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Michael J. Kelly

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Michael J. Kelly*

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* Indiana University, B.A. 1990, J.D. 1994, Georgetown University, LL.M. in International & Comparative Law 1996. Mr. Kelly, formerly an attorney with the Indiana Department of Environmental Management, is currently the Director of Legal Research, Writing and Advocacy at Michigan State University's Detroit College of Law. The views expressed herein are solely those of the author.

## I. INTRODUCTION

The inherent conflict between freer international trade and greater protection of the environment has emerged during the last ten years as one of the most intractable problems of international law.[1] While increased trade presupposes a greater degree of natural resource exploitation and augmented manufacturing capacity, increased environmental protection conversely presupposes conservation of natural resources and stricter controls on industrial pollution. Thus, the two goals appear mutually exclusive and even contradictory; yet, a recent trade treaty has attempted to synthesize these goals and neutralize their harmful effects on each other.[2]

On August 12, 1992, the United States, Mexico, and Canada signed the North American Free Trade Agreement (NAFTA).[3] These parties negotiated the regional free trade pact to eliminate many of the tariffs restricting free trade between the three member states that exist under the General Agreement on Tariffs and Trade (GATT).[4] The participants created NAFTA as a response to the development of other regional trading blocs around the world, such as the European Community and Pacific Rim states.[5]

Nonetheless, because of the fear generated by the environmental and labor communities within the United States that NAFTA would spur excessive environmental degradation and job loss, the United States government negotiated side agreements specifically addressing environmental and labor issues.[6] The Clinton administration completed the side agreements initiated by the Bush administration, and Congress passed the NAFTA and side accords as a package deal, even though they are considered separate parallel agreements.[7]

This Article focuses on the North American Agreement on Environmental Cooperation (NAFTA Environmental Side Accord or Side Ac-

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1. C. FORD RUNGE, FREER TRADE, PROTECTED ENVIRONMENT: BALANCING TRADE LIBERALIZATION AND ENVIRONMENTAL INTERESTS 3-4 (1994).

2. *See* North American Free Trade Agreement, December 17, 1992, U.S.-Canada-Mexico, 32 I.L.M. 289 (1993) & 32 I.L.M. 605 (1993) [hereinafter NAFTA].

3. *Id.*

4. General Agreement on Tariffs and Trade, Oct. 30, 1946, 61 Stat. A3, 55 U.N.T.S. 187 [hereinafter GATT].

5. Richard L. Holman, *EC Moves Ahead on New Members*, WALL ST. J., Dec. 22, 1993, at A8.

6. The environmental and labor communities were key constituencies to the Democratic members of Congress who controlled both the House and the Senate. Ken Jennings & Jeffery W. Steagall, *Unions and NAFTA's Legislative Passage: Confrontation and Cover*, 21 LAB. STUD. J. 61, 63 (1996). As a result, NAFTA could have been lost without the side agreements in place. *Id.* at 65-67.

7. *Id.* at 62.

cord),[8] emphasizing the framework it establishes for bringing a complaint on environmental grounds.[9] Consideration is then given to the "workability" of the elaborate procedural process established by the NAFTA Environmental Side Accord.[10] Finally, the weaknesses of the prescribed methodology for bringing a complaint are highlighted, and several case studies noted.[11]

## II. BACKGROUND & NEGOTIATIONS

### *A. Movement Toward a NAFTA Environmental Side Accord*

The 1992-93 NAFTA debate polarized the United States. From an environmental perspective, much of the concern centered on Mexico and its lax enforcement regime.[12] The Bush administration's arguments that increased wealth in Mexico from NAFTA's implementation would create more revenue to enforce existing environmental laws and clean up the border region were not well presented and were largely ineffective.[13] On the other hand, the environmental community deftly presented its assertions with stark "worse-case scenarios;" and consequently, these assertions were quite persuasive:

> The debate over the NAFTA alone raised a number of trade-related environmental concerns, including: fears that expanded trade would result in pollution spillovers into the United States from increased industrial activity in Mexico; lower U.S. environmental standards and a loss of U.S. sovereignty as laws and regulations were "harmonized" at compromise or baseline levels; limitations on the ability of the United States to use trade measures in support of international environmental agreements; and marketplace disadvantages for U.S. facilities competing against plants located in "pollution haven" Mexico-resulting in job losses or downward pressure on U.S. environmental standards.[14]

In order to blunt this powerful, coordinated attack on NAFTA, the U.S. government was forced to address the environmental issues, but Canada

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8. North American Agreement on Environmental Cooperation, September 9-14, 1993, U.S.-Canada-Mexico, 32 I.L.M. 1480 [hereinafter NAFTA Environmental Side Accord].

9. *See infra* notes 12-25 and accompanying text.

10. *See infra* notes 26-149 and accompanying text.

11. *See infra* notes 150-89 and accompanying text. An in-depth analysis of the various domestic laws of the member states is beyond the scope of this study.

12. RUNGE, *supra* note 1, at 53.

13. Jennings & Steagall, *supra* note 6, at 63.

14. DANIEL C. ESTY, GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE 1-2 (1994).

and Mexico registered opposition to reopening NAFTA for discussion.[15] In order to save NAFTA without reopening it, all three countries agreed that a parallel treaty was the best alternative.[16] The fact that the U.S. government continued to negotiate the NAFTA Environmental Side Accord is a testament to the effectiveness of the arguments presented by the environmental movement to the American public as well as to members of Congress.

### *B. Completion of Negotiations Between Mexico, Canada, and the United States*

In March, 1993, President Clinton fulfilled a campaign promise by recommencing negotiations on the NAFTA Environmental Side Accord.[17] The negotiations proved long and difficult because the United States initially proposed strong measures.[18] The United States-Canadian Free Trade Agreement, the precursor to NAFTA, did not contain provisions for trade sanctions, and, thus, Canada was indignant at the thought of allowing them in the NAFTA Environmental Side Accord, even though Canada realized that the proposed enforcement provisions were primarily aimed at Mexico.[19]

Mexico also opposed the possibility of sanctions, claiming these sanctions would infringe upon sovereignty.[20] Within the United States, congressional Republicans were predictably against sanctions as well, while congressional Democrats threatened to kill NAFTA if the sanction provisions were not included.[21] In order to save NAFTA, Mexico eventually

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15. Michael J. Kelly, *Environmental Implications of the North American Free Trade Agreement*, 3 IND. INT'L & COMP. L. REV. 361, 388-89 (1993).

16. Kenneth Berlin, *The North American Free Trade Agreement and the Environment: A New Paradigm for Environmental Protection in North America, in* NAFTA CRITICAL BUSINESS AND LEGAL ISSUES 1 (1994).

