Presentation to the
Fourth International Seminar on Environmental Law
Sponsored by the Brazilian Council for Federal Justice and Center for Judicial Studies
Brasilia, Brazil
May 6-7, 2002

By Kristin Dawkins, Vice-President for International Programs
Institute for Agriculture and Trade Policy
Minneapolis, Minnesota USA

The empirical evidence with NAFTA has disproved the theory that environmental protection follows economic growth. To the contrary, real economic growth in Mexico has averaged $14 billion per year over the past decade but the financial costs of environmental degradation averaged about $36 billion per year, according to Mexico's National Institute for Statistics, Geography and Information Systems. Air pollution alone accounts for about half of that cost, and has doubled since the implementation of NAFTA in 1994. Less than 10% of the country's wastewater is treated properly.

If social conditions had improved dramatically, some might argue the environmental destruction was worth it. But manufacturing workers in Mexico now receive 12% less in actual earnings than they did in 1994, and the purchasing power of the peso has gone down 22%. In the past year, some 400,000 jobs have left that country to relocate in China, and in just the past six months the U.S. border patrol arrested more than half a million Mexicans illegally in "el Norte." In the U.S. three quarters of a million jobs were lost, according to the Economic Policy Institute, while Canadians have found much of their public health and social security system has been demolished by the private sector after trade liberalization.

In the Mexican countryside, the horticultural sector was supposed to increase producers' earnings but it never became competitive in the world market, while corn imports from the United States increased by a factor of 18. Flooded with corn, prices for producers fell drastically, yet the price of tortillas in the urban areas actually went up! Mexican producers increased the area under cultivation, attempting to make up in volume what they lost in value, and soil erosion has become a big problem. Recently, the contamination of Mexico's invaluable stock of diverse corn varieties by genetically-engineered imports from the U.S. was recognized as a probable source of genetic erosion.

The beef industry made Mexico a supplier of feeder calves to companies in the U.S. and Canada, which then ship processed beef back to the Mexican consumers -- contributing to the extreme air pollution along trucking routes and especially at check-points along both of the United States' borders. Canada has been forced to export energy to the U.S. in ever-escalating proportions, with huge mega-dams destroying the homelands of Cree Indians as well as the ecology of major river systems. Canadian subsidies for sustainable forestry were found to be "unfair" to U.S. companies, and exports of hazardous waste from Canada to the U.S. for disposal are skyrocketing.

Despite all of this, NAFTA was called the "greenest" trade agreement until the bilateral deal between the U.S. and Jordan last year. To be sure, provisions in the text of the NAFTA agreement give precedence to certain multilateral environmental agreements in cases of a conflict, and discourage -- or at least, they don't encourage -- the sacrifice of environmental regulation to pursue a trade advantage. And the creation of the NAFTA Commission on Environmental Cooperation has shown what strong processes of information gathering and citizen participation can do to build public support for protecting the environment. The CEC's research has been impressive and, along with the other institutions in the so-called "side agreement," have led to numerous significant if relatively small projects involving local communities in monitoring, compliance, and infrastructure development.

However, the most radical element in NAFTA -- by far -- has been the creation of Investors' Rights under Chapter 11, with enormous implications for the environment as well as social welfare. Unnoticed by critics, including IATP, during the negotiations, Chapter 11 restructures democracy, sovereignty and constitutional law, affecting the powers of the three countries' federal, state and municipal governments. It differs from the usual norms of international law in two big ways: (1) giving corporations the right to directly enforce an international treaty to which they are not a party nor have any obligations; and (2) invoking private commercial arbitration to resolve public policy disputes -- thus keeping the relevant data confidential and the public uninformed.

Chapter 11 broadens the concept of protecting private property from "takings," stating that no government may "directly or indirectly nationalize or expropriate an investment... or take a measure tantamount to nationalization or expropriation..." In particular, the words "indirectly" and "tantamount" are exceedingly vague. When the Mexican negotiator at the time complained that the scope was so broad it could lead to unintended effects, the U.S. responded that "the ebb and flow of arbitral wisdom would contribute to reasonably limit its scope."

Let's see how reasonably Chapter 11 has performed. Here are a few of the cases generated under these Investors' Rights provisions in NAFTA:

- The Ethyl Corporation, based in the U.S., sued Canada for $250 million and, in 1998, settled for $13 million in payments from Canadian taxpayers to make up for profits lost when Canada banned the gasoline additive MMT, a nerve toxin. And the ban was reversed.

- Methanex, a Canadian company, sued the U.S. for $970 million after the State of California moved to phase out the carcinogenic gasoline additive MTBE. Studies have identified 10,000 possible sites where MTBE is leaking into the groundwater, and cleanup costs could reach $1 million each. This case is pending.

- Metalclad is a U.S. company suing Mexico because the State of San Luis Potosi denied a permit for waste disposal on a stream and then created an ecological preserve. The company sought $90 million from Mexican taxpayers and was awarded $16 million.

- S.D. Myers is a U.S. company that objected to a Canadian ban on imports of PCB waste in fulfillment of the international Basle Convention on Toxic Wastes. The ban was revoked in 1997, but the company sought $30 million in compensation anyway. When it was awarded just $20 million, the company appealed. Meanwhile, citizens groups have appealed to the Canadian federal courts.

- SunBelt Water is a U.S. company suing Canada for "between $1 billion and $10.5 billion," after losing its effort to export bulkwater in British Columbia's court system.

- Mondev is a Canadian company suing U.S. taxpayers for $16 million because the City of Boston denied a permit to build a shopping mall back in the 1980s, despite a Massachusetts law protecting the city's Redevelopment Authority from liability.

- Philip Morris, the tobacco giant, is suing Canada for prohibiting the words "light and mild" on cigarette packages.

- And perhaps most outrageous: United Parcel Service is suing Canada on grounds its national postal service competes unfairly with the private sector!

Clearly, the Investors' Rights chapter in NAFTA have gone far beyond the "reasonable" test, and must be revoked. Most assuredly, Chapter 11 should never be replicated in other international agreements, such as the Free Trade Area of the Americas (FTAA) seeking to extend NAFTA-type policies throughout Latin America or the pending WTO negotiations on Investment. To the contrary, trade negotiators should identify ways to enforce "Investors' Responsibilities."

Other lessons from the NAFTA experience suggest the legal provisions protecting domestic health and environmental policy and multilateral environmental and social agreements deserve to be extended and given clear precedence over commerce and trade. So too, the research and information functions as well as the citizen participation elements of the Commission on Environmental Cooperation deserve to be replicated, whether or not as part of a trade agreement, as should the creation of institutions to channel investments into infrastructure improvements.

But dire statistics showing the costs of environmental degradation greatly over-ride the gains in economic growth are probably the most important finding of the NAFTA implementation period. A World Bank study confirms the Mexican Institute of Statistics reports: despite increases in GDP, the net effect for Mexico, counting the financial costs of environmental damage, is a negative rate of growth of -6%.

The very nature of trade -- moving products around needlessly and burning fossil fuels to do it -- has proven to be both environmentally and economically devastating to the already poor nation of Mexico as well as its neighbors and, indeed, the planet as a whole. Trade liberalization is not an engine for sustainable development.

MORE DETAILS REGARDING THE INFORMATION IN THIS REPORT ARE AVAILABLE FROM THE AUTHOR <kdawkins@iatp.org> AND THE NAFTA COMMISSION ON ENVIRONMENTAL COOPERATION WEBSITE <http://www.cec.org>.