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Stop Biting the Hand That Feeds Us: Safeguarding Sustainable Development Through the Application of NEPA's Environmental Impact Statement to International Trade Agreements

Jose A. Egurbide

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"I look forward to the day when trade agreements are routinely matched by closer environmental cooperation."[1]

I. INTRODUCTION

In the past half century, global levels of industrialization, economic expansion, fossil fuel consumption and population have increased dramatically.[2] These exponential growth patterns, experienced mainly by the world's industrialized nations, were capitalized by the often reckless exploitation of natural resources worldwide.[3] Many such resources were, or are, on the verge of being irreparably damaged in the process due to lack of management, planning and technology.[4] The current ratio of cut to planted trees, at ten to one in the tropics and twenty-nine to one in Africa, illustrates the threatening rate at which we are consuming our

1. George Bush, The White House, (Jan. 1993), *reprinted in* 23rd Annual Report on the Council of Environmental Quality 52 (1993) [hereinafter 23rd Annual Report]. *But see* George Bush, Address Before a Joint Session of the Congress on the State of the Union (Jan. 28, 1992) (calling for less domestic regulation).

2. *See* Jim MacNeill, *Strategies for Sustainable Economic Development: Balancing Economic Growth and Ecological Capital*, SCI. AM., Sept. 1989, at 154 (emphasizing that economic development is negatively affected when the natural resources that capitalize it are not replenished); *see also* Alan L. Button, *Prerequisite to Peace: An International Environmental Ethos*, 59 TENN. L. REV. 681 (1992) (warning that failure to sustain development results in political instability, which in turn threatens world peace).

3. United States economic policies, for example, have traditionally favored increased production of goods and GNP growth "at the expense of an eroding environment." Mobil Oil Corp. v. FTC, 430 F. Supp. 855, 868 (1977).

4. *See* McNeill, *supra* note 2, at 154. Poor resource planning and management can have dire consequences for even the mightiest countries, forcing them to reshape their relations with other countries, and ultimately affecting national defense, the trade deficit, and the competitiveness of other domestic industries. *See, e.g.*, David Hricik, *The United States Copper Industry in the World Market: Running Hard Yet Losing Ground*, 8 J. INTL. L. BUS. 686 (1988) (discussing the broad effects resulting from the United States' failure to establish a national copper policy).

environmental resources.[5] As a result of decades of careless development practices, our generation is now confronted with the reality of irreversible environmental damage.[6]

The damage already caused has affected our global commons to such a degree that it can no longer be ignored or unilaterally remedied.[7] At the same time, the concept of free trade continues to spread throughout the world, expanding existing markets, creating new ones, and, as a corollary, placing greater demands on environmental resources than ever before.[8] Such demands cannot possibly be met without changing the way we plan for and manage the life-support system common to every socioeconomic infrastructure: our environment.[9] Simply, current development trends will soon be unsustainable unless nations begin cooperating to mitigate the damage caused by such development through environmental impact assessments, resource restoration and environmental rehabilitation programs.[10]

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5. *See* McNeill, *supra* note 2, at 154; *see also* Peter Bunyard, *World Climate and Tropical Forest Destruction*, 15 ECOLOGIST 125-26 (1985) (quoting Prime Minister of France, Laurent Fabius, as stating that "[d]eforestation today is drought tomorrow and famine the day after").

6. Russell E. Train, *A Call For Sustainability: To Ensure Our Future Survival, Major Changes Are Needed Now*, EPA J., Sept.-Oct. 1992, at 7 (suggesting that estimated growth levels of economic activity in the United States and projected global population over the next half-decade could be environmentally and economically disastrous unless we take proper action immediately).

7. Obviously, local or regional actions cannot address problems like global warming alone. *But see* Joaquim Oliveira-Martins et al., *The Economic Costs of Reducing CO_2 Emissions*, in OCED ECONOMIC STUDIES 123 OCED No. 19 (1992) (arguing that even unilateral or regional action is still better than "business as usual"). The basic problem with unilateral environmental policy-making is that it can be misinterpreted as a non-tariff trade barrier (NTB). *See infra* notes 94-105 and accompanying text (discussing the GATT's treatment of NTBs).

8. The destructive effect of current trade policies is obscured by an inherent flaw in the internationally accepted system of economic accounting, which measures countries' GNPs by "subtract[ing] the depreciation of plant and equipment from the overall output of goods and services" but fails to account for depreciation of natural capital, i.e. soil erosion, deforestation and ozone depletion. Lester R. Brown, *A New Era Unfolds*, CHALLENGE, May-June 1993, at 37-38.

9. *See, e.g., Capital Hill Hearing Before The Senate Energy and Natural Resources Committee* (May 24, 1994) (testimony of Robert T. Watson, Associate Director For Environment Office Science and Technology Policy) (presenting the potential adverse effects of global warming on precipitation patterns, human health, ecological systems, and socioeconomic sectors, and arguing for the development of new technologies). Since 1993, Dr. Watson has testified before various House and Senate committees on the serious magnitude and repercussions of the environmental problems. He testified recently on October 6, 1994 to the House Subcommittee on Energy and Power. *Capital Hill Hearing Before The Senate Energy and Natural Resources Committee* (Oct. 6, 1994) (testimony of Dr. Robert T. Watson, Associate Director For Environment Office Science and Technology Policy).

10. The environment's ability to sustain any given population depends on the size

Effective damage assessment must be made *before* potentially harmful activities are undertaken, particularly in disciplines that have broad environmental implications, such as international trade.[11] Unfortunately, trade negotiators, in general, traditionally ignore or exclude environmental concerns in the process of drafting international trade agreements.[12] But in today's global economy, the failure to incorporate environmental provisions in trade talks could mean that all will have to face the negative consequences, rich and poor nations alike.[13]

In order to protect its own future economic prosperity, the United States must develop policies that encourage less-developed nations, on which we rely for critical resources, to achieve economic growth in an environmentally-sound way.[14] This task must include a commitment to continued enforcement and expansion of existing methods of evaluating, planning, and approving actions that affect our environment.[15] It must include a renewed commitment to the National Environmental Policy Act of 1969 (NEPA).[16]

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of the population, its per capita consumption, and the damage caused by the technologies used to satisfy each unit of consumption. *See generally* Gretchen C. Daily & Paul R. Ehrlich, *Population, Sustainability, and Earth's Carrying Capacity*, 42 BIOSCIENCE 761 (1992).

11. Growing concern over the impact of international trade on the environment made this the central issue at the 1992 Earth Summit in Rio de Janeiro, Brazil. *See* Kenneth Berlin & Jeffrey M. Lang, *The New Trade Policy Agenda: Trade and the Environment*, 16 WASH. QTRLY. 35 (1993) (discussing the need to integrate trade and environmental policies in order to address the rapid depletion of renewable resources).

12. The best example of trade negotiators' apathy towards the environment are the current GATT environmental rules, which can be described as rudimentary, at best. *See infra* notes 88-92 (discussing GATT environmental measures).

13. *See supra* notes 4-10 and accompanying text.

14. Despite recent efforts at the Rio Conference to develop some type of comprehensive liability and compensation policy system to address global environmental problems, no such system exists today. *See Agenda 21: Program of Action For Sustainable Development*, Rio de Janeiro, U.N. Doc. A/CONF. 151/26 (1992) [hereinafter *Agenda 21*].

15. As previously discussed, unilateral measures in support of sustainable development can raise considerable concerns in the trade community. *See infra* notes 94-105 and accompanying text (discussing NTBs); *see also* Edith Brown Weiss, *Environment And Trade As Partners In Sustainable Development*, 86 AM. J. INT'L. L. 728 (1992) (affirming that unilateral environmental measures might potentially be viewed as eco-imperialistic practices). The United States can avoid this by entering into international agreements that adopt its standards and procedures, especially where sufficient international consensus exists over the benefits of implementing such measures. *Id.*

16. *See* Pub. L. No. 91-19042, codified at U.S.C. §§ 4321-4370a (1970). For a discus-

NEPA, signed into law in 1970, was the first significant environmental regulation enacted in the United States.[17] NEPA required all agencies of the federal government to take into account the environmental consequences of proposed or recommended actions by requiring prior preparation of an extensive report weighing the benefits of the project versus the risk of damage to the environment.[18] Today, most U.S. federal agencies incorporate NEPA's requirements into practice, and its concept continues to spread abroad.[19]

Ironically, while the European Community and other nations around the globe are busy developing guidelines and regulations modeled after NEPA, our environmental "Magna Carta," the Supreme Court, and the executive branch of the United States continue to undermine the Act's purpose by limiting its scope at home.[20] Congress intended the NEPA process to result in agency actions that were less damaging to the environment.[21] In fact, NEPA has made a significant contribution towards

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sion of the early stages of NEPA history, see generally FREDERICK R. ANDERSON & ROBERT H. DANIELS, NEPA IN THE COURTS (1973).

17. After NEPA, Congress launched a series of acts principally aimed at addressing pollution-related problems. *See* Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (1980); Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992 (1976); Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629 (1976); Safe Drinking Water Act, 42 U.S.C. §§ 300 et seq. (1974); Endangered Species Act, 16 U.S.C. §§ 1531 et seq. (1973); Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 135 et seq. (1972); Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1972); Clean Air Act, 42 U.S.C. §§ 7401-7642 (1970); *see also* Jennifer Woodward, *Turning Down the Heat: What United States Laws Can Do To Help Ease Global Warming*, 39 AM. U. L. REV. 203 (1989) (listing the 27 states that have either partially or completely adopted NEPA's federal requirements to state agency actions).

18. *See* 42 U.S.C. § 4332(2)(C) (1993).

19. *See* Arthur W. Murphy, *The National Environmental Policy Act and the Licensing Process: Environmentalist Magna Carta or Agency Coup de Grace?*, 72 COLUM. L. REV. 963 (1972) (describing NEPA as the most important environmental statute).

20. *See* Michael C. Blumm, *Introduction: The National Environmental Policy Act At Twenty: A Preface*, 20 ENVTL. LAW 447, 449-451 (1990) (arguing that the Supreme Court's deference to agency decisionmaking and its view of NEPA as essentially procedural are reasons for NEPA's waning reputation at home, even as other countries continue to adopt EIS legislation modeled after NEPA).

21. Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 772 (1983). The legislative intent behind NEPA is instantly clear upon review of the following statements by two of NEPA's original proponents:

> What is involved [in NEPA] is a congressional declaration that we do not intend, as a government or as a people, to initiate actions which endanger the continued existence or the health of *mankind*: That we will not intentionally initiate actions which do irreparable damage to the air, land and water which support *life on earth*.

115 Cong. Rec. 40416 (1969) (remarks of Sen. Jackson) (emphasis added).

improving our environment by encouraging federal agencies to implement NEPA's procedural requirements, resulting in less litigation and more environmentally-sound projects.[22] Notwithstanding NEPA's relative success, courts have misconstrued NEPA's broad directives during the past twenty-four years by ignoring its substantive provisions and purpose and narrowly interpreting its application.[23] Supreme Court jurisprudence reflects a particular lack of commitment to the Act by undermining the legislative intent that should courts apply NEPA substantively.[24] The Court's refusal to interpret NEPA substantively, combined with its equally restrictive view on standing under NEPA, results in a minimization of the Act's impact and "deprives the nation of the full reach of Congress's purpose in enacting the statute."[25]

The latest example of the judiciary's restrictive interpretation of NEPA began on August 1, 1991, when several non-profit environmental groups (Public Citizen) filed a lawsuit against the Office of the United States Trade Representative (OTR),[26] alleging that the OTR violated NEPA's procedural requirements by failing to provide an environmental impact

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> [We] can now move forward to preserve and enhance our air, aquatic, and terrestrial environments . . . to carry out the policies and goals set forth in the bill to provide each citizen of this great country a healthful environment.

Id. at 40924 (remarks of Rep. Dingell).

22. *See* SERGE TAYLOR, MAKING BUREAUCRACIES THINK: THE ENVIRONMENTAL IMPACT STATEMENT STRATEGY OF ADMINISTRATIVE REFORM (1984) (concluding that agency implementation of EIS requirement benefits actions by resulting in less expensive mitigation measures). The number of NEPA cases filed dropped from 189 in 1974 to 94 in 1991, while the number of environmental impact statements prepared by federal agencies increased. *See* COUNCIL ON ENVIRONMENTAL QUALITY, TWENTY-THIRD CEQ CUMULATIVE NEPA LITIGATION SURVEY (1992) [hereinafter CEQ Report].

23. *See generally* Nicholas C. Yost, *Nepa's Promise—Partially Fulfilled*, 20 ENVTL. L. 533 (1990).

24. *Id.* at 539-40.

25. *Id.* at 540; *see also* Annotation, *Environmental And Conservation Groups' Standing To Challenge Omission Or Adequacy Of Environmental Impact Statement Required by § 102(2)(C) Of National Environmental Policy Act of 1969 (42 USCS § 4332(2)(C))*, 63 A.L.R. Fed. 446 (1983 & Supp. 1994); Annotation, *Private Individual's Standing to Challenge Omission or Adequacy of Environmental Impact Statement Required by § 102(2)(C) Of National Environmental Policy Act of 1969 (42 USCS § 4332(2)(C))*, 62 A.L.R. FED. 337 (1983 & Supp. 1994).

26. "The Trade Representative is responsible for conducting international trade negotiations, developing and coordinating U.S. international trade policy, and imposing retaliatory trade sanctions on other countries." Public Citizen v. Office of the United States Trade Representative, 970 F.2d 916, 917 (D.C. Cir. 1992); 19 U.S.C. § 2171, 2411-2417 (1988).

statement (EIS) in connection with the ongoing North American Free Trade Agreement (NAFTA) negotiations.[27] The District Court granted defendant's motion to dismiss the action on grounds that plaintiffs failed to satisfy Article III standing or ripeness requirements.[28]

The United States Court of Appeals for the District of Columbia affirmed the district court's dismissal of the action, holding that the OTR's failure to prepare an EIS for NAFTA was *not* judicially reviewable because OTR's preparation and submission of NAFTA to the President was not a "final agency action" subject to NEPA's EIS requirement.[29] The court of appeals based its decision on the preliminary determination that the issue was not "judicially reviewable within the meaning of § 10(c) of the Administrative Procedure Act."[30] As a result, the court never reached the substantive issue of the case: whether NEPA's EIS requirement applies to international trade agreements.[31]

The purpose of this Comment is to challenge the legislature and judiciary to take action to apply NEPA's EIS requirement to international treaties and trade agreements. Part II examines the critical interdependency between the environment and development.[32] Part III critiques the lack of environmental provisions in the existing international trade structure.[33] In addition, Part III discusses the growing need to include such provisions in trade negotiations.[34] Part IV explores the language of existing international environmental agreements and their use of the environmental impact assessment concept in their attempt to ensure future "sustainable development."[35] Part V evaluates NEPA, its provisions, the

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27. Public Citizen v. Office of United States Trade Representative, 782 F. Supp. 139 (D.C. 1992).

28. *Id.* at 144. Article III of the Constitution requires demonstration of an injury in fact, traceable to the challenged action, and that a favorable determination is likely to redress the injury. *Id.* at 141 (quoting Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982)); Foundation on Economic Trends v. Lang, 943 F.2d 79, 82 (D.C. Cir. 1991). For a general discussion of a party's standing to sue for failure to prepare an EIS in accordance with NEPA, see Annotation, *Standing of Entity, Other Than Governmental or Environmental Entity, To Challenge Omission or Adequacy of Environmental Impact Statement Required by § 102(2)(C) Of National Environmental Policy Act of 1969 (42 USCS § 4332(2)(C))*, 61 A.L.R. FED. 657 (1983 & Supp. 1994).

29. *Public Citizen*, 970 F.2d at 923.

30. *Id.* at 917. The pertinent text of the Administrative Procedure Act can be found at 5 U.S.C. § 704.

31. *Id.* Interestingly, the court mentioned that notwithstanding the finality issue, it was unclear whether a broad macroeconomic change, such as a trade agreement, would trigger NEPA's EIS requirement. *Id.* at 921.

32. *See infra* notes 39-76 and accompanying text.

33. *See infra* notes 77-119 and accompanying text.

34. *See infra* notes 77-119 and accompanying text.

35. *See infra* notes 120-195 and accompanying text.

