ARTICLE

Free Trade and the Environment: The NAFTA, the NAAEC, and Implications for the Future

Ignacia S. Moreno
James W. Rubin
Russell F. Smith III
Tseming Yang*

* Ignacia S. Moreno, James W. Rubin, and Russell F. Smith III are attorneys in the Environment and Natural Resources Division (Division), United States Department of Justice. Tseming Yang is an Assistant Professor of Law at Vermont Law School, and was previously an attorney in the Division. All four specialize in international environmental law. The views expressed in this Article are solely those of the authors and do not necessarily reflect the views of the United States Government, the United States Department of Justice or any other Federal agency. The Article's focus is on the mechanisms and procedures established under the North American Free Trade Agreement and the North American Agreement on Environmental Cooperation and their operation. Evaluations of the empirical environmental effects of the NAFTA and the NAAEC remain hampered by a scarcity of data, and are not considered in this Article. Because negotiation of the Free Trade Area of the Americas Agreement is ongoing, this Article's discussion of the process and substance of those negotiations is only current through April, 1999. The most current information on the Free Trade Area of the Americas can be found at <http://www.ftaa-alca.org>, the official website of the negotiations.

I. INTRODUCTION

Rapid industrialization by developed and developing countries has increased the interdependence and globalization of national economies. Recent history has witnessed increased efforts to spur economic development and to liberalize world trade by breaking down barriers to the free flow of goods, services and investments. At the same time, heightened awareness of the environmentally harmful effects of industrialization and other human activities has led to greater efforts to protect the global environment and to use natural resources in a sustainable manner. Economic integration through trade and investment liberalization and the protection of the environment, including natural resources conservation, have been considered independent goals that appear to be in conflict. Both are, however, important United States policy objectives that must be integrated and made mutually supportive. In the United States and abroad, democratically-elected governments have recognized sustainable development as the operating paradigm for the integration of economic, environmental and social policy objectives.[1] In practice, however, that integration has not always been easy to achieve.

1. "Sustainable Development" is a principle that recognizes the vital importance of both economic development, environmental protection and social development, as well as the need for their balance and mutual reinforcement. "Sustainable Development" has been defined as development which "meets the needs of the present without compromising the ability of future generations to meet their own needs." THE WORLD COMMISSION ON ENVIRONMENT AND

Efforts to spur economic development through international trade liberalization have not always been balanced with equal efforts to protect the environment from the potential adverse effects of such development.[2] However, public and congressional concerns regarding the potential environmental effects of the North American Free Trade Agreement (NAFTA)[3] had a significant impact on the negotiations, and resulted in the adoption of the North American Agreement on Environmental Cooperation (NAAEC),[4] also known as "the environment side agreement." These agreements among the United States, Mexico and Canada arose from a desire to promote free markets on the North American continent, while simultaneously ensuring that necessary environmental protection measures were not ignored in the push toward further trade liberalization.[5]

In 1994, the continuing pursuit of trade liberalization resulted in discussions among the leaders of the 34 democratically-elected governments in the Western Hemisphere at the Miami Summit of the Americas.[6] As a result of these discussions the leaders resolved to expand free trade and investment across the hemisphere through the establishment of a Free Trade Area of the Americas (FTAA).[7] The leaders launched formal FTAA negotiations at the Second Summit of

---

DEVELOPMENT, OUR COMMON FUTURE (Oxford Univ. Press 1987); *see also Report of the United Nations Conference on Environment and Development*, Principle 3, U.N. Doc. A/CONF. 151/26/rev. (1992) [hereinafter RIO DECLARATION] (declaring that development must consider the needs of both present and future generations). The principle of sustainable development was also elaborated at the World Summit for Social Development held in Copenhagen in March, 1995. *See Report of the World Summit for Social Development*, Annex 1, at 5, U.N. Doc. A/CONF. 166/9 (1995).

2. *See, e.g.*, General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 194 [hereinafter GATT]. The GATT is fundamentally a trade agreement, despite language in its Preamble which states that the Parties agree to conduct their trade and economic relations in a manner that "allows the optimal use of the world's resources in accordance with the objective of sustainable development[.]" *Id*., at Preamble. It was not until 1994 that the Committee on Trade and the Environment was established by the World Trade Organization to examine the relationship between trade and the environment in order to promote sustainable development, and make recommendations on whether modifications to the multilateral trading system to accomplish that end were necessary. *See infra* Part IV.C.1 and notes 332-343 and accompanying text.

3. The North American Free Trade Agreement between the Government of the United States, the Government of Canada, and the Government of the United Mexican States, Dec. 17, 1992, 32 I.L.M. 296 (1993) [hereinafter NAFTA].

4. North American Agreement on Environmental Cooperation, Sept. 14, 1993, 32 I.L.M. 1480 (1993) [hereinafter NAAEC].

5. *See* NAFTA, *supra* note 3, at 297; NAAEC, *supra* note 4, at Preamble.

6. *See* SUMMIT OF THE AMERICAS, DECLARATION OF PRINCIPLES AND PLAN OF ACTION, Dec. 11, 1994, 34 I.L.M. 808 (1995) [hereinafter SUMMIT OF THE AMERICAS].

7. *See id.* at 811.

the Americas in Santiago, Chile in April, 1998.[8] The FTAA negotiations are scheduled to conclude by the year 2005.[9] At this time, it is unclear how such a broad-based free trade agreement will ultimately address or affect environmental protection.

This Article identifies free trade and environmental protection principles found in the NAFTA and the NAAEC, and examines how such principles may be applied to the FTAA Agreement under negotiation. Part II sets the stage for the discussion by examining the background of the NAFTA and the NAAEC, and focuses on those provisions applicable to environmental protection. Part III examines the NAAEC's framework, objectives and programs implemented under the Agreement, including the unique provisions for ensuring high levels of environmental protection, public participation, and trilateral cooperation on environmental enforcement. Part III also considers the implementation of the NAAEC and related institutions and initiatives concerning the environment in the United States-Mexico border region. Part IV introduces the FTAA process and explores contemporary developments in the interplay between trade expansion and environmental protection. Part V identifies a number of themes and principles that emerge from the NAFTA and the NAAEC, and considers lessons learned from the NAFTA and the NAAEC that maybe applicable to the FTAA. The Article concludes by discussing the possible relevance of these themes and principles to the FTAA, and identifying matters that may need to be considered during the FTAA negotiations.

II. NEGOTIATION OF THE NORTH AMERICAN FREE TRADE AGREEMENT AND ITS ENVIRONMENT SIDE AGREEMENT

A. Background

An understanding of the historical background of the NAFTA[10] and the NAAEC, is necessary to appreciate the structure and

---

8. *See* SECOND SUMMIT OF THE AMERICAS, DECLARATION OF PRINCIPLES AND PLAN OF ACTION, Apr. 19, 1998, 37 I.L.M. 947 (1998) [hereinafter SECOND SUMMIT OF THE AMERICAS, SANTIAGO MINISTERIAL DECLARATION AND SANTIAGO PLAN OF ACTION].

9. *See* SUMMIT OF THE AMERICAS, *supra* note 6; *see also* SECOND SUMMIT OF THE AMERICAS, *supra* note 8.

10. The NAFTA is supplemented by three other agreements: the NAAEC; the Agreement Between the Government of the United States of America and the Government of the United Mexican States Concerning the Establishment of a Border Environment Cooperation Commission and a North American Development Bank [hereinafter the BECC-NADBank Agreement]; and the North American Agreement on Labor Cooperation [hereinafter the NAALC]. *See* NAAEC, *supra* note 4; BECC-NADBank Agreement, Nov. 16 and 18, 1993, 32 I.L.M. 1545 (1993); and the NAALC, Sept. 14, 1993, 32 I.L.M. 1502 (1993), respectively. The

implementation of these agreements and their possible application to the FTAA. In the mid-1980s, Canadian Prime Minister Brian Mulroney's government began pursuing bilateral negotiations with the United States for an agreement that would ensure the economic benefits of free trade.[11] It was estimated that in Canada alone, such an agreement would create at least 200,000 jobs by 1995.[12] In addition, the value of exports from the United States to Canada were expected to increase by twenty-five billion dollars over a five-year period.[13] In December, 1987, United States President Ronald Reagan and Prime Minister Mulroney signed the Canada-United States Free Trade Agreement, which became the basis for many aspects of the NAFTA.[14]

At about the same time, Mexico expressed its interest in expanding free trade with the United States as part of its ongoing program of trade liberalization and economic development.[15] Trade liberalization with Mexico was expected to yield benefits for the United States' economy.[16] In June, 1990, Mexico and the United States agreed to work towards the negotiation of a comprehensive bilateral free trade agreement.[17]

While the effects of free trade on the environment had not been a major concern during the negotiation of the United States-Canada Free Trade Agreement, such concerns surfaced almost immediately after the announcement that the United States would officially consider free trade talks with Mexico.[18] Public concern arose over the

---

BECC-NADBank Agreement and its implementation is discussed in Part III.E *infra* at notes 270-288 and accompany text. Discussion of the NAALC is beyond the scope of this Article.

11. *See U.S.-Canada Free Trade Pact Would Benefit Economies of Both Countries, Study Finds*, 4 Int'l Trade Rep. (BNA) 344 (Mar. 11, 1987).

12. *See Free Trade Agreement with United States Would Create Canadian Jobs, Report Says*, 3 Int'l Trade Rep. (BNA) 1288 (Oct. 22, 1986).

13. *See U.S.-Canada FTA Could Result in 'Significant' Economic Gains for Both Countries, Katz Says*, 4 Int'l Trade Rep. (BNA) 1440 (Nov. 18, 1987).

14. *See* Canada-United States: Free-Trade Agreement, Dec. 22, 1987 and Jan. 2, 1988, 27 I.L.M. 281 (1988).

15. *See President-Elect Salinas, Despite Pressures, Can Be Expected to Keep Trade Reform Course*, 5 Int'l Trade Rep. (BNA) 1577 (Nov. 30, 1988); *see also Mosbacher Says Mexico FTA Will Improve Both Economies and Create More U.S. Jobs*, 8 Int'l Trade Rep. (BNA) 249 (Feb. 13, 1991) [hereinafter *Mosbacher*].

16. *See Mosbacher*, *supra* note 15.

17. *See Bush and Mexican President Salinas Agree to Move Toward Free Trade Agreement*, 7 Int'l Trade Rep. (BNA) 834 (June 13, 1990). Actual negotiations did not commence until October, 1990. *See President Sends Formal Request to Congress to Begin Free Trade Negotiations with Mexico*, 7 Int'l Trade Rep. (BNA) 1499 (Oct. 3, 1990).

18. *See Canada Will Make Decision by Fall on Role in U.S.-Mexico Free Trade Talks, Crosbie Says*, 7 Int'l Trade Rep. (BNA) 971, 972 (June 27, 1990); *AFL-CIO Tells House Panel*

potential environmental impacts of a free trade agreement with Mexico, and the ability of the United States to protect public health and the environment under such a pact.[19] Although Canada had been expected to participate in the bilateral discussions,[20] it did not join the trade talks until February, 1991, because of concerns over the potential impacts of free trade with Mexico on public health, safety, and the environment.[21]

In the United States, environmental groups and members of Congress believed that Mexico's environmental laws and their enforcement were less stringent than in the United States.[22] They feared that free trade would exacerbate a preexisting "pollution haven" in Mexico by encouraging relocation of United States industry.[23] Environmentalists feared that the relocation of American industry to Mexico would also create pressure to downgrade environmental norms in the United States.[24] Critics of free trade generally argued that such downward pressure would occur, in part, because investors would seek to reduce the costs of environmental compliance by relocating industry to Mexico.[25] They posited that countries seeking investment would have a disincentive to raise environmental standards above those of countries with which they

---

that New FTA Between U.S.-Mexico Would Harm U.S. Workers, 7 Int'l Trade Rep. (BNA) 1001 (July 4, 1990).

19. *See* Anne Rowley, *Mexico's Legal System of Environmental Protection*, 24 Envtl. L. Rep. 10, 431 at n.1 (Aug. 1994) [hereinafter Rowley]. Some also expressed concern that Mexico's environment would erode under the NAFTA. *See Operating Standard for Maquiladoras Sought in U.S.-Mexico FTA Legislation*, 8 Int'l Trade Rep. (BNA) 279 (Feb. 20, 1991).

20. *See Canada Will Make Decision by Fall on Role in U.S.-Mexico Free Trade Talks, Crosbie Says*, supra, note 18; *Canada Will Join United States and Mexico in Negotiation for Free Trade Agreement*, 8 Int'l Trade Rep. (BNA) 184 (Feb. 6, 1991). Concern that the United States might gain dominance over the North American market through exclusive bilateral agreements, and, thus, become the only country with free trade access to all of North America contributed to Canada's request to participate in the trade talks. *See Canada Must Join Talks on U.S.- Mexico FTA to Prevent U.S. Trade Domination, Study Says*, 7 Int'l Trade Rep. (BNA) 1480 (Sept. 26, 1990). However, as late as March, 1990, Canada had ruled out a bilateral or trilateral free trade agreement with Mexico. *See Canada, Mexico Sign Trade Agreement, But Canada Rules Out Free Trade Zones*, 7 Int'l Trade Rep. (BNA) 409 (Mar. 21, 1990).

21. *See, e.g.*, *Canada Will Make Decision by Fall on Role in U.S.-Mexico Free Trade Talks, Crosbie Says*, *supra*, note 18.

22. *See, e.g., NAFTA: Environmental Issues: Hearings Before the Subcomm. on Rules of the House of Comm. on Rules, House of Representatives*, 102d Cong., 1st. Sess. (1991) [hereinafter NAFTA Environmental Hearings]. A report prepared by the Environmental Protection Agency (EPA) suggests that the perception that Mexico's environmental laws are less stringent may be correct. *See* Rowley, *supra* note 19, at n.258 and accompanying text.

23. *See, e.g.*, NAFTA Environmental Hearings, *supra* note 22, at 77 (statement of Dr. Brent Blackwelder, President, Friends of the Earth, USA).

24. *See* NAFTA Environmental Hearings, *supra* note 22, at 52-53.

25. *See id.* at 53.

competed for investment dollars if their environmental standards were lower.[26] Opponents also charged that Mexico might use claims of protectionism under the trade agreement to challenge and dismantle the United States' environmental and health and safety standards, because such standards would allegedly make it more difficult for Mexico to export its goods to the United States.[27]

Fears that increased economic development would lead to increased pollution were not without a historical basis. Since 1963, a number of United States-owned companies, primarily manufacturing and assembly plants, relocated to Mexico under a Mexican government sponsored plan.[28] Through this relocation, such companies, called "maquiladoras," took advantage of preferential tariff and tax treatment and Mexico's lower labor costs, while remaining in close proximity to the United States' market.[29] Maquiladoras were believed to generate hazardous wastes and to contribute significantly to air and water pollution that affected not only the Mexican side of the border, but also the environment of the United States.[30] Mexico's environmental protection laws appeared to be neither complied with by the maquiladoras nor enforced by Mexican authorities.[31]

Concerns that United States environmental standards could be jeopardized by free trade requirements crystallized when Mexico challenged a United States embargo on Mexican tuna under the

---

26. *See id.* at 52-53.

27. *See Fast-Track Process for Trade Agreement Threatens Environmental Laws, Groups Warn*, 8 Int'l Trade Rep. (BNA) 698 (May 8, 1991).

28. *See, e.g.*, NAFTA Environmental Hearings, *supra* note 22; *Environmental Assessment of Trade Agreement Urged by 17 Lawmakers in Letter to President*, 21 Env't Rep. (BNA) 1996 (Mar. 8, 1991); *Trade Talks Should Include Environment, Citizen Groups Tell House Rules Subcommittee*, 22 Env't Rep. (BNA) 1560 (Oct. 18, 1991).

29. *See Operating Standards for Maquiladoras Sought in U.S.-Mexico FTA Legislation*, *supra*, note 19. In 1987, there were an estimated 1000 maquiladora plants, employing approximately 300,000 Mexican workers, and providing Mexico with $1.6 billion in foreign exchange. *See Commerce Supports Maquiladora Programs to Preserve Jobs, Promote Competition*, 4 Int'l Trade Rep. (BNA) 790 (June 17, 1987).

30. *See Water Pollution Called Biggest Problem in Region of United States/Mexico Border*, 24 Env't Rep. (BNA) 1080 (Oct. 8, 1993). In addition to direct discharges to the environment by maquiladoras, there were a number of indirect impacts from the pressures placed by population growth on existing wastewater treatment infrastructure, as workers migrated to the border to work at maquiladoras.

31. *See Lack of Environmental Protection Provision May Lead to Trade Pact Rejection, Baucus Warns*, 22 Env't Rep. (BNA) 2378 (Feb. 14, 1992); *Six U.S.-Owned Maquiladoras Did Not Comply With Mexican Environmental Laws*, *GAO Reports*, 23 Env't Rep. (BNA) 1206 (Aug. 14, 1992).

General Agreement on Tariffs and Trade (GATT).[32] The Marine Mammal Protection Act prohibited the importation of tuna caught with purse-seine nets, because of the harm that practice caused to porpoises.[33] In August, 1991, a GATT dispute panel found that the United States' embargo violated the Agreement, because it constituted a discriminatory nontariff trade barrier that did not fall within the GATT's Article XX exceptions.[34] Under the GATT rules applicable at the time, the United States voted against acceptance of the final report, and consequently was not subject to sanctions or penalties.[35] Thus, despite the exceptions under the GATT for environmental protection measures, a GATT panel had found that a United States environmental law violated the trade rules.[36]

The panel's findings raised questions about the adequacy and scope of the GATT's environmental exceptions and the overall effect on U.S. environmental laws of a trade agreement with Mexico. Doubts also arose concerning the ability of the U.S. to implement trade restrictive components of international environmental agreements,[37] such as the Convention on International Trade in

---

32. *See* General Agreement of Tariffs and Trade: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, 30 I.L.M. 1594 (1991) [hereinafter Tuna-Dolphin I]; *see also U.S. Embargo on Mexican Tuna Violates GATT Rules, Panel Finds*, 8 Int'l Trade Rep. (BNA) 1288 (Aug. 28, 1991); Earth Island Institute v. Mosbacher, 746 F. Supp. 964 (N.D. Cal. 1990), *aff'd*, 929 F.2d 1449 (9th Cir. 1991).

33. *See* Marine Mammal Protection Act, 16 U.S.C. § 1371(a)(2)(B) (1997).

34. *See* Tuna-Dolphin I, *supra* note 32 at 1623. Article XX (General Exceptions) of the GATT provides, in part:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> . . . .
>
> (b) necessary to protect human, animal or plant life or health;
>
> . . . .
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

GATT, *supra* note 2.

35. *See* Tuna-Dolphin I, *supra*, note 32 at 1594.

36. In 1994, a second GATT panel reached the same conclusion reached by the panel in the first Tuna Dolphin matter in a challenge by the European Union to the United States' restrictions on the importation of certain tuna. *See* General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, 33 I.L.M. 839, 895 (1994) [hereinafter Tuna-Dolphin II].

37. *See*, Donald M. Goldberg, *GATT Tuna-Dolphin II: Environmental Protection Continues to Clash with Free Trade—Part II*, 2 Center for International Environmental Law (June 1994) <http://www:econet.upc.org/ciel/issue2b.html>

Endangered Species of Wild Fauna and Flora (CITES)[38] and the Montreal Protocol of Substances that Deplete the Ozone Layer (Montreal Protocol).[39]

In May, 1991, as part of an effort to persuade Congress to renew fast-track authority for the United States-Mexico trade agreement, the Administration of President George Bush issued a formal response to the environmental concerns that had been raised by the House of Representatives.[40] The Bush Administration pledged to step up cooperative efforts with Mexico to address environmental trade issues in the free trade negotiations and to launch a number of joint environmental initiatives.[41] President Bush committed to a final trade agreement that would address environmental issues by including measures that would permit the United States to: (1) exclude products that did not meet its environmental standards; (2) implement environmental standards that were stricter than those of the exporting country; and (3) comply with international environmental agreements, such as CITES and the Montreal Protocol, regardless of potential inconsistencies between those agreements and the trade and investment rules and disciplines in the NAFTA.[42] In addition, the President promised to complete a long-term border plan to address pollution and enforcement issues.[43] President Bush also announced that the Administration would engage in a review of United States-Mexico environmental issues, including a study of the environmental effects of a free trade agreement.[44] These efforts led to the release of a 231-page review of U.S.-Mexico environmental issues in February, 1992.[45]

---

38. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249, 993 U.N.T.S. 243 [hereinafter CITES].

39. Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1541 (1987) [hereinafter Montreal Protocol].

40. *See Response of the Administration to Issues Raised in Connection With the Negotiation of a North American Free Trade Agreement*, 1991 WL 434200 (May 1, 1991) [hereinafter *Response of the Administration*].

41. *See id.* at *1.

42. *See id.* at *6. The major NAFTA provisions addressing environmental matters are discussed *infra* in Part II.B.

43. *See Response of the Administration*, *supra* note 40, at *7-8. The promise eventually resulted in the February, 1992, Integrated Environmental Plan for the Mexican United States Border Area. *See infra* note 83.

44. *See Response of the Administration*, *supra* note 40, at *5-*6.

45. *See* United States Trade Representative, Review of U.S.-Mexico Environmental Issues (1992) [hereinafter Environmental Review]. *See also President Announces Three-Year Program to Clean up, Prevent Pollution at Mexican Border*, 22 Env't Rep. (BNA) 2427 (Feb. 28, 1992). A draft of the report was made available to Congress and the public for comment on October 17, 1991.