During the negotiation of NAFTA, the impact of trade on the environment became an issue of great importance for the first time ever in a trade negotiation. Ultimately, it forced the parties to NAFTA to reopen their negotiations after the signing of NAFTA and negotiate a specific side agreement designed to alleviate negative impacts of trade on the environment.

17. Kal Raustiala, *The Political Implications of the Enforcement Provisions of the NAFTA Environmental Side Agreement: The CEC as a Model for Future Accords*, 25 ENVTL. L. 31, 36-38 (1995).

18. Daniel B. McGraw, Jr., *Trade Agreements, available in* WESTLAW, C990 ALI-ABA 193, 201 (May 4, 1995). Such strong measures include a completely independent Secretariat and trade sanctions for failure to enforce environmental laws. *Id.*

19. Raustiala, *supra* note 17, at 37-38.

20. *Id.* at 38.

21. *Id.* The U.S. environmental lobby was not silent on this issue by any means. *Id.* They continued to push hard for meaningful enforcement provisions, and by April, 1993, some of the Non-Governmental Organizations (NGOs) had come to support

accepted the limited sanctions regime that now exists in the NAFTA Environmental Side Accord.[22] Canada, while having succeeded in keeping the sanctioning power inert as applied to itself, agreed to allow domestic Canadian courts to impose fines, rather than grant this power to a supranational body.[23]

Consequently, by August 13, 1993, only one day to the year after President Bush signed the original NAFTA, a draft text for the Environmental Side Accord emerged that was acceptable to all parties and became part of the NAFTA package.[24] It is the first document of its kind anywhere in the world, and for that it should be given due recognition. The agreement that emerged is, above all, a document intended to ensure the enforcement of environmental laws.[25]

As we shall see, however, the chasm between the treaty's intended goals and the achievement of those goals is an exceedingly wide one. Whether NAFTA can bridge this chasm is a question that will determine its future effectiveness. Nonetheless, that the Agreement was actually negotiated and agreed upon is a significant milestone and represents movement in the right direction.

## III. TEXTUAL PROVISIONS & WEAKNESSES

### *A. Parts One and Two*

The preamble to the NAFTA Environmental Side Accord contains flourishing rhetoric acknowledging the importance of strong environmental laws and their enforcement, as well as the links between environmental goals and international trade.[26] The objectives in Part One go on to discuss the promotion of sustainable development and increased cooperation between the Parties, avoidance of new trade barriers, compliance

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NAFTA in principle. *Id.* Capitalizing on this split, President Clinton obtained their commitment to support passage of the NAFTA package if the proposed trinational panel envisioned under the NAFTA Environmental Side Accord had the power to arbitrate environmental disputes. *Id.* at 37. Mexico eventually caved in under this pressure and that exerted by House Democrats. *Id.* at 38.

22. *Id.* at 38.

23. *Id.*

24. *Id.*

25. *Id.*

26. NAFTA Environmental Side Accord, *supra* note 8, at 1482.

with environmental regulations, and promotion of pollution prevention policies.[27]

Mandatory language begins to emerge in Part Two.[28] For instance, Article 3 recognizes "the right of each Party to establish its own levels of domestic environmental protection," but at the same time mandates that "each Party shall ensure that its laws and regulations provide for high levels of environmental protection and shall strive to continue to improve those laws and regulations."[29] Although this is general language, it arguably confronts the potential problem of downward mobility by attempting to address the creation of pollution havens,[30] one of the primary fears of the American environmental community under NAFTA.[31]

Article 4 reflects U.S. public access laws by requiring the publication of environmental laws and regulations and encouraging advance publication of proposed measures together with public comment periods.[32] Article 5 provides that the Parties shall "effectively" enforce their own, but not each others', environmental laws, and ensures that "judicial, quasi-judicial or administrative enforcement proceedings" are available to provide remedies.[33] These articles are buttressed by procedural guarantees of "fair, open and equitable" proceedings that comply with due process of law in Article 7.[34] In addition, they are open to the public, safeguard responsive pleadings, and should encourage uncomplicated procedures.[35]

Article 6, however, ultimately has a greater bearing on a private party's ability to bring a case than any other article in Part Two.[36] It requires that "[e]ach Party shall ensure that interested persons may request the Party's competent authorities to investigate alleged violations of its environmental laws and regulations and shall give such requests due consideration in accordance with law."[37] Of course, the application of the "due consideration in accordance with law" clause may qualify the impact of this provision, giving a broader group of interested persons standing under one Party's law than they have under another's. The language in the following section supports this assertion. It reads: "Each Party shall

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27. *Id.* at 1483.
28. *Id.*
29. *Id.*
30. *See id.*
31. RUNGE, *supra* note 1, at 54.
32. NAFTA Environmental Side Accord, *supra* note 8, at 1483.
33. *Id.* at 1484.
34. *Id.* at 1484-85.
35. *Id.* at 1484.
36. *See id.*
37. *Id.*

ensure that *persons with a legally recognized interest under its law* in a particular matter *have appropriate access* to . . . proceedings . . . ."[38]

Again, the remedies are qualified, but extensive. The third section of Article 6 breaks them out individually:

> Private access to remedies shall include rights, *in accordance with the Party's law*, such as: (a) to sue *another person under that Party's jurisdiction* for damages; (b) to seek sanctions or remedies such as monetary penalties, emergency closures or orders to mitigate the consequences of violations of its environmental laws and regulations; (c) to request the competent authorities to take *appropriate* action to enforce that Party's environmental laws and regulations in order to protect the environment or to avoid environmental harm; or (d) to seek injunctions where a person suffers, or may suffer, loss, damage or injury as a result of conduct by another person under that Party's jurisdiction contrary to that Party's environmental laws and regulations or from tortious conduct.[39]

This section raises two concerns. First, if any of these proposed remedies does not exist under the relevant Party's domestic law, then they are not available to private individuals because NAFTA prohibits a Party from creating a law that would provide for a domestic right of action against another NAFTA Party.[40] Moreover, for example, only a Mexican citizen can bring a private action under Mexican law against a Mexican industry; likewise for Canadian and U.S. citizens. Thus, a Texas farmer's crop decimated by acid rain traced to a Mexican industrial plant is remediless under Article 6. Furthermore, subsection (c) is a bogus remedy because a "request" for "appropriate" enforcement action is potentially meaningless in the heavily bureaucratic states that currently comprise the NAFTA nations.

### *B. Part Three*

Part Three of the NAFTA Environmental Side Accord gives private groups the opportunity to ensure enforcement.[41] Nonetheless, as one author stated, the political realities cannot be extricated from the legal process:

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38. *Id.* (emphasis added).

39. *Id.* (emphasis added).

40. *Id.* at 1494. Under Article 38, a private individual does not have a right of action against another Party: "No Party may provide for a right of action under its law against any other Party on the ground that another Party has acted in a manner inconsistent with this Agreement." *Id.*

41. *Id.* at 1485-89.

