

# DISPUTE AVOIDANCE: WEIGHING THE VALUES OF TRADE AND THE ENVIRONMENT UNDER THE NAFTA AND THE NAAEC

ENVIRONMENT AND TRADE SERIES



COMMISSION DE  
COOPÉRATION ENVIRONNEMENTALE

COMISIÓN PARA LA  
COOPERACIÓN AMBIENTAL

COMMISSION FOR  
ENVIRONMENTAL COOPERATION



# ENVIRONMENT AND TRADE SERIES

---

The Commission for Environmental Cooperation's Environment and Trade Series is designed to deepen our understanding of environment and trade linkages in the context of North American trade liberalization.

- No. 1 NAFTA Effects — A Survey of Recent Attempts to Model the Environmental Effects of Trade: An Overview and Selected Sources
- No. 2 NAFTA Effects — Potential NAFTA Environmental Effects: Claims and Arguments, 1991-1994
- No. 3 Dispute Avoidance: Weighing the Values of Trade and the Environment under the NAFTA and the NAAEC



---

Retail Price: \$15.00 US  
Diskettes: \$10.00 US

For more information, contact:

**Commission of Environmental Cooperation Secretariat**

393 St.-Jacques, Suite 200  
Montreal, Quebec, Canada H2Y 1N9  
Tel: (514) 350-4308  
Fax: (514) 350-4314

**Internet address: [www.cec.org](http://www.cec.org)**

E-mail: [rvincent@ccemtl.org](mailto:rvincent@ccemtl.org)

This publication was prepared for the Secretariat of the Commission for Environmental Cooperation (CEC) as a background paper. The views contained herein do not necessarily reflect the views of the CEC, or the governments of Canada, Mexico or the United States of America.

ISBN 0-921894-31-7

© Commission for Environmental Cooperation, 1996

Published by Prospectus Inc.

Printed in Canada

To order additional copies of the report,  
please contact the publishers in Canada:

Prospectus Inc.  
Barrister House  
180 Elgin Street, Suite 900  
Ottawa, Ontario, Canada K2P 2K3  
Tel: (613) 231-2727 1-800-575-1146  
Fax: (613) 237-7666  
E-mail: [publications@prospectus.com](mailto:publications@prospectus.com)

or the distributor in Mexico

Infomex  
Nuevo León No. 230-203  
Col. Hipodromo Condesa  
06140 México D.F.  
Tel: (525) 264-0521  
Fax: (525) 264-1355  
E-mail: [74052.2717@compuserve.com](mailto:74052.2717@compuserve.com)

Disponible en français.

Disponible en español.

---

# COMMISSION FOR ENVIRONMENTAL COOPERATION

---

Three nations working together to protect the Environment.

A North American approach to environmental concerns.

The Commission for Environmental Cooperation (CEC) was established by Canada, Mexico and the United States in 1994 to address transboundary environmental concerns in North America. While the idea to create such a commission originated during the negotiations of the North American Free Trade Agreement (NAFTA), it derives its formal mandate from the North American Agreement for Environmental Cooperation (NAAEC).

The NAAEC builds upon and complements the environmental provisions established in the NAFTA. It creates a North American framework whereby goals related to trade and the environment can be pursued in an open and cooperative way.

In broad terms, the NAAEC sets out to protect, conserve and improve the environment for present and future generations. How? The parties to the Agreement set out the following objectives:

- to protect the environment through increased cooperation;
- to promote sustainable development based on mutually supportive environmental and economic policies;
- to support the environmental goals of NAFTA and avoid creating trade distortions or new trade barriers;
- to strengthen cooperation on the development of environmental laws and enhance their enforcement; and to promote transparency and public participation.

In signing the NAAEC, the governments of Canada, Mexico and the United States committed themselves to a core set of actions, including:

- reporting on the state of the environment;
  - striving for improvement of environmental laws and regulations;
  - effective enforcement of environmental law; and
  - publication and promotion of information.
-

# MISSION STATEMENT

---

The CEC facilitates cooperation and public participation to foster conservation, protection and enhancement of the North American environment for the benefit of present and future generations, in the context of increasing economic, trade and social links between Canada, Mexico and the United States.





## ACRONYMS

---

CEC	Commission for Environmental Cooperation
ECJ	European Court of Justice
FTA	Canada-U.S. Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
ICSID	International Convention for the Settlement of Investment Disputes
IJC	International Joint Commission
NAAEC	North American Agreement on Environmental Cooperation
NAFTA	North American Free Trade Agreement
OECD	Organization for Economic Cooperation and Development
SEDUE	Secretariat of Urban Development and Ecology
UHT	Ultra High Temperature treated
UNCITRAL	United Nations Commission on International Trade Law
(U.S.) EPA	(United States) Environmental Protection Agency
WTO/GATT	World Trade Organization/General Agreement on Tariffs and Trade
DFAIT	Department of Foreign Affairs and International Trade
RFG	Reformulated Gasoline
CSA	Canadian Standards Association
UNEP	United Nations Environmental Program

---



# TABLE OF CONTENTS

---

**DISPUTE AVOIDANCE:  
WEIGHING THE VALUES OF TRADE AND THE ENVIRONMENT UNDER  
THE NAFTA AND THE NAAEC**

Acronyms . . . . .	.....
Preface and Acknowledgments . . . . .	.....
Introduction . . . . .	.....
<b>I. THE RELATIONSHIP BETWEEN ENVIRONMENT AND TRADE: FACTUAL BACKGROUND . . . . .</b>	.....
<b>Past Issues.....</b>	.....
Environmental Cooperation.....	.....
<b>Potential Issues: The Environmental Impact of Increased Economic Activity.....</b>	.....
Border Areas . . . . .	.....
The U.S. NAFTA Report on Environmental Issues.....	.....
Areas of Recent Economic Development.....	.....
<b>Recent Issues.....</b>	.....
Recent Trade Disputes.....	.....
Formal Disputes Under Chapter 18 of the Canada-U.S. Free Trade Agreement . . . . .	.....
<b>II. EXPERT ENVIRONMENTAL ADVICE IN TRADE DISPUTES . . . . .</b>	.....
<b>The Canada-U.S. Free Trade Agreement, Chapter 18.....</b>	.....
GATT/WTO Dispute-Settlement.....	.....
European Court of Justice (ECJ).....	.....
<b>The NAFTA and the NAAEC.....</b>	.....
Relevant Provisions of the NAAEC.....	.....
Relevant Provisions of the NAFTA.....	.....
Other NAFTA Dispute-Settlement Processes . . . . .	.....
NAFTA Committees and Working Groups.....	.....
<b>III. SUMMARY AND CONCLUSIONS . . . . .</b>	.....
<b>Bibliography . . . . .</b>	.....



## PREFACE AND ACKNOWLEDGMENTS

---

This document was prepared by the Commission for Environmental Cooperation (CEC) as part of a dialogue to encourage the avoidance and resolution of environmentally related trade disputes. It responds to the mandate given the Commission in the North American Agreement on Environmental Cooperation (NAAEC).

Specifically, Article 10:6(c) enjoins the Council to cooperate with the NAFTA Free Trade Commission to achieve the environmental goals and objectives of the NAFTA by: “contributing to the prevention or resolution of environment-related trade disputes by (iii) identifying experts able to provide information or technical advice to the NAFTA committees, working groups and other NAFTA bodies.” This present report attempts to identify those issue areas where environmentally related trade disputes have arisen in the past and might likely arise in the future. It outlines the general areas of expertise that could help the existing institutional mechanisms designed to avoid and resolve these disputes. It identifies old and new avenues for consultation and advice provided in both the NAFTA and the NAAEC. And it details the makeup of existing bodies, while suggesting further means of contributing to those processes.

The attempt to define these relationships and processes is critical for effective implementation of the NAFTA and the NAAEC in the area of dispute avoidance. It is crucial, too, for other trade agreements and regimes considering how to approach the environmental elements of trade disputes and consultations. The further elaboration of NAFTA rules through the ongoing work of various committees and working groups, the harmonization of rules, the mutual recognition of standards, the removal of various types of ongoing barriers to free trade between the three countries, as well as the settlement of formal disputes — all are part of the same general purpose and policy of the NAFTA.

The principal author of this report was Armand L.C. de Mestral, a professor at the Institute of Comparative Law at McGill University’s School of Law in Montreal, Canada. The views expressed in this document do not necessarily reflect the views of the governments of Canada, the United States, or Mexico.

Sarah Richardson  
Program Manager, NAFTA/Environment  
March 1996



# INTRODUCTION

---

The North American Agreement on Environmental Cooperation (NAAEC)<sup>1</sup> was established to promote cooperation among the three North American countries. It was also created to deal with one of the most important consequences of trade liberalization between and among these countries — its potential environmental impacts. Many trade policy analysts and trade lawyers are surprised by the existence of the NAAEC. In fact, even the relatively modest environmental dimensions of the North American Free Trade Agreement (NAFTA)<sup>2</sup> are regarded as novel and significant developments. However, the relationship between environmental and trade issues is a completely natural one. Even students of the European Economic Union, where environmental rules are seen as essential to the establishment of a common market governed by common standards, are familiar with the concept. The association of environmental and trade questions is simply the logical consequence of an economic union's evolving dynamics. The further the North American partners move toward economic integration, the more they will have to deal collectively with a host of matters that are the logical consequences of the development of economic integration (e.g., transportation, and agriculture, common economic policies, environmental and labour policies, communications, education, and scientific research). In other words, once a decision is taken to

move beyond an arm's-length trading relationship — typified by the General Agreement on Tariffs and Trade (GATT)<sup>3</sup> in the early seventies — it becomes necessary to deal with such new “non-trade” issues.

The entry into force of the NAFTA and the NAAEC has heightened awareness of the link between trade and environment. This study examines the potential for environmental trade disputes under the NAFTA. It also highlights the mechanisms through which such disputes may be addressed.

The texts of both the NAAEC and the NAFTA and, by way of comparison, the GATT/WTO (World Trade Organization) (1994) and the Treaty of Rome (1957-1993) were reviewed for this study. Also examined were various Panel Reports under the Canada-U.S. Free Trade Agreement (FTA) and the General Agreement on Tariffs and Trade (GATT), as well as certain decisions of the European Court of Justice. A review of the relevant legal literature was undertaken as well. A further, more cursory examination of relevant writings in both business and environmental journals clarified areas in which disputes are likely to arise. For the same reason, attention was given to recent domestic court decisions on transboundary pollution questions. Also, memberships of both the FTA Chapter 18 and Chapter 19 Rosters and the NAFTA Chapter 19 Roster

---

<sup>1</sup> North American Agreement on Environmental Cooperation, 8 September 1993, Canada/Mexico/United States, 32 I.L.M. 1480.

