

**COMMENT ON COMPATIBILITY OF NORTH AMERICAN
ENVIRONMENTAL LAWS***

**Peter L. Reich, J.D., Ph.D.
Professor of Law
Director, Environmental Law Concentration & Mexico City Program
Whittier Law School
Costa Mesa, California**

August 9, 2013

* Submitted to the Commission for Environmental Cooperation on the occasion of the 20th anniversary of the North American Agreement on Environmental Cooperation.

Introduction

Assembling and promulgating information about the compatibility of environmental laws is an appropriate function of the Commission for Environmental Cooperation (CEC). The CEC could promote agreement among the three NAFTA countries by systematically supplying legal doctrinal information in a treatise for use in judicial and legislative proceedings.

One recent evaluation of the CEC considered its performance “modestly positive” in promoting conservation and publicizing environmental problems.¹ Another analyst saw varying success in CEC activities, viewing the facilitation of voluntary cooperation as most effective, with environmental enforcement, independent reporting, and the integration of trade and environment following in descending order.² The idea proposed here is that the CEC summarize the decisional and statute law of all three countries in a widely disseminated Restatement-like treatise, noting divergences and commonalities. The Commission would then be able to help resolve national disputes in which the law of other NAFTA countries is relevant, as well as those involving international litigation between them. Further, the treatise would be a resource for those participating in legislative discussions of legal and regulatory harmonization.

¹ See Stephen Zamora, *Rethinking North America: Why NAFTA's Laissez Faire Approach to Integration is Flawed, and What to Do About It*, 56 VILL. L. REV. 631, 639 (2011). The Zamora analysis echoed the multi-author, earlier assessment that the CEC's record was “generally positive” in GREENING NAFTA 310-11 (David L. Markell & John H. Knox eds. 2003).

² See Linda J. Allen, *The North American Agreement on Environmental Cooperation: Has It Fulfilled Its Promise and Potential? An Empirical Study of Policy*, 23 COLO. J. INT'L L. & POL'Y 120, 190-92 (2012).

The Compatibility Problem: A Water Law Example

A recent U.S. appellate decision, *Consejo de Desarrollo Económico de Mexicali, AC vs. United States*, exemplifies the dangers inherent in an assumption that NAFTA participants' legal systems are incompatible.³ In *Consejo*, Mexican farmers and ecosystems had depended for more than half a century on cross-border flows from an aquifer partially supplied by seepage from the All-American Canal, an earthen conveyance ditch located entirely on the U.S. side. Yet after the Bureau of Reclamation in 1994 ordered the Canal to be lined with concrete, cutting off this water source, the Ninth Circuit rejected the Mexican plaintiffs' property deprivation and environmental claims, basing its holding on mootness, lack of subject matter jurisdiction, and sovereign immunity.⁴

The court ignored the ways that Mexican civil law tradition and legislation allocating water on the basis of need might have been reconciled with the U.S. common law doctrine of absolute property rights. In fact, a need-based approach to the canal lining dispute would be entirely consistent with prior appropriation precedent in the western United States, since the *Consejo* plaintiffs had uninterruptedly drawn on the seepage for decades. By compiling information about divergent legal systems and explaining their potential compatibility, the CEC might be the perfect mechanism to provide technical assistance to courts faced with such problems.

³ 482 F. 3d 1157 (9th Cir. 2007). For a more detailed discussion of this case and its implications, see Peter L. Reich, *The Historical, Comparative, and Convergence Trifecta in International Water Law: A Mexico-U.S. Example*, 43 ENVTL L. REP. 10509 (2013).

⁴ 482 F. 3d at 1158, 1174.

Treatise on Coordination of National Legal Standards

The CEC has the international legitimacy and enforcement experience to supervise the production of *North American Environmental Law*, a comprehensive summary of the environmental law of the three NAFTA countries. Authorization for the CEC's researching and creating such a project can be found in the Commission's mandate to prepare independent reports on matters related to the cooperative functions of the North American Agreement on Environmental Cooperation (NAAEC).⁵ As does the American Law Institute's authoritative Restatement series, this treatise would contain detailed discussions of the historical development of doctrine, the current status of statutory and case law, and contrasting interpretations, and would be regularly updated.⁶

Obviously there will be variances among and within the three countries, just like the jurisdictional approaches noted in the Restatements. But the treatise would identify existing subject areas of commonality, and also propose harmonization where countries' laws conflict. As the Restatements have done, *North American Environmental Law* would prove a resource for courts and legislatures confronting international conflicts as well as national disputes with regional implications. The treatise could also help all three nations' legislators and regulators assess the effectiveness of their environmental regimes.

⁵ North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., Sept. 14, 1993, art. 13 (1), 32 I.L.M. 1487-88 (1993).

⁶ Some earlier efforts have been made to find parallels between Mexican and U.S. environmental law, which one report found "broadly comparable." See Evaluation of Mexico's Environmental Laws, Regulations, and Standards in NAFTA AND THE ENVIRONMENT 583, 615 (Daniel Magraw ed., 1995). But nothing trilateral, comprehensive, or kept up-to-date has been produced.

Interventions in Judicial and Legislative Proceedings

Private parties, and the CEC as authorized by the NAFTA Commission, could employ the treatise in a variety of judicial and legislative interventions. In court proceedings, *amicus curiae* briefs are an appropriate vehicle for introducing material in support of foreign law compatibility. For example, the Colorado Supreme Court's 2002 holding in *Lobato v. Taylor* incorporated this author's arguments in an *amicus* brief that successors-in-interest to an 1843 Mexican land grant were entitled to grazing and other usufructuary rights on the community's former common lands, now owned by a ski resort.⁷ In the legislative context, the treatise could be useful in explaining trilateral differences and commonalities as a basis for statutory harmonization.

At the present time, interested individuals, nonprofit organizations, and government agencies would be free to utilize the treatise as a resource for these interventions. While such activity may not fall within an existing mandate allowing the CEC to take action itself, interventions could be proposed as part of its future role, depending on the political will of each country.

Conclusion

Any suggestion of an expanded role for a trilateral institution such as the CEC raises the spectre of encroachment on sovereignty, particularly among those viewing international cooperation as a threat to a national economy, society, government, and

⁷ 71 P. 3d 938, 943 (Colo. 2002). For further discussion of the case and related comparative law perspectives, see Peter L. Reich, *Litigating Property Under the Guadalupe Hidalgo Treaty: The Sangre de Cristo Land Grant Case*, 5 SCHOLAR 217 (2003).

environment.⁸ But merely presenting legal information in a convenient form for judges and legislators does not constitute a policy prescription. All three NAFTA countries have unique jurisprudence and statutes that function well, and from which the others can learn without relinquishing independent control. The advantage of the Restatement-like treatise *North American Environmental Law* is that it will clarify for jurists and policymakers which portions of the trilateral legal corpus are compatible across borders. And if the CEC's governing authorities wish to grant it a more interventionist role, it will be able to act in a knowledgeable, targeted fashion.

⁸ See ROBERT A. PASTOR, *THE NORTH AMERICAN IDEA: A VISION OF A CONTINENTAL FUTURE* 10-16 (2011).