

THE NAFTA ENVIRONMENTAL SIDE AGREEMENT: IMPLICATIONS FOR ENVIRONMENTAL COOPERATION, TRADE POLICY, AND AMERICAN TREATYMAKING

Steve Charnovitz†

In August 1992, the Bush Administration began to prepare its formal notice to Congress on a new trade agreement with Mexico and Canada.¹ This notification was a key procedural step in gaining "fast track" status for trade agreement consideration by Congress.² After the broad outlines of the agreement had been announced in August,³ the Bush Administration challenged the Democratic Presidential candidate Bill Clinton to announce his support for the agreement. For weeks the Clinton campaign vacillated.⁴ The pressure for Clinton's decision intensified after President Bush sent formal notification of the signing of the trade pact to Congress on September 18, 1992.⁵

On October 4, 1992, Clinton gave a major speech on the North American Free Trade Agreement (NAFTA)⁶ in which he expressed his general support for the NAFTA, but recognized its deficiencies. In particular, he expressed concern regarding environmental protection, labor relations, and safeguarding against import surges. In an effort to remedy some of the problems, Clinton stated that he would not sign legislation implementing the trade agreement until new "supplemental agreements" had been negotiated

† B.A., Yale University, 1975; M.P.P., Harvard University, 1983; Policy Director at the Competitive Policy Council in Washington, D.C.. The author wishes to thank Abram Chayes, John Jackson, and David Wirth for their helpful comments on an earlier draft. The views are those of the author only.

1. See ROBERT A. PASTOR, *INTEGRATION WITH MEXICO OPTIONS FOR U.S. POLICY* (1993) (for further background on the NAFTA.).

2. Harold Hongju Koh, *The Fast Track and United States Trade Policy*, 18 *BROOK. J. INT'L L.* 170 (1992) (discussing fast track) [hereinafter Koh]. Fast track is a rule of the House and Senate that provides for guaranteed consideration of a trade agreement and necessary implementing legislation. Under the fast track rule, a final vote must be held within 90 days and Congress cannot amend the bill submitted by the President.

3. Keith Bradsher, *The Trade Accord; Economic Accord Reached by U.S., Mexico and Canada to Lower Trade Barriers*, N.Y. TIMES, Aug. 13, 1992, at A1.

4. Robert F. Housman & Paul M. Orbuch, *Integrating Labor and Environmental Concerns into the North American Free Trade Agreement: A Look Back and a Look Ahead*, 8 *AM. U. J. INT'L L. & POL'Y* 719, 792-796 (1993).

5. Letter to Congressional Leaders on the North American Free Trade Agreement, PUB. PAPERS 1595 (Sept. 18, 1992) [hereinafter PUB. PAPERS].

6. Bill Clinton, *Expanding Trade and Creating American Jobs*, at North Carolina State University (Oct. 4, 1992) in 23 *ENVTL L.* 683 (1993). See, *Candidate Bill Clinton's Proposal for Supplemental Agreements on NAFTA*, in *BEYOND NAFTA, THE WESTERN HEMISPHERE* 192 (Rodney Dabell and Michael Henfeld eds., May 1993).

with Mexico and Canada regarding these issues.⁷ Specifically, Clinton advocated that the environmental and labor side agreements would be negotiated to "require each country to enforce its own environmental and worker standards."⁸

Clinton's speech was a response to political pressure. He had to foreclose further changes in the text of the NAFTA because such modifications would undermine business support to his campaign. At the same time, he had to deal with the deficiencies of the agreement to gain interest group support.⁹ Clinton's speech served to meet his political need by granting his campaign the opportunity to appeal both to those who supported the NAFTA, as well as to those who opposed it. Further, this approach answered the jibes of the Bush Administration that Clinton was afraid to take a position on the NAFTA.¹⁰

The choice of separate agreements had several implications.¹¹ First, the numerous deficiencies of the NAFTA, as perceived by many environmentalists and public interest groups, would not be remediable.¹² Second, pursuing environmental objectives in a "side agreement" was similar to the Bush Administration's approach that environmental issues be treated in parallel accord.¹³ Many democrats in Congress had opposed this oblique approach to handling environmental problems. They wanted environmental concerns to be integrated into trade negotiations.¹⁴ Third, the President's ability to sign agreements eligible for "fast-track" implementation would lapse on May 31, 1993.¹⁵ This timetable would necessitate a very rapid negotiation by the new Administration.

The three heads of government signed the NAFTA on December 17, 1992.¹⁶ Side agreement negotiations commenced after President Clinton

7. Clinton, *supra* note 6, at 684. The notion of supplemental agreements was a peculiar one. At that point the NAFTA could not be signed until after the election (the 90th day after September 18, 1992). Assuming Clinton were to win the election, he could have convinced Mexico and Canada not to consummate the agreement with the Bush Administration. Once Clinton took office, he could have renewed negotiations for a Protocol to the NAFTA.

8. *Id.* at 686.

9. Housman & Orbuch, *supra* note 4, at 792-796.

10. *Id.*

11. Steve Charnovitz, *NAFTA's Social Dimension: Lessons from the Past and Framework for the Future*, 8 INT'L TRADE J. 39 (1994).

12. See Michael Gregory, *Environment, Sustainable Development, Public Participation, and the NAFTA: A Retrospective*, 7 J. ENVTL. L. & LITIG. 99 (1992) (discussing the history of negotiations and the environmentalist critiques).

13. See John Audley, *Why Environmentalists Are Angry about the North American Free Trade Agreement*, in *TRADE AND THE ENVIRONMENT LAW, ECONOMICS, AND POLICY* 191 (Durwood Zaelke et al. eds., 1993) (calling on President Clinton to directly link the supplemental agreement to the language of the NAFTA).

14. See GARY C. HUFBAUER & JEFFREY J. SCHOTT, *THE NAFTA AN ASSESSMENT* 91-109 (1993) (discussing environmental concerns regarding the NAFTA).

15. See *supra* note 2 and accompanying text (discussing the rules of Congressional fast track).

16. North American Free Trade Agreement Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States,

took office. The Administration sought an agreement with "teeth,"¹⁷ and took several months to work out acceptable solutions. Agreements were finally reached on August 13, 1993 (one year after the original NAFTA agreement had been reached),¹⁸ and the new agreements on the environment, labor, and import surges were signed and made public on September 14, 1993.¹⁹ After weeks of intense lobbying by the Administration, the President submitted the NAFTA legislation in early November and it was approved by the Congress shortly thereafter. The NAFTA and the side agreements went into force consecutively on January 1, 1994.²⁰

This article will examine the environmental side agreement, officially called the North American Agreement on Environmental Cooperation (NAAEC).²¹ Section I will summarize the Agreement while Section II will consider some implications of the agreement for environmental cooperation. Section III will consider some implications of the agreement for trade policy. Finally, Section IV will consider some implications of the NAAEC implementing process for the treaty-making process in the United States.

The article will focus on the NAAEC rather than the NAFTA.²² The Canadian, Mexican, and U.S. governments expended considerable effort in keeping most environmental issues on a separate track than the NAFTA (the so-called parallel track), so it would seem inappropriate to merge them after the fact. Moreover, the agreements are legally separate. There will be a few instances, however, where a close connection between the two agreements justifies bringing the NAFTA into a discussion of the NAAEC.

Dec. 17, 1992, 32 I.L.M. 605, *reprinted in* THE NAFTA (United States Government Printing Office ed., 1993) [hereinafter NAFTA].

17. Clinton, *supra* note 6, at 684 (providing that the side agreements had to affirmatively deal with the deficiencies of the NAFTA, namely, the critical yet unaddressed issues of environmental protections, and labor rights).

18. Keith Bradsher, *The Free Trade Accord; 3 Nations Resolve Issues Holding Up Trade Pact Vote*, Aug. 14, 1993, N.Y. TIMES, at A1.

19. 32 I.L.M. 1480, 1499, 1519. By mid-1993, the contradiction between promoting free trade and preventing import surges had become apparent to the Clinton Administration officials. The side agreement on import surges runs only two pages and is characterized as an "Understanding." The Understanding merely sets up a special working group between the three governments. Understanding Between the Parties to the North American Free Trade Agreement Concerning Chapter Eight - Emergency Action, Sept. 14, 1993, 32 I.L.M. 1519, *reprinted in* THE NAFTA SUPPLEMENTAL AGREEMENTS (United States Government Printing Office ed., 1993).

20. North American Free Trade Agreement Implementation Act, 19 U.S.C. § 3312 (1993).

21. North American Agreement on Environmental Cooperation, Sept. 14, 1993, 32 I.L.M. 1480, *reprinted in* THE NAFTA SUPPLEMENTAL AGREEMENTS (United States Government Printing Office ed., 1993) [hereinafter NAAEC].

22. See Steve Charnovitz, *The North American Free Trade Agreement: Green Law or Green Spin?*, LAW & POL'Y INT'L BUS. (forthcoming 1994) (discussing environmental provisions of NAFTA).

I. SUMMARY OF THE NAAEC

The NAAEC has seven parts.²³ Part One lists the "Objectives of the Agreement" and includes the objective to "support the environmental goals and objectives of NAFTA."²⁴ The meaning of this provision is unclear, however, since the comparable section of the NAFTA does not list any environmental objectives.²⁵

A. *Obligations and Commitments*

Part Two of the NAAEC discusses "Obligations."²⁶ Among the "General Commitments," the most important concern is to "assess, as appropriate, environmental impacts."²⁷ Interestingly, the U.S. government did not prepare an environmental impact statement on the NAFTA. After a federal court ordered the U.S. Trade Representative to prepare a statement, the Clinton Administration appealed the decision and eventually prevailed.²⁸ Nevertheless, both the Bush and the Clinton Administrations published environmental commentaries on the NAFTA.²⁹

Another commitment in this part of the NAAEC is to "promote education in environmental matters."³⁰ The need for such education has been noted for some time. For example, a monograph prepared for the Second Pan American Scientific Congress of 1915-16 called for education of the public as to economic needs of the future and probable social value of resources now subject to destruction and neglect because of their negligible present value.³¹ The three governments also committed themselves to "promote the use of economic instruments for the efficient achievement of environmental goals" and to "consider" prohibiting the export of pesticides or toxic substances to the other two parties when the use of the pesticide or substance is banned in one's own territory.³²

Perhaps the most lofty commitment in the NAAEC is that each country "shall ensure that its laws and regulations provide for high levels of environ-

23. NAAEC, *supra* note 21.

24. *Id.* art. 1(d), 10.6.

25. NAFTA, *supra* note 16, art. 102. However, the environment is listed in the preamble.

26. NAAEC, *supra* note 21, art. 2.

27. *Id.* art. 2.1(e). This language was apparently meant to allow countries to avoid doing environmental impact statements about impacts outside their own territory.

28. *See* Public Citizen v. United States Trade Representative, 5 F.3d 549 (D.C. Cir. 1993) (reversing district court's ordering the U.S. Trade Representative to produce environmental impact statements on the NAFTA before it was submitted for approval). *See infra* note 332 and accompanying text (discussing the Public Citizen lawsuit).

29. U.S. GOVERNMENT, REVIEW OF U.S.-MEXICO ENVIRONMENTAL ISSUES, February 1992; UNITED STATES TRADE REPRESENTATIVE, THE NAFTA REPORT ON ENVIRONMENTAL ISSUES, (Nov. 1993) [hereinafter NAFTA REPORT].

30. NAAEC, *supra* note 21, art. 2.1(c).

31. Ralph Hess, *Conservation in its Relation to Industrial Evolution*, in PROCEEDINGS OF THE SECOND PAN AMERICAN SCIENTIFIC CONGRESS 26 (Glen L. Swiggert ed., 1917).

32. NAAEC, *supra* note 21, art. 2.1(f), 2.3. In addition, the NAAEC requires that whenever a party restricts the use of a pesticide or toxic substance, it notify the other parties.

mental protection and shall strive to continue to improve those laws and regulations."³³ Unfortunately, the NAAEC does not define "high levels."³⁴ In announcing the side agreements, U.S. Trade Representative Mickey Kantor declared that they "will help insure that no nation can lower labor or environmental standards, only raise them"³⁵ Nevertheless, since the commitment is vague and because a country may modify its laws as it sees fit,³⁶ it is unclear whether this provision will operate as Kantor suggests.³⁷ The most publicized obligation under the NAAEC is that "each Party shall effectively enforce its environmental laws and regulations through appropriate governmental action"³⁸ One might suggest that a new principle of international law has emerged from the NAAEC. That is, nations have an international obligation to each other to enforce their own environmental laws.³⁹ Others have suggested that no new principle has emerged since any treaty confers an obligation to enforce the necessary laws to implement the treaty's commitments.⁴⁰ The NAAEC lacks specific policy commitments.⁴¹ Thus, nations must only enforce the laws on their books.

The NAAEC also requires each country to ensure that enforcement procedures are available under its laws to remedy violations.⁴² Such remedies "shall as appropriate . . . include . . . the cost of containing or cleaning up pollution."⁴³ Even if a country lacks adequate law regarding enforcement, the NAAEC lacks a provision for further action beyond consultation.⁴⁴ It is

33. *Id.* art. 3.

34. A similar phrase is used in the Maastricht Treaty on European Union which calls for a "high level" of environmental protection. Maastricht Treaty on European Union, July 30, 1993, reprinted in RICHARD CORBETT, *THE TREATY OF MAASTRICHT* (1993). This provision amends the EEC Treaty, Article 130r(2). There is another provision in the EEC, Article 100a(3), which states that the Commission will take "as a base" a high level of protection. Treaty Establishing the European Economic Community, Mar. 25, 1957, reprinted in *EUROPEAN COMMUNITY TREATIES* (Sweet & Maxwell ed., 1972). The U.N. Stockholm Declaration of 1972 states that governments should establish environmental standards "at whatever levels are necessary . . . to safeguard the environment." See 11 I.L.M. 1462, Recommendation 103(e).

35. UNITED STATES TRADE REPRESENTATIVE, *NAFTA SUPPLEMENTAL: AGREEMENT ON ENVIRONMENTAL COOPERATION*, (Aug. 13, 1993) at 14 (statement by Ambassador Mickey Kantor, U.S. Trade Representative, announcing the NAFTA Supplemental Agreements on Labor and the Environment). According to Daniel Magraw, this provision is "known colloquially as the anti-rollback provision." Daniel Magraw, *NAFTA's Repercussions: Is Green Trade Possible?*, 36 ENV'T 14, 39 (1994). This sobriquet seems undeserved.

36. NAAEC, *supra* note 21, art. 3.

37. *But see*, Christopher Thomas & Gregory A. Tereposky, *The NAFTA and the Side Agreement on Environmental Cooperation*, 27 JOURNAL OF WORLD TRADE 5, 19 (1993) (pointing out that no party is free to reduce the efficacy of its environmental law).

38. NAAEC, *supra* note 21, art. 5.

39. *See* Magraw, *supra* note 35, at 28 (requiring countries to enforce their environmental laws reinforces the rule of law).

40. *See Vienna Convention on the Law of Treaties*, U.N. Conference on the Law of Treaties Off. Rec., 1st & 2d Sess., art. 26, U.N. Doc. A/Conf. 39/27 (1969).

41. NAAEC, *supra* note 21.

42. *Id.* art. 5.2.

43. *Id.* art. 5.3(b).

44. *Id.*

unclear whether "environmental laws" here means all environmental laws, or just the narrow range of laws specified in the NAAEC's definitions.⁴⁵

The NAAEC has a provision addressing "Private Access to Remedies," but there are almost no substantive obligations in it.⁴⁶ For instance, the right to seek an injunction to force a party to comply with its law must be in accordance with the party's existing law.⁴⁷ The only real obligations are to give interested persons the right to request, but not necessarily to obtain, an investigation of environmental violations and to give interested persons "appropriate" access to judicial or administrative procedures.⁴⁸ These provisions may have a salutary effect. According to the Environmental Defense Fund, the provisions in the side agreement "will produce changes in Mexico's legal system that will greatly benefit the environment."⁴⁹

In regard to judicial remedies for disputes with a transborder dimension, the NAAEC takes a very cautious approach. It directs the three countries to develop appropriate recommendations on providing access to the court system of a polluting nation to persons in another party who suffer damage from that pollution.⁵⁰ Other environmental agreements do provide substantive obligations for equal access. For example, the Scandinavian Convention on the Protection of the Environment of 1974 gives individuals who may be affected by environmentally harmful activities in one of the party's territory the right to bring lawsuits in that party's courts.⁵¹

The NAAEC requires each country to provide certain procedural guarantees in its administrative, quasi-judicial, and judicial proceedings. For example, each country shall assure that such proceedings "are not unnecessarily complicated and do not entail unreasonable charges or time limits or unwarranted delays."⁵² If taken seriously, this could be the most significant obligation in the NAAEC for the United States, since its proceedings are almost always complicated and lengthy.

45. *Id.* art. 45.2. This definition is located in the General Provisions section.

46. *Id.* art. 6. But see *North American Free-Trade Agreement (NAFTA) and Supplemental Agreements to NAFTA: Hearings Before the Committee on Ways and Means*, 103rd Cong., 1st Sess. 48 (1993), at 43 (statement of EPA Administrator Carol Browner that "there will be greater public access to courts and other bodies that enforce environmental laws in all three countries because of the side agreement").

47. NAAEC, *supra* note 21, art. 6.3. The NAAEC does not require parties to provide standing to individuals now lacking it.

48. *Id.* art. 6.

49. *NAFTA and Related Side Agreement: Senate Hearing*, 103rd Cong., 1st Sess. 439 (1993), at 234 [hereinafter *NAFTA and Related Side Agreements*].

50. NAAEC, *supra* note 21, art. 10.9. See also, *NAFTA and Related Side Agreements*, *supra* note 49, art. 10.8 (which provides that the three environmental ministers will encourage themselves to permit other parties to seek a reduction of transboundary pollution).

51. Convention on the Prevention of the Environment, Feb. 19, 1974, Swed.-Den.-Fin.-Nor., art. 3, 1092 U.N.T.S. 279. The author was unable to find out whether these provisions had been used.

52. NAAEC, *supra* note 21, art. 7.1(d).

B. Commission for Environmental Cooperation

Part III of the NAAEC establishes the Commission for Environmental Cooperation (Commission).⁵³ The Commission is governed by the Council which consists of cabinet-level environmental ministers from the three countries.⁵⁴ The Commission is directed to cooperate with the Free Trade Commission created by the NAFTA.⁵⁵ The Commission is to be aided by a Joint Public Advisory Committee consisting of five members from each of the three NAFTA countries.⁵⁶ This Advisory Committee could reduce the likely tendency of the three ministers to logroll with each other.⁵⁷ The jointness of the Advisory Committee is a noteworthy innovation.

The Council has a number of very general duties, such as to "strengthen cooperation on the development and continuing improvement of environmental laws and regulations. . . ."⁵⁸ The NAAEC lists eighteen specific issues for which the "Council may consider, and develop recommendations," such as the promotion of public awareness regarding the environment.⁵⁹ Any such recommendation of the Council requires a unanimous vote.⁶⁰ Neither the Council nor the Commission maintain an explicit role in the work of the NAFTA Committees on Sanitary and Phytosanitary Measures and Standards-Related Measures.⁶¹

The Council may develop recommendations regarding transboundary and border environmental issues.⁶² Public concerns about the U.S.-Mexico border might have led to a more specific mandate. Other treaties have had a firmer mandate on such border issues. For example, the treaty between The Republic of Austria and the Czechoslovakia Socialist Republic Concerning the Regulation of Water Management Questions Relating to Frontier Waters provides that each country will refrain from carrying out any measures that would adversely affect water conditions in the other country unless the other country consents.⁶³

53. *Id.* art. 8. See also, Mary E. Kelly, *NAFTA's Environmental Side Agreement: A Review and Analysis*, TEXAS CENTER FOR POLICY STUDIES, (1993) (critiquing the Commission).

54. NAAEC, *supra* note 21, art. 9.1. The Agreement does not specify environmental ministers, but that seems to have been the intention.

55. *Id.* art. 10.6.

56. *Id.* art. 16. Exactly ten years earlier, the Mexico-U.S. Border Environmental Agreement (The La Paz Agreement) had provided for the participation of non-governmental organizations by mutual agreement between the Parties. See Agreement to Cooperate in the Solution of Environmental Problems in the Border Area, Aug. 14, 1983, U.S.-Mex, art. 9, 22 I.L.M. 1025.

57. NAAEC, *supra* note 21, art. 10.6. The most significant provision here relates to the NAFTA Article 1114.2 and seems to give the Commission a role in consultations regarding the derogation from an environmental standard for purposes of attracting investment.

58. *Id.* art. 10.3.

59. *Id.* art. 10.2; see generally *id.* art. 10.

60. *Id.* art. 9.6.

61. *Id.* art. 10.3(b), 10.6(e); NAFTA, *supra* note 16, art. 722, 913. However, such a role is not precluded.

62. NAAEC, *supra* note 21, art. 10.2(g), 10.7.

63. Treaty Concerning the Regulation of Water Management Questions Relating to Frontier Waters, Mar. 18, 1970, Aus.-Czech., art. 3, 728 U.N.T.S. 352.

