

THE NORTH AMERICAN ENVIRONMENT AND ITS LINKAGES TO TRADE

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I. INTRODUCTION

The augmenting concern for the environment over the past twenty-five years is reflected in the amplification of environmental laws and international environmental agreements. This growth has occurred in the context of an increasingly integrated world economy and a rapidly expanding flow of international trade and investment. The potential for conflict between environmental and trade policy objectives was vividly realized in the debate over the North American Free Trade Agreement in the early 1990s.³¹ Although the NAFTA's provisions failed to appease political views in the United States, they connote, however, a small piece of a large environmental puzzle which was ultimately completed upon the consummation of a separate side agreement on the environment, the North American Agreement on Environmental Cooperation.³² The NAAEC's implementation reflects a heightened desire to enforce international environmental cooperation and a rising concern that the NAFTA failed to adequately protect against the adverse effects of increased trade on the environment.

This article will follow a deductive approach in order to comprehend the intricacies involved in the NAFTA and NAAEC's environmental provisions. It will also contextualize the inseparable relationship between environmental protection and trade which is depicted in these agreements. Part I will review and analyze the NAFTA's environmental provisions, focusing on their relevant mechanisms, nexus to trade, and shortcomings. In Part II, the uniqueness and effectiveness of the formula developed to reconcile trade and the environment in the form of the NAAEC will be introduced. Part III is divided into three categories: the Commission for Environmental Cooperation ("CEC"),³³ Dispute Resolution Mechanisms, and the Submission Process under the NAAEC. Here, each subsection's

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³¹ North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289 (1993)[hereinafter NAFTA].

³² North American Agreement on Environmental Cooperation, Sept. 13, 1993, Can.-Mex.-U.S., 32 I.L.M. 1480 [hereinafter NAAEC].

³³ See NAAEC, *supra* note 2, at 1485.

viability in ensuring that member nations dutifully enforce their environmental laws is examined, as well as each component's efficiency in monitoring the efforts made by the Parties to reach the NAAEC's goals. Part III will consider the mandate and operations of the NAAEC and its relevant elements, the Parties and the CEC, while defining the flaws and virtues of the NAAEC. Finally, Part IV will suggest revisions to particular sections of the NAFTA and NAAEC in light of the North American experience regarding environmental protection and trade since 1994.

PART I: THE NAFTA

When the NAFTA took effect on January 1, 1994, it created the largest free trade zone in the world.³⁴ The United States, Canada, and Mexico entered into this agreement in order to remove restrictions on imports and exports among the three Parties and to increase the opportunity for investment in each member nation.³⁵ By removing these trade barriers, the countries anticipated economic growth through a rise in the availability of consumer goods and stronger positions for each nation in the global market.³⁶

Although the NAFTA is primarily a trade agreement, it contains environmental provisions that exceed the boundaries of previous trade agreements. This article, in part, focuses on these environmental provisions and their association with trade. While the NAFTA's purpose is to promote free trade between the Parties, its preamble lists environmental protection and conservation, sustainable development, and the enforcement of environmental laws and regulations as factors meriting support within a trade agreement.³⁷

In Article 104 (Relation to Environmental and Conservation Agreements), the NAFTA acknowledges various environmental commitments, as well as the relationship between trade and the environment.³⁸ Simultaneously, however, it provides wide boundaries for exceptions and a permissive understanding of its environmental provisions.³⁹ The NAFTA's primary and most detrimental flaw is that it

³⁴ See NAFTA, *supra* note 1.

³⁵ See *id.* at 287; LESLIE ANN GLICK, UNDERSTANDING THE NORTH AMERICAN FREE TRADE AGREEMENT 3 (2d ed. 1994).

³⁶ See NAFTA, *supra* note 1, at 297.

³⁷ See *id.* at 297 (outlining the six trade related objectives in the NAFTA). The NAAEC refers to member nations as "Parties."

³⁸ See NAFTA, *supra* note 1, at 298. In an attempt to protect the integrity of the trade-restrictive enforcement provisions in multilaterally negotiated environmental treaties, the NAFTA's Article 104 exempts from challenge certain multilateral agreements including the Convention on the International Trade of Endangered Species and the Montreal Protocol. *Id.*

³⁹ See *id.*, art 104, at 298 (providing that in the event of an inconsistency between the NAFTA and certain trade obligations provided in certain international environmental

fails to set any environmental standards or a particular level of environmental quality.⁴⁰ Instead, the Agreement balks at standard conversion and conformation and embraces each Party's unparalleled set of domestic environmental regulations.⁴¹

The majority of the NAFTA's environmental provisions are included in Chapter 7 on Agriculture and Sanitary and Phytosanitary Measures ("SPS")⁴² and in Chapter 9 on Standard Related Measures ("SRM"). In these chapters, the NAFTA establishes "zones" that are impervious to forbidden trade barriers and nontariff trade barriers ("NTBs"). Although they are usually ambivalent, NTBs are national standards that were constructed to obscure trade.⁴³ The NAFTA specifically condones NTBs in Chapter 9, permitting Parties to embrace any SRM but particularly those that would help define the Parties' levels of environmental protection.⁴⁴

Moreover, any SPS "necessary for the protection of human, animal or plant life or health in its territory, including a measure more stringent than an international standard, guideline or recommendation" may be embraced by a Party under Article 712.⁴⁵ According to the NAFTA, SPS measures should be "applied only to the extent necessary to achieve [the Party's] appropriate level of protection taking into account technical and economic feasibility."⁴⁶ Yet, the NAFTA also provides that "[n]o Party may adopt, maintain or apply any sanitary or phytosanitary measure with a view to, or with the effect of, creating a disguised restriction on trade between the Parties."⁴⁷ Such discrepancies generate uncertainty and havoc amongst the Parties, causing "major conflicts [of environmental provisions which] will likely be tracked out to dispute resolution for fact-specific findings."⁴⁸

The NAFTA also contains many additional environmental provisions, namely Articles 1114(1) and 1114(2) of Chapter 11 and Article 1709 of Chapter 17.⁴⁹ Article 1114(1) permits Parties to adopt standards they

agreements, the latter should prevail.) *See also* Robert K. Paterson et al., *International Trade and Investment Law in Canada* 3.11(a)(iii) (2d. ed. 1994).

