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**Evaluating the Effectiveness of the North American Agreement on Environmental
Cooperation (NAAEC): Towards a Holistic Approach**

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A Thesis in the
Department of Political Science

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Canada

Abstract

Evaluating the Effectiveness of the North American Agreement on Environmental Cooperation (NAAEC): Towards a Holistic Approach

Leonor Alvarado López

This paper examines the effectiveness of the North American Agreement on Environmental Cooperation (NAAEC) and its impact on the environmental conditions in the North American region resulting from increased trade activity driven by NAFTA. An initial review of international regime theories facilitates the assessment of the political effectiveness of the regime in solving the problems that originated its creation. This is followed by a review of contemporary ecosystem-based regime theories, as well as the links between liberalized trade and the environment to complement the analysis. An emphasis is placed on the ideological underpinnings dominating the trade-environment debate, by decomposing the neoliberal discourse behind the pro-trade position. A political economy approach in the understanding of the origins of environmental problems provides support for the argument that the free market ideology behind NAAEC is in direct contradiction with the concept of sustainability, making it impossible for the regime to meet the criteria for ecological effectiveness. It is further argued that the structural and power deficiencies inherited from the negotiation process hinder the effectiveness of the regime. This paper makes a case for increased public participation in the decision-making mechanisms of NAAEC as a necessary condition to counterbalance the excess political power of the trade elites.

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Evaluating the Effectiveness of the North American Agreement on Environmental Cooperation (NAAEC): Towards a Holistic Approach

Introduction

The negotiation of the North American Free Trade Agreement (NAFTA) in the early 1990's provoked virulent reactions among environmental and labour groups in the United States, where these two previously antagonistic groups united to form a strong opposition to the Agreement in the Senate¹. The media coverage of the environmental and social problems in the U.S.-Mexico border-trading region solidified the largely negative public perception of the links between trade liberalization and the environment. As a result, this historical circumstance created a unique opportunity for environmental groups to modify the political agenda for trade policy negotiations to include environmental issues. Environmental groups had a sudden ability to access to key members of Congress, and used this opportunity to overcome some of the most onerous trade rules and procedures typical of the growth-oriented framework in which the agreement was negotiated. The extraordinary political compromises between environmental groups and trade advocates that resulted were crystallized in the unprecedented environmental provisions contained in the trilateral trade agreement, which entered into force in January 1994. Because of these provisions, some consider NAFTA as the *greenest trade agreement ever*.

¹ Environmental and Labour groups enjoyed a political leverage to modify the political agenda for trade policy negotiations to include environmental issues, given by the unique circumstances surrounding Fast Track reauthorization in the United States. For a detailed account of these circumstances, see John Audley, *Green Politics and Global Trade: NAFTA and the Future of Environmental Politics*. (Washington: Georgetown University Press, 1997)

Responding to public pressure, presidential candidate Bill Clinton pledged not to implement NAFTA until a supplemental side agreement had been concluded, requiring each country to enforce its own environmental standards and establishing an *environmental protection commission with substantial powers and resources to prevent and clean up water pollution*². The North American Agreement on Environmental Cooperation (NAAEC) was thereby negotiated and signed in 1993³, augmenting NAFTA's environmental provisions and dispute settlement procedures.

NAAEC entered into force in 1994, to ...*foster the protection and improvement of the environment in the region, ...promote sustainable development... and... support the environmental goals and objectives of the NAFTA agreement*⁴. But the high expectations created during Clinton's 1992 presidential campaign quickly vanished, when his administration negotiated an accord that was poorly funded and with no enforcement powers. Instead, a broad mandate of "environmental cooperation" was chosen for the new agreement, thus diluting the original intentions for a strong environmental NAFTA watchdog. The North American Commission for Environmental Cooperation (CEC) was then established, as part of the regime's institutional structure, comprised of a Council of Ministers of the Environment, a Secretariat and the Joint Public Advisory Committee (JPAC). Despite the remarkable institutional innovation that signified the inclusion of a public advisory body as part of the regime's decision-making structure, NAAEC's

² Speech at the Carolina State University, 4 October 1992. Cited in NAFTA and the Environment: Seven Years Later. Cited in Gary C. Hufbauer et al., Institute for International Economics. Policy Analyses in International Economics Series. No. 61, October 2000.

³ Another agreement on labor cooperation was also concluded and signed. However, the study of that regime remains beyond the scope of this paper.

⁴ North American Agreement on Environmental Cooperation, Article 1a),1b),and 1d).

performance has been very controversial and its results have been mixed.

In particular, the regime has been criticized for the lack of enforcement powers regarding environmental regulations, lack of transparency in the decisions of the Council and the weak institutional links between the NAFTA Secretariat and the CEC to address environmental issues arising from increased trade in the region. Most of all, the startling results of the disputes presented under NAFTA's Chapter 11 have brought attention to the CEC's inability to deal with contentious trade-environment issues involving NAFTA Parties. Chapter 11 contains NAFTA's investor's provisions, under which corporations are given citizen status, allowing them to challenge in court any governmental measure that could have a negative influence in their profits – including environmental regulations.

This paper is concerned with the effectiveness of the North American Agreement on Environmental Cooperation and its impact on the environmental conditions in the North American region resulting from increased trade activity driven by NAFTA. Three main ideas will guide this research.

First, the ideological foundation behind both agreements, mainly free market capitalism, is in direct contradiction with a holistic notion of sustainable development, making it impossible for NAAEC to meet the criteria for ecological effectiveness⁵. Its

⁵ The findings in this paper relate only to one case study, and any generalizations would therefore be biased. Some scholars believe that the type of capitalism exercised in the European Union allows for supranational environmental regulations that effectively protect the environment from adverse impacts arising from trade activity in the EU. While debatable, it is not under the scope of this paper to present a counter-argument. Rather, a clarification of what is meant by capitalism in this paper should suffice. Capitalism here refers to the social system involving two naturally given resources, land and labour, and a third, which is man-created, capital, to produce goods and services that people consume to ensure their intergenerational reproduction and survival with a desired quality of life. The accumulation of wealth is the

preambular rhetoric of sustainable development notwithstanding, NAFTA was intended to promote intraregional economic integration, and as such, it privileges trade and investment over the environment. National environmental regulations are thus suspect, and they must prove they are not cleverly disguised as barriers to trade if they are to be enforced.

Second, the effectiveness of the regime is hindered by the fact that NAAEC is an appendage to the larger, more preponderant NAFTA accord. The post-NAFTA environmental regime's capacity to cope with trade-related challenges suffers from fundamental structural and power deficiencies, including the lack of enforcement powers and resources, lack of political independence and lack of political will. It will be argued in this paper that the particular circumstances that gave origin to the regime forced trade elites into a political compromise that was never intended to be fulfilled. Once the initial opposition was overcome, it was no longer necessary to yield to the environmentalists' demands and a weak NAAEC was negotiated instead. As a result, NAAEC was not designed to act as the NAFTA environmental watchdog as environmental groups demanded, but rather, a soft-core version was signed with unclear objectives of "environmental cooperation", no enforcement capabilities and inadequate financial resources.

motor of the system, which is derived from the profits of production. Profits derive from the difference between the cost of producing the goods – which includes wages, cost of marketing and distribution, etc – and the price at which the good is sold. One of the most salient features of capitalism is that producers produce for sale, not for their own consumption, and this production does not necessarily respond to the real needs of consumers. The nature of the system is non-static, which means that it cannot sustain equilibrium with the environment. For a thorough analysis of the mode of production and its relation to the environment, see R. J. Johnston, *Nature, State and the Economy: A Political Economy of the Environment*. (London: Belhaven Press, 1989; reprinted Chichester: John Wiley, 1996).

An initial focus will be a review of international regime theories and their treatment of Multilateral Environmental Agreements (commonly known as MEAs), to assess the political effectiveness of the agreement in solving the problems that gave origin to its creation. A review of contemporary ecosystem-based theories, as well as the links between liberalized trade and the environment will complement the theoretical framework that will facilitate the analysis. An emphasis is placed on the ideological underpinnings dominating the trade-environment debate, by decomposing the neoliberal discourse behind the pro-trade position. Using a political economy approach to understand the origins of environmental problems will uncover the fundamental contradiction between the rationale behind trade liberalization – mainly the expansion of markets to increase profits, and the claims that liberalized trade can in fact improve the environment through the promotion of cleaner technologies.

A third, but more subtle argument is related to the role of the public in changing environmental policies. NAAEC's mechanism of public participation could very well be the trigger for a profound transformation of the current international trade regime as we know it today, as the "global citizen" understands the power that it can exercise when there is a coordinated and coherent opposition to unfettered capitalist ambitions.

In order to understand the deficiencies behind NAAEC, we must first understand NAFTA in terms of the contemporary process of globalization in which it occurred, where the driving force behind economic policy is the ideology of free market capitalism. Within this context, the interests of international capital subdue the economy, thereby separating the social equation from the economic development formula. This is

particularly critical for environmental policy making because decisions are often based on inadequate cost-benefit analyses that fail to incorporate the complexities of the interlocking systems and sub-systems that form an ecosystem.

The creation of environmental problems is not only a consequence of human struggle for survival, but is also increasingly a product of the predominant mode of social organization (capitalism) through which that struggle is coordinated collectively. The fundamental link between the economy and the environment is that they are both interdependent: the environment sustains economic activity, and economic activity has an impact on the environment either through resource depletion, through pollution or through both. Because the environment operates as a vast complex of interlocking systems and sub-systems, environmental problems must be countered collectively, rather than individually. However, such collective control would require mitigating the demands made on the environment by the unceasing quest for greater profitability in the production and circulation of commodities. In a profit-driven economy, this would entail constraining the mode of production, which in turn may result in its demise. So profitability must be promoted, to maintain economic stability, which means promoting further environmental stress. Institutions and their structures therefore have a crucial role in the coordination of collective action necessary to counterbalance the preponderant power of private economic interests.

In as long as the NAAEC regime does not effectively address these issues, and represent a countervailing force against the interests of the trade elites, it will fail to solve the problems that gave origin to its creation. A necessary condition for this to happen will

be a shift in priorities in the domestic policies of the three Parties – an unlikely but possible event. As this paper will suggest, a dim hope lies in the active role that citizens are assuming in the decision making process of the CEC, inspired in part by the anti-globalization movement that is challenging mainstream economics worldwide.

Chapter 1 – Negotiating NAAEC

NAAEC Antecedents

In the spring of 1990, Mexico's President, Mr. Salinas de Gortari, officially requested to undertake negotiations of a Free Trade Area with the United States. Canada requested to be included in the negotiations in June of the same year, afraid that the American–Mexican initiative would impose the economic and political consequences of the agreement on Canada without their having a proper say [Johnson & Beaulieu, 1996:3].

The proposal was met with strong opposition from labour and environmental groups in the U.S.⁶. Worsening conditions in the midst of urban growth along the U.S.–Mexico border, particularly along the Maquiladora trading region, prompted environmental and labour groups to campaign against the signature of the Agreement, unless certain conditions were met. For the first time, environmentalists and labour groups – two antagonistic groups otherwise – gathered enough forces to pressure certain elements within the U.S. Congress to reject the agreement.

After almost two years of intense negotiations, NAFTA was finally signed in December of 1992, and entered into force in 1994. Labour and environmental groups had agreed to support NAFTA once the Clinton administration vowed to negotiate two different side agreements that would address the weaknesses in the trade agreement. A

⁶ Environmental groups and voters, traditionally not concerned with trade, mobilized against efforts to further trade liberalization after a panel ruled against the U.S. over the Tuna-Dolphin case in 1991 at the General Agreement on Tariffs and Trade (GATT). The ruling against the U.S. ban on imports of tuna caught in nets that killed dolphins motivated a tremendous public outcry, and environmental groups vowed not to let this happen again.

year later, the North American Agreement for Environmental Cooperation (NAAEC), together with an agreement on labour cooperation were signed just in time to enter into force along with NAFTA in January 1994.

From the environmental point of view, NAFTA was a sharp departure from previous free trade agreements in the region, which had only addressed tangential economic affairs. For the first time in history, an international trade agreement included provisions aiming to protect the environment from degradation resulting from increased economic activity. NAFTA's environmental provisions and the role played by U.S. environmental organizations are the products of the institutional relationship between these organizations and the political actors involved in NAFTA's negotiations. This relationship empowered environmental organizations with a political leverage not seen before and granted them access to members of the political regime responsible for making and implementing U.S. trade policy [Audley, 1997:3].

In order to assess the efficiency of NAAEC, it is crucial to examine the nature of the negotiations that led both to NAFTA's approval by the U.S. Congress and the signature of NAAEC. The following section describes this process as it occurred in the three nations.

United States

In 1992, candidate Bill Clinton's initial criticism of NAFTA was partially based on environmental grounds, hence supporting the idea of addressing environmental (and labour) concerns through specific side agreements. By 1993, when he became the U.S. President, the number of environmental organizations involved in the NAFTA debate had

grown steadily. It became clear to U.S. trade officials that a trade agreement opposed not only by the usual groups such as trade unions and protectionists but also by the environmental community would never be passed in Congress. The fact that the U.S. held a presidential election in 1992 helped to empower labour and environmental interests, weaken business interests, and compelled a commitment from candidate Clinton that continued beyond the election into his presidency [Mayer, 1998: 167].

These historical circumstances and the political sequence of events that followed created a unique opportunity for environmental and labour groups to modify the political agenda for trade policy negotiations to include both environmental and labour issues in the text. The source of political leverage used by environmental organizations during negotiations was their ability to present a strong opposition to NAFTA. Environmental organizations were able to obtain some concessions, such as the signing of the North America Agreement on Environmental Cooperation (NAACE) and the establishment of a Commission for Environmental Cooperation (CEC). However, environmental concerns over trade policy lacked the leverage to substantively alter the norms and principles of trade policy. At the end, environmental issues were not pivotal to the voting decisions of members of Congress as the consensus among the opposing groups began to wane⁷.

Consistently resisted by traditional trade policy elites, unwanted by both Mexico and Canada, environmental groups were forced to accept substantially less than they had originally hoped to achieve or risk losing any improvements in trade policy. The

⁷ Labor groups began to negotiate separately, and the environmentalists were deeply divided on the issue of whether NAFTA would be beneficial for the Environment as long as it granted the creation and transfer of cleaner technologies to Mexico.

domination of the powerful symbol of free trade and the demands for constantly expanding economies from the trade elites would not be replaced by environmental norms that suggested limits to the scale of human activity.

Canada

In Canada, the negotiation process of NAFTA followed a different path. During the Canada-U.S. Free Trade negotiations, there was no acknowledgement of the environment, which sparked strong criticism against the Canadian government and the Environment Minister at the time, Mr. Tom McMillan [Page, 1992:10]. As a result, the new Environmental Assessment and Review Process Legislation (EARP) was developed between 1990 and 1992, which served as a background to the Canadian process. NAFTA was one of the first policies to be subject to this new policy assessment.

The Canadian environmental review came at a time when the American environmental review was well underway. The EPA process was highlighted by public consultation hearings held in six major cities, after which a document was finalized for presentation to the Government. Ottawa rejected this type of public consultation, and instead favored an inter-departmental model, where open public scrutiny was ruled out [Page, 1992:10]. The Interdepartmental Review Committee was formed with wide representation from External Affairs – which played an important role in liaising with the various stakeholders: Energy Mines and Resources, Department of the Environment, Finance, Fisheries and Oceans, Forestry, Industry Science and Technology, and Transport. In addition to the formal committee, there was a technical and scientific advisory body put together by Environment Canada.

Through late 1991 and the first eight months of 1992, the Review Committee, linked directly to the International Trade Advisory Committee (ITAC) – an advisory body made up primarily of CEOs of major exporting companies – and the sectoral advisory committees (SAGITs) went through a series of drafts on the environmental implications of NAFTA. The Review Committee had a dual mandate: first, it had the responsibility to advise the negotiators on the environmental implications of the various options being considered at the negotiating table. Secondly, the Review Committee had to produce an environmental review of NAFTA to be considered by Cabinet along with the final trade agreement. After pressure from environmental representatives on ITAC and SAGITs, the final report was released in its entirety [Page, 1993:11].

Trade advocates were predictably comfortable with the report, while environmental NGOs were very sceptical. For instance, the review recognized that quantitative analysis of the effects of NAFTA was impossible given the number of uncertainties involved. ENGOs asserted that the analysis was flawed, optimistic and sometimes misleading, because the Canadian Review tended to claim as victories attributable to NAFTA issues that were not even covered in the agreement. Environmentalists cited the treatment given to greenhouse gas production as one particular example, since the Canadian Review referred to “the initiatives” to limit the production of these gases, yet none of the initiatives mentioned had anything to do with NAFTA. It also predicted no significant increase of burning fossil fuels in Canada, despite the strong correlation between economic output and greenhouse gas production and the fact that, without safeguards, freer trade could encourage environmentally undesirable means of production.

Mexico

The process in Mexico also had two parallel developments, although most North American analysts fail to take into account the position of the emerging Mexican environmental movement, spearheaded by the *Unión de Grupos Ambientalistas* and the *Red Mexicana de Accion Frente al Libre Comercio*.

The official position was tainted by distrust and suspicion. As Mexico expected NAFTA to have been signed before the 1992 election, the idea of holding supplemental negotiations—from March to August 1993—was never welcomed [Gonzalez, 1999: 4]. Clearly, NAFTA had provoked extremely complex domestic politics within the U.S., which made it difficult to agree upon a national negotiating position on the environmental and labour issues. This situation in turn had an impact on the dynamics of the NAFTA negotiations, which became more complex as a result of the U.S. requests to include labour and environment [Mayer, 1998: 208].

When side issues (environment and labour) took greater precedence under the Clinton administration, Mexico's officials felt that U.S. values were imposed on the trilateral trade agenda⁸. The supplemental negotiations placed the Mexican trade officials at a disadvantage. The re-negotiation that started in March of 1993 was considered a second "traumatic" trade and environment experience. Not only was the U.S. pressured to agree upon environmental and labour issues high, but it was also the first time such topics

⁸ Mexican's officials were still traumatized by the Tuna-Dolphin case, Mexico's first trade and environment experience and one of the first cases ever to address the trade and environment interface. Mexico had suffered important economic losses during the tuna embargo imposed by the United States, and became very suspicious of any attempts to include environmental concerns as part of the new NAFTA, for fear of disguised barriers imposed on Mexico.

were being considered by trade negotiators.

Mexican environmentalists, on the other hand, had always expressed their opposition to NAFTA, and became hopeful that the new developments in the negotiations would actually help Mexico improve its environmental performance. Their hopes quickly vanished when it became clear that the final agreement had failed to create an ecological region with the same environmental standards throughout [Barba, 1993:10].

Substantive changes in the environmental and natural resources agenda in North America occurred during the 1980s, immediately prior to the beginning of the NAFTA negotiating process. Mexico and the U.S. had moved the agenda beyond transboundary water issues to a new set of environmental concerns, particularly along their common border, highlighting a new era of cooperation between the nations. In 1988, the *General Law on Equilibrium and Environmental Protection* was implemented in Mexico, which considerably advanced its environmental legislation. At the same time, citizens were becoming increasingly aware of the political forces behind free trade and the issues at stake, triggered in part by improved access to information. It was also around the same time that global environmental issues prompted specialists to start looking at North America as an ecological region and pointed to the existence of a North American environmental agenda.

When NAFTA negotiations began, the Mexican environmental community reacted with deep concern over the expected increase in the exploitation of natural resources and the industrialization process. Despite public opposition to the treaty, the Mexican government was not interested in participating in multistakeholder forums because they were aware that Mexico lacked the infrastructure to satisfy the demands of

environmental groups [Barba, 1993:10]. The Mexican environmental community was interested in protecting the integrity of Mexico's environment from any uncontrolled growth driven by free trade, and was very concerned with the ineffectiveness of the country's environmental laws due to lack of enforcement. Mexican officials chose to ignore these concerns, keeping the public out of the negotiations.

At the beginning of 1992, environmental groups in Mexico decided to press on and shifted their strategy by changing the jargon that had dominated the public discourse until that time. They also made concrete and precise demands written in sophisticated treaty-language. The result was a proposal called "Minimum Safeguard Environmental Clauses for NAFTA", which was made available to high-level officials from the three governments in May 1992. Trade officials from the three countries also received this proposal with disdain and rejection, prompting distrust among Mexican environmental groups, who felt betrayed and unhappy with the resulting NAFTA text.

In particular, they were concerned with the explicit renunciation of the three governments to pursue together a trilateral program to harmonize their levels of environmental protection. For Mexico, this meant a *de facto* authorization to maintain the same level of environmental protection prevalent at the time, which was considerably lower than the protection enjoyed by the United States and Canada. Mexican ENGOs had hoped that NAFTA would require the upward harmonization of environmental standards, attainable through a cooperative programme involving the three Parties [Barba, 1993:11].

They viewed with cynicism the provision under which no Party should choose lower environmental standards for the purpose of attracting investment, not only because

it was non-binding, but also because Mexican authorities had already lowered domestic legislation governing forests, water, mining, fisheries, tourism, land use, among others, in the second half of 1992⁹.

After the Clinton administration committed to the creation of a North American Commission on the Environment (NACE), Mexican ENGOs hoped that the resulting institution would be given substantive enforcement powers. They prepared a draft proposal for the establishment of NACE, which incorporated the following elements:

The inclusion of the word protection in the name of the institution, thereby making it clear what the objective and purposes of the new NACE would be: North American Commission for the Protection of the Environment (Article 1.1);

A pro-tempore Secretariat entrusted to each of the Parties for two-year periods (Article 1.3)

The object and purpose of the Commission would include serving as a focal point for environmental cooperation among the Parties; ensuring the environmentally sound application of NAFTA in order to protect the environment and public health; and serving as a mechanism for the evaluation and monitoring of the environmental agreements in force (Article 2);

Development of an Index of Parameters of Maximum Tolerance of Environmental Impacts as part of a set of monitoring tools (Article 3);

A UN-style governance structure for the Commission;

⁹ Mexican ENGOs reacted with anger and doubted the Government's good faith, when in the second half of 1992, a proposed legislation was sent from the Executive to Congress, to modify or replace a number of laws and regulations relevant to the environment and natural resources, almost invariably having the effect of actually lowering the level of environmental legal protection in the country. See Alberto Szekely, *Free Trade and Environment in North America: Concerns, Proposals and Responses*".

In the end, the resulting agreement did not contain any of the elements included in the proposal presented by the environmental community. Mexican officials were forced to accept the U.S. proposed agreement not because they decided to honour the demands of Mexican NGOs, but rather, because Mexico wanted to avoid risking the signature of NAFTA. In the end, the demands of the environmental groups in the U.S. had waned down, and the new agreement looked less threatening for the Mexican trade agenda.

The final agreement contains several provisions that make a trivial attempt¹⁰ at integrating economic and environmental considerations: NAFTA is the first major trade liberalization agreement that specifies in its preamble the promotion of sustainable development and the strengthening of the development and enforcement of environmental laws and regulations, as well as the commitment to implement its provisions in a manner *consistent with environmental protection and conservation* (Article 102: Objectives).

NAFTA's Environmental Provisions

This section outlines the environmental provisions contained in the text of the NAFTA Agreement. It is important to note, however, that there are no specific “environmental goals” set out in the objectives section (Chapter 1, Article 102) of the agreement.

- a. **The Preamble:** NAFTA's Preamble includes general statements on promoting sustainable development and strengthening the development and enforcement of

¹⁰ It is argued in this paper that the provisions contained in NAFTA are far from adequate to foster sustainable development. However, NAFTA advocates have largely identified NAFTA as the *greenest trade agreement* ever signed.

environmental laws and regulations. It adds that trade goals must be achieved in a manner "...consistent with environmental protection and conservation." While the preambular language carries no obligation on behalf of the NAFTA parties, supporters argue that it was a positive step to make explicit the importance of the environment in a trade context. It has been interpreted as rising sensitivity with respect to growing environmental concerns.

b. Relation of NAFTA and Environmental and Conservation Agreements

(Article 104): This provision states that in the event of any inconsistency between NAFTA and specific trade obligations set out in certain environmental agreements, such obligations "shall prevail to the extent of the inconsistency, provided that where a Party has a choice among equally effective and reasonable available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions in the agreement". The agreements considered are the Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES); the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol); and the Basel Convention on the Control of Transboundary Movements of Hazardous. Wastes and Their Disposal (Basel Convention). In addition, Annex 104.1 includes the U.S.–Canada agreement on the Transboundary Movement of Hazardous. Waste, and the U.S.–Mexico agreement for the Protection and Improvement of the Environment in the border area.

c. Sanitary and Phytosanitary Measures (Chapter 7, Section B): Under Article

712, each party has the right to adopt, maintain or apply any sanitary or phytosanitary measure necessary for the protection of human, animal or plant life or health in its territory. These measures are related to food safety and focus on the risks associated with animal or plant pests or diseases, food additives, and food contaminants. NAFTA authorizes countries to establish "appropriate" levels of protection in accordance with Article 715, when protecting human, animal or plant life or health. They must ensure that any sanitary or phytosanitary measure adopted, maintained or applied is (i) based on scientific principles, taking into account relevant factors including, where appropriate, different geographic conditions; (ii) not maintained where there is no longer a scientific basis for the measure; and (iii) based on a risk assessment, as appropriate to the circumstances. When adopting, maintaining, or applying a measure the country must ensure that it does not discriminate arbitrarily or unjustifiably between its goods and like goods of the other two countries.

- d. **Standard–Related Measures** (Chapter 9): These measures are related to product standards. This chapter includes the measures, other than those covered by Chapter 7, which may directly or indirectly affect trade in goods or services. Countries are authorized to adopt standard–related measures, including those related to the protection of human, animal, and plant life and health and the environment (Article 904 [1]). The standard–related measures must be consistent with the WTO Agreement on Technical Barriers to Trade and other agreements, including environmental and conservation agreements (Article 903) to which the countries are party. In pursuing its legitimate objectives (including protection of

the environment), each country *may establish* the levels of protection it considers appropriate (Article 904[2]). Article 906 encourages countries to make compatible their respective standard–related measures to the greatest extent possible, without reducing, among other factors, the level of protection of the environment. When a country considers it necessary to address an urgent problem (i.e. the protection of the environment), the normal steps of the notification provisions may be waived.