The NAAEC establishes a Secretariat headed by an Executive Director selected by the Council.⁶⁴ Although the Clinton Administration describes it as the "Independent Secretariat",⁶⁵ several elements of independence are not fully present.⁶⁶ Given the ambiguity of the term, it may be useful to digress briefly on the topic of independence in an international commission.

Since international commissions are set up by governments, such commissions cannot be fully independent of these parent governments. Depending on their formulation, commissions can operate with self-direction and day-to-day autonomy from particular governments. An independent commission would have the following attributes: (1) a governing body composed of representatives serving fixed terms who are not responsible to the government of their home nation, (2) a robust decision making method such as majority rule,⁶⁷ (3) fiscal powers to tax in order to be financially self-sustaining, (4) budgetary autonomy, (5) judicial or arbitral powers to settle disputes and impose fines, and (6) a staff of international civil servants.

How does the NAAEC Council and Secretariat stack up against these attributes? First, the members of the governing Council are cabinet officials fully responsible to their home country governments.⁶⁸ Second, the normal decision-making method requires unanimous agreement,⁶⁹ although the decision to convene an arbitral panel can be taken by a two-thirds supermajority.⁷⁰ Third, the Commission's budget and annual program must be submitted to the Council for approval or disapproval.⁷¹ The only fiscal powers of the Commission are the fines that can be imposed by dispute panels.⁷² Fourth, the Council may appoint panels with arbitral power.⁷³ Fifth, the Secretariat will have civil servants who should not seek or receive instructions from any authority external to the Council.⁷⁴ However, the Council has authority to "oversee" the Secretariat and may reject potential

64. NAAEC, *supra* note 21, art. 11.

65. NAFTA REPORT, *supra* note 29, at 18.

66. The Senate Foreign Relations Committee suggests that the Executive Director "will enjoy considerable independence." North American Free Trade Agreement Implementation Act, S. REP. NO. 189, 103rd Cong., 1st Sess., at 131. Daniel Magraw, one of the negotiators, explains that the Secretariat "will have strong elements of independence." Magraw, *supra* note 35, at 20.

67. For further discussion of the need for majority rule, see FRANCES B. SAYRE, EXPERIMENTS IN INTERNATIONAL ADMINISTRATION 150-158 (1919).

68. NAAEC, *supra* note 21, art. 9.1.

69. *Id.* art. 9.6.

70. *Id.* art. 24.1. But see, NAFTA, *supra* note 16, art. 2008.2 (demonstrating that the appointment of the NAFTA arbitral panel does not require a supermajority, indeed, it seems to be automatic).

71. NAAEC, *supra*, note 21, art. 11.6. The Secretariat may report on areas outside of its program if it notifies the Council and the Council does not reject the request within 30 days. *Id.* art. 13.1.

72. *Id.* annex 34.3.

73. *Id.* art. 27; NAFTA, *supra* note 16, art 2011. Both NAFTA and NAAEC have five-person panels.

74. NAAEC, *supra* note 21, art. 11.4.

appointment by a two-thirds vote.⁷⁵ Further, the Executive Director is given a term of three years.⁷⁶

Although the Secretariat has some latitude, many of its potentially key functions will be closely supervised by the Council. The Secretariat may prepare a "factual record" about a party's enforcement record only if the Council instructs it to do so by a two-thirds vote.⁷⁷ The Secretariat can release these facts to the public only by a two-thirds vote.⁷⁸ On the other hand, the Secretariat may prepare reports on other matters without prior approval of the Council.⁷⁹ In view of these specifics, a more accurate description of the Council and the Secretariat would be "semi-independent."

The Commission may be described as an international organization, but its status is not completely clear. On the one hand, there is no provision stating that the Council or Secretariat has "legal personality," as there is for other new organizations such as the World Trade Organization.⁸⁰ On the other hand, the Commission resembles an international organization in the way that it is required to assure an "equitable proportion of the professional staff from among the nationals of each Party."⁸¹ The NAAEC parties have agreed to grant the Secretariat the privileges and immunities common to international organizations.⁸²

To aid it in determining whether to seek approval to develop a record of the facts, the Secretariat "may" consider a submission from any non-governmental organization or person regarding a party's failure to enforce its environmental law.⁸³ The NAAEC declares that the Secretariat need not consider a submission which appears to be aimed at "harassing industry" rather than promoting enforcement.⁸⁴ The NAAEC fails to elucidate this interesting distinction. The NAAEC also indicates that in considering a submission, the Secretariat shall be guided by whether "private remedies" have been pursued.⁸⁵ According to U.S. Trade Representative Mickey Kantor, a person could not file a petition concerning the United States until "the mean-

75. *Id.* art. 10.1(c), 11.3.

76. *Id.* art. 11.1.

77. *Id.* art. 15.2. Although Canada cannot request a panel in certain circumstances, Canada is free to support a request for a panel. *Id.* art. 24.1, annex 41.4.

78. *Id.* art. 15.7.

79. *Id.* art. 13.

80. General Agreement on Tariffs and Trade - Multilateral Trade Negotiations (The Uruguay Round): Agreement Establishing the Multilateral Trade Organization [hereinafter World Trade Organization] Dec. 12, 1993, art. VIII: 1, 33 I.L.M. 13; NAAEC, *supra* note 21, art. 11.4 (noting the "international character" of the Executive Director's responsibilities).

81. NAAEC, *supra* note 21, art. 11.2(c).

82. *Id.* art. 44.

83. *Id.* art. 14.1. The non-governmental organization has to reside in the territory of one of the three parties. See also, Zen Makuch and Scott Sinclair, *The Environmental Implications of the NAFTA Side Agreement*, CANADIAN ENVTL. L. ASS'N (1993).

84. NAAEC, *supra* note 21, art. 14.1(d).

85. *Id.* art. 14.2(c).

ingful avenues of relief available under U.S. laws" have been used.⁸⁶ The difficulty of navigating such U.S. avenues could create considerable hurdles.

The provisions relating to the "factual record" reach an odd procedural dead end because they are not attached to any dispute settlement procedures. Indeed, a dispute panel is precluded from using the factual record unless submitted by one of the parties.⁸⁷ Of course, an objective ascertainment of facts is always beneficial. Indeed, the factual record may be useful in securing improvements by the defendant country or, failing that, approval by the Council to create a panel.⁸⁸ It is unclear whether business groups can make submissions about ineffective enforcement caused by the regulatory agency's inflexibility.

The Secretariat may also prepare reports on non-enforcement issues. Such reports will be released to the public unless the Council decides otherwise.⁸⁹ The Secretariat will also prepare an annual report for the public which shall "periodically" address the state of the environment in North America.⁹⁰ Such inter-governmental reports are a good idea, but do not represent a totally new endeavor. For example, the Canada-U.S. International Joint Commission issued an excellent report on transboundary pollution seventy-five years ago.⁹¹

Part IV of the NAAEC commits countries to cooperate, to engage in consultations, to respond to inquiries from the other parties, and to notify each other of relevant environmental information.⁹² The Agreement does not mandate the exchange of information when prohibited by law or when a government believes that such disclosure would impede law enforcement.⁹³ Countries must promptly provide any information needed for the preparation of a Commission report or factual record, but a country may refuse such information if it deems the request "excessive or otherwise burdensome."⁹⁴ Moreover, the NAAEC does not provide for unannounced or announced inspections by the Secretariat of enforcement agencies in the three countries.⁹⁵

C. Dispute Resolution

Part V, the longest section in the NAAEC, concerns dispute resolution. If one government complains that another is not effectively enforcing the environmental laws, the Council can convene an arbitral panel. Such com-

86. See *Kantor Letter on NAFTA Effect on U.S. Sovereignty*, INSIDE U.S. TRADE, Oct. 22, 1993, at 16.

87. NAAEC, *supra* note 21, art. 15.

88. *Id.* art. 14, 15, 23, 24.

89. *Id.* art. 13.3.

90. *Id.* art. 12.3. The Council reviews the annual report in draft. See *id.* art. 12.1.

91. See FINAL REPORT OF THE INTERNATIONAL JOINT COMMISSION ON THE POLLUTION OF BOUNDARY WATERS (1918).

92. NAAEC, *supra* note 21, art. 20-21.

93. *Id.* art. 39.1.

94. *Id.* art. 21.2, 21.3.

95. *Id.* art. 11.

plaints can only allege non-enforcement of environmental laws as they pertain to goods traded in the North America or produced by export-competing industries. The NAAEC contains no environmental injury test, and the complaining country does not have to show environmental injury to it or to the scofflaw country.⁹⁶

Panelists are chosen from a roster for this temporary assignment; in other words, they are not permanent judges. They may be chosen for their "expertise or experience in environmental law or its enforcement," or for other expertise, but there is no requirement that a panel considering an environmental dispute have panelists with environmental expertise.⁹⁷ The panel is not permitted to seek information from outside experts unless the disputing parties agree.⁹⁸ However, in the Reciprocal Trade Agreement of 1942 between Mexico and the United States, either government had the right to obtain a committee of technical experts to assist in health-related disputes.⁹⁹

The panel must submit its initial report within 180 days after formation. The report will include "a determination as to whether there has been a persistent pattern of failure by the Party complained against to effectively enforce its environmental law."¹⁰⁰ A "persistent pattern" is defined as a "sustained or recurring course of action or inaction."¹⁰¹ In addition, the NAAEC states that a determination of ineffective enforcement shall not be made when there is a "reasonable exercise" of investigatory, prosecutorial, or regulatory discretion, or when there have been "bona fide decisions to allocate resources" to enforcement of higher priority environmental matters.¹⁰² There is no commitment in the NAAEC to increase agency enforcement budgets.¹⁰³

The term "environmental law" is also sharply circumscribed.¹⁰⁴ The NAAEC takes a narrow approach to environmentalism by specifically excluding laws whose "primary purpose" is to manage the harvesting of natural resources.¹⁰⁵ Thus, it is unclear whether important environmental issues such as strip mining, soil conservation, energy extraction, coastal fishing, and sustainable timber harvesting are included or excluded.¹⁰⁶ Moreover, envi-

96. *Id.* art. 24.1.

97. *Id.* art. 25.2(a).

98. *Id.* art. 30. See also, NAFTA, *supra* note 16, art. 2014, 2015 (listing a similar limitation).

99. Agreement Between the United States and Mexico Respecting Reciprocal Trade, art. VI(5), 57 Stat. 833 (1942) (not in force).

100. NAAEC, *supra* note 21, art. 31.2(b).

101. *Id.* art. 45.1.

102. *Id.*

103. See generally *id.*

104. *Id.* art. 45.2. Only laws whose "primary purpose" is environment or health are covered. *Id.* art. 45.2(c).

105. *Id.* art. 45.2(b). But see, NAFTA REPORT, *supra* note 29, at 14 (pointing out that the Environmental Agreement has a broad, inclusive scope).

106. NAAEC, *supra* note 21, art. 45.2. The Council, or perhaps the panel, would have to determine the primary purpose of the relevant legislative provision. This is perforce a subjective judgment.

ronmental laws pertaining to wildlife outside of a party's own territories are excluded from NAAEC's conception of the environment.¹⁰⁷ For example, if Mexico had a law preventing its fishing vessels from harvesting shrimp without turtle excluder devices, this law would not be subject to NAAEC factual records or dispute panels (except possibly when the shrimping occurs in Mexico's territory).¹⁰⁸

The non-coverage by the NAAEC leads to an asymmetry with the NAFTA. For instance, if the U.S. Department of State imposed an embargo on Mexican shrimp in conjunction with U.S. law,¹⁰⁹ then the embargo could be challenged under the NAFTA dispute settlement with the United States having the burden of proof.¹¹⁰ The Commission would not consider whether Mexican shrimping was consistent with the NAAEC, but a NAFTA dispute panel would consider whether U.S. conservation laws violated the NAFTA.

How a panel may ascertain whether there has been a failure of enforcement remains unclear. The NAAEC states that the panel "shall base its report on the submissions and arguments of the Parties"¹¹¹ Thus, the panel will not go from factory to factory to ascertain compliance. What should the panel infer from the information supplied by the parties? Is a high percentage of enforcement convictions a sign of effective or ineffective enforcement? Are repeat violations a sign of enforcement failure? Which side has the burden of proof? The NAAEC does not answer these questions.¹¹²

The NAAEC does not address public submissions such as amicus briefs or public observation of the dispute settlement process. However, according to the U.S. Department of State, the NAAEC "includes more open dispute settlement provisions than ever before"¹¹³ It is unclear what the Department of State means by this.

The parties, but not the public, get the opportunity to comment on the initial report.¹¹⁴ The final report must be issued within 60 days of the initial report.¹¹⁵ If a party is found to be engaged in a pattern of ineffectively en-

107. *Id.* art. 45.1, 45.2(a).

108. *But see Environmental Implications of NAFTA: Hearing Before the House Committee on Merchant Marine and Fisheries*, 103rd Cong., 1st Sess. 80 (1993), at 23 (statement of EPA Administrator Carol Browner telling Congress that such a law would be covered) [hereinafter *Environmental Implications*].

109. 16 U.S.C. § 1537 (1988).

110. NAFTA, *supra* note 16, art. 309, 2101. Mexico would have the burden of proof to show a pro forma violation of the NAFTA and then the burden would shift to the United States to defend the measure under. Steve Charnovitz, *NAFTA: An Analysis of Its Environmental Provisions*, 23 ENVTL. L. REP. 10067, 10070-71 (1993) [hereinafter Charnovitz, *NAFTA*].

111. NAAEC, *supra* note 21, art. 31.1.

112. *See generally id.*

113. *Testimony of Timothy E. Wirth Before the Subcommittee on Foreign Commerce and Tourism*, 103rd Cong., 2nd Sess. (1994).

114. NAAEC, *supra* note 21, art. 31.4.

115. *Id.* art. 32.1.

forcing its environmental law, the panel may propose an action plan.¹¹⁶ The disputing parties will then attempt to agree upon an action plan to remedy this situation.¹¹⁷ If no agreement is reached within 60 days, the panel may be reconvened.¹¹⁸ Within 90 days, the panel will approve or impose an "action plan."¹¹⁹

The "action plan" may be significant for several reasons. First, it may provide an objective way for the panel to measure progress toward better enforcement. Second, bureaucratic benefits may develop in having an action plan imposed on a country. For example, an environmental agency might use the plan as justification for a larger budget request for its regulatory staff. Third, the action plan may embarrass a government into mending its ways.

Whenever a complaining party believes that an action plan is not being fully implemented, it may reconvene the panel.¹²⁰ If the panel decides that the defendant country is not fully implementing the plan, the panel must impose a "monetary enforcement assessment" within 60 days.¹²¹ For 1994, the penalty is capped at \$20 million.¹²² The panel has broad discretion in determining the amount of the penalty.¹²³ In a remarkable departure from enforcement norms, the monetary assessment is paid to the Commission, and then expended by the Council to "improve the environment or environmental law enforcement" in the scofflaw country.¹²⁴ It is unclear what theories of deterrence underlie this novel approach to punishment.

Thus, these fines are not penalties in the usual sense of the term.¹²⁵ In other words, the "teeth" barely bite.¹²⁶ As one Administration official explained, the value of the penalties "would be primarily symbolic."¹²⁷ On the other hand, there may be domestic political fallout for a government in being named an environmental scofflaw. The use of fines in international trade or environmental agreements may be unique.

If the plaintiff party remains dissatisfied, it may, reconvene the panel after six months. The panel must then make a determination within 60 days as to whether the defendant party is fully implementing the "action plan."¹²⁸

116. *Id.* art. 33.

117. *Id.*

118. *Id.* art. 34.1.

119. *Id.* art. 34.4.

120. NAAEC, *supra* note 21, art. 34.1.

121. *Id.* art. 34.5.

122. *Id.* annex 34.1. After 1994, the cap is \$70 for every \$1 million of trade in goods between the disputing parties.

123. *See id.* annex 34.2 (listing the factors to be considered).

124. *Id.* annex 34.3.

125. They might be viewed as "tied" assessments - similar to tied foreign aid that must be used to purchase goods and services in the country giving the aid.

126. If they are not "paid," the complaining party may suspend trade benefits to collect the assessment through tariffs. NAAEC, *supra* note 21, art. 36.1.

127. D. Holly Hammonds, *NAFTA: Improving the Chances for Environmental Cooperation and Sustainable Development in the Region and Beyond*, NATIONAL SECURITY COUNCIL (1993), at 12.

128. NAAEC, *supra* note 21, art. 35.

If not, the plaintiff party may increase certain tariffs¹²⁹ to collect an amount equal to the monetary assessment.¹³⁰ Of course, as with all tariffs, it is the importers and ultimately the consumers in the country imposing the tariffs who pay these costs. These tariffs may only be imposed against the United States or Mexico; Canada chose not to be on the receiving end for trade sanctions.¹³¹ The use of such tariffs to collect arbitral fines may be unprecedented.

Imposing trade sanctions against a country that fails to enforce its environmental laws is a protracted and cumbersome process. At a minimum, it would take 755 days from the initiation of a complaint to the attainment of a trade sanction.¹³² While this is lengthy — the same procedure under the NAFTA dispute settlement process takes only 240 days¹³³ — it is summary justice compared to the extremely prolonged and complex procedures to reach trade sanctions in the North American Agreement on Labor Cooperation.¹³⁴ Indeed, some commentators have suggested that complaints about child labor enforcement will be rendered moot because the victims will no longer be children by the time the Labor Commission would permit trade sanctions.

Part VI of the NAAEC contains general provisions such as definitions. Part VII of the NAAEC contains typical final provisions in an international agreement. There are also two special annexes for Canada. One of them provides replacement procedures for the trade sanctions.¹³⁵ Under these procedures, Canada commits to making a panel's determination¹³⁶ an "order of the court."¹³⁷ This is a significant commitment, in effect, accepting binding

129. The NAAEC does not require that sanctions be imposed. *Id.* art. 36. The NAAEC limits the height of penalty tariffs to the rates existing prior to NAFTA. *Id.* art. 36B.1(a). This is an odd provision because it assumes that Mexico had a permanent entitlement to zero tariff rates under the GSP.

130. *Id.* art. 36.2. Although Annex 36B.1 is ambiguous, the drafters apparently meant that the complaining party could use tariffs to collect the monetary enforcement assessment as well as to impose an additional punishment equal to the monetary enforcement assessment. *Id.* annex 36B.1(a).

131. *Id.* annex 36A.3. President Clinton probably misspoke in suggesting that the NAAEC permits a trade sanction against Canada. See Remarks at the Signing Ceremony for the North American Free Trade Agreement Supplemental Agreements, 29 WEEKLY COMP. OF PRES. DOC. 1754, 1757 (Sept. 14, 1993).

132. NAAEC, *supra* note 21, art. 23-36. This is based on the time deadlines in the NAAEC. Many of these deadlines may be lengthened or shortened by agreement of the Parties. See *Environmental Implications*, *supra* note 108, at 35 (statement of EPA Administrator Carol Browner that she does not believe that they add up to 500 days in any way).

133. NAFTA, *supra* note 16, ch. 20.

134. North American Agreement on Labor Cooperation, Sept. 14, 1993, 32 I.L.M. 1499, reprinted in THE NAFTA SUPPLEMENTAL AGREEMENTS (United States Government Printing Office ed., 1993) [hereinafter NAALC]. It would take over 41 months to reach trade sanctions under the North American Agreement on Labor Cooperation. *Id.* art. 28-39.

135. NAAEC, *supra* note 21, annex 36A.

136. *Id.* art. 34-35.

137. *Id.* annex 36A.2(c). It is modeled after arbitral treaties which makes awards enforceable in domestic courts.

arbitration.¹³⁸ Interestingly, Canada does not make the same commitment with respect to decisions of the NAFTA panels.¹³⁹

The other annex clarifies that the NAAEC obligations do not apply to matters under the jurisdiction of the Canadian provinces.¹⁴⁰ Matters under Canadian federal jurisdiction are covered. Matters under provincial jurisdiction are not covered unless the province agrees to be covered and at least 55 percent of *all* Canadian activity (measured by gross domestic product and by the sector involved) takes place in provinces that agree to be covered.¹⁴¹ This annex offers a creative approach to treaty compliance in federal systems.

Since there is no comparable annex for the United States, one might assume that the NAAEC obligations do apply to the matters under the jurisdiction of the U.S. states.¹⁴² The Clinton Administration did not seek an exception for state governments or state authorities. Thus, if a panel finds that a state government is not effectively enforcing its laws, it can levy a monetary assessment on the federal government. Since the federal government already has a very large deficit, it will probably want to force the state to remedy the enforcement quickly. For example, the President might seek a court order based on the panel report and the underlying NAAEC obligation to enforce laws. The Clinton Administration promised not to introduce the NAFTA panel reports as evidence in federal courts, but made no analogous promise regarding NAAEC panel reports.¹⁴³

II. IMPLICATIONS FOR THE ENVIRONMENT

According to the Office of the U.S. Trade Representative, the NAAEC "will ensure that economic growth is consistent with goals of sustainable development . . ." ¹⁴⁴ EPA Administrator Carol Browner claims that the Agreement "makes it harder to pollute in all three countries."¹⁴⁵ Congressman Fred Grandy calls it "the strongest environmental treaty ever signed . . ." ¹⁴⁶ Yet, according to Wesley Smith of the Heritage Foundation, "the U.S. negotiating team had to settle for face-saving agreements that contained little more than vague language, including monitoring commissions with little or no

138. *Id.* It is beyond the scope of this article to discuss this annex in the context of the evolving doctrines of "regulatory negligence."

