

THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL PROTECTION AND THE ARCTIC COUNCIL AGREEMENT: WILL THESE MULTINATIONAL AGREEMENTS ADEQUATELY PROTECT THE ENVIRONMENT?

RICHARD J. ANSSON, JR.*

I. INTRODUCTION

States usually form multinational legal regimes to solve common problems and disputes. Regimes are social institutions composed of States voluntarily agreeing to certain principles, norms, rules, and decision-making powers that govern the States in those agreed-upon areas.¹ Recently, the United States entered into two multinational environmental legal regimes² to remedy the problem of transboundary environmental degradation.³ These re-

* Adjunct Professor of Law, University of Missouri-Kansas City School of Law. LL.M., 1998, University of Missouri-Kansas City School of Law; J.D., 1997, University of Oklahoma Law Center; B.A., 1994, University of Oklahoma. The author thanks Tricia Elizabeth Ansson for her help in the preparation of this article.

1. See GAIL OSHERENKO & ORAN R. YOUNG, *The Formation of International Regimes: Hypotheses and Cases*, in POLAR POLITICS: CREATING INTERNATIONAL ENVIRONMENTAL REGIMES 1, 1-2 (1993) [hereinafter OSHERENKO & YOUNG I]. Multinational legal regimes have been formed by states to address numerous issues. The river commissions in Europe were the first examples of multinational legal regimes. ROBERT E. RIGGS & JACK C. PLATO, *THE UNITED NATIONS—INTERNATIONAL ORGANIZATION AND WORLD POLITICS* 3 (2d ed. 1994). For instance, “the Central Rhine commission was created in 1804 by an agreement between France and Germany; it provided for extensive regulation of river traffic, the maintenance of navigation facilities, and the hearing and adjudication of complaints for alleged violations of the Commission’s rules.” *Id.* Interestingly enough, this commission functions today much as it did in 1804. *Id.* Since then, however, numerous states have voluntarily entered into agreements on a variety of issues including, but not limited to, military issues, trade alliance issues, intellectual property issues, and environmental issues.

2. See, e.g., Senator Lloyd Bensten, *Review of U.S.-Mexico Environmental Issues*, CURRENTS: INT’L TRADE L.J., Winter 1991, at 5; Donald R. Rothwell, *International Law and the Protection of the Arctic Environment*, 44 INT’L & COMP. L.Q. 280, 280 (1995) [hereinafter Rothwell I].

3. Transboundary environmental degradation occurs when pollution from one state degrades the environment of a neighboring state. For instance, if a Mexican industrial coal plant

gimes are the Environmental Side Agreement,⁴ created by the North American Free Trade Agreement (NAFTA),⁵ and the Arctic Council Agreement.⁶

The United States advocated NAFTA's Environmental Side Agreement, a trilateral agreement between the United States, Mexico, and Canada, in response to fears that increased trade along the United States-Mexican border under NAFTA would exacerbate preexisting pollution problems in the southwestern United States.⁷ NAFTA's Side Agreement created the Commission for Environmental Cooperation and charged it with resolving environmental degradation claims through a dispute mechanism process.⁸ Under this process, the Commission first may hear disputes advanced by a citizen or non-governmental organization,⁹ and second, may hear claims com-

located near the United States-Mexican border has polluted the air, and that pollution effects territory within the United States, then transboundary environmental degradation has occurred.

4. North American Agreement on Environmental Cooperation, Sept. 8-14, 1993, Can.-Mex.-U.S., 32 I.L.M. 1480 [hereinafter Environmental Side Agreement].

5. North American Free Trade Agreement, Dec. 8-17, 1992, Can.-Mex.-U.S., 19 U.S.C.A. §§ 3301-3473, 32 I.L.M. 289 (entered into force Jan. 1, 1993); see also North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993). NAFTA, as enacted, creates a barrier-free trade zone among the nations of Canada, the United States, and Mexico.

6. Joint Communiqué and Declaration on the Establishment of the Arctic Council, Sept. 19, 1996, Can.-Den.-Fin.-Ice.-Nor.-Russ.Fed.-Swed.-U.S., 35 I.L.M. 1382 [hereinafter Arctic Council Agreement]. For previous Arctic multinational agreements, see Arctic Environmental Protection Strategy, June 14, 1991, Can.-Den.-Fin.-Ice.-Nor.-Swed.-U.S.S.R.-U.S., 30 I.L.M. 1624 [hereinafter Arctic Environmental Agreement]; Agreement on the Conservation of Polar Bears, Nov. 15, 1973, Can.-Den.-Nor.-U.S.-U.S.S.R., 13 I.L.M. 1624 (entered into force Jan. 1, 1974) [hereinafter Polar Bear Agreement].

7. See, e.g., Kal Raustalia, *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, 34 (1995). Environmental degradation had steadily risen along the United States-Mexican border during the 1970s and 1980s. By the early 1990s, the American Medical Association described the border region as a "virtual cesspool and breeding ground for infectious disease." Lynn Stanton, *A Comparative Analysis of the NAFTA's Environmental Side Agreement*, 2 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 71, 72 (1994) (citing Michael Satchell, *Poisoning the Border*, U.S. NEWS & WORLD REPORT, May 6, 1991, at 32). The report also noted that "[u]ncontrolled air and water pollution [wa]s rapidly deteriorating and [this] seriously affect[ed] the health and future economic vitality on both sides of the border." *Id.* The report also noted that "[t]here . . . [were] two obvious explanations for what . . . [had] caus[ed] the environmental degradations: (1) the Maquiladoras improperly dispose[d] of their hazardous wastes; and (2) the 'colonias,' the shanty towns which spr[ang] up around the Maquiladoras, have improper and inadequate water sanitation facilities." *Id.*

8. For a discussion on the dispute resolution process, see Kevin W. Patton, Note, *Dispute Resolution Under the North American Commission on Environmental Cooperation*, 5 DUKE J. COMP. & INT'L L. 87 (1994); Jeffrey P. Bialos & Deborah E. Siegel, *Dispute Resolution Under the NAFTA: The Newer and Improved Model*, 27 INT'L LAW. 603 (1993). For a discussion on some of the initial cases to be heard under the dispute mechanism process, see Jason Coatney, Comment, *The Council on Environmental Cooperation: Redaction of Effective Enforcement Within the North American Agreement on Environmental Cooperation*, 32 TULSA L.J. 823 (1997).

9. Environmental Side Agreement, *supra* note 4, art. 14. The agreement defines a non-governmental organization as any scientific, professional, business, non-profit, or public in-

menced by a signatory Party.¹⁰ The Parties adopted this adjudication process to “enhance compliance with, and enforcement of, environmental laws and regulations”¹¹ and to “strengthen cooperation on the development and improvement of environmental laws, regulations, procedures, policies, and practices.”¹²

The Arctic States adopted the Arctic Council Agreement, an eight-party multilateral agreement,¹³ to protect the Arctic’s environment from future Exxon *Valdez*-like incidents.¹⁴ This agreement seeks to protect the Arctic’s pristine environment through a quasi-legislative intergovernmental forum charged with recommending, implementing, and developing environmental policies.¹⁵ The Arctic States maintain this intergovernmental forum will “lend greater efficiency, focus and political impetus to existing circumpolar

terest organization, which is neither affiliated with, nor under the direction of, a government. *See id.* art. 45(1)(b).

10. Environmental Side Agreement, *supra* note 4, art. 22(1).

11. *Id.*

12. *Id.* art. 1(f). *See generally* Stephen Zamora, *NAFTA and the Harmonization of Domestic Legal Systems: The Side Effects of Free Trade*, 12 ARIZ. J. INT’L & COMP. L. 401, 402 (1995) (noting that the Free Trade Agreement does not unify domestic laws, but the commissions could initiate harmonization).

13. The eight Arctic States are: Canada, Denmark, Finland, Iceland, Norway, Russian Federation, Sweden, and the United States. *See* Arctic Counsel Agreement, *supra* note 6.

14. While shipping oil out of Alaska, the Exxon *Valdez*, a single-hulled supertanker, collided with the submerged granite of Bligh Reef in Alaska’s Prince William Sound shortly after midnight on Mar. 24, 1989. ZYGMUNT PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 163-64 (1992). The submerged granite reef ruptured the hull of the supertanker, and eleven million gallons of crude oil subsequently spewed from the wreck. *Id.* Aided by a strong northeasterly wind, the oil slick spewed out over 1,000 miles of coastline. *Id.* at 64. The extraordinarily rich ecosystem was severely effected by the spillage. *Id.* Indeed, one commentator noted:

The ecosystem hit by the Exxon-*Valdez* spill was extraordinarily rich. Affected species included the herring, black cod, cutthroat trout, dolly varden, shark, halibut, rock fish, shellfish, several species of salmon, sea otters, fur seals, stellars, sea lions, harbor porpoises, dall porpoises, blue whales, gray whales, deer, fox, coyotes, black bears, brown bears, bald eagles, several species of gulls, hundreds of thousands of sea birds, such as kittiwakes, puffins, hawks, guillemots, murres, murreletes, loons, grebes, diving ducks, dungeness crab, pot shrimp, trawl shrimp. . . and these were just the upper layers of the ecological pyramid. The waters and the wildlife of the Gulf of Alaska were among the most fertile communities on earth built upon a confluence of ocean currents in micro-organisms, zooplankton, and phytoplankton.

Id. Since the Exxon *Valdez* incident in Alaska, the fragile nature of the Arctic’s environment has received assiduous attention from the eight Arctic States. *See* Rothwell I, *supra* note 2, at 280. These Arctic States have acknowledged a need for regional environmental initiatives and cooperation in implementing these initiatives. *See id.*

15. Before this intergovernmental organization was established, the Arctic’s legal regime had been dominated by the legal regimes of those states bordering the Arctic Circle. *See* Rothwell I, *supra* note 2, at 280. For a thorough discussion of the various Arctic legal regimes, see remarks by Alan E. Boyle in *Legal Regimes of the Arctic*, 82 AM. SOC’Y INT’L L. PROC. 315, 323 (1988).

organizations, while at the same time avoiding duplication of effort in the development of future multilateral activities."¹⁶

This article compares and contrasts the multinational environmental regimes created under the Environmental Side Agreement and the Arctic Council Agreement. Section II reviews the North American Environmental Side Agreement. Section III outlines the Arctic Council Agreement's provisions. Section IV examines how the two multinational environmental initiatives seek to resolve environmental disputes and proposes changes designed to strengthen the Arctic Council Agreement and the North American Environmental Side Agreement. Section V concludes by urging the member States to modify each regime's multinational environmental initiatives to ensure environmental protection.

II. NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION

A. NAFTA and Environmental Protection

The United States-Mexican border stretches for 1,600 miles and includes fourteen border cities.¹⁷ Many United States residents living along the border have experienced water, waste, and air pollution associated with the maquiladoras industry in Mexico.¹⁸ The maquiladoras industry first developed along the border in response to the Mexican government's implementation of the Border Industrial Program in 1965.¹⁹ This program allowed foreign-owned and managed corporations to assemble products in Mexico as long as these corporations operated as Mexican companies for all legal, fis-

16. Arctic Council Agreement, *supra* note 6, at 1382. In addition, organizations representing the majority of indigenous peoples groups will be involved in the process as Permanent Participants. *See id.* at 1385.

17. *See* Adrian R. Martinez, *Environmental Pollution Along the U.S.-Mexico Border and an Overview of Mexico's General Law for Ecological Equilibrium and Protection of the Environment*, CURRENTS: INT'L TRADE L.J., Winter 1995, at 39.

18. *See* Aaron Holland, *The North American Free Trade Agreement on Environmental Cooperation: The Effect of the North American Free Trade Agreement on the Enforcement of United States Environmental Laws*, 28 TEX. TECH. L. REV. 1219, 1220 (1997). The Maquiladoras industries import raw materials and incomplete goods from foreign-owned assembly plants. *Id.* Mexican laborers then assemble these raw materials and incomplete goods into finished products in factories located along the border region. *Id.*

19. *See* Rodolpho Sandoval, *The Implications of NAFTA on the Maquiladoras in Mexico*, CURRENTS: INT'L TRADE L.J., Winter 1991, at 27. Mexico enacted this program due to 70% unemployment rates in northern Mexico. *See* David W. Eaton, *NAFTA and the Environment: A Proposal for Free Trade in Hazardous Waste Between the United States and Mexico*, 27 ST. MARY'S L.J. 715, 716-36 (1996). Unemployment rates soared during this period because the United States government would no longer allow Mexican laborers to enter the United States on a daily basis as seasonal agricultural workers. *See* Sandoval, *supra*, at 27. Mexican laborers had been allowed to enter the United States for this type of seasonal labor for most of the 20th century. Indeed, during World War II, Mexican citizens were encouraged to cross the border to help United States farmers in the war effort. Shortly after the war, the migration of seasonal laborers was officially sanctioned by the Bracero Act. This program lasted until pressure from the farm unions forced termination in 1964. *See id.*

cal, and labor purposes.²⁰ For United States corporations, the principal advantage of operating in Mexico resided in the ability to import raw materials, assemble them in Mexico using cheap labor, and export them back to the United States, essentially duty-free.²¹ By 1990, United States corporations had taken full advantage of these favorable conditions as they operated over 1,920 factories and employed over 500,000 people.²²

Although providing needed employment for Mexican laborers, the maquiladoras industries have severely polluted both sides of the border. Two factors have contributed to such indiscriminate pollution. First, some Mexican environmental laws are not as stringent as American environmental laws. For example, Mexican air emissions standards are not as stringent as American standards.²³ Residents of Eagle Pass, Texas, across the Rio Grande from Piedras Negras, Mexico, annually are effected by two Carbon I and II coal-burning electric generating facilities in Piedras Negras that emit up to 250,000 tons of sulfur dioxide per year.²⁴ The effects of this generating facility have been felt more than 120 miles away at Big Bend National Park in Texas where sixty percent of the 800,000-acre park is usually obscured by white haze.²⁵

Second, those Mexican environmental laws that are as stringent as American laws have not been enforced by Mexican environmental agencies.²⁶ For example, Mexican regulations require that any hazardous wastes generated by the maquiladoras industry be returned to their country of origin.²⁷ However, according to the Mexican environmental protection agency, "52% of the maquiladoras generate hazardous wastes, but only 30% have complied with regulations requiring information to be provided to [the Mexican environmental protection agency] about the disposal of these wastes, and only 19% are complying with waste disposal laws."²⁸

The United States has been concerned with the transboundary environmental degradation caused by the maquiladoras industries for a number of years. In 1983, the United States and Mexico signed the Agreement on Co-

20. See Sandoval, *supra* note 19, at 27. See also Jose D. Garcia & Robert Loughran, *Maquiladoras: A Basic Primer*, CURRENTS: INT'L TRADE L.J., Winter 1991, at 35. The maquiladoras program was expanded to include interior Mexico in 1972. See Sandoval, *supra* note 19, at 27.

21. See Sandoval, *supra* note 19, at 27; Garcia, *supra* note 20, at 35. Duty is assessed only if any value is added to the product during the assembly process. See *id.*

22. See Garcia, *supra* note 20, at 36.

23. See Holland, *supra* note 18, at 1221.

24. See *id.* It is interesting to note that the entire emissions from all the sources in Texas dwarf in comparison to the level emitted at these two Carbon I and Carbon II plants. See *id.*

25. See *id.*

26. See Martinez, *supra* note 17, at 37; Stanton, *supra* note 7, at 73. For a detailed account on the development of environmental laws in Mexico, see Humberto Celis, *The Legal Evolution of Mexican Environmental Laws*, CURRENTS: INT'L TRADE L.J., Fall 1994, at 34.

27. See Stanton, *supra* note 7, at 73.

28. *Id.*

operation for the Protection and Improvement of the Environment in the Border Area.²⁹ This agreement was the first to establish a framework for discussing environmental issues affecting the border region.³⁰ Nonetheless, even with the La Paz Agreement, environmental degradation continued and many government officials criticized the La Paz Agreement's insufficient scope and lack of enforcement mechanisms.³¹

With continuing environmental degradation along the United States-Mexican border and an ineffective environmental agreement in place, many residents living along the United States-Mexican border expressed fears that further liberalization of trade laws under NAFTA would lead to greater environmental degradation on the Mexican side of the border.³² In response to this perceived need for a multinational environmental agreement, the Parties to NAFTA passed a supplemental environmental agreement.³³ The passage of the supplemental agreement was extremely noteworthy. Many trade experts lobbied against it contending that an international trade agreement that expressed too much concern for environmentally sensitive issues would eventually affect trade adversely.³⁴ Nevertheless, the Parties to NAFTA

29. Agreement on Cooperation for the Protection and Improvement of the Environment in the Border Area, Aug. 14, 1983, U.S.-Mex., T.I.A.S. No. 10,827, 22 I.L.M. 10,255 [hereinafter La Paz Agreement]; see Bensten, *supra* note 2, at 5.

30. See *id.* The La Paz Agreement was penned by U.S. and Mexican officials in response to growing concerns for the border environment. Eaton, *supra* note 19, at 742. The Agreement expanded the International Boundary and Water Commission that had been created in 1944 to focus on cross-border water pollution (especially sewage collection and disposal). Bensten, *supra* note 2, at 5. Additionally, the Agreement also shifted responsibility for addressing border pollution issues to the Environmental Protection Agency and its Mexican counterpart, the Secretaria de Desarrollo Urbano y Ecologica. Further, these agencies were charged with "improving the means for dealing with emergency situations and establishing a mechanism for high-level and technical meetings." *Id.* The Agreement also consisted of five annexes, each of which concentrated on a specific environmental problem. *Id.* These annexes covered wastewater treatment, responses to hazardous substance spills, transport of hazardous wastes, emissions from copper-smelting operations, and urban air pollution (El Paso-Ciudad Juarez area). *Id.* In all, the Agreement provided the necessary framework to address common environmental problems that had developed along the U.S.-Mexican border. Eaton, *supra* note 19, at 742.

31. See *id.*

32. See, e.g., Raustiala, *supra* note 7, at 35; Stanton, *supra* note 7, at 71; Patton, *supra* note 8, at 91-92. For a comparison of environmental laws in Mexico and the United States, see Alicia A. Samios, *NAFTA's Supplemental Agreement: In Need of Reform*, 9 N.Y. INT'L L. REV. 49, 52-63 (1996).

33. Under NAFTA, the United States, Canada, and Mexico signed the famed Environmental Side Agreement. For an in-depth discussion, see *infra* Section II.B. Additionally, the United States and Mexico also signed the Agreement Concerning the Establishment of a Border Environmental Cooperation Commission and a North American Development Bank, Nov. 16-18, 1993, U.S.-Mex., 32 I.L.M. 1545 (1993) (entered into force Jan. 1, 1994) [hereinafter Border Side Agreement]. This agreement was designed to solely address United States-Mexican border relations. See *infra* Section II.C.

34. See Arthur Grimaldo II, *Hazardous Waste and the Mercado Comun Del Sur (MERCOSUR): How a Regional Trade Agreement Handles the Problems of Environmental Protection*, CURRENTS: INT'L TRADE L.J., Winter 1996, at 21. However, contrary to the trade experts' opinions, empirical evidence has shown that pollution generally decreases when na-

passed the supplemental environmental agreement, thereby creating the first international trade agreement that substantially addresses transboundary environmental degradation.³⁵

B. Commission on Environmental Concern

In order to achieve its objective of environmental protection,³⁶ the Environmental Side Agreement lays out a dispute mechanism designed to provide incentives for each country to police itself.³⁷ Limited use of trade sanctions is allowed, as a last resort, to encourage a country to enforce its environmental laws.³⁸

tional income levels increase. See Laura Shinn Westin, *NAFTA: Bridging the U.S./Mexico Environmental Gap*, CURRENTS: INT'L TRADE L.J., Winter 1996, at 42.

35. See Jack I. Garvey, *Trade Law and Quality of Life-Dispute Resolution Under the NAFTA Side Accords on Labor and the Environment*, 89 AM. J. INT'L L. 439, 441 (1995). See generally Stephen Zamora, *Allocating Legislative Competence in the Americas: The Early Experience Under NAFTA and the Challenge of Hemispheric Integration*, 19 HOUS. J. INT'L L. 615 (1997). For a telling discussion on the economic ramifications of the Environmental Side Agreement, see Daniel C. Esty & Damien Geradin, *Market Access, Competitiveness, and Harmonization: Environmental Protection in Regional Trade Agreements*, 21 HARV. ENVTL. L. REV. 265 (1997). Other international trade law doctrines have sought to initiate agreements that substantially address environmental degradation and have not been successful. See, e.g., the *Mercado Comun del Sur* (MERCOSUR) regional trade agreement signed in 1991 by Brazil, Argentina, Uruguay, and Paraguay, which created an Environmental Protection Commission charged with creating uniform environmental standards. See Grimaldo, *supra* note 34, at 21, 25. However, the Commission has failed to address environmental issues because important decisions regarding environmental protection are made by committees devoted to the land, transportation, tourism, energy, industry and technology policy, and agricultural policy, whose main goal is economic development rather than conservation. See *id.* at 25.

