University of Montana

ScholarWorks at University of Montana

Graduate Student Theses, Dissertations, & Professional Papers

Graduate School

2005

# The NAAEC after ten years: A qualitative assessment of the North American agreement on environmental cooperation

Clifford T. Cosgrove
*The University of Montana*

Follow this and additional works at: https://scholarworks.umt.edu/etd

Let us know how access to this document benefits you.

Recommended Citation

Cosgrove, Clifford T., "The NAAEC after ten years: A qualitative assessment of the North American agreement on environmental cooperation" (2005). *Graduate Student Theses, Dissertations, & Professional Papers*. 8629.
https://scholarworks.umt.edu/etd/8629

This Thesis is brought to you for free and open access by the Graduate School at ScholarWorks at University of Montana. It has been accepted for inclusion in Graduate Student Theses, Dissertations, & Professional Papers by an authorized administrator of ScholarWorks at University of Montana. For more information, please contact scholarworks@mso.umt.edu.

**Maureen and Mike**
**MANSFIELD LIBRARY**

The University of

# Montana

**Permission is granted by the author to reproduce this material in its entirety, provided that this material is used for scholarly purposes and is properly cited in published works and reports.**

****Please check "Yes" or "No" and provide signature****

**Yes, I grant permission**

**No, I do not grant permission**

**Author's Signature:** Clifford T. Cosgrove

**Date:** 6/1/05

**Any copying for commercial purposes or financial gain may be undertaken only with the author's explicit consent.**

**8/98**

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

THE NAAEC AFTER TEN YEARS:

A QUALITATIVE ASSESSMENT OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION

by

Clifford T. Cosgrove

B.A. Thomas Edison State College, Trenton, New Jersey, 2000

presented in partial fulfillment of the requirements

For the degree of

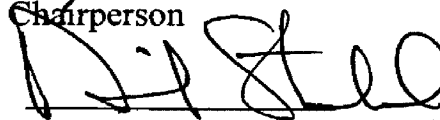
Masters of Science

The University of Montana

May 2005

Approved by:

Chairperson



Dean, Graduate School

5-31-05

Date

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

UMI Number: EP39430

All rights reserved

INFORMATION TO ALL USERS
The quality of this reproduction is dependent upon the quality of the copy submitted.

In the unlikely event that the author did not send a complete manuscript
and there are missing pages, these will be noted. Also, if material had to be removed,
a note will indicate the deletion.

UMI EP39430

Published by ProQuest LLC (2013). Copyright in the Dissertation held by the Author.
Microform Edition © ProQuest LLC.
All rights reserved. This work is protected against
unauthorized copying under Title 17, United States Code

ProQuest LLC.
789 East Eisenhower Parkway
P.O. Box 1346
Ann Arbor, Mi 48106 - 1346

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Cosgrove, Clifford T. M.S., May 2005
College of Forestry and Conservation

The NAAEC after Ten Years: A Qualitative Assessment of the North American Agreement on Environmental Cooperation

Chairperson: Alan McQuillan

The North American Agreement on Environmental Cooperation (NAAEC) was created as a side agreement to the North American Free Trade Agreement (NAFTA) and was designed to address environmental concerns arising from expanded free trade within North America that were left outside of NAFTA. At the time the NAAEC was signed it was considered by many experts to be the most innovative environmental agreement ever executed in association with a trade treaty. This thesis examines how well the NAAEC has addressed environmental concerns as well as the overall performance of the side agreement during its first decade.

In order to explore and understand these issues the author presents a history and analysis of the NAAEC in conjunction with a series of interviews he conducted with a variety of professionals having expertise relating to the NAAEC. The author further evaluates the strengths and weaknesses of the agreement, presenting a qualitative assessment based on information obtained from these interviews.

This assessment suggests the NAAEC did not live up to the expectations of those environmental groups, members of Congress and others who had originally sought a strong environmental agreement. The inclusion of the NAAEC only as a separate side agreement to NAFTA, with no authority to intervene in NAFTA environmental disputes proper, effectively relegated environmental concerns to secondary consideration. By not providing police powers or "teeth" in the structure of the agreement the NAAEC was essentially set up to fail, and it did.

The silver lining in this agreement, however, is the Commission for Environmental Cooperation (CEC), the central institution created by the NAAEC to meet the objectives and goals of the agreement. Examples of how the CEC has effectively sought and helped implement cooperative solutions to environmental and trade related-disputes, despite the limitations of the NAAEC, and the implications this could have for future trade agreements, are also presented.



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

To Jodi and Reg



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

CONTENTS

ABSTRACT . . . . . . . . . . . . . . . . . . . . . . . . . . . . . ii

INTRODUCTION . . . . . . . . . . . . . . . . . . . . . . . . . . 1

CHAPTER

1. Background and History

Origins of the NAAEC . . . . . . . . . . . . . . . . . . . . 7

Criticism of the Parallel Approach . . . . . . . . . . . . . . . . . . . . 9

The Role of NGOs . . . . . . . . . . . . . . . . . . . . . . . . 11

2. Overview of the NAAEC

Purpose and Objectives . . . . . . . . . . . . . . . . . . . . . . 22

The Commission For Environmental Cooperation . . . . . . . . . . 24

The Council . . . . . . . . . . . . . . . . . . . . . . . . 24

The Secretariat . . . . . . . . . . . . . . . . . . . . . . . 26

The Joint Public Advisory Committee . . . . . . . . . . . . . . 30

3. Methodology . . . . . . . . . . . . . . . . . . . . . . . . . . 33

4. Interviews and Discussion

Interview One . . . . . . . . . . . . . . . . . . . . . . . . . 37

Discussion . . . . . . . . . . . . . . . . . . . . . . . . . . 39

Interview Two . . . . . . . . . . . . . . . . . . . . . . . . . 42

Discussion . . . . . . . . . . . . . . . . . . . . . . . . . . 44

Interview Three . . . . . . . . . . . . . . . . . . . . . . . . 48

Discussion . . . . . . . . . . . . . . . . . . . . . . . . . . 50



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Interview Four . . . . . . . . . . . . . . . . . . . . . . . . . . . 57
Discussion . . . . . . . . . . . . . . . . . . . . . . . . . . . 60
Interview Five . . . . . . . . . . . . . . . . . . . . . . . . . . . 63
Discussion . . . . . . . . . . . . . . . . . . . . . . . . . . . 65
Interview Six . . . . . . . . . . . . . . . . . . . . . . . . . . . 72
Discussion . . . . . . . . . . . . . . . . . . . . . . . . . . . 73
Interview Seven . . . . . . . . . . . . . . . . . . . . . . . . . . . 76
Discussion . . . . . . . . . . . . . . . . . . . . . . . . . . . 78
Table 1 . . . . . . . . . . . . . . . . . . . . . . . . . . . 82
5. Conclusion . . . . . . . . . . . . . . . . . . . . . . . . . . . 84
WORKS CITED . . . . . . . . . . . . . . . . . . . . . . . . . . . 92



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

# INTRODUCTION

During the 1992 U.S. presidential race it was often difficult to watch the news or read the paper without hearing or seeing the phrase "that giant sucking sound." This was presidential candidate Ross Perot's description of what the American public would hear as U.S. jobs were lost to Mexico if the North American Free Trade Agreement (NAFTA) was passed. Eventually NAFTA did pass and the giant sucking sound, much like Mr. Perot's presidential hopes, quickly faded away. Nevertheless, the anticipated effect NAFTA would have on the environment and labor led to the creation of two supplemental agreements to NAFTA. These two agreements, the North American Agreement on Labor Cooperation and the North American Agreement on Environmental Cooperation, are collectively known as the side agreements.

On December 17, 1992, the governments of Canada, Mexico and the United States entered into the North American Free Trade Agreement. The agreement went into force on January 1, 1994 and, at the time, was considered the most comprehensive and unique trade agreement ever signed between such large trading partners (Johnson and Beaulieu 1996).

One of the qualities that makes NAFTA unique is its declared goal, stated in its preamble, that puts trade liberalization in the context of sustainable development, where sustainable development is the desired end. The NAFTA preamble states that the agreement will not compromise public welfare, environmental protection or conservation and further claims that the agreement should:



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

> contribute to the harmonious development of world trade...in a manner consistent with environmental protection and conservation ... promote sustainable development... [and] strengthen the development and enforcement of environmental laws and regulation (Housman 1997, p. 10).

The inclusion of the North American Agreement on Environmental Cooperation (NAAEC), often called the environmental side agreement within the framework of the North American Free Trade Agreement was, arguably, an attempt to reconcile trade and environmental interests into a workable affiliation. The NAAEC went into force alongside NAFTA on January 1, 1994 as a parallel agreement separate from, but within the framework, of the greater NAFTA.

The NAAEC is a means to ensure that the environmental ideals stated in the NAFTA preamble are carried forward. The NAAEC obligates the multilateral parties to a series of commitments aimed at greening international trade between the partners. The text of the NAAEC states the intent to:

> [F]oster the protection and improvement of the environment in the territories of the Parties for the well being of present and future generations; promote sustainable development based on cooperative and mutually supportive environmental and economic policies; increase cooperation between the Parties to better conserve, protect, and enhance the environment, including wild flora and fauna; support the environmental goals and objectives of NAFTA; avoid creating trade distortions or new trade barriers, strengthen cooperation on the development and improvement of environmental laws, regulations, procedures, policies and practices; enhance compliance with, and enforcement of, environmental laws and regulations; promote transparency and public participation in the development of environmental laws and regulations; and policies; promote economically efficient and effective environmental measures; and promote pollution prevention policies and practices(NAAEC art. 1).

Even with a stated willingness for international environmental cooperation, the task of implementing such a far-reaching agreement as the NAAEC is complex.



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

In most negotiations involving free trade, when the issues of trade and environment are brought together they are, unfortunately, often viewed as trade versus environment, polar opposites instead of two sides of the same coin. Many trade experts believe that environmental provisions are synonymous with barriers to free trade and should not be included within a trade agreement. When first examining trade interests and environmental considerations it is natural to think in terms of a two-sided approach. However, on closer analysis it is apparent that in the negotiations over the inclusion of the environmental side agreement within NAFTA the issue was not so black and white.

During the NAAEC negotiations, throughout most of 1993, there were trade and environmental professionals and organizations on both sides of the agreement that believed support for free trade was a stance against environmental standards or provisions and vice-versa, but they were not in the majority. Most positions fell somewhere in between and differed in the degree of support for one position over the other. Many believed these issues were in fact intertwined, with opinions that varied on whether the emphasis should be placed on trade or environment.

The environmental community wanted an agreement that provided greater transparency and civil participation in trade negotiations as well as one that ensured environmental standards were not sacrificed by expanded trade. The latter concern mainly related to Mexico which had environmental standards comparable to the U.S. and Canada but lacked the ability and/or will to enforce them. The fear in the environmental community was that once free trade was established between the three countries, companies would begin moving from Canada and the U.S to Mexico to avoid the more



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

rigidly enforced environmental laws and regulations in those two countries, thereby creating a "downward harmonization."

In response to this concern the NAAEC emphasized enforcement, specifically that each country would be obligated to enforce their existing environmental laws and regulations. This approach was preferred over creating international environmental standards for all three countries as it avoided the necessity of creating an organization with multilateral enforcement powers, which was something the governments of all three countries were not willing to do.

To address these concerns as well as others, the NAAEC established the Commission for Environmental Cooperation (CEC) as the central institution mandated to meet the commitments stated in the environmental side agreement. The CEC attempts to do this in innovative ways, particularly the citizens submission process which is often considered the "centerpiece" of the agreement. This is the method laid out in Articles 14 and 15 of the NAAEC designed specifically to address enforcement, transparency and greater civil participation.

These articles describe the process through which a non-governmental organization or private citizen can file a petition (called a "submission") to the CEC that their government is failing to enforce existing environmental standards. If the submission is found valid the CEC then investigates and ultimately produces a Factual Record. The Factual Record is the final report that can then be released to the public that details the offense and what has been done. It contains just the facts and offers neither opinions nor recommendations. Once the report is released the involvement of the CEC is finished.



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

The CEC has no judicial or police authority to levy fines or penalties against an offending party or government.

The CEC also has the authority to prepare what are called Article 13 Secretariat Reports. These reports can be initiated by the Secretariat, a branch of the CEC, and can address any environmental issue that relates to NAFTA, which covers essentially all of North America. The CEC can also form working groups and develop work programs related to environmental issues stemming from trade. Though not originally considered the focal point of the agreement, nevertheless these methods can be used to address issues of transparency and civil participation.

The problem with the NAAEC is that it is hamstrung from the outset. Including the NAAEC in NAFTA only as a separate, “side” agreement allows NAFTA to function without addressing the environmental issues of enforcement and transparency specifically within the NAFTA text. Nowhere does NAFTA require the participation or input of any group or commission established by the NAAEC in any environmental decisions relating to trade under NAFTA. It is entirely up to the NAFTA commissions whether to seek input from the CEC.

The CEC is charged with meeting the goals of the NAAEC, yet is not granted any type of police authority to levy fines or sanctions against governments who do not enforce their existing laws or against companies who are found to repeatedly violate environmental standards. This effectively reduces the NAAEC to an environmental “gentlemen’s agreement” between the three countries. The CEC has functioned in innovative ways despite the limitations placed on it by the structure of the NAAEC but



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

whether this has been enough to adequately meet the objectives of the NAAEC is a question that is explored further in this thesis.

To determine if the NAAEC sufficiently addressed environmental concern within the context of NAFTA there is a broad gray area that needs to be examined. The question, ultimately, is subjective and depends on the point of view of the individual. While positions may change over time, it is likely that most experts on these issues will have opinions that reflect, at least to some extent, their original positions when the agreement was signed.

This paper is designed to examine what some of these positions are and then assess the NAAEC from the information garnered. In order to understand the assessment, a background, history and summary of the agreement is needed. After this, interviews and a subsequent discussion, conducted with professionals who have expertise in the fields of environment and trade will be presented, followed by a conclusion. The primary purpose of the thesis is to qualitatively assess the NAAEC. The assessment will be drawn from the issues analyzed in the discussion section. The discussion section will incorporate the answers given by the interviewees to the questions posed, and the assessment, therefore, will be based on the information presented from these interviews.



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

# CHAPTER ONE

## History and Background

### Origin of the NAAEC

While the NAFTA preamble may have stated aspirations towards sustainable development, it is important to remember that NAFTA is a trade agreement and trade's primary focus is always in the area of commerce. The NAAEC is a parallel environmental agreement within the larger context of NAFTA and the purpose of the NAAEC is not necessarily to address existing environmental problems but to address environmental concerns as they might arise within the constraints of a trade liberalization agreement (NAFTA).

This was an unusual and unprecedented agreement. At the beginning of the NAFTA debate the political and social climate in the U.S. was such that some form of environmental standards needed to be included in a trade agreement as far reaching as what was then being considered. Improved science and technology coupled with greater public exposure and environmental awareness led to demands from Non Government Organizations (NGOs) and influential segments within the public sector for concessions in the trade agreement that addressed environmental concerns (Johnson and Beaulieu 1996).



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

In May of 1991, in order to gain fast-track[1] authority to negotiate a free trade agreement with Mexico, the administration of President George H. W. Bush (1988-92) guaranteed that environmental concerns would be addressed in the agreement. By April of 1993, when the new Clinton administration had begun to settle in Washington, very little progress had been made incorporating environmental concerns into the trade agreement. Preliminary discussions between the Chief of the U.S. Environmental Protection Agency and the Environmental Ministers of both Canada and Mexico had produced a non-written agreement that they would enter into more talks on environmental issues in the near future and they also announced a plan to create a North American Environmental Council. These talks were the beginning of what would eventually lead to the environmental side agreement (Johnson and Beaulieu 1996). During this time NAFTA, and the extent of environmental regulation in the side agreement, remained fiercely debated topics among trade interests, politicians, environmentalists and the public.

With the inclusion of the side agreements, ratification of NAFTA in the U.S. was still by no means assured, but without them NAFTA was guaranteed not to pass. President Clinton had made a promise during his campaign that without sufficient provisions on environmental and labor issues he would not support NAFTA. Considering the climate of public opinion in the U.S. and the political support and influence many of the environmental NGOs now enjoyed, the environmental provisions already in NAFTA and

[1] The online legal reference site FindLaw.com defines fast track authority as trade agreement negotiation authority that provides two guarantees essential to the successful negotiation of trade agreements: (1) a vote on implementing legislation within a fixed period of time, and (2) a yes or no vote on trade agreement legislation without allowing amendments to the legislation. In the NAAEC negotiations the agreement would be submitted to the House and Senate for ratification after a 90 day period of consultation with Congress.



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

the existing labor agreements with Mexico were not going to be enough to gain approval for the passage of NAFTA (Ferber, Ferretti and Fischer 1995). With public opinion and the promise of two presidents in favor of environmental provisions, renewed negotiations on the agreements continued for almost a year. On September 14, 1993 in Washington D.C., the environmental representatives of the United States, Canada and Mexico signed the final legal text of the North American Agreement on Environmental Cooperation, to be put into force along with NAFTA on January 1, 1994.

## Criticism of the Parallel Approach

In Canada and Mexico, where the domestic parliamentary institutions are mostly government controlled, the debate was not as public and the ratification of NAFTA was not necessarily dependent on the inclusion of environmental considerations, neither was it dictated by popular opinion to the extent it was in the United States. The influence of popular opinion is a key motivating factor in the American political process and very often determines legislative action. In the case of NAFTA and the NAAEC debates this was apparent and perhaps best summed up by this statement from one Washington D.C. political commentator:

> [D]espite its important innovations, the NAFTA environmental regime is the product not of any fundamental, enduring commitment to environmental values on the part of governments in North America, but of a temporary need on the part of a Republican and then a Democratic president to secure sufficient domestic support to ensure legislative passage of a historic free trade agreement (Munton and Kirton 1994).[2]

In the U.S., by the first half of 1993, the NAAEC/NAFTA debates had become a highly politically, charged topic.

