

7-1-1995

Regional Environmental Law in the Americas: Assessing the Contractual Environment

Donna Lee Van Cott

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Donna Lee Van Cott, *Regional Environmental Law in the Americas: Assessing the Contractual Environment*, 26 U. Miami Inter-Am. L. Rev. 489 (1995)

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REGIONAL ENVIRONMENTAL LAW IN THE AMERICAS: ASSESSING THE CONTRACTUAL ENVIRONMENT

DONNA LEE VAN COTT*

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I. INTRODUCTION

The Western Hemisphere is a region of vast geographical differences and economic disparities. Until very recently, animosity between Northern and Southern powers in the hemisphere regarding the dominance of the United States (U.S.) and its hemispheric technology monopoly left little room for collaboration. Recent events, however, have improved the prospects for an environmental regime for the Americas. First, a web of new economic integration arrangements — from the North American Free Trade Agreement (NAFTA)¹ extending southward to the Common Market of the South (MERCOSUR)² — provide an opportunity to incorporate trade-related environmental concerns into binding sub-regional agreements, as some of these arrangements already do.

Second, the Summit of the Americas, convened by the U.S. in December of 1994 for the hemisphere's freely elected heads of state, produced several important initiatives.³ The pledge of the Summit participants to establish a Free Trade Area of the Americas (FTAA) by 2005 compels harmonization of the trade-related environmental policies of the hemisphere's governments relative to the NAFTA.⁴ In addition, specific environmental initiatives were generated by the Summit: partnerships for sustainable energy use, biodiversity, and pollution prevention.⁵

Third, the ascension of an environmentally friendly U.S.

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

2. The Treaty of Asunción, Mar. 26, 1991, 30 I.L.M. 1041, established a common market (Mercado Común del Sur/MERCOSUR) among Argentina, Brazil, Paraguay, and Uruguay. Bolivia and Chile have been invited to join. Other sub-regional trade pacts are the Central American Common Market, the Caribbean Economic Community (CARICOM), the Andean Pact, the Group of 3, and the Rio Group.

3. U.S. GOV'T, SUMMIT OF THE AMERICAS, DECLARATION AND PLAN OF ACTION (Dec. 11, 1994).

4. *Id.* § II, point 9.

5. *Id.* § IV, points 21-23.

administration created the political climate for the U.S. signing of the United Nations Convention on Economy and Development (UNCED) accords,⁶ as well as new initiatives promoted by environmentalist Vice President Albert Gore.

Finally, the U.S.-led revitalization of the Organization of American States (OAS) and the Inter-American Development Bank (IDB) provides the regional infrastructure to institutionalize the growing consensus in the hemisphere on environmental issues.⁷ These developments, as well as a harmonious foreign policy climate, the growing hemispheric convergence on values (such as democratic governance), protection of human rights, sustainable development, and the maturity of the region's non-governmental sector, have fostered a contractual environment conducive to the creation of an environmental regime capable of addressing both local and international environmental management problems.⁸

The contractual environment is the sum of the actions of international institutions, governments, scientists, and non-governmental organizations (NGOs) that apply pressure for the signing of effective agreements, the implementation of laws, policies, and regulations, as well as the direct allocation of resources toward environmental protection and restoration. Such monitoring and advisory functions of international institutions, as well as "a combination of binding international law and public exposure of noncompliance (often by less inhibited nongovernmental organizations), normative persuasion, scientific argu-

6. The UN Conference on Environment and Development (UNCED) was held from June 3-14, 1992 in Rio de Janeiro, and was attended by representatives of more than 170 nations. UNCED resulted in the signing of Conventions on Biological Diversity and Climate Change, additional statements of principle, and a Declaration on Environment and Development. UN Conference on Environment and Development, June 3-14, 1992, *reprinted in* 31 I.L.M. 814. Moreover, approval of a comprehensive Agenda 21 proposal for coordinated international environmental action was achieved at the UNCED. AGENDA 21: PROGRAM OF ACTION FOR SUSTAINABLE DEVELOPMENT, Rio de Janeiro, UN Doc. A/CONF.151/26 (3 vols. 1992).

7. For example, the Clinton administration is seeking to triple its 1996 financial contribution to the OAS Unit for the Promotion of Democracy and its most recent replenishment of Inter-American Development Bank (IDB) funds is the most generous to date. See U.S. GOV'T, SUMMIT OF THE AMERICAS U.S. GOVERNMENT IMPLEMENTATION STRATEGY. KEY ACTIONS THROUGH JUNE 1996 (1995).

8. See generally INTER-AMERICAN DIALOGUE, CONVERGENCE AND COMMUNITY: THE AMERICAS IN 1993 (1992); INTER-AMERICAN DIALOGUE, A TIME FOR LEADERSHIP: THE AMERICAS IN 1994 (1994); ABRAHAM F. LOWENTHAL & GREGORY TREVERTON, LATIN AMERICA IN A NEW WORLD (1994).

ment, technical assistance, and investment"⁹ create an environment in which governments sign binding agreements and engage in patterns of productive cooperation. An auspicious contractual environment is considered particularly important for environmental action by governments on transboundary and commons problems.¹⁰ As one commentator explains:

[S]tates must be able to make credible commitments, to enact joint rules with reasonable ease, and to monitor each other's behavior at moderate cost so that strategies of reciprocity can be followed. In short, it must be feasible for governments to make and keep agreements that incorporate jointly enacted rules, without debilitating fear of free-riding or cheating by others.¹¹

There are several reasons why the countries of the hemisphere should take advantage of this opportunity to create a regional environmental regime. As the Secretary-General of the OAS has articulated:

The absence of a jointly constructed, balanced and transparent inter-American policy framework often saps the will to cooperate and triggers disputes in specific areas that would be of common interest if the respective parameters were agreed on collectively.

In short, the lack of such a framework and the absence of those collective institutions in the environmental field is a sharp constraint on the immense possibilities which exist in the Americas for cooperation in such matters. Progress in the development of policy measures and a legal basis for the management of environmental matters, marked by greater respect for each state's sovereignty, the governments' autonomy in defining their development strategies and their full-

9. Robert O. Keohane et al., *The Effectiveness of International Environmental Institutions*, in INSTITUTIONS FOR THE EARTH: SOURCES OF EFFECTIVE INTERNATIONAL ENVIRONMENTAL PROTECTION 17 (Keohane et al. eds., 1994); see also Andrew Hurrell & Benedict Kingsbury, *International Politics of the Environment: An Introduction*, in INTERNATIONAL POLITICS OF THE ENVIRONMENT 20-1 (Hurrell & Kingsbury eds., 1991).

10. See Keohane et al., *supra* note 9, at 19.

11. *Id.* On the contractual environment and environmental cooperation, see also ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* (1990); ORAN R. YOUNG, *INTERNATIONAL COOPERATION: BUILDING REGIMES FOR NATURAL RESOURCES AND THE ENVIRONMENT* (1989).

fledged authority in the treatment of their natural resources, would undoubtedly be a very important step in cementing more harmonious relations in this field.¹²

Geographical proximity provides common interests in conservation and sustainable development of natural resources. The Amazon jungle, Caribbean basin, Andean Mountains, and River Plate basin are ecosystems that transcend international boundaries; many migratory species of wildlife inhabiting these ecosystems make transitory homes in several countries. These species can only be protected through regional cooperation. However, it is costly to investigate the economic possibilities and ecological vulnerabilities of these zones — scientific cooperation and joint management are natural solutions.

In addition, the economic interdependence of the region is growing. Even prior to the signing of the NAFTA, forty-two percent of Latin American and Caribbean (LAC) exports flowed to the U.S., and fifty-six percent of exports from the NAFTA countries were destined for other countries in the hemisphere.¹³ The natural resource base for this economic activity must be viewed from a hemispheric perspective as business and governmental interests plan for future development. A regional environmental legal regime will enable the region to negotiate future environmental conventions as a bloc vis-à-vis other regions of the world.¹⁴

From an environmental standpoint, while high, uniform international standards are the goal, regional standards can lift environmental protection levels higher than the international norm, just as regional trade agreements resolve more multilateral trade issues than do global agreements. Moreover, regional law is the mechanism by which some global agreements are implemented, and it can achieve greater specificity than global accords can contemplate.¹⁵

12. GENERAL SECRETARIAT, ORGANIZATION OF AM. STATES, A NEW VISION OF THE OAS, WORKING PAPER OF THE GENERAL SECRETARIAT FOR THE PERMANENT COUNCIL 38 (May 1995) (draft).

13. INTERNATIONAL MONETARY FUND, DIRECTION OF TRADE STATISTICS 1993 YEARBOOK (1993).

14. M.J. Peterson, *International Fisheries Management*, in INSTITUTIONS FOR THE EARTH: SOURCES OF EFFECTIVE INTERNATIONAL ENVIRONMENTAL PROTECTION 292 (Keohane et al. eds., 1994).

15. RAÚL BRANES BALLESTEROS, INSTITUTIONAL AND LEGAL ASPECTS OF THE

Finally, from an international standpoint, regional law relieves stress on an over-burdened United Nations (UN) system.

In order to meet the challenge of a regional environmental regime, the nations of the hemisphere must reach consensus on a hemispheric environmental agenda, harmonize levels of protection and environmental policies among the nations (by building national judicial and administrative capacity in order to implement and enforce international and national laws), and enable existing international institutions to support these processes. In Part II this article will survey the evidence thus far of the creation of a "Western Hemisphere Environmental Agenda." Parts III, IV, and V will describe the nature of environmental law in the region and identify existing agreements, conventions, and "soft law." A description of the inter-American institutions responsible for environmental issues and an assessment of their contribution to the region's contractual environment will follow in Part VI. Part VII will examine issues related to the 1994 Summit of the Americas. Finally, the prospects for creation of a Western Hemisphere regime on the environment will be assessed in Part VIII in light of the nature of the contractual environment.

II. SETTING THE AGENDA

Perhaps the most difficult obstacle to regional harmonization is setting a common agenda, without which cooperation cannot commence. Environmental issues in the Western Hemisphere range from those that concern particular cities or sea coasts to those that impact an ecosystem to those that are global in impact. While there is a growing consensus on the magnitude and nature of these problems, views tend to differ between the industrialized (Northern) and developing (Southern) countries of the hemisphere over the relative contribution to engendering these problems of the North and the South, and the proper dis-

ENVIRONMENT IN LATIN AMERICA: INCLUDING THE PARTICIPATION OF NON-GOVERNMENTAL ORGANIZATIONS IN ENVIRONMENTAL MANAGEMENT 34-5 (1991); Peterson, *supra* note 14, at 193; Ronald Mitchell, *Intentional Oil Pollution of the Oceans, in INSTITUTIONS FOR THE EARTH* 225 (1994); Kirk Rodgers, *Latin American Environment and Development, in GOVERNMENTS IN THE WESTERN HEMISPHERE* 381 (Viron P. Vaky ed., 1983); Frederick M. Abbott, *Regional Integration and the Environment: The Evolution of Legal Regimes*, 68 CHI.-KENT L. REV. 179 (1992).

tribution of responsibility for resolving them.¹⁶ In addition to resolving the North-South obstacle, the countries must articulate "the connections between local, regional and global environmental agendas."¹⁷

Northern and Southern nations traditionally split on the priority of environmental issues, with the North placing more emphasis on global issues of climate change, the ozone layer, and protecting the earth's biodiversity.¹⁸ With respect to Latin America, Northern environmentalists and policy makers are most interested in the impact on its biosphere and global climatic conditions due to environmental deterioration.¹⁹ Approximately forty percent of the world's tropical vegetable and animal species are found in Latin America.²⁰ At the present rate of deforestation, one-tenth of this bounty will have disappeared by the year 2000.²¹ Latin America is also estimated to produce fourteen percent of total worldwide emissions of carbon dioxide through energy consumption, deforestation, farming and industry.²²

The key link between the local and global environmental agendas in the Western Hemisphere is land use, particularly use of land for agriculture. While the Western Hemisphere is rich in biological resources relative to other regions, it is underendowed with fertile agricultural land.²³ Due to its impact on biodiversity, deforestation, and energy consumption, agriculture is the pivotal connection in the Americas to climate change.²⁴ A hemispheric agenda should, therefore, relate global environmental change to land use, then to agriculture and trade. Yet the hemisphere has failed to make this connection, partly due to the failure of the U.S. to permit international commodities agree-

16. See Steven Sanderson, *North-South Polarity in Inter-American Environmental Affairs*, 36 J. INTER-AM. STUD. & WORLD AFF. 25-46 (1994); SHRIDATH RAMPHAL, *OUR COUNTRY, OUR PLANET: FORGING A PARTNERSHIP FOR SURVIVAL* (1992).