Despite these efforts the public remained skeptical toward a United States free trade agreement with Mexico. Environmental groups criticized the Environmental Review as being too narrow in scope, too optimistic with respect to the potential benefits of a free trade agreement, and too pessimistic about the environmental benefit from not enacting a free trade agreement.[46] Specifically, skepticism was directed at the Environmental Review's conclusion that a free trade agreement would have positive environmental effects, because economic development would occur in the border area.[47]

Environmentalists demanded that a formal environmental impact statement (EIS) be prepared under the National Environmental Policy Act (NEPA).[48] In August, 1991, before the public release of the draft version of the Environmental Review, Public Citizen, a non-governmental organization, and others filed suit against the Office of the United States Trade Representative (USTR).[49] Public Citizen's challenge failed when the Court of Appeals for the District of Columbia affirmed the dismissal of its claims on jurisdictional grounds.[50] Because the NAFTA was still under negotiation, there was no final agency action reviewable under the Administrative Procedures Act.[51]

Congress approved the NAFTA by enacting the NAFTA Implementation Act in November, 1993.[52] The Act was signed into law by President William Clinton in December, 1993.[53]

B. The NAFTA Provisions Applicable or Relevant to Environmental Protection

In spite of initially strong environmental opposition to the NAFTA, its final provisions addressing health, safety and the

---

46. *See, e.g.*, NAFTA Environmental Hearings, *supra* note 22, at 121, 123-130 (critique of the USTR's Review of U.S./Mexico Environmental Issues).

47. *See id.* at 126; *see also* Environmental Review, *supra* note 45, at 223.

48. *See* National Environmental Policy Act, 42 U.S.C. §§ 4321-4370 (1995).

49. *See* Public Citizen v. Office of the United States Trade Representative, 782 F. Supp. 139 (D.D.C. 1992) *aff'd* 970 F.2d 916 (D.C. Cir. 1992) (claiming that USTR violated NEPA by not preparing an EIS for the NAFTA); *see also* Rebekah Denn, *Trade Accord Sparks Suit by 3 Groups*, THE SEATTLE TIMES, Aug. 2, 1991, at C12.

50. *See* Public Citizen, *et al.* v. Office of the United States Trade Representative, *et. al.*, 970 F.2d at 919-921.

51. *See id*. A subsequent challenge to the NAFTA by Public Citizen and others also failed on the grounds that submission of the NAFTA to Congress by the President did not constitute final agency action reviewable under the Administrative Procedure Act. *See* Public Citizen v. Office of the United States Trade Representative, 5 F.3d 549, 551-52 (D.C. Cir. 1993).

52. 19 U.S.C. § 3311 (1997); Pub. L. No. 103-182, 107 Stat. 2057 (1993) [hereinafter NAFTA Implementation Act].

53. *See* Ronald A. Taylor, *Clinton Signs NAFTA,* WASH. TIMES, Dec. 9, 1993, at A4.

environment provide important safeguards. These provisions represent significant progress over environmental protections provided under other trade agreements, such as the GATT.[54] Although the NAFTA is first and foremost a trade agreement, it contains a number of provisions discussed below that are directly applicable or relevant to environmental issues.

1. Preamble

The Preamble of the NAFTA expresses the high aspirations of the Parties with respect to environmental protection and sets the context for interpretation of the specific provisions of the agreement. The Preamble states that the Parties resolve, among other things, to: (1) "[u]ndertake [to act] in a manner consistent with environmental protection and conservation [in pursuing the goals of the agreement];" (2) "[p]reserve their flexibility to safeguard the public welfare;" (3) "[p]romote sustainable development;" and (4) "[s]trengthen the development and enforcement of environmental laws and regulations."[55]

2. Right to Protect Health, Safety, and the Environment

The NAFTA sets forth a number of basic rights available to the Parties and obligations with which they must comply to ensure the protection of their respective environment.[56] For example, each party, including its state and local governments, has the right to: (1) establish its own appropriate levels of human health, safety and environmental protection; (2) adopt, maintain, or apply measures to achieve these goals; (3) set protective standards that are higher than international standards; (4) adopt measures that achieve such higher standards; and (5) use provisional protection measures when the available scientific evidence or other information is insufficient to complete an assessment of what environmental protection levels are adequate.[57] Accordingly, the NAFTA specifically recognizes each

54. *See* Steve Charnovitz, *The North American Free Trade Agreement: Green Law or Green Spin?*, 26 LAW & POL'Y INT'L BUS. 1, 29 (1994). According to Jay Hair, the President of the National Wildlife Federation, the "NAFTA makes substantial improvements over the GATT, and reduces the probability of successful challenges to our laws to near zero . . . ." *Id.*

55. NAFTA Implementation Act, *supra* note 52, Preamble.

56. *See*, *e.g.*, NAFTA, *supra* note 3, arts. 712 (Sanitary and Phytosanitary Measures) and 904 (Standards-Related Measures).

57. *See, e.g., id.* arts. 713, 905, 715 and 907: *see also North American Free Trade Agreement, Texts of Agreement, Implementing Bill, Statement of Administrative Action, and Required Supporting Statements*, H.R. Doc. No. 159, at 541, 573 (1993), *reprinted in* ARNOLD & PORTER LEGISLATIVE HISTORY, Pub. L. No. 103-182 [hereinafter A&P LEG. HIST.].

country's right to set appropriate levels of protection for health, safety, and the environment.[58] The NAFTA also allows each party to impose environmental requirements, consistent with the Parties' obligations under the Agreement, to ensure that investment activity in its territory is undertaken in an environmentally sensitive manner.[59]

In the context of sanitary and phytosanitary (SPS) measures,[60] the right to protect the environment takes on a special meaning. SPS measures may be discriminatory, because "imported goods or goods from a particular foreign country . . . pose a different risk of a plant or animal pest or disease."[61] In contrast, a Party may not discriminate arbitrarily or unjustifiably between similar goods or services in setting the level of protection that it considers appropriate for standards-related measures (SRMs).[62] Neither type of measure may create an "unnecessary obstacle to trade."[63]

---

58. *See* A&P LEG. HIST., *supra* note 57, at 542; *see also* Office of the U.S. Trade Representative, the NAFTA: Expanding U.S. Exports, Jobs and Growth: Report on Environmental Issues 7-8 (1993) *reprinted in* MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING NORTH AMERICAN FREE TRADE AGREEMENT SUPPLEMENTAL AGREEMENTS AND ADDITIONAL DOCUMENTS, H.R. DOC. NO. 103-160 (1993) [hereinafter MESSAGE FROM THE PRESIDENT].

59. *See* NAFTA, *supra* note 3, art. 1114(1); *see also* A&P LEG. HIST., *supra* note 57, at 594.

60. A sanitary or phytosanitary (SPS) measure is a measure "that a Party adopts, maintains or applies to:

> (a) protect animal or plant life or health in its territory from risks arising from the introduction, establishment or spread of a pest or disease,
> (b) protect human or animal life or health in its territory from risks arising from the presence of an additive, contaminant, toxin or disease-causing organism in a food, beverage or feedstuff,
> (c) protect human life or health in its territory from risks arising from a disease-causing organism or pest carried by an animal or plant, or a product thereof, or
> (d) prevent or limit other damage in its territory arising from the introduction, establishment or spread of a pest, including end product criteria; a product-related processing or production method; a testing, inspection, certification or approval procedure; a relevant statistical method; a sampling procedure; a method of risk assessment; a packaging and labeling requirement directly related to food safety; and a quarantine treatment, such as a relevant requirement associated with the transportation of animals or plants or with material necessary for their survival during transportation."

NAFTA, *supra* note 3, art. 724.

61. A&P LEG. HIST., *supra* note 57, at 537. "Discrimination is only allowed as long as it is not arbitrary or unjustifiable." *Id.*

62. *See* NAFTA, *supra* note 3, art. 907(2). A standards-related measure (SRM) is a standard, technical regulation or conformity assessment procedure, other than an SPS measure, including "those relating to safety, the protection of human, animal and plant life and health, the environment, and consumers, and measures to ensure their enforcement or implementation." *Id.* arts. 915, 904.

63. *See id.* arts. 712(6), 904(4). SPS measures, for example, must be based on scientific principles, must not be maintained if a scientific basis no longer exists, and must be based on a risk assessment where appropriate. *See id.* art. 712(3). Risk assessments used in determining the

3. Maintaining Existing Environmental Protection Levels

The NAFTA also contains a number of other provisions that generally support the protection of health, safety and the environment. In the first instance, the NAFTA recognizes that "it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures," and permits consultations among the Parties where such activity has been alleged.[64] Furthermore, the NAFTA provides that if a party's environmental measures are challenged as violative of SPS or SRM requirements, and the party requests technical country-to-country consultations, the challenging party bears the burden of proving that the measure is inconsistent with the NAFTA.[65] Finally, the NAFTA encourages the use of international standards,[66] and promotes cooperative efforts to enhance the level of health, safety and environmental protection.[67]

4. Transparency

Transparency is a concept generally applicable to government decision-making and regulatory activity, although it can have particular relevance to environmental protection. The NAFTA contains a number of provisions to promote transparency in government regulation.[68] The NAFTA defines transparent procedures as "those [procedures] designed to allow interested persons to know what requirements apply and to be able to adapt their production or other activity to the requirements."[69]

In the context of free trade agreements, protection of health, safety, and the environment has not been the impetus for transparency. Transparency has instead generally been considered a tool to prevent disguised barriers to trade and to facilitate international trade by helping exporters learn about the regulatory requirements of the

---

appropriate level of protection must also be based on relevant scientific evidence, and a Party should "take into account the objective of minimizing negative trade effects" in establishing its appropriate level of protection. *Id.* art. 715; *see also* A&P LEG. HIST., *supra* note 57, at 546- 47.

64. NAFTA, *supra* note 3, art. 1114(2).

65. *See id.* arts. 723(6), 914(4); *see also* A&P LEG. HIST., *supra* note 57, at 550, 578. While the text is not explicit, the burden of proving the inconsistency of an environmental measure with the obligations in the NAFTA presumably carries over to the dispute resolution stages, including mediation and arbitration. *See* NAFTA, *supra* note 3, arts. 2007-2008.

66. *See* NAFTA, *supra* note 3, arts. 713, 905; *see also* A&P LEG. HIST., *supra* note 57, at 544-45, 574.

67. *See* NAFTA, *supra* note 3, arts. 720, 722, 906.

68. *See* A&P LEG. HIST., *supra* note 57, at 549-50; NAFTA, *supra* note 3, arts. 718, 719.

69. A&P LEG. HIST., *supra* note 57, at 549-50.

importing country.[70] Because transparency facilitates government accountability and public participation in governmental decision-making on matters of public policy, including the environment, it may be considered an additional element that promotes environmental protection under the NAFTA.

Transparency is promoted under the NAFTA through the requirement that the Parties provide advanced public notice of laws, regulations, procedures, and other information relevant to a Party's interest under the Agreement.[71] NAFTA also requires designation of public inquiry locations regarding such laws and regulations.[72] Thus, transparency can serve as an important means of securing the protections included in the NAFTA by providing an interested public with access to information, which is a necessary element in securing a meaningful role in the policy-making process. In particular, it can facilitate citizen and interest groups participation in decisions affecting protection of the environment, thereby improving the implementation of the Agreement's provisions on health, safety and the environment.

5. Reservations and Exceptions

Although the NAFTA prohibits the Parties from discriminating between foreign and domestic investors and among foreign investors, it also allows for some exceptions.[73] Pre-existing national laws can be "grandfathered" against legal challenge under the chapter on investment, which provides for national treatment[74] and most-favored-nation treatment[75] for foreign investors and investments.[76] In addition,

---

70. *See* NAFTA, *supra* note 3, art. 718.

71. *See id.* arts. 1802-1803; *see also id.* art. 718.

72. *See id.* arts. 719, 910.

73. *See id.* Annex I, Reservations for Existing Measures and Liberalization Commitment Schedule of the United States, art. 104, Annex I. The United States negotiated a country- specific reservation from NAFTA's investment disciplines for a number of statutes, including the Clean Water Act, the Federal Insecticide, Fungicide, and Rodenticide Act, as well as the Atomic Energy Act and Mineral Lands Leasing Act of 1920. These exceptions also apply to NAFTA Chapter 12 (Cross-Border Trade in Services) and Chapter 14 (Financial Services).

74. National treatment is the requirement that a NAFTA Party "accord to [investors] of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to . . . investments." NAFTA, *supra* note 3, art. 1102(1).

75. Most-favored-nation treatment is the requirement that a NAFTA Party accord to the investors and investments "of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to . . . investments." *Id.* art. 1103(1)-(2).

76. *See id.* art. 1108. Chapter 11, the Investment Chapter, also permits an individual private investor to bring an investment dispute claim against a Party. If a dispute remains after consultation or negotiation, the NAFTA provides a mechanism for arbitration. *See id.* arts. 1115-

NAFTA generally accords special treatment to certain specified international agreements.[77] For example, NAFTA Article 104 provides that in the event of an inconsistency between the NAFTA and trade-related obligations in international environmental agreements,[78] the trade-related obligations in the environmental agreement will prevail to the extent of the inconsistency. However, "where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party [must] choose[] the alternative that is the least inconsistent with the other provisions of [the NAFTA]."[79]

Finally, the NAFTA provides a number of general exceptions to its overall requirements for national security and other interests[80] In particular, it incorporates the environmental exceptions of Article XX of the General Agreement on Tariffs and Trade (GATT) into Part II (Trade in Goods) and Part III (Technical Barriers to Trade).[81]

C. Negotiation of the Environment Side Agreement

The negotiation and adoption of the NAAEC was the primary response to a contentious debate surrounding the adoption of the

---

1138. There have been a number of recent challenges to environmental regulations under the Investment Chapter. For example, Ethyl Corporation, an American-owned company, challenged the Canadian government's ban on the use of MMT, a manganese-containing gasoline additive under Chapter 11 of the NAFTA. *See MMT: Ethyl Corp. Files NAFTA Claim over Passage of Canadian Import Ban*, 21 Chem. Reg. Rep. (BNA) 49 (Apr. 18, 1997). Canada settled the dispute with a payment to Ethyl Corp. and withdrawal of the ban. *See MMT: Canadian Government Withdraws Ban on Trade, Import of Gasoline Additive*, 22 Chem. Reg. Rep. (BNA) 781 (July 24, 1998). Several additional challenges to environmental regulations have also been filed under Chapter 11. *See, e.g.*, *Third NAFTA Investor-State Dispute Versus Canada Arises Over Water*, AMERICAS TRADE, Dec. 24, 1998, at 1, 12-13; *Parties Seek Panel in NAFTA Investor Case on Waste Against Mexico*, AMERICAS TRADE, Apr. 22, 1999, at 9-12.

77. The agreements specified under NAFTA Article 104.1 include: the Convention on International Trade in Endangered Species of Wild Fauna and Flora, *supra* note 38; the Montreal Protocol on Substances that Deplete the Ozone Layer, *supra* note 39; and two bilateral agreements: the Agreement Between the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Waste, Oct. 28, 1996, T.I.A.S. No. 11099; and 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, Aug. 14, 1993, T.I.A.S. No. 10827. *See* NAFTA, *supra* note 3, art. 104.1, Annex 104.1.

78. *See* NAFTA, *supra* note 3, art. 104.1.

79. *Id.*

80. *See id.* arts. 2101, 2102.

81. *See id.* art. 2101(1); *see also supra* note 34 and accompanying text. The Article 2101(1) exceptions do not apply to services or investments. *See* NAFTA, *supra* note 3, art. 2101. These exceptions also do not apply to sanitary and phytosanitary measures, which are covered in Chapter 7 of the NAFTA. *See id.* art. 710. Article 2101(2) extends exceptions similar to those in GATT Article XX to services. *See id.* art. 2101(2).

NAFTA and the effects that the Agreement was expected to have on the environment in North America.[82] Despite the inclusion of provisions in the NAFTA to respond to criticisms of the Agreement,[83] environmentalists considered the Agreement insufficiently protective of the environment.

During the 1992 Presidential campaign, Democratic Presidential Candidate William Clinton made a pledge to seek to complement the NAFTA with significant environmental guarantees and to negotiate an additional side agreement to the NAFTA to protect the environment.[84] Following the Presidential election, the new Clinton Administration conducted a second review of the environmental issues raised by the NAFTA. The results of that review, entitled *The NAFTA Report on Environmental Issues*, were submitted to Congress, with the NAFTA implementing legislation in November, 1993.[85]

Although the idea of an environmental side agreement to the NAFTA originated under the Bush Administration, the Clinton Administration brought this concept to fruition.[86] Canada, Mexico, and the United States completed drafting the NAAEC in September, 1993 and the Agreement entered into force in January, 1994.[87] Thus, the NAFTA and the NAAEC were negotiated against a backdrop of

---

82. *See* Commission for Environmental Cooperation, *Potential NAFTA Effects: Claims and Arguments 1991-1994* (Apr. 1996) <http://www.cec.org/english/profile/index.cfm>.

83. *See supra* notes 54-67 and accompanying text. The Bush Administration further attempted to address environmental concerns in continuous discussions with Mexico on environmental matters, for example, by amending 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 (La Paz Agreement). These efforts resulted in the preparation of the Integrated Environmental Plan for the Mexican-United States Border Area, which was made public in February, 1992. The Integrated Border Environment Plan outlined a three-year, one billion dollar joint United States-Mexico initiative to address both environmental and labor issues in the border area. *See* 22 I.L.M. 1025 (1983); *Three Environmental Agreements Signed by United States, Mexico During Visit by Salinas*, 20 Env't Rep. (BNA) 1095 (Oct. 20, 1989); U.S.-Mexico Border, 22 Envtl. L. Rep. 10358 (May 1992); *President Announces Three-Year Program to Clean up, Prevent Pollution at Mexican Border*, 22 Env't Rep. (BNA) 2427 (Feb. 28, 1992); *see also* Integrated Environmental Plan for the Mexican-U.S. Border Area (1st Stage, 1992-1994), 57 Fed. Reg. 8453 (Mar. 10, 1992). Bi-national cooperation on the improvement of the border environment continues under the Border XXI Plan through the year 2000. *See* U.S. EPA, U.S.-MEXICO BORDER XXI PROGRAM: FRAMEWORK DOCUMENT (Oct. 1996); *United States, Mexico Adopt New Border Plan, Pact*, 27 Env't Rep. (BNA) 247 (May 10, 1996); *see also Binational Plan Spells out Objectives for Cleaning up Pollution along Border*, 27 Env't Rep. (BNA) 470 (June 21, 1996).

84. *See Clinton Endorses the NAFTA with Certain Reservations*, 9 Int'l Trade Rep. (BNA) 1720 (Oct. 7, 1992).

85. *See* MESSAGE FROM THE PRESIDENT *supra* note 58.

86. *See Group to Oversee NAFTA Environmental Issues*, 23 Env't Rep. (BNA) 1880 (Nov. 20, 1992).

87. *See* NAAEC, supra note 4.

concern that the promotion of free trade and economic development would lead to a decline in the protection of the environment in North America. Indeed, support for the NAFTA was eventually achieved only through the negotiation of the NAAEC, to complement the NAFTA, and through United States-Mexico bilateral commitments to improve the environment in the border area.[88]

III. THE GENERAL FRAMEWORK AND IMPLEMENTATION OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION AND RELATED ENVIRONMENTAL ACTIVITIES

This Part of the Article reviews the NAAEC's framework and the programs implemented under that Agreement. Specifically, it considers the role of the Commission for Environmental Cooperation (Commission or CEC) as a forum for trilateral cooperation in environmental protection in North America, including cooperation in environmental enforcement and compliance. It also examines the implementation of the NAAEC's requirements that each Party ensure that its laws and regulations provide for high levels of environmental protection; work to improve its laws and regulations; and take appropriate governmental action to enforce its environmental laws effectively. In addition, the unique role of the public in the implementation of the Agreement through participation in consultations and other activities of the Commission, and through the submission of petitions alleging government failure to enforce environmental laws effectively is also explored. The role of bilateral agreements negotiated in conjunction with the NAAEC in furthering the goal of environmental protection is also evaluated. Ultimately, this review may inform the possible menu of options available for consideration by negotiators of the FTAA to ensure environmental protection in that context.

The Parties' objectives under the NAAEC are in part to work cooperatively to foster the protection and betterment of the environment; promote sustainable development; enhance enforcement and compliance with environmental laws and regulations; promote transparency and public participation, and avoid creating distortions

88. Parallel bilateral negotiations with Mexico resulted in the Mexico-United States Agreement Concerning the Establishment of a Border Environment Cooperation Commission (BECC) and a North American Development Bank (NADBank). *See* The Establishment of a Border Environment Cooperation Commission and a North American Development Bank, 32 I.L.M. 1545 (1993); *see* Discussion of the BECC and NADBank, at *infra* Part III.E, notes 270-288 and accompanying text.

or new barriers to trade.[89] Against the backdrop of these objectives, the Parties have agreed to provide for high levels of domestic environmental protection in their respective laws and regulations,[90] and to achieve such levels through the effective enforcement of the same.[91]

As discussed more fully in Parts II.C and II.D below, the Parties have undertaken considerable trilateral efforts to address environmental issues affecting their shared ecosystems, watersheds and airsheds. They have also undertaken steps domestically to maintain high levels of environmental protection with varying degrees of success.

A. The North American Commission for Environmental Cooperation

The NAAEC established the Commission to help ensure that the Parties meet their NAAEC commitments and to realize the Agreement's goals and objectives.[92] The Commission's work is central to the Parties' implementation of the Agreement, which calls for high levels of environmental protection; the strengthening of environmental laws and practices; protection of public health, safety and the environment; the promotion of transparency and the participation of civil society.[93] The Commission comprises a Council, a Secretariat and the Joint Public Advisory Committee (JPAC).[94] In general, the Council directs the work of the Commission, and the Secretariat implements the decisions of the Council.[95] The JPAC serves as a source of, and conduit for, public participation in the decisions of the Council.[96]

---

89. *See* NAAEC, *supra* note 4, Part I, arts. 1(a)-(b) and (e)-(h).

