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The Effect of NAFTA on Environmental Regulations in the United States, Canada, and Mexico

Raymond Walker*

I. Introduction.

The North American Free Trade Agreement (NAFTA) has been praised (and criticized) as the "greenest" trade agreement around. In fact, the preamble to NAFTA states that a primary purpose of the agreement is to "contribute to the harmonious development and expansion of world trade ... in a manner consistent with environmental protection and conservation; ... promote sustainable development; ... [and] strengthen the development and enforcement of environmental laws and regulations." With such lofty goals, NAFTA and its accompanying side agreements attempt to balance expansive international trade interests against growing concerns surrounding the

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1. See Joseph G. Block & Andrew R. Herrup, Addressing Environmental Concerns Regarding Chilean Accession to NAFTA, 10 Conn. J. Int'l L. 221, 226 (1995). That environmentalists are divided over the issue of NAFTA's adoption is illustrated by comparing a list of those environmental organizations that supported NAFTA's adoption to a list of those that opposed it. NAFTA was (and is) supported by a coalition of major environmental organizations, including (1) the National Wildlife Federation, (2) the World Wildlife Fund, (3) the National Audubon Society, (4) the Environmental Defense Fund, (5) the Natural Resources Defense Council, (6) Conservation International, (7) Defenders of Wildlife, and (8) the Nature Conservancy. See Who Supports, Opposes Accord, THE ARIZ. REP., Nov. 7, 1993, at A14. In contrast, NAFTA is opposed by other major environmental groups including (1) the Sierra Club, (2) Greenpeace, (3) the United States Public Interest Research Group (U.S. PIRG), (4) Citizens' Action, (5) Public Citizen, (6) the Clean Water Fund, (7) Earth Island Institute, and (8) the Student Environmental Action Coalition. See id.; see also H.R. Rep. No. 156, 103rd Cong., 1st Sess. 9066, 9069 (1993) (recording concerns of Clean Water Fund that NAFTA may undermine state and local efforts to regulate the use of fresh water resources).

depletion of environmental resources. After nearly five years in existence, the question arises, has NAFTA met its environmental challenges and the goals set forth by the United States, Canada, and Mexico in their various agreements?

This comment will examine the various enforcement actions and environmental projects undertaken by NAFTA organizations. It will then explore the various goals set out in the Supplemental Environmental Agreement (SEA) to NAFTA. Finally, this comment will examine whether these goals are being met by the SEA's activities in the context of the Independent Review Committee's (IRC's) four year report, released in June of 1998.

II. Original NAFTA Environmental Provisions

A. The Need for Environmental Provisions.

The expansion of trade toward a more global economy is evident through the various trade-expanding agreements that nations have created in the past two decades. Because of the inevitable effect increased trade has on the environment, environmental concerns were at the center of the debate over NAFTA between Canada, Mexico, and the United States. In fact, there were legitimate reasons for these concerns. When NAFTA took effect on January 1, 1994, it created the largest free trade zone in the world. NAFTA will ultimately eliminate all tariff and non-tariff barriers to trade creating a market worth $6.7 trillion and composed of 370 million people. Such an increase in international economic activity would certainly increase the rate of depletion of the world's limited natural resources, particularly in developing countries like Mexico that tend to form economic policies that promote environmentally destructive agricultural export production.

4. See Christopher N. Bolinger, Assessing the CEC on its record to date; Commission for Environmental Cooperation, 28 LAW & POL'Y INT'L BUS. 1107 (1997) (noting that the proliferation of international environmental laws and agreements has occurred because of an increasingly integrated world economy, and the potential for conflict between environmental and trade policies).
5. See id.
9. See Vogel, supra note 6. These environmental fears are becoming even more acute today with discussions of Chilean accession to NAFTA. Like Mexico, Chile has serious and obvious problems with air and water pollution caused by lack of proper controls on large-scale mining operations. Air pollution in Santiago, Chile for instance, is considered among the worst in the world, forcing many residents to wear gas masks. Chile argues that its socioeconomic level does not grant it the luxury of high anti-pollution standards, leaving environmentalists, politicians and member countries to NAFTA wondering where to draw the line between trade and the environment. See Block & Herrup, supra note 1, at 249-251.
After NAFTA was signed, many environmental groups felt that the agreement failed to adequately address these and other environmental issues. One such environmental group, Public Citizen, filed suit to enjoin NAFTA for lack of an accompanying “environmental impact statement.” The U.S. National Environmental Policy Act (NEPA) generally requires such statements, and Public Citizen obtained a ruling at the trial court level in June of 1993 that NEPA applied to NAFTA.

This ruling seriously threatened the agreement and its scheduled 1994 implementation. However, on appeal in September of 1993, the Court of Appeals for the District of Columbia reversed the trial court decision to the great relief of country officials. Implementation of NAFTA commenced.