17. Sanderson, *supra* note 16, at 26.

18. INSTITUTE FOR EUROPEAN-LATIN AM. RELATIONS, *LATIN AMERICA, EUROPE AND THE ENVIRONMENT: THE GREENING OF BIREGIONAL RELATIONS* 15-18, DOSSIER NO. 42, Madrid, (Jan. 1993) [hereinafter IRELA].

19. *Id.* at 15.

20. *Id.*

21. *Id.* at 14.

22. *Id.* at 20.

23. ENVIRONMENTAL COMM., INTER-AM. DEV. BANK, 1993 ANNUAL REPORT ON THE ENVIRONMENT AND NATURAL RESOURCES 1 (1994).

24. Sanderson, *supra* note 16, at 34.

ments and to review its own consumption patterns.²⁵ While the expansion of free trade in the hemisphere has spurred agreement on some environmental issues relative to competitiveness, U.S. domestic agricultural policy has precluded a rational approach to the hemisphere's critical agricultural problems because it prioritizes the concerns of domestic growers over those of international environmental challenges.

A. *The Latin American and Caribbean Agenda*

In contrast to the absence of a hemispheric agenda, the LAC countries have achieved considerable consensus on the principles and goals of environmental policy,²⁶ a consensus motivated by the wish to present a common front at 1992's UNCED conference,²⁷ and encouraged by the region's experienced international institutions — particularly the IDB and the UN Economic Commission for Latin America and the Caribbean (ECLAC).²⁸ Relative to the international community, Latin Americans:

[a]re more concerned about urban degradation than about natural resource problems or difficulties of predominantly global consequences, and they stress the social and economic security of present generations. The continent's priorities stem from the need to achieve, simultaneously, higher standards of living for the bulk of society and a sustainable pattern of production.²⁹

The three goals promoted by Latin leaders at UNCED were: 1) the need to transfer clean technology at concessional prices; 2) better access to markets for Latin American exports; and 3) the need for financial cooperation from industrialized countries for major environmental initiatives and concessional funds for environmental and other development projects.³⁰ In addition, debt relief was identified as crucial to the ability of LAC nations to

25. *Id.*

26. See COMISIÓN DE DESARROLLO Y MEDIO AMBIENTE DE AMÉRICA LATINA Y EL CARIBE, *NUESTRA PROPIA AGENDA* (1990) [hereinafter *NUESTRA PROPIA AGENDA*].

27. *Id.* at iii.

28. See, e.g., ENVIRONMENT COMM., INTER-AM. DEV. BANK, *supra* note 23; UN ECONOMIC COMMISSION FOR LATIN AMERICA AND THE CARIBBEAN, *BIENNIAL REPORT* (Apr. 16-27, 1994).

29. See IRELA, *supra* note 18, at 16.

30. *Id.* at 16-17.

address environmental problems. Their view is that, since the developed world has already completed its development in an unsustainable way, the developed world owes the world's developing countries an "ecological debt."³¹

The LAC environmental agenda was first articulated in a report prepared by the Latin American and Caribbean Commission on Development and Environment (LACCDE).³² *Nuestra Propia Agenda [Our Own Agenda]* takes as its reference the 1987 Brundtland Commission report, *Our Common Future*,³³ and was prepared in order to inform debate at the Rio Conference. The report focused squarely on the issue of development, assigning highest priority to those environmental issues in the development-poverty-population-environment nexus.³⁴ Critical to addressing the environmental problems in the region is eradication of the poverty that makes environmental destruction necessary for the survival of individuals and the economic growth of the region.³⁵ The report calls on the industrial countries to change their behavior and consumption patterns, as well as their attitudes toward and relations with other countries in the region. Industrial countries must declare their support for the principle of sharing the costs of environmental protection and development in the South "in a form commensurate with their responsibility for the environmental degradation and their considerable capacity to pay for it."³⁶ Moreover, the North must provide these funds without the conditionality usually imposed by those in the North wishing to suppress development in the South.³⁷

In sum, there is a three-part agenda of interrelated themes for the sustainable development of the region. The first,

31. *Id.* at 17. For further discussions on the position of Latin American and Caribbean countries during UNCED, see Pilar Suescum & Terencio J. García M., *Summary of Proceedings of the Seminar on Environmental Law and Policy in Latin America: Implementing Agenda 21 and the Environmental Conventions, in AGENDA 21 AND LATIN AMERICA: THE CHALLENGE OF IMPLEMENTING ENVIRONMENTAL LAW AND POLICY IX-XXIII* (Terencio J. García M. ed., 1994).

32. NUESTRA PROPIA AGENDA, *supra* note 26.

33. OUR COMMON FUTURE, U.N. CONFERENCE ON THE HUMAN ENVIRONMENT, REPORT OF THE BRUNDTLAND COMMISSION, STOCKHOLM, SWEDEN (June 5-16, 1972).

34. NUESTRA PROPIA AGENDA, *supra* note 26, at vii-xiii.

35. *Id.* at xiii.

36. *Id.* at viii (trans. by author).

37. *Id.* at 95.

which is centered in our environmental problems, must direct us toward national and regional strategies for better environmental management. The second, which has been presented by the developed countries and contains themes such as global warming, which affect all of us, but responsibility for which belongs to the developed countries. The remainder must include the topic of the policies and behavior of the industrialized North, which seriously affect our environment and development and which should be modified in order that the Third World and, in particular Latin America and the Caribbean, can achieve sustainable development. In relation to the last, it would be proper to analyze the environmental debt that the developed countries have contracted with our region and others in the Third World. In effect, for centuries they have used, for their own development and frequently in an exploitative form, the natural resources of the developing countries, at extraordinarily low prices, in any case, far below what poor countries must now pay.³⁸

Immediately prior to the Summit of the Americas, the LACCDE released a second report. *Our Common Agenda for the Americas* is the culmination of a process of discussions begun in February of 1994 among Commission members, staff of the UN Development Program (UNDP) and the IDB (which sponsor the Commission), as well as experts, governmental officials and NGO leaders from throughout the hemisphere.³⁹ This report conveys a marked change of tone from the Commission's previous report. The softening of the attitude of LAC countries toward the U.S. is no doubt due to the universal interest in access to a free trade pact including the U.S. The conciliatory and cooperative tone of the report matches that of the Summit documents themselves and reflects the thinking more of the professional international

38. *Id.* at 18-19 (trans. by author). Recent IDB reports essentially echo the view of the LAC countries. This is distinguishable from the agenda for the region described by UNEP, which stresses problems generated in Latin America and the Caribbean that impact on the global environment. According to Raúl Branes Ballesteros, recent studies of the region's main environmental problems stress changes in natural resources and their use, which are considered to jeopardize the future growth of the region and may lead to major environmental crisis. See BRANES BALLESTEROS, *supra* note 15, at 4. The crucial problems that tend to be mentioned include deforestation and forest management, deterioration of marine and coastal ecosystems, soil erosion, loss of biodiversity, deterioration of the quality of urban life, and environmental pollution. *Id.*

39. LATIN AMERICAN AND CARIBBEAN COMMISSION ON DEVELOPMENT AND ENVIRONMENT [LACCDE], *OUR COMMON AGENDA FOR THE AMERICAS* (1994).

staff of the IDB and UNDP than of the Southern Hemisphere's more strident critics of North American patterns of consumption and exploitation of Southern resources.⁴⁰

In place of flowery general statements of principle and the identification of environmental problems in the hemisphere, the 1994 report contains dozens of specific and practical recommendations for cooperatively addressing shared problems.⁴¹ These suggestions reflect the consensus in the Americas on principles of good governance and sound economic policy that are the favored thinking in Washington: investment in human resources through education and training, high savings and investment, modernization and decentralization of state operations, and the pursuit of a high degree of social and political consensus.⁴² Most conspicuous is the prominent role given to nurturing the pluralistic voices of civil society,⁴³ as well as the consideration of a variety of tax and fiscal incentives and the involvement of the private sector in raising the necessary funds for the ambitious environmental agenda.⁴⁴ This is a novel approach in a region where the state has traditionally dominated policy decisions, and replaces demands for billions of dollars from the North with "no strings attached."⁴⁵ The report maintains the intensive focus on reducing poverty and inequality in the hemisphere, while tying environmental issues to the hemisphere's key foreign policy goal of deepening trade and investment ties.⁴⁶ Within that link, energy efficiency and the development of cleaner energy technologies is given particular attention,⁴⁷ an interest that was followed up at the Summit as one of the three key foci of the sustainable development "basket" (the others are

40. For an example of the impact of the IDB and NGOs in Washington, see *id.*, § IV(G), Protecting the Rights of Indigenous Peoples, at 33-35, which is the most far-reaching and comprehensive statement of indigenous rights published by a non-indigenous group in this hemisphere. That statement alone indicates that the report does not convey the sentiments of those governments that convinced the U.S. to gut the indigenous peoples initiatives from the Plan of Action of the Summit of the Americas. In the last two years the IDB has created a department to deal with indigenous peoples development and has made indigenous peoples a lending and spending priority.

41. *Id.* at 13-37.

42. *Id.* at 14-15.

43. *Id.*

44. *Id.* at 55-63.

45. *Id.* at 16-17, 23-25, 52-63.

46. *Id.* at 15-17.

47. *Id.* at 45-51.

pollution prevention and biodiversity).

B. Sub-regional Agenda-Setting

Three sub-regional groups in the Western Hemisphere published their own environmental agenda for the UNCED conference.⁴⁸ These efforts are particularly useful because they define three important sub-regional ecosystems: Central America, the Caribbean, and the Amazon Basin.

The Central American Commission on Environment and Development (CACED) was created in 1989 to develop cooperative agendas for environmental management.⁴⁹ The Central American countries' top priority is halting deforestation and, accordingly, they have adopted common guidelines for forestry policy.⁵⁰ Environmental issues of concern to the Commonwealth Caribbean (CARICOM) roughly correspond to those of Latin America, but human productivity and the development of tourism and marine and coastal resources are CARICOM's first priority.⁵¹ Agriculture, tourism and fisheries — the Caribbean's top employers and earners of foreign exchange — are considered especially vulnerable to environmental degradation.⁵² The CARICOM leaders' interest in marine resources has also increased since the establishment of national jurisdiction over the 200-mile exclusive economic zones of each country.⁵³

Policies and strategies for the development of the Amazon are expressed in a report prepared by the Commission on Development and Environment for Amazonia (CDEA),⁵⁴ composed of

48. COMMISSION ON DEV. AND ENV'T FOR AMAZONIA, AMAZONIA WITHOUT MYTHS (1991) [hereinafter AMAZONIA WITHOUT MYTHS]; CENTRAL AMERICAN COMM. ON ENV'T AND DEV., AGENDA 2000 (1991); THE PORT OF SPAIN ACCORD, CONFERENCE ON THE MANAGEMENT AND CONSERVATION OF THE CARIBBEAN ENVIRONMENT, PORT OF SPAIN, TRINIDAD (June 1989).

49. USAID AND WORLD RESOURCES INST., NEW PARTNERSHIPS WORKING GROUP, NEW PARTNERSHIPS IN THE AMERICAS 6-9 (Dec. 1994).

50. *Id.* at 6-8; NIGEL SIZER, WORLD RESOURCES INST., OPPORTUNITIES TO SAVE AND SUSTAINABLY USE THE WORLD'S FORESTS THROUGH INTERNATIONAL COOPERATION 14, 15 (Dec. 1994).

51. CARIBBEAN LAW INST., ENVIRONMENTAL LAWS OF THE COMMONWEALTH CARIBBEAN: ANALYSIS AND NEEDS ASSESSMENT 23-24 (1991).

52. *Id.* at 24-25.

53. *Id.* at 23-26.

