Comparative Analysis of the NAFTA's Environmental Side Agreement

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Introduction

Labor and environmental concerns motivated the negotiation of side agreements to the North American Free Trade Agreement (hereinafter NAFTA). Entitled "The North American Agreement on Environmental Cooperation between the Government of Canada, the Government of the United Mexican States, and the Government of the United States of America," the environmental side agreement was signed on September 14, 1993. Labor and environmental groups lobbied for extra environmental protections to be added to the NAFTA because of perceived inadequacies in Mexico's environmental laws which they feared might create a pollution haven in the wake of free trade. A study done by the United States Trade Representative showed that Mexico's environmental laws are "fully equivalent" to the United States' environmental laws, but that there is a lack of effective enforcement. Enforcement of environmental laws has become the focus of the Agreement on Environmental Cooperation. Environmental and labor groups may have good reason to fear the environmental fallout from free trade between the United States and Mexico given the appalling environmental degradation of the border area which resulted from the free trade experiment, the Maquiladora program, between Mexico and the United States.

The region's surface waters are veritable sewers, thick with human feces and industrial toxins. The subsurface water tables, upon which the arid region is highly dependent for both human and industrial consumption needs, are similarly compromised. Toxic hot spots, areas where industrial and often hazardous and/or toxic wastes have been disposed of without regard for law or the environment, dot the region's landscape.

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2. The idea of a pollution haven is that environmental prevention and clean up is expensive. If companies are given the choice between expensive regulatory costs in the U.S., or selling to the U.S. market but not having to pay these costs by moving to Mexico, then they will choose the latter to the detriment of ecosystems as well as cleaner companies and American labor.


Even more importance attaches to the Agreement given the likelihood that it will serve as the model for other such agreements as the Clinton Administration seeks to add South and Central American partners to the NAFTA.

This Note will assess the likely effectiveness of the Agreement on Environmental Cooperation to implement better enforcement of domestic environmental laws in Mexico and will examine and recommend alternative methods which might achieve more effective enforcement. In Part I, the background for environmental concerns over the NAFTA will be examined by looking at the Maquiladora program and also at Mexico’s environmental laws and enforcement. In Part II, an in-depth examination of the Agreement on Environmental Cooperation will focus on the side agreement’s stance on private rights of action, the structure of the Commission for Environmental Cooperation [hereinafter CEC or Commission], and the CEC’s dispute resolution process. In Part III, this Note will examine other dispute resolution agreements in the environmental context to determine what provisions are most effective in those agreements. In Part IV, recommendations are suggested for more effective enforcement of environmental laws in NAFTA countries.

Part I: The Background for Environmental Concerns Over Free Trade

Mexico’s environmental laws appear to have failed to protect against degradation.5 This failure is especially evident at the border and strongly motivates worries about the NAFTA’s effects on the environment. While it is beyond the scope of this Note to examine Mexican environmental laws in great detail, or even the means by which those laws are enforced and the many theories as to why they fail, at least some background is necessary to provide a context for understanding the importance of the concerns which motivated the Agreement on Environmental Cooperation. The Maquiladora region is a living example of these concerns. A glimpse of the legal, political, and economic climate is essential to an understanding of the impediments to Mexican domestic environmental law effectiveness.

A. The Maquiladora Experiment

Maquiladora comes from the Spanish verb *maquilar*, meaning to perform a task for another.6 A Maquiladora is a factory which makes goods pursuant to a free trade treaty experiment between the United States and Mexico which was signed in 1971.7 The treaty allows American-owned factories located in Mexico to import raw materials into Mexico without paying duties and then export a finished or partly finished product back to the United States.8 The goods they produce are subject to a United States customs duty, payable on export, based only on the value added to the product outside the country—in this case, the foreign labor.9 The treaty promoted what was perceived as a mutually beneficial arrangement: the Mexicans get jobs, the foreign factory owners get cheap labor, and Americans get inexpensive goods. These factories are owned primarily by Americans, although some are owned by Japanese. Since its inception in 1971, the program has grown explosively: it started with twelve plants employing roughly 3,000 workers; by its twentieth anniversary in 1991, the program boasted 1,936 plants with almost 500,000 employees.10

