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**Environmental Implications of the North American Free Trade  
Agreement**

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**Environmental Implications of the North American Free Trade  
Agreement**

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## **Abstract**

# **Environmental Implications of the North American Free Trade Agreement**

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This paper argues that the environmental provisions of the North American Free Trade Agreement (NAFTA) and the North American Agreement on Environmental Cooperation (NAAEC) have been ineffective at preventing environmental harm because of weak enforcement mechanisms. The agreements sacrificed the potential benefits of linking trade and environmental issues by failing to impose trade penalties for environmental infractions. Chapter One of the paper demonstrates how traditional methods of addressing global environmental issues through multiparty environmental agreements have proven largely ineffective. Chapter Two lays out the potentially harmful effects of free trade agreements like NAFTA on the environment. Chapter Three demonstrates how the environmental provisions of NAFTA as well as the NAAEC fail to impose high enough penalties to deter violations. The conclusion briefly discusses the recently signed United States-Mexico-Canada Agreement (USMCA) and its environmental implications.

## Table of Contents

Introduction: <i>Environmental Implications of NAFTA</i> .....	1
Chapter 1: <i>The Limited Success of Multiparty Environmental Agreements</i> .....	3
Global Environmental Governance .....	3
Problems with Enforcement.....	11
Chapter 2: <i>NAFTA's Potential Negative Environmental Effects</i> .....	19
Chapter 3: <i>How NAFTA and the NAAEC Address Environmental Issues</i> .....	23
Conclusion: <i>Failed Enforcement of the NAAEC</i> .....	39
Works Cited .....	<b>44</b>

## **Introduction: *Environmental Implications of NAFTA***

In 1994, Canada, the United States and Mexico signed the North American Free Trade Agreement (NAFTA), further integrating the North American economy. Alongside NAFTA, the parties negotiated and signed a side agreement called the North American Agreement on Environmental Cooperation (NAAEC), which was meant to force member nations to enforce their own environmental protections.

Prior to NAFTA, global environmental issues had largely been addressed through the use of multiparty environmental agreements, which faced significant obstacles to enforcement. The drive to compete in the global market took precedence in national agendas, sidelining global environmental goals. NAFTA represented the first attempt to incorporate environmental provisions into a trade agreement, by coming to a parallel side agreement on the environment. The mechanisms created by the side agreement have made small improvements in specific, isolated circumstances. However, many of the same enforcement challenges have persisted.

This paper argues that the environmental provisions of NAFTA and the NAAEC have been ineffective at preventing environmental harm because of weak enforcement mechanisms. The agreements sacrificed the potential benefits of linking trade and environmental issues by failing to impose trade penalties for environmental infractions. Chapter One of the paper demonstrates how traditional methods of addressing global environmental issues through multiparty environmental agreements have proven largely ineffective. Chapter Two lays out the potentially harmful effects of free trade agreements like NAFTA on the environment. Chapter Three demonstrates how the environmental

provisions of NAFTA as well as the NAAEC fail to impose high enough penalties to deter violations.

In the conclusion, I briefly examine the recently signed United States-Mexico-Canada Agreement (USMCA) and its environmental implications. While the USMCA promotes environmental issues to the main text, rather than relegating them to a side agreement, it does not improve the weak enforcement mechanism put in place by NAFTA. Moving forward, agreements addressing both trade and environment should more fully link these issues by imposing trade penalties or fees for environmental infractions.

## **Chapter 1: *The Limited Success of Multiparty Environmental Agreements***

### **GLOBAL ENVIRONMENTAL GOVERNANCE**

Issues such as pollution have been a topic of discussion among global leaders for 30 years.<sup>1</sup> Concerns about the effect of industry on the air and water began in a domestic context but soon rose to the level of international importance, as the environmental movement matured and it became clear that its concerns transcended national boundaries.

Modern environmentalism is the heir of conservationist movements that arose in the 19th century, when some people began to call for the conservation of wildlife and natural landscapes.<sup>2</sup> This growing concern with the environment led to the development of resource management principles and eventually reached the international level: In 1900 European nations signed the first international convention, on conserving animal species in Africa; in 1902, the International Council for the Exploration of the Sea was formed.<sup>3</sup> The United Nations formed in 1945, signaling greater international cooperation more broadly.<sup>4</sup> True cooperation on environmental issues did not occur until after World War II, however.<sup>5</sup>

After the war, there was a rush to industrialize and grow the economy, which caused greater and greater environmental pollution.<sup>6</sup> Smog and soot in the air caused coughing and other respiratory problems, while beaches and lakes would sometimes close

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<sup>1</sup> Steinar Andresen, Elin Lerum Boasson and Geir Henneland, “An international environmental policy takes shape,” *International Environmental Agreements: An Introduction*, Routledge (2012), 4.

<sup>2</sup> *Ibid.*, 10.

<sup>3</sup> *Ibid.*, 10-11.

<sup>4</sup> *Ibid.*, 11.

<sup>5</sup> *Ibid.*, 10.

<sup>6</sup> *Ibid.*, 12.



down because of water contaminants. Even when water sites were open, plastic and other garbage was often visible floating downstream.<sup>7</sup>

This was the context for Rachel Carson's movement-creating book, *Silent Spring*, which highlighted the threats to various animal populations posed by chemical pollution.<sup>8</sup> In the United States and Western Europe, critics of economic growth pointed out the havoc being wreaked on the environment and sparked a popular environmentalist movement.<sup>9</sup> In 1968, astronauts on the first Apollo mission returned with photos of earth, further inspiring the environmental movement, and in 1970 the U.S. government recognized the first Earth Day.<sup>10</sup> All of this environmental concern led to legislation such as the Clean Water Act and the Clean Air Act in the United States.

That movement eventually went international: The first international environmental organization was the World Wildlife Fund (WWF) which formed in 1961.<sup>11</sup> Greenpeace, established in 1979, later took over as the main lobbyist and popular campaigner for environmental protection.<sup>12</sup>

One reason environmental issues lent themselves to international action is that they were rarely confined to the borders of one country. Such international environmental problems arise where “the responsible activity, the impacts of that activity, or the concern about (and solutions to) those impacts do not all exist within one country’s borders.”<sup>13</sup> Even a problem that physically exists only within a country’s borders may become

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<sup>7</sup> Speth, 57.

<sup>8</sup> Andresen, 12.

<sup>9</sup> Ibid.

<sup>10</sup> Speth, 57.

<sup>11</sup> Andresen, 11.

<sup>12</sup> Ibid.

<sup>13</sup> Ronald B. Mitchell, *International Politics and Environment*, Ronald Mitchell (2010), 23.

international if other countries are concerned about the problem and if there are advantages to international cooperation.<sup>14</sup>

For example, some of the first conservation-related treaties were related to hunting of whales and seals. Because both groups were hunted by multiple countries in international waters, their harvest led to competition and sometimes even violence. In the case of the seals, in 1886 the US captured and confiscated a Canadian ship hunting seals off the U.S. coast, leading to an international crisis that eventually led to a bilateral agreement between the United States and Great Britain.<sup>15</sup> In 1931, countries signed a whaling convention to prevent similar crises.<sup>16</sup>

There are two broad responses possible to mounting environmental challenges: the governmental, regulatory approach, and the voluntary approach whereby private actors forego environmentally harmful products and practices.<sup>17</sup>

The government approach could be unilateral and domestic or international. The first option may be useful where one country is causing the bulk of the problem; for example, the United States passed regulation in the 1970s prohibiting the production of products with ozone-depleting chlorofluorocarbons (CFCs) and thereby drastically reduced CFCs released into the atmosphere.<sup>18</sup> However, where solving the problem requires sacrifices, multiparty cooperation is usually necessary because of the scope of the problem and because of the disincentive of individual governments to act against their own economic interest.<sup>19</sup> In the case of the U.S. ozone regulations, CFCs began to rise

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<sup>14</sup> Mitchell, 24.

<sup>15</sup> Scott Barrett, *Environment and Statecraft: The Strategy of Environmental Treaty-Making*, Oxford Press (2003) 27.

<sup>16</sup> Mitchell, 227.

<sup>17</sup> *Ibid.*, 53.

<sup>18</sup> *Ibid.*, 54.

