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# Building an Environmental Protection Framework for North America: The Role of the Non-Governmental Community

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## Introduction

On 1 January 1994 the North American Free Trade Agreement (NAFTA) officially entered into force, creating the world's largest trading bloc, and the first ever reciprocal free-trade agreement between developing and industrialized countries. The treaty, along with its side agreements, represents the first time environment has been given serious consideration in a trade agreement. The fact that environment was given such high-profile treatment was largely due to organized pressure and participation by environmental groups in Mexico, Canada, and the USA. The accords reflect the new importance of the North American environmental community as a tri-national non-governmental movement.

The debate in North America over NAFTA was a complex one, involving many sectors of society. In all three countries, elements of the labour community, human-rights activists, and environmental advocates, in addition to traditional trade interests from the business community, sought to influence the outcome of the negotiations. The environmental community in particular was highly successful in organizing across borders and in articulating its agenda.

In September 1990, the Mexican president Carlos Salinas de Gortari officially sought the opening of negotiations for a free-trade agreement between the USA and Mexico. Shortly afterwards President Bush notified Congress that the negotiations would go forward. Non-governmental environmental organizations in all three countries were quick to express their concern regarding the potentially adverse impact which a trade agreement of this scope would have on the conservation of natural resources and on the health of the 360 million inhabitants of North America. From the beginning, they argued for an inclusion of environmental issues within the negotiations, to ensure that a North American Free Trade Agreement would promote environmentally sustainable development, rather than further environmental degradation.

The urgency and high visibility of three issues in particular created a climate in which the governments felt compelled to deal with a series of serious environmental concerns:

- the rapid industrialization and population growth along the US–Mexico border provided particularly vivid images of potential environmental problems arising from increased economic growth. The problems in the region are many, including insufficient infrastructure to deal with water-treatment and waste-disposal needs, rising levels of air pollution, and abysmal housing conditions around factories;
- the 1991 GATT decision in the Tuna–Dolphin case, which deemed that efforts by the USA to protect resources (dolphins in this case) beyond its borders were inconsistent with international trade rules, raised a red flag for environmental and consumer protection advocates. The highly publicized case raised fears that trade agreements could weaken human health- and natural-resource protection measures;
- the weakness of environmental law enforcement in Mexico created widespread concern about the possible repercussions of expanded trade. On the one hand, industry, labour, and environmentalists in Canada and the USA feared the possible creation of so-called 'pollution havens' that would produce unfair advantages for industry operating in Mexico. This was compounded by the more generalized and realistic fear that bad enforcement practices combined with growth in the industrial sector would lead to further degradation of the Mexican environment.

The response of the environmental groups to the above concerns, and others detailed further in this article, was organized and swift. The groups quickly joined forces across borders, identifying anticipated environmental and public-health problems associated with increased trade. Later, after gaining a better understanding of trade rules, some environmentalists began offering solutions to trade and environment conflicts. The concrete solutions offered by many environmental groups eventually laid the groundwork for NAFTA and its environmental side agreements.

## Anticipated Impacts of NAFTA

From an economic point of view, NAFTA is predicted to promote additional economic growth in all three North American economies, through the specialization and economies of scale resulting from freer trade and investment flows. A US International Trade Commission synthesis of economic models concluded that NAFTA would result in additional economic growth of less than 0.5 per cent of the gross national product (GNP) for Canada and the USA. Growth of up to 11 per cent of the GNP was predicted for Mexico.<sup>1</sup> Greater investment is also predicted, especially in Mexico. Analysis shows growth in exports for the USA and Mexico, increased wages in all sectors except agriculture, and improved returns on investment in both countries.<sup>2</sup>

Despite overall growth, certain sectors such as corn production in Mexico are expected to experience large reductions in output due to increased competition from imports.<sup>3</sup> The most widely recognized negative outcomes are in small-scale agriculture and small business in Mexico. Increased competition from cheaper US and Canadian grain production is expected to cause significant dislocation for Mexican peasant farmers. This dislocation was already under way, as a result of recent reforms in Mexican land-tenure laws. Small and medium-sized manufacturing industries in Mexico are also expected to suffer in the short term as they are forced to compete with large and more efficient US and Canadian firms.

From an environmental perspective, economic growth can have potentially negative impacts on natural resources and human health; it is likely to be accompanied by increased production of hazardous waste, greater energy and natural-resource consumption and extraction, and rising agricultural output using more water and agricultural chemicals. Without proper infrastructure and enforcement of environmental laws, all of these will exacerbate existing environmental problems in Canada, Mexico, and the USA.

Furthermore, the predicted dislocation in the rural regions of Mexico could result in serious degradation of the environment. Environmental damage as a result of rural poverty, including accelerated deforestation and overcropping of marginal lands, is well documented. Migration from rural to urban areas places additional stresses on already overtaxed urban infrastructures, creating human health and environmental problems. Many of these problems would occur without NAFTA, as a result of the elimination of the collective farming system in Mexico and the shortage of credit for small farmers.

In addition to these general problems, environmentalists raised a number of specific concerns in the NAFTA debate which are detailed below. Environmental NGO participation in the process was largely aimed at preventing or mitigating these anticipated and existing problems.