Council on Environmental Quality, and the role of the courts as primary, although seemingly reluctant, enforcers of NEPA's EIS requirement over the past twenty-four years.[36] Part VI argues for NEPA's application to trade activity, critiquing the recent court of appeals holding that executive agency proposals to the President on international trade agreements do not require preparation of an EIS.[37] Finally, this author suggests some changes that, if implemented, would encourage our administration to lead the international trade community toward sustainable development practices by negotiating trade agreements that are environmentally sound and promote long-term economic growth for our trading partners as well as for the United States.[38]

II. SUSTAINABLE DEVELOPMENT[39]

The threat of irreversible environmental damage has sparked a great deal of public and political concern in the international community over global warming, depletion of the ozone layer, desertification, deforestation, ocean contamination, and overpopulation.[40] Scientific data on the

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36. *See infra* notes 196-285 and accompanying text.

37. *See infra* notes 286-340 and accompanying text.

38. *See infra* part VII.

39. "Sustainable development" gained international notoriety when the internationally influential Bruntland Commission used the term in its 1987 report. *See* WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE (1987). According to the report, "A world in which poverty and inequity are endemic will always be prone to environmental and other crises. Sustainable development requires meeting the basic needs of all and extending to all the opportunity to satisfy their aspirations for a better life." *Id.* at 43-44. More specifically, "[s]ustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs." *Id.* at 44; *see also* Robert W. Hahn, *Toward a New Environmental Paradigm*, 102 YALE L.J. 1719, 1748-50 (1993) (reviewing ALBERT GORE, JR., EARTH IN THE BALANCE: ECOLOGY AND THE HUMAN SPIRIT (1992)).

40. *See Economic Declaration Issued By Group of Seven Industrial Nations At The Conclusion of Their Economic Summit in Houston on July 11 1990*, 7 INT'L TRADE REP. (BNA) No. 29, 1127 (July 18, 1990) [hereinafter *Economic Declaration*] (calling for closer international cooperation in order to combat ozone depletion, deforestation, ocean pollution and other environmental challenges). The United States, "transfixed" by the threat of Communism over the past several decades, is now beginning to recognize the possibility of irreversible environmental damage, such as the thinning ozone layer, as a threat to international security. Alice M. Rivlin, *New World, New Dangers*, WASH. POST., April 10, 1990, at A23. *See* Hricik, supra note 4. For a more in-depth discussion on the different environmental problems currently facing us, see generally GARETH PORTER, & JANET W. BROWN, GLOBAL ENVIRONMENTAL POLITICS (1991); AL GORE, EARTH IN THE BALANCE: ECOLOGY AND THE HUMAN SPIRIT (1992).

ozone problem alone indicates that "[s]ince 1967, the ozone layer over the equator has decreased by 3%, [and] over Europe and North America by 10%" and that "[e]ach 1% decrease can lead to a 3% to 6% increase in skin cancer."[41] The depletion of the ozone layer exacerbates another problem, global warming, which in addition to its potential for raising the sea level and wiping out entire island groups, could have dire medical consequences.[42]

The accuracy of scientific data regarding the actual effect of different environmental problems is an area of much controversy, as opposite sides present their own persuasive research.[43] While it is true that degrees of certainty and conclusiveness for different scientific data vary, governments should not use this fact alone to justify inaction.[44] The environmental problems the world faces may vary in degree, but they are real and simply too critical to ignore.[45]

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41. Donella Meadows, *New Ozone Accord Is One Giant Step For Mankind; Environment: Getting 93 Nations To Agree To Eliminate Chlorofluorocarbons Is A Near Political Miracle; On To The Greenhouse Effect*, L.A. TIMES, July 8, 1990, at M2.

42. *See Environmental Change Seen As Threat to Health*, GREENWIRE, Dec. 15, 1993 (interviewing Dr. Eric Chivian). Doctor Eric Chivian, a Nobel laureate psychiatry professor at Harvard Medical School, explains that data on global warming indicate that increased temperatures would result in higher mortality rates for the elderly and the chronically sick as well as more rampant spread of diseases typically carried by mosquitos and ticks. *See id. But see* Malcolm Ritter, *Arctic Temperatures Show Flaws in Global-Warming Projections, Study Says*, THE ASSOCIATED PRESS, Jan. 28, 1993.

43. *See, e.g.*, Janet Fairchild, Annotation, VALIDITY AND CONSTRUCTION OF STATUTES REGULATING STRIP MINING, 86 A.L.R. 3d 27 (1978 & Supp. 1994) (discussing the difficulty of attacking strip-mining regulation in light of the volumes of scientific data on the damages caused by the practice). On the international level, international scientific cooperation has yielded increasingly convincing evidence that is beginning to make its way to regulatory decision-makers. *Implications of the Findings of the Expedition to Investigate the Ozone Hole over the Antarctic: Joint Hearing on S. 385 Before the Subcomm. on Environmental Protection and the Subcomm. on Hazardous Wastes and Toxic Substances of the Senate Comm. on Environment and Public Works*, 100th Cong., 1st Sess. 11 (1987) (conclusively establishing a link between atmospheric chlorine accumulation and ozone-depletion); *see also* Peter H. Sand, *Lessons Learned In Global Environmental Governance*, 18 B. C. ENVTL. AFF. L. REV. 213, 214-16 (1991) (noting that the most recent ice-core data of carbon dioxide in Antarctica reveal a steep upward trend in the last few decades). The accumulation and review of expert data, like carbon dioxide findings in Antarctica, is critical in formulating a valid base for future governmental action. *Id.* at 214-17.

44. *See Economic Declaration*, *supra* note 40, 29 at 1127 (acknowledgment by leaders of the industrialized nations that the threat of irreversible environmental damage demands action regardless of "scientific certainty" of such damage and declaring responsibility for passing on a healthy environment to future generations).

45. *See* Joel Yellin, *Science, Technology, and Administrative Government: Institutional Designs for Environmental Decisionmaking*, 92 YALE L.J. 1300, 1315-17 (1983) (arguing that the judiciary "may properly reach a considered judgment that a court

A. Public Involvement: A Necessary Precursor to Political Action

Any commitment toward resolving global environmental problems must include public participation to ensure a fair process and to guarantee that risks to our environment have been eliminated or, at the very least, minimized.[46] The public's moral outrage over environmental disasters seems to function as a catalyst for change in the field of environmental law.[47] To that end, "[s]cientific data and the verification of the environmental theories they make possible must be accessible to the general public and disseminated widely to have a chance of political efficacy."[48] Government and industry are typically unwilling to pass costly environmental laws if left free from public political pressure.[49]

Public awareness of environmentally sensitive projects and their effect on the environment results in the mobilization of interest groups that in turn can pressure politicians into action, as was the case when President Bush moved toward restricting chlorofluorocarbon (CFC) emissions thought to be destroying the ozone layer.[50] Arguably, the studies and

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should, even unaided, take the inferential leap from scientific argument to legal conception," thereby sharing the responsibility for dealing with environmental problems traditionally assigned solely to administrative policymakers).

46. "Governments should collect and maintain full and accurate environmental information necessary for the formulation and implementation of environmental policy, and citizens and public officials should have appropriate access to such information." THE 1991 BELLAGIO CONFERENCE ON U.S.-U.S.S.R. ENVIRONMENTAL PROTECTION INSTITUTION: THE BELLAGIO DECLARATION ON THE ENVIRONMENT, 19 B. C. ENVTL. AFF. L. REV. 499, 499-500 (1992); *see also* Philip H. Meyers, Annotation, *Construction and Application of §§ 101-105 of National Environmental Policy Act of 1969 (42 USCS §§ 4331-4335) Requiring All Federal Agencies to Consider Environmental Factors in Their Planning and Decisionmaking*, 17 A.L.R. FED. 33, § 2(b) (setting forth the extent of the public's right to timely information regarding programs that significantly affect the environment).

47. *See* Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1217-19 (1977) (recognizing the public's moral outrage as a catalyst for environmental reform).

48. Alfred C. Aman, Jr., *The Earth As Eggshell Victim: A Global Perspective on Domestic Regulation*, 102 YALE L.J. 2107, 2115 (1993).

49. Traditional economic notions of risk-based analysis often lead government and industry to defer implementation of costly regulation geared toward resolving highly disputed future risks. For an excellent comparison of the risk-based, cool analysis versus the moral outrage approach, see Christopher H. Schroeder, *Cool Analysis Versus Moral Outrage In The Development Of Federal Environmental Criminal Law*, 35 WM. & MARY L. REV. 251 (1993).

50. *See Reconciliation Bill Likely To Include Environmental Taxes, Hill Aides Tell*

regulations passed by the Reagan and Bush administrations with respect to CFCs occurred because of public pressure and environmental groups' lobbying efforts.[51]

President Bush's agreement to restrict CFCs also preceded the United Nations' recognition of a growing international sentiment that immediate international cooperation was necessary to prevent further global environmental deterioration.[52] Before the 1992 World Environmental Conference in Rio de Janeiro, a United Nations negotiating committee suggested a proposal for reducing carbon dioxide emissions and other "heat-trapping" gases in an attempt to force the issue of global warming at the upcoming conference.[53]

Public pressure also played a large role in shaping international environmental policy in Europe, where the European Community (EC)[54] introduced new legal guidelines on environmental impact assessments.[55] The Single European Act of 1986[56] elevated environmental protection in Europe to constitutional levels by providing comprehensive environmen-

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ABA, 21 ENVTL. REP. (BNA) 152 (1990); Seth Cagin & Philip Dray, *Are the Greens Turning Yellow?* N.Y. TIMES, May 25, 1993, at A23; Michael Weisskopf, *Bush Offers Clean Air Compromise: Democrats Call Letter a Ploy to Insulate President from Critics*, WASH. POST, Sept. 27, 1990, at A14.

51. *See* Rita Beamish, *Bush Makes Election-Year Turnaround on Ozone-Depleting Chemicals*, THE ASSOC. PRESS, Feb. 12, 1992; *see also* Michael Weisskopf, *U.S. May Seek to Hasten Action to Protect Ozone; Signs of Atmospheric Damage Alarm Officials*, WASH. POST, Feb. 6, 1992, at A3 (noting the Bush administration's increasing attention to the CFC problem "only after initial resistance"). For an argument that the public and environmental organizations should be granted standing to enjoin federal actions if they are denied information about the environmental effects of such action, see generally Lawrence Gerschwer, Note, *Informational Standing Under Nepa: Justiciability And The Environmental Decisionmaking Process*, 93 COLUM. L. REV. 996 (1993) (defending informational standing to challenge agency actions under NEPA).

52. *See* William K. Stevens, *Compromise Offered at U.N. On Greenhouse Emissions*, N.Y. TIMES, May 2, 1992, at 3.

53. *Id.* The proposal was in response to grim scientific predictions that the temperature of the Earth's atmosphere will inevitably rise within the next century if the current emissions levels continue unchecked, resulting in catastrophic consequences to the global ecosystem. *Id.*; 1 UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, UNITED NATIONS ENVIRONMENT PROGRAMME, EFFECTS OF CHANGES IN STRATOSPHERIC OZONE AND GLOBAL CLIMATE 257 (J. Titus, ed. 1986) (providing an overview of the effects of global change on the planet).

54. *See generally* Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3 (1958), as amended by Single European Act, 1987 O.J. L 1969/1 (1987) [hereinafter EEC Treaty].

55. *See Analysis And Perspective: European Community Waste Policy: At The Brink Of a New Era.*, 14 INT'L ENVTL. REP. (BNA) 403 (July 17, 1991).

56. 1987 O.J. L 1969/1 (1987), reprinted in 25 INT'L LEGAL MATERIALS 506 (1986). *See also infra* notes 179-191 and accompanying text (discussing the European Community's approach to environmental problems).

tal policies that granted the EC power to "impose *binding* obligations on sovereign nation states."[57] This type of international environmental regulation is unprecedented. A more recent chapter in the Single European Act explicitly covers "environmental protection measures, such as air and water quality and assessment procedures for new industrial facilities."[58] This type of inter-governmental cooperation with respect to environmental concerns represents a workable model for implementation of environmental regulation by current NAFTA members.[59]

The EC's activities to protect the environment evince a trend in the Nineties toward a more environmentally conscious world in which government leaders, industry, employers, and investors are playing catch-up to the increasingly "green" demands of people everywhere.[60]

B. The Paradox Of Harmonizing Economic Development and Environmental Concerns

The increasing "green" demands for global and regional environmental solutions can no longer be met through unilateral action, but instead require international cooperation.[61] Such cooperation is difficult to achieve within the framework of current international trade schemes,

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57. George A. Bermann, *The Single European Act: A New Constitution for the Community?*, 27 COLUM. J. TRANSNAT'L L. 529 (1989) (discussing the Single European Act); *see also European Environmental Policy: Effects of the Single Market*, 16 INT'L ENVTL. REP. (BNA) 30 (Jan. 13, 1993) (listing the Single European Act of 1986, increased public pressure, and the emergence of environmental groups as reasons for the EC's more active role in passing environmental legislation).

58. *European Environmental Policy*, *supra* note 57, at 30; *see also infra* note 182 and accompanying text. The Single European Act provided major environmental procedures by amending the existing Treaty of Rome, the treaty establishing the European Economic Community. *See* EEC Treaty, *supra* note 54, pt. 1, art 3. For a more in-depth discussion of the Single European Act's environmental provisions, see Ludwig Kraemer, *The Single European Act and Environment Protection: Reflections on Several New Provisions in Community Law*, 24 COMMON MKT. L. REV. 659 (1987).

59. *See supra* notes 179-91 and accompanying text.

60. Peter A. A. Berle, *A Healthy Environment And A Healthy Economy Can Go Hand-in-Hand; How Green is Green?: International Environmental Groups Debate the Wisdom of Partnerships With Business*, INT'L ASS'N OF BUS. COMM., April 1992, at 27. "Against this 'green' consumer, employment, and investor background, it is clear that it is not a matter of if the world goes to a basis of environmentally sustainable economic development, it is a matter of when." *Id.*

61. *See supra* notes 40-42 and accompanying text.

particularly because wide economic gaps between industrialized and developing countries result in different outlooks and priorities with respect to environmental concerns.[62]

It is imperative that developing nations industrialize in order to sustain the needs of their growing populations and shoulder their share of responsibility for our global environment.[63] But for many developing countries, the need to industrialize is great while their budgets are small.[64] Some countries plainly lack the money necessary to study and assess environmental challenges and implement environmentally sound solutions.[65] Malaysia, for example, has no industry to speak of except timber, making it highly dependent on the exploitation of this resource.[66] In the absence of technological help from industrialized nations, Malaysia, and many nations like it, must choose between starving or logging.[67]

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62. *See* Cliff Haas, *Wellstone Raising His Voice On The Environment*, STAR TRIB., May 31, 1992, at 12A. Prior to his trip to Rio de Janeiro as a Senate observer at the Earth Summit, United States Senator Paul Wellstone stated that "other nations, especially in the Third World, are reluctant to sacrifice economical development for environmental purposes unless they see the United States demonstrate a willingness to do that." *Id.*

63. *See* MALCOLM N. SHAW, INTERNATIONAL LAW 531 (1991) (citing the developing countries' inability to pay for environmentally sound economic development as major challenge to the development of international environmental law).

64. *Id.*

65. Most developing countries' monetary problems are exacerbated by the accumulating interest on debts still owed to commercial banks since the 1970s. *See* Marilyn Post, Comment, *The Debt-for-Nature Swap: A Long-Term Investment for the Economic Stability of Less Developed Countries*, 24 INT'L. LAW 1071, 1072 (1990) (pointing to a 40% price increase by the Organization of Petroleum Exporting Countries (OPEC) as the principal reason for the current external debt crisis experienced by developing countries).

66. *See* D.S. Mahathir Mohamed, *Poor Nations Alone Can't Save The Environment*, THE HOUSTON CHRON., June 3, 1992, at A25. "Unfortunately, quick-fix solutions, such as clearing forests for farming, mining, and lumber, pillage tropical rainforests, wetlands, and grasslands, and produce emasculating effects on this ecologically vital corner of the world." *Id.* at 486; *see* Priya Alagiri, Comment, *Give Us Sovereignty Or Give Us Debt: Debtor Countries' Perspective On Debt-For-Nature Swaps*, 41 AM. U. L. REV. 485 (1992).