36. See Environmental Side Agreement, *supra* note 4, art. 1. The objectives of this Agreement are to:

- (a) foster the protection and improvement of the environment in territories of the Parties for the well-being of present and future generations;
- (b) promote sustainable development based on cooperation and mutually supportive environmental and economic policies;
- (c) increase cooperation between the Parties to better conserve, protect, and enhance the environment, including wild flora and fauna;
- (d) support the environmental goals and objectives of the NAFTA;
- (e) avoid creating trade distortions or new trade barriers;
- (f) strengthen cooperation on the development and improvement of environmental laws, regulations, procedures, policies, and practices;
- (g) enhance compliance with, and enforcement of, environmental laws and regulations;
- (h) promote transparency and public participation in the development of environmental laws, regulations, and policies;
- (i) promote economically efficient and effective environmental measures; and
- (j) promote pollution prevention policies and practices.

37. See *id.*

38. See *id.* art. 5.

The Side Agreement envisions enforcement activity taking place initially at the international level, between the Parties themselves.³⁹ If consultation between the Parties fails to solve the dispute, the matter moves to the Commission on Environmental Cooperation (CEC).⁴⁰ The CEC was created by the Environmental Side Agreement to function as the nexus for dispute resolution, and is composed of a Council, a Secretariat, and a Joint Public Advisory Committee.⁴¹ The Council is made up of cabinet-level or equivalent representation from each Party,⁴² and is the governing body of the Commission.⁴³ The Secretariat, headed by an Executive Director, provides technical, administrative, and operational support to the Council.⁴⁴ The Joint Public Advisory Committee provides technical and scientific information to the Council.⁴⁵

1. Dispute Resolution

a. Process for Non-Governmental Organizations or Persons

The dispute resolution process under the Environmental Side Agreement is triggered when a Party does not enforce its own environmental laws.⁴⁶ Articles fourteen and fifteen provide for enforcement through the dissemination of information.⁴⁷ Upon submission of a complaint by a person or non-governmental organization, the Secretariat may request a response by the offending Party.⁴⁸ The complaint must meet several substantive and pro-

39. *See id.*

40. *See id.* arts. 9, 10, 23.

41. *See id.* art. 10.

42. *See id.* art. 9(1). The representative of the United States is the Administrator of the Environmental Protection Agency. *See* Federal Implementation of the North American Agreement on Environmental Cooperation, Exec. Order No. 12,915, 19 U.S.C.A. § 3472, 59 FR 25775 (1994).

43. *See* Environmental Side Agreement, *supra* note 4, art. 10.

44. *See id.* art. 11. The position of Executive Director rotates between the Parties' representatives.

45. *See id.* art. 16.

46. *See id.* art. 14. *See also id.* art. 45, broadly defining environmental law as:

any statute or regulation of a Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health, through (i) the prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants, (ii) the control of environmentally hazardous or toxic chemicals, substances, materials and wastes, and the dissemination of information related thereto, or (iii) the protection of wild flora or fauna, including endangered species, their habitat, and specifically protected natural areas in the Party's territory, but does not include any statute or regulation, or provision thereof, directly related to worker safety or health.

47. *Id.* arts. 14, 15.

48. *See id.* art. 14. Note that a Party does not make the submission, but a private individual or non-governmental organization does.

cedural requirements and must allege that a Party is failing to enforce effectively its environmental laws.⁴⁹ If all criteria are met, the Secretariat may choose to request a response from the Party.⁵⁰ After reviewing the Party's response, the Secretariat may decide that a factual record of the situation should be developed.⁵¹ Upon a two-thirds vote of the Council, the Secretariat will prepare a factual record.⁵² Upon a second two-thirds vote of the Council, the Secretariat will make the final factual record publicly available.⁵³

Although the process provided by Articles fourteen and fifteen to private parties is very valuable,⁵⁴ it is not particularly strong. Enforcement is dependent upon either public pressure from within the violating Party's country or the Part Five procedure,⁵⁵ neither of which will occur until after the factual record becomes public.⁵⁶ However, there are three points at which the submission process can be terminated, preventing the record from becoming public. First, if the complaint does not meet the procedural or substantive requirements, or the Secretariat does not think it merits a Party's response, then the submitter is given an opportunity to revise the submission.⁵⁷ If the revision is not satisfactory, then the process is terminated for that submission.⁵⁸ Second, if the Council does not vote to prepare a factual record, then the submission process is terminated.⁵⁹ Third, if the council does not vote to make the factual record public, then this record will not be available for either the public or another Party.⁶⁰

b. Process for the Parties

In contrast, Part Five of the Environmental Side Agreement sets forth the primary, more forceful dispute resolution process.⁶¹ To initiate the process, any Party may request a consultation with the offending Party.⁶² This

49. *Id.* art. 14.

50. *Id.*

51. *Id.* art. 15.

52. *Id.*

53. *Id.*

54. The ability of any person or non-governmental organization to gain access to the process is an entirely new dynamic in the regime of international trade law. *See* Garvey, *supra* note 35, at 453.

55. The Part Five procedure, which begins with consultation between Parties and can end with an arbitral panel imposing sanctions, is discussed *infra*, notes 61-73 and accompanying text.

56. *See* Patton, *supra* note 8, at 112.

57. EPA, GUIDELINES FOR SUBMISSIONS ON ENFORCEMENT MATTERS UNDER ARTICLES 14 AND 15 OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION 4 (1995).

58. *Id.* at 4-5.

59. *Id.* at 7.

60. *Id.* at 8.

61. *See, e.g.*, Patton, *supra* note 8, at 103-05.

62. Environmental Side Agreement, *supra* note 4, art. 22(l). In full, Article 22(l) states that "[a]ny Party may request in writing consultations with any other Party regarding whether

consultation will address whether there has been “a persistent failure by [the offending] Party to effectively enforce its environmental law.”⁶³ If they are unable to resolve the matter within sixty days of the consultation request, either consulting Party may request a special session of the Council.⁶⁴ If the Council is unable to reach a resolution within sixty days, it may convene an arbitral panel upon the request of a Party and a two-thirds vote.⁶⁵ The panel will consist of five members chosen from a roster of forty-five individuals who have expertise in environmental law, dispute resolution, and other relevant areas.⁶⁶ The panel will ascertain whether, in fact, there has been a “persistent pattern of failure by the Party complained against to effectively enforce its environmental law.”⁶⁷ Additionally, they will make findings of fact and recommendations for a suitable resolution.⁶⁸

there has been a persistent pattern of failure by that other Party to effectively enforce its environmental law.” Environmental Side Agreement, *supra* note 4, art. 22(l).

63. *Id.*

64. *Id.* art. 23.

65. *Id.* art. 24. The panel can only investigate situations involving goods or services traded between the Parties or which compete, in the territory of the offending Party, with goods or services produced by another Party. *See id.*

66. *Id.* art. 26. Panel members are chosen from a roster of forty-five individuals who have expertise in environmental law under guidelines set forth in Article 27. Article 27 states:

1. Where there are two disputing parties, the following procedures shall apply:
 - (a) The panel shall comprise of five members.
 - (b) The disputing parties shall endeavor to agree on the chair of the panel within 15 days after the Council votes to convene the panel. If the disputing Parties are unable to agree on the chair within this period, the disputing Party chosen by lot shall select within five days a chair who is not a citizen of that Party.
 - (c) Within 15 days of the selection of the chair, each disputing Party shall be selected by lot from among the roster members who are citizens of the other disputing Party.
2. Where there are more than two disputing Parties, the following procedures shall apply:
 - (a) The panel shall comprise of five members.
 - (b) The disputing Parties shall endeavor to agree on the chair of the panel within 15 days after the Council votes to convene the panel. If the disputing Parties are unable to agree on the chair within this period, the Party or Parties on the side of the dispute chosen by lot shall select within 10 days a chair who is not a citizen of such Party or Parties.
 - (c) Within 30 days of selection of the chair, the Party complained against shall select two panelists, one of whom is a citizen of a complaining Party, and the other of whom is a citizen of another complaining party. The complaining Parties shall select two panelists who are citizens of the Party complained against.
 - (d) If any disputing Party fails to select a panelist within such period, such panelist shall be selected by lot in accordance with the citizenship criteria of subparagraph (c).

67. *Id.* art. 22.

68. *Id.* art. 31.

If the panel determines there has been a persistent pattern of failure to enforce, then the disputing Parties may again convene and impose a “monetary enforcement assessment.”⁶⁹ If the action plan fails to resolve the dispute within sixty days, the panel may again convene and impose a “monetary enforcement assessment.”⁷⁰ This sanction, limited by provisions in Annex 34, must be paid within 180 days, or the complaining Party may suspend the application of NAFTA benefits to the offending Party.⁷¹

The possible imposition of sanctions is the main force behind the CEC’s dispute resolution process.⁷² Although this process culminates in arbitration and sanctions, it provides the offending Party many opportunities to modify its behavior and avoid sanctions. As such, this promotes voluntary compliance with a Party’s own environmental laws.⁷³

2. Importance of Party Support

Unfortunately, however, while the Environmental Side Agreement’s dispute resolution works in theory, there are criticisms and drawbacks to it. Several commentators point out that the reach of the Agreement is too narrow because both dispute resolution processes require Party-support of a complaint.⁷⁴ The process available to individuals and non-governmental or-

69. *Id.* art. 33. Annex 34 provides that the assessment shall not be any greater than .007 percent of the total trade in goods between the parties during the most recent year that such data is available. Annex 34(1). Additionally, the assessed country shall be allowed to pay the fine in that Party’s own currency. Annex 34(3). In determining the amount of assessment, the Panel must evaluate:

- (2)(a) the pervasiveness and duration of the Party’s persistent pattern of failure to effectively enforce its environmental law;
- (b) the level of enforcement that could reasonably be expected of a Party given its resource constraints;
- (c) the reasons, if any, provided by the Party for not fully implementing an action plan;
- (d) efforts made by the Party to begin remedying the pattern of non-enforcement after the final report of the panel; and
- (e) any other relevant factors.

Id.

70. *Id.* art. 34.

71. *See id.* arts. 35, 36. The benefit may only be suspended in an amount sufficient to collect the monetary enforcement assessment.

