



Ten Years of North American Environmental Cooperation

Report of the
**Ten-year Review and
Assessment Committee**
to the Council of the Commission
for Environmental Cooperation



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Ten-year Review and Assessment Committee (TRAC)

15 June 2004



Letter of transmittal

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11 June 2004

Dear Members of the CEC Council:

I am pleased to submit to you the report of the Ten-year Review and Assessment Committee on the Commission for Environmental Cooperation, as called for under Council Resolution 03-02. As Chair of the Committee of six persons appointed by your respective governments, I can say that we have worked as a strong team that has been able, in the conduct of our Review, to reach out to CEC stakeholders, past and present. The report presents a concise review of the implementation of the North American Agreement on Environmental Cooperation over its first ten years, and recommends actions to assist the Council in charting the path for the CEC over the next decade.

Speaking for all of my colleagues, we believe that the Commission for Environmental Cooperation is fundamentally important to development and effective environmental cooperation in North America.

You have in your hands our unanimous report, which we trust will assist you in guiding the CEC now and in the future.

We wish to thank the Council for entrusting us with this work. Please accept, Ministers, our respectful regards.



Pierre Marc Johnson

Chairman,
Ten-year Review and Assessment Committee

On behalf of:

Daniel Basurto
Jennifer A. Haverkamp
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To review the record of a complex organization such as the Commission for Environmental Cooperation (CEC) and an international agreement like the North American Agreement on Environmental Cooperation represents a major challenge. The Ten-year Review and Assessment Committee (TRAC) was fortunate to be able to speak to and learn from a large number of individuals, many of whom were involved in the CEC's creation and others who remain engaged today. We want to thank these individuals, including current and former Council members, government officials, industry and NGO representatives, academics and other experts and observers, and the CEC Secretariat staff, for the valuable insights they contributed over the course of our work. Not all organizations accept to subject themselves to such outside scrutiny. We commend the Council for initiating this review and thank the CEC for giving us wide scope and open access to conduct our work.

During the seven months of the review, we were ably supported by Timothy Whitehouse and Alain Droga from the CEC Secretariat who looked after all our logistical needs. We very much appreciated their efficiency and the high standards of integrity they maintained in these tasks.

TRAC members want to underline the remarkable work performed by François Bregha, George Greene and Karla Heath of Stratos Inc., the consulting firm that supported our work; we also extend our appreciation to the professionals, academics and others who have undertaken various tasks as consultants and whose identities can be found in the appendices.



Executive summary

Ten years ago, Canada, the United States and Mexico negotiated the largest free trade agreement in the world at the time, the North American Free Trade Agreement. NAFTA created a marketplace of 400 million people and a combined GDP in excess of \$7 trillion.

A separate agreement, the North American Agreement on Environmental Cooperation (NAAEC), created a trilateral institution, the Commission for Environmental Cooperation (CEC). This Commission is led by a Council comprising Canada's Minister of Environment, Mexico's Secretary of the Environment and the Administrator of the United States Environmental Protection Agency. The Commission was the first of its kind in the world in linking environmental cooperation with trade relations.

The NAAEC's mandate allows the CEC to address almost any environmental issue anywhere in North America. The NAAEC stands out for its provisions for public participation and for the unprecedented commitment by the three governments to account internationally for the enforcement of their environmental laws. These provisions make the CEC an international model.

Last fall, the CEC Council mandated our review committee, composed of two representatives from each of the three NAFTA countries, to assess NAAEC's implementation over its first decade and provide recommendations for the future. We have concluded as follows.

The CEC was and remains a unique, innovative and important institution. The CEC has helped both to demonstrate that North America is a collection of linked ecosystems and to create a sense of regional environmental consciousness. The CEC has also facilitated more fluid cooperation among the Parties (Canada, the United States and Mexico) and their various stakeholder groups by broadening their relationships and increasing the number and range of their contacts.

As well as promoting regional environmental cooperation, the CEC plays an important role in addressing the issues around environment and trade. Its work in this area provides the basis for proactive policies to mitigate the possible negative environmental effects of market integration and enhance its possible beneficial effects.

The CEC has pursued both its environmental cooperation agenda and its environment and trade agenda in active collaboration with civil society. It has involved the public of all three countries in its research work, promoted dialogue and information exchange through North American networks of individuals sharing the same interests and created an increasingly valuable body of knowledge on North American environmental issues.

The three Parties have benefited significantly from the NAAEC. While Mexico had already revised its environmental legislation prior to the NAAEC, the Agreement facilitated progress in a number of areas, including pesticide control and pollution prevention. Environmental awareness and the government's commitment to the environment have both grown, driven in part by the public participation process the CEC has introduced.

More specifically:

- The CEC has been an extraordinarily active organization, with a broad range of successful environmental cooperation activities in areas such as the sound management of chemicals, the conservation of biodiversity, the enforcement of environmental regulations and green trade.
- It has helped create a North American environmental community that provides the moral and scientific authority for the three governments to address issues of North American importance.
- The CEC has achieved substantial results on key North American issues such as chemicals management and set the basis for progress on the conservation of North American biodiversity.
- The CEC has built substantial environmental capacities, largely in Mexico but also in the United States and Canada.
- The CEC has advanced our understanding of trade-environment linkages and has provided useful information on the North American environment to a range of audiences.
- The CEC has successfully promoted citizen engagement on environmental issues and increased government accountability regarding the enforcement of environmental laws.

We have also found a number of issues that need attention if the CEC is to realize its full potential to act on the North American environmental agenda. These relate to:

- The need to engage more fully the environment ministers of the three countries. Ministers need to renew their commitment to the CEC as the premier body for trilateral environmental cooperation and for assessing the environmental implications of trade;
- The governance of the CEC. The Parties need to clarify the roles and responsibilities of the CEC's three main bodies—its ministerial Council, the Secretariat and the Joint Public Advisory Committee—as they relate to the cooperative agenda and the citizens' submission process;
- More effective outreach to key stakeholders and the mobilization of the CEC's diverse constituency across the three countries. The CEC must respond to the calls from business, indigenous peoples and academics to engage them more actively in the activities of the CEC while maintaining the active engagement of environmental NGOs;
- A sharper programming focus reflecting the CEC's priorities, its financial resources and increased demands for demonstrated results. Governments and key stakeholders would

reap substantial benefits from the CEC playing its convening and research catalyst roles to bring credible information to bear on current key environment and sustainable development issues, for example related to energy and water.

- Establishing an adequate funding base for the future. In order to continue delivering on its mandate, the CEC will need renewed funding from the three Parties and the ability to leverage additional resources through voluntary contributions and partnerships.
- A continued focus on integrating capacity building into the CEC's activities with an emphasis on helping Mexican government institutions and private organizations strengthen the implementation of environmental laws and policies.

We have developed recommendations in four areas designed to support the CEC Council and the other CEC institutions as they chart a path forward for the next ten years.

Recommendations of the Ten-year Review and Assessment Committee

FURTHERING TRILATERAL ACTION FOR THE NORTH AMERICAN ENVIRONMENT

1. A Renewed Commitment to the CEC as an Innovative Institution

The Ten-year Review and Assessment Committee calls upon the Mexican Secretary of Semarnat, the US Administrator of the EPA and the Canadian Minister of the Environment to strengthen and renew publicly the commitment of their governments and themselves to the CEC as their institution of choice for trilateral environmental cooperation and for assessing the linkages between NAFTA and the environment.

2. Addressing Key North American Environmental and Sustainable Development Issues

We recommend that the CEC continue to address key issues for the environmentally-sustainable development of North America, including energy management, water management, and biodiversity conservation.

We recommend that the Council clearly establish the CEC's role as catalyst and analyst, and emphasize the CEC's presence as:

- A convener of experts and researchers to develop dialogue;
- A "safe harbor" forum to discuss issues and stakes; and
- A developer of tools and promoter of best practices.

3. Advancing Our Knowledge of Trade and Environment Linkages

We recommend that the CEC continue its research program on trade and environment linkages, and facilitate and inform the work of CEC and NAFTA working groups at the interface between trade and environment.

We recommend that the CEC establish a web-based North American Clearinghouse on Trade and Environment Linkages.

We recommend that the CEC continue to support and encourage efforts to build markets for green trade, and that it pursue the development and promotion of market-based instruments for addressing environmental issues.

4. Building Capacity for Stronger Environmental Partnerships

We recommend that the CEC systematically incorporate capacity building into its programs with the objective of helping build institutional capacities and a new generation of knowledgeable environmental officials and experts inside and outside government.

We recommend that these efforts support Mexican government institutions and private organizations to strengthen their implementation of environmental laws and policy, and build effective relationships among like-minded environmental organizations in the three countries.

EFFECTIVE GOVERNANCE AND EFFICIENT FUNCTIONING OF THE COMMISSION FOR ENVIRONMENTAL COOPERATION

5. Getting the Relationships Right—Effective Governance in the CEC

We recommend that the CEC institutions develop and document a renewed understanding on their respective roles, responsibilities and interactions, building on the NAAEC provisions and the good governance principles of:

- Transparency in decision making;
- Accountability for the discharge of roles and responsibilities;
- Respect for the roles of the other CEC bodies; and
- Efficiency in the use of resources.

We provide more detailed recommendations on the elements to incorporate into this understanding. These relate to:

- The Council of Ministers, functioning as the “Board” of the CEC, and in exercising its mandate on Submissions on Enforcement;
- The Secretariat of the CEC, working in support of the Council and carrying out its functions under the NAAEC; and
- JPAC as a principal body of the CEC, providing advice to the Council and serving as the “conscience” of NAAEC.

6. Ensuring Accountability and Reporting on Implementation of Obligations

We recommend that the Parties provide objective and timely reviews of progress made in the implementation of their obligations under the Agreement.

7. Adding Value to the Regular Sessions of the CEC Council

We recommend that the annual Regular Session of the CEC Council be structured around a standing agenda which:

- Allows ministers to discharge their duties as the Council of the CEC, including setting strategic direction and overseeing the program; and
- Provides the setting for ministers to report on and showcase the progress made in their own countries.

8. Focusing the CEC Program for Efficiency and Effectiveness

We recommend that the Council of Ministers develop a five-year Strategic Agenda for North American Environmental Cooperation. The Agenda would serve as the basis for the preparation of a three-year Operational Plan, for endorsement by the Council of Ministers in December 2004 and will guide the development of annual work plans and annual reporting to the Council.

9. Ensuring and Leveraging Sustainable Funding for the CEC

We recommend that the three Parties demonstrate their commitment to a refocused CEC and its three-year Operational Plan by increasing current core funding at least to its original level in real terms.

We recommend that the Council make provision for allocating an increased share of the annual budget to specific programs and capacity building activities benefiting Mexico.

We recommend that the CEC broaden its funding base through voluntary contributions by the Parties and partnerships with outside organizations.

10. Ensuring Effective Implementation of the Citizen Submission Process

We recommend that a clear agreement be reached between the Council of Ministers and the executive director on the ground rules for action on these obligations, and that the Council respect the role and authority of the executive director in line with the provisions of the NAAEC.

We recommend that the Parties develop a mediation step in the submissions process to facilitate more efficient resolution of enforcement matters and consider reporting voluntarily on follow-up activities to factual records.

11. Reaching Agreement on Dispute Resolution under Part Five

We recommend that the Parties publicly commit to refrain from invoking Part 5 for a period of 10 years.

BUILDING KNOWLEDGE AND OUTREACH

12. Building and Communicating Knowledge

We recommend that the CEC strengthen its role in producing objective reporting on the North American environment, and work to become the acknowledged center for information on key environment and sustainable development issues.

We recommend that the CEC Secretariat ensure the quality and usefulness of its information products through better focusing its research and dissemination efforts, meaningful consultation with all relevant interests, and use of peer review to ensure rigor in product quality.

13. Building the CEC Constituency

We recommend that the CEC Council direct the executive director, with the assistance of JPAC, to ensure that the CEC pursues a more systematic and balanced engagement of the business community, indigenous groups, academics, community-based interests and environmental and socio-economic NGOs in the three countries across all CEC programs and activities.

ACTING ON THE RECOMMENDATIONS

14. Acting on the Recommendations

In order to provide follow up on actions taken, we recommend that the Council, with the executive director's assistance and JPAC's advice, report publicly on the implementation of these recommendations for the 2006 annual meeting of the Council.



1 Purpose of review

The year 2004 marks the tenth anniversary of the Commission for Environmental Cooperation (CEC), established pursuant to the North American Agreement on Environmental Cooperation (NAAEC). Canada, the United States and Mexico negotiated the NAAEC as part of their commitment to trade liberalization embodied in the North American Free Trade Agreement (NAFTA).

Ten years is a milestone in the life of any organization. It represents a natural time to reflect on the past and reconsider the future. It is in this spirit that the CEC Council, composed of the Minister of the Environment for Canada, the Administrator of the United States Environmental Protection Agency and the Secretary of the Environment and Natural Resources for Mexico, appointed in fall 2003 a Ten-year Review and Assessment Committee (TRAC) to:

...undertake a retrospective of the implementation of the NAAEC over the past ten years and [to] include an examination of the environmental effects of NAFTA and ... provide recommendations to the Council for charting a path for the CEC over the next decade.

Our full terms of reference appear as Appendix 1 to this report. One of our first tasks after our appointment was to define this broad mandate into a series of questions that would guide our review¹:

1. Has the CEC helped to further a common North American environmental agenda?
2. Has the CEC helped to achieve the environmental goals and objectives of the NAFTA?
3. How well are the main institutions created under the NAAEC working together?
4. Has the CEC facilitated greater public involvement in North American environmental management?

This is the CEC's second official review. In 1998, the CEC Council appointed an Independent Review Committee (IRC) to conduct a review of the CEC's operations and the effectiveness of the NAAEC.² We took careful note of the IRC's findings and have built on its analysis and conclusions in conducting our own assessment.



2 Overall assessment

When NAFTA came into effect in 1994, it created the biggest free trade area in the world at the time with a combined population of 400 million people and an aggregated GDP of over US\$7 trillion. NAFTA is remarkable not only for the size of the trade area it created but also for bringing together countries with different cultures, economies and levels of prosperity. On its own terms, NAFTA has been very successful: trade among the three countries has more than doubled in ten years to reach over US\$621 billion (United States-Mexico trade more than tripled in the same period). Foreign direct investment by the NAFTA partners in each other's countries also more than doubled, to reach US\$299.2 billion in 2000³. Mexico is now the United States' third main trading partner (after Canada and China). Canada is Mexico's second main trading partner (after the United States) and Mexico is Canada's third-largest supplier worldwide.

Comparable indicators on the state of the North American environment since 1994 are largely lacking. Overall, one cannot tell whether environmental conditions in North America are improving or deteriorating (although examples of both trends exist), let alone whether these changes result from expanded trade. This is not only because of the inherent difficulty in making such a diagnosis, but also because as societies we have invested far less in measuring changes in environmental than in economic conditions. The large gap in this information impedes all three countries' pursuit of more environmentally-sustainable forms of economic development.

Canada, the United States and Mexico concluded their free trade negotiations in August 1992. While NAFTA included some groundbreaking environmental provisions in its text, it also raised a number of concerns, primarily in the United States, that Mexico might use lower environmental and labor standards as a source of competitive advantage in its new trade relationship. In order to win United States congressional approval of NAFTA and to answer a broadening movement concerned about the environmental effects of globalization, Canada, the United States and Mexico negotiated a "side agreement" on the environment, the North American Agreement on Environmental Cooperation (NAAEC).⁴

Ten years later, the NAAEC remains a unique, highly innovative agreement and the CEC a brave experiment in institution-building. NAAEC's very creation represented a commitment by the governments of North America to integrate trade and environment considerations in their policy processes. The NAAEC is also one of the very few international agreements seeking to coordinate the *overall* environmental cooperation efforts of several countries (the Treaty establishing the European Union is another one). This broad mandate allows the CEC to address almost any environmental issue anywhere in North America and has presented it with a continuing challenge to focus its efforts to those areas where it could have an impact.

The NAAEC established a secretariat for the CEC, based in Montreal (with a second office in Mexico City), and provides for annual meetings of the environment ministers of the three countries. The only other policy areas with similar (but less elaborate) coordination mechanisms at the regional level are trade and labor. The NAAEC also stands out for its provisions for public participation and for the unprecedented commitment by the three governments to account internationally for the enforcement of their environmental laws. These provisions make the CEC an international model for providing new avenues of public participation for civil society.

The CEC is composed of three separate bodies:

1. The *Council*, made up of the environment ministers of the three countries.⁵ The Council is the governing body of the CEC. As such, it is responsible for setting the CEC's overall direction and ensuring the achievement of the NAAEC's objectives.
2. The *Secretariat* has two primary functions: to support the work of the Council and to administer the submissions process on enforcement matters (Articles 14 and 15 of the NAAEC). In addition, under Article 13, the Secretariat may prepare reports to the Council on any matter within the scope of the annual work program or, unless the Council objects, on any environmental matter related to the cooperative functions of the NAAEC.
3. The *Joint Public Advisory Committee* (JPAC) is composed of five members from each of the three countries, who serve as volunteers. Their responsibility is to advise the Council and inform the Secretariat on all matters within the scope of the NAAEC.

The CEC can point to several notable accomplishments over the last decade. The most important may be the creation of a trilateral North American environmental community joining the governments and the public. More specifically, the CEC has:

- Coordinated trilateral action to address environmental problems of common concern (e.g., persistent organic pollutants, threats to biodiversity; see Section 3 below);
- Promoted accountability, transparency and public participation (through e.g., ministerial meetings open to the public, its work program and the citizens' submission process; see Section 6 below);
- Facilitated the development of Mexico's environmental management capacity in several important areas (e.g., pollution prevention, toxic chemicals, pollution release inventories; see Section 3.2 below);
- Gathered environmental information and made it more publicly accessible (see Section 3.3 below); and
- Created a neutral forum for examining emerging and complex issues and possible strategies to address them (e.g., on environment and trade relationships, electricity, and genetically-modified corn).

The CEC has become an important setting for governments and the public to address environmental issues on a North American basis. Such a forum is important because North Americans increasingly realize that many environmental problems cut across borders: whether the issue is air quality, invasive species, hazardous wastes, migratory wildlife or the long-range atmospheric transport of toxic pollutants, achieving long term results requires coordinated approaches. The CEC's work has helped both to demonstrate that North America is a collection of linked ecosystems and also to create a sense of regional environmental consciousness. The CEC has also facilitated a more fluid cooperation among the Parties and their various stakeholder groups by broadening their relationships and increasing the number and range of their contacts.

As well as promoting regional environmental cooperation, the CEC plays an important role in addressing the nexus of issues around environment and trade. Its work in this area provides the basis for proactive policies to mitigate the possible negative environmental effects of market integration and enhance its possible beneficial effects.

The CEC has pursued both its environmental cooperation agenda and its environment and trade agenda in active collaboration with civil society. It has involved the public of all three countries in its research work, promoted dialogue and information exchange through North American networks of individuals sharing the same interests and created an increasingly valuable body of knowledge on North American environmental issues.

Mexico has benefited significantly from the NAAEC. While Mexico had already revised its environmental legislation prior to the NAAEC, the Agreement facilitated progress in a number of areas, including pesticide control and pollution prevention. Environmental awareness and the government's commitment to the environment have both grown, driven in part by the public participation process the CEC has introduced. It is unlikely that this progress would have happened outside of the framework provided by NAFTA and the NAAEC.⁶ The CEC's influence in Canada and the United States has been more subtle: it has highlighted the importance of some issues and forced both governments to pay more attention to these matters.

In spite of these successes, a number of important concerns have also emerged:

- After ten years, the main CEC stakeholders, including the Parties, the Secretariat and the Joint Public Advisory Committee (JPAC), have not been able to develop a common vision about the CEC mandate or their respective roles. These differences have led to considerable friction;
- The NAAEC's most innovative public participation mechanism, the citizens' submission process, has become mired in controversy;
- The CEC work program is spread thinly and its results are not always clear;
- The links to, and influence on, trade institutions and mechanisms remain weak; and
- The CEC has not reached out sufficiently to business and indigenous groups.

As a result, almost everyone—Council and JPAC members, government representatives, Secretariat staff and the CEC's constituencies of NGOs, business and academia—agree that the CEC has not yet realized its full potential.



