

January 1992

# The North American Free Trade Agreement and U.S. Environmental Law

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## Recommended Citation

David A. Wirth. "The North American Free Trade Agreement and U.S. Environmental Law." *American Society of International Law, Proceedings of the 86th Annual Meeting* (1992): 155-166.

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the regionalization of environmental-impact assessment processes, in order to ensure that the nongovernmental sector has a role in the protection of the North American environment.

#### THE NORTH AMERICAN FREE TRADE AGREEMENT AND U.S. ENVIRONMENTAL LAW

By David A. Wirth\*

The following words of Benjamin Disraeli nearly a century and a half ago sum up quite well the situation we are dealing with in this panel. "Free trade," said Disraeli, "is not a principle, it is an expedient." Today I would like to discuss the interaction of this "expedient" with another domestic and international issue—the environment. Ambassador Szekely has described this issue in some detail from the Mexican side, and I would like to provide some additional views from a U.S. perspective.

I would first like to discuss a recent lawsuit against the U.S. Trade Representative (USTR) alleging violation of U.S. environmental laws in the negotiation of the proposed North American Free Trade Agreement (NAFTA). Secondly, I will address the important issue of harmonization of domestic environmental standards among Mexico, Canada and the United States. Finally, I will take up the question of dispute settlement, which has significant implications for the environment.

The National Environmental Policy Act of 1969 (NEPA),<sup>1</sup> directs federal agencies to consider the impacts of proposed federal activities in advance of their execution. NEPA is the U.S. domestic version of the environmental impact assessment methodology that Ambassador Szekely has described in an international context. For governmental activities anticipated to have a significant adverse impact on the environment, an analysis called an environmental impact statement is required in advance of final action. The Council on Environmental Quality, located, like the USTR, in the Executive Office of the President, is the chief caretaker of the statute. The Council's regulations specifically state that proposed international agreements are subject to the statute's requirements.<sup>2</sup> The Department of State also has regulations that apply NEPA and the environmental impact statement requirement to international agreements.<sup>3</sup> The USTR in February produced a final environmental review to accompany the NAFTA negotiations.<sup>4</sup> However, to the best of my knowledge, the Executive Branch has never claimed that this document satisfies the statutory requirements.

In the past, various executive branch agencies have prepared environmental impact statements for proposed international agreements. It is probably fair to say that the implementation of the requirement for international agreements has been uneven, and that not every agreement that might have adverse environmental impacts has been analyzed as required by NEPA. On the other hand, a number of

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<sup>1</sup>42 U.S.C. §4332(C).

<sup>2</sup>40 C.F.R. §1508.18(b)(1) (definition of major federal actions to which NEPA applies, including "treaties and international conventions or agreements").

<sup>3</sup>22 C.F.R. §161.5.

<sup>4</sup>Office of the United States Trade Representative, *Review of U.S.-Mexico Environmental Issues* (1992). See also U.S. Environmental Protection Agency and Secretaria de Desarrollo Urbano y Ecología, *Integrated Environmental Plan for the Mexican-U.S. Border Area* (First Stage, 1992-94) (1992).

international agreements, including the Panama Canal Treaty,<sup>5</sup> have been the subject of environmental impact statements, at least some of which explicitly rely on NEPA as the legal authority for their preparation. Until recently, however, there had been no litigation of the environmental impact statement requirement as applied to international agreements.

On August 1, 1991, three public interest organizations—Public Citizen, the Sierra Club and Friends of the Earth—brought suit for declaratory and injunctive relief in the U.S. District Court for the District of Columbia alleging application of NEPA to the NAFTA and GATT Uruguay Round negotiations. This precedent-setting case has implications far beyond the environmental consequences of trade agreements. The *Public Citizen* lawsuit raises the question of the application of statutory requirements to the negotiation of international agreements, an issue with separation-of-powers overtones. One component of the NEPA process is open consultation involving public comment. If successful, this suit would open trade negotiations in particular, and the negotiation of international agreements generally, to considerably more public scrutiny than is now standard practice. The case also raises the issue of the application of NEPA and U.S. statutes generally to effects that occur overseas—sometimes known as the “NEPA Abroad” problem.<sup>6</sup>