- e. **Environmental measures under the Investment Chapter 11:** Under Article 1114 (2) parties are discouraged from attracting investment by relaxing domestic health, safety, or environmental measures. Countries *should not* waive or derogate from such measures for the establishment, expansion, or retention of an investment. If one party considers that another party of the NAFTA has offered such an encouragement, it may request a consultation with the other country with a view to avoiding such behaviour.
- f. **Dispute Settlement:** A country that complains about an action from another NAFTA member seeking to adopt, maintain, or protect the environment –taken under Article 104 (Environmental agreements), Subchapter 7[b] (Sanitary and Phytosanitary measures), or Chapter 9 (Standards–related measures)–can have recourse to dispute settlement procedures solely under NAFTA if it so requests. Under Article 2015, a country *can request* the panel to receive input from a scientific review board on environmental issues (among others) during a dispute. The panel can take the board’s report into account in the preparation of its own report.

g. **General Exceptions** (Article 2101): The General Agreement on Tariffs and Trade (GATT)'s Article XX and interpretative notes are part of NAFTA (except for the provisions that apply to services and investment). The measures referred to in Article XX include paragraph (b) –environmental measures necessary to protect human, animal or plant life or health– and paragraph (g) applied to measures relating to the conservation of living and non–living exhaustible natural resources. With respect to investment, Article 2101 (2) establishes that the agreement does not prevent countries from adopting or maintaining measures necessary to secure compliance with laws or regulations that are not inconsistent with the provisions of the Agreement, including those related to health and safety – which may include environmental measures necessary to protect human, animal, or plant life or health.

The Need for a North American Commission on the Environment

During the initial discussions about NAFTA, the intentions to include environmental considerations followed two different approaches: the first approach was to have one agreement encompassing all trade and environmental issues. The second one was to have two parallel but contemporaneous negotiations leading to two agreements [Johnson and Beaulieu, 1996: 24-34]. As explained earlier, there was enough opposition to the passing of NAFTA from labour and environmental groups that the governments involved had to consent to the signature of side agreements that would address NAFTA's deficiencies in those two areas in order to guarantee its approval by the three governments.

Once the debate was no longer about *the need* to address the environment in a side agreement, but rather *how* to do it, the focus of the negotiations shifted towards enforcement and procedural matters. Although largely united on the need for a trilateral commitment to mitigating the environmental effects of free trade in the North American region, environmentalists were divided over the questions of how much regulation was desirable to preserve and extend environmental values and what type of organization was best suited to achieve such objectives.

One of the demands made by the environmental organizations that backed NAFTA in the end was the establishment of a mechanism to address environmental concerns not addressed by NAFTA. While they believed the NAFTA text included important provisions aimed at the enforcement of environmental laws and standards, it did not “adequately address the broader environmental ramifications of liberalized trade—that is, the extent to which shifts in capital and competitive advantage will alter patterns of natural resource use throughout the NAFTA region” [Fuller, Statement to the U.S. Senate, 1992]. Mostly composed of conservation groups, this coalition was particularly concerned with the lack of a mechanism for anticipating trade-driven changes in land use, and for mitigating the resultant impacts on biodiversity.

The United States Trade Representative at the time, Ms. Carla Hills, quickly accepted the demands for a North American Commission on the Environment (NACE) and confirmed it in a letter addressed to Mr. Jay Hair, President of the National Wildlife Federation, corroborating the Trade Department’s understanding that the role of the new institution *would go beyond facilitating environmental cooperation and would include a*

*mandate to deal with trade issues*¹¹. The commission's functions would include facilitating effective implementation of NAFTA environmental provisions, providing information on environmental protection activities of the three countries, promoting cooperative environmental problem-solving, and ensuring effective public participation. The environmental commission would offer innovative solutions to address the complex relationship of trade and environment.

NGOs also suggested that a trilateral body such as NACE would avoid double standards imposed by powerful players, by setting a common ground for negotiating among the Parties solutions to environmental problems in the region¹².

A first round of negotiations for the new environmental side agreement began in Washington DC in March of 1993. These were described as largely conceptual discussions on both the ultimate labour and environmental side agreements [Johnson & Beaulieu, 1996:38]. The U.S. Trade Representative consultations gave interested parties the opportunity to provide some input on how the supplemental agreements might be structured. The negotiations resumed in Mexico City in April of the same year, with a more detailed and in depth set of discussions on the key issues and specific proposals.

Around the same time, the National Round Table on the Environment and the Economy in Canada (NRTEE), in collaboration with the U.S. Environmental and Energy Study Institute (EESI), sponsored two one-day workshops in Ottawa as part of the

¹¹ Letter from Carla Hills to Mr. Jay Hair, President of the National Wildlife Federation. Appendix C3 in The North American Free Trade Agreement and the North American Commission on the Environment. Edited by Sarah Richardson, NRTEE, March 1993.

¹² During the 1980's, the U.S. played a double card trying to muscle Mexico on acid rain and its smelters, while at the same time, denying Canada that there was a problem. See John Wirth. Smelter Smoke in North America. The Politics of Transborder Pollution. Lawrence: University Press of Kansas, 2000.

consultation process that preceded the signature of the new side agreement. During these two workshops, representatives from ENGOs, public advocacy groups and industry lobbyists were asked to lay out what would later be the structure and functions of a NACE, based on a draft produced by the U.S. Trade Representative. The process served to shape the expectations of all the stakeholders involved, some of which are summarized in this section.

Focus on new problems, not on old ones

Environmentalists in Canada saw the proposed NACE as an opportunity to avoid making the same mistakes made during the Canada–U.S. FTA¹³, and to make a difference by helping the trade regime adequately manage environmental problems arising from trade [Von Moltke, 1993:19]. A NACE would also raise the opportunity to solve border related environmental issues that the plethora of bilateral agreements in existence at the time had not been able to mitigate. These appalling environmental conditions raised public outrage during the NAFTA negotiations. However, as it will be seen in Chapter IV, cross-border environmental issues have remained a difficult one for the CEC to address.

A champion in sustainable development?

Poverty, sustainable development and the need to internalize environmental costs were seen by some ENGOs as the main focus for the new institution. For these groups, the scale of poverty in the hemisphere, a major cause for environmental degradation, was

¹³ Environmental activists harshly criticized the Canadian Government after the negotiations of the Canada-U.S. FTA for not including any environmental provisions as part of the agreement.

deemed unacceptable. They were concerned that trade liberalization could exacerbate these conditions, and therefore the new institution should ensure that proper measures were taken to guarantee that the benefits of growth were equitably distributed and sustainable in the long run. In a statement to the Subcommittee on International Trade at the U.S. Senate, Kathryn Fuller, President of the World Wildlife Fund, urged all three governments to develop concrete plans both to institute policy reforms and to provide the necessary financial resources to make the NAFTA agreement truly sustainable. The new NACE should be more than a mere subterfuge to help NAFTA pass, it should strive for sustainable development and ecosystem management in North America [Richardson, 1993; Von Moltke, 1993].

However, as we will see later, the institutional link between NAFTA and NAACE is very weak, and NAFTA almost invariably takes precedence over NAACE, deeming it irrelevant when it comes to challenging a trade measure.

A “grab bag” of issues on the environmental agenda

Environmentalists recognized even at the time that an agenda for a NACE would include a huge and diverse number of issues and that the institution must be able to identify issues, seek solutions and recognize the full dimension of the problems; this could only be achieved if enough resources were allocated to the institution. Some of the pressing issues identified included migratory species, water management, long-range air pollution, transboundary movement of hazardous wastes (curiously enough, seen as a trade rather than an environmental issue), and ecological labelling.

A NACE should also be able to address the links between the continental

environment and the global environment. Continental environmental problems that have global dimensions included energy efficiency, high seas over-fishing, climate change commitments, land use, boundary waters, the marine and coastal environments, and various other global instruments to which the countries were already parties.

Monitoring

A new NACE would have a strong monitoring role, in particular it was suggested that NACE could administer a Toxics Release Inventory, which would register all the hazardous substances being emitted into the environment on a continental basis.

Standards

Environmentalists believed that the basic concept of free trade would lead to further de-regulation in the environmental field, a lowering of the standards, and harmonization to the lowest common denominator. The new institution should have a role in facilitating the upward harmonization of environmental standards. Although not a standard setting body per se, NACE would act as a consultative body and a catalyst in the initiation of cooperative systems to permit the systematic upward harmonization of environmental standards.

Dispute Settlement Mechanisms

There was a broad consensus that a NACE would have a role in complementing NAFTA in dispute settlement, including: responsibilities for consultation, creation of expert and technical working groups, selection of environmental experts for the dispute settlement roster, the provision of expert and scientific boards and commenting on the

interim reports of panellists. As it will be seen in Chapter IV, however, this has not yet happened after nine years of existence.

Enforcement

Although trade advocates maintain that NAFTA does not have supra-national enforcement powers [Richardson, 1993:37], the bitter after taste left by the contentious cases presented under NAFTA's Chapter 11 certainly have demonstrated quite the opposite [Mann & Von Moltke, 1999]. Nonetheless, the spirit of the NACE negotiations was influenced by the notion that supra-national enforcement powers were not appropriate, thereby causing important divisions between ENGOs [Mumme & Duncan, 1996; Audley, 1997].

On the one side, a number of groups¹⁴ believed that NACE should have regulatory authority throughout North America as an EPA-type body, with jurisdiction to go into Canada, Mexico and the U.S., where the application of an environmental law is being violated, and to levy fines or institute some other punishment. On the other side, there were groups that feared that the supra-national enforcement of the Party's domestic environmental laws could have a negative impact on that Party's sovereignty¹⁵. This was also the concern of the trade policy community, in particular concerning trade sanctions,

¹⁴ The coalition of U.S.-based NGOs that opposed NAFTA since the beginning included the Sierra Club, Friends of the Earth, Green Peace, the Humane Society, the American Society for the Prevention of Cruelty to Animals, Clean Water Action, Public Citizen and others. This coalition was in favor of strong enforcement powers for the new NACE. The five major U.S. environmental organizations that in the end supported the environmental provisions of NAFTA were the National Wildlife Federation, the World Wildlife Fund, Environmental Defense Fund, the Natural Resources Defense Council and the National Audubon Society.

¹⁵ For a detailed account of the negotiation of NAFTA, see John J. Audley. *Green Politics and Global Trade: NAFTA and the Future of Environmental Politics*. American Governance and Public Policy, Ed. Barry Rabe and John Tierney. (Washington, D.C.: Georgetown University Press, 1997).

arguing that supranational enforcement would be very difficult to implement across the various jurisdictions, and would have a chilling effect on the raising of standards. In addition, providing strong enforcement powers adjudicated to NACE was deemed by some analysts as unrealistic, because of the resources that would be needed to accomplish the task for the entire region.

Rather than “enforcing” domestic environmental laws, trade advocates argued that NACE should “encourage” governments to realize that compliance would be in their own interests. For this, a number of “soft” tools were proposed:

NACE could have a strong monitoring role, with the capacity to set its own agenda, issue annual state of the environment reports and report periodically on other emerging issues.

NACE could contain provisions to encourage public participation and open information as a key element to enforce environmental laws effectively in the region, recognizing that the pressure from the public often has an important effect on governments.

The use of consensus in the decision making and voting procedures of NACE. Environmentalists were inclined towards majority voting, at least for some of NACE’s voting.

Trade advocates in the United States, and to a certain extent in Canada, saw the side agreement on environment as a valid vehicle to level the playing field for companies, since the failure of one trading partner to enforce its own environmental laws puts industry at a competitive disadvantage vis-à-vis the other trading partners. On the other hand, they warned that while enforcement was necessary to maintain the legitimacy of

environmental legislation, NACE should consider the necessity of some leeway in prosecutorial discretion, allowing for innovative ways to enforce a law in more amicable ways than prosecuting [Houseman, 1993:23].

Independence

This issue proved to be a challenging one. On the one hand, it was important to have an independent body that could look into environmental issues regardless of governments' wishes in order to gain public credibility. However, excessive independence could result in governments that would not listen, therefore rendering the institution pointless. A delicate balance had to be struck between openness and accessibility and the institution's ability to function effectively. There seemed to be a consensus on the need for adequate funding [Richardson, 1993: 40].

Structure

Planning the structure of the new institution was a difficult task, because there were no clear precedents in terms of comparable international environmental bodies with links to trade and other agreements. At the time, environment and trade was a relatively new field, with no consensus on the problems, let alone the solutions. However, it was clear that an organic link between NACE and NAFTA should exist [Page, 1993:27].

There was a basic agreement that NACE should be a trilateral body concerned with problems of the regional, national, continental and global environment as they relate to North America. It was also accepted that NACE would have both non-trade and trade related functions, in particular in the area of standards and dispute settlement.

It was suggested that in order to obtain a balance between openness and

accessibility, a Council or executive body of environment ministers would head the institution, to guarantee relevance within governments. Under this body, independent commissioners could be appointed to do the full-time job [Page, 1993:29-30].

Realistic expectations

Environmentalists realized at the time that NACE alone would not be in a position to solve all environmental problems in North America. Neither could one institution reverse decades of environmental degradation; however, it would be a necessary condition to initiate meaningful action. Expectations ran high particularly in the border region, where environmental conditions were appalling due to recent spurts in urban and industrial growth.

The Final NAAEC

The North American Free Trade Agreement was finally signed in December of 1993, and it came into force on January 1, 1994. The resulting agreement was to build upon, and complement, the *environmental provisions* established in NAFTA. The objectives of the environmental side agreement as set out in Article 1 are: a) *to protect the environment through international cooperation*; b) *to promote sustainable development*; c) *to support the environmental goals of the NAFTA and avoid creating distortions or new trade barriers*; d) *to strengthen cooperation on the development of environmental laws while enhancing their reinforcement*; and e) *to promote transparency and public participation*.

In signing the NAAEC, the governments of Canada, Mexico and the United States agreed to a core set of actions and principles, including (CEC, 1996):

- reporting on the state of the environment;
- effective enforcement of environmental law;
- improved access to environmental information;
- striving for the improvement of environmental laws and regulations; and
- promotion of the use of economic instruments to achieve environmental goals.

Chapter 2. International Regime Theory

Chapter 1 examined the events that gave origin to the North American Agreement for Environmental Cooperation, born under the aegis of the NAFTA trade giant. The historical circumstances that prompted the signing of NAAEC were key determinants in the creation and final structure of the regime. As a side agreement to NAFTA, NAAEC is in fact a very peculiar case: its institutional link to the trade agreement is not reciprocal, as a result of the unsynchronized negotiation process of the two agreements. At the time NAFTA was negotiated, the environmental agreement was not even in sight, and by the time NAAEC negotiations began, the NAFTA text was completed and authorities in the three countries refused to open NAFTA to renegotiation. Therefore, both the labour and the environmental side agreements were negotiated on the side. This paper argues that this has had important implications on the institutional effectiveness of the NAAEC regime.

Even if the institutional links to NAFTA were strengthened, a question arises about the overall effectiveness of NAAEC as an environmental regime; that is, whether the regime itself has been capable of stopping, reversing and/or reducing environmental damage arising from increased trade activity as a result of NAFTA. This section will review different theories of international regimes with a focus on regime effectiveness, and it will explore the potential of this theoretical framework to fully assess the effectiveness of the NAAEC. Because regime theory is not a very cohesive body of literature, a careful review of the different schools of thought is necessary.

International Regimes: a Conceptual Framework

Global Governance

International regime theory emerged as a sub-branch of International Relations theory from the need to understand international cooperation after WWII. International relations theorists are concerned with cooperative processes through which authority is transferred from a national government to an international entity to address global problems.

This is directly related to the concept of Global Governance, defined by Mayer, Rittberguer and Zürn as “*purposeful systems of rule or normative orders which have to be distinguished from regularities (natural orders) emerging from the restricted interactions of self-interested actors in a state of anarchy*” [Mayer, Rittberguer and Zürn, 1995: 393]. Governance without government refers to the coordination of global problems through voluntary international agreements that entail a set of binding obligations. These agreements create convergent expectations and govern behaviour based on the legitimacy of rules and their underlying norms.

Although there is considerable consensus among international relations scholars that a world state is unfeasible¹⁶, regime analysts argue that normative institutions that effectively regulate social interactions do not need a central authority as a prerequisite; on the contrary, governance without government results from non-hierarchical, voluntary

¹⁶ A world state is unfeasible, for this would entail not only the monopoly of physical force of such a state, but also political hyper-centralization which tends to undermine democratic practices and does not guarantee peace and prosperity [Mayer, Rittberguer and Zürn, 1995: 396].

self-organization.

The evidence seems to support this argument, as a number of research studies have shown that governance without government is widespread in industrially developed societies with a state and a modern bureaucracy. Obligations emanate from voluntary agreements to play by a set of rules that are binding in the sense that they create convergent expectations and govern behaviour. International actors voluntarily comply because there is legitimacy of rules and their underlying norms. [Rosenau, 1992:8].

International Regimes Theory¹⁷

Three main schools of thought dominate the discussion on international regimes: the realist, the neo-realist or rationalist, and the cognitivist. Each of these schools has emerged as an attempt to explain international cooperation, influenced by the historical circumstances prevalent at the time they were conceived. We will turn to each of these schools in detail.

Realists

The realist tradition in international relations perceives the world of nations as a community of sovereign, independent states competing for power and influence in a situation of anarchy. In such a world, international regimes exist when patterned state behaviour results from joint, rather than independent decision-making to avoid

¹⁷ Although the literature on International Regimes is profuse, the works of the most relevant international regimes scholars were compiled into two important volumes. The first one, *International Regimes*, edited by Krasner in 1983, set up the foundations for a strong criticism and reshaping of the main concepts involved. Twelve years later, Volker Rittberger and Peter Mayer published the second volume, *Regime Theory and International Relations*, as a response to the original criticisms made to the first volume, attempting to amend some of the original weaknesses of regime theory. The discussion that follows is

undesirable or sub optimal outcomes [Stein, 1983:117].

The theoretical foundations of the realist school have been traced far back to the political theory of Machiavelli and Hobbes. The Hobbesian influence in international relations is reflected in the reference to traditional realists notions confining politics and rule setting to statehood, where the state is assumed to represent the most perfect form of political association that humankind has thus far devised. The normative order that the state claims to represent, including its polity, economic system and value structure, must be secured from outside interference. Since no authority above the state exists, states must rely exclusively upon their own resources in ensuring their survival. The international political environment is therefore best characterized as anarchical, where states are sovereign, self-reliant, and with competing interests. Cooperation and coordination among self-interested social actors is only possible through a superior institution *endorsed with the monopoly of physical force* - Hobbes' Leviathan¹⁸. Under this view, all interactions leading to undesirable outcomes ought to be regulated by state intervention as a mechanism of correcting the natural deviations of the 'free' market (as in the case of environmental protection and national security). Collective regulatory action is doomed to failure in the absence of a monopoly of physical force to back it up. Most importantly, regimes are created because of the *functional benefits* that they

based in part on these foundational essays, as well as on the work of other scholars that have contributed important works to the field of international regimes.

¹⁸ Although in today's institutions the monopoly of physical force is the exception and not the rule, other forms of coercion could be interpreted as the monopoly of force, such as the imposition of trade measures, which is widely used in trade, human rights and environmental agreements. Another interesting concept that should be regarded here is hegemony in the Gramscian sense as Cox readily pointed it out, although this remains an under-studied subject. See 'Social forces, states and world orders: Beyond international

provide, emphasizing the idea of self-interest and reciprocal benefits while downplaying the role of community and a sense of justice.

Neo-realists

During the Cold War era, American scholars adopted a modified realist framework known as neo-realism. This new 'American' realism, described by Robert W. Cox as the '*ideological form [of realism] abstracted from the real historical framework imposed by the Cold War*' [Cox 1981: 280], transformed realism into a problem-solving theory, ripped from its historical contexts. The basic realities underlying neo-realist framework are: 1) the nature of man and the nature to self-destruction understood in Hobbesian terms; 2) the nature of states, which differ in their domestic constitutions and in their capabilities for mobilizing strength, but have a similar notion of national interest as a guide to their actions; and 3) the nature of the state system, which places rational constraints upon the rampant pursuit of rival national interests through the mechanism of the balance of power.

Neo-realists focus on the relative capabilities and interests of the States. According to this view, international regimes can affect capabilities by serving as a source of influence for States whose policies are consistent with regime rules, or which are advantaged by the regime's decision-making procedures. Consequently, Neo-realists have focused on inter-state relations grounded on efforts to promote national preferences,

relations theory' by Robert Cox in 'A Reader in International Relations and Political Theory', edited by H. Williams, M. Wright and T. Evans [Open University Press, Buckingham: 1993].

as constrained by the international distribution of material capabilities. These capabilities can change, therefore leading to changes in the balance of the international system.

The main focus moves away from war as the major source of conflict, thereby leaving room for cooperation between states to achieve a common aim, a departure from realist principles. Conversely, the kind of cooperation that emerges is driven by short-run, self-interests of states. This is one of the methodological limitations of the neo-realist school, because it fails to explain the web of international environmental cooperation that has emerged in this century [Kütting, 2000:12]

Rationalists

The rationalist school emerged from the neo-realist school as a utilitarian theory of international regimes. Inspired in the rational prudence of Hugo Grotius, these theories typically focus on the behaviour of rational utility maximizers and assume that actors of this type will reach agreement on the content of mutually beneficial institutional arrangements. Using models of game theory or microeconomics as tools of analysis, utilitarians seek to predict the position of final settlements as well as the bargaining pattern leading to these settlements. Rational actors are expected to realize joint gains while keeping transaction costs low.

Under this framework, regimes are seen as a pervasive and significant phenomenon in the international system, based on non-hierarchical normative institutions involving a stabilized pattern of behaviour of a given number of actors in recurring situations. Interests, power, diffuse norms, customs and knowledge may all play a role in regime formation, and these causal factors may be manifested through the behaviour of individuals, particular bureaucracies, and international organizations [Krasner, 1983: 2].

Institutional and liberal theories are also branches of rational theories, and like utilitarian theories, use microeconomic and game-theoretical models as analytical tools. Liberal cooperation theories emphasize the challenge for states to overcome market failure, the situation in which individual rational self-interested policies produce outcomes that leave each state worse off than it might otherwise have been [Stein, 1983:123]. The challenge is to devise policies that make it possible to reach the Pareto frontier, using the prisoners' dilemma pay-off matrix. Institution building emerges as the ideal solution: by changing the incentives facing policy-makers, institutions encourage cooperative behaviour [Keohane, 1993:149]. The success or failure of regimes can be explained by the extent to which regimes provide information, monitoring capabilities, or focal points that allow states to move to the Pareto frontier; everyone becomes better off at the same time, and absolute rather than relative gains matter [Krasner, 1983:18].

As the previous discussion indicates, there is a fine line between liberal cooperation and neo-realist theories of international regimes, mainly based on relative gains vs. absolute gains. For the neo-realist, the basic issue is where states will end up on the Pareto frontier, not how to reach the frontier in the first place. Gains of one actor mean losses for another, international regimes are created to promote the interests of *particular* actors. Thus, Institutionalism can also be seen as a complement to neo-realism, as international regimes can have effects on state action by altering bureaucratic practices and rules (or habits), by promoting learning about cause-effect relationships, by altering ideas about the legitimacy and value of practices and by changing the balance of political influence within domestic politics.

This fine line between liberal Institutionalists and neo-realists Institutionalists is a reflection of the theoretical ambiguities that have plagued regime theory and that have been addressed by a number of scholars since its beginnings. This debate can be attributed in part to the similarities between Grotius and Hobbes. Although Hobbes was influenced by Grotius' concept of natural law in his early writings, he differed from him in the need for a mighty power to hold control, which can be paralleled with the concept of the *hegemon* as adopted by Keohane in his theory of *Hegemonic Stability*¹⁹. On the other hand, both philosophers seemed to agree on the existence of an international anarchic environment, and the major difference between them lies in their distinct recipes to deal with anarchy.

Despite their different approaches, contemporary international regime theorists have tended to fuse the Groatian and the Hobbesian traditions into realist thinking, thus contributing to the confusion. According to David Hurrell, Hobbes has been viewed as the precursor of precisely those theorists who seek to construct models of cooperation, and indeed, of justice, based on rational prudence, when in fact he advocated the complete opposite [Hurrell, 1995:51]. Realists and liberals scholars share a contractualist understanding of society, with the intellectual limitations characteristic of positivist social science. In what seems to be an attempt to divide the two schools, realists and liberals

¹⁹ Robert Cox points out to the difference between the hegemon abdicated by Keohane, which is limited to dominance by a state, from Gramsci's hegemony, which refers to a dominant structure, where the dominant power can be the state, a group of states or some combination of state and private power, which is sustained by broadly based consent through acceptance of an ideology and institutions consistent with this structure. See Robert Cox 'Social forces, states and world orders: Beyond international relations theory' in 'A Reader in International Relations and Political Theory', edited by H. Williams, M. Wright and T. Evans [Buckingham: Open University Press Buckingham: 1993].

constitute the problem-solving mainstream of international relations that has produced most of the 20th century regime-based literature [Laferrière and Stoett, 1999:9].

Cognitivists

The cognitivist school rises as an attempt to improve both neo-realist and rationalist approaches, and calls for a different paradigm that would see regimes as autonomous variables independently affecting not only related behaviour and outcomes, but also the basic causal variables that led to their creation in the first place, through a feedback process only possible with the creation of knowledge [Krasner, 1983:19]. Cognitivists focus on the role of prevailing forms of reason by which actors identify their preferences, and the available choices facing them. Consequently, new information can result in new regime patterns; thus, learning – understood as “ a political process through which collective behaviour is modified in light of new collective understanding” [Haas, 1995: 175] – becomes pivotal in the process of regime creation, persistence and change.

The ‘Definitional’ Problem

As a relatively new discipline, regime theory suffers from lack of consensus on the basic definitions about what a regime should be. This was the focus of Susan Strange’s seminal article written in 1983 criticizing traditional regime theory [Strange, 1983]. In it, she pointed out to the lack of mutual understanding amongst regime theorists on the actual definition of the term, which was at the origin of all the other inconsistencies that plagued the discipline. Although she actually pointed out two epistemological inconsistencies that carried an ideological weight [p.343], the answer from the discipline was to streamline the original concept. As a result, major attempts

have been made to clarify what exactly is meant by international regimes, with little mention of its ideological underpinnings.

In general terms, a debate arises from the issue of defining regimes as a set of “explicit rules and procedures” or on the basis of observed behaviour. The first option restricts regimes to purely nominal agreements even if these had no behavioural implications. On the other hand, identifying regimes solely on behaviour likely leads to circular reasoning. Both Keohane and Krasner agree that a distinction must be made between regimes and agreements: agreements are *ad hoc*, “one-shot” arrangements, and the purpose of regimes is to facilitate agreements. Regimes must therefore be understood as something more than temporary arrangements that are prone to change with shifts in power or interests. This implies not only norms and expectations that facilitate cooperation beyond short-term self-interests, but also cooperation based on the creation and transfer of knowledge.

