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Gustavo Vega-Canovas

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NAFTA AND THE ENVIRONMENT[†]

GUSTAVO VEGA-CÁNOVAS*

INTRODUCTION

Mexico and the United States share both a long border and a long history of economic integration. Mexico is currently the United States' second largest trading partner after Canada, accounting approximately for ten to eleven percent of United States' exports and imports. The United States, on the other hand, is Mexico's dominant trading partner, accounting for more than two-thirds of both imports and exports and far outdistancing Mexico's trade with Europe, Japan, the rest of Latin America, and Canada. The United States is also the major source of foreign investment flows in the Mexican economy, accounting for more than seventy percent of the total. Labor market integration is also very high. Mexican migrant labor has had a large impact on the United States economy by increasing the labor supply –an effect probably greater than that arising from increased United States-Mexican commodity trade, foreign investment or financial transactions. At least ten percent of the growth of the United States labor supply since World War II is due to Mexican migrants.

Not all of the impacts of this deepening integration between both countries, has been beneficial. In recent decades and especially since the inception of the Maquiladora program in the mid-sixties, the environment has become a highly charged regional issue, particularly in urban clusters along the United States-Mexico border. Whether it is the dumping of raw sewage, over irrigation, or overuse of fertilizers, environmental policies and practices in each country affect its neighbor. According to recent estimates, environmental conditions have worsened

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* Professor, Center for International Studies at El Colegio de México, Mexico City, Mexico; and Visiting professor and Associate Director of the Center for North American Studies, Duke University, 1998-1999. He is presently a member and chair of the review panel for the Final Determination of the Mexican Ministry of Trade and Industrial Promotion concerning the imports of High Fructose Corn Syrup from the United States File MEX-USA-98-1904-01 and is also member of the National System of Researchers (SNI) of the Education Ministry of Mexico.

along the United States-Mexico border over the past decade. Explosive growth has created new jobs and raised incomes, but it has been accompanied by more pollution.

Worsening conditions in the environment along the United States-Mexico border date back to the 1970's and deteriorated even further during the "lost decade" of deep economic crisis in Mexico in the 1980's. It shouldn't be surprising that the proposal to deepen economic integration through a North American Free Trade Agreement (NAFTA) provoked such a sharp opposition from the environmental community in the United States. According to environmental groups, the increased industrial growth that NAFTA would produce would further deteriorate Mexico's environmental infrastructure, lax enforcement of environmental laws would encourage "environmental dumping" and increased competition would provoke a "race to the bottom," a weakening of environmental standards in all three countries. They demanded that any trade agreements should include strong safeguards against real or potential abuses.

NAFTA was initially opposed by most major United States environmental groups, and environmental group opposition was a significant factor influencing opposition by many democratic members of the United States Congress. From the onset of NAFTA negotiations, Democratic members of Congress pressed the Republican administration of past-President George Bush, senior, to make NAFTA more environment-friendly, and the Bush administration negotiated some basic provisions protective of the environment with the governments of Canada and Mexico. As part of his presidential campaign, past-President William Clinton proposed the negotiation of supplemental agreements on the environment and labor.

When President Clinton entered office, a majority of members of Congress were democrats. However, because a substantial number of Democrats in Congress opposed NAFTA, the President's strategy for seeking approval of the agreement was to maintain support for it among Republicans, while persuading moderate Democrats to vote in its favor. The Republicans were largely opposed to including environment or labor related provisions in NAFTA. The moderate democrats demanded such provisions. To satisfy both constituencies, the President chose to negotiate two supplemental agreements which gave the impression of addressing environmental and labor concerns, but which would not threaten to impose any significant costs on United States business enterprises. Clinton also chose not to spend large sums of federal money on improving conditions in United States and Mexican border communities. In the absence of a United States commitment to a regional bank, Canada and Mexico preferred a less confrontational approach to dealing with environmental issues in the region and did not agree to key United States demands, particularly enforcement provisions. Thus, the NAFTA side accord on environment did not

deliver on some of Clinton's ambitious environmental promises. Such a situation has meant that major environmental groups which initially supported NAFTA and the parallel side agreements have become increasingly dissatisfied with government efforts to deal with environmental issues in the region and have since opposed new trade initiatives.

Do the last seven years since NAFTA and the parallel side agreements went into effect, justify the criticisms of environmental groups?

This paper, attempts to respond to this question by analyzing the terms of the North American Agreement on Environmental Cooperation (NAAEC) and its implementation history.

THE NAAEC

Both the NAAEC and the North American Agreement on Labor Cooperation (NAALC) have a common background, institutional framework, general norm structure and more or less a similar implementation history. These commonalities are partly explained by the fact that both agreements were negotiated out of the political necessity to gain political support for NAFTA from the United States Congress and not a genuine political commitment to address regional environmental and labor issues. This fact in turn explains the limited impact of the institutional mechanisms contemplated in the NAAEC and the NAALC. The following discussion focuses on the environment related agreement: the NAAEC

The NAAEC was created to establish a "framework . . . to facilitate effective cooperation on the conservation, protection and enhancement of the environment" ¹ and set up an institution, the North American Commission for Environmental Cooperation (CEC) to facilitate joint activities and mediate environmental disputes.

