



## Evaluation of Mexican Environmental Law Enforcement and Compliance after NAFTA

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### Introduction

By 1990, when Mexico started negotiations with Canada and United States of America for a Free Trade Agreement, three different environmental laws had already been enacted by the Federal Congress: the Federal Act to Prevent and to Control Environmental Pollution of 1971;<sup>1</sup> the Federal Act for Environmental Protection of 1982;<sup>2</sup> and the Ecological Equilibrium and Environmental Protection Act of 1988.<sup>3</sup> In addition, two distinct official agencies had been empowered to enforce these laws: the Under Ministry of Health and Social Assistance, from 1971 to 1982;<sup>4</sup> and the Ministry of Ecology and Urban Development, from 1982 to 1992.<sup>5</sup> However, the enforcement of these laws was practically non-existent and it was impossible to evaluate the level of compliance with them prior to the 1990s owing to the absence of accurate official data.

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<sup>1</sup> Ley Federal para Prevenir y Controlar la Contaminación Ambiental, Diario Oficial de la Federación, March 23, 1971.

<sup>2</sup> Ley Federal de Protección Ambiental, Diario Oficial de la Federación, December 30, 1981.

<sup>3</sup> Ley General del Equilibrio Ecológico y la Protección al Ambiente, Diario Oficial de la Federación, January 28, 1988.

<sup>4</sup> Subsecretaría de Salubridad y Asistencia.

<sup>5</sup> Secretaría de Desarrollo Urbano y Ecología.

Therefore, despite the existence of the above laws and institutions, until the early 1990s environmental protection in Mexico exhibited the following characteristics:

- it was subordinate to the objectives of the economic activities, which caused intensive exploitation of natural resources and unprecedented environmental degradation;
- under the civil law tradition, enforcement was an exclusive government function and public participation was not allowed; and
- inspection and monitoring of industries by administrative authorities was exclusively 'enforcement-based'.

In 1991 the situation started to change. Many scholars are of the opinion that this change can be partly attributed to the negotiations surrounding the North American Free Trade Agreement (NAFTA) with Canada and United States, which precipitated a substantial modification of both domestic policy and environmental law.

### **Institutional Changes**

The creation of PROFEPA (the Attorney General's Office for Environmental Protection) was one of the first effects of NAFTA negotiations on the enforcement of and compliance with Mexican environmental law. It was set up by 1992 with the aim of sending the message that Mexico really had environmental laws and authorities to enforce them. This was supported, by the mid 1990s, by the setting up of a special branch to enforce criminal environmental laws within the Attorney General's Office.

### **Legal and Regulatory Changes**

Before NAFTA came into force, the Ecological Equilibrium and Environmental Protection General Act of 1988 (LGEEPA) was the most important environmental law

in Mexico because it: established the principles governing national environmental policy; enumerated the instruments for the implementation of such policy; regulated the process of conducting monitoring and inspections visits; described the kinds of behavior considered to constitute environmental crimes; and established both administrative and criminal sanctions. The Mexican environmental law framework also included a number of laws to protect specific natural resources such as forest, water or flora and fauna. Furthermore almost all of the local governments had enacted their own local environmental laws, based in the principle of concurrent jurisdictions recognized by paragraph XXIX-G of article 73 of Mexican Federal Constitution. All the same, environmental laws were mainly based on the 'command and control approach' and as a result, the roll of public participation was practically nonexistent.

In 1996, LGEEPA was amended for first time. This reform introduced the right of access to information, legal standing for environmental impact assessment authorizations, and environmental audits as a voluntary method of enforcement. In addition, the Criminal Code was modified to include a new chapter containing environmental crimes that had previously been regulated by LGEEPA.

At the same time, NAFTA directives for the harmonization of member state's environmental laws meant that Mexico was compelled to develop a body of Technical Standards comparable in scope to those issued by the US EPA, during the mid-1990s. It should however be noted that before NAFTA came into force, Mexican law already featured 58 ecological technical standards: 33 relating to residual water discharges; five relating to air pollution monitoring; 13 in the area of air pollution; and seven regarding hazardous waste. Following the conclusion of NAFTA, the Mexican Government focused its activities on issuing standards in those areas where regulations were absent and reclassifying and modifying the wording of those that were already in operation. There are currently 106 Mexican Official Norms: four for residual water quality; 12 for water exploitation; 32 for air pollution; 14 for waste; five for noise; 6 for environmental impact assessment; and 33 relating to natural resources.<sup>6</sup>

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<sup>6</sup> Diario Oficial de la Federación April 23, 2003.

