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# THE ENVIRONMENT AND NAFTA POLICY DEBATE REDUX: SEPARATING RHETORIC FROM REALITY

LINDA J. ALLEN, PHD\*

## INTRODUCTION

At times, it seems like the debate over the environmental repercussions of the North American Free Trade Agreement<sup>1</sup> (“NAFTA”) has never ended.<sup>2</sup> Twenty-five years ago, in response to environmentalists’ dire predictions of industry flight, pollution havens, and a race to the bottom for domestic environmental standards under the trade agreement, the United States, Mexico, and Canada negotiated ground-breaking environmental policies in NAFTA and an associated environmental side agreement, North American Agreement on Environmental Cooperation<sup>3</sup> (“NAAEC”), to address the potential environmental impacts associated with trade liberalization in North America.<sup>4</sup> The integration of environmental issues into NAFTA was considered a watershed event as it represented the first time policymakers explicitly sought to address the complex linkages between environmental protection and liberalized trade. At that time, NAFTA was touted as the “greenest” trade agreement ever and its policy framework was presented as a model for all future trade agreements.<sup>5</sup>

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<sup>1</sup> North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 [hereinafter NAFTA].

<sup>2</sup> This Article focuses on the debate over the environmental effects of NAFTA, but the debate over the free trade agreement itself likewise persists. Without a doubt, NAFTA was a controversial trade agreement at its inception. Although most of this continuing controversy is related to its impacts on jobs in the United States, its environmental effects are frequently cited as one of its major shortcomings. *See infra* note 4.

<sup>3</sup> North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., Sept. 14, 1993, 32 I.L.M. 1480 [hereinafter NAAEC].

<sup>4</sup> *See generally* PIERRE MARC JOHNSON & ANDRÉ BEAULIEU, THE ENVIRONMENT AND NAFTA: UNDERSTANDING AND IMPLEMENTING THE NEW CONTINENTAL LAW (1996); JOHN J. AUDLEY, GREEN POLITICS AND GLOBAL TRADE, NAFTA AND THE FUTURE OF ENVIRONMENTAL POLITICS (1997); FREDERICK MAYER, INTERPRETING NAFTA, THE SCIENCE AND ART OF POLITICAL ANALYSIS (1998); BARBARA HOGENBOOM, MEXICO AND THE NAFTA ENVIRONMENT DEBATE (1998).

<sup>5</sup> *See, e.g.*, AUDLEY, *supra* note 4, at 126.

And yet concerns over the adequacy of NAFTA policies to protect the environment have repeatedly surfaced over the intervening years with accompanying calls to renegotiate or strengthen the environmental provisions.<sup>6</sup> The Obama administration raised concerns about the environmental provisions but declined to reopen NAFTA;<sup>7</sup> it subsequently strengthened some aspects of the agreement indirectly within the context of the Trans-Pacific Partnership<sup>8</sup> (“TPP”) by adding new policies related to conservation of international fisheries, as well as commitments to implement obligations under certain multilateral environmental agreements.<sup>9</sup> More recently,

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<sup>6</sup> See, e.g., John H. Knox, *The Neglected Lessons of the NAFTA Environmental Regime*, 45 WAKE FOREST L. REV. 391, 392 (2010) [hereinafter Knox, *The Neglected Lessons of the NAFTA Environmental Regime*]; Jeffrey Kucik, *Strengthen labor, environmental rules to improve NAFTA*, THE HILL (Jan. 31, 2017), <http://thehill.com/blogs/pundits-blog/energy-environment/317180-strengthen-labor-environmental-rules-to-improve-nafta> [https://perma.cc/MN9Q-3CPS]. John Audley & Scott Vaughan, *Time for the NAFTA Environmental Watchdog to Get Some Teeth*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Jun. 24, 2003), <http://carnegieendowment.org/2003/06/24/time-for-nafta-environmental-watchdog-to-get-some-teeth-pub-1300>; Randy Christensen & Albert Koehl, *NAFTA needs environmental credibility*, WINDSOR STAR (Mar. 8, 2008), § A6; Helmut Mach, *Rethinking trade with our largest partner*, EDMONTON J. (Dec. 10, 2008), § A19.

<sup>7</sup> Mach, *supra* note 6; Brian Knowlton, *Obama doesn't plan to reopen NAFTA talks*, N.Y. TIMES (Apr. 20, 2009), [http://www.nytimes.com/2009/04/21/business/21nafta.html?\\_r=1](http://www.nytimes.com/2009/04/21/business/21nafta.html?_r=1) [https://web.archive.org/web/\*/http://www.nytimes.com/2009/04/21/business/21nafta.html?\_r=1].

<sup>8</sup> See Trans-Pacific Partnership Agreement art. 20.1-.5, Feb. 4, 2016, U.S.T.R., <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership> [https://perma.cc/ZB65-VWUJ] [hereinafter TPP] (a free trade agreement encompassing twelve Pacific-rim countries including the United States, initiated under the George W. Bush administration, and concluded under the Obama administration. The Trump administration decided that it would not seek approval of the trade agreement from the U.S. Congress. TPP includes all three NAFTA countries, thus provisions in TPP serve to augment those in NAFTA).

<sup>9</sup> Rohan Patel, Special Assistant to the President, *What Environmental and Conservation Advocates Are Saying About TPP's Environment Chapter*, THE WHITE HOUSE (Nov. 6, 2015), <https://obamawhitehouse.archives.gov/blog/2015/11/04/what-environmental-and-conservation-advocates-are-saying-about-tpps-environment> [https://perma.cc/A4ES-NEE4]. The environment chapter of TPP included a general commitment to implement multilateral environmental agreements to which each trading partner was a party, as well as specific commitments to fulfill obligations under the Montreal Protocol on Substances that Deplete the Ozone Layer, the International Convention for the Prevention of Pollution from Ships, and the Convention on International Trade in Endangered Species of Wild Fauna and Flora. Additionally, the TPP environment chapter included commitments to improve management of marine wild fisheries and conservation of other marine species, such as turtles and sharks, and most importantly, the elimination of certain subsidies that contribute to overfishing and overcapacity. See TPP, *supra* note 8.

the Trump administration took a much stronger position on NAFTA overall and threatened to abrogate the trade agreement entirely but subsequently agreed to renegotiate it.<sup>10</sup> Towards that end, the Trump administration has identified specific renegotiation objectives for the environmental provisions that seek to redress the perceived weaknesses of the existing NAFTA policy framework.<sup>11</sup> Undoubtedly, the NAFTA environmental policies have been and continue to be a source of contention.

What is the source of the NAFTA trade and environmental policy debate redux? Critics of NAFTA and NAAEC have long argued that the environmental policy framework is inadequate for addressing the trade-related environmental impacts of NAFTA and falls far short of the original expectations of the environmentalists. For example, critics claim that the mechanisms created under the trade agreement to ensure effective enforcement of domestic environmental regulations are toothless,<sup>12</sup> the integration of the trade and environment has never occurred,<sup>13</sup> some of NAFTA's provisions have had unintended adverse consequences that undermine environmental protection,<sup>14</sup> and new environmental concerns

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<sup>10</sup> Julie Hirschfeld Davis, *Trump Sends Nafta Renegotiation Notice to Congress*, N.Y. TIMES (May 18, 2017), <https://www.nytimes.com/2017/05/18/us/politics/nafta-renegotiation-trump.html?mcubz=0> [[https://web.archive.org/web/\\*/https://www.nytimes.com/2017/05/18/us/politics/nafta-renegotiation-trump.html?mcubz=0](https://web.archive.org/web/*/https://www.nytimes.com/2017/05/18/us/politics/nafta-renegotiation-trump.html?mcubz=0)].

<sup>11</sup> Press Release, Office of the U.S. Trade Representative, Summary of Objectives for NAFTA Renegotiation (July 17, 2017), <https://ustr.gov/sites/default/files/files/Press/Releases/NAFTAOBJECTIVES.pdf> [<https://perma.cc/C6A5-AZG9>]; see, e.g., *NAFTA Renegotiation Should Start with May 10 Agreement*, INSIDE U.S. TRADE (May 12, 2017) (detailing reactions of environmentalists and Congressional leaders to renegotiation); see *Environmental Groups Back Eight 'Essential' Changes to NAFTA*, INSIDE U.S. TRADE (Apr. 7, 2017).

<sup>12</sup> See, e.g., Geoff Garver, *Tooth Decay*, 25 ENVTL. FORUM 34, 34–38 (2008) (in reference to the state-to-state dispute resolution process, Garver states “NAFTA’s environmental teeth are in real danger of rotting away, with little potential to address the important environmental concerns that ensue from globalization.”); see also Tracy D. Hester, *Designed for Distrust: Revitalizing NAFTA’s Environmental Submissions Process*, 28 GEO. ENVTL. L. REV. 29, 29–33 (2015); Kal Raustiala, *The Political Implications of the Enforcement Provisions of the NAFTA Environmental Side Agreement: The CEC as a Model for Future Accords*, 25 ENVTL. L. 31, 31–32 (1995); GARY HUFBAUER ET AL., INST. FOR INT’L ECON., NAFTA & THE ENVIRONMENT: SEVEN YEARS LATER (Oct. 2000).

<sup>13</sup> See, e.g., Knox, *The Neglected Lessons of the NAFTA Environmental Regime*, *supra* note 6, at 392. Knox concludes that with respect to the performance of the NAFTA environmental regime, “As an attempt to solve ‘trade-and-environment’ problems, it is undoubtedly a failure. From that perspective, it either addresses baseless concerns or is ineffective.”

<sup>14</sup> See, e.g., Christine Chiu, *Chapter 11 and the Environment*, 33 ENVTL. POL. & L. 71, 73 (2003) (“Although the Objective of Chapter 11 is to ensure that countries do not favor domestic investors over foreign investors, essentially it ends up having the opposite effect. Except in rare instances, none of the party nations provide compensation to domestic companies that incur losses as a result of government regulations.”).

have emerged that are not adequately addressed.<sup>15</sup> Although NAFTA and NAAEC included some of the most far-reaching environmental policies ever included in a trade agreement, the current view is that these policies must be substantially revised and augmented.

Notwithstanding the rhetoric in favor of renegotiation of NAFTA environmental provisions, it is not clear that the proposed revisions or additions are truly warranted. Moreover, opening the environmental policies would send a strong yet contradictory message that the corresponding policies in other U.S. free trade agreements, which are largely modeled after NAFTA,<sup>16</sup> are also inadequate, even though similar calls for renegotiation of environmental provisions of the other agreements have not been made. Lastly, renegotiation of the NAFTA environmental policies may provide an opportunity to merely weaken the environmental provisions or at best provide some cosmetic window dressing with no substantive changes, which in both cases will further perpetuate the illusion that the environmental protection provisions are essential for liberalizing trade even if the provisions are ineffective.

This Article provides a critical review of the rhetoric that has forced the environmental concerns related to NAFTA back onto the domestic policy agenda and how the rhetoric matches the reality for addressing the environmental consequences of the trade agreement. This Article argues that there is a notable disconnect between the rhetoric and reality, and any revisions to NAFTA environmental policies should be informed by the reality. The Article is organized as follows; Part I provides background on the environmental impacts associated with NAFTA, Part II provides an overview of the NAFTA's and NAAEC's environmental policies intended to address the impacts, Part III discusses the perceived shortcomings of the policies and the justification for policy changes based on

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<sup>15</sup> See, e.g., Daniel C. Esty & James Salzman, *Rethinking NAFTA: Deepening the Commitment to Sustainable Development* 125, 126, in *PIIE BRIEFING: 17-2 A PATH FORWARD FOR NAFTA* (C. Fred Bergsten & Monica de Bolle, eds., 2017) ("The environmental elements that negotiators first incorporated in NAFTA 25 years ago have stood up surprisingly well, although weaknesses have emerged and other issues and priorities have come to the fore."); see also Linda J. Allen, *Trade and Environment: A New Direction for Green Trade*, 15 *THE ESTEY CENTRE J. OF INT'L L. & TRADE POL.* 47, 48 (2014), <https://ideas.repec.org/s/lags/ecjilt.html> [<https://perma.cc/WS99-ABLA>] ("For NAFTA, the priorities were addressing a broad range of hypothetical environmental effects of trade liberalization such as industry flight, pollution havens, downward harmonization, . . . . By contrast, for more recent trade agreements, environmentalists have focused on a narrower set of tangible environmental policy concerns that may not be linked directly to trade liberalization but rather are environmental issues that need urgent attention from the international community.").

<sup>16</sup> See generally Allen, *supra* note 15.

existing research, Part IV examines the Trump administration renegotiation objectives for the NAFTA environmental policies, and the Conclusions summarize the recommendations for moving forward.

## I. THE NAFTA AND ENVIRONMENT DEBATE

Almost from the moment that the United States and Mexico announced their intent to negotiate a free trade agreement, environmental groups in the United States raised concerns over the potential environmental impacts of trade liberalization in North America.<sup>17</sup> Most of the concerns stemmed from the fact that the trade liberalization was occurring between two highly developed countries with high levels of enforcement of environmental regulations and a developing country with weak

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<sup>17</sup> See SUSAN FLETCHER & MARY TIEMANN, CONG. RESEARCH SERV., IB92006, ENVIRONMENT AND TRADE (1992) (detailing how the United States and Mexico formally announced their intent to negotiate a free trade agreement in June 1990, Canada joined the negotiations in February 1991, and NAFTA, which encompasses all three countries, was finalized in August 1992); Canada-United States Free Trade Agreement, Oct. 4, 1988, 27 I.L.M. 281, 289 [hereinafter CUSFTA]. See, e.g., STEVEN SHRYBMAN, SELLING CANADA'S ENVIRONMENT SHORT: THE ENVIRONMENTAL CASE AGAINST THE TRADE DEAL 19 (1988); MICHELLE SWENARCHUK, ENVIRONMENTAL IMPACTS OF THE CANADA-U.S. FREE TRADE AGREEMENT 2 (1988); Uruguay Round of the General Agreement on Tariffs and Trade, *opened for signature* on Jan. 1, 1948, T.I.A.S. No. 1700, 55 U.N.T.S. 194 [hereinafter GATT] (indicating that NAFTA was not the first trade agreement to raise environmental concerns, but it was the first to explicitly address them. Environmentalists identified environmental concerns during negotiations of the CUSFTA and GATT in the late 1980s and early 1990s, but these concerns never gained traction). See, e.g., Mark Ritchie, *GATT, Agriculture, and the Environment: The U.S. Double Zero Plan*, 20 ECOLOGIST 214 (1990); JANINE FERRETTI ET AL., INTERNATIONAL TRADE AND THE ENVIRONMENT 2 (Can. Env'tl. Law Assoc., Issue Paper, Oct. 1991); Charles Arden-Clarke, *The general agreement on tariffs and trade, environmental protection and sustainable development* (World Wildlife Fund 1991). See generally NAT'L WILDLIFE FED'N, *Environmental Concerns Related to a United States-Mexico-Canada Free Trade Agreement* 631-43, NAFTA & THE ENVIRONMENT (Daniel Magraw ed., 1995); *The North American Free Trade Agreement: Hearing before the H. Subcomm. on International Economic Policy and Trade and on Western Hemisphere Affairs of the Comm. on Foreign Affairs*, 102d Cong., 64-66 (1991) (statement of Stewart Hudson) [hereinafter Statement of Stewart Hudson]; *North American Free Trade Agreement: Hearing before the H. Subcomm. on Commerce, Consumer Protection, and Competitiveness of the Comm. on Energy and Commerce*, 102d Cong., 113-33 (1991) (statement of Richard Kamp) [hereinafter Statement of Richard Kamp] (addressing initial concerns about NAFTA). See SUSAN ARIEL AARONSON, TAKING TRADE TO THE STREETS: THE LOST HISTORY OF PUBLIC EFFORTS TO SHAPE GLOBALIZATION (2001) (discussing comprehensively the history of environmental, labor, and other social concerns within the trade policy domain).

levels of enforcement of comparable regulations.<sup>18</sup> Environmentalists argued that this disparity in levels of enforcement would worsen environmental protection in all three countries.<sup>19</sup> Due to the strength of the environmental lobby in the United States and the salience of the issues raised at that particular time, the environmentalists were able to leverage their political relationships with key U.S. legislators to ensure that environmental issues were considered during the trade agreement negotiations.<sup>20</sup> By the time NAFTA was submitted for legislative approval in 1993, the resolution of environmental concerns had become a political imperative required for ultimate passage of the trade agreement.<sup>21</sup>

The principal environmental concern identified for NAFTA was the potential for liberalized trade to give rise to “pollution havens” in Mexico as dirty industries relocated to take advantage of lax enforcement of environmental laws in that country, with possible pollution spillovers along the U.S.-Mexico border.<sup>22</sup> Rapid industrialization along this border prior to NAFTA had resulted in considerable environmental degradation and these dire conditions served as a harbinger for what might occur elsewhere in Mexico as trade and investment were further liberalized.<sup>23</sup> Although pollution havens were the initial concern for NAFTA, environmental groups subsequently raised several other concerns, including the potential use of trade regime rules to challenge legitimate domestic environmental regulations and standards as non-tariff barriers to trade,<sup>24</sup>

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<sup>18</sup> M. ANGELES VILLARREAL & IAN F. FERGUSSON, CONG. RESEARCH SERV., R42965, THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA) (2017); *see also* JOHNSON & BEAULIEU, *supra* note 4, at 12, 20.

<sup>19</sup> *See, e.g.*, HOGENBOOM, *supra* note 4; JOHNSON & BEAULIEU, *supra* note 4, at 17–19.

<sup>20</sup> *See, e.g.*, AUDLEY, *supra* note 4, at 65, 69.; MAYER, *supra* note 4, at 94, 98; HOGENBOOM, *supra* note 4.

<sup>21</sup> *See, e.g.*, AUDLEY, *supra* note 4.

<sup>22</sup> Office of the U.S. Trade Representative, *Review of U.S.-Mexico Environmental Relationship*, in NAFTA & THE ENVIRONMENT, *supra* note 17, at 211–23.

<sup>23</sup> *See* JOHNSON & BEAULIEU, *supra* note 4, at 27; *see also* NAT'L WILDLIFE FED'N, *supra* note 17, at 632–33; *North American Free Trade Agreement: Hearing before the H. Subcomm. on Commerce, Consumer Protection, and Competitiveness of the Comm. on Energy and Commerce*, 102nd Cong., 129 (1991) (statement of Richard Kamp); *Protecting the Environment in North American Free Trade Agreement Negotiations, Hearing before the H. Subcomm. on Regulation, Business Opportunities, and Energy of the H. Comm. on Small Business*, 102nd Cong., 98–103 (1991) (statement of Mary E. Kelly) [hereinafter *Protecting the Environment Hearing*].

