SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Canada-United States Law Journal

Volume 24 | Issue

Article 26

January 1998

# Sovereignty, Trade, and the Environment--The North American Agreement on Environmental Cooperation

Sarah Richardson

# SOVEREIGNTY, TRADE, AND THE ENVIRONMENT – THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION

*Sarah Richardson*[*]

This Article explores in a preliminary fashion ways in which the North American Agreement for Environmental Cooperation (NAAEC)[1] impacts the sovereignty of its Parties – the governments of Canada, Mexico, and the United States. It will not explore the nature of sovereignty in detail. Rather, it will consider any legally binding commitments in the NAAEC as well as the changing patterns of behavior brought about by a commitment to cooperate on a wide range of issues. It will consider the extent to which by entering into the NAAEC and beginning to consider North America as a community within the Commission for Environmental Cooperation (CEC), the countries of North America have restricted their own autonomy and have put in place a framework for cooperation that promotes accountability and encourages environmentally responsible behavior. This Article will also consider how the NAAEC, a regional environmental agreement, constrains national governments in ways that are quite distinct from the constraints on national behavior embodied in comprehensive regional trade liberalization agreements such as the North American Free Trade Agreement (NAFTA).[2]

The NAAEC does not attempt to set out common rules on substantive environmental issues to govern the North American environment or make as its focus the development of a supranational international organization. It does, however, represent an acknowledgement of the environmental interdependence of the countries of North America in the context of their economic interdependence, and the need to approach those common environmental issues in a cooperative manner. NAFTA addresses issues of economic interdependence in a very different and ultimately more legally binding way.

---

* Sarah Richardson is the Program Manager, NAFTA/Environment, at the Commission for Environmental Cooperation in Montreal, Quebec. The views expressed in this Article are those of the author and do not necessarily represent the views of the Commission for Environmental Cooperation or the Governments of Canada, Mexico, or the United States. The author wishes to thank John Kirton, Linda Duncan, and Carla Sbert for their thoughtful comments

[1] North American Agreement on Environmental Cooperation, Sept. 8, 1993, Canada/Mexico/United States, 32 I.L.M. 1480.

[2] North American Free Trade Agreement, Dec. 8, 1992, Canada/Mexico/United States, 32 I.L.M. 289.

The NAAEC has its most constraining effects on national governments through practice and observed behavior brought about by efforts to reach consensus and the adoption of procedures relying on public participation and requiring transparency. However, influencing the behavior of governments is not the same as constraining the sovereignty of states. Some commentators would argue that the NAAEC, with its emphasis on mandating the domestic enforcement of domestic environmental law as opposed to promoting harmonization among the three Parties, actually strengthens national sovereignty.[3] This Article will explore these arguments.

## I. SOVEREIGNTY AND INTERNATIONAL AGREEMENTS

Sovereignty denotes the legal personality of a state in public international law. Being sovereign and equal to others, a state has certain rights and corresponding duties. These rights include exclusive control over its territory, its permanent population, and other aspects of its domestic affairs. The associated duty is one not to intervene in the affairs of other states and thus not to interfere with their exclusive jurisdiction.

Sovereignty is affected by international agreements and organizations to varying degrees. Sovereignty determines that a nation has exclusive control over its territory, its population, and its domestic affairs. However, states acting together through negotiated legal instruments can accede sovereignty over specified issues to a supranational institution where there is some reciprocal benefit to so doing. Also through negotiated agreements, states can agree to relinquish exclusive jurisdiction over certain issues, or sets of issues, with universal appeal through cooperative mechanisms. Thus the principle of cooperation denies to some extent the exclusiveness of states' rights. Indeed, if the interdependent nature of an issue is acknowledged by states and a regime for management of that issue becomes a joint one, this, by definition, denies exclusivity.

Since the 1940s, states have determined that it is in their best interests to open their borders through progressive rounds of trade liberalization negotiations. Thus, a number of trade liberalization agreements and regimes have been established that codify the rules of trade and in so doing provide certainty and predictability to trading relationships. Yet, in receiving the benefits of liberalized trade – the guarantee that one country's goods will be able to compete without discrimination in foreign markets – one must clearly provide the corresponding legal guarantee to that foreign country to allow its

[3] Daniel C. Esty & Damien Geradin, *Market Access, Competitiveness and Harmonization: Environmental Protection in Regional Trade Agreements*, 21 HARV. ENVTL. L. REV. 265-336.

goods to enter one's own market without discrimination. Thus, the rules at shared borders are jointly agreed upon. Should those rules be violated, states have access to dispute settlement processes under the trading regimes equipped to issue binding decisions. Such is the case with the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO), the Canada-United States Free Trade Agreement, and the North American Free Trade Agreement.