Part 1 of the NAAEC comprises an ambitious set of objectives including the protection and improvement of the environment, the promotion of sustainable development, and enhanced compliance with and enforcement of environmental laws. Part 2 imposes on the parties to periodically issue reports on the state of their environment, to develop environmental emergency preparedness measures, to promote environmental education, to develop environmental technology and scientific research; to assess environmental impacts; and to "ensure that [their] laws and regulations provide for high levels of environmental protection."¹

1. North American Agreement in Environmental Cooperation (NAAEC), Sept. 14, 1993, 32 ILM 1480, 1482; Preamble, available at <http://www.naaec.gc.ca/english/resource/Download/naaec.doc> (last visited October 23, 2001).

Part 3 of the NAAEC establishes the CEC with three components: the Council; the Secretariat; and, the Joint Public Advisory Committee (JPAC). The Council consists of the three environment ministers of the parties, and is the executive decision-making body of the CEC. The Secretariat serves at the direction of the Council and its officials are independent of the party governments. The NAAEC establishes an inter-party dispute settlement mechanism that permits claims based on an allegation of persistent failure to enforce environmental laws. A party that is found to have consistently failed to enforce such laws is expected to devise and implement an "action plan" to remedy this situation. If an action plan is not accepted or implemented, a monetary fine may be imposed on the recalcitrant party. The maximum fine is a modest amount and it is to be expended at the direction of the Council to remedy the situation of non-compliance in the defaulting party

In addition to the inter-party dispute settlement mechanism, private parties (including interest groups) may file petitions with the Secretariat requesting the preparation of a "factual record." If certain threshold requirements are determined by the Secretariat to be met, the Secretariat will request the Council to authorize the preparation of a factual record. The Council may approve the recommendation to prepare a factual record by a two-thirds vote. The Secretariat is responsible for developing and preparing the factual record, and submitting it to the Council. The Council may approve the publication of the factual record by a two thirds-vote.

THE NAAEC IMPLEMENTATION HISTORY

When one carefully studies the different provisions of the NAAEC and takes into account its implementation history so far, several observations can be made:

First, the NAAEC parties are not subject to specific requirements in terms of environmental protection. Each party is free to determine its own level of protection and to modify its rules. In other words, this main substantive obligation was deliberately drafted to be imprecise. It was clear to all governments involved in the negotiations that the US was not seeking an agreement which would impose significant compliance obligations.

The Secretariat may prepare and publish a "factual record". The publication of a factual record serves a transparency and publicity function. While NAAEC governments may alter their behavior based on adverse publicity, there is no legal obligation that arises from the publication of an adverse factual record. Intergovernmental dispute settlement in the context of the NAAEC is limited to claims that a party has persistently failed to enforce its environmental laws. This standard has been difficult and will be difficult to apply. Only in rare circumstances do governments persistently enforce their laws, relying

instead on voluntary compliance by most persons. It shouldn't be a surprise therefore, that so far there have been no initiatives regarding persistent failure to enforce environmental law, and hence this mechanism remains untested.

Second, the NAAEC did not mean to change and has resulted in little change in the identity of persons who make environment-related decisions in the country-parties. Political decisions relating to the environment in each country-party continue to be made by the relevant authorities responsible for the environment before the NAAEC entered into force.

The NAAEC has facilitated some interaction among NAFTA governments in respect to environmental matters. Representatives of the governments meet together on a regular basis in various NAAEC fora. The NAAEC institutions have had success in establishing a range of research and cooperation programs with respect to the North American environment. The CEC in particular has developed specific programs and project implementation in five priority areas:

Pollutants and Health. Projects in this area include the identification of priority pollutants and development of action plans to reduce the risks associated with toxic substances;² the elaboration and publication of an annual North American Pollutant Release and Transfer Register (PRTR); training programs to enhance pollution prevention; and development of tools to monitor and improve North American air quality

Environment, trade and the economy. This program identifies links between environmental variables and economic indicators and reports on NAFTA-environmental effects;³

Environmental Conservation. The purpose of this program is to promote the protection and conservation of North American biodiversity;⁴

Enforcement. The program monitors and reports on the

2. Actions plans were established to phase out four pollutants: chlordane, DDT, PCBs and mercury.

3. Phase I of this program identified four major linkages between the NAFTA and environmental changes in Canada, Mexico and the United States Phase II will develop a general analytical framework to assess the environmental effects of NAFTA through the study of specific issues in key sectors such as automotive-transportation, energy-petrochemicals, and forestry. Environmental impact studies on maize in Mexico, cattle feedlots in Canada and the United States and electricity in the three NAFTA countries were used to test and refine the framework for analysis of the NAFTA effects.