## *Weakening of Environmental Laws and Standards*

Environmental advocates feared that NAFTA would limit each nation's ability to manage and conserve its own resources and enact high standards for public health and environmental protection. Fears revolved around harmonization or attempts to create uniform standards throughout the free-trade region. Many feared that harmonization efforts would force high national standards down to a lowest common denominator or to international standards that are frequently lower than the strong environmental and consumer protection laws in the USA and Canada. Another key concern was that the agreement would open to challenge as trade barriers federal, state, and local laws designed to conserve natural resources and protect human health. There were further fears that competition from firms operating in countries with lower standards would gain an unfair advantage over firms operating in the country with higher standards, thus causing a movement of industry and jobs to the nation with the weakest laws, or creating political pressures to lower standards in the country with stricter laws. This last issue became less of a concern once environmentalists discovered that Mexico's environmental laws were relatively strong, if badly enforced.

## *Insufficient Funding for Environmental Protection and Infrastructure*

Budgetary constraints hamper the implementation of Mexico's environmental laws and programmes. Although Mexico nearly tripled its federal pollution-control budget between 1990 and 1992, as part of a significant increase in overall environmental spending, resources continue to fall short of actual needs. State and local governments in Mexico are particularly ill-equipped to enforce environmental laws and protect public health. To make matters worse, a recent restructuring of Mexico's environmental authority has placed more responsibility with those same entities, further exacerbating enforcement problems.

A key concern during the NAFTA negotiations was ensuring that Mexico have access to sufficient funds to consider the environment in its development plans and to comply with domestic laws and international protocols and conventions. There was a general consensus that Mexico needed money to train more personnel, to develop the technical capacity to deal with complex environmental problems, and to create a sufficient infrastructure to absorb new development. There is currently a shortage of funds and qualified personnel for monitoring the existing industrial plants and implementing extant Mexican laws and international agreements.

### *Degradation of the Border Environment*

Related to the above were particular concerns about degradation of the US–Mexico border environment due to a lack of infrastructure accompanied by rapid industrial growth. Many saw the border as a predictor of future problems throughout Mexico. Much focus in the media and by environmental organizations was placed on the inadequate housing situation on both sides of the border, lack of water-treatment and waste-disposal capabilities, clandestine hazardous-waste sites, and worsening air quality in many of the cities in the region.

### *Lack of Enforcement of Environmental Laws*

Over the last few years, Mexico has made important strides in the development of strong environmental laws and regulations. Nevertheless, environmentalists feared that serious enforcement problems in Mexico would be exacerbated by increased trade and investment, possibly attracting polluting industry to Mexico.

For example, a 1992 US General Accounting Office (GAO) sample found that none of six US majority-owned ‘maquiladora’ factories surveyed had prepared an environmental impact assessment for new plants established in Mexico, as required under Mexico’s 1988 General Ecology Law.<sup>4</sup> The GAO findings are consistent with the observations of Mexican environmentalists, who have described chronic and widespread violations of Mexico’s environmental impact requirements. The implementation of those requirements has routinely neglected a timely disclosure of assessment documents, as well as full notice and comment procedures that are essential to informed public participation.<sup>5</sup>

Enforcement problems are due in large part to a lack of money and technical resources, exacerbated in some cases by inefficiency, corruption, and a lack of political will. Another factor resulting in weak enforcement is that citizens and environmental groups, who play an important part in the enforcement of environmental law in other countries, are not given the opportunity to participate fully, thus limiting the already under-funded enforcement efforts. Although an ‘Attorney-General’ for the environment was created in Mexico in 1992, providing a citizen-complaint procedure, many environmental groups in Mexico expressed dissatisfaction with the process.

### *Insufficient Public Participation In Decision-making Processes*

NGOs were concerned about getting a seat at the table in both the NAFTA process, and more generally in guaranteeing a greater role for citizens in the enforcement and decision-making process in all three countries, especially Mexico. In particular, Mexican environmentalists were concerned about the general lack of democratic processes in

Mexico, particularly in the arena of environmental decision-making.

Under the GATT dispute-resolution procedures, used during the Tuna–Dolphin case and others, for example, the entire process was closed to the public and no NGO input was allowed. The same rules prevailed under the US–Canada free-trade agreement. Environmentalists and others had a strong interest in opening up these processes and ensuring that environmental disputes included input from experts.

At the national level, particularly in Mexico, citizens are not given important information or allowed to participate in decision-making processes. For example, Mexican citizens have no access to information about toxic emissions or potentially harmful industrial activities, as Mexican law does not require reporting or public release of this data. Mexican NGOs have repeatedly called for the creation in Mexico of a toxic-release inventory and the passage of right-to-know legislation. Such requirements were seen as even more important in light of the trade agreement, as more foreign companies set up operations in Mexico.

### *Changes in the Mexican Constitution and Environmental Law During the NAFTA Process*

Many Mexican environmentalists expressed particular concern about the changes that were made in the Mexican constitution in order to conform with NAFTA.

The most striking example is the reform of Article 27, eliminating the collective farming system known as the *ejido*. While agricultural policy in Mexico has long had negative social and environmental effects in rural areas, the abrupt removal of all support for the small-scale farmer is expected to create widespread problems in Mexico. Removal of the law which has hitherto forbidden sale of communal *ejido* property, especially in coastal and heavily forested areas, presents a serious threat of additional deforestation, destruction of wetlands, and environmentally unsound tourism development. In addition, many experts predict that foreign competition under the trade agreement will exacerbate the problems of dislocation and underemployment.

