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X. COUNTRY/REGION REPORTS

1. UNITED STATES OF AMERICA

This 1992 update focuses on six broad areas having significant international import: (1) standing under the Endangered Species Act (ESA) to challenge governmental activities abroad; (2) the effect of the National Environmental Policy Act (NEPA) on trade agreements under negotiation; (3) new obligations from the UN Conference on Environment and Development (UNCED) and the North American Free Trade Agreement (NAFTA); (4) international conventions ratified by the United States Senate in 1992; (5) Congressional Acts that have international environmental impact; and (6) accelerated CFC phaseouts under the Montreal Protocol.

1 *Standing Under the ESA*

In *Lujan v. Defenders of Wildlife* (112 S.Ct. 2130 (1992)), the Supreme Court held that environmental groups lacked the requisite standing to challenge the Department of the Interior's determination that the Endangered Species Act does not require federal agencies to confer with that Department or the Department of Commerce prior to providing funding for projects in foreign countries that may harm endangered species. The lawsuit challenged the Department's interpretation of the ESA that its provisions only apply to activities within the United States or on the high seas, and not to projects in other countries. The Court of Appeals granted standing to Defenders of Wildlife to bring suit, and subsequently decided in their favor that the ESA applied to extraterritorial U.S. government activities. The Supreme Court did not reach the second question, dismissing the case on standing grounds. A divided Court concluded that respondents had not demonstrated concrete and particularized injury to its members and that respondent's claim was not redressible by the Court because there was no assurance that without United States funding these projects would not proceed. This decision marks yet another departure from earlier Supreme Court decisions which liberally granted environmental groups standing under environmental statutes, and could narrow environmentalists' ability to bring future claims under other environmental statutes.

Another lawsuit, brought in July by Earth Island Institute in the U.S. District Court in the Northern District of California, challenged various federal agencies' failure to protect sea turtles from harm related to foreign shrimp fishing (see *Earth Island Institute v. Baker*, No. C-92-0832-JPV, 1992 U.S. Dist., LEXIS 8604, May 6, 1992). Congress adopted legislation in 1989 designed to protect and conserve sea turtles, which calls upon the Executive when negotiating with foreign governments to protect sea turtles and embargo shrimp imports if foreign programs to protect the turtles are not comparable to the U.S. program (16 U.S.C. § 1537 (1990)). Earth Island argued that the U.S. government had failed to negotiate and properly implement the terms of the shrimp embargo. The Court dismissed the case, finding that the issue concerning the Executive's compulsion by Congress to enter into international negotiations is a nonjusticiable, political question, and further that the U.S. Court of International Trade has exclusive jurisdiction over the claim

related to the embargo. The Court did not reach the issue of whether the Institute had standing under the *Defenders of Wildlife* decision by the Supreme Court in June.

2 *The Effect of NEPA on Trade Agreements Under Negotiation*

On August 7, 1992, a federal appeals court frustrated the attempt of environmental citizens' groups to compel the United States Trade Representative to prepare environmental impact statements (EISs) under NEPA for two trade agreements under negotiation: the Uruguay Round of GATT and the NAFTA. The Court refused to hear the lawsuit, *Public Citizen v. Office of the U.S. Trade Representative* (970 F.2d 916 (D.C. Cir. 1992)), concluding that these groups had failed to identify a "final agency action" under the Administrative Procedure Act (APA). The APA must be the basis for review for their claim, according to the Court, because NEPA does not create a private right of action. Only final agency action is reviewable under the APA. Neither trade negotiation has produced a final agreement, the Court said, and it is not clear that a final agreement will ever be produced. If, however, such agreements do emerge, the Court added that Congress can influence the content of the final agreement by delaying the ratification process until an EIS has been prepared.

3 *New Multilateral Treaties, Declarations, and Resolutions*

(a) *Multilateral Treaties and Agreements from UNCED*

The United States entered into several new multilateral agreements at the United Nations Conference on Environment and Development in June. President George Bush signed the (→) Framework Convention on Climate Change and presented a six-step scheme to facilitate quick implementation of the new treaty in the United States. The six steps include maintenance of a large budget for climate change research, increased foreign aid, and increased monitoring of emissions. The U.S. set a deadline to complete a national action plan addressing climate change by January 1, 1993, and called for other Western industrialized nations to do the same.

Standing alone among other major industrialized nations, the United States did not endorse the (→) Biological Diversity Convention presented for signature at the Conference. President Bush cited numerous reasons for his stance: concern about the status of U.S. intellectual property rights; possible problems with funding and export controls, especially with regard to technology transfer; concern that the treaty could harm the biotechnology industry; and possible implications for the Endangered Species Act and domestic wetlands policies.

Although the U.S. call for a convention on forests was rejected at UNCED, the U.S. did go along with the (→) Non-Binding Declaration of Forest Principles that was adopted by all parties. In addition, the U.S. announced a new forest protection effort, the Forests for the Future Initiative, offering an additional \$150 million in aid to developing countries, and invited other industrialized nations to double the amount currently invested in international forest conservation efforts. The U.S. also expressed its desire at the Earth Summit to convene a global forest convention in the near future. The U.S. Forest Service planned to prepare a strategy for implementing the forestry principles drafted at the Earth Summit and elements of Agenda 21. Recommendations in Agenda 21 on freshwater resources and biodiversity will also be included in the new guidelines. The U.S. is also planning an International Forum on Foreign Aid for Forests in 1993. Although the United States embraced the philosophical centerpiece of the Earth Summit,

the (→) Rio Declaration, it attached Statements of Interpretation to some key Earth Summit documents, including ten issues within the Rio Declaration, parts of Agenda 21, and the Declaration on Forests. Most notably, the U.S. strongly resists any kind of agreement that commits it to technology transfer if it will affect U.S. private intellectual property rights.

