

## PLAYING THE RIGHT ROLE: THE CEC AND ALTERNATIVE SOLUTIONS TO THE ENVIRONMENTAL IMPACTS OF NAFTA

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*The North American Free Trade Agreement (NAFTA) opened and increased trade between the U.S. and Mexico. Increased industrial development along the border region arguably increases trans-boundary environmental issues, including pollution and natural resource use. The Commission for Environmental Cooperation (CEC) was created through NAFTA's Side Agreements, but it deals with problems between all three member countries of NAFTA and possesses too little power to effectively fix environmental issues between the U.S. and Mexico. This article advocates the strengthening of the CEC or the creation of a body with more power to successfully deal with these environmental problems.*

### INTRODUCTION

The southwest United States was once considered a vast wilderness with unlimited, untapped resources. But some believe that with increased free trade and development, resources such as clean air and water become threatened. To some, when free trade wins, the environment loses. This was one opinion that impacted negotiations for the North American Free Trade Agreement (NAFTA), which gradually eliminated trade barriers between Canada, the U.S. and Mexico. With the onset of NAFTA provisional discussions, the threat of a zero-sum game between the environment and free trade became an important debate. To ensure that the environment would not lose out for the benefit of business on both sides of our border, side accords were created to address the environmental impacts of NAFTA. On the American side of NAFTA, upcoming elections pushed the trade agreement into 'fast track' legislation, pressing opposing sides of the environmental debate to agree quickly. The Side Agreement involving the environment was called the North American Agreement on Environmental Cooperation (NAAEC), and created the Commission for Environmental Cooperation (CEC), which "has a number of very general duties, such as to 'strengthen cooperation on the development and continuing improvement of environmental laws and regulations'" (Charnovitz 31). However, its effectiveness over the last decade has been brought into question.

### METHODS

First, I will discuss the environmental issues resulting from increased trade between Mexico and the U.S. This includes differing theories on the

connection between pollution and free trade, the problems associated with proving causation of environmental problems, and examples of environmental issues arising from shared and connected resources existing under two different sets of environmental laws. By combining theories and ideas provided in scholarly publications and texts on these issues and examples, I will evaluate the effectiveness of environmental policies created in light of further integration of the U.S. and Mexico. I will address the effectiveness of the CEC by looking at the positive and negative aspects of the organization's essential lack of enforcement power. I will also address alternative solutions for Mexico and the United States' environmental problems by evaluating successful policies and bilateral organizations, both those that existed prior to and those created as a result of NAFTA. As a result of NAFTA, increased trade between the U.S. and Mexico has led to environmental pressures, especially in the border regions. While the transparency provided by the CEC is helpful in combating these environmental issues, the CEC's flaws, including its broad and ambiguous role, leaves some of the U.S. and Mexico's problems better addressed by bilateral cooperation.

## THE ENVIRONMENTAL ISSUES

The link between NAFTA and environmental problems is based on the idea that free trade will increase trade, and therefore development. For instance, while environmental problems in the border regions of Mexico and the U.S. are not direct results of NAFTA, they can be associated with the expansion of the *maquiladora* sector, located mainly in these regions, because of heightened demand as a result of markets newly opened by NAFTA. The construction of these *maquiladoras*, or assembly factories that are located in Mexico but owned by foreign companies, has increased after NAFTA, as tariffs are reduced and U.S. companies seek to save money on production costs by moving their operations across the border. Environmental issues resulting from NAFTA include pollution associated with industry, allocation and pollution of shared resources along border regions, differing chemical standards, biodiversity depletion and the environmental impact of new development.

Although there is a correlation between development and pollution, "causation is notoriously elusive in complex economy-trade-environment relationships" (Block 33). Pollution and poverty are often linked in arguments relating to NAFTA's influence over decreasing pollution in Mexico. One basic argument links free trade to reducing poverty levels which "in turn, can help reduce environmental degradation" (Vaughan 226). This is because added technology and foreign direct investment can "facilitate the transfer of cleaner technologies to countries with lower environmental performance" (Gallagher 121). The other argument in favor of free trade as a solution to environmental problems is the Kuznet's Curve hypothesis. This idea "suggests

that environmental degradation may increase during the initial stages of economic development, but that scale, composition and technology effects can cause those trends to reverse” at a certain point in income level (Gallagher 121). However, Mexico has passed that predicted estimated income level without a reduction in pollution.