> [T]he parties retain the power to impose political limitations on the complaint process. However, here the political controls are more subtle. The council and secretariat are creatures of the three governments, which select the members of the council and then, through the council, the executive director of the secretariat, who in turn appoints the staff of the Secretariat. Whether an NGO complaint that did not have the support of a member government would be allowed into the process is doubtful.[42]

Structurally, Part Three begins by establishing the Commission for Environmental Cooperation (Commission) as the organ for implementing the Side Accord.[43] The Side Accord divides the Commission into three functional institutions: a Council, a Secretariat, and a Joint Public Advisory Committee.[44]

1. The Institutions

Cabinet-level representatives of the Parties comprise the Council, which meets annually unless a party specially requests an additional meeting.[45] Decisions are always made public and by consensus unless otherwise agreed or provided in the Side Accord.[46] As the Council's mandate is broader in scope than either of the other institutions,[47] it serves as the governing body of the Commission and essentially encourages enforcement and compliance under the environmental laws and regulations of the Parties.[48]

The Secretariat serves largely as the executive arm of the Commission under the Council, establishing annual reports and budgets as well as providing technical, administrative, and operational support,[49] and technically remains free from the instructions of any Party's government.[50] Although the Council envisioned the Secretariat to be the active suprana-

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42. Jack I. Garvey, *Trade Law and Quality of Life: Dispute Resolution under the NAFTA Side Accords on Labor and the Environment*, 89 AM. J. INT'L L. 439, 446 (1995).

43. NAFTA Environmental Side Accord, *supra* note 8, at 1485.

44. *Id.*

45. *Id.*

46. *Id.* at 1484-85.

47. *Id.* at 1485-87. The mandate allows the Council to consider and develop nonbinding recommendations on a wide array of issues such as comparability of techniques and methodologies for data gathering and analysis; pollution prevention; scientific environmental research and technology development; transboundary environmental issues; harmful exotic species; conservation of wild flora, fauna, and endangered species; environmental compliance and enforcement approaches; and eco-labelling. *Id.* at 1485-86.

48. *Id.* at 1486.

49. *Id.* at 1487.

50. *See id.* (Article 11: Secretariat Structure and Procedures and Article 12: Annual Report of the Commission).

tional body of the Commission, the Council serves as a brake on the Secretariat's activities; and thus, the national governments avoided relinquishing unfettered latitude on trade-environmental matters.

The Joint Public Advisory Committee is a partial tip of the hat to the idea of public participation. Its mandate involves providing the Council and Secretariat with advice on any matter within the scope of the NAFTA Environmental Side Accord.[51] An equal number of members from each Party selected by the Party or, at the Party's option, by its National Advisory Committee comprises the Joint Public Advisory Committee.[52] Members of the public and Non-Governmental Organizations (NGOs) comprise the National Advisory Committee, but the Side Accord does not require the Parties to bring these committees into existence.[53] Consequently, it is possible for Canada's representatives to be environmental engineers and professors, America's representatives members of environmental NGOs and public citizens, and Mexico's representatives members of industrial associations and trade specialists.

2. The Petition Process

Article 14 contains the key provisions of the NAFTA Environmental Side Accord that allow for direct citizen involvement in the enforcement process. This article has a promising introductory tone, which proves upon analysis to be potentially fleeting. It begins:

> The Secretariat may consider a submission from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law, if the Secretariat finds that the submission:
>
> (a) is in writing in a language designated by that Party in a notification to the Secretariat;
>
> (b) clearly identifies the person or organization making the submission;
>
> (c) provides sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based;
>
> (d) appears to be aimed at promoting enforcement rather than at harassing industry;
>
> (e) indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response, if any; and

51. *Id.* at 1489.
52. *Id.*
53. *Id.*

(f) is filed by a person or organization residing or established in the territory of a Party.[54]

Note the extensive discretionary authority given the Secretariat. First, the Secretariat has the option simply to not consider a submission without even justifying its decision.[55] Second, if the Secretariat does decide to consider a submission, it may do so only if the submission successfully jumps the hurdles laid out in subsections (a) through (f) of Article 14.[56] Third, the procedural hurdles are riddled with discretionary findings such as the "clearness" of the submitter's identification, the "sufficiency" of the information, the "appearance" of harassment, and the "indicativeness" of communication to the relevant Party.[57] A valid substantive submission could easily fail on any of these procedural grounds.

Moreover, NAFTA limits submissions by an NGO or person to the territories in which they are located.[58] For instance, an Arizona environmental group cannot submit against Mexico for allowing raw sewage to drain into the Rio Grande, only a Montana citizens' coalition can submit against the United States Department of the Interior for allowing overgrazing on the badlands, and only Quebec fishermen can submit against the Federal Environmental Ministry for allowing toxic discharge into fishing waters in the Gulf of Maine. The practical effect, therefore, precludes transboundary pollution submissions.

If the submission is lucky enough to pass the initial battery of hurdles, it then proceeds to the next section wherein the Secretariat must determine whether the submission merits requesting a response from the Party. Here, the submission encounters another obstacle course of guidelines which the Secretariat "shall" consider in making its determination:

In deciding whether to request a response, the Secretariat shall be guided by whether: (a) the submission alleges harm to the person or organization making the submission; (b) the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of this Agreement; (c) private remedies available under the Party's law have been pursued; and (d) the submission is drawn exclusively from mass media reports.[59]

Should the Secretariat decide, again at its discretion, to request a response, it then forwards the submission to the Party.[60] Within thirty days, or sixty if notification occurs, the Party advises the Secretariat on whether the matter is the subject of pending litigation (in which case the submission dies) and any other matter it wishes the Secretariat to

54. *Id.* at 1488.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*

know.[61] Article 15 then comes into play, and eventually, the Secretariat decides whether the submission warrants the development of a "factual record," although the Side Accord imposes no time limit.[62] The Secretariat must then secure the permission of the Council to proceed by a two-thirds vote.[63]

After securing the Council's permission, the Secretariat develops a draft factual record, considering any information furnished to it by a Party, but maintaining the option of refusing to consider information furnished by NGOs, persons, a Joint Public Advisory Committee, or experts.[64] Upon completion of the draft factual record, the Secretariat submits it to the Council, then accepts comments from any Party (but no one else), makes appropriate revisions, and submits a final factual record to the Council.[65] The Council may then decide, at its discretion and by a two-thirds vote, whether to make the final factual record publicly available.[66]

Of course, making "the final factual record publicly available" does not require the Council to actually publish the factual record, only to make it available. The Council's discretion means that, in practice, an interested NGO would have to find and publish the factual record at its own expense in order to generate the public pressure necessary to force a Party to enforce its environmental laws and regulations. Otherwise, the "publicly available" documentary finding would simply languish in a bureaucratic office. Even to contemplate publicizing the factual record, an NGO must hope that the Council decides to exercise its discretion and make the finding publicly available. This falls short of even "declaratory relief" usually granted by common law courts.