90. *See id.*, art. 3 ("[E]ach Party shall ensure that its laws and regulations provide for high levels of environmental protection and shall strive to continue to improve those laws and regulations."). Underlying the Parties' commitment to high levels of environmental protection is the recognition that each Party has a sovereign right to establish its own levels of domestic protection, and to modify its environmental laws and regulations, accordingly. *See id.*

91. *See id.* art. 5.

92. *See id.* art. 10.

93. *See id.* art. 1.

94. *See id.* arts. 8(1) and (2).

95. *See id.*

96. *See id.* arts. 10-11.

1. The Council

The Council consists of Cabinet-level representatives of the Parties,[97] and it functions as the Commission's governing body by directing its work. The Council's considerable responsibilities are delineated in Article 10 of the NAAEC.[98] It must approve the annual program and budget for the Commission, and it may consider and develop recommendations to the Parties with respect to a broad range of projects.[99] The Council is required to meet at least once annually, and to host a public meeting during the course of its regular session.[100] Because the Council members can act on behalf of the Parties to implement the NAAEC, Council decisions on how to direct the Commission's annual programs are backed by political will and financial resources.

2. The Secretariat

The Secretariat operates independently of the Parties and, in general, acts at the direction of the Council.[101] One of the Secretariat's functions is to support the work of the Council and the groups it has established by providing technical, administrative and operational assistance.[102] Articles 13, 14 and 15 of the NAAEC establish an independent role for the Secretariat. Under Article 13, the Secretariat may prepare reports to the Council "on any matter within the scope of the [Commission's] annual program[,]"[103] but not on matters related to a Party's failure to enforce its environmental laws and regulations. Upon notification to and with the tacit approval of the Council, the Secretariat may also prepare reports on any other

97. *See id.* art. 9. The Council is comprised of the Minister of the Environment (Canada), the Secretary of the Environment, Natural Resources, and Fisheries (Mexico), and the Administrator of the Environmental Protection Agency (United States). *See* Council for Environmental Cooperation, *CEC Profile and Programs* (visited Oct. 26, 1998) <http://www.cec.org/english/profile/index.cfm?format=2>.

98. *See* NAAEC, *supra* note 4, art. 10. Among other things, the Council is tasked expressly with (1) promoting cooperation among the Parties; (2) strengthening cooperative efforts to develop and improve environmental laws and regulations; (3) encouraging effective enforcement and compliance with environmental laws; and (4) promoting public access to information concerning the environment. *See id.*

99. *See id.* arts. 10 (1)(e) and 10(2)-(9).

100. *See id.* arts. 9(3) and (4).

101. *See id.* art. 11(4).

102. *See id.* art. 11(5).

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

environmental matter related to the "cooperative functions of the Agreement."[104]

Article 14 outlines a key Secretariat function. This function is to process and review citizen submissions alleging government failures to enforce environmental laws effectively, and recommend to the Council whether the Council should prepare a factual record.[105] Under Article 15, the Secretariat is also responsible for developing the factual record of such an alleged failure[106] when so directed by the Council.[107]

3. The Joint Public Advisory Committee

A unique feature of the NAAEC is the creation of the Joint Public Advisory Committee (JPAC).[108] The JPAC may advise the Council on "any matter within the scope of the Agreement" or its implementation and further elaboration.[109] The JPAC may also provide "relevant technical, scientific or other information to the Secretariat," including information to be used in the development of a factual record under Article 15.[110]

The JPAC's goal is "to promote continental cooperation in ecosystem protection and sustainable economic development and to ensure active public participation and transparency in the actions of the full Commission."[111] As discussed in Part II.D below, the JPAC has played an important role in the implementation of the NAAEC by facilitating the public's access to information and its participation in

104. *Id.* The Secretariat may proceed with the preparation of such a report if the Council does not object by a two-thirds vote within 30 days of the Secretariat's notification. *See id.*

105. *See id.* art. 14; *see also infra* notes 247-255 and accompanying text.

106. *See id.* art. 15; *see also infra* note 256 and accompanying text.

107. *See id.* art. 15(7).

108. The JPAC's fifteen members, five from each country, are selected from the public at large and are required to meet at least once a year at the time of the regular Council meeting. *See id.*, arts. 16(1) and (3). Traditionally, members of the JPAC have been drawn from academia, the business community and environmental non-governmental organizations. In addition, the NAAEC authorizes each Party to establish a national advisory committee (NAC) and/or a governmental advisory committee (GAC) comprised, respectively, of members of the public and representatives of federal, state, and provincial governments to advise the Party establishing the committee on implementation and further elaboration of the Agreement. *See id.* arts. 17 and 18.

109. *Id.* arts. 16(1) and (4).

110. *Id.* art. 16(5).

111. Commission for Environmental Cooperation, Joint Public Advisory Committee, 1997 Public Consultations: Report to Council (Sept. 12, 1997) (JPAC 1997 Report) at 1.

the process of identifying and setting priorities for trilateral cooperation in environmental protection.[112]

The three components of the Commission work together to assist the Parties in achieving the goals and obligations agreed to in the NAAEC. The efficacy of these efforts is evident in the trilateral cooperation of the Parties to protect human health and the environment, as well as their efforts to implement the Agreement domestically.

B. Trilateral Enforcement Cooperation to Protect Human Health and the Environment

The Parties' trilateral cooperative efforts are reflected in Council-adopted annual work programs to which the Secretariat and the JPAC provided input. The Council implements the programs through work and expert groups that are supported by the Secretariat.[113] Recognizing that strong environmental laws will do little to protect the environment unless they are accompanied by adequate enforcement efforts, the Council created the North American Working Group on Environmental Enforcement and Compliance Cooperation (Enforcement Work Group) in August, 1996.[114] This work group was established to assist in the development and implementation of a work program to facilitate and strengthen trilateral cooperation in environmental enforcement and compliance, and to improve the exchange of enforcement and compliance information.[115] The Enforcement Work Group is comprised of senior enforcement officials from the national environmental and law enforcement agencies of the three countries.[116] State and provincial officials also participate.[117] As described below, the Enforcement Work Group has undertaken numerous activities to advance its mission, including: establishing working relationships among the relevant environmental enforcement agencies; exchanging information and experiences with respect to enforcement and compliance approaches; and making

---

112. *See* Commission for Environmental Cooperation, *Introducing the 1997 Annual Program* (visited Oct. 26, 1998) <http://www.cec.org/english/resources/publications/budgol96.cfm?format=2#intro>.

113. *See id.*

114. *See* Commission for Environmental Cooperation, *Council Resolution No. 96-06, Resolution to Establish the North American Working Group on Environmental Enforcement and Compliance Cooperation* (Aug. 2, 1996) <http://www.cec.org/jpac/disp_res.cfm?var- lan=english&format=2&document10=21>.

115. *See id.*

116. *See* COMMISSION FOR ENVIRONMENTAL COOPERATION, 1995 ANN. REP., Annex I, at 86.

117. *See id.*

trilateral training opportunities in enforcement and compliance mechanisms available to the enforcement agencies in each country.[118]

The Enforcement Work Group is engaged in projects that involve a number of significant initiatives. Recent projects and/or commitments for cooperative trilateral activities include: (1) developing mechanisms for sharing information among the enforcement officials in the three countries in support of efforts to enforce environmental laws; (2) analyzing the relationship between environmental management systems, such as ISO 14001[119] and government-sponsored enforcement and voluntary compliance programs;[120] (3) improving the detection and monitoring of transboundary movement of hazardous waste through information sharing and capacity building;[121] (4) facilitating cooperation, information sharing, and training in support of the prosecution of illegal trafficking in wildlife, flora and fauna;[122] (5) promoting voluntary compliance and environmental auditing; and (6) cooperating on the detection of illegal shipments of chlorofluorocarbons (CFCs) and other ozone depleting substances.[123]

In addition, the Parties have initiated a series of programs providing for sound chemical management;[124] assessment of

---

118. *See* Steven A. Herman & Lawrence I. Sperling, *Emerging Networks of Environmental Enforcement and Compliance Cooperation in North America and the Western Hemisphere, National Association of Attorneys General*, NAT. ENVT'L ENFORCEMENT J., June, 1996, at 10.

119. ISO 14001 is an international standard for environmental management systems. It is not, however, a performance standard, or a substitute for compliance with legal requirements. The private sector has had primary responsibility for the development of this standard. The U.S. government has offered input.

120. *See* Commission for Environmental Cooperation, *Council Resolution No. 97-05, Future Cooperation Regarding Environmental Management Systems and Compliance* (June 12, 1997) <http://www.cec.org/jpac/disp_res.c…lan=english&format=2&10=32> (declaring, in part, that "[g]overnments must retain the primary role in establishing environmental standards and verifying and enforcing compliance with laws and regulations").

121. *See* Commission for Environmental Cooperation, *Annual Program and Budget 1997* (Oct. 26, 1998) http://www.cec.org/english/resources/publications/budgo196.cfm#02 [hereinafter *Annual Program and Budget 1997*]. Under this project the Parties have, among other things, been looking at ways to improve the tracking of hazardous waste and improving border enforcement capacity to detect violations of the laws regulating the movement of hazardous substances. *See id*.

122. *See id.* The CEC has also sponsored training designed to improve the enforcement of laws protecting wildlife resources. This training has included courses for wildlife inspectors and enforcement personnel on the identification and handling of various endangered fur-bearing and bird species. *See id.*

123. *See id.*

124. *See* Commission for Environmental Cooperation, *Council Resolution No. 95-05, Sound Management of Chemicals* (Oct. 13, 1995) <http://www.cec.org/jpac/disp_res.c…rlan=english&format=2&document+ID=6>.

transboundary impacts of certain domestic projects;[125] and scientific research on the impact of human activities on the state of the environment.[126] As discussed in Part III.E below, other NAFTA institutions have also taken action to ensure the improvement and protection of public health and the environment along the United States-Mexico border. This is also true of the non-NAFTA institutions created under the La Paz Agreement.[127]

1. Sound Management of Chemicals

Part of the CEC work program focuses on cooperative efforts to reduce pollution and minimize its effects. The NAFTA Parties have agreed to develop continental action plans for the sound management of chemicals that are acutely toxic or that can build up to unacceptable levels in the food chain.[128] Agreement has been reached on regional action plans for eliminating the use of PCBs by the year 2008, and for phasing out the use of two pesticides, DDT and chlordane, over the next ten years.[129] The action plan for chlordane includes the goal of replacing that pesticide with less environmentally harmful controls for termites.[130] In addition, a task force is working on a strategy to reduce the use of mercury, which has both natural and anthropogenic sources.[131] Finally, in accordance with Council Resolution No. 95-05, a CEC work group has developed criteria for

125. *See* Commission for Environmental Cooperation, *Council Resolution No. 97-03, Transboundary Environmental Impact Assessment* (June 12, 1997) <http://www.cec.org/jpac/gisp_res.c…lan=english&format=2&documentID=30>.

126. *See, e.g.*, *Annual Program and Budget 1997*, *supra* note 121.

127. *See supra* note 83 and accompanying text.

128. *See* Commission for Environmental Cooperation, *Council Resolution No. 95-05, Sound Management of Chemicals*, (Oct. 13, 1995) <http://www.cec.org/apartcom/comupre-98_13e.htm>.

129. *See* Commission for Environmental Cooperation, *Sound Management of Chemicals Project, PCB Regional Action Plan* (Dec. 1996) <http://www.cec.org/english/resourc…object/rap_e.cfm?format=2&dest=reso>; Commission for Environmental Cooperation, *Sound Management of Chemicals Project, North American Regional Action Plan on DDT* (June 1997) <http://www.cec.org/english/resourc…object/DDT_e.cfm?format=2&dest=reso>; Commission for Environmental Cooperation, *Sound Management of Chemicals Project, North American Regional Action Plan on Chlordane* (June 1997) <http://www.cec.org/english/resourc…ect/chlor_e.cfm?format=2&dest+reso>.

130. *See* Commission for Environmental Cooperation, *Sound Management of Chemicals Project, North American Regional Action Plan on Chlordane* (June, 1997) <http://www.cec.org/english/resourc…ect/chlor_e.cfm?format=2&dest+reso>.

131. *See* Commission for Environmental Cooperation, *Overview and Update of the Sound Management of Chemicals Initiative under Council Resolution No. 95-5* (June, 1997) <http://www.cec.org/english/profile/coop/smoz97e.cfm?format=2&dest=prog>.

selecting substances that would be the subject of future North American regional action plans.[132]

The CEC has also decided to collect, and make available to the public, information on the emission of various pollutants in a North American pollutant release inventory.[133] The United States' experience with its toxic release inventory system demonstrates that such inventories can be used to encourage industry to generate less waste.[134] These inventories also support community right-to-know initiatives, which make information available to citizens on the pollutants in their communities.[135] With assistance from Canada and the U.S., Mexico has begun to implement a comprehensive system for tracking the release of pollutants into the environment.[136] The development of this system is coordinated with a larger CEC effort to promote regional cooperation to enhance pollution release transfer registries in North America.[137] The three governments are also in the process of developing a cooperative long-term air quality monitoring, modeling and assessment program for North America.[138]

2. Transboundary Environmental Impact Assessments

In accordance with Article 10(7) of the NAAEC, the Council must consider and develop recommendations with a "view to agreement" for the (a) assessment of the transboundary environmental

---

132. *See* Commission for Environmental Cooperation, *Task Force on Criteria, Process for Identifying Candidate Substances for Regional Action under the Sound Management of Chemicals Initiative: Report to the North American Working Group on the Sound Management of Chemicals* (visited Oct. 17, 1998) <http://www.cec.org/english/resources/publications/project/criter_e.cfm?format=2&dest=reso>.

133. *See* Commission for Environmental Cooperation, *Annual Program and Budget 1997: North American Pollutant Release Inventory* (visited Oct. 26, 1998) <http://www.cec.org/english/resources/publications/budgoal96.cfm?format=2#97.o2.o2?format=2>.

134. *See* Commission for Environmental Cooperation, *North American Pollutants Release Inventory Information Project, Putting the Pieces Together: The Status of Pollutant Release and Transfer Registers in North America* (Nov. 1996) <http//:www.cec.org/english/resources/publications/index.cfm>. The U.S. EPA-maintained Toxic Release Inventory was created by Section 313 of the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11023 (1997).

135. *See National Pollution Release Inventory will Complete North American System*, Int'l Env't Daily (BNA) (May 29, 1997) [hereinafter *National Pollution Release Inventory*]; Commission for Environmental Cooperation, *1996 Annual Report* (visited Oct. 26, 1998) <http://www.cec.org/english/resources/publications/index.cfm> [hereinafter *1996 Annual Report*].

136. *See id.*

137. *See 1996 Annual Report*, *supra* note 135.

138. *See* Commission for Environmental Cooperation, *Council Resolution No. 97-04, Promoting Comparability of Pollutant Release and Transfer Registers* (PRTRs) (June 12, 1997) <http://www.cec.org/jpac/disp_resp.c…lan=english&format=2&document10=31>.

impacts of certain proposed projects that are "likely to cause significant adverse transboundary effects;" (b) notification, sharing of relevant information and consultation between the Parties with respect to such projects; and (c) consideration of measures to mitigate the potential adverse effects of proposed projects.[139] In June, 1997, the Parties resolved through a CEC Council Resolution, to complete a "legally-binding" agreement consistent with their Article 10(7) obligations by April 15, 1998.[140] The proposed Transboundary Environmental Impact Assessment Agreement (TEIA Agreement) is expected to include "provisions on the assessment of transboundary environmental impacts, notification to the potentially affected Party, consideration of mitigation measures, and public participation."[141] The TEIA Agreement negotiations began in September, 1997 and are ongoing.[142]

3. Scientific Research

The implementation of the NAAEC has also resulted in scientific research relating to the environment and its protection. For example, the CEC has undertaken to identify land-based threats to two marine and coastal ecosystems: the Southern California Bight and the Gulf of Maine.[143] By focusing on these threats and identifying steps to address them, the CEC is assisting the three governments to implement their commitments under the Global Programme of Action for the Protection of the Marine Environment from Land-based Activities, a separate global initiative.[144]

4. Activities Undertaken by the Secretariat

The CEC Secretariat has completed two reports under Article 13: one on the long-range transport of air pollutants[145] and the other on

139. NAAEC, *supra* note 4, art. 10(7)(a)-(c).

140. *See* Commission for Environmental Cooperation, *Council Resolution No. 97-03, Transboundary Environmental Impact Assessment* (June 12, 1997) <http://www.cec.org/jpac/disp_res.cfm?varlan=english&format=2&document10=30>.

141. *Id.*

142. The TEIA negotiations were not completed by April 15, 1998, as expected, because of the as yet unresolved issues relating to the applicability of the TEIA Agreement to non-federal governments.

143. *See Annual Program and Budget 1997*, *supra* note 121.

144. *See id.* The Global Programme of Action for the Protection of the Marine Environment from Land-based Activities was adopted in Washington, D.C. in November, 1995. This nonbinding agreement seeks to prevent the degradation of the marine environment from land-based activities through sustained and effective action.

145. *See* COMMISSION FOR ENVIRONMENTAL COOPERATION, CONTINENTAL POLLUTANT PATHWAYS: AN AGENDA FOR COOPERATION TO ADDRESS LONG-RANGE TRANSPORT OF AIR

the death of 40,000 migratory birds at the Silva Reservoir in the Mexican State of Guanajuato.[146] The Secretariat has also initiated a process that will culminate in a report examining water use and its impact on migratory birds in the San Pedro Riparian Conservation Area in Arizona.[147] This process consists of an expert study of these issues, a 60-day period for public comment on the expert study, and a panel convention to consider the expert study and public comments and to make policy recommendations, as appropriate.[148]

Another project undertaken by the CEC through the Secretariat is the design and implementation of an analytical framework for identifying and assessing the effects of the NAFTA on the environment.[149] The first phase of this project was exploratory.[150] The CEC focused its efforts on an examination of the NAFTA's central elements and their immediate impacts on North American trade and investment.[151] The CEC also sponsored a public workshop to consider a preliminary framework for assessing effects on the environment.[152] As part of its public outreach efforts, the CEC has published a series of documents including the research papers developed in the first phase of the project and the proceedings of the workshop.[153] The second phase of the project has involved, inter alia, the studies of the various intergovernmental agencies that have been created or inspired by the NAFTA with the hope of obtaining a better understanding of the interaction between environment and trade bodies.[154] This "NAFTA Effects" project is important beyond the

---

POLLUTION IN NORTH AMERICA (1997). This report examines the sources, pathways and effects of air pollution in North America. Based upon the work of over 30 scientists in the three countries, it includes recommendations for actions to be taken by the three governments to reduce air pollution and to gain more knowledge about the causes and effects of air pollution. *See Annual Program and Budget Report 1997*, *supra* note 121.

146. *See* COMMISSION FOR ENVIRONMENTAL COOPERATION, CEC SECRETARIAT REPORT ON THE DEATH OF MIGRATORY BIRDS AT THE SILVA RESERVOIR (1994-95) (1995). The report concluded that the overwhelming cause of death on the migratory birds was avian botulism, and the CEC is currently working with the local government to clean up the Reservoir to prevent a recurrence. *See id*. In addition, an international team of scientists has been formed to exchange information about avian botulism in an effort to resolve cooperatively many of the outstanding questions about the disease. *See id*.

147. *See* Commission for Environmental Cooperation, *Press Release, NAFTA Environment Commission Will Solicit Public Input for San Pedro Conservation Area Report* (July 2, 1997) <http://www.cec.org/new/Data.cfm?&varlan=English&vardate=9999&unique=95&format=2>.

148. *See 1996 Annual Report*, *supra* note 137, at 19.

149. *See id.*

150. *See id.*

151. *See id.*

152. *See id.*

153. *See id.*

154. *See Annual Program and Budget 1997*, *supra* note 121.

implementation of the NAFTA and the NAAEC, because it represents an unprecedented attempt to examine the impact of trade agreements on the environment.

Thus, through a wide variety of cooperative efforts under the auspices of the CEC, the Parties to the NAAEC have sought to address the necessary balance between the promotion of free trade and economic development and the protection of human health and the environment. In practice, the NAAEC has established a unique mechanism and structure for trilateral cooperation. As discussed below, it has also spurred domestic efforts to strengthen domestic environmental laws and enforcement.

C. Domestic Efforts to Maintain High Levels of Environmental Protection

The commitment to stringent standards for environmental protection is linked to the requirement that the Parties enforce their domestic environmental laws effectively.[155] It is also complemented by the recognition that environmental laws may have to be strengthened to achieve that objective. By requiring Canada, Mexico and the United States to undertake "appropriate governmental action" to achieve "high levels of environmental protection and compliance with [their respective] laws and regulations[,]" the NAAEC sets the parameters within which the Parties must work domestically to meet their trilateral commitments.[156]

Article 5 of the NAAEC provides examples of the type of "appropriate governmental action" that each Party can undertake to meet this obligation. Subject to constraints on the extraterritorial application of a Party's laws, appropriate governmental action includes (1) appointing and training inspectors; (2) monitoring compliance and investigating violations of environmental laws, including use of on-site inspections; (3) publicly releasing non-compliance information; (4) promoting environmental auditing; (5) requiring record keeping and recording; (6) using licenses, permits or authorizations; (7) initiating timely judicial, quasi-judicial, or administrative proceedings to seek sanctions and remedies for violations of environmental laws and regulations; and (8) issuing administrative orders.[157] In furtherance of the NAAEC requirements,

155. *See* NAAEC, *supra* note 4, at Preamble, art. 5.