<sup>2</sup> North American Free Trade Agreement, 8 December 1992, Canada/Mexico/United States, 32 I.L.M. 289.

<sup>3</sup> General Agreement on Tariffs and Trade (GATT), 30 October 1947, Can T.S. 1947 No. 27, 61 Stat. A11, 55 U.N.T.S. 187, T.I.A.S. No. 1700, 1st Supp. B.I.S.D. (1953) 6.

---

---

were reviewed, and inquiries made concerning the possible composition of the future NAFTA Chapter 20 Roster. Finally, consideration was given to the composition of various NAFTA Working Groups and Standing Committees.

Part I of this study, in an effort to provide background to the issue, examines past, potential, and recent trade disputes and their environmental dimensions. It reviews various ways in which Canada, the United States, and Mexico cooperated on transboundary environmental problems before the NAFTA. It highlights notable public and private cases involving environmental disputes among the three countries. As well, it discusses the potential for dispute caused by increased economic activity in border areas, and the ensuing environmental impacts — both legacies of the *maquiladora* program. This program was designed to attract U.S. industry to set

up in the border regions of Mexico on the basis of free trade privileges when products are re-exported, and rapid industrialization in Mexico. It then scrutinizes some of the principal trade questions negotiated between the Canadian and American governments since 1993 — with a view to determining those with environmental aspects and how they were, or could have been, resolved.

Part II addresses the status of expert opinion on environmental matters in trade disputes. It also sets forth the relevant provisions of the NAAEC and NAFTA that allow dispute-settlement panels to seek expert advice on environmental and similar matters. It explores, too, cases in which the relevance of the environmental dimension to the trade dispute is doubtful. By way of comparison, the European mechanisms in the GATT/WTO and the European Court of Justice are examined.

---



---

## I. THE RELATIONSHIP BETWEEN ENVIRONMENT AND TRADE: FACTUAL BACKGROUND

This first section seeks to review the factual background underlying the North American trade disputes prior to the NAFTA and NAAEC that involved barriers due to environmental considerations. Also examined are potential areas of future dispute and several examples of recent, environmentally sensitive cases referred to dispute-settlement panels under the FTA.

### Past Issues

The examination of North American environmental cooperation — or North American environmental disputes — immediately before the entry into force of the NAFTA and the NAAEC reveals that the extensive Canada-U.S.-Mexico economic integration led the three governments to cooperate on a range of environmental matters on a number of occasions. In other words, even though not legally bound to do so by any formal economic union, the mere fact of close economic integration was sufficient to ensure environmental cooperation as an important policy consideration for the three governments.

### *Environmental Cooperation*

Canada and the United States have signed a number of important environmental agreements. Indeed, one of the earliest international environmental agreements, the Boundary Waters Treaty,<sup>4</sup> signed between the United States and Great Britain on behalf of Canada in 1909, set up the International Joint Commission (IJC). Amplified in 1978 and subsequently amended in 1983 and 1987 by the Great Lakes Water Quality Agreement,<sup>5</sup> it commits both countries to an innovative program of basin management for the entire Great Lakes area.

Similarly, the United States and Mexico adopted a Boundary Waters Treaty in 1944. Then, in February 1992, the United States Environmental Protection Agency (U.S. EPA) and the *Secretaría de Desarrollo Urbano y Ecología (SEDUE)*, Secretariat of Urban Development and Ecology, adopted a “comprehensive” Border Plan — in effect, an interagency agreement.<sup>6</sup> Over the last two decades, air pollution has been the subject of considerable negotiation between the three countries.<sup>7</sup> It is also worth noting

---

<sup>4</sup> Boundary Waters Treaty, U.S.T.S. 548; 1910 Br.T.S. 23.

<sup>5</sup> Canada-United States Great Lakes Water Quality Agreement, (1978) Can.T.S. No.20; 30 U.S.T. 1383; TIAS 9257.

<sup>6</sup> The Integrated Environmental Plan for the United States-Mexico Border, U.S. EPA Doc. A92-171 (1992).

<sup>7</sup> Brenda S. Hustis, “The Environmental Implications of NAFTA” (1993) 28 Texas Int’l. L.J. 589.

---

---

that Canada, the United States, and occasionally Mexico, have worked closely in such international fora as the Third United Nations Conference on the Law of the Sea, and in negotiations surrounding ozone layer protection, seeking forms of multilateral environmental protection of mutual interest.

For a long time, the three governments shared common concerns and interests in environmental preservation. Although mutually agreeable solutions sometimes ensued, acrimonious disputes occasionally arose, such as Canadian complaints concerning the effects of acid rain from the United States, or U.S. complaints of air and water pollution from Mexico. In the early 1990s, when the three governments began to formalize their economic relationships in a free trade agreement of a particularly complex nature, it was perfectly natural that these governments consider the non-trade consequences of their trading relationship. The upshot was the conclusion of a further international agreement—the NAAEC.

#### ***Environmental Cases between Canada-USA and Mexico-USA***

Over the years, the preferred method of handling disputes has always been dispute-avoidance rather than litigation. But it is worth noting that there have been a number of notable public and private cases involving environmental questions. Most frequently, these cases have dealt with problems of air and water pollution.

Canada and the United States have traditionally resolved water pollution problems by negotiating, or by referring them to the International Joint Commission. One critical situation, however, which dealt with the opening of the Gut Dam in 1968 by Canadian authorities and its impact on water levels in the Great Lakes and the St. Lawrence River, had to be referred to arbitration.<sup>8</sup>

Another case requiring arbitration involved the copper smelter in Trail, British Columbia. The deleterious effects of airborne pollution from the smelter throughout the 1920s, and the refusal of the Canadian government to intervene, caused the American government to request arbitration, including an award for damages to cover apple growers' loss of income in the state of Washington. The Trail Smelter Arbitration<sup>9</sup> is perhaps the most significant, precedent-setting, arbitral award of the twentieth century regarding the question of international responsibility for pollution damage.

Although no single decision on environmental matters can compare with the Trail Smelter Arbitration, there have been a number of arbitrations between Mexico and the United States dealing with water management questions.

---

<sup>8</sup> Canada-U.S. Settlement of Gut Dam Claims, Sept. 22nd, 1968, *Compromis C.T.S.* 1966, No. 22.

<sup>9</sup> Trail Smelter Arbitration, *United States v. Canada*, (1931-1941), 3 R.I.A.A. 1905.

---

---

Perhaps the most significant of these is the Chamizal Arbitration of 1911, which involved a determination by the Canadian arbitrator Eugène Lafleur concerning displacement of the Rio Grande River and its impact on the international boundary.<sup>10</sup>

Procedural questions and the rules of private international law have often made private litigation arising out of environmental disputes a complex and frustrating matter. In recent years, however, the volume of litigation dealing with transboundary environmental questions has increased. The Canadian border was the site of a recent case in point. In 1995, the Quebec Superior Court issued a declaratory judgment rejecting an attack by the Sanivan Company on certain provisions of the Quebec Environmental Protection Act that have the effect of prohibiting the dumping of wastes coming from outside the province (whether from the rest of Canada or from the USA) in landfill sites in the province of Quebec.<sup>11</sup> This declaratory action was argued on grounds of both Canadian constitutional law and the NAFTA. It was alleged that the Quebec legislation violated NAFTA and, for that reason alone, it was argued that the law and regulations were null and void. In the end, the court rejected both the constitutional and the NAFTA-based arguments.

Earlier, during the 1980s, the Michigan state government's attempts to open a major incineration plant near Detroit were the object of litigation in the U.S. Federal Courts. Fears were that the incineration plant would have serious environmental impacts, both in the United States and across the border in Canada. This meant litigation in the United States, although Canadian environmental organizations and the government of Ontario intervened, arguing against the opening of the incineration plant.

In recent years, a variety of cases in the United States have dealt with air and water pollution resulting from increased economic activity in the area bordering Mexico. Often this economic activity stemmed from the *maquiladora* program. The dumping of sewage into the Rio Grande, the New, and the Tijuana Rivers, as well as cross-border shipment of wastes led to litigation or threats of litigation in the United States. The Dos Republicas Carbon II power plant has been a source of concern along the border as well.

---

<sup>10</sup> U.S.-Mexico International Boundary Commission, constituted by the Treaty of June 24th, 1910 (1911) 7 A.J.I.L. 788.

<sup>11</sup> *Entreprise de rebuts Sanivan c. P.G.Q. et al.*, C.S. no. 500-05-010020-947, 21 Fev. 1995.

---

---

**Potential Issues:  
The Environmental Impact of  
Increased Economic Activity**

***Border Areas***

The literature cited in the bibliography is replete with discussions of the environmental impact of increased economic activity in border areas. The writings generally focus on the serious degradation of the environment along the Mexico-U.S. border as a result of both the *maquiladora* program and rapid industrialization in Mexico.<sup>12</sup> For example, the normally cautious American Medical Association, in addition to describing the border area as a “virtual cesspool and breeding ground for infectious diseases,” has stated that “uncontrolled air and water pollution is rapidly deteriorating and seriously affecting the health and future economic viability on both sides of the border.”<sup>13</sup> The effects of rapid economic development along many points of the U.S.-Mexican border and its environmental impact on both sides of the boundary — increased air and water pollution, hazardous waste disposal, and threats to wildlife and endangered species — have heightened concerns. Another worry is the variety of public health problems resulting from pollution, particularly in

the lower Rio Grande Valley; along the Texas border; in the Matamoros-Reynosa region; and around the cities of Mexicali, Brownsville, and Juarez.

***The U.S. NAFTA Report  
on Environmental Issues***

The 1993 U.S. government’s environmental report on the NAFTA, NAAEC, and North American Agreement on Labour Standards focuses on similar concerns.<sup>14</sup> Section 5 of the report singles out three sectors — energy, agriculture, and transportation — where the NAFTA may well be affecting the environment, both positively and negatively. The report argues that the NAFTA provisions, by supplying more rational uses and markets for energy and agricultural goods as well as transportation services, should in fact improve the environment in the three countries, rather than the reverse. The latter, it argues, would be the case should the NAFTA not enter into force.

Section 6 of the report singles out specific areas of concern, particularly in the Mexico-U.S. border region. It suggests that the joint effects of the NAFTA, the NAAEC, and the Border Environmental Cooperation

---

<sup>12</sup> See in particular Brenda S. Hustis, “The Environmental Implications of the NAFTA,” supra note 7; “Note on Free Trade and the Environment” (1993) 8 American University J. Int’l Law & Pol. 839; Amanda Atkinson, “NAFTA, Public Health and Environmental Issues in Border States” (Summer 1994) Nat. Res. & Environment 23.