67. Creditor nations have begun implementing nature-for-debt swaps in an effort to discourage poorer nations from clear-cutting the few remaining tropical forests in the world. *See* The International Development in Finance Act of 1989 §§ 512, 521, Pub. L. No. 101-240, §§ 12, 521 *reprinted in* 1989 U.S.C.C.A.N. 2492; Moran, *Debt-for-Nature Swaps: U.S. Policy Issues and Options*, RENEWABLE RESOURCES J., Spring 1991, at 20-22; A. Dan Tarlock, *Environmental Law: The Role of Non-Governmental Organizations In The Development of International Environmental Law*, 68 CHI.-KENT. L. REV. 61, 74-75 (1992) (discussing non-governmental organizations' participation in the nature-for-debt swap process). Through these programs, some developing countries have been able to parlay the rest of the world's concern over precious shrinking resources into financial and technical assistance. *See* Alagiri, *supra* note 66, at 486-88.

This is not to say that developing countries do not care about the environment. However, they do not feel their forests should be locked up to help pay for the "ecological sins [of industrialized countries] committed on the[ir] road to prosperity."[68]

In the past, industrialized nations limited the scope of their environmental agendas to domestic policy-making.[69] This state of affairs is rapidly changing as industrialized nations realize that ignoring environmental degradation abroad could mean future destabilization of their own economic infrastructures.[70] But existing high-consumption societies, led by the United States, still demand a continuous supply of rapidly depleting global natural resources.[71] Considering the effects that trade liberalization, in terms of the strain that high-population countries like China will cause once they reach U.S. levels of consumption, can the earth keep up with such demands?[72] It is true that political choices to protect the global environment can mean short-term economic slowdown of industries that either pollute or are highly dependent upon natural resources.[73] Such hard choices are made even tougher when implementation could require changes in public consumption habits.[74] But if governments wait

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68. *See* Mohamed, *supra* note 66, at A25.

69. Under United States law, for example, it is well settled that domestic legislation will not be applied extra-territorially absent a clear legislative intent to do so. Congress' primary concern for actions within the territorial jurisdiction of the United States versus conduct abroad reflects the broad doctrine of territorial sovereignty. Julienne I. Adler, Comment, *United States' Waste Export Control Program: Burying Our Neighbors In Garbage*, 40 AM. U. L. REV. 885 (1991); *see also* U.N. CHARTER art. 2, ¶1 (setting forth the principle of sovereign equality).

70. *See supra* notes 9-11 and accompanying text.

71. The United States, representing 6% of the world's population, consumes 30% of the world's mineral production. G. Kevin Jones, *United States Dependence on Imports of Four Strategic and Critical Minerals: Implications and Policy Alternatives*, 15 B.C. L. REV. 217, 220 § 2 & n.21 (1988) (discussing mineral import dependency and vulnerability issues). The United States also consumes 25% of the world's energy and emits 22% of all carbon dioxide produced. Dr. Ranee Khooshie Lal Panjabi, *Can International Law Improve the Climate? An Analysis of the United Nations Framework Convention on Climate Change Signed at the Rio Summit in 1992*, 18 N.C. J. INT'L L. & COM. REG. 491, 509 (1993).

72. For an answer to this question that is a cautious yes, see generally MacNeill, *supra* note 2, at 154.

73. Furthermore, protection of global commons may encounter resistance from developing countries interested more in economic growth than environmental quality. Patrick Low, *Trade and the Environment: What Worries the Developing Countries?*, 23 ENVTL. L. 705, 706 (1992).

74. AL GORE, EARTH IN THE BALANCE 349-52 (1992) (describing several proposals to

until the scientific community can support their grim predictions with 100% accuracy, will it then be too late?

The seemingly paradoxical situation is that, while industrialization provides the monetary and technological resources necessary for implementation of costly environmental measures, it also increases the demand for shrinking natural resources and creates exceedingly high levels of worldwide pollution.[75] Ironically, industrialized nations are asking developing nations to achieve what they themselves failed to do: implement economic growth strategies that minimize adverse environmental effects. However, industrialized nations cannot continue their gluttonous consumption of global non-renewable resources, such as fossil fuel, and expect developing countries to forego industrialization.[76]

The challenge of harmonizing economic development with the environment calls not only for innovation and cooperation, but for a reassessment of existing international structures that disregard the inescapable conclusion that economic development and the environment are inextricably linked together.

III. THE GATT

The General Agreement on Tariffs and Trade (GATT)[77] governs international trade among nations.[78] Founded after World War II, in 1947, the

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combat pollution and other environmental evils).

75. On one hand, "the pursuit of high rates of economic growth may, depending on the economic characteristics of the economy, cause faster-than-sustainable rates of depletion of natural resources and increased water emissions and energy use - a key factor underlying air pollution. On the other hand, rapid economic growth can generate the resources by which a government can finance environmental protection policies." Kenneth Miranda & Timothy R. Muzondo, *Governments Must Consider the Possible Impacts of Their Environmental Policies on Key Macroeconomic Balances*, 28 FIN. & DEV. 2, 25 (1991).

76. 135 CONG. REC. H6836 (daily ed. Oct. 10, 1989) (statement of Rep. Studds). Comments by Congressmen that "leadership must begin at home" underline their observations that the United States is by far "the world's largest generator of the emissions that cause global warming . . . the largest user of the CFC's that deplete the layer's ozone" and "the world's largest consumer of fossil fuels." *Id.*

77. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 [hereinafter GATT]. For a history of GATT, see S. GOLT, THE GATT NEGOTIATIONS 1986-90: ORIGINS, ISSUES, AND PROSPECTS (1988); ROBERT E. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY (2nd. ed. 1990).

78. For general background information on GATT, see KENNETH W. ABBOTT, BASIC DOCUMENTS OF INTERNATIONAL ECONOMIC LAW, THE GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT), 1 B.D.I.E.L. 3 (1990) *available in* LEXIS, INTLAW Library, BDIEH file; REINHARD RODE, GATT AND CONFLICT MANAGEMENT: A TRANSATLANTIC STRATEGY FOR A STRONGER REGIME (1990) (criticizing GATT members as "egocentric actors" and arguing that new solutions involving the three developing trade blocks (North America, Europe, and Asia) are imperative in order to preserve free trade); JOHN H. JACK-

Protocol of Provisional Application of the General Agreement on Tariffs and Trade was originally part of a more ambitious project: the formation of the International Trade Organization (ITO).[79] ITO's role would have been the economic equivalent to the United Nations Security Council, as enforcer of the GATT rules, but disagreement among the member nations prevented the formation of the organization, leaving GATT disputes to be arbitrated by dispute panels that have no power to enforce their decisions.[80]

It has been suggested that the modern formation of an ITO-like Multilateral Trade Organization (MTO) "might be better equipped than the GATT to deal with a global economy which now has financial and ecological aspects that the original GATT signatories in 1947 could never have dreamed of."[81] Although formation of the ITO never materialized, wide post-war sentiment against protectionism and in favor of international cooperation resulted in the GATT.[82] Since its creation, the GATT has grown from twenty-three to over 100 nations, has undergone more than eight rounds of negotiations, the last of which took seven years to conclude, and has drastically altered the economic relations between member and non-member nations alike.[83]

An oversimplified view of the GATT reveals two main principles at the heart of the agreement: (1) the principle of "most-favored nations," requiring GATT members to treat each other equally and (2) the notion of customs duties, or import tariffs, as the only accepted method of protect-

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SON, RESTRUCTURING THE GATT SYSTEM (1990) (examining the "institutional" and "constitutional" structures of GATT).

79. Marshall A. Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L. REV. 273, 298 (1991).

80. *See What's a GATT?*, THE PLAIN DEALER, Dec. 15, 1993, at 15A (discussing the set-up of penalties at the Uruguay Round in an attempt to improve the inadequate enforcement provisions of the GATT). For details on GATT's dispute settlement procedure, see *Improvement to the GATT Dispute Steelement Rules and Procedures* in General Agreement on Tariffs and Trade: Decisions Adopted At the Midterm Review of the Uruguay Round, Apr. 8, 1989, 28 I.L.M. 1023, 1031 (1989).

81. *See Europe And America; The Figleaf Hunt*, THE ECONOMIST, Nov. 13, 1993, at 62.

82. *See What Is GATT? Here Are Questions And Answers*, ST. PETERSBURG TIMES, Dec. 15, 1993, at 4A.

83. *Id.* "[A]verage tariffs imposed by industrialized countries have fallen from more than 40 percent to less than 5 percent, while the value of world merchandise exports has skyrocketed from $ 50-billion to $ 3.7-trillion." *Id.*

ing domestic industries.[84] A detailed evaluation of the economic provisions of the GATT is beyond the scope of this Comment.[85]

Problems addressed during the Uruguay Round of the latest GATT talks included adjustments to account for the slowdown of economic growth during the last two decades, the increased utilization of subsidies and other non-tariff barriers (NTBs) by countries attempting to protect domestic producers, and areas of international trade that remain unregulated by the GATT, such as services, intellectual property, and agriculture.[86] The failure to incorporate provisions addressing the emerging list of global environmental issues in the Uruguay Round has caused delays and disagreements as well as disillusionment. The end result being a GATT that, at best, inadequately addresses global environmental problems such as the depletion of natural resources.[87]

The GATT rules pertaining to the environment are contained in a single paragraph describing the limitations on the use of technical regulations or standards.[88] If there is an international technical standard on point, GATT members are to adhere by it "except where, as duly explained upon request, such international standards or relevant parts are inappropriate for the [p]arties concerned, for . . . reasons [such] as . . . protection for human health or safety, animal or plant life or health, or the environment."[89] This general exemption allowing justified domestic environmental standards is vague and unclear.[90]

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84. *Id.*

85. For further reference material, see *supra* notes 77-78.

86. Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, GATT Doc. MTN.TNC/W/FA (Dec. 20, 1991). For the final act of the Uruguay Round of GATT talks, see Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, GATT Doc. MTN/FA (Dec. 15, 1993), *reprinted in* 33 I.L.M. 1 (1994).

87. Howard LaFranchi, *What's Next for World Trade?*, THE CHRISTIAN SCIENCE MONITOR, Dec. 23, 1993, at 6 (citing United States chief trade negotiator Mickey Kantor as saying that environmental issues must be included in future GATT talks, and that an environmental work program is already prepared and waiting for approval by trade ministers).

88. *See* GATT, Oct. 30, 1947, art. XX, 61 Stat. A3, A60, T.I.A.S. No. 1700, 55 U.N.T.S. 194, 262 (providing rules for application of non-discriminatory domestic regulations); *see also* General Agreement on Tariffs and Trade: Technical Barriers to Trade, Apr. 12, 1979, art. 2.2, 31 U.S.T. 405, T.I.A.S. No. 9616, reprinted in 18 I.L.M. 1079, 1083 (1979) (GATT Standards Code in force since Jan. 1, 1980 Tokyo round of the talks).

89. *Id.*

90. Environmentally vague standards undermine domestic environmental policies in the United States. *See generally* Kurt C. Hofgard, *Trade And The Environment: Is This Land Really Our Land?: Impacts of Free Trade Agreements On U.S. Environmental Protection*, 23 ENVTL. L. 635, 664 (1992).

There are two basic problems with the GATT environmental provisions. First, notwithstanding the language in the above paragraph, attempts at restricting imports in response to domestic environmental policies have been found to be unacceptable NTBs in violation of the GATT.[91] Second, the GATT does not explicitly incorporate any of the numerous international agreements on the environment into its framework.[92]

A. The GATT's Current Treatment of Environmental Standards; NTBs in Violation of Free Trade

One problem identified with the GATT's position of restricting NTBs while allowing exemptions for environmental regulation is the lack of proper criteria for differentiating between environmentally protective trade restrictions and NTBs.[93] A recent example of a legitimate environmental concern found to be an NTB is the GATT panel report on United States Restrictions on Imports of Tuna.[94]

In August of 1990, the United States imposed a temporary import embargo on yellowfin tuna products and yellowfin tuna harvested with purse-seine nets in the Eastern Tropical Pacific Ocean until it could determine whether the exporting countries were complying with standards set by the Marine Mammal Protection Act (MMPA).[95] The purpose of the MMPA was to reduce dolphin mortality rates occurring as an incidental result of the use of purse-seine netting and driftnet fishing techniques

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91. *See infra* notes 93-103 and accompanying text.

92. *See infra* notes 112-19 and accompanying text.

93. *See infra* notes 104-12 and accompanying text.

94. *See* Report of the Panel, United States, Restrictions on Imports of Tuna, GATT Doc. D/S21/R (Sept. 3, 1991); *General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna*, 30 I.L.M. 1594 (1991). For a general critique of the GATT provisions in light of the tuna/dolphin decision, see Matthew Hunter Hurlock, Note, *The GATT, U.S. Law And The Environment: A Proposal To Amend The Gatt In Light Of The Tuna/Dolphin Decision*, 92 COLUM. L. REV. 2098 (1992).

95. *See generally* Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-1407 (1972) [hereinafter MMPA]. For general information on the MMPA, see Michael A. DiSabatino, Annotation, *Validity, Construction, And Application Of Endangered Species Act of 1973 (16 U.S.C.S. §§ 1531-1543)*, 32 A.L.R. FED. 332 (1994). For further information on the applicability of the Act's provisions to actions in foreign countries, see Ethel R. Alston, Annotation, *Construction And Application Of Marine Mammal Protection Act of 1972 (16 USCS §§ 1361 et seq.) And Administrative Regulations Promulgated Thereunder*, 43 A.L.R. FED. 599, § 8(b) (1994).

used in harvesting tuna.[96] Section 1371(a)(2)(C) of the Act required intermediary nations exporting yellowfin tuna to the United States to "provide reasonable proof that [they have] acted to prohibit the importation of such tuna and tuna products from any nation from which direct export to the United States of such tuna and tuna products is banned under this section."[97]

Mexico requested a GATT panel to review the MMPA import prohibitions to determine, among other issues, whether such prohibitions were inconsistent with Article XI and Article XIII of the GATT.[98] The GATT panel found the import prohibitions, and the provisions of the MMPA under which the United States imposed them, contrary to Article XI and XX of the GATT.[99] The panel reasoned that the MMPA prohibition resulted in an unfair benefit to the United States tuna fleet that already adopted alternative techniques to comply with the MMPA.[100]

The panel also reasoned that to the extent to which the parties were free to supplement or waive the General Tariff provisions by agreement, the panel's report would not affect "the rights of individual contracting parties to pursue their internal environmental policies and to co-operate with one another in harmonizing such policies, nor the right of the [contracting parties] acting jointly to address international environmental problems which *can only be resolved through measures in conflict with the present rules.*"[101] Interestingly, the GATT panel itself admittedly recognized the inconsistencies that exist between the goal of environmental preservation and the current GATT trade policy.

GATT restricts the use of technical standards, including environmental protection standards. On the other hand, GATT encourages parties seeking to give their environmental policies effect to enter into bilateral agreements that amend the GATT provisions as between them or, alternatively, waive the GATT requirements altogether.[102] If the parties cannot agree to more elevated standards by amendment or waiver, their

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96. 16 U.S.C. § 1371(a)(2) (West Supp. 1994).

97. *Id.* § 1371(a)(2)(c).

98. *See* United States—Restrictions on Imports of Tuna, Report of the GATT Panel (Aug. 16, 1991), *reprinted in* 30 I.L.M. 1594, 1624 (1991). Article XI of the GATT includes a general prohibition of quantitative restrictions while Article XIII prohibits the establishment of "discriminatory conditions for a specific geographical area." *Id.*

99. *Id.*

100. *Id.*

101. *Id.* (emphasis added).

102. This is precisely what the GATT panel reviewing the United States restrictions on tuna suggested. *See Gatt Dispute Settlement Panel Report: United States-Restrictions On Imports Of Tuna*, 1993 AM. SOC'Y. OF INT'L L. BASIC DOCUMENTS OF INTERNATIONAL ECONOMIC LAW 1, *available in* LEXIS, INTLAW Library BDIEL File (1991) (containing the text of the tuna/dolphin case).

domestic environmental protection standards must defer to accepted international standards or risk being deemed NTBs in violation of the GATT.[103]

Which international environmental agreements control as accepted international standards? GATT does not expressly adopt any of them. Certainly, GATT's endorsement of a list of accepted international environmental agreements would go far in resolving this mystery. With the tuna/dolphin case, the United States experienced firsthand the uncertainty the current GATT rules create with respect to environmental provisions affecting international economic activity.[104] According to some, NAFTA is a step toward resolving this uncertainty, at least on a regional level.[105]

B. A Preview of the Next GATT Round; Environmental Reform Will Likely Take Center Stage

After the conclusion of the Uruguay Round of the GATT talks,[106] observers disagreed about what the talks accomplished and what still remains to be done.[107] Some considered that the Uruguay Round did not go far enough in removing perceived obstacles to free trade.[108]

According to some observers, the only clear winners after the Uruguay GATT talks are the industrial countries and their multinational compa-

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103. For a general discussion on the conflict between the GATT rules and environmental regulation, see Thomas J. Schoenbaum, *Trade And Environment: Free International Trade And Protection Of The Environment: Irreconcilable Conflict?*, 86 AM. J. INT'L. L. 700 (1992).