<sup>24</sup> Concerns over the preemption of domestic laws were heightened when a GATT arbitral panel ruled in 1991 during the midst of the NAFTA negotiation that a U.S. embargo on tuna imports from Mexico under the U.S. Marine Mammal Protection Act was in

downward harmonization of environmental laws and standards as trading partners strive for common laws and standards, insufficient levels of funding for environmental protection and remediation in Mexico, accelerated exploitation of natural resources due to liberalization of certain economic sectors, a general increase in levels of pollution due to economic growth, and lack of environmental expertise, transparency, and public participation in environment-related trade disputes.<sup>25</sup>

In general, these potential negative environmental effects of trade liberalization are often categorized as: (1) *legal* or regulatory effects, (2) *scale* effects, (3) *sectoral*, structural, or composition effects, and (4) *product* or technological effects.<sup>26</sup> *Legal* effects generally refer to differing levels of domestic environmental safeguards or enforcement between trading partners, or a 'conflict of rules' between trade regime rules and domestic or international environmental laws.<sup>27</sup> Differing levels of safeguards or enforcement may give rise to a competitive advantage that results in a downward harmonization of regulations [race to the bottom hypothesis], or migration of dirty industries to countries with lower standards or enforcement [pollution havens or industrial flight hypotheses].<sup>28</sup> A conflict

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violation of GATT, *see, e.g.*, Eric Christensen & Samantha Geffen, *GATT Sets Its Net on Environmental Regulation: The GATT Panel Ruling on Mexican Yellowfin Tuna Imports and the Need for Reform of the International Trading System*, 23 U. MIAMI INTER-AM. L. REV. 569, 593 (1992), <http://repository.law.miami.edu/umialr/vol23/iss2/9> [<https://perma.cc/CKH4-D7R3>]; Steve Charnovitz, *GATT and the Environment: Examining the Issues*, 4 INT'L ENVTL. AFF. 203 (1992).

<sup>25</sup> *See, e.g.*, NAT'L WILDLIFE FED'N, *supra* note 17, at 632–33; Statement of Stewart Hudson, *supra* note 17; *Protecting the Environment Hearing*, *supra* note 23, at 31–34 (statement of Michael McCloskey); Statement of Richard Kamp, *supra* note 17; *Proposed Negotiation of a Free Trade Agreement with Mexico: Hearing before the H. Subcomm. on Trade of the H. Comm. on Ways and Means*, 102d Cong., 213, 218 (1991) (statement of David E. Ortman); *Trade and Environment: Hearing before the S. Subcomm. on International Trade of the S. Comm. on Finance*, 102d Cong., 64, 66 (1991) (statement of Lynn Greenwalt).

<sup>26</sup> *See* OECD, THE ENVIRONMENTAL EFFECTS OF TRADE 12–17 (1994); Håkan Nordström & Scott Vaughan, *Special Studies 4: Trade and Environment* 29–30, WTO (1999); Per G. Fredriksson, *Trade, Global Policy, and the Environment: New evidence and issues*, in TRADE, GLOBAL POLICY AND THE ENVIRONMENT 1, 1–3 (World Bank Discussion Paper No. 42, Per G. Fredriksson ed., Aug. 1999); Michael J. Ferrantino, *International Trade, Environmental Quality and Public Policy*, 20 WORLD ECON. 43, 48–50 (1997).

<sup>27</sup> OECD, *supra* note 26, at 16–17; Nordström & Vaughan, *supra* note 26, at 35; James Salzman, *Seattle's Legal Legacy and Environmental Reviews of Trade Agreements*, 31 ENVTL. L. 503, 529 (2001).

<sup>28</sup> Nordström & Vaughan, *supra* note 26, at 35–43; WILLIAM J. BAUMOL & WALLACE E. OATES, THE THEORY OF ENVIRONMENTAL POLICY (1988); Matthew A. Cole, *Examining the*

between trade regime rules and environmental laws may occur when regime rules restrict the use of trade-related measures for enforcement of international environmental laws and treaties, or they restrict domestic environmental regulations if the regulations are determined to be non-tariff barriers to trade.<sup>29</sup>

Negative *scale* effects correspond to higher levels of pollution or faster depletion rates of natural resources due to expansion of production and consumption activities associated with increased trade.<sup>30</sup> *Sectoral* effects are associated with changes in the patterns of production and resource use within specific sectors, as liberalized trade alters the international location and intensity of production and consumption activities. These effects foster a relocation of pollution sources between trading partners.<sup>31</sup> *Sectoral* effects may be negative when production or consumption shifts to geographic areas that are unsuited to the nature or intensity of the new activity.<sup>32</sup> Negative *product* effects are associated with changes in trade flows of particular environmentally damaging or harmful products, such as hazardous waste, endangered species, or toxic chemicals; for these effects, the characteristics of the product cause the adverse environmental impact.<sup>33</sup>

Given the complexity of linkages between trade liberalization and environmental quality, and the existence of other non-policy factors, it is difficult to predict the specific environmental effects that may emerge as trade is liberalized between countries. In general, however, the emergence of negative scale, sectoral, and product effects largely depend on the substantive focus or areas of liberalization of a particular free trade agreement, whereas the legal effects depend more generally on non-substantive trade regime rules or levels of environmental protection in

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*Environmental Case Against Free Trade*, 33 J. WORLD TRADE 183, 190 (1999); Ferrantino, *supra* note 26, at 48.

<sup>29</sup> Nordström & Vaughan, *supra* note 26, at 29; Kerry Krutilla, *World Trade, the GATT, and the Environment*, in ENVIRONMENTAL POLICY: TRANSNATIONAL ISSUES AND NATIONAL TRENDS 87, 97–104 (Lynton K. Caldwell & Robert V. Bartlett eds., 1997); Cole, *supra* note 28, at 191.

<sup>30</sup> Fredriksson, *supra* note 26, at 2; OECD, *supra* note 26, at 2.

<sup>31</sup> Nordström & Vaughan, *supra* note 26, at 29; Kym Anderson & Richard Blackhurst, *Trade, The Environment, and Public Policy*, in THE GREENING OF WORLD TRADE ISSUES 3, 4–7 (Kym Anderson & Richard Blackhurst eds., 1992); OECD, *supra* note 26, at 13–14; Fredriksson, *supra* note 26, at 2.

<sup>32</sup> OECD, *supra* note 26, at 16; Nordström & Vaughan, *supra* note 26, at 29.

<sup>33</sup> OECD, *supra* note 26, at 12–13; Peter L. Lallas, *NAFTA and Evolving Approaches to Identify and Address "Indirect" Environmental Impacts of International Trade*, 5 GEO. INT'L ENVTL. L. REV. 519, 522, 526–27 (1998).

each country. For NAFTA, the anticipated environmental effects of primary concern were the legal effects, followed by scale and sectoral effects, especially in Mexico.

To address the potential effects of NAFTA identified by the environmentalists, the Bush administration initially sought in 1991 and 1992 to incorporate a limited number of environmental policies directly into NAFTA, as well as to develop supplemental environmental policies or programs in parallel with the trade agreement.<sup>34</sup> However, when these measures proved insufficient to obtain support of the environmentalists for NAFTA approval in 1992 and the three countries were unwilling to reopen NAFTA,<sup>35</sup> the incoming Clinton administration committed to establish, through a supplemental agreement, an environmental commission that would have substantial powers to address lax enforcement of environmental laws in Mexico and provide remedies for damages.<sup>36</sup>

Based on this commitment, the United States, Mexico, and Canada negotiated NAAEC in 1993, which established a trilateral commission, the North American Commission for Environmental Cooperation (“CEC”), to address the remaining environmental effects associated with NAFTA not

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<sup>34</sup> George H.W. Bush, *Response of the Administration of George Bush to Issues Raised in Connection with the Negotiation of a North American Free Trade Agreement*, in NAFTA & THE ENVIRONMENT, *supra* note 17, at 163 (proposing the establishment of a trilateral commission to promote environmental cooperation, as well as separate programs to address transboundary pollution along the U.S.-Mexico border); *see also Report of the Administration on The North American Free Trade Agreement and Actions Taken in Fulfillment of the May 1, 1991 Commitments*, in NAFTA & THE ENVIRONMENT, *supra* note 17, at 239.

<sup>35</sup> *See, e.g.,* JOHNSON & BEAULIEU, *supra* note 4, at 30 (stating that the negotiation of NAFTA concluded in August 1992); *see* David Hendricks, *NAFTA puts San Antonio in trade spotlight*, SAN ANTONIO EXPRESS NEWS (July 31, 2015), <http://www.expressnews.com/150years/major-stories/article/NAFTA-put-San-Antonio-in-trade-spotlight-6418868.php> [<https://perma.cc/MW9M-MDGT>] (explaining how the final draft of the agreement was initialed by U.S. President Bush, Mexican President Salinas, and Canadian Prime Minister Mulroney in October 1992 and formally signed on December 17, 1992); *see* David Alire & Michael O’Boyle, *The rocky history of NAFTA*, REUTERS (Sep. 1, 2017), <https://www.reuters.com/article/us-trade-nafta-timeline/the-rocky-history-of-nafta-idUSKCN1BC5IL> [<https://perma.cc/KD3F-2FYB>]; *see Statement of Natural Resources Defense Council on Administration Announcement of the North American Free Trade Agreement*, in NAFTA & THE ENVIRONMENT, *supra* note 17, at 681 [hereinafter *Statement of Natural Resources Defense Council*]; Stewart J. Hudson & Rodrigo J. Prudencio, *National Wildlife Federation Report on the North American Commission on Environment and other Supplemental Environmental Agreements: Part Two of the NAFTA Package*, in NAFTA & THE ENVIRONMENT, *supra* note 17, at 691 (stating that several of the largest environmental groups opposed NAFTA without additional environmental safeguards).

<sup>36</sup> *Remarks by Governor Bill Clinton at The Student Center at North Carolina State University*, in NAFTA & THE ENVIRONMENT, *supra* note 17, at 263–66.

addressed in the trade agreement itself.<sup>37</sup> The negotiation of NAAEC commenced in April and was concluded in August 1993.<sup>38</sup> Overall, NAAEC provides the CEC with several broad mandates to promote environmental cooperation and integration of trade and environment objectives under NAFTA, and improve enforcement of environmental laws in North America. Taken together, the NAFTA environmental policies and NAAEC were sufficient to address most of the environmentalists' concerns and garner their support for approval of NAFTA in 1993.<sup>39</sup>

## II. NAFTA ENVIRONMENTAL POLICY FRAMEWORK

The NAFTA environmental policies included in the trade agreement itself and NAAEC collectively were intended to ensure that trade liberalization in North America did not foster increased environmental degradation, primarily in Mexico. The principal environmental policies under the NAFTA framework are summarized in Table 1, along with the specific environmental concern that each policy was intended to address. The following provides a general discussion of the content and purpose of the major policies. To facilitate discussion of the framework, the major policies are grouped under traditional categories used to characterize the potential negative trade-related environmental effects: (1) *legal* effects, (2) *scale* effects, (3) *sectoral* effects, and (4) *product* effects.<sup>40</sup> The policies associated with scale, sectoral, and technological effects are discussed together as the same policies were used to address these three effects.

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<sup>37</sup> See *Hills Letter on NAFTA Environmental Commission* at 6, INSIDE U.S. TRADE (Oct. 2, 1992) (indicating that Mexico and the United States also negotiated a bilateral Agreement Concerning the Establishment of a Border Environment Cooperation Commission and a North American Development Bank to develop and fund environmental infrastructure projects along their shared border); 32 I.L.M. 1545 (1993); see, e.g., Craig E. Brackbill, *Financial Help for Utilities along the U.S.-Mexico Border*, 91 J. OF AM. WATER WORKS ASSOC. 129 (Apr. 1999).

<sup>38</sup> *Negotiation of NAFTA Side Agreements to Start by Mid-April, Wilson Says*, INT'L TRADE REP. 257, 257 (Feb. 17, 1993); *Agreement on Side Deals Reached Among NAFTA Parties*, INT'L TRADE REP. 1352, 1352 (Aug. 18, 1993).

<sup>39</sup> See, e.g., AUDLEY, *supra* note 4, at 121; MAYER, *supra* note 4.

<sup>40</sup> See, e.g., Kevin B. Smith, *Typologies, Taxonomies, and the Benefits of Policy Classification*, 30 POL'Y STUD. J. 379, 379 (2002) (showing there are numerous approaches to categorizing policies, and substantive policy content is a traditional policy dimension used to classify public policies); Allen, *supra* note 15, at 50 (categorizing environmental policies in U.S. free trade agreements as: aspirational, cooperative, quasi-regulatory, and permissive policies); but see *infra* Part II (discussing how economists typically categorize trade-related environmental effects as: (1) scale effects, (2) sectoral effects, (3) product effects, and (4) legal effects and this typology will be used herein).

TABLE 1: KEY ENVIRONMENTAL PROVISIONS OF NAFTA AND NAAEC

	Policy	Location	Environmental Concern
Legal Effects	Implement trade agreement consistent with environmental protection	NAFTA, Preamble	Pollution havens, race to the bottom
	Levels of protection	NAAEC, Part 2, Art. 3	Pollution havens, race to the bottom
	Effective enforcement	NAAEC, Part 2, Art. 5	Pollution havens, race to the bottom
	State-to-state dispute resolution	NAAEC, Part 5	Pollution havens, race to the bottom
	Public submissions process	NAAEC, Part 3, Art. 14 and 15	Pollution havens, race to the bottom
	Anti-rollback	NAFTA, Art. 1114	Pollution havens, race to the bottom
	Minimize conflicts between FTA and MEA obligations	NAFTA, Art. 104	Conflict of rules
	Sanitary and Phytosanitary Standards and Technical Barriers to Trade	NAFTA, Chap. 7 and 9	Conflict of rules
	Environmental expertise in trade disputes	NAFTA, Chap. 20	Conflict of rules
	Procedural guarantees	NAAEC, Art. 5 (2), Art. 6 and Art. 7	Lack of transparency and public participation; also pollution havens, race to the bottom
	Opportunities for public participation	NAAEC, Part 1, Art. 1 and Part 3, Art. 5, 16, 17, and 18	Lack of transparency and public participation
Scale, Sectoral, and Product Effects	Environmental cooperation	NAAEC, Part 3, Art. 10 (1), Art. 11 (6) and Art. 9 (3)	Overexploitation of natural resources, increased pollution, and pollution havens

A. *Legal Effects*

Concerns over the legal effects of NAFTA on environmental protection dominated the NAFTA negotiations and the key demand of the environmentalists was the establishment of a process with recourse to punitive measure to ensure the countries enforced their environmental laws.<sup>41</sup> In particular, the environmentalists sought a process for filing claims of non-enforcement with ultimate recourse to sanctions or fines, in other words, a process that had “teeth.”<sup>42</sup> At the same time, environmentalists wanted a process that would provide private parties with standing to initiate investigations of lax enforcement of environmental laws.<sup>43</sup> In addition, the environmentalists sought policies that would safeguard domestic environmental laws and regulations as well as obligations under multilateral environmental agreements (“MEAs”) from being challenged by trade regime rules and assurances that environmental expertise could be brought to bear when challenges were actually made under NAFTA.<sup>44</sup> A suite of environmental policies was included in both NAFTA and NAAEC to address these major concerns.

1. Lax Enforcement of Environmental Laws and Pollution Havens

Lax enforcement of environmental laws in Mexico was the single most important environmental concern identified for NAFTA.<sup>45</sup> The

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<sup>41</sup> Confidential interview with private sector representative, in Washington, D.C. (Jan. 6, 2003); Confidential interview with U.S. government representative, via telephone, Carlisle, PA (Mar. 17, 2003). Interviews cited herein were conducted for Linda Allen, *The Politics of Structural Choice of the Commission for Environmental Cooperation: The Theoretical Foundations of the Design of International Environmental Institutions* (Apr. 2005) (unpublished Ph.D. dissertation, Indiana University) (on file with author).

<sup>42</sup> Hudson & Prudencio, *supra* note 35, at 693; William Snape, *NACE: Some Functions and Form*, in *SHAPING CONSENSUS: THE NORTH AMERICAN COMMISSION ON THE ENVIRONMENT AND NAFTA* 34 (Sarah Richardson ed., 1993) [hereinafter *SHAPING CONSENSUS*]; Robert Housman, *Enforcement and Trade Sanctions*, in *SHAPING CONSENSUS, supra*, at 23; *Recommendations for a North American Commission on the Environment, Prepared by Five Environmental NGOs*, in *NAFTA & THE ENVIRONMENT, supra* note 17, at 706; *Green Groups Press Kantor for Powerful NAFTA Environmental Commission* at 8–9, *INSIDE U.S. TRADE* (Mar. 5, 1993).

<sup>43</sup> Confidential interview with private sector representative, in Washington, D.C. (Jan. 6, 2003).

<sup>44</sup> *Environmental Group Coalition Proposes Stronger NAFTA Safeguards*, *INT'L TRADE REP.* 1097, 1097 (Jun. 24, 1992); Gary Hufbauer, *Functions of NACE: Trade Sanctions and Procedural Safeguards*, in *SHAPING CONSENSUS, supra* note 42, at 17; Justin R. Ward, *Natural Resources Defense Council Statement Regarding Environmental Protection in the North American Free Trade Agreement*, in *NAFTA & THE ENVIRONMENT, supra* note 17, at 670.

<sup>45</sup> Confidential interview with U.S. non-governmental organization representative, in

prevailing view when NAFTA was being negotiated was that Mexico had environmental laws comparable to those of the United States but it did not effectively enforce its laws, and the lax enforcement was largely due to limited institutional capacity and fiscal resources.<sup>46</sup> Regardless, the lax enforcement could give rise to pollution havens in Mexico as dirty industries relocated to that country to gain a competitive advantage due to lower costs for environmental compliance.<sup>47</sup> Moreover, in response to this industry migration, the other trading partners would weaken their enforcement or “roll-back” their regulations to remain competitive, resulting in an erosion of environmental protection in the other countries and a “race to the bottom.”<sup>48</sup>

To address the lax enforcement, the NAFTA environmental policy framework included several policies to promote effective enforcement of domestic environmental laws in the territories of the three trading partners. These policies were included in NAAEC and consisted of a commitment to effectively enforce domestic environmental laws<sup>49</sup> as well as the establishment of two mechanisms for ensuring the trading partners adhered to that commitment: a state-to-state consultation and dispute

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Washington, D.C. (Jan. 6, 2003); confidential interview with U.S. non-governmental organization representative, in Washington, D.C. (Jan. 7, 2003); confidential interview with U.S. government representative, in Washington, D.C. (Mar. 17, 2003); confidential interview with U.S. government representative, via telephone, Washington, D.C. (Jun. 16, 2003); see also NAT'L WILDLIFE FED'N, *supra* note 17, at 634; *Two Key Lawmakers Request 'Action Plan' From President Bush on Mexico Trade Talks*, INT'L TRADE REP. 377, 377 (Mar. 13, 1991); *Critics of North American Free Trade Pact Say Environment, Labor Safeguards Needed*, INT'L TRADE REP. 1294, 1294 (Aug. 28, 1991).

<sup>46</sup> *Evaluation of Mexico's Environmental Laws and Regulations—Interim Report of EPA Findings*, in NAFTA & THE ENVIRONMENT, *supra* note 17, at 195–97; *Evaluation of Mexico's Environmental Laws*, in NAFTA & THE ENVIRONMENT, *supra* note 17, at 583, 615; U.S. GEN. ACCOUNTING OFFICE [GAO], NAT. SEC. DIV., GAO/NSAID-91-227, REP. TO THE CHAIRMAN OF THE SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION, U.S.-MEXICO TRADE, INFORMATION ON ENVIRONMENTAL REGULATIONS AND ENFORCEMENT (May 1991).

<sup>47</sup> *Environmental Safeguards for the North American Free Trade Agreement, Priority Recommendations to Negotiators and Congress, With Model Language for Key Provisions*, in NAFTA & THE ENVIRONMENT, *supra* note 17, at 675; NAT'L WILDLIFE FED'N, *supra* note 17.