<sup>19</sup> *Ibid.*, 55.

again in the 1980s until international action was taken by establishing a global regulatory system.<sup>20</sup>

Where, as with CFCs, the problem can only be solved through international cooperation, the traditional approach has been to sign a legally binding treaty, often called a convention where it involves more than two parties.<sup>21</sup> In theory, parties could enter into agreement: informally, where parties agree on what needs to be done and then tackle the issue separately, and formally, where there is binding language compelling action.<sup>22</sup> However, usually to be taken seriously and solicit enough of a response, parties need to write an actual law and bind themselves to the agreement.<sup>23</sup>

The traditional method of dealing with environmental problems involving multiple countries is to establish a multilateral environmental agreement (MEA).<sup>24</sup> Such multi-party agreements also often establish a permanent secretariat that facilitates negotiations between the parties, among other functions depending on the treaty.<sup>25</sup> It has also been common to use a convention-protocol approach: first, countries sign a convention agreeing on goals and a framework for future action.<sup>26</sup>

In 1972, 120 nations attended the Stockholm Conference on the Human Environment, which set a precedent for coming to international agreements to resolve environmental problems.<sup>27</sup> Overall, 114 government representatives attended the

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<sup>20</sup> Ibid., 54-55.

<sup>21</sup> Andresen, 15.

<sup>22</sup> Speth, 55.

<sup>23</sup> Ibid.

<sup>24</sup> Andresen, 4.

<sup>25</sup> Ibid., 15.

<sup>26</sup> Lawrence E. Susskind and Salim H. Ali, *Environmental Diplomacy: Negotiating More Effective Global Agreements* Oxford (2015) 30-31.

<sup>27</sup> Andresen, 3, 12.

conference, 134 NGOs participated in unofficial side meetings.<sup>28</sup> The Stockholm Conference agreed on the “polluter pays” principle and created the United Nations Environment Program (UNEP).<sup>29</sup> Stockholm represented the first time nongovernmental entities played a major role in an international conference.<sup>30</sup>

Since Stockholm, there have been an increasing number of conferences, negotiations, agreements, and other action plans related to global environmental stewardship.<sup>31</sup> The conference led to several agreements on “classic” environmental issues such as wildlife protection.<sup>32</sup> There are hundreds of environmental agreements now - most are bilateral or regional, as environmental issues can be more easily addressed at lower levels.<sup>33</sup> During the 1970s and 80s, treaties were signed regarding water and air pollution as well as ozone depletion.<sup>34</sup> Regional air pollution was addressed in the Convention on Long Range Transboundary Air Pollution in 1979.<sup>35</sup>

Several events in the 1980s once more reinvigorated the push for environmental protection: the accident with the nuclear reactor in Chernobyl (1986) and the appearance of a hole in the ozone layer over Antarctica.<sup>36</sup> NGOs and journalists were active in the environmental space at that point and thus made sure that these events received plenty of public attention.<sup>37</sup>

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<sup>28</sup> Speth, 59.

<sup>29</sup> Andresen, 12.

<sup>30</sup> Speth, 60.

<sup>31</sup> Ibid., 52.

<sup>32</sup> Andresen, 3.

<sup>33</sup> Andresen, 14.

<sup>34</sup> Andresen, 4.

<sup>35</sup> Ibid., 61-62.

<sup>36</sup> Ibid., 12.

<sup>37</sup> Speth, 65.

Meanwhile, traditional conservationist principles were making their way into international agreements such as the Convention on International Trade in Endangered Species of World Flora and Fauna (CITES) and the Convention on the Protection of the World's Cultural and Natural Heritage. The World Heritage Convention designated important environmental spaces such as the Great Barrier Reef, Galapagos Natural Park, and Yellowstone National Park as World Heritage sites.<sup>38</sup>

In the 1970s, however, only the early signs of an agenda regarding truly global concerns were taking shape. The issues at Stockholm were basically local: water and air pollution, infrastructure construction, strip mining and clear cutting.<sup>39</sup> Scientific groups were releasing studies on ozone depletion and climate change at that time, but treaties were not yet addressing those high-level concerns.<sup>40</sup>

In addition, these earlier treaties called out the problem and set out ambitious plans for action, with no prescribed targets.<sup>41</sup> They functioned largely as knowledge-sharing or norm-setting arrangements. A good example of a knowledge sharing approach is UNEP's large-scale project of creating databases for information sharing purposes. In the early 1980s, UNEP had already set about crafting procedures for information exchange and was organizing and mobilizing networks of scientists to study environmental issues.<sup>42</sup>

Other treaties focused on setting an international norm in hopes of moving all countries in a similar ideological direction. One important norm-setting document is the United Nations publication, released in 1987, called *Our Common Future*, which

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<sup>38</sup> Ibid., 62.

<sup>39</sup> Ibid., 61.

<sup>40</sup> Ibid., 62.

<sup>41</sup> Speth, 76

<sup>42</sup> Speth, 65.

champions the idea of “sustainable development.” At the time of its release, it was meant to recommit developed nations to mitigating the effects of industrialization while helping undeveloped nations to grow their economies in a responsible, environmentally conscious manner.<sup>43</sup> The report famously defined sustainable development as development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs.<sup>44</sup>

Later agreements often set numerical targets and deadlines, imitating the Montreal Protocol to address ozone depletion.<sup>45</sup> For example, in the 1997 Kyoto Protocol on climate change, parties committed to reducing emissions of six greenhouse gases by 2008-2012.<sup>46</sup> These targets indicate that treaty drafters are attempting to do more than set norms or share knowledge: they are trying to set enforceable rules. As scholars have pointed out, that’s an ambitious task in an anarchic international space lacking a single authority.<sup>47</sup>

In addition, from the start of the interest in international environmental issues, nongovernmental organizations (NGOs) have played a substantial role.<sup>48</sup> If Stockholm marked the beginning of widespread NGO involvement in international policymaking, in 1992 the initiation of the World Business Council alongside the official Summit at Rio marked a new openness to involving business leaders in meeting environmental goals.<sup>49</sup> Since the 2002 World Summit in Johannesburg, there has been a focus on multi-

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<sup>43</sup> Andresen, 12.

<sup>44</sup> Speth, 67.

<sup>45</sup> Ibid., 16.

<sup>46</sup> Speth, 76.

<sup>47</sup> Andresen, 5-6.

<sup>48</sup> Andresen, 5.

<sup>49</sup> Speth, 69.

stakeholder processes involving environmental groups, governments, and corporate actors working together to plan and remedy issues.<sup>50</sup>

In fact, today a number of multinational corporations have taken stronger, more creative action on environmental protection than some countries.<sup>51</sup> For example, Home Depot and Unilever have both committed to purchasing forest and fish products produced sustainably and justly -- likely not enough to solve the deforestation problem altogether, but still a substantial step.<sup>52</sup>

Yet the relationship of corporations to the environmental movement has often been more strained. During the 1960s and 70s, the burgeoning movement and its spokespeople, such as Ralph Nader and Rachel Carson, vilified corporations as the cause of the world's environmental problems.<sup>53</sup>

In 1992, nations met in Rio de Janeiro for the Conference on the Environment and Development (UNCED).<sup>54</sup> The UN had announced the conference four years earlier, with the stated purpose of determining how to actually implement the idea of sustainable development that had been hashed out by the Brundtland Commission.<sup>55</sup> UNCED made it clear for the entire world that environmental issues were now as important as the traditional subjects of international concern, such as politics and economics.<sup>56</sup>

The UNCED Summit laid out a policy framework for global environmental governance that included social and economic development, conservation and management of resources for development, strengthening the role of major groups,

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<sup>50</sup> Andresen, 13.

<sup>51</sup> Speth, 53.

<sup>52</sup> Ibid., 54.

<sup>53</sup> Ibid., 57.

<sup>54</sup> Andresen, 4.

<sup>55</sup> Speth, 65.

<sup>56</sup> Ibid., 69.

including non-state actors and interest groups such as NGOs, businesses, scientists, workers, trade unions, and farmers.<sup>57</sup> But the question remained, how effectively would this innovative policy framework be in implementation?

#### **PROBLEMS WITH ENFORCEMENT**

In the early 1980s, UNEP was making plans to develop international environmental law as a means of addressing both local and truly global environmental concerns.<sup>58</sup> Between Stockholm in 1972 and Johannesburg in 2002, governments have relied heavily on these formal agreements. Because of that, international environmental law is well developed, but there is still considerable work to be done in the political scientists' arena, of determining the conditions under which environmental law is successfully implemented.<sup>59</sup>

More recently, political scientists have begun to theorize on precisely that point. For example, Andresen has pointed out that enforcement regimes need to be designed appropriate to the problem at hand. Some problems are "malign", that is, characterized by political disagreements and asymmetries of power, as well as scientific uncertainty, that make solutions more elusive. For example, both climate change and biodiversity are considered malign problems, while the more benign ozone issue has been more effectively addressed by multiparty environmental agreements.<sup>60</sup>

It can be difficult to measure the effectiveness of MEAs because the causal link between the agreement and the environmental change is not always clear.<sup>61</sup> For example, in the early 1960s the International Whaling Commission had recently increased its

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<sup>57</sup> Speth, 70.

<sup>58</sup> Ibid., 62.

<sup>59</sup> Ibid., 55.

<sup>60</sup> Andresen, 9.

