

1996

## NAFTA Accession and Environmental Protection: The Prospects for an "Earth Friendly" Integration of Latin American Nations into the North American Trading Bloc

Russel M. Lazega

Follow this and additional works at: <https://ir.law.fsu.edu/jtlp>



Part of the Antitrust and Trade Regulation Commons, Comparative and Foreign Law Commons, Environmental Law Commons, and the International Law Commons

---

### Recommended Citation

Lazega, Russel M. (1996) "NAFTA Accession and Environmental Protection: The Prospects for an "Earth Friendly" Integration of Latin American Nations into the North American Trading Bloc," *Florida State University Journal of Transnational Law & Policy*. Vol. 5: Iss. 2, Article 5.

Available at: <https://ir.law.fsu.edu/jtlp/vol5/iss2/5>

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Journal of Transnational Law & Policy by an authorized editor of Scholarship Repository. For more information, please contact [efarrell@law.fsu.edu](mailto:efarrell@law.fsu.edu).

---

# NAFTA Accession and Environmental Protection: The Prospects for an "Earth Friendly" Integration of Latin American Nations into the North American Trading Bloc

Cover Page Footnote

J.D., The Florida State University College of Law.

# NAFTA ACCESSION AND ENVIRONMENTAL PROTECTION: THE PROSPECTS FOR AN "EARTH FRIENDLY" INTEGRATION OF LATIN AMERICAN NATIONS INTO THE NORTH AMERICAN TRADING BLOC

RUSSEL M. LAZEGA\*

I.	Introduction.....	315
II.	NAFTA, the New Global Economy, and the Rise of Trading Blocks..	318
III.	The Injection of Environmental Issues into the Trade Debate .....	320
	A. Do Environmental Issues Belong in a Trade Treaty?.....	320
	B. Are Trade and the Environment Really Competing Interests? .....	321
IV.	The Response of the Western Trading Bloc .....	324
	A. The North American Agreement on Environmental Cooperation	324
	B. The NAFTA Approach.....	330
V.	The Problem of Integrating Latin America Under the Current Side Agreement Approach.....	331
	A. Sovereignty Concerns.....	331
	B. Economic Concerns.....	332
VI.	Models for the Integration of Latin America.....	333
	A. The Approach for More Developed Countries .....	333
	B. Integrating the Rest of Latin America.....	334
VII.	Conclusion.....	339

## I. INTRODUCTION

"For this generation, ours, life is nuclear survival, liberty is human rights, the pursuit of happiness is a planet whose resources are devoted to the physical and spiritual nourishment of its inhabitants." —Jimmy Carter.<sup>1</sup>

"Once you've seen one redwood, you've seen them all." —Ronald Reagan.<sup>2</sup>

In December 1992, the United States, Canada and Mexico entered into the North American Free Trade Agreement (NAFTA).<sup>3</sup> While

---

\* J.D., The Florida State University College of Law.

1. United States President Jimmy Carter, *Farewell Address* (Jan. 14, 1981), reprinted in DANIEL B. BAKER, *POWER QUOTES* 65 (1992).

2. United States President Ronald Reagan, *New York Times Magazine* (July 4, 1976), reprinted in DANIEL B. BAKER, *POWER QUOTES* 65 (1992).

3. 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, Dec. 17, 1992, 32 I.L.M. 289 (1993) (*preamble to Chapter 10*); 32 I.L.M. 605 (1993) (*Chapter 10 to errata*) (entered into force Jan. 1, 1994) [hereinafter NAFTA].

NAFTA expressly recognizes the development and enforcement of environmental laws as an objective of the agreement,<sup>4</sup> its primary function is to create a free trade zone<sup>5</sup> encompassing Mexico, Canada, and the United States, that would maximize the ability of all three nations to capitalize on the six-trillion dollar North American market.<sup>6</sup>

The NAFTA countries comprise one of the world's largest markets—360 million consumers.<sup>7</sup> With discussions of integrating the growing Latin-American market forthcoming, NAFTA, within the next decade, could well encompass the world's largest market—850 million consumers spending thirteen-trillion dollars annually.<sup>8</sup>

Today's Latin America is a tempting prospect for integration. In stark contrast to the closed, protectionist Latin America of the earlier half of the century, contemporary Latin America is increasingly open, democratic, and stable.<sup>9</sup> This new-found stability and receptiveness to open trade have sparked a dramatic increase in the level of foreign investment in the region,<sup>10</sup> and created a Latin America that increasingly resembles its more-developed northern counterparts.<sup>11</sup> Cries of "Yankee go home" are now muffled by investment-

4. NAFTA, *supra* note 3, at preamble.

5. FREDERICK M. ABBOTT, LAW AND POLICY OF REGIONAL INTEGRATION: THE NAFTA AND WESTERN HEMISPHERIC INTEGRATION IN THE WORLD TRADE ORGANIZATION SYSTEM 1, 2 (1995).

6. Robert Housman, *The North American Free Trade Agreement's Lessons for Reconciling Trade and the Environment*, 30 STAN. J. INT'L L. 379, 379-80 (1994).

7. *Id.*

8. See John Geshko & Peter Behr, *Leaders of the Western Hemisphere Agree To Form Free Trade Zone*, WASH. POST, December 11, 1994, at A1.

The NAFTA member nations have devoted considerable thought to the potential integration of a number of Latin American countries into NAFTA. See generally ABBOTT, *supra* note 5, at 179-83 (noting, for example, that a U.S. inter-governmental working group has been considering four possible approaches to eventually creating a western hemispheric free trade area). Specifically, the United States has indicated that it will float a test balloon by attempting to integrate Chile into NAFTA. *Id.* at 182. If Chile is successfully integrated, some experts predict that the NAFTA trading bloc will next seek to integrate Argentina, Brazil, Colombia and Venezuela. *Id.*

9. See Michael Rezendes, *Latin Economies Looking Up and Knocking on U.S. Door: Summarizing the Summit of the Americas*, BOSTON GLOBE, Dec. 4, 1994, at FOCUS 81.

10. The Inter-American Development Bank estimates that direct investment has skyrocketed from \$3.1 billion in 1984, to \$21.1 billion just ten years later. Martha M. Hamilton, *The Latin Boom Roots of Recovery Began Decades Before This Week's Summit of the Americas*, WASH. POST, Dec. 4, 1994, at H1. Net capital flows into Latin America soared from \$25 billion in 1990, to \$69 billion in 1993. *Id.* The United States, in particular, has stepped-up investment into the region, pouring in over \$52 billion in 1992, a steady increase from the \$42 billion 1989 figure. See Geshko, *supra* note 8, at A1.

11. Washington Post staff writer, Martha Hamilton, describes the new Santiago, Chile: "In this city where the Latin economic boom of the 1990's first began to take root two decades ago, men and women now hustle up and down the sidewalks, past rapidly rising new office buildings, swinging briefcases and clutching cellular phones." See Hamilton, *supra* note 10, at H1.

enticing promises of deregulation, privatization, tax reform and free trade.<sup>12</sup> A far cry from the self-deprecating philosophy of years past,<sup>13</sup> the new Latin America has become the master of its own swift growth.

Unfortunately, Latin America's environmental law reform has not progressed as quickly as its economic growth.<sup>14</sup> Lagging environmental reform presents an obstacle to Latin American integration because any offer of accession to NAFTA will almost certainly be predicated on the acceding country entering into an environmental side agreement similar to the North American Agreement on Environmental Cooperation<sup>15</sup> between Mexico, Canada and the United States.<sup>16</sup> However, unlike Mexico, the United States and Canada, which basically agreed to enforce their extensive existing protections,<sup>17</sup> many Latin American countries do not have sufficient existing environmental laws to satisfy the requirements for NAFTA accession.<sup>18</sup> The result is that many Latin American countries may be forced to surrender a competitive advantage<sup>19</sup> and dramatically change their domestic laws to satisfy North American standards.

