

AN ANALYSIS OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION

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I. INTRODUCTION

Nogales, Mexico is a city along the United States and Mexico border that is often referred to as "Paradise Lost."¹ This once remote and beautiful city, located at the corner of where Mexico meets Arizona, has become home to poverty, disease and pollution.² In the past twenty-five years, over two thousand manufacturing plants, called *maquiladoras*, have moved into the Nogales area creating jobs and economic opportunity, but also creating a "cesspool and breeding ground for infectious disease" and pollution.³ Nogales is no longer the beautiful place residents remember.

The *maquiladora* program was established by the Mexican government to encourage United States companies to bring their plants to the Mexican side of the border.⁴ These American companies are allowed to import raw materials into Mexico without paying duties and to export the finished product back to the United States, subject to a low value-added customs duty.⁵ Under this system, United States companies are able to make goods at lower costs and Mexicans are able to find work. However, the *maquiladora* plants have lowered their manufacturing costs by circumventing mandatory environmental regulations.⁶ A 1992 study indicated that only five percent of these plants returned their waste to the United States for proper disposal. In communities with *maquiladoras*, people fear that hazardous conditions exist in the air, soil and water.⁷

1. Diego Ribadeneira, *SIDEBAR On Mexico's Border, 'Prosperity' Has an Ugly Side*, BOSTON GLOBE, July 12, 1994, at 10.

2. *Id.*

3. *Id.*

4. Lawrence J. Rowe, *NAFTA, the Border Area Environmental Program and Mexico's Border Area: Prescription for Sustainable Development?*, 18 SUFFOLK TRANSNAT'L L. REV. 197, 198 (1995); Some *maquiladora* plants are Japanese-owned as well. Lynn A. Stanton, *A Comparative Analysis of the NAFTA's Environmental Side Agreement*, 2 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 71, 72 (1994).

5. Stanton, *supra* note 4, at 72.

6. *Id.*; Sanford E. Gaines, *Bridges to a Better Environment: Building Cross-Border Institutions for Environmental Improvement in the U.S.-Mexico Border Area*, 12 ARIZ. J. INT'L & COMP. LAW 429, 430 (1995).

7. Ribadeneira, *supra* note 1, at 10.

Waste is returned to the United States because Mexico does not have proper treatment facilities to treat the hazardous materials.⁸

This environmental pollution has damaging impact on Nogales, Arizona. Air samples from Nogales show very high levels of carcinogens. Also, there are high rates of cancer and lupus in the area.⁹ In fact, there were sixteen cancer cases in fourteen homes on one street in Nogales.¹⁰ Since the creation of the *maquiladora* system in 1965,¹¹ the border area has become an environmental nightmare and attempts to remedy the situation have little political support. To combat border area pollution, the United States, Mexico, and Canada created the North American Agreement on Environmental Cooperation in 1993.¹² This agreement was adopted to promote environmental protection through cooperation between the three member countries.

A. *International Cooperation*

The North American Agreement on Environmental Cooperation is an attempt to restore a necessary balance between economic growth and environmental protection. Nations are very dependent upon one another for goods, services, investments, etc.¹³ It is these transactions solidified on paper that keep the world economy flourishing. Examples include the North Atlantic Free Trade Agreement (hereinafter "NAFTA") and the European Union (hereinafter "EU"), two international trade entities created to promote economic growth and cooperation through few or no trade barriers.¹⁴ Also, international environmental agreements such as the United States - Canada Air Quality Agreement and the Nordic Convention show that one country cannot control and resolve all of its environmental problems on its own.¹⁵ The environment does not honor national

8. *Id.*

9. *Id.*

10. *Id.*

11. Rowe, *supra* note 4, at 198.

12. North American Agreement on Environmental Cooperation, *opened for signature* Sept. 8, 1993, Ca.-Mex.-U.S., 32 I.L.M. 1480 [hereinafter NAAEC]. NAAEC is a side agreement under the North American Free Trade Agreement, Dec. 17, 1992, Ca.-Mex.-U.S., 32 I.L.M. 289 [hereinafter the NAFTA].

13. NAFTA, *supra* note 12, at 447.

14. Beth Ann Bivona, *What Price are We Willing to Pay for Our Environment?*, 5 J. INT'L L. & PRAC. 161 (1996); Christian Zacker, *Environmental Law of the European Economic Community: New Power Under the Single European Act*, 14 B.C. INT'L & COMP. L. REV. 249, 251 (1991).

15. Agreement Between the Government of the United States of America and the Government of Canada on Air Quality, March 13, 1991, U.S.-Can., T.I.A.S. No. 11783 [hereinafter Air Quality Agreement]; Denmark-Finland-Norway-Sweden: Convention on the

boundaries.¹⁶ Even though many countries create standards to improve their environmental conditions, pollution in border areas is often the responsibility of more than one country. These responsible countries need to work together and cooperate in order to protect these areas. Economic growth and environmental protection cannot be achieved without international cooperation. However, with cooperation, strategies may be adopted to help create a balance between the two.

1. The United States Environmental Protection Agency

The Environmental Protection Agency (hereinafter "EPA") has been a central figure in international environmental protection. The EPA's mission is to promote human health and environmental protection along with "sustainable economic activity in a cost-effective manner."¹⁷ A key to the EPA's achievement of its mission is international cooperation.¹⁸ The EPA provides training and information regarding environmental regulation to other countries.¹⁹ For example, the EPA has provided Mexico with drinking water treatment technologies in order to make Mexican water safe to drink.²⁰ The EPA's actions and the cooperation of other countries have enabled this organization to make a significant difference regarding international environmental concerns.

2. The North American Agreement on Environmental Cooperation

As illustrated in the introduction, the border area has become a serious environmental concern. This paper analyzes the effectiveness of the National Agreement on Environmental Cooperation (hereinafter "NAAEC") and its dispute resolution process. Recommendations will also be provided regarding how this process may better serve the NAAEC's goals.

Overall, the NAAEC provides an effective means of environmental protection. However, this agreement is not perfect. In assessing the NAAEC and recommending reforms, it is important to recall that this agreement was created to address the problem of pollution in the border area and the need to make Mexico enforce its environmental laws. Since 1889, the United States, Mexico, and Canada have attempted to create environmental agreements to address environmental concerns. However,

Protection, Feb. 19, 1974, Den.-Fin.-Nor.-Sweden, 13 I.L.M. 591 [hereinafter Nordic Convention].

16. Symposium, *Managing International Environmental Risk: The Role of Private Parties in Resolving Public Problems*, 18 U. PA. J. INT'L ECON. L. 447-48 (1997).

17. *Id.* at 447.

18. *Id.*

19. *Id.* at 450-51.

20. *Id.* at 451.

many of these plans have failed due to a lack of enforcement and dedication on the part of all parties involved. The NAAEC is a product of this period of trial and error and good intentions.

The NAAEC and the NAFTA were not created overnight. The NAAEC provides a foundation to be built upon and altered in due time. It is not something that can be severely altered in a short period. Change needs to occur gradually in order to be accepted and successful.²¹ Drastic change often results in resistance. Major changes to the NAAEC, as many critics desire, would threaten the foundation that the NAAEC represents and would frustrate cooperation, which the NAFTA and the NAAEC stand for. Therefore, the recommendations offered in this paper are classified as short-term or long-term solutions, indicating their present feasibility. Also, these recommendations are centered around the NAAEC goal of cooperation.

This paper will begin with a background discussion to provide the reader with a frame of reference. Next, a closer look will be taken at the NAAEC's Commission on Environmental Cooperation (hereinafter "CEC"), its composition, functions and potential reforms. Finally, the paper will analyze the NAAEC's dispute resolution process and suggest possible reforms.

II. BACKGROUND

A. *The North Atlantic Free Trade Agreement*

In order to understand how and why the NAAEC was formed, it is necessary to provide some background information regarding the NAFTA, the environmental laws and prior agreements of the United States, Mexico and Canada and the reasons for the NAAEC. The United States, Mexico and Canada signed the NAFTA agreement in December of 1992 with the goal of eliminating all restrictions on trade within fifteen years.²² The United States and Canada had always kept an arguably open border, but the

21. "Although the pace of legal and economic reform in Russia over the past six years or so has been breathtaking, it would be naive to expect that formal changes of such magnitude would be accompanied by similarly rapid changes in social attitudes or in the mindset of the former Soviet bureaucratic apparatus." Karen Halverson, *Resolving Economic Disputes In Russia's Market Economy*, 18 MICH. J. INT'L L. 59, 93 (1996); "China has approached its goal [a socialist market economy] gradually, directly opposing the adopted policies of Poland and the Soviet Union, the former implementing painful and fast shock therapy to change from a centrally planned economy to a market based economy in one step, and the latter testing many immediately effective political reforms in the face of economic crisis." Lyndsey A. Erickson, *Gradual Economic Reform in China*, (visited in 1997) <http://www.middlebury.edu/list_archives/ipe-wt97/0138.html>; "China's gradual reforms have been the most economically successful." *Id.*

22. Joel L. Silverman, Note, *The "Giant Sucking Sound" Revisited: A Blueprint to Prevent Pollution Havens by Extending NAFTA's Unheralded "Eco-Dumping" Provisions to the New World Trade Organization*, GA. J. INT'L & COMP. L. 347, 358 (1994).

NAFTA forced "Mexico to abandon a legacy of protectionism and economic nationalism."²³ In the early 1980s Mexico was facing impending economic collapse and access to the United States markets was a major factor in Mexico's economic reform.²⁴ Fearing competition with Mexico for investment in the United States, Canada decided to join the NAFTA.²⁵ Therefore, the NAFTA was created in order to promote cooperation and economic growth.