While the Maquiladora program has enjoyed great short-term economic success, the environmental degradation it has caused has brought attention to the dangers of free trade programs.11 The American Medical Association [hereinafter AMA] described the border region, where large numbers of the Maquiladoras are located, as a “virtual cesspool and breeding ground for infectious disease.”12 The report went further, finding that “[u]ncontrolled air and water pollution is rapidly deteriorating and seriously affecting the health and future economic vitality on both sides of the border.”13 There are two obvious explanations for what is causing the environmental degradation: 1) the Maquiladoras improperly dispose of their hazardous wastes; and 2) the “colonias,” the shanty towns which spring up around Maquiladoras, have improper and inadequate water and sanitation facilities.14

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5. See Houseman, supra note 4.
9. Id. at 686.
10. Id.
11. See Houseman, supra note 4 and Satchell, Infra note 12.
13. Id.
Mexican regulations require that hazardous wastes be returned to their country of origin. Despite this requirement, in 1988, only 7 out of 748 Maquiladoras requested shipment of hazardous waste back into the United States. In 1990, the total number of requests rose to eighty-five. According to one report by the Secretaria de Desarrollo Urbano y Ecologia [hereinafter SEDUE, the Mexican equivalent of the United States Environmental Protection Agency [hereinafter EPA]], 92% of Maquiladoras generate hazardous wastes, but only 30% have complied with regulations requiring information to be provided to SEDUE about disposal of these wastes, and only 19% are complying with waste disposal laws. A California Regional Water Quality Control Board report done on the New River, which originates south of Mexicali, crosses the border, and empties into the Salton Sea near a National Wildlife Refuge, gives strong evidence of improper disposal of hazardous wastes. The report found evidence of numerous industrial chemicals and fifteen viruses capable of causing cholera, dysentery, hepatitis, meningitis, polio, and typhoid. A study done by the National Toxics Campaign Fund in 1990 showed that toxic organic chemicals were being discharged from industrial plants at levels which violate both EPA and Mexican standards. Water samples from sixteen of twenty-two locations violated both Mexican and United States water quality standards.

The other environmental problem is the colonias. Colonias have sprung up on both sides of the border. They have brought with them increases in disease caused by a lack of potable water and inadequate sanitation facilities. The incidence of hepatitis in border areas like that between El Paso and Brownsville in Texas is six times the national average. In the El Paso colonia of San Elizario, 95% to 99% of adults contract hepatitis by age thirty-five.

B. Mexican Environmental Law and Enforcement

Mexican environmental laws greatly resemble those of the United States, because Mexico's 1988 General Law for Ecological Equilibrium and Environmental Protection (hereinafter the 1988 law) was modeled on United States environmental statutes and regulations.

Most significantly, hazardous waste is specifically defined and follows closely the U.S. guidelines related to corrosivity, reactivity, toxicity, and ignitability. In addition, requirements for documenting (i.e. manifesting) shipments of hazardous wastes are delineated. Environmental Impact Statements (EIS) on new projects are mandated, and no hazardous waste is allowed to be imported into Mexico unless the waste can be recycled or reused in Mexico.

The 1988 law was a reaction to Mexico's 1982 Federal Environmental Law and its 1984 Amendments which failed to provide any definitions or require any strong enforcement by SEDUE. The Inadequacies of the 1982 law resulted in environmental degradation and led to an amendment to the Mexican Constitution in 1987 which gave the government the right to impose measures on private owners for benefits to the public interest and ecological balance. The 1988 law provides concrete guidelines and criminal and administrative sanctions for failure to comply with regulations regarding hazardous materials. SEDUE issues technical standards, and the government (federal, state, or local) may impose sanctions for non-compliance.

Tort law is available as an alternative to criminal or administrative sanctions in Mexico under the Mexican Civil Code. Liability is based on a standard similar to the reasonable person duty in U.S. tort law. Mexican tort liability, however, is restricted by statute. For instance, damages are limited;
one cannot receive compensation for mental anguish or loss of consortium, and no punitive damages may be assessed.\textsuperscript{37} Also, no class actions or contingent fee arrangements are available under Mexican law, making such suits unrewarding and difficult to finance.\textsuperscript{38}

Despite the many similarities between Mexican environmental laws and United States environmental laws, their effectiveness is far from similar. The ineffectiveness of Mexican environmental laws as compared to the United States’ laws arises in part from the lack of money available to SEDUE for enforcement. SEDUE’s budget is $0.48 per capita, while United States expenditures for environmental protection are $24.40 per capita.\textsuperscript{39} Such a limited budget provides enormous challenges to environmental law enforcement in Mexico.