---

12. See *id.*

13. In Latin America, there has long been a deep-seeded notion that Latin America's economic failure is rooted in the vices of its people. See Albert O. Hirschman, *Ideologies of Economic Development in Latin America*, in *LATIN AM. ISSUES* 3-7 (1961) [hereinafter Hirschman]. This philosophy was aptly described by Daniel Cosío Villegas: "Why is there so much wretchedness, so much poverty in this fabulous land . . . ? Ah, says one—it is the priest's fault; another blames it on the military; still others on the Indian; on the foreigner; on democracy; on dictatorship; on bookishness; on ignorance; or finally on divine punishment." Daniel Cosío Villegas, *EXTREMOS DE AMERICA* ("Extremes of America") 105 (1949), *quoted in id.* at 3.

14. For example, even Latin America's more progressive countries like Chile have questioned whether their existing regulatory systems are adequate to satisfy the NAFTA parties. See, e.g., David Gilmore, *Expanding NAFTA To Include All of the Western Hemisphere: Making Chile the Next Member*, 3 *J. INT'L L. & PRAC.* 413, 416 (1994) ("The Chilean Foreign Ministry has admitted that the country's loose environmental regulations would be a problem that needs to be overcome if it is to be included in NAFTA."). For a discussion of the deficiencies in Chile's environmental law and their impacts see *id.* at 416-17.

15. North American Agreement on Environmental Cooperation Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States, Sept. 13, 1993, 32 *I.L.M.* 1480 (entered into force Jan. 1, 1994) [hereinafter NAAEC].

16. 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 ENVTL. L. & POL'Y* 273, 273-74 (1994).

17. See Robert F. Housman, *The Treatment of Labor and Environmental Issues in Future Western Hemisphere Trade Liberalization Efforts*, 10 *CONN. J. INT'L L.* 301, 307-08 (1995).

18. See Gilmore, *supra* note 14, at 416.

19. The idea of competitive advantage is that more lax environmental laws (and, of course, lower labor costs) will make it cheaper, and therefore more enticing, to manufacture in Latin America. By binding themselves to protect their own environment, the northern Parties will be economically disadvantaged by their far-sighted policy of protection. Of course, the corollary is also true—the short-sighted policy of attracting industry by allowing it to destroy the

This raises several questions. The threshold question is whether environmental issues should even be a part of trade negotiations. If environmental issues should be a part of the trade debate, by whose rules should the parties play? The perception to some extent, has been that the environmental side agreements were a U.S.-imposed condition.<sup>20</sup> Therefore, a strict application of North American environmental standards to Latin America may spark renewed complaints of U.S. domination of internal Latin American policy. Additionally, it is unclear to what extent Latin American countries will sacrifice the competitive advantage of weaker regulation for accession to NAFTA. Lastly, if Latin America cannot be successfully integrated under the existing side-agreement structure, what alternatives exist to integrate the growing Latin American market without jeopardizing the environment?

This Comment addresses each of these issues, beginning with a brief discussion of the history of NAFTA in the Introduction and the rise of trading blocks in Part II. Part III analyzes the reasons for the recent injection of environmental issues into the trade debate. Part IV assesses the NAFTA parties' side-agreement approach to addressing environmental issues. Part V discusses the complications involved in integrating the rest of Latin America under the current side-agreement approach. Part VI presents alternative methods of integrating Latin America into NAFTA and analyzes whether these alternative methods run afoul of environmental or sovereignty concerns.

## II. NAFTA, THE NEW GLOBAL ECONOMY, AND THE RISE OF TRADING BLOCKS

"NAFTA represents part of [the] trend toward structural regionalization of the world economy."—Frederick M. Abbott<sup>21</sup>

Business is becoming increasingly global. Domestic businesses are more often depending on expanding foreign markets to support their growth. For example, over the past few years, more than fifty-percent of the growth of the U.S. gross domestic product (GDP)

---

environment with impunity affords the less-regulated countries a competitive advantage over the more-regulated northern Parties.

20. For example, the Chilean government has openly criticized the United States for imposing environmental conditions on NAFTA accession. See *Gilmore, supra* note 14, at 417.

21. ABBOTT, *supra* note 5, at 165.

has come from exports.<sup>22</sup> At the current rate, international trade will constitute twenty percent of the U.S. GDP by the year 2000.<sup>23</sup>

To capitalize on the internationalization of industry, countries have begun forming trading blocks, common markets and free trade areas designed to reduce tariffs and thereby increase trade among participants.<sup>24</sup> The two most significant current integration efforts have formed along regional lines.<sup>25</sup> The European Community (EC) has its roots in a consolidated effort to rebuild post-World War II Europe.<sup>26</sup> Some proponents of the EC view current integration efforts as a precursor to the political, economic and military integration of Europe.<sup>27</sup> The plan envisions a Europe that shares a common currency and defense community, has minimal interstate travel restrictions, and is subject to the jurisdiction of a supranational governmental body.<sup>28</sup>

NAFTA reflects a less comprehensive integration plan, focussing primarily on the eventual creation of a western-hemispheric free trade zone.<sup>29</sup> The "NAFTA package"<sup>30</sup> also includes side agreements between the NAFTA parties, committing them to increased environmental and labor standards.<sup>31</sup> Because its historical foundation is economic (capitalizing on a growing Mexican market),<sup>32</sup> rather than political (strengthening ties to prevent another World War),<sup>33</sup> NAFTA does not emphasize the integration of the parties' political and military systems.<sup>34</sup> The result is an agreement that can be

---

22. Darin Narayana, *Preparing for Prosperity from Growing Global Trade*, STAR TRIB. (Minneapolis/St. Paul), Apr. 11, 1994, at D3.

23. *Id.* Currently, exports comprise about eleven percent of the total U.S. GDP. *Id.*

24. ABBOTT, *supra* note 5, at 13-20.

25. *Id.* at introduction and overview.

26. *Id.* at 13-14. The EC was viewed as a means of integrating the European nations. The belief was that an integrated Europe was necessary to avoid the divisiveness and inter-state conflict that had launched Europe into two World Wars. *Id.*

27. See generally Jim Hershberg, *Outposts—Geopolitics; A Pan-European Military?; Combining Blocs Could Answer Everyone's Security Needs*, WASH. POST, June 17, 1990, at D3.

28. See *id.*

29. See Housman *supra* note 17, at 301-02.

30. The combined NAFTA and NAAEC documents are sometimes referred to as the "NAFTA package" because currently, as a political matter, they are necessarily linked. See Saunders, *supra* note 16, at 284.

31. For a discussion of the environmental side agreement, see *infra* part IV. A. Betty Southard Murphy provides an enlightening discussion of the labor side-agreement in *NAFTA's North American Agreement on Labor Cooperation: The Present and the Future*, 10 CONN. J. INT'L L. 403 (1995).

32. ABBOTT, *supra* note 5, at 13-15.

33. *Id.*

34. See generally *id.* at 1-2 (discussing the underpinnings of NAFTA as a mechanism for trade liberalization and comparing it to the European Community which strives to create a more socially integrated community).

described as "a trade agreement with some environmental provisions."<sup>35</sup>

### III. THE INJECTION OF ENVIRONMENTAL ISSUES INTO THE TRADE DEBATE

#### A. Do Environmental Issues Belong in a Trade Treaty?

NAFTA is a trade agreement;<sup>36</sup> yet, by trade agreement standards, NAFTA devotes significant attention to environmental concerns.<sup>37</sup> More important, the NAFTA trading partners have addressed a number of environmental issues through the use of side or supplemental agreements,<sup>38</sup> like the North American Agreement on Environmental Cooperation (NAAEC).<sup>39</sup> The agreements can, in a sense, be considered a part of the NAFTA package because accession to NAFTA has been conditioned on the prior implementation of the environmental side agreements.<sup>40</sup> In essence, environmental concessions are the price for a seat at the NAFTA bargaining table.