<sup>61</sup> Ibid., 8.



regulation of whaling, and there was a corresponding drop in the number of whales hunted globally. However, the drop in the whaling numbers actually had more to do with the decimated whale population -- there were so few whales left, they were harder to find.<sup>62</sup>

Mitchell defines certain categories of problem to inquire whether certain problem structures lend themselves to different solutions. Over-appropriation problems occur where resources are consumable and non-shareable, such that people are incentivized to consume as much as possible before others do. Degradation problems occur where resources are shareable, but one persons activities may reduce the resources' quality (for example, air pollution).<sup>63</sup>

International collaboration on environmental issues can interfere with national efforts to address the same problems.<sup>64</sup> Where there are deep-seated political conflicts over an issue, MEAs are harder to reach and enforce.<sup>65</sup>

MEA's can be viewed as an infringement on the sovereign rights of nations-- a subject of particular concern for post-colonial states. For example, in Stockholm in 1972, the common principles arrived at by negotiating parties acknowledged the sovereign right of nations to exploit resources within their own borders, while also recognizing the responsibility of nations to prevent their activity from causing environmental problems in other countries.<sup>66</sup>

Thus, despite successfully agreeing to numerical targets in the Montreal Protocol, today a number of international agreements still fail to arrive at those crucial agreements.

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<sup>62</sup> Andresen, , 8.

<sup>63</sup> Mitchell, 30-32.

<sup>64</sup> Andresen, 4.

<sup>65</sup> Andresen, 9.

<sup>66</sup> Speth, 59-60.

For example, the Copenhagen accord on global climate change in 2009 never mentions any shared global goal in terms of emissions. Prior the agreement, the plan had been to reduce global emissions by 50% by 2050, but there was pressure from China not to set and hold to any specific number.<sup>67</sup>

Another major impediment to international environmental cooperation has been the preeminence of free trade as a national goal and the drive for developing nations to prioritize industrialization over environmental protection.

The push to integrate development with environmental protection has come in large part from developing countries, which is a function of timing: As developed nations completed industrialization during the 20th century and realized the extent of the processes' negative impacts on the environment, the global south was craving the same industrialization to remedy widespread poverty and political inefficacy.<sup>68</sup> These southern countries were often newly independent and, freed from their colonial masters, were eager to increase their economic power and improve their populations' living conditions.<sup>69</sup> Thus the South became industrialists just as the North became environmentalist. Naturally, environmental and trade concerns would become linked.

Under such conditions the global South aimed to catch up economically while also calling on richer nations to pay for environmental protection, because the industrialized nations were the biggest polluters the first place.<sup>70</sup> In this view, environmental regulations is a means for wealthy, industrialized nations to impose trade

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<sup>67</sup> James Urpelainen, *Global Environmental Politics in the Twenty-First Century* (pre-publication draft, October 2017), delivered to LBJ School Class taught by Joshua Busby.

<sup>68</sup> Andresen, 14.

<sup>69</sup> Speth, 58.

<sup>70</sup> *Ibid.*, 58.

barriers on poor nations, which lack the capacity to impose expensive environmental protection programs.<sup>71</sup>

Thus the Brundtland Commission's report, which was accepted and adopted by the UN Assembly in 1987, emphasized that environmental and developmental goals due to links between environmental degradation and poverty.<sup>72</sup> The extent to which this proposition stands up to scrutiny is debatable, but it served the interests of both the global north and south at the time it was written. Later, at Rio, negotiators linked poverty alleviation and development assistance with environmental goals.<sup>73</sup> This argument characterized many of the discussions that took place in Rio in 1992, where the international community ultimately failed to achieve an agreement that ensured subsidies and support from the North.<sup>74</sup>

Today, the global environmental discussion continues to be characterized by a "tug of war," as Speth and Has call it, between developed countries who are battling pollution and developing countries who are battling poverty.<sup>75</sup> The North and South frequently disagree over whether the North should provide funding over and above normal official aid, and if so, whether it should be provided with strings attached.<sup>76</sup> Commitments at conferences like Rio are not binding, so the ideals articulated at these conferences may not translate into actual agreements.<sup>77</sup>

In the 1990s, the intersection between international trade and environmental protection was becoming more controversial. Free trade agreements meant to lower

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<sup>71</sup> Dale Colyer, Agriculture and Environmental Issues in Free Trade Agreements, *The Este Centre Journal of International Law and Trade Policy*, Vol. 4, No. 2 (2003) 127.

<sup>72</sup> Speth, 67.

<sup>73</sup> *Ibid.*, 70.

<sup>74</sup> Esty, 26.

<sup>75</sup> Speth, 59.

<sup>76</sup> Susskind, 16-17.

<sup>77</sup> Andresen, 14.

barriers to foreign markets were, in the view of some groups, beginning to whittle away individual countries' power to impose environmental protective measures.<sup>78</sup> For example, the US and Norway went head to head over whaling, China and Taiwan fought over trade in tiger and rhino ivory, while Mexico had concerns about tuna and dolphins, Japan with sea turtles, and Brazil over the rainforest.<sup>79</sup>

The reasons for these rising controversies include scientific advancements that made environmental degradation more visible, while at the same time the global economy was becoming ever more integrated.<sup>80</sup> Pressure to compete in the global marketplace make it difficult to convince nations to impose costs on their own industries -- even if those costs protect the globe's environmental health.<sup>81</sup>

Around the same time, a fierce debate also arose between environmentalists and the trade policy community over the consequences of free trade.<sup>82</sup> Early on, those debates occurred in the context of NAFTA negotiations and the Uruguay Round of GATT.<sup>83</sup> Those critical of an integrated global economy made several arguments: first and foremost, free trade would undermine nations' attempts to institute environmental protections. Trade of any kind in theory undermines domestic regulation, because foreign producers are not subject to the regulations and their prices may undercut domestically products. One way of protecting domestic industries under such circumstances would be to impose trade restrictions such as tariffs -- but international trade agreements limit

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<sup>78</sup> Esty.

<sup>79</sup> Ibid.

<sup>80</sup> Esty, 11, 20.

<sup>81</sup> Esty, 4.

<sup>82</sup> Brian R. Copeland and M. Scott Taylor, "Trade, Growth and Environment," *Journal of Economic Literature* Vol. XLII (March 2004) 7.

<sup>83</sup> Ibid., 7.

nations' freedom to impose such restrictions.<sup>84</sup> In this sense, liberalized trade threatened efforts at environmental protection.

In addition, the industries themselves that grow larger in a free market environment would use up natural resources. Mass industry tends to cause more pollution, which led to the environmental movement in the first place. The effect would be two-fold because industry will grow and so will the transportation of goods, which also costs energy. Thus the timber trade decreases biodiversity by over-harvesting forests, while the transport of the lumber internationally increases greenhouse gas emissions.<sup>85</sup> Finally, opponents of free trade predicted that industries that pollute heavily will move to countries where pollution regulations are less stringent. This “pollution haven” hypothesis is based on the fact that, economically speaking, a country’s comparative advantage in dirty industries suffers when it imposes pollution regulations.<sup>86</sup>

Those who argued for free trade said trade agreements could help rather than harm the environment. Agreements could be protective, meant to alleviate the deleterious effects of trade, or they could be designed to be offensive, meant to use trade as a tool to raise environmental standards.<sup>87</sup> In this view, so long as there are enforcement mechanisms, getting nations to sign on to free trade agreements – on condition of enforcing high environmental standards – could actually improve environmental protections.

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<sup>84</sup> Larry Karp, “The Environment and Trade,” *Annual Review of Resource Economics*, Vol. 3 (2011) 399.

<sup>85</sup> Sikina Jinnah. Secretariat Influence on Overlap Management North America: NAFTA and the Commission for Environmental Cooperation, *Review of Policy Research*, Vol 32, Issue 1. 125. Accessed at <https://onlinelibrary-wiley-com.ezproxy.lib.utexas.edu/doi/epdf/10.1111/ropr.12106>.

<sup>86</sup> Karp, 400.

<sup>87</sup> Esty, 2.

Additionally, proponents argued, trade in green technologies could also improve the way humans interact with the environment.<sup>88</sup> Free trade “changes relative goods prices by opening up the economy to increased foreign competition.” The growth caused by free trade “improves technology at given external prices.”<sup>89</sup> Because trade leads to growth that makes technology cheaper, there is an argument to be made that free trade actually leads to greater environmental protections. Technology challenges the pollution haven hypothesis and complicates the relationship between free trade and environmental protection: trade in green technology, then, may actually help mitigate the effects of industrialization.<sup>90</sup>

Debates like this eventually led to the incorporation of environmental provisions into trade agreements such as the North American Free Trade Agreement (NAFTA). However, the effectiveness of those provisions is yet to be established. In addition, as trade and economic development began to take center stage, efforts to arrive at more effective multilateral treaties began to lag.

