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Resolving North America's Environmental Disputes

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RESOLVING NORTH AMERICA'S ENVIRONMENTAL DISPUTES

Mike Mauseth*

I. INTRODUCTION

Seventeen years ago John E. Carroll and Newell B. Mack analyzed the then-current status of environmental protection mechanisms used between Canada and the United States.¹ They criticized the ad hoc nature of North America's history of environmental dispute resolution, which they dubbed "ad hockery,"² and believed the present ambiguity hurt business, diplomatic relations, and the citizenry's environment.³ Since that publication, increasing efforts to incorporate environmental concerns into Conventions have resulted in several multilateral agreements focusing on environmental protection and dispute resolution. Part Two of this paper will introduce a few of these recent agreements and the mechanisms they have established to monitor environmental damage and to enforce the goals of the agreements. The agreements discussed include: Montreal Protocol on Substances that Deplete the Ozone Layer;⁴ Vienna Convention for the Protection of the Ozone Layer;⁵ Protocol on Substances that Deplete the Ozone Layer;⁶ Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal;⁷ Canada-United States: Agreement on Air Quality;⁸ Rio Declaration on Environment and Development;⁹ Frame-

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1. John E. Carroll & Newell B. Mack, *On Living Together in North America: Canada, the United States and International Environmental Relations*, 12 DENV. J. INT'L L. & POL'Y 35 (1982).

2. *Id.* at 38.

3. *Id.* at 39-41. The authors claim that the greatest disadvantage of the ad hoc approach is the loss of predictability where each Party to a dispute is a potential loser and thus has less incentive to raise criticism. *Id.* at 41.

4. Reprinted in 26 I.L.M. 1541 (1987). For adjustments and amendments to the Montreal Protocol, see 31 I.L.M. 874 (1993).

5. Reprinted in 26 I.L.M. 1516 (1987).

6. Reprinted in 26 I.L.M. 1541 (1987).

7. Reprinted in 28 I.L.M. 649 (1991).

8. Reprinted in 30 I.L.M. 676 (1991).

9. Reprinted in 31 I.L.M. 874 (1992).

work Convention on Climate Change;¹⁰ Convention on Biological Diversity;¹¹ and the North American Agreement on Environmental Cooperation.¹²

Part Three will discuss the general concern related to economic development (with the need to maintain "sustainable development"¹³), the possible environmental impact of NAFTA, and the Supplemental Agreement's strengths and weaknesses.

II. SELECTED ENVIRONMENTAL AGREEMENTS AND THEIR RESPECTIVE DISPUTE SETTLEMENT/ENFORCEMENT FRAMEWORKS

A. *Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol)*

The Montreal Protocol asks the Parties to "take appropriate measures to protect human health and environment against the adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer."¹⁴

The protocol requires Parties to reduce their CFC production based on levels emitted during 1986.¹⁵ The Parties, after entering the agreement into force, will report yearly levels of CFC production to the Convention's secretariat who will supervise Parties' compliance with the Convention's requirements.¹⁶ The protocol holds that Parties shall ban trade with non-members who do not comply with the protocol if such trade involves any of the controlled substances listed within the Convention.¹⁷

10. Reprinted in 31 I.L.M. 849 (1992).

11. Reprinted in 31 I.L.M. 818 (1992).

12. *Id.*

13. See United Nations Conference on the Human Environment (Stockholm Declaration), reprinted in U.N. Document A/CONF.48/14 which states at principle 7 that "economic and social development is essential for ensuring a favorable living and working environment for man and . . . necessary for the improvement of the quality of life." See also WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE 4-5 (1987) (finding that pursuing sustainable development an important aspiration, and the key aspect in doing so is "the recognition that economic and environmental goals are inextricably linked").

14. Montreal Protocol, *supra* note 4, at 1549. The agreement applies a different standard to developing countries when it states that a "special provision is required to meet the needs of developing countries for these substances." *Id.*

15. *Id.* art. 2.

16. *Id.* art. 7. Data collection of CFC production is measured and reported by domestic functionaries. *Id.* Developing countries are given preferential treatment, they are allowed to exceed such limits if done "in order to meet its basic domestic needs." *Id.* art. 5. The developing countries also benefit from a ten-year grace period in fulfilling the requirements of the agreement.

17. *Id.* art. 4. This includes products produced with, but not containing, certain con-

The goals of the Montreal Protocol are detailed, giving desirable levels of CFC production for Parties of the agreement.¹⁸ Such detail disappears when looking for enforcement power or guidance for dispute resolution under the agreement.¹⁹ The agreement refuses to implement specific enforcement powers of the Secretariat and mentions no procedure for settling disputes.²⁰

B. Vienna Convention for the Protection of the Ozone Layer

The Convention takes a broad view of adverse effects to the environment, defining it as "changes in the physical environment or biota, including changes in climate, which have significant deleterious effects on human health or on the composition, resilience and productivity of natural and managed ecosystems, or on materials useful to mankind."²¹ In preventing such damage, the Convention requires Parties to "take appropriate measures . . . to protect human health and the environment against adverse effects resulting from human activities which modify or are likely to modify the ozone layer."²²

The "appropriate measures" include requiring Parties to engage in systematic research and observation, to adopt harmonized internal legislation that limits damaging human activities, and to cooperate with the individual Party-states and international bodies in creating standards and enforcement of this Convention.²³ The Convention, though requiring coordination of activity, is ever mindful of not usurping domestic sovereignty²⁴ and the need for a scientific basis for any action.²⁵ The need for reasonable action motivates the Convention in encouraging the exchange of information.²⁶ The exchange of information also encourages the transfer of technologies to developing countries through: (a) the facilitation of developing countries acquiring alternative technologies; (b) the provision of instruction on the alternative technologies; (c) the provision of required equipment and research; and (d) the provi-

trolled substances. *Id.*

18. See Annex C of the Montreal Protocol Adjustments and Amendments, *supra* note 4.

19. Montreal Protocol, *supra* note 4, art. 8.

20. *Id.* The reason may be that the Protocol refers to its recognition of the Vienna Convention for the Protection of the Ozone Layer. *Id.* art. 1.

21. Vienna Convention for the Protection of the Ozone Layer, *supra* note 5, art. 1.2.

22. *Id.* art. 2.1.

23. *Id.* art. 2.2.

24. *Id.* art. 2.3.

25. *Id.* art. 2.4.

26. *Id.* art. 4.1 (suggesting that Parties "facilitate and encourage the exchange of scientific, technical, socio-economic, commercial and legal information" to bodies agreed upon by the Parties).

sion of appropriate training of required personnel.²⁷

The Convention provides an established framework for dispute settlement, requiring Parties to negotiate if a conflict arises about the interpretation or application of the Convention.²⁸ If the Parties cannot agree on a solution, a third Party may be requested to preside over the dispute.²⁹ If the Parties are still unable to end the conflict, three things may happen: (a) the dispute may go to arbitration; (b) the dispute may be heard and decided by the International Court of Justice; or (c) a conciliation commission may be created (with equal members appointed by the separate Parties) which will deliver the final award.³⁰ No specific enforcement powers are granted through the Convention, but the final judgments and recommendations on the disputes must be "considered in good faith" by the Parties.³¹

C. The Global Convention on the Control of Transboundary Movements of Hazardous Waste (Basel Convention)

The Convention serves to protect neighboring environments of waste producing Parties by prohibiting the exportation of hazardous wastes to non-consenting neighboring states.³² The Convention goes farther by: requiring Parties to minimize the creation of hazardous wastes within their own domestic boundaries; ensuring proper disposal facilities are located in the domestic territory; having proper management and procedure to deal with the hazardous wastes; and reporting the transboundary movement of hazardous wastes.³³

The Convention emphasizes the need for Party cooperation to better handle environmental waste.³⁴ To do this, the Convention requires Parties to: (a) harmonize technical standards and practices "for the adequate management of hazardous waste and other waste"; (b) cooperate in monitoring the effects of hazardous waste management on hu-

27. *Id.* art. 4.2. The Convention makes clear that transferring technology must be in compliance with the domestic laws of the transferring Parties. *Id.*

28. *Id.* art. 11.1.

29. *Id.* art. 11.2. The direction which the dispute will go depends on whether the Parties involved have authorized the ICJ or arbitration proceedings to rule over their case. This is done by writing a declaration to the Convention's Depository that such proceedings are allowable. *Id.* art. 11.3. The Secretary-General of the United Nations shall be the Depository of this Convention. *Id.* art. 20.1.