---

[2] In Johnson and Beaulieu 1996, p. 10 note 5.



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

From the very beginning of the NAAEC negotiations the political leaders in all three countries were clear that there would be no reopening of the NAFTA text, the NAAEC would have to stand on its own as a parallel environmental side agreement. This parallel track approach has been highly criticized as a fundamental failure by many observers who support both free trade and strong environmental standards. Critics assert that the failure to integrate trade and environmental issues from the beginning resulted in added last minute negotiations over many issues that had to be dealt with quickly and less effectively then if they had been included in the original trade negotiations (Housman and Orbuch 1993).

Many environmentalists claimed that making the NAAEC a parallel agreement virtually ensured that any new environmental provisions not mentioned or included in the NAFTA text would face an uphill battle of being considered through the NAAEC by the respective governments and trade organizations. The NAAEC would be working from the outside in, trying to regulate the environmental agenda once NAFTA was in place. If the environmental agreement had been part of the NAFTA text, critics contend, then compliance with a specified environmental standard would have been considered before or with any decisions on commerce.

This criticism may be valid up to a point, but it is helpful to keep in mind that this type of environmental regulation was exactly what the trade interests did not want. They wanted very few environmental provisions relating to trade within any part of NAFTA, let alone a separate side agreement. The argument was that restrictive national or local environmental regulation in one country would lead to unfair trade advantages in countries that had little environmental regulation or enforcement (Smith 1993).



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Ironically, the concern among trade interests that lack of multilateral environmental regulation would lead to unfair trade advantages was partly the catalyst for the creation of the environmental side agreement. As one analyst put it "The NAAEC was created out of the recognition that a severe gap existed between the Mexican environmental laws on the books and the enforcement of these laws which might distort trade to the advantage of Mexican producers" (Schuler 1996, p. 364). Whether the multilateral side agreement that resulted from these concerns is what trade interests had envisioned is debatable. NAFTA alleges to "promote environmental enhancement through trade related development" (Schuler 1996, p. 354). The side agreements go further, laying a framework whereby these goals may be achieved. The legitimacy of the criticism that environmental concerns were not adequately addressed within the trade agreement is an issue that will be explored further in this paper. One point of accord among analysts and critics on all sides of the issue is the critical role NGOs played in the development of the NAAEC.

## The Role of NGOs

The call for sustainable development proclaimed in the NAFTA preamble and supported by the NAAEC requires a collaborative effort between multiple parties to succeed. The NAFTA negotiations have shown that political support from domestic populations within participating governments was crucial to the passage of the side agreements. In the U. S. and, to a lesser degree Canada, government response is often dictated by political pressure from their respective constituents who in turn are greatly influenced by the media.



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Arguably, it was the media who educated and, for the most part, involved and informed the general public in the debates that would possibly impact the environmental health of many areas of North America for years to come. This leads to the question of who educated or informed the media. Neither the trade organizations, that have long held the view that strategy which protects the environment weakens competitive advantage and restricts trade, nor the agencies within the separate governments which are often controlled by or support executive policy, alerted the media. Rather it was NGOs, operating separate from government and trade interests, which are credited with alerting the media to patterns of environmental neglect as part of their campaign to influence trade policy in favor of the environment that ultimately resulted in the NAAEC (Ferber, Ferretti, and Fischer 1995).

The coordinated and combined efforts from the NGOs, particularly in the U.S., took many trade negotiators by surprise. A number of events prior to NAFTA had seasoned many of the environmental groups for the type of campaign launched in response to the initial NAFTA talks. The Bruntland Report[3] was presented to the United Nations in 1987 and stressed the urgent need for global cooperation in progressing toward economic development that could be sustained without degrading the environment or depleting natural resources. The report established the paradigm of "sustainable development," defining it as, "development that meets the needs of the present without compromising the ability of future generations to meet their own needs" (Brundtland 1987). In the decade preceding the Brundtland report, many environmental activists and groups had

[3] In 1983 the United Nations appointed an international commission chaired by Norwegian Prime Minister Gro Harlem Brundtland. The commission was charged with proposing strategies for "sustainable development". The commission's report was called "Our Common Future" but became known as "The Brundtland Report" (the Brundtland City Energy network).



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

already begun to shift their focus from primarily localized environmental problems to a more global view.

The report catalyzed the organizational structure and vision of some of the larger NGOs and they began to monitor and study the environmental impact of economic decisions among different countries. They realized the connection that exists between trade and the environment and began viewing them as "two sides of the same coin" (Johnson and Beaulieu 1996). These NGOs then started lobbying in numerous countries to influence economic decisions that had multilateral environmental implications.

During this time the potential hazards from waste emissions, soil and air pollution, climate changes, and ozone and natural resource depletion, which the scientific community had been warning about for years, was taking on new significance as the cumulative effects of systematic environmental degradation were becoming apparent. This, combined with the efforts of the NGOs, raised the environmental alarm on a global scale and prompted the international community to study the patterns of global environmental interdependence culminating in the 1992 Earth Summit in Rio de Janeiro.[4]

When initial trade talks between the U.S. and Mexico first began in 1990, prior to Canadian involvement, the reaction by environmental groups was quick and organized. In addition to the burgeoning multilateral concerns between NGOs, the horrendous environmental record of the Maquiladoras[5] provided vivid images of environmental degradation along the U.S.-Mexican border and served as a rallying point for the

---

[4] Attempts to address the issue of potential conflicts between trade and environment at the Summit were meant with strong opposition from the US and other developing countries. As a result the issue was deferred to the General Agreement on Tariffs and Trade. See Peter H. Sand, *International Environmental Law After Rio,* (European Journal of International Law 4, 1993); no. 3, 377-389.

[5] The Maquiladoras are Foreign-owned assembly plants in Mexico. Companies import machinery and materials duty free and export finished products around the world. They are also known as twin plants, maquilas and in-bond industries.



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

inclusion of environmental provisions in any future trade agreement between the two countries.

The weakness and lack of funding for environmental law enforcement in Mexico led to widespread concern among environmental groups in the U.S., Mexico and, eventually, Canada that expanded trade in the region would lead to the creation of pollution havens that would provide "perverse" incentives for industry to relocate in these areas. Labor unions expressed similar concerns, fearing that cheap labor across the border would lead to unfair advantages for industries relocating there and the loss of many jobs domestically.

The 1991 General Agreement on Tariffs and Trade (GATT) decision in the Tuna-Dolphin case,[6] which ruled that efforts by the U.S. to protect resources beyond its borders (in this case dolphin) were inconsistent with international trade rules, raised a red flag for many environmental groups. The Tuna-Dolphin ruling, for many NGOs, gave credence to their fears that environmental issues would always be disregarded in favor of commerce under the current standards in existing trade agreements. Most of the NGOs involved had no doubt that without sufficient multilateral environmental provisions a trade agreement of this scope would have tremendous adverse impact on natural resource conservation and human health in many industrial corridors, particularly on the U.S-Mexico border.

The border area quickly became the focal point for organized resistance from environmental groups and others to the current structure of NAFTA. Their agenda was to prevent issues like downward harmonization, the "race to the bottom," from becoming a

[6] United States-Restrictions on Imports of Tuna (Mexico v. United States) (1991), GATT Doc. DS21/R, 39th Supp. B.I.S.D. (1992) 155; 30 I.L.M. 1594. In Johnson and Beaulieu 1996, 25. The U.S. treated physically identical goods, tuna, differently according to the manner in which they were caught, harvested or processed and this was determined by A GATT tribunal to be a violation of GATT rules. The U.S. can protect tuna but only through "less trade restrictive measures."



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

reality, and to prevent rulings like the Tuna-Dolphin case from setting precedent. The resolution proceedings for the Tuna-Dolphin case were a closed-door process in accordance with GATT dispute procedure (Charnovitz 1992). Under the 1986 U.S. - Canada Free Trade Agreement[7] similar closed door proceedings were used in dispute resolution scenarios. The NGOs sought to increase transparency in these types of proceedings by opening them to public participation and scrutiny.

The Canadian Environmental Law Association claims that:

> A secretive, unelected international commission that favors industry over the environment will rule on trade disputes and give a voice to corporations that is denied to environment protection organizations and the general public. The panel will meet behind closed doors, and the public will hear only its final decision (Toronto, 1992 at 1).[8]

This process runs counter to the U.S. and Canadian models of open regulatory hearings and was exactly the type of commission that NGOs were hoping to prevent by influencing the NAFTA agreement.

In response to these concerns NGOs in all three countries began collaborating. The Mexican advocacy group, Grupo de los Cien, initially made contact with similar groups in the U.S. and Canada. On April 5, 1991, environmental groups in the three countries jointly released to the press a "Common Declaration by Environmental Groups in Mexico, the United States and Canada Regarding the North American Free Trade Agreement" (Ferber, Ferretti, and Fischer 1995). Other statements by various NGOs, published both individually and jointly, soon followed, expressing additional concerns to their respective governments.

---

[7] See *Canada-United States Free Trade Agreement*, 22 December 1987.
[8] In Johnson and Beaulieu 1996, p 28 note 44.



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

At the same time, NGOs in the U.S. were lobbying congress to open NAFTA negotiations using the border issue as a way in. They continuously repeated the message that, "if NAFTA did not properly address the environmental concerns, the environmental degradation of the border area would spread to the rest of the planned free trade zone" (Johnson and Beaulieu 1996, p. 27). The success of this lobbying garnered enough support among congressional leaders to make President Bush's fast track authority contingent on an acceptable environmental plan.[9]

The U.S. Environmental Protection Agency and the Mexican Secretaria de Desarrollo Urbano y Ecologia (SEDUE) addressed these concerns by releasing the "Integrated Plan for the Mexican-U.S. Border Area (Border Plan)" for public comment in August of 1991.[10] In addition The U.S. Trade Representative, in lieu of an environmental impact assessment, released the "Review of US-Mexico Environmental Issues" for public comment in October of 1991.[11] The EPA and SEDUE held seventeen public hearings along the border area to elicit response to the Border Plan.

The response was not favorable and criticism of the draft included:

1) Lack of financing for improvements;
2) The plan did not address health related pollution problems and hazardous waste disposal;
3) Minimal attention was given to water supply and pollution problems;
4) No wetlands or wildlife protection was included in the plan;
5) There were no provisions for bi-national pollution enforcement;
6) The public had limited access and the plan recommended future study without taking any immediate action.;

---

[9] See Letter from House Majority Leader Richard Gepharrt to President George Bush, March 17, 1991. In Johnson and Beaulieu 1996, 27.

[10] U.S. Environmental Protection Agency and Secreteria di Desarollo Urbano y Ecologia (1992), *Integrated Environmental Plan for the Mexican-US Border Area* (First Stage, 1992-4)(Feb). In Ferber, Ferretti, and Fischer, 1995, note 9; 92.

[11] U.S. Environmental Protection Agency and Secretaria de Desarrollo Urbano (1991), 'Review of US-Mexico Environmental Issues' (Oct.), draft. In Ferber, Ferretti, and Fischer 1995, note 10; 92.



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

The final Border Plan, released in February of 1992, was rejected by the NGOs as an "inadequate response to existing environmental problems and increased pressures under [the] free trade agreement." The Border Plan had ignored most of the NGOs' previously stated concerns (Ferber, Ferretti, and Fischer 1995, p. 86).

Reaction to the Environmental Review was also negative. The NGOs involved criticized it as biased on most of the issues in favor of trade, and that it focused almost exclusively on the border area. When the final Environmental Review was released in February of 1992, it ignored most of the concerns from the environmental groups.

This lack of responsive action from the government agencies in the U.S. and Mexico prompted further collaboration between NGOs from all three countries to prepare specific and comprehensive recommendations. Among the most notable were the jointly released "Environmental Issues Related to the North American Free Trade Agreement" by the National Wildlife Federation, and Pollution Probe Canada, on March 7, 1992 and the "Review of Environmental Concerns Arising from a North American Free Trade Agreement" released April 7, 1992 by the Natural Resource Defense Council et al. Though differing in specifics, most of the recommendations were demanding that similar concerns be addressed. P.M. Johnson and A. Beaulieu in "The Environment and NAFTA" summarize them as:

(1) Guarantees for upward harmonization of environmental standards in the NAFTA area
(2) More transparency and NGO participation in the administration and dispute settlement mechanism of NAFTA
(3) Better enforcement of environmental regulations as well as some built-in procedure to make violations of this principle actionable under NAFTA (thus raising the possibility of trade sanctions)
(4) Elaborated protection of environmental laws and regulations against pre-emption and NAFTA trade discipline challenges
(5) A major and well-financed effort to clean up the Mexico-US border area



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

(1996 p. 28).

While most of the credit for assembling political influence on the environmental side of this issue is given to U.S. NGOs, the initial effort at organizing by the Mexican environmental groups, and the further collaboration with the U.S. and Canadian groups, helped the Mexican NGOs to gain some political leverage in their country while at the same time demonstrating that the border issue was not exclusively a concern of U.S. NGOs. Yet it was the U.S., as the largest and most powerful trading partner, that would set the example for integrating trade and environmental policy.

When NAFTA was completed in August of 1992, some of these concerns had been marginally addressed but not enough to meet even the minimal requirements for support from the larger NGOs. As a result none of the NGOs supported the NAFTA package by September of 1992 (Audley n.d.). Soon after, the government representatives of the three countries in response to the political pressure mentioned earlier, agreed to negotiate a parallel environmental side agreement. Once these intentions were announced the National Wildlife Federation (NWF) declared their support for the NAFTA package, contingent on the completion of the side agreements, thereby becoming the first of the larger NGOs to do so.

It was at this point that division within the environmental community began to arise. Essentially there were some groups that were satisfied with working towards a strong environmental side agreement without reopening the NAFTA text, and other groups that had misgiving about the effectiveness of parallel agreements that would not directly modify trade policy. The latter group, headed by the Friends of the Earth and the Sierra



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Club, wanted to reopen NAFTA and renegotiate the environmental provisions therein, a request the three governments were adamant about not granting.

In October of 1992, presidential candidate Clinton, whom the environmental NGOs' almost unilaterally endorsed, announced that he would support NAFTA only if side agreements on the environment and labor were included.[12] Further rifts in the environmental community then developed when the National Wildlife Federation and the World Wildlife Fund (WWF), whose main agenda as it related to NAFTA was poverty relief through trade induced growth, urged candidate Clinton not to make NAFTA conditional on a strong NAAEC (Johnson and Beaulieu 1996).

After the 1992 election President Clinton made clear his support of the parallel track approach for the side agreements. It was then that twenty-five environmental organizations sent a letter to U.S. Trade Representative (USTR) Mickey Kantor relating their concerns and expectations regarding the environmental side agreements.[13] The letter had the support of influential groups such as the Sierra Club, Defenders of Wildlife and Friends of the Earth. Other groups with political clout, such as NWF, WWF and the National Resource Defense Council (NRDC) would not support the letter as drafted. The letter went beyond the environmental agenda within the NAAEC and criticized NAFTA, emphasizing changes within the NAFTA text, which could only be done by reopening that agreement (Audley n.d.). These latter groups had already made known their intentions to work with government agencies on the parallel track approach without

---

[12] The North American Agreement on Labor Cooperation (NAALC) went into force on January 1, 1994 alongside NAFTA. The NAAEC and NAALC are often referred to as the NAFTA side agreements on environment and labor. Bill Clinton, "Expanding Trade and Creating Jobs," reprinted in (1993) 23 Environmental Law at 683-684. See also: Presidential candidate Gov. Bill Clinton, Address, University of North Carolina, October 4, 1992. In Johnson and Beaulieu 1996, 31.

[13] Defenders of Wildlife, Center for International Environmental Law et al., Letter to Ambassador Mickey Kantor, March 6, 1993.



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

reopening NAFTA. In light of the continued demands by a faction of NGOs to reopen NAFTA, regardless of the three government's steadfast refusal to do so, it appeared these NGOs were not going to support NAFTA on any of the terms being proposed.

On May 7, 1993 the Center for International Environmental Law, Defenders of Wildlife, the Audubon Society, the Nature Conservancy, NWF, WWF and NRDC published a letter in support of "a NAFTA/NAAEC package that reduced the pressure on USTR Mickey Kantor and therefore lowered the threshold of what the government was expected to accomplish" (Johnson and Beaulieu 1996, p. 33). Despite the criticism this letter received from many environmental groups, and even some politicians that it gave up too much, the public view was that the major NGOs were behind a NAFTA package as long as the NAAEC properly addressed environmental concern. In effect the May 7 letter became the standard through which the NAFTA package was to be judged (Audley and Uslaner 1994).

On September 13, 1993, the Sierra Club, with the support of some 300 smaller environmental organizations, declared its opposition to the NAFTA package. The next day, September 14, the NWF, WWF, NDRC, the Environmental Defense Fund, Audubon and Conservation International announced, at a press conference attended by Vice President Al Gore and EPA Administrator Carol Browner, their support for the NAFTA/NAAEC package. This public split within the NGO community was a signal that their differences were irreconcilable and caused an alliance of environmental groups against each other. The split came a month before the final vote for NAFTA approval was to be held, negating any chance to further influence the vote with a unified front in the 11th hour (Audley n.d.).



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

By the time this formal public split within the NGO community occurred, the NAFTA environmental side agreement debate, that appeared likely to determine the success or failure of NAFTA in the fall of 1992, had faded from the forefront of both the public and the political forum (Duquette 1997). The letter on May 7, supporting a NAFTA package with an extensive NAAEC was a culmination of the effort by those NGOs that were trying to work towards a "greener" NAFTA. Many analysts claim that this letter had come at a cost of much of the political leverage the NGOs had had. The political influence the environmental community might still have been able to wield, to further strengthen provisions within the NAAEC in the final months before the vote in Congress, was diminished by the division within the environmental community. When the vote was held in the fall of 1993, the perception of the general public was that the NAAEC had adequately addressed the environmental concerns of NAFTA (Audley n.d.).