54. In the spirit of the aforementioned Commissions on Development and Environment for Central America and Amazonia, the IDB is currently helping to organize

prominent individuals from the signatory countries of the Amazon Cooperation Treaty (ACT).⁵⁵ As the title of its report, *Amazonia Without Myths*, indicates, the CDEA sets out to destroy global perceptions about the Amazon and replace them with the Amazon countries' own view of the "Amazonian reality." Many of the recommendations and observations are aimed squarely at the developed North. Language concerning the responsibility of the North for the current devastation of the Amazon environment and for paying for the rehabilitation of the Amazon basin is far more strident than in the above-mentioned sub-regional reports.

The "Amazon reality" that the CDEA urges upon the international community includes intensive development of the region's resources, explicitly rejecting the notion of preserving the totality or majority of the Amazon basin in a pristine condition.⁵⁶ This view is representative of Amazonian elites — the military, gold traders, cattle ranchers, timber and petroleum interests — that have benefited most from exploitation of the Amazon. Contrary to the recommendations of environmentalists ("radical ecological groups"), the CDEA envisions intensive agriculture, ranching, forestry, and mineral and oil exploitation "whenever necessary and compatible,"⁵⁷ and calls for increased settlement of the region to benefit "underpopulated areas."⁵⁸ Despite acknowledging the seriously destructive impact of the construction of highways into Amazonia, — which also spurs waves of colonization by land-hungry farmers — the CDEA calls for more highways and rail transportation.⁵⁹ This is rationalized by the belief that development of the Amazon would be environmentally sustainable if only the U.S. would give the Amazon countries its newest technology⁶⁰ — as if such technologies were a magic pill that would eliminate the need to change current development patterns.

In exchange for "restraint" in exploiting the remainder of

a Commission for the Andean region. Interview with Anne Deruyttere, Head of Indigenous Peoples Unit, IDB (Dec. 1994).

55. Treaty for Amazonian Cooperation, July 3, 1987, 17 I.L.M. 1045.

56. AMAZONIA WITHOUT MYTHS, *supra* note 48, at xii, 57 (1991).

57. *Id.* at 62.

58. *Id.* at 63.

59. *Id.*

60. *Id.* at 81-82.

the Amazon basin's resources, the CDEA calls on the North to pay a premium equivalent to the opportunity cost of the restraint, plus the cost of the services the Amazon provides to the world, which are said to mainly benefit the industrialized countries.⁶¹ The bill is steep. The CDEA estimates \$1.7 billion in lumbering potential, \$1.6 trillion for measured and discovered mining reserves, which amounts, inexplicably, to a total of \$10 trillion in 1984 dollars.⁶² Consistent with the demands of the other sub-regional commissions, this largesse is to be offered "without any pressures or contingency whatever."⁶³

III. NATIONAL ENVIRONMENTAL LAW IN THE AMERICAS

An environmental regime for the Americas must overcome regional disparities in the structure and scope of environmental

61. *Id.* at 60-61, 87.

62. *Id.* at 62, 84-85.

63. *Id.* at 62. For non-governmental views on the hemispheric agenda, see *Compact for a New World* (Oct. 1991) (written by the New World Dialogue on Environment and Development in the Western Hemisphere, a group of prominent private citizens from twelve countries in the region); *OUR COMMON ENTERPRISE: A BUSINESS PERSPECTIVE ON SUSTAINABLE DEVELOPMENT IN LATIN AMERICA* (May 1992) (prepared by a Latin American subset of the Switzerland-based Business Council for Sustainable Development). These views prepared for the Summit of the Americas are also of interest: *NORTH-SOUTH CENTER, POLICY PROPOSALS ON THE ENVIRONMENT AND SUSTAINABLE DEVELOPMENT* (Oct. 1994) (the result of a pre-Summit of the Americas workshop held by the North-South Center of the University of Miami in Kingston, Jamaica); *PROMISES TO KEEP: THE UNFINISHED AGENDA FOR HUMAN RIGHTS AND ECONOMIC JUSTICE IN THE AMERICAS. A STATEMENT AND RECOMMENDATIONS BY CONCERNED CIVIL SOCIETY ORGANIZATIONS* (Nov. 1994) (a pact signed by dozens of grassroots organizations in the Americas); and the declaration of over ninety hemispheric groups drafted by the Environmental Law Institute encouraging public participation in sustainable development.

For the views of indigenous peoples on the hemispheric environmental agenda, see *COORDINATING AGENCY OF THE INDIGENOUS ORGANIZATIONS OF THE AMAZON BASIN* [hereinafter *COICA*], *OUR AGENDA* (1989), as well as *COICA's* resolutions at their September 1994 regional meeting in Santa Cruz de la Sierra, Bolivia; *KARIOCA DECLARATION AND INDIGENOUS PEOPLES' EARTH CHARTER* (the statements of indigenous delegates to the 1992 UNCED conference); *SHELTON DAVIS, INDIGENOUS VIEWS OF LAND AND THE ENVIRONMENT* (1992); Russell Lawrence Barsh, *The Challenge of Indigenous Self-Determination*, 26 U. MICH. J.L. REF. 277-312 (1993); Alan Thein Durning, *Guardians of the Land: Indigenous Peoples and the Health of the Earth*, *WORLD WATCH*, Dec. 1992, at 112; *WORLD COUNCIL OF INDIGENOUS PEOPLES, RIGHTS OF INDIGENOUS PEOPLES TO THE EARTH* (July 30, 1985) (presented to the UN Working Group on Indigenous Populations, UN Commission on Human Rights, Geneva); *Armstrong Wiggins, Indian Rights and the Environment*, 18 *YALE J. INT'L L.* 345-54 (1993).

law.⁶⁴ Three main disparities require attention: 1) the general inadequacy of environmental law in Latin America and the Caribbean relative to North America; 2) differing approaches to implementing environmental law; and 3) inconsistencies in the treatment of the land of indigenous peoples.

A. *Adequacy of Latin American and Caribbean National Environmental Law*

The efficacy of international law depends on the development of domestic law and the level of national administrative and judicial capacity.⁶⁵ The state is given a paramount role by regional and international law, particularly with respect to the organization of the industrial structure and the innovation of technology.⁶⁶

Latin American legal systems historically granted absolute property rights.⁶⁷ In the twentieth century a conservationist strain entered the property rights regime to provide some protection for water, soil, and wildlife resources.⁶⁸ Environmental legislation in Latin America was originally created to regulate economic activity with incidental implications for the environment.⁶⁹ The environmental dimension is not incorporated into the general legal system or into economic legislation; thus, the mode of development promoted by the economic system tends to cause the environmental problems.⁷⁰ Most countries in Latin America and the Caribbean now have laws protecting all major sectors of the environment, as well as constitutional provisions

64. A less important disparity should be noted. Latin American law is based on the civil law system, rather than common law, which forms the basis of anglophone Caribbean law. CARIBBEAN LAW INST., *supra* note 51, at 28 (1991). According to Susan Bass, the two legal systems have been moving toward each other and their differences do not present a problem for regional environmental law. Personal communication with Susan Bass, Director of the Inter-American Program, Environmental Law Institute, Mar. 17, 1995. See also BRANES BALLESTEROS, *supra* note 15, at 6.

65. Keohane et al., *supra* note 9, at 20; BRANES BALLESTEROS, *supra* note 15, at 46.

66. *Sustainable Development: Changing Production Patterns, Social Equity and the Environment*, UN ECONOMIC COMMISSION FOR LATIN AMERICA AND THE CARIBBEAN, 126 LC/G.1648 (CON.80/2) (1991) [hereinafter ECLAC].

67. BRANES BALLESTEROS, *supra* note 15, at 13 (1991).

68. *Id.* at 14.

69. *Id.* at 6.

70. *Id.* at 44.

protecting public health and defining ownership of natural resources.⁷¹ What they lack are comprehensive environmental legislation, consistent enforcement, and an effective judicial system to punish violations.⁷² Much law continues to regulate particular economic sectors, rather than the environment as a whole. This has begun to change in a few countries, though statutory laws and subsidiary legislation still make up the majority of environmental laws. Much of this is overlapping and contradictory, due to its generation during different historical

71. See ECLAC, *supra* note 66, at 126; BRANES BALLESTEROS, *supra* note 15, at 20.

Constitutional provisions governing use and ownership of natural resources are found in the following original or revised constitutions: COLOM. CONST. (1886), MEX. CONST. (1917), COSTA RICA CONST. (1949), VENEZ. CONST. (1961), DOM. REP. CONST. (1966), BOL. CONST. (1967), PARA. CONST. (1967), PAN. CONST. arts. 110, 114-117, PERU CONST. art. 123 (1979), ECUADOR CONST. art. 19, ¶ 2 (1979), CHILE CONST. art. 19, ¶ 8. (1980), HOND. CONST. art. 145 (1982), EL SAL. CONST. art. 117 (1983), GUAT. CONST. art. 97 (1985), NIC. CONST. art. 60 (1987), BRAZ. CONST. art. 225 (1988).

Environmental protection statutes are found in these constitutions: PAN. CONST. arts. 110 (1972), 114, 117; PERU CONST. art. 123 (1979); ECUADOR CONST. art. 19, ¶ 2 (1979, rev. in 1983); CHILE CONST. art. 19, ¶ 8 (1980); HOND. CONST. art. 145 (1982); EL SAL. CONST. art. 117 (1983); GUAT. CONST. art. 97 (1985); NIC. CONST. art. 60 (1987); MEX. CONST. arts. 27, 73 (XXIX)(g) (1987); BRAZ. CONST. art. 225 (1988).

72. BRANES BALLESTEROS, *supra* note 15, at 36; IRELA, *supra* note 18, at 21 (1993). Bolivia, Brazil, Mexico, Trinidad & Tobago, Uruguay and Venezuela have ministries of the environment/sustainable development, while other countries tend to have committees on the environment and/or address environmental questions under the appropriate ministry of agriculture, health, planning, natural resources, or labor. *Id.*; Bolivia, Brazil, Colombia, Ecuador, Guatemala, Mexico, Peru and Venezuela currently have what may be considered "true environmental legislation." BRANES BALLESTEROS, *supra* note 15, at 119. See Código Nacional de los Recursos Renovables y Protección al Medio Ambiente [National Code on Renewable Natural Resources and Environmental Protection] (1974) (Colom.); Ley Orgánica del Ambiente [Basic Environmental Act], arts. 1, 5, 7 (1976) (Venez.); Ley de la Protección y el Control sobre la Contaminación del Ambiente [Ecuadorian Act on the Prevention and Control of Environmental Pollution] (1976) (Ecuador); Lei No. 6.938 de 31 de Agosto de 1981 (1981) (Braz.) (governing the establishment of national environmental policy, and related Lei No. 4.504 (land use), Lei No. 6.662 (water) Lei No. 4.771 (plant life) Lei No. 5.197 (wildlife), Lei No. 5.357 (marine environment); Ley de la Protección y el Mejoramiento del Ambiente [Environmental Protection and Improvement Act] (1986) (Guat.); Ley General del Equilibrio Ecológico y La Protección al Ambiente [General Act on Ecological Balance and Environmental Protection], Editorial Porrúa (1988) (Mex.); El Código del Medio Ambiente y Los Recursos Naturales [Environment and Natural Resource Code] (1990) (Peru); similar legislation is being considered in several other countries. In addition, the 1991 Colombian Constitution includes forty-two articles on the environment; the Chilean constitution guarantees citizens the right to a pollution-free environment. BRANES BALLESTEROS, *supra* note 15, at 119.

eras and by different parts of the government.⁷³

Seven recent trends have been noted in LAC environmental legislation: 1) the incorporation of some basic environmental protection principles in the newer constitutions; 2) incorporation of environmental protection into some economic legislation; 3) the promulgation of more comprehensive, systemic regulatory laws; 4) the decentralization of environmental legislative powers within a consistent national framework; 5) an improvement in the legal setting that should make the promulgation of particular environmental laws in certain fields easier; 6) the development of international environmental law on the regional, sub-regional, bilateral and global levels; and 7) the strengthening of legal custodianship of environmental interests.⁷⁴

The new trend is toward a more "holistic and systemic concept that is transforming legislation and has given rise to laws that establish principles aimed at protecting the environment as a whole."⁷⁵ Recently the two largest countries in the region moved to place more economic sectors under the control of environmental ministries, make environmental law more comprehensive, and reduce its contradictions. In January 1995, Mexico's president established a Secretariat of Environment, Natural Resources, and Fisheries.⁷⁶ The purpose of the reorganization of environment-related offices is to take a more comprehensive approach to environmental management, placing all environmental and resource issues under one ministry (except for the Attorney General's Office for Environmental Protection, which remains autonomous).⁷⁷ That same month the incoming Brazilian administration transferred responsibility for water resources from the Mining and Energy Ministry to the Ministry for the Environment, in order to more adequately address conservation and agricultural concerns. Brazilian environment minister Gustavo Krause said that one of his priorities will be creating more coherent environmental policy among the divisions of his ministry, which previously had conflicting interests.⁷⁸

73. BRANES BALLESTEROS, *supra* note 15, at 119.

74. *Id.* at 47.

