
The Commission for Environmental Cooperation as a model for promoting sustainable development in the Americas

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Abstract: The North American Commission for Environmental Cooperation (CEC) has been touted as a regional model for strengthening environmental cooperation and sustainable development related to free trade regimes. This study reviews CEC's development since 1994 in the context of its ambitious North American Free Trade Agreement related mandate. Drawing on its own documents, government records and scholarly assessments, the study traces the CEC's steady decline in response to limited support by its member governments. The CEC has nevertheless gained a valuable niche in North American environmental management, spotlighting problems, strengthening public participation and building capacity for environmental cooperation in critical areas of regional environmental importance. Thus we argue the CEC is at least a partial template for building environmental protection into free trade agreements in the hemisphere. Future agreements should be informed by the CEC's shortcomings as well as its successes if they wish to strengthen trade-related environmental protection in the Americas.

Keywords: Commission for Environmental Cooperation; North American Agreement for Environmental Cooperation; NAFTA; North American Free Trade Agreement; sustainable development.

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1 Introduction

The North American Commission for Environmental Cooperation, better known by its acronym, CEC, is a stepchild of the North American Free Trade Agreement (NAFTA) that entered into force on 1 January 1994. The CEC is something of an institutional Cinderella. Born of civic concern with free trade's potential to erode environmental standards region wide, it has been held up as a regional model for holding governments more accountable to their public in trade-related environmental matters and as a useful mechanism for strengthening bilateral and multilateral cooperation for environmental protection and sustainable development. On the other hand, over its 16-year institutional life, it has been starved by its member governments and shunned by some environmental organisations whose protests and lobbying in the run-up to NAFTA were seminal to its creation.

While the CEC is not the only trade-related institutional model for advancing international environmental cooperation, it is the first to have the region's dominant trading partner, the Americas, as a member, and the organisation with the longest track record in this policy domain. This alone ensures that CEC is subject to considerable scrutiny as advocacy groups and politicians move to strengthen the environmental conditions attached to trade agreement approvals within the hemisphere.

This paper offers both an overview and a critique of the CEC's achievements and considers its utility as an institutional model for harnessing trade to sustainable development in Americas. We review the CEC's role and achievements in the context of its foundational expectations as well as the much more restricted scope of its present work that reflects its adaptation to the expectations of its member governments. It is our view that any serious consideration of the CEC's relevance for advancing sustainable development in the US hemisphere must be gauged against these twin sets of ambitions for its role as a constituent part of the evolving regime for environmental management in the region.

This paper proceeds chronologically, first describing the CEC's formation and its formal mandate, followed by an account of its development and contraction in the face of the institutional limits imposed by its member governments and public criticism. It then reviews the CEC's accomplishments within this more restricted frame of policy reference, focusing first on its enforcement functions and second on its substantive programme objectives for tri-national environmental cooperation. This paper concludes by reflecting on those aspects of CEC's structure and functions that may well be worth emulating or incorporating in future binational or multilateral agreements related to mitigating trade's adverse effects on environmental protection within the hemisphere.

A qualitative methodology is used in developing this assessment. Our account and interpretation of the CEC's work is predicated on a thorough canvass of the scholarly literature and journalistic and advocacy group commentary on the CEC over a decade and half. We also review the CEC's own extensive reports and the internal documents produced by its citizen's advisory committees and other government documents and

reports that comment on its mission and performance. This study builds on earlier scholarly assessments of the CEC by reporting on the CEC's institutional changes and modified programme of work since 2004 and considering its relevance as a model for future trade-environment agreements as trade liberalisation advances in the US hemisphere.

2 Greening NAFTA: CEC's impossible mandate

The CEC, like NAFTA itself, may be characterised as a policy outcome of an epic clash between two sets of normative values, those associated with free-market growth and those associated with sustainable development (Audley, 1995, p.333). The NAFTA debate, waged over two-and-a-half years and culminating in the historic November 1993 agreement, not only pitted environmentalists against traders, but also opposed environmentalists against themselves. This fractured coalition weakened the thrust of environmental advocacy at the time and ensured that any policy solution supported by the accommodationist wing of the environmental movement, those favoured by the Clinton administration and key actors in the US Congress, would confront a highly sceptical advocacy community once the deal was done.

Without reviewing the historic coalition politics that produced the North American Agreement on Environmental Cooperation (NAAEC) and the CEC – that story is well told elsewhere (Audley, 1995, 1997; Grayson, 1995; Johnson and Beaulieu, 1996; Mayer, 2002; Torres, 2002), the CEC's mandate remains an extraordinary achievement that at once captures both the aspirations of environmentalists at the time as well as their political weaknesses. To begin, the NAAEC created a tripartite institutional structure: a Council of Ministers (the environmental ministries of Canada, the Americas and Mexico), the CEC and a Joint Public Advisory Council (JPAC) consisting of business, government and environmental representatives from the three countries. Second, the mandate as set out in Parts I–III of the Agreement – particularly in Articles 1–7 referring to the responsibilities of the Parties and Article 10 referring to the functions of CEC's governing body, the Council – touches upon practically every conceivable aspect of what might reasonably fall within the realm of sustainable development policy for North America. Reflecting the Rio Declaration and Agenda 21, the Agreement's objectives as set out in Article 1 are to:

- foster the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generations
- promote sustainable development based on cooperation and mutually supportive environmental and economic policies
- increase cooperation between the Parties to better conserve, protect and enhance the environment, including wild flora and fauna
- support the environmental goals and objectives of NAFTA
- avoid creating trade distortions or new trade barriers
- strengthen cooperation on the development and improvement of environmental laws, regulations, procedures, policies and practices

- enhance compliance with, and enforcement of, environmental laws and regulations
- promote transparency and public participation in the development of environmental laws, regulations and policies
- promote economically efficient and effective environmental measures
- promote pollution prevention policies and practices.

