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## Lessons of NAFTA for APEC

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**\* DRAFT Please Do Not Quote or Cite Without Permission \*ABSTRACT**

At the beginning of this decade, environmentalists truly began to discover trade issues. The debate between environmentalists and trade liberation proponents has usually been framed by two questions: "How does trade liberalization harm the environment?" and "How do environmental protection measures interfere with trade liberalization?" Few have asked "Is it possible to promote trade liberalization while maintaining or increasing the level of environmental protection?" Seemingly, the only two paths have been to keep trade and environmental agreements separate, or to completely integrate them into some whole system. To keep them separate contemplated the need for conflict resolution between them, while the integrated approach suggested that conflict avoidance was the correct solution.

This paper demonstrates that the model of regional environmental decision-making in North America provides significant lessons for liberalizing trade while protecting the environment. At present, APEC seems committed to a path of separate treatment of environmental issues. This paper reviews North America's complex blend of direct integration and parallel agreements and argues that while some of the balances were not ideal, this blended approach suggests some solutions to increase APEC's level of environmental protection at the same time that trade is liberalized. Applying the lessons from NAFTA and combining them with the unique APEC circumstances may result in even more promising environmental performance. Thus, the North American example holds important lessons for APEC.

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## I. INTRODUCTION

At the beginning of this decade, environmentalists truly began to discover trade issues. The debate

between environmentalists and trade liberation proponents has usually been framed by two questions: "How does trade liberalization harm the environment?" and "How do environmental protection measures interfere with trade liberalization?" Few have asked "Is it possible to promote trade liberalization while maintaining or increasing the level of environmental protection?" Seemingly, the only two paths have been to keep trade and environmental agreements separate, or to completely integrate them into some whole system. To keep them separate contemplated the need for conflict resolution between them, while the integrated approach suggested that conflict avoidance was the correct solution.

At the global level, the trade and environmental issues have been kept separate. For example, a remarkable number of stand-alone multilateral environmental agreements were successfully negotiated during the many years it took to complete the negotiations of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT). While this may be very satisfying from the standpoint of addressing environmental issues, it does not resolve the potential for conflict between trade agreements and the international environmental conventions, nor conflicts between the trade agreements and domestic environmental laws. As trade agreements go beyond merely reducing or eliminating border tariffs on goods to address non-tariff barriers to trade, it can be expected that there will be conflict with environmental policies. Meanwhile, environmental policy is simultaneously moving beyond compelling the "end of pipe" clean up of pollution to address pollution prevention as well as to examine production and process methods. Unfortunately, in many cases, these new focuses of environmental policy fall into the current international definition of a non-tariff barrier to trade. Hence the conflict.

As a first attempt to address this trade/environment conflict at the regional level in North America, trade and environmental issues have been linked, rather than kept separate. While this paper examines the lessons from the North American experience, it is extremely difficult to suggest that there are lessons from North American Free Trade Agreement ("NAFTA") for the Asia Pacific Economic Cooperation ("APEC") forum<sup>(2)</sup> given the differences between the two systems. The NAFTA is a legal agreement between three nations which is binding and relatively enforceable. The APEC, on the other hand, is more like a forum for the coordination of actions by its members. The current focus of APEC is for its members to act in concert, but unilaterally. This has been called open regionalism and is much different than the "rule of law" contractual arrangement which is NAFTA. However, it is possible to look to the NAFTA trade agreement and its two environmental side agreements and discern some solutions to regional environmental problems and some resolution of the question of how to liberalize trade while simultaneously improving environmental performance. Some of North America's negotiated solutions could form the basis for concerted unilateral action in the APEC region, even if they are taken on seriatim instead of globally. In addition, if APEC continues to address trade and environmental issues separately, there will inevitably be a conflict between the two key policy areas which will require resolution. It is for this reason as well, that the North American example may be instructive for the members of APEC.

This paper is organized into five parts. Following this introduction, Part II is a brief background on resolving the trade/environment conflict. Part III reviews the environmental provisions incorporated into the NAFTA itself. Part III also includes an analysis of the two environmental side agreements to NAFTA and the three new environmental institutions they created. Part IV lists some of the major issues which were omitted from the NAFTA and its side agreements. Finally, Part V is a conclusory summary of how the lessons of NAFTA might be applied by APEC.

## **II. BACKGROUND: Resolving the trade/environment conflict**

### **A. Regional environmental policy-making**

Current environmental decision-making in North America is lead by the US, but incorporates some unique elements from the Canadian and Mexican systems. While the US and Canada have "command and control" oriented systems, Canada has experimented more with economic incentives for environmental compliance. Mexico has more of a "pollution prevention" approach, with some command and control elements added. Mexico has almost no financial or tax incentives for environmental compliance. All three countries have varying levels of enforcement and success in dealing with pollution and natural resources issues. As a result of the injection of environmental protection issues into the debate over the NAFTA, during the last two years the three nations have embarked upon a joint effort to deal with environmental issues. Included in this rather young collaboration are environmental protections which are integrated directly into the NAFTA trade agreement, and the creation of three new institutions to deal with environmental problems as have been outlined below (see Part III).

The North American example differs from APEC which has not yet significantly integrated trade and environment issues. The nineteen members of APEC, which include all three NAFTA Parties, are not currently negotiating a customs union or free trade area per se. These types of formal arrangements may be contemplated in the future, however, it is equally likely that many of the same goals will be accomplished through APEC's open regionalism in a gradual step-by-step basis. The individual members of APEC have vastly differing environmental policy regimes that reveal gaps between the members which are even larger than in the North American context.

While environmental issues are slowly becoming more important for APEC's members, they clearly take a back seat to economic development. Most important, with some minor exceptions, environmental decision-making on a regional level is non-existent. Instead, to address environmental issues, APEC is mainly evolving as a vehicle to build capacity "from the ground up," that is, to promote cooperation to develop national environmental management capacities. Like the trade-based open regionalism, environmental policy takes the form of concerted unilateral national actions rather than a traditional international soft law cooperation agreement. Thus, environment issues are firmly on a separate track. Unfortunately, the development of environmental policy is no longer a luxury, the press of environmental degradation is making it a necessity. How the APEC region's environmental policy-making will be developed is crucial. At present, none of the APEC Members, including the US, want to link environmental performance to trade sanctions within the APEC regime. (3)

## **B. Structural adjustments for unequal partners**

Variations in environmental policies from one jurisdiction to the next can arise from one or more of three principle sources: differences in environmental conditions; differences in priorities according to the resources available for environmental protection and clean up; and differences in values. (4)

There are many difficulties in reconciling the US legal system's confrontational style and the Latin American and Asian system's conflict avoidance and cooperation styles. While there are differences between Latin America and Asia, the more significant gap is between these two regions and the third (which includes the US and Canada). Finding a common legal structure to address environmental issues which is acceptable to these different cultures may be even harder than integrating trade and environment concerns. In fact, full integration may be impossible. In the NAFTA context, the US could almost dictate its terms to the other Parties. Within APEC, the US is faced with Japan and China and can thus not be as dictatorial. Separation of environmental issues from trade issues with some loose linkages may be the best possible solution. It is partly in this

context that the North American example is helpful in looking at how to proceed in the APEC context. As illustrated in parts III and IV of this paper, NAFTA allows us to identify some environmental issues which can be linked to trade liberalization, other issues which can be put into parallel agreements, and still others that hindsight now suggests should have been dealt with in some manner.

Another subtle layer of concern in addition to the trade/environment conflict, and the legal and cultural differences between member nations is the development gap.

Many developed countries fear that they will be prevented from adopting standards sufficiently rigorous to deal with the heavy burdens their economic activities impose on the environment and to meet the high demand for environmental quality among their citizens. Developing countries -- in contrast -- are concerned that they cannot afford to meet environmentally-based process standards designed for the conditions of developed countries, and that as a result their exports to those countries will be penalized. (5)

The North American context of bridging this gap between Mexico and the US is instructive of how to deal with gaps between the APEC nations. (6) One way this gap was bridged was unilateral. Mexico prepared for entry into NAFTA by modernizing its social and economic structures:

The transformation is still underway, but even a partial list of what has been done is impressive enough:

Opening the economy to world competition; privatizing state banks and other governmental holdings; breaking the oil unions' stranglehold on the energy sector; deregulating capital markets; modernizing the country's infrastructure; balancing the government's fiscal accounts; accepting electoral defeats in gubernatorial elections and responding (albeit too selectively) to grass-roots political complaints. The momentous decision to replace the ejido system of state communal farms with private ownership was the equivalent in political courage of a U.S. President privatizing the postal service. (7)

The other ways of bridging this gap are those unfulfilled promises of the United Nations Conference on Environment and Development of 1992 ("UNCED") which would require the "North" to provide technical assistance and financial support to the "South" in exchange for its promise to develop in an environmentally benign manner.