3 Has the CEC helped further a North American environmental agenda?

By virtue of occupying the same continent, Canada, Mexico and the United States have long shared some resources (e.g., water, migratory wildlife species) and have engaged in activities that have at times led to transboundary environmental impacts. In order to manage these resources and reduce these adverse impacts, the three countries have negotiated several dozen bilateral agreements over the years. In some cases, these agreements have led to the creation of specific institutions (e.g., the International Joint Commission between Canada and the United States; the International Boundary and Waters Commission, the Border Environment Cooperation Commission (BECC) and the North American Development Bank (NADBank) between the United States and Mexico). In addition, Canada, the United States and Mexico have negotiated trilateral arrangements in areas such as wildlife (*viz.*, the Trilateral Committee for Wildlife and Ecosystem Conservation and management) and plants (*viz.*, North American Plant Protection Organization). The CEC was meant to complement, not replace, these arrangements.

The NAAEC is an agreement among three sovereign parties, each contributing equally to the CEC budget, and each represented equally on the CEC's decision-making structures. While the three Parties are ostensibly equal, they are in fact characterized by numerous asymmetries (*viz.*, in their economic size, political culture, natural resource endowment, in the environmental pressures they face, in their institutional capacities and in the level of national attention focused on the environment; see Table 1). Geography makes the United States the dominant partner in this relationship: straddling the middle of North America and being the only country sharing borders with both its partners, the United States has a greater stake in, and a greater influence over, the CEC's success than its neighbors.

Table 1: Comparison of Canada, the United States and Mexico

	CANADA	USA	MEXICO
Population (millions)	31.1	285.3	99.4
GDP (US\$ billions; purchasing power parity)	924	10,308	904
GNI per capita, (\$)	21,930	34,280	5,530
Land area (1,000 sq km)	9,221	9,159	1,909
Forest area (1,000 sq km)	2,446	2,260	552
Mammal species, total known	193	428	450
Bird species, total known	426	650	769
CO ₂ emissions per capita (mt)	14.4	19.7	3.9
Renewable freshwater resources per capita (m ³)	94,314	9,985	4,675

Source: *The World Bank, 2003.*

The asymmetries above mean that the Parties often bring different priorities to the table. As one of the richest countries in the world in terms of biodiversity, Mexico, for example, has manifested a greater interest in “green” issues at the CEC than its neighbors. The United States, on the other hand, has shown a greater interest in the CEC’s “accountability” agenda because it believes that greater public involvement, greater transparency and greater enforcement will lead all Parties to improve their environmental performance. These differing priorities flow in part from the different mandates of the environmental agencies represented on the CEC Council (while having a much bigger budget, the US EPA has a narrower mandate, focused on environmental protection, than either Environment Canada or Mexico’s environment department, Semarnat, whose mandates include issues such as wildlife management).

Another obvious difference among the Parties is their institutional capacities. This difference is most evident in the case of Mexico, whose environmental protection institutions and processes are both younger and less well-funded than their counterparts in Canada, let alone those in the United States. Mexico’s ability to participate fully in the CEC’s activities has been taxed by having fewer financial and human resources than its neighbors. A running theme in the CEC’s activities, and one of its major contributions, has been to raise these capacities.

To these differences one must superimpose the impact of each country’s domestic politics on the CEC’s work program: national elections, cabinet shuffles, and the wax and wane of domestic priorities all influence to what a country may be willing to commit in a trilateral forum. As a result, the CEC has not addressed some issues because they were sensitive to one or more of the Parties (e.g., climate change).

Notwithstanding these differences and political considerations, the Parties have undertaken to work on a consensual basis, as indeed the NAAEC stipulates for most matters. From the start, they have tried to pursue a trilateral agenda that at least purports to benefit all three countries equally, based on a concern that the CEC would not receive continued funding from the Parties if it was seen to benefit one country consistently more than the others.

All these factors—the asymmetries among the three countries, their different interests and capacities, their domestic politics and the pressure to work on the basis of consensus—are basic constraints on any international organization but become highlighted when there are few members. They have made it difficult for the three Parties to develop and implement a common agenda, let

alone address contentious issues.

The inherently-bilateral nature of some environmental issues also helps to explain why certain elements of the NAAEC cooperation agenda show so little progress ten years after the Agreement was signed. The Parties, for example, have developed recommendations on transboundary environmental impact assessment (Article 10 (7)) but have been unable to conclude an agreement; they have made no meaningful progress on granting reciprocal access to their courts on environmental issues (Article 10 (9)) or on establishing procedures allowing each other to seek to reduce transboundary pollution (Article 10 (8)). The issues of reciprocal access are not only largely bilateral in nature but also involve primarily provincial and state law. For both Articles 10 (8) and (9), a trilateral approach to what are essentially bilateral problems has not proven conducive to finding solutions.⁷

It is all the more remarkable, therefore, that notwithstanding their differences and the obstacles to trilateral action, the Parties have succeeded through the CEC in developing common programs on a number of issues such as biodiversity, children's environmental health and sound management of chemicals.

3.1 Meeting the Parties' environmental obligations

The NAAEC not only creates a framework for trilateral cooperation on environmental issues but Part Two of the Agreement also establishes a number of obligations on each of the Parties. Of particular note is each Party's commitment to effectively enforcing its environmental laws and regulations (Article 5); this obligation is enforceable with formal dispute settlement through Part Five, as well as being the focus of the Article 14-15 citizen submission process. Additional obligations pertain to the levels of environmental protection, transparency, private access to remedies and procedural guarantees each Party needs to achieve on its own territory. Many of these obligations are largely procedural in nature and leave the Party considerable discretion in meeting them.

The Secretariat is responsible for preparing the CEC's annual report, which Article 12 requires to address the extent to which the Parties are meeting their obligations under NAAEC. This is an important accountability mechanism. Each year, the Parties provide text describing how they have discharged their Part Two obligations. While Article 12 also states that the annual report "shall cover ... relevant views and information submitted by nongovernmental organizations and persons," in practice, the chapters of the annual report addressing the Parties' performance are written by the Parties themselves.

The Parties' contributions to the CEC's annual reports are difficult to interpret because:

- The significance of the long lists of activities reported is unclear as the NAAEC provides no standard against which to assess performance; and
- The Parties use different measures of relevance in choosing what to include, which makes it difficult to compare their contributions (*viz.*, in the 2001 report, the United States does not report under economic instruments for environmental protection even though it uses them more extensively than Canada or Mexico; Canada reports twenty times as many environmental assessments as Mexico even though its GDP is similar and its population only a third of Mexico's).

In recent years, this annual report has been published with a considerable lag. During the course of our review, for example, the 2001 annual report was the most recently available.⁸ Such a delay is inconsistent with the principle of transparency that the CEC otherwise successfully promotes in its programs.

Finding

- The absence of policy context, the focus on activities rather than results, the lack of comprehensiveness and the different reporting practices in each country make it very difficult to ascertain from their self-reporting the extent to which each of the Parties is meeting the obligations listed in Part Two of the NAAEC.
-

3.2 Work program

The NAAEC gives each of the CEC's main bodies a role in its work program:

- The Secretariat proposes the work program (Article 11 (6));
- The Council must approve it (Article 10 (1(e))); and
- JPAC must receive the proposed work program and budget at the same time as the Council (Article 16 (6)) and may comment on it.

As already stated, NAAEC gives the CEC an extremely wide mandate (*viz.*, the long list of areas on which the Council may make recommendations). The CEC's resources, however, are relatively modest and have been fixed at US\$9 million since the beginning. These two factors—extensive mandate and limited resources—have challenged the CEC from the beginning to set priorities and focus its activities in a few areas. While the Secretariat, the Parties, JPAC and others have all agreed to this need, they have differed on its application: those who emphasize the CEC's catalytic role, for example, have argued for a broader work program than those who believe it should also play an operational role in some areas.

The CEC Secretariat developed its first work program with little direction from the Parties.⁹ In the absence of stated Council priorities, the Secretariat spent the first several years deliberately testing various areas of activity listed in the NAAEC. This testing resulted in a broad work program with projects eventually clustered under four general themes. Today, the CEC's four programs are:

- *Law and Policy.* The Law and Policy program addresses regional priorities regarding the NAAEC obligations and commitments related to enhancing compliance with and enforcement of environmental laws and regulations, environmental standards, environmental performance, and the continued development and improvement of environmental law and policy. Program initiatives monitor and report on regional trends in implementing and enforcing environmental laws and standards, including innovations in regulation, economic instruments and voluntary initiatives. There were 10 projects under this program in 2004.
- *Environment, Economy and Trade.* The Environment, Economy and Trade program undertakes projects (i) to improve our understanding of the environmental effects of free trade and related economic integration in North America, as well as to identify opportunities for policy integration between environmental and trade policies in a manner that actively promotes transparency and public participation; (2) to identify opportunities among the NAFTA partners for cooperation and trade in environmental goods and services, including renewable energy and energy efficiency; and (3) to strengthen partnerships with the private financial services sector in the area of finance and the environment. There were 14 projects under this program in 2004.

- *Pollutants and Health.* The Pollutants and Health program establishes cooperative initiatives on a North American scale to prevent or correct the adverse effects of pollution on human and ecosystem health. The program itself is focused on Children's Health and the Environment, Sound Management of Chemicals, Pollutant Release and Transfer Registers, Capacity Building for Pollution Prevention and Cooperation on Air Quality Issues. Efforts focused on these initiatives include: encouraging technical cooperation among the Parties; promoting pollution prevention techniques and strategies; recommending appropriate limits for specific pollutants, taking into account differences in ecosystems; recommending approaches for the compatibility and comparability of techniques and methodologies for data gathering and analysis, data management, and electronic data communications; and promoting access to publicly available information concerning the environment that is held by public authorities of each Party. There were 12 projects under this program in 2004.
- *Conservation of Biodiversity:* In the context of increasing economic, trade and social links, the CEC seeks to enhance North American cooperation in securing the conservation and sustainable use of North American biodiversity, in particular its shared and critical habitats and corridors, and migratory and transboundary species. In addition, the program fosters cooperative action to prevent and control alien invasive species and documents the threat posed by toxic chemicals to birds. There were 10 projects under this program in 2004.

This is indeed a broad work program. It is true that the program is less scattered than the number of projects might indicate as they are not all funded equally (most program resources go to Pollutants and Health). Nevertheless, most observers, including JPAC, the NACs, government officials and some Secretariat staff, believe that the CEC program needs to be more focused and more results-oriented. Many observers have noted that the CEC's effectiveness has suffered from a short-term orientation to its work, unclear objectives for some projects and insufficient attention to strategic planning. One of the challenges facing the CEC from the beginning has been to decide when to wind down its projects or hand them off to others, including the Parties: in other words, when has the CEC achieved its objectives and when should it move on? Given its limited resources, the CEC cannot afford to take on new projects unless it makes the difficult choice to shed some existing ones, nor can it continue to play its broad catalytic role unless it regularly turns over its programming.

The CEC Secretariat introduced in 2003 an organization-wide planning framework with a hierarchy of goals, objectives, strategies and targets. Previously, each program area set its own goals and annual priorities. The new operational plan is intended to introduce greater rigor to the work planning process. In time, this approach should help the CEC streamline its activities, enhance its effectiveness and increase internal accountability.

In this regard, the planning approach described in the CEC's Biodiversity Strategy could serve as a model for all its projects.

Throughout its existence, the CEC has pursued partnerships with several organizations with common interests. These partnerships have been most evident in pollution prevention (where the CEC has partnered with Mexican industrial associations and the three national pollution prevention round tables) and health (where it has partnered with the Pan American Health Organization and the International Joint Commission's Health Professionals Task Force). Some of these partnerships, however (e.g., with the international business councils in each of the three countries), while existing on paper, have not resulted in meaningful joint projects.

Box 1: Planning factors in biodiversity projects

Biodiversity project outlines will incorporate all the following information:

1. Goals and objectives
2. Links to Biodiversity Strategic Plan
3. Background information
4. Target completion dates
5. List of deliverables
6. Accomplishments to date
7. Proposed and actual budget
8. List of members of the project task group
9. Indicators to measure results and assess progress
10. Plan for future actions up to three years
11. Counterpart or in-kind contributions from other funding sources

Strategic Plan for North American Cooperation in the Conservation of Biodiversity CEC (2003), p. 22

Box 2: CEC's shade-grown coffee initiative

The CEC's shade-grown coffee initiative is a notable example of trilateral cooperation that provides biodiversity, trade and capacity development benefits:

- **BIODIVERSITY:** The Mexican states of Oaxaca and Chiapas are home to a substantial portion of North American migratory songbirds, which winter in the area, as well as numerous species of residential birds, mammals, reptiles and flora. This is one of the poorest areas of Mexico and is under significant development pressures, endangering important wildlife habitats and the ecological services they provide. The shade-grown coffee project was born as an initiative of the Trade and Environment and Biodiversity programs, to conserve important habitat for migratory birds and other wildlife, while still enabling socio-economic development. In 1999, through a partnership with the Smithsonian Migratory Bird Center, the CEC initiated the development of ecological criteria for what "shade-grown coffee farming" should be. The criteria are now incorporated into the Smithsonian Migratory Bird Center's "Bird Friendly®" labeling system for shade-grown coffee.
- **TRADE:** The shade-grown coffee initiative has been implemented in cooperation with local farmers, coffee cooperatives, and conservation NGOs, as well as coffee buyers such as Starbucks. In 1998, Starbucks formed a partnership with Conservation International (CI), and in 1999 they made an initial purchase of 76,000 pounds of shade-grown Mexico coffee and began offering it in US retail locations. In 2003, Starbucks purchased more than 1.6 million pounds of shade-grown coffee from Mexico and invested \$200,000 in CI's Conservation Coffee™ program. Starbucks has committed an additional \$1.5 million over the next three years to support the expansion of the program. In 2001, farmers producing shade-grown coffee in Mexico received a 60 percent price premium over local prices for their coffee, and exported 50 percent more than the previous year. Since 1998, the number of cooperatives involved in the project doubled. Today there are nearly 700 farmers and more than 2000 hectares involved in that program.
- **CAPACITY DEVELOPMENT:** The CEC, in partnership with Fomento Ecológico Banamex, is finalizing preparations to establish a sustainable coffee fund. The fund will provide grants for technical assistance, training, and certification to provide a stimulus to the adoption of socially, economically and environmentally preferable coffee growing practices.

Findings

- The CEC work program is spread thinly, given the organization's resources.
 - Some projects have suffered from an insufficient focus on the results they were meant to achieve.
 - The CEC is starting to put in place the tools needed to support a more strategic planning process.
-

3.3 Increasing environmental management capacity

Capacity building describes the development of individual and organizational abilities to devise and implement solutions to problems. In environmental policy, all institutions, including governments, need to continuously develop capacity to deal with new problems, apply new approaches or respond to increased public expectations. While all three Parties have capacity building needs in environmental management, Mexico's are greater because its institutions are younger and smaller, and its legislative environmental protection regime is more recent.

Capacity building is implicit in the achievement of most of the NAAEC's objectives, though not an explicit objective in itself. As a result, capacity building had become an important CEC activity even before the Council undertook to integrate it formally into its work program in 1998 and re-emphasized its commitment in 2001. Mexico has been the primary beneficiary of these efforts. In general, the CEC has provided Mexico with the opportunity to learn from more developed environmental regimes and to work together with experts in policy areas that are still relatively new in its country. It is important to note, however, that Canada and the United States also gain from the CEC's investment in Mexico's enhanced capacities: e.g., to the extent that Mexico can reduce its transboundary pollution, ecosystems in Canada and the United States benefit directly (*viz.*, Mexico's phase-out of DDT will reduce the windborne flow of this bio-accumulative toxic to high latitudes). In addition, building Mexican environmental management capacity further reduces the concern that the country may become a pollution haven.

In its ten years, the CEC has helped Mexico build capacity most notably in the areas of (i) pollution prevention (with the CEC's assistance, Mexico has developed a pilot funding mechanism for small and medium-size enterprises (SMEs) which is now being replicated, set up a chemicals department in Semarnat, expanded its technical capacities and established a round table of stakeholders); (ii) the management of toxic chemicals (Mexico's successful approach at phasing out DDT is now being adopted in Central America and has attracted India's interest); (iii) the development of a mandatory pollutant release and transfer registry (PRTR);¹⁰ and (iv) the conservation of wildlife habitat.

Box 3: The Sound Management of Chemicals Program (SMOC)

Developing greater capacity to control toxic pollution is an issue for all three countries. Through SMOC, Mexico has gained access to Canadian and US technical expertise on risk assessment and monitoring as well as institutional expertise in instrument design, and enforcement.

Through SMOC, the CEC has provided information that has strengthened Mexican capacities and management systems in areas such as:

- The updating of databases on toxic, persistent and bioaccumulative substances;
- The development of management procedures to control and restrict production, imports, trade and use of selected substances;
- The identification of toxic, persistent and bioaccumulative substances to be phased out;
- The disclosure of decisions and communications of follow-up actions;
- Improving the quality, relevance and comparability of monitoring information collected in the three countries;
- Research on health and environment risks;
- Environmental sampling and analysis and risk assessment; and
- Technology transfer to promote process changes, control systems and remediation methods.

The three countries, however, have not established a baseline to measure the success of their capacity development efforts systematically nor tracked the effectiveness of these efforts. As a result, it is difficult to assess their impact.

The CEC does not have a capacity building program *per se*. Instead, program managers have used a range of activities to create learning opportunities. For example, the CEC has:

- Run seminars and workshops on regulatory enforcement dealing with transboundary environmental issues (e.g., fur trade; wildlife protection; illegal traffic of animals as well as chemicals, such as ozone-depleting chemicals), and assessed capacity building needs in the tracking of hazardous wastes;
- Developed tools, emissions inventories and methodologies for technology identification, and sponsored professional exchanges as part of its air quality work (e.g., training workshops on best available technologies for air pollution control, and supporting development of the first ever Mexico national air emissions inventory);
- Developed information systems and networks as part of its biodiversity work and undertaken capacity building activities for Marine Protected Areas practitioners;
- Convened symposia, developed databases and promoted best practices in its environment, economy and trade program;
- Held workshops, provided technical assistance and sponsored exchanges as part of its children's health and the environment project;¹¹ and
- Funded community-based projects in the three countries that strengthened the capacities of local people, organizations and institutions to implement local solutions to environmental problems (see section 6.2 below on the North American Fund for Environmental Cooperation).

The CEC's ability to fund the attendance of government and nongovernment individuals at its conferences and workshops has been critical to its capacity building efforts: in the first ten months of 2003¹², for example, the CEC ran 30 meetings. These meetings involved over 1300 individuals (excluding CEC staff and JPAC members), of which some 130 were government officials from the three countries and over 1100 were members of public interest groups and individuals with an interest in environmental concerns as well as academics with particular expertise to share. In order to facilitate participation at these meetings, the CEC contributed to the travel expenses and accommodation of 571 of these participants (once again excluding CEC staff and JPAC members), some 440 of whom were from the public. About one half of these participants were Mexican, 84 of whom were government officials.

As a result, practitioners are in closer contact with their counterparts, not only in governments but also in NGOs and academia. The resulting exchange of information and experiences among such practitioners in the United States, Canada and Mexico has contributed to a greater mutual appreciation of the nature of the environmental problems each country faces and added to a shared commitment to improve the quality of the North American environment.

The Mexican beneficiaries of the CEC's capacity development efforts have included:

- Government officials: The primary audience for most of the CEC's activities in this area has been the government. Semarnat dedicated some of its best officials to the CEC work, in part because of the on-the-job training opportunities available;
- NGOs: One of the CEC's major contributions to Mexico has been to promote the public's right to know, to foster citizen involvement and to provide open forums for discussion. The CEC has gradually been able to involve more and more organizations, especially NGOs, that did not previously have adequate forums to express their concerns; and
- Industry: A growing number of small and medium-size enterprises, largely in León and the Mexico City area, have gained access to financing and technical support for pollution prevention activities.

In addition, all three countries have benefited from the CEC's coordination of trilateral activities in biodiversity conservation. This coordination is increasing the effectiveness of North American conservation efforts by (i) developing common priorities for the protection of certain species; (ii) developing North American Conservation Action Plans for three shared marine species; (iii) providing tools such as a map of terrestrial ecoregions which management agencies are using in their programs; and (iv) setting out common mechanisms for planning and monitoring bird conservation programs.