<sup>13</sup> Public Citizen, CAP “NEPA Environmental Impact Statements Are Crucial: Some Potential Health, Safety and Environmental Impacts of the Uruguay Round of GATT and the North American Free Trade Agreement” (August 1991), cited by Hustis, supra note 7 at 595.

<sup>14</sup> See, U.S. Government, NAFTA Report on Environmental Issues (November 1993).

---

---

Agreement should assist governments in focusing on environmental problems in the border region. It argues, too, that the agreements should improve the prospects for environmental protection and enhancement.

The report also notes that the border region — a fragile, semi-arid area where the ecosystems are already under great stress — is inhabited by a rapidly growing population of some 10 million people. Although the report notes that air quality in the border region is generally good, it contends that in major metropolitan areas such as San Diego and El Paso, ambient air-quality standards fall far below U.S. requirements. In many areas of southwestern United States, visibility is degraded as well. The report also notes that water quality and supply are becoming matters of much concern. The water supply in the border areas is increasingly restricted due to heavy demands for fresh water by agriculture, business, industry, and the local population. Sources of pollution include untreated, or inadequately treated, domestic sewage and industrial waste water; contamination from surface run-off; and contamination from mineral salts, fertilizers, and pesticides in irrigation return flows.

The report characterizes the solid and hazardous waste management as a serious problem. Under Annex III of the Border Environmental Cooperation Agreement, most hazardous waste generated by *maquiladora* facilities must be returned to the United States for disposal. The report and several commentators suggest that not only is this not happening to existing waste, but the volume of waste is constantly increasing. The report warns that public health and food safety are also

matters of concern, given the problems in providing sanitation, potable water services, and basic health care south of the American border. The incidence of certain diseases, particularly among children, and of health problems ranging from bacterial infections to toxic effects and hazardous waste is on the rise.

According to the report, wildlife and endangered species are being placed under increasing stress, both from changes in habitat and increases in legal and illegal commercial plant and wildlife traffic. The fisheries, resources that span the three countries' respective economic zones or that migrate through the various zones, will require increased three-way cooperation to ensure effective management of the fish stocks involved. As for forests, parks, and range lands, the report identifies deforestation in Mexico as a major environmental concern (Mexico ranks seventh in tropical forest areas). It also warns that significant forest resources in the United States and Canada are threatened as well.

The report does single out these areas as matters for concern. But it argues that in every case, the NAFTA and the NAAEC have adopted a framework for cooperation and rational management of resources, industry, and commerce to help ensure sustainable development and enlightened environmental management among all three countries. Thus while the general message of the Environmental Impact Assessment is positive, the report itself is useful. It clearly identifies many areas of particular concern — areas where cooperative management is required, and where the potential for environmental disputes is serious.

---

---

### ***Areas of Recent Economic Development***

Early economic development is usually a good indicator of potential problem areas. But the sites of the most rapid economic development since the launch of NAFTA are also likely areas of future environmental concern. Given that NAFTA only entered into force on January 1, 1994, the evidence for this is somewhat fragmentary. Nevertheless, the following percentages for the year 1994, showing increased Mexico-U.S. trade, are already available:<sup>15</sup>

#### 1994 Trade Increase

<u>Sector</u>	<u>Percentage</u>
Automobiles	481
Corn Grain	261
Metallurgical equipment	178
Cotton	112
Prefabricated buildings	274
Art and antiques	170
Energy equipment	165
Tobacco	131
Fruits	115
Fish	114

This list of products reflects both manufactured and agricultural goods.

Commentators have also suggested that the increased use of pesticides and chemical fertilizers in a modernized Mexican agriculture has already had, and will continue to have, serious environmental effects.<sup>16</sup>

### **Recent Issues**

#### ***Recent Trade Disputes***

Perhaps the best predictor of the areas in which environmental problems could provoke trade disputes can be derived from a review of the principal preoccupations of Canadian trade negotiators in their dealings with the United States over the last few years.<sup>17</sup>

Among the trade issues discussed regularly between the Canadian and American governments are problems flowing from the area of manufactured, semi-manufactured, and raw materials, as well as agricultural products. Additional issues relate to quality and process standards, packaging and labelling, as well as allegations of discrimination against certain types of products. Many of these issues have been, or could shortly become, the object of formal dispute-settlement processes. And many, before their

---

<sup>15</sup> L. Ioannou, "NAFTA's Promised Land" (1995) 1 Int'l Bus. 22 at 22.

<sup>16</sup> R. Beglay, "Chemical and Environmental Industries Reap NAFTA Rewards" (1993) 153 Chemical Week 23.

<sup>17</sup> These issues for the years 1993, 1994, and the first half of 1995 were reviewed on the basis of material made available by the Canadian Department of Foreign Affairs and International Trade. This material deals not only with formal disputes but, more significantly, with the broader trade irritants that have been the object of negotiation between the Canadian and American governments. Some of these matters have not been publicly discussed, while on the other hand, a number of them have been the object of considerable political and public comment.

---

---

resolution, are the object of protracted negotiations. Some are clearly environmental in character or raise legal issues similar to those posed by environmental trade disputes. Resource questions in one form or another (whether pertaining to forestry, agriculture, or fisheries) are constantly brought before the two governments. Food and drink — such as beer, dried peas, lentils, and grain — are the object of habitual debate between the two governments. Gas, gasoline, and potentially more environmentally-friendly gasoline substitutes have also been the object of discussions between the two governments; as have UHT (Ultra High Temperature-treated) milk, beef, pork, live swine, and other agricultural products.

In February 1993, the Canadian and American governments discussed the following FTA Chapter 18 trade issues:

- the Canadian Wheat Board,
- UHT milk,
- U.S. Standards Organizations,
- extension of the Textile Tariff Rate Quota for 1993,
- treatment of wine and beer in the United States, and
- regulation of oil and gas.

In February 1994, the trade ministers discussed the following FTA Chapter 18 matters:

- trade in alcoholic beverages,
- trade in grains, particularly durum wheat,
- trade in peanut butter,
- UHT milk,
- tobacco,
- sugar,

- export restrictions on Canadian potatoes,
- meat inspection,
- trade in game birds,
- trade in salmon and herring,
- the marking of frozen produce,
- trade in automotive weather stripping,
- U.S. regulations for reformulated gasoline (methanol),
- newsprint recycling,
- U.S. imports of oil and petroleum from Canada,
- Canadian federal government collection of New Brunswick sales tax on goods purchased in the United States,
- trade in uranium,
- American Barrick Mining Co.'s complaints of discriminatory treatment in the United States,
- U.S. government procurement proposals,
- U.S. Barry Amendment: BOD life jackets contract cancellation, and
- U.S. Tariff Act, section 337 investigation against the Comdev Co. of Cambridge, Ontario, for alleged patent infringement.

In February 1995, Canada-U.S. discussions dealt with the following NAFTA Chapter 20 issues:

- bilateral agricultural negotiations on dairy and poultry products,
  - bilateral agricultural negotiations on sugar,
  - Canadian regulation of country music broadcasting on television,
-

- 
- implications of a possible U.S. border-crossing fee,
  - work of the Canada-U.S. Joint Commission on Grains,
  - implementation of U.S. meat end-use certificates,
  - the Minnesota Wheat & Barley Check-Off Fee,
  - UHT milk,
  - U.S. reinspection of Canadian meat carcasses to be sold in the United States,
  - implications of the proposed U.S. Hazard Analysis and Critical Control Points Meat Inspection System for all Canadian imports of meat and poultry to be sold in the United States,
  - bilateral agricultural negotiations on peanut butter,
  - Underwriters Laboratories of Canada Ltd.'s application for test lab accreditation in New York State,
  - implication of the U.S. Pre-Cast/Pre-Stress Concrete Institutes' withdrawal of Canadian Standards Association (CSA) certification for pre-cast concrete
  - implications of the U.S.-Russia Anti-Dumping Suspension,
  - Agreement for trade in uranium products,
  - U.S. reformulated gasoline regulations (methanol),
  - implications of the EPA ruling that 30 percent of oxygenates in reformulated gasoline (RFG) used in the United States be derived from renewable sources, thus favouring U.S. ethanol producers over Canadian methanol producers,
  - U.S. standards for procurement of permanent paper,
  - U.S. Customs National Compliance Measurement Program examinations (zealous application of U.S. inspection procedures), and
  - discriminatory U.S. excise tax on recycled halon from Canada.
- The majority of the items listed above reveal a number of issues that have little or nothing to do with the environment. However, a number of issues have a strong environmental component. Some of these are the following: the negotiations concerning U.S. standards for the procurement of permanent paper; the U.S. standards for reformulated gasoline regulations, which favour ethanol over methanol; the ongoing discussions concerning implementation of the UHT Milk Panel Report, which turn on principles applicable to the establishment of equivalent standards; the restrictions on export of Canadian potatoes to the USA, where it has been alleged that the potatoes carry a virus that could affect U.S. potatoes; the U.S. Food and Drug Administration regulations requiring zero tolerance for salmonella in poultry, including imported Canadian game birds, thus raising the issue of the reasonability of standards; and the review of the Canada-U.S. Salmon and Herring Agreement, established pursuant to the Panel Report under Chapter 18 of the Canada-U.S. Free Trade Agreement. These issues either deal directly with environmental questions, or treat issues of standards and standard-making in which the legal principles would also apply to environmental issues.
-



---

Fisheries is the other area in which trade negotiators also regularly discuss environmental matters. Here, though, it is often very difficult to differentiate clearly between the strictly economic, regulatory issue, and environmental dimensions. Advice on environmental matters in relation to fisheries and, indeed, trade in other natural resources may well be important to the three governments from time to time in the future. It must be noted that no NAAEC disputes may relate to resource exploitation. No such limit, however, exists under the NAFTA.

On the basis of this brief review, it would seem clear that Canadian and American trade negotiators deal regularly with matters that raise environmental issues. The next section highlights three formal disputes considered under the FTA that had environmental components.

#### ***Formal Disputes Under Chapter 18 of the Canada-U.S. Free Trade Agreement***

Of the five disputes formally sent to panels under Chapter 18 of the Canada-U.S. Free Trade Agreement, no less than three dealt with fisheries or standards questions. The disputes are as follows:

*Canada's Landing Requirement for Pacific Coast Salmon and Herring*, CDA-89-1807-01, October 16th, 1989 (regulations under the Canadian Fisheries Act prohibiting the export of unprocessed herring or salmon);

*Lobsters from Canada*, USA-89-1807-01, May 21st, 1990 (interpretation of U.S. minimum size requirements for lobsters pursuant to the Magnuson Fishery Conservation & Management Act);

*Treatment of Non-Mortgage Interest Under Article 304*, USA-92-1907-01, June 8th, 1992 (determination whether "direct cost processing" in FTA Article 304 included interest payments on debts of any form to finance acquisition of fixed assets);

*Interpretation of and Canada's Compliance with Article 701.3 With Respect To Durum Wheat Sales*, CDA-92-1807-01, February 8th, 1993 (interpretation of FTA Article 701.3 prohibiting sales of agricultural products below cost, with reference to payments by the Canadian Wheat Board); and

*Puerto Rico Regulations on the Import, Distribution & Sale of UHT Milk from Québec*, USA-93-1807-01, June 3rd, 1993 (prohibition of importation of milk pursuant to Puerto Rican Department of Health and Agriculture regulations).

