Notes

DISPUTE RESOLUTION UNDER THE NORTH AMERICAN COMMISSION ON ENVIRONMENTAL COOPERATION

I. INTRODUCTION

With the adoption of the North American Agreement on Environmental Cooperation (Environmental Side Agreement)[1] and the establishment of the North American Commission on Environmental Cooperation (CEC), the North American Free Trade Agreement (NAFTA)[2] goes further in addressing environmental concerns than any trade agreement in history.[3] The dispute resolution mechanisms laid out in the Environmental Side Agreement under the CEC and in NAFTA Chapter 20 under the Free Trade Commission set a bold precedent for the resolution of environmental disputes within a trade context. Although the creation of these mechanisms has not silenced all critics, the Environmental Side Agreement provisions, including the limited use of trade sanctions to encourage Party enforcement of national environmental law, represent a step forward in the evolution of the legal process for resolving trade disputes. These modern dispute settlement procedures will strengthen the ability of the new NAFTA institutions to reconcile difficult trade and environmental objectives and may encourage the Parties not to rely on more traditional and dangerous unilateral measures.[4]

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1. North American Agreement on Environmental Cooperation, Dec. 17, 1993, U.S.-Can.-Mex., 32 I.L.M. 1480 [hereinafter Environmental Side Agreement].

2. North American Free Trade Agreement, Sept. 14, 1993, U.S.-Can.-Mex., 32 I.L.M. 289 [hereinafter NAFTA]. NAFTA will regulate areas far beyond the traditional focus of trade agreements, including issues ranging from investment to intellectual property and public health. In order to effectively address the expanse of subject matter covered under the agreement, NAFTA includes broad dispute resolution procedures. *See* Rodger Schlickeisen, *We Can Have Free Trade and a Clean Environment*, HOUS. CHRON., Apr. 6, 1993, at A13.

3. Richard B. Stewart, *The NAFTA: Trade, Competition, Environmental Protection*, 27 INT'L LAW. 751, 753 (1993).

4. *See* Jeffrey P. Bialos & Deborah E. Siegel, *Dispute Resolution Under the NAFTA: The Newer and Improved Model*, 27 INT'L LAW. 603, 603 (1993).

NAFTA's Chapter 20 establishes the basic structure for the resolution of Party disputes.[5] A complaint brought under Chapter 20 will proceed through a three step process: (1) consultations between the Parties to the dispute; (2) mediation by the NAFTA Free Trade Commission if these consultations do not resolve the issue; and (3) the establishment of an arbitral panel as a mechanism of last resort.[6] The settlement procedures of Chapter 20 will be triggered when questions arise regarding either the interpretation or application of the Agreement or when "a Party considers that an actual or proposed measure of another Party would be inconsistent with the obligations of this Agreement."[7] Only Parties to NAFTA are allowed to bring challenges under Chapter 20. Private citizens, corporations, and non-governmental organizations (NGOs) do not have standing to challenge a Party under Chapter 20.[8]

For disputes arising from alleged violations of either NAFTA or the General Agreement on Tariffs and Trade (GATT),[9] the complaining Party may choose to utilize the settlement procedures of either GATT or NAFTA respectively.[10] However, if the dispute is over national measures designed to protect health or the environment, the defending Party may insist on using the NAFTA process.[11] In this way, the observance of certain international environmental treaties,[12] and the protection of domestic environmental, health, and safety measures can be assured.[13] Furthermore, forcing the Parties to abide by the NAFTA settlement procedures in these cases will place the burden of proving inconsistency between the challenged Party's national environmental and health standards and the

5. NAFTA, *supra* note 2, at 694-98 (citing arts. 2003-2019).

6. *Id.* at 694-95 (citing arts. 2006-2008); *see* Bialos & Siegel, *supra* note 4, at 615 (describing the NAFTA dispute resolution mechanism).

7. NAFTA, *supra* note 2, at 694 (citing art. 2004).

8. *Id.* (citing art. 2005).

9. The General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, T.I.A.S. No. 1,700, 55 U.N.T.S. 187 (1969) [hereinafter GATT].

10. NAFTA, *supra* note 2, at 694 (citing art. 2005(1)).

11. *Id.* (citing art. 2005(4)).

12. *See id.* at 297-98 (citing art. 104, which allows the Convention on International Trade in Endangered Species of Wild Fauna and Flora, the Montreal Protocol on Substances that Deplete the Ozone Layer, and the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal to take precedence over NAFTA provisions).

13. *Id.* at 377-83 (citing ch. 7B concerning Sanitary and Phytosanitary measures); *id.* at 386-92 (citing ch. 9 concerning Standards-Related Measures).

Agreement's standards on the challenging Party.[14] In contrast, GATT places the burden on the defending Party.[15] NAFTA therefore takes a deferential approach toward national sovereignty concerns.

The dispute settlement process under the Environmental Side Agreement has a much narrower focus than the Chapter 20 process. Under the Side Agreement, the dispute resolution procedures cover challenges to a Party's enforcement of its domestic environmental laws.[16] This settlement process, like that of Chapter 20, begins with consultations between the Parties involved.[17] If those consultations do not resolve the conflict, the matter is turned over to the CEC Council, which can investigate, hear experts, issue recommendations, or propose mediation.[18] Finally, if the matter remains unresolved, the CEC can establish an arbitral panel upon request of any of the consulting Parties[19] to decide if "there has been a persistent pattern of failure by the Party complained against to effectively enforce its environmental law, and to make findings, determinations and recommendations."[20]

This Note proposes that the dispute settlement process adopted for the CEC in the Environmental Side Agreement strikes the proper balance between respect for national sovereignty and the creation of a forum that will encourage a good faith approach towards the enforcement of national environmental law. By including a trade sanction option as a means of last resort to punish the most flagrant and persistent cases of Party non-enforcement,[21] the CEC maintains its focus on the rewards of the consultative process. This balancing of priorities also provides a limited response to certain criticisms of

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14. *Id.* at 382 (citing art. 723(6) concerning the burden of proof in Sanitary and Phytosanitary measures cases); *id.* at 391 (citing art. 914(4) regarding the burden of proof in Standards-Related Measures cases).

15. *See* JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 182-83 (1969) (describing a defending party's rebuttal requirements to a challenge of "nullification or impairment" of GATT benefits).

16. Environmental Side Agreement, *supra* note 1, at 1490 (citing art. 22 which discusses consultations on enforcement matters).

17. *Id.* (describing the consultative process under the Environmental Side Agreement); NAFTA, *supra* note 2, at 694 (citing art. 2006 which describes the consultative process under NAFTA).

18. Environmental Side Agreement, *supra* note 1, at 1490 (citing art. 23).

19. *Id.* at 1490-91, 1492 (citing arts. 24, 33).

20. *Id.* at 1491-92 (citing art. 28).

21. *See infra* notes 119-91 and accompanying text.

the NAFTA Chapter 20 dispute resolution process,[22] and serves as a starting point from which future negotiators can approach trade and environmental issues.[23]

In presenting these conclusions, this Note seeks first to analyze the political forces surrounding NAFTA and the negotiations which affected the final formulation of the Environmental Side Agreement. Part II will address the environmental concerns raised by NAFTA and its Chapter 20 dispute resolution mechanism. These concerns are particularly important in order to understand the final formulation of the dispute resolution provisions. Part III will discuss the Parties' early draft proposals for the CEC and their dispute resolution mechanisms. Part IV will present a detailed description of the CEC structure and its dispute resolution procedures, while selected criticism of the compromises achieved will be evaluated in Part V. Part VI concludes that the structure and procedures of the CEC and the mechanism for the settlement of disputes recognize a new relationship between trade and the environment and represent a step towards the ultimate goal of sustainable economic development.

II. ENVIRONMENTALIST CONCERNS WITH NAFTA

A. General Concerns

During the political debate over ratification of NAFTA in the United States, a number of environmental groups expressed dissatisfaction with the treaty's environmental protection provisions.[24] Although the United States, Canada, and Mexico all had laws to regulate environmental protection and to provide for the punishment of environmental infractions, Mexico had a history of erratic enforcement of its environmental laws.[25] Because NAFTA was

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22. *See infra* notes 26-57 and accompanying text.

23. Stewart, *supra* note 3, at 760 (predicting that NAFTA successes will likely be emulated in other free trade agreements).