⁴⁰ *See* NAFTA, *supra* note 1, at 297.

⁴¹ *See* Jeffrey Atik, *Environmental Standards Within NAFTA: Difference by Design and the Retreat from Harmonization*, 3 *IND. J. GLOBAL LEGAL STUD.* 81, 82 (1995).

⁴² Sanitary and phytosanitary measures, measures generally intended to protect against health risks from the "introduction, establishment or spread of a pest or disease," are more stringent than international standards and may be adopted if they have some specific basis and are fairly applied. NAFTA, *supra* note 1, art. 712.

⁴³ *See* Atik, *supra* note 11, at 90, 99.

⁴⁴ *See* NAFTA, *supra* note 1, art. 904, at 387.

⁴⁵ *Id.* art. 712, at 377.

⁴⁶ *Id.* art. 712(5).

⁴⁷ *Id.* art.712(6).

⁴⁸ Atik, *supra* note 11, at 96.

⁴⁹ *See* Patterson, *supra* note 9, at 3.11(a)(iii).

believe will foster actions perceptive to environmental concerns. On the other hand, Article 1114(2) encourages Parties to remain steadfast in upholding their environmental regulations designed to attract or retain investment. Further, Article 1709 permits Parties to thwart inventions from patentability if the invention proves to be permissible as an effort to protect human, animal or plant life or health, or to avoid harm to nature or the environment.

A. A Critical Assessment of the NAFTA, the Environment, and Public Safety

As the NAFTA was being negotiated, environmentalists were becoming increasingly vocal and were heightening public awareness as a result. Thus, environmentalists did not embrace the NAFTA upon its conclusion in December 1992. Their disapproval of the NAFTA was justified, as close scrutiny of the NAFTA's environmental provisions and their definitions bring specific environmental concerns.

The first issue is the unenforceability of the NAFTA's preamble which sets the tone for the Agreement.⁵⁰ Out of 15 preambular statements, three concern the implementation of environmental laws or sustainable development.⁵¹ Unfortunately, however, not only are these regulations ambiguous and unenforceable⁵² but the NAFTA also failed to list environmental protection as one of its primary goals.⁵³

Other issues regarding the NAFTA range from increased trade to greater degradation of the environment. Evidence gathered over four years has shown that the unregulated expansion of North American trade has made an already heavily-polluted border region much dirtier and more corrupt. Moreover, the NAFTA's counterparts, designed to handle such environmental and public safety problems, are wholly inefficient.⁵⁴

⁵⁰ See Michelle Swenarchuk, *The Environmental Implications of NAFTA: A Legal Analysis*, in GROWTH, TRADE AND ENVIRONMENTAL VALUES 83, 83-84 (Ted Schrecker & Jean Dalgleish eds., 1994).

⁵¹ See JAMES R. HOLBEIN AND DONALD J. MUSCH, NAFTA FINAL TEXT: SUMMARY, LEGISLATIVE HISTORY & IMPLEMENTATION DIRECTORY 107 (1994). In the NAFTA's preamble, the Parties plan to "undertake [trade and investment] . . . in a manner consistent with environmental protection and conservation," "promote sustainable development," and, "strengthen the development and enforcement of international laws and regulations." *Supra* note 1, at 109. See also NAFTA, *supra* note 1, at 297.

⁵² See Pierie Marc Johnson & Andre Beaulieu, *The Environment and NAFTA: Understanding and Implementing the New Continental Law 1* (1996). *C.f.* Vienna Convention of the Law of Treatises, May 23, 1969, 1155 U.N.T.S. 331. The United States is not a party to the Vienna Convention. *Id.*

⁵³ See HOLBEIN & MUSCH, *supra* note 21, at 109.

⁵⁴ For example, the NAFTA clean up plan for the U.S.-Mexico border has failed, generating only 1% of the promised clean-up money; the NAFTA opened the U.S. borders to trucks that fail to meet U.S. safety standards; the NAFTA has weakened food safety inspections; the Ethyl Corporation of Virginia has filed a \$120 million suit against the Canadian government, under the NAFTA rules, after Canada banned a toxic gasoline

Among the most important issues associated with the NAFTA's environmental provisions and trade agreements are that increased competition is encouraging countries to either relax their environmental regulations in order to preserve provincial commodities or to relocate to areas of lower environmental standards in order to attract investment, thereby creating "pollution havens."⁵⁵ The increase in industrial activity is creating a rise in pollution and consumption of natural resources. This is forcing an awesome burden onto the environment which is already enduring extreme stress in many areas. Further, even though the NAFTA is encouraging trade expansion, domestic and international environmental laws are nonetheless creating unnecessary trade barriers which consequently are threatening the veracity of multilateral agreements.⁵⁶ As a result, member nations are able to compete domestically in the open market by lowering the standards of their environmental regulations.

