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## Cuixmala Model Draft Treaty for the Protection of the Environment and the Natural Resources of North America

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ALBERTO SZÉKELY, J. ALAN BEESLEY, ALBERT E. UTTON\*

# Cuixmala Model Draft Treaty for the Protection of the Environment and the Natural Resources of North America

## INTRODUCTION

The basic research paper for the preparation of this Model Draft Treaty was carried out and published by Alberto Székely under the title "Establishing a Region for Ecological Cooperation in North America", in 32 Nat. Resources J. 563 (1992).

The Cuixmala Model Draft was then prepared by the International Transboundary Resources Center's (CIRT) Trilateral Legal Experts Team composed of Alberto Székely from Mexico (Rapporteur of the project), J. Alan Beesley from Canada and Albert E. Utton from the United States. It was first reviewed by the Team at a working meeting in Cuixmala, Mexico (a Reserve of the Biosphere which constitutes an important habitat for transboundary migratory birds of North America), in January of 1993, and finalized on Zavikon Island, Canada (in the international section of the St. Lawrence River in the border between Canada and the United States), in July of 1995.

The Model Draft is preceded by similar research exercises carried out under the sponsorship of CIRT, with the participation of Albert E. Utton and Alberto Székely, and which produced the publication of the "Ixtapa Draft Agreement Relating to the Use of International Groundwaters" (25 Nat. Resources J. 713, 1985), the "Bellagio Draft Treaty" on Transboundary Groundwaters (29 Nat. Resources J. 663, 1989), and the "Puerto Vallarta Draft Treaty" on Transboundary Hydrocarbon Resources (31 Nat. Resources J. 609, 1991).

The preparation of the Cuixmala Model Draft Treaty for the Protection of the Environment and the Natural Resources of North America, coincided with the elaboration of the draft "International Covenant on Environment and Development", by the Working Group of the Commission on Environmental Law of the World Conservation Union (IUCN) in cooperation with the International Council on Environmental Law, which was finalized in March of 1995 (referred to in commentaries to various articles of this Draft as the "95IUCN Draft").

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Alberto Székely and Alan Beesley participated in that Working Group. Both of them participated also, as Members of the International Law Commission, in the work of that subsidiary organ of the U. N. General Assembly, in the preparation of draft treaty articles on "the law of non-navigational uses of international watercourses", on international "State responsibility" and on "international liability for injurious consequences arising out of acts not prohibited by international law", (the latter referred to in commentaries to various articles in this Draft as the "1996 ILC International Liability Draft Articles", meaning the "Draft Articles on International Liability for the Injurious Consequences of Acts Not Prohibited by International Law", which were adopted by the Commission at its Forty-eighth Session, 1996, and which can be found in U. N. Doc. A/CN.4/L.533, 17 July 1996), codifying and progressively developing the international practice of States, all of which are directly pertinent to the object and purposes of the Cuixmala Draft Treaty.

It is the hope of the authors that this draft will stimulate further research, advance regional thinking and contribute to the development of an urgently needed legal regime for the protection of the environment and natural resources of the North American region.

CIRT and the authors wish to express their profound appreciation to the William and Flora Hewlett Foundation for its support to this project, and to the Cuixmala and Max Bell Foundations for their hospitality.

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## TABLE OF CONTENTS

- Article 1. Area of Application of the Treaty.
- Article 2. Definitions and Use of Terms.
- Article 3. Object and Purpose.
- Article 4. Scope and Application.
- Article 5. The North American Environmental Cooperation Regime.
- Article 6. Sovereign Rights and Fundamental Duties.
- Article 7. Abuse of Rights.
- Article 8. No Transboundary Relocation or Transfer.
- Article 9. Non-discrimination.
- Article 10. Environmental Standards.
- Article 11. Sustainable Development and International Trade.
- Article 12. Conservation and Sustainable Use of Natural Resources.
- Article 13. Transboundary Natural Resources.
- Article 14. Pollution of the Environment.
- Article 15. Polluter Pays Principle.
- Article 16. Rights and Duties of North American Inhabitants.
- Article 17. Public Rights to Participate and to Know.
- Article 18. Intergenerational Equity.

- Article 19. Obligation to Comply with and to Implement the North American Environmental Cooperation Regime.
- Article 20. General Obligation to Cooperate.
- Article 21. Implementation of the Obligation to Cooperate.
- Article 22. Cooperation Arrangements and Agreements.
- Article 23. Exchange of Data, Information and Research.
- Article 24. Prevention and Abatement.
- Article 25. Precautionary Principle.
- Article 26. Priority of Prevention Obligations.
- Article 27. Monitoring.
- Article 28. Environmental Emergencies and Disasters.
- Article 29. Prior consultation.
- Article 30. Prior Notification and Information.
- Article 31. Mandatory Prior Environmental Assessment.
- Article 32. State Responsibility and Liability.
- Article 33. State Liability
- Article 34. Remedies.
- Article 35. Rehabilitation and Restoration.
- Article 36. Peaceful Settlement of Disputes.
- Article 37. Hazardous Wastes and Substances.
- Article 38. Establishment of the Council.
- Article 39. Organs of the Council.
- Article 40. Principal Function of the Council.
- Article 41. Instruments of the North American Environmental Policy.
- Article 42. Conference of the Parties.
- Article 43. The Advisory Committee of the Environmental Experts.
- Article 44. Public Selection Procedure for the Committee.
- Article 45. The Secretariat of the Council.
- Article 46. The North American Environmental Report.
- Article 47. The Regionally Agreed Directives.
- Article 48. The North American Recommended Index of Parameters of Maximum Tolerance of Environmental Impacts.
- Article 49. The Environmental Advisories.
- Article 50. Communications by Individuals and Non-governmental Organizations.
- Article 51. The North American Environmental Protection Fund.
- Article 52. Budget.
- Article 53. Final Clauses.

*Canada, the United Mexican States and the United States of America  
(the Parties),*

**RESOLVED** to preserve, for their present and future generations, the natural heritage with which they are endowed in their territories and in the areas within the limits of their respective national jurisdictions,

**REAFFIRMING** Principle 21 of the 1972 Stockholm Declaration on the Human Environment, as well as Principle 2 of the 1992 Rio Declaration on Environment and Development, and United Nations General Assembly Resolution 1803 (XVII) of 14 December 1962 on Permanent Sovereignty over Natural Resources,

**DETERMINED** also to embark on a cooperative program for the gradual restoration and rehabilitation of the ecosystems, components of those ecosystems and the renewable natural resources of the region, which have been degraded as a result of activities which have proved not to be environmentally sound and to be incompatible with sustainable development,

**AWARE** of the need to enhance their common understanding of the scientific, environmental, economic and social effects of global environmental changes and degradation phenomena,

**RECOGNIZING** their common but differentiated responsibilities, to undertake effective and timely measures, in order to reduce and control the impact from the region upon global environmental degradation phenomena, especially in the field of atmospheric interference's with the global environment and their impact on human health and the protection of their respective renewable natural resources, as well as water and air resources,

**RESOLVED** to preserve their biological diversity, with special emphasis on forest resources, on their wetlands of regional importance, on marine ecosystems, on the protection of indigenous species and of those endangered or threatened with extinction,

**AWARE** of the need to protect numerous highly migratory species of birds and other fauna within the region;

**CONSCIOUS** of the increasing importance of fresh water resources in the region, and their vulnerability to the impact of all forms of human activity, particularly from the danger of anthropogenically induced global warming,

**RESOLVED** to take the necessary measures to ensure that activities arising from the NAFTA, shall be implemented only in a manner that protects natural resources and improves environmental quality, as well as the health and safety of individuals in all three countries,

**BEARING** in mind the progress made in the North American Agreement on Environmental Cooperation, adopted by the Parties in connection with the North American Free Trade Agreement (NAFTA),

**CONCERNED** with the potential environmental impacts within the region from anticipated substantial increases in the trade of goods and services and in the related exploitation of natural resources,

**RECOGNIZING** that only through their joint or coordinated action, within the framework of a legal regime of environmental cooperation, and with the support of adequate institutional mechanisms and instruments, can the objectives of a regional zone of environmental cooperation in North America be effectively and efficiently achieved,

**RECALLING** that, in the past, their respective Governments have entered into bilateral and trilateral agreements, for the protection of the environment and of the natural resources of the region, which need to be strengthened and developed in the framework of a more comprehensive and integrated legal regime of environmental cooperation, with well defined principles and the related reciprocal rights and obligations, and through establishing the necessary institutional mechanisms and instruments,

**RESOLVED** to comply with and to implement their international obligations, as provided in the relevant bilateral, trilateral and multilateral environmental and natural resource agreements to which they are respectively parties,

**HAVE AGREED AS FOLLOWS:**

**TREATY FOR THE PROTECTION OF THE ENVIRONMENT AND THE  
NATURAL RESOURCES OF NORTH AMERICA**

(Comment on the title: There are currently five international legal instruments already in force, which establish various geographical regions of ecological cooperation more or less analogous in substance and in scope to the one intended in this Draft. They are the Benelux Convention for the Conservation of Nature and the Protection of the Landscape (Brussels, 8 June 1972), the Nordic Convention on the Protection of the Environment (Stockholm, 19 February 1974), the African Convention for the Conservation of Nature and Natural Resources (Algiers, 15 September 1968), the Convention for the Protection of the Natural Resources and the Environment of the South Pacific (Noumea, 24 November 1984) and, in a much more limited way, the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere (Washington, 12 October 1940); see "I. Precedents of Regional Cooperation" in Székely, Alberto, "Establishing a Region for Ecological Cooperation in North America", 32 *Nat. Resources J.*, 563 (1992). The title of the South Pacific Convention seemed to embrace the general idea and purposes of an agreement to establish, in a given

geographical region, a zone of ecological cooperation, that is, a zone where the States in the region agree to put into force a legal regime and institutional mechanisms and instruments, in order to preserve or protect the various elements of its natural environment and the resources therein).

