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TABLE RONDE NATIONALE SUR L'ENVIRONNEMENT ET L'ÉCONOMIE

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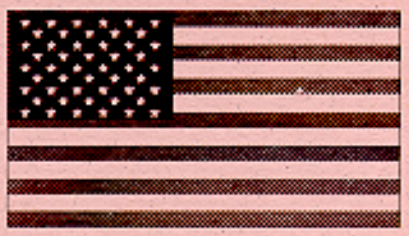

SHAPING CONSENSUS:
THE NORTH AMERICAN COMMISSION ON THE ENVIRONMENT AND NAFTA

REPORT OF A WORKSHOP
APRIL 7, 1993
WASHINGTON, D.C.

EDITED BY:

SARAH RICHARDSON

FOREIGN POLICY ADVISOR
NATIONAL ROUND TABLE ON THE
ENVIRONMENT AND THE ECONOMY

National Round Table on the Environment and the Economy

Table ronde nationale sur l'environnement et l'économie

EESI

Environmental and Energy Study Institute

National Round Table on the
Environment and the Economy (NRTEE)
1 Nicholas Street
Suite 1500
Ottawa, Ontario
K1N 7B7

Phone (613) 992-7189
Fax: (613) 992-7385

Environmental and Energy Study Institute
122 C Street NW, Suite 700
Washington, D.C. 20001-2109

Phone: (202) 628-1400
Fax: (202) 628-1825

Desktop Publishing: Patti Bacon
NRTEE

Assistant: Sarah Shadforth
NRTEE

Aussi disponible en français

SHAPING CONSENSUS:
The North American Commission on the Environment and NAFTA

Edited by:

Sarah Richardson

Foreign Policy Advisor
National Round Table on the
Environment and the Economy

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PREFACE

As Americans, Mexicans and Canadians are trying, through the NAFTA, to put together a comprehensive trade pact which will lead to the creation of a market of 360 million consumers, environmental issues are emerging at the forefront of the debate through the arduous negotiations of a parallel North American Environmental Agreement. This political process creates an opportunity to discuss continental environmental cooperation and may even provide room for the consideration of a sustainable development agenda shared by one of the most powerful nations on earth, a highly developed country to its north, and a developing neighbour to its south.

The current negotiations provide a chance to start building a North American vision that allows environmental concerns to be better integrated into the decision-making of the three countries. In the trade area, as well as outside its domain, there are numerous issues to be addressed which are as complex as they are pressing. Yet, this setting provides a challenge where a spirit of compromise and cooperation might produce a landmark agreement on the sustainable management of our common natural environment.

The Canadian National Round Table on the Environment and the Economy, together with the Environmental and Energy Study Institute, decided to provide a forum where the ideas and proposals of many interested organizations and concerned individuals might be heard and debated while the three NAFTA parties are coming to terms with the difficulties and the opportunities created by the crafting of a North American Environmental Agreement. The texts and submissions included in these proceedings are the result of this joint effort.

Pierre Marc Johnson
Montreal, May 1993

INTRODUCTION

In September, 1992, the Canadian, Mexican and American governments concluded negotiations for a North American Free Trade Agreement (NAFTA). Since then, it has become clear that there will be no NAFTA if strong supplemental accords on labour and the environment are not concluded. Particularly in the U.S., there is a great deal of pressure to impose strong side agreements; the United States Trade Representative (USTR) has made a commitment to negotiate these parallel accords before sending the NAFTA implementing legislation to the Congress.

The supplemental agreement on the environment will create a North American Commission on the Environment (NACE). Clearly, the NACE presents a very important opportunity to develop cooperative approaches to the pressing transboundary, regional and global environmental problems of the present and future. The NACE is expected to play an important role in coordinating a continental approach to North American and global environmental problems, addressing the environmental effects of a NAFTA and assisting the NAFTA in its operations that relate to the environment. Some important questions about the extent of its power, especially in regards to enforcement, its structure and its mandate are currently the subject of intergovernmental negotiation and public debate.

As of April 30, 1993 Canadian, Mexican and U.S. negotiators had met twice to develop the shape of the new NACE. The first meeting was on March 17-18 in Washington where broad concepts were discussed. The second meeting was on April 14-15, in Mexico City, the third meeting of negotiators on May 19-21 in Ottawa.

Since early 1991, the National Round Table on the Environment and the Economy (NRTEE), an advisory body to the Prime Minister of Canada, has been working on the linkages between trade and the environment through its Task Force on Trade and Sustainability. The NRTEE was established in 1988. Through its members and their respective spheres of influence, it is charged by the Parliament of Canada to act as a catalyst on important issues of public policy. As part of its ongoing process of research and deliberation on the subject of NAFTA and its supplemental environmental agreement, the NRTEE and the Environmental and Energy Study Institute (EESI) co-sponsored a one-day workshop in Washington on April 7, 1993.

The EESI has a critical role to play in this debate as an advisory arm to the Senate and the House of Representatives on environmental affairs. The EESI is an independent, non-partisan, public policy research and education corporation founded in 1984 by leaders of the Congressional Environmental and Energy Study Conference, the largest legislative service organization in Congress. It is the United States' only independent organization established by Congressional environmental leaders to produce better-informed debate on environmental and energy issues and to generate innovative policy responses. Within the U.S., the shape of the American position and the ultimate acceptance of NAFTA and its parallel environmental accord will be determined largely by the views of the representatives and senators who will seek guidance from experts in their staffs and from policy groups such as EESI.

The April 7 workshop was co-chaired by Pierre Marc Johnson, Chair of the NRTEE's Task Force on Trade and Sustainability, and Gareth Porter, Director of the International Program at EESI. It gave the Task Force an opportunity to exchange concepts, perspectives and research with a knowledgeable group of American and

Mexican experts and stakeholders at a critical moment in the negotiations. The workshop fell immediately after the first negotiating session between the three governments on the prospective NACE.

The day's agenda was designed to deal with some specific issues of function and form of the NACE. Functions related to NAFTA, as well as an independent environmental mandate were considered. An entire session was devoted to the question of enforcement which is provoking considerable controversy in the debate over the NACE and its mandate. In fact, the question of enforcement has been identified as the key, politically, to the acceptability of the NAFTA to the U.S. Congress. The agenda for the Workshop is attached to this report as Appendix A.

The workshop attracted a formidable group of participants, a list of which is attached as Appendix B. The quality of the presentations was very high as was the discussion around the table. Given the critical timing of the workshop, this report is an attempt to ensure that the proceedings are made available to a wider audience. It contains edited versions of the major presentations. The discussion, including areas of consensus and controversy, is reflected in the final chapter of this report.

In Chapter One, Pierre Marc Johnson, Vice Chair of the NRTEE, Chair of its Task Force on Trade and Sustainability, and a former Premier of Quebec, opened the workshop with a brief overview of the issues that will be critical to the debate. These include the mandate of the Commission as it relates to the North American and global environments, and the mechanism, form and funding of NACE. Dr. Johnson also discussed the present Canadian political climate and outlined possible scenarios for NAFTA which is currently making its way through the Canadian Parliament.

In Chapter Two, Eric Biel, Counsel for Trade in the Senate Finance Committee deals with the background of the NAFTA negotiations in the U.S. and the status of the side agreements on the environment and labour. The U.S. is just beginning the process of drafting its NAFTA implementing legislation. Mr. Biel concludes that as long as the supplemental negotiations are completed by the middle of August, it is still possible to have a NAFTA in place by January 1, 1994.

In Chapter Three, Regina Barba, President of the Union of Environmental Groups in Mexico provides the perspective of Mexican non-governmental organizations on the NAFTA and its environmental provisions. She includes an explanation of draft environmental safeguard clauses that have been proposed by Mexican NGOs. Ms. Barba also presented the Mexican NGO position paper on the NACE. She noted that the Mexican government did not yet have a formal position on the environmental commission.

Chapter Four is contributed by Armand de Mestral, a professor of comparative law at the Faculty of Law, McGill University. Professor de Mestral examines the possible functions for a NACE which are related to NAFTA, either generally trade related, or which could be dove-tailed to complement specific articles in the trade agreement. Professor de Mestral cautions against comparing North America directly to the European Community and strongly urges parties to understand the nature and the limitations of NAFTA and to be realistic and cognisant of these limitations when designing a NACE.

In Chapter Five Gary Hufbauer, a fellow at the International Institute for Economics and author of a recent book, NAFTA: An Assessment, provides his views of the functions and form that a NACE should take. He cautions first, however, that the supplemental agreements cannot radically alter the nature of NAFTA and that they will be largely process-oriented. Mr. Hufbauer presents four procedural safeguards that

could be used in conjunction with trade sanctions to prevent their abuse.

Konrad von Moltke, a Professor at Dartmouth College and a Senior Fellow at the World Wildlife Fund presents Chapter Six. Professor von Moltke addressed the relationship between a NACE and the North American environment. He observes that poorly managed trade agreements will continue to threaten the environment, particularly with respect to commodities. Professor von Moltke itemizes the array of environmental issues that North America must deal with. He notes that rather than focusing on problems of the past, the NACE must arm itself to deal with the problems of the future.

In Chapter Seven, Robert Housman, Counsel at the Centre for International Environmental Law speaks to the issue of enforcement and the NACE, including the issues of trade sanctions. He sees NACE as a mechanism to address the perceived shortcomings of NAFTA. The principle trade related issue is that of enforcement. Mr. Housman proposes that at the end of the day, national governments should be able to impose trade sanctions to ensure that countries are enforcing their domestic environmental laws. Complaints that should be considered by a trinational NACE are those that are either trinational, related to transboundary issues or issues of the global commons, or issues that are directly trade-related.

Chapter Eight is presented by Dr. Nina McClelland, President and CEO of the international public health and environment standards and conformity assessment organization, NSF International. Dr. McClelland contributes the perspective of the private sector on creating environmental regulation through the development of standards. The standards community is very interested in the trade of its customers as well as its own trade internationally. As such it is very interested in the process of harmonization of standards within a NAFTA, and appreciates the importance and potential contribution of NACE.

In Chapter Nine, Robert Page, a member of the NRTEE's Task Force on Trade and Sustainability, and Dean of the Faculty of Environmental Design at the University of Calgary, presents a novel suggestion for the design of a NACE. Professor Page calls for a NACE with an advisory body based on the multistakeholder, consensus-seeking National Round Table model.

Bill Snape, counsel at Defenders of Wildlife in Washington, wrote Chapter Ten. Mr. Snape advocates a highly independent NACE secretariat, accompanied by environmental experts with a binding voice in the dispute resolution of environmental disputes and the consideration of any environmental enforcement matter. A NACE should be broader than NAFTA and trade agreements, giving it the ability to consider certain public policy questions that relate to the North American environment and trade. He would also like to see American environmental laws institutionalized vis-à-vis trade agreements and apply laws like *the U.S. National Environmental Policy Act* (NEPA) to trade agreements.

In Chapter 11, Sarah Richardson, Foreign Policy Advisor at the National Round Table on the Environment and the Economy summarizes the major components of the debate on this important issue and institution. Specific instances of consensus and compromise positions building on the common ground among the parties are highlighted as are those areas where the debate remains active.

The views expressed in this report are those of the individual authors alone and do not necessarily reflect the views of either the EESI, the National Round Table on the Environment and the Economy, or the Government of Canada.

1. OVERVIEW AND CANADIAN CONTEXT

Pierre Marc Johnson

In addressing the institutionalization and the various tripartite relationships that are going to be set up in the context of a possible North American Commission on the Environment (NACE), there are two principal categories of concern about the North American Free Trade Agreement (NAFTA) that must be considered. The first is the concern that NAFTA could bring about a lowering of environmental standards and inhibit new policies which permit more rational use of natural resources. A NACE might present the opportunity to take a major step forward towards better integration of environmental and economic issues. This should be reflected in the broadness, scope, and mandate of the institutions to be set up. The NACE negotiators, familiar with the NAFTA in a trade context, have addressed this concern, and the basic notion of cooperative systems to permit a more systematic upward enhancement environmental standards will likely be part of a NACE. It involves compliance with these standards, enforcement, efficiency, linkages with NAFTA; it also involves the exchange of data and cooperative systems between the government and beyond. These are very complicated and important issues; even if trade sanctions and the idea of a supranational enforcement mechanism were taken out of the picture, the area to be explored is wide.

The second element to be considered when designing a NACE are the challenges and opportunities which would allow the present NACE negotiations to become stepping stones to something broader. To address the question, these challenges and opportunities can be divided into three categories: first, the substance to be addressed; second, the areas, categories and issues which concern process and mechanisms; and third, financing.

Substance

With respect to the substance of a NACE, there are three critical issues: the global commons, bilateral transboundary issues, and priority areas on the North American continent. Will the NACE really be significant if it does not address the links between global issues, including climate change commitment schedules, ozone depleting substances, replacement products, use of the high seas and various other global agreements which the three countries are already parties to? Can the NACE really be effective, if it is not concerned with what is going to happen in the GATT on issues related to the environment? How can a NACE take into account the extraordinary number of transborder issues which are already the subjects of agreements between the three countries at the bilateral level covering a broad range of areas including water-flows, atmospheric emissions and migratory species? To what extent will a NACE relate to already existing agreements and the considerable resources put into them? Priority areas in continental activities might include issues such as the green coverage of North America, concerns about energy use and efficiency, and more rational and technologically-advanced coastal water management and development of resources.

Process and Mechanisms

Any institutional set-up which pretends to address adequately issues of process will be both original and a benchmark if it ensures that there is a high degree of public participation. What mechanisms can be put in place to see that this is achieved? To what extent will there be public access to the substance of the NACE, and to the secretariat reporting? Should there be public reporting or not? Should a multistakeholder approach be used? Is the use of a consensus system the best

decision-making approach? Will secretariat arrangements reflect the pooling of existing resources? How can common capabilities be created among the three countries? Should the NACE consist of a meeting of ministers once a year, or should there be more to it than that? Should the mechanics of summitry be associated with a NACE on a regular basis?

Financing

Finally, there is the question of resources and funding for the NACE. This has been addressed by a number of proposals including an ecological enhancement fund, dedicated taxes, diverting funds from the InterAmerican Development Bank, or raising money through philanthropic and private organizations.

A Canadian Political Context

In the Canadian context, considering a NACE involves first looking at the domestic evolution of the NAFTA. The NAFTA implementing legislation is currently at the Committee stage in the Canadian Parliament. It passed through second reading with the imposition of closure, which is a sign of the present government's willingness to see the bill passed. However, there is little time left before the summer recess and there are other significant events which might affect the bill. One must also bear in mind that this bill includes a "rubber-band" provision. This means that once it is adopted, it will be up to Cabinet to decide whether the U.S. and Mexico would comply adequately with what the Canadian parliament has adopted. Technically, therefore, if Canada passed the bill before it is adopted in the two other countries, it is still possible for Cabinet to decide that the compliance legislation in the two other countries is not satisfactory in the Canadian view.

It is possible that the NAFTA implementing legislation will pass before the end of June, 1993, but it is unlikely. These are very substantive provisions, and that timetable would give it only a month and a half in committee.

Politically, other events may also affect NAFTA's passage. First of all, the opposition parties in Canada are strongly opposed to NAFTA. The Liberal Party has said that it will reopen the Agreement and the New Democratic Party (NDP) is dead set against it. In the provinces, NDP governments have been elected in British Columbia, Saskatchewan and Ontario, and they are all opposed to the NAFTA. That is the essential political decor. Added to this is the fact that Prime Minister Brian Mulroney has announced that he will be resigning in June 1993 and he will be replaced by any one of a series of candidates. One might reasonably believe that Mulroney's successor as leader of the Conservative Party and Prime Minister, would continue the policy of the Party as far as NAFTA is concerned.