24. *See, e.g.*, Letter from Defenders of Wildlife et al., to Mickey Kantor, United States Trade Representative (Mar. 4, 1993) (authored jointly by 21 environmental and consumer groups) (on file with *The Duke Journal of Comparative and International Law*); *An Assessment of the North American Free Trade Agreement: Hearings Before the House Comm. on Small Business*, 102d Cong., 2d Sess. 4 (1992) [hereinafter Schott Assessment] (Statement of Jeffrey J. Schott, Senior Fellow, Institute for International Economics).

25. House Majority Leader Richard Gephardt (D-MO), Address Before the Citizen Trade Campaign (Mar. 25, 1993), *available in* LEXIS, Genfed Library, EXTRA File; *see* Keith Bradsher, *Trade Pact Signed in 3 Capitals*, N.Y. TIMES, Dec. 18, 1992, at D1.

expected to foster industrial growth, environmentalists were concerned that the agreement was not equipped to address the challenges that this growth would present to already inadequately enforced environmental laws. Environmentalists were particularly concerned that ambiguous language in NAFTA would provide loopholes which the Parties could use to justify inadequate environmental standards.

One point of contention revolved around the inclusion of certain language from Article 20(b) of GATT. This article allows for trade restrictions that might not otherwise be tolerated under the GATT rules, if the restrictions are "necessary to protect human, animal or plant life or health."[26] GATT panels which have ruled on the application of this phrase have interpreted it narrowly, allowing environmental measures only if there are no alternatives which present fewer restrictions on free trade.[27] In NAFTA, the GATT provision was incorporated by prohibiting environmental regulations from presenting "unnecessary obstacles" to trade.[28] Additionally, in NAFTA Article 2101, the Parties specifically stated that GATT Article 20(b) applied to environmental measures.[29] Thus, when the first NAFTA Free Trade Commission dispute panel is called upon to interpret whether a given Party's environmental law is an "unnecessary obstacle" to trade, it may well turn to environmentally unfriendly GATT precedents in defining the scope of this language.[30]

This interpretative issue was highlighted when a GATT panel report,[31] issued during the negotiations over NAFTA, found that a U.S. ban on Mexican tuna imports harvested without dolphin-safe nets was in conflict with GATT.[32] This GATT panel report is representative of the basis for environmentalists' concerns that NAFTA would result in the invalidation of U.S. laws and would compromise the

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26. GATT, *supra* note 9, at 262 (citing art. 20(b)).

27. *See, e.g., Measures Affecting Alcoholic and Malt Beverages*, GATT Doc. DS23/R (Feb. 7, 1992).

28. *See* NAFTA, *supra* note 2, at 387 (citing art. 904(4)).

29. *Id.* at 699 (citing art. 2101).

30. Stanley M. Spracker et al., *Environmental Protection and International Trade: NAFTA as a Means of Eliminating Contamination as a Competitive Advantage*, 5 GEO. INT'L ENVTL. L. REV. 669, 693 (1993) (discussing implications of GATT art. 20(b) language being included in NAFTA).

31. *GATT: Dispute Settlement Panel on United States Restrictions on Imports of Tuna*, 30 I.L.M. 1594 (1991).

32. James Sheehan, *Clinton's Plan for the NAFTA Deal*, WASH. TIMES, Jan. 18, 1993, at E4.

ability of the United States to enforce rigorous environmental standards.[33]

This general fear of downward harmonization of laws and the concern about the failure of NAFTA to regulate production processes were the primary threats to the ratification of NAFTA in the United States.[34] The likely result of greater economic integration among the NAFTA Parties will be a move towards the harmonization of national laws allowing goods and services to flow more efficiently across Party borders.[35] However, with this harmonization, U.S. environmentalists feared they would lose hard-fought domestic environmental victories as tough United States and Canadian practices were watered down to more closely align with the realities of sporadic Mexican enforcement.[36]

Responding to these feelings of unease, then-Governor Bill Clinton delivered an October 1992 Presidential campaign speech in which he promised to pursue a supplemental agreement to NAFTA which would require each Party to retain responsibility for its own environmental laws and regulations.[37] In this address, Clinton declared that "we must establish an Environmental Protection Commission with substantial powers and resources . . . [that will] encourage the enforcement of [each] country's own environmental laws . . . ."[38] Clinton also stated that the environmental commission should have the power to provide remedies, including the power to assess money damages and the legal right to stop pollution.[39] Thus, Clinton promoted the use of supplemental agreements to address what critics in the U.S. Congress and environmental groups viewed as NAFTA's weaknesses.[40] Once Clinton became President, he initiated negotiations of a supplemental agreement which included

33. *See id.*

34. *See* Schott Assessment, *supra* note 24, at 5; *see also* Spracker et al., *supra* note 30, at 693.

35. Stewart Baker, *After the NAFTA*, 27 INT'L LAW. 765, 769 (1993).

36. *Id.*

37. Governor Bill Clinton, Remarks at the Student Center at North Carolina State University (Oct. 4, 1992), *available in* LEXIS, News Library, Fednew File.

38. *Id.*

39. *Id.*

40. *Id.*; *see* Stephen Franklin & John N. Maclean, *Foes Battle to Mold, If Not Kill, Free-Trade Pact,* CHI. TRIB., Feb. 22, 1993, at 3 (citing environmental groups' concerns over NAFTA's enforcement tools and NAFTA's ability to ensure that the United States' strict standards will not be compromised).

trade sanctions. The trade sanction issue later developed into a major point of contention between the Parties.[41]

B. Concerns over the NAFTA Dispute Panel Process

Beyond the general concerns over how NAFTA was going to be interpretted, many environmentalists specifically scrutinized and criticized the dispute resolution process outlined in Article 20 of the treaty.[42] In particular, critics complained that environmental experts were not required on the panels considering environmental complaints. They also expressed concern over the lack of public awareness and participation in the dispute resolution process.[43]

First, some environmentalists criticized the lack of environmental experts on the Free Trade Commission as a feature which had limited the effectiveness of trade panel dispute resolution in the past.[44] While NAFTA allows for the solicitation of technical advice beyond its normal roster of Free Trade Commission panelists, the Agreement does not *require* expert participation.[45] Rather, with Party approval, a panel may solicit the opinions of a board of scientific experts on concerns about "environmental, health, safety or other scientific matters" at issue in the dispute.[46] However, the views of those experts are merely advisory and consequently have no binding effect.[47] The complexity and breadth of issues that may be brought before a Free Trade Commission dispute resolution panel will most likely force generalist panels to resort to increased use of such expert advice.[48] This use of expertise, particularly in specialized fields, may have the positive effect of bolstering the panel's credibility, thereby encouraging wider acceptance of panel reports in such areas.[49]

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41. Anne Swardson, *Canada's Commons Approves Trade Pact with U.S., Mexico*, WASH. POST, May 28, 1993, at A32.

42. *See, e.g., North American Free Trade Agreement: Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 102d Cong., 2d Sess. 238, 244, 255 (1992) (testimony of Peter M. Emerson, Senior Economist, Environmental Defense Fund, and John J. Audley, Trade Analyst, Sierra Club).

43. *NAFTA and its Impact on the U.S. Economy, Wages and Jobs: Hearings of the Senate Comm. on Commerce, Science and Transportation*, 103d Cong., 2d Sess. (1993) (describing specific complaints to the dispute resolution process under NAFTA).

44. Lori Wallach, *Hidden Dangers of GATT and NAFTA*, *in* THE CASE AGAINST FREE TRADE: GATT, NAFTA, AND THE GLOBALIZATION OF CORPORATE POWER 23, 57 (1993).

45. NAFTA, *supra* note 2, at 696 (citing art. 2014).

46. *Id.* at 696-97 (citing art. 2015(1)).

47. *Id.* (citing arts. 2014-2015).

48. Bialos & Siegel, *supra* note 4, at 621.

49. *Id.*

Critics have thus argued that referral of technical issues to experts by the Free Trade Commission should be mandatory, rather than merely discretionary.[50]

Also, critics in the United States attacked the perceived inability of the public to contribute to, or even to receive adequate notice of, the dispute resolution process under NAFTA Chapter 20 procedures.[51] Under Chapter 20, Free Trade Commission panel communications, deliberations, and hearings are confidential.[52] Furthermore, in issuing opinions, Free Trade Commission arbitral panelists are prohibited from disclosing which panelists were associated with the majority or dissenting opinions.[53] Complaints are filed by national governments and decided in proceedings where the public has no voice or access to relevant information.[54]

The idea that those who are most affected by the resolution of a dispute should have a say in the settlement procedure is not new. Over twenty years ago, Philip C. Jessup, former Judge of the International Court of Justice, remarked on the importance of public involvement, notification, and participation in dispute resolution.[55] He stated that "[i]t would be folly to provide for the settlement of disputes" in the international arena without allowing for the participation of "those entities which will be as much concerned with enforcement of the new standards as will governments of states."[56] However, the NAFTA Parties, in designing the Chapter 20 dispute resolution procedures, provided for neither public disclosure of panel preliminary deliberations and decisions, nor public participation in the dispute resolution process.[57]

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50. *Id.*

51. *See* Wallach, *supra* note 44, at 43 ("NAFTA dispute panel provisions completely fail to provide citizens from the NAFTA countries with the means to obtain information from, and participate in, resolution of trade disputes concerning environmental, conservation, health, and safety matters.").