Proponents of the NAFTA believe that the NAFTA will lower the amount of pollution generated, improve Mexico's environmental laws and increase wealth among the member countries.²⁶ Without the NAFTA, proponents, mainly businesses, say that the *maquiladoras* would increase in number and continue to pollute.²⁷ They argue that the NAFTA is necessary in order to establish good relations and cooperation among the three member countries. Proponents also argue that these good relations will carry over into attempts to create environmental policy.²⁸

The NAFTA opponents, such as labor organizations and environmental groups, believe that free trade will increase the depletion of natural resources and attract polluters to Mexico.²⁹ They also fear United States environmental laws may be relaxed because they create trade barriers and industries will challenge the validity of these laws.³⁰ Therefore, the NAFTA has created a search for a balance between economic growth and environmental protection.

Despite these criticisms, the NAFTA does contain environmental provisions. Chapter Eleven of the NAFTA prohibits the creation of a "pollution haven" for economic advancement. Many countries felt lax environmental law enforcement gave Mexico the economic advantage of lower production costs.³¹ Chapter Eleven adopted a "polluter pay principle," which states a polluter should pay the costs of meeting environmental regulations.³² In theory, this measure limits Mexico's use of lax environmental enforcement to allow low production costs.

23. *Id.*

24. Michael Robbins, *The North American Free Trade Agreement: The Integration of the Environment*, 7 TEMP. INT'L & COMP. L.J. 123, 127 (1993).

25. *Id.* at 127-28.

26. Rowe, *supra* note 4, at 216.

27. Robbins, *supra* note 24, at 130.

28. *Id.*

29. *Id.* at 129.

30. Rowe, *supra* note 4, at 216-17.

31. Silverman, *supra* note 22, at 367.

32. *Id.*

Other provisions in the NAFTA reflect environmental concerns.³³ For example, Article 904(2) states "each party may pursue its legitimate objectives of safety or the protection of human, animal or plant life or health, the environment, or consumers."³⁴ However, the term "legitimate objective" is rather vague and dispute panels have interpreted it narrowly.³⁵ Therefore, despite the NAFTA's explicit concern for the environment, these provisions do not mandate interventions in support of environmental protection. Nevertheless, the NAFTA was a step towards further cooperation between these North American countries, and has provided them with a basis upon which to address environmental issues.

B. *United States and Mexican Environmental Laws*

The environmental laws of the United States and Mexico indicate a commitment to environmental protection. Although Mexico has been labeled a lax environmental law enforcer, in 1988, Mexico enacted the General Law of Ecological Balance and Environmental Protection (hereinafter "General Law"), which greatly resembles United States law.³⁶ The General Law recognizes that all citizens have a right to a safe and healthy environment and in order to protect this right those citizens have a duty to protect the environment.³⁷ Mexican law provides guidelines for

33. "[I]f there is an inconsistency between NAFTA and the Convention of the International Trade in Endangered Species of Wild Fauna and Flora, the Montreal Protocol on Substances that Deplete the Ozone Layer, the Convention on the Control of Transboundary Movements of Hazardous Wastes, and other agreements listed in Annex 104.1, then these agreements shall prevail over NAFTA 'to the extent of the inconsistency, provided that where a party has a choice among equally effective and reasonably available means of complying with such obligations, the party chooses the alternative that is the least inconsistent with the other provisions of [NAFTA].'" Robbins, *supra* note 24, at 143-44.

34. *Id.* at 144.

35. *Id.*

36. Robbins, *supra* note 24, at 136; In the past it was commonly understood that Mexican pollution was so pervasive because the industries' actions went unchecked. Mexican environmental laws were weak, compared to other countries, and further, governmental corruption prohibited already ineffective enforcement. Therefore, it was believed that Mexican pollution was also affecting U.S. air quality. Cameron A. Grant, *Transboundary Air Pollution: Can NAFTA and NAAEC Succeed Where International Law Has Failed?*, 5 *COLO. J. INT'L ENVTL. L. & POL'Y* 439, 440 (1994).

37. Robbins, *supra* note 24, at 136; The General Law gives the Social Development Secretariat (the "SEDESOL") the responsibility of enforcing and implementing Mexican environmental law. A 1993 report stated that SEDESOL was given \$263 million for enforcement but that \$6.5 billion was needed to reach internationally acceptable pollution levels. Also, a 1992 Congressional survey found that none of the *maquiladora* plants chosen at random had met the 1988 law requirements and only 5 percent met the requirement to return hazardous waste to the U.S. for disposal. Nevertheless, there are signs that Mexico is becoming more serious about environmental protection. Mexico has taken measures to reduce lead content in petroleum, closed

creating regulations, but does not include a superfund program and does not have the resources to enforce these laws.³⁸ In addition, private citizens are unable to bring toxic tort or citizen suits to demand enforcement of environmental laws.³⁹ All environmental disputes are resolved in administrative proceedings under Mexico's civil legal system.⁴⁰

United States environmental laws consist of independent statutes and regulations regarding various environmental concerns.⁴¹ The EPA enforces these statutes and creates environmental regulations and standards.⁴² Enforcement is handled through judicial proceedings, civil and criminal litigation and administrative enforcement. However, the majority of disputes end in settlement.⁴³ In addition, the United States system, in contrast to the Mexican system, encourages public participation.⁴⁴ Even though Mexican law differs from United States law, Mexico has shown that it is concerned about the environment and with greater resources would have better regulation.⁴⁵

C. *Prior Environmental Agreements*

1. United States and Mexico

Since 1889, the United States, Mexico and Canada have created several bi-national agreements regarding the environment.⁴⁶ In 1944, the United States and Mexico established the International Boundary Water

oil refineries, is replacing smog producing fuel with natural gas and has increased its budget by ten times for environmental protection since 1989. Also, the U.S. EPA is training the SEDESOL. Silverman, *supra* note 22, at 355-57.

38. Rowe, *supra* note 4, at 200-01.

39. Silverman, *supra* note 22, at 357; The NAAEC requires each member country to "ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial or judicial proceedings for the enforcement of the party's environmental laws and regulations." NAAEC, *supra* note 12, art. 6, 32 I.L.M. at 1484. However, private suits would not be considered "legally recognized" interests in Mexico.

40. Rowe, *supra* note 4, at 202, 204.

41. *Id.* at 200.

42. *Id.* at 204.

43. *Id.*

44. *Id.*

45. Canadian environmental law is very similar to United States law, Canada like the United States is very experienced in environmental litigation. Grant, *supra* note 36, at 454.

46. Rowe, *supra* note 4, at 204-05. The major agreements adopted by the United States and Mexico are: 1889: The Boundary Waters: Rio Grande and Rio Colorado Convention; 1944: Utilization of Waters of Colorado and Tijuana Rivers of the Rio Grande Treaty; 1984: La Paz Agreement, also known as the Cooperation for Improvement of the Environment in the Border Area Agreement; 1992: the Border Agreement and the NAFTA; 1993: the NAAEC and; 1994: the BECC/NADB Agreement. *Id.*

Commission (hereinafter "IBWC"), which has the power to stop violators, settle disputes and make recommendations.⁴⁷ However, the IBWC lacked power and has had little impact.⁴⁸ In 1984, the La Paz Agreement was created to promote cooperation between the United States and Mexico.⁴⁹ It was not successful because it did not give the IBWC enforcement powers, lacked resources and did not establish a dispute resolution process.⁵⁰ Under the La Paz Agreement, the United States and Mexico were to ensure "to the extent practicable" their environmental laws were enforced, but this obligation was vague and never enforced.⁵¹ Without a dispute resolution process, and with vague provisions, the La Paz Agreement did not curb pollution.⁵² In 1991, Presidents Bush and Salinas and Prime Minister Mulroney had committed themselves to the creation of the NAFTA and abandoned these prior agreements.⁵³ Nevertheless, these prior agreements indicate that environmental protection was a concern as early as 1889 for the United States and Mexico.

2. United States and Canada

Past environmental agreements between the United States and Canada have produced mixed results. First, in 1909 the Boundary Waters Treaty was created to deal with the misuse and diversion of water along the United States - Canadian border.⁵⁴ Under this treaty, the International Joint Commission (hereinafter "IJC") was established to resolve disputes and it still exists today.⁵⁵ In the 1980's the United States and Canada entered into the Great Lakes Water Quality Agreement, but it has not been successful in

47. M. Grace Giorgio, *Transboundary Pollution Disputes Under the North American Free Trade Agreement*, 3 S.C. ENVTL. L.J. 166, 178 (1994).

48. *Id.*

49. *Id.* at 180.

50. *Id.*

51. *Id.* at 182.

52. *Id.* at 178.