After a leadership convention in June, there are a couple of possible scenarios. Firstly, assuming that the NAFTA implementing legislation does not pass under Prime Minister Mulroney, who decides to wait for the third reading because he cannot get it through the committee even with the rubber band around it and it is left to his successor; it will be June and there will be an election within a few months. If the Conservatives win the election with a majority, the legislation will probably pass. If the Liberals win the election with a majority, a Liberal government might seek to reopen the NAFTA text. If the NDP wins the election, the legislation will probably die.

Another possible scenario is that the legislation is not passed by June and there is an election which results in a minority government. That would not give the future government much leeway, even in a system which usually gives generous leverage to the Prime Minister because of Cabinet solidarity. A government that is weak in the House, does not have that much power

around such an issue. By this point it would be autumn, government would be weak and the NAFTA would likely be in real jeopardy.

Although NACE was not in the cards until recently, when the American administration changed, suddenly the NACE created an opportunity for many people to come back to the table with ideas that had been overlooked during the NAFTA negotiations. While the issues had subsided a little in Canada, this opportunity has meant that environmental groups are now voicing concerns about the consequences of NAFTA.

NACE will be subject to a couple of obvious constraints in Canada. First, the provincial jurisdiction in environmental matters is reasonably clear in Canada and that makes implementation more difficult. The Federal government will have to get the provinces on board to support any NACE that is negotiated. In Canada, the provinces have jurisdiction over environmental issues and the provinces are the owners of most of the natural resources. This is fundamental as one tries to understand the consequences of international environmental agreements negotiated by the Federal government and how they are implemented in Canada.

A second constraint will be the cost of a NACE. The present Canadian government has abolished recently a wide range of consultative organizations in order to reduce public spending. So in talking about a secretariat and the mechanics of the NACE, one is sure to encounter the cost issue. However there is always the possibility that the NACE could be presented ultimately as a good investment from a Canadian point of view.

2. THE NAFTA AND ITS SUPPLEMENTAL AGREEMENTS: The American Political Context

Eric Biel

In March and April of this year, the United States Trade Representative (USTR), the Environmental Protection Agency (EPA) and the Labour Department met with staffers and committee members on Capitol Hill, and conducted extensive consultations on the North American Free Trade Agreement (NAFTA) and the supplemental agreements on environment and labour that will go along with it. Rufus Yerxa's team met with the various committees of jurisdiction, primarily the Ways and Means Committee and the Senate Finance Committee, but also Environment and Public Works, the Agricultural committees and others. There have been consultations as well with business and labour groups, the various formal trade advisory committees, and other interested parties including environmental groups.

This chapter is based on consultations with the Senate Committee and will provide one view of the political context in the U.S. It will then address the structure, elements, and powers of a North American Commission on the Environment (NACE) and how the NACE might fit together with the NAFTA.

By way of the process, a first round of negotiations was held from March 17-18, 1993 in Washington. These were described as largely conceptual discussions on both the ultimate labour and environmental side agreements as well as a third agreement on import surges which is getting much less attention. Information gathered from the U.S. negotiators suggests that the U.S. used this round of negotiations to lay out a series of possible approaches with respect to creating a NACE and creating a labour commission to deal with labour issues.

The USTR consultations have given interested parties the opportunity to provide some input on how the supplemental agreements might be structured. The negotiations resume April 14-15 in Mexico City, with what is expected to be a much more detailed and indepth set of discussions on the key issues, and some exchange of views on specific proposals.

The U.S. negotiators are hearing two very different points of view on this issue. One is from those who want to push the debate to seek whatever terms are necessary to create meaningful side agreements in both the labour and environmental areas. This would include a NACE with well-defined, strong powers which might include independent enforcement powers, but would certainly include investigative powers of its own.

A second view that the negotiators are hearing from those on the Hill and elsewhere, is one that reflects a fear of possible repercussions for the U.S. of strong commissions. It is fair to say that sovereignty is not used simply by the Mexicans these days. There are a lot of people on the Hill who are using, and perhaps misusing in some regards, the word sovereignty based on fears of the implication for U.S. federal enforcement authorities as well as sub-federal authorities. There are certainly some concerns among state and local officials in regards to a NACE if it were given the power to review some of their own enforcement decisions.

The negotiators are, therefore, in a difficult position; they are really damned if they do and damned if they don't on the Hill because they are hearing both from those who are indicating their ultimate upward or downward vote on NAFTA will depend heavily on what emerges from the supplemental negotiations. The negotiators

are hearing as well from those people who do not want to see strong independent commissions established given that they would obviously be reciprocal and would not simply be focusing on questions of Mexican enforcement and standards.

What is emerging at the same time, however, is a greater degree of agreement and some degree of consensus on the issue of whether the supplemental agreements should be structured in a way that promotes better domestic enforcement of one's own environmental and labour laws. Even some strongly pro-NAFTA business groups in the U.S. have expressed a willingness to consider the idea of potential trade sanctions at the end of the day, as long as those trade sanctions are confined to each national government, and are only considered after the process of consultation and dispute resolution has run its course. At the end of the day each national government would have some authority to impose trade sanctions based on certain circumstances such as repeat violations which suggest a pattern of non-enforcement.

There is no visible consensus emerging around the idea of an independent NACE or an independent labour commission having power to impose trade sanctions on its own. A number of the points raised by environmental groups about the so-called Intellectual Property Rights (IPR) model, the model in Chapter 17 of the NAFTA on intellectual property, have hit home and forced consideration of whether, notwithstanding the difference between an IPR holder's rights compared to the environment and labour questions, there might be some analogous model applicable to the environment and labour context.

The second aspect of what is happening on the Hill is the beginning of the process of crafting the NAFTA implementing legislation. The U.S. is well behind its Canadian counterparts here. As of early April, there is really nothing dramatic going on. Congressional staff have begun to identify some of the necessary implementing legislation that will be required in an implementing bill based on the text of NAFTA itself. Certainly USTR officials are well on their way to identifying those provisions and are beginning to figure out how to turn them into legislative language. But there is no specific draft bill floating around that addresses the technical changes in U.S. laws and simultaneously the changes to the U.S. regulations that will be necessary to implement the NAFTA, let alone legislation that goes to the more interesting issues of so-called "appropriate" but not required implementing legislation -- NAFTA worker dislocation programs, how to fund border clean up and any add-ons that might be part of the final implementing bill. Those decisions have not been made and the Congress is still several weeks away from figuring out how to turn those issues into elements of the implementing legislation. For instance in the case of worker dislocation programs it probably is not going to be until some time in May that President Clinton's Administration completes its work on a universal worker dislocation and training program and then determines how a NAFTA-specific program would fit in with it.

With respect to the timing of the NAFTA implementing legislation, a lot will depend on the progress made in the supplemental negotiations because Mickey Kantor has said that the USTR does not intend to formally submit implementing legislation to the Congress until the supplemental negotiations have been completed. Secondly, no specific schedule has been set for the mock hearing and mark-up process and ultimately the conference process. That will not be clarified for a while. Thirdly, it will take some time to complete the nitty gritty drafting of the implementing legislation once the decisions are made on the issues such as worker dislocation and funding priorities. The U.S. is well behind Canada.

However, there is a note of optimism for those people who want to see NAFTA completed this year. During the first week in April, both the Secretary of the Treasury and the USTR have reaffirmed that the goal of this Administration is to have NAFTA approved and in place by January 1, 1994. Working back from that, one could expect a final Congressional up or down vote in the fall, which means that it probably would not matter if the implementing bill was formally submitted in June or July or even shortly before the August recess. In any event, the Administration will need to get the consent of the Congressional leadership and the key Committee chairmen in order to shorten the 90-legislative day process for consideration from the time of implementation to the time of final vote, whatever the case may be. However, if the bill has not been introduced by the time of the August recess, people who want to see NAFTA in place January 1, 1994 can begin to worry because the calendar looks increasingly doubtful.

All of this suggests that the next two to three months will be critical, probably as critical as any time frame to this point in the negotiations on the trade agreement itself, in terms of what is going to happen to the supplemental agreements and where the ultimate support will be for the NAFTA.

3. NAFTA AND NACE: A MEXICAN PERSPECTIVE

Regina Barba[*]

During the 1980s, immediately prior to the beginning of the NAFTA negotiating process, there was a substantive change in the environmental and natural resources agenda in North America. There was increased cooperation among the countries of North America on both bilateral and trilateral issues. Mexico and the U.S. had moved the agenda beyond transboundary water issues to a new set of environmental concerns, particularly along their common border and in 1988, the *General Law on Ecological Equilibrium and Environmental Protection* was implemented in Mexico which advanced considerably its environmental legislation; at the same time there was a rising awareness of the consciousness of people, and increasing access to information.

Also in the 1980s, Canada and the U.S. were dealing with complex transboundary issues of their own. There was a growing awareness as to the potential adverse impact on the region from global environmental problems such as climate change. These problems prompted specialists to start looking at North America as an ecological region and pointed to the existence of a new environmental agenda in North America. Therefore, when NAFTA was initiated, the expected increase in the exploitation of natural resources and in the industrialization process, produced an immediate concern among the environmental community in Mexico.

At present there is opposition to NAFTA from a number of sectors of Mexican society and opposition groups, some of whom are siding with environmental groups. The government and the negotiators are not interested in participating in multistakeholder forums at this point because they know that Mexico does not have the infrastructure to handle all of the environmental demands that will be made of it.

Since the beginning of the NAFTA negotiations, environmental groups in Mexico have been expressing concern about environmental issues related to NAFTA and have made a number of concrete proposals to the Mexican government for safeguards to be included in the text of the agreement. They have also promoted the North American Commission on the Environment (NACE).

The Mexican environmental community was interested in protecting the integrity of Mexico's environment from any uncontrolled growth propelled by free trade. The environmental community was concerned with the ineffectiveness of most of Mexico's environmental laws, which in the letter of their provisions in many cases may be models of the sophisticated legal protection but which in practice are rarely enforced. Eventually, it was clear that public expressions of concern were not being taken seriously.

When the Government realized that these demands would not go away, they offered to deal with the matter separately in a so-called "parallel track", but is not negotiated into the text of the Agreement. The question was undertaken only in the most fragmented fashion and at first, only the U.S. and Mexican governments were involved, and their discussion was exclusively restricted to the border area between their two countries. This clearly shows that they were missing the point, since environmental concerns had been raised regarding potential adverse impacts of NAFTA throughout the entire region, not only in the U.S.-Mexico border areas.

Moreover, one of the intentions behind the Agreement had admittedly been to further

[*] These comments were taken largely from: Alberto Szekely, "Free Trade and Environment in North American: Concerns, Proposals and Responses".

extend the maquiladora industrial complex from its current concentration in the north of Mexico to the rest of its territory and up to the Yucatan Peninsula. There has been an increase in the exploitation of natural resources throughout the whole region and particularly in all of Mexico as the provider of raw materials.

At the beginning of 1992, the Mexican environmental community decided to press on, but this time with the following strategy:

1) To leave behind the level of generality and the use of stereotyped jargon that had been permeating its public discourse on the matter;

2) To make its concerns and demands concrete and precise, and as detailed as possible;

3) To do so by contributing with a proposal, rather than simply a critical manner; and

4) To express its proposals in the very language appropriate to the specific exercise that it was attempting to influence, namely in treaty language.

The result of such work was the drafting, adoption, proposal and publication by more than 30 environmental groups in Mexico, of a package of "Minium Safeguard Environmental Clauses" for NAFTA, which were made available at the highest levels to the three governments in May 1992. The text of the Draft Environmental Safeguard Clauses is attached to this Report as Appendix C.

Unfortunately, the reaction of the governments was again perceived by the environmental groups as being one of disdain and rejection of their proposals. Each Government privately alleged that it had taken the proposals to the negotiating table and that they had not been totally accepted by the other Governments. The language included in NAFTA to address environmental concerns was a very superficial and ineffectual attempt to make it appear that the environmental question had finally been addressed; it was the Mexican groups that were the most unhappy with the whole thing.

The signed Agreement affirmed the right of each country to choose the level of environmental protection that it considered appropriate which means the explicit renunciation of the three governments to pursue together some trilateral programme to harmonize their levels of environmental protection. In the Mexican case, it leaves the door open for keeping the country at the low level of legal protection currently in force and, above all, at a lower level than that enjoyed by the United States and Canada.

This does not mean that the U.S. or Canada should have in any way imposed on Mexico their levels of environmental protection. The proposed harmonization to the more stringent standards had to be understood as an agreed mandatory goal, to be attained not instantly but through an equally agreed programme under an urgent but realistic time-table, and precisely taking advantage of NAFTA to secure international cooperation to obtain the necessary support for the early attainment of the final goal.

Another NAFTA provision stipulates that none of the three countries should choose lower environmental standards for the purpose of attracting investment, which in view of the obvious rejection of the negotiators to the idea of mandatory heightening of environmental standards, signified a modest consolation or compensatory provision.

The problem with the recommendation (instead of obligation) not to lower national environmental standards, was that it would not take whatever force or effect it had been meant to have, until the entry into force of NAFTA. That explains the anger of the Mexican environmental groups, and their suspicions of the Government's good faith

intentions, when in the second half of 1992 proposed legislation was sent by the Executive to Congress, to modify or replace a variety of laws and regulations relevant to the environmental and natural resources, almost invariably having the effect of actually lowering the level of environmental legal protection in the country. That was the case with the legislation on forestry, water, mining, fisheries, tourism, land use, and others, which the groups felt simply were effectively dismantled.

In September 1992, the three Governments announced their intention to create the NACE. At the end of the Bush Administration, Mexico showed a clear intention of the government to establish an apparent institutional mechanism, mostly devoted to exchange of information but with little if any substantive powers. The coming to power of the Clinton Administration, however, and perhaps that more than any other reason, produced new hope that a trilateral Commission would come into being with more substantive powers.

Mexican environmental groups have prepared a detailed proposal for a "Draft Agreement Establishing the Commission for the Protection of the Environment in North America" which has been distributed to all of the negotiators of a NACE. A copy of this proposal is reproduced in Appendix D. However, while environmental groups have consulted with the Mexican negotiators, it remains very difficult to provide an accurate description of the current political context in Mexico. The Mexican negotiators have not produced a formal position paper on the supplemental agreements. There is strong support in the government for NAFTA which is considered an important agreement for all elements of Mexican society.

4. TRADE-RELATED FUNCTIONS OF NACE: Building on NAFTA

Armand de Mestral

Over the last year both environmental and energy groups have said some harsh things about the General Agreement on Tariffs and Trade (GATT) and about the North American Free Trade Agreement (NAFTA). Both the trade communities of the GATT and of the NAFTA have responded with trepidation. This being said, if the environmentalists were familiar with trade law, they would find it less sinister, and if the trade lawyers knew more about the environment, they would also see that there is a great deal of complementarity between the two disciplines.

There are a few general points about the NAFTA where a North American Commission on the Environment (NACE) might fit in. There are also ways in which a NACE and NAFTA might actually dovetail, particularly with respect to dispute settlement but also in the area of standard setting. However, the issue of trade sanctions is not one of the issues where NAFTA and NACE can effectively complement each other.

When creating a complementary body to NAFTA, it is very important to understand in legal institutional terms exactly what it is going to compliment. Where does NAFTA stand in terms of the degrees of the options which will move North America towards economic integration? These options range from no integration at all - to the multilateral standards of the GATT - to federalism or unitary states. The existing Canada-U.S. Free Trade Agreement (FTA) and the NAFTA fit in somewhere along that spectrum.

Clearly, the NAFTA is neither a supranational organization nor a supranational commitment. It is very much a consensual, tripartite agreement based on the sovereign equality of the three parties. There are no supranational institutions created, no executive, no court, and no legislature. In other words, the NAFTA does not create a European Community (EC). One might compare the standards provisions in NAFTA to Article 100A of the Single European Act. Article 100A gives legislative jurisdiction for environmental matters to a central authority, to be set on the basis of a high level of protection for community citizens. North America is a long way from the level of integration contemplated in the Single European Act. One should be very careful when designing NACE to maintain a sense of what can actually be demanded of it given the nature of the NAFTA.