The *Non-Mortgage Interest* Panel Report and the *Durum Wheat Sales* Panel Report turned on questions having little to do with the environment. The first report dealt with the highly technical question of rules of origin. The second dealt with the issue of subsidies permitted under the FTA. While environmentalists and proponents of sustainable development might well have views on the issues raised in both affairs, it is hard to see how these views could have affected disposition of these matters before either panel.

---

---

The following analysis of the *Salmon and Herring*, the *Lobsters from Canada*, and the *UHT Milk from Québec* Panel Reports, attempt to determine the extent to which environmental considerations played a role in the disputes. They also explore whether the legal and factual issues raised in these reports would have been better understood had the panelists had advice from environmental experts.

a) *Salmon and Herring*

The central legal issue in the *Salmon and Herring Report* came from Canada's contention that its regulation requiring that all fresh salmon and herring caught in its waters be landed in Canada constituted a conservation measure. Canada argued that in order to conserve its stocks effectively, all fish caught in waters under its jurisdiction (whether by Canadians or Americans) must be brought into Canadian ports for processing. An exact count of the fish caught during the course of each fishing season is thereby ensured. The United States argued that this constituted a disguised restriction on trade, as well as an export quota. The Panel agreed to some extent with both parties. While it accepted Canada's concern for conservation, it also accepted the U.S. contention that not all fish caught in Canadian waters need be landed in Canada. The Panel suggested, therefore, that at least 10 percent of the fish caught in Canadian waters be exported directly to the United States. After negotiations between the

two governments, a 25 percent figure was declared reasonable and was enshrined in a Canada-U.S. agreement. This agreement comes under review in June 1995.

The panelists in the *Salmon and Herring* case were trade bureaucrats and academics, experts in the law of the GATT. None had strong credentials as fisheries biologists, or even as fisheries managers. Yet the central issue turned on an argument of conservation and the effectiveness of certain types of measures to guarantee conservation and, in a broader sense, on the theme of sustainable development. It is reasonable to suggest that the input of experts on the matters raised before the panel might have assisted it, particularly with respect to the argument that an exception to the general principle of free trade might be justified on conservation grounds. Both the Canadian and American governments argued as to conservation and the effectiveness of these measures, indeed of their very *bona fides*, in their pleadings before the Panel, as well as in the legal briefs and extensive supporting documents.<sup>18</sup>

All three issues — fisheries, conservation, and sustainable development — were put to the Panel. However, perhaps what was missing was the opinion of an independent group of experts — experts whose neutrality and expertise would have been above dispute. Perhaps this type of expert opinion, pursuable under the FTA and now clearly suggested under the NAAEC, could have assisted the Panel in reach-

---

<sup>18</sup> It should be noted that these are confidential proceedings, and neither the written nor the oral phases are open to the public. The application of U.S. freedom of information laws to these proceedings is still before the courts of the USA. The author writes on the basis of general conversations with the participants and an appraisal of the report.

---

---

ing its decision. The 10 percent figure, for instance, appears to be a somewhat arbitrary number. And its arbitrariness is further enhanced by the fact that both governments agreed, under pressure from the United States, to increase it to 25 percent. On what basis was this decision made? A report of independent experts might well have added weight to the decision. Indeed, impartial and unimpeachable expert opinion might well have been of considerable help to the parties in reaching their final decision as to implementation. At the very least, persuasive and impartial expert opinion might have convinced the losing state to accept a panel's opinion and implement it as recommended.

b) *Lobsters from Canada*

The Lobsters from Canada case arose out of Canadian complaints that the size requirements established by the United States for lobsters imported for sale into the United States constituted a disguised quota and, hence, an unfair restriction on international trade. The American defence was that such a restriction constituted a nondiscriminatory conservation measure. That is, the United States argued that if it restricted the entry of Canadian lobsters, it did so in a nondiscriminatory fashion affecting both American and imported lobsters alike. Furthermore, the American side argued that the purpose of the measure was conservation. The Panel, split three to two on national lines (the only such occurrence in the five Chapter 18 disputes), accepted the American arguments. Thus the U.S. law remained unchanged and implementation of the report never materialized.

The pros and cons of the conservation issue were certainly argued by both sides. The panelists and subsequent critics of the report might well have adopted another position, had impartial environmental experts in fisheries questions been among the many scientific advisors and fisheries managers advising the governments.

c) *UHT Milk from Québec*

This Quebec milk case should particularly interest individuals and organizations pondering international environmental issues. The point in contention went beyond strictly environmental matters, into the legal principles applicable to standards. But the question of legal equivalency of standards is relevant to the setting and justification of environmental standards.

The case developed as follows. A Canadian complaint was made that UHT milk from Québec, traditionally sold in Puerto Rico, had been unjustifiably excluded from the Puerto Rican market because of the adoption of new milk production standards. The American response was that the measures were fully justified, based as they were on the adoption of a new and more comprehensive ordinance governing the production of milk — one already in force throughout the continental United States. In effect, Puerto Rico was simply bringing its standards into line with the United States, as it was fully empowered to do.

The Panel unanimously concluded that the authority over standard setting with respect to the safety of milk production lay fully within the jurisdiction

---

---

of the Commonwealth of Puerto Rico. They agreed, too, that the provisions of the FTA on long-term harmonization of standards between Canada and the United States were of a largely hortatory and “best efforts” character. However, the Panel unanimously agreed that in circumstances such as this, the Puerto Rican and U.S. federal authorities should have given the Québec milk producer an opportunity to prove that its milk was produced under conditions equivalent to those required by the new standards in Puerto Rico. The Panel held that there had been nonviolation, nullification, and impairment of the benefits which the Canadian producer could legitimately expect in the Puerto Rican market under the FTA. The Panel recommended, therefore, that a fair opportunity be granted to the Canadian producer to prove that its milk was produced in Québec under conditions equivalent to those required by the American standard. Some two years later, this process has now been completed.

The question underlying the *UHT Milk from Québec Panel Report* relates to the substantive equivalency, and comparison, of standards governing the production of milk. It is important to realize, however, that this was not the legal issue before the Panel. The Panel had to consider only the narrower issue of whether an opportunity to prove equivalency had been offered at an appropriate time and in an appropriate manner. Indeed, for the Panel to have made any judgment as to the substantive equivalency of the Canadian and American standards would have been improper. In this case, as in many others, the FTA and the NAFTA were

concerned as much with a legal right to process as with substance. In most cases, the substantive issues are left to the sovereign discretion of each State. The trade agreement commits them only to certain formal legal processes.

It is difficult, therefore, to say that in this case the Panel would have benefited from the advice of environmental experts on milk production. In the field of standard setting, expert advice applies only in instances where the reasonableness of the standard itself can be judged by a panel. This can arise, for example, if a panel is invited to determine the adequacy of the scientific justification for a particular standard, or whether a particular standard reflects generally accepted international standards. On both these points, expert advice can be extremely valuable.<sup>19</sup> Usually, however, the standards-related issues arising under the NAFTA will deal more with process than with substance.

A further comment concerning the *UHT Milk from Québec Panel Report* relates to the composition of the Panel (see Part II of this study for additional discussion of this matter). The American government chose, as one of its panelists, a distinguished lawyer who had served both as ambassador to the General Agreement on Tariffs and Trade (GATT) and the Organization for Economic Cooperation and Development (OECD), and as a well-known academic agricultural economist. In choosing these panelists, the U.S. government presumably felt it was drawing on relevant expertise. Likewise, the Canadian government named as panelists a former Canadian ambassador to the GATT and two aca-

---

<sup>19</sup> D. Wirth, “The Role of Science in the Uruguay Round and NAFTA Trade Disputes” (1994) 27 *Corwell Int’l. L.J.* 817

---

---

democratic trade law professors. Both professors had considerable experience in government, and at least one had some modest environmental credentials. This point is raised not to review the credentials of the individuals themselves, but rather to point out the freedom of manoeuvre that the governments had under the FTA. In other words, to obtain an appropriate mix of background and expertise, they could choose panelists from both on and off the Roster. As will be shown later, it is not yet clear whether governments under the NAFTA process in Chapter 20 will enjoy the same freedom. But if this is the case, the argument in favour of recourse to experts in appropriate circumstances may become even stronger.

One question remains. What is the potential value of expert opinion in reaching a final settlement of a dispute after a panel has reported? According

to press reports regarding the UHT Milk from Québec case, a process for determining equivalency of Canadian versus Puerto Rican milk-production standards was adopted and implemented, after some difficulty, by the two governments. It therefore took some time before Québec standards, with certain modifications, were deemed equivalent to American standards. The underlying issue in the UHT Milk panel case, and in all probability in other standard-setting cases, was not simply the procedural question, but the substantive issue of equivalence. Indeed, once the governments are faced with the substantive issue, expert advice becomes extremely relevant.

Part II of this report addresses more fully the relevance of expert opinion on environmental matters in trade disputes. It also examines the provisions for recourse to experts in free trade agreements.

## II. EXPERT ENVIRONMENTAL ADVICE IN TRADE DISPUTES

### **The Canada-U.S. Free Trade Agreement, Chapter 18**

A review of the five Free Trade Agreement Chapter 18 Panel Reports suggests that there may well be situations in which expert environmental evidence could be valuable. For example, a panel might need help in reaching its conclusions and in assisting governments to resolve their disputes. But, by the same token, this review suggests that there may be many instances in which the substantive environmental question is not the legally dispositive issue before the panel. Indeed, at times, it would be a mistake to divert the panel's attention from the essentially procedural questions before it.

Article 2014 allows panels to seek expert scientific advice. This provision parallels the authority (seemingly never used) of the GATT/WTO panels to seek expert advice. But how useful is expert advice during panel proceedings? Given that during these proceedings both parties provide scientific evidence from their respective governmental experts, perhaps that expert advice is more useful before and after the proceedings. The panel would have to weigh the scientific evidence and make a judgment as to which testimony is most convincing. To have an outside panel of experts weigh the conflicting evidence is arguably an abandonment of the panel's duty to decide the issue before it. A scientific

---

---

advisory committee that acts as an assessor in helping to understand and apply technical advice is one thing; a scientific advisory committee that, in effect, is called upon to decide on the issues before the panel is quite another.