Beyond these obviously inadequate procedures, the petition process goes no further.[67] Articles 14 and 15 only provide for redress by a pri-

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61. *Id.*
62. *Id.*
63. *Id.* at 1488-89.
64. *Id.*
65. *Id.*
66. *Id.*
67. "Critics have questioned the CEC's effectiveness under Articles 14 and 15 to reverse government actions that could negatively impact the region's environment." *NAFTA: Commission to Decide on Petition Alleging U.S. Cuts in ESA Funding Violate Side Pact*, 1995 Daily Env't Rep. (BNA) No. 155, at D-9 (August 11, 1995) [hereinafter *Commission to Decide*]. "CEC representatives respond that most of the trinational organizations' success will lie on behind-the-scenes pressures to each government." *Id.*

vate party against its own country for failure to enforce its environmental laws. If a private party wants to challenge another country on similar grounds, it has two options. The first option is to persuade an NGO from the other country to bring the action and then join in as one of several submitters.[68] The second option is for the private party to persuade its own country to begin the dispute resolution process provided for in Part Five of the NAFTA Environmental Side Accord.

### *C. Part Five*

The Side Accord handles disputes differently between NAFTA Parties than the private party petition process. Part Five establishes the procedures for dispute resolution between the Parties, which can ultimately result in an arbitration.[69]

#### 1. Disputes Between Parties

Arguendo, should an NGO be successful in persuading its government to bringing a case against another NAFTA Party, the procedure for bringing the suit begins with Article 22. Interestingly, this provision substantially increases the threshold requirement for beginning the process. The Party bringing the suit must allege that "there has been a *persistent pattern of failure* by that other Party to effectively enforce its environmental laws."[70]

This "persistent pattern" standard is much more difficult to meet than the nonenforcement standard established under the private party petition process. The underlying rationale for raising the standard rests on the premise that not all countries are at similar stages of developing environmental law, nor do they possess sufficient resources to ensure the effective enforcement of stringent environmental legal regimes.[71] Because the arbitration process can potentially yield monetary penalties or trade sanctions, the Side Accord substantially increased the threshold requirement to begin this process.

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68. This was done for the Endangered Species Act submission in 1995. Cheryl Hogue, *NAFTA: Commission Will Not Investigate Claim that U.S. Failing to Enforce ESA*, 1995 Daily Env't Rep. (BNA) No. 187, at D-15 (Sept. 27, 1995). "Five environmental groups in the United States and Mexico on July 5 asked the Commission on Environmental Cooperation (CEC) . . . to investigate their claims . . . . Filing the petition for the investigation were the Biodiversity Legal Foundation, Consejo Asesor Sierra Madre, Forest Guardians, Greater Gila Biodiversity Project, and the Southwest Center for Biological Diversity." *Id.*

69. NAFTA Environmental Side Accord, *supra* note 8, at 1490-94.

70. *Id.* at 1490 (emphasis added).

71. Kenneth Berlin & Jeffrey M. Lang, *Trade and the Environment*, 16 WASH. Q. 35, 46 (1993).

The process begins when the alleging Party submits written requests for consultations to the offending Party and the Secretariat.[72] If consultations do not resolve the matter within sixty days,[73] a special session of the Council may be requested. The Council can, at its discretion, convene and discuss the matter.[74] If it does convene, the Council may study the matter, use mediation or conciliation, or make recommendations to resolve the dispute, which may be made public if the Council so decides by a two-thirds vote.[75] Article 23 states: "Where the Council decides that a matter is more properly covered by another agreement or arrangement to which the consulting Parties are party, it shall refer the matter to those Parties for appropriate action in accordance with such other agreement or arrangement."[76]

The text of this conditional mandate suggests that if a separate international agreement exists between the two disputing parties concerning the environmental matters at issue, their proper recourse is through the mechanics of that agreement rather than through the NAFTA Environmental Side Accord. This interpretation is buttressed by Article 40, which states that "[n]othing in this Agreement shall be construed to affect the existing rights and obligations of the Parties under other international environmental agreements, including conservation agreements, to which the Parties are party."[77]

Consequently, if a dispute arises concerning anadromous fishing stocks in the Gulf of Maine between Canada and the United States, and the United States has ratified the Law of the Sea Convention,[78] that treaty would govern resolution of the dispute. Article 40 arguably also broadens the scope of NAFTA's Article 104. Under the Article, the Parties agreed that in the event of an inconsistency between NAFTA and the Convention on International Trade in Endangered Species of Wild Fauna and Flora,[79] the Montreal Protocol on Substances that Deplete the Ozone

72. NAFTA Environmental Side Accord, *supra* note 8, at 1490.

73. *Id.* at 1490. Note that the time period for consultations may be other than 60 days if the consulting Parties agree. *Id.*

74. *Id.* If it decides to convene, the Council must do so within 20 days. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 1494.

78. United Nations Conference on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1261. UNCLOS III has extensive environmental provisions. Anadromous stocks are governed by Article 66. *Id.* at 1282.

79. Convention on International Trade in Endangered Species of Wild Fauna and Flora, March 3, 1973, 993 U.N.T.S. 243.

Layer,[80] or the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal,[81] those environmental agreements would prevail, provided that the Parties use the least trade-restrictive alternative to resolve the inconsistency.[82]

2. The Arbitration Process

Ultimately, if the dispute cannot be settled by any other means, it can go to arbitration. Although the arbitration process is usually binding by all Parties to the agreement, it is in reality "more akin to a declaratory judgment procedure than arbitration."[83] Under Article 24, if the Council cannot resolve the situation within sixty days, a Party may request formation of an arbitration panel.[84] The Council must convene the panel if the Party's request receives a two-thirds vote of the Council.[85]

Another procedural hurdle arises at this point. The panel will only be convened when a complained-against Party's alleged consistent failure to "effectively enforce its environmental law relates to a situation involving workplaces, firms, companies or sectors that produce goods or provide services: (a) traded between the territories of the Parties; or (b) that compete."[86] If the Party does not surmount this hurdle, the process goes no further. It is, in effect, an issue of subject matter jurisdiction. This provision ostensibly ensures that the dispute links a Party's environmental concerns to only trade issues.

Article 25 establishes the roster of potential panelists from which the Council may draw the arbitral panel.[87] The roster is comprised of people who "have expertise or experience in environmental law or its enforcement, or in the resolution of disputes arising under international agree-

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80. Montreal Protocol on Substances that Deplete the Ozone Layer, *done on* Sept. 16, 1987, 26 I.L.M. 1541.

81. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, *done on* Mar. 22, 1989, 28 I.L.M. 649.