### *The NGO Role in the NAFTA Process*

When the USA entered into trade negotiations with Canada in 1986, the major US environmental and consumer-protection organizations showed little interest. During 1990, as the Uruguay round of GATT appeared to be drawing to a close, some of the environmental–consumer concerns mentioned in the previous section were raised for the first time. The NAFTA negotiations, however, created great concern that regional integrations would directly threaten natural resources and public health in Mexico as well as the

viability of US and Canadian environmental and health standards.

For much of the environmental community the early 1991 GATT dispute over the US ban on tuna imports from Mexico set off alarm bells. GATT ruled in favour of Mexico in August of that year, stating that the USA could not fairly ban the importation of Mexican tuna to protect dolphins. Concerns triggered by the GATT ruling, coupled with growing dissatisfaction with the US–Canada free-trade agreement, as well as the enforcement, participation, and infrastructure concerns mentioned in the previous section, set the stage for a cross-border coalition of environmentalists interested in improving or preventing NAFTA.

Environmental organizations from Mexico and the USA worked closely together during the free-trade discussions. Products of this collaboration have included conferences and seminars to develop recommendations for NAFTA and joint submissions to each country's trade negotiators.<sup>6</sup>

### *Building Tri-National Coalitions*

The problems described above prompted concerns from groups throughout the region, and became the platform for the environmental community. Soon after the intention to negotiate an agreement was announced, environmentalists in the USA, Mexico, and Canada began collaborating. In March 1991 the Grupo de los Cien—a Mexican advocacy group—initiated contacts with American and Canadian groups. On 5 April a *Common Declaration by Environmental Groups in Mexico, the United States and Canada Regarding the North American Free Trade Agreement*<sup>7</sup> was released to the press in all three countries. The communities quickly developed a mutually beneficial relationship which afforded groups in Mexico support and leverage in their attempts to influence the negotiations and allowed American and Canadian groups to demonstrate that concern for Mexico's environment was not exclusive to environmentalists in the USA.

Later, at a meeting held in Mexico City in January 1992, representatives of environmental groups in Mexico, Canada, and the USA developed recommendations for specific actions their governments could take to evaluate and mitigate environmental risks posed by NAFTA.<sup>8</sup>

A number of joint and individual declarations were made over the following months; however, the response from the negotiators was less than satisfactory.

### *Inadequate Government Response*

As an initial response to concerns voiced by the environmentalists, the US and Mexican environmental authorities (EPA and SEDUE) produced the *Integrated Plan for the Mexican–US Border Area* (Border Plan).<sup>9</sup> The US Trade Representative also released the *Review of US–*

*Mexico Environmental Issues*<sup>10</sup> (Environmental Review), in place of a more formal environmental impact assessment.

A draft of the Border Plan was released in August 1991 for public comment. Hundreds of Mexican and US citizens testified at the seventeen public hearings organized along the border by the Mexican Secretaria de Desarrollo Urbano y Ecología (SEDUE) and the US Environmental Protection Agency (EPA). Major criticisms of the draft focused on lack of financing, recommendations for future study rather than plans for immediate action, failure to address health-related pollution problems, insufficient attention to hazardous waste, superficial treatment of water supply and pollution, lack of provisions for binational enforcement of pollution regulations, inadequate public access to information, and omission of wetlands and wildlife protection from the plan.

The final plan was released in February 1992, to further criticism from Mexican and US groups. They condemned it as an 'inadequate response to existing environmental problems and increased pressures under [the] free trade agreement',<sup>11</sup> emphasizing that the Border Plan does not prescribe any significant changes to existing environmental laws and institutions.

A draft of the Environmental Review was released for comment in October of 1991. It too was widely criticized by US and Mexican environment groups for its nearly exclusive focus on the border region and its biased analysis of many issues.<sup>12</sup> The final Environmental Review was released in February 1992, without taking into account most of the comments from environmentalists.

### *Detailed and Specific Proposals from the Environmentalists*

Unhappy with the response from the negotiators, a number of environmental groups joined together to formulate concrete and detailed recommendations to the negotiators. The documents focused on environmental safeguards to be included in NAFTA. In early 1992, working in parallel on both sides of the border, a number of US and Mexican organizations resolved to transform their concerns into specific proposals. The Mexican groups prepared a package of 'Environmental Safeguard Clauses' for inclusion in the agreement.<sup>13</sup> Following the Mexican groups' example, environmentalists in the USA and Canada drew up similar proposals.<sup>14</sup> The respective documents were delivered to trade negotiators in all three governments in May and June of 1992.

The groups strongly urged the creation of a permanent, independent, trilateral panel or commission, in addition to public participation in dispute-resolution processes, better enforcement procedures, and additional funding for environmental infrastructure. In July of that year, fifty-one Mexican, US, and Canadian groups signed an open letter to

negotiators from the three countries, again urging the inclusion of environmental safeguards within NAFTA, whose final text was then nearing completion. Emphasizing their common aims, they again argued for language in NAFTA which would ensure public participation and oversight, guarantee improved enforcement of environmental legislation, increase funding for environmental programmes, and protect local, state, and national standards for public health and the environment.<sup>15</sup>

### *Improved NAFTA Text*

The NAFTA negotiators incorporated some recommendations offered by environmental organizations into the final text of the treaty. In disputes involving health and environmental measures, for example, the agreement places the burden on challenging countries to prove inconsistency with NAFTA's trade rules.<sup>16</sup> The Preamble of the agreement promises to '[u]ndertake . . . [the agreement] in a manner consistent with environmental protection and conservation' and '[p]romote sustainable development'.<sup>17</sup> Article 1114 in the investment chapter warns the parties against a weakening of domestic law to attract investment.<sup>18</sup>

Most environmental groups in all three countries were quick to reject the final NAFTA text as insufficient because it did not address the key concerns of improving enforcement and funding environmental infrastructure. In addition, many expressed concerns that, despite improvements, the new NAFTA standards language did not fully address risks of possible trade challenges to environmental and public-health laws.

