THE SIGNIFICANCE OF THE NAFTA SIDE AGREEMENTS ON ENVIRONMENTAL AND LABOUR COOPERATION

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I. INTRODUCTION

A. The North American Free Trade Agreement

The North American Free Trade Agreement[1] (NAFTA) entered into force on January 1, 1994. It superseded the Canada—U.S. Free Trade Agreement[2] (CUFTA) which had been in force since January 1, 1988. Both these agreements fall into the category of free trade agreements. Their function is to provide a degree of economic integration which goes beyond that required by the general regime of international trade relations, the General Agreement on Tariffs and Trade 1947, (GATT) which as of January 1, 1995, has been recast as the GATT 1994 and which is binding on all members of the World Trade Organization (WTO).[3]

The original Canadian and American negotiators of the Free Trade Agreement (FTA)[4] and subsequently their Mexican counterparts embarked upon the FTA and NAFTA negotiations for a variety of different reasons,[5] but there is no doubt that they were all united in their intention to negotiate a free trade agreement and nothing else. There was no disposition in the U.S. Congress to allow any further restriction on American sovereignty, and the history of

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1. *See* North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M 289 (1993) [hereinafter NAFTA].

2. *See generally* Canada-U.S. Free Trade Agreement, Dec. 22-23, 1987 and Jan. 2, 1988, Can.-U.S., 27 I.L.M. 281 (1988) [hereinafter FTA].

3. As of May 1997 there were 130 Members of the WTO.

4. *See* J.R. JOHNSON & J.S. SCHACHTER, THE FREE TRADE AGREEMENT: A COMPREHENSIVE GUIDE 65 (Aurora, Ont: Canada Law Book, 1988).

5. In the case of the United States, the primary motive was to influence the course of the GATT Uruguay round negotiations by demonstrating that matters such as services, investments and intellectual property could be negotiated successfully as well as ensuring greater stability of access to the Canadian and Mexican markets. In Canada's case the primary motive was to ensure access to at least one of the great world markets at a moment when access to major markets was not assured by the GATT and subsequently not to be left out of an arrangement which would have left the United States the center of a series of regional agreements in the Americas. Mexico's primary motive was to ensure that the liberal reforms of the Mexican economy adopted in the 1980's could not be undone by subsequent governments, thus also making the Mexican market more attractive to foreign investors as well as gaining access to the United States market.

economic and political relations with the United States made Mexican and Canadian negotiation of a free trade agreement with their neighbor, a perilous exercise.

B. Degree of Integration Implied by the NAFTA

The GATT 1994 is increasingly seen as a common minimum standard of treatment of goods and services moving in international trade. The initial membership of the WTO was in excess of 120 and it continues to grow, with such remaining giants as Russia and China seeking to enter. Membership in the WTO now requires commitments on services, intellectual property and investments, as well as on goods.[6] The Multilateral Agreement on Investment (MAI), currently under negotiation at the Organization for Economic Security and Development (OECD),[7] may ultimately be transferred to the WTO to assure wider participation.[8] Some argue that the commitments inherent in WTO membership should be given constitutional status in order to assure the continuity of the liberal trading order.[9] The GATT has always been characterized by the commitment to remove barriers to trade at the border (negative integration). With the adoption of the GATT 1994, there has been a perceptible shift towards more measures taken by domestic regulatory systems (positive integration), particularly with respect to services.

C. The Separation of Economic Values From Other Values Under the GATT

Traditionally, it has been difficult to reconcile the values of trade as embodied in the GATT, with other social and economic values such as those pertaining to the protection of the environment and protection of labor standards. For its first thirty years the GATT was understood to be essentially an international trading arrangement within which countries negotiated their trading

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6. *See generally* C. GAZ., Part I (December 31, 1994).

7. *See* Multilateral Agreement on Investment: Consolidated Text and Commentary, Negotiating Group on the MAI, Directorate for Financial, Fiscal and Enterprise Affairs, Org. for Econ. Cooperation and Dev., OECD Doc. DAFFE/MAI(97)1/REV2 (May 14, 1997).

8. This may be necessary to achieve global acceptance in light of the OECD's limited membership, composed mainly of developed European countries.