104. *See* Michael B. Froman, Recent Developments Note, *The United States-European Community Hormone Treated Beef Conflict*, 30 HARV. INT'L L.J. 549 (1989) (discussing the United States-European Community dispute over the importation of hormone-treated beef).

105. *See infra* notes 112-19, 159-60 and accompanying text.

106. Keith M. Rockwell, *Largest Trade Pact In History Completed*, J. OF COMMERCE, Dec. 16, 1993, at A1 (claiming Uruguay Round is the biggest trade pact yet and the first GATT round to include agricultural, textile, and patent provisions).

107. *See GATT: Delegates Debate the Inclusion of Labor Standards in the Next GATT Round*, INT'L TRADE DAILY, Jan. 25, 1994 (available in WESTLAW, BNA-BTD Database) [hereinafter *GATT: Delegates Debate*].

108. *See* Kan Seng, *Gatt Accord Doesn't Remove All Trade Barriers*, BUSINESS TIMES (Singapore desk), Jan. 15, 1994, at 2. In Singapore, Home Affairs Minister Wong Kan Seng expressed that although the latest GATT round successfully removed the "most blatant protectionist measures, other invidious barriers will continue to block the path towards closer global economic integration." *Id.*

nies.[109] Others stress that "'social clauses' such as human rights and environmental issues" are barriers that continue to stand in the way of free trade.[110] Certain developing countries view environmental concerns as disguised protectionist attempts by industrialized countries to keep resource-rich nations from developing.[111]

But existing inequities among trading countries should not be used as an excuse for postponing environmental reforms to the GATT that could improve global health. Current differences in opinion only serve to reinforce the fact that the issue of trade and the environment will, most likely control the next GATT talks.[112]

In the United States, legislators on Capitol Hill were divided over the issue of including environmental reforms in the next talks.[113] The Clinton administration supported the idea of future environmental reforms to the GATT, stating that in the meantime it was "prepared to be firm" by using unilateral trade sanctions on countries that harm the environment.[114] The inclusion of international environmental standards in the recently concluded NAFTA provision lent credibility to the

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109. *See* Kevin Watkins, *Under GATT Deal, The Poor Will Be Even Poorer*, THE MONTREAL GAZETTE, Dec. 19, 1993, at B4 (available in WESTLAW, PAPERSCAN Database). In his article, the author cites estimates by the Organization for Economic and Co-operative Development that "less than a third of the income gains from the agreement will go to the south, overwhelmingly to China and a few upper-income southeast Asian countries . . . [while] the European Community, the United States and Japan will absorb the lion's share of the gains." *Id.*

110. Seng, *supra* note 108, at 2; *see also GATT: Gatt Delegates Debate*, *supra* note 107 (President Clinton and the International Labor Federations arguing for inclusion of labor rights in the next round while the European Union is opposed to the idea of including a GATT "social clause").

111. *See Gatt Official Says Developing Countries Seeking Progress in Trade, Environment*, INT'L TRADE DAILY (BNA), Jan 26, 1994. Balkrishnan K. Zutshi, GATT Council chairman, states that: "To overlook [free trade, foreign aid and sharing technology as necessary to sustain development] and instead focus the trade and environment debate on polemics about greening the GATT would reduce the debate to an irrelevance for the great number of contracting parties. Worse than that, it would be viewed as a serious protectionist threat to their trade interests." *Id.*

112. *See GATT: Delegates Debate*, *supra* note 107 (GATT members are in general agreement that the next talks ought to include "environmental considerations").

113. *See Court Ruling Fuels Discussion on NEPA Applicability to Trade Deal*, INT'L TRADE DAILY (BNA), July 23, 1993.

114. *Trade Sanctions: Administration Unveils New Policy On Sanctions For Environmental Harm*, INT'L TRADE DAILY (BNA), Feb. 4, 1994. Timothy Wirth, the Clinton administration's counselor on global affairs, expressed commitment to implementing environmental reforms to the GATT while making a presentation to the Senate Commerce, Science, and Transportation Subcommittee on Foreign Commerce and Tourism. *See id.* Stewart Hudson of the National Wildlife Federation added that an environmentally sound GATT "would ensure that U.S. manufacturers would have a 'level playing field' based on sustainable development in worldwide markets." *Id.*

administration's position.[115] Unlike GATT, NAFTA specifically lists international environmental agreements that supersede the GATT trade rules.[116] Most likely, the United States will push for GATT adoption of the environmental agreements already included in NAFTA.[117] This will supposedly provide common environmental standards for all GATT members, alleviate uncertainty, and encourage cooperation in seeking compliance with these standards.[118] Some expect international standards included in NAFTA to encourage nations seeking to join this regional agreement to step up their environmental laws to NAFTA levels as a requisite to joining the agreement.[119] But what are NAFTA's international standards and are they enforceable? Are they merely a watered down, lowest common level of environmental protection? More importantly, do they incorporate the requirement to prepare environmental impact assessments prior to undertaking action?

IV. INTERNATIONAL ENVIRONMENTAL AGREEMENTS

A. *Codified, Non-binding International Agreements that Recommend the Increased Utilization of Environmental Impact Assessments*

In June 1992, on the twentieth anniversary of the Stockholm Declaration of the United Nations Conference on the Human Environment,[120]

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115. *See Hierarchy of Treaty Pre-emption Seen Affecting Future Trade Pacts*, INT'L TRADE DAILY (BNA), Jan. 13, 1994. Gary Hufbauer of the Institute of International Economics believes that NAFTA establishes a precedent which will lead to future trade agreements adopting more environmental measures into their framework. *Id.*

116. *Id.* Under NAFTA, the Montreal Protocol on Substances that Deplete the Ozone Layer, the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal, and the Convention on International Trade in Endangered Species of Wild Flora and Fauna "trump" the GATT rules, allowing unilateral "trade sanctions against violators." *Id.* For a detailed discussion of these agreements, see *infra* notes 169-95 and accompanying text.

117. *See supra* note 115 and accompanying text.

118. *See generally NAFTA: Canada is Loser on Dispute Process Created Under NAFTA, Home Study Says*, INT'L TRADE DAILY, Aug. 9, 1994. (the Study "rejects suggestions that the NAFTA will encourage a massive shift in investment toward participating countries where environment and labor standards are lowest").

119. *See id.; NAFTA-Created Commission to Begin Environmental Effects Program in 1995*, INT'L TRADE DAILY, Dec. 1, 1994 (NAFTA standards are adaptable and must be upheld).

120. *See generally Stockholm Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF. 48/14 (1972), *reprinted in* 11 I.L.M. 1416 (1972).

"more than 170 countries met in Rio de Janeiro for the United Nations Conference on Environment and Development" (UNCED).[121] The Conference, symbolizing global recognition of the interconnected relationship between development and the environment, "resulted in several documents including Agenda 21, a declaration concerning climate change, biological diversity, and forest conservation."[122]

Agenda 21 was comprised of two parts.[123] One part included a declaration of commitment to achieving sustainable development by integrating environment and development decision-making as a top priority.[124] The other part addressed how to achieve sustainable development by creating and implementing new mechanisms for environmental compliance and ensuring full participation by all countries in the law-making process.[125] Countries generally agreed to the establishment of a United Nations Commission for monitoring and reviewing purposes, but industrialized nations, including the United States, did not agree to demands for a financing commitment of 0.7% of their GNP to assist developing countries.[126]

The Rio Declaration on Environment and Development, set forth twenty-seven principles to guide environmental protection and economic development worldwide.[127] Included in this list of principles was the assertion of an obligation to undertake environmental impact assessments.[128] According to the Council on Environmental Quality, the United States negotiators additionally emphasized, among other things, the principles of public participation in decision-making and public access to information.[129]

The Rio Declaration, however, is a non-binding statement.[130] Nothing compels signatories of the Declaration to undertake environmental assessments or include the public in decisions that affect the

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121. Edith Brown Weiss, *Introductory Note, United Nations Conference on Environment and Development*, 31 I.L.M. 814 (1992).

122. *Id.* at 814-17.

123. *See Agenda 21, supra* note 14, pt. 1, at 12.

124. *Id.* This part also included a commitment to addressing worldwide and regional problems of pollution, resource management, conservation of bio-diversity, and the protection of global commons. *Id.* pt. 1, at 6-107.

125. *See id.* pt. 2, at 9.

126. *See* Weiss, *supra* note 121, at 815.

127. *United Nations Conference on Environment and Development: Rio Declaration on Environment and Development* (June 14, 1992), Principle 13, U.N. Doc. A/CONF. 151/5/Rev.1 (1992), *reprinted in* 31 I.L.M. 874, 876-80 (1992) [hereinafter *Rio Declaration*].

128. *Id.* at 879 (Principle 17).

129. 23rd Annual Report of the Council on Environmental Quality 140 (1993).

130. *See generally Rio Declaration, supra* note 127.

environment.[131] Notwithstanding the non-binding nature of the Declaration, how can United States negotiators expect other countries to recognize the importance of public participation and access to information in an international forum when they themselves are denying that information to United States citizens at home?[132]

The Convention on Biological Diversity[133] "provides for national monitoring of biological diversity, the development of national strategies . . . impact assessments of projects for adverse effects on biological diversity, and national reports from parties on measures taken to implement the convention and the effectiveness of these measures."[134] This Convention also recognizes the importance of conducting environmental impact assessments. Unfortunately, the United States did not sign it due to concerns over points on "technology transfer and intellectual property rights (Articles 16 and 22), biotechnology and biosafety (Article 19), and the designation of the permanent financial mechanism (Articles 39 and 21)."[135]

The full name of the Statement of Principles on Forests, "A Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests," underlines its weakness; it also is a non-binding statement.[136] Nevertheless, it is the first United Nations consensus on forest conservation.[137]

Even though none of the principles spelled out at UNCED are legally binding on the parties present at the Conference, they represent a step in the right direction, by codifying the importance of environmental assessment in international documents.[138]

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131. *Id.*

132. *See supra* notes 21-38 and accompanying text.

133. Convention on Biological Diversity, June 5, 1992, *reprinted in* 31 I.L.M. 818 (1992).

134. *Id.* at 825.

135. *Id.* at 817; *see also* United States: Declaration Made At The United Nations Environment Programme Conference For The Adoption Of The Agreed Text Of The Convention On Biological Diversity (reproduced from the text of the Declaration attached to the Nairobi Final Act provided by the United Nations Environment Programme), 31 I.L.M. 848 (1992).

136. Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests, U.N. Conference on Environment and Development, Annex 3, U.N. Doc. A/CONF. 151/26/Rev.1 (Vol. 1) (1993).

137. *Id.*

138. *See supra* note 130 and accompanying text. Many countries ultimately accepted

B. *Enforceable International Agreements that Mandate Environmental Impact Assessment for Particular Activities*

One International Convention that deals *specifically* with preparation of environmental impact assessments is the Convention on Environmental Impact Assessment in a Transboundary Context,[139] to which the United States is a member.[140] The purpose of the Convention, as stated in the Preamble, is to "minimize transboundary pollution through the application of environmental impact assessments."[141]

Article II of the Convention lists a number of general duties, including the duty "to conduct an environmental impact assessment[142] before approving a proposed activity[143] listed in Appendix I."[144] If an industrial

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the principles proposed at the Rio Conference, but the United States remained opposed to the Biodiversity treaty. *See* Fact Sheet: US Environmental Accomplishments in Support of UNCED, 3 U.S. DEP'T ST. DISPATCH. Supp. No. 4, 9, 11 (1992) (defending its opposition on the grounds that the treaty did not provide intellectual property protection to those with the technological know-how to make bio-diversity a success). *But see* Franklyn P. Salimbene, *U.S. Business And Technology Transfer In The Post-UNCED Environment*, 17 MD. J. INT'L L. & TRADE 31, 37 (1993) (arguing that despite the concerns raised by the U.S. State Department, the Conference results should not discourage U.S. businesses from participating in the "development and transfer of technology").

139. The United Nations Convention on Environmental Impact Assessment in a Transboundary Context, Feb. 25, 1991, U.N. Doc. E/ECE/1250, *reprinted in* 30 I.L.M. 800 (1991) [hereinafter *U.N. Convention on Environment Impact Assessment*].

140. *Id.* "As of June 11, 1991, the following had signed the Convention: Albania, Austria, Belgium, Bulgaria, Byelorussian Soviet Socialist Republic, Canada, Denmark, European Economic Community, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Romania, Spain, Sweden, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom, United States." *Id.* at 800.

141. *Id.* at 802.

142. *Id.* "'Environmental impact assessment' means a national procedure for evaluating the likely impact of a proposed activity on the environment." *Id.*

143. *Id.* "'Proposed activity' means any activity or any major change to an activity subject to a decision of a competent authority in accordance with an applicable national procedure." *Id.*

144. *Id.* The list of activities in the appendix include:

> Crude oil refineries . . . installations for the gasification and liquefaction of . . . coal or bituminous shale . . . Thermal power stations and other combustion installations . . . nuclear power stations and other nuclear reactors . . . [i]nstallations solely designed for the production or enrichment of nuclear fuels, for the reprocessing of irradiated nuclear fuels or for the storage, disposal and processing of radioactive waste . . . installations for the initial smelting of cast-iron and steel and for the production of non-ferrous metals . . . [i]nstallations for the extraction . . . processing and transformation of asbestos and products containing asbestos . . . for friction material . . . [and for] [i]ntegrated chemical installations.

Id. at 812-13.

activity is listed in Appendix I, the Convention imposes on the signatories the duty to prepare an environmental impact assessment in accordance with Article 4 and Appendix II of the Convention.[145] "A Party may submit, by declaration, to compulsory jurisdiction of the ICJ or to arbitration pursuant to Appendix VII" to enforce the Convention's provisions.[146]

The language of this Convention, reminiscent of the broad statutory language used in NEPA, states that the parties are "aware of the interrelationship between economic activities and their environmental consequences . . . . [and are] [d]etermined to enhance international co-operation in assessing environmental impact[s]."[147]

The Convention "commands" members to "ensure that, through their national legal and administrative provisions and their national policies, environmental impact assessment is carried out."[148] The entire document reinforces the importance of considering environmental effects early in the decision-making process "by applying environmental impact assessment, at all appropriate administrative levels, as a necessary tool to improve the quality of information presented to decision makers so that environmentally sound decisions can be made paying careful attention to minimizing significant adverse impact."[149]

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145. *Id.* at 806 and Appendix II. Other relevant parts of the Convention include Article 5 (Consultations on the Basis of the Environmental Impact Assessment Documentation), Article 6 (Final Decision), Article 7 (Post-Project Analysis), Article 8 (Bilateral and Multilateral Co-Operation), and Article 15 (Settlement Of Disputes). *Id.* at 806-07, 810.

Arguably, if any of these activities are undertaken, whether it be under NAFTA or otherwise, United States would be obligated to prepare an EIS. The problem here is that the law of treaties only allows *nations* to bring a claim in front of the ICJ, not *individuals*. MALCOLM N. SHAW, INTERNATIONAL LAW 137 (1991). Therefore, although the U.S. has an existing obligation to prepare EISs for certain activities, only other nations can sue for noncompliance, something highly unlikely given the U.S.'s political might and other countries' fear of economic retaliation.