In order to fully understand the material presented, a review of the objectives and institutional procedures of the agreement is necessary. The next section of this project will summarize the content, structure and function of the NAAEC.



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

# CHAPTER TWO

## Overview of the NAAEC

### Purpose and Objectives

The North American Agreement on Environmental Cooperation was created in response to concern that liberalized free trade through NAFTA would lead to increased environmental degradation in impacted areas. The agreement establishes a tri-national cooperative framework for implementing environmental protection. The NAAEC is an international legal instrument that commits the participating parties to a series of obligations aimed at achieving specific objectives. Johnson and Beaulieu claim that like many international legal instruments, the NAAEC is a constitutional rather than a regulatory document (1996). It establishes no specific environmental standards, regulations or rules; rather it creates an institutional framework to facilitate environmental cooperation among the trading partners.

The NAAEC preamble states the principles behind the agreement. These include the declaration that the governments of the United States, Mexico and Canada will emphasize public participation in protecting the environment, acknowledge the link between trade and environment and build on existing international environmental agreements and laws to promote cooperation (NAAEC art. 5). Part one follows the preamble and lists the objectives of the agreement as:



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

(1) Foster the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generations
(2) Promote sustainable development based on cooperation and mutually supportive environmental and economic policies
(3) Increase cooperation between the Parties to better conserve, protect, and enhance the environment, including wild flora and fauna
(4) Support the environmental goals and objectives of NAFTA
(5) Avoid creating trade distortions or new trade barriers
(6) Strengthen cooperation on the development and improvement of environmental laws, regulations, procedures, policies and practices
(7) Enhance compliance with, and enforcement of, environmental laws and regulations
(8) Promote transparency and public participation in the development of environmental laws, regulations and policies
(9) Promote economically efficient and effective environmental measures
(10) Promote pollution prevention policies and practices (NAAEC art. 7, 1).

Following these objectives in Part Two of the agreement is a series of obligations agreed upon by the participating parties. These are outlined as general commitments, levels of protection, publication, government enforcement action, private access to remedies and procedural guarantees. Key features in this section include:

public access to judicial and administrative procedures and rulings as they relate to environmental law;
ensure that each Party's laws and regulation provide for high levels of environmental protection and strive to improve these laws and regulations;
effectively enforce its (each Party's) environmental laws and regulations;
ensure that interested persons may request the appropriate authorities investigate alleged violations of its environmental laws and regulations and;
ensure that the procedure for developing their environmental laws are impartial, transparent and equitable.[14]

[14] NAAEC art. 3; 4(1); 5(2); .6(3)(c); 7(1).



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

## The Commission for Environmental Cooperation

Part Three of the agreement describes The Commission for Environmental Cooperation, which is the central institution created by the NAAEC. The CEC has a general mandate to:

> cooperate with the NAFTA Free Trade Commission to achieve the environmental goals and objectives of NAFTA by:
> (1) Contributing to the prevention or resolution of environment-related trade disputes
> (2) Consider on an ongoing basis the environmental effects of the NAFTA
> (3) Otherwise assist the Free Trade Commission in environment-related matters
> (4) Assess the environmental impact of proposed projects subject to decisions by a competent government authority and likely to cause significant adverse transboundary effects.[15]

To facilitate these objectives the CEC is divided into three component institutions, the Council of Ministers, the Secretariat and the Joint Public Advisory Committee.

### *The Council*

The Council consists of cabinet level ministers from each country who serve as the governing body of the Commission. This intergovernmental body will meet once a year in regular session and each party shall chair each session successively. Special sessions can be held at the request of either party and decisions will be made by consensus unless otherwise stipulated in the agreement.[16]

The Council acts as the political arm of the CEC. The Council approves the CEC budget and oversees the Secretariat. They decide questions regarding the interpretation or application of the agreement and act as the final point of inquiry from NGOs and private individuals. Final authority in dispute matters pertaining to the agreement rests

[15] NAAEC art. 10(6); 10(6)(c)(d)(e), 10(7)(a).
[16] Ibid., art. 9(3), 3(a)(b).



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

with the Council and they serve as a forum for the discussion of environmental matters within the scope of this agreement.[17]

In addition to the procedural functions set down for the Council, the NAAEC allows for the organic growth of the Council within the reach of the agreement. The Council is mandated to encourage compliance, among the Party's, with their respective environmental laws and regulations and promote public access to information concerning the environment that is held by public authorities of each Party. The agreement allows for the development of recommendations for future environmental disputes and:

> Recognizing the significant bilateral nature of many transboundary environmental issues, the Council shall, consider and develop recommendations with respect to:
> (1) Assessing the environmental impact of proposed projects likely to cause significant adverse transboundary effects
> (2) Notification, provision of relevant information and consultation between Parties with respect to such projects; and
> (3) Mitigation of the potential adverse effects of such projects.[18]

While the agreement provides no specific procedural guidelines for the implementation of these recommendations, the agreement does recognize the possible future need to do so and provides for the organizational structure at the discretion of the Council.

Under the Council Articles in the NAAEC are sections that stipulate courses of action the Council shall do and action the Council may do. Considering the broad mandate of the CEC, the NAAEC allows for future courses of action that may be necessary depending on the situation. These actions are discretionary in nature and are decided upon by the Council and include:

> (1) Establish and assign responsibilities to, *ad hoc* committees
> (2) Seek the advice of non-governmental organizations or persons
> (3) Take such other action in the exercise of its functions as the Parties may agree

[17] Ibid., art. 10(1)(a)(d)(f), 6(a).
[18] Ibid art. 10(4)(a)(b), 5(a), 7(a)(b)(c).



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

The council may consider, and develop recommendations regarding:

(1) Pollution prevention techniques and strategies
(2) The use of economic instruments for the pursuit of domestic and internationally agreed environmental objectives
(3) Transboundary and border environmental issues
(4) The conservation and protection of wild flora and fauna and their habitat and specially protected natural areas
(5) Environmental matters as they relate to economic development
(6) Approaches to environmental compliance and enforcement
(1) Other matters it may decide.[19]

The tri-national membership of the Council provides the leadership to institute the mandate of the CEC. They are to work closely with the Joint Public Advisory Committee and the Secretariat, and it is the Council who has final authority on whether information from any environmental inquiry is released to the public.

***The Secretariat***

The Secretariat is the second component of the CEC and its function and structure is supportive in nature. The Secretariat is instructed to "provide technical, administrative and operational support to the council and to committees and groups established by the council" (NAAEC art. 11(1)). An Executive Director, chosen by the council for a three-year term, with a two-term limit, supervises the Secretariat and each director will rotate consecutively between citizens of each participating country.

The director appoints the staff of the Secretariat, taking into consideration "lists of candidates prepared by the Parties and by the Joint Public Advisory Committee" (NAAEC art. 11(2)(b)). The appointment of staff is at the discretion of the director but the Council has the authority to reject any appointment by a two-thirds vote. The director

[19] Ibid., art. 9(5)(a)(b)(c); 10(2)(b)(d)(g)(i)(l)(p)(s).



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

also submits the annual program and budget of the commission for final approval by the Council (NAAEC art. 11(3), (6)).

Under the articles of the NAAEC the Secretariat is directed to protect from disclosure the identity of an NGO or individual making a submission as well as the nature of the submission when the source of the submission deems it proprietary.[20] This does not apply to submissions claiming a Party is not enforcing its environmental laws, which are covered separately under articles 14 and 15.

The annual report to the Commission is prepared by the Secretariat and covers the approved Commission budget, yearly activities and expenses and "shall periodically address the state of the environment in the territories of the Parties." This includes "[T]he action taken by each Party in connection with its obligations under this agreement" and information submitted by NGOs and individuals on enforcement activities within the Parties (NAAEC art. 12(2)(3).

The CEC, under the authority of the Secretariat, has the discretionary power to prepare reports and studies on "any matter within the scope of the annual program." The Secretariat may prepare a report on "any other environmental matter related to the cooperative functions of this agreement," subject to a two-thirds veto by the council within 30 days of notification (NAAEC art. 13(1)). The exception to this is issues pertaining to non-enforcement of environmental laws and regulations, which are covered separately. When preparing reports outside the annual program the Secretariat may use information from NGOs, technical and scientific experts, public information, and advice from the Joint Public Advisory Committee or other credible sources. The report is

[20] Ibid., art. 11(8)(a)(b).



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

submitted to the council and made public within 60 days unless the council decides otherwise (NAAEC art. 13(2)(3)).

Articles 14 and 15, pertaining to issues on enforcement matters and factual records, fall under the purview of the Secretariat and are often considered two of the most pioneering articles in the agreement. Article 14 directly addresses the process by which a private citizen, NGO or other group, from a participating country may submit, and the Secretariat consider, a complaint that a "Party is failing to effectively enforce its environmental laws" (NAAEC art. 14(1)).

When a complaint is submitted (a submitted complaint is called a submission in the articles of the agreement) the Secretariat determines if the submission meets certain criteria such as:

(1) The submitting party is identified and is a national of a participating country;
(2) The claim is legitimately targeting enforcement and not harassment aimed at a specific industry and;
(3) The party submitting a complaint has notified, in writing, the proper authorities in the targeted territory and that countries response, if any.[21]

Once the Secretariat establishes that the submission meets the specified criteria it can then consider requesting a response from the offending Party, pursuant to certain guidelines.

In addition to the criteria, there are specific factors the Secretariat is mandated to consider before requesting a response from a Party. These include:

(1) Whether the submission alleges harm to the complainant;
(2) If private remedies have been pursued;
(3) Whether the submission is drawn exclusively from media reports and;
(4) If the submission involves matter whose further study would advance the goals of the agreement.[22]

[21] Ibid., art. 14(1)(b)(c)(d)(e)(f).
[22] Ibid., art. 14(2)(a)(b)(c)(d).



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

If the Secretariat decides a response is warranted, a copy of the compliant and any supporting documentation is forwarded to the Party, which then has thirty days to respond. When the Secretariat receives the response a decision is made whether to pursue the matter further.

At this point the Party against which a complaint has been made can stop the proceedings if it can ascertain and show that the complaint is the "subject of a pending judicial or administrative (presumably) proceeding." The Party may also present documentation on any previous judicial or administrative hearing the issue received and whether available private remedies were utilized[23].

The next step is the development of a factual record under Article 15. If the Secretariat deems that a factual record is warranted, it then notifies the Council of its decision. The Council must then approve the request by a two-thirds vote. Under these procedures, once the Secretariat decides to prepare a factual record, the group or individual submitting the complaint has no further function other than support in the process. When preparing the factual record the Secretariat is mandated to "consider any information furnished by a Party" and, at its discretion, may consider any relevant information available publicly, from NGOs, the Joint Public Advisory Committee, or from their own or independent experts.[24]

The factual record is sent to the Council for approval, and any Party can make additional comments within 45 days before the factual record is released. If the Council agrees by a two-thirds vote to release the factual record, it is then released publicly within 60 days of its final submission to the Council.

---

[23] Ibid., art. 14(3)(a)(b)(i)(ii).
[24] Ibid., art. 15(4)(a)(b)(c).



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

The original submission procedures, under articles 14 and 15, initially generated controversy on how the internal procedures should be applied within the CEC. In the spring of 1995, to eliminate any confusion, the Secretariat produced the "Draft Procedures for submissions on enforcement matters under articles 14 and 15 of the NAAEC" (referred to as Draft Procedures). These procedures address disputed sections of Articles 14 and 15 and establish specific criteria as it relates to the submission process leading to a factual record.

When an individual or NGO submits a claim that a party is failing to enforce its environmental laws, the claimant must remain within the limits of the Party's environmental law. For example, if an industry is releasing a known pollutant into the air in a Party's territory and there is no law against this then, regardless of whether the pollutant is harmful, a submission cannot be accepted. Under the Draft Procedures, the environmental law and the specific provision within the law that is violated must be identified and if there is no law against an act then there is no violation.

### *The Joint Public Advisory Committee*

The Joint Public Advisory Committee (JPAC) consists of fifteen individuals comprised equally of five members from each participating country. "Each Party or, if the Party so decides, its National Advisory committee convened under Article 17,[25] shall appoint an equal number of members." Although the Council "shall establish the rules of procedure for the [JPAC]," the JPAC will choose its own chair. It will meet at least once a year during the regular session of the Council and may convene at other times as the

[25] Article 17 states: "Each Party may convene a national advisory committee, comprising members of its public, including representatives of non-governmental organizations and persons, to advise it on the implementation and further elaboration of this Agreement."



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

"Council, or the committees chair with the consent of a majority of its members, may decide."[26]

The JPAC provides advice "on any matter within the scope of this agreement" to the Council and provides technical, scientific or other information to the Secretariat, as needed, for the development of a factual record. The JPAC also receives from the Secretariat copies of the annual program, budget and any other report "pursuant to article 13," which gives discretionary powers to the Secretariat to form independent investigations on which the JPAC may advise (NAAEC art. 16(4)(5).

Essentially, except for the submissions process under Articles 14 and 15 of the NAAEC, the JPAC is the means by which input from NGOs and other groups in the private sector will be included, or at least considered, in the actions of the CEC. The JPAC's function as a nongovernmental advisory group allows it to seek relevant information from almost any outside source it deems appropriate. The formal inclusion of a nongovernmental body in the structure of the CEC ensures that an institutionalized attempt at increased transparency, a stated objective of the NAAEC, is a fundamental part of the agreement.

There are a total of 51 Articles and a number of annexes and addendums to the NAAEC. This chapter has summarized the first 16 Articles of the agreement that have direct relevance to this paper. The remainder of the agreement has four additional sections covering cooperation and provision of information, consultation and resolution of disputes between participating governments, general provisions and final provisions. While these sections are important they are mostly procedural functions as they relate to the CEC except for dispute resolutions between governments which will be addressed

[26] Ibid., art. 16(1)(2)(3).



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

later in this thesis. Any additional sections of the agreement not specifically covered in this section will be analyzed in the next section of this paper should it have relevance to a topic being discussed.

The next section of this thesis [or project] will present interviews conducted with various professional individuals who have expertise in environmental law, policy, trade, resource management and other related fields. The interviews will provide the basis for the discussions, which, in turn, will provide the material used for assessing the performance of the agreement during its first decade.



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

# CHAPTER THREE

## Methodology

Seven interviews were conducted with individuals that were selected by an ad hoc process, seeking persons who have expertise involving trade issues and were either involved with the original negotiations in some form or were actively involved with at least one of the influential NGOs during that time. The interviews were to be broken down as: three representing Canada, three from the U.S., three from Mexico and three interviews likely biased towards business interests from any country. The method used to determine the people to interview was through research. Repetition of specific individual names in the initial research was the first criterion in attempting to determine who to interview. An additional method was to check the websites of some of the larger NGOs to find their contact person for trade issues, and the same method was to be used for government agencies such as the U.S. Trade Representative, the EPA and its equivalent agencies in Canada and Mexico.

This approach, however, had limited success. Trying to find the original people involved proved to be extremely difficult, the negotiations being over ten years past and many positions having been temporary in government, and most of the individuals involved in the initial debates from the NGOs having moved on. The language barrier in Mexico prevented more thorough research for individuals there, and tracking down negotiators on the trade side led to eventual dead ends. Also some of the more politically



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

prominent individuals, who were often mentioned in the press during the original negotiations, could not fit interviews into their busy schedules.

Eventually the first four interviewees were decided by using this original approach, the fact that they agreed to be interviewed helped also. Interview five, a former CEC Director, was found from direct contact with the CEC. Interview seven, also a former CEC member, was a referral from interview five. This referral was given after interviewee five was asked if he knew of another CEC member from Mexico who might be agreeable to doing an interview. Interview six was located through initial contact with the U.S. EPA and U.S. Trade Representative, both of whom interview six has past associations with. After contact with these agencies I was directed to the Center for International Law, the NGO where interview six is the current president.

A total of seven interviews was finally decided upon for several reasons, the first and most salient being that the information and topics raised by the interviews were becoming repetitive and a discernible pattern had emerged. Secondly, the length of the project needed to be considered and, finally, the time involved trying to track down these interviews was considerable. On the average it took eight weeks from the time the initial contact was made with an individual until the interview was conducted. By far the most difficult aspect of this project was tracking down individuals who were willing to take the time to do these interviews.

The original idea to have an equal number of interviews with representatives from each country, and from the trade community, who had participated in the original negotiations was discarded as the research progressed for two reasons. The first was as just discussed above and the second, and most relevant, was that the assessment is based



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

on the information from the discussion section, which expands on topics brought up during the interviews. The focus of this project and, therefore, of the interview questions was on the performance of the NAAEC since it went into force, not on the structure of the agreement decided upon through the original negotiations. As the project progressed it became clear that this perspective negated the relevance of interviews with individuals who had participated in the original negotiations from the strictly trade side as their involvement and interest was primarily with the structure of the initial agreement.

This project does not assess the NAAEC based on the interviewees' opinions; the relevance of the interviews is that they provide the basis for the discussion based on the topics brought up during the interview process. Therefore, it was more relevant to seek interviews with individuals who had an active working knowledge or involvement with the NAAEC over the last ten years rather than only individuals who were involved initially. As it worked out six of the individuals fit both criteria, the only possible disparity being interview three. The possible disparity being that while this individual presumably had a working knowledge of the agreement and the CEC, the NGO this individual represented was not "actively" involved with the agreement after it was signed. This interview was chosen because the individual was currently the Director of the Sierra Club's Trade Program and had held this position during the original negotiations. The Sierra Club was the most prominent NGO to oppose the NAAEC and it led the coalition of NGOs that opposed the agreement. The rationale for this choice was that the perspective of this interviewee would add more depth to the project.