52. NAFTA, *supra* note 2, at 696 (citing art. 2012(1)(b)).

53. *Id.* at 697 (citing art. 2017(2)).

54. *See* Robert Housman et al., *Enforcement of Environmental Laws Under a Supplemental Agreement to the North American Free Trade Agreement*, 5 GEO. INT'L ENVTL. L. REV. 593, 614 (1993).

55. *See* Philip C. Jessup, *Do New Problems Need New Courts?*, 65 AM. SOC'Y INT'L L. PROC. 261, 265 (1971).

56. *Id.* at 265.

57. NAFTA, *supra* note 2, at 697 (citing art. 2017(3)). After all relevant information is given in confidence to the Commission only the final report of the panel is published. *See id.* at 697 (citing art. 2017(4)).

III. SIDE AGREEMENT FORMULATION

A. Side Agreement as a Means to Address Concerns with NAFTA

The Environmental Side Agreement and the CEC were formulated largely in response to concerns over interpretative issues regarding the NAFTA text and the perceived limitations of the NAFTA dispute resolution process in dealing with environmental matters under Chapter 20. Addressing these concerns directly in the text of the treaty was considered politically impracticable.[58] Acceptance of NAFTA by the U.S. Congress and by the vocal environmental critics depended, to a large extent, on the negotiators' ability to provide assurances that Mexican environmental laws would be properly enforced.[59] As a result, the Parties relied on the Environmental Side Agreement to win the support necessary for NAFTA's ratification.[60]

Reaffirming the belief that stronger economic interdependence must be linked with an increased commitment to environmental protection, U.S. environmental NGOs drafted proposals for such an environmental side agreement.[61] Many of these proposals sought to create an environmental commission to oversee the environmental aspects of the treaty and to impose sanctions if a Party consistently failed to enforce appropriate environmental standards.[62] However, these proposals were opposed by government officials and important commercial interests in Canada[63] and Mexico.[64] The Mexican government conceded that to achieve NAFTA ratification, it was

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58. *See Supplemental Agreements to the North American Free Trade Agreement: Hearing Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 103d Cong., 1st Sess. 6 (1993) (comments of Chairman Gibbons).

59. *See Review of the President's Supplemental Agreements to the North American Free Trade Agreement and an Update on the Uruguay Round of the General Agreement on Tariffs and Trade Negotiations: Hearing Before the House Comm. on Agriculture*, 103d Cong., 1st Sess. 22 (1993) (questions from Congressman Charles Canady to Ambassador Mickey Kantor); *see also* Keith Schneider, *Senate Panel Democrats Attack Free Trade Pact*, N.Y. TIMES, Sept. 17, 1992, at D2.

60. *See generally* Schneider, *supra* note 59, at D2.

61. Defenders of Wildlife et al., *supra* note 24 (calling for legally-binding agreement for all NAFTA Parties which is of the same stature of NAFTA).

62. *See* Max Baucus, *Freer Trade, A Greener Continent*, WASH. POST, Mar. 18, 1993, at A27. Baucus is a Democratic Senator from Montana.

63. *See Canada Business Lobby Refuses to Support Trade Sanctions, Fines in NAFTA Side Pacts*, Int'l Trade Rep. (BNA) No. 24, at 986 (June 16, 1993).

64. *See Mexican Official Says NAFTA Side Pacts Could be Completed in Several Weeks*, Int'l Trade Rep. (BNA) No. 24, at 976 (June 16, 1993).

prepared to discuss labor and environmental side agreements. However, Mexico was not willing to renegotiate the terms of the NAFTA text or to empower a supranational commission which might compromise national sovereignty.[65] Other U.S. environmentalists and free-trade advocates also opposed an environmental commission armed with sanctions that would have the authority to reimpose tariffs based on environmental differences.[66]

B. National Draft Proposals

At an early stage in the negotiations on the side agreement for the environment, the Parties proposed a North American Commission on the Environment (NACE) to serve as the principal institution for addressing environmental concerns not covered by NAFTA.[67] In the final Environmental Side Agreement text, NACE ultimately evolved into the CEC.[68] During this evolution, the most contentious issues in the negotiation process included the overall structure of the Commission, the limits of its authority, and its enforcement capabilities concerning Party disputes.[69]

The U.S. negotiating text for the supplemental agreement proposed two paths to promote effective enforcement of each Party's environmental laws. First, Article 6 sought to provide for national enforcement by requiring that each Party ensure that its citizens had "appropriate access to administrative or judicial procedures for the enforcement of the Party's environmental laws."[70] Second, Article

65. *See* Diane Lindquist, *No NAFTA Tinkering, Top Negotiator Warns*, SAN DIEGO UNION-TRIB., Sept. 27, 1992, at I-1.

66. Domestic critics of plans for a strong environmental commission urged that the United States was by no means immune from charges that its own environmental enforcement was ineffective. *See* Stephen L. Kass, *Recent Developments in International Environmental Law*, *in* ENVIRONMENTAL LAW UPDATE 1993, at 821, 866 (P.L.I. Litig. & Admin. Practice Course Handbook No. 474, 1993). For example, the ambient air quality goals (NAAQS) of the Clean Air Act remain largely unfulfilled after more than twenty years in force, and a provision of the Clean Water Act, 33 U.S.C. § 1251(a)(i), still calls for the end to effluent discharges in navigable waters by 1985. *Id.*

67. Tom Meersman, *A Green Thumbs Up? U.S., Canadian Environmentalists Divided on Whether to Support NAFTA*, STAR TRIB., May 31, 1993, at 1D.

68. Holly Hammonds, *NAFTA is Good for the Environment*, S.F. CHRON., July 13, 1993, at A21.

69. Scott Otteman, *U.S.-Backed Sanctions, Strong Commission Absent from Canadian NAFTA Texts*, INSIDE U.S. TRADE, May 24, 1993, at S-1.

70. *U.S. Draft Legal Text for NAFTA Environment Pact*, INSIDE U.S. TRADE, May 21, 1993 at S-10, S-11 [hereinafter *U.S. Proposal*]; *see also* Scott Otteman, *U.S., Mexican NAFTA Green Drafts at Odds on Sanctions, Panel Independence*, INSIDE U.S. TRADE, May 21, 1993, at S-1, S-10.

16 provided for the calling of a special session of the environmental commission council whenever it was suspected that a Party was following a "persistent and unjustifiable pattern of non-enforcement" regarding its domestic environmental laws.[71] Also in Article 16, and seemingly in response to the vocal criticisms of the NAFTA Article 20 process, the United States sought to open the environmental dispute resolution process to the public.[72]

The U.S. negotiating team also proposed that a Party to NAFTA be permitted to impose trade sanctions for another Party's "persistent and unjustifiable" failure to enforce its environmental laws.[73] As discussed above, the Clinton Administration's position differed from the position taken by both the Bush Administration and the Canadian and Mexican negotiating teams, which had not previously considered sanctions in this context.[74] Moreover, negotiators from Canada and Mexico, as well as U.S. critics with a different vision for the environmental commission, initially concluded that the sanctions sought by the Clinton negotiating team were both overly aggressive and counterproductive.[75] The sanction issue subsequently developed into a major source of contention between the Parties.[76]

Because of the effect the debate over sanctions had on the ultimate institution charged with environmental oversight of the NAFTA environmental provisions, this issue was crucial. What is perhaps most important, is that without trade sanctions, ratification of NAFTA itself would have faced increased opposition in the U.S. Congress.[77]

While the Mexicans tried to preserve as much of the agreements made with the Bush administration as possible, they had to accommodate enough of the Clinton proposal to ensure U.S. Congressional

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71. *U.S. Proposal*, supra note 70, at S-13 (citing article 16(1)).

72. *Id.* at S-13 (citing art. 16(4)(c) which requires panel hearings to be public).