This political "tax" on NAFTA accession has drawn staunch opposition on two grounds.<sup>41</sup> Some critics have expressed concern that dominant trading partners are dangling trade like a carrot and wielding it like a stick in an effort to promote social or political agendas.<sup>42</sup> Seemingly benign conditions, such as requiring a

35. See Saunders, *supra* note 16, at 278, 284.

36. See *id.* (noting that NAFTA is predominantly a trade agreement).

37. For example NAFTA's preamble lists the following resolutions of the parties:

Undertake each of the preceding [commitments to trade and mutual cooperation]

in a manner consistent with environmental protection and conservation;

Promote sustainable development;

Strengthen the development and enforcement of environmental laws and regulations . . . .

NAFTA, *supra* note 3, at preamble.

38. "Completed on September 14, 1993, these supplemental agreements, coupled with other NAFTA-related environmental efforts, became the NAFTA parallel environmental package." See Houseman, *supra* note 6, at 383.

39. See NAAEC, *supra* note 15.

40. Saunders, *supra* note 16, at 284.

41. Perhaps the most noteworthy opposition has come from U.S. Congressional Republicans who have "led the charge to have accession to the NAFTA trade agreement be clean and unencumbered by either labor or environmental concerns." See Houseman, *supra* note 17, at 314-17.

Proponents of the "NAFTA Clean" approach are divided into two camps: (1) those who maintain that environmental and labor protections should never have been a part of NAFTA in the first place and (2) those who believe that environmental provisions were properly included in the side agreements between the original NAFTA parties, but would not be appropriate as a general regional integration policy. *Id.* at 315. Supporters of the later approach argue special circumstances such as shared borders and common resources justified the NAAEC. *Id.* at 315.

42. Andrew F. Upton, *The Big Green Stick: Reducing International Environmental Degradation Through U.S. Trade Sanctions*, B.C. ENVTL. AFF. L. REV. 671, 691-92 (1995).



commitment to increase environmental protections, have been rejected as cultural imperialism.<sup>43</sup> Other dissenters question whether such social and political issues<sup>44</sup> should even be a part of the trade debate. Their argument is relatively straightforward—business and politics belong on separate bargaining tables,<sup>45</sup> or to play on an old saying, “what’s environmental protection got to do with the price of tea in China?” This position is espoused by a number of prominent Republicans in Congress.<sup>46</sup>

The response to this argument is two-fold. First, as a practical matter, economic and environmental interests are often interwoven.<sup>47</sup> For example, disparate environmental standards among trading partners afford a less-regulated state a competitive advantage over its more regulated partner.<sup>48</sup>

Second, trade benefits and sanctions have long been used as a method of promoting national security interests and curbing the undesirable behavior of trading partners.<sup>49</sup> In fact, many of the Republicans who oppose the inclusion of political conditions in trade agreements supported imposing a trade embargo against Nicaragua to undermine the communist-linked Sandinista regime.<sup>50</sup> The question is not so much whether it is proper to impose social conditions on trading partners, as what values should be promoted.

### *B. Are Trade and the Environment Really Competing Interests?*

In the context of trade, environmental interests have historically been viewed as adverse to business and trade interests.<sup>51</sup> The

---

43. *See id.*

44. While the critics have framed commitments on labor and the environment as non-economic or social issues, a strong argument can be made that the issues also have a clearly economic side. More lax regulation affords less-regulated trading partners a competitive advantage for being pollution havens. *See infra* text part III.B.2.

45. *See Housman, supra* note 17, at 301-02.

46. *See id.* at 324.

47. *See generally id.* at 315-18 (discussing the interrelation between trade and the environment).

48. *See Upton, supra* note 42, at 672.

49. Kevin C. Kennedy, *Reforming U.S. Trade Policy to Protect the Global Environment: A Multilateral Approach*, 18 HARV. ENVTL. L. REV. 185, 185-87 (1994). “In 1807, for example, in an effort to avoid war with Britain and France, President Thomas Jefferson imposed an embargo on all export trade from the United States to any foreign port.” *Id.* at 186. In 1985, in an effort to combat the spread of communism in the western hemisphere, President Reagan issued Executive Order Number 12,513, imposing a trade embargo against Nicaragua and the Sandinista regime.

50. *See id.* at 185-86.

51. *See generally* Daniel Farber & Robert Hudec, GATT Legal Restrictions on Domestic Environmental Regulations 1-3 (September 12, 1994) (unpublished manuscript on file with the author) (explaining the various bases for the perceived conflict between trade and the environment); Kennedy, *supra* note 50, at 198-99.

general perception within the trade community has been that environmentalists view the trade-environment debate as a zero sum game, with trade leading to increased production, which leads to increased pollution and depletion of natural resources.<sup>52</sup> Nevertheless, future trade agreements may likely be measured by how well they integrate trade concerns with environmental concerns.<sup>53</sup> The reasons are twofold. First, the environment is delicately balanced, and substantial damage done to it by those in one region can have significant and permanent consequences for those in other regions.<sup>54</sup> Additionally, future prosperity depends upon careful management of existing resources.<sup>55</sup> Second, the enticing low cost of doing business in a less-regulated state will spark an environmental "race to the bottom" among more-regulated states.<sup>56</sup>

*1. Green Concerns: Ecological Incentives to Support Increased International Environmental Protections*

"This policy [of conservation] rests upon the fundamental law that neither man nor nation can prosper unless, in dealing with the present, thought is steadily taken for the future."—Theodore Roosevelt.<sup>57</sup>

In June 1992, more than 20,000 representatives from over 100 countries attended the Earth Summit in Rio de Janeiro, Brazil.<sup>58</sup> The Summit highlighted the most pressing international environmental issues, and culminated in the adoption of Agenda 21, a 500-page "blueprint for sustainable development."<sup>59</sup> More important, it demonstrated that both developed and developing countries are beginning to recognize that international cooperation is essential to maintaining the earth's delicate balance.

This growing recognition is perhaps best evidenced by the recent surge in international environmental treaties. Since 1972, nations

---

52. See generally Kennedy, *supra* note 49; Charles R. Fletcher, *Reconciling GATT and Multilateral Environmental Agreements Within the Existing World Trade Regime*, 5 J. TRANSNAT'L L. & POL'Y \_\_\_\_ (forthcoming 1996) (criticizing the argument that trade and the environment are competing and irreconcilable interests).

53. See Geshko, *supra* note 8, at A1.

54. See generally ALBERT GORE, *EARTH IN THE BALANCE: ECOLOGY AND THE HUMAN SPIRIT* 183-96 (1992) (discussing the consequences of short-term environmental policies on the long-term health of the planet).

55. See *id.*

56. See Upton, *supra* note 42, at 671.

57. United States President Theodore Roosevelt, Speech to the Colorado Livestock Association (Aug. 29, 1910), reprinted in DANIEL B. BAKER, *POWER QUOTES* 64 (1992).