156. *Id.*

157. *See id.* art. 5 (1)(a)-(b),(d),(f),(g),(i)-(j),(l). The Parties have also agreed to ensure that enforcement proceedings, including judicial, quasi-judicial and administrative proceedings, are available to sanction or remedy violations. *See id.* art. 5(2). As appropriate, sanctions and

the Parties have undertaken domestic efforts to implement and improve their environmental laws in the last four years.[158] However, at the same time, some of the Parties have seen possible reductions in protection of the environment. Federal and/or provincial and state legislatures have acted to roll-back environmental protection, and have cut budgets for environmental programs and enforcement.[159]

1. Mexico

One of the primary concerns with the NAFTA negotiations was Mexico's ability and/or willingness to enforce its existing environmental law.[160] Also of concern was the perceived disparity between the degree of environmental protection afforded by Mexican environmental law and that afforded by United States and Canadian laws.[161] Recent events, however, suggest that Mexico is making a greater effort in its enforcement program than critics anticipated. "From 1992 to 1996, Mexico conducted 12,347 inspection and compliance verification visits in the border area[;] partially or totally closing 548 facilities and fining 9,844 facilities."[162] "As a result, Mexico report[ed] a seventy-two percent reduction in serious violations in the maquiladora industries from 1993 to 1996, and a forty-three percent increase in the number of maquiladora facilities in complete compliance."[163] Mexico's efforts have also included participation in cooperative efforts to increase its enforcement capacity through training in criminal enforcement of environmental laws, hazardous waste inspection, water discharge inspection, and investigatory sampling techniques.[164]

---

remedies are to include compliance agreements, fines, imprisonment, injunctions, the closure of facilities and the recovery of the costs of containing or cleaning up pollution. *See id.* art. 5(3). Sanctions that are imposed must take into account the nature and gravity of the violation as well as the economic benefit achieved by non-compliance. *See id*.

158. *See infra* Parts III.C.1-3.

159. *See id.*

160. *See* Rose Gutfield, *Keeping it Green*, WALL ST. J., Sept. 24, 1992, at R9; *supra* note 19 and accompanying text.

161. *See supra* notes 21-26 and accompanying text. *But see* Rowley, *supra* note 19 (concluding that Mexican environmental law has a solid legal foundation and is sufficient to address some of the concerns expressed about the consequences for the environment, if Mexico and the U.S. moved forward as trade partners).

162. U.S. OFFICE OF THE PRESIDENT, STUDY ON THE OPERATION AND EFFECT OF THE NORTH AMERICAN FREE TRADE AGREEMENT 125 (1997) [hereinafter U.S. STUDY ON NAFTA].

163. *Id.*

164. *See, e.g.*, *1996 Annual Report*, *supra* note 137, at 21; *Annual Program and Budget 1997*, *supra* note 121.

In 1992, the Mexican government instituted an auditing program to promote industry leadership in voluntary compliance.[165] As of April, 1997, 617 facilities had completed environmental audits through this program.[166] In addition, 404 facilities had signed action plans in which they agreed to implement improvements to their facilities and/or procedures in order to attain, continually assure, and exceed compliance.[167] These action plans have resulted in the commitment of at least $800 million U.S. dollars to environmental improvement projects in Mexico.[168]

Since becoming a signatory to the NAAEC in 1994, Mexico has also taken steps to maintain high levels of environmental protection by amending its organic environmental law, the 1988 General Law on Ecological Balance and Environmental Protection (LGEEPA).[169] In general, the 1996 Amendments are premised on a "new" environmental policy based on the principle of sustainable development.[170] The Amendments strengthen environmental planning tools and provide for greater public participation.[171] Additionally, the Amendments provide for: (1) greater specificity for the conduct of environmental impact assessments of private activities;[172]

---

165. *See* U.S. STUDY ON NAFTA, *supra* note 162.

166. *See id*.

167. *See id.*

168. *See id.*

169. *See* General Law on Ecological Equilibrium and Environmental Protection, available in LEXIS, ENVIRON Library, MXENV File [hereinafter LGEEPA] (1996). The amendments were the result of a consultation process, spanning a period of 18 months, during which the Mexican government consulted with federal and local authorities, private citizens and affected enterprises. *See* Secretariat of the Environment, Natural Resources, and Fisheries, Office of the Federal Attorney for Environmental Protection (SEMARNAP), *Amendments to the General Law on Ecological Balance and Environmental Protection (Resume)* (November, 1996) at 2-3 (on file with authors) [hereinafter SEMARNAP Summary of Amendments]. The draft amendments were approved unanimously by both houses of the Mexican Congress, the Chamber of Deputies and the Senate of the Republic, in October, 1996, and became effective on December 13, 1996. *See id.*

170. *See* Commission for Environmental Cooperation, *supra* note 132, at 3; *see also* Gabriel Quadri de la Torre, Secretariat of the Environment, Natural Resources, Fisheries, *Reformas a la Legislacion Ambiental: Alcance y Significado* (Oct. 21, 1996) (on file with authors).

171. *See* LGEEPA, *supra* note 169.

172. The Amendments expand the list of activities and/or projects under the 1988 LGEEPA that require the preparation of an environmental impact assessment to include, among other things: (1) changes in soil use in wooded areas, as well as in forests and arid zones; (2) industrial parks where highly dangerous activities are contemplated; (3) real estate developments that affect coastal ecosystems; (4) activities and projects in wetlands, mango swamps, lagoons, rivers, lakes and estuaries connected to the sea, as well as their coastlines or federal zones; and (5) fishing aquaculture, or farming activities that could endanger the preservation of one or more species or could cause damage to ecosystems. *See* LGEEPA, *supra* note 167, tit. I, ch. IV, sec. V, art. 28.

(2) increased sanctions for recidivism;[173] (3) more specific emergency injunctive authority;[174] and (4) tighter hazardous waste control.[175] The Amendments also add forfeiture and permit revocation as administrative penalties, [176] and codify Mexico's environmental auditing program to promote self-regulation.[177] While there has been some internal debate in Mexico regarding whether the decentralization of certain responsibilities and the new provisions for environmental impact assessments will be more protective of the environment,[178] it is significant that Mexico has taken steps to improve its organic law to provide for better enforcement. Government officials have also publicly affirmed their political will to apply the new provisions vigorously and effectively. This will be crucial to improvements in the environment in Mexico and in the border area of the United States.

2. Canada

Implementation of the NAAEC has led to proposals for increased protection of the environment in Canada. For example, Canada, like Mexico, has proposed amendments to its organic environmental law, the Canadian Environmental Protection Act (CEPA).[179] As proposed, the existing CEPA would have been replaced with CEPA 1997, containing new provisions on pollution prevention, toxics, pollutants,

---

173. *See id.* tit. VI, ch. IV, art. 171.

174. *See id.* tit. VI, ch. III, art. 170.

175. *See id.* tit. IV, ch. VI, arts. 150-153. For example, the Amendments expand prohibitions on the import of hazardous materials, prohibit importation from a country where the manufacture and use of the hazardous substance is illegal, and promote waste minimization and recycling. *See id*.

176. *See id.* tit. VI, ch. IV, art. 172.

177. The provisions on environmental auditing are intended to promote private sector initiatives "to improve their environmental performance beyond the provisions of current standards in Mexico." *Id*. tit. I, ch. IV, sec. VII, art. 38. Specifically, Article 38 provides that industry may develop voluntary processes for environmental self-regulation, respecting the applicable law and regulations, through which they will improve their environmental performance and commit themselves to achieve better or superior levels, goals, or benefits with respect to environmental protection. *See id*. Subject to the non-disclosure of confidential industrial or commercial information, SEMARNAP must make preventive and corrective programs created from environmental audits available to persons directly affected by the activity. *See id.* art. 38 B I.

178. *See* Dora Delgado, *Green Groups*, *Industrialists Seek Delay in New Environmental Law, Want More Debate*, 19 Int'l Env't Rep. (BNA) 362, 362-63 (May 1, 1996).

179. *See Liberals Ditch Labor Legislation*, FIN. POST, Apr. 26, 1997, at 10. These amendments to the CEPA did not become law, as they were not approved by the Senate before elections were held in April, 1997. For the amendments to take effect, they will need to be reintroduced and passed by both houses of Parliament.

waste, enforcement, and citizen participation.[180] Primarily, Environment Canada, Canada's lead Federal environmental agency, would be given additional powers to require pollution prevention planning for CEPA-designated toxic substances.[181] The amendments would also provide for a process to improve the identification and management of toxic substances, virtually eliminate the use of most dangerous substances, and set a time frame for imposition of controls on other toxic substances.[182] With respect to enforcement authority, inspectors would be authorized to issue inspection warrants and environmental protection orders "on-the-spot[,] to stop illegal activity" and to require corrective action in response to emergency or urgent situations.[183] Citizen participation mechanisms would also be strengthened to allow greater participation by Aboriginal Peoples in environmental protection, improve opportunities for public involvement in the judicial process, and improve "whistle-blower" protection.[184]

The Endangered Species Protection Act was also introduced in the Canadian House of Commons. As introduced, it would have provided for the early identification, protection and recovery of species at risk.[185] The species covered included "migratory birds, fish and marine mammals, species that range across international borders, and all species on federal lands."[186] A listed species would have received protection against the damage or destruction of habitat that is critical to its survival.[187] In addition, the Act would have established a mandatory recovery planning process to put measures in place to address the identified threats faced by covered species, and would have included stiff penalties for offenses.[188]

Other recent efforts by the federal government in Canada to improve environmental protection have included proposals for the promulgation of a variety of regulations. Some regulations seek to improve air quality and reduce negative impacts on human health by

---

180. *See* Environment Canada, *Strengthening Environmental Protection in Canada: A Guide to the New Legislation* (visited Oct. 20, 1998) <http://www2.ec.gc.ca/cepa/guide%5Fe.html> [hereinafter Environment Canada, *Guide to Amendments*]; *see also* The House of Commons of Canada, Bill C-74 (First Reading, Dec. 10, 1996).

181. *See* Environment Canada, *Guide to Amendments*, *supra* note 180.

182. *See id.*

183. *Id.*

184. *See id.*

185. *See Marchi Brings in Endangered Species Law*, ECO-LOG WK. (Nov. 8, 1996).

186. *Id.*

187. *See id.*

188. *See id.*

limiting the concentration of sulfur in diesel fuel.[189] Other regulations seek to enable federal departments to better implement and administer storage tank management programs for federally and privately owned storage tank systems, which contain petroleum or allied petroleum products.[190] The owners of these tanks would be required to register them with Environment Canada.[191] Canada also proposed amendments to its regulations that require public notice of new chemical substances and require health and environmental assessment of biotechnology products.[192] These amendments provide a safety net for those products not regulated by other Canadian laws.

In spite of these efforts, Canadians had also seen some reduction in the environmental protection afforded by both federal and provincial governments. One stark example of this roll-back is illustrated by the reduction in the resources dedicated to environmental protection in Environment Canada's 1997-1998 budget.[193] At a time when the federal government's lead agency on environmental protection was trying to address new issues and make sustainable development a reality, it also experienced major budget cuts.[194] Environment Canada's 1997-98 budget was approximately C$230 million less than the 1994-95 budget. Additionally, Environment Canada's workforce had been reduced by about 1,300 people.[195] Similarly, the Ontario Ministry of Environment and Energy saw a significant reduction in its budget, from $480 million in 1990-91 to $271.4 million in 1996-97.[196] The actual effects of these cutbacks are yet to be measured, but the assumption is that they will have a detrimental effect on environmental protection.

3. United States

The United States has worked in a variety of ways to fulfill its commitments under the NAAEC, including its commitment to ensuring high levels of environmental protection. One has been the

---

189. *See Low Sulfur Diesel Fuel Regulations to Limit Content by Weight in 1997*, Int'l Env't Daily (BNA) (Oct. 4, 1996).

190. *See Proposed Rules Require Registration of all Storage Tanks on Federal Lands*, Int'l Env't Daily (BNA) (Oct. 17, 1996).

191. *See id.*

192. See *Pollution Prevention Becomes Cornerstone of Revised Environmental Protection Act*, Int'l Env't Daily (BNA) (Dec. 12, 1996).

193. *See, e.g.*, *DOE Outlines Plan for Implementing S&T Strategy*, ECO-LOG WK., Mar. 22, 1996, *available in* 1996 WL 8729297.

194. *See id.*

195. *See id.*

196. *See* Gary T. Gallon, *Feds Help Polluters by Cutting Back on Budgets*, MONTREAL GAZETTE, May 9, 1996, at B2.

development of new ideas on how to better protect the environment, while meeting the economic needs of communities. For instance, the United States has worked to develop Habitat Conservation Plans (HCPs) in the context of endangered species protection.[197] Habitat-based conservation planning methodology has allowed the United States to bring an ecosystem perspective to the protection of individual endangered species, thereby increasing the chances that the primary target species will survive, and providing protection to all species associated with a particular habitat type.[198] This includes species that are not protected under the law. It has also allowed the participation of stakeholders, including affected landowners and local governments, to participate in the decision-making process.[199] In addition, it has given the regulated community increased certainty regarding the kinds of development activities that can be undertaken in a protected area.[200]

Additionally, the United States has sought to ensure high levels of environmental protection through continued efforts to improve the federal environmental protection laws. Recent examples of these efforts include the passage of the Safe Drinking Water Act Amendments of 1996 (SDWAA)[201] and the Food Quality Protection Act (FQPA).[202]

The SDWAA established state revolving funds to assist communities in improving their drinking water facilities.[203] Additional provisions require EPA to promulgate new regulations for disinfectants and disinfection by-products.[204] The Amendments also require community water systems to monitor up to 30 unregulated contaminants.[205] The information gathered will be included in the national drinking water occurrence database, which is used to determine whether an unregulated contaminant exists in the drinking

---

197. *See* Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, 96 Stat. 1411 (1992); *see also* Endangered Species Act § 10(a)(2)(A) (1997), 16 U.S.C. § 1539(a)(2)(A) (1997). Lands that are managed under HCPs include lands that are to be preserved, as well as areas that are to be actively managed or developed. *See id.*

198. *See* Albert Lin, Comment, *Participants' Experiences with Habitat Conservation Plans and Suggestions for Streamlining the Process*, 23(2) ECOLOGY L.Q. 369, 395 (1996).

199. *See id.* at 393.

200. *See id.*

201. *See* Safe Drinking Water Act, Amendments of 1986, Pub. L. No. 104-182, 110 Stat. 1613 (1996) [hereinafter SDWAA].

202. *See* Food Quality Protection Act of 1996, Pub. L. No. 104-170, 110 Stat. 1489 (1996) [hereinafter FQPA].

203. *See* SWDAA, *supra* note 201, § 130, 110 Stat. at 1662.

204. *See id.* § 102(b)(2)(C), 110 Stat. at 1621.

205. *See id.* § 125(c), 110 Stat. at 1656.

water at a level that raises public health concerns.[206] The data will also be used to issue an annual "consumer confidence report," which includes information on contaminant levels in the drinking water purveyed by the system.[207] Another important provision in the Amendments increases the penalties that may be assessed by EPA against a party that fails to comply with an administrative order issued by EPA pursuant to various provisions in the Act.[208] The penalties have increased from $5,000 to $25,000.[209] The Amendments further address ways to improve delivery of drinking water.[210] For example, in order to participate fully in EPA's state revolving fund program, a state must now have the ability to ensure that all new systems have the technical, managerial and financial capacity to comply with national drinking water regulations that are in effect or expected to come into effect.[211] States must also certify system operators.[212]

The FQPA amended both the Federal Food, Drug and Cosmetic Act[213] and the Federal Insecticide, Fungicide and Rodenticide Act.[214] One of the FQPA requirements is that pesticide tolerances be determined to be safe for children.[215] The Act requires that, if necessary, an additional safety factor of up to ten-fold, must be used to account for uncertainty in data relating to the impact of the subject pesticide on children.[216] The FQPA also helps to ensure a high level of environmental protection by establishing a strong, health-based safety standard (reasonable certainty of no harm) for pesticide residues in all foods,[217] including: (1) a requirement that tolerances be reviewed within ten years of enactment to ensure that they meet new health and safety standards;[218] (2) authorizing the Food and Drug

206. *See id.* § 126(g)(3), 110 Stat. at 1658.

207. *See id.* § 114(a)(4)(A), 110 Stat. at 1639. "The Annual Report is created through the joint efforts of the Administrator, in consultation with Public Water Systems, environmental groups, public interest groups, risk communications experts, and the States, and other interested parties." *Id*.

208. *See id.* § 113(a)(3)(C)(i), 110 Stat. at 1639.

209. *See id.*

210. *See id.* § 119, 110 Stat. at 1647.

211. *See id.*

212. *See id.* § 123, 110 Stat. at 1652.

213. 21 U.S.C. §§ 301-392 (1997); *amended by* FQPA, *supra* note 202, Pub. L. No. 140-170 §§ 101, 201, 110 Stat. at 1489 (1996).

214. 7 U.S.C. §§ 136-136y (1997); *amended by* FQPA, *supra* note 202, Pub. L. No. 140-170 § 401, 110 Stat. at 1531 (1996).

215. *See* FQPA, *supra* note 202, § 405, 110 Stat. at 1514.

216. *See id.*

217. *See id.*

218. *See id.*

Administration to impose civil penalties for tolerance violations;[219] and (3) including provisions that direct EPA to develop procedures and guidelines that will expedite the review of safer pesticides so that they can reach the market more quickly and replace older and potentially more dangerous chemicals.[220]

In addition to the SDWA Amendments and the passage of the FQPA, the federal government has continued to emphasize the enforcement of environmental laws. For example, in fiscal year 1996, EPA initiated its highest number of criminal actions to date.[221] During that year, the federal government was awarded approximately $173,000,000 in criminal, civil judicial and administrative penalties,[222] secured injunctive relief worth about $1,430,000,000,[223] and entered into Supplemental Environmental Projects in matters involving environmental pollution worth approximately $66,000,000.[224]

There has, however, been legislation which lessens environmental protection afforded by U.S. law. For example, the Emergency Supplemental Appropriations and Rescissions for the Department of Defense to Preserve and Enhance Military Readiness Act of 1995[225] (Rescissions Act) rescinded the EPA's rule-making initiatives to promulgate ground-level ozone and carbon monoxide federal implementation plans for portions of the State of California.[226] The Rescissions Act also reduces the U.S. Fish and Wildlife Service's ability to determine whether a species should be declared "endangered" or "threatened."[227] The same provision addresses whether an area should be designated "critical habitat" under the Endangered Species Act (ESA) by rescinding $1,500,000 from amounts already approved for expenditure in fiscal year 1995.[228]

In addition, the U.S. Congress has enacted the Emergency Supplemental Appropriations for Additional Disaster Assistance, for

---

219. *See id.* § 407(2), 110 Stat. at 1535 (imposing fines of up to $50,000 for violations by an individual, or $250,000 for violations by entities).

220. *See id.* § 250, 110 Stat. at 1510.

221. *See 1996 Annual Report*, *supra* note 137, at 88.

222. *See id.*

223. *See id.*

224. *See id*. A Supplemental Environmental Project is an "environmentally beneficial project[] which a defendant/respondent agrees to undertake in settlement of an enforcement action, but which the defendant/respondent is not otherwise legally required to perform." EPA, Supplemental Environmental Projects Policy, 63 Fed. Reg. 24,796 (May 5, 1998).

225. Pub. L. No. 104-6, 109 Stat. at 73 (1995).

226. *See id*. at 88.

227. *See id.* at 86.

228. *See id*.

Anti-terrorism Initiatives, for Assistance in the Recovery from the Tragedy that Occurred at Oklahoma City and Rescissions Act, which limited or eliminated public recourse to judicial and administrative review of specified governmental decisions and agency actions concerning timber salvage sales from public lands.[229] Both of these provisions were the subject of a submission under Article 14 of the NAAEC,[230] however, the Secretariat did not request a response from the U.S. government in either case.[231]

Since the enactment of the NAAEC, the Parties have made efforts to take appropriate governmental action domestically to strengthen laws and regulations to ensure the achievement of high levels of environmental protection. However, empirical data on whether there have been any beneficial or adverse effects on the environment of the Parties as a consequence of the described legislative development is lacking.

D. Transparency and Public Participation

1. Outreach, Access to Information, and Public Consultations

Transparency and public participation have been identified as important components of the various programs developed to protect the environment under the NAAEC and related agreements.[232] To meet these commitments, the Parties to these agreements have created a variety of institutions and mechanisms to support public participation and promote access to information.

For example, under the NAAEC, the CEC Council holds annual public meetings at which the three environment Ministers engage in open dialogues with the public.[233] In addition, the JPAC holds annual public consultations.[234] In 1997, the JPAC held a series of

---

229. Pub. L. 104-19, § 2001(i), 109 Stat. 194, 245-246 (1995).

230. *See* Biodiversity Legal Foundation, et al., Submission No. SEM-95-001; Sierra Club, et al., Submission No. SEM-95-002 [hereinafter SEM-95-002 Submission]; *see* NAAEC, *supra* note 4, art. 15.

231. See CEC Secretariat, Determination Pursuant To Articles 14 & 15 of The North American Agreement on Environmental Cooperation: Submission I.D.: SEM-95-002 (Dec. 8, 1995) <http://www.cec.org/templates/registrytext.cfm?&varlan=english&documentid=8&format=2> [hereinafter SEM-95-002 Determination]; CEC Secretariat Determination Pursuant To Articles 14 and 15 of The North American Agreement on Environmental Cooperation: Submission I.D.: SEM-95-001 (Dec. 11, 1995) <http://www.cec.org/templates/registrytext.cfm?&varlan=english&documentid=5&format=2> [hereinafter SEM-95-001].

232. *See, e.g.*, NAAEC, *supra* note 4, art. 1(h).

233. *See id.* art. 9(4).

