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ISO 14000 - Is There a Role for the CEC?

*Timothy M. Egan and James W. Harbell**

I. Introduction

In response to revelations about sweatshop-like working conditions for immigrant labourers in the U.S. garment industry, U.S. Labour Secretary Robert Reich summoned the biggest names in U.S. retailing to a meeting in September of 1995. His objective was to have the national chains become the industry's police force and weed out unscrupulous suppliers. In the words of one Labour Department spokesman:

If retailers send the message that they won't tolerate this, we would see a rapid about face from the manufacturers. What really puts the fear of God into them is the threat of disrupting their commerce.¹

Criticism of Reich's action was strong. Law and order advocates maintained that the government was shirking its criminal law enforcement responsibility and deferring to industrial vigilantes. Social activists insisted that this was yet another sign of unmitigated free enterprise and they condemned the U.S. government for not enforcing its own labour laws. It is possible, one would hope, that Reich had considered both criticisms beforehand and chose to proceed in this way *not* to ignore the need to enforce the law and *not* to defer to marketplace governance, but because he saw that he might complement these other two approaches with a third: the use of moral suasion.

Those who address environmental issues in their professional work will recognize the three policy instruments evidenced in the sweatshop debate. A well-known text on Ontario Environmental Law, *Environmental on Trial*, states them succinctly:

The range of options open to members of society can be constrained through the use of *regulatory instruments* (also known as the command and control approach). Alternatively, the relevant cost-benefit ratios of various options can be changed through manipulation of the marketplace, employing economic instruments. Third, behaviour might be modified through the use of *suasive instruments*. These encourage the internalization of the environment within the preference structure of the individual.²

The fact that there are three very general policy instruments available in addressing environmental issues (and perhaps labour issues) is rarely debated. What is often debated is: (1) where the application of any one ends and another begins and (2) how best can government effect change through one over another. The first of these points spawns a theoretical and

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1. Scott Sutherland, a U.S. Department of Labour spokesman, quoted by Brian Milner, *Retailers Under Sweatshop Spotlight* in *The Globe and Mail*, Sept. 11, 1995, at B1.

2. David Estrin & John Swaigen, *Environmental on Trial: Guide to Ontario Environmental Law and Policy* (3rd ed. 1993).

moral debate on public policy – what means should government use to fulfill its ends? The second point encourages practical debate about how to best use resources. This turns on the mandate of, and the resources available to, the government authority in question. In essence, the stronger, the better staffed and the better funded the government authority, the more able it is to use command and control mechanisms. Correspondingly, the weaker and poorer the authority, the more appropriate may be the application of suasive techniques.

Under the North American Free Trade Agreement (the NAFTA), a new government authority has been created to address environmental issues: the North American Commission on Environmental Cooperation (CEC). In the scheme of government authorities, the CEC is a weak and poor agency. Its authority amounts to the provision of advice and research in its efforts to improve cooperation and communication on environmental issues between the NAFTA signatories. As such, following the reasoning set out above, it should emphasize suasive techniques in trying to achieve its mandate.

Identifying opportunities to apply suasion may be the most difficult task of the still very young CEC. A difficulty compounded by the problems inherent in working with three countries with very different environmental concerns, enforcement regimes, and traditions of governmental involvement. However, in the following we argue that one early opportunity exists.

The International Standards Organization's (ISO) evolving series of environmental standards (the ISO 14000 series), and particularly the Environmental Management System Standard (ISO 14001), offer a unique industry-sponsored initiative aimed at improving the process of environmental management. The ISO work in the area is involving standard-setting bodies from countries around the world, as well as representation from leading international organizations.

The ISO 14000 series offers numerous benefits to industry. At a time when courts are increasingly scrutinizing managerial decisions in apportioning environmental liability, the ISO 14001 standard and the accompanying guidance document (ISO 14004) offer corporations something to hold up as a sign of their environmental due diligence. In addition, they offer an environmental management model for industry to apply in its efforts to gain competitive advantage, both nationally and internationally.

Governments can also reap benefits from an international environmental standard. Companies that have been registered under the standard should require less attention by government enforcement officers, permitting the latter to focus their limited and shrinking enforcement budgets on the really recalcitrant industry players. Moreover, when enforcement is required, government can measure the conduct of the allegedly guilty industrial concern against the industry-wide environmental standard to which the concern has subscribed, to see if the party under scrutiny has been diligent.

On the other hand, many questions about the utility of the ISO 14000 series remain unanswered. Will the costs involved in designing a system outweigh any potential rewards? How widely will the standards be accepted? Does it threaten to pose a non-tariff barrier to trade? These and other questions are going to be posed as the process begins to publish its standards in mid-1996. It behooves some arm of government to consider them closely.