Part II, Article 2, which stipulates the 'general commitments' of the Parties in NAAEC's section on 'Obligations', specifies that each member country within its own territorial jurisdiction shall:

- periodically prepare and make available reports on the state of the environment
- develop and review environmental emergency preparedness measures
- promote education in environmental matters, including environmental law
- further scientific research and technology development in respect of environmental matters
- assess, as appropriate, environmental impacts
- promote the use of economic instruments for the efficient achievement of environmental goals.

It further appeals to the Parties to consider implementing in law any recommendations developed by the Council under Article 10 (5) (b) of the Agreement promoting public access to government environmental information and the development of appropriate limits for specific pollutants, and it further appeals to the Parties to consider prohibiting the export of any pesticide or toxic substance whose use is prohibited within a Party's territory. Articles 3–7 of Part II refer to levels of protection, publication of laws, regulations and rulings applicable to the Agreement, government enforcement action, private access to remedies and procedural guarantees.

Under Part III, d 10(2) of the Agreement, the governing Council was authorised to consider and develop recommendations on an exceptionally broad range of matters including:

- comparability of techniques and methodologies for data gathering and analysis, data management and electronic data communications on matters covered by this agreement
- pollution prevention techniques and strategies
- approaches and common indicators for reporting on the state of the environment
- the use of economic instruments for the pursuit of domestic and international agreed environmental objectives
- scientific research and technology development in respect of environmental matters
- promotion of public awareness regarding the environment
- transboundary and border environmental issues, such as the long-range transport of air and marine pollutants

- exotic species that may be harmful
- the conservation and protection of wild flora and fauna and their habitat, and specifically protected natural areas
- the protection of endangered and threatened species
- environmental emergency preparedness and response activities
- environmental matters as they relate to economic development
- the environmental implications of goods throughout their life cycles
- human resource training and development in the environmental field
- the exchange of environmental scientists and officials
- approaches to environmental compliance and enforcement
- ecologically sensitive national accounts
- eco-labelling
- other matters as it may decide.

An astute reader of this mandate will quickly adduce that its breadth and scope in matters of environmental cooperation is at once both its strength and its weakness. From the very beginning NAAEC's designers intended that the agreement provide symbolic assurance to NAFTA's many environmental critics while allowing its member governments almost unlimited discretion as to its substance (see Block's comments, 2003, p.26). Astute readers will also quite fairly surmise that the laundry list of mandate values and potential functions, apart from expressing a theology of good intentions, reflected to a substantial degree what the governments were already doing at the bilateral or multilateral levels (Charnovitz, 1994, pp.273–274). What was new about NAAEC was simply that it took those particular extant commitments and their underlying statutory and diplomatic structures and placed them in a new formal framework encompassing the North American region. Furthermore, it loosely justified this new structure for trilateral environmental cooperation on the basis of the expected intensification of regional trade, though NAAEC's trade role and the CEC's institutional authority in this aspect were slender at best. There was little in NAAEC that really bound the governments as such or compelled any particular regulatory outcome in tri-national environmental affairs. This was plain to environmental critics at the outset (Carlsen and Salazar, 2002, p.222).

There are, however, several exceptions to this broad and somewhat critical characterisation of NAAEC. Responding to the very real concerns in the advocacy community and fear the mechanism would lack legitimacy absent some sort of compelling force, the agreement's drafters wrote in provisions for independent investigations, including citizen initiated investigations of non-enforcement of environmental laws, and a quasi-judicial provision for arbitration and sanction in the instance of a Party's non-compliance with an arbitral decision. These provisions were fairly soft enforcement procedures, based more on cooperation than confrontation (McFadyen, 1998, p.1). In Part III of the Agreement, Article 13 provides that the Secretariat – CEC's administrative body subject to the authority of Council – may prepare a report on any matter within the scope of work of the annual programme as well

as on any matter it deems necessary provided it so informs the Council and provided that two-thirds of the Council fails to object within 30 days of notification. Articles 14 and 15 authorise the Secretariat to consider citizen-initiated claims that a Party is failing to enforce its environmental laws. The Secretariat may initiate an investigation on the basis of such claims when it believes it may be warranted and if authorised by two-thirds of the Council, proceed with a factual record investigation. The findings may be made public if two of the three Council members consent. In addition, under Part V, Articles 22–36, should prior consultation fail, the Council by a two-thirds vote may establish an arbitral panel to consider the matter “where the alleged persistent pattern of failure by the Party to effectively enforce its environmental law relates to a situation involving workplaces, firms, companies, or sectors that produce goods or provide services” (NAAEC, Article 24 in CEC (1998, p.26)). If the panel’s final report upholds the allegation of persistent failure to enforce and if the offending Party refuses to agree to or abide by an action plan to remedy the problem, a monetary enforcement assessment may be imposed by the arbitral panel. If refused, the other Parties may elect to deny NAFTA benefits to the offending Party up to but not exceeding the monetary amount of the fine (NAAEC, Article 36 in CEC (1998, p.34)).

These enforcement measures remain the most controversial part of the CEC’s portfolio of responsibilities. While NAAEC’s dispute resolution and arbitration provisions have yet to be used and have been characterised as ‘soft teeth in the back of the mouth’ with respect to NAFTA related environmental disputes (DiMento and Doughman, 1998), they have bolstered NAAEC’s credibility. They provide at least one avenue for holding governments accountable for enforcing their environmental laws. The CEC’s investigative functions, as weak as they are in compelling administrative action, rank among its most visible and influential mechanisms for directing attention to environmental enforcement problems in North America (DiMento and Doughman, 1998, p.681).

In sum, the CEC was designed to embody the aspirations of environmental concern without conceding much at all in matters of sovereignty and national commitment to trade and environmental affairs. As is true of many multilateral bodies, its role and functions are almost completely determined by its member governments. Public involvement in CEC’s agenda and its work is mostly indirect, as the governments remain its principal stakeholders and dominant constituency. The historic division among leading environmental advocacy groups at the time of the NAFTA debate had the unfortunate effect of weakening the advocacy community as a potential body of stakeholders invested in CEC’s activities, further empowering the governments in CEC’s affairs. It is not too much a stretch to argue that while CEC was created to fill a very visible hole in the North American environmental regime, it has been relegated to an institutional purgatory by the governments since its inception. To better understand this predicament, it is useful to review the scholarly criticisms levelled at the agency since it came into being and how it has responded to these criticisms over time.