President Bush formally signed NAFTA on behalf of the United States in December of 1992. Pressure from environmental groups claiming that the basic agreement did not go far enough to protect the environment forced Bush’s successor, President Clinton, to strengthen the environmental provisions by including a supplemental environmental agreement with “real teeth.” This supplemental agreement is the primary focus of this comment.

B. ORIGINAL NAFTA PROVISIONS ON THE ENVIRONMENT.

Before looking at the supplemental agreement, however, it is important to note that NAFTA’s preamble sets forth a number of environmentally focused goals. Specifically, the parties resolved to (1) undertake trade and investment in a manner consistent with environmental protection and conservation; (2) promote “sustainable development;” and (3) strengthen enforcement of environmental laws and regulations.

To accomplish these goals, NAFTA includes a number of environmental provisions. NAFTA effectively prohibits parties from lowering environmental standards to attract investment, as the parties “recognize that it is inappropriate to encourage investment by relaxing health, safety, or environmental measures.” Further, article 904 of NAFTA represents an unprecedented instrument in trade agreements and is designed to maintain and enhance health, safety, and environmental protection in NAFTA countries. Article 904 uniquely provides that each NAFTA member has the right to adopt, maintain, and apply product standards relating to safety, health, the environment, or consumer protection at levels that the member country deems appropriate. Thus, NAFTA addresses the

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10. See Bolinger, supra note 4.
12. See id. at 551 (citing 42 U.S.C. § 4332(2)(C)).
13. See id.
15. See Public Citizen, supra note 11, at 549.
16. See FOLSOM & FOLSOM, supra note 14, at § 8.03[B].
18. NAFTA, supra note 2, at preamble.
19. Id. art. 1114(1).
20. See Kim & Cargas, supra note 8, at 5, 6.
21. See NAFTA, supra note 2, art. 904.
environmental issue not by requiring countries to heighten their standards,22 but to simply enforce their own existing laws.23 Each partner in turn has the right to refuse imports from partner countries that do not conform to the importing country's standards.24

NAFTA also addresses the United States-Mexico border region, which has long been environmentally stressed.25 The two countries have worked together on the border environment since 1983 with the Agreement on Cooperation for the Protection and Improvement of the Environment in the Border Area (the La Paz Agreement).26 Interestingly, this is one of only five transnational agreements that NAFTA does not preempt.27 Under the La Paz Agreement, both countries expanded their environmental cleanup efforts along the 2,000-mile border.28 In 1993, two NAFTA parallel agreements were put in force to supplement the La Paz Agreement: the Mexico-U.S. Border Environment Cooperation Agreement, which establishes the Border Environment Cooperation Commission (or BECC); and the North American Development Bank (NADBANK), which is jointly funded by both countries and provides additional monies to address border environmental infrastructure projects.29

Finally, NAFTA addresses a number of health issues related to environmental concerns. In fact, chapter 7 of NAFTA (Sanitary and Phytosanitary measures, or SPS) specifically addresses the area of health standards associated with food products. Chapter 7 includes provisions concerning the protection of human, animal, and plant pests and diseases, food additives, and contaminants (or toxins).30 SPS measures as they affect trade are addressed in subsection B.

C. THE NAAEC.

Notwithstanding the unprecedented environmental provisions, environmental groups criticized NAFTA for not going far enough. Playing off of pressure exerted by these interest groups, U.S. presidential candidate Bill Clinton promised that he would approve NAFTA

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22. Many environmental groups were concerned with Mexico's poor environmental track record, and pushed for heightened standards. President Clinton recognized that the issue, however, was not the need for Mexico to strengthen its standards, but Mexico's soft and inconsistent enforcement of existing standards. See Kim & Cargas, supra note 8, at 8.

23. For example, Article 1114(1) of NAFTA states that the parties "recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures," effectively prohibiting member countries from lowering their environmental standards to attract investment. See NAFTA, supra note 2, art. 904.1. See also Kim & Cargas, supra note 8, at 10 (noting that NAFTA encourages harmonization of domestic and international standards, but directs the parties to fulfill this goal without reducing the level of protection currently provided by domestic law).

24. See NAFTA, supra note 2, art. 904.1. See also Kim & Cargas, supra note 8, at 10 (noting that NAFTA encourages harmonization of domestic and international standards, but directs the parties to fulfill this goal without reducing the level of protection currently provided by domestic law).


27. See NAFTA, supra note 2, art. 103.


29. See id. at 287.

30. See NAFTA, supra note 2, at ch. 7.
only if the concerns of the environmental community were satisfied. Once elected, President Clinton entered into negotiations with Canada and Mexico to address the environmental community's concerns, only to find that both Canada and Mexico refused to reopen NAFTA to negotiation. It was necessary, therefore, to formally negotiate a separate agreement. As a result of these negotiation efforts, the three parties to NAFTA formed the North American Agreement on Environmental Cooperation (NAAEC).