146. U.N. Convention on Environmental Impact Assessment, *supra* note 139, at 806-07, 810.

147. *Id.* at 802. The Convention also incorporates relevant provisions of "the Charter of the United Nations, the Declaration of the Stockholm Conference on the Human Environment, the Final Act of the Conference on Security and Co-operation in Europe (CSCE) and the Concluding Documents of the Madrid and Vienna Meetings of Representatives of the Participating States of the CSCE." *Id.*

148. *Id.*

149. *Id.*

Under the Convention, the type of environmental impact that will trigger the duty to prepare an environmental impact statement is extensive.[150] "Impact" is broadly defined as "any effect caused by a proposed activity on the environment."[151]

Additionally, the Convention mandates that each party "*shall* take the necessary legal, administrative or other measures to implement the provisions of this Convention, including . . . the establishment of an environmental impact assessment procedure that permits public participation and preparation of the environmental impact assessment documentation."[152]

The principle underlying these environmental conventions and declarations is the assessment of environmental impact *before* an activity is approved. Unfortunately, United States negotiators did not include any of the above-mentioned conventions in NAFTA, and opted instead for environmental agreements that concentrate on control and reduction of *already existing* activities that they deem harmful to the environment.[153]

C. *Environmental Agreements Included in the North American Free Trade Agreement*

Commentators heralded NAFTA as the "greenest" trade agreement yet.[154] The United States, Canada, and Mexico agreed on some environmental provisions that contain specific language of commitment to the promotion of "sustainable development."[155] NAFTA states that the parties are not to lower their health, safety, and environmental standards for purposes of attracting foreign investment.[156]

NAFTA also contains provisions whereby members resolve conflict through the North American Commission on the Environment (NACE).[157] The commission will be made up of environmental ministers

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150. *See* 30 I.L.M. 800, 803 (1991) (section (vii) defines "impact" and section (viii) defines "transboundary impact").

151. *Id.* "'Transboundary impact' means any impact, not exclusively of a global nature, within an area under the jurisdiction of a Party caused by a proposed activity the physical origin of which is situated wholly or in part within the area under the jurisdiction of another Party." *Id.*

152. *Id.* at 803 (emphasis added).

153. *See supra* note 116 and accompanying text.

154. 23rd Annual Report, *supra* note 1, at 52; Will Dunham, *Wildlife Group Backs Free Trade*, HOUS. CHRON., Sept. 17, 1992, at 2.

155. 23rd Annual Report, *supra* note 1, at 52.

156. *Id.*

157. *Id.* For the final draft of the NAFTA Environmental Cooperation Agreement, see North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., 32 I.L.M. 1480 (1993) (containing language limiting the Commission's role to that of considering and recommending courses of action) [hereinafter NAFTA Environmental

of all three countries, and its functions will include providing a forum for resolution of disputes as well as studying issues of mutual concern like the effects of trade on the environment.[158]

NAFTA incorporates several international environmental agreements into its framework, stating that in the event of conflict between NAFTA and GATT rules, the environmental agreements shall prevail.[159] For example, if any inconsistency arises between NAFTA and the trade obligations set out in either the Convention on International Trade in Endangered Species of Wild Fauna and Flora, the Montreal Protocol on Substances that Deplete the Ozone Layer, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, or agreements set out in Annex 104.1 of NAFTA, "such obligations shall prevail to the extent of the inconsistency."[160] In this regard, NAFTA sets a precedent for trade agreements between industrialized and developing nations whereby the parties to a trade agreement agree to incorporate common environmental goals as well as schemes to pay for environmental clean-ups.[161]

The first of such agreements is the Protocol on Substances that Deplete the Ozone Layer, commonly known as the Protocol on Chlorofluorocarbons, which was signed in Montreal on September 16, 1987.[162] The Protocol specifies the signatories' obligations to "limit and reduce" the use of CFCs and other ozone-depleting chemicals.[163]

Cooperation].

158. *Id.*

159. *Hierarchy of Treaty Pre-emption Seen Affecting The Future Trade Pacts*, INT'L TRADE DAILY (BNA), Jan. 13, 1994, *available in* LEXIS, BNA Library, BNAITD File. Economist Gary Hufbauer, senior fellow for the Institute of International Economics feels that GATT is preempted by the environmental agreements in NAFTA, resulting in the parties' ability to use trade sanctions against the violators of these agreements despite the GATT NTB rules. *Id.*

160. *See, e.g.*, North American Free Trade Agreement, 32 I.L.M. 289 (1993). The environmental agreements listed in Annex 104.1 are The Agreement Between the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Waste and the Agreement Between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area. *Id.* at 298.

161. *See* NAFTA Environmental Cooperation, *supra* note 157.

162. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. Treaty Doc. No. 10, 100th Cong., 1st Sess. (1987), *reprinted in* 26 I.L.M. 1550 (1987), *amended and adjusted*, S. Treaty Doc. No. 4, 102d Cong. 1st Sess. (1991), *reprinted in* 30 I.L.M. 537 (1991) [hereinafter Montreal Protocol].

163. *Id.*

The Protocol also calls for a systematic phase-out of consumption and production of CFCs including deadlines for compliance with these phase-out plans.[164] In addition, it bans trading and importation of controlled substances with non-parties and discourages exports except to developing countries that may delay compliance.[165] In contrast, members are encouraged to exchange information on technology to help achieve its goals.[166] The obvious objective behind these provisions is to encourage non-members to sign the Protocol. As for enforcement, the Protocol adopted assessment and review measures to be conducted by expert panels every four years, commencing in 1990.[167]

In 1991, the parties agreed to adjust the target levels of consumption and production, and include halons as a controlled substance.[168] Neither the Protocol nor its amendment expressly call for parties' preparation of environmental impact assessments.

Another environmental agreement incorporated into NAFTA is the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal.[169] In August 1992, the Senate agreed to ratify this Convention.[170] The Convention "was designed to stop exports of hazardous wastes to countries that are either unaware they are receiving such shipments or do not have appropriate facilities to treat or dispose of the wastes."[171] In the preamble, the parties stated their awareness of the risks caused by the transboundary movement of hazardous wastes and acknowledged the potential threat to health and the environment.[172] In light of this threat, the Convention calls on the parties to reduce the generation of such wastes and, alternatively, to take the necessary steps to ensure that disposal is "consistent with the protec-

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164. The phase out on consumption levels seeks to initially reduce consumption to 1986 levels, then to 80%, then to 50% of those 1986 levels. *Id.* art. 2.

165. *Id.* art. 5.

166. *Id.* arts. 9 & 10.

167. *Id.* art. 6. These enforcement measures were scheduled to be conducted by expert panels beginning in 1990. *Id.*

168. The adjustments require "1995 levels not to exceed 50%, with 10% exception to satisfy basic domestic needs; 1997 levels not to exceed 15%, with 10% exception; 2000 levels not to exceed 0%, with 15% exception . . . [s]ame targets as above [for halons], except there is no interim goal between 1995 and 2000." Montreal Protocol, *supra* note 162, at 537-40.

169. *See* United Nations Environment Programme Conference on Plenipotentiaries on the Global Convention on the Control of Transboundary Movements of Hazardous Wastes: Final Act And Text Of Basel Convention, U.N. Doc. IG.80/L.12 (1989), *reprinted in* 28 I.L.M. 649 (1989).

170. INT'L TRADE DAILY (BNA) July 29, 1993, *available in* LEXIS, BNA Library, BNATID File [hereinafter Basel Convention].

171. *Hazardous Waste: Export Ban Included In Options For Administration Basel Convention Bill*, 24 ENVTL. REP. (BNA) 563 (July 30, 1993).

172. Basel Convention, *supra* note 170, at 657.

tion of human health and the environment whatever the place of their disposal."[173]

The parties to the Convention agreed to use the international law of treaties in case of a material breach of any provisions.[174] The Convention also promotes technology transfer to help developing countries manage hazardous wastes.[175]

A member party exporting hazardous wastes to other countries is required to provide information about the effects of the proposed transboundary movement on health and the environment. Also, parties are to "[c]o-operate with other parties *and* interested organizations by disseminating information on the transboundary movement of hazardous wastes."[176] However, the requirements set forth by the Basel Convention also fall short of calling for an environmental impact statement. Even if it called for one, the aggrieved party within the recognized system of international law has to be another nation, leaving no possible avenue of relief for aggrieved private parties.

The third environmental agreement included in NAFTA is the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES).[177]

While the inclusion of these environmental agreements in NAFTA is commendable as a first in international trade negotiations, they are, nevertheless, less stringent than currently existing United States laws. None require the preparation of an EIS before conducting trade activity that may harm the environment. One could argue that incorporating NEPA's EIS requirement into NAFTA is unworkable because the United States "cannot be telling our neighbors to the north and to the south what they can and cannot do."[178]

Indeed, the principle of sovereignty would preclude the United States from regulating the actions of another nation, or its citizens, while acting outside the United States. However, this principle does not preclude the application of United States environmental requirements for actions by

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173. *Id.*

174. *Id.* at 658. Again, the law of treaties does not recognize individuals as a legal personality. *See supra* note 145 and accompanying text.

175. Basel Convention, *supra* note 170, at 659.

176. *Id.* at 663.

177. Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Mar. 3, 1973, 27 U.S.T. 1087, 50 C.F.R. § 23 (1994).

178. 139 CONG. REC. § 16005 (statement by Sen. Hatch); *see also* note 69 and accompanying text.

its own agencies and citizens, particularly where the result of such actions could have significant impact within the United States. Despite this, United States trade negotiators opposed the preparation of an EIS for NAFTA. The OTR's position that NEPA's EIS requirement does not apply to their legislative proposal for NAFTA is irreconcilable with their posturing and open promotion of the use of environmental assessments at the UNCED.

D. The European Community Model

In 1992 the EC effectively became a "Union."[179] The Maastricht summit "mark[ed] a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen."[180] It will also facilitate the future fulfillment of the ultimate goals of the Union, including promotion of "balanced and sustainable" economic and social development, the reduction of internal frontiers, the establishment of a single currency system, the "implementation of a common foreign and security policy" and finally, the protection of individual rights.[181]

Article 168(A)(1) of the Single European Act[182] provides that "certain classes of action or proceeding[s] brought by natural or legal persons" may be reviewed by the Court of Justice.[183] The European Council is in charge of adopting "harmonization measures" with regard to the environment. If a member state applies independent national environmental provisions, the Commission decides whether such national provisions are "a means of arbitrary discrimination or a disguised restriction on trade between Member States."[184] The Commission, as well as any member state "may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of [its] powers . . . ."[185]

Title VII of the EEC Treaty sets forth general objectives of the preservation, protection, and prudent utilization of natural resources.[186] To

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179. *See* Treaty On European Union, Feb. 7, 1992, 31 I.L.M. 247 (1992).
180. *Id.* at 253.
181. *Id.*
182. Feb. 17-28, 1986, 25 I.L.M. 503, 506 (1986) (listing the 1986 Single European Act along with modifications on environmental protection). The Act "is an expression of the political resolve . . . to transform the whole complex of relations between their States into a European Union, in line with the Stuttgart Solemn Declaration of June 19, 1983." *Id.* at 503.
183. *Id.* at 508.
184. *Id.*
185. *Id.* at 512. Articles 169 and 170 authorize this approach. *Id.*
186. *Id.* at 515.

achieve these goals, environmental action by the Community "shall be based on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source, and that the polluter should pay."[187] Any action by the Community regarding the environment calls for the consideration of scientific and technical data, existing regional environmental conditions, risk-benefit analysis of proposed actions versus alternatives, and the economic and social developmental needs of the Community as a whole.[188] While members are, of course, still encouraged to implement local environmental measures, the Community as a whole addresses broader actions requiring co-operation.[189]

When action is required by the Community, Article 130(S), provides that "[t]he Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, shall decide what action is to be taken by the Community."[190] An important provision allows member states to maintain or introduce more stringent environmental measures than those adopted in common, as long as they are compatible with the Maastricht summit.[191]

Upon comparison of the above provisions with the non-binding language surrounding the environmental provisions for NAFTA, one can easily see that NAFTA calls for "unilateral" rather than "unified" action by the member states, and only with respect to their own territory.[192] Furthermore, the parties are only obligated to "consider" recommendations developed by the Council.[193] The Council's role is limited to encouraging "effective enforcement by each Party of its environmental laws and regulations," compliance and cooperation.[194]

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187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.* at 515-16.
191. *Id.* at 516.
192. Canada-Mexico-United States: North American Agreement on Environmental Cooperation, Sept. 8-14, 1993 32 I.L.M. 1480 (1993). NAFTA states that "[e]ach Party shall, with respect to its territory: (a) periodically prepare and make publicly available reports on the state of the environment; (b) promote education in environmental matters, including environmental law; (c) further scientific research and technology development in respect of environmental matters; (d) assess, as appropriate, environmental impacts; and (e) promote the use of economic instruments for the efficient achievement of environmental goals." *Id.* at 1483.
193. *Id.*
194. *Id.* at 1486. The Council is also supposed to "promote" and "develop" recommendations regarding environmental impact statements and public access to informa-

Another obvious problem in NAFTA is that the multinational panel set up to review compliance of environmental assessments focuses on remedial, not preventive measures. In reviewing the parties' compliance, it examines past actions of the parties such as a "persistent pattern of failure to effectively enforce its environmental law . . . [and] the reasons, if any, provided by the Party for not fully implementing an action plan."[195]

In terms of the application of a cohesive international environmental agenda, the European model is a great example of a regional agreement that provides a uniform approach to environmental assessment, regulation, and most importantly, binding enforcement provisions that ensure compliance. The model has effectively constitutionalized the right to environmental protection, something the United States is unwilling to do with NEPA. Additionally, the EC model is simply more effective than NAFTA because: (a) it embraces joint, not unilateral action; (b) it uses a uniform body to settle disputes that has the power to issue binding decisions, and not mere recommendations; and (c) because the successful set-up of an authoritative enforcement body allows the EC to settle disputes without resorting to unilateral trade sanctions that, if utilized, can only serve to create animosity between parties.

V. THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

In enacting NEPA, Congress declared a broad national environmental policy

> [T]o encourage productive and enjoyable harmony between man and his environment; to . . . eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.[196]

In enacting NEPA, Congress recognized that the past history of dealing with environmental problems was quite inadequate.[197]

A. Title I: Purpose, Scope, and Requirements

The first major part of the Act is Congress' statement of the Act's policy and declaration of its goals, both stated using broad language. In Sec-

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tion concerning the environment. *Id.*

195. *Id.* at 1492.

196. 42 U.S.C. §§ 4321-4361 et seq. (1993) (congressional declaration of purpose).

197. 115 CONG. REC. 40,415 (1969). As pointed out in the congressional record, NEPA's new approaches were to deal with these problems on a "preventive and anticipatory basis" rather than focus on "efforts to deal with 'crises' and to 'reclaim' our resources" once environmental abuse has already taken place. *Id.*

tion 101, Congress "recogniz[ed] the profound impact of man's activity on . . . the natural environment."[198] Congress specifically acknowledged "population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances" as activities that impact our environment.[199] Trade agreements often include many, if not all of the activities Congress recognized as affecting the environment. NEPA mandates consideration of such trade activities, like chemical pollution and world resource exploitation.[200]

Congress further declared that "it is the continuing policy of the Federal Government . . . to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."[201] Congress' intent was that responsible decision-making would lead to "attain[ing] the *widest* range of beneficial uses of the environment without degradation [or] risk to health or safety."[202]

Section 4332 of the Act provides the main "action-forcing" procedural mechanism to ensure compliance with NEPA's general goals.[203] Specifically, section 4332(2)(C) requires that all federal agencies "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on . . . the environmental impact of the proposed action."[204] Such statement is commonly referred to as an environmental impact statement or EIS.

The purpose of this "action forcing" procedure is "to insure that the policies and goals defined in [NEPA] are infused into the ongoing programs and actions of the Federal Government."[205] The U.S. could apply NEPA's procedural EIS requirement to trade agreements and thereby foster Congress' goal of productive harmony between man and nature without being inconsistent with other national policy concerns.

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198. 42 U.S.C. § 4331 (1977).

199. *Id.*

200. Swain v. Brinegar, 517 F.2d 766, 775 (1975).

201. 42 U.S.C. § 4331(a) (1988); *see supra* note 197. These "practicable" means to improve Federal plans and programs ought to be "consistent with other essential considerations of national policy." 42 U.S.C. § 4331(b) (1988).

202. 42 U.S.C. § 4331(b)(3) (1988) (emphasis added).

203. *See* ANDERSON & DANIELS, *supra* note 16, at 2-3.

204. 42 U.S.C. 4332(2)(C) (1988).

205. 115 CONG. REC. 40415, 40416 (1969).