9. *See* ERNST U. PETERSMANN, CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW (1991); Ernst U. Petersmann, *Constitutionalism and International Organizations*, 17 NW. J. INT'L. L. & BUS. 399 (1997).

relationships. Every effort was made by the trade community represented in GATT negotiations to separate trade values from other considerations. During the 1980's and throughout the present decade, it has become increasingly difficult to make this separation. As the GATT extended its ambit into services, intellectual property, and investment questions, this attempt to separate trade and other values has become virtually impossible to maintain.[10] However, the search for a new equilibrium has been extremely difficult. A Committee on Trade and the Environment was revived two years prior to the adoption of the GATT 1994 and has been maintained as a permanent committee of the WTO subsequently. Considerable work has been done by that Committee but few results have yet been achieved.[11]

D. Free Trade Agreements: Essential Characteristics—Reconciliation of Values of a Non-Economic Character

The current decade has been characterized by a great increase in the number and importance of regional free trade agreements. The essential characteristic of the modern free trade agreement, such as the NAFTA,[12] the ASEAN,[13] the European Free Trade Agreement (EFTA),[14] or the Central European Free Trade Agreement (CEFTA),[15] is to increase the degree of economic integration existing among the states of a region. The fundamental premises of regional free trade agreements are deemed to be compatible with those of the GATT in that they adopt the same techniques of trade liberalization, especially the elimination of tariffs, the removal of non-tariff barriers, and the opening-up of markets to services.[16] The only test established by the GATT is that the free trade agreement must be "trade creative" rather than "trade

10. Evidence of such is to be found in no less than seven recent GATT/WTO dispute settlement panel reports dealing with trade in environmental issues. *See* E.U. PETERSMANN, THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS AND DISPUTE SETTLEMENT 92-134 (1997).

11. *See* Thomas J. Schoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconcialiation*, 91 AM. J. INT'L. L. 268 (1997).

12. *See generally* NAFTA, *supra* note 1.

13. *See* Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (AFTA), Jan. 28, 1992, 31 I.L.M. 513 (1992); Framework Agreement on Enhancing ASEAN Economic Cooperation, Jan. 28, 1992, 31 I.L.M. 506 (1992).

14. *See generally* Convention Establishing the European Free Trade Association, Jan. 4, 1960, 370 U.N.T.S. 3 [hereinafter EFTA].

15. *See generally* Central European Free Trade Agreement, Dec. 21, 1992, 34 I.L.M. 3 (1995) [hereinafter CEFTA].

16. *See* NAFTA, *supra* note 1, art. 103.

restrictive."[17] Otherwise, the legal principles governing a free trade agreement and the techniques of their drafting and implementation are generally very close to those of the GATT. This raises the question of whether it is easier to reconcile trade values with other values under a free trade arrangement than under the GATT. Is it possible to make a greater provision for the impact of free trade on the environment or the impact of free trade on labor standards in a regional trading agreement between member states sharing the same continent and sharing many common values? This is the central question posed by this paper. To what extent does the existence of the NAFTA facilitate the reconciliation of trade, environmental, and labor values in a manner which appears so far to have escaped the members of the World Trade Organization?

E. Supranationalism and the Potential for the Reconciliation of Conflicting Values

In addition to the goals of economic liberalization and integration, the third level of economic integration characteristic of the present era is the European Community (E.C.). First constituted by the Treaty of Rome in 1957,[18] and now by the Treaty of European Union of 1992 (hereinafter the Treaty),[19] the European Community pursues the same goals of economic liberalization and integration as the GATT and regional free trade agreements. However, the means of achieving these goals reflect a difference not simply of degree but also of kind.[20] The E.C. is based on respect for supranational rules which play a quasi-constitutional role vis-à-vis the Member States.[21] European Community law, including the Treaty, is deemed to be superior law to the domestic law of Member States and must be given precedence over domestic law. European Community law is maintained by the legislative and judicial institutions which also play a role which is superior to domestic legislative institutions. The E.C. is also served by a Commission whose function is to defend the interests of the Community and the values of economic integration enshrined in Community law. The Commission is entirely independent of the Member States. European Community law has been developed over the years by formal treaty amendment which has embraced an

17. General Agreement on Tariffs and Trade, ch. XXIV, art. 6., Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194.

18. *See* Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11.

19. *See* Treaty Establishing The European Community, Feb. 7, 1992, O.J. (C 224) 1 (1992), 31 I.L.M. 247.

20. By granting a "freedom" of circulation of goods, services, persons and capital. *See generally* CEFTA, *supra* note 15.

21. *See* Costa Flaminio v. ENEL, [1964] ECR 585; Van Gend & Loos N.V. v. Inspecteur Invoerrechten en Accijnzen, [1985] ECR 779.

increasingly broad set of values and greatly increased the legislative competence of the Community. Community law has also grown interstitially by virtue of the action of the Community legislator and incrementally by virtue of interpretation of Community law by the European Court of Justice. Community law has thus been able, both formally and incrementally, to take into account and to seek to reconcile in a much more overt and conscious fashion a range of political and social values with those of trade integration. The Community has demonstrated a capacity to reconcile conflicting values and to give itself many different objectives, including respect not simply for the free movement of goods, services, persons and capital, but also respect for the environment and for the fundamental human rights of individuals. Arguably, this has been rendered possible by the existence of supranational rules and institutions. The question for the NAFTA over the long term may well be whether a shift towards supranational rules and institutions will make possible the same flexibility of reconciliation of conflicting values.