These efforts have to be placed in context: the CEC is a small organization and its own capacity development activities have only scratched the surface. As is the case in other capacity development projects, staff turnover in the recipient organizations has at times nullified the value of the training imparted. The absence of a stable supporting technical infrastructure in Mexico has sometimes meant that trained individuals were unable to use fully the skills they had acquired. In other instances, the policy approaches being transferred did not always reflect Mexican priorities or were not entirely appropriate to its conditions. More importantly, CEC staff and working groups have pursued these activities largely on their own, without a common definition of, or strategy for, capacity building, and no systematic monitoring or evaluation of results achieved. As it continues its efforts in this area, one of the CEC's challenges will be to focus its efforts increasingly on institutional rather than individual capacity development.

Nevertheless, it seems clear that, while Mexico could have increased its environmental management capacities on its own, doing so would undoubtedly have taken much longer, and imposed attendant environmental costs. We are concerned therefore that the CEC's recent budget squeeze (see Section 3.5 below) will erode the CEC's ability to bring individuals from the three countries together to share experiences and learnings, thereby hurting its capacity building efforts.

Findings

- In spite of the absence of a strategy to guide its activities, the CEC's capacity building efforts have been useful and have made an appreciable contribution to North American environmental management, particularly in Mexico.
 - A more systematic effort with objectives and follow-up could significantly enrich the CEC's capacity building contributions.
-

3.4 Producing policy-relevant environmental information

The provision of policy-relevant environmental information is an important CEC function that derives from several of the NAAEC's provisions, including Articles 10(2), 11(7), 12 and 13. The CEC reflects this importance in the four goals it has defined in its latest operational plan, all of which support this function to a greater or lesser extent.

The CEC publishes a very large amount of information, most of which is available on its web site in English, Spanish and French. The CEC's working language, however, is English and some Mexican government officials and nongovernmental representatives have complained that draft documents circulated for comment are not always translated. Interestingly, a review of CEC web logs reveals that Spanish speakers represent an important audience for the CEC. Almost half of the top 150 files downloaded from the CEC site, for example, are in Spanish. While the size of this audience may reflect in part the fact that there is less environmental information in Spanish than in English on the Internet, it may also represent an indicator of the CEC's success at public outreach.

Box 4: CEC outreach efforts

- The production, promotion and distribution of CEC documents average some 300 reports, working papers, and general documents yearly—in most cases in each of the CEC's three languages.
- The number of visitors to the CEC web site averages in excess of 115,000 discrete visitors every month.
- As of February 2004, the e-mail distribution list had grown to over 7,000 subscribers.
- The 2003 roll-out of *Taking Stock* earned 463 separate news stories in all media and reached an audience of at least 20 million people in North America.
- In 2003, the CEC exhibited and distributed materials at seven conferences throughout North America.

Source: CEC Secretariat

The CEC plays several roles related to information:

- *Information disclosure:* The CEC has made information regarding pollutant releases more accessible to the public;
- *Integration:* The CEC has combined information from the three countries to present it on a North American scale (e.g., a map of terrestrial ecoregions). While, in some cases, this has involved repackaging information, in others, the CEC has helped fill information gaps;
- *Building support for action:* Because it is more than an intergovernmental secretariat and actively solicits external expertise, the public sees the CEC as a credible source of information (e.g., on the sound management of chemicals); and
- *Policy analysis:* The CEC can fill a useful policy gap in focusing public attention on issues that need a longer look (e.g., the environmental challenges and opportunities of the evolving North American electricity market).

Observers agree that the CEC has raised the awareness of the policy community and helped “move the agenda” in a number of areas, such as:

- *Pollutant releases. Taking Stock* is the name of a series of annual reports presenting Canadian, US and Mexican information on selected industrial emissions. It is by far the CEC’s best known publication and illustrates well some of the conflicting expectations facing the CEC: NGOs have lauded *Taking Stock* for presenting emissions data in a comparative North American context and encouraging domestic policy debates in the lagging jurisdictions about the reasons for their ranking.¹³ Many in the private sector, however, have strongly criticized *Taking Stock* for its approach of aggregating all emissions as being scientifically unsound (because not all emissions pose the same environmental or human health risks and because emission figures do not take changes in economic production into account). Depending on the audience, *Taking Stock* is either an irritant and a demonstration of the CEC’s anti-business bias or a success that deserves to be replicated (see Box 5).
- *Children’s health and the environment:* The CEC has played an important role in putting this issue on the North American agenda and influencing the policies of all three Parties by identifying the linkages between children’s health and environmental factors such as lead exposure, toxic chemicals and waterborne diseases. Observers have noted that North America is ahead of the global agenda on this issue. The CEC has undertaken this work in partnerships with WHO, UNEP and UNICEF. However, here too, some industry groups have criticized the science behind the CEC’s work.¹⁴

- *Sound management of chemicals (SMOC)*. The information generated by this program has supported Mexico's phase out of two pesticides (DDT and chlordane) and PCBs as well as cooperative action to reduce mercury emissions and certain persistent organic pollutants (e.g., dioxins and furans, hexachlorobenzene). The CEC's North American Regional Action Plan on mercury is seen as a precursor to the recently adopted Global Mercury Assessment Program coordinated by UNEP. Many observers have praised SMOC as the CEC's most successful initiative (see Box 3).
- *Biodiversity*: Governmental and nongovernmental observers have noted the CEC's work on species of common conservation concern, marine conservation areas and birds as particularly useful. No other organization has undertaken such regional-scale ecosystem classification work and the CEC's biodiversity mapping therefore provides important contextual information for each country's wildlife agencies. Government departments in all three countries use information from the North American Bird Conservation Initiative (NABCI) as a resource for bird conservation programs. The United States Fish and Wildlife Service, for example, uses the eco-regional map developed by the CEC to determine funding allocations for bird programs.
- *Article 13 reports*. The CEC has prepared five such reports to date. While many observers have found these to be of high quality and a useful contribution to the understanding of the issues, government officials have sometimes found the reports to be of inconsistent quality and limited usefulness. If some government officials singled out the report on electricity markets as having been particularly timely, others expressed concerns over some of the background material prepared for the report on maize.

Most of the CEC's publications are posted on its web site, which provides an important resource centre on the issues on which the CEC is active. It is not always clear, however, which publications have been peer-reviewed or even, in some cases, the identity of the author. The absence of this information may reduce the usefulness of CEC publications for some of its readers.

NGO observers have also commented positively on the CEC web site and the *Trio* newsletter as simple, effective, means of communicating what the CEC is doing and what information resources it has available.

The CEC's limited work in state of the environment (SOE) reporting, however, has not been received as favorably. The NAAEC requires the CEC to report "periodically" on the state of the environment in the territories of the Parties (Article 12(3)). This requirement represents quite a challenge, as the Parties do not collect environmental information either in a consistent or comprehensive fashion. The CEC Secretariat has produced only one SOE report to date. Government and NGO observers have criticized this report for not adding to our knowledge of North America and being less useful than other similar work (e.g., the United Nations Environment Program's *Global Environment Outlook* and the World Resources Institute's *World Resources*).

Observers also have mixed assessments of the usefulness of the CEC's various databases. For example, while some users see the database on Environmental Law in North America as useful, they also note that it needs more regular updating and maintenance.

Box 5: Taking Stock

The CEC's Taking Stock report identified Gerdau Ameristeel Whitby (previously Co-Steel Lasco) in 1995 as a top Canadian polluter. Since then, as a direct result of negative publicity, Gerdau Ameristeel Whitby has made significant strides in improving environmental performance. According to the 1999 Taking Stock report, Gerdau Ameristeel Whitby was the NPRI facility with the largest decrease in total releases and transfers for disposal from 1995 to 1999. The facility also reported increases in the amounts transferred for recycling along with decreases in on-site land disposal of metals.

	Onsite releases (tonnes)	Transfers for disposal (tonnes)	Transfers for recycling (tonnes)
1995 ¹	2411.5	6030.8	0
1999 ²	1093.2	3086.5	722.7
2000 ³	1115.2	67.0	3558.6
2001 ⁴	852.3	77.7	1787.7
Percent change over 1995	-64.7 percent	-98.7 percent	+1787.7 percent

Based on NPRI data as of 3 March 2004.

¹ Substances reported in 1995: cadmium, chromium, copper, lead, manganese, and zinc.

² Substances reported in 1999: calcium fluoride, chromium, copper, lead, manganese, and zinc.

³ Substances reported in 2000: calcium fluoride, chromium, copper, hexachlorobenzene, lead, manganese, mercury, dioxins and furans, and zinc.

⁴ Substances reported in 2001: calcium fluoride, chromium, copper, hexachlorobenzene, lead, manganese, mercury, nickel, dioxins and furans, and zinc.

Source: CEC Taking Stock reports

Findings

- Through its many publications, outreach activities and public meetings, the CEC plays an important role in building knowledge about the North American environment.
- The CEC web site serves a growing clientele and appears to meet important information needs, particularly in the Spanish-speaking world.
- Some stakeholders are concerned that some CEC reports do not provide sufficient contextual information or supporting analysis.
- The CEC could do more to fulfill the NAAEC requirement to report periodically on the state of the North American environment.

3.5 Budget issues

Each Party makes the same contribution of US\$3 million a year to the CEC's operations for a total budget of US\$9 million. As the CEC's budget has not changed since 1994, its real value has declined through inflation by almost 20 percent. For several years, this decline was partly offset by the gradual devaluation of the Canadian against the US dollar (being based in Montreal, much of the CEC's spending is in Canadian dollars) (see Chart 1).

The extent to which the CEC's budget may have constrained activities in the past is unclear. On the one hand, parts of it have sometimes lapsed in previous years; on the other, the CEC was forced to cut the budget for the North American Fund for Environment Cooperation (NAFEC) in half in 2000. Some have also argued that the budget has limited the number of Article 13 reports the Secretariat has been able to prepare.

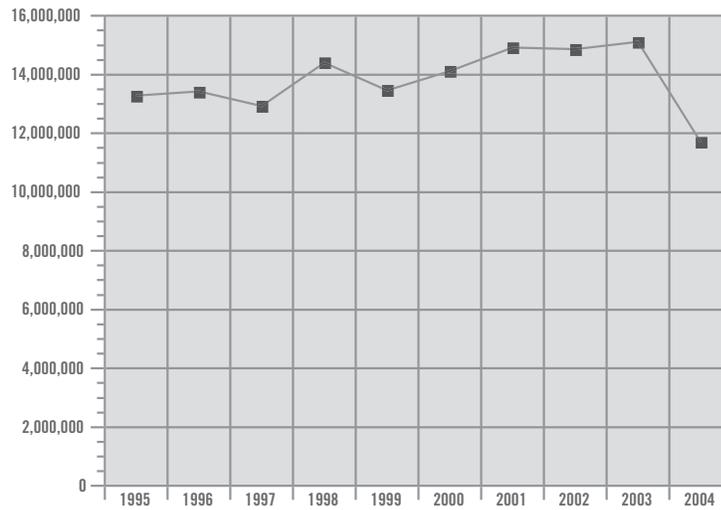
In 2003, however, the rapid appreciation of the Canadian dollar reduced the value of the Parties' contribution from C\$15.1 million in 2003 to C\$11.7 million, a drop of over 20 percent (see Table 2). This appreciation led the CEC to eliminate the NAFEC completely in 2004 and forced it to make cuts in most of its programs. Some observers fear that these cuts will adversely affect the CEC's public outreach activities in particular.

It is important to note that the CEC's budget underestimates what the Parties are spending on trilateral environmental cooperation as it does not include the very significant in-kind resources that each Party contributes to CEC operations.

Table 2: CEC Budget, 2004

Program area	2004 (CDN\$)
Conservation of Biodiversity	\$755,000
Environment, Economy and Trade	\$530,000
Law and Policy	\$405,000
Pollutants and Health	\$1,986,000
JPAC	\$360,000
Articles 14/15	\$351,500
Article 13	\$281,600
Administration, communications, others	\$7,082,400
TOTAL	\$11,751,500

Chart 1: Evolution of CEC budget in Canadian dollars
(unadjusted for inflation)



Findings

- The CEC has had to make deep program cuts in 2004, largely as a result of the unexpected appreciation of the Canadian dollar.
- The budget cuts are forcing the CEC to scale back and refocus its activities.



4 Has the CEC helped to achieve the environmental goals and objectives of NAFTA?

Article 10(6) of the NAAEC states that the Council shall cooperate with the NAFTA Free Trade Commission [composed of the three countries' trade ministers] to achieve the environmental goals and objectives of NAFTA by, *inter alia*:

“(c) contributing to the resolution of environment-related trade disputes by:

1. seeking to avoid disputes between the Parties,
2. making recommendations to the Free Trade Commission with respect to the avoidance of such disputes, and
3. identifying experts able to provide information or technical advice to NAFTA committees, working groups and other NAFTA bodies;

(d) considering on an ongoing basis the environmental effects of the NAFTA; and

(e) otherwise assisting the Free Trade Commission in environment-related matters.”

These responsibilities, along with the Article 1 objective to “support the environmental goals and objectives of the NAFTA,” are the NAAEC’s clearest articulation of its link to NAFTA itself. We examine below how the CEC has cooperated with the Free Trade Commission and considered the environmental effects of free trade in North America.

4.1 Cooperation with the NAFTA Free Trade Commission

Article 10(6) describes the various ways in which the CEC Council is to cooperate with the NAFTA Free Trade Commission (FTC). For several reasons, the CEC has made little progress in implementing this provision of the NAAEC, particularly with regard to contributing to the resolution of environment-related trade disputes.

First of all, a presumption that underlay Article 10 (6), namely that there were likely to be several trade disputes over environmental measures, has proven unfounded. Relatively few trade and environment concerns have arisen (e.g., invasive species, the environmental impacts of trade corridors, hazardous wastes pollution havens, investors' rights in NAFTA's Chapter 11), none of which have threatened to take the form of a government-to-government NAFTA trade dispute as referenced in Article 10(6).¹⁵ In the case of NAFTA bilateral trade disputes with a secondary environmental dimension (United States-Canada softwood lumber, United States-Mexico trucking), the environmental aspect has not been integral to the legal arguments in the trade dispute, and the involved Parties have not sought to involve the CEC.

In the case of NAFTA Chapter 11 investor-state disputes, efforts to engage the CEC were unsuccessful largely because those aspects of Chapter 11 that raised the concerns of environmental NGOs (e.g., governmental regulation as expropriation of property; lack of transparency of the dispute settlement process) were not primarily environmental issues, and thus trade officials were reluctant to give the CEC the lead. Similar problems arose in other attempts (whether by NGOs, the JPAC, or one of the governments) to use the CEC to address legal questions in the trade and environment realm: trade ministries were reluctant to defer to the CEC on trade issues where they saw implications well beyond the environment.

An additional reason for the lack of progress in cooperating with the FTC is structural. The NAAEC was negotiated after NAFTA was completed; thus, while the CEC is obligated to “cooperate with the NAFTA Free Trade Commission to achieve the environmental goals and objectives of NAFTA...,” NAFTA does not oblige the FTC to cooperate with the CEC. While most observers would dismiss this discrepancy as insignificant, the absence of a concrete obligation has made it more difficult to bring trade officials to the table and at least one of the Parties' trade officials has on occasion argued that cooperation therefore need only go in one direction. A related problem is that the FTC meets irregularly and has no trilateral secretariat to support it.¹⁶ The absence of a trade counterpart to the CEC Secretariat means that an institutional mechanism that might support cooperation between the CEC and the FTC is unavailable. In addition, an assumption running through the text of the NAAEC—that the Council is well-suited to making recommendations to the Parties on issues of environmental and trade policy—may not be realistic. For one thing, if a Party's environment minister obtained interagency sign-off (including from the trade minister) before submitting a CEC recommendation to the FTC, such a “recommendation” would essentially be a case of the Parties recommending to themselves something that they had already decided internally to support, rather than an independent source of “green” leverage on FTC activities.

Finally, all three countries have had difficulty developing an internal consensus on how to integrate environmental considerations into their trade policies. In all three, ministers of the environment have less influence over trade policy decisions than their colleagues in economic ministries. This makes it difficult for them to take the initiative (either within their governments or through the CEC) on trade-related matters that extend beyond their environmental protection mandate.

As a result of all these factors, an observation made in a 1997 CEC study is still relevant today:¹⁷

Despite Article 10(6) of the North American Agreement on Environmental Cooperation, there has been a paucity of contact, communication, and in some cases trust, let alone integrated decision-making and cooperation, between NAFTA's economic bodies with specific environmental responsibilities and the CEC itself.

In retrospect, the NAAEC may have raised unrealistic expectations about how much cooperation was possible between the CEC and the FTC. Where the Parties have chosen to integrate environmental considerations in the negotiating positions they bring to the NAFTA working groups and committees, for example, they have done so internally through their usual interagency consultation process. For reasons explained above, the CEC, as a trilateral institution, has no role in the development of such national policies. NAFTA working groups and committees addressing environmentally-related trade issues (e.g., harmonization of automotive emissions standards; labelling practices for pesticides) have not sought the CEC's technical expertise because the Parties already had solicited the environmental advice they wanted from their own experts. An exception to this pattern has been the NAFTA working group on investment, which did consult JPAC on NAFTA's Chapter 11.

CEC involvement in other types of trade and environment activities has also had a mixed record of success. Over the years, there have been some efforts to use the CEC as a forum to address trade and environment issues of a more general nature, but they have generated little interest among the governments given the existence of other fora, such as the OECD's Joint Working Party on Trade and Environment, and the WTO Committee on Trade and the Environment, both of which include the three NAFTA countries among their members.

Despite these impediments, the Parties have over the years periodically pursued opportunities for FTC-CEC cooperation, and many outside observers continue to place a high value on such efforts. At its inaugural meeting in 1994, the FTC agreed to try to meet with its environmental and labor counterparts. In 1995, the FTC reviewed again how it might collaborate with the CEC. In June 2001, the CEC Council announced its intention to pursue a meeting with the FTC in 2003. Nothing came of these overtures, largely because the Parties have been unable to develop a substantive agenda that they believed warranted a ministerial-level meeting. In 2003, the Council again asked officials to prepare a possible agenda, this time prior to the 2004 Council meeting.

Alt Reps' have met periodically with their trade counterparts in a forum called the "10(6) Group," though the exercise has to date produced few tangible results. In spring 2004 the Parties reenergized the 10(6) Group and have tasked it with developing a strategic plan for the CEC's environment, economy and trade program. While it is unclear whether this work will eventually lead to a ministerial-level meeting, it presents opportunities for constructive FTC-CEC engagement on issues at the trade and environment interface. For example, both the CEC and the NAFTA working groups addressing overlapping issues would benefit from being better informed of each others' work. The CEC could also function as a clearinghouse to inform the public of meetings of NAFTA harmonization working groups whose activities may have an environmental component.¹⁸

The NAAEC represented a political acknowledgement that sustainable development requires the integration of environmental and trade considerations. A decade after negotiating the NAAEC, however, the Parties still pursue their trade and environmental policies largely separately rather than through the CEC. One of the results is that they are not always in a position to anticipate—and thus to prevent—environmental problems associated with increased trade and economic development. For some, this is one of the NAAEC's biggest disappointments. For others, the main value-added of the CEC is in the area of North American environmental cooperation, with the efforts to elaborate a trade component more of a distraction than a priority.

¹⁷ The Alternative Representatives, or Alt Reps, are senior environment officials from the three countries.

4.2 Considering the environmental effects of free trade

Promoting a better understanding of trade and environment relationships is central to the CEC mandate. While Article 10(6) constitutes the main authority regarding the CEC-FTC relationships, and the source of the obligation to consider the environmental effects of NAFTA, it is not the only article addressing trade and environment. The CEC has also conducted research on trade and environment relationships in some of the Secretariat's Article 13 reports (e.g., on electricity and maize) and in some of its other programs.