### *Creating a North American Environment Commission*

On 17 September 1992, in a partial response to joint NGO proposals, the environmental ministers of Canada, Mexico, and the USA announced their intention to create a North American Commission for the Environment.<sup>19</sup>

Several weeks later, twenty-three Mexican environmental organizations made public a detailed proposal for the establishment of a 'North American Commission on Trade and the Environment', drawn up jointly with their counterparts in the USA and Canada.<sup>20</sup> A number of proposals from various organizations were circulated; most requested the basic principles of independence, public participation, a procedure for citizen complaints or submissions, and the ability to focus a 'spotlight' on environmental problems in the region.

### *Additional Funding for the Environment*

The issue of additional funding was also not addressed in the original agreements, leading to many proposals for cross-border taxes and other mechanisms to pay for the needed clean-up and infrastructure.

The most detailed and promising of these proposals came from a broad coalition of environmental and social groups in the USA, led by three national Latino organizations. The coalition proposed the creation of a North American Development Bank (NADBank) to provide funding for environmental infrastructure and community development projects in the USA, Canada, and Mexico.

Originally presented by the National Council of La Raza, Southwest Voter Research Institute, and the Mexican American Legal Defense and Education Fund, the NADBank proposal gained support from a number of environmental organizations and elected officials. NADBank supporters envisioned a new type of multilateral development bank that would loan directly to communities experiencing negative economic impacts from NAFTA, in addition to providing loans for environmental projects throughout the region.<sup>21</sup>

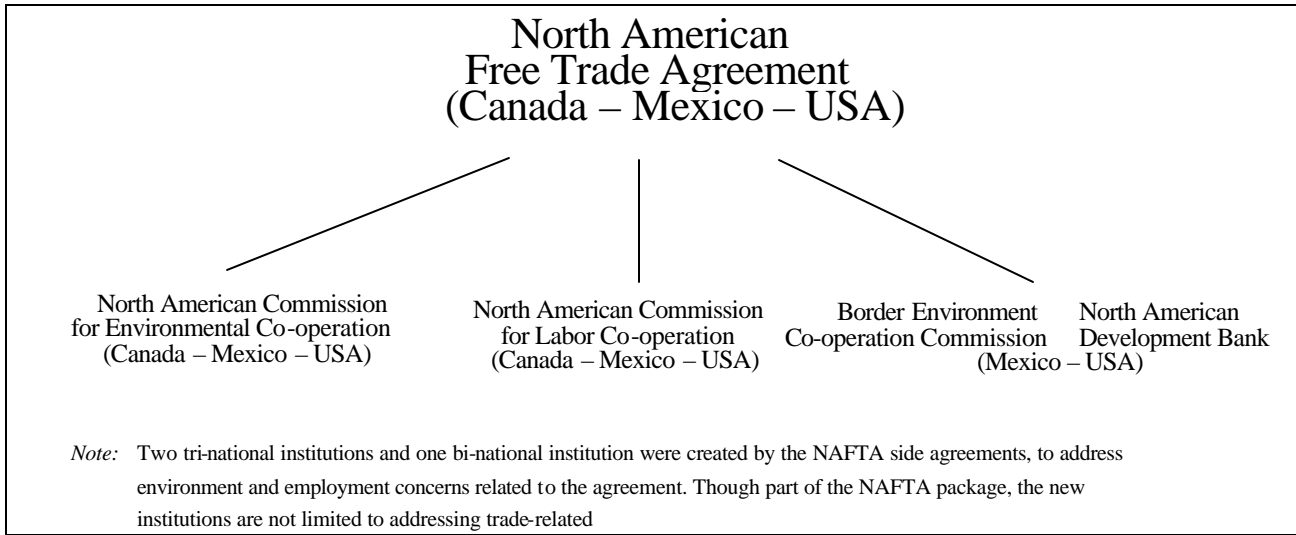
### **The Governments' Final Response to Environmental Concerns**

In response to the concerns voiced by environmentalists in the three countries, the governments finally negotiated one trilateral and one bilateral agreement to deal with environmental concerns raised during the trade debate. In addition, the USA allocated US\$20 million for biodiversity and natural-resource protection in Mexico, and provided additional clarification of the NAFTA language ensuring that the environmental laws would not be weakened by the agreement. The following section briefly describes and assesses the agreements and the new institutions created.

### *The North American Agreement on Environmental Co-operation*

The cornerstone of the governments' response to the environmental communities is the environmental side agreement signed by Canada, Mexico, and the USA. The North American Agreement on Environmental Co-operation (Side Agreement or NAAEC), obligates the countries to enforce their environmental laws, creates an independent commission to facilitate enforcement and co-operation, and ultimately permits the parties to impose trade sanctions in cases of persistent non-enforcement of environmental laws.

The North American Commission for Environmental Co-operation (NACEC or Commission), created by the Side Agreement, has a three-part structure. It is governed by a three-member council made up of the environment ministers of each country. The NACEC will be staffed by an independent secretariat headed by an executive director, who will serve a renewable three-year term. The first executive director, the Mexican economist Victor Lichtinger, enjoys support from environmentalists in all three countries.