In the following, we review the CEC and the ISO 14000 process. Recognizing the former's limited jurisdiction and the promises surrounding the latter, we argue that the CEC should make a concerted effort to review, critique and potentially assist with the dissemination and application of these new standards in each of the three NAFTA signatories. Moreover, the CEC should move itself directly into the evolving ISO process, taking a proactive "research" stance to investigate ways in which the application of the standards

could help improve environmental management and environmental cooperation in and among Mexico, the United States and Canada.

II. The CEC

A "side agreement" to the NAFTA, the North American Agreement on Environmental Cooperation³ (NAAEC) was announced on August 13, 1993, to come into force with the proclamation of the NAFTA on January 1, 1994. The NAAEC is intended to, amongst other things, "support the environmental goals and objectives of the NAFTA,"⁴ but the link between the two agreements stops with those words. The NAFTA has never been amended to reflect the provisions of the NAAEC. Although the latter commits the council set up under the NAAEC to cooperate with the NAFTA Free Trade Commission, "to achieve the environmental goals and objectives of the NAFTA,"⁵ the Free Trade Commission has no legal obligation to listen to the Council. As the objectives of the NAAEC make clear, it is designed to foster, promote, increase, enhance, and avoid, but not to command and control.⁶

Both the wording of the NAAEC and the institutions it has created suggest that its effectiveness will turn on how committed the Parties are to achieving its objectives and how effective its institutional staff are at working with the resources at their disposal to achieve those objectives.

The principle innovation under the NAAEC is the North American Commission on Environmental Cooperation, or CEC. The CEC has been mandated, through its governing body the Council to, "serve as a forum for the discussion of environmental matters within the scope of this Agreement"⁷ and to "promote and facilitate cooperation between the Parties with respect to environmental matters."⁸ Each Party maintains complete sovereignty over the development and enforcement of its own environmental laws within its own territory. The CEC's job is to ensure that the three parties communicate as much as possible on such development and enforcement.

The CEC is made up of three separate bodies: a Council, a Joint Public Advisory Committee (JPAC), and a Secretariat. The Council is the governing body of the Commission, comprised of Ministers of the Environment or their equivalents from each of the three Parties. The first Council meeting since the establishment of a workplan by CEC officials was held in Mexico in late October of 1995. The decisions at that meeting were

3. North American Agreement on Environmental Cooperation Between the Government of the United States of America, the Government of Canada, and the Government of the United Mexican States, Sept. 13, 1993, 32 I.L.M. 1480 (entered into force Jan. 1, 1994)[hereinafter NAAEC]. All references to the NAAEC are drawn from the Canadian Government's September 13, 1993 draft of the agreement. The three signatories to the NAAEC (Mexico, the United States and Canada) are hereinafter referred to as "the Parties".
4. *Id.* at art. 1(d).
5. NAAEC, art. 10(6).
6. *Id.* at art. 1. Article 1 of the Agreement lists 10 separate objectives; promote (4 times), foster (1), increase (1), support (1), avoid (1), strength (1), and enhance. While objectives in legal accords (particularly international ones) often sound like platitudes, the language here is evidently less forceful than that found in the objectives of the NAFTA itself under Article 102. That article uses the words eliminate, create, and establish, amongst others.
7. *Id.* at art. 10(1)(a).
8. *Id.* at art. 10(1)(f).

intended to give political sanction to the workplan, which will not be a public document before January of 1996. The fact remains, however, that such political sanction is conditioned by the Ministers' own authority at their respective cabinet tables, where economics and trade take priority over the environment. In short, the Council's approval of the CEC agenda turns on directives given to Council members by their more powerful cabinet colleagues, who are intent on upholding their national interests under the NAFTA - interests which may not coincide with the CEC agenda.

The Joint Public Advisory Committee (JPAC) set up under the NAAEC⁹ is made up of 15 members, an equal number appointed by each of the Parties. The JPAC may provide guidance and advice to both the Council and the Secretariat and offers the most evident mechanism for the channeling of opinions and ideas from the private sector and non-governmental organizations into the CEC. However, there is no requirement within the NAAEC that the JPAC be relied upon in this way. Reliance on it is at the discretion of the Council. Therefore, JPAC's effectiveness will turn on the quality of the advice it provides and ultimately on whether the Council and the Secretariat consider that advice worth following.

The third principle CEC body, the Secretariat, is designed to provide technical, administrative and operational support to the Council and to committees and groups established by the Council.¹⁰ Under the direction of a Council-appointed Executive Director, the Secretariat devotes itself exclusively to acting upon an annual workplan devised by the staff and approved by the Council. Any work pursued outside of the parameters set by the workplan can only proceed if within 30 days of notification to Council, the Secretariat has not received a 2/3's rejection.¹¹ There is no provision requiring the monitoring of the North American environment as part of this annual workplan, although all three Parties have made a general commitment to "periodically prepare and make publicly available reports on the state of the environment."¹² The focus of the Secretariat workplan activity is education and communication.