58. LESTER R. BROWN, *STATE OF THE WORLD* 170 (1995).

59. *Id.*

have adopted more than 110 environmental treaties,<sup>60</sup> addressing such issues as the atmosphere,<sup>61</sup> global warming,<sup>62</sup> protection of biological diversity,<sup>63</sup> and transboundary movement of wastes.<sup>64</sup>

The concern over global ecology is well taken. Since 1950, the world's population has doubled.<sup>65</sup> By 2050, the earth's population is expected to be three to four times the 1950 figure, or between 7.9 and 11.9 billion people.<sup>66</sup> Accompanying an increase in population is an increased consumption of energy,<sup>67</sup> finite resources, and replenishable resources.<sup>68</sup> Serious debate exists over whether "nature's limits are beginning to impose themselves on the human agenda . . . ." <sup>69</sup>

## 2. Financial "Green" Concerns: Economic Incentives to Support Increased International Environmental Protection

Perhaps the phrase "[p]olitics makes strange bed-fellows"<sup>70</sup> ought to be amended to say "trade politics makes stranger bed-fellows." Some have been surprised to see many United States businesses and labor organizations join the green movement in its push to require certain environmental guarantees as a precondition to NAFTA accession.

Upon reflection, the concern of business and labor communities over the environment is economically sound. The theory is that a country operating under less-stringent environmental standards reaps an unfair competitive advantage because the cost of environmental compliance is lower in less-regulated countries.<sup>71</sup> The reduced business cost then draws companies away from the more-

---

60. *Id.* at 172 (recognizing that there are 170 environmental treaties in force, and that more than two thirds are post-1972).

61. *See, e.g.,* Montreal Protocol, *infra* Part VI.B.2.a (implementing provisions for the eventual phase-out of chlorofluorocarbons (CFCs)).

62. *See* BROWN, *supra* note 58, at 173.

63. Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818 (*entered into force* Dec. 29, 1993).

64. *Global Convention on the Control of Transboundary Movements of Hazardous Wastes*, U.N. Environment Programme, Agenda Item 3, U.N. Doc. IG.80/3 (1989) *reprinted in* 28 I.L.M. 649.

65. Jonathan Adler et al., *Benchmarks: The Ecological and Economic Trends that are Shaping the Natural Environment and Human Societies*, in *THE TRUE STATE OF THE PLANET* 398-99 (Ronald Bailey ed., 1995).

66. *Id.*

67. *Id.* at 434-35. ("Total final consumption of energy worldwide has increased by nearly 50 percent from 1970 to 1990.")

68. For example, annual global fish harvest levels have skyrocketed over 50 percent since 1970, climbing from 66.9 million metric tons to over 101.8 million metric tons in 1991. *See* Adler, *supra* note 65, at 422-23.

69. *See* BROWN, *supra* note 58, at 5.

70. Charles D. Warner, *Fifteenth Week*, MY SUMMER IN A GARDEN (1871), *reprinted in* DANIEL B. BAKER, *POWER QUOTES* 234 (1992).

71. *See* Saunders, *supra* note 16, at 277.

regulated states to the less-regulated, thereby pressuring the more-regulated states to relax their environmental protections.<sup>72</sup> Essentially, businesses and labor are arguing that in order to compete and maintain an upward trend of environmental protection NAFTA must assure a level playing field.

#### IV. THE RESPONSE OF THE WESTERN TRADING BLOC

In response to both "green concerns," then-presidential candidate Bill Clinton announced a hard-line position regarding United States participation in NAFTA—his administration would not support NAFTA unless the parties agreed to implement certain environmental and labor protections.<sup>73</sup> These protections were consolidated in separate side agreements between the parties.<sup>74</sup> The use of side agreements, rather than incorporation of the provisions into NAFTA proper, was a compromise. Clinton was reluctant to undercut his support from the business community by significantly modifying the text of the NAFTA document,<sup>75</sup> so he advocated the negotiation of separate environmental and labor side agreements between the parties.<sup>76</sup> The environmental and labor side agreements went into force consecutively with NAFTA proper on January 1, 1994.<sup>77</sup>

##### A. *The North American Agreement on Environmental Cooperation*

The environmental side agreement is called the North American Agreement on Environmental Cooperation (NAAEC).<sup>78</sup> The NAAEC primarily obligates each of the parties to: (1) "ensure that its laws and regulations provide for high levels of environmental protection;"<sup>79</sup> (2) "strive to continue to improve those laws and regulations;"<sup>80</sup> and (3) enforce its own environmental laws and regulations.<sup>81</sup>

---

72. *Id.*

73. See Housman, *supra* note 6, at 382-83.

74. See Steve Charnovitz, *The NAFTA Environmental Side Agreement: Implications for Environmental Cooperation, Trade Policy, and American Treaty-making*, 8 *TEMPLE INT'L & COMP. L.J.* 257, 258-59 (1994).

75. See *id.* 257-59.

76. See *id.* 257-58.

77. See *id.* 259.

78. See NAAEC, *supra* note 15.

79. See *id.* art. 3.

80. See *id.*

81. See *id.* art. 5.

### 1. *An Anatomy of the NAAEC*

The NAAEC is divided into seven parts.<sup>82</sup> The first five sections contain the key substantive provisions. Parts six and seven are a definitional section and catchall section, respectively, and will not be discussed in this Article.

#### a. *Part I: Objectives of the Agreement*

As the title suggests, Part I sets out the objectives of the NAAEC. The most noteworthy aspect of this section is that it lists "support [of] the environmental goals and objectives of NAFTA" as an objective of the agreement.<sup>83</sup> While the comparable NAFTA section does not list environmental objectives,<sup>84</sup> the provision may be referring to the resolutions listed in NAFTA's preamble, namely the resolutions to: 1) undertake each of the NAFTA preamble commitments in a manner consistent with environmental protection and conservation; 2) "promote sustainable development"; and 3) "strengthen the development and enforcement of environmental laws and regulations."<sup>85</sup>

#### b. *Part II: Obligations and Commitments*

The NAAEC obligates the parties to a number of important environmental commitments. Some of the provision's commitments, such as the commitments to promote education in environmental matters,<sup>86</sup> "consider" prohibiting the export of domestically banned pesticides and toxic substances to NAFTA parties,<sup>87</sup> and to "promote the use of economic instruments for the efficient achievement of environmental goals,"<sup>88</sup> seem more aspirational than directory. However, other commitments in Part II of the NAAEC are more substantial. Under the NAAEC, each party agrees to "ensure that its laws and regulations provide for high levels of environmental

---

82. See NAAEC, *supra* note 15.

83. See *id.* art. 1(d).

84. See NAFTA, *supra* note 3, art. 102.

85. See *id.* at preamble.

86. NAAEC, *supra* note 15, art. 2.1(c).

87. *Id.* art. 2.3. The use of the ambiguous word "consider" undercuts the force of an otherwise powerful provision. Parties may "consider" but never act. However, it is still unclear whether the parties will treat article 2.3 as a binding commitment despite its effectively non-binding language.

88. *Id.* art. 2.1(f). The parties agree by this provision to promote integrating environmental concerns into future trade treaties. However, the provision does not specify any efforts that the parties must take to "promote" the integration of environmental issues and economic instruments. Absent specific commitments, the provision is essentially an aspirational statement, because it does not commit the parties to any concrete or enforceable commitment.

protection and strive to continue to improve those laws and regulations."<sup>89</sup> While the term "high levels" is not defined in the treaty, the treaty's commitment to improve environmental standards provides a strong argument against any party attempting to lower its environmental standards. The provision establishes a commitment, albeit vague, to increase, rather than decrease, environmental protections.