Since the 1970s, sovereign states have come to recognize that an increasing number of environmental issues cannot be dealt with effectively at a national level. Rather, the realization has emerged that some environmental issues embodied the universal concerns that were the underpinning of an international society and therefore required multilateral cooperative action. Thus, cooperative agreements are based upon the environmental interdependence of states, their reliance on common resources, their shared stewardship over migratory species, and the recognition that there is a unity of purpose in protecting a global or regional environment.[4]

In 1972, the Stockholm Declaration on the Human Environment[5] considered the need for a common outlook and for common principles to inspire and guide the peoples of the world in the preservation and enhancement of the human environment. Among the principles set out in the Stockholm Declaration, two in particular address the issue of the rights and responsibilities of states with respect to each other.

> Principle 21
>
> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or to areas beyond the limits of national jurisdiction.
>
> Principle 24
>
> International matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries, big or small, on an equal footing. Cooperation through multilateral or bilateral arrangements or other appropriate means is

---

[4] For a general discussion, see HUGH M. KINDRED ET AL., INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED IN CANADA (820) (Emond Montgomery Publications Ltd., 1987).

[5] U.N. Doc. A/CONF. 48/14 (1972), 11 I.L.M. 1416. From the U.N. Conference on the Human Environment (June 5-16, 1972).

> essential to prevent, reduce or eliminate adverse environmental effects resulting from activities conduced in all spheres, in such a way that due account is taken of the sovereignty and interests of all States.[6]

Such an approach meant that, increasingly, global environmental issues have been dealt with at an international level in fora such as the United Nations or the Organization for Economic Cooperation and Development (OECD).[7] Following Stockholm, select international issues were addressed through multilateral environmental agreements (MEAs) beginning in 1973 with the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).[8] Additional attempts to broaden the international legal regime for global environmental issues include the conclusion of the Montreal Protocol[9] and the Basel Convention.[10] Most recently, the United Nations Conference on Environment and Development held in June 1992, resulted in the Rio Declaration,[11] a set of non-binding principles, as well as the U.N. Convention on Biodiversity,[12] and the U.N. Framework Convention on Climate Change,[13] which has since been enhanced by the Kyoto Protocol.[14]

Thus, by the 1970s the international environmental regime had begun to recognize basic issues that had been adopted by the trade community decades earlier. Just as countries that sign trade agreements at their discretion suspend some sovereignty in order to gain the benefit that they will then receive by being part of a rules-governed international trading bloc, the same thing occurs in the environmental field. However, the terms of the agreements that address environmental issues ensure that the suspension of sovereignty does not occur to the same extent.

The existence of international organizations and cooperative international agreements is a recognition of the need for the continuous, rules-based, intergovernmental cooperation to achieve ends that independent states cannot accomplish for themselves individually. They include a strong role for the

---

[6] *Id.*

[7] The United Nations Environment Programme (UNEP) was created by the U.N. General Assembly in December, 1972.

[8] Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249, 993 U.N.T.S. 243, ELR Stat. 40336.

[9] Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1541.

[10] Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, art. 4(5), 28 I.L.M. 649.

[11] Rio Declaration on Environment and Development, June 14, 1992, 31 I.L.M. 874.

[12] Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818.

[13] Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 849.

[14] U.N. Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22.

nation state as the organization and political authority behind the collective action. International institutions that promote cooperation can thus enhance sovereignty by providing national governments with added instruments to implement and enforce law, to develop capacity, and to otherwise meet the needs of their citizens. Indeed, through cooperation with a bordering nation, a state can arguably extend its jurisdiction by the ascendance of other states to its domestic agenda.