75. *Id.* at 14-15.

76. CUTTER INFO. CORP., NEW ENVIRONMENT SECRETARIAT BEGINS TO TAKE SHAPE, 5 ENV'T WATCH LATIN AM. 1, 2 (Jan. 1995).

77. *Id.*

78. CUTTER INFO. CORP., BRAZIL STRUGGLES TO DEFINE HAZARDOUS-WASTE IM-

B. Different Approaches to Implementing Environmental Law

According to Susan Bass of the Environmental Law Institute, an important impediment to the creation of regional instruments on environmental law is the difference in approaches taken by countries to implement and enforce their own and international environmental laws.⁷⁹ While Canada prefers a process of negotiation and wide consultation with those with a stake in environmental management, the U.S. system is based on an adversarial, judicial method with a strong enforcement apparatus.⁸⁰ Where they have any enforcement measures at all, Latin American countries have used a "policing" approach which, according to one commentator, does not address the need to change entrenched patterns of behavior based on unsustainable patterns of consumption and production.⁸¹ Moreover, the measures fail to address the underlying problems and no mechanisms to compensate for damages exist.⁸² The weakness of enforcement in Latin America is due to the resource-intensiveness of judicial and environmental bureaucracies, which has strained the already limited capacity of these countries. At the regional level there are no mechanisms to enforce the 1940 Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere (Convention on Nature Protection).⁸³

C. Territorial Law and Indigenous Peoples

Countries in the Western Hemisphere differ significantly regarding the extent to which they recognize claims to communal land ownership.⁸⁴ There are currently thousands of disputes

PORT POLICY, 5 ENV'T WATCH LATIN AM. 9 (Jan. 1995).

79. Personal communication with Susan Bass, *supra* note 64.

80. *Id.*

81. BRANES BALLESTEROS, *supra* note 15, at 37.

82. *Id.* at 37-38.

83. Convention On Nature Protection and Wildlife Preservation in the Western Hemisphere, *opened for signature* Oct. 12, 1940, 56 Stat. 1354, 161 U.N.T.S. 193.

84. On land and natural resource policies of Western Hemisphere countries, see DONNA LEE VAN COTT, STATE POLICIES TOWARD INDIGENOUS PEOPLES IN LATIN AMERICA, INTER-AM. DIALOGUE POLICY BRIEF (June 1994); DONNA LEE VAN COTT, INDIGENOUS PEOPLES AND DEMOCRACY IN LATIN AMERICA (1994). See also DERECHO

between indigenous peoples and either the state, the military, or private interests over Indian claims to land ownership or the exploitation of resources on Indian-claimed lands. These disputes frequently result in violence, particularly in the Amazon.⁸⁵

The political constitutions of the different countries show various ways of handling [indigenous] rights. In the Bolivian, Ecuadorian and Venezuelan Constitutions, only passing reference is made to the indigenous peoples, whereas the Brazilian, Peruvian and Colombian Constitutions, which are more recent, deal with them in greater detail. In the majority of countries, problems surrounding the indigenous peoples, particularly those of the Amazon, are addressed through specific legislation and administrative regulations which recognize the indigenous communities as legal persons and acknowledge their right to legal recognition and demarcation of their lands. With the exception of Ecuador and Venezuela, the countries also recognize the inalienable right to the communal lands in perpetuity. Nevertheless, serious contradictions have continued to crop up between constitutional mandates and specific legislation promulgated in favor of the indigenous peoples, especially with respect to territory and to the use and management of natural resources.⁸⁶

In addition, the move toward free trade and the concomitant impetus to privatize Indian lands has made the legal status of communal lands more contentious, while the increased colonization in the 1980s, particularly in the Amazon, has created new forms of ownership through squatting, claimstaking, invasion and third-person sales or grants.⁸⁷

Since many of the environmental problems that Latin American countries face involve land-use and natural resources ex-

INDIGENA Y DERECHOS HUMANOS EN AMÉRICA LATINA (Rodolfo Stavenhagen ed., 1988); SHELTON DAVIS, LAND RIGHTS AND INDIGENOUS PEOPLES: THE ROLE OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS (1988); Richardson, et al., *Indigenous Peoples and Environmental Management: A Review of Canadian Regional Agreements and their Potential Application to Australia*, 11 ENV'T'L L. & PLAN. J. 4, 320-43 (1994).

85. For a discussion of human rights violations of Indians over land conflicts, see AMNESTY INT'L, THE AMERICAS: HUMAN RIGHTS VIOLATIONS AGAINST INDIGENOUS PEOPLES 34-41 (1992); VAN COTT, *supra* note 84.

86. AMAZONIA WITHOUT MYTHS, *supra* note 48, at 32.

87. *Id.*

ploitation policies and indigenous peoples occupy some of the most biodiverse and coveted lands in the Amazon countries, resolution of the status of indigenous land rights and the conflicts they generate is imperative to a regional approach to land use planning.

IV. REGIONAL AND SUB-REGIONAL ENVIRONMENTAL LAW

In 1940, the countries of the Western Hemisphere signed the Convention on Nature Protection, for which the OAS' Department for Regional Development and Environment (DRDE) is responsible.⁸⁸ Since its enactment in 1942, the Convention has been the chief vehicle for the creation of national parks and wilderness reserves in the LAC region, yet it currently has no enforcement mechanism.⁸⁹ Prior to the Summit of the Americas, an effort was made by agencies of the U.S. Government, the OAS, the IDB, and the NGO community in Washington to reactivate the role of an OAS secretariat to implement the Convention; however, political opposition from some of the larger Latin American countries resulted in the abandonment of these efforts.⁹⁰ Nevertheless, the role of the Convention may be heightened by an expected request from the secretariat of the Biodiversity Convention⁹¹ that the OAS assume responsibility for its monitoring and information gathering activities.⁹² Given the Convention's emphasis on protection of plant, animal, and bird species, coupled with the expertise of the OAS' DRDE on biodiversity, the OAS will likely become the main agency for

88. Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, *supra* note 83.

89. Interview with Richard Saunier, Senior Environmental Management Adviser, Department of Regional Development and Environment, Organization of Am. States (Mar. 9, 1995).

90. Argentina and Brazil are currently pushing for the U.S. to sign the UNCED Biodiversity Convention and see the revitalization of the 1940 Convention as a half-way measure that might preclude adoption of the former. Due to Republican control of the Senate, however, the U.S. is not currently considering a vote on the Biodiversity Convention. On revitalization of the 1940 Western Hemisphere Convention, see SUSAN BASS, REVITALIZATION OF THE WESTERN HEMISPHERE CONVENTION, PRESENTATION TO THE STANDING COMMISSION ON THE ENVIRONMENT, ORGANIZATION OF AM. STATES (Nov. 1993).

91. Convention On Biological Diversity, *opened for signature* June 5, 1992, UN Doc. UNEP/Bio.Civ./Conf./L.2 (1992), *reprinted in* 31 I.L.M. 818.

92. Interview with Richard Saunier, *supra* note 89.

implementation of the Biodiversity Convention — a task it was assigned by the hemisphere's leaders at the Summit of the Americas.⁹³

Other important regional instruments are the Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco)⁹⁴ and several conventions having to do with pollution in the South-East Pacific.⁹⁵ In addition, the 1969 American Convention on Human Rights (by protocol) includes the right of individuals to an environment of quality.⁹⁶ This right, however, has not been activated through complaint procedures for individuals.⁹⁷

The sub-regional agreement that deals most specifically with the natural resource problems most important to Latin America is the Amazon Cooperation Treaty,⁹⁸ which was signed in 1978 by Bolivia, Brazil, Colombia, Ecuador, Guyana, Peru, Suriname and Venezuela and entered into force in 1980. Its principal aims are to improve navigation and economic development on the Amazon River and to maintain the ecological balance within the region.⁹⁹ As international action on the environment increased during the 1980s, the ACT took on a broader role. An Amazon Cooperation Council convenes annually and, in April 1989, an Amazonian Parliament was constituted.¹⁰⁰ Also in 1989, the Declaration of Brasilia¹⁰¹ provided for the establishment of environmental commissions on fauna and flora and

93. U.S. GOV'T, SUMMIT OF THE AMERICAS, *supra* note 3, at Appendix § 1 (1994).

94. Treaty for the Prohibition of Nuclear Weapons in Latin America with Protocols, Feb. 14, 1967, 22 U.S.T. 762. The U.S. is not a party.

95. For a list of these conventions, see BRANES BALLESTEROS, *supra* note 15, at 125, Table 5.

96. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), Nov. 17, 1988, art. 11, GA/OEA, 18th Reg. Sess.

97. Patricia Birnie, *International Environmental Law: Its Adequacy for Present and Future Needs*, in INTERNATIONAL POLITICS AND THE ENVIRONMENT 70 (Hurrell & Kingsbury eds., 1991). The U.S. has not signed the American Convention on Human Rights but promised to consider doing so at the Summit of the Americas. The U.S. appears hesitant to sign due to the Convention's ban on the death penalty, among other controversial issues.

98. Treaty for Amazonian Cooperation, *opened for signature* July 3, 1987, 17 I.L.M. 1045.

99. BRANES BALLESTEROS, *supra* note 15, at 33.

100. AMAZONIA WITHOUT MYTHS, *supra* note 48, at 21.

101. Declaration of Brasilia, *opened for signature* Mar. 31, 1989, 28 I.L.M. 1311.

on indigenous peoples under the ACT.¹⁰² In May of 1990, a Pro Tempore Secretariat was established in Bogotá. The activities of the Pro Tempore include the selection and implementation of sustainable development projects, development of an Amazon information system, and the preparation of common positions, such as the aforementioned document prepared by the CDEA prior to the UNCED conference, *Amazonia Without Myths*.¹⁰³

The Central American countries have made greater progress toward establishing a truly cooperative regime to manage the environment, due both to the less-exaggerated asymmetries among the Central American countries and their greater demonstration of commitment to conservation. In June of 1992 the Central American presidents signed the Agreement for the Conservation of the Biodiversity and Protection of Priority Uncultivated Areas of Central America.¹⁰⁴ Central American cooperation intensified during 1990-1991 with the creation of Central America's National Forestry Action Program, which was a collective approach to participation in the United Nations Tropical Forest Action Program.¹⁰⁵ This positive experience led to the Regional Convention for the Management and Conservation of Natural Forest Ecosystems and the Development of Forest Plantations, signed at the sixteenth Summit of Central American presidents.¹⁰⁶

102. Edith Brown Weiss, *International Environmental Law: Contemporary Issues and the Emergence of a New World Order*, 81 GEO. L.J. 675, 682-83 (1993).

103. AMAZONIA WITHOUT MYTHS, *supra* note 48.

104. Agreement for the Conservation of the Biodiversity and Protection of Priority Uncultivated Areas of Central America [Convenio para la conservación de la biodiversidad y protección de áreas silvestres prioritarias en América Central], opened for signature June, 1992, 17 INTEGRACIÓN LATINOAMERICANA 78 (Jul. 1992); see also *Central American Presidents Set Environmental Agenda*, BUS. WIRE, Oct. 17, 1994, available in LEXIS, News Library, ENVRT File.

105. The program was sponsored by the UN and the World Resources Institute, and financed by international donor agencies and NGOs.