In addition to requiring parties to agree to improve their existing environmental laws and regulations, the NAAEC provides a somewhat novel provision requiring NAFTA parties to enforce their own existing environmental laws and regulations.<sup>90</sup> Perhaps the most important commitment in the NAAEC, this provision obligates each Party to "effectively enforce its environmental laws and regulations through appropriate governmental action . . ."<sup>91</sup>

To enforce compliance, the NAAEC requires enforcement procedures to be made available under the parties' respective domestic laws.<sup>92</sup> Specifically, the NAAEC requires that the parties assure private citizens the right to *request* an investigation of suspected environmental violations.<sup>93</sup> While the provision does not ensure that the government will launch an official investigation at the request of a private citizen, or that the citizen will be afforded anything more than *appropriate* access<sup>94</sup> to the judicial and administrative system, it does lay a foundation.

### *c. Part III: The Commission for Environmental Cooperation*

The NAAEC's primary enforcement mechanism is established in Part III of the agreement. This section creates the Commission for Environmental Cooperation (CEC),<sup>95</sup> which is governed by the Council consisting of cabinet-level officials from all three NAFTA parties.<sup>96</sup> While the Council has a number of general responsibilities, such as promoting public awareness of environmental issues,<sup>97</sup> the council's most important function is to provide "formal mechanisms by which private parties [and NAFTA member states] may initiate

---

89. *Id.* art. 3.

90. *Id.* art. 5.

91. *Id.*

92. *Id.* art. 6.

93. *Id.*

94. *Id.*

95. *Id.* art. 8.

96. *Id.* art. 9.1.

97. *See id.* art. 10(f).

investigatory actions against member states believed to be persistently failing to enforce their own environmental laws."<sup>98</sup>

*d. Cooperation and Consultation*

Part IV commits the NAFTA parties to cooperate, consult each other, respond to each other's inquiries, and notify each other of relevant environmental matters.<sup>99</sup> Because the provision lacks specific standards and enforcement mechanisms, it essentially does little more than punctuate the parties' concern for uniting to address environmental problems. However, the language does underscore the parties' intent to cooperate and protect their shared environment.

*e. Dispute Resolution Mechanisms*

Part V provides a mechanism for NAFTA parties to challenge another party's persistent failure to enforce its own environmental laws.<sup>100</sup> Complaints proceed in a series of steps, beginning with consultation, and can ultimately lead to trade sanctions against the offending party.<sup>101</sup>

As is often the case with dispute resolution, the process begins with a grievance, such as one NAFTA party contending that another is persistently failing to enforce its own environmental laws.<sup>102</sup> The complaining party may then request consultations with the offender to determine whether there has in fact been a persistent failure of enforcement.<sup>103</sup>

If the parties fail to resolve the matter through consultations, the complaining party may request that the Council be convened for a special session.<sup>104</sup> At the special session, the Council may employ any of a variety of methods to resolve the dispute, including conciliation and mediation.<sup>105</sup> The Council may also issue a non-binding recommendation.<sup>106</sup>

---

98. 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, 32 (1995).

99. See NAAEC, *supra* note 15, art. 20-21.

100. See *id.* at art. 22(1). The provision is limited to the narrow range of cases where there is a "persistent" lack of enforcement by a Party and where the dispute has gone to arbitration. See Saunders, *supra* note 16, at 298.

101. See generally Saunders, *supra* note 16, at 297-302 (discussing the NAAEC dispute resolution process).

102. See Charnovitz, *supra* note 74, at 266-67.

103. See NAAEC, *supra* note 15, art. 22(1).

104. See *id.* art. 23(1).

105. See generally Saunders, *supra* note 16, at 299 (discussing the procedures for initiating the NAAEC dispute resolution process).

106. See *id.* at 299.

If after sixty days<sup>107</sup> the dispute remains unresolved, the party may request that the Council convene an arbitral panel.<sup>108</sup> The arbitral panel considers the submissions and arguments of the parties and, within 180 days, issues an initial report. The report contains findings of fact, a determination whether there has been a persistent pattern of non-enforcement, and a recommendation.<sup>109</sup> The panel may, in certain cases,<sup>110</sup> seek expert advice to aid in its decision.<sup>111</sup> A final report, which is sent to the Council for publication, must be issued within sixty days of the initial report.<sup>112</sup>

The disputing parties may either adopt the panel's recommended action plan or agree to one of their own.<sup>113</sup> If the parties fail to commit to an action plan, or to fully implement one, the panel may be reconvened with authority to approve or impose an action plan,<sup>114</sup> and when warranted, impose a monetary assessment against the offender.<sup>115</sup> The monetary enforcement assessment is capped at seventy dollars for every one million dollars of trade in goods between the disputing parties.<sup>116</sup> If after six months the offending party has still failed to pay the assessed penalty or implement an action plan, the complaining party may ask to reconvene the panel.<sup>117</sup> If the panel determines that the defendant has failed to fully implement the action plan or pay the assessment, the panel may authorize the complaining party to increase certain tariffs to collect

---

107. The sixty days is measured from the date the Council is convened. *See id.* at 299.

108. *See id.* at 299. Assignments to the panels are rotating, non-permanent positions. *Id.* at 299-300. Panelists need not be environmental experts, though there appears to be a preference for environmental experts. *See NAAEC, supra* note 15, art. 23(1).

109. *See NAAEC, supra* note 15, at art. 31.2; Saunders, *supra* note 16, at 299-300.

110. The panel may seek the advice of experts: (1) at the request of a disputing party or (2) without a request if the disputing parties agree. Saunders, *supra* note 16, at 300 n.151.

111. *See NAAEC, supra* note 15, art. 30.

112. *See id.* art. 32.1.

113. *See id.* art. 33. If the parties adopt their own action plan, it is expected that the plan will conform with the determinations and recommendation of the panel. *Id.*

114. *See id.* arts. 33, 34.

115. NAAEC, *supra* note 15, art. 34; "Whenever a complaining party believes that an action plan is not being fully implemented, it may reconvene the panel. 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." *See Charnovitz, supra* note 75, at 269 (citing the NAAEC, *supra* note 15, art. 34).

116. The assessment is paid directly to the Commission and earmarked toward improving the environmental law or enforcement in the offending country. *See id.* annex art. 34.3.

117. *See Charnovitz, supra* note 74, at 269-70.



the amount of the monetary assessment.<sup>118</sup> The entire process from complaint to trade sanctions takes at least 755 days.<sup>119</sup>

## 2. *Integrating Mexico and Canada under the NAAEC*

The NAAEC employs a unique approach to environmental regulation by encouraging each party to enforce its own existing laws.<sup>120</sup> This approach was directed toward integrating three countries with fairly sophisticated environmental legislation.<sup>121</sup> The NAAEC does not attempt to harmonize North American environmental laws, or even provide minimum standards; the NAAEC merely imposes upon each party an obligation to enforce its own existing environmental laws.<sup>122</sup> The parties remain free to adopt whatever laws and standards they see fit.<sup>123</sup>

### *a. Mexico*

Mexico did not have to undergo a major revamping of its environmental laws to satisfy the environmental conditions of NAFTA accession.<sup>124</sup> Mexico did pass some new environmental laws in an attempt to match its trading partners,<sup>125</sup> and also agreed to clean up the U.S.-Mexican border.<sup>126</sup> However, the substance of Mexico's environmental laws was never seriously viewed as the primary impediment to its accession to NAFTA.<sup>127</sup> The grievance

---

118. NAAEC, *supra* note 15, art. 36. Canada refused to be subject to trade sanctions under this provision, and is therefore not subject to the tariff provisions of article 36. See Charnovitz, *supra* note 74, at 269-70.