The NAAEC, at its genesis, set forth several goals for itself: (1) to dictate minimum environmental control Regulations; (2) to implement cooperation on improving the North American environment; (3) to enforce compliance with party countries' own domestic environmental laws; and (4) to allow participation of the public in development of new environmental laws and policies.

There are two central features of the NAAEC. The first is the establishment of the Commission for Environmental Cooperation (CEC). The second is the development of dispute resolution procedures that allow parties to complain that another party is guilty of a "persistent pattern of failure ... to effectively enforce its environmental law[s]."

The CEC is made up of a Council, a Secretariat, and a Joint Public Advisory Committee (JPAC). Although such institutions are not new to NAFTA's signatories, the NAAEC's commission is the most comprehensive and ambitious ever created and is the first developed in connection with a trade agreement.

The Council, comprised of the environmental ministers of Mexico and Canada and the administrator of the Environmental Protection Agency, is the governing body of the CEC. The Council meets once a year or more often if requested by any of the parties. The function of the Council is to oversee the NAAEC's implementation. In doing so, it is charged with serving as a forum for the discussion of environmental matters, promoting and facilitating cooperation, overseeing the Secretariat, and encouraging effective enforcement of and compliance with each party's environmental laws. The Council may consider and develop recommendations on transboundary and border environmental issues, pollution prevention and environmental enforcement strategies, and the promotion of public environmental awareness.

32. See id.
33. See id.
35. See id.
36. See id. at pt. III.
37. See id. at pt. III, art. 8.
38. Id. at 1490.
39. See id. at pt. III, art. 8.
40. See Kim & Cargas, supra note 8, at 11.
41. See NAAEC, supra note 34, art. 10.
42. See id. art. 9(3)(a).
43. See id. art. 9(3)(b).
44. See id. art. 9(6).
45. See id. art. 10(2).
Additionally, the Council is charged with assessing and mitigating the environmental impact of projects likely to cause significant adverse transboundary effects. They review public access to environmental information held by each party, and make recommendations on establishing a process of upward harmonization of “environmental technical regulations, standards and conformity assessment procedures” consistent with NAFTA. Finally, the Council must continually consider the environmental effects of NAFTA.

An executive director, responsible for preparing an annual report to be made available to the public, is chosen by the Council to head the Secretariat. This annual report looks at the activities and expenses of the CEC for the previous year, as well as the budget and program for the subsequent year. The report contains data on environmental enforcement activities by each party and relevant non-governmental organizations (NGOs). Finally, the report includes a periodic “State of the Environment” report.

Article 14 establishes a citizen submission process that provides an opportunity for individuals or groups in any of the three parties to send submissions directly to the Secretariat. The submissions generally include an assertion that a party has failed to enforce its environmental laws at some level. The IRC’s Report states that the public participation component of the NAAEC is an “unquestionably ground-breaking instrument.” The IRC further noted that the citizen submission process established a significant avenue for public involvement in the NAAEC as an international agreement.

Using the submission process, Mexican environmentalists won an appeal allowing ecology groups to challenge government environmental policies. They brought suit claiming the Mexican government had violated its commitments under NAFTA, and they won an important legal victory whereby ecology groups are allowed the right to challenge government environmental policies in court, even when the groups themselves are not directly affected. The environmentalists stated that “this case constitutes the first instance in Mexican environmental issues of a Federal Court recognizing the existence of the legal right of a non-governmental organization . . . to challenge actions by authorities that affect the environment.”

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46. See id. art. 10(7).
47. Id. art. 10(3)(b).
48. See id. art. 10(6)(d).
49. See id. arts. 11(1), 12.
50. See id. art. 12.
51. See id.
52. Id.
54. See id. at 3.4.
55. See id.
57. See id. (noting that Mexican courts previously had denied standing in all law suits challenging that the enforcement of environmental policies on grounds that individuals and non-governmental organizations had no legal interest in the issues).
Each party appoints five members to the JPAC.\textsuperscript{58} JPAC's members have been drawn from industry, NGOs, and academia,\textsuperscript{59} and their role is to "ensure that the citizens of the three countries play a strong part in the efficient execution of the CEC mandate."\textsuperscript{60} The group meets at least once a year and advises the Council on any matter within the scope of the NAAEC, including the annual program and budget, and provides technical, scientific, or other information to the Secretariat.\textsuperscript{61}

III. The Independent Review Committee's Four-Year Report.

A. History of the IRC.

The Council of the CEC, composed of the ministers of environment of Canada and Mexico and the administrator of the EPA of the United States, established the Independent Review Committee (IRC) to fulfill the CEC's responsibility of reviewing the operation and effectiveness of the NAAEC.\textsuperscript{62} The IRC is made up of three members appointed by the Council.\textsuperscript{63} The Committee, within the report, made a list of twenty-six recommendations for the CEC.