From the beginning, implementing the CEC's mandate to consider the environmental impacts of NAFTA has been a challenging, and at times controversial, undertaking. Over the years, and especially at its inception, proponents and opponents of free trade have both made strong claims about the environmental implications of trade in general and NAFTA's effects specifically.¹⁹

In order to overcome these divisions, the Parties agreed to establish an independent, expert-driven process, granting the Secretariat a free hand in selecting teams of experts, consulting widely with interested public and holding public meetings at various stages in the development of the assessment framework. Nonetheless, in the early stages of the project, Secretariat staff expended considerable energy trying to satisfy intergovernmental working groups that the team would carry out its work in a responsible manner,²⁰ in part because trade officials have been reluctant to acknowledge possible adverse environmental consequences publicly or fund research in this area.

To steer this work, the Secretariat appointed a high-level, multi-stakeholder advisory body composed of distinguished economists, political science experts, and representatives of business and environmental nongovernmental organizations. The Secretariat consulted the Advisory Body frequently at various decision points in the process of developing and testing its methodology. The Secretariat also made draft documents available to the public, and actively solicited comment from a core group of organizations and individuals who had expressed interest in the initiative.

On balance, these measures appear to have worked well. Of those who have expressed concerns over the results of the program, virtually no one has called into question the integrity of the process or the efforts undertaken by the CEC, its commissioned researchers or advisors. On the contrary, observers have praised the CEC's work as "producing a cutting-edge analysis methodology."²¹ This alone is one of the CEC's major achievements.

Between 1995 and 1998, the CEC focused on developing a framework for assessing NAFTA's environmental effects. During this period, the CEC published a six-part trade and environment series and several technical papers.²² The CEC also published criteria for identifying sectors and areas of focus for the assessment of the environmental impacts of trade and applied this approach to the agriculture and energy sectors. The CEC has supported work examining, for example, the complex environmental implications of land-use shifts in Mexico owing to the reduction in corn production as a result of growing imports of US corn and grains. The CEC has also undertaken research examining the integration and consolidation of food processing chains and the potential environmental considerations attending to the spread of US-style industrial confined agricultural feedlot operations ("CAFOs") for pork and poultry into Mexico. This work culminated with the release of the peer-reviewed methodology in 1999.

The CEC next invited interested groups or individuals to test, refine or critique the methodology by applying it to discrete issues or sectors and presenting the findings at public symposia. To date, the CEC has organized two symposia on the environmental effects of trade liberalization (Washington, October 2000 and Mexico City, March 2003).

In “*The Picture Becomes Clearer*” (CEC 2002), the Secretariat offered its own views and the public’s on the state of trade and environment assessment in light of the Washington meeting and comments received by participants. Three areas in particular stand out.

1. *It is important to supplement “macro” studies with more geographically limited, or media-specific, studies.* It is increasingly recognized that the NAFTA has produced both positive and negative effects that vary across regions and sectors. Aggregate data may therefore mask important conditions at the local level. For example, while overall North American forest cover may be stable or increasing, ecologically-significant stands may feel the pull of regional or global lumber export markets. Unfortunately, the general decline in environmental monitoring activities makes it more difficult to conduct such disaggregated analyses.

Data availability at the regional or local level—where it matters most—is often a far more vexing hurdle than analytical complexity. Environmental monitoring at local and regional scales falls well short of minimum standards of comprehensiveness and reliability, and despite several promising recent initiatives, efforts to harmonize regional data across political boundaries continue to founder. The further step of correlating environmental indicators with trade data is only practical for a relatively small subset of actively monitored resources, species or environmental media.

2. *The scale and compositional effects of trade liberalization deserve at least as much attention as competitive effects.* For the most part, competitive factors triggering “pollution havens” and “race-to-the-bottom” scenarios feared by some have not materialized. On the other hand, countries need to make a much better effort to predict, monitor and buffer sectoral and regional impacts resulting from major shifts in the pattern and composition of trade (*viz.*, the environmental impacts of freer trade on Mexico’s agricultural sector²³). Environmental safeguards are especially vital during transitional periods which can place vulnerable, non-renewable resources at maximum risk. Environmental budgets in all three countries, however, have not been adjusted to meet the needs of expanded production and increased investment.
3. *For some areas, economic integration without concomitant efforts to ensure complementary regulatory policies in the health and environment realm entails risks.*²⁴ The CEC has promoted the development of compatible environmental standards through the sharing of best practices and the establishment of a baseline from which to evaluate changes in trends. Efforts to make headway on regulatory compatibility in key areas such as hazardous waste, however, have made little progress in the past decade.

In general, the CEC’s steady progress on developing, refining and testing a framework for assessing the environmental impacts of trade has supported and influenced similar efforts undertaken by the US and Canadian governments, by researchers in Mexico and by other international organizations such as the OECD and UNEP. Officials in the Canadian government have found both the methodological development and the documentation of the NAFTA environmental impacts to be particularly useful. The CEC has also helped stimulate similar work undertaken outside of governments and international organizations, including by the World Wildlife Fund, the Fletcher School of Law and Diplomacy, Tufts University, the International Institute for Sustainable Development, Unisfera, Colegio de Mexico, and the Carnegie Endowment for International Peace.

Though the exact impact is difficult to measure, the CEC’s work in this area has enhanced the capacity of researchers to examine trade and environment relationships at the same time as it has expanded the audience for these studies. Nonetheless, when measured against the NAAEC man-

date to consider on an “ongoing basis” the environmental effects of the NAFTA, and high public expectations in this area, the initiative remains modest in scope, and is not well insulated from budget or programmatic swings within the CEC workplan.

4.3 Environmental impacts of the NAFTA

One of the biggest environmental concerns when the NAFTA was signed was that there would be a “race to the bottom.” This did not occur. Polluting industries did not move to Mexico to take advantage of supposedly less stringent environmental laws (mostly because other factors of production are more important) and Mexico did strengthen its environmental protection efforts. A sectoral analysis of Mexican exports over the last decade shows that there has not been a shift towards more polluting industries.²⁵ On the contrary, there are numerous examples of Mexican industry becoming cleaner over time (e.g., automobile manufacturing, electronic industry, tanning), although industrial emissions have increased in absolute terms as a result of a large increase in overall production since 1994.

While it is always difficult to trace a direct cause and effect relationship, several CEC studies have identified areas where increased trade has led to environmental effects (e.g., a “robust, direct link” between NAFTA freight truck transport and increased air pollution at selected US–Mexico and US–Canada border crossings).²⁶

A study on the transboundary movements of hazardous waste in North America found that “less stringent hazardous waste disposal regulatory requirements in Ontario and Quebec were a key factor in a significant increase of waste exports from the United States to Canada”²⁷ since the early 1990s. While not directly a result of NAFTA, this increase illustrates that lax environmental standards can sometimes lead to increased trade in undesirable goods.

The CEC’s work, however, has also shown the limitations of focusing attention on only the trade-environment interactions. The bigger issues relate to the environmental implications of economic growth more broadly and policies the Parties pursue about the pattern and rate of resource development, the resource-intensity of the economy, the structure of economic growth, consumption patterns, etc. Changes to trade rules or tariff levels due to free trade agreements, or even changes in trade flows due to other factors, are seldom the main factor behind environmental degradation. Trade institutions, therefore, have limited leverage in addressing these broader sustainable development issues.

Findings

- The expectations about the influence the CEC could or should have on the FTC were unrealistic. Over the last ten years, these organizations have had little interaction or collaboration.
 - The CEC has conducted its NAFTA environmental effects work in a transparent and inclusive manner. Its methodological work is highly regarded and has influenced researchers in their work.
 - This work has increased our collective understanding of the environmental effects of NAFTA, and of trade and economic development more generally, and on occasion has contributed to some positive environmental results.
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5 How well are the main institutions created under the NAAEC working together?

As described in Section 2, the CEC is composed of three separate bodies:

1. The *Council*, made up of the environment ministers of the three countries. Because the Council meets only once a year at the ministerial level, most decision-making falls to their Alternative Representatives (Alt Reps), senior officials in the three environmental agencies, who usually meet four times a year. Much of the day-to-day oversight is the responsibility of the General Standing Committee (GSC), composed of mid-level officials reporting to the Alt Reps. The Council generally formalizes its decisions through resolutions. To the end of 2003, the Council had passed 112 resolutions.
2. The *Secretariat*: With its head office in Montreal and a branch office in Mexico City, the Secretariat is headed by an executive director and includes over 50 professional and support staff.
3. The *Joint Public Advisory Committee* (JPAC) may advise the CEC Council on any matter within the scope of the NAAEC, and may inform the Secretariat. Its 15 members, with five appointed by each Party, represent civil society and serve as volunteers. The full committee usually meets four times a year, with issue-specific sub-committees holding additional meetings as required. The JPAC chair also participates in meetings of the Alt Reps.

The roles and functions of these three institutions are set out in Articles 9 to 16 of the NAAEC. In addition, all three Parties have created national advisory committees (the Mexican NAC no longer exists) and the US government established a Government Advisory Committee (GAC). This is a complex governance structure for a small organization and it has imposed significant transaction costs on all participants.

In the decade the CEC has been in existence, there have been four Canadian, three US and three Mexican Council members.²⁸ Alt Reps in each country have also changed. In the same period, there have been three executive directors and two interim directors (one who served for more than a year and another who served almost a year before being elevated to the permanent position). While such turn-over may not be unusual in international organizations, it has made it more difficult for a common understanding of the Council's and the Secretariat's respective roles to emerge as successive Council members, government officials and executive directors brought different styles, priorities and points of view to the table. It has also at times led to inconsistent messages (e.g., whether "the Secretariat should engage in partnerships to stretch resources") that have further muddied the waters.

Today, the relationships among the Parties, the Secretariat and the JPAC are often strained. There have been insufficient communications between the Council and the Secretariat, in particular between ministers and the executive director (most communications happens at the level of the GSC and working groups). The Parties are concerned that the Secretariat is not sufficiently transparent and accountable while, for its part, the Secretariat complains that the Parties are micromanaging its activities and inappropriately circumscribing its autonomy (e.g., on Articles 14 and 15). JPAC and the Council have reached stalemate on certain priority issues, leading to frustration by JPAC members and government officials. The result has been high transaction costs for everyone and an unfulfilled potential for the CEC as a whole.

It is important to underline that, in spite of these problems, the CEC has delivered some impressive programs. Most observers, including government officials, recognize the CEC Secretariat's technical competence, dedication and the overall high quality of its work. Also noteworthy are the JPAC members' dedication to their mission and their voluntary investments of time and energy. Likewise, many government officials have made a valuable professional and personal investment in the CEC's work program. Nevertheless, today, the CEC appears caught in a vicious circle: the ministers pay insufficient attention to its work program because they do not see it delivering sufficiently relevant results; without their engagement and leadership, however, the Secretariat is unable to identify and deliver these results. As a consequence, the CEC as a whole is not achieving its full potential.

5.1 The Council

In 1998, the Independent Review Committee (IRC) noted that "a critical aspect of the Council's role is to establish a clear vision to guide the work of all the component elements of the CEC. To date, no such vision has emerged."²⁹ This observation is still valid six years later. The issues ministers bring to the CEC table reflect more their domestic agendas than North American priorities. At the conclusion of its meeting in Mérida in June 1998, the CEC Council issued "A Shared Agenda for Action" which identified two overarching priority areas—"Pursuing environmental sustainability in open markets" and "Stewardship of the North American environment"—and promised a longer-term strategic approach, focusing on a limited number of projects. This effort appears to have been largely ineffective as CEC program activity grew over the next four years (see Table 3) and the Council did not return explicitly to this strategic framework in future communiqués.

Table 3: CEC program activity per year ³⁰

	1994-1998	1999-2003
Conservation of biodiversity	12	Number of activities peaked at 52 in 2000 before stabilizing at 28
Law and policy	13 to 25	16 to 27
Environment, economy and trade	6 to 25	24
Pollutants and health	9 to 48	54 to 72
Total	40 to 110	146 to 151

Three years later in Guadalajara, the Council established a framework “to optimize the CEC’s effectiveness in promoting protection, conservation and sustainable use of the environment,”³¹ that emphasizes six roles for the CEC. One year after that, in 2002, the Council focused its communiqué on “environmental priorities in the areas of energy and environment, environment and human health, and partnerships for sustainable development.”³² The CEC has not explained what links, if any, exist among the two Mérida priorities, the six Guadalajara roles and the three environmental priorities proposed in 2002.

Council members have delegated much of their involvement in the CEC to their Alt Reps and, in turn, to subordinate officials (e.g., the GSC; see Box 6). Because the GSC representatives do not have the ability to communicate direction when none has been provided by the Council, their default role has become primarily a defensive one: to protect the interests of their respective countries or agencies and to ensure that due process is followed. While the micromanagement about which the Secretariat complains is partly an indication of the government’s lack of trust, it also reflects a leadership vacuum at the Council level.

Box 6: Council Resolution: 95-01

The Council hereby approves the establishment of a General Standing Committee composed of representatives of each Party to ensure regular communication between the Secretariat and the Parties on all aspects of implementation of the Agreement. The Parties’ representatives on the General Standing Committee will act as first points of contact for the Secretariat on Agreement implementation for their respective governments and ensure timely follow up on Secretariat requirements for information and/or action. The General Standing Committee will communicate regularly with the executive director or a designated representative of the Secretariat, in person or via conference call, to ensure regular exchange of information and views on the following key issues:

- Development and implementation of the annual program and budget, including review of project proposals for use of resources from the Project Implementation Fund described in the annual program and budget;
- Preparation of the annual report;
- Issues related to the implementation of Articles 14 and 15 of the Agreement;
- Cooperative activities undertaken by the Secretariat and the Parties in accordance with the annual program and budget and/or pursuant to the Agreement;
- Timing of, nature of, and governmental participation in expert meetings; and
- Other issues of mutual interest.

Montreal, 8 February 1995

At a practical level, weak Council leadership has been evidenced by long inter-regnums between appointments of executive directors, the long limbo of the Mexican NAC and delays in appointments to JPAC and the Canadian and US NACs. It has also been evident in the Council's passivity vis-à-vis the Secretariat's proposed work program. Until the recent budget crisis forced the issue, the Parties appeared to take the path of least resistance by ratifying the work program the Secretariat initiated rather than strive to build a new consensus based on the priorities of the three Council members.

But if many have criticized the Council for not providing sufficient overall direction to the Secretariat's environmental cooperation program, they have also expressed concern about the Council exercising too much direction on the administration of Articles 14/15 where the Secretariat has specific responsibilities under the NAAEC (see Section 6.3 below). This issue has been an important source of friction among the Parties (the Council, the Alt Reps and the GSC), the Secretariat and JPAC and has colored their relationships.

5.2 The Secretariat

The CEC Secretariat is unique among intergovernmental organizations in the combination of its traditional service role to the governments that created it with responsibilities where the Secretariat has certain autonomy (Articles 13 to 15; see Section 6.3 for a discussion of Articles 14 and 15). In the words of a former CEC executive director, "the independent authority on these issues granted by the Agreement to the Secretariat creates a significant natural tension between the Secretariat and the Parties."³³ The Secretariat has been forced to balance performance of its dual roles in the face of diverging expectations among its stakeholders: government officials have had difficulty accepting the Secretariat's autonomy where it is specified; NGOs, JPAC, and academics, on the other hand, have tended to believe the Secretariat should have more discretionary authority and have encouraged it in that direction.

Some of the early difficulties the Secretariat faced in its relationship with the Parties (e.g., debates over salaries, division of roles and responsibilities, the development of a coherent work program, etc.) were par for the course for any new international organization. However, the Secretariat's tendency to explore the limits of its autonomy has also contributed to a strained relationship with the Parties since the early days. Government officials have criticized the Secretariat's lack of understanding of government decision-making processes and the political needs of Council members. All three Parties have felt that the Secretariat has at some time exceeded its authority under NAAEC.

The Parties have not favored a strong Secretariat. Former Council members have stated that they saw an inverse relationship between their role and that of the Secretariat: they believe that a stronger Secretariat leads ministers to be less engaged.

The Secretariat has tended to view its role differently. Many Secretariat staff members have read the NAAEC as giving it considerable autonomy. They have based this interpretation not only on Articles 13 to 15 but also on the provisions in Articles 11(6) and 11(4) mandating the executive director to initiate the CEC's work program and budget and prohibiting any single Party from instructing the staff directly Article 11(4). NGOs have encouraged the Secretariat in this interpretation. But the Parties' public position, too, has at times been equivocal. The United States, for example, once saw a strong Secretariat as a one of the NAAEC's selling features. The Council's lack of overall direction to the executive director has also encouraged the Secretariat to assume greater responsibilities.

Some staff members have interpreted Article 11(4) as a license to keep all three Parties at arm's length. To avoid anticipated government interference, the Secretariat has at times not been fully transparent about its intentions and work and as a result has occasionally surprised the Parties with the unexpected evolution of some projects. Officials from all three governments have been particularly unhappy that the Secretariat has imposed a lower standard of project planning (i.e., definition of results, performance indicators, budgeting, project evaluation) for most of its projects than they themselves have to meet within their own administrations.

Under Article 13 of the NAAEC, the CEC Secretariat has the authority to initiate independent investigations and prepare reports on environmental issues that are within its operational plan. Once completed, the CEC Secretariat submits the report to the CEC Council and makes it public within 60 days, unless the Council decides otherwise. This is an unusual power for an intergovernmental Secretariat. To date, the CEC Secretariat has prepared five Article 13 reports (one currently in draft form) on maize and biodiversity; electricity; migratory bird habitat; North American pollutant pathways; and the Silva Reservoir; see the Appendices for short descriptions of each of these reports). By and large, observers have praised these reports as being of high quality and a useful contribution to the policy debate although some government officials have been less satisfied with the results.

Box 7: CEC Working groups

The CEC conducts the bulk of its program work through various working groups, composed almost entirely of government officials from the three Parties. JPAC and others have repeatedly asked that the membership of these groups be broadened to include nongovernmental participants. Since 1995, the Council has created six working groups. In addition, the Secretariat and the working groups themselves have established additional sub-committees to guide specific aspects of their work. There are now 23 such groups related to the Pollutants and Health Program, six related to the Conservation of Biodiversity, four to Law and Policy, two to Environment, Economy and Trade and five related to other initiatives.³⁴ The Secretariat also relies on nongovernmental experts to assist it with the work program, Article 13 reports, Article 14-15 legal issues, etc.

The level of working group activity represents an extensive commitment of governmental resources to the CEC's work program; the representation of nongovernmental representatives on advisory groups and task forces represent a successful effort by the Secretariat to leverage outside resources and expertise in furtherance of the work program.

A number of issues have arisen about the operations of these groups:

- Roles and responsibilities: not all working groups have terms of reference and the specificity of these terms varies where they exist. Partly as a result, the division of roles and responsibilities among the working groups, the Secretariat and the Parties is not always clear. This has led to conflict, most recently when the CEC budget was cut.
- "Mandate creep": some working groups have acquired a vested interest in their work and members have advocated their group's continuation past its original mandate. While such promotion may be legitimate, it can also introduce institutional rigidities by making CEC-wide program adjustments more difficult.
- Membership: in order to function effectively, working group members need to have the appropriate authority from their governments to make commitments or provide advice. This is not always the case. The operations of some working groups have been hampered because their members were too junior to engage their governments. This has discouraged the participation of government representatives with the appropriate authority. In a different vein, the high turnover in some groups has hurt the groups' efficiency.
- Other issues: These have included transparency (some groups have opposed public reporting of their activities) and the need to clarify the relationship between working groups and JPAC.

The effectiveness of these groups has varied. The most effective groups have been characterized by the strong personal commitment and equivalent seniorities of the members, well-defined terms of reference, a shared vision and clear operating procedures.

5.3 The Joint Public Advisory Committee (JPAC)

Article 16 of the NAAEC gives JPAC several rights, including (i) to advise the Council “on any matter within the scope of this Agreement,” (ii) to provide information to the Secretariat and (iii) to receive the proposed annual work program, budget, draft annual report and Article 13 reports at the same time as the Council. The Canadian and Mexican JPAC members are named by their Council member, while the US members are named by the President. All serve without remuneration.