<sup>48</sup> *The North American Free Trade Agreement: Hearings before the H. Subcomm. on International Economic Policy and Trade and on Western Hemisphere Affairs of the H. Comm. on Foreign Affairs*, 102d Cong., 64–66 (1991) (statement of Stewart Hudson); *Protecting the Environment Hearing*, *supra* note 23, at 32–33 (statement of Michael McCloskey); see also DANIEL C. ESTY, GREENING THE GATT, TRADE, ENVIRONMENT, AND THE FUTURE 2 (1994).

<sup>49</sup> NAAEC, *supra* note 3, art. 5; see also NAFTA, *supra* note 1, at preamble (“STRENGTHEN the development and enforcement of environmental laws and regulations”).

resolution process<sup>50</sup> and a public submissions process.<sup>51</sup> The state-to-state consultation and dispute resolution process was intended to be the principal policy for rectifying lax enforcement; under this process, the countries can submit complaints against each other for failure to effectively enforce their domestic environmental laws with ultimate recourse to sanctions or fines.<sup>52</sup> Given its sanctioning potential, the dispute resolution process has the potential to be highly coercive if used, thus it was touted as the “teeth” of NAFTA to ensure environmental laws are enforced.<sup>53</sup>

The public submission process was the other mechanism established to ensure effective enforcement of environmental laws and under this process, private citizens or organizations can submit complaints of lax enforcement of domestic laws for independent review and verification.<sup>54</sup> These complaints are validated via a fact-finding process conducted by CEC that ends with the preparation of a factual record; however the complaints are not linked to a formal dispute resolution process with recourse to sanctions.<sup>55</sup> Rather, the public submission process was intended to serve as a spotlight remedy that can focus public scrutiny on enforcement activities and thereby generate pressure for remedial or corrective action.<sup>56</sup>

Lastly, the three countries committed to make available, within their respective territories, judicial, quasi-judicial, or administrative proceedings to sanction or remedy violations of its environmental laws.<sup>57</sup> Moreover, these proceedings must be fair, equitable, and open, and comply with due process of law.<sup>58</sup> The countries also committed to provide private access to remedies, through which parties can request “competent authorities to investigate alleged violations of its environmental laws and regulations.”<sup>59</sup> In general, these proceedings could also be used by

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<sup>50</sup> NAAEC, *supra* note 3, Part IV.

<sup>51</sup> *Id.* arts. 14 & 15.

<sup>52</sup> Kevin W. Patton, *Dispute Resolution Under the North American Commission on Environmental Cooperation*, 5 DUKE J. COMP. & INT'L L. 87, 87–90 (1994).

<sup>53</sup> HOGENBOOM, *supra* note 4; MAYER, *supra* note 4.

<sup>54</sup> NAAEC, *supra* note 3, arts. 14 & 15; ENVTL. LAW INST., FINAL REPORT: ISSUES RELATED TO ARTICLES 14 AND 15 OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION (2003).

<sup>55</sup> NAAEC, *supra* note 3, arts. 14 & 15.

<sup>56</sup> *See, e.g.*, Geoffrey Garver, *Citizen Spotlight is Beginning to Show Results*, 18 THE ENVTL. F. 34 (2001); David Markell, *The Citizen Spotlight Process*, 18 THE ENVTL. F. 32 (2000); David Schorr, *NAFTA and the Environment: A Review of the Basic Issues*, in FREE TRADE: RISKS AND REWARDS 226 (L.I. MacDonald ed., 2000) [hereinafter FREE TRADE].

<sup>57</sup> NAAEC, *supra* note 3, arts. 5 (2), 6 & 7.

<sup>58</sup> *Id.* art. 7.

<sup>59</sup> *Id.* art. 6.

private parties to raise claims of lax enforcement entirely within the domestic arena.

## 2. Rollback of Domestic Regulations and Race to the Bottom

Closely related to concerns over lax enforcement and pollution havens were concerns that countries would rollback their enforcement of regulations to remain competitive if one country had weaker levels of protection or enforcement.<sup>60</sup> Policies to address the potential regulatory rollback and a race to the bottom included a commitment under NAFTA to not waive or otherwise derogate from domestic environmental measures in order to retain or attract investment.<sup>61</sup> The anti-rollback commitment can be subject to consultation between the parties but not dispute resolution.<sup>62</sup> In conjunction with this commitment, NAFTA included a provision that recognizes the right of the countries to establish their own environmental standards as long as they were not arbitrary or a disguised restriction on trade and investment.<sup>63</sup> Additionally, NAAEC included a non-binding policy under which the NAFTA countries commit to have their domestic environmental laws provide for and encourage high levels of environmental protection.<sup>64</sup> Taken together, these policies provided hortatory, albeit non-enforceable, commitments for the NAFTA countries to maintain existing high levels of environmental laws and regulations.

## 3. A Conflict of Rules

A separate legal concern unrelated to levels of enforcement of environmental laws was the potential for a 'conflict of rules' between trade regime rules and domestic or international environmental laws.<sup>65</sup> A conflict between trade regime rules and environmental laws may occur when regime rules or trade disciplines restrict the use of trade-related measures for enforcement of MEAs,<sup>66</sup> or when rules restrict domestic environmental

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<sup>60</sup> Office of the U.S. Trade Representative, *supra* note 22, at 230–31.

<sup>61</sup> NAFTA, *supra* note 1, art. 1114.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* art. 1106(6).

<sup>64</sup> *Id.* art. 3.

<sup>65</sup> OECD, *supra* note 26, at 16–17; Nordström & Vaughan, *supra* note 26, at 35–46; Salzman, *supra* note 27, at 529.

<sup>66</sup> Around twenty MEAs, such as the Montreal Protocol on Substances that Deplete the Ozone Layer and the Convention on International Trade in Endangered Species of Wild Fauna and Flora, have "trade restrictive measures to address transboundary and global

regulations if they are determined to be discriminatory or non-tariff barriers to trade.<sup>67</sup> This particular concern came to the fore after a GATT arbitral panel issued a ruling in 1991 that U.S. restrictions on tuna imports from Mexico violated the provisions of that trade agreement, forcing the United States to either remove the restrictions or be subject to trade sanctions.<sup>68</sup> The ruling highlighted the potential for trade regime rules to impede the implementation of domestic environmental regulations,<sup>69</sup> and NAFTA and NAAEC included several policies to address a potential conflict of rules.

To address a potential conflict between trade rules and MEAs, NAFTA includes a provision that allows the trade-related measures under MEAs to take precedence over obligations under the trade agreement.<sup>70</sup> The NAFTA countries also have the right to resolve trade disputes related to MEAs or environmental and health-related measures (either sanitary and phytosanitary measures or standards-related measures) under the substantive and procedural provisions of NAFTA rather than GATT.<sup>71</sup> Both NAFTA and NAAEC allow for use of environmental experts in their

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ecological problems." Robyn Eckersley, *The Big Chill: The WTO and Multilateral Environmental Agreements*, 4 GLOB. ENVTL. POL. 24, 24 (May 2004).

<sup>67</sup> See, e.g., Nordström & Vaughan, *supra* note 26; Krutilla, *supra* note 29; Cole, *supra* note 28; ESTY, *supra* note 48, at 218–20.

<sup>68</sup> AUDLEY, *supra* note 4, at 73; see also Ted L. McDorman, *The 1991 U.S.-Mexico GATT Panel Report on Tuna and Dolphin: Implications for Trade and Environment Conflicts*, 17 N.C. J. INT'L L. & COM. REG. 461, 462–63, 471 (1992), <http://scholarship.law.unc.edu/ncilj/vol17/iss3/2> [<https://perma.cc/9HH9-EM32>].

<sup>69</sup> Charnovitz, *supra* note 24, at 153; ESTY, *supra* note 48, at 29; *Statement of Natural Resources Defense Council*, *supra* note 35, at 682.

<sup>70</sup> NAFTA, *supra* note 1, art. 104 (relating to environmental and conservation agreements, "[i]n the event of any inconsistency between this Agreement and the specific trade obligations set out in the Convention on International Trade in Endangered Species of Wild Fauna and Flora . . . , the Montreal Protocol on Substances that Deplete the Ozone Layer, . . . the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal . . . such obligations shall prevail to the extent of the inconsistency, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement.").

<sup>71</sup> NAFTA, *supra* note 1, art. 2005(3) ("In any dispute referred to in paragraph 1 where the responding Party claims that its action is subject to Article 104 (Relation to Environmental and Conservation Agreements) and requests in writing that the matter be considered under this Agreement, the complaining Party may, in respect of that matter, thereafter have recourse to dispute settlement procedures solely under this Agreement."). The multilateral trading system embodied by the GATT is now overseen by the World Trade Organization. WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994).

respective state-to-state dispute resolution processes,<sup>72</sup> which provides some assurance that trade disputes related to environmental standards or enforcement will take into consideration the environmental aspects of the standards or enforcement. NAAEC also included policies that allowed for CEC to assist the NAFTA Free Trade Commission<sup>73</sup> (“FTC”) in environmental-related trade issues.<sup>74</sup> Lastly, NAFTA’s provisions for standards-related measures provides some assurance that environmental regulations may not be challenged as technical barriers to trade,<sup>75</sup> although these particular protections were considered weak from the onset.<sup>76</sup> In general, all of these provisions were intended to reduce the potential for a conflict between trade rules and environmental laws and standards.

One policy that was included in NAFTA that was not associated with addressing the legal environmental effects of the trade agreement but subsequently presented a new type of conflict of rules was the Chapter 11 foreign investor protections. In general, Chapter 11 establishes the rights of private investors to challenge domestic environmental regulatory decisions within the investor’s host country as a “regulatory expropriation.”<sup>77</sup>

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<sup>72</sup> NAFTA, *supra* note 1, art. 2007. “The Commission may: (a) call on such technical advisers or create such working groups or expert groups as it deems necessary . . .” *Id.* “Role of Experts. On request of a disputing Party, or on its own initiative, the panel may seek information and technical advice from any person or body that it deems appropriate, provided that the disputing Parties so agree and subject to such terms and conditions as such Parties may agree.” *Id.* art. 2014.

On request of a disputing Party or, unless the disputing Parties disapprove, on its own initiative, the panel may request a written report of a scientific review board on any factual issue concerning environmental, health, safety or other scientific matters raised by a disputing Party in a proceeding, subject to such terms and conditions as such Parties may agree.

*Id.* art. 2015.

<sup>73</sup> NAFTA, *supra* note 1, art. 2001. The Free Trade Commission (“FTC”) is the intergovernmental body that oversees the implementation of NAFTA.

<sup>74</sup> NAAEC, *supra* note 3, art. 6. The CEC has the authority to: 1) assist the NAFTA FTC in environment-related matters, serving as a point of inquiry on NAFTA environmental goals and objectives, 2) assist with NAFTA art. 1114, and 3) identify experts for NAFTA committees, working groups, and bodies.

<sup>75</sup> NAFTA, *supra* note 1, art. 904(1) (describing the Right to Take Standards-Related Measures: “Each Party may, in accordance with this Agreement, adopt, maintain or apply any standards-related measure, including any such measure relating to safety, the protection of human, animal or plant life or health, the environment or consumers, and any measure to ensure its enforcement or implementation.”).

<sup>76</sup> JOHNSON & BEAULIEU, *supra* note 4, at 20.

<sup>77</sup> NAFTA, *supra* note 1, art. 1110 (including prohibitions against direct or indirect nationalization or expropriation or any “measure tantamount to nationalization or expropriation”

If a regulatory decision is determined to be “tantamount to expropriation,” the host country is required to compensate the private investor.<sup>78</sup> Not only does Chapter 11 have the potential to impose serious costs on a host country, the potential for private investors to pursue future claims against regulatory decisions may lead to a regulatory “chill”, where government officials are hesitant to rigorously enforce existing environmental laws or enact new laws in fear that they may be challenged as a regulatory expropriation.<sup>79</sup> The regulatory chill would result in a weakening of levels of enforcement or protection.

#### 4. Lack of Transparency and Public Participation

Historically, due to the sensitive nature of trade policy negotiations, they often had been conducted in secrecy with little input from the public, and this lack of transparency and public participation was criticized by environmentalists throughout the negotiation of NAFTA.<sup>80</sup> Some steps were taken during the negotiation to improve transparency and promote public input, for example, by appointing environmental group representatives to trade advisory committees and conducting frequent briefings with them.<sup>81</sup> In addition, specific policies were included in NAFTA and NAAEC to allow for public participation during implementation of both agreements. These policies included the establishment of public

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unless the expropriation is “(a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation.”); *see, e.g.*, Sanford E. Gaines, *Environmental Policy Implications of Investor-State Arbitration Under NAFTA Chapter 11*, 7 INT’L ENVTL. AGREEMENTS 171, 191 (2007) (explaining that regulatory expropriations are akin to regulatory takings).

<sup>78</sup> Esty & Salzman, *supra* note 15, at 125, 129; *see generally* Kathleen Cooper et al., *Seeking a Regulatory Chill in Canada: The Dow Agrosciences NAFTA Chapter 11 Challenge to the Quebec Pesticides Management Code*, 7 GOLDEN GATE U. ENVTL. L.J. 5 (2014); HOWARD MANN & KONRAD VON MOLTKE, INT’L INST. FOR SUSTAINABLE DEV., NAFTA’S CHAPTER 11 AND THE ENVIRONMENT, ADDRESSING THE IMPACTS OF THE INVESTOR-STATE PROCESS ON THE ENVIRONMENT (1999).

<sup>79</sup> Esty & Salzman, *supra* note 15, at 129; THE COUNCIL OF CANADIANS, GETTING IT RIGHT: A PEOPLE’S GUIDE TO RENEGOTIATING NAFTA, at 12–14 (2017).

<sup>80</sup> *See, e.g.*, *Recommendations for a North American Commission on the Environment*, *supra* note 42, at 707; *Letter from Seven NGOs to Ambassador Michael Kantor Regarding Supplemental Agreements*, in NAFTA & THE ENVIRONMENT, *supra* note 17, at 715.

<sup>81</sup> Confidential interview with U.S. government official, in Washington, D.C. (Feb. 24, 2003); confidential interview with U.S. government official, in Washington, D.C. (Feb. 26, 2003). *See also* Bush, *supra* note 34, at 174; JOHNSON & BEAULIEU, *supra* note 4, at 29.

advisory committees for the CEC at the national and international level,<sup>82</sup> and the ability of private parties to present final briefs under NAFTA's state-to-state dispute resolution,<sup>83</sup> all of which provided avenues for public input and participation in the implementation of the NAFTA environmental policies.

### *B. Scale, Sectoral, and Product Effects*

The potential for trade liberalization to give rise to increased levels of pollution and exploitation of natural resources can occur in any country regardless of levels of regulatory enforcement simply because liberalized trade fosters changes in the patterns of production and consumption within the countries. Concerns over potential scale and sectoral effects were raised during the NAFTA negotiations, and in general, addressing them requires a robust domestic environmental management regime. Punitive measures such as the state-to-state dispute resolution process may provide some incentive for undertaking robust environmental management, but more cooperative initiatives can also address the source of the problem by building institutional capacity and providing additional resources.<sup>84</sup> Towards that end, NAAEC includes policies focused on building institutional capacity on a voluntary basis.

#### 1. Increased Pollution and Exploitation of Natural Resources

To address the potential increases in pollution and exploitation of natural resources due to scale, sectoral, and product effects, the primary policy prescriptions under the NAFTA policy framework were policies that fostered voluntary environmental cooperation to build the institutional

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<sup>82</sup> NAAEC, *supra* note 3, art. 1, 16–18 (stating, “[t]he objectives of this Agreement are to: . . . (h) promote transparency and public participation in the development of environmental laws, regulations and policies.”). NAAEC also authorizes the establishment of three advisory bodies: art. 16 (Joint Public Advisory Committee), art. 17 (National Advisory Committees), and art. 18 (Governmental Committees). *Id.* at arts. 16–18.

<sup>83</sup> NAFTA, *supra* note 1, art. 2013 (third party participation: “[a] Party that is not a disputing Party, on delivery of a written notice to the disputing Parties and to its Section of the Secretariat, shall be entitled to attend all hearings, to make written and oral submissions to the panel and to receive written submissions of the disputing Parties.”).

<sup>84</sup> See, e.g., COMM'N FOR ENVTL. COOPERATION, <http://www.cec.org> [<https://perma.cc/B5KJ-BFUK>] (last visited Apr. 4, 2018).

capacity of the trading partners, in particular Mexico, and to strengthen their various environmental protection regimes.<sup>85</sup> Recognizing that the weak enforcement of environmental laws and low levels of environmental protection were due largely to lack of capacity, NAFTA anticipated that enhanced institutional capacity would strengthen efforts to effectively enforce environmental laws, as well as improve the domestic environmental management of natural resources and pollution, but through cooperation rather than coercion. The NAFTA policy framework includes numerous policies focused on promoting environmental cooperation between the NAFTA countries under NAAEC, which was largely envisioned as its primary mandate<sup>86</sup> with the majority of CEC's work focused on cooperative activities.<sup>87</sup>

### III. POLICY FRAMEWORK SHORTCOMINGS—RHETORIC VS. REALITY

Given the ground-breaking nature of the NAFTA environmental policies, a considerable amount of research focused on their implementation over the years. In general, the research indicates that the impact of the policies has been underwhelming and had minimal to no effect on enhancing environmental protection or improving enforcement of environmental laws in the NAFTA countries.<sup>88</sup> Major criticisms of the policies include the placement of the obligation to effectively enforce environmental laws, and the associated state-to-state dispute resolution process, within NAAEC rather than NAFTA;<sup>89</sup> the problematic implementation of the public submission process;<sup>90</sup> the limited number of MEAs protected

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<sup>85</sup> See, e.g., Linda J. Allen, *The North American Agreement on Environmental Cooperation: Has It Fulfilled Its Promises and Potential? An Empirical Study of Policy Effectiveness*, 23 COLO. J. INT'L ENVTL. L. & POL'Y 121, 123 (2012); Greg Block, *The CEC Cooperative Program of Work*, in GREENING NAFTA: THE N. AM. COMM'N FOR ENVTL. COOPERATION, 25, 28 (David L. Markell & John H. Knox eds., 2003) [hereinafter GREENING NAFTA].

<sup>86</sup> Confidential interview with Canadian government official, in Ottawa, Ont. (Feb. 10, 2003); confidential interview with U.S. government official, in Washington, D.C. (Jan. 22, 2003); confidential interview with U.S. government official, in Washington, D.C. (Feb. 26, 2003); see also *Hills Letter on NAFTA Environmental Commission*, *supra* note 37, at 6.

<sup>87</sup> NAAEC, *supra* note 3, at art. 11(6).

<sup>88</sup> See, e.g., Allen, *supra* note 85, at 164; Joseph F. DiMento & Pamela M. Doughman, *Soft Teeth in the Back of the Mouth: The NAFTA Environmental Side Agreement Implemented*, 10 GEO. INT'L ENVTL. L. REV. 651, 725–26 (1998).

<sup>89</sup> Mach, *supra* note 6.