Furthermore, the exclusion of certain principles from the NAFTA has caused great concern. These exclusions include statutes and regulations focused on managing natural resources, through the regulation of various harvesting methods,⁵⁷ and Canadian exceptions pertaining to the export of raw logs and unprocessed fish.⁵⁸ The health and safety of employees in their working environments has also been neglected.⁵⁹

PART II: THE NAAEC

The Parties to the NAFTA authored a side agreement, the NAAEC, in an attempt to acquiesce the NAFTA's adverse effects and bolster the environmental aspects and inseparable relationship of environmental protection and trade.⁶⁰ As its name suggests, the NAAEC is an accord

additive; the NAFTA weakened border inspections of U.S. trade. See Kal Raustuala, *The Policial Implications of the Enforcement of Provisions of the NAFTA Environmental Side Agreement: The CEC as a Model for Future Accords*, 25 ENVTL. L. 31, 34-35 (1995) (failing to offer incentives to Mexico to enforce its domestic environmental regulations).

⁵⁵ Under the NAFTA, "it is inappropriate [for Parties] to encourage investment by relaxing health, safety or environmental measures." NAFTA, *supra* note 1, art. 1114(2).

⁵⁶ Examples of "multilateral agreements" are the Montreal Protocol or the Convention on the International Trade in Endangered Species ("CITES").

⁵⁷ See Raustiala, *supra* note 24, at 43.

⁵⁸ See Swenarchuk, *supra* note 20, at 86.

⁵⁹ See Paulette Stenzel, *Can NAFTA's Environmental Provisions Promote Sustainable Development?*, 59 ALB. L. REV. 423, 472 (1995).

⁶⁰ See John J. Kim & James P. Cargas, *The Environmental Side Agreement to the North American Free Trade Agreement: Background and Analysis*, 23 ENVTL. L. REP. 10720, 10725-26 (1993). See *Foreign Policy implications of the North American Free Trade Agreement (NAFTA) and Legislative Requirements for the Side Agreements, Hearings Before the Senate Committee on Foreign Relations*, 103rd Cong. 14, at 18, 50 (1993) (testimonies of Cameron Duncan, Trade Policy Coordinator for Greenpeace International, and Rufus H. Yerxa, United States Trade Representative ("U.S.T.R.") Deputy). See also *North American Free Trade Agreement Supplemental Agreements and Additional Documents*, H.R. Doc. No. 160, at 170 (1993).

which propagates environmental protection among the governments of Canada, Mexico, and the United States. It was designed to act as an enforcement body that monitored the member nation's application of their environmental laws. Further, it was devised to respond to primary environmental concerns that emerged during the NAFTA negotiation in 1992 and 1993.⁶¹ Thus, this side Agreement to the NAFTA was created in an attempt to correct the shortcomings of the main treaty. For this reason alone, it must be regarded as part of the NAFTA package. The NAAEC, however, also differs from the NAFTA, especially in its fundamental approach which reflects a heightened desire to enforce international environmental protection.

Divided into seven major "Parts" consisting of 51 "Articles," the NAAEC possesses two presiding features. Parts I - IV and VI regard issues to be covered through environmental cooperation of the CEC.⁶² Part V sets forth dispute resolution procedures, accessible when one Party alleges that another has disregarded the enforcement of its environmental regulations.⁶³ The submission procedure which is available to individuals and mandates the Secretariat, is established in Part III, Section B. Not possessing autonomy within the NAAEC and not being incorporated within the dispute resolution component, the Secretariat is relegated by the NAAEC to a "secondary" status. Part I of the NAAEC sets forth the goals of the Parties entering into the Agreement.⁶⁴ Under Article 1, such objectives include: harboring the "protection and improvement of the environment",⁶⁵ "promot[ing] sustainable development,"⁶⁶ "increas[ing] cooperation between the Parties to enhance conservation and protection of the environment,"⁶⁷ avoiding the creation of trade distortions and new trade barriers,⁶⁸ strengthening cooperation on improvement of environmental laws and policies,⁶⁹ "enhanc[ing] compliance with . . . environmental laws,"⁷⁰ "promot[ing] transparency and public

⁶¹ Environmental issues articulated by government and nongovernmental organizations ("NGOs") while forming the NAFTA illustrates that many concerns were associated to the proliferating assimilation of the North American economy.

⁶² See NAAEC, *supra* note 2, at 1485.

⁶³ See *id.* pt.V, at 1490.

⁶⁴ See *id.* at 1483.

⁶⁵ *Id.* art.1(a).

⁶⁶ *Id.* art.1(b).

⁶⁷ *Id.* art.1(c).

⁶⁸ See *id.* art.1(e).

⁶⁹ See *id.* art. 1(f). See generally Stephen Zamora, *NAFTA and the Harmonization of Domestic Legal Systems: The Side Effects of Free Trade*, 12 *Ariz. J. Int'l & Comp. L.* 401, 402 (1995) (claiming the NAFTA made little effort in intermingling the Parties' domestic laws); Raustiala, *supra* note 24, at 52 (suggesting the possibility of the U.S. Congress deferring some environmental policy decisions to the NAFTA commissions).

⁷⁰ NAAEC, *supra* note 2, art.1(g), at 1483.

participation" in environmental legislation,⁷¹ and "support[ing] the environmental goals and objectives of the NAFTA."⁷²

Part II, Articles 2-6, binds the Parties to their environmental obligations⁷³ and mandates them, under Article 2, to occasionally make reports, accessible to the public for review, that analyze the environment's present state in their respective countries.⁷⁴ The member nations must confirm that their laws "provide for high levels of environmental protection" pursuant to Article 3.⁷⁵ In order to enable the public to participate in the submission process, Article 4 demands accessibility to a Party's enacted, but also proposed, environmental laws and policies.⁷⁶ Article 5 depicts the most "publicized" obligation: "each Party shall effectively enforce its environmental laws and regulations through appropriate governmental action. . . ."⁷⁷ Here, "government action" connotes various enforcement proceedings designed to rectify or reprimand a nation's violation of its environmental laws and regulations.⁷⁸ Finally, Article 6 requires the Parties to provide private party access to certain remedies, request the competent authorities to exercise enforcement, and seek injunctions in the event of loss, damage or injury resulting from the violation of environmental laws.⁷⁹

A. Commission for Environmental Cooperation

⁷¹ *Id.* art. 1(h). See Daniel Magraw, *NAFTA and the Environment: Substance and Process* 163, 11 (1995). See also Mark J. Spaulding, *Transparency of Environmental Regulation and Public Participation in the Resolution of International Environmental Disputes*, 35 SANTA CLARA L. REV. 1127, 1136-38 (1995).