### ***GATT/WTO Dispute-Settlement***

The GATT does not deal with environmental matters in any specificity, and indeed contains fewer explicit references to environmental issues than does the NAFTA. Nevertheless, it is striking that some of the most significant disputes to come before the GATT panel process in recent years have been related to environmental issues. The most notable are the two Tuna-Dolphin cases<sup>20</sup> and the case involving American automotive emission standards.<sup>21</sup> But these three are only the most salient of a series of decisions on matters relating to trade and the environment, to standards, and to fisheries and agricultural products. Undoubtedly, other cases involving similar matters will be referred to WTO panels in future years.

As of 1989, the GATT/WTO panels have been empowered to call upon the assistance of bodies of experts.<sup>22</sup> To date, though, they have not done so. This authority was strengthened by the agreement on dispute-settlement form-

ing part of the WTO (1994) agreements, which concluded the Uruguay round of Multilateral Trade Negotiations. Whether such experts will, in fact, be used by future WTO dispute-settlement panels is not yet clear. There may well be some feeling that relevant environmental issues, and others, can be put before panels by the Contracting Parties with an interest in so doing, and that panels normally have a mandate to deal with any legal problems arising out of international trade. No doubt, the WTO will continue trying to frame disputes in trade terms, rather than attempt to arbitrate what may be, fundamentally, environmental disputes. This reflex may be even stronger, given the GATT's lack of clear language on environmental matters. Essentially, the WTO continues to regard decisions on environmental standards as being within the authority of Contracting Parties. Only when environmental regulations impinge on the international trade rights covered by the GATT must they be dealt with.

The GATT/WTO's second response was to set up important new committees to discuss the range of issues raised by the relationship between trade and environmental issues. In fact, the GATT/WTO prefers, and has always preferred, to attempt to negotiate new

---

<sup>20</sup> United States - Restrictions on Imports of Tuna, Aug. 16th, 1991, (1991) 30 I.L.M. 1594; United States - Restrictions on Imports of Tuna, June 16th, 1994, GATT Doc. D529/R.

<sup>21</sup> United States - Taxes on Automobiles, June 16th, 1994, GATT Doc. D531/R.

<sup>22</sup> Arguably they could have done so under the Agreed Description of the Customary Practice of the GATT in the Field of Dispute-Settlement, Annexed to the 1979 Understanding Regarding Notifications, Consultations, Dispute-Settlement and Surveillance, Nov. 28th, 1979, GATT Doc. L/4907.

---

---

issues rather than have them resolved by dispute-settlement panels. The GATT Dispute-Settlement Panels have certainly ruled on matters of considerable interest over the years, but it would be a mistake to consider their reports as comparable to the jurisprudence of a court, such as the European Court of Justice. In fact, the GATT framework for panels has much less room to develop a genuine jurisprudence comparable to that of a true court. Moreover, the very nature of the process appears to preclude this attempt. The introduction in 1995 of an appellate process may well bring about some change in this regard. For the moment it is difficult to speculate on this matter.

The recent *GATT Panel Reports* on environmental questions have successfully clarified certain legal issues relating to the authority of states to impose environmental measures that have a discriminatory impact, that apply to production standards, or that apply to situations arising entirely beyond the borders of the state adopting the measure. While these considerations significantly affect the making and implementation of environmental policies, they are not in themselves inherently environmental decisions. Rather, they are judgments reflecting general principles of GATT law. Even if it were deemed advisable, for environmental reasons, to allow all WTO Contracting Parties to impose their production process standards on the products of other states for environmental reasons, the GATT would not necessarily authorize the imposition of production process standards on imports for all other purposes. In other words, although the experts giving their opinion on the legality of certain environmental measures may well

assist panels in understanding the justification of these measures, the panels may be stopped by general principles of GATT law from deciding that their application to imports is justified under the GATT.

The advice of environmental experts does become relevant to the work of panels when it is argued that exceptions to general principles of GATT law are justified on environmental grounds. In such circumstances, because the measure is essentially environmentally oriented, it cannot be said to constitute an unjustifiable impediment to international trade. The role of such advice will become even more relevant if the GATT is formally amended, or if some kind of interpretative statement is adopted authorizing exceptional measures for purposes of environmental protection.

#### ***European Court of Justice (ECJ)***

Environmental interests have been regularly weighed against competing trade interests in at least one quasi-international process: the case law of the European Court of Justice (ECJ) under the Treaty of Rome (1957), as amended by various treaties, including the Maastricht Treaty of 1993. European Community law provides interesting comparisons and insights into the GATT and NAFTA case law. There are a number of fundamental differences, however, between GATT law and European Community law. First, European Community law is embedded in a supra-national legal order, fully integrated into the law of each Member State. The GATT, on the other hand, is an international legal order — one not normally integrated into domestic law, that presumes national sovereignty, and

---

---

that claims no inherent supremacy over domestic law. The same is true of European Community institutions, such as the European Court of Justice. The ECJ can be seized, either by states, community institutions, or private parties; and its decisions are binding on all three categories of persons and institutions.

Second, and equally important, for a number of years European Community law has made it very clear that environmental protection is one of the fundamental values of the European Community, along with the economic goals of free movement of goods, services, persons, and capital. The ECJ thus has the mandate, which GATT Panels manifestly lack, to weigh the competing values of trade and environment against each other and to make appropriate decisions in light of the facts of each case. The ECJ is also able to operate in a context where national or community environmental policies are much more clearly articulated before it than may be the case with respect to the GATT or NAFTA. European Community environmental law is, itself, based on an attempt to reconcile many of the competing values inherent in the promotion of trade and the protection of the environment. The issues that come to the ECJ are therefore in every sense more legally mature than those put before a GATT or a NAFTA panel.

The *Danish Bottle Case*<sup>23</sup> — a major case chosen from among the many European Community environmental disputes — illustrates the difference

between European Community law and the NAFTA/GATT law. In this case, companies wishing to sell beer in Denmark complained that a Danish regulation requiring a system of deposit/return of all types of beer bottles, as well as a restriction on the sizes and shapes of beer bottles sold on the Danish market, constituted an unjustifiable restriction on the free movement of goods between Denmark and the rest of the Community. The Danish Government argued that these measures were justifiable on grounds of environmental protection. Whereas a NAFTA Panel, in the absence of an international agreement on the subject, would have had to restrict itself to considering the ensuing issues in the light of a rather formal test of nondiscriminatory treatment of imported containers, the ECJ was able to perform a much more complex weighing of the competing trade and environmental values. In its decision, the ECJ held that, while environmental considerations amply justified a system of deposit/returns, the restriction on the number and size of bottles that may be sold in the Danish market was unjustifiable. Furthermore, Danish law would have to accommodate smaller sales volumes of non-Danish beers in unusually shaped bottles. By going to the heart of the environmental issue, the ECJ was able to reach a decision, based on Community law, that weighed trade and environmental values. A GATT/NAFTA Panel would have had great trouble doing this since, in most cases, it lacks the legal authority to do so.

---

<sup>23</sup> Commission v. Denmark, Case 302/86, [1988] ECR 4607.

---



---

The ECJ is authorized to receive evidence from the parties on both factual and strictly legal issues, as well as evidence and argument from the Advocate General. The Court is also empowered, in those cases it deems necessary, to seek expert advice from assessors. Ultimately, the ECJ rules on matters of law and states the appropriate legal remedy. In comparison, the NAFTA legal process is one that leaves the whole issue of remedies almost entirely in the hands of Member States. The NAFTA process leaves much less scope for arguing competing trade and environmental values before dispute-settlement panels. It is important to bear this in mind when seeking to determine the extent and manner in which experts could be used by NAFTA dispute-settlement panels.

Whatever the differences between European Community law, GATT law, and the law of the NAFTA, environmental considerations are clearly giving rise, with increasing frequency, to disputes between states. It is important that the true nature of the dispute be clarified and that the parties to the dispute be helped to reach a workable solution. Procedures such as the provision of expert opinion or the constitution of expert committees to advise NAFTA dispute-settlement panels should be used wherever appropriate.

### **The NAFTA and the NAAEC**

A number of points in the dispute settlement process under the NAFTA and the NAAEC make it possible for both the states and the panels to seek expert advice, be it on environmental questions or on other matters.

### ***Relevant Provisions of the NAAEC***

The most relevant provisions of the NAAEC are Article 9, paragraph 5:

The Council may:

- a) establish and assign responsibilities to, ad hoc or standing committees, working groups or expert groups;
- b) seek the advice of non-Governmental organizations or persons, including independent experts; and
- c) take such other action in the exercise of its function as the parties may agree;

and Article 10, paragraph 6:

The Council shall cooperate with the NAFTA Free Trade Commission to achieve environmental goals and objectives of the NAFTA by:

- a) acting as a point of inquiry and receipt of comments from non-governmental organizations and persons concerning those goals and objectives;
- b) providing assistance in consultations under Article 1114 of NAFTA where a Party considers that another Party is waiving or derogating from, or offering to waive or otherwise derogate from, an environmental measure as an encouragement to establish, acquire, expand or retain an investment of an investor, with a view to avoiding any such encouragement;

- 
- c) contributing to the prevention or resolution of environment-related trade disputes by:
    - i) seeking to avoid disputes between the Parties,
    - ii) making recommendations to the Free Trade Commission with respect to the avoidance of such disputes, and
    - iii) 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.

#### ***Relevant Provisions of the NAFTA***

Within the NAFTA, the Article of particular importance is Article 2007, paragraph 5:

The Commission may:

- a) call on such technical advisors or create such working groups or expert groups as it deems necessary,
- b) have recourse to good offices, conciliation, mediation, or such other dispute-resolution procedures, or
- c) make recommendations as may assist the consulting Parties to reach a mutually-satisfactory resolution of the dispute.

Also relevant are Articles 2003, 2004, and 2005, as well as Articles 513 (Working Group on rules of origin), Article 723 (sanitary and phytosanitary measures/technical consultations), and Article 914 (standards-related measures/technical consultations). Of relevance, too, are Article 2009, which deals with the composition of the Roster (up to thirty individuals to serve as dispute-settlement panelists under Chapter 20); Article 2010, which deals with the qualifications of panelists; and Article 2011, which deals with the selection of panelists in particular cases.

Article 2014 of the NAFTA deals with the role of experts:

- a) On request of a disputing Party, or of its own initiative, the Panel may seek information and technical advice from any person or body that it deems appropriate, provided that the disputing parties so agree, and subject to such terms and conditions as such parties may agree.