F. Federalism

In contemplating the different models of international economic integration that currently exist, it is useful to compare them with the long-standing model of federalism. Many of the concerns of federalism relating to economic integration are shared with the other models of integration, but clearly the federal model is by far the most flexible. The federal model also allows the greatest degree of integration of potentially conflicting values and the reconciliation of the interests of those groups who appear to be winning and losing by virtue of the choices which are made by governing authorities. The radical difference between federalism and the other models, including the supranational one, is that federalism creates a single state as well as an economic and monetary union. The strong addition of the political dimension is helpful to the reconciliation of the different values in that this occurs within the framework of a common state whose population share roughly compatible values.

G. Adoption of the Side Agreements

The North American Agreement on Environmental Cooperation[22] (NAEEC) resulted from the opinions expressed by the environmental community in the United States during the course of the 1992 presidential election

22. *See* North American Agreement on Environmental Cooperation, Sept. 14, 1993, U.S.-Can.-Mex., 32 I.L.M. 1480 [hereinafter NAAEC].

campaign.[23] The environmental community, led by major environmental groups in the United States and to a lesser extent in Canada, was concerned that the NAFTA, as drafted under the aegis of Presidents Bush, Salinas, and Prime Minister Mulroney, did not sufficiently respect the values represented by the preservation of the environment of North America.[24] Many expressed fears that the North American environment would be subject to ever-increasing pressure resulting from an increasingly competitive economic climate where primacy would always be given to the imperatives of trade and economic development without a concomitant respect for the preservation of the environment.[25] United States Presidential Candidate Bill Clinton promised the environmental community that he would not approve the NAFTA unless these environmental concerns were met.[26] Clinton also made similar promises to the labor community which opposed the adoption of the NAFTA because of its concerns with respect to labor standards.[27]

Following his election, President Clinton called for a review of the NAFTA and then authorized his trade negotiator, Micky Kantor, to enter into negotiations with both Canada and Mexico in order to alleviate the concerns of the environmental and labor communities.[28] Both Canada and Mexico refused to reopen the NAFTA so it was necessary to formally negotiate separate agreements.[29] The NAEEC resulted from a strong political need by a major interest group in the United States. If one analyzes the demands of environmentalists made to President Clinton during the course of the election campaign, one finds that, in substance, many of those calling for action to protect the environment were, in fact, calling for the establishment of supranational rules and institutions. But the solution developed by Ambassador Kantor and his Mexican and Canadian governments falls far short of any kind of supranationality. This constitutes a significant indication as to the nature of the NAFTA and the nature of the NAAEC itself. This in turn leads to reflection upon

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23. *See* P.M. JOHNSON & A. BEAULIEU, THE ENVIRONMENT AND NAFTA: UNDERSTANDING AND IMPLEMENTING THE NEW CONTINENTAL LAW 32 (1996).

24. *See id.* at 30.

25. *See id.*at 26.

26. *See id.*at 30-1.

27. *See id.*

28. *See id.* at 32.

29. *See id.* at 30. It should be noted that while NAFTA was formally adopted under the negotiating authority to conclude trade agreements under the "fast track procedure," the environment and the labour side agreements are the result of the exercise of the presidential capacity to negotiate executive agreements. This distinction is not made in either Canada or Mexico with respect to the agreements. It has potential consequences with respect to the constitutional basis of the NAFTA and the side agreements. *See* Bruce Ackerman & David Golove, *Is NAFTA Constitutional*, 108 HARV. L. REV. 799 (1995).

the potential for action to protect the environment and other non-trade values within the context of a free trade agreement such as the NAFTA.

II. THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION

The North American Agreement on Environmental Cooperation (NAAEC) is both ambitious and modest in its objectives. The agreement is ambitious because the Parties commit themselves to maintaining high levels of environmental protection[30] and agree to allow challenges by private groups in cases where the legislation was not enforced adequately.[31] The agreement is modest because the commitment to common solutions to shared continental problems is weak and because the dispute settlement procedures are restricted to a fairly narrow range of issues.