JPAC is a unique trilateral public advisory mechanism without any direct precedent or peers among international environmental institutions (neither NAFTA nor the Labor Cooperation Agreement have JPACs). JPAC’s vision is to promote North American cooperation in ecosystem protection and sustainable economic development and to ensure active public participation and transparency in the actions of the Commission. JPAC works by consensus. JPAC members act independently of the Council and do not seek or receive instruction from any government or the Secretariat. Over the course of its existence, JPAC has made 79 recommendations to the Council and provided several letters and reports from public meetings on a wide range of matters (e.g., trade and transportation, transboundary Environmental Impact Assessment, the sound management of chemicals, water, environmental management systems, CEC work program, biodiversity) and has regularly updated the Council on its activities. At the Council’s request, JPAC has also developed guidelines on sensitive issues, such as the citizens’ submission process (Article 14) and NAFEC grant applications.

JPAC members have for the most part shown an extraordinary commitment to the work of the Committee—taking their work plan seriously and fulfilling their role as advisors to the Council and a sounding board for the public.

JPAC is arguably the most innovative of the three CEC institutions. While its formal responsibility is to provide advice to the Council, some of its members have also interpreted their role to include “keeping Council honest” and “helping maintain Secretariat’s independence.” More so than any NGO could, JPAC can observe and remain up-to-date on CEC issues. Its direct access to the Council and the Secretariat helps keep the Parties and the executive director responsive to their constituencies in a way that a broader, more generalized public discourse could not. Its two workshops on NAFTA’s Chapter 11, for example, demonstrate JPAC’s ability to bring substantive opinions to a relatively complex issue that is beyond the experience of many citizens. This role is a fundamental aspect of JPAC’s work. At the same time, the Council looks to JPAC as a strategic partner in pursuing a regional agenda and identifying priorities for continued attention. In many ways, JPAC is the CEC’s “public face”: through the many public meetings it hosts, JPAC plays an important role both as an intermediary between the Council and the concerned public and as a sounding board for ideas.

JPAC has certainly experienced failures and frustrations in terms of both engaging the public and affecting the Council’s agenda and regional environmental policy. While it has attracted a high level of sustained interest by environmental NGOs, other stakeholders, such as business,³⁵ have participated much less in JPAC’s work. In many ways, JPAC’s relations with the Council and the Alt Reps have evolved into a highly formalized, even ossified discourse. The Council has not always followed JPAC advice and JPAC perceives that the Alt Reps do not sufficiently credit its role. The Alt Reps bear increasing responsibility for the relationship between JPAC and the Council, yet have seemed slow in embracing this role. JPAC’s protracted advocacy in support of an effective citizens’ submission process (see Section 6.3 below) arguably hurt its relationship with the Council and the Alt Reps. Its determination to bring back issues after the Council had dismissed them may also have hurt its credibility. JPAC can become mired in technical details and procedural concerns, and the challenge of fulfilling a dual role of “public conscience” and strategic partner has led some to criticize what they see as JPAC’s occasionally confrontational approach to the Council.

Nevertheless, we believe that cases where JPAC advice may not have been followed should not be seen as a failure of JPAC, the Council or the process, but rather a natural product of a public participation mechanism in a multilateral context where priorities differ or where issues among state parties are not yet settled. In some cases, the Parties themselves are simply not ready to move forward on an issue and public participation through a regional body will not necessarily affect this dynamic. In other cases, the Parties, after considering input from multiple sources, take a decision that cannot be reconciled with the opinion of the advisory body. While these circumstances are certainly frustrating, they can be seen as a necessary byproduct of public discourse and will not disrupt the functioning of JPAC as long as the discourse remains civil, and responsible and tolerant of divergent views.

At the same time, JPAC has provided meaningful input that has influenced and strengthened the CEC's policies and programs. This has been particularly true where these are most consistent with the cooperative nature of the NAAEC and involve "non-controversial" issues that the parties are willing and able to address. Thus, JPAC has served as the CEC's main institutional channel for public participation; helped develop rules of procedure or guidelines for Article 14 submissions, NAFEC applications and a Framework for Public Participation in CEC Activities; as well as helped the Secretariat to conduct some public consultations. New budget limitations, however, will begin to constrain JPAC's core work and limit its public diplomacy role.

JPAC has received consistent and meaningful support from the Secretariat (two full-time persons and one part-time consultant). It is receiving C\$360,000 this year (down from \$400,000 in the previous two years) to fund its activities (a significant portion of this sum goes to defraying the travel costs of public participants in JPAC's public meetings and workshops on topical CEC issues), and has benefited from the commitment and long-term institutional memory provided by Secretariat staff.

JPAC has also created a detailed public record of its work that is easily accessible through the Internet to interested parties in all three countries. This level of transparency and openness lends credibility to the work of JPAC and the CEC. It also serves an outreach function by informing the broader public of the work of the CEC and engaging the public in discourse about North American environmental issues.

Findings

- With few exceptions, the Council has not projected a coherent agenda with measurable goals and interim targets to guide the CEC's work.
- The Secretariat and the Parties disagree about the Secretariat's roles and responsibilities.
- The Parties have lost some confidence in the Secretariat's ability to manage programs in their collective interest.
- JPAC has been an innovative debate facilitator and point of entry for the public.
- JPAC's dual role as a watchdog to the Parties and a strategic partner to the Council has created philosophical and operational challenges.
- JPAC's relations with the Alternate Representatives have been increasingly important, but strained.

5.4 Other advisory bodies

The NAAEC encourages each Party to create a National Advisory Committee (NAC) and a Government Advisory Committee (GAC). The US NAC was formed shortly after the entry into force of the NAAEC and consists of 12 members—with four each drawn from national and local environmental NGOs, academic institutions, and the business sector. The Canadian NAC was established in 1996 and is comprised of nine members, appointed for three-year terms, who reflect the diversity of the country and a range of public and private interests. While Mexico's NAC at one time counted sixteen members from academics, scientists, businesses, NGOs and indigenous communities, and was active during the late 1990s, it is no longer functioning. In all cases, NAC members are appointed by the Council member of their country and are not remunerated for their services.

The NACs have offered an important outside perspective on the NAAEC implementation to their respective governments. Both the Canadian and United States committees have been geographically and sectorally diverse, bringing a range of opinions to bear in their discussions. Each NAC has taken positions critical of its government from time to time. While it is always difficult to determine the impact of advisory bodies, both NACs have forced their respective governments to consider issues that they otherwise might not have (e.g., related to Articles 14 and 15).

The United States is the only Party to have formally created a Government Advisory Committee. The GAC is composed of ten members drawn from state, local and tribal governments with relatively broad geographic diversity. Most of the GAC's work is to respond to EPA requests for advice on a variety of issues. The GAC usually meets jointly with the US NAC and together the institutions broaden public awareness of the CEC and its activities.

5.5 Interagency coordination

In all three countries, the CEC work program extends beyond the mandate of the environmental agencies represented on the CEC Council. As a result, all three Parties need to involve other government agencies and departments to ensure effective input to the CEC's work program. This is particularly true in the case of the United States where the EPA's legislative mandate focuses on a narrower range of issues than either Environment Canada or Semarnat.

Observers agree that United States interagency coordination was not effective in early years. The EPA, which had little prior experience with coordinating United States' government participation in international institutions, did not invest sufficiently in raising the awareness of its government partners about the CEC. As a result, the CEC had to delay addressing certain issues because the United States had not conducted effective interagency consultations. While the EPA's success at coordination has improved, officials in some United States agencies still see little value added in the CEC for their program areas as they already have their own bilateral or trilateral relationships with their Canadian and Mexican counterparts and see no reason to subsume them under EPA's lead at the CEC. An early casualty of this detachment was the CEC's biodiversity program. Since the lead US agency on these issues, the Department of the Interior, was not interested (it has since become actively involved), the EPA was unable to agree to a substantial CEC biodiversity program. Others have stayed on the sidelines even when they have similar projects in Mexico (e.g., United States Agency for International Development). The CEC's small budget and the perception that the CEC could involve high transaction costs for little return have provided little incentive for some agencies to participate actively.

Interagency coordination has been less of an issue in Canada, where Environment Canada devoted considerable effort in developing interdepartmental and intergovernmental (with three provinces) awareness and cooperation. Unlike in the United States and Mexico, most Canadian environmental law is provincial and the federal government did not bind the provinces when it signed the NAAEC. Only three out of ten provinces signed on to the NAAEC (Alberta, Manitoba and Québec) and there has been little pressure to add to this list in recent years. While Canada has not established a formal GAC, it does have an Intergovernmental Committee, consisting of the federal Environment Minister and the ministers of the three participating provinces. This committee has not met formally in recent years but working-level officials from the four jurisdictions meet regularly, usually by phone, to shape Canadian positions and provide input to various CEC projects and planning processes. Overall, these provinces appear satisfied with this process. While the small number of participating provinces may give the impression that Canada is not fully committed to the NAAEC, it does not appear to be an issue as the federal government consults all the provinces on issues that affect them whether or not they have signed the Agreement.

Mexico has faced its own challenges related to interagency coordination. On the one hand, Semarnat's broad mandate over natural resources and environmental protection and smaller size relative to the EPA or Environment Canada have made internal coordination easier for most issues (an exception is the regulation of toxic chemicals which, in Mexico, is the responsibility of the Health Department; in the United States, the EPA regulates toxics and in Canada it is Environment Canada and Health Canada jointly). On the other hand, the gap separating environment and trade policies is deeper in Mexico than in either Canada or the United States. Mexican trade officials have consistently opposed addressing environmental issues as part of trade policy in the NAFTA, the FTAA, the WTO or other trade agreements the country has signed. They believe that the importance of the linkages between trade and environment has been exaggerated. More importantly, they have long been concerned that developed countries may invoke environmental protection as a non-tariff barrier to block access to the exports of developing countries. For example, they have consistently viewed as disguised protectionism the United States *Marine Mammal Protection Act's* restrictions on imports of tuna caught in a manner harmful to dolphins.

5.6 Party-to-party Formal Dispute Resolution (Part Five)

Article 5(1)'s obligation on the Parties to effectively enforce their environmental laws may be considered the core obligation of the NAAEC. In an unprecedented development for an international environmental agreement, this obligation is made enforceable through the availability of formal dispute settlement proceedings (Part Five of the NAAEC) that can lead to monetary penalties (and in the case, of the United States and Mexico, trade sanctions) for "a persistent pattern of failure to effectively enforce environmental laws."

The hard-fought negotiations of Part Five led to the design of a convoluted process full of checks and balances. After a decade, it has not been applied and there appears to be little prospect that it will be in the foreseeable future as there is no manifested interest among the Parties to invoke it. Mexico, of course, had argued against enforceable obligations and sanctions from the beginning, preferring that the NAAEC focus on environmental cooperation. Canada, too, would be prepared to repeal Part Five, despite having replicated it in the Chile-Canada FTA. The United States, however, has continued to insert similar obligations and dispute settlement procedures (albeit more streamlined) in other trade agreements it has negotiated since the NAFTA (e.g., with Chile, Singapore, Central America, Australia and Morocco).

The Parties' implicit intent not to invoke Part Five does not mean that it is irrelevant. Some observers have claimed that: (i) its very existence could discourage the Parties from adopting strong environmental laws because of the possible trade risks attached;³⁶ (ii) Part Five is a reason why more Canadian provinces have not joined the NAAEC; and (iii) that one of the reasons why the Council has limited the scope of the citizens' submission process to preclude alleged widespread enforcement failures is to reduce the threat of another Party invoking Part Five.

Finding

- The punitive approach embedded in Part Five is inconsistent with the value of environmental cooperation that dominates the spirit of the NAAEC as a whole.
-



6 Has the CEC facilitated greater public involvement in North American environmental management?

One of the NAAEC's objectives is to “promote transparency and public participation in the development of environmental laws, regulations and policies.” The CEC has promoted public participation through its various programs, the work of the JPAC, the North American Fund for Environmental Cooperation (NAFEC) and, of course, through the implementation of the citizens' submission process (Articles 14 and 15).

Some CEC stakeholders and Secretariat staff argue that public participation is the CEC's key value added as the three governments can already collaborate directly on environmental matters.

6.1 Public involvement

Most observers give the CEC high marks overall for public participation practices. The CEC has exceeded the Parties' expectations in this regard and senior officials in the three countries consider its role in public engagement to be one of the CEC's strengths. However, these same observers, JPAC and the Secretariat included, agree that the CEC must make stronger efforts to reach out to business and indigenous peoples (particularly important constituencies on issues such as electricity restructuring and maize, the subjects of the CEC's latest Article 13 reports).

For their part, grassroots NGOs see value in the annual meetings between the Council and the public as a rare opportunity to speak directly to the ministers although they and others agree that focusing such meetings on fewer themes would likely make them more productive.

The CEC fills a relatively larger institutional space in Mexico than it does in either Canada or the United States, whose environmental policy landscapes are much more crowded. The CEC, for

example, has been instrumental in encouraging public participation in policy development in Mexico, particularly from environmental NGOs. While the CEC might have difficulty standing out in a city such as Washington with its many policy institutes, NGOs and government agencies concerned with the environment, it has established a strong presence in Mexico City. The CEC Secretariat has gained easier and more frequent access to senior Mexican government and industry leaders in Mexico than with equivalent Canadian (let alone, United States) officials. This access gives the CEC both a high profile in Mexico and considerable opportunities to facilitate public involvement in environmental policy

On the other hand, the CEC has less support than could have been anticipated among its major stakeholder groups (NGOs, business, academia) in the United States for a variety of reasons. The interest of US NGOs has declined, partly due to their perception that the CEC has not had much of an impact, partly because some of them have moved from trade and environment to other issues. US NGO dissatisfaction with what they see as the Council weakening the citizens' submission process (see Section 6.3 below) has contributed to this detachment. Canadian and Mexican NGOs, however, have valued the increased transparency that the citizens' submission process has brought to specific issues in each of these countries.

For US and Canadian NGOs working in the environment and trade field, one of the central issues under NAFTA and the NAAEC in recent years has been the investment provisions of NAFTA's Chapter 11. The CEC's inability to focus on this issues prevents it from connecting well with elements of this constituency on trade and environment.

The private sector has been represented on JPAC, has participated in several CEC workshops and has been involved in a few projects. Overall, however, it has played a minor role in the CEC to date, although there are important national differences to underline.

Canadian business sees free trade as critical to its future, and trade-related institutions such as the CEC, therefore, as having an important role to play in environmental cooperation and coordination. It would like the CEC to broaden its emphasis to sustainable development rather than simply environmental issues and to focus its work program around trade and environment linkages. Several Canadian business officials feel that the CEC has not addressed issues directly relevant to them nor listened when they have presented their views (e.g., the presentation of emissions data in *Taking Stock*—see page 17). They believe that the CEC could liaise more effectively with major business organizations such as the Chamber of Commerce, Canadian Manufacturers and Exporters Association or the Canadian Council of Chief Executives. Business's widespread perception that the CEC is primarily an environmental advocacy organization has further discouraged its participation.

In the United States, few business representatives have seen much value in engaging actively in CEC activities: most are simply not sufficiently relevant to their concerns. The situation in Mexico is different. By having designed programs of direct benefit to certain segments of Mexican business (e.g., support for pollution prevention in small and medium enterprises), the CEC has been able to involve them to a greater extent than in Canada or the United States.

As North American markets become more integrated, business interest in the CEC could well increase, particularly if the CEC were to address environment issues with trade or economic implications of greater significance to industry, such as air emissions trading, facilitating/promoting trade in green goods and services, environmental non-tariff barriers, and environmental problems associated with modes of transport and border crossings (e.g., pollution from idling trucks). Business could be a valuable source of information and expertise on such issues; its greater involvement in CEC projects would allow the CEC to reach more policy-relevant conclusions and give them credibility with a broader audience.

Findings

- Observers agree that the CEC has reached out more effectively to its environmental constituencies than to business and indigenous organizations.
 - Some NGOs seem to be growing disillusioned by the CEC's perceived lack of influence and relevance to their priorities and are less engaged than before.
-

6.2 North American Fund for Environmental Cooperation (NAFEC)

The CEC created the North American Fund for Environmental Cooperation (NAFEC) in 1995 as a means to fund community-based projects in Canada, Mexico and the United States that promoted the goals and objectives of the CEC. From its creation in 1995 until 2003, NAFEC awarded 196 grants (79 of which were binational or trinational) for a total of C\$9.36 million and leveraged an additional \$5 million contribution from other sources. NAFEC projects funded a wide range of activities, including some related to biodiversity, green goods and services, energy, human health and air quality. The NAAEC itself did not create NAFEC; rather, the Secretariat proposed it at a time when it had surplus funds. As a result of recent budget constraints, the CEC has terminated NAFEC, but projects approved in 2002 and 2003 will continue to receive administrative support until the completion of their activities.

Box 8: On the Path of the Grey Whale: Linking Local Conservation Efforts from Baja California to the Bering Sea

The CEC awarded US\$250,000 to the Canadian Parks and Wilderness Society, the US Center for Marine Conservation and Environmental Defense, and Mexico's Pronatura in 2001 to generate public support for, and foster, the creation of a network of marine protected areas in the Baja California to Bering Sea region frequented by the migratory grey whale. Local partners undertook community outreach and constituency building, held workshops, and raised awareness about the importance of marine conservation.

This project represents the first international attempt to create and link marine protected areas along the Pacific coast of North America. Through this project, the Baja California to Bering Sea Initiative provided networking opportunities for local community MPA projects and gave them trinational profile. In addition, this project demonstrated the benefits of trinational cooperation in the conservation of shared migratory species.

The Baja California to Bering Sea Marine Conservation Initiative will attempt to raise funds to support different sites as a continuation of this project.

More information on this project can be found on the CEC web site at: <<http://www.cec.org/grants/projects/details/index.cfm?varlan=english&ID=149>>

NAFEC supported projects that:

- Were community-based;
 - Responded to a specific issue or problem and led to concrete results;
 - Reflected cooperative and equitable partnerships between or among organizations from different sectors and/or countries within North America;
 - Met the objectives of the CEC (by complementing the CEC program);
- Has the CEC facilitated greater public involvement in North American environmental management? 41

- Strengthened and built the capacities of local people, organizations and institutions;
- Emphasized sustainability, linking environmental, social and economic issues; and
- Leveraged additional support, but were unlikely to obtain full funding from other sources.

As well as providing grants, NAFEC served as a forum for information exchange, both through disseminating information about NAFEC-supported projects and by helping organizations working on similar issues to contact one another. NAFEC thus supported both the CEC's capacity development and public outreach functions.

An internal review of NAFEC concluded in June 2000 that NAFEC was achieving specific and substantial results and that it was making a significant contribution to the CEC's goals. JPAC, NGOs and the Mexican government officials all highly value NAFEC.

Finding

- NAFEC has played an important role in capacity development, promoting grassroots community participation, particularly in Mexico, and in expanding the CEC's constituency.
-

6.3 Citizens' submission process (Articles 14/15)

As already stated, the NAAEC was negotiated out of a concern that a Party's lack of enforcement of its environmental laws might provide it with an unfair competitive advantage. Article 5 (1) stipulates therefore that "each Party shall effectively enforce its environmental laws and regulations." One of the key mechanisms the NAAEC created to meet its objective of enhancing compliance with, and enforcement of, environmental laws and regulations is the citizens' submission process. Described in Article 14 of the Agreement, this process allows any person or nongovernmental organization to make a submission to the Secretariat asserting that one of the Parties is "failing to effectively enforce its environmental law." Such an assertion does not, however, have to establish a link to trade (i.e., that lack of enforcement would be providing a trade advantage). Where the submission meets certain requirements, the Secretariat may decide to request a response from the affected Party. If the Secretariat considers that the submission warrants developing a "factual record," it may do so if its recommendation is approved by at least a two-thirds vote of the Council. By a similar vote, the Council may determine whether to release the factual record publicly.

A factual record does not include any recommendations and the NAAEC does not require any follow-up by the affected Party. The impact of such a record is to trigger internal reviews, raise the profile of the issue, force greater interdepartmental or inter-jurisdictional cooperation where required, and perhaps bring public embarrassment to the Party. As the Parties appear to have agreed informally that they do not intend to resort to dispute settlement under Part Five of the NAAEC even if a factual record should reveal "a Party's persistent pattern of failure to effectively enforce its environmental law," the preparation and publication of the factual record is, for all practical purposes, the end of the process.³⁷

This mechanism is the NAAEC's most innovative and most controversial. JPAC, the Canadian and US NACs, the GAC, NGOs and academics have widely hailed the process for the increased accountability it imposes on the Parties. The Parties' own view is more ambiguous: while they

publicly embrace the values that underlie the process—transparency, accountability, stronger environmental protection—they have in practice sought to circumscribe it, for reasons not well appreciated by outside observers. Even though the CEC has received far fewer submissions than initially anticipated, the process itself has dominated its agenda, strained relations among the Council, JPAC and the Secretariat and, in the views of some, even hurt the pursuit of a cooperative agenda among the Parties.

