

# NAFTA's North American Agreement for Environmental Cooperation: A Civil Society Perspective

By Andrea Abel | March 2003

NAFTA has been hailed as the first international trade agreement to include environmental provisions. These provisions were included in a supplemental environmental agreement called the North American Agreement for Environmental Cooperation (NAAEC). For many, NAFTA was regarded optimistically as a test incubator for a vision of trade liberalization that would incorporate trilateral environmental cooperation. Many in the environmental community believed that NAFTA's environmental provisions would be the minimum starting point for all future trade agreements. While tangible improvements have been made under the NAAEC, NAFTA has not lived up to its promise of a sustainable development model that balances environmental and economic considerations.

The North American Commission for Environmental Cooperation (CEC), the trilateral institution created in 1994 under the NAAEC, currently finds itself at a crossroads. Both the U.S. and Mexican members of CEC's Council have changed within recent years as well as the most senior staff at the Secretariat, losing leadership that had been involved with the institution since its inception. It is up to the Council, the CEC governing body made up of the environmental ministers (or their equivalents) from each member country, to determine CEC policy and scope. The CEC Council has a great opportunity to set the standard for addressing the nexus of trade and environment but has shown a lack of interest in the institution. Without the CEC Council's leadership at this juncture, the CEC will continue to contribute to environmental improvement through cooperative environmental projects. But it will lose its creators' vision of bringing closer together the often-competing arenas of trade and environment.

NAFTA, the NAAEC, and the NAFTA parties have failed in three ways: 1) the very structure of the NAFTA and its supplemental agreements, 2) the structure of the Council and Secretariat, including funding and governance, and 3) the fluctuations in political will and consideration of civil society.

## The Agreement

Despite NAFTA's preamble promoting sustainable development and strengthening environmental laws and regulations, the agreement fails to integrate the environment, rendering it an afterthought subordinate to commerce

and job creation. Sustainable development recognizes the "three E's": economy, environment, and social equity. In NAFTA, however, not all E's are created equal. Instead, environmental considerations are relegated to the NAAEC supplemental agreement. The great strides made by the CEC are tempered by its lack of power as an equal player within the NAFTA structure.

The Council, however, is not cut off entirely from the central NAFTA institution, namely the Free Trade Commission. This Commission, composed of the trade ministers from each country, supervises implementation of NAFTA trade terms and assists in the resolution of disputes regarding the agreement. NAAEC Article 10(6) stipulates that the Council and the Commission cooperate to achieve NAFTA's environmental goals and objectives.

The issue of whether the Council is fulfilling Article 10(6) or whether they should be playing a greater role in advocating for an environmental agenda with the Commission has been the subject of much debate in the trade and environment community. Much of the interaction is predicated on the political will of the CEC Council. Nevertheless, some hesitancy on their part may be due to the fact that its authority is derived from the NAAEC and not from NAFTA's main text. A broader explanation of why trade policy often seems to have greater political might than environmental policy lies in the myriad of cross-border issues confronting the continent, particularly between the U.S. and Mexico. Government decisionmakers simply may not want to highlight the environment issue when trade, migration, transportation, and cross-border security issues must also be addressed.



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## Structural Issues

Paramount to the NAAEC's success is the CEC Council's ability to articulate a shared vision for the North American environment based on a transparent process involving multi-stakeholder participation. Without this shared vision, the CEC runs the risk of becoming an extension of each individual government's priorities rather than a voice for all of North America.

Furthermore, the Secretariat needs a healthy modicum of independence to allow it to develop and release reports and consider Article 13 issues about significant North American environmental problems prepared by the Secretariat and presented to the Council, as well as considering Citizen Submissions under Articles 14-15. Of course, this review process should be carried out in coordination with federal, state, and civil society bodies to ensure that they are aware of on-going efforts and possible duplication of projects.

Yet, the very nature of the CEC structure inhibits independence of the Secretariat. The Secretariat receives its annual budget from the agencies that make up the Council—a big Catch-22 hindering independence. It takes very strong leadership from within the Secretariat not to kowtow to the individual agendas of the CEC Council members.

The fate of the Secretariat's independence has come to the forefront with the departure in mid-2002 of the CEC's executive director, Janine Ferretti, and its director of programs, Greg Block. The U.S. has the primary role of hiring the new executive director, since the NAAEC stipulates that the position should rotate consecutively among the parties. Mexico had the first appointment held by the current SEMARNAT Secretary Victor Lichtinger, and Canada had the subsequent appointment with Ms. Ferretti. The individual hired to lead the Secretariat will play a significant role in shaping the policy and scope of the CEC, influencing its impact on the North American environment.