Finally, Article 2015 deals with the composition of Scientific Review Boards:

- a) On request of a disputing Party or, unless the disputing Parties disapprove, on its own initiative, the panel may request a written report of a scientific review board on any factual issue concerning environmental, health, safety or other scientific matters raised by a disputing Party in a proceeding, subject to such terms and conditions as such Parties may agree.
-

- 
- b) The board shall be selected by the panel from among highly qualified, independent experts in the scientific matters, after consultations with the disputing Parties and the scientific bodies set out in the Model Rules of Procedure established pursuant to Article 2012(1).

The articles of the NAFTA referred to above make it plain that, at a number of points in the dispute-settlement process under Chapter 20, it is possible for the Commission for Environmental Cooperation (CEC), for the Parties, and for panels in appropriate circumstances to seek expert advice, including expert advice on environmental questions. All these provisions were drafted and widely discussed before a decision was made to negotiate the NAAEC. Indeed, the NAAEC provisions were drafted in light of the broader provisions of the NAFTA, and are designed to dovetail neatly with them. This is particularly the case with Article 10, paragraph 6, which provides the CEC with a mandate to identify experts able to provide information or technical advice to NAFTA committees, working groups, and other NAFTA bodies. A close interrelationship exists between the provisions of the two agreements concerning the constitution of expert committees, working groups, and other bodies as they relate to the NAFTA dispute-settlement process. It is also evident that the NAAEC provisions perform a dual function in that they have been drafted in light of the Chapter 20 dispute-settlement, as well as the other institutional and committee structures established under the various chapters of the NAFTA. The third function is to provide any expert advice required under NAAEC procedures.

In summary, provision of expert advice under the NAAEC has a threefold function as follows:

- a) to provide advice with respect to complaints, inquiries, and disputes falling squarely within the NAAEC;
- b) to provide advice to the Commission, to Parties to a dispute, and to dispute-settlement Panels under the NAFTA; and
- c) to provide advice to various NAFTA committees.

#### **Other NAFTA Dispute-Settlement Processes**

The NAFTA contains several other dispute-settlement procedures in addition to Chapter 20. These cover financial services, investments, other environmental agreements, and the Chapter 19 Binational Panel process arising out of domestic countervailing duty and anti-dumping duty proceedings. But none of these proceedings appear to dovetail with the NAAEC in the quite same manner as Chapter 20. As well, the NAFTA contains extensive provisions of an institutional character. As discussed below, these establish a number of permanent or ad hoc committees, or permit the Parties to create new tripartite committees so as to promote the purposes of the Agreement.

Chapter 14, which covers dispute-settlement in respect of financial services, provides for the creation of a special Roster of Financial Services Panelists and requires that financial disputes be resolved by persons on this Roster. It parallels quite closely, therefore, Chapter 20 of the NAFTA and, to the extent that the parties to a dispute (or the panel itself) feel it appropriate,

---

they can call for expert advice under Article 2014. A potential relationship is thus established between the NAAEC and Chapter 14. The problem here is to determine when and how environmental issues might be at the heart of disputes over financial services under the NAFTA.

Chapter 11 of the NAFTA, dealing with investments, requires that investment disputes be resolved by one of two procedures that are entirely extraneous to the NAFTA. Article 1120 allows for investment disputes to be resolved by arbitration under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules. Alternatively, Article 1120 allows for investment disputes to be resolved under the International Convention for the Settlement of Investment Disputes of 1965 (ICSID). This convention, established under the aegis of the World Bank, promotes the peaceful resolution of investment disputes. Its particular advantage is that it allows private investors to submit claims against sovereign States. While it is possible under the ICSID to seek expert advice, no provision has been made for expert environmental advice. It is hard to see how the NAAEC provisions could be dovetailed with the ICSID procedures.

Article 1114 is a special case. It contains specific obligations for NAFTA parties with regard to the environmental impact of investments. This article states that “a party should not” attract investment by waiving environmental obligations. If this is alleged, consultations are required “with a view to avoiding any such encouragement.” Whether this is hard or soft law

remains to be determined. There is nonetheless a clear mandate for the provision of expert advice as to the appropriateness of certain types of governmental measures in the light of NAAEC Article 10, paragraph 6(b).

Conceivably, there will be situations in which the nature of the dispute is questioned: Is it environmental in character or strictly an investment matter? Should such disputes arise, it is submitted that the Parties should negotiate the applicable procedure — the ICSID or Chapter 20 of NAFTA. The Parties to the NAFTA are sovereign and, it is submitted, would be free, by consent, to make decisions interpreting or even amending by practice the meaning of the NAFTA. Disagreements as to whether a particular dispute ought to be negotiated under the ICSID procedure would appear to be a matter for the Chapter 20 general dispute-settlement proceedings. Alternatively, should a question arise during the course of an ICSID procedure or an arbitral procedure under Article 1120, it is submitted that the tribunals would be competent to judge the limits of their own jurisdiction.

Article 104 of the NAFTA gives priority to three international environmental agreements and allows the Parties to add other international environmental agreements to this list. Insofar as these agreements contain their own dispute-settlement processes, they will take precedence over the applicable dispute-settlement processes of the NAFTA. Interestingly, the agreements that can be covered are multilateral as well as bilateral environmental agreements, as witnessed by Annex 104.1.

---

---

It is unclear whether these agreements would be given priority over the dispute-settlement provisions of the NAAEC. The NAAEC is legally separate from the NAFTA. Furthermore, Article 104 of the NAFTA, having been drafted before the NAAEC, contains no reference to the latter agreement. This question may remain a matter of pure speculation, should no disputes arise. However, one can imagine a situation arising in which a NAFTA government fails to enforce its legislation adopted under one of the listed international environmental agreements. The question might then arise as to the appropriate dispute-settlement procedure. Should the complaint be pursued under dispute-settlement proceedings of the international environmental agreement in question? Or should recourse be pursued under the NAAEC?

Still another issue is the extent to which complaints with respect to violations of international environmental agreements may be submitted under the NAAEC. Several questions covered by some of the various listed agreements have, in fact, been noted as potential flashpoints for environmental disputes between NAFTA Parties. Authors commenting on these matters usually cite two particular topics: trade in endangered species, and the transboundary transportation of hazardous wastes. In such cases, it is submitted that the Parties may opt for the procedure of their choice. However, it is not as clear that the Parties may rule out laying complaints under Article 14 of the NAAEC. In certain circumstances, violation of the NAAEC and international environmental agreements may arise out of the same act, just as it is possible to violate both the GATT and the NAFTA simultaneously in a number of circumstances.

Finally, Chapter 19 of the NAFTA allows private parties to call for the constitution of a Binational Panel to hear appeals from domestic administrative proceedings relating to anti-dumping and countervailing duty complaints. There would appear to be no formal link between the NAAEC and Chapter 19. Neither is there a procedural manner by which the advice of environmental experts could either be sought, or legally offered, under Chapter 19 procedures. Whereas the applicable procedural rules are set out in the rules of practice made by the Parties pursuant to Chapter 19, the substantive rules are those that apply in Canada, the United States, or Mexico with respect to appeals from such administrative procedures, under the respective laws of the three countries.

One remote nexus between the NAAEC and Chapter 19 may exist. This relates to the fact that certain types of subsidies granted for environmental purposes are to be exempt from countervailing duties under the 1994 WTO Agreement on Subsidies. What exactly constitutes an environmental subsidy is a matter perhaps best left for further discussion between the contracting parties to the WTO, to WTO dispute-settlement, or to domestic case law.

#### **NAFTA Committees and Working Groups**

Dispute avoidance through the work of committees and working groups reflects NAFTA policy. Envisaged is the creation of various *ad hoc* and standing committees, whose mandates may be limited in time and function. Occasionally, other committees and working groups sanctioned by the Parties would be struck. Some of these

---

---

committees would actually have a function in various stages of the NAFTA dispute-settlement process under Chapter 20. This is particularly so with Articles 513, 723, and 914. There, consultations in Working Groups on rules of origin, sanitary and phytosanitary measures, and standards-related measures would replace regular consultations under Article 2007, in the process leading up to formal dispute-settlement under Chapter 20.

The NAFTA committees exist to deal with a host of matters, both general and highly technical. These matters include: trade in goods, and various aspects of trade in textiles; rules of origin, and customs matters generally; grading and quality standard in agriculture, agricultural subsidies and trade, and private disputes over agricultural goods; government procurement; the point of inquiry concerning sanitary and phytosanitary standards, and sanitary and phytosanitary standards in general; grain products, and agricultural grading and marketing standards, notification of technical standards; and standards-related matters generally; land transportation, telecommunications, and automotive standards; small business, and services and investment; quotas, and requirements for licensing and certification; and financial services, trade in competition, and temporary entry. A number of committees have been created, or may be created, to deal with technical standards under Article 913. Relevant matters include: nomenclature, quality, and packaging; product approval, and

accreditation; uniform chemical hazard classifications, and training and inspection; and good laboratory practices, good manufacturing practices, and criteria assessment. Aside from the panoply of possible standing and *ad hoc* committees created to regulate disputes, there exists an Advisory Committee on Private International Disputes, as well as committees whose task it is to review, on a long-term basis, the rules of origin in the North American automotive sector. Finally, there are also working groups dealing with import surges, subsidies and countervailing duties, and anti-dumping duties — all charged with negotiating possible changes to the NAFTA on these matters.

Some of the roughly one hundred committees, *ad hoc* committees, and working groups briefly reviewed here are clearly dealing with matters of very direct relevance to environmental questions. Others, however, only occasionally meet environmental problems in the course of their work.

### **The Legal Status of Environmental Advice**

Quite clearly, there will be many instances in which the underlying trade issue is one of environmental policy, or one that raises environmental concerns — although it may be cast entirely as a trade matter. Moreover, issues will probably remain quite open-ended where the various NAFTA committees are concerned.

---

---

Within the framework of a specific dispute, however, and particularly within the framework of disputes under Chapter 20 of the NAFTA, it is by no means clear that the environmental issues underlying a dispute will be legally relevant. A good case in point is the UHT Milk from Québec Panel Report. Here, the fundamental dispute between the United States and Canada was probably related to distrust of foreign standards. This was not the legal issue before the Panel, however. And it would have been inappropriate for the Panel to seek expert advice on the substantive issue of equivalence of standards. With this matter entirely within the discretion of the two States at all times, comment on such issues from the Panel would have been neither relevant nor helpful. Given that many NAFTA disputes relate to questions of formal equality and, more broadly, to procedural questions involving the treatment of imported goods and services, the underlying environmental issue will not always be the object of the formal dispute-settlement process. This may be somewhat frustrating for environmentalists. However, given the nature of NAFTA's position as an intergovernmental and international trade agreement — one not backed up by any formal supranational executive or legislative organ, let alone a supranational court — this frustration would appear to be inevitable.