3 In search of a role: criticism and transition at the CEC

After opening its doors in January 1994, the CEC struggled to find its place in the North American environmental policy regime. Although most scholars agree it has found a niche (Hufbauer et al., 2000; Knox and Markell, 2003, p.13), the CEC accomplished this

by incrementally scaling back its work programme, particularly in response to its respective four-year and 10-year reviews (CEC, 2004a,b).

From the outset the CEC drew criticism. Critics pointed to its comprehensive yet non-imperative mandate, its limited role in trade administration and the frailty of its regulatory authority. Environmentalists, faulting CEC's design, held low expectations. Their concerns hit on all three parts of CEC's operations: its exceptionally expansive mandate; how the Articles 13–15 procedures would work in holding the Parties accountable for enforcing their environmental laws and how the Secretariat would perform in response to citizen-initiated complaints; and whether CEC would be able to carve out a role in regulating the environmental aspects of NAFTA trade. Many environmentalists doubted the governments would support the institution financially.

The CEC's former Executive Director, Greg Block, recalls the organisation's first three years as posing a special challenge in priority setting (Block, 2003, p.27). Attempting to steer a path between the advices of those who counselled CEC to focus on a few non-controversial service functions and do them well and those who wanted it to carve out an influential role in the regulatory arena, the CEC's 1995 work programme contained seven programme areas incorporating more than 30 initiatives. Erring on the side of ambition, the CEC's Secretariat's 'creative experimentation', as Block describes it, aimed to maximise the number of policy opportunities that might be available in the complex context of trilateral, largely intra-governmental, negotiations concerning its role and functions. The Secretariat's efforts ran aground, however, on the twin shoals of its financial constraints and the unwillingness of the three governments to cooperate in developing key initiatives (Block, 2003, p.29).

The problem of weak financial support surfaced early in CEC's development and persists to the present day. NAAEC's Article 43 provides that each country will contribute equally to the Commission's budget and "No Party shall be obligated to pay more than any other Party in respect to an annual budget" (CEC, 1998, p.36). At the time of its founding, the expectation was that each country would contribute a minimum of US\$5 million to the Commission, but this never materialised. From the outset, the CEC had to survive on a per-country contribution of US\$3 million, for a total annual base of \$9 million dollars. This remains unchanged. The several flaws in the funding formula included ensuring that CEC's budget would be held hostage to the lowest common denominator among the Parties in terms of willingness to pay (Hufbauer et al., 2000, p.21), and failing to adjust for national differentials in economic capacity. The result was a severe constriction of its financial capacity which has grown more acute in real dollar terms over time, particularly after 2003 when the appreciation of the Canadian Looney against the dollar hurt the Commission (CEC, 2004a,b, p.8).

In view of these inter-Party divisions concerning CEC's role and functions and financing, the problem of tri-national cooperation on a common regional environmental programme was addressed by shrinking CEC's work. This contraction came about after a highly critical independent review of NAAEC performance commissioned by the Parties in 1998. The review called CEC to task for overextension, a lack of focus and failure to engage in long-term programme planning. The CEC's subsequent 'Shared Agenda for Action', released in June 1998, downsized radically around the twin themes of promoting 'Environmental Sustainability in Open Markets' and 'Stewardship of the North American Environment'. These programmes were to be implemented and evaluated on a rolling three-year basis (CEC, 1998, p.7).

By 1998, the CEC was retreating from the broader aspirations associated with the NAFTA debates and the early expectations of many in the environmental community. The merits of its more focused approach were certainly arguable, even persuasive given its resource constraints and the accountability practices of government units in Canada and the Americas. That said, CEC's retreat did little to alter the scepticism concerning its potential among environmental advocacy organisations.

The Commission's subsequent work programme centred on environmental cooperation in four programme areas located in the twin overarching domains of environmental sustainability in open markets and stewardship of the North American environment: environment, economy and trade, conservation of biodiversity, pollutants and health, and law and policy. The 25 specific programmes across these four programme fields for the 1999–2001 three-year period are presented in Table 1. This agenda remained fairly constant until 2003 when the number of programmes was cut to 20, dropping or combining at least five programmes, two of these in the area of pollutants and health/North American air quality issues and at least one programme in each of the other major programme areas (CEC, 2003, p.3). One of the Commission's more visible capacity-building mechanisms, a small seed-grant programme, the fund for environmental cooperation (NAFEC), was also abandoned at this time (Silvan, 2004).

Table 1 CEC's programmes, 1999–2001

<i>Environment, economy and trade</i>
Understanding linkages between environment, economy and trade
1 Emerging trends in North America
2 NAFTA environmental effects
Green goods and services
3 Sustainable use of primary natural resources: agriculture
4 Facilitating conservation of biodiversity as it relates to trade in wildlife species
5 Sustainable tourism in natural areas
<i>Conservation of biodiversity</i>
North American biodiversity conservation strategies
1 Strategic directions for the conservation of biodiversity
2 Ecosystem monitoring initiative
Stewardship for shared terrestrial and marine ecosystems and transboundary species
3 Cooperation on the protection of marine and coastal ecosystems
4 Mapping marine and estuarine ecosystems of North America
5 North American marine-protected areas' network
6 North American biodiversity conservation mechanisms
Improving information on North American biodiversity
7 North American biodiversity information network
<i>Pollutants and health</i>
Cooperation on North American air quality issues
1 Facilitating tri-national coordination in air quality management
2 Developing technical and strategic tools for improved air quality in North America
3 Environmental cooperation in the NAFTA transportation corridors
4 Regional cooperation towards improved understanding
5 Eventual implementation of the clean development mechanism and joint implementation

Table 1 CEC's programmes, 1999-2001 (continued)

Sound management of chemicals programme
6 Sound management of chemicals
North American pollutant release and transfer register programme
7 North American pollutant release and transfer register
Pollution prevention
8 Shared approaches to by-product synergy
9 Capacity building for pollution prevention
<i>Law and policy</i>
Environmental standards and performance
1 Cooperation between environmental laboratories
Enforcement cooperation
2 North American regional enforcement forum
3 Enforcement and compliance capacity building
4 Indicators of effective environmental enforcement

Source: CEC (1999, p.i).