## Transparency

A number of items have been left pending at the CEC over the past two years. Arguably, these pending items may be perceived as signs of decreasing responsiveness to civil society and a waning commitment to transparency. A pessimistic analysis of at least five of these unresolved issues reveals a pattern in which affirmative, supportive statements are made by the Council or its members but which are then followed by contradictory- or no action taken by the Council or its representatives.

A centerpiece of the NAAEC is the Citizen Submissions on Enforcement Matters process, a mechanism outlined in Articles 14-15 that enables a member of the public to submit a petition to the CEC claiming an alleged failure on the part of any of the NAFTA countries to effectively enforce its environmental laws. After a review of the submission, if the Secretariat determines the petition has merit, it may recommend to the Council that a factual record be published, subject to the approval of the CEC Council.

Throughout most of 1999 and in the months leading up to the June 2000 CEC ministerial, the Council and its representatives privately discussed making changes to the Citizen Submissions process. The negotiations were a culmination of years of dissatisfaction by Mexico and, to a lesser extent Canada, with the Article 14-15 process. Until that time, no submission concerning the U.S. had proceeded to a factual record, with the majority of submissions being filed against Canada and Mexico. To a large extent, Canada and Mexico regarded the NAAEC as the bitter pill that they had to live with in order for the U.S. to sign NAFTA. The Articles 14-15 process proved to be a time-consuming embarrassment to Canada and Mexico's environment ministers and their staffs.

Many in the trade and environment community viewed the efforts to change the Citizen Submissions process as a crisis-point for the CEC and the future of the NAAEC, indicating that the process was valid and should be left alone. Led by then-EPA Administrator Carol Browner, an 11th hour solution was reached at the June 2000 ministerial with the Council agreeing to institute a public review process for any proposed changes to the Citizen Submissions Process. The Joint Public Advisory Council (JPAC), the tri-national body appointed by each country to advise the CEC Council, would be charged with conducting a public review of any proposed change to Articles 14-15.

In June 2001 the JPAC presented the Council with a report entitled *Lessons Learned: Citizen Submissions*, which examines the history of citizen submissions under Articles 14 and 15 of the North American Agreement on Environmental Cooperation. The report culminated their nearly one year public consultation on the NAAEC Articles 14-15 Citizen Submissions Process summarizing public comments addressing issues such as timeliness, transparency, and effectiveness of the current process as well as providing conclusions on possible next steps. Addressing the area of factual record follow-up, the JPAC believes that the current Article 14-15 process lends itself increased oversight by the public as well as the CEC "to remedy any enforcement failures that are revealed in a

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factual record.” Further, the JPAC recommended a process where the party involved would report to Council within a reasonable amount of time the actions that had been taken to address the issues raised in the factual record.

The Council’s response in Council Resolution (CR) 01-06 voiced their support of the Articles 14-15 process, took action on a handful of the JPAC’s recommendations, though not the issue of factual record follow-up, and agreed to consider other recommendations made in the report. Despite that first step, to date they have not taken action on any of the other recommendations made in the report.

To the contrary, in November 2001, the Council released decisions on five citizen submissions. Though the resolutions supported the preparation of factual records for all five, two other elements were added. First, all of the resolutions required the Secretariat to prepare and present to the parties workplans outlining their intended course for preparation of the factual record; Second, for four of the submissions, the Council reframed the submissions as they originally were prepared by limiting the scope of inquiry. This was carried out by allowing the Secretariat to pursue factual records based only on certain illustrative cases included in the submissions meant to be used as examples of alleged broader failure to comply with environmental laws.

Their decisions contradict Council Resolution 00-09 made in Dallas whereby the ministers agreed that any proposed changes to the Articles 14-15 process would first be given to the JPAC for public consideration. Further, by interfering in the scope of petitions as submitted, the Council has threatened the independence of the Secretariat.

Subsequently, the JPAC requested permission from the Council to carry out a public review on Council’s changes to the Citizen Submissions process. In response, the Council reluctantly agreed for JPAC to proceed on the workplan issue but prohibited JPAC from proceeding on the issue of limiting the scope of a factual record until the Council made a final vote on the four submissions in questions.

The CEC Council’s participation in the NAAEC Article 10(6) process has been a source of disagreement over the years. Trade and environment advocates repeatedly have urged the Council to invigorate the process and to participate more fully in the NAFTA Free Trade Commission to strengthen environmental considerations in the agreement.

The Council at times has taken the initiative, but, lacking follow-through, its efforts are often left floundering. For example, under the theme of “Building Partnerships

and Strategic Linkages,” a June 2001 Council communiqué announced a commitment “consistent with NAAEC Article 10(6)” to explore “the possibility of convening a joint meeting between the CEC and the North American Free Trade Commission, aiming for 2003.” As a first step the ministers instructed senior officials to draft an agenda and desired outcomes.