The Secretariat may not, of its own accord, prepare factual reports on issues related to whether a party has failed to enforce its environmental laws and regulations.¹³ Organizations and individuals may bring complaints to the attention of the Secretariat in respect to such a failure to enforce, but these will not be the subject of a factual report until a lengthy review process is completed by the Secretariat and a 2/3 approval for the factual report is extended by the Council.¹⁴ This factual report, once completed, would remain a private document unless after review the Council by a 2/3 majority, again approves of its release to the public.¹⁵ One of the criteria used by the Secretariat in evaluating whether a complaint will be considered, is an assessment of whether the submission appears to be aimed at promoting enforcement rather than at harassing industry. If the intention is industry harassment, the complaint will not proceed.

Complaints that proceed, become the subject of a factual report and with Council's approval eventually become public, the issue could end there. The organization or individual complainant's only further recourse is to petition one of the Parties to take up the

9. *Id.* at art. 16.

10. *Id.* at art. 11(5).

11. *Id.* at Art. 13(1). That is, rejection by 2 of the 3 parties.

12. *Id.* at art. 2(1)(a).

13. *Id.* at art. 13(1).

14. *Id.* at art. 14, 15.

15. *Id.* at art. 15.

complaint. Should a Party wish to pursue a complaint, a complex procedure evolves. When one Party believes that another is failing to enforce its environmental laws, the former may notify the latter and give the latter credible information about the violation. The latter is then obliged to take the appropriate steps to inquire into the alleged failure to enforce and to respond to the complaint.¹⁶

When a Party believes that the failure to enforce has become a persistent pattern, it may request formal consultations with the allegedly violating party.¹⁷ A third party may participate in the consultations if it can demonstrate that it has a substantial interest in the matter.¹⁸ The process can continue, leading to arbitration and perhaps after two years of continued reporting and reviewing procedure to trade sanctions. The process is designed to be difficult and time-consuming and to provide as many opportunities for settlement as possible.

As a whole, the NAAEC strongly emphasizes and affirms national sovereignty of the signatories in environmental matters. Its provisions call upon the three Parties to undertake initiatives with respect to their domestic environments and to uphold the environmental rights and remedies available to citizens, but it makes no specific reference to shared regional or global environmental concerns.

Clearly, the NAAEC is not intended to hinder business development opportunities between the parties. The limited authority of the various bodies within the Commission to criticize any of the parties and the complicated procedure involved in launching and carrying out a complaint against another Party, are testament to this. What the NAAEC really promises is a forum for discussion and debate about environmental concerns. Deciding how best to advance this promise is difficult in itself, in light of the CEC's limited reporting authority. The Commission does not employ enforcement officers, it cannot afford a diligent monitoring system of environmental abuses, nor is it mandated to do either of these things. Intended as a weak governmental authority, it serves to provide encouragement and advice and the best opportunity for it to pursue this is through the Secretariat's workplan.

From the time of its creation, much criticism has been levied against the idea of the CEC because of this limited mandate. Many environmental activists had hoped for a much more proactive institution: an environmental watchdog for the NAFTA. Leaving aside what might have been and the whole question of whether a stronger international body would be appropriate, we are left with the issue of what the CEC can do within its mandate. In a public presentation in the early autumn of 1995, Secretariat Executive Director Victor Lichtinger indicated that three types of initiatives by the CEC Secretariat begun in 1995, would continue in 1996: those that involve developing, gathering and sharing information, those that build capacity, and those that facilitate cooperative action.¹⁹

The areas of action identified are illustrative of how the CEC is obliged to emphasize activities that focus on communication and education, rather than action. This rankles those who are convinced that greater multilateral enforcement is the best means to ensure environmental protection in the NAFTA trade zone. To such critics the CEC is a waste of resources that could be used more effectively to achieve that environmental protection. However, it is important to recognize that through its workplan activities the CEC may still

16. *Id.* at art. 20(4).

17. *Id.* at art. 22(1).

18. *Id.* at art. 22(3).

19. From the author's notes to a presentation by Lichtinger to the Canadian Environmental Industry Association, Autumn, 1995.

serve as an advocate of environmental reform, albeit by means other than command and control or economic sanction. By educating and communicating on initiatives that do promise reform, it can be much more proactive than its enabling documents might suggest. One 'outside' initiative that is deserving of such attention by the CEC is the ISO 14000 process.