Among the proposals for the NACE there are suggestions that high environmental standards must be maintained for North America; and that there should be no pollution havens. There is also the suggestion that NACE should advocate higher and better environmental standards for the three countries and possibly a means of enforcement, either by way of putting pressure on national governments to enforce their own laws or to enforce common standards. Finally, there is the suggestion that trade sanctions be available either to a NACE or to any of the three governments in order to enforce whatever standards are accepted.

From the perspective of an international lawyer, this is both fascinating and entirely logical. It is a recognition that North America is a community. No state is an island; not in North America and not in the world. As the countries of North America consolidate their already close economic relationship, there is nothing unacceptable or wrong in asking trading partners to be mindful of the non-economic dimensions of

the relationship. As the economic relationship is solidified, the environmental dimensions of this relationship become more visible.

However NAFTA does not provide North America with the executive, legislative and judicial institutions necessary to make all of these links and to make the links work. One must be very careful in designing a NACE, not to create an institution that is heavier or stronger than the basic NAFTA institution on which it is going to be grafted. The trade lawyers drafting NAFTA put together a useful text of trade commitments. However they were relatively careful not to encroach too far on national sovereignty. Some restrictions to sovereignty are implicit, but the drafters of NAFTA certainly have not moved towards an abandonment of sovereignty by binding the parties to general commitments to make uniform laws and uniform standards and creating a central institution to require all three governments to live up to these standards.

What the NACE seems to be doing on the environmental level is to go further than NAFTA itself has gone in the trade arena. As usual the environmentalists are the revolutionaries and the trade lawyers are more conservative in the kind of institutions they envision. One must remember that it was twenty-five years before the environment was factored into the European Community process- even with all its institutions and the much higher degree of economic and legal integration between the Member States and the Community. The environment has indeed become a factor in Community decision-making, by virtue of the Single European Act. But there exists a supranational framework in the EC. It will be more difficult to factor environment and labour standards into the much more conservative framework of the NAFTA.

Nevertheless, there are some areas where, given the NAFTA text, the NACE can fit in very closely and play a very clear role. First of all, with respect to dispute settlement under Chapter 20 of the NAFTA, which, among other things, sets up the Free Trade Commission (hereinafter referred to as the "Commission") composed of representatives of each of the parties. These Commission has fairly broad authority to choose and create subordinate institutions. NAFTA also creates committees, either general or of a specialised character in Article 2001. In order to draft NACE onto, and effectively integrate it into NAFTA, one must view NACE as a NAFTA institution. NACE must be considered an integral part of the NAFTA, albeit perhaps subordinate. In that sense, the process would be very similar to thet of any international organization creating a new major committee; just as GATT has recently resuscitated the long-standing committee on Trade and the Environment, or in the way the United Nations might create a new specialized agency that fits into the general family of specialized agencies. Thought of in these terms, NACE might be built right into NAFTA.

Secondly, Article 2006 creates the duty of consultation in all potential disputes. One could certainly design the NACE so that consultations on environmental issues would take place within a NACE and still conform to Article 2006.

Thirdly, with respect to the formal dispute settlement process, there is a requirement that there be a short period of consultation. Indeed some of the chapters, particularly Chapters 5, 7, and 9, say specifically require that consultations which take place under those chapters be carried forward and become part of the dispute settlement chapter so that there is no need to consult twice. One might organise the NACE so that consultation on environmentally-related problems becomes a precursor to dispute settlement under Chapter 20.

In the same vein, Article 2007(5) allows the Commission to create expert working groups, to name technical advisors, and to

establish conciliation processes. This seems to be an obvious opening for a NACE.

Fourth, In order to form panels under the formal dispute settlement process, Chapter 20 includes a roster of 25 experts named from the three countries. There is no reason why a NACE could not be party to the selection of some of these 25 people. One would simply have to agree that when environmental questions lead to a dispute, or are part of a trade dispute, that at least one or more of the five panellists would be chosen from the NACE roster of environmentalists. Indeed, there is even a precedent for this: in the Financial Services Chapter, there is a special financial services roster of 15 experts, instead of 15 trade lawyers. The bankers have no faith in trade lawyers and when the NAFTA was being drafted they insisted that if there was a dispute on financial matters they would name the appropriate people. NACE could set up its own environmental roster. What is good for the bankers is surely good for the environmentalists or the energy people. So there is room to work either with the existing roster or with a parallel roster. Indeed, there is no restriction in the text of NAFTA on a panel being composed of people who are not in the 25-member roster. One can choose panellists from outside the roster, that is already being done under the Canada-U.S. FTA.

Fifth, there are provisions that allow for the panel to call upon experts (Article 2014) and to establish scientific review boards (Article 2015) during the course of the dispute. NACE could provide the expertise or be a party to the constitution of these scientific groups in disputes which include an environmental dimension.

Sixth, at one stage in the Chapter 20 process, an interim report of the dispute settlement panel is forwarded to the parties to the dispute. While this may be somewhat delicate, there is no reason why one could not have the interim review of the dispute forwarded to NACE which would be given an opportunity to make comments on it. Alternatively, when the final report is issued, NACE might have a role in both implementing and commenting upon the report of the panellists before, or as, the governments make their decision to implement the report.

The recommendations above have addressed Chapter 20 of NAFTA, the general dispute settlement chapter. Chapter 19 of NAFTA covers countervailing duty and dumping disputes. The definition of a subsidy in a given context is a matter of great sensitivity. What is an export subsidy? Is it in any context proper to characterize as countervailable, money which is provided for environmental clean up, or money which goes towards the restructuring industrial technology so that it pollutes less? The Uruguay Round text had attempted to clarify these issues; the NAFTA text does not, it simply leaves it up to the existing law in Canada, the U.S. and Mexico and leaves room for clearer policy guidance. NACE might play a role in developing guidelines to answer these sorts of general policy questions.

Both of the chapters on standards, Chapter 7 (general) and Chapter 9 (agricultural) provide for attempts at the long-term harmonization of standards or mutual recognition of standards or standard-setting. Both chapters protect the right of individual governments to maintain their own level of standards and to set standards at as high a level as they regard to be appropriate. There has been some concern expressed as to whether the standards provisions in NAFTA will lead to a lowering of standards in any of the three countries. In NAFTA there is no clear mandate as exists in Article 100A of the Single European Act, which requires environmental standards to be based on a "high level of environmental protection". However, a NACE might be given a policy role to ensure that that in fact is what happens.

Finally, on the question of trade sanctions; at the end of the road, if things go wrong, if certain standards are violated, if governments do not respect whatever consensus they reach, should there be trade sanctions? In my opinion those who advocate the use of trade sanctions out of concern for the environment and the need to maintain a high level of environmental protection and promote responsible use of natural resources in North America, are making a big mistake. The quickest way to be bought out by special interests is to become their spokesperson. Do environmentalists want to be the spokespersons of the sunset industries in the three countries, the rust-belt industries, the industries that are on their way down and need protection and will seek out protection wherever it is available? Environmentalists will be taken over and the process will become -- as most of the anti-dumping and countervailing duties processes are in Canada and the U.S. -- expressions of special interests in need of protection and assistance, through difficult periods of transition.

Anti-dumping law has very little to do with genuine injury and the genuine failure of one industry or one country to respect high standards of behaviour. In particular, anti-dumping laws, which are the archetype of the trade remedy, reflect very dubious policy concerns and rest on very shaky intellectual foundations. To have NACE go that route and become associated with that kind of process would be an extremely unfortunate development. If one is concerned about not polluting the atmosphere and about using energy carefully, one does not levy anti-dumping duties or countervailing duties against small foreign cars -- one buys them and drives them. What is being proposed with respect to using trade sanctions to bolster a NACE is analogous to driving big gas guzzlers.

5. FUNCTIONS OF NACE: Trade Remedies and Procedural Safeguards

Gary Hufbauer

While the supplemental negotiations surrounding the North American Free Trade Agreement (NAFTA) are certainly important, there are two broad points that must be made. Firstly, there is no way that they can turn a sow's ear into a silk purse or an ugly duckling into a swan. The mythology which is now being loosely promoted at various levels in the U.S. government that these new supplemental agreements are going to radically change the character of the NAFTA, is not exactly intellectual truth-telling even if it is politically convenient. At this point, a fence-sitting Congressman could ask a staff member to draw up an outline of what is going to be in the supplemental agreements, and 80% of the content would be clear. It is a tactical error for the Administration to be allowing the process to drift as much as it has, while keeping in suspense its ultimate verdict on the total package.

Secondly, the supplemental agreements themselves are, out of necessity, going to be very process-oriented; they are not going to settle landmark differences in environmental standards on day one. They will be a first step in what must be a long, getting-to-know-you process at all levels of government in the three countries. The supplemental agreements are a starting point and should have built-in reviews of how the process works after five years or so. Since process tends to be disappointing when one is looking for substance, much of the rhetoric is pointed to substance.

Because the agreements will focus on process, they should be counterbalanced with a robust institution, in the North American Commission on the Environment (NACE), applied to the environment. A NACE should be well financed. It should include the ministers from the three countries - perhaps both foreign ministers (secretary of state) and environmental ministers. There should be a secretary-general: a person of recognized international stature. There should be some form of advisory council on which NGOs are well represented. The NACE also needs a good-sized staff and a roster of experts for disputes. In other words, an institution should be created of some substance, not just a room in a department, and not so understaffed as the U.S.-Canada Free Trade Commission. There must be a more visible process and a more visible building.

While NAFTA has been declining in terms of public approval ratings since the first of the year and looks in trouble in the U.S. Congress, counterbalancing the negatives is the recognition, certainly by Ambassador Kantor, Secretary Brown and probably by the President, that the NAFTA is the foundation stone of U.S. trade policy. If NAFTA goes down, the Administration has lost leadership on trade policy, and one could be justifiably pessimistic about the Uruguay Round or other initiatives.

By measures of standard mercantile arithmetic, which runs in terms of access to markets, the NAFTA is the most successful agreement the U.S. has negotiated in the post-war period. Mexico lowers its barriers three times as much as the U.S. lowers its own barriers: Mexico cuts its tariffs and quotas from about 15% to zero, while the U.S. cuts its tariffs and quotas from about 5% to zero. As a bonus, Mexico dramatically reforms its intellectual property and investment rules. So it would be truly anomalous if the NAFTA were rejected.

A NACE has three important tasks. First, it should somehow be linked to the way money is spent on the environment;

secondly, a NACE will very likely be in the trade remedy business; and thirdly, over a period of time it should become a consultative body for merging environmental standards.

The critical point about money is that all three countries need to create a substantial fund to address environmental abuse linked to our expanding trade.

With respect to trade remedies, in the fullness of time, this will probably not be a big part of the story. But at the moment, in the United States, the availability of trade remedies to a NACE has become the litmus test of the acceptability of the whole NAFTA agreement. If there has to be a litmus test, perhaps this is one of the least harmful tests to put on the table, so long as it is designed so as to avoid the "capture" problem. A "capture-avoidance" design would necessitate four components. One is a government filter which says that industries or NGOs do not have standing to bring a case on their own; instead they must first persuade a federal government to bring a case. Secondly, there must be a period of consultation. Only after the consultation mechanism has run its course, should the case be referred to a trinational panel of distinguished experts. Here the U.S.-Canada agreement has worked surprisingly well, given the magnitude and frequency of the cases. Third, there should be a presumption that any trade remedy be imposed in the nature of a broad-based fee as opposed to a narrowly targeted fee. There should be a big distinction between the anti-dumping and countervailing duty laws which are normally targeted on firms and industries, and broad-based fees imposed under NACE auspices which should essentially be attention getters.

A broad-based fee does not entail the arithmetic of precisely measuring the harm and trying to assess a remedy which just balances the harm. It is just an attention-getter fee and may not be more than a slap on the wrist. Finally, the fees themselves should not go to the Treasury of the importing country but should go to the exporting country with a requirement that the monies be used to address the environmental issues. With these sorts of buffers, the trade remedy portion of this text would satisfy the litmus test, yet at the same time the capture problem would be avoided.

With respect to the evolution of standards in the environmental area (and this applies equally to the labour area), a leaf should be taken from the Organization of Economic Cooperation and Development (OECD). The OECD has made a great deal of progress over a long period of time on difficult issues, such as liberalization of capital movements and model tax treaties. The OECD has made progress with extensive consultation, followed by recommended draft models. With a few exceptions, these are not binding proceedings but rather discussion, consultation and voluntary convergence. Such an approach necessitates the budget to invite state authorities and NGOs to join the process. It is impossible to tackle the entire backlog of environmental regulations which are already in place, but this is a rapidly growing area, and when new regulations are proposed they could be looked at based on the OECD model. North Americans could learn a lesson from the OECD process and over a period of time -- five, seven or ten years -- engage in a similar procedure to ensure the upward convergence of environmental standards.

6. NACE AND THE NORTH AMERICAN ENVIRONMENT

Konrad von Moltke

Poorly managed international environmental problems threaten trade regimes. The distinction between non-trade and trade-related environmental issues is to some extent artificial. If all facets of environmental problems are not managed properly in the future, they will continue to threaten trade regimes. In addition, the debate thus far has largely been about manufactured goods, future problems will be largely in the commodities area where the environmental impacts are irreducible; by definition commodities are taken from the environment. Historically, commodities and commodities-like products have tended to be the source of environmentally-related trade disputes; for example, lobsters and tuna. Clearly there is a strong link between the non-NAFTA aspect to the North American Commission on the Environment (NACE) and the NAFTA-related elements, and there is no doubt that some of the conflict between trade and the environment is the result of past failures to manage adequately the international environmental problems which do exist on the North American continent. A couple of examples readily illustrate this point.

In the past, hazardous waste agreements negotiated between the United States and Canada and Mexico have been motivated in large measure by a desire to escape the strictures of the U.S. RCRA Amendments on prior informed consent. The result is that Greenpeace is now the source of record on hazardous waste movements in North America. While Greenpeace is to be commended on its work, I prefer to get such information from governments.

During the negotiation of the Canada-U.S. Free Trade Agreement (FTA), people in the U.S. were not aware that there was a major debate on trade and the environment in Canada, relating to free trade. The United States Trade Representative (USTR) ignored claims that there were serious environmental issues related to trade agreements. It was a lost opportunity. At the time I did not feel that the environmental reasons were strong enough to oppose the FTA but in retrospect they were serious, and worthy of debate.

Also, over the last several years, the International Joint Commission (IJC), which is an important bi-national body, has increasingly been ignored by governments. While governments may not have abandoned it completely, they certainly have moved away from it. One of the reasons that they have moved away from it is that the Great Lakes community discovered the IJC as a way to criticize governments and so the governments have withdrawn from it.

There are important lessons here for the NACE; namely that an effective NACE will be unpleasant for governments. It has to be, otherwise, it will not do its job. The IJC has done a lot of very interesting work and the Great Lakes Water Quality Agreement has some remarkable aspects. For example, the principle of ecosystem management is written into the Great Lakes Water Quality Agreement. Some of the difficulties in implementing it have to do with that. The International Boundary and Waters Commission (IBWC) on the U.S.-Mexican border is simply inadequate. It is an international public utility. The fact that some intergovernmental agreements take the form of minutes of the IBWC is just the Administrations' way of finding a comfortable means by which to document their agreements - with less legislative interference than some other routes might involve.

This is only a partial list of how the opportunities to address the environmental problems of North American have already been missed in the past. The NACE presents a major opportunity to do it right. There is no full list of agreements and instruments, between the U.S. and Mexico or the U.S. and Canada on the environment because nobody has put it together. In a recent publication Alberto Szekely has included most of those concerning the U.S. Mexican border and I have pieced together a list for the U.S.-Canada border but transboundary issues have not had the attention that they deserve and the NACE represents a real opportunity to correct that.