119. See Charnovitz, *supra* note 74, at 270. "[T]he same procedure under the NAFTA dispute settlement process takes only 240 days." *Id.*

120. See Housman, *supra* note 17, at 307.

121. See *id.*

122. *Id.*

123. *Id.*

124. Mexico's environmental laws are described as "highly sophisticated" and comparable in many ways to Canadian and U.S. environmental legislation. See Michael I. Jeffery, Q.C., *The Environmental Implications of NAFTA: A Canadian Perspective*, 26 URB. L. 31, 40-41 (1994).

125. See, e.g., Gilberto Borja, *A 'Green' Deal in More Ways than One NAFTA: A Trade Boom Will Strengthen Mexico's Agenda for Environmental Protection*, L.A. TIMES, Nov. 5, 1993, at B5 (discussing Mexico's upgrade of its environmental laws, including the passage of the General Law for Ecological Balance and Environmental Protection).

126. Todd Robberson, *Mexicans Say Cleanup of Border Imperiled Session Today to Take up NAFTA Obligations*, WASH. POST., May 16, 1995, at A12. In 1993, in an effort to win congressional approval of NAFTA proper, Mexico agreed to include in the side agreement a pledge to clean-up the U.S.-Mexico border. *Id.*

127. See Joseph G. Block & Andrew R. Herrup, *The Environmental Aspects of NAFTA and Their Relevance to Possible Free Trade Agreements Between the United States and Caribbean Nations*, 14 VA. ENVTL. L.J. 1, 2-3 (1994).

with Mexico concerned its lackluster *enforcement* of otherwise adequate environmental laws.<sup>128</sup>

*b. Canada*

In contrast to Mexico, Canadian environmental standards and enforcement mechanisms did not present a major hurdle to Canada's admission into NAFTA. In fact, Canada's environmental laws are generally considered comparable to, if not more extensive than, those of either the U.S. or Mexico. Not surprisingly, Canada voiced great concern over the adequacy of NAFTA's environmental protections. Canada contended that NAFTA would not provide sufficient protection against potential United States diversions of Canadian water.<sup>129</sup>

*B. The NAFTA Approach*

The side agreements to NAFTA, which comprise the bulk of the environmental provisions associated with NAFTA, are separate from the primary NAFTA trade document.<sup>130</sup> While as a political matter the documents may be viewed as integrated, the side agreements are not linked with NAFTA by any provision in the trade agreement.<sup>131</sup> NAFTA's accession provision, article 2204, requires only that accession must be: (1) subject to the terms and conditions set by the accessor and the Commission,<sup>132</sup> (2) in accordance with the legal procedure of each country,<sup>133</sup> and (3) applicable only between accessors and parties that have both consented to its provisions.<sup>134</sup> Article 2204 does not condition NAFTA accession on submission to any side agreements.<sup>135</sup> The side agreements represent a purely political condition on NAFTA accession.<sup>136</sup>

Because the side agreements are a political condition, they may change along with the politics of the parties. Theoretically, the Republican majority in Congress could alter the entire equation. However, such a policy shift would risk drawing objections from the other NAFTA parties, who were required to agree to the conditions.

128. *See id.* at 3.

129. Saunders, *supra* note 16, at 276.

130. Housman, *supra* note 17, at 304.

131. *Id.*

132. NAFTA, *supra* note 3, art. 2204(1).

133. *See id.*

134. *Id.* art. 2204(2). "[A]rticle 2204(2) . . . allows the acceding country and the NAFTA countries to apply even the NAFTA agreement selectively . . ." *See* Housman, *supra* note 17, at 303.

135. Housman, *supra* note 17, at 304.

136. *See id.*

Given the Republicans' previous approval of environmental side agreements between Mexico and Canada, a similar approach can be expected for the accession of Latin America.<sup>137</sup>

#### V. THE PROBLEM OF INTEGRATING LATIN AMERICA UNDER THE CURRENT SIDE AGREEMENT APPROACH

"It is virtually impossible to imagine the terms of accession for [additional] Parties not including environmental provisions similar to those in the NAFTA and its side agreement on the environment."

—J. Owen Saunders<sup>138</sup>

Integrating the rest of Latin America under side agreements similar to the NAAEC side-agreement may prove complicated. Unlike Mexico, the United States, and Canada, the issues for Latin America do not only involve enforcement, they also include the adequacy of domestic environmental legislation.<sup>139</sup> However, any effort by the NAFTA parties to impose environmental thresholds or requirements as a condition to accession risks being perceived as U.S. ordering of Latin-American domestic policy.<sup>140</sup> More important, it is unclear how much environmental regulation Latin American countries will accept before NAFTA accession becomes economically unattractive.<sup>141</sup>

#### A. Sovereignty Concerns

In the discussions to which this interest has given rise and in the arrangements by which they may terminate the occasion has been judged proper for asserting, as a principle in which the rights and interests of the United States are involved, that the American continents . . . are henceforth not to be considered as subjects for future colonization by any European powers.—Monroe Doctrine, 1823.<sup>142</sup>

---

137. *Id.* (discussing the potential application of environmental side agreements to future Latin American accession efforts).

138. Saunders, *supra* note 16, at 274.

139. See Hamilton, *supra* note 10, at H1.

140. Even Chile, one of Latin America's more environmentally progressive nations, has criticized the United States' policy of including environmental provisions in trade agreements. See Gilmore, *supra* note 14, at 413, 417.

141. At least in the case of Chile, it appears the benefits of accession to NAFTA will likely outweigh sovereignty concerns. See *id.* (noting that Chile, despite its objections, will likely agree to environmental conditions to NAFTA accession). However, whether other Latin American countries will accept the environmental conditions is unknown.

142. United States President James Monroe, *President Monroe's Seventh Annual Address to Congress* (Dec. 2, 1823), in DOCUMENTS OF AMERICAN HISTORY 236 (Henry Steele Commager ed., 7th ed. 1963) [hereinafter *Monroe Doctrine*].

The Monroe Doctrine set the tone for what has become a deep-seated Latin American resentment of U.S. domination of the western hemisphere.<sup>143</sup> To many Latin Americans, the doctrine was less about protection against European interference in the new world, than staking first claim to the region.<sup>144</sup>

While the promise of trade and prosperity has taken the bite out of much of Latin America's anti-U.S. sentiment,<sup>145</sup> the perception that the United States seeks to dominate and oppress Latin America still lingers,<sup>146</sup> and will invariably underlie future trade negotiations. This is particularly true in the case of conditioning accession to NAFTA on compliance with U.S.-dictated environmental standards, which have been criticized as cultural imperialism by both Latin American<sup>147</sup> and U.S.<sup>148</sup> leaders.

### B. Economic Concerns

One reason that Latin America is a tempting investment prospect is because more lax environmental laws make doing business in Latin America less costly. Many Latin American nations have resisted heightening their environmental standards in an effort to attract investment and much needed hard currency.<sup>149</sup> While the cost of doing business in more-regulated states continues to rise, less-regulated states have been able to maintain comparatively low costs.

This approach may seem short-sighted and self-destructive. The policy appears to promote development at the expense of a nation's environment. However, many Latin American governments view minimal business regulation and open access to natural resources as necessary conditions to the establishment of a developed nation. Without this competitive advantage, investment is limited, and the government cannot provide for needed services like food, education, and medical care.<sup>150</sup> Environmental protection, it is argued, must give way to more pressing concerns.<sup>151</sup>

Latin Americans often point to the industrialization of the United States as an example. These critics argue that the U.S. built its industrialized society at the expense of the environment. They contend

---

143. Michael Rezendes, *Latin Economies Looking Up and Knocking on U.S. Door: Summarizing the Summit of the Americas*, BOSTON GLOBE, Dec. 4, 1994, at FOCUS 81.