234. *See* COMMISSION FOR ENVIRONMENTAL COOPERATION JOINT PUBLIC ADVISORY COMMITTEE, 1997 REPORT I [hereinafter JPAC REPORT].

consultations in Mexico, Canada, and the United States[235] on the long range transport of air pollutants, voluntary compliance with environmental management systems, and environmental networking among North American communities.[236] The purpose of these consultations was to improve public access to information and participation, to consult citizens about environmental issues of concern and prioritize those issues, and to provide the public with a greater role in the "real and effective improvement of the environment in North America."[237]

Under the NAAEC Agreement, each Party has authority to establish a national and a governmental advisory committee to provide advice on the "implementation and further elaboration of [the] Agreement."[238] One committee is comprised of members of the public (the NAC) and the other of representatives of federal, and state or provincial governments (the GAC).[239] The U.S. has established both committees.[240] They meet at least twice a year and provide important input into U.S. policy regarding the functioning of the CEC.

The Parties, through the offices of the CEC, have also sought to develop mechanisms to provide the public with access to accurate and timely information about the environment. The CEC's Internet Homepage, for example, contains a wide variety of information, including current CEC publications, summaries of the three countries' environmental laws, and CEC project results.[241] To make information more accessible to citizens, the CEC has also established resource centers at its headquarters in Montreal and in its offices in Mexico City.[242]

Another mechanism the CEC uses to encourage public participation in environmental protection activities is to fund community-based projects. In 1995, the CEC created the North American Fund for Environmental Cooperation (NAFEC) for that

---

235. *See* Letter from Maria Cristina Castro, JPAC President, to The Honorable Christine Stewart, Minister of the Environment (Canada), the Honorable Carol Browner, Administrator of the United States Environmental Protection Agency, and the Honorable Julia Carabias, Secretary of the Environment, Natural Resources, and Fisheries (Mexico) (Sept. 12, 1997) (transmitting the JPAC 1997 Report) [hereinafter Letter from Maria Christina Castro].

236. *See* JPAC REPORT, *supra* note 234 at 1, 2-15. Other topics were also discussed. *See id*. at 15-23.

237. Letter from Maria Christina Castro, *supra* note 235.

238. NAAEC, *supra* note 4, arts. 17, 18.

239. *See id.*

240. *See* Exec. Order No. 12,915, 59 Fed. Reg. 25,775 (1994).

241. *See* <http://www.cec.org>.

242. Commission for Environmental Cooperation, *1995 Ann. Rep. 17* (1996) (visited Oct. 21, 1998) <http://www.cec.org/english/resources/publications/anrindex.cfm?format=2>.

purpose.[243] The NAFEC provides a source of funding for community-based environmental projects which, among other things, "strengthen and build the capacities of local people, organizations and institutions."[244] The NAFEC seeks projects that "respond creatively to new challenges or [seek] new solutions to old problems," and whose results can be shared throughout North America.[245] To date, more than $3.9 million have been committed to sixty-nine new projects and to this program.[246]

2. Citizen Submissions on Allegations of Failures to Enforce Environmental Laws Effectively

One important mechanism for public participation is contained in Articles 14 and 15 of the NAAEC. Articles 14 and 15 permit residents and non-governmental organizations of the Parties to submit allegations to the Commission that a party has failed to enforce its domestic environmental laws effectively.[247] This mechanism provides for the independent evaluation of a Party's actions with respect to enforcement of its environmental laws, and can result in the publication of a factual record concerning the activities in dispute.[248] It also creates an opportunity for public oversight of government

---

243. Commission for Environmental Cooperation, *Council Resolution, #95-09: Creation of the North American Environment Fund* (Oct. 13, 1995) <http//www.cec.org/jpac/disp_res.cfm?varlan=english&format=2&documentID=10>.

244. NAFEC, *What Is NAFEC?* (visited Oct. 21, 1998) <http://www.cec.org/english/nafec/flyer.cfm?format=1>.

245. *Id.*

246. *See* NAFEC, *NAFEC Projects by Sector* (visited Oct. 21, 1998) <http://www.cec.0rg/english/nafec/sector.cfm?format=1>. Likewise, the Border Environment Cooperation Commission (BECC) and the North American Development Bank (NADBank) have sought to ensure public involvement and access to information in their activities. *See supra* note 10 and accompanying text. The BECC has accomplished this through the inclusion of representatives from border states and communities in the BECC Board and Advisory Council, in an effort to ensure that the region's environmental priorities are considered. The BECC also developed its own criteria for certifying projects with the participation of hundreds of citizens and scores of institutions. Those criteria, among other things, flesh out requirements in the BECC-NADBank Agreement for extensive public participation and transparency. *See* BECC, *Project Certification Criteria* (visited Oct. 21, 1998) <http://www.cocef.org/aproyectos/ing5.htm>. In addition, the criteria require an environmental assessment and a BECC determination, in consultation with representatives of affected localities, that the project will result in a high level of environmental protection for the affected area. *See id.*; *see also* BECC, PROCEDURE REGARDING PUBLIC NOTICE AND COMMENT ON PROJECT APPLICATIONS, art. I (which requires that the BECC give public notice of all project submissions, including written or electronic notice to persons or organizations requesting such notice) and art. II (requiring the publication of all projects that will be considered for certification by the BECC at least 45 days before they are considered).

247. *See* NAAEC, *supra* note 4, arts. 14, 15.

248. *See id.*

activities related to environmental law enforcement, much like the citizen suit provisions contained in some U.S. environmental statutes.[249] Unlike these provisions, however, the Article 14 and 15 process is a fact-gathering and public disclosure process. The Article 14 and 15 process does not provide the Commission with tools, such as the imposition of monetary sanctions or injunctive relief, which can be used to affect a party's behavior directly. Instead, the process can create political pressure by allowing public scrutiny of a Party's record in enforcing its environmental laws effectively.[250]

The process of filing a submission is straight-forward, so as to make it readily accessible to the public.[251] The NAAEC provides that submissions must be filed with and considered by the Secretariat, who then determines whether the submission was properly filed and whether a response should be requested from the allegedly delinquent Party.[252] If the Secretariat determines that a response needs to be

---

249. *See, e.g.*, Clean Air Act (CAA) § 304, 42 U.S.C. § 7604 (1997); Toxic Substances Control Act (TSCA) § 207(f), 15 U.S.C. § 2647(f) (1997); Clean Water Act (CWA) § 505, 33 U.S.C. § 1365 (1997); Endangered Species Act (ESA) § 11(g), 16 U.S.C. § 1540(g) (1997).

250. *See* NAAEC, *supra* note 4. arts. 14-15. The NAAEC does contain provisions that permit one Party to challenge the enforcement practices of another Party with the possibility of obtaining a remedy that may have an impact on the behavior of the challenged Party. *See id*. arts. 22-36, Annexes 34, 36A, 36B. Part V of the NAAEC provides for consultation and dispute resolution that may lead to a monetary penalty or sanction when a Party or Parties allege that another Party has been engaged in "a persistent pattern of failure . . . to effectively enforce its environmental law." *Id.* art. 22(1).

251. *See id.* art. 14. Submissions must, among other things, be in writing; identify the person or organization making the submission; provide "sufficient information to allow the Secretariat to review the submission[;]" and further the enforcement of environmental laws, among other things. *Id*. art. 14(1). The Secretariat initially rejected a submission from the Friends of Old Man River, because the submission did not include any indication that the matter had been communicated to the relevant Canadian authorities, and did not indicate any response to that communication. *See* Council for Environmental Cooperation Secretariat, *Article 14(1) Determination* (Oct. 1, 1996) <http://www.cec.org/templates/registrytext.cfm?varlan=english&documentid=25&format=2>. As is permitted under the rules, the submission was amended and resubmitted. *See* COUNCIL FOR ENVIRONMENTAL COOPERATION, GUIDELINES FOR SUBMISSIONS ON ENFORCEMENT MATTERS UNDER ARTICLES 14 AND 15 OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION, GUIDELINE 6.2 [hereinafter CEC GUIDELINES].

252. *See* NAAEC, *supra* note 4, art. 14(2). If the Submission meets the criteria set out in Article 14(1), the Secretariat must then determine whether the submission merits a response from the Party alleged to be failing to enforce its environmental laws effectively. *See id.* art. 14(2). The Secretariat's determination is guided by whether: the submission alleges harm to the submitter; the submission raises matters that, if studied, would further the goals of the NAAEC; the submitter has pursued available private remedies; and "the submission is drawn exclusively from mass media reports." *Id.* art. 14(2)(a)-(d). In response to one of the petitions filed, the Secretariat declined to seek a response from the Party named in the submission despite a finding that the submission met the requirements of Article 14(1), because it found that the submitter had initiated a judicial proceeding on the same issue as alleged in the submission and the petition was pending. *See* Council for Environmental Cooperation, *Determination Pursuant To Articles 14 & 15 of the North American Free Trade Agreement on Environmental Cooperation: Submission*

requested of a Party, Article 14 provides guidance on the types of information that, at minimum, the party must provide in the response.[253] After the response has been submitted, the Secretariat decides whether it should recommend that the Council authorize the preparation of a factual record concerning the allegations[254] or end the inquiry.[255] If the Council directs that a factual record is warranted, it is prepared by the Secretariat and submitted to the Council, which then decides whether the factual record should be made public.[256]

As of August 15, 1998, seventeen submissions had been made to the Commission under Article 14.[257] Of those submissions, the

---

I.D.: SEM-96-002 (May 28, 1996) <http://www.cec.org/templates/registrytext.cfm?&varlan=english&documentid=19&format=2> [hereinafter SEM-96-002].

253. *See* NAAEC, *supra* note 4, art. 14(3). Barring exceptional circumstances, the Party must respond within 30 days and advise the Secretariat "whether the matter is the subject of a pending judicial or administrative proceeding, in which case the Secretariat shall proceed no further." *Id.* art. 14(3)(a). The Party may also provide any other information in response, including, but not limited to, whether the matter was previously litigated or the subject of an administrative proceeding, and whether private remedies are available to the submitter and whether they have been pursued. *See id.* arts. 14(3)(b)(i), (ii).

254. *See id.* art. 15(1). If the Secretariat determines that a submission warrants the development of a factual record based on its consideration of the submission and the Party's response, it must inform the Council and provide its reasons. *See id.* art. 15(1). The Secretariat must prepare a factual record upon a two-thirds vote of the Council. *See id.* art. 15(2). In preparing a factual record, the Secretariat must consider any information provided by the Party and "may consider any relevant technical, scientific or other information[.]" *Id.* art. 15(4).

255. *See id.* art. 14. There are several bases upon which the Secretariat might decide not to recommend the preparation of a factual record following the submission of a response from the Party. One of those under Article 14(3)(a), requires that the Secretariat proceed no further on a matter which is the subject of a pending judicial or administrative proceeding that has been brought by the government that is the subject of the submission. *See id*. arts. 14-15. In considering the Friends of Old Man River submission, the Secretariat also concluded that, while it was not compelled to proceed any further on a matter that is the subject of a proceeding that has been initiated by someone other than the Party, it has the discretion to consider that factor in deciding whether to request a response from the Party. *See* Council for Environmental Cooperation Secretariat, *Determination Pursuant to Articles 14 & 15 of the North American Agreement on Environmental Cooperation: Submission I.D.: SEM-93* (Apr. 2, 1997) <http://www.cec.org/templates/registrytext.cfm?&varlan=english&documentid=73&format=2> [hereinafter Old Man River]. In that matter, the Secretariat decided that it should not seek a response from the Party, and should instead terminate the proceeding, because of "the risk that preparation of the factual record might duplicate important aspects of the judicial action" and because "the preparation of a factual record . . . present[d] a substantial risk of interfering with pending litigation" by intruding into the litigants' strategic considerations. *Id.*

256. *See* NAAEC, *supra* note 4, art. 15(7). Once a draft of the factual record has been prepared by the Secretariat, it is submitted to the Council for its review. *See id.* art. 15(5). Any Party has 45 days to prepare and submit comments on the accuracy of the draft. *See id.* The Secretariat must then incorporate, if appropriate, any comments into the final factual record and then submit it to the Council. *See id.* art. 15(6). The Council may decide to make the final record public by a two-thirds vote. *See id.* art. 15(7).

257. *See Registry of Submissions on Enforcement Matters* (visited Aug. 15, 1998) <http://www.cec.org/templates/RegistryFront.cfm?&format=2&varlan=english>. One additional document was provided to the Commission, but was not treated as a submission under Article 14,

Secretariat found only one that did not meet the requirements for filing.[258] Three submissions did not warrant the submission of a response by the Party whose actions were the subject of the submission.[259] One submission did not warrant the preparation of a factual record after the submission of a response by the Party,[260] one was withdrawn before the Secretariat finished its review,[261] and a factual record was prepared in response to one submission.[262] However, the Secretariat has recently been instructed to prepare a factual record in another matter.[263] On August 15, 1998, decisions on seven submissions were pending.

The CEC has been subject to some criticism for its conclusion that its mandate runs only to issues of non-enforcement by administrative agencies or law enforcement authorities, and does not include legislative activities.[264] Various non-governmental

---

because it exceeded the 15 page limit provided for in Section 3.3 of the Guidelines for Submissions on Enforcement Matters Under Articles 14 and 15 of the North American Agreement on Environmental Cooperation (Guidelines). Section 6.2 provides that a submission that has been rejected may be revised to conform with the Commission's requirements and resubmitted within 30 days of it rejection. *See* CEC GUIDELINES, *supra* note 251. The submission that was rejected has not been resubmitted.

258. *See* Council for Environmental Cooperation Secretariat, *Determination Pursuant To Articles 14 & 15 of the North American Agreement on Environmental Cooperation: Submission I.D.: SEM-95-004* (Aug. 25, 1997) <http://www.cec.org/template/registrytext.cfm?&varlan=english&documentid=8&format=2>.

259. *See* SEM-95-001, *supra* note 231; SEM-95-002 Determination, *supra* note 231; SEM-96-002, *supra* note 252.

260. *See* Old Man River, *supra* note 255.

261. *See Registry of Submissions on Enforcement Matters* (visited Oct. 28, 1998) <http://www.cec.org/templates/registryview.cfm2&varlan=english7submissionID=88format=1> (the referenced submission was made by the Southwest Center for Biological Diversity and was designated SEM-96-004).

262. *See* Council for Environmental Cooperation Secretariat, *Recommendation of the Secretariat to Counsel for the Development of the Factual Record in Accordance with Articles 14 and 15 of the North American Agreement on Environmental Cooperation: Submission I.D.: SEM-96-001* (June 7, 1996) <http://www.cec.org/templates/registrytext.cfm?&varlan=english&documentid=15&format=1> [hereinafter SEM-96-001].

263. *See* COMMISSION FOR ENVIRONMENTAL COOPERATION, COUNCIL RESOLUTION NO. 98-07, INSTRUCTION TO THE SECRETARIAT OF THE COMMISSION FOR ENVIRONMENTAL COOPERATION ON THE PREPARATION OF A FACTUAL RECORD REGARDING THE EFFECTIVE ENFORCEMENT OF § 35(1) OF THE FISHERIES ACT, WITH RESPECT TO CERTAIN HYDRO- ELECTRIC INSTALLATIONS IN BRITISH COLUMBIA, CANADA: SUBMISSION I.D.: SEM-97-001 (June 24, 1998).

264. *See* Daniel Seligman, *NAFTA's Broken Promises: The Border Betrayed* (visited Oct. 20, 1998) <http://www.publiccitizen.org/pctrade/nafta/reports/enviro96.htm>. In a submission under Article 14, the Sierra Club and others alleged that section 2001(a)(3) of the Fiscal Year 1995 Supplemental Appropriations, Disaster Assistance and Rescissions Act, Pub. L. No. 104-19, 109 Stat. 194, resulted in a U.S. failure to enforce its environmental laws effectively, because it limited or eliminated administrative and judicial review of specified decisions and agency actions; provided that certain actions would be deemed to fulfill the requirements of various environmental laws; and eliminated private remedies for salvage timber sales. *See* SEM-95-002 Submission, *supra* note 230. The Secretariat determined that the submission did not meet the

organizations and commentators have complained that in adopting such a narrow view of its jurisdiction, the CEC has passed up an important opportunity to address the Parties' attempts to gain a competitive advantage by weakening their environmental laws.[265] Alternatively, the Secretariat has arguably interpreted its authority expansively by finding that it can consider allegations of continuing failures of a Party to enforce its environmental laws prior to January 1, 1994, the effective date of the NAAEC.[266]

Actions following the filing of the submission by Comité para la Protección de los Recursos Naturales, A.C., also demonstrate the power of the submission process. In response to this submission, the Secretariat prepared and the Council authorized the publication of a factual record.[267] That record is now available on the Commission's Internet web site.[268] Following the filing of the submission, which concerned the environmental impact of development in a world renown reef area off Cozumel Island in Mexico, the Mexican government declared the area a national marine park, and stated its intent to implement a management plan for the park and to complete an ecological management study of Cozumel Island.[269]

---

requirements of Article 14(1). *See* SEM-95-002 Determination, *supra* note 231. This determination was based upon the Secretariat's conclusion that enactment of legislation that specifically exempts, modifies, or waives provisions of an earlier law does not constitute a failure to enforce the earlier law effectively. *See id.* The Secretariat stated that it could not "characterize the application of a new legal regime as a failure to enforce an old one." *Id.*; *see also* SEM-95-001, *supra* note 231 (rejecting a submission challenging the Emergency Supplemental Appropriations and Rescissions for the Department of Defense to Preserve and Enhance Military Readiness Act of 1995, Pub. L. No. 104-6, 109 Stat. 73).

265. *See* Seligman, *supra* note 264.

266. The Secretariat made that decision based on its conclusion that actions of the Party prior to that date "may create conditions or situations which give rise to current enforcement obligations. It follows that certain aspects of these conditions or situations may be relevant when considering an allegation of a present, continuing failure to enforce environmental law." SEM-96-001, *supra* note 262.

267. *See* Commission for Environmental Cooperation, *Press Release, NAFTA Environment Ministers Release Cozumel Factual Record to the Public* (visited Oct. 24, 1997) <http://www.cec.org/new/Data.cfm?varlan=english&vardate=9999&unique=74&format=2>.

268. *See Final Factual Record of the Cruise Ship Pier Project in Cozumel, Quinta Roo* (visited Oct. 2, 1998) <http://www.cec.org/english/resources/publications/cozindexe.cfm?format=1>.

269. *See* Commission for Environmental Cooperation, *Council Resolution No. 96-08: Instruction to the Secretariat of the Commission for Environmental Cooperation on the Preparation of a Factual Record Regarding the Construction and Operation of a Public Harbor Terminal for Tourist Cruises on the Island of Cozumel, State of Quintana Roo, Mexico* (Aug. 2, 1996) <http://www.cec.org/english/profile/counsel/resolutions/96-081.cfm?format=1>.

E. Promoting High Levels of Environmental Protection Under Related Bilateral Agreements

The NAFTA Parties have undertaken additional environmental protection efforts through the implementation of various bilateral agreements, in particular those concerning the development of infrastructure and capacity in economically disadvantaged communities. For example, the agreement creating the BECC and NADBank was negotiated in conjunction with the negotiation of the NAFTA and its side agreements.[270] The general mandate of the BECC is to advance the well-being of the people of the United States and Mexico by helping preserve, protect and enhance the environment of the border region.[271] The NADBank was created in part to provide financing for projects certified by the BECC.[272] In addition, the NADBank helps BECC-certified projects secure financing from other sources.[273]

BECC primarily focuses on water, wastewater, and solid waste infrastructure.[274] Some of its efforts have focused on developing and securing funding for infrastructure projects designed to provide regulated entities with the technological ability to comply with relevant regulations. As of July 24, 1998, the BECC had certified 24 projects, ten of which are under construction and one of which has been completed, worth a combined estimated cost of $600 million.[275] Eight of those projects are partially or fully funded by NADBank, while many are receiving financing from other sources.[276] The financing for other projects is still being developed.[277] One project certified by the BECC is the construction of a $25.8 million water treatment facility in the City of Brawley, California.[278] This facility is designed to bring the city into compliance with existing federal and

---

270. *See Implementation of NAFTA*, N.Y. L.J., Dec. 30, 1993, at 3.

271. *See* Agreement Between the Government of the United States of America and the Government of the United Mexican States Concerning the Establishment of a Border Environment Cooperation Commission and a North American Development Bank, ch. I, art. I, 32 I.L.M. 1547 (1993).

272. *See id.* ch. II, art. I.

273. *See* North American Development Bank, *1996 Ann. Rep.* (1997) 3-4, 16 (visited Oct. 28, 1998) <http://www.nadbank.org/English/Library/Annual_Report/Annual_Report_frame.htm>.

274. *See* BECC, PRESS RELEASE, THE BECC REPORTS PROGRESS IN BORDER ENVIRONMENTAL INFRASTRUCTURE DEVELOPMENT DURING PRESIDENT'S VISIT (May 22, 1998).

275. *See* U.S. EPA, *BECC and NADBank: Promoting Environmental Infrastructure on the U.S.-Mexico Border* (July 1998) <http://www.epa.gov/oia/mex2.htm>.

276. *See id.*

277. *See id.*

278. *See id.*

state water quality standards.[279] NADBank's financing package helped Brawley (an unrated community) access funds from private sector institutional investors.[280]

While some of the BECC-certified projects have focused on bringing a community or other entities into compliance with existing law, other projects have sought to move beyond mere compliance. Three such projects are the $99.6 million South Bay Reclamation Plant in San Diego, California, the $11.7 million Wastewater Reuse Project in El Paso, Texas, and the $170,000 Ecoparque project in Tijuana, Baja California.[281] These facilities will treat wastewater for reuse in irrigation and, in some cases, for industrial use.[282] In addition, these projects will reduce both the amount of waste discharged into nearby bodies of water, and the number of primary water sources used for irrigation and industrial purposes.