⁷² NAAEC, *supra* note 2, art.1(d), at 1483; cf. NAFTA, *supra* note 1, at 297.

⁷³ See NAAEC, *supra* note 2, art. 2(e). The most critical issue is to "assess, as appropriate, environmental impacts." Ironically, the U.S. government failed to discharge an environmental impact statement on the NAFTA. *Id.* art. 2.1(e).

⁷⁴ See *id.* art. 2(1)(a). Additionally, each Party must "develop and review environmental emergency preparedness measures." *Id.* art. 2(1)(b).

⁷⁵ *Id.* art. 3. Unfortunately, the NAAEC does not define "high levels."

⁷⁶ See *id.* art. 4.

⁷⁷ *Id.* art. 5(1). See Daniel Magraw, *NAFTA's Repercussions: Is Green Trade Possible?* 36 *Env'tl* 14, 28 (1994) (requiring countries to enforce their environmental laws); see also NAAEC, *supra* note 2, at 1485; cf. Vienna Convention of the Law of Treaties, U.N. Conference on the Law of Treaties Off. Rec., 1st & 2d Sess., art. 26, U.N. Doc. A/Conf. 39/27 (1969).

⁷⁸ See NAAEC, *supra* note 2, art. 5(2), at 1485. Even if a country possesses inadequate law enforcement procedures, the NAAEC is in dire need of a provision that would further action beyond consultation. *Id.* art. 5.3(b). It is uncertain whether "environmental laws" here refers to all environmental laws or just the narrow range of laws specified in the NAAEC. *Id.* art. 45(2).

⁷⁹ See *id.* art. 6. Although the NAAEC has a provision addressing "Private Access to Remedies," there are almost no substantive obligations in it. *But see* NAFTA and Supplemental Agreements to NAFTA: Hearings before the Committee on Ways and Means, 103rd Cong., 1st Sess. 48 (1993), at 43 (quoting EPA Administrator Carol Browner: "there will be greater public access to courts and other bodies that enforce environmental laws in all three countries because of the side agreement").

Part III of the NAAEC establishes the Commission for Environmental Cooperation, or CEC,⁸⁰ "to monitor the efforts of each of the [P]arties toward[s] NAAEC's] goal and to ensure that each sovereign dutifully enforces its environmental laws."⁸¹ The CEC, however, was allotted no enforcement power since its main function is to investigate the facts and to foster adherence through its administrative and institutional bodies. Article 8 establishes these bodies, which are comprised of a Council, a Secretariat, and a Joint Advisory Committee.⁸²

Articles 9 and 10 of Section A create the Council of the Ministers of the Environment ("the Council") of each Party. The Council, which assembles annually and upon a Party's special request, represents the member nations' political interests.⁸³ Furthermore, it is the foundation of the CEC and the "forum for the discussion of environmental matters within the scope" of the NAAEC's provisions.⁸⁴ Its obligations include monitoring the application of the NAAEC and providing suggestions to better the NAAEC's operation and effectiveness.⁸⁵ According to Article 10, as the CEC's governing body, the Council must oversee the Secretariat, address questions and differences the Parties may encounter in applying or interpreting the terms of the NAAEC,⁸⁶ and promote and facilitate the Parties' cooperation on environmental matters.⁸⁷

Article 11 in Section B establishes the Secretariat who is governed by an Executive Director elected by the Council.⁸⁸ The Secretariat's duties include preparing the CEC's annual budget and furnishing various support to Council.⁸⁹ Expressing loyalty to the Council is of such paramount importance that the Executive Director is enjoined from obtaining information from any source other than from the Council. Further, in order to preserve the Council's aura of an international community, the Parties are forbidden from influencing others in this realm.⁹⁰ In addition, the

⁸⁰ See NAAEC, *supra* note 2, art. 8(1), at 1485. See also MARY E. KELLY, NAFTA'S ENVIRONMENTAL SIDE AGREEMENT: A REVIEW AND ANALYSIS, TEXAS CENTER FOR POLICY STUDIES (1993) (critiquing the CEC).

⁸¹ Adam Simon, *North American Agreement on Environmental Cooperation*, 8 GEO. INT'L ENVTL. L. REV. 496, 496 (1996).

⁸² See *id.* art.8(2).

⁸³ See *id.* arts. 9(1), (3)(a)–(b).

⁸⁴ *Id.* art. 10(1)(a).

⁸⁵ See *id.* art. 10(1)(b). The NAAEC requires the Council's review "in the light of experience" within "four years after the date of [its] entry into force." *Id.* The four-year anniversary of the date of entry into force is January 1, 1998. See 19 U.S.C. § 3311 (1994).

⁸⁶ See NAAEC, *supra* note 2, art. 10(1)(d), at 1486.

⁸⁷ See *id.* art. 10(1)(f).

⁸⁸ See *id.* art. 11(1). The Executive Director is appointed for a three-year term that may be renewed for one additional three-year term, or which may be ended early solely for cause. See *id.* The Executive Director position is to be filled consecutively by each nation on a rotating basis. See *id.*

⁸⁹ See *id.* art. 11(5)–(6).

⁹⁰ See *id.* art. 11(4).