<sup>90</sup> Esty & Salzman, *supra* note 15, at 129–30; see also Jonathan G. Dorn, *NAAEC Citizen Submissions Against Mexico: An Analysis of the Effectiveness of a Participatory Approach*

under NAFTA Article 104;<sup>91</sup> weak protection of environmental laws and regulations related to process and production methods from challenge under trade rules;<sup>92</sup> the use of NAFTA Chapter 11 investor protections to challenge implementation of domestic environmental laws as regulatory takings;<sup>93</sup> the underfunding of the CEC in general;<sup>94</sup> and the absence of specific policies to address emerging environmental concerns, such as overfishing and illegal timber and wildlife trafficking.<sup>95</sup> Other lesser criticisms include the lack of implementation of commitments to ensure that “laws and regulations provide for high levels of environmental protection”;<sup>96</sup> lack of transparency of NAFTA governance;<sup>97</sup> and NAFTA’s weak commitment to sustainable development.<sup>98</sup> Many of these criticisms have been used to call for strengthening of the NAFTA environmental policies.<sup>99</sup> The following examines the major perceived shortcomings in light of existing research and discusses how the rhetoric matches the reality.

A. *Location of Enforcement Obligations and State-to-State Dispute Resolution Process*

The state-to-state dispute resolution process was the primary mechanism included in the NAAEC to address lax enforcement of environmental

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*to Environmental Law Enforcement*, 20 GEO. INT’L ENVTL. L. REV. 129, 139–40 (2007); Christopher Tollefson, *Stormy Weather: The Recent History of the Citizen Submission Process of the North American Agreement on Environmental Cooperation*, in LINKING TRADE, ENVIRONMENT, AND SOCIAL COHESION: NAFTA EXPERIENCES, GLOBAL CHALLENGES 161 (John J. Kirton & Virginia W. Maclaren, eds., 2002) [hereinafter LINKING TRADE]; Paul S. Kibel, *Awkward Evolution: Citizen Enforcement at the North American Environmental Commission*, 32 ENVTL. L. REP. 10769, 10769 (2002); David J. Blair, *The CEC’s Citizen Submission Process: Still a Model for Reconciling Trade and the Environment?*, 12 J. ENV’T & DEV. 295 (2003); Garver, *supra* note 12; Chris Wold et al., *The Inadequacy of the Citizen Submission Process of Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, 26 LOY. L.A. INT’L & COMP. L. REV. 415, 417 (2004); Hester, *supra* note 12.

<sup>91</sup> Esty & Salzman, *supra* note 15, at 134.

<sup>92</sup> *See id.*

<sup>93</sup> *Id.* at 128–29.

<sup>94</sup> *Id.* at 129.

<sup>95</sup> *Id.* at 136; *see also* U.S. Environmental Groups Urge Inclusion of Lacey Act Language in TPP, INSIDE U.S. TRADE (June 4, 2010).

<sup>96</sup> Esty & Salzman, *supra* note 15, at 129.

<sup>97</sup> *Id.* at 136.

<sup>98</sup> *Id.* at 126.

<sup>99</sup> *See, e.g.*, Michael McAuliff, *NAFTA Report Warns of Trade Deal Environmental Disasters*, HUFFINGTON POST (Mar. 11, 2014), [https://www.huffingtonpost.com/2014/03/11/nafta-environment\\_n\\_4938556.html](https://www.huffingtonpost.com/2014/03/11/nafta-environment_n_4938556.html) [<https://perma.cc/6UFS-LV2P>].

laws, but the process is widely seen as ineffective.<sup>100</sup> According to critics, the limited effectiveness of the process is due to the fact that state-to-state dispute resolution process (and associated obligation to effectively enforce environmental laws) is located within the environmental side agreement, NAAEC, rather than the trade agreement itself, which has its own state-to-state dispute resolution process.<sup>101</sup> Although the obligation itself is adequate, the NAAEC dispute resolution process is perceived to be inferior to the NAFTA process for two reasons: the NAAEC process is more onerous than the NAFTA process, and the NAAEC process is overseen by environmental officials who lack expertise in resolving trade-related disputes.<sup>102</sup> Relocating the obligation to be under NAFTA would remedy both of these shortcomings. While both the NAAEC and NAFTA dispute resolution processes include comparable procedures for resolving disputes between the trading partners, the NAAEC process is undoubtedly more convoluted, and includes numerous escape clauses and legal uncertainties, and a very difficult means test<sup>103</sup> for triggering the arbitration phase of the NAAEC process compared to the NAFTA process.<sup>104</sup> These differences, coupled with oversight by environmental rather than trade

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<sup>100</sup> SABAA A. KHAN, INT'L INST. FOR SUSTAINABLE DEV., ENVIRONMENTAL AND PUBLIC INTEREST CONSIDERATIONS IN NAFTA RENEGOTIATION 3 (2017), <https://www.iisd.org/sites/default/files/publications/environmental-public-interest-nafta-renegotiations.pdf> [<https://perma.cc/22UW-DCQX>].

<sup>101</sup> See, e.g., *id.*

<sup>102</sup> See, e.g., Edward Hymson et al., *Increasing Benefits and Reducing Harm Caused by the North American Free Trade Agreement*, 19 S. L. J. 219, 232 (2009) (discussing the lack of enforceability of the NAAEC process).

<sup>103</sup> The criteria for allowing a dispute to move forward to arbitration is that there needs to be a persistent pattern of non-enforcement that gives rise to some competitive advantage within the trade relationships. NAAEC, *supra* note 3, art. 31(2).

<sup>104</sup> Robert Housman described the procedures leading to sanctions as "absurd." VED P. NANDA & GEORGE R. PRING, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY FOR THE 21ST CENTURY 586 (2d rev. ed. 2013) (quoting INT'L ENV'T DAILY, BNA (Sept. 14, 1993)). "Someday, [in] some bizarre set of circumstances where the planets are aligned," trade sanctions could be imposed for a NAFTA partner's persistent failure to enforcement its domestic environmental statutes. *Id.* See also The North American Free Trade Agreement and its Environmental Side Agreements: S. Hrg. 103-329 Before the Comm. On Envtl. and Pub. Works, 103rd Cong. 39 (1993) (statement of Peter A.A. Berle, President and CEO, National Audubon Society); *The National Environmental Policy Act and The North American Free Trade Agreement: S. Hrg. 103-219 Before the Comm. On Envtl. and Pub. Works*, 103rd Cong. 35 (1993) (statement of Rodger Schlickeisen, President of Defenders of Wildlife); Raustiala, *supra* note 12, at 43; Garver, *supra* note 12, at 39; Knox, *The Neglected Lessons of the NAFTA Environmental Regime*, *supra* note 6, at 397.

officials, create the perception that the NAAEC process would be difficult to administer, and unlikely to run its full course and result in sanctions, which are the “teeth” in the process essential for remedying lax enforcement of environmental laws.<sup>105</sup>

As a result, critics have pushed for relocating the obligation to enforce environmental laws effectively to NAFTA itself, where breaches of this obligation would be subject to the better functioning NAFTA state-to-state dispute resolution process.<sup>106</sup> This change in policy would also bring NAFTA up to par with all other U.S. trade agreements. Since NAFTA entered into effect, the United States concluded twelve other regional or bilateral trade agreements, and for all of these trade agreements with the exception of one, the obligation to enforce environmental laws effectively has been included within the trade agreements rather than an environmental side agreement.<sup>107</sup> Moreover, the enforcement obligation is subject to the same state-to-state dispute resolution process as all other obligations under the trade agreements.<sup>108</sup> Thus, the argument that the policy for effective enforcement under NAAEC is inadequate and should be changed seems reasonable. However, in reality, it is unlikely that the countries will ever pursue claims of non-enforcement against each other under the dispute resolution process, regardless of where the process is located, because the conditions required for triggering the process never materialized, and even if perchance they do, the countries would be very reluctant to initiate the process and publicly criticize each other’s domestic enforcement activities.<sup>109</sup>

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<sup>105</sup> See, e.g., Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AM. J. OF INT’L L. 259, 266 (1992).

<sup>106</sup> NAFTA, *supra* note 1, at ch. 20 (defines the state-to-state dispute resolution process for the trade agreement).

<sup>107</sup> See Allen, *supra* note 15, at 49.

<sup>108</sup> *Id.* at 50.

<sup>109</sup> See Scott Vaughan, *Thinking North American Environmental Management*, in 2 THE ART OF THE ST. 13 (Thomas J. Courchene, Donald J. Savoie, & Daniel Schwanen, eds., 2004) (stating that “neither NAFTA nor NAAEC fine and sanction measures were initiated. A simple explanation may well be that trade officials in all three North American countries retain a profound dislike for the punitive and heavy handed nature of the environmental safeguards . . .”); see also Chris Wold, *Evaluating NAFTA and the Commission for Environmental Cooperation: Lessons for Integrating Trade and Environment in Free Trade Agreements*, 28 ST. LOUIS UNIV. PUB. L. REV. 201, 236 (2008) (recognizing that the FTAs negotiated subsequent to NAFTA include obligations to effectively enforce environmental laws, and these obligations are enforceable through dispute settlement procedures under the trade agreement, but that “[b]ecause these provisions are included in

First, with respect to the conditions required to trigger the dispute resolution process, there are two conditions that could be used to justify action under this process: the existence of widespread non-enforcement of environmental laws, and the emergence of pollution havens. These conditions are clearly related, as widespread non-enforcement is believed to give rise to pollution havens.<sup>110</sup> However, as a practical matter, it may be easier to identify pollution havens than weak enforcement patterns, even though the dispute resolution process is tied to enforcement levels. In order to initiate the dispute resolution process under NAAEC, the countries are required to first conduct consultations, during which the aggrieved Party must demonstrate that there “has been a persistent pattern of failure by that other Party to effectively enforce its environmental law.”<sup>111</sup> To move beyond consultation and request an arbitral panel for formal dispute resolution, the aggrieved Party must further demonstrate that the persistent pattern of non-enforcement affects trade in some manner.<sup>112</sup> Since NAFTA entered into effect twenty-four years ago, none of the NAFTA countries has ever filed a claim, or even asserted, that there was widespread non-enforcement of environmental laws that affected trade.<sup>113</sup>

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the FTA itself, rather than a side agreement, the United States championed such provisions as further integration of trade and the environment. Because there is no legal difference between placing the environmental provisions in a side agreement or in the FTA itself, this benefit is more imagined than real.”)

<sup>110</sup> *But see* Andreas Waldkirch & Munisamy Gopinath, *Pollution Haven or Hythe?\*: New Evidence from Mexico* 1–4 (May 27, 2005), <http://www.colby.edu/economics/faculty/thtieten/ec476/mexpollution.pdf> [<https://perma.cc/H6VF-7SPH>].

<sup>111</sup> NAAEC, *supra* note 3, art. 22(1) (stating that the determination of a persistent pattern of non-enforcement itself may not be possible); *see also* Vaughan, *supra* note 109, at 7 (“There is no international legal or management standard that defines how to measure the effective enforcement of environmental regulations.”). The criteria for this standard set forth in NAAEC “is incoherent, opaque and based on an awkward double-negative.” *Id.* These criteria, coupled with “the failure of the NAAEC to define clearly what a pattern of regulatory non-enforcement looks like,” results in a policy that is “fundamentally flawed, the product of pandering to an incoherent political agenda as opposed to aligning legal remedies to actual needs.” *Id.*

<sup>112</sup> NAAEC, *supra* note 3, art. 24(1) (noting that a Party must show that the “alleged persistent pattern of failure by the Party . . . to effectively enforce its environmental law relates to a situation involving workplaces, firms, companies or sectors that produce goods or provide services: 1. traded between the territories of the Parties; or 2. that compete, in the territory of the Party complained against, with goods or services produced or provided by persons of another Party.”).

<sup>113</sup> The United States and its trading partners have not filed any claims of persistent patterns of non-enforcement under the other twelve free trade agreements that the United States has concluded since NAFTA. *But see* Tollefson, *supra* note 90, at 27.

One reason the countries may not have pursued these claims is that there has been an absence of widespread patterns of non-enforcement; however, identifying these patterns may be difficult. An alternative approach could be to identify pollution havens and deteriorating environmental conditions in the NAFTA countries. While the existence of polluting industries and increased pollution does not necessarily mean a country is not enforcing its laws, it is a more tangible indicator that something may be amiss. Moreover, the primary rationale for including a policy on effective enforcement in NAFTA was the concern over creation of pollution havens in Mexico.<sup>114</sup> Thus, the existence of pollution havens could be a proxy for weak enforcement.<sup>115</sup> Research to date, however, does not identify the emergence of pollution havens or a significant deterioration of environmental conditions in any of the NAFTA countries, especially Mexico.

While it is very difficult to make broad generalizations about the impact of NAFTA on the environment, in general, the trend in Mexico towards improving environmental protection has been positive under NAFTA, although the factors that influenced this trend have not necessarily been related to trade liberalization under this trade agreement. Overall, since NAFTA's inception, there has been no relative increase in pollution because of NAFTA's provisions, nor has Mexico become a pollution haven.<sup>116</sup> With respect to levels of energy use and common pollutants, research indicates "that the extreme predictions of the outcomes of NAFTA have not materialized. Rather, trends that were already present before the introduction of NAFTA continued and, in some cases, improved post-NAFTA, but not yet in a dramatic way."<sup>117</sup> At the same time, there has been a significant increase in the market for environmental goods and services in Mexico, which nearly doubled in size from 1995 to 2005, reaching \$4.7 billion at the end of this period.<sup>118</sup> In general, this increase in environmental goods and services was primarily due to stronger domestic environmental regulations and enforcement over the years, and a tendency for foreign manufacturers

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<sup>114</sup> See Waldkirch & Gopinath, *supra* note 110, at 1–4.

<sup>115</sup> *See id.*

<sup>116</sup> KEVIN GALLAGHER, *FREE TRADE AND THE ENVIRONMENT, MEXICO, NAFTA, AND BEYOND* 31 (2004); *see also* Vaughan, *supra* note 109, at 7 ("Looking at the pollution-haven and race-to-the-bottom claims a decade later, we find little empirical evidence showing any systematic occurrence of either.").

<sup>117</sup> David I. Stern, *The Effect of NAFTA on Energy and Environmental Efficiency in Mexico*, 35 *POL'Y STUD. J.* 291, 291 (2007).

<sup>118</sup> Grant Ferrier, *The evolution of the environmental industry in the post-NAFTA era in Mexico*, 10 *INT'L ENVTL. AGREEMENTS* 147, 151 (2010).

to adhere to higher global environmental standards.<sup>119</sup> Along similar lines, expenditures for environmental protection by businesses increased after NAFTA entered into effect, and these changes were driven by various factors, including foreign shareholder pressure, government regulation, and “the need to comply with standards demanded by customers in the international market.”<sup>120</sup> Thus, the larger export-oriented industries in Mexico have not engaged in a race to the bottom, and greater exports from Mexico “provided an incentive to increase environmental investment.”<sup>121</sup> Overall, it appears that NAFTA has not given rise to pollution havens<sup>122</sup> in Mexico, or the other countries, which may also explain the lack of claims for non-enforcement.

The fact that the countries have not filed claims related to persistent patterns of non-enforcement could also be because the countries are hesitant to criticize each other's domestic enforcement activities,<sup>123</sup> and to a large degree, that is the reason why the NAAEC dispute resolution process differs in its design from the NAFTA dispute resolution process. In late 1992, when the NAFTA countries agreed to subject their domestic enforcement activities to independent review and sanctions, they were concerned that the process would infringe upon sovereignty and be used towards protectionist ends.<sup>124</sup> To address these concerns, the countries intentionally crafted the NAAEC dispute resolution process such that it was unlikely to ever run its full course to the sanctioning phase if initiated;

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<sup>119</sup> *Id.* at 156–57; see also Knox, *The Neglected Lessons of the NAFTA Environmental Regime*, *supra* note 6, at 398 (The NAFTA environmental regimes “ha[ve] contributed to stronger environmental protections, especially in Mexico.”).

<sup>120</sup> Lilia Domínguez-Villalobos & Flor Brown-Grossman, *NAFTA's Impact on Business Environmental Decision Making*, 35 POL'Y STUD. J. 245, 246 (2007).

<sup>121</sup> *Id.* at 257.

<sup>122</sup> Knox, *The Neglected Lessons of the NAFTA Environmental Regime*, *supra* note 6, at 398 (“[s]tudies, including those prepared under the auspices of the CEC itself, have consistently indicated that the fear of pollution havens is largely baseless. The marginal costs of abating pollution in developed countries, such as the United States, are simply not high enough to induce companies to move their operations abroad in search of lower costs in countries with lower environmental standards.”).

<sup>123</sup> See Garver, *supra* note 12, at 38.

<sup>124</sup> See, e.g., Sarah Richardson, *Conclusions: An Emerging Consensus*, in SHAPING CONSENSUS, *supra* note 42, at 37; *Canada Against Using Trade Sanctions To Enforce Supplemental Pacts*, *Weekes Says*, INT'L TRADE REP. 486, 486 (Mar. 24, 1993); *Business Groups Warn Kantor That Draft Texts are Flawed*, INT'L TRADE REP. 946, 946 (June 9, 1993); *Trade Sanctions to Enforce NAFTA Could Threaten Pact, Governors Told*, INT'L TRADE REP. 1026, 1026 (June 23, 1993); Gilbert Winham, *Enforcement of Environmental Measures: Negotiating the NAFTA Environmental Side Agreement*, 3 J. OF ENV'T & DEV. 29, 29 (1994).

the process would *prima facie* satisfy the political demands of environmentalists, but, in practice, prove to be ineffective.<sup>125</sup> The onerous design of the dispute resolution process is one obvious indication of the countries' reluctance to pursue claims of non-enforcement of environmental laws against each other; however, the countries also demonstrate their reluctance in other ways. In particular, the NAFTA countries failed to develop model rules of procedure<sup>126</sup> or establish a roster of potential panelists for

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<sup>125</sup> Allen, *supra* note 41; confidential interview with Mexican government representative, in Mexico City, Mex. (Apr. 3, 2003); confidential interview with Mexican government representative, via telephone, Washington, D.C. (May 15, 2003); confidential interview with Canadian government official, in Ottawa, Ont. (Feb. 10, 2003); confidential interview with Canadian government official, in Ottawa, Ont. (Feb. 11, 2003); confidential interview with U.S. environmental organization representative, in Washington, D.C. (Jan. 7, 2003); confidential interview with U.S. government official, in Washington, D.C. (Jan. 22, 2003). *See also Some Environmentalists Fault Side Deal for What it Lacks Rather than Provisions*, INT'L TRADE REP. 1506, 1506 (Sep. 15, 1993). Several government officials involved in the NAFTA negotiations observed that the dispute resolution process was required for political reasons, and once NAFTA was approved, it had essentially served its' purpose. *See also* Richard Kiy & John D. Wirth, *Introduction to ENVIRONMENTAL MANAGEMENT ON NORTH AMERICA'S BORDERS* (Richard Kiy & John D. Wirth eds., 1998); Vaughan, *supra* note 109, at 9 (noting "the fact that sanctions and fines were thought to be necessary to halt the highly remote chance of pollution havens from taking root underscores the extent to which politics overshadowed any policy logic around the final environmental deal that emerged from the tatters of the highly acrimonious trade negotiations").