The Europeans have further contributed to this debate by looking at the study of causal influences as a precondition to identifying regimes, thus inverting the usual order of scientific investigation, in which description and descriptive inference precede explanation. With this in mind, Keohane believes that the best approach to define regimes would be to consider regimes as arising when states recognize these agreements as having continuing validity, thereby differentiating them from nominal agreements defined in purely formal terms.

Regime Formation

According to neo-realist approaches to regime creation, institutional arrangements, such as international regimes, reflect the configuration of power in the

relevant social system. Thus, arrangements come into existence when those possessing sufficient power take the necessary steps to create them. Neo-realists stress the role of preponderant actors or hegemons [Keohane & Nye, 1977:248] in the process of regime formation. The basic causal variables that lead to the creation of regimes are power and interests, and the basic actors are States. However, power-based theories fail to hold in instances where there is no identifiable leader or hegemon, or instances where the role of the hegemon is diminished altogether. Similarly, Young argues that these power-based theories are seriously flawed when it comes to accounting for the actual record of success and failure in efforts to form international regimes. Realists for example, overemphasize the role of the hegemon since *hegemony is an extreme case in international society* (Young, 1989: 354). In fact, the great powers today routinely find themselves in situations in which they must negotiate the terms of international regimes covering specific issue-areas, whether they like it or not. He adds that *leadership in connection with the formation of international regimes is a matter of entrepreneurship; it involves a combination of imagination in inventing institutional options and skill in brokering the interests of numerous actors to line-up support for such options* (Young, 1989: 355).

Liberal co-operation theories attempt to overcome this problem, thus developing schemes based on mutual gains. Arthur Stein develops a conceptualization of regimes based on liberal cooperation assumptions. According to him, a regime exists *when the interaction between the parties is not unconstrained or is not based on independent decision making* [Stein, 1983:117]. Consequently, in the context of sovereign, independent states, international regimes exist when patterned state behaviour results from joint, rather than independent decision-making. This happens when individualistic

self-interested calculations lead states to prefer joint decision making because independent self-interested behaviour can result in undesirable or sub-optimal outcomes.

Stein refers to these situations as dilemmas of common interests and dilemmas of common aversions. The dilemma of common interests arises when independent decision making leads to Pareto-deficient outcomes, and the dilemma of common aversions arises when the actors with contingent strategies do not most prefer the same outcome but agree that there is at least one outcome that all want to avoid. Regimes arise because actors forgo independent decision making in order to deal with the dilemmas of common interests and common aversions. It is in their interests mutually to establish arrangements to shape their subsequent behaviour and allow expectations to converge, thus solving the dilemmas of independent decision-making.

Regimes established to deal with common interests dilemmas require collaboration, whereas those regimes established to deal with common aversions dilemmas require coordination, which Stein argues, explains the difference between regimes that often confused analysts. Collaboration regimes need to assure Pareto-optimal outcomes, thus specifying strict patterns of behaviour and compliance, whereas cooperation regimes need to make expectations converge and allow the actors to coordinate their actions. Cheating is therefore not desirable and policing is not needed.

Institutional bargaining models retain an emphasis on negotiations among self-interested parties as a means of dealing with collective action problems. Inspired on utilitarian bargaining models, Oran Young developed the institutional bargaining model based on consensual decision making, as opposed to majority rule or some other decision rule, justifying a focus on the development of winning coalitions. Once the membership

of the relevant groups is set, Young argues, negotiations regarding international regimes generally result in efforts to design arrangements in an integrative way that all parties can accept [Young, 1989:361]. Problem solving approaches and intra as well as inter party bargaining play a key role in the final outcome. However, there is no guarantee that in all cases the parties can reconcile divergent approaches to problems, hence failing to reach an agreement.

Young identifies six hypothesis about the determinants of success in institutional bargaining in international society, pointing both to the role of structural considerations and to process considerations. These are: 1) institutional bargaining can succeed only when the issues at stake lend themselves to contractarian interactions; 2) the availability of arrangements that all participants can accept as equitable (rather than efficient) is necessary for institutional bargaining to succeed; 3) the existence of salient solutions (or focal points describable in simple terms) increases the probability of success in institutional bargaining; 4) the probability of success in institutional bargaining rises when clear-cut and effective compliance mechanisms are available; 5) exogenous shocks or crises increase the probability of success in efforts to negotiate the terms of international regimes for the most part; and 6) institutional bargaining is likely to succeed when effective leadership emerges, and it will fail in the absence of such leadership.

Elizabeth Ridell-Dixon developed an extension of this approach by examining the relative importance of individual leadership in promoting – or impeding – regime implementation [Ridell-Dixon, 1997]. Drawing from the work of Oran Young on political leadership, Ridell-Dixon asserts that leadership is a critical determinant of success or failure in the processes of institutional bargaining to form international

regimes. Thus, the power of the state to affect outcome depends not only on its structural power, but also on the skills of the individual negotiators that assume a leadership role during critical times [Ridell-Dixon, 1997:265-267]. This process is overlooked by traditional theories of hegemonic stability, which generally focus on power configurations and hegemonic leadership as necessary elements in the creation and maintenance of regimes. However, critics of hegemonic stability theories fail to establish strong causal links because they cannot predict when a potential hegemon with capacity to lead will actually assume leadership. Rather, the will to act is largely determined by domestic politics, not considered under state-centred theories [Ridell-Dixon, 1997: 264].

Concluding from the above analysis, rationalist bargaining theories are process-focused and place great emphasis on the events leading to the creation of an agreement, undermining the reasons that gave origin to the creation of the regime. This is a fundamental flaw in the methodology that leaves unanswered questions about the reasons why states are compelled to act “collaboratively” under conditions of inequality, which will then affect their decision-making capabilities as independent actors. For example, the option to be left out of a trade agreement for small states is almost non-existent, yet this would be treated by regime theory as an independent process of decision-making, because it is in their *best interest*. Seen under this simplistic view, one could argue that it is in the *best interest* of the small states to join trade agreements with industrialized states, in order to enjoy equal terms. In reality, given the prevailing World Order, industrialized countries set the international terms of trade and small states simply have to abide by them, or suffer the consequences of being left out of the international market. International regime theories in general, and institutional bargaining theories in particular

fail to incorporate the political analysis necessary to understand these processes. Regimes are treated as closed systems, operating in a social vacuum. Without a conscious incorporation of socio-economic and historical factors into the analysis of regime formation, there will not be a clear understanding of the forces behind the decision-making mechanisms of the regimes themselves.

Cognitivist explanations to regime creation are considered critical in understanding the changes over time of a regime's substance, strength, and effectiveness, while recognizing that they alone cannot successfully explain regime creation. Cognitivists such as Peter Haas acknowledge that outcomes are clearly the result of power exercised by parties on behalf of the ideas and preferences imparted by the epistemic community, and institutional resources are also important for an effective regime. However, he is quick to assert that knowledge is a critical process by which regime patterns change over time, and epistemic communities are important actors for shaping what learning occurs and shaping the path by which regimes evolve.

Epistemic communities are "networks of knowledge based communities with an authoritative claim to policy-relevant knowledge within their domain of expertise" (Haas, 1995: 179). These communities are likely to be found where scientific disciplines have been applied to policy-oriented work in substantive issues, and in countries with well-established capacities in terms of administration, science and technology. Under conditions of uncertainty, the work of the epistemic communities plays a key role in policy-making, particularly on issues affecting the environment, as scientists inform politicians and bureaucrats of the implications of environmental problems and appropriate policies to counteract these effects.

Under these theories, science is usually perceived as politically neutral, skewed most of the time towards the views of Western scientists. Nonetheless, the social role of science needs to be better understood, because in fact, science is not an objective body of knowledge providing neutral answers to a particular phenomenon, and the sources of funding have an important influence on the type of issues to be investigated as well as the kind of answers provided by the scientific community [Kütting, 2001:7].

Domestic Links to Regime Formation

What is the relationship between domestic politics and international politics? Is there some kind of interaction between these two variables? Traditional regime theory assumed a dichotomy between domestic politics and international politics, stressing fundamental differences between the two. Domestic politics are generally focused on the individual citizen and his relationship to the state, with institutions conceived to facilitate individual action in pursuit of happiness and the values of the state reflect the values of its citizens. The domestic realm represents the interplay between political, social, economic and technological activity. International politics, on the other hand, was simply a domain where each state was engaged in the endless activity of promoting and protecting its own interests against the intrusion of other states engaged in the same processes. The state of anarchy was one of the fundamental distinctions of domestic politics, where anarchy cannot be tolerated.

Contemporary international regime scholars have rejected this idea by studying the links between domestic and international societies, and how these affect regime creation, change and demise. Michael Zürn develops a conceptual framework to account for the domestic sources of regime formation. The societal forces that are either benefited

or harmed by international cooperation are critical in the understanding of regime formation and change. Accordingly, Zürn borrows Krasner's concept of *intervening variables* and applies it to his own model, where *causal variables* become *domestic politics* and *intermediary variables*, which impact on regime formation, become *foreign policy types*, which represent typologically distinguishable courses of foreign policy. To reveal links between domestic structures and international cooperation, Zürn looks both at regime-conducive or regime-preventive foreign policy types and the domestic sources of such policies, usually determined by *foreign policy interests*.

Both *foreign policy interests* and *foreign policy types* may be determined either by *positional characteristics*— representing the properties of state actors in relation to other actors, such as the relative amount of power resources, relative economic strength, kind of interdependence, and roles occupied in international institutions— or *non-positional characteristics* — which are determined by the properties of a state's polity and politics, its economy and culture, and its decision-makers. Thus, there is a dual relationship between foreign policy interests and foreign policy. On the one hand, if the interests of an actor are explained, the actor will act rationally following an appropriate course of behaviour on the basis of the domestically defined interests, *vis-à-vis*, possible outcomes of interaction. Accordingly, foreign policy would be clearly dependent on actor interests. On the other hand, foreign policy can also be explained in terms of positional and non-positional state characteristics as such, without any reference to interests at all, depending on the circumstances.

The result of his findings suggests the following. First, foreign policy appears to be regime conducive in instances where it is a product of a friendly bargaining process,

thus bridging the gap between actor characteristics and regime formation. Second, the conditions under which such a regime-conducive foreign policy can prevail depend upon (i) the competitiveness of the national economy and its degree of dependence on foreign trade, (ii) the degree of the state's enmeshment in international institutions, (iii) the existence of a corporatist domestic structure, (iv) a prior change in domestic power constellation, and (v) the ratio of domestic groups benefiting from policy change to the domestic groups benefiting from the current status quo. An indirect implication of his study is that although power is not a critical factor in regime formation, it can enhance the prospects of success once the regime is in place.

Bruce Doern also looks at domestic sources of environmental policy decisions that affect international regimes. In his book *Green Diplomacy: How Environmental Policy Decisions Are Made* (1993), Doern identifies and examines the key players and issues involved in the dynamics of international environmental agreements, with special focus on consensus-building and conflict management among the Canadian domestic interests involved. Notably, he emphasizes on the integrated nature of green policy making with the larger policy and institutional issues and challenges that are inherent in global environmental concerns and in Canadian policy choices, particularly its subordination to economic and trade issues.

The new dynamics of negotiation involve difficult tradeoffs among interests and regions within Canada, as well as between developed nations and developing countries over issues such as financial assistance and technology transfer. Accordingly, Doern identifies three distinct key policy issues among which the tradeoffs usually occur: ecological and economic policy issues, political distributive issues and finally,

managerial and organizational issues. International green agenda setting is a function of the early role played by the scientific community (Haas' epistemic communities), who are key players at the early stages of the agenda cycle, the interaction of forces of ENGO-business lobbying and pressure, and the leadership or entrepreneurial policy role of key ministers and officials that eventually move issues toward an action-and-control stage.

A similar pattern can be seen in the political leverage enjoyed by environmental groups in shaping U.S. and international trade policy for the first time during their involvement in the NAFTA negotiations. The interactions among the participants explain how political compromises between environmental groups and trade policy elites came about, focusing in particular on the roles played by US environmental organizations. The final product was the signature of a trilateral trade agreement that includes unprecedented environmental provisions, although this only occurred because of historical circumstances and a sequence of political events that created an opportunity for environmental groups to modify the political agenda for trade policy negotiations to include environmental issues.

Regime Effectiveness

Regime theorists are concerned that some regimes seem more successful than others in dealing with the problems that gave origin to their formation. In the particular case of environmental regimes, the core question is why some environmental regimes have a greater impact than others on the behaviour of those whose actions have given rise to the relevant problem. Most of the literature on international regimes is dedicated to the study of regime creation and maintenance, leaving the issue of regime effectiveness relatively unexplored. Traditional approaches of regime analysis to effectiveness rely

heavily on regime rules and decision-making procedures, but none of them, either collectively or separately, can provide a completely satisfactory set of effectiveness criteria [Vogler, 1995:22].

Liberal scholars have suggested that the impact of regime is best demonstrated at the unit level of analysis with a focus on situations in which compliance with regime rules is inconvenient for governments [Hurrell, 1995; Keohane, 1995]. The underlying argument here is that in cases where non-compliance is very likely, the regime serves to bolster the forces that regard the maintenance of the regime to be in the national interest. Thus, by virtue of its connection with both domestic and international law, the foreseeable effects of defection on the state's international reputation may be an important barrier to non-compliance, which could be utilized by its defenders. The methodological problems associated with determining the effects of an international regime under these premises are quite significant. Specifically, the causal linkages would have to be assessed against the possibility that the regime did not exist at all, but as to how precisely this type of research can be conducted is not yet clear and it is bound to be founded on speculative arguments.

The above discussion is a reflection of the state of the study of regime consequences today. Despite the existence of several works dealing with the study of regime consequences, the conceptualization of what may be taken to be a consequence or effect of an international regime still remains highly underdeveloped [Mayer, Rittberger & Zürn, 1995:426]. Although there are rapid advancements in this area, there are methodological problems involved in studying regime consequences, mainly related to the unfeasibility of large case studies due to the impossibility to attain sufficient

comparability of the cases. Scholars have suggested one solution to counteract this problem, mainly to turn to individual regimes and seek to ascertain their effects on an *ad hoc* basis [Mayer, Rittberger & Zürn, 1995; Young, 1999; Vogler, 1995].

Another difficulty in the study of regime effects arises from the multitude of conceivable regime consequences that add complexity to comparative research. Zürn developed a model to map dependent variables for the study of regime consequences with the cross-tabulation of five ‘dimensions’ (Behavior, Capabilities, Cognitions, Values and Interests) and three ‘units of analysis’ (Government, Society/Domestic Politics, and Issue Area) [Mayer, Rittberger, & Zürn, 1995:428]. This model demonstrates how many different kinds of potential regime consequences there are, but also warns of the need to define further research priorities.

Other approaches to the study of regime consequences/effectiveness refer to the extent to which rules and decisions are internationalized, i.e., authority is transferred from the national to the international level [Vogler, 1995:32], or to the capacity to modify behaviour [Vogler, 1995; Young, 1999]. Here, effectiveness in regime modification involves questions of monitoring and enforcement as well as the subtle and non-coercive ways in which institutions may condition and even alter the perception of national and corporate actors. The transfer in expertise and technology among regime participants has a critical impact on the effectiveness of the regime.

Following this approach, Oran Young [1999:5] argues that effectiveness is fundamentally a matter of the contribution that institutions make to solve the problems that motivated their establishment in the first place. Given the diversity of disciplines involved in a regime, effectiveness can be looked at from different approaches: Problem-

solving, Legal, Economic, Normative and Political. These approaches can be assessed in terms of the dimension of the effects, that is, if effects are internal to the behavioural complex – as opposed to external, direct as opposed to indirect and positive as opposed to negative. Regime effectiveness is thus addressed in this context along two dimensions: behavioural impact and solutions to the problem that the regime was set up to address.

Using a completely different approach based on the German tradition of international regimes as part of ‘peace and conflict’ studies, Helmut Breitmeyer and Dieter Wolf [1995:339] engage in a systematic approach to the study of regime consequences as the dependent variables. They develop various categories of regime consequences to be explained in terms of factors grouped according to regime types. Rather than searching for a fixed set of explanatory variables to be applied universally to the analysis of regime consequences in general, the authors suggest that *regime properties* or *types* offer useful explanations for regime consequences only in specific issue areas and need to be supplemented by ‘exogenous’ factors derived from the whole family of explanations that have been developed in regime analysis so far.

The resulting model, however, is very complex, and therefore inadequate to study regime consequences, especially because the authors themselves acknowledge that the explanatory variables are not exhaustive and may have to be complemented by additional variables. However, a more critical problem of this approach is its strong reliance on ‘normative values’. Because values are subjectively defined, they are potentially changeable, and severe contradictions are likely to emerge across multiple central values; thus, trade-offs and conflicts among those values are to be expected.

In spite of the different approaches to the study of regime consequences, most scholars agree that while the general impact of international regimes remains within the realm of context change, regime types are relevant because of their respective impact on problem solving. A problem with regime types, however, is that they do not seem to be generally applicable to all kinds of issue areas, and they may have to be set up on an ad hoc basis, in order to offer sufficient explanations in the specific case to be studied.

International Environmental Regimes

More recently, the Norwegian school of regime scholars has attempted to explore regime effectiveness as applied to environmental regimes. Arild Underdal borrows some of the elements found in neo-realist and liberal theories and applies them to environmental regimes, adding as a dependent variable the actual change brought by the regime. Applied to environmental regimes, effectiveness is given by the extent to which the regime improves the environment itself [Underdal, 2001:9]. The health of the environment is attributed to human behaviour that causes environmental damage, and the objective of the regime would be to alter such behaviour in a way that an improvement on the state of the environment is noticeable. Borrowing from Keohane, Underdal departs from the pre-regime position with speculative facts about what would be the state of the environment before the regime was created, in order to arrive at some measured change. Any difference between the pre-regime and the post-regime measurements are attributed to the existence or operation of the regime [p. 10], practice that obviously carries a large weight of subjective inference. Underdal tries to isolate the effects of the particular regime being studied by defining an “ideal” situation where the regime should take us.

The role of scientific experts remains pivotal in this type of analysis, since the impact on the biophysical environment requires natural science expertise. Policy-making and policy-implementing processes are traced as causal inference. In the end, two fundamental questions guide their model: the nature of the problem itself (whether the problem is intellectually less complicated or politically more benign, hence easier to resolve); and the institutional capacity to deal with the issue (the relative power of the tools being used or the skill and energy with which the problems are faced).

It becomes clear from the previous discussion that the motivations for studying the effectiveness of international regimes are predominantly directed at studying the effectiveness of the institutions created under an agreement rather than its potential for improving the problem that gave origin to its creation. While institutional effectiveness remains important, the study of the issue itself, placed within the appropriate historical and socio-economic context, is key to evaluate the effectiveness of a regime. This is particularly true for environmental regimes, where environmental conditions are the determinant of the effectiveness of the regime. Urendal brings this element to the table by incorporating measurements of the state of the environment, although pre-regime measurement remains largely speculative. In the end, his approach is still limited to the institutional framework and mostly concerned with the performance of the institutions themselves.

The issue of regime effectiveness of international environmental regimes is beginning to catch the attention of regime scholars, but the bulk of their work inherits the methodological limitations of traditional regime theory. As explained before, the

academic research conducted to date in no way has offered a definitive answer, although some key issues associated with the efficiency of these regimes have been identified.

First, under conditions of uncertainty, the work of the epistemic communities may play a key role in regime formation and policy-making, as they inform politicians and bureaucrats of the implications of environmental problems and appropriate solutions to counteract these effects [Haas, 1995:170]. Second, the concept of state sovereignty has been affected by the erosion of the traditional scope of state sovereignty implicit in increasing calls for regional cooperation, as well as a changing approach to the exploitation of natural resources. A recognition of the global significance of environmental issues and awareness of the limits to the carrying capacity of the earth have given rise to a number of duties that set limits to a State's jurisdiction over its natural wealth and resources by requiring it to manage them more carefully [Schrijver, 1997:195]. However, there is certain unwillingness on the part of states to accept international regulations that infringe their traditional sovereign prerogatives with regard to population, forests, biodiversity, and other natural resources within their boundaries, or on their use of international commons.

Third, human security is being increasingly linked to environmental degradation, thus adding a sense of urgency to the need for effective environmental cooperation and regulation on a global scale [Stern, 1995; Brunée and Toope, 1997; Norman, 1998]. Fourth, there is increasing recognition that ecological and economic issues are inevitably intertwined, and the overall policy goal of environmental agreements is to significantly and persistently reduce, reverse, and in some cases eliminate damage to the world

ecosystem by various systems or interactive pollutants, without hindering economic activity.

Table 1

Key issues associated with efficiency of Environmental regimes

- | |
|--|
| <ol style="list-style-type: none">1 Increased knowledge through the active participation of epistemic communities2 Eroded State sovereignty over the use of international commons3 Environment degradation seen as a security threat4 Recognition of the interplay between economic activity and the environment, with a focus on pollution control |
|--|

Unfortunately, the debate has been dominated by excessive emphasis on pollution control and cleaner technologies, and not enough on issues of land utilization, resource depletion and structural changes that ultimately can cause irreversible direct or indirect damage to the environment. There is much political rhetoric about environmental protection and willingness to tackle clearly identified problems such as those of CFC gases. But more often than not, solutions remain merely ameliorative, thus suggesting the absence of any blueprint for an environmentally less damaging future [Johnston, 1989:11]. Actions remain reactive to the problems we create, despite the evidence that those problems increase in scale and continue to compromise a healthy future for the earth.

Regime Theory and NAAEC – a critique

The different theories of international regimes that have been reviewed here could be instrumental in the analysis of the creation of NAAEC. For example, the circumstances that gave rise to the formation of NAAEC fit well within the neo-realist approaches to regime creation, whereby institutional arrangements, such as international

regimes, reflect the configuration of power in the relevant social system. In purely neo-realist terms, one could argue that NAAEC adequately reflects this international configuration of power and that the regime was established because the U.S. took the necessary steps to create it.

The United States acted as the hegemon vis-à-vis Canada and Mexico, by imposing the conditions that the U.S. had to meet in order to have the approval of the U.S. Senate. Although neither the Mexican government, nor the Canadian, were particularly enthusiastic about negotiating the side agreements, they were forced into signing because NAAEC and NAALC became a necessary condition for NAFTA to get approval from the U.S Congress.

Similarly, Liberal theories of institutional bargaining could explain why Mexico and Canada would join an agreement neither of them wanted. They both had vested interests in avoiding not signing NAFTA. On the other hand, while the U.S. government could impose its agenda on its weaker partners, it could not do so within its own polity because its power was diminished by the pre-emptive leverage enjoyed by environmental and labour groups threatening NAFTA. In this case, the U.S. government had to adopt a more collaborative approach - Young's entrepreneurship approach – exercising leadership in the design of a novel institutional structure and skill in brokering the interests of numerous actors to line-up support for the final outcome.

All three Parties derived functional benefits in signing NAAEC: for the US, it guaranteed NAFTA's approval by the U.S. Senate; for Canada and Mexico, functional benefits derived in that it allowed the United States to engage in the larger, more preponderant trade agreement.

The final structure of the CEC could be explained under the liberal cooperation framework that emphasizes arrangements to shape subsequent behaviour and allow expectations to converge, thus solving the dilemmas of independent decision-making – this principle is embedded in the CEC’s consensual decision-making mechanism.

Cognitivist theories could also explain the crucial role of the epistemic communities in raising concerns over the critical state of the environment in the border region resulting from increased maquiladora activities and expanding urban growth. This in turn prompted environmentalists to build a coalition to impose certain conditions to the U.S. Government before NAFTA could be passed through the Senate.

The agenda of the NAAEC is evidently shaped by domestic politics, and is perpetuated through the decision-making structure, whereby the maximum authority is the Council of Ministers of the environment from the three countries. Here, the ministers have a dual role: on one side, each Council member represents his/her own constituency. On the other side, Council members represent environmental interests in the region, vis-à-vis economic and trade interests. Ultimately, domestic priorities will influence the outcome of the decisions of the Council, leaning towards favouring the position of the strongest Party, in this case the U.S.

Because NAAEC is a very unique kind of regime, effectiveness may have to be evaluated essentially on the contribution that it has made in solving the problems that motivated its establishment in the first place. Regime effectiveness is thus addressed in this context along two dimensions: behavioural impacts and solutions to the problem that the regime was set up to address. The first issue at hand here would be what is the problem that motivated its creation. Recalling from Chapter I, NAAEC was conceived to

guarantee that the increased trade activity resulting from NAFTA would not cause environmental damage in the North American Region. Therefore, a behavioural impact would be, for example, Parties' compliance with their own environmental regulations. In the case where Parties are not complying, then the analysis would turn to the implementation of solutions prescribed by NAAEC in cases of non-compliance. Questions regarding the adequacy of the solution still remain outside of regime theory, which in fact is a serious methodological constraint in assessing the efficiency of an environmental regime.

The above discussion brings us to the limitations of traditional regime theory. Because of its excessive emphasis on the role of power or interests, regime theory oversimplifies the causes prompting states to engage in cooperative behaviour. For example, seen under the neo-realist light, the Mexican government had an interest in joining NAAEC – functional benefits – because NAAEC became the necessary condition for the approval of NAFTA by the Senate in the U.S. On the other hand, Mexico's interest to join NAFTA are a reflection of the international world order, mainly that as a member of the developing nations, Mexico is subject to the international terms of trade established by strong states such as the U.S. Under these conditions, Mexico has to find an alternative that would improve its position in the international market by ensuring access to one of the largest consumer markets in the world – the U.S. While the merits of Mexico's decision to join NAFTA are debatable, it is clear that developing states have little choice when it comes to international trade issues.

Another methodological constraints of regime theory is that it assumes that an institution with active and cooperative members will incite change, and changes are

compared with a supposed pre-institutional state. But no questions are asked over the adequacy of the regime itself. It focuses on actor's behaviour and on the definition of actor's interests in the negotiation situation as the crucial objects of the study. More importantly, there is a depolitization of problem solving dynamics, assuming that institutions will somehow enmesh political actors within pre-established patterns of cooperative behaviour [Laferrière and Stoett, 1999:9].