Many of these fascinating questions may go unanswered. On January 7, Judge June Green granted the Government’s motion to dismiss the complaint for lack of standing.<sup>7</sup> She also suggested that the case was not ripe and hence not justiciable. Oral argument on an appeal currently pending in the U.S. Court of Appeals for the District of Columbia will be heard on May 4. If the Court of Appeals reaches the merits in this case, it will be confronted with a history, admittedly spotty, of the apparently smooth application of NEPA to the negotiation of international agreements without, to my knowledge, interference with the Executive Branch’s constitutional prerogatives, disruption of negotiations, or objections from prospective treaty partners. In particular, it is important to realize that NEPA is a statutory directive addressed only to federal agencies, not to private parties in the United States or abroad. Even then, the law requires only preparation of an environmental study. NEPA’s application does not, as some on occasion have suggested, infringe the exclusive jurisdictional prerogatives of foreign states that we customarily associate with the term “sovereignty.”

The second issue that I would like to discuss is “harmonization,” a very important issue in this trade agreement and others. The draft NAFTA text is reported, like the Uruguay Round, rather antiseptically to address “harmonization” of “san-

<sup>5</sup>Besides the Panama Canal Treaty, for which the U.S. Department of State prepared a draft environmental impact statement (EIS) in 1977, the Executive Branch has also prepared the following final EISs in connection with the negotiation of the following international agreements: Montreal Protocol on Substances That Deplete the Ozone Layer (Department of State & Environmental Protection Agency, 1988); Interim Convention on the Conservation of North Pacific Fur Seals (Department of Commerce and Department of State, 1985); Incineration of Wastes at Sea Under the 1972 Ocean Dumping Convention (Department of State and Environmental Protection Agency, 1979); Renegotiation of Interim Convention on Conservation of North Pacific Fur Seals (Department of Commerce, 1976); Convention for the Conservation of Antarctic Seals (Department of State, 1974); Ratification of Proposed Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (Department of State, 1973); and Negotiation of an International Regime for Antarctic Mineral Resources (Department of State, undated).

<sup>6</sup>*Cf.* Exec. Order No. 12,114, 3 C.F.R. 356 (1980), *reprinted in* 42 U.S.C. §4321 app. (articulating attenuated requirements for analysis of environmental effects abroad of major federal actions).

<sup>7</sup>*Public Citizen v. Office of the United States Trade Representative*, 782 F.Supp. 139 (D.D.C. 1992), *appeal docketed*, No. 92-5010 (D.C. Cir. Jan. 9, 1992).

itary and phytosanitary measures.” In essence, these measures are domestic regulatory measures governing contaminants in the food supply, including food additives and pesticide residues such as those from alar and DDT. On the basis of a recently leaked version of the NAFTA text, that agreement is reported to track the December 1991 version of the GATT Uruguay Round, the so-called “Dunkel Draft,”<sup>8</sup> on this issue. If that is the case, the stringency of domestic regulations could be circumscribed by international standards such as those in the Codex Alimentarius, an international body that, among other things, establishes pesticide tolerances or “maximum residue levels.” According to a recent General Accounting Office report,<sup>9</sup> those limitations are not necessarily as strict as U.S. standards. Even if they are stricter than such international standards as those in the Codex Alimentarius, domestic regulations like those of the United States would nonetheless be permitted if they are scientifically justified.

This requirement for “sound science,” although it sounds attractive, is really a red herring. Scientists routinely disagree on issues that are questions of public policy rather than of science. Dispute settlement processes, like those reported to be established by the draft NAFTA text, historically have almost no scientific expertise on which to draw that would enable informed application of a scientific standard in individual cases. As a result of this portion of the agreement, such important statutes as the Delaney Clauses<sup>10</sup>—which prohibit the use of cancer-causing food colorings, additives and animal drugs in any amount—could be affected. The NAFTA text also reportedly requires preemption of state standards. For example, some California standards in this area are stricter than federal regulations. The United States would be required to override these more stringent requirements of subsidiary governmental bodies despite the fact that, after long and bitter battles in the Congress, national legislation specifically does not preempt the ability of the fifty states to adopt more demanding pesticide standards under certain circumstances.<sup>11</sup>

Moreover, domestic environmental statutes, like those under which pesticide residue limitations are promulgated, do not ordinarily anticipate international review procedures like those under discussion in the GATT Uruguay Round and those reported to be included in the current text of the NAFTA. Consequently, the domestic mechanism for implementing adverse decisions from dispute settlement processes under trade agreements is far from clear. One can imagine a situation in which a foreign government, by means of a dispute settlement process pursuant to a trade agreement like the NAFTA, would successfully challenge a U.S. pesticide tolerance, which might then be withdrawn by the Executive Branch. In a subsequent domestic action for judicial review of an alleged failure by the Executive Branch to promulgate pesticide residue limitations that meet domestic statutory requirements for the protection of public health, a court might very well be confronted with the potential application of the political question doctrine, which

<sup>8</sup>Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations in GATT, Doc. MTN.TNC/W/FA (Dec. 20, 1991).