The essential obligations of the Parties are to maintain high levels of environmental protection, to ensure effective enforcement of these laws, and to provide appropriate private remedies through equitable and open procedures.[32] These articles are partially reinforced by the dispute settlement procedures of Part V of the NAAEC. The reinforcement is only partial because the commitment to submit to compulsory dispute settlement, on the model of the general provisions of the NAFTA Chapter 20, arises only with respect to an allegation of a "persistent failure" to "effectively enforce its environmental laws."[33] Furthermore, this persistent failure must relate to a situation concerning the production of goods or services which are traded between the Parties or which compete in the territory of the Party subject to the complaint with goods and services of the complainant.[34] A special roster is maintained of individuals willing to serve as panelists.[35] The panelists must have knowledge of environmental law or other relevant knowledge. The panel process procedure is similar to the procedure established in NAFTA Chapter 20. After the panel report is submitted to the NAAEC Council, the Parties "may agree on a mutually satisfactory action plan, which normally shall conform to the determinations and recommendations of the panel."[36] Should this not happen or should there be a complaint that the losing Party is not implementing the action plan, the panel can be reconvened and

30. *See* NAAEC, *supra* note 22, art. 3.
31. *See id.* art. 6.
32. *See id.* arts 3, 5, 6, 7.
33. *Id.* art. 22.
34. *See id.* art. 24.
35. *See id.* art. 25.
36. *See id.* art. 33.

can reconfirm the plan and impose a monetary penalty for non-compliance.[37] If one Party fails to pay this penalty, the complaining Party may suspend equivalent benefits.[38] Canada, which had objected to the introduction of trade sanctions into the NAAEC, committed itself to requiring that the monetary penalty could be collected by an action before the Federal Court of Canada.[39] It must also be noted, the obligations of the NAAEC only arise against those Canadian Provinces which agree to be bound.[40]

The most innovative aspect of the NAAEC is found in its institutional arrangements. The basic system parallels the NAFTA because the Agreement is supervised by a Commission for Environmental Cooperation composed of a Council and a Secretariat.[41] The Council, which is composed of cabinet level representatives, in Canada's case the Federal Minister of the Environment, is charged with the oversight of the Agreement and the Secretariat and the development of recommendations concerning a very wide range of environmental problems common to the Parties.[42] The Council is also expected to encourage effective enforcement of environmental laws and cooperation between the Parties. Additional responsibilities of the Council are to improve cooperation, to develop recommendations with respect to projects having significant transboundary effects, and to maintain close links with non-governmental organizations.[43]

The Secretariat is headed by an Executive Director who appoints the staff, made up of environmental and legal experts, prepares the work program and directs its activities.[44] The Secretariat is required to abide by the instructions of the Council and is prohibited from seeking or receiving instructions from any government authority external to the Council, although this does not preclude maintaining relations with various NAFTA bodies. The Secretariat is a more autonomous institution than the NAFTA Secretariat, as illustrated by Articles 13 and 14 of the NAAEC.[45] Article 13 empowers the Secretariat to undertake studies either at the behest of the Council or on its own initiative ". . . on any matter within the scope of the annual program." These studies are submitted to the Council. Article 14 is the core provision of the NAAEC because it empowers the Secretariat to receive submissions from non-governmental organizations or persons which assert that a Party ". . . is failing to effectively enforce its environmental laws." This authority has the potential of eventually leading to a

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37. *See id.* art. 34:4.
38. *See id.* art. 36.
39. *See id.* art. 36A.
40. *See id.* at Annex 41.
41. *See generall, id.* Part III.
42. *See id.*
43. *See id.* art. 10.
44. The Secretariat is located in Canada.
45. The Secretariat has no such mandate. *See* NAFTA, *supra* note 1, at ch. 20.

dispute,[46] but it is designed in a much more positive spirit. It is really designed to gather information on environmental problems of common concern to the Parties, with a view to understanding and resolving them. The Secretariat exercises discretion, within the guidelines of Article 14, as to the propriety of responding to a submission and must advise the petitioner of its decision within thirty days. When the Secretariat agrees to act on the submission it must first seek a response from the Party in question. If the Secretariat considers that the submission warrants further study, after receiving the response of the Party, it may then proceed to prepare a factual record on the basis of information received from the Party, interested non-governmental bodies, independent experts or its Joint Public Advisory Committee.[47] The factual record must be presented to the Council, which may make it public or remit it to the Joint Public Advisory Committee.[48]

The Secretariat chose to use its powers cautiously during the first years of its existence, but it has acted under both Articles 13 and 14 on a number of occasions. The first public act of the Secretariat was a study, including a much publicized visit to the site in 1995, of an incident involving the sudden death of twenty thousand water birds in a Mexican reservoir.[49] The Secretariat has received a number of submissions[50] and has prepared factual records in several cases.[51] The first two submissions involved legislative changes in the United States. The first case limited the capacity of the Federal environmental and forestry officials to act by cutting their budget.[52] The second case restricted private rights of action.[53] In both cases, the Secretariat concluded that it was not dealing with a failure to enforce environmental laws on the ground that the application of a new legal regime could not be characterized as a failure to

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46. *See id.* arts. 22-36.

47. *See id.* art. 15.

48. *See id.*

49. *See* Commission for Environmental Cooperation, *Three Nations Working Together to Protect the Environment* (visited Feb. 2, 1998) <http://www.cec.org>.

50. The presentation of submissions is governed by Procedures issued in 1995 after extensive consultations with the Parties.