139. This refers to NAFTA Chapter 20 panels. NAFTA, *supra* note 16, ch. 20. Chapter 19 panel decisions are enforceable. *Id.* ch. 19.

140. NAAEC, *supra* note 21, art. 41, annex 41.

141. *Id.* annex 41.4, 41.5. The Agreement contains several inducements to attract provinces in and it seems now that a number of provinces will opt in.

142. The Clinton Administration says that it does. NAFTA REPORT, *supra* note 29, at 15. See also, 19 U.S.C. § 3312(c)(2) (forbidding any private right of action against a state on the grounds of inconsistency with the NAAEC).

143. H.R. DOC. NO. 159, 103d Cong., 1st Sess. 461-462 (1993).

144. OFFICE OF THE U.S. TRADE REPRESENTATIVE, NAFTA SUPPLEMENTAL AGREEMENT ON ENVIRONMENTAL COOPERATION (August 13, 1993).

145. Browner, *Former EPA Chief Reilly Push for Support for NAFTA on Capitol Hill*, 10 INT'L TRADE REP. 1685 (October 6, 1993).

146. Advertisement, WASH. POST, October 26, 1993, at B5.

power of enforcement . . . [A]lthough these side agreements are troublesome and establish worrisome precedents, the protectionists are correct: they are largely meaningless."¹⁴⁷

After separate consideration of the cooperation and enforcement provisions of NAAEC, this article will conclude that while the cooperation aspects may be constructive, there is very little, if anything, that was not already being done.¹⁴⁸ By contrast, the enforcement provisions are novel, but they do not look to be constructive.

A. NAAEC as a Cooperative Institution

Although the trilateral aspects of the NAAEC Commission do make it a unique institution,¹⁴⁹ the United States has formally cooperated with Canada and Mexico on environmental issues for many decades. For example, under the Canada-U.S. Boundary Waters Treaty of 1909, the parties agreed that boundary waters "shall not be polluted on either side to the injury of health or property on the other."¹⁵⁰ This treaty established an International Joint Commission which remains in operation.¹⁵¹ Under the Mexico-U.S. Water Treaty of 1944, the parties agreed to "give preferential attention to the solution of all border sanitation problems."¹⁵² This treaty expanded the mandate of a commission that had been established 55 years earlier and renamed it the International Boundary and Water Commission. This Commission remains in operation, but the environmental activities of these Commissions have been unsatisfactory and the NAAEC does not address those problems.¹⁵³

Regional environmental policy in North America began at the North American Conservation Conference of 1909 when Canada, the United States, and Mexico issued a "Declaration of Principles" calling for "concurrent measures" relating to public health, forests, water pollution, and game pro-

147. *Assessing the NAFTA Side Agreements*, in HERITAGE FOUNDATION BACKGROUNDER (Sept. 30, 1993).

148. For a more optimistic view, see J. Owen Saunders, *NAFTA and the North American Agreement on Environmental Cooperation: A New Model for International Collaboration on Trade and the Environment*, 5 COLO. J. INT'L L. & POL'Y 273, 287-89 (suggesting that the NAAEC goes beyond general international law to articulate an interest in domestic environmental issues).

149. *Environmental Implications of NAFTA*, Hearing before the House Committee on Merchant Marine and Fisheries, Ser. No. 103-80 at 61 (November 10, 1993) (U.S. Trade Representative Kantor stating that the NAFTA package provides for the "creation of the first ever North American Commission on Environmental Cooperation . . .")

150. 36 Stat. 2448, T.S. 548, Art. III (1909). The treaty was technically with the United Kingdom. Attention to pollution was not unique to North America. For another early treaty, see Convention Between Estonia and Latvia for the Protection of Fish and the Regulation of Fishing of 1925, 54 L.N.T.S. 233, Ad Art. 7 (1925) (discussing the prevention of pollution).

151. Jeffrey L. Roelofs, *United States-Canada Air Quality Agreement: A Framework for Addressing Transboundary Air Pollution Problems*, 26 CORNELL INT'L L. J. 421, 425 (1993).

152. Mexico-U.S. Water Treaty, 3 U.N.T.S. 313, art. 3 (1944)

153. For example, see *Canada Rejects IJC Call to Crackdown on Waste Incinerators Near Great Lakes*, INT'L ENV'T REP. 903 (1994).

tection.¹⁵⁴ In 1911, Canada and the United States agreed upon a Convention for the Preservation and Protection of Fur Seals.¹⁵⁵ In 1916, Canada and the United States agreed upon a Convention for the Protection of Migratory Birds.¹⁵⁶ In 1928, Mexico and the United States approved a Convention on Diseases in Livestock that required both parties to take concurrent control measures.¹⁵⁷ Both countries agreed to post "adequate live stock sanitary police" on their borders¹⁵⁸ and to promulgate certain regulations governing the disinfection of transportation vessels and vehicles.¹⁵⁹ In 1935, Canada and the United States agreed to establish a tribunal to effect a permanent settlement regarding a longtime dispute about a polluting smelter in British Columbia.¹⁶⁰ In 1936, Mexico and the United States approved a Convention for the Protection of Migratory Birds and Game Mammals.¹⁶¹

In recent years, many more specific agreements have been reached.¹⁶² An agreement between Canada and the United States was reached in 1972.¹⁶³ The La Paz Agreement between Mexico and the United States of 1983 commits the two countries to adopt "appropriate measures to prevent, reduce and eliminate sources of pollution in their respective territor[ies] which affect the border area of the other."¹⁶⁴ The La Paz agreement has several annexes dealing with particular environmental problems (e.g., hazardous wastes and copper smelters).¹⁶⁵ Indeed, one of the annexes commits the two countries to explore ways to harmonize air pollution standards and air-quality standards.¹⁶⁶ The Canada-U.S. Agreement on Air Quality of 1991

154. Loomis Havemeyer, et al., CONSERVATION OF OUR NATURAL RESOURCES 535, APPENDIX II (1938). It would be satisfying to view the NAAEC as building on this agreement, but it really does not. It detracts from it by emphasizing non-concurrent measures.

155. 37 Stat. 1538 (1911). The Convention was executed with the United Kingdom.

156. 221 C.T.S. 408 (1916). The Convention was executed with the United Kingdom.

157. 106 L.N.T.S. 481 (1928).

158. *Id.*, art. I.

159. *Id.*, art. V.

160. Trail Smelter Convention, 49 Stat. 3245, T.S. 893 (1935). Article XII commits the parties to comply with the decisions of the Tribunal.

161. 178 L.N.T.S. 309 (1936). See CONGRESSIONAL RECORD, Vol. 58, at 500 and Vol. 59, at 2635 (1920) (Senate urging the President to negotiate such a treaty).

162. See U.S. Government, REVIEW OF U.S.-MEXICO ENVIRONMENTAL ISSUES 8 (Feb. 1992) (reviewing U.S.-Mexico cooperation on the environment as of early 1992).

163. 23 U.S.T. 301 (1972).

164. Cooperation for the Protection and Improvement of the Environment in the Border Area, Sept., 1983, Mexico-U.S., 22 I.L.M. 1025, Art. 2 (1983); see Stephen Mumme, *Enforcing International Environmental Agreements: Lessons from the U.S.-Mexico Border*, 3 J. ENV'T & DEV. 71 (1994).

165. Annexes to Agreement on Cooperation for the Protection and Improvement of the Environment in the Border Area, Jan., 1987, Mexico-U.S., 26 I.L.M. 16, 17 (1987).

166. Agreement of Cooperation Regarding International Transport of Urban Air Pollution, Jan., 1990, Mexico-U.S., 29 I.L.M. 29, annex V, art. V (1990).

includes general objectives regarding air quality and specific objectives for sulfur dioxide and nitrogen oxides.¹⁶⁷

Considered against this longtime pattern of cooperation, it is difficult to view the NAAEC as a significant development.¹⁶⁸ While past efforts have proved ineffective in preventing environmental and health deterioration along the U.S.-Mexican border,¹⁶⁹ the NAAEC's effectiveness remains to be seen. Many observers hope that it will rationalize the numerous intergovernmental environmental institutions which already exist.

The establishment of an institutionally innovative commission by the NAAEC — for example, a tripartite commission consisting of government, environmental, and business members — would have been something to laud and could have avoided the circularity of environmental ministers making recommendations to themselves. However, a new bureaucratic structure superimposed on the numerous existing institutions and agreements does not merit much applause.¹⁷⁰ In fairness to the Clinton Administration, it inherited this unimaginative Commission from the Bush Administration which had crafted it, with advice from the National Wildlife Federation, mainly to gain environmental support for the NAFTA.¹⁷¹ The Clinton Administration retained the Bush Administration's framework and added the enforcement provisions.

The widespread perception of the Commission as a landmark institution is owed to some extent to the *New York Times*, which proclaimed in a lead story on page one that the NAAEC "will create a powerful three-nation bureaucracy to pursue a wide array of environmental problems."¹⁷² Powerfulness, however, is a relative concept. One benchmark is whether the NAAEC is as powerful as the commission advocated by then Governor Clinton during the presidential campaign.¹⁷³ For example, then Governor Clinton wanted a

167. Agreement on Air Quality, Mar. 13, 1991, Canada-U.S., 30 I.L.M. 676 (1991). The Congress had urged the President to negotiate such an agreement years earlier. See 42 U.S.C. § 7415 note. There are no trade provisions in this Agreement.

168. See *North American Free Trade Agreement, Hearings before the House Committee on Ways and Means*, Serial 102-135, at 73-74 (Sept. 9, 1992) (U.S. Trade Representative Carla Hills discussing steps that were already being taken to improve Mexico's enforcement of its environmental laws).

169. See Mickey Kantor, *At Long Last, A Trade Pact To Be Proud Of*, WALL ST. J., Aug. 17, 1993, at A14.

170. See Lloyd J. Spivak, *Structural and Functional Models for the Proposed North American Commission on the Environment*, 8 AM. U. J. OF INT'L L. & POL'Y 901, 934-95 (1993) (recommendations for how the Commission might have been designed).

171. See THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE NORTH AMERICAN COMMISSION ON THE ENVIRONMENT 42 (Sarah Richardson ed., Dec. 1992) (outlining the structure of the Commission agreed to by the three countries and the letter of support from the National Wildlife Federation).

172. Keith Bradsher, *Side Agreements To Trade Accord Vary In Ambition*, N. Y. TIMES, Sept. 19, 1993, at A1.

173. See *NAFTA and Related Side Agreements, Hearing Before the Senate Committee on Finance*, S. Doc. No. 103-439 Cong. Sess., at 288-89 (1994) (comparing the NAFTA and the NAAEC agreement to what Governor Clinton advocated in the campaign).

commission to have "the power to provide remedies, including money damages and the legal power to stop pollution."¹⁷⁴ The NAAEC does provide for panels with the authority to impose monetary "assessments," but there is no power to stop pollution.¹⁷⁵ The Commission cannot initiate complaints on its own in the same manner as the European Union Commission.

Then Governor Clinton also wanted the Commission to have "substantial powers and resources to prevent and clean up water pollution."¹⁷⁶ If the Commission collects monetary assessments, it may use them to enhance environmental law enforcement.¹⁷⁷ Otherwise, the Commission has no power or resources to prevent or clean up water pollution. In addition, Clinton called for an agreement "that permits citizens of each country to bring suit in their own courts when they believe their domestic environmental protections and workers standards aren't being enforced."¹⁷⁸ The NAAEC, however, requires private remedies only "in accordance with the Party's law."¹⁷⁹

Finally, then Governor Clinton called for new U.S. legislation to give U.S. citizens "the right to challenge objectionable environmental practices by the Mexicans or the Canadians."¹⁸⁰ To date, however, the Clinton Administration has not sought such legislation. Indeed, the Administration agreed in the NAAEC to lock in a rule that would *preclude* any of the three countries from providing a private right of action against any other party for acting inconsistently with the NAAEC.¹⁸¹ In addition, under the NAAEC, the public cannot initiate complaints that could lead to trade sanctions. Such complaints can only be lodged by one of the three governments and must gain the consent of another government.¹⁸² Thus, the *New York Times'* claim that a powerful bureaucracy was being created would seem unwarranted.¹⁸³

B. Environmental Harmonization

The NAFTA contains no substantive commitment by the three governments regarding any environmental process standard. The NAFTA does establish a Committee on Standards-Related Measures which permits the Committee to consider the "promotion and implementation of good manufacturing practices."¹⁸⁴ Because this provision was deemed inadequate by

174. *Candidate Bill Clinton's Proposal for Supplemental Agreements on NAFTA, in BEYOND NAFTA, THE WESTERN HEMISPHERE INTERFACE* 192 (Rodney Dobell and Michael Neufeld eds., May 1993).

175. See NAAEC, *supra* note 21, art. 34(5)(b), annex 34.

176. BEYOND NAFTA, THE WESTERN HEMISPHERE INTERFACE, *supra* note 6, at 192.

177. NAAEC, *supra* note 21, annex 34.3. Such assessments may also be used to enhance the environment.

178. BEYOND NAFTA, THE WESTERN HEMISPHERE INTERFACE, *supra* note 6, at 193.

179. NAAEC, *supra* note 21, art. 6.3

180. BEYOND NAFTA, THE WESTERN HEMISPHERE INTERFACE, *supra* note 6, at 192.

181. NAAEC, *supra* note 21, art. 38. The NAFTA has a similar discipline in art. 2021.

182. *Id.*, art. 24.1.

183. See Bradsher, *supra* note 172, at A1 (suggesting that such a bureaucracy was developing).

184. NAFTA, *supra* note 16, art. 913.5(b)(ix).

many environmentalists, the issue of process standards was addressed again in the NAAEC. The NAAEC states that the new Commission "may consider, and develop recommendations regarding . . . the environmental implications of goods throughout their life cycles."¹⁸⁵ Yet, it is unclear what environmental standards are embraced under this rubric. If the three parties really agreed that the NAAEC Commission would do more than the NAFTA Committee with regard to environmental policy coordination, they probably would have used less ambiguous language.

Consider, for example, the Germany-U.S. Agreement on Environmental Cooperation of 1974 which commits both countries to "use their best efforts to harmonize to the maximum extent practicable their environmental policies and practices, and to promote broad international harmonization of effective measures to prevent and control environmental pollution."¹⁸⁶ This seems far meatier than "environmental implications of goods throughout their life cycles." Even before the NAFTA, the three parties had already endorsed life cycle analysis as part of Agenda 21.¹⁸⁷

During the negotiations on the side accord, Canada proposed that the three parties adopt common limits on concentrations for specific pollutants, such as DDT.¹⁸⁸ Yet this proposal was not accepted. Instead, the NAAEC directs the Council to "as appropriate, develop recommendations regarding . . . appropriate limits for specific pollutants, taking into account differences in ecosystems."¹⁸⁹ The NAAEC contains no timetable for such appropriate efforts. In addition, the NAAEC does not commit the parties to ratify any existing international environmental treaty or to develop a common policy for the application of new environmental treaties in North America.

C. Environmental Goals and Targets

The recognition that an interdependent world economy requires international social standards dawned over a century ago.¹⁹⁰ Since then, numerous treaties have embodied international standards on fisheries, weights and measures, health, communications, postal delivery, intellectual property, sta-

185. *Id.*, art. 10.2(m). The Council will establish a process for developing recommendations on greater compatibility of environmental technical regulations "in a manner consistent with NAFTA." NAAEC, *supra* note 21, art. 10.3b. The meaning of this is unclear. For example, is it tied to the NAFTA definition of a technical "regulation?" If so, that might preclude life cycle analysis. In addition, is the term "environmental" (not otherwise defined in the NAAEC) to be given a broad meaning, or is it to be given the narrow meaning as defined in NAAEC art. 45.2?

186. Agreement on Environmental Cooperation, 1974, Germany-U.S., 13 I.L.M. 598, art. IV (1974).

187. U.N. Conference on Environment and Development, Agenda 21, chs. 4.20, 7.70(c), and 9.18(e) (1992).

188. *INSIDE U.S. TRADE*, May 14, 1993, at S-4.

189. NAAEC, *supra* note 21, art. 10.5(b).

190. *See e.g.* LEONARD WOOLF, *INTERNATIONAL GOVERNMENT* 150 (1916) (noting that the recognition of international interests was the great social discovery of the last 100 years); *ORDWAY TEAD, THE PEOPLE'S PART IN PEACE* (1918).

tistics, sanitation, labor, conservation, and customs cooperation.¹⁹¹ Some treaties have created institutions to help enforce newly-minted standards,¹⁹² but none were focused on domestic standards in the manner of the NAAEC.

For example, the Convention of 1908 between Great Britain and the United States established an International Fisheries Commission "to prepare a system of uniform and common International Regulations for the protection and preservation" of fisheries in waters contiguous to the United States and Canada.¹⁹³ These regulations included closed seasons and limits on nets.¹⁹⁴

In 1911, the International Convention for the Preservation and Protection of Fur Seals committed the four parties to carry out mutually agreed conservation policies including a ban on pelagic seal hunting.¹⁹⁵ President William H. Taft did not ask Czar Nicholas II to enforce Russia's own law on seal hunting. Luckily for the seals, the Taft Administration had the vision to see that the nations in the treaty had to act in parallel.

In 1937, Canada and the United States signed a Convention for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea.¹⁹⁶ The two countries agreed to "enact and enforce" such legislation as may be necessary to make the Convention effective.¹⁹⁷ In 1946, Canada and the United States signed a Convention for the Conservation of Fisheries of the Great Lakes.¹⁹⁸ The two countries agreed to prohibit the shipment, import, or export of fish taken from the Great Lakes in violation of the regulations made under this Convention.¹⁹⁹

The notion of an independent international commission is not new. The Opium Convention of 1925 established an independent board to "continuously watch" over the opium trade.²⁰⁰ Under the Convention of 1953, the Opium Board had the power to ask countries for explanations of Convention violations.²⁰¹ If the Opium Board found that actions by a country were seriously impeding narcotics control, it could propose remedial measures to the country or issue a public statement about the matter.²⁰² The Opium Board is

191. Joseph Chamberlain, *International Economic Treaties*, in *WORLD SOCIAL ECONOMIC PLANNING* 509 (1931).

192. Anne-Marie Burley, *Regulating the World*, in *MULTILATERALISM MATTERS* 125 (John Gerard Ruggie ed., 1993).

193. 206 C.T.S. 392, art. I (1908) (not in force).

194. *Report of the International Fisheries Commission*, H.R. DOC. NO. 638, 61st Congress (1908).

195. 214 C.T.S. 80, art. IV (1911) (not in force).

196. 50 Stat. 1351 (1937) (not in force).

197. *Id.* art. IV.

198. 8 *UNPERFECTED TREATIES OF THE UNITED STATES OF AMERICA* 5 (Christian L. Wiktor, ed., 1946). The treaty did not go into force.

199. *Supra* note 106, art. VII.

200. 81 L.N.T.S. 317, arts. 19 and 24 (1925).

201. 14 U.S.T. 10, art. 11 (1953).

202. *Id.* arts. 11-12.

similar in some ways to what many environmental groups wanted in the NAAEC — that is, an independent board with teeth.²⁰³

The Opium Board policed international standards. Other international institutions, like the International Labour Organization (ILO), were also developed to promote adherence to international standards.²⁰⁴ When the ILO receives a labor complaint about a country, the ILO examines the adherence of that country to the relevant ILO conventions.²⁰⁵ The ILO is generally uninterested in whether the country adheres to the letter of its law.²⁰⁶ The ILO ascertains whether that country meets internationally recognized labor standards.²⁰⁷ Similarly, when the International Atomic Energy Agency sends inspectors to countries like North Korea, they investigate compliance with international norms, not with North Korea's own nuclear proliferation laws.²⁰⁸

The NAAEC has a different, actually retrogressive, focus: namely, the domestic standards of each country.²⁰⁹ The Clinton Administration claims the commitment to effective environmental enforcement is unprecedented,²¹⁰ but one very obvious precedent exists: the Mexico-U.S. Agreement which commits each party to enforce its domestic laws regarding transboundary shipments of hazardous waste.²¹¹ The tentative approach of this agreement was criticized by environmentalists when adopted by the Reagan Administration.

Aside from the lessons of a century of international cooperation, there are many reasons to doubt whether domestic standards are the appropriate target for international supervision. First, the parochial laws of a country may be inadequate for its own environmental needs as well as for the rest of

203. See *supra* notes 173 and 174 and accompanying text (discussing the expectations of the NAAEC).

204. E.A. Landy, *THE EFFECTIVENESS OF INTERNATIONAL SUPERVISION: THIRTY YEARS OF I.L.O. EXPERIENCE* (1966). See, Steve Charnovitz, *Environmental and Labour Standards in Trade*, in 15 *THE WORLD ECONOMY* 335 (1992).

205. Landy, *supra* note 204. See *CONSTITUTION OF THE INTERNATIONAL LABOUR ORGANIZATION AND STANDING ORDERS OF THE INTERNATIONAL LABOUR CONFERENCE*, art. 19.5(d) (1980).