Congress directed federal agencies to administer U.S. policy in accordance with section 102(2)(c) and the other provisions in the chapter, "to the fullest extent possible." An EIS "informs the public of environmental consequences of and alternatives to proposed actions and enables evaluation, comment and intervention."[206] "It ensures that environmental considerations are placed before the ultimate decision-maker—the public—before federal agencies undertake environmentally damaging actions."[207] Agencies proposing legislation *and* "any other major Federal action" must make available to the public a detailed statement on:

> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effect which cannot be avoided should the proposal be implemented,
>
> (iii) to the proposed action,
>
> (iv) the relationship between short-term uses of man's environment and the maintenance and enhancement of long term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.[208]

In this respect, NEPA is a full disclosure law seeking to make federal agencies act more responsibly toward the environment.[209]

In section 102(f), Congress specifically recognized the global character of environmental challenges by stating:

> [A]ll agencies of the Federal Government shall . . . recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment.[210]

1. Legislative History

NEPA's legislative history reflects congressional intent that federal agencies "participate in the development of a positive, forward-looking program of international cooperation in dealing with environmental problems."[211] Congress clearly intended this provision in NEPA to encourage application of the EIS process to foreign policy actions, like international

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206. L. LYNN HOGUE, PUBLIC HEALTH AND THE LAW 370 (1980).

207. *Id.*

208. 42 U.S.C. § 4332 (1977). The requirements governing disclosure of agencies' comments on the necessity of NEPA's EIS requirement and its contents are under the provisions of the Freedom of Information Act. *See* 115 CONG. REC. 40,420 (1969).

209. Environmental Defense Fund, Inc. v. Corps. of Eng'rs of United States Army, 325 F. Supp. 749, 759 (1971) (finding that Congress intended the Act to make decisionmaking more responsive and more responsible to the environment).

210. 42 U.S.C. § 4932 (F) (1977).

211. 115 CONG. REC. 404015, 40416-17 (1969).

trade agreements, at least to the extent that NEPA doesn't conflict with foreign policy objectives.

Congress additionally clarified its intent that federal agencies apply NEPA to "the fullest extent possible" by stating that such language is "intended to assure that all agencies of the Federal Government shall comply with the directives . . . and that no agency shall seek to construe its existing statutory authorizations in a manner to avoid compliance."[212]

NEPA's EIS requirement is Congress' own initiative to prevent the future decline of mankind's environment. As such, the preparation of an EIS in conjunction with international trade agreements would ensure the proper evaluation of the impact on the environment and the potential alternatives for the provisions contained therein. Furthermore, the United States could utilize the report's conclusions to gain important trade concessions on environmental enforcement changes that enhance our mutual environment. This is particularly important with respect to Mexico and Canada, with whom we share immediate geographic borders, and with whom we have had environmental enforcement problems in the past.

2. Executive Order 12,114[213]

Issued in 1979, this Order furthers NEPA's purpose by requiring an EIS for major federal actions "with respect to the environment *outside* the United States, its territories and possessions."[214] The Executive Order requires an EIS for major federal actions significantly affecting global commons such as the oceans or Antarctica; actions significantly affecting the environment of a third party nation not participating in the action with the U.S.; actions significantly affecting a foreign nation that provide that nation products, or projects that produce principal products, emissions, or effluents that are "prohibited or strictly regulated by Federal law in the United States" in order to protect the public from toxicity or radioactive substances.[215]

Many of the activities to be conducted under the provisions of NAFTA fall under the above-stated categories of federal actions requiring an EIS. But the Order has numerous exemptions from the EIS requirement, including "actions taken by the President" and actions that pose "difficulties of obtaining information and agency ability to analyze meaningfully

212. *Id.*
213. Exec. Order No. 12,114, 44 Fed. Reg. 1957 (1979).
214. *Id.* § 1-1. (emphasis added).
215. *Id.* § 2, 3(a)-(d).

environmental effects of a proposed action."[216] This latter exemption provides an out for any agency that decides they do not want to prepare an EIS by simply claiming an EIS would be too difficult to prepare.[217] The Executive Order further allows for categorical exclusions from the EIS requirement in the case of emergency or exceptional foreign policy or national security situations.[218]

Finally, the Order specifically points out that it exists "solely for the purposes of establishing internal procedures for Federal agencies to consider the significant effects of their actions on the environment outside the United States, its territories and possessions, and nothing in [the] Order shall be construed to create a cause of action."[219] Therefore, this language clearly precludes private parties from seeking relief when agencies fail to comply with the Order.

B. Title II: The Council On Environmental Quality

Title II of the Act creates the Council on Environmental Quality (CEQ) and defines its primary responsibilities.[220] The Council's responsibilities include assisting and advising the President on environmental issues, reviewing and appraising federal programs and activities that affect the environment, and providing recommendations to the President.[221] In 1978, the CEQ issued binding regulations on EIS preparation to all federal agencies.[222] The courts give these regulations substantial deference.[223] Their declared purpose was "to tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act."[224]

In contrast to the Supreme Court decisions holding that NEPA does not create substantive rights, CEQ's regulations plainly state: "The president, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the *substantive requirements* of section

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216. *Id.* § 2 - 5(a)(ii), 5(b)(iii)(5).

217. This is exactly what the USTR did in response to Public Citizen's request for an EIS on NAFTA.

218. Exec. Order No. 12,114, 44 Fed. Reg. 1957, § 2-5(c) (1979).

219. *Id.* at 1960-62, § 3-1.

220. 42 U.S.C. §§ 4341-4347 (1988).

221. Council on Environmental Quality, 40 C.F.R. §§ 1500-1508; *supra* note 197, at 40, 421.

222. 40 C.F.R. § 1500.3 (making parts 1500-1508 binding on all federal agencies).

223. Andrus v. Sierra Club, 442 U.S. 347, 358 (1979) (finding that the CEQ's interpretation of NEPAs is given deference); Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 355 (1989) (indicating that requiring agencies to take a "hard look" at the effect of their actions and providing groups of individuals access to important information are the two main functions of the EIS requirement).

224. 40 C.F.R. § 1500.1(a) (1994).

101."[225] Ironically, the Supreme Court has interpreted NEPA's mandate as essentially procedural even though it also held that "CEQ regulations are entitled to substantial deference."[226] According to the CEQ, the EIS procedural requirement is a means of ensuring that quality environmental information is available to the public before federal agencies implement actions.[227]

Most importantly, the CEQ guidelines not only reinforce that NEPA requires an EIS to be included "in every recommendation or report . . . [o]n proposals . . . [f]or legislation and . . . [o]ther major Federal actions," but also defines potentially problematic terminology such as "Federal agency," "proposals," and "legislation."[228]

The CEQ defines "Federal agency" as all agencies of the federal government except "the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office."[229] But, according to the CEQ's own definitions, it considers treaties and international conventions or agreements a category of federal agency action capable of triggering NEPA's EIS requirement.[230] The CEQ further defines a "proposal" as existing when a federal agency (as defined above) has a goal, is actively contemplating alternative means to achieving that goal, and the effects of such alternatives can be "meaningfully evaluated."[231] The CEQ defines legislation as:

> [A] bill or legislative proposal to Congress developed by *or with significant cooperation and support of a Federal agency.* . . . [T]he test for significant cooperation is whether the proposal is in fact predominantly that of the agency rather than another source. Drafting does not by itself constitute significant cooperation. *Proposals for legislation include requests for ratification of treaties.* Only the agency which has primary responsibility for the subject matter involved will prepare a legislative environmental impact statement.[232]

CEQ's definition of federal action, expressly states that it includes trade agreements such as NAFTA. Furthermore, NAFTA was unquestionably "developed by or with significant cooperation and support of" OTR.[233] OTR did not merely draft the proposals for NAFTA; it negotiat-

225. *Id.* (emphasis added).
226. *Andrus*, 442 U.S. at 358.
227. *See* CEQ Report, *supra* note 22, at 140.
228. 40 C.F.R. § 1502.3 (1994).
229. *Id.* § 1508.12.
230. *Id.* § 1508.18.
231. *Id.* § 1508.23.
232. *Id.* § 1508.17 (emphasis added).
233. *Nafta Impact Statement Ruling Seen Giving U.S. Increased Clout In Side*

ed the entire agreement. As the primary federal agency involved in negotiating the agreement, OTR should have provided a legislative EIS.

In the past, the CEQ also expressed its view that NEPA applies extraterritorially, not only with respect to actions affecting our global commons, but when the federal government's action only effects a foreign country.[234] It is unfortunate that CEQ never included this view in the final draft of its guidelines and regulations, since the courts eventually held such regulations as binding on all federal agencies.[235]

Under the Reagan and Bush administrations, the CEQ's budget was significantly reduced while its access, influence, and authority declined.[236] In particular, the Reagan administration, in its last days, rejected CEQ's proposed recommendations calling for a requirement that federal agencies consider the impact of their actions on the global environment. Such recommendations were never incorporated during the Bush administration.[237] The CEQ remained conspicuously quiet throughout the NAFTA-EIS controversy.[238] This is possibly due to political pressure, especially in light of the current administration's plan to scrap the CEQ and pass its responsibilities and functions on to the EPA.[239]

Notwithstanding the current controversy, the CEQ has still played an instrumental role in interpreting and passing regulation that effectively

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Agreement Talks, INT'L TRADE DAILY (BNA), July 2, 1993. Nicholas Yost of the Washington law firm of Dickstein, Shapiro & Morin, former general counsel for the CEQ under the Carter administration, stated that the District Court's decision that NEPA applies to proposals for ratification of trade agreements "was a sound one." *Id.* Yost further stated that prior administrations, including the Nixon, Ford, Carter, and Reagan administrations, presented an EIS for about a dozen treaty-related legislative packages. *Id.*

234. *See* Council on Environmental Quality, Memorandum on the Application of the EIS Requirement to Environmental Impacts Abroad of Major Federal Actions, 42 Fed. Reg. 61,068-69 (1977); *see also* Natural Resources Defense Council, Inc. v. NRC, 647 F.2d 1345, 1386 n.156 (D.C. Cir. 1981) (Robinson J., concurring).

235. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970); *see also* Andrus v. Sierra Club, 442 U.S. 347, 357-58 (1979).

236. *See* 137 CONG. REC. S7631 (1991); 135 CONG. REC. H6837 (1991) (criticizing the Reagan-Bush administrations for ignoring the CEQ).

237. 135 CONG. REC. S5991 (1991). The recommendations were ignored even after numerous members of Congress, including present Vice-President Al Gore, asked Bush to direct the CEQ to issue guidelines that will ensure federal agency consideration of the effect of their actions on global warming. *Id.* (letter from members of Congress to the President).

238. *CEQ: White House "Stonewalling" Hill on EIS Oversight*, GREENWIRE, July 30, 1993.

239. *See Baucus Offers Recommendations On NAFTA Environmental Commission*, INT'L TRADE DAILY (BNA), Mar. 9, 1993. William Reilly, administrator of the EPA during the Bush presidency feels that the EPA already has enough conflicts to try to "watchdog" federal agency compliance of NEPA. *Reilly Weighs In On Browner, Enviros, CEQ*, GREENWIRE, Nov. 23, 1993 (interview).

codified existing NEPA case law.[240] But while the CEQ played a substantial role by establishing guidelines for NEPA compliance, the courts clearly assumed the principal role as enforcers and interpreters of NEPA.[241]

C. The Courts

Agency compliance with NEPA's procedural EIS requirement is not discretionary and must be complied with in the absence of a "clear and unavoidable conflict in statutory authority."[242] The problem is that the courts, the legislature, federal agencies, and environmental groups often differ in opinion as to what constitutes clear and unavoidable conflict with the statutory language.

In several opinions,[243] the United States Supreme Court interpreted Title I of the Act as not creating any new substantive rights, holding instead that only the procedural provisions stemming from the Act's EIS requirement were judicially enforceable.[244] Several members of Congress repeatedly criticized this view.[245] Nevertheless, the result of these opinions has made NEPA's procedural requirements, mainly the EIS provision, the main focus of litigation. Accordingly, the courts have carved out their own set of judicial review requirements for NEPA actions, which must be met before a NEPA claim can be litigated.

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240. *See supra* notes 220-35 and accompanying text.

241. *See* ENVTL. L. INST. FED. ENVTL. L. 242 (Erica L. Dolgin & Thomas G.P., Gilbert eds. 1972).

242. Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, 426 U.S. 776, 788 (1975) (holding NEPA inapplicable where it conflicts with statutory requirements of the Interstate Land Sales Full Disclosure Act); Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1115 (D.C. Cir. 1971) (holding that United States Atomic Energy Commission's procedural rules did not comply with NEPA requirements).

243. "NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural." Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978) (*citing* Aberdeen & Rockfish R. Co. v. SCRAP, 422 U.S. 289, 319 (1975)).

244. *See* J. GORDON ARBUCKLE ET AL., ENVIRONMENTAL LAW HANDBOOK 372; *see also* Kleppe v. Sierra Club, 427 U.S. 390, 405-406 (1976) (emphasizing that the only procedural requirements imposed by NEPA are those stated in the plain language of the Act). *But see* Nicholas Yost, *NEPA's Promise-Partially Fulfilled*, 20 ENVTL. L. 533 (1990) (where the author attacks the Supreme Court for failing to recognize the legislative intent that the Court engage in substantive review of agencies' NEPA violations).

245. *See infra* note 299.

1. Judicial Review

CEQ's advice to the courts with respect to judicial review is that courts refrain from judicial review of agency compliance until an agency "has filed the final environmental impact statement, or has made a final finding of no significant impact (when such a finding will result in action affecting the environment), or takes action that will result in irreparable injury."[246] Judicial review of a federal agency's decision can vary because there is a split in the courts as to whether the courts should review agency action under the "arbitrary and capricious" standard or the "reasonableness" standard.[247] The more widely accepted approach is the arbitrary and capricious standard.[248] Under this standard, review of agency decision not to prepare an EIS requires that the plaintiff prove by a preponderance of the evidence that the agency's decision is arbitrary and capricious.[249]

Application of the arbitrary and capricious standard results in substantial deference to agency decisions since the standard requires only that agencies "adequately" consider the environmental impact of its action.[250]

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246. 40 C.F.R. § 1500.3 (1994); 43 Fed. Reg. 55,990 (Nov. 28, 1978).

247. For a general discussion of these two standards under NEPA, see Comment, *Shall We Be Arbitrary Or Reasonable: Standards of Review For Agency Threshold Determination Under NEPA*, 19 AKRON L. REV. 685 (1986). For examples of decisions applying the "arbitrary and capricious" standard, see Citizens For A Better Henderson v. Hodel, 768 F.2d 1051 (9th Cir. 1985) (denying injunctive relief on construction of electric plant based on insufficiency of EIS); Sierra Club v. Froehlke, 534 F.2d 1289 (8th Cir. 1976) (denying plaintiff's request for an injunction on dam construction project based on the inadequacy of the EIS prepared). For a decision applying the "reasonableness" standard, see Enos v. Marsh, 769 F.2d 1363 (9th Cir. 1985) (denying injunction on construction of harbor).

248. *See* Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989) (requiring courts using the "reasonableness" standard to reexamine their method of review). For an example of a decision in which the court abandoned the "reasonableness" standard in favor of the "arbitrary and capricious" standard and ultimately held that the agency decision not to prepare an EIS was not "arbitrary and capricious," see Sabine River Authority v. U.S. Dep't of Interior, 951 F.2d 669 (5th Cir.), *cert. denied*, 113 S. Ct. 75 (1992); *see also* Greenpeace Action v. Barbara Franklin and Nat'l Marine Fisheries Serv., No. 91-36062 (9th Cir. 1992) (switching to the "arbitrary and capricious"/"hard look" standard in light of the *Marsh* decision).

249. Strycker's Bay Neighborhood Council v. Karlen, 444 U.S. 223, 227 (1980).

250. Accordingly, as long as an agency complies with the "statutory minima," its decision of whether to prepare an EIS effectively escapes judicial review. *Vermont Yankee*, 435 U.S. at 548. *But see* National Latino Media Coalition v. FCC, 816 F.2d 785, 789 (1987) (stating that existing case law suggests that principles of fairness should dictate notice-and-comment procedures for any interpretative rule that substantially impacts people's legal rights) (citing Pickus v. United States Bd. of Parole, 507 F.2d 1107, 1112-13 (D.C. Cir. 1974); Thompson v. Washington, 497 F.2d 626, 640-41 (D.C. Cir. 1973) (same).

> [O]nce an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken.'[251]

In reviewing agency action, courts have held that NEPA's goal is to "insure a fully informed and well considered decision, not necessarily a decision the judges . . . would have reached had they been members of the decisionmaking unit of the agency."[252] But in *Baltimore Gas & Electric Co. v. National Resource Defense Council*, the Supreme Court recognized that, in addition to the duty to consider the environmental impact of its action, the agencies must also fulfill NEPA's other goal, that of "ensur[ing] that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process."[253] Yet, almost in the same breath, the Court retreated by cautioning that Congress did not, however, intend "to elevate environmental concerns over other appropriate considerations."[254]

In sum, the "arbitrary and capricious" standard of judicial review is one of great deference toward agency determination as to whether or not it must prepare an EIS.[255] Some court decisions have held that even actions that present a risk, or *certainty*, of environmental damage are not precluded by NEPA if the agency decision is not arbitrary and capricious.[256] How can a court conclude that an action is not arbitrary and

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251. *Strycker's Bay*, 444 U.S. at 227 (quoting Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976)).

