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Article 14 Non-Governmental Organization Submissions under the Environmental Side Agreement:

Foundations, Justiciability and Implications for Future Challenges

by Marcus J. Williams¹

I. Introduction.

During the debate over ratification of the NAFTA, some members of the U.S. Congress decried the NAFTA's potential for adverse impacts on the U.S. economy, as well as upon business and industrial interests in all three signatory countries.² Perhaps no forecasts were more ominous than the threats that the NAFTA and the Environmental Side Agreement would provide too little — or too much — environmental protection, with disastrous results to the economy or the environment.³ During late 1995, the North American Commission for Environmental Cooperation [hereinafter, the "Commission"] was afforded its first opportunities to demonstrate its role in the operation of the NAFTA. Contrary to the fears of some, and to the chagrin of others, the Commission quietly handed down several decisions which may indicate a well-reasoned and deliberate approach to the environmental issues being addressed to the Commission. However, this approach is unlikely to appease conservative politicians in the U.S., and is certain to meet with strong opposition from environmental groups in all three Party nations.

1. Candidate, Juris Doctor, Southern Methodist University, Class of 1997. The author wishes to express appreciation to Mr. Marc Paquin and Ms. Natalie Dost at the Commission for Environmental Cooperation in Montreal, Quebec, for their assistance in obtaining the petition of *Comite Para la Proteccion de los Recursos Naturales*, et al., Submission 96-001 (January 17, 1996). The author also wishes to express his gratitude to Ms. Lara Saldivar of the Editorial Staff for her cogent and timely translation of that submission.
2. See, e.g., 139 Cong. Rec. S16974-02, S16975 (November 22, 1993) (remarks of Sen. D'Amato). Proceedings and Debates of the 103rd Congress, 1st Sess., *North American Free Trade Agreement*.
3. 139 Cong. Rec. S16622-01, S16628 (November 20, 1993) (remarks of Sen. Riegle). Proceedings and Debates of the 103rd Congress, 1st Sess., *North American Free Trade Agreement*. The general tone of arguments opposing the ratification of the NAFTA were, like Senator Riegle's, depicting a flood of lost American jobs which would cascade to Mexico as a result of that country's purported lack of environmental protections. See *New pacts break logjam on trade NAFTA: Side deals may ease passage in Congress*, Los Angeles Times (August 14, 1993), 1.

This comment will discuss briefly the formation and basic structure of both the North American Agreement on Environmental Cooperation⁴ and the Commission, including the compromises which molded the document in its current form. It will then review several recent decisions handed down by the Commission, and will close with a discussion of the possibilities for the future of the Environmental Side Agreement and the Commission.

II Creation of the Environmental Side Agreement and the Commission

A. BACKGROUND

To a large extent, the Environmental Side Agreement was created to address environmentalists' concerns that the NAFTA would result in an overall weakening of international environmental law.⁵ The primary concern appears to have been that the NAFTA posed an increased risk of harm to the environment by liberalizing trade among the United States, Canada, and particularly Mexico.⁶ Environmental groups feared that the "harmonization" of environmental standards across borders⁷ would result in an overall decrease in the substantive standards of the more environmentally sensitive nations to correspond to those with fewer protections. This fear was based upon an assumption that Mexico had substantively weaker environmental protections than the United States or Canada.⁸

This perception was not entirely accurate. Indeed, a 1991 study by the U.S. Environmental Protection Agency found that Mexico's General Law for Ecological Equilibrium and Environmental Protection⁹ was substantively quite similar to the United States' environmental laws.¹⁰ Mexico's environmental laws provide scientific standards regarding the production, storage, shipment and disposal of hazardous wastes, and prescribe criminal and civil sanctions for their violation.¹¹ The weakness in Mexican environ-