<sup>126</sup> When CEC was established in 1993, the U.S. government committed to develop Model Rules of Procedure. *See North American Free-Trade Agreement (NAFTA) and Supplemental Agreements to the NAFTA: Hearings Before the H. Comm. on Ways and Means*, 103rd Cong. (1993) (statement of Carol M. Browner, Administrator, EPA); Exec. Order No. 12,915, 59 Fed. Reg. 25775 (May 13, 1994). In 1995 the CEC commissioned the Bar Associations of the three countries to jointly draft the Model Rules; however, the draft rules were never adopted. *See* Jay M. Vogelsson, *Dispute Resolution Under the North American Agreement on Environmental Cooperation*, 30 INT'L L. 198, 200 (1996). The United States attempted again in the late 1990s to develop Model Rules. *See, e.g.*, CEC, SUMMARY RECORD, SESSION 98-07 OF THE COUNCIL (Sept. 3-4, 1998), [http://www.cec.org/sites/default/files/documents/sesiones\\_del\\_consejo/2197\\_sr98-7e\\_ES.pdf](http://www.cec.org/sites/default/files/documents/sesiones_del_consejo/2197_sr98-7e_ES.pdf) [<https://perma.cc/EL2J-PW47>]; CEC, SUMMARY RECORD, SESSION 99-09 OF ALTERNATIVE REPRESENTATIVES (1999) (on file with author). However, these efforts were not supported by either Mexico or Canada. At that time, very preliminary rules were drafted but still have never been finalized. Freedom of Information Act Request HQ-RIN-00457-04 (on file with author); *see also* Gary Hufbauer et al., *NAFTA and the Environment Americas: Lessons for Trade Policy* (Feb. 28, 2001), <http://ctrc.sice.oas.org/geograph/papers/ie/hufbauer0301-1.asp> [<https://perma.cc/GK4K-DWLH>]; John H. Knox, *A New Approach to Compliance with International Environmental Law: The Submissions Procedure of the NAFTA Environmental Commission*, 28 ECOLOGY L. Q. 1, 4-14 (2001) [hereinafter Knox, *A New Approach to Compliance with International Law*]. Efforts by the United States to establish Model

the arbitral panels,<sup>127</sup> both of which are required to initiate the dispute resolution process. In addition, the three governments may be subject to a monetary penalty for failure to enforce their laws,<sup>128</sup> but the United States, at least, has never established guidelines to define payment of the fines.<sup>129</sup> Based on these acts of commission and omission, it appears that the three countries, from the outset, had no intention of initiating the dispute resolution process.<sup>130</sup>

Subsequent trade agreements negotiated by the United States after NAFTA did not include a similar onerous dispute resolution process for the simple reason that by the time these later trade agreements concluded, it was evident that conditions required to initiate the formal dispute resolution process were unlikely ever to materialize, obviating the need for an onerous process. Moreover, even if the conditions did materialize, the countries could still avoid initiating the process because it was entirely under their control.<sup>131</sup> Thus, the argument that the effective enforcement obligation should be moved to the NAFTA and subject to dispute resolution under that agreement in order to be more effective is unwarranted. In retrospect, the United States and its trading partners did not need to craft an ineffective dispute resolution process within NAAEC, and the relocation of this policy to NAFTA rather than NAAEC does not change the fact that the countries have no basis or desire to challenge each other's enforcement activities.<sup>132</sup>

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Rules of Procedure appeared to be driven by the interest of specific individuals in the U.S. Environmental Protection Agency ("EPA") to maintain credibility of the process and by pressure from environmental groups.

<sup>127</sup> Pursuant to NAAEC, *supra* note 3, art. 25, the governments are required to "establish and maintain" a roster of up to forty-five individuals to serve as panelists for an arbitral panel for the process. To date, the three governments have never developed a roster of panelists.

<sup>128</sup> NAAEC, *supra* note 3, art. 34.

<sup>129</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO-01-933, NORTH AMERICAN FREE TRADE AGREEMENT: U.S. EXPERIENCE WITH ENVIRONMENT, LABOR, AND INVESTMENT DISPUTE SETTLEMENT CASES 49 (2001).

<sup>130</sup> See, e.g., Schorr, *supra* note 56; HUFBAUER ET AL., *supra* note 12; John J. Kirton, *Winning Together: The NAFTA Trade-Environment Record*, in LINKING TRADE, *supra* note 90; Knox, *A New Approach to Compliance with International Law*, *supra* note 126; John H. Knox, *Separated at Birth: The North American Agreements on Labor and the Environment*, 26 LOY. INT'L & COMP. L. REV. 359, 359-60 (2004).

<sup>131</sup> See Knox, *The Neglected Lessons of the NAFTA Environmental Regime*, *supra* note 6, at 397.

<sup>132</sup> See, e.g., Allen, *supra* note 41; confidential interview with private sector representative, by telephone, Washington, D.C. (Mar. 21, 2003); confidential interview with Mexican government official, in Mexico City, Mex. (Apr. 3, 2003); confidential interview with U.S.

Setting aside the likelihood that the process will be used or whether it is even needed, one concern over the use of a dispute resolution process with recourse to sanctions is whether it is the best policy approach to address lax enforcement of environmental laws. Some individuals argue for eliminating the dispute resolution process entirely, as punitive measures are unlikely to achieve the requisite strengthening of domestic enforcement capacities.<sup>133</sup> The capacity of a country to effectively enforce its laws is intrinsically tied to its level of development and internal societal pressures. While some external parties feel that coercion is necessary where governments lack the will or resources, it is unlikely to address the root cause of the lax enforcement. Rather, economic growth and greater societal awareness are more important drivers for environmental protection. Thus, the emphasis on sanctioning countries to improve enforcement of environmental law seems unnecessary, at best, and counterproductive, at worst.

#### *B. Ineffectiveness of Public Submission Process*

The public submission process is the other mechanism established under the NAFTA policy framework to address specific instances of lax enforcement of environmental laws. The minimally functional process, when employed, substantiates the legal claims of submitters and enhances

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government official, by telephone, Washington, D.C. (Feb. 26, 2003) (Relocating the effective enforcement commitment to NAFTA rather than NAAEC would also place implementation of the policy under the purview of the trade officials not environmental officials. While trade officials do have more expertise in implementing dispute resolution processes, they would be even more reluctant than environmental officials to pursue a claim related to effective enforcement of environmental laws. Historically, trade officials have been strongly opposed to using trade remedies to achieve non-trade (e.g., environmental) policy objectives. For NAFTA, trade officials largely viewed the environmental policies as the “price” for getting the trade agreement. Their primary concern has been ensuring that environmental obligations did not undermine the benefits of trade liberalization); see, e.g., *Position of USA\*NAFTA on the Environmental Side Agreement to the NAFTA*, in NAFTA & THE ENVIRONMENT, *supra* note 17, at 696; see, e.g., Allen, *supra* note 41; Schorr, *supra* note 56; *U.S. Groups Criticize Inaction on Peru FTA Forestry Sector Requirements*, INSIDE U.S. TRADE (Jun. 4, 2010) (showing the use of dispute resolution process and showing that over time, trade officials have become more comfortable with the inclusion of environmental policies as their locus has moved to the trade agreement, because this location allows for a high degree of policy control). Thus, placement of the effective enforcement obligation under NAFTA would guarantee that the process will never be used.

<sup>133</sup> Audley & Vaughan, *supra* note 6.

their credibility to pursue their claims within a broader context.<sup>134</sup> The process establishes a baseline for discussion and creates a compilation of facts derived from all interested stakeholders,<sup>135</sup> but in general, the submissions process has no measurable impact on enforcement levels in the countries. The process has been plagued with much controversy over the years, largely due to disagreements over the respective decision-making authorities, responsibilities, and levels of discretion of the governments and the CEC Secretariat<sup>136</sup> in the implementation of the process.<sup>137</sup> Critics describe the process as very time consuming, overly legalistic, and at odds with the cooperative mandates of CEC.<sup>138</sup> Despite efforts to resolve the disagreements and improve implementation of the process, problems remain. At present, the process has largely “fallen into disarray”<sup>139</sup> and become

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<sup>134</sup> Allen, *supra* note 85, at 191.

<sup>135</sup> *Id.* at 191.

<sup>136</sup> According to NAAEC, *supra* note 3, art. 10(1)(d) (The Parties are responsible for addressing questions and differences that may arise between the Parties regarding the interpretation and application of the NAAEC.). Some of the specific interpretative issues that have arisen for arts. 14 and 15 include the authority of the Council of Ministers to narrow the scope of factual records or to determine what constitutes sufficient information to allow the Secretariat to review the submission, or the authority of the Secretariat to determine the process used to gather information for a factual record or to release information obtained during preparation of a factual record to the public without Council approval. Closely related to the interpretative issues have been controversies over certain government actions to delay release of information, selectively disclose information, assert that domestic enforcement action has been undertaken (which deprives the CEC Secretariat of the authority to proceed), claims confidentiality to prevent full disclosure, or disapproval of Secretariat's recommendations and conclusions. *See generally* ENVTL. LAW INST., *supra* note 54; CEC JOINT PUBLIC ADVISORY COMMITTEE, LESSONS LEARNED, CITIZEN SUBMISSIONS UNDER ARTICLES 14 AND 15 OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION (2001); Jonathan Graubart, *Giving Meaning to New Trade-Linked “Soft Law” Agreements on Social Values: A Law-In-Action Analysis of NAFTA’s Environmental Side Agreement*, 6 UCLA J. INT’L L. & FOREIGN AFF. 425, 442–43 (2002); Tollefson, *supra* note 90, at 153–54; Hester, *supra* note 12, at 31–33.

<sup>137</sup> Serena Wilson, *Article 14–15 of the North American Agreement on Environmental Cooperation: Intent of the Founders*, in LINKING TRADE, *supra* note 90, at 187; *see also* Tollefson, *supra* note 90, at 153–54, 163–67; John H. Knox, *Fixing the CEC Submissions Procedure: Are the 2012 Revisions Up to the Task?*, 7 GOLDEN GATE U. ENVTL. L.J. 81 (2014), <http://digitalcommons.law.ggu.edu/gguelj/vol7/iss1/6> [<https://perma.cc/3KG7-52UU>] [hereinafter Knox, *Fixing the CEC Submissions Procedure*].

<sup>138</sup> *See generally* Kibel, *supra* note 90; Wilson, *supra* note 137; Victor Lichtinger, *NAFTA and the Environment: Five Years Later*, in FREE TRADE, *supra* note 56, at 222–23; Margaret Wilder, *Border Farmers, Water Contamination, and the NAAEC Environmental Side Accord to NAFTA*, 40 NAT. RES. J. 873 (2000).

<sup>139</sup> Hester, *supra* note 12, at 31.

“hobbled by intractable conflicts of interest, a lack of compulsory power to engage in the process, an absence of follow-up to factual records, and cumbersome procedural and substantive requirements that dilute its appeal to citizens and nongovernmental organizations.”<sup>140</sup> As a result, over the past few years, interested stakeholders rarely used the process.<sup>141</sup>

Over the years, supporters of the public submission process, including legal scholars and environmentalists, vigilantly monitored implementation of the process and proposed numerous recommendations to improve its effectiveness, including implementing procedural changes (e.g., allowing follow-up on completed factual records, defining deadlines for taking action), safeguarding the independence of the Secretariat, and recasting the submission process as a less formal or legalistic procedure.<sup>142</sup> While adopting some recommendations, the CEC declined to adopt others, especially those inhibiting the countries’ ability to exercise a high degree of control over the process.<sup>143</sup> Through this control, the countries maintain a minimally functional process, focusing on a limited number of narrowly defined instances of lax enforcement. Overall, the countries’ efforts to control the public submission process limit its potential to examine widespread patterns of non-enforcement, which could ultimately feed into the state-to-state dispute resolution process, discussed in Section III.A.<sup>144</sup>

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<sup>140</sup> *Id.* at 60.

<sup>141</sup> As of December 2017, a total of eighty-nine public submissions had been received by CEC (over a period of twenty-three years), and of these submissions, twenty-three factual records had been prepared while two submissions were still active and under review. Over the past five years, CEC has received just eleven submissions. CEC, *Registry of Submissions*, <http://www.cec.org/sem-submissions/registry-of-submissions> [https://perma.cc/3JCU-EKVT] (last visited Apr. 4, 2018).

<sup>142</sup> See, e.g., Knox, *Fixing the CEC Submissions Procedure*, *supra* note 137; Hester, *supra* note 12, at 67; see also Esty & Salzman, *supra* note 15, at 137; Knox, *The Neglected Lessons of the NAFTA Environmental Regime*, *supra* note 6, at 412 (“the CEC citizen-submissions procedure . . . would be far more effective if it were less under government control, incorporated clear legal findings and recommendations, and led to regular institutional follow-up.”).

<sup>143</sup> Knox, *Fixing the CEC Submissions Procedure*, *supra* note 137; Hester, *supra* note 12, at 66.

<sup>144</sup> Confidential interview with CEC Secretariat official, via telephone, Spain (Aug. 1, 2003) (“Part 5 ‘state-to-state dispute resolution’ has contaminated the public submission process and negotiations, the Parties are fearful that arts. 14 and 15 could lead to a Part 5 claim.”); see also confidential interview with Canadian environmental group representative, via telephone, British Columbia (Mar. 3, 2003) (“the Parties have tried to limit the potential of a factual record to demonstrate a persistent pattern of non-enforcement”); Wold, *supra* note 109, at 218 (“[t]he sanctions provisions cast a long shadow over the cooperative nature of the NAAEC and arguably have made the Parties hypersensitive to the citizen submission procedure for fear that an issue raised by a citizen could later become the subject of the more consequential governmental sanctions process.”).

As such, the countries are unlikely to cede or circumscribe any of their authorities over the process. While the dispute resolution process can only be initiated by the countries and they are unlikely to do so under their own volition, it is possible they might be pressured to do so based on the outcomes of the public submission process. Even though legal scholars provide reasonable and detailed justifications supporting modifications to improve implementation of the submissions process, all of which could be undertaken without renegotiating NAAEC,<sup>145</sup> these appeals to modify the process based on legal reasoning alone are insufficient to foster change. The existence and continued use of the process is driven by politics, not jurisprudence, and the political influence of the supporters of the process diminished over the years.

The inclusion of the public submission process in NAAEC was a political concession to the environmentalists when the side agreement was negotiated.<sup>146</sup> When the three countries crafted the submission process provisions in NAAEC in 1993 (Articles 14 and 15), they could not agree on the division of responsibilities between the governments and CEC Secretariat for administering the process.<sup>147</sup> As a result, NAAEC included only a general outline of the process with ambiguous language for how it would work in practice, leaving details of the process design for future negotiation.<sup>148</sup> Conceptually, the process envisioned a spotlight remedy, although the countries also recognized at the time that process could be a source of input into the state-to-state dispute resolution process if the submissions substantiated the existence of persistent patterns of non-enforcement.<sup>149</sup> As the likelihood of that linkage occurring increased over time, the countries sought to constrain the implementation of the process.

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<sup>145</sup> See, e.g., John H. Knox & David L. Markell, *Evaluating Citizen Petition Procedures: Lessons from an Analysis of the NAFTA Environmental Commission*, 47 TEX. INT'L L. J. 505, 520–29 (2012); Hester, *supra* note 12, at 37–63.

<sup>146</sup> Confidential interviews with two U.S. government officials, in Washington, D.C. (Feb. 26, 2003); confidential interview with U.S. government official, via telephone, Alexandria, VA. (Feb. 24, 2003); confidential interview with Mexican government official, in Washington, D.C. (Jun. 24, 2003).

<sup>147</sup> Confidential interview with U.S. government official, in Washington, D.C. (Feb. 26, 2003); see also Wilson, *supra* note 137, at 188; Tollefson, *supra* note 90, at 166–67.

<sup>148</sup> Confidential interview with U.S. government official, in Washington, D.C. (Feb. 26, 2003).

<sup>149</sup> Confidential interview with Canadian government official, in Ottawa, ON (Feb. 10, 2003); confidential interview with Canadian government official, in Ottawa, ON (Feb. 11, 2003); confidential interview with environmental organization representative, in Washington, D.C. (Jan. 7, 2003); confidential interview with US government official, in Washington, D.C. (Feb. 24, 2003); see also Hufbauer et al., *supra* note 126; Robert Housman et al., *Enforcement of Environmental Laws Under a Supplemental Agreement to the North American Free Trade Agreement*, 5 GEO. INT'L ENVTL. L. REV. 593 (1993).

Differences in interpretation of Articles 14 and 15 emerged almost immediately when implementation of the public submission process began in 1995.<sup>150</sup> To resolve these differences, both the CEC Secretariat and NAFTA countries took steps to develop more detailed guidelines for the process.<sup>151</sup> The CEC Secretariat first developed draft guidelines in 1995, but the countries never adopted these guidelines.<sup>152</sup> The countries then crafted the guidelines currently used to administer the process,<sup>153</sup> however these guidelines still left many aspects of the process open to interpretation because countries could not reach consensus amongst themselves.<sup>154</sup> Since that time, the CEC Secretariat has interpreted various aspects of Articles 14 and 15 left unclear by the guidelines, but the countries strongly disagreed with these actions.<sup>155</sup> The countries, in turn, sought several times to resolve the interpretative issues through revisions to the guidelines, including in 1998, 1999, 2000, and most recently in 2012.<sup>156</sup> However, some of these efforts were perceived as attempts to undermine the independence of the CEC Secretariat and the credibility of the public submission process<sup>157</sup>

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<sup>150</sup> Wilson, *supra* note 137, at 188; Tollefson, *supra* note 90, at 162; *see also* Marc Paquin et al., UNISFÉRA INTERNATIONAL CTR., *The Articles 14 & 15 Citizen Submission Process of the North American Agreement on Environmental Cooperation: Discussion Paper* (2003).

<sup>151</sup> Wilson, *supra* note 137, at 188.

<sup>152</sup> Confidential interview with U.S. government official, via telephone, Washington, D.C. (July 31, 2001); confidential interview with CEC Secretariat official, via telephone, Spain (Aug. 1, 2003).

<sup>153</sup> CEC, GUIDELINES FOR SUBMISSIONS ON ENFORCEMENT MATTERS UNDER ARTICLES 14 AND 15 OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION 5 (2012), <http://www3.cec.org/islandora/en/item/10838-guidelines-submissions-enforcement-matters-under-articles-14-and-15-north-en.pdf> [<https://perma.cc/WR6X-8J2L>]. Earlier versions of the guidelines were entitled: *Bringing the Facts to Light: A Guide to Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (2007).

<sup>154</sup> Confidential interview with U.S. government official, via telephone, Washington, D.C. (July 31, 2001); confidential interview with Canadian government official, via telephone, Ottawa, ON. (Mar. 3, 2003).

<sup>155</sup> *See, e.g.*, Tollefson, *supra* note 90; Kibel, *supra* note 90.

<sup>156</sup> Clifford T. Cosgrove, *The NAAEC after ten years: A qualitative assessment of the North American agreement on environmental cooperation*, at 63, 69 (Jun. 1, 2005) (unpublished thesis, University of Montana), <https://scholarworks.umt.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=9664&context=etd> [<https://web.archive.org/web/20180329225049/https://scholarworks.umt.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=9664&context=etd>]; Knox, *Fixing the CEC Submissions Procedure*, *supra* note 137, at 81.