Potential interview subjects who informed the researcher they had not been involved with the NAAEC in some manner relevant to this project during the last ten years were



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

dropped from consideration. Six of the interviews were conducted by phone, lasting between 15 and 25 minutes generally. This was the agreed upon time for the length of the interview but there was no specific limit placed on the time of duration for each interview. None of these interviews were recorded, as some of the individuals did not want their phone conversations taped. To ensure that each phone interview would carry equal weight, each conversation was transcribed by hand on a notepad by the interviewer, rather than recording some conversations and not others. The transcription was done during and immediately following the interview and the notes were kept in a 6 x 9 stenographer's notepad.

The question format was open-ended in that it did not follow a rigid set of questions in a specific order. Each interview began with the initial question of, "how well did the NAAEC address environmental concerns?" The questions that followed were determined by the direction of the interview and are written out during each interview exactly as they were phrased in the interview and are reported in the discussion section. This was thought to be a more appropriate format for this project as the interviewees are the experts and it was their perspective on the agreement that the interviewer was attempting to solicit for the material in the discussion section. It was the judgment of the researcher that having an organic format allowed the interviewer to ask questions relevant to the topics being discussed during the interview instead of adhering to a rigid set of questions prepared by the interviewer. The only in-person interview was interview three. This was at the request of the interviewee since previous attempts at a phone interview were either interrupted or postponed.



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

# CHAPTER FOUR

## Interviews and Discussion

### Interview One

The first interview was conducted with Professor Richard Steinberg; the following biography is from the faculty list at UCLA.

> Professor Steinberg teaches *International Business Transactions, International Trade Law, National Security Law, public International Law,* and *Theories of International Law.* After graduating from law school, Professor Steinberg was named a MacArthur Fellow in International Security Affairs at the Center for International Security and Arms Control, Stanford University, and then a Ford foundation Fellow at the Center for General Counsel to the United States Trade Representative in Washington, D.C., and later as an associate with Morrison & Foster in San Francisco. He then served as Project Director at the Berkeley Roundtable on the International Economy (BRIE) at UC Berkeley. He is on the Editorial Board of International Organization and a member of the Council on Foreign Relations. Professor Steinberg has written numerous articles and books on international law, including *The Greening of Trade Law? International Trade Organizations and Environmental Issues* (2001).

Professor Steinberg's answer to the question of how well did the NAAEC address environmental concerns was, "very well." He said the side agreements were ambitious and "broke away from a persistent pattern of failure to enforce environmental laws and regulations internationally." He said the agreement realistically addressed enforcement issues and cited Mexico as an example. Claiming that while there is still widespread corruption in matters of environmental enforcement in Mexico, enforcement is now taken more seriously, whereas in the past enforcement was completely unregulated.



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

In response to the question of whether trade induced growth in Mexico has led to an upward harmonization, guided by the NAAEC, and increased revenue for environmental concerns, Professor Steinberg replied "no." He said there has been some increased enforcement as a result of trade regulation stemming from the NAAEC but no improved conditions or budgets that could be directly attributed to trade. Professor Steinberg added that the predicted pollution havens have not resulted either.

When asked whether public participation in the submissions process under Articles 14 and 15 has been effective, Professor Steinberg said he believed the benefit of having public participation is that this involvement creates a public awareness of environmental issues that may not have previously existed. He said public scrutiny presupposes or creates an environmental standard to address. In a sense a standard is created (when comparing multilateral environmental regulations) that can now be assessed where previously none existed or no public forum existed to evaluate these standards.

Professor Steinberg opined that the emphasis placed on the importance of NGO participation (in the submissions process) in the agreements was overstated. He said this suggests that somehow the NGOs can see problems and respond quicker and more competently than government agencies. He also said the criticism that the submissions process, leading to a factual record, is overly drawn out is unfounded, in comparison with civil proceedings in the U.S. it was relatively swift. Professor Steinberg said overall the agreements went a long way in addressing environmental concerns, claiming that it was the most ambitious environmental agreement ever included in a trade treaty.



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

## Discussion

In 1993, a team of legal experts in environmental regulation was sent to Mexico by the U.S. EPA to report on the environmental standards in Mexico. They found that Mexican laws were "broadly comparable" to Environmental laws in the U.S. (Magraw 1995). Their findings were little disputed by the larger environmental groups concerned with the new trade treaty being discussed. Instead they pointed to this report as further proof that lack of enforcement was a major problem in Mexico, one that would become worse with increased, unrestricted trade (Ferber, Feretti, and Fischer 1995). The political and public pressure brought to this issue by the environmental sector coupled with industry's fear of relaxed regulation creating a competitive advantage in the form of "pollution havens" in Mexico, were determining factors in the creation of the NAAEC.

Studies suggest that neither the pollution havens feared nor, as professor Steinberg pointed out, has the upward harmonization hoped for occurred. While Mexican foreign trade has increased under NAFTA it is not attributed to the creation of pollution havens (Schatan 2003). In this study Schatan found that Mexican trade trends have actually shifted towards cleaner high-tech industries rather than a specialization towards the traditional pollution prone industries. Statistical research showed that the chemical sector, considered the most polluting of all industries, had a more rapid growth of imports compared to exports since the NAFTA/NAAEC package went into force (Schatan 2003).

Professor Steinberg claimed that increased regulation and enforcement as per the agreement has had some impact in Mexico, and a study conducted by the World Bank Development Research Group appears to support this assertion. The study found that plants in Mexico that experience regulatory inspections and enforcement are considerably



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

cleaner than industries that do not experience regulatory inspections. Of the 236 industrial firms surveyed that were subject to regulatory inspections, 60 % were in compliance with environmental regulation, primarily due to regulatory enforcement (Dasgupta, Hettige, and Wheeler 1997). While these findings may reinforce the benefit of regulatory environmental enforcement, other studies suggest that implementing the enforcement is still a significant problem in Mexico. The federal Mexican environmental watchdog agency Procuraduria Federal de Proteciccion al Ambiente (PROFEPA) reported that since the signing of the NAFTA/NAAEC package, plant inspections in Mexico, which only reached a high of 6 percent of all industrial firms nationally in 1993, has steadily declined (Gallagher 2001).

One of the more optimistic predictions for NAFTA was that trade-induced growth in Mexico would translate into bigger environmental budgets and the NAAEC would spotlight and guide environmental programs that would arise from a heightened environmental awareness (Johnson and Beaulieu 1993). It was hoped that this synergistic relationship between trade and environment would eventually lead to an upward harmonization in Mexico; an event which Professor Steinberg stated has not occurred. A recent study on industrial pollution in Mexico concluded, "[That] despite some notable improvements, the environmental costs of trade-led economic growth in Mexico have remained high since the entry into force of NAFTA" (Gallagher 2001). The study presented figures from the Mexican Statistical Agency, which showed the environmental costs of economic growth in Mexico from 1985-1999 at 10 percent of the Gross Domestic Product per year or roughly $36 billion (US). At the same time economic



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

growth was 2.5 percent annually, or $14 billion per year (Gallagher 2003). In comparison the CEC has an annual operating budget of $9 million (US).

The inclusion of Articles 14 and 15 on citizen submissions and the creation of a factual record within the NAAEC were in response to pressure from NGOs for greater transparency and public participation in trade related issues. (Gallagher 2001) According to the CEC website, in the ten years since the NAAEC went into force, 43 submissions have been received by the Secretariat. Of these 43 submissions, 32 of the cases have been closed, 11 are active and nine have resulted in the establishment of a factual record. The details of a number of these factual records and how they have led to greater public awareness of environmental concerns, as Professor Steinberg suggests, will be discussed later in this chapter, however, the very act of creating these factual records focuses attention on specific environmental issues that otherwise might have gone unnoticed.

Professor Kal Raustiala in "*Citizen Submissions and Treaty Review in the NAAEC*" describes two types of treaty review, which he calls "police patrols" and "fire alarms." [27] The police patrols are the federal investigative bureaucracy and the fire alarms are the investigations triggered by private citizens or groups. Raustiala claims that fire alarms in treaties "while not unknown, is unusual; international law rarely permits private actors to challenge states." Raustiala further explains that centralized authorities (police patrols) systematically search for violations through means such as hearings, audits, inspections and the like. Fire alarms, on the other hand, are reactionary and decentralized, instigated by private individuals or organizations that usually have a political or economic stake in the outcome of the issue at hand. In other words, as Professor Steinberg said, NGOs and private individuals are not necessarily more competent or better equipped than

[27] In Markell and Knox 2003, 270 note 3.



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

government agencies, but they might often see problems or be concerned with issues that may be overlooked by government agencies. "There is no reason to think the information private actors possess is systematically better than that of governments; rather, it is likely to be different than that possessed by governments" (Raustiala 2003). Chemical pollutants in a fisherman's favorite stream or a hiker uncovering toxic waste in a remote wood are scenarios that would likely be overlooked by more systematic government investigations. Under the NAAEC, if a private citizen or group reported the preceding scenarios and their government refuses to act, the citizen or group now has another avenue in which to pursue their complaint.

## Interview Two

The second interview was conducted with Professor Peter L. Lallas. Professor Lallas is currently a senior attorney in the International Law Office of the U.S. EPA and, as a representative of the EPA, was involved in the original NAFTA/NAAEC negotiations. He also lectures at Georgetown University; the following biography is from the faculty list at Georgetown University.

> Professor Lallas provides legal advice and counsel on a wide range of international environmental issues, including environment and trade matters, and issues relevant to the negotiation and implementation of international environmental agreements. He is a lead expert in a multi-year environmental cooperation partnership with the countries of Central America and coordinates EPA policy work relating to the Convention on Biological Diversity. Prior to joining EPA, he worked on international trade and European Community issues in Brussels and on environment and land use issues with a California law firm. He has authored and co-authored a number of articles on international environmental policy and law themes.

Professor Lallas, in response to the question of how well did the NAAEC address environmental concerns, said there are several goals indicated in the NAAEC and looking



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

at how well the CEC has met these goals is a valid criterion to measure how well the agreement addressed environmental concern. He said the CEC has successfully promoted environmental cooperation on regional levels and initiated cooperative programs that have been effective. He cited Resolution 95 on the Sound Management of Chemicals, which led to the development of North American Regional Action Plans on specific chemicals. Another successful initiative, according to Professor Lallas, is the Biodiversity Conservation Working group, which he said has led to the establishment of a number of projects targeting specific conservation areas. Two goals he claimed that have not been successful to date are the development of an agreement on Transboundary Environmental Impact Assessments and the establishment of a cooperative relationship with the NAFTA Free Trade Commission.

When asked whether the public submissions and the dispute resolution process detailed in the NAAEC have been effective, Professor Lallas's reply was that the public submissions process has been used while the dispute resolution process has not. He said the agreements took a significant step in recognizing and including public participation in the implementation of the agreement in a manner not found in other trade agreements. He added that Articles 14 and 15 are a straightforward process leading to a factual record. This, comparatively, is much less than happens under investment dispute procedures under NAFTA where investors can obtain monetary damages from a country under Chapter 11.

Professor Lallas said the NAAEC laid out specific goals that address environmental concern and some of the goals have met with success while others have not faired as well. He said the agreements were new and innovative in connecting trade and the



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

environment. They set an early benchmark for state-to-state resolution processes as well as those involving private citizens or organizations, though he expressed concern that the process is currently being excluded from consideration in the proposed Free Trade Area of the Americas (FTAA). He said public participation is one of the strengths of the agreement and the failure, to date, to realize some of the goals of the agreement have not been failures of the CEC. Professor Lallas added that he thought the CEC website, the links and information found there, is a multilateral environmental accomplishment in its own right.

## Discussion

The CEC is the central institution created by the NAAEC and is the means by which the goals and mandates stated in the agreement will be carried out. Professor Lallas cited numerous examples of working groups, initiatives and programs started by the CEC that have actively and successfully worked towards promoting multilateral environmental cooperation between various stakeholders. In October 1995, the CEC Council approved Resolution #95-5 on the Sound Management of Chemicals (SMOC). The resolution called for a multilateral cooperative effort to address chemical issues of mutual concern between the participating countries and for the implementation of proposals contained in Chapter 19, Agenda 21, of the Declaration of the United Nations Conference on Environment and Development (UNCED) in 1992 (Buccini n.d.). The resolution gave first priority to persistent organic pollutants (POPS) and established a tri-national



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

working group to develop and implement North American Regional Action Plans (NARAPs) on specific chemicals.[28]

The working group, composed of two senior officials from each country, was directed to recommend intensive efforts to reduce the risks posed by the targeted pollutants (Block 2003). The group began with polychlorinated biphenyls (PCB's), chlordane, DDT and mercury. The program has produced concrete results. Chlordane is no longer registered for use in North America, the PCB action plan is working to accomplish the near elimination of PCB's in North America, DDT has been phased out of Mexico (Block 2003) and the council has been actively engaged in reducing mercury to naturally occurring levels and informing the public (and industries) on methods to reduce the risks of exposure.[29]

Article 10(2) authorizes the CEC to "develop recommendations regarding the conservation and protection of wild flora and fauna and their habitat, the protection of threatened and endangered species and other matters it may decide." The Secretariat has the authority to prepare reports on any environmental matter within the scope of the agreement except on issues related to enforcement failures (NAAEC art. 13). In 1995 the Secretariat issued the *Report on the Death of Migratory Birds at the Silva Reservoir* in Guanajuato State, Mexico, and in 1999, issued *Ribbon of Life: An Agenda for Preserving Transboundary Migratory Bird Habitat on the Upper San Pedro River* in Northern Mexico and Southern Arizona. Both these reports directly relate to biodiversity. In June 2001, Council Resolution 01-03 established the Biodiversity Conservation Working

---

[28] See North American Commission for Environmental Cooperation, Public Workshop on the Sound Management of Chemical Program and Joint Public Advisory Committee Regular Session. 20-21 September 2001, Tucson, Arizona.
[29] See the Commission for Environmental Cooperation Council Resolution 00-06, 13 June 2000.



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Group, whose directives include "[to] identify areas of emerging interest or opportunities for biodiversity conservation, promote the integration of the CEC's biodiversity related activities and support finalization and effective implementation of the Strategic Plan for biodiversity conservation" (Glickman 2003).

The CEC's 2002-2004 North American Agenda for Action describes seven target project areas for biodiversity conservation, spearheaded by the Strategic and Cooperative Action for the Conservation of Biodiversity in North America. The program initiatives will help guide the Commission's long term conservation plan as well as provide and inform both public and private interests with environmental targets and performance indicators (CEC 2002). The other six projects implemented by the CEC cover a wide range of concern and will use strategies developed from the above Cooperative Action program. These projects are: the North American Bird Conservation Initiative; Species of Common Conservation Concern; Mapping Marine and Estuarine Ecosystems of North America; North American Protected Areas Network; Closing the Pathways of Aquatic Invasive Species across North America; and the North American Biodiversity Information Network.

Two areas where Professor Lallas claimed the CEC has not been successful were in developing Transboundary Environmental Assessments and establishing a cooperative relationship with the NAFTA Free Trade Commission. Article 10(7) and 10(7)(a) of the NAAEC mandates the council that "within three years consider and develop recommendations with respect to assessing the environmental impact of proposed projects." The CEC began preparations to meet this objective almost immediately and by October 1995, the CEC's project on Transboundary Environmental Impact Assessments



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

(TEIA) was launched. In 1997, the participating Parties convened a tri-national group of experts who subsequently produced a draft agreement on transboundary environmental impact assessments (Knox 2003). In response, the Council passed a resolution intending that the Parties would complete a legally binding agreement by April 15, 1998.[30]

As of March 2004, the Parties are still negotiating and the problem appears to be in the language of the agreement. John Knox, in *The CEC and Transboundary Pollution* writes, "The Parties are deadlocked over the scope of the agreements-specifically which actions should be considered, 'proposed projects' and therefore subject to notification and assessment" (2003). In Canada and the United States, environmental impact assessments (EIA's) are required only on federal projects, while in Mexico EIA's are sometimes required on sub-federal and private projects as well. A compromise over this difference in "proposed projects" has reached an impasse. Mexico is not willing to amend its domestic law to limit EIA's to only federal projects in fear that by exempting private and sub-federal projects from EIA's, conditions along the border will become worse (Delgado 1998). Considering the current political climate in the United States it is unlikely there would be enough political support to broaden current EIA requirements and Canada faces similar obstacles (Kennett 1995).

Article 10(6) of the NAAEC directs the Council to "cooperate with the NAFTA Free Trade Commission to achieve the environmental goals and objectives of the NAFTA." Despite this mandate "the North American governments have yet to call on the CEC's significant trade and environment experience to inform... the deliberations of NAFTA's Free Trade Commission" (Reed and Kelly 2003, p. 102). The CEC has neither been called upon for input in any environment related dispute occurring under NAFTA, nor

[30] See Commission for Environmental Cooperation 1997. Resolution 97-03. Pittsburg (June).



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

have they yet met with the NAFTA Free Trade Commission. Notwithstanding these obstacles, the CEC has been active in pursuing its obligations under Article 10(6), producing the Environment, Economy and Trade Program[31] which has led to a new analysis methodology used to explore trade and environment linkages in a variety of areas.[32]

Of growing concern among many in the environmental community, which Professor Lallas briefly mentioned, is the application of Chapter 11 disputes under NAFTA. Specifically, the concern centers upon the language in Article 1110 (NAFTA Chapter 11) that states investors will "[have] protection from expropriation, or measures tantamount to expropriation." What has caused alarm is the use of this provision by some multinational corporations to challenge environmental protection initiatives, and regulations in the Parties territories. The CEC is actively involved in this debate but, once again, has not been called upon by the NAFTA Free Trade Commission in any of the environment related investment disputes that have gone to arbitration under Chapter 11 of NAFTA.

## Interview Three

The third interview was conducted with Dan Seligman, Director of The Sierra Club's Responsible Trade Program. The following biography is from the Sierra Club website at www.sierraclub.org.