30. *Id.* art. 11.

31. *Id.* art. 11.5.

32. Basel Convention, *supra* note 7. The preamble recognizes the idea that "hazardous wastes and other wastes should, as far is compatible with environmentally sound and efficient management, be disposed of in the State where they were generated."

33. *Id.* art. 4. The state of export may export the waste after it has received written confirmation from the receiving state which contains a contract for the "environmentally sound management of the wastes in question." *Id.* art. 6.3.

34. *Id.* art. 10.1.

man health and the environment; (c) develop and implement low-waste technologies; and (d) transfer the technologies to developing countries.³⁵

Dispute resolution under the Basel Convention encourages Parties, in case of a dispute over the interpretation, application, or compliance with the provisions in the Convention, to settle the dispute through any peaceful means of the Parties' choice.³⁶ If this consensual resolution fails to work, the Parties may allow the dispute go before the International Court of Justice or to arbitration.³⁷ If the Parties cannot agree to either of these destinations, they are still required to seek resolution of the dispute.³⁸

The Convention sets out a detailed list of procedures for arbitration which will be in effect if both Parties agree to a forum for dispute settlement.³⁹ A tribunal, consisting of three members, will be established to settle the dispute.⁴⁰ Each Party appoints one arbitrator and the two appointees agree on a third arbitrator who is not a national of either Party.⁴¹ The decisions of the tribunal are decided by a majority of votes and the arbitrators may engage in any reasonable fact-finding that they deem necessary to make a decision.⁴² The tribunal is not given explicit sanctioning or enforcement power, but the Convention requires the Parties to consider the final decision as binding and final.⁴³

D. Canada-United States: Agreement on Air Quality

The agreement begins by proclaiming that air pollution can cause "significant harm to natural resources of vital environmental, cultural and economic importance, and to human health."⁴⁴ To combat such harm, the agreement lists both general and specific air quality objectives for both nations to meet. The general objective controls transboundary air pollution between Canada and the United States,⁴⁵ and includes the following steps: (a) establishing specific emissions limita-

35. *Id.* art. 10.2. All domestic laws must be upheld while fulfilling the requirements of this treaty. *Id.*

36. *Id.* art. 20.1.

37. *Id.* art. 20.2-3. The Parties may consent to either forum when they ratify, accept, approve, confirm, or accede to the Convention (or any time after that). *Id.*

38. Without both Parties agreeing to the ICJ or arbitration, they are left to their own peaceful devices to settle the dispute. *Id.*

39. *Id.* at Annex VI.

40. *Id.* at Annex VI, art. 3.

41. *Id.* at Annex VI, art. 3. If the two appointed arbitrators cannot agree on a third arbitrator, the Secretary-General of the United Nations, at the request of either Party, will appoint the third arbitrator. *Id.* at Annex VI, art. 4.

42. *Id.* at Annex VI, art. 6. The absence or default of a Party in the dispute will not hinder the effectiveness or validity of the tribunal's proceedings. *Id.*

43. *Id.* at Annex VI, art. 10.2.

44. Canada-United States: Agreement on Air Quality, *supra* note 8.

45. *Id.* art. 3.2.

tions or reductions of air pollutants and the adoption of programs to implement such standards;⁴⁶ (b) beginning environmental impact assessments, prior notification, and mitigation efforts;⁴⁷ (c) maintaining coordinated scientific research and technical activities, including the exchange of information;⁴⁸ and (d) creating dispute resolution and assessment institutions.⁴⁹ The agreement also formed the Air Quality Committee⁵⁰ that will be kept apprised of pertinent issues.⁵¹

If a dispute arises over the implementation or interpretation of the agreement, the Parties must negotiate at the request of either Party.⁵² If the Parties cannot resolve their dispute by negotiating they may elect the International Joint Commission⁵³ (IJC) to settle the conflict. If Parties cannot agree to the IJC presiding over the dispute, they must submit to another agreed on form of dispute resolution.⁵⁴

E. Rio Declaration on Environment and Development

Though not a Convention with binding requirements on signatories, the Rio Declaration⁵⁵ demonstrates the significance of the environment to the global community and highlights the concern of North America⁵⁶ in protecting the environment. The declaration begins by reiterating the point that nations have the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies coupled with the responsibility not to damage other nations' environments "or areas beyond the limits of national jurisdiction."⁵⁷ This

46. *Id.* art. 3.2(a). Each Party must follow its domestic laws when considering to undertake an environmental impact statement. *Id.* art. 5.1. Either Party may consult with the other when any domestic activity (either industrial or legislative) may have a significant affect to transboundary pollution. *Id.* art. 5.3. If either Party becomes aware of a air pollution problem which affects both nations, the aware Party must notify and consult with the other Party. *Id.* art. 5.6.

47. *Id.* art. 3.2(b).

48. *Id.* art. 3.2(c).

49. *Id.* art. 3.2(e).

50. *Id.* art. 8.

51. The Committee will gather joint information on monitoring emissions, technologies for controlling emissions, atmospheric processes and effects of air pollutants. *Id.* art. 7.1. The Commission will not release the provided information unless authorized to do so by the informing Party. *Id.* art. 7.2.

52. *Id.* art. 13. The negotiations must begin within ninety days from the date of request, unless otherwise agreed to by the Parties. *Id.*

53. *Id.* art. 13.2. The IJC is a mechanism of the Boundary Waters Treaty, of which both Canada and the United States are Parties.

54. *Id.*

55. United Nations Conference on Environment and Development: Rio Declaration on Environment and Development, *supra* note 9.

56. Canada, Mexico, and the United States are Parties to the Declaration.

57. *Id.* at Principle 2. This is the idea of state sovereignty combined with the principle of *sic utere tuo ut alienum non laedas* ("one should use one's own property in such a manner as not to injure that of another") as enshrined in the 1972 Stockholm Declaration,

exercise in sovereignty balances with several international principles that intertwine environmental protection with economic development.⁵⁸ The burden placed upon developing countries, though not as heavy as the developed nations, requires acknowledgment of the developing countries' responsibilities to the global environment in pursuing sustainable development.⁵⁹ As part of preventing unjustified environmental degradation, the declaration outlines several procedures, including: (a) public awareness and public access to information activities in their communities (including the opportunity for public participation in the decision-making process);⁶⁰ (b) the enactment of effective domestic environmental legislation;⁶¹ (c) promoting the internalization of environmental costs;⁶² and (d) the use of environmental impact assessments for proposed activities "that are likely to have a significant adverse impact on the environment."⁶³

F. Framework Convention on Climate Change

The Convention's objective is to stabilize the concentrations of greenhouse gases at such a level so as to not pose a threat to the climate system.⁶⁴ The level of concentration would allow natural climate adaptation by ecosystems yet ensure both adequate food production and sustainable economic development.⁶⁵ Parties should protect the climate system for future generations⁶⁶ and take precautionary measures to "anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects."⁶⁷ In pursuit of the Convention's objectives and principles, the Parties have committed to several programs, which include: (a) publishing and updating national inventories of anthropo-

supra note 13.

58. See *id.* at Principle 3 ("the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations"); Principle 4 ("environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it").

59. *Id.* at Principle 7 ("States have common but differentiated responsibilities").

60. *Id.* at Principle 10.

61. *Id.* at Principle 11. The legislation should reflect the "environmental and developmental context to which they apply" and must be relative to the particular situation of each Party. *Id.*

62. *Id.* at Principle 16. This idea goes to the idea that the polluter should bear the cost of pollution, yet avoiding injuring international trade. *Id.*

63. *Id.* at Principle 17.

64. United Nations Conference on Environment and Development: Framework Convention on Climate Change, *supra* note 10.

65. *Id.* art. 2.

66. *Id.* art. 3.1. The Parties' particular development and needs must be considered when considering the responsibilities placed on the Parties. *Id.* art. 3.2.