4. North American Agreement on Environmental Cooperation Between the Government of Canada, the Government of the United Mexican States, and the Government of the United States of America, Sept. 13, 1993, 32 I.L.M. 1480 (entered into force Jan. 1, 1994) [*hereinafter* Environmental Side Agreement].
5. Kal Raustiala, *The Political Implications of the Enforcement Provisions of the NAFTA Environmental Side Agreement: The CEC as a Model for Future Accords*, 25 *Envtl. L.* 31 (1995).
6. *New days dawn for U.S., Mexico; Despite trade benefits, many Mexicans resent the way some Americans think of them*, Orlando Sentinel (November 19, 1993).
7. North American Free Trade Agreement, drafted Aug. 12, 1992, revised Sept 6, 1992, U.S.-Can.-Mex., 32 I.L.M. 605 (entered into force Jan. 1, 1994) [*hereinafter* NAFTA], Article 906.
8. *See, e.g., Poll shows deep split on NAFTA*, San Diego Union-Tribune, (September 27, 1993).
9. *Ley General del Equilibrio Ecológico y la Protección al Ambiente*, Cited in, 412 *Diario Oficial de la Federación* 23 (January 28, 1988) [*hereinafter*, *Ley General*].
10. Office of the General Counsel, United States Environmental Protection Agency, *Evaluation of Mexico's Environmental Laws and Regulations: Interim Report of EPA Findings*, ii (November 22, 1991).
11. Lynn A. Stanton, *A Comparative Analysis of the NAFTA's Environmental Side Agreement*, 2 *Hastings W. N.W. Env'tl. L. & Pol'y J.* 71, 73 (1994).

mental law was not in its substance, but in its enforcement of those laws; Mexico's per capita expenditures for enforcement of environmental laws traditionally have amounted to approximately 2% of U.S. levels.¹²

However, since 1990, largely as a result of environmental agreements with the United States, Mexico has significantly increased its expenditures for environmental law enforcement.¹³ A significant portion of those efforts have been directed — again, in part as a result of pressure from the United States — at reduction of pollution from factories near the U.S.-Mexico border.¹⁴ By way of example, Van Pelt notes that between 1989 and 1994, the Mexican government shut down over 2,000 factories for violations of pollution laws, and recent efforts have included an increase in the number of environmental inspectors from 50 to 250 over that same period.¹⁵

B. NAFTA ENVIRONMENTAL PROVISIONS

The preamble and the general language of the NAFTA make it clear that the treaty is a trade agreement, not an environmental agreement. Its purposes are to "contribute to the harmonious development and expansion of world trade and provide a catalyst to broader international cooperation," and to "create an expanded and secure market for the goods and services," while doing so "in a manner consistent with environmental protection and conservation."¹⁶

However, the NAFTA places greater emphasis on the environment than any international trade agreement in history,¹⁷ attempting to balance the enhancement of health, safety and the environment with its stated objective of removing barriers to free trade.¹⁸ The treaty is directed toward promoting "sustainable development" while strengthening "the development and enforcement of environmental laws."¹⁹ In contrast, the General Agreement on Tariffs and Trade requires signatories to ensure their environmental protections meet a "least restrictive means" standard, thereby subordinating environmental protections to free trade interests.²⁰

12. *Id.* at 72.

13. Laura J. Van Pelt, Comment, *Countervailing Environmental Subsidies: A Solution to the Environmental Inequities of the North American Free Trade Agreement*, 29 *Tex. Int'l L.J.* 123, 133 (1994). See also, Jill A. Kotvis, *The Mexican Environment after NAFTA: Doing Business with Mexico under NAFTA; Environmental and Enforcement Issues*, given at Rocky Mountain Mineral Law Foundation, International Bar Association Section on Energy & Natural Resource Law (February 13, 1995), at 2 (on file with Author).

14. Van Pelt, *supra*.

15. *Id.* at 127, note 38.

16. NAFTA Preamble.

17. Bradley J. Condon, *NAFTA and the Environment: A Trade-Friendly Approach*, 14 *Nw. J. Int'l L. & Bus.* 528.

18. Stefan R. Miller, Comment, *NAFTA: A Model for Reconciling the Conflict between Free Trade and Environmental Protection*, 56 *U. Pitt. L. Rev.* 483, 509 (1994).

19. NAFTA Preamble.

20. General Agreement on Tariffs and Trade, opened for signature January 1, 1948, T.I.A.S. No. 1700, 55 U.N.T.S. 194, as amended [*hereinafter*, GATT].