The efforts of the BECC and the NADBank have been subject to some criticism. Much of the criticism of these two institutions flows from the perception that the BECC has been too slow to certify projects and the NADBank has been too slow to provide financing.[283] The BECC has generally attributed any delays to its constituency's inability to develop projects that are technically sustainable, while the NADBank found the projects to be financially unsustainable.[284] Both organizations, however, have taken steps to address these concerns. For its part, the BECC has established a Technical Assistance Program to assist communities in developing technically and financially sustainable projects.[285] The NADBank has established an Institutional Development Cooperation Program (IDP) to help eligible communities operate their water, wastewater, and municipal solid-waste management services effectively and efficiently.[286] The NADBank has also established the Border Environment Infrastructure

---

279. *See* BECC, *Project Certification* (visited July 24, 1998) <http:www.cocef.org/aproyectos/ING53.htm> [hereinafter *Project Certification*].

280. *See* Joel Millman, *No Sovereignty Along the U.S.-Border, Cities Desperately need to Accommodate Growth*, WALL ST. J., Sept. 18, 1997, at R5.

281. *See* BECC, *BECC Homepage* (visited Oct. 20, 1998) <http://www.cocef.org>.

282. *See Project Certification*, *supra* note 279.

283. *See, e.g.*, Public Citizen's Global Trade Watch Institute for Policy Studies, *The Failed Experiment: NAFTA at Three Years* (June 1997).

284. *See* BECC, *BECC News—Special Edition* (visited Oct. 20, 1998) <http://cocef.org/apartcom/jun97.htm>.

285. *See* BECC, *Technical Assistance for Border Communities: Users Guide* (visited Oct. 20, 1998) <http://www.cocef.org/atecnica/usersguide.htm>.

286. *See* NADBank, *Institutional Development Cooperation Program* (visited Oct. 20, 1998)
<http://www.nadbank.org/English/Programs/IDP/IDP_frame.htm>.

Fund (BEIF) to make environmental infrastructure projects affordable to border communities by combining grant funds with loans or guarantees for projects that would otherwise be financially unfeasible.[287]

The BECC-NADBank agreement demonstrates the possibility of negotiating bilateral environmental agreements in conjunction with multilateral trade agreements as a mechanism for furthering the protection of the environment.[288] These agreements are important to the development of infrastructure and capacity in economically disadvantaged regions that may not otherwise be equipped to address environmental concerns arising from increased development.

In conclusion, the NAAEC establishes a number of principles and objectives designed to ensure that trade liberalization does not come at the sacrifice of environmental protection. In fact, the NAAEC's programs and mechanisms, particularly those implemented through the CEC, seek to improve each country's environmental protection measures through trilateral cooperation, the domestic implementation of international obligations, and public scrutiny and participation in the process of environmental regulation and enforcement. While it may be premature to gauge the overall effectiveness of the NAFTA and the NAAEC fully in achieving a balance between trade liberalization and environmental protection, these agreements have led to cooperative efforts among the Parties to address common environmental concerns. Additionally, they have spurred domestic actions to improve environmental protection. The principles, objectives, programs and mechanisms found in the NAFTA and the NAAEC have potential relevance in the FTAA context, where trade liberalization and environmental protection must be made mutually supportive on a much larger scale.

---

287. *See* NADBank, *Border Environment Infrastructure Fund* (visited Oct. 20, 1998) <http://www.nadbank.org/English/Programs/BEIF/BEIF_frame.htm>. In 1997, the U.S. EPA contributed $170 million for use in water and wastewater projects. *See id.*

288. Another source of potential protection of the environment is pre-existing bilateral environmental agreements, such as the La Paz Agreement between the United States and Mexico. During the negotiation of the NAFTA, the United States and Mexico also agreed to invigorate the provisions of the 1983 La Paz Agreement. Since the implementation of the NAFTA, the United States and Mexico have increased their activities under the La Paz Agreement resulting in greater environmental protection in the border region. *See supra* note 83 and accompanying text.

IV. THE PROPOSED FREE TRADE AREA OF THE AMERICAS AGREEMENT

A. Background

This Part of the Article addresses the FTAA process and traces its outgrowth from the Miami Summit of the Americas to its current status. It then focuses on the environment's role in the FTAA process and examines contemporaneous developments in other fora where trade and the environment have played significant roles. Finally, this Part briefly examines the fast-track debate that may establish the parameters under which the environment and environmental protection can be integrated into the FTAA. The purpose of this overall analysis is to gain an understanding of the FTAA and its context in order to identify themes and principles common to the earlier analysis in this Article of the NAFTA, the NAAEC and related agreements.

1. Miami Summit of the Americas

The FTAA generally refers to a process initiated in 1994 to extend the principles of trade liberalization and economic integration throughout the Western Hemisphere. The FTAA grew out of the First Summit of the Americas, held in Miami in December of 1994, at which the thirty-four democratically elected heads of government in the hemisphere[289] ("the leaders") "committed to advance the prosperity, democratic values and institutions, and security of [the] Hemisphere."[290] The First Summit of the Americas involved a wide range of discussions on preserving and strengthening democracy, promoting prosperity through economic integration and free trade, eradicating poverty and discrimination, guaranteeing sustainable development,[291] and conserving the natural environment.[292]

Regarding economic integration and free trade, the leaders declared:

---

289. The Parties to the Summit of the Americas are: Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guiana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, St. Kitts Nevis and St. Lucia, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago, Uruguay, the United States, and Venezuela. *See* SUMMIT OF THE AMERICAS, DECLARATION OF PRINCIPLES AND PLAN OF ACTION, DEC. 11, 1994, DECLARATION OF PRINCIPLES, para. 1, 34 I.L.M. 808 [hereinafter MIAMI DECLARATION OF PRINCIPLES or MIAMI PLAN OF ACTION, respectively].

290. *Id.*

291. *See supra* note 1 and accompanying text.

292. *See* MIAMI DECLARATION OF PRINCIPLES, *supra* note 289, paras. 1-5.

> A key to prosperity is trade without barriers, without subsidies, without unfair practices, and with an increasing stream of productive investments. Eliminating impediments to market access for goods and services among our countries will foster our economic growth . . . . Free trade and increased economic integration are key factors for raising standards of living, improving the working conditions of people in the Americas and better protecting the environment.[293]

Consequently, the leaders resolved to "construct the 'Free Trade Area of the Americas,' in which barriers to trade and investment will be progressively eliminated."[294] The leaders agreed that, by the end of the twentieth century, they would begin negotiations that would conclude no later than 2005.[295]

At the First Summit of the Americas, the leaders also endorsed a Plan of Action that set out 23 initiatives to be achieved by the FTAA.[296] The stated goals include democratization, economic integration and free trade, eradication of poverty and discrimination, and promotion of sustainable development and environmental protection.[297] In addition, Initiative no. 9, "Free Trade in the Americas," stressed a strong commitment to multilateral rules and disciplines, such as negotiation and implementation of disciplines under the World Trade Organization (WTO), GATT, and other bilateral and sub-regional trade agreements.[298] The Miami Plan of Action further recognizes the "extraordinary achievements" made by countries of the hemisphere in trade liberalization and sub-regional integration.[299] The Plan also states that free trade and economic integration are critical to achieving sustainable development. Mutually supported trade liberalization and environmental policies will further this goal.[300]

As outlined in the Miami Plan of Action, the FTAA would represent a comprehensive agreement extending to numerous sectors and subject areas. Some of these areas include tariff and nontariff barriers, agriculture, subsidies, investment, antidumping and countervailing duties, sanitary and phytosanitary standards and procedures, dispute resolution, and competition policy.[301] The Plan

293. *Id.* para. 2.
294. *Id.*
295. *See id.* para. 11.
296. *See id.* at 815.
297. *See id.* ch. II, pt. 9, para. 1.
298. *See id.*
299. *See id.* para. 2.
300. *See id.*
301. *See id.* para. 3.

emphasizes that decisions on trade agreements remain the sovereign right of each nation, and that each nation will take the necessary action to implement the agreements.[302] Finally, the Miami Plan of Action stresses the need to provide technical assistance to facilitate the integration of smaller economies and increase their level of development.[303]

2. Pre-Negotiation and Negotiation Phases

The Miami Plan of Action does not set out a detailed plan for achieving its goals. Rather, it directs trade ministers to take a series of "concrete initial steps to achieve the 'Free Trade Area of the Americas,'"[304] including the development of work programs, reports to ministers and a timetable for further work.[305] This pre-negotiation phase consisted of a number of high-level meetings (Ministerials). At the Ministerials, trade ministers designated working groups to serve a fact-finding role, and directed vice-ministers and senior trade officials on preparations for actual negotiations.[306]

At the most recent Ministerial in San Jose, Costa Rica, the trade ministers reiterated that the FTAA negotiations will consider the broad social and economic agenda contained in the Miami Declaration of Principles and Plan of Action.[307] The ministers recommended that the Heads of State and Government in the hemisphere commence FTAA negotiations during the Second Summit of the Americas in Santiago, Chile in April, 1998.[308] They also reaffirmed certain key principles and objectives established since the First Summit of the Americas in Miami, including that (1) the

302. *See id.* para. 4.
303. *See id*. para. 5.
304. *Id.* para. 6.
305. *See id.* para 9.
306. Ministerial meetings have been held in Denver (June, 1995) [hereinafter Denver Ministerial]; Cartagena, Colombia (March, 1996) [hereinafter Cartagena Ministerial]; Belo Horizonte, Brazil (May 1997) [hereinafter Belo Horizonte Ministerial]; and San Jose, Costa Rica (March 19, 1998) [hereinafter San Jose Ministerial]. In San Jose, the Ministries agreed to a "Ministerial Declaration of San Jose," which sets forth the elements, structure and time line of the negotiations, including the establishment of a Trade Negotiations Committee (TNC) to oversee negotiations and the overall architecture of the agreement. The San Jose Ministerial Declaration served as the basis for the official launch of negotiations by heads of state and governments at the Second Summit of the Americas in Santiago, Chile on April 18-19, 1998. <http://www.sice.oas.org/FTAA/costa/minis/minis_e.stm>. For a chronology of the FTAA process, *see* <http://www.ftaa-alca.org/EnglishVersion/view e.htm>.
307. *See* SAN JOSE MINISTERIAL DECLARATION, *supra* note 306, para. 4. These include raising living standards, improving the working conditions of people in the Americas and better protecting the environment.
308. *See id.* para. 8.

"agreement . . . be balanced, comprehensive, WTO-consistent, and . . . constitute a single undertaking," and (2) negotiations be transparent.[309] The ministers also agreed to an initial structure for the negotiations and established a Trade Negotiations Committee (TNC) at the Vice-Ministerial level to decide on the overall structure of the agreement, resolve institutional issues and guide the work of the nine established negotiating groups.[310] To ensure the participation of the public, the ministers created a committee of government representatives to receive input from business, labor, environmental, consumer and academic groups.[311]

In April, 1998, at the Second Summit of the Americas, the Heads of State and Governments directed their respective trade Ministers to negotiate the FTAA in accordance with the principles, objectives, structure, modalities and all other decisions set out in the San Jose Ministerial Declaration.[312] Concrete progress on the negotiations must be achieved by the year 2000, the negotiating process must be transparent, and the trade Ministers must consider the views of civil sectors, such as business, labor, consumer, environmental and academic groups on trade matters.[313] This input is to be presented to the Government Committee on Civil Society,[314] as it has become known.[315]

B. The FTAA and the Environment

While sustainable development and environmental protection have not been specifically designated as sectors or areas for agreement in the pre-negotiation and negotiation phases of the FTAA, they have been identified as key elements of the process from the

309. *Id.* para. 9.

310. *See id.* paras. 10, 11. The Ministers established negotiating groups on: market access, investment, services, government procurement, dispute settlement, agriculture, intellectual property rights, subsidies, antidumping and countervailing duties, and competition policy. *See id.* para. 11. The negotiating groups began their work in late August and September, 1998, and are meeting throughout 1999. *See* Negotiating Groups, <http://www.ftaa-alca.org/EnglishVersion/ngrap_e.htm>. They will continue to work through 2005 and report to the TNC by December 2000. *See id.* para. 11.

311. *See id.* para. 17.

312. *See* SANTIAGO PLAN OF ACTION, *supra* note 8, sec. III, pt. A.I.1.

313. *See id.* pt. A.I.3-5.

314. *See id.* pt. A.I.5.

315. *See* Free Trade of the Americas, 63 Fed. Reg. 40,579 (1998). The Trade Policy Staff Committee of the Office of the United States Representative has solicited public comments "on how the Committee should carry out its mandate to receive, analyze, and report on the full range of comments received from civil society throughout the hemisphere on trade matters related to the FTAA process." *Id.* at 40,579.

beginning.[316] The First Summit of the Americas Plan of Action expressly noted that "[f]ree trade and increased economic integration are key factors for sustainable development," and will be "furthered as we strive to make our trade liberalization and environmental policies mutually supportive . . . ."[317]

Environmental concerns have been raised at the FTAA trade Ministerials. In Denver in 1995, the ministers tangentially addressed the environment by declaring their commitment to "transparency" in the FTAA process.[318] The ministers further stated that, "[a]s economic integration in the hemisphere proceeds, [they] welcome the contribution of the private sector and appropriate processes to address the protection of the environment . . . through our respective governments."[319] One year later, in Cartagena, the ministers reaffirmed their commitment to transparency and went a step further, directing "[the] Vice-Ministers to consider appropriate processes to address the protection of the environment."[320] Specifically, the ministers stated their intent to consider creating a study group on this issue, based upon the recommendations from their vice-ministers and a December, 1996 report by the Committee on Trade and the Environment (CTE) to a WTO Ministerial.[321] The ministers concluded that they would then consider how to proceed in the construction of the FTAA in the environmental area.[322]

At the third trade Ministerial at Belo Horizonte, the ministers did not make progress on discussions about the environment, but did agree to keep the issue of the environment and its relation to trade under consideration.[323] They noted that the relationship has been discussed since Cartagena, and stated that: They would "keep this issue under consideration, in light of further developments in the work of the WTO Committee on Trade and the Environment."[324]

---

316. *See* MIAMI PLAN OF ACTION, *supra* note 289, ch. II, pt. 9, para. 2.

317. *Id.* It should be noted that the Miami Summit of the Americas Plan of Action also established a number of initiatives on sustainable development and the environment, including partnerships for the sustainable use of energy, biodiversity and pollution prevention. *See id.* ch. IV, pts. 21-23. Chief among the initiatives has been the hemispheric effort to phase out lead in gasoline. *See id.*

318. *See* DENVER MINISTERIAL DECLARATION, <http://www.sice.oas.org/ftaa/denver/denvjde.stm>, para. 11.

319. *Id.*

320. CARTAGENA MINISTERIAL DECLARATION, <http://www.sice.oas.org/FTAA/cartage/ministee.stm>, para. 15.

321. *See supra* notes 26-35 and accompanying text on the WTO and CTE.

322. *See* CARTAGENA MINISTERIAL DECLARATION, *supra* note 320, para. 15.

323. *See* BELO HORIZONTE MINISTERIAL DECLARATION, <http://www.sice.oas.org/FTAA/belo/minis/minis_e.stm>, para. 15.

324. *Id.*

The United States officially endorsed the idea of establishing a study group (as opposed to a working group or negotiation group) on the environment.[325] This proposal did not receive much support, and was eventually rejected.[326]

Instead of establishing either a study group or a negotiating group on the environment, the trade ministers proposed, and their leaders adopted at the Santiago Summit, the establishment of a Government Committee on Civil Society (GCCS or the Committee).[327] The Committee is to receive and consider the views of civil society, including environmental groups.[328] The creation of the Committee established the first mechanism for the public across the hemisphere to influence the FTAA process.[329] The Committee will

---

325. A working group would develop actual text for eventual inclusion in a final agreement whereas a study group would operate outside the working group context and provide information to the negotiators. *See* Scott Otteman, *U.S. Seeks Nine Groups for FTAA Talks, Plus Labor, Green Groups,* INSIDE U.S. TRADE, Oct. 31, 1997, at 13-16.

326. In August of 1997, the heads of twelve Latin American countries stressed that the FTAA should not incorporate trade-related environmental issues, indicating instead that they should be dealt with in the context of the WTO's CTE. These sentiments were expressed in a joint declaration by the "Rio Group," consisting of the Southern Cone Common Market (MERCOSUR) countries of Argentina, Brazil, Paraguay and Uruguay; the Andean Group countries of Bolivia, Ecuador, Colombia, Peru and Venezuela; and Mexico, Chile and Panama. Foreign ministers of Guyana and Honduras, representing the Caribbean Community and Central America, respectively, also signed the document. *See Latin Leaders Signal Desire to Build FTAA Without Labor, Green Issues*, AMERICAS TRADE, Sept. 4, 1997, at 11-13.

327. *See* SAN JOSE MINISTERIAL DECLARATION, *supra* note 306, para. 17; *see also* SANTIAGO MINISTERIAL DECLARATION, *supra* note 8, para. 5. Protection of the environment in the context of trade liberalization was mentioned in both the San Jose Ministerial Declaration and the Declaration of Santiago. At San Jose, the Ministers stated as general objectives of the negotiations "to promote prosperity through increased economic integration and free trade among the countries of our Hemisphere, which are key factors for raising standards of living, improving the working conditions of people in the Americas and better protecting the environment" and "to strive to make our trade liberalization and environmental policies mutually supportive, taking into account work undertaken by the WTO and other international organizations." SAN JOSE MINISTERIAL DECLARATION, *supra* note 306, Annex II a & e. The Santiago Declaration also recognized a link between economic improvement, investment, and free trade, on the one hand, and environmental protection on the other. The Ministers concluded that "[t]hese issues will be taken into account as we proceed with the economic integration process in the Americas." SANTIAGO MINISTERIAL DECLARATION, *supra* note 8, at 2. *See also* SECOND SUMMIT OF THE AMERICAS PLAN OF ACTION, *supra* note 8, at II.9.2. The Santiago Declaration and Second Summit of the America's action plan also contained statements and initiatives on environmental protection unrelated to the context of trade liberalization. *See* SANTIAGO MINISTERIAL DECLARATION, *supra* note 8, at 4; SECOND SUMMIT OF THE AMERICAS PLAN OF ACTION, *supra* note 8, at IV ("Guaranteeing Sustainable Development and Conserving or Natural Environment for Future Generations.)"

328. *See* SAN JOSE MINISTERIAL DECLARATION, *supra* note 306, para. 17; *see also* SANTIAGO MINISTERIAL DECLARATION, *supra* note 8, para. 5.

329. *See* Free Trade Area of the Americas, 63 Fed. Reg. at 40,580.

receive and analyze civil society's comments and prepare a report before the ministers' next meeting in October, 1999.[330]

In spite of the Miami Summit Declaration statement stressing the importance of making trade and the environment mutually supportive, tension continues to exist among the potential Parties to the FTAA about whether and how to address environmental matters in the FTAA process.[331] To understand the context of environmental concerns and how this issue may proceed in the FTAA negotiations, it is important to trace the progression of trade and environment discussions in the contemporary hemispheric and global fora.

C. Other Contemporary Developments Relating to Trade and the Environment

The relationship between economic integration and trade liberalization on the one hand, and environmental protection on the other, has been examined in a number of fora both before and after the First Miami Summit of the Americas. Indeed, this relationship has been the subject of much global and hemispheric discussion, resulting in a wide range of declarations, principles and initiatives that may be relevant to the FTAA.

1. World Trade Organization and Committee on Trade and the Environment

The WTO Committee on Trade and the Environment (CTE) is an example of a forum where the relationship between trade and the environment has been examined. The CTE was initially created at a trade ministers meeting in Marrakesh, Morroco in April, 1994. At that meeting, the results of the Uruguay Round negotiations under the WTO were also approved.[332] The CTE's competence for policy coordination, like that of the multilateral trading system, is limited to

---

330. *See id.* General guidelines for the Committee were established by the FTAA governments at their June, 1998 meeting. *See id.* Canada chaired the first meeting of the Committee in October, 1998. *See id.* The U.S. Government has also made several proposals to ensure that the functioning of the Committee is effective, including the publication of written comments and reports. *See id.* Comments were filed in March, 1999. The Committee will meet again in June, 1999.

331. *See, e.g.*, *Barshefsky Says Early FTAA Results Must Not Hurt Final Agreement*, AMERICAS TRADE, Apr. 2, 1998, at 4.

332. The Preamble to the WTO Agreement states that the Parties commit to conducting their trade and economic relations so as to ". . . allow[] for optimal use of the world's resources in accordance with the objective of sustainable development. . . ." General Agreement on Tariffs and Trade, Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125, 1143 [hereinafter WTO Agreement].

trade and trade-related aspects of environmental policies that may result in significant trade effects for its members.[333] Within this context, though, the CTE has broad authority to review all areas of the multilateral trading system, to identify relationships between trade and environmental measures in order to promote sustainable development, and to make recommendations on whether any modifications to the provisions of the multilateral trading system are required.[334]

In January, 1995, the CTE formally began its work program, examining areas such as trade liberalization and sustainable development, the relationship between WTO provisions, and trade measures applied pursuant to multilateral environmental agreements (MEAs), dispute settlement, and eco-labeling.[335] Because of significant differences of opinion among its members, the CTE did not make much progress on these or other issues in its first two years of discussion.

These differences were noted in the CTE's first report, published in November, 1996.[336] The CTE Report concluded, however, that the WTO was interested in building a constructive relationship between trade and environmental concerns.[337] It stated that trade and the environment were both important areas of policy-making and should be mutually supportive to promote sustainable development.[338] The Report further indicated that governments had the right to establish their national environmental standards in accordance with their own conditions, needs and priorities, but that it was inappropriate for them to relax their existing standards or enforcement merely to promote trade.[339] The Report acknowledged that an open, equitable and non-discriminatory multilateral trading system and environmental protection are essential to promoting sustainable development.[340] Finally, the CTE Report noted that removal of trade restrictions and

---

333. *See Trade and Environment in the WTO*, at 1-2 (modified Apr. 16, 1997) <http://www.wto/environ/environ1.htm>. S*ee also* REPORT OF THE WTO COMMITTEE ON TRADE AND ENVIRONMENT, Nov. 14, 1996, PRESS/TE 014, paras. 167-68 (1996) [hereinafter CTE REPORT].