### **C. How to liberalize trade while improving environmental performance**

As noted above, there are two ways to address the trade/environment conflict: through separate stand alone agreements, or through linkage. Linkage can take two forms, the integration of environmental provisions into a trade agreement, or through the negotiation of parallel environmental agreements which are both supporting and dependent upon the trade agreement negotiated along side them.

#### **1. Separation**

Separating trade and environmental issues may be the right answer because the trade and environment regimes are very different in nature. Historically, separation has been the rule.

Each of the many international environmental regimes established over the past 20 years was

negotiated separately and linkages to other international regimes were only rarely taken into account. (8)

While the Uruguay Round negotiations were under way between 1986 and 1994, a significant number of negotiations regarding environmental issues were separately conducted. Among the resulting environmental agreements were the Vienna Convention, the Montreal Protocol, the Basel Convention, the Bamako Convention and the Wellington Protocol. Also during this time UNCED took place which produced the Rio Declaration, Agenda 21, the Convention on Climate Change and the Convention on Biological Diversity. The conference also led to the establishment of the Global Environment Facility. (9)

Perhaps the environment is better off without the burdensome entanglements of direct integration of environmental issues into trade agreements. More can be accomplished in a shorter period of time by isolating environmental issues and dealing with them directly in stand alone agreements than if the issues are left to the trade negotiators. In addition, if environmental issues can be dealt with directly, perhaps it is best to not risk exposing them to the more powerful and arguably more vested interests involved in trade negotiations, many of which still view pollution as an externality rather than a cost that should be internalized.

There are problems with the approach of negotiating separate environmental agreements, however, which stem from:

incongruent patterns of memberships, that is problems concerning relations between countries which are members of both regimes and countries which are members of only one, typically the trade regime. (10)

Another concern involves the external scrutiny of the environmental impact of trade measures:

From an environmental point of view, the ecological impacts of trade liberalization should be considered before trade barriers are lowered and environmental policies put in place in tandem with liberalization. (11)

As early as May 1991, the Bush administration announced (in what became known as the "May 1 Commitments") that the United States Trade Representative ("USTR") would review US-Mexico environmental issues and that the NAFTA would be negotiated in a way that would protect US federal and state environmental laws and regulations as well as certain international environmental agreements. It was at this time that the Bush administration began to discuss dealing with environmental issues on a parallel track. Most of the US government reports issued as a result of the USTR review asserted that while Mexico had severe environmental problems, it had good laws. All that Mexico needed was greater efforts in the area of enforcement, and that its efforts were currently hampered by a general lack of resources which would be provided when NAFTA's impact on the Mexican economy was felt. The problem was that the answer was circular and did not deal with the potential environmental impacts of NAFTA's trade and investment liberalization. (12) Instead, the trade negotiators relied upon the unfounded argument of economists that as income rises so does concern for and spending on environmental issues.

## **2. Linkage**

A few multilateral environmental agreements (MEAs) directly link trade with environmental

protections by banning trade in environmentally harmful materials, or endangered species. In addition, NAFTA and to a much lesser extent the Uruguay Round of the GATT, acknowledge the direct linkage of trade and environmental issues in other ways by integrating environmental provisions into the body of the trade agreement which either alter the design of the liberalization process, or expose some of the trade provisions to environmental scrutiny.

The linkage can also be expressed through parallel agreements; and the NAFTA regime has two such parallel agreements dedicated to environmental issues. During the presidential campaign in 1992, there was a question whether then-candidate Clinton would support NAFTA or not. In a speech at the University of North Carolina, he announced that he would support it, but only if substantial protections for the environment and labor were incorporated into the agreement. When it became clear that no one wanted to reopen the NAFTA negotiations themselves, the decision was made to use parallel or side agreements. Ultimately, because support for NAFTA was very thin, the negotiators were forced to seriously consider environment issues to gain more votes in Congress. (13) It was a unique moment in time.

Admittedly, some work in this area had already been begun by the Bush administration. However, the major portion of the work on the side agreements was undertaken in a very short time span. In a matter of months, those of us in the environmental community drafted proposals for the elements of the two side agreements. (14) This proposed language was fed to an inter-agency working group made up of the United States Trade Representative ("USTR"), the Department of Justice, the Environmental Protection Agency and others. In more than one instance, a request for information, or for suggested language came from the inter-agency working group at the last minute and language was literally drafted overnight. For example, I drafted the language on third-party citizen suit rights(15) in one evening, it was delivered to the USTR the next day, and two days after that showed up as the US proposed language on April 15, 1993 tabled in Canada. (16)

A simple comparison of the NAFTA text to the two side agreements show where the importance was placed. The NAFTA text is nearly 1,000 pages long (not counting two lengthy annexes of tariff schedules), while the two environmental side agreements are only 30 pages each. Most importantly, a close reading of the two side agreements show that environmental protection is secondary to trade interests. One goal of trade liberalization is to create a level playing field in which competition can be made more pure. There is thus an emphasis, even in these side agreements, on harmonization of environmental laws, cooperation, resolution of accusations of lax enforcement, and provision of environmental infrastructure to support the trade infrastructure. Only the Border Environmental Cooperation Commission/North American Development Bank ("BECC/NADBank") agreement deals with cleaning up the environmental harm of the pre-existing border free trade (or maquiladora) zone. (17) In other words, this may be the only part of the of NAFTA regime which addresses the environment directly, rather than as an element of trade policy.

**D. The pace of trade liberalization's affect on the environment**On the negative side, trade openness subjects national economies to rising market demand and the pressures of international market prices, which rarely include any, let alone full, calculation of environmental damage. With environmental degradation simply outside the market equation, market signals do not give information about the true costs of production. As a result, global production and consumption patterns could be grossly inefficient, in both narrowly economic and ecological terms. (18)

As noted above, Mexico rapidly undertook massive unilateral measures to liberalize its trade with the outside world. The NAFTA negotiations were the motivation, and were ongoing at a quick pace under fast-track authority. This may have caused a broad shift in production to export-oriented crops

and products. Some of these shifts may have caused harm to the environment. For example, the maquiladora program involved the construction of thousands of factories in the border region. NAFTA is expected to continue this process because there is not adequate transportation infrastructure in the interior of Mexico to shift production away from the export platform of the border zone. This production pattern has caused, and may continue to result in massive migration and construction of factories in an area with little water and no environmental infrastructure. Thus, tremendous pressure is put on eco-systems. (19)

While NAFTA proponents did not predict new maquiladoras in the interior, one goal was to reduce or equalize the advantage of border industry by eliminating tariffs for all producers throughout Mexico, thus undercutting the maquiladora program's duty free advantage. However, certain circumstances have maintained the focus of industry at the border. In addition to the peso devaluation and civil unrest, the primary reason for staying at the border is a lack of transportation and communication infrastructure. Maquiladora operators have no choice if they want to reach their US markets. (20)

Trade liberalization at the pace seen in Mexico has outstripped the ability of communities to keep up: they can not build the needed infrastructure for double digit population growth. Meanwhile the federal government can not develop transportation infrastructure to spread the economic impact throughout the country. Mexico City has massive unemployment, while Tijuana's is at less than 2%. The suddenness of change also affects the ability of civil society to respond. The people who live in the border communities are not given choices to make: whenever a new maquiladora springs up, a shanty town appears around it regardless of city planning or rules, and seemingly nothing can be done to stop it.

The current rate of trade liberalization is not letting change happen gradually and not allowing government and civil society the chance to deal with its impacts. If we look at the GATT example, which is unlike the NAFTA or Mexico's unilateral measures, we can see a more gradual, even laborious, process. This more gradual process would lessen the impact of sudden shifts of production by isolating them. In this way, society might be better able to absorb change.

One suggestion is to handle environmental governance and trade liberalization by sector instead of globally. An official Mexican government report on the State of the Environment has argued for incorporating ecological policy into sectoral development programs internally, not just at the international trade level. (21) This is how trade liberalization negotiations are normally conducted anyway, so it might make sense to approach environmental issues the same way. For example, look at one industry, such as trade in energy, and evaluate ways in which trade can be liberalized and environmental protection improved at the same time.

There may be some difficulties in approaching environmental issues and trade issues by sectors:

Progress in achieving cost internalization would go a long way towards ensuring that development and trade policies take account of and address environmental consequences. At the same time, there are limitations to cost internalization. It is not useful in cases where the environmental losses are irreplaceable, as in the case of species extinction, since it is difficult to price something for which there is no substitute. Furthermore, it cannot accurately reflect costs to future generations, since we have no way of knowing what value they will attach to environmental resources. Nor is cost internalization necessarily useful when costs are extremely high; the magnitude of the future costs involved in ozone depletion, for example, may be so great that for practical reasons the chemicals contributing to the problems should simply be phased out, rather than priced accurately. (22)

## **E. Subsidiarity**

The problem may not be the speed with which liberalization is undertaken, but the differences in the levels of government affected. The principle of subsidiarity states that:

decisions should be taken as close as possible to the affected public, at the lowest level of jurisdiction encompassing all those affected. (23)

This principle demonstrates one aspect of the conflict between trade and environment issues. Trade issues are usually considered national. The only concern of national governments is the balance of trade and the potential for economic growth. Too often the local impact of international trade is forgotten. The local aspects of international environmental policy is usually handled by the negotiators of MEAs much better, but could still be dealt with even closer to the affected public.