73. *Id.* at S-13 (citing art. 16(1)-(4)).

74. The Bush negotiating team, headed by former United States Trade Representative Carla Hills, had sought an environmental commission with consultative, oversight, and activity coordination roles, but which did not pursue environmental enforcement, or get involved with dispute resolution. *See* Letter from Carla Hills, United States Trade Representative, to Jay Hair, President, National Wildlife Federation (Sept. 29, 1992), *in* INSIDE U.S. TRADE, Oct. 2, 1992, at S-6, S-6.

75. *See* Otteman, *supra* note 69, at S-1.

76. Otteman, *supra* note 70, at S-1.

77. *See* Scott Otteman, *U.S. Draft Texts for NAFTA Side Pacts Include Difficult-To-Reach Sanctions*, INSIDE U.S. TRADE, May 21, 1993, at S-17.

ratification.[78] First, the Mexican government asserted that the NAFTA text should not be renegotiated.[79] Second, citing the need to respect national sovereignty, Mexico expressed disapproval of any supranational institutions that had the power to interfere with a national government's duty to enforce national law.[80]

Looking to recent events between the Parties, Mexican concern over sovereignty guarantees was justified. In *United States v. Alvarez-Machain*,[81] the U.S. Supreme Court ruled that the abduction of a Mexican national by U.S. agents for purposes of a criminal trial in the United States did not violate the Extradition Treaty between Mexico and the United States. Jurisdiction was affirmed on the grounds of domestic law. *Alvarez-Machain* remains a recent enough reminder to trigger concern over the respect the United States has for Mexico's sovereignty.[82]

It is not surprising, therefore, that the initial Mexican proposal did not provide for trade sanctions as a method of enforcement. Instead, the Mexican proposal focused on the use of "sunshine provisions" which would require that the commission's recommendations be made available to the public.[83] Like the U.S. proposal, the Mexican draft included sections on the national enforcement of environmental laws.[84] The Mexican negotiators adopted a standard similar to that of the United States, requiring an "unjustifiable, persistent and systematic failure" to properly enforce national environmental laws before a complaint could be considered.[85] The only role for public entities in the Mexican draft was through the National Advisory Councils.[86]

The Canadian draft for the regulation of the environmental aspects of NAFTA under the Side Agreement also did not envision

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78. *See, e.g., Finlay Lewis, Salinas Being Wary on NAFTA*, SAN DIEGO UNION-TRIB., Sept. 29, 1992, at E-1.

79. Housman et al., *supra* note 54, at 599-600.

80. *Id.*

81. United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992).

82. *See* Marjorie Miller, *Salinas Hopes Clinton Meeting will Calm Trade-Pact Fears*, L.A. TIMES, Jan. 8, 1993, at A5.

83. *Mexican Draft Text for NAFTA Environmental Pact*, INSIDE U.S. TRADE, May 21, 1993, at S-14, S-14 [hereinafter *Mexican Proposal*].

84. *Id.* at S-16 (citing art. 8(2)-(3) which ensures that each party will grant recourse to persons with legal standing to pursue enforcement of environmental laws in an expeditious and fair setting).

85. *Id.* at S-16 (citing art. 9(1)).

86. *Id.* at S-15 (citing art. 6).

the use of trade sanctions to ensure national enforcement of law.[87] Rather, an "Enquiry Committee" would be called upon if consultations between disputing Parties failed to bring resolution.[88] However, the trigger for the establishment of such an Enquiry Committee would not be as stringent as that required by the Mexican or American proposals, but would require a mere "consistent pattern of violation of the obligations" by a Party under the Agreement.[89] To find such a pattern, the Enquiry Committee, through investigation and publicly reported recommendations, would need to find "a pattern of reliably documented violations" by the offending Party.[90]

National enforcement was also ensured under the Canadian draft which required access to equitable administrative, quasi-judicial or judicial procedures.[91] These equitable procedures included the following rights: to request that an investigation be initiated, to bring suit for damages, to pursue injunctions, to initiate private prosecutions, and to seek review of tribunal action.[92]

The Canadian draft also made proposals with regard to transboundary pollution[93] and the application of the Side Agreement to subfederal units.[94] To combat transboundary pollution, the Parties were required, within five years of the Agreement's execution, to provide to victims of transboundary pollution "the same rights and remedies" as were provided to their own citizens.[95] The Canadian's intense concern with the transboundary acid rain problem[96] helps explain Canadian interest in the inclusion of such a provision. The fact that the vast majority of Canadian environmental law is handled at the provincial level by governments often wary of national powers similarly provides insight into the Canadian proposal allowing subfederal units to opt-out of the agreement.[97]

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87. *See Canadian Draft Text for NAFTA Environmental Pact*, INSIDE U.S. TRADE, May 24, 1993, at S-2, S-6 [hereinafter *Canadian Proposal*].

88. *Id.* (citing art. 19(1)).

89. *Id.* "Consistent pattern of violations" is defined in the Canadian proposal as "a pattern of reliably documented violations of a Party's obligations under this Agreement." *Id.*

90. *Id.* (citing art. 19(3)).

91. *Id.* at S-5 (citing art. 13(1)).

92. *Id.* (citing art. 13(2)(a)-(e)).

93. *Id.* (citing art. 14).

94. *Id.* at S-6 (citing art. 22).

95. *Id.* at S-5 (citing art. 14(3)).

96. *See* William A. Davis, *Tourism and the Environment: The Fight Against Acid Rain*, BOSTON GLOBE, May 21, 1989, at B1.

97. *The Consensus Report on the Constitution*, MONTREAL GAZETTE, Oct. 3, 1992, at A10 [hereinafter *Consensus Report*] (describing the Canadian Provinces' exclusive jurisdiction over

Both U.S. environmental groups and business interests criticized the U.S. proposal, although for entirely different reasons.[98] Environmentalists applauded the fact that sanctions were available,[99] but argued that both the standard by which enforcement was to be judged and the procedures to be followed in the dispute resolution process were flawed.[100] These environmentalists claimed that penalizing a Party for non-enforcement of domestic laws would act as a disincentive to the promulgation of new and more aggressive environmental laws.[101] Furthermore, the high hurdle of "persistent and unjustifiable pattern of non-enforcement," coupled with the two Party majority needed to convene a dispute resolution panel, could ensure that the threat of sanctions would remain a hollow one.[102]

Not surprisingly, the business coalitions also opposed the use of trade sanctions to achieve national enforcement.[103] These critics argued that the environment would be best protected by an environmental commission that acted solely as a forum for discussion and cooperation, without playing a part in Party enforcement.[104] The business coalitions objected to granting investigatory powers to the commission.[105] They also objected to the commission having unfettered reporting powers.[106] In the absence of effective safeguards, they argued, the commission could use its powers to harass individual companies,[107] to engage in costly "fishing expedi-

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cultural matters, which include many environmental issues).

98. *See* Sierra Club et al., Analysis of the U.S. Proposal for an Environmental Side Agreement to the North American Free Trade Agreement: Omissions and Ambiguities (June 8, 1993) (endorsed by 28 environmental groups) (on file with the *Duke Journal of Comparative and International Law*); Letter from the Business Roundtable et al., to Mickey Kantor, United States Trade Representative (June 4, 1993) [hereinafter Business Critique] (endorsed by eight business organizations) (on file with the *Duke Journal of Comparative and International Law*).

99. *See, e.g.*, Meersman, *supra* note 67, at 1D.

100. *See* Sierra Club et al., *supra* note 98, at 3.

101. *See id.* at 4.

102. *See id.*; *see also* Stewart Hudson, *NAFTA's Environmental Struggle*, J. COMM., June 17, 1993, at 10A (noting that the road to sanctions under the U.S. draft proposal was "tortuous," and that the probability of trade sanctions becoming a realistic enforcement option was "almost nil").

103. Business Critique, *supra* note 98, at 6.

104. *Id.*

105. *Id.* at 1-2.

106. *Id.* at 2.

