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THE SHADOWS THAT BECAME THE STAR OF THE SHOW: THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION AND THE NORTH AMERICAN AGREEMENT ON LABOR COOPERATION

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I. INTRODUCTION

THE North American Free Trade Agreement (NAFTA) was signed into law by President Bill Clinton on December 8, 1993.[1] But NAFTA was not the only agreement being negotiated during that time. President Clinton emphasized the need for additional negotiations and provisions regarding environmental and labor issues that could supplement the free trade provisions in NAFTA.[2] The initial objectives of these side agreements were to create environmental protection commissions to improve pollution and enforcement mechanisms between the countries and labor commissions to ensure workers were being treated fairly and participating in safe work environments.[3] The side agreements were negotiated on a "parallel track" to NAFTA[4] and were the key to winning the Senate's approval and support of NAFTA.[5]

In December 1993, negotiations were complete and the North American Agreement on Environmental Cooperation (NAAEC) and the North

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1. *Dec 8, 1993: NAFTA signed into law*, HISTORY, http://www.history.com/this-day-in-history/nafta-signed-into-law (last visited Feb. 20, 2015).
2. Jacqueline McFadyen, *NAFTA Supplemental Agreements: Four Year Review*, PETERSON INST. FOR INT'L ECON., *available at* http://www.iie.com/publications/wp/print.cfm?ResearchId=145&doc=pub ("Three agreements were concluded in August 1993").
3. *Id.*
4. Steve Charnovitz, *The NAFTA Environmental Side Agreement: Implications for Environmental Cooperation, Trade Policy, and American Treatymaking*, 8 TEMP. INT'L & COMP. L.J. 257, 259 (1994), *available at* http://www.wilmerhale.com/uploadedFiles/WilmerHale_Shared_Content/Files/Editorial/Publication/charnovitznaftaenvironment.pdf.
5. Alex Zaretsky, *The Existing Labor and Environmental Agreements in NAFTA*, ILL. BUS. J. (2008), *available at* http://www.law.illinois.edu/bljournal/post/2008/03/21/The-Existing-Labor-and-Environmental-Agreements-in-NAFTA.aspx.

American Agreement on Labor Cooperation (NAALC) were signed into effect.[6] The two side agreements are legally separate from NAFTA, but were signed within one year of each other as part of the "parallel track" duo.[7] Since their implementation, both agreements have been applauded and duplicated in numerous free trade agreements with other countries.[8] But they have also faced harsh criticism from legal scholars who argue that these agreements simply did not add any value to the enforcement and legislative mechanisms that were already in place prior to their implementation.[9]

This report will analyze the provisions of both the NAAEC and NAALC, comparing their similarities and differences. It will conclude that although both agreements' enforcement mechanisms are fairly weak and susceptible to the power struggle between companies and government, their provisions are important in serving as the model for the many free trade agreements the United States has since entered into.[10] Therefore, regardless of their complete effectiveness, they continue to serve an important role in the realm of treaty-making and will be deemed a success.

II. THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION (NAAEC)

A. Relevant Provisions and Objectives

The NAAEC created an "intergovernmental organization—the Commission for Environmental Cooperation (CEC)—to support cooperation among the NAFTA partners to address environmental issues of continental concern, including the environmental challenges and opportunities presented by continent-wide free trade."[11] Through the CEC, the governments of the United States, Mexico, and Canada work together to protect ecosystems and communities, reduce pollution, address climate change issues, and strengthen environmental law enforcement.[12] Each country has the legal obligation to each other to enforce their own internal environmental laws. The NAAEC specifically requires that each country commit and "ensure that its laws and regulations provide for high levels of environmental protection and shall strive to continue to improve those laws and regulations."[13]

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6. McFayden, *supra* note 2.
7. Charnovitz, *supra* note 4.
8. *See* Michael O'Donovan, *Labor Provisions from NAFTA to CAFTA: Standards that Work*, or a Work in Progress (Law & Justice in the Americas Working Paper Series, Working Paper No. LJA 2005-1, 2006), *available at* http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1001&context=ljawps.
9. *See, e.g.*, Steve Charnovitz, *supra* note 4.
10. *See id.*
11. *About the CEC*, Comm'n for Envtl. Cooperation, http://www.cec.org/Page.asp?PageID=1226&SiteNodeID=310 (last visited April 5, 2015).
12. *Id.*
13. Charnovitz, *supra* note 3, at 260-61.