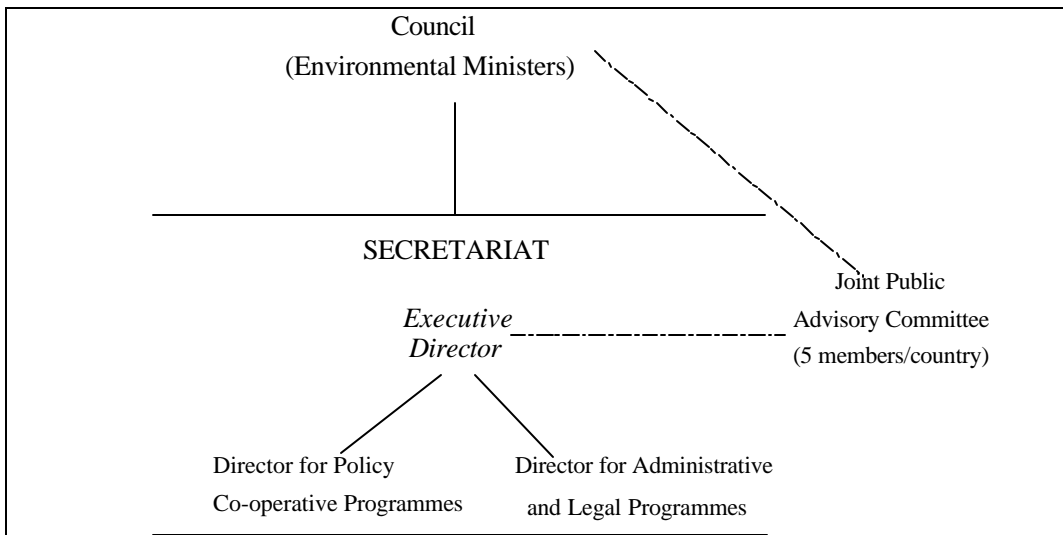


**Fig. 1 NAFTA and side agreements**

The secretariat, which will be housed in Montreal, Quebec, will employ approximately eighteen people, to be expanded to thirty or forty in 1995. It is loosely organized into two divisions, headed by directors from Canada and the USA. One division will focus on policy and co-operative programmes, with 'committees' dealing with the specialty areas of enforcement, pollution prevention, conservation and biodiversity, transboundary and border issues, and production process-related issues. The other division will handle administrative and legal concerns, including disputes over failure to enforce environmental laws. The Council and Secretariat will be advised by a

fifteen-member Joint Public Advisory Committee (J-PAC), with five members from each country. In addition, each party may create National Advisory Committees (NACs), with broad non-governmental representation.<sup>22</sup>

The role of NACEC (pronounced NAY-sec) will fall into three broad categories: (1) facilitating co-operation among the NAFTA parties on a range of environmental concerns; (2) preparation of reports and recommendations to improve natural-resource and human-health protection throughout the continent; and (3) investigation of citizen complaints related to non-enforcement of environmental laws.



**Fig. 2. North American Commission for Environmental Co-operation**

*Assessment of NACEC*

While NACEC does provide an important step forwards in improving environmental protection in North America, it falls short in some areas. On the one hand, the agreement largely met the demands of the mainstream environmental community by (1) providing an international institution with an independent secretariat; (2) establishing a mechanism for citizen complaints; and (3) obligating countries to enforce domestic environmental laws.

On the other hand, there are flaws in the procedures for openness and public access to the institution. Many of the documents produced by the secretariat, such as investigations of complaints and reports on environmental issues, will require a two-thirds vote of the parties to be released to the public.<sup>23</sup> Failure by the parties to release such information will seriously limit the ability of NACEC to spotlight environmental problems and will diminish the credibility of the institution. In addition, the side agreement is vague in defining the role of the public advisory committees. It is silent on the organization and size of the secretariat. Very few guide-lines are given in the agreement for preparation of reports, while nineteen open-ended potential topics are listed for consideration.

Overall, the institution has a lot of potential. Environmental groups across the continent, including opponents of NAFTA, have begun to participate in the process of naming advisors to the Commission and making recommendations for rules of procedure and priorities for the work-plan.<sup>24</sup>

If appropriate rules of procedure are adopted, and the national governments refrain from using the institution for political ends, the

Commission could play an important role in spotlighting environmental problems and recommending co-operative actions that the countries could take. The executive director, Victor Lichtinger, was widely endorsed by environmental groups,<sup>25</sup> and is seen as a highly independent proponent of environmental protection, with excellent managerial experience. His appointment further guarantees the independent nature of the Commission.

*The Border Environment Co-operation Commission and the North American Development Bank*

In a bilateral agreement, the USA and Mexico created the Border Environment Co-operation Commission (Border Commission or BECC) and the North American Development Bank (NADBank).<sup>26</sup> The two institutions are designed to co-ordinate, prioritize, and fund environmental infrastructure projects in the US–Mexico border region.<sup>27</sup>

BECC's mandate is to assist border communities in addressing wastewater treatment, drinking-water supply, and municipal waste-management needs. It will provide technical assistance, packaging, and certification of projects. BECC will be located in Ciudad Juarez in Chihuahua, Mexico.