## II. NAFTA'S ENVIRONMENTAL PROVISIONS

The "NAFTA debate" as it related to the environment, centered on a few key issues.[15] One was the creation of pollution havens. It was thought by some that economic integration among the three countries of North America would result in the migration of businesses to areas where environmental standards were lower, or were perceived to be lower, thereby creating so-called "pollution havens." A second issue was that regional integration would encourage a so-called "race to the bottom" with respect to environmental standards. It was thought by some that the countries of North America would be encouraged to lower their environmental standards or cease enforcing environmental laws in order to attract industry or enhance the competitiveness of their existing industry. A third issue was concern about increased cross-border pollution. Finally, there were concerns that trade-related provisions in multilateral environmental agreements could be challenged under NAFTA.

Given these concerns, the negotiators of NAFTA were the first trade negotiators to take environmental issues into account *during* trade negotiations. NAFTA, as it was negotiated, was characterized by many as the "greenest" trade agreement ever. From the perspective of mandatory environmental behavior, however, there is little in the NAFTA that forces the behavior of nations in their approach to environmental issues.

NAFTA includes perambulatory provisions recognizing the importance of sustainable development and encouraging the effective enforcement of

---

[15] For more complete discussions of the negotiation of the NAAEC and for perspectives on the underlying reasons for the Agreement, see JOHN J. AUDLEY, GREEN POLITICS AND GLOBAL TRADE: NAFTA AND THE FUTURE OF ENVIRONMENTAL POLITICS (Georgetown University Press, 1997); Sarah Richardson & André Beaulieu, *The North American Agreement on Environmental Cooperation: A Canadian Perspective*, *in* NAFTA AND THE ENVIRONMENT, (Seymour J. Rubin & Dean C. Alexander, eds., Kluwer Law Int'l 1996); PIERRE MARC JOHNSON & ANDRÉ BEAULIEU, THE ENVIRONMENT AND NAFTA: UNDERSTANDING AND IMPLEMENTING THE NEW CONTINENTAL LAW (Island Press, 1996); Don Munton & John Kirton, *North American Environmental Cooperation: Bilateral, Trilateral, Multilateral*, *in* NORTH AMERICAN OUTLOOK 59-86, (Mar. 1994).

environmental law.[16] However, these provisions have no force in law and are not referred to in the body of the NAFTA agreement. Article 1114 in the investment chapter of NAFTA includes a normative restraint indicating that a Party should not lower its environmental standards in order to attract investment. However, there is no absolute prohibition against such behavior and no legal remedy beyond government-to-government consultation against a Party that engages in it.[17] Article 104 of NAFTA protects listed MEAs that include trade-restrictive provisions from challenge under the provisions of the trade agreement.[18] Among the multilateral environmental agreements currently listed are the Montreal Protocol, CITES, and the Basel Convention. This affirms the supremacy of the trade-restricting provisions in those three international agreements. However, in the domain of their economic relations, the three Parties have subscribed to common rules and dispute settlement regimes for trade and investment in goods and services in the broadest trade agreement in history. Moreover, there are no provisions in the NAFTA that mandate or even encourage public participation and transparency. Thus, there is no mechanism for public accountability or avenues for the public to encourage environmentally enhancing behavior.

The NAFTA, as it was negotiated in 1992, did little to ensure that countries enforce their environmental laws or to address the issue of increased pollution brought about by increased economic activity that could accompany trade. That is understandable; after all, NAFTA is a trade liberalization agreement. However, during the autumn of 1992 in the context of the U.S. presidential campaign, NAFTA's impacts on both labor and the environment became critical issues. In a speech on October 4, 1992, Governor Bill Clinton endorsed a supplemental agreement on the environment that created a Commission "with teeth" in the form of enforcement powers, moving its scope beyond the cooperative arrangement originally contemplated.[19]

During the negotiation of the "environmental side agreement," the issue of sovereignty was discussed. It was relatively unproblematic to ensure that a large part of the agreement was based on trilateral cooperation to address environmental issues of common concern to North America as a region. However, the debate over sovereignty was particularly heated in considering the "teeth" that might be appropriate to ensure that the Parties would enforce their domestic environmental law, such as the suspension of NAFTA benefits through the imposition of trade sanctions against an offending Party.

---

[16] NAFTA, *supra* note 2, at preamble, art. 1(b).

[17] NAFTA, art. 1114.

[18] NAFTA, art. 104.

[19] *Expanding Trade and Creating American Jobs*, Remarks of Gov. William J. Clinton at North Carolina State University, Oct. 4, 1992.