At the root of the controversy have been the strikingly different expectations that citizens and the governments have about the process. Its advocates have variously described the citizen submission process as:

- “A unique and indispensable role in fostering vigorous environmental enforcement”³⁸
- “A cornerstone of the North American Agreement on Environmental Cooperation”³⁹
- The NAAEC’s “centerpiece.”⁴⁰

Government officials, on the other hand, are often surprised by the process’s intrusiveness and the Secretariat’s autonomy in administering it.⁴¹ Many have difficulty accepting that a government-funded organization should be able to comment publicly on their regulatory decisions. Some have sought to limit its application by arguing that submitters should exhaust local remedies and demonstrate direct harm before resorting to Article 14. Governments have been particularly concerned about allegations of a widespread failure to enforce regulations made in certain Article 14 submissions. These concerns have been both practical and legal, as follows:

- Practical: how does one respond to such a broad accusation? How much would it cost to document enforcement strategies and activities in large regions and over a period of time? How will affected jurisdictions be involved [a particularly-important consideration in the case of Canada where the provinces have greater enforcement responsibilities than the federal government]? How does one define “effective enforcement”?
- Legal: could a factual record documenting a widespread failure to enforce lead to dispute settlement under Part Five of the Agreement?⁴²

Canadian and Mexican government officials (the United States has not been as subject to this process as its neighbors) have therefore questioned what burden of proof submitters should have to meet before a Party has to commit the needed resources to preparing a factual record.⁴³

The process of filing a submission and preparing a factual record has proven more burdensome for all—the submitters, the Parties and the Secretariat—than had been initially anticipated. The process itself is relatively inflexible and does not provide an alternative mechanism to resolve the issues in question once it has been triggered.

Table 4: Status of Submissions on Enforcement Matters under Article 14 of the NAAEC, February 2004

	Canada	Mexico	USA	TOTAL
Active Files	4	7	-	11
Closed Files	10	14	8	32
Factual records prepared and made public	4	4	1	9
Dismissed on grounds that they did not warrant further consideration based on Article 14(1) or (2)	4	6	3	13
Terminated under Article 14(3)(a)	-	-	2	2
Terminated under Article 15(1)	1	3	1	5
Withdrawn by the Submitters	-	-	1	1
Dismissed by Council under Article 15(2) following notification from the Secretariat that preparation of a factual record was warranted	1	1	-	2
TOTAL	14	21	8	43

We focus below on two questions:

- Has the citizens' submission process been implemented as the NAAEC requires?
- Has the citizens' submission process benefited the North American environment?

Has the citizens' submission process been implemented as the NAAEC requires?

When the Parties negotiated this process, they left a number of implementation matters to be worked out later (e.g., time limits between various steps in the process). Some of these have raised important issues related to the interpretation of terms in the Agreement. In 1995, the Parties adopted a first set of guidelines that fleshed out procedural and administrative details missing in the NAAEC. The Parties proposed amending the guidelines in 1998. After a public consultation, JPAC recommended against the proposed amendments. At its regular session in 1999, the Council adopted some of the proposed amendments plus a few new ones addressing the implementation of Article 14 and launched internal discussions on guidelines for the preparation of factual records (Article 15).

As a result of strong public opposition, the Council agreed in 2000 to ask JPAC to review lessons learned about the process since 1995 and to address certain issues of concern before changing the guidelines further. JPAC presented its *Lessons Learned Report* to the Council in June 2001 with specific suggestions on issues related to timeliness, transparency, accessibility, balance and follow-up. The Council accepted some of these suggestions and rejected others. In November 2001, the Council accepted the Secretariat's recommendations to prepare four factual records but restricted their scope to specific examples rather than the allegations of widespread failures to enforce contained in the original submissions. Many observers perceived this action as contradicting the 2000 Council resolution implying that the Council would ask JPAC to review changes to the process before they were introduced. In 2002 and 2003, JPAC held separate public reviews of two issues: the matter of limiting the scope of factual records and the Council request that the Secretariat provide its proposed workplan for the preparation of a factual record to the Parties for their comments. Many observers argue that one of the consequences of this evolution has been to make the process more legalistic and complex.

The NAAEC gives the Secretariat a central role to play in the administration of the process. In this role, the Secretariat needs to consider carefully the interests of both the Parties and the submitters. Submitters and outside observers by and large believe that the Secretariat has performed its obligations well.⁴⁴ For its part, the Independent Review Committee noted in 1998 that the friction opposing the Secretariat and the Council was more procedural than substantive. The Parties, on the other hand, believe that the Secretariat has at times both extended the process beyond what had been contemplated (e.g., by proposing to comment publicly on the Parties' compliance with the process) and overstepped its authority (e.g., by publishing a factual record before the Parties had authorized it; by speaking to the media over the Parties' objections). In one instance, the Council chastized the Secretariat publicly for allegedly not following the guidelines.⁴⁵ The way in which the Secretariat has administered the process, particularly at the beginning, has contributed to the development of an adversarial relationship between the Parties and the Secretariat.

Individual Council members also have a delicate role to play in the administration of the process as they may be sitting both as subject of a submission and playing a role in its follow-up. If they fail to balance these competing roles appropriately, they risk undermining the process's legitimacy and its very purpose in promoting transparency and the effective enforcement of environmental regulations. The Council has adopted a series of measures over the years to narrow the process's scope:⁴⁶

- By disallowing examinations of allegations of a broad pattern of ineffective enforcement in several factual records;
- By limiting the scope of factual records; and
- By questioning the sufficiency of information required for the Secretariat to recommend the preparation of a factual record.

JPAC, the NACs, the US GAC, academics, independent observers and NGOs have widely and repeatedly criticized the Council for these actions.⁴⁷ They have argued that (i) the Council has exceeded its legal authority by making decisions that the NAAEC assigns to the Secretariat (e.g., determining whether a submission should be accepted); (ii) the impact of these actions may make it prohibitively difficult for citizens to file submissions; (iii) these decisions/actions will adversely affect the credibility of the process; and (iv) they will contribute to an emerging perception of the Council members operating with a conflict of interest. In their view, these changes compromise the very reason why Articles 14 and 15 were drafted in the first place: "to provide some 350 million pairs of eyes to alert the Council of any "race to the bottom" through lax environmental enforcement."⁴⁸

These critical views are shared by a team of legal advisors from the three countries who periodically advise the Secretariat on Article 14 and 15 matters. In a submission to TRAC, these advisors write:⁴⁹

...if the scope of factual records continues to be limited to specific alleged failures to enforce—e.g., a destroyed nest here or a damaged stream bed there—the result is likely to seriously limit the effectiveness of the Article 14-15 process. Moreover, such limitations of factual record scope has the potential to permanently undermine the integrity of the process to the point where it is of limited interest to potential submitters. Process integrity and credibility are critical because it is a public process that relies on and is driven by the responses and actions of citizens and NGOs in the three countries.

In a recent resolution related to *Ontario Logging* (March 2004), the Council, however, did approve the preparation of a broad factual record after the submitters provided additional information at the CEC's request, arguing their case. What burden of proof a submitter must meet before the Council agrees to the preparation of a factual record remains an issue for several observers.

In addition to the above, submitters have also criticized the Parties for not providing information requested by the Secretariat, for delaying the process, for pre-empting CEC review by engaging in desultory enforcement actions and for not responding to submitters' letters.⁵⁰

Has the citizens' submission process benefited the environment?

Anecdotal evidence indicates that the process has helped protect environmental quality. However, because there is no mandatory follow-up to factual records, these benefits have not been documented systematically. In general, one would expect the process at least to raise the profile of the issue within the responding government and encourage it to review its enforcement strategy. Notwithstanding the problems described in the section above, the following examples of the process's positive impact can be offered:

- The proposed Cozumel development was downsized and additional measures introduced to protect a threatened reef. In addition, this case influenced the reform of Mexico's environmental assessment legislation.
- The filing of the submission in the BC Hydro case spurred the resolution of issues that had long been stalled. For its part, the factual record generated ideas for improving the application of the provincial Water Use Planning Process and the federal No Net Loss policy.
- The Secretariat's investigation conducted as a result of the BC Logging submission uncovered deficiencies in the procedures of Fisheries and Oceans Canada that the Department subsequently sought to address.
- Fisheries and Oceans Canada increased its presence in the prairie provinces.
- In a letter to BC government authorities, Environment Canada cited the BC Mining submission when it rejected a proposal to adopt a less costly, but less effective, effluent treatment method at the Britannia Mine.
- The submission related to the operations of a shrimp farm in Mexico (Aquanova) encouraged negotiations among the submitters, local and environmental authorities and the developer that led to actions to reduce the impact of the farm's waste water discharge and a mangrove replanting program.

There is an argument to be made that the process could generate more environmental benefits if the Council sought to restrict it less. Some observers have argued, for example, that the actions of the Council have eroded the credibility of the process and are directly responsible for the fact that no new submissions have been brought against the United States Government in the last four years and that large environmental NGOs are not using the process.⁵¹

Findings

- In the early years, the Secretariat broadened its authority beyond what the NAAEC contemplated.
 - More recently, the Council's constraining actions have upset the balance set out in the NAAEC and undermined the Secretariat's roles in ways that could compromise the process's effectiveness and credibility.
 - The public sees the Parties as neither supporting the citizens' submission process nor the values underlying it.
 - The submission process fulfills a useful role in highlighting inadequacies in enforcement efforts.
 - The process has had a modest but positive environmental impact.
-



7 Conclusions and recommendations

The Ten-year Review and Assessment Committee has drawn conclusions on various aspects of the implementation of NAAEC and the work of the Commission for Environmental Cooperation over the last 10 years. From these conclusions, we have developed the following recommendations designed to support the CEC Council and the other CEC institutions as they chart a path forward for the next ten years.

TRAC Recommendations

FURTHERING TRILATERAL ACTION FOR THE NORTH AMERICAN ENVIRONMENT

1. A Renewed Commitment to the CEC as an Innovative Institution
 2. Addressing Key North American Environmental and Sustainable Development Issues
 3. Advancing Our Knowledge of Trade and Environment Linkages
 4. Building Capacity for Stronger Environmental Partnerships
-

EFFECTIVE GOVERNANCE AND EFFICIENT FUNCTIONING OF THE COMMISSION FOR ENVIRONMENTAL COOPERATION

5. Getting the Relationships Right—Effective Governance in the CEC
 6. Ensuring Accountability and Reporting on Implementation of Obligations
 7. Adding Value to the Regular Sessions of the CEC Council
 8. Focusing the CEC Program for Efficiency and Effectiveness
 9. Ensuring and Leveraging Sustainable Funding for the CEC
 10. Ensuring Effective Implementation of the Citizen Submission Process
 11. Reaching Agreement on Dispute Resolution under Part Five
-

BUILDING KNOWLEDGE AND OUTREACH

12. Building and Communicating Knowledge
 13. Building the CEC Constituency
-

ACTING ON THE RECOMMENDATIONS

14. Implementing the recommendations of this report

Furthering Trilateral Action for the North American Environment

Recommendation 1: A Renewed Commitment to the CEC as an Innovative Institution

The North American Agreement on Environmental Cooperation is a unique agreement that promotes environmental cooperation in the context of closer trade relations. Through its Council of Ministers, Secretariat and Joint Public Advisory Committee, the Commission for Environmental Cooperation has achieved much in just 10 years. It has added substantially to our knowledge of the North American environment and the linkages between NAFTA and the environment; it has taken trilateral action on key environmental issues and strengthened the capacity of public institutions to manage environmental issues and to enforce laws and regulations; it has also promoted transparency and public participation.

The Ten-year Review and Assessment Committee calls upon the Mexican Secretary of Semarnat, the US Administrator of the EPA and the Canadian Minister of Environment to strengthen and renew publicly the commitment of their governments and themselves to the CEC as their institution of choice for trilateral environmental cooperation and for assessing the linkages between NAFTA and the environment.

Recommendation 2: Addressing Key North American Environmental and Sustainable Development Issues

The CEC has worked on a number of environmental issues of trilateral significance which have helped develop a shared agenda among the three Parties to the Agreement, such as biodiversity conservation, the sound management of chemicals and protecting children's health. Its ability to

make progress on other issues has at times been hampered because of their political sensitivity to one or more of the Parties. CEC work on such issues requires careful scoping and well-defined roles.

We recommend that the CEC continue to address key issues for the environmentally-sustainable development of North America. Among those for ongoing or future attention we have identified: energy management (including renewables and tools for emission trading), water management (including municipal waste treatment and watershed protection), and biodiversity conservation.

We recommend that the Council clearly establish CEC's role as an analyst and catalyst in activities that address North American environment issues; the Council should craft criteria to emphasize the CEC's active presence as:

- **A convener of experts and researchers to develop a basis for dialogue;**
- **A “safe harbor” forum for the Parties and stakeholders to discuss issues and stakes; and**
- **A developer of tools and promoter of best practices.**

Recommendation 3: Advancing Our Knowledge of Trade and Environment Linkages

The CEC has played a catalytic role in building knowledge of trade and environment links, and in convening experts and interests to study the environmental effects of NAFTA in North America. It has also played a positive, if limited, role in creating markets for green goods and services.

While we conclude that it was and continues to be unrealistic for the CEC to play a significant role in NAFTA implementation and dispute resolution, the CEC has a potentially constructive role to play in implementing other provisions of Article 10.6 of the NAAEC and in otherwise promoting cooperation at the interface between environmental protection and economic development in North America. We welcome the recent efforts of the Alt Reps and their trade counterparts in the three countries to develop a work program on trade and environment linkages.

We recommend that the CEC continue its research program on trade and environment linkages, and that it facilitate and inform the work of CEC and NAFTA working groups addressing issues at the interface between trade and environment.

We recommend that the CEC establish a web-based North American Clearinghouse on Trade and Environment Linkages to integrate and disseminate the results of research, seminars, conferences and dialogues.

We recommend that the CEC continue to support and encourage efforts to build markets for green trade, an area of work for which it is uniquely well-positioned.

We further recommend that the CEC pursue the development and promotion of market-based approaches addressing environmental issues, including such instruments as emissions trading.

Recommendation 4: Building Capacity for Stronger Environmental Partnerships

The CEC efforts to build the capacities of government officials and agencies, environmental and community NGOs and industry, while modest, have shown encouraging results. These efforts have benefited all three countries. They have also strengthened relationships among Canadian, Mexican and US NGOs, industry and governments.

The North American Fund for Environmental Cooperation (NAFEC) has proven to be an effective mechanism for building local environmental capacities.

The CEC's efforts can be strengthened through a more systematic approach aimed at creating long-term institutional capacities for governments and organizations outside government in all three countries, while being more responsive to Mexican needs.

We recommend that the CEC direct its capacity building efforts to helping build institutional capacities, and a new generation of knowledgeable environmental officials and experts inside and outside government, including in the academic and business sectors.

In order to achieve this goal, we recommend that the CEC systematically integrate capacity building into most of its programs, with an emphasis on: 1) supporting Mexican government institutions and private organizations to strengthen the implementation of environmental laws and policies; and 2) building effective relationships among like-minded environmental organizations in all three countries.

The design of this cross-cutting program should include:

- Developing a broad definition of capacity building which includes sharing of best practices and investing in local capacity;
- Setting clear goals and objectives, with measurable indicators of progress and monitoring of results achieved; and
- Facilitating direct partnerships involving Canadian or US business and private foundations with Mexican organizations, which then can carry out capacity building activities in the country.

We further recommend that the CEC maintain its support for NAFEC, as an element of its capacity building efforts, and as a means of continuing to broaden the CEC's constituency base.

Effective Governance and Efficient Functioning of the Commission for Environmental Cooperation

Recommendation 5: Getting the Relationships Right—Effective Governance in the CEC

The heart of the CEC is its institutions—the Council of Ministers, the Secretariat and the Joint Public Advisory Committee. These institutions' representatives have actively worked to carry out their mandates over the last ten years. At the same time, the lack of clarity as to their respective roles and accountabilities has become increasingly evident. This is partly the result of the NAAEC itself but more importantly of how the Agreement has been interpreted and implemented over

time. Concerted action is needed to bring greater clarity to these roles in order to ensure efficient and effective governance of the CEC.

We recommend that the Council, working with the executive director and JPAC, develop and document a renewed understanding on their respective roles, responsibilities and interactions, building on the NAAEC provisions and the good governance principles of:

- **Transparency in decision making;**
- **Accountability for the discharge of roles and responsibilities;**
- **Respect for the roles of the other CEC bodies; and**
- **Efficiency in the use of resources.**

More specifically, this understanding should incorporate the following elements.

The Council and the Secretariat

The Council of Ministers, supported by the Alt Reps, should discharge its role by following the model of a Board of Directors for the CEC. To that end:

1. For the work plan, the Council needs to focus its efforts on:

- Setting a long-term vision and strategic priorities for the CEC;
- Approving the annual work program and budget; and
- Overseeing program implementation through an annual review of results.

The Council and the Alt Reps should then entrust to the executive director the implementation of the annual program.

2. For Submissions on Enforcement and Factual Records (Art.14-15), the Council needs to:

- Set out clear ground rules for the Secretariat, consistent with a strict interpretation of NAAEC's intent;
- Entrust the executive director with carrying out his/her functions effectively, as set out in the NAAEC; and
- Implement its own role consistent with a strict interpretation of the NAAEC.

3. The executive director should focus the Secretariat's role on:

- Developing the Commission's annual program and budget for the Council's approval;
- Implementing the Council-approved program;
- Reporting on and being accountable to the Council for the results of this program;
- Carrying out the responsibilities under Articles 13, 14 and 15 under NAAEC; and
- Maintaining direct communication with the ministers, and reporting periodically on implementation progress.

We further recommend that the executive director meet individually with each of the ministers once a year and maintain an "open phone line" dialogue with each of the Alt Reps. Relations with GSC members can be effectively handled by senior and other Secretariat staff.

JPAC and the Council

We recommend that the Council clearly recognize JPAC as one of the three principal bodies of the CEC and recognize the valuable role that it plays as advisor to Council, and as “NAAEC’s conscience.”

We recommend that JPAC continue to provide advice to Council and serve as “NAAEC’s conscience,” working to effectively engage ministers and the Alt Reps while setting realistic expectations for its role in their decision-making.

We recommend that JPAC draw on its expertise and network of contacts to:

- Engage a broader and deeper set of North American constituencies, including business, community-based interests, indigenous peoples, environmental and socio-economic NGOs and academia/policy research institutes; and
- Assist the CEC to identify supplementary sources of funding to strengthen its environmental cooperation program.

JPAC and the Secretariat

We recommend that the Council provide JPAC with the staffing and financial resources it needs to be effective, separate from the CEC Secretariat and accountable to the JPAC chair. To ensure effective liaison, JPAC staff should be housed within the CEC Secretariat, operating in a manner to avoid any real or perceived conflict of interest in their work.

The executive director should continue to keep JPAC fully informed of the Secretariat’s work, and should facilitate its engagement in the activities of the CEC.

Recommendation 6: Ensuring Accountability and Reporting on Implementation of Obligations

Under NAAEC, the executive director is responsible for preparing the CEC’s annual report, under the Council’s instructions. This report is supposed to include actions taken by each Party in connection with its obligations. The annual report is thus an important means of holding the Parties accountable for, and tracking their progress toward fulfilling, their national obligations, but it has been underutilized.

We recommend that the Parties make better use of these reports to provide objective and timely reviews of progress made in implementation of their obligations under the Agreement.

Recommendation 7: Adding Value to the Regular Sessions of the CEC Council

The annual Regular Sessions of the CEC Council provide an important setting for ministers to set a shared North American environmental agenda and take trilateral actions in favor of sustainable development.