144. *Id.*

145. *Id.*

146. *Id.*

147. Upton, *supra* note 42, at 675-79, 691.

148. Housman, *supra* note 17, at 314-15.

149. Upton, *supra* note 42, at 671-72.

150. See Hamilton, *supra* note 10, at H1.

151. See Gilmore, *supra* note 14, at 416.

that the U.S., now in a position to regulate its industries without risking massive flight, seeks to impose these restrictions on everyone, including those who cannot afford it.<sup>152</sup> Any model for Latin American accession must take into account that many Latin American countries remain reluctant to limit two of their most competitive advantages: (1) low wage and regulatory costs and (2) natural resources.

## VI. MODELS FOR THE INTEGRATION OF LATIN AMERICA

### A. *The Approach for More Developed Countries*

A country like Chile will be relatively easy to incorporate under the existing side agreement system. While Chile has voiced some objection to entering into environmental side agreements, Chile is probably willing to enter into an agreement similar to the NAAEC.<sup>153</sup>

Like Mexico, Chile's problem is a lack of enforcement, not a lack of legislation,<sup>154</sup> and Chilean officials have made overtures that Chile is "up to the challenge" of negotiating a side accord that would improve its environmental enforcement.<sup>155</sup> The reason for the receptiveness is that Chile, like Mexico, has a great deal to gain from NAFTA accession. Chile's industrial base and economy have grown rapidly,<sup>156</sup> with trade concentrating heavily on the United States.<sup>157</sup> Further, Chile's industries can expect a fairly hospitable competitive environment under NAFTA because many of the industries

---

152. See Joseph G. Block & Andrew R. Herrup, *Addressing Environmental Concerns Regarding Chilean Accession to NAFTA*, 10 CONN. J. INT'L L. 221, 237-38 (1995).

Smaller, less developed nations look suspiciously at U.S. attempts to address environmental issues and have at times labeled them as 'eco-imperialism.' Less developed nations chafe at being required to adopt more stringent environmental restrictions while they develop than currently developed nations had to follow at a similar stage and are unwilling to make the large capital investments often required to implement these standards.

*Id.*

153. Gilmore, *supra* note 14, at 417 & n.44 (noting that the Director of Chile's EPA said that Chile would not object to an environmental agreement similar to the NAAEC agreement with Mexico).

154. Gabriel Escobar, *Various Lobbies Pose Tough Choices for Chile as It Prepares to Join NAFTA*, WASH. POST, Dec. 25, 1994, at A33 ("[Chile's] laws are compatible with NAFTA, meaning few reforms are required. Its labor and environmental standards are exemplary when compared with Mexico.").

155. Gilmore, *supra* note 14, at 417.

156. *Id.* at 415-16. Chile's GDP, over the past five years, has grown at an average annual rate of seven percent, making it one of the fastest growing economies. *Id.*

157. *Id.* at 418. The United States is Chile's top trading partner, accounting for twenty percent of its exports and twenty-three percent of its imports. *Id.*

complement, rather than compete, with U.S. industries.<sup>158</sup> In this case the benefits outweigh the burdens.<sup>159</sup>

### B. *Integrating the Rest of Latin America*

Integrating Latin America's less developed nations may prove more complicated because the current side agreement approach contemplates that the parties already have an adequate regulatory system in place.<sup>160</sup> Many underdeveloped Latin American countries which lack environmental legislation may be unsuitable for this approach.<sup>161</sup>

Any integration model for Latin American countries with inadequate levels of existing environmental protection must temper the parties' dual concerns of ecological protection and fair competition with Latin America's sovereignty interests and level of development. Three approaches have been offered to reconcile these concerns.

#### 1. *The NAFTA Clean Approach*

The NAFTA clean approach is perhaps inaccurately described as an attempt to reconcile the competing interests, because reconciliation under the NAFTA clean approach means eliminating outright NAFTA's environmental conditions.<sup>162</sup> Proponents of the NAFTA clean approach contend that trade issues and environmental issues belong on separate bargaining tables.<sup>163</sup> The position asserts that environmental issues are not sufficiently related to trade to be included in trade agreements.

Three points severely undercut this argument. First, the NAFTA clean approach completely fails to address the parties' ecological and fair competition concerns. Business interests in the more-regulated states will face the clearly *economic* issue of competitive disadvantage vis-a-vis less-regulated states, yet under the NAFTA clean approach the matter is purely political and beyond the scope of the agreement.<sup>164</sup> Second, accepting new parties under less rigorous environmental standards is bound to draw opposition from the existing

---

158. *Id.* For example, Chile's growing season is opposite the United States' growing season. *Id.*

159. *Id.* at 417.

160. *See supra* part I.

161. Escobar, *supra* note 154, at A33.

162. Housman, *supra* note 17, at 314-15.

163. *Id.* at 314-16.

164. *See infra* part V(B).

NAFTA parties, particularly Mexico.<sup>165</sup> The entire NAFTA process was nearly derailed in a last-minute effort to bind Mexico to environmental and labor concessions.<sup>166</sup> Failing to apply the same approach to future accessors would be a political Pandora's Box. Finally, the most zealous advocates of the NAFTA clean approach, U.S. Republicans, have already agreed to an environmental side agreement with Mexico and Canada.<sup>167</sup> The Republicans would severely undercut their political credibility and create instability in the NAFTA process if they were to completely retreat from their original position.

### 2. *The Side Agreement/NAFTA Package Approach*

The second approach is square one—the side agreement approach currently in effect. While the current side agreement approach has been criticized on sovereignty grounds, it is not an insurmountable obstacle to the integration process. Overall, Latin American countries have been very interested in the prospect of regional and hemispheric free trade, which may soothe the tensions created by the sovereignty issue.<sup>168</sup> Moreover, Latin American countries have increasingly recognized the importance of environmental protection. This increased awareness is highlighted by the adoption of Agenda 21 and a host of other international environmental agreements.<sup>169</sup> Finally, many Latin American countries have recently made considerable strides toward strengthening their domestic environmental laws.<sup>170</sup> However, despite these encouraging reforms, many Latin American countries still lack sufficient environmental safeguards to qualify for NAFTA accession.<sup>171</sup>

### 3. *The NAFTA Plus Approach*

The NAFTA Plus approach advocates both strengthening NAFTA's environmental provisions and using side agreements to handle particulars between the parties and prospective accessors.<sup>172</sup>

---

165. Mexico and Canada have both stated that NAFTA accession must include the entire package of agreements. See Housman, *supra* note 17, at 320-21.

166. See *supra* part IV.

167. *Id.*

168. See generally Carol Stump, *Free Trade Area of the Americas*, 4 J. INT'L L. & PRAC. 153, 153-56 (1995) (discussing the prospects for western hemispheric free trade).

169. See BROWN, *supra* note 58, at 170.

170. See generally *id.* at 170-89 (discussing recent international and local environmental reforms).

171. See *supra* notes 14-19 and accompanying text.

172. See generally Housman, *supra* note 17, at 321-23 (discussing the NAFTA Plus approach).

The favored approach of the labor and environmental camps, the NAFTA Plus approach could be used to plug various loopholes in the side agreements<sup>173</sup> and clarify ambiguities<sup>174</sup> in NAFTA.

The NAFTA Plus approach also would allow for a stable core of environmental protections in NAFTA proper, while providing flexibility to deal separately with specific problems associated with particular accessors.<sup>175</sup> For example, NAFTA is vague about mining. Chile is one of only a few mining countries in Latin America.<sup>176</sup> Under the NAFTA Plus approach, the parties could address this largely Chilean interest under a separate, unique agreement.<sup>177</sup>

However, the NAFTA Plus approach has two shortfalls. First, this approach requires an overhaul and renegotiation of NAFTA<sup>178</sup>, a treaty that took years to negotiate.<sup>179</sup> Second, Mexico and Canada would have to agree to the approach and the revisions.<sup>180</sup> In light of the difficulties that were involved in reaching the original agreement,<sup>181</sup> and later negotiating two additional side agreements, a trip back to the drawing board could be complicated.