In 1992, the nations that gathered in Rio committed to sustainable development, and in the wake of the conference, many in the international community were optimistic that wealthier nations would agree to subsidize the sustainable development of the globe.<sup>91</sup> After Rio, however, developed nations failed to substantially aid developing nations with sustainable industrialization, and in 1997 when nations met to review progress since the Rio Conference, no new agreements were produced and the optimism of five years earlier had all but disappeared.<sup>92</sup>

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<sup>88</sup> Jinnah, 125-126.

<sup>89</sup> Copeland, 24.

<sup>90</sup> See Arik Levinson, “Technology, International Trade, and Pollution from U.S. Manufacturing,” *American Economic Review* (2009) 99:5, 2177.

<sup>91</sup> Andresen, 12.

<sup>92</sup> *Ibid.*, 13.

According to Speth and Has, the ambitious scope of the Rio conference goals was part of its own undoing. Implementing UNCED would depend on strong leadership, enough financial resources, and strong institutions to monitor and enforce change -- none of which were forthcoming.<sup>93</sup>

There were some treaties signed that built on the momentum on Rio, including conventions on desertification, trade in hazardous chemicals, cancer-causing Persistent Organic Pollutants and -- notably -- the Kyoto Protocol on climate change.<sup>94</sup> But ahead of the next World Summit in 2002, there was broad consensus that Rio had failed because industrial countries had not lived up to their commitments.<sup>95</sup> And in Johannesburg in 2002, the attending nations failed to set any new verifiable goals or solve the problem of implementing sustainable development.<sup>96</sup>

Importantly, one major explanation for why the optimism of Rio did not produce any real results is that globalization proved to be a stronger force than environmental movement.<sup>97</sup> Not only do developing nations prioritize industry over environment, market-based economic integration has also garnered much stronger support from wealthy nations than the environmental agenda; “trade not aid” is the order of the day.<sup>98</sup>

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<sup>93</sup> Speth, 70.

<sup>94</sup> Ibid., 74.

<sup>95</sup> Ibid., 76.

<sup>96</sup> Ibid.

<sup>97</sup> Speth, 79.

<sup>98</sup> Ibid., 80.

## Chapter 2: *NAFTA's Potential Negative Environmental Effects*

Unlike multilateral environmental conventions, the North American Free Trade Agreement is not primarily an agreement over methods to protect the environment. In fact, the “Statement of Objectives” within the agreement makes no mention at all of environmental goals.<sup>99</sup> However, NAFTA was the first U.S. trade agreement to incorporate environmental provisions.<sup>100</sup>

Following NAFTA's signing on January 1, 1994, the deal led to a slew of other free trade agreements across the globe.<sup>101</sup> As early as June of the same year, Mexico, Colombia, and Venezuela signed their own agreement, and in December the U.S. President met with 33 leaders from countries in the Western Hemisphere to contemplate an eventual trade deal meant to encompass all of the Americas.<sup>102</sup> By the 2000s, the United States alone was signing free trade agreements with Singapore, Morocco, Chile, and Jordan, among other countries.<sup>103</sup>

When NAFTA was first announced in 1990, it split the environmental community. Some worried that it would exacerbate environmental problems; others hoped to use the agreement proactively as a tool to raise standards in Mexico.<sup>104</sup> Major environmental interest groups fell on opposite sides of the divide, with groups such as National Wildlife Federation, the National Audubon Society, the Environmental Defense

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<sup>99</sup> Paulette L. Stenzel. Can NAFTA's Environmental Provisions Promote Sustainable Development? *Albany Law Review* (1995) 59, 423. Retrieved from <https://advance-lexis-com.ezproxy.lib.utexas.edu/api/document?collection=analytical-materials&id=urn:contentItem:3S3T-VYG0-00CW-2044-00000-00&context=1516831>.

<sup>100</sup> Stenzel, 59, 423.

<sup>101</sup> James McBride and Mohammed Aly Sergie, NAFTA's Economic Impact, Council on Foreign Relations (Oct. 1, 2018) Accessed at <https://www.cfr.org/backgrounder/naftas-economic-impact>.

<sup>102</sup> Stenzel, 59, 423.

<sup>103</sup> David L. Markell, The North American Commission for Environmental Cooperation After Ten Years: Lessons About Institutional Structure and Public Participation in Governance, 26 *Loy. L.A. Int'l & Comp. L. Rev.* 341 (Spring 2004)

<sup>104</sup> Esty, 28.



Fund, the Natural Resources Defense Council, and the Nature Conservancy supporting the deal, and Sierra Club, Greenpeace, Public Citizen, and the Clean Water Fund opposing it.<sup>105</sup>

The debate between these groups was invigorated by a trade dispute between the United States and Mexico which was finally resolved in 1991. The dispute centered on tuna fishing and the risk it posed to dolphins. The U.S. had passed a law banning the import of Mexican tuna caught using a specific type of net that killed dolphins in the course of catching the fish.<sup>106</sup> The U.S. loss at the WTO made it seem as though increasing global trade would put domestic environmental protections at risk.<sup>107</sup> (Later, the WTO/GATT dispute resolution panel partially overturned a similar case involving sea turtles, but that failed to assuage concerns about the trade v. environment conflict.<sup>108</sup>)

There was little hope from the environmental community that international structures meant to promote the lowering of trade barriers would effectively protect environmental regulations. Even where the law has text that could be interpreted to secure such protections, the WTO arbitration panels have tended to go the other way. GATT Article XX, for example, allows members to pass laws inconsistent with GATT disciplines but necessary to protect human, animal or plant life or health (paragraph (b)), or relating to the conservation of exhaustible natural resources (paragraph (g)).<sup>109</sup>

However, the way GATT Article XX has been interpreted sets a high hurdle for proving a domestic regulation is not a trade barrier. The restriction must be “necessary to

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<sup>105</sup> Stenzel, 59, 423.

<sup>106</sup> Dagne, T. “Building on the Canadian approach to resolve the stalemate on the trade and environment agenda in the world trade organization,” *Journal of International Trade Law & Policy*, 8(2), 159-180. Retrieved from <http://dx.doi.org.ezproxy.lib.utexas.edu/10.1108/14770020910981489>.

<sup>107</sup> Colyer, 124.

<sup>108</sup> Colyer, 126.

<sup>109</sup> World Trade Organization. WTO Rules and Environmental Policies: GATT Exceptions. [https://www.wto.org/english/tratop\\_e/envir\\_e/envt\\_rules\\_exceptions\\_e.htm](https://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm)

protect human, animal, and plant life or health.” This phrase has been narrowly construed to mean that no less GATT-inconsistent policy tool is available, setting a very high hurdle.<sup>110</sup> In the tuna/dolphin case, the U.S. used as its authority GATT Article XX and claimed that the law was necessary for the “conservation of natural resources”.<sup>111</sup> Its attempt to use Article XX in this protective manner was unsuccessful. Ever since, the WTO has been a subject of criticism by the environmental community and it has yet to establish a clear scope as to what types of environmentally motivated regulations are allowed under GATT rules.<sup>112</sup>

These concerns surrounding international trade put pressure on the U.S. presidential administration to incorporate some explicit environmental protections into NAFTA. These provisions were incorporated via an environmental “side agreement” called the North American Agreement on Environmental Cooperation.<sup>113</sup> This environmental side agreement – alongside another side agreement – was critical for winning support for NAFTA in the Senate.<sup>114</sup>

The choice to arrive at separate side agreements rather than addressing environmental concerns as a part of trade negotiations angered some people in the environmentalist community. There were some NAFTA provisions with potentially negative environmental ramifications, but negotiating a separate environmental-specific

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<sup>110</sup> Esty, 49.

<sup>111</sup> Dagne, T. (2009). Building on the Canadian approach to resolve the stalemate on the trade and environment agenda in the World Trade Organization. *Journal of International Trade Law & Policy*, 8(2), 159-180. doi:<http://dx.doi.org.ezproxy.lib.utexas.edu/10.1108/14770020910981489>

<sup>112</sup> Ibid.

<sup>113</sup> Charnovitz, Steve. “The NAFTA Environmental Side Agreement: Implications for Environmental Cooperation, Trade Policy, and American Treatymaking,” 8 *Temp. Int’l & Comp. L.J.* 257. 1994. Accessed at <http://www.worldtradelaw.net/articles/charnovitznaftaenvironment.pdf.download>.

<sup>114</sup> Natalie Sears, *The Shadows that Became the Star of the Show: The North American Agreement on Environmental Cooperation and the North American Agreement on Labor Cooperation*, 21 *L. & Bus. Rev. Am.* 185 (Spring 2015).

document meant that those provisions would not be clarified or re-worded to mitigate harmful effects. Additionally, the side agreement had to be negotiated in haste during the lapsing period where President Clinton enjoyed “fast track” implementation authority, granted by Congress.<sup>115</sup>

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<sup>115</sup> Charnovitz, 257.