Mexico’s political climate also seems to discourage the enforcement of its environmental laws. Both citizens and scientists appear to be actively deterred from pursuing enforcement of environmental laws and information about environmental law violations. One example of this is Carmen Hernandez de Vasquez, former head of the Tijuana civil protection office, who was warned, then fired, while investigating a toxic waste site owned by a United States firm.\textsuperscript{40} She was told that her investigations and public-awareness campaigns were "alarming" the citizenry.\textsuperscript{41} Many other Mexican environmental critics have alleged that they too are being pressured to keep quiet by threats of firings and funding cuts.\textsuperscript{42}

Private citizens are also discouraged from complaining. Not only is little information made available to them, but there is a "Big Brother"-like pressure brought to bear on those who complain. For example, ABC’s \textit{Primetime Live} television news team followed a group of residents of a Maquiladora region in Matamoros, Mexico, as they went to SEDUE to complain about rampant dumping of hazardous chemicals in their neighborhood.\textsuperscript{43} The SEDUE official promised to get back to the group in three days.\textsuperscript{44} Three days later, the official refused to allow the news team into the interview, but a woman who talked to the official reported that the official admitted to accusing the group of being "foreign agents" and telling them that they were all under investigation.\textsuperscript{45}

Given this climate, practitioners will find it difficult to gather information, find citizens who are willing to bring suit, or recover much in damages against a Maquiladora. Many Maquiladoras further protect themselves by investing very little in their Mexican factories, so that little is at risk from suits.\textsuperscript{46} Even if a successful claim is made in Mexico, insufficient capital holdings in Mexico will create the need for additional litigation in the United States to make the judgment enforceable against the American parent corporation.\textsuperscript{47}

\section*{Part II: The Agreement on Environmental Cooperation}

The Agreement on Environmental Cooperation creates the Commission for Environmental Cooperation.\textsuperscript{48} The actions taken by the CEC, and its accessibility to members of the public, may play a significant role in arbitrating disputes over the environment and negotiating change in each country’s laws. To assess the likely effectiveness of the Agreement, an in-depth analysis of the CEC and the provisions of the Agreement is necessary.

\subsection*{A. The Commission for Environmental Cooperation}

The CEC provides a forum for dispute resolution regarding environmental matters. The Commission is composed of three parts: a Council, a Secretariat, and a Joint Public Advisory Committee.\textsuperscript{49}

\subsubsection*{1. The Council}

The main task of the Council is to oversee the implementation of the Agreement on Environmental Cooperation and to make recommendations regarding pollution control technology, data gathering, protection of flora and fauna, eco-labelling, emergency preparedness, and stronger pollution control laws, as well as other concerns.\textsuperscript{50} The Council is made up of cabinet-level representatives (or designees) from each member country (hereinafter country or countries) and conducts public meetings

\begin{thebibliography}{10}
\bibitem{37}Connor, \textit{supra} note 8, at 693.
\bibitem{39}Satchell, \textit{supra} note 12, at 36.
\bibitem{40}Vaznaugh, \textit{supra} note 38, at 219.
\bibitem{41}Id.
\bibitem{42}Id.
\bibitem{43}\textit{Primetime Live}, (ABC television broadcast), Apr. 1, 1993
\bibitem{44}Id.
\bibitem{45}Id.
\bibitem{46}Vaznaugh, \textit{supra} note 38, at 217.
\bibitem{47}Id.
\bibitem{48}See \textit{supra} note 1.
\bibitem{49}Id.
\bibitem{50}Id. art. 10, § 2.
\end{thebibliography}
at least once a year and additional meetings at the request of any member country. The Council works on a consensus basis, except in cases of enforcement challenges and other specified areas, where a two-thirds majority is required.

2. The Secretariat

The Secretariat provides "technical, administrative, and operational support to the Council." The Secretariat prepares an annual report for the Commission covering the actions member countries have taken to fulfill their obligations under the Agreement, including data on domestic enforcement of laws, information submitted by non-governmental organizations, and any matter referred to the Secretariat by the Council. The Secretariat may investigate any matter on its own initiative, except domestic enforcement of environmental laws. The Council may veto any investigation by the Secretariat with a two-thirds majority. The Secretariat is run by an Executive Director, a position which rotates between nationals of each country.