III. The ISO 14000 Process

The ISO was established in 1947 to, "develop worldwide standards to improve international communication and cooperation, and to facilitate the international exchange of goods and services."²⁰ A non-governmental federation of close to 100 national standards bodies representing 95% of the world's industrial production, the ISO's work results in international agreements that are published as international standards. Since its formation, the ISO has published over 8,000 standards and technical reports. All standards developed by the ISO are voluntary; no legal requirements force countries to adopt them. However, in some countries ISO standards are adopted as national standards and therefore become legal requirements in that country.²¹

The ISO has traditionally developed technical standards, which it characterizes as vertical standards, as distinct from system or horizontal standards. A vertical standard compartmentalizes and stays within clearly defined organizational functions. It is seen as a technical, not a business concern. Such standards are familiar to most of us who have seen approval symbols on everything from hockey helmets to bathroom sinks; the symbol is representative of the fact that the particular product meets the accepted national technical criteria for that product.²²

Traditionally, standard setting was a process involving engineers who would establish product specifications on such topics as design and safety. In 1979, the ISO established its technical committee ISO/TC 176 on Quality Management and Quality Assurance, which began to look beyond technical concerns to the idea of standards as an essential part of strategic business management. This focus on overall quality management, out of which evolved the ISO 9000 series of quality management standards in 1987, was the ISO's first attempt at a systems standard. A horizontal standard is one defined as cutting across the functions of an organization and is integrating, coordinating and holistic. It affects the strategic direction and overall performance of the business.²³

The idea of a systems standard has provided much of the impetus behind pollution prevention initiatives in Canada and the U.S., which have attempted to move away from traditional end-of-pipe pollution control engineering and thinking. In the U.S., the Environmental Protection Agency has begun to move toward a multi-media approach to regulation; developing strategies that address industry pollution prevention in all media within one industrial sector rather than media-specific (air or water for instance) regula-

20. Alan Knight, *International Standards for Environmental Management: The Work of ISO/TC 207*, UNEP Indus. & Env't, July 1994, at p.45.

21. Interview with John Wolfe and Alan Knight, Canadian Standards Association. John Wolfe served as secretary to the TC 207.

22. *Id.*

23. *Id.*

tory enforcement.²⁴ Such efforts build on the U.S. *Federal Pollution Prevention Act of 1990*, which created a legislative framework upon which pollution prevention efforts could be built.²⁵

In the June 1995 report, *It's About Our Health*²⁶, The Canadian House of Commons' Standing Committee on Environment and Sustainable Development recommended that pollution prevention should be an essential component of environmental legislation in Canada, lending strong support to such a horizontal standard approach. In the Committee's words:

...because pollution prevention focuses on preventing pollution in the first place, rather than on managing pollution after it has been created, it is the most sensible approach to environmental protection. Pollution prevention involves the efficient use of raw materials, energy, water and other environmental commodities. Increasing evidence internationally has demonstrated that adopting a pollution-prevention approach not only generates real and significant environmental benefits, it also optimizes economic benefits and reduces economic and legal liabilities.²⁷

The focus in pollution prevention is on rethinking design and operational processes, the same idea that is behind a systems standard. Whereas vertical product specifications add another technological device to the end of the line to reduce effluent and thereby meet a regulatory standard (for instance by reducing concentrations of hazardous chemicals in effluent), the rationale behind systems standards is that they promote the integration of business and other performance concerns: cost, efficiency, productivity and environmental performance all become part of the same decision-making process.

Many forces are behind the push for such horizontal standards on the environment. In the words of Dr. George Connell, Chairman of the ISO technical committee responsible for the ISO 14000 series (TC 207):

To a large extent, the environment has become as prominent as it has because of the ever-broadening spectrum of stakeholders and expectations that businesses must relate to. It is no longer just the financial experts and shareholders who make demands at the annual meeting or call up the CEO or the Investors Relations Director with importunate questions. There are now environmental groups, employees, neighborhood and community organizations, unions, banks, insurers, pension fund managers and consumers demanding information and action. They all have power in their own way. They can all influence how successful a company will be. To be competitive, a company must listen, understand and perform to expectation.

In light of such expectations, the success of the ISO 9000 standard series, the growing emphasis on ideas like pollution prevention to address the increasingly complicated environmental field and the simple fact that environmental awareness continues to grow as a

24. Tom Tibor & Ira Feldman, *ISO 14000: A Guide to the New Environmental Management Standards 21* (1996).

25. Pub. L. No. 101-508, title VI, 6601-6610, 104 Stat. 1388 at 1388-321 to 1388-327.

26. House of Commons Standing Committee on Environment and Sustainable Development, *It's About Our Health: Towards Pollution Prevention, CEPA Revisited*, Ottawa: Canada, 1995.