By failing to address not only the nature of the problem, but also the socio-economic and historical context in which the regime operates, regime theory is limited to analyzing institutional efficiency, which undoubtedly will have an impact on the regime itself, but falls short of evaluating the adequacy of the regime to deal with the issue that gave rise to its creation in the first place. This is particularly relevant in the case of international environmental regimes, given the complexities of environmental phenomena. Regime effectiveness will ultimately have to look at the impact of the regime on the ecosystems where it operates. Such impact may be linked to the adequacy of the solutions proposed and implemented under the regime, and not only on the changes in actors' behaviour. Efficiency in this light would have to include other actors as well, since states are not monolithic institutions. In the next section, an attempt will be made to overcome the methodological limitations of traditional regime theory by reviewing alternative approaches integrating ecosystems health and the socio-economic origins of environmental degradation.

Chapter 3. Evaluating the Effectiveness of International Environmental Regimes – Beyond Regime Theory

Methodological Limitations of International Regime Theory

As seen in Chapter 2, traditional regime theory has not overcome the methodological weaknesses of realist and neo-realist thought. The study of causal linkages may prove helpful in explaining regime formation or the domestic links of international regimes, but it is of limited usefulness when dealing with environmental agreements. According to traditional regime theory, the basic element for determining whether the regime is effective would be its contribution to solving the problem it is supposed to address [Young, 1999:5]. But the scope of the analysis remains limited to the institutional framework. While this is an important element to consider, it is insufficient to determine the effectiveness of an environmental regime. Increasingly environmental regimes do not address environmental issues directly, but rather, set standards that are assumed to be appropriate. Consequently, a regime can be deemed effective because it enables the respect of standards, even though these may turn out to be inadequate to protect the environment [Von Moeltke, 2001:8]. To attain these standards, regimes frequently seek to modify human behavior in specific ways or require the respect of certain procedures. This in itself can then be deemed a measure for effectiveness, even though the resulting change in behavior may not have an impact on the desired goal. Most often the modification of behavior is achieved by requiring the adoption of certain laws and other policy measures; an environmental regime that results in such laws and policy measures may be viewed as effective, whether or not changes in behavior result.

Attention has shifted to new approaches for measuring effectiveness of international environmental regimes that have been developed outside of mainstream regime theory. Ecologists have made important contributions to the study of regime efficacy from an ecosystemic perspective, which measure effectiveness based on the actual changes to the ecosystems that are considered under a particular regime. The implications of this type of approach extend well beyond measuring effectiveness of the actual design and implementation of environmental regimes, offering important insights on the definition of sustainable development.

The problem-structure approach

One approach suggests the design of organizations with appropriate institutions defined according to the particular problem structure of the environmental issue¹⁹. Under this approach, a wide range of institutions may prove necessary. The key determinant for the effectiveness of a regime then would be the “fit” between problem structure and the institutions employed. Issues of organization are second-order problems, flowing in large measure from the prior decisions concerning institutions. Under these circumstances, however, it is unlikely that there be an ideal organizational template that will guarantee effectiveness. Rather, the structure of the organization will depend on the kinds of

¹⁹ Konrad Von Moltke makes a distinction between “organization” and “institution”, which he considers crucial to strengthen international environmental governance. Organizations are institutions that have a physical existence, a charter, an office and employees. Thus the church is both an institution and an organization, and government is an organization for governance. Generally regimes will encompass organizations as well as institutions. Some of these institutions include Science, Precaution, Efficiency, Transparency, Participation, Subsidiarity, Environmental Assessment, Dispute Settlement and Technology Transfer. See Konrad Von Moltke. *Whither MEAs? The Role of International Environmental Management in the Trade and Environment Agenda*. International Institute for Sustainable Development. Winnipeg, July 2001.

institutions required to address a particular problem.

An assumption is made that environmental regimes are complementary to trade regimes and that an efficient management of natural resources is necessary to avoid conflicts with aspects of the trade regimes. To this end, the trade regime must defer to environmental policy decisions that are recognized as necessary, even when these conflict with aspects of the trade regime. Von Moeltke asserts that *it is international environmental issues that are not adequately managed that threaten the trade regime since they transfer many of the conflicts that arise out of the problem structure of the issue into a setting that is known to be institutionally ill-equipped to handle such issues* [Von Moeltke, 2001:13].

The argument follows that the key determinant for the effectiveness of a regime—whether economic or environmental—is the “fit” between problem structure and institutions employed. Trade regimes operate with a single set of institutions that are replicated in all trade agreements, while environmental regimes are forced to innovate institutionally to address the highly complex set of issues. These structural differences are fundamental in understanding the trade and environment interface. While Von Moeltke recognizes the interconnectedness between economic policy and environment, he fails to incorporate a broader socio-political context to his analysis. His prescription for more effective environmental regimes is limited to the definition of boundaries between trade and environmental regimes, recognizing their synergies. For Von Moelke, changes in the economic system are limited to the articulation of economic policy directed to impact on the production, transformation, consumption and disposal activities that engender environmental consequences, and in no way does he challenge the prevailing economic

system. Although his analysis fails to address the potential conflict within the economic base of the social organization, it represents a departure from the closed systems typical of traditional regime theory. It recognizes that public participation as a necessary element of an efficient environmental regime, which is an important variable in all public policy. Reflecting a cornucopian vision, however, his analysis relies heavily in the role of epistemic communities – the role of science – which he characterizes of non-political²⁰. His analysis is flawed in that he fails to recognize the dialectic relationship between environment, economic base and social organization.

Ecosystem Approach

An ecosystems approach requires consideration of whole systems rather than its individual components, combined with management approaches that are broad-based in a spatial sense, as well as based on criteria for human interaction with and use of the environment that respect the need for maintaining 'ecosystem integrity' [Jutta & Toope, 1997, Hyvarinen & Brack, 2000]. An ecosystem approach to regime building will promote sustainable development, intergenerational equity and precaution. While remaining human in outlook, these three interrelated concepts introduce an ecological

²⁰ Increasingly, environmental regimes designed under the prevailing liberal ideology takes the form of Technocentrism, the belief that human creativity and ingenuity can surmount any difficulties that the environment might place in the way of its search for material advancement [O'Riordan, 1981]. According to O'Riordan, technocentrism is identified by the values of rationality, managerial efficiency, optimism and faith: *faith in the ability of man to understand and control physical, biological and social processes for the benefit of present and future generations. Progress, efficiency, rationality, and control – these forms of the ideology of technocentrism that downplays the sense of wonder, reverence, and moral obligation that are the hallmarks of the ecocentric mode* [O'Riordan, 1981: p.11]. Central to this faith is the role of science, which provides the intelligence for the rational control of the environment – not only the physical science which provides the means of manipulating nature but also the social (especially economic) science which evaluates that manipulation in a common metric, money.

dimension to economic development to the extent that, independent of interference with states' sovereign interests, it must respect limits defined by what the environment can sustain. Brunée and Toope argue that regimes framed in this context are the most likely to be effective, both in ensuring ecological balance and in preventing conflict over shared resources [Brunée and Toope:29].

They propose a reconceptualization of environmental security acknowledging the continuing interplay between competitive statist behavior and an admission that concern for the environment *per se* and the interest of people might put pressure on states toward more cooperative strategies. However, their analysis fails to deal with the political mechanisms that motivate states to act in one way or another. At the same time, the prospect that people might be interested in the environment is rather loose – in what way are people interested in the environment? In a similar vein, the assumption of a certain sense of awareness and consensus in the general population over environmental issues does not correctly reflect the complexities behind environmental politics.

Their argument reasons that through the promotion of various environmental regimes, the goal is to move the normative evolution along a path from preoccupation with the allocation of resources toward ecosystem integrity, without ignoring the continuing power of states to shape the ultimate elaboration of international regimes. For this to hold true, however, we would have to assume an altruistic behavior among nations, where the common good would be the ultimate objective of any government action.

Joy Hyvarinen and Duncan Brack (2000) further elaborate on the concept of ecosystem approach to determine the effectiveness of an environmental regime,

recognizing the importance of political will in shaping the final outcome. According to them,

...an effective global environmental governance structure needs to enable, support and encourage policy and decision-making leading to an effective response to environmental management needs which require (or benefit from) a response at the global level [Hyvarinen and Brack, 2000:14].

The management goals of an effective structure include: avoiding further harm, in particular irreversible harm, to the natural environment; halting and reversing negative trends; repairing damage; and generating positive trends. Global dialogue leading to action that takes into account the needs of both developing and developed countries, is an essential prerequisite for effective global environmental governance. An effective global environmental governance structure must be conducive to such a dialogue. Table 2 lists the twelve key features that the authors identified as necessary for an effective environmental governance structure. They consider elements such as transformational leadership, to bring about fundamental changes in social and economic policies of industrialized nations; clear and early identification of the problems and the response options; effective implementation at the international level through a variety of mechanisms including dispute resolution, enforcement and compliance; coordination of activities at the national and international levels; maximization of scarce resources; integration of environmental policy with other policy areas, in particular economic policy, at the national and the international level; mobilization of private sector resources; transformation of the traditional industrialized-country development model; international equity; legitimacy and institutional adaptability.

Table 2

Key Features necessary for effective international environmental governance

1. Transformational leadership	Leadership that is capable of bringing about fundamental changes, including the rethinking of the economic and social policies of industrialized economies, through action that is perceived as legitimate.
2. Clear and early identification of problems	Cost-effective response action requires early identification of problems, root causes and likely future trends. Science and an effective science-policy interface are key components.
3. Identification and assessment of response options and management objectives	Problem identification needs to be followed by identification and assessment of response options, which includes: addressing the policy implications of scientific knowledge; assessment of costs and benefits, leading to choices among response options; and analyzing and deciding on the appropriate level for action (local, national, regional or global).
4. Effective implementation at international level	Including negotiation of new multilateral environmental agreements (MEAs) where necessary, or agreement on non-binding instruments (e.g. guidelines or action plans); effective implementation of MEAs; and successful operation of dispute resolution, compliance and enforcement mechanisms based on a genuine North-South consensus.
5. Coordination of activities	Activities must be coordinated; they should identify interlinkages, capture synergies, and be focused. This relates to national governments and national ministries just as much as it does to UN-level and other intergovernmental bodies.
6. Effectiveness of activities	Activities must be prioritized, ensuring efficiency and good use of resources, not only at the institutional level, but also at the intergovernmental level by making the best of negotiation processes.
7. Policy integration	Achieving the integration of environmental considerations into all other policy areas, in particular economic policy, at the national level (where an effective global structure can provide an important driver) and at the global level, in international financial and trade institutions.

8. Mobilization of private sector resources	<p>Most international agencies, or MEAs, or even national governments, achieve little unless they also affect the ways in which the private sector – producers and consumers – operate. When producers are reluctant to act, consumers can often provide the impetus for change.</p> <p>Most international agencies, or MEAs, or even national governments, achieve little in the sphere of environmental protection unless they also affect the ways in which the private sector – producers and consumers – operates.</p>
9. Transformation of the traditional industrialized-country development model	<p>The system needs to have the capability to address issues with far-reaching implications for lifestyles and national economies in all countries. Beyond the need for fundamental modernization of resource use patterns, in particular energy use, leading to a transition to much less resource-intensive consumption and production, it needs to restructure the national economies in a way that will have considerable institutional implications. It needs to trigger, or at least enhance and support, action at every level of society.</p>
10. International equity	<p>The provision of financial resources, technology transfer and capacity-building assistance is a prerequisite for ensuring effective action in many cases of environmental stress. An effective structure also needs to take into account the historical responsibility of industrialized countries for global pollution levels and the development priorities of developing countries.</p>
11. Legitimacy	<p>This includes equitable representation and decision-making processes that do not discriminate against developing countries or other groups of countries; effective mechanisms that enable contributions by non-governmental actors; and transparent decision-making processes, including access to information.</p>
12. Institutional adaptability: innovation and learning	<p>An effective global environmental governance structure needs to identify new ways of addressing old problems, and ways of addressing problems that are entirely new in nature. Learning must take place continuously, and include the ability to respond to new threats and to abrupt, non-linear change.</p>

Source: Joy Hyvarinen and Duncan Brack [20000]

This approach recognizes environmental degradation as a fundamental consequence of the socio-economic organization of industrialized economies, and its corresponding political ramifications. It acknowledges that the institutional structure is an essential part of the process of developing environmentally sustainable societies, but it is in itself insufficient. At the root of the problem lies the need for political will that is fundamental to move the world down the road towards sustainable development. It is clear from this framework that the necessary changes in the relationship between society and environment will be the result of the concurrence of several factors, recognizing the complexity of achieving an overarching societal change. In the end, however, it is not clear how this process may begin, in the face of strong, powerful economic interests that dominate domestic and international politics.

Gabriela Kütting also developed an alternative model to evaluate effectiveness of international environmental regimes as a response to the methodological limitations of traditional realists and neo-realists approaches to international regimes. Such limitations- mainly the focus on actor behaviour and the definition's of actors' interests in the negotiating situation – can be overcome by placing the agreement in question in its social, political, economic, technological, scientific and temporal context [Kütting, 2001:2]. She distinguishes between institutional and environmental effectiveness, whereby the former refers to the performance of the institution, while the latter makes the eradication or prevention of environmental damage a priority. Both types of effectiveness go together, and a distinction can only be made heuristically. Institutional effectiveness is therefore concerned with feasibility while environmental effectiveness takes a holistic approach, concentrating more on necessity rather than feasibility. This holistic notion of effectiveness places the regime in a wider social context as part of a web of social, political economic and environmental relations. She defines four determinants of effectiveness that refer to conditions of effectiveness as opposed to sources of effectiveness – that i.e., there is no prior assumption that effectiveness can actually be achieved by each environmental agreement. These

are economic and regulatory structures, science and time.

Economic Structures are recognized as strong determinants of both the content and the social environment in which it is negotiated, because environmental regulation usually imposes a cost on society and economic activity. Society is organized based on an economic structure, and therefore determining the relationship between environment and society. The harmony between environment and society may be restored only by changing the mode of production to incorporate knowledge about the nature of environmental systems.

Regulatory Structures refer to the adequacy of regulatory structures to the environmental problem. Traditional regime approaches focus on what is feasible, but do not relate this back to what is environmentally necessary. There needs to be reconciliation between the two.

Science is a crucial determinant of effectiveness because of the implications of scientific knowledge in our understanding of environmental phenomena. Nonetheless, the social role of the scientific community is important, as science is not viewed as an objective body of knowledge giving politically neutral answers about environmental phenomena. In particular, scientific knowledge may be responding to particular interests that finance scientific research.

Time is directly related to the conflict between environmental needs and institutional feasibilities vis-à-vis irreversibility of the environmental damage, for which she recommends a rigorous application of the Precautionary Principle [Kütting, 2000: 41]. Time is seen from an institutional point of view, relating to the timeframes in the negotiation and implementation of agreements to reflect the urgency of the environmental

problem to be regulated. From the environmental effectiveness point of view, time relates to the differences between organic – the time nature takes to regenerate itself – vis-à-vis industrial times, which is faster than the organic, and it is usually not compatible, thereby causing environmental degradation.

The approach suggested by Hyvarinen and Brack examined above recognizes, albeit not explicitly, that contemporary environmental problems are rooted in the realm of political economy, which is a refreshing contribution regime theory. It incorporates a relevant set of causal variables that go beyond the assessment of institutional efficiency and may contain a recipe for transformational change that may lead to sustainability in the future. On the other hand, the contribution that Kütting's work has done to international regime theory, while not a recipe for success, it gives a framework to determine whether an environmental regime will be effective given the prevailing socio-economic structures. It is an important step towards achieving a holistic understanding of society's relationship with its environment.

Political Economy and the Environment

The changes taking place towards a global economy are felt not only at the international level, but also at the national and local levels. This in turn is having a great effect in both the social and political level. Therefore, the economy cannot be viewed as separate from the political and social realms. These three levels of analysis must be looked at in their true, interconnected dialectic relationship. This is particularly true of environmental phenomena, which is deeply affected by socio-economic variables.

In the words of Ralf Johnston, *an understanding of the origins of environmental*

problems must be found in the discipline of political economy, with a strong emphasis in the modes of economic organization [Johnston, 1999: 13]. The study of environmental damage as a consequence of the mode of economic organization is an important link in understanding the synergies between economic activity and the environment. However, delving into the political economy roots of the problems will ultimately end up challenging the capitalist mode of production²¹ predominant in most contemporary liberal democracies.

An economic system that relies on the accumulation of private profit will ultimately enter into direct conflict with the potential solutions to environmental problems [Johnston, 1999:57]. Because the environment operates as a vast complex of interlocking systems and sub-systems, environmental problems must be countered collectively, rather than individually. However, such collective control would require mitigating the demands made on the environment by the unceasing quest for greater profitability in the production and circulation of commodities. In a profit-driven economy, this would entail constraining the mode of production, which in turn may result in its demise. So profitability must be promoted, to maintain economic stability, which means promoting further environmental stress. Institutions and their structures therefore have a crucial role in the coordination of collective action necessary to counterbalance the preponderant power of private economic interests.

Conservationist ecologists, who share an utilitarian notion of the environment,

²¹ The tension between environmental damage and the economic base of social organization is also present in centralized economies operating as a form of "state capitalism" found in the so-called communist states. Given that the ideology behind NAFTA is free market capitalism, the following discussion is limited to this type of capitalism.

have failed to incorporate this political economy approach in their analyses, restricting the intellectual debate to technical discussion about resource management: environmental issues are treated in essence as resource scarcity issues, and solutions to the problem are usually varying degrees of managerial techniques for resource utilization.

This is the ideology behind those conservation groups that ultimately gave their support to NAFTA and were instrumental in the final structure of NAAEC and its institutions. Cooperation between the three countries is geared to facilitate the transfer of cleaner technologies necessary to prevent pollution, under the premise that the increased wealth resulting from increased trade activity will yield the economic resources necessary to implement expanded pollution control and resource conservation programs [Esty, 1999:197]. In other words, pollute all you can, we will fix it later once we become rich.

The logic behind this argument is based on the Environmental Kuznets Curve (EKC) principle: environmental damage increases in the early stages of growth, but diminishes as nations reach higher levels of income. As advances in economic development generate wealth, society becomes more concerned with the environment, and therefore will invest in environmentally cleaner technologies. NAFTA's so called "environmental provisions" visited in Chapter II are also based on this principle, including the NAAEC agreement. However, the empirical evidence does not sustain it, in fact, judging by the abysmal environmental record of the United States, the opposite may hold true²².

²² For a review of the Kuznets curve, see the chapter on Trade and the Environment written by Jonathan M Harris in *Environmental and Natural Resource Economics: A Contemporary Approach*. Chapter 19. Houghton Mifflin, 2002.

Aside from the lack of empirical evidence, however, the rationale behind the EKC is fundamentally flawed for three simple reasons. First, it assumes that environmental damage is a direct consequence of the use of dirty technologies, thus undermining the complexity of environmental phenomena, as we have seen in the preceding sections. Second, it assumes that environmental damage can be reversible. However, in some cases this damage can be so severe, that the damage may become irreversible – hence the relevance of the timing issue raised by Kütting earlier in this chapter. Therefore, even if society becomes wealthy, there will be no means to reverse the damage inflicted on the environment. Moreover, in cases where the damage is reversible, the costs of cleaning up may be so high, that it would not make economic sense to invest in it, particularly when there cannot longer be a profit from such enterprise. Third, it assumes a certain degree of environmental consciousness from the citizenry that will compel society into investing in environmentally friendly techniques and practices. However, there is no guarantee that citizens will indeed become more environmentally conscious, particularly in societies where over consumption is encouraged by the economic system.

In conclusion, the rationale behind the discourse used by conservationists to support NAAEC is unsubstantiated and besieged with ideological rhetoric. The resulting institution therefore, may not have been designed to effectively protect the environment, because it fails to address the real causes of environmental stress. The predominant free-market ideology in North America – and of the increasingly globalized world economy – has meant that all other issues of national and international policy become subservient to the trade agenda. This is clearly reflected in the debate about the linkages on trade and the environment.

There seems to be a general recognition among analysts that the link is very straightforward: all human activity affects the operation of environmental systems to some extent. Trade liberalization affects the environment in two distinct ways. First, by the extent that the increased economic activity discharges pollutants into the environment either as a product or a by-product resulting from the production processes. These toxic substances can harm different forms of life – including human life - and cause irreversible damage to the ecosystems. Second, by the extent to which shifts in capital and competitive advantage alter patterns of natural resource use, leading to resource depletion in some cases, and resource exhaustion in others, particularly in the agricultural sector. During the NAFTA negotiations, too much emphasis was placed on the effects of pollution, and not on the structural changes that would occur in the commodities sector. As a consequence, the institutional answer to the problem is inappropriate because it fails to deal with the complexity of the issue.

Sustainable Development – Beyond the Rhetoric

In addressing trade and environment links, trade advocates such as Daniel Esty argue that freer trade and economic integration more broadly offer the promise of improved social welfare through the principles of sustainable development [Esty, 1999:204]. In this context, environmental concerns are rightly taken into consideration when pursuing economic integration. Esty adheres to the sustainable development paradigm, which would accept the possibility that environmental improvements might arise from economic growth so long as pollution control and resource consumption issues are expressly addressed. He also recognizes poverty as a main focus of environmental

degradation because “poverty leads to short-term decision making that is often environmentally harmful”. Therefore, he alleges that to the extent that trade promotes growth and alleviates poverty, it can yield environmental benefits – the famous “trickle down” effect of the Kuznets curve.

While there is a strong reference to sustainable development in NAFTA’s Preamble²³, it does not go beyond preambular rhetoric [Mann, 2000:11]. The buzzword of the 90s *par excellence*, the term sustainable development has become a “must” in all sorts of politically risky enterprises, in particular those involving international trade initiatives.

This is because the definitions of the term are ambiguous enough to fit just about everyone’s agenda, no matter how onerous this agenda may be. Holdren, Daily and Ehrlich have brilliantly captured the spirit of this debate in the following passage:

Notwithstanding the extraordinary growth of sustainability literature in the past few years, much of the analysis and discussion of this topic remains mired in terminological and conceptual ambiguities, as well as in disagreements about facts and practical implications. These problems arise in part because the sustainability of the human enterprise in the broadest sense depends on technological, economic, political, and cultural factors, as well as on environmental ones and in part because practitioners in the different relevant fields see different parts of the picture, typically think in terms of different time scales, and often use the same words to mean different things. At the root of the debate on trade and the environment is the difference on definition of sustainability. [Holdren, Daily and Ehrlich, 1995: 3]

The term, in fact, has been evolving since the early 80s, reflecting the different shifts in mainstream thought. The first broadly accepted definition of sustainable

²³ In the preamble, the three countries agree to promote sustainable development, including the development and enforcement of environmental laws and regulations and to achieve the trade and investment goals of the Agreement in an environmentally compatible manner.

development was developed by the International Union for the Conservation of Nature and Natural Resources (IUCN) in 1980, when ecological sustainability was the focus:

"For development to be sustainable, it must take account of social and ecological factors, as well as economic ones; of the living and non-living resource base; and of the long-term as well as the short-term advantages and disadvantages of alternative action" [IUCN/UNEP/WWF, 1980].

This definition was criticized for being concerned mainly with ecological sustainability rather than sustainable development *per se*. So the next attempt broadened mainstream interpretations to include social factors as well, in what is commonly known as the Brundtland definition²⁴:

"Economic and social development that meets the needs of the current generation without undermining the ability of future generations to meet their own needs" [WCED, 1987].

Following the publication of the Brundtland report, there has been a long list of alternative definitions of sustainable development, involving mainly two components: the meaning of development and the conditions necessary for sustainability. In 1991, IUCN revised its earlier version, to fit within the new paradigm:

"Improving the quality of human life while living within the carrying capacity of supporting ecosystems" [IUCN, 1991].

However, these definitions carry a heavy dose of subjectivity, such as what is development? What are needs? What is the carrying capacity of earth? Thereby raising as many questions as they answer. In turn, the answers to these questions are often the result of a social construct, according to author Sharachchandra Lele [Lele, 1991:627]. Lele criticizes the simplistic characterization of the problems of poverty and environmental

²⁴ This definition was developed during the World Commission on Sustainable Development held in 1987, and it derives the name from Gro Harlem Brundtland, Prime Minister of Norway, who chaired the meeting.

degradation, and challenges the assumption that poverty causes environmental degradation and that economic growth is necessary for environmental sustainability. She also questions the neo-classical economic assumptions that (a) economic growth necessarily constitutes development; and (b) economic growth reduces poverty. Distinctions should be made between ecological and social sustainability, such that the dynamic interplay between social structures and environmental conditions are recognized.

Holdren, Daily and Ehrlich also challenge the notion that economic growth does not necessarily lead to sustainability in their own definition:

We think development ought to be understood to mean progress toward alleviating the main ills that undermine human well-being. These ills are seen in terms of perverse conditions, driving forces and underlying human frailties. The development process is then seen to entail improving the perverse circumstances by altering the driving forces, which in turn requires overcoming to some extent the underlying frailties. Sustainable development then means accomplishing this in ways that do not compromise the capacity to maintain the improved conditions indefinitely. [Holdren, Daily and Ehrlich, 1995: 4]

Development in this condition, they argue, should not be considered synonymous with economic growth, since growth itself does not assure progress towards alleviating any of the human ills, although they admit that it may be a necessary condition for alleviating some of them. In this context, however, development does not extend indefinitely, but rather, the choice of processes and end states for development are compatible with maintaining the improved *conditions* indefinitely.

These improved conditions are a consequence of the complex interplay between *perverse conditions* (caused by poverty, impoverishment of the environment, possibility of war, oppression of human rights and loss of cultural diversity) *driving forces* (excessive population growth, misdistribution of consumption and investment, misuse of

technology, corruption and mismanagement) and *underlying human frailties* (greed, selfishness, intolerance, and shortsightedness, ignorance, stupidity, apathy and denial).

As the human enterprise expands, interdependencies mediated through the world economy, the global environmental commons, and international political and military relations link and intensify the threats by each of these ills. Thus, the requirements for sustainability include not only environmental factors, but also military, political and economic ones.

All of these definitions imply some sort of trade-off between the economic activity that fosters development, and the ecological damage that ultimately result. The critical issue then becomes to specify a level of damage that is acceptable to society. [Daly & Cobb, 1989: 35].

In the end, a recipe for sustainability would include a shift from the economic growth paradigm that would entail changes in unsustainable practices, reduction of excessive material consumption, and better social policies leading to egalitarian income distribution and social welfare.