### **Membership on Dispute Settlement Panels**

The underlying environmental issue may often not be the central legal issue before a panel. Hence, it may be appropriate for the CEC to help nominate Roster members who will be sensitive to environmental issues. At times, assistance may even be needed to find an off-the-Roster panel chairperson with the appropriate environmental credentials.

A cursory review of the memberships of the FTA Chapter 18 Rosters in Canada and the United States, as well as the various panels whose members were chosen off the Roster and named under the Canada-U.S. Free Trade Agreement, suggests that very few possess what environmentalists might call “strong environmental credentials.” Indeed, only one person on the Chapter 18 Roster seems to have done significant work on environmental questions while in government service.<sup>24</sup> Further analysis of many of the other panelists indicates persons with broad legal and governmental experience, open and humane views of life, and an interest in promoting the welfare of their fellow human beings. The career path of most of these other people, however, lay outside the field of environmental protection — whether as government servants, academics, or private practitioners.

---

<sup>24</sup> Armand de Mestral was a member of the Canadian Delegation to the Law of The Sea Conference and worked in Committee III on environmental questions. He was also a member of several Canadian delegations to major environmental conferences between 1970 and 1978.

---

---

### III. SUMMARY AND CONCLUSIONS

The evolving dynamics of economic union among and between Canada, the United States, and Mexico has heightened awareness of the relationship between trade and environment. Even before the three governments were bound by any formal union, they had begun to cooperate on a range of environmental issues stemming from the development of economic integration. With the entry into force of the NAFTA, the potential for environmental impacts associated with free trade has become the source of concern. Increased economic activity in border areas, particularly along the Mexican-U.S. border as a result of the *maquiladora* program, has augmented the possibility of environmental disputes. Between 1993 and 1995, Canadian and American trade negotiators regularly dealt with matters that raised environmental concerns, as illustrated in the review of the FTA Chapter 18 trade issues. And those disputes with environmental components either dealt directly with environmental questions, or with issues of standards and standard-making in which the legal principles were also applicable to environmental issues. Indeed, three of the five disputes sent to panels under Chapter 18 dealt with conservation or standards questions that introduced environmental considerations into the trade question.

Given the potential for trade disputes under the NAFTA and the possibility that many of these will involve environmentally sensitive matters, it is pertinent to consider the mechanisms by which such disputes have been resolved in the past. It is also advisable to examine available channels that might facilitate the process in the

future. One sees that the three environment related disputes formally sent to panels under Chapter 18 were settled without recourse to the advice of environmental experts. Yet such advice might well have helped resolve the substantive issues in more satisfactory ways for all parties concerned.

The NAFTA legal process offers scope for arguing the competing trade and environmental values before dispute-settlement panels. The NAFTA and NAAEC articles make provision for both states and panels to consult experts for advice in appropriate circumstances during the dispute-resolution process — including those disputes involving environmental questions — through NAFTA committees, working groups, or the nomination of Roster members. When the issues being confronted involve legally relevant environmental questions, existing Rosters may lack the environmental expertise required to settle the issue satisfactorily. NAFTA bodies, however, have recourse to information, technical advice, and the opinion of experts in the field through the CEC, which is mandated to identify and contribute such expertise.

This survey has made it clear that trade negotiators are regularly involved in the discussion of issues that raise environmental matters. Moreover, the potential is there for trade disputes with environmental dimensions to occur more regularly in the future. In such disputes, the neutrality and expertise of an independent group of experts will likely either add weight to the decisions made by panels, or help clarify issues — in the end enriching the judgments.

---



## BIBLIOGRAPHY

---

- Abbott, F. "Regional Integration and the Environment" (1992) 68 *Chicago-Kent L. Rev.* 173.
- Abler, D.G. "NAFTA, Agriculture and the Environment" (1993) 28 *Tulsa L.J.* 659.
- Aguilar, M. et al. "Panel Discussion on Environmental Standards, Enforcement and NAFTA" (1993) 5 *Georgetown Int'l L. Rev.* 565.
- Appleton, B. *Navigating NAFTA: A Concise User's Guide to the North American Free Trade Agreement.* (Scarborough, Ontario: Carswell, 1994).
- Baer, M. D. & S. Weintraub, Dir. *The NAFTA Debate: Grappling with Unconventional Trade Issues.* (Boulder, Colorado: Lynne Rienner Publishers, 1994).
- Bailey, J. E. "Free Trade and the Environment — Can NAFTA Reconcile the Irreconcilable?" (1993) 8 *Am. U. J. Int'l L. & Pol.* 839.
- Barber, M. "Bridging the Environmental Gap" (1992) 5 *Tulane Env'tl L.J.* 429.
- Barr, R., R. Honeywell & S. Stofel. "Labor and Environmental Rights in the Proposed Mexico-U.S. Free Trade Agreement" (1991) 14 *Houston J. Int'l L.* 1.
- Black, A. "Economic and Environmental Regulatory Relations: United States-Canada Free Trade in Energy" (1993) 8 *Conn. J. Int'l L.* 583.
- Block, Joseph G. & Andrew R. Herrup. "The Environmental Aspects of NAFTA and their Relevance to Possible Free Trade Agreements Between the United States and Caribbean Nations" (1994) 14 *VA Env'tl L.J.* 1.
- Brown Weiss, E. "A U.S. Perspective on the North American Free Trade Agreement and the Environment: The Competitive Aspects of Mexico's Accession to an Enlarged Free Trade Agreement" (1992) 18 *Canada-U.S. L.J.* 199.
- Business America. "North American Free Trade and the Environment" (Oct. 8th, 1993) *Business Am.* 36.
- Business Mexico. "NAFTA: The World's First Green Treaty - Environmentally Sound Trade" (1994) 4 *Business Mexico* 51.
- Business Mexico. "A Greener Frontier" (1994) 4 *Business Mexico* 27.
- Camillo, J. L. "The North American Free Trade Agreement & The Environment" (1993) 114 *Business Mexico* 38.
- Cardenas, C. "Free Trade, the Environment, and the Need for a Social Charter" (1992) 15 *Loyola Int'l & Comp. L.J.* 71.
-

- 
- Chapman, A. *Reduction of Tariffs on Supply Managed Commodities under the GATT and the NAFTA*. Ottawa: Library of Parliament, Research Branch, 1994.
- Charnovitz, S. "NAFTA: An Analysis of Its Environmental Provisions" (1993) 23 *Env'tl L. Rep.* 10067.
- Colorado Journal of International Law and Policy. "Comment: Transboundary Air Pollution: Can NAFTA & NAAEC Succeed Where International Law Has Failed?" (1994) 5 *Col. J. Int'l L. & Pol.* 439.
- Condon, Bradley J. "NAFTA and the Environment: A Trade-Friendly Approach" (1994) 14 *J. Int'l L. & Bus.* 528.
- DeBellevue, Edward B., Eric Hitzel et al. "The North American Free Trade Agreement: An Ecological-Economic Synthesis for the United States and Mexico" (1994) 9 *Ecological Economics* 53.
- de Fouloy, C. *Glossary of NAFTA Terms*. (Boston: M. Nijhoff Publishers, 1994).
- Deitrick, Sabina. "Ever the Best of Friends? The Regional Impact of the North American Free Trade Agreement" (1993) 19 *Built Env.* 73.
- Diez, R. & S. P. Wolfson. "Mexico Emphasizes the Environment" (1994) *Int'l Corp. L.* 16.
- Downs, P. "NAFTA and its Stateside Skeptics" (1993) 59 *Planning* 26.
- Dunleavy, M. "The Limits of Free Trade: Sovereignty, Environmental Protection and NAFTA" (1993) 51 *U. Toronto Fac. L. Rev.* 204.
- Economist (The). "NAFTA's Progress: No Social Contract" (Feb. 18th, 1995) *The Economist* 24.
- Economist (The). "After NAFTA" (March 20th, 1993) *The Economist* 71.
- "Enforcement of Environmental Laws Under a Supplemental Agreement to the North American Free Trade Agreement" (1993) 5 *Georgetown Int'l Env'tl L. Rev.* 592.
- "The Environment's New Power Arrangement" (1995) *Business Mexico* 35.
- "The Environment: A New Priority in International Relations: A Planetary Problem" (1994) 4 *Business Mexico* 43.
- "The Environmental Side Agreement: Implications for Environmental Cooperation, Trade Policy and American Treaty-making" (Fall, 1994) 8 *Temple Int'l & Comp. L.J.* 257.
- Esty, Daniel C. "Trade and the Environment: Beyond Rio" (1992) 23 *Env'tl L.* 387.
-

- 
- Gendron, C. "L'accord de libre-échange nord-américain et l'environnement" (1994) 13 *Écodécision* 22.
- Georgetown International Law Review. "Note, Environmental Protection and International Trade: NAFTA as a Means of Eliminating Environmental Contamination as a Competitive Advantage" (1993) 5 *Georgetown Int'l L. Rev.* 669.
- Glick, L. A. *Understanding the North American Free Trade Agreement: Legal and Business Consequences of NAFTA*. (Boston: Kluwer Law and Taxation Publishers, 1994).
- Goldman, P. "The Legal Effect of Trade Agreements on Domestic Health and Environmental Regulation" (1992) 7 *Env't'l L. & Litigation* 11.
- Gonzalez-Baz, A. "A Mexican Perspective on the North American Free Trade Agreement and the Environment" (1992) 18 *Canada-U.S. L.J.* 235.
- Gregory, M. "Environment, Sustainable Development, Public Participation and the NAFTA: A Retrospective" (1992) 7 *J. Env't'l L. & Litigation* 99.
- Hart, M. & S. Gera. "Trade and the Environment: Dialogue of the Deaf or Scope for Cooperation?" (1992) 18 *Canada-U.S. L.J.* 207.
- Hofgard, Kurt C. "Trade and the Environment: Is This Land Really Our Land: Impacts of Free Trade Agreements on U.S. Environmental Protection" (1992) 23 *Env't'l L.* 635.
- Hollbein, J. R. *NAFTA: Final Text, Summary, Legislative History & Implementation Directory*. (New York: Oceana, 1994).
- Holmer, A. & J. Bello. "Trade and the Environment: A Snapshot from Tuna/Dolphins to the NAFTA and Beyond" (1993) 27 *Int'l L.* 169.
- Horlick, Gary N. & F. Amanda DeBusk. "Dispute Resolution under NAFTA: Building on the U.S.-Canada FTA, GATT and ICSID" (1993) 27 *J. World Trade* 21.
- Housman, Robert. "The North American Free Trade Agreement's Lessons for Reconciling Trade & Environment" (1994) 30 *Stan. J. Int'l L.*
- Housman, Robert & Durwood J. Zaelke. "Trade and the Environment: Making Trade and Environmental Policies Mutually Reinforcing: Forging Competitive Sustainability" (1992) 25 *Env't'l L.* 545.
- Housman, Robert & UNEP. "Reconciling Trade and the Environment, Lessons from the North American Free Trade Agreement" (1994) 3 *WRI, Env't & Trade Series*.
-

