NAFTA's Environmental Provisions: Are They Adequate--A View from Canada

Greg M. Block
NAFTA'S ENVIRONMENTAL PROVISIONS: ARE THEY WORKING AS INTENDED? ARE THEY ADEQUATE?-A VIEW FROM CANADA

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I. INTRODUCTION

In preparing my comments on the effectiveness of NAFTA's Environmental Provisions, I recognize that I am not the ideal candidate to assess the adequacy or success of the side agreement. As a staff member of the Commission for Economic Cooperation (CEC), I am not impartial. In my opinion, the side agreement is valuable and is beginning to realize its full potential. I would like to share with you some of the elements which may be useful for you to consider in your own evaluation of the North American Agreement on Environmental Cooperation (NAAEC).

Since its inception, the CEC has been the subject of both praise and criticism. In the past three years, there has been a robust dialogue about our mandate and usefulness. The very structure of the side agreement has facilitated dialogue and demonstrated the utility of designing an open and transparent organization capable of self-correction.

II. THE CEC UNDER REVIEW

Although the CEC officially dates back to 1994, the Secretariat, the operational and administrative arm of Council, was not fully staffed until July of 1995. These past two years have gone a long way towards hammering out the details of our day-to-day operational practice and developing a coherent, trinational vision. But people want speedy results, and the CEC has accelerated a handful of projects to provide some early outputs. The NAAEC contains a provision for a review of the "operation and effectiveness [of the NAAEC] in light of experience" four years after its entry into force.

As a preliminary input to Council in its review of the side agreement, the NAAEC will be assessed by an Independent Review Committee chaired by Morris Strong and made up of distinguished Canadians, Americans, and Mexicans, including Senator Chafee from the United States, Clifford Lincoln, a parliamentarian from Canada, and Jose

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Sarukhan, former President of the National Autonomous University of Mexico. I sat in on the first day of the discussions, and I was pleased to hear a lively and informed exchange of views on CEC operations. After the two-day meeting, the committee will draft a written report. This information will then be made available to the CEC's Council, which is made up of the three Environmental Ministers. Finally, the Council will meet in the Fall to discuss the report and other comments received, with a view to evaluating the Agreement next year.

Other efforts to review CEC progress are underway. Joe DiMento, a professor at the University of California, Irvine, will soon be publishing an article that deals with the very questions this panel is addressing. His analysis is quite provocative and honest. It gives you a good overview of the Secretariat's operations and provides a much more in-depth look at programs than anybody else has attempted in the past.

Why is this a timely question? The CEC's four-year review is part of a much wider process evaluating the effects of NAFTA. In July, President Clinton will prepare a report for Congress on the entire NAFTA, including the side agreements. I would not be surprised if the GAO is drafted into that exercise for another look at both side agreements. The time is ripe for self-reflection at the CEC. We have had two years within which to implement projects in North America, and I think we have a very good idea now where the opportunities lie. We have also gained a better understanding of our constraints. The result is a solid, coherent set of projects for 1997.

III. THE CEC'S WORK PROGRAM

A key element in analyzing whether the side agreement is doing what it is supposed to do is to take a look at our work program. A simple glance at the provisions of the side agreement will attest to the CEC's enormously broad mandate. In terms of implementation, this is both a blessing and a curse. It is a blessing because it provides us with the flexibility to move into important areas without limitative jurisdictional concerns. I believe the governments felt that a wide discretion for choosing projects would be very useful. You cannot predict the kind of regional environmental issues that will arise at any given time. Generally, our work program can be divided into discretionary and mandatory functions. One would want to consider the evolution of both in reviewing progress under the NAAEC.

The CEC's broad mandate has at times also proven difficult to manage. Because of the breadth of our work program, it is challenging
to maintain a clear focus. Based on input we receive from the public, from discussions such as this one, from what we hear from governments, from what the Joint Public Advisory Committee tells us and what they have learned in their public hearings, the Secretariat prepares a consolidated program of work. The Secretariat then delivers the work program to the three Ministers in draft for discussion and eventual approval. What ensues is kind of a friendly tug-of-war, since each country has a natural instinct and obligation to try to direct the work program toward their domestic priorities. The resulting work program may not reflect the same linkages it did initially, but in some sense, it reflects a shared view of the three parties.

IV. THE NAAEC IN PRACTICE: IN SEARCH OF TRINATIONAL ENVIRONMENTAL COOPERATION

Developing criteria for judging the success of the side agreement may be easy to do on paper, but it is quite a different challenge in practice. We know, for example, that projects should focus on value added; that we do not want to duplicate existing efforts; that timing is absolutely critical. Timing is an essential consideration and one which involves an accurate reading of continental patterns and the disposition of relevant actors. If it is premature, you may direct a considerable amount of time and energy into a failing venture.