While sustainable development may be possible, the nature of the capitalist mode of production makes it unattainable. Whatever the political rhetoric, sustainability is not a viable agenda item. As O’Riordan points out, the concept of sustainable utilization is politically acceptable because it is safely ambiguous. But the concept of sustainability is not, because it challenges the status quo. The creation of environmental problems is a product of the dominant mode of production of the world today, and the solution of those problems is difficult because the only institutions within which the necessary collective action could be mobilized exist to promote the interests of that mode of production

[Johnston, 1989: 256].

Public Participation and Transparency – The Necessary Link

Since the public outraged materialized in Seattle over the secretive operations of the World Bank, the role of public participation has been recognized to be pivotal in the legitimization of public policy in international trade agreements. In this sense, advocates of the pro and anti globalization movements see the merits of public involvement in decision-making processes for different reasons. Pro-globalization elites recognize that incorporating public participation, as part of the decision-making process is a powerful tool in legitimizing the trade agenda. On the other hand, anti-globalization activists see public participation as an institutional form of seizing the trade agenda to include social concerns. While there are important differences between the two positions²⁵, the role of the public in shaping public policy is a step forward in the democratization of institutional processes.

Daniel Esty suggests that the participation of civil society in the trade regimes can enhance the WTO's legitimacy as part of the fabric of global governance by broadening the coalition supporting liberalized trade and blunting environmentalist opposition to open markets. Specifically, environmental NGOs can be instrumental in correcting environmental externalities that may cause market failure in the international economic system; improve the quality of WTO environmental decision-making by

²⁵ Public participation has to be meaningful in order to be effective, and should not be limited to nominal "consultation" processes. Concepts such as hegemony become critical in the understanding of public participation in shaping public policy and it certainly is an interesting subject for further study. Given the scope of this paper, the study of public participation will be limited to definitions of its virtues,, and not how these processes occur. This could be the subject of a separate study .

counterbalancing governmental monopoly of information; and provide the WTO with a better system of checks and balances reflecting the diversity of interests and views in the international policy domain [Esty, 1997:7-11]. Assuming that not all NGOs abide to liberal institutionalism, and that progressive forces can indeed have access to the decision making process monopolized by trade elites worldwide, the resulting compromises would indeed be conducive to a structural transformation of the world economic system towards sustainability.

For environmental regimes, transparency and participation have become central institutions as a reflection of scientific uncertainty and subsidiarity²⁶. Citizens have come to play an active role in monitoring environmental conditions in specific locations, complementing the work of government authorities. Public participation and transparency are central to the trade and environment debate since most concerned with environmental issues have come to expect certain levels of information and access to decision-making processes. Similarly, citizen participation is the only institution capable of launching a complaint about non-compliance, because all states would ultimately be guilty of non-compliance [Von Moeltke, 2001:21-22].

As citizens become more involved in the structures of environmental regimes, it will become more difficult to skew the agenda to favour one particular group over another. Through coalition building, citizens can in fact present a strong opposition to unfettered capitalist ambitions from the bottom up, and become the agents of real structural change necessary for economic sustainability.

²⁶ Environmental NGOs have been involved in international environmental policy-making since the 1970's, and were indeed instrumental in shaping the agenda of the Earth summit both in Brazil and South Africa.

Chapter 4 – Effectiveness of NAAEC and the Commission of Environmental Cooperation (CEC)

Structure of the CEC

The CEC was established under NAAEC to facilitate the implementation of the agreement, as a response to the demands of environmental organizations for an institutional mechanism to ensure that trade-related environmental problems were addressed. Created and constituted by Part Three of NAAEC, the CEC is composed of a Council, a Secretariat and the Joint Public Advisory Committee (JPAC). Other committees, working groups or experts groups are also established to fulfill specific mandates. The following is brief description of some of the most interesting features contained in the environmental Agreement.

Council

The Council is the governing body of the CEC. It is composed of the environment ministers of each Party. Council members have full authority to act in all matters within the scope of NAAEC. It meets at least once a year in a regular session, where a public assembly is held to listen to concerns of the North American public. CEC issues are decided upon during in-camera sessions by consensus and in some instances by two-third vote.

The Council is encouraged to request policy, technical or scientific advice from the Joint Public Advisory Committee on any matter within the scope of the Agreement, including advice on any documents submitted for Council's approval. However, this is taken as advice only, and Council has no obligation to follow this advice in their

decisions.

Secretariat

The Secretariat provides administrative, technical and operational support to the Council and implements initiatives for work or research pertaining to the NAEEC. Under Article 13, the Secretariat has the mandate to prepare a report to Council on any matter within the scope of the annual program, or any other environmental matter related to the cooperative functions of the Agreement. The Council will decide on the final publication of the report by a two-thirds vote.

Although the study of Article 13 remains out of the scope of this paper, two cases deserve mention: the Silva Reservoir, and the San Pedro River. These two investigations are innovative and have had multiple impacts. The Sylva Reservoir investigation and report opened up the possibility of a regional cleanup of the river system; the San Pedro Report opened up a way for local people to deal with transborder linkages in order to consider a comprehensive solution.

The Citizen submission process

Perhaps one of the most innovative processes contained in the Agreement refers to the Citizen Submission on Enforcement Matters, stipulated under Article 14 and 15, whereby the Secretariat considers a submission from individual citizens or non-governmental organization asserting that a Party is failing to enforce its environmental law effectively.

The process does not lead to a determination of compliance or non-compliance with the enforcement obligation, but, if the process is followed to completion, the Secretariat may determine the facts surrounding government action or inaction in relation

to the subject of the submission. Under Article 15 the council has the discretionary power to instruct the Secretariat to develop and publish a Factual Record. The public release of the document is also subject to a two-thirds Council vote.

Joint Public Advisory Committee

The Joint Public Advisory Committee (JPAC) was under Article 16. It is composed of fifteen volunteer citizens, five appointed by each Party. The Canadian and Mexican members are appointed by their respective Council member, while the US members are appointed directly by the President of the United States. The US and Mexican members have no fixed terms, and the Canadians have a three year term, starting at the date of their nomination.

JPAC's main function is to provide advice to the Council on any matter within the scope of the agreement. It can also act as an advisor to the Secretariat, providing relevant policy, technical and scientific or other information about different issues, including a Factual Record under Article 15.

Like the Council, JPAC works by consensus and its members act independently of the Council or governments. The Committee acts as a single, transnational body, whose role is to represent the North American public at large, by ensuring that public input and concerns are taken into account when formulating its advice to Council. To achieve this goal, JPAC organizes plenary discussions with the public on general or specific issues related to the CEC, four to five times a year.

Dispute Settlement Mechanism

Chapter V of the Agreement establishes a traditional state-to-state dispute resolution process that can lead to trade sanctions or pecuniary penalties against a Party

that persistently fails to effectively enforce its environmental laws. Despite the high publicity around this provision, the process has not been used to date, rendering it virtually toothless. Parties are continuing to develop rules of procedure in the event the provision is ever used.

Evaluation of the Effectiveness of NAAEC

Articles 14 & 15 - The citizen submission process.

One of the principal aims of the NAAEC is the promotion of effective enforcement by the Parties of their environmental legislation, as set out in the Objectives (Article 1(g)). For this reason, the study of the history of the implementation of Articles 14 and 15 offers important insights on the effectiveness of NAAEC. These two articles constitute the core of the citizen submission process, as they provide the means by which any citizen or nongovernmental organization from each of the three countries may have a role in the enforcement of domestic environmental laws.

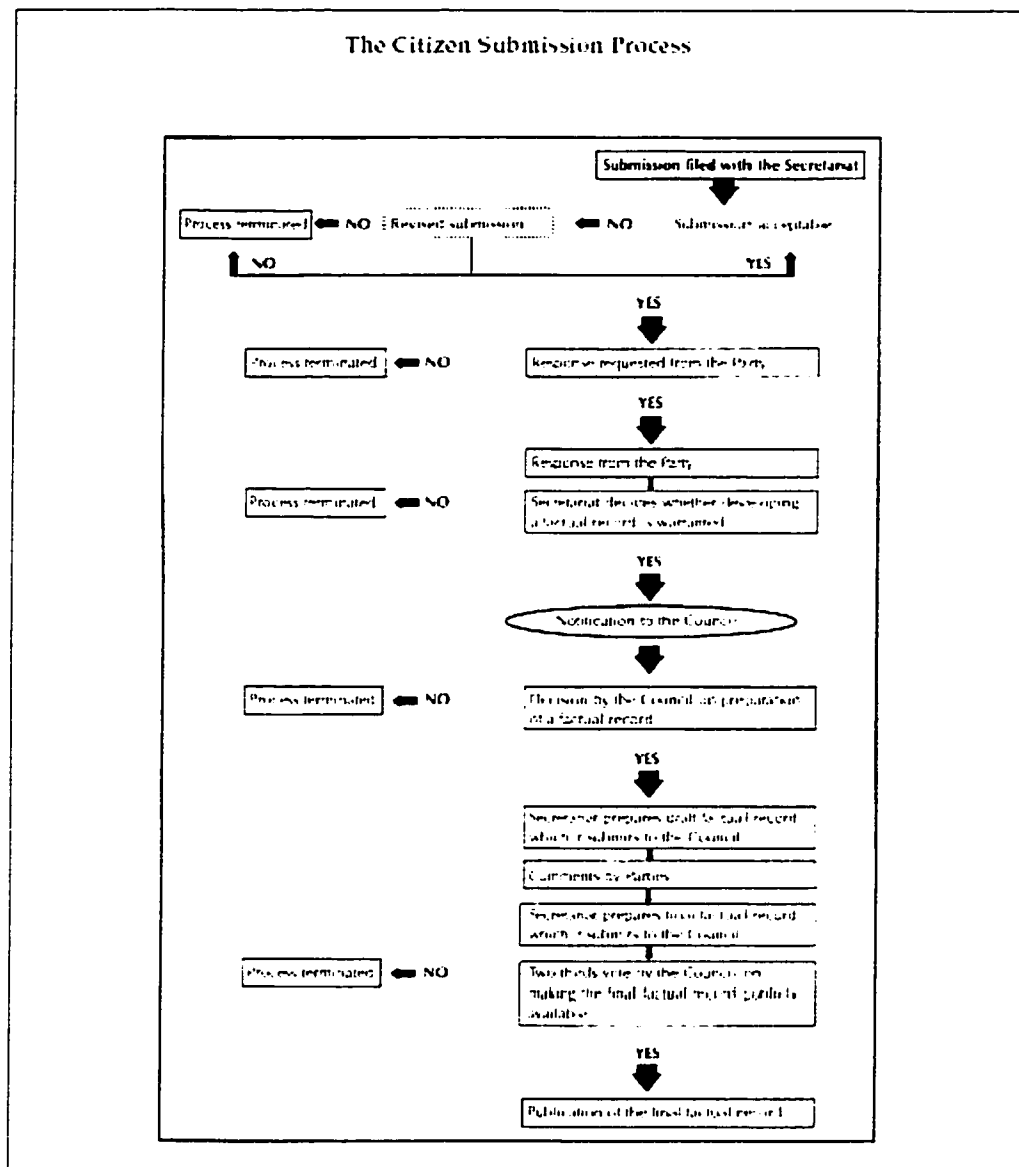
A set of guidelines provides guidance to the submitters with regards to the process envisaged in these two articles²⁷. These guidelines have been revised twice since their adoption in 1995, and have been considered key to the implementation of the provisions contained in the two Articles. Some of the controversy surrounding the adoption of changes to the Guidelines will be examined later in this chapter.

The Process

Pursuant to Article 14 of NAAEC, any nongovernmental organization or person

²⁷ CEC. Guidelines for Submissions on Enforcement Matters Under Articles 14 and 15 of the North American Agreement on Environmental Cooperation. Montreal, 1995. Revised in 1999 and 2001. Can be obtained from www.cec.org.

Figure 1
Citizen Submission Process



Source: CEC. *Bringing the Facts to Light: A guide to Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, Montreal, 2000.

may file a submission, a written declaration with the Secretariat, claiming that a Party to the NAAEC is failing to enforce environmental law effectively. It is important to note, however, that the submission must focus on the extent to which a Party has *failed to*

effectively enforce its environmental laws, not on the *effectiveness* of the environmental laws as written [CEC, 2000a: 48]. The process diagram is included in Figure 1 above.

The Secretariat, after having received the submission, determines whether it conforms to a number of procedural criteria set out in paragraph 1 (See table 3 below). Note that there is no time limit for this review.

Table 3

Criteria for the submission of a citizen complaint under Article 14 (1)

- | |
|--|
| <ul style="list-style-type: none">• The submission is presented in writing in a language designated by the Party in a notification to the Secretariat;• Clearly identifies the person or organization making the submission;• Provides sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based;• Appears to be aimed at promoting enforcement rather than at harassing industry (i.e. is not presented by a competitor);• Indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response, if any; and• Is filed by a person or organization residing in the territory of a Party. |
|--|

If the Secretariat determines that the formal criteria have not been satisfied, it shall issue a notification to the submitter asking to provide a Submission that conforms to the formal requirements within 30 days²⁸. If the Submitter responds within the stipulated timeframe with a revised submission, and the Secretariat determines again that the formal requirements of Article 14(1) have still not been satisfied, the Secretariat will terminate the process. However, if the Secretariat determines that the Submission meets the formal requirements, it conducts a second review, this time against more substantive and discretionary criteria set out in Article 14 (2) (Table 4 below).

²⁸ Guidelines, section 6.2. See Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation. CEC. Revised 28 June 1999. Can be accessed from www.cec.org

Again, there is no time limit for the Secretariat in making this determination. If the Secretariat determines that no response from the Party is merited, it may consider or ask for new or supplemental information from the Submitter within 30 days following receipt by the Submitter of the Secretariat's negative determination. If the Submitter does not provide sufficient information during this period, the Secretariat will terminate the process. If the Secretariat determines that the requirements of Article 14(2) are met, it forwards a copy of the Submission and any supporting documents to the Party involved.

Table 4
Criteria for requesting a response from a Party under Article 14 (2)

- The submission alleges harm to the person or organization making the submission;
- The submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of this Agreement;
- Private remedies available under the Party's laws have been pursued; and
- The submission is drawn exclusively from mass media reports

The Party shall advise the Secretariat within 30 days or, in exceptional circumstances within 60 days, (1) whether the matter was previously the subject of a judicial or administrative proceeding, and (2) of any other information the Party wishes to submit, such as whether private remedies in connection with the matter are available to the person or organization making the Submission and whether they have been pursued (Article 14(3)).

If the matter raised is the subject of a pending judicial or administrative proceeding, the Secretariat will terminate the process (Guidelines section 9.4). If, on the other hand, is not, and the Party has sent due response (or has failed to do so), the

Secretariat determines whether it will recommend to the Council the development of a Factual Record. (Guidelines, section 9.5). Again, there is no deadline for this decision and there is no opportunity for the Submitter to reply to the Party's response. The Guidelines do not set up criteria for the Secretariat to base its decision, but require that the Secretariat notify the Submitter and the Council of its reasons. (Guidelines, section 10.1).

In light of that response, the Secretariat may decide that a Factual Record is not warranted, in which case, the process is terminated (Article 15 (1)). If however, the Secretariat estimates that the development of a Factual Record is warranted, it informs the Council. There is no time limit for Council to respond. The revised guidelines approved in 1999, a 30-day period was set before the Submitter or the public could be notified that Council had been informed. However, after significant pressure from the public, the Council agreed to reduce this "blackout" period to 5 days, thereby modifying the guidelines in 2001 [Council Resolution 01-06].

At this point in the process, the decision-making role of the Secretariat ends. The recommendation to Council that a Factual Record is warranted must be approved by a two-thirds vote of Council, as set out in Article 15(2). This mechanism has been fiercely criticized by Submitters and public at large, alleging that the Council may be in conflict of interest, acting both as a member of the CEC Council, and as the Party against the claim is presented [CEC:1999; CEC 2000b]. There is no time limit regarding the preparation of the Factual Record, and no provision specifically allowing the submitter to provide additional information. The Council may take as long as it deems appropriate,

sometimes lengthening the process to up to 50 months (Please refer to the Status table included in Appendix II).

The Secretariat, in preparing a Factual Record, will consider information that is either publicly available, submitted by interested non-governmental organizations or persons, submitted by JPAC, or developed by the Secretariat or independent experts (Article 15.4). A draft Factual Record is submitted to the Council and any Party may provide comments on the accuracy of the draft within 45 days thereafter (Article 15(5)). Remarkably, the Submitter has no opportunity for the Submitter to comment on the Factual Record, which has been seen as lack of transparency in the process [CEC:1999:12;CEC 2001:6].

If necessary, the Secretariat incorporates any comments to the Factual Record, but the decision to make the final Factual Record publicly available is left to the discretion of the Council, who will decide on a two-thirds vote. A two-thirds decision means within the context of the NAAEC that two out of three Parties agree on a particularly issue. With such small group of Parties, decisions are bound to favour the most predominant Party, in this case the United States. In the event of a negative vote from Council, there is, once again, no opportunity for the Submitter to appeal the decision, and no further action is required from the Party.

A Catalyst for Action

Since the establishment of the CEC in 1994, thirty-six Submissions have been filed with the Secretariat, of which twenty-five have been terminated and eleven are still pending (See Table 5). Of the twenty-five terminated cases, only three Factual Records

have been developed to date²⁹. Thirteen were terminated because they did not satisfy the formal requirements under Article 14 (1), (2) and (3)(a). In six cases, the Secretariat did not recommend the preparation of a Factual Record, and in two cases, the Council instructed the Secretariat not to prepare a Factual Record. There was only one case where the submitters withdrew their Submission.

Of the 11 pending cases, the Secretariat has not yet decided whether to recommend the preparation of a Factual Record under Article 15(1) for two submissions, and it is currently developing Factual Record for five submissions. The Council is considering whether to authorize the development of a Factual Record in two cases, is considering making it publicly available in one case and is reviewing a draft Factual Record in one case. More detail on the status of the Submissions is included in Appendix A.

Table 5
Summary of the Citizen Submission Process

Active (11 files)	Secretariat deciding on whether to recommend the development of a Factual Record	2
	Secretariat preparing Factual Record	5
	Pending Council decision to make Factual Record publicly available	1
	Pending Council decision to approve draft Factual Record	1
	Pending Council decision to authorize development of a Factual Record	2
Inactive (25 files)	Factual Record developed and released	3
	Secretariat recommended development of a Factual Record and Council refused	2
	Secretariat did not recommend development of a Factual Record	6
	Submitters withdrew	1
	Submissions did not satisfy Article 14 requirements	13

²⁹ The Secretariat is currently working on the development of five additional Factual Records, and Council is considering two cases for the release of the Factual Record to the public.

Effectiveness of the Citizen Submission Process

Sem-96-001 Cozumel Pier Project

The Cozumel Pier project was the first case that ended in the development of a Factual Record, and as such, it has served to inform the process in the subsequent cases. It is also a good example of the effectiveness of this mechanism, because sufficient time has passed to evaluate any actions taken from the concerned Party in relation to this complaint.

In January 18, 1996, a group of non-governmental organizations³⁰ submitted a complaint alleging that the Mexican Government was failing to effectively enforce its environmental laws, in approving a port terminal project in *Playa Paraiso*, Cozumel. The Submitters alleged that by approving the project without requiring a comprehensive Environmental Impact Assessment (EIA) for the entire port project, the Government was indeed failing to enforce its environmental laws effectively. An EIA was conducted only for the single new pier proposed for tourist cruise ships at Cozumel. The submitters further alleged that the authorized activity extended to a protected natural area and would result in the destruction of habitats important for some species, in violation of Mexican environmental and land use laws.

The Secretariat estimated that the Submission met all the requirements under Article 14 (1) and (2), and requested a response from the Party on February 6, 1996. In turn, Mexico responded on March 27, 1996, contending that the Submission was

³⁰ The Committee for the Protection of Natural Resources A.C., the International Group of One Hundred A.C. and the Mexican Center for Environmental Law A.C.

improper because it challenged actions that took place before NAAEC had come into force. Mexico also argued that the Submitters had not exhausted the administrative recourse available to them under Mexican law (instead resorting to a method of “popular complaint”) and that the project both conformed to applicable environmental laws and had been the subject of the required EIA.

In light of the Party’s response, and in conformity with Article 15 (2), the Secretariat estimated that more information was needed and notified Council that the Submission warranted the development of a Factual Record. The Council, by a unanimous vote (Council Resolution 96-08), asked the Secretariat to prepare a Factual Record pursuant to NAAEC Guidelines. It asked the Secretariat to *consider whether the Party concerned [had] failed to enforce effectively its environmental law since the NAAEC’s enactment*. Consequently, Council directed the Secretariat to consider relevant facts prior to January 1, 1994 in the development of the Factual Record.

In its Factual Record, the Secretariat focused on extensions of the authorizations that had been based on the initial Environmental Impact Assessment (EIA), although the applicable environmental laws had changed. With respect to the environmental land use laws, the Secretariat pointed to sections in the EIA indicating potential harm to coral reefs. The Secretariat stated, however, that it would not determine whether in the light of the EIA the construction and operation of the port terminals was in compliance with the environmental laws applicable when the authorization was issued [CEC, 2001].

The Record of the Cozumel Pier project is a clear summary of the contentions of the parties involved and provides a good basis for the reader to understand the working of Mexico’s EIA statute and the respective claims on both sides of the dispute. However, the

Record's principal contribution was to assemble the contentions and analyses of the Parties. The Report does not offer any conclusions concerning the effective enforcement of applicable environmental laws, and for the layperson, it is highly technical. The process ends here, and there are no further recommendations for immediate or future action.

In the end, the Cozumel Pier Project was completed, with only minor reductions on its scope, although it is not clear if the reduction was due to the impact of the Factual Record on public opinion in Mexico. The ecological damage was in no way prevented, and the establishment of a fund to protect coral reefs could only serve as a minor remedial measure. Some improvements in the EIA regulations in Mexico occurred as a result [CEC, 2001], but these would not be applied retroactively.

SEM-97-003- Quebec Hog Farms

In April 1997, the Secretariat received a submission alleging that the Quebec government was failing to enforce environmental laws concerning pollution originating from livestock operations, primarily from hog farms. After determining that the submission met all the criteria under Article 14(1), the Secretariat then requested a response from the Party, the government of Canada, pursuant to Article 14 (2). Canada responded to the allegations asserting that it was indeed effectively enforcing the environmental laws concerning agricultural operations in Quebec. Canada argued that it had developed and implemented a wide variety of strategies in order to promote compliance with the laws concerning agricultural operations in Quebec. However, these arguments were not convincing, and the Secretariat recommended to Council that a Factual Record be developed.

While the response described some of the measures Quebec had employed to enforce the Environmental Quality Act, the Secretariat believed that additional information should be developed *concerning the central issue of the effectiveness of these measures, particularly in light of the widespread violations asserted to exist in the submission* [CEC, 2000a: 52].

The Secretariat argued that *...while the response asserts that the Party's strategies are effective in preventing and addressing violations of these laws, the Submitters assertions (supported by the Auditor General and others) that violations are widespread, and to some extent subsidized by the government, supports developing additional information concerning the use and effectiveness of these tools* [CEC, 2000: 64]. In the end, Council instructed the Secretariat not to develop a Factual Record without offering an explanation.

SEM-97-006 Friends of the Oldman River

In October 1997, the non-governmental organization Friends of the Oldman River (FOR) submitted a complaint alleging that Canada was failing to effectively enforce its Fisheries Act and the Canadian Environmental Assessment Act (CEEAA)³¹. Specifically, *the Government of Canada is failing to apply, comply with and enforce the habitat protection sections of the Fisheries Act and with CEAA (Canadian Environmental Assessment Act). In particular the Government of Canada is failing to apply, comply with and enforce Sections 35, 37 and 40 of the Fisheries Act, Section 5(1)(d) of CEAA and*

³¹ FOR had submitted a first complaint in October 1996, which was rejected on the grounds that the same matter was before the Courts. When the case was finally withdrawn from the courts, FOR made another submission in October 1997.

*Schedule 1 Part 1 Item 6 of the Law List Regulations made pursuant to paragraphs 59(f) and (g) of CEAA.*³²

FOR alleged that the decision-making process of the Department of Fisheries was fundamentally flawed and as a consequence, there had been very few prosecutions under the habitat provisions of the Fisheries Act. Under a Directive issued by the department of Fisheries, the standard enforcement response to projects that could harm fish habitat typically involves engaging in discussions with the project proponent and issuing a Letter of Advice. FOR characterized this approach as a *powerful force for the reduction of the protection afforded to fish habitat*³³. They further argued that this amounted to a de facto abdication of legal responsibilities by the Government of Canada to the inland provinces, and that the provinces had not done a good job of ensuring compliance with or enforcing the Fisheries Act.

Because the submitter had cited the Sunpine Road project as an example of the government's alleged failure to effectively enforce its environmental laws, Canada recommended in its response that the Secretariat not consider this project because it was under litigation at that time. However, the Sunpine case that was standing before the courts dealt with different legal issues than the case cited in the submission. Moreover, the Secretariat also understood that the submission dealt with the general failure of Canada to effectively enforce the Fisheries Act and CEAA (i.e. Canada's approach to project reviews, as reflected in the 1995 Directive to issue "Letter of Advice", and its approach to prosecutions) and not with a specific case. The Secretariat estimated that it had not

³² The entire text of the Submission can be obtained at www.cec.org

³³ See the Appendix to the submission SEM-97-006 Friends of the Oldman River at <http://www.cec.org/files/pdf/sem/97-6-SUB-E.pdf>.

received sufficient information concerning the current use of the Letters of Advice, and related enforcement tools. The Secretariat then issued a recommendation to Council on July 1999 stating that it was appropriate to develop a Factual Record concerning these enforcement tools.

The instruction from Council to develop the Factual Record was issued in November 2001 (Council Resolution 01-08), forced by decisive public pressure and strong leadership by the members of the Joint Public Advisory Committee (JPAC). Council was under public scrutiny after having modified the Guidelines for Citizen Submission on Articles 14 & 15, which prompted general discontent with the entire process. In addressing the Council during its public session in June 2000, Martha Kostuch, Vice President of FOR, accused the Governments of undermining the integrity of the public submission process through conflict of interest, and urged them to separate their responsibilities as members of the CEC Council from their interests as Parties subject to review. Ms. Kostuch asked the Council to immediately refer FOR's submission to the Secretariat for the preparation of the Factual Record [Kostuch, 2000].

SEM-98-007 Metales y Derivados

A Mexican environmental health coalition submitted a complaint to the Secretariat in October 1998, asserting that Mexico was failing to effectively enforce its environmental laws in the case of an abandoned land smelter in Tijuana, Baja California. The Submitters alleged that the site represented a major risk for the health of the neighboring communities and the environment, that Mexico had failed to extradite the persons responsible for the contamination, and the measures that had been taken at the

site were not sufficient to protect the neighboring population and avoid ecological damage.