The Mexican Government has also enacted a number of new environmental laws: the General Wildlife Act of 2000;<sup>7</sup> the General Act for the Sustainable Development of Forests of 2003;<sup>8</sup> the General Act for Comprehensive Management of Prevention of Waste of 2003;<sup>9</sup> and the National Water Act (amended in 2004). These laws regulate many overlapping environmental issues and owing to the fact that they arose from different government departments, there are a number on contradictions between them that arguably produce more confusion than benefit for environmental policy.

## **Enforcement Strategies**

Mexico's environmental laws currently recognise three basic enforcement approaches: a) the deterrence-based approach, b) the reflexive approach, and c) public participation.

### *The Deterrence-Based Approach*

All of Mexico's environmental laws,<sup>10</sup> empower environmental authorities to conduct inspection and monitoring visits to industrial facilities and individuals in order to verify their level of compliance with relevant environmental laws. In this way, according to article 161 of LGEEPA<sup>11</sup>, article 104 of LGVS<sup>12</sup>, articles 158 and 160 of LDFS<sup>13</sup>,

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<sup>7</sup> Diario Oficial de la Federación July 3, 2000.

<sup>8</sup> Diario Oficial de la Federación February 25, 2003.

<sup>9</sup> Diario Oficial de la Federación October 8, 2003.

<sup>10</sup> These laws include: the Ecological Equilibrium and Environmental Protection General Act of 1988 (in Spanish LGEEPA); the Wildlife General Act of 2000 (in Spanish LGVS); the Sustainable Forest Development General Act of 2003 (in Spanish LDFS); the Prevention and Comprehensive Management of Waste General Act of 2003 (in Spanish LGPGIR); and the National Water Act of 1992 (in Spanish LAN), as amended in 2004.

<sup>11</sup> Article 161. The Secretariat shall carry out actions to inspect and verify compliance with the provisions established in this law, as well as the provisions derived there from.

<sup>12</sup> Article 104.

<sup>13</sup> Articles 158 and 160.

articles 101 and 102 of LGPGIR<sup>14</sup>, and article 86V of LAN,<sup>15</sup> environmental authorities must undertake actions to inspect and verify compliance with the laws.

These statutes also provide administrative sanctions to be applied in cases of non-compliance that include: fines ranging from 20 to 50 000 days of minimum wage in force in the Federal District at the moment the sanction is imposed; shut downs; administrative detention; forfeiture; and suspension or revocation of concessions, licenses, permits or authorizations. Furthermore, LGEEPA includes a provision empowering PROFEPA to substitute investment in compliance with the unfulfilled rule of law for an administrative sanction.<sup>16</sup>

In addition, the Federal Criminal Code describes a number of activities that are considered environmental crimes. Section XXV of the Federal Criminal Code (called 'Crimes against the environment and the environmental management') includes twenty criminal offences relating to activities such as: technological and dangerous activities; bio-safety; bio-diversity; and environmental management.<sup>17</sup> In all the cases, the available sanctions include a prison term of between one and ten years. Furthermore, it should be noted that there is no real difference between the kinds of behavior considered as administrative infractions and those considered as criminal offences. In accordance with the Mexican Constitution, it is permissible to be punished by an administrative and a criminal authority for the same conduct.

### *The Reflexive Approach*

Reflexive law has been considered as a third way to enforce compliance. It sits theoretically between regulation by the market and state-based regulation. Its core approach means that civil society is basically self-regulated, though supported, and if

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<sup>14</sup> Article 101.

<sup>15</sup> Article 86.

<sup>16</sup> Article 173.

<sup>17</sup> J. Gonzalez, *La responsabilidad por el daño ambiental en Mexico: El paradigma de la reparación* (2002) UAM-Miguel Angel, Porrúa, at pp. 249-284.

necessary directed (but essentially only supervised), by the state.<sup>18</sup> Examples of enforcement methods featured in reflexive law are: unilateral commitments; public schemes in which private parties volunteer to meet standards established by authorities; environmental audits; and negotiated agreements, which arise from dialogue between government authorities and private parties. It is not a new feature in Mexican law, having been pursued by PROFEPA since 1992, following the Guadalajara blasts<sup>19</sup> through a comprehensive environmental audit and self-regulation program. This approach was recognized by LGEEPA in 1996.