3. The Joint Public Advisory Committee

The Joint Public Advisory Committee is the Council's source for technical and scientific information. The Committee consists of fifteen members (unless the Council decides otherwise) with equal numbers from each country. The Committee provides advice to the Council and to the Secretariat upon request.

B. The Process of Dispute Resolution in the Commission

Dispute resolution is the main function of the CEC. The dispute resolution process provides a forum for resolution of enforcement problems with a member country, such as Mexico. Since there are stiff penalties for failing to abide by the arbitrated result, the hope is that this process may succeed in encouraging enforcement of domestic environmental laws in each country. However, the process is long and requires not only that a member country file a complaint calling for the initiation of an arbitration panel but also that another country join the request.

If a dispute arises, the complaining country may request consultations with the complained-of country to attempt to resolve the dispute. If consultations fails, within sixty days of the request for consultations, a party may request a special session of the Council. The Council may then offer advice, mediate, or create working groups to attempt to resolve the dispute. However, if the matter is not resolved within sixty days, a consulting party may request an arbitral panel. With approval of two-thirds of the Council, a panel is convened from an existing roster to consider whether there is a "persistent pattern of failure by the Party complained against to effectively enforce its environmental laws" and whether this failure affects goods or services that are traded between the countries or are in competition with goods or services of the complaining country. There are several obstacles to successful implementation of this process. For instance, a failure to achieve a two-thirds majority vote in the Council would halt the process before an arbitral panel was ever formed. Also, even if the panel is convened, it may not have enough evidence to support a finding of a persistent pattern of failure to enforce environmental laws on the part of the complained-of country. Further, it may be difficult to establish a direct connection between the persistent pattern of failed enforcement and an effect on goods or services in another country. These factors place an onerous burden on a complaining country and might, in some cases, discourage complaints.

When a panel is convened, it issues a final report. If the parties do not agree on an implementation plan consistent with that report within sixty days, the panel may be reconvened for the purpose of deciding on an implementation plan. If the parties do not agree that an implementation plan is being properly implemented 180 days after the plan is established or approved, the panel may again be reconvened. If the panel agrees that the plan is not being fully implemented, it may impose a monetary enforcement assessment against the country found to be in violation; the assessment:

51. Id. art. 9, §§ 1, 4. Annual meetings are public. The additional meetings are public only if the Council decides that they should be. Id. art. 9, § 4.
52. Id. art. 11, § 5.
53. Id.
54. Id. art. 16.
55. Id.
56. Id. Annex 34.
57. Id. art. 34, § 1.
58. Id.
59. Id.
60. Id.
61. Id.
62. Id. art. 22, § 1.
63. Id. art. 24.
64. Id.
65. Id. art. 34, § 1.
66. Id. art. 34, §§ 1 and 3.
may not exceed twenty million dollars (U.S.) for the first year of the agreement. The money received from such an assessment is paid into a fund, which is used to "improve or enhance the environment or environmental enforcement in the [country] complained against." An order for an assessment against Canada is filed in a domestic court of Canada which will enforce the collection of the assessment without opportunity for appeal. If the United States or Mexico fails to pay an assessment within 180 days, the complaining country may suspend the benefits of the free trade agreement to impose tariffs sufficient to collect the assessment. A private interested party may complain to the Secretariat, in writing, with proper documentation, of an alleged persistent failure by a member country to enforce environmental laws. The most that will result from such a private complaint is the compilation of a factual record. The factual record, however, cannot be compiled without a two-thirds majority vote of the Council. Another two-thirds majority vote is required to make the factual record public.

C. Private Right of Action

The successful enforcement of environmental laws in the United States is due in great part to suits initiated by private parties, such as environmentalists and industry members, who challenge interpretations of regulations and force regulatory agencies to take action. The Agreement on Environmental Cooperation requires only a small protection of the private right of action in enforcement of environmental laws.

Article 6 of the Agreement requires each country to "ensure that persons with a legally recognized interest under its law" have access to the courts and administrative proceedings of that country. In the United States, where most environmental laws provide for a private right of action, this provision almost certainly effects no change. Since the language of this article only requires access for those with a legally recognized interest, there is no man-

date to change laws to allow non-citizens to sue.

Similarly, Mexico will not be required under this provision to open up its courts to American parties who might wish to challenge a lack of enforcement. Article 6 sets out no suggested goals or recommended standards to determine what interests ought to be "legally recognized." However, the article does specify the types of rights and remedies that ought to be available in the courts and proceedings, including injunctions, damages, and enforcement orders.