The first of these recommendations expressed the IRC's perception that the NAAEC should be seen not just as a side deal for trade, but as a "complete and vital agreement in its own right."\textsuperscript{64} The IRC stated specifically that it believes the long-term value of the NAAEC and the Commission will be measured "not so much by a technically defined environment and trade 'ruler,' but rather by the contribution the CEC makes to improve environmental conditions" in North America and, more specifically, by its contribution to "sustainable development" in North America.\textsuperscript{65}

\begin{itemize}
\item \textsuperscript{58} See NAAEC, supra note 34, art. 16.
\item \textsuperscript{59} See Bolinger, supra note 4, at 7.
\item \textsuperscript{60} Id.
\item \textsuperscript{61} See NAAEC, supra note 34, art. 16.
\item \textsuperscript{62} CEC Resolution 97-06.
\item \textsuperscript{63} The Independent Review Committee was made up of the following three members appointed by the Council: (1) León Bendesky is a partner and director of ERI economic consultants in Mexico City; (2) Barbara J. Bramble is Senior Director, International Affairs, for the National Wildlife Federation in Washington, D.C.; and (3) Stephen Owen is the Lam Professor of Law and Public Policy and the Director of the Institute for Dispute Resolution at the University of Victoria.
\item \textsuperscript{64} IRC, supra note 53, at 2 (stating specifically that "the NAAEC and the CEC should be seen as more than a side deal for trade, but as a complete and vital agreement in its own right," and noting the importance of the CEC's role in developing cooperative and productive environmental programs. The three parties provided a "clear and strong mandate" to do so as exemplified in Article 1 of the NAAEC, which includes seven sections that relate specifically to environmental protection and sustainable development).
\item \textsuperscript{65} Id. This is in accord with the IRC's 6th recommendation to the CEC that "the Council of the CEC should undertake a careful process to articulate both a strategic vision of its contribution to sustainable development in North America and its process for achieving this vision. The vision should be coherent and comprehensive, and set a platform for the annual work program." Id.
\end{itemize}
B. THE CITIZENS' SUBMISSION PROCESS.

A second key component for the CEC's success is the article 14 citizens' submission process discussed above. The IRC's recommendations 11, 14, and 16 recognize and support the value of public input.

The IRC was concerned with the general public's misperceptions about the process and its perceived adversarial nature. The committee explains that the process relates to the broader goal of sustainable development by allowing citizens to take action if their local environment is, in their view, at risk. In effect, the submission process provides the CEC with "350 million pairs of eyes to alert the Council of any 'race to the bottom' via lax environmental enforcement."

The IRC points out, however, that the Secretariat itself does not act in an adversarial manner to the party involved. Instead, the Council's role, much like the judiciary's, is wholly neutral and objective with respect to both parties. Unlike the judicial system, however, the Council determines on a case-by-case basis whether or not a particular submission warrants a factual development. There is no sophisticated system for filing briefs and counter-briefs. The IRC sees this incomplete fact finding process as efficient and useful, analogous to widely accepted dispute avoidance and resolution procedures.

As of June 1998, fifteen submissions had been filed. The Council has successfully disposed of seven of those (only one of which was accompanied by a factual finding) with eight still pending. This hardly seems efficient, but the IRC cites personnel shifts and staffing difficulties as the true culprit, and not the process itself.

C. THE ENVIRONMENT AND TRADE NEXUS.

At the heart of this entire discussion is the contention between liberalizing trade and protecting the environment. While NAFTA is a trade liberalizing agreement, the

66. See id at 3.4 (stating that "the NAAEC is unquestionably a ground-breaking instrument as it relates to public participation.") The IRC further noted that the key features of the process were (1) the requirement for one council meeting every session to be open to the public, see NAAEC, supra note 34, art. 9(4); (2) the establishment of a trilateral Joint Public Advisory Committee (IPAC) of five independent individuals from each party specifically to advise the Council as a whole, see id. art. 16; (3) recognizing the value of the National Advisory Committee (NAC) of independent citizens to advise each party, see id. art. 17; and, (4) recognizing the value of a Governmental Advisory Committee (GAC) to bring in advice from different levels of government to advise the party, see id. art. 18.