B. The Challenge Facing Mexico and its Underdeveloped Environmental Legislation Case Law

One particular challenge faced by the implementation of the CEC was the lack of pre-existing case law interpreting Mexico's environmental legislation.[14] The United States and Canada had environmental legislation and precedent existing for decades prior to NAFTA, but Mexico's law was far behind those countries' governments.[15] Because every legislative change and decision made by the CEC would provide a new basis for judicial decisions and opinions, the CEC created a training program to ensure the Mexican judiciary interpreted legislation correctly in accordance with U.S. and Canadian precedents.[16]

C. Dispute Resolution Procedures

As is the case with NAFTA, the NAAEC's dispute resolution procedures have caused great concern for governments because the enforcement mechanisms prove most beneficial for challenging private parties.[17] The procedural aspects of CEC allow for third parties, both companies and citizens, to file claims that allege violations of environmental laws in the United States, Canada, and Mexico.[18] This process begins with a third-party claim, which then invokes the CEC's procedural steps.[19] In addition to third-party claims, the NAAEC also authorizes each of the three countries to report environmental law violations against each other.[20]

In the case that a valid complaint is filed, the CEC can decide to convene an arbitral panel for its investigation.[21] In order for a complaint to be valid, it may only allege non-enforcement of an environmental law regarding products traded between the United States, Canada, and Mexico or made by export-competing industries.[22] The complaining party has the burden to show environmental injury to its country, or in the case of a private party—itself.[23]

In order for a complaining party to prevail, it must prove to the CEC's panel that there has been a "persistent pattern of failure by that other

14. *See* Pardee Ctr, The Future of North American Trade Policy: Lessons from NAFTA (Kevin P. Gallagher et al. eds. 2009), 47–48 , *available at* http://www.bu.edu/pardee/files/2009/11/Pardee-Report-NAFTA.pdf [*hereinafter* Gallagher].
15. *See, e.g.*, Charnovitz, *supra* note 4, at 278.
16. *Id.*
17. *See* Gallagher, *supra* note 14, at 44.
18. *Id.* at 62.
19. *Id.*
20. Charnovitz, *supra* note 4, at 261.
21. *Id.* at 266–67.
22. *North American Agreement on Environmental Cooperation Article 22*, Comm'n for Envtl Cooperation (CEC), *available at* http://www.cec.org/Page.asp?PageID=122&ContentID=2734 (last visited May 8, 2015).
23. Charnovitz, *supra* note 4, at 110.

[p]arty to effectively enforce its environmental law."[24] A persistent pattern of conduct has been defined as a "sustained or recurring course of action or inaction."[25] Therefore, one country's single failure to enforce a particular environmental law will likely not be sufficient to be held liable by the CEC.

The dispute regarding the CEC's true effectiveness arises after the decision has been made. The dispute rests on the premise that its enforcement and punishment capabilities are insufficient to warrant a severe enough penalty.[26] In addition, these procedures have been shown to be so untimely as to prove almost moot.[27] If the CEC finds a party guilty of a "persistent pattern" of conduct, it may propose an action plan and the parties will then have to agree on its implementation.[28] But in the case of negotiations between a private party and a country's government, the private party seems to hold the power—a fact troublesome to many. Legal scholars argue that the enforcement organization of the CEC is institutionally weak.[29] The CEC lacks the means to actually ensure adherence to the policies it is tasked with upholding. In addition, there is not enough protection from legislation to counter-balance the increased stress of higher levels of trade resulting from NAFTA—a problem many predicted two decades ago. Most importantly, it is very easy for firms to challenge environmental policies if they can be construed to be barriers of trade. Therefore, it is easier to dodge environmental legislation for private firms, and governments can have little to no control over their own environmental legislation.