It is extremely important that NACE is not designed to solve yesterday's problems. Environmental policy is still evolving and one should not act like a general who always begins a war by planning for the battles of the previous one.

The standard here is not just to ensure the passage of NAFTA, but to strive for sustainable development and ecosystem management in North America. That has to be the standard to which NACE is held. To this end, sustainable development ought to have been written into NAFTA as an aim, rather than just as a preambular comment. It would be fascinating to see what its inclusion as an aim would do to the structure of NAFTA. Trade lawyers are challenged to make sustainable development an aim the next time a free trade agreement is drafted and see what happens. In some sense, and without going into all the structural differences, that is what is happening in the European Community. This is a challenge that will have to be met.

If sustainable development is the goal, the economic element of this is structural change in the economy. The purpose is not defense; it is change. That is one of the big changes that has happened in the environmental community. As a corollary at this point, stringent standards are often an advantage, particularly in the manufacturing industry. There is a lot of evidence that industry is not damaged by stringent standards.

Another aspect to this discussion is that pollution havens arise in declining industries. It is difficult to think of one thriving industry where there is a risk of a pollution havens. Where manufactured goods are concerned, one ought to be more worried about the industry which is asking for weak standards than about the weak standards themselves; that industry is probably not going to exist for long.

What is the environmental agenda in North America? What follows is really a grab bag of issues, with little structure or priorities. One issue is that of migratory species on the North American continent. There is also the problem of arid regions which really link the West, although water management will become a transcendent problem of the entire continent. The North and North East will have enough water, but there will be large areas where there will not be enough water. Now is the right time to find a way to address those problems before they really divide not only the countries but also the states and the regions of this continent.

Long-range air pollution is also a problem. There continues to be evidence that DDT is entering the Great Lakes ecosystem; the evidence is tenuous but it is there. The only place where the DDT can come from is Mexico, so the links are more real than most people realize.

This begs the question of monitoring. In the discussion about NACE, there has been a lot of discussion about enforcement but very little discussion about monitoring. The first task is to make sure that there is reasonably consistent monitoring. This is difficult but at least it produces reasonably comparable data. One way to do this is to establish a North American Toxic Release Inventory, which a NACE could administer. A North American Toxic Release Inventory would register all the hazardous substances being

emitted into the environment on a continental basis.

There is also the whole issue of hazardous waste, which curiously is seen as a free trade issue. Hazardous waste is a trade in services and the key point is making sure that they are treated right where they go. Prior informed consent is a first step. There will be a lot of difficulty in this area.

Technology development and technology transfer are difficult to handle because of the tricky balance between making sure that it happens by itself and ensuring an appropriate level of government involvement. These issues are very closely related to intellectual property rights. The area of ecological labels and the identification of consumer products, is a trade issue. But if there is ecological labelling, it should really be as broadly based as possible and a NACE might be able to do something there. With respect to scientific assessment, there will be disputes about science, not only about acid rain, not only phoney disputes, there will be real disputes and there must be a way to ensure joint assessment of the issues. Tuna/dolphin is to some extent a case of assessment of the actual impact of tuna fisheries not only in the eastern Tropical Pacific but beyond that where the evidence is terribly thin. Some of the Mexican argument has been that the tuna problem exists elsewhere and they have criticized the environmental community for focusing on the Eastern Tropical Pacific. These scientific assessment issues are critical.

On the issue of enforcement, it is important to bear in mind that the only way to enforce environmental laws effectively in the U.S., North America, or abroad, is through public participation and open information. That is the bedrock of enforcement. Because of the conflict of interests in most governments and administrations, if there is not pressure to enforce, it is unlikely to get done, and the source of the pressure is not within the government. There is no commercial interest pressuring governments to enforce environmental laws, therefore public participation and open information are really the preconditions for effective enforcement.

By way of enforcement, there are useful things which can be done which do not infringe on sovereignty but which are adequately unpleasant for the governments to make them avoid the exposure which they bring, on issues of energy policy, land use and even boundary waters. Some people may ask, why it is necessary to create a continental Commission to deal with boundary waters which are bilateral issues? Watching the U.S.-Canada process however, it sometimes seems that there is either one country too many, or one country too few. Throughout the 1980s, the U.S. has been muscling Mexico on acid rain and on its smelters while at the same time, denying to Canada that there was a problem; a NACE would have stopped that. There are problems in bilateral relations where a third party can be helpful and it might be useful to have that provision built in. Finally, there are issues relating to common responsibilities for the marine environment.

Because the environmental problems in North America are a grab-bag of issues that cannot necessarily be prioritized a NACE must be able to identify issues, to seek solutions, and to recognize the full dimensions of the problems. A number of key criteria emerge from these issues with respect to the design of a NACE. The kind of institution which has emerged from the FTA is not good enough. A NACE must have one location. That is a big problem, not only a political problem, it is an administrative problem, and it says something about its character. A NACE has to be open and accessible, not only to governments. This presents a challenge in construction because excessive independence will result in governments that do not listen, while insufficient independence means that the institution will

not have any public credibility. There is a very delicate balance to be struck between openness and accessibility and an institution's ability to function in a useful manner for government. Perhaps this demands a two-tiered structure - a Commission which is made up of the environment and other relevant ministers, under which Commissioners would be appointed to do a full-time job.

A NACE alone will not solve all the environmental problems on the North American continent, but it is doubtful that without NACE the problems will be solved.

As one probes deeper into the environmental agenda, it will become clear that the penetration of the economic structure of the three countries requires a lot of change, particularly in the U.S. which has one of the least sustainable economies in the world. To the extent the issues this raises are international in character, there is one very interesting lesson to draw from the trade negotiations: sooner or later, Congress will be giving the Administration fast-track authority to negotiate environmental matters. That defines the kinds of issues being looked at.

7. ENFORCEMENT AND TRADE SANCTIONS

Robert Housman

It is wonderful for environmentalists to see movement towards a North American Commission on the Environment (NACE), which might, at some point, become an environmental commission for the hemisphere as more countries accede to the North American Free Trade Agreement (NAFTA). There is a strong impetus to put a lot of things on the shoulders of this new NACE; to ask it to oversee global issues and how North Americans deal with them. These issues are important, and to a certain extent the NACE should play a role in these and other areas, but it is critical not to lose sight of one simple fact: the NACE is about the NAFTA. The NACE is a mechanism to address what many perceive to be shortcomings in the current NAFTA.

The NAFTA is simply about trade. Given that, the NACE must play a role in the trade-related environmental issues that arise and the principle one is enforcement. At the environmental level, enforcement is important because nobody likes to see the rivers polluted, nobody likes to breathe bad air, nobody likes to eat food that is poisoned. But in this day and age, one must recognize that there have been changes in trade. When first talking about trade and the rights and rules of trade, one spoke of the ability to move products across borders and to allow them to compete freely in foreign markets. Over time, trading rules have evolved and now it is not just a case of entering a market and competing, it is the way one competes and whether one competes fairly. That is why there are anti-trust provisions, intellectual property rights and investment provisions in the NAFTA. In trade, it is not good enough to be allowed into the market, it is a question of being treated fairly at the market on a level-playing field. The environment is no different in that regard than anti-trust legislation which is also a social form of legislation. Anti-trust came about because of the perception that consumers were getting the short end of the stick. There is concern in a competitive world market, and particularly in a competitive regional market, that the failure of one trading partner to enforce its own environmental laws puts industry at a competitive disadvantage.

Another valid assumption also merits examination. Unless there is movement on enforcement to change the status quo which has held that the environment is somehow separate from trade, the U.S. Congress will not accept any NAFTA.

Enforcement can be dealt with oe different levels. On one level, enforcement should include citizen supervision, even with the problems that occur over standing. The notion of allowing citizens to participate through domestic lawsuits, and enforcing decisions of their own governments is vital. The ability of citizen supervision to encourage environmental enforcement in the U.S. cannot be questioned, recognizing that that kind of enforcement does not speak to the competitiveness aspect of environmental legislation. In order to get at that competitiveness aspect, and to create an environment that encourages countries to enforce their own laws in NAFTA, another level of enforcement is necessary-- one that is outside the political and territorial boundaries of each NAFTA party.

In stepping back, one is struck by the commonality between some of the proposals put forward by the trade community and the environmental community. The two communities are waking up to the fact that given the commonality of interests they need to be partners in this endeavour. No one wants enforcement to breed protectionism; that reduces both the legitimacy of the environmental movement and also, it

reduces the effectiveness of trade to promote economic development, heighten standards of living and hopefully, through the trickle down theory, ensure greater environmental protection. Both communities share a common interest in ensuring that competition occurs on a level-playing field.

In order to achieve this level-playing field, each country must enforce its own laws. In the trade area each country must enforce certain trade-related commercial laws, and if they fail to do that, a trade sanction that says nothing about the sovereignty of making decisions is imposed. Violation is tolerated, but not without compensation. Similarly, in the environmental area, if a party fails to enforce its environmental laws, as members of a contract among nations it may, but it must recognize that there will be recourse by its trading partners.

There is concern that national governments have to be able to impose sanctions for violations at the end of the day. These sanctions could be authorized by a trinational body to minimize sovereignty concerns. By using a trinational approach, one of the things that is dealt with is the question of who gets to complain: citizens, companies, or governments? A trinational body could function much like the Supreme Court: it could weed out the important complaints from those that are frivolous or protectionist in intent. Given guidance, the complaints that should be considered are trinational, related to transboundary issues or issues of the global commons, or directly trade-related.

With that guidance, a trinational NACE could weed out those cases that are most important, make decisions about when enforcement is and is not occurring, and authorize countries in cases where enforcement is not occurring to invoke trade measures. This would not include product specific trade measures such as countervailing duties. The countervail is a fertile field for protectionism and is not the route to follow. Suitable trade measures would be broad-based and would be imposed only after a long consultation and cooperative effort. This would minimize the ability of the environmental enforcement process to be used for protectionist interests, but nonetheless, it would be strong enough to serve the goal of encouraging each nation to enforce their own environmental laws. And to those who do not want to enforce their environmental laws one must ask, why create a democratic environmental law if there is no will to enforce it?

One final point is the notion of the necessity of some leeway in prosecutorial discretion. Enforcement does not just deal with lawsuits. The EPA enforces a range of environmental laws in the U.S. under administrative consent orders. Under these orders the EPA goes to a company that is violating something and proposes that it should do X, Y and Z with the aim of bringing them into compliance. This may be over five years or five months; nevertheless, it is enforcement.

Whatever process is created under the NACE it should minimize the notion that trade sanctions imposed by a trinational body are going to have a chilling effect and be a monster on the backs of state and federal enforcement officials. That will not be the case if the proper procedural safeguards are built in.

8. THE ROLE OF THE PRIVATE SECTOR

Nina McClelland

There is an important private sector element to this debate. The US third party consensus standards development and conformity assessment organizations are very important to environmental "regulation". They develop private sector standards on the environment and provide conformity assessment to ensure that standards and regulations are being met. In the US, there are over 600 independent standards-writing organizations representing a whole range of additional, quasi regulatory action arising out of the private sector.

Historically, the private sector standards writers and those who demonstrate conformity by testing and certification of products and services are a very important part of the US system; they are very important in Canada as well. They are currently not so prominent in Mexico. These traditional third party organizations provide an important public service and concurrently support government initiatives at all levels. It is not unusual for private sector consensus standards in the US and Canada to be mandated in codes, regulations, or policies; sometimes the conformity assessment programs are mandated as well.

Credible private sector programs are effective because they are accepted by public authorities. Governments rely on them; therefore, manufacturers of products and providers of services use them. The US standards community has a very strong public/private partnership.

NSF International (NSF) was chartered fifty years ago. Its entire mission in both standards and conformity assessment deals with public health and the environment. Historically, it has been the private sector organization in the US that has been recognized for comprehensive environmental standards. The Environmental Protection Agency (EPA) relies on NSF for standards and conformity assessment programs, particularly for chemicals that are used to treat drinking water and for products with which drinking water comes into contact during its treatment, storage, or transmission. NSF operates worldwide. Its programs are used in all fifty US states, and in 38 other countries. It has offices around the US, one in Canada and one in Brussels, plus a major laboratory in Ann Arbor, Michigan and a satellite laboratory in Sacramento, California. Clearly, the NSF Mark is very prevalent in the marketplace.

The concern of NSF with trade is not only with its customers' experiences, but with its own trade internationally as well. NSF is very closely allied to the American National Standards Institute (ANSI) and its standards are accredited and adopted by ANSI as American National Standards. ANSI and a Dutch organization, the RvC, have both accredited all of the NSF's product conformity assessment programs, demonstrating compliance with strict national and international quality and performance standards. NSF believes that networking is extremely important and has established a Memorandum of Understanding for working together with the Canadian Standards Association (CSA). Part of NSF's relationship with the CSA calls for taking the environmental management standards (EMS) that have been developed by the Canadians as draft documents, and putting them through the consensus process in the US. The goal is to harmonize, to the extent appropriate, EMS requirements between the US and Canada; and, to find an appropriate Mexican partner, to establish a consensus position for North America. Ultimately, the EMS standards would be taken to the

international standards-writing table through the International Standards Organization (ISO) process.

Recently, the Third Trilateral Standardization Forum was held in Mexico City. The subject of the environment was on the agenda for the first time. There is no question of the increased need for the US to communicate, both with the Canadians and the Mexicans. This Forum was intended to begin that kind of dialogue. An initial goal was to determine what exists with both official regulation and private sector consensus standards for the environment, what is planned, and then to develop dialogue to lead to appropriate harmonization of these documents.

In the private sector, endorsement is achieved principally through a contractual arrangement with customers. There is already upward movement in the standards writing activities through the Trilateral Forum; and, as part of that process, the environment sector delegates adopted a statement on North American Standards Cooperation between the three countries. This statement is being disseminated widely across North America to all interested parties. The sectoral group will remain together and call itself The North American Environmental Standards Working Group. This private sector activity, as a corollary for discussions going on between the governments, is an important potential contribution to the whole subject of developing an appropriate North American Commission on the Environment (NACE), and certainly, in supporting a North American Free Trade Agreement (NAFTA).

The private standards community relies on consensus as an important part of its process. The consensus process determines what the standards should be and what policies should be adopted for their enforcement. By contrast, there is a bottom line sanction. The ultimate penalty imposed on a company which violates an agreement is revoking the right to display the formally registered certification Mark. To remove the Mark when a requirement is mandated by a state or federal jurisdiction is a very serious penalty. These private sector standards and conformity assessment enforcement activities are used in government procurement specifications as well. They are a very effective way to meet enforcement objectives and are compatible not only with government programs at all levels, but also with multinational processes like those used at the international standards-writing table.

Any recommendation regarding the format and construction of a NACE agreement should consider the importance of the private sector activities that are ongoing in the US and in Canada. Mexicans believe that the environmental standards in place in Mexico are at least equivalent to those in the US and in Canada. What is different, is the level of resources available to ensure compliance with the standards.

The NSF has been asked by a representative of the Water Research Institute in Mexico, if it could agree to a contractual arrangement whereby NSF might certify products and quality management systems for products that are being exported from US to Mexico. That is an important proposal and offers the NSF the opportunity for an ongoing relationship with the Mexicans.

Consensus is a process that should not be overlooked in designing a NACE agreement. As a vehicle for developing standards for environmental policy, it provides assurance of acceptance because it involves all parties at interest. Consensus also recognizes and responds to the need for sustainable development.

9. NACE: SOME STRUCTURAL SUGGESTIONS

*Robert Page**

Following completion of the NAFTA negotiations, significant questions on the environment and labour were left over for "parallel" agreements between the parties. These have now taken on added significance to ensure the smooth passage of the enabling legislation and the later implementation of the NAFTA. The central feature of the parallel agreement on the environment is the creation of a North American Commission on the Environment or (NACE). Currently critical negotiations are underway between the three parties to NAFTA, but only basic concepts have yet been discussed. This situation presents a prime opportunity for environmental stakeholders to influence the negotiations and the final structure of NACE.