[It produced] some 22 projects with a budget of about \$160 million focusing on regional approaches to information exchange, professional training, the redirection and strengthening of forestry extension services, the systematization of land-use categories, multinational watershed conservation units, population and environment, and a regional financing strategy based on debt swaps.

USAID AND WORLD RESOURCES INST., *supra* note 49, at 7.

106. See *id.*; see also *Desarrollo sostenible busca C.A.* [Central America Will Seek Sustainable Development], DIARIO DE HOY, Mar. 30, 1995, at 4.

Central America's convention encompasses regional commitments to consolidating systems of protected areas, reforestation and rehabilitation of degraded lands, concentration of management activities and forest production in secondary forest areas, and the effective participation of all stakeholders in formulating and implementing forest policy. This forward-looking convention also seeks to control illegal trafficking in flora and fauna, to recognize and respect the rights of indigenous peoples and other groups that depend on the forests, to strengthen intersectoral coordination and promote capacity-building, and to create the legal conditions conducive to carrying out environmental impact assessments of all activities affecting the forests.

The ratification of the Convention to implement the provisions resulted in the Central American Council on Forests, composed of the region's forest service directors as well as representatives of civil society. It is now exploring ideas like eco-labeling to provide incentives for businesses to use forest resources more sustainably.¹⁰⁷

On October 13, 1994, at the Central American Ecological Summit in Managua, Nicaragua (attended by U.S. Vice President Albert Gore), the Central American presidents signed the Central American Alliance for Sustainable Development.¹⁰⁸ During the Summit of the Americas, President Clinton committed the U.S. to support the Central American nations' environmental efforts by signing the Conjunta Centroamérica—U.S.A. (CONCAUSA) environmental agreement.¹⁰⁹ Under CONCAUSA, representatives of the U.S. and the seven Central American countries will meet yearly to monitor progress on initiatives in four main areas: biodiversity, energy, environmental legislation, and sustainable economic development. While the Central American countries work on developing strong, compatible environmental regulations at high levels of environmental

107. *Id.*

108. The previous month, Costa Rica and the U.S. signed the "Statement of Intent for Bilateral Sustainable Development Cooperation and Emissions of Greenhouse Gases. *Central Americans Take Lead on Sustainable Development*, SUMMIT OF THE AMERICAS NEWS, Oct. 1994, at 5. On September 30, 1994, the two countries signed an agreement on climate change that will likely be expanded to include the other Central American countries. *See also* DEPT STATE BUREAU OF PUB. AFF., CONCAUSA DECLARATION AND ACTION PLAN 24-25, 6 DISPATCH, Supp. 2 (May 1995).

109. *Id.*

protection, the U.S. is working with Central American representatives to develop a legal network as well as technical assistance projects to implement CONCAUSA.¹¹⁰ As a result, the Center for Tropical Agriculture Education and Research and the Inter-American Institute for Agricultural Cooperation, two Central American institutions based in Costa Rica, will promote scientific cooperation.¹¹¹

Treaties specific to the Caribbean region include the Cartagena Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region and the Protocol Concerning Cooperation in Combatting Oil Spills in the Wider Caribbean Region,¹¹² which are part of the United Nations Environment Programme's Regional Seas Convention program.¹¹³ The various international agreements on marine pollution also have great relevance to Caribbean countries, which are particularly concerned with the movement of toxic and hazardous wastes through the Caribbean.¹¹⁴ In 1994, an action plan emerged at the Global Conference on the Sustainable Development of Small Island Developing States in Barbados.

V. ENVIRONMENTAL PROVISIONS OF TRADE AGREEMENTS

The negotiation of the NAFTA and its side agreement on the environment raised the profile of environmental protection in the process of economic and trade integration, and heightened

110. The CONCAUSA Plan of Action has already received multi-million dollar support from the World Bank's Global Environment Facility (GEF) and the IDB, as well as \$1.5 million pledged by the Canadian government. The U.S. has not indicated its financial commitment, if indeed there will be any. CUTTER INFO. CORP., CENTRAL AMERICAN LEADERS SIGN ENVIRONMENTAL AGREEMENT WITH US, 5 ENVIRONMENT WATCH LATIN AMERICA 14-15 (Jan. 1995); U.S. GOV'T, SUMMIT OF THE AMERICAS, U.S. GOVERNMENT IMPLEMENTATION STRATEGY: KEY ACTIONS THROUGH JUNE 1996 10 (Mar. 1995).

111. James L. Buizer, *New Partnerships for Global Change Research and the International Research Institute for Seasonal to Interannual Climate Protection, in THE ENVIRONMENT IN U.S.-CUBAN RELATIONS: OPPORTUNITIES FOR COOPERATION* 35-44 (Inter-Am. Dialogue ed., 1995).

112. Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, Mar. 24, 1983, 22 I.L.M. 227; Protocol Concerning Cooperation in Combatting Oil Spills in the Wider Caribbean Region, Mar. 24, 1983, T.I.A.S. No. 11085.

113. See Edith Brown Weiss, *supra* note 102.

114. CARIBBEAN LAW INST., *supra* note 51, at 28 (1991).

awareness in the hemisphere of the connection between economic competitiveness and environmental regulations. It also generated institutional mechanisms for the involvement of citizens and environmental NGOs in the management of environmental issues.¹¹⁵ The environmental provisions of the NAFTA obligate its members to adhere to the trade obligations of major international environmental agreements in the event of a conflict between these and the NAFTA.¹¹⁶ In so doing, the NAFTA diverges from the GATT, which does not prioritize environmental law over its own provisions. The NAFTA provisions are important given the likelihood that the NAFTA will be the center of an eventual Western Hemisphere Free Trade Agreement (WHFTA).¹¹⁷

115. Robin Rosenberg, *Trade and Environment: Economic Development versus Sustainable Development*, 36 J. INTER-AM. STUD. & WORLD AFF. 140, 141 (1994). Among its environmental provisions, the NAFTA:

[A]ffirms and protects the sovereign right of each country to propose rigorous standards on imports as long as they serve a scientifically verifiable environmental purpose and apply equally to imports and exports. A signatory must notify the other parties of a decision to restrict a pesticide or chemical and must consider banning the export of any substances that are banned in its own territories.

Sean Neill, Regional Environmental Cooperation, Internal Memorandum, Inter-Am. Dialogue 1-3 (Feb. 22, 1995). It calls for \$8 billion for water and sewage treatment for the U.S.-Mexican border area, while enjoining the parties from creating "pollution havens" by encouraging investment. The three parties are expected to report on the status of their environments, "develop emergency preparedness measures for environmental disasters, promote environmental education and research, assess environmental impacts, and promote the use of economic instruments that measure environmental costs." *Id.* More remarkable than these provisions is the strength of enforcement measures to which the parties agreed, which created a process for the monitoring and punishment of violations of environmental regulations. *Id.* The agreement falls short of equalizing environmental law within the NAFTA countries or allowing countries to enforce their own environmental laws in the other member countries. *Id.* The Commission on Environmental Cooperation does, however, have the power to impose fines of up to \$20 million and to impose trade sanctions. *Id.*

116. The NAFTA's Article 104 specifically identifies the following international environmental agreements as prevailing over the NAFTA: Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087; Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1550; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Mar. 22, 1989, 28 I.L.M. 657; Agreement Concerning the Transboundary Movement of Hazardous Waste, U.S.-Can., Oct. 28, 1986, T.I.A.S. 11099; Agreement on Cooperation for the Protection and Improvement of the Environment in the Border Area, Aug. 14, 1983, U.S.-Mex., T.I.A.S. 10827. See Michael I. Jeffery, *The Legal Framework for Environmental Regulation Under the North American Free Trade Agreement*, 11 ENV'TL & PLAN. L.J. 383, 384 (1994).

117. WILLIAM KNEPPER & JAMES LANDBERG, WESTERN HEMISPHERE FREE TRADE

The model being floated for creation of a WHFTA is the merging of the NAFTA and the MERCOSUR. The MERCOSUR, signed in March of 1991, includes forty-two percent of the population of South America (approximately 200 million people), with a gross domestic product of approximately \$550 billion.¹¹⁸ A MERCOSUR environmental commission was established in 1992 for the purpose of harmonizing environmental legislation, recommending base-line standards, regulating transboundary pollution conflicts, and developing transnational environmental projects.¹¹⁹

Common environmental problems preceding the creation of MERCOSUR were those involving the River Plate basin, which the four countries share, urban water pollution, and toxic substances used in agriculture.¹²⁰ The expansion of economic development resulting from the pact is expected to exacerbate problems in the Southern Cone; in particular, the environmental commission is looking at infrastructure projects in transportation and their affects on the environment.¹²¹ According to the Brazilian environment ministry, the MERCOSUR countries take a dual approach to the environment. The "economic approach" emphasizes converging national pricing policies with respect to natural resources as well as harmonizing environmental legislation to avoid distortions in comparative production costs that would lead to commercial advantages.¹²² The "conservation approach" stresses harmonizing environmental measures to the pact's most advanced country, a title Brazil claims.¹²³ Given the current political movement within Brazil to repeal some of the country's progressive environmental and Indian protection legislation (much of which was never implemented or enforced),¹²⁴ it is difficult to predict how the Southern Cone will

AREA: PRECEDENTS FOR HANDLING ENVIRONMENTAL ISSUES, IDB-ECLAC WORKING PAPERS ON TRADE IN THE WESTERN HEMISPHERE (Nov. 1993). For a complete discussion of the NAFTA's environmental provisions, see Jeffery, *supra* note 117, at 5.

118. Haroldo de Macedo Ribeiro, *Mercosur and the Environment*, in AGENDA 21 AND LATIN AMERICA: THE CHALLENGE OF IMPLEMENTING ENVIRONMENTAL LAW AND POLICY 299 (Terencio J. Garcia ed., 1994).

119. *Id.*

120. *Id.* at 300.

121. *Id.*

122. *Id.* at 300-01.

123. *Id.* at 301.

124. *Establishing the Rule of Law for the Indian Peoples of Brazil: Hearings on Western Hemisphere Affairs Before the Subcomm. on Foreign Affairs*, H. REP. (July

achieve the level of conservation that either the NAFTA or the Central American countries are proposing. The MERCOSUR countries have convened several meetings on the environment and developed declarations and regional management plans for the sub-region. But the fact remains that important decisions regarding environmental protection are made by committees devoted to land, transportation, tourism, energy, industrial and technology policy, and agricultural policy, whose main goal is economic development rather than conservation.¹²⁵ An NGO in Argentina, the Environment and Natural Resource Foundation (FARN), recently completed a comparison of environmental regulations among the MERCOSUR countries and found that harmonizing environmental standards among the four countries would be very difficult.¹²⁶ The FARN is now cooperating with the Argentine Ministry of Health to develop environmental provisions for the MERCOSUR agreement.¹²⁷

In addition to legal conventions among Western Hemisphere states, there is an impressive body of soft law¹²⁸ that institutionalizes environmental cooperation. While soft law is by definition not binding, it has been a very effective means of creating binding legislation.¹²⁹ Western Hemisphere soft law ranges from declarations of a majority or a subset of countries, recommendations, policies, or guidelines of inter-American institutions, as well as agreements for scientific and technical cooperation (some of the major declarations and statements of principles on the environment that have been signed by LAC countries are listed in the table following part IV). There are also a number of regional and sub-regional commissions on the environment that establish guidelines and monitoring proce-

14, 1993) (statement of Ana Valéria N. Araújo Leitao).

125. Haroldo de Macedo Ribeiro, *supra* note 118, at 302-04.

126. Personal communication with Susan Bass, Director, Inter-American Program, Environmental Law Institute (Mar. 17, 1995).

127. IRELA, *supra* note 18, at 16.

128. Soft law has been defined as "Declarations, resolutions, guidelines, criteria, codes, recommended practices, standards, etc. [which] are increasingly used and increasingly legally significant as signposts on the way to customs and treaties, albeit . . . of questionable legal status." Patricia Birnie, *International Environmental Law: Its Adequacy for Present and Future Needs*, in INTERNATIONAL POLITICS OF THE ENVIRONMENT 83 (Andrew Hurrell & Benedict Kingsbury eds., 1991).