51. As of June 1996: *Biodiversity Legal Foundation et al.*, Case No. SEM-95-001, (June 30, 1995) (on file with the Environmental Secretariat and available at <http://www.cec.org/> under Citizen Submissions-Article 14, Registry Of Submissions); *Sierra Club et al.*, Case No. SEM-95-002, (Aug. 30, 1995) (on file with the Environmental Secretariat and available at <http://www.cec.org/> under Citizen Submissions--Article 14, Registry Of Submissions); *Comite para la Proteccion de los Recursos Naturales, A.C. et al.*, Case No. SEM-96-001, (Jan. 17, 1996) (on file with the Environmental Secretariat and available at <http://www.cec.org/> under Citizen Submissions-Article 14, Registry Of Submissions); *Mr. Aage Tottrup, P.Eng*, Case No. SEM-96-002, (Mar. 20, 1996) (on file with the Environmental Secretariat and available at <http://www.cec.org/> under Citizen Submissions-Article 14, Registry Of Submissions);

52. *See Biodiversity Legal Foundation et al., supra* note 51.

53. *See Sierra Club et al., supra* note 51.

enforce the old, more generous, regime. The third submission encountered greater success. It involved allegations that Mexican authorities had failed to enforce existing environmental legislation by allowing the construction of a major new harbour terminal in Cozumel which threatened the local coral reefs.[54] The Secretariat took up this complaint and prepared a factual record confirming the concerns of the submission.[55]

Subsequent complaints have dealt with the construction of the Old Man River dam in the Province of Alberta and allegations that the Government in the Province of Québec is authorizing the establishment of large pig farms without adequate environmental protections.[56]

The complaint process can be seen as both something of a novelty and something of a success. The Commission has been extremely prudent, some would say too prudent, in its approach to responding to complaints and to conducting inquiries into complaints. However, those complaints which the Commission has followed up have resulted in solid and interesting analysis of the environmental problem and its causes. These reports have been the source of some embarrassment of the governments involved and have allowed members of the public to highlight issues of concern to them and to put pressure upon their governments in a way not otherwise open to them under domestic law. The originality of the process is that it provides an international forum which is directed to the implementation of domestic law. Because in many cases it is the implementation of domestic law as much as any trans-boundary impact which is the issue of fundamental concern, this would indicate that the complaint process is in fact fulfilling a useful role.

The Commission has been very discreet in the number of studies which it has undertaken independently. However, the same thing that has been said above with respect to the complaint process is equally true with respect to the reporting function. Both procedures provide the Commission with a small but nevertheless clear measure of autonomy as an independent and international body. Both procedures also allow the Commission to put the spotlight upon governmental action in a way which requires reflection upon the need to protect the environment of North America as a whole. Thus, the Commission has potential to focus attention upon the North American environment as a totality and to home in on individual problems which may well reflect issues of wider social and political concern.

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54. *See Comite para la Proteccion de los Recursos Naturales, A.C. et al, supra* note 51.

55. *See generally* P.M. JOHNSON & A. BEAULIEU, *supra* note 22.

56. *See Centre québécois du droit de l'environnement (CQDE)*, Case No. SEM-97-003, (Mar. 20, 1996) (on file with the Environmental Secretariat and available at <http://www.cec.org/> under Citizen Submissions-Article 14, Registry Of Submissions).

III. THE NORTH AMERICAN AGREEMENT ON LABOR COOPERATION

The North American Agreement on Labor Cooperation[57] (NAALC) is also of interest in this context. It is drafted in a similar manner as the NAAEC. The Parties maintain their right to adopt domestic labor standards, but commit themselves to ensuring that their laws and regulations "provide for high labor standards."[58] They are also committed to effective enforcement, private remedies, and procedural guarantees of these standards.[59] Dispute settlement through the NAALC is also based on the NAFTA model. However, like the NAACE, the NAALC is restricted in scope and is subject to even more procedural hurdles.

Like the NAACE, the most original aspects of the NAALC are found in the administrative structures and powers of the Commission. The Commission for Labor Cooperation is composed of a Council, made up of cabinet level representatives, which oversees the Agreement, and of a Secretariat, led by an Executive Director.[60] The Secretariat may prepare studies for which it is responsible to the Council. A major difference from the NAACE is that each Party must establish a National Advisory Office (NAO) at the federal level.[61] The NAO is the focal point for questions or complaints which may be received concerning the application of labor standards in the territory of another Party. As such, it serves as the first stage of the complaints and dispute settlement process, but it is also empowered to take up the study of a broader range of issues than those susceptible to formal dispute settlement. Article 21 states that the NAO may request "consultations" with the other NAO's "in relation to the other Party's labor law."[62] The United States chose to grant its NAO investigative powers including the authority to receive complaints and hold public hearings with all concerned groups, including nationals of another Party.[63] The Agreement also provides for the creation of an Evaluation Committee of Experts,[64] a second institution not found in the NAACE. The basic function of these committees is to

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57. *See generally* North American Agreement on Labor Cooperation, Sept. 14, 1993, 32 I.L.M. 1499 [hereinafter NAALC].