The Challenge

Planning this new institution called NACE is a difficult task because there are no clear precedents in terms of comparable international environmental bodies with links to trade or other agreements. As well, environment and trade is a relatively new field with no international consensus on the problems, let alone the solutions. NACE must have an organic link to NAFTA but in addition NACE is much more than an "add on" to the NAFTA; it will be a free-standing environmental institution in its own right with its own environmental powers and responsibilities. The issues facing the NACE are more complex than those before the International Joint Commission (IJC). Its structure and procedures must be compatible with the political culture of three different nations as well as three different economies.

A concept that is dear to Canadians is that of bilingualism and biculturalism. Some of the same problems emerge in the debate over the prospective NACE: people are using the same words, but the cultural contexts in which they are used are different. When designing the NACE, it is critical that it is designed to allow for "cross-cultural" dialogue within the institution in a cultural sense, because it will not be handled adequately in written documents alone. There is no perfect model to fall back on; there is only the ingenuity and the creativity of those involved in the process. In order to forward the debate on the NACE, ideas can be drawn from the Canadian experience with the IJC and the Round Table movement.

Proposals to Date

So far, the Canadian Government has proposed that a NACE be constituted as a "Ministers' Council", meeting at least yearly with a secretariat in each country providing support services. The list of the functions of the commission is extensive and includes many useful activities in collecting data on environmental standards and enforcement, promoting environmental research and pollution prevention strategies, increasing public awareness on the environment, promoting upward harmonization of standards, and cooperating with the NAFTA including the providing of a joint list of experts for dispute settlement panels or scientific boards. While the goals are laudatory, the process to determine the actions seems tentative and restrictive. Public participation is to be limited to a national advisory committee in each country, presumably external to the NACE process. Such a model is going back to earlier approaches, and ignores recent advances in the theory and practice of public participation. For NACE to be a credible body the structure must be opened up to inject a new level of public representation between Ministers at the top and the supporting secretariat below. There must be a direct interaction by public representatives with ministers and senior officials to influence decision-making in order for the

* The views expressed in this chapter are those of the author alone and do not necessarily reflect the views of the National Round Table on the Environment and the Economy or the Government of Canada.

public to have faith in the NACE. The political success of NAFTA is dependent upon the public credibility of NACE.

Lessons from the IJC and the Round Table Process

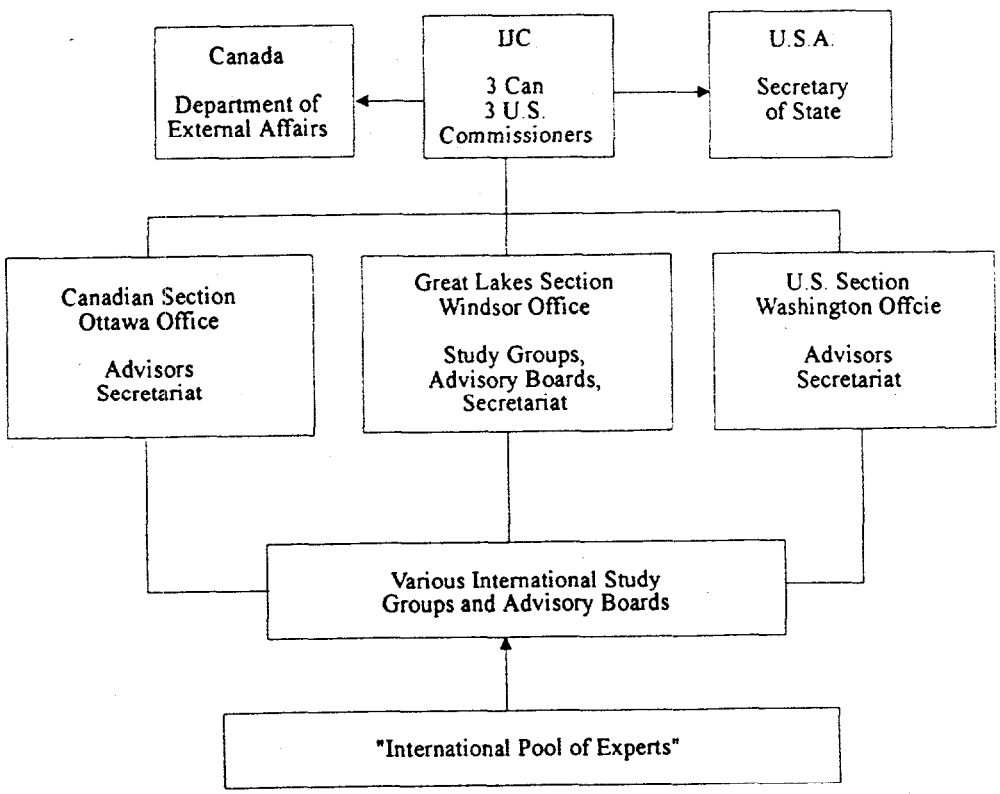
In constructing the NACE it is essential to assess the lessons from existing institutions. Two institutions which provide some insights are the IJC and the National Round Table on the Environment and the Economy. The IJC has handled transboundary water issues between Canada and the U.S. since 1912. The National Round Table is a post-Brundtland, multi-stakeholder process to advise the Canadian government on implementing Sustainable development. It is important to provide some background on each institution while stressing at the same time that neither is the answer to what is sought.

The International Joint Commission (IJC)

The IJC is headed by three commissioners from each country. These commissioners are political appointments made by their respective governments. Canada and the U.S. have separate offices and support staff in each country. In addition there are a series of expert panels or boards to deal with specific issues or projects (see Figure 1).

Figure 1

International Joint Commission Structure



Strengths of the IJC

- Over time the IJC has helped to resolve some difficult boundary water disputes by helping to bring the two parties together.
- The interactive consultations between the commissioners have helped to build consensus and sort out problems in a way which is impossible for elected officials.
- Political appointees have access to the administrations in Ottawa and Washington.
- Involvement of the states and provinces helps to ensure their cooperation.
- Advisory boards provide strong scientific input to the commissioners and in some cases to the public thus promoting public education.

Weaknesses of the IJC

- Commissioners' recommendations often water down the logic of the scientific work to make it more politically acceptable.
- Frequent NGO criticisms claim that it is slow and vacillating when urgent action is needed and not a full multi-stakeholder process.
- Available government funding often precludes action on recommendations.
- Arbitration powers have never been used.

While the IJC has done some good work its effectiveness has been hampered by the political control at the top.

The Round Table Process in Canada

Following the Brundtland Commission, Canada instituted a multi-stakeholder process to develop plans for implementing sustainable development at the national, provincial, and in some cases the municipal level. The National Round Table on the Environment and the Economy (NRTEE) membership includes: Federal Ministers (Environment, Trade, Finance and Energy), Provincial Ministers (3), NGO representatives (8), senior executives from the private sector (7), academics (6), plus representation from unions and other stakeholders. The Round Table reports directly to the Prime Minister in letter and report form. It meets quarterly as a body to review general policy and specific reports from specialized committees and the NRTEE is supported by a professional secretariat headed by an executive director. The purpose of the NRTEE is to build consensus between stakeholders which it has attempted to do in critical areas like forestry, tourism, trade, education and decision-making. While the NRTEE took some time to get going, it is currently producing policy documents in a number of key areas. The NRTEE's committees and task forces include both its members and outside experts, brought in to fulfill specific tasks.

The NACE

Applying the lessons of the IJC or the Round Table process to NACE would produce a new level in the institutional structure between the Ministers and the secretariat, directly interacting with the level above and the level below. Two possible models emerge from this analysis: (A) a Trilateral Council (such as three commissioners from each nation) or (B) a Trilateral Round Table.

The Council model is likely to perpetuate some of the problems of the IJC while the Round Table model would provide more

comprehensive, multi-stakeholder, consensus-building within and between the three countries. It could help governments to formulate the creative solutions and tradeoffs essential for consensus building and successful policy. Without a bold new structure the NACE will not achieve the required public acceptance.

Rationale

Given that the passage of the NAFTA legislation is in doubt due to criticism and opposition from NGOs and other stakeholders;

Given that NACE requires a high level of public accountability to achieve credibility;

Given that the currently proposed advisory committees will not be participating in the internal decision-making of NACE;

Given that a Ministerial Council (on its own) will not provide transparency of action;

A trilateral NACE should be established which would consist of:

(1) A Ministerial Council (meeting at least yearly)

The Council would issue an annual State of the Environment Report.

(2) A Trilateral Round Table (eight members from each country)

Each delegation would be headed by a full-time chair. The chairs would work together to provide a Trilateral Executive to coordinate the work of the Round Table.

(3) A Secretariat (with central and national offices headed by a NACE secretary general). The NACE must be more than the sum of its three parts and provide meaningful interaction between the three countries.

(4) Specialized Advisory Boards in areas such as:

(a) Trade dispute resolution and policy;

(b) Scientific research (transboundary);

(c) Enforcement complaints and upward harmonization;

(d) Data exchange and state of the environment reporting; and

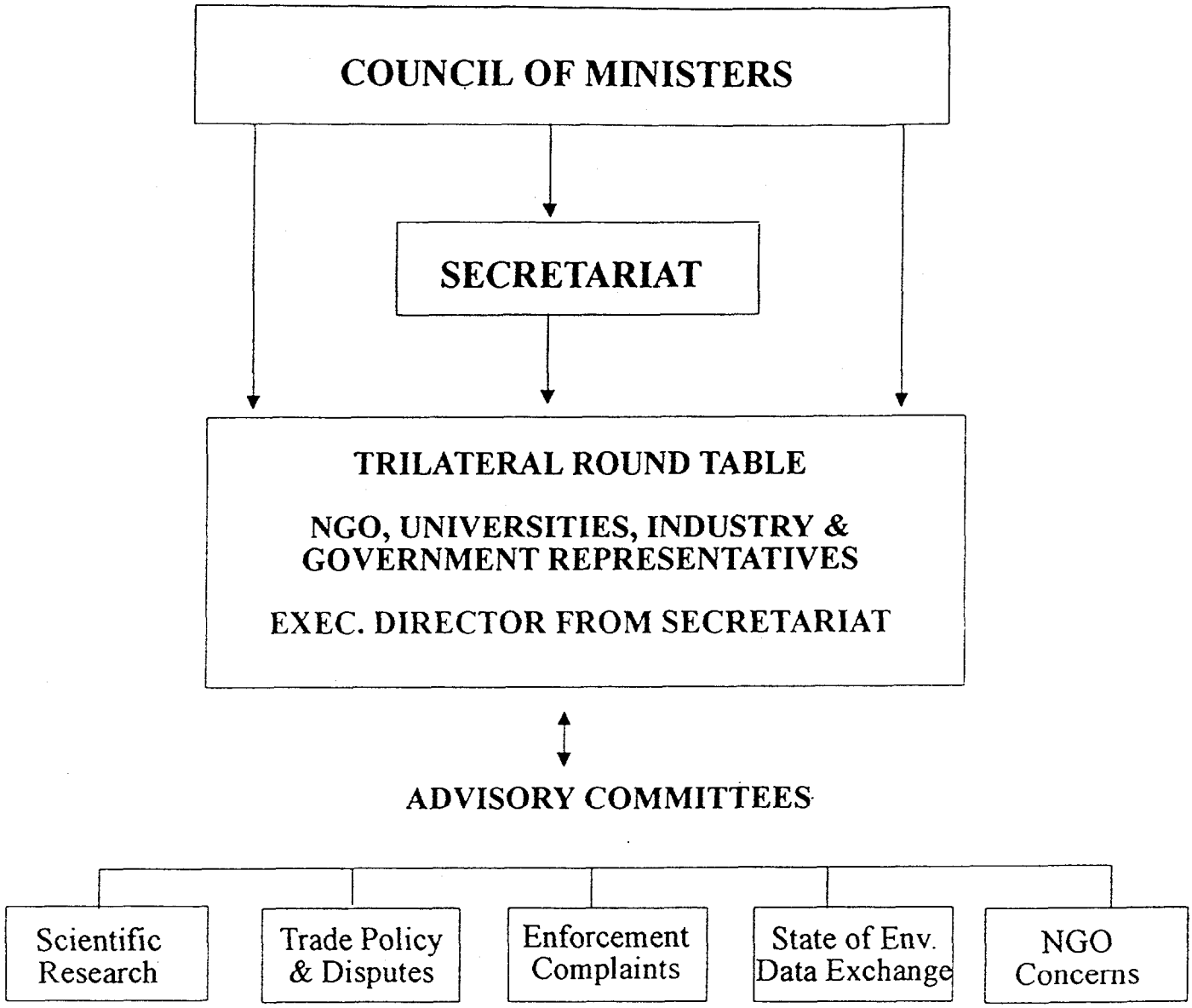
(e) NGO concerns.

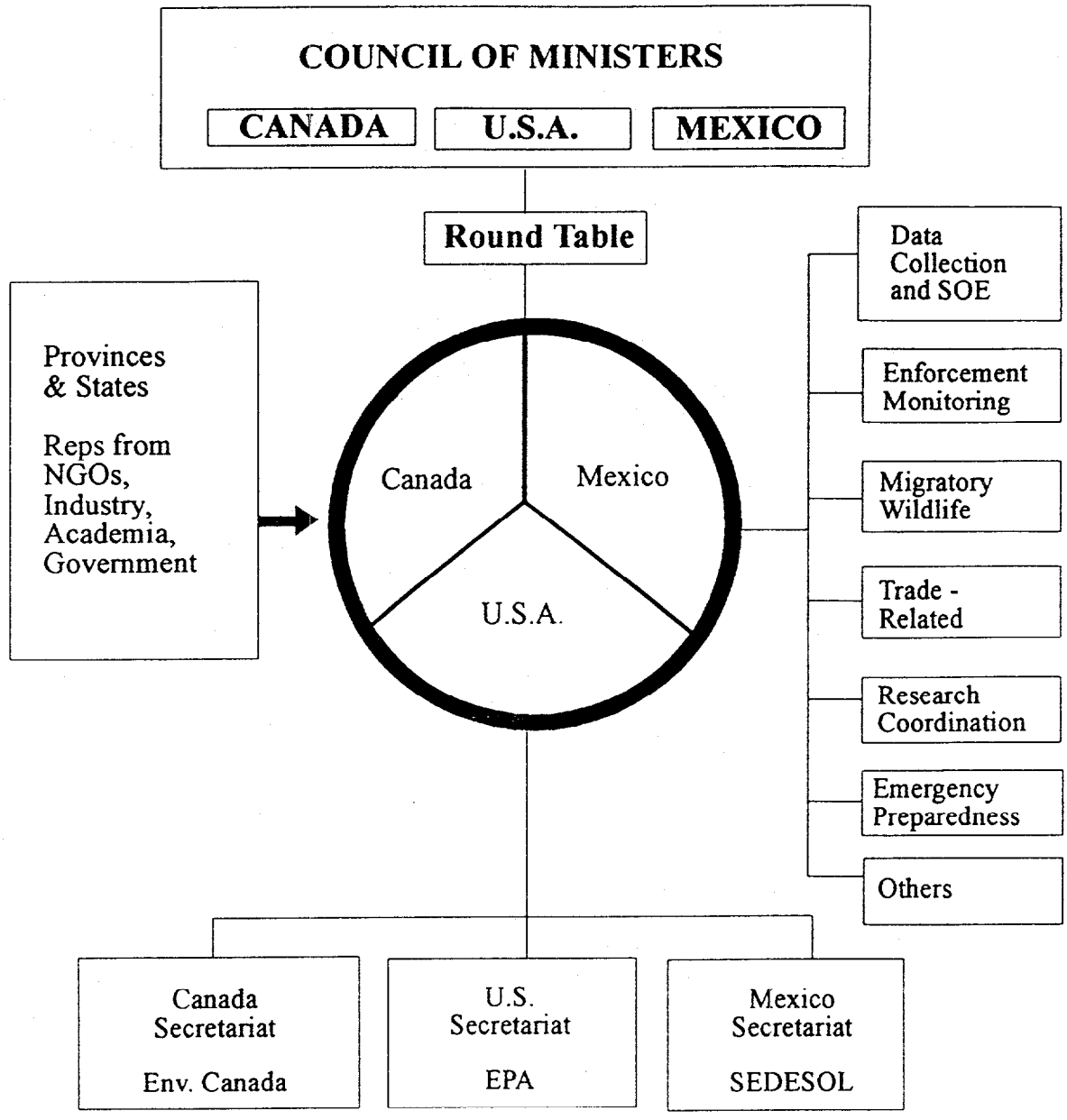
This draws on the successful work of the IJC with its scientific advisory boards.