This shrinkage proved a portent of even further programme contraction with the release of the CEC's Ten-Year Review (CEC, 2004a,b). While the tri-national Ten-Year Review and Assessment Committee (TRAC) praised the Commission for a number of highly significant achievements over its ten years of operations, it flagged a number of key concerns that, in its view, had constrained the Commission from realising 'its full potential' (CEC, 2004a,b, p.5). As outlined by TRAC, the five leading concerns were:

- 1 after ten years, the main CEC stakeholders, including the Parties, the Secretariat and the JPAC, have not been able to develop a common vision about the CEC mandate or their respective roles, causing considerable friction
- 2 the NAAEC's most innovative public participation mechanism, the citizen submissions process, has become mired in controversy
- 3 the CEC work programme is spread thinly and its results are not always clear
- 4 the links to, and influence on, trade institutions and mechanisms remains weak
- 5 the CEC has not reached out sufficiently to business and indigenous groups.

More specifically, the Committee noted:

- 1 the need to engage more fully the environmental ministers of the three countries
- 2 the need to clarify the roles and responsibilities of the CEC's three main bodies
- 3 the need for more effective outreach to key stakeholders and the mobilisation of the CEC's diverse constituency across the three countries
- 4 the need for a sharper programming focus reflecting the CEC's priorities, its financial resources and increased demands for demonstrated results
- 5 the need to establishing an adequate funding base for the future

- 6 the need for integrating capacity building into the CEC's activities with an emphasis on helping Mexican government institutions and private organisations strengthen the implementation of environmental law and policies.

In response to TRAC's criticisms, the CEC, in 2004, adopted major changes to its operational plan. These changes were based on a 'goals > objectives > strategies > targets' approach intended to facilitate better review and assessment of its activities and achieve greater operational efficiencies within the constraints of its budget. The new orientation, announced in the CEC's June 2004 Puebla Declaration, laid out a decade-long vision for the CEC centred around the notions that the CEC would: serve as a catalyst for change in partnership with other governmental entities and stakeholders within the North American region; function as a forum to facilitate regional action; generate concrete policy results based on rigorous analysis and policy recommendations in specific programme areas; and provide high-quality compatible data at a North American scale to support sound environmental science (CEC, 2005).

To implement this new leaner, more efficient vision of the CEC's role, a further paring of its priorities and programmes was undertaken in 2005, folding activities in the cooperative work programme around three new overarching priorities:

- 1 information for decision-making
- 2 capacity building
- 3 trade and environment (CEC, 2005, p.9).

This streamlining resulted in 15 such project initiatives – counting just the initiatives in each of the three prioritised areas of work (Table 2).

Finally, facing another period of transition in 2010, the CEC again modified its priorities and programmes. Although its new strategic vision is to be refined throughout 2010 – culminating in the adoption of a new 2010–2015 Strategic Plan – the new strategic focus 'broadly defined by the CEC Council' includes: healthy communities and ecosystems, climate change – low-carbon economy and greening the North American economy (CEC, 2010a, p.3). Changes to the cooperative work programmes increased these:

- 1 environmental information
- 2 environment, economy and sustainability
- 3 enforcement and compliance
- 4 pollutants and health
- 5 biodiversity conservation.

Table 2 CEC's cooperative work programme's programme, 2007–2009

<i>Priority 1</i>	<i>Information for decision-making</i>
Project 1	Monitoring and assessing pollutants across North America
Project 2	Tracking pollutant releases and transfers in North America
Project 3	Enhancing North American air quality management
Project 4	Mapping North American environmental issues
Project 5	Reporting on the state of the North American environment
<i>Priority 2</i>	<i>Capacity building</i>
Project 6	Strengthening wildlife enforcement capacity
Project 7	Improving private and public sector environmental performance
Project 8	Building local capacity for integrated ecosystem management and to conserve critical species and spaces
Project 9	Sound management of chemicals
<i>Priority 3</i>	<i>Trade and environment</i>
Project 10	Promoting the North American renewable energy market
Project 11	Encouraging green purchasing
Project 12	Harnessing market forces for sustainability
Project 13	Trade and the enforcement of environmental laws
Project 14	Guidelines for risk assessment of invasive alien species and their pathways
Project 15	Ongoing environmental assessment of NAFTA

Source: CEC (2007, p.3).

Despite an increase in work programmes, the number of projects held constant at 15, some projects were eliminated while others were spliced into more than one project (Table 3).

Mere enumeration of these initiatives, of course, fails to capture real synergies and efficiencies gained by keener prioritising and belt-tightening, or shifts in emphasis within and across issue areas and across regions and countries, or gains in stakeholder support and partnerships emerging from these reforms. The CEC, particularly its Secretariat, has climbed the upside of a steep learning curve in attempting to establish its relevance for each and all of its member countries. But it is also true that the Parties' decision requiring the CEC to pare its programmes and perform them more effectively despite a shrinking budget means, at the end of the day, simply doing less – widening the gap between NAAEC's mandate and its actualities. Among the programmes left by the wayside are NAFEC, monitoring the environmental effects of trade, various programmes related to biodiversity and marine ecosystems, its focus on important transboundary issues and others. CEC's flirt with 'creative experimentation', as Greg Block put it, may well be past.