72. *See id.* annex 34. The fines can range up to 20 million U.S. dollars. *Id.*

73. *See id.*

74. *See, e.g.,* Stanton, *supra* note 7, at 76-77. For example, one commentator has stated:

The Agreement on Environmental Cooperation appears to allow for almost no citizen intervention or meaningful output. There are only two possible inroads for private citizens or groups to access the CEC. First, the groups or citizens may attempt to influence their country’s representative on the Council. Even if the representative for the United States is swayed by such influence, that representative would need to influence another country’s representative (Canada’s representative in the

ganizations⁷⁵ requires a Party vote both to prepare a factual record and to make it public, while the Part Five process requires a Party itself to bring forward the complaint and support it throughout the process.⁷⁶ This, combined with the fact that the Side Agreement specifically precludes private rights of action against a Party beyond what that Party's laws allow,⁷⁷ makes a Party's support of an issue essential to the resolution of that issue.

C. The Border Side Agreement

1. Border Environmental Cooperation Commission

In addition to the Environmental Side Agreement, Mexico and the United States signed a Border Side Agreement that created the Border Environmental Cooperation Commission (BECC)⁷⁸ and the North American Development Bank (NADB).⁷⁹ The Border Agreement's stated purpose is to "help preserve, protect and enhance the environment of the border region in order to advance the well-being of the people of the United States and Mexico."⁸⁰ The BECC has the authority to assist states, local governments, and private investors in coordinating, preparing, and analyzing the feasibility of environmental infrastructure projects in the border area.⁸¹ Additionally, the BECC, through the Border Environment Finance Facility, has the ability to certify applications for financing projects involving water pollution, waste water treatment, municipal solid waste, and related matters.⁸² Finally, the BECC has the power to require any border region projects having significant transboundary environmental effects to perform an environmental assessment before commencing the project.⁸³

case of a complaint against Mexico) to make it past the stage of mere consultations with the complained-of country. This is a significant barrier. The other potential inroad to the CEC is through the Secretariat, to whom anyone may file a complaint with proper documentation. However, the complaint will go no further unless two of the three member countries agree to gather more information regarding the complaint. Both of these approaches require significant lobbying of the two governments—no small task by any reading.

Id. at 76-77.

75. *See supra* Section II.B.1.a.

76. *See id.*

77. *See* Environmental Side Agreement, *supra* note 4, art. 38. Article 38 reads: "[n]o party may provide for a right of action under its law against any other Party on the ground that another Party has acted in a manner inconsistent with this Agreement."

78. *See* Border Side Agreement, *supra* note 33, intro. art.

79. *See id.*

80. *Id.* ch. I, art. I, § 1(a).

81. *See id.* ch. I, art. I, § 2.

82. *See id.* ch. I, art. II, § 2(b).

83. *See id.* ch. I, art. II, § 3(c).

2. North American Development Bank

The NADB was established to provide financing for environmental infrastructure projects that the BECC has certified, or that either member nation has endorsed.⁸⁴ The NADB also has been empowered to provide financial and technical assistance for the implementation of projects.⁸⁵ To facilitate financing for these tasks, the NADB has received a total of \$3 billion in initial capital funds from the United States and Mexico.⁸⁶ The NADB has been authorized to use the initial capital investment "to support environmental projects by making or participating in loans that are funded by either the available capital or by loans backed by capital raised in financial markets or borrowed by the banks to be included in its capital."⁸⁷

III. THE 1996 ARCTIC COUNCIL AGREEMENT

A. *The Arctic, Its Resources, and the Environment*

The Arctic countries⁸⁸ first asserted sovereignty over their respective Arctic spheres in the late-nineteenth and early-twentieth centuries when they discovered the region's enormous potential for commercial exploitation.⁸⁹ For example, to assure that it would have control over a substantial portion of the Arctic, Canada declared as early as 1909 that it had exclusive sovereignty over the Arctic territory that lies within a series of straight lines drawn from its eastern and western extremities due north to the Pole.⁹⁰

84. See *id.* ch. II, art. I, § 1.

85. See *id.* ch. II, art. I, § 2(c). The Bank also has the power to provide support "by guaranteeing in whole or in part loans made to, or securities issued in connection with, projects." *Id.* ch. II, art. III, § (2)(c).

86. See Holland, *supra* note 18, at 1231-32. Each country bought 150,000 shares at \$10,000 a share. *Id.*

87. *Id.*

88. See *supra* note 13.

89. See Finn Sollie, *Polar Politics: Old Games in New Territories, or New Patterns in Political Development?*, 39 INT'L J. 695, 697 (1984). The value of the Arctic for commercial exploitation was first recognized in the late-nineteenth and early-twentieth centuries. During this period, the Arctic regions in North America were severely impacted by hunting and fishing expeditions. Extensive fishing, sealing, and whaling resulted in substantial depletion of these commercial stocks. Rothwell I, *supra* note 2, at 283.

90. See Donald R. Rothwell, *The Canadian-U.S. Passage Dispute: A Reassessment*, 26 CORNELL INT'L L.J. 331, 331-32 (1993) [hereinafter Rothwell II]. Canada first claimed this territory in 1909. See *id.* at 331. Since 1909, Canadians have repetitively asserted their sovereign claims to these lands. Indeed, in 1986, the Canadian government proclaimed straight baselines around the Arctic Archipelago and, by doing so, enclosed the waters of the Northwest Passage so that they became internal waters. See *id.* Canadian public interest in the Arctic has been keen. For example, in 1991 it was reported that the United States and British submarines had surfaced around the North Pole causing Canadian newspapers to question Canada's ability to effectively enforce its sovereignty claims to the Arctic territory. See *id.* at 331 n.1.

Shortly thereafter, the remaining Arctic States made similar declarations.⁹¹ Since then, the Arctic has fallen prey to the commercial exploitation of those States bordering the Arctic Circle.⁹²

During this century, the Arctic environment has been severely impacted by commercial exploitation. Extensive fishing, sealing, and whaling expeditions first plagued the Arctic regions in North America.⁹³ These hunting and fishing expeditions resulted in a substantial depletion of these commercial stocks.⁹⁴ Shortly thereafter, land-based resource development began in Siberia, Alaska, and northwest Canada.⁹⁵ Many environmentalists have since raised concerns over the mining of minerals and the drilling for oil in these regions.⁹⁶ In the latter part of this century, many environmentalists and non-environmentalists also have expressed serious concerns over the unmonitored dumping of nuclear waste by the former Soviet Union.⁹⁷

The Arctic has also been particularly prone to the effects of transboundary pollution.⁹⁸ Indeed, of the problems identified by the Arctic Environment Agreement, five problems have been denoted as transboundary in

91. See Rothwell II, *supra* note 90.

92. See Rothwell I, *supra* note 2, at 283. At first, the Arctic's ecosystem was severely altered due to extensive fishing, whaling, and hunting. Rothwell I, *supra* note 2, at 283. Later, the Arctic States began developing the numerous vast mineral deposits in the Arctic. GAIL OSHERENKO & ORAN R. YOUNG, *THE AGE OF THE ARCTIC: HOT CONFLICTS AND COLD REALITIES* 45 (1989) [hereinafter OSHERENKO & YOUNG II]. Indeed, the vast deposits of hydrocarbons in the region has fueled this development. *Id.* at 46. For example, "the Prudhoe Bay field located on Alaska's North Slope, discovered only in 1968, originally contained an estimated 9-10 billion barrels of recoverable oil and 26 trillion cubic feet of recoverable natural gas; it is the largest single field ever discovered in the United States." *Id.*

93. See *id.*

94. See *id.* For more on the devastating effect hunting had on the seal population, see Natalia S. Mirovitskaya et al., *North Pacific Fur Seals: Regime Formation as a Means of Resolving Conflict*, in *POLAR POLITICS* 22, 22-55 (Gail Osherenko & Oran R. Young eds., 1993).

95. See Rothwell I, *supra* note 2, at 283.

96. See William E. Westermeyer, *Energy from the Polar Regions*, 39 *INT'L L.J.* 721, 721 (1984).

97. See Rothwell I, *supra* note 2, at 283. Rothwell stated that the Barents and Kara Seas north of Norway and Russia were the primary dumping grounds for the former Soviet Union. See *id.* Rothwell further noted that "the costs of cleaning up this damage are proving considerable, the environmental impact of 21 nuclear reactors leaking radioactive waste is devastating to the marine environment." *Id.* For more on Soviet nuclear dumping, see Rothwell I, *supra* note 2, (citing P. Jones, *Russia's Nuclear Dumping Legacy*, 26(5) *MARINE POLLUTION BULL.*, 231 (1993)); *Soviet Nuclear Legacy*, 26(10) *MARINE POLLUTION BULL.*, 536 (1993); *Leak Fears on Sunken Nuclear Sub*, *SYDNEY MORNING HERALD*, Apr. 22, 1994, at 8 (discussing the problem of sealing the bow of a Soviet nuclear submarine which sank off the coast of Norway in the Barents Sea in 1989).

98. See Rothwell I, *supra* note 2, at 283. The Arctic's environment is extremely prone to pollution that has been transported by winds from mid-latitude regions. OSHERENKO & YOUNG II, *supra* note 92, at 122-23. Indeed, as one commentator has noted: "The pristine Arctic is no longer pristine. Polar bears may be toxic and reindeer radioactive. Wind currents blow carbon dioxide (CO₂), sulfate compounds, soot, sulfur dioxide (SO₂), chlorofluorocarbons, and pesticides from mid-latitude sources to the Arctic where they produce Arctic haze, acid deposition, depletion and climate warming." *Id.*

nature: radioactivity, oil pollution, acidification, heavy metals, and persistent organic contaminants.⁹⁹ Radioactivity in the Arctic region has been found around illegal nuclear dumps.¹⁰⁰ Additionally, radioactivity has been detected in the region due to radiation fallout from early atomic bomb tests and from Chernobyl.¹⁰¹ Oil pollution has become more and more prevalent in the North American Polar region due to increased oil drilling in the Arctic.¹⁰² Persistent organic chemicals, such as PCBs and DDT, have been found at considerably higher levels in the Arctic than in southern latitudes.¹⁰³ Heavy metals, have been found at significantly high levels in the “air, precipitation, ocean waters, soils, rivers, lakes, and bottom sediments of the Arctic as well as in marine, freshwater, and terrestrial biota.”¹⁰⁴ Finally, the Arctic has encountered higher levels of acidification due in large part to the long-range transport of sulfur and nitrogen emissions from mid-latitudes.¹⁰⁵

Transboundary air pollution also has become a primary concern in the Arctic.¹⁰⁶ International concern first was seen in this field after scientific evi-

99. See Rothwell I, *supra* note 2, at 283-84.

100. See *id.* at 283.

101. See OSHERENKO & YOUNG II, *supra* note 92, at 122-23. Shortly after the Chernobyl incident occurred in 1986, Sweden determined that 100,000 reindeer were likely to be contaminated. *Id.* at 126-27. Indeed, the Swedish government found that “[t]he meat from ninety-seven percent of the first 1,000 reindeer slaughtered in 1986 exceeded the 300 becquerels per kilogram limit, in many cases by as much as a factor of ten.” *Id.* at 127.