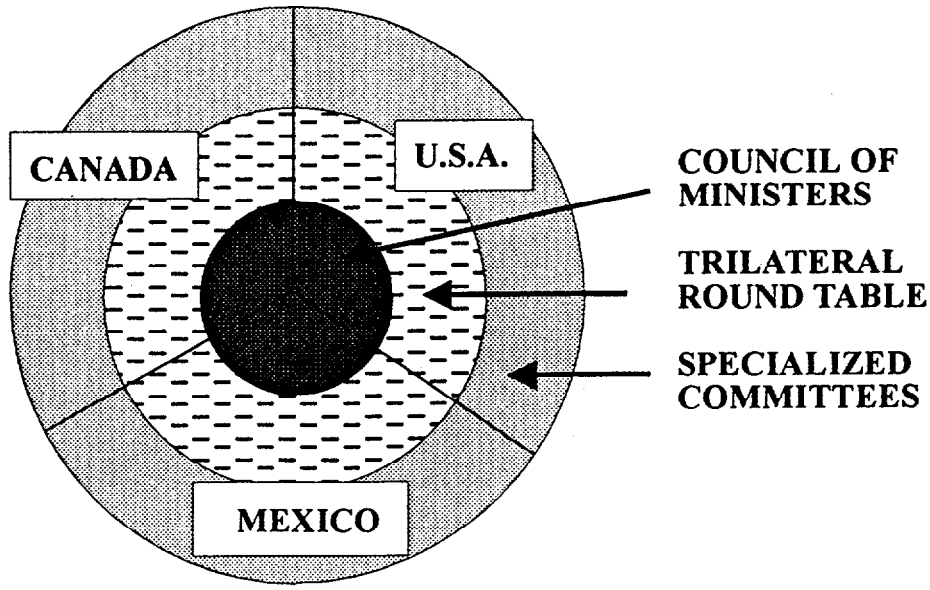
Conclusions

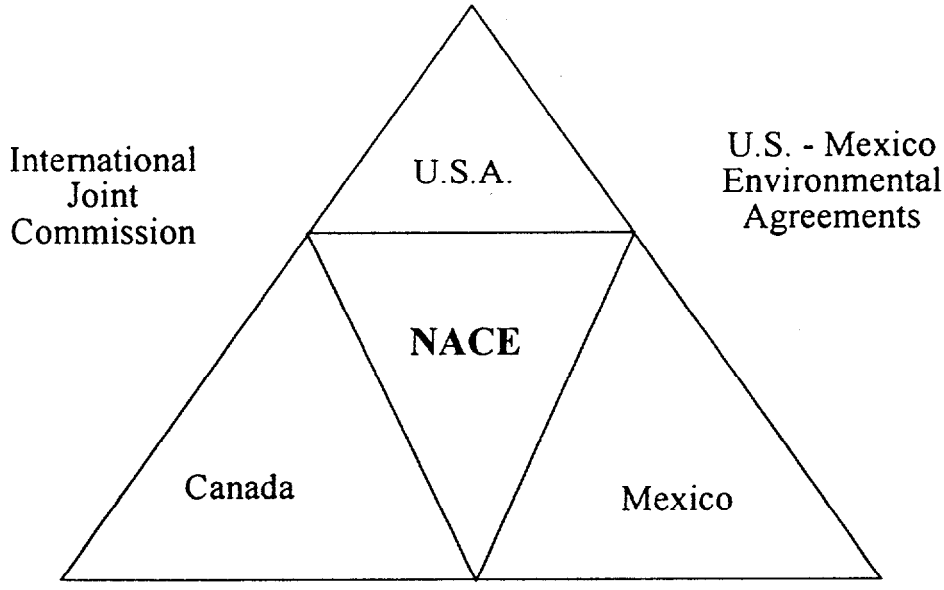
This format would greatly enhance the public accountability and the credibility of the NACE by ensuring serious input from NGOs, the scientific community, industry, and others, to enrich the deliberations of the Ministers. The discussions at the Trilateral Round Table would help consensus building between sectorial representatives, as well as national representatives, and would contribute to solving common transboundary problems. Through technical and scientific advisory boards, informed analysis could be made available to the NACE, as well as the trade dispute settlement mechanism of the NAFTA.

The environmental area remains a serious block to achieving the political acceptance and approval of the NAFTA. A Ministerial Council alone will not have sufficient public acceptance nor credibility in allaying public concerns. Therefore a more radical solution must be sought such as the proposed Trilateral Round Table, as an advisory body to the Ministerial Council. Such a body would enrich the deliberations of the Ministers and help to forge new multi-stakeholder solutions to transboundary environmental problems.


COUNCIL OF MINISTERS
SECRETARIAT
TRILATERAL ROUND TABLE
NGO, UNIVERSITIES, INDUSTRY & GOVERNMENT REPRESENTATIVES
EXEC. DIRECTOR FROM SECRETARIAT
ADVISORY COMMITTEES
Scientific Research
Trade Policy & Disputes
Enforcement Complaints
State of Env. Data Exchange
NGO Concerns


COUNCIL OF MINISTERS
CANADA
U.S.A.
MEXICO
Round Table
Provinces & States
Reps from NGOs, Industry, Academia, Government
Canada
Mexico
U.S.A.
Data Collection and SOE
Enforcement Monitoring
Migratory Wildlife
Trade - Related
Research Coordination
Emergency Preparedness
Others
Canada Secretariat
Env. Canada
U.S. Secretariat
EPA
Mexico Secretariat
SEDESOL





Canada-Mexico Environmental Agreements

10. NACE: SOME FUNCTIONS AND FORM

William Snape

In terms of the difference between funtion and structure, one cannot talk about the structure of the North American Commission on the Environment (NACE) ot the structure of the North American Free Trade Agreement (NAFTA) unless talking also about their respective funtions. In NAFTA, enforcement is a function which is highly dependent on the structure of a NACE. In Canada, the main difficulty with enforcement seems to be that the provinces have a great degree of autonomy. With respect to what a NACE will look like, while cooperation and reports are quite important, in order to create an effective NAFTA environmental enforcement regime which ensures that environmental laws do not become the basis for competitive advantage or disadvantage, one must get to the point of what really is at issue when creating a continental trade agreement -- enforcement of existing standards. In terms of function, there should be some sort of enforcement capability with NACE itself if NAFTA is to be environmentally friendly.

There are many ways to interpret the word 'enforcement'. For some time, people were very concerned about the issue of American or NACE officials being able to roam around and close plants in the U.S., Canada and Mexico. That is not what the debate on enforcement is about. So, it is essential to define what enforcement means. For example, investigation and the ability to shine a spotlight on those that are not complying with existing laws and to make that non-compliance public is a very powerful function. At the end of any spotlight process, however, economic sanctions must be a remedy, albeit an undesirable one, or there will be no real deterrence against non-enforcement of environmental laws. While international agreements are all about consensus building, one must be very wary of a NACE that is an emty shell.

Given this outline of functions, what should NACE's structure look like? The relationship between the ministers in the respective countries (the NACE Commission), and the NACE secretariat is an important one. There must be a highly independent NACE secretariat so that the institution does not drift into an annual meeting and cocktail party of environment ministers. In the case of environmental disputes, environmental experts must have a significant and binding say in the resolution of those disputes. Or, if environmental provisions are involved in a trade dispute, it is mandatory that environmental expertise be given the deference that it deserves in the process.

One of the differences between the American and the Canadian positions on NACE is the degree to which the public may communicate directly with the Commission. It will be very difficult for the Clinton Administration not to heed the calls to allow the public direct access to a NACE. This puts the people first and reflects the age of the new democracy. It will be very difficult for President Clinton to sell a NAFTA package to Congress which creates a bureaucratic body of any sort that is off limits to the public and it will be food for Ross Perot's fodder. If that reality exists, it is the hammer ready to fall on this Administration as they seek to implement a successful NAFTA. One possible middle ground between having a filter between the public and the NACE, versus the public having direct participation in the NACE, would be a NACE public advisory committee. This would be a committee to which the public has direct access and it would be a body that has direct access to the NACE decision makers. The disadvantage

of the NACE public advisory body approach is that it adds another layer of bureaucracy, but it might be a very good compromise.

A NACE should be broader than NAFTA. The potential of a NACE to go beyond what is in the realm of the traditional trade agreement is a very exciting one and one that, although it is novel and might scare some people, would be a very wise move. It could provide a forum for addressing such questions as the public policy difference between a transboundary pollution effect and a trade effect. It could also be a security blanket for addressing environmental issues facing the continent.

A NACE should not have the authority to act on any type of environmental non-enforcement. The environmental community does not expect NACE to be able to enforce regulations in, say, Fairfax, Virginia, governing bad waste facilities that are not complying with existing local laws, but that do not have any trade effects, do not have any transboundary effects, or do not affect the global commons. Those three limitations have been advocated by some representatives on Capitol Hill and are generally supported by the environmental community. Nonetheless, NACE should be able to consider any environmental enforcement matter.

The last thing to consider is the institutionalization of laws vis-à-vis trade agreements, concentrating on U.S. laws. Here, one must come to grips with the fact that laws like *National Environmental Policy Act* (NEPA), the *Endangered Species Act*, the *Clean Water Act*, and the *Clean Air Act*, have provisions which seek to scope out the effects of certain federal agency actions as they relate to wetlands, endangered or threatened species, clean air emission requirements, or in NEPA's case, any effect on the human environment. If one is to analyze the environmental effects of any trade agreement and have a baseline idea of where the starting point is, these laws should be applied to trade agreements. One of the problems the Congress, and the Administration to some extent, now face is that they do not have a feel for what NAFTA is going to do to the environment. They simply do not know. They do not even know how much money is needed to clean up the border region. Majority Leader Richard Gephardt has been on a crusade to figure this out and he still does not have the answer. He has called five governors in the border states, he has asked representatives from the border states, and he has asked representatives from the Mexican government but he still does not have a number that he is satisfied with. There are two reasons for this uncertainty. First, it is a difficult calculation, and second, the government in the U.S. has not made the attempt to scope it all out. Therefore, the institutionalization of environmental laws vis-à-vis trade agreements is very important.

In conclusion, the idea of free trade has been seen by some as an end in and of itself for too long. However, free trade as laudable as its goal is, needs to be a means to an end. Many people remain to be convinced that for the people of the three countries, and the environment of the continent, free trade is a good idea and that the standards of living of people in North America will be raised by the NAFTA, not lowered by it.

11. CONCLUSIONS: AN EMERGING CONSENSUS

Sarah Richardson

There is a broad consensus that there will be no North American Free Trade Agreement (NAFTA) without a North American Commission on the Environment (NACE) and that there will be no NACE without a NAFTA. Yet as the negotiators sit down for the third round of negotiations, there is still no complete consensus among the interested communities about the mandate and powers that the prospective NACE should wield. There is a basic agreement that NACE should be a trinational body concerned with problems of the regional, national, continental and global environment as they relate to North America. It is also generally accepted that the NACE will have trade as well as non-trade related functions. That is, it will interact with provisions of the NAFTA in order to ensure that the latter is sensitive to environmental concerns. In particular, there is a consensus that there is a role for a NACE to play in the area of standards and dispute settlement.

THE NORTH AMERICAN ENVIRONMENT

There is an acknowledged need that the three North American governments must cooperate more on the environment, that border issues need more attention and that the existing bilateral treaties between the countries can be broadened and strengthened. To this end, there is widespread support for the NACE to play a major coordinating role in the promotion of sustainable development and responsible ecosystem management in North America.

Continental issues that a NACE might address include the protection of migratory species, arid regions, water management, long range air-borne pollution which crosses borders and other transboundary issues which are already covered by bilateral instruments between the countries. A NACE should also address the links between the continental environment and the global environment. Continental environmental problems that have global dimensions would include energy efficiency, high seas over-fishing, climate change commitments, land use, boundary waters, the marine and coastal environments, and various other global instruments which the countries are already parties to.

STANDARDS

There is consensus that one important task for the NACE would be to act as a consultative body to initiate cooperative systems to permit the systematic upward harmonization of environmental standards, or the mutual recognition of standards and standard-setting activities in various contexts. The NACE itself would not be a standard-setting body but would facilitate the upward harmonization of standards that is called for in the NAFTA text, and perhaps assist in the negotiation of criteria for the use of process standards. Indeed, the evolution of environmental standards could well consume the largest amount of NACE's time over the next five to ten years.

DISPUTE SETTLEMENT MECHANISM

There is a broad consensus that a NACE could play a role to compliment NAFTA in dispute settlement including: duty of consultation, creation of expert and technical working groups, selection of environmental experts for dispute settlement roster, the provision of expert and scientific boards, comments on the interim report of panellists. Under Chapter 19 of NAFTA there might be a role for NACE in developing clearer policy guidelines for what is a subsidy in a given context, in light of the possible future

development of permissable "green subsidies".

Enforcement And Trade Sanctions

Supra-National Enforcement Powers

NAFTA itself is not an agreement that binds parties to a supra-national institution; it is an agreement based on the sovereign equality of each party. Therefore, there is a limit to the amount that can be expected of NAFTA and NACE. An institution with supra-national powers would go far beyond NAFTA, which neither forces countries to abandon their sovereignty nor commits them to making uniform laws. There is a consensus that the supra-national enforcement of the Parties' domestic environmental laws is not an appropriate role for the NACE.

Trade Sanctions

One possible avenue to encourage the parties to NAFTA to enforce their domestic environmental laws is through the use of trade sanctions. There is some support for a strong side agreement which creates a NACE with well-defined powers of enforcement, including trade sanctions. However, there is also a concern that the extraterritorial review of domestic environmental laws or law enforcement might not always be desirable. While environmental groups support the use of sanctions as a necessary last resort, much of the trade policy community is opposed to the use of trade sanctions by a NACE to enforce the three countries' domestic environmental laws.

There are three principal reasons why trade sanctions are not a good idea. First, they would be very difficult to implement as a general remedy across the various jurisdictions. Second, the effect of trade sanctions would disproportionately injure Canada. Because 30% of Canada's GNP derives from international trade, its economy is far more vulnerable to trade measures than the American or Mexican economies. Third, the existence of trade sanctions to "force" countries to enforce their domestic environmental laws would deter the Parties from ever raising or even establishing their own domestic standards; sanctions based on a country's inadequate enforcement of law creates a disincentive to draft stronger laws. Moreover, governments often lack the resources and the support of politicians to properly enforce domestic environmental standards in a "command and control" model. Thus different approaches to enforcement (i.e., tradeable permits) might be worth considering.

Unfair Trade Practices Law

The use of private unfair trade practices law, and the creation of "environmental countervail" in the NAFTA-NACE regime does not enjoy widespread support. There is considerable consensus that in practice, domestic anti-dumping and subsidies laws generally reflect very dubious policy concerns and are too easily accessed by special interest groups with protectionist intent. Even environmentalists acknowledge the threat of "green protectionism" that could be associated with the use of private unfair trade practices law.