67. See IRC, supra note 53, at 3.3.3, 3.4.1. See also Environmental Work Plan Focuses on Toxics, Climate Change, ECO-LOG WEEK, July 25, 1997, at 3 (stating that the system of cooperation between government and society as set up by the CEC has "become a widely valued forum and mechanism for the exchange of information, promotion of scientific research, and access to information and public participation at a regional level.")
NAAEC "side agreement" seeks to protect the environment, a goal that often opposes trade liberalization.\textsuperscript{75}

From the outset of the negotiations for NAFTA and the NAAEC, it was apparent that all three parties were concerned with opening up trade policies, and that they wanted to avoid building barriers to the increased trade they were attempting to promote.\textsuperscript{76} The problem of increasing trade while maintaining or increasing levels of protection for the environment produced a unique system for trade sanctions in the NAAEC.\textsuperscript{77} Generally, the agreement focuses not on sanctioning a party for failing to enforce its environmental laws, but instead on encouraging them to do so.\textsuperscript{78} The system of sanctions that did find its way into the agreement is fundamentally different from those typically thought of in trade circles.\textsuperscript{79} Under the agreement, trade sanctions may only be imposed if, after an extended process of encouraging a party to enforce a particular law, the party "(1) continues to refuse to enforce the law; (2) refuses to make a plan and accept assistance aimed at addressing the problem; and (3) fails to pay a fine, limited in amount under the supplemental agreement."\textsuperscript{80}

This raises the question as to whether the CEC is even capable of bridging the gap between trade and the environment and ensuring that trade growth does not have serious negative environmental consequences. The IRC believes that the CEC, as a proponent for the environment, need not become an enemy of NAFTA in this capacity.\textsuperscript{81} It reasons that addressing the positive and negative consequences of trade liberalization head-on is healthier and more efficient than waiting until it is too cumbersome or expensive to do so.\textsuperscript{82}

To accomplish this goal, however, the CEC must, in the IRC's opinion, develop a balanced system of review of the effects of NAFTA.\textsuperscript{83} The committee's report noted that the debate on the effect of the CEC has been "too highly influenced by the mostly theoretical," because many aspects of the relationship between trade and the environment are speculative, and as of yet unknown.\textsuperscript{84} The lack of hard data (which will be the subject of future NAFTA effects studies) has overshadowed the fact that, in the Committee's opinion, the CEC has begun addressing trade issues through practical and concrete programs that are not merely amorphous "research exercise[s]."\textsuperscript{85}

D. THE CEC'S WORK PLAN.

As examples of the CEC's efforts to address the environmental issues in a more concrete fashion, the Council has concentrated on fostering "results-oriented cooperation"
and has adopted a vision of building on the efforts of governments and society alike. This is exemplified, at least in part, by the citizens' submission process previously discussed. From this foundation, and with an annual budget of $2,687,000, the CEC has targeted four general areas of priority: (1) reducing risk to human health; (2) climate change and energy efficiency; (3) habitat and species protection and (4) the North American Greenlane.

1. Reducing Risk to Human Health.

The CEC has developed several projects under the category of reducing risk to human health. The IRC points to three such projects (the Sound Management of Chemicals project, the Environmental Enforcement program, and the Technology Clearinghouse Project) as specific examples of the CEC's ability to address environmental issues in an effective manner.

The Sound Management of Chemicals project, for instance, draws its authority from Council Resolution #95-5, which calls the Council to "promote and, as appropriate, develop recommendations regarding appropriate limits for specific pollutants, taking into account differences in ecosystems and other responsibilities for the sound management of chemicals." In this capacity, the project has articulated four specific objectives: (1) to "begin development of two additional regional action plans for two priority substances yet to be determined;" (2) to "support the implementation of the completed North American Regional Action Plans;" (3) to "review and identify substances of common concern for future joint action;" and (4) to "develop proactive strategies on the sound management of chemicals." As to the second goal, an impressive result of the project (which was budgeted in 1997 for $450,000) is a series of four North American Regional Action

86. See id.
88. See id.
89. See id. These programs include the North American Pollutant Release Inventory, North American Air Monitoring and Modeling, and Transboundary Environmental Impact Assessment (TEIA). Id.
90. See IRC, supra note 53, at 4.1. The Sound Management of Chemicals project is designed to prevent banned or severely restricted chemicals from passing from one producing company to another (typically underdeveloped country). See id. The project has its own work program and draws its authority from Articles 2(3) and 10(2) of the NAAEC. See id.
91. See id. The Environmental Enforcement program is coordinated by the Secretariat of the CEC, composed of senior enforcement officials of the parties, and participated in by several enforcement-related agencies representing environmental and wildlife interests from all three parties.
92. See id. The technology clearinghouse project, initiated with funds from the CEC, is a commercial database of environmental technologies, and a service informing businesses of those available technologies.
93. See IRC, supra note 53, at 4.1.
94. See NAAEC Budget, supra note 87, at 97.02.01.
95. Id.
96. Id.
Plans (NARAPs) dealing with the regulation of potentially harmful and widely used chemical agents.\textsuperscript{97} Other projects in this category include the North American Pollutant Release Inventory,\textsuperscript{98} the North American Air Monitoring and Modeling Project,\textsuperscript{99} and the Transboundary Environmental Impact Assessment project (TEIA).\textsuperscript{100}