We recommend that the Regular Session of the Council be structured around a standing agenda that:

- **Allows ministers to discharge their duties as the CEC “Board” as they:**
- **Set the Strategic Plan for the CEC;**
- **Exercise oversight of the implementation of the Agreement; and**
- **Receive reports from the executive director on the results of the environmental cooperation program and the discharge of his/her other duties under the Agreement.**
- **Provides the setting for the ministers to:**
- **Announce key initiatives of the CEC;**
- **Report on the progress made in their own countries on implementing the Agreement;**
- **Showcase the most significant projects or initiatives supporting North American environmental cooperation;**
- **Highlight their respective domestic environment and sustainable development agendas which would benefit from trilateral action through the CEC; and**
- **Interact with citizens on a focused set of environmental themes.**

The executive director has an essential role in organizing the Council Session to help the ministers achieve these purposes.

Recommendation 8: Focusing the CEC Program for Efficiency and Effectiveness

The CEC has put in place an extensive program of activities in its first ten years, many of which have directly benefited the North American environment and its citizens. This program can be made more effective by focusing it, and by giving it clearer strategic direction. This will permit the Secretariat to produce higher quality results in fewer program areas.

We recommend that the Council of Ministers develop a five-year Strategic Agenda for North American Environmental Cooperation. The executive director should initiate this process in consultation with the Alternate Representatives, JPAC and the NACs.

We further recommend that this Strategic Agenda, along with the results of our Ten-year Review, serve as the basis for the executive director, working with the Alt Reps and with advice from JPAC, to prepare a three-year Operational Plan, for endorsement by the the Council in December 2004. This, in turn, should guide the development of annual work plans for the CEC institutions, and annual reporting to the Council and the public on progress made in implementation.

Recommendation 9: Ensuring and Leveraging Sustainable Funding for the CEC

The financial resources available to the CEC have been constant in US\$ but have declined in real terms through inflation and the recent appreciation of the Canadian dollar. We conclude that the erosion in the CEC budget is adversely affecting its ability to meet the NAAEC obligations and the quality of its work. We also conclude that, given its economic conditions, Mexico would benefit from a larger share of CEC program resources.

We recommend that the three Parties demonstrate their commitment to the CEC and its three-year Operational Plan by increasing its current core funding, at a minimum to its original level in real terms. In addition, the Parties may wish to adopt a funding formula that reduces the volatility of the CEC budget arising from currency fluctuations.

We recommend that the Council make provision for allocating an increased share of the annual budget to activities benefiting Mexico, for the purposes of specific, agreed programs and for capacity building activities.

We further recommend that the CEC broaden its funding base. This could involve voluntary contributions by the Parties to special projects or non-core programs of the CEC. It could also involve partnerships with other organizations, including multilateral development agencies and institutions and the business sector, in funding specific aspects of programs, co-financing activities and secondments.

Recommendation 10: Ensuring Effective Implementation of the Citizen Submission Process (Articles 14 and 15)

Articles 14 and 15 of NAAEC provide a mechanism that has successfully promoted greater transparency regarding the Parties' environmental enforcement practices. It has also led to some improvements in environmental policy and practices. In order for the citizen submission process to be a credible and effective mechanism, there needs to be greater clarity and comfort among the CEC institutions and the public about how these obligations of the Agreement are implemented; and a willingness by the Parties to address legitimate issues raised through citizen submissions. So as not to be unduly burdensome for submitters, the Secretariat, or the responding government, the process needs to be managed efficiently.

We urge the three CEC Parties, as well as the CEC Secretariat, to be sensitive to perceived conflict of interest, and to protect the integrity of the process in exercising their respective roles under the NAAEC provisions for citizen submissions on enforcement matters.

We recommend that:

- A clear agreement be reached between the Council of Ministers and the executive director on ground rules for action on these obligations;
- The Council of Ministers respect the role and authority of the executive director, in line with a strict interpretation of the Agreement; and
- The executive director initiate and maintain an open dialogue with the Alt Reps on actions related to submissions and factual records.

We also recommend that:

- The Council, working with the executive director and JPAC, develop a mediation step in the citizen submission process to facilitate the resolution of enforcement matters. Such a step would help manage the demanding resource requirements on submitters, the Secretariat and the Parties in implementing the submission process.
- The Parties consider reporting on a voluntary basis on follow-up activities to factual records in their respective jurisdictions. Such follow-up would increase the effectiveness of the process.

Recommendation 11: Reaching Agreement on Dispute Resolution under Part Five

NAAEC represents a comprehensive framework for trilateral collaboration on environmental issues that overall has served the Parties and their citizens well. However, we conclude that the dispute settlement and sanction provisions in Part Five for ineffective enforcement are in tension with the Agreement's overall spirit of cooperation and may even be counterproductive. The threat of their being invoked, no matter how unlikely given the tacit understanding that doing so could undermine the Agreement, negatively affects the implementation of Articles 14 and 15 on submissions and factual records on enforcement matters.

We recommend that the Parties publicly commit to refrain from invoking Part Five for a period of 10 years.

Building Knowledge and Outreach

Recommendation 12: Building and Communicating Knowledge

The CEC plays an important role as a generator and repository of environmental information, including on trends in environmental standards and compliance in North America, the state of the environment, and the linkages between the environment and trade. Knowledge generation has been a strength of the CEC and is a fundamental role highly valued by governmental, non-governmental and other interests alike. Secretariat Reports under Article 13 of the Agreement on environmental matters of North American importance are one of the useful vehicles for building and communicating knowledge.

In order to maintain and advance its leadership role in environmental knowledge, the CEC needs to ensure that the information it presents is solidly grounded in science and targets audiences who can make effective use of its analysis; it must maintain the highest quality of its information products. This need for credible products applies not only to formal Secretariat reports but also to all that the CEC institutions produce.

We recommend that the CEC strengthen its role in producing objective reporting on the North American environment, and actively work to become the acknowledged North American center for information on key environment and sustainable development issues.

We recommend that the CEC Secretariat ensure the quality and usefulness of its analysis and information products through:

- Better focusing its research and information dissemination efforts to be policy-relevant and client-oriented;
- Meaningful consultations with all interests relevant to a topic or product, for input; and
- Use of peer review in ensuring rigor in the quality of its products

We recommend that the CEC budget make adequate provision for the preparation of Article 13 Secretariat reports, and that the Secretariat pay particular attention to ensuring that well-informed, rigorous analyses and peer-review processes are used in their preparation.

Recommendation 13: Building the CEC Constituency

In order to fulfill its mandate, the CEC needs strong and broad support from key North American environmental interests. The CEC has built a substantial base of support among NGOs and community groups. While continuing to work with its existing base of support, the CEC can reinforce the effectiveness and legitimacy of its programs through more active engagement of the business community, academics and indigenous groups.

To strengthen links with key constituencies, and to increase its understanding of their needs, we recommend that the Council direct the executive director, with the assistance of JPAC, to ensure the CEC pursues a more systematic and balanced engagement of the business community, indigenous groups, academics, community-based interests and environmental and socioeconomic NGOs in the three countries, across all CEC programs and activities.

We also recommend that the executive director seek secondments of relevant experts from the business community and academic institutions.

Acting on the Recommendations

Recommendation 14: Implementing the recommendations of this report

We recommend that the Council, with the executive director's assistance and JPAC's advice, report publicly on the implementation of these recommendations, including those which have been fully or partially implemented and those which have not, with the reasons, to the 2006 annual meeting of the Council.



8 Appendices

Appendix 1: Terms of reference

1. Official Designation

Ten-year Review and Assessment Committee

2. Mandate

Pursuant to Council Resolution 03-02, the Ten-year Review and Assessment Committee (TRAC) will undertake a retrospective of the implementation of the NAAEC over the past ten years and will provide the Council with a report of its findings. The report will also include an examination of the environmental effects of NAFTA and will provide recommendations to the Council for charting a path for the CEC over the next decade. The report shall be prepared with the input of the Council, the Secretariat, JPAC and a wide selection of organizations and institutions to be determined by the TRAC. The final report shall be delivered to the Council on or before 1 April 2004.

3. Ten-year Review and Assessment Committee (TRAC) Tasks

- 3.1 Define the scope and goal of the report.
- 3.2 Adopt a work plan and timeline for completing the report.
- 3.3 Solicit comments and submissions from the public, the Council, the Secretariat and JPAC at key stages in the process, including on the draft report and its preliminary recommendations.
- 3.4 Prepare recommendations to the Council for inclusion in the final report.
- 3.5 Make the final report publicly available.

4. TRAC Support

- 4.1 The Secretariat will provide financial support for the operation of the TRAC, consistent with CEC travel policy, and taking into account budgetary constraints.
- 4.2 The TRAC shall be supported by a consultant(s), selected by the TRAC, who will assist the TRAC in undertaking its tasks, including preparation of the final report for review by the TRAC. Additional consultant services may be used, if required, to provide the TRAC with specialized independent research on matters that will support the preparation of the final report.
- 4.3 The Secretariat may suggest a work plan and a timeline for completing the report.
- 4.4 The Secretariat will provide background material, as may be requested by the TRAC.
- 4.5 The Secretariat will provide interpretation and translation services, as required by the TRAC.

5. Membership

- 5.1 The TRAC will have six members, consisting of two members chosen by each of the three Parties to the NAAEC. The members shall be selected based on their knowledge of trade and the environment or related fields, their familiarity with the NAAEC and the CEC, and their experience in business, academia, or non-governmental organizations. The members will serve as volunteers and shall act independently of the Parties.
- 5.2 Three members (one from each country) shall constitute a quorum for a TRAC meeting.
- 5.3 The TRAC will select a member to chair the TRAC meetings

Appendix 2: Members of the Ten-year Review and Assessment Committee (TRAC)

Pierre Marc Johnson (Chair). Lawyer, physician, former Premier of Québec and former Professor of Law at McGill University, now Counsel with the Montreal law firm HEENAN BLAIKIE, Dr. Johnson has a wide experience of international negotiations with the United Nations on environment and development issues. He has recently chaired the Evaluation Committee of the Global Mechanism of the Convention to Combat Desertification. He lectures in North America, Latin America and Europe on the workings and effects of globalization. Author of *The Environment and NAFTA—Understanding and Implementing the New Continental Law* (Island Press, Washington 1996), he has published among many essays, “Beyond Trade: the Case for a Broadened International Governance Agenda” (Institute for Research on Public Policy, Montreal 2000) and “Citizens, States and International Regimes: Challenges in a Globalized World” (IRPP, Montreal, 2003). He is a former founding member and vice-chairman of the National Round Table on the Environment and the Economy, an advisory body to the Prime Minister of Canada, and chaired its Foreign Policy Committee from 1990 to 1997.

Daniel Basurto is an environmental lawyer and founding partner of the firm Lexcorp Abogados, through which he advises domestic and foreign companies on compliance with Mexican environmental legislation. He is currently chairman of the environment commission of the National Federation of Industrial Chambers (CONCAMIN) and a member of the environmental committees of various Mexican industrial associations. He also serves on the National Advisory Committee for Sustainable Development and on the National Advisory Committee for Environmental Standardization. He is a former member of the Joint Public Advisory Committee of the CEC. Mr. Basurto has written extensively about environmental law in several journals and specialized publications, both foreign and domestic.

Jennifer A. Haverkamp is a former Assistant US Trade Representative for Environment and Natural Resources at the Office of the United States Trade Representative (USTR), where she oversaw negotiations of environmental components of trade agreements and participated in the negotiation of the NAAEC. Before USTR she worked on enforcement issues for the US Environmental Protection Agency, served as an environmental attorney for the US Justice Department, and conducted environmental policy research at the Conservation Foundation (since merged with the World Wildlife Fund). She now works as an independent consultant on trade and international environmental policy, based in Washington, DC. She is also an adjunct professor at Johns Hopkins University and serves on the US Trade Representative’s Trade and Environment Policy Advisory Committee (TEPAC).

John F. Mizroch is the president and CEO of World Environment Center, a not-for-profit organization that encourages corporate environmental leadership. He came to the WEC with extensive experience in trade, environment and sustainable development issues. He has served as a Foreign Service Officer in South Africa, a senior official at the Department of Commerce in the Reagan and Bush Administrations, and as a senior advisor to the Joint Economic Committee of the US Congress. He is also an attorney who has been in private practice. Directly before coming to the WEC, Mr. Mizroch was executive director of a not-for-profit organization in Washington, DC, which promoted environmental technology transfer and investment in the developing world. In that position, he managed or oversaw programs in Latin America, Asia and Eastern Europe. He also serves on the US Trade Representative’s Trade and Environment Policy Advisory Committee (TEPAC).

Robert J.D. Page is vice president for sustainable development at TransAlta Corporation, a private power generation company based in Calgary, Alberta. He is also Chair of the Board of the BIO-CAP Canada Foundation, member of the Board, International Institute for Sustainable Develop-

ment, member of the Business Environment Leadership Council and the PEW Centre on Global Climate Change (Washington, DC). He is former Board Chair, International Emissions Trading Association (Geneva); and former Dean of the Faculty of Environmental Design at the University of Calgary, where he remains an adjunct professor of environmental science.

Blanca Torres is a professor and researcher at the College of Mexico (*El Colegio de México*). She is a member of the National System of Researchers (*Sistema Nacional de Investigadores*) and of the Mexican Academy of Sciences (*Academia Mexicana de Ciencias*). She is a specialist in Mexican foreign policy and Mexico-US relations, with a current focus on environmental issues.

Appendix 3: Methodology

The Ten-year Review and Assessment Committee (TRAC) was a six-member, independent committee appointed in October 2003 by the Council of the CEC to review the operations and effectiveness of NAFTA's environmental side accord, the North American Agreement on Environmental Cooperation (NAAEC). The Council chose the six members of the TRAC based on their knowledge of trade and the environment or related fields, their familiarity with the NAAEC and the CEC, and their experience in business, academia, or nongovernmental organizations (see Appendix 2 for the list of members). Over the course of its mandate, the TRAC met 13 times, 5 times in person, and 8 times by conference call.

TRAC Schedule	Date
TRAC mandate announced	Council Resolution, 28 March 2003
TRAC members appointed	October 2003
First TRAC face-to-face meeting, Montréal	15 October 2003
General call for public comments	16 October 2003
First TRAC conference call	31 October 2003
TRAC-JPAC meeting	5 December 2003
Second TRAC conference call	8 December 2003
Third TRAC conference call	18 December 2003
Targeted call for public comments	12 January 2004
Second TRAC face-to-face meeting, Mexico City	19-20 January 2004
Fourth TRAC conference call	18 February 2004
Third TRAC face-to-face meeting, Washington	4 March 2004
Fourth TRAC face-to-face meeting, Montréal	5-6 April 2004
Fifth TRAC conference call	16 April 2004
Sixth TRAC conference call	22 April 2004
Fifth TRAC face-to-face meeting, Montréal	18 May 2004
Seventh TRAC conference call	2 June 2004
Eighth TRAC conference call	8 June 2004
TRAC presents report at Regular Session of Council	22 June 2004

TRAC conducted its review and assessment through a combination of:

1. *A literature review:* including CEC reports, government documents and published papers; see Appendix 7 for a list of the references used in this report;
2. *Interviews:* over 100 individuals were interviewed as part of the review, some more than once. Most of these interviews were conducted by TRAC members or Stratos staff, while some were conducted by the subcontractors TRAC hired. The interviews TRAC and Stratos conducted were selected on the basis of the following criteria:
 - A balance among the three countries across stakeholder categories;
 - A representative sample of current and former Council members, government officials (including non-environment officials), NGOs, industry representatives, advisory committees (JPAC, NACs, US GAC), and independent experts;
 - Availability; and
 - Budget.

In addition, TRAC interviewed all CEC senior staff. Subcontractors interviewed CEC staff, government officials and others who could contribute to the projects these subcontractors were undertaking. The list of all interviewees appears as Appendix 4.

3. *Public input:* Shortly after TRAC was named, the CEC Secretariat issued a call for public comments using its electronic distribution list. In addition, TRAC sent 115 targeted letters to a representative mix of nongovernmental stakeholders (including business) in the three countries inviting them to submit written comments. The list of public input received appears in Appendix 5.
4. *Contracted research:* TRAC commissioned nine contributions on various topics relevant to its mandate. The list of these contributions and their authors appears in Appendix 6.
5. *Peer reviews:* TRAC asked five independent experts to review and comment on a draft of the report. These experts were Jorge Bustamante (*El Colegio de la Frontera Norte/University of Notre Dame*), Alejandro Lorea (*Consejo Coordinador Empresarial (CCE)*), John Kirton (*University of Toronto*), John Knox (*Pennsylvania State University*) and David Runnalls (*International Institute for Sustainable Development*).

Appendix 4: List of interviewees

Name	Position	Institution
Acheson, Kathy		Alberta Environment
Adkins, Jocelyn		US EPA
Alanís-Ortega, Gustavo	<i>President</i>	Centro Mexicano de Derecho Ambiental
Audley, John	<i>Senior Transatlantic Fellow</i>	German Marshall Fund (formerly with EPA and US NGOs)
Ayers, Judith	<i>Assistant Administrator for International Affairs</i>	US EPA, AltRep (US)
Ballhorn, Richard	<i>Director</i>	DFAIT
Barba, Regina	<i>Director General, Public Participation</i>	Secretaría de Medio Ambiente y Recursos Naturales
Bastida-Muñoz, Mindahi Crescencio	<i>President</i>	Consejo Mexicano para el Desarrollo Sustentable
Bejarano, Fernando		Red de Acción sobre Plaguicidas y Alternativas en México (RAPAM)
Bellefleur, Julie-Anne	<i>Council Secretary</i>	CEC
Benedetto, Miguel	<i>General Director</i>	National Chemical Industry Association (ANIQ)
Berger, Martha (Dr.)	<i>Office of Children's Health Protection</i>	US EPA
Berle, Peter		(formerly) JPAC (US)
Bowcott, Andy	<i>Manager</i>	Environment Canada, International Relations Directorate, former GSC member
Bramble, Barbara		National Wildlife Federation; member, Four-year Independent Review Committee
Browner, Carol	<i>Former EPA Administrator and Council member (US)</i>	
Caldwell, Jake		Globalization and the Environment Program, National Wildlife Federation, Washington, DC
Carabias, Julia	<i>Former Secretary and Council member (Mexico)</i>	Secretaría de Medio Ambiente, Recursos Naturales y Pesca
Carillo, Oscar	<i>Designated Federal Officer, National and Governmental Advisory Committees</i>	US EPA
Carpentier, Chantal Line	<i>Program Head, Environment, Economy and Trade</i>	CEC
Castillo Ceja, Mateo	<i>Former Chair</i>	Mexico NAC
Cerutti, Rita	<i>Acting Manager, GSC representative</i>	Environment Canada, International Relations Directorate
Charbonneau, Julie	<i>Policy Analyst, Policy Development and Integration</i>	Environment Canada
Christmas, Dan	<i>Senior Advisor</i>	Membertou Band Council
Clarey, Patricia	<i>Chief of Staff</i>	Office of Governor Schwarzenegger; JPAC