> Dan Seligman has been director of the program since April 1993; he led the Sierra Club's grassroots mobilization at the Seattle Summit of the World Trade Organization (WTO). He has also directed the Sierra Club's lobbying activities

[31] See www.cec.org/programs_projects/trade_environ_econ. In Knox and Markell 2003, 111; note 1.
[32] See CEC, Environment and Trade Series 6-*Assessing Environmental Effects of the North American Free Trade Agreement (NAFTA): An Analytic Framework (Phase II) and Issue Studies* 1-64 (1999).



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

concerning fast-track trade promotion authority, the WTO, and the North American Free Trade Agreement. Dan is cited frequently in the media, has testified before Congress, and is the author of a variety of reports and articles on trade and the environment. Before joining the Sierra Club, Dan was a consultant at the World Resources Institute in Washington, D.C., specializing in Latin American environmental issues. He holds a masters degree in International Economic and Latin American studies from the Johns Hopkins University's School of Advanced International Studies and a B.A., with honors, in American history from the University of Chicago.

Mr. Seligman, in response to the question of how well did the NAAEC address environmental concerns, said there were two ways to look at the NAAEC, was the agreement strictly a reaction to the political fallout from NAFTA or a broader insight aimed at working with environmental problems. He said the CEC had both roles, as they were to oversee environmental cooperation with traded goods and, at the same time, establish public forums for environmental conflicts arising from liberalized trade. He said the dilemma with the NAAEC was that it was limited (initially) to problems as they relate to trade under NAFTA, and that the problem is not trade, but the nature of these trade agreements. NAFTA, according to Mr. Seligman, only looks at problems that can be solved with investment and tends to ignore the indirect environmental effects from liberalized trade. Effects such as natural resource depletion, carbon emissions and infrastructure pressure from the migration of large populations to concentrated areas are not considered.

When asked if environmental conditions in Mexico have improved from increased environmental enforcement that can be attributed to the side agreements, he said some things are better controlled like air and water, which can be measured but companies are likely polluting less overtly. He claimed the upward harmonization theory that was lauded by the pro-NAFTA lobby is "based on the Environmental Kuznets Curve (EKC)



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

which has been shown to be flawed" and that "Mexico starts below the curve" which renders the application of the theory meaningless.

Mr. Seligman said the CEC is a good structure with considerable limitations and that it has been beneficial in spotlighting environmental issues and has used its independent discretionary functions in a constructive manner likely not foreseen by the trade lobby. He said the side agreements were a political payoff to the environmental lobby for supporting NAFTA, and "there were a lot of broken promises, the environmental lobby controlled 35 congressional votes, enough to block NAFTA, instead they took bad deals." Mr. Seligman expressed the opinion that they could, and should have held out for a stronger environmental agreement and that the damage from NAFTA outweighs the benefit of the NAAEC.

## Discussion

One of the shortcomings of NAFTA, according to Mr. Seligman, was that it failed to consider the indirect environmental effects of trade. Specific Articles of the NAAEC allows the CEC the latitude to develop strategies seeking cooperative solutions to the negative environmental impacts of NAFTA that go beyond the immediate and direct effects of the expanded trade stemming from that agreement. Article 13(1) of the NAAEC grants the Secretariat authority to "prepare a report on any other environmental matter related to the cooperative functions of this agreement [unless] within 30 days... the Council objects by a two-thirds vote." In the ten years since the signing of the NAAEC, the CEC has been active in attempting to identify and understand linkages between trade and environmental change. In its first five years the CEC developed and



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

released the Analytical Framework for Assessing the Environmental Effects of NAFTA and established an extensive North American cooperative program developed around four central themes; of which one, environment, economy and trade, deals explicitly with the direct and indirect environmental effects from trade.

The CEC has been active in providing information on pollution release and transfer registry programs (PRTR) across North America. A PRTR is a database to which facilities must report their annual release of specified chemicals to the environment and transfers of these chemicals off-site.[33] In 1995, the CEC Council began work on establishing a North American Pollutant Release Inventory (NPRI) with the goal of improving environmental quality by making publicly available information on North American pollutant sources and risks.[34] Although a complete NPRI, as envisioned by the CEC in 1995 has not yet been created, it is not far from being realized. The CEC is credited with facilitating the emergence of a multidisciplinary cooperative policy network around PRTRs in Canada, Mexico and the United States and supplying information to the public, governments and industry, as well as applying pressure to the latter two through its annual North American PRTR release *Taking Stock* (Winfield 2003).

On October 11-12, 2000 in Washington D.C., the CEC hosted the "First North American Symposium on Understanding the Linkages Between Trade and Environment." The symposium, chaired by Dr. Pierre Marc Johnson, former premiere of Quebec, presented research papers from authors in Canada, the United States, Mexico, Latin America and the Caribbean.[35] A second symposium was held in March 2003 in Mexico

---

[33] See CEC Council Session in Dallas June 12-13, 2000.
[34] See CEC's 1994-9197 Taking Stock reports www.cec.org/programs_projects/trade_environ_econ/sustain_agriculture/index.cfm.
[35] See www.cec.org/symposium.



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

City. Both symposiums presented papers from academic researchers, NGOs, the private sector and representatives from intergovernmental organizations examining the direct and indirect effects on the environment from liberalized trade under NAFTA. They explored the impact of NAFTA on a range of issues from air quality, freshwater, forests and fisheries to the links between free trade and growing rates of hazardous wastes being shipped between the U.S., Canada and Mexico (Johnson 2004). The indirect effects that were studied considered how NAFTA impacts the environment "as its rules and institutions alter trade and transborder investment flows and influence and interact with production, infrastructure, social and governmental processes" (CEC 2002).

The 2000 symposium was the first test of the CEC's new analytical framework for assessing linkages between trade and the environment. One primary finding from the assessments was that large scale analysis, similar to ones used to examine macro economic effects from trade, are potentially misleading in that overall levels of environmental change on a continental (or global) scale may appear minor using this approach yet may be more significant on a localized scale when measured by geographic region, environmental standard or economic division (Vaughan and Block 2002). For example:

> due to changes induced by consumption patterns of the local population, species and genetic diversity may lose their direct or indirect value. Thus the failure of the market to allocate global values to natural resources at the local level could have disastrous consequences for biodiversity."[36]

These are some of the indirect effects that were not adequately measured using previous trade and environmental impact assessment methodology.

---

[36] Environment and Trade Series. 1996. *Building A Framework For Assessing NAFTA Environmental Effects.* Report of a workshop Held In La Jolla, Ca. CEC (April).



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Additional presentations discussed means by which liberalized trade indirectly affects the environment through infrastructure impacts such as long term transportation maintenance. This can adversely affect land, water and air well after the initial impacts of new roads, railways and other changes in modes of transportation that were constructed to accommodate the influx of trade have passed. The increase of alien invasive species and their potential impact on ecosystems was explored and directly linked to an increase in the transportation corridor, largely from marine transport (Vaughan and Block 2002). The exclusion of these concerns and their quantifiable impacts in previous environmental assessments of trade and the failure of these assessments to produce conclusive negative or positive results regarding NAFTA's impact on the environment, led the CEC to try a new alternative "environment first" approach.

This approach is just one of four basic elements to the analytical framework developed by the CEC to assess trade and environmental linkages in the NAFTA context. The framework first considers the context, in regards to environmental, geographic, economic and social scale, of the region or issue being studied; an "environment first" approach. The framework then analyzes connections to NAFTA related to NAFTA institutions, rule changes, trade flows, multilateral investments and other economic factors. Next it explores how changes in government policy, infrastructure, technology, production and social organization relate to changes in trade and investment triggered by NAFTA, the framework then provides a means for evaluating environmental effects utilizing various indicators (Reed and Kelly 2003).[37]

---

[37] For a more detailed explanation see *Analytical Framework*, supra, 32.



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

The EKC, which Mr. Seligman said was the basis for the upward harmonization premise, is an economic theory that hypothesizes a relationship between various indicators of environmental degradation and income per capita. The theory is based on the Kuznets Curve, named after the Nobel Prize winning economist Simon Kuznets who, in a 1955 paper, observed that income inequality first rises and then falls as economic development proceeds (Stern 2003). The Environmental Kuznets Curve essentially restates the economic theory to apply to environmental protection by predicting that negative environmental impacts will first rise then fall as economic development proceeds. The EKC concept surfaced in early studies of potential environmental impacts from NAFTA[38] but it was the World Bank's *World Development Report 1992,* which gained widespread acceptance of the EKC as a model for economic development (Stern 2003).

The World Bank report argued, "As incomes rise, the demand for improvements in environmental quality will increase, as will the resources available for investment" (Stern 2003, p. 4). Grossman and Krueger showed that per capita income over a certain "turning point" reduced earlier negative environmental impacts (i.e. environmental benefit) from economic development (1995). Free trade proponents used the catch phrase "upward harmonization" as the natural progression of trade liberalization in developing countries based almost exclusively on the EKC.

Numerous studies, conducted since the signing of NAFTA, have questioned the validity of the EKC as a rationale for economic development (Dasgupta et al. 2002). Many researchers have found the EKC applies in only a limited number of air pollutants

[38] See Grossman, G. M. and A. B. Krueger 1991. *Environmental Impacts of a North American Free Trade Agreement.* National Bureau of Economic Research Working Paper 3914, NBER, Cambridge, MA. In Stern 2003, 22.



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

such as particulates, ozone, sulfur dioxide, nitrogen dioxide, carbon monoxide and lead (Gallagher 2003). Other researchers have found that the reciprocal relationship predicted by the EKC depends on the environmental indicators observed and, in fact, greenhouse gases and indicators such as loss of biodiversity and primary forests appear to increase as income per capita continues to rise (Vaughan and Block 2002). Stern, in *Progress on the Environmental Kuznets Curve,* found the per capita "turning point" to be well beyond the $5,000 (US) Gross Domestic Product claimed by Grossman and Krueger as the income level where environmental contamination from economic expansion begins to recede (1991).

Additional research has found that even if the EKC holds true in specific uniform situations, the majority of the world's population who remain below the income per capita "turning point" will never reap the environmental improvements predicted by the EKC from trade liberalization (World Wildlife Fund 1998). The argument here, which Mr. Seligman (and others) is making, is not that economic development through free trade is a bad idea, but that basing that development on the structure of the current free trade agreement that uses a flawed theory such as the EKC to predict environmental benefits is.

Another key issue Mr. Seligman discussed, which was also investigated at the CEC symposium (2003) was the ongoing concern that domestic environmental regulation is weakened by the structure of trade liberalization agreements like NAFTA. The 400 percent increase in imports of hazardous waste from the U.S. to Canada was cited as an example of how differences in environmental regulatory compliance between two trading partners can lead to specific instances of pollution havens (CEC 2002).



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

> The question is not whether free trade in and of itself leads to better or worse levels of environmental quality...However, the effectiveness of environmental regulations is of pivotal importance, especially during transitional periods when countries open markets to international competition...and move to restructure markets through the deregulation of competition policies... [A]s countries move to the convergence of trade, investment and competition polices in support of the globalization agenda, a similar effort is needed to ensure that robust environmental regulations and polices are enacted to anticipate and mitigate environmental impacts stemming from free trade (Vaughan and Block 2002).

Vaughan and Block stress the need to mitigate the environmental shocks of trade liberalization by adjusting the progression of trade agreements to allow environmental regulators adequate time to adjust to market integration (2002). Similar to the way the IMF concluded, in a 2001 report, that economic markets need to progress in future trade agreements to allow domestic markets time to adjust to the impact of international competition, and avoid repeating the financial crises of the 1990s.[39]

It was environmental guarantees such as these that leading NGOs like the Sierra Club, Friends of the Earth and Public Citizen were looking for in an environmental side agreement within the NAFTA text, "We are pro-trade...[w]e believe in trade, but it's got to be with environmental protection."[40] When it became clear that the environmental side agreement left each party "free to determine its own level of protection and to modify its rules" these groups withdrew support of the NAAEC and formally opposed NAFTA (Canovas 2002).

These NGOs would not support a side agreement that had no authority to deal with what they believed was the central environmental issue of NAFTA. That in order to further commercial interests NAFTA would "[E]nforce legal 'disciplines' on domestic

---

[39] International Monetary Fund 2001. "Chapter IV: International Financial Integration and Developing Countries," *World Economic Outlook: (October).* Washington, DC: IMF. In Vaughan and Block 2002, 4, note 8.

[40] Roni Lieberman, the Sierra Club. *Christian Science Monitor*, July, 2 1993, 2.



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

laws, regulations, and administrative procedures in ways that may sharply restrict legitimate health and environmental safeguards" (Seligman 2001). The initial assurances given to the environmental lobby that this would not be the case with NAFTA has resulted in many of the "broken promises"[41] Mr. Seligman referred to, and has led many of the major environmental groups who initially supported the NAFTA/NAAEC package to oppose any new trade initiatives (Canovas 2001).

## Interview Four

The fourth interview was conducted with Justin Ward, Director for Agriculture, Forestry and Fisheries with the Center for Environmental Leadership in Business, a division of Conservation International (CI). The following biography is from the CI website at www.conservation.org.

> Prior to joining the CI staff in April 2000, Mr. Ward was a Senior Policy Specialist with the Natural Resources Defense Council (NRDC). During more than 17 years with NRDC, he directed the organization's activities on farm policy, international trade, and global forest conservation. He is the author of numerous publications, and the recipient of a 1988 Agricultural Conservation Award from the American Farmland Trust. In 1996, Mr. Ward was elected to a three-year term on the international Board of Directors of the Forest Stewardship Council, and he currently serves on the Board of the Consumer's Choice Council and on the Steering Committee of The Forests Dialogue. During the last three years, he has represented Conservation International on the Sustainable Forestry Board's Resources Committee and has been co-chair of the SFB task group on Forests With Exceptional Conservation Value.

In response to the question of how well did the NAAEC address environmental concerns, Mr. Ward said the agreement addressed region wide environmental concerns in innovative ways. It created a tri-national structure in the CEC, and Articles 14 and 15

[41] See Seligman, D. 1996. "The Morning NAFTA", *The Planet Newsletter*. Sierra Club. Also Scott, R. E. 2003. " The high price of 'free' trade: NAFTA's failure has cost the United States jobs across the nation" *Economic Policy Institute*, No. 147 (November).



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

provided new avenues for bringing attention to environmental issues, which triggered closer looks at existing problems. He said this has been of particular benefit in Mexico where an avenue for expressing environmental complaint has been created by the submissions process.

When asked if the parallel approach has been effective, Mr. Ward responded that he "has not been persuaded that a trade agreement is the best route for environmental considerations." He also said that a multilateral institution is now in place and whether it is in a trade or environmental agreement is really a secondary consideration. He further added that the CEC might have had a different structure with less independence had it been included in the NAFTA proper. Mr. Ward said, "You often hear we need international environmental governance, you have that now [in the CEC], let's support it, learn from the mistakes."

Mr. Ward was asked if he felt the NAAEC was lacking any real teeth in regards to enforcement provisions. He responded that there are monetary penalties that can be levied, but strengthening the enforcement provisions was too political an issue to have succeeded. He said, "What were the options, trade sanctions? Environmental standards are different in each country so how do you evaluate things like urban air quality." He said The NAAEC creates an institution (the CEC) to address these kinds of problems.

Mr. Ward said the agreement often gets overlooked as an experiment on how to address transboundary environmental issues on a multilateral level, "some approaches have worked others have not." When asked if he thought the NAAEC could serve as a model for future agreements he replied, "Yes, absolutely it could. It does exist, learn from it." He said looking at whether environmental standards have been enforced is the



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

wrong metric, "If the enforcement provisions played out and fines were levied, then we failed, environmental improvements were not made." Mr. Ward added that this does not necessarily mean that if fines have not been levied improvements were made, but only that the CEC has made its presence felt and enforcement was, at least, being considered.

When asked if overall environmental conditions have improved since the NAFTA/NAAEC package went into force and to what degree could this be attributed to the agreements Mr. Ward said he was:

> Opposed to any definitive statement that NAFTA environmental policies have failed. If you look at all three countries, where forward progress has been made and cases where it has not, it is hard to evaluate or attribute directly to either agreement. Conditions are probably worse off, but not always.

He said NAFTA has been a "mixed bag" and to further evaluate the success or failure of the side agreements based on whether environmental conditions have improved is misleading and not that significant. "People are more aware of the problems, as awareness grows, civic minded environmentalism will grow, and eventually this translates into improvements." According to Mr. Ward this is an approach that has been utilized successfully by individuals and organizations, which is facilitated by the NAAEC.

Mr. Ward said that it is "remarkable that the commission still exists as this is a period of inadequate support for internal development." He claimed many environmental related government programs have been cut but, so far, the CEC has been left alone. Mr. Ward said the Commission has made all three governments uncomfortable and the independence of the CEC has been used to good effect, but has caused tension. He said the fact that politicians have not stripped the CEC likely means they are doing some good.



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

## Discussion

Mr. Ward said, regarding the structure of the CEC that, "some approaches have worked others have not." He claimed that before environmental conditions improve civic minded awareness must grow. He also said that the CEC is a fledgling form of multilateral environmental governance that should be supported. The following section explores these points and examines how the structure of the CEC is an integral part of maintaining the credibility of the submissions process under Articles 14 and 15.

The NAAEC established the first regional environmental organization, the CEC, in North America with innovative mandates for integrating trade and environmental issues (Knox and Markell 2003). In its ten year history the CEC has set up and facilitated numerous multi-national programs, working groups and work plans dealing with issues concerning trade, air and water pollutants, hazardous waste, biodiversity, environmental law and other related issues. The CEC has established working partnerships and collaborations with organizations like the World Bank, the Global Environment Facility, the International Joint Commission, and the International Boundary and Water commission and have continually sought input from both international and provincial NGOs.[42]

Over these ten years the CEC has gradually emerged as an environmental information center for North America. *The Operational Plan of the Commission For Environmental Cooperation 2004-2006,* calls for the CEC to strengthen its value as an environmental database for North America by "facilitating data comparability and information sharing, investigating environmental threats and issues through forward looking assessments, and

[42] See CEC: Operational Plan of the Commission for Environmental Cooperation 2004-2006.