(b) *The North American Free Trade Agreement (NAFTA)*

Negotiations for NAFTA were completed by the United States, Canada, and Mexico on August 12, 1992. An initial text was released in September of 1992. A summary of the Agreement stated that the United States will maintain its standards involving health, safety, and environmental issues. The Agreement allows other governments to enact stricter standards, and encourages the parties to agree jointly on higher standards. The agreement relies on the U.S.-Mexico Integrated Environmental Border Plan which was announced by President Bush in February. It is unclear how NAFTA will affect the Maquiladora Decree signed by the U.S. and Mexico in 1983, which mandates that waste generated in Mexico from manufacturing processes with raw materials from another country be returned to the country from which it came. According to the U.S. Environmental Protection Agency, enforcement of environmental laws along the U.S.-Mexico border should improve under NAFTA. There is some resistance to the agreement in California, which foresees more hazardous waste disposal sites in San Diego County, and possibly illegal dumping into the Tijuana sewer system which flows into San Diego. The concern of those over the border in the U.S. arises out of the inequality of the environmental laws between Mexico and the United States. As the agreement now stands, Mexico is not required to amend its existing environmental laws; all changes are voluntary. The three parties are currently forming an environment commission to oversee the agreement.

The U.S. and Mexican governments have also given increased attention to environmental problems along their shared border. The first enforcement actions under the Integrated Environmental Plan for the Mexican-U.S. Border Area were announced in June. The EPA announced seventeen actions involving violations of U.S. federal and state laws, and the Mexican government announced actions involving thirty-four facilities. EPA Administrator William K. Reilly said that these actions are the direct benefit of the increased sharing of information and cooperation under the plan. Nevertheless, a dispute arose in March concerning U.S. plans to build three toxic waste dumps near the Mexican border. Mexico claims that it should have been consulted about these three facilities under the 1983 La Paz Treaty, (22 *ILM* 1025 (1983)), which requires prior consultation on any proposed nuclear or toxic waste disposal site within 100 km of the border. Texas state officials who are handling the permitting process of the facilities said that they have not tried to hide anything from the Mexican government, and, in at least in one case, that they invited the Mexican government to become a party to the process and received no response.

The EPA has also asked maquiladoras, industrial plants located along the border, to voluntarily reduce chemical emissions, and is stepping up efforts to find out what is causing mothers to give birth to anencephalic babies in the Brownsville-Matamoros area. In addition, a data base is being developed by one of the regional operations of the EPA to help the Mexican government track hazardous waste generated by the maquiladoras to determine whether all the generated waste is going back across the border, as is required by law. Despite these efforts by the EPA and Mexican government, Congress

is concerned about environmental problems along the border and will likely not ratify NAFTA unless the concerns are satisfied. One U.S. representative predicted that although NAFTA will contain some "green" principles, Congress will likely develop attendant agreements addressing environmental issues with the U.S. administration and the Mexican government that will parallel the NAFTA agreement.

4 International Conventions Ratified in 1992

The Senate ratified three international environmental conventions in 1992. The first of these, the (→) Convention on Climate Change was ratified on October 7. Under the Convention, industrialized nations agree to reduce their emissions of greenhouse gas emissions. As a framework convention, the agreement offers guidelines for emissions, but does not set deadlines or benchmarks for these reductions. Negotiations have been called by the Senate to draft a protocol to the agreement in order to create a national plan of action to implement the goals of the treaty.

The Basel Convention on the Control of Transboundary Movements of Hazardous Waste was ratified in August. The Senate ratified the Protocol on Environmental Protection to the Antarctic Treaty on October 7.

5 Congressional Acts that have International Environmental Impact

(a) Foreign Appropriations Bill Provides Funding for Global Environment Facility (GEF)

A foreign appropriations bill provides \$30 million for the Global Environment Facility, a fund jointly run by the World Bank and the United Nations to help developing countries address environmental problems of global proportions. The Bill requires reforms in the GEF, otherwise the funds will be transferred to the U.S. Agency for International Development for the global warming initiative.

(b) Congress Passes Debt-for-Nature Swap Bill

A debt-for-nature swap bill was passed by Congress, allowing nine Latin American and Caribbean countries to reduce a portion of their debt owed to the Agriculture Department's Commodity Credit Corporation. Under the bill, these countries can reduce portions of their debt if they agree to finance domestic environmental or developmental projects (*Pub. L. No. 102-532, 106 Stat. 3509 (1992)*).

(c) House Subcommittee Votes to Reject Trade Pacts that Conflict with United States Law

In May, a House of Representatives Subcommittee approved a resolution that stated that Congress will not approve of any trade agreement that jeopardizes U.S. health, environmental, safety, or labor laws. The resolution specifically refers to NAFTA, and the GATT Uruguay Round agreement under negotiation.

6 Accelerated CFC Phaseouts Under the Montreal Protocol

President Bush announced in February that the U.S. will ban the manufacture of chlorofluorocarbons by December 31, 1995, five years earlier than the timetable set by the Montreal Protocol, given recent findings that the ozone layer is thinning more rapidly than previously believed. The U.S. was already ahead of the timetable set by the Montreal

Protocol. In November, the Fourth Meeting of the Parties to the Montreal Protocol went further when 86 countries declared they would phase out CFCs by the end of 1995. In addition, the U.S., along with eighty-five other countries, agreed to create a permanent fund enabling the transfer of technology from developed to developing countries to assist them in replacing their ozone-depleting gases.

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