The NADBank is capitalized by US\$112 million in paid-in capital, in equal shares from Mexico and the USA. The bank is expected to be able to use leverage to acquire between US\$2 and US\$3 billion in loans and guarantees for border projects. It will be the lead bank in funding projects certified by the Border Commission. It is expected to play an important role in putting together financing packages of private capital, NADBank loans and guarantees, and grants from federal and state governments. The environmental window of the bank is located in San Antonio, Texas.

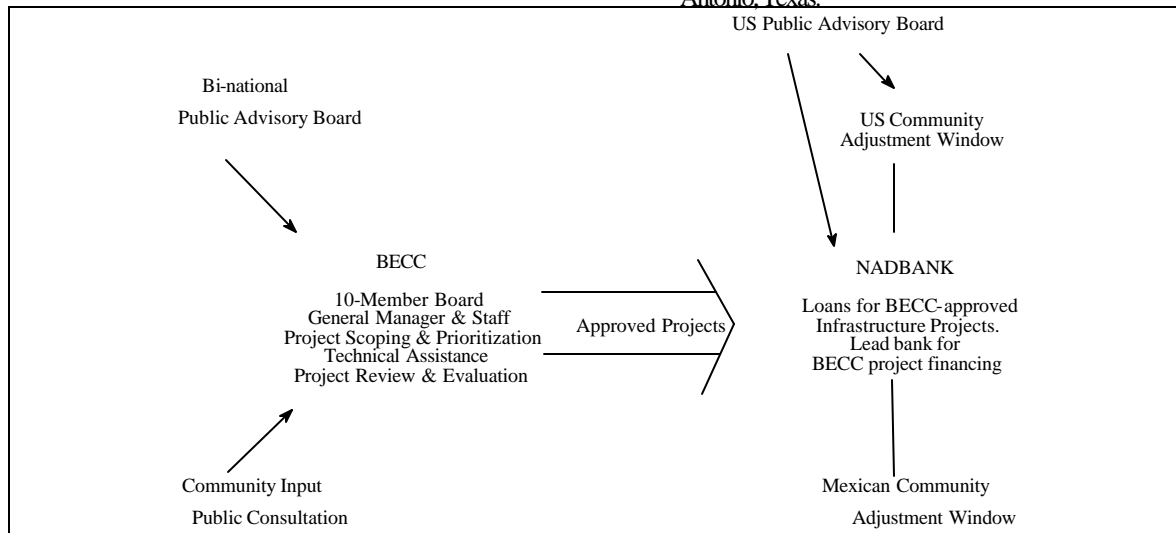


Fig. 3. Border Environment Co-operation Commission. North American Development Bank

### *Assessment*

Both the NADBank and BECC have been met with widespread optimism on the part of both the financial and environmental communities. The bottomup project design system presents an important alternative to the traditional development-bank approach. If successful, the NADBank could well offer a starting-point for future reforms of the World Bank and the other multilaterals.

On the negative side, there are some concerns about the potential for economic success of NADBank loans. The payment stream for projects is expected to come from user fees imposed on the communities benefiting from the projects. Given the level of poverty found in many US and Mexican border communities, there is some question about the ability of these communities to pay sufficient user fees. In addition, half of the capital of the bank which can be called upon is from Mexico. The investment markets may not be willing to accept this Mexican callable capital as a guarantee for bonds issued by the bank, with the result that the bank will be limited in its lending capacity to the paid-in capital plus the capital which can be called upon from the USA.

### **Looking to the Future**

#### *A Focus on the North American Environment*

It is difficult to predict specific effects of the trade agreement and the new institutions on environmental protection in the hemisphere. Much will depend on the successful implementation of the institutions and on the continued commitment from the three governments. Recent political upheavals in Mexico make predictions even more difficult—environmentalists in that country will be struggling to keep their concerns at the top of the government's list of priorities.

The increased attention focused on environmental problems and the likelihood of increased international co-operation will probably result in better management of transboundary environmental problems. Scrutiny from NACEC may provide incentives for stronger environmental laws, especially in Mexico but also in US and Canadian states and provinces with lower levels of protection. The citizen-complaint procedure of NACEC combined with the threat of trade sanctions may well lead to better enforcement practices in Mexico and elsewhere, though additional funds and training will also be necessary. Finally, there is every indication that the increased funding for border infrastructure will result in better environmental quality and public health in that region.

### *Improving Relations Among NGOs*

Clearly, the stronger ties between the non-governmental communities of all three countries have already had a positive effect. All indications are that some of the ties created during the NAFTA process will continue during and beyond the implementation phase of the new institutions. For example, many organizations are already planning joint submissions to NACEC.

The success of the environmental movement in achieving better environmental protection as part of NAFTA was largely due to the high level of co-operation among NGOs. This presents an important lesson for other social movements, such as labour and human-rights groups in North America. It also provides a useful model for future trade negotiations with Chile and other countries in Latin America.

### *Creating Models for Future Trade Agreements*

NAFTA sets an important precedent for treatment of the environment in future trade talks. The agreement recognizes for the first time the legitimacy of environmental concerns in international trade. NAFTA and its side agreements will provide a useful starting-point for future negotiations.

### **Process-Related Standards**

In the contentious debate over process-related standards,<sup>28</sup> the language in NAFTA and the side agreement represents a first step towards including process-related concerns within future trade agreements. The provisions relating to enforcement of environmental laws in the environmental side agreement<sup>29</sup> and the reference to international environmental agreements in Article 104 of NAFTA suggest that the environmental practices of a nation are of legitimate concern to its trading partners, even if those practices are not directly related to a product or its characteristics. While falling short of explicitly allowing trade restrictions based on production methods, NAFTA and its side agreement recognize that environmentally unsound production methods can distort trade patterns, as well as negatively affect natural resources and public health.