Environmentalists fear that the imposition of NAFTA will create a “pollution haven” by opening borders. This implies that due to lowered trade barriers, “foreign firms would invest in Mexico to take advantage of the lax environmental law enforcement there, thus lowering their costs” (Schatan 133). However, a CEC symposium model presentation in 2000 “found no evidence for the pollution haven effect” (Vaughan 236). In addition, the idea of a zero-sum game between trade liberalization and pollution is difficult to directly prove. By thinking of environmental problems as a zero-sum situation, it could be said that increased environmental protection directly associates with decreased revenue for companies and countries involved. In other words, if one side wins, the other side loses. In fact, “many environmentalists, worried about past trends in which economic growth led to depleted resource stocks, displaced rural communities or pollution, in turn identified free trade as the catalyst for all kinds of environmental woes” but most have had difficulty proving direct association (Vaughan 230). However, specific effects can be proven, like the increase in transportation of goods across the border, which has undoubtedly led to “an absolute increase in air pollution concentrations at Mexico-U.S. and U.S.-Canada border crossing points” (Vaughan 235). This problem gives the CEC an opportunity for action.

## THE ROLE OF THE CEC

Unable to make fully supported arguments only a decade after NAFTA, the CEC has been effectively filling its role as an information provider in the pollution debate. The CEC has developed “national pollutant release and transfer registries (PRTR), commonly known as ‘toxic release inventories’... [which] helps to establish a common information base for identifying and assessing North American trends for specific pollutant emissions and loading, highlights key information for policy-makers and the public, and provides an extra incentive for reducing emissions” (Block 32). Here, the CEC is successfully providing information to the public to increase environmental awareness.

One environmental problem that has been addressed and solved by the CEC is the harmonizing of chemical use standards between Mexico and the U.S. The CEC addressed this merely one year after NAFTA went into effect because toxic chemicals “can easily be transported across national boundaries through air and water pollution and through traded goods and because they pose a serious threat to human health and the environment” (Block 31). For example, the New River flows from Mexico to California’s Imperial County

and carries toxic substances discharged by industries in Mexico that create “an increased health and safety risk to U.S. residents” (Kiy 355). The Sound Management of Chemicals (SMOC) eliminated the use of polychlorinated biphenyls (PCBs), chlordane, DDT and mercury in Mexico, chemicals already banned in the U.S. In fact, the goal was to reduce DDT use in Mexico by 80% by 2002, but “the approach was so successful that Mexico phased out DDT entirely by 2000” (Block 31).

Another issue in need of cooperation is the lack of water to support growing populations on both sides of the border. This is especially relevant because of the expansion of border cities to support *maquiladora* plants, 73% of which are located in the border region (Ranger 321). One major river that supports the border is the north-to-south flowing Colorado River, regulated under the 1944 Water Treaty between the U.S. and Mexico. Pollution of this important resource is now becoming an international issue, as with “the Colorado River Delta, where ecological degradation in Mexico is the result of upstream water diversions in the United States” (Tarlock and Thorson 230). U.S.- and Mexican-owned wastewater treatment facilities will eventually be required “given the trans-boundary impact of sewage flows from some Mexican origin waters” like the Tijuana River, New River and Nogales Wash (Kiy 354). Another example is the San Pedro River which serves as “a microcosm of the water and related land-use conflicts” between “an era when development was the sole objective of the water allocation and land-use law and more contemporary values emphasizing the maintenance or restoration of ecosystem functions” (Tarlock and Thorson 221). The river basin includes an area set aside as the San Pedro Riparian National Conservation Area. Increased pumping of groundwater on both sides of the border for agricultural, mining and urban development is threatening to alter this “dynamic water balance” (Tarlock and Thorson 223).

While the San Pedro River Basin experience addresses water use, it also deals with a less defended environmental problem in the protection of biodiversity across international borders. The idea of biodiversity protection is a rather new and less standardized on an international level, representing the problems of opposing environmental law in trans-boundary situations. The most effective method of the CEC is drawing public attention to these law-breaking industries. However, this method is less useful in this situation because “as of yet, there is comparatively little shame in failing to practice biodiversity conservation, so noncoercive information disclosure is not enough” (Tarlock and Thorson 232).

## ENVIRONMENTAL IMPACT STATEMENTS

The proliferation of development in the wake of free trade often has hidden risks associated with it. So to prevent publicly unsupported environmental degradation, both the U.S. and Mexico are required by federal

law to organize a report on the expected impact of proposed projects, called Environmental Impact Assessments (EIAs). These EIAs provide information to the public before starting a project, which forces “government decision-makers to take environmental considerations into account in deciding whether to carry out or authorize a project” (Knox 84). In fact, the first case brought before the CEC involved the Cozumel case against the Mexican government in regard to their EIAs. A factual record was compiled because “groups argued that the construction of a pier in Cozumel was illegal, because, among other things, the Environmental Impact Assessment done by the authorities was incorrect” (Ortega 183). Like the EIA itself, the factual record “contributed to creating more environmental awareness among Cozumel’s population” as well as the “moral sanction...felt by Mexico’s environmental authorities” (Ortega 185).