Article 7 guarantees some procedural rights in the trial or hearing. The member countries are to ensure "fair[,] open[,] and equitable" proceedings, by complying with "due process of law," opening hearings to the public whenever possible, allowing the presentation of evidence, and avoiding unreasonable delay, complications, or excessive fees. Opinions shall be in writing and made available to the public.

Article 10 briefly addresses the notion of a right of action for citizens of a NAFTA country who are not citizens of the complained-of country. As the Agreement stands, there is no assurance that any such system for cross-border suits will be developed. The idea of a cross-border citizen suit is relegated to "consideration" by the Council. The Council is to consider the issue and make a recommendation on such suits "as appropriate." The cross-border citizen suit might be the best way to ensure enforcement of environmental laws, because United States environmental groups are already skilled at, and well-funded for, such efforts. Further, any corruption or political pressure on citizens in Mexico would discourage these suits. Since United States citizens are more removed from these pressures, they would be less likely to be deterred from filing and prosecuting suits.

D. Summary

The Agreement on Environmental Cooperation appears to allow for almost no citizen intervention

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67. Id. Annex 34, § 1.
68. Id. Annex 34, § 3.
69. Id. Annex 36A.
70. Id. art. 36, § 2.
71. Id. art. 14.
72. Id.
73. Id. art. 15, § 7.
75. Agreement on Environmental Cooperation, supra note 1, art. 6, § 2.
76. On the other hand, section 304 of the Clean Air Act provides a private right of action for non-citizens: "any person may commence a civil action" and "[t]he district courts shall have jurisdiction, without regard to the citizenship of the parties." 42 U.S.C. § 7604 (a) (West 1992).
77. Agreement on Environmental Cooperation, supra note 1, art. 6, § 3.
78. Id. art. 7.
79. Id.
80. Id. art. 10.
81. Id.
82. Id. art. 10, § 9.
or meaningful input. There are only two possible inroads for private citizens or groups to access the CEC. First, the groups or citizens may attempt to influence their country's representative on the Council. Even if the representative for the United States is swayed by such influence, that representative would then need to influence another country's representative (Canada's representative in the case of a complaint against Mexico) to make it past the stage of mere consultations with the complained-of country. This is a significant barrier. The other potential inroad to the CEC is through the Secretariat, to whom anyone may file a complaint with proper documentation. However, the complaint will go no further unless two of the three member countries agree to gather more information regarding the complaint. Both of these approaches require significant lobbying of two governments—no small task by any reading.

Part III: Alternative Methods of Environmental Treaties and Agreements

While a number of treaties and agreements have been formed to attempt to resolve transboundary environmental problems, most have failed to be very effective. Most of these treaties have required parties to agree to vague declarations on the importance of the environment and have relied on the good faith of the parties to follow through on these declarations "as appropriate." Unfortunately, the ubiquitous presence of words like "as appropriate" and the lack of any enforcement mechanism have left parties unable to require any action by other parties.

There do exist a few environmental treaties or agreements which are notable for having achieved a modicum of success. Generally they have achieved this success by setting specific requirements with avenues for enforcement. A few of these treaties will be examined for methods which might be applied to the Agreement on Environmental Cooperation.

A. The Nordic Convention

The Nordic Convention of 1974 [hereinafter Convention] took a unique approach to environmental remedies by opening up its domestic court system to non-citizens who are citizens of a signatory country. Sweden, Finland, Denmark, and Norway agreed to principles of equal access and non-discrimination. Non-citizens are given the same access to courts for litigation of claims against polluters. Further, the non-citizen is given treatment equal to that which a citizen might receive. The Convention provides that "any person who is affected or may be affected by a nuisance caused by environmentally harmful activities in another Contracting State" may bring that action before the court of that country "on the same terms as a legal entity of the State in which such actions are being carried out." Of course, since only four countries are party to this Convention, the effectiveness is limited.