252. *See Vermont Yankee*, 435 U.S. at 558. If the agency has taken a "hard look" at whether its actions require an EIS and decides not to prepare one, even erroneously, the courts may not subsequently substitute their judgment for that of the agency. Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976); *see also* Foundation on Economic Trends v. Thomas, 637 F. Supp. 25, 29 (D.C. 1986) (holding that NEPA's EIS requirements do not apply to EPA decision to authorize testing of certain bacteria strains since the decision was made in compliance with EPA's regulatory framework that, akin to NEPA's mandates, already requires thorough consideration of environmental impacts).

253. Baltimore Gas & Elec. Co. v. National Resources Defense Council, 462 U.S. 87, 97-101 (1983) (discussing the twin aims of NEPA).

254. *Id.* at 97 (emphasizing that NEPA doesn't elevate environmental concerns over other concerns, but rather, requires that agencies take a "hard look" at potential environmental impacts before acting). *Id.*

255. *See* Greenpeace USA v. Steve, 748 F. Supp. 765 (D. Haw. 1990) (agency's decision not to supplement an EIS will not be set aside unless it is arbitrary & capricious).

256. *See* North Slope Borough v. Andrus, 486 F. Supp. 332, 345 (D.D.C. 1979) (discussing EIS requirement under the APA in light of development plans for the outer

capricious when it is certain that it will result in environmental damage? Under a purely economic analysis, many agency decisions would escape the arbitrary and capricious label so long as there is some sort of economic payoff as, for example, the discovery of additional oil reserves in Alaska's pristine coastal plains. Accordingly, agencies can easily overcome the arbitrary and capricious standard by presenting a persuasive risk-benefit argument despite the negative implications on the environment.[257]

In *Sierra Club v. United States Department of Transportation*, the court identified four elements that must be present before a court undertakes judicial review of an agency decision not to prepare an EIS.[258]

> First, the agency must have accurately identified the relevant environmental concern. Second, once the agency has identified the problem, it must have taken a "hard look" at the problem in preparing the EA [environmental assessment]. Third, if a finding of no significant impact is made, the agency must be able to make a convincing case for its finding. Last, if the agency does find an impact of true significance, preparation of an EIS can be avoided only if the agency finds that changes or safeguards in the project sufficiently reduce the impact to a minimum.[259]

The determination of whether or not there exists a "significant impact" on the environment has been a prime focus of litigation, with the word "significant" becoming "a chameleon-like word that takes its functional meaning from its context."[260] Furthermore, even when an agency action is determined to have "significant impact," NEPA may still not apply because the action is exempt[261] or because there is another statute that controls.[262]

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continental shelf); Alaska v. Andrus, 580 F.2d 465, 472 (turning down petition to enjoin Alaska lease sale), *vacated in part as moot*, 439 U.S. 922 (1978).

257. ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION 32 (1992).

258. *Id.* at 127; Sierra Club v. United States Dep't of Transp., 753 F.2d 120, 127 (D.C. Cir. 1985).

259. *Sierra Club*, 753 F.2d at 127; *see also* Center For Marine Conservation v. Brown, 1993 U.S. Dist. LEXIS 3801, 8 (Civil Action No. 92-2471(JHG)).

260. Louisiana Wildlife Fed'n v. York, 761 F.2d 1044, 1052-53 (5th Cir. 1985) (finding that forest clearing plan warranted preparation of an EIS) (quoting Environmental Defense Fund v. Marsh, 651 F.2d 983, 991 (5th Cir. 1981)); Hanly v. Kleindienst, 471 F.2d 823, 830-33 (2d Cir. 1972) (factoring in the qualitative and quantitative effects in determining whether there exists a risk of significant impact on the environment).

261. *See supra* note 232 and accompanying text.

262. *See* Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 558, 558 (1978); *see also* Merrell v. Thomas, 608 F. Supp. 644, 647 (D. Or. 1985) (holding NEPA inapplicable where FIFRA's procedural requirements are the "functional equivalent" of NEPA) (citation omitted); Alabamians For A Clean Env't v. Thomas, 18 ENVTL. L. REP. 20460, 20462 (D. Ala. 1987) (holding NEPA inapplicable where RCRA requirements are the "functional equivalent" of NEPA); Alabama v. EPA, 911 F.2d 499, 505 (11th Cir. 1990) (holding that RCRA supersedes NEPA because it was enacted after NEPA and provides more specific procedural guidelines to be followed by the EPA);

So, what other criteria must be considered when NEPA is being applied to a legislative proposal? First, the courts recognize that an agency decision not to act does not trigger NEPA's EIS requirement.[263] This view is in line with the APA requirement for finality in agency decisions before judicial review may occur.[264] Second, congressional intent reflects a clear desire that recommendations or reports be supported by an EIS "at the time the *initial* legislative proposals were made."[265]

The question of when to prepare a legislative EIS becomes one of timing. Should an agency prepare an EIS once it completes a draft for a proposal? "Mere contemplation" of a project is not enough to classify as a proposal for major federal action.[266] But if the agency completes a proposal and initiates action by publishing a proposal and holding hearings, then an EIS should accompany that proposal.[267]

The Ninth Circuit has determined that an EIS must be prepared before "an irretrievable commitment of resources" occurs.[268] What if the agency first makes the proposal to the President who then turns it over unchanged to Congress? It is here that the courts have consistently shown an unwillingness to require the Executive to prepare an EIS for legislative proposals.[269]

Schalk v. EPA, 10 ENVTL. L. REP. 20381, 20382 (S.D. Ind. 1988) (holding that citizen suit provision available for CERCLA does not give plaintiff the right to assert a NEPA failure to prepare an EIS claim).

263. *See, e.g.*, Alaska v. Andrus, 580 F.2d 465, 477, (holding that Secretary of State's decision not to exercise his power does not trigger NEPA's EIS requirement), *vacated in part*, 439 U.S. 922 (1978).

264. *See infra* notes 270-85 and accompanying text (discussing NEPA standing under the APA).

265. Wingfield v. OMB, 7 ENVTL. L. REP. 20362 (D.C. 1977) (denying injunctive relief in connection with transmittal of federal agency reports and recommendations to Congress on pending mining legislation) (emphasis added).

266. Kleppe v. Sierra Club, 427 U.S. 390, 404 (1976).

267. Aberdeen & Rockfish R.R. v. Students Challenging Regulatory Agency Procedures (S.C.R.A.P.), 422 U.S. 289, 320 (1975).

268. Conner v. Burford, 836 F.2d 1521, 1532 (9th Cir. 1988).

269. *See* Andrus v. Sierra Club, 442 U.S. 347, 361 (1979) (holding that requests for appropriations do not require a legislative EIS because of their limited and specific purpose); Chamber of Commerce of United States v. Dept. of Interior, 439 F. Supp 762, 766 (D.D.C. 1977) (depriving the public of the opportunity to participate in the decision-making process is not sufficient grounds for standing when a proposal is already in the hands of Congress because Congress can, at that point, require agency preparation of an EIS or refuse to consider the proposal).

2. Standing

NEPA does not provide a private right of action for damages or restitution.[270] Although the originally proposed language in NEPA stated that "each person has a fundamental and inalienable right to a healthful environment," this constitution-like language was later softened to read "each person should enjoy a healthful environment."[271] The fact that no other part of NEPA explicitly references any individual rights of action has led the courts to conclude that, by itself, NEPA does not embrace a private right of action.[272] NEPA has also been characterized as a supplemental statute. As a result, the standing requirements under NEPA depend on which other statute the plaintiff is bringing his action under.

Section 704 of the Administrative Procedure Act provides: "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."[273] Since NEPA has no statutory private right of action, plaintiffs must rely on the APA to satisfy the standing requirement.[274] Review of NEPA under the APA cannot serve as basis for substantial revision of carefully constructed rule-making procedural specifications of the Administrative Procedure Act.[275] This means that judicial review of agencies' failure to comply with NEPA's provisions must first satisfy APA's statutory requirements of "final agency action."[276]

The finality requirement under the APA serves to insure that review involves concrete injury or threatened injury rather than hypothetical effects of agency actions.[277] Agency inaction can be considered "final

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270. Sierra Club v. Penfold, 857 F.2d 1307, 1315 (9th Cir. 1988); *see also* Noe v. Metropolitan Atlanta Rapid Transit Auth., 644 F.2d 434, 439 (5th Cir. 1981) (concluding that there is no legislative intent to grant a private remedy under NEPA). *But see* Atchison, Topeka, and Santa Fe Ry. v. Callaway, 431 F. Supp. 722, 728 (D.D.C. 1977) (concluding that NEPA's EIS requirement can be enforced by private action); ANDERSON & DANIELS, *supra* note 16, at 16-23 (private parties have a right to enforce adequate preparation of an EIS for "major federal actions").

271. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 1969 U.S.C.C.A.N. 2751, 2768-69.

272. Tanner v. Armco Steel Corp., 340 F. Supp. 532, 538 (S.D. Tex. 1972) (holding that NEPA does not create any "substantive" rights).

273. Administrative Procedure Act, 5 U.S.C. § 704 (1993).

274. Since NEPA has been interpreted as an essentially a procedural statute, review of its EIS requirement is principally achieved through the APA. 5 U.S.C. § 706(2)(D) (1993).

275. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 et seq. (1988); Administrative Procedure Act, 5 U.S.C. § 553 (1993).

276. Before undertaking judicial review, courts require that the challenged action is "definitive" and has a direct impact on the challenger. Chicago Truck Drivers v. National Mediation Bd., 670 F.2d 665, 668 (7th Cir. 1981).

277. National Wildlife Fed'n v. Goldschmidt, 677 F.2d 259, 263 (2d Cir. 1982); Abbott

agency action" subject to judicial review "so long as it continues and so long as there is a vestige of a right which will suffer further impairment by an extension of the delay," and it amounts to violation of a legal right within the Federal Administrative Agency Act.[278]

In addition to the finality requirement, a prima facia challenge to an agency violation of NEPA's EIS requirements under the APA requires that the plaintiff "show that it was aggrieved by an agency action, the challenged action caused it an 'injury-in-fact', and the alleged injury was to an interest 'arguably within the zone of interest to be protected or regulated' by [NEPA]."[279]

In *National Wildlife Federation*, the Supreme Court reviewed a challenge against the Bureau of Land Management (part of the Department of Interior) alleging a violation of NEPA.[280] The Court refused to recognize standing, reasoning that a general government "program" does not qualify as "agency action" within the meaning of the APA.[281] Standing in general requires that the plaintiff "identify [a] particular 'agency action' that was the source of [its] injuries," and plaintiff's affidavit in this case failed to convince the Court that it did so with sufficient specificity.[282] The courts reject "informational standing" without more because, as one court put it, accepting such a standard for standing under NEPA "would potentially eliminate any standing requirement in NEPA cases, save when an organization was foolish enough to allege it wanted the information for reasons having nothing to do with the environment."[283] Instead, courts prefer that plaintiffs prove "the creation of a risk that serious environmental impacts will be overlooked" to establish an injury sufficient to satisfy standing.[284] Under this analysis, the mere failure to pre-

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Lab. v. Gardner, 387 U.S. 136, 149-50 (1967).

278. Deering Milliken, Inc. v. Johnston, 295 F.2d 856, 865 (4th Cir. 1961).

279. VALERIE M. FOGLEMAN, GUIDE TO THE NATIONAL ENVIRONMENTAL POLICY ACT; INTERPRETATIONS, APPLICATIONS, AND COMPLIANCE 171 (1990) (citing Sierra Club v. Morton, 405 U.S. 727, 733 (1972)).

280. 497 U.S. 871 (1990), *vacated*, Mountain States Legal Found. v. National Wildlife Fed'n, 497 U.S. 1020 (1990).

281. *Id.* at 899.

282. *Id.*

283. Foundation On Economic Trends v. Lyng, 943 F.2d 79, 84 (D.C. Cir. 1991); *see also* Foundation On Economic Trends v. Watkins, 794 F. Supp. 395, 398 (D.D.C. 1992) (equating informational standing to the "ideological interest" in the global warming problem and concluding that both are insufficient for standing).

284. City of Davis v. Coleman, 521 F.2d 661, 670-71 (9th Cir. 1975) (identifying such a risk of serious environmental impact as sufficient procedural injury to satisfy standing requirements).

pare an EIS is insufficient, absent "identifiable substantive agency action putting the parties at risk."[285]

VI. EXTRATERRITORIAL APPLICATION OF NEPA

The issue of NEPA's applicability to extraterritorial agency actions has yet to be directly addressed by the courts and there are very few decisions even dealing with the issue. In *National Resources Defense Council v. Nuclear Regulatory Commissioner*, (NDRC) the D.C. Circuit considered whether the export of a nuclear reactor to the Philippines triggered the EIS requirement, even though the potential environmental impact would fall exclusively within the territory of the Philippines.[286]

The *NRDC* court held that NEPA did not apply to nuclear licensing exports, making it clear, however, that its holding did not preclude applicability of NEPA to other potential federal actions abroad.[287] The court reasoned that the NEPA "looks toward cooperation, not unilateral action" and that Congress should not impose its national environmental goals on other countries.[288]

The court also wrestled with the issue of whether to interpret NEPA as applying extraterritorially to the U.S. Army's activities in Germany in *Greenpeace USA v. Stone*.[289] While the court recognized Congress' concern with the "worldwide environment," it also pointed out that NEPA does not explicitly call for extraterritorial application.[290] The court then evaluated the Army's decision not to prepare an EIS in light of the requirements of Executive Order 12114,[291] concluding that the Army sufficiently complied with the Order.[292]

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285. Public Citizen v. United States Trade Representative, 5 F.3d 549, 552 (D.C. Cir. 1993) (relying on language in *Lyng*, 943 F.2d at 85).

286. Natural Resources Defense Couns., Inc. v. Nuclear Reg. Comm'n, 647 F.2d 1345, 1366-67 (D.C. Cir. 1981).

287. *Id.* at 1367-68.

288. *Id.* at 1366. Of course, this argument will not apply when the other country has openly adopted the NEPA's EIS requirement as their own or where the imposition of NEPA's EIS requirement falls on a United States agency, i.e. the OTR, not on another sovereign.

289. Greenpeace USA v. Stone, 748 F. Supp. 749 (D. Haw. 1990) (denying injunction of transportation of American Army's nerve gas stockpile from Germany to the Johnston Atoll where the transfer was part of an agreement between the President of the United States and a foreign head-of-state and the Army had already substantially complied with Executive Order 12114 in preparing an EIS); *see also Natural Resources*, 647 F.2d at 1367.

290. *Greenpeace USA*, 748 F. Supp. at 757.

291. *Id.* For a discussion of Executive Order 12114, see *supra* notes 213-19.

292. *See Greenpeace USA*, 748 F. Supp at 762. *But see* EEOC v. Arabian Am. Oil Co., 111 S. Ct. 1227, 1229 (1991) (ruling that NEPA does not apply extraterritorially and that non-compliance with Executive Order 12114 does not create a right of ac-

A. *Recent Legislative Attempts to Clarify NEPA's Extraterritorial Mandate*

In 1989, House Representative Studds introduced a bill for reauthorization of the CEQ, including a clarification that NEPA apply extraterritorially.[293] According to Mr. Studds, the purpose of the bill was twofold.[294] First, it "makes it absolutely, 100 percent clear, that NEPA applies . . . to major federal actions having a significant environmental impact on the atmosphere, the oceans, Antarctica, and other areas that commonly make up what is commonly referred to as the global commons."[295] Second, it requires Federal agencies to consider the environmental impact of their actions on climate change, ozone depletion, transboundary pollution and other global problems.[296] On March 5, 1991, Mr. Studds presented yet another bill in the House of Representatives calling for the extraterritorial application of NEPA.[297] The section on NEPA's extraterritorial application was ultimately stricken from the final version of the bill.[298]

In 1987, the Senate also presented a similar bill calling for the extraterritorial application of NEPA.[299] Although the bill included certain exemptions from the extraterritorial application of NEPA, international

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tion); Conservation Law Found. v. Clark, 590 F. Supp. 1467, 1477-78 (D. Mass. 1984) (holding that Executive Order in furtherance of NEPA did not create private right of action).