Because any of the methods for resolving the conflict between trade and environmental issues described in this part of the paper are imperfect, one suggestion is to balance their impacts. APEC may find that it could benefit from some regional environmental policy-making, as well as some direct linkage of trade issues to environmental ones. It should be able to explore these possibilities while continuing its unilateral efforts at structural adjustment and trade liberalization. Regardless, APEC should pay attention to the pace of its trade liberalization and seek to involve the lowest level of jurisdiction whenever possible.

### **III. LESSONS FROM NAFTA: New Structures for Environmental Decision-Making in the North America Region**

**A. Environmental protections incorporated into the NAFTA trade agreement.** NAFTA became the first "traditional" trade agreement to attempt to integrate some environmental considerations into the text of the agreement itself. It also demonstrated clearly that where international environmental management is absent or weak, trade agreements will have a hard time avoiding the shoals of environmental concern. (24)

The North American Free Trade Agreement ("NAFTA") among the US, Mexico, and Canada (25) was approved by the US Congress in October 1993, and became effective January 1, 1994. However, it will be many years before we feel the full effect of the pact, due to the gradual nature of the removal of tariffs.

The preamble of the NAFTA states that sustainable development is a commitment of the three countries, and that the Parties will provide for environmental protection, planning, and enhancement of environmental laws. (26) The pact also has chapters specifically designed to preserve the integrity of environmental laws and regulations. However, the focus of the NAFTA is on trade, free trade, not the environment. Technically, the environment only enters the picture in so far as environmental laws might be viewed as non-tariff barriers to trade.

#### **1. NAFTA protects Multilateral Environmental Agreements from trade challenge.**

The NAFTA protects certain Multilateral Environmental Agreements ("MEAs") from trade challenges, by asserting they supersede the NAFTA in case of an inconsistency. While this is a major international law accomplishment, it is limited in that only a few conventions are designated. (27) The few agreements listed are the only international environmental provisions that preempt the NAFTA, and they only do so if the Parties act pursuant to them in a manner "least inconsistent" with



the principles of the NAFTA. (28) Further, this listing may create a negative implication, that treaties not listed can be challenged. (29)

## **2. NAFTA prohibits reducing environmental standards to attract investment.**

The NAFTA's somewhat contradictory goals stem from the fierce political pressure that was applied by divergent camps for trade liberalization on the one hand, and greater international environmental protection on the other. The result is a treaty which appeals to environmental interests in part by prohibiting the weakening of, or the failure to enforce, environmental laws for the purpose of encouraging trade or investment. (30) Unfortunately, NAFTA failed to provide for enforcement of these provisions, nor did it deal with already differing laws which might give one jurisdiction an unfair advantage over another. This lack of enforceability may be a non-issue because the average industry's cost for environmental compliance is usually only 1% to 2% of its total operating expenses, other factors such as tax regimes and labor costs are far more likely to dictate where a multinational corporation is likely to invest.

## **3. NAFTA sets general, multilateral rules on Sanitary and Phytosanitary Measures (SPSs) and other Standards Related Measures (SRMs).**

The NAFTA allows member countries to adopt Sanitary and Phytosanitary Measures ("SPSs") (31) designed to protect human, animal and plant life or health. (32) The SPSs must be non-discriminatory and based on scientific principles; however, the amount of acceptable risk a member country is willing to take in designating SPSs is a social value.

NAFTA preserves the right of Parties to apply standards to the level needed to achieve the level of protection desired. (33) In so doing, the NAFTA calls for use of the "best method" rather than the GATT standard of "least trade restrictive". Most importantly, it is acceptable under NAFTA to adopt environmental measures to avoid risk, even if there is not sufficient evidence of the risk yet shown. In other words, the precautionary principle is institutionalized.

The NAFTA also allows Parties to adopt other Standards-Related Measures ("SRMs") for "legitimate objectives" (34) such as safety, protection of human animal or plant life or health, environment or consumers. In designating SRMs, the role of science is not as central as for SPSs. (35) SRMs are defined under the NAFTA as standards, (36) technical regulations, (37) or conformity assessment procedures. (38)

Specifically, NAFTA requires its Parties to: (a) use international standards when they are sufficient to achieve "legitimate objectives;" (39) (b) conduct risk assessments or base SRMs on "available, relevant information;" (c) accept other Parties' SRMs as equivalent and compatible with their own, provided that they adequately fulfill their objectives; (d) make conformity assessment procedures as compatible as practicable with those in other territories (40); and (e) ensure that SRMs do not pose any unnecessary obstacles to trade. (41)

The NAFTA's language on SPSs and SRMs influenced the Uruguay Round final language. (42)

## **4. NAFTA promotes the harmonization of environmental policies and standards.**

As discussed above, NAFTA prohibits the lowering of environmental standards to attract investment. Another issue raised during the debate over the NAFTA concerns the harmonization of environmental laws. It is generally desirable, from a trade perspective, to harmonize environmental

laws across all three NAFTA countries. In this way, a product manufacturer does not have to deal with differing standards and regulations. One product can be sold anywhere. On the environment side of the equation there are two concerns: first, that the harmonization would focus on the lowest common denominator and that harmony would most easily be found at the lowest environmental standard; and second, that harmonization would discourage innovation in environmental regulation. Under the NAFTA, only the first concern was addressed. While upward harmonization is encouraged, (43) NAFTA offers no incentives for this upward harmonization of standards. No provisions are made for capacity-building or technical and financial resource transfers to promote or facilitate harmonization.

### **5. NAFTA provides for improved consideration of environmental issues in its dispute resolution procedures.**

There have been a number of challenges to environmental laws and regulations as non-tariff trade barriers under the GATT/WTO (such as the tuna/dolphin, CAFE standards, and reformulated gas cases). There have also been some challenges to environmental laws under the US-Canada Free Trade Agreement (e.g. the beer can dispute). To date, no challenges to environmental laws as non-tariff trade barriers have been made under the NAFTA.

The NAFTA provisions for the resolution of conflicts represent an important departure from those contained in the GATT. Under the GATT, the burden of proof is on the challenged Party to demonstrate that its law is not unduly restrictive of trade; by contrast, under the NAFTA, the burden is on the Party challenging an environmental law. (44) In addition, a defending NAFTA Party can have any dispute that arises under both the NAFTA and the GATT heard before a NAFTA panel, which effectively ensures that the defending Party enjoys the benefit of any doubt about the purpose or impact of the challenged measure. (45)

If a challenge to an environmental law involves scientific or technical issues, NAFTA dispute resolution panels may consult with experts. (46) These provisions afford governments whose laws are challenged an opportunity to present the testimony of any scientific expert upon whom it relied in drafting and enacting the law, provided the opposing Party agrees to allow the expert to testify. (47) Unfortunately, the NAFTA trade dispute procedure still lacks public participation and transparency.

If a panel finds that a state or local measure is inconsistent with the NAFTA, that measure is not automatically preempted or invalidated. Rather, the Parties are required to reach some kind of resolution which conforms to the recommendations of the dispute resolutions panel's final report. (48) If a NAFTA panel finds a measure to be inconsistent with the treaty, and the Parties involved are unable to reach a mutually satisfactory resolution, the aggrieved Party is authorized to retaliate by suspending trade benefits to an extent roughly commensurate with the cost to the aggrieved Party of the measure found to be in violation. (49)

### **B. The North American Agreement for Environmental Cooperation(50)**

The stated goal of the Clinton Administration in calling for an environmental side agreement was to make sure that economic growth with Canada and Mexico, as a result of the NAFTA, would not come at the expense of the environment. The focus of the environmental side agreement is on conflict resolution, the harmonization of environmental laws to avoid conflicts, and cooperation in the enforcement of current laws; the agreement also provides for the maintenance of a separate independent body to "watchdog" the environmental law enforcement of the Parties. For these

reasons, the side agreement shall have a significant affect on health and environment issues in North America.

The Commission for Environmental Cooperation ("CEC") created by the side agreement is governed by three commissioners. The work program of the CEC will be carried out by its Secretariat staff. This staff will also provide technical, administrative and operational support for the Commission and its related committees. The legal staff of the Secretariat will review submissions from non-governmental organizations and individuals which assert that a Party to the NAFTA is failing to effectively enforce its environmental laws. Finally, the Commission is supported by a fifteen member Joint Public Advisory Committee ("JPAC").<sup>(51)</sup> The CEC is thus unique in that it contemplates the US yielding a significant leadership role in place a consensus-based decision-making structure at the Commission, the Secretariat, and the JPAC levels -- even for dispute resolutions.