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

informing the public and decision makers of the impacts of environmental degradation on human and ecosystem health." The plan reiterates the intention of the CEC to continue making this information available to the public through publication releases such as *Taking Stock* and their periodic *State of The Environment Reports.*

The credibility of the CEC largely depends on the non-partisan structure of the three branches that make up the commission. The expectation is that having a multidisciplinary configuration of equal members from each party will ensure the integrity of the organization, and the CEC can then act as a cohesive environmental voice for North America. "Of the three branches [of the CEC], the Joint Public Advisory Committee is arguably the most innovative" (Wirth 2003). The 15 member JPAC (five from each country) made clear from its first meeting its intention to function as multilateral organization with one voice. After the first meeting in July 1994, the JPAC drafted their vision statement, which declared:

> While we come from three different nations and have different institutional connections, we serve on the JPAC as individual citizens of the North American continent, joined in a commitment to preserving and enhancing our common environment and to achieving a sustainable society.[43]

The JPAC is mandated to give advice to the CEC Council, comment on the Secretariat work plan and consult with the public, in open meetings, on issues concerning the CEC (Markell and Knox 2003). During its first ten years the JPAC has convened multiple public workshops on a variety of environmental issues in all three participating NAFTA countries.

The JPAC serves as a liaison between civil society and the council ministers, establishing "A link between the North American Public and other bodies of the CEC,

[43] Joint Public Advisory Committee Vision Statement. Washington, D.C. July 26, 1994.



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

with the objective of promoting public participation in the decision making process of the CEC" (Bugeda 1999, p. 1591). In this capacity the JPAC has successfully engaged the public in open consultations involving the CEC work plan during council meetings and has been called upon, by the council, to clarify the guidelines for the citizen submissions process under articles 14 and 15 of the NAAEC (Wirth 2003).

In June 2000, Council Resolution 00-09 called upon the JPAC to prepare a report to, "help the council improve the citizen submissions process." In 2001 the JPAC released, *Lessons Learned; Citizen Submissions under Article 14 and 15 of the North American Agreement on Environmental Cooperation.* In this report the JPAC recommended that the submission process, "be more timely, open, equitable, accountable and effective."[44] The report also was critical of the discretionary power of the Council in deciding whether or not to instruct the Secretariat to prepare a factual record and the lack of any process for appeal should the Council decide against the preparation of a factual record.

Articles 14 and 15 of the NAAEC are often considered the fundamental attribute of the agreement. The International Environmental Law Project, in a report commissioned by the JPAC, states:

> The Citizen Submission Process is widely regarded as the most innovative and closely-watched aspect of the NAFTA environmental side agreement. Many regard the Citizen Submission Process as a potential model of accountability and governance for a new breed of international institutions-a positive response to globalization giving citizens a voice in the often impenetrable affairs of international organizations.

The credibility of the submissions process and the institutional legitimacy of the CEC are ultimately dependant upon public perception. If the public believes the CEC cannot function effectively, the submissions process would likely not be utilized and the

[44] JPAC Advice to Council No. 03-05. December 17, 2003.



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

integrity of the agreement could be compromised. Resolution 00-09 also sought to address this problem when concern was expressed that the Parties were trying to covertly revise the *Guidelines*[45] to hamper public participation in submissions process. Resolution 00-09 guaranteed the JPAC's position in facilitating public input in issues related to the Articles 14 and 15 guidelines as well as "formulating advice for any proposed guideline revisions." The Resolution also permits the JPAC to conduct a public review on any proposed "elaboration" to these articles.

## Interview Five

The fifth interview was conducted with Greg Block, former United States CEC Director. The following biography is from the EnviReform Website and the University of Toronto at www.envireform.utoronto.ca.

> Greg Block is the 2002-2004 Distinguished Environmental Law Scholar at Lewis and Clark College of Law in Portland, Oregon. From 1994 to 2002, Mr. Block served as the Head of the Legal Division, and later as Director, at North American Commission for Environmental Cooperation, headquartered in Montreal. There, he established the unit responsible for investigating allegations that a NAFTA party had failed to enforce its environmental laws effectively, as well as overseeing the CEC's co-operative program area. Mr. Block has also taught environmental law in Mexico under the auspices of a Fulbright Lecture Grant and co-directed a series of environmental workshops in collaboration with FUNDEA, a Mexican environmental non-governmental organization, as well as Litigated environmental cases with the law firm of Thelen, Marrin, Johnson and Bridges in San Francisco, California. Mr. Block received his undergraduate degree in Political Science from UCLA, and J.D. from McGeorge School of Law in Sacramento, California.

In response to the question of how well did the NAAEC address environmental concerns, Mr. Block said the agreement calls for the harmonization of many concerns but

[45] See CEC Citizen Submission on Enforcement Matters: Adoption of the Revised Guidelines for Submissions on Enforcement Matters Under Articles 14 and 15 of the North American Agreement on Environmental Cooperation. June 26, 1998.



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

does not offer a comprehensive plan for integrating them. He said there are European agreements that could be looked to as an example of ways to successfully integrate trade and environmental concerns. He claimed the U.S. instead looked at Canadian and Mexican environmental law accords and then related the agreement strictly to enforcement.

Mr. Block said this basis is flawed. The more pressing problem is environmental infrastructure both technical, such as lack of hazardous waste disposal facilities, and legislative, in the form of regulation and enforcement. He felt it was difficult to enforce environmental laws in a given country, when infrastructure support to adequately address a specific problem was non-existent. He referred to the disposal of hazardous waste in one state of Mexico as an example where there is only one plant for hazardous waste disposal available for a large area, and bringing the hazardous material from outside the area to the plant is cost prohibitive.[46] The problem, according to Mr. Block, is not whether a country is enforcing their environmental laws but how to raise the environmental infrastructure to a level where existing laws can then be applicable.

When asked in what areas the CEC has been successful Mr. Block replied that the mechanism of discretionary power has been used judiciously by the Secretariat and has been very successful. Mr. Block said, "The quality of investigations under Article 13 has led to tangible public policy." He said the Secretariat has used its own experts to investigate certain problems while encouraging anyone or group, with relevant information on an issue under investigation, to come forward and present their findings,

[46] Mexico has only one authorized, operating hazardous waste disposal site located in Mexico's Northern region outside of Monterrey, Nuevo Leon. Alliance Consulting International. 2000. *Pulse Point Newsletter*. January.



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

and this approach has gone a long way in establishing the integrity and credibility of the Secretariat.

Mr. Block was asked whether governments have been reluctant to cooperate in any investigations. He said governments have utilized forbearance under Article 13 and have been cooperative. Mr. Block said that recently, however, the participating governments have applied pressure to limit and change the scope of factual records under Articles 14 and 15 of the NAAEC.

## Discussion

Mr. Block was critical of the NAAEC's use of enforcement as a measure of environmental harmonization, particularly when environmental regulations are inconsistent between countries and the infrastructure of a participating country lacks the means to effectively enforce existing environmental regulations. Mr. Block said there are past and existing agreements in both the U.S. and Europe that establish precedent for multilateral harmonization in regards to environmental regulation. The following discussion examines these points and further explores the Article 13 Secretariat Reports, which Mr. Block claims have, so far, been successful.

In reference to environmental policy coordination, Article 10(2) of the NAAEC states, "The Council may consider, and develop recommendations regarding:" then lists several areas where the Council might take an interest. Should the Council develop recommendations regarding tri-lateral environmental policy, none of the three countries would be obligated to act on any of these recommendations. A significant critique of the



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

agreement is the lack of a substantive commitment by the participating Parties towards environmental harmonization.

Presidential candidate Bill Clinton, during the 1992 presidential campaign, stated that he wanted an agreement that had "the power to provide remedies, including money damages and the legal power to stop pollution [and] substantial powers to prevent and clean up water pollution."[47] The NAAEC allows the Council to levy monetary assessments that can be used to clean up the environment but the Council has no authority to act on its own to clean up, stop or prevent pollution in any of the participating countries (Charnovitz 1994). The NAAEC does not hold the Parties to an international environmental standard; rather, it obligates the Parties to effectively enforce the existing environmental laws in their respective countries. The Clinton Administration claimed this was an unprecedented commitment towards environmental enforcement and basing the environmental enforcement standards on each country's domestic law was seen as preferable to and less intrusive than an alternative minimum international standard (Charnovitz 1994).

This approach has been criticized for a number of reasons. Steve Charnovitz, in a 1994 article in the *Temple International and Comparative Law Journal* wrote, "The parochial laws of a country may be inadequate for its own environmental needs as well as for the rest of North America. When laws are inadequate, rigorous enforcement will provide little benefit" (p. 13). Charnovitz points out that a country that enforces a deficient environmental law in its own country would be in compliance with the NAAEC as would a country that lowered its environmental law to avoid NAAEC scrutiny. In a

[47] Candidate Bill Clinton's Proposal for Supplemental Agreements on NAFTA. 1993. In *Beyond NAFTA, The Western Hemisphere Interface* 192. Dobell, R. and M. Neufeld. May. In Charnovitz 1994, 11.



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

1993 letter to then U.S. Trade Representative Mickey Kantor, the National Governors Association stated "a party should not be able to complain about a lack of enforcement by another party of a standard higher than its own."[48] Under the NAAEC, a plaintiff country need not implement a law, it claims, the defendant country does not enforce if that law does not exist in the plaintiff country (Charnovitz 1994).

Critics also contend that previous or existing international agreements were not considered or looked to for precedent when the NAAEC was structured. The Agreement on the European Economic Area incorporates environmental regulation and protection with economic expansion within the context of the agreement (1994). Numerous other international agreements entered into by the United States, prior to NAFTA, established international standards on "fisheries, weights and measures, health, communications, postal delivery, intellectual property, statistics, sanitation, labor, conservation and customs cooperation" (Charnovitz 1994, p. 12). The concept of an international board of review has successfully been implemented in the past. In 1925 The Opium Convention established an independent board to monitor the opium trade. Over 50 years ago the Opium Board was granted the power to propose corrective measures or issue public statements to, or about, countries that were not in compliance with international norms (Charnovitz 1994). The European Union created international legislative and judicial commissions with the authority to pass binding legislation as well as review and invalidate domestic laws (Tarlock and Thorson 2003).

Under Article 13 of the NAAEC the Secretariat may prepare reports on any matter within the scope of the annual work program without Council approval or on any other

---

[48] Governor's Letter on NAFTA Environmental Pact, Inside U.S. Trade 4. July 16, 1993. In Charnovitz 1994, 14; note 226.



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

environmental matter related to the cooperative functions of the NAAEC unless the Council objects by a two-thirds vote (NAAEC art. 13(1)). The experience of the CEC, to date, has proven the work program to be fairly extensive, thereby empowering the Secretariat to report on almost any environmental issue in North America it considers worth exploring (Markell and Knox 2003). The Secretariat has, thus far, prepared five Article 13 reports on: maize and biodiversity; electricity; migratory bird habitat; North American pollutant pathways; and the Silva Reservoir.

The report of the Ten-year Review and Assessment Committee (TRAC), sponsored by the CEC and given the task of assessing the NAAEC's first ten years stated:

> While many observers have found these [reports] to be of high quality and a useful contribution to the understanding of the issues, government officials have sometimes found the reports to be of inconsistent quality and limited usefulness. If some government officials singled out the report on electricity markets as having been particularly timely, others expressed concerns over some of the background material prepared for the report on maize (2004, p. 18).

While the usefulness of the information from the Article 13 reports may have been questioned in some circles, the CEC has been credited with bringing together highly specialized multi-disciplinary teams from the private and public sector that have produced thorough investigative environmental reports that have influenced public policy (TRAC 2004). Tarlock and Thorson claim that while Article 13 does not have the power to influence public and private behavior with the threat of enforcement, it does give the CEC considerable power to "shine a light into places" the Parties might rather remain dark (2003, p. 214).

According to Mr. Block Articles 14 and 15 of the NAAEC have recently come under pressure from the participating governments and attempts have been made to limit the scope of the factual records. The citizen submissions process under Articles 14 and 15



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

received wide support in the environmental community as a means to effectively address the issue of slack enforcement and outright non-enforcement of domestic laws in the participating countries (Kibel 2003). While the Secretariat ostensibly reviews citizen submissions then makes recommendations to the Council on whether a factual record is warranted, it is ultimately up to the Council to decide if a factual record is to be prepared. Concerns about possible conflicts of interest were raised regarding the structure of this process:

> [namely] that the nation that was the subject of the non-enforcement claims in a citizen submission was also entitled to vote (through its national representative on the CEC Council) on whether to approve the preparation or otherwise limit the scope of a factual record to investigate these claims. (Kibel 2003, p. 2)

The JPAC's *Lessons Learned* (2001) report clearly outlines the potential conflict and makes recommendations on how to proceed, with regards to Articles 14 and 15, to avoid possible future disagreement.

The JPAC's report was prompted from public outcry over efforts of the Council, in 1999 through June 2000, to change the guidelines of the submission process. After this report was released, in May 2001, the Council articulated its support in Council Resolution 01-06. At that time the Council had only once decided against the Secretariats recommendation regarding the preparation of a factual record.[49]

In November 2001, the Council decided in favor of the preparation of five factual records submitted by the Secretariat but with a significant modification: the Council limited the scope of inquiry on four of the submissions. In all four cases citizens submitted complaints against a participating country alluding to a pattern of failing to enforce an environmental law. In each case specific examples were given to illustrate

[49] See Council Resolution 00-01. May 16, 2000.



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

this pattern. The Council's decision allowed factual records to be prepared only as they applied to the specific examples cited, essentially prohibiting any attempt to show a persistent pattern of failure by the accused Parties (Wold 2003).

This decision was immediately attacked as an attempt to undermine the independence of the Secretariat and the credibility of the submission process. The JPAC, in Advice To Council: NO. 01-07 states, "[JPAC] is compelled to express its frustration at being forced to advise on issues related to Articles 14 and 15, because past agreed-upon procedures are being ignored or circumvented." The "agreed-upon procedures" the JPAC refer to is Council Resolution 00-09 released in June 2000, where Council agreed that any amendments to the guidelines, or any issues related to Articles 14 and 15 the Council "proposes to address," should first be submitted to the JPAC for public review. The JPAC further charge that these decisions "constitute a flagrant disregard...with respect to supporting the independence of the Secretariat."[50] The JPAC claimed that the factual records could no longer produce evidence of pervasive patterns of enforcement failures if the records are restricted to only the specific examples meant to show such cumulative effects.

Numerous groups also suggest political motivation behind the Council's decision. The Sierra Legal Defence Fund stated, in a letter to the JPAC, "Despite previous commitments of the three countries to support and respect the integrity of the citizen submissions process, these Council Resolutions leave an impression of political manipulation and failure to respect the independence and judgment of the Secretariat" (Sierra Legal 2003). In a 2001 letter to then U.S. EPA Administrator Christine Todd Whitman, the U.S. Government Advisory Committee wrote:

---

[50] JPAC Advice to Council. 03-05. December 17, 2003.



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

> We are concerned that, by allowing a Party to a submission the latitude to define the scope of the factual record, as currently advocated by the U.S., the independence historically exercised by the Secretariat in the submission process will be eviscerated. If the Secretariat's independence is undercut in the manner proposed by the U.S., there will be no future credibility to the submission process.[51]

Chris Wold, Director of the International Environmental Law Project argues that the Council's actions are "*ultra vires* beyond its authority in the NAAEC" (2003, p. 4), claiming that Article 15 grants Council the power to deny or reject the Secretariat's recommendation to prepare a factual record, but not the authority to limit the scope of factual records, which is the purview of the Secretariat. In other words, according to Wold, the NAAEC allows the Council to reject the preparation of a factual record, but it permits the Secretariat, not the Council, to decide the scope of the factual record. Wold is arguing that the Council cannot grant permission of a factual record sent to it by the Secretariat and then put specific limits as to what it may include in its investigation, if doing so changes the scope of the original factual record prepared by the Secretariat. The JPAC concedes that the issue regarding the citizen submissions process "may indeed reflect a structural challenge within the NAAEC itself," but it considers the question of whether the Council is being influenced by the Parties to "be of sufficient concern" to justify additional investigation.[52]

[51] National Advisory Committee Letter to the U.S. Representative to the Commission for Environmental Cooperation. October 15, 2001.
[52] JPAC Advice to Council 03-05. December 17, 2003.



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

## Interview Six

The sixth interview was conducted with Daniel Magraw, President and Executive Officer of the Center for International Law (CIEL), Located in Washington D.C. The following biography is from the CIEL website at www.ciel.org/Staff/magraw.html.

> Mr. Magraw is currently the chief executive officer for CIEL. From 1992-2001, Mr. Magraw was Director of the International Environmental Law Office at the U.S. Environmental Protection Agency. During that period, he served on scores of United States delegations to international negotiations and other meetings. He took leave to co-chair a White House assessment of how the United States regulates genetically engineered organisms and to be the Acting Principal Deputy Administrator of the Office of International Activities at the U.S. Environmental Protection Agency. From 1983-92, he was professor of International Law at the University of Colorado, where he taught Public International Law, International Environmental Law, International Business Transactions, and International Development Policy and the Law. Mr. Magraw has a J.D. degree from the University of California, Berkeley, where he was Editor-in Chief of the California Law Review, and a B.A. in Economics from Harvard University.

In answer to the question of how well did the NAAEC address environmental concerns, Mr. Magraw said at the time it seemed good but it was an experiment. He said it looked at concerns not addressed in NAFTA. He claimed the citizen submissions and cooperative activities have been positive but the dispute settlement procedure between Parties in Part Five of the agreement has not been effective.