#### **ARTICLE 1**

##### ***Area of Application of the Treaty***

This Treaty applies to the territories of the Parties, as well as to the areas within the limits of their respective national jurisdictions, in accordance with international law, hereinafter called "the region". (This specific region, so conceived, obviously excludes other immediate territorial insular jurisdictions, such as Denmark (for Greenland), France (for its claimed St. Pierre and Miquelon islands adjacent to the eastern coast of Canada, and for Clipperton Island west of the Mexican coast), the United Kingdom (for Bermuda and Caicos Islands), the Bahamas, Cuba, the Dominican Republic, Haiti, and several other Caribbean island States or European possessions, all of which are generally situated, like the three continental countries, approximately between parallels N120 and N880, and meridians W1700 and W500, and which would otherwise constitute, from a strict geographic standpoint of view, the North American region *latu sensu*).

#### **ARTICLE 2**

##### ***Definitions and Use of Terms***

1. "Transboundary impacts" means:

- a) The effects arising from events or activities which transcend their respective boundaries.
- b) The effects in the region arising from events or activities undertaken outside the region as defined in this Article.
- c) The effects outside the region arising from events or activities undertaken in the region as defined in this Article.

2. "Transboundary ecosystem" means a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit, as well as a system of inputs and outputs connected to the surrounding biosphere, which may be in the form of radiant energy, water, gases, chemicals, or organic materials, which move through the ecosystem's boundary by meteorological, geological or biological processes". (See definition in Article 2 of the United Nations Convention on Biological Diversity, and definition by E. and L. Teclaff in "International Control of Cross-Media Pollution-An Ecosystem Approach", 27 Nat. Resources J. 21, 1987.)

3. "Transboundary natural resources" means those resources extending across the boundaries of:

a) The territory or areas within their respective national jurisdictions,

b) The territory or areas within the limits of the national jurisdiction of one of the Parties and the territory or areas within the limits of national jurisdiction of another State that is not a Party to this Treaty, or

c) The territory or areas within the limits of the national jurisdiction of any of the Parties and areas beyond the limits of any national jurisdictions. (See definition by Alberto Székely in "Transboundary Resources: A View from Mexico", 26 Nat. Resources J. 675, 1986.)

4. "Environment" includes ecosystems and natural resources, both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors; property which forms part of the cultural heritage; and the characteristic aspects of the landscape. (See definition in Article 2/10 of the 1993 Lugano Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, as completed by the ILC Special Rapporteur on "International Liability for Injurious Consequences of Acts not Prohibited by International Law", at the Forty-seventh session, with his Eleventh Report, in document A/CN.4/468 of 26 April 1995, p. 16.)

5. "Harm" means:

a) Loss of life, personal injury or impairment of the health or physical integrity of persons;

b) Damage to property or loss of profit;

c) The cost of reasonable measures taken or to be taken to restore or replace destroyed or damaged natural resources or, where reasonable, to introduce the equivalent of these resources into the environment;

d) The cost of preventive measures and of any further damage caused by such measures;

e) Compensation in accordance with the principles of equity and justice if the measures indicated in subparagraph i) were impossible, unreasonable or insufficient to achieve a situation acceptably close to the status quo ante.

(See draft text proposed by the ILC Special Rapporteur on "International Liability for Injurious Consequences of Acts not Prohibited by International Law", at the Forty-seventh session, with his Eleventh Report, in document A/CN.4/468 of 26 April 1995, pp. 15-16.)

6. "Transboundary harm" means harm caused in the territory of or areas under the jurisdiction or control of a Party other than the Party of origin,

whether or not the Parties concerned share a common border. (See Draft Art. 2/b in 1996 ILC International Liability Draft Articles.)

7. "Significant harm" means an adverse effect that:

- a) Can be established by objective evidence;
- b) Is not trivial in nature; and
- c) Is measurable and entails:

i) Some degree of importance, without need to rise to the level of being of serious importance or to the level of substantial harm, and

ii) Real impairment of use. (See commentary to Draft Article 2/b in 1996 ILC International Liability Draft Articles, as well as Paragraphs 13 to 15 of Chapter III of ILC Report on the Work of its Forty Sixth Session in 1994, on "The Law of the Non-Navigational Uses of International Watercourses", pp. 211-212, and statement by Mr. A. Székely, in the Official Record of ILC Plenary meeting of 13 May 1994, seeking from Mr. J. Barbosa and Mr. C. Calero clarification on the meaning they attached to the term "significant harm", in their Plenary statements on 29 June and 1 July, 1993, respectively (see also Official Records of those Plenary meetings), and reply by Mr. R. Rosenztock, the Special Rapporteur, in the same meeting.)

8. "Risk of causing significant transboundary harm" means a low probability of causing disastrous harm and a high probability of causing other significant harm". (See draft Art. 2/a of 1996 ILC International Liability Draft Articles.)

9. "Party of origin" means the Party within whose territory or under whose jurisdiction or control the activities referred to in Article 4 paragraph 1 are carried out. (See draft Art. 2/c of 1996 ILC International Liability Draft Articles.)

10. "Pollution" means the introduction by man, directly or indirectly, of substances or energy into the environment, which results or is likely to result in such deleterious effects as harm to living resources and life, hazards to human health, hindrance to activities, impairment of quality for use and reduction of amenities. (See UNCLOS Art. 1/1/4.)

11. "NAFTA" means the North American Free Trade Agreement.

12. The "Council" means the North American Council on the Environment.

### ARTICLE 3

#### *Object and Purpose*

The object and purpose of the present Treaty are to establish a legal regime for environmental cooperation in the region, as well as the

institutional mechanisms and instruments required by the Parties in order to:

1. Prevent, control, abate, eliminate and respond to transboundary impacts adverse to national, transboundary or regional natural resources, to environmental quality or to the health and safety of individuals, in any of the territories or areas within the limits of the national jurisdiction of the Parties, and arising from:

a) events or activities undertaken in the territory or areas within the limits of the national jurisdiction of any of the Parties, or

b) events or activities undertaken outside the region.

2. Prevent, control, abate, eliminate and cooperate to respond to impacts outside the region adverse to the conservation and sustainable use of national, transboundary, regional or international natural resources, to environmental quality or to the health and safety of individuals, and arising from events or activities undertaken in the territory or areas within the limits of the national jurisdiction of any of the Parties.

3. Undertake programs of cooperation to restore the environmental quality of natural ecosystems affected by the adverse transboundary impacts referred to in this Article.

#### **ARTICLE 4**

##### ***Scope and Application***

1. This Treaty applies to activities falling within the purview of its object and purpose as provided in Article 3, and undertaken in its area of application, as defined in Article 1, by the Parties, as well as by the physical or juridical, public or private, national or foreign persons under their jurisdiction or control (See Draft Art. 1 of "Draft Articles on International Liability for Injurious Consequences of Acts not Prohibited by International Law", adopted by the ILC Drafting Committee during its Forty-sixth session in 1994, in Doc. A/CN.4/L.503 of 15 July 1994, hereinafter referred to as "1994 ILC Draft Articles", and as changed in Draft Article 1 of 1996 ILC International Liability Draft Articles.)

2. In the pursuance of the object and purpose of this Treaty, the Parties undertake to adopt all the necessary legal, administrative and other domestic measures, in order to apply, comply with, and ensure the observance of the provisions of this Treaty, by physical or juridical persons within their respective territories or areas within the limits of their national jurisdiction.

3. The provisions of this Treaty shall not affect the right of each of the Parties to adopt and implement more stringent measures than those required under this Treaty. (See 95IUCN Art. 57/1.)

**ARTICLE 5*****The North American Environmental Cooperation Regime***

The rights and obligations of the Parties under this Treaty, together with those provided in other international environmental agreements as well as in other pertinent rules of international law binding on the Parties constitute, for the purposes of this Treaty, the "North American Environmental Cooperation Regime". (See 95IUCN Art. 1, and Draft Articles 6 and 8 of 1996 ILC International Liability Draft Articles.)

**ARTICLE 6*****Sovereign Rights and Fundamental Duties***

1. The Parties have, in accordance with the Charter of the United Nations and the principles of international law:

a) The sovereign right to utilize their own resources pursuant to their own environmental policies. (See 95IUCN Art. 11/1, and Draft Article 3 of 1996 ILC International Liability Draft Articles.)

b) The right and obligation to protect the environment in their respective territories and in areas within the limits of their national jurisdiction, from potential or actual significant harm caused by activities outside their national jurisdiction. (See 95IUCN Art. 11/2.)