For more than a decade, the American-owned company, *Metales y Derivados*, recycled car and boat batteries to extract their lead, melted it into bricks and shipped the bricks back to the United States. Although Mexican officials shut down the plant in 1994, the site was never cleaned up. Its owner, a U.S. citizen named Jose Kahn, crossed the border back into San Diego. Mexican arrest warrants were outstanding, charging him with gross environmental pollution, although a deportation was never requested [Sullivan, 2003]. According to the Mexican government, he left behind up to 8,500 tons of toxins emanating from recycled battery that are spread out over three acres of land in open piles and rusted barrels. Toxins are carried by the wind and water streams, ending up in *Colonia Chilpancingo*, a worker's village of 10,000 people directly below the plant [Sullivan, 2003].

Mexico has estimated that a cleanup of the site could cost over \$6 million US. Recently, the state of Baja California and Kahn filed a joint loan request for \$800,000 from the North American Development Bank, which is being reviewed. It is clear, nonetheless, that this amount will not cover the cost of the cleanup. In the meantime, the site represents a major public health hazard, exposing children and adults alike to these dangerous substances. Medical reports have indicated that the communities suffer for an unusual rate of strange diseases, including skin rashes, cancer and an alarming incidence of birth defects and stillbirths [Public Citizen, 1996: 3; Sullivan, 2003:A17].

On March 5, 1999, the Secretariat notified Mexico that it had reviewed the

Submission and determined that it met the criteria set forth in Article 14 (1) of the NAAEC and 14 (2), and decided that the Submission merited a response from the Party. The response came on June 1, 1999 and designated that response as confidential. The Secretariat requested further clarification of the extent and reasons for the confidentiality claim, and in light of the Parties response, the Secretariat decided that the development of a Factual Record was warranted in one of the allegations claimed in the Submission, mainly that Mexico was failing to effectively enforce Articles 170 and 134 of the General Law on Ecological Balance and Environmental Protection. In its decision, the Secretariat asserted that a Factual Record was granted to *understand Mexico's enforcement efforts to prevent an imminent risk to the environment and dangerous repercussions to public health, and to prevent and control soil contamination, including by restoration, at the Metales y Derivados site, in accordance with those provisions*³⁴.

Council authorized the public release of the Factual Record on 11 February 2002. The report indicates that *exposure to these heavy metals can severely harm human health* [CEC, 2002d: 8] and called the site's cleanup "urgent." In the commission's report, EPA viewed the Metales situation as "exemplifying a critical public policy issue in the border region: the use of the border as a shield against enforcement."³⁵ It also says that the enforcement division of Mexico's Secretariat of the Environment (PROFEPA) reports to the US EPA "*with alarming regularity of abandoned maquiladoras on the Mexican side of the border*" with their hazardous waste left behind. The Mexican government has been reluctant to clean up foreign-made messes, and when the foreigners leave the country

³⁴ Secretariat's notification to Council dated 6 March 2000.

³⁵ Ibid, p.45

they are beyond the reach of Mexico's laws [Sullivan, 2003:A17].

The Metales and Derivados case is another example of the weaknesses in this process. The motive behind this submission was to generate public outrage that would lead to government action, given the gravity of the environmental damage and the threat to human lives in these border communities. Despite a report prepared by PROFEPA recommending a number of actions to be taken, neither the government nor the investors have initiated any meaningful action yet. This may in part be due to the huge costs involved in the clean up, as stated before, and the absence of mechanisms to address the lack of funds necessary for remedial action.

In the meantime, people continue to get ill and die as a result of their exposure to the lead and other toxics left out in the open. Not only is the ecosystem at stake, but also the health and well-being of humans is being threatened. This should sufficient reason to mobilize governments in finding a viable solution to this problem, and the mechanisms established under NAAEC have not been able to do this.

Procedural Issues

The CEC has undergone three evaluations of the process contemplated under Articles 14 and 15. The first one was conducted during the four-year internal review of the CEC [Bendesky, Bramble and Owen, 1998]. The second evaluation occurred when Council's decision to amend the existing Guidelines was faced by significant public outrage, prompting a public revision of the proposed revised guidelines³⁶. The third

³⁶ See CEC compilation of Call for Public Comments on the Revised Guidelines for Citizen Submissions on Enforcement Matters under Articles 14 and 15 of the NAAEC, 15 December 1998; JPAC Advice to

evaluation was also originated through a Council Resolution (Council Resolution 00-09), directing JPAC to conduct a public review of the lessons learned on the Citizen Submissions process.

In general, critics have pointed out to issues pertaining to the timeliness of the process, transparency, effectiveness, resources, Secretariat's independence, and potential conflict of interest from Council's dual role.

Timeliness

The timeliness of the process has been a concern for the public. In general, there are no specific limits to the time the Secretariat can spend in processing the complaints. For example, it has taken anywhere from 1 month to 24 months to process a complaint under Articles 14 (1) and Articles 14 (2). Similarly, there is no time limit on the Secretariat's internal review of any response received from a Party; nor is there a time limit on preparation of the draft and final Factual Records. The public has judged the lack of time constraints as "unreasonable", given the relative simplicity of some of the tasks, such as the review under article 14(1) and 14(2). This lack of clear timelines has given the Secretariat ample excuse for extending the process, rather than rationalizing it³⁷.

In a lot of cases, the delays in the process may be attributable to the defendant Party, which may be slow in submitting its response. To this end, stakeholders have suggested that stricter deadlines should be imposed to accelerate that process. Deadlines

Council No. 99-01 and CEC JPAC Report on the Workshop on the Revised Guidelines for Citizen Submissions on Enforcement Matters under Articles 14 and 15 of the NAAEC, 29 January 1999.

³⁷ In its four year revision of the CEC, the Internal Review Committee recognized that while personnel shifts and other difficulties may have caused delays in the process, the IRC urged the secretariat to move as expeditiously as possible to address the problem. Three years later, in JPAC's report on lessons learned from the citizen submission process, commentators also mentioned the problem related to timing issues within the process.

for the Secretariat to make its determination on whether to request authority to prepare a factual report have also been suggested. Others suggest that, once a recommendation has been made, a strict deadline should apply to the Council's decision whether to instruct the Secretariat to prepare the Factual Record.

Another point of contention has been the requirement that a Secretariat recommendation to the Council (and the information that it is based upon) be withheld from the public for 30 days after its submission to the Council. During the consultations on lessons learned, JPAC heard the overwhelming consensus that this requirement be eliminated because "it is impractical, and that it does not stand up to serious analysis, and that, in general, it seriously undermines the purpose of the Articles 14 and 15 process" [CEC, 2001:10]. Consequently, JPAC recommended to Council that the deadline either be removed or substantially reduced. To that extent, Council reduced the "black-out" period to 5 days after Council has been notified that a the development of a Factual Record is warranted [Council Resolution 01-06]. The Council also committed to respond expeditiously, but no additional timeline was established.

Effectiveness

The Articles 14 & 15 Process does not provide any enforcement mechanism after a Factual Record has been publicly released. For the Internal Review Committee, the lack of an enforcement mechanism did not make the process useless or ineffective; as they believed that impartial fact finding is a valuable part of dispute avoidance and dispute resolution processes [CEC, 1998: 20]. However, NAAEC observers have serious doubts about the merits of this fact-finding process without having a monitoring mechanism to further follow up on the Party's actions concerning a Factual Record. JPAC advised the

Council that while they agreed that enforcement of environmental laws cannot be left to private citizens or NGOs, the concerned Party could report to the Secretariat within a reasonable period of time on the actions taken (if any) to address the matters set forth in that Factual Record [CEC, 2001:17]. Council response was sent to JPAC on December 6, 2002, indicating that *any follow-up which a Party might choose to pursue is a domestic policy matter.*

Under these circumstances NAAEC is deemed toothless with respect to the enforcement of environmental laws in the three Parties. While local groups may increase their pressure on governments with the release of a Factual Record, there is no guarantee that government's will listen to the their demands. Public pressure is in itself insufficient to force meaningful governmental action on a particular issue, as demonstrated by the NAFTA negotiations, and more recently with the Free Trade Area of the Americas (FTAA) negotiations.

Resources

The issue of resource allocation has always been contentious in the Secretariat. Lack of human and financial resources have been blamed in large part for the diminished efficiency of the Secretariat, specially concerning the citizen submission process. Only two staff members in the Secretariat are assigned to the submissions unit. Two people probably cannot promptly dispose of the stream of Submissions that will be filed in the next few years as the procedure earns public support. The number of requests for Factual Records is increasing as well, and the current resources assigned to the process may be insufficient for handling all of them.

The operating budget of the Secretariat has been set at US\$9 million a year.

Despite some public pressure to increase the level of funding, it is unlikely to happen in the near future, given the trend of declining or stagnant departmental budgets in the three Parties during the last decade. In addition, Parties contribute to the budget on equal terms, which imposes a huge financial burden on Mexico. According to the report of the Independent Review Committee, Mexico's one-third allocation of the CEC budget equals or exceeds the amount available for management of its national protected areas³⁸.

Council's role

The report of the Independent Review Committee (IRC) mentions the challenges presented by the dual role of the Parties in the CEC. On one hand, Council members act as individual nations in an international organization, each reflecting its own national interest. On the other hand, the same representatives seek to identify and achieve goals. This reflects both the history of the NAAEC, in particular the sense that it was established primarily to watch Mexico, and observations that in many instances it has been implemented in that manner. The report urges Parties to pay greater attention to their own involvement with and oversight of the CEC, as well as a more coordinated policy development among departments within their own governments. However, the experience under Articles 14 & 15 indicate that it has been extremely difficult – if not impossible – to balance these two roles.

Further developments in the Articles 14 & 15 process indicate that the Council has often attempted to retain control of the process. Between 1999 and 2000, JPAC exercised a strong leadership in voicing the concerns from the public regarding matters of

³⁸ CEC, 1998. See footnote on page 9.

transparency and the Secretariat's independence in the process³⁹. After significant public pressure, the Council agreed to some concessions, including the involvement of JPAC in reviewing any issues concerning the implementation and further elaboration of Articles 14 & 15 arising from the Council, the Secretariat, the public or JPAC itself [Council Resolution 00-09]. In the following year, however, decisions authorizing the development of Factual Records for five cases were eclipsed by Council's shameful attempt to micro-manage the process, by both limiting the scope of the Factual Records and directing the Secretariat to provide the Parties with its overall work plan for gathering the relevant facts and the opportunity to comment on it⁴⁰. In response, JPAC issued an Advice to Council urging Council, in the interests of transparency, independence of the Secretariat, respect for the public, to authorize JPAC to conduct a public review on these issues⁴¹.

Council authorized JPAC to conduct a public review of the second issue, mainly the requirement for the Secretariat to provide the Parties with its work plan and the opportunity to comment on it, and delayed the public review on the matter limiting the scope of Factual Records until after the concerned Factual Record be developed⁴². JPAC conducted a public consultation immediately following Council's authorization, and submitted an Advice to Council recommending that it *refrain in the future from including*

³⁹ Increasingly frustrated by Council's foot-dragging attitude towards the pending cases on Articles 14 & 15, JPAC assumed a protagonist role in the process by publicly exercising pressure on Council members in the months proceeding and during their annual meeting in June 2000. See letters sent by Regina Barba, JPAC Chair for 2000, to the Council in March 24, 2000 and in May 2, 2000.

⁴⁰ See Council Resolutions 01-08, 01-09, 01-10, 01-11 and 01-12.

⁴¹ JPAC Advice to Council No. 01-09

⁴² See letter to JPAC by Council members on 11 February 2002 concerning JPAC's Advice to Council No. 01-09.

a requirement that the Secretariat provide the Parties with the opportunity to comment on the overall work plans. It added that the Secretariat could provide the work plans to the Parties for information purposes, at the same time as they are provided to the public⁴³.

JPAC's advise was drawn from the analysis of the public consultation, notably that there was a perception in the public *of undue influence by the Parties in the activities of the Secretariat regarding the citizen submission process.* Other considerations include the potential for conflict of interest for the Parties in directing the work of the Secretariat, as well as potential delays arising from the Parties' comments and the subsequent response from the Secretariat. Council responded that the original instruction to the Secretariat to provide the Parties with the work plans and an opportunity to comment on the overall plans was meant to *assist the Secretariat in obtaining government held information sought from the Parties and expedite the fact gathering process.* Council did commit, nonetheless, to making its comments publicly available to the public and JPAC⁴⁴.

Transparency

Transparency and public access to the status of the information concerning the Submissions are key elements of the process set out in Articles 14 & 15. As it stands now, there is too much discretionary decision making, even in cases where it need not be. A Party may decide when information is confidential and simply hold the right to keep information that may be key in the development of a Factual Record. Similarly, a citizen has no ability to determine if the response given by a Party is truthful or accurate and

⁴³ JPAC Advice to Council 02-07

⁴⁴ See letter to JPAC by Council members on June 14 2002 concerning JPAC's Advice to Council No. 02-07

there is no specific provision allowing a Submitter to participate in the development of a draft Factual Record. Only Parties may offer comments on the draft Factual Record, forcing the Submitter to rely on the Secretariat to pursue the claim. The Submitter is therefore isolated from the discussions of the Council, and has no recourse to reply or even appeal any of these decisions.

NAFTA Chapter 11 and NAAEC

One of the most contentious issues surrounding NAFTA are the provisions to protect investors' rights contained in Chapter 11. Under these provisions, corporations are given citizen status, allowing them to challenge in court any governmental measure that could have a negative influence in their profits – including regulations to protect the environment or human health.

There are two basic concerns with Chapter 11 and the ability of governments to protect human health or the environment:

- Chapter 11 can undermine efforts to enact new laws and regulations in the public interest in these two areas – what some experts have referred to as the “regulatory chill”.
- Chapter 11 can require governments to pay compensation to polluters to stop polluting, even if their activities have an adverse impact on public health and welfare.

The first arbitration initiated under Chapter 11 was *Ethyl vs. Canada*, where Canada conceded the case and paid Ethyl Corp. \$20 million Canadian, and signed a letter saying there was no proof that MMT was harmful. More recently, a US pesticide lobby

group threatened to initiate a case against the provincial government in Quebec if the new law restricting the use of pesticides in the province was passed⁴⁵.

In June 1999, the three NAFTA environment ministers, meeting together as the governing Council for the CEC, recognized the emerging problems with Chapter 11 in a statement that reaffirmed the sovereign right of each government to protect the environment⁴⁶. However, efforts made to discuss NAFTA Chapter 11 in the Free trade Commission have stalled, with no clear consensus on the scope of the problem [Hufbauer et al, 2000].

The investor-state process is fundamentally flawed in that it does not contain democratic safeguards. The international arbitration process was originally conceived as addressing private matters between businesses or between business and a government; this is not the case with Chapter 11, where important decisions affecting public interest are increasingly being litigated behind closed doors.

The process is started by a foreign investor that invokes its right to do so. The first step is to issue a notice of intent to submit a claim to arbitration. This is followed by a consultation and cooling down period of at least 90 days before the claimant starts the actual arbitration by sending a "notice of arbitration" to the NAFTA Party involved. When sending the notice of arbitration, the investor must choose one of three internationally recognized arbitration processes operating under the United Nations Commission on International Trade Law (UNCITRAL) or the International Center for Settlement of Investment Disputes (ICSID). The notice of intent and the notice of

⁴⁵ Kevin Dougherty, *Pesticide sparks NAFTA fight*, The Montreal Gazette, Friday July 5, 2000.

⁴⁶ Final Communique, Commission for Environmental Cooperation, Annual Council Meeting, Banff, Alberta, June 28, 1999.

arbitration are always sent to the national government of the NAFTA Party, even if the disputed measure is from a state, provincial or local government. The national government is ultimately responsible to conduct the arbitration itself and can ultimately be liable for any awards against the country, even if the actions that give rise to an award are actions of a state or province.

A three person-tribunal is appointed: the investor and the state each nominate their own arbitrator, and a third neutral arbitrator is either agreed on by the Parties or is appointed by the Secretary General of the ICSD from their panel of arbitrators. The ability of each side to choose its arbitrator may be problematic when issues of public welfare and public policy are placed against private interests [IISD and WWF, 2001]. Furthermore, with the exception of a few instances, the arbitrators appointed so far have primarily commercial law backgrounds and experience, and no comprehensive understanding of public policy issues governing health and the environment⁴⁷. Once the tribunal is chosen, it operates under the rules of procedure of the ICSID or the UNCITRAL process chosen by the investor. In all three cases, the rulings are similar, allowing for the filing of legal arguments, presentation of evidence, cross-examination of witnesses, oral arguments, and finally, the decision of the tribunal. The rules in each of the process give the Tribunal a significant ability to fit the needs of the case at hand. This can be a very costly process, which is to be bared by the litigating Parties, so even if the case is won by a national government, taxpayers will still have to pay the bills, which can amount to millions of dollars.

⁴⁷ This has been one of the criticisms that NAEEC observers have voiced, arguing that the CEC should play an important role in providing expertise to these panels, as set out in Article 10 of the NAAEC.

In certain cases the Tribunal has been allowed to rule against a country's domestic law, such as in the *Metalclad vs. Mexico* litigation. Although the case is currently under judicial review, it can have devastating consequences to democracy. First, there is no requirement for the arbitrators to have any expertise or experience on domestic law. Second, the Chapter 11 system does not provide basic transparency safeguards such as public access to the process or broad rights to appeal.

Given the procedural and the content flaws of Chapter 11, experts are currently debating on ways to improve its functioning in a manner that is consistent with sustainable development. One option suggested is for NAFTA governments to issue a formal "interpretative statement" as allowed under NAFTA Article 1131(2)⁴⁸. Such statement, if adopted by the three Parties through the Free Trade Commission, would bind all future Chapter 11 Tribunals⁴⁹. Other experts believe that, given the mix of substantive and procedural issues that are problematic within Chapter 11, an interpretive statement may not be sufficient to address its democratic deficiencies, and have suggested that the NAFTA's text be reopened. However, this suggestion has met strong resistance from governments who fear the potential for a wholesale renegotiation. Given these fears, governments are faced with two options: first, governments could agree to open Chapter 11 text only so far as required to amend its procedural rules, while

⁴⁸ This option is based on the view that the problems experienced under Chapter 11 were "unintended" and "unforeseen" by NAFTA negotiators, and that rulings that have favored the investors against public welfare are a consequence of "erroneous" interpretations of the agreement.

⁴⁹ See Aaron Cosbey. NAFTA's Chapter 11 and the Environment: Discussion Paper for a Public Workshop of the Joint Public Advisory Committee of the Commission for Environmental Cooperation of North America, Mexico City, 24 March 2003. In fact the FTC did issue such a statement in July 2001. It had two parts: first, an interpretation of Article 1105 (minimum international standards of treatment); and second, a clarification and commitment on the issue of transparency. An analysis of this statement clearly illustrates the limited function such a mechanism can play in reforming some of the problems identified in this paper. See the statement at <http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp>

developing an interpretive statement in a separate exercise. Second, governments could move aggressively to promote public access to Chapter 11 cases, by releasing court documents, pushing for open hearings, and supporting public participation in *amicus* processes. This would by far be the easiest, and more practical way of amending the flaws of Chapter 11, but they remain within the realm of the trade elites of each Party, known for their tradition to solve public problems behind closed doors. Citizens from the three nations have an important role in making these changes happen, through their implication in the various forums where these issues are discussed – such as the CEC – or by making demands to their local authorities to make pressure on their federal counterparts.

Article 10(6): Institutional links with the NAFTA Secretariat.

There is a fundamental structural bias in NAAEC with respect to NAFTA: the NAFTA agreement was signed in December 1992, and NAAEC one year later. As a result, the link between the two agreements comes only through NAAEC. But since NAFTA almost always takes precedence over NAAEC, and NAFTA was set out to promote trade, it prioritizes trade over environmental issues.

Despite all the rhetoric about sustainable development in its Preamble, NAFTA has no specific section spelling out its environmental *goals and objectives*⁵⁰. Yet, one of the functions of the Council of the Commission for Environmental Cooperation is to

⁵⁰ The Preamble to the agreement states that the three governments resolved to ... “Preserve their flexibility to safeguard the public welfare”... and ...“Strengthen the development and enforcement of environmental laws and regulations”... , but no specific objective laid out in Article 101 mentions any environmental objectives. See Howard Mann. NAFTA and the Environment: Lessons for the Future. Tulane Environmental Law Journal. Vol. 13. 2001.

cooperate with the NAFTA Free Trade Commission to achieve the environmental goals and objectives of the NAFTA ⁵¹. This ambiguity may have contributed in part to the weak institutional links between the NAFTA and the NAAEC Secretariats. Although there are substantive and procedural overlaps between the two agreements through the enforcement of environmental laws, in reality, cooperation between the two agencies has been inexistent [Hufbauer *et al*, 2000:36-37]. Article 10(6) is a critical point of intersection for the establishment and future development of the relationship between the NAFTA and the NAAEC, and between trade law and environmental law. It expressly calls for cooperative interaction on trade and environmental issues, particularly with regard to public access to the process and to dispute avoidance and resolution.

One of the key areas where the two Secretariats should cooperate is in the resolution of the investor's disputes under Chapter 11, but as we saw in the previous section, the CEC has never been asked to integrate the expert panel in the arbitration process. Rather, corporate lawyers who know very little about the complexities of environmental phenomena take decisions.

The CEC Council is well aware of the institutional weaknesses between the two Secretariats. It has been raised repeatedly, both by the Internal review Committee and the public through JPAC. As recent as December 2002, JPAC had issued an Advice to Council where it reminds the Parties of the importance to have a meeting of the Trade and Environment Ministers, which has been on the agenda since 1995, with very little success. For the Trade Ministers of the three Parties, meeting with the CEC Council is

⁵¹ North American Agreement on Environmental Cooperation, Article 10(6).

obviously not a priority. Trade and Environment Officials, on the other hand, have met twice since 2001, although their meetings remain highly secret. This was also a matter of concern for JPAC, urging the Council to make the meetings of trade and environment officials open to the public and the minutes published in the CEC website (JPAC Advice to Council 02-11).

Trade and Environment Links

A major centerpiece in the work of the CEC is the Environment, Economy and Trade Program. The historical context surrounding the negotiations leading to the Agreement resulted in the political compromise to monitor NAFTA effects, translated into several provisions throughout the text. These provisions are contained in Articles 1(b) *promote sustainable development based on cooperation and mutually supportive environmental and economic policies*; and Article 1(d) *support the environmental goals and objectives of the NAFTA*.

There are also specific references to potential CEC involvement in environmental and trade matters in Article 10 of the NAAEC⁵², which lists among the Council's functions the ability to consider and develop recommendations addressing *the environmental implications of goods throughout their life cycles*. The wording of Article 10(2) provides the Council with the ability, but not the mandate, to place these issues on their agenda: *the Council may consider, and develop recommendations regarding the environmental implications of goods and eco-labeling* (Art. 10(2)).

To date, the most aggressive action of the CEC regarding product-life cycle and

⁵² Articles 10(2)(d), 10(2)(m), 10(2)(r), 10(3)(b) and 10(6)(d).

eco-labeling has been in the context of specific issues. This is best seen in the promotion of “green products”, such as shade-grown coffee, bringing the environmental dimensions of the production process together with the labeling of such products. Activities such as this are largely touted under the rubric of “win-win” trade and environment issues, where trade promotion can be used to help promote environmentally sounder products. The CEC has not yet attempted to address issues relating to process and production methods and eco-labeling more broadly, considered a key element in the development of sustainable economies⁵³.

The CEC has also been criticized for its disproportionate emphasis on “green-washing” trade. In response, the IRC recommended Council to focus research efforts on the development of studies that may reveal both negative and positive impacts from trade growth. Although research was very slow at the beginning, studies presented under the program *Understanding the Linkages Between Environment, Economy and Trade* are beginning to produce concrete results.

Studies have suggested various ways in which trade liberalization can affect the environment⁵⁴. Perhaps the most critical remains the policy-to-policy interplay between trade policy reforms included in NAFTA and environmental regulations. A key concern

⁵³ One of the most contentious issues regarding the relationship between trade and the environment has been the need to adopt international standards governing the processes and methods of production (PPMs), and not only the characteristics of products in trade. Strongly resisted by trade policy makers, the need for PPMs remains the core conflict between trade and environment since it is manifest that trade can contribute to sustainability only if it is possible to distinguish between products produced sustainably and unsustainable products in international trade. See Konrad von Moltke. Trade and the Environment: The linkages and the politics Paper for the Roundtable on Canberra, 25 August 1999. International Institute for Sustainable development, Winnipeg, 1999. Can be obtained from www.iisd.org

⁵⁴ A compendium of these studies can be obtained from the CEC. See The Environmental Effects of Free Trade: Papers Presented at the North American Symposium on Assessing the Linkages between Trade and Environment (October 2000), CEC 2002. Available online at www.cec.org.

for environmental groups is the history of NAFTA Chapter 11 on investment provisions, which have prompted a tacit “regulatory freeze” of environmental policy in the region.

Surprisingly, the CEC admitted that there is some evidence that differences in environmental regulations between the NAFTA trading partners is contributing to specific instances of pollution havens. A report recently published by the CEC cites the large increase in imports of hazardous wastes from the United States to Canada as the most dramatic example of pollution havens since NAFTA was implemented in 1994 [CEC, 2003]. This finding contradicts those who repeatedly insisted that there was no evidence that increased trade activity under NAFTA had led to pollution havens [Hufbauer et al, 2000; Esty, 1999; Mumme and Duncan, 1996].

The report also finds that environmental impacts become more significant when disaggregated and measured by economic sector, environmental medium or geographic location. Therefore, in certain sectors, the evidence of changes in environmental outcomes as a result of increased trade activity is more robust in the transportation sector relating to (a) increased air pollution in border areas, from freight transportation, and (b) the increased entry of alien invasive species, from the expansion of transportation pathways, particularly from marine transportation.

The CEC argues that the hazardous waste example underlines a key lesson of environmental assessments of trade, mainly that environmental regulations, and environmental institutions, matter. The report concludes that *the effectiveness of environmental regulations is of pivotal importance, especially during transitional periods when countries open markets to international competition, streamline regulations and standards to reduce administrative costs, and move to restructure markets through the*

deregulation of competition policies.