Council demands that the Secretariat presents to it each year an annual report and a proposed budget for the upcoming year.⁹¹ The Annual Report concerns several aspects: a listing of the CEC's activities and expenses during the previous year,⁹² information on how a member country is propagating environmental protection, a Party's actions made on the behalf of the NAAEC,⁹³ and any significant data provided by NGOs or persons⁹⁴ such as various complaints or recommendations concerning the environment.⁹⁵ In light of the screening role the Secretariat performs in the citizen and NGO submission process, such an approach is of profound importance with regard to reconciling governments and NGOs, as well as trade interests and environmental concerns.

Articles 16, 17, and 18 of Section B, the final section of the CEC, create the Joint Public Advisory Committee ("JPAC").⁹⁶ A main venue for the NGOs, the JPAC is a permanent body to the Council, consisting of fifteen members which the Parties assume an equal role in electing.⁹⁷ The JPAC, however, selects its own chair.⁹⁸ This committee, which meets annually unless the Council mandates otherwise, is permitted to advise the Council on any issue encompassed by the NAAEC.⁹⁹ The NAFTA and NAAEC's presence are dire to the CEC's existence, because it provides autonomy and authority that extends beyond the boundaries of the NAFTA.¹⁰⁰ As a result, the public duty of the NAFTA and NAAEC is enhanced; moreover, it transforms the public into a monitor that regulates the proliferating effect of trade on the environment.

Part IV mandates the three countries work together as a unit by exchanging information, providing each other with valuable knowledge on the environment, and replying to other Party's concerns.¹⁰¹ It is important to note, however, that the Parties are not obligated to exchange information, such as that needed for the preparation of a Commission report or factual record, when the laws of their countries enjoin it.¹⁰² Furthermore, the countries are permitted to deny such disclosure to other

⁹¹ See *id.* art. 12(2)(a)–(b).

⁹² See *id.* art. 12(2)(a).

⁹³ See *id.* art. 12(2)(c).

⁹⁴ See generally *supra* note 37.

⁹⁵ See NAAEC, *supra* note 2, art. 12(2)(d)–(f). The Secretariat may submit reports to the Council on any matter falling within the scope of the annual program. See *id.* art. 13(1).

⁹⁶ See *id.* art. 16.

⁹⁷ See *id.* art. 16(1). However, the Council can change that number. See *id.* Each Party appoints an equal number of members, currently five. See *id.*

⁹⁸ See *id.* art. 16(2).

⁹⁹ See *id.* art. 16(4). The JPAC may also provide "relevant technical, scientific or other information" to the Secretariat for consideration in developing a factual record under Article 15 for presentation to the Council. *Id.* art. 16(5).

¹⁰⁰ See Johnson, *supra* note 22, at 139–40.

¹⁰¹ See NAAEC, *supra* note 2, arts. 20–21, at 1489–90.

¹⁰² See *id.* art. 39(1).

countries if responding to their requests would be "excessive and burdensome."¹⁰³ Finally, the Parties' enforcement agencies are not subject to investigations by their respective Secretariats under the NAAEC.¹⁰⁴

Part VI of the NAAEC provides guiding definitions,¹⁰⁵ technical matters, and general provisions such as the NAAEC's relation to other environmental agreements¹⁰⁶ and the national security exception.¹⁰⁷

Part VII sets forth the final provisions of the international trade agreement which includes two additional annexes for Canada. The first annex concerns trade sanctions and applicable replacement procedures.¹⁰⁸ It is made clear in the second annex that issues encompassed in Canada's jurisdiction do not include the duties of the NAAEC.¹⁰⁹ What is provided for, however, are federal jurisdiction matters and certain provincial concerns. Provincial participation is crucial since provinces representing 55% of Canada's gross domestic product must commit to the NAAEC before its dispute resolution provisions apply to signatory governments.¹¹⁰

B. Dispute Resolution Mechanisms

Dispute resolution is governed by the NAFTA and NAAEC's environmental provisions and is limited to "Country-to-Country" claims.¹¹¹ The NAAEC is not an agreement regarding the environment per se, but rather a dispute resolution relating to the Parties' enforcement of their environmental standards to the NAFTA trade agreement.¹¹²

How to administer dispute resolution under the NAFTA is specified in Chapter 20.¹¹³ Articles under the NAFTA provide Parties with many options when addressing dispute resolution. The member nations are able to elect between a NAFTA mechanism or a General Agreements of Tariffs

¹⁰³ See *id.* art. 21(2).

¹⁰⁴ See *id.* art. 11.

¹⁰⁵ See *id.* art. 45.

¹⁰⁶ See *id.* art. 40.

¹⁰⁷ See *id.* art. 42. Although Part V has not yet been invoked by any of the Parties, in order to make use of it, alleged non-enforcement must be part of a persistent pattern.

¹⁰⁸ See NAAEC, *supra* note 2, annex 36A, at 1493.

¹⁰⁹ See *id.* art. 41, annex 41, at 1494.

¹¹⁰ See *id.* annex 41.4, 41.5. See *Ottawa, Quebec sign environmental side accord to NAFTA*, Eco-Log Week, Jan. 10, 1997, at 1, available in 1997 WL 9031149 (stating that three provinces, thus far, have opted in: Alberta, Manitoba, and Quebec).