### *The Public Participation Approach*

Currently, citizens are allowed to participate in enforcement and monitor compliance in four ways: (a) by appealing an environmental impact assessment authorization; (b) by filing a *denuncia popular*; (c) by filing a constitutional *amparo*; or (d) by filing a civil suit.<sup>20</sup>

#### (a) Administrative Motions for Appeal

Article 176 of LGEEPA states that ‘the final resolutions issued in administrative procedures due to the enforcement of this Law, its regulations and provisions derived from, may be appealed by the affected parties by filing a motion for review within fifteen working days counted from the day of notice or with the corresponding jurisdictional authorities’. This means that in the case of the environmental impact assessment procedure, people are guaranteed: access to information; an opportunity to participate in the decision-making process; and access to justice in order to contest an administrative decision taken by the authorities. This has been the basis

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<sup>18</sup> G. Callies, ‘Lex Mercatoria: A Reflexive Law Guide to an Autonomous Legal System’ (2001) *German Law Journal* (available at [www.germanlawjournal.com](http://www.germanlawjournal.com)).

<sup>19</sup> Several gas explosions occurred in the sewer system of Guadalajara City in 1992. As a result, eight kilometers of roads were destroyed, a number of people killed and injured, and hundreds of properties damaged.

<sup>20</sup> K. Bailey ‘Citizen Participation in Environmental Enforcement in Mexico and the United States: A Comparative Study’ (2004) *Georgetown International Environmental Law Review*, Winter 2004 (available at <http://findarticles.com>).

of one of the few legal actions brought by people before the Judiciary in an environmental issue.<sup>21</sup>

(b) Popular Complaint (*Denuncia Popular*)

NAFTA not only spurred the creation of PROFEPA as the public body in charge of enforcement programs, but also facilitated interaction between non-governmental environmental groups through the three signatory countries, stimulating public participation in environmental protection. To this end, Article 189 of LGEEPA provides that any individual or group may report to PROFEPA, through a *denuncia popular* (popular complaint), any matter that could result in harm to the environment or natural resources, or that violates any environmental law or regulation.

(c) *Amparo*

In 1999, the Mexican Constitution was amended to recognize the so called right to a healthy environment. Since this provision was included in the chapter on fundamental rights, it is possible to bring an *amparo* complaint to court where an authority's decision affects this right. The *amparo* suit is a legal action founded on the Mexican Constitution, through which individuals may seek damages for, or the suspension or annulment of, an act of a government authority that violates the individual's rights. An *amparo* suit may not be brought by an environmental organization on behalf of an affected group, or as a class action on behalf of many similarly situated individuals. Rather, it must be brought by an individual who can show that he or she has been directly affected and has suffered harm as a result of the government authority's action.

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<sup>21</sup> L. Cabrera, *El amparo colectivo protector del derecho al ambiente y de otros derechos humanos* (2000) México, Porrúa, at p. 99.

#### (d) Civil suits

Access to justice is not fully realized in Mexican environmental law. Legal actions to restore a damaged environment are normally only available to public bodies. The Wild Life General Act, for example, allows PROFEPA to take action to demand the restoration of damaged natural resources and the LGEEPA does not provide for direct citizen enforcement of the law.

Only the Environmental Protection Act of Mexico City and the State of Colima grant broad standing to sue in cases of environmental damage. These laws allow any person, even those who are not directly affected, to file an action to obtain environmental restoration. Furthermore, only those who have suffered damages themselves possess standing to sue for damages under Mexico's Civil Code.

#### **Conclusion**

NAFTA has had more influence on legal and institutional changes than on enforcement. Nevertheless, it is not possible to attribute such legal and institutional improvements solely to NAFTA's influence. These legal and institutional changes have not however led to improved enforcement and compliance with environmental legislation. While the changes that occurred during the 1990s opened the door to alternative methods of enforcement, such those based on self-regulation and public participation, inspection visits and monitoring still represent the main approach to enforcing Mexico's environmental laws.