334. *See id.*

335. For several points on its agenda, the CTE expanded on discussions that took place in the 1992-1993 GATT Group on Environmental Measures and International Trade, and in 1994 in a Sub-Committee on Trade and Environment of the WTO Preparatory Committee. *See* CTE REPORT, *supra* note 333, paras. 1-2.

336. *See id.* paras. 11-13.

337. *See id.* paras. 166-67.

338. *See id.*

339. *See id.* para. 169.

340. *See id.* para. 196.

distortions, in particular high tariffs, tariff escalation, export restrictions, subsidies, and nontariff barriers can potentially yield benefits for both the multilateral trading system and the environment.[341]

At the December,1996 Singapore WTO Ministerial, the trade ministers received the CTE Report, stating that the CTE "has been examining and will continue to examine, inter alia, the scope of the complementarities between trade liberalization, economic development and environmental protection . . . . The work of the Committee has underlined the importance of policy coordination at the national level in the area of trade and environment."[342] The ministers directed the CTE to continue to carry out its work under its existing terms of reference.[343] The CTE continues to pursue its work program.

2. Principles Derived from Other Fora

The principles pertaining to trade and development described in the 1996 CTE Report to the ministers bear a strong resemblance to those stated at the Miami Summit in 1994. Indeed, these principles were derived from a number of fora that pre-dated the CTE, and have reappeared in other fora since the CTE began its work. For example, at the 1992 United Nations Conference on Environment and Development in Rio de Janeiro, Brazil (UNCED, also known as the Earth Summit or Rio Summit), world leaders agreed to a set of principles for sustainable development and environmental protection known as "the Rio Declaration on Environment and Development," and a program of action for worldwide sustainable development known as "Agenda 21."[344] Both of these documents contain a number of principles similar to those adopted by the Summit of the Americas and the CTE.[345] These principles include the following: (1) states should cooperate to promote a supportive and open international economic system that will lead to economic growth and sustainable development to better address the problem of environmental

341. *See id.* para. 198.

342. WORLD TRADE ORGANIZATION, SINGAPORE MINISTERIAL DECLARATION, Dec. 13, 1996, para. 16, 36 I.L.M. 218 [hereinafter SINGAPORE DECLARATION].

343. *See id.*

344. *See* RIO DECLARATION, *supra* note 1; *Report of the United Nations Conference on Environment and Development*, Annex 2, Agenda Item 21, U.N. Doc. A/Conf. 151/21/Rev.1 (1992) [hereinafter Agenda 21].

345. *See id.* para. 14; RIO DECLARATION, *supra* note 1, Principle 4.

degradation;[346] (2) a warning against the use of discriminatory measures under the guise of environmental protection;[347] (3) discouragement of the relocation and transfer to another country of polluting or other harmful activities,[348] and (4) the general admonition that trade and the environment should be mutually supportive.[349] Many of these principles have been repeated in the NAFTA and the NAAEC,[350] as well as in more recent international conferences such as the December, 1996, Bolivia Summit on Sustainable Development,[351] and the June, 1997, United Nations General Assembly Special Session (UNGASS) which was convened to review progress on the environment since the 1992 Rio Summit.[352]

---

346. *See* RIO DECLARATION, *supra* note 1, Principle 12; Agenda 21, *supra* note 344, paras. 19, 20, 22.

347. *See* Agenda 21, *supra* note 344, paras. 19, 20, 22.

348. *See id.* Principle 14.

349. *See* Agenda 21, *supra* note 344, Principles 4, 8, and 25.

350. *See supra* Parts I.B, II.A-C.

351. The Bolivia Summit resulted in the Declaration of Santa Cruz De La Sierra (the Santa Cruz Declaration) and Plan of Action for the Sustainable Development of the Americas (the Santa Cruz Plan of Action), which stated, among other things, that countries should "reinforce the mutually supportive relationship between trade and the environment . . . while safeguarding an open, equitable, and nondiscriminatory multilateral trade system, taking into account the efforts currently being deployed in this field by the Committee on Trade and Environment of the World Trade Organization." THE SANTA CRUZ DECLARATION, para. 10(a) <http://www.oas.org/EN/PROG/BOLIVIA/sumiteng.htm>. The Declaration further called on countries to "recognize the great need . . . to improve access to markets while maintaining effective and appropriate environmental policies. In this regard, we will avoid hidden trade restrictions, in accordance with the General Agreement on Tariffs and Trade/World Trade Organization (GATT/WTO) and other international obligations." *Id.*

352. In particular, the General Assembly said in its review of Agenda 21:

> [t]here should be a balanced and integrated approach to trade and sustainable development, based on a combination of trade liberalization, economic development and environmental protection. Trade obstacles should be removed with a view to contributing to achieving more efficient use of the earth's natural resources in both economic and environmental terms. Trade liberalization should be accompanied by environmental and resource management policies in order to realize its full potential contribution to improved environmental protection and the promotion of sustainable development through the more efficient allocation and use of resources. The multilateral trading system should have the capacity to further integrate environmental considerations and enhance its contribution to sustainable development, without undermining its open, equitable and non discriminatory character.

U.N. General Assembly, *Programme for the Further Implementation of Agenda 21*, para. 29 (last modified July 1, 1997) <gopher://gopher.un.org/00/ga/docs/S-19/plenary/ES5.TXT> (advanced unedited text) [hereinafter UNGASS Report]. The General Assembly concluded that action was needed to ensure that "[d]ecisions on further liberalization of trade . . . take into account effects on unsustainable development and . . . be consistent with an open, rule-based, non-discriminatory, equitable, secure and transparent multi-lateral trading system." *Id.* para. 29(b). Moreover, the leaders stated that, "[w]ithin the framework of Agenda 21, trade rules and environmental principles should interact harmoniously[.]" *Id*. para. 29(d).

Hence, there has been agreement at the global and hemispheric level that trade liberalization, economic integration, sustainable development and environmental protection must all be mutually supportive. Countries have concluded that efforts to liberalize trade cannot be divorced from environmental considerations, and that environmental protection depends in part on prosperity achieved through trade liberalization. In the various fora described above, certain common themes arise, including the concept that Parties have the right to set domestic levels of environmental protection, but that those levels must be high.[353] Similarly, Parties should not decrease environmental protection levels to attract trade and investment, should not create trade barriers in the guise of environmental protection, and should integrate environment and trade policy domestically and internationally. These themes echo the Miami Summit's pronouncement. The FTAA will be negotiated against this backdrop.

D. Fast-Track

The United States will play a critical role in shaping the scope of any FTAA Agreement, because it maintains the largest economy in the Western Hemisphere and is a primary exporter and market for imports and exports. A crucial factor affecting the United States' role is whether and how the Administration receives "fast-track" authority from Congress. "Fast-track" authority allows the President to seek congressional approval without amendment of an international trade agreement, which would require either implementing legislation or a change in domestic law.[354] In a fast-track process, the President is required to consult with Congress and to give advance notice of his intent to enter into a trade agreement.[355] After entering into the agreement, the President is then required to submit the agreement, along with implementing legislation and a statement of administrative action to Congress.[356] Until that point, the procedures for

353. *See, e.g.*, NAAEC, *supra* note 4, art. 3.

354. Congress introduced fast-track procedures in 1974. It has renewed these procedures a number of times since then, preserving the basic structure each time. Fast-track authority was renewed for eight years by the Trade Agreements Act of 1979, and again renewed for five years by the Omnibus Trade and Competitiveness Act of 1988. The authority granted in the 1988 Act was extended in 1993 to allow completion of the Uruguay Round of WTO negotiations. Fast-track authority expired in 1994. *See Finance Committee Summary of Fast-Track Bill*, INSIDE U. S. TRADE, SPECIAL REPORT, Oct. 1, 1997, at 2; *What is Fast Track?* (last modified Nov. 5, 1997) <http://www.whitehouse.gov/Initiatives/FastTrack/what.html> (White House Fact Sheet) [hereinafter White House Fact Sheet].

355. *See id.*

356. *See id.*

Congressional consideration are strictly circumscribed. Congress may accept or reject the agreement, but it may not amend it.[357] Fast-track legislation gives the President the authority to negotiate trade agreements with foreign countries that Congress cannot reopen or amend.[358] Theoretically, other countries will negotiate more willingly if they know that the United States speaks with one voice and that the Congress will not alter the agreement. Indeed, nations in the hemisphere have expressed reservations about negotiating the FTAA with the United States without fast-track authority from Congress.[359] Although the President is currently seeking fast-track authority for a number of trade agreements, the FTAA has been particularly linked to fast-track authority, especially by FTAA Parties.[360]

Even before President Clinton introduced the fast-track proposal in September of 1997, clear lines existed between fast-track's supporters and opponents.[361] In particular, the issue of how the environment was to be treated in fast-track, and hence in the FTAA and other relevant agreements, has driven a clear wedge between Republicans and Democrats in the House and Senate.[362] Republican majority leaders have stated their opposition to any environmental provisions in fast-track legislation that are not at least directly related to trade.[363] Democratic minority leaders have stressed that fast-track

357. *See* H.R. 2621, 105th Cong. (1997).

358. *See* White House Fact Sheet, *supra* note 354.

359. *See, e.g.*, *Costa Rican Trade Chief Reveals Major Points of Pending FTAA Debate*, AMERICAS TRADE, Sept. 18, 1997, at 1, 18; White House Office of the Press Secretary, *Press Briefing by Secretary of Treasury Robert Rubin et al.* (last modified Sept. 10, 1997) <http://www.whitehouse.gov/Initiatives/FastTrack/0910brief.html> (statements of Barshefsky) [hereinafter Sept. 10, 1997 White House Briefing]; *Asian Economic Crisis Likely to Complicate Fast Track, China WTO Entry*, INSIDE U.S. TRADE, Jan. 1998, at 19.

360. As originally proposed by the Clinton Administration, fast-track authority would cover agreements in the WTO on agriculture and government procurement and intellectual property rights. Fast-track authority would also apply to Chile's accession to the NAFTA, with some exceptions for Congressional notification requirements. In fact, Chile's accession to the NAFTA could be the first step toward a comprehensive hemispheric free trade agreement. *See* Sept. 10, 1997 White House Briefing, *supra* note 359; Office of the United States Trade Representative and Related Entities, *Report to the Congress: Recommendations on Future Free Trade Area Negotiations* (last modified Sept. 25, 1997) <www.sice.oas.org/root/forum/p_sector/govt/fftal.stm.>

361. *See, e.g.*, Donna Smith, *Fast-Track Trade Battle Heats up in Congress*, REUTERS, Nov. 3, 1997; John Harris, *Clinton Hits 'Fast-Track' Opponents*, WASH. POST, Oct. 28, 1997, at A4; *Republican Leaders Profess Uncertainty Over House Fast-Track Vote*, AMERICAS TRADE, Oct. 16, 1997, at 2-4; *see also* Robert F. Housman, *The Treatment of Labor and Environmental Issues in Future Western Hemisphere Trade Liberalization Efforts*, 10 CONN. J. OF INT'L L. 302, 310-314 (1995) (describing earlier Clinton Administration efforts to secure fast-track authority for the WTO Agreement).

362. *See id.*

363. *See* Smith, *supra* note 361, at 2.

authority must contain a provision ensuring environmental protection, as well as protections for labor.[364]

The original Administration proposal sought a compromise between the two camps by addressing environmental protection in several different ways. It first defined as an "overall trade negotiation objective," subject to fast-track procedures, the need "to address those aspects of foreign government policies and practices regarding labor, the environment, and other matters that are directly related to trade and decrease market opportunities for the United States' exports or distort United States' trade."[365] Similarly, environmental protection was identified as a "principal trade negotiating objective," which was to be addressed outside the fast-track agreement through the WTO.[366] Agreements could not be reached regarding tariff and nontariff barriers unless they made progress in meeting the applicable "principal negotiating objectives," but these barriers were not explicitly covered by fast-track.[367]

address those aspects of foreign government policies and practices regarding labor, the environment, and other matters that are directly related to trade and decrease market opportunities for the United States' exports or distort United States' trade."[365] Similarly, environmental protection was identified as a "principal trade negotiating objective," which was to be addressed outside the fast-track agreement through the WTO.[366] Agreements could not be reached regarding tariff and nontariff barriers unless they made

364. *See* Harris, *supra* note 361, at A4.

365. Export Expansion and Reciprocal Trade Agreement, Administration Proposal § 2(a)(5) [hereinafter Administration Proposal].

366. The Administration Proposal stated in relevant part that "[t]he principal negotiating objectives of the United States regarding . . . protection of the environment are, through the World Trade Organization . . . (D) to promote sustainable development; and (E) to seek to ensure that trade and environmental protection are mutually supportive, including through further clarification of the relationship between them." *Id.* § 2(b)(7). In pursuing the "principal negotiating objectives," negotiators were to take into account United States domestic objectives, including but not limited to the protection of health and safety and environmental interests, laws and regulations. *See id.* § 2(c).

367. *See* Administration Proposal, *supra* note 365, § 3(b)(2).

365. Export Expansion and Reciprocal Trade Agreement, Administration Proposal § 2(a)(5) [hereinafter Administration Proposal].

366. The Administration Proposal stated in relevant part that "[t]he principal negotiating objectives of the United States regarding . . . protection of the environment are, through the World Trade Organization . . . (D) to promote sustainable development; and (E) to seek to ensure that trade and environmental protection are mutually supportive, including through further clarification of the relationship between them." *Id.* § 2(b)(7). In pursuing the "principal negotiating objectives," negotiators were to take into account United States domestic objectives, including but not limited to the protection of health and safety and environmental interests, laws and regulations. *See id.* § 2(c).

progress in meeting the applicable "principal negotiating objectives," but these barriers were not explicitly covered by fast-track.[367]

Hence, the Administration bill sought to include environmental provisions in its proposal in a manner that both suggested limits (e.g., trade-relatedness, negotiations "through" the WTO), while simultaneously allowing for broader interpretations (e.g., negotiators were to take into account domestic objectives) and the possibility of addressing environmental measures in other fora or instruments not subject to fast-track, such as the WTO.[368] Nevertheless, the proposal failed to satisfy either those members of Congress most opposed to the inclusion of environmental measures in a trade agreement, or those who demanded that environmental protection be given a higher profile or be made binding on Parties.[369]

The Clinton Administration then began work with the relevant Senate and House committees to reach agreement on a consensus bill.[370] Tentative agreement was first reached in early October of 1997, when the Senate Finance Committee agreed on a bill that took a slightly different approach to the trade and environment issue.[371] The Export Expansion and Reciprocal Trade Agreements Act of 1997 sought to prevent government regulation and other government practices (including health, safety, labor and environmental standards) from affording a commercial advantage to domestically produced goods or third country imports. Specifically, the Act prohibited weakening or failing to enforce existing regulations to attract investment, because such practices would discriminate against U.S.

---

367. *See* Administration Proposal, *supra* note 365, § 3(b)(2).

368. *See* White House Office of the Press Secretary, *Press Briefing by Mike McCurry and Dan Tarullo* (last modified Sept. 16, 1997) <http://www.whitehouse.gov/Initiatives/FastTrack/19970916-3756.html> (statement of Tarullo).

369. *See 1996 Annual Report*, *supra* note 137, at 88; text accompanying note 242 *supra*.

370. *See* S. 1269, 105th Cong., § 2(b)(15) (1997) [hereinafter S. 1269]. In order to address concerns that fast-track would impact the environment and labor adversely, President Clinton released a Statement of Executive Initiatives Accompanying Fast-Track, on November 3, 1997. These initiatives mostly concerned labor issues, but the Statement did propose a series of initiatives to address the environment, including efforts to increase transparency and openness in the WTO; convene a group of experts to review how environmental considerations relate to the WTO; and encourage international financial institutions to incorporate environmental issues into their operations. President Clinton also committed to reviewing prospective free trade partner countries' environmental laws and practices, including the enforcement of those laws. *See Statement of Executive Initiatives Accompanying Fast-Track Legislation*, Daily Lab. Rep. (BNA) (Nov. 3, 1997).

371. *See* White House Office of the Press Secretary, *Statement by the President on Senate Finance Committee Vote on Fast-track Legislation* (last modified Oct. 1997) <http://www.whitehoue.gov/Initiatives/FastTrack/1997100-6646.html>.

goods, services, or investment.[372] The Senate bill then identified a number of "international economic policy objectives," which were to reinforce the trade negotiation process.[373] These objectives included expanding trade to ensure the optimal use of the world's resources, while seeking to protect and preserve the environment and to enhance the international means for doing so.[374] The proposal stated that legislation modifying United States law in pursuit of these objectives would not be subject to fast-track consideration.[375]

In mid-October of 1997, the House Ways & Means Committee approved a marked-up bill, the Reciprocal Trade Agreement Authorities Act of 1997, which took an approach similar to the Senate bill.[376] The House bill provided that a principal negotiating objective would include those aspects of foreign policies and practices regarding the environment that are directly related to trade.[377] Countries were not permitted to derogate from or waive existing domestic environmental, health or safety measures to attract investment.[378] These provisions were limited so that the objective would not be used to address non-discriminatory changes to a country's laws that are consistent with sound macroeconomic development.[379] The House bill also provided that the President should take into account the relationship between trade agreements and other "International Economic Policy Objectives," such as environmental protection, to ensure that the trade agreements complement and reinforce the policy goals.[380] Thus, fast-track authority would not apply to those matters. The House bill would also require negotiators to take into account United States domestic objectives, including protection of health, safety and the environment.[381]

Hence, as originally introduced in 1997, the Administration, Senate and House proposals shared many elements concerning environmental protection, but clearly placed most other

372. Trade in services is another principal negotiating objective. Under this objective, United States negotiators shall consider legitimate domestic objectives, such as health, safety, and the environment. That provision, however, did not authorize any modification of United States law. *See* S. 1269, *supra* note 370, § (b)(15)(B).

373. *See id.* § 2(c)(1).

374. *See id.* § 2(c)(1)(D).

375. *See id.* § 3(a)(5).

376. *See* H.R. 2621, 105th Cong. (1997).

377. *See id.* § 102(b)(7).

378. *See id.*

379. *See id.*

380. *See id.* § 102(c)(1).

381. *See id.* § 102(d)(1).

environmental provisions outside the purview of fast-track authority and guarded against other countries using environmental protection as a guise for discriminatory measures. The proposals, however, identified environmental protection as an important policy interest, thereby suggesting that such a matter could be addressed through other fora or agreements.

Although President Clinton made passage of a fast-track bill a priority in the Fall of 1997, Administration and House leaders failed to secure a sufficient number of committed votes to ensure its passage in the House, and the bill was withdrawn from consideration on November 10, 1997.[382] The Senate bill was also not submitted for a vote. In announcing the House withdrawal, the President assured the public that fast-track authority was not "dead" and that he would bring the matter "back up at the appropriate time."[383]

The failure to ensure passage was blamed primarily on organized labor's opposition to fast-track authority as well as House Republican's insistence in tying the matter to controversial and unrelated issues.[384] Nevertheless, concerns over the environment did play a significant role in convincing legislators to oppose fast-track legislation as currently proposed.[385] As of this writing, neither the Administration nor Congress has reintroduced fast-track legislation. Hence, it is uncertain if and how the fast-track proposals would be changed, and in particular, whether different approaches may be tried for the provisions on environmental protection.[386]

---

382. *See* Federal Document Clearing House, *Transcript of President Bill Clinton* (last modified Nov. 10, 1997) <http://allpolitics.com/1997/11/10/fast-track.folo/fdch.html> [hereinafter FDCH Transcript].

383. *Id.*

384. *See* John E. J. Yang, *Lacking Support, Clinton Postpones 'Fast-track' Vote*, WASH. POST, Nov. 10, 1997, at A1; David Phinney, *Clinton Shelves Trade Effort* (last modified Nov. 10, 1997) <http://www.abcnews.com/sections/us/trade 1106/index.html>; David Phinney, *Rethinking Fast Track*, (last modified Nov. 11, 1997) <http://www.abcnews.com/sections/us/treaty1111/index.html>; *see also Republican Leaders Profess Uncertainty Over House Fast-Track Vote*, AMERICAS TRADE, Oct. 16, 1997, at 4-5; *Senate Finance Poised to Pass Fast Track Without Labor, Environment*, INSIDE U.S. TRADE SPECIAL REPORT, Oct. 1, 1997, at 1.