206. *Id.*

207. *Id.*

208. See generally, *International Atomic Energy Agency (IAEA): Improving Safeguards*, House of Representatives, Committee on Foreign Affairs, Subcommittees on International Security and Scientific Affairs and on International Economic Policy and Trade (Mar. 3, 1982).

209. See NAAEC, *supra* note 21, art. 5.

210. U.S. TRADE REPRESENTATIVE, *THE NAFTA REPORT ON ENVIRONMENTAL ISSUES* 15 (Nov. 1993).

211. See *supra* note 165, annex III, art. II, para. 2. See also *North American Free Trade Agreement*, Hearing before the Committee on Ways and Means, Serial 102-135, at 73 (Sept. 1992) (U.S. Trade Representative Carla Hills noting a proposed U.S.-Mexico committee to consider enforcement issues).

North America.²¹² When laws are inadequate, rigorous enforcement will provide little benefit.

The environmental laws in all three countries are probably inadequate,²¹³ since they are inadequate in the United States.²¹⁴ At the federal level, for example, weak particulate air pollution standards contribute to excess mortality in certain U.S. cities.²¹⁵ At the state level, many serious problems also exist. For example, the state of Arkansas has long resisted imposing sanitary standards on poultry industry pollution.²¹⁶

Second, even if the environmental laws in all three NAFTA countries were perfect when the NAFTA was signed, the laws are unlikely to remain so. Nevertheless, the effective enforcement provisions of the NAAEC fixate on the existing laws in a country.²¹⁷ A country that mindlessly enforces an inadequate law would maintain conformity with the NAAEC. Moreover, a country that lowered its law to avoid NAAEC scrutiny would also remain in conformity.²¹⁸

Third, the orientation of the side agreement was premised on the misperception that U.S. and Mexican environmental laws were substantially equivalent. The comparisons of U.S. and Mexican environmental laws offered by the Bush and Clinton Administrations are too general to draw any conclusions.²¹⁹ The Bush and the Clinton Administrations have ignored a statutory requirement to submit a report comparing air quality standards among major U.S. trading partners.²²⁰ The closest thing to a systematic, numerical analysis is a staff study conducted by the U.S. Environmental Protec-

212. Jonathan Schlefer, *History Counsels 'No' on NAFTA*, N. Y. TIMES, Nov. 14, 1993, at 3-11 (suggesting that it is as nonsensical for Mexico, Canada, and the United States to have different environmental rules as it would be if half of the United States regulated air pollution and half did not.)

213. *But see*, *Hearing Before the Committee on Foreign Relations*, S. DOC. NO. 103-360, Cong., Sess., at 28 (Oct. 27, 1993) (U.S. Trade Representative Rufus Yerxa explaining that "the basic assumption of this negotiation was that the laws themselves are quite good, the laws that are on the books in all three countries are quite good, and the problem has been one of enforcement . . .").

214. *See e.g.* AL GORE, *EARTH IN THE BALANCE* 346 (1992); BILL CLINTON & AL GORE, *PUTTING PEOPLE FIRST* 93 (1992).

215. Douglas W. Dockery et al., *An Association Between Air Pollution and Mortality in Six U.S. Cities*, 329 THE NEW ENGLAND J. OF MEDICINE 1753, (1993). *See*, John H. Cushman Jr., *States and Government Lag in Meeting Clean Air Law*, N. Y. TIMES, Nov. 16, 1993, at A18.

216. John T. Holleman, *In Arkansas Which Comes First, The Chicken or the Environment?*, 6 TUL. ENV'T'L L. J. 21, 27 (1992) (describing the magnitude of the manure problem in Arkansas as problematic).

217. NAAEC, *supra* note 21, art. 5. An agreement by a nation to maintain its current laws would be a significant concession. For example, GATT Article II binds certain tariff concessions. But the discipline in the NAAEC is not to maintain one's law, only to enforce it.

218. Apparently, in October 1993, Mexico did lower some environmental standards.

219. U.S. GOVERNMENT, *REVIEW OF U.S.-MEXICO ENVIRONMENTAL ISSUES* 23 (Feb. 1992) and U.S. Trade Representative, *THE NAFTA REPORT ON ENVIRONMENTAL ISSUES* 25 (Nov. 1993).

220. 42 U.S.C. § 7612 note § 811(b)(1)(A)(ii).

tion Agency.²²¹ According to this study, some Mexican standards for stationary air pollution "are substantially less stringent than the comparable provisions of U.S. law."²²² For industrial water pollution, U.S. standards overall are "substantially more stringent than the existing Mexican standards on direct discharges to surface waters."²²³ For pesticides, U.S. regulations ban some dangerous chemicals, such as DDT, BHC, EPN, and chlordane, which continue to be used in Mexico.²²⁴

Fourth, the NAAEC holds parties to differing standards. For example, Mexico could lodge a protest about non-enforcement of a U.S. law even when the inadequate U.S. law enforced was tighter than the comparable Mexican law adequately enforced. In other words, the plaintiff country is not required to enforce a law that it claims the defendant country is not enforcing.²²⁵ During the NAAEC negotiations, the National Governors Association wrote to U.S. Trade Representative Kantor suggesting that "a party should not be able to complain about a lack of enforcement by another party of a standard higher than its own,"²²⁶ but the negotiators apparently believed that the major areas covered by each country's environmental laws and their respective levels of protection were roughly comparable.²²⁷

Fifth, oversight of a government's compliance with its own law is more difficult than with an international standard.²²⁸ Any government is the expert on its own law, and a dispute system based on second-guessing a country's own enforcement will be mired in matters of interpretation and judgment. The NAAEC recognizes this problem by deferring to a "reasonable exercise of prosecutorial discretion and to "bona fide" resource alloca-

221. Office of the General Counsel, *Evaluation of Mexico's Environmental Laws, Regulations and Standards* 29 (Nov. 5, 1993).

222. *Id.* Mexico also lacks regulations for hazardous air pollutants comparable to U.S. regulations. *Id.* at 30.

223. *Id.* at 36.

224. *Id.* at 72-73.

225. Of course, the trade regime does not generally require this either. For example, a country does not have to be a non-subsidizer to invoke GATT Article VI and levy a countervailing duty. A country does not have to be a non-dumper to invoke Article VI and levy an antidumping duty.

226. *Governors' Letter on NAFTA Environmental Pact*, INSIDE U.S. TRADE 4 (July 16, 1993).

227. A different practice was followed in the North American Agreement on Labor Cooperation. See NAALC, *supra* note 134, arts. 29.1(b) and 49.1 (referencing "mutually recognized labor laws").

228. The NAFTA provides for binational panel rulings on whether antidumping or countervailing duty rulings are in accordance with the laws of the importing country. NAFTA, *supra* note 16, art. 1904.2. These rulings are considered to be court rulings in each country. For some projected implementation problems, see *Canada Succeeds in Modifying Final NAFTA Language on Disputes*, INSIDE U.S. TRADE, Nov. 12, 1993, at 20.

tion decisions,²²⁹ but its general language makes it even harder to demonstrate non-compliance.²³⁰

Sixth, focusing on a party's own laws was apparently perceived as less intrusive on sovereignty than pursuing a negotiation for minimum regional environmental standards. However, there is nothing more intrusive than meddling in a country's own enforcement of its own laws. An international obligation based on each government's own standard is the weakest conceivable form of international agreement,²³¹ and the absence of precedent should not be surprising.²³² The Clinton Administration seemed oblivious to the implications of its misdirected policy.²³³ Even if the NAAEC dispute mechanism proves workable, it may prove to be of little importance to the environmental challenges facing North America. What was needed was a creative, forward-looking institution to develop common approaches to the environmental problems in North America. Instead, the three governments resorted to an atavistic, uninspiring approach aimed at the wrong target.

D. Deficiencies in the Agreement

Given the approach of international supervision of domestic enforcement, the NAAEC has some deficiencies which will impede the effectiveness of such supervision. First, the NAAEC enforcement procedures only apply to domestic laws²³⁴ and therefore do not apply to international obligations that are not self-executing as domestic law. Thus, the one substantive obligation in the NAAEC, to provide for "high levels" of environmental protection²³⁵ is not subject to dispute settlement under the NAAEC or the NAFTA.

Second, neither the NAAEC Secretariat nor the dispute panels have subpoena power.²³⁶ U.S. Trade Representative Kantor notes, however, that

229. NAAEC, *supra* note 21, art. 45.1(a)(b). Since enforcement is to a large extent a function of the resources expended on it, a country may be able to justify its weak enforcement in the area being complained about by explaining that its limited enforcement resources were being used for higher priority environmental matters.

230. For example, how is enforcement to be judged in situations of negotiated compliance to regulations.

231. In making this statement, this commentator is not suggesting that the enforcement procedures are trivial. They may develop into a significant discipline.

232. President Clinton, once said, "This has never happened in the whose history of world trade where one country has said, you can put our environmental laws in the trade agreement and enforce them." WEEKLY COMP. PRES. DOC. 2259 (1993). Later he stated that Mexico and Canada allowed the United States to have "a trade agreement that gets into their internal politics more than any country in history on the environmental policy and on labor policy." WEEKLY COMP. PRES. DOC. 2309 (1993).

233. According to a White House options paper leaked to the press, the Administration considered the option of committing the parties to apply higher environmental standards. See *Confidential NEC Options Paper on Environment and Labor*, INSIDE U.S. TRADE 12 (Mar. 12, 1993).

234. NAAEC, *supra* note 21, art. 5.

235. *Id.*, art. 3.

236. See *id.*, part 3, § B and part 5.

the labor and environmental Secretariats "can examine any information they receive and may have recourse to publicly available sources of information."²³⁷ Publicly available sources of information may be sufficient for the Secretariat's work. Yet, the Canada-U.S. Boundary Waters Treaty of 1909 provided that the parties would enact legislation to give subpoena power to the International Joint Commission.²³⁸ The NAAEC Commission lacks that power. The NAAEC does not specifically empower the Secretariat to collect information on-site, but it does not seem to preclude it either.²³⁹

Whether the absence of subpoena power impedes the panels will depend on whether they search for patterns of inadequate enforcement in the practices of regulatory agencies or in actual pollution levels. Whether the panel will be able to compel governments to provide information from regulatory agencies is unclear. The lack of subpoena power may prove to be a significant constraint on actual pollution level information if governments are not forthcoming with information.

Third, the NAAEC relies exclusively on ad hoc panels.²⁴⁰ In contrast, the European Community has an on-going Court that develops case law for Community-wide rules. Over time, this Court has developed useful environmental norms, but whether useful norms will emerge from the NAAEC's narrow procedures remains to be seen.²⁴¹

E. Other Claims

The NAAEC does not accomplish that which some of its proponents claim it does. For instance, U.S. Trade Representative Kantor declared that "if a country doesn't go after its polluters, we will."²⁴² The NAAEC, however, specifically precludes a party from "undertak[ing] environmental law enforcement activities in the territory of another party."²⁴³

President Clinton has declared that the side agreements "will make it harder than it is today for businesses to relocate solely because of very low wages or lax environmental rules,"²⁴⁴ but the NAAEC has no disciplines at all on the laxity of environmental rules.²⁴⁵ Additionally, the Labor Agreement has no discipline on low wages, nor does it have any disciplines on plant relocations. One wonders why the NAAEC will make it harder to relocate,

237. *Kantor Letter on NAFTA Effect on U.S. Sovereignty*, INSIDE U.S. TRADE, Oct. 22, 1993, at 17 [hereinafter *Kantor Letter*].

238. 36 Stat. 2448, T.S. 548, art. XII (1909).

239. NAAEC, *supra* note 21, art. 13.2.

240. *Id.*, art. 25.

241. John H. Barton and Barry E. Carter, *International Law and Institutions for a New Age*, GEO. L.J. 491, 547 (1993) (discussing the evolving international common law).

242. Kantor, *supra* note 169.

243. NAAEC, *supra* note 21, art. 37. Oddly, this is captioned the "Enforcement Principle".

244. WEEKLY COMP. PRES. DOC. 1757 (1993).

245. Actually, it could be argued that the NAAEC might *promote* capital flight to Mexico because business executives would no longer have to be defensive about it. They could say that Mexico's scrupulous adherence to the NAAEC sanctifies such U.S. foreign investment.

especially since the NAFTA's new rules on investment could make it easier to relocate.

Environmental agreements sometimes have dispute settlement procedures relating to the scope of the agreement.²⁴⁶ The NAAEC does too, but since the scope of the agreement is enforcement, its dispute settlement is limited to that aspect.²⁴⁷ Some observers are under the impression that the NAAEC will help to settle continental environmental disputes. The closest the NAAEC gets is a provision stating that the Council may seek to prevent "environment-related trade disputes."²⁴⁸ Even some disputes relating to the quality of enforcement, for example, the clean-up of hazardous waste sites, could not be considered by a panel unless there were a link to trade.²⁴⁹

In summary, the strongest aspect of the NAAEC is its creation of a regional environmental organization. Given the long history of environmental cooperation among the three countries, many of the provisions in the NAAEC are unremarkable. The dispute aspects of the Agreement assert a new principle of an obligation to enforce one's own law, but this principle may not be very constructive for the environmental regime. The next section will consider whether the possibility of trade sanctions asserts a constructive principle for the trade regime.

III. IMPLICATIONS FOR TRADE POLICY

Future trade agreements will probably recognize the environment more than past trade agreements have done. While some commentators have suggested that the NAFTA and the NAAEC may provide models for new efforts to reconcile trade and environment,²⁵⁰ it is hard to justify the continuation of this unwieldy, "parallel" approach. A better course would devise broad agreements that encompass both trade and environment. For example, the Agreement on the European Economic Area between European Union and European Free Trade Association countries combines the free movement of goods with a number of environmental commitments, including the incorporation of certain regulations into national environmental laws.²⁵¹

246. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 28 I.L.M. 649, annex VI; Canada-U.S. Agreement on Air Quality, 30 I.L.M. 676, arts. XII-XIII. An example of an earlier trade treaty with dispute settlement procedures is the International Convention Concerning the Export and Import of Animal Products, 193 L.N.T.S. 61, art. 10(2) (1935).

247. See generally, NAAEC, *supra* note 21, part 5.

248. *Id.* art. 10.6(c). The NAAEC is ambiguous as to whether the Commission would be able to assist in resolving such disputes.

249. *Id.* art. 24.1.

250. *Administration Continues to Press for Fast Track on GATT Bill*, INSIDE U.S. TRADE, Aug. 5, 1994, at 1.

251. Council on the European Communities, Agreement on the European Economic Area, arts. 1, 73, and 74 (1992).

A. Prospects for Sanctions

Although the NAFTA was supported in the U.S. business community, there was considerable angst about the trade sanctions in the NAAEC. One concern was that such trade sanctions violated the NAFTA.²⁵² Trade sanctions could also counteract the commercial benefits of the free trade agreement, and at \$20 million a complaint,²⁵³ there is probably enough ineffective environmental enforcement to undo all of the trade liberalization. In addition the NAAEC would allow the complaining party to select products based on competitiveness factors. A better procedure would have been to require such sanctions to be a very small tariff on all imports.

The cumbersome procedures of the NAAEC make such trade sanctions unlikely. First, the NAAEC requires a showing of a "persistent pattern of failure" to effectively enforce a country's own environmental law.²⁵⁴ Patterns can be hard to prove. Under U.S. foreign assistance law, certain kinds of assistance are conditional upon whether a foreign government engages in "a pattern" or "a consistent pattern" of "gross violations of internationally recognized human rights."²⁵⁵ The target country can easily interrupt the pattern by letting a dissident out of jail, as countries under scrutiny for human rights violations have learned. A country under NAAEC examination can undertake one high profile prosecution and then argue that its pattern is no longer persistent.

Second, the Commission's oversight of the quality of enforcement in each country conflicts with a Council of three environment ministers.²⁵⁶ Few people, least of all government officials, are capable of objectively investigating their own performance.

Even though trade sanctions are unlikely, business groups remain queasy about establishing the principle of permitting trade sanctions within a trade agreement. Of course, the General Agreement on Tariffs and Trade (GATT) is not innocent of trade sanctions.²⁵⁷ Although they are given a different name, anti-dumping and countervailing duties are discriminatory and therefore are trade sanctions.²⁵⁸ These sanctions are imposed by national laws derived from "international" standards in the GATT Article VI.

252. At a minimum, such sanctions would violate the NAFTA art. 301 (National Treatment) and art. 302 (Tariff Elimination).

253. NAAEC, *supra* note 21, annex 34.

254. *Id.*, arts. 24.1 and 31.2.

255. 22 U.S.C. § 262d(a), 2151n(a), and 2304(a)(2).

256. Steve Charnovitz, *NAFTA's Link to Environmental Policies*, CHRISTIAN SCI. MONITOR, Apr. 21, 1993, at 19.

257. See e.g. General Agreement on Tariffs and Trade (GATT), 62 U.N.T.S. 86, art. VI (1948) (authorizing duties on products that are being dumped) [hereinafter GATT].

258. However, the types of sanctions are distinguishable. Under the GATT or the NAFTA, the trade sanctions are a contract-type remedy, designed to restore the balance of advantages embodied in the original bargain. Under NAAEC, the trade sanctions are punishment for not paying a fine or not adhering to a panel's action plan.

When Country A places an antidumping duty on Country B, the determination is not based on whether the dumping by B is illegal under B's own law.

In commending the NAAEC, President Clinton declared that it is "the first time that there have ever been trade sanctions in the environmental law area."²⁵⁹ Many observers were surprised when President Clinton boasted about this since a few weeks earlier, the Secretary of Commerce had certified Panama under the Pelly amendment.²⁶⁰ Panama was certified because its marine mammal protection program did not meet U.S. environmental standards.²⁶¹ However, it may have met Panamanian standards. Yet, when given the opportunity to impose the first environmental trade sanction a few weeks later, Clinton declined.²⁶²

Although the NAAEC is the first environmental agreement to include trade sanctions, other international agreements have used import controls.²⁶³ For example, the International Sugar Agreement of 1937 provided that the Sugar Council could authorize import restrictions on sugar against parties that infringed upon the Agreement.²⁶⁴ Additionally, the Opium Board could mandate a multilateral embargo on opium trade against a country whose actions were impeding the Convention.²⁶⁵ Nevertheless, both of these treaties provided for sanctions only against the product being regulated by the treaty. The NAAEC is different in that it provides for sanctions against any product.²⁶⁶

B. Other Implications

Several other trade concerns have been voiced about the NAAEC. The side agreement might be imposed on Latin American countries hoping to join the NAFTA. Given the disproportionate power of the United States, this may occur in the short run,²⁶⁷ but eventually, the incoherence of that approach is bound to fall of its own weight. If three parties have difficulty in

259. WEEKLY COMP. PRES. DOC. 1757 (1993).

260. 22 U.S.C § 1978. See also Steve Charnovitz, *Encouraging Environmental Cooperation Through the Pelly Amendment*, J. OF ENVIRONMENT & DEVELOPMENT 3 (1994) (discussing the history and effectiveness of the Pelly amendment) [hereinafter Charnovitz, ENCOURAGING ENVIRONMENTAL COOPERATION].

261. See Charnovitz, ENCOURAGING ENVIRONMENTAL COOPERATION, *supra* note 260.

262. WEEKLY COMP. PRES. DOC. 2059 (1993). Later President Clinton imposed unilateral trade sanctions against Taiwan for inaction on rhino and tiger trade. 59 Fed. Reg. 22,043 (1994).

263. The inclusion of trade sanctions in international agreements is unusual. The GATT mechanism providing for the authorization of trade countermeasures art. XXIII:2 has only been used once.

264. 141 B.F.S.P. 496, art. 44 (1937). The Sugar Bounties Convention of 1902 had a provision requiring countries to impose countervailing duties following a decision by the majority. See 95 B.F.S.P. 6, arts. IV and VII (1902). By contrast, the trade countermeasures authorized under GATT, the NAFTA, and the NAAEC are discretionary.

265. 14 U.S.T. 10, art. 12.3. These provisions applied to parties and non-parties.

266. NAAEC, *supra* note 21, annex 36B.2.

267. See e.g., *Ambassador Indicates Chile Ready to Accept NAFTA Environmental Side Deal*, INT'L TRADE REP., Jan. 26, 1994, at 148.

keeping track of each other's laws, what will happen when there are six parties?²⁶⁸

If countries must join the NAAEC to get into the NAFTA, they may increase pollution tolerance levels so that future enforcement will be easier. This would reverse the normal process of the GATT whereby countries have to decrease their own trade barriers in order to become a GATT member.²⁶⁹ It would be difficult for the NAAEC to require any entrance fees from new members since the three original parties did not agree to improve, or even to maintain, their environmental standards.