2. \textit{Climate Change and Energy Efficiency.}

In the category of climate change and energy efficiency, the CEC budgeted $100,000 in 1997 for an examination of North American Co-operation on Greenhouse Gas (GHG) Emissions Trading.\textsuperscript{101} This project, which will be reported directly to the Council, involves a continued evaluation of the potential for a GHG emissions trading system in North America.\textsuperscript{102} Specifically, the 1997 project "explores the economic instruments to

\textsuperscript{97} See id. Specifically, these action plans, which are currently waiting on final approval from the Council, address the regulation of PCB, DDT, chlordane, and mercury. Further, the CEC is developing criteria for selecting other substances requiring regional action.

\textsuperscript{98} See \textit{id.} at 97.02.02. The North American Pollutant Release Program (NAPRI) was budgeted in 1997 for $105,000. Notably, in 1996, NAPRI assisted Mexico in developing its own pollutant release inventory. NAPRI's long-term goal is to provide track emissions through domestic inventory programs, and to show baseline, trends, and changes in those emissions. Its specific objectives are: (1) "To develop a North American pollutant release transfer register report for an identified group of substances which are of transboundary or North American concern, based on existing public inventory" (currently 1996 statistics and information) in the party countries; (2) "to establish a common information base on loadings into the North American environment for specific pollutants;" and (3) "to highlight compatible and comparable information of national pollutant release inventory information, and based upon national priorities and needs, facilitate further compatibility." The rationale behind the inventory project is that "inventories are essential methods in enhancing environmental quality on a regional basis" by acting as a tool encouraging companies and helping them recognize different efforts to reduce waste generation. \textit{Id.}

\textsuperscript{99} See \textit{id.} at 97.02.03. In 1997, the North American Air Monitoring and Modeling Project received a budget of $150,000. The central focus of this project is to develop better air quality controls, primarily through research data, modeling, and assessment programs. Several projects are either underway, or slated to be undertaken within the next year, including four pilot projects on monitoring and modeling in shared airsheds. Other projects include: (1) an assessment of availability and compatibility of monitoring and modeling data in the eastern Canada-northeastern U.S. border area; (2) a report on the potential for enhanced compatibility of North American air quality data sets; and (3) summary papers on such issues as North American aerosol particle monitoring programs and North American atmospheric deposition monitoring arrays. \textit{Id.}

\textsuperscript{100} See \textit{id.} at 97.02.04. The Transboundary Environmental Impact Assessment Project was budgeted in 1997 for $100,000. The assessment project draws its authority from article 10(7) of the NAAEC, which states that "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 . . . likely to cause significant adverse transboundary effects . . .; (c) mitigation of the potential adverse effects of such projects." The assessment projects mission then is to target projects that are likely to cause significant transboundary damage, and collect relevant raw data on these activities and their potential and realized effects. The project will then notify the parties as to culprit projects, facilitate discussions between the parties, and consult with them on how to best mitigate the damaging effects of such projects. \textit{Id.}

\textsuperscript{101} See \textit{id.} at 97.03.01.

\textsuperscript{102} See \textit{id.}
reduce the emission of GHGs by continuing the evaluation of the potential for a GHG emissions trading system in North America.”

This should result in a determination of the viability and possible effects of such a system, as well as guidelines for cross-border trading. The project was built upon by efforts from following years. The expected results include an “analysis of the viability of a GHG emissions trading regime in North America” and “identification of principles or rules for cross-border trading.” Also expected is a general increase in the “understanding of the barriers, opportunities and constraints of an actual trading system” if it were implemented.

3. Enforcement Cooperation and Law Enforcement.

Following its directive to encourage enforcement of existing laws, the CEC has undertaken two projects. The first project, known as the Enforcement Cooperation Program, was budgeted in 1997 for $320,000 and was developed to enhance “North American cooperation in environmental enforcement and compliance.” The Enforcement Cooperation Program’s objectives include providing a forum for North American cooperation in environmental enforcement and compliance, supporting initiatives for sharing enforcement related strategies, expertise, and technical knowledge, and to support capacity building in effective enforcement and enhanced compliance.

It is this last objective, focusing on capacity building, that has drawn the attention of the IRC. In its discussion of the NAAEC’s “living program,” the IRC points out that capacity building (providing a country or organization with the tools and support to participate in any given work program) is an integral part of the Compliance Cooperation and needs to be embraced for other projects, such as the Technology Clearinghouse Project, in order to bring Mexico up to speed. In other words, a project is only effective if the party countries have the resources to enact it.