<sup>9</sup>GENERAL ACCOUNTING OFFICE, INTERNATIONAL FOOD SAFETY: COMPARISON OF U.S. AND CODEX PESTICIDES STANDARDS (1991).

<sup>10</sup>Federal Food, Drug, and Cosmetic Act §§409(c)(3)(A), 512(d)(1)(H) and 706(b)(5)(B), 21 U.S.C. §§348(c)(3)(A), 360b(d)(1)(H) and 376(b)(5)(B).

<sup>11</sup>See Federal Insecticide, Fungicide, and Rodenticide Act §24(a), 7 U.S.C. §136v(a); Safe Drinking Water and Toxic Enforcement Act of 1986, Cal. Health & Safety Code §§25249.5–.13; Wisconsin Public Intervenor v. Mortier, 111 S. Ct. 2476 (1991); COPARR, Ltd. v. City of Boulder, 942 F.2d 724 (10th Cir. 1991).

has particular vitality in the foreign relations area. Despite the Supreme Court's rejection of the applicability of the political question doctrine to questions of statutory interpretation in the 1986 *Japan Whaling* case,<sup>12</sup> the Government often raises the doctrine as a bar to adjudication, as it did in the *Public Citizen NEPA* case.

Although I know of no studies addressing this question, it is intuitively plausible that environmental regulations that might be nontariff barriers, as exemplified by pesticide residue limitations stricter than international standards, are not necessarily the biggest trade problem. Rather, countries with environmental policies that are too weak—not those with excessively strict environmental regulations—may present considerably larger threats of disruption to the integrity of the international trade regime. In other words, industries in countries that fail to regulate pollution of the air, water, and soil incidental to manufacturing processes obtain an unfair trade advantage by comparison with industries in countries with more advanced environmental policies.<sup>13</sup> One might think of this situation, this unfair trade advantage, as a "pollution subsidy." So, for instance, the United States, which has relatively strict environmental laws, should find it in its national interest to pull all countries up to an international minimum standard instead of chopping them down to a least common denominator. In any event, the general GATT rule, which presumably will be adopted in the NAFTA, is that competitive advantages deriving from discrepancies in national environmental policies cannot be offset by at-the-border trade measures. Still, for some time trade agreements like the GATT have targeted certain export subsidies.<sup>14</sup>

Another area in serious need of reform is public access to international decision-making processes like dispute settlement proceedings in the NAFTA. The recent "tuna/dolphin" case in GATT, mentioned by previous speakers, demonstrates the necessity for improved procedures. That case involved a provision of the Marine Mammal Protection Act (MMPA),<sup>15</sup> a statute enacted in 1972, amended in 1984 and 1988, but never fully implemented by the Executive Branch. The statute requires that the kill of dolphin incidental to fishing for yellowfin tuna with "purse-seine" nets be comparable to that of the U.S. fleet. The remedies for not meeting this standard are trade restrictions on imports of tuna from the offending country. The Earth Island Institute, a private nonprofit organization, sued in the U.S. District Court for the Northern District of California and obtained a court order directing the Executive Branch to impose a ban on imports of yellowfin tuna from Mexico and other countries.<sup>16</sup>

<sup>12</sup>*Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221, 229–30 (1986).

<sup>13</sup>A 1972 OECD recommendation articulates the "Polluter-Pays Principle," intended as an international minimum standard requiring the internalization of environmental costs for the express purpose of eliminating trade distortions arising from disparate domestic environmental policies. Recommendation on Guiding Principles Concerning International Economic Aspects of Environmental Policies, OECD Doc. C(72)128, reprinted in Organisation for Economic Cooperation and Development, *OECD and the Environment* 23 (1986). The European Community applies the Polluter-Pays Principle internally. See Single European Act, Feb. 17 & 28, 1986, art. 25, 19 Bull. Eur. Comm. Supp. (No. 2), at 5 (1986), reprinted in 25 ILM 506 (1986) (adding new article 13OR, para. 2, specifying "that the polluter should pay," to Treaty of Rome); Recommendation Regarding Cost Allocation and Action by Public Authorities on Environmental Matters, 18 OFF. J. EUR. COMM. (No. L 194) 1 (1975), reprinted in BNA, 131 INT'L ENV'TL. REP. 1001 (implementing Polluter-Pays Principle).