¹¹¹ See Elizabeth A. Ellis, Note, *Bordering on Disaster: A New Attempt to Control the Trans-boundary Effects of Maquiladora Pollution*, 30 VAL. U. L. REV. 621, 621-22 (1996). As of Fall 1998, no "Country-to-Country" disputes have been filed with the CEC. *Id.*

¹¹² See generally Beatriz Bugeda, *Is NAFTA up to its green expectations? Effective law enforcement under the North American Agreement on Environmental Cooperation*, 34 U. RICH. L. REV. at 6 (forthcoming Jan. 1998) (stating, "[t]he most extensive section of the environmental side agreement is the one dealing with settlement of disputes"). *Id.*

¹¹³ See NAFTA, *supra* note 1, at 296.

and Trade ("GATT") dispute resolution under Article 2005. Suggestions as to which dispute resolution process should be applied are made under Articles 2014 and 2015 if you are a private party, including an NGO. Such leeway by the NAFTA in regards to dispute resolution suggests the Agreement is cognizant of environmental goals that warrant a divergence from trade obligations.¹¹⁴

Part V of the NAAEC also concerns dispute resolution.¹¹⁵ In fact, it authorizes the Council to assemble a committee if one member nation claims that another is not effectively enforcing its environmental laws.¹¹⁶ Such allegations may only pertain to a Party's non-enforcement of environmental laws that involve goods traded in the North America or produced by export-competing industries. The NAAEC, however, fails to provide an environmental injury test. Thus, the complaining nation is not required to establish environmental injury to it or to the alleged permissively-regulated country.¹¹⁷

C. The Submission Process Under the NAAEC

The submission process is the most effective instrument when challenging the NAAEC on its environmental commitment. Part III, Section B of the NAAEC lays out the submission procedure in stages. The stages can either lead to ensuing steps or be aborted and end at any interval. Articles 14 and 15, and to a lesser extent Article 13, are most critical to the submission process.¹¹⁸ Article 6, on the other hand, only permits private party access to some remedies under the domestic law. Although Articles 14 and 15 also allow private party access, they go one step further than Article 6 by "opening the door" to the CEC.

Article 14 of the NAAEC provides the Secretariat with the power to review and evaluate an NGO or individual's submission alleging that a member nation is failing to adequately protect the environment against adverse effects such as increased trade.¹¹⁹ As soon as the Secretariat is provided with such a claim, it immediately determines whether the bid is grounded, in other words, whether it meets the CEC's guidelines.¹²⁰ If the

¹¹⁴ See, e.g., Ileana Porrás, *The Puzzling Relationship Between Trade and Environment: NAFTA, Competitiveness, and the Pursuit of Environmental Welfare Objectives*, 3 IND. J. GLOBAL LEGAL STUD. 65, 69 n.8 (1995).

¹¹⁵ See NAAEC, *supra* note 2, at 1490.

¹¹⁶ See *id.* at 1490.

¹¹⁷ See NAAEC, *supra* note 2, art. 24.1.

¹¹⁸ See NAAEC, *supra* note 2, arts. 13–15.

¹¹⁹ See *id.* art. 14(1). Although several Article 14 petitions have already been filed with the NAAEC, the NAAEC ruled for the first time, in Spring 1997, that the U.S. must respond to all submissions by NGOs alleging ineffective enforcement of the environmental laws by the U.S.

¹²⁰ See *id.* As of Fall 1998, fifteen (15) of such Article 14 petitions have been filed; seven (7) have been disposed of, and eight (8) are still pending. Only one submission has been subject to investigation; the environmental impact of the construction of a pier on the

Secretariat concludes that the submission requires a further investigation, it then formally requests a response from the Party against whom the complaint was made.¹²¹

Continuing in the submission process under Article 15 of the NAAEC, the CEC may then request a fact-finding hearing that may otherwise be known as a factual record. This factual record would be the final stage and could be accessible to the public upon a two-thirds vote by the CEC.

Of less significance to the submission process is Article 13. Under this article, the Secretariat must "prepare a report for the Council on any matter within the scope of the annual program . . . [as well as] on any other environmental matter related to the cooperative functions of this Agreement."¹²² The report may include any relevant technical or scientific information that is publicly available or that interested parties submit.¹²³ However, "[s]uch other environmental matters should not include issues related to whether a [P]arty has failed to enforce its environmental laws and regulations."¹²⁴ Instead, Article 14 encompasses the "issues" to which Article 13 has made reference. It is important to note that even though Article 13 does not specifically exclude a submission process, it fails to confer one as well. Thus, a submitting party would have another resort under Article 13 were his/her submission repudiated under Article 14.

PART III

A. Flawed Areas of the NAAEC and its Relevant Components

Although some environmentalists were dissatisfied with the NAAEC, others felt it did achieve all of its goals.¹²⁵ In light of the North American

Carribbean resort island of Cozumel. 1998 Rep. of the Indep. Rev. Comm. at 19. See Christopher N. Bolinger, *Assessing the CEC on its record to date*, 28 LAW AND POL'Y INT'L BUS. 1107, 1122 (1997).

¹²¹ See NAAEC, *supra* note 2, art. 14(2). See also *Commission for Environmental Cooperation, Registry of Submissions on Enforcement Matters: Sierra Club et al.*, (visited April 7, 1999) <http://www.cec.org/templates/registryview.cfm?&varlan=English&submissionID=2&format=1> (finding that a submission by the Sierra Club against the United States did not meet Article 14(1)(a)-(f)'s criteria and stating that the Secretariat would not request a response from the United States); cf. *Commission for Environmental Cooperation, Registry of Submissions on Enforcement Matters: The Southwest Center for Biological Diversity et al.*, (visited April 7, 1999) <http://www.cec.org/templates/registryview.cfm?&varlan=English&submissionID=8&format=2> (informing the Southwest Center for Biological Diversity and Dr. Robin Silver that a response was requested from the United States under Article 14(2) of the NAAEC).

¹²² NAAEC, *supra* note 2, art. 13(1).

¹²³ See *id.* art. 13(2)(a)-(f). The information may be submitted by NGOs or persons, by a governmental Party, through conferences or seminars, and by experts consulted by the Secretariat. *Id.*

¹²⁴ *Id.* art. 13.