82. NAFTA, *supra* note 2, at 297-98.

83. Garvey, *supra* note 42, at 446. The arbitration process resembles a declaratory judgment procedure on several fronts. The most notable aspect is that "[t]he arbitration panel's report is only declarative on the merits of the issue," and does not produce a conclusive determination on all issues of the dispute. *Id.* The parties are expected to take the panel's report and begin mediation or negotiation sessions for the purpose of finalizing an action plan to resolve the issues in the dispute based upon the panel's findings. *Id.*; *see* NAFTA Environmental Side Accord, *supra* note 8, at 1492.

84. NAFTA Environmental Side Accord, *supra* note 8, at 1492.

85. *Id.*

86. *Id.*

87. *Id.* at 1491. The Council, via a consensus selection process, is responsible for creating and maintaining a roster of 45 people to be panelists, each with a term of service of three years. *Id.*

ments, or other relevant scientific, technical or professional expertise or experience."[88] The panel selection process under Article 27 is rather convoluted, and is somewhat similar to the jury selection process in common law jurisdictions.

The panel consists of five members, and the chair is the first member selected.[89] Within fifteen days of the Council's vote to convene the panel, the Parties must agree on the chair.[90] If that is not possible, then one of the disputing Parties is chosen by lot to select the chair, but the chair selected cannot be a citizen of that Party.[91] Within fifteen to thirty days of chair selection, each Party chooses two panelists who are citizens of the other disputing Party.[92] However, the panelists are not required to be members of the roster; Article 27 provides only that "[p]anelists shall normally be selected from the roster."[93] If any other Party objects to the proposal of a non-roster panelist, it may exercise a peremptory challenge to veto the proposed panelist.[94]

Under this selection process, a panel hearing a United States-Mexico dispute in which the United States is the complaining Party could conceivably consist of an American industrial processing expert, an American international mediation attorney, a Mexican environmental lawyer, a Mexican ecosystem biologist, and a Swiss chairperson who is an international trade negotiator. Alternatively, the panel could be made up of an American chemistry professor, an American corporate environmental counsel, a Mexican law professor, a Mexican international trade specialist, and a Japanese chairperson who is an environmental engineer. In short, the possible combinations are as varied as a Rubic's Cube.

Unless the "Parties otherwise agree within 20 days after the Council's vote to convene the panel," the panel's default standard of review is the following:

> To examine, in light of the relevant provisions of the Agreement, including those contained in Part Five, whether there has been a persistent pattern of failure by

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88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* There is no NAFTA equivalent of a *Batson* challenge for these peremptory challenges; because the court based *Batson* on racial discrimination not allowed under the U.S. Constitution, these considerations do not have extraterritorial application. *See* Batson v. Kentucky, 476 U.S. 79 (1986) (holding State's use of peremptory challenges subject to scrutiny under the Equal Protection Clause).

the Party complained against to effectively enforce its environmental law, and to make findings, determinations and recommendations in accordance with Article 31(2).[95]

The arbitral panel may seek any "information and technical advice from any person or body that it deems appropriate," subject to the agreement of the Parties.[96] One hundred eighty days after the panel has been selected, the panel must issue an initial report which contains findings of fact, a determination of whether a persistent pattern of failure to enforce environmental laws has occurred, and if so, the panel's recommendations for the resolution of the dispute, "which normally shall be that the Party complained against adopt and implement an action plan sufficient to remedy the pattern of non-enforcement."[97]

Any disputing Party has thirty days to submit written comments on the initial report, which may persuade the panel to reconsider its report and make further examinations.[98] The panel presents its final report to the Parties within sixty days after the initial report, and the Parties then forward the final report to the Council within fifteen days of receipt.[99] The Council has an affirmative duty to "publish" the final report within the subsequent five days.[100]

3. Available Remedies

If the panel determines that a "persistent pattern of failure" to enforce environmental laws exists, the Parties have the option of agreeing "on a mutually satisfactory action plan" to address the problem, "which normally shall conform with the determinations and recommendations of the panel."[101] Under Article 34(1)(a) and Article 34(2), if the Parties cannot reach agreement on an action plan, a Party may request that the panel reconvene between sixty and one hundred twenty days from the issuance of the final report.[102] When the panel reconvenes, it first decides whether the "action plan proposed by the Party complained against is sufficient to remedy the pattern of non-enforcement."[103]

The panel approves the action plan if it deems it sufficient and then the Secretariat approves it.[104] If the panel does not consider it suffi-

95. NAFTA Environmental Side Accord, *supra* note 8, at 1491-92.
96. *Id.* at 1492.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at 1493.
104. *Id.*

cient, however, the Secretariat establishes an action plan "consistent with the law of the Party complained against."[105] The Secretariat also has the option of imposing a monetary enforcement assessment under Annex 34[106] within ninety days after the panel reconvened.[107] The imposition of such a penalty, however, is not mandatory.[108]

Under Article 34(1)(b) and Article 34(3), if the Parties are unable to agree on whether an action plan is being properly implemented, either Party may reconvene the panel after 180 days from the establishment of the action plan.[109] The panel must then determine whether the action plan is being fully implemented.[110] If it is, then that is the end of the matter.[111] If it is not being fully implemented, however, "the panel imposes a monetary enforcement assessment in accordance with Annex 34 . . . . [w]ithin 60 days after it has been reconvened."[112] The Annex then mandates that the panel must "provide that the Party complained against shall fully implement" the action plan, "shall pay any monetary enforcement assessment," and that the panel's provision "shall be final."[113] This part is not optional, but rather a form of mandatory sentencing.[114]

If a Party fails to comply with the order to pay a monetary enforcement assessment, then NAFTA benefits may be suspended unilaterally by the complaining Party against the offending Party under Article 36 and Annex 36[115] in an amount no greater than that equal to the original monetary enforcement assessment.[116]

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105. *Id.* Note that the language here is normative: "shall establish." *Id.*

106. *See infra* notes 125-34 and accompanying text for a discussion of the imposition of a monetary enforcement assessment under Annex 34.

107. NAFTA Environmental Side Accord, *supra* note 8, at 1493. Note that the language here is precatory: "may." *Id.*

108. *Id.*

109. *Id.* at 1492-93.

110. *Id.* at 1493.