### **Creating Environmental Institutions within Trade Agreements**

The final NAFTA package reflects the need for environmental institutions as an independent counterweight to trade institutions. NACEC clearly provides the framework for that balance in its ability to identify and address the environmental effects of trade. Particularly if trade negotiations move forward in the Western Hemisphere with Chile and other countries, NACEC will provide a model institutional framework, whether those countries accede to NAFTA or negotiate bilateral agreements with the USA.

### **Creating a Climate of Openness and Public Participation**

The openness and participatory elements of the environmental Commission created by the side agreement is likely to pervade not just NAFTA itself, but future trade agreements. The NAFTA agreement requires that environmental experts be called upon in the case of trade disputes involving the environment. The Commission goes even further in allowing some participation by the non-governmental sector in disputes over enforcement of environmental laws. Once this door is opened it will be difficult to shut in future negotiations, especially those planned for the Western Hemisphere.

### **Conclusions**

Whether or not one believes that the NAFTA package provides sufficient safeguards for natural resources and public health (the authors are split on this point) the environmental community of North America deserves substantial credit for significantly advancing the linkage of trade and the environment. In all arenas, NAFTA represents an important step forwards.

In the area of environmental protection, the language of NAFTA itself presents a significant improvement over previous trade agreements. The preamble cites sustainable development and resource conservation as goals of the treaty.<sup>30</sup> Specific provisions in the agreement discourage countries from weakening environmental laws to attract investment.<sup>31</sup> Explicit protection is provided for certain International Environmental Agreements, in cases where the trade provisions of those treaties are in conflict with NAFTA.<sup>32</sup> Language in the standards portion of the treaty significantly improves upon previous trade agreements in its protection of strong domestic laws and standards.<sup>33</sup>

In addition to progressive language in the agreement itself, NAFTA generated path-breaking environmental side agreements. The tri- and bi-national institutions created by the side agreements are unique in laying the groundwork for improved enforcement and co-operation among countries. The institutions provide mechanisms allowing for citizen participation and complaints, as well as creating an independent secretariat with reporting and investigative capabilities, as requested by environmental organizations.

Perhaps most significantly, the process of negotiation of NAFTA and its side agreements set new precedents for participation by non-governmental organizations and the public in general in trade policy decisions. While uneven and far from satisfactory in Mexico, consultation with environmental groups in all three countries during the process was a first in the trade negotiation process. Unfortunately, in Mexico trade negotiators did not officially meet with a broad segment of the environmental community until after the text of the Agreement had been completed. In the USA and Canada, however, trade negotiators met numerous times with representatives of environmental groups and acted on many of the suggestions made by those groups. For example, as described in this article, the concept of a North American environment commission originated with environmentalists;<sup>34</sup> detailed

recommendations for the structure and role of the institution were elaborated on a tri-national coalition of NGOs.<sup>35</sup> The environment commission structure finally negotiated by the governments retains many of the features first proposed by the NGO community.

In what is likely to have significant long-term benefits in North America, NAFTA generated unprecedented co-operation among the environmental communities of Canada, Mexico, and the USA, creating important leverage for environmental advocates and ensuring future co-operation and joint efforts to protect the environment of North America. In fact, the high level of co-ordination among the NGO communities in the three countries allowed Mexican environmentalists to play an important role in the process despite the lack of opportunities for participation provided by the Mexican government.

Lastly, NAFTA will provide a useful starting-point for future multilateral and bilateral trade agreements. It is widely predicted that Chile will soon join the agreement or at a minimum negotiate a bilateral agreement with the USA. In addition, there has been much discussion recently of a Western Hemisphere trading bloc including all of the countries of Latin America, the USA, and Canada. Recent attention has been focused on the formation of the World Trade Organization (WTO), created during the last round of the General Agreement on Trade and Tariffs, as well as preliminary discussions of a 'Green Round' of world trade negotiations. The new mechanisms for environmental protection created by NAFTA present an important model for these and other future trade talks.

The implementation of NAFTA and its side agreement will be the key to the success of environmental protection in North America. If environmentalists in all three countries continue to work together to ensure effective implementation of NAFTA and its side accords, the agreements can become an important tool for protecting public health and natural resources on the North American continent. The environmental communities deserve much credit for the achievements of NAFTA, and will play a key role in determining the continued success of the institutions they helped to create.