### **Chapter 3: *How NAFTA and the NAAEC Address Environmental Issues***

The NAAEC is the primary mechanism drafted to address environmental issues. However, before diving into the side agreement, I will examine the several provisions within NAFTA itself that are relevant to environmental regulations:<sup>116</sup>

NAFTA's preamble states that trade must be conducted in a "manner consistent with environmental protection and conservation."<sup>117</sup> Article 104 within the "Objectives" section of the agreement state that the requirements of several international environmental agreements prevail over NAFTA in the event of any inconsistency.<sup>118</sup> One of the most relevant sections is Chapter 7, "Agriculture and Sanitary and Phytosanitary Measures," which states:

Each Party may, in accordance with this Section, adopt, maintain or apply any sanitary or phytosanitary measure necessary for the protection of human, animal or plant life or health in its territory, including a measure more stringent than an international standard, guideline or recommendation.<sup>119</sup>

In Article 903 the Parties affirm the right of each Party to abide by international agreements, "including environmental and conservation agreements."<sup>120</sup> NAFTA lists three multilateral environmental agreements that supersede the Agreement in the event of inconsistency.<sup>121</sup>

In Article 21, parties state:

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<sup>116</sup> Another important provision of NAFTA is Chapter 11, the investment provision, which creates a dispute settlement process for claims by investors who believe they have not been treated fairly by one of the treaty parties pursuant to the NAFTA terms. It requires parties of the dispute to first negotiate and attempt to settle, then institutes a system for arbitrating that dispute. This chapter has strong implications for environmental protections but falls outside the scope of this paper.

<sup>117</sup> Jinnah, 126.

<sup>118</sup> NAFTA Article 4.

<sup>119</sup> NAFTA Article 712.

<sup>120</sup> NAFTA Article 903.

<sup>121</sup> Jinnah, 126.

The Parties understand that the measures referred to in GATT Article XX(b) include environmental measures necessary to protect human, animal or plant life or health, and that GATT Article XX(g) applies to measures relating to the conservation of living and non-living exhaustible natural resources.<sup>122</sup>

However, considering how GATT Article XX has been interpreted by the WTO arbitration panels, this is likely not a very protective provision.

The side agreement to NAFTA is meant to ensure that all three nations maintain high environmental standards. The agreement is called the North American Agreement on Environmental Cooperation (NAAEC). The side agreement requires all party nations to enforce their own environmental laws, commits to information-sharing and cooperation on environmental issues, establishes a secretariat to implement the terms of the agreement, and – in a novel move by negotiators – establishes a citizen’s advisory committee to advise the secretariat. I will examine each of these provisions in turn. In the next section, I will turn to an investigation of the effectiveness of these provisions and make a comparison between the challenges and successes of NAAEC versus those of classic international environmental agreements.

Article 3 of the NAAEC states that countries have right to maintain environmental laws and levels of environmental protection, commits parties to “high levels of environmental protection,” and articulates that parties “shall strive to continue to improve those laws and regulations.”<sup>123</sup>

Article 20 of the agreement creates a platform for cooperation and information-sharing on environmental matters.<sup>124</sup>

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<sup>122</sup> NAFTA Article 21.

<sup>123</sup> Jinnah 126-27.

<sup>124</sup> Jinnah, 127.

Finally, and perhaps most importantly, the NAAEC establishes the Council on Environmental Cooperation, which serves as the Secretariat for the agreement. The CEC operates on three principles that NAFTA countries were able to agree upon: (1) They agreed no country will become a pollution haven to attract investment; (2) They created rules about how regulations could be used to protect human and environmental health; and (3) they gave priority to multilateral treaties such as the WTO.<sup>125</sup>

The CEC's role is to address North American environmental concerns, prevent conflict between trade and environmental goals, and ensure enforcement of environmental protection laws.<sup>126</sup> To that end, it cooperates with the U.S. Federal Trade Commission to implement environmental goals, it serves as a contact point for citizens and nonprofits regarding environmental concerns, and (at least in theory) it administers a dispute resolution process. Its budget has been \$9 million a year since 1996, involving equal contributions from each country<sup>127</sup>

The CEC's structure includes the governing Council, composed of environmental ministers from each member country, a secretariat to provide technical, administrative, and operational support, and a joint public advisory committee (JPAC) made up of five citizens from each country and which meets annually to issue recommendations to the Council.<sup>128</sup>

The Secretariat's administrative headquarters are located in Montreal, with a liaison office in Mexico City. The Executive Director is selected by the Council to serve

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<sup>125</sup> Colyer, 127.

<sup>126</sup> Jinnah, 127.

<sup>127</sup> Sikina Jinnah. Secretariat Influence on Overlap Management North America: NAFTA and the Commission for Environmental Cooperation, *Review of Policy Research*, Vol 32, Issue 1. 124. Accessed at <https://onlinelibrary-wiley-com.ezproxy.lib.utexas.edu/doi/epdf/10.1111/ropr.12106>

<sup>128</sup> Colyer, 128.

three-year terms and must then rotate nationalities.<sup>129</sup> The Secretariat annually prepares draft program plans and budgets but must submit these drafts for approval from the Council.<sup>130</sup> The CEC Secretariat is actually empowered with more latitude than is the case in prior international agreements. The Secretariat may prepare a report for the Council on “any matter within the scope of the annual program,” and – with prior approval of Council – “any other environmental matter related to the cooperative functions of the Agreement.”<sup>131</sup> The language of the Agreement empowers the Secretariat to produce reports on environmental issues even where there is not yet consensus on the causes or solutions among the states<sup>132</sup>.

The Secretariat is also empowered to investigate claims that parties are violating the terms of the NAAEC. Complaints are reviewed by Evaluation Committee of Experts and then passed along to a dispute panel if found credible. Rulings are to be enforced using trade or monetary penalties.<sup>133</sup> Any third-party claim filed with the CEC sets off a set of procedures to evaluate the claim and potentially arbitrate the dispute. Private parties or the three party nations to the treaty may submit a claim.<sup>134</sup> Complaints are reviewed by Evaluation Committee of Experts and then passed along to a dispute panel if found credible. Rulings are to be enforced using trade or monetary penalties.<sup>135</sup> A

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<sup>129</sup> NAAEC Article 11. See also Colyer, 128.

<sup>130</sup> David L. Markell, *The North American Commission for Environmental Cooperation After Ten Years: Lessons About Institutional Structure and Public Participation in Governance*, 26 *Loy. L.A. Int'l & Comp. L. Rev.* 341 (Spring 2004)

<sup>131</sup> *Ibid.*

<sup>132</sup> *Ibid.*

<sup>133</sup> Colyer, 128

<sup>134</sup> Natalie Sears, *The Shadows that Became the Star of the Show: The North American Agreement on Environmental cooperation and the North American Agreement on Labor Cooperation*, 21 *L. & Bus. Rev. Am.* 185 (Spring 2015).

<sup>135</sup> Colyer, 128.

complaint is evaluated for its validity; if it is found valid, the CEC may convene an arbitral panel.<sup>136</sup>

A valid complaint must allege that a country is not enforcing an environmental law pertaining to products that are traded between the three nations or that are produced by export-competing industries. The complainant then bears the burden of demonstrating (1) environmental injury to itself, and (2) a persistent pattern of failure by the party to effectively enforce its environmental law. A persistent pattern is defined as “a sustained or recurring course of action or inaction.” One single failure is likely not enough.<sup>137</sup>

In addition to the CEC, the Agreement established the Joint Public Advisory Committee. This body is made up of five citizens from each of the three countries and may “provide advice to the Council on any matter within the scope of the Agreement.” These citizens are meant to represent the North American public, as distinct from the state structures alone.<sup>138</sup>

Between 1994 and 2012, the three member states have collectively invested over \$140 million dollars in implementing the NAAEC.<sup>139</sup> Biermann and Siebenhuner (2009) and Jinnah (2014) have outlined ways in which a Secretariat *can* influence policy decisions.<sup>140</sup> These ways are:

- (1) Knowledge brokering and information sharing
- (2) Negotiation facilitation
- (3) Capacity building
- (4) Litigation Facilitation

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<sup>136</sup> Sears.

<sup>137</sup> Ibid.

<sup>138</sup> Markell.

<sup>139</sup> Linda J. Allen, The North American Agreement on Environmental Cooperation, 23 Colo. J. Int'l Env'tl. L. & Pol'y 121

<sup>140</sup> Jinnah, 129.



## (5) Marketing<sup>141</sup>

The CEC has engaged in information sharing and negotiation facilitation, however it has done little in the way of building capacity, facilitating litigation, or marketing. Where it has helped share information, increase transparency, and encourage negotiation, it has been in limited, isolated instances, and civil society groups have had to take an active role in bringing the projects to their conclusion.