102. See Westermeyer, *supra* note 96, at 722-26. The Arctic is one of the areas of the world that is extremely vulnerable to the effects of oil pollution. Indeed, on this point, the 1991 Arctic Environmental Agreement noted:

This is due to physical environmental conditions such as low temperature, periods with little or no light, ice cover, etc. Low temperatures lead to reduced evaporation of the volatile, toxic oil components. Dark, cold winters in the Arctic lead to reduced ultraviolet radiation and decomposition of oil. In areas of drift ice, oil dispersal caused by wave action is also reduced. Oil in iced areas will be trapped between ice floes or under the ice, and only partly transported to the ice surface. These factors result in a generally slower decomposition of oil in the Arctic than in temperate regions. The period in which a particular oil spill can be harmful to wildlife is thus comparatively longer in the Arctic.

Arctic Environmental Agreement, *supra* note 6, at 1636-37.

103. See Rothwell I, *supra* note 2, at 284. The 1991 Arctic Environmental Agreement stated that these persistent organic chemicals have been found in the fatty tissues of many Arctic animals—including polar bear, whales, and seals. Arctic Environmental Agreement *supra* note 6, at 1634-35. Further, the Agreement noted that “[t]his is of particular concern in the Arctic because of the high level of consumption of lipid-rich wildlife foods by residents, resulting in a pathway of contaminants to humans.” *Id.* at 1635.

104. Arctic Environmental Agreement, *supra* note 6, at 1638.

105. *Id.* at 1642. Sulfur and nitrogen emissions from Arctic industrial activities have also contributed to higher levels of acidification. *Id.* at 1642-43. In all, this increased acidification has led to the Arctic haze phenomenon. *Id.* at 1643. For more on the Arctic haze phenomenon, see *infra* notes 106-110.

106. See Marvin S. Soroos, *Arctic Haze and Transboundary Air Pollution: Conditions Governing Success and Failure*, in POLAR POLITICS 186-222 (Gail Osherenko & Oran R. Young eds., 1993).

dence denoted the problems with acidification, ozone depletion, and global warming.¹⁰⁷ In the Arctic, an atmospheric phenomenon known as “Arctic Haze” has attracted significant scientific research.¹⁰⁸ According to scientific research, this haze “consists of anthropogenic pollutants that originate in the heavily industrialized, midlatitude regions of Eurasia and are transported to the Arctic regions by prevailing weather patterns during the winter season.”¹⁰⁹ Since this discovery, scientists have been conducting on-going tests to determine how this haze is effecting the Arctic environment.¹¹⁰

The Arctic area also has been effected by ozone depletion.¹¹¹ Ozone depletion in the Arctic was not discovered until 1989.¹¹² By the time scientists had identified this problem, CFCs and halons had been decreasing in use.¹¹³ Nevertheless, scientists have noted that ozone depletion may continue for some time in the Arctic.¹¹⁴ This continued depletion has raised the concern that ozone depletion may lead to global warming that would adversely impact the whole Arctic ecosystem.¹¹⁵

The pristine nature of the Arctic environment has been severely impacted over the last one hundred years.¹¹⁶ Although vast and largely unexplored, the Arctic ecosystem has been deemed by scientists as extremely complex.¹¹⁷ However, the world’s understanding of this complexity had not been noticed fully until the Exxon *Valdez* spill highlighted the vulnerability of the Arctic’s ecosystem to human disruption.¹¹⁸ This vulnerability has been

107. *See id.* at 186.

108. *Id.*

109. *Id.*

110. *See id.*

111. *See* Peter M. Haas, *Stratospheric Ozone: Regime Formation in Stages*, in POLAR POLITICS 152-85 (Gail Osherenko & Oran R. Young eds., 1993).

112. *See id.* at 152-53.

113. *See id.*

114. *See id.*

115. *See* Rothwell I, *supra* note 2, at 284. It is hard to predict how global warming will actually impact the Arctic’s environment. One commentator has stated:

Because of the greenhouse effect, biologists predict that tundra areas will shrink and forests will creep north along the coasts, up mountain slopes, and into former tundra areas. They anticipate that higher CO₂ levels will increase photosynthesis, decomposition, and the nutrient cycling process. Coupled with longer growing seasons, these processes would change the compositions of plant and animal communities. Migration patterns of terrestrial and marine mammals as well as altered ice conditions would certainly affect the economy of subsistence-based communities. Cod, anchovy, and other northern fish, known to swim thousands of kilometers in response to changes in one or two degrees in ocean temperatures, might migrate with disastrous results for fisheries in several Arctic rim nations.

Id.

116. *See* OSHERENKO & YOUNG II, *supra* note 92, at 122.

117. *See id.* at 111-18.

118. *See id.* *See supra* note 14 for a discussion of the Exxon *Valdez* oil spill.

heightened due to the complex ecosystems in the Arctic.¹¹⁹ Two commentators on the Arctic have listed six reasons why the Arctic is so vulnerable to human disturbance:

- (1) low temperatures retard the decomposition of natural and man made substances and the breakdown of pollutants;
- (2) regeneration is a protracted process because of the short growing season;
- (3) large concentrations of animals heighten vulnerability to catastrophes;
- (4) marine animals are particularly important in comparison to other regions of the globe;
- (5) climatic conditions are likely to produce a more pronounced CO₂-induced warming trend than in temperate regions;
- (6) severe weather and ice dynamics make environmental protection and clean-up extremely difficult.¹²⁰

According to these commentators, these factors make the Arctic the most fragile region in the world.¹²¹ This has led many to conclude that the Arctic is extremely vulnerable to any adverse environmental impacts on the region.¹²² Indeed, one commentator stated that “[t]he combination of a sensitive environment and one subject to such extensive environmental impact is not found elsewhere in this world.”¹²³

B. The Arctic and Environmental Protection

The Arctic is protected under several international treaties. Because the Arctic is an ocean, numerous existing international treaties on marine pollution protect it.¹²⁴ For example, the 1973 International Convention for the Prevention of Pollution from Ships and its 1978 Protocol (MARPOL),¹²⁵ the 1972 Convention on the Prevention of Marine Pollution By Dumping Wastes and Other Matters,¹²⁶ and the 1990 International Convention on Oil Pollution Preparedness, Response and Co-Operation,¹²⁷ have been invoked to protect the Arctic waters from environmental degradation.¹²⁸ Various multi-

119. See OSHERENKO & YOUNG II, *supra* note 92, at 111-17. Subregional ecosystems exist within the Arctic region. See Rothwell I, *supra* note 2, at 282. Therefore, ecologists can easily distinguish between the ecosystems in Siberia (Asia) and North America. Not surprisingly, this distinguishing feature is the direct result of the continental landmasses. See *id.*

120. OSHERENKO & YOUNG II, *supra* note 92, at 111-17.

121. See *id.*

122. See, e.g., Rothwell I, *supra* note 2.

123. *Id.* at 284.

124. See *id.* at 285.

125. See International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, 12 I.L.M. 1319 and 17 I.L.M. 546 (1978). All states have ratified these two treaties with the exception of Canada. See Rothwell I, *supra* note 2, at 285.

126. Convention on the Prevention of Marine Pollution by Dumping Wastes and Other Matter, Mar. 13, 1975, 1046 U.N.T.S. 120.

127. Nov. 30, 1990, 30 I.L.M. 733, 735.

lateral European treaties also protect portions of the Arctic.¹²⁹ Additionally, the unilateral acts of several Arctic States work to protect the Arctic.¹³⁰

International conventions or individual state legislation protects certain areas within the Arctic. Examples of these include the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage,¹³¹ the 1971 Convention on Wetlands of International Importance Especially as Waterfowl Habitat,¹³² and United Nations Educational, Scientific and Cultural Organization (UNESCO) Biosphere Reserve System.¹³³ Individual state legislation has set aside numerous other reserves and parks.¹³⁴ For example, Greenland has created the Greenland National Park that spans seventy million hectares in size throughout the Arctic and has become a renowned bird sanctuary.¹³⁵

Species preservation also has been of concern and has gained both international and regional protection. For example, certain international statutes, including the 1992 Convention on Biodiversity,¹³⁶ the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora,¹³⁷ and the 1979 Convention on the Conservation of Migratory Species of Wild

128. Other multilateral treaties also cover certain sections of the Arctic. *See, e.g.*, Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft, Feb. 15, 1972, 932 U.N.T.S. 3; Conference on the Prevention of Marine Pollution from Land-Based Sources: Convention on the Prevention of Marine Pollution from Land-Based Sources, Feb. 21, 1974, 13 I.L.M. 352. These apply to the waters denoted as the Greenland Sea, Norwegian Sea, Barents Sea, and the Arctic Sea up to an arc north of 36N, 42W, and 51E.

129. *See supra* note 128.

130. *See* Rothwell I, *supra* note 2, at 286-87. These protections have resulted from certain countries' rights of sovereignty over ships that pass through their waters. *See id.* Canada initially passed an Arctic Waters Pollution Act after the U.S. tanker *Manhattan* passed through its Northwest passage. *See id.* at 286. This legislation attempted to extend Canada's jurisdiction beyond its territorial sea. *See id.* This position was codified with the help of the United States and the former Soviet Union in Article 234 of the 1982 Law of the Sea Convention. *See id.* Since then, the Arctic States have taken advantage of this provision. *See id.* at 286-87.

131. Convention for the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 U.S.T. 37, 11 I.L.M. 1358.

132. Convention on Wetlands of International Importance Especially as Waterfowl Habitat, Feb. 2, 1971, T.I.A.S. No. 11,084.

133. *Discussed in, The World Network of Biosphere Reserves*, UNESCO COURIER, May 1, 1997, at 36.