Some committed multilateralists see no problem with attaching environmental conditionality to a free trade agreement. For example, Jagdish Bhagwati accepts a U.S. policy:

that if we enter into a special, preferential, discriminatory Free Trade Area with, and for another country, we will insist on requiring (and even assisting) it to adopt a minimum set of standards: on democratic politics, on environmental cleanups, on labor safety, etc. In short, we would not lie in a special bed with Mexico, or any other country, offering them special trading rights not extended to all others, unless this is done.²⁷⁰

The NAFTA, as written, imposes no minimum standards, but if a free trade agreement did impose environmental production standards and then sought to keep imports out of the green enclave not meeting those standards, that would raise profound GATT problems because of the violation of the most-favored-nation principle.²⁷¹

Another concern is that the side agreement validated the notion that differing environmental standards in various countries necessitates a level playing field. It is one thing to propose harmonization for environmental reasons. For example, the Montreal Protocol²⁷² imposes common standards to preserve the ozone layer, but harmonization for competitiveness reasons is a different matter.²⁷³ Unfortunately, President Clinton seemed to favor the NAAEC as a way to raise Mexican production costs.²⁷⁴ This mercantilist approach by the United States has undermined progress on the trade and environment issue in other fora, such as the GATT.²⁷⁵

268. Three parties need only six monitors to watch each other's enforcement. Six parties would require thirty monitors.

269. See GATT, *supra* note 257, art. XXIII.

270. Jagdish Bhagwati, *Purely Opportunistic*, in *THE NEW REPUBLIC* 5 (Nov. 11, 1993).

271. See GATT, *supra* note 257, art. I.

272. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1541 [hereinafter Montreal Protocol].

273. See Benn Steil, *The New Rules of Trade*, in *NAT'L REV.*, Apr. 18, 1994, at 40 (pointing out that NAFTA represents the first international trade pact actually to enshrine social protectionism).

274. *WEEKLY COMP. PRES. DOC.* 1757, 1766, 1996 (1993).

275. See *Mr. Clinton's Trade Agenda*, *FINANCIAL TIMES*, Jan. 14, 1994 at 19. See also, *Which Way? Free Trade or Protection?*, in *CHALLENGE* 1722 (Jan.-Feb. 1994) (interviewing Jagdish Bhagwati).

Finally, conflicts between the NAFTA and the NAAEC may occur when the former looks at enforcement that is too strict and the NAAEC looks at enforcement that is too lax.²⁷⁶ Mexico might complain in the NAFTA that U.S. meat safety standards are being enforced too rigidly to keep out Mexican exports.²⁷⁷ Canada might complain in the NAAEC about a pattern of U.S. meat safety standards being enforced so loosely that cheaper and dirtier American meat displaces potential sales of clean Canadian meat.²⁷⁸ If both dispute panels agree with the complaining parties, the United States could be hit by trade sanctions from both countries.²⁷⁹ Such a conflict is unlikely to happen, but it shows the danger of bifurcating the enforcement issues. What is needed is an institution that considers both over-regulation and under-regulation.²⁸⁰

In summary, although the NAAEC breaks new ground in incorporating trade enforcement into an environmental agreement, such enforcement has been used in other international agreements. While sanctions are unlikely to be used anytime soon, they may complicate the operation of the NAFTA and future accession by other countries. If the sanctioning mechanism in the NAAEC had been based on international standards, the experiment would have been much more constructive.

IV. IMPLICATIONS FOR AMERICAN TREATYMAKING

The U.S. government can enter into a binding agreement with another government in several ways.²⁸¹ First, the President can negotiate a "treaty."²⁸² Prior to ratification, he must submit the treaty to the U.S. Senate

276. See NAAEC, *supra* note 21, art. 23.5 (a complaint under NAAEC that enforcement was too tight might be referred to the NAFTA).

277. NAFTA, *supra* note 16, art. 712.5. For example, Mexico could allege that the measure is unnecessary to achieve the chosen level of protection in the United States.

278. Note that neither complaint is predicated on a commercial injury test.

279. The NAFTA Statement of Administrative Action declares that "The Administration does not consider that there are any inconsistencies between the supplemental labor and environmental agreements and the NAFTA." See *Message from the President of the United States*, H.R. Doc. No. 103-159, 103d Cong., 1st Sess., Vol. 1 at 452 (1993).

280. Steve Charnovitz, *Environmental Harmonization and Trade Policy*, in *TRADE AND THE ENVIRONMENT, LAW, ECONOMICS, AND POLICY* 283 (Durwood Zaelke et al. eds., 1993) (offering a proposal for an International Environment Organization that would develop and monitor standards).

281. JOHN H. JACKSON, *THE EFFECTS OF TREATIES IN DOMESTIC LAW* 141-69 (Francis G. Jacobs & Shelley Roberts eds., 1987). Jackson catalogs five different ways for the U.S. government to enter into a binding agreement with another government. They are (1) formal treaty, (2) executive agreement previously authorized by Congress, (3) executive agreement subsequently approved by Congress, (4) Presidential or sole executive agreement, and (5) executive agreement authorized by prior treaty. *Id.*

282. 64 Stat. III-VIII (1950) and 1 U.S.C. § 112a (1988). As used here, the term "treaty" will refer only to agreements proclaimed by the President after consent by the Senate. It is interesting to note that until 1952, the U.S. Department of State reported these treaties separately from "International Agreements Other Than Treaties." *Id.*

for advice²⁸³ and consent by a two-thirds vote.²⁸⁴ Second, through a "congressional-executive" agreement,²⁸⁵ the President or an inferior official can negotiate and implement an executive agreement pursuant to statutory authority from the U.S. Congress.²⁸⁶ Third, utilizing a "sole executive" agreement,²⁸⁷ the President can negotiate and implement an executive agreement predicated on his Constitutional authorities.

The NAFTA uses the congressional-executive method pursuant to Congressional "authority" provided in the Omnibus Trade and Competitiveness Act of 1988.²⁸⁸ This law required subsequent Congressional approval of a bilateral agreement before it could take effect.²⁸⁹ To facilitate such approval, Congress granted "fast track" status which guaranteed a vote without amendment on the implementing legislation within 90 days.²⁹⁰

This 1988 legislative authority could have been used for the NAAEC if that Agreement had been entered before June 1, 1993.²⁹¹ Since the NAAEC was not signed until September 14, it was not eligible for fast track status. This left two options for securing Congressional approval.²⁹² First, the President could have asked Congress to approve the NAAEC through a joint resolution. Second, the President could have asked the Senate to approve NAAEC as a treaty.

The first option was unsuitable because the Administration's political strategy for selling the NAFTA depended on presenting it as part of a complete package which included the side agreements. Without fast track, Congress would not approve the NAAEC in time to help with the NAFTA vote. From the Administration's perspective, any scenario calling for de-coupling the NAFTA and the NAAEC was viewed as fatal to the NAFTA. The second option was unsuitable for the same reason. In addition, two-thirds of the

283. CHARLES CHENEY HYDE, *INTERNATIONAL LAW VOL. II* 1433 (1945). "Although frequently in consultation with its members, the President has long since ceased to seek and obtain the advice of the Senate preliminary to the negotiations of treaties." *Id.*

284. U.S. CONST. art. II, § 2, cl. 2

285. There are three ways this can be done: (1) by prior authorization, (2) by subsequent approval, and by (3) retroactive approval. The trade agreements entered into under the Reciprocal Trade Agreements Act of 1934 is an example of the first. 19 U.S.C. § 1350 (1988). NAFTA is an example of the second. NAFTA, *supra* note 16. The Canada-U.S. Automotive Products Agreement is an example of the third. Pub. L. No. 89-283, 79 Stat. 1016 (1965).

286. *Field v. Clark*, 143 U.S. 649, 694 (1892). *But see supra* note 423 and accompanying text.

287. EDMUND MCGOVERN, *INTERNATIONAL TRADE REGULATION* 52 (1982).

288. 19 U.S.C. § 2902(c) (1988).

289. 19 U.S.C. § 2903(a)(1)(C) (1988).

290. 19 U.S.C. § 2191 (1988). The implementing legislation provides for Congressional approval of the trade agreement. 19 U.S.C. § 2191(b)(1)(A) and P.L. 103-182 § 101(a), 107 Stat. 2057, 2061 (1993), 19 U.S.C. § 3311(a) (1993). Koh, *supra* note 2, at 170.

291. 19 U.S.C. § 2191(c) (1988). Some observers had urged the Administration to act before then. See Charnovitz, *NAFTA*, *supra* note 110, at 10073.

292. *NAFTA Side Deals Will Not Require Fast-Track Notification, Officials Says*, *INSIDE U.S. TRADE*, Feb. 12 1993 at 11. Nevertheless, in February 1993, an unnamed key U.S. trade official told *INSIDE U.S. TRADE* that the notification by President Bush to Congress in September 1992 was "adequate to address the entire package." *Id.* Yet, President Bush did not presuppose an environmental side agreement.

Senate could not be mustered.²⁹³ Even though the President referred to the NAFTA as a "treaty,"²⁹⁴ the White House apparently never considered the possibility of using the normal Senate treaty procedures.

What remained was the characterization of NAAEC as a sole executive agreement. As will be seen, the Administration feigned in this direction. Ultimately, however, the Administration sought and obtained a vague Congressional approval. The Clinton Administration had some difficulty in deciding how to classify the NAAEC. Sometimes, it was described as a trade agreement.²⁹⁵ For example, President Clinton called it "the first trade agreement in history dealing seriously with labor standards and environmental standards . . ."²⁹⁶ Sometimes, it was described as an environmental agreement.²⁹⁷ According to U.S. Trade Representative Kantor, "the Supplemental Agreement on Environmental Cooperation is the first environmental agreement negotiated specifically to accompany and build on a trade agreement."²⁹⁸ Later, a more nuanced formulation emerged from the U.S. Trade Representative, namely "that the supplemental agreements are not trade agreements for purposes of fast track procedures."²⁹⁹ In other words, agreements may exist for certain purposes such as implicitly modifying the NAFTA, but not for other purposes such as meeting the fast track deadline.

The NAAEC is not independent of the NAFTA. In signing the side agreements, President Clinton said, "I will sign three agreements that will complete our negotiations with Mexico and Canada to create a North American Free Trade Agreement."³⁰⁰ Furthermore, in transmitting the NAFTA to Congress, President Clinton claimed that "NAFTA was negotiated by two Presidents of both parties . . ."³⁰¹ Since President Bush approved the

293. The Senate approved NAFTA with 61 votes — in other words, only 61 percent. See CONG. Q. ALMANAX 103d Cong., 1st Sess. at 171 (1993).

294. See e.g., Interview With Rolland Smith of KNSD-TV of San Diego, 42 WEEKLY COMP. PRES. DOC. 2149 (Oct. 25, 1993).

295. Remarks at the Signing Ceremony for the North American Free Trade Agreement Supplemental Agreements, 37 WEEKLY COMP. PRES. DOC. 1758 (Sept. 20, 1993) Later he explained that Mexican environmental laws "will have to be enforced because they're in this trade agreement." Remarks on NAFTA to Employees of Lexmark International in Lexington, 44 WEEKLY COMP. PRES. DOC. 2259 (Nov. 8, 1993). See, Remarks on Endorsements of the North American Free Trade Agreement, 45 WEEKLY COMP. PRES. DOC. 2309 (Nov. 15, 1993).

296. Remarks at the Signing Ceremony for the North American Free Trade Agreement Supplemental Agreements, 37 WEEKLY COMP. PRES. DOC. 1758 (Sept. 20, 1993).

297. *Senators Press Administration Official About the Status of NAFTA Supplements*, INT'L TRADE REP., Oct. 20, 1993, at 1761. This change was signaled when Deputy U.S. Trade Representative Rufus Yerxa told the Congress that the side agreements were executive agreements on labor and environmental matters.

298. *Environmental Implications of NAFTA: Hearing before the House Committee on Merchant Marine and Fisheries*, Nov. 10, 1993, Cong., Sess., Serial No. 103-80, at 68.

299. 139 CONG. REC. H9928-29 (daily ed. Nov. 17, 1993) (letter from U.S. Trade Representative Kantor).

300. Remarks at the Signing Ceremony for the North American Free Trade Agreement Supplemental Agreements, 37 WEEKLY COMP. PRES. DOC. 1755 (Sept. 20, 1993).

301. Message to Congress Transmitting the NAFTA Legislation, 44 WEEKLY COMP. PRES. DOC. 2255 (Nov. 8, 1993).

NAFTA, President Clinton must have viewed his own work on the NAAEC as also being part of the NAFTA.

The NAFTA does provide for amendments, but they go into force only after being "approved in accordance with the applicable legal procedures of each Party . . ."³⁰² For the United States, the applicable procedures are not clear.³⁰³ Congress did not grant the President authority to amend the NAFTA.³⁰⁴ The implementing legislation for the Canada-U.S. Free Trade Agreement provided for temporary fast-track approval for implementing amendments,³⁰⁵ but the NAFTA implementing legislation lacks a comparable provision.³⁰⁶

The Clinton Administration has not yet suggested that the President has authority to amend the NAFTA. If he had that authority, the NAAEC might have been viewed as the first amendment. Thus, any provisions that specifically amend NAFTA would have to be submitted to Congress for approval. All of the provisions in NAAEC that contradict the NAFTA might be viewed as *implicit* amendments.³⁰⁷ U.S. Trade Representative Kantor explained that these amendments supersede the NAFTA as a "later in time agreement."³⁰⁸ Yet, he did not explain the Administration's authority to agree to such an implicit change in the NAFTA subsequent to the expiration of the deadline for entering into trade agreements.³⁰⁹

302. NAFTA, *supra* note 16, art. 2202.2. It is interesting to note that the NAAEC has a similar provision. NAAEC, *supra* note 21, art. 48.2.

303. John H. Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 249, 277-78 (1967). One might hypothesize that the same authority used to enter into the agreement would have to be relied upon for subsequent amendments. *But see TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE*, Senate Print 103-53, November 1993, at 145-46 (the President would be within his rights to agree to an amendment consonant with the underlying law which authorized the agreement).

304. There is one tiny exception. Section 202(q)(3)(B) provides the President authority for one year to proclaim modifications to correct any typographical, clerical, or other nonsubstantive technical errors in Appendix 6.A of the NAFTA Annex 300B and in Section XI of Part B of the NAFTA Annex 401. This relates to rules of origin. The existence of this provision suggests that the President would otherwise lack authority to proclaim modifications to the NAFTA. NAFTA, *supra* note 16.

305. 19 U.S.C. § 2112(e) note § 102(e) (1988).

306. It is interesting to note that the Truman Administration's proposed legislation to authorize U.S. membership in the International Trade Organization stated that the President was not authorized to accept future amendments of the ITO Charter without approval by the Congress. H.R.J. RES. 236, 81st Cong., 1st Sess. (1949).

307. *See* NAAEC, *supra* note 21, art. 36. (providing for trade sanctions would appear to be an implicit, *lex posterior* amendment of the NAFTA Article 302.1 which provides for tariff elimination) However, the Statement of Administrative Action states that "the Administration does not consider that there are any inconsistencies between the supplemental labor and environmental agreements and the NAFTA." *See Message from the President of the United States*, H.R. Doc. No. 103-159, 103d Cong., 1st Sess., Vol. 1, at 452 (1993).

308. *See* 139 CONG. REC., H9929.

309. *Id.* All treaty amendments are later in time agreements. But if the Administration does not have authority to amend the NAFTA, then it may not have authority to consummate later in time agreements that amend the NAFTA.

In July 1993, eleven members of Congress wrote President Clinton inquiring about the legal status of the NAFTA supplemental agreements.³¹⁰ When he responded in *October* 1993, U.S. Trade Representative Kantor wrote that, “[t]he supplemental agreements are executive agreements. The agreements do not require Congressional approval since they are executive agreements and are not formally part of, or annexed to, the NAFTA.”³¹¹ In a November 4 message to Congress regarding the NAFTA, President Clinton declared that the environmental and labor side agreements “are not subject to formal congressional approval under fast-track procedures.”³¹² The President seemed to be saying that his legislation did not provide “formal Congressional approval.” This could be the case only if the side agreements, unlike the NAFTA, were sole executive agreements that could be implemented without approval by Congress.³¹³ As a result of various statements by Administration officials, many members of Congress became convinced that NAAEC was a sole executive agreement. For example, the House Committee on Ways and Means called the side agreements “Executive agreements that do not require Congressional approval . . .”³¹⁴ In the Senate, the ranking Republican on the Environment and Public Works Committee, John H. Chafee, explained on the Senate floor the following:

I think the impression has been given that the side agreements are being approved by Congress. These are not agreements that Congress must approve. They are not the same as trade agreements which are considered under fast track. The President can enter into these side agreements without approval. These are the types of agreements that the Executive of the United States can enter into, and he enters into numerous executive agreements every year. So that is the first point. The side agreements are not before us. If you look at this legislation, the side agreements are not in it. The next point. What Congress has to do is to implement certain U.S. *obligations* (emphasis added) under the side agreements, and that is done under this bill.³¹⁵

310. Letter from U.S. Rep. George Brown et al. to President Clinton (July 20, 1993).

311. Letter from U.S. Trade Representative Kantor to U.S. Rep. George Brown, (Oct. 8, 1993) (responding for President Clinton).

312. See WEEKLY COMP. PRES. DOC. 2255-56 (1993). The President's statement leaves open the possibility that the agreements would be subject to congressional approval under a different method than fast track procedures, for example, a free standing law; however, no such law has been proposed by the Clinton Administration. *Id.*

313. The Statement of Administrative Action on the NAFTA implementing legislation, also submitted on that day, reveals nothing about this complex issue. See H.R. Doc. No. 103-159, 103d Cong., 1st Sess., Vol. I, at 450 (1993).

314. *North American Free Trade Agreement Implementation Act*, H.R. REP. 361, 103d Cong., 1st. Sess., 8 (1993).

315. 139 CONG. REC. S16361-62 (daily ed. Nov. 19, 1993) Senator Chafee seems to saying that the President had the right to agree to certain *obligations* on behalf of the United States. *Id.* Thus, the role of Congress would not be accepted to reject the obligations, but rather to implement them through legislation. *Id.*

Notwithstanding these views, and contrary to President Clinton's statement of November 4, the President did ask Congress to authorize the side agreements, to which Congress agreed. Title V, Subtitle D of the implementing legislation, written by the Clinton Administration, is captioned "Implementation of The NAFTA Supplemental Agreement."³¹⁶ In the subsection captioned "Membership," Section 532(a)(1) states that, "the United States is authorized to participate in the Commission for Environmental Cooperation in accordance with the North American Agreement on Environmental Cooperation."³¹⁷ The Senate Foreign Relations Committee, in its report on the bill, further explained that this provision "provides the *necessary authority* (emphasis added) for the United States to participate . . ." in the side agreement.³¹⁸

Since the President's authority to enter into the NAAEC was doubtful, the Administration decided to secure Congressional approval of the NAAEC while simultaneously denying that such approval was needed. This explains why the Administration requested authority to "participate."³¹⁹ If the Administration really believed its public stance that the NAAEC could be a sole executive agreement, then there would have been no requirement for such authority. The President would have needed to go to Congress for an appropriation to contribute to the Commission's budget, but such funding authorization would have been needed regardless of how the President entered into the agreement, whether by treaty, congressional-executive agreement, or sole executive agreement. For NAAEC, the appropriation is authorized in a separate provision of the law,³²⁰ and the authority for participation is not tied to the funding issue.

To "participate" is not the usual term in similar provisions in American law.³²¹ For example, when the Congress authorized U.S. membership in the ILO in 1934, fifteen years after the Senate had rejected a treaty providing for U.S. adherence³²², the law "authorized" the President "to accept membership" in the ILO.³²³ When Congress authorized U.S. membership and participation in the South Pacific Commission, the law "authorized" the President "to accept membership" in the Commission.³²⁴ When Congress authorized

316. Pub. L. No. 103-182, 107 Stat. 2059 (1993).

317. *Id.* at § 532(a)(1) (codified as amended at 19 U.S.C. § 3472(a)(1993)).

318. *North American Free Trade Agreement Implementation Act*, S. REP. NO. 189, 103d Cong., 1st Sess., 129 (1993).

319. *See supra* note 317. Unlike most legislation, fast track legislation is carefully drafted by the Administration. Congressional committees of jurisdiction participate in the drafting process, but the President ultimately signs off (in addition to later signing the legislation). So the Administration cannot deny that it requested § 532(a)(1) exactly as written.

320. Pub. L. No. 103-182 § 532(a)(2) (codified as amended at 19 U.S.C. § 3472(a)(2)(1993)).

321. For one instance see Pub. L. No. 267, 58 Stat. 122 (1944) (joint resolution to enable the United States to participate in the work of the U.N. Relief and Rehabilitation Administration).

322. Treaty of Versailles, June 28, 1919, 225 Consol. T.S. 188, Part XIII.

323. 48 Stat. 1182 (1934) (providing for membership in the International Labour Organization).

324. 62 Stat. 15 (1948) (providing for representation in the South Pacific Commission).

U.S. membership in the new North American Development Bank, the law "authorized" the President "to accept membership" in the Bank.³²⁵ It is possible that the verb "participate" was chosen to downplay the significance of Section 532(a)(1).

The use of "United States" is also unusual. Normally, legislation authorizes *the President* to join international organizations.³²⁶ The United States, however, already had the authority under either the Constitution or the law of nations to participate in such endeavors. Perhaps the phraseology was chosen to qualify the Commission under the U.S. law defining international organizations for purposes of granting privileges and immunities.³²⁷ This explanation, however, is inconsistent with past legislation.³²⁸ Instead the drafters may have tried to insinuate as much authority as possible into Section 532(a)(1).