Table 3 CEC's 2010 cooperative work programme

<i>Environmental information</i>	
1	Mapping North American environmental issues
2	State of the environment reporting
<i>Environment, economy and sustainability</i>	
3	Environmental assessment of NAFTA
4	Supporting the growth of green building
5	Trade flows of North American used electronics
<i>Enforcement and compliance</i>	
6	Trade and the enforcement of environmental laws
7	Strengthening wildlife enforcement
<i>Pollutants and health</i>	
8	Sound management of chemicals
9	Monitoring and assessing pollutants across North America
10	Enhancing North America's air quality management
11	Tracking pollutant releases and transfers in North America
<i>Biodiversity conservation</i>	
12	Conserving marine species and spaces of common concern
13	Conserving the monarch butterfly and promoting sustainable livelihoods
14	Protecting priority conservation areas from alien invasive species
15	Conserving North American grasslands

Source: CEC (2010, p.6).

4 Enforcement: citizen submissions, dispute resolution and legitimacy

Just as the CEC has backed away from programme commitments in regional environmental cooperation, it has likewise retreated from earlier enforcement ambitions. The Commission's Part III, Articles 13–15, investigative mandate and its Part V, Articles 22–36, mandate for dispute resolution were controversial from the beginning but considered by many as the Parties' most serious commitment to resisting a regulatory race to the bottom in environmental protection among the three countries. Opening NAAEC to citizen submissions – requests for formal investigations of alleged failures to enforce national environmental laws – was and is viewed as the acid test of commitment to promoting the values of public participation and transparency in environmental protection for North America (Tollefson, 2002, p.169). As David Markell, who led CEC's legal office early on put it, citizens submissions are intended to shine an 'international spotlight' on the domestic environmental enforcement practices of the countries (Markell, 2003, p.274). At this writing (August 2010), the CEC has received 75 submissions, 62 of which are closed, 13 remain open and commissioned 16 factual records detailing the formal investigation of a party (www.cec.org) (Table 4).

Both the 1998 Independent Review Committee and TRAC noted the governments' resistance to a more expansive citizen-led process of investigation (CEC, 2004a,b, p.43). Even as the Secretariat sought to be even handed and rigorous in vetting Article 14

complaints, the governments have often seen it as exceeding its mandate by failing to demand that complainants exhaust local remedies or provide irrefutable evidence of harm before proceeding with a factual investigation (CEC, 2004a,b, p.43). They also regard it as a potentially costly diversion of administrative resources which may come at the expense of other regulatory needs, a consideration that is particularly acute in Mexico where environmental protection is hard pressed for resources. The Secretariat's occasional public comments on rationale for proceeding with a factual study or in reporting findings in advance of Council approval have also been viewed as meddling. The Secretariat, on the other hand, supported by leading environmental groups, argues that NAAEC confers on it a degree of quasi-sovereign autonomy in this area that is essential if the governments are to be held accountable for enforcing environmental regulations.

Table 4 Citizen submissions made to the CEC from 1995 to July 2010

<i>Year</i>	<i>No. of submissions: (closed records)</i>	<i>No. of factual records publically released</i>	<i>No. of submissions where Council voted not to instruct Secretariat NOT to prepare factual records</i>	<i>No. of submissions (active records by CS date file open records)</i>	<i>No. of open cases where Secretariat considers submission warrants development of factual record</i>
1995	2 (US-2)	0		0	
1996	4 (C-2, US-1, M-1)	1		0	
1997	8 (C-5, M-3)	3	1 (Canada)	0	
1998	6 (C-1, US-1, M-4)	3		0	
1999	2 (US-2)	1		0	
2000	6 (C-1, US-2, M-3)	3		0	
2001	3 (C-1, M-2)	0	1 (Mexico)	0	
2002	5 (C-2, M-3)	2		0	
2003	6 (C-12, M-4)	2		1 (M-1)	1 (M-1)
2004	7 (C-3, US-1, M-3)	1		2 (C-1, US-1)	2 (C-1, US-1)
2005	3 (M-3)	0		1 (M-1)	1 (M-1)
2006	7 (C-2, US-1, M-4)	0		3 (C-1, M-2)	3 (C-1, M-2)
2007	5 (C-3, M-2)	0			
2008	3 (C-1, M-2)	0			
2009	5 (C-2, M-3)	0		4 (C-1, M-3)	
2010 (January – August)	3 (C-2, M-1)	0		2 (C-2)	
Total	75 (C-17, US-10, M-25)	16		13 (C-5, US-1, M-7)	7 (C-2, US-1, M-4)

Source: CEC (2010b).

While the Council had reservations from the outset concerning Articles 14 and 15 procedures and moved to limit the scope of factual investigations, it became more resistive after a procedural review of the process by CEC's JPAC, completed in 2001. The JPAC's 'Lessons learned' report was critical of the Council's actions in this area (CEC, 2001, pp.14–18). While the Council implemented a few of JPAC's recommendations, it failed to embrace much of the document and continued to question the Secretariat's handling of matters. As noted by TRAC in 2004, the Council's actions to limit the reach of factual investigations include (CEC, 2004a,b, p.45):

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

In the minds of many observers, the Council acted outside both the spirit and the letter of NAAEC's mandate, weakening the Secretariat and damaging public confidence in Articles 14 and 15 procedures (Kirton, 2002, p.91). Markell (2003, p.284), a sharp critic, notes, "while the Council retains the authority to veto shining the spotlight in particular directions, the Council cannot decide where the spotlight should shine". These issues endure (Markell, 2005, p.784), although the fact that the last submission where the Council voted to instruct the Secretariat not to prepare factual records occurred in 2001 appears to be a positive sign. Despite this, these issues remain a source of contention, deflecting attention from CEC's accomplishments within the cooperative programme, causing some critics to counsel de-emphasising citizen submissions and abandoning Part V dispute resolution altogether.