67. *Id.* art. 3.3. The lack of scientific certainty should not be used as an excuse for postponing implementation of such measures. *Id.*

genic emissions by sources;⁶⁸ (b) publishing and updating national and regional programs which mitigate climate change;⁶⁹ (c) promoting the transfer of technologies and cooperation in the development of new technologies;⁷⁰ (d) considering climate change when implementing domestic policies and activities;⁷¹ (e) promoting scientific cooperation in gathering and analyzing climate system data;⁷² and (f) promoting education, training, and public awareness of climate change and the environment.⁷³

In an effort to coordinate the Parties, the Convention creates institutions to monitor Parties and to facilitate Party action consistent with the objectives of the Convention. These institutions include: (a) Conference of the Parties,⁷⁴ (b) Secretariat,⁷⁵ (c) Subsidiary Body for Scientific and Technological Advice,⁷⁶ and (d) Subsidiary Body for Implementation.⁷⁷

The Convention requires Parties to attempt to negotiate a resolution to a dispute.⁷⁸ If the Parties cannot peacefully resolve the conflict, the dispute may go before the International Court of Justice and/or to arbitration under the Convention.⁷⁹ If either Party does not consent to either the ICJ or arbitration for resolution then the Parties have twelve months to reach an agreement.⁸⁰ If a year passes without a solution the Conference of the Parties will create a conciliation commission com-

68. *Id.* art. 4.1.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* art. 7. Their duties include, as supreme body of the Convention, reviewing the implementation of the Convention, adoption of legal instruments, and facilitating the exchange of information. *Id.*

75. *Id.* art. 8. The Secretariat acts as the Convention's administrator; compiling reports and acting as an intermediary between the Subsidiary bodies, the Conference of the Parties, and the Parties. *Id.*

76. *Id.* art. 9. Their duties include assessing scientific knowledge of the Parties, identifying new and efficient technologies, providing scientific programs to encourage international cooperation, and responding to scientific and technical questions asked by the Conference of the Parties and its subsidiary bodies.

77. *Id.* art. 10. The Body is open to all Parties' participation and considers all information gathered to help the Conference of the Parties determine the level of current implementation and recommendations to further future implementation and compliance. *Id.*

78. *Id.* art. 14. The dispute must concern the interpretation or application of the Convention. *Id.*

79. *Id.* art. 14.2. The Parties may recognize either forum as compulsory ipso facto and without special agreement when the Parties ratify, accept, approve or accede to the Convention. *Id.* Such a recognition shall remain in force until it expires (due to the terms of the agreement) or until three months after written notification of a Party's revocation has been deposited. *Id.* art. 14.3.

80. *Id.* art. 14.5.

prised of equal number of members appointed by concerned Parties with a chairman chosen jointly by the appointed members.⁸¹ The commission will recommend a decision which the Parties will consider in good faith.⁸²

G. Convention on Biological Diversity

The objective of the Convention⁸³ and the contracting Parties is to preserve biological diversity⁸⁴ while at the same time maintaining sustainable use⁸⁵ of the environment and encouraging "sharing of the benefits arising out of the utilization of genetic resources."⁸⁶ In order to achieve this goal the Convention sets out several policies for Parties to follow, including mechanisms for: (a) the creation or adoption of national programs for the conservation and sustainable use of biological diversity;⁸⁷ (b) the identification of components important for biological diversity and sustainable use;⁸⁸ (c) the monitoring components important for biological diversity and sustainable use (paying particular attention to those requiring urgent conservation measures);⁸⁹ and (d) the categorization of processes which have or likely will have "significant adverse impacts on the conservation and sustainable use of biological diversity."⁹⁰

The Convention recognizes the different types of conservation efforts and possibilities by establishing separate policies and procedures for both "in-situ"⁹¹ and "ex-situ"⁹² conservation. Each Party must, to

81. *Id.* art. 14.6.

82. *Id.*

83. United Nations on Environment and Development: Convention on Biological Diversity, *supra* note 11.

84. As defined by the Convention, "biological diversity" means "the variability among living organisms from all sources including . . . terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are apart; this includes diversity within species, between species and of ecosystems." *Id.* art. 2.

85. As defined by the Convention, "sustainable use" means the use of biological resources "in a way and at a rate that does not lead to the long-term decline of biological diversity . . . to meet the needs and aspirations of present and future generations." *Id.* art. 3.

86. *Id.* art. 1. See also *id.* art. 5 (stating that contracting Parties, to the extent possible, should cooperate with each other in all appropriate matters and methods "for the conservation and sustainable use of biological diversity").

87. *Id.* art. 6. Such programs must integrate with existing domestic legislation and policies. *Id.*

88. *Id.* art. 7(a). The identification should be in reference to the Convention's Annex I, which breaks the identification into (1) ecosystems and habitats (containing high diversity, large numbers of endemic or threatened species or wilderness) and (2) species and communities (which are threatened or of some economic, agricultural, social, cultural or scientific importance).

89. *Id.* art. 7(b).

90. *Id.* art. 7(c).

91. In-situ conservation is defined by the Convention as the "conservation of ecosys-

the degree possible and appropriate, do the following for in-situ conservation: (a) create a system of protected areas;⁹³ (b) develop guidelines for the establishment and management of the protected areas;⁹⁴ (c) manage biological resources important to conserving biological diversity;⁹⁵ (d) promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in their natural surroundings;⁹⁶ (e) rehabilitate degraded ecosystems and help recover threatened species;⁹⁷ and (f) create or maintain regulation to help protect threatened species.⁹⁸

For ex-situ conservation, the Convention is less demanding but requires the Parties to: (a) create mechanisms for ex-situ conservation of components of biological diversity;⁹⁹ (b) establish facilities for ex-situ conservation and research on plants, animals and micro-organisms;¹⁰⁰ (c) enact domestic measures to aid in the recovery and rehabilitation of threatened species so they may be returned to their natural environment;¹⁰¹ and (d) regulate the collection of biological resources from natural habitats for ex-situ conservation purposes "so as not to threaten ecosystems and in-situ populations."¹⁰²

The Convention focuses on the need for sustainable use of components for biological diversity and delineates several steps the Parties must take, including: (a) integrating the concept of sustainable use into national policy-making;¹⁰³ (b) implementing measures to minimize the

tems and natural habitats and the maintenance and recovery of viable populations of species in their natural surrounding and, in the case of domesticated or cultivated species, in the surroundings where they have developed their distinctive properties." *Id.* art. 2.

92. Ex-situ conservation is defined by the Convention as the "conservation of components of biological diversity outside their natural habitats." *Id.*

93. *Id.* art. 8(a).

94. *Id.* art. 8(b).

95. *Id.* art. 8(c). This applies to biological resources both within and outside of the designated protected areas.

96. *Id.* art. 8(d). The Convention also asks for the promotion of "environmentally sound and sustainable development in areas adjacent to protected areas with a view to furthering protection of these areas." *Id.* art. 8(e).

97. *Id.* art. 8(f). The rehabilitation efforts are through "the development and implementation of plans or other management strategies." *Id.*

98. *Id.* art. 8(k). The steps required are many but the funding for such projects is vague at best. *Id.* art. 8(k) (encouraging Parties to "cooperate in providing financial and other support for in-situ conservation . . . particularly to developing countries").

99. *Id.* art. 9(a). The Convention encourages ex-situ conservation to be done in the country of origin of the components. *Id.* art. 9(a)-(b).

100. *Id.* art. 9(b).

101. *Id.* art. 9(c).

102. *Id.* art. 9(d). The Convention is also vague on the financing structure for encouraging ex-situ conservation efforts. *Id.* art. 9(e) (encouraging cooperation in financing ex-situ conservation, especially for developing countries).

103. *Id.* art. 10(a). One piece of domestic legislation asked of all Parties is the authori-

damage to biological diversity caused by the use of biological resources;¹⁰⁴ and (c) encouraging cooperative efforts between domestic governments and private sector actors in developing methods for sustainable use.¹⁰⁵

As for the Convention's institutions, the Parties created the Conference of the Parties,¹⁰⁶ the Secretariat,¹⁰⁷ and the Subsidiary Body on Scientific, Technical and Technological Advice.¹⁰⁸ These bodies play an important role in dispute settlement under the Convention. If two or more Parties have a disagreement regarding the interpretation or application of the Convention, they are required to initially attempt resolution by negotiation.¹⁰⁹ If negotiation fails to resolve the conflict the Parties may request a third Party mediation.¹¹⁰ Provided that mediation brings no solution, the dispute will go before either the International Court of Justice, an arbitration tribunal, or a conciliation commission.¹¹¹ If the Parties agree to go to arbitration, they shall notify the Secretariat of the decision.¹¹²

The arbitral tribunal will consist of three members; each of the two Parties appoints an arbitrator and the two appointees jointly appoint

zation of access or transfer of technologies relevant to the sustainable use of biological diversity. *Id.* art. 16. The promotion of national policies encouraging the scientific and technical cooperation is also stressed by the Convention. *Id.* art. 18.