58. *Id.* art. 2.

59. *See id.* pt. II.

60. The Secretariat is located in the United States.

61. *See* NAALC, *supra* note 57, art. 15.

62. *Id.* art 21.

63. *See* U.S. Department of Labor, Revised Notice of Establishment of U.S. National Administrative Office and Procedural Guidelines, 59 Fed. Reg. 16660 (1994). As of September 1996, Canada and Mexico had chosen not to adopt a process of public hearing and maintained NAO's in their respective Departments of Labor.

64 *See* NAALC, *supra* note 57, art. 23.

take up issues at the behest of the Council when they are not resolved by the NAO.[65]

Dispute settlement under the NAALC is both similar and more complex than under the NAACE. The NAALC is similar, in that disputes must focus on the allegation that there has been a persistent failure by a Party to enforce its own labor standards in relation to three categories: occupational safety and health, child labor, and minimum wage standards.[66] The NAALC is different because a matter must first be raised before a NAO, and subsequently before an Evaluation Committee of Experts, before a Party can initiate consultations leading to the constitution of an Arbitral Panel to study the dispute. The panel is formed from a roster of persons having specialized knowledge of labor issues.[67] The dispute shall normally be resolved by the adoption and implementation of an action plan by the Party declared in violation of the Agreement.[68] In the event of refusal, the consequences are similar to those of the NAACE.

The capacity of the NAALC to respond to the concerns raised by labor unions and the general public with respect to employment and labor standards is even more questionable than that of the NAACE for environmental issues. However, the agreement has already begun to produce certain results. First, the Ministers of Labor meet at least once a year and have taken up a number of thorny issues.[69] Second, the procedures of the U.S. NAO[70] have put the insufficiencies of Mexican labor law and its interpretation by Mexican authorities into dramatic focus in several cases. The first two complaints were made to the U.S. NAO on February 14, 1994 by the United Brotherhood of Teamsters and the United Electrical, Radio and Machine Workers Union.[71] They claimed that General Electric Company and Honeywell Incorporated violated Mexican labor laws and workers rights in the firings of some one hundred workers. Both complaints resulted from specific labor conflicts where the unions believed that there had been a denial of the right of free association. The companies argued that the NAO had no authority to sit in judgment in such cases, that the NAO could not act as an appellate body from Mexican governmental decisions. The

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65. *See id.*

66. *See id.* art. 27.

67. *See id.* art. 30.

68. *See id.* art. 38.

69. *See id.* art. 9.

70. *See generally* U.S. Department of Labor, Notice of Hearing on Submissions 940001 and 940002, 59 Fed. Reg. 38492 (1994); Notice of Hearing on Submission 940003, 59 Fed. Reg. 52992 (1994); Notice of Submission 940004, 59 Fed. Reg. 54094 (1995). *See generally* R. Herstein, *The Labour Cooperation Agreement among Mexico, Canada and the United States: Its Negotiation and Prospects*, 3 U.S.-MEX. L.J. 121 (1995).

71. *See generally* U.S. Department of Labor, Notice of Hearing on Submissions 940001 and 940002, 59 Fed. Reg. 38492 (1994).

companies further stressed that the role of the NAO was to establish facts concerning the enforcement of Mexican law. The NAO found no failure to respect freedom of association in both cases because the workers had accepted offers of compensation which, in law, precluded their right to pursue the lengthy and complex reinstatement procedures. These reports were criticized for ignoring the systemic difficulties under which Mexican workers labor and for ignoring the fact that the Mexican Government exercises wide discretionary powers and is able to control most unions. However, the reports did establish that NAO consultations could cover a wide range of labor matters and helped establish the parameters for what is a rare occurrence, the administrative organ of one state inquiring into very specific events of another state.

The third complaint was filed with the NAO in August 1994.[72] It alleged that there had been a persistent failure to enforce Mexican labor laws in a situation involving a Sony subsidiary, Magneticos de Mexico, by restricting union activities of workers and forcing workers to work longer hours than allowed by the law. The NAO declined to consider the work hours issue on the grounds that local remedies had not been pursued. However, in this case, the NAO did not decide that the fact that most workers had signed releases and had accepted compensation precluded it from inquiring into whether the dismissals prevented the registration of an independent union. The NAO consulted with its Mexican counterpart and held a public hearing resulting in a NAO report finding that: ". . . it appears plausible that the workers' discharges occurred for the causes alleged, namely for participation in union organizing activities."[73] The NAO recommended ministerial consultations, which were subsequently held in April 1995. The ministerial consultations resulted in the establishment of a work program for each country to improve procedures for union certification and the constitution of a commission of independent experts to study union registration. This time the ministerial process has been the object of criticism since it did nothing specific to reinstate the workers or ensure registration of their independent union. In the ensuing months the workers were subject to continued opposition from the company and their second attempt at registration of an independent union was also frustrated.