When asked if public participation as outlined in the NAAEC has had an impact, Mr. Magraw said, "yes it has, the agreement focused attention on these concerns." He said the submissions process has made a major difference as each investigation brings closer scrutiny and attention to environmental problems and governments are paying more attention to cooperative functions. Mr. Magraw said the commitments in the NAAEC have been successful, yet there are areas where there could be improvement but citizen



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

awareness has to be high for many of the processes to work and the issues are often too political.

In response to the question that the agreement has often been criticized for not having more teeth and does he think more could have been done, Mr. Magraw said the agreements were as good as they were going to get. He said at the time of the agreement negotiations environmental proponents were excited about the agreements while free trade proponents were not. He claimed NAFTA was not going to be reopened, and the NGOs had done a lot as it was. He added that Canada and Mexico did not like the agreements being politicized or having to go back to the NAFTA text, which was something they were not going to do.

## Discussion

Part Five of the NAAEC, which Mr. Magraw claims has been ineffective, outlines the Party-to-Party dispute resolution process. This section describes the legal course of action when one Party accuses another Party of failing to enforce its own environmental laws. A lengthy litigation process then follows and, if a Party is found guilty, a penalty is levied which can be trade sanctions in Mexico or the U.S., and fines in Canada (Kirton 2004). In a September 2000 letter to the JPAC, John Knox, who at the time was chair of the U.S. National Advisory Committee wrote, "One important lesson from the first five years of the CEC is that the threat of Part Five sanctions is not only useless, it may be worse than useless, as a way to support an effective submissions procedure." Knox further suggested that an institutionalized system of cooperation rather than confrontation



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

might be more productive (Knox 2000). In the first ten years of the NAAEC, the Part Five provisions have never been utilized (Kirton 2002).

Mr. Magraw said the NAAEC has been successful in other areas such as: establishing cooperative functions between multilateral participants aimed at environmental issues, the commitments and obligations of the Parties and the impact of the submissions process. In the paper *international Institutions, Sustainability Knowledge and Policy Change: The North American Experience*, presented at the 2002, Berlin Conference, John Kirton explains how the CEC, through its science based environmental organization, has influenced public policy in all three member countries. Kirton presents four mechanisms critical to CEC's success in facilitating knowledge-based change. These mechanisms are: the "top down" Article 13 reports; the "bottom up" Article 14-15 citizen submissions process; the CEC's "Taking Stock" state of the environment report; and the "NAFTA Effects" program related to Article 10(6)(d). Kirton explains how each area has been a "test case of the hypothesis of international science producing national policy change through the three P's," which he identifies as research potential, issue prominence and expert participation (2002, p. 2).

Kirton further analyzes how the Article 13 reports "have had a clear effect in stimulating action" and facilitated cooperative problem solving by mobilizing a broad array of stakeholders (2002, p. 3). The submissions process, according to Kirton, has had both direct and indirect influence on government and civil society. He focuses primarily on Mexico and discusses how the act of initiating a submission, by civil society or NGOs', is an indicator that the system has value and thus influences behavior toward change. By the same token Kirton claims that the resistance by governments in all three



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

countries to the Article 14 and 15 processes, and the continued efforts by the Parties to change these procedures is also an indicator that they are having an effect.

The commitments of the Parties in the NAAEC fall under the larger context of "Obligations" in Part Two of the agreement. Article 2 is the first article in Part Two and delineates "General Commitments" of the Parties. These include:

> [to] periodically prepare and make public reports on the state of the environment; develop and review emergency preparedness measures; promote environmental education; further scientific research and technology development; assess as appropriate environmental impacts; and promote the use of economic instruments for the efficient achievement of environmental goals (1(a-f)).

The Ten-year Review and Assessment Committee (TRAC) referred to the CEC as the Parties "institution of choice for trilateral environmental cooperation and for assessing the link-ages between NAFTA and the environment" (2004, p. 48). Given that each Council member can be considered the representatives of their respective governments, the Parties may be viewed, in a loose sense, as attempting to meet some of their commitments under the NAAEC.

Article 12 of the NAAEC states "The Secretariat shall prepare an annual report of the Commission [and] the report shall cover the actions taken by each Party in connection with its obligations under this Agreement"(2(c)), but in practice the Parties themselves prepare the chapters in the report addressing their performance in regards to meeting their obligations (TRAC 2004). The Ten-year Review Committee asserts the Parties contribution to the annual report is difficult to assess. Primarily because there is no standard by which to measure environmental performance and the Parties have different criteria for determining what is relevant to include, thus making it difficult to compare their contributions. The TRAC also states that the CEC's ability to effectively address



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

other issues related to the commitments has been hindered because of the political sensitivity of some of the issues to one or more of the parties.

Mr. Magraw said, with regards to stronger enforcement provisions within the NAAEC, "the agreement was as good as [its] going to get." During the initial NAAEC negotiations between the United States, Canada and Mexico the Parties agreed there would be no reopening of the NAFTA text to include any additional environmental provisions. President Bush in 1992 only agreed on a "parallel track" approach to secure enough votes in congress to pass NAFTA (Johnson and Beaulieu 1996). Canada and Mexico were not in favor of the NAAEC, regarding the agreement as "the bitter pill they had to live with in order for the U.S. to sign NAFTA" (Abel 2003, p. 3). Mexico only warmed up to the NAAEC when the focus of the agreement shifted from enforcement with teeth to cooperation, and Canada went along with the agreement only after they were exempted from trade sanctions. (Magraw 1994).

## Interview Seven

The Seventh interview was conducted with former CEC member, Carla Sbert. The following biography is from the EnviReform website at the University of Toronto at www.envireform.utoronto.ca.

> From 1998 to 2003, Ms. Sbert was Legal Officer of the Submissions on Enforcement Matters Unit at the North American Commission for Environmental Cooperation, reviewing submissions filed by citizens on alleged failures by Canada, Mexico and the United States to enforce environmental laws, and preparing factual records. Focusing on environmental law and policy, she has worked in the Mexican government, in a New York City law firm and in Mexico's state-owned oil company, Pemex. Ms. Sbert also lectured at the Mexican Autonomous Institute of Technology (ITAM) on the Mexican legal system and on the NAFTA environment package. She was trained in law at ITAM and obtained a Master of Laws degree from Harvard Law School.



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Ms. Sbert said, in response to the question of how well did the NAAEC address environmental concerns that it depended on your point of view regarding what might have happened. She said the provisions of the NAAEC went very far in addressing environmental concerns, even in a toothless way, especially in Mexico, where the creation of avenues for civil participation was new. She said she was surprised the environmental lobby got so much in the agreement and that environmental concerns were addressed effectively, but the hoped-for ends have not resulted.

When asked if the emphasis that the agreement placed on the enforcement of environmental regulation has had an impact in Mexico, Ms. Sbert replied that enforcement has improved very little but there is no benchmark for comparison. She said you could compare the number of inspectors and inspections now to those prior to the agreement but you would need to understand what the conditions looked like; she added that there has been some embryonic changes in the attitude of government.

Ms. Sbert's response to the question of whether the submissions process and civil participation has been effective in Mexico was that there are some examples in factual records and submissions where conditions did change after a submission was filed to improve the existing situation. She said the Aquanova Factual Record has had an impact and the Cozumel Factual Record brought about changes in the law. Ms. Sbert said in some cases nothing happened and in others attention is sometimes brought to environmental issues, she said the CEC reports are descriptive of what has been done.

Ms. Sbert said that while the agreement has provided an avenue for citizen complaint in Mexico, the process has had little impact and the changes have been slow. She said one thing that is clear in Mexico is the environmental groups have gained a respectability



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

and influence they did not have before the agreement. The Mexican government, thanks to the agreement and the CEC, now recognizes NGOs. Ms. Sbert claimed The CEC meetings in Mexico and their office in Mexico City have had an impact by giving Mexican civil society a recognized and vested interest in the CEC and the environmental concerns being analyzed.

In response to the question of whether more emphasis should have been placed on, and funds allocated for, infrastructure in Mexico, Ms. Sbert said that infrastructure support was addressed in the Border Side Agreement. She said the fact that each country contributes equally could be expensive for Mexico, but this gives Mexico some weight. Had Mexico been treated less equally they may have had less weight.

Ms. Sbert's reply to the question of whether any recognizable upward harmonization has occurred in the border region in Mexico contributable to the agreement was, "no, there has been absolutely no upward harmonization in the border region." She said that many companies that have a problem with the environmental restrictions are simply relocating to China.

## Discussion

Ms. Sbert said the submission process in Articles 14 and 15 of the NAAEC and ensuing civil participation has led to specific instances of change in Mexico. The next section examines these instances and also explores Ms. Sbert's claim that Mexican NGOs have benefited from the agreement, and what impact this might have in regards to environmental procedure in Mexico.



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

On October 24, 1996 the CEC released the Cozumel Factual Record, the first factual record released under Article 14 of the NAAEC.[53] The petition, filed on behalf of the Mexican Center for Environmental Law, the International Group of One Hundred and the Cozumel-based Natural Resources Protection Committee, alleged that the Mexican Government failed to enforce its environmental law when it approved the Cozumel Cruise Ship Pier Project without a complete environmental impact assessment (Border Briefs 1997). The pier was being constructed in an ecologically sensitive coral reef area in Cozumel, Mexico and the petition claimed the assessment was incomplete because it dealt only with the construction of the pier in the water and not the impact of the port development on land (Garver 2001).

The initial reaction of the Mexican government to the creation of a factual record was hostile but this only led to greater publicity for the issue and "called forth a constituency supportive of the environmental case" (Kirton 2002, p. 5-6). Subsequent to the public outcry and release of the factual record the Mexican Government reversed their position and President Zedillo declared the Cozumel reefs to be a natural protected area. The Mexican Government also signed a collaboration agreement with the petition submitter to manage the protected areas around Cozumel, "More broadly, the case influenced the reform of Mexico's environmental law of 1996, created environmental awareness in the Cozumel region, and encouraged other cases to be sent through to the factual record stage" (Kirton 2002, p. 6). Gustavo Alanis-Ortega, president of the Mexican Center for Environmental Law, one of the submitters of the petition, concluded that in the Cozumel case the CEC's citizen "spotlight" had ultimately worked.

---

[53] See www.cec.org.



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

On June 23, 2003 the CEC released the Aquanova Factual Record on allegations that Mexico failed to effectively enforce its environmental law by allowing a shrimp farm in Nayarit, Mexico destroy mangrove forests and fill wetlands.[54] The original submission was filed on October 20, 1998 by Grupo Ecologico "Manglar" and asserts that the authorities have failed to effectively enforce legal provisions for the protection of rainforests specifically in regards to certain mangrove and migratory bird species, environmental impact requirements, wastewater discharge, and provisions on fisheries and the introduction of alien species.[55] Although it may be too soon to determine the effect the submission and the subsequent factual record might have on the environmental concerns discussed, the TRAC stated the submission catalyzed negotiations among the submitters, the developer, and local and environmental authorities that led to actions to reduce the impact of the farm's waste water discharge as well as a mangrove replanting program.

The Center for Strategic and International Studies claimed that the investigation of citizens' complaints from numerous NGOs in Mexico has given the Mexican Secretariat of the Environment and Natural Resources increased political leverage to deal with the detrimental effects of various projects on the environment in Mexico. International exposure through the CEC has strengthened the institutional capacity of NGOs in Mexico, which has lead to international funding for many of their activities (Gilbreath 2001). From 1996 to 2003, 109 non-profit community organizations in Mexico received

[54] See CEC Latest News: CEC releases factual record on Aquanova shrimp farm in Mexico. Montreal, 25 June 2003.
[55] See CEC Citizen Submission on Enforcement Matters: Aquanova. Mexico, 20 October 1998.



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

grants for local and area wide projects from the CEC through its North American Fund for Environmental Cooperation (NAFEC).[56]

According to observers, technical support and funding have paved the way for recognition in the international forum for Mexican NGOs and facilitated the exchange of technical expertise and information with both Canadian and American NGOs (Silvan 2004). Regular interactions among the CEC, government representatives and NGOs has also helped in the recognition of common agendas in Mexico, such as the loss of biodiversity, deforestation and the need to strengthen Mexico's institutional ability to address environmental concerns. Although obvious differences in priorities exist between Mexican environmental officials and Mexican NGOs, SEMARNAT[57] officials are "particularly supportive of the citizen submission process" (Gilbreath 2001, p. 34). SEMARNAT representatives assert that international attention spotlighting its own performance pressures other areas of Mexican government to conduct legitimate assessments of the environmental impacts from proposed construction projects. This pressure, applied through Articles 14 and 15 at the behest of various NGOs, has prompted Mexican officials to scale back some projects that would have caused significant environmental degradation (Gilbreath 2001).

The following are the results from the interviews: a + sign signifies the interview subject indicated the agreement was successful in addressing this criterion; a – sign signifies the interview subject indicated the agreement was unsuccessful in addressing this criterion; a* signifies the interview subject indicated this criterion was invalid; n/a indicates the criterion was not discussed in the interview.

[56] The NAFEC was discontinued in 2003.
[57] Secretari del Medio Ambiente y Recursos Naturales. This translates in English to Mexican Department of Environmental Affairs and Natural Resources.



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Table1. Interview Summary

| Criterion | Interview | | | | | | |
|---|---|---|---|---|---|---|---|
| | 1 | 2 | 3 | 4 | 5 | 6 | 7 |
| **Enforcement** | + | n/a | – | * | – | + | – |
| **Public Involvement** | + | + | n/a | + | + | + | + |
| **Upward Harmonization** | – | n/a | – | – | – | n/a | – |
| **Factual Records and Dissemination** | + | + | + | + | + | + | + |
| **Visibility, Awareness** | + | + | n/a | + | n/a | + | + |
| **Involvement of NGOs** | * | + | n/a | + | + | + | n/a |
| **Cooperation from National Governments** | n/a | n/a | – | – | +_ | | + |
| **Effectiveness of the CEC** | n/a | + | + | + | + | + | n/a |
| **Good Beginning** | + | + | – | + | – | + | n/a |
| **Interaction with NAFTA** | n/a | – | – | * | – | n/a | n/a |



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Table 1 illustrates that:

- Interview 1 and 6 found the enforcement criterion successful; 1, 3, 5 and 7 found it unsuccessful and 4 found it an invalid criterion as to the success or failure of the agreement.
- Interview 1, 2, 4, 5, 6, and 7 found the public involvement criterion successful.
- Interview 1, 3, 4, 5, and 7 found the upward harmonization criterion unsuccessful.
- All 7 interviews found the factual record and dissemination criterion successful.
- Interview 1, 2, 4, 6, and 7 found the visibility/awareness criterion successful.
- Interview 2, 4, 5 and 6 found the involvement of NGOs criterion successful and 1 found it invalid.
- Interviews 3 and 4 found the cooperation of national governments criterion successful and 5 found it both successful and unsuccessful.
- Interviews 2, 3, 4, 5, and 6 found the effectiveness of the CEC criterion successful.
- Interviews 1, 2, 4 and 6 found the good beginning criterion successful; 3 and 5 found it unsuccessful.
- Interviews 2 and 3 found the interaction with NAFTA criterion unsuccessful and 4 found it invalid.



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

# CHAPTER FIVE

## Conclusion

The NAAEC was created to address environmental concerns left out of NAFTA and to ensure that existing environmental regulations in all three participating countries, particularly in Mexico, were enforced. The objectives of the agreement included promoting mutually supportive environmental and economic policies, promoting transparency and supporting the environmental goals and objectives of NAFTA; which included promoting sustainable development. In order for the NAAEC to meet or attempt to meet these objectives, interaction with numerous NAFTA commissions and organizations by various institutions and groups, created by the NAAEC, to address a multitude of issues, would be necessary.

Interpretation of the results from Table 1 show that the interview subjects found the NAAEC successfully addressed 6 out of the 10 criteria. If each criterion is weighed equally in terms of the performance of the agreement then, overall, these results indicate the agreement had a 60% success rate. This would also indicate that the NAAEC was moderately successful in addressing environmental concerns. While these results may have answered the initial question in this study of how well the agreement addressed environmental concern, it would be misleading to interpret this to mean the NAAEC, on the whole, was successful as well.

Data concluded that the NAAEC was unsuccessful in interacting with NAFTA and evidence presented in the previous chapter shows that the CEC, the institution created by



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

the NAAEC and mandated to meet the objectives and goals of the agreement, has been shut out of virtually all meetings and negotiations with any NAFTA commission. On the criterion of enforcement Table 1 indicated the agreement was also unsuccessful, thus failing to live up to another of the fundamental objectives of the agreement. Interviews 1 and 6, who found this criterion successful, found it successful in specific instances but stated in their interviews that the overall impact was negligible.

The NAAEC was supposed to bring greater transparency to the free trade organizations of NAFTA, something it was also unable to do as a result of being shut out of the very organizations it was supposed to bring transparency to. Table 1 indicated the 3 criteria; public involvement, factual records and dissemination, and visibility/awareness, which all involve transparency, were successful, yet these criteria all dealt with the performance of the CEC as a function of the NAAEC, and were not a measure of the performance of the NAAEC as a whole. Therefore, while each criterion in Table 1 can be weighed equally as a measure of how well the NAAEC addressed environmental concern, each criterion does not carry equal weight as a determining factor of whether the agreement succeeded in meeting its initial objectives. Only by first effectively meeting the criteria enforcement and interaction with NAFTA both initial objectives of the NAAEC could the agreement, on the whole, be considered successful.

The NAAEC did not adequately address the environmental concerns as envisioned by the original negotiators who had hoped for a strong environmental agreement. The agreement was flawed from the beginning as the parallel status of the NAAEC, in effect, set the agreement up to fail. With no mandated authority to interact with the NAFTA commissions in any environmental disputes relating to trade, the NAAEC essentially



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

became an environmental smokescreen for NAFTA. NAFTA received a "green" label because of the NAAEC, yet it is not required to seek any type of environmental permission or even counsel from the CEC before making trade related decisions that impact the environment.