## III. IMPLICATIONS OF THE NAAEC ON SOVEREIGNTY

The North American Agreement for Environmental Cooperation is the "environmental side agreement" passed alongside the NAFTA.[20] Both agreements have as their Parties Canada, Mexico, and the United States. Both agreements came into force on January 1, 1994. The NAAEC was conceived to address two key issues raised in the debates that occurred during the negotiation of NAFTA and the possible impacts of that trade liberalization agreement on the environment. Those issues were the need for regional cooperation on environmental issues of concern to North Americans and the need to enhance the effective enforcement of environmental laws in all three countries in order to protect the environment thereby ensuring a level playing field for increased trade and investment in North America.

In its Preamble, the NAAEC reaffirms the Parties commitment to the Stockholm Declaration of 1972 and the Rio Declaration on Environment and Development in 1992, thereby confirming their support of the universality of environmental issues and issues of sustainable development. It also reaffirms:

> The sovereign right of States to exploit their own resources pursuant to their own environmental and development policies and their responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction . . . .[21]

There are three broad areas of the agreement to consider further in a discussion of sovereignty and how it is impacted by cooperative regimes such as the one created by the NAAEC. The first is through the obligations of the Parties under the Agreement. The second is through the institutional framework set up in North America to implement the Agreement. And the third is through the annual work program and budget developed under the cooperative provisions of the Agreement.

### A. The Obligations of the Parties

The term "Parties" in the NAAEC is understood to include the various departments, ministries, or agencies that make up the governments of Canada, Mexico, and the United States, including provinces and states.[22] The

---

[20] For a recent discussion on the CEC, see John Kirton, *NAFTA's Commission for Environmental Cooperation and Canada-U.S. Relations*, *in* 27 AM. REV. CAN. STUDIES 459-86 (1997).

[21] NAAEC, preamble, *supra* note 1, at 1482.

[22] In Canada this is subject to the Canadian provinces acceding to the NAAEC.

obligations of the Parties are contained in Part Two of the NAAEC. These are the obligations of the governments generally, and the relevant departments with jurisdiction over issues ranging from fisheries and lands to justice, trade, commerce, foreign affairs, and state, among others.

General obligations of the Parties include the preparation of periodic reports on the state of their national environments, the development and review of environmental emergency preparedness measures, and the promotion of environmental education. Further obligations include scientific research and technology development in respect to environmental matters, the assessment of environmental impacts, the promotion of the use of economic instruments for the efficient achievement of environmental goals, and the consideration of a prohibition on the export to the territories of the other Parties of a pesticide or toxic substance whose use is prohibited within the Party's territory.[23]

Of particular importance for a discussion of the impacts of the North American Agreement on Environmental Cooperation on the national sovereignty of its Parties is Article 3 as follows:

> Recognizing the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities and to adopt or modify accordingly its environmental laws or regulations, each Party shall ensure that its laws and regulations provide for high levels of environmental protection and shall strive to continue to improve those laws and regulations.[24]

Article 3 thus mandates the Parties to ensure a high level of environmental protection and strive to continue to improve those laws and regulations. However, there is no definition of "high" and the Parties are required only to "strive" to improve their environmental laws and regulations, thus simply requiring best practices. Therefore, as a matter of law, national sovereignty is the dominant principle governing the behavior of the Parties and further to Article 3 it is ultimately unaffected by the generally conceived constraints to provide high levels of protection and to strive to continue to improve those levels. So in signing the NAAEC, as a matter of law, no Party has given up its sovereign right to set national environmental priorities, policies, laws, and regulations at a level that it alone determines. Furthermore, there is no requirement that the three Parties shall, at present, or in the future, harmonize any of their national laws or regulations to meet any trinational standard.

---

[23] NAAEC, *supra* note 1, at art. 2.

[24] *Id.* at art. 3.

The Parties are also required by the Agreement to ensure that their laws, regulations, procedures, and administrative rulings on areas covered in the NAAEC are published. Moreover, they are required, "to the extent possible" to publish in advance any proposed measures and to provide interested persons and Parties a reasonable opportunity to comment on those proposed measures.[25] There is no threat to sovereignty in a requirement to publish domestic legislation that is adopted. And, even in the event that a Party publishes proposed measures and asks for comments from the other Parties, there is no requirement to take any comments received into account.