Despite the name of the commission, its "cooperation" role is not given great focus in the side agreement, nor did advocates of the creation of the institution put as much stock in this aspect of its functions as they put into the more litigious functions contemplated by the dispute resolution and citizen suit provisions. Simply stated, the CEC will have a cooperation function which will include face-to-face communications of the three environmental ministers and tripartite cooperation on the dissemination of information on environmental protection issues, transboundary environmental harm, and natural resources accounting methods. <sup>(52)</sup> To date, the best example of this cooperation involves the CEC facilitation of a joint ban of production and trade throughout North America of four chemicals: DDT, PCBs, Mercury, and Chlordane.

The CEC will work toward upward harmonization of environmental laws in the US, Mexico and Canada. <sup>(53)</sup> From the standpoint of trade liberalization proponents, this function of the CEC was key. It was to be the means to achieve the level playing field by which trade could be made most easy. Some industrialists went so far as to say they did not fear stringent environmental laws as long as they were uniform. To date, the CEC's main efforts in this area involve the collection and dissemination of information about environmental laws in North America. The CEC's Internet web site provides an excellent side by side summary of the three NAFTA Parties' environmental laws.

### **1. Environmental Dispute Resolution, Enforcement and Sanctions.**

It was the areas of dispute resolution, enforcement of environmental laws and sanctions for non-compliance with the side agreement into which the major environmental groups, which in the end supported the NAFTA, poured their resources. Lead by the Natural Resources Defense Council and the Environmental Defense Fund, two organizations heavily staffed with lawyers, these aspects of the side agreement got the most concerted attention.

In some ways, this was one of the bargains which underpins NAFTA. The Mexican Government was unwilling to concede sovereignty in the realm of environmental policy making and it was wary of efforts to harmonize up to U.S. standards. It was, however, willing to substantially increase the efforts to enforce existing Mexican law through better training, tougher penalties for non compliance, and revised domestic legislation. These sorts of links could provide the basis for arrangements with other countries. <sup>(54)</sup>

**a. Government v. government.** Formal government-to-government disputes regarding each other's lax enforcement of environmental laws and regulations will be resolved through the CEC. Two of the three NAFTA Parties must agree to accuse a third Party of lax enforcement. The commission will impanel environmental experts to hear each Party's arguments. These experts may conduct hearings

similar to the trade dispute resolution procedures in the main trade agreement. (55) This is a ground-breaking development in international law to create a formal mechanism for dispute resolution of purely environmental matters. Historically, few environmental regimes have been designed for purposes of dispute resolution. (56) An even more important international law accomplishment is the inclusion of international sanctions or "snap backs" on trade agreement benefits for the punishment of lax enforcement. According to some analysts, the conflict resolution mechanisms are too limited, because they are reached after too many standing and evidentiary hurdles, as well as non-public votes by the Commission. However, unlike many other international dispute resolution mechanisms, the CEC dispute resolution process has deadlines for submissions of pleadings and evidence which ensure a relatively short time frame for the resolution of disputes (by international standards).

To date, no cases have been brought under these provisions.

**b. Private party v. government.** The CEC can also investigate and attempt to resolve complaints of non-enforcement of environmental laws (i.e. the governments will be held accountable for enforcement). (57) Such CEC investigations can be prompted by citizens, non-governmental organizations ("NGOs"), businesses, and governmental entities. (58) To reach this ground-breaking development in international law, the negotiators overcame some, but not all, sovereignty concerns. Unfortunately, the CEC has no subpoena or police powers to conduct its investigations and must rely on the Parties and the public for information. In addition, two of the three NAFTA Parties have to agree that a factual record of an investigation should be prepared, and then after the Secretariat prepares the record, a two-thirds vote by the Council is again required to make it public. This second vote and its potential to limit the CEC's transparency is a rather critical flaw which, if exercised, would undermine the institution's credibility.

The National Audubon Society, together with Mexican environmental NGOs, requested an investigation of enforcement of Mexican environmental laws after a mass death of migratory birds at the Silva Reservoir in Guanajuato where illegal discharge of industrial pollutants was alleged to have occurred. This issue was brought to the CEC's attention under its Article 13 investigatory powers rather than the Article 14 "complaint" provisions. An international panel of scientists was formed which investigated the circumstances and determined the cause to be a form of avian botulism from exposure to human sewage, rather than because of chemical or industrial pollution. The report and process have been widely hailed as a success.

Meanwhile, US environmental NGOs filed two Article 14 submissions complaining that the US was violating the NAFTA and the environmental side agreement by defunding the Endangered Species Act and by enacting a timber salvage rider that suspended environmental laws for the alleged purpose of improving forest health. The CEC rejected the two petitions as not dealing with failures to enforce environmental laws; the challenged actions were viewed instead as legislative changes.

The two public submissions rejected by the CEC had to do with the rollbacks of US environmental legislation by the anti-environmental 104th Congress. For the CEC to take no action was probably the proper response because it was not a lax enforcement issue. My recommendation at the CEC Council meeting on August 1, 1996 was that the CEC should call for consultations with the trade secretariat regarding the rollbacks as a potential violation of article 1114 of the NAFTA (the CEC adopted this recommendation as part of a broader decision to arrange a meeting with the trade secretariat). However, because all three NAFTA Parties are lowering environmental standards, because this process calls into question national sovereignty, and because it sets up the NAFTA trade secretariat and the CEC in opposition to those who fund them, it is probable that the rollbacks will not be adequately addressed in this context.

A more recent submission under Article 14 filed by a Mexican environmental NGO asserts that Mexico did not comply with its environmental laws in approving an environmental impact assessment on a project in Cozumel to construct a pier for cruise ships that will harm a coral reef. The CEC accepted this submission and on August 1, 1996 accepted the recommendation of its Secretariat that a factual record be prepared.

**2. Guarantees for private party v. private party actions.** Ensuring a right of action to citizens would not be enough on its own if citizens fear that corruption of the system may put their lives or liberty in danger by exercising that right. (59)

In reliance on the tremendous success of third-party litigation in the US to address pollution problems and natural resources preservation, the environmental groups working with the Clinton Administration in the drafting of the side agreement suggested language requiring the NAFTA Parties to guarantee citizen suit rights, and guarantee access to reasonable remedies for environmental harm. The language is intended to ensure a domestic right of action for those who can show an injury from a failure to enforce environmental laws. (60)

Although the environmental groups asked for cross-border suit rights to be included in the side agreement, in the end this was dropped to avoid accusations of imperialism and fears of loss of sovereignty. Despite the disappointment at the time, I think the lack of these rights empowers Mexicans to assert their own environmental rights in their own courts, rather than allowing the more well established US environmental NGOs to do it for them. In the long run this is probably the better outcome.

### **3. Design flaws.**

The anti-NAFTA environmental groups which included Public Citizen, Greenpeace, Sierra Club, and the Friends of the Earth, either were primarily anti-trade or felt that the NAFTA did not contain sufficient environmental protections, that its provisions were too vague, or that US environmental laws were still vulnerable to attack as unfair non-tariff barriers to trade. Many of these groups equate free trade with environmental deregulation. (61) To be fair to them, some serious process and production method (PPM) standards issues were not addressed in the NAFTA, and the tuna-dolphin case(62) circumstance was not resolved as some had wanted.

The CEC has been criticized for its lack of complete independence and authority, but this weakness is the unavoidable result of compromise and the fear of delegation of sovereignty. Some criticisms include:

- the Executive Director has not been given sufficient authority and independence;
- public access to reports or complaints can be blocked;
- a two-thirds vote of the three Commissioners is required to investigate a complaint from a non-government source;
- consultation requirements regarding environmental disputes will result in excessive delays;
- the CEC agreement only seeks to promote, but does not make a commitment to guarantee the public's right to know;
- there are strict limitations on citizen complaints; and
- there is no provision for amicus briefs.

#### **4. Evolution of the CEC.**

At their inaugural meeting in March 1994, the three CEC Commissioners (63) decided that the focus of the CEC will include pollution prevention, technology cooperation, and the compilation of a study on the environmental effects of the NAFTA. During the first year, the emphasis was to be on environmental conservation and the enforcement of environmental regulations. The key goal, because the CEC is part of a trade agreement, is to prevent unfair trade advantages for one country's industry as the result of lax enforcement of environmental laws. The official work program of the CEC, adopted at the commissioners' first meeting, also included:

- conservation and ecosystem protection;
- enforcement of domestic environmental laws;
- pollution prevention;
- economic incentives such as user fees to reduce pollution;
- technology transfers to help Mexico improve its capacity to inspect and regulate polluters;
- transboundary pollution issues; and
- the NAFTA effects(64) and consultation.

During 1995, the CEC issued draft guidelines for submissions under Articles 13 (requests for reports) and 14 (public complaints of lax enforcement of environmental laws). These guidelines outline the showing that must be made for a valid submission, who has standing to make such a submission, and how the submissions will be handled procedurally.

Although the work program includes enforcement as an area of concentration, the expected focus on enforcement/dispute resolution has given way to an emphasis on cooperation/harmonization.