The CEC research supports the case for the need to ensure that robust environmental regulations and policies are enacted to anticipate and mitigate environmental impacts stemming from expanding trade. This has always been the concern of civil society in the trade-environment debate, questioning the capacity of domestic regulations to meet the challenges of globalization. The report expresses skepticism over the abilities – or willingness – of governments to maintain effective environmental regulations due to the constraints that international markets impose on governments to adopt environmental policies that may affect GDP. Although there have not been comparable efforts to examine whether liberalization of trade policy is overwhelming domestic environmental regulators, there are indications that this is already the case [Swenarchuk, 2001:13-14]. Recalling from the previous section, a US pesticide lobby group threatened to initiate a case against the provincial government in Quebec if the new law restricting the use of pesticides in the province was approved. Although the Quebec Environment Minister dismissed the threat, there may be other cases in which local authorities may not feel empowered enough to legislate to protect human health or the environment.

Under the current NAAEC structure and functions, the processes put in place to ensure environmental compliance do not deal with the effectiveness of those environmental policies. Moreover, as was seen in Chapter 2, the influence of domestic political imperatives in determining the agenda of international bodies is pivotal, and the overwhelming priority of the domestic policies in the three countries favor trade over the environment. Ensuring that adequate environmental laws are in place to respond to the

increased demands from expanding trade is, nevertheless, beyond of the scope of NAAEC.

Conclusions

This paper is concerned with the effectiveness of the North American Agreement on Environmental Cooperation and its impact on the environmental conditions in the North American region resulting from increased trade activity driven by NAFTA. Three broad areas of discussion have guided this research:

1. The ideological foundation of free market capitalism behind both NAFTA and NAAEC is in direct contradiction with a holistic concept of sustainable development, making it impossible for NAAEC to meet the criteria for ecological effectiveness.
2. The effectiveness of the regime is hindered by structural and power deficiencies derived mostly from the dynamics of the negotiation process that led to the signature of NAAEC and the political imperatives of domestic policy in the United States. These deficiencies include the lack of enforcement powers and resources, lack of political independence and lack of political will.
3. NAAEC's hope for increased efficiency in the future lies in its mechanism for public participation, which empowers citizens to present a coordinated and coherent opposition to unfettered capitalist ambitions. Mechanisms such as these could be instrumental in catalyzing real societal changes necessary to achieve sustainability in the future.

A thorough revision of international regime theories was conducted in Chapter 2, complemented by a revision of alternative theories based on an ecosystems approach in Chapter 3 to determine the conditions under an environmental regime would be deemed

effective. In this regard, traditional regime theory resulted insufficient to explain the effectiveness of environmental regimes in general, and of NAAEC in particular. Specifically, the limitations of traditional regime theory include excessive emphasis on the role of power or interests and on individual actors. Traditional regime theory oversimplifies the causes prompting states to engage in cooperative behaviour, leaving behind the wider socio-economic and political sphere in which these regimes operate. Similarly, traditional regime theory tends to focus on institutional effectiveness, rather than assessing the adequacy of the regime to solve the problem that originated its creation. It assumes that an institution with active and cooperative members will incite change, and changes are compared with a supposed pre-institutional state. The problem-solving approach fails to question the adequacy of the policies being implemented, and compliance with the regime's policies is deemed effectiveness, even though these policies may not have an impact on the state of the environment at all. More importantly, regime theory tends to the depolitization of problem solving dynamics, assuming that institutions will somehow enmesh political actors within pre-established patterns of cooperative behaviour.

By failing to address not only the nature of the problem, but also the socio-economic and historical context in which the regime operates, regime theory is limited to analyzing institutional efficiency, which undoubtedly will have an impact on the regime itself, but falls short of evaluating the adequacy of the regime to deal with the issue that gave rise to its creation in the first place. This is particularly relevant in the case of international environmental regimes, given the complexities of environmental phenomena.

In an attempt to overcome the methodological limitations of traditional regime theories, ecologists have made important contributions to the study of regime efficacy from an ecosystemic perspective, which measure effectiveness based on the actual changes to the ecosystems that are considered under a particular regime. The implications of this type of approach extend well beyond measuring effectiveness of the actual design and implementation of environmental regimes, offering important insights on the definition of sustainable development.

In general, two main approaches were reviewed. The problem structure approach, based on the fit of the institutional structure to the environmental problem to be addressed. This approach is an improvement over traditional regime theory because it recognizes the interconnectedness between economic policy and environment; but fails to incorporate a broader socio-political context to the analysis. Prescriptions for more effective environmental regimes are limited to the definition of boundaries between trade and environmental regimes, recognizing their synergies. Changes in the economic system are limited to the articulation of economic policy directed to impact on the production, transformation, consumption and disposal activities that engender environmental consequences, but no significant challenge to the prevailing economic system is suggested. Although this analysis fails to address the potential conflict within the economic base of the social organization, it represents a departure from the closed systems typical of traditional regime theory. As such, public participation is recognized as a necessary element of an efficient environmental regime for its potential to enhance public policy processes. In the end, this analysis, like traditional regime theory, is de-contextualized from the political environment where regimes are created and operate,

which can significant consequences in our understanding of regime effectiveness.

The ecosystem approach represents a real advancement in our understanding of the effectiveness of international environmental regimes by recognizing the social, economic and political variables that affect environmental phenomena. It recognizes that the roots of contemporary environmental problems are entrenched in the realm of political economy, which is a refreshing contribution to the intellectual development of traditional regime theory. It incorporates a relevant set of causal variables that go beyond the assessment of institutional efficiency and may contain a recipe for transformational change that may lead to sustainability in the future. While not attempting to develop a recipe for success, these theories provide a framework to determine whether an environmental regime will be effective given the prevailing socio-economic structures.

Deriving from these theories is the concept of sustainability, which has evolved dramatically in the past thirty years. This paper has made the case for the incorporation of a holistic concept of sustainable development, rid off all pre-conceived ideological rhetoric, into the ecosystem-based body of theories as an important step towards achieving a holistic understanding of society's relationship with its environment.

The final element for effectiveness is given by the inclusion of non-state actors in the decision-making process. While one should remain cautious in not over estimating the role of civil society, the anti-globalization movement that has spawned public opposition against the excesses of economic elites worldwide represents a hopeful development in the quest for alternative ways of socio-economic organization.

Further research in the area of public participation in international environmental

regimes would improve our understanding of the evolution of the citizen's role in shaping public policy. I suggest using a political economy perspective would better inform the study.

The above theoretical discussion served as background in the analysis of the case study on the NAAEC and its institutions. Guided by the ecosystem approach to regime theory, the regime is placed within its broader socio-economic and political environment to understand the interconnectedness of these three dimensions. The study of NAAEC has been instrumental in pointing out the methodological shortcomings of traditional regime theory and the necessity to borrow from other theories to complement the analysis. Specifically, this paper has shown that institutional efficiency may not necessarily lead to environmental efficiency, especially if the regime has been designed without considerations of the political, economic and social environments in which it operates. What follows is a detail analysis of the findings.

Ideological foundation of NAAEC

The ideological foundation behind NAFTA and NAAEC is examined in Chapter 3. The analysis of the political discourse embraced by trade advocates has revealed the unsubstantiated ideological rhetoric dominating trade policy in North America. At the core of their argument lies the infamous Kuznets Curve, largely unsupported by empirical studies. Trade advocates continue to wave their free trade banner as a viable instrument for mitigating the environmental problems arising from expanding trade activities. Consequently, all issues related to environmental protection

have become subservient to the trade agenda, a methodological blunder leading to the design of ineffective mechanisms to protect the environment.

While the preambles of the two agreements contain direct references to sustainable development, the principle was not entrenched as a basic premise in the operation of either of the agreements. Important structural changes in the economies of the three countries would have to be undertaken, in order to achieve the sustainable development goals NAFTA claims to foster, and the text contain no elements to make this happen. The pretension that NAFTA fosters environmental goals comes with a question mark: NAFTA was created to expand trade in the context of capitalism, not to protect the environment. Under the capitalist mode of production, the endless pursuit for higher profitability the environment is further stressed by the demands of modern industrialization processes and the need to produce more commodities. An ever-increasing spiral, the expansion of unfettered trade is in direct contradiction with the principle of sustainable development.

This ideological bias is reflected in the architecture of NAFTA and its environmental side agreement, NAAEC. It is particularly evident in the circular logic of the objectives set out in Article 1(d) of NAAEC. The agreement is supposed to support the *environmental goals and objectives* of NAFTA, environmental goals and objectives that cannot be found anywhere in the NAFTA text. The relationship between trade and the environment is poorly understood, and therefore the existing mechanisms to protect the environment are inadequate to respond to the complexity of environmental phenomena. As a result, the links between the two agreements – and their institutions – are weak and unidirectional, and the institutional answer to the problem – NAAEC – fails

to deal with contentious environmental issues resulting from the trade agenda.

Structural and power deficiencies

The process that led to the signature of NAAEC was explored in Chapter 1. Because labour and environmental groups were able to present a united front to threaten the passing of NAFTA in the U.S. Senate, the U.S. government had to compromise with the negotiation of two side agreements. As a result, negotiations for NAAEC began after the three Parties had already signed NAFTA, and no further changes could be incorporated into the NAFTA text. The resulting NAAEC has an institutional link with NAFTA, but this is not a reciprocal link, which has had important repercussions on the ability of the environmental side agreement to act as a counterbalance to the trade agenda.

This is an important element in the effectiveness of NAAEC, because the agenda under NAFTA reflects the priorities of the national governments, and consequently, more attention is devoted to what happens under NAFTA. Because of its appended nature, NAAEC has been unable to counteract the negative environmental effects of NAFTA, as the history of Chapter 11 has demonstrated. Although by design the CEC is the institution with the technical expertise necessary to evaluate the environmental cases Chapter 11, it has never been allowed to provide expert advice on environmental law. Instead, corporate lawyers have been responsible for the onerous rulings under Chapter 11, undermining the value of the NAAEC institutions in supporting NAFTA's environmental goals and objectives.

The political sets of events that preceded the signature of NAAEC, as well as the expectations of the groups involved, called for the creation of an institution with strong

enforcement powers. But the evidence examined in this paper suggests the resulting institution created under NAAEC lacks the enforcement powers needed to ensure compliance with environmental regulations. Moreover, there are no mandatory provisions to harmonize environmental regulations upwards. Without the ability to develop strong domestic environmental laws and ensure efficient enforcement for compliance, NAAEC is left toothless facing its giant parent.

Testing NAAEC for ecological efficiency gives no better results. Efficacy from an ecosystem perspective include avoiding further harm, in particular irreversible harm, to the natural environment; halting and reversing negative trends; repairing damage; and generating positive trends. The evidence presented in this paper indicates that NAAEC fails to meet some of these essential elements of efficiency. As a side agreement to NAFTA, NAAEC has no power to directly limit trade that may damage the environment. It cannot, for example, determine that Canada's forestry industry or US agricultural industry is environmentally damaging, and limit trade in goods produced by those sectors. It cannot even guarantee that the damage be repaired, as it has been clearly demonstrated in the case of *Metales y Derivados*, despite the imminent threat to human lives and the ecosystem.

The structure of the institutions created under NAAEC further limits the efficiency of the regime. First, the decision-making mechanism whereby the Council says the last word has important implications for transparency, particularly concerning the citizen complaint process. Council is not obliged to explain why a decision is taken, and citizens have no way of appealing these decisions.

Second, there is a clear conflict of interest between the dual role of the Parties as

representatives of individual nations in an international organization, each reflecting its own national interest, and as ultimate decision makers in identifying and achieving the goals of the organization. This has been evident in some of the decisions made by the Council with respect to the preparation and publication of factual records.

The study of the citizen submission process set out in Articles 14 and 15, has been critical in understanding some of the weaknesses of NAAEC. Thought to be the cornerstone of the regime, it suffers from serious procedural problems. The role of the Council, as mentioned before, is one of the components that hinder efficiency of the process. However, there are other elements that would grant revision. For example, the process is based on the premise that all the necessary environmental laws are in place. So problems that are not yet legislated would not qualify under articles 14 & 15. In addition, even if a submission is granted the development of a factual record, there is no guarantee that damage will be undone once the records are released to the public, as it was the case with the Cozumel Pier submission. Worse still, if a submission falls in a legally ambiguous territory, such as the case with *Metales y Derivados*, there is no additional mechanism to solve the environmental problem, even if it represents a public health concern.

Research on the links between trade and the environment has moved slowly. Nine years after the CEC was created, there has been no concrete action, although the research program has been in place since 1995. In the mean time, the border region is still a toxic graveyard, water levels in the region are critically threatened and not enough is being done to avoid further harm in areas where there has been a clear link, such as in the case of trade in hazardous materials.

The role of citizens

Despite its faults, NAAEC has been an avant-garde regime in that it has integrated a public participation process as part of its decision-making mechanisms. Although the Council is not obliged to follow the recommendations of the Joint Public Advisory Committee (JPAC), given the right pressure, the Ministers will be compelled to listen to the demands of the citizens.

One word of caution is warranted. Governments have not been able to fully understand the power of involving citizens in their decisions. They have tended to work “against” the public participation process and not *with* the process. This adversarial approach undermines the support that environmental constituencies could give to their ministries, in light of competing interests in the domestic political agenda. This paper has examined how the domestic political agenda tends to favor trade and other economic prerogatives over the environment. Through the public participation process, Environment ministers could find the political leverage they need to level the playing field vis-à-vis other trade prerogatives. Further research in this area could add value to the role of meaningful public input in the development of public policy.

Final remarks

As seen in Chapter 3, a recipe for sustainability would include a shift from the economic growth paradigm that would entail changes in unsustainable practices, reduction of excessive material consumption, and better social policies leading to egalitarian income distribution and social welfare. Neither NAFTA nor NAAEC can contribute to this recipe because they are both instruments designed to promote the interests of the trade elites.

While there is hope that NAAEC could become a forum for challenging the economic growth paradigm by aggressively promoting changes to unsustainable practices and reduction of excess consumerism, the pursuance of better social policies would have to come from different institutions.

Whatever the political rhetoric, sustainability is not a viable agenda item. As long as the concept of sustainable utilization remains safely ambiguous, it will be politically acceptable. But the concept of sustainability will not, because it challenges the status quo. The creation of environmental problems is a product of the dominant mode of production of today's world, and the solution of those problems is difficult because the only institutions within which the necessary collective action could be mobilized exist to promote the interests of that mode of production.

Our only hope for meaningful change lies in the role that citizens choose to play within NAAEC. Should they fiercely decide to hijack the Parties agenda, some progress could be achieved, albeit a slow and cautious one. This is an area that deserves further research.

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Appendix A

**NORTH AMERICAN AGREEMENT
ON ENVIRONMENTAL
COOPERATION**

BETWEEN

THE GOVERNMENT OF CANADA,

**THE GOVERNMENT OF THE UNITED MEXICAN
STATES**

AND

**THE GOVERNMENT OF THE UNITED STATES OF
AMERICA**

1993

PREAMBLE

The Government of Canada, the Government of the United Mexican States and the Government of the United States of America:

CONVINCED of the importance of the conservation, protection and enhancement of the environment in their territories and the essential role of cooperation in these areas in achieving sustainable development for the well-being of present and future generations;

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

RECOGNIZING the interrelationship of their environments;

ACKNOWLEDGING the growing economic and social links between them, including the North American Free Trade Agreement (NAFTA);

RECONFIRMING the importance of the environmental goals and objectives of the NAFTA, including enhanced levels of environmental protection;

EMPHASIZING the importance of public participation in conserving, protecting and enhancing the environment;

NOTING the existence of differences in their respective natural endowments, climatic and geographical conditions, and economic, technological and infrastructural capabilities;

REAFFIRMING the *Stockholm Declaration on the Human Environment* of 1972 and the *Rio Declaration on Environment and Development* of 1992;

RECALLING their tradition of environmental cooperation and expressing their desire to support and build on international environmental agreements and existing policies and laws, in order to promote cooperation between them; and

CONVINCED of the benefits to be derived from a framework, including a Commission, to facilitate effective cooperation on the conservation, protection and enhancement of the environment in their territories;

HAVE AGREED AS FOLLOWS:

PART ONE

OBJECTIVES

Article 1: Objectives

The objectives of this Agreement are to:

- (a) foster the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generations;
- (b) promote sustainable development based on cooperation and mutually supportive environmental and economic policies;
- (c) increase cooperation between the Parties to better conserve, protect, and enhance the environment, including wild flora and fauna;
- (d) support the environmental goals and objectives of the NAFTA;
- (e) avoid creating trade distortions or new trade barriers;
- (f) strengthen cooperation on the development and improvement of environmental laws, regulations, procedures, policies and practices;
- (g) enhance compliance with, and enforcement of, environmental laws and regulations;
- (h) promote transparency and public participation in the development of environmental laws, regulations and policies;
- (i) promote economically efficient and effective environmental measures; and
- (j) promote pollution prevention policies and practices.

PART TWO

OBLIGATIONS

Article 2: General Commitments

1. Each Party shall, with respect to its territory:
 - (a) periodically prepare and make publicly available reports on the state of the environment;
 - (b) develop and review environmental emergency preparedness measures;
 - (c) promote education in environmental matters, including environmental law;
 - (d) further scientific research and technology development in respect of environmental matters;
 - (e) assess, as appropriate, environmental impacts; and
 - (f) promote the use of economic instruments for the efficient achievement of environmental goals.
2. Each Party shall consider implementing in its law any recommendation developed by the Council under Article 10(5)(b).
3. Each Party shall consider prohibiting the export to the territories of the other Parties of a pesticide or toxic substance whose use is prohibited within the Party's territory. When a Party adopts a measure prohibiting or severely restricting the use of a pesticide or toxic substance in its territory, it shall notify the other Parties of the measure, either directly or through an appropriate international organization.

Article 3: Levels of Protection

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

Article 4: Publication

1. Each Party shall ensure that its laws, regulations, procedures and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and Parties to become acquainted with them.
2. To the extent possible, each Party shall:
 - (a) publish in advance any such measure that it proposes to adopt; and
 - (b) provide interested persons and Parties a reasonable opportunity to comment on such proposed measures.

Article 5: Government Enforcement Action

1. With the aim of achieving high levels of environmental protection and compliance with its environmental laws and regulations, each Party shall effectively enforce its environmental laws and regulations through appropriate governmental action, subject to Article 37, such as:
 - (a) appointing and training inspectors;
 - (b) monitoring compliance and investigating suspected violations, including through on-site inspections;
 - (c) seeking assurances of voluntary compliance and compliance agreements;
 - (d) publicly releasing non-compliance information;
 - (e) issuing bulletins or other periodic statements on enforcement procedures;
 - (f) promoting environmental audits;
 - (g) requiring record keeping and reporting;
 - (h) providing or encouraging mediation and arbitration services;
 - (i) using licenses, permits or authorizations;
 - (j) initiating, in a timely manner, judicial, quasi-judicial or administrative proceedings to seek appropriate sanctions or remedies for violations of its environmental laws and regulations;

- (k) providing for search, seizure or detention; or
 - (l) issuing administrative orders, including orders of a preventative, curative or emergency nature.
- 2. Each party shall ensure that judicial, quasi-judicial or administrative enforcement proceedings are available under its law to sanction or remedy violations of its environmental laws and regulations.
- 3. Sanctions and remedies provided for a violation of a Party's environmental laws and regulations shall, as appropriate:
 - (a) take into consideration the nature and gravity of the violation, any economic benefit derived from the violation by the violator, the economic condition of the violator, and other relevant factors; and
 - (b) include compliance agreements, fines, imprisonment, injunctions, the closure of facilities, and the cost of containing or cleaning up pollution.

Article 6: Private Access to Remedies

- 1. Each Party shall ensure that interested persons may request the Party's competent authorities to investigate alleged violations of its environmental laws and regulations and shall give such requests due consideration in accordance with law.
- 2. Each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial or judicial proceedings for the enforcement of the Party's environmental laws and regulations.
- 3. Private access to remedies shall include rights, in accordance with the Party's law, such as:
 - (a) to sue another person under that Party's jurisdiction for damages;
 - (b) to seek sanctions or remedies such as monetary penalties, emergency closures or orders to mitigate the consequences of violations of its environmental laws and regulations;
 - (c) to request the competent authorities to take appropriate action to enforce that Party's environmental laws and regulations in order to protect the environment or to avoid environmental harm; or

- (d) to seek injunctions where a person suffers, or may suffer, loss, damage or injury as a result of conduct by another person under that Party's jurisdiction contrary to that Party's environmental laws and regulations or from tortious conduct.

Article 7: Procedural Guarantees

1. Each Party shall ensure that its administrative, quasi-judicial and judicial proceedings referred to in Articles 5(2) and 6(2) are fair, open and equitable, and to this end shall provide that such proceedings:

- (a) comply with due process of law;
- (b) are open to the public, except where the administration of justice otherwise requires;
- (c) entitle the parties to the proceedings to support or defend their respective positions and to present information or evidence; and
- (d) are not unnecessarily complicated and do not entail unreasonable charges or time limits or unwarranted delays.

2. Each Party shall provide that final decisions on the merits of the case in such proceedings are:

- (a) in writing and preferably state the reasons on which the decisions are based;
- (b) made available without undue delay to the parties to the proceedings and, consistent with its law, to the public; and
- (c) based on information or evidence in respect of which the parties were offered the opportunity to be heard.

3. Each Party shall provide, as appropriate, that parties to such proceedings have the right, in accordance with its law, to seek review and, where warranted, correction of final decisions issued in such proceedings.

4. Each Party shall ensure that tribunals that conduct or review such proceedings are impartial and independent and do not have any substantial interest in the outcome of the matter.

PART THREE

COMMISSION FOR ENVIRONMENTAL COOPERATION

Article 8: The Commission

1. The Parties hereby establish the Commission for Environmental Cooperation.
2. The Commission shall comprise a Council, a Secretariat and a Joint Public Advisory Committee.

Section A: The Council

Article 9: Council Structure and Procedures

1. The Council shall comprise cabinet-level or equivalent representatives of the Parties, or their designees.
2. The Council shall establish its rules and procedures.
3. The Council shall convene:
 - (a) at least once a year in regular session; and
 - (b) in special session at the request of any Party.

Regular sessions shall be chaired successively by each Party.

4. The Council shall hold public meetings in the course of all regular sessions. Other meetings held in the course of regular or special sessions shall be public where the Council so decides.
5. The Council may:
 - (a) establish, and assign responsibilities to, *ad hoc* or standing committees, working groups or expert groups;
 - (b) seek the advice of non-governmental organizations or persons, including independent experts; and
 - (c) take such other action in the exercise of its functions as the Parties may agree.
6. All decisions and recommendations of the Council shall be taken by consensus, except as the Council may otherwise decide or as otherwise provided in this Agreement.
7. All decisions and recommendations of the Council shall be made public, except as the Council may otherwise decide or as otherwise provided in this Agreement.

Article 10: Council Functions

1. The Council shall be the governing body of the Commission and shall:
 - (a) serve as a forum for the discussion of environmental matters within the scope of this Agreement;
 - (b) oversee the implementation and develop recommendations on the further elaboration of this Agreement and, to this end, the Council shall, within four years after the date of entry into force of this Agreement, review its operation and effectiveness in the light of experience;
 - (c) oversee the Secretariat;
 - (d) address questions and differences that may arise between the Parties regarding the interpretation or application of this Agreement;
 - (e) approve the annual program and budget of the Commission; and
 - (f) promote and facilitate cooperation between the Parties with respect to environmental matters.
2. The Council may consider, and develop recommendations regarding:
 - (a) comparability of techniques and methodologies for data gathering and analysis, data management and electronic data communications on matters covered by this Agreement;
 - (b) pollution prevention techniques and strategies;
 - (c) approaches and common indicators for reporting on the state of the environment;
 - (d) the use of economic instruments for the pursuit of domestic and internationally agreed environmental objectives;
 - (e) scientific research and technology development in respect of environmental matters;
 - (f) promotion of public awareness regarding the environment;
 - (g) transboundary and border environmental issues, such as the long-range transport of air and marine pollutants;
 - (h) exotic species that may be harmful;

- (i) the conservation and protection of wild flora and fauna and their habitat, and specially protected natural areas;
- (j) the protection of endangered and threatened species;
- (k) environmental emergency preparedness and response activities;
- (l) environmental matters as they relate to economic development;
- (m) the environmental implications of goods throughout their life cycles;
- (n) human resource training and development in the environmental field;
- (o) the exchange of environmental scientists and officials;
- (p) approaches to environmental compliance and enforcement;
- (q) ecologically sensitive national accounts;
- (r) eco-labelling; and
- (s) other matters as it may decide.

3. The Council shall strengthen cooperation on the development and continuing improvement of environmental laws and regulations, including by:

- (a) promoting the exchange of information on criteria and methodologies used in establishing domestic environmental standards; and
- (b) without reducing levels of environmental protection, establishing a process for developing recommendations on greater compatibility of environmental technical regulations, standards and conformity assessment procedures in a manner consistent with the NAFTA.

4. The Council shall encourage:

- (a) effective enforcement by each Party of its environmental laws and regulations;
- (b) compliance with those laws and regulations; and
- (c) technical cooperation between the Parties.

5. The Council shall promote and, as appropriate, develop recommendations regarding:
- (a) public access to information concerning the environment that is held by public authorities of each Party, including information on hazardous materials and activities in its communities, and opportunity to participate in decision-making processes related to such public access; and
 - (b) appropriate limits for specific pollutants, taking into account differences in ecosystems.
6. The Council shall cooperate with the NAFTA Free Trade Commission to achieve the environmental goals and objectives of the NAFTA by:
- (a) acting as a point of inquiry and receipt for comments from non-governmental organizations and persons concerning those goals and objectives;
 - (b) providing assistance in consultations under Article 1114 of the NAFTA where a Party considers that another Party is waiving or derogating from, or offering to waive or otherwise derogate from, an environmental measure as an encouragement to establish, acquire, expand or retain an investment of an investor, with a view to avoiding any such encouragement;
 - (c) contributing to the prevention or resolution of environment-related trade disputes by:
 - (i) seeking to avoid disputes between the Parties,
 - (ii) making recommendations to the Free Trade Commission with respect to the avoidance of such disputes, and
 - (iii) identifying experts able to provide information or technical advice to NAFTA committees, working groups and other NAFTA bodies;
 - (d) considering on an ongoing basis the environmental effects of the NAFTA; and
 - (e) otherwise assisting the Free Trade Commission in environment-related matters.
7. Recognizing the significant bilateral nature of many transboundary environmental issues, the Council shall, with a view to agreement between the Parties pursuant to this

Article within three years on obligations, consider and develop recommendations with respect to:

- (a) assessing the environmental impact of proposed projects subject to decisions by a competent government authority and likely to cause significant adverse transboundary effects, including a full evaluation of comments provided by other Parties and persons of other Parties;
- (b) notification, provision of relevant information and consultation between Parties with respect to such projects; and
- (c) mitigation of the potential adverse effects of such projects.