134. *See generally* Kathleen Rogers & James A. Moore, *Revitalizing the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere: Might Awakening a Visionary but "Sleeping" Treaty be the Key to Preserving Biodiversity and Threatened Natural Areas in the Americas?*, 36 HARV. INT'L L.J. 465, 471 (1995).

135. *See* Kevin J. Madonna, *The Wolf in North America: Defining International Ecosystems vs. Defining International Boundaries*, 10 J. LAND USE & ENVTL. L. 305, 342 n.121 (1995).

136. United Nations Conference on Environment and Development: Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 849.

137. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, T.I.A.S. No. 8,249, amended June 22, 1979, T.I.A.S. No. 11,079, 993 U.N.T.S. 243.

Animals¹³⁸ protect Arctic species. Regional efforts also have been made to protect certain species. For instance, the United States and Canada enacted an Agreement on the Conservation of the Porcupine Caribou Herd¹³⁹ in an effort to protect large caribou herds that extend throughout northern Canada and northern Alaska. Fur seals,¹⁴⁰ polar bears,¹⁴¹ and whales¹⁴² also are protected by various acts.

Concerned about transboundary air pollution, the Arctic States developed extra-regional regimes¹⁴³ such as the 1979 Convention on Long-Range Transboundary Air Pollution.¹⁴⁴ Although this treaty does not directly regulate pollutant emissions, it has allowed the Arctic States to work together and treat the European air mass as a shared resource.¹⁴⁵ The 1985 Vienna

138. Convention on the Conservation of Migratory Species of Wild Animals, June 23, 1979, 19 I.L.M. 15 (1980).

139. See Rothwell I, *supra* note 2, at 289 (citing Agreement Between the Government of Canada and the Government of the United States of America on the Conservation of the Porcupine Herd, 1987 Can. T.S. No. 31).

140. For an excellent discussion on the 1911 Convention for the Preservation of Fur Seals, 214 Consol. T.S. 80, see Mirovitskaya et al., *supra* note 94, at 22-55. The United States, Russia, Japan, and Great Britain/Canada were signatories to this convention. See *id.* at 22. According to these authors, there were two factors that led to the treaty. See *id.* at 51-52. First, these parties all stood to reap joint gains from the treaties enactment. See *id.* at 51. Second, these parties all understood that if a treaty was not entered into, the fur seal would become extinct. See *id.* at 52.

141. For an excellent discussion on Conservation of Polar Bears, Nov. 1, 1976, 27 U.S.T. 3918, see Anne Fikkan et al., *Polar Bears: The Importance of Simplicity*, in POLAR POLITICS 96-151 (Gail Osherenko & Oran R. Young eds., 1993). The regime for conserving the polar bears was restricted to the five states with polar bear populations (denoted as the ice states). See *id.* at 97. These states included the United States, the former Soviet Union, Denmark/Greenland, Norway, and Canada. See *id.* To adequately protect the polar bear, the five states have

agreed-upon rules that apply within each party's jurisdiction as well as in international waters and that include[s] the regulation of trade across borders. The members of the regime have agreed to protect the polar bear, to protect the ecosystems of which the polar bears are a part (especially denning and feeding sites and migration routes), and to manage polar bear populations "in accordance with sound conservation practices based on the best available scientific data." *Id.* at 98. According to these authors, this is one of the first international regimes based on ecological principles: Polar bears are viewed as part of the ecosystems, and member states are called upon to protect these ecosystems as well as the bears.

Id. at 96-97.

142. Whaling has been regulated under the International Convention for the Regulation of Whaling, Dec. 2, 1946, 161 U.N.T.S. 74. The International Convention created a Commission to monitor and protect whale populations. Rothwell I, *supra* note 2, at 291-92. Recently, the Commission imposed a moratorium on commercial whaling. *Id.* at 292.

143. See Rothwell I, *supra* note 2, at 292-94.

144. United Nations: Convention on Long-Range Transboundary Air Pollution, Nov. 13, 1979, T.I.A.S. No. 10,541, 18 I.L.M. 1442.

145. See P.W. BIRNIE & A.E. BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 398 (1992).

Convention for the Protection of the Ozone Layer¹⁴⁶ also protects the Arctic Region. The Arctic States have also invoked additional treaties to preserve and protect the Arctic habitat from harmful transboundary pollution.¹⁴⁷

C. The Establishment of an Arctic Council—A New Legal Regime?

Prior to the 1991 Environmental Arctic Agreement¹⁴⁸ and the subsequent Arctic Council Agreement,¹⁴⁹ the Arctic regime was dominated by the laws of the sovereign Arctic State that asserted power over it; therefore, any problems that developed in a certain State's area would be resolved by that State.¹⁵⁰ These States only entered into bilateral or multilateral treaties when this was advantageous to their respective interests, thereby leaving international conventions to address any other problems that might arise.¹⁵¹

Due to a lack of interdependence in the Arctic region, the Arctic States have not been forced to form a limited, much less a broad-based, regime. However, as these States become more active in the Arctic region, risks to the environment increase; therefore, all of the Arctic States begin to share a similar concern. In the Arctic, human interaction and activity has become more prevalent and has increased the likelihood of potential international environmental concerns. As a result, the eight Arctic States concluded that it was necessary to develop an intergovernmental regime designed to protect the fragile nature of the Arctic ecosystem.

1. The Arctic Environmental Agreement

In 1991, the eight Arctic countries signed the Arctic Environmental Agreement.¹⁵² Under this Agreement, the states identified several primary objectives including:

- (1) the protection of the Arctic Environment,
- (2) the sustainable use of natural resources,
- (3) the recognition and encouragement of the indigenous peoples in the

146. Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, T.I.A.S. No. 11,097, 26 I.L.M. 1529 (entered into force Sept. 22, 1988) (all the states have signed except Greenland/Denmark).

147. See United Nations Conference on Environment and Development: Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 849 (1992); United Nations Environment Programme Conference of Plenipotentiaries on the Global Convention on the Control of Transboundary Movements of Hazardous Wastes: Final Act and Text of Basel Convention, Mar. 22, 1989, 28 I.L.M. 649 (1989); International Convention on Oil Pollution Preparedness, Response and Co-Operation, Nov. 30, 1996, S. Treaty Doc. No. 102-11 (1991), 30 I.L.M. 735.

148. Arctic Environmental Agreement, *supra* note 6.

149. Arctic Council Agreement, *supra* note 6.

150. See Rothwell I, *supra* note 2, at 280.

151. See *id.*

152. See Arctic Environmental Agreement, *supra* note 6, at 1624.

Arctic environment, and

(4) the identification, reduction, and eventual elimination of pollution.¹⁵³

The Agreement created a decision-making body comprised of eight ministers each representing their respective State.¹⁵⁴ Under the Agreement, these ministers are required to meet every two years and are briefed by Senior-Level Arctic officials.¹⁵⁵ Senior Level Arctic officials meet regularly and are responsible for the national coordination of any implemented programs.¹⁵⁶ Additionally, the Senior Level officials are required to meet with several indigenous groups.¹⁵⁷ Hence, under this Agreement, the Senior Level officials are an intermediary body of officials that manage the organization.¹⁵⁸

A multilateral fund, an assessed fee, or voluntary funding have not funded the programs.¹⁵⁹ Instead, individual countries have given money for particular programs on an ad hoc basis.¹⁶⁰ Several programs have subsequently been initiated and funded under the 1991 Agreement.¹⁶¹

The Arctic Monitoring and Assessment Program (AMAP) was established to monitor the levels and assess the effects of anthropogenic pollutants in the Arctic.¹⁶² The Conservation of Arctic Flora and Fauna (CAFF) was created to initiate cooperation among the Arctic States in an effort to conserve Arctic flora and fauna.¹⁶³ CAFF subsequently created the Circumpolar Protected Areas Network (CPAN) and is charged with determining the appropriate measures needed to ensure biodiversity in the region.¹⁶⁴

The Agreement also established a program denoted as Protection of the Arctic Marine Environment (PAME).¹⁶⁵ PAME is instructed to protect the Arctic marine environment from pollution.¹⁶⁶ Finally, the Agreement also created the Emergency Prevention, Preparedness, and Response (EPPR).¹⁶⁷ The EPPR agency is designed to facilitate cooperation and action among the Arctic States in the event that a regional response is needed for an environ-

153. *Id.* at 1631.

154. *See* Arctic Council Agreement, *supra* note 6, at 1382-85.

155. *See id.*

156. *See id.*

157. *See id.* The recognized indigenous groups are the Inuit Circumpolar Conference, the Saami Council, and the Association of the Indigenous Minorities of the North, Siberia, and Far East Federation. *Id.* at 1386.

158. *See id.*

159. *See id.*

160. *See id.*

161. *See id.*

162. *See* Arctic Environmental Agreement, *supra* note 6, at 1655-60.

163. *See id.* at 1663-68.

164. *See* Arctic Council Agreement, *supra* note 6, at 1382-85.

165. *See* Arctic Environmental Agreement, *supra* note 6, at 1660.

166. *See id.*

167. *See id.* at 1660-63.

mental emergency.¹⁶⁸

Each of these programs is headed by a Chair and a Vice Chair or by a Lead Chair.¹⁶⁹ Each program has one member from each Arctic State on the committee.¹⁷⁰ Moreover, each program is required to communicate with the Indigenous Secretariat in an effort to adequately address the needs of the local indigenous peoples.¹⁷¹

The initial amendment, after identifying the goals and tasks of the organizations, also identified problematic areas now facing the Arctic regions.¹⁷² The Amendment listed six specific areas including persistent organic contaminants, oil pollution, heavy metals, noise, radioactivity, and acidification.¹⁷³ In the Amendment, the Arctic States detailed the effects that these six specific areas have had on the Arctic regions.¹⁷⁴ Thereafter, the Amendment noted several areas of concern that were not covered by a specific international treaty and recommended that the Arctic States proceed in remedying these problems through multilateral efforts.¹⁷⁵

2. Arctic Council Agreement

In the fall of 1996, the eight Arctic States created the Arctic Council.¹⁷⁶ This Council was contrived to serve as a multinational forum that would promote cooperation and political action in the Arctic.¹⁷⁷ More importantly, the Council was designed to address the wide range of issues common to its members. As a result, the Council has been empowered as a high-level intergovernmental organization in which the eight Arctic States can monitor the existing programs as well as adopt new initiatives.¹⁷⁸

The Council Agreement has also provided that the indigenous peoples of the region will have a voice in this intergovernmental organization.¹⁷⁹ In-

168. *See id.*

169. *See* Arctic Council Agreement, *supra* note 6, at 1382-85.