129. See LEE A. KIMBALL, FORGING INTERNATIONAL AGREEMENT: STRENGTHENING INTER-GOVERNMENTAL INSTITUTIONS FOR ENVIRONMENT AND DEVELOPMENT, WORLD RESOURCES INST. 25 (1992); see also SIZER, *supra* note 50, at 11.

dures for cooperation on environmental issues.¹³⁰

VI. WESTERN HEMISPHERE INSTITUTIONS

Crucial to the development of environmental law in the hemisphere is the strength of the inter-American institutions charged with implementing it, whether this means regional implementation of global law or the creation and implementation of regional accords. According to a recent report by the World Resources Institute, there is now an unprecedented opportunity for international and regional institutions to influence the actions of national governments in the area of sustainable development.¹³¹ Agenda 21 recognizes a role for regional and sub-regional institutions in implementing the agreements reached at UNCED, particularly in the area of capacity building, integrating environmental concerns into development policies and promoting cooperation on transboundary issues.¹³²

Institutions have a key role to play in improving the contractual environment in which countries make and honor agreements. They do this by: 1) helping to create consensus on an agenda for action "reflecting the convergence of political and technical consensus about the nature of environmental threats,"¹³³ 2) reducing the "costs of agreement by generating information about potential zones of agreement and providing a forum for bargaining;"¹³⁴ 3) by monitoring activities that reas-

130. Considerable scientific cooperation and information exchange is currently underway. In March 1994, the U.S. National Oceanic and Atmospheric Administration (NOAA) and the National Science Foundation formed the Inter-American Institute for Global Change Research as a "regional partnership to advance sustainable development in the Americas by generating environmental data, scientific research, and policy-relevant information within the region." USAID AND WORLD RESOURCES INST., *supra* note 49, at 94.

The U.S. is also launching the International Research Institute (IRI), which is a multinational climate-prediction institute intended to generate and disseminate information on climate change to regional centers throughout the world, including one in the Americas. Ten countries in the region are slated for participation in pilot programs and the U.S. Department of Agriculture is currently sponsoring collaboration in forest management with counterparts in the forest services of nine "sister forests" in Latin America. *Id.* at 98-99.

131. See SIZER, *supra* note 50, at 1.

132. See AGENDA 21, *supra* note 6.

133. Keohane et al., *supra* note 9, at 24.

134. *Id.*

sure states that others are not cheating;¹³⁵ 4) by providing national governments with the technical and institutional capacity to respond to environmental threats at their source;¹³⁶ and 5) by creating "timetables for action, regular policy reviews," and other mechanisms to make states reassert their commitment to environmental protection.¹³⁷ They can also provide rewards or punishments tied to state behavior¹³⁸ and invoke environmental conditionality when recipient governments are dependent upon donor funds for economic development.¹³⁹ A multi-issue area and multi-country study by Robert Keohane et al., found that the monitoring function of institutions made a big difference in the effectiveness of institutions in encouraging compliance with international agreements.¹⁴⁰ In addition, the ability of international institutions to focus and magnify public pressure on non-compliant states contributed directly to changing state policy.¹⁴¹

The Western Hemisphere has an abundance of institutions with a wide range of technical capabilities and decades of experience. Within the UN system, there are strong regional offices of the UNDP, with offices throughout Latin America and the Caribbean, the ECLAC based in Santiago, Chile, and the UN Environment Program (UNEP), which maintains an office in Mexico City. These institutions compete for funding and policy leadership with the hemisphere's key economic and political organizations, the IDB and the OAS. Since the Rio Earth Summit in 1992, the UNDP, UNECLAC, UNEP, IDB, OAS, and World Bank have been officially coordinating their efforts and have met three times thus far under the auspices of a Working Group led by the OAS.¹⁴² In addition, the IDB, OAS and ECLAC

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 21.

139. Interview with Nan Burroughs, Public Information Officer, IDB (Mar. 3, 1995).

140. Keohane et al., *supra* note 9, at 16.

141. *Id.* at 22.

142. Development agencies serving the LAC region have been coordinating their environmentally related activities since the early 1980s in response to the Declaration of Environmental Policies and Procedures Relating to Economic Development (Feb. 1, 1980), which called on the world's development institutions to create mechanisms to protect the environment in its development activities. "Their determination to incorporate environmental considerations systematically into lending decisions is

worked together to produce a white paper for the Summit of the Americas, which included recommendations on sustainable development.¹⁴³ Coordination among the UN agencies, multilateral banks, as well as organizations within the OAS system (like the Pan-American Health Organization (PAHO)), is facilitated by the fact that several of these institutions are headquartered in Washington, and most retain offices there. Needless to say, this also facilitates coordination with U.S. government agencies.

The majority of the OAS' environmental work is done through the Department of Regional Development and Environment (DRDE), opened in 1963.¹⁴⁴ While not the largest program of the OAS, it is perhaps the best funded, as the DRDE has gone outside the Organization to the donor community to fund many of its projects.¹⁴⁵ The OAS Inter-American Economic and Social Council mandates the DRDE to assist member states in "their efforts to maintain the natural resource base for sustainable development."¹⁴⁶ Since the early 1980s, environmental quality objectives have been routinely included in technical assistance and planning missions by the OAS and in all of its training courses.¹⁴⁷ The DRDE's principal focus and greatest area of expertise has been in studies for integrated development of sub-national regions, although a significant portion of its work has been devoted to planning for environmental management of transboundary river basins and border zones.¹⁴⁸

strongly reinforcing government policies to promote sustained economic development. The follow-up action to this agreement has been particularly vigorous by agencies serving the Latin American region," which include the World Bank, IDB, OAS, UNDP, UNEP and the Caribbean Development Bank. Kirk Rodgers, *Latin American Environment and Development*, in GOVERNANCE IN THE WESTERN HEMISPHERE 379 (Viron P. Vaky ed., 1983).

143. ORGANIZATION OF AM. STATES/INTER-AM. DEV. BANK, TOWARD FREE TRADE IN THE WESTERN HEMISPHERE (Sept. 15, 1994).

144. In addition to the work of the DRDE, environmental activities are undertaken by the OAS offices of scientific affairs, education, and legal affairs. The OAS' Standing Commission on the Environment and its Juridical Committee also deal with environmental issues. Secretary-General César Gaviria has proposed opening a Special Unit on the Environment within his office. Interview with Richard Saunier, *supra* note 89.

145. The budget for the 1994-1995 biennium is \$18 million. The DRDE has a full-time professional staff of 18, with other professionals working in the field, as required. DEPT OF REGIONAL DEV. AND ENV'T, CATALOG OF TECHNICAL COOPERATION PROJECTS COMPLETED AND IN EXECUTION RELATED TO REGIONAL DEVELOPMENT AND ENVIRONMENT 1 (1994).

146. *Id.*

147. ENVIRONMENTAL COMM., INTER-AM. DEV. BANK, *supra* note 23.

148. RICHARD E. SAUNIER, INTEGRATED REGIONAL DEVELOPMENT PLANNING AND

The DRDE also provides technical cooperation and training in environmental management and development planning, and for particular investment projects.¹⁴⁹

The multilateral nature of the OAS has enabled it to be particularly useful for resolving resource disputes in border areas, in balancing the conflicting objectives among the states involved, in facilitating cross-border commerce and transportation, communication, and energy infrastructure services and in integrating tourism activities into development planning.¹⁵⁰ Another particular focus is the management of natural hazards.¹⁵¹ The DRDE advises governments of the hemisphere on reducing the vulnerability of planned and existing social and economic infrastructure and provides technical assistance, training,¹⁵² and technology transfer in this area.

In a working paper prepared for the OAS' June 1995 annual meetings, the Secretary-General set forth his proposal for the development of a Unit on Environment within his office, whose short-term function would include the coordination of environmental programs mandated by the Summit of the Americas, the organization of 1996's Summit on Sustainable Development, and creation of a database on the environment in the Americas.¹⁵³

NATIONAL PLANS FOR SUSTAINABLE DEVELOPMENT: OECD WORKSHOP ON NATIONAL PLANS FOR SUSTAINABLE DEVELOPMENT (Ottawa, Canada 1993) (statement of Richard E. Saunier, Senior Environmental Management Advisor, DRDE).

149. *Id.*

150. Current projects include a plurinational project to manage the Amazon River Basin; integrated management of Lake Titicaca, which straddles the Bolivia-Peru border; several projects in energy conservation; environmental protection and integrated development of the Trifinio border region that straddles El Salvador, Guatemala, and Honduras; and development of the Gulf of Fonseca and Honduras. Other projects focus on the Caribbean (in conjunction with USAID) and Central America, and there is also a regional project on the vulnerability of electric companies to earthquake damage. See DEP'T OF REGIONAL DEV. AND ENV'T, *supra* note 145.

151. The U.S. Agency for International Development commissioned from the DRDE a major study on management of natural hazards. See DEP'T OF REGIONAL DEV. AND ENV'T, OAS, DISASTERS, PLANNING, AND DEVELOPMENT: MANAGING NATURAL HAZARDS TO REDUCE LOSS (1990).

152. The DRDE conducts seminars, graduate degree programs, and short courses through the Inter-American Center for Integrated Development of Land and Water Resources (CIDIAT) and the Inter-American Center for Regional Development (CINDER), both based in Venezuela. See DEP'T OF REGIONAL DEV. AND ENV'T, *supra* note 145, at 4.

153. GENERAL SECRETARIAT, ORGANIZATION OF AM. STATES, *supra* note 12, at 37-40.

In the long term, the Unit's responsibilities would include the "design of frameworks for environmental protection that include the formulation of juridical principles and policies, the creation of institutional mechanisms and the devising of systems for executing and ensuring compliance with environmental standards, along with techniques for evaluating sustainable use of biological resources."¹⁵⁴

The IDB created an environment committee in 1983 and an Environmental Protection Division in 1990. Today, all Bank projects are pre-assessed for their environmental impact.¹⁵⁵ The IDB has significantly increased its environmental lending since 1990, when it spent just under one-half billion dollars on environmental projects. In 1993, it spent \$1.2 billion, for a total of \$3.7 billion in the last four years.¹⁵⁶ The Bank's particular specialties are the "brown issues": working with individual countries on pollution control, waste management, the creation of action plans to clean up the environment, the fortification of environment and natural resource ministries, and support for legal and institutional regulatory frameworks.¹⁵⁷ They have also focused a lot of attention on watershed management, reforestation, and coastal resource management, the last of which is particularly important to the economies of the Caribbean and smaller countries where tourism and fishing are the primary sources of income.¹⁵⁸ Future priorities of the Bank include strengthening the environmental legal and regulatory framework. On May 26-28, 1993, the Bank sponsored a major international seminar on Environmental Law and Planning in Santiago, Chile, in cooperation with the IUCN, focusing on the national legal and institutional issues surrounding implementation in Latin America and the Caribbean of the UNCED and other international environmental conventions, as well as the long-term incorporation of the Agenda 21 principles in economic planning.¹⁵⁹

The Bank just completed a major reorganization from a sectoral to a geographical structure. Countries served by the

154. *Id.*

155. See ENVIRONMENTAL COMM., INTER-AM. DEV. BANK, *supra* note 23, at 7.

156. *Id.* at 1-2.

157. The IDB has spent \$1.3 billion on pollution control since 1990. See *id.* at 4.

158. See Interview with Nan Burroughs, *supra* note 139.

159. See ENVIRONMENTAL COMM., INTER-AM. DEV. BANK, *supra* note 23, at 30.

Bank are now divided into three regions, each with its own office of environmental policy. It is not yet known how this decentralization will affect environmental policy or projects.¹⁶⁰ Similarly, each of the World Bank's four regions — one of which is Latin America and the Caribbean — has its own environment department. The World Bank's GEF small grants program is currently sponsoring community-based projects in nine LAC countries, and intends to fund regional and sub-regional NGO projects. The pilot phase of the GEF allocated twenty-two percent of its total budget to the Latin American and Caribbean region, with about two-thirds of that spending allocated to the area of biodiversity.¹⁶¹

The ECLAC has focused on regional research on environmental economics. With a staff of more than 500, ECLAC has sub-regional offices in Argentina, Brazil, Mexico, Trinidad and Tobago, Uruguay, and Washington, D.C. Its impact on environmental issues is made both through joint work with UNEP, and as the regional executing organization for UNDP-financed projects.¹⁶² It maintains sub-programs in natural resources, energy and water resources, intergovernmental maritime matters, industrial development and technology, agricultural development (in cooperation with FAO), and development and the environment (in cooperation with UNEP).