4. Projects in this area have identified important resting and nesting areas for migratory birds and developed ecoregion maps to assess their conservation status and water resources. This program also developed a North American Biodiversity Information Network to link the databases of various agencies and make biodiversity information accessible to the public

implementation and enforcement of environmental standards and promotes regional cooperation to improve environmental laws and regulations;

Information and Public Outreach. The objective of this program is to promote environmental awareness and provide the general public with environmental information;

Even though the CEC was devised not to effect any change in the way environmental policy is carried out in the three countries, the CEC has managed nevertheless to produce some change in intergovernmental conduct in developing Article 13 reports of which the CEC has produced 3 so far;⁵

Of these three, the most significant has been the investigation of the death of migratory birds in the Silva Reservoir in Mexico which concluded that Mexico, was not responsible for the problem.⁶ A scientific panel identified specific actions to deal with the issue, but the final CEC recommendation to the Mexican government was only to conduct a comprehensive evaluation and propose solutions. As a result of the Silva report, an action program for the State of Guanajuato was developed, the state's first environmental council was created, and workshops on the Turbio River and waste-water treatment were established.⁷

It is interesting to note that this report was a result of a petition filed with the CEC by the National Audubon Society, the Grupo de los Cien Internacional and the Centro Mexicano de Derecho Ambiental. The petition to the Secretariat was not submitted as a request for the preparation of a factual record, but was instead submitted as a request that the Secretariat prepare a report on an environmental matter. This approach was supposedly adopted by the NGOs to avoid creating a

5. NAAEC Article 13 permits the Secretariat to prepare reports within the scope of its approved annual work program, and to prepare reports "on any other environmental matter related to the cooperative functions of this agreement," unless two-thirds of the Council object. Such reports will be made publicly available, unless the Council unanimously decides otherwise.

6. Initial allegations concerning the cause of the deaths had suggested a single dumping of toxins by an unknown party, or a more systematic dumping of toxic wastes by a local industrial plant or plants. See Anthony DePalma, *Deaths of Birds in Mexico Lake Test trade Pact*, NY TIMES, June 8, 1995 at A4 and Anthony DePalma, *Treaty Partners Study Fate of Birds at Polluted Mexican Lake*, NY TIMES, Aug. 1, 1995, at B6.

7. The second report analyzed the long-range transport of air pollutants in North America. This report provided a technical basis that can be used for coordination of air pollution policies in North America. The third report examined the water base in the resting stops of migratory birds along the upper San Pedro River which originates in Sonora, Mexico, and runs north into Arizona. The report found that the current level of development of the aquifer is unsustainable, recommended specific measures for water conservation, and pointed out the need for a bi-national coordinating structures to produce and implement action plans.

confrontational atmosphere.

The results of the case seem to suggest that in a broad sense the NAAEC appears to have enhanced the capacity of domestic interest groups to engage national government decision-makers in international relations. The capacity of environmental groups afforded by the NAAEC to internationalize the Silva Reservoir problem may have facilitated a more satisfactory investigation and report on the incident than would have been forthcoming in the absence of the CEC. Without the CEC, the matter would likely have been pursued through charges and countercharges between Mexican government authorities and NGOs, played out before the press. Significantly, the CEC provided a mechanism by which a major United States-based environmental organization was able to coordinate an investigation in Mexican territory with the cooperation of the Mexican government.⁸ Prior to the establishment of the CEC structure, it is doubtful that the National Audubon Society would have been able to pressure the United States Environmental Protection Agency (or USTR) to persuade the Mexican government to allow a trilateral team of scientists to investigate the incident.

The NAAEC may have altered political relations between Mexico and the U.S. by providing a framework in which the EPA could more legitimately claim to examine Mexico's international governance. Also at the domestic level, it seems unlikely that the Mexican government would have responded seriously to a petition from Mexican environmental interest groups absent the internationalization of the incident.

CONCLUSION

This conclusion that NAAEC appears to have enhanced the capacity of domestic interest groups to engage national government decision-makers in international relations and indirectly influence government policy seems to hold also in the case of the processing of citizens submissions and developing factual reports pursuant to Articles fourteen and fifteen of the NAAEC. The CEC can investigate citizens' complaints about national enforcement of environmental laws. Between 1995 and August 2000, twenty-eight citizens' submissions on enforcement matters were registered: nine regarding Canadian enforcement, eleven regarding Mexican enforcement and eight regarding United States enforcement.

8. It is worth pointing out that when the CEC created the panel of experts composed of scientists from the three NAFTA parties to investigate, report and make recommendations on the matter, the Mexican government welcomed the appointment of the team.

The Secretariat ruled that seven of these submissions did not warrant the cost of developing a factual record, one submission was withdrawn by the submitters and in four cases the Secretariat informed the Council that submissions warranted developing a factual record. The Council instructed the Secretariat to prepare a factual record in the Cozumel Pier case against Mexico, The British Columbia hydroelectric dams case against Canada and the Tijuana smelter case against Mexico. The Council voted down the development of a factual record on the Quebec animal production pollution case against Canada. Two factual records have been published to date.

After the Cozumel factual record was compiled, the Council did not make any recommendation to the Mexican government. Despite the lack of action of the Council on this matter and the initial disregard of the record by the Mexican government (which permitted the work to continue), this submission yielded some positive results; it prevented the development of a larger tourism infrastructure; it pushed the Mexican government to declare Cozumel island a protected natural area and most importantly it involved civil society in ecological regulation of the island.