General critiques of the CEC include two main arguments: One, although the CEC has a mechanism for arbitrating disputes, it has no real power to enforce its decisions.<sup>142</sup> Two, the mechanism itself works so slowly it is relatively useless as a method of recourse.<sup>143</sup> At the same time, it is much easier to challenge environmental regulations as trade barriers under NAFTA. As a result, the CEC is a weak and insufficient counterweight to the pressure for countries to lower or bracket environmental protection in the name of increased trade.<sup>144</sup>

In 2007, Jonathan Dorn evaluated the efficacy of the CEC's complaint system in an article for *Georgetown International Environmental Law Review*. After examining several cases and their outcomes, Dorn pointed out three main problem areas with the process:

(1) *Complexity of the process*. Evidenced by the fact that the majority of the submissions came from nonprofits rather than individuals.

(2) *Delays in review and response*. Prior to 1998, only one official reviewed submissions. It regularly took five years for the CEC to publish a factual record.

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<sup>141</sup> Ibid.

<sup>142</sup> Sears.

<sup>143</sup> Ibid.

<sup>144</sup> Sears.

(3) *Lack of transparency.* The challenged party's may request confidentiality, screening its responses from the public in their entirety.

(4) *Lack of follow-up after publication of Factual Record.* The Joint Public Advisory Council in 2001 advised the Council to institute some kind of follow-up procedure but the Council declined, stating that follow-up was a domestic concern.

(5) *Conflict of interest.* The environmental ministers for all three states sit on the Council, meaning that a process designed to embarrass governments is also controlled by those governments.

(6) *No Arbitration Panel.* In none of the cases did one of the other nations request an arbitration panel pursuant to their rights under the NAAEC, suggesting that political concerns essentially make obsolete that important function of the CEC.<sup>145</sup>

Included within Dorn's critique are both of the general elements: delays, and lack of follow-up, which could also be understood as failure to enforce and instead yielding to domestic enforcement. This is a problem as a philosophy for an international Secretariat like the CEC because the agreements exist precisely because domestic enforcement cannot be trusted.

For instance, the requirement of the NAAEP that posed a challenge for Mexican lawmakers was that there was little existing case law interpreting Mexico's environmental laws. Canada and the United States, by contrast, had a very robust jurisprudence. Because domestic court rulings would be affected by CEC decisions, and because the CEC wanted relative uniformity in the interpretation of each country's laws,

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<sup>145</sup> Jonathan G. Dorn, NAAEC Citizen Submissions Against Mexico: An Analysis of the Effectiveness of a Participatory Approach to Environmental Law Enforcement, 20 Geo. Int'l Envtl. Rev. 129 (Fall 2007).

the CEC actually administered a training program from Mexican judges to help them interpret their own laws in accordance with Canadian and U.S. precedent.<sup>146</sup>

I will review examinations of effectiveness the CEC, examine the role of JPAC, and evaluate overall effectiveness of the NAAEC in meeting its own stated goals as well as the functions laid out by Biermann and Siebenhuner.

In 2007, Jonathan Dorn evaluated the success of the citizen submission process under NAAEC. Between June 1995 and August 2007, 32 people filed complaints against Mexico. Eighteen were terminated in that time. Most of those submissions were focused on an industrial issue in a particular urban area. Fifty-five percent were filed by nonprofits and forty percent by individuals.<sup>147</sup> Dorn examined several claims where the CEC established a factual record, including the following cases: Cozumel (1996), regarding the construction of a cruise ship pier in Quintano Roo, Mexico; Rio Magdalena (1997), regarding illegal discharges of wastewater into the Magdalena River; Aquanova (1998), regarding a shrimp farm in Isle de Conde and its impact on Mangrove forest ecosystems; and Metales y Derivados (1998), regarding an abandoned battery recycling operation with thousands of tons of hazardous waste. Several themes arise from Dorn's selected cases that shed light on the effectiveness of the CEC.

One, when the CEC deems a complaint valid and produces and publishes a Factual Record, civil society takes notice and puts pressure on the parties to correct the environmental harms at issue. However, another theme is that the efforts of civil society to force change result in isolated victories, compromises that give investors and industries their profits while making some small gestures toward environmental protection.

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<sup>146</sup> Sears.

<sup>147</sup> Dorn.

In the Cozumel case, three nonprofits filed a complaint against Mexico for violations relating to a cruise ship pier being constructed in Play Paraiso, Cozumel, Quintana Roo. The complaint alleged that both the construction and operation of the pier would fatally damage two reefs in the area, and that the project had moved forward without an environmental impact assessment. Mexico has a law on the books called the General Law of Ecological Equilibrium and Environmental Protection (the LGEEPA), which was passed in 1988 and serves as Mexico's general environmental protective law. The Cozumel complaint alleged that the authorizing the pier construction violated Mexico's own law and therefore violated the terms of the NAAEP.<sup>148</sup>

The complaint was found valid, and the CEC went on to produce and publish a factual record, which included a confirmation by the government of Quintana Roo that the pier would damage the reef. Some hailed the publication of the record as a real step toward holding Mexico accountable for its actions, basically through the method of public shaming.<sup>149</sup> And indeed, the publication of the record did spur some action: Mexico created a national marine park for the reef, downsized the pier project, improved the legal standard for environmental assessments, and established a trust fund for reef protection.<sup>150</sup> However, despite all these gestures, the pier project did move forward, prompting some to declare CEC an ineffective political mechanism.<sup>151</sup>

In the 1998 Aquanova case, the company took alleviating actions but Mexico – the party actually bound by the NAAEC and challenged by the complaint – took no action. The shrimp farm at issue, according to the complaint, was damaging local mangrove ecosystems by impacting fish populations and water quality. A Factual Record

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<sup>148</sup> Ibid.

<sup>149</sup> Ibid.

<sup>150</sup> Ibid.

<sup>151</sup> Ibid.

was finally released five years later, in 2003. It showed that the farm had caused severe harm to a mangrove forest by obstructing a creek, violated Mexican law by destroying acres of forest with no attempts to save any plants or animals, and violated Mexican water law by discharging wastewater for two years before it had any authorization to do so.<sup>152</sup>

There was a response on the part of the company that operated the farm: The company ceased obstructing the creek and constructed some more sustainable infrastructure, returned 850 hectares of land to Mexico, and initiated a reforestation program. The company also reduced the maximum size of the farm by 300 hectares.<sup>153</sup> However, Mexico's response was simply to assert that there was a preliminary investigation going on into the violations.<sup>154</sup>

In the Metales y Derivados, two nonprofits submitted a complaint in 1998 against Mexico for failing to contain hazardous materials at an abandoned lead smelting site in Tijuana.<sup>155</sup> The facility recycled batteries sent from the United States.<sup>156</sup> The owner, New Frontier Co., should have repatriated the waste to the United States. Instead, there were ongoing reports of health problems in the nearby community and violations of environmental law. Finally the Mexican government shut down the facility, the operator fled to the United States, and the site was left with 23,000 tons of mixed contaminated waste, including heavy metals, sulfuric acid, and more than 6,000 tonnes of lead slag.<sup>157</sup>

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<sup>152</sup> Ibid.

<sup>153</sup> Dorn, NAAEC Citizen Submissions Against Mexico: An Analysis of the Effectiveness of a Participatory Approach to Environmental Law Enforcement, 20 Geo. Int'l Env'tl. Rev. 129 (Fall 2007)

<sup>154</sup> Commission for Environmental Cooperation. Submission. Accessed at <http://www.cec.org/sem-submissions/aquanova>.

<sup>155</sup> Dorn.

<sup>156</sup> What We Do. Environmental Health Coalition. Accessed at <https://www.environmentalhealth.org/index.php/en/what-we-do/border-environmental-justice/metales-y-derivados-toxic-site>

<sup>157</sup> Dorn.

Once more the CEC produced and published a Factual Record, which at first spurred little action. Mexican authorities lacked the capacity and power to extradite New Frontier Co.'s CEO from the United States. However, the record did drum up enough public outrage to pressure Mexico's environmental minister to take some action. He finalized an agreement with the mayor of Tijuana and the governor Baja California for a five-year clean-up plan for the area. Mexico funded the first stage and successfully clean up 1,936 tons of above-ground hazardous waste.<sup>158</sup> The entire cleanup was completed in 2008, ahead of schedule, thanks to the continued efforts of Environmental Health Coalition and its Tijuana-based affiliate.<sup>159</sup>

Notably, although the Metales y Derivados case does show considerable success in cleaning up a site, it heavily involved nonprofits in the actual work. The first round of clean-up was funded mostly by Mexico. However the state of Baja California later had to apply for a loan to finance continued cleanup efforts.<sup>160</sup> The United States, which shipped the used batteries to the factory and is the home of the company's CEO, did not contribute funding to the clean-up.