The joint ECLAC/UNDP Unit on Development and Environment "supports initiatives that are concerned with specific ecosystems: wet tropical regions; high-altitude ecosystems, cold zones, arid zones, and metropolitan areas."¹⁶³ The ECLAC was the regional coordinating body for the UNCED conference and has been responsible since the 1992 conference for implementation of Agenda 21. Under that rubric the Commission, in 1993, organized a regional seminar for the application of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.¹⁶⁴ The Unit has focused

160. See Interview with Nan Burroughs, *supra* note 139.

161. See USAID AND WORLD RESOURCES INST., *supra* note 49, at 31.

162. JOSÉ CAYUELA, ECLAC 40 YEARS (1948-1988) 55 (1993).

163. *Id.* at 69.

164. Basel Convention on the Transboundary Movement of Hazardous Wastes and Their Disposal, Mar. 22, 1989, UN Doc. UNEP/IG.80/3 (1989), reprinted in 28 I.L.M. 657 (1989). Contracting parties to the Basel Convention have called on the regional commissions to "to play a more active role in monitoring and preventing

attention in the last biennium on "technical cooperation for environmental planning and management" in LAC and "guidelines and consultancy services on controlled environmentally sound waste management."¹⁶⁵ Waste management has been a specialty of the Unit, particularly in urban areas.¹⁶⁶

The UNDP works mostly in coordination with other institutions on environmental issues. Its Local Initiative for Urban Environment is working in Latin America promoting international information exchange through regional and inter-regional networks. In addition to working with ECLAC, UNEP, with an office in Mexico City, often works in conjunction with the OAS' DRDE, although the OAS usually coordinates directly with the Nairobi office.¹⁶⁷

The contribution of ECLAC and the other regional institutions mentioned above was well stated by ECLAC's executive secretary, Gert Rosenthal:

We have . . . the calling, the tradition, the resources, and the capacity for bringing together the best thinkers from within and without the region to propose directions, formulate proposals, and offer guidelines. We can play a catalytic role in encouraging debate; we can carefully monitor developments in the academic world within and without the region; we can learn lessons from our experiences in the different countries of the region; and we can distill the stimuli which we receive from various sources in the statements formulated to governments.¹⁶⁸

Our survey of Western Hemisphere institutions confirms the findings of Keohane et al., that international institutions are more likely to cooperate than to engage in inter-institutional struggles.¹⁶⁹

illicit traffic in hazardous and other wastes." ECLAC, BIENNIAL REPORT 295, Supp. 18 E/1994/38 LC/G.1828P (April 1992-April 1994). For a further analysis of the Basel Convention, see Katharina Kummer, *The International Regulation of Transboundary Traffic in Hazardous Wastes: The 1989 Basel Convention*, 41 INT'L & COMP. L.Q. 530 (1992).

165. *Id.* at 91.

166. *Id.*

167. See USAID AND WORLD RESOURCES INST., *supra* note 49, at 31.

168. See CAYUELA, *supra* note 162, at 1.

169. See Keohane et al., *supra* note 9, at 15.

VII. THE SUMMIT OF THE AMERICAS

While the above-mentioned institutions are focused on environmental programs in Latin America and the Caribbean, initiatives for truly Western Hemispheric cooperation were proposed at the Summit of the Americas on December 9-11, 1994.¹⁷⁰ The Summit Plan of Action committed the thirty-four governments present to three major initiatives in the sustainable development arena: the Partnership for Sustainable Energy Use, the Partnership for Biodiversity, and the Partnership for Pollution Prevention.¹⁷¹ In addition, under the section on economic integration, there is an initiative to promote greater cooperation in science and technology and remove barriers to collaboration.¹⁷²

The Summit Declaration affirmed the support of the parties of the 1992 UNCED commitments (specifically, Agenda 21, the Convention on Biological Diversity, and the Framework Convention on Climate Change¹⁷³) as well as the Central American Alliance for Sustainable Development,¹⁷⁴ and agreements made at the 1994 Global Conference on the Sustainable Development of Small Island Developing States. It committed the parties to "create cooperative partnerships to strengthen [their] capacity to prevent and control pollution, to protect ecosystems and use [their] biological resources on a sustainable basis, and to encourage clean, efficient and sustainable energy production and use."¹⁷⁵ The potential impact on the creation of a legal regime on the environment in the Western Hemisphere lies in initiatives under the Partnership for Pollution Prevention, which commit governments to: "develop compatible environmental laws and regulations, at high levels of environmental protection, and promote the implementation of international environmental

170. The Summit was hosted by the U.S. and invitations were limited to democratically elected governments, allowing the U.S. to exclude Cuba. While other countries in the hemisphere objected to this exclusion and threatened to make it an issue at the Summit, mutual interest in progress on other issues kept such objections subdued in Miami.

171. U.S. GOV'T, SUMMIT OF THE AMERICAS, *supra* note 3, at § IV, points 21-23 (1994).

172. *Id.* § II, point 12.

173. Framework Convention on Climate Change, S. TREATY DOC. NO. 38, 102d Cong., 2d Sess. 1 (1992), *reprinted in* 31 I.L.M. 849.

174. See DEP'T STATE BUREAU OF PUB. AFF., *supra* note 108, at 24-25.

175. U.S. GOV'T, SUMMIT OF THE AMERICAS, *supra* note 3, at 4.

agreements."¹⁷⁶

The U.S. moved quickly in early 1995 to follow-up on its Summit commitments, organizing several conferences in conjunction with the IDB.¹⁷⁷ On March 20, 1995, the U.S. unveiled its new Environmental Initiative for the Americas, which will be funded and coordinated through USAID. The \$23 million Initiative is the U.S.' follow through on the sustainable development "basket" of the Summit, which USAID staff hope will provide continuity on environmental issues until the 1996 Sustainable Development Summit.¹⁷⁸

While the primary responsibility for implementing the Plan of Action falls on governments, "individually and collectively, with participation of all elements of our civil societies,"¹⁷⁹ particular institutional prerogatives are outlined. The OAS is given responsibility for free trade, scientific and technological cooperation, and the Partnership for Pollution Prevention.¹⁸⁰ It is responsible for hosting the August 1996 conference on sustainable development in Bolivia, and for establishing an Office of Biodiversity Affairs to resuscitate the 1940 American Convention and coordinate regional implementation of other biodiversity agreements.¹⁸¹ Under the Summit Plan, the IDB is principally responsible for the Partnership for Sustainable Energy Use, the Partnership for Biodiversity, and for sharing responsibility with the OAS in pollution prevention, free trade, and

176. *Id.*

177. In early March of 1995 the U.S. released a calendar of implementation events for the next eighteen months that includes annual meetings of the hemisphere's foreign ministers (June 1995 & 1996), a trade ministerial (June 30, 1995), annual meetings of PAHO, the IDB, and the OAS, as well as special conferences on commerce, women, micro-enterprises, money laundering, terrorism prevention, education, tourism, science and technology, and telecommunications. Given the current budget-cutting climate in Washington with respect to foreign aid, Summit activities will be funded primarily with existing funds. The U.S. has also requested funding for Summit initiatives from the IDB and World Bank. See NAFTA, *supra* note 1, at Appendix.

178. Information on the Environmental Initiative for the Americas is from a briefing on March 20, 1994, at USAID, and from documents circulated at that meeting: USAID, ENVIRONMENTAL INITIATIVE FOR THE AMERICAS (n.d.); USAID, ENVIRONMENTAL INITIATIVES FOR THE AMERICAS (n.d.); USAID, PROTECTING THE ENVIRONMENT: USAID'S STRATEGY (n.d.).

179. U.S. GOV'T, SUMMIT OF THE AMERICAS, *supra* note 3, at Appendix.

180. *Id.*

181. *Id.*

scientific cooperation.¹⁸²

Taken as a whole, the entire sustainable development agenda that emerged from the Summit represents a common agenda of those environmental issues on which consensus has been reached among the countries of the Americas. The Summit's environmental initiatives reflect the common view in the hemisphere that accelerated economic growth is the route to poverty reduction and, thus, environmental protection and restoration. This is an explicit rejection of the view that, in order to preserve the region's biodiversity, growth in the hemisphere must slow.¹⁸³

VIII. PROSPECTS FOR A REGIONAL ENVIRONMENTAL REGIME

What have we learned thus far about the contractual context for environmental law in the Western Hemisphere? First, the hemisphere has begun to identify an agenda on which there is consensus to move forward, as demonstrated by the Summit of the Americas initiatives. In addition, several sub-regions that comprise entire ecosystems are actively pursuing the harmonization of environmental law and policy — most notably Central America. Second, international institutions working on the environment in the Americas have developed strict environmental guidelines and been very active throughout the region. These institutions have developed areas of specialization and, since 1992, have intensified cooperative efforts on environmental programming. Third, virtually all governments in the region are involved in international programs on the environment, mostly sponsored by international institutions. Many have recently reorganized their environmental bureaucracies and drafted more comprehensive environmental legislation — always with a view toward harmonization with their trading partners. Most countries in the hemisphere are bound by trade agreements that include some sort of environmental or natural resource provisions and have signed and ratified the major international envi-

182. *Id.*

183. On the pro-growth agenda of the Western Hemisphere, see generally INTER-AMERICAN DIALOGUE, A TIME FOR LEADERSHIP: THE AMERICAS (1994) (on file with U. Miami *Inter-American Law Review*); see also U.S. GOV'T, SUMMIT OF THE AMERICAS, *supra* note 3.

ronmental agreements. Fourth, the U.S., which must play a leadership role given its political and economic weight in the hemisphere, has shown since the Summit of the Americas impressive resolve to implement Summit commitments, despite the dramatic change in the domestic political climate vis-à-vis domestic environmental issues and foreign aid following the defeat of Congressional Democrats in November. Fifth, the Western Hemisphere is perhaps the world leader in independent, well-funded and managed nongovernmental organizations and links between Northern and Southern NGOs have been facilitated by telecommunications.¹⁸⁴ These NGOs have and will continue to play an important role in influencing government policy and monitoring the performance of government and industry. Finally, the foreign policy atmosphere in the Americas is at an all time high due to the establishment of democratically elected governments and open market economies in all active OAS-member countries.¹⁸⁵

All these factors contribute to the unprecedented level of cooperation, comity, and convergence on environmental issues. There are three key questions, however, that must be answered to fully assess the contractual environment for regional environmental law: 1) can trade be a force for environmental protection?, 2) can institutions play a leadership role?, and 3) can the U.S. provide consistent, long-term leadership?

A. *Can Trade be a Force for Environmental Protection?*

The use of economic and trade agreements to address common environmental problems provides an exceptional opportunity for environmental cooperation, provided it does not lead to a least-common-denominator approach. While sub-regional accords that do not include North America may continue to use whatever environmental criteria they like, any agreements that include the NAFTA parties, such as the anticipated negotiation to extend the NAFTA to Chile,¹⁸⁶ will have to use the NAFTA's en-

184. See generally USAID AND WORLD RESOURCES GROUP, *supra* note 49.

185. See INTER-AMERICAN DIALOGUE, *supra* note 183.

186. While the Mexican peso crisis has cast a pall over U.S. plans to extend the NAFTA to the entire hemisphere, U.S. officials assure that such plans are still on track. The NAFTA talks with Chile took place in May and June 1995. See David R. Sands, *Mexico Debacle Doesn't Slow NAFTA's Thrust*, WASH. TIMES, Mar. 15, 1995,

vironmental standards as a minimum.¹⁸⁷

The success of the Western Hemisphere in locking-in higher environmental standards in its trade agreements to some extent depends on the future flexibility of the World Trade Organization with respect to allowing countries to impose national environmental standards on imports, and to exclude or apply tariffs to those that do not meet standards higher than the international norm. This is particularly problematic in two areas: 1) attempts by countries to protect common pool resources outside their jurisdiction (e.g., the U.S. banned imports of Mexican tuna to protect both Mexican dolphins and those on the high seas); and 2) sanitary and phytosanitary measures that purport to protect the health of a country's people and environment.¹⁸⁸ The GATT's dispute resolution panel overturned the U.S. ruling in the Mexican tuna case.¹⁸⁹ GATT panels have also ruled against sanitary and phytosanitary measures as being protectionist. And indeed, such measures — like excluding U.S. beef from Europe due to allegedly dangerous hormones — have been prone to abuse by protectionist governments, particularly in the agricultural sector.¹⁹⁰ "As a result," according to Jeffery, "establishing any sanitary or phytosanitary measure at a level more stringent than the international norm appears to be an arduous undertaking."¹⁹¹

As long as developed and less-developed countries trade with one another there will be tensions concerning environmental standards; less-developed countries simply cannot afford the levels of protection the industrialized world now considers the norm.¹⁹² While poor countries complain that their products are

at 1.