103. Id.
104. See id.
105. See id. (noting that past efforts included (1) “an assessment of the barriers and opportunities to implement;” (2) a workshop on the opportunities for regional cooperation on [Joint Implementation];” (3) “building capacity of relevant Mexican institutions involved in GHG mitigation;” (4) “funding to evaluate potential JI projects at four different sites;” (5) “options paper on the potential for a GHG emissions trading system;” and (6) “work on designing economic instruments to reduce GHG.”).
106. Id. at 97.03.01 (Expected Results).
107. Id.
108. See id. at 97.07.01, 97.07.02.
109. See id. at 97.07.01.
110. Id. Ongoing projects for the Enforcement Cooperation Program include the provision of assistance in the compiling of an annual report on environmental enforcement; the development of an enhanced tracking system to improve enforcement and compliance with laws governing transboundary movements of hazardous substances; exploration of improved measures for effective enforcement and compliance with environmental laws; and the second phase of an examination of ISO 14000 and potential implications for environmental enforcement and compliance obligations and strategies.
111. See id.
112. See IRC, supra note 53, at 4.1.
The second project, addressing New Approaches for Improving Environmental Performance, investigates the development of a program to promote environmental performance based upon best practices (practices that exceed expected levels of compliance with domestic regulatory standards) in the public and private sectors.\(^\text{113}\) Work for this project is intended to focus primarily on identifying methods that have been particularly successful in the area of efficient, high-quality environmental protection.\(^\text{114}\) This is the Council's effort to help the parties go beyond their environmental laws, to exceed current standards and develop principles to guide the parties in "developing a new generation of environmental regulatory and other management . . . in order to avoid a reduction of effective environmental protection and public health standards."\(^\text{115}\) This performance program draws its authority from the NAAEC, obligating the parties "to ensure that their laws and regulations provide for high levels of environmental protection and to strive to improve those laws and regulations."\(^\text{116}\) In order to meet this goal, the CEC sponsored a multi-stakeholder meeting on the principles and trends of legal reform in 1996.\(^\text{117}\) Present at this discussion were party representatives, environmental non-governmental organizations (ENGOs), industry representatives, and other interested persons who interjected their perspectives and advice on how to best undertake the task of developing these principles.\(^\text{118}\) From this meeting the parties settled on several activities designed to raise the bar of environmental protection in each of the party countries.\(^\text{119}\) The Council expects this project will provide "a final report on recommended principles and processes to guide a new generation of environmental regulatory and other management systems," and recommendations for the development of a program promoting environmental performance in North America based upon best practices.\(^\text{120}\)


The notion of "sustainable development" as a goal for countries on an international scale originated in a 1987 report issued by the United Nations World Commission on the Environment and Development (World Commission).\(^\text{121}\) The World Commission states

\(^{113}\) See NAAEC Budget, supra note 87, at 97.07.02. The CEC has made known that a final report, due by 1998, will recommend principles and processes to guide a new generation of regulatory and other management systems. Recommendations will also be made on the development of a North American program to promote environmental performance based on best practices.

\(^{114}\) See id. These methods will include voluntary compliance, economic instruments, and harmonization initiatives.

\(^{115}\) Id.

\(^{116}\) Id.

\(^{117}\) See id.

\(^{118}\) See id.

\(^{119}\) See id. The activities the parties will focus on include (1) building on work already undertaken by the CEC that has proven successful in identifying approaches to delivering high quality environmental protection; (2) using public consultants to examine commonalities between the three countries; (3) respecting inherent social, cultural, and institutional differences; and (4) to facilitate discussions with stakeholders to review the recommended principles.

\(^{120}\) Id.

\(^{121}\) See Stenzel, supra note 3, at 426.
in its report that "humanity has the ability to make development sustainable - to ensure that it meets the needs of the present without compromising the ability of future generations to meet their own needs." The goal of ensuring that humanity meets its present needs without compromising the ability of future generations to meet their own needs is a lofty goal. On a practical level, the pursuit of sustainable development is complicated by an uneven distribution of world resources, with disproportionate shares going to the citizens of developed countries.

"Sustainable development is not a fixed target which can be set, pursued, and definitively attained. Rather, it represents an objective which is still being defined and will continue to be defined in coming decades." The important issue then is whether NAFTA can, in the future, promote or even achieve this goal of sustainable development. Linked to this issue is whether NAFTA can prevent further degradation of the environment in the wake of increased trade among the parties, and, further, whether NAFTA's provisions will promote the cleanup of existing environmental problems stemming from prior trade practices.