<sup>14</sup>See, e.g., Agreement on the Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, B.I.S.D. 26th Supp. at 56 (1980) (GATT Subsidies Code).

<sup>15</sup>16 U.S.C. §1371.

<sup>16</sup>*Earth Island Institute v. Mosbacher*, 746 F.Supp. 964 (N.D. Cal. 1990), *aff'd*, 929 F.2d 1449 (9th Cir. 1991). The Court of Appeals affirmed a second order of the District Court, issued after a conclusion that the federal defendants' subsequent finding that Mexico satisfied the statutory standard of the

Mexico initiated dispute settlement process in the GATT, challenging the import ban as a nontariff barrier to trade. The dispute settlement panel ruled in Mexico's favor.<sup>17</sup> What is interesting in this context is the process by which the dispute was adjudicated. In contrast to the opportunities for public input into the legislative, administrative and judicial fora in which this dispute was treated on the domestic level, but consistent with standard GATT procedures, the documents and oral proceedings in the case were not accessible to the public.<sup>18</sup> Dispute settlement in GATT does not provide for participation by private parties as intervenors or amici. However, in the tuna/dolphin case, ten other GATT contracting parties and the European Economic Community made written submissions to the panel, all of which were critical of the MMPA ban and most of which argued that that action is inconsistent with the GATT.<sup>19</sup> Further, the Executive Branch, which had ignored three statutory directives and reluctantly implemented the import ban under court order, represented the United States in the GATT dispute settlement process. Particularly against the background of the closed nature of the GATT process, there were obvious questions as to whether the Executive Branch vigorously defended the U.S. position. Consequently, there is every reason to believe that important perspectives were not adequately presented to the GATT dispute settlement panel, which, at least as a formal matter, had access to a spectrum of views that was considerably less than complete.

Open hearings and general availability of documents in publicly constituted adjudicatory processes are ordinarily thought to be desirable, if not necessary, to the integrity of those processes. Further, it is axiomatic that those who could be affected should have an opportunity to present their positions in adjudicatory

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MMPA was illegal. The District Court recently granted plaintiffs' motion for a preliminary injunction and issued an order clarifying the broad extent of a secondary ban on imports from intermediary nations that purchase yellowfin tuna abroad and export it to the United States. *Earth Island Institute v. Mosbacher*, 785 F.Supp. 826 (N.D. Cal. 1992).

<sup>17</sup>United States—Restrictions on Imports of Tuna, *reprinted in* 30 ILM 1594 (1991). The three-member dispute settlement panel noted that discrimination by importing states based on the methods by which foreign goods are produced, as opposed to characteristics of the foreign goods themselves, is not warranted by the GATT. Consequently, the GATT requires competitive treatment of imported products as such without regard to the environmental policies of the country of export. Further, the exceptions in article XX of the GATT for trade measures directed at the protection of animal life or health or the conservation of natural resources must be narrowly construed. In light of that interpretation, the drafting history of the agreement and the broader implications for international trade, the panel concluded that trade measures to protect resources outside the jurisdiction of a contracting party are not permissible. Further, the United States had failed to demonstrate that the import restriction primarily aimed at conservation or that measures less burdensome to international trade as such were unavailable. Presumably because of its stake in the NAFTA negotiations, Mexico postponed presentation to the GATT Council of the panel report. See *WASH. POST*, Sept. 27, 1991 at A26 (advertisement by Government of Mexico). The GATT Council recently rejected a request by the European Economic Community to adopt the Mexican Tuna panel report. See *GATT Council Refuses EC Request to Adopt Panel Report on U.S. Tuna Embargo*, 9 INT'L TRADE REP. (BNA) 353 (1992).