The most recognized case resulting in this exact predicament was *Ethyl Corp. v. Canada*, which resulted in the Canadian Parliament repealing an environmental law and issuing Ethyl Corporation a damages award in excess of nineteen million dollars.[30] In *Ethyl Corp. v. Canada*, the Canadian Parliament banned the import and transport of an Ethyl product called MMT, citing it to be a "dangerous toxin" and a "significant public health risk."[31] Ethyl Corporation filed a lawsuit under NAFTA's Chapter Eleven provisions, which require governments to compensate investors when their goods are "expropriated" or when their actions are "tantamount to expropriation."[32] Chapter Eleven of NAFTA allowed this lawsuit because it gives standing to a private corporation to sue a

24. *North American Agreement on Environmental Cooperation Article 22*, *supra* note 22.
25. Charnovitz, *supra* note 4, at 110.
26. *Id.* at 269.
27. *Id.* at 270.
28. *North American Agreement on Environmental Cooperation* Article 23, CEC, http://www.cec.org/Page.asp?PageID=122&ContentID=2734 (last visited May 8, 2015).
29. Charnovitz, supra note 4, at 229.
30. Julie A. Soloway, *Environmental Trade Barriers Under NAFTA: The MMT Fuel Additives Controversy*, 8 MINN. J. GLOBAL TRADE 55, 55 (1999).
31. *See* Michelle Sforza and Mark Vallianatos, *Chemical Firm Uses Trade Pact to Contest Environmental Law*, GLOBAL POL'Y F. (Apr. 1997), *available at* https://www.globalpolicy.org/component/content/article/212/45381.html.
32. *Id.*

government directly, similar to the complaint filing procedures used by the CEC.[33]

After negotiations, Canada agreed to rescind the MMT ban, pay Ethyl Corporation in excess of nineteen million dollars, and even issue a statement that MMT was not an environmental or health risk to its Canadian citizens.[34] At the time of its resolution and even today, this case was very important because it expanded Chapter Eleven of NAFTA, which was previously understood to only apply to investments. The decision expanded Chapter Eleven's scope to allow private companies great power in restricting legitimate health and safety laws inadvertently related to trade.

III. THE NORTH AMERICAN AGREEMENT ON LABOR COOPERATION (NAALC)

A. Relevant Provisions and Objectives

NAFTA and its accompanying NAALC were the first agreements to ever include worker rights provisions.[35] Similar to the NAAEC, the NAALC provides for each country's enforcement of its own labor laws and standards, while also holding each country accountable to one another.[36] The NAALC does not force any of the countries to adopt new labor laws or conform to each other's work standards—it only requires each country to enforce what is already existing in each country with regards to their labor laws.[37]

B. Dispute Resolution Procedures

Similar to the NAAEC and Chapter Eleven of NAFTA, claims alleging a violation of a country's labor standards are heard in a dispute resolution process that involves consultation, evaluation, and arbitration.[38] The standard for the finding of a violation under the NAALC are "patterns of practice" by a party in the enforcement of its occupational safety and health or other technical labor standards—a standard very close to the one required under the NAAEC.[39]

But unlike the NAAEC, the NAALC limits those claims that can be brought to challenge and removes "freedom of association, collective bargaining, and the right to strike" from its control.[40] In addition, a claim