Name	Position	Institution
Clarke, Amelia	<i>President</i>	Sierra Club of Canada, Montreal
Clifford, Jerry	<i>Deputy Assistant Administrator, Office of International Affairs</i>	US EPA
Cloghesy, Michael	<i>President</i>	Centre patronal de l'environnement du Québec, former JPAC (Canada)
Cooper, Katherine	<i>Researcher</i>	Canadian Environmental Law Association
Correa Sandoval, Nelly	<i>Professor</i>	Centro de Calidad Ambiental
Cortinas, Cristina	<i>Former Director of Hazardous Materials, Wastes and Risk Activities</i>	Formerly National Institute of Ecology (INE), now private sector
Cough, Paul	<i>Director, Office of International Environmental Policy</i>	US EPA
de Buen, Odón	<i>Former Director</i>	National Commission for Energy Savings (CONAE)
Delgado, Martha	<i>President</i>	Presencia Ciudadana Mexicana
Desai, Dinkerrai	<i>Environmental Coordinator</i>	US Army Material Command; JPAC
Duran, Arturo	<i>Commissioner</i>	International Boundary and Water Commission, United States Section
Elgie, Stewart	<i>Member, NAC (Canada)</i>	
Enkerlin, Ernesto	<i>President</i>	Comisión Nacional de Áreas Naturales Protegidas
Fernández, Adrián	<i>Director General, Urban and Regional Pollution Research</i>	National Institute of Ecology (INE)
Ferretti, Janine	<i>Former Executive Director, CEC</i>	
Ferron-Tripp, Spencer	<i>Media and Outreach Officer</i>	CEC
Figueroa, Biol. Alma Leticia	<i>Director General, Ecology and Civil Protection</i>	Municipality of Ciudad Juárez, Chihuahua
Findlay, Rick	<i>Director, Water Program</i>	Pollution Probe
Fisher, Jeff		US State Department, Office of Ecology and Terrestrial Conservation
Gardner, Jane	<i>Manager and Counsel, Remediation Programs</i>	General Electric Company; JPAC
Garver, Geoffrey	<i>Director, Submission on Enforcement Matters (SEM) Unit</i>	CEC
Gérin, Jacques	<i>Former Chair, JPAC</i>	
González, Victor	<i>Director</i>	Fund for Pollution Prevention Projects (FIPREV)
Greene, Adam	<i>Director, Environmental Affairs and Corporate Responsibility Member</i>	US Council for International Business US NAC
Guerrero, Hernando	<i>Director, Mexico Office</i>	CEC
Hajost, Scott	<i>Executive Director</i>	IUCN USA Multilateral Office, Washington DC
Hanson, Arthur J.	<i>Distinguished Fellow</i>	International Institute for Sustainable Development

Name	Position	Institution
Hecht, Alan	<i>Director, Sustainable Development</i>	US EPA; former NAAEC negotiator
Herrmann, Hans	<i>Program Head, Biodiversity</i>	CEC
Hoth, Jürgen	<i>Program Manager, Conservation of Biodiversity Program</i>	CEC
Jarvis, Bill	<i>Director, Policy Research</i>	Environment Canada
Kennedy, William	<i>Executive Director</i>	CEC
Knox, John	<i>Professor of Law</i>	Pennsylvania State University (also US NAC Chair)
Lapierre, Louise		Quebec Environment
Lazar, Avrim	<i>Executive Director</i>	Forest Products Association of Canada, former Alt Rep (Canada)
Lavallée, François	<i>Chief</i>	National Pollutant Release Inventory, Environment Canada
Lichtinger, Victor	<i>Former Secretary, Semarnat, former Executive Director of CEC</i>	Secretaría de Medio Ambiente y Recursos Naturales
Lloyd, Evan	<i>Director of Communications</i>	CEC
Magraw, Dan	<i>President</i>	Center for International Environmental Law, former EPA legal advisor on NAAEC negotiations
Mahfood, Steve	<i>Director</i>	Missouri Department of Environmental Quality; Chair, US GAC
Mann, Howard	<i>Consultant</i>	Four-year Independent Review Committee
Marzouk, Evonne		US EPA
May, Elizabeth	<i>Executive Director</i>	Sierra Club of Canada
McDonald, Patricia	<i>Consultant; JPAC member</i>	
Medina Aguilar, José Manuel	<i>GSC member (Mexico)</i>	Semarnat
Mitchell, Anne	<i>Executive Director</i>	Canadian Institute for Environmental Law and Policy, Toronto
Muffett, Carroll	<i>International Counsel</i>	Defenders of Wildlife, Washington, DC
Padrón, Francisco	<i>Director of IMAC Program</i>	Mexican Fund for the Conservation of Nature (FMCN)
Pepin, Manon	<i>JPAC liaison, NAFEC</i>	CEC
Pérez-Gil, Ramon	<i>Consultant</i>	IUCN National Committee Mexico, Mexico City
Perras, Jean	<i>Chair, NAC (Canada)</i>	
Phare, Merrell-Ann	<i>Executive Director/Legal Counsel</i>	Centre for Indigenous Environmental Resources, JPAC (Canada)
Plaut, Jonathan	<i>Former JPAC (US)</i>	

Name	Position	Institution
Porter, Stephen	<i>Senior Attorney, Trade and Climate Change</i>	Center for International Environmental Law, Washington / Geneva
Price, Michelle	<i>Office of Pollution Prevention and Toxics</i>	USEPA
Redhead, Bob		Chamber of Commerce
Redlin, David	<i>GSC member</i>	US EPA
Rose, Erwin		US State Department
Roy, Martin	<i>Coordinator, Environmental Cooperation Agreements</i>	Canadian Department of Foreign Affairs
Rubinoff, Pam	<i>Mexican Programs Coordinator</i>	Coastal Resources Center, University of Rhode Island
Runnalls, David	<i>President</i>	IISD
Saint-Laurent, Carole	<i>International Policy Advisor</i>	WWF/IUCN, Toronto
Samaniego, José Luis	<i>Former Alternative Representative (Mexico)</i>	
Sandoval Olvera, Carlos	<i>President</i>	Consejo Nacional de Industriales Ecologistas
Schorr, David	<i>Former Chair of US NAC (with WWF US)</i>	Currently private consultant
Shantora, Victor	<i>Program Head, Pollutants and Health</i>	CEC
Silvan, Laura	<i>Directora</i>	Proyecto Fronterizo de Educación Ambiental
Slater, Robert (Dr.)	<i>Former Assistant Deputy Minister, Environmental Conservation Service</i>	Environment Canada
Smith, Norine	<i>Assistant Deputy Minister</i>	Environment Canada, AltRep (Canada)
Stoub, Jeffrey	<i>Publications Manager</i>	CEC
Tajbakhsh, Melida		US Department of the Interior
Tingley, Donna	<i>Chair, JPAC</i>	
Tollefson, Chris	<i>Professor of Law</i>	University of Victoria
Tornel, Raúl	<i>Former Chairman</i>	Comisión de Ecología Concamin
Urteaga, José Antonio	<i>Programs Director</i>	Trust Fund for Electricity Savings (FIDE)
Vaughn, Scott	<i>Director, Sustainable Development</i>	Organization of American States, former employee of CEC responsible for trade and environment
Vetter, Darci	<i>Office of Environment and Natural Resources</i>	Office of the US Trade Representative
Wirth, David	<i>Member, US NAC; Professor,</i>	Boston College Law School
Whitehouse, Tim	<i>Program Head, Law and Policy</i>	CEC
Wright, Doug	<i>Director of Programs</i>	CEC

Appendix 5: List of public submissions received

Name	Affiliation	Nationality
Agardi, Tundy	Executive Director, Sound Seas	USA
Alanis-Ortega, Gustavo	Centro Mexicano de Derecho Ambiental (Cemda)	Mexico
Angulo, Rayo	Canadian Chemical Producers' Association	Mexico
Cortinas, Cristina	Instituto Nacional de Ecología (INE)	Canada
Esty, Daniel	Yale University	Mexico
Hill, Bonny	BC Hydro	USA
Jiménez, Blanca	Universidad Nacional Autónoma de México (UNAM)	Canada
Knox, John	Associate Professor of Law, Penn State University	Mexico
Muller, Frank G.	Concordia University	USA
Penn, Alan	Science Advisor, Cree Regional Authority	Canada
Wirth, David	Professor, Boston College Law School	USA
Wong, Yee	Institute for International Economics	USA

Appendix 6: List of contracted research

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- Christensen, Randy L. Counsel, Sierra Legal Defense Fund. “The Citizen Submission Process Under Articles 14 & 15 of the North American Agreement for Environmental Cooperation: A Canadian NGO Perspective.”
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Appendix 8: List of Article 13 Secretariat Reports

Article 13 Secretariat Reports

DRAFT – Maize and Biodiversity: The Effects of Transgenic Maize in Mexico **11 March 2004**

On 11 March 2004, the CEC Secretariat released for public comment a draft of *Maize and Biodiversity: The Effects of Transgenic Maize in Mexico*, an independent report written by many of the world's leading experts. The report was initiated in 2002 following a petition by several communities and NGOs to investigate the claim that genetically modified material had been found amongst traditional Mexican varieties of maize despite a moratorium on its planting. The CEC Secretariat appointed an international advisory group to steer the development of the report and advise the governments of Canada, Mexico and the United States.

The final book will analyze expected consequences of the presence of transformed maize in Mexico. Those consequences involve a number of issues, including: genetic diversity of maize and its wild relatives, natural ecosystems, agriculture, human and animal health, society and culture, and risks and opportunities.

Environmental Challenges and Opportunities of the Evolving North American Electricity Market **17 June 2002**

The report discusses long-range and cross-border environmental impacts, new generation capacity, and how electricity market integration can affect the North American environment. Opportunities for environmental cooperation are outlined, including transboundary airshed management, innovative economic instruments, energy efficiency and renewable energy, access to information, and information, planning and transboundary and cumulative impact assessment. Throughout the process of developing the information for the report, the Advisory Board members, governments and members of the public identified and discussed key policy considerations emerging from increased market integration, and provided specific proposals in the report.

Ribbon of Life

An Agenda for Preserving Transboundary Migratory Bird Habitat on the Upper San Pedro River **1 June 1999**

This report puts forth a number of actions aimed at balancing human activities with the preservation of important wildlife habitat along the upper San Pedro River. It provides a ground-level look at the many challenges and opportunities that local communities, states, provinces and national governments will face as they consider measures to protect migratory species.

Continental Pollutant Pathways

An Agenda for Cooperation to Address Long-Range Transport of Air Pollution in North America **1 January 1997**

This report highlights critical issues concerning the long-range transport of air pollutants in North America with the intent of fostering increased trilateral cooperation at all levels to deal with this pressing problem. Clear data and evidence exist to show that transboundary pollution affects human health, nature, and natural resources. There is ample evidence to conclude that the three nations and their societies can collaborate successfully in responding to continent-wide problems, broadening and deepening existing areas of bilateral cooperation. It is important to take account of this interdependency and begin to act on it together, with due consideration for shared responsibilities and concerns, as well as for differing conditions and possibilities in the three countries.

CEC Secretariat Report: Silva Reservoir

CEC Secretariat Report on the Death of Migratory Birds at the Silva Reservoir (1994-95)

1 October 1995

The CEC Secretariat created the International Silva Reservoir Scientific Panel composed of specialists in waterbird biology, wildlife disease, toxicology, ecology, hydrology and chemical engineering. The panel was instructed 1) to report to the Secretariat on the possible causes of mortality of water birds in the Silva Reservoir; and 2) to provide advice as to what can be done: a) to reduce the likelihood of another die-off in the reservoir and watershed; b) to propose a response mechanism if and when similar die-offs occur in the territories of Canada, the United States and Mexico; and c) to identify opportunities for international cooperation arising from the work of the panel.

Endnotes

¹ Through these questions, we have focused our review on the CEC institutions—the Council, the Secretariat, the Joint Public Advisory Committee as well as the National Advisory Committees. NAAEC also imposes obligations on each of the Parties. We did not have the resources necessary to assess the extent to which the Parties are meeting these obligations.

² Independent Review Committee (1998). *Four-year Review of the North American Agreement on Environmental Cooperation. Report of the Independent Review Committee*. Montreal. Available on the CEC web site <www.cec.org>.

³ NAFTA Free Trade Commission Joint Statement (2003). “Celebrating NAFTA at Ten.” Montreal.

⁴ The three countries (also known as “the Parties”) negotiated two other side agreements as well, one on labor and the other on import surges.

⁵ NAAEC does not specify that Council members should be environment ministers, only that they should be cabinet-level. Nor does it limit the number of Council members.

⁶ Another factor enhancing environmental awareness and government commitment to the environment in Mexico was its joining the OECD in 1994.

⁷ See John Knox, “The CEC and Transboundary Pollution,” in Markell and Knox, eds. (2003). *Greening NAFTA*. (Stanford University Press, Palo Alto, CA).

⁸ The 2002 annual report was published in late May 2004, after TRAC completed its review.

⁹ Janine Ferretti (2003). “Innovations in Managing Globalization: Lessons from the North American Experience,” *Georgetown International Environmental Law Review* 15:367.

¹⁰ This mandatory registry has not yet been implemented.

¹¹ See Mark Oven and Marina Bergua (2004). *Analysis of Capacity-building Results as Part of the 10-year Assessment of the Commission's Operations*. Report commissioned by the Ten-year Review and Assessment Committee.

¹² Source: CEC Secretariat. Figures for the full year were unavailable at the time of writing.

¹³ See Mark Winfield (2003). “North American Pollutant Release and Transfer Registries—A Case Study in Environmental Policy Convergence,” in David Markell and John Knox, eds. *Greening NAFTA*.

¹⁴ The Canadian Chemicals Producers' Association, for example, has criticized the CEC's *Toxic Chemicals and Children's Health in North America* report.

¹⁵ In contrast, the World Trade Organization has seen several environment-related disputes in the past decade; e.g., regarding reformulated gasoline, shrimps and asbestos.

¹⁶ While the Parties mooted the creation of a NAFTA Coordinating Secretariat at the time NAFTA was being approved, they have not established it.

¹⁷ Commission for Environmental Cooperation (1997). *NAFTA's Institutions: The Environmental Potential and Performance of the NAFTA Free Trade Commission and Related Bodies*. (CEC, Montreal), p. 64.

¹⁸ Article 10(6)(a) of NAAEC states that the Council shall act “as a point of inquiry and receipt for comments from non-governmental organizations and persons concerning those [NAFTA] goals and objectives.”

¹⁹ See, for example, CEC (1996). *Potential NAFTA Effects: Claims and Arguments 1991–1994*.

²⁰ Secretariat staff were frustrated by the failure of officials from one or more of the three trade ministries to critique or comment in writing on the work plan. Trade officials, on the other hand, were on their guard after discovering that the Secretariat had initially decided to use “NAFTA” as shorthand for trade flows and economic development more generally—a terminology that the officials feared could lead to NAFTA taking the blame for unrelated environmental effects.

²¹ See Mary Kelly and Cyrus Reed (2003). “The CEC's Trade and Environment Program,” in Markell and Knox, *Greening NAFTA*, p. 101.

²² The CEC Trade and Environment Series remains available online at <www.cec.org>.

- ²³ Scott Vaughn (2003). "The Greenest Trade Agreement Ever? Measuring the Environmental Impacts of Agricultural Liberalisation," in Audley, Papademetriou *et al.* (2003). "NAFTA's Promise and Reality." (Carnegie Endowment for International Peace, Washington, DC).
- ²⁴ The CEC Article 13 report, *The Environmental Implications of Evolving North American Energy Markets* underscored this point, cautioning of potential conflicts between jurisdictions with widely divergent emissions and air quality standards, as well as policies which diminish the effectiveness of domestic approaches in neighboring jurisdictions. Trans-boundary air emissions by a non-participating jurisdiction into an airshed governed by a pollutant cap and trade regime furnishes an example of both concerns.
- ²⁵ See Claudia Schatan, "The Environmental Impact of Mexican Manufacturing Exports under NAFTA," in Markell and Knox, *op. cit.* See also CEC (2002). *Free Trade and the Environment: The Picture Becomes Clearer*.
- ²⁶ Commission for Environmental Cooperation (2002). *Free Trade and the Environment: The Picture Becomes Clearer*. (CEC, Montreal <<http://www.cec.org>>); Rachel M. Poynter and Sheila A. Holbrook-White, "NAFTA Transportation Corridors: Approaches to Assessing Environmental Impacts and Alternatives," in CEC 2000. *The Environmental Effects of Free Trade: Papers presented at the North American Symposium on Assessing the Linkages between Trade and Environment*, at pp. 299-331.
- ²⁷ Mary Kelly and Cyrus Reed (2003). "The CEC Trade and Environment Program," in Markell and Knox, *op. cit.*, at pp. 107-108. This increase, attributable mostly to the steel and chemical sectors, occurred in spite of an absolute drop in waste generation in these sectors in the US since NAFTA.
- ²⁸ The Canadian Council members have been Sheila Copps, Sergio Marchi, Christine Stewart and David Anderson. The US Council members have been Carol Browner, Christine Whitman and Michael Leavitt. The Mexican Council members have been Julia Carabias, Victor Lichtinger (who had previously been the CEC's first executive director) and Alberto Cardenas.
- ²⁹ Independent Review Committee (1998). *Four-year Review of the North American Agreement on Environmental Cooperation. Report of the Independent Review Committee*. Montreal. Available on the CEC web site <www.cec.org>.
- ³⁰ See Marc Paquin and Karel Mayrand (2003). "The Evolution of the CEC Program and Budget." Discussion Paper submitted to the CEC by Unisfera International Centre.
- ³¹ CEC Council Communiqué, 29 June 2001, Guadalajara.
- ³² CEC Council Communiqué, 19 June 2002, Ottawa.
- ³³ Janine Ferretti (2003). "Innovations in Managing Globalization: Lessons from the North American Experience," *Georgetown International Environmental Law Review* 15:367.
- ³⁴ For more information on CEC working groups, see Unisfera International Centre (2004). *CEC Groups and Committees: Analysis and Recommendations*. Report to the CEC Secretariat.
- ³⁵ This is an issue also for JPAC: only about 7 percent of the persons who have attended JPAC meetings and workshops have been from the private sector. See Eric Dannenmaier, Alastair Lucas, José Juan Gonzalez M., and Carla Delfina Aceves (2004). *Assessing the NACEC Public Advisory Committees*. Tulane Institute for Environmental Law and Policy. Report commissioned by the TRAC.
- ³⁶ See Blanca Torres (1999). "The North American Agreement on Environmental Cooperation: Rowing Upstream," in Carolyn Deere and Daniel Esty, eds. *Greening the Americas* (The MIT Press, Cambridge, MA, USA).
- ³⁷ The Secretariat has explained that "factual records provide information regarding asserted failures to effectively enforce environmental law in North America that may assist submitters, the NAAEC Parties and other interested members of the public in taking any action they deem appropriate in regard to the matters addressed."
- ³⁸ JPAC, Advice to Council 03-05, 17 December 2003.
- ³⁹ Government Advisory Committee letter to EPA Administrator, 24 April 2002.
- ⁴⁰ Kal Raustiala (2003). "Citizen Submissions and Treaty Review in the NAAEC," in Markell and Knox, *op. cit.*, p. 260.
- ⁴¹ Marc Paquin and Karel Mayrand (2003). *The Articles 14 & 15 Citizen Submission Process: Discussion Paper*. Submitted to the Commission for Environmental Cooperation.

⁴² While Council members may have informally agreed not to invoke Part Five, it remains possible that a Party will want to use these provisions in the future until the Agreement is amended.

⁴³ Article 21(2) sets out a procedure allowing a Party to notify Council that “a request for information from the Secretariat is excessive or otherwise unduly burdensome” and for the Council, by a two-thirds vote, to impose limitations and require the Secretariat to revise the scope of the request. None of the Parties has invoked this provision to date.

⁴⁴ The *Academia Sonorense de Derechos Humanos* and others have complained about the slowness of the process.

⁴⁵ See Council Resolution 03-04. The Council reminded the Secretariat that, “any assistance it provides to submitters must be in accordance with the NAAEC and the Guidelines.” The Secretariat obtained a legal opinion in June 2003 from its special legal advisers, a team of nine lawyers representing each of the NAAEC countries, arguing that the Secretariat had not acted contrary to NAAEC or the guidelines.

⁴⁶ But see Article 10 (1)(d) of NAAEC, which authorizes the Council to “address questions and differences that may arise between the Parties regarding the interpretation or application of [the] Agreement.”

⁴⁷ But see a letter to JPAC dated 5 September 2003, from the Forest Products Association of Canada arguing for limiting the scope of factual records and against “suggestive language and commentary...[which] is misleading and detracts from a clear presentation of the facts.”

⁴⁸ Independent Review Committee (1998). *Four-year Review of the North American Agreement on Environmental Cooperation. Report of the Independent Review Committee*. Montreal. Available on the CEC web site <www.cec.org>.

⁴⁹ Special Legal Advisors (2004). Letter to the TRAC, 20 February 2004.

⁵⁰ See papers prepared for the TRAC by Chris Wold, Domingo Gutierrez and Randy Christensen, listed in Appendix 6.

⁵¹ See Marc Paquin and Karel Mayrand (2004). *The Effectiveness of the NAAEC Articles 14 and 15 Process*, and Wold (2004). *The Inadequacy of the Citizens' Submission Process of Articles 14 and 15 of the North American Commission on Environmental Cooperation*. Submission to the TRAC.