One of the events that catalyzed the environmental community to take action to make NAFTA "greener" was the GATT Tuna-Dolphin ruling. The environmental lobby wanted greater transparency and participation in the NAFTA decision making process involving environmental disputes to counter rulings like that one. In the early 1990's (and today) the structure of most neo-liberal trade agreements only allowed closed door judicial proceedings whose decisions were not subject to appeal, or even scrutiny, by any outside agency. Yet the NAAEC never adequately addressed this issue and without having environmental considerations adopted as an integral part of NAFTA procedures, it is doubtful it ever could, no matter how many "teeth" the agreement might have been granted.

NAFTA requires that companies meet the environmental regulations and standards of the country where they are doing business and the NAAEC, through the CEC, is mandated to ensure these national regulations and laws are enforced. One of the motivations behind Articles 14 and 15 of the NAAEC was to ensure that the environmental standards of a NAFTA country are enforced. Under Article 14 a private citizen or NGO can make a submission to the CEC that a company is not meeting their host countries environmental standards, the CEC can then investigate and, under Article 15, create a Factual Record. If the CEC Council agrees by a two-thirds vote, the Factual



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Record is released to the public in hopes that this will be sufficient to force the host country to take action.

The CEC has no police powers so the involvement of the CEC ends here. If the offending company still violates applicable laws and regulations and the host country chooses not to take action, the CEC has no authority to levy fines or penalties. Under Part Five of the NAAEC the CEC may levy a fine or impose sanctions if one country complains to the CEC that another country is not enforcing its own environmental standards, but this has never been utilized most likely because it is too politically volatile. These procedures are the primary methods available to the CEC through which both regulatory environmental enforcement (through the submissions process), and transparency (through the creation of a factual record were to be achieved.

The Articles 14 and 15 process is unique and has worked well in specific instances such as the Cozumel Factual Record, yet, by not allowing the CEC to take punitive action against a government or offending company on its own volition (since Part Five requires complaint by another government), there is no great incentive for governments or companies to cooperate, and the NAAEC again falls short of meeting desired ends (which in this case is increased regulatory enforcement). In addition, under Article 14, for a submission to advance towards a factual record the individual or group who filed the submission must have exhausted all civil process for complaint in the respective country. By the time the Factual Record is created the respective government is aware of the issue and if it has not yet acted, it is unlikely that it would unless the publicity generated enough pressure to make it in the best interest of the government to do so.



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

From the onset of the agreement these shortcomings in the NAAEC were criticized and are why the agreement has often been referred to as "toothless" and why many political analysts maintain the NAAEC was created to give political cover to pro-trade democrats in the U.S. for their NAFTA "swing" vote (Fitzmaurice 2003). It is difficult to argue with this conclusion given the fact that, in addition to these limitations, the CEC has an annual budget of only $9 million (US) with which to meet all the mandates of the agreement, with no automatic increases without first petitioning the participating governments for more funds. This limitation all but ensures the NAAEC can do very little towards meeting its goals and objectives. Wesley Smith from the Heritage Foundation, in an early assessment of the agreement, wrote, "Although these side agreements are troublesome and establish worrisome precedents, the protectionists are correct: they are largely meaningless" (1993).

Interview 4 (Ward) indicated that the criteria of enforcement and interaction with NAFTA were invalid as measurements of success for the NAAEC. In his interview, Mr. Ward said that the agreements were new and experimental and that what is important is not whether the NAAEC succeeded or failed overall, but to take what worked from the agreement and learn from the mistakes. The data suggests what did work from the NAAEC was the effectiveness of the CEC, public involvement, factual records and dissemination, visibility/awareness and the involvement of NGOs.

Evidence presented in the previous chapter showed that the positive aspects of the agreement almost all came from functions of the CEC. Even though the CEC was excluded from most of the NAFTA institutions it moved forward with its own initiatives and mandates, pursuant to Articles 10-16 of the NAAEC. It was in this approach that the



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

CEC implemented the criteria the interview subjects found successful. Although the NAAEC may have failed to live up to its initial objectives, this agreement created the CEC which the data suggests has been successful, despite the limitations placed on it by the initial structure of the NAAEC.

Articles 14 and 15 may not have brought transparency to NAFTA institutions but they have been used effectively by the CEC, particularly in Mexico where, previously, private citizens or groups had no recourse for these types of complaints. The process of preparing a factual record has, in each case, led to attention being drawn to specific areas of environmental concern, which led to a dialogue seeking cooperative solutions in the Aquanova case, and the Cozumel Factual Record instigated policy change in the region.

The Article 13 Secretariat reports have also been used judiciously and to good effect. These reports have been referred to as the "Roving Spotlight" which can be used, at the discretion of the Secretariat, to investigate and prepare reports under the CEC's own initiative (Kirton 2002). The five reports prepared thus far, despite some criticism, have been praised in the environmental and scientific community for their thoroughness and high quality. Conceivably the most important accomplishment of the Article 13 reports is that they have shown that cooperative solutions can be accomplished by seeking input from, and bringing together, a variety of stakeholders in both government and the private and public sectors.

The preparation of the Secretariat reports brings attention to the concerns being investigated in the same manner as a factual record. Yet the Article 13 reports go much further than the factual records, they not only give recommendations on how to proceed with corrective measures, they also point out what went wrong or what the threat is and



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

why. Of equal significance is that the purpose of the reports is not necessarily to confront governments or corporations with evidence of wrongdoing, but to move forward with cooperative solutions that accentuate positive linkages between trade and the environment and in the process allay some of the inherent fears of transparency that many in both the trade community and the member governments appear to have..

Recognizing the limitations of the NAAEC, the CEC has been effective insofar as it has increased civic participation and public awareness to environmental concerns in all 3 participating countries through the citizen submissions process, the Article 13 Secretariat Reports and its work programs, which in specific cases have led to policy changes. The CEC has evolved into a de facto environmental think tank and information center for North America that is increasingly being recognized by both public and private interests for the relevance of its information and for its cooperative approach in seeking solutions to environmental concerns.

The CEC is the silver lining to an otherwise ineffective environmental agreement. As current debates continue on possible free trade agreements between the U.S. and other Central and South American countries, the structure and success of the CEC should be emulated and included in these or any future trade agreement entered into by the U.S. The CEC has shown that cooperative solutions involving trade and environmental disputes are possible without polarizing the differing points of view.

If, however, environmental concerns are to be seriously considered in any future trade agreements entered into by the U.S. they need to be addressed within the text of the trade agreement itself. Incorporating environmental concerns within the text of the trade agreement will ensure that these concerns are addressed equally and alongside decisions



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

involving trade. Critics of this approach often claim that creating environmental standards within a trade agreement will restrict trade, yet the European Union which allows additional countries to join only after first meeting specific environmental requirements, has shown that this is not true. The U.S., as the largest trading partner in any trade agreement it enters into, is in a position to make sustainable development a prerequisite of partnership, rather than an abstract concept, for any country hoping to gain access to U.S. markets.

If we assume that NAFTA was inevitable then it was probably better off with the NAAEC than without it and, while a stronger agreement with more "teeth" might have been possible, the majority of the interview subjects as well as other opinions presented in this study believed this agreement was the best that could be obtained at the time.

This begs the question, of course, as to whether the environment would have been better off without NAFTA at all. All that can be said in this regard is that the NAAEC, as it is constituted, is not capable of providing the level of environmental protection originally sought by members of the U.S. Congress and those NGOs who supported the agreement.



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

# WORKS CITED

Abel, A. 2003. NAFTA's North American Agreement for Environmental Cooperation: A Civil Society Perspective. *Americas Program, Interhemispheric Resource Center.* Silver City, NM. (March).

*Agreement on the European Communities.* 1994. Council on the European Communities arts. 1, 73 and 74.

Audley. n.d. Environmental Interest Group Participation in NAFTA. <http://www.ap.harvard.edu/mainsite/papers/tne/audley/audley.html>.

Audley, J. J. and E.M. Uslaner. 1994.NAFTA, the Environment, and American Domestic Politics. 4 *North American Outlook* 30. In Johnson and Beaulieu 1996, 29.

Block, G. 2003. A North American Agenda for Action. Chapter 2 in *Greening NAFTA.* Markell and Knox, 25-37. Stanford CA: Stanford University Press.

Border Briefs 1997. Cozumel Factual Record A Victory for Transparency, if not for Environment. *Americas Policy.* Borderlines 41, vol. 5; 11. (11 December).

Brundtland, H.G. 1987. *Our Common Future: The World Commission on Environment and Development.* Oxford: Oxford Press.

Buccini, J. n.d. North American Cooperation on Persistent Organic Pollutants. <www.chem.unep.ch/pops/POPS_Inc/proceedings/abu-dhabi?BUCCINI3.html>.

Bugeda, B. 1999. Is NAFTA Up to Its Green Expectations? Effective Law Enforcement Under the North American Agreement on Environmental Cooperation. 32 *University of Richmond Law Review.* 1591 (January).

Canadian Environmental Law Association. 1992. NAFTA and the Democratic Process. *NAFTA Facts* (Toronto). In Johnson and Beaulieu 1996, 28.

Canovis, G. V. 2002. NAFTA and the Environment. *Denver Journal of International Law and Policy* Vol. 30:1. (February).

Charnovitz, S. 1994. The NAFTA Environmental Side Agreement: Implications For Environmental Cooperation, Trade Policy, And American Treaty making. *8 Temple International and Comparative Law Journal* 257.

Charnovitz, S. 1992. GATT and the environment: Examining the issues. *International Environmental Affairs* 4, 3: 203-33.



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Commission for Environmental Cooperation www.cec.org

Dagupta, S., B. Laplante, H. Wang, and D. Wheeler. 2002. Confronting the environmental Kuznets curve. *Journal of Economic Perspective.* 16 147-68. In Stern 2003, 21.

Dasgupta, S., H. Hettige, and D. Wheeler. 1997. What Improves Environmental Performance? Evidence from Mexican Industry. *World Bank Development Research Group.* (December).

Delagado, D. 1998. NAFTA: U.S., Mexico Still Need to Resolve Reciprocity Issues on Assessments. *BNA Daily Environmental Reports.* (July). In Knox and Markell 2003, 86.

Duquette, M. 1997. The NAFTA side-agreement on the environment: Domestic politics in the making of a regional regime. *Canadian Review of American Studies.* 27, 1: 119, 24.

Ferber, B., J. Ferretti, and L.M. Fischer. 1995. Building an Environmental Protection Framework for North America: The Role of the Non-Government Community. *Green Globe Yearbook of International Co-operation on Environment and Development* 83.

Fitzmaurice, M. 2003. Public Participation In The North American Agreement On Environmental Cooperation. *ICLQ 52.2, 333.* Oxford University Press.

Gallagher, K. P. 2001. Is NACEC a Model trade and Environment Institution? Lessons from Mexican Industry. Medford, MA: *Tufts University.* (October).

Gallagher, K. P. 2003. Assessing the Mexican Experience. Chapter 7 in *Greening NAFTA.* Markell and Knox, 117-132. Stanford, CA: Stanford University Press.

Garver, G. 2001. Factual record helped in Cozumel pier case, says submitter. *North American Commission for Environmental Cooperation.* Trio. (summer).

Gilbreath, J. 2001. Environment and Trade: Predicting a Course for the Western Hemisphere Using the North American Experience. *Center for Strategic and International Studies.* Washington D.C. (June).

Glickman, R. L. 2003. The CEC's Biodiversity Agenda. Chapter 4 in *Greening NAFTA.* Markell and Knox, 57-89. Stanford, CA: Stanford University Press.

Grossman, G. and Krueger, A. 1995. Economic Growth and the Environment. 110 *Quarterly Journal of Economics* 305-48. In Markell and Knox. 2003, 131; note 4.



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Housman, R. 1997. Reconciling Trade and the Environment: Lessons from the North American Free Trade Agreement. *RRojas Databank Journal* (January).

Housman, R. F., and P.M. Orbuch. 1993. Integrating Labor and Environmental Concerns Into the North American Free Trade Agreement: A Look Back and a Look Ahead, 8 *American University Journal of International Law Policy* 4.

Johnson, P. M. 2004. Global trade and the environment: Building policy integration in the post Seattle context. *Trio* (summer).

Johnson, P. M., and A. Beaulieu. 1996. *The Environment and NAFTA: Understanding and Implementing the New Continental Law.* Washington, D.C: Island Press.

Kennett, S. A. 1995. The Canadian Environmental Assessment Act's Transboundary Provisions: Trojan Horse or Paper Tiger? 5 *Journal of Environmental Law and Practice*, 263. In Knox and Markell 2003, 86.

Kibel, P. S. 2003. Comments to JPAC on CEC Council Actions Limiting Scope of Factual Records Prepared Pursuant to Articles 14 & 15 of NAAEC. Fitzgerald, Abbot &Beardsley L.L.P. 8, (September).

Kirton, J. NAFTA Dispute Mechanisms: An Overview. (Prepared for an Experts Workshop on "NAFTA and its Implications for ASEAN's Free Trade Area," Asian Institute, Munk Centre for International Studies, Toronto, 27 May 2004).

Kirton, J. 2002. International Institutions, Sustainability Knowledge and Policy Change: The North American Experience. Proceedings of the 2002 Berlin Conference. *University of Toronto.*

Knox, J. H. 2003. The CEC and Transboundary Pollution. Chapter 5 in *Greening NAFTA.* Markell and Knox, 80-100. Stanford, CA: Stanford University Press.

Knox, J. H. Comments on Lessons Leaned From The History Of The 14/15 Submissions Procedure. (Submitted to Regina Barba, Chair, Joint Public Advisory Committee. Montreal, Quebec, 22 September 2000).

Magraw, D. 1995. Evaluations of Mexico's Environmental Laws, Regulations, and Standards. In *NAFTA and the Environment,* 615. In Markell and Knox 2003, 19.

Magraw, D. 1994. NAFTA's Repercussions: Is Green Trade Possible? 35 *Environment* 14. (March). In Johnson and Beaulieu 1996, 123; note 2.

Markell, D. L., and J. H. Knox. 2003. *Greening NAFTA: The North American Commission for Environmental Cooperation.* Stanford, CA: Stanford University Press.



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Munton, D., and J. Kirton. 1994. North American Environmental Cooperation: Bilateral, Trilateral, Multilateral. *North American Outlook* 4 (March): 60-86.

*North American Agreement on Environmental Cooperation,* 8 September 1993, Canada-Mexico-United States, 32 I.L.M. 1480.

Raustiala, K. 2003. Citizen Submissions and Treaty Review in the NAAEC. Chapter 14 in *Greening NAFTA.* Markell and Knox, 256-273. Stanford, CA: Stanford University Press.

Reed, C., and M.E. Kelly. 2003. Cutting-Edge Analysis but Untapped Potential. Chapter 6 in *Greening NAFTA.* Markell and Knox, 101-117. Stanford, CA: Stanford University Press.

Schatan, C. 2003. The Environmental Impact of Mexican Manufacturing Exports under NAFTA. Chapter 8 in *Greening NAFTA.* Markell and Knox, 133-151. Stanford, CA: Stanford University Press.

Schuler, D. A. 1996. The NAFTA and the Environment: Trade, Diplomacy, and Limited Protection. *International Trade Journal* 10 (fall):353-377.

Seligman, D. 2001. "How NAFTA Expansion would Undermine Protection" *Sierra Club Responsible Trade,* (February).

Sierra Legal Defence Fund. 2003. Issues Related to the Articles 14 and 15 Process-Written Comments of the Sierra Legal Defence Fund for the JPAC Public Meeting on October 2, 2003. Vancouver, BC.

Silvan, L. 2004. CEC Makes a Difference in Mexico by Fostering Public Participation: The North American Free Trade Agreement has succeeded to address some environmental issues in Mexico. *North American Commission for Environmental Cooperation.* Tijuana. (June).

Smith, W. R. 1993. Assessing the NAFTA Side Agreements. *The Heritage Foundation* (September).

Stern, D. I. 2003. The Rise and Fall of the Environmental Kuznets Curve. *Rensselaer Polytechnic Institute.* Troy, NY. (October).

Stern, D. 1998. Progress on the environmental Kuznets Curve? 3 *Environment and Development Economics* 173-96. In Markell and Knox. 2003, 131; note 6.

Tarlock, D. and J. E. Thorson. 2003. What Role for the CEC? Chapter 12 in *Greening NAFTA.* Markell and Knox, 217-236.



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.

Ten Years of North American Environmental Cooperation. 2004. *Report of the Ten-year Review and Assessment Committee.* (June).

The Environmental Effects of Free Trade: Papers Presented at the North American Symposium on Assessing the Linkages between Trade and Environment 2000. *Commission for Environmental Cooperation of North America 2002.*

Vaughan, S. and G. Block. 2002. Free Trade and the Environment: The Picture Becomes Clearer. *Commission for Environmental Cooperation of North America.* Montreal, Canada.

Winfield, M. S. 2003. A Case Study in Environmental Policy Convergence. Chapter 3 in *Greening NAFTA.* Markell and Knox, 38-56. Stanford, CA: Stanford University Press.

Wirth, J. D. 2003. Perspectives on the Joint Public Advisory Committee. Chapter 11 in *Greening NAFTA.* Markell and Knox, 199-216. Stanford, CA: Stanford University Press.

Wold, C. 2003. Comments on Issues Relating to Articles 14 & 15 of the North American Commission on Environmental Cooperation. *International Environmental Law Project.* (October).

World Wildlife Fund. 1998. Emerging Issues at the Interface of Domestic and International Policy: Agriculture Trade and the Environment. *OECD Workshop on Emerging Trade Issues in Agriculture.* (October).



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.