<sup>18</sup>See, e.g., *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*, Annex ¶6(iv), B.I.S.D., 26th Supp. at 210 (1980). ("Written memoranda submitted to the panel have been considered confidential, but are made available to the parties to the dispute.") See also *Draft Final Act*, *supra* note 8, §§ ¶¶12.1–2 (draft understanding on rules and procedures governing the settlement of disputes under Articles XXII and XXIII of the GATT specifying that "written memoranda submitted to the panel shall be considered confidential").

<sup>19</sup>See *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*, *supra* note 18, ¶15 ("Any contracting party having a substantial interest in the matter before a panel, and having notified this to the Council, should have an opportunity to be heard by the panel.").

proceedings that could have an impact on their interests. Moreover, it is well accepted that an expansive, as opposed to constricted, array of relevant perspectives presented to a tribunal increases the likelihood of an accurate result. For these reasons, many domestic legal systems, including that of the United States, generally require open judicial proceedings whose workings the public can scrutinize and allow interests that are not party to a dispute, but that nonetheless will be affected by the outcome, to participate in dispute settlement processes as intervenors or amici.

Until relatively recently, however, only states as represented by governments were considered subjects of international law, and the international system still acknowledges only a very limited role for the individual. But as graphically demonstrated by the GATT dispute settlement process, decisions that directly affect the lives, health and livelihoods of individuals can be taken to the international level by governments with little or no accountability directly to the public. Although some scientists, businessmen, and nongovernmental organizations have managed to carve out niches for themselves as observers or advisers to multilateral institutions and processes, policy and practice among international organizations regarding public participation—a principle, if not a right, that we take for granted on the domestic level—remains very uneven and has not been standardized. In any event, trade agreements seem to be lagging behind other substantive areas of international law in this regard.

There is now a need to define expanded rights of participation by the public in international processes like dispute settlement proceedings under the NAFTA and the GATT. Openness in governmental processes, we now know, is essential to ensuring public accountability. Public scrutiny of documents of international organizations and multilateral processes should be considerably expanded.

Washington and Lee University will host a symposium on the trade and environment connection in late September. The tentative title for that conference is "Environmental Quality and Free Trade: Interdependent Goals or Irreconcilable Conflict?" As I have suggested, there are ways for the two issues to reinforce each other. First, trade agreements can be structured to target pollution subsidies, a priority goal before whose full realization attacks on environmental measures as nontariff barriers are, in my opinion, inappropriate. Secondly, dispute settlement process and the negotiation of new or modified trade agreements can be opened to public scrutiny and participation. However, as I have also tried to suggest, I fear that recent trade developments, and the draft NAFTA in particular, unnecessarily risk exacerbating rather than ameliorating the situation.

## DISCUSSION

JOHN BARCELO:\* I want to ask a question that relates the NAFTA to the Free Trade Agreement. I had the impression in the negotiations between the United States and Canada on the Free Trade Agreement that the unfair trade remedies area was particularly controversial and central to that agreement and in the end led to the rather unique binational panel provisions as a sort of compromise. In the agreement between the United States and Canada, there is a provision for continued negotiation for seven years, five years, and then an extension of two, toward new regimes for antidumping and countervailing duties. Now the trilateral negotiation is going on at the same time. My question is whether there is anything

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happening on the required negotiation between Canada and the United States in this unfair trade remedy area, and whether that is being merged into the trilateral negotiation. A somewhat related question is whether the unfair trade remedy area is controversial in the trilateral negotiations in the way that it was in the bilateral negotiations.

Mr. SHOYER: What came out of the FTA was the bilateral panel structure which is procedural rather than substantive, and an agreement to negotiate toward or to consider changes in U.S. substantive law, as well as in Canadian law. In the NAFTA negotiations, we are having discussions, but not much has happened. Is the Chapter 19 trade remedy issue controversial? Definitely. We have discussed that at length in the NAFTA with the Government of Mexico, which has concerns similar to those of Canada going into the FTA negotiations. So, the controversy relates both to whether the NAFTA will address substantive rights on trade remedies and to whether there should be a procedural mechanism similar to the FTA Chapter 19.

Mr. LIER: I will add just one point. One of the reasons why there is not a lot of activity going on in the subsidy discussions is the parallel negotiations going on in the GATT, and the hope is that they will produce something concrete, thereby either resolving the problems we had bilaterally or providing a basis upon which to negotiate further.

