside of any international agreement) is bound to be criticized as hypocritical and arbitrary. After all, the United States became a mighty industrial power by exploiting its resources. President Dwight D. Eisenhower spoke with pride about America's industrial pre-eminence in 1956: "I have seen the smoky fury of our factories—rising to the skies." Yet the United States in the 1950s was largely unaware of the ecological effects of industry. To a great extent, U.S. environmental law has kept pace with scientific discoveries. The discovery of a hole in the ozone layer over Antarctica in 1985 resulted in the signing of the Montreal Protocol on Substances that Deplete the Ozone Layer within two years.

Richard Benedick, the chief U.S. negotiator of the Montreal Protocol, recounts how the United States sprang into action in response to the ozone discovery:

The U.S. government set the example by being the first [nation] to take regulatory action against the suspect chemicals. [It] ... tenaciously campaigned for its international acceptance [of the Montreal Protocol] through bilateral and multilateral initiatives. The staff of the U.S. Environmental

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161 After a decade of rapid industrialization in maquiladora border communities, greatly increased rates of rare and fatal birth defects such as anencephaly (brain deformity) are being reported. Joel Simon, Dirty Work, 13-Feb. CAL. LAW. 40 (1993).

162 The economic principle of "Gresham's law" ("bad money drives out good") is frequently invoked to describe this phenomenon. When one firm relocates to a pollution haven to take advantage of an eco-subsidy, its competitors have an incentive to follow suit, in order to remain competitive. For example, at least eleven Los Angeles wood furniture manufacturers, facing increased air pollution costs due to their high-volume use of paint and solvents, followed each other to Mexico between 1988 and 1990. U.S. General Accounting Office, U.S.-Mexico Trade: Some U.S. Wood Furniture Firms Relocated from Los Angeles Area to Mexico 3, GAO/NSIAD-91-191, April 1991.

163 Weiss, supra note 17, at 732.


165 See Montreal Protocol, supra note 106.
Protection Agency (EPA) labored tirelessly to develop volumes of analyses on all aspects of the problem . . . .166

During the 1980s, as the U.S. automakers General Motors, Ford, and Chrysler began to lose their global hegemony to foreign imports, the effect on employment in Michigan, Ohio, and other states was devastating.167 The United States could have protected those jobs by lowering pollution standards for the auto industry.168 That it did not perhaps suggests that the nation was conscious that prosperity cannot be artificially maintained at the cost of the environment.169

Perhaps more convincingly, developing nations do not currently have unfettered sovereignty to exploit their resources in an unsustainable way. NAFTA itself restricts trade development to “a manner consistent with environmental protection and conservation.”170 Consider also the Stockholm Declaration on the Human Environment of 1972,171 which declares that nations must prevent domestic activities from causing environmental degradation outside their territory, as well as the less bold but still significant Rio Declaration on Environment and Development.172

166 RICHARD ELLIOT BENEDICK, Ozone Diplomacy 5-7 (1991).
169 This forbearance has paid off. 1994 has been a record-breaking year for Detroit. This success was won by producing better cars, not by internalizing environmental costs.
170 NAFTA, supra note 6, preamble.
171 Stockholm Declaration of the United Nations Conference on the Human Environment, Principle 21, June 16, 1972, U.N. Doc. A/CONF.48/14 and Corr. 1, at 3-5 (1972), reprinted in 11 I.L.M. 1416 (1972) [hereinafter Stockholm Declaration]. The Stockholm Declaration, while nonbinding, articulated the imperative of sustainability far more boldly than any current international agreement: “All countries agree that uniform environmental standards should not be expected to be applied universally by all countries with respect to given industrial processes or products except in those cases where environmental disruption may constitute a concern to other countries.” Id. at Recommendation 103(e) (emphasis added).
The WTO must not be allowed to commence its work without added environmental protections. Yet, the concerns of third-world nations for their sovereignty are valid. Opposition will block any environmental reform of the WTO unless those nations' concerns are adequately addressed. As the NRDC's Justin Ward suggests, "It is clear that the developing nations are viscerally opposed because they see it as a sneaky attempt to keep them in poverty by using environmental standards." Both the sovereignty issue and environmental concerns must be at the heart of any proposal for a "green round" of GATT negotiations.