The CEC has been confronted with a number of issues involving sustainable development of natural resources since its inception and has met these with differing degrees of success. One of the more heated controversies occurred in July of 1997, when Canada was locked in a legal battle with the Virginia-based company Ethyl Corp., a leading manufacturer of the gasoline additive MMT. Ethyl Corp. brought suit claiming that Canada's then one-year ban on MMT violated NAFTA. Canada had instituted the ban in response to recent studies by environmental health groups that indicated that the additive's key ingredient manganese, might cause memory impairment, tremors, and other damage to the central nervous system. When faced with a $250 million lawsuit, how-

122. Id. at 426-427.
123. See id. at 427.
124. NAFTA, supra note 2, at preamble.
125. Stenzel, supra note 3, at 433.
126. See id.
127. See Canada: Government Lifts MMT Ban in Response to Suit, GREENWIRE, July 21, 1998, at SPOTLIGHT STORY. It has been reported that MMT as a gasoline additive can incrementally increase gasoline's octane at less than half the cost of other known methods leading to considerable savings in the fuel refining process. See Juanos I. Timoneda, The Legal Dynamics of the Regulation of MMT: Air Quality Standards and the Salt Lake City Airshed, 17 J. LAND RESOURCES & ENVTL. L. 283, 285 (1997).
128. See id.
129. See id. MMT's safety profile shows that it can be poisonous through ingestion, inhalation, skin contact, intravenous, and intraperitoneal routes. The route of exposure identified as posing the greatest hazard with respect to MMT is skin contact. See Robert H. Hinderer, Toxicity Studies of Methylcyclopentadienyl Manganese Tricarbonyl (MMT), 40 AM. INDUSTRIAL HYGIENE ASS'N J. 164, 166 (1979). MMT is also considered a skin irritant acting on the central nervous system once it has penetrated the skin. It emits toxic carbon monoxide fumes when heated to combustion and is listed on the EPA Extremely Hazardous Substance List. See RICHARD J. LEWIS, SR., HAZARDOUS CHEMICALS DESK REFERENCE 797 (3d ed. 1993). These results are discussed in Timoneda, supra note 127, at 285.
ever, the Canadian government finally admitted that, "'there isn't enough evidence to prove the additive . . . poses problems to human health or to cars.' Canada settled the suit for $13 million.\(^{131}\)

Frustrated by the Canadian government's impotence on the MMT issue, environmental groups spoke out. Elizabeth May of the Sierra Club stated that, "'It is outrageous that a U.S.-based multinational has more weight with the Chretien government than our Parliament, public health and our environment.'\(^{132}\) Despite their frustration, however, the Canadian government has stated that it will only re-institute the MMT ban if it finds legitimate evidence of the additive's harmful effects on health or the environment.\(^{133}\)

The lack of guidance on the MMT issue raises the question of whether the NAAEC together with the Commission are even capable of truly addressing environmental issues in a meaningful and productive manner.\(^{134}\) However, it is important to remember that NAFTA's primary objective is not the environment, but increased trade between Canada, Mexico, and the United States.\(^{135}\) Even without "teeth" to enforce the goal of sustainable development, the simple addition of this goal is an important, if mostly symbolic, recognition that "economic decisions and actions carry environmental ramifications and costs."\(^{136}\) With this in mind, it would be more appropriate to evaluate the NAAEC and its Commission based upon the protection they provide, rather than upon their shortcomings.\(^{137}\)

\[\text{V. Conclusion.}\]

That NAFTA is known as the "greenest" trade agreement around says more about previous agreements than it does NAFTA. Nevertheless, NAFTA (especially with the inclusion of the NAAEC) has a structure in place that can help protect the environment and promote sustainable development of our limited resources.

The key to NAFTA's success in the environmental arena is its stated goal of strengthening the development and enforcement of environmental laws and regulations. If NAFTA can accomplish this through features such as its citizens' submission process, then it can be an agreement that expands world trade in a manner consistent with environmental protection and conservation.

\[^{130}\] See Canada, supra note 127.
\[^{131}\] See id.
\[^{132}\] Id.
\[^{134}\] See Bolinger, supra note 4 (noting that several organizations have not been satisfied with the terms of the NAAEC and considered the form of the CEC problematic and inadequate to "repair the existing environmental damage on the [U.S.-Mexico] border, much less counter the new environmental problems [they] feared NAFTA would cause." PUBLIC CITIZEN, NAFTA's Broken Promises: The Border Betrayed, 54-55 (1996)).
\[^{135}\] See Stenzel, supra note 3, at 450.
\[^{136}\] Id.
\[^{137}\] See Bolinger, supra note 4 (recognizing that the CEC is not without its flaws, but that it "provides greater environmental protection than previously available in the trade arena," and stands as an important first step toward environmental awareness).
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