<sup>157</sup> *See, e.g.*, Andrea Abel, *NAFTA's North American Agreement for Environmental Cooperation: A Civil Society Perspective*, AM. PROG. POL'Y REP. (Mar. 1, 2003); ENVTL. LAW INST., *supra* note 54; Wilson, *supra* note 137; Tollefson, *supra* note 90; Kibel, *supra* note 90; GREENING NAFTA, *supra* note 85, at 275; Wold, *supra* note 109.

and were strongly opposed by environmental groups; as a result, only minor changes were adopted.<sup>158</sup>

During the ensuing years, disagreements remain among the countries, CEC Secretariat, and external stakeholders over implementation of the public submission process. Two of the main criticisms raised about implementation of the process have been: "the inherent conflict of interest created when the Parties, as Council members, review Secretariat requests to develop or release factual records that pertain to their own enforcement records" and "the inability to compel a Party to comply with NAAEC's procedural and substantive requirements."<sup>159</sup> According to Knox,

The fundamental problem underlying all of these criticisms is that the procedure is overseen by the same Parties against which the submissions are directed. The Parties control key decision points including whether to authorize an investigation and whether to make public any resulting report, and they have found it difficult to resist the temptation to use their power over the submissions process to delay or limit reports that might criticize their environmental policies. Their efforts to protect themselves from embarrassment have often led to counter-efforts by CEC advisory bodies and environmental groups to defend the independence and effectiveness of the procedure.<sup>160</sup>

Over the years, political pressure from environmental groups and other external stakeholders safeguarded the submission process. These groups often worked with the Joint Public Advisory Committee and national advisory committee in the United States to garner U.S. support for the process. As such, the United States historically is the primary protector of the public submission process, with Mexico and Canada taking more adversarial positions and seeking to influence the implementation

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<sup>158</sup> ENVTL. LAW INST., *supra* note 54, at 29–33; Paquin et al., *supra* note 150, at 6–8; Tollefson, *supra* note 90, at 153–54; Wilson, *supra* note 137, at 189–90; confidential interview with CEC official, via telephone, Montreal, QC (Apr. 17, 2003).

<sup>159</sup> Hester, *supra* note 12, at 38; *see also* Knox, *Fixing the CEC Submissions Procedure*, *supra* note 137, at 82 (stating "[s]cholars and environmental advocates have increasingly criticized the procedure on three grounds: (a) it is far too slow, (b) the Parties interfere with it too often, and (c) the CEC does not follow-up factual records to determine whether they have led to real improvements.").

<sup>160</sup> Knox, *Fixing the CEC Submissions Procedure*, *supra* note 137, at 82.

of the process to protect their interests.<sup>161</sup> The ability of the United States to hold the line fluctuates depending on the political dynamics in the United States and involvement and political influence of the environmentalists. During the early years of implementation, many of the U.S. environmental groups who advocated for the process remained actively involved in monitoring the implementation of submission process and continued to wield considerable political influence.<sup>162</sup> Thus, the submission process functioned and saw great use. However, the environmental groups have gradually seen their political influence over time wane and with it, their influence over the public submission process.<sup>163</sup>

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<sup>161</sup> Ross E. Mitchell, *Evaluating the Submission Process of the Commission for Environmental Cooperation of NAFTA*, 15 J. ENV'T & DEV 297, at 309 (stating that “[i]n May 2000, . . . at the urging of the governments of Canada and Mexico, the Council deviated from the Secretariats recommendations to investigate matters brought forth in two citizen submissions.”); *see also* confidential interview with U.S. government official, in Washington, D.C. (Feb. 26, 2003) (“the Mexicans were always trying to limit the applicability of the process”); confidential interview with Canadian government official, via telephone, Ottawa, ON (Mar. 3, 2003) (“arts. 14 and 15 have been a source of friction between the Parties themselves, U.S. vs. Canada and Mexico. The U.S. had a different perception of the process, it was more proactive”); confidential interview with U.S. government official, in Washington, D.C. (Jun. 24, 2003) (“there was a lot of resistance to the SEM in Mexico, it didn’t have a tradition of citizen involvement, but there was also a lot of resistance by Canada as well, Canada was never proactive”); confidential interview with CEC Secretariat official, via telephone, Spain (Aug. 1, 2003) (“The Parties tried to revise the guidelines, but the changes were opposed by the U.S. The U.S. is the self-appointed defender of the SEM process.”).

<sup>162</sup> *See* Wold, *supra* note 109, at 214 (noting the impact that U.S. environmental organizations had on the origination of the NAAEC environmental provisions).

<sup>163</sup> Environmental groups from all three countries were actively involved in the political debate over the environmental effects of NAFTA and recommended specific environmental policies for inclusion in NAFTA and NAAEC, and a significant amount of their recommendations were incorporated. After NAFTA and NAAEC entered into effect, some environmental groups monitored the agreements implementation and actively participated in some of the activities of the CEC, as well as served on the Joint Public Advisory Committee and national level advisory committees in each country. These advisory committees have served as an important vehicle for transmitting input to the countries on the NAFTA environmental policies, but as of 2017, only the U.S. national and government level advisory committees were still active. *See* CEC, *Advisory Committees*, <http://www.cec.org/about-us/council/advisory-committees> [<https://perma.cc/9WT6-PM8D>] (last visited Apr. 4, 2018); TEN-YEAR REVIEW AND ASSESSMENT COMMITTEE, TEN YEARS OF NORTH AMERICAN ENVIRONMENTAL COOPERATION, at 34 (2004), <http://www.cec.org/islandora/en/item/11382-ten-years-north-american-environmental-cooperation-report-ten-year-review-and-assessment-en.pdf> [<https://perma.cc/BF3A-7F8E>] (“[m]ore so than any NGO could, JPAC can observe and remain up-to-date on CEC issues. Its direct access to the

Upon its creation, the public submission process increased openness and public involvement in environmental matters primarily in Mexico, in particular for environmental groups who had limited mechanisms for challenging their governments' regulatory actions.<sup>164</sup> The conflict over its implementation has not been due to a lack of reasonable legal interpretations of NAAEC to develop functional guidelines, but rather due to differing political interests of the countries. As such, any resolution of the interpretation and implementation issues will need to be through political not legal means, just as in the past. The functionality of the submission process directly relates to the political power of its core constituency: the environmentalists, and their ability to influence the United States. As the political power of the environmentalists diminishes or the United States ceases to act as the protector of the process for other reasons, the process will languish, just as over the past few years.<sup>165</sup>

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Council and the Secretariat helps keep the Parties . . . responsive to their constituencies in a way that a broader, more generalized public discourse could not.”).

<sup>164</sup> Confidential interviews with two U.S. government officials, in Washington, D.C. (Feb. 26, 2003); confidential interview with U.S. government official, via telephone, Alexandria, Va. (Feb. 24, 2003); confidential interview with Mexican government official, in Washington, D.C. (Jun. 24, 2003).

<sup>165</sup> In addition to NAFTA, there are several other trade agreements that include provisions for a public submissions process that is overseen by a third party organization, not the governments of the trading partners. None of these processes appear to be widely used or effective. For example, under the Canada-Chile Agreement on Environmental Cooperation, which is the environmental side agreement to the Canada-Chile Free Trade Agreement, the two countries established a public submissions process and Joint Submissions Committee to review the submissions. This submissions process was modeled directly after the process in NAAEC, arts. 14 and 15. The submission process became active in 1997 and appears to have been functional for about ten years, during which time a total of five public submissions were received; for four of these submissions, the Joint Submissions Committee recommended not to develop a factual record, while for one submission, the process was terminated early, thus the process has never produced a factual record evaluating the alleged claim of non-enforcement. The Canada-Chile public submission process has not been used in about a decade. See *Citizen submissions on Canada-Chile environmental matters*, GOV. OF CAN., <https://www.canada.ca/en/environment-climate-change/corporate/international-affairs/partnerships-countries-regions/latin-america-caribbean/canada-chile-environmental-agreement/citizen-submission-process-commission/matters.html#a02-01> [<https://perma.cc/KKM6-3B7N>] (last visited Apr. 4, 2018). Under DR-CAFTA, the United States and its six trading partners similarly created a public submissions process that is administered by the Secretariat for Central American Economic Integration. See SECRETARIAT FOR ENFORCEMENT MATTERS, <http://www.saa-sem.org/indexEN.html> [<https://perma.cc/J8NG-YABF>] (last visited Apr. 4, 2018). Since 2006, when the submissions process became operational, a total of thirty-six submissions have been received; of these submissions, two submissions have resulted in the publication of

C. *Continued Conflict of Rules*

Domestic environmental laws and MEA trade-related measures can violate free trade agreement disciplines and principles under certain circumstances, but NAFTA includes several policies directed at safeguarding these types of environmental measures from preemption. With respect to MEAs, NAFTA Article 104 offers some of the strongest protection for trade-related measures of any existing regional or multilateral trade agreement,<sup>166</sup> but it only covers three MEAs,<sup>167</sup> some call for expanding the list of MEAs covered under this Article.<sup>168</sup> The perceived peril that MEAs face is highlighted by the failure of trade officials to identify approaches to reconcile the conflict between trade rules and MEAs over

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a factual record, ten submissions still active and under review or preparation of a factual record is underway, although some of the active submissions date back to 2011. Twenty-four submissions did not meet the criteria for preparation of a factual record or were withdrawn. See *Registro Público Casos*, SECRETARIAT FOR ENFORCEMENT MATTERS, <http://www.saa-sem.org/listaCasos.html> [<https://perma.cc/4F2W-UKMY>] (last visited Apr. 4, 2018).

<sup>166</sup> Knox, *The Neglected Lessons of the NAFTA Environmental Regime*, *supra* note 6, at 416 (“NAFTA environmental regime has only two elements [to address a conflict of rules]: NAFTA Article 104, which addresses potential conflicts with a limited number of environmental agreements . . . . The first eight post-NAFTA agreements weaken these already feeble provisions. The Jordan Free Trade Agreement does not refer to the potential conflict with multilateral environmental agreements (“MEAs”) at all; later agreements refer to it, but only to suggest that the parties may consult with one another about the relationship between MEAs and trade obligations in light of the ongoing discussions at the WTO.”); see TPP, *supra* note 8 (the most recent trade agreement negotiated by the United States, TPP, provides even weaker provisions for reconciling conflicts between trade rules and MEAs. The policy related to reconciling conflicts between trade agreements and MEAs states: “[t]he Parties emphasise the need to enhance the mutual supportiveness between trade and environmental law and policies, through dialogue between the Parties on trade and environmental issues of mutual interest, particularly with respect to the negotiation and implementation of relevant multilateral environmental agreements and trade agreements”).

<sup>167</sup> NAFTA, *supra* note 1, art. 104 (covering the Convention on International Trade in Endangered Species of Wild Fauna and Flora, Montreal Protocol on Substances that Deplete the Ozone Layer, and Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal). Additionally, there are also two bilateral agreements covered under art. 104: The Agreement Between the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Waste and The Agreement Between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area. Under art. 104(2), the Parties may add other environmental or conservation agreement to the list.

<sup>168</sup> Esty & Salzman, *supra* note 15, at 134.

the past twenty years at the multilateral level.<sup>169</sup> The WTO Committee on Trade and Environment (“CTE”) produced no tangible guidelines towards that end; rather, the deliberations under the WTO CTE “have revealed major conflicts over the conceptualization of, and future prescriptions for, trade-environment linkages in general, and on the MEA question in particular.”<sup>170</sup> The lack of progress appears to be due primarily to “deep-seated differences in national interests, particularly between developed and developing countries.”<sup>171</sup> Thus, in principle, the addition of other MEAs to the Article 104 list seems prudent. However, in practice, trade-related measures associated with MEAs remain unchallenged under trade regime rules, and as such, the conflicts of rules may be “more academic than real.”<sup>172</sup>

NAFTA also includes several provisions intended to protect domestic environmental standards from challenge under trade agreements<sup>173</sup> strongly influenced by the GATT arbitral panel ruling in 1991 against U.S. restrictions on tuna imports from Mexico.<sup>174</sup> Concerns over the adequacy of these policies persist, but since the late 1990s and early 2000s, numerous decisions by the Appellate Body of the WTO “[indicate] that it [WTO Appellate Body] would interpret trade agreements in ways that were less likely to run afoul of domestic and multilateral environmental

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<sup>169</sup> See, e.g., Eckersley, *supra* note 66; Richard Tarasofsky & Alice Palmer, *The WTO in Crisis: Lessons Learned from the Doha Negotiations on the Environment*, 82 INT'L AFF. 899 (2006) (The GATT/WTO established a Committee on Trade and Environment in 1994 to reconcile potential conflicts between trade rules and environmental laws, including MEAs); see WTO, *The Committee on Trade and Environment*, [https://www.wto.org/english/tratop\\_e/envir\\_e/wrk\\_committee\\_e.htm](https://www.wto.org/english/tratop_e/envir_e/wrk_committee_e.htm) [<https://perma.cc/GBD5-5KBB>] (last visited Apr. 4, 2018); see also Rachel McCormick, *A Qualitative Analysis of the WTO's Role on Trade and Environment Issues*, 6 GLOB. ENVTL. POL. 102, 105–06 (2006).

<sup>170</sup> Eckersley, *supra* note 66, at 46.

<sup>171</sup> Robert Falkner & Nico Jaspers, *Environmental Protection, International Trade and the WTO*, in THE ASHGATE RES. COMPANION TO INT'L TRADE POL'Y 19 (Ken Heydon & Steven Woolcock, eds., 2012), [https://static1.squarespace.com/static/538a0f32e4b0e9ab915750a1/t/538db556e4b038f0a6eff7c4/1401795926548/Falkner\\_Jaspers\\_2012\\_Environment\\_Trade\\_WTO\\_final\\_ms.pdf](https://static1.squarespace.com/static/538a0f32e4b0e9ab915750a1/t/538db556e4b038f0a6eff7c4/1401795926548/Falkner_Jaspers_2012_Environment_Trade_WTO_final_ms.pdf) [<https://perma.cc/4NFR-XP6M>].

<sup>172</sup> Tarasofsky & Palmer, *supra* note 169, at 903; see also Eckersley, *supra* note 66.

<sup>173</sup> NAFTA, *supra* note 1, art. 2005(3) allows the NAFTA Parties to resolve disputes related to sanitary and phytosanitary measures or standards-related measures under the substantive and procedural provisions of NAFTA rather than GATT. NAFTA, *supra* note 1, art. 2007. NAFTA allows the use of environmental experts in the state-to-state dispute resolution process. NAFTA, *supra* note 1, at 368. Also, NAFTA provides some assurance that environmental regulations may not be challenged as technical barriers to trade.

<sup>174</sup> See Esty & Salzman, *supra* note 15, at 122, 127.

rules than critics had feared.”<sup>175</sup> Through various arbitration proceedings that involved challenges to environmental laws, “the Appellate Body has rejected virtually all of the reasoning of the Tuna-Dolphin panel, incorporated many of the suggestions made by environmental critics, and upheld some of the challenged laws.”<sup>176</sup> Thus, with respect to some domestic environmental laws, the “WTO jurisprudence has evolved significantly to allow more domestic regulatory freedom” and “restrictions against extra-territorial application of environmental regulations are largely make-weights, PPM-based distinctions can be WTO-legal, and the burden of justifying environmental regulations has shifted more onto complainants seeking to invalidate regulations.”<sup>177</sup> This evolution indicates that the conflict between domestic environmental laws and trade rules today may not be as significant as when the conflict first emerged over twenty-five years ago.

*D. Regulatory Expropriations Under the Investor-State  
Dispute Settlement*

The potential for NAFTA Chapter 11 to weaken implementation of environmental regulations came to the fore after the trade agreement entered into effect and the investor rights embodied in this chapter came under sustained attack by environmentalists.<sup>178</sup> Under Chapter 11 protects investors from the NAFTA countries “against potential discriminatory treatment or uncompensated expropriations of investments by the host country.”<sup>179</sup> Investors use these protections to bring claims of expropriation

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<sup>175</sup> Knox, *The Neglected Lessons of the NAFTA Environmental Regime*, *supra* note 6, at 401.

<sup>176</sup> *Id.*

<sup>177</sup> Hajin Kim, *Do Trade Liberalization and International Trade Law Constrain Domestic Environmental Regulation?*, 43 ENVTL. L. REV. 10823, 10831 (2013).

<sup>178</sup> See, e.g., QUENTIN KARPILOW ET AL., NAFTA: 20 YEARS OF COSTS TO COMMUNITIES AND THE ENVIRONMENT 7 (2014), <http://big.assets.huffingtonpost.com/NAFTAReport.pdf> [<https://perma.cc/H3BV-DYUB>]; see also *U.S. Environmental Groups Urge Inclusion of Lacey Act Language in TPP*, INSIDE U.S. TRADE (Jun. 4, 2010) [hereinafter *U.S. Environmental Groups Urge Inclusion*] (“[t]he [environmental] groups also reiterated their arguments that the Obama administration should . . . dramatically scale back the ability of private entities to challenge governments through an investor-state arbitration mechanism. . . . Environmental groups worry that investor-state arbitration presents a threat to the ability of governments to regulate in the public interest, because those regulations could become subject to legal challenges brought by private entities under the FTA.”).

<sup>179</sup> Gaines, *supra* note 77, at 1; NAFTA, *supra* note 1, art. 1110 (“No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in

when host countries take actions to implement or enforce environmental laws, resulting in regulatory expropriations or “takings.”<sup>180</sup> These successful rulings not only require compensation from the host country, but also have the potential to undermine enforcement or enactment of environmental laws for fear that investors will claim a regulatory expropriation and seek compensation in the future.<sup>181</sup>

Recommendations for limiting the potential for investors to claim regulatory expropriations range from revision of the investor rights to complete elimination of Chapter 11.<sup>182</sup> Although the potential for Chapter 11 to be used for regulatory expropriation was unforeseen, since it has emerged, the U.S. government has modified the investor protection provisions within the most recent trade agreement it negotiated, TPP, to limit the scope for expropriation.<sup>183</sup> The modification to TPP provisions validate the concerns raised about use of the investor protections to undermine domestic environmental laws, and thus justify similar revisions to NAFTA. However, it is possible that the potential to undermine domestic environmental laws is not as great as envisioned. Earlier rulings for “regulatory expropriation” cases, such as *Metalclad Corporation v. United Mexican States*, “adopted a broad standard that, if taken literally, would

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its territory or take a measure tantamount to nationalization or expropriation of such an investment (‘expropriation’), except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation in accordance with paragraphs 2 through 6.”)

<sup>180</sup> Knox, *The Neglected Lessons of the NAFTA Environmental Regime*, *supra* note 6, at 402–03, 417.

<sup>181</sup> See, e.g., Christopher Oliver, *The Treadmill of Production Under NAFTA*, 18 *ORG. & DEV.* 55 (2005).

<sup>182</sup> COUNCIL OF CANADIANS, *supra* note 79, at 4, 12.

<sup>183</sup> TPP, *supra* note 8, art. 9.8 (“No Party shall expropriate or nationalise a covered investment either directly or indirectly through measures equivalent to expropriation or nationalisation (expropriation), except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate and effective compensation in accordance with paragraphs 2, 3 and 4; and (d) in accordance with due process of law”); NAFTA, *supra* note 1, art. 1110 (showing that the key difference between TPP and NAFTA is replacement of the statement “take a measure tantamount to nationalization or expropriation” with “measures equivalent to expropriation or nationalization.” The changes seeks to eliminate the problematic interpretation of the phrase “tantamount to nationalization or expropriation.”); Sanford Gaines, *Methanex Corp. v. United States*, 100 *AM. J. OF INT’L L.* 683, 684–85 (2006) (“The vexing interpretive question in Article 1110 is whether the phrase ‘tantamount to expropriation’ merely clarifies the right to compensation for indirect expropriations, or whether it creates a broader right for compensation for measures with lesser effect on the investment.”).

mean that almost any regulation that significantly restricts the use of property would be an expropriation.”<sup>184</sup> However, “a later tribunal adopted a standard much more protective of nondiscriminatory regulation,”<sup>185</sup> indicating that the arbitral panels are giving more careful consideration to the merits and context of the claims.