27. *Id.* at 85.

global concern, allowed the ISO to recognize that the time was ripe to address environmental expectations. ISO Technical Committee 207 was struck to develop the ISO 14000 series of standards for managing environmental performance.²⁸

Initially the work of the TC 207 has focused on six subject areas: environmental management systems (EMS); environmental auditing; environmental labelling; environmental performance evaluation; life-cycle analysis, and terms and definitions.²⁹ Additional areas identified for future standard development include: environmental risk assessment; emergency planning, preparedness and response; design for the environment; environmental site assessment; site remediation, and environmental impact assessment. From the six initial subject areas several standards are to be published in 1996, including an EMS standard.

The subcommittee established to address the EMS had three issues on its agenda: environmental management systems specifications with guidance for their use; general guidelines on environmental management principles and their execution, and guidelines on special considerations affecting small and medium-sized organizations. Out of the subcommittee's work there evolved two documents in the 14000 series: the ISO 14001 EMS specification and the ISO 14004 EMS guidance document.

The ISO 14001 is a management systems specification for certification or registration purposes. It contains the core verifiable elements of the proposed environmental management system, of which there are five: (1) the preparation by top management of an environmental policy; (2) a detailed planning process including procedures to identify environmental aspects of the business, legal requirements, and objectives and targets; (3) an implementation and operational process, including a management structure, training initiatives, communication and documentation schemes, document control mechanisms and emergency response mechanisms; (4) a process for checking and corrective action, including monitoring and measurement, records and an auditing system, and (5) a management review system. All of this is driven by the principal of continual improvement.³⁰

ISO 14004, the guidance document (previously numbered as ISO 14000), takes a broader view of environmental management as an enabling tool that can create the conditions for both improved environmental performance and competitive business advantage. The ISO 14004 expands on the core elements of the ISO 14001 and provides: practical help based on experience; suggestions on how to get started; specific examples of activities that could be undertaken; and specific advice for small and medium sized enterprises for whom a more complex management system may not be applicable.³¹ While it is not intended as a registrable standard, adherence to it offers a very similar model for management.

28. It includes representatives from over 50 countries from the current ISO membership, as well as over 15 liaison members. Member countries can participate as voting or non-voting members in the committee process, and liaison members are usually international organizations with an interest or expertise in the area, who can participate but not vote. Knight, *supra* note 20, at 45.
29. *Environmental Management: TC 207 Steers a Course Resolutely Forward* 25 *ISO Bulletin* 3, (Dec. 1994).
30. "International Standards Organization, *Draft International Standard ISO/DIS 14001: Environmental management systems - Specification with guidance for use*, Geneva: August 1995.
31. International Standards Organization, *Draft International Standard ISO/ IS 14004: Environmental management systems - General guidelines on principles, systems and supporting techniques*, Geneva: August 1995.

The TC 207 work plan has been nothing if not comprehensive. Using the EMS standard as an example, in an attempt to ensure that its efforts build on standard-setting enterprises already under way, the subcommittee used existing international standards as seed documents for its own drafting process.³² In addition, the TC 207 as a whole, has from the start set out to work as closely as possible with others. The rationale behind this liaison activity is twofold: it can ensure that the many standard processes on the environment currently under way could be brought in line, and it can help to ensure that the broadest and most widely acceptable international standards might evolve.³³

In short, the ISO 14000 process has managed to position itself in the international spotlight as the governing framework for managing, measuring and communicating environmental performance, and ultimately for ensuring that such a framework is consistent with other ongoing management standards around the world. Moreover, it is already set to launch that framework. At present, the second draft of the ISO 14001 and the ISO 14004 are out for balloting - the review process by which the various member countries of the ISO accept or reject the proposed standard. The balloting process closes in February of 1996, after which time, assuming a positive vote, the participating countries will put together the necessary processes for verification in anticipation of the document's final publication in the summer of 1996. Once released, companies will then begin to bring their EMS's to national verification bodies for registration.

What will registration represent? Registration under the ISO 14001 does not equal a commitment to improved environmental performance; there is no promise attached to it that company X will build a more environmentally friendly mousetrap. However, ISO