104. *Id.* art. 10(b). The Convention suggests, as one minimizing measure, that Parties use environmental impact assessments for all internal projects proposed that are likely to have a significant adverse effect on biological diversity. *Id.* art. 14(1).

105. *Id.* art. 10(e).

106. *Id.* art. 23. The Conference of the Parties' duties include the adoption and amending of rules, transmission of information to the Parties (as well as receipt of information), and reviewing advice and information given to it so as to define compliance with the Convention. *Id.*

107. *Id.* art. 24. The Secretariat is required to perform the administrative functions for the Convention, as well as any other functions assigned to it by the Conference of the Parties. *Id.*

108. *Id.* art. 25. The Body's duties include the scientific assessment of biological diversity, identification of efficient technology related to conservation and sustainable use, and providing advice on any scientific, technical, or methodological question put to it by the Conference of the Parties.

109. *Id.* art. 27(1).

110. *Id.* art. 27(2).

111. *Id.* art. 27(3)-(4). Before whom the continued dispute finally goes depends on whether the Parties are both able to agree to go before either the ICJ or the Convention's arbitration tribunal. If the Parties have not come to such an agreement then the conciliation commission is created. *Id.*

112. *Id.* at Annex II, pt. 1, art. 1. The notification will contain the disputed interpretation or application of the Convention which is in dispute (if the subject in dispute cannot be agreed upon, the tribunal will determine the subject matter). The Secretariat will forward all collected information to all the contracting Parties. *Id.*

the president, who cannot be a national of either Party in dispute.¹¹³ The tribunal must base its decision on the content of the Convention and international law.¹¹⁴ The disputing Parties must provide the tribunal with all relevant documents and information, which may include calling experts and other witnesses when necessary to properly develop the issues.¹¹⁵ Failure of a disputing Party to appear or properly defend itself before the tribunal will not be a bar to the proceedings and the tribunal may make a final decision.¹¹⁶ The decision will be based on a majority of the arbitrators¹¹⁷ and will be without appeal unless the Parties previously agreed to an appellate procedure.¹¹⁸

If the Parties cannot agree to either the ICJ or an arbitration tribunal settling the dispute, a conciliation commission is created upon the request of one of the disputing Parties.¹¹⁹ The commission consists of five members; two appointed by each Party, with the president of the commission jointly elected by the four appointees.¹²⁰ The commission will render its "proposal for resolution of the dispute, which the Parties shall consider in good faith."¹²¹

H. NAFTA's Supplemental Agreement on Environmental Cooperation

NAFTA's stance within the primary agreement was to "recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures."¹²² Building on the text of the main agreement, the Supplemental Agreement¹²³ announced the importance of maintaining the environment in a cooperative manner "for the well being of present and future generations."¹²⁴ The Agreement's objectives include: (a) to protect and improve the

113. *Id.* at Annex II, pt. 1, art. 2. If the disputing Parties cannot select the president of the tribunal, the Secretary-General of the United Nations will select the president within a two-month period. *Id.* at Annex II, pt. 1 art. 3.

114. *Id.* at Annex II, pt. 1, art. 4. The tribunal will determine its own rules of procedure. *Id.* at Annex II, pt. 1, art. 5.

115. *Id.* at Annex II, pt. 1, art. 7.

116. *Id.* at Annex II, pt. 1, art. 13. Before making a final decision, the tribunal must be satisfied that the claim is "well founded in fact and law." *Id.*

117. *Id.* at Annex II, pt. 1, art. 12.

118. *Id.* at Annex II, pt. 1, art. 16.

119. *Id.* art. 27(4).

120. *Id.* at Annex II, pt. 2, art. 1. If the disputing Parties cannot select the president of the commission, the Secretary-General of the United Nations will select the president within a two-month period. *Id.*

121. *Id.* at Annex II, pt.2, art. 5. The word "proposal" instead of "decision" may make the outcome seem less determinative than that of the arbitration tribunal, which gives "final decisions." *Id.* at Annex II, pt. 1, art. 13.

122. North American Free Trade Agreement, art. 1114, *reprinted in* 32 I.L.M. 605 (1993).

123. North American Agreement on Environmental Cooperation, *supra* note 12.

124. *Id.* at Preamble.

environment for "well-being of present and future generations";¹²⁵ (b) to promote sustainable development through cooperative efforts in implementing environmental and economic policies;¹²⁶ (c) to increase the enforcement and compliance of environmental laws and regulations;¹²⁷ and (d) to avoid creating barriers to trade or trade distortions.¹²⁸

To best fulfill the Agreement's objectives, the Parties resolved to commit themselves generally to: (a) preparing and publicly releasing reports on the condition of the environment within their boundaries;¹²⁹ (b) developing environmental emergency procedures;¹³⁰ (c) educating the public on environmental matters;¹³¹ (d) assessing environmental impacts;¹³² and (e) promoting economic tools to effectively achieve environmental goals.¹³³

The Parties agreed to the above obligations with the condition that each Party establish its own level of environmental protection and environmental policies.¹³⁴ Though it may seem to thwart harmonization under the Agreement, the Parties also committed that such domestic regulation would "provide for high levels of environmental protection and shall strive to continue to improve those laws and regulations."¹³⁵ After announcing such preeminence of internal legislation, the Agreement outlines particular government action required of the Parties,¹³⁶ including: (a) effective enforcement of its environmental laws and regulations;¹³⁷ (b) the existence of judicial, quasi-judicial or administrative proceedings for sanctions or remedies related to violations under its environmental laws and regulations;¹³⁸ and (c) the allocation of appro-

125. *Id.* art. 1(a).

126. *Id.* art. 1(b). The polices would be enacted by and under the supervision of the domestic mechanisms of the Parties to the Agreement. *Id.* art. 1(b)-(f).

127. *Id.* art. 1(g).

128. *Id.* art. 1(e).

129. *Id.* art. 2.1(a). The Agreement also requires Parties to ensure that its domestic laws and regulations relating to any matter covered in the Agreement must be published. To the extent possible, the Parties should allow notice of prospective measures it may adopt and a reasonable opportunity for interested persons to comment. *Id.* art. 4.

130. *Id.* art. 2.1(b).

131. *Id.* art. 2.1(c).

132. *Id.* art. 2.1(e).

133. *Id.* art. 2.1(f).

134. *Id.* art. 3.

135. *Id.*

136. *Id.* art. 5.

137. *Id.* art. 5.1. Examples of "effective enforcement" are given, including: appointing inspectors, monitoring compliance and investigations of suspected violations, promoting environmental audits, requiring record keeping and reporting, using licenses (permits or authorizations), initiating proceedings to seek appropriate sanctions or remedies for violations (including emergency orders), or providing for search, seizure or detention. *Id.*

138. *Id.* art. 5.2. The Agreement requires the ability of private interested persons to have access to the proceedings. The private person's rights would include the ability to

priate sanctions and remedies for violations of its environmental laws and regulations.¹³⁹

The Agreement established the Commission for Environmental Cooperation to oversee the implementation and administration of the announced objectives and criteria.¹⁴⁰ The Commission consists of a Council, a Secretariat and a Joint Public Advisory Committee.¹⁴¹ The Council¹⁴² convenes at least once a year¹⁴³ and may use wide discretion in deciding what procedures to apply¹⁴⁴ and what action it may take.¹⁴⁵ The Council acts as the governing body of the Commission¹⁴⁶ and its functions are to: (a) serve as a forum for environmental matters;¹⁴⁷ (b) supervise the implementation of the Agreement as well as recommend elaborations to strengthen the agreement;¹⁴⁸ (c) oversee the Secretariat;¹⁴⁹ (d) address "questions and differences that may arise between the Parties regarding the interpretation or application of the Agreement";¹⁵⁰ (e) consider and develop recommendations for the Agreement's functions;¹⁵¹ (f) strengthen Parties' cooperation for improving environmental laws and regulations;¹⁵² (g) promote public access to environmental information;¹⁵³ (h) cooperate with the NAFTA Free

sue another person, seek sanctions or remedies to mitigate environmental damage, and request authorities to enforce the domestic environmental laws and regulations. *Id.*

139. *Id.* art. 5.3. A Party must consider the nature and gravity of the violation, any economic benefit derived from the violation, and the economic position of the violator. Compliance agreements, fines, imprisonment, closure of facilities and the cost of containing or cleaning up the pollution are possible sanctions to be imposed. *Id.*

140. *Id.* art. 8.1.