107. *Id.*

tions,"[108] and to publish reports inaccurately accusing companies of environmental infractions.[109]

Contrary to the suggestions of Mexico, Canada and private interest groups, the U.S. proposal for sanctions promised to make NAFTA a more reliable agreement in the long term, an agreement on which the Parties could rely, in lieu of more stringent unilateral measures. In addition, the use of sanctions as promoted in the U.S. negotiating proposal can be seen as both limited in scope and well-defined in purpose. First, the U.S. proposal required "a persistent and unjustifiable pattern of non-enforcement" before the process of dispute resolution would be triggered.[110] Second, the sanctions proposed by U.S. negotiators would only be used on rare occasions, due to the extensive procedures required before sanctions would become an option to settle a dispute. The first step following initiation of the dispute resolution process would be a study and consultation between the complaining and defending Parties.[111] Then, only after a thirty-day period of consultations and a vote of two of the three Parties, an arbitral panel would be convened.[112] If the panel were to find a "persistent and unjustifiable pattern of non-enforcement," a further round of mediation would follow.[113] Only if the Parties failed to agree on an enforcement plan during this second round of consultations would a Party be authorized to suspend an "appropriate level" of NAFTA trade benefits.[114] The loss of these trade benefits or the imposition of trade sanctions would last only until the offending Party began to adequately enforce its domestic environmental laws.[115] It is unlikely that many disputes would survive these mandatory dispute resolution procedures to reach the point at which trade sanctions would be triggered.

In fact, if NAFTA lacked an effective enforcement procedure, far more stringent unilateral trade responses might be required under U.S. law. Under section 301 of the Trade Act of 1974, the Office of the United States Trade Representative (U.S.T.R.) may be required

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108. *Id.*

109. *Id.* at 5-6.

110. *U.S. Proposal, supra* note 70, at S-13 (citing art. 16(1)); *see Canadian Proposal, supra* note 87, at S-6 (citing art. 19(1)). This standard would have been more difficult to satisfy than that proposed by the Canadian negotiating team.

111. *U.S. Proposal, supra* note 70, at S-13 (citing art. 16(2)).

112. *Id.* (citing art. 16(3)).

113. *Id.* (citing art. 16(4)(e)-(f)).

114. *Id.* (citing art. 16(4)(h)).

115. *Id.*

to respond to a violation of U.S. trade rights with retaliatory action.[116] However, if a provision for sanctions already existed within the structure of the treaty, no section 301 action would be triggered by either Mexican or Canadian non-enforcement, as the treaty provision would provide the required protection for U.S. interests.[117] Moreover, under the NACE structure as envisioned by the U.S. negotiators, the United States would not be able to impose trade sanctions until the full range of consultations and panel investigation and Party voting had been completed.[118] Thus, by including a provision for trade sanctions in the treaty, the actual potential of the United States imposing sanctions against Mexico or Canada may be lower, and certainly less objectionable, because Mexico and Canada would have a chance to participate under the procedural protections of the Environmental Side Agreement dispute resolution process.

IV. DISPUTE RESOLUTION UNDER THE SIDE AGREEMENT

A. The Structure of the Commission on Environmental Cooperation

To understand the CEC's role in the enforcement of national law, a general understanding of the structure of this new institution is necessary.[119] Under the Environmental Side Agreement, the CEC has maintained a three-institution structure consisting of a Council, a Secretariat, and a Joint Advisory Committee.[120] The Council, consisting of cabinet-level ministers from each Party government,[121] will meet at least once a year and in special sessions at the request of any Party.[122] The second institution, the Secretariat, is headed by

116. 19 U.S.C. § 2411(a)-(c) (1988).

117. *Id.* § 2411(a)(2)(A).

118. *See U.S. Proposal*, *supra* note 70, at S-13 (citing art. 16(4)(h)).

119. The United States proposed forming a Commission made up of a Council (headed by the environmental ministers of each government), a Secretariat, and a Public Advisory Committee. *Id.* Likewise, Mexico proposed a Commission comprised of an Executive Committee of cabinet-level representatives, a Secretariat, and National Advisory Councils. *See Mexican Proposal*, *supra* note 83, at S-15 (citing arts. 4-5(1)). Similarly, Canada proposed a Commission consisting of a Secretariat, Government Advisory Bodies, and a Public Advisory Committee. *See Canadian Proposal*, *supra* note 87, at S-2, S-4 (citing arts. 2, 3, 5, 6).

120. Environmental Side Agreement, *supra* note 1, at 1485 (citing art. 8).

121. *Id.* (citing art. 9).

122. *Id.*

an Executive Director who is to be chosen by the Council for a three-year term.[123] The Executive Director will appoint his own staff, subject to a veto by a two-thirds vote of the Council.[124] The final branch of the CEC is the Joint Public Advisory Committee, which will be made up of five members provided by each Party, for a total of fifteen members.[125] One function of this Committee is to provide advice to the Council on any relevant matter within the scope of the Agreement.[126]

The structure of the CEC is designed to help the institution discharge its significant responsibilities overseeing the environmental aspects of NAFTA. However, although the CEC is assigned duties ranging from the preparation of reports on the status of the environment within each Party's domain,[127] to a substantive role in encouraging the Parties to properly enforce and comply with their domestic environmental laws,[128] its own authority is limited.[129]

B. The Process of Dispute Resolution Under the CEC

The dispute resolution process of the Environmental Side Agreement is designed to address situations where a "persistent pattern of failure by a Party to effectively enforce its environmental law" is invoked by another Party.[130] "Environmental law" is broadly defined to include "any statute or regulation of a Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health . . . ."[131]

The first step for a Party who perceives that another Party is failing to enforce its domestic environmental law is to file a written

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123. *Id.* at 1487 (citing art. 11(1)).
124. *Id.* (citing art. 11(2)-(3)).
125. *Id.* at 1489 (citing art. 16(1)).
126. *Id.* (citing art. 16(4)).
127. *Id.* at 1487 (citing art. 12(3)).
128. *Id.* at 1486 (citing art. 10(4)).
129. For example, the CEC can only respond to requests for inquiry for complaints which are filed to further the enforcement of laws. It may not initiate the dispute resolution process or issue trade sanctions on its own. *See id.* at 1488 (citing art. 14).
130. *Id.* at 1490 (citing art. 22(1)). A "persistent pattern" is described as "a sustained or recurring course of action or inaction beginning after the date of entry into force of this Agreement." *Id.* at 1494-95 (citing art. 45(1)(b)).
131. *Id.* at 1495 (citing art. 45(2)(a)). This definition is only minimally constrained by the caveat that an "environmental law" does not include any law "the primary purpose of which is managing the commercial harvest or exploitation, or subsistence or aboriginal harvesting, of natural resources." *Id.* at 1495 (citing art. 45(2)(b)).

request with the CEC for consultations with that Party.[132] A third NAFTA Party that considers itself to have a substantial interest in the dispute may also participate in these consultations upon request to the Secretariat.[133] This initial consultative phase is designed to promote a voluntary settlement between the Parties, and may last for up to sixty days.[134]

If the Parties cannot resolve the issue within this sixty-day period, then each Party has the option of requesting that a special session of the Council be convened.[135] The Council, charged with the goal of "resolv[ing] the dispute promptly," will meet within twenty days of this Party's written request.[136] If the Council decides that it would be more proper for a GATT dispute panel or the NAFTA Free Trade Commission to address the issue, it may choose to refer the matter back to the Parties for consideration under those agreements.[137]

If, however, the Council takes jurisdiction over the dispute and the Parties do not reach agreement on the matter within sixty days from the convening of the special session, then the complaining Party may ask that an arbitral panel be convened.[138] The powers of such an arbitral panel to investigate Party non-enforcement extend only to situations involving goods or services which are traded between the Parties or which compete, in the territory of the offending Party, with like goods or services from another Party.[139] This language appears to be designed to limit the arbitral panel's review to trade-related issues, and effectively filters out complaints which do not affect trade.