Prosecutorial Discretion

Another issue under consideration is the use of prosecutorial discretion in enforcement. This might involve adopting a set of criteria to differentiate between those areas where the letter of the law has not been strictly enforced from those areas where a regulator has simply turned its back. In the former case, a facility might be brought into compliance over a certain number of years, perhaps through new technologies.

Procedural Safeguards

Because trade remedies as part of NACE are now the political measure of acceptability of the whole NAFTA agreement for some groups, particularly in the U.S., some procedural safeguards might be put in place to avoid the threat of the "capture" of environmentalists by industry. Typically,

such safeguards would include a government "filter" for standing (the right to pursue a case), a mandatory consultation period, and a remedy that would be a broad-based fee (rather than one that is narrowly-targeted) and, once collected, would be returned to the treasury of the offending country to assist it in addressing the environmental problem that the fee was associated with.

Chapter 17 Model

Another possible way to employ trade sanctions would be to translate the Intellectual Property Rights (IPR) model from NAFTA to the environment in an appropriate way. Under Chapter 17 of NAFTA, any right holder can file a complaint with its own government for violation of intellectual property rights. The IPR model grants standing for the right holder to sue in the domestic courts of the country where the violation occurred, in order to enforce the intellectual property right. Thus if there is a violation in Mexico, one sues in Mexico. However, there will be problems with definitions of legal interests in the trade, environment and competitiveness context, and issues of competitive disadvantage that do not arise in the area of intellectual property, where rights are clear. For example, in order to obtain standing in the U.S. one must be seeking to defend an interest that the law promotes; the interest that the U.S. *Clean Water Act* promotes is clean water, not the competitiveness interest of a level playing field.

The IPR model, functioning effectively will address problems with the enforcement of laws already on the books. However, it does not allow parties to get at the other fundamental issue of the lack of practices, or proper management of resources, in any of the three countries.

Environmental Subsidies

One might look to the Dunkel proposal for the Uruguay Round of the GATT for some assistance in this debate. If the subsidy text in the Dunkel proposal is accepted, it will provide a useful umbrella for governments to provide environmental assistance to industry without industry fearing their exports will be subject to countervail action. It is thought that even fairly robust environmental assistance would be shielded from countervail. The litmus test for a subsidy will be money passing hands or perhaps some transferable right. Inadequate enforcement of environmental standards will probably not be deemed a "subsidy".

Other Tools / Instruments

Another approach to this question emerges when one asks how a NACE can encourage compliance. Governments must feel that it is in their interests to comply with their obligations. In considering how to achieve compliance, short of strict "command and control" enforcement, the following tools have been suggested. These would institutionalize what the environmental community has been calling a "roving spotlight" to highlight egregious violations of environmental standards by the parties. In the absence of trade sanctions, it is critical to create the most institutionally-sound and accountable NACE possible, to ensure that it is a credible organization.

Monitoring/Fact-finding/Reporting

One tool necessary for enforcement is good monitoring. It has been suggested that NACE would administer a possible North American Toxic Release Inventory which would keep track of what chemical plants are regularly emitting into the atmosphere. Independent investigative powers might also be an important element of a strong NACE. There is some feeling that the Canada-U.S. International Joint Commission is too controlled by government because governments direct their references. In contrast, the NACE must be able to set its own agenda. There appears to be consensus that a NACE would issue detailed annual reports and that these would be made available to the public.

Consultation

Procedure and consultation are very powerful tools. They are not necessarily "soft" if properly constructed.

Public Participation/Independence

One way to encourage compliance with environmental laws all over North America is to build into NACE provisions for public participation and open information. It was suggested that governments need pressure from the public in order to accomplish their objectives.

Voting and Consensus Building

Another tool might be the use of consensus in decision making and voting procedures. While there is considerable support for decisions by consensus, some environmental groups are inclined towards majority voting, at least for some of the NACE's functions.

One model advanced for the NACE included a body structured along the lines of the NRTEE concept of a consultative, multi-stakeholder, consensus-building body. This architecture has the intention of institutionalizing the participation of major stakeholders who are the critical components government needs to decide. The challenge will be for the political ministers who head the NACE to work with the more autonomous body of multistakeholder experts.

Private Sector / Standards Community

There seemed to be general agreement that an important component of a NACE would be to take advantage of, and encourage, the role of "bottom up" environmental standards-setting activities already in progress or in prospect by and among private sector and non-profit organizations such as the Canadian Standards Association in Canada, ANSI in the United States and CANACINTRA in Mexico. Many aspects of this approach are fundamentally compatible with the principles of sustainable development: the use of full life-cycle methodology through the development and standardization of environmental management systems and appropriate eco-logos and product labelling; bottom up, consensus-oriented standard setting; and the use of market instruments such as the withdrawal of certifications or eligibility for bidding on contracts as a means of ensuring compliance through conformity assessment. Because such voluntarily created standards are often referenced in government regulations and because private sector compliance mechanisms can be reinforced by changes in government procurement practices, this approach represents a partnership between the private sector, non-profit community and governments that has a proven record as a standards-setting and compliance approach.

Structure

There is some consensus that the NACE should be structured in two tiers. The first tier would consist of the Ministers, strong enough to act as a counterbalance to the Free Trade Commission composed of trade ministers and to provide the NACE with a political presence and political accountability. The second tier might be composed of arm's length appointments. Staggered terms and an annual ministerial summit meeting seem desirable. Other proposals include the position of a Secretary General to head an independent Secretariat comprising of professionals and experts.

Building in an advisory body is also an issue. There was some consensus that there should be public input into the NACE decision making structure, and even an institutionalized dialogue within NACE between citizens, stakeholders, professionals and politicians. This would assist the NACE in achieving credibility. The advisory body could include all relevant stakeholders with nine members (three from each country) and a Chair.

Independence

While public participation and independence are important, governments must want and value the NACE as an organization. There is a fine line between a Commission with independent powers and the degree of discomfort governments are willing to tolerate. The balance between structural independence and openness, and NACE's value in the eyes of governments, is a precarious one. A body must have enough independence so that issues will get raised, but not so much that governments will be tempted to walk away from the institution. This balance can be achieved through both the mandate and the composition of the NACE.

Funding

An important aspect to ensuring the necessary independence is funding. Funding is traditionally the most effective instrument of control. Thus getting the source and amount of funding right is as important as getting the composition of the NACE right. An assured source of funding is critical if NACE is to set its own agenda.

Conclusion

It appears now that there will be no NAFTA without a NACE, and, according to one influential environmental group in the U.S., a NACE that is a good deal stronger than the Canada-U.S. International Joint Commission.

The U.S. Administration, in consultation with the relevant Congressional committees, is in the first stages of the "reverse mark-up" procedure. During this procedure the implementing legislation to accompany NAFTA, as well as the supplemental agreements on labour and environment, will be drafted. However, there are a number of important aspects of the implementing legislation which, as of early April, had not been considered and would not be worked out for several weeks. One such issue is how to fund the border clean up plan between the U.S. and Mexico.

The U.S. has announced that they do not intend formally to submit implementing legislation to the Congress until the supplemental negotiations have been completed. However, both the Secretary of the Treasury and the United States Trade Representative (USTR) have reaffirmed that the goal of the Administration is to have NAFTA approved and in place by January 1, 1994. This suggests a Congressional vote in late September or early October, which means that the implementing package should be sent to Congress by mid-June. The two to three months following April 1 are thus critical for the development of the implementing legislation and the supplemental agreements.

As of April 17, in the Canadian Parliament, the NAFTA legislation is at the Committee stage, having passed second reading. There is some chance that the bill will pass before the summer. If it does not, then it will become an issue in the general election that must be held by the autumn of 1993. Depending on the results of that election, and the strength of the incoming government, NAFTA may or may not pass.

Finally, an important element of any supplemental agreement is to ensure that any country acceding to NAFTA in the future is willing to make similar commitments to the environment, signing on to the supplemental agreement would be a prerequisite. This requirement should be included in the agreement, especially if the NAFTA is truly just the stepping stone to a broader agreement that will cover all of the Americas. To this end, there is some room for creativity in setting up mechanisms to assist future trading partners in raising their environmental standards and performance.

APPENDIX A

Agenda

9:30-9:40	**Welcoming Remarks** *Robert Blake,* Chairman of the Board, EESI *Pierre Marc Johnson,* Vice-Chair, NRTEE
9:40-10:10	**Context** Moderator: *Gareth Porter*, EESI United States: *Eric Biel*, Senate Finance Committee Canada: *Pierre Marc Johnson,* NRTEE Mexico: *Regina Barba*, Union of Environmentalists
10:10-11:25	**Trade Related Functions of NACE: Building on NAFTA** *Armand de Mestral,* McGill Law School *Gary Hufbauer,* International Institute for Economics Discussion
11:25-11:40	**Break**
11:40-12:30	**Non-trade Related Functions of NACE: Independent of NAFTA** *Konrad von Moltke*, Dartmouth College Discussion
12:30-1:30	**LUNCH**
1:30-2:45	**Enforcement** *Robert Housman,* Centre for International Environmental Law *Nina McClelland,* NSF International Discussion
2:45-3:00	**Break**
3:00-4:45	**Institutionalization and Organization** *Robert Page,* NRTEE *William Snape,* Defenders of Wildlife *Regina Barba,* Union of Environmental Groups Discussion
4:45-5:00	**Closing Remarks** *Pierre Marc Johnson,* NRTEE *Gareth Porter,* EESI

APPENDIX B

Participants

John Audley
Trade Analyst
Sierra Club

Regina Barba
President
Union of Environmentalists
(Mexico)

André Beaulieu
Centre for Medicine, Ethics and Law
McGill University

Eric Biel
Counsel for Trade
Senate Finance Committee

Richard Blackhurt
Chief Economist
GATT

Robert Blake
Chairman
EESI

Seth Brewster
Trade Legislative Assistant
Senator Mitchell's Office

Lise Boucher
McGill University

Steve Charnovitz
Policy Director
Competitiveness Policy Council

Ann Cronin-Cossette
Environment Section
Canadian Embassy, (Washington)

Armand L.C. de Mestral
Professor
Faculty of Law
McGill University

Ronald Doering
Executive Director
NRTEE

Janine Ferretti
Executive Director
Pollution Probe

Lynn Fischer
Natural Resources Defence Council

Margaret Goud-Collins
Fellow
Senate Committee on Environment
and Public Works

Arthur Hanson
President
IISD

Jean Hennessey
Director, Institute on Canada and the
United States
Dartmouth College

Robert Housman
Centre for International
Environmental Law

Stewart Hudson
International Program
National Wildlife Federation

Gary Hufbauer
International Institute for Economics

John Jackson
Georgetown University Law Centre

Pierre Marc Johnson
Director
Centre for Medicine, Ethics and Law
McGill University

John Kirton
Department of Political Science
University of Toronto

Hayes McCarthy
International Program Associate
EESI

Nina McClelland
President and CEO
NSF International

Ralph Osterwoldt
Environment Directorate
World Bank

Robert Page
Dean
Faculty of Environmental Design
University of Calgary

Jaime Palafox
Assistant to Representative of SEDESOL
SEDESOL

Gareth Porter
Director
International Program
EESI

Sarah Richardson
Foreign Policy Advisor
NRTEE

David Runnalls
Institute for Reseach on Public Policy

Matt Schaefer
c/o Western Governors' Association

Richard Smith
Principal Deputy Assistant Secretary
for Environment
Department of State

William Snape
Associate Counsel
Defenders of Wildlife

Kenneth Thomas
Bilateral Affairs Officer
Environmental Protection Office
OAS/ENV
Department of State

Konrad von Moltke
Dartmouth College

Mel Wilson
Associate
IRIS Environmental Systems

APPENDIX C

Draft Environmental Safeguard Clauses
for a
North American Free Trade Agreement Article
Extent of Obligations: Prevalence of More Stringent Environmental Standards

1. No Provision Of This Agreement Shall Be Applied Or Interpreted:

A) In a manner conducive to adversely affect human health, the integrity or equilibrium of the environment or the conservation of natural resources in the territory or areas under national jurisdiction of any of the parties, or

B) In a manner less stringent or contrary to the national or international environmental standards in force in the place of origin, implementation or impact of policies, plans, programs or activities undertaken on the basis of this agreement.

2. The parties shall, either individually or jointly, take all appropriate and effective measures, including legal, administrative or other measures, or conclude the necessary bilateral or multilateral agreements, to ensure that their individual or joint policies, plans and programs under this agreement, as well as activities undertaken by natural or juridical persons under their respective jurisdiction or control, comply with paragraph 1 of this agreement.

3. In the event of any inconsistency between the provisions of this agreement and any bilateral or multilateral environmental agreements or rules of international law binding on any of the parties, the one containing more stringent environmental provisions shall prevail.

ARTICLE

Extent of obligations: mandatory environmental impact assessment

1. Within the term of one year from the date of entry into force of this agreement, the parties shall take all appropriate and effective measures, including legal, administrative or other measures, in order to make strictly mandatory, for any proposed policy, plan, program or activity, or any major change thereof, the obligation of previous submission and approval of an environmental impact assessment.

2. The obligation referred to in the previous paragraph shall apply, whenever the proposal is intended to be undertaken;

   A) Under the purview of this agreement:

   B) By governmental agencies or natural or juridical persons, whatever their nationality, and

   C) In their respective territory or areas under national jurisdiction, or in those of any of the other two parties to this agreement.

3. The measures to be adopted by each of the parties as a result of paragraphs 1 and 2 of this article shall include:

A) The establishment of an appropriate national mechanism to make effective the compliance with those paragraphs;

B) The designation of a national authority with competence and technical capacity to process, evaluate and authorize or deny the environmental impact assessments, and to undertake periodic mandatory post-project verification analysis of the environmental impacts caused by any already authorized policy, plan, programme or activity, and with powers to suspend or revoke such authorization, whenever there are reasonable grounds to conclude that, as a result of that authorization, an adverse environmental impact has been caused or is about to be caused, in contravention of applicable national or international standards, and to condition any future authorization to the submission and approval of a new environmental impact assessment.

C) The establishment of an open and effective procedure or mechanism to facilitate and ensure public participation in the implementation of this article, particularly in the timely evaluation of environmental impact assessments and of the post-project verification analysis, which additionally provides for legal remedies to prevent and revert undue or illegal authorizations, and always ensuring an opportunity at least equivalent to the one provided for public participation in the other parties to this agreement in accordance with their respective national legislations.

D) The establishment of procedures and mechanisms to ensure that governmental authorities, and physical or juridical persons under their jurisdiction or control, strictly and effectively comply with the provisions of this article.

4. While the provisions of the above paragraphs of this article take full effect, within the term available for it in accordance with paragraph 1, each of the parties shall:

A) Take all appropriate and effective measures, in order to extreme the stringency in the requirement of compliance of national laws and regulations in force, which provide for the mandatory submission and approval of environmental impact assessments, maximising public participation in the process of evaluation and approval of those assessments, at least in a manner equivalent to that provided for the public of the other parties to this agreement.

B) Take all appropriate and effective legally permissible measures to condition, to the submission and approval of an environmental impact assessment, the authorization or extension of authorization to any proposed policy, plan, program or activity, or any major change thereof, intended to be undertaken or already being undertaken under the purview of this agreement or in matters covered by this agreement, by governmental agencies or natural or juridical persons, independently of their nationality, and in their territory or areas under national jurisdiction, especially in those cases where such obligation is provided by the national legislation of any of the parties to this agreement.

ARTICLE

Definitions of General Application

Policy, Plan, Programme or Activity, or any major change thereof means any action which, if undertaken on the basis of this agreement, would have the potential to adversely affect human health, the integrity or equilibrium of the environment or the conservation of natural resources in the territory or areas under the national jurisdiction of any of the parties, in a manner contrary to the national or international environmental standards in force in the place of origin, implementation or impact of such action.