According to the Environmental Health Coalition, there are 66 documented toxic waste sites in Mexican border states.<sup>161</sup> Metales y Derivados may be viewed as somewhat of a success case, but it also represents the failure of the Mexican government to enforce its own environmental laws in the first place, and therefore a failure of the NAAEC. The Metales y Derivados case also give credence to the "pollution haven"

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<sup>158</sup> Dorn.

<sup>159</sup> What We Do. Environmental Health Coalition.

<sup>160</sup> U.S.-Mexico Binational Commission Environment Working Group. State Department Bureau of Western Hemisphere Affairs. November 12, 2003. Archived at <https://2001-2009.state.gov/p/wha/rls/rpt/26201.htm>.

<sup>161</sup> What We Do. Environmental Health Coalition.

hypothesis expressed by NAFTA critics: this U.S. owned factory operated at much lower standards in Mexico, and its bad actions shifted the cost to non-profits and local government to deal with, resulting in impunity for the corporation itself.

Moreover, in none of these cases did any of the other parties request an arbitration. The Secretariat can publish the factual record, but no arbitration occurs unless one of the member nations requests it. The fact that none did, as Dorn observes, reveals a conflict of interests intrinsic to the structure of the CEC itself: the Council is made up of the environmental ministers of each state, which means that the people in charge of an organization designed to publicly shame the member nations do themselves represent those nations.<sup>162</sup> There is an incentive not to conduct an arbitration against another member country, because they do so they too may have to undergo arbitration proceedings.

As for the JPAC, the organization which promised to provide more citizen and NGO participation in the process has proved to be relatively powerless. In 2001, JPAC advised the Council to create some type of follow-up mechanism to complement the publication of a Factual Record. As it stood, the CEC does little to follow up once the Record is published – leaving the public shaming and pressuring to come from NGOs and citizens. In the Rio Magdalena case, for instance, after the Record was published there was no evidence that anyone – not the municipalities nor the federal Mexican government – did anything to remedy the situation.<sup>163</sup>

Despite the JPAC's recommendation, the Council declined to adopt any new procedure, stating that follow-up is the responsibility and purview of domestic

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<sup>162</sup> Dorn.

<sup>163</sup> Ibid.

governments.<sup>164</sup> In the case of Mexico, whose ability to enforce its own laws has proved suspect time and time again, that statement does little to answer the question of how the CEC acts as an enforcement mechanism.

This brings us back to the five functions a Secretariat may serve according to Biermann and Siebenhuner: (1) Knowledge brokering and information sharing; (2) Negotiation facilitation; (3) Capacity building; (4) Litigation Facilitation; and (5) Marketing.<sup>165</sup> How well does the CEC serve each of these functions?

There is little information available on the topic of the CEC's role in facilitating litigation or marketing, but certainly the Factual Records and reports that it produces may be used as evidence in trial proceedings. The CEC seems to de-emphasize marketing, as it is not widely known and directs much of its efforts toward working with private-sector companies rather than with the public at large.<sup>166</sup>

In the realm of knowledge-sharing, the CEC performs relatively well. The CEC's 2015-2020 Strategic Plan, four of the organization's five priorities involve some form of information sharing:

(1) Working to improve conditions in vulnerable communities by sharing and increasing access to information, such as expanding the AirNow monitoring system to Mexico.

(2) Developing guidelines for designing marine protected area networks in a changing climate.

(3) Enhancing the enforcement of environmental laws to improve the management of electronic

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<sup>164</sup> Ibid.

<sup>165</sup> Jinnah, 129.

<sup>166</sup> See Commission for Environmental Cooperation Strategic Plan 2006 and 2015, accessed at <http://www.cec.org/about-us/annual-reports>



waste and spent lead-acid batteries, and share information on the illegal trade of wildlife.

(4) Improving the comparability of data related to climate change.<sup>167</sup>

The CEC's website bears a host of information on the state of various ecosystems and projects to better understand and enforce the provisions of the NAAEC. Moreover, the publication of Factual Records upon receipt of complaints results in increased transparency and the proliferation of information that civil society can use to put pressure on government actors.

In serving this function, CEC operates much like other major international environmental organizations with states as members, including the Secretariat for the United Nations Framework on Climate Change, the United Nations Environmental Program, and the CITES Secretariat (Convention on International Trade in Endangered Species of Wild Fauna and Flora). All of these programs publish reports and conduct research on their issue areas to help further discussion and eventually progress.

CEC has not made the facilitation of negotiations a major part of its programming, at least in that it does not serve as the host forum for many multi-party discussions. In this it is unlike UNEP, which has hosted numerous discussion between states on environmental issues. However, this is likely a function of CEC's role as a secretariat for just three specific countries and its limited mandate to implement the NAAEC. Though it does not so much mediate disputes, the CEC does manage to make negotiations more likely by changing parties' worst alternative to a negotiated agreement. The publication of a Factual Record brought international attention to issues such as the

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<sup>167</sup> The fifth involves working with private actors such as corporations to improve green building construction. CEC Strategic Plan 2015-2018. Accessed at [http://www.cec.org/sites/default/files/documents/strategic\\_plans/strategic\\_plan\\_2015\\_2020.pdf](http://www.cec.org/sites/default/files/documents/strategic_plans/strategic_plan_2015_2020.pdf)

shrimp farm and the pier construction, which likely spurred the challenged parties to more mitigation action than they otherwise would have taken. Therefore the CEC serves as a partner with civil society by lending the weight of three nations to the causes of environmental and community groups – albeit in a limited way.

The CEC’s capacity building work has been primarily focused toward work with private, corporate partners in the form of efforts to “green” supply chains and improve green building techniques.<sup>168</sup> This is alarming in light of the ongoing debate surrounding environmental protection more generally across the globe—developing nations seek capacity in the form of funding and technology to “green” their operations while catching up to the West’s level of development. However, the CEC operates in North America and works largely with U.S. and Canadian corporations that already have considerable capacity to green their own supply chains. The CEC thus directs its capacity building efforts toward beneficiaries that do not need the support, while neglecting to issue funds to Mexico with tight strings attached that require oversight and adequate enforcement of environmental laws. This approach to capacity building represents a sadly missed opportunity to tie environmental protection to financial benefits, which was the hoped-for outcome of linking trade and environmental protection in the first place.

The CEC’s preference for working with corporations adds credibility to Roberto Sanchez’s findings that over the lifetime of NAFTA, the role of environmental organizations has declined while private market actors have become more powerful in the treaty’s implementation.<sup>169</sup> This trend is echoed in the realm of environmental treaties, where nonprofits and corporations played a major role in both recent Summits, and

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<sup>168</sup> See 2006 and 2015 Strategic Plans, accessed at <http://www.cec.org/about-us/annual-reports>

<sup>169</sup> R.A. Sanchez, Governance, trade, and the environment in the context of NAFTA. *The American Behavioral Scientist*, 45(9), 1369-1393. 2002.  
doi:<http://dx.doi.org.ezproxy.lib.utexas.edu/10.1177/0002764202045009005>

where, incidentally, very little progress was made on solidifying standards or solving the enforcement problem.

Whether or not the NAAEC was effective is an important question for two reasons. First, the WTO has failed to arrive at a clear definition of what types of environmentally motivated barriers are permissible.<sup>170</sup> Second, the proliferation of bilateral trade agreements and free trade zones make the “floor” provided by GATT somewhat obsolete.<sup>171</sup>

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<sup>170</sup> Dagne, 159-180.

<sup>171</sup> See Colyer, 126.

## **Conclusion: *Failed Enforcement of the NAAEC***

The NAAEC established an information-sharing organization akin to Secretariats for international environmental agreements. While it was negotiated alongside NAFTA, it did not link environmental issues to trade in a meaningful way, because violations of environmental standards does not result in any trade or financial penalties.

This failure on NAAEC's part is particularly important to note because NAFTA has increased the level of integration between the North American markets, and that integration is growing industry in all three countries. Because industrialization has a negative impact on natural resources, this economic growth should be accompanied by higher and strongly enforced environmental standards.

Between 1987 and 2001, trade between Mexico, Canada, and the United States increased 155 percent.<sup>172</sup> In 2000, Mexico became a greater net exporter of agricultural products than the European Union.<sup>173</sup> At the same time, studies show pollution in the U.S. has dropped: One study by Jevan Cherniwchan at the University of Alberta examines plant-level data to determine the effects of trade liberalization on the pollutants emitted by individual plants, using NAFTA as an example.<sup>174</sup> Cherniwchan finds that changes in tariffs correlated with decreases in pollutants emitted by U.S. plants.<sup>175</sup> He theorizes that NAFTA caused production to shift from less productive plants to more productive plants, who could more profitably take advantage of the new Mexican market and the cheaper, imported Mexican inputs (the assumption being that the more productive

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<sup>172</sup> T. Vollrath, "Gauging NAFTA's success and confronting future challenges," *AgExporter*, 16(1), 7 (2004) Retrieved from <http://ezproxy.lib.utexas.edu/login?url=https://search-proquest-com.ezproxy.lib.utexas.edu/docview/206802350?accountid=7118>.