Seemingly in response to the sharp criticism of the NAFTA Free Trade Commission's lack of mandatory technical expertise on its dispute resolution panels,[140] the CEC Council will select panelists from a list which includes environmental experts.[141] If necessary, additional environmental expertise is available from special working

132. *Id.* at 1490 (citing art. 22(1)). Consultations are also the first step in the resolution of interpretative differences under NAFTA. *Id.* at 1489 (citing art. 20(1)).
133. *Id.* at 1490 (citing art. 22(3)).
134. *Id.* (citing art. 23(1)).
135. *Id.*
136. *Id.* (citing art. 23(3)).
137. *Id.* (citing art. 23(5)).
138. *Id.* (citing art. 24(1)).
139. *Id.* (citing art. 24(1)(a)-(b)).
140. *See supra* notes 44-50 and accompanying text.
141. Environmental Side Agreement, *supra* note 1, at 1491 (citing art. 25(2)).

groups,[142] or from NGOs or independent experts.[143] Technical advice or information may also be sought from the bureaucratic agencies of the Parties' own governments.[144]

In deciding whether a Party has persistently failed to enforce its domestic environmental laws, the arbitral panel will be guided by the Model Rules of Procedure established by the Council.[145] These rules will allow for a minimum of one hearing before the panel,[146] and the opportunity to submit initial and rebuttal positions in writing.[147] However, as with the NAFTA Free Trade Commission procedure under Article 20, NGOs will have no participation rights in the panel process for the CEC.[148]

The arbitral panel has 180 days after the last panelist is selected to determine if a persistent pattern of non-enforcement exists.[149] If the panel finds such a pattern of non-enforcement, it must issue recommendations for the ultimate resolution of the dispute.[150] After giving the Parties sixty days to respond to these recommendations, the arbitral panel issues a final report.[151] Apparently in response to transparency concerns, the drafters of the Side Agreement required that this important final report be made available to the public within five days of its submission to the Council.[152]

If the arbitral panel finds that a Party persistently failed to enforce a domestic environmental law, then that party has sixty days to formulate a remedy which is acceptable to the complaining Party and in conformity with the requirements of the panel report.[153] If, however, the Parties involved in the dispute do not reach an agreement on the remedy within this time frame, any Party may request that the arbitral panel be reconvened.[154] The reconvened

142. *Id.* at 1490 (citing art. 23(4) which permits consultation with "technical advisers" or "expert groups" by the Council as needed).

143. *Id.* at 1485 (citing art. 9(5)(b)).

144. *See id.* at 1492 (citing art. 30 which empowers the panel to consult with any "person or body" that it determines would be helpful).

145. *Id.* at 1491 (citing art. 28(1)-(2)).

146. *Id.* (citing art. 28(1)(a)).

147. *Id.* (citing art. 28(1)(b)).

148. *Id.* at 1492 (citing art. 29 which provides for participation by a third NAFTA Party government but not by non-governmental groups).

149. *Id.* (citing art. 31(2)(b)).

150. *Id.* (citing art. 31(2)(c)).

151. *Id.* (citing art. 32(1)).

152. *Id.* (citing art. 32(3)).

153. *Id.* at 1492-93 (citing arts. 33, 34).

154. *Id.* at 1492 (citing art. 34(1)(b)(iii)).

panel will then have the power to assess a "monetary enforcement," or fine, against the offending Party.[155]

Once the decision to impose a monetary enforcement assessment is made, the arbitral panel will consider several factors in setting the amount of the fine.[156] First, the panel will consider the duration and the pervasiveness of the Party's pattern of non-enforcement.[157] Second, the panel will consider the resource constraints on the Party, and whether the level of enforcement required by the environmental law could be reasonably expected given the Party's financial state.[158] Third, the panel will note the reasons provided by the Party for its non-enforcement.[159] Finally, the panel will acknowledge the efforts made by the Party to remedy its pattern of non-enforcement since the time when the final report was handed down.[160] The amount of the fine that an arbitral panel can assess may not exceed twenty million dollars (U.S.) for claims arising in 1994, or after 1994, .007% of the total trade between the Parties during the most recent year.[161]

While the Agreement labels this monetary enforcement assessment "final,"[162] the offending Party, 180 days after being fined, may request that the panel be reconvened in order to reconsider the dispute.[163] All monetary enforcement assessments are to be deposited into a fund established by the CEC for use by the Council to improve "the environment or environmental law enforcement in the Party complained against."[164] In determining how the money from the assessment fund should be used, the CEC will not be able to force a program upon an unwilling offending Party.[165]

If the United States or Mexico is the offending Party and refuses to pay the assessment, NAFTA empowers the complaining Party to suspend trade benefits after 180 days for an amount no greater than the assessment.[166] Upon suspension of benefits, the complaining Party may raise tariff rates against the defending Party. However, the

155. *Id.* at 1493 (citing art. 34(5)(b)).
156. *See id.* at 1496 (citing Annex 34(2)).
157. *Id.* (citing Annex 34(2)(a)).
158. *Id.* (citing Annex 34(2)(b)).
159. *Id.* (citing Annex 34(2)(c)).
160. *Id.* (citing Annex 34(2)(d)).
161. *Id.* (citing Annex 34(1)).
162. *Id.* at 1493 (citing art. 34(6)).
163. *Id.* (citing art. 35).
164. *Id.* at 1496 (citing Annex 34(3)).
165. *See id.* at 1485 (citing art. 9(6)).
166. *Id.* at 1493 (citing art. 36(1)).

rates are capped by the lesser of the pre-NAFTA rate or the Most-Favored-Nation rate for the goods in question.[167] Initially, the complaining Party should seek to impose sanctions on the industry or economic sector that benefitted from the non-enforcement of the offending Party's environmental law.[168] If such a sanction would not be "practicable or effective," the complaining Party may suspend trade benefits for other industries or economic sectors.[169] Thus, the Parties themselves, not the CEC, retain the ultimate discretion in deciding whether and where to impose trade sanctions. Despite this Party control of trade sanctions, limitations exist on the sanctions' maximum amounts, their focus, and their duration.

Under the Side Agreement, trade sanctions may continue to be applied to offending Party imports until the CEC has collected the fine assessed by the arbitral panel.[170] If two complaining Parties impose sanctions on either the United States or Mexico, the amounts collected will be added until the assessed penalty has been reached.[171] The offending Party may request that the arbitral panel reconvene to determine whether the Party has fully implemented the action plan or has paid its monetary enforcement penalty.[172] If the arbitral panel rules that the Party has fully implemented its plan or has paid its fine, the sanctions will be removed.[173] In addition, if the offending Party feels that the sanctions imposed by the complaining Party are "excessive," it may ask the arbitral panel to reconvene and review the measures taken.[174] The arbitral panel will rule on the appropriateness of the Party sanctions within forty-five days of such a request.[175]

A fine against Canada is handled using a separate procedure from that described above.[176] To enforce an assessment against Canada, the complaining Party must turn to the Canadian courts for collection under the compromise achieved in the Side Agreement.[177] Upon request from the complaining Party, the CEC may initiate this

167. *Id.* at 1497 (citing Annex 36B(1)).
168. *Id.* (citing Annex 36B(2)(a)).
169. *Id.* (citing Annex 36B(2)(b)).
170. *Id.* at 1493, 1497 (citing art. 36(1), Annex 36B(1)).
171. *Id.* at 1493 (citing art. 36(3)).
172. *Id.* (citing art. 36(4)).
173. *Id.*
174. *Id.* at 1494 (citing art. 36(5)).
175. *Id.*
176. *See id.* at 1496-97 (citing Annex 36A).
177. *See id.*

process by filing a certified copy of the arbitral panel's report, including the monetary assessment, in a Canadian court of competent jurisdiction.[178] In subsequent proceedings to enforce the panel determinations, the court will refer any questions of fact or interpretation back to the panel.[179] Such panel decisions shall not be subject to appeal or domestic review by the Canadian courts.[180] Ultimate enforcement determinations by a Canadian court are similarly unreviewable by the CEC or the complaining Party.[181]

A second important compromise inserted into the supplemental text which protects Canadian interests is the "opt-out" provision for the Canadian provinces.[182] In Canada, the provinces rather than the federal government oversee most environmental protection and enforcement.[183] Under the terms of the Agreement, Canada must declare which of its provinces will be bound by the Environmental Side Agreement.[184] If any of the provinces decide to opt-out of the Agreement, Canada will be precluded from initiating dispute resolution procedures in the CEC on behalf of those provinces.[185] To ensure that such provinces do not unfairly reap the benefits of the Agreement, Canada must show that all complaints are made either for matters under Canadian federal jurisdiction or provincial jurisdiction that accounts for at least fifty-five percent of Canada's Gross Domestic Product.[186] If a complaint targets a specific industry, then at least fifty-five percent of total Canadian production in that industry must occur in provinces that are subject to the Agreement.[187]

C. The Relation between the Dispute Resolution Processes under the Environmental Side Agreement and Chapter 20 of NAFTA

Since the brief discussion in Section II of the Chapter 20 dispute resolution procedures of the Free Trade Commission, this Note has focused on the Environmental Side Agreement's dispute resolution mechanism. It is useful to analyze how these two processes will interact. The sections of NAFTA that are most likely to involve