The NAFTA specifically allows nations to adopt and maintain standards for the protection of life, health and the environment, and to enact such sanctions as may be necessary to effect such protections.²¹ Nations may also adopt or amend domestic environmental protections, even though such modifications would involve added restrictions on trade, so long as the protective measures are aimed at legitimate health and safety concerns.²²

Critics of the NAFTA emphasize that the agreement focuses on avoiding the use of trade barriers disguised as environmental protections, and fails to provide specific environmental goals and sanctions.²³ Under the NAFTA, a nation may cite environmental protection as a legitimate objective for actions which result in a limitation on trade, provided that the nation imposing the protective nature can establish that such measures are not simply protectionist measures.²⁴

During the 1992 Presidential campaign, in response to pressures from environmental groups, the Clinton team took a position favoring greater protections for the environment as a condition to support for NAFTA enabling legislation. These factors gave rise to proposals which would eventually become the Environmental Side Agreement.²⁵

C. THE ENVIRONMENTAL SIDE AGREEMENT

There are widely conflicting views over the potential costs and benefits of the Environmental Side Agreement. Environmentalists point to a lack of objective standards for environmental protection, noting that the agreement calls only for the enforcement of each nation's existing environmental laws.²⁶ In part, such views are based upon the misperception of the adequacy of Mexico's environmental laws, as discussed above. However, environmentalists also point to the admittedly weak language of Article 2(3): "[each] Party shall *consider prohibiting* the export . . . of a pesticide or toxic substance whose [sic] use is prohibited within the Party's territory." (Emphasis added). Supporters of the duties imposed under the Environmental Side Agreement will insist that inclusion in the NAFTA of more specific requirements would amount to an invalid encroachment on the sovereignty of the member nations.²⁷

21. NAFTA Article 904(1).

22. NAFTA Article 904(2).

23. *Id.* See Jack I. Garvey, *Trade Law & Quality of Life — Dispute Resolution under the NAFTA Side Accords on Labor and the Environment*, 89 Am. J. Int'l L. 439, 447 (1995).

24. NAFTA Article 904(4), Article 2101. Note, however, that the nation imposing the limitation will bear the burden of showing that its action is related to a "legitimate objective," and that it is not simply a disguised restraint on trade.

25. Stefan R. Miller, Comment, *NAFTA: A Model for Reconciling the Conflict between Free Trade and Environmental Protection*, 56 U. Pitt. L. Rev. 483, 513-514 (1994).

26. See Garvey, *supra* note 23, at 447; Van Pelt, *supra* note 13, at 130.

27. Proceedings and Debates of the 103rd Congress, 1st Sess., *North American Free Trade Agreement Implementation Act*, remarks of Congressman Mineta, 139 Cong. Rec. H9875-01, H10027 (November 17, 1993).

D. NORTH AMERICAN COMMISSION ON ENVIRONMENTAL COOPERATION

1. *Structure and Functions of the Commission*

The Environmental Side Agreement functions through the North American Commission on Environmental Cooperation, which is made up of the Council, the Secretariat, and a Joint Public Advisory Committee.²⁸ Governing authority under the Environmental Side Agreement is vested primarily in the Council,²⁹ which is made up of one cabinet or ministerial representative, or their equivalent, from each Party.³⁰ The Environmental Side Agreement call for annual meetings of the Council,³¹ as well as a review of operations and effectiveness of the Agreement to take place four years after the signing of the Agreement.³² Article 10(1) also provides that the Council is to “oversee the implementation and develop recommendations on the further elaboration of [the] Agreement,” and “address questions and differences that may arise between the Parties” under the Agreement.

The Council is given the authority under Article 10(2) to recommend, among other things, the use of economic instruments for the pursuit of domestic and internationally agreed environmental objectives. To this end, the Council is to cooperate with the Free Trade Commission established under Article 2001(1) of the NAFTA to effect the environmental objectives of the NAFTA.³³ The implication of this provision is that the NAFTA would treat as an unfair trade practice any action from which a Party derives economic benefit as a result of failure to enforce environmental laws and regulations.