Other efforts expanding the right of cross-border citizen suits have not been as effective as the Nordic Convention. In 1976, the Organization for Economic Cooperation and Development [hereinafter OECD] issued a recommendation for "Implementation of a Regime of Equal Right of Access and Non-Discrimination in Relation to Transfrontier Pollution." To date, the recommendation has not achieved much success. The United States and Canada entered into the "Transboundary Pollution Reciprocal Access Act" (hereinafter United States-Canada Act or Act) to give reciprocal equal access for victims of transboundary pollution. However, this Act has only been ratified by a handful of states and provinces within the two countries. It may very well be that, should the Council of the CEC decide to adopt a recommendation as to reciprocal access to the courts, such a recommendation would meet with the same lack of enthusiasm as did the OECD's recommendation and the United States-Canada Act. The carrot of a free trade package might have been sufficient inducement to create a reciprocal right of action, but now there is not as much bargaining power, since the free trade package is already a fait accompli.
B. The Montreal Protocol

The Montreal Protocol [hereinafter Protocol] was negotiated under the Vienna Convention in 1987 to address the problem of ozone depletion. Each country voluntarily agrees to reach a specific emission rate of ozone-depleting chemicals, unless the Protocol fails in any respect, it is in the provision of effective enforcement. If non-compliance is complained of, there is a process of dispute resolution which involves making a complaint to the Secretariat of the Vienna Convention. The party complaining of the base level and any reduction, such numbers may be suspect.

C. United States Domestic Negotiated Rulemaking

Negotiated rulemaking was developed in response to dissatisfaction with notice and comment procedures in federal agency rulemaking under the Administrative Procedures Act. The traditional rulemaking processes have been criticized for being too adversarial and for inappropriately grafting judicial processes onto a quasi-legislative, policy-making process. Negotiated rulemaking allows interested parties to a federal rule to negotiate a mutually acceptable rule. Each party can individually weigh the different policy choices and make trade-offs in the negotiation process based on the relative value of one policy over another. This ensures a better representation of actual interests in the rulemaking process. The negotiations tend to be successful, because the threat of a rule developed under the traditional procedure acts as an incentive to reaching agreement. Several federal agencies have successfully used negotiated rulemaking. For instance, the EPA has used negotiated rulemaking to develop proposed rules on non-conformance penalties for vehicle emissions and on emergency exemptions from pesticide regulations.

Participants in the negotiated rulemaking procedure are selected by giving notice to the known interested parties. Others are allowed to join based upon whether their interest might give rise to standing to challenge the rule in court. By including anyone who might be able to challenge the rule, the agency can avoid many lengthy court battles and assures that the negotiations are meaningful.

Many of the concepts of negotiated rulemaking are incorporated into international treaties. For instance, as previously discussed under the Montreal Protocol, in the event of a dispute, an Implementation Committee is impanelled to facilitate a consensual agreement between the parties, but with the threat that the dispute will be submitted to a Meeting of the Parties if a consensus is not reached. This may not be effective, because the parties may make diplomatic, though environmentally undesirable, compromises. Nevertheless, it at least motivates a discussion of solutions.

D. The Canada-U.S. Air Quality Agreement and the International Joint Commission

The friendly relationship between the United States and Canada has been responsible in large part for the successes in negotiating agreements over transboundary issues, such as pollution and water boundaries, because many of these agree-
ments rely on voluntary negotiations to work out disputes. In the 1991 Canada-United States Agreement on Air Quality (hereinafter Agreement on Air Quality), if a dispute arises over the interpretation of the Agreement on Air Quality, the parties first enter into consultations and, in the event consultation fails, next consider whether to submit the dispute to the International Joint Commission (hereinafter IJC). For disputes over other issues, however, the parties must consult, and if that fails, they must "refer the matter to an appropriate third party." What gives these consultations a likelihood of success is the transparency and availability of the progress reports made by the two countries. The Agreement on Air Quality also requires the Bilateral Air Quality Committee (with three members from each country) to prepare progress reports every two years. These reports are given to each country, as well as to the IJC and the public. The IJC invites comments on the reports (making use of public hearings), reviews the information, and puts together a record of the comments which is then released to the public. This provides a check on the accuracy of reports made by the countries' representatives and gives the public access to the documents.

By requiring public disclosure of the progress each party is making, the Agreement on Air Quality allows citizens to put pressure on their governments to make changes, and consultations are thus encouraged. This transparency also promotes accurate reporting.