385. *See id.*

386. *See* Ann Curley, *Gephardt Says He'll Offer Fast-Track Alternative* (last modified Nov. 11, 1997) <http://allpolitics.com/1997/11/10/email/gephardt/> (CNN News Email). Immediately after the proposal was withdrawn, Democratic House Leader Dick Gephardt announced his intention to offer an alternative formulation that would require "countries who are signatories to a trade agreement . . . to properly enforce their labor, worker and environmental laws with trade sanctions to enforce their ability to do that." *Id.* In his press conference explaining the withdrawal of the fast-track proposal, President Clinton described the Democratic Party's efforts to "inject labor issues and environmental issues into our international negotiations as part of our strategy to expand trade and economic partnerships" as a "positive thing." FDCH Transcript, *supra* note 382, at 4. The House of Representatives finally did vote on fast-track

E. President Clinton's Statement Before the WTO

In a recent statement before the WTO, President Clinton strongly underscored many themes that have arisen in the fora and institutions mentioned above.[387] These include the importance of balancing trade and the environment, the need to ensure high levels of environmental protection, and the importance of transparency and public participation.[388] At the commemoration of the 50th anniversary of the WTO, President Clinton recognized that the new global economy presents new challenges, including the need to balance economic growth with a sustainable environment.[389] While stating the importance of trade expansion, he nevertheless recognized that such expansion should not come at a detriment to the environment.[390] Rather, he stated that "we should be leveling up, not down" on environmental, consumer and labor protections.[391]

The President also stated that "expanded trade can and should enhance—not undercut—the environment," and proposed doing more to harmonize the two principles.[392] He observed that "international trade rules must permit sovereign nations to exercise their rights to set protective standards for health and safety, the environment and biodiversity," and that "[n]ations have a right to pursue those protections, even when they are stronger than international norms."[393] He proposed a high-level meeting to bring together trade and environment ministers to "provide strong direction and new energy to the WTO's environmental efforts in the years to come . . . ."[394] Such a meeting, the WTO High-Level Symposium on Trade and Environment, was held in March, 1999, in Geneva, Switzerland.[395]

Finally, the President underscored the importance of transparency in the WTO process, calling for all WTO hearings to be

---

legislation in the Fall of 1998, defeating the measure 243-180. *House Defeats Fast-Track Trade Authority*, WASH. POST, Sept. 26, 1998. As of the date of this writing, the Clinton Administration is considering reintroducing fast-track legislation that would take into account environmental concerns. *See Clinton, Barshefsky Signal New Approach to Fast-Track Authority*, INSIDE U.S. TRADE, Nov. 13, 1998 at 1, 18.

387. *See* White House Press Release, *Remarks by the President at the Commemoration of the 50th Anniversary of the World Trade Organization* (last modified May 18, 1998) <http://www.pub/whitehouse.gov/uri.../oma.eop.gov.us/1998/5/19/8.text.1>.

388. *See id.*

389. *See id.* at 2.

390. *See id.* at 3.

391. *Id.*

392. *Id.*

393. *Id.*

394. *Id.*

395. *See* WTO Website <http://www.wto.org/wto/hlms/sumhlenv.htm>.

open to the public, and for all briefs filed by the Parties before dispute panels to be made available to the public.[396] He further proposed that stakeholders be permitted to file amicus briefs to help inform WTO panels in their deliberations, and that panel decisions be made publicly available as soon as they are issued.[397] He challenged the WTO to become a consultative forum where business, labor, environmental and consumer groups can provide regular and continuous input to "help guide further evolution of the WTO."[398]

While these statements were all made in the context of the WTO, they are consistent with principles derived from the NAFTA, the NAAEC, the Summit of the Americas, and other agreements and fora. It remains to be seen how the President's statement will affect the implementation of United States' policy, the functioning of the WTO, or the FTAA.

V. THEMES AND PRINCIPLES FROM THE NAFTA AND THE NAAEC THAT MAY BE RELEVANT TO THE FTAA PROCESS

Concerns about the effects of economic development caused by trade liberalization on environmental protection will need to be addressed during the FTAA negotiations. As discussed in previous Parts of this Article, these negotiations will not occur in a vacuum. The Miami Summit, which underlies the FTAA process, expressly calls for efforts to make the two operating principles mutually supportive.[399] This call has been reiterated in a number of other fora, including the WTO and most recently by President Clinton.[400] It is the NAFTA and the NAAEC, however, that represent the most significant attempts to date to actually implement such efforts. Thus, Parties to the FTAA may examine those agreements as suggesting ways to balance and mutually promote free trade and environmental protection in a broader, hemispheric context. We acknowledge that the agreements have only been in force for a limited time and, with the scarcity of empirical studies, it is difficult to draw definitive conclusions about their effects on the Parties' efforts to protect their respective environments, safety, and human health. Nevertheless, there are some preliminary lessons and principles that can be derived from an analysis of the NAFTA and NAAEC and their implementation and contemporaneous fora. This Part of the Article

396. *See id.* at 4.
397. *See id.*
398. *Id.* at 3.
399. *See* MIAMI DECLARATION OF PRINCIPLES, *supra* note 289, paras. 10-19.
400. *See supra* notes 338, 342, 349-352, 365-366 and 393 and accompanying text.

will conclude by examining how these principles and the lessons learned about their application in the NAFTA/NAAEC context may relate to the FTAA process. Based on that examination, the Article suggests matters that may need to be addressed in the context of the FTAA.

A. Principles Derived from the NAFTA, the NAAEC and Contemporaneous Fora

A number of principles regarding the relationship between the environment and trade can be derived from the NAFTA and the NAAEC, for example:

1. Economic development through trade liberalization must be integrated with environmental protection. The Miami Summit and all recent fora in which trade and the environment have been considered establish as a premise that trade liberalization must be integrated with environmental protection fully, and that the two concepts must be made mutually supportive. This principle recognizes that both trade liberalization and environmental protection are necessary for sustainable development.[401] The NAFTA, through its environmental provisions, and the NAAEC strive to achieve this integration at both the international and domestic levels.

2. Where appropriately balanced, increased economic development can lead to better environmental protection efforts. The NAFTA, the Miami Summit Declaration and Plan of Action, and commitments in other fora posit the principle that economic development through trade liberalization can actually improve the environment and establish environmental protection as a foundation principle.[402] Such development can allocate resources and increase prosperity efficiently, which allows a focus on development that is sustainable rather than exploitative.

3. Countries should promote high levels of environmental protection. The NAFTA recognizes this principle by encouraging nations to set levels higher than international standards.[403] This principle is also underscored in the NAAEC through specific mandatory commitments and multilateral cooperative efforts.[404] Underlying this principle is a view that trade liberalization need not

401. *See supra* Part IV.B and C.
402. *See id.*
403. *See* NAFTA, *supra* note 3, art. 905.3.
404. *See supra* Part III.

and should not result in harm to the environment, and that both goals are compatible.

4. Countries should not lower standards to attract trade or investment. This principle is expressly recognized in the NAFTA, where it is mandatory, and other fora and agreements such as Agenda 21.[405] Indeed, concern over lowering standards and the resulting transfer of polluting industries was a main impetus for the NAAEC negotiations.[406] This imperative is a corollary to the principles of compatibility between free trade and environmental protection and the need to maintain high environmental protection levels. Thus, free trade should not undermine a nation's will to establish and enforce high standards. President Clinton recently reiterated this concept in the WTO context.[407]

5. Countries should have the right to protect health, safety and the environment by setting standards at their own preferred level; however, countries should not use such standards as a disguise for discrimination. The NAFTA, the NAAEC and the WTO expressly recognize the sovereign right of nations to select standards appropriate to achieve desired levels of protection, and to take actions to achieve those standards as long as those standards meet a minimum threshold. The right is limited by the prohibition on unjustifiable discrimination and disguised barriers to trade.[408] This principle, however, generally recognizes the legitimacy of a Party's environmental laws and regulations, rather than assuming the supremacy of trade interests in each instance.

6. Countries should promote effective enforcement and cooperation. This principle is central to the NAAEC, which establishes mandatory domestic commitments for effective enforcement and creates avenues for addressing instances where such efforts are not undertaken.[409] Moreover, through the Commission and its work groups and programs, Parties have the opportunity to cooperate in the development and enhancement of enforcement capacity and expertise.[410]

7. Transparency and public participation are essential to ensuring that trade and environmental protection are properly balanced. These related principles are generally recognized in the

405. *See supra* Parts II.B & IV.C.
406. *See supra* Part II.A.
407. *See supra* Part IV.E.
408. *See supra* Parts II.B.2, III, & IV.C.1.
409. *See supra* Part III.D.2. and note 250.
410. *See supra* Part III.B.

NAFTA and are inherent in the institutions created in the NAAEC, most notably the public submission process.[411] Transparency ensures that all Parties understand and have access to information regarding regulatory decisions and actions that may affect them. Public participation allows residents and citizens to play a role in the decision-making process, and in some instances to challenge decisions. Again, President Clinton recently reiterated the importance of these concepts.[412]

B. Lessons From the NAFTA and the NAAEC and their Application to the FTAA

As noted at the beginning of this Article, insufficient information currently exists to draw definitive empirical conclusions on how the environmental provisions of the NAFTA and the NAAEC have affected environmental protection in the Party states. Significant controversy about the NAFTA's compatibility with environmental protection remains. For instance, some advocacy organizations have argued that the NAFTA has contributed to increased air pollution in the U.S.-Mexico border zone.[413] On the other hand, a number of important domestic and trilateral efforts in environmental protection have resulted from increased international cooperation under the NAAEC and related agreements, which were prompted by or improved in response to the NAFTA.[414] These efforts have led, for instance, to increases in funding for infrastructure construction to control pollution, improvements in enforcement cooperation, and increased public awareness about environmental issues.[415]

In spite of controversy and the general lack of empirical evidence, some preliminary observations can be made about how the agreements and the principles contained therein have worked and their possible relevance to the FTAA process. Indeed, some of the issues raised will necessarily arise in the FTAA negotiations.

1. Addressing Environmental Protection in the FTAA Process

One tentative lesson that can be drawn from the NAFTA's environmental protection provisions arises out of the explicit relationship that the NAFTA spells out between trade and the

411. *See supra* Part III.C.; *see also* Part III.A.3.
412. *See supra* IV.E.
413. *See supra* note 10.
414. *See supra* Parts III.B-E.
415. *See id.*

environment. Because the NAFTA has given environmental protection measures an explicit and legitimate role in the trade context, it has determined their relationship prior to any disputes. In marked contrast, the GATT/WTO has chosen to rely on an ad hoc decision-making process. Evaluations by GATT/WTO trade panelists clarify the interrelationship between trade and the environment as specific issues arise in dispute resolution proceedings.[416] As a result, the NAFTA relies less on the judgment of trade specialists—unaccountable to any nation—to establish the proper balance between the benefits of trade and environmental protection.

However, the GATT/WTO has proven to be the premier forum for dealing with free trade issues. Its theoretical approaches and dispute-panel decisions regarding trade, particularly trade and environmental protection measures, are considered authoritative within the WTO and perhaps even in a broader trade context. Consequently, GATT/WTO approaches and jurisprudence may be relied upon when the NAFTA is silent on an issue. Therefore, if the specific relationship between trade and the environment is to be any different from that provided under GATT/WTO, any future trade agreement probably has to expressly set out that relationship. That may be one of the most significant reasons why it may be useful to specify the relationship between trade and environmental measures within the text of a new trade agreement itself, rather than simply rely on the GATT Article XX exceptions provision or on separate environmental side agreements.

Hence, the Parties to the FTAA will need to decide if they wish to follow the NAFTA model and address environmental protection directly in the text of the free trade agreement. If they decide to take this approach, they must then decide whether such provisions should be preambular or be provided separately in the body of the agreement. The NAFTA contains both types of provisions.[417] If substantive provisions are agreed upon, the Parties may need to decide further if such provisions are to be binding or nonbinding (e.g. "shall" versus "should"), and if binding, what kind of dispute mechanisms might apply. The NAFTA generally contains non-binding language relating to environmental protection, although it does render certain provisions subject to party consultations.[418]

---

416. *See supra* notes 32-37 and accompanying text.
417. *See supra* Part II.B.
418. *See, e.g.*, NAFTA, *supra* note 3, § 1114(2) (not lowering environmental standards).

Finally, the Parties may need to consider whether environmental provisions in an FTAA Agreement should simply protect a Party's ability to develop and implement environmental law and prohibit it from lowering its standards, or whether affirmative obligations, such as requiring high levels of protection and effective enforcement, are sufficient. The former types of provisions appear in the NAFTA while the latter are found in the NAAEC.[419]

Negotiating environmental provisions in an FTAA Agreement would undoubtedly be controversial and difficult in the current hemispheric and domestic political climate. Questions have arisen about the appropriateness of including environmental provisions in trade agreements at all.

2. Ensuring the Ability to Regulate Domestically and the Viability of International Agreements

If no explicit environmental provisions are included in a FTAA Agreement or accompanying side agreement, the Parties will probably still need to address the relationship of the FTAA to the WTO in the environmental arena. In the NAFTA, this issue is addressed in Article 2101, which incorporates, for most purposes, GATT/WTO Article XX exceptions for health, safety, and environmental laws and regulations that are not themselves unjustifiably discriminatory or disguised restrictions on trade.[420] The inclusion of such a provision in the FTAA would also depend on the types of disciplines and dispute resolution provisions included in the FTAA. Moreover, like the NAFTA, the FTAA may need to address how its disciplines would apply to certain multilateral environmental agreements, including the recently negotiated Kyoto Protocol to the United Nations Framework Convention on Climate Change, which establishes certain mechanisms that could be relevant to trade concerns.[421]

---

419. *See supra* Parts II.B & III.D-E.

420. *See supra* notes 80-81.

421. *See, e.g.*, Kyoto Protocol to the United Nations Framework Convention on Climate Change, Articles 12 (clean development mechanisms), 17 (emissions trading), and 18 (non-compliance procedures), U.N. Doc. FCCC/CR/1997/L.7/Add.1(1998). Note that it is far from clear whether these provisions even relate to trade in goods and services subject to multilateral trade agreements.

3. Establishing Contemporaneous Agreements and Institutions to Promote Environmental Protection and Enforcement Cooperation

As noted above, while the NAFTA includes provisions to ensure that trade liberalization does not come at the expense of environmental protection, these provisions primarily recognize that nations retain their right to protect the environment. Provisions promoting high levels of protection, effective enforcement, multilateral cooperation and public participation in environmental decision-making are instead contained in the NAAEC.[422] Such provisions may have made important contributions to protecting the North American environment by spurring domestic improvement of laws and enforcement, as well as multilateral initiatives to ensure better stewardship of common resources.[423] Institutions created contemporaneously with the NAFTA and the NAAEC have also resulted in the development of necessary infrastructure and capacity in economically disadvantaged regions.[424]

Even more significantly, the NAAEC created the CEC as a means of implementing the NAAEC principles and objectives.[425] Together with institutions such as the BECC and the NADBank, the Commission has established itself as an important forum for the three countries to discuss and engage cooperatively in environmental protection efforts.[426] In these fora, the need for environmental protection is no longer an issue that must continually be reaffirmed. Discussions are focused on the assumption that environmental protection is necessary. A key question is how to achieve environmental protection most effectively. The fact that the CEC's national representatives are each country's environment Ministers instead of foreign affairs or trade representatives especially underscores this concept.[427]

Furthermore, the CEC and related institutions have served to focus public and political attention on the need for environmental protection and cooperative environmental efforts. Creation of these fora has itself created public expectations for increased environmental protection. At the same time, the Agreement's mechanisms for public participation, such as the Article 14 and 15 processes under the

422. *See supra* Part III.
423. *See supra* Parts III.D & E.
424. *See supra* Part III.E.
425. *See supra* Part III.A.
426. *See supra* Parts III.A & E.
427. *See supra* note 97.

NAAEC, have increased accountability to and opportunity for pressure by the public. Nevertheless, there has also been criticism that the organizations set up under the side agreements, such as the CEC, lack sufficient authority "to alleviate trade-related environmental problems."[428] Whether giving such intergovernmental organizations increased authority with respect to individual member countries is desirable is, of course, open to question. However, their value as permanent fora for multilateral cooperation on environmental issues should be evident.

Consequently, one of the overall lessons of the NAFTA and its side agreements, even at this early stage, is that the establishment of environmental fora through side agreements has been extremely valuable. The NAFTA model has shown that the creation of such institutions need not occur as part of the free trade agreement itself, but can occur concurrently. Of course, the simultaneous negotiation of an environmental side agreement can provide leverage with regard to obtaining a strong environmental agreement. However, the creation of multilateral environmental organizations charged with guarding against free trade related environmental degradation need not, as a fundamental matter, be directly tied to the negotiation of a free trade agreement.

With this background, the Parties to the FTAA may consider addressing environmental concerns in one or several contemporaneous agreements or institutions. They might also find these appropriate only for more affirmative provisions and initiatives which could bolster an underlying FTAA Agreement and provide necessary capacity for environmental protection. In either event, the Parties would be faced with a number of complex issues. Numerous countries are involved in the FTAA process and each has its own level of political commitments, financial resources and institutional capacity to develop and enforce environmental laws. Also, each party has its own accepted standards of protection. Moreover, unlike in the NAFTA /NAAEC context, not all countries share common borders or resources that could be impacted by development that is not sustainable. Finally, the creation of some central institution to coordinate cooperative efforts and programs or to enforce agreements could raise sovereignty and resource concerns among nations already adverse to expanding environmental protection in the trade context.

---

428. Public Citizen's Global Trade Watch Institute for Policy Studies and the Sierra Club, *The Failed Experiment: NAFTA at Three Years* (June 1997); *see also* Joel Millman, *NAFTA's Do-Gooder Side Deals Disappoint: Efforts to Protect Labor, Environment Lack Teeth*, WALL ST. J., Oct. 15, 1997, at A19.

Such complications are not insurmountable. Institutions and agreements for hemispheric cooperation already exist upon which new efforts can be built or modeled. For example, the nations in the Western Hemisphere have already convened a Summit on Sustainable Development in Bolivia in 1996, which resulted in a number of specific initiatives related to environmental protection.[429] Additionally, the Western Hemisphere nations are now developing a process for implementing these initiatives through the Organization of American States (OAS) and two OAS institutions—the Inter-American Commission on Sustainable Development and the Inter-American Council for Integral Development.[430] Moreover, these nations share a common forum for discussion of trade and the environment generally through the WTO CTE.[431] Thus, institutions exist within which the Parties can seek to develop a dialogue to determine how to address any environmental concerns arising from an FTAA Agreement. In fact, the possibility of working through existing mechanisms appears to be raised by the various formulations of congressional fast-track legislation proposals.[432]

4. Environmental Review of the FTAA

To determine how an FTAA Agreement might affect the environment and environmental protection, Parties individually or collectively may consider undertaking comprehensive written environmental reviews of the FTAA Agreement. These reviews would need to be conducted sufficiently early in the process and with public input to allow information to be taken into account in the negotiations. Such reviews have been conducted by the United States in the NAFTA context on two occasions.[433] If the Parties choose this route, they will need to determine the appropriate time in the negotiation process to conduct such a review and how to address any concerns identified by the process.

---

429. *See supra* note 351.

430. *See, e.g.*, Permanent Council of the Organization of American States, Special Committee on Inter-American Summit Management, *Follow up to the Bolivia Summit of the Americas on Sustainable Development*, OEA/SER.G, CE/GCI125/97 add. 2 (Nov. 26, 1997).

431. *See supra* Part IV.C.1.

432. Note that even if the FTAA creates no new side agreements or institutions, the Parties may still need to consider what role existing institutions such as the OAS, CTE, and groups implementing Summit agreements should play in addressing environmental issues.

433. *See supra* notes 45 and 85 and accompanying text. In March, 1999, the United States called for a written environmental review of the Millennium Round of Negotiations, which will be launched at the WTO Seattle Ministerial in December, 1999. *See* WTO High-Level Symposium on Trade and Environment, *Statement of the United States, Introduction and Opening Session*, March 15-16, 1999 at 2. A review of the Uruguay Round was also conducted. *Id.*

5. Dispute Resolution and Consequences of Non-compliance

While a number of challenges to environmental laws and regulations have been filed under the NAFTA's Investment Chapter (Chapter 11),[434] as of yet there have not been any decisions that interpret the provisions of the NAFTA with respect to the permissibility of domestic environmental laws or regulations.

Theoretically, at least, incorporating specific environmental concerns and protections into the NAFTA can arguably be said to have had important political effects on when environmental challenges are brought. Explicit environmental guarantees change the political and legal calculus of bringing trade challenges to environmental regulations. Such explicit guarantees can create the quasi-presumption that measures which provide a high degree of environmental protection are permissible, since they are explicitly made part of the NAFTA obligations. By contrast, agreements such as the GATT that do not contain such explicit guarantees, have tended to address environmental protection as the exception rather than the rule. Thus, when considering the permissibility of environmental measures, the NAFTA has swung the calculus in favor of environmental protection through the specific environmental protection provisions and the quasi-presumption of permissibility that they create.

In the context of the FTAA, the Parties will need to decide whether they wish to create a NAFTA-like presumption and/or a GATT-like exception. The types of dispute resolution mechanisms and consequences for non-compliance negotiated by the Parties will color the type of environmental provisions that could be appropriate. For example, the Parties would need to consider whether public health, safety and environmental regulations would need protection from challenge under FTAA disciplines, and if so, Parties may also need to consider how to address non-compliance with any environmental obligations that might be established in an agreement. Again, the NAFTA may provide some guidance.

Finally, the Parties to an FTAA Agreement may need to consider whether to subject obligations in any environmental side agreements to dispute resolution. The NAAEC model provides for specific obligations on domestic enforcement, and establishes mechanisms for the Parties and the public to challenge party compliance, including possible financial penalties and trade sanctions.[435]

---

434. *See supra* note 76.

435. *See supra* Part III.D.2. and note 250

6. Transparency and Public Participation

The related principles of transparency and public participation are enshrined in the NAFTA and NAAEC provisions, and are intended to ensure that all affected Parties understand, and have a "say" in, governmental decisions. The NAAEC, in fact, empowers private citizens to petition for a factual record relating to a government's alleged failure to enforce its environmental laws effectively.[436] These concepts again may be controversial in the FTAA context, where nations less experienced in fostering public participation are involved. The trade ministers have declared their commitment to transparency in the FTAA, however,[437] and it is likely that these principles will be addressed in the FTAA negotiations.

VI. CONCLUSION

While some of the issues and approaches discussed in this Article are complex and often controversial, none are completely new to the hemispheric or international stage. Indeed, under the pronouncements of the Miami Summit, they are issues which should be addressed in order to make economic development and environmental protection mutually supportive. Most importantly, they are issues that have already arisen in the context and implementation of the NAFTA and the NAAEC. Therefore, the provisions of these agreements and their implementation should provide a point of reference and potentially a guide to all the Parties embarking on FTAA negotiations.

436. *See id.*
437. *See supra* Parts IV.A & B.