2. In order to prevent significant transboundary environmental harm, each Party has the fundamental duty to:

a) Ensure that activities within their respective jurisdiction or control do not cause potential or actual significant harm to the environment of other States or of areas beyond the limits of national jurisdiction. (See 95IUCN Art. 11/1/b.)

b) To prevent activities in its territory or areas within its respective national jurisdiction from causing adverse effects to the environment and natural resources, particularly transboundary resources, in any other part of the region or outside the region;

c) Fully comply with its respective obligations of non-discrimination, prior consultation, prior notification, prior mandatory environmental impact assessments and other relevant obligations toward the other Parties in the region as provided in this Treaty; and

d) In the case of actual or potential transboundary environmental harm originating within its respective territory or areas within the limits of its national jurisdiction, and without prejudice to its international legal responsibility or liability, grant the victims access to, as well as due process and equal treatment in, administrative and judicial proceedings, to the same extent as is available to victims within its territory or national

jurisdiction who have been or may be similarly affected. (See Articles on Remedies, Water Resources Committee, 67th Conference of the International Law Association, Helsinki, 1996, and Draft Articles 5 and 20 of 1996 ILC International Liability Draft Articles.)

3. Each Party has the fundamental obligation to conserve and utilize transboundary resources in an equitable and reasonable manner. (See ILC Watercourses Draft Art. 5.)

4. Each Party has the obligation to avoid, to the maximum extent possible, and reduce, to the minimum extent possible, any adverse transboundary environmental effects.

#### **ARTICLE 7**

##### ***Good Faith and Abuse of Rights***

The Parties shall fulfill in good faith the obligations assumed under this Treaty and shall exercise their rights, jurisdictions and freedoms recognized in this Treaty in a manner which would not constitute an abuse of rights. (See UNCLOS Art. 300, and Draft Article 6 of 1996 ILC International Liability Draft Articles.)

#### **ARTICLE 8**

##### ***No Transboundary Relocation or Transfer***

The Parties shall take the necessary measures to ensure that:

a) Harm or the threat thereof is not transferred directly or indirectly from one geographical area to another, within or outside the region (see UNCLOS Art. 195);

b) One type of harm is not transformed into another type of harm; and

c) Activities and substances that cause environmental harm or are found to be harmful to human health, are not geographically relocated or transferred, either within or outside the region. (See 95IUCN Art. 14; and also Draft Article 12 of 1996 ILC International Liability Draft Articles.)

#### **ARTICLE 9**

##### ***Non Discrimination***

1. The Parties shall take into account in formulating their domestic environmental policies, and the potential adverse environmental effects arising out of the utilization of transboundary resources, without discrimination as to whether the effects would occur within or outside

their territory or areas under the limits of their respective national jurisdictions.

2. Each Party shall, as a minimum, apply at least the same standards for environmental conduct and impacts regarding transboundary natural resources and environmental interference, as are applied within its respective territory or areas under its national jurisdiction.

#### **ARTICLE 10**

##### ***Environmental Standards***

1. The Parties shall establish and publish, strengthen and enforce specific standards, including product, process, emission and quality standards, designed to prevent or abate harm to or interference with the regional environment.

2. The Parties shall enact for imported goods and services environmental standards not less stringent than the national or international environmental standards in the place of origin of those goods and services.

3. The Parties shall establish and harmonize international methods of measuring environmental parameters, and use comparable or standardized research techniques.

4. The Parties shall exchange and provide access to information gained through individual and joint monitoring programs.

#### **ARTICLE 11**

##### ***Sustainable Development and International Trade***

1. In pursuance of the objective of sustainable development, the Parties shall ensure that environmental protection shall constitute an integral part of their respective development policies and their regional trade and not be considered in isolation from them. (See 95IUCN Arts. 8 and 13/2.)

2. The Parties shall ensure that conservation of renewable natural resources is treated as an integral part of any planning and implementation of development and trade activities. (See 95IUCN Art. 13/2.)

3. In compliance with their obligations under this Article, the Parties shall:

a) Conduct regular national reviews of environmental and developmental policies and plans;

b) Enact effective laws and regulations which use, where appropriate, economic instruments; and

c) Establish and strengthen institutional structures and procedures to fully integrate environmental and developmental issues in all spheres of decision making. (See 95IUCN Art.13/2.)

4. In the case of economic activities taking place in the territory or within the areas under the national jurisdiction or control of one of the Parties but originating in another Party, the host Party shall be entitled to:

a) Require all entities engaged in those activities within their respective jurisdictions, to provide information on:

i) Potential or actual harm to the environment resulting from their activities;

ii) The relevant environmental legal requirements and standards applicable in the Party of origin;

iii) The techniques in use in the Party of origin to comply with such requirements and standards; and

iv) Reasonably available data and information concerning state-of-the-art techniques to prevent environmental harm.

b) The Party of origin, and upon request of the host Party, shall:

i) Provide all relevant information on applicable environmental requirements and standards in its territory and in areas within the limits of its national jurisdiction;

ii) Enter into consultations with the host Party to enable the host Party to take appropriate measures regarding such activities; and

iii) Ensure that, in the absence of equally strict or more stringent environmental standards in the host Party or express agreement by the Host Party to the contrary, it shall cause its nationals to apply the relevant standards of the State of origin. (See 95IUCN Art. 31.)

5. Regarding trade, the Parties shall endeavor to ensure that:

a) Trade does not entail or lead to the wasteful use of natural resources nor interfere with their conservation or sustainable use;

b) Trade measures addressing transboundary or global environmental problems are based on international agreement;

c) Trade measures for environmental purposes do not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade;

d) Prices of commodities and raw materials reflect the full direct and indirect social and environmental costs of their extraction, production, transport, marketing and, where, ultimate disposal; and

e) As regards trade of biological resources, products and derivatives:

i) Is based on management plans for the sustainable harvesting of such resources and does not endanger any species or ecosystem, and

ii) Parties, whose biological resources cannot be exported, due to prohibitions imposed by a multilateral environmental agreement, shall receive appropriate compensation for losses suffered due to non-compliance by any other Party to that agreement. (See 95IUCN Art. 30.)

6. The Parties shall make special provisions for affordable access among them to environmentally sound technology, additional technical cooperation and financial resources, in order to accelerate their transition to sustainable development.

## **ARTICLE 12**

### ***Conservation and Sustainable Use of Natural Resources***

1. In order to ensure the conservation and sustainable use of natural resources, the Parties shall:

a) Maintain regional ecosystems and ecological processes found by the Council to be essential for the functioning of the biosphere;

b) Ensure the protection, preservation and conservation of biological diversity at the genetic, species and ecosystems levels, so that the genetic viability of the earth is not, as determined by the Council, compromised and take all necessary measures to that end, both in situ and, where appropriate, ex situ;

c) Provide, in particular, for the protection, preservation and conservation of those species and their habitats, which are listed as being rare, indigenous, endangered or threatened with extinction, and give special protection to unique areas and to representative samples of all of the different types of ecosystems;

d) Undertake programs aimed at preventing waste of natural resources, and observe the principle of sustainable use for living resources and ecosystems. (See 95IUCN Art. 11/3.)

e) Undertake programs and develop strategies aimed at reducing and eliminating unsustainable patterns of production and consumption, including measures to:

i) Collect and disseminate information on consumption patterns and develop or improve methodologies for analysis;

ii) Ensure that all raw materials and energy are used as efficiently as possible in all products and processes;

iii) Require recycling of used materials to the fullest extent possible;

iv) Promote product designs that increase reuse and recycling and as far as possible eliminate waste; and

v) Facilitate the role and participation of consumer organizations in promoting more sustainable consumption patterns. (See 95IUCN Arts. 10 and 28.)

2. In order to maintain maximum biological diversity, the Parties shall:

a) Take all necessary measures to protect, preserve and conserve animal and plant species and their habitats, with priority being given to rare and endangered species, particularly indigenous species and their habitats;

- b) Create and maintain specially protected areas with a view to, *inter alia*, conserving genetic resources *in situ*;
- c) Regulate the taking of species and prohibit unselective taking methods;
- d) Regulate and take appropriate measures to:
  - i) Where necessary, prohibit the introduction of alien species or modified organisms which are likely to have adverse effects on other organisms or the environment;
  - ii) Prevent accidental introduction or escape of such organisms;
  - iii) Manage the risks associated with the development, use and release and modified organisms resulting from biotechnologies which are likely to have adverse effects on other organisms or the environment;
  - iv) Control and to the extent possible, eradicate introduced alien or modified organisms when such organisms have or are likely to have a significant adverse effect on other organisms or the environment (see 95IUCN Arts. 21 and 26); and
- e) Promote and establish gene banks and other documented collections of animal and plant genetic resources.

3. In giving priority to rare, endangered species, particularly indigenous species, the Parties shall, *inter alia*:

- a) Prohibit the taking of the species, except in exceptional circumstances by special authorization;
- b) Regulate the trade in and possession of specimens and products of the species;
- c) Especially protect the habitat of the species, *inter alia*, by ensuring that sufficient portions are included in specially protected areas; and
- d) Take all other necessary measures to improve their conservation status, and restore their populations to sustainable levels.