While the presence of EIAs are helpful in providing public knowledge, they present another problem regarding inconsistencies between U.S. and Mexican laws. The General Law in Mexico requires both private and public facilities to submit EIAs, while “U.S. federal laws normally require EIAs only for actions involving the federal government” (Knox 84). In fact, when addressing binational development issues such as wastewater facilities for U.S. and Mexican joint water resources, neither country addresses the role of EIAs.

## IDEAL ENVIRONMENTAL INSTITUTIONS

Institutions dealing with the environmental aspects of NAFTA should consider the following goals or problems arising from increased free trade: the enforcement of a country’s own environmental laws, providing public information as a way to put pressure on governments to follow their own laws, regulatory body capable of punishing countries that do not follow laws, and an institution designed to facilitate harmonization discussions. The CEC has been successful in doing the first two and should continue as an informative committee that pressures governments into law enforcement. However, the third goal has not yet been accomplished under NAFTA and the fourth is better served by bilateral negotiations rather than involving all three countries.

One important aspect of the CEC is that it balances out the entirely free trade attitude of NAFTA by being a “hybrid agency combining elements of two competing theories of how to achieve compliance with international norms” on free trade and environmental protection (Tarlock and Thorson 218). The idea of transparency and providing public knowledge is the most powerful aspect of the CEC, and it should continue to develop in a direction that utilizes the effectiveness of these strategies. Another success of the CEC is that complaints about government inaction are brought about by a “non-governmental organization or person,” allowing public access to the enforcement process (McRae 244). In fact, if claims submitted to the CEC

are selected for factual reports, then during the research phase, “a substantial opportunity exists for the provision of information” (McRae 251). These reports then serve another important purpose of enforcing laws through public involvement.

While there are debates about whether or not the CEC should be given “teeth,” meaning the ability to actually enforce laws, some feel that the factual records prepared by the CEC are successful enough in “shaming” countries into fixing environmental problems. In addition, the CEC is a publicly accessible venue and serves a necessary purpose in providing information to the public. An example of the success of this public access to information occurred with the San Pedro River Basin project, in which the second stage, gathering public input, was expansively solicited. This included having “fifteen hundred copies of the report...distributed to libraries, public officials and opinion-makers,” printing the initiative’s summary in local papers, and broadcasting ads on local radio stations which helped provide the CEC with a summary of public opinion (Tarlock and Thorson 227-228). The idea of making governments responsible for their actions through transparency “works well when people have both the incentives and the capacity to modify their behavior in response to what is disclosed” (Tarlock and Thorson 231). This means that if the public can do something with the information provided they will.

A likely result of the rush to move NAFTA and its side agreements through Congress is the ambiguity behind the NAAEC and the role of the CEC. The Council is provided with a great deal of discretion with regards to its actions, with suggested areas of “consideration including issues as diverse as eco-labeling, pollution prevention, the protection of endangered and protected species, the long-range transportation of air and marine pollutants, and human resource training and development” (Block 26). Some believe in expanding “the CEC’s ability to examine problems, question policies, facilitate agreements and highlight solutions” (Block 36). However, the CEC lacks resources necessary for development and enforcement. “If the Commission collects monetary assessments, it may use them to enhance environmental law enforcement” (Charnovitz 42) but has no other fiscal resources. The idea that “the CEC was trying to undertake too many initiatives without clear goals” (Block 30) has made it less effective.

## **ADDRESSING BILATERAL PROBLEMS WITH A TRILATERAL INSTITUTION**

The CEC has very little power to punish a country that does not comply with its own environmental laws, which some feel make it a very powerless institution. In fact, “the agreement identifies numerous areas the Council can address but requires it to take concrete actions on very few of them” (Block 26). So, while the CEC has broad jurisdiction on paper, “sovereignty is maintained and no party may conduct environmental law



enforcement activities in the territory of another party” (Ranger 344). Not included in the jurisdiction of the CEC are rather important “laws whose primary purpose is to manage the harvesting of natural resources... such as strip mining, soil conservation, energy extraction, coastal fishing, and forest clearing” (Charnovitz 34).