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<sup>173</sup> Ibid.

<sup>174</sup> Jevan Cherniwchan, "Trade Liberalization and the Environment: Evidence from NAFTA and US Manufacturing." *Journal of International Economics* 105 (2017) 130-149.

<sup>175</sup> Ibid.

firms are also less polluting).<sup>176</sup> Shapiro and Walker found similar decreases in pollution -- a 60 percent drop in emissions from U.S. manufacturing between 1990 and 2008.<sup>177</sup> However, Shapiro and Walker credit changing environmental regulations with the drop in pollution rather than the lowering trade costs.<sup>178</sup>

Regardless, this data only paints a picture of pollution in the U.S. – it does not take into account the higher pollution caused by new U.S. plants opening in Mexico. The Environmental Health Coalition gives us a different view: there are now 66 active toxic waste sites along the U.S.-Mexican border.<sup>179</sup> The host of clean-up projects promised in Mexico were either delayed or never begun.<sup>180</sup> The *maquiladora* program, which allows foreign companies to set up assembly factories in Mexico to process duty-free foreign materials for export, had existed since 1965.<sup>181</sup> By 1993 there were more than 2,000 *maquilas* in Mexico, with over 80 percent of those along the U.S.-Mexican border.<sup>182</sup> In the five years after the beginning of NAFTA, the number of *maquilas* grew by 86 percent as compared with 47 percent over the five years prior to the agreement.<sup>183</sup> The extent to which this increase was due to NAFTA, if at all, is beyond the scope of this paper. But the rise of both industry and pollution at the very least cast doubt on NAAEP's ability to

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<sup>176</sup> Ibid.

<sup>177</sup> J.S. Shapiro, and R. Walker. *Why is pollution from U.S. manufacturing declining? the roles of trade, regulation, productivity, and preferences*. Cambridge: National Bureau of Economic Research, Inc. (2015) doi:<http://dx.doi.org.ezproxy.lib.utexas.edu/10.3386/w20879>

<sup>178</sup> Ibid.

<sup>179</sup> What We Do, Environmental Health Coalition.

<sup>180</sup> Nancy Nusser, "Environmental promises unfulfilled in Mexico NAFTA has not helped the country solve its severe pollution woes." *Globe & Mail* (Toronto, Canada). (Dec. 23, 1995)

<sup>181</sup> Dr. J. Michael Patrick, "The Impact of NAFTA on Border Maquiladora and Industrial Activity," Institute for International Trade (April 1994) at 1, accessed at <http://texascenter.tamui.edu/PDF/NAFTA/techrp04.pdf>.

<sup>182</sup> Ibid. at 2,3.

<sup>183</sup> William C. Gruben, "Did NAFTA Really Cause Mexico's High Maquiladora Growth?" Center for Latin American Economics Working Paper (July 2001), at 2. Accessed at <https://www.dallasfed.org/~media/documents/research/papers/2001/wp0106.pdf>.

protect the environment from the side effects of free trade. By 2010 several wastewater treatment plants in border towns that were supposed to have been begun in 1994 had still not begun construction.<sup>184</sup>

Prior to 2016, and the U.S. Presidential election that put trade barriers in the spotlight, increasing free trade was the order of the day. Moving forward, the United States and other countries with environmental priorities should use the waning support for free trade as an opportunity to bargain for much stronger environmental protective mechanisms within trade agreements. Rather than negotiating environmental side agreements, trade agreements should have environmental protection as an substantive goal and have real penalties in place for violating standards. At the very least, agreements should provide clear language describing what types of environmental regulations are valid exercises of state power, protecting states from being targets of sanctions or causes of action for merely implementing conservationist principles.

In November 2018, the leaders of the United States, Canada, and Mexico signed what is meant to be a replacement for the existing NAFTA agreement. The United States-Mexico-Canada Agreement (USMCA) includes environmental language not included in the original NAFTA, and much that language mimics the intent of the NAAEC.<sup>185</sup> Parties agree to enforce their own environmental laws and implement processes to assess the environmental impact of new laws. Additionally, the complaint mechanism laid out in the NAAEP, which allows any person of a party allege that a party is not abiding by its

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<sup>184</sup> Ibid.

<sup>185</sup> Congressional Research Service, “In Focus: Proposed U.S.-Mexico-Canada (USMCA) Trade Agreement (February 22, 2019). Accessed at <https://fas.org/sgp/crs/row/IF10997.pdf>.

environmental obligations, is now described in the body of the USMCA itself.<sup>186</sup> Thus the new agreement retains the CEC and the citizen submission process.<sup>187</sup>

The USMCA also contains some new language that was not present in either NAFTA or the NAAEC. One, parties affirm their commitments under multilateral environmental agreements to which they are already a party. Two, parties recognize the importance of protecting certain aspects of the environment, including air quality, the ozone layer, biodiversity, flora, fauna, and forests. Three, parties must promote trade and investment in environmental goods and services.<sup>188</sup> One other area where USMCA differs from NAFTA is that it prohibits certain types of fishery subsidies, specifically subsidies available to vessels and operators and subsidies that negatively affect fish stocks.<sup>189</sup>

Though the USMCA echoes much of the protective language present in NAFTA and the NAAEP, whether or not this language will translate into effective environmental protections is less clear. The International Institute for Sustainable Development has expressed doubt that new trade agreement will provide stronger protections than NAFTA.<sup>190</sup> The director of the Sierra Club's responsible trade program also reacted negatively to the new agreement, stating that its language regarding air pollution is weak and weakly enforced. The USMCA also guarantees companies an opportunity to comment on proposed regulations across borders and requires each country to develop processes that consider the effects of the proposed laws on small businesses and on

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<sup>186</sup> U.S.-Mexico-Canada Trade Agreement: Likely Impact on the U.S. Economy and on Specific Industry Sectors. United States International Trade Commission. (April 2019) Accessed at <https://www.usitc.gov/publications/332/pub4889.pdf>

<sup>187</sup> Scott Vaughan, "USMCA Versus NAFTA on the Environment," International Institute for Sustainable Development <https://www.iisd.org/library/usmca-nafta-environment>.

<sup>188</sup> U.S.-Mexico-Canada Trade Agreement: Likely Impact on the U.S. Economy and on Specific Industry Sectors.

<sup>189</sup> Vaughan.

<sup>190</sup> Ibid.

business competition. According to Sierra Club, these provisions could give industry the opportunity to delay or change environmentally protective measures throughout North America.<sup>191</sup>

A coalition of environmental groups, including Sierra Club, has also noted that an important provision in the original NAFTA has been removed in USMCA. That provision, Article 104 in NAFTA's Objectives section (discussed *supra*) clarifies that in the event of conflict between the trade agreement and any of five MEAs, the MEAs prevail.<sup>192</sup> The absence of the phrase could imply that USMCA is meant to supersede any other environmental agreements in the event of a conflict.<sup>193</sup>

The USMCA does re-prioritize environmental issues by addressing them within the main agreement instead of relegating them to a side agreement like NAAEC. However, it does so without strengthening the enforcement mechanism as it exists through the CEC. The new agreement represents so slight a step forward on environmental issues as to be almost inconsequential. Congress has yet to ratify the USMCA, which must occur before the agreement goes into effect. Still, until environmental infractions are addressed with sanctions and retaliatory measures comparable to free trade violations, the protective language that does exist in agreements like the USMCA is not likely to force much compliance.

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<sup>191</sup> Nicholas Kusnetz, "How Trump's New Trade Deal Could Prolong His Pollution Legacy," Inside Climate News, <https://insideclimatenews.org/news/04102018/trump-trade-deal-climate-change-canada-mexico-pollution-outsourcing-nafta-usmca>.

<sup>192</sup> (1) Convention on International Trade in Endangered Species of Wild Fauna and Flora; (2) Montreal Protocol on Substances that Deplete the Ozone Layer; (3) Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal; (4) The Agreement Between the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Waste; (5) The Agreement Between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area.; NAFTA Article 104-104.1.

<sup>193</sup> "Trump's NAFTA Deal Threatens Our Water, Air, and Climate: environmental Groups Oppose This Deal, Given Failure to Meet Basic Criteria." Sierra Club et al. Accessed at <https://www.sierraclub.org/sites/www.sierraclub.org/files/NAFTA-environment-statement.pdf>



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