4. In discharging their obligations under this Article, the Parties shall comply with and implement their obligations under the Special Regime Annexes to this Treaty, including Annex I on the Conservation and Sustainable Use of the Wild Living Resources of North America, Annex II on the Conservation and Sustainable Use of the Highly Migratory Species of North America, Annex III on the Conservation and Sustainable Use of the Vegetation Cover of North America, Annex IV on the Conservation and Sustainable Use of the Forests of North America, Annex V on the Conservation and Sustainable Use of the Wetlands and Other Natural Systems of North America, Annex VI on the Conservation and Sustainable Use of the Soils of North America, Annex VII on the Conservation and Sustainable Use of the North American Marine Environment, Annex VIII on the Conservation and Sustainable Use of the Fresh Water Components of the North American Hydrologic Cycle, Annex IX on the Conservation and

Sustainable Use of the Terrestrial, Freshwater, Coastal and Marine North American Areas Subject to Special Protection Regimes, Annex X on the Conservation and Sustainable Use of Transboundary Hydrocarbon Resources in North America, Annex XI on the Conservation and Sustainable Use of the Atmosphere in the North American Region, Annex XII on the Generation, Transportation, Export and Disposal of Hazardous Wastes and Substances in North America, and any other Annexes to this Treaty that the Parties may agree to conclude.

### **ARTICLE 13**

#### ***Transboundary Natural Resources***

The Parties shall use their best efforts to cooperate, on the basis of equity and reciprocity and, in particular, through bilateral and multilateral agreements, in the conservation, management and restoration of transboundary living and non-living natural resources, and to this end they shall:

1. Manage a transboundary natural system as a single ecological unit.
2. Harmonize their policies and strategies covering the entire system and the ecosystems it contains.
3. Treat migratory species or populations as a single biological unit.
4. Utilize transboundary resources in an equitable and reasonable manner, with a view to attaining optimal utilization thereof and benefits therefrom consistent with adequate protection of the resource and, to that effect, enter into negotiations with a view to concluding, when appropriate, joint management agreements. (See ILC Watercourses Draft Art. 5.)
5. Utilize a transboundary natural resource equitably and reasonably, taking into account all relevant factors, including:
  - a) Factors of a natural character, such as geographic, hydrographic, hydrological, climatic, ecological and other factors;
  - b) The social and economic needs of the Parties concerned;
  - c) The population dependent on the resource in each of the Parties;
  - d) The effects of the use or uses of the resource in one Party on the other Party;
  - e) Existing and potential uses of the resource;
  - f) Conservation, protection, development and economy of use of the resource and the costs of measures taken to that effect; and
  - g) The availability of alternatives, of corresponding value, to a particular planned or existing use of the resource. (See ILC Watercourses Draft Art.6, and Draft Article 19 of 1996 ILC International Liability Draft Articles.)

6. Utilize a transboundary natural resource exercising due diligence in such a way as not to cause significant harm to another Party. Where, despite the exercise of due diligence, significant harm is caused to another Party, the Party whose use causes the harm shall, in the absence of agreement to such use, consult with the Party suffering such harm over:

a) The extent to which such use is equitable and reasonable taking into account relevant factors, and

b) The question of ad hoc adjustments to its utilization, designed to eliminate or mitigate any such harm caused and, where appropriate, the question of compensation. (See ILC Watercourses Draft Art. 7.)

7. Attach no inherent priority of use over a transboundary natural resource over other uses, in the absence of agreement or custom to the contrary and, in the event of conflict between uses, resolve such conflict with reference to the provisions of this Article, with special regard being given to the requirements of vital human needs. (See ILC Watercourses Draft Art. 10.)

#### **ARTICLE 14**

##### ***Pollution of the Environment***

1. The Parties shall exercise due diligence and take all practicable measures to ensure that all activities within their territories, or in the areas within the limits of their respective national jurisdictions, are strictly regulated to prevent, reduce or control pollution, including any discharges of pollutants in the territory or in the areas within the limits of the national jurisdiction of another Party, or beyond the limits of national jurisdictions, particularly radioactive, toxic and other hazardous substances. (See 95IUCN Art. 24.)

2. In discharging their obligations under this Article, the Parties shall:

a) Identify processes and categories of activities that have or threaten to have appreciable adverse impacts on the environment, and monitor and regulate those process and activities in order to prevent such harm;

b) Establish procedures for minimizing or eliminating pollution at its source, for minimizing or treating waste and for encouraging the most efficient use of natural resources in manufacturing and industrial processes;

c) Establish, where possible, procedures for recycling and reuse of all waste materials; and

d) Submit activities with a potential to cause pollution to controls which shall take into consideration both the cumulative effects of the pollutants and the assimilative capacity of the environment.

**ARTICLE 15*****Polluter Pays Principle***

The Parties shall take the measures necessary to ensure that the costs of prevention or restoration of environmental harm, as well as compensation, shall be borne by the originator of the activities which give rise to such harm or the threat thereof. (See 95IUCN Art. 11/6.)

**ARTICLE 16*****Rights and Duties of North American Inhabitants***

1. The regional environment and the transboundary ecosystems and natural resources of North America constitute the common concern of all the inhabitants of the region. (See 95IUCN Art. 3.)
2. The Parties shall ensure through their legal systems that all inhabitants of the region have:
  - a) A fundamental right to an environment adequate for their health and well-being. (See 95IUCN Art. 12/1.)
  - b) The obligation to protect and preserve the regional environment and the transboundary ecosystems and natural resources of the region. (See Article 45/1 of the Spanish Constitution and Article 66/1 of the Portuguese Constitution; See 95IUCN Art. 12/2.)
  - c) A recognized legal interest in the protection of the regional environment and in the preservation of the transboundary ecosystems and natural resources of North America.
  - d) The right to effective access to judicial and administrative proceedings, including for redress and remedy, in enforcing their rights under this Treaty and under their respective domestic legislation.
3. Indigenous peoples and local communities have the right to pursue their sustainable traditional practices. (See 95IUCN Art. 12/6.)
4. In order to ensure the full enjoyment of the rights provided in this Article, the Parties undertake to adopt, within two years from the date of entry into force of this Treaty, the necessary legislative and administrative domestic measures.

**ARTICLE 17*****Public Right to Know and to Participate***

The Parties shall take all appropriate and effective measures, including legal, administrative or other measures:

1. To respect the right of all persons, without being required to prove an interest, to seek, receive and disseminate information on activities or

measures adversely affecting or likely to affect the environment. (See 95IUCN Art. 12/3.)

2. To provide for and promote participation by individuals and non-governmental organizations in all aspects of conserving the environment and its resources, in particular providing for adequate opportunity to participate, individually or with others, in the decision-making process.

3. To ensure access by individuals and non-governmental organizations to the means of prevention of and redress for environmental harm, as well as prompt and adequate legal remedies to ensure compliance with the provisions of the North American Environmental Cooperation Regime. (See 95IUCN Art. 12/3 and Draft Article 20 of 1996 ILC International Liability Draft Articles.)

4. To guarantee effective and appropriate opportunities to indigenous peoples, to participate in decision-making processes. (See 95IUCN Art.11/4.)

5. To develop and maintain mechanisms to facilitate the involvement of indigenous peoples and local communities in environmental decision-making at all levels. (See 95IUCN Art.12/6.)

#### **ARTICLE 18**

##### ***Intergenerational Equity***

The Parties shall protect and use the environment and natural resources of the region for the benefit of present and future generations. (See 95IUCN Art. 5.)

#### **ARTICLE 19**

##### ***Obligation to Comply with and Implement the North American Environmental Cooperation Regime***

1. The obligations entered into by the Parties in accordance with this Treaty, together with those provided by other international agreements and rules of international environmental law in force and binding on the three Parties, and governing environmental and natural resource matters, shall be regarded, for the purposes of this Treaty, as constituting the North American Environmental Cooperation Regime. (See Draft Article 6 of 1996 ILC International Liability Draft Articles.)

2. The Parties undertake to take all necessary legislative, administrative and other measures, in order to ensure the fullest and most effective implementation and compliance with the North American Environmental Cooperation Regime.

**ARTICLE 20*****General Obligation to Cooperate***

1. The Parties, while exercising their respective sovereign rights and interests, shall take into account those of other concerned States and of the international community, and shall cooperate, individually or jointly, on an equal footing, among themselves and with other concerned States and intergovernmental or non-governmental organizations, to ensure the fullest and most effective implementation and compliance with rights and obligations provided in this Treaty. (See 95IUCN Art. 11/4, and Draft Articles 3 and 6 of 1996 ILC International Liability Draft Articles.)

2. The Parties, when complying with their general obligation to cooperate, shall observe the following principles:

- a) Good faith;
- b) Good neighbourliness;
- c) Sovereign equality;
- d) Territorial integrity; and
- e) Mutual benefit.

(See ILC Watercourses Draft Art. 8; see 95IUCN Art. 11/4, and Draft Article 3 of 1996 ILC International Liability Draft Articles.)

3. When implementing their cooperation obligations, the Parties agree that in the event of any inconsistency between this Treaty and any bilateral, trilateral or multilateral environmental agreement or rules of international law binding on the Parties, the one containing more stringent environmental provisions shall prevail. (See Draft Article 8 of 1996 ILC International Liability Draft Articles.)