8. The Council shall encourage the establishment by each Party of appropriate administrative procedures pursuant to its environmental laws to permit another Party to seek the reduction, elimination or mitigation of transboundary pollution on a reciprocal basis.

9. The Council shall consider and, as appropriate, develop recommendations on the provision by a Party, on a reciprocal basis, of access to and rights and remedies before its courts and administrative agencies for persons in another Party's territory who have suffered or are likely to suffer damage or injury caused by pollution originating in its territory as if the damage or injury were suffered in its territory.

Section B: The Secretariat

Article 11: Secretariat Structure and Procedures

1. The Secretariat shall be headed by an Executive Director, who shall be chosen by the Council for a three-year term, which may be renewed by the Council for one additional three- year term. The position of Executive Director shall rotate consecutively between nationals of each Party. The Council may remove the Executive Director solely for cause.

2. The Executive Director shall appoint and supervise the staff of the Secretariat, regulate their powers and duties and fix their remuneration in accordance with general standards to be established by the Council. The general standards shall provide that:

- (a) staff shall be appointed and retained, and their conditions of employment shall be determined, strictly on the basis of efficiency, competence and integrity;

- (b) in appointing staff, the Executive Director shall take into account lists of candidates prepared by the Parties and by the Joint Public Advisory Committee;
 - (c) due regard shall be paid to the importance of recruiting an equitable proportion of the professional staff from among the nationals of each Party; and
 - (d) the Executive Director shall inform the Council of all appointments.
- 3. The Council may decide, by a two-thirds vote, to reject any appointment that does not meet the general standards. Any such decision shall be made and held in confidence.
- 4. In the performance of their duties, the Executive Director and the staff shall not seek or receive instructions from any government or any other authority external to the Council. Each Party shall respect the international character of the responsibilities of the Executive Director and the staff and shall not seek to influence them in the discharge of their responsibilities.
- 5. The Secretariat shall provide technical, administrative and operational support to the Council and to committees and groups established by the Council, and such other support as the Council may direct.
- 6. The Executive Director shall submit for the approval of the Council the annual program and budget of the Commission, including provision for proposed cooperative activities and for the Secretariat to respond to contingencies.
- 7. The Secretariat shall, as appropriate, provide the Parties and the public information on where they may receive technical advice and expertise with respect to environmental matters.
- 8. The Secretariat shall safeguard:
 - (a) from disclosure information it receives that could identify a non-governmental organization or person making a submission if the person or organization so requests or the Secretariat otherwise considers it appropriate; and
 - (b) from public disclosure any information it receives from any non-governmental organization or person where the information is designated by that non-governmental organization or person as confidential or proprietary.

Article 12: Annual Report of the Commission

1. The Secretariat shall prepare an annual report of the Commission in accordance with instructions from the Council. The Secretariat shall submit a draft of the report for review by the Council. The final report shall be released publicly.
2. The report shall cover:
 - (a) activities and expenses of the Commission during the previous year;
 - (b) the approved program and budget of the Commission for the subsequent year;
 - (c) the actions taken by each Party in connection with its obligations under this Agreement, including data on the Party's environmental enforcement activities;
 - (d) relevant views and information submitted by non-governmental organizations and persons, including summary data regarding submissions, and any other relevant information the Council deems appropriate;
 - (e) recommendations made on any matter within the scope of this Agreement; and
 - (f) any other matter that the Council instructs the Secretariat to include.
3. The report shall periodically address the state of the environment in the territories of the Parties.

Article 13: Secretariat Reports

1. The Secretariat may prepare a report for the Council on any matter within the scope of the annual program. Should the Secretariat wish to prepare a report on any other environmental matter related to the cooperative functions of this Agreement, it shall notify the Council and may proceed unless, within 30 days of such notification, the Council objects by a two-thirds vote to the preparation of the report. Such other environmental matters shall not include issues related to whether a Party has failed to enforce its environmental laws and regulations. Where the Secretariat does not have specific expertise in the matter under review, it shall obtain the assistance of one or more independent experts of recognized experience in the matter to assist in the preparation of the report.
2. In preparing such a report, the Secretariat may draw upon any relevant technical, scientific or other information, including information:

- (a) that is publicly available;
- (b) submitted by interested non-governmental organizations and persons;
- (c) submitted by the Joint Public Advisory Committee;
- (d) furnished by a Party;
- (e) gathered through public consultations, such as conferences, seminars and symposia; or
- (f) developed by the Secretariat, or by independent experts engaged pursuant to paragraph 1.

3. The Secretariat shall submit its report to the Council, which shall make it publicly available, normally within 60 days following its submission, unless the Council otherwise decides.

Article 14: Submissions on Enforcement Matters

1. The Secretariat may consider a submission from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law, if the Secretariat finds that the submission:

- (a) is in writing in a language designated by that Party in a notification to the Secretariat;
- (b) clearly identifies the person or organization making the submission;
- (c) provides sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based;
- (d) appears to be aimed at promoting enforcement rather than at harassing industry;
- (e) indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response, if any; and
- (f) is filed by a person or organization residing or established in the territory of a Party.

2. Where the Secretariat determines that a submission meets the criteria set out in paragraph 1, the Secretariat shall determine whether the submission merits requesting a response from the Party. In deciding whether to request a response, the Secretariat shall be guided by whether:

- (a) the submission alleges harm to the person or organization making the submission;
- (b) the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of this Agreement;
- (c) private remedies available under the Party's law have been pursued; and
- (d) the submission is drawn exclusively from mass media reports.

Where the Secretariat makes such a request, it shall forward to the Party a copy of the submission and any supporting information provided with the submission.

3. The Party shall advise the Secretariat within 30 days or, in exceptional circumstances and on notification to the Secretariat, within 60 days of delivery of the request:

- (a) whether the matter is the subject of a pending judicial or administrative proceeding, in which case the Secretariat shall proceed no further; and
- (b) of any other information that the Party wishes to submit, such as
 - i) whether the matter was previously the subject of a judicial or administrative proceeding, and
 - ii) whether private remedies in connection with the matter are available to the person or organization making the submission and whether they have been pursued.

Article 15: Factual Record

1. If the Secretariat considers that the submission, in the light of any response provided by the Party, warrants developing a factual record, the Secretariat shall so inform the Council and provide its reasons.

2. The Secretariat shall prepare a factual record if the Council, by a two-thirds vote, instructs it to do so.

3. The preparation of a factual record by the Secretariat pursuant to this Article shall be without prejudice to any further steps that may be taken with respect to any submission.

4. In preparing a factual record, the Secretariat shall consider any information furnished by a Party and may consider any relevant technical, scientific or other information:

- (a) that is publicly available;
- (b) submitted by interested non-governmental organizations or persons;
- (c) submitted by the Joint Public Advisory Committee; or
- (d) developed by the Secretariat or by independent experts.

5. The Secretariat shall submit a draft factual record to the Council. Any Party may provide comments on the accuracy of the draft within 45 days thereafter.

6. The Secretariat shall incorporate, as appropriate, any such comments in the final factual record and submit it to the Council.
7. The Council may, by a two-thirds vote, make the final factual record publicly available, normally within 60 days following its submission.

Section C: Advisory Committees

Article 16: Joint Public Advisory Committee

1. The Joint Public Advisory Committee shall comprise 15 members, unless the Council otherwise decides. Each Party or, if the Party so decides, its National Advisory Committee convened under Article 17, shall appoint an equal number of members.
2. The Council shall establish the rules of procedure for the Joint Public Advisory Committee, which shall choose its own chair.
3. The Joint Public Advisory Committee shall convene at least once a year at the time of the regular session of the Council and at such other times as the Council, or the Committee's chair with the consent of a majority of its members, may decide.
4. The Joint Public Advisory Committee may provide advice to the Council on any matter within the scope of this Agreement, including on any documents provided to it under paragraph 6, and on the implementation and further elaboration of this Agreement, and may perform such other functions as the Council may direct.
5. The Joint Public Advisory Committee may provide relevant technical, scientific or other information to the Secretariat, including for purposes of developing a factual record under Article 15. The Secretariat shall forward to the Council copies of any such information.
6. The Secretariat shall provide to the Joint Public Advisory Committee at the time they are submitted to the Council copies of the proposed annual program and budget of the Commission, the draft annual report, and any report the Secretariat prepares pursuant to Article 13.
7. The Council may, by a two-thirds vote, make a factual record available to the Joint Public Advisory Committee.

Article 17: National Advisory Committees

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.

Article 18: Governmental Committees

Each Party may convene a governmental committee, which may comprise or include representatives of federal and state or provincial governments, to advise it on the implementation and further elaboration of this Agreement.

Appendix B

Status of the Submissions under Articles 14 & 15

SEM I.D. No./ SUBMITTER	MATTER ADDRESSED IN THE SUBMISSION	DATE FILED	PARTY	PROCESS STATUS
SEM-95-001 / Biodiversity Legal Foundation et al.	Submitters alleged that provisions of the "Rescissions Act" have resulted in a failure to enforce effectively selected provisions of the Endangered Species Act.	30 June 1995	United States	Process terminated under Article 14(2) on 11 December 1995.
SEM-95-002 / Sierra Club et al.	Submitters alleged that provisions of the Fiscal Year 1995 Supplemental Appropriations, Disaster Assistance and Rescissions Act result in a failure to enforce effectively all applicable Federal environmental laws by eliminating private remedies for salvage timber sales.	30 August 1995	United States	Process terminated under Article 14(2) on 8 December 1995.
SEM-96-001 / Comité para la Protección de los Recursos Naturales, A.C. et al.	The Submitters alleged that the appropriate authorities failed to effectively enforce environmental laws during the evaluation process of the project "Construction and Operation of a Public Harbor Terminal for Tourist Cruises on the Island of Cozumel, State of Quintana Roo."	18 January 1996	Mexico	Process terminated. Factual record released on 24 October 1997.
SEM-96-002 / Aage Tottrup	The Submitter asserted that the governments of Canada and Alberta have failed to effectively enforce their environmental laws resulting in the pollution of specified wetland areas which impacts on the habitat of fish and migratory birds.	20 March 1996	Canada	Process terminated under Article 14(2) on 28 May 1996.
SEM-96-003 / The Friends of the Oldman River	The Submitter alleged that the Government of Canada is failing to apply, comply with and enforce the habitat protection sections of the Fisheries Act and the CEAA	9 September 1996	Canada	Process terminated under Article 15(1) on 2 April 1997.

	(Canadian Environmental Assessment Act).			
SEM-96-004 / The Southwest Center for Biological Diversity et al.	The Submitters alleged that the United States is failing to effectively enforce its environmental law, namely the National Environmental Policy Act (NEPA), with respect to the United States Army's operation of Fort Huachuca, Arizona.	14 November 1996	United States	Process terminated by submitters' withdrawal on 5 June 1997.
SEM-97-001 / B.C. Aboriginal Fisheries Commission et al.	The Submitters allege that the Canadian Government is failing to «enforce s. 35(1) of the Fisheries Act, and to utilize its powers pursuant to s. 119.06 of the National Energy Board Act, to ensure the protection of fish and fish habitat in British Columbia's rivers from ongoing and repeated environmental damage caused by hydro-electric dams.	2 April 1997	Canada	Process terminated. Factual record released on 11 June 2000.
SEM-97-002 / Comité pro Limpieza del Río Magdalena	The Submitters allege that wastewater originating in the municipalities of Imuris, Magdalena de Kino, and Santa Ana, located in the Mexican state of Sonora, is being discharged into the Magdalena River without prior treatment, in violation of Mexican environmental legislation governing the disposal of wastewater.	15 March 1997	Mexico	Council instructed the Secretariat to develop a factual record. The Secretariat placed a work plan and a repository of documents on its web site or otherwise made these available to the public and stakeholders on 22 March 2002.
SEM-97-003 / Centre québécois du droit de l'environnement	The Submitters allege a failure to enforce several environmental standards related to agriculture on the territory of the Province of Quebec.	9 April 1997	Canada	Process terminated under Article 15(2) on 16 May 2000.
SEM-97-004 / Canadian Environmental Defence Fund	The Submitter alleged that Canada has failed to enforce its law requiring environmental assessment of	26 May 1997	Canada	Process terminated under Article 14(1) on 25 August 1997

25 August 1997.	federal initiatives, policies and programs.			
SEM-97-005 / Animal Alliance of Canada et al.	The Submitters alleged that Canada is failing to enforce its regulation ratifying the Convention on Biological Diversity signed at the Rio Earth Summit on 11 June 1992, and subsequently ratified pursuant to an Order-in-Council on 4 December 1992.	21 July 1997	Canada	Process terminated under Article 14(1) on 26 May 1998.
SEM-97-006 / The Friends of the Oldman River	The Submitter alleges that Canada is failing to apply, comply with and enforce the habitat protection sections of the Fisheries Act and the CEAA (Canadian Environmental Assessment Act).	4 October 1997	Canada	Council instructed the Secretariat to develop a factual record on November 2001 and the Secretariat is currently developing it.
SEM-97-007 / Instituto de Derecho Ambiental	The Submitters allege that Mexico is failing to enforce environmental law, in connection with the citizen complaint filed on 23 September 1996, concerning the degradation of the Lerma Santiago River- Lake Chapala Basin.	10 October 1997	Mexico	Process terminated under Article 15(1) on 14 July 2000.
SEM-98-001 / Instituto de Derecho Ambiental, with citizens affected by the 22 April 1992 explosions	The Submitters allege that Mexican Federal Attorney General and the Federal Judiciary did not duly enforce the General Law on Ecological Balance and Environmental Protection (LGEEPA) in relation to the explosions in the Reforma area of the city of Guadalajara, State of Jalisco.	9 January 1998	Mexico	Process terminated under Article 14(1) on 11 January 2000.
SEM-98-002 / Hector Gregorio Ortiz Martinez	The submission alleged "improper administrative processing, omission and persistent failure to effectively enforce" environmental law in connection to a citizen complaint filed by the	14 October 1997	Mexico	Process terminated under Article 14(1) on 18 March 1999.

	Submitter.			
SEM-98-003 / Department of the Planet Earth et al.	The Submitters assert that the US Environmental Protection Agency's regulations drafted and programs adopted to control airborne emissions of dioxins/furans, mercury and other persistent toxic substances from solid waste and medical waste incinerators violate and fail to enforce both: 1) US domestic laws, and; 2) the ratified US-Canadian treaties designed to protect the Great Lakes that are partly referenced in the US Clean Air Act.	27 May 1998	United States	Process was terminated by the Secretariat under Article 15 (1) on October 5, 2001
SEM-98-004 / Sierra Club of British Columbia, et al.	The submission alleges a systemic failure of Canada to enforce section 36(3) of the Fisheries Act to protect fish and fish habitat from the destructive environmental impacts of the mining industry in British Columbia.	29 June 1998	Canada	Council instructed the Secretariat to develop a factual record on 16 November 2001, and the Secretariat is developing it.
SEM-98-005 / Academia Sonorense de Derechos Humanos et al.	The Submitters allege that Mexico has failed to effectively enforce environmental law by having authorized the operation of a hazardous waste landfill (CYTRAR) less than six kilometers away from Hermosillo, Sonora.	23 July 1998	Mexico	Process terminated in accordance with Article 15(1) on 26 October 2000.
SEM-98-006 / Grupo Ecológico Manglar A.C.	The submission alleges that Mexico is failing to effectively enforce its environmental laws with respect to the establishment and operation of Granjas Aquanova S.A., a shrimp farm in Isla del Conde, San Blas, Nayarit, Mexico.	20 October 1998	Mexico	The Secretariat submitted a draft factual record to Council 7 March 2003, for a 45-day comment period on the accuracy of the draft
SEM-98-007/ Environmental Health Coalition, et al.	The Submitters allege that Mexico has failed to effectively enforce its environmental law in connection with an abandoned	23 October 1998	Mexico	The final factual record was publicly released on 11 February 2002

	lead smelter in Tijuana, Baja California, Mexico, that poses serious threats to the health of the neighboring community, and to the environment.			
SEM-99-001 / Methanex Corporation(consolidated with SEM-00-002)	The Submitters allege that the United States of America has failed to enforce California's environmental laws and regulations related to water resource protection and to the regulation of underground storage tanks (USTs).	18 October 1999	United States	Process terminated under Article 14(3)(a) on 30 June 2000.
SEM-99-002 / Alliance for the Wild Rockies, et al.	The Submitters allege that the United States Government is failing to effectively enforce Section 703 of the Migratory Bird Treaty Act (MBTA), 16 U.S.C. §§703-712, which prohibits the killing of migratory birds without a permit.	19 November 1999.	United States	The Secretariat submitted a final factual record to Council on 21 February 2003 for Council's vote on whether to make the final factual record publicly available.
SEM-00-001 / María Rosa Escalante de Fernández	The Submitter asserts that health and crops in the town of Cumpas, Sonora, Mexico, have been affected by air pollution from the Molymex, S.A. de C.V. plant which allegedly operates in violation of LGEEPA air quality provisions and Official Mexican Standards for Environmental health that establish limits for sulfur dioxide and particulate matter of ten microns or less (PM ₁₀).	27 January 2000	Mexico	Process terminated under Article 14 (1) on 25 April 2000.
SEM-00-002 Neste Canada Inc.	The Submitter alleges that the State of California is failing to enforce its laws, relating to underground storage tanks (USTs), with the result that significant volumes of gasoline continue to leak into and contaminate soil, water and air in that State. The Submitter alleges that based on its knowledge of the current political and regulatory	21 January 2000	United States	The Secretariat determined to proceed no further 30 June 2000, because the matter is the subject of a pending judicial or administrative proceeding.

	environment in California relating to gasoline and methyl tertiary butyl ether (MTBE) specifically, private remedies appear to be impractical.			
SEM-00-003 / Hudson River Audubon Society of Westchester, Inc., et al.	The Submitters allege that the United States Department of Interior – National Park Service, is failing to enforce and proposing to violate: (i) Section 703 of the Migratory Bird Treaty Act (MTBA) 16 U.S.C. 703-712, which prohibits the killing of migratory birds without a permit from the U.S. Fish and Wildlife Service; and (ii) Sections 4 through 10 of the Endangered Species Act of 1973 (ESA), which prohibits the taking of endangered and threatened species and requires the protection of such species “whether by protection of habitat and food supply” and requires the designation of “critical habitat.”	2 March 2000	United States	Process terminated under Article 14 (1) on 12 April 2000.
SEM-00-004 / David Suzuki Foundation et al.	The Submitters allege that the Government of Canada “is in breach of its commitments under NAAEC to effectively enforce its environmental laws and to provide high levels of environmental protection.” They allege that the Fisheries Act is violated by logging activities undertaken by British Columbia	15 March 2000	Canada	The Secretariat placed a work plan and a repository of documents on its web site or otherwise made these available to the public and stakeholders on 14 December 2001
SEM-00-005 / Academia Sonorense de Derechos Humanos et al.	The Submitters allege that Mexico has failed to effectively enforce the LGEEPA in relation to the operation of the company Molymex, S.A. de C.V. in the town of Cumpas, Sonora, Mexico. The company processes residues generated in the smelting of copper by national and foreign companies to produce molybdenum trioxide, presumably causing damage and loss to human health and	6 April 2000	Mexico	The Secretariat placed a work plan and a repository of documents on its web site or otherwise made these available to the public and stakeholders on 28 May 2002

	the environment.			
SEM-00-006 / Comisión de Solidaridad y Defensa de los Derechos Humanos, A.C.	The Submitters allege a failure by Mexico to effectively enforce its environmental law by denying access to environmental justice to Indigenous communities in the Sierra Tarahumara in the state of Chihuahua.	9 June 2000	Mexico	29 August 2002 The Secretariat informed Council that the Secretariat considers that the submission warrants development of a factual record.
SEM-01-001 / Academia Sonorense de Derechos Humanos A.C. et al.	The Submitters allege that Mexico has failed to effectively enforce environmental law by having authorized the operation of the hazardous waste landfill (CYTRAR) located near the city of Hermosillo, Sonora.	14 February 2001	Mexico	Process was terminated by Council on 10 December 2001 under Article 15 (2)
SEM-01-002 Names withheld pursuant to Article 11(8)(a)	The Submitters allege that the government of Canada, is failing in its obligation as enumerated in Article 2(3) of the North American Agreement on Environmental Cooperation (NAAEC), which states that 'each Party shall consider prohibiting the export to the territories of the other Parties of a pesticide or toxic substance whose use is prohibited within the Party's territory. When a Party adopts a measure prohibiting or severely restricting the use of a pesticide or toxic substance in its territory, it shall notify the other Parties of the measure, either directly or through an appropriate international organization.' The Submitters assert that Canada has failed to issue a prohibitory and/or injunctive order halting the export to the United States, by AAA Packaging, of products containing "isobutyl nitrite" which the Submitters claim is a "banned hazardous substance".	12 April 2001	Canada	The thirty-day term expired without the Secretariat receiving a submission that conformed to Article 14(1). Under guideline 6.2, the process was therefore terminated 24 May 2001
SEM-01-003 Mercerizados y Teñidos de Guadalajara, S.A.	The company Mercerizados y Teñidos de Guadalajara, S.A. asserts that Mexico failed to enforce effectively Articles 5,	14 June 2001	Mexico	The thirty-day term expired without the Secretariat

	6 and 7 of the North American Agreement on Environmental Cooperation (NAAEC) and Article 194 of the General Law of Ecological Equilibrium and Environmental Protection (Ley General de Equilibrio Ecológico y Protección Ambiental-LGEEPA), by denying probative value in a civil trial to a technical opinion issued by the Federal Attorney for Environmental Protection (Procuraduría Federal de Protección al Ambiente-Profepa), in relation to groundwater contamination caused by the firm Dermet, S.A. de C.V. that produces pesticides and fungicides and is located in the city of Guadalajara in Jalisco			receiving a submission that conformed to Article 14(1). Under guideline 6.2, the process was therefore terminated 19 October 2001
SEM-02-001 Canadian Nature Federation et al.	The Submitters assert that Canada is failing to effectively enforce section 6(a) of the Migratory Bird Regulations (MBR) adopted under the Migratory Birds Convention Act, 1994 (MBCA) against the logging industry in Ontario. Section 6(a) of the MBR makes it an offence to disturb, destroy or take a nest or egg of a migratory bird without a permit. The Submitters claim that their research, based on statistical data, estimates that in the year 2001 clear-cutting activity destroyed over 85,000 migratory bird nests in areas of Central and Northern Ontario. They allege that Environment Canada, through its Canadian Wildlife Service, is primarily responsible for enforcing the MBCA and that virtually no action has been taken to enforce section 6(a) of the MBR against logging companies, logging contractors and independent contractors. They assert that despite the estimated widespread destruction of bird nests, an access to information request	6 February 2002	Canada	The Secretariat informed Council that the Secretariat considers that the submission warrants development of a factual record on 12 November 2002. The council's decision is pending.

	revealed no investigations or charges in Ontario for violations of section 6(a). The Submitters assert that the alleged failure to enforce section 6(a) of the MBR, in addition to the harmful impact on the migratory bird population, has negative consequences for wildlife biodiversity, tourism, respect for the law, fair competition within the logging industry and healthy wood stocks.			
SEM-02-002 Jorge Rafael Martínez Azuela, Jorge Martínez Sánchez, Raul Morelos C., José Alberto Tellez Murillo, Saul Gutiérrez Hernández, Norma Guadalupe Viniegra Cantón	In the submission received by the CEC Secretariat on 7 February 2002, Jorge Rafael Martínez Azuela and other neighbors in the area surrounding the Mexico City International Airport (Aeropuerto Internacional de la Ciudad de México—AICM) assert that Mexico is failing to effectively enforce its environmental laws with respect to the noise emissions originating at that airport. According to the Submitters, there are studies showing that the noise emissions of the AICM exceed the limits established in environmental law, causing irreversible damage to the thousands of persons living near the airport.	7 February 2002	Mexico	The Secretariat determined not to recommend the preparation of a factual record. Under guideline 9.6, the process was terminated on 25 September 2002
SEM-02-003 Friends of the Earth et al.	The Submitters allege that Canada is failing to meet its stated policy to seek to ensure compliance according to the Pulp and Paper Effluent Regulations (the "PPER"), as well as its stated commitment to fair, predictable and consistent enforcement. They assert that for years, certain mills have been "free riders" at the expense of their competitors and the environment.	8 May 2002	Canada	The Secretariat received a response from the concerned government Party on 6 August 2002 and began considering whether to recommend a factual record
SEM-02-004 Arcadio, Leoncio, Fernanda and Milagro Pesqueira Senday	The Submitters assert that Mexico is failing to effectively enforce its environmental laws with respect to the "El Boludo" mining project on the site	23 August 2002	Mexico	The Secretariat received a response from the concerned

	<p>called "El Tiro," owned by the Submitters and located in the Municipality of Trincheras, Sonora, Mexico. According to the Submitters, the company Minera Secotec, S.A. de C.V. has exploited the low-grade placer gold deposit of the "El Boludo" project without complying with several conditions of the environmental impact authorization. The Submitters claim the company is violating the General Law of Ecological Balance and Environmental Protection (Ley General del Equilibrio Ecológico y la Protección al Ambiente—LGEEPA), paragraphs III and IV of Article 15 of the LGEEPA Hazardous Waste Regulations and the Mining Law and its Regulations.</p>			<p>government Party on 9 January 2003 and began considering whether to recommend a factual record.</p>
<p>SEM-02-005 Mr. Angel Lara García</p>	<p>The Submitter asserts that the manufacturing facility of ALCA, S.A. de C.V. releases highly toxic contaminants into the neighborhood of Santa Isabel Industrial, where Mr. Lara García lives. The health and economic effects allegedly attributable to the emissions produced by the company are cited in the 183 documents submitted by Mr. Lara García. He claims that the factory should close or relocate since, "according to environmental standards, which have not been respected, it is a source of pollutants." The documents make multiple references to the presence of strong odors from fuels and solvents. And Mr. Lara García claims that complaints lodged with the Procuraduría Federal de Protección al Ambiente (Federal Attorney for Environmental Protection) and other agencies have been to no avail.</p>	<p>25 November 2002</p>	<p>Mexico</p>	<p>The thirty-day term expired without the Secretariat receiving a submission that conformed to Article 14(1). Under guideline 6.2, the process was therefore terminated on 31 January 2003.</p>