The law does not stop at authorizing participation in the new Commission, which is Part III of the NAAEC. The United States is also authorized to participate in the Commission "in accordance with" the NAAEC.³²⁹ This language seems to infuse all aspects of the NAAEC into U.S. participation. The NAFTA implementation legislation has no specific provision authorizing membership or participation in the Free Trade Commission created by the NAFTA.³³⁰ Perhaps, authority is needed for both commissions, but the method used for the NAFTA, expressly approving the agreement by legislation, was not viewed as being politically available for the NAAEC.³³¹

By including this unusually written provision in the statute, the Administration can now characterize it as Congressional approval for the NAAEC if the need arises. From a Congressional perspective, this presents some problems. Many members of Congress, such as Senator Chafee, may not have understood they were granting that approval. Another problem is that many members did not get much input into the design of the NAAEC Commission.

325. Pub. L. No. 103-582 § 541(a) (codified as amended at 22 U.S.C. § 290m(a) 1993)).

326. See 139 CONG. REC. H9928 (characterizing this provision as "authorizing the President's participation" in the supplemental agreement by U.S. Trade Representative Kantor).

327. See Statement of Administrative Action, H. R. Doc. No. 159, 103d Cong., 1st Sess., 679 (1993) (President Clinton granted these privileges in March 1994). See Exec. Order No. 12904, 59 Fed. Reg. 13,179 (1994).

328. 22 U.S.C. § 288a (1988) (using the term "United States" had apparently never been a pre-requisite in the past when other organizations (e.g., the ILO) were granted such privileges).

329. Pub. L. No. 103-182 § 532(a)(1) (codified as amended at 19 U.S.C. § 3472(a)(1) (1993)).

330. NAFTA, *supra* note 16, art. 2001.

331. All of the points raised here about the NAAEC also apply to the NAALC. Effectuating a plurilateral labor agreement as a sole executive agreement is even more problematic than an environmental agreement given that all ILO Conventions are considered to be treaties in the United States. See U.S. DEP'T OF STATE, TREATIES IN FORCE 353-56 (1993).

The Congressional rules on fast track allow the President to put anything he desires into such legislation.³³² The rules suggest only that such changes be "necessary or appropriate to implement such trade agreement . . ." and, in practice, this language has been interpreted as open-ended.³³³ In effect, the test is a subjective one: what will the political market bear?³³⁴ The Administration was concerned that a straightforward provision approving the NAAEC would leave the NAFTA implementing legislation vulnerable to a parliamentary point of order. In actuality, there was probably little risk. Given the vagueness of the fast track law, a point of order in the U.S. House of Representatives against such a provision would not have succeeded. Moreover, the House passed a special rule for implementing legislation that waived all points of order.³³⁵ In the Senate, parliamentary procedure is less clear. Since sixty-one Senators voted for the implementing legislation,³³⁶ they could have reversed any ruling in favor of a point of order.

After announcing that it would not be seeking Congressional approval of the NAAEC, the Administration piggybacked the NAAEC onto the NAFTA implementing legislation. Thus, the NAAEC is a congressional-executive agreement. Moreover, since it did not enter into force until January 1, 1994, several weeks after the implementing legislation was approved, the NAAEC never was constitutionally "illegitimate." Having secured a vague authorization for the NAAEC, the Administration may play it either way. They can use the NAAEC as a precedent for future Presidential pactmaking on trade and/or the environment by claiming that the NAAEC is a sole executive agreement. If the unusual birthing of the NAAEC ever leads to a legal problem,³³⁷ the Administration can easily implicate Congress and say that the whole arrangement was legislatively approved.³³⁸ Looking back on how this was handled, a number of Constitutional questions can be raised.³³⁹

332. Steve Charnovitz, *No Time for NEPA: Trade Agreements on a Fast Track*, 3 MINN. J. GLOBAL TRADE 195, 200 (1994) [hereinafter, Charnovitz, *No Time for NEPA*].

333. 19 U.S.C. § 2191(b)(1)(c)(1988). A point of order is conceivable arguing that the subject matter of the legislation goes beyond the rule, but there are no standards in the fast track rule for the presiding officer to make such a judgment. *Id.*

334. Senator John Danforth captured the parliamentary situation well when he stated, during the Senate floor debate on the NAFTA, "Ultimately, when we vote on this, we will determine whether it is necessary or appropriate." 139 CONG. REC. S16359.

335. H.R. RES. 311. See CONG. REC. at H9856-71 (1993).

336. See *supra* note 293.

337. During the Senate debate, Senator Stevens declared that "I believe a duly constituted court of the United States at some time is going to declare that these are not agreements that are within the President's power to put into effect through this mechanism." 139 CONG. REC. S16361.

338. The NAAEC is specifically mentioned in Pub. L. No. 103-182 §§ 101(b)(2), 102(c).

339. This article does not attempt to examine whether the NAAEC would have binding under international law as a sole executive agreement or whether the NAAEC would have enforceable domestic effect as a sole executive agreement. These issues are interesting ones, but are not being pursued here because of the conclusion that the NAAEC was retroactively approved by the Congress. It should be noted that nothing in the NAAEC appears to be self-executing with respect to private individuals. Furthermore, the NAFTA implementing legislation precludes any private right of action under the NAAEC. 19 U.S.C. § 3312(c) (1993).

A. *Treaties and the Constitution*

Of the 100 members of the U.S. Senate, only one actively objected to the NAAEC on the grounds that it should have been submitted as a "treaty."³⁴⁰ Senator Ted Stevens stated that "the side accords should have been negotiated as a treaty and presented to the Senate as such."³⁴¹ To remedy this situation, Senator Stevens offered an amendment to strike Subtitle D from the bill, but this amendment was ruled out of order as a violation of fast track which does not permit amendments.³⁴² This seeming acquiescence of 99 percent of the Senate is significant since Senators are the principal "victims"³⁴³ if the President recasts treaties as sole executive agreements. If a sole executive agreement is used rather than a congressional-executive agreement, the members of the U.S. House of Representatives are also victims.³⁴⁴

The U.S. Constitution lacks a bright line between treaties and congressional-executive agreements, and between treaties and sole executive agreements.³⁴⁵ Actually, the U.S. Constitution does not even mention congressional-executive agreements or sole executive agreements.³⁴⁶ Since World War II, a growing percentage of international agreements have come in these two forms.

Sole executive agreement has been used throughout American history on a bilateral basis for military and overseas policy matters.³⁴⁷ Yet, for plurilateral agreements,³⁴⁸ especially for matters involving "domestic" policy, the most common practice is that agreements are in "treaty" form and submitted to the Senate.³⁴⁹ When the United States undertakes plurilateral health and

340. 139 CONG. REC. S16359-61, S16365. Senator Stevens received oral support from Senators Riegle and D'Amato, but it is unclear whether they agreed that the NAAEC was a treaty. Senator Stevens' appeal of the ruling of the chair that his amendment was out of order was supported by 26 Senators (including these three), but that was a different question than whether the NAAEC was a treaty. *Id.*

341. *Id.* at S16352.

342. *Id.* at S16353.

343. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 179 (1972).

344. *See also id.*

345. SAMUEL B. CRANDALL, *TREATIES THEIR MAKING AND ENFORCEMENT* 43-44 (1916) (explaining that the Constitutional Convention contemplated giving treaty making power to the Senate).

346. Raoul Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1, 55 (1972) (maintaining that there is no serious argument that sole presidential agreements find warrant in the constitutional text).

347. U.S. DEP'T OF STATE, *THE LAW OF TREATIES AS APPLIED BY THE GOVERNMENT OF THE UNITED STATES OF AMERICA* 222 (1950). Yet until 1950, the use of executive agreements were "comparatively rare."

348. By plurilateral, I mean an agreement of more than two parties. Even agreements with only two other parties are submitted to the Senate. For example, see the International Convention for the High Seas Fisheries of the North Pacific Ocean, May 9, 1952, 4 U.S.T. 380. In 1992, President Bush submitted a treaty regarding anadromous fishery conservation with three other parties to the Senate. S. TREATY DOC. NO. 102-30., 102 Cong., 2d Sess. (1992).

349. *See e.g.*, the Convention Relating to the Exchange of Official Publications, Jan. 27, 1902, 1 Bevans 335; the Treaty on the Protection of Historic Monuments, June 27, 1930, Fin.-Ice., 167 L.N.T.S. 279; the Convention Concerning Artistic Exhibits, Dec. 23, 1936, 188 L.N.T.S. 151;

environmental agreements, it usually does so by treaty.³⁵⁰ When the United States joins an international organizations, a treaty,³⁵¹ or a piece of legislation³⁵² almost always provides the authority for such membership. For example, the Statutes of the World Tourism Organization were submitted to the

the Convention on Road Traffic, Sept. 19, 1949, 125 U.N.T.S. 22; the Convention Concerning Customs Facilities for Touring, June 4, 1954, 276 U.N.T.S. 230; the Single Convention on Narcotic Drugs, March 30, 1961, 520 U.N.T.S. 204; the Agreement on the Rescue of Astronauts, Apr. 22, 1968, 672 U.N.T.S. 119; the Convention Establishing the World Intellectual Property Rights Organization, July 14, 1967, 828 U.N.T.S. 3; and the International Coffee Agreement, Sept. 16, 1982, T.I.A.S. 11095.

350. See *e.g.*, the Convention for the Preservation and Protection of Fur Seals, July 7, 1911, 214 Consol. T.S. 80; the International Sanitary Convention, Jan 17, 1912, 215 Consol. T.S. 224; the International Agreement for the Creation of an International Office for Epizootics, Jan. 25, 1924, 57 L.N.T.S. 135; the Pan American Sanitary Code, Nov. 14, 1924, 86 L.N.T.S. 43; the Convention for the Establishment of the Inter-American Tropical Tuna Commission, May 31, 1949, 80 U.N.T.S. 3; the International Plant Protection Convention, Dec. 6, 1951, 150 U.N.T.S. 67; the Convention on Nature Protection and Wildlife Conservation in the Western Hemisphere, Oct. 21, 1940, 161 U.N.T.S. 193; the International Convention for the Prevention of Pollution of the Sea by Oil, May 12, 1954, 327 U.N.T.S. 3; the Convention on Fishing and Conservation of Living Resources of the High Seas, Apr. 29, 1958, 559 U.N.T.S. 285; Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space, and Under Water, Aug. 5, 1963, 480 U.N.T.S. 43; the International Convention for the Conservation of Atlantic Tunas, May 14, 1966, 673 U.N.T.S. 63; the Convention on Wetlands of International Importance, Feb. 2, 1971, 996 U.N.T.S. 245; the Convention on the Prevention of Marine Pollution by Dumping of Wastes, Dec. 29, 1972, 1046 U.N.T.S. 120; the Agreement on the Conservation of Polar Bears, Nov. 15, 1973, 27 U.S.T. 3918; the Convention for the Conservation of Antarctic Seals, June 1, 1972, 29 U.S.T. 441; the Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, May 18, 1977, 31 U.S.T. 333; the Convention on the Conservation of Antarctic Living Resources, May 20, 1980, 33 U.S.T. 3476; the Convention for the Conservation of Salmon in the North Atlantic, Mar. 2, 1982, T.I.A.S. 10789; the Convention for the Prohibition of Fishing With Long Driftnets in the South Pacific, Oct. 20, 1990, 29 I.L.M. 1454; and the United Nations Framework Convention on Climate Change, June 23, 1988, 31 I.L.M. 849.

351. Some organizations joined by treaty include the International Office of Public Health, Dec. 9, 1907, 206 Consol. T.S. 31; the International Civil Aviation Organization, Dec. 7, 1944, 15 U.N.T.S. 295; the World Meteorological Organization, Oct. 11, 1947, 77 U.N.T.S. 143; the Organization of American States, Apr. 3, 1948, 119 U.N.T.S. 3; the International Whaling Commission, Dec. 2, 1946, 338 U.N.T.S. 366; the International Atomic Energy Agency, Oct. 26, 1956, 276 U.N.T.S. 3; the International Hydrographic Organization, May 3, 1967, 751 U.N.T.S. 41; the International Council for the Exploration of the Sea, Sept. 12, 1964, 652 U.N.T.S., 237; and the Organisation for Economic Co-operation and Development, Dec. 14, 1960, 888 U.N.T.S. 179. The Convention on the Cape Spartel Lighthouse, May 31, 1865, 131 Consol. T.S 203 was a quasi-organization.

352. See *e.g.*, the International Monetary Fund, 59 Stat. 512 (1945); the Food and Agriculture Organization, 59 Stat. 529 (1945); the International Refugee Organization, 61 Stat. 214 (1947); the World Health Organization, 62 Stat. 441 (1948); the Caribbean Commission, 62 Stat. 66 (1948); and the Pan American Railway Congress, 62 Stat. 1060 (1948). The President obtained legislative authority to "maintain" U.S. membership in the International Tropical Timber Organization and the International Union for the Conservation of Nature in 1990 (thus implying prior participation in the organization before Congressional approval), 104 Stat. 64 (1990). Federal agencies often participate in international technical organizations without formal Congressional approval. Some laws indirectly authorize membership via an appropriation. For example, the International Statistical Bureau, 43 Stat. 112 (1924) and International Hydrographic Bureau, 41 Stat. 1215 (1921).

Senate for approval as a treaty.³⁵³ More recently, the World Trade Organization has been submitted to the Congress as a congressional-executive agreement.³⁵⁴

The practice of approving plurilateral *trade* agreements has evolved in a singular way.³⁵⁵ At one time, such agreements were submitted to the Senate as treaties,³⁵⁶ but, in recent decades, they have been effectuated as congressional-executive agreements authorized by prior statute, such as the GATT,³⁵⁷ or approved via subsequent legislation, such as the Tokyo Round.³⁵⁸ For joining new trade organizations, the practice of past Presidents has been to seek legislation. When President Truman wanted authority for U.S. membership in the International Trade Organization, he sought an act of Congress.³⁵⁹ When President Eisenhower sought authority for U.S. membership in the Organization for Trade Cooperation, he requested an act of Congress.³⁶⁰ Both requests, however, were unsuccessful.

Whether the NAAEC is an environmental agreement or a trade agreement, past practice would suggest that Congress approve it as a treaty or as a law. This conclusion reflects both the NAAEC policy commitments and the membership in a new organization. The United States has entered into bilateral environmental agreements with various countries as sole executive agreements.³⁶¹ In other cases, the treaty form has been used for bilateral

353. Statutes of the World Tourism Organization, July 27, 1970, 27 U.S.T. 2211 [hereinafter WTO].

354. *The Uruguay Round Trade Agreements, Texts of Agreements Implementing Bill, Statement of Administrative Action and Required Supporting Statements*, H.R. Doc. 103-316, 103d Cong., 2d Sess. (1994).

355. For bilateral trade agreements, the U.S. practice has included both treaties (since 1794) and executive agreements pursuant to Congressional authorization (since 1890). For the treaty of 1794, see 52 Consol. T.S. 243. For the law of 1890, see 26 Stat. 567, 612 q3. For the executive agreement of 1891, see 26 Stat. 1563. There are also a few instances of sole executive bilateral agreements. See, the Commercial Agreement with Rumania, Aug. 20, 1930, 115 L.N.T.S. 115.

356. See e.g., the Tariff Treaty with Japan, June 25, 1866, 132 Consol. T.S. 383; the International Convention for the Abolition of Import and Export Prohibitions and Restrictions, Nov. 8, 1927, 97 L.N.T.S. 393; and the Agreement to Refrain from Invoking MFN in Respect to Certain Multilateral Economic Conventions, July 15, 1934, 165 L.N.T.S. 9.

357. For the Truman Administration's view on its statutory authority to undertake the GATT see *Extension of Reciprocal Trade Agreements Act: Hearing Before the Senate Committee on Finance*, Pt. 2 at 1051-55, February 1949. See John H. Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 249, 274-75 (1967). For an example of an instance when the President claimed sole executive authority, see EDMUND MCGOVERN, *INTERNATIONAL TRADE REGULATION* 52 (1982).

358. Pub. L. No. 96-39, 93 Stat. 188 (1979).

359. Special Message to the Congress: Transmitting the Charter for the International Trade Organization, in PUB. PAPERS, *supra* note 5, at 233. During the U.N. Conference that drafted the ITO Charter, the Ways and Means Committee of the U.S. House of Representatives adopted a resolution to help clarify for foreign nations that the Congressional Branch had not yet accepted the Charter. See 49 CONG. REC. A1821 (1949).

360. Special Message to Congress Recommending United States Membership in the Organization for Trade Cooperation, in PUB. PAPERS, *supra* note 5, at 238 (Apr. 3, 1957).

361. See e.g., The Germany-U.S. Agreement on Cooperation in Environmental Affairs, May 9, 1974, 13 I.L.M. 598; the Mexico-U.S. Agreement to Cooperate on the Solution of Envi-

agreements.³⁶² However, plurilateral sole executive agreements on health or the environment are rare.³⁶³ There are no plurilateral sole executive agreement on trade. Because the NAAEC establishes a plurilateral organization, past practice suggests that it be approved through a treaty or law.

If the NAAEC is viewed as part of a growing class of trade-environment agreements,³⁶⁴ the precedents would be very strong against the sole executive agreement approach.³⁶⁵ For example, the Montreal Protocol is a trade-environment agreement, and it was sent to the Senate.³⁶⁶ In calling the NAFTA and the side agreements a "truly unique trade agreement in the his-

ronmental Problems in the Border Area, Aug. 14, 1983, 22 I.L.M. 1025; the Japan-U.S. Agreement Concerning Commercial Sperm Whaling, Nov. 13, 1984, T.I.A.S. 11070; and the Canada-U.S. Agreement on Air Quality, Mar. 13, 1991, 30 I.L.M. 676. In most or all of these cases, the President had requisite authority under existing law to implement the agreements. The Bush Administration consulted with certain Senators as to whether the Air Quality Agreement should be sent as a treaty. The response reportedly was that Senators preferred not to vote on the subject of acid rain.

362. See e.g., The Mexico-U.S. Convention for the Protection of Migratory Birds and Game Mammals, Feb. 7, 1936, 178 L.N.T.S. 309; the Japan-U.S. Convention for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, Mar. 4, 1972, 25 U.S.T. 3329; the USSR-U.S. Convention Concerning the Conservation of Migratory Birds and Their Environment, Apr. 17, 1979, 1134 U.N.T.S. 97; and the EC-US Agreement on Fisheries Off the United States Coasts, Oct. 1, 1984, T.I.A.S. 11033. In one case, the Fur Seal Agreement of 1944, the executive agreement was given effect only after legislative approval by the Congress. See Pub. L. 237, 58 Stat. 100, 1379, 1383 (1944). In recent years, fisheries agreements have been approved by the Congress. See 16 U.S.C. § 1823.

363. The only early example was the Agreement on the Unification of Pharmacopoeial Formulas of 1906, T.S. 510. In signing the Agreement, the U.S. Ambassador to Belgium stated a reservation that the only U.S. obligation would be to exert influence on pharmacopoeial revision. With regard to the environment, the Convention on Long-Range Transboundary Air Pollution of 1979 was signed by the EPA Administrator and never submitted to the Senate. Nov. 13, 1979, T.I.A.S. 10541. See Armin Rosencranz, *The ECE Convention of 1979 on Long-Range Transboundary Air Pollution*, 75 AM. J. INT'L LAW 975, 980 (1981) (stating that no country has to alter its status quo unless it wants to). The United States has also entered two protocols under the 1979 Convention. One of these, the Sofia Protocol, contains commitments on pollution levels. It appears as though the United States met the commitments of these protocols at the time they were entered into.

364. The earliest U.S. trade-environment treaty was the Convention with Great Britain for the Protection of Migratory Birds, Aug. 16, 1916, 221 Consol. T.S. 408. This treaty became the subject of a landmark U.S. Supreme Court decision which affirmed a broad treaty-making power. *Missouri v. Holland*, 252 U.S. 416 (1920). The fact that the scope of the treaty making power was determined in a case involving the environment is noteworthy.

365. Of course, not all agreements submitted to the Senate are approved. An example of a trade-environment agreement not approved by the Senate is the Argentina-U.S. Convention on Sanitary Regulations of 1935.

366. Montreal Protocol, *supra* note 272. Other trade-environment treaties approved by the Senate include the Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 993 U.N.T.S. 243; the Convention of Psychotropic Substances, Feb. 21, 1971, 1019 U.N.T.S. 175; the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 28 I.L.M. 649; and the Protocol on Environmental Protection to the Antarctic Treaty, S. TREATY DOC. No. 102-22 (Oct. 4, 1991).

tory of world trade . . . ,”³⁶⁷ President Clinton indirectly presents a compelling argument for scrupulous adherence to letter of the U.S. Constitution regarding treaties.

This interchangeability between treaties and congressional-executive agreements has been recognized for some time.³⁶⁸ Indeed, as a result of the fiasco in the Senate on the Treaty of Versailles, many enlightened commentators viewed this interchangeability as a very beneficial development.³⁶⁹ Yet, the notion that sole executive agreements are interchangeable with the other two stands in direct contradiction to the intent of the U.S. Constitution’s authors.³⁷⁰ As Thomas Jefferson explained, the U.S. Constitutional intent for treaties was “the President originating and the Senate having a negative.”³⁷¹ The Senate does not have a negative with sole executive agreements as it does with the other two methods.