53. Gaines, *supra* note 6, at 430.

54. Giorgio, *supra* note 47, at 175.

55. Boundary Waters Treaty, opened for signature Jan. 11, 1909, Canada - United States, The International Joint Commission and the Boundary Waters Treaty. Under Article IX, the U.S. and Canada may submit a dispute to the IJC regarding "questions or matters of difference arising between them involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along the common frontier between the United States and the Dominion of Canada" *Id.* at 10. A submission under Article IX only permits the IJC to examine and report on the facts of the matter along with the ability to provide recommendations and conclusions. *Id.* These reports are not decisions. Under Article X, the same disputes can be heard as in Article IX, but if parties submit a claim under Article X, the IJC is able to reach a decision and if it cannot, the U.S. and Canada select an umpire to resolve the matter. *Id.*

resolving water pollution disputes, namely because the IJC lacks enforcement power.⁵⁶ In 1986 the United States and Canada entered into the Hazardous Waste Agreement in order to control the transportation of waste. Similar to the La Paz agreement, each country was to enforce its own environmental laws "to the extent possible." Unfortunately, there were no enforcement procedures in place for failure to meet this obligation.⁵⁷ The only remedy for injury under this agreement was an insurance policy in which each member was required to insure waste was being transported across the border.⁵⁸ The Air Quality Agreement was created in 1991 and has been very successful because it encourages settlements through alternative dispute resolution ("ADR") and promotes transparency of environmental laws, goals and techniques for environmental regulation.⁵⁹

As mentioned above, political leaders in the early 1990's did not support environmental protection and shifted their attention to the NAFTA. Nevertheless, the environmental agreements between the United States and Canada, along with others, have strengthened relationships between the United States and Canada. The Air Quality Agreement is an example of how international environmental protection can be achieved through cooperation.

D. Reasons for the North American Agreement on Environmental Cooperation

In 1993, the United States, Mexico, and Canada signed the NAAEC, to promote cooperation and to oblige each member country to enforce its

56. Giorgio, *supra* note 47, at 176.

57. *Id.* at 177.

58. *Id.*

59. Air Quality Agreement, *supra* note 15, art. IV, VI, VII, XI & XIII, T.I.A.S. No. 11783, at 2-5; The purpose of the Air Quality Agreement is "to address shared concerns regarding transboundary air pollution." Both countries expressed the belief that a healthy environment is necessary "to assure the well-being of present and future generations." *Id.* at 1-2; Both parties developed specific objectives stated in the annexes and each party has the responsibility to develop programs and to take the necessary measures to meet those objectives. *Id.*; If one party does not agree with the other's proposals the dispute is resolved through consultations. Further, if one country plans to engage in an activity likely to cause pollution, it must consult the other country. *Id.* at 2-3; The parties are to do research to learn about transboundary pollution and how to control it, and they must share this information with the other party. *Id.* at 3; In dispute resolution, the parties are to enter consultations and if no result is reached, to use negotiations. *Id.* at 5; If that does not work, the parties are to submit the matter to the IJC for either examination or decision *see* Boundary Waters Treaty, *supra* note 55, at 10, or the parties may agree on ADR. *Id.* at 5.

environmental laws.⁶⁰ The NAAEC was created as a result of the tremendous pollution caused by the *maquiladora* plants in the border area.

In the early 1990's, local residents and environmental advocates pressured the NAFTA governments to create legal provisions and an administrative mechanism that would integrate environmental protection into the NAFTA.⁶¹ These groups wanted a system that would create obligations and commitments to the preservation of the environment.⁶² Overall, people wanted political leaders to take environmental protection seriously because they were being injured and had no power to protect themselves.

The NAAEC was also created to fill in the gaps of the NAFTA environmental provisions, such as Chapter Eleven, and to provide a balance between trade and environmental preservation.⁶³ Mexico's conspicuous absence of environmental law enforcement permitted low cost production and the NAFTA's *polluter pay principle* was not enforced.⁶⁴ Under the NAAEC, each member must establish *high levels* of environmental protection and enforce its laws.⁶⁵ Overall, the NAAEC was created to promote cooperation between the three member countries and effectuate environmental protection.

III. THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION AND ITS DISPUTE RESOLUTION PROCESS

A. *Motivations & Obligations*

The NAAEC's objectives center on the general goals of environmental protection, cooperation, public participation, balancing economic growth with environmental protection, and promoting the enforcement of environmental laws.⁶⁶ Other important aspects of the NAAEC are that

60. NAAEC, *supra* note 12, art. 1, 32 I.L.M. at 1483; In 1993, the United States and Mexico created the Border Environment Cooperation Commission ("BECC") and the North American Development Bank ("NADB"). The BECC directs and certifies environmental protection projects while the NADB funds BECC approved projects. Federal, state and local governments plus the private sector provide additional funding. Agreement Between the Government of the United States of America and the Government of the United Mexican States Concerning the Establishment of a Border Environment Cooperation Commission and a North American Development Bank, Jan. 1, 1994, Mex. - U.S., St. Dep't. No. 94-28; Rowe, *supra* note 4, at 213-14.

61. Gaines, *supra* note 6, at 432.

62. *Id.*

63. Bivona, *supra* note 14, at 161.

64. *Id.* at 163.

65. *Id.* at 164; NAAEC, *supra* note 12, art. 3, 32 I.L.M., at 1483.

66. NAAEC, *supra* note 12, art. 1, 32 I.L.M., at 1483; NAAEC articulates ten major objectives:

each member must prepare reports on the state of its environment, publish all environmental laws, and provide citizens with access to judicial or administrative proceedings when a citizen has a *legally recognized interest*.⁶⁷ Regarding interpretation of the NAAEC, the member countries are to come to a mutual understanding on the agreement's meaning, and settle any interpretation concerns through *cooperation and consultations*.⁶⁸ In addition, each party is to notify any other party if the first party believes its actions may affect the operation of this agreement or significantly affect the other party's interests.⁶⁹ These provisions promote accountability, environmental protection, transparency and public awareness.

B. *The Commission*

The NAAEC's dispute resolution institution is the Commission on Environmental Cooperation (hereinafter "CEC"). The CEC does not settle a wide range of disputes but only determines whether there has been a persistent pattern of failure by a party to effectively enforce its environmental laws.⁷⁰ Therefore, this process does not provide a private right of action.⁷¹ The CEC consists of a Council, Secretariat, Joint Public Advisory Committee (hereinafter "JPAC") and other committees.⁷² Each actor has a distinct function within the NAAEC.

-
- 1) foster the protection and improvement of the environment in the territories of the parties for the well-being of the present and future generations;
 - 2) promote sustainable development based on cooperation and mutually supportive environmental and economic policies;
 - 3) increase cooperation between the parties to better conserve, protect, and enhance the environment, including wild flora and fauna;
 - 4) support the environmental goals and objectives of the NAFTA;
 - 5) avoid creating trade distortions or new trade barriers;
 - 6) strengthen cooperation on the development and improvement of environmental laws, regulations, procedures, policies and practices;
 - 7) enhance compliance with, and enforcement of, environmental laws and regulations;
 - 8) promote transparency and public participation in the development of environmental laws, regulations and policies;
 - 9) promote economically efficient and effective environmental measures; and
 - 10) promote pollution prevention policies and practices.

Id.

67. NAAEC, *supra* note 12, art. 4-6, 32 I.L.M. at 1483-84.

68. NAAEC, *supra* note 12, art. 20, 32 I.L.M. at 1489.

69. *Id.* at 1489-90.

70. J. Owen Saunders, *NAFTA and the North American Agreement on Environmental Cooperation: A Model for International Collaboration on Trade and the Environment*, 5 COLO. J. INT'L ENVTL. L. & POL'Y 273, 298 (1994).

71. Giorgio, *supra* note 47, at 191.

72. NAAEC, *supra* note 12, art. 8, 32 I.L.M. at 1484.

1. Council

The Council, as the governing body of the CEC, consists of cabinet level representatives from each member country and oversees the Secrétariat.⁷³ The Council is able to delegate authority and obtain information from experts, private individuals and non-governmental organizations ("NGOs").⁷⁴ The Council provides a forum in which to resolve environmental matters related to the NAAEC and makes recommendations regarding the environment and pollution-prevention techniques.⁷⁵ The Council encourages cooperation between the members and helps each member improve its environmental laws by promoting the exchange of information regarding methods used to establish or enforce environmental standards.⁷⁶ The Council must also assist the NAFTA Free Trade Commission ("FTC") in achieving the environmental goals in the NAFTA.⁷⁷ The Council has the duty to make recommendations regarding the potential for cross-border suits by injured persons. However, Council recommendations are not binding.⁷⁸

The Council convenes a panel to resolve disputes when they occur. The Council created a roster of persons willing to be panelists that it keeps undated.⁷⁹ Roster member must have experience in environmental law, its enforcement in the resolution of disputes under international agreements or other relevant experience or expertise.⁸⁰ Each roster member must comply with the Council's code of conduct and if a party believes a panelist to be in violation of the code, the parties shall consult. If all parties agree, the panelist will be removed and a new panelist will be selected.⁸¹

In the panelist selection process, the parties agree on a chair within fifteen days after the Council votes to convene a panel.⁸² If the parties cannot agree on a chair, the party chosen by lot must pick a chair within five days.⁸³ Within fifteen days after that chair is selected, the parties are to choose two panelists who are citizens of the opposing party's country. If a party cannot make a choice, the panelists will be chosen by lot.⁸⁴

73. NAAEC, *supra* note 12, art. 9 & 10, 32 I.L.M. at 1485.

74. *Id.*

75. NAAEC, *supra* note 12, art. 10, 32 I.L.M. at 1485-86.

76. *Id.* at 1486.

77. *Id.*

78. *Id.* at 1487.