Based on a review of several regulatory expropriation cases involving environmental measures under NAFTA Chapter 11, Gaines determined that “[t]he facts of the cases and developments subsequently indicate that the government actions in the first three cases were not truly environmental protection measures, but were motivated by local political and economic considerations. The fourth claim, which involved a bona fide environmental protection, was rightly rejected.”<sup>186</sup> Thus, rulings under Chapter 11 related to regulatory expropriation due to environmental laws do not appear to be targeting legitimate regulations. Nonetheless, some “critics remain concerned that environmental and other social regulations are at risk of successful challenge under the investment provisions in NAFTA and later agreements.”<sup>187</sup> However, Gaines argues that “environmentalists have little ground for alarm, and much reason to be encouraged, about how Chapter 11 has influenced environmental protection.”<sup>188</sup>

### *E. Underfunding of CEC*

The overarching mandate of NAAEC is to promote environmental cooperation to strengthen environmental management and protection in North America to counter the scale and sectoral effects of trade liberalization under NAFTA. Since NAFTA entered into effect, CEC has implemented a broad range of environmental cooperative initiatives between the United States, Mexico, and Canada.<sup>189</sup> The overall funding for these initiatives has generally been considered inadequate, given the size of the

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<sup>184</sup> Knox, *The Neglected Lessons of the NAFTA Environmental Regime*, *supra* note 6, at 402.

<sup>185</sup> *Id.*

<sup>186</sup> Gaines, *supra* note 77, at 171.

<sup>187</sup> Knox, *The Neglected Lessons of the NAFTA Environmental Regime*, *supra* note 6, at 402–03.

<sup>188</sup> Gaines, *supra* note 77, at 171; *see also* Esty & Salzman, *supra* note 15, at 11, 136.

<sup>189</sup> *See* Allen, *supra* note 85, at 137–38; GREENING NAFTA, *supra* note 85, at 25–26; COMM. FOR ENVTL. COOPERATION, STRATEGIC PLAN 2015–2020 at 1 (July 15, 2015), [http://www.cec.org/sites/default/files/documents/strategic\\_plans/strategic\\_plan\\_2015\\_2020.pdf](http://www.cec.org/sites/default/files/documents/strategic_plans/strategic_plan_2015_2020.pdf) [<https://perma.cc/4YSD-VXT6>].

economies of the three countries, and the actual impacts of these cooperative efforts on environmental management has been trivial. As such, there have been continued calls to increase funding for the cooperative programs. However, there is little evidence that the environmental conditions in any of the countries has deteriorated due to changes in levels or location of economic activities under NAFTA. As was discussed under Section III.A, NAFTA has not given rise to pollution havens, fostered greater environmental degradation in Mexico, or weakened environmental management in the NAFTA countries. Some supporters of NAAEC have argued that the side agreement is still useful for advancing sustainable development within North America, providing a general forum for hemispheric environmental cooperation unrelated to NAFTA, or enhancing environmental governance.<sup>190</sup> Numerous government officials involved in negotiation of NAAEC envisioned that the cooperative mandate of NAAEC would be the mandate to endure over the long term and would be used to the extent needed by the countries, and that is largely how it has played out.<sup>191</sup> Environmental policy problems vary in magnitude and scope across the hemisphere and CEC provides a governance structure that allows countries to collectively decide what problems they will work on, when, and in what manner. As a general forum for hemispheric environmental cooperation, CEC is most useful for problems that are truly hemispheric in scope. However, as a forum for building institutional capacity to address the environmental effects of NAFTA, it is neither effective nor needed any longer.

#### F. *Absence of "Emerging" Environmental Concerns*

Within the past decade, a new criticism of the NAFTA environmental policies has been that they do not address emerging environmental concerns, such as illegal exploitation of and trade in natural resources or the fulfillment of obligations under MEAs, concerns that featured prominently in the negotiation of environmental policies for TPP.<sup>192</sup> When

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<sup>190</sup> See, e.g., Esty & Salzman, *supra* note 15, at 11, 136.

<sup>191</sup> See Allen, *supra* note 41, at 321; see also confidential interview with U.S. government official, in Washington, DC (Feb. 24, 2003); confidential interview with U.S. government official, in Washington, DC (Feb. 26, 2003); confidential interview with Canadian government official, in Ottawa, ON (Feb. 12, 2003).

<sup>192</sup> See, e.g., OFFICE OF THE U.S. TRADE REPRESENTATIVE, *Trade Facts: Bipartisan Agreement on Trade Policy* at 2 (2007), <http://www.ustr.gov/sites/default/files/uploads/factsheets>

NAFTA was negotiated over twenty-five years ago, the major environmental concerns at the time were a range of hypothetical effects of trade liberalization such as industry flight, pollution havens, downward harmonization, and conflicts between environmental laws and trade regime rules.<sup>193</sup> However, these hypothetical effects never materialized, and environmentalists shifted their focus to a narrower set of specific environmental concerns that may not be linked directly to trade liberalization but still require urgent attention from the international community.<sup>194</sup> While these concerns are new to the trade policy domain, they are not new to the environmental policy domain. In fact, they have been the focus of global efforts for many years. Moreover, the broad mandate of NAAEC allows the NAFTA countries to work on these policy issues on a cooperative basis. Thus, the lack of focus on these issues in NAFTA should not be viewed necessarily as a shortcoming.

Regardless, environmentalists have sought binding, enforceable commitments in newer trade agreements on these emerging concerns. For example, environmentalists pressed for inclusion of enforceable policies to reduce overfishing, and illegal trade in wildlife and timber in TPP,<sup>195</sup> even though the extent to which these problems were present in the TPP countries varied and they were not likely to worsen solely due to TPP.<sup>196</sup> The overexploitation of these natural resources is a serious, long-standing

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/2007/asset\_upload\_file127\_11319.pdf [https://perma.cc/W29W-KWGC]; OFFICE OF THE U.S. TRADE REPRESENTATIVE, *USTR Green Paper on Conservation and the Trans-Pacific Partnership* (2011), <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2011/ustr-green-paper-conservation-and-trans-pacific-partnership> [https://perma.cc/PRC6-GXU4] [hereinafter *USTR Green Paper*]; U.S. Environmental Groups Urge Inclusion, *supra* note 178; *Addressing conservation challenges in the Trans-Pacific Partnership Agreement* (2013) [hereinafter *Addressing conservation challenges*]; Letter from 24 Nongovernmental Organizations to USTR Michael Froman (Nov. 26, 2013), <http://nffc.net/wp-content/uploads/2013/03/Letter-on-G33-Proposal-US-groups-Nov-26.pdf> [https://perma.cc/LG4A-9F45]; Bipartisan Congressional Trade Priorities Act of 2014, 113th Cong., 2d Sess., U.S. Finance Committee (2014).

<sup>193</sup> AUDLEY, *supra* note 4.

<sup>194</sup> *Environmental Groups Laud New Peru Language as First Step*, INSIDE U.S. TRADE (Jun. 29, 2007).

<sup>195</sup> U.S. Environmental Groups Urge Inclusion, *supra* note 178; U.S. Tables Parts of TPP Environmental Text on Conservation Issues, INSIDE U.S. TRADE (Apr. 1, 2011); *Addressing conservation challenges*, *supra* note 192; *USTR Green Paper*, *supra* note 192.

<sup>196</sup> OFFICE OF THE U.S. TRADE REP., *Trans-Pacific Partnership Agreement; Interim Environmental Review* ii (2013), <http://www.ustr.gov/federal-register-notices/trans-pacific-partnership-agreement-interim-environmental-review> [https://perma.cc/9PUP-22VV] [hereinafter OFFICE OF THE U.S. TRADE REP., *Trans-Pacific Partnership Agreement*].

global problem that has not been dealt with effectively in existing fora.<sup>197</sup> Overfishing has been a problem for many years, with over 60 percent of fishing stocks fully exploited or depleted,<sup>198</sup> but regional management authorities have not been able to stem the decimation. Likewise, illegal trade in wildlife has been addressed on a limited basis under MEAs such as CITES,<sup>199</sup> while trade in illegally logged timber<sup>200</sup> has been particularly challenging to address.<sup>201</sup> Environmentalists have also pressed for enforceable policies to ensure fulfillment of obligations under certain MEAs, something that many developing countries have struggled to achieve. Overall, there is considerable merit to addressing these environmental problems, and despite the long-standing efforts to do so at the international level, trade agreements provide another vehicle for making progress. Moreover, by shifting their focus to more politically salient, tangible, or highly visible environmental problems, environmentalists are able to regain some influence within the trade policy domain.

Inclusion of these new policies within NAFTA, as well as other trade agreements, however, has several potential negative repercussions that must be weighed against the positive benefits that may arise from these policies.<sup>202</sup> First, policies related to management of natural resources within countries have implications for infringement of state sovereignty. The implementation of similar policies for management of the forest sector under the U.S.-Peru free trade agreement provides an extremely cautionary lesson that stronger enforceable commitments are not easily implemented and can have unintended consequences that may undermine domestic political processes.<sup>203</sup> Inclusion of these types of

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<sup>197</sup> See, e.g., *USTR Green Paper*, *supra* note 192.

<sup>198</sup> See, e.g., FOOD AND AGRIC. ORG., THE STATE OF WORLD FISHERIES AND AQUACULTURE 2008 (2009), <http://www.fao.org/docrep/011/i0250e/i0250e00.htm> [<https://perma.cc/CEM4-7CYY>]; Steven A. Murawski, *Rebuilding depleted fish stocks: The good, the bad, and, mostly, the ugly*, 67 ICES J. OF MARINE SCI. 1830, 1832, 1835–36 (2010).

<sup>199</sup> Stephanie Eberhardt, *The Lacey Act Amendments and United States' policing of international trade*, 35 HOUSTON J. OF INT'L L. 397, 415 (2013).

<sup>200</sup> Ryan Villarreal, *Interpol Launches Crackdown on Global Timber Trafficking In Latin America*, INT'L BUS. TIMES (Feb. 2, 2013), <http://www.illegal-logging.info/content/interpol-launches-crackdown-global-timber-trafficking-latin-america> [<https://perma.cc/QE2Y-UFQ5>].

<sup>201</sup> See, e.g., Vanda Felbab-Brown, *Not as easy as falling off a log: The illegal logging trade in the Asia-Pacific Region and possible mitigation strategies V* (Foreign Pol'y at Brookings, Working Paper No. 5, Mar. 2011), <https://www.brookings.edu/research/not-as-easy-as-falling-off-a-log-the-illegal-logging-trade-in-the-asia-pacific-region-and-possible-mitigation-strategies/> [<https://perma.cc/9YV9-G4TX>].

<sup>202</sup> See Allen, *supra* note 15, at 50–51 (a more detailed discussion of these repercussions).

<sup>203</sup> The forest sector commitments under the U.S.-Peru free trade agreement required

environmental policies in trade agreements may also undermine the

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substantial changes to domestic laws and institutions within eighteen months after the trade agreement took effect, which was in Apr. 2006. In order to implement the forest sector commitments within that time frame, the Peruvian president was granted extraordinary powers in 2008 to unilaterally enact legislation, but these power was severely abused, resulting in laws without adequate public or political consultation that weakened the existing levels of protection of forest resources in the country. *See, e.g.*, Sikina Jinnah, *Strategic Linkages: The Evolving Role of Trade Agreements in Global Environmental Governance*, 20 *J. OF ENV'T & DEV.* 191, 192–93, 207 (2011) (The forest sector policies created “perverse incentives for the Peruvian government to subvert standard national regulatory developed channels”); Neil Hughes, *Indigenous protest in Peru: The ‘Orchard Dog’ bites back*, 9 *SOC. MOVEMENT STUD.* 85 (2010); *see* ENVTL. INVESTIGATION AGENCY, *Peru’s forest sector: Ready for the new international landscape?* (2010), <http://www.illegal-logging.info/content/perus-forest-sector-ready-new-international-landscape> [<https://perma.cc/F3FK-A3YL>] (violent protests over the laws by indigenous groups resulted in the deaths of at least thirty Peruvians. *See, e.g.*, *Peru Says it is Complying with Small Fraction of FTA Forestry Obligations*, *INSIDE U.S. TRADE* (Sep. 20, 2010); *U.S. ‘Monitoring Situation’ after Peru Fails to Act on New Forestry Law*, *INSIDE U.S. TRADE* (Dec. 24, 2010); *U.S. Has No Solid Timeline For Peru To Comply With FTA Forestry Annex*, *INSIDE U.S. TRADE* (May 6, 2011); Press Release, Office of the USTR, The United States and Peru Reach Agreement on Action Plan to Strengthen Forest Sector Governance (Jan. 11, 2013), <http://www.ustr.gov/about-us/press-office/press-releases/2013/january/us-peru-action-plan-forest-sector-governance> [<https://perma.cc/8AKW-9W84>]; *Peruvian Documents on Forestry Annex Show Commitments Not Fully Met*, *INSIDE U.S. TRADE* (Oct. 2, 2015); *USTR Comes Under Fire for Weak Oversight of Peru FTA Logging Rules*, *INSIDE U.S. TRADE* (June 12, 2015); *U.S. Meets with New Peruvian Administration to Discuss Illegal Logging Issues*, *INSIDE U.S. TRADE* (Nov. 18, 2016) (showing that implementation of the forest sector commitments has been arduous, resource intensive, and time-consuming process). *See* USTR, in *‘Unprecedented’ Action, Orders Halt of Peruvian Timber Imports*, *INSIDE U.S. TRADE* (Oct. 27, 2017) (to support implementation of the commitments, the United States provided full-time staff with expertise in forestry management along with \$60 million in assistance. Although some progress has been made, in 2017, the United States halted shipments of some timber imports due to possible illegal harvesting. According to USTR, “[w]hile the Forest Annex has catalyzed meaningful reforms in Peru’s forestry sector, the verification process last year highlighted the systemic challenges that remain in combating illegal logging in Peru.”); *see* Interagency Committee on Trade in Timber Products from Peru, Statement Regarding July 2016 Timber Verification Report from Peru 4 (Aug. 17, 2016), <https://ustr.gov/sites/default/files/IssueAreas/Environment/Timber%20Committee%20Report.pdf> [<https://perma.cc/L27W-TDFF>]; *see also* USTR, UNITED STATES-PERU TRADE PROMOTION AGREEMENT: STRENGTHENING FOREST SECTOR GOVERNANCE IN PERU (2013), <http://www.ustr.gov/sites/default/files/2013-Progress-under-the-Forest-Annex.pdf> [<https://perma.cc/RSS6-VVNU>]; *United States-Peru Environmental Cooperation Work Program (2015–2018)*. The U.S. interagency committee that reviewed the documentation on illegal timber shipments acknowledged that challenges remain for Peru to implement its obligations under the trade agreement, “[t]he bilateral action plan and other recent efforts spurred additional progress in Peru’s governance of its forestry sector. . . . However, complex challenges remain that will require continued, vigilant engagement, attention, and collaboration. This verification process highlighted, in particular, ongoing challenges to ensuring timely enforcement.

general credibility and effectiveness of the multilateral system for managing environmental issues,<sup>204</sup> create differential environmental policy obligations on trading partners,<sup>205</sup> create enforceable obligations that require substantial funding allocations and assistance that may never materialize, and place important MEA or other environmental commitments under the purview of non-environmental government agencies that may not have the expertise or inclination to ensure effective implementation of obligations.<sup>206</sup> Thus, while the environmental concerns raised more recently by environmentalists all have merit and require immediate action, the inclusion of enforceable policies within a regional trade agreement to address them should be given careful consideration.

*G. Summary of Rhetoric vs. Reality*

Although the environmental policies included under NAFTA are some of the most far-reaching and robust of any existing trade agreement,<sup>207</sup> these policies have been the subject to ongoing criticisms over the years with accompanying calls for their renegotiation. Major criticisms of the policies include the inadequacy of the two mechanisms established to ensure effective enforcement of environmental laws, insufficient protections of MEAs and domestic environmental laws from preemption by trade regime rules, use of investor rights under NAFTA Chapter 11 to claim regulatory expropriations, underfunding of the CEC, and the absence of enforceable policies to reduce overexploitation or illegal trade in natural resources, or fulfill MEA obligations. Based on a detailed review of these criticisms, the rhetoric for modifying the policies is not supported by the reality.

The commitment to effectively enforce environmental laws and associated state-to-state dispute resolution process and public submission process have not had measurable impact on enforcement activities by the NAFTA countries, and arguments have been made to modify both processes. The state-to-state dispute resolution process has never been invoked because the conditions that trigger the process have not materialized; however, the countries would be loath to initiate the process even if the conditions did materialize. Incorporating the commitment for

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<sup>204</sup> See, e.g., Jinnah, *supra* note 203.

<sup>205</sup> See, e.g., *U.S. TPP Environment Proposal Follows 'May 10', But May Have Different Effects*, INSIDE U.S. TRADE (Nov. 18, 2011).

<sup>206</sup> See, e.g., Allen, *supra* note 85 (for NAFTA environmental policies).

<sup>207</sup> OECD, *supra* note 26.

effective enforcement into the NAFTA itself will not change the fact that the countries have no basis or desire to challenge each other's enforcement activities. The implementation of the public submission process, the other mechanism established for ensuring effective enforcement, has been problematic due to resistance from Mexico and Canada. However, overcoming this resistance depends on the political power of its core constituency, the environmentalists, and their ability to influence the United States, not on the power of legal reasoning. Given the general decline of saliency these concerns over the years,<sup>208</sup> it is unlikely that environmentalists will have the political power to return the public submission process to a fully functional level.

NAFTA includes some of the most robust provisions for protection for MEA trade-related measures and domestic environmental regulations and standards against challenge by trade rules; however, the conflicts between these two policy domains appear to be "more academic than real." Challenges to MEAs have never occurred while challenges to domestic regulations have increasingly seen favorable rulings in support of the environmental measures. The potential use of the investor rights provided under NAFTA Chapter 11 to undermine implementation of domestic environmental laws was unforeseen. However, arbitral rulings to date do not appear to target legitimate environmental regulations, only those that are protectionists in nature. Even so, as a precaution, minor modifications to the policy language are warranted, as was done for TPP.

The limited funding provided to CEC constrains the scope and level of environmental cooperative activities that can be undertaken, thereby limiting its ability to build institutional capacity in the NAFTA countries, and in particular Mexico. However, the institutional capacity of Mexico to protect the environment has improved markedly over the years in response to many factors, and CEC's contribution has been trivial. CEC has been and will remain predominantly a forum for addressing hemispheric environmental issues, but only if it is the most convenient and effective means of doing so. Increasing funding levels does not change the fact that CEC is a demand driven institution. Lastly, the concerns over overexploitation or illegal trade in natural resources or fulfillment of MEA obligations are valid, but are probably best addressed in multilateral fora. Overall, there is very little justification for renegotiating the NAFTA environmental policies, and in fact, what is really needed is a critical reassessment of the basis for including these policies in future trade agreements at all.

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<sup>208</sup> See, e.g., Pauline Abetti, *Congressional voting on DR-CAFTA: The ineffectiveness of environmental lobbying*, 11 J. OF ECON. POL'Y REFORM 11, 11–12 (Mar. 2008).