¹²⁵ "The belief that [the NAAEC and] NAFTA's environmental institutions have failed to carry out their mandate was partly responsible for President Bill Clinton's failure to win

experience on environmental protection and trade since 1994, the discontented individuals' reasons are justified; the NAAEC possesses several flaws.

A primary drawback of the NAAEC involves the submission process. Although time limits are prescribed to the submitting party and the responding party, a time limit fails to be enforced on the Secretariat at any stage of the submission process. This forces the credibility of the CEC to be undermined.¹²⁶ Moreover, at stage two, the submitting party's participation in the process terminates upon the Secretariat's decision on whether or not to request a Party's response.¹²⁷ From this stage forward, the submitting party's participation in the submission process is non-existent.¹²⁸ At this point, the Secretariat assumes the submitting party's role and acts as its delegator. Meanwhile, the Party remains actively involved in the submission process. The permissibility of the Party's actions is so broad, in fact, that it may even review and comment on the submitting party's draft.

Moreover, the submission process lacks allowance for any private direct action.¹²⁹ In fact, the process applies pressure through public opinion instead of through actual enforcement.¹³⁰ In order to compel a Party to adhere to its environmental regulations, more stringent measures need to be asserted. Many consider the lack of and need for concrete relief that is both recognized and upheld by all Parties to be a drastic vice of the submission process.¹³¹

The NAAEC's Commission is undoubtedly restricted in its range of autonomy and control.¹³² It is merely regarded as an instrument with

"fast-track" authority [in 1997]. . . . 1998 WL 5987973. This authority "would have enabled him to negotiate new trade agreements that Congress would have [had] to either accept, or reject [as] the final submitted . . . package." *Id.*

¹²⁶ See Jay Tutchton, *The Citizen Petition Process Under NAFTA's Environmental Side Agreement: It's Easy to Use, But Does it Work?* 26 ENVTL. L. REP. 10021, 10034 n.13 (1996) (quoting "justice delayed is justice denied").

¹²⁷ If the Secretariat does decide to prepare a factual record at this stage in the submission process, the submitter may only provide the Secretariat with information for generating the report. See Bugada, *supra* note 82, at 18.

¹²⁸ See Tutchton, *supra* note 96, at 10034.

¹²⁹ See Stenzel, *supra* note 29, at 472; Jack Garvey, *Trade Law and Quality of Life - - Dispute Resolution under the NAFTA Side Accords on Labor and the Environment*, 89 Am. J. Int'l. L. 439, 445 (1995).

¹³⁰ The only benefit of a factual record is its effect on public opinion and the indirect pressure it places on member nations to abide by their environmental laws and to initiate new legislation. See Bugada, *supra* note 82, at 17.

¹³¹ See Bugada, *supra* note 82, at 16 (stating "the fact that the process provides not for a judicial decision, but for an informative clarification in the form of a factual report resulting in the absence of direct guarantee of remedy, is [] a serious shortcoming of the procedure"). *But see* Tutchton, *supra* note 96, at 10034.

¹³² See Spaulding, *supra* note 41, at 1133.

which NGOs may gain political attention by expressing their apprehensions. The Executive Director's lack of control comprises the weak foundation of the CEC. Another facet of the CEC's flaws is its ability to bar the public's access to complaints or reports. This contradicts the NAAEC's alleged attempts to encourage public participation and access, since it consciously and unlawfully obstructs the public's right to know.¹³³ Further, Parties are furnished with such immense power under the CEC that they are potentially able, initially, to block unfavorable submissions.¹³⁴

Flaws exist not only in the NAAEC's submission process, but also in the environmental issues it covers. In particular, the NAFTA's definition of "environment" remains too narrow. "The health and safety of workers within the walls of the worksite [shall] be protected, as well as the health and safety of citizens outside its walls."¹³⁵ Since the NAAEC purposely deterred any new environmental legislation, this rebuff would be more appropriate if leveled at the NAFTA.

B. Virtues of the NAAEC and the Submission Process

Notwithstanding the foregoing negative comments, the attributes of the NAAEC and the submission process merit some recognition. In particular, the very downfalls emphasized above also stress the side Agreement's benefits.¹³⁶ Ironically, critical to the prosperity of trade agreements, such as the NAAEC, is the Parties' ability to block the public's access to reports or complaints.

The NAAEC was a triumph for environmental advocates since it reached heights unprecedented in previous trade agreements.¹³⁷ One of its greatest achievements was the opportunity for public interaction, which was made possible through the CEC.¹³⁸ Only time will tell if such participation will project a more favorable outlook upon the NAAEC's Commission.¹³⁹ Even though the NAAEC obviously requires some restructuring, its shortcomings should be overridden by its major accomplishment: gaining environmental compliance from countries that are primary contributors to the effects of trade on the environment.¹⁴⁰

¹³³ *See id.*

¹³⁴ *See Garvey, supra* note 99, at 446.

¹³⁵ Stenzel, *supra* note 29, at 472.

¹³⁶ *See generally* Garvey, *supra* note 99.

¹³⁷ *See* Porras, *supra* note 84, at 67.

¹³⁸ *See id.* at 70.

¹³⁹ *See* Spaulding, *supra* note 41, at 1138.

¹⁴⁰ "The greatest environmental opportunity springing from the process of economic integration in the Americas now lies in the chance to build up the CEC." Johnson, *supra* note 22, at 275.

What the CEC provides to society should be acknowledged: an accessible international forum to present and publicize environmental problems. As flawed as the CEC may be, it is a significant step forward in international trade agreements, which are only beginning to show their promise. Moreover, the CEC is saturated with such potential that it eventually will counterbalance the NAFTA.¹⁴¹ Thus, one of the greatest achievements the NAAEC may encounter, due to the CEC's acting as its solid foundation, would be for future international trade agreements to regard it as a mandated model.