141. *Id.* art. 8.2.

142. The Council "shall comprise cabinet-level or equivalent representatives of the Parties or their designees." *Id.* art. 9.1.

143. *Id.* art. 3.

144. *Id.* art. 2.

145. *Id.* art. 5. The council may assign responsibilities to ad hoc or standing committees, seek advice of non-governmental organizations or persons, and take such action "in the exercise of its functions as the Parties may agree." *Id.*

146. *Id.* art. 10.1.

147. *Id.* art. 10.1(a).

148. *Id.* art. 10.1(b). The Council will review the effectiveness of the Agreement four years after the entry into force. *Id.*

149. *Id.* art. 10.1(c).

150. *Id.* art. 10.1(d).

151. *Id.* art. 10.2. The Council may develop recommendations on a broad spectrum of possible subjects, including: techniques and methodologies for gathering data and analysis; environmental matters as they relate to economic development; protection of endangered species and habitats; approaches to environmental enforcement; and "any other matters it may decide." *Id.*

152. *Id.* art. 10.3. The Agreement encourages the exchange of information on developing environmental standards with the goal of harmonizing such standards. *Id.*

153. *Id.* art. 10.5. This would include public participation in the decision-making process. *Id.*

Trade Commission to discourage Parties from waiving environmental measures;¹⁵⁴ (i) create a system that oversees Parties' national policies with environmental impact assessments;¹⁵⁵ and (j) develop proper access and remedies for a Party who has suffered an injury.¹⁵⁶

The Secretariat fulfills the Agreement's needs for an information-gatherer and record-maker. Every year the Secretariat prepares a report of the Commission¹⁵⁷ which is ultimately released to the public.¹⁵⁸ Questions over a Party's non-enforcement of its environmental laws and regulations result in the Secretariat investigating the matter.¹⁵⁹ The Secretariat "may consider a submission from any non-governmental organization (NGO) or person asserting that a Party is failing to effectively enforce its environmental law."¹⁶⁰ To be considered by the Secretariat, the submission must contain "sufficient information to allow the Secretariat to review the submissions, including documentary evidence on which the submission may be based"¹⁶¹ and appear to be "aimed at promoting enforcement rather than at harassing industry."¹⁶² Notification of the complaint must be made to the accused Party¹⁶³ and the person or NGO must reside or exist in the territory of a Party to the Agreement.¹⁶⁴

When the Secretariat acknowledges that a submitted complaint fulfills the set criteria it will determine the necessity of a response from the accused Party.¹⁶⁵ If the accused Party notifies the Secretariat that the matter is "the subject of a pending judicial or administrative

154. *Id.* art. 10.6.

155. *Id.* art. 10.7.

156. *Id.* art. 10.9. The injured Party would need proper redress in the violating Party's adjudicative systems, as if the injury had been caused within the violator's own territory. *Id.*

157. *Id.* art. 12.1. The report covers many areas of interest: the activities and expense of the Commission, actions taken by each Party (including enforcement data), views of non-governmental organization (or persons), and recommendations made on any matter. *Id.* art. 12.2. If the Secretariat wishes to prepare a report on a matter within the scope of the annual program it may, unless two-thirds of the Parties object to the creation of such a report. *Id.* The report may not concern itself over a Party's lack of enforcement of its environmental laws. *Id.*

158. *Id.* art. 12.1.

159. *Id.* art. 14.1.

160. *Id.*

161. *Id.* art. 14.1(c).

162. *Id.* art. 14.1(d).

163. *Id.* art. 14.1(e). The submission must also include any response the accused Party has made to the complaint. *Id.*

164. *Id.* art. 14.1(f).

165. *Id.* art. 14.2. The Secretariat will determine necessity of response based upon whether: (1) the submission alleges harm to the complaining Party; (2) the submission requires study that advances goals of the Agreement; (3) private remedies under the accused Party's law have been exhausted; and (4) the submission is drawn exclusively from mass media reports. *Id.*

proceeding" the Secretariat must stop the investigation.¹⁶⁶ The accused Party shall submit any information it wishes if no internal proceedings are in progress.¹⁶⁷ The Secretariat may proceed further, with the consent of the Council,¹⁶⁸ by developing a factual record¹⁶⁹ using a wide array of sources for information.¹⁷⁰ It shall submit a draft to the Council and any Party may provide commentary on the record's accuracy after the Secretariat compiles the factual record.¹⁷¹

The Agreement creates the Joint Public Advisory Committee (JPAC)¹⁷² whose duties include: (a) advising the Council on any matter within the scope of the agreement, as well as implementing and elaborating on the agreement;¹⁷³ (b) providing relevant information to the Secretariat to assist in developing factual records;¹⁷⁴ and (c) any other duties required by the Council.¹⁷⁵

The Agreement contains an elaborate and innovative structure for dispute settlement that begins with consultation.¹⁷⁶ Any Party may request a consultation with another Party "regarding whether there has been a persistent pattern of failure . . . to effectively enforce its environmental law."¹⁷⁷ All interested Parties are allowed to participate in the consultation¹⁷⁸ and shall "make every attempt to arrive at a mutually satisfactory resolution of the matter through consultations."¹⁷⁹

A special session of the Council may be requested if consultations fail to resolve the dispute within sixty days of a Party's request for a consultation.¹⁸⁰ The Party requesting the special session will submit,

166. *Id.* art. 14.3

167. *Id.* art. 14.3(b). This includes any previous action or remedies given by the accused Party relating to the matter. *Id.*

168. *Id.* art. 15.2. The Council must authorize the preparation of a factual record by a two-thirds vote. *Id.*

169. *Id.* art. 15.1. The Secretariat must consider whether "the submission, in the light of any response provided by the Party, warrants developing a factual record." *Id.*

170. *Id.* art. 15.4. The Secretariat may consider any information "furnished by a Party and may consider any relevant technical, scientific, or other information" that is: (a) publicly available; (b) submitted by an interested NGO or person; (c) submitted by the Joint Public Advisory Committee; or (d) developed by the Secretariat or by independent experts. *Id.*

171. *Id.* art. 15.5. The Parties commenting have 45 days after the Secretariat submits the draft record to the Council. *Id.*

172. *Id.* art. 16.1. The Parties will appoint an equal number of the fifteen members to the Committee. *Id.*

173. *Id.* art. 16.4.

174. *Id.* art. 16.5.

175. *Id.* art. 16.4.

176. *Id.* art. 22.

177. *Id.* art. 22.1.

178. *Id.* art. 22.3.

179. *Id.* art. 22.4.

180. *Id.* art. 23.1.

with their request, a description of the dispute.¹⁸¹ The Council, unless otherwise decided, will convene within twenty days of the request and attempt to resolve the issue.¹⁸² In resolving the dispute, the Council may:

(a) call on such technical advisers or create such working groups or expert groups as it deems necessary;

(b) have recourse to good offices, conciliation, mediation or such other dispute resolution procedures; or

(c) make a recommendation, as may assist the consulting Parties to reach a mutually satisfactory resolution of the dispute. Any such recommendations shall be made public if the Council, by a two-thirds vote, so decides.¹⁸³

Provided the Council cannot resolve the matter sixty days after the convening of the special session, it may consider creating an arbitral panel.¹⁸⁴ An interested Party must request the panel and the Council must approve the panel by a two-thirds majority.¹⁸⁵ The agreement limits disputes to failures of enforcement "involving workplaces, firms, companies or sectors that produce goods or services"¹⁸⁶ that are involved with trade among the Parties or compete with "goods or services produced or provided by persons of another Party."¹⁸⁷

The Council, after approving the dispute for arbitration, will establish a roster of forty-five individuals who are able to serve as panelists.¹⁸⁸ The roster members must have experience in environmental law or international dispute settlement, or have relevant professional expertise or experience.¹⁸⁹

The chosen panel consists of five members whose selection depends upon the number of Parties involved in the arbitration.¹⁹⁰ Each Party selects two panelists who are citizens of the opposing Party when there are two disputing Parties.¹⁹¹ When there are more than two Parties, the Party complained against selects two panelists whose citizenry is from different complaining Parties.¹⁹² The complaining Parties must select two panelists whose citizenry is from the complained against

181. *Id.* art. 23.2.