To provide the Council with the expertise needed to develop and implement recommendations for improvement of environmental quality, the Environmental Side Agreement calls for the formation of the Secretariat.³⁴ The Secretariat is headed by an Executive Director, who appoints staff members and experts as are necessary to carry out the duties of resolving lower-level disputes, as well as for conducting fact-finding for disputes to be resolved by the Council, and for providing technical and administrative support to the Council. In addition, the Secretariat is to provide “technical, administrative and operational support to the council,³⁵ and to provide the Parties and the public [with] information . . . and expertise with respect to environmental matters.”³⁶ Thus, the Secretariat is intended as a full-time staff of environmental experts and administrators who oversee the day to day operation and implementation of the Environmental Side Agreement.

28. Miller, *supra* note 25, at 516.

29. See, e.g., Environmental Side Agreement, Article 10(1)(b).

30. Environmental Side Agreement, Article 9(1).

31. Environmental Side Agreement, Article 9(3)(a). Special sessions may be called at the request of any Party. Article 9(3)(b).

32. Environmental Side Agreement, Article 10(1)(b).

33. Environmental Side Agreement, Article 10(6)(c).

34. Article 10(2) calls for the Executive Director of the Secretariat to appoint staff members based upon their “efficiency, competence and integrity.”

35. See generally, Environmental Side Agreement, Article 11; Miller, *supra* note 25, at 518-519.

36. Environmental Side Agreement, Art. 11(5), (6).

2. *Dispute Resolution under the Environmental Side Agreement*

The Parties to the Environmental Side Agreement have provided for resolution of disputes brought by both governmental and non-governmental parties. For interpretation and application of the Agreement, and to resolve disputes arising under the Agreement, the Parties may address concerns to the Council.³⁷ In the case of submissions by Parties, the Agreement provides for a sixty day consultation period following the filing of the submission, during which Parties are encouraged to "make every attempt to arrive at a mutually satisfactory resolution of the matter."³⁸ If the Parties are unable to resolve the dispute during the consultation period, the Council may, by a two-thirds vote, convene an arbitral hearing by a panel of experts with backgrounds in environmental law or enforcement, or in international dispute resolution.³⁹ Within 180 days following the arbitral hearing, the panel must issue an initial report, which becomes final within 60 days following any review requested by the Parties.⁴⁰ Sanctions may be levied in the form of a monetary assessment against the offending Party, and if the Party fails to pay the assessment within 180 days, the Council may order a suspension of NAFTA benefits to that Party.⁴¹

Actions against member nations by private parties or non-governmental organizations must be addressed to the Secretariat.⁴² Following the receipt of the submission, the Secretariat may request a response from the Party concerned,⁴³ and will decide whether the matter should be addressed to the Council.⁴⁴ Article 14 contains certain criteria which are to be considered in determining whether to refer a matter to the Council. Those provisions in effect set forth the justiciability requirements for a person or organization to sustain a complaint before the Secretariat.

37. Environmental Side Agreement, Article 10(1)(b), Article 10(1)(c).

38. Environmental Side Agreement, Article 22(4).

39. Environmental Side Agreement, Article 25(2)(a).

40. See generally, Environmental Side Agreement, Article 30-32. These articles set forth the procedural requirements to be followed by the panel and by disputants, as well as the reporting requirements by the Panel following the hearing.

41. Article 34(4) provides for imposition of monetary assessments against nations found in violation of the Agreement, unless the nation is found to be in the process of according its practices with recommendations made by the Panel. The arbitral panel is directed to meet 60 days following the issuance of its final report to determine whether the practices are being brought into compliance. Monetary assessments are limited by Annex 34 to no more than .007% of the total trade in goods between the Parties to the complaint giving rise to the enforcement action. If, within 180 days following imposition of the sanction, the offending nation has not complied with the enforcement penalty, Article 36 provides for a suspension of NAFTA benefits to that nation. Annex 36B limits the suspension to an increase in tariffs imposed by the complaining Party against the offending Party to the lesser of the tariff that was applicable prior to the date of entry into the NAFTA, or the Most Favored Nation rate in effect on the date of suspension of benefits.