#### **C. The Border Environmental Cooperation Commission and the North American Development Bank.**

The debate over the North American Free Trade Agreement worked to bring further attention to North American environmental problems. The seriousness of the border region's environmental crisis, coupled with concerns about increasing environmental degradation under the NAFTA, pointed to the need for immediate action to address the situation(65) Thus, the Governments of Mexico and the United States formally agreed, in November 1993, on institutional arrangements to assist communities on both sides of the border in coordinating and carrying out environmental infrastructure projects. (66) This agreement furthers the goals of the environmental side agreement to promote growth along the border while reducing negative environmental impacts.

In the November Agreement, the governments established two separate institutions:

- a Border Environmental Cooperation Commission (BECC) with headquarters in Ciudad Juarez, Chihuahua, Mexico, to assist local communities and other sponsors in developing and implementing environmental infrastructure projects, and to certify projects for North American Development Bank financing.
- a North American Development Bank (NADBank) with headquarters in San Antonio, Texas, capitalized in equal shares by the United States and Mexico, to provide \$3 billion in new financing to supplement existing sources of funds and leverage the expanded participation of private capital. (67)The BECC/NADBank structure shatters many precedents. It is a balanced structure, with equal

financial support and equal votes for the US and Mexico. BECC/NADBank represents the first instance of the US sharing equal decision-making and spending power. The US has normally maintained an upper hand in development banks by tying its larger contributions to equally larger voting rights. By structure, these entities will be balanced, evenhanded, binational, equal membership organizations, and by promise, they will have sufficient funding to meet their mandates. Those who worked on the creation of the NAFTA environmental institutions were concerned about not repeating the mistakes of the past. First, the BECC was made separate to avoid it being driven by finance considerations only. Second, the NADBank was limited to only financing projects certified by the BECC to assure that only sustainable development projects were financed. Sustainable development concepts require that "[d]evelopment today must not undermine the development of present and future generations". (68) This means that BECC/NADBank projects must not adversely harm the environment or local culture. At the same time, the projects must improve the quality of life for those living on the border. Neither the Inter-American Development Bank nor the World Bank started out with the express goal of "sustainability," and thus focused on capital intensive projects which in many cases were detrimental to the environment. The BECC has a binational Board of Directors with 10 members, five from each country and decision-making procedures structured to ensure that the views of states, local communities, and members of the public are taken into account. The Commission is required to consult with an Advisory counsel of 18 members, nine from each country. The BECC will be managed by a General Manager, a Deputy General Manager, other officers and a small staff. The total number of employees will be about 18. Each country contributes an equal share of the operating budget of the Commission.

**1. The role of civil society.** There are two levels for the role of civil society, including NGOs: first, in the creation of the institutions, and second, in the implementation of the institutions. Interestingly, it is not the same group of NGOs and individuals that have been involved in both levels. Much like the environmental side agreement discussed above, the BECC/NADBank agreement was negotiated in a very short time frame. Again, the Clinton Administration called upon a small number of national environmental groups to help it design a way to pay for the environmental clean-up along the border and thus quiet a few more critics of the NAFTA. The original concept for the NADBank can be found in the work of Raul Hinojosa and Carlos Melcher who had proposed such a development bank for broad-based economic development focused on the integration of the economies of the three NAFTA Parties. To a certain degree, the environmental community hijacked this concept and redirected it to finance the construction of badly needed environmental infrastructure along the border. Some of the original concept can still be seen in the so-called "domestic window" of the NADBank, which will make use of 10% of its funds to provide adjustment to communities adversely impacted by the trade agreement. During the implementation phase, the BECC has established procedures for public participation, including written notice and opportunity to comment on general guidelines and on applications for certification of projects. The BECC's annual report has been made available to the public. The Board of Directors holds public meetings each quarter. Interestingly, during the implementation phase the larger national environmental groups that were instrumental in creating the institutions have been replaced by more local environmental and development-oriented NGOs and individuals for whom issues related to the border are the primary focus. An example of how the NGO participation has shaped the BECC is the development of its certification criteria. The BECC held a number of public outreach meetings in communities along the border to present its Draft Guidelines for Project Submission and Criteria for Project Certification ("Guidelines and Criteria"). On August 31, 1995, the BECC held a public meeting in El Paso to adopt guidelines and criteria for its certification of US-Mexico border environmental infrastructure projects. The eleven-month-old BECC had issued the draft guidelines and criteria in early June 1995. The draft was ultimately circulated to nearly 1200 individuals and organizations. During the following thirty-day comment period, the BECC received over 150 written and oral comments on the guidelines and criteria. The guidelines and criteria were provisionally adopted (for one year) by the 10-member binational

BECC Board. Unfortunately, the adoption of the guidelines was not without controversy. Four days before the meeting to vote on the adoption, on August 28, 1995, the Office of International Activities of the US Environmental Protection Agency issued a memo attacking the sustainable development criteria as written by the BECC staff (and more importantly, as revised after all of the public input had been received). This memorandum strongly criticized the draft criteria's language on public participation, public acceptance of projects, human capacity building, and institutional capacity building, and opposed the BECC giving greater assistance to projects with the highest rating of sustainable development. Worse yet, with support from NADBank President Alfredo Phillips, the EPA view carried the day at two private BECC Board meetings on August 30, 1996 where the Board twice voted 9-to-1 for a watered-down version of the criteria. Only the public's representative on the Board, Lynda Taylor, stood up for what the public had said it wanted. During the open forum meeting on August 31, the public took up the battle to oppose the Board's decision (with support from the BECC's own 18-member binational Advisory Council). During this dramatic showing of effective public input, the Board was forced to rewrite the criteria and reinsert many of the provisions that had been removed while the Board was still seated on the dais. The Board then unanimously approved the criteria. (69) Fortunately, the public who live along the border cared enough to show up and to speak out. (70)

**2. Certification criteria.** The BECC has adopted ground breaking rules for citizen participation, transparency, and capacity building. The BECC certification criteria are on the cutting edge in the field of sustainable development, and it is hoped that their use will enhance the quality of life of those who live on the border now and in the future. The Criteria were first adopted in August 1995 by the BECC Board of Directors following an extensive public review and comment process described above. They are now being revised to account for lessons learned during the first year of use. The Criteria are utilized by the BECC to evaluate and certify environmental infrastructure projects. To be certified by the Board of Directors, project sponsors must comply with general criteria and five specific criteria including: 1) environment and human health; 2) technical feasibility; 3) financial feasibility; 4) community participation; and 5) sustainable development. (71) These criteria, if strictly applied, will ensure real, long-term solutions to many environmental problems in the border region. The NADBank meanwhile has issued its fundamental documents, including its Loan and Guaranty Policies and Operational Procedures. To date, eight projects have been certified; and two have been financed. The first two were rushed through presumably to please Congress (Brawley and Ensenada). Arguably because of this rush, these two projects contain flaws that are delaying their financing and construction. Three other projects have received public acclaim for their quality and design as well as for the transparent process in which they were brought forward for certification (Naco, Douglas, and EPISO); and one is considered quite good (El Paso). The last two projects are mired in controversy (Nogales and FINSA). The controversies stem, in the case of Nogales, from unresolved allegations of conflict of interest and from a lack of strict compliance with certification criteria. In the case of FINSA, the controversial issue is whether there should be a benefit to the public when a purely private project is funded. FINSA was required to agree to provide \$50,000 worth of in-kind services to the surrounding communities, but this has stirred a controversy over how future "private projects" will be handled. (72) Four more projects will be up for certification at the BECC's next meeting in November 1996.

**3. Cooperation regarding shared resources.** The BECC and the NADBank must work with states and local communities, private investors and non-governmental organizations in developing effective solutions to environmental problems in the border region, giving preference to projects involving water pollution prevention, wastewater treatment, municipal solid waste disposal and related projects. In other words, the BECC/NADBank structures are intended to provide public goods. Those affected are often the poorest communities on our border that must function every day without these basic services. It has been established over and over again that public works, such as those proposed to be financed by the NADBank, are exactly the type of infrastructure that helps to reduce poverty. And the NADBank is supposed to provide these public goods without grants or give-aways; this is a self-supporting lending



institution.**4. Design flaws.**Despite these positive qualities in the areas of public participation and project certification, concrete projects must be built and pollution cleaned up. The most glaring threat to successfully reaching this goal is the NADBank's high interest rates. The NADBank is restricted by Congress and the US Department of Treasury to market-based interest rates. Market rates, particularly in Mexico are so prohibitively high that communities can not afford to take advantage of what the BECC/NADBank structure has to offer. This is the dilemma that must be resolved before we can learn if the NAFTA environmental institutions will live up to their promise.