Part IV: Recommendations

A. Citizen Suit Provisions

While the Agreement on Environmental Cooperation takes a step in the right direction by requiring the opening of courts to some individuals to sue, a cross-border citizen suit provision is still needed. The Agreement does not ensure a right to sue to individuals who are citizens of either the complained-of country or another member country. Any member country is free to place burdensome restrictions to recognizing a right of action for citizen or non-citizen suits. Ensuring a right of action to citizens would not be enough on its own if citizens fear that corruption of the system may put their lives or liberty in danger by exercising that right. Since United States citizens have great experience and resources, and as there is a long history in the United States of suits to enforce environmental laws, a cross-border citizen suit provision would greatly enhance environmental law enforcement efforts.

The Agreement on Environmental Cooperation would be more effective if it included provisions requiring domestic rights of action for those who can show an injury from failure to enforce environmental laws. Further, the Agreement should incorporate a cross-border citizen suit option, such as that contained in the Nordic Convention. With that example of a workable system available, it should not be difficult to achieve a workable model for the NAFTA countries. This would then allow citizen action to address any particular failure to enforce domestic environmental laws (as opposed to the weighty burden of proving a "persistent failure" as required under the CEC) and deter pollution by giving injured parties the right to seek tort damages in many cases.

B. Transparency

Transparency allows citizen groups to learn the facts of a problem and lobby for a particular outcome through public opinion pressure. There are some measures in the Agreement on Environmental Cooperation which may give onlookers information about the facts available to, and actions taken by, the CEC. For example, the Secretariat's annual report, including assessments of the state of the environment of each member country, must be released publicly. This will aid the public's participation in assessing the validity of progress as reported by nations and also encourage citizen pressure on governments through disclosure of the environmental status of each country. However, greater transparency in the process would give the consultation requirements more effectiveness, would allow

10. For example, the Boundary Waters Treaty prohibits pollution of boundary waters, but the International Joint Commission may only make recommendations on compliance disputes, unless both countries submit to binding arbitration, which they have never done. Boundary Waters Treaty, Jan. 11, 1909, U.S.-Gr. Brit., 36 Stat. 2448.

11. Agreement on Air Quality, Mar. 13, 1991, art. XII, U.S.-Can., 30 I.L.M. 676. The IJC was established by the Boundary Waters Treaty. See supra note 10. The IJC is available to make recommendations on transboundary pollution problems between the United States and Canada, but its recommendations are not binding.

12. Supra note 11.

13. The term "transparency" is used to indicate a process whereby reports and findings are available to the public so that the public may be informed about the state of disputed matters.

14. See supra note 11.

15. Id.

16. Id.

for more extensive citizen participation, and would be of aid to other aspects of the Agreement.

Currently, allegations of failure to enforce environmental laws may be made by private citizens, but a report will result only if two-thirds of the member countries allow it to be prepared. Then, a further two-thirds vote is necessary to make the report public. Instead, a report should be prepared whenever the Secretariat finds that the allegations meet the criteria in Article 14. The resulting report should always be made public. This record should then be considered by the Council. If one member of the Council, or both the Secretariat and the Joint Public Advisory Committee (by a majority vote), decide that the report shows evidence of a failure to enforce environmental laws, then the dispute resolution process, with mandatory arbitration at the end, should be invoked.

Transparency would also allow the public to participate in the process of monitoring environmental law enforcement. Breaches in enforcement could then be dealt with, notwithstanding any possible diplomatic implications inherent in initiation of the dispute resolution process. An increase in pressure on member countries to achieve more effective enforcement of environmental laws will almost certainly benefit the environment.

C. Negotiated Rulemaking

The Agreement would be improved by increased participation at the consultation stage such as occurs during negotiated rulemaking. According private rights of action to domestic citizens and citizens of other member countries would likely increase enforcement, as well as participation in the dispute resolution process. Although consultations are required if a dispute arises under the current Agreement, the consultations only involve the two member countries. Such negotiated settlements are therefore subject to challenge in court by anyone who was injured by an enforcement failure. Greater representation and participation of interested parties in the consultation process will decrease the likelihood of a successful court challenge and encourage better advocacy of environmental issues. Although compromise may be more difficult between more parties, it would be in the best interest of resolution of a dispute to adopt the inclusive approach characteristic of negotiated rulemaking. By bringing in other interested parties early on in the process—thus increasing public participation—the ability to formulate an environmentally sound solution would be strengthened. Additionally, transparency of proceedings is likely to give incentive to effective negotiation.