**ARTICLE 21*****Implementation of the Obligation to Cooperate***

1. The obligation to cooperate shall have, as its fundamental objective, the protection of the environment in the region from adverse effects and transboundary interference.

2. Each Party shall take all appropriate and effective measures, including legal, administrative or other measures, to control, prevent, abate or eliminate unsound interference with the environment of the region.

3. The Parties shall cooperate to ensure the conservation, as well as the equitable, rational and harmonious utilization of transboundary and regional resources by concluding the necessary bilateral, trilateral and multilateral agreements.

4. Each Party shall, when implementing its cooperation obligations, ensure that its activities, laws and regulations, policies, plans and programs, as well as activities undertaken by natural or juridical persons under its jurisdiction or control, are consistent with its obligations under this Article. (See Draft Articles 6 and 7 of 1996 ILC International Liability Draft Articles.)

#### **ARTICLE 22**

##### ***Cooperative Arrangements and Agreements***

1. The Parties shall, within one year from the entry into force of this Treaty, develop and maintain a scheduled agenda of regional negotiations for the adoption of the necessary Special regime Annexes provided by Article 12 paragraph 4, in order to enable them to comply fully and strictly with their respective cooperation obligations under this Treaty, particularly regarding all forms of transboundary activities and interference.

2. The Parties shall endeavor to become and remain parties to non-regional treaties and agreements relating to the object and purpose of this Treaty. (See 95IUCN Art. 56.)

3. The provisions of this Treaty shall not prejudice any more stringent obligation which the Parties have entered into or may enter into on their existing or future treaties or agreements. (See 95IUCN Art. 57/2.)

#### **ARTICLE 23**

##### ***Exchange of Data, Information and Research***

1. The Parties shall, on a timely and regular basis, exchange available and appropriate scientific, technical and legal data, information and experience, concerning all matters pertaining to this Treaty and its implementation. When the requested data or information is not available, the requested Party shall employ its best efforts to comply with the request but may condition its compliance upon payment by the requesting Party of the reasonable cost of collecting and, where appropriate, processing such data or information. (See ILC Watercourses Draft Art. 9.)

2. The Parties shall collect and disseminate to the public data and information on the environment and use of natural resources, particularly as they may be relevant to all matters pertaining to this Treaty and its implementation. (See IUCN Art. 40.)

3. The Parties shall coordinate, to the greatest extent possible, their research activities concerning matters pertaining to this Treaty and its implementation.

4. The use of proprietary information exchanged by the Parties shall be subject to the conditions of confidentiality established by the Party providing such information.

#### **ARTICLE 24**

##### ***Prevention and Abatement***

1. The Parties shall exercise due diligence and take all practicable measures, including legislative, administrative or other measures to:

a) Prevent the risk of harm or actual significant harm to the regional environment;

b) In particular, prohibit activities causing irreversible harm to the regional environment; and

c) Minimize the risk, reduce the effects and eliminate the source of transboundary environmental interference. (See draft Article 4 of 1996 ILC International Liability Draft Articles.)

2. The Parties shall ensure that activities referred to in paragraph 1) a) of Article 3, are not carried out in their respective territories or otherwise under their jurisdiction or control without their prior authorization. (See draft Article 9 of 1996 ILC International Liability Draft Articles.)

3. The Parties shall, before taking a decision to authorize an activity, ensure that the impact assessment, referred to in Article 31, is undertaken of the risk of such activity, which shall include an evaluation of the possible impact of that activity on persons or property as well as in the environment of other Parties. (See draft Article 10 of 1996 ILC International Liability Draft Articles.)

4. If a Party ascertains, upon entry into force of this Treaty, that an activity involving a risk of causing transboundary harm is already being carried out in its territory or otherwise under its jurisdiction or control without the authorization required in this Article, it shall direct those responsible for carrying out the activity that they must obtain the necessary authorization. Pending authorization, the Party may permit the continuation of the activity in question at its own risk. (See draft Article 11 of 1996 ILC International Liability Draft Articles.)

5. The Parties shall identify and evaluate substances, technologies, processes and categories of activities, which have or are likely to have significant adverse effects on the environment. They shall systematically survey, regulate or manage them with a view to preventing any significant environmental harm. (See 95IUCN Art. 23.)

**ARTICLE 25*****Precautionary Principle***

The Parties shall not postpone or cancel action to protect or preserve the environment or natural resources of the region, on the grounds that there is less than complete scientific certainty as to the existence of threats of significant harm, and shall base their actions on the precautionary principle. (See 95IUCN Art. 7.)

**ARTICLE 26*****Priority of Prevention Obligations***

The Parties undertake to exercise due diligence to give priority to their prevention obligations, rather than merely relying on remedies or compensating for environmental harm. (See 95IUCN Art. 6, footnote 45; Trail Smelter and Corfu Channel Cases, and Draft Article 20/2 of 1996 ILC International Liability Draft Articles.)

**ARTICLE 27*****Monitoring***

1. Each Party, within its territory and in the areas within the limits of its respective national jurisdiction, shall establish, strengthen and implement monitoring programs, to study and monitor regionally identified environmental problems, inter alia, to determine the condition of each environmental medium, the cumulative or synergistic effects on the environment as a whole, the cumulative or synergistic effects of particular substances or activities on the environment, the effects on the regional environment of particular sectors of the economy, and the status or changes in the status of natural resources.

2. The Parties shall establish, strengthen and implement regional monitoring programs for the purposes provided in paragraph 1 of this Article, to be carried out in cooperation by each Party in its territory and in the areas within the limits of its respective national jurisdiction.

3. The Parties shall participate and cooperate in global monitoring programs, particularly as they are relevant to the effects in the region from environmental interference.

**ARTICLE 28*****Environmental Emergencies and Disasters***

1. Each Party shall, without delay and by the most expeditious means available, notify and inform the other Parties of any emergency situations

or natural disasters which may have adverse repercussions for them, or beyond the limits of the region (see 95IUCN Art. 15/1);

2. Each Party within whose jurisdiction or control an emergency originates, shall immediately take all practicable measures necessitated by the circumstances, in cooperation with the other potentially affected Parties and, where appropriate, with competent international organizations, to prevent, mitigate and eliminate harmful effects of the emergency. (See 95IUCN Art. 15/2.)

3. The Parties shall respond to transboundary emergencies in order to prevent, abate and eliminate, anywhere in the region, all avoidable significant harm to the environment and repair harm to the fullest extent practicable, as provided in Article 32 2(b).

4. The Parties shall ensure that safety precautions and joint contingency plans are established and agreed upon to prevent accidents which may cause environmental harm anywhere in the region, and to control, contain and eliminate such harm. (See 95IUCN Art. 15/3.)

5. The Parties shall ensure that adequate emergency control plans are established by all persons, natural or juridical, undertaking activities in their respective territories or areas within the limits of their national jurisdictions, which could lead to release of substances which may cause transboundary environmental harm anywhere in the region or outside the region; and

6. In the case of an emergency situation suddenly causing significant transboundary environmental harm, or a significant risk thereof, the Parties shall ensure that the necessary measures are taken and, where necessary, take action themselves:

a) To minimize environmental harm and to deal with the harm at source; and

b) To warn the public and any Party or other concerned State whose interests may be affected, as soon as possible, while:

i) Giving them such pertinent information as will enable them to minimize environmental harm;

ii) Informing them of the steps taken to abate the cause of the environmental harm; and

iii) Cooperating with other interested States and international organizations in order to prevent or minimize the harmful effects of such an emergency situation or other change of circumstances.

7. The Parties shall designate as ecological disaster areas those where catastrophic environmental harm has taken place and:

a) Establish a special regime in ecological disaster areas, covering all human activities, and

b) Undertake long-term programs for the restoration of those areas.

## **ARTICLE 29**

### ***Prior Consultations***

1. The Parties shall resort to prior consultations regarding any actual or planned activities, laws and regulations, policies, plans and programs with potential transboundary adverse environmental effects in the region.

2. In application of the obligation of prior consultation:

a) A Party of origin shall consult at an early stage and in good faith with other Parties or concerned States regarding existing or potential adverse transboundary environmental interference in the region.

b) Any Party has the right to request and obtain from any other Party timely prior consultations concerning any actual or planned activities, laws and regulations, policies, plans and programs with potential transboundary environmental effects in the region. Such consultations shall be carried out on the following basis:

i) The consultations shall be held with a view to achieving acceptable solutions regarding measures to be adopted in order to prevent or minimize the risk of causing significant transboundary harm, and cooperate in the implementation of those measures;

ii) The Parties shall, on the basis of the provisions of Article 36, seek solutions based on an equitable balance of interests, taking into account all relevant factors and circumstances, including:

a) The degree of risk of significant transboundary harm and the availability of means of preventing or minimizing such risk or of repairing the harm;

b) The importance of the activity, taking into account its overall advantages of a social, economic and technical character for the Party of origin in relation to the potential harm for the Parties likely to be affected;

c) The economic viability of the activity in relation to the costs of prevention demanded by the Parties likely to be affected and to the possibility of carrying out the activity elsewhere or by other means or replacing it with an alternative activity;

d) The degree to which the Parties likely to be affected are prepared to contribute to the costs of prevention; and

e) The standards of protection which the Parties likely to be affected apply to the same or comparable activities and the standards applied in comparable regional or international practice.

iii) If the consultations fail to produce an agreed solution, the Party of origin shall nevertheless take into account the interests of Parties likely to be affected and may proceed with the activity at its own risk,

without prejudice to the right of any Party withholding its agreement to pursue such rights as it may have under this Treaty or otherwise. (See draft Articles 17 and 18 of 1996 ILC International Liability Draft Articles.)

c) When no notification has been given of an activity conducted in the territory or otherwise under the jurisdiction or control of a Party, any other Party which has serious reason to believe that the activity has created a risk of causing it significant harm may require consultations. The Party requiring consultations shall provide technical assessment setting forth the reasons for such belief. If the activity is found to be one of those referred to in this Article, the Party requiring consultations may claim an equitable share of the cost of the assessment from the Party of origin. (See draft Article 18 of 1996 ILC International Liability Draft Articles.)