79. NAAEC, *supra* note 12, art. 25, 32 I.L.M. at 1491.

80. *Id.*

81. NAAEC, *supra* note 12, art. 25, 27, 32 I.L.M. at 1491

82. NAAEC, *supra* note 12, art. 27, 32 I.L.M. at 1491.

83. *Id.*

84. *Id.*; If there are three disputing parties, the panel shall still contain five members and all three parties need to chose a chair within fifteen days after the Council agrees to convene the

When a panelist is chosen who is not on the roster, any party may use a preemptory challenge to remove that panelist.⁸⁵

2. Secretariat

The Secretariat is headed by an Executive Director who is chosen by the Council for a three-year term. This position rotates among members of each member country.⁸⁶ The Executive Director appoints a staff procured from a list prepared by the member countries and the JPAC. The Council can reject any appointment by a two-thirds vote.⁸⁷

The Secretariat has a variety of functions. It provides technical, administrative and operational support to the Council, submits the annual program and budget for Council approval, and prepares an annual report that is released to the public after Council review.⁸⁸ This report may include information about actions taken by each member country in connection with its obligations under the NAAEC or data regarding each member's environmental law enforcement.⁸⁹ The Secretariat receives submissions from private persons or NGOs asserting that a member country has failed to effectively enforce its environmental laws.⁹⁰ The Secretariat may request a response from the other party involved if the claim is well founded, but if the matter is pending in another court or administrative proceeding, the Secretariat will not honor the claim.⁹¹ Each claim must:

- a) be in writing;
- b) clearly identify the person or organization making the submission;
- c) provide sufficient information to allow the Secretariat review the claim;
- d) promote and not harass industry;

panel. If the parties cannot agree on a chair, the party or parties chosen by lot shall choose a chair within ten days. Within thirty days after selection of the chair, the party complained against shall choose two panelists, one from each of the complaining parties. The complaining countries select two panelists who are citizens of the party complained against. If any party does not pick a panelist, the panelist will be chosen by lot based on the citizenship requirements stated above. *Id.*

85. *Id.*

86. NAAEC, *supra* note 12, art. 11, 32 I.L.M. at 1487.

87. *Id.*

88. NAAEC, *supra* note 12, art. 11, 12, 32 I.L.M. at 1488.

89. NAAEC, *supra* note 12, art. 12, 32 I.L.M. at 1488.

90. NAAEC, *supra* note 12, art. 14, 32 I.L.M. at 1488.

91. *Id.*

e) indicate that the matter has been communicated in writing to the relevant authorities of the party and indicate the party's response;⁹² and

f) be filed by a person or organization residing or established in the territory of a party.⁹³ If the submission warrants the making of a factual record, the Secretariat notifies the Council and provides reasons.⁹⁴ A two-thirds Council vote is needed to make a factual record and another vote is required to make the factual record public.⁹⁵

The Secretariat may be equated to that of an Administrative Manager⁹⁶ because it collects all claims and undertakes the initial investigation to determine if the claims are worthwhile. The Council then votes on the Secretariat's determination of whether to publish these factual records and annual reports. These procedures make the dispute resolution process more efficient because the Council vote is a check on the Secretariat's determinations, ensuring the Secretariat acts in an acceptable manner. In preparing the factual record, the Secretariat will obtain information from the submitting parties, the JPAC, independent experts, information it has discovered and publicly available information.⁹⁷ The Secretariat, however, has no authority to review a party's failure to enforce its environmental laws.⁹⁸

3. Committees

The JPAC is made up of fifteen representatives, five from each member country.⁹⁹ The JPAC provides technical and scientific information

92. This is how a member country becomes involved in the suit. The NAAEC is not clear on whether approval is needed or if notice to the member country is sufficient.

93. NAAEC, *supra* note 12, art. 14, 32 I.L.M. at 1488; When the Secretariat determines that a submission meets the filing requirements, it must determine whether the submission merits a response from the complained against party. The Secretariat considers:

- 1) if the submission alleges harm to the person or organization making the claim;
- 2) if the submission raises issues whose further study would advance the goals of the NAAEC;
- 3) if private remedies have been pursued under the party's laws; and
- 4) if the submission is based solely on media reports.

Id.

94. NAAEC, *supra* note 12, art. 15, at 1488-89.

95. *Id.*

96. Often called a preparatory judge, case manger, civil prosecutor or judge de mise.

97. NAAEC, *supra* note 12, art. 15, at 1488-89.

98. Grant, *supra* note 36, at 449.

99. NAAEC, *supra* note 12, art. 16, at 1489.

to the Secretariat and advice to the Council.¹⁰⁰ Each country may convene a national advisory committee made up of members of the public and/or governmental advisory committees made up of federal and state representatives to advise on the implementation and possible alterations to the NAAEC.¹⁰¹

C. *Assessment of the CEC & Actors*

The CEC employs a coordinate structure in which each actor has separate functions, subject to checks on these functions. The Council is involved in dispute resolution, recommendations promoting cooperation, and helping the member countries create highly protective environmental laws. The Secretariat investigates claims, creates factual records and prepares other reports. All these actions performed by the Secretariat are subject to Council review. The JPAC and other committees provide services only when called upon by the Council or Secretariat.

The CEC also has a vertical or hierarchical structure. The Council is the governing body and the Secretariat, and other committee functions, are subject to Council oversight. The JPAC, subject to the orders of the Secretariat and Council, is an information-providing source for the two bodies, while the other national advisory committees are under the control of each member country. In many ways this system shares characteristics with the structure of the United States government in that each actor has defined roles, similar to the separation of powers concept. Each actor in the CEC is subject to a check or oversight, similar to the United States checks and balances system. However, the Council is the one body in the CEC whose actions do not appear to be subject to any checks.

Except for the selection process and criteria requirements for panelists, the NAAEC is extremely vague regarding the selection of Council members as well as the number appointed. It also does not mention how many Secretariat staff persons are appointed or if an equal number is selected from each member country. These vague provisions create difficulty in interpreting the NAAEC.

The North American Agreement on Labor Cooperation (hereinafter "Labor Side Agreement") provides greater detailed descriptions of these selection procedures.¹⁰² For example, the CLC Council is made up of labor ministers from each member country.¹⁰³ There should be a requirement under the NAAEC that members of the CEC Council have

100. *Id.*

101. NAAEC, *supra* note 12, art. 17, 18, at 1489.

102. North American Agreement on Labor Cooperation, *opened for signature* Sept. 9, 1993, Can.-Mex.-U.S., 32 I.L.M. 1499; The Labor Side Agreement created a Commission for Labor Cooperation ("CLC") containing a Council and Secretariat assisted by the National Administrative Office ("NAO") of each party. *Id.* at art. 8, 32 I.L.M. at 1504.

103. The Labor Side Agreement, *supra* note 102, art. 9, 32 I.L.M. at 1505.

environmental law experience or require that the Council be composed of environmental ministers. These specialized representatives could provide guidance and possibly better dispute resolution skills, than a representative without environmental experience. The CLC Executive Director selects its Secretariat staff while taking into consideration "the importance of recruiting an equitable proportion of the professional staff from among the nationals of each party."¹⁰⁴ Also, the Council is made up of fifteen staff members. The Council can change this number if they deem it necessary.¹⁰⁵

These detailed selection provisions in the Labor Side Agreement may be due to the fact that labor issues involve human rights. When dealing with human rights issues, further protections are usually taken to avoid violating an individual's rights. Adding these detailed descriptions of the selection process of CEC intervenors would serve to clarify the NAAEC, provide skilled decision-makers and avoid interpretation disputes.

The NAAEC does contain evaluation criteria. For example, the Council may remove the Executive Director for cause, each panelist must abide to a code of conduct and the filing party must meet certain initial requirements to file, and the Secretariat's actions are subject to Council oversight.¹⁰⁶ These measures would appear to effectively check the actions of Council members. However, the Council's power, in practice, appears to be unfettered.

A check should be placed on the Council's authority, such as removal of the two-thirds vote to deny a claim and the publishing of a factual report. An apt replacement would be a frivolous claim standard that the Council must apply accompanied by a requirement to provide reasons for why a claim should be denied.¹⁰⁷ There is little reason not to prepare a factual record because the Secretariat has already done most of the research and publishing the factual record promotes transparency and public awareness.¹⁰⁸ If the Council denies a claim then decides not to publish the factual record, a suspicion of cover-up will flourish that will undermine the credibility of the CEC.¹⁰⁹ Therefore, the Council's two-thirds veto power should be restricted. This power limitation would promote public awareness and participation, create an incentive for enforcement of domestic environmental laws and protect CEC credibility.

104. The Labor Side Agreement, *supra* note 102, art. 12, 32 I.L.M. at 1506.

105. *Id.*

106. NAAEC, *supra* note 12, art. 10, 11, 14, 25, 32 I.L.M. at 1485, 1487, 1488, 1491.

107. *See infra* pp. 34-35 for a further discussion of this concern.

108. David S. Baron, *NAFTA and the Environment: Making the Side Agreement Work*, 12 ARIZ. J. INT'L & COMP. L. 603, 611 (1995); NAAEC does take into account confidential information and will not make such information public. NAAEC, *supra* note 12, art. 39, 32 I.L.M. at 1494.

109. *Id.*

The Council gathers technical data, develops recommendations, and encourages members to incorporate these recommendations into their laws and policies. These actions have some political impact because they encourage a member to alter its present laws and may infringe on a member's sovereignty. However, because these Council recommendations are not binding, they have little influence. To make these recommendations binding would give the Council too much power and usurp the control of the member countries over their domestic environmental laws, a power retained by the members under the NAAEC.¹¹⁰

In order to make this Council function more effective, the member countries should have the right to vote on adopting a recommendation. This procedure would promote cooperation because if a recommendation is approved, the laws of the members will become more unified. Therefore, although the Council has too much power in some areas, such as denying submissions and the publishing of factual records, it seems illogical to give the Council the power and resources to conduct research and make recommendations if these recommendations have little weight. This is a waste of resources. Council research and recommendations are very important because they promote cooperation through the potential for unification of law. Therefore, giving each member the right to vote upon each recommendation would substantiate this function of the Council and give the Council a quasi-legislative role. It would also be advantageous to let Council members initiate legislation and vote on policy. In addition, the members have their own research and environmental regulation procedures, which may be attractive to other members. This sharing of ideas can lead to additional cooperation between nations, and assist less advanced nations by enhancing technology ideas and information.