#### 4. *NAFTA Plus a Twist: Minimum Standards Based on Existing Multilateral Environmental Agreements*

Complications could be minimized by limiting the modifications of NAFTA proper to a specific set of core environmental standards already established in existing treaties between the parties. The parties would essentially turn to existing multilateral environmental commitments to form the basis for a core set of NAFTA environmental norms. The parties would be rehashing existing environmental agreements. No party would be agreeing to anything new.

Mexico, Canada, and the United States are all signatories to a number of key multilateral environmental treaties which could form the basis for a core set of international standards for waste trade, ozone depletion, endangered species protection, and pollution.

---

173. For example, the NAAEC contains a loophole allowing a Party to avoid charges of persistent non-enforcement by showing that the failure stems from a lack of resources. See NAAEC, *supra* note 15, art. 45.1.

174. Housman, *supra* note 17, at 321-23.

175. *Id.* at 322.

176. Gilmore, *supra* note 14, at 416-17.

177. Housman, *supra* note 17, at 322.

178. *Id.*

179. Jeff Faux, *NAFTA Delusions*, WASH. POST, Sept. 3, 1993, at 25A.

180. Housman, *supra* note 17, at 322.

181. See *supra* part IV.



These treaties include: the Basel Convention, Montreal Protocol, and CITES.<sup>182</sup>

*a. Standards for Transboundary Waste Disposal: The Basel Convention*

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention)<sup>183</sup> was adopted in 1989 as a response to international concerns over the transboundary movement of wastes.<sup>184</sup> The treaty limits waste trade among member nations, prohibits the export of waste to non-member nations, and prohibits the transboundary shipment of wastes without the prior consent of both the importing and exporting nation.<sup>185</sup> Mexico, Canada, Argentina, Brazil, Chile, El Salvador, Panama, and Uruguay have ratified the Basel Convention.<sup>186</sup> Bolivia, Colombia, Ecuador, Guatemala, the United States, and Venezuela have signed, but not ratified, the convention.<sup>187</sup>

*b. Standards for Air Pollution and Consumption of Ozone Depleting Substances: The Montreal Protocol*

The Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol),<sup>188</sup> which was signed in 1987, limits transboundary air pollution.<sup>189</sup> The parties to the Montreal Protocol agreed to establish a \$100 million "financial mechanism" trust fund to wean developing countries away from ozone-depleting chlorofluorocarbons (CFC's) and to promote the development of CFC alternatives.<sup>190</sup> The Montreal Protocol commits each of the parties to completely phase-out consumption of CFC's<sup>191</sup> and Halons<sup>192</sup> by the year 2000. Mexico, Canada, the United States, Argentina, Brazil,

---

182. The list of subjects and treaties are intended to be illustrative, not exhaustive.

183. *Global Convention on the Control of Transboundary Movements of Hazardous Wastes*, U.N. Environment Programme, Agenda Item 3, U.N. Doc. IG.80/3 (1989) *reprinted in* 28 I.L.M. 649 [hereinafter *Basel Convention*].

184. Thomas R. Mounteer, *Codifying Basel Convention Obligations into U.S. Law: The Waste Export Control Act*, 21 ENVTL. L. REP. 10085 (1991).

185. Basel Convention, *supra* note 182, art. 4.

186. LAKSHMAN D. GURUSWAMY ET AL., *INTERNATIONAL ENVIRONMENTAL LAW AND WORLD ORDER: A PROBLEM-ORIENTED CASEBOOK 1290-91* (1993).

187. *Id.*

188. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1550 (*entered into force* Jan. 1, 1989) [hereinafter *Montreal Protocol*].

189. Charles E. Di Leva, *Trends in International Environmental Law: A Field with Increasing Influence*, 21 ENVTL. L. REP. 10076, 10080-81 (1991).

190. *Id.*

191. Montreal Protocol, *supra* note 188, art. 2A.

192. *Id.* art. 2B.

Chile, Costa Rica, Panama, Paraguay, and Venezuela have all signed and ratified the Montreal Protocol.<sup>193</sup>

*c. Limits on the Trade of Endangered Species: CITES*

The 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)<sup>194</sup> is a multilateral environmental agreement signed by more than 100 nations.<sup>195</sup> CITES was adopted to protect threatened species from exploitative trade.<sup>196</sup>

CITES divides various species of flora and fauna into three appendices: (1) species that are threatened with extinction, (2) species that may become threatened with extinction if trade is not limited, and (3) species that a Party identifies as subject to regulation within its jurisdiction and in need of cooperative protection.<sup>197</sup> The treaty strictly regulates trade of species listed in appendix I, permitting trade only in "exceptional circumstances."<sup>198</sup> Species listed in appendices II and III may be exported if the exporting state's scientific authority determines that the export will not be detrimental to the survival of the species, and the state's management authority is satisfied that the specimen will be shipped safely.<sup>199</sup> Export of specimens listed in appendix II also requires that the exporting country's managing authority certify that the specimen was not obtained illegally.<sup>200</sup> Mexico, Canada, the United States, Argentina, Belize, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Paraguay, Peru, Uruguay, and Venezuela have all signed and ratified CITES.<sup>201</sup>

*5. Prospects for Integrating Latin America Under NAFTA Plus*

This approach would appeal to potential accessors because it strikes a delicate balance between sovereignty interests and the need for international environmental norms. While many accessors would need to increase certain environmental standards, each has already committed to at least some of the core requirements. For example, Uruguay has committed to the standards set out in CITES and the

193. GURUSWAMY, *supra* note 186, at 1278.

194. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 993 U.N.T.S. 243, 27 U.S.T. 1087 (*entered into force* July 1, 1975) [hereinafter CITES].

195. Di Leva, *supra* note 189, at 10080.

196. *Id.*

197. CITES, *supra* 194, art. II.

198. *Id.* art. II (1).

199. *Id.* arts. IV, V.

200. *Id.* art. IV (2)(b).

201. GURUSWAMY, *supra* note 186, at 1293.

Basel Convention, but not the Montreal Protocol. Costa Rica has signed and ratified CITES and the Montreal Protocol, but not the Basel Convention. Each accessor must relinquish some sovereignty, but the overall objections are minimized by integrating the agreement with existing norms. The parties have already agreed to much of the bargain.

## VII. CONCLUSION

The question is one of values. Social conditions on trade are nothing new, and environmental interests can hardly be considered wholly divorced from trade concerns. What is really at issue is whether the United States and future accessors to NAFTA consider the environment important enough to be a "deal-breaker." From the Latin American perspective, the critical issue is how much sovereignty Latin American states are willing to surrender to buy a seat at the NAFTA table. In some cases, like Chile, the benefit of NAFTA accession is worth the cost of relatively minor legislative revision. However, poorer countries that face a greater legislative overhaul, may find the price of NAFTA accession to be a bit more costly. Nonetheless, sovereignty issues do not appear to be enough to undercut the entire process, particularly when the nations are already moving toward increased environmental protection. Moreover, sovereignty objections can be minimized by basing accession standards on existing multilateral environmental agreements.

On the U.S. front, both green and economic concerns demonstrate that environmental concessions are clearly related to trade and logical preconditions to NAFTA accession. For the United States, the issue of whether future side agreements are appropriately included in trade documents will come down to values and the ultimate question—What's a redwood worth to Congress?