The Parties have also agreed to a common obligation to "effectively enforce its environmental laws and regulations within its own territory through appropriate governmental action," [26] with the aim of achieving high levels of environmental protection and compliance with its environmental laws and regulations. The Parties have chosen to pursue this obligation through a Council-created trilateral North American Working Group on Environmental Enforcement and Compliance (EWG). The EWG focuses on enhancing linkages among North American Environmental and Wildlife Enforcement agencies and exploring alternative approaches to addressing regional issues.[27] It serves as a North American forum to build regional networks and develop strategies related to multilateral agreements such as CITES and the Basel Convention. The EWG encourages regional efforts for developing environmental enforcement capacity including training. It also provides a regional policy forum for dialogue among national, state, and provincial environmental and wildlife enforcement agencies regarding delivery of their respective domestic and international obligations. In this way, the obligations under Article 5 to effectively enforce environmental laws are being addressed in a trilateral fashion with the added capacity of the CEC as a facilitator. However, the EWG is not required by the text of the NAAEC. It is less a part of the obligations of the Parties than it is a part of the cooperative framework and incremental practice that the Council has chosen to implement the obligations.

Under Article Six the Parties have agreed to ensure the existence of private access to remedies. These provisions and the examples of remedies listed in the article are crafted to guarantee such access in accordance with a Party's law. Article Seven requires the Parties to provide to their publics pro-

---

[25] *Id.* at art. 4.

[26] *Id.* at art. 5.

[27] For a detailed discussion of the CEC Enforcment Cooperation Program, see Linda F. Duncan, *The North American Agreement for Environmental Cooperation: A Regional Framework for Effective Environmental Enforcement*, Paper prepared for the Fifth International Conference on Environmental Compliance and Enforcement, Nov. 16-20, 1998, Monterey, California.

cedural guarantees in its administrative, quasi-judicial, and judicial proceedings.

The obligations of the Parties in Part Two of the NAAEC are essentially neutral in their impact on sovereignty in the strict sense of the term. Obligations undertaken freely by governments to enforce and perhaps even strengthen their own environmental laws, to let their citizens know what those laws are, to provide their citizens with access to legal remedies and procedural guarantees are not constraints on national sovereignty. Nevertheless, the existence of these obligations may well influence the behavior of the Parties and add pressures for the cooperative allocation of resources towards those specific provisions in the NAAEC.

B. Institutional Structures

The NAAEC was negotiated to address the key issues of enforcement and cooperation on regional environmental issues. Thus, these areas comprise the majority of the Agreement. This section will examine the Agreement's so-called "teeth" in the context of the trilateral inter-governmental institution that it created – the Commission for Environmental Cooperation (CEC). The CEC itself has a single headquarters in Montreal, Canada. It is funded equally by the three Parties at a cost of nine million dollars (U.S.), although the specific level of funding is unspecified in the Agreement.[28]

The CEC has three principle components: the Council, the Secretariat, and the Joint Public Advisory Committee (JPAC). The Council is comprised of the three most senior environmental officials in each of the three countries.[29] The Council is the governing body of the Commission and as such is assigned tasks including oversight of the Secretariat, the approval of the annual work program and budget, and the development of recommendations on a number of important regional environmental issues.[30] The Council is also charged with cooperating with the NAFTA Free Trade Commission to achieve the environmental goals and objectives of NAFTA.[31] The Council is required to meet once a year and is required to hold public meetings during the course of its regular session.[32]

---

[28] NAAEC, *supra* note 1, at art. 43.

[29] The Honorable Christine Stewart, Minister of the Environment in Canada; Julia Carabias Lillo, Secretaría, Secretaría de Medio Ambiente, Recursos Naturales y Pesca in Mexico; and, Carol Browner, Administrator of the Environmental Protection Agency in the United States.

[30] NAAEC, *supra* note 1, at art. 10(1) and (2).

[31] *Id.* at art. 10(6).

[32] *Id.* at art. 9(3) and (4).

The second component of the CEC is the Secretariat. The Secretariat is headed by an Executive Director, who is appointed jointly by the three governments. It is the responsibility of the Executive Director to appoint and supervise the professional staff that is recruited from the three NAFTA countries.