111. *Id.*

112. *Id.* Note that here the language is normative, "shall impose a monetary enforcement assessment," as opposed to the earlier precatory language used for a penalty imposition. *Id.*

113. *Id.* After 180 days from the panel's determination that a Party is not fully implementing its action plan, the complaining Party may request that the panel reconvene to make a similar determination. *Id.* This acts as a follow-up mechanism to ensure implementation proceeds. *Id.*

114. *Id.*

115. See *infra* notes 135-44 and accompanying text for a discussion of Annex 36.

116. NAFTA Environmental Side Accord, *supra* note 8, at 1493. Several escape

When the complaining Party suspends benefits, the panel reconvenes to determine whether the Party paid the equivalent of the monetary enforcement assessment or whether it fully implemented the action plan.[117] If the Party fully implements the action plan, it is no longer subject to NAFTA benefit suspension.[118] The offending Party may also have its penalty reduced if it believes that the suspension of benefits is "manifestly excessive."[119] In these cases, the panel reconvenes at the request of the Party complained against and makes its determination within forty-five days.[120]

Remedies not specifically available, as noted earlier, are enforcement by one Party's authorities of environmental laws in the territory of another Party,[121] and a right of action under the domestic law of one Party to reach another Party "on the ground that another Party has acted in a manner inconsistent with this Agreement."[122] Consequently, Articles 33 through 36 provide the remedies available to the complaining Party.[123]

### *D. The Annexes*

The operation of the Annexes to the NAFTA Environmental Side Accord directly affect the imposition of the above-mentioned remedies, their effectiveness, and their procedural application.[124] Annex 34 provides that no monetary enforcement assessment shall be "greater than .007 percent of [the] total trade in goods [not including services] between the Parties during the most recent year for which data are available."[125] In essence, this is a fluctuating cap on the maximum penalty that can be imposed by an arbitral panel.[126]

Annex 34 also lays out a guideline type of formula for determining the amount of a monetary enforcement assessment which the arbitral panel is required to consider:

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hatches have been built into this Article, however, to allow the offending Party to get out from under the trade benefit suspension either completely or partly. *Id.*

117. *Id.* The panel makes its determination within 45 days. *Id.*

118. *Id.*

119. *Id.* at 1494. "Manifestly excessive" will likely be construed to mean that the suspension of benefits is greater than the monetary enforcement assessment issued by the panel.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 1492-93. *See supra* notes 102-20 and accompanying text (discussing Articles 34 and 36).

124. *See* NAFTA Environmental Side Accord, *supra* note 8, at 1495. "The Annexes to this agreement constitute an integral part of the agreement." *Id.* at 1492-93.

125. *Id.* at 1496.

126. *See id.*

> In determining the amount of the assessment, the panel shall take into account: (a) the pervasiveness and duration of the Party's persistent pattern of failure to effectively enforce its environmental law; (b) the level of enforcement that could reasonably be expected of a Party given its resource constraints; (c) the reasons, if any, provided by the Party for not fully implementing an action plan; (d) efforts made by the Party to begin remedying the pattern of non-enforcement after the final report of the panel; and (e) any other relevant factors.[127]

The factors to be taken into account could be characterized as mitigating factors akin to those that a U.S. criminal court takes into consideration when determining a guilty defendant's sentence.[128] For instance, (b) plays to Mexico's favor.[129] Mexico's resources are limited and understandably prioritized such that environmental enforcement ranks relatively low compared to economic development policies and infrastructure construction. While (c) and (d) potentially play to each Party's favor, (a) could cut into any Party's arguments equally because it is determined from the final report.[130] Of course, (e) is an avenue for the arbitral panel to justify any monetary enforcement assessment that it establishes.[131]

All collected monetary enforcement assessments go into a fund controlled by the Council and are spent to improve the environment or enhance environmental law enforcement in the territory of the Party complained against.[132] Thus, in a very real sense, the money never leaves the country. It is put back into the offending nation and spent for environmental purposes.[133] In this way, the Commission could be accused of reprioritizing that nation's expenditure on domestic programs, thereby interfering with that nation's free exercise of sovereignty.[134]

Annex 36B lays out the regime for collection of the monetary enforcement assessment through suspension of NAFTA benefits when the offending Party will not pay the assessment:

> Where a complaining Party suspends NAFTA tariff benefits in accordance with this Agreement, the Party may increase the rates of duty on originating goods of the Party complained against to levels not to exceed the lesser of: (a) the rate that was applicable to those goods immediately prior to the date of entry into force of the NAFTA, and (b) the Most-Favored-Nation rate applicable to those goods on

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127. *Id.*
128. *Id.*
129. *See id.*
130. *See id.*
131. *See id.*
132. *Id.* Note that the expenditure must be consistent with the law of the Party complained against. *Id.*
133. *Id.*
134. *See id.*

the date the Party suspends such benefits, and such increase may be applied only for such time as is necessary to collect, through such increase, the monetary enforcement assessment.[135]

It should be noted that the collection in increased tariffs accrue to the benefit of the complaining Party.[136] The monies collected under this Annex are not handed over to the Council's fund for redistribution into the offending country for environmental purposes.[137] The monies remain with the complaining Party.[138] Thus, it is in the offending Party's best interest to pay the original monetary enforcement assessment to ensure that the money comes back into the country.[139]

Annex 36B does contain the caveat that the complaining Party "shall first seek to suspend benefits in the same sector or sectors as that in respect of which there has been a persistent pattern of failure by the Party complained against to effectively enforce its environmental law."[140] The provision that if the complaining Party considers it impracticable or ineffective to suspend benefits in the same sector it may suspend benefits in other sectors, however, undermines this caveat.[141]

Annex 36A is a special one, pertaining only to Canada.[142] Under this Annex, any panel determination that Canada must pay a monetary enforcement assessment or that it has failed to fully implement an action plan, must be filed by the Commission in a Canadian court within 180 days of the determination.[143] When filed, the determination becomes an order of the court, and a subsequent court order to enforce the panel determination is not subject to review or appeal.[144]

Annex 41 contains many provisions also pertaining only to Canada.[145] The most important underlying principle, however, is that each Canadian province must separately succeed to the NAFTA Environmental Side Accord.[146] The Annex requires each province to sign the Canadian Intergovernmental Agreement.[147] Canadian Environment Minister, Sheila Copps, explained that "[i]n Canada, the provinces have jurisdiction in environmental matters, requiring the federal government to negotiate

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135. *Id.* at 1496-97.
136. *Id.*
137. *Id.*
138. *Id.*
139. *See id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* at 1497-98.
146. *Id.*
147. *Id.*

with each province on most environmental issues that don't involve federal lands."[148] Alberta has already stepped forward and signed the agreement.[149]

## IV. CASE STUDIES & APPLICATIONS

To date, there have been no arbitrations between Parties. There have been, however, three petitions brought under Articles 14 and 15.[150] The first two, brought mainly by American environmental groups, failed to surmount initial procedural hurdles.[151] The third, brought exclusively by Mexican NGOs, has cleared the Article 14 inquiries and triggered an investigation by the Secretariat.[152] The results of that investigation have yet to be determined. A short summary of the three cases follows, including a brief analysis of their respective arguments and the Secretariat's legal reasoning.