The Council has been more generous with the Secretariat in supporting its Article 13 investigations. The Secretariat's capacity to independently initiate investigations was characterised as 'unusual power for an intergovernmental secretariat' (CEC, 2004a,b, p.33). To date, the CEC has initiated five such investigations. While several of these were laced with controversy, advocacy organisations and stakeholders largely agree that this 'spotlight' role has been successful. The Article 13 studies allow the Secretariat to delve into the effectiveness of existing environmental laws and agreements in a way that goes beyond the specifics of enforcement. This 'catalytic' role enables CEC to be proactive in monitoring regional environmental conditions. Critics note, however, that casting a spotlight on important issues, even when that spotlight is based on rigorous science, may lack immediate impact on the governments without strong civic mobilisation behind those findings (Tarlock and Thorson, 2003, pp.230–231). Controversial reports also risk antagonising the governments, as the CEC's investigation of transgenic maize demonstrated in 2004 (EcoAmericas, 2004, p.9). The need for an independent auditor to report on problems of regional environmental import, however, is generally conceded by most commentators (Hufbauer, 2005, p.179).

5 CEC's accomplishments: filling a small space in a large niche

After 16 years and considerable operating retrenchment, even critics tend to agree CEC has achieved a great deal, filling important gaps in North American environmental management, forging and strengthening intergovernmental ties for environmental protection and opening new avenues for public participation in environmental affairs within the tri-national region. CEC's most touted accomplishments were needed and likely would not have been tackled by individual governments in CEC's absence, even though most of the capacity for tri-national environmental initiatives and enforcement rests with member governments. There is little dispute that CEC exerted a catalytic influence on North American regional cooperation in this issue area, building on existing national, bilateral and regional practices.

A persuasive argument can be made, however, that the niche for regional environmental cooperation is much larger than CEC's current operational activities suggest and is much closer to the original scope of its 'creative experimentation' than recent official and quasi-official assessments suggest. The TRAC report and JPAC's assessments were heavily influenced by financial constraints placed on the Commission and often seem to take the form of a quiet and constructive self-censorship aimed at mollifying the governments – the Council in particular – rather than taking a broad view of what is needed in North American regional environmental cooperation. They are also influenced by data and argument suggesting that some of the original rationales for NAAEC's creation, namely, the possible deterioration of environmental standards and the emergence of regional pollution havens, have not materialised in any significant way (CEC, 2002a, pp.13–14, 22; Knox and Markell, 2003, pp.310–311). Such arguments undergird the greater emphasis on the cooperative side of CEC's mandate by the Council and Secretariat.

While much debate over the CEC's performance and role over the past decade centred on the Articles 14–15 process, few dispute that the heart of CEC's role as a regional institution centres on its cooperative programme. This reality has a strong foundation in NAAEC's Article 1 'Objectives' promoting 'sustainable development based on cooperation and mutually supportive economic policies', strengthening 'cooperation among the Parties to better protect, and enhance the environment', strengthening 'cooperation on the development and improvement of environmental laws, regulations, procedures, policies, and practices' and promoting 'transparency and public participation' values in improving North American environmental practices (NAAEC, Article 1, subsections b, c, f and h). As seen above, since 2005 and until 2010 the Council focused CEC's operations for regional environmental cooperation on three broad priorities:

- 1 information for decision-making
- 2 capacity building
- 3 trade and the environment (CEC, 2005, p.9).

The crucial link between each of these priorities is the intent to strengthen civil society and governments, enabling both to better advance sustainable development in North America. A brief discussion of recent operations in these areas is warranted to better appreciate CEC's approach and achievements in advancing its cooperative programme.

5.1 Improving environmental decision making

The CEC's focus on environmental decision making is twofold: the Commission aims to improve decisions affecting regional environmental conditions, assuring that they are scientifically sound, and it works to ensure that decisions respond to public needs and civic interests in and across the member countries. This second element, an obligation to provide all countries' public with open access to information has drawn the most attention and is frequently identified as CEC's crowning achievement (CEC, 2004a,b, p.39).

Public participation is undertaken through both the JPAC and the Secretariat. The JPAC holds public discussions of CEC's direction and priorities and takes these comments to the CEC's Council of Ministers. The meetings, although not as effective as many would like, are unique in their efforts to include the public's concerns in the decision-making process (CEC, 2006; Wirth, 2003). The Secretariat reviews petitions submitted by citizens or organisations and gives the public advice on finding technical expertise on environmental matters. The dissemination of information, in English, French and Spanish, is another achievement of the CEC. The CEC was one of the first international organisations to address public outreach through the World Wide Web and hypertext transfer protocol (http) technologies, supplementing traditional methods of information dissemination.

Other tools, CEC, have created to support public participation include its summary of environmental law in North America, its North American state of the environment report, the North American integrated information system and a newly released programme that tracks pollution via Google Earth. These databases provide an ecosystem wide base, combining biological, political, economic and social data to further inform the public.

In sum, though the CEC's data gathering and information activities may not always influence the decision-making process, the CEC is uniquely mandated to facilitate public participation and to serve the public in this way. The amount of information the CEC provides the public is substantial,¹ and remains a key achievement.

5.2 Building capacity

In the area of capacity building, the CEC has generated numerous mechanisms facilitating collaboration among the countries, non-governmental organisations (NGOs) and industry. Opportunities for collaboration derive from the Commission's public information mandate as well as from discrete programmes aimed at addressing environmental issues of common concern. Two of the most notable are the tri-national biodiversity conservation programme and the addition of Mexico's Register of Emissions and Pollutant Transfers (RETC) to the Canadian and US programmes which require industries to make public pollution emissions information. The CEC was a critical advocate for Mexico's RETC; without the CEC's encouragement, Mexican industries would likely not be held responsible for reporting polluting emissions. In addition to these programmes, the CEC set up funding and technical support allowing Mexican NGOs and indigenous people to obtain and exchange information and technical expertise among themselves and with NGOs from the Americas and Canada. Controversially, NAFEC, a part of this programme which supplied grants for 109 non-profit community

organisations from 1996 to 2003, was discontinued in 2003. Its discontinuation is viewed by some as evidence of a weakening of the CEC's capabilities (Silvan, 2004, p.3). Overall, the CEC does appear to be attempting to improve their capacity building – such programmes are slated for greater funding in CEC's latest budget.