The first step in the process is to identify which issues, if they are not addressed cooperatively, that will render the policies or some policy direction of one country futile. Without multilateral cooperation, a party cannot implement effective environmental policies. A good example of this is air. The Secretariat has engaged a number of experts to prepare a report on the long-range transport of atmospheric pollutants in North America. A substantial percentage of the DDT in the Great Lakes originates thousands of miles away. Recent studies show alarming concentrations of PCBs in Inuit mothers' breast milk in the Arctic where PCB's are not in local use. Air pollution will be a great problem in the next century, and it cannot be dealt with unilaterally. Migratory species provide another good illustration. If you are trying to protect migratory songbirds and you do not develop conservation policies throughout their entire range of habitat, those unilateral policies, obviously, will fall short.

Another area of our work program focuses on accelerating the implementation of existing global or regional initiatives. For example, we have adopted UNEP's list of twelve persistent organic chemicals- the "dirty dozen." A working group formed by Council is developing re-
Regional action plans for DDT, PCBs, mercury, and chlordane for virtual elimination or, in some cases, drastic reductions. Here, the CEC is selecting chemicals of special regional importance to target for early reductions, well ahead of the pace established globally.

V. THE CEC WORK PROGRAM AND SUBMISSIONS ON ENFORCEMENT MATTERS

To develop a critical understanding of our work program, it is useful to examine areas outside of the cooperative program of work. I will start with Articles 14 and 15, which receive the most media and scholarly attention. Articles 14 and 15 deal with alleged failures to enforce environmental law. Article 14 allows the Secretariat to consider submissions from any non-governmental organization or person. If the submission meets certain procedural criteria, the Secretariat can request a response by the government to the allegations of non-enforcement. Under Article 15, the Secretariat can review the governments' response and, with the consent of Council, prepare a factual record. These two articles address one of the concerns about NAFTA ensuring a "level playing field" for conducting business in North America.

The NAAEC has a rather unusual definition of environmental law, excluding from Articles 14 and 15 the exploitation or harvesting of natural resources. Also unique is the requirement that submitters "pursue" local remedies. That is an interesting choice of words from the standpoint of international organizations in the human rights context and elsewhere in international law where exhausting local remedies is the norm. But in the English version of the NAAEC we see a variety of other definitions that, quite frankly, could not be further negotiated.

Articles 14 and 15 present a special challenge because of inherent tension between evaluating allegations against a Party under these articles in our watchdog capacity and implementing consensus-based programs at the same time. Overall, our work on Articles 14 and 15 has been quite successful, but it will take a number of years to fully evaluate its wider effects.

A. Submissions to Date

There have been eight submissions filed to date, two of which are quite recent. The first submission related to trade was filed by groups in the Pacific Northwest. This is available to the public through our website, as are all of our submissions. This particular submission alleges that the way that hydroelectric dams are being operated in British Co-
lumbia impairs fish habitat, and this, it is alleged, contravenes Federal Canadian law. The submission contains an interesting allegation that U.S. hydroelectric producers on the other side of the border are constrained by an array of environmental laws and regulations, and consequently cannot compete on the same terms as their northern neighbor.

While this allegation may not be particularly relevant to the Article 14 and Article 15 analysis, it makes quite a few people nervous. The swift response in Canadian media was indicative of the kind of reaction that one can elicit through Articles 14 and 15 submissions. Environmental organizations have employed Articles 14 and 15 as a way to capture media exposure and have used this as a political pressure tactic early on. Others have been quite disappointed that Articles 14 and 15 do not include stronger remedies. At the end of the day, the remedy is the development and publication (following a two-thirds vote by Council) of the final factual record.

To date, Article 14 and 15 submissions appear to have captured the imagination and interest of the public mainly through the media. If this continues, the media will be an interesting and relevant consideration in any analysis. I think most would agree that governments are quick to respond when their political figures feel threatened or embarrassed.

The only submission that has proceeded to the point of developing a factual record is the Cozumel submission. This was a petition filed by two environmental organizations in Mexico alleging that Mexican environmental authorities had failed to prepare a comprehensive environmental impact assessment on the development of a pier and perhaps some on-shore facilities related to the pier in Cozumel. The Secretariat is currently completing the development of a draft factual record, which will be submitted to Council shortly. Council then has forty-five days to comment on the accuracy of that draft, after which we will resubmit the final factual record. The record is normally made public within sixty days, following a vote by Council.

B. Submissions Under Article 13 of the NAAEC

Article 13 is another interesting element relevant to assessing the effectiveness of the CEC. This article permits the Secretariat to develop reports on any matter within the scope of our annual work program, excluding enforcement issues.