EDWARD LANG:\* Could you give us a general sense of the concepts in the draft relating to rules of origin, bearing in mind the *Honda* case? Could you also give us a sense of what the draft is saying about escape clauses à la GATT Articles XIX, XX and XXI? I am interested in getting an answer to this question in general terms in relation to how the draft stands at the moment and to its possible extension to the rest of the hemisphere.

Mr. SHOYER: I cannot speak to any specifics, but I can tell you in general what is on the table in terms of rules of origin. Rules of origin help to identify the country in which the last substantial transformation occurred before a good is imported. The idea behind rules of origin in a free trade agreement is to ensure that the benefits of the agreement accrue primarily to the parties to that agreement. In the U.S.-Canada FTA, change in tariff classification was used for the first time as the principal mode for determining substantial transformation. The FTA has been a model that the NAFTA negotiators have looked to carefully. An alternative to the change in tariff classification is the use of value added or value content to determine whether there has been sufficient economic activity within the territory to warrant the benefits of the tariff preference. Value content rules were used in the Canada FTA, most often in hybrid rules that require both a change in tariff classification and a particular percentage of local value content. The required percentage of value content in the Canada FTA is 50 percent. The value content level was defined in such a way that it has given rise to concerns addressed very publicly between the U.S. Customs Service and Honda about its Canadian operation. In the view of the U.S. Government, the controversy arose not from the language of FTA, but from the results of an audit of a company. Frankly, we have not done many audits yet in this area. The resources are such that we do not audit all the companies that claim benefits under the U.S.-Canada FTA. As to how these limited resources would be impacted if other countries of the hemisphere accede

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to an agreement like the NAFTA, I have no idea. Perhaps these countries would try to negotiate different terms.

As to the escape clause, I would suggest again the model of the U.S.-Canada FTA. There are two issues, one bilateral, the other global. On the bilateral side, in the Canada FTA, if, as a result of the tariff elimination (tariffs on U.S.-Canada trade are being scaled down to zero over ten years), an industry suffers serious injury, then the escape clause mechanism allows either country to "snap back" a most-favored-nation (MFN) rate to protect that industry. The other issue is on the global side. Do you include Canadian goods in an escape clause action taken under Article XIX of the GATT that would otherwise be taken on an MFN basis? Both concepts are very much at stake in the NAFTA. I cannot tell you specifically where the negotiation stands but those two issues are being discussed.

Professor BURR: I would like to ask Michael Leir to comment briefly on the Canadian perspective on the Honda dispute over rules of origin and the Honda cars.

Mr. LEIR: I asserted earlier that the devil is in the detail, and this is a classic example. An interpretation by the Customs Department has resulted in a result that we feel undermines the value of the FTA, and the point is being disputed in the specifics of the case itself. We would look upon the NAFTA as an opportunity to improve upon the rules of origin.

SAMI KALLEL:\* What kind of economic relationship will exist between the NAFTA and the EC, and what kind of dispute settlement is being discussed under the NAFTA? Will it be the same as the one under the GATT provision, or will it be a specific one to the region?

Mr. SHOYER: We are rather less ambitious now than the EC in what we are proposing for the NAFTA. I do not think NAFTA will have any legal or juridical personality, so it is rather less than a relationship among the parties. It would have no particular relationship with EC. Under Article XXIV of the GATT we are proscribed from creating trade barriers to outside trade; therefore, to the extent that the NAFTA will be consistent with that, as is intended, there will be no additional barriers. We hope we will continue to trade with EC countries to the same or a much greater extent.

Dispute settlement provisions will probably be like those of the GATT, although I cannot speak specifically. We have been looking at the GATT and the U.S.-Canada FTA as models. Despite some real differences, Chapter 18 of the FTA is a useful model for government disputes. In addition, there are other types of dispute settlement for investor-state disputes in the FTA. We are examining them as a potential model, as well as Chapter 19, which is quite different. Chapter 19 does not deal with a government-to-government dispute. The dispute is not about the agreement itself, among the parties, as in Chapter 18 of the Canada FTA. Rather, it is about whether a government has applied its own domestic laws properly; those are different models, and there is some controversy about that.

LAKSHMAN GURUSWAMY:\*\* I have a question for Ambassador Szekely. I was interested to hear you say that environmental impact assessments were more uniformly and more expansively applied in Mexico. The question is, as you know in this country, environmental assessments are made but you do not necessarily need to act upon the results. Is that the situation in Mexico, or are you obliged to act on the results of the assessment so that you do not take the route that causes

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environmental damage? I also have a question for David Wirth. Assuming that one can undertake an environmental impact assessment, how do you propose doing that with a moving target like a trade negotiating process? Is it something that lends itself to the type of impact assessment we have been talking about?