### *A. The Endangered Species Act (ESA)[153] Case*

The ESA case was the first petition to be filed with the Secretariat under the procedures set forth in Articles 14 and 15.[154] On July 5, 1995, Earthlaw, an NGO at the University of Denver College of Law, filed a submission on behalf of five environmental groups in the United States and Mexico.[155] It asserted that an unrelated provision attached to a mili-

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148. *NAFTA: Alberta Becomes First Canadian Province to Sign Environmental Cooperation Accord*, 25 Daily Env't Rep. (BNA) No. 162, at D-13 (Aug. 22, 1995).

> The Canadian Intergovernmental Agreement enables signatory provinces and territories to fully participate in the implementation, management, and further elaboration of the [NAFTA Environmental Side Accord], including cooperative consultations, evaluations, and dispute resolution. In addition, signatories will be able to initiate discussions and consultations on enforcement practices in Mexico and the United States . . . . However, the provisions of the [NAFTA Environmental Side Accord] do not come into effect until provinces with a combined gross domestic product of 55 percent sign onto the Canadian Intergovernmental Agreement.

*Id.*

149. *Id.* Canada consists of 10 provinces and 2 territories.

150. *See infra* notes 154-89.

151. *See infra* notes 154-79.

152. *See infra* notes 180-89.

153. 16 U.S.C. §§ 1531-1544 (1994).

154. *Commission to Decide*, *supra* note 67, at D-9.

155. Jay Tutchton, *The Citizen Petition Process Under NAFTA's Environmental Side Agreement: It's Easy to Use, but Does it Work?*, 26 Envtl. L. Rep. (Envtl. L. Inst.)

tary appropriations bill by Senator Hutchison (R-Texas) included "a provision that suspended listings of threatened and endangered species and designations of critical habitat under the ESA."[156] This provision is referred to as the ESA Moratorium.[157]

The NGO's submission alleged that the ESA Moratorium was a failure by the United States to enforce its environmental law.[158] Their underlying rationale for this argument rested on a narrow reading of Article 3, which recognizes "the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental laws and regulations."[159] Relying on Arizona case law, holding that the ESA Moratorium did not constitute an amendment of the statute, the NGOs asserted that "the United States had not modified or amended the ESA through the ESA Moratorium; rather Congress had simply suspended the Act's enforcement."[160]

In an opinion letter dated September 25, 1995, the Secretariat did not agree with this characterization.[161] After concluding that the submission met all of the initial procedural hurdles laid out in Article 14(1), the Secretariat moved on to Article 14(2) considerations to determine if the submission warranted the requested response from the United States.[162] It was decided that the submission failed on this issue, and a response was not requested:

> The enactment of legislation which specifically alters the operation of pre-existing environmental law in essence becomes part of the greater body of environmental laws and statutes on the books. This is true even if pre-existing law is not amended or rescinded and the new legislation is limited in time. The Secretariat therefore cannot characterize the application of a new legal regime as a failure to enforce an old one. . . . For the foregoing reasons, the Secretariat will not request a response from the government of the United States of America.[163]

Earthlaw and the other submitters were upset with the result, and identified a potential loophole flowing from the opinion's reasoning. The "legislative exception" that the NGOs criticized was gleaned from the

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10018, 10025 n.51 (Jan. 1996).

156. Hogue, *supra* note 68, at D-15.

157. *Id.*

158. Tutchton, *supra* note 155, at 10025 n.51.

159. *Id.* (quoting NAFTA Environmental Side Accord, *supra* note 8, at 1483).

160. *Id.*

161. *Commission on Environmental Cooperation Opinion Letter on Petition Regarding Application of NAFTA Side Accord to Suspension of ESA Listings under FY 95 DOD Supplemental Funding Dated Sept. 25 (Text)*, 1995 Daily Env't Rep. (BNA) No. 187, at D-33 (Sept. 27, 1995). Victor Lichtinger, the Secretariat's Executive Director, wrote the letter. *Id.*

162. *Id.*

163. *Id.*

following statements contained in the Secretariat's opinion letter disposing of the case:

> However, Articles 14 and 15 read in conjunction with other provisions of the Agreement strongly suggest that a failure to enforce environmental law applies to the administrative agencies or officials charged with implementing laws and regulations. . . . Articles 14 and 15 primarily envisage administrative breakdowns (failures) resulting from acts or omissions of an agency or official charged with implementing environmental laws. . . . Articles 14 and 15 were intended to address failures by enforcement agencies or departments, and not inaction mandated by law.[164]

Led by Earthlaw, the NGOs responded angrily by accusing the Secretariat of exempting the legislature from having to enforce environmental laws.[165] The NGOs opined that "this blanket 'legislative exception' will no doubt swallow the effective enforcement 'rule'. . . . By distinguishing legislative failures to effectively enforce environmental laws from executive or administrative failures, the Secretariat has created a distinction without a difference."[166]

### *B. The National Forest Logging Case*

On August 30, 1995, the Sierra Club Legal Defense Fund filed the second petition with the Secretariat under the procedures of Articles 14 and 15, representing the interests of twenty environmental groups.[167] The complaint alleged that a rider attached to the 1995 fiscal year rescissions package, which increased the amount of logging allowed in U.S. forests, constituted a breach of U.S. environmental laws by preventing enforcement of the laws.[168] This petition sought to differentiate its argument from the prior ESA Moratorium case by pointing out that, unlike the ESA rider, "the logging rider [left] existing environmental laws intact but specifically preclude[d] their enforcement."[169]

The NGOs in this case, from the United States, Mexico, and Canada, asserted that the suspension of enforcement was to allow for "salvage logging of sick or diseased trees in old growth forests," but that the term "salvage logging" was defined so broadly it "could be interpreted to mean any tree that could someday be diseased."[170] The rider's sponsor, Sena-

164. *Id.*
165. Tutchton, *supra* note 155, at 10025 n.51.
166. *Id.*
167. Hogue, *supra* note 68, at D-15.
168. *Id.*
169. *Id.*
170. Susan Bruninga, *NAFTA: Environmentalists Seek Investigation of Logging Rid-*

tor Gorton (R-Wash.), claimed to have drafted the rider to comply with trade agreements and U.S. environmental laws.[171] However, the NGOs and the attorneys filing on their behalf strongly disagreed. Patti Goldman, the Sierra Club lawyer filing the petition, said that it was "outrageous for a nation built on principles of freedom to suspend enforcement of its laws and prevent citizens from holding the government accountable."[172]

Bill Arthus, another Sierra Club attorney, said, "This is exactly what the NAFTA environmental agreements is supposed to prevent . . . . Many Americans feared that Mexico might lead a race to the bottom by lowering environmental standards to help its industries."[173] He further added that "[i]t is ironic that the U.S. has been the first North American nation to try to suspend its environmental standards, in this case to help the timber industry."[174]

Nonetheless, the Secretariat found the submission unconvincing, and dismissed the submission without requesting a response from the United States.[175] In its December 8, 1995, opinion letter, by the same author as the ESA Moratorium letter, the Secretariat relied on a time-worn rule of statutory and treaty interpretation.[176] It determined that "'[t]he submission focuses on a later-enacted law that impacts on the implementation of an existing environmental law without directly amending or repealing it. . . . Where the new law explicitly exempts, modifies or waives provisions of an earlier law, the later-enacted law will prevail.'"[177]

Consequently, once again, "[a] new legal regime [was not found to] constitute a failure to enforce an old one."[178] It is unclear whether the Secretariat must defer to prior decisions under a system of stare decisis, but it appears to have happened in the first two submissions. Clearly, to

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*er Under Trade Agreement*, 1995 Daily Env't Rep. (BNA) No. 169, at D-3 (Aug. 31, 1995).