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6. See e.g. Natural Resources Defense Council, Instituto Autónomo de Investigaciones Ecológicas, and Grupo de los Cien (1991), *Comments on the US Trade Representative's 'Draft Review of US-Mexico Environmental Issues'*, (Dec.).
7. *Common Declaration by Environmental Groups in Mexico, the United States and Canada Regarding the North American Free Trade Agreement* (5 Apr. 1991). Endorsing organizations in Mexico: Grupo de los Cien, Colectivo Ecologista Jalisco, Comunidad Ecologista de Occidente, Enlace Ecológico, Grupo Ecologista del Mayab, Instituto Autónomo de Investigaciones Ecológicas, Movimiento Ecologista Mexicano, Pacto de Grupos Ecologistas, Partido Verde Ecologista de Mexico, Proyecto Fronterizo de Educación Ambiental; in the USA: National Wildlife Federation, Arizona Toxics Information, Border Ecology Project, Community Nutrition Institute, Environmental Defense Fund, Friends of the Earth, Natural Resources Defense Council, National Toxics Campaign, Public Citizen, Texas Center for Policy Studies; in Canada: Pollution Probe, Canadian Arctic Resources Committee, Canadian Environmental Law Association, Rawson Academy of Aquatic Science.
8. Instituto Autónomo de Investigaciones Ecológicas, Natural Resources Defense Council, National Wildlife Federation, (1992) Conference: 'El Medio Ambiente y el Tratado de Libre Comercio', Mexico City, (30-1 Jan.).
9. US Environmental Protection Agency and Secretaria de Desarrollo Urbano y Ecología (1992), *Integrated Environmental Plan for the Mexican-US Border Area* (First Stage, 1992-4)(Feb.).
10. US Environmental Protection Agency and Secretaria de Desarrollo Urbano (1991), 'Review of US-Mexico Environmental Issues' (Oct.), draft.
11. Natural Resources Defense Council, Instituto Autónomo de Investigaciones Ecológicas and Grupo de los Cien, (1002) Press Release, *US and Mexican Groups Hit Plan for Border Environment* (25 Feb.).
12. See e.g. Justin Ward and Lynn Fischer (1991), *Comments on the 'Draft Review of US-Mexico Environmental Issues'*; Prepared for the Natural Resources Defense Council, Grupo de los Cien, and the Instituto Autónomo de Investigaciones Ecológicas; (Dec.).
13. Grupo de los Cien, Instituto Autónomo de Investigaciones Ecológicas, Asociación Ecológica de Coyoacan, et al. (1992), *Proyecto de cláusulas de salvaguardia ambiental para un Tratado Norteamericano de Libre Comercio* (May).
14. Natural Resources Defense Council (1992), *Environmental Safeguards for the North American Free Trade Agreement* (June); National Wildlife Federation and Pollution Probe (1992), *Minimal Environmental Safeguards to be Included in the North American Free Trade Agreement* (May).
15. Natural Resources Defense Council, National Wildlife Fund, Grupo de los Cien, Instituto Autónomo de Investigaciones Ecológicas, Asociación Ecológica de Coyoacan, Pollution Probe, et al. (1992), *Open Letter to North American Trade Negotiators*, (20 July).
16. NAFTA (1992), Art. 765(6).
17. *Ibid.*, Preamble.
18. *Ibid.*, Art. 1117.
19. US Environmental Protection Agency and Secretaria de Desarrollo Social (1992), Press release (17 Sept.).
20. Unión de Grupos Ambientalistas, Grupo de los Cien, Consejo para la Defensa de la Costa del Pacifico Mexicano, Instituto Autónomo de Investigaciones Ecológicas, Asociación Ecológica Coyoacan, et al. (1992), *Acuerdo que Establece la Comisión Norteamericana para Comercio y Medio Ambiente* (Oct.).
21. Albert Fishlow, Sherman Robinson, and Raul Hinojosa-Ojeda (1991), 'Proposal for North American Regional Development Bank and Adjustment Fund' (University of California, Berkeley) (May).
22. The USA has appointed a NAC with broad participation from the environmental community. As of October 1994 Mexico was in the process of creating a NAC, Canada had not yet decided whether to create additional advisory committees.
23. See e.g. North American Agreement on Environmental Co-operation, (1993) Art. 15(7) and 16(7), related to release of complaint investigations to the public and to the Joint Public Advisory Committee.
24. See e.g. *NGO Recommendations for Implementation of the North American Commission for Environmental Cooperation* endorsed by thirty-one organizations from Canada, Mexico, and the USA (22 Feb. 1994).
25. See e.g. NRDC letter of 15 June 1994 to Robert Sussman, deputy administrator of the US Environmental Protection Agency, (On behalf of the Environmental Defense Fund and National Audubon Society); and Center for Mexican Environmental Law letter of 21 June 1994 to Mexican president Carlos Salinas.
26. *Agreement between the Government of the United States of America and the United Mexican States concerning the Establishment of a Border Environment Commission and a North American Development Bank* (1993).
27. The border region is specifically defined as 100 km. on either side of the border.
28. Process-related standards or Product Production Methods (PPMs) are laws or standards that regulate the method or process used to manufacture or produce a good or service, as opposed to the quality of the good or service.
29. *North American Agreement on Environmental Co-operation* (1993), Art. 3, 5, 6, 7.
30. NAFTA (1992), Preamble.
31. *Ibid.*, Art. 1114.
32. *Ibid.*, Art. 104.
33. Kenneth Berlin (undated) *The NAFTA Environmental Agreements*; for the law firm Winthrop, Stimpson, Putnam & Roberts (undated), Washington, DC, 19-21.
34. The first reported suggestion for a 'tri-national environmental commission' was by John Adams, executive director of the Natural Resources Defense Council, in a meeting with US president George Bush in early 1991; the concept was further elaborated in Pollution Probe-Canada (1991), *The Environmental Dimensions of Free Trade* (June).
35. Unión de Grupos Ambientalistas, Grupo de los Cien, et al. *Acuerdo que Establece la Comisión Norteamericana para Comercio y Medio Ambiente*; and Natural Resources Defense Council, Environmental Defense Fund, et al. (1993), *Recommendations for a North American Commission on the Environment* (Mar.).