**5. Evolution of the BECC and the NADBank.**The expected focus of the BECC/NADBank institutions was on environmental clean-up. Instead the requirements of public participation have lead to major breakthroughs in the opening of Mexican civil society. It has been nearly three years since two new US/Mexico border institutions were created to clean up the border environment. Unfortunately, construction has not yet begun on any environmental infrastructure projects, and the NADBank only recently announced that funding had been arranged for two projects (Naco and FINSA). However, the creation and operation of the BECC/NADBank institutions has resulted in some fundamental changes in how environmental issues are dealt with in the border region. They have begun the arduous process of capacity building and democratization of decision-making, which, if accomplished, may have a more lasting impact than any sewage treatment plant ever will. In particular, included in both the BECC/NADBank Agreement and the certification criteria document were institutional concepts of transparency and public participation to promote sustainable development. Without transparency and public participation there can be little chance for successful community empowerment to understand, solve and pay for solutions to environmental crises. It is these concepts that are making the difference in empowering local individuals and NGOs. It is a pleasure to watch Mexican citizens and interest groups come alive as they realize they can speak at public meetings and that their ideas must be considered.

#### **IV. LESSONS FROM NAFTA: The key issues omitted from the NAFTA and its two environmental side agreements**

**A. Production Process Methods.**Production Process Methods ("PPMs") are regulations which seek to govern how a product or service is produced or processed. These regulations are controversial for free trade proponents because they discriminate against otherwise identical products on the basis of something that happened during production or processing. PPMs are also controversial because they are viewed as an attempt to apply domestic standards extraterritorially and thus invade other nation's sovereignty. Although PPMs are often used as a justification to ban imports, NAFTA did not address this issue. This is a major NAFTA failure, particularly in light of the fact that GATT's resolution of the Tuna/Dolphin case (invalidating a US PPM statute) was the motivation for environmentalists to intervene in the trade negotiations. International agreements on PPM issues are preferable to unilateral trade restrictions, *where they can be achieved*. To the extent that they are better tools for addressing international environmental problems, it is in the interests of *both the developed and developing countries* that MEAs be more widely used, and to greater effect.

(73) All hope is not lost, however, and "many scholars and environmentalists feel that the trade regime will continue to move to include PPM considerations." (74) In fact, without international agreements on PPMs, they will continue to be viewed as non-tariff barriers to trade and thus will probably continue to be a major basis for trade disputes over the next few years.

**B. Migration and immigration.**Migration is as big an issue on the US/Mexico border as it is in Asia. While some migration in Asia is motivated by environmental degradation, in North America the primary motivation is economic. However, much of the migration to the US/Mexico border causes, as discussed above, significant environmental degradation. However, neither the NAFTA, nor its side agreements dealt with this issue directly. Migration and immigration was only lightly discussed as an indirect outcome. It was said that a primary benefit of free trade agreements is to promote international interdependencies which can then lead to international cooperation. This cooperation can be in the form of promoting peace, safety, and environmental initiatives. NAFTA provides an excellent example: a major reason for the negotiation of NAFTA was the hope of avoiding another

revolution in Mexico and/or avoid social unrest and migration by improving Mexico's economy. If the economic gap between the US and Mexico, for example, can be lessened, it is hoped that health, safety, and environmental concerns will play a greater role and less of a secondary role to Mexico's need to develop, or individual Mexicans' need to migrate. It is precisely because of . . . problems emanating from Mexico that the free trade agreement makes sense for the United States. The best way to protect U.S. interests against a continued inflow of undocumented workers, illegal drugs and spreading border pollution is to help Mexico develop economically. . . U.S. jobs are far more threatened by entry of hundreds of thousands of undocumented Mexican workers to the United States than by the movement of U.S. companies to Mexico. U.S. workers therefore stand to gain far more from NAFTA than they will lose. (75) In the end, however, it was probably impossible for the US to raise the issue of immigration directly because it is too sensitive politically. Even immigration to the border was off limits. Even more than immigration, US complaints about immigration would have been viewed by Mexico as an imperialist invasion of Mexico's sovereignty. Mexicans would not stand for the US suggesting they should be limited in their ability to migrate within their own nation.

**C. Natural resources.** Neither the NAFTA nor its side agreements address natural resources such as forests, soil, and coastal resources to a great degree. Arguably, there is too much focus on pollution clean-up and prevention, an area in which the US tends to look good; and not enough focus on the preservation of natural resources and the related need to reduce consumption, areas in which the US and Canada look bad. This is unfortunate because, for example, "the removal of environmentally perverse subsidies could do more for the implementation of sustainable development than any other single action." (76) In anticipation of NAFTA, the Salinas administration reformed Article 27 of the Mexican Constitution to lift protections which had promoted land reform, communal land ownership and restricted foreign investment in the agricultural sector. This unilateral action basically opened Mexico's agriculture up to participate in the liberalization of investment that comes with NAFTA. It is anticipated that this will have a substantial affect on the environment and development if such investment shifts production to favor export crops. However, according to a new book, *Agriculture, Trade, & The Environment: Discovering and Measuring the Critical Linkages*, "Most of the research that has already been done on the relationship between expanded agricultural trade and environmental protection is theoretical, incomplete, and lacks sufficient empirical content." (77)

**D. Legislation rollbacks** The potential for lessening of environmental protections was considered in the NAFTA, but left out of the side agreement. As noted above, the NAFTA nominally prohibits lowering environmental standards to attract trade and investment. The issue was neglected in the side agreement because it was in the NAFTA. The CEC has a very limited the ability to look into questions of rollbacks, and/or the reduction of standards to attract investment. These key elements of environmental policy unfortunately were left outside the ambit of the CEC. Instead they are left in the hands of the trade secretariat.

**V. CONCLUSION** The right question, if NAFTA is the issue, is whether environmental conditions have a better prospect of being improved with the NAFTA and its associated environmental institutions in operation, or without them. Let us imagine a border area with virtually all the maquilas and pollution that are there now (because most of them would be there with or without NAFTA) and without the BECC and the CEC and the broader economic benefits of the NAFTA to the two countries. I think that there can be no doubt that the border area would be even worse off in a no-NAFTA situation than it is with the NAFTA and with the BECC. At the very, very least, it is much too soon to reach conclusions much stronger than my own expression of opinion. Rome wasn't built in a day, and the border environment will not be cleaned up in a year or two, or even in a decade, and nobody promised otherwise. (78) While conditions may be worse than two years ago, this situation may not be caused by the NAFTA. In fact, it is unlikely. Very few changes have taken place as a result of the NAFTA. The NAFTA is to be phased in over more than a decade. Meanwhile, the CEC and BECC/NADBank side agreement institutions are just beginning to function. Thus, it may be too early to fully interpret their outcomes. With this caveat in mind, the following is a summary of the lessons to be learned from the NAFTA experience.

**A.**

## **What was done right in the NAFTA**

- NAFTA preserved the right to implement multilateral environmental agreements. The members of APEC could expand upon NAFTA's success by recognizing MEAs and by creating an automatic means of listing new MEAs that will preempt any regional trade arrangements (perhaps as a majority of APEC members sign one).
  - NAFTA created new ways to resolve trade disputes involving environmental regulations. APEC members may want to consider adoption of similar procedures to increase the protections for any individual member's environmental regulations which might be undercut by a WTO trade dispute panel if challenged as non-tariff barriers to trade.
  - NAFTA prohibits the reduction of environmental standards to attract investment. APEC may wish to adopt similar measures to avoid the creation of unfair competition based on a perceived comparative advantage in a lack of environmental regulation.
  - NAFTA also urges upward harmonization of standards, while at the same time preserving the right of the NAFTA Parties to adopt new standards including SPSs and SRMs. APEC can look to these provisions as a starting point for the sharing of information on the success of individual member's standards and work toward a "best methods" approach.
- **B. What was done right in the two side agreements**
    - NAFTA environmental side agreement created new ways to resolve purely environmental disputes. The members of APEC may wish to adopt similar provisions so that a mechanism is in place in the event that one nation must seek to resolve a purely environmental dispute with another APEC member (for example, Japan may need such a dispute resolution mechanism to address acid rain problems caused by China's burning of coal).
    - NAFTA's environmental side agreement created domestic citizen suit guarantees. APEC may consider encouraging its members to adopt similar guarantees which in effect enlist civil society's assistance in curbing environmental abuse.
    - The environmental side agreement created the right of private party actions on an international level to address lax enforcement of environmental laws. Again, adopting similar provisions within the context of APEC would enlist civil society's assistance in curbing environmental abuse (in this case in an international context).
    - NAFTA and its side agreements created significant mechanisms for public participation in two of its new environmental institutions. For the most part, this is an appropriate follow through for the participants in the UNCED who have signed the Rio Declaration and Agenda 21. For this reason, APEC's members can look to the public participation provisions as one example of how to achieve subsidiarity.
    - The BECC has created an advanced set of guidelines and criteria for the certification of infrastructure projects which among other things incorporates sustainable development requirements. Within the increasingly dynamic APEC region, new investment will necessitate the construction of new infrastructure. For this reason, APEC would do well to consider using a set of guidelines and criteria to evaluate such projects.
  - **C. What could have been done better**
    - Trade was liberalized too fast. Other APEC members should resist the US, Canada and Australia push for rapid trade liberalization.
    - Environmental side agreement negotiations were undertaken in too short a time frame. Clearly regional economic integration establishes the possibility for the creation of regional frameworks for environmental governance. However, the amount of attention given to the creation of these frameworks is the key to their success.