178. *Id.* at 1497 (citing Annex 36A(2)(a)).
179. *Id.* (citing Annex 36A(2)(f)).
180. *Id.* (citing Annex 36A(2)(g)).
181. *Id.* (citing Annex 36A(2)(h)).
182. *Id.* at 1494, 1497-98 (citing art. 41, Annex 41).
183. *See Consensus Report, supra* note 97, at A10.
184. Environmental Side Agreement, *supra* note 1, at 1497 (citing Annex 41(1)).
185. *Id.* at 1497-98 (citing Annex 41(3), (4)).
186. *Id.* at 1498 (citing Annex 41(4)(b)).
187. *Id.* (citing Annex 41(4)(c)).

environmental matters are Chapters 7B and 9, concerning sanitary and phytosanitary measures and standards-related measures, respectively.[188] These sections could have an impact on a wide range of issues, ranging from safety standards for children's sleepwear to the kinds of pesticides allowed in vegetable cultivation. If any regulation concerning such standards is challenged as a trade barrier, the dispute will go to the Free Trade Commission governed by the NAFTA Chapter 20 dispute resolution procedures.[189] Whenever an environmental issue arises in such proceedings, the CEC may be called upon to provide technical expertise.[190] However, the process under the Side Agreement will not be triggered. The dispute resolution mechanism of the Side Agreement is reserved only for those occasions when a Party has alleged a persistent pattern of non-enforcement of an existing, democratically approved, environmental law.[191] While the scope of "environmental law" will need to be refined in practice, the Side Agreement process has a much narrower focus and is supplementary to the broader roles of the Free Trade Commission in Party dispute settlement.

V. CRITICISMS OF THE DISPUTE RESOLUTION MECHANISMS OF THE CEC

A. Use of Sanctions

One of the most hotly debated and perhaps most significant issues discussed by the Parties and commentators in the proposed Environmental Side Agreement was whether the dispute resolution mechanism would utilize trade sanctions.[192] Resolution of the sanctions issue would ultimately define the role of the CEC itself. If limited to a support role, the CEC would not need the extensive powers detailed in the U.S. draft proposal.[193] If, however, the CEC were to play a central role in the arbitration of disputes with the potential for trade sanctions, the status and autonomy of the

188. *See* NAFTA, *supra* note 2, at 377-83, 386-93 (citing chs. 7B, 9).

189. *See id.* at 693-99 (citing ch. 20).

190. Environmental Side Agreement, *supra* note 1, at 1486 (citing art. 10(6)(c)(iii)).

191. *Id.* at 1490 (citing art. 22(1)).

192. *See* Baucus, *supra* note 62, at A27 (stressing the importance of trade sanctions to achieve Party enforcement of environmental law).

193. *See supra* notes 70-76, 98-115 and accompanying text.

institution would have to be more prominent than foreseen by the Canadian and Mexican proposals.[194]

Although this Note has focused on the CEC's role in the resolution of Party disputes and on the use of sanctions to achieve Party enforcement of environmental law, the CEC will perform many additional functions as well. In fact, the ultimate power of the institution will depend in large measure on the practices that are established for handling environmental issues as they arise, and the support of the Parties in addressing these issues within the CEC structure. Under the Environmental Side Agreement, the CEC is given broad responsibility for protecting the North American environment. Among its other duties, the CEC must analyze environmental matters, oversee Party environmental efforts, promote public awareness of the environment, and facilitate cooperation between the Parties on environmental matters.[195] The CEC's ultimate effectiveness will hinge on its ability both to project an image of competent authority and to convince the Parties to accept its recommendations.

While trade sanctions will play only a limited role in the enforcement of environmental law in North America, certain commentators see any use of trade sanctions to pursue environmental goals as potentially problematic.[196] First, in making determinations on Party enforcement, the CEC, as an outside body, would be second-guessing local decision-makers, raising accountability concerns and risking downward harmonization.[197] Second, remedial measures determined by a supranational institution will likely ignore the local political and cultural concerns that are inevitably tied to environmental decisions.[198] Third, a dispute resolution process that utilizes trade sanctions as an enforcement measure may overemphasize sticks rather than carrots.[199] In a country with limited resources with which to remedy environmental problems, carrots are more suitable in achieving a sustainable infrastructure.[200] Finally, the unequal effects of trade sanctions upon the NAFTA trading partners will

194. *See supra* notes 78-97 and accompanying text.

195. Environmental Side Agreement, *supra* note 1, at 1485-87 (citing art. 10(1)-(2)).

196. *See, e.g.*, Richard A. Johnson, *Commentary: Trade Sanctions and Environmental Objectives in the NAFTA*, 5 GEO. INT'L ENVTL. L. REV. 577 (1993).

197. *Id.* at 586.

198. *See id.*

199. *Id.* at 587.

200. *Id.* (describing potential carrots as the providing of technical assistance and regional coordination of environmental matters).

provide unequal incentives to enforce environmental laws.[201] Canada and Mexico rely much more heavily on trade with the United States than vice versa. Thus, trade sanctions against these countries could have a more potent discouraging effect since a larger part of their economy would be affected.[202]

Instead of using the threat of sanctions to spur environmental enforcement, the Parties might alternatively attempt to advance environmental protection by relying on "soft law" options.[203] Sometimes called "sunshine provisions," these options have the desired effect of increasing consumer awareness, providing for innovative technical assistance, and possibly producing faster and longer lasting environmental protection than "hard law" approaches.[204] In addition, these soft law approaches serve to counter the market forces inherent in trade-related sanctions by including the public in the process and allowing an impartial Commission to resolve the disputes.[205] The net result is a more democratic and less legalistic system of environmental enforcement.

B. Public Access

Other criticisms of the CEC's dispute resolution process focus on the limited public access to the process.[206] In making the choice to restrict non-Party access, the negotiators of the Side Agreement recognized the possible abuse of access by those seeking to harass or to pursue protectionist aims on behalf of private interests. However, while the goal of excluding those with improper motives from the dispute resolution process of the CEC is certainly a credible one, the cost of such protection may exceed its worth.[207]

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201. *Id.* at 588 (explaining that trade with the United States accounts for 15% of Mexico's GNP and 20% of Canada's, while Canadian trade equals only 2% of the U.S. GNP and Mexican trade only 0.5%).

202. *Id.*

203. *Id.*

204. *Id.* at 589-90.

205. *Id.* at 590.

206. *See, e.g.*, Robert Housman et al., *supra* note 54, at 614.

207. *Id.* An alternate vision, proposed by the Center for International Environmental Law and Defenders of Wildlife, was designed to create a NAFTA environmental institution that would block protectionist harassment while maintaining a democratic character in the dispute settlement process. Under this proposal, any citizen or NGO could issue a complaint of Party non-enforcement to the environmental commission, but that body could screen and select cases for the formal review process. While recognizing that for practical purposes, complaints by the Party governments should get a certain degree of preference, a screening process like the granting of certiorari by the United States Supreme Court could provide a useful model.

The CEC's dispute resolution structure sets out a difficult path for the private citizen or NGO to advance a claim of Party non-enforcement of environmental law.[208] A complaining group, other than a Party government, is allowed to initiate a claim with the Secretariat.[209] However, the best result that this group can hope for is that the Secretariat will compile and submit a factual record to the Council.[210] In addition, this record can only be made public by a vote of two-thirds of the Council.[211] Without this vote, not even the complaining Party will have access to the record. Some of the additional obstacles that a private complaining party will have to overcome to get a record submitted to the Council include the following: (i) persuading the Secretariat that the complaint deserves to be investigated;[212] (ii) ensuring that the claim is not pending review before any Party's domestic judicial or administrative forum;[213] and (iii) convincing at least two-thirds of the Council to direct the Secretariat to compile a factual record on the complaint.[214]

One potential method for providing increased public access to the NAFTA environmental dispute resolution process is to allow any interested private party to submit written briefs to the arbitral panel outlining a case for or against Party enforcement.[215] Oral arguments before the panel by the complaining Party and complained-against Party could be supplemented by amici curiae where the Parties and the panel agree that such arguments should be heard.[216] By utilizing this method, private parties could ensure that the dispute resolution process does not overlook their valid interests in the environment.

Protectionist motives would be further thwarted by the focus on governmental enforcement efforts, not on action against private citizens or commercial entities. Since only a NAFTA Party can be required to respond to a charge of non-enforcement, there is a reduced chance that one with a special interest would be able to subvert the process and harass a competitor. *Id.* at 615.

208. *See* Environmental Side Agreement, *supra* note 1, at 1488 (citing art. 14(1)).

209. *Id.*

210. *Id.* at 1488 (citing art. 15(1)).

211. *Id.* at 1489 (citing art. 15(7)).

212. *See id.* at 1488 (citing art. 15(1)).