293. H.R. 1113, 101st Cong., 1st. Sess., 135 CONG. REC. H6836 (daily ed. Oct. 10, 1989).

294. 135 CONG. REC. H6836-37 (1989) (statements of Rep. Studds).

295. *Id.* at 6837.

296. *Id.*

297. 137 CONG. REC. H1413-15 (Mar. 45, 1991). Michael Deland, then Chairman of the CEQ, was present at the subcommittee hearings and expressed that the administration's view was that the extraterritorial application of NEPA "should be implemented by amending the existing executive order rather than legislatively." H.R. REP. NO. 1092, 102d Cong. (1992).

298. H.R. REP. No. 553, 102d Cong. 2d Sess., pt. 1, at 1-3 (1992).

299. S. REP. NO. 180, 102d Cong., 2d Sess., (1991). The Senate bill 1278 was different in that, unlike the House bill, it exempted certain federal activities from NEPA's extraterritorial application and gave the President authority to exempt other actions on a case-by-case basis. The list of specific exemptions included actions "taken to protect the national security of the U.S.; Those taken in the course of an armed conflict; Votes in international conferences or organizations; Strategic intelligence activities; Armaments transfers; and Judicial or administrative civil or criminal enforcement actions." *Id.* at 4.

trade agreements were not among them.[300] The bill emphasized the nature of NEPA's global scope by requiring "consideration of local, regional, and global environmental impacts" regardless of geographical location.[301]

The Conference Report attached to the bill explained the inadequacy of Executive Order 12114 as unenforceable, lacking "many important features of NEPA and the implementing regulations, including provisions for public participation."[302] The most important of the missing features in Executive Order 12114 was its lack of a right of private action.[303] The report also cites the CEQ's own conclusions, after a 1987 study of this Executive Order, that agency interpretations of the Order were inconsistent when they were followed at all.[304]

Additionally the report criticizes the Supreme Court decision of *Robertson v. Methow Valley* as a "narrow interpretation of NEPAs substantive duties and procedural requirements contrary to the overall objectives of the Act."[305] The *Robertson* decision held that NEPA does not impose upon agencies a substantive duty to mitigate environmental effects or to fully develop mitigation plans in each EIS."[306] In contrast, Congress responded that NEPA is to be "construed broadly" so as to improve weak agency compliance with respect to actions that affect global climate, ozone depletion, transboundary pollution, deforestation, biological diversity, desertification, and overpopulation.[307]

Another bill was presented in the House of Representatives in 1993, to extend NEPAs reach to extraterritorial actions, specifically calling for NEPAs application to bilateral and multilateral agreements.[308] Congressional members concerned about the court's reluctance to interpret NEPA as applying to international actions introduced the bill to clarify that "actions covered by NEPA would include the President's submission to Congress of implementing legislation for trade agreements."[309] Mem-

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300. *Id.*

301. *Id.* at 2.

302. *Id.* at 3; *see also supra* notes 211-217 and accompanying text (discussing Executive Order 12114).

303. *See* Environmental Defense Fund, Inc. v. Massey, 986 F.2d 528, 530 (D.D.C. 1993) (holding that Executive Order 12114 does not create a private cause of action for failure to prepare an EIS on actions abroad).

304. S. REP. No. 180, *supra* note 296, at 3.

305. *Id.* at 5.

306. Robertson v. Methow Valley Citizen's Council, 490 U.S. 332, 353 (1989).

307. *See* S. REP. NO. 180, *supra* note 298, at 5.

308. 139 CONG. REC. E2342, (daily ed. Oct. 5, 1993). The bill emphasized that "NEPA's strength lies in its democratization of federal administrative law [by] empower[ing] citizens with the information they need to meaningfully contribute to the environmental decisionmaking process." *Id.*

309. *Id.* "Bilateral and multilateral trade agreements inevitably have environmental

bers proposing the bill explained that the Executive Branch may sidestep NEPAs requirements "every time that the President has final Constitutional or statutory responsibility for the final step" of presenting a federal action to Congress.[310] This bill would have granted a private right to sue the President or his executive office whenever they fail to provide an EIS along with legislative proposals for international agreements.[311] The bill did not become law.

Ironically, a different bill passed in 1989, requiring multilateral development banks to refuse funding unless requesting projects were in compliance with the EIS requirement.[312] As the proponents of amending NEPA asked: "How can we insist that multilateral banks prepare impact assessments on foreign projects when we fail to require our own [OTR] to prepare environmental impact statements[?]"[313]

B. Public Citizen: The Latest Attempt to Resolve the Issue of NEPA's Extraterritorial Application Through the Courts

The latest attempt by a citizen group to apply NEPA's EIS requirement to extraterritorial action was the suit brought by Public Citizen against the United States Trade Representative for failure to prepare a legislative EIS in conjunction with its proposal for the North American Free Trade Agreement.[314] As discussed, NEPA does not have a citizen suit provision,[315] therefore Public Citizen had to rely on the Administrative Procedure Act (APA)[316] to bring the NEPA lawsuit against OTR.[317] By doing

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consequences which must be thoroughly examined prior to their approval. *Id.*

310. *Id.*

311. *Id.* Proponents of the bill explained that the U.S. Trade Representative (U.S.T.R.) could easily make the preparation of an EIS part of its negotiating process as other federal agencies have already done. *Id.*

312. International Development and Finance Act of 1989, Pub. L. No. 240, § 521, 103 Stat. 2511 (1989) (signed into law by President Bush).

313. *See* 139 CONG. REC. E2342 (daily ed. Oct. 5, 1995) (statement of Rep. Owens)

314. *See* Public Citizen v. Office of the United States Trade Representative, 970 F.2d 916, 917 (D.C. Cir. 1992).

315. *See* Sierra Club v. Penfeld, 857 F.2d 1307, 1315 (9th Cir. 1988); *see also* Noe, v. Metropolitan Atlanta Rapid Transit Auth., 644 F.2d 434, 438 (5th Cir. 1981). *But see* Atchison Topeka and Santa Fe Ry. v. Callaway, 431 F. Supp. 722, 438 (D.D.C. 1977).

316. Under the Administrative Procedure Act, a private party may sue for injunctive relief if they are "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702 (1993).

317. *Public Citizen*, 970 F.2d at 918 ("NEPA does not create a private right of action, so plaintiffs rest their claim" on the APA).

so, plaintiffs had to comply with the APA's requirements for standing, mainly, that the agency action subject to review must be "final agency action for which there is no other adequate remedy in a court."[318]

The District Court for the District of Columbia held that Public Citizen did not satisfy the standing requirements under the APA because OTR's ongoing preparation of NAFTA was not final action.[319] Once NAFTA was finalized and signed, Public Citizen brought suit again and this time the district court granted plaintiff's summary judgment, ordering OTR to prepare an EIS on NAFTA.[320] However, Public Citizen's victory proved to be short-lived.

On appeal, the United States Court of Appeals reasoned that submission of NAFTA to the President was not final because the President has the power "to renegotiate NAFTA before submitting it to Congress or to refuse to submit it at all . . . [therefore] his action, and not that of the OTR, will directly affect Public Citizen's members."[321] Accordingly, the court concluded that NAFTA's legislative proposal to Congress is not reviewable under the APA because the President will present it, and he is not an agency subject to NEPA's procedural requirements.[322] In reaching this decision, the court looked at the recent Supreme Court case of *Franklin v. Massachusetts*.[323]

In *Franklin*, the Court reasoned that a census count was not a "final agency action" under the APA because the Secretary's report to the President "serves more like a tentative recommendation than a final and binding determination."[324] The Court further reasoned that "[b]ecause it is the President's personal transmittal to Congress that settles the appor-

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318. *Id.*

319. Public Citizen v. Office of the United States Trade Representative, 782 F. Supp. 139 (D.C. Cir.) (holding that plaintiffs lacked standing and noting additional problems with finality of the action), *aff'd*, 970 F.2d 916 (D.C. Cir. 1992) (holding that Court had no jurisdiction because ongoing NAFTA negotiations did not constitute "final agency action" under the APA).

320. Public Citizen v. United States Trade Representative, 822 F. Supp. 21 (D.C. Cir. 1993), *rev'd*, 5 F.3d 549 (D.C. Cir. 1993). The U.S. District Court stated that "the plain language of the NEPA makes it a foregone conclusion that the OTR must prepare an EIS on the NAFTA." *Id.* at 29.

321. Public Citizen v. United States Trade Representative, 5 F.3d 549, 553 (D.C. Cir. 1993).

322. *Id.*; *see also* Armstrong v. Bush, 924 F.2d 282, 289 (D.C. Cir. 1991) (holding that the President is not an agency within the meaning of the Administrative Procedure Act), *rev'd*, 1 F.3d 1274 (D.C. Cir. 1993).

323. 112 S. Ct. 2767 (1992). The *Franklin* decision reversed a lower court holding that directed the Secretary of State to eliminate overseas federal employees from census counts used to apportion the number of representatives to Congress, and ordered a recount. *Id.* at 2770.

324. *Id.* at 2774.

tionment, until he acts there is no determinate agency action to challenge. The President, not the Secretary, takes the final action that affects the States."[325]

The Court distinguished *Japan Whaling Ass'n v. American Cetacean Society*, "in which [the Court] held that the Secretary of Commerce's certification to the President that another country was endangering fisheries was 'final agency action.'"[326] According to the Court, the difference in *Japan Whaling* was that the Secretary's action "automatically triggered sanctions," as opposed to the *Franklin* report to the President, which had "no direct effect on reapportionment."[327]

Public Citizen believed that the OTR is still legally required to prepare a legislative EIS on NAFTA, notwithstanding the jurisprudential challenges that prevented the case from being tried on the merits.[328] In October of 1993, the group filed a petition for certiorari with the United States Supreme Court.[329] In the interim, Public Citizen stated that "the court of appeals disregarded more than two decades of NEPA jurisprudence, executive branch practice, and congressional understanding."[330] The group further criticized the decision, stating that it effectively renders NEPA's EIS requirement unenforceable.[331] The Supreme Court refused to review the case.[332]

It is the view of the author that *Public Citizen* was erroneously decided. First, NEPA's EIS mandate to prepare an EIS for any federal action that has a substantial impact on the environment is to *all* federal agencies; Congress did not provide an exemption for the OTR.[333] Second, the CEQ regulations expressly mention that treaties and international agreements are federal actions.[334] These regulations are subject to substantial

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325. *Id.* at 2775.

326. *Id.* at 2774 (citing Japan Whaling Assn. v. American Cetacean Soc'y, 478 U.S. 221, 231 (1986)).

327. *Id.*

328. *Public Citizen News Conference*, FED. NEWS SERV., Sept. 24, 1993.

329. 10 I.T.R. 1716 (Oct. 13, 1993).

330. *See supra* note 233 and accompanying text.

331. *See also* Public Citizen v. United States Trade Representative, 5 F.3d 549, 553 (D.C. Cir. 1993). (Public Citizen brief at 43).

332. Public Citizen v. United States Trade Representative, 114 S. Ct. 685 (1994); *see* also *Supreme Court Refuses to Review Case on Whether EIS Required For Trade Deal*, I.T.R. (BNA) 60 (1994).

333. *See* Comment, *Nepa's Role In Protecting The World Environment*, 131 U. PA. L. REV. 353, 361 n.53 (1982).

334. *See supra* notes 231-33 and accompanying text.

deference by the courts, and therefore, they should apply as authority that international agreements are subject to NEPA's EIS requirement.[335] Third, the court of appeals erred in finding that OTR's NAFTA recommendation to the President did not represent "final agency action." As Judge Randolph correctly pointed out in his concurring opinion, "judicial review under the APA demands 'final agency action' whereas the duty to prepare an impact statement arises earlier."[336] The court erroneously concluded that when OTR presented the completed and signed NAFTA to the President, there was no final agency action reviewable by the court.[337] Furthermore, the President's signature and subsequent recommendation of NAFTA for legislative proposal created a generally accepted "obligation of good faith to refrain from acts calculated to frustrate the object of the treaty [which] attaches to a State which has signed a treaty subject to ratification."[338] Fourth, NEPA's application to international trade agreements would not infringe on the President's constitutional powers, nor would it offend the international principles of comity and territorial sovereignty.[339] On the contrary, it would both help the

335. *See* Andrus v. Sierra Club, 442 U.S. 347, 355 (1989).

336. *See* Public Citizen v. United States Trade Representative, 5 F.3d 549, 554 (D.C. Cir. 1993) (Randolph, J., concurring). Judge Randolph also commented on the need to reconcile *Franklin* with a prior Supreme Court case requiring court intervention "when a proposal or recommendation is made, and someone protests either the absence or the adequacy of the final impact statement." *Id.* (quoting Kleppe v. Sierra Club, 427 U.S. 390, 406 n.15 (1976)). The EIS requirement is triggered when the OTR makes its NAFTA recommendations to the President, not when the President later proposes those recommendations to Congress. *See* Nevada v. Watkins, 939 F.2d 710, 713 n.8 (1991).

337. Other agencies reporting and making recommendations to the President are currently required to prepare an EIS prior to making such recommendations. *See, e.g., Watkins*, 939 F.2d at 713 n.8 (stating that Secretary of the Department of Energy's recommendation to the President regarding nuclear waste sites is clearly reviewable pursuant to the APA "as a final decision or action by the Secretary" despite the fact that the President makes the final recommendation to Congress).

338. Michael J. Glennon, *The Senate Role in Treaty Ratification*, 77 A.J.I.L. 257, 275 n.111 (1983) (quoting reports of the Commission to the General Assembly, U.N. Doc. A/6309/Rev.1 (1966), *reprinted in* 2 Y.B. INT'L L. COMM'N 70, U.N. Doc. A/CN.4/SER.A/1966/Add.1).

339. In fact, the President himself has previously been subject to preparation of an environmental impact report requiring him, according to the Jackson amendment, to "examine alternative potential basing modes and alternative weapons systems" to the infamous MX missile. *See* Romer v. Carlucci, 847 F.2d 445, 452 (8th Cir. 1988) (further holding that Air Force's EIS compliance with NEPA is fully reviewable despite the fact that MX EIS decisions are "interwoven with political issues going to the heart of foreign policy and national defense which have been already resolved by the President"). *Id.* at 461. *See generally* Department of Defense Authorization Act of 1984, Pub. L. No. 98-94, § 110, 97 Stat. 614, 621-22 (1983) (DAA 1984); 96 Stat. 1830, 1846 (Jackson Amendment). *But see* National Resources Defense Council, Inc. v. Nuclear Regulatory Comm'n, 647 F.2d 1345, 1347 (D.C. Cir. 1981) (finding that foreign

President in making better recommendations to Congress, and help other nations that lack the resources and technology to conduct as thorough an EIS as the United States is capable of generating. Finally, the American public has a right to participate in the process of entering into international trade agreements that, as discussed, have a tremendous impact on the earth's environment and its resources.[340]

VII. CONCLUSION

Economic development is inextricably linked to the environmental health of our planet to the extent that most industries are dependent on natural resources in one way or another. Our failure to account for the real value of such shrinking resources could lead to economic consequences that could destabilize order in many regions of the world. The application of NEPAs EIS requirement to trade agreements would result in greater public participation, the dissemination of full and accurate information, and better decision-making.

Despite this, the court in *Public Citizen* was unwilling to expand NEPA's mandate by interpreting its scope to include both procedural and substantive requirements or by enforcing executive agency compliance with what has now become an international practice, the EIS. The Executive Branch, in an effort to bypass the rigorous evaluation required by NEPA's EIS, and to speed up passage of NAFTA, resisted the preparation of an EIS on the agreement despite environmentally-sensitive Al Gore's statements that a federal agency could easily prepare one.

Congress must enact new legislation that puts teeth into NEPA and resolves the ambiguities surrounding the statute. Legislators must amend NEPA to: (a) create a citizen suit provision and (b) clarify NEPA's scope to apply to all federal agency actions, including trade agreements and other extraterritorial actions. While implementation of these proposed provisions into NEPA will not solve the environmental challenges we face, it would certainly represent a step in the right direction.

JOSE A. EGURBIDE

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policy concerns regarding nuclear exports supersede NEPA's EIS requirement).

340. *See supra* note 308 and accompanying text; *see also supra* notes 46-62 and accompanying text (discussing the role of the public in shaping environmental policy).