Possibly the most important problem with the CEC is the mandate to hold three different countries to three different sets of environmental laws. At the time of NAFTA’s implementation, a major fear was the lowering of environmental standards in one country to attract investment, creating a pollution haven. While this makes sense when “premised on the perception that U.S. and Mexican environmental laws were substantially equivalent,” some Mexican standards for air pollution, water pollution and the use of dangerous chemicals were “substantially less stringent than the comparable provisions of U.S. law” (Charnovitz 46-47). This means some laws may not have to be changed at all to provide a pollution haven. Also, existing laws were never evaluated prior to the signing of NAFTA and “may be inadequate for its own environmental needs as well as for the rest of North America” (Charnovitz 45). In addition, rapidly changing environmental standards are also ignored. However, an important aspect is that the side provisions value the higher environmental protection of one country by upholding a country’s “standards that are higher than national or international standards” (Kiy 353). Harmonization of environmental laws, while desirable “for reasons of effectiveness or fairness,” is difficult to reach under trilateral institutions because “most cases of trans-boundary pollution do not directly concern all three North American countries” (Knox 90). In fact, because of the vast differences in the northern and southern borders of the U.S., “the countries can reasonably seek to reach different solutions to parallel problems” with Canada and Mexico (Knox 90). The success of bilateral institutions dealing with environmental problems in border regions goes back nearly a century and can provide an example for the future of bilateral organizations under NAFTA.

Because of the problems with the CEC listed above, it appears that other actions and avenues should be explored for remaining environmental issues. For instance, while NAFTA is trilateral, many environmental problems related to increased trade are not. The CEC still holds an important role “when the ecosystem affected by trans-boundary pollution is continental in scope” because “no bilateral institution can address it as well” (Knox 92). It is difficult to deny that the environmental problems of two countries require binational solutions hinged on the cooperation of those two involved. The added involvement of another country brings more interests and needs that often make cooperation more difficult. For instance, Canada and the U.S. are unable to agree upon a solution to environmental issues on their border because “that potential agreement is blocked by the United States and Mexico over how to address EIAs along their border” (Knox 89). So why include

three countries in the negotiation of environmental problems affecting only two, especially when past agreements with Mexico have proved successful in regulating environmental issues in border regions and provide examples for further bilateral agreements?

For example, the 1944 Water Treaty created the International Boundary and Water Commission (IBWC) “to allocate the water of the Colorado River and the Rio Grande between Mexico and the United States and to create dams and reservoirs in order to maximize the amount of water available” (Knox 81). The second was the broader La Paz Agreements of 1983 that “provides for an ongoing dialogue between the federal governments...to exchange information and coordinate policies on particular issues,” encouraging the governments to work together rather than seek to punish the other through independent institutions (Knox 82). It has created five annexes which have done the following: addressed sanitation in the San Diego-Tijuana border, formulated a response to hazardous waste and oil spills, regulated waste transportation across the border, dealt with trans-boundary air pollution and organized data collection relating to air pollution in certain areas (Ranger 348). In addition to these five annexes, the La Paz Agreement “can address almost any border issue, but it has no independent commissioners or secretariat able to produce objective, professional reports like those of the CEC” (Knox 91).

Because of the growing interrelation of the environments of Mexico and the U.S., NAFTA has focused attention from both governments on environmental cooperation, leading to expanded and better organized groups. The North American Development Bank (NADBANK) and Border Environmental Cooperation Commission (BECC) are institutions founded in conjunction with NAFTA to fund border development projects. NADBANK and BECC are “empowered to assist border area communities with the financing of environmental infrastructure projects such as wastewater treatment plants and solid waste facilities” (Kiy 352). These institutions provide useful agencies for border development dealing with two countries, rather than involving all three NAFTA members.

## **RECOMMENDATIONS: A STRONGER BODY**

All that remains to be done now is the creation of an enforcement agency, independent of the federal interests of member countries, which has the power of direct regulation if necessary. Although the CEC approaches non-compliance with the idea of enforcement through public pressure, it can be assumed that this will not be an effective measure in all situations. This proposed arena could also deal with dispute resolution because there is the incorrect idea “that NAAEC will help to settle continental environmental disputes. That is very doubtful” (Charnovitz 50). Due to the rushed development of the Side Agreements and the NAAEC, it is not surprising that this possibility was ignored, but now, with over a decade of watching NAFTA



in effect, such an independent, powerful organization should be developed.

Environmental problems along the border are a result of increased development due to open trade between the U.S. and Mexico. Air and water pollution, water allocation, chemical use standards, development and biodiversity loss are all problems associated with the integration of goods and trade between two countries with different environmental laws. If the CEC were to narrow its focus, it could be a successful organization for gathering and distributing information as well as putting public pressure on governments for enforcement. Harmonization of laws is better addressed through bilateral organizations, such as the BECC and NADBANK, and negotiations exemplified by the La Paz Agreements. But when it comes down to sheer dispute resolution and law enforcement for countries unaffected by shaming techniques, an independent enforcement body has yet to be established. Otherwise, the fears of environmentalists about a zero-sum game between free trade and the environment might be realized at the cost of the wild southwest.

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