170. *See id.*

171. *See id.* The indigenous peoples of the Arctic lived in relative isolation for years and have only been effected by outside domains during this century. Osherenko & Young II, *supra* note 92, at 72. The indigenous peoples have relied traditionally upon hunting and have developed self-sufficient economies. *Id.* However, this era ended when many governments resettled Native people into centralized communities so they could deliver the Native peoples health care and educational services. Such internal colonialization has led to high unemployment rates and to a high demand for welfare benefits. *Id.* These conditions have led many indigenous peoples to form organizations. *Id.* These organizations have sought to ensure cultural survival, retention of a land base, and the ability to govern themselves. *Id.*

172. *See* Arctic Environmental Agreement, *supra* note 6, at 1633-55.

173. *See id.*

174. *See id.*

175. *See id.*

176. *See* Arctic Council Agreement, *supra* note 6, at 1386-89.

177. *See id.*

178. *See id.*

179. *See id.* at 1388.

deed, along with the eight Arctic States, the Arctic Council Agreement established that three organizations representing the indigenous peoples will be "Permanent Participants" in the Arctic Council.¹⁸⁰ These three organizations have representatives from the Inuits Circumpolar Conference, the Saami Council and the Indigenous Peoples of the North, and the Siberian and the Far East of the Russian Federation.¹⁸¹ These three organizations have been created to allow these groups to meaningfully participate in governmental decisions made by the Council.¹⁸²

The Council is also charged with focusing on environmental protection and sustainable development in the Arctic.¹⁸³ Under the Arctic Council Agreement, issues pertaining to the Arctic Environmental Agreement will continue to be addressed by the aforementioned programs.¹⁸⁴ Hence, the Council is an umbrella organization that takes into its ambit existing Arctic organizations and initiatives.¹⁸⁵ Indeed, the incorporation of the Council into preexisting organizations is critical to the success of the new regime.¹⁸⁶

The Council will also focus on sustainable development.¹⁸⁷ Consequently, the Sustainable Development and Utilization Initiative (SDU), initially proposed under the 1991 Amendment, has been transferred to the Council's control.¹⁸⁸ The SDU's purpose is to help various governmental entities improve the economic, environmental, and social conditions of the Arctic with a particular focus on indigenous communities.¹⁸⁹

The Arctic Council's primary focus will be on issues central to the Arctic's environment.¹⁹⁰ The Council's powers are quite broad.¹⁹¹ The only limitation placed on the council is directly related to any matters dealing with

180. *Id.* at 1386-88.

181. *See id.* Indigenous groups throughout the Arctic region organized into political associations shortly after World War II. Osherenko & Young II, *supra* note 92, at 89. Through these new political associations, the indigenous groups sought to deal directly with States that exercised power over them. *Id.* For instance, the Saami, who are the aboriginal inhabitants of northern Scandinavia, formed the Nordic Saami Council in 1956. *Id.* at 87-89. The Saami Council represents Saami in Finland, Sweden, and Norway. *Id.* This Council deals directly with the powerful transnational organization of the three Nordic Nations, the Nordic Council. *Id.* Now after the enactment of the 1996 Arctic Council Agreement, the Saami Council, as well as other indigenous councils, will be allowed to work with the Arctic Council.

182. *See id.*

183. *See id.*

184. *See id.*

185. *See id.*

186. *See id.*

187. *See id.* Sustainable development has been defined by the agreement as "including economic and social development, improved health conditions and cultural well-being." *Id.* at 1387.

188. *See id.*

189. *See id.*

190. *See id.* "The Council will focus on environmental protection and sustainable development in the Arctic." *Id.* at 1383.

191. *See id.*

military security.¹⁹² Therefore, the Council has the power to address numerous issues.¹⁹³

IV. STRENGTHENING THE TWO MULTINATIONAL ENVIRONMENTAL AGREEMENTS

A. NAFTA's Environmental Provisions and Environmental Protection Today

1. Environmental Protection Today

a. NAFTA's Environmental Side Agreement

NAFTA's Environmental Side Agreement was enacted in large part to prevent further environmental degradation along the U.S.-Mexican border.¹⁹⁴ However, five years after its enactment, environmental degradation is still occurring at an alarmingly frequent rate.¹⁹⁵ There are two obvious reasons for

192. *See id.* "Only matters related to military security have been specifically excluded from the Council's considerations." *Id.* at 1384.

193. *See id.* The issues that are currently going to be addressed are environmental in nature. However, because this document does not provide numerous limitations on the power of the organization, the organization could theoretically address any issue, outside of military security, which would arise in the region.

194. *See* Raustiala, *supra* note 7, at 34.

195. For instance, the National Toxic Campaign Fund found many disturbing factors that currently contribute to the degradation of waters within the Border region. Martinez, *supra* note 17, at 38. The report issued by this organization indicated that:

1. Border industries will typically discharge toxic substances into local waters. More than one-third of the sites (eight out of twenty-three) had toxic levels of twenty to 215,000 times in excess of standards for receiving waters.
2. Border residents are poisoned by these excessive discharges. There have been observations that the water canals bordering these maquiladora chemical plants are full of chemical discharges.
3. American maquiladora plants are exploiting Mexico's lack of enforcement of its environmental laws. In 1991, Mexico budgeted forty-eight cents per capita for environmental enforcement compared to \$24.40 in the United States.
4. There is little auditing of the discharging of toxic wastes, even when they present a danger to human and animal life. It is suspected that the higher levels of liver cancer and pancreatic cancer along the border are attributable to these toxic waste.
5. The crisis of raw-sewage discharges into Border waters continues despite attempts and planning to solve this problem. According to the American Medical Association, these waters have converted the border into a virtual "cess pool." The incidence of hepatitis along the border is four times greater than the national average in the United States.
6. The maquiladora pollution in Mexico reflects an inefficient industry. High discharges of petroleum and xylene indicate that these companies are not engaging in efficient materials management. They are not recycling these chemicals, a measure which, in turn, would reduce their costs and increase their revenues.

Id.

environmental degradation along the border. First, Mexico has failed to raise its environmental standards.¹⁹⁶ As a result, pollution emitted from Mexican plants, such as the 250,000 tons of sulfur dioxide per year emitted by the two Carbon I and II coal-burning electric generating facilities in Piedras Negras, Mexico, still severely affect the border region.¹⁹⁷

Second, the Mexican Environmental Agency has failed to enforce its own environmental laws and has failed to establish the necessary procedures for administering and interpreting its own environmental rules.¹⁹⁸ As a result of the Mexican government's ineptness, many corporations knowingly pollute the environment. For instance, only thirty of the 164 tons of hazardous waste generated per day, by approximately five percent of maquiladoras, is disposed of properly.¹⁹⁹ Meanwhile, approximately forty-four tons of hazardous waste generated per day by the maquiladoras goes unaccounted for.²⁰⁰ This unaccounted-for waste has adversely affected the environment. For example, one-third of the water pollution check sites have detected toxic levels twenty to 215,000 times in excess of standards.²⁰¹ Indeed, tests conducted in the Rio Grande and Rio Bravo Rivers determined that thirty different toxic substances exceeded acceptable levels including arsenic, copper, and mercury.²⁰²

NAFTA's Environmental Side Agreement has not created an adequate forum to address environmental degradation caused by Mexico's lax enforcement of its environmental laws or its lax environmental standards. Citizens and non-governmental organization submissions from the United States to the CEC are ineffective in challenging Mexico's failure to adequately enforce its environmental standards because citizen suits can not effect internal enforcement of laws.²⁰³ The United States could bring a claim under the CEC for Mexico's failure to enforce its environmental standards.²⁰⁴ If such a failure were found, the Mexican government would have monetary sanctions imposed against it.²⁰⁵ However, the United States has chosen not to bring a claim against the Mexican government because of fears that such a claim would lead to diverse political ramifications. Finally, neither the United States nor private citizens could bring a claim under the CEC for Mexico's failure to have more stringent environmental standards.²⁰⁶ Consequently, if

196. See Holland, *supra* note 18, at 1250.

197. See *id.*

198. See Martinez, *supra* note 17, at 39.

199. See Eaton, *supra* note 19, at 728. In general, Mexico generates 6.2 million tons of toxic waste per year. See *id.* However, only fifteen percent of the amount is disposed of properly. See *id.*

200. See *id.*

201. See Martinez, *supra* note 17, at 39-42.

202. See *id.* at 38.

203. See Environmental Side Agreement, *supra* note 4, at arts. 14, 15.

204. See *id.* art. 22(1).

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

206. Note that there is no provision that states that claims are not possible if Mexico has

Mexican companies are not acting within environmental standards, as seen with the Carbon I and II coal-burning facilities in Piedras Negras, Mexico, the Environment Side Agreement does not provide for recourse under the CEC.

b. The Border Side Agreement

The NADB and BECC have not been very productive to date.²⁰⁷ Many have been highly critical of the NADB and the BECC for their failure to assist the poor communities that are in the most need of environmental assistance through environmental projects.²⁰⁸ Indeed, the NADB and the BECC have not approved loans for these communities because the NADB has determined that these poor communities could not afford repayment.²⁰⁹ Due to these standards, the NADB and the BECC have spent only \$7.48 million on environmental projects.²¹⁰ This stands in pale comparison to the Clinton Administration's initial assertion that \$8 billion would be spent on environmental projects in the border region.²¹¹

2. Strengthening NAFTA's Environmental Protection Capabilities

NAFTA's Environmental Side Agreement only focused on the adjudication of potential environmental problems. This provision, however, failed to provide a forum whereby the three countries could develop standards to prevent transboundary environmental degradation. Consequently, the Carbon

failed to enact stringent environmental standards. Rather, several provisions state that each Party shall enforce its regulations. For instance, Article 4(1) states "[e]ach Party shall ensure that its laws, regulations, procedures, and administrative rulings of general application respecting any matter covered by this Agreement are promptly punished or otherwise made available in such a manner as to enable interested persons and Parties to become acquainted with them." Consequently, if the party does not enforce its laws, Article 14 provides a remedy. Article 14 states that "[t]he Secretariat may consider a submission from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law. . . ." Article 14 does not provide a remedy if the Party's laws are not as stringent as another may want or think they should be. Therefore, if Mexico enforces its regulations, and those regulations are weaker than U.S. regulations, then there is no recourse. See also Holland, *supra* note 18, at 1250.