182. *Id.* art. 23.3.

183. *Id.* art. 23.4.

184. *Id.* art. 24.1.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* art. 25.1.

189. *Id.* art. 25.2.

190. *Id.* art. 27.

191. *Id.* art. 27.1.

192. *Id.* art. 27.2.

Party.¹⁹³

The panel, either upon request by a Party or by its own initiative, "may seek information and technical advice from any person or body that it deems appropriate."¹⁹⁴ This seemingly broad power is curtailed by disputing Parties who retain the power to limit this investigative power of the panel "to such terms and conditions as such Parties may agree."¹⁹⁵ The panel must present an initial report to the disputing Parties within 180 days after panelist selection. The panel's initial report contains: (a) findings of fact; (b) its ruling as to whether there has been a persistent pattern of failure to effectively enforce environmental law; and (c) the panel's recommendation, if any, for resolution of the dispute.¹⁹⁶

After the disputing Parties are given an opportunity to comment and to request reconsideration of the initial report,¹⁹⁷ the panel will give the disputing Parties a final report that will be subsequently published.¹⁹⁸ If the panel found a persistent pattern of failure to effectively enforce environmental law, the disputing Parties may agree on an action plan to eliminate such failure.¹⁹⁹ The panel may be reconvened if the disputing Parties cannot agree to an action plan²⁰⁰ or agree that an action plan is being fully implemented.²⁰¹

If the panel reconvenes to resolve disagreement over a proposed action plan, the panel will determine the sufficiency of the proposed action plan to remedy the pattern of non-enforcement.²⁰² If found insufficient, the panel may impose monetary enforcement assessment within ninety days after the panel reconvenes.²⁰³

193. *Id.* When settling disputes between two or more Parties, the Parties must agree on the chair to the panel. If such agreement cannot be reached, a Party will be chosen randomly and it will be allowed to select the chair (the chair cannot be a citizen of the randomly chosen Party). *Id.*

194. *Id.* art. 30.

195. *Id.*

196. *Id.* art. 31. This normally is the required adoption of an action plan that remedies the pattern of non-enforcement.

197. *Id.* art. 31.5.

198. *Id.* art. 32. The report will be published five days after it is transmitted to the Council. *Id.*

199. *Id.* art. 33. The Parties must notify the Secretariat and the Council of any agreed resolution of the dispute.

200. *Id.* art. 34. The disputing Parties cannot agree on an action plan within sixty days of the final report.

201. *Id.* The implementation dispute may be over an action plan agreed to by the Parties or one established by the panel.

202. *Id.* art. 34.4. If the panel does not approve the plan it may create one consistent with the Party's domestic laws. *Id.*

203. *Id.* art. 34.4. The Council deposits all funds generated by the monetary enforcement assessment into a fund that improves and enhances the environment or environmental law enforcement in the Party complained against. *Id.* at Annex 34.

If the panel reconvenes to determine whether a complained against Party is fully implementing an action plan, the panel will decide on the questioned implementation.²⁰⁴ The panel may not impose a monetary enforcement assessment if it finds that the plan is being fully implemented.²⁰⁵ The panel shall impose a monetary enforcement assessment within sixty days after the panel reconvenes if full implementation has not been established.²⁰⁶

A complaining Party to a dispute may annually suspend the NAFTA benefits when a complained against Party fails to pay the monetary enforcement assessment within 180 days of the judgment.²⁰⁷ The suspension of benefits cannot exceed the monetary enforcement assessment.²⁰⁸ Where the dispute involved more than one complaining Party, the suspension of benefits will be calculated in the aggregate and the sum of the suspensions cannot exceed the monetary enforcement assessment.²⁰⁹ The suspension of the benefits will cease when the Party pays the monetary enforcement assessment or begins to fully implement the action plan.²¹⁰

III. THE ENVIRONMENT VS. THE ECONOMY

As estimated by the U.S. Trade Representative Office in 1993, NAFTA creates the world's largest market²¹¹ and will stimulate economic growth for the members to the agreement.²¹² But with the increased economic activity come fears of environmental degradation and the belief that rapid growth will outpace environmental

204. *Id.* art. 34.5.

205. *Id.*

206. *Id.* In addition to the monetary assessment, the panel will require full implementation of the action plan. *Id.* To determine the amount of the monetary enforcement assessment the panel should look at: (a) the duration and degree of the Party's persistent pattern of failure to effectively enforce its environmental law; (b) the enforcement level reasonably expected of a Party, considering its resources; (c) the Party's reasons for not fully implementing an action plan; (d) effort made by the Party to begin remedying the non-enforcement; and (e) any other relevant factors. *Id.* at Annex 34.

207. *Id.* art. 36. The first year of the Agreement, any monetary enforcement assessment could not exceed twenty million dollars (U.S.). For the years following, the assessment cannot exceed .007 percent of the total trade in goods between the Parties during the most recent year for which data is available. *Id.* at Annex 34.

208. *Id.* art. 36.2.

209. *Id.* art. 36.3.

210. *Id.* art. 36.4. The panel may be requested to reconvene to determine if the suspension of benefits is "manifestly excessive." The panel will present its decision in a report to the disputing Parties within forty-five days of the request. *Id.* art. 36.5.

211. U.S. TRADE REPRESENTATIVE OFFICE, ENVIRONMENTAL IMPACT OF NAFTA (1994). The market will consist of over 370 million people and \$6.5 trillion of production.

212. *Id.* The Trade Representative Office predicted an increase of U.S. export-supported jobs by 200,000 in the first two years and one percent increase to the Mexican growth rate. *Id.* at 1.

infrastructure.²¹³

One concern lies with Mexico's ability to enforce its environmental laws and whether free trade will result in Canadian and U.S. businesses sponsoring the lackluster enforcement in pursuit of profit.²¹⁴ Many environmentalists point to the current *maquiladora* industry as a road sign to where free trade will take North America.²¹⁵ Sparked by the Mexican economic crisis of 1982, *maquiladora* employment increased at the rate of fifteen percent a year during the mid-1980s.²¹⁶ The present rate of employment does not rival previous levels, yet it grows at a high rate as do the exports derived from the industry.²¹⁷ Industry and populations have been drawn to the border area to take advantage of the economic benefits.²¹⁸ The increased industrial activity and population, without environmental protection mechanisms established or enforced, resulted in the poisoning of the environment.²¹⁹

213. Jagdish Bhagwati & Herman E. Daly, *Debate: Does Free Trade Harm the Environment?*, SCIENTIFIC AMERICAN, Nov. 1993, at 41.

214. DANIEL MAGRAW, NAFTA & THE ENVIRONMENT 4 (1995). The fear is that Mexico would become a "pollution haven" where businesses would be attracted to low levels of environmental protection to save production costs. *Id.*

215. The *maquiladora* program allows components to be imported duty-free into Mexico from the United States for further manufacturing by border factories and then exported duty-free back into the United States (a twin factory is created on the border, with the production side in Mexico). *Id.* at 5.

216. Edward J. Williams, *The Maquiladora Industry and Environmental Degradation in the United States-Mexico Borderlands*, 27 ST. MARY'S L.J. 765, 766 (1996).

217. *Id.* The first ten months of 1995 displayed an increase of *maquiladora* employment by 9.4% with *maquiladora* exports increasing by 19.2%. The exports for the first quarter of 1996 increased 12% since the first quarter of 1995.

218. Electronic industries increased their presence, from 1979 to 1985, by 65% and account for 85% of *maquiladora* employment. Between 1984 and 1988, the chemical industry increased employment from 272 to 1674 workers. From 1980 to 1990, the number of furniture industry plants increased from 59 to 274 resulting in the addition of 22,000 workers. *Id.* at 776.