- 
- Hustis, B. "The Environmental Implications of the North American Free Trade Agreement" (1993) 28 *Texas Int'l L.J.* 589.
- Jacek, H. J. *Public Policy and NAFTA: The Role of Organized Business Interests and the Labor Movement*. (Orono, Maine: Canadian-American Center, 1994).
- Jeffrey, M. "The Environmental Implications of NAFTA: A Canadian Perspective" (1994) 26 *U.R.B. L.* 31.
- Jeffrey, Michael I. "The Legal Framework for Environmental Regulation Under the North American Free Trade Agreement" (1994) *Env't'l & Planning L.J.* 382.
- Johnson, R. "Commentary: Trade Sanctions and Environmental Objectives in the NAFTA" (1993) 5 *Georgetown Int'l Env't'l L. Rev.* 577.
- Johnston, Jon. *The North American Free Trade Agreement: A Comprehensive Guide*. (Toronto: Canada Law Book, 1994).
- Kennedy, K. "Reforming U.S. Trade Policy to Protect the Global Environment" (1994) 18 *Harv. Env't'l L. Rev.* 185.
- Kim, John J. & James P. Cargas. "The Environmental Side Agreement to the North American Free Trade Agreement: Background and Analysis" (1993) 23 *E.L.R.* 10720.
- King, R. J. "An Analysis of the Environmental Provisions in the NAFTA" (1993) 3 *J. Env't'l L. & Pract.* 299.
- Kublicki, N. "The Greening of Free Trade: NAFTA, Mexican Environmental Law and Debt Exchanges for Mexican Environmental Infrastructure Development" (1994) 19 *Columbia J. Int'l L.* 59.
- Lallas, P., D. Esty & D. van Hoogstraten. "Environmental Protection and International Trade: Toward Mutually Supportive Rules and Policies" (1992) 16 *Harv. Env't'l L. Rev.* 271.
- Lande, S. & N. Crigler. "1994: The Year of the Trade Accords - NAFTA & Uruguay Round Provisions" (1994) 4 *Business Mexico* 10.
- Lee, Thea. "Happily Never NAFTA" (1993) *Dollars & Sense* 12.
- Lipsey, R. G. *NAFTA: What's In, What's Out, What's Next*. Toronto: C.D. Howe Institute, 1994.
- Loizides, S. *NAFTA Extension in the Americas: The Business Case*. Ottawa: Conference Board of Canada, 1994.
- Ludwiszewski, R. "Improving Trade and Protecting the Environment (Will NAFTA Protect the Environment?)" (1993) 10 *Env't'l Forum* 34.
-

- 
- “Green” Language in the NAFTA: Reconciling Free Trade and Environmental Protection” (1994) 27 *Int’l L.* 691.
- Madnick, Michael D. “NAFTA: A Catalyst for Environmental Change in Mexico” (1993) 11 *Pace Env’t L. Rev.* 365.
- Magraw, Daniel. “NAFTA’s Repercussions: Is Green Trade Possible?” (1994) *Env’t.* 14.
- Mason, T. D. & A. M. Turay, Dir. *Japan, NAFTA and Europe: Trilateral Cooperation or Confrontation?* New York: (St. Martin’s Press, 1994).
- Mello, J. A. “The Environmental Cost of Free Trade” (1994) 91 *Business & Soc. Rev.* 8.
- Moran, R. T. *NAFTA: Managing the Cultural Differences.* Houston: Gulf Publishing Co., 1994.
- Oshins, A. “Canadians Focus on Corporate Change & the Environment” (1994) *Risk Manag’t* 62.
- Patton, Kevin W. “Dispute Resolution Under the North American Commission on Environmental Cooperation” (1994) 5 *Duke J. Comp. & Int’l L.* 87.
- Popiel, Brian R. “Comment: From Customary Law to Environmental Impact Assessment: A New Approach to Avoiding Transboundary Environmental Damage Between Canada and the United States” (1995) 22 *Boston College Env’t Aff. L. Rev.* 447.
- Prati-Perugia, R. “Mexican Environmental Legislation: An ‘On the Book’ and Practical Overview” (1993) 36 *Priv. Inv. Abroad* 2.1.
- Ranger, E. M. “The Environment and NAFTA” (1993) 3 *Business Mexico* 78.
- Risk Management. “Manitoba: Conference Highlights” (1994) *Risk Management* 48.
- Robina, Michael. “The North American Free Trade Agreement: The Integration of Free Trade and the Environment” (1993) 7 *Temple J. Int’l & Comp. L.* 123.
- Rodarte, H. “Environmental Protection in Mexico” (1992) 15 *Loyola Int’l & Comp. L.J.* 79.
- Rugman, A. M., Dir. *Foreign Investment and the NAFTA.* (Columbia: University of South Carolina Press, 1994).
-

- 
- Saunders, J. D. "NAFTA & The North American Agreement on Environmental Cooperation: A New Model for International Collaboration on Trade & Environment" (1995) 5 *Col. J. Int'l Env't'l L. & Pol.* 272.
- Schoenbaum, T. J. "The North American Free Trade Agreement (NAFTA): Good for Jobs, for the Environment and for America" (1993) 23 *GAJ. Int'l & Comp. L.* 461.
- Schwenker, C. "Protecting the Environment and U.S. Competitiveness in the Era of Free Trade" (1993) 71 *Texas L. Rev.* 1355.
- Schwenker, C. "Will NAFTA Protect the Environment?" (1993) 10 *Environmental Forum*.
- Shanoff, B. "NAFTA Reveals Progress, Troubles After One Year" (1995) 38 *World Wastes* 15.
- Sheehy, K. "Nature Calls Victor Lichtinger" (1994) 4 *Business Mexico* 34.
- Simon, J. "Dirty Work: With NAFTA in the Balance, Environmental Cops Try to Cut Pollution by American Industries Operating in Mexico" (1993) 13 *Cal. L.* 40 & 89.
- Sinclair, M. Note, "The Environmental Cooperation Agreement Between Mexico and the United States: A Response to the Pollution Problems of Borderlands" (1986) 19 *Cornell Int'l L.J.* 87.
- Spivak, Lloyd J. "Structural and Functional Models for the Proposed North American Commission on the Environment" (1993) 8 *A. U. J. Int'l L. & Pol.* 913.
- Stewart, Richard B. "The NAFTA: Trade, Competition, Environmental Protection" (1994) 27 *Int'l L.* 751.
- Stoub, J. "Beyond NAFTA: A Chemical Reaction" (1994) 4 *Business Mexico* 32.
- Swenarchuk, M. "NAFTA and the Environment" (1993) 71 *Canadian Forum* 13.
- Thomas, Christopher & Gregory A. Teresposky. "The NAFTA and the Side Agreement on Environmental Co-operation: Addressing Environmental Concerns in a North American Free Trade Regime" (1993) 27 *J. World Trade* 5.
- "Trade & the Environment: The Environment vs. Trade Rules: Defogging the Debate" (Winter 1992) 23 *Env't'l L.* 475.
- Trade Reporter. "Mexican Financial Crisis Threatens Environmental Spending Under NAFTA" (1995) 12 *Trade Reporter* 582.
- United States. Environmental Aspects of the Proposed North American Free Trade Agreement: Hearing Before the Subcommittee on International Trade of the Senate Committee on Finance, 102d Cong., 2nd Sess. (1992).
-

- 
- United States. Environmental Implications of NAFTA: Hearing Before the House Committee on Merchant Marine & Fisheries, 103d Cong., 1st Sess. (1993).
- United States. NAFTA: Environmental Issues, Hearing Before the Subcommittee on Rules of the House of the House Committee on Rules, 102d Cong., 1st Sess. (1991).
- United States. The National Environmental Policy Act and the North American Free Trade Agreement, Hearing Before the Senate Committee on Public Works, 103d Cong., 1st Sess. (1993).
- United States. Protecting the Environment in the North American Free Trade Agreement Negotiations: Hearing Before the Subcommittee on Regulations, Business Opportunities, and Energy of the House Committee on Small Business, 102d Cong., 1st Sess. (1991).
- United States. Supplemental Agreement to the North American Free Trade Agreement: Hearing Before the Subcommittee on Trade of the House Committee on Ways & Means, 103d Cong., 1st Sess. (1993).
- Van Pelt, Laura J. "Countervailing Environmental Subsidies: A Solution to the Environmental Inequities of the North American Free Trade Agreement" (1994) 29 *Texas J. Int'l L.* 123.
- Vaznaugh, Richard. "Extraterritorial Jurisdiction: Environmental Muscle for the North American Free Trade Agreement" (1993) 17 *Hastings Int'l & Comp. L. Rev.* 207.
- Wainikka, G. W. *The NAFTA and Canada-Mexico Trade Data (Master's Thesis in Economics)*. (Montreal: McGill University [unpublished], 1994).
- Weinest, R. S. *NAFTA and Financial Services*. (Coral Gables, Florida: University of Miami, 1994).
- Weintraub, S. *NAFTA: What Comes Next?* (Westport, Connecticut: Praeger, 1994).
- Weston, A. *The NAFTA Papers: Implications for Canada, Mexico and Developing Countries*. Ottawa: North-South Institute, 1994.
- Wilkinson, D. G. "NAFTA & the Environment: Some Lessons for the Next Round of GATT Negotiations" (1994) 17 *World Economy* 395.
-

- 
- Wirth, D. A. "The Role of Science in the Uruguay Round and the NAFTA Trade Disciplines" (1994) 27 *Cornell Int'l L.J.* 817.
- Wright, A. G. "Mr. Salinas' Watermark" (1994) 223 *E.N.R.* 24.
- Wynne, B. "The Impact of NAFTA on the U.S./Mexican Border Environment" (1994) 26 *U.R.B. L.* 11.
- Zagaris, B. "The Transformation of Environmental Enforcement Cooperation between Mexico and the United States in the Wake of NAFTA" (1992) 18 *N.C.J. Int'l L. & Com. Reg.* 59.
- Zamora, S. "The Americanization of Mexican Law: Non-Trade Issues in the North American Free Trade Agreement" (1993) 24 *L. & Policy Int'l Bus.* 391.
-