The Supreme Court’s decision in *United States v. Curtiss-Wright* is often viewed as the apogee of judicial affirmation of the President’s powers in foreign policy.³⁷² *Curtiss-Wright* had nothing to do with a sole executive agreement, but rather with a Presidential proclamation issued pursuant to law. The Court found that the delegation of these powers to the President was not unconstitutional and therefore the criminal violation being prosecuted was allowed to proceed.³⁷³ In dicta, Justice Sutherland found a:

very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international

367. Remarks at the NAFTA Jobs and Products Day Trade Fair, 42 WEEKLY COMP. PRES. Doc. 2111 (Oct. 25, 1993).

368. Myres S. McDougal and Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: I*, 54 YALE L.J. 181 (1932). See also *1945 Extension of Reciprocal Trade Agreements Act*, Hearings of the House Committee on Ways and Means, May 1945, Vol. 2, at 1967-84. Recently, this interchangeability has been questioned with respect to the Uruguay Round trade agreement. See *Tribe Letter on Treaty Vote*, INSIDE U.S. TRADE, July 22, 1994 at S-1. See John Jackson, *GATT and the Treaty Debate*, J. COMM. 8A (Aug. 16, 1994).

369. See QUINCY WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* 235-36 (1922); James W. Garner, *Acts and Joint Resolutions of Congress as Substitutes for Treaties*, 29 AM. J. INT’L LAW 482 (1935); WALLACE MCCLURE, *INTERNATIONAL EXECUTIVE AGREEMENTS* 343-87 (1941); Craig Mathews, *The Constitutional Power of the President to Conclude International Agreements*, 64 YALE L.J., 345 (1955).

370. ELBERT M. BYRD, JR., *TREATIES AND EXECUTIVE AGREEMENTS IN THE UNITED STATES* 122 (1960) (hereinafter BYRD) The Supreme Court has never held or asserted that international agreements other than treaties may be as extensive in scope as treaties, i.e., that they are entirely interchangeable with treaties. See LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 229 (1988). If the power to conclude executive agreements coincides perfectly with the treaty power, that would emasculate the Senatorial check on Executive discretion embodied in the Constitution. See CHARLES CHENEY HYDE, *INTERNATIONAL LAW VOL. II* 1417 (1945). Senate approval of treaties is not to be rendered abortive by recourse to a different procedure for which no provision was made.

371. THOMAS JEFFERSON, *MANUAL OF PARLIAMENTARY PRACTICE*, Section LII (1987). Jefferson himself was not a co-author of the constitution.

372. *U.S. v. Curtiss-Wright*, 299 U.S. 304 (1936).

373. *Id.* at 327-33.

relations — a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.³⁷⁴

As Congress readily admits, the President does have some plenary power in foreign affairs.³⁷⁵ Justice Sutherland states that the United States has “the power to make such international agreements as do not constitute treaties in the constitutional sense,”³⁷⁶ but on this he only cites one case, *Altman & Co. v. United States*.³⁷⁷ Yet *Altman* was not about a sole executive agreement either; it was about a congressional-executive agreement. Subsequent to *Curtiss-Wright*, the Supreme Court has found a sole executive agreement relating to the recognition of the Soviet Union to have the status of a treaty, notwithstanding the absence of Senate consent.³⁷⁸ That was five decades ago. With the Supreme Court’s reassertion of separation of powers doctrine regarding legislative vetoes³⁷⁹ and appointments,³⁸⁰ even though these decisions reversed decades of governmental practice, a reconsideration of the “treaty” status of sole executive agreements could occur.

There is no consensus on what subordination “the applicable provisions of the Constitution” place on the President’s power. According to one author, “[a] valid and effective Presidential sole executive agreement pertains only to those situations, then, in which the President has full power in his own right to implement the agreement.”³⁸¹ Perhaps the best explication of the U.S. Constitutional tradition was made by Attorney General Robert H. Jackson in 1940. According to Jackson:

The President’s power over foreign relations while “delicate, plenary, and exclusive,” is not unlimited. Some negotiations involve commitments as to the future which would carry an obligation to exercise powers vested in the Congress. Such Presidential arrangements are customarily submitted for ratification by a two-thirds vote of the Senate before the future legislative power of the country is committed.³⁸²

In 1919, George Sutherland wrote that executive agreements are “perhaps confined to such as affect administrative matters, as distinguished from policies, and those which are of only individual concern, or limited scope and

374. *Id.* at 320.

375. *See e.g.*, 19 U.S.C. § 2112 note § 304(a)(2) (1993).

376. *Curtiss-Wright*, 229 U.S. at 318.

377. 224 U.S. 583 (1912).

378. *United States v. Belmont*, 301 U.S. 324, 330 (1937). A similar decision was reached in *United States v. Pink*, 315 U.S. 203 (1942) (concerning the same U.S.-Soviet agreement signed by President Roosevelt).

379. *INS v. Chadha*, 462 U.S. 919 (1983).

380. *Bowsher v. Synar*, 478 U.S. 714 (1986).

381. BYRD, *supra* note 370, at 178.

382. 39 OP. ATT’Y GEN. 484-87 (1940).

duration, as distinguished from those of general consequence and permanent character."³⁸³

The *Restatement (Third) of The Foreign Relations Law of the United States* indicates that Presidents have asserted a broad authority to make many international agreements in the absence of inconsistent legislation, but also notes that the "great majority of sole executive agreements are of a routine character."³⁸⁴ One survey of sole executive agreements in 1943 found them relating to customs revenues of the Dominican Republic, a claim against Venezuela, and a military agreement with the United Kingdom.³⁸⁵ None of these agreements involved "domestic" policies of the United States, like the NAAEC does.³⁸⁶ Another survey finds that sole executive agreements "take care of routine administrative or *housekeeping* (emphasis added) matters."³⁸⁷

To clarify policy as to when international agreements would be submitted to the Senate, the U.S. Department of State developed standards 30 years ago.³⁸⁸ According to these standards, a treaty is necessary when the subject matter is "traditionally handled by treaty," "not solely within the Constitutional authority of the President," "when the agreement itself is to have the force of law without legislative action," or when the agreement "involves important commitments affecting the nation as a whole."³⁸⁹ On the other hand, a sole executive agreement can be used when subject matter and the treatment thereof are within the Constitutional powers of the President.³⁹⁰

B. Commitments Under the NAAEC

To assess what legal procedure would be most appropriate for the environmental side agreement, one might examine whether the subject matter in the NAAEC is within the Constitutional powers of the President based on his authority under Article II of the U.S. Constitution and whether the President has pre-existing legislative authority from Congress to carry out such com-

383. GEORGE SUTHERLAND, *CONSTITUTIONAL POWER AND WORLD AFFAIRS* 121 (1919)

384. *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 303(g)(h), Reporter's Note 11 (1987).

385. GEORGE HAYWOOD HACKWORTH, 5 *DIG. INT'L LAW* 402-7 (1943).

386. Of course, any international agreement, by circular logic, involves an issue of interest to another country and therefore may be viewed as "foreign" rather than "domestic" policy. But there is a difference in domestic implications between U.S. adherence to a treaty on the Red Sea versus a treaty on copyrights. See *Agreement Regarding the Maintenance of Certain Lights in the Red Sea*, Oct. 28, 1966, 17 *U.S.T.* 2145; U.S. adherence to the *Universal Copyright Convention*, July 10, 1974, 25 *U.S.T.* 1341.

387. AMY M. GILBERT, *EXECUTIVE AGREEMENTS AND TREATIES* 4 (1973).

388. See e.g., Sharon G. Hyman, *Executive Agreements: Beyond Constitutional Limits?*, 11 *HOFSTRA L. REV.* 805 (1982)(discussing the State Department process).

389. MARJORIE M. WHITEMAN, 14 *DIG. INT'L LAW* 209 (1968). The U.S. Department of State was instructed by the White House not to carry out the Circular 175 procedures for the NAAEC to determine whether it was a treaty or executive agreement. This is based on confidential interviews with government officials.

390. *Id.* For an excellent discussion of these issues, with some recommendations for reform, See David A. Wirth, *A Matchmaker's Challenge: Marrying International Law and American Environmental Law*, 32 *VA.J. INT'L L.* 377, 388-91, 414-17 (1992)

mitments. Some commentators suggest that if current U.S. practice meets the agreement, then a sole executive agreement is permissible.³⁹¹ Many hypothetical Presidential commitments, such as keeping the U.S. population under 280 million, would be very questionable as sole executive agreements, because the President has no authority to maintain the existing situation. For a President to negotiate a treaty with another country which he has no authority to fulfill would evade his Constitutional obligations.

Let us now look at the specific provisions in the NAAEC and juxtapose them with the Presidential authorities under the Constitution or law. First, does the President have authority to implicitly amend the NAFTA by accepting trade sanctions in the NAAEC?³⁹² Congress could have, in the NAFTA implementing legislation, given the President the authority to amend the NAFTA as needed, but Congress did not do so. While the NAAEC might be viewed as superseding the NAFTA as a subsequent "treaty," but the President's power to agree to this implicit amendment is open to question. Without that authority, Mexico has no guarantee that President Clinton's successor might not view Mexican sanctions against the United States as a violation of the NAFTA, even when such trade discrimination is authorized by a NAAEC panel.³⁹³

Second, does the President have the authority to impose the trade sanctions provided for in the NAAEC? It appears as though prior trade legislation grants the President authority to withdraw trade concessions.³⁹⁴ Even if such authority did not exist, the lack of authority is not dispositive since the NAAEC does not require the United States to impose any sanctions. The panel may authorize them, but the plaintiff does not have to impose them. The United States must only accept trade sanctions imposed on it pursuant to a panel report.

391. For an example of a sole executive agreement with Spain "to preserve the status quo", see 3 TREATIES 2840 (William M. Malloy ed. 1910).

392. It is interesting to note that during hearings on the proposed ITO Charter in 1947, the Chairman of the Senate Finance Committee (Eugene D. Millikin) stated that "whenever you come to a matter where sanctions may be invoked against the United States by an international body, then I respectfully suggest that you have probably entered the legitimate field for treaties." See *International Trade Organization, Hearings before the Senate Committee on Finance*, Pt. 1, 1947, at 168-69.

393. Furthermore, if the NAAEC does not amend the NAFTA, then Mexico could lodge a NAFTA complaint about any sanction on it imposed by the United States. Mexico could argue that the U.S. sanction is arbitrary discrimination since it would impose no sanction against other countries for weak environmental enforcement. Since the U.S. sanction would be extrajudicial, the complaining country (i.e., Mexico) could choose the GATT as the venue. The GATT might then determine that the NAAEC-approved sanction conflicted with the GATT. See GATT, *supra* note 257.

394. 19 U.S.C. § 2135(c) (1988). In addition, Section 301 authority could be used for punishing violations of a trade agreement if the NAAEC is viewed as a trade agreement. See 19 U.S.C. §§ 2411(a)(1)(B), 2411(d)(4)(A) (1988). Additional authority is provided in 19 U.S.C. 3331(b)(1)(D) (1993).

Third, does the President have access to funds to pay the fines that might be assessed against the United States?³⁹⁵ The Justice Department believes the President does have access to the "judgment fund."³⁹⁶ This, however, is a questionable use of the fund for several reasons. One, a NAAEC panel is not a foreign tribunal as contemplated in the law.³⁹⁷ Two, the United States can avoid payment by accepting a trade sanction. Additionally, there is no contested liability that is the subject of litigation. In addition, under the Anti-Deficiency Act, all officers of the U.S. government are prohibited from involving the government in an obligation for the payment of money before an appropriation is authorized by law.³⁹⁸ Regardless of whether the President can dip into the judgment fund, he should not commit American taxpayers without legislative authorization.³⁹⁹ Even the U.S. Department of State, the guardian of Presidential prerogatives in foreign policy, acknowledges that a sole executive agreement cannot be inconsistent with legislation enacted by the Congress in the exercise of its Constitutional authority.⁴⁰⁰

Fourth, does the President have the authority to commit state governments to the disciplines in the NAAEC regarding high standards and enforcement?⁴⁰¹ Some would say yes, in line with the Supreme Court's decisions in *United States v. Belmont* and *United States v. Pink*.⁴⁰² Yet *Belmont* and *Pink* involved efforts to *prevent* state governments from undertaking law enforcement and do not address efforts to require state governments to take certain actions. According to the Clinton Administration, the NAAEC does convey "obligations" to the states.⁴⁰³ This would make an interesting case if challenged under the Tenth amendment of the U.S. Constitution.

Fifth, does the President have the authority to commit the United States to "ensure that its laws and regulations provide for high levels of environmental protection . . . ," as required by NAAEC?⁴⁰⁴ Heretofore it has been assumed that whether federal laws provide for a high level of protection, or a low level of protection, is a matter for Congress to decide.⁴⁰⁵ While this provision is not enforceable under the NAAEC, Canada and Mexico presumably

395. See NAAEC, *supra* note 21, art. 34.5, annex 34.

396. This fund can be used for judgments against the United States by a note "foreign court or tribunal" for which there is an obligation to pay. 28 U.S.C. § 2414 (1988).

397. *Id.*

398. 31 U.S.C. § 1341(a)(1)(B) (1988).

399. This point may become clearer if one imagines that the maximum assessment had been set at \$200 million.

400. See U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL, Circular 175, § 721.2(b)(3).

401. It might be noted that NAAEC Article 18 does refer to the states.

402. *Belmont*, 301 U.S. at 324; *Pink*, 315 U.S. at 203. For a critique of these decisions, see Steve Charnovitz, *The Environment Vs. Trade Rules: Defogging the Debate*, 23 ENVTL. L. 475, 501-10 (1993).

403. THE NAFTA REPORT, *supra* note 29, at 15.

404. NAAEC, *supra* note 21, art. 3.

405. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker). See *Dames & Moore v. Regan*, 453 U.S. 654, 661-62 (1981).

would want the United States to fulfill its commitment. Even assuming that current U.S. law provides for high levels of protection, the President's authority to *commit* to high levels is doubtful.

Sixth, does the President have the authority to commit the United States to "effectively enforce its environmental laws and regulations through appropriate government action"? Given his responsibility under the Constitution to "take care that the laws be faithfully executed . . ." ⁴⁰⁶ the President has authority to make this commitment.

Seventh, does the President have the authority to commit the United States to various guarantees relating to judicial proceedings? For example, each party is to provide that its court proceedings "do not entail unreasonable charges or time limits or unwarranted delays." ⁴⁰⁷ Here the President lacks authority, except for military courts.

Eighth, does the President have the authority to convey privileges and immunities appropriate to the NAAEC as an international organization? ⁴⁰⁸ The International Organization Immunities Act provides for such authority, but only for organizations in which the United States participates pursuant to treaty, an act of Congress, or Congressional appropriation. ⁴⁰⁹ Thus, this authority did not exist when the NAAEC was signed, but would as soon as an appropriation was obtained.

Ninth, does the Executive Branch have the authority to pay one-third of the funding for the Commission, as required under the NAAEC? ⁴¹⁰ Other State Department accounts probably could be used for that purpose. More importantly, however, since the Commission's budget must be approved unanimously by the Council, ⁴¹¹ and since an Executive Branch official sits on the Council, signing the NAAEC entails no financial obligation. In any event, the Administration sought and received an explicit authorization in the implementing legislation. ⁴¹²

If the Clinton Administration is to be taken seriously on its claim that the side agreement was not subject to formal congressional approval under fast-track procedures, then the designation of NAAEC as a sole executive agreement represents a significant accretion of Presidential power. This is not an accord made in wartime, or a response to a national emergency, or a settlement of a bilateral claim, or a component of the recognition of a foreign government. This is an plurilateral accord made in peacetime about topics typically dealt with by treaty or by congressional-executive agreement. Since modern Presidents meet with foreign leaders at least once a week, a require-

406. U.S. CONST. art. II, § 3, cl. 3.

407. See NAAEC, *supra* note 21, art 7.1(d).

408. *Id.* art. 44. This provision does not state what privileges and immunities need to be conveyed. Compare to the Uruguay Round Agreement Establishing the WTO, 33 I.L.M. 1144, Article VIII.4.

409. 22 U.S.C. §§ 288, 288a (1988).

410. NAAEC, *supra* note 21, art. 9.6, 11.6.

411. *Id.*

412. 19 U.S.C. § 3472(a)(2) (1993).

ment that all ensuing consensus go to the Senate would be very awkward. One must thus distinguish between agreements intended to be legally binding and coordinated political statements.⁴¹³

In summary, the NAAEC commits the United States to take action not solely within the Constitutional authority of the President or authorized by legislation. Because the NAAEC involves important commitments affecting the nation as a whole, the usual practice would be for such agreements to be handled as "treaties." The Clinton Administration's assertion that the NAAEC did not have to be sent to the Senate for consent or to Congress for approval has stunning Constitutional implications.

C. Implications for Future Treaties

There are two checks on Presidential overreaching in undertaking sole executive agreements. First, other countries have to be confident that the President can deliver. If the Executive branch makes commitments to other countries that it has to renege on because of lack of authority, then other governments will be wary of future negotiations.

Second, the Senate has to go along with the Administration's attempt to reinvent government. The issue of executive agreements has traditionally been sensitive in Congress, especially in the Senate. At one time in American history, the U.S. Senate was quite jealous of its prerogative to review treaties. President Clinton apparently made an assessment that the Senate of the 1990's would not object to his assertion that he could consummate NAAEC as a sole executive agreement.

What are the implications of this new supineness of the Senate for Presidential treaty-making? If the Senate will not question the President's decision as to what needs Senate consent, then any submission to the Senate of an international agreement becomes tactical to gaining political cover in a controversial treaty. The empowerment of the President to make treaties could mean more and deeper agreements with other countries. For example, there are many important human rights conventions awaiting U.S. approval, including the ILO Convention on Freedom of Association (No. 87) which has been languishing on the Senate treaty calendar for 45 years. Perhaps the Clinton Administration will consider approving these treaties as sole executive agreements.

International law "includes the entire body of obligations which one nation owes to another, in respect to its own conduct or the conduct of its citizens toward other nations."⁴¹⁴ With the increasing integration of the world economy, international law and international agreements will continue to erode the distinctions between foreign and domestic policy. Thus, one can anticipate future conflicts with the Congress, as Presidents seek to expand traditional powers over foreign policy to many areas of domestic policy.

413. 22 C.F.R. § 181.2(a)(1).

414. 27 Fed. 200-01. There is also commentary that the matters in international agreements will increase as nations grow nearer through commercial dealings.

D. Recent Developments

As this article goes to press, a new controversy has erupted over the Constitutionality of the congressional-executive agreement. To wit, can the Congress approve the Agreement Establishing the World Trade Organization by legislation, as President Clinton has proposed,⁴¹⁵ or does the Senate have to approve the WTO as a "treaty" by a two-thirds vote?⁴¹⁶ The issue is more than a pedantic one since the WTO approval legislation may be supported by less than two-thirds of the Senate. The positive characterizations being offered about the GATT Uruguay Round agreement, that it is the most comprehensive trade agreement in history, make the Constitutional questions even more compelling. If the Congressional action on GATT is so significant, if it is one of the most important Senate votes since the Treaty of Versailles, then shouldn't it have the full dignity of a "treaty" and be voted on by the Senate under the Article II procedures? Moreover, if the World Tourism Organization was voted on by the Senate as a "treaty," should the second WTO, on a more important issue, follow that same procedure?

This article has presumed the constitutionality of the congressional-executive agreement based on the doctrine of interchangeability.⁴¹⁷ That is, insofar as the Congress is Constitutionally competent to enact a law, such a law is capable of approving any international agreement that might otherwise need Senate consent by a two-third vote. Therefore, the article's attention to the NAAEC focused on the Administration's initial claim that it could enter into the agreement *without* approval by the Congress or a two-thirds vote by the Senate. Since the Congress did ultimately approve the NAAEC, this article did not question the Constitutionality of that action.

In the current debate over the WTO, some commentators are questioning the doctrine of interchangeability and hence the validity of U.S. membership in some international agreements. Since the NAAEC—and indeed the NAFTA—was approved by only 61 members of the Senate,⁴¹⁸ some might argue that the President has no right to enter into the agreement until he has obtained the consent of 67 members of the Senate. In this commentator's opinion, such arguments are wrong. Congressional-executive agreements are valid under the Constitution. The NAFTA and the NAAEC are not doubtful on Constitutional grounds.

The ongoing debate over the Constitutionality of the Congressional-executive agreement has received a high profile because of the legal luminaries involved. On one side, Harvard Law Professor Laurence H. Tribe is arguing

415. See H.R. Doc. 103-316, 103d Cong., 1st Sess., Vol 1. See also, H.R. 5110, 103d Cong., 2d Sess., § 101(a), (1994) (providing that the Congress approves the Uruguay Round agreements). Section 101(b) provides that the President may accept the Uruguay Round agreements. This will become P.L. No. 103-465.