The third component of the CEC is the Joint Public Advisory Committee (JPAC). The JPAC is comprised of fifteen members, five appointed by each Party. The JPAC may provide advice to the Council on any matter within the scope of the NAAEC.[33] The JPAC is required to meet at least once a year.

## C. Submissions on Enforcement Matters

The Parties are not required to modify in any way their environmental standards. One of the objectives of the Agreement is to "enhance compliance with, and enforcement of, environmental laws and regulations."[34] To this end, there exists a mechanism in the NAAEC whereby "any non-governmental organization or person" may make a submission to the Secretariat claiming that a Party "is failing to effectively enforce its environmental law."[35] Taken together, Articles 14 and 15 of the NAAEC represent a critical institutional mechanism to encourage the effective enforcement by the Parties of their domestic environmental law. While these provisions have no *de jure* impact on sovereignty, in practice this new trilateral regime has the potential to influence a Party's behavior should it become the focus of such a submission.

Provided that this complaint meets criteria set out in the Agreement, the Secretariat can make a recommendation to the Council that it warrants the development of a factual record.[36] The Council can direct the Secretariat to go ahead with the development of a factual record by a two-thirds vote.[37] Once completed, the Secretariat submits the factual record to the Council and the Council may, again by a two-thirds vote, decide to make that factual record public.[38] There is no further remedy for the submitter and no further duty on the Party that was the subject of the factual record under this submission process, notwithstanding the contents of the factual record.

---

[33] *Id.* at art. 16.

[34] *Id.* at art. 1(g).

[35] *Id.* at art. 14(1). Procedures for filing complaints are set out in the NAAEC, and are elaborated upon by Guidelines for Submission on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation.

[36] NAAEC, *supra* note 1, at art. 15(1).

[37] *Id.* at art. 15(2).

[38] *Id.* at art. 15(5) and (7).

Thus, there is no ultimate overt challenge to national sovereignty inherent in the citizens' submission process. However, Article 14 is a novel mechanism in any international environmental or other agreement. It is innovative in that it allows citizens to publicly seek accountability from the Parties for alleged failure to enforce environmental laws and regulations in the three countries. Moreover, it allows citizens of one country to submit allegations of non-enforcement against any one of the three Parties. Thus, for the purpose of promoting the effective enforcement of environmental law, the NAAEC allows for the citizens of the three countries to behave as though they are North American environmental citizens.

Furthermore, it allows for the governments to respond as a region. The decisions about whether to pursue a factual record, and then whether to make that factual record public are not decisions that need to be taken by consensus. Thus, the Party that is the subject of the factual record can be overruled by the other two Parties should the former not wish either to direct the development of a factual record or allow for its public release. Once released to the public, it is up to the submitters or the citizens of the region to bring pressure to bear on their governments through existing democratic institutions of government to encourage any action that addresses issues raised in the submission and the factual record. There is no trilateral mechanism to direct a Party's behavior on these issues.

From January 1, 1994 to September, 1998 the CEC had received eighteen submissions from citizens or non-governmental organizations under Article 14.[39] Of these, seven disputes have been considered and dismissed by the Secretariat for procedural reasons or because they were deemed not to fall under the scope of Article 14. In previous rulings, it has been determined by the Secretariat that Article 14 cannot be used in cases where, through the democratic process, a Party has amended an environmental law and applies only to administrative failure to enforce. In only two cases has the Secretariat recommended to the Council that it prepare a factual record.[40] In both cases the Council has agreed by unanimous vote. The first of those factual records was completed in early 1997 and the Council agreed to make it public by a unanimous vote in June 1997.[41] The second factual record is currently being developed by the Secretariat.

---

[39] *See* Registry of Submissions on Enforcement Matters at http://www.cec.org (last visited Sept. 10, 1998).

[40] SEM-96-001(Aug. 2, 1996) and SEM-97-001 (Council Resolution 98-07 dated June 24, 1998).

[41] SEM-96-001, *Final Factual Record of the Cruise Ship Pier Project in Cozumel, Quintana Roo* (Oct. 24, 1997).

In keeping with the NAAEC's commitment to transparency, this mechanism is an open one. A summary of each file is available to the public in three languages in hard copy and on the Internet, and all of the documentation not designated as confidential regarding the submission review process developed by the submitter, the Parties, and the Secretariat may be consulted upon request.