D. *The CEC Dispute Resolution Process*

Once the Secretariat accepts a submission, any party may request a consultation with any other concerned party, whether or not there has been a persistent pattern of failure by the other party to effectively enforce its environmental laws.¹¹¹ The request must be in writing and submitted to the Secretariat and the other party.¹¹² A third party may participate in the consultations if it believes that it has a significant interest in the matter.¹¹³ The parties are expected to take every measure in order to reach a resolution, but if no result is reached within sixty days, any party may request a Council session.¹¹⁴ The Council is to convene within twenty days

110. NAAEC, *supra* note 12, art. 3, 32 I.L.M. 1483.

111. NAAEC, *supra* note 12, art. 22, 32 I.L.M. at 1490.

112. *Id.*

113. *Id.*

114. NAAEC, *supra* note 12, art. 22, 23, 32 I.L.M. at 1490.

of receiving the request, and may utilize the assistance of technical advisers, experts or other groups.¹¹⁵ To assist the parties in reaching a mutually satisfactory agreement, the Council may use conciliation and mediation or make a recommendation.¹¹⁶ These procedures involve the use of a neutral party to help the disputing parties reach a settlement. A Council recommendation will be made public if approved by a two-thirds Council vote.¹¹⁷

If the dispute has not been settled within sixty days, the Council, by written party request, shall convene an arbitrary panel to decide whether there has been a persistent pattern of failure by a party to effectively enforce its environmental laws.¹¹⁸ The panel bases its determination on the submissions and arguments of each party, and the information presented by experts.¹¹⁹ Within 180 days, the panel must present an initial report to the parties containing findings of fact, a determination of whether or not a persistent pattern of failure to effectively enforce environmental law has occurred, and its recommendations for the resolution of the dispute.¹²⁰ Any party may submit written comments to the panel and after considering these comments, the panel will present a final report, which will be published.¹²¹ If the panel decision is in the affirmative, the parties may mutually agree on an action plan, which must conform to the panel decision and must be presented to the Council and Secretariat.¹²²

Under certain conditions, the panel may reconvene. If the parties, (a) cannot agree on the action plan or (b) cannot agree on whether or not the defending party has fully implemented an action plan chosen by the parties or an action plan created by the panel, any party may request the panel to reconvene.¹²³ If the panel is reconvened under (a), it will determine whether an action plan proposed by the defending party is sufficient and if

115. *Id.*

116. *Id.*

117. *Id.*

118. NAAEC, *supra* note 12, art. 24, 32 I.L.M. at 1490; A panel will only decide this issue if the matter involves "workplaces, firms, companies or sectors that produce goods or provide services: (a) traded between the territories of the parties; or (b) that compete, in the territory of the party complained against, with goods or services produced or provided by persons of another party." *Id.* Therefore, it must be a trade-related issue.

119. NAAEC, *supra* note 12, art. 28-30, 32 I.L.M. at 1492; The Council is to establish rules of procedure that provide a right to at least one hearing before the panel and the chance to make written submissions. NAAEC, *supra* note 12, art. 28, 32 I.L.M. at 1491.

120. NAAEC, *supra* note 12, art. 31, 32 I.L.M. at 1492; The punishment is an action plan requiring the losing party to correct its non-enforcement. NAAEC, *supra* note 12, art. 33, 32 I.L.M. at 1492.

121. NAAEC, *supra* note 12, art. 31, 32, 32 I.L.M. at 1492.

122. NAAEC, *supra* note 12, art. 33, 32 I.L.M. at 1492.

123. NAAEC, *supra* note 12, art. 34, 32 I.L.M. at 1492.

so, it will approve the plan.¹²⁴ On the other hand, if the plan is not permissible, the panel will establish an action plan.¹²⁵ The panel may also impose monetary sanctions.¹²⁶

If the panel is reconvened under (b), the panel is to determine if the offending party has fully implemented the action plan and if that party has not done so the panel is to impose monetary sanctions.¹²⁷ The money from these sanctions is used to improve environmental law enforcement in the offending country.¹²⁸ A party may again convene a panel to determine if the opposing party has fully implemented the action plan.¹²⁹ If a party fails to pay a monetary sanction, the complaining party may suspend that party's NAFTA benefits.¹³⁰ The sanctioned party may submit a written request that the Council reconvenes the panel to determine whether the suspension of benefits is excessive.¹³¹

These enforcement procedures are subject to Annex 34 and 36A.¹³² Annex 34 states that a monetary sanction cannot exceed .007 percent of the total trade in goods between the parties during the most recent year for which such data is obtainable.¹³³ Annex 36A states that if a panel determines that Canada shall pay a sanction or fully implement an action plan, the CEC will file the panel determination with a Canadian court with competent jurisdiction and such panel determination will become a court order.¹³⁴ This panel determination is binding on the court and it is not subject to domestic review or appeal.¹³⁵

E. *Assessment of the North American Agreement on Environmental Cooperation*

This discussion will begin with an analysis of the vagueness¹³⁶ within certain NAAEC provisions regarding compulsory/non-compulsory

124. *Id.* at 1493.

125. *Id.*

126. *Id.*

127. *Id.*

128. Stanton, *supra* note 4, at 76.

129. NAAEC, *supra* note 12, art. 35, 32 I.L.M. at 1493.

130. *Id.* at 1494.

131. *Id.*

132. NAAEC, *supra* note 12, annex 34, 32 I.L.M. at 1496; Annex 36B also places limits on the suspension of NAFTA benefits; NAAEC, *supra* note 12, Annex 36B, 32 I.L.M. at 1497.

133. *Id.*

134. NAAEC, *supra* note 12, annex 36A, 32 I.L.M. at 1497.

135. *Id.*

136. Although most international agreements do contain vague language, in order to form an agreement that all parties will support, this language often creates disputes regarding

jurisdiction, interpretation consultations, and the phrase "high levels." The discussion will then shift to the actual dispute resolution process. First, entry or access to the process will be discussed. This will include: the party who submits the claim, who is involved in the suit, the issue decided, and Council oversight. Second, party control, as a theme throughout the entire process, will be analyzed, including the concepts of consensual resolution and time restrictions for settlement. Third, the methodology of the decision-making will be discussed, focusing on how decisions are made and what is taken into consideration. Finally, the discussion will look at the outcome, whether it is binding or non-binding, the enforcement of the outcome and other related concerns.

1. Vagueness

The NAAEC does not specifically state if consent to jurisdiction is compulsory or non-compulsory. In Article 22, after a party makes a request for consultations to another party, there is no mention of whether or not the requested party can deny the request.¹³⁷ This could be a problem because parties may take vastly differing views on if and when consent is needed. If the requested party is required to comply, that party is now subject to the entire CEC dispute resolution process and possibly a binding panel decision. If the party is able to deny the request the goal of cooperation among member countries would be frustrated, which would constitute avoidance which would be detrimental to the success of this agreement and the members' relations. Although non-compulsory jurisdiction may have been the intent of the NAAEC's drafters, compulsory jurisdiction is practiced because of pressure from member countries. Compulsory jurisdiction is the best method for the NAAEC because it forces the parties to meet and resolve their problems. The fact that a binding panel decision may lie ahead is an incentive to reach a mutually satisfactory decision as soon as possible. This provision needs to be clarified in order to prevent future conflicts. Also, this change could be made in the short-term because it would not change the nature of the NAAEC but rather align the interpretations of the member countries. The NAAEC fails to provide procedures for consultations when an interpretation dispute arises. The NAAEC does not mention where the parties are to meet; which issues are to be discussed; and how long the parties have to resolve the matter through consultations. Also, the NAAEC does not provide further procedures in the event a result cannot be reached through consultations. When the members disagree on the NAAEC's interpretation the parties must use "cooperation and consultations to resolve

interpretation. NAAEC contains several provisions with vague language creating difficulty in determining precisely how the dispute resolution process operations.

137. NAAEC, *supra* note 12, art. 22, 32 I.L.M. at 1490.

any matter that might affect its operation.”¹³⁸ This provision provides little guidance.

The Labor Side Agreement, provides explicit procedures regarding disputes over interpretation.¹³⁹ A National Administrative Office (hereinafter “NAO”), which serves as a contact point for each member and the Secretariat, may request consultations with another NAO. Any party may request, in writing, consultations with another party regarding any matter within the scope of the Labor Side Agreement.¹⁴⁰ If the matter is not resolved through consultations, a party may request the establishment of an Evaluation Committee of Experts (hereinafter “ECE”). The ECE is selected in a manner similar to the CEC panel, which will create a draft report to which the parties can submit comments and then publish a final report.¹⁴¹ The Council is able to keep the matter under review.¹⁴² These procedures provide a framework and promote cooperation, unlike the confusion the NAAEC provides. Specific procedures, like those in the Labor Side Agreement, could be added to the NAAEC in the short-term. These procedures would be a positive addition because they would reduce or eliminate interpretation disputes and promote cooperation through consultations.