Subsequent complaints have focused upon the operation of a spring telecommunications plant in Los Angeles and an industrial plant in Sonoma, Mexico.[74] Both these complaints are still pending.[75]

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72. *See generally* U.S. Department of Labor, Notice of Hearing on Submission 940003, 59 Fed. Reg. 52992 (1994).

73. U.S. National Administrative Office, Public Report of Review, NAO Submission 940003, at 27 (U.S. Department of Labor, April 11, 1995).

74. *See generally* Mexican NAO "Submission 9501" (Sprint); U.S. NAO "Submission 9601" (SEMARNAP); U.S. NAO "Submission 9602" (Maxi-Switch).

In summary, it is unlikely that the NAALC will provoke rapid change in the situation of Mexican workers. Indeed there is cause for pessimism. But there can be little doubt that the NAO process is a source of embarrassment to the Mexican Government and assists those seeking a just labor relations climate and a more open and democratic political process in that country. As the process of the democratization of Mexico continues, it can be expected that the NAALC will continue to provide a vehicle for those who seek to promote the emergence of a more open society in that country. As such, the NAALC plays an important role. Arguably, one of the reasons for its success is that it permits complaints against domestic action, but in a forum in another country from whose scrutiny it is difficult to hide. Arguably, the NAALC should be seen as a modest success with considerable potential to promote social change.

IV. EXTENSION OF THE NAFTA MODEL TO THE CANADA—CHILE TRADE AGREEMENT

It should be noted that the governments of Chile and Canada have completed a bilateral free trade agreement which both expect ultimately to become part of the NAFTA.[76] This agreement is accompanied by two additional side agreements dealing with labor and environmental cooperation.[77] These agreements were completed some three weeks after the bilateral free trade agreement at the end of 1996. It is reported that the government of Chile was not enthusiastic about the conclusion of such agreements but that the Canadian Government insisted that Chile could not seek to be a party to the NAFTA without submitting to the same kinds of discipline on environmental and labor

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75. A further complaint, the formal notice of which is scheduled to be published in the Federal Register on July 17, 1997, alleges systematic discrimination against female employees in the maquiladora region by employers compelling women to state their pregnancy status. *See* I.L.A.B., *Press Release, Labor Department to Review Employment Discrimination in Mexico* (visited 07/15/97) <http://www.dol.gov./dol/opa/public/media/press/ilab/ila97238.htm>.

76. *See Canada-Chile Free Trade Agreement* (visited Feb.2, 1997) <http://www.dfait-maeci.gc.ca/english/gov/lac/cda-chili/menu.htm>; DFAIT/MAECI, *Press Release, Canada and Chili Sign Free Trade Agreement,* Nov. 18, 1996, No. 211 (visited Feb. 2, 1997) <http://www.dfait-maeci.gc.ca/english/gov/lac/cda-chili/menu.htm>; Canadian implementing legislation received royal assent on April 25, 199. *See* Canada-Chile Free Trade Agreement Implementation Act, *assented to* April 25, 1997, *entered into force* July 5, 1997, ch. 14; DFAIT/MAECI, *Press Release, Canada-Chile Free Trade Agreement to be Implemented July 5,* July 4, 1997, No. 113 <http://www.dfait-maeci.gc.ca/english/gov/lac/cda-chili/menu.htm>.

77. Both side accords are available with the main agreement at DFAIT's web site: <http://www.dfait-maeci.gc.ca/english/gov/lac/cda-chili/menu.htm>.

cooperation as was the case for the other NAFTA Parties. Whether the existence of these two side-agreements with Chile will be a help or hindrance to Chile's accession to the NAFTA has yet to be determined.

V. CONCLUSIONS

A. The Potential of the NAALC and the NAAEC

The question asked at the inception of this paper was why the side agreements did not emerge as supranational agreements with the clear advantages of more dynamic development enforcement made available by this format? The answer lies in the nature of the free trade agreement format itself. A free trade agreement is essentially grounded in the law and the structure of the World Trade Organization and the GATT 1994. This structure is premised upon the sovereignty of states and is essentially an intergovernmental relationship. At this level of economic integration, governments certainly intend to reduce barriers to trade, but in the final analysis they wish to retain a very considerable measure of discretion. This being so, it would have been impossible to adopt side agreements on environmental and labor cooperation based on principles of supranationality and grounded in supranational institutions. The very structure and nature of the NAFTA itself militated against this ever happening and there clearly was no political will to let it happen. The real question is whether the free trade agreement format permits states to move forward and take concrete steps for the protection of the environment and labor standards and the reconciliation of these values with the values of international trade in a more complete way than the GATT. The answer, although submitted as affirmative, is very much tempered by prudence and discretion. Clearly, the free trade agreement format seriously restricts the capacity of states to reconcile the values of trade with those of the protection of the environment and labor standards. However, the free trade agreement format does allow for the modest steps forward that have been described above and, should the states be willing to allow these procedures to be fully utilized, there is little doubt that they can make a positive, albeit modest contribution.