The evidence in the decisions surrounding citizen submissions suggests that sovereignty is secure. Early decisions suggest that the sovereign right of a country to make or change laws through its national legislative process is not subject to challenge. Nevertheless, despite the limitations in the scope of Article 14, a pattern is beginning to emerge in its application and acceptance by the Parties. It appears that the Parties are not prepared to object to the review process or a Secretariat determination that is on the public record and are not prepared, in the face of a two-thirds voting provision, to appear to be undermining the mechanism that they themselves negotiated and agreed to in 1994.

## D. Consultation and Resolution of Disputes

A second institutional vehicle to encourage effective enforcement in the NAAEC is in Part V, which contains the provisions for Party-to-Party Consultations and Dispute Resolution. Any Party may request consultations with any other Party regarding whether there has been "a persistent pattern of failure by that other Party to effectively enforce its environmental law."[42] If consultation does not solve the issues, then a special session of the Council can be requested and failing solution through that means, any Party may request an arbitral panel. The Council, by a two-thirds vote, may convene such a panel to consider the matter:

> ...where the alleged persistent patterns of failure by the Party complained against to effectively enforce its environment law relates to a situation involving workplaces, firms, companies or sectors that produce goods or provide services:
>
> (a) traded between the territories of the Parties; or

[42] NAAEC, *supra* note 1, at art. 22.

(b) that compete, in the territory of the Party complained against, with goods or services produced or provided by persons of another Party.[43]

The Panel will produce an initial report that will contain findings of fact as well as a determination by the panel as to whether there has been a persistent pattern of failure to effectively enforce environmental law. If such a finding is made, the Panel will propose an action plan to remedy the non-enforcement. Following a comment period, the final report shall be published five days after it is transmitted to the Council.

If the action plan is not adhered to, remedies include monetary assessment (fines).[44] In the event that the monetary assessments are not paid, there can, in the case of Mexico and the United States, be a suspension of benefits under NAFTA in the sector affected by the determination.[45] In Canada, the Commission will file a copy of the panel determination in federal court to be enforced through the domestic court system as an order of the court not subject to domestic review or appeal.[46]

Thus, there is a remedy if a government chooses to allege that another government is not enforcing its environmental law. Part V of the NAAEC is the dispute resolution procedure that includes legal "teeth" while the citizens' submission process under Article 14 (as previously discussed) relies on the power of persuasion, public participation, democracy, and accountability. Where there are legal "teeth" in Part V, standing is granted only to a Party, as opposed to any citizen. Where there are legal "teeth," the test is a "persistent pattern of failure . . . to effectively enforce" an environmental law that has an impact on trade,[47] as opposed to a simple "failure to effectively enforce an environmental law" under Article 14.[48] Where the agreement has "teeth" the process involves an arbitral panel appointed by the governments as opposed to a process left in the hands of the Secretariat. Part V has yet to be used. On the other hand, despite its limitations in law, Article 14 is being used by the citizens of North America.

## E. The Cooperative Work Program

NAAEC provides the scope for the Council to cooperate on a broad range of issues and the CEC's extensive cooperative work program constitutes the

---

[43] *Id.* at art. 24.
[44] *Id.* at art. 34(5)(b) and Annex 34.
[45] *Id.* at art. 36 and Annex 36B.
[46] *Id.* at Annex 36A.
[47] NAAEC, *supra* note 1, at arts. 24(1) and 24(1)(a).
[48] *Id.* at art. 14.

majority of its work. The annual work program and budget is developed in the first instance by the Secretariat and must ultimately be approved by consensus by the Council.[49] The structure of the CEC allows for the public provision of outside advice to the Council through the JPAC and domestic National Advisory Committees on the annual program and budget. Such guarantees of public input reflect the Parties' perambulatory affirmation of the importance of public participation in conserving, protecting, and enhancing the environment.

Since 1995, a number of projects have been carried out under the annual work program of the CEC within major areas of concern to the North American environment including biodiversity and ecosystems, pollutants and health, enforcement cooperation and law, capacity building and education, and environment, economy, and trade. Some projects assist the Parties to develop common frameworks for joint action. For example, the sound management of the chemicals project is promoting actions to reduce, and then phase out, the use of targeted chemicals in North America. The CEC develops and assists in the implementation of North American regional action plans to do this. Plans are being implemented that cover dangerous substances such as DDT, cholordane, PCBs, and mercury and a number of additional substances are being considered for control. A second example of the trilateral development of new instruments for environmental protection is provided in Article 10(7). Article 10(7) mandates that the Council shall consider and develop recommendations with respect to assessing the environmental impact of proposed projects subject to decisions by a competent government authority and likely to cause significant adverse transboundary effects. The CEC is implementing this article by assisting the Parties in the negotiation of a binding agreement on the environmental impact assessment of transboundary undertakings.