3. The Parties have the obligation to consult with each other on a continuing basis, in order to secure the coordination of activities pertaining to actual or potential regional environmental interference originating within or outside the region.

#### **ARTICLE 30**

##### ***Prior Notification and Information***

1. The Parties have an obligation of prior notification regarding any planned activities, laws and regulations, policies, plans and programs with potentially significant adverse transboundary environmental effects in the region. (See draft Article 13 of 1996 ILC International Liability Draft Articles.)

2. In application of the obligation of prior notification, a Party of origin shall make in good faith a timely, fully informed and detailed notification to other Parties or concerned States, regarding planned activities, laws and regulations, policies, plans and programs with potentially significant transboundary environmental effects in the region, to be undertaken in its territory or areas within the limits of its national jurisdiction and by public or private, natural or juridical, national or foreign persons. (See draft Article 13 of 1996 ILC International Liability Draft Articles.)

3. The notification shall be accompanied with the available technical and other relevant information, and an indication of a reasonable time within which a response is required. (See draft Article 14 of 1996 ILC International Liability Draft Articles.)

4. While the activity is being carried out, the Parties concerned shall exchange in a timely manner all information relevant to preventing or minimizing the risk of causing significant transboundary harm. (See draft Article 14 of 1996 ILC International Liability Draft Articles.)

5. The Parties shall, whenever possible and by such means as are appropriate, provide their own public likely to be affected by an activity referred to in this Article with information relating to that activity, the risk involved and the harm which might result and ascertain their views. (See draft Article 15 of 1996 ILC International Liability Draft Articles.)
6. Data and information vital to the national security of the Party of origin or to the protection of industrial secrets may be withheld, but the Party of origin shall cooperate with the other Parties concerned in providing as much information as can be provided under the circumstances. (See draft Article 16 of 1996 ILC International Liability Draft Articles.)
7. No planned activities, laws and regulations, policies, plans and programs with potentially significant adverse transboundary environmental effects in the region, shall be carried out if the obligations of prior notification provided in this Article are not fully observed.
8. Any Party affected by the non-compliance by another Party with the obligations of prior notification provided in this Article, has the right to request and to obtain from that other Party the immediate suspension or cancellation, as appropriate, of the activities, laws and regulations, policies, plans and programs involved.

### **ARTICLE 31**

#### ***Mandatory Prior Environmental Assessments***

1. The Parties shall establish or strengthen environmental impact assessment procedures to ensure that all activities which are likely to have a significant adverse transboundary effect on the environment are evaluated before approval.
2. The assessment shall include the evaluation of:
  - a) Cumulative, long-term, indirect, long-distance, and transboundary effects;
  - b) The possible alternative actions, including not conducting the proposed activity; and
  - c) Measures to avert or minimize the potential adverse effects.
3. Each Party shall designate appropriate national authorities to ensure that environmental impact assessments are effective and conducted under procedures accessible to other concerned Parties, international organizations, persons and non-governmental organizations. The Parties shall also ensure that the authority deciding on approval takes into consideration all observations made during the environmental impact assessment process and makes its final decision public.

4. The Parties shall conduct periodic reviews both to determine whether activities approved by them are carried out in compliance with the conditions set out in the approval and to evaluate the effectiveness of the prescribed mitigation measures. The results of such reviews shall be made public.

5. The Parties shall take appropriate measures to ensure that before they adopt policies, programmes, and plans that are likely to have a significant transboundary adverse effect on the environment, the environmental consequences of such actions are duly taken into account. (See 95IUCN Art. 37.)

6. The measures to be adopted by each of the Parties as a result of paragraphs 1 and 2 of this Article shall include:

a) The national authorities designated under paragraph 3 of this Article shall have competence and technical capacity to process, evaluate and authorize or deny the environmental impact assessments, and to undertake periodic mandatory post-project verification analysis of the environmental impacts caused by any already approved policy, plan, programme or activity. The Parties shall have the power to suspend or revoke such authorization, whenever there are reasonable grounds to conclude that, as a result of that authorization, a significant adverse transboundary or regional environmental impact has been caused or is about to be caused, in contravention of applicable national or international standards, and to condition any future authorization to the submission and approval of a new environmental impact assessment.

b) The establishment of an open and effective procedure or mechanism to facilitate and ensure public participation in the implementation of this Article, particularly in the timely evaluation of environmental impact assessments and of the post-project verification analysis.

c) The establishment of procedures and mechanisms to ensure that governmental authorities, and physical or juridical persons under their jurisdiction or control, strictly and effectively comply with the provisions of this Article.

7. Until the provisions of the above paragraph of this Article take full effect, each of the Parties shall:

a) Take all appropriate and effective measures, in order to increase compliance of national laws and regulations in force, which provide for the mandatory submission and approval of environmental impact assessments.

b) Take all appropriate and effective measures in order to maximize public participation in the process of evaluation and approval of those assessments, at least in a manner equivalent to that provided for the public of the other Parties.

c) Take measures to require an environmental impact assessment, prior to the authorization of any proposed policy, plan, program or activity, or any major change thereof, which is likely to have a significant adverse transboundary effect on the environment in matters covered by this Treaty or by NAFTA, and undertaken by any person, whether or not such obligation is provided by the national legislation of any of the other Parties to this Treaty.

8. In application of the obligations provided in this Article, a Party of origin shall make in good faith a timely and detailed notification containing all appropriate information, to other Parties or concerned States regarding the results of submitted and authorized environmental impact assessments, regarding potentially significant adverse transboundary effects in the region, resulting from the activities, laws and regulations, policies, plans and programmes proposed to be undertaken in its territory or areas within the limits of its national jurisdiction and by public or private, natural or juridical, national or foreign persons.

9. No planned activities, laws and regulations, policies, plans and programmes with potentially significant adverse transboundary environmental effects in the region, shall be carried out if the obligations in this Article are not fully observed.

10. Any Party affected by the non-compliance by another Party with the obligations provided in this Article, has the right to request and to obtain from that other Party the immediate suspension or cancellation, as applicable, of the activities, laws and regulations, policies, plans and programmes involved.

## **ARTICLE 32**

### ***State Responsibility***

1. The Parties are responsible, under international law, for the breach of any obligation under this Treaty or of other applicable rules of international law binding on them. (See 95IUCN Art. 47, and Draft Article 5 of the 1996 ILC International Liability Draft Articles.)

2. The Party committing such a breach shall:

a) Cease the breach;

b) As far as possible, re-establish the situation which would have existed if the breach had not been committed, particularly through rehabilitation and restoration;

c) To the extent re-establishment under subparagraph b) is not possible, provide compensation or other remedy for harm resulting from the breach; and

d) where appropriate, give satisfaction for the breach. (See 95IUCN Art. 49/1.)

3. Where a Party suffers such harm caused in part by its own negligence or that of physical or juridical persons under its jurisdiction or control, the extent of any redress or the level of any compensation due may be reduced to the extent that the harm is caused by negligence of that Party or persons under its jurisdiction or control. (See 95IUCN Art. 49/2.)

4. Each party may be held responsible for significant harm to the environment resulting from its failure to carry out the obligations contained in this Treaty, in respect to its acts or omissions or those of its nationals. (See 95IUCN Art. 50.)

### **ARTICLE 33**

#### ***State Liability***

1. A Party is liable for significant harm to the environment or to the natural resources of the other Parties, whether in their territories or in the areas within the limits of their national jurisdiction, caused by its acts or omissions, or by the acts or omissions by physical or juridical persons under its supervision or control. (See 95IUCN Art. 48.)

2. Liability for significant transboundary environmental harm shall be met by compensation, financial or otherwise. (See draft Article 21 of 1996 ILC International Liability Draft Articles.)

3. If, as a consequence of the significant harm to the environment there is also harm to persons or property, the Party of origin is liable for the harm of its own inhabitants, as well as to any person in another Party who has suffered significant harm or is exposed to a significant risk thereof.

4. The Party of origin of the harm shall not be liable if the harm:

a) Is directly due to a natural phenomenon of an exceptional and inevitable character, or

b) Is caused wholly by an act or omission of a third party. (See 95IUCN Art. 51.)