- A sectoral focus could have been used. APEC could establish common environmental guidelines on a sector by sector basis. Such a sectoral approach may also be more consistent with international trade progress.
  - APEC should address the items "left out" of NAFTA. The items that APEC should not ignore are PPMs, migration/immigration, and the potential for national legislatures to rollback environmental protections. Also, APEC should be sure to examine the role of natural resources in the trade/environment linkage. There was too much focus in NAFTA on pollution and not enough on resource issues. Research should be focused on how to reform economic theory and the valuation of natural resources in national accounts and the international trade regime. This would include further development of the internalization of the costs of pollution. Finally, models of trade liberalization must be created which do not preclude environmental preservation.
- **D. A potential for policy convergence** First, APEC would do well to examine how the NAFTA regime addresses key environmental provisions. Some are incorporated directly into the trade agreement, while some others are built into parallel side agreements. Second, APEC can examine the NAFTA experience from the perspective of what could have been done better. In undertaking these examinations, APEC can consider whether it can use a step-by-step process to gradually adopt some of the environmental promises made in the NAFTA and its parallel agreement. Arguably APEC's members can make these same promises and make the same movements toward improved environmental performance through its open system without a contractual agreement as used in the North American context. In fact, the members can focus and act unilaterally on individual promises with the understanding that NAFTA may provide lessons for a loose framework for APEC's regional environmental promises and actions. In the long term, APEC may need to consider the dispute resolution provisions of the NAFTA and its main side agreement to resolve conflicts between trade and environmental policy. In particular, the NAFTA's environmental side agreements, despite their rapid negotiation, do seem to support capacity building through information exchanges, enforcement cooperation, training programs, and scientific collaborations. To the degree that APEC's current path of unilateral concerted action on the environment is pursued, it might find some valuable models and examples in the NAFTA environmental side agreement. In this way, as is happening in North America, APEC could pursue a balanced management of its environmental policy convergence. Perhaps the CEC, or an institution like it, could facilitate APEC's creation of common frameworks, policies and guidelines for national environmental and resource management.

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**Notes**(1) The author thanks Lyuba Zarsky for her comments on the development of the outline for this paper and Marta Burg for her significant editorial guidance. Mark J. Spalding is an Adjunct Professor at the Graduate School of International Relations and Pacific Studies (IR/PS) at UCSD. He is also the Chair of the California State Bar, Environmental Law Section's International Environmental Law Committee. In 1993, as an attorney with the Natural Resources Defense Council he participated in the creation of the Commission for Environmental Cooperation, the Border Environmental Cooperation Commission and the North American Development Bank; and he continues to be actively involved in their implementation. For further information, Mark Spalding may be contacted at 619/259-7879, or mspalding@ucsd.edu.(2) The members of APEC are Japan, South Korea, China, Hong Kong, Taipei, Thailand, Indonesia, Malaysia, Singapore, Brunei, Philippines, Australia, New Zealand, Papua New Guinea, Canada, the United States, Mexico and Chile.(3) Zarsky, Lyuba "APEC Ministerial Meeting on Sustainable Development" Nautilus Institute for Security and Sustainable Development (July 12 1996), at 3 (emphasis added).(4) Blackhurst, Richard, et. al. Trade and Sustainable Development Principles International Institute for Sustainable Development, 1994, at 24 [hereafter "Blackhurst"].(5) Ibid.(6) Again, the level of development in much of Asia may be more like Mexico than the US because of Asia's large rural population.(7) "NAFTA in the Balance," The Wall Street Journal, March 4, 1993, p. A14.(8) Von Moltke, Konrad International Environmental Management, Trade Regimes and Sustainability at 4 [hereafter "Von Moltke"].(9) Id. at 1-3.(10) Id. at 41.(11) Zarsky, Lyuba "APEC, Citizen Groups and the Environment: Common Interests, Broad Agenda"

Presentation to Citizens Forum on Trade and Environment, People's Forum 2001 Japan, Nautilus Institute for Security and Sustainable Development (November 11-12, 1995), at 12 [hereafter "Zarsky APEC Citizen"].(12) The Sierra Club made a formal assertion in a lawsuit that an environmental impact assessment of NAFTA's trade and investment liberalization should be conducted. The court which heard the matter agreed with the government that enough had already been done to assess the potential environmental impacts of NAFTA.(13) Von Moltke supra note 8, at 33-4(14) The side agreement was negotiated between February 1993 and August 1993. It was signed by the NAFTA parties on 14 September 1993.(15) North American Free Trade Agreement, December 17, 1992, 32 I.L.M. 605, at art. 6 [hereafter "NAFTA"].(16) With a few of my typographical errors still in place.(17) There was good reason for this agreement given the extensive environmental degradation in the border region (see note 65 below). For example, "52% of Maquiladoras generate hazardous wastes, but only 30% have complied with regulations requiring information to be provided to SEDUE about disposal of these wastes, and only 19% are complying with waste disposal laws." Stanton, Lynn "A Comparative Analysis of the NAFTA's Environmental Side Agreement" West•Northwest Vol. 2, No. 1 (Fall 1994) at 73 [hereafter "Stanton"].(18) Zarsky APEC Citizen supra note 11, at 5.(19) Draft editorial by Lori Saldana of the Sierra Club, copy on file with author (July 25, 1996).(20) Of course, from an environmental perspective, a whole lot of infrastructure may not be such a good idea either -- be careful for what we ask, we may get it. . .(21) Urquidi, Victor L. "Economic and Regulatory Policy Instruments in Developing Countries, with Special Reference to Mexico" Pacific Trade and Development Conference - PAFTAD 22 Environment and Development in the Pacific (revised text October 1995), at 8.(22) Blackhurst supra note 4, at 21-2.(23) Id. at 24.(24) Von Moltke supra note 8, at 34.(25) NAFTA supra note 15.(26) "Contribute to the harmonious development and expansion of world trade . . . in a manner consistent with environmental protection and conservation; . . . promote sustainable development;. . . [and] strengthen the development and enforcement of environmental laws and regulations." NAFTA supra note 15 at Preamble.(27) The treaties currently listed are the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora, the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, the 1986 US-Canada Agreement Concerning the Transboundary Movement of Hazardous Waste, and the 1983 US-Mexico La Paz Agreement on Cooperation for the Protection and Improvement of the Environment in the Border Area. NAFTA supra note 15 at art 104.(28) Ibid.(29) A few of the treaties omitted include the 1911 Treaty for the Preservation and Protection of Fur Seals, the 1921 ILO Convention (#13) concerning the Use of White Lead in Painting, the 1940 Washington Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, the 1948 Washington International Convention for the Regulation of Whaling (and its 1956 Protocol), the 1949 Washington Convention for the Establishment of an Inter-American Tropical Tuna Commission, the 1950 Paris International Convention for the Protection of Birds, the 1951 FAO International Plant Protection Convention, the 1952 Tokyo International Convention for the High Seas Fisheries of the North Pacific Ocean, the 1954 International Convention for the Prevention of Pollution of the Sea by Oil, the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas, the 1961 Paris International Convention on the Protection of New Varieties of Plants, the 1971 Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat, the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter, the 1973 London International Convention for the Prevention of Pollution from Ships (MARPOL), the 1974 Paris Convention for the Prevention of Marine Pollution from Land-Based Sources, the 1979 Bonn Convention on the Conservation of Migratory Species of Wild Animals, the 1983 International Tropical Timber Agreement, the 1985 Vienna Convention for the Protection of the Ozone, the 1989 Convention for the Establishment of a Latin American Tuna Organization, the 1992 United Nations Framework Convention on Climate Change, and the 1992 Convention on Biological Diversity (not yet ratified by the US Senate),(30) i NAFTA supra note 15 at arts. 104, 906(2), and 1114.(31) Sanitary or Phytosanitary measure is defined as " a measure that a Party adopts, maintains, or applies to:

- (a) protect animal or plant life or health in its territory from risks arising from the introduction, establishment or spread of a pest or disease
- (b) protect human or animal life or health in its territory from risks arising from the presence of a an additive, contaminant, toxin or disease-causing organism in a food, beverage or feedstuff
- (c) protect human or animal life or health in its territory from risks arising from the presence of a an additive, contaminant, toxin or disease-causing organism or pest carried by an animal or plant, or a product thereof, or
- (d) prevent or limit other damage in its territory arising from the introduction, establishment or spread of a pest, including end product criteria; a product-related processing or production method; a testing, inspection, certification or approval procedure; a relevant statistical method; a sampling procedure; a method of risk assessment; a packaging and labeling requirement directly related to food safety; and a quarantine treatment, such as a relevant requirement associated with the transportation of animals or plants or with material necessary for their survival during transportation." NAFTA supra note 15 at ch. 7B, art. 724.(32) NAFTA supra note 15 at art. 712(1).(33) Id. at art. 712.(34) Unfortunately, NAFTA failed to address state or local referendums and regulations based on consumer preferences (e.g. a ban on fur from leg-hold traps).(35) NAFTA supra note 15 at ch. 9.(36) A