187. See Jeffery, *supra* note 116, at 93.

188. Frederick M. Abbott, *Regional Integration and the Environment: The Evolution of Legal Regimes*, 68 CHI.-KENT L. REV. 178 (1992).

189. *Id.*; see also DONALD M. GOLDBERG, CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, GATT TUNA-DOLPHIN II: ENVIRONMENTAL PROTECTION CONTINUES TO CLASH WITH FREE TRADE (June 1994).

190. Jeffery, *supra* note 116, at 384-85.

191. *Id.* at 385. For more on the link between trade and the environment in the Americas, see DIFFICULT LIAISON: TRADE AND THE ENVIRONMENT IN THE AMERICAS (Heraldo Muñoz & Robin Rosenberg eds., 1993); THE CHALLENGE OF INTEGRATION: EUROPE AND THE AMERICAS (Peter H. Smith ed., 1993); Rob Housmann, *The North American Free Trade Agreement's Lessons for Reconciling Trade and the Environment*, 30 STAN. J. INT'L L. 2 (1994).

192. Abbott, *supra* note 188, at 191; NANCY BOCKSTAEL & IVAR STRAND, FREE

excluded by protectionist environmental standards in developed countries, the latter complain about the lesser competitiveness of their products, which are more expensive to produce under more stringent conditions.¹⁹³

B. *Can the Hemisphere's Regional Institutions Lead?*

The hemisphere's most valuable resource may be its web of multilateral institutions. As the Western Hemisphere has become more economically integrated, it has come to rely more on its multilateral institutions for technical advice and facilitating cooperation. This gives these institutions — which have decades of experience among them on environmental management — an increasing role in influencing environmental policy.

The only region that may rival the Americas in the development of strong institutions is Europe.¹⁹⁴ Europe has benefitted from the strong leadership of a number of Northern countries, a higher GDP overall, a more homogenous level of development among the countries, and more even distribution of income within them. It also possesses as a region a high level of political commitment to the goal of environmental protection and a consensus on the principles and goals of the EC, which has encouraged EC countries to cede sovereignty to European institutions to develop, implement, and enforce environmental protection legislation.¹⁹⁵ This is not a short-term possibility in the more sovereignty-sensitive Western Hemisphere. The greater centralization and institutionalization of the EC has also facilitated cooperation. While the Western Hemisphere has many overlapping political and economic institutions, the EC has a single (though complex) set of institutions established by the Treaty of Rome in 1958.¹⁹⁶

Protection of the environment was recognized as an "essen-

TRADE AND GLOBAL RESOURCES: THE CASE OF PROTECTED MARINE SPECIES, IDB-ECLAC WORKING PAPERS ON TRADE IN THE WESTERN HEMISPHERE 3, 37 (1993).

193. Abbott, *supra* note 188, at 189.

194. For comparisons of environmental regimes in Europe and the Western Hemisphere, see Abbott, *supra* note 188; IRELA, *supra* note 18; THE CHALLENGE OF INTEGRATION: EUROPE AND THE AMERICAS (Peter H. Smith ed., 1993).

195. Abbott, *supra* note 188, at 191.

196. These are the Council of Ministers, Commission, Court of Justice, and European Parliament. *Id.* at 181.

tial objective of the Community" by the Court of Justice in 1985, which enabled the Court to develop directives toward that end.¹⁹⁷ In addition, in 1992 the Single European Act made explicit reference to the goal of environmental protection.¹⁹⁸ A critical success of EC institutions in terms of environmental protection is the establishment of the principle that local environmental legislation may restrict the freedom of trade: the goal of environmental protection is so important in the Community's pantheon of principles that it can overrule that of economic development. One commentator notes two lessons from the EC experience: 1) governments must establish tough dispute settlement provisions to provide for compliance; and 2) consensus-building is crucial to allaying fears of sovereignty infringement.¹⁹⁹

Another drawback faced by the Western Hemisphere institutions is that they do not have the prestige of national office and are not as politically persuasive as some of the European institutions are. According to Keohane et. al, "the most effective institutions penetrate the state politically to a high degree,"²⁰⁰ and this cannot be said for organizations like the OAS and IDB, which tend not to attract the more powerful political leaders of Latin American countries.²⁰¹ Their influence is, thus, not as independent actors but as "catalysts for government and NGO transnational linkages."²⁰² Perhaps more problematic, the dependence of the OAS on national requests for intervention severely limits its role to initiate environmental action.²⁰³

The institutions described above have made a real contribution in the countries in which they have worked, and they have been able to develop specializations that complement one another: the IDB on "brown issues;" the OAS on river basins, border areas, national parks, and natural hazards; ECLAC on waste management and trade-linked analyses of environmental issues,

197. *Id.* at 182.

198. Single European Act, Feb. 17, 1986, 25 I.L.M. 503. The Single European Act also established several important principles for environmental protection: "that preventive action should be taken, that environmental damage should be rectified at the source, and that the polluter should pay." *Id.* at 183.

199. Abbott, *supra* note 188, at 189, 199-200.

200. Keohane et al., *supra* note 9, at 24.

201. *Id.*

202. *Id.*

203. See Rodgers, *supra* note 142, at 376.

etc. But since the institutions cannot lead the nations of the hemisphere, nor create environmental law, that leadership must still come from a community of nations deeply divided over the responsibility of its richest member — the U.S. — for funding environmental cleanup, research and prevention.

C. *Can the United States Provide Consistent Leadership?*

The quixotic leadership role of the U.S. may be the key factor that would propel or impede the creation of hemispheric environmental laws and standards. The presence of the most pro-environment U.S. administration in decades at an important time in the negotiation of international environmental agreements is clearly a boon. The problem is that the Republican Senate is not likely to approve key pending agreements requiring Senate action like the Law of the Sea,²⁰⁴ the Basel Convention,²⁰⁵ and the Convention on Biological Diversity.²⁰⁶ Nevertheless, while treaties require Senate ratification, the president may sign "executive agreements" without Congressional approval or participation.²⁰⁷ These can facilitate cooperation between the Executive Branch and foreign governments or the multilateral banks in cases where implementing legislation is not required.²⁰⁸

204. UN Convention on the Law of the Sea, UN Doc. A/Conf.62/122, reprinted in U.N. Sales No. E.83.V.5 (1983).

205. Basel Convention, *supra* note 164. See also *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal: Hearing Before the Senate Comm. on Foreign Relations*, 102nd Cong., 2d Sess. (1992); Message from The President of the United States Transmitting the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, with Annexes, Done at Basel, Mar. 22, 1989, S. TREATY DOC. 5, 102d Cong., 1st Sess. (1991).

206. Convention on Biological Diversity, *supra* note 91. The U.S. Senate ratified the Convention on Climate Change in 1992.

207. Two U.S. Supreme Court decisions serve as guideposts for the circumscription of the Executive's powers vis-à-vis the Legislature: *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *United States v. Curtiss-Wright Export Corporation*, 299 U.S. 304 (1936).

208. Between 1949 and 1990, the U.S. Congress approved 683 international treaties. During the same period, 12,122 executive agreements were signed. David Wirth cautions that it is not a good practice for the Executive Branch to work on environmental issues without Congressional participation, as this leads to greater tension between international and domestic environmental law, as well as the exclusion of public participation. David A. Wirth, *A Matchmaker's Challenges: Marrying International Law and American Environmental Law*, 32 VA J. INT'L L. 387-90 (1992). He

There are three primary problems with U.S. leadership on environmental issues. First, there is some confusion, even among senior officials at the multilateral institutions, over the source of U.S. environmental policy — whether the State Department, White House, USAID, or Environmental Protection Agency is taking the lead. Second, high mobility and turnover within the Executive Branch make it difficult to locate key actors in order to coordinate projects or keep apprised of developments. Third, given the diversity of U.S. agencies working to implement the initiatives of the Summit of the Americas or solutions to other international environmental issues, it is difficult for countries in the hemisphere and NGOs in Washington to identify key players on particular issues.²⁰⁹

In sum, the main impediments to the achievement of a regional environmental regime are: 1) the stark economic asymmetry between the U.S. and Canada on the one hand and the remainder of the hemisphere on the other; 2) the subordination of environmental issues to development; 3) the massive poverty and extreme income inequality within the LAC countries and the resulting lack of resources to invest in administrative capacity; 4) the weakness of judicial systems in the LAC; 5) the overemphasis on trade as the key to resolving conservation and pollution prevention issues; and 6) the difficulty of sustained U.S. leadership on environmental issues due to the fluid nature of domestic politics.

Without U.S. leadership LAC nations can and will move forward on their own based on common interests, but without the contribution of the North American countries they cannot afford the level of environmental technology or higher standards that the NGOs and the scientific community advise. Whether

further predicts that objections to future international environmental agreements can be expected from the U.S. public, since they will lack the notice, judicial review, public hearings, and protection of individual rights that Americans have come to expect from domestic environmental law. *Id.* He also points out the powers of Congress and the courts to weaken international agreements. *Id.*

209. The undated U.S. Department of State document, IMPLEMENTATION OF THE SUMMIT PLAN OF ACTION: CONTACT POINTS FOR THE PRIVATE SECTOR AND NON-GOVERNMENTAL ORGANIZATIONS, lists as NGO contact officials for Summit environmental initiatives persons in these offices: Office of International Energy Policy, Department of Energy; Office of Science & Technology Policy, the White House; Oceans and International Environmental and Scientific Affairs, Department of State; Office of International Activities, Environmental Protection Agency.

this occurs in the short term will depend on the ability of the region's strong but decentralized institutions and its NGO sector to prod governments in the hemisphere to devote resources and develop the political will necessary for advancement. This will be even more difficult if, as seems likely at this writing, the Republican Congress prevents the Clinton administration from taking the lead on hemispheric environmental cooperation by constricting funds for domestic and international environmental activities.

WESTERN HEMISPHERE DECLARATIONS AND STATEMENTS OF PRINCIPLE

Our Own Agenda (1990). The result of an initiative of the Latin American and Caribbean Commission on Environment and Development, established in 1989 under the auspices of the IDB and UNDP, in collaboration with UNECLAC and UNEP.

Tlatelolco Platform on Environment and Development (1991). Adopted by representatives of Latin American and Caribbean nations at an UNECLAC-sponsored meeting in Tlatelolco, Mexico. The Platform acknowledges the rights of NGOs to be involved in domestic environmental policy affairs and global negotiations, as well as the rights of indigenous peoples and individuals to be involved in the management of the environment.

Amazonia Without Myths (1991). A report prepared by the Commission on Development and Environment for Amazonia to present a joint position of the Amazon Treaty countries before the UNCED.

Agenda 2000 (1992). Like the aforementioned Amazon commission document, this agenda was prepared by the Central American Commission on Environment and Development for the UNCED.

Carta de Manaus (1992). This declaration prepared by the Amazon Pact countries with reference to the UNCED commits the signatories to sustainable development of the Amazon region, provided financial and technological support from the developed world is guaranteed. They reject any control over such funds by donors.

Carta de Canelas (February 20, 1992). This declaration of the Southern Cone countries with respect to the UNCED stressed "shared responsibility" for environmental problems.

Our Common Agenda for the Americas (1994). A report prepared by the Latin American Caribbean Commission on Environment and Development in preparation for the December 9-11, 1994, Summit of the Americas. Funded by the IDB and the Latin American and Caribbean office of the UNDP.