42. Environmental Side Agreement, Article 14(1).

43. Environmental Side Agreement, Article 14(2).

44. Environmental Side Agreement, Article 15(1).

Article 14 provides that the Secretariat may consider submissions from private parties asserting that a signatory nation has failed effectively to enforce its own environmental laws.⁴⁵ Article 14(1)(d) contains a limitation effectively barring actions directed toward "harassing industry," rather than at "promoting enforcement." Furthermore, the Article requires the Secretariat to consider whether the "submission alleges harm to the person or organization making the submission;" and whether the submitting person has pursued remedies available under domestic law.⁴⁶

If the Secretariat lacks the expertise in a given area, it may engage such outside experts as required to issue a report on the matter in question.⁴⁷ Once the Secretariat reaches a decision on referral, that determination is published by the Executive Director in an Opinion Letter. If the Secretariat finds it appropriate, it may develop a factual record for review by the Council.⁴⁸ Article 15 gives the Parties a 45 day period in which to comment upon the report prior to consideration by the Council.⁴⁹ The decision to make public the Secretariat report rests with the Council, which may elect whether to do so by a two-thirds vote.⁵⁰

III. Recent Commission Decisions

In the past nine months, the Commission has considered three complaints.⁵¹ Significantly, all three actions were filed with the Secretariat by non-governmental parties under the private action provisions contained in Article 14. While several critics of the Environmental Side Agreement have noted that resolution under the Agreement may be time consuming, in each case the Secretariat has responded in less than ninety days. The Secretariat has also demonstrated a willingness to force compliance with the justiciability requirements of Article 14. While subjecting the Environmental Side Agreement to criticism for "formalism,"⁵² the decisions represent the first steps toward making environmental dispute resolution under the Agreement a realistic process which may provide substantial benefits to the Parties and to non-governmental parties.

45. Environmental Side Agreement, Article 14(1).

46. Environmental Side Agreement, Article 14(2)(a), (c).

47. Environmental Side Agreement, Article 13(2)(f), Article 13(1).

48. *Id.*

49. Environmental Side Agreement, Article 15(5).

50. Environmental Side Agreement, Article 15.

51. On January 17, 1996 the CEC received a petition in a matter designated SEM-96- 001. Although the Secretariat has not ruled on this submission as of press time, the submission is discussed more fully *infra*.

52. *International Trade: Logging Rider does not Constitute Failure to Enforce Laws, Commission Rules*, 1995 Daily Report for Executives: Regulation, Economics and Law 231 (BNA) (December 12, 1995), at d31.

A. *Pre-NAFTA: New River Issues*

One issue which might have been resolved under the Environmental Side Agreement arose so early in the process that the Secretariat was not yet in place to address the issue. However, it is discussed here to illustrate both the need for resolution proceedings for private parties and the type of issue which may be addressed by the Secretariat in the future.

The New River begins near Mexicali, Mexico, and carries sewage, industrial wastes, pesticides and other hazardous materials some 75 miles before depositing them in the Salton Sea in Imperial County, California.⁵³ Tests by the California Regional Water Quality Management Board indicate the presence of DDT, Toxaphene, sewage and metals in the water, as well as in fish and sediments found in the river.⁵⁴ In December 1993, the Board of Supervisors of Imperial County, together with citizen groups from both the U.S. and Mexico, sought to be the first to use the Environmental Side Agreement as a dispute resolution mechanism. Those groups filed a petition requesting that the EPA use the NAFTA to address the issue of transboundary pollution along the New River.⁵⁵

The EPA declined to address those concerns to the Council, ruling that "the EPA and other agencies of the U.S. Government [had] just begun the process of implementing the [Environmental Side Agreement], and that enforcement was at that time impossible because of the incompleteness of the institutions required to address the issue."⁵⁶

The EPA decision went on to point out that resolution under the Environmental Side Agreement requires a showing of a "'persistent pattern of non-enforcement' of environmental law."⁵⁷ Because the Environmental Side Agreement had been in place only since January 1, 1994, and covered only events occurring subsequent to that date, the EPA ruled there could be no such pattern.⁵⁸ In a noteworthy dictum, however, the EPA went on to suggest that the petitioners address their grievances directly to the government of Mexico which, under Article 6 of the Environmental Side Agreement, is required to give requests of private parties "due consideration in accordance with the law."