171. *Id.* Senator Gorton included a "sufficiency provision" in the rider to ensure that it complied with all applicable environmental and trade laws. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* "According to the petition, the logging rider leaves the actual laws in place; it just suspends their enforcement. The rider directs the Departments of Agriculture and Interior to increase the volume of salvage timber sales 'to the maximum extent feasible.'" *Id.* To increase the volume, all that the rider requires is for the government to receive one document containing an "environmental assessment under the National Environmental Policy Act, and a biological review under the Endangered Species Act." *Id.*

175. Cheryl Hogue, *NAFTA: Logging Rider Does not Constitute Failure to Enforce Laws, Commission Rules*, 1995 Daily Env't Rep. (BNA) No. 238, at D-3 (Dec. 12, 1995).

176. *See id.*

177. *Id.*

178. *Id.*

succeed in triggering a response from a Party, a future submission must be based not on a legislative enactment, but rather an administrative oversight or negligent act. Congress and the President acting jointly will thus not fail to enforce an environmental law.[179]

### *C. The Cozumel Pier Case*

The most recent case was filed against Mexico's government on January 18, 1996, by several Mexican ecology organizations.[180] The petition alleged that Mexico violated its environmental laws by allowing a Mexican company, Consorcio H, to construct a port terminal on Cozumel inside a coral reserve area without requiring an environmental impact study.[181] Though a study was conducted in 1990, it only analyzed the impact of pier construction, not of port operation.[182] Referring to the failure of the two prior petitions against the United States, the NGOs argued this petition was suitable for investigation because it concerned only current environmental laws and regulations, and there was no legislative argument dealing with amendments or modifications.[183]

On February 12, 1996, the Commission for Environmental Cooperation announced that "it would investigate alleged irregularities by Mexican federal government authorities in the authorization process for an island pier," and the Secretariat requested a response from the Mexican government within thirty days.[184] Another thirty days could be granted, howev-

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179. Ann Devroy, *President Calls for End to Logging of Old-Growth Trees*, WASH. POST, Feb. 25, 1996, at A3. Interestingly, despite the defeat of the environmentalists' petition, President Clinton recently called for a repeal of the logging rider. *Id.* White House spokesman Mike McCurry said, "We believe there should be a repeal of cutting in ancient, old-growth forests." *Id.* He added that the administration would ask Congress "either for replacement timber allocations for companies that have valid contracts or for buyout authority to stop the cutting." *Id.*

180. Dora Delgado, *NAFTA: Groups File Petition to NAFTA Commission Stating Port Project Violates Mexican Law*, 1996 Daily Env't Rep. (BNA) No. 12, at D-15 (Jan. 19, 1996).

181. *Id.* Note that unlike the environmental assessments and impact studies required under U.S. law for federal government action, the environmental laws of most other countries, including Mexico, require these studies for both public and private construction, and this is the crux of the Cozumel pier case. *Id.*

182. *Id.*

183. *Id.*

184. *NAFTA: CEC to Investigate Authorization of Pier in Mexican Natural Protected Area*, 1996 Daily Env't Rep. (BNA) No. 32, at D-9 (Feb. 16, 1996).

er, if "required by exceptional circumstances."[185] Significantly, though the outcome is still indeterminate, this is the first petition to make it over the Article 14(2) hurdle.[186] Following Mexico's response, the Secretariat must decide whether or not to forward the submission to the Council for approval to begin a fact-finding investigation.[187]

The NGOs are hopeful. The remedy they seek is to prevent commencement of the pier's operation for as long as possible because full operation would devastate the coral reef close to Cozumel's El Paraiso Beach, whereas construction has affected only about 2.6% of the reef.[188] Seizing the opportunity to point out the government's politico-economic preferences regarding law enforcement, the NGOs held a press conference and stated, "[T]he Cozumel case is representative of the Mexican government's common disregard of environmental regulations to privileged domestic and foreign investment."[189]

## V. CONCLUSION

Although the NAFTA Environmental Side Accord is a jumble of procedural hurdles and political trap doors, it represents significant progress in the conflict-plagued, yet ever-improving, relationship between international free trade and environmental protection. Its successful negotiation is a testament to the ability of nations to unite in an effort to resolve the recurring and competing tensions between increased free trade and greater environmental protection. The agreement is riddled with textual weaknesses and hortatory enforcement provisions. Yet, for all this, it constitutes a step in the right direction.

International trade regimes have been institutionalized and have grown strong over the past century. Conversely, international environmental law reflects only a patchwork of treaties and customs between states.[190] It is a relatively new field of law, and there are no global institutions, like the World Trade Organization, to present guidance for the enforcement of the policies embodied in the Side Accord.[191] Until such a body comes

185. *Id.*
186. *See id.*
187. *See id.*
188. *Id.*
189. *Id.*
190. Edith Brown Weiss, *International Environmental Law: Contemporary Issues and the Emergence of a New World Order*, 81 GEO. L.J. 675, 707-08 (1993) ("[I]nternational environmental law still consists only of many separate and disparate legal instruments.").
191. Not surprisingly, several people have proposed the creation of an international environmental institution, including Sir Geoffrey Palmer, former Prime Minister of New Zealand:

into existence, the successful marriage of international trade and environmental policies will remain dependent on the work of sovereign states settling disputes caused by these conflicting goals. The NAFTA Environmental Side Accord can serve as a model for future trade agreements only in a general sense. If future agreements copy its limited substantive achievements and procedural loopholes wholesale, then little progress has been made. If future agreements use the Side Accord as a framework for the creation of a new documentary synthesis between free trade and environmental protection, however, then success has been achieved, and the NAFTA Environmental Side Accord has served a larger purpose as a developmental step in that direction.

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> We would envisage the new Environmental Protection Council becoming the point in the United Nations system which links the streams of economic and environmental advice. It would perform the function that currently falls between the cracks in the mandates of all existing organizations. It would have responsibility for taking coordinated decisions on sustainable policies for global environmental protection. It would be empowered to take binding decisions . . . . But the key thing is that it should have power to act—not just talk.

Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AM. J. INT'L L. 259, 279 (1992).