Mr. SZEKELY: I do not think I said that the environmental impact statements were more extensive in Mexico. I said that in the letter of the law they were mandatory for many more activities than in U.S. legislation. I think that the legislation of Mexico is also more advanced in this respect, in the sense that once you have complied with your obligation to submit to the competent authority an environmental impact statement, you have to describe not only what the impact will be but also what mitigation measures you are prepared to undertake. The government—the competent authority—will tell you whether your impact assessment is accurate or insufficient, whether it will allow you to go ahead with the proposed mitigation measures or with additional ones that the authority imposes or perhaps it will not authorize you to proceed no matter how many mitigation measures you put in. The important thing is that the public has a right to participate in this process of defining the impact and the mitigation measures, and even in the process of determining whether to approve the activities. So this legislation does have far-reaching consequences. But I want to emphasize that although this is in the letter of the law, we are only now establishing the first precedents. I was looking last week at the list of environmental impact statements that have been submitted to assessment and approval by the competent authority. There is an official list that covered up to January of this year, which is almost up to date. And this mandatory requirement has been in place in our law since 1988. Therefore, the list covers almost five years, and I was amazed to find that only 443 environmental impact statements were submitted in the entire country in five years, and that more than half came from two governmental agencies which obviously have directors of legal affairs that are very strict about complying with the law. Almost all other public entities that undertake projects of activities, for instance, the minister of communications, who is in charge of road building—a very big thing going on in Mexico right now—has not been present in the compliance with our legislation and environmental impact statements. I want to emphasize that, while the letter of the law is very good, we now have to make it good in application.

Professor WIRTH: I will respond to your second question about how as a practical matter to do an environmental impact statement on a treaty negotiation, particularly one that is a moving target. As you know, the first step in the environmental impact statement process is to identify the proposed action, and already we have run into the “moving target” problem that you identified. By the way, of the ten to twenty agreements that I mentioned that had been the subject of environmental impact statements, the proposed action was not always negotiation of the agreements. Sometimes it was Senate advice and consent to ratification; if it was an agreement that did not require Senate advice and consent, the proposed action was sometimes mere deposit of the instrument of ratification by the Executive Branch. Not all of those ten to twenty were actually done on the negotiations proper.

If we skip over identification of the proposed action, the core of an environmental impact statement is the analysis of alternatives. It is pretty clear that if one were to do an environmental impact statement on a treaty negotiation, among those alternatives are alternative negotiating positions. So the fact that the proposal may be somewhat difficult to identify, in contrast to a typical impact statement on a dam or a highway, does not necessarily mean that the alternatives

and their impacts cannot be identified and assessed. Which of those alternatives actually is identified as the proposal may be difficult to determine at an early stage, but that does not necessarily imply that the alternative negotiating positions cannot be assessed. The process also anticipates supplements to environmental impact statements. If there were a radical discontinuity in the negotiation at some point, the original environmental impact statement could be supplemented. Incidentally, these principles of environmental impact assessment are now well accepted on the international level. For instance, a new multilateral agreement<sup>1</sup> adopted and signed by the United States last February requires the application of environmental impact assessment methodologies to a broad variety of activities with transboundary effects. Also, USTR's study, which I mentioned earlier, contains much of the information and analysis that would be included in an environmental impact statement. Its principal defect from a statutory point of view is its failure to analyze alternatives—in particular, alternative negotiating positions.

NAOMI RHOT-ARRIAZA:\* I would like the panelists to address natural resource policy in conjunction with what they have been talking about on the environment. In the U.S.-Canada FTA, one of the areas that nongovernmental organizations have pointed to as being most problematic is the question of natural resource uses. Looking especially at energy use, provisions in the U.S.-Canada FTA seem to encourage export of fossil fuels by removing barriers to exports of natural resources; also, there have been a number of disputes over reforestation and over forestry practices in British Columbia in conjunction with that agreement. Now, extrapolating that experience to a trilateral agreement, at the same time that on the one hand the Mexican Government says that there will be no changes in the Mexican constitution with respect to control of oil, on the other hand there is in the FTA encouragement of energy exports. So it seems that there are a number of conflicting provisions there. What has been talked about, what has been done, and how do you see the natural resources sector coming out in the FTA?