Other projects focus on the collection, evaluation, and dissemination of data and information. For example, in its project North American Pollutant Release and Transfer Registry, the CEC monitors pollutant releases and transfers in North America based on national reporting systems. This project makes available in a trilateral publication information collected by the national governments on the pollutant releases of some of the most important industries in the region.

The CEC also provides a forum for trilateral cooperation among officials including officials in different disciplines and encourages dialogue between

---

[49] The CEC's annual program and budget is a public document. All of the work of the CEC is available, when it is in its final form on the Internet, free of charge, in the three languages of the CEC—English, French, and Spanish. Thus, work undertaken under the NAAEC is made available to the public fully responding to the NAAEC's calls for transparency.

disparate communities. For example, the NAAEC encourages cooperation between trade and environment officials.[50] Article 10(6) is of particular note in this discussion. It gives the Council the role in acting as a point of inquiry for receipt of comments from non-governmental organizations and persons concerning the goals and objectives of NAFTA. It also specifies that the Council should provide assistance in consultations under NAFTA's Article 1114 and undertake an ongoing assessment of the environmental effects of NAFTA. Thus, it provides a forum for cooperation on issues where trade and the environment policies meet and, in particular, where they can produce positive synergies. It also provides a public window on the normative constraints in NAFTA.

Other important capacity-building initiatives are being undertaken in Mexico including cooperation on strengthening the environmental management capacity in the State of Guanajuato and developing a Natural Protected Areas System.

This cooperative agenda is not intended as a means to limit the sovereign freedom of one nation to behave in any way that it wishes. Indeed, one could argue that the exchange of information and capacity building strengthen the Parties' individual ability to address environmental issues of importance to their national affairs, their domestic environments, and their citizens. However, the mechanisms put in place under the agreement that direct the three governments to work together and determine the manner in which they will work together in a trilateral way, can impact on the decision-making dynamics and influence decisions through the persuasion inherent in a trilateral, consensus-driven process. Looking for trilateral consensus necessary for regional cooperation on regional issues means that the focus of the CEC is not necessarily on any one nation's domestic priorities.

## IV. CONCLUSION

This preliminary exploration of ways in which the NAAEC impacts the sovereignty of its Parties suggests that its most constraining elements are the result of actual practice and not necessarily as a matter of law. While the NAAEC rarely impacts the sovereignty of its Parties – after all they are ultimately free to withdraw from the Agreement with six months notice[51] – it appears to affect their behavior in a subtle way that relates to their commitment to public participation, transparency, and commitment to cooperate by consensus on issues where they have determined there is an overall benefit for regional action. In the particular case of the NAAEC and the CEC, the

[50] NAAEC, *supra* note 1, at art. 10(6).

[51] *Id.* at art. 50.

Parties relinquished very little through the development of common legal rules or efforts to harmonize. Yet observed practice shows signs of changing behavior and a regional approach to issues of common environmental concern through institutional structures and process requirements that may not exist in multilateral approaches.

From an environmental perspective, the regional environmental agreements constrain sovereignty more than does the NAFTA, but the legal rules in NAFTA that govern trade in North America ultimately have considerably more of a constraining impact over the behavior of the three countries and their sovereignty in the economic domain. This suggests that that states are prepared to relinquish more control over their economic destiny with an assurance that achieving the reciprocal benefits from their trading partners will promote their own prosperity in ways that they could not do alone. A similarly clear and forthright recognition of the mutual benefits embodied in joint environmental protection and a similar rules-based system for the multilateral protection of the environment, paralleling the regime that governs the multilateral trading system, has not been advocated by nations more broadly. Indeed the value of the benefits of regional environmental protection has not been fully accepted to the extent that states are willing to give up a degree of sovereignty over their choices with respect to their domestic environments, even in the most advanced regional arrangement such as that which exists in North America that includes the NAFTA and the NAAEC.