207. *Id.*

208. See *id.* Public Citizen has been highly critical of the NADB and the BECC because these organizations have failed to grant economic assistance to the poor communities that need such assistance to fund environmental projects. *Id.* at 1250. Additionally, the U.S. General Accounting Office issued a report in 1996 that noted the environmental cleanup efforts have been thwarted by the inability of many along the border to receive financing from the North American Development Bank. *Id.* at 1247. The report issued by the Public Citizen "asserts that the poorest communities are in the most need of assistance through environmental projects, but that these same communities do not have access to NAD Bank because they cannot afford repayment." *Id.* at 1247.

209. See *id.*

210. *Id.* at 1250-51.

211. See *id.* at 1251.

I and II plants in Piedras Negras, Mexico, will continue to pollute the air across south Texas because, under the CEC, it is impossible to remedy transboundary pollution if the company is operating within its home country pollution standards.²¹²

To prevent environmental degradation, the Parties to NAFTA must create an organization comparable to the Arctic Council. This NAFTA Council would serve as a multinational forum designed to promote cooperation and political action on environmental issues common to its members. Further, this Council would be charged with developing an enforcement and compliance cooperative work program to facilitate cooperative compliance in regulated industries.

This Council could establish subgroups to focus on particular environmental issues. For instance, the Council could establish a subgroup to focus on the transboundary movement of hazardous waste. The movement of hazardous waste between the United States and Mexico currently constitutes a major concern for United States residents. A 1996 report by the United States General Accounting Office noted that more than 1250 trucks cross daily from Mexico into the United States carrying cargo that exhibited "significant safety concerns."²¹³ These trucks reportedly have been carrying "corrosives, chemicals, explosives, jet fuels, poisons, toxic wastes, and pesticides."²¹⁴ The General Accounting Office has asserted that it "did not believe Mexico had the compliance or enforcement mechanisms necessary to ensure trucks crossing the border in the United States were safe and road worthy."²¹⁵

If a subgroup were in place, it could develop a common system for tracking the hazardous waste shipments. Implementation of such a program could help identify illegal hazardous waste shipments and could also allow for better monitoring of legal hazardous waste shipments. Finally, a common system for tracking could also provide information useful in hazardous waste program planning, policy-making, public reporting, and emergency preparedness and response.

B. Arctic's Environmental Provisions and Environmental Protection Today

1. Environmental Protection Today

Multinational cooperation among the eight Arctic States has been very rare until just recently. The Arctic States, however, have initiated an Arctic Environmental Agreement which will be enforced and strengthened under

212. Likewise, the United States and Mexico have been encouraging Canada to pass an endangered species law. Under the CEC, it is impossible to force Canada to protect endangered species. See *A Complaint Against Canada*, THE KANSAS CITY STAR, Jan. 8, 1998, at A2.

213. Holland, *supra* note 18, at 1246.

214. *Id.*

215. *Id.*

the newly created Arctic Council.²¹⁶ This new regime has been designed to conform with the peculiarities of the prior Arctic legal regime. In many aspects, this new regime is forward-looking because it provides a strong organizational base that may be empowered in the future to resolve larger environmental conflicts. This strong organization may be needed in the future because some commentators have asserted that we are entering the "Age of the Arctic."²¹⁷

These commentators have contended that the Arctic may well become one of the most highly sought-after areas in the world.²¹⁸ Indeed, these commentators have maintained that the Arctic is a highly strategic region for militarization purposes.²¹⁹ Moreover, these commentators have noted the vast deposits of hydrocarbons that lay under the Arctic region.²²⁰ As a result, they have concluded that the Arctic is an extremely valuable area that will be subjected to increased development and increased controversy.²²¹

If we are entering the Age of the Arctic, then it is of vital importance that the eight Arctic States develop a strong Arctic legal regime. Indeed, if increased activity abounds, many daunting issues are likely to arise in the Arctic. Hence, a strong regional regime would be advantageous because the Arctic States could formulate a scheme of governance that would enable them to adequately solve any potential problems, as well as resolve any potential conflicts.

216. See Arctic Council Agreement and Arctic Environmental Agreement, *supra* note 6.

217. OSHERENKO & YOUNG II, *supra* note 92, at 3-5. Osherenko and Young have contended that we are entering the Age of the Arctic. These commentators have asserted that the Arctic is very important due to its vast deposits of minerals and its strategic importance in military affairs. Indeed, the commentators have noted:

Iron, lead, and zinc mines in the Arctic produce valuable ore transported to the South through these once unknown Arctic passages. Nuclear-powered ice breakers and ice-breaking container ships move cargo year round to and from ports that, until recently, were inaccessible for over half the year. The wealth of black gold and its companion natural gas now flows southward through hundreds of miles of pipeline from deposits in northern Alaska and northwestern Siberia. For the military, the Arctic has emerged as one of the world's most important theaters for deployment and operations of strategic weapons systems. Northern Natives, first treated by white men as semi-savages or barbarians and later regarded with awe for their remarkable ability to survive in a frigid environment, have adapted politically, economically, and socially to assume roles of leadership in international Arctic affairs . . . Taken together, these developments have transformed the Arctic into a region of increasing domestic and international conflicts.

Id. at 3-4.

218. See *id.*

219. See OSHERENKO & YOUNG II, *supra* note 92, at 17-44.

220. See *id.* In the case of hydrocarbons, it is estimated that recoverable reserves in the region range between 100 and 200 billion barrels of crude oil and between 2,000 and 3,000 trillion cubic feet of natural gas. *Id.* at 45.

221. See *id.* at 117-18.

2. Strengthening the Arctic Council Agreement

The Arctic Council has been given broad powers to fashion a functional and effective legal regime in the Arctic. In achieving such, the Council should first establish a reliable means of obtaining funds. For example, the Council could require each Arctic State to contribute an equal amount of funds to the entire organizational structure. Additionally, the Council could tax or assess operational fees on certain environmentally hazardous industries (oil and gas) to help fund certain aspects of the regime. However, for any governmental entity to survive and function properly, it must have a reliable source of income. Hence, finding a reliable source of funding should be a primary goal of the Council.

Thereafter, the Council needs to create enforcement and adjudicatory authorities within its umbrella organization. Without such, the organizations lack credibility, and, as a result, the organization's initiatives could be completely ignored. The Council should enact an adjudicatory process like the one created under NAFTA's Environmental Side Agreement, whereby the Parties, citizens, and non-governmental organizations can adjudicate environmental degradation claims. Indeed, an adjudicatory organization will be needed as industrial development increases in the Arctic region.

Once enforcement mechanisms and appropriate funding schemes have been established, the Council should create additional programs designed to address environmental problems in the Arctic. These additional programs should include areas that are not covered by existing treaties and that are not adequately covered under existing agreements. For instance, the Arctic region should have a program established to address the problems caused by increased oil and gas extraction. Such a program is needed as oil and gas companies are actively drilling in the Arctic region. For example, Atlantic Richfield Company (ARCO) has recently drilled the first well just offshore from the Arctic National Wildlife Refuge and plans to drill more wells soon.²²² Indeed, many more wells will be drilled in the Arctic. The United States Geological Service has estimated that the Alaskan Arctic contains at least seventeen billion barrels of oil and ninety-one trillion cubic feet of natural gas.²²³ The Canadian Arctic also has substantial oil and gas reserves in the Beaufort Sea/Mackenzie Delta Area, estimated at least at thirteen billion barrels of oil and 200 trillion cubic feet of natural gas.²²⁴

The Arctic Council also should establish a committee to formulate guidelines on uniform procedures for oil and gas companies to follow when extracting and transporting oil. Without such a committee, oil and gas com-

222. See *Oil in the Arctic: Baked Alaska*, GREENPEACE MAG., 4 Winter 1997-98, at 4.

223. See Westermeyer, *supra* note 96, at 723.

224. See *id.* at 723-24. Many scientists have also estimated that the energy potential in the Euroasian Arctic is perhaps far greater than in the North American Arctic. Indeed, the world's largest gas field, located in Urengoy, Russia, contains more than one trillion cubic meters of gas. See *id.*

panies are free to transport oil out of the region by any means available to them. Such leadway could yield unwarranted environmental degradation. For instance, ARCO and British Petroleum (BP) plan to ship oil out of the ice-jammed waters of the southern Arctic Ocean via a sub-sea pipeline to the trans-Alaska pipeline.²²⁵ BP and ARCO plan to construct this sub-sea pipeline in unstable permafrost below the surface of the Arctic Ocean.²²⁶ This, combined with the fact that the southern Arctic Ocean is gouged with ice almost year round, makes the pipeline extremely vulnerable to spillage.²²⁷ Similarly, the United States and Canada have proposed transporting oil out of the Arctic using tankers strengthened for use in ice-laden waters.²²⁸ However, shipping oil out of the Arctic under these conditions is risky and may pose significant environmental risks.

The eight Arctic States have empowered the Arctic Council to create an environmentally-conscious legal regime in the Arctic. The Council has the power to protect one of our most pristine environmental treasures. The Arctic States have recognized the need to facilitate such. It is now up to the Council to ensure that the Arctic's environment is protected. The Council has an awesome task. Yet, it is one that must be accomplished if we are to protect our world's environment.

V. CONCLUSION

States voluntarily enter into multinational regimes to solve problems. The importance of these multinational regimes in our international legal system has continually grown over the past fifty years. Since World War II, our society has learned how valuable such institutions can be in resolving conflicts and solving problems. Indeed, two renowned commentators on the subject have stated:

The importance of intergovernmental regimes is growing in a world in which increasing interdependence heightens the impact of the actions of individualized states . . . on the welfare of other states and their inhabitants. . . . Natural resource and environmental regimes play an increasingly important role in structuring international relations as transboundary air and water pollution, the protection of migratory or endangered species, and other environmental issues have come to the attention of policy makers and the public.²²⁹

Voluntarily, the United States has entered into two multinational environmental regimes to solve the problems of transboundary pollution.²³⁰ How-

225. See *Oil in the Arctic: Baked Alaska*, *supra* note 222, at 5.

226. See *id.*

227. See *id.*

228. See Westermeyer, *supra* note 96, at 723.

229. OSHERENKO & YOUNG I, *supra* note 1, at 1-2.

230. Environmental Side Agreement, *supra* note 4; Arctic Council Agreement, *supra* note 6. Provisions stating environmental protection is a goal of the agreement is found at Art.

ever, neither agreement is capable of fully protecting the environment. Consequently, the signatory Parties must create new organizations to assure that these multinational environmental regimes succeed in their stated goals. Clearly, the development of these new organizations is needed to prevent environmental degradation.

1 of the Environmental Side Agreement, and page 1388 of the Arctic Council Agreement.