5.3 Advancing environment and trade

The CEC's work on environment and trade remains controversial. Supporters believe the Commission has been a critical asset in dealing with specific environmental problems related to the economic integration of NAFTA. Critics suggest the Commission has been ineffective mainly due to the fact the CEC is subordinated to the economic elements of NAFTA. Some go so far as to suggest the CEC has indirectly legitimised the environmental deficiencies embedded in NAFTA's trade and investment clauses, and that it has failed to establish a real commitment to the environment and sustainable development.

While the CEC's efforts in this area are disappointing to many observers, most agree its problems are structural and to some extent a function of an overly narrow emphasis on trade as opposed to the more secular complex of economic factors associated more broadly with economic growth. The CEC has never had a strong policy link to NAFTA's trade secretariat and decision-making process, diminishing its ability to gain the attention of the governments for trade-related environmental concerns. It has had modest success on the analytical level, crafting a sophisticated framework to assess trade effects on the North American environment that has been generally well received in the advocacy community if not by the governments (Kelly and Reed, 2003, p.102; Whitehouse, 2006, p.252). CEC sponsored research, utilising this approach, identified a number of regional trade-related problems, particularly in the area of transportation and transportation corridors, energy and hazardous waste exports. The intermingling of trade effects with other economic variables, however, exposes even rigorous research in this area to criticism. More recently, the CEC has sought to refocus efforts in this area towards promoting green consumption and other less controversial grassroots measures (fair trade, energy efficient, eco-building solutions, etc.) that are trade compatible and a good deal less controversial than exposing trade practices to government regulation.

6 CEC as a model: extracting lessons for the hemisphere

As analysts have persuasively argued, the CEC's post-1994 record and its uniqueness as the first regional institution devoted exclusively to the promotion of international environmental cooperation make it a model for consideration as other countries enter into bilateral and multilateral trade agreements with the Americas, Canada and each other. The real issue is not whether CEC is a model – certain features were incorporated into the Dominican Republic–Central America Free Trade Agreement of 2005 (DR-CAFTA) – but whether it is an attractive model from which to draw in addressing the trade-environment policy nexus and which aspects of its achievements and its difficulties should be taken into consideration in crafting new regional trade and environment deals. From an environmental advocacy point of view, there is clearly much to admire as well as despair in CEC's story even when seen from a pragmatic, less ideologically driven point of view.

Most worthy of emulation, certainly in our view, are CEC's comprehensive mandate for advancing environmental protection and sustainable development in the region, its strong emphasis on promoting administrative transparency and public participation in environmental affairs in the North American region, the relative independence of its Secretariat and its ability to 'spotlight' enforcement problems through the citizen submissions process, the independence of its citizen advisory board, JPAC and its ability to capitalise on a very limited budget to realise significant advances in environmental cooperation in important issue areas of regional scale. These goals, institutional bodies, procedures and substantive achievements have garnered well-deserved praise from the environmental community and are the features most frequently singled out for commendation by independent audits.

No international organisation can hope to satisfy all interested constituencies, however, and none is without flaws. After 16 years of operations, a number of CEC's persistent institutional flaws and operational shortcomings are now evident. First and foremost is the funding formula and the Parties' respective willingness to support CEC's Secretariat with sufficient funds to manage both its substantial cooperative agenda and a growing utilisation of its citizen submission process (Hufbauer and Schott, 2004, p.178). Funding is central to the effectiveness of any international organisation and often its most visible constraint. Funding is also highly political. What is notable about the CEC funding formula is that it is based on parity, which has clear symbolic value from a diplomatic perspective. Parity, however, is quite arguably an inadequate model for supporting a regional institutional mandate for environmental protection in the context of significant variation in development levels among the parties and consequent variation in the capacity to pay. Where significant development differentials exist among the participating parties, some compensatory funding mechanism will almost certainly be an improvement in assuring adequate funding of an institution's mandated functions.

As seen above, the CEC has also run-up against various governance challenges, particularly in the area of citizen-based investigations. The TRAC's conclusions concerning a need for renewal of commitment to the CEC at executive levels of the three member countries and the need to clarify the roles and responsibilities of CEC constituent bodies as they relate to its mandate should certainly be heeded. The Secretariat's independent role in vetting citizen's allegations of 'failure to enforce' should be insulated from political meddling by the ministers. The Secretariat itself should be better endowed with the capacity to offer technical assistance in developing citizen allegations that appear to have merit in initial review.

Perhaps CEC's greatest failure, at least in certain quarters, is its limited impact on trade practice in North America. A number of specialists argue the failure to include an environmental chapter in NAFTA either incorporating CEC or directly linking CEC to NAFTA implementation virtually ensured CEC's marginalisation in this area. There is certainly a near consensus among analysts that the NAFTA/NAAEC lesson is that some environmental provisions should be incorporated in all future trade agreements and that NAFTA's environmental provisions could be improved upon, to include tightening normative language and provisions for production and processing standards and greater care with investment rules (Deere and Esty, 2002, pp.334-335).

The CEC's effort to assess trade-related environmental effects has had mixed results. Where the Secretariat has identified trade effects, as in the case of its 2004 report on 'Maize and Biodiversity', it has been sharply criticised (EcoAmericas, 2004, p.9; USTR, 2004) – despite the report's application of the CEC's well-respected methodology for

examining trade's effects on the environment (CEC, 2002b; Kelly and Reed, 2003, p.101). On the other hand, the CEC's efforts to rigorously examine this relationship have stimulated and helped refine trade assessment methodology by other international organisations (CEC, 2004a,b, p.27). The CEC has also generated data and insights that have opened further space for public participation in environmental policy within the tri-national region (Antal, 2006, p.188).