"standard" means any document "approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for goods or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a good, process, or production or operating method." NAFTA supra note 15 at art. 915.(37) "Technical regulation" means any document, "which lays down goods' characteristics or their related processes and production methods, or services characteristics or their related operating methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a good, process, or production or operating method." NAFTA supra note 15 at art. 915.(38) "Conformity assessment procedure" means any procedure used, "directly or indirectly, to determine that a technical regulation or standard is fulfilled, including sampling, testing, inspection, evaluation, verification, monitoring, auditing, assurance of conformity, accreditation, registration or approval used for such a purpose." NAFTA supra note 15 at art. 915.(39) "Legitimate objective" is defined to include safety, protection of human, animal, or plant health; protection of the environment; protection of consumers; sustainable development; and fundamental geographical or infrastructural factors. Protection of domestic production is explicitly not a legitimate objective. NAFTA supra note 15 at art. 915.(40) For example, parties must not employ procedural requirements that are stricter than necessary, they must initiate and complete any procedure as expeditiously as possible, and they must process applications in a non-discriminatory manner. NAFTA supra note 15 at art. 908.(41) NAFTA supra note 15 at arts. 902 and 904.(42) In December 1993 negotiators were able to introduce "some minor environmental provisions into parts of the Round and into the structure of the World Trade Organizations." Von Moltke supra note 8, at 33.(43) NAFTA supra note 15 at arts. 713, 714, 905 and 906.(44) Id. at arts. 723, and 914.(45) Id. at art. 2005(4).(46) Id. at arts. 2014-15.(47) Id. at art. 2014.(48) Id. at art. 2018.(49) Id. at art. 2019.(50) "North American Agreement on Environmental Cooperation," 32 I.L.M. 1480 (1993), commonly referred to as the "Environmental Side Agreement" [hereafter "NAAEC"].(51) The JPAC has played a significant role in the implementation of the CEC. It has been the key point for much of the public input into the CEC. In addition, the members of the committee have worked very hard to reflect a North American identity by thinking of themselves as representing the continent as a whole rather than their home nations.(52) NAAEC supra note 50, at arts. 10, 12-13.(53) Id. at art. 3.(54) Runnalls, David "Shall We Dance? What The North Needs To Do To Fully Engage The South In The Trade And Sustainable Development Debate" International Institute for Sustainable Development (27 June 1996), at 15 [hereafter "Runnalls"].(55) NAAEC supra note 50, at arts. 22-36.(56) Von Moltke supra note 8, at 49.(57) NAAEC supra note 50, at art. 5.(58) Id. at arts. 13-15.(59) Stanton supra note 17, at 79.(60) NAAEC supra note 50, at art. 6.(61) The most radical of these groups predicted the NAFTA and the GATT trade dispute panels would overrule all of the hard won environmental laws of the U.S. This fear is misplaced. U.S. Constitutional law would not automatically apply the results of any dispute panel hearing to the interpretation of U.S. domestic laws (dispute panel rulings are not self-executing treaties). An act of Congress would be required to change a law to conform with an international ruling.(62) GATT Dispute Panel Report on United States Restrictions on Imports of Tuna, August 16, 1991, 30 I.L.M. 1594. The U.S. has blocked the adoption of this report pending diplomatic resolution of the dispute with Mexico. The report has no legal effect until adopted by a GATT Council.(63) As of that date, the three CEC commissioners were Carol Browner, Administrator of the EPA; Carlos Rojas Gutierrez, the Secretary of Mexico's National Institute of Ecology, Ministry of Urban Development and Ecology (now replaced by Julia Carabias of SEMARNAP); and Sheila Copps, the Minister of Environment Canada (now replaced by Sergio Marchi).(64) It is anticipated that the increased trade resulting from the NAFTA pact will adversely affect the environment in at least two ways. First, there will probably be extra burdens placed on any environmental infrastructure in the border regions. Second, increased transport and traffic among the countries will increase the use of fossil fuels and reduce air quality.(65) The border region is defined as 100 kilometers/62 miles on each side of the border. The region constitutes the most populous and most rapidly growing region of North America. The population in 1960 was 1 million, and today it is over 10.5 million. The region suffers from significant in-migration to the border from both countries. This has made it nearly impossible for border communities to keep up with growth and provide adequate infrastructure. This lack of infrastructure puts pressure on natural resources, and creates environmental problems, many of which are transborder in nature. Making matters worse, city and state governments on both sides of the border (but especially in Mexico) often lack the basic resources or information to address these environmental issues in the border region. Cross-border cooperation is limited by the two very different political systems that meet at the border and which result in few direct governmental and administrative counterparts across the border. The bad news is that while the region still faces significant economic challenges, there is significant job creation in the maquiladora industry. For example, unemployment in Tijuana is only 1%. And, with NAFTA, the economic linkages across the border are expected to continue to grow and intensify thus causing conditions to continue to worsen.(66) "Agreement Between the Government of the United States of America and the Government of the United Mexican States Concerning the Establishment of a Border Environment Cooperation Commission and a North American Development Bank," 32 I.L.M. 1545, 1993.(67) Mexico and the U.S. will each contribute half of the

\$450 million in paid-in capital and half of the \$2.55 billion in callable capital. It has been estimated that leveraging these moneys could produce \$20 to \$60 billion for environmental and social adjustment projects.(68) This definition of sustainable development is from the World Conference on Environment and Development of 1987 (see the Brundtland Report: Our Common Future) and was reaffirmed and made part of the Rio Declaration on Environment and Development (see Annex I of the Report of the United Nations Conference on Environment and Development, 1992). It has been incorporated into the NAFTA regime by inclusion in the preamble of the environmental side agreement and by inclusion in the sustainable development criteria for certification of BECC/NADBank projects.(69) Patrick Whelan of the Office of International Activities of the US Environmental Protection Agency defended the EPA memorandum as follows: "A document [the draft criteria] designed 'by committee', as this one was, is bound to have inconsistencies or even contradictions in it, and EPA's goal throughout has been to produce a document that gives unequivocal guidance to applicants, the public, and BECC staff on the certification of border infrastructure projects. The August 'final draft' did not give unequivocal guidance." BECCNET listserv E-mail posting September 12, 1995.(70) The intense showing of public interest in and support for these new institutions at the August 31, 1995 BECC Board meeting did not influence some Congress members' opinions of these institutions. Instead, in its headlong effort to "balance the budget" regardless of the results, these new ideas and new institutions are threatened with indirect destruction through an appropriations bill. The Senate Sub-Committee on Foreign Operations and the Senate Appropriations Committee actions zeroed-out funding for the North American Development Bank (NADBank) contained in H.R. 1868 (The Foreign Operations, Export Financing, and Related Programs Appropriations Act for 1996). Again, the public came through for these new institutions and through a letter writing campaign was able to have the entire \$56.25 million appropriation for the NADBank restored.(71) This list is based on the draft revisions expected to be adopted by the BECC in November 1996.(72) The BECC Certified Projects and their status is as follows:

- Brawley, California -- \$17 million Water Treatment facility. Initial finance bids came in too high, project to be restructured.
- Ensenada, Baja California -- \$8 million Wastewater Treatment Plant. The NADBank decided this project could not be financed as designed. It is in the process of redesign.
- El Paso, Texas -- \$11.7 million Wastewater Reuse Project. This project is being financed by the Texas Water Board because NADBank's interest rates were not competitive.
- Douglas, Arizona -- \$2 million Upgrade of Water and Wastewater System. A search for funding is underway.
- Nogales, Sonora -- \$39 million Water Supply and Distribution System. Thanks to the intervention of President Zedillo, Mexico's National Water Commission will pay for nearly half of this project. Financing for the rest is under way.
- FINSA (Matamoros, Tamaulipas) -- \$1 million Wastewater Treatment Plant for a private industrial park. Issues related to the in-kind services for the community have been resolved and financing has been completed with NADBank participation.
- Naco, Sonora -- \$650,000 Water Supply and Wastewater Treatment Project. Financing has been completed with NADBank participation.
- EPISO (El Paso, Texas) -- \$110,000 On-Site Wastewater Treatment System Self-Help Loan Project. BECC certification to be used to seek grant funding.
- (73) Runnalls supra note 54, at 14 (emphasis in the original).(74) Id. at 8.(75) iPurcell, Susan Kaufman "What's in NAFTA for Us," The Washington Post, 3 March 1993.(76) Runnalls supra note 54, at 12.(77) Bredahl, Maury E. et. al. (eds.) Agriculture, Trade, & The Environment: Discovering and Measuring the Critical Linkages, Westview Press, 1996, at 281.(78) E-mail from Sanford Gaines, who handled environmental issues for the US Trade Representative from the end of the NAFTA negotiations and through the BECC/NADBank Agreement Negotiations, copy on file with author (February 12, 1996).

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