ARTICLE

Panel Procedures

Within 30 days of the date of entry into force of this agreement, the parties shall, applying the provisions of this article *Mutatis Mutandis*, establish a permanent and independent panel for the monitoring and annual review of the impact of this agreement on the environment, which shall be open to the widest possible public participation. In its annual report, the panel may propose to the parties amendments to this agreement in order to prevent further negative impacts on the environment resulting from its implementation. The panel may also propose at any time the suspension of any part of this agreement, whenever it deems that the continued implementation of that part may cause irreversible damage to public health, the environment or to the conservation of natural resources.

APPENDIX D

Draft Agreement Establishing the Commission for the Protection of the Environment In North America

The Governments of Canada, the United Mexican States and the United States of America (the Parties),

PERSUADED by the need to cooperate among themselves for the protection of the environment and of the natural resources in North America;

CONVINCED that their North American Free Trade Agreement (NAFTA) shall, from the date it enters into force, be implemented only in a manner that ensures that activities arising from the Agreement and undertaken throughout the region protect natural resources and improve environmental quality as well as the health and safety of individuals in all three countries;

DECIDING to provide for an effective institutional mechanism that will permanently ensure an environmentally sound implementation of the NAFTA;

REAFFIRMING Principle 21 of the 1972 Stockholm Declaration on the Human Environment, as well as Principle 2 of the 1992 Rio Declaration on Environment and Development, and United Nations General Assembly Resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources, of 14 December 1962;

RECALLING the various bilateral, trilateral and multilateral environmental and conservation agreements to which they are Parties, and their relationship with the NAFTA, in accordance with its Article 104;

HAVE AGREED AS FOLLOWS:

Article 1

Establishment of the Commission

1. The Parties hereby establish the North American Commission for the Protection of the Environment in North America (the Commission), comprised of the Meeting of the Parties, the Committee of Environmental Experts (the Committee) and by the ad hoc committees of governmental, independent or mixed experts that the Parties may establish in conformity with this Agreement.

2. The Parties shall provide the Commission with an adequate budget to carry out its functions under this Agreement, and shall administer a North American Fund for Environmental Protection as provided in Articles 3 and 12.

3. The Meeting of the Parties, the Committee of Experts and the ad hoc committees will function with the support of a pro tempore secretariat, which will be entrusted to each of the Parties for two year periods.

Article 2

Object and Purpose

The object and purpose of the Commission will include:

1. To serve as a focal point for environmental cooperation among the parties, especially through the exchange of information regarding policies, legislation, plans and programs adopted and applied by each of the parties for protection of natural resources and the environment;

2. To ensure the environmentally sound application of the NAFTA, in order to protect against negative impacts caused by the activities carried out under that Agreement, natural resources and environmental quality, as well as public health and safety of individuals in the three countries.

3. To serve as a mechanism for the evaluation and monitoring of the environmental agreements in force and those agreed to by the parties in accordance with the updated list that appears as an Annex to this Agreement and to formulate recommendations for their more effective application.

Article 3

Instruments of North American Environmental Policy

The instruments of environmental policy available to the Commission are:

1. The Biennial Report of the Commission, as provided in Article 6;

2. The Index of Parameters of Maximum Tolerance of Environmental Impacts, as provided in Article 7;

3. The Environmental Advisories, as provided in Article 8;

4. The communications by individuals and non-governmental organizations concerned with the environment, as provided in Article 10; and

5. The North American Fund for Environmental Protection, as described in articles 1 and 12 of this agreement.

Article 4

The Meeting of the Parties

1. The Meeting of the Parties is the main organ of the Commission with powers to issue recommendations and to adopt decisions binding on the three Parties, regarding the specific matters provided in this Agreement.

2. Each Party shall appoint a delegation to the Meeting of the Parties.

3. The delegations to the Meeting of the Parties shall be headed by a person devoted full time to the Commission and with demonstrated expertise in environmental affairs, and shall not have a vested economic interest in trade and investment arising under the NAFTA.

4. The Meeting of the Parties shall adopt its own Rules of Procedure.

5. The Meeting of the Parties shall convene at least twice a year in regular sessions, rotating the venue among the three Parties.

6. All sessions of the Meeting of the Parties shall be open to the public, as well as all its records and documentation, and shall be publicly convoked at least 15 days in advance. During its sessions, the Meeting of the Parties shall allow for the presentation of proposals by the public. Those proposals shall be debated and decided on by the Meeting of the Parties in the same session.

7. The functions of the Meeting of the Parties are the following:

   a) to create and publish the Biennial Report of the Commission, under the terms of Article 6 of this Agreement; and

   b) to facilitate the exchange of information regarding policies, legislation, plans and programs adopted and applied by each of the three Parties for the protection of natural resources and the environment, as provided by Article 2 Paragraph 1 of this Agreement;

   c) to carry out the evaluation and monitoring of the environmental agreements in force and those to be agreed upon by the Parties, included in the updated list of the same that appears as an Annex to this Agreement, as provided in paragraph 3 of Article 2, as well as to formulating recommendations for the more effective application of these agreements;

   d) to carry out, through an interdisciplinary ad hoc committee of experts, and with the support of the Committee of Experts, the effective and prompt creation of the draft treaty for the establishment of a comprehensive regional regime for environmental cooperation in North America, and to proceed with the negotiations and to put it in force in conformity with Article 11 of this Agreement; and

   e) other functions entrusted to it in this Agreement.

Article 5

The Committee of Environmental Experts

1. The Committee of Environmental Experts shall be an independent and impartial organ of the Commission, with powers to issue recommendations to the Meeting of the Parties, subject to the provisions of this Agreement.

2. Each Party shall appoint three members to the Committee of Environmental Experts.

3. All members of the Committee shall have demonstrated expertise in environmental affairs, shall not be employed by the Governments of the Parties and shall not have a vested economic interest in trade and investment arising under the NAFTA.

4. The Parties shall make their appointments to the Committee in accordance with a public selection procedure, as provided in Article 9.

5. The members of the Committee shall perform their duties exclusively in their private personal capacity.

6. The Committee shall adopt its own Rules of Procedure.

7. The Committee shall convene at least quarterly in regular session, rotating the venue among the three Parties. Two of the regular sessions of the Committee shall be held immediately before the regular sessions of the Meeting of the Parties.

8. All sessions of the Committee shall be open to the public, as well as all its records and documentation. During its sessions, the Committee shall allow for the presentation of proposals by the public. Those proposals shall be debated and open to discussion by the members of the Committee in the same session.

9. The functions of the Committee are the following:

   a) to create, adopt and maintain an updated Index of Parameters of Maximum Tolerance of Environmental Impacts, in conformity with Article 7 of this Agreement;

   b) to issue Environmental Advisories, in conformity with Article 8 of this Agreement;

   c) to promote exchange of information regarding policies, legislation, adopted and applied plans and programs of each Party for the protection of natural resources and the environment, in conformity with Paragraph 1 of Article 2 of this Agreement;

   d) to participate in the evaluation and monitoring of agreements in force or that are concluded among the Parties involving environmental matters, which are included in the list that appears as an Annex to this Agreement and is in conformity with Paragraph 3 of Article 2 of the same;

   e) to support the Meeting of the Parties and the Committee of Environmental Experts in establishing in conformity with Section (d) of Paragraph 7 of Article 4 of this Agreement, the effective and prompt creation of a draft agreement for the establishment of a regional and comprehensive regime for environmental cooperation for North America; and

   f) other functions entrusted to it by this Agreement.

Article 6

The Annual Report of the Commission

1. The Biennial Report of the Commission shall be published within one year after the NAFTA enters into force and thereafter every two years.

2. Two months before publishing the Report, a draft of its contents shall be effectively available throughout the region for public comment through hearings or through the communications referred to in Article 10.

3. The Report shall be divided in separate chapters that shall include:

   a) a review of the laws, regulations and technical norms and standards adopted by each of the Parties, as well as the administrative structures established by them for the protection of natural resources, the environment and human health;

   b) the administrative and judicial record of enforcement and compliance, by both the public and the private sectors, of those national laws, regulations and technical norms and standards in force in each of the three countries;

   c) a review of the efforts to harmonize the environmental standards undertaken by the Parties, and their effects;

   d) an evaluation of the impact on the environment, on natural resources and on human health, resulting from differences in environmental standards in each of the three countries;

   e) an evaluation of the participation of each of the Parties in international treaties and agreements concerning environmental protection, and their adherence to them;

   f) an evaluation of the degree of public participation in the adoption of environmental legislation, policy and decision-making, and in the process of enforcement and impact assessment in each of the three countries;

   g) an evaulation of the environmental impact deriving both from the application of the provisions of the NAFTA, by sector and sub-sector, and from different categories of activities arising from the NAFTA;

   h) a review of the degree of compliance, by both the public and private sectors, with mandatory provisions in the field of environmental impact assessments and statements in each of the three countries;

   i) a review of disturbing environmental trends in each of the three countries, identifying areas of critical environmental concern, and recommending criteria and plans for clean-up and elimination of environmental pressures;

   j) the recommendations and decisions of the Meeting of the Parties regarding each of the items included in all of the above chapters of the Report;

   k) the recommendations made by the Committee for each of the above chapters of the Report, and the reasons of the Meeting of the Parties for adopting or not adopting each and every one of those recommendations; and

   l) the full text of communications received by the Commission from private individuals or non-governmental organizations, in conformity with Article 10 of this

Agreement, including the findings of the Committee in each case and its respective recommendations to the Meeting of the Parties and the decision adopted in each case by the Meeting of the Parties.

Article 7

The Recommended Index of Parameters of Maximum Tolerance of Environmental Impacts

The Recommended Index of Parameters of Maximum Tolerance of Environmental Impacts shall be adopted and updated in accordance with the following provisions;

a) The Index shall involve general and specific impacts on the different ecosystems and components of the environment, on specific natural resources and on human health, caused by activities arising under the NAFTA by sector and sub-sector;

b) The Index shall be based on the best available scientific evidence;

c) The Index shall remain public at all times throughout the region;

d) The Parties shall provide the Committee with all information necessary for the Index;

e) In creating and adopting the Index, the Committee shall commit itself to a time frame that equally takes into account, on the one hand, the necessity of accelerating the protection of the components of ecosystems and, on the other, the different capacity of the Parties to observe those Parameters;

f) The different Parameters shall be interpreted into the Index and shall be published after each of them is adopted by the Committee; and

g) The first complete Index must be completed within five years from the entry into force of this Agreement and shall be updated in accordance with the criteria established by the Committee.

Article 8

The NAFTA Environmental Advisories

1. The Committee shall issue a NAFTA Environmental Advisory, when it finds that there are reasonable indications, even if there is no absolute scientific certainty, to determine whether the Parameters of Maximum Tolerance are about to be or have been exceeded;

2. NAFTA Environmental Advisories shall include the recommendations of the Committee as to the measures that the Parties should adopt in order to prevent the impacts or revert the environmental damage in question.

3. If the Committee finds that activities arising under the NAFTA, in a given sector or sub-sector, are about to cause or are causing irreversible damage to an ecosystem or component of the environment, or to a natural resource or to human health, the Meeting of the Parties shall have the power to declare a suspension or a provisional amendment of the relevant provisions of the NAFTA, and to propose to the Parties, on the basis of a recommendation by the Committee, the definitive measures they should undertake regarding those provisions.

Article 9

Public Selection Procedure

1. Each Party shall establish a Public Selection Procedure for the purpose of selecting members to the Committee, including a Selection Panel comprised of two Government representatives, two recognized independent members of the academic community, and a representative from an independent non-governmental organization concerned with the environment. The latter shall enjoy the widest possible support of national non-governmental organizations concerned with the environment.

2. The Selection Panel must ensure that the three experts it selects for the Committee include at least one member from the academic community, and at least one member of an independent non-governmental organization concerned with the environment. That member shall enjoy the widest possible support of non-governmental organizations concerned with the environment.

3. The Meeting of the Parties shall issue recommendations to ensure that the Public Selection Procedure in the three countries are as compatible as possible.

Article 10

Communication by Individuals and Non-Governmental Organizations

1. Any individual or non-governmental organization shall have the right to send to the Commission, through the Committee, communications on:

   a) Any matter within the competence of the Commission; or

   b) Any activity or any sector or sub-sector of activities which, in the view of the author of the communication, involves an environmental impact contrary to the environmentally sound application of the NAFTA, or of the environmental and conservation treaties and agreements in force for the Party or among the Parties in whose territory the activity is taking place.

2. Any communication submitted to the Commission must be supported by scientific and other evidence available to the author of the communication.

3. The Committee may ask the author of the communication for any clarifications or further information it may need to issue its finding.

4. The authors of communications shall have the right to a finding by the Committee at the latest in the next session, and to be notified of such finding, as well as the recommendation made by the Committee to the Meeting of the Parties and of the decision of the Meeting of the Parties.

5. If the author of a communication has reason not to be satisfied with the finding of the Committee, or with the decision of the Meeting of the Parties, those reasons shall be published in the Biennial Report of the Commission, together with all relevant documentation regarding the communication.

6. The provisions of this Article are independent from and without prejudice to the domestic legal remedies available to individuals and interested organizations.

Article 11

Guidelines for the Creation and Negotiation of a Regional Regime of Environmental Cooperation in North America

In conformity with Article 2 of this Agreement, the creation and negotiation of a Comprehensive Regional Regime of Environmental Cooperation in North America shall observe the following initial directives:

1. The Regime should be comprised of legally binding standards in order to:

   a) Provide the best possible protection of the ecosystems and natural resources of the region, especially those that are found in a transboundary situation;

   b) Prevent the resulting negative effects, or potential resulting negative effects, from activities undertaken in the territory or zones subject to the national jurisdiction of one of the Parties, or from other extraregional sources, on the ecosystems or natural resources in the territory or in zones subject to the national jurisdiction of any of the Parties;

   c) Combat, mitigate, control and reduce the negative effects and damage that said activities;

   d Provide for the restoration of ecosystems and natural resources that are deteriorated by such activities;

   e) Require responsibility from those who cause the damage referred to above;

   f) Establish an obligatory procedure to give the Parties previous notice and time to evaluate the activities with a potential transboundary environmental impact in the region; and

   g) Put in force a program of obligatory cooperation for the Parties, with the goal of reducing their contributions to global environmental phenomena.

2. The institutional mechanisms necessary to apply and make effective the said regime, including the Committee established by this Agreement.

Article 12

North American Environmental Protection Fund

1. In conformity with Articles 1 and 3 of this Agreement, the Parties shall establish the North American Environmental Protection Fund, by whatever means available, and shall administer the financial resources necessary to meet the objective and purposes of the Commission and, concretely, in order that the Meeting of the Parties, the Committee of Environmental Experts and the ad hoc committees are able to carry out their respective functions.

2. The financial resources of the Fund shall come from, inter alia, the following sources;

   a) The contributions of the Parties, considering the different economic and financial conditions of each of them;

   b) A percentage agreed among the Parties of the fines or economic sanctions that their respective authorities collect resulting from violations of their environmental laws and regulations, that have been committed within their territory or in zones subject to their national jurisdiction;

   c) Amounts that are obtained from international financial organizations; and

   d) Other private and public sources.

Article 13

Final Clauses

1. This Agreement shall enter into force the day after the NAFTA has already entered into force and the Parties have communicated to each other that they have completed their respective domestic procedures to that effect.

2. This Agreement admits no reservations.

3. This Agreement may be amended with the consent of the three Parties.

4. This Agreement shall remain into force until terminated by the Parties.

IN WITNESS THEREOF, the Parties have signed the equally authentic original texts of this Agreement in the English, French and Spanish languages, on the _____th of of 199_, in the City of _____.