219. *Id.* Everything from raw sewage to hazardous wastes has been dumped into the local environment. The Mexican government admits that over 28,000 tons of hazardous waste produced by the *maquiladora* industry is not accounted for in 1995. *Id.* The authors cite Polly Chaz, *America's Deadly Border*, GUARDIAN (LONDON), Dec. 12, 1993, at 16, who reports that children play in pools of toxic green scum and hazardous waste is dumped by local factories onto the streets. *Id.* at n.33. For more detail on the problems resulting from the *maquiladora* industry, see Jane Kay, *The "Toxic Dump" that Flows into California*, S.F. EXAMINER, June 22, 1986, at 7 (reporting that ground water is highly contaminated, as is the New River, which flows from Mexico into California and "contains every disease known in the Western hemisphere"); Michael Scott Feeley & Elizabeth Knier, *Environmental Considerations of the Emerging United States-Mexico Free Trade Agreement*, 2 DUKE J. COMP. & INT'L L. 259 (1992) (stating that the pollution of the water is so high that 90% of adults thirty-five or older in the towns near San Elizario, Mexico contract hepatitis during their lifetimes); and Paulette L. Stenzel, *Can NAFTA's Environmental Provisions Promote Sustainable Development?*, 59 ALB. L. REV. 423, 446 (1995) (stating that in Ciudad Juarez, a ditch filled with untreated household and industrial sewage carries over one million gallons of waste a day into the Rio Grande).

The example given by the maquiladora industry begins the list of environmental problems tied to industrialization. Acid rain stands as another concern related to North American industry.²²⁰ Pollution along the U.S.-Canadian border poses a special problem due its size²²¹ and population concentration along it.²²² History marks notable increased emissions of sulfur dioxide and nitrogen oxide (two pollutants linked to acid rain) during the last fifty years in North America.²²³ The increase of the pollutants traces directly back to rising power plant and motor vehicle emissions.²²⁴ The short-term effects of acid rain include the destruction of many species populations and various aquatic ecosystems.²²⁵ The long-term effects are debatable, but many studies suggest permanent damage to agriculture (damage to soil, root systems, and microorganisms), urban damage (erosion of stone, paint and metals), and hazards to human health (ingestion of water and food affected by acid rain).²²⁶

Both the maquiladora industry and the increased levels of acid rain display pollution's lack of deference to national boundaries and the increased levels of pollution associated with economic growth.²²⁷ The environmentalists' wariness seems logical since the purpose of NAFTA is to stimulate industrial activity and economic prosperity. Whether the Side Agreement contains sufficient incentives and enforcement powers deserves attention and will be discussed below.

220. In 1986, the annual rainfall in the eastern half of the U.S. was estimated to be ten to forty times more acidic than normal rainfall, with manmade pollutants the source of the acidity. Jeffrey L. Roelofs, *United States-Canada Air Quality Agreement: A Framework for Addressing Transboundary Air Pollution Problems*, 26 CORNELL INT'L L.J. 421, 422 n.6 (1993).

221. The two countries share approximately 5,000 miles of border and more than 150 lakes and rivers. Brian R. Popiel, *Comment: From Customary Law to Environmental Impact Assessment: A New Approach to Avoiding Transboundary Environmental Damage Between Canada and the United States*, 22 B.C. ENVTL. AFF. L. REV. 447 (1995).

222. Almost 90% of all Canadians live within one hundred miles of the U.S.-Canadian border. *Id.*

223. As of the early 1980s, annual sulfur dioxide emissions for the U.S. equaled approximately 26 million tons, a 26% increase since 1946, while nitrogen oxide emissions totaled 23 million tons as of 1980. Canada's annual emission of sulfur dioxide and nitrogen oxide were, respectively, 5 million tons and 2 million tons. Roelofs, *supra* note 220, at 422.

224. More than 90% of acid rain is due to man-made emissions of sulfur oxide and nitrogen oxides (sulfur oxide causes two-thirds of the problem). *Id.* at 421.

225. *Id.* at 423 (citing ACID RAIN AND FRIENDLY NEIGHBORS: THE POLICY DISPUTE BETWEEN CANADA AND THE UNITED STATES (Jurgen Schmandt & Hilliard Roderick eds., 1988)).

226. *Id.* at 423-24.

227. Some scholars suggest several of NAFTA's potential threats to the environment, including: declining domestic environmental standards; deteriorating air and water quality; eroding of physical infrastructure within Mexico; and increasing mishandling of hazardous waste. Feeley & Knier, *supra* note 219, at 6-8.

A. *The Side-Agreement's Shortcomings*

The directives of the Side Agreement require enforcement of domestic environmental laws and regulations. Critics of the Agreement attack this objective, arguing that baseline levels of environmental protection must be established.²²⁸ Without requiring environmental standard harmonization it is feared that Mexico will sacrifice continued environmental protection in an effort to entice businesses to relocate.²²⁹

Critics raise the ability for a Party to side-track enforcement procedures²³⁰ and the ease which a Party may withdraw from the Agreement²³¹ as other weak areas of the Convention. The Council, which settles disputes under the Agreement, consists of political appointees and has a myriad of procedures to delay any adjudication of conflicts.²³² A Party must only give notice and wait six months to withdraw from the Agreement.²³³ Critics argue that Parties' behavior will change only when obligations are not easily circumvented or dischargeable.²³⁴

Critics also find fault with the limited access and remedies involved with the dispute resolution mechanisms of the Agreement.²³⁵ The Agreement allows for private remedies for those who have, as determined by Parties' environmental laws, a "legally recognized interest."²³⁶ This gives non-citizens difficulty in finding sufficient standing to bring cross-border suits and complicates the enforcement of the Agreement.²³⁷ If a private actor has a sufficient interest to bring suit, the person or or-

228. See Farah Khakee, *The North American Free Trade Agreement: The Need to Protect Transboundary Water Resources*, 16 *FORDHAM INT'L L.J.* 848, 880 (1993). The idea of global standardization of environmental policies has been argued long before the creation of NAFTA. See *Developments in the Law - International Environmental Law*, 104 *HARV. L. REV.* 1484, 1609 (1991) (discussing the concept of extraterritorial environmental regulation to cover those nations whose environmental regulation lacks substance).

229. Alicia A. Samios, *NAFTAs Supplemental Agreement: In Need of Reform*, 9 *N.Y. INT'L L.R.* 49 (1996) (reviewing Mexico's history of lax enforcement as reason to doubt the strength of the Agreement); see also Khakee, *supra* note 228, at 880 (detailing the deficiencies of Mexican, Canadian, and U.S. domestic legislation).

230. David S. Baron, *NAFTA and the Environment - Making the Side Agreement Work*, 12 *ARIZ. J. INT'L & COMP. L.* 603, 604 (1995).

231. Samios, *supra* note 229, at 67.

232. Baron, *supra* note 230, at 604. The obstacle most obvious is the bar put on any dispute that is currently "subject of a pending judicial or administrative proceeding." Supplemental Agreement, *supra* note 12, art. 14.3(a).

233. Supplemental Agreement, *supra* note 11, art. 50.

234. Samios, *supra* note 229, at 67.

235. *Id.* at 69.

236. Supplemental Agreement, *supra* note 12, art. 6.2.

237. Samios, *supra* note 229, at 69. In interpreting the standing requirements of the Agreement, one scholar suggests the disregarding of U.S. Supreme Court's view of standing. Baron, *supra* note 230, at 610 (claiming the U.S. approach to standing "leads to enormously complex and costly litigation to no productive end[s]"). *Id.*

ganization may only submit a complaint to the Secretariat.²³⁸ The Secretariat can investigate the matter more thoroughly only after two of the three Parties consent to such an investigation.²³⁹ This politicizes the alleged injury and may hinder the resolution of disputes.²⁴⁰

Finally, critics object to the limited subject matter allowed in dispute settlement²⁴¹ and the sanctioning mechanisms to enforce decisions under the Agreement.²⁴² The Agreement limits the scope of arbitration to matters relating to "workplaces, firms, companies or sectors, that produce goods or provide services: (a) traded between the . . . Parties; or (b) that compete . . . with goods or services produced or provided by person of another Party."²⁴³ This arguably limits the environmental protection to commercial areas and allows private disregard of environmental laws.²⁴⁴

If the dispute falls within these parameters, the imposition of trade sanctions (or monetary assessments) to enforce the decision may be counter-productive.²⁴⁵ The Agreement allows trade sanctions for "persistent and unjustifiable pattern[s] of non-enforcement."²⁴⁶ But such a pattern lacks objective definition and would likely result in arbitrarily imposed sanctions.²⁴⁷ Even if objective criteria could be achieved it may not be desirable. The narrow focus to heighten environmental enforcement might be at the cost of Mexico's infrastructure.²⁴⁸ The requirement of similar levels of environmental enforcement may be unrealistic when one considers the disparity of economic development between Mexico and its northern partners. To comply with the Agreement's enforcement conditions, Mexico may have to sacrifice its spending on important infrastructure projects (such as sewers).²⁴⁹ What may result is less

238. Supplemental Agreement, *supra* note 11, art. 14.

239. *Id.* art. 15(2).