33. *See* Soloway, *supra* note 30, at 85–86.
34. Gus Van Harten, *Reforming the NAFTA Investment Regime*, 3 (All Papers Osgoode Digital Commons, Working Paper No. 32, 2009).
35. Mary Jane Bolle, NAFTA Labor Side Agreement: Lessons for the Worker Rights and Fast-Track Debate 1 (2001), *available at* http://fpc.state.gov/documents/organization/6211.pdf.
36. *Id.* at 3.
37. *Id.*
38. *Section V: Internpretation, Application, and Enforcement*, NAALC (1997), *available at* http://new.naalc.org/index.cfm?page=248.
39. *Id.*
40. *See id.*

cannot be brought if the labor law allegedly violated is not "covered by mutually recognized labor laws," which requires that each country have laws that address the "same general subject matter in a manner that provides enforceable rights, protections or standards."[41]

The problem arises when one country alleges a violation against another, believing its labor laws to be the same without understanding their difference. For example, the Mexican government asserted that its employment discrimination laws against sex and pregnancy cover only those workers who are already employed.[42] This is in direct contrast to the similar United States discrimination laws, which prohibit discrimination throughout all facets of the employment spectrum—hiring, firing, and even mid-employment areas, such as promotion.[43] Therefore, the United States would likely not have a claim against Mexico within this realm of law because the two countries do not have a "mutually recognized labor standard."[44]

IV. THE EFFECT OF NAFTA'S TWO SIDE AGREEMENTS–LOOKING AT THE PAST AND TOWARDS THE FUTURE

A. The Complaints Regarding the NAAEC and the NAALC

The NAALC and NAAEC are similar in many ways, from the "concerns that led to their creation to the criticisms leveled against them."[45] When NAFTA was first negotiated, many scholars criticized its lack of labor and environmental provisions that it addressed.[46] One concern was that a conflict might arise regarding the interplay between domestic laws restricting trade for environmental or labor purposes and NAFTA, which provided for free trade.[47]

Both agreements require commitment from all parties to "'effectively enforce' their domestic environmental or labor laws" and attempt to avoid the chance that each country may lower its overall standards to ensure easy compliance with this provision.[48] But the problems associated with these two side agreements show that it might not come down to governmental compliance at all. As proven by *Ethyl Corp. v. Canada*, private investors and companies are able to implement NAFTA's Chapter Eleven provisions to side-step any environmental regulation of the United States, Canada, or Mexico.[49]

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41. *See id.*
42. *Id.*
43. *Id.*
44. *See id.*
45. John H. Knox, *Separated at Birth: The North American Agreements on Labor and the Environment*, 26 Loy. L.A. Int'l & Comp. L. Rev. 359, 359 (2004).
46. *See id.* at 363.
47. *Id.*
48. *Id.* at 365.
49. *See generally* Soloway, *supra* note 30.

Therefore, it is a very low threshold for corporations to show injury to their transport and sale of goods, and can prove to be a power struggle among parties and governments hoping to keep their citizens safe through environmental and labor regulations.

B. Despite The Criticism, They Both Serve as the Model Environmental and Labor Standards for Many Free Trade Agreements

Despite the criticisms, it is clear that the United States, Canadian, and Mexican governments are better off with these provisions than without. If NAFTA failed to address labor and environmental regulations, it would have greatly compromised the safety of local workers and the communities in which they live. In addition, these two agreements have proved to be a successful model for future free trade agreements and that fact, in itself, shows that the NAAEC and NAALC are worth it.

Since their implementation in 1994, the NAALC and the NAAEC have been copied and implemented into many other free trade agreements involving the United States; these include agreements with Jordan, Singapore, Chile, and Peru.[50] They currently serve as the model provisions for environmental and labor concerns with the above countries and therefore serve a very important role in treaty-making today and in the future.[51] Despite the numerous challenges to the NAALC and NAAEC, the fact of their existence almost remains more important than their outright effectiveness. Both agreements have furthered cooperation among countries in preventing negative effects of free trade and provided a pathway towards improving environmental and labor standards for decades to come.

50. *See* Zaretsky, *supra* note 5.
51. *See id.*