### **ARTICLE 34**

#### ***Remedies***

1. The Parties shall ensure the availability of effective civil remedies that provide for cessation of harmful activities as well as for compensation to victims of environmental harm, irrespective of the nationality or the

domicile of the victims. (See 95IUCN Art. 52/1, and Article 20 of 1996 ILC International Liability Draft Articles.)

2. In cases of significant environmental harm, if an effective remedy is not provided in accordance with paragraph 1, the Party of nationality of the victim shall espouse the victim's claim by presenting it to the Party of origin of the harm. The Party of origin shall not require the exhaustion of local remedies as a pre-condition for presentation of such claim. (See 95IUCN Art. 52/3, and Draft Article 20 of 1996 ILC International Liability Draft Articles.)

3. The Party of origin shall ensure that any person in another Party who is adversely affected by transboundary environmental harm, has the right of access to administrative or judicial procedures equal to that afforded nationals or residents of the Party of origin in cases of domestic environmental harm. (See 95IUCN Art. 53/1 and Draft Article 20 of 1996 ILC International Liability Draft Articles.)

4. Each Party shall ensure that adversely affected persons have a right of recourse for violations of environmental regulations by that Party or any person or entity associated with that Party. (See 95IUCN Art. 53/2, and Draft Article 20 of 1996 ILC International Liability Draft Articles.)

#### **ARTICLE 35**

##### ***Rehabilitation and Restoration***

The Parties shall take measures to rehabilitate, to restore or to reinstate, to the extent practicable, regional habitats ecosystems and related ecological processes which have been degraded or destroyed. (See 95IUCN Art. 49/1.)

#### **ARTICLE 36**

##### ***Peaceful Settlement of Environmental Disputes***

1. The Parties shall settle all their environmental disputes, arising from the interpretation or application of this Treaty, peacefully and by appropriate means in accordance with Chapter VI of the Charter of the United Nations, resorting to appropriate bodies or arrangements, whether global or regional or, when appropriate, bilateral, or by any other peaceful means. (See 95IUCN Art. 62/1.)

2. The Parties shall seek solutions based on an equitable balance of interests, taking into account all relevant factors and circumstances, including:

a) The degree of risk of significant transboundary harm and the availability of means of preventing or minimizing such risk or of repairing the harm;

b) The importance of the activity, taking into account its overall advantages of a social, economic and technical character for the Party of origin in relation to the potential harm for the Parties likely to be affected;

c) The economic viability of the activity in relation to the costs of prevention demanded by the Parties likely to be affected and to the possibility of carrying out the activity elsewhere or by other means or replacing it with an alternative activity;

d) The degree to which the Parties likely to be affected are prepared to contribute to the costs of prevention; and

e) The standards of protection which the Parties likely to be affected apply to the same or comparable activities and the standards applied in comparable regional or international practice. (See Draft Articles 19 and 22 of 1996 ILC International Liability Draft Articles.)

3. If mutual agreement on a solution or on other dispute settlement arrangements is not reached within 18 months from the date when negotiations were started, or if no negotiations were possible from the date when the dispute arose, the Parties shall submit the dispute to arbitration or judicial settlement at the request of any of them. (See 95IUCN Art. 62/2.)

#### **ARTICLE 37**

##### ***Hazardous Wastes and Substances***

1. The Parties shall adopt effective measures to ensure that the generation of hazardous wastes and substances is reduced to a minimum in terms of quantity as well as hazard potential. (See 95IUCN Art. 25/1.)

2. The Parties shall adopt effective measures to ensure that, where the generation of hazardous wastes and substances is unavoidable, they are disposed of safely and as close as possible to their source of generation. (See 95IUCN Art. 25/1.)

3. The Parties shall require that, to the extent possible, waste be minimized and disposed of at its source.

4. The Parties shall require that all waste be disposed of in an environmentally sound manner.

5. The Parties shall, under no circumstances, undertake or permit the export of hazardous wastes to other States without prior informed consent of the State Parties concerned. (See 95IUCN Art. 25/2.)

6. The Parties shall adopt effective measures to ensure that the export of hazardous wastes and substances be permitted only if the State of import has the technical capacity and facilities to dispose of or recycle them in an environmentally sound manner. (See 95IUCN Art. 25/2.)

7. Every Party has the sovereign right to ban the import of hazardous wastes and substances into its territory or to areas within the limits of its national jurisdiction.

8. The Parties shall comply with and enforce Annex XI to this Treaty on the Generation, Transportation, Export and Disposal of Hazardous Wastes and Substances in North America.

9. The Parties shall not allow any transboundary movement of hazardous wastes and substances, from their respective territories or areas under national jurisdiction, to a Party which has prohibited their import, and those which are expressly permitted shall only be allowed if they are packaged, labeled and transported in conformity with the law of the receiving Party.

#### **ARTICLE 38**

##### ***Establishment of the Council***

The Parties establish under this Treaty the North American Environmental Protection Council.

#### **ARTICLE 39**

##### ***Organs of the Council***

The Organs of the Council are:

- a) The Conference of the Parties (the Conference);
- b) The Advisory Committee of Environmental Experts (the Committee);
- c) The Secretariat; and
- d) Any other subsidiary or ad hoc organs that may be established by the Conference of the Parties.

#### **ARTICLE 40**

##### ***Principal Function of the Council***

The principal function of the Council is to serve the Parties as their institutional mechanism under this Treaty to carry out its objects and purposes.

**ARTICLE 41*****Instruments of North American Environmental Policy***

The instruments of environmental policy available to the Council are:

1. The North American Environmental Report (the "Report"), to be issued every two years by the Council as provided in Article 46;
2. The Regionally Agreed Directives (the "Directives"), to be adopted by the Council as provided in Article 47;
3. The North American Recommended Index of Parameters of Maximum Tolerance of Environmental Impacts (the "Index"), to be issued by the Advisory Committee of Environmental Experts as provided in Article 48;
4. The Environmental Advisories (the "Advisories"), to be issued by the Advisory Committee of Environmental Experts as provided in Article 49; and
5. The North American Environmental Protection Fund (the Fund), as provided in Article 51.

**ARTICLE 42*****The Conference of the Parties***

1. The Conference of the Parties is the main organ of the Council, with powers to issue recommendations and to adopt by consensus Regionally Agreed Directives binding on the Parties, on the specific matters provided in this Treaty, unless a Party objects to a Directive within three months from its adoption by the Conference of the Parties.
2. Each Party shall appoint a delegation to the Conference of the Parties.
3. The delegations to the Conference of the Parties shall each be headed by a person devoted full time to the Council and with demonstrated expertise in environmental affairs, and shall not have any conflict of interest related to trade and investment arising under the NAFTA.
4. The Conference of the Parties shall adopt its own Rules of Procedure.
5. The Conference of the Parties shall convene at least twice a year in regular session, rotating the venue among the three Parties.
6. All sessions of the Conference of the Parties shall be open to the public, as well as all its records and documentation. Notice of all meetings shall be public and made at least 15 days in advance. During its sessions, the Conference of the Parties shall allow for the presentation of proposals by

the public. Those proposals shall be debated and decided on by the Conference of the Parties.

7. The Chair of the Conference of the Parties shall be rotated among the Parties every two years.

8. The functions of the Conference include the following:

a) To approve the Report of the Council, in the terms of Article 46 of this Treaty;

b) To evaluate and make recommendations for the more effective application of this Treaty, as well as of the other relevant environmental and conservation bilateral, trilateral and multilateral agreements and treaties;

c) To adopt Directives as provided in Article 42; and

d) Other functions entrusted to it in this Treaty.

#### **ARTICLE 43**

##### ***The Advisory Committee of Environmental Experts***

1. The Committee shall be an independent and impartial organ of the Council, with powers to issue recommendations to the Conference, subject to the provisions of this Treaty.

2. Each Party shall appoint three members to the Committee.

3. All members of the Committee shall have demonstrated expertise in environmental affairs, and shall not be employed by the Governments of the Parties.

4. The Parties shall make their appointments to the Committee in accordance with a public selection procedure, as provided in Article 43.

5. The members of the Committee shall perform their duties exclusively in their private personal capacity.

6. The Committee shall adopt its own Rules of Procedure.

7. The Committee shall convene at least quarterly in regular session, rotating the venue among the three Parties. Two of the regular sessions of the Committee shall be held immediately before the regular sessions of the Conference of the Parties.

8. All sessions of the Committee shall be open to the public, as well as all its records and documentation. During its sessions, the Committee shall allow for the presentation of proposals by the public.

9. The Chair of the Committee shall be rotated among the Parties every two years.

10. The functions of the Committee include the following:

a) to adopt and maintain an updated North American Recommended Index of Parameters of Maximum Tolerance of Environmental Impacts, in accordance with Article 48 of this Treaty;

b) to issue Environmental Advisories, in accordance with Article 49 of this Treaty;

c) To undertake and promote the exchange of information on policies, legislation, plans and programs adopted and applied by the Parties on matters relevant to the objects and purposes of this Treaty;

d) To evaluate and make recommendations for the more effective application of this Treaty, as well as of the other relevant environmental and conservation bilateral, trilateral and multilateral agreements, which shall be included in Appendix I to this Treaty as provided in Article 45; and

e) Other functions entrusted to it by this Treaty.