The side agreements certainly do not represent new forms of government comparable to the law and the institutions of the E.C. However, the autonomy given to the Secretariat of the Commission on Environmental Cooperation and the mandate which can be given to the National Administrative Offices of the Commission on Labor Cooperation constitute valuable experiments in the development of new international institutions. As such, it is suggested that environmentalists and the labor movement would do well not to reject them out of hand but rather to seek to use them to their maximum capacity.

B. The Side Agreements and the Enlargement of the NAFTA

One possible future for the NAFTA is the expansion of the number of NAFTA members. All NAFTA parties expressed willingness to contemplate a free trade zone for all of North and South America at the December 1994 Miami Summit of the Americas.[78] Subsequently, the Canadian and the U.S. Governments declared themselves willing to contemplate extension of the NAFTA to Chile. However, the denial of fast track negotiating authority by the U.S. Congress in 1995 and 1996 precluded this at least until after the November 1996 elections. This left Canada to continue bilateral negotiations with Chile for a separate agreement, including environmental and labor questions, designed to be compatible with the NAFTA. Formally, adhesion of a new NAFTA Party requires the consent of all the existing Parties, and would have to include the specific terms of entry. Canada and Mexico have taken the position that Chile must adhere both to the NAFTA and to the side agreements.[79]

Expansion of the NAFTA seemed to be a logical step in 1995, but the political climate changed rapidly in the United States and, to a lesser extent, in Canada and Mexico. Now, unless the U.S. Congress changes its approach, the emergence of a patchwork of bilateral agreements or of loose understandings between North and South American trading blocs seems the more probable outcome for the rest of the decade. However, the environmental and labor dimensions appear likely to remain despite Congressional opposition in the United States and administrative opposition in Mexico.

C. The Side Agreements and the Deepening of NAFTA

Another possible future for the NAFTA may be the deepening or expansion of its substantive rules. This has already happened with respect to customs procedures. Agreements were reached to facilitate customs procedures through joint consultations, and with respect to tariff cuts where unilateral tariff reductions were made in some areas at the behest of industrial groups. The numerous joint committees established by the NAFTA also have the potential for development and renewal of the NAFTA in such areas as standards. This was the purpose of their creation, since the format of a free trade area did not permit the establishment of a common supranational organization. The role for the Secretariats of the NAFTA and of the side agreements could be expanded if the

78. *See* Minutes of the Summit of Americas Meetings, (visited Feb. 2, 1998) <http://www.eia.doe.gov/summit/mint.html>.

79. This raises legal as well as political difficulties in the United States, since the NAFTA was concluded under the "fast track" trade agreement process and the side agreements are ordinary executive agreements. *See* EFTA, *supra* note 14.

Parties so desire, but there appears to be no disposition to do this. Currently, it appears that parts of the NAFTA most likely to develop relate to services and government procurement. In the latter case, states and provinces were required to make their own commitments two years after 1994.[80] In addition, it is clear from the chapters on services, further negotiations are required to deepen and complete the original commitments. Further negotiations between the Parties are to be expected on a range of services, beginning with professional services, financial services, and telecommunications.[81]

Will this process of deepening be assisted by the existence of the side agreements? Politically, these agreements have assisted the U.S. administration to justify the NAFTA and to maintain support for it. Arguably, they continue to play this role and perception of the failure of the side agreements to produce tangible results will lead to further erosion of the political support for the NAFTA.

The process of development and change will probably be slow, but it is clear the NAFTA and the side agreements are not static documents. They are difficult to change, since formal change to these complex texts requires unanimous consent of all the Parties, but it can be expected that the pressures for change will overcome the many difficulties which lie ahead.

D. Expansion of the Side Agreements

Expansion of the side agreements should not be ruled out as an option. The side agreements contain the seeds of future growth—as normative instruments and as institutions. The agreements represent an attempt to press a free trade agreement structure to the limit. They reflect the fact of ever-increasing economic integration between the three North American countries and the consequent need to reconcile the values represented by trade with those of environmental protection and maintenance of high labor standards.

80. This had not yet been done at time of publication in 1997.
81. *See* NAFTA, *supra* note 1, chs. 12-14.