The difficulty in establishing scientifically rigorous relationships between trade practices and environmental conditions is well established but is not in itself a sufficient reason to abandon this aspect of CEC's mandate (Gibson and Walker, 2001, p.453). Nor does the fact that environmental standards and conditions have improved in some areas in the absence of evidence of a downward spiral in environmental practices provide a sufficient argument for its abandonment. While this area of the Commission's work will continue to be controversial, both the analysis itself and the ability to bring credibly documented adverse effects to the attention of the governments is vital, particularly where trade agreements engage nations at varying levels of economic complexity and public sector development.

At the level of the cooperative programme, the need for sustained and broadened outreach is also clear. Outreach is key to effective mobilisation of citizen participation in CEC's various substantive programmes. Both JPAC and TRAC have identified indigenous peoples, business organisations and academia as stakeholder groups warranting greater attention from the Secretariat. Reaching out to stakeholders, however, is not simply a matter of inviting them to table; it often requires active support and capacity building, an area where the CEC has retreated in recent years. Such action is fully consistent with recent recommendations urging that CEC augment its capacity-building efforts with an emphasis on Mexican government institutions and civil society organisations (CEC, 2004a,b).

As future trade agreements are being drawn up, they should certainly take these lessons into consideration. Recent initiatives suggest, however, that while some of the more benign elements of CEC's experience are being adapted in agreements like DR-CAFTA,² US-Panama, US-Colombia and US-Peru, US trade negotiators have been much less willing to consider NAAEC's weaknesses and build in compensatory reforms.

The 2005 DR-CAFTA agreement is a case in point. Proponents of the accord, to include the US Trade Representative (USTR) and corporate advocates such as the Business Roundtable, are quick to argue that DR-CAFTA was a 'groundbreaking' agreement, the first trade accord to incorporate comprehensive environmental protections directly into the Agreement's text (Business Roundtable, 2005; USTR, 2004). Also touted were its citizen submissions process, voluntary mechanisms, to include market-based incentives for environmental improvement, its capacity-building commitments, and formal recognition of obligations under other multilateral agreements for environmental protection and conservation (Business Roundtable, 2005, p.1). These advocates argue the Central American regional Environmental Cooperation Agreement (ECA), signed in February 2005 under the auspices of the Organisation of American States and linked directly to DR-CAFTA, should reinforce the cooperative elements of the DR-CAFTA environment regime.

The Agreement's critics, including a veritable A list of leading environmental advocacy organisations (CIEL, 2004), point to the fact that in the environmental chapter alone, Chapter 17, there is no express provision that a country maintain or effectively enforce environmental laws, no stipulation of enforceable standards of corporate

responsibility, nor any commitment of the governments – through DR–CAFTA’s ECA’s Environmental Cooperation Commission – to follow up or enforce factual findings or recommendations by the Secretariat. They also note that neither the Council nor the Secretariat is truly independent of the Trade Commission, that financial support for Chapter 17 remains largely unspecified, that its Secretariat structure was left unspecified (it has since been constituted as an quasi-independent unit within the Secretariat for Central American Economic Integration (SIECA)), and that there is no mandate whatsoever to examine or report on trade effects on the environment of its member states (CIEL, 2004; DR–CAFTA, 2005; Global Exchange, 2005; SIECA, 2006; USDS, 2005).

The secular drift of these recent trade-environment agreements in the hemisphere, with the Americas playing a guiding role, is clearly to play down the challenging and costly elements of environmental administration in favour of the less controversial aspects of environmental cooperation. Even the CEC has been headed in this direction, with its recent operational plans stressing its roles as a catalyst of needed regional environmental initiatives, as a convener and forum for dialogue on regional environmental affairs, and as coordinator of regional scale networking among governments and civil society with the goal of building capacity for environmental protection (CEC, 2004a,b, p.6). Such roles are attractive in an environment of resource scarcity and governmental contention over its roles and functions. Yet as Block put it so well in 2003 (p.35), to shunt CEC off as a “mere forum for discussion and coordination”, or “primarily a tool to gather and exchange information ... would be a mistake”. If this is true of the CEC in North America, it is even more true to trade-environment arrangements where the development differentials are even more pronounced that those among these three card-carrying members of the OECD. As the trade-environment debate moves on to Panama, Columbia, and a possible free trade zone for the Americas, it behooves civil society and the governments to press forward with a more demanding agenda for sustainable development and the environment (Zepeda et al., 2009, p.18).

7 Conclusion

This analysis reveals the CEC as an international organisation endowed with an ambitious mandate to promote environmental cooperation in North America and guard against lax enforcement of environmental law but one which has suffered from the tepid support of its member governments since its inception. The Parties reluctance to finance the CEC led it to sharply restrict its scope of work within a decade of its formation. Within this restricted functional domain, however, the CEC has made real contributions in spotlighting regional environment and conservation problems, strengthening the basis for regional environmental decision making, enhancing governmental capacity for environmental enforcement, and promoting eco-friendly trade practices.

A number of lessons may be gleaned from the CEC’s development that should be considered in crafting environmental protections in future agreements aimed at mitigated the environmental effects of trade. We argue that the CEC’s broad mandate in the environmental area, the partial independence of its secretariat in conducting certain types of environmental investigations and spotlighting environmental problems, the autonomy of its citizen advisory committee, its commitment to advancing public participation in environmental decision making and its ability to catalyse instances of tri-national environmental cooperation are all worthy of emulation. On the other hand, the CEC’s

parity-based funding formula, the Secretariat's limited financial and regulatory autonomy in relation to its member governments, its weak statutory link to trade regulation and limited capacity for stakeholder outreach hamper its capacity to promote sustainable development and environmental improvement in North America. As future trade-environment accords are crafted in the Americas, their drafters are encouraged to draw on CEC's institutional strengths, not its weaknesses, in their design.

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Notes

¹In 2004, it was reported that due to the pressure from the US Government, the CEC did not publish a report (i.e. did not make the information public) until after the November 2004 Presidential elections in the Americas. The suggestion is that releasing the data would have meant fewer votes for the Bush campaign from the grain and Hispanic sectors (Alanis, 2005).

²Subscribing parties include Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua and the Americas. A separate agreement has been negotiated with Panama and is now under consideration by the US Congress.