In practice, Article 13 allows the Secretariat to identify issues with important regional environmental considerations- issues which may not garner the unanimous support of all parties to the Agreement. Judicious use of Article 13 presents a unique opportunity to address important
issues which traditionally could not be examined by an international organization. While we have no authority to coerce or regulate, Article 13 does allow us to address issues of regional importance.

To date, the CEC has prepared two reports under Article 13. The first was reactive in nature: a problem was identified, a response was formulated. The report came about as a result of the unexplained death of migratory waterfowl in the Silva Reservoir in the State of Guanajuato, Mexico. There were several different, fairly plausible theories of what was causing their deaths. We impaneled a group of experts from the three countries, and the group investigated the site with the full cooperation of Mexican authorities. Together the expert panel concluded that the cause of death was avian botulism. An emergency response team has been put in place, and a plan to avoid future die-offs is being effectively implemented in Guanajuato.

The second Article 13 report is being prepared and should be ready within a month. It is a proactive report in the sense that it focuses on a problem that will be of increasing future concern: the long-range transport of atmospheric pollutants. Growing scientific consensus about the nature and gravity of the problem suggests that it is time to underscore the importance of this issue before a broader North American public.

VI. MEETING OUR OBJECTIVES

I will now attempt to quantify in concrete terms the progress we have made in actually fulfilling the objectives of the projects that have been undertaken over the past two-and-one-half years. One promising initiative involves transboundary environmental impact assessment. The NAAEC contains an entire article dedicated to this subject, Article 10-7, and it is quite specific in its terms of reference. We are to look at notification, consultation, and public participation involving projects that may cause significant adverse transboundary environmental impact.

The governments have been discussing a two-tiered notification regime, with automatic notification of a whole category of projects. In the United States these would be federal projects subject to the NEPA. Any other projects with the potential to significantly adversely impact outside of that range would also necessitate notification and consultation with the neighboring country.

The consultation provisions on transboundary environmental impact allow for the participation of the parties and, more importantly, the public in any hearings that are available to citizens. For example, Canadian citizens would be allowed to participate in hearings on proposed projects originating within the territory of the United States. And, of
course, mitigation and dispute resolution will also be considered. There is a fairly good chance that the framework set up in the NAAEC will be expressed as a binding international instrument. We see this as a great tool for promoting dispute avoidance and to get people working together at the local level. Communication must occur prior to disagreements escalating and later hemorrhaging in diplomatic forums, as we have seen primarily in the U.S./Mexico relationship.

Regarding the management of chemicals, I did mention the regional action plans. First are the plans for the reduction or elimination of toxic substances. To date four substances have been identified and are the subject of regional action plans: PCBs, mercury, chlordane, and DDT. The project also seeks to develop recommendations regarding pollution prevention and precautionary approaches.

VII. CURRENT PROJECTS AT THE CEC

One of the core missions of the side agreement is to explore and provide a forum for debate on contentious issues. Trade and environment is one of our focuses and will continue to be, despite the difficulties the subject entails. There are significant differences between the trade community’s culture and the environmental community’s culture, and the two are not often seen dining together. In our experience, it will be a very tentative and slow-developing relationship, but in time it will evolve.

The NAFTA effects project aims at developing a methodology for how to approach the broader linkages between the impact of trade and economic policies on the environment. The project’s advisory body and project team are independent. The purpose of the project is not to unravel trade initiatives, but to understand the effects of trade on the environment so that informed policy choices can be made which maximize positive impacts and mitigate the negative ones. It will be a great challenge to freely explore the linkages between free trade and the environment. Advancing our understanding of this dynamic puzzle remains at the core of our mission.

The CEC is providing databases of environmental technologies and making them available to small and medium-sized businesses in order to give them better information on what technologies have been tested, where, and with what results. The information has lead to an embryonic form of verification on a trinational level but in essence, it simply disseminates information on technologies and their uses.

Another project the CEC is currently sponsoring is based on enforcement cooperation. Senior environmental officials, and in some cases
provincial, state, and local officials meet on a regular basis to coordinate North American enforcement initiatives.

The official working group is cooperating on the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES), and they are working on developing compliance and performance indicators to help measure when a party is maintaining a high level of environmental protection - one of the obligations of the parties under Article 3. Illegal CFC trade is another area of priority for the enforcement working group.

Finally, I think the CEC has done some of its best work in developing and disseminating information. We have, for example, a comparative law database, which summarizes the environmental laws of each of the three countries and allows you to access other databases to retrieve the full text of statutes and regulations. For example, the full texts of the U.S., Canadian, and now Mexican laws and statutes are available on our website. Other databases include an inventory of both formal and informal transboundary agreements, and we have about seven or eight publications now in print. Most of them are available in full text in three languages on our home page (http://www.cec.org). Almost all of our important documents are available to the public on-line.