32. The EMS documentation draws significantly from, among others, the British Standards BS 7750: Specifications for Environmental Management Systems; and the (EMAS) European Management and Eco-Audit Scheme. As per conversations with John Wolfe and Alan Knight, Canadian Standards Association, and members of the secretariat to the EMS working group of the TC 207.
33. There have been three particular kinds of liaison activity by the TC 207. First, a concerted effort has been made to ensure balanced representation and participation. Developing and newly industrialized countries, geographic regions, and trade blocs are all party to the committee's work, either through an Advisory Group set up under the Committee Chairman, or through direct participation. While Canada and the United States have been active in the process from the start, Mexico was not. However, over the course of the committee's deliberations Mexico has become a fully participating member. Second, liaison activities have been encouraged with existing national and international bureaucracies that affect business, such as trade organizations and other standards development organizations. As a sign of the level of such liaison, organizations involved or consulted include the new World Trade Organization (WTO), the European standards-setting committee (CEN - Comité européen des Normes), and the OECD. Third, liaison activities that can ensure integration of the ISO 14000 series with other business management concerns have been encouraged. This has included coordination with other ISO technical committees. In particular, a coordination group was established to ensure compatibility between the ISO's work on quality management and environmental management (the ISO 176/TC 207 Coordination Group). This group has prepared a strategic framework document for use as an internal management tool by both TC's. The framework calls for the coordination of 176 and 207 strategic planning; the coordination of the document development process using a staged process that allows for communication and consultation; and short, medium and long-term implementation guidance. The officers of the two TC's have been charged with putting in place the appropriate liaison mechanisms within the scope of their respective TC's.

14001 registration is indicative of the existence of a management process consistent with an international minimum standard. It means that company X is committed to manage the environmental aspects of building the mousetrap according to certain internationally agreed upon criteria.

This means that when you buy a mousetrap from an ISO 14000 registered company, that company has an environmental management system which includes a comprehensive policy committing it to, amongst other things, pollution prevention. It means that if you live near Company X, you live near a company which has a process in place to constantly monitor and measure the impact of its activities on the environment. It means that if you lend to Company X, you are lending to a company which has established procedures for the identification, maintenance and disposition of environmental records. And it means that if you want to enforce against Company X, you will be enforcing against a company which holds itself out as meeting certain management processes. Perhaps more importantly, you will be enforcing against a company whose management has committed itself to engage in a review which, "shall address the possible need for changes to policy, objectives and other elements of the environmental management system, in the light of environmental management audit results, changing circumstances and the commitment to continual improvement."³⁴

IV. Why The CEC Should Encourage an EMS Standard

This article has described in some detail the limited jurisdiction of the CEC and the process and thinking behind the ISO 14000 process. In terms of what makes the latter a subject of interest to the former, there are both practical and substantive considerations at stake. Below we identify three of each.

A. OPPORTUNITY TO SHOW LEADERSHIP

The first practical consideration is best defined as the opportunity to show leadership. From a purely political perspective, the CEC needs to be a champion. While its position as educator and communicator on the environment is important, particularly across the economic and cultural divides separating the parties to the NAFTA, the fact remains that many alternative educative mechanisms exist. Bilateral initiatives between the U.S. and Mexico have been under way for decades, particularly in the border states.

Likewise, bilateral initiatives between Canada and the U.S. have been under way for an equally long if not longer time. If anything, the least degree of interaction has been between Mexico and Canada. While this says something for the placement of the CEC's Secretariat in Montreal, the fact remains that the organization has broader goals than acting as a channel for communication on Canada-Mexico environmental relations.

Research centres, academic institutes, professional bodies, industry associations and others have been conducting activities that involve (to make reference to Secretariat Executive Director Lichtinger's words again) sharing information, building capacity and facilitating cooperative action between the NAFTA parties. The CEC does offer something for them: a source of funds for continuing research and at a trilateral level. This may be important, but the CEC, by its own mandate, seeks some higher objectives than the fund-

34. *Management Review*, ISO/DIS 14001, at Section 4.5.

ing of activities by others. An opportunity to capitalize on that mandate is presented by the ISO process.

While the TC 207 is composed of national committees representing countries from around the world and various international associations observing and participating indirectly in the process, there is no multilateral governmental body actually conducting a process review. And yet, the ISO process, while it is private-sector initiated, offers the potential to have widespread public significance on trade issues between countries around the globe.

The CEC offers an untried and therefore untainted mechanism - holding little threat from a command and control perspective - which can take the lead on analysis and monitoring of the ISO process. Such analysis is critical to ensure that the standard and guidance documents are effectively and fairly applied. By dedicating its research abilities to the challenges and opportunities offered by the ISO series in the markets' of Mexico, the U.S. and Canada, the CEC could position itself as a serious and objective critic of a significant international environmental process.

B. MOMENTUM

Second, is momentum. The ISO 14000 process is moving forward very quickly. Whereas the ISO 9000 process took over seven years to complete, from initial preparatory meetings until its promulgation in 1987, the ISO 14000 process has reached the draft international standard stage in just two years after the formation of TC 207 in 1993.³⁵ The ISO has seen the demand for environmental standards grow: through the proliferation of standards and voluntary initiatives; through the increasing emphasis on environmental stewardship from many sectors in society and through consumer demand for greener products.