Mr. LEIR: I would not say that the FTA encourages exports; the FTA does not erect any barriers to exports. There is a big difference there, whether we are talking about natural resources or any type of manufactured product, in that the lowering of tariffs or the removal of nontariff barriers would not necessarily encourage exports. The debate over forestry practices and environmental controls is something that predates the FTA, and it has been a longstanding issue and concern for governments and environmental groups going back ten or fifteen years at least. The FTA itself has had no impact on forestry practices in that context.

MONROE LEIGH:\*\* My question would have been about the Calvo doctrine and how you expect to get past that to dispute resolution, but I'm sure it cannot be answered in the time available so I am going to yield the floor to Professor Jackson.

CRAIG JACKSON:\*\*\* I have a question about structure or logistics. A lot of people have thought of the NAFTA as an outgrowth of the FTA, although all that has to be negotiated. But if, somehow, a regime is worked out to deal with the dumping and countervailing areas in the FTA and that does *not* happen vis-à-vis the U.S. and Mexico in the NAFTA, what kind of structure could there be? Would the FTA exist separately from the NAFTA, or would there be a special regime

<sup>1</sup>Convention on Environmental Impact Assessment in a Transboundary Context, Feb. 25, 1991, reprinted in 30 ILM 802 (1991).

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between the U.S. and Canada that doesn't exist between the United States and Mexico?

Mr. SHOYER: I do not know. At this point it is really a matter of substance. What we are trying to do as the negotiations near conclusion is throw the issue open to see where we are and see, in Vienna Convention terms, whether we should suspend certain aspects of the FTA, supplant it in whole or in part or keep it alive and use it by reference. All those things remain to be seen, but I think the substance will drive those determinations.

Mr. SZEKELY: I am interested now in the response that would have been made to the question about the Calvo clause.

Mr. SHOYER: Mexico passed a decree law several months ago that goes a long way to resolving the problem. I suggest everyone read it. It is a fascinating document. Mexico has tried to address the Calvo clause problem itself, but I don't think it completely solves the problem. We are looking at our great success in the bilateral investment treaties as we negotiate with Argentina, where Calvo was born, and I think some events in Mexico have actually helped to ameliorate some of the concerns on Calvo. The problem is not gone yet.

Mr. SZEKELY: Are you willing to say that this so-called law on treaties that was passed by Congress has in a way solved the Calvo clause problem?

Mr. SHOYER: I do not think it has solved it, but it certainly addresses some of the concerns about Calvo.

Mr. SZEKELY: That is very interesting because, in any case, this law of Congress is in a way derogating the Constitution, after all the Calvo clause is a constitutional provision. I find the suggestion extremely interesting that that law and treaties that have been published would have any legal effect on the Constitution.

CHRISTINE ELWELL:\* I have a question on dispute settlement. In talking about the parallel track negotiations that are going on about environmental and labor law standards, may I just add that there is generally not a great deal of confidence in those negotiations because people remember the International Trade Organization (ITO) history, the history of the Havana Charter where other chapters on development, for example, were negotiated and dropped at the opportune moment once the commercial negotiations had been completed. But, assuming these parallel track negotiations are going well, may I ask whether the negotiators are considering the integration of those environment and labor standards into the main agreement, or will they remain on a parallel track? Do the negotiators anticipate providing some sort of trinational inspection team for private prosecution in each of the states to enforce minimum standards? I would suggest that if those process mechanisms are not dealt with, there will be a great deal of litigation involving national, traditional trade instruments such as border measures and duties—a great litigious program of dubious efficiency. Do the parallel track negotiations envision public participation in the dispute settlement mechanisms of the main agreement?

Mr. SHOYER: Regarding most of your comments, I do not know whether those things have been addressed. As to the last point, I have strong personal feelings, which are not necessarily the view of the U.S. Government although they happen to match its current view: that is, I find very troubling the notion of public participation in what is otherwise dispute settlement in a club. The GATT is a club of sovereigns, and I don't understand how such public participation would work. I

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know others have talked about it at great length, but I am not sure how U.S. interests are to be represented with more than one voice. I have litigated in the GATT and under the U.S. free trade agreement with Israel. I have great difficulty with the notion of amici people participating because I am concerned about how U.S. interests can be reflected; it is a highly controversial issue. Those are my personal views.

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