Another vague provision in the NAAEC is the obligation that each member country must create environmental laws, which provide *high levels* of environmental protection.¹⁴³ The meaning of *high levels* in the United States differs from its meaning in Mexico. Each member has a different view of what the definition of *high levels* of environmental protection is. In addition, the NAAEC does not provide a check to make sure that each member’s laws meet this standard. Overall, this provision has little weight because of its vagueness and lack of enforcement.

After the NAAEC becomes more influential, it would be beneficial to establish specific environmental standards that apply to all members. Specific standards would give this provision a purpose while creating a basis of measurement to determine whether or not each party has met the standard. This reform would change the CEC’s threshold issue of determining whether the standards have been met instead of whether each member has enforced its own laws. However, domestic law should still cover the methods used to obtain these standards. This would be a long-term goal since the NAAEC is new and such a drastic change would limit sovereignty.

138. NAAEC, *supra* note 12, art. 20, 32 I.L.M. at 1489.

139. The Labor Side Agreement, *supra* note 102, art. 20-26, 32 I.L.M. at 1507-09.

140. The Labor Side Agreement, *supra* note 102, art. 21, 22, 32 I.L.M. at 1507-08.

141. The Labor Side Agreement, *supra* note 102, art. 23, 32 I.L.M. at 1508.

142. The Labor Side Agreement, *supra* note 102, art. 26, 32 I.L.M. at 1509.

143. NAAEC, *supra* note 12, art. 3, 32 I.L.M. at 1483.

Overall, an international agreement with gaps or vague language causes disputes and could impair cooperation. However, too much specificity could be detrimental and impede approval. Except for the third one, the aforementioned measures do not significantly alter the agreement, and would only improve interpretation and compliance.

2. The Process

Access into the process has several positive and negative features. It is easy for a private individual or an NGO to submit a claim and to have the Secretariat make a factual record, so long as it meets the requirements stated earlier.¹⁴⁴ These requirements are read liberally in order to ensure that the process provides much public participation, a goal of the NAAEC.¹⁴⁵

On the downside, the parties making the submissions are not the parties to the suit; rather the member countries are the parties to the suit.¹⁴⁶ Therefore, it seems as though private individuals and NGOs would be discouraged from making a claim since they cannot recover damages through this system. However, since the CEC is the only institution providing an environmental dispute resolution process regarding the border, private individuals and NGOs are more likely to submit claims in order to make their member country aware of another member's failure to enforce its laws.

Another concern limiting access is that the CEC dispute resolution process only resolves one issue. That issue is whether or not a party has shown a persistent pattern of failure to effectively enforce its environmental laws.¹⁴⁷ This is a difficult issue to prove because it may require technical information that an individual or NGO does not have access too. Also, the determination of this question is based upon how the actors involved in the dispute resolution process perceive what does and what does not constitute a persistent pattern of failure to enforce environmental laws. Therefore, a subjective method is used which may prohibit impartial decision-making.¹⁴⁸

In addition, limiting access to one issue, denies injured individuals with valid claims against a polluting party, access to an international environmental dispute resolution process. Mexico does not allow citizens to bring private actions to demand enforcement of environmental laws. Therefore, the NAAEC requirement that each member provide a right of action for citizens with a "legally recognized interest", would not apply to Mexican citizens who were injured.¹⁴⁹

144. NAAEC, *supra* note 12, art. 14, 32 I.L.M. at 1488.

145. Baron, *supra* note 108, at 608.

146. *Id.*; see *supra* note 144.

147. NAAEC, *supra* note 12, art. 22, 32 I.L.M. at 1490.

148. See *infra* pp. 37-39 for a further discussion of this issue.

149. Silverman, *supra* note 22, at 357; NAAEC, *supra* note 12, art. 6, 32 I.L.M. at 1484.

Supporters of cross-border suits believe that although suits may be filed across borders today, government corruption severely restricts the use of this option.¹⁵⁰ Thus, cross-border suits under the NAAEC would provide injured persons with a means by which to seek remedy against the government, and to participate in the movement toward environmental protection and accountability.

The Nordic Convention of 1974 between Denmark, Finland, Norway, and Sweden is an environmental agreement that allows cross-border suits.¹⁵¹ Any person affected by environmentally harmful activities in another contracting state has the right to bring a claim to the appropriate court or administrative authority regarding the permissibility of such activities.¹⁵² An individual may appeal the decision and has the same legal rights as a person of that country in which the harmful activities are taking place.¹⁵³ One critic of the NAAEC believes that cross-border suits need to be added to the NAAEC because there is no private right of action.¹⁵⁴ Also, since the United States is very skilled at environmental litigation, United States citizens and organizations could effectively sue in Mexican courts and receive the remedies due.¹⁵⁵ However, critics suggest that cross-border suits would infringe upon each member country's sovereignty.¹⁵⁶ Mexico holds sovereignty in high regard and would likely withdraw from the NAAEC if cross-border suits were established.¹⁵⁷ In addition, this change would force member countries to alter their standing laws giving up more sovereignty.¹⁵⁸ The United States and Canada are very experienced in environmental litigation and cross border suits would result in a flooding of Mexican courts which would be grossly unfair to Mexico and would frustrate cooperation.¹⁵⁹ Additionally, it has been argued that since the present CEC does not permit private individuals to directly sue polluting, factories for damages, there is a diluted impact on the actual polluters, since the member country of the polluter is the one who is punished.¹⁶⁰ While this argument is very persuasive, the NAAEC is

150. "Any member country is free to place burdensome restrictions to recognizing a right of action for citizen or non-citizen suits." Stanton, *supra* note 4, at 79; "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". *Id.*

151. The Nordic Convention, *supra* note 15, art. 3, 13 I.L.M. at 592.

152. *Id.*

153. *Id.*

154. Stanton, *supra* note 4, at 76.

155. *Id.*

156. Grant, *supra* note 36, at 452.

157. *Id.*

158. *Id.* at 454.

159. *Id.* at 455.

160. *Id.*

not prepared for cross-border suits. However, such a process may be desirable in the future.

Cross-border suits would require substantial change in a limited time.¹⁶¹ It would limit sovereignty and force member countries to change their domestic laws. The member countries would not be willing to give up this much control so soon after the NAAEC's adoption. Before making a large revision to the NAAEC, the member countries would want to analyze the NAAEC's impact and success in its original form. After the NAAEC establishes itself, problems will be easier to locate and such a reform, as a cross-border suit, may be implemented.

Another measure, such as the creation of a commission to oversee suits, could be implemented to provide injured individuals with a right of action against polluters. The NAAEC could support a commission to deal solely with private individual and organization claims against polluters. This commission, containing representatives from each member country, would use ADR to give the parties a chance to resolve their issues. If a result cannot be reached, the court could then hold a trial type hearing and reach a dichotomous decision. It is important not only to punish the member county for not enforcing its laws, but also to punish the polluter for ignoring the laws and injuring innocent people.

Another potential solution is to allow the CEC to settle private disputes, thus increasing the number of issues the CEC can resolve. However, this solution has several weak points. First, if the CEC resolved public and private international disputes it would be burdened with a huge caseload. Second, this suggestion would involve restructuring the CEC and its dispute resolution process. Third, this procedure would give the CEC too much power. Therefore, creating a new commission for private suits would make more sense. It would be comparable to the United States Tax Court in that it would be a specialized court only hearing cases related to private and organization disputes, just as the Tax Court only hears tax related cases.

A third possible reform would be to allow the United States and Canadian citizens and organizations, experienced in environmental litigation, to file suits against United States plants in the border area. Thus, eventually full cross border suits could be enacted. Although this process sounds good, it is discriminatory since United States plants would be subject to pay damages when Japanese or Mexican plants located near the United States plants are able to pollute. In addition, since pollution knows no boundaries, the pollution from another factory could make its way to a United States plant's section of the river, soil or air, making that United States plant liable for the pollution from other plants. United States

161. Even though the Council has the authority to make recommendations to the member countries about cross border suits, these recommendations are not binding and nothing in my research suggests that cross border suits are being considered at this time. NAAEC, *supra* note 12, art. 10, 32 I.L.M. at 1487.

plants would have to pay higher production costs and this would clearly interfere with free trade under the NAFTA. This system would not be successful and would not promote cooperation.

Unlike the European Union (hereinafter "EU"), the United States, Mexico, and Canada do not want to become entirely interdependent.¹⁶² They cherish their sovereignty while supporting cooperation through the NAFTA and the NAAEC. Therefore, a commission solely for private suits would be the best solution since a forum is needed for individuals injured by pollution are able to seek redress from the polluters.

Another aspect of the CEC that denies access is the Council's power to deny a claim even if the Secretariat believes that the claim meets the stated requirements and merits a factual record. The Council can deny this action by a two-thirds vote, and can also deny making a factual record public by a two-thirds vote.¹⁶³ This Council power is too great and impedes the NAAEC goal of public participation. If a claim is based on incorrect information and is unfounded it should not be considered. However, if the Secretariat expends the time and money to investigate a claim and provides good reasons for making and publishing a factual record, the Council should approve the submission. Therefore, a frivolous claim standard, similar to the United States rules of summary judgment or failure to state a claim should be adopted. This would promote public participation, continue to put a check on the Secretariat along with restricting the Council's vast authority to deny claims, even when the Secretariat fully believes the claim is well supported. Publishing the factual record would provide parties with an incentive to enforce their laws and would also promote public awareness.