Indications are that the demand will translate into participation. The numbers of registrations issued under the ISO 9000 standard provides some indication of how much interest there will be (by late 1995 the number had reached over 100,000).³⁶ The greatest level of interest has been in the U.S. and Japan, followed by several far-eastern markets.³⁷ While there is no guarantee that all of those registered under ISO 9000 will register for ISO 14000, the fact remains that these are companies concerned about better management practices. The ISO 14000 series offers a much broader range of standards and does so at a time when concern for environmental management issues is at a high. In addition, as made clear above, it has built on the standard setting initiatives of numerous other bodies, not only national and multinational standard setting bodies, but industrial initiatives like the U.S. Chemical Management Association's Responsible Care Program, and the Global Environmental Management Initiative's (GEMI) Environmental Self Assessment Program.

An Arthur D. Little study, conducted in the Fall of 1995, on ISO 14000 saw 62% of the 115 companies surveyed (each with sales of more than \$1 billion/year) describe ISO 14000 as essential to their success.³⁸ Such companies are expected to pressure their many suppli-

35. Tibor, *supra* note 24.

36. Interview, *supra* note 21.

37. Joanne Petrini, ISO 14000 Environmental Management Standards, Opportunities and Pitfalls 3 (1995).

38. Arthur D. Little, Arthur D. Little ISO 14001 Survey (1995).

ers to ensure that the latter meet whatever management standards the former have in place. As a result of such factors, the numbers of certificates expected to be issued under the ISO 14000 is very high. By involving itself in the ISO process now, the CEC could act as a key facilitator and critic for the application of the process throughout North America and beyond.

C. TIMING

The third practical consideration is timing. As explained above, voluntary measures to improve environmental performance are front and centre in both Canada and the United States through pollution prevention and other initiatives. In both countries extensive efforts are under way to identify opportunities to achieve various governmental objectives without the cost of constant enforcement activity - through either legal remedies or financial penalties. The preferred approach involves mechanisms which see the competitive market place internalize the policy considerations underlying enforcement action and thereby assist public authorities to achieve results in a more cost-effective manner. In effect, the goal is to have the market regulate itself.

In Mexico where similar programs are not at the same stage of development, the environmental legislation is considered to be fairly comprehensive but the institutional capacity for effective enforcement does not exist. This is compounded by a lack of financial resources of an even more serious nature than in Canada or in the U.S. Moreover, the country is determined to continue with an aggressive industrialization policy, fed by export development. That means the exports in question have to meet the standards of the international market.

The ISO 14000 offers a private-sector led, voluntary global mechanism to address some environmental concerns. While not a panacea for public authorities who want greater self-regulation by the marketplace, it is a major step forward in such efforts. Assessing its usefulness in this way is an ideal function for the CEC. The latter, without a command and control agenda of its own, can maintain a certain degree of objectivity in its assessment. It has no vested interest in advocating one approach over another. It does offer a unique perspective by providing the opportunity to combine perspectives from economies of very different scale and culture.

As part of its workplan the CEC is already engaging in initial comparisons of various voluntary measures.³⁹ Using this as a basis and focusing on the ISO 14000 work, the CEC could truly evaluate the significance and impact of the regime. As we have mentioned earlier, while better environmental management does not equate to improved environmental protection, it is a necessary aspect of such protection for the long-term. The voluntary nature of the ISO 14000 scheme makes it particularly well-suited for the participation of the CEC.

Of the three substantive considerations behind advocating the CEC review of ISO 14000, the first is the important implications of the ISO 14000 series. It is expected that companies will have to consider many issues when implementing the ISO 14001 standard. An ad hoc legal issues forum created by the U.S. Technical Advisory Group to the TC 207 identified five major areas of concern:⁴⁰

39. Interview with CEC staff members.

40. Tom Tibor & Ira Feldman, *Hurdles to Implementation: Legal Issues Important to Consider*, Chem. Wk., Nov. 8, 1995, at 50.

- 1) **Audit Confidentiality:** will the ISO 14000 EMS audits qualify for protection under existing policies, public law regimes or common law principles?
- 2) **Government Enforcement and Regulation:** How will government agencies view the role of ISO 14000, and what will be the implications of incorporating the series in some way into government regulatory, enforcement and procurement policy?
- 3) **Standard of Care:** If the ISO Standard becomes widely accepted, will it constitute a legal standard of care to be used by courts to judge corporate performance?
- 4) **ISO 14001 Requirements:** Which of the aspects of the actual EMS standard actually have legal aspects?
- 5) **Auditor-Certifier Liability:** To what extent are auditors liable for regulatory violations discovered during ISO 14000 audits?

These questions may not be answerable until the issues come up in a court of law. Nonetheless, their consideration now by the CEC could produce research of considerable value for the three NAFTA governments and for the many corporations considering the ISO process.