213. *Id.* at 1488 (citing art. 14(3)(a)).

214. *Id.* at 1488 (citing art. 15(2)).

215. Housman et al., *supra* note 54, at 617.

216. *Id.*; *cf.* SUP. CT. R. 37 (allowing groups interested in litigation appearing before the Supreme Court to submit written briefs and make oral arguments).

C. Sovereignty

Other criticisms of the Side Agreement, more easily overstated, warn that trade sanctions may lead to the loss of national sovereignty in the enforcement of environmental law.[217] Several points suggest, however, that the existing CEC will not seriously threaten national sovereignty. The CEC evaluates Parties only with respect to their own laws and has no power to set independent standards for environmental protection.[218] Further, the imposition of trade sanctions against a Party would not require any change in that country's practices. Rather, any Party found to be denying trade benefits to its NAFTA partners through its ineffective enforcement of environmental law could simply be held accountable for the subsequent losses.[219]

Moreover, the Parties have included explicit exceptions within the Environmental Side Agreement to ensure that Party sovereignty will not be threatened by the CEC. For example, a Party will not be held to have failed to enforce its environmental laws if any action or inaction "reflects a reasonable exercise of [its] discretion."[220] Nor will a Party be held liable for trade sanctions if non-enforcement "results from bona-fide decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities."[221] In actuality, these extremely broad sovereignty-protection clauses could potentially swallow environmental enforcement if not contained by the CEC.

Another fear related to the sovereignty debate, and also easily overstated, is that sanctions for environmental non-enforcement will hamper Party prosecutorial discretion. Some critics have expressed concern that the autonomy of government authorities to decide what laws to enforce and how to enforce them may be infringed upon if a supranational body oversees national enforcement.[222] Often in the

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217. Finlay Lewis, *Side Accords Bring NAFTA Few Converts Gebhardt Joins Opposition After Deals Announced*, SAN DIEGO UNION-TRIB., Aug. 14, 1993, at A1.

218. *See* Environmental Side Agreement, *supra* note 1, at 1488, 1490 (citing arts. 14(1), 22(1)).

219. *See id.* at 1492-93, 1496 (citing art. 34, Annex 34) (describing the imposition of monetary enforcement assessments).

220. *Id.* at 1494 (citing art. 45(1)(a)).

221. *Id.* at 1494 (citing art. 45(1)(b)).

222. *See* Harold Gilliam, *How Green is NAFTA? Two Environmentalists—One Pro, One Con—Take on the Treaty*, S.F. CHRON., Oct. 24, 1993, § Z-1, at 5 (describing impact of NAFTA environmental provisions on domestic environmental laws).

environmental field, the threat of enforcement can motivate industry to take voluntary steps that support environmental protection but that do not initially achieve statutory compliance. For example, a factory may be allowed to discharge air pollutants in excess of the statutory limit while it installs the latest in environmental scrubber technology to bring the facility into full statutory compliance. While concerns over national prosecutorial discretion are valid, they need not be grounds for abandoning trade sanctions altogether. Rather, guidelines are needed to enable the CEC to distinguish between productive prosecutorial discretion and protective prosecutorial abuse.[223]

Additionally, NAFTA, built on previous agreements between the Parties and reaching new areas of regulation, is full of compromises which could be seen as waivers of Party sovereignty. In the fields of intellectual property, antitrust, and trade regulation, for example, the Parties have agreed to new mechanisms for supranational enforcement of relevant provisions in order to foster efficient economic returns.[224] The oversight of environmental enforcement in the Side Agreement should not present any more of a threat to Party sovereignty than these existing regulatory measures.

Only a few of the many potential criticisms of the CEC dispute resolution process have been addressed here. This discussion by no means attempts to cover the field or exhaust the debate on this subject. Thus, rather than attempting to address all potential glitches in the process, perhaps it is better at this early stage to remember that many of the perceived defects in the CEC dispute resolution process can be cured in practice. In addition, model rules can be installed either to provide greater public access to arbitral proceedings or to allow NGOs to participate in the process.

VI. CONCLUSION

Inherent in the procedures developed for the CEC is the hope that most disputes will be settled early in the consultative stages, without the need for trade sanctions. While the probability of trade sanctions being issued may be quite low, the threat of such measures will, nonetheless, serve a valuable purpose if it brings the Parties to

223. *See* Housman et al., *supra* note 54, at 620 (proposing a set of criteria to differentiate prosecutorial discretion from prosecutorial abuse).

224. NAFTA, *supra* note 2, at 663-64, 670-81 (citing chs. 15 and 17, describing NAFTA handling of competition policy and intellectual property matters, respectively).

the dispute resolution process with a common interest in compliance.[225] Success in the consultative stage would render the rest of the resolution process, including the use of trade sanctions, unnecessary. This process represents a positive step forward in securing strong international relationships and a healthy trade agreement.

Any trading relationship is threatened when one partner takes unilateral measures that can be viewed as an attempt to extend its own risk preference beyond its territory and onto its trading partners' territory.[226] Such measures inevitably create resentment and foster an atmosphere where retaliatory action becomes politically necessary.[227] Moreover, the atmosphere created by unilateral action inhibits trade efficiency, which in turn slows economic growth, a necessary element of the greater goal of sustainable development.[228] By offering an alternative to such unilateral action, the NAFTA dispute resolution process helps to protect relationships between the Parties.

By striking a balance between the capacity of trade sanctions and respect for national sovereignty, the dispute settlement procedures of the CEC also provide the NAFTA Parties with an effective tool to encourage enforcement of domestic environmental law. With this goal, trade sanctions will be effective even if the non-enforcing Party can absorb the monetary enforcement assessment rather than alter its environmental practices. In such a scenario, the trade sanctions will serve to increase the costs of the goods or services produced by the benefits of non-enforcement.

NAFTA and the Environmental Side Agreement may well have the positive effect of locking Mexico into a "greener" agenda, while ensuring that the United States' southern neighbor does not become a "pollution haven" for American companies seeking to avoid environmental restrictions. To some extent, the Environmental Side Agreement was pursued to address public and political concerns in

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225. *See* Robert F. Housman, *A Kantian Approach to Trade and the Environment*, 49 WASH. & LEE L. REV. 1373, 1385-86 (1992) (stressing the importance of both carrots and sticks in environmental reform).

226. *See, e.g.*, Thomas L. Friedman, *Japan Warns of Retaliation for U.S. Trade Sanctions*, HOUS. CHRON., Feb. 13, 1994, at A23 (describing the hostile response by Japan to a potential unilateral attempt by the United States to raise tariffs on Japanese imports).

227. *See id.*

228. *But see* Stanley M. Spracker & David C. Lundsgaard, *Dolphins and Tuna: Received Attention on the Future of Free Trade and Protection of the Environment*, 18 COLUM. J. ENVTL. L. 385, 386 (1993) (discussing the positive effects of unilateral trade sanctions in protecting the environment).

the United States over law enforcement in Mexico.[229] While Mexico has many of the same interests as the United States and Canada in a clean environment, in the past it has lacked the resources to carry out its environmental goals. Increased trade as a result of NAFTA could provide the necessary resources needed to realize the common goal of a cleaner environment.[230]

Finally, in creating an institution that will foster environmental enforcement along with trade liberalization, NAFTA sends a signal to the greater global trading community.[231] The effects of the Environmental Side Agreement will be felt far beyond the territories of the three Parties. Almost certainly, the Agreement will serve as a reference from which the Parties can begin future bilateral or multilateral trade negotiations. It is widely thought that NAFTA will expand to cover much of the Western Hemisphere by the turn of the century.[232] The achievements of the treaty will influence both the method whereby future trade agreements address environmental concerns, and the environmental agenda within each country hoping to become a member of NAFTA. Ultimately, by ensuring that environmental laws are enforced and that costs are internalized, trade can be a mechanism to promote the greater interest of sustainable development.

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229. *See* Meersman, *supra* note 67, at 1D (stating that the Side Agreement dispelled some environmentalists' concerns over environmental law enforcement in Mexico).

230. *Commonly Asked Questions About the Trade Pact*, SAN DIEGO UNION-TRIB., July 15, 1993, at C3.

231. Robert J. Caldwell, *NAFTA's Victory The Future Triumphs Over the Past*, SAN DIEGO UNION-TRIB., Nov. 21, 1993, at G1.

232. Arthur Golden, *Views Differ on Expanding NAFTA to Latin Nations*, SAN DIEGO UNION-TRIB., Nov. 21, 1993, at I1.