PART IV: SUGGESTED ADAPTIONS TO THE NAFTA AND NAAEC

In light of the North American experience on environmental protection and trade since 1994 and emerging environmental priorities, the following suggests revisions to particular sections of the NAFTA and NAAEC. Here, the objective consists of improving the NAFTA and NAAEC as environmental enforcement tools and as public forums for trade and environmental concerns, while maintaining their future political viability. Although countless possible modifications exist, only conditions requiring immediate attention are introduced here.

Although the NAFTA generally deters the waning of environmental laws to promote investment and encourage the application of such regulations, it fails to travel the extra step by enforcing strict adherence to these ordinances. Since enforcement of environmental laws is of profound importance, the NAFTA should only be condoned when it addresses these concerns and compels international environmental cooperation. Hence, the NAFTA should be revised, as the Independent Review Committee suggests in its 1998 report, to include enforceable environmental standards for those left out of the benefits of trade.¹⁴²

The NAAEC's submission process, on the other hand, should be amended to enforce time constraints on the Secretariat.¹⁴³ There is no viable reason not to impose such restrictions. Most importantly, this would place greater significance on addressing environmental issues more swiftly. Further, it should not be an indication that the Secretariat may claim liberated discernment just because it has not, as of yet, taken advantage of its position.

¹⁴¹ See *id.* at 129.

¹⁴² Article 10(1)(b) of the NAAEC requires the CEC's Council to review its operation and effectiveness four years after its entry into force. See NAAEC, *supra* note 2, art. 10(1)(b). In order to assist the Council in its review, the CEC Secretariat appointed an Independent Review Committee ("IRC") to provide advice that suggests future directions for the NAAEC. *Id.* The IRC's report was issued in June 1998.

¹⁴³ See *id.* at 19. This suggestion does not coincide with the IRC's view on the submission process: "the IRC sees no reason to suggest alterations to [the submission] part of the process." *Id.*

Under the NAAEC, if a submission indicates an inadequacy in effectively exercising one's environmental laws, the Secretariat is allowed to not demand a Party's response. This subservient reaction to the disregarding of environmental laws goes against the grain of the NAAEC. Thus, the NAAEC should be revised to mandate an answer to any submission that addresses a possible disregard for environmental laws.¹⁴⁴

Finally, in lieu of the lessons of past international trade agreements, many questions are leveled at whether domestic standards are efficient international laws. These doubts arose after the Parties' local laws proved to be inadequate in enforcing international environmental cooperation. With this being the case, how could these nations assert rigorous enforcement over the remainder of North America?¹⁴⁵ Obviously little, if any, because one may assume that the Parties' environmental laws are most likely inadequate¹⁴⁶ since they have proven to be ineffective in the United States.¹⁴⁷

Finally, it is dire that new international standards be adopted in order to maintain the linkage between environmental protection and trade. Conclusion In light of the proliferation of international trade relations and the often challenged disparity between trade and environmental regimes, the NAAEC's implementation is a triumph for the environmental cause. By propagating environmental protection against the adverse effects of increased trade on the environment, the NAAEC suggests foresight into environmental and international trade interests. In and of itself, the integrating of the NAFTA and NAAEC connotes such "foresight" and a positive attempt in the right direction. Now, such steps must continue forward as environmental needs are already pressing. These efforts may

¹⁴⁴ See *id.* Again, the IRC disagrees with the proposal in its report.

¹⁴⁵ See Jonathan Schlefer, *History Counsels "No" on NAFTA*, N.Y. TIMES, Nov. 14, 1993, at 3(11) (suggesting that it is as nonsensical for Mexico, Canada, and the United States to have different environmental rules as it would be if half of the United States regulated air pollution and half did not).

¹⁴⁶ But see *Hearing Before the Committee on Foreign Relations*, S. Doc. No. 103-360, Cong., Sess., at 28 (Oct. 27, 1993) (U.S.T.R. Rufus H. Yerxa explaining that "the basic assumption of this negotiation was that the laws themselves are quite good, the laws that are on the books in all three countries are quite good, and the problem has been one of enforcement. . .").

¹⁴⁷ See, e.g., Al Gore, *Earth in the Balance* (1992); Bill Clinton & Al Gore, *Putting People First* 93 (1992). At the federal level, for example, weak particulate air pollution standards contribute to excess mortality in certain U.S. cities; Douglas W. Dockery et al., *An Association Between Air Pollution and Mortality in Six U.S. Cities*, 329 THE NEW ENGLAND J. OF MEDICINE 1753, 1753 (1993); John H. Cushman Jr., *States and Government Lag in Meeting Clean Air Law*, N.Y. TIMES, Nov. 16, 1993, at A18. At the state level, many serious problems also exist. For instance, the state of Arkansas has long resisted imposing sanitary standards on poultry industry pollution; John T. Hollman, *In Arkansas Which Comes First, The Chicken or the Environment?*, 6 TUL. ENV'T'L L. J. 21, 27 (1992) (describing the magnitude of the manure problem in Arkansas as problematic).

be consummated by mandating adherence to current environmental standards while gradually incorporating more effective ones. A challenging task stands before the NAAEC, and the results can only be measured in due time.

CONCLUSION

In light of the proliferation of international trade relations and the often challenged disparity between trade and environmental regimes, the NAAEC's implementation is a triumph for the environmental cause. By propagating environmental protection against the adverse effects of increased trade on the environment, the NAAEC suggests foresight into environmental and international trade interests. In and of itself, the integrating of the NAFTA and NAAEC connotes such "foresight" and a positive attempt in the right direction. Now, such steps must continue forward as environmental needs are already pressing. These efforts may be consummated by mandating adherence to current environmental standards while gradually incorporating more effective ones. A challenging task stands before the NAAEC, and the results can only be measured in due time.