B. Reforming the WTO to Allow Imposition of Eco-Tariffs

It is unknown what priorities the new Republican majority in Congress hold towards the WTO. The support of incoming House Speaker Newt Gingrich and Senate Majority Leader Bob Dole were crucial to ratification of the Uruguay Round. Moreover, many Republican members of Congress are hostile towards environmental restraints on trade. The new Majority, however, should take a close look at legislation proposed by former House Majority Leader Richard Gephardt. Gephardt has proposed "Blue and Green 301" legislation ("Blue" for blue-collar labor and "Green" for the environment) modeled on Section 301 of the U.S. trade law to "allow a stronger U.S. response to inadequate pollution control." The present Section 301 has been used to impose sanctions against foreign markets perceived by the United States as being unfairly protectionistic. A "Blue and Green 301" would recognize that environmental and labor subsidies are unacceptable trade practices, even though process-based. It would recognize the great power of the U.S. market to leverage social change around the world.

Like a sledgehammer, though, a market is a blunt tool to create change. Unilateral action by the United States against third world nations seems inherently paternalistic. This perception will create even more North-South resentment, a prospect which dampens any hope for sustainable global

\[\text{173} \text{ Ward interview, supra note 13.}\]
\[\text{174} \text{ The Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. §§ 2411-2487 (1988 & Supp. 1990). Feared by other countries, Section 301 empowers the United States Trade Representative to impose crushing tariffs on countries in violation of "fair" trade practices. Id.}\]
economic growth. Further, the U.S. Senate is likely to act in a markedly more isolationist manner under Republican control. Passage of “Blue and Green 301” is now very unlikely.

The solution will not come from Congress. A multilateral forum is required to impose eco-tariffs on products manufactured under an environmental subsidy. This forum need not be created from scratch, because an appropriate organization is about to be born: the WTO itself. There is no reason that the WTO must be a counter-environmental organization. Three specific changes would make this powerful new organization into a vehicle for sustainable global trade and environmental protection:

1. Amend the GATT subsidy code, defining eco-dumping as an unfair trading practice.
2. Eliminate the confidentiality provisions of the dispute resolution procedures. This will create a climate of moral accountability for votes cast on eco-dumping complaints.
3. Adopt an environmental standards chapter similar to NAFTA’s. This will prohibit downward harmonization of environmental standards, and will slowly ratchet up standards in developing nations as their economies grow as a result of the freer trade.

It seems unlikely that the new Republican majority in Congress will have any desire to reform the WTO to address concerns of global environmental sustainability. Yet, the desperate conditions along the U.S.-Mexico border should be horrifying enough to convince even the most ardent free trader of the necessity of preventing pollution havens.

IV. CONCLUSION

In the earliest example of industrial land-use planning, the Bible recounts that when Adam was granted the Garden of Eden, he was commanded “to work it and take care of it.” This ancient notion of development tempered with stewardship lies at the heart of NAFTA: it is a strong framework for free trade, imbued with an strong environmental ethic. This ethic is repudiated by the WTO, which subscribes to a philosophy of

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176 See NAFTA, supra note 6, at ch. 9.
177 Genesis 2:15.
development at any cost. Unsustainable development is unconscionable in a generation that has seen the horrors wreaked by untempered industrialization: Chernobyl,\textsuperscript{178} the Exxon Valdez oil spill,\textsuperscript{179} the chemical tragedy at Bhopal,\textsuperscript{180} and increasingly, the U.S.-Mexico border area. The WTO will inevitably spur the creation of more pollution havens unless sustainability provisions such as multilaterally imposed eco-tariffs are adopted. It requires supermajority voting by all WTO members to amend WTO rules.\textsuperscript{181} It will thus require a strong showing of diplomatic resolve to convince the world community to allow eco-tariffs. The consequences for failure to do so, however, are very grave indeed. The WTO is a new organization, and cannot yet use "but we've always done it this way . . ." as an excuse to resist change. The best opportunity to act is now.

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\textsuperscript{181} Final Act, \textit{supra} note 126, at art. X.