The situation in the New River dispute is an excellent example of the type of situation which might now be adequately addressed under the Environmental Side Agreement. Specifically, *Ley General* requires that industrial facilities treat wastes prior to introduction into sewers and receiving waters.⁶⁰ If the complainants could allege a pattern of non-enforcement taking place since the Environmental Side Agreement became effective, those

53. Kotvis, *supra* note 13, at 30.

54. *Environmental Protection Agency Response to Citizens' Petition*, 59 Fed. Reg. 13,722 (March 23, 1994). It should be pointed out that those same tests indicate that a significant portion of the pesticides found in the water are a result of runoff from Imperial County farming operations and residues contained in the soils since the banning of DDT in the 1970s.

55. *Id.* at 13,725.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* See Environmental Side Agreement Article 6(1), "Each Party shall ensure that interested persons may request the Party's competent authorities to investigate alleged violations of its environmental laws and regulations and shall give such requests due consideration in accordance with the law."

60. *Id.* at 13,722.

impact data, the Cozumel Submission contends that the data falls short of the criteria set forth in *Ley General*⁹⁷ and applicable regulations and local ordinances.⁹⁸

The Center also argues that the development “presumably has started to damage the ecosystem of Paradise Reef.”⁹⁹ Moreover, according to the Cozumel Submission, Paradise Reef is a part of a Grand Caribbean ecosystem, and is thus a “community asset of North America.”¹⁰⁰ Therefore, the Cozumel Submission requests that the Secretariat initiate an investigation of Mexico’s failure to apply its environmental laws and regulations in the case of the Cozumel Shipping Terminal.¹⁰¹

It is difficult to predict the outcome of the Cozumel Submission. While the complainants have alleged a persistent pattern of failure to enforce existing environmental law, the Secretariat has previously demonstrated prudence in requiring a showing of demonstrable harm to the submitting party. While the submission alleges that the pier and development “presumably have begun to damage the ecosystem of Paradise Reef,”¹⁰² there is no direct allegation of significant harm. Moreover, the Secretariat has consistently followed the Article 14(2)(c) requirement that submitting parties show they have pursued the private remedies available under the laws of Parties.¹⁰³ In the Cozumel Submission, the Center has raised an issue which will require the Secretariat to distinguish further its criteria for preparing an Article 15 record upon requests by non-governmental organizations. Given recent submissions by environmental groups, the private party submission provision is likely to become the most often used — if not the most successful — basis for submissions under the Side Agreement. However, as the Commission and the Secretariat continue to define justiciability criteria under these provisions, the private party submission mechanism will help the Environmental Side Agreement continue to develop as the most environment-friendly trade agreement in history.

We have seen that, less than two years following its consummation, the Environmental Side Agreement has begun to provide examples by which attorneys, business persons and legal scholars may begin to understand the workings and functions of the different offices within the NAFTA bureaucracy. Moreover, the Secretariat and the Council have begun to fulfill their duties, and show great potential for providing the expertise and balance the drafters expected. With respect to the dispute resolution mechanism, the Secretariat has demonstrated that it possesses both the expertise and the restraint necessary to function in an adequate and impartial manner. While unlikely to satisfy either staunch environmentalists or strongly pro-industrial interests, the Side Agreement has been shown to be an excellent document, with an outstanding potential for growth. The Environmental Side Agreement can be expected to continue to serve as a model for international environmental accords to be established in the future.

97. See *Ley General* Article 28, 32.

98. These regulations include the Environmental Impact Regulations promulgated under *Ley General*; decrees establishing the Cozumel Marine Wildlife Refuge (June 11, 1980); and the Cozumel Municipal Zoning Ordinance (March 9, 1987).

99. Cozumel Submission, Paragraph II(5).

100. Cozumel Submission, Paragraph III(1)(A).

101. Cozumel Submission, Paragraph VI(1).

102. Cozumel Submission, Paragraph II(5).

103. See Endangered Species Act Submission and Logging Rider Submission, *supra*.