Conclusion

The Agreement on Environmental Cooperation has many strong provisions, such as the sanctions for lack of enforcement, the transparency of some procedures, and the requirement of consultations. However, much of this may not be effective without needed additions. Sanctions may never be reached with a strict two-country majority requirement for action, and no domestic enforcement by private suit may be possible. The Agreement needs a requirement that a cross-border citizen suit agreement between the member countries be reached. The dispute resolution process would be much improved if the Secretariat were empowered to investigate legitimate complaints from member countries and make the record public. The Agreement shows much promise in encouraging techniques such as public input and participation, transparency of records, consultations with the threat of arbitration, and private rights of action. But encouragement is not enough. The Agreement needs provisions which will guarantee that legitimate complaints of failure to enforce environmental laws made by consumer groups and Industry will also be investigated, and that actions will be taken based on the findings of those investigations. The Agreement on Environmental Cooperation will have to evolve and strengthen if it is truly to protect our global environment.
Resource Guide

Agreement that transboundary air pollution causes significant environmental harm and that air pollution can effectively be reduced through cooperative or coordinated action. Establishes both general and specific air quality objectives. Also establishes procedures for assessment, notification, mitigation, exchange of information, review, consultations, referrals, and settlements of disputes.

Evaluates the industrial situation and environmental effects created at the US-Mexico border and analyzes possible remedies for border citizens. Provides (1) historical background on the maquiladora (assembly plant) program and the present state of the environmental agreements between the United States and Mexico, as well as the applicable domestic legal authority within each country, (2) evidence of the deteriorating environmental situation and discusses some of the problems in the system as it now exists, and (3) a discussion of possible short-term solutions and the prospect of the proposed Free Trade Agreement providing a more long-term remedy.

Agreement ending an urgent need to protect and improve the environment. Provides that persons may question the permissibility of environmentally harmful activities in an appropriate court or administrative agency, including the issue of measures to prevent damage and to appeal court or administrative decisions.

Examines the status of various Mexican laws and regulations addressing environmental concerns as they pertain to assembly plant operations in Mexico and the current political climate as it relates to meaningful enforcement of such laws and regulations. Explores the potential liability of United States parent corporations for the "environmental sins" of a Mexican assembly plant subsidiary under laws in both Mexico and the United States.

Focuses on the enforcement approach advocated by the Center for International Environmental Law and the Defenders of Wildlife. Sets forth the enforcement proposals promulgated by the governments of the three Parties, the U.S. Congress, and by the environmental community. Analyzes the two basic approaches to enforcement found in these proposals, concluding with suggestions for the most effective ways to incorporate environmental enforcement provisions in the NAFTA side agreements.

Argues that environmental and international trade policies must become mutually reinforcing so that environmental policies do not distort trade flows and economic activities do not continue in an unsound and unsustainable manner. Considers competitive sustainability as the means for achieving sustainable development and finds that an international system of incentives and disincentives will create a mutually reinforcing mechanism for directing trade and environmental policies toward improving the worldwide standard of living.

Examines negotiated rulemaking and deems it a realistic alternative to adversarial administrative procedures. Covers the evolution of the negotiated rulemaking concept, conceptual models drawn from political science and dispute resolution negotiation, some examples of negotiations and future agency plans with respect to negotiated rulemaking, major legal issues affecting future use of negotiated rulemaking, and the basis for the 1985 Administrative Conference of the United States recommendations.

Analyzes the United States-Canada Air Quality Agreement and posits that the agreement sets up a comprehensive framework in which both countries can effectively address problems of transboundary air pollution. Describes the nature and scope of the acid rain problem; surveys past bilateral, multilateral, and domestic attempts to address the problem; and determines that such efforts were ineffective. Discusses negotiations and difficulties encountered in reaching agreement and examines the resulting agreement, deeming it a success.

Traces the movement away from the traditional state-centered view of international environmental protection. Discusses the history of the non-state party in numerous international and domestic forums, including the International Court of Justice, and examines the recent changes which have increased the power of non-state interests despite the absence of an absolute right for non-state actors to initiate environmental claims within the international forum.

This Note was published as the NAFTA was being passed; it is somewhat prospective in its analysis. It examines the NAFTA's potential environmental effect, and analyzes extraterritorial environmental regulation, offering it as a highly effective yet controversial solution to Mexico's poor environmental regulatory structure. Asserts that if environmental deterioration along the Mexican border persists, extraterritorial jurisdiction remains a solution to the regulatory imbalance between the United States and Mexico.