240. Samios, *supra* note 229, at 71 (concluding that the agreement fails to promote public participation in developing environmental laws, regulations and policies). *Id.*; see also *id.* at 73 (complaining that the "broad sovereignty-protection clauses as ripe for manipulation by the Party-governments").

241. *Id.* at 72.

242. Nicolas Kublicki, *The Greening of Free Trade: NAFTA, Mexican Environmental Law, and Debt Exchanges for Mexican Environmental Infrastructure Development*, 19 COLUM. J. ENVTL. L. 59 (1994).

243. Supplemental Agreement, *supra* note 12, art. 24(1).

244. Samios, *supra* note 229, at 72 (claiming that the Agreement is not able to assess sufficiency of environmental laws).

245. Kublicki, *supra* note 242, at 112-113.

246. *Id.* Kublicki argues that "persistent and unjustifiable pattern of non-enforcement" will be interpreted at a level commensurate with that of Canada and the U.S. *Id.* at 111.

247. *Id.* at 111.

248. *Id.* at 113.

249. *Id.* at 115. The author cites a columnist who writes: "How can a country that has been unable even to clean up its own drinking water – and still uses vast quantities of pesticides that are banned in the United States – comply with far-higher U.S. environ-

development in the name of enforcement which may leave the environment worse off than before the Agreement.²⁵⁰ Focusing narrowly on enforcement raises several concerns, including: (a) the formation of an adversarial relationship between business and government;²⁵¹ (b) compliance with regulation will be the focus of business instead of conserving resources;²⁵² and (c) the absence of mechanisms within Mexico to enforce the regulations.²⁵³

B. The Side-Agreement's Strengths

Despite the criticisms, many environmentalists find the Side-Agreement to procure considerable power in preserving the environment and enforcing domestic regulation.²⁵⁴ Supporters hold out the Agreement as marking "the first time in international trade agreements the environment is incorporated as a significant factor."²⁵⁵

The Agreement protects more stringent national environmental standards from erosion by emphasizing concepts of national autonomy.²⁵⁶ This prevents the atrophy of higher domestic standards in order to create harmonized international standards.²⁵⁷

Supporters also point to improvements in domestic environmental infrastructure as another strength of the Agreement.²⁵⁸ The increased economic benefits derived from free trade would allow for proper monitoring, air and water treatment, and education needed to properly en-

mental standards?" *Id.* at n.249 (citing Harold Gilliam, *Will Clinton Put the Earth First?*, SAN FRAN. CHRON., Jan. 31, 1993, at 4).

250. *Id.* at 115.

251. C. Foster Knight, *Comment: Voluntary Environmental Standards vs. Mandatory Environmental Regulations and Enforcement in the NAFTA Market*, 12 ARIZ. J. INT'L. & COMP. LAW 619, 629 (1995).

252. *Id.*

253. *Id.* The ability for private enforcement is mostly missing within Mexican environmental law. *Id.* at n.36. The author suggests the implementation of voluntary compliance with the international environmental standards as the best method of harmonizing standards and enhancing compliance with those standards. *Id.* at 634.

254. Kublicki, *supra* note 242, at 69.

255. *Id.* (quoting Jay D. Hair, President of the National Wildlife Federation).

256. North American Agreement on Environmental Cooperation, *supra* note 12, art. 3 (holding that each Party has the right to "establish its own levels of domestic environmental protection and environmental development policies and priorities"). See also Sanford E. Gaines, *Environmental Laws and Regulations After NAFTA*, 1 U.S. MEXICO L.J. 199, 204 (1993); Kublicki, *supra* note 242, at 70.

257. *Id.* The Parties are to ensure that its laws are enforced and must "strive to improve those laws and regulations." *Id.* This will leave intact the high requirements already established in the United States and Canada, while encouraging development within Mexico's legislation. Kublicki, *supra* note 242, at 30-32.

258. Kublicki, *supra* note 242, at 65.

force environmental regulation.²⁵⁹ Infrastructure development would institutionalize environmental protection through public projects, as well as environmental education.²⁶⁰ Developing infrastructure would alleviate the problems of international enforcement while avoiding sovereignty conflicts caused by trade sanctions or fines.²⁶¹ It is asserted by supporters that with economic prosperity comes a cleaner environment; those who are wealthier can afford more efficient technologies and pollution control.²⁶² With the proper revenues, infrastructure can be improved (or created).²⁶³ Though an inverse relation may not exist between the economic prosperity and environmental degradation, economic growth is a logical prerequisite to environmental protection in developing countries.²⁶⁴

The Agreement allows considerable public participation within the Agreement, especially in dispute-resolution processes.²⁶⁵ It requires notification of a government's change in food safety measures,²⁶⁶ on which the public is then allowed to comment.²⁶⁷ It is ground-breaking in that it encourages private citizens to submit complaints.²⁶⁸ Despite the political nature of arbitration,²⁶⁹ no other environmental agreement allows such private access.²⁷⁰

Arguments that the Agreement will encourage business to relocate to Mexico are rebuffed by stating that such relocation was not prohibited prior to NAFTA.²⁷¹ Supporters point out that NAFTA discourages environmentally motivated relocation.²⁷²

259. *Id.*

260. *Id.* at 65-66.

261. *Id.*

262. *Id.* at 106-107 (citing Jonathon Marshal, *How Ecology Is Tied To Mexico Trade Pact*, SAN FRAN. CHRON., Feb. 25, 1992, at A8 (reporting about a Princeton study by Gene Grossman and Alan Krueger showing that pollution levels rise steadily until income reaches beyond \$4,000 per capita, and then pollution falls off as income increases beyond \$4,000). Mexico's per capita income in 1992 was \$5,000. *Id.*

263. Kublicki, *supra* note 242, at 66.

264. *Id.* at 107.

265. Stenzel, *supra* note 219, at 478 (1995).

266. North American Free Trade Agreement, *supra* note 122, art. 718.

267. *Id.*

268. North American Agreement on Environmental Cooperation, *supra* note 12, art. 14

269. *See* Samios, *supra* note 229, at 71.

270. *See* Stenzel, *supra* note 219, at 478.

271. Kublicki, *supra* note 242, at 102.

272. North American Free Trade Agreement, *supra* note 122, art. 1114.2 (stating that a "Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from such [environmental] measures as an encouragement"). Supporters of the Agreement state that environmental regulation is a minor consideration when deciding where to locate a business or factory. Kublicki, *supra* note 242, at 104. Labor costs, transportation costs, raw material costs, labor skill, and corporate good will all must also be considered. *Id.* Normally environmental regulation costs average 3% of total output of industries that pollute the most. *Id.* at 103.

While critics believe the Agreement falls short of what is currently needed,²⁷³ supporters claim that the Agreement's potential to enforce environmental protection with economic incentive makes the Agreement uniquely powerful.²⁷⁴ The creation of jobs and higher wages may be the environment's most effective protection.²⁷⁵

IV. CONCLUSION

The landscape of international environmental protection and dispute resolution has changed markedly since 1982. Several Conventions and agreements later, the North American countries can no longer question the existence of procedures able to deal with environmental damage. Instead, the U.S., Canada and Mexico must weigh the many possible rights and obligations under the discussed agreements and decide what actions would be most effective. The agreements balance sovereignty and community with the hope of attaining responsible independence. The mechanisms for resolving environmental disputes often sacrifice binding force in favor of cooperative efforts. While weak enforcement and limited applicability haunt these dispute mechanisms, the development of trade sanctions and/or fines opens new possibilities for future agreements.

North American countries currently have the framework to change a neighbor's behavior through any one of the discussed agreements. The wealth of procedure indicates a growing awareness of the environment's importance and an increased desire to encourage sustainable development. Improvements must be made in defining a Party's obligations to the environment and outlining the steps necessary to correct a nation's behavior. Yet, the great progress made in the last seventeen years must be recognized and respected if further agreements are to occur.

273. See, e.g., Samios, *supra* note 229.

274. Stenzel, *supra* note 219, at 478.

275. *Id.* at 467-68 (noting that Jay D. Hair, president of the National Wildlife Federation stated "the means of addressing environmental concerns are directly tied to economic development. If environmental progress is not to remain solely the property of affluent nations, developing nations must have their fair shot at progress.").