Even now courts are paying closer and closer attention to standards against which directors and officers should be held to assess whether they have exercised due diligence. An environmental management system effectively applied gives a kind of due diligence proof that directors and officers can offer in their defense. It presents a systematic mechanism to ensure that they are meeting their environmental responsibilities. The CEC, concerned about consistent application of environmental law in the three NAFTA countries can, by its review, measure the ISO system's effectiveness as a means to help industry engage in more environmentally responsible behaviour.

The second substantive consideration is international competitiveness. It is expected that when the ISO 14000 series is fully adopted in the next few years, European firms will refuse to buy or receive bids from non-accredited suppliers.⁴¹ Other countries outside of the EC, in Asia, Africa and South America will be concerned about participation not only to guarantee business opportunities with the EC, but also with other principal industrial nations that endorse the ISO process, like the U.S., and Japan. The absence of any ISO 14000 registration process may effectively block international business opportunities.

In addition, many believe that a uniform global standard will level the playing field for world trade and become a sign of credibility for companies interested in doing business in foreign markets. ISO proponents argue that differing environmental regulations in various countries can currently serve to bar trade. Such barriers can best be overcome by the kind of efficiency offered by international standards. Some U.S. manufacturing companies who initially ignored the ISO 9000, were caught short in complying with it and were obliged to play catch up with their European counterparts.⁴² ISO proponents point to this as a sign of what could happen again in ISO 14000. Others emphasize that foreign interests,

41. Interview, *supra* note 21.

42. Jason Makansi, *ISO 14000: Environmental Conduct for the Global Village*, 139 Power 9.

particularly in Asian markets, are positioning themselves to be well ahead in the application of the EMS standard by the time of its publication, to give themselves a competitive advantage over their North American counterparts.⁴³

The CEC as an organization, born of a trade process, is uniquely positioned to apply the kind of expertise required to assess such trade and competitiveness concerns and it should make every effort to ensure that business opportunities for corporations located in Mexico, the U.S. and Canada are not missed by a poor understanding of the ISO process.

Third and related to the above, is the need to have a voice defending the rights of less industrialized economies like Mexico. Developing countries' firms were conspicuous by their absence throughout most of the deliberations of the ISO 14000 process. A leading reason was cost: the process of developing the standards has been both demanding and expensive for participants and developing nation representatives have had difficulty affording full involvement. Some saw that their human and fiscal resources could be better devoted to other priorities. The result is that the process very much reflects an industrial nation perspective. This is unfortunate for two reasons: it exacerbates a business divide between the developed and the developing world and it means an opportunity to launch a process with implications for improved environmental performance that the developing world has missed.⁴⁴ The CEC, with equal participation of one of the world's largest emerging economies in Mexico, offers a mechanism to address some of these concerns through effective research on the strengths and weaknesses of the ISO from a developing nation's perspective. The research and involvement of an organization like the CEC could help to raise such concerns and ensure that a fair international regime concerning the application and integration of the ISO 14000 standards is developed. This would be of value not only to Mexico, but to many other emerging economies in the Americas where business interests are increasingly concerned with global competitiveness.

V. Conclusion

It should be stated again that the ISO 14000 does not offer any direct guarantees that environmental protection will improve in the companies that are certified. Nor does it promise to. What it does offer is a mechanism to ensure that business decisions affecting the environment are made in a consistent and transparent way. Such an efficiency gain is important for better long term environmental performance. Recognizing this and the significant impact the ISO 14000 series is likely to have, the CEC is well-advised to become much more involved in the process through liaison with the TC 207, through its own research on the issues being addressed by that committee and through the kind of discrete lobbying in which a political organization of its kind can engage.

For a governmental organization with limited scope for action, the CEC is offered a unique opportunity with the ISO 14000 series. The latter's standards are voluntary programs that will, by becoming a pre-condition for effective international business, have a law-like significance. The implications of that significance need to be monitored, and the

43. Interview, *supra* note 21.

44. Stephen L. Kass & Jean M. McCarroll, *ISO 14000: Standards Present New Challenges*, N.Y.L.J., May 15, 1995, at S1.

CEC is uniquely positioned to do that monitoring.

One reviewer has described the ISO process in the following way:

ISO 14000, and countless individual and collective efforts like it, may simply reflect the fact that responsible environmental management of the environment is a cultural trait that must become as natural as shaking hands, bowing, or embracing when doing business in the global village.⁴⁵

By supporting the new cultural trait (an appropriate task for a multicultural organization), the CEC can indirectly achieve the more proactive results that it cannot achieve directly. This will help the organization give a hard edge to its limited mandate and more importantly, lend support to better long-term environmental management worldwide.

45. Makansi, *supra* note 42.