3. Party Control

162. The EU was created in 1957 under the Treaty of Rome with the purpose of creating a unified economy and environmental issues were not considered an economic concern at this time. Robbins, *supra* note 24, at 144-45; In 1987, the Single European Act [hereinafter "SEA"], Title VII, often called the Environmental Title, gave the EU the express power to consider environmental protection as an essential factor in all economic and social policy-making. *Id.*; The SEA established the following objective: "to preserve, protect and improve the quality of the environment, to contribute towards protecting human health and to ensure prudent and rational utilization of natural resources." WILLIAM RAWLINSON, *EUROPEAN COMMUNITY LAW: A PRACTITIONER'S GUIDE* 263 (2d. ed. 1994); The EU Court of Justice has jurisdiction over a wide range of issues and has recognized environmental protection as an EU objective since 1985. Zacker, *supra* note 14, at 264; Therefore, if an EU member violates EU environmental law, the Court of Justice will punish that member. EU members are able to create their own environmental laws, but EU law supersedes member law with a few exceptions. Symposium, *The European Community in 1992: An Integrated Approach to Economy and Ecology*, 1990 B.Y.U. L. REV. 1759, 1779 (1990). EU members have a desire to be unified economically and in other ways, but the NAFTA and the NAAEC members do not want such interdependence.

163. NAAEC, *supra* note 12, art. 15, 32 I.L.M. at 1488-89.

The CEC process provides the parties to the dispute with much control over how the dispute will be resolved.¹⁶⁴ The parties initiate the procedures by requesting a council or panel session, or by reconvening a panel after a panel decision is made.¹⁶⁵ This procedure gives the parties control over the resolution of their dispute and promotes cooperation because it would be in the parties' best interests to reach a resolution before they go to a panel and have the matter decided for them. Party control also exists in the selection of the intervenor because the parties appoint cabinet level officials from their respective countries to serve on the Council and also select the panelists.¹⁶⁶

Party control extends into the Council session. The Council may use a variety of procedures to settle the dispute and may also make recommendations to assist the disputing parties in reaching a mutually satisfactory resolution.¹⁶⁷ However, prior to being subject to a Council decision, the parties have a chance to reach a resolution in a non-adversarial way, thus avoiding a dichotomous decision and promoting cooperation.¹⁶⁸ The parties must weigh the costs and benefits of resolving the dispute through the CEC and may choose ADR outside the CEC. In the future, the parties may be able to resolve some disputes through cross border suits. The Council has the duty of making recommendations to the member countries regarding the possible implementation of such

164. Party control is a theme found in NAFTA and the Air Quality Agreement.

165. NAAEC, *supra* note 12, art. 23-24, 35, 32 I.L.M. at 1490-91, 1493.

166. NAAEC, *supra* note 12, art. 9, 27, 32 I.L.M. at 1484, 1491.

167. NAAEC, *supra* note 12, art. 23, 32 I.L.M. at 1490.

168. "Cooperative resolution of disputes by the parties themselves is a laudable goal, and the Agreement provides ample opportunity to pursue that end." Baron, *supra* note 145, at 612; The dispute resolution process of the Labor Side Agreement is almost identical to the CEC dispute resolution process, thus promoting party resolution of disputes before being subject to a binding determination. The Labor Side Agreement, *supra* note 141, art. 27-41, 32 I.L.M. at 1509-12; The NAFTA dispute resolution process has the goal of enhancing relations between the parties and a great commitment to reaching an agreement at the consultations stage rather than at the FTC or panel stage. GILBERT R. WINHAM, *ASSESSING NAFTA: A TRINATIONAL ANALYSIS* 256 (Steven Globerman & Michael Walker eds., 1993); Article 2022 says that each party must encourage the use of arbitration and other ADR and that each party should establish procedures to observe agreements to arbitrate and to recognize and enforce arbitration decisions. The NAFTA, *supra* note 12, art. 2022, 32 I. L. M. at 698; Therefore, the NAFTA process seems even more rigorous in forcing members to resolve disputes on their own. The Air Quality Agreement also places extreme emphasis on party resolution of disputes. The parties must go through consultations and negotiations before they may submit their matter to the IJC. The Air Quality Agreement, *supra* note 11, art. XI, XIII, T.I.A.S. No. 11783 at 4-5; In addition, the parties are not bound to submit matters to the IJC and are encouraged to use ADR. *Id.* Therefore, it can be inferred that much of the CEC dispute resolution process is taken from the NAFTA and the Air Quality Agreement.

procedures with the possibility that such measures may be included in the NAAEC in the future.¹⁶⁹

Another aspect of party control is the fact that the CEC dispute resolution process limits the length of consultations and Council sessions to sixty days.¹⁷⁰ This is a good safeguard to make sure the parties approach ADR seriously and work rigorously to reach a result. The limitations provide an incentive to reach a settlement quickly because the parties may be subject to a binding panel decision which one or all parties may not find advantageous.

Overall, as in NAFTA and other agreements, the CEC dispute resolution process strongly promotes party control over the resolution of disputes through the use of ADR. This process promotes cooperation and provides the members with skills that will be useful in the future for making additional changes or additions to the NAAEC and other agreements..

F. *Methodology of Decision*

Since the NAAEC is a relatively new agreement, the CEC does not have pre-existing law upon which to base its decisions. The CEC decision-makers make determinations based on what they believe constitutes a persistent pattern of failure to effectively enforce environmental laws. With members from all three countries on the Council and panel, reaching this conclusion may be difficult and result in inconsistent conclusions. There is no prior law and the issue to be decided is a factual question. Therefore, the method used in decision-making is a subjective test. Results are based upon the interests and perceptions of the intervenors and not upon a body of law. The interests of these intervenors should be to promote environmental protection and to make sure each member country enforces its laws. However, there is no check on the discretion of the decision-makers, so other interests interfere with objective reasoning. Since each member is represented on the Council and panel, the decision seems fair because each party is equally represented, but the subjective test prohibits impartiality.

NAAEC critics claim that the CEC should be composed of government and non-governmental organizations, environmental and health experts, environmental organization members, the public, interested local and regional environmental, industrial, and development organizations in order to better serve the needs of the border areas.¹⁷¹ A more inclusive CEC would promote public and expert participation, community involvement and local bi-national cooperation.¹⁷² "An increase in local

169. NAAEC, *supra* note 12, art. 10, 32 I.L.M. at 1487.

170. NAAEC, *supra* note 12, art. 23, 24, 32 I.L.M. at 1490.

171. Rowe, *supra* note 4, at 228.

172. *Id.*

public participation should promote equitable consideration of *maquiladora* community residents' needs, acknowledge both economic and social considerations, and reduce environmental racism.¹⁷³ Therefore, one solution to biased decision-making may be to make the CEC more diverse. In addition to diversifying the CEC, an objective test standard should be created to be applied to each dispute. An objective test will reduce biased decision-making by applying the same standard to each case.¹⁷⁴

The NAAEC does take into consideration Customary International Environmental Law, which states that each country has the sovereign right to control the use of resources within its boundaries unless or until such activities harm an area outside the country's territory.¹⁷⁵ Bilateral international agreements regarding the environment create broad principles and domestic law is required to enforce these international principles.¹⁷⁶ The domestic law of each member country must provide *high levels* of environmental protection in order to meet the objectives of the NAAEC.¹⁷⁷

G. Outcome and Enforcement

The NAAEC provides extremely effective procedures for enforcing panel determinations. The NAAEC is new and the United States, Mexico, and Canada have never created an environmental commission like the CEC. Therefore, decisions must be enforced in order to ensure the NAAEC is complied with while giving the CEC respect and clout.

1. Binding

Panel decisions are binding due to the enforcement procedures that are initiated by party request.¹⁷⁸ Under this new dispute resolution process, Mexico can no longer use the excuse that it is too costly to enforce its environmental laws. Under the NAAEC, it is too costly not to enforce those laws because if a member has not fully implemented an action plan or has not paid a sanction, the panel may suspend NAFTA benefits or institute

173. *Id.*

174. The objective test may entail the following analysis: 1) the complained against party's law enforcement practices since the NAAEC's enactment; 2) the extent of injuries to private individuals and any organizations involved; and 3) an analysis of the severity of actual land, water or air damage keeping in mind that a large amount of environmental damage may result from one sudden and unexpected event. These three steps will be based on a reasonableness standard similar to the U.S. system. Therefore, even if many of the Council representatives are biased toward a party, they will have to provide reasons for why there is a persistent pattern of failure to enforce environmental laws and cannot make a decision solely because of personal beliefs.

175. Giorgio, *supra* note 47, at 168.

176. *Id.* at 170. These broad international principles are called "soft law."

177. NAAEC, *supra* note 12, art. 3, 32 I.L.M. at 1483.

178. NAAEC, *supra* note 12, art. 34, 35, 32 I.L.M. at 1492-94.

monetary sanctions.¹⁷⁹ These enforcement procedures provide an incentive for a member country to enforce its laws and for disputing parties to resolve the matter through ADR, consultations or Council sessions. Overall, these procedures have a deterrence effect and are imperative for the NAAEC's success.

2. Non-Binding

Alternatively, consultations and Council session determinations are non-binding. The rationale is that parties will be less likely to agree to participate in these procedures if decisions are binding and rigidly enforced.¹⁸⁰ If a resolution is reached through consultations, Council session or ADR, the decision is not binding per se because it is mutually agreed upon and assumed the parties will comply.