416. U.S. CONST. art. II, § 2, cl. 2.

417. See McDougal and Lans, *supra* note 308.

418. See *supra* note 293.

for a strict construction of the treatymaking provision.⁴¹⁹ He states that treaties need the consent of two-thirds of the Senate, particularly when they inhibit the regulatory power of state governments as, he posits, the WTO does. Also in this camp is Bruce Fein, a legal analyst who has written several opeds making the same point.⁴²⁰ On the other side, a Yale Law Professor Bruce Ackerman and University of Arizona College of Law professor David Golove are arguing that the treatymaking provision is one method, but not the only method, of entering into international agreements.⁴²¹ Ackerman and Golove claim that the validity of congressional-executive agreements was accepted by the Senate, the House, and the President many decades ago even though the authors of the constitution may not have anticipated this method. Also in this camp is a University of Michigan Law Professor John Jackson.⁴²²

The Senate hearings in which Tribe and Ackerman testified have just concluded as this article was being written, and it will be many months before they are published. Additional debates and parliamentary challenges will undoubtedly occur on the Senate floor. Therefore, this article will not attempt to rehearse the exact arguments made by the two sides. Rather, it will offer a brief tour of the Constitutional issues and explain why the Ackerman-Golove position is the correct one. Of course, as both Ackerman and Tribe note, the Supreme Court has never squarely addressed the validity of congressional-executive agreements in relation to the Article II treaty clause.⁴²³ The high visibility of the debate over the WTO may lead to a court challenge if the WTO is approved by less than 67 Senators.

Does the Constitution authorize the President and the Congress to effectuate a congressional-executive agreement? Certainly, the treatymaking provision does not do so, since it authorizes the President "to make Treaties" only upon the consent of two-thirds of the Senate. To find the authority for congressional-executive agreements, one must look in both Articles I and II. Article I authorizes the Congress to "regulate Commerce with foreign Nations"⁴²⁴ to "coin Money, regulate the Value thereof, and of foreign Coin,"⁴²⁵ to "establish Post offices and post Roads,"⁴²⁶ and to "make all

419. *Prepared Testimony of Laurence H. Tribe, The World Trade Organization and the Treaty Clause: The Constitutional Requirement of Submitting the Uruguay Round of GATT as a Treaty, Senate Committee on Commerce, Science and Transportation.*

420. For example, Bruce Fein, *GATT Bill: Flouting Treaty Rules*, J. COMM., Sept. 29, 1994, at 10A.

421. *Joint Statement of Professor Bruce Ackerman, Yale Law School, and Professor David Golove, University of Arizona College of Law, to the Senate Commerce Committee, October 18, 1994.*

422. See Jackson, *supra* note 368.

423. But the United States Court of Customs and Patent Appeals found that a trade agreement with Iceland and the accompanying Presidential Proclamation was valid notwithstanding its lack of concurrence by the Senate by a two-thirds vote. See *Star-Kist Foods, Inc. v. United States*, 275 F.2d 472, 483-84 (1959).

424. U.S. Const. art. I, § 8, cl. 3.

425. *Id.* cl. 5.

426. *Id.* cl. 7.

Laws which shall be necessary and proper. . . ."⁴²⁷ Article II gives the President the "executive Power"⁴²⁸ and the power to "receive Ambassadors. . . ."⁴²⁹ both of which have been interpreted to give the President executive authority for foreign policy. Given the power of the Congress to pass laws on the topics above and the executive role of the President, it would seem reasonable that the Congress could pass a law directing the President to seek commercial agreements, or monetary agreements, or postal agreements with other countries.⁴³⁰ Similarly, in a logical inference, if the law authorizing a negotiation is valid, the Congress should also be able to authorize the President to put the negotiated agreement into effect, or alternatively to approve the results of the negotiation by a subsequent law.⁴³¹

The Congress can also authorize inferior officials in the Executive Branch to negotiate and implement agreements. For example, in 1872, the Congress authorized the Postmaster-General, "by and with the advise and consent of the President," to "negotiate and conclude postal treaties or conventions . . ."⁴³² As Solicitor-General William H. Taft explained, "the existence of such a power in Congress may, perhaps, be worked out from the authority given to that body . . . to establish post offices and post-roads."⁴³³ One might argue that postal conventions are technical rather than "political," and therefore are atypical international agreements. However, many modern agreements that promote intergovernmental cooperation may have more in common with postal conventions than with classic "political" treaties that settled wars or split up control of Africa.

All this may sound straightforward now, but the congressional-executive agreement was the product of a long evolutionary process. The initial delegations to the President to lift embargoes did not include any specific negotiating authority.⁴³⁴ It was not until 1911 that the Congress explicitly authorized a trade negotiation with Canada and established a procedure for approving the agreement which did not involve a two-thirds Senate vote.⁴³⁵ In the late 1940s, when President Truman asked Congress to approve U.S. membership in the International Trade Organization by law, the issue of

427. *Id.* cl. 18.

428. *Id.* art. II, § 1, cl. 1.

429. *Id.* art. II, § 3.

430. See Garner *supra* note 369. There is no inconsistency between the authority of the President and Senate to regulate foreign relations through agreements in the form of "treaties," and the power of the President and Congress to deal with matters of foreign policy through legislative action.

431. At the Senate debate in 1934 on the Reciprocal Trade Agreement Act Senator Walter George noted that U.S. commitments can arise from "the will of the people as expressed by previous acts of Congress." 78 CONG. REC. 10072 (May 31, 1934).

432. 17 Stat. 283, 304. The Postmaster General brought the United States into the General Postal Union under this provision. See 19 Stat. 577.

433. 19 OP. ATT. GEN. 513, 520.

434. For example, see the law of June 13, 1798, 1 Stat. 565 or the law and proclamation of October 1, 1890, 26 Stat. 612. See related proclamation at 1563.

435. 37 Stat. 7, 12.

whether a "treaty" or a law was the proper method drew a modicum of controversy.⁴³⁶ The Congress had self-consciously chosen to approve U.S. membership in the International Monetary Fund⁴³⁷ by using a law rather than a treaty.⁴³⁸ Such Congressional action could have been justified by the authority of the Congress to regulate the value of the foreign coin.⁴³⁹

The most important precedent for the use of a congressional-executive agreement in place of a treaty may have been the law passed in 1934 which authorized the President to accept membership in the International Labour Organization (ILO).⁴⁴⁰ Here the Senate acted by law to do something that it had rejected in 1919 and 1920 by failing to approve the Treaty of Versailles by a two-thirds vote.⁴⁴¹ Moreover, in 1919, the Congress had passed a law authorizing the President to host the first ILO conference in Washington, but forbade the appointment of delegates "until the Senate shall have ratified the provisions of the proposed treaty of peace with Germany with reference to a general international labor conference."⁴⁴² It might be noted that the Senate approved the 1934 ILO law by unanimous consent, in effect meeting the two-thirds requirement.⁴⁴³ However, it is clear from the record that the Senate was not giving consent to a "treaty" as such.⁴⁴⁴

The Congresses and the Presidents of the early 20th century surely had no idea that the congressional-executive agreements would evolve into what they are today. Similarly, it seems likely that the congressional-executive agreements will blossom into something quite different fifty years from now. One innovation in recent years has been the "fast track" approval process

436. For example, see *Testimony by Harry S. Barger of the National Economic Council, in Membership and Participation by the United States in the International Trade Organization, Hearings before the House on Foreign Affairs*, H. J. RES. 236, 81 Cong., 2d Sess., at 295-305. See also *id.*, at 167-69.

437. 2 U.N.T.S. 39.

438. See Richard H. Lansdale, Jr., 'Accepting' the Bretton Woods Agreements, 33 GEO. L.J. 1, 57 (1944). The Constitutional issues had been raised in Congressional hearings. See *Constitutionality of the Bretton Woods Agreements Act, in Hearings before the Senate Committee on Banking and Currency*, H.R. Doc. 3314, 79th Cong., 1st Sess., at 529 (1945). For the U.S. legislation, see 59 Stat. 512.

439. This Constitutional provision may also have justified a congressional-executive agreement eleven years earlier. In May 1933, the Congress authorized the President to fix the weight of the gold dollar in accordance with international agreements, to fix the weight of the silver dollar in relation to gold, and to provide for unlimited coinage. See 48 Stat. 31, § 43. In July 1933, an international agreement was reached on silver, which President Roosevelt effectuated by proclamation. See 153 L.N.T.S. 108 (agreement) and 48 Stat. 1723 (proclamation). The provisions in the Silver agreement go beyond the authorizing statute however, so this agreement might be better characterized as a sole executive plurilateral agreement on monetary policy.

440. 48 Stat. 1182. See, 62 Stat. 1151 for a law authorizing the President to accept an amendment to the ILO Constitution.

441. The Senate had a spirited debate on the ILO which culminated in a reservation. See 59 CONG. REC. 4599, § 13.

442. 41 Stat. 279.

443. See Manley O. Hudson, *The Membership of the United States in the International Labor Organization*, 28 AM. J. INT'L L. 669, 675 (1934).

444. See 78 CONG. REC. 11343 (1934).

designed to speed up Congressional votes and prevent attempts by Congress to amend the agreements.⁴⁴⁵

Unlike the treaty-making power, which can be broader than Article I authority,⁴⁴⁶ the congressional-executive agreements need to fit within the powers given to the Congress.⁴⁴⁷ Thus, if the WTO agreement included a provision that went beyond the competence of the Congress — for example, if it forbade an increase in a state sales tax applying to an imported good — one could reasonably argue that a federal statute could not put it into effect. Tribe, however, does not seem to be suggesting that the WTO has provisions that go beyond Article I.

The most interesting feature about the congressional-executive agreements is that they are not exclusive powers of the President or the Congress. They are “pooled” powers of both branches working together.⁴⁴⁸ Both powers, lawmaking and executive, are critical to the alloy. The congressional-executive agreements do not enhance the power of the President at the expense of the Congress. They empower both branches to accomplish their goals. In the case of trade agreements, the Congress routinely sets advance goals for the President⁴⁴⁹ and limits the use of such negotiating authority.⁴⁵⁰ The President gains too since there are many things he may want to do — such as join international organizations — that are difficult to do without Congressional authorization and funding.

It should be noted that interchangeability works in both directions.⁴⁵¹ The President is always free to send any agreement to the Senate for approval as a “treaty.” So the congressional-executive agreements do not render Article 2, Section 2, Clause 2 a nullity. They simply provide an alternative channel for matters that lie within the powers of the Congress. One could imagine a trade agreement being acted on by both methods, consent by two-thirds of the Senate plus approval or implementation by the Congress, since bills to raise revenue must originate in the U.S. House of Representa-

445. For a history of fast track, see Charnovitz, *No Time for NEPA*, *supra* note 332, at 198-205.

446. The leading case is *Missouri v. Holland*, 252 U.S. 416 (1920).

447. In other words, there can be some interchangeability between “treaties” and congressional-executive agreements without there being full interchangeability.

448. See *Chicago & Southern Air Lines v. Waterman Steamship Corp.*, 333 U.S. 103, 110 (1948) (legislative and executive powers are pooled obviously to the end that commercial strategic and diplomatic interests of the country may be coordinated and advanced without collision or deadlock between agencies). One commentator describes this “new tool” as “a combination of the Presidential and legislative power.” See *Executive Agreements and the Treaty Power*, 42 COLUM. L. REV. 831, 842 (1942).

449. For the Uruguay Round, the goals are outlined in 19 U.S.C. 2901(b).

450. For example, in 1993 the Congress voted to extend the President’s negotiating authority to December 15, 1993, which would have otherwise expired on March 2, 1993. See 107 Stat. 239.

451. See remarks by Luther Evans, *The International Regulation of Tariffs*, in *PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW* 89 (Charles E. Martin ed., 1934) (noting that the treaty making power and the legislative power share a basis of parity).

tives.⁴⁵² This double action was used for the Commercial Convention with Cuba of 1903⁴⁵³ and was prescribed for agreements under the Dingley Tariff Act of 1897.⁴⁵⁴ However, this approach is unwieldy.

The strict constructionists have one point in their favor. If the Senate approves a congressional-executive agreement by less than two-thirds, then the anti-agreement faction is in a sense a "victim" who can plausibly argue that its "rights" have been denied. Given the Senate's historical role of representing the states, which was diminished somewhat by the 17th Amendment, one can imagine hypotheticals in which certain states or regions are disadvantaged by relying on a majority vote, while the pro-agreement states are benefited. Tribe is correct in that one should not dismiss this concern in a federalist system, but the argument that the Senate "protects" the states does not demonstrate whether a 51 person-vote requirement is enough protection, or whether a 67 person-vote requirement is needed. When the Senate does take up the WTO, it is anticipated that the critical vote will require 60 Senators to get over a procedural hurdle relating to the budget rules, and perhaps, that is enough protection for the states.

One way of dealing with this concern might be to separate the issue of the validity of a treaty or an agreement as an international obligation of the United States from the issue of its supremacy in municipal law. Treaties, congressional-executive agreements, and most if not all of the sole executive agreements are binding international commitments. However, the supremacy with respect to federal or state laws is another matter. Treaties approved by two-thirds of the Senate are certainly supreme.⁴⁵⁵ Some sole executive agreements are also,⁴⁵⁶ but others are not.⁴⁵⁷ For the congressional-executive agreements, the Congress can make the decision regarding direct application.⁴⁵⁸ In the case of the WTO, the Congress has determined that the new GATT agreement will not trump federal law⁴⁵⁹ and that there will be no private right of action to apply the WTO agreement to state laws.⁴⁶⁰ This is a reversal of past practice in which individuals did have a private right to argue that state laws were in violation of the GATT.⁴⁶¹

Since the Congress can determine the supremacy of the congressional-executive agreements by law, just as Congress often determines when federal

452. U.S. CONST., art. I, § 7, cl. 1.

453. For the treaty, see 6 Bevans 1106. The Senate consented to the ratification subject to an amendment that the Convention not take effect until it was "approved" by the Congress. The Congress passed the necessary legislation soon thereafter. See 33 Stat. 3.

454. 30 Stat. 151, 204-05 § 4.

455. U.S. CONST. art. VI, cl. 2.

456. For example, see *United States v. Belmont*, 301 U.S. 324 (1937). This case related to the President's power of recognition.

457. See *United States v. Guy W. Capps, Inc.*, 204 F.2d 655 (1953) (for an example on sole executive agreement that is not supreme).

458. Ambiguities would be reviewable by the federal court.

459. H.R. 5110, 103d Cong., 2d Sess., § 102(a) (1994).

460. *Id.* § 102(c).

461. See Jackson, *supra* note 303, at 269, 287.

law pre-empts state law, one could imagine a literal interpretation of the supremacy clause⁴⁶² that excludes the congressional-executive and the sole executive agreements.⁴⁶³ Article I of the Constitution does use the term "agreement" and "compact" to describe agreements between two states or between one state and "a foreign Power."⁴⁶⁴ Therefore, one might infer that there could be "compacts" or "agreements" between the federal government and another country that are different from the Constitution's Article II, Section 2 "treaties."⁴⁶⁵ As the Supreme Court pointed out in *Holmes v. Jennison*⁴⁶⁶ "the words 'agreement' and 'compact,' cannot be construed as synonymous with one another; and still less can either of them be held to mean the same thing with the word 'treaty.'"⁴⁶⁷ Similarly, in *Altman & Co. v. United States*,⁴⁶⁸ the Court explained that a commercial trade agreement was "a compact authorized by the Congress of the United States," which is "not technically a treaty requiring ratification."⁴⁶⁹

If one views the WTO as an "agreement" rather than as a "treaty," then there may be a way to bridge the views of Ackerman and Tribe and to reconcile the divergence between current practice and Article II, Section 2, Clause 2 of the Constitution. If the Congress passes the law authorizing the President to "accept" the WTO, then it becomes a valid international obligation of the United States even without the Senate's two-thirds supermajority. However, since the WTO does not have the "dignity" of a treaty,⁴⁷⁰ it would not have automatic status under the supremacy clause.

Under this approach, a superminority of 34 Senators could prevent a sole executive agreement from enjoying the full force of the supremacy clause vis-a-vis state laws. But the 34 to 50 Senators would not be able to stop the President from making certain international commitments or stop the Congress from approving a congressional-executive agreement. It should be noted that the middle ground view suggested here is consistent with the doctrine of interchangeability. That is, treaties and the congressional-executive agreements may be interchangeable for some purposes like tariff-setting, but not for other purposes like whether state governments can set their own health laws.

462. U.S. CONST. art. VI, cl. 2.

463. For a discussion of the caselaw leading to the view that sole executive agreements are "treaties," see Steve Charnovitz, *The Environment vs. Trade Rules: Defogging the Debate*, 23 ENVTL. L., 475, 501-10 (1993).

464. U.S. CONST. art. I, § 10, cl. 3.

465. See the distinction made by Senator Carl Hayden in 1943 between treaties and agreements, compacts, and conventions in 89 CONG. REC. 9207 (1943).

466. *Holmes v. Jennison*, 39 U.S. 540 (1840).

467. *Id.* at 571.

468. *Altman & Co. v. U.S.* 224 U.S. 583 (1912).

469. *Id.* at 601. The Court misuses the word "ratification" to imply action by the Senate when in fact the President ratifies a treaty following consent by the Senate.

470. See *id.* (for the use of the term "dignity.")

F. Summary

The Senate's consent to treaties should not be viewed as Constitutionally optional. The authors of the Constitution did not write the two-thirds requirement for the President's use only when he was in a masochistic mood. The practice as to when a matter should be a treaty rather than an executive agreement is an evolving one. The Clinton Administration's assertion that the NAAEC was a sole executive agreement stands in contradiction to previous practice, and represents a major departure. In the end, the Clinton Administration obtained Congressional approval for the NAAEC. The Administration pretended that it did not need such approval because had such explicit approval been needed, it might have been politically unobtainable. While this artifice worked, the President's statement that the side agreements are not subject to formal congressional approval is troubling.

If one takes President Clinton at his word, and assumes that the NAAEC was not approved by legislation in the way the NAFTA was, then we have witnessed a strengthening of Presidential power. Only a limited number of precedents will inspire the Departments of State and Justice to justify a broader Presidential power on the basis of long-standing practice. In view of the actual language in the NAFTA implementing bill, it can be persuasively argued that the Congress approved the NAAEC as a congressional-executive agreement. This should settle some of the Constitutional doubts which have been voiced about the NAAEC.⁴⁷¹ It also raises questions as to whether President Clinton can be taken at his word. Either way, the bait and switch tactic of the Clinton Administration is disturbing.

V. CONCLUSION

The advent of the NAFTA supplemental negotiations offered three countries an opportunity to take steps toward a regional environmental policy. Unfortunately, this opportunity was largely missed. The NAAEC is a rather shallow agreement, and adds little to the La Paz Accord enacted ten years earlier. The terms of the NAAEC suggest that the three governments will keep the Secretariat on a short leash. Nevertheless, North American citizens should make the most of what they have. The creation of the NAAEC Commission offers new possibilities for promoting cooperation and for spotlighting national enforcement efforts on pollution and pesticide use. So far, the Commission has gotten off to a slow start.⁴⁷²

The increasing economic integration of the late 20th century seems likely to bring greater political integration in the years ahead. Issues regarding national "sovereignty" and the relationship of international and regional agreements to municipal law are likely to engender new controversies. As the

471. PUBLIC CITIZEN MEMORANDUM, 139 CONG. REC. S16354-56 (daily ed. Nov. 19, 1993). See Bruce Fein, *Constitutional Clouds Over NAFTA*, LEGAL TIMES, Oct. 25, 1993 at 34.

472. See *Environment Ministers To Meet as Environment Cooperation Council*, INT'L ENVTL. REP. July 13, 1994 at 596 (reporting that the first six months of the Commission have not been eventful).

distinctions between "foreign" policy and "domestic" policy continue to fade, it would be useful for the American people to come to a clearer understanding about how the United States makes an international commitment and when that commitment becomes the supreme law of the land.

There is general agreement that the United States needs a strong President to deal with the rest of the world. But it is not clear what the President can do on his own, what he can do with prior or subsequent "authority" from the Congress, and what he can do using a treaty consented to by the Senate. Decisions as to the use of one or another of these methods seem to be made on a case by case basis; more regularization would be useful.

The congressional-executive agreement grew in the 20th century in response to the needs of the times. It was a justified invention. Its legitimacy was derived from a liberal reading of the Constitution and from the ensuing teamwork of the Congress and the President. There is considerable danger, however, in taking this good idea one step further. The argument that a plurilateral sole executive agreement is as kosher as a "treaty" or a "congressional executive" agreement may lead to a counter-reaction that could undermine the President's flexibility in foreign policy.

The current national mood is quite different from what it was during the Depression, the World War II, and the Cold War. An expansion of the sole executive agreement not benefiting from close teamwork with the Congress would seem inconsistent with this mood. During the next several years, there may be a resurgence of isolationism, new Constitutional amendments governing Congressional procedure, including new supermajority requirements, and devolution of the federal programs to state governments. In this environment, a resurrection of the "Bricker Amendment" to put limits on treaties and executive agreements is possible.⁴⁷³ The best way to prevent this type of overreaction is for U.S. Presidents to be circumspect in their use of sole executive agreements, especially those that may interfere with the authority of state governments. Future episodes of Presidential overreaching, such as the Clinton Administration's assertions regarding the NAAEC, should be avoided.

473. For background on the Bricker amendment, see FRANK E. HOLMAN, *STORY OF THE "BRICKER" AMENDMENT* (1954).