Both the JPAC and EPA’s National Advisory Committee (NAC) have endorsed just such a joint meeting as a means to energizing the Article 10(6) process. However, an agenda does not appear to be forthcoming. Officials from the office of the United States Trade Representative (USTR) have sought agenda items from the U.S. NAC as well as other sources, indicating that to have a meeting on a ministerial level requires a substantive agenda. Subtle signals suggest that the trade ministers will not agree to a strong agenda that stipulates greater role for the environment. Nor will the environment ministers publicly request such a change.

This dilemma highlights a weakness in the NAFTA agreement mentioned earlier—the environment ministers lack the same authority to influence policy that the trade representatives enjoy. It also can be regarded as a lack of political will on the part of the ministers to assert themselves in the NAFTA Free Trade Commission process and to truly make the environment an equal component of continental trade liberalization, as NAFTA’s preamble sets out.

## **Civil Society Participation**

In two other instances, the U.S. and Mexico have shown a decreasing commitment to elements of civil society participation included in the NAAEC by allowing some of their public advisory committees to languish.

NAAEC Article 17 allows for each member country to create a national advisory committee to provide counsel to that country’s CEC Council member. The U.S. National Advisory Committee to the U.S. Representative to the CEC (NAC) allows for up to 12 members with equal representation from the private sector, academia, and non-profit, or community-based organizations. Article 18 follows that each member country may also create a Government Advisory Committee (GAC) that includes representatives from federal, state, or provincial governments. To date, the U.S. is the only party to create a GAC.

The EPA has not appointed or reappointed members to the NAC and GAC since former administrator Carol Browner left office in January 2001. Virtually all the

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terms of the current NAC and GAC members have expired with some pending reappointment. In addition, both committees are functioning without a full complement of members. For example, the NAC has only nine members, with only one representative from the private sector. Perhaps even more importantly, the NAC has been without a permanent chair since June 2001, with EPA appointing temporary chairs for each meeting. Repeated statements from EPA officials have promised quick consideration of new appointments, but there have been no new appointments.

In Mexico, the Fox administration has not secured legal authorization for the continuation of the Mexican NAC, which has not formally met since Victor Lichtinger became Mexico's environment minister. Nor have the members been told whether they still serve on the NAC or have been replaced. Despite repeated statements by Mexican officials that a new NAC will be appointed, no action has been taken, leaving Mexico without a civil society advisory body on trade and environment. Secretary Lichtinger, however, has made bold appointments to the Mexican delegation of the JPAC.

While none of these issues in and of itself significantly changes the nature of the CEC, taken together they indicate a situation of benign neglect by the Council for the institution and a waffling commitment to link trade liberalization with environmental cooperation.

## CEC Strengths

The CEC has had numerous successes since its inception. One only needs to remember the state of trilateral environmental cooperation before NAAEC to appreciate the improvements in addressing continental environmental concerns. For example, the CEC program to reduce toxic substances through its Sound Management of Chemicals program has created North American Regional Action Plans (NARAPs) for DDT, chlordane, PCBs, and mercury, whose purpose is to reduce the prevalence of these persistent toxic substances.

## The Americas Program

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In 2002, the CEC released *Electricity and the Environment: Environmental Challenges and Opportunities of the Evolving Continental Electricity Market*, a timely Article 13 initiative bringing together some of the foremost North American experts on energy. This report is the third Article 13 initiative completed by the CEC; its current report focuses on *Continental Pollutants Pathways*.

The CEC continues to explore the effects of trade liberalization in North America through market-based mechanisms and the study of trade and environment linkages. Despite some political opposition from the three NAFTA governments, the CEC's Environment, Economy, and Trade program has proved itself as a pioneer in developing valuable case studies and credible methodologies to assess the impacts of trade and environment.

The CEC's Conservation of Biodiversity program also has played an important role in convening and supporting collaborative efforts to address key areas of continental concern, such as mapping terrestrial and aquatic ecological regions in North America, identifying "Species of Common Conservation Concern," and fostering bird preservation through the North American Bird Conservation Initiative (NABCI).

Should we throw the baby out with the bath water and concede that NAAEC has not made a difference? Absolutely not. The CEC has made a considerable difference in identifying and seeking solutions to North American environmental issues, particularly those that benefit from multi-stakeholder approaches and trilateral collaboration. At this juncture, it is in the hands of the Council to determine the strength of its commitment to the NAAEC and the possibilities held within for trade and environment.

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