Nevertheless, some check should be imposed to make sure non-binding decisions are followed. One possibility would be to require the parties meet one year after the decision is reached to ensure the decision has been complied with. If after one year the parties are satisfied with the results of the decision, no further meetings are necessary. If there is non-compliance, the parties should be allowed to re-enter the CEC dispute resolution process, use other ADR to reach a new solution, or decide how to achieve the old solution. This would promote cooperation by forcing compliance. If a party will not comply with the settlement, they are frustrating the goals of the NAAEC and must be forced to comply or else asked to withdraw from the NAAEC.¹⁸¹ This additional procedure to ensure that non-binding decisions are complied with would make the NAAEC stronger, and indicate a true commitment by the parties to environmental protection and cooperation.

3. Party Comments

Although the CEC process does not provide for appeals, the panel is able to change its initial determination. After the panel makes an initial report, the parties are able to submit written comments that the panel considers in reaching its final determination.¹⁸² At this stage it is possible for the panel to change its decision if a party comment points to an error in the initial report. This procedure is good because it forces the panel to review its prior determination and correct any inconsistencies. An appeals

179. NAAEC, *supra* note 12, art. 34, 35, 32 I.L.M. at 1493 & 1494.

180. NAAEC provides further proceedings, that are party initiated, in which the panel reconvenes to determine if the losing party has fully implemented the approved action plan, and if not, that party will pay sanctions or have its NAFTA benefits suspended. NAAEC, *supra* note 12, art. 34, 35, 32 I.L.M. at 1493-94.

181. Each member is able to withdraw from the NAAEC six months after submitting a written notice of withdrawal to all members. NAAEC, *supra* note 12, art. 50, 32 I.L.M. at 1495.

182. NAAEC, *supra* note 12, art. 31, 32, 32 I.L.M. at 1492.

process would increase the CEC caseload and cause delay. Environmental issues need quick determinations in order to avoid further pollution. This two step procedure provides a review of the prior determination plus allows for quick decision-making.¹⁸³ The CEC enforcement procedures are effective because they force compliance and make sure that each member enforces its environmental laws.¹⁸⁴

H. *Justifications for Outcome*

The final determination is based on evidence presented by the parties to the proceedings, the parties who submitted the claim, experts, and the Council and Secretariat. As mentioned above, the decision is not based on a standard, but rather on what the CEC decision-makers and the parties believe constitutes a persistent pattern of failure to enforce one's environmental laws. However, the NAAEC does provide objectives and goals that provide guidance for making decisions. Also, the NAAEC incorporates International Environmental Customary Law as a basis for decision-making. This customary law principle is that each country is able to use their resources and pollute their land until it harms another country.¹⁸⁵ Therefore, the NAAEC provides some framework to be applied in decision-making, but an objective standard needs to be imposed to avoid biased decisions.

The power of the CEC panel to issue sanctions and suspend NAFTA benefits is a very effective way to encourage compliance. The NAAEC needs this power in order to be successful, ensuring compliance to the sanctions.¹⁸⁶

IV. SOCIETAL FACTORS

Several societal factors challenge the NAAEC's success. First, each member has a very different history and ideology. Mexico appears to be changing its old belief that economic growth and environmental regulation

183. Within 180 days after the last panelist is chosen, the panel must issue the initial report and within sixty days after the initial report's issuance, a final report must be presented. These time limits force the panel to work efficiently and to reach a decision as soon as possible.
Id.

184. This feature of the NAAEC sets this agreement apart from the various United States-Mexico and United States - Canada bi-national environmental agreements mentioned earlier. Outcome enforcement is a key factor for a successful agreement.

185. Giorgio, *supra* note 47, at 168.

186. Each member country may have different interest regarding environmental protection, but with the NAAEC, they are able to combine their interests through cooperation. Through cooperation, under the NAFTA and the NAAEC, the members are able to determine how far they want to go with free trade and how far they want to go with environmental protection. By reaching these determinations together, they are strengthening relations, creating a better environment, and encouraging economic growth.

can not go hand in hand. Based on the General Law, Mexico is becoming concerned about pollution in the border area and the rapid spread of disease that has resulted.¹⁸⁷ People living on the border are being injured by the *maquiladora* pollution and have no recourse under Mexican law. The United States on the other hand, is economically advanced and has a lot of experience with environmental law, legislation and litigation.¹⁸⁸ The United States environmental laws provide a safe environment for its citizens, plus the right of action in the United States court system if a citizen is injured.¹⁸⁹ Canada is very similar to the United States and has strengthened relations with the United States through several successful binational environmental and trade agreements.¹⁹⁰ One of the biggest obstacles for the NAAEC will be trying to get three different countries to interpret and comply with the NAAEC in a similar manner. However, the NAAEC would not be in existence if not for the commitment of the United States, Mexico, and Canada to environmental protection through cooperation.

Second, the border area is a unique area because there are many socially and economically linked communities called *sister cities* on each side of the border.¹⁹¹ These communities are a result of the border area's disparate division. The West Side of the border was divided and plotted by surveyors without concern for mountains, rivers, and other terrain.¹⁹² The East Side was more naturally divided and, before 1848, the Rio Grande was entirely in Mexico, but it was later divided so that parts of the river were in both countries.¹⁹³ This has created a challenge for the NAAEC because the United States and Mexico suffer from the same environmental problems but have very different cultures, laws and economic conditions.¹⁹⁴ In addition, the border area contains many different ecological zones, such as, mountains, deserts, rivers and ocean making environmental protection more complex.¹⁹⁵ Therefore, in order to protect the environment, the

187. However, Mexican citizens are very poor and many have moved to the boarder area for work and believe they are better off now then they were before. Ribadeneira, *supra* note 1, at 10.

188. Stanton, *supra* note 4, at 76.

189. Robbins, *supra* note 24, at 136.

190. "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 agreements rely on voluntary negotiations to work out disputes." Stanton, *supra* note 4, at 78-79.

191. Gaines, *supra* note 6, at 435.

192. *Id.* at 436.

193. *Id.*

194. *Id.* at 435.

195. *Id.*

NAAEC needs to promote cooperation so that the member countries can work together in solving the environmental problems they encounter.

Overall, the three member countries realize the need to protect the environment on border areas. Mexico has come to understand that a stable environment is necessary for economic growth. Through the NAAEC, private individuals and NGOs are able to bring forth claims to encourage accountability, to make others aware of how laws are or are not being enforced and to clean-up the border area where Mexican and American citizens live and work. Despite the obstacles involved, the NAAEC, as does the NAFTA, stands for cooperation and indicates the potential for further unification in the future.

V. CONCLUSION

Since the NAAEC is rather new it is difficult to fully analyze its impact or success. The NAAEC was a necessary addition to the NAFTA in order to protect the environment against economic growth. Although the NAAEC was created in response to the border area pollution, this agreement governs all environmental issues involving the United States, Mexico and Canada.

The recommendations provided above serve to clarify vague provisions, provide private individuals with a forum in which to seek damages, limit the Council's unfettered power and to make the CEC dispute resolution process advocate cooperation.¹⁹⁶ The United States, Mexico and Canada must establish specific environmental standards for each member to attain, that is objective and reasonable for all parties and that do not create trade barriers.

The future holds two challenges to the NAAEC and to international environmental protection in general. In May of 1998 the Multilateral Agreement on Investment may be ratified.¹⁹⁷ This agreement threatens environmental protection because it would prohibit governments from imposing certain restrictions on foreign businesses and investors.¹⁹⁸ Canada and twenty-eight other countries are involved in the agreement.¹⁹⁹ Many believe "the MAI will [not] provide anything more than token environmental protections."²⁰⁰ The challenge is not only a limit to

196. As mentioned earlier, international cooperation is essential for international environmental protection. Despite prior unsuccessful environmental agreements, the NAAEC members are committed to environmental protection. They have no choice. If the United States, Mexico, and Canada want economic growth they must protect the enforcement also.

197. Ruth Abramson, *Paying the Polluters?: A New Treaty Could Bring Investors and Controversy*, MACLEAN'S, Sept. 1, 1997 at 68.

198. *Id.*

199. *Id.* "The lack of public discussion, combined with the complexity of the 175-page MAI draft, means that most Canadians are still in the dark about its contents."

200. *Id.*

environmental regulations on foreign businesses, but also Canada's membership in the MAI. Canada will be bound to the MAI and also to the NAAEC and the NAFTA, which supports economic growth along with environmental protection. This could frustrate relations with the United States and Mexico, while restricting Canada's ability to meet NAAEC obligations.

A second important concern for the future is the Kyoto Protocol. This agreement will require the United States to cut emissions by approximately eighteen percent.²⁰¹ It could ultimately result in the United States building new nuclear power plants and eliminating the use of coal.²⁰² Industry leaders are concerned because the Kyoto Protocol "doesn't allow enough time to reduce emissions without inflicting massive damage on the economy."²⁰³ Rapid change is often unsuccessful and may cause resistance. Some suggest that industry and the government should work together to develop the technology required to meet the Kyoto Protocol standards.²⁰⁴ Therefore, this agreement also presents the tension between environmental protection and economic growth.

The international world will always have the problem of balancing the industrial world with the needs of the environment. However, cooperation between nations is necessary, in order to responsibly protect the environment while promoting economic growth. The world may never find the ultimate balance, but by establishing strategies through cooperation it is making progress.

201. Martha M. Hamilton & Curt Suplee, *The Price of Achieving Kyoto Goals; U.S. to Consider Range of Options, Technologies if Pact Advances*, THE WASH. POST., December 12, 1997, at § A.

202. *Id.* Coal provides over half of the nation's electricity.

203. *Id.*

204. *Id.*