#### **ARTICLE 44**

##### ***Public Selection Procedure for the Committee***

1. Each Party shall establish a public procedure for the selection of its members to the Committee, including a Selection Panel composed of two Government representatives, two recognized independent members of the academic community, a representative from an independent non-governmental organization concerned with the environment, and a member from the business community.

2. The Selection Panel must ensure that the three experts it selects for the Committee include a member from the academic community, and at least one member of an independent non-governmental organization concerned with the environment, who must enjoy the widest possible support of non-governmental organizations concerned with the environment, and a member from the business community, who must have demonstrated expertise in environmental matters.

3. The Conference of the Parties shall issue recommendations to ensure that the Public Selection Procedures in the three countries are compatible.

#### **ARTICLE 45**

##### ***The Secretariat of the Council***

A Secretariat of the Council shall be established and maintained to:

1. Provide an adequate professional staff to assist the Council, the Conference, and the Committee of Environmental Experts and such other subsidiary or ad hoc organs that may be created by the Council in carrying out their responsibilities under this Treaty.

2. Undertake and promote the exchange of information on policies, legislation, plans and programs adopted and applied by the Parties on matters relevant to the objects and purposes of this Treaty.
3. Maintain a List of those agreements and treaties, which shall be annexed to this Treaty as its Appendix I.

#### **ARTICLE 46**

##### ***The North American Environmental Report***

1. The first Report shall be published within two years after this Treaty enters into force, and every two years thereafter.
2. Two months before publishing the Report, a draft shall be made effectively available throughout the region for public comment through hearings or through the communications referred to in Article 50.
3. The Report shall be divided in separate chapters that shall include, with particular emphasis on their direct or indirect relevance to the object and purpose of this Treaty:
  - a) An assessment of the degree of compliance with each of the rights and obligations of the North American Environmental Cooperation Regime;
  - b) The state of the North American environment;
  - c) A review of the laws, regulations and technical norms and standards adopted by each of the Parties, of the administrative structures set up by them and the bilateral and trilateral agreements they undertook for the protection of national or transboundary natural resources or the environment and human health, as well as for the prevention, control and abatement of adverse transboundary environmental impacts;
  - d) The record of administrative and judicial enforcement and compliance, by both the public and the private sectors, of those national laws, regulations and technical norms and standards in force in each of the three countries;
  - e) A review of the environmental standard harmonization efforts undertaken by the Parties, and their effects;
  - f) Programmatic, legislative and enforcement gaps in the environmental protection regimes of the Parties;
  - g) An evaluation of the impact on the environment, on natural resources and on human health, resulting from differences in environmental standards in each of the three countries;
  - h) A review of the degree of compliance, by both the public and private sectors, with mandatory provisions in the field of environmental impact assessments and statements in each of the three countries;

- i) An assessment of the participation of each of the Parties in, and adherence to, international treaties and agreements concerning environmental protection;
- j) An evaluation of the environmental impact deriving both from the implementation of the provisions of the NAFTA, by sector and sub-sector, and from different categories of activities arising from the NAFTA;
- k) An evaluation of the degree of public participation in:
  - i) the national environmental law, policy and decision-making, and in enforcement and impact assessment processes in each of the three countries;
  - ii) the observance of relevant international agreements; and
  - iii) in the application of this Treaty.
- l) A review of disturbing environmental trends in each of the three countries threatening to the region, identifying areas of critical environmental concern, and recommending criteria and plans for clean-up and elimination of threats to the environment;
- m) The recommendations and decisions of the Conference of the Parties regarding each of the items included in all of the above chapters of the Report;
- n) The recommendations made by the Committee for each of the above chapters of the Report, and the reasons of the Conference of the Parties for adopting or not adopting each of those recommendations;
- o) The full texts of communications received by the Council from private individuals or non-governmental organizations, in accordance with Article 50 of this Treaty, including the finding of the Committee in each case and its respective recommendations to the Conference of the Parties, and the decision adopted in each case by the Conference of the Parties; and
- p) Measures being taken to protect migratory species and transboundary natural resources, especially air and water.

#### **ARTICLE 47**

##### ***The Regionally Agreed Directives***

1. The Conference of the Parties is empowered to adopt, in accordance with Article 42 paragraph 1 Directives in order to:
  - a) Pursue the object and purpose of this Treaty as provided in Article 3;
  - b) Ensure compliance with this Treaty and particularly with the rights and obligations of the North American Environmental Cooperation Regime;
  - c) Determine the binding nature of a specific Parameter of the Index;

d) Decide when measures recommended by the Committee in an Environmental Advisory pursuant to Article 42 should be transformed into binding Directives; and

e) In cases of environmental emergencies, to secure the suspension or, as appropriate, the termination of an activity, which the Committee finds is about to cause or is causing irreversible harm to a regional ecosystem or component of the environment, or to a natural resource or to human health.

2. The Parties shall enact, within a year from the date of entry into force of this Treaty, appropriate national legislation and procedures, and establish the necessary effective national institutional mechanisms, in order to secure the full domestic binding nature and the effective enforcement of the Directives of the Council.

#### **ARTICLE 48**

##### ***The North American Recommended Index of Parameters of Maximum Tolerance of Environmental Impacts***

The Committee shall adopt and maintain a Recommended Index of Parameters of Maximum Tolerance of Environmental Impacts, in accordance with the following provisions:

1. The Index shall involve general and specific impacts on the different ecosystems and components of the environment, on specific natural resources and on human health;
2. The Index shall be based on the best available scientific evidence;
3. The Index shall remain public at all times throughout the region;
4. The Parties shall provide the Committee with all information necessary for the Index;
5. The elaboration and adoption of the Index shall be undertaken by the Committee in conformity with a calendar, which shall take equitably into account, on the one hand, the need to accelerate the regional protection of the various components of the ecosystems and of the natural resources and, on the other, the differentiated capabilities of the Parties to observe such Parameters;
6. The Parameters shall be integrated into the Index and published as soon as they are adopted; and
7. The first complete Index shall be ready and published within five years from the date of entry into force of this Treaty, and shall be maintained by the Committee on the basis of its own criteria.

**ARTICLE 49*****The Environmental Advisories***

1. The Committee shall issue an Environmental Advisory, whenever it finds that there are reasonable grounds, in accordance with the precautionary approach to determine that the Parameters of Maximum Tolerance are about to be reached or have been reached;
2. Environmental Advisories shall include, inter alia, the recommendations of the Committee and, as appropriate, of the Conference of the Parties, as to the measures that the Parties should adopt in order to prevent, control or abate the adverse impacts or restore the environmental harms in question.

**ARTICLE 50****Communications by Individuals  
and Non-Governmental Organizations**

1. Any individual or non-governmental organization shall have the right to send to the Council, through the Committee, communications on any matter which involves a transboundary environmental impact contrary to the object and purpose of this Treaty or to the rights and obligations of the North American Environmental Cooperation Regime.
2. Any communication submitted to the Council must be supported by relevant concrete data and scientific and other evidence available to the author of the communication.
3. The Committee may ask the author of the communication for any clarifications or further information it may need to issue its finding.
4. The authors of communications shall have the right to a reasoned response. Such response shall be published in the Report of the Council, together with all other documentation pertaining to the communication.
5. The Parties hereby agree that the provisions of this Article are independent from and without prejudice to the domestic legal remedies available to individuals and organizations concerned. (See Draft Article 20 of 1996 ILC International Liability Draft Articles.)
6. When deemed useful by the Council, technical meetings, workshops and briefings relating to environmental matters may be held under the auspices of the Council or in cooperation with authorities and organizations concerned with the welfare of the North American Environment.

**ARTICLE 51*****North American Environmental Protection Fund***

1. The Parties shall establish a Fund within a year from the entry into force of this Treaty, in order to obtain the necessary financial resources to carry out the object and purpose of this Treaty, and the performance of the functions of the Council.
2. The financial resources of the Fund shall derive from, inter alia, the following sources:
  - a) The contributions of the parties, on the basis of an agreed scale that shall consider the differences in their economic and financial conditions;
  - b) An agreed percentage from the fines and monetary sanctions domestically imposed by the respective authorities of each of the Parties, for violations to their applicable environmental laws and regulations;
  - c) The sums obtained from international financial and other intergovernmental organizations; and
  - d) Other public or private contributions.

**ARTICLE 52*****Budget***

The Parties shall provide the Council with an adequate budget to carry out its functions under this Treaty.

**ARTICLE 53*****Final Clauses***

1. This Treaty shall come into force 30-calendar days after the date when all Parties have notified each other that they have completed their respective domestic procedures to that effect.
2. This Treaty permits no reservations.
3. This Treaty may be amended with the consent of the three Parties.
4. This Treaty shall remain in force for twenty years from the date of entry into force, and be renewed automatically for further successive periods of twenty years unless otherwise decided by the Parties.
5. The Government of \_\_\_\_\_ shall be the depository of this Treaty.
6. In accordance with Article 102 of the United Nations Charter, the depository shall register this Treaty with the Secretary General of the United Nations.

IN WITNESS THEREOF, the Parties have signed the equally authentic original texts of this Treaty in the English, French and Spanish languages, on the \_\_\_\_th of \_\_\_\_\_ of 199\_\_, in the City of \_\_\_\_\_.