#### IV. RENEGOTIATION OF NAFTA ENVIRONMENTAL POLICIES UNDER TRUMP ADMINISTRATION

During the presidential campaign in 2016, candidate Trump heavily criticized NAFTA over its impacts on jobs in the United States.<sup>209</sup> and once in office, made the decision to renegotiate the trade agreement, including its environmental policies. Towards that end, the Trump administration has developed a specific list of renegotiation objectives for the environment, which are summarized in Table 2. In general, these objectives appear to be crafted to address the common criticisms leveled against the NAFTA environmental policies, with one exception as discussed below. Moreover, many of these provisions seem directed at bringing the NAFTA environmental policies in line with the policies in other U.S. trade agreements negotiated since NAFTA over the past 25 years. However, as the analysis in Part III highlights, there is very little justification for renegotiating these policies and the following provides a critique of the Trump administration renegotiation objectives in light of the preceding analysis.

TABLE 2: ENVIRONMENTAL RENEGOTIATION OBJECTIVES FOR NAFTA

No.	Trump Administration NAFTA Renegotiating Objectives	Reference to Existing NAFTA/NAAEC Policy
1	Bring the environment provisions into the core of the Agreement rather than in a side agreement.	NAAEC, Parts 1, 2, 3, 4, and 5
2	Establish strong and enforceable environment obligations that are subject to the same dispute settlement mechanism that applies to other enforceable obligations of the Agreement.	NAAEC Part 2, Art. 5 and Part 5
3	Establish rules that will ensure that NAFTA countries do not waive or derogate from the protections afforded in their environmental laws for purposes of encouraging trade or investment.	NAFTA Art. 1114
4	Establish rules that will ensure that NAFTA countries do not fail to effectively enforce their environment laws through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the parties.	NAAEC Part 2, Art. 5 and Part 5

<sup>209</sup> See, e.g., Stephen Gandel, *Donald Trump Says NAFTA Was the Worst Trade Deal the U.S. Ever Signed*, *FORTUNE* (Sep. 27, 2016), <http://fortune.com/2016/09/27/presidential-debate-nafta-agreement/> [<https://perma.cc/P2MT-DF9E>].

No.	Trump Administration NAFTA Renegotiating Objectives	Reference to Existing NAFTA/NAAEC Policy
5	Require NAFTA countries to adopt and maintain measures implementing their obligations under select Multilateral Environment Agreements (MEAs) to which the NAFTA countries are full parties, including the Convention on International Trade in Endangered Species of Wild Fauna and Flora.	Not explicitly covered under NAFTA policy framework, but could fall under cooperative mandate of NAAEC
6	Establish a means for stakeholder participation, including commitments for public advisory committees, and a process for the public to raise concerns directly with its government if they believe it is not meeting its environment commitments.	NAAEC, Part 2, Art. 6, and Part 3, Arts. 16, 17, and 18
7	Require NAFTA countries to ensure access to fair, equitable and transparent administrative and judicial proceedings for enforcing their environmental laws, and provide appropriate sanctions or remedies for violations of their environmental laws.	NAAEC, Part 2, Arts. 6 and 7
8	Provide for a framework for conducting, reviewing, and evaluating cooperative activities that support implementation of the environment commitments, and for public participation in these activities.	NAAEC, Part 2
9	Establish or maintain a senior-level Environment Committee, which will meet regularly to oversee implementation of environment commitments, with opportunities for public participation in the process.	NAAEC, Part 3, Art. 9
10	Combat illegal fishing, unreported, and unregulated (“IUU”) including by implementing port state measures and supporting increased monitoring and surveillance.	Not explicitly covered under NAFTA policy framework, but could fall under cooperative mandate of NAAEC
11	Establish rules to prohibit harmful fisheries subsidies, such as those that contribute to overfishing and IUU fishing, and pursue transparency in fisheries subsidies programs.	Not explicitly covered under NAFTA policy framework, but could fall under cooperative mandate of NAAEC
12	Promote sustainable fisheries management and long-term conservation of marine species, including sharks, sea turtles, seabirds and marine mammals.	Not explicitly covered under NAFTA policy framework, but could fall under cooperative mandate of NAAEC
13	Protect and conserve flora and fauna and ecosystems, including through action by countries to combat wildlife and timber trafficking.	Not explicitly covered under NAFTA policy framework, but could fall under cooperative mandate of NAAEC

Renegotiation objective 1 would likely eliminate NAAEC entirely or drastically reduce its remit by subsuming specific environmental policies from the side agreement into NAFTA. Obviously, none of the long-standing criticisms of the NAFTA environmental policies has ever called for abrogation of NAAEC. However, eliminating and moving the environmental provisions of NAAEC into the core of NAFTA would bring NAFTA into line with all other U.S. trade agreements, for which the majority of environmental provisions are included in the trade agreements rather than the environmental side agreements.<sup>210</sup> As a practical matter, given the limited effect that the NAAEC has had on environmental protection in North America, it is hard to justify retaining the side agreement, with its extensive institutional structures, unless it can be transformed into or recast as an trilateral institution completely unrelated to NAFTA with a mandate that is fully supported by the NAFTA countries.<sup>211</sup>

Renegotiation objectives 2 and 4 pertain to relocating the commitment to effectively enforce environmental laws from NAAEC to NAFTA

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<sup>210</sup> See Allen, *supra* note 15 (comparison of environmental provisions of U.S. free trade agreements since NAFTA. All U.S. trade agreements since NAFTA have had an accompanying environmental side agreement. However, these side agreements included a smaller, and sometimes weaker, set of environmental provisions, as well as more minimalist institutional structures compared to NAAEC. NAAEC included the most comprehensive and ambitious set of environmental provisions and robust institutional arrangement for any U.S. free trade agreement).

<sup>211</sup> The United States, Mexico, and Canada have long recognized their ecological interdependence due to shared ecosystems on the North American continent and over the years have established numerous bilateral, and to a lesser extent, trilateral environmental institutions to facilitate joint action on specific environmental issues of common concern. See Don Munton & John Kirton, *North American Environmental Cooperation: Bilateral, Trilateral, Multilateral*, 4 NORTH AMERICAN OUTLOOK (1994); Alberto Szekely, *Establishing a Region for Ecological Cooperation in North America*, in MAKING FREE TRADE WORK IN THE AMERICAS (Boris Kozolchyk, ed., 1993); Roberto Sanchez-Rodriguez et al., *The Dynamics of Transboundary Environmental Agreements in North America*, in ENVIRONMENTAL MANAGEMENT ON NORTH AMERICA'S BORDERS, *supra* note 125, at 33–34. Notwithstanding these past efforts, the three countries never established a regional body for broad-based environmental cooperation until the NAFTA negotiations, despite some calls to do so. See Mary Kelly, *Carbón I/II: an unresolved binational challenge*, in ENVIRONMENTAL MANAGEMENT ON NORTH AMERICA'S BORDERS, *supra* note 125, at 189, 199–201; Konrad von Moltke, *NAAEC and The North American Environment*, in SHAPING CONSENSUS, *supra* note 42, at 20–21. The transfer of all the environmental provisions of NAAEC to NAFTA would signify that the provisions are only relevant for the trade context, and do not have any value independent of the trade agreement. However, NAAEC and CEC have often been viewed as viable outside of the trade context; in other words, their existence could be justified without NAFTA. If NAAEC and CEC are to remain viable, that independent value must be made readily apparent.

and subjecting breaches of this commitment to the trade agreement's own state-to-state dispute resolution process. As was discussed in Part III, there is no justification for moving this commitment to NAFTA, and in fact, the entire commitment could be eliminated entirely, it is for all practical purposes a paper tiger. Renegotiation objective 3 is already included in NAFTA and this policy does not appear to need strengthening. There has never been an instance of a NAFTA country rolling back its environmental regulations or enforcement levels to encourage trade, and this concern is no longer even raised by environmentalists in the context of trade policy negotiations.

Renegotiation objectives 5, 10, 11, 12, and 13 pertain to the inclusion of emerging environmental concerns that have been advanced by environmentalists over the past decade and were included in TPP. Given that the United States, Mexico, and Canada have already negotiated specific environmental policies to address these issues in TPP, as a practical matter, the three countries should have no reservations over including similar policies under NAFTA. However, as discussed in Part III, the merits of incorporating these policies into a regional free trade agreement should be given careful consideration. Undoubtedly, the concerns are valid and need urgent attention by the international community, but subordinating international environmental policy to a free trade agreement may not be prudent.

Renegotiation objective 6 reflects a long-standing environmental provision that has been included in all other U.S. free trade agreements. This objective requires establishment of a domestic advisory body for providing recommendations, similar to the national advisory committee under NAAEC, however, this provision would also likely serve as a substitute for establishment of the more robust Joint Public Advisory Committee under NAAEC. Moreover, the objective would create an even weaker process for public complaints than the public submissions process under NAAEC. Seven U.S. free trade agreements included similar provisions that allow for submittal of complaints directly to the government rather than via a submission process administered by a third party external to the national governments.<sup>212</sup> The operation and effectiveness of these domestic processes has not been reviewed in the literature.

Renegotiation objective 7 merely relocates an environmental policy related to establishment of judicial, quasi-judicial, or administrative proceedings and access to remedies from NAAEC to NAFTA. This commitment

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<sup>212</sup> See Allen, *supra* note 15, at 47–53.

is tied to the concern over lax enforcement that was a central concern for NAFTA. While the widespread patterns of non-enforcement envisioned with NAFTA have not materialized, any credible democracy should provide its citizens with procedural guarantees and access to remedies to ensure enforcement of environmental laws within the domestic context. Similar guarantees have been included in all other U.S. free trade agreements,<sup>213</sup> however, the environmental provision is non-enforceable. As such, it seems a bit of a stretch to believe that including a non-enforceable provision in a regional trade agreement will have more force in bringing about these types of domestic policy changes than the weight of history and long-standing democratic traditions of the NAFTA countries.

Lastly, renegotiation objectives 8 and 9 capture the central cooperative mandate of NAAEC and require the establishment of some basic institutional structure for overseeing the implementation of cooperative activities. All other U.S. free trade agreements include some provisions for pursuing environmental cooperation, but often in conjunction with an environmental side agreement, with the cooperative activities being undertaken primarily under the auspices of the side agreement.<sup>214</sup> However, the phrasing of objective 8, with no mention of a corresponding side agreement, indicates that NAFTA will be the governing agreement for environmental cooperation. The proposed senior-level oversight body is consistent with other U.S. free trade agreements, but would be much less robust than the existing CEC Secretariat.<sup>215</sup>

Overall, the Trump administration's negotiation objectives for the NAFTA environmental policies seemed geared towards bringing the policies in line with those of other U.S. trade agreements while addressing common criticisms leveled against the trade agreement. For the other U.S. trade agreements, all of the core environmental provisions are located within the trade agreement, including the key provisions related to effective enforcement of environmental laws, non-derogation of laws, and procedural guarantees. All other U.S. trade agreements also have accompanying environmental side agreements, but they are much less robust than NAAEC and solely focused on promoting voluntary environmental cooperation. At first glance, it appears that the renegotiation of NAFTA environmental policies may result in the complete elimination of NAAEC, or at a minimum, a significant reduction in its remit. However,

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<sup>213</sup> *See id.*

<sup>214</sup> *See id.*

<sup>215</sup> *See id.*

the central thrust of the renegotiations objectives is that they merely move policies from one legal instrument to another without giving any consideration to the merit of policies themselves. The analysis in Part III demonstrates that many of these policies are no longer needed, as they address problems that are more academic or imagined than real. As such, moving the policies from one place to another is akin to rearranging the chairs on the deck of the Titanic.

### CONCLUSIONS

The NAFTA environmental policies have been and continue to be a source of contention for activists and policymakers alike, giving rise to periodic bouts of environment and trade policy debate redux. The perceived shortcomings of the policies and attendant improvements are well-known. However, with few minor exceptions, the rhetoric supporting policy changes does not match the reality. The NAFTA environmental policies were crafted at a time when there was a rudimentary understanding of the nexus between trade and environment policies. Extensive scrutiny of the environmental policies over the years has confirmed that the adverse environmental effects of NAFTA have not materialized, and as such, the policies are largely unneeded. Thus, rather than continue to replicate or reshuffle policies merely to achieve some academic sense of consistency across U.S. trade agreements, as is being done now by the Trump administration as it renegotiates NAFTA, what is needed is a critical assessment of the overall policy approach used by the United States to integrate environmental and trade policies.

Over the past 25 years, the United States has used a standard approach to integrating environmental policy concerns into its trade policy. This approach consists of including a portfolio of similar environmental policies in each trade agreement that deal with a broad range of issues while allowing for some minor variation depending on the level of development and environmental conditions of its trading partners.<sup>216</sup> Most of the environmental policies are legacy policies, first included under NAFTA and carried forward and modified slightly over time.<sup>217</sup> While these policies have been sufficient to ensure legislative approval of the trade agreements, the policies are largely based on past precedent rather than empirically grounded. The time has come to take a hard look at U.S. efforts to integrate

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<sup>216</sup> See generally *id.*

<sup>217</sup> See generally *id.*

environmental and trade policy, and the following summarizes a general reassessment of the current policy approach for U.S. trade agreements.

A. *Identify Bona Fide Trade-Related Environmental Policy Priorities*

The paramount question that needs to be asked is whether environmental policies are really needed within trade agreements, and the answer to that question depends on the potential environmental effects that arise when trade is liberalized. Obviously, this question has been at the center of the trade and environmental debate for three decades but definitive answers remain elusive. Research indicates that it is very difficult to identify or predict specific environmental effects of trade liberalization *ex ante*. As was discussed in Part I, there may be “legal” effects of trade liberalization, due to differences in the stringency of environmental laws and levels of enforcement between trading partners or due to a conflict between trade regime rules and environmental laws; these legal effects may hypothetically occur for any free trade agreement. There also may be “sectoral,” “scale,” or “product” effects of trade liberalization due to changes in the pattern and magnitude of trade flows when specific economic sectors are liberalized, and these effects are highly variable depending on the substantive content of the trade agreement.

Historically, the United States has sought to identify these various types of environmental effects by completing an environmental impact assessment of its proposed free trade agreements.<sup>218</sup> However, these reviews are focused only on environmental impacts within the United States.<sup>219</sup> To date, environmental reviews completed by the United States have not identified any significant environmental effects of any trade agreements for the U.S. territory.<sup>220</sup> Identifying the potential environmental impacts of U.S. trade agreements in the territories of the trading

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<sup>218</sup> See Environmental Review of Trade Agreements, Exec. Order No. 13141, 64 Fed. Reg. 63,169 (Nov. 18, 1999); Guidelines for Implementation of Executive Order 13141, 65 Fed. Reg. 79,442 (Dec. 19, 2000) (Under Exec. Order 13141, “[e]nvironmental reviews are an important tool to help identify potential environmental effects of trade agreements, both positive and negative, and to help facilitate consideration of appropriate responses to those effects whether in the course of negotiations, through other means, or both.”).

<sup>219</sup> Environmental Review of Trade Agreements, Exec. Order 13141, *supra* note 218 (these reviews can be used to examine global and transboundary impacts too).

<sup>220</sup> See OFFICE OF THE U.S. TRADE REP., *Environmental Reviews*, <https://ustr.gov/issue-areas/environment/environmental-reviews> [<https://perma.cc/FK8P-PTYB>] (last visited Apr. 4, 2018).

partners is the responsibility of each country. Although sometimes the other countries do complete their own environmental reviews and release the results to the public,<sup>221</sup> more often they do not and the United States has no authority to compel them to do so. Thus, the United States generally lacks a solid analytical basis to craft specific environmental policies for its trade agreements.

The more general academic literature on the environmental effects of liberalized trade likewise offers little guidance for crafting specific environmental policies for trade agreements. The crux of the problem is that trade agreements in themselves do not cause direct and immediate environmental damage,<sup>222</sup> rather environmental effects arise when economic activities associated with freer trade exacerbate unmitigated market or government failures.<sup>223</sup> As Kirkpatrick and Scrieciuc note:

[t]he environmental outcome of trade and investment liberalisation is determined by a complex process of interdependent relationships, which are difficult to capture in an econometric or modelling framework. The robustness of environmental policies and institutions, including the adequacy of supporting regulatory instruments, are important determinants of the environmental impacts of trade and investment liberalisation.<sup>224</sup>

Thus, the key to addressing any possible sectoral or scale effects that may arise is ensuring that trading partners have robust domestic environmental protection regimes. In principle, the environmental policies included in U.S. trade agreements are intended to do just that. However, in practice these policies do not contribute much to building institutional capacity.<sup>225</sup> For existing U.S. trade agreements, many of the policies are “largely aspirational in nature, urging that the environment be protected,

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<sup>221</sup> Canada completes environmental reviews of its trade agreements which are available to the public. See, e.g., *Canada-Ukraine Free Trade Negotiations: Final Environmental Assessment Report—January 2016*, GLOBAL AFFAIRS CAN. (Nov. 29, 2016), [http://www.international.gc.ca/trade-agreements-accords-commerciaux/env/final\\_ea\\_canada-ukraine\\_ee.aspx?lang=eng](http://www.international.gc.ca/trade-agreements-accords-commerciaux/env/final_ea_canada-ukraine_ee.aspx?lang=eng) [<https://perma.cc/HDR7-AEXB>].

<sup>222</sup> Arden-Clarke, *supra* note 17; OECD, *supra* note 26, at 12–13.

<sup>223</sup> See, e.g., OECD, *supra* note 26, at 15–17; Nordström & Vaughan, *supra* note 26, at 39, 46; Cole, *supra* note 28, at 188, 193; Anderson & Blackhurst, *supra* note 31, at 4–5; ESTY, *supra* note 48, at 21.

<sup>224</sup> Colin Kirkpatrick & S. Serban Scrieciuc, *Is trade liberalisation bad for the environment? A review of the economic evidence*, 51 J. OF ENVTL. PLAN. & MGMT. 497, 506 (2008).

<sup>225</sup> See generally Allen, *supra* note 15.

but providing few means . . .”<sup>226</sup> Policies for promoting environmental cooperation are chronically underfunded, duplicative of existing development programs, and often times, are not focused on broad-based capacity building, but rather on targeted cooperative initiatives.<sup>227</sup> Overall, the existing environmental policies in U.S. trade agreements are inadequate for strengthening institutional capacity, the *sine qua non* for ensuring that increased environmental degradation does not occur as a result of trade liberalization.

In lieu of the current policy approach, a new approach could be pursued that focuses exclusively on building institutional capacity of trading partners. In particular, the approach would require completion of a comprehensive *ex ante* assessment of the institutional capacity of the U.S. trading partners to protect the environment, along with the environmental review required under Executive Order 13141. Based on this capacity assessment, the United States would determine if assistance is needed to strengthen the trading partners’ domestic environmental protection institutions. If assistance is needed, it should be developed completely outside the context of the trade agreement, and channeled through existing bilateral and multilateral programs, with oversight by national level ministries of foreign affairs. Moreover, the assistance should be broad-based and well-funded, but with a sunset provision<sup>228</sup> that will trigger a review of its effectiveness after a reasonable number of years. For trading partners that already have robust environmental protection regimes, no assistance should be provided.

*B. Get Rid of the Teeth But Fix the Regulatory Expropriations*

Along with the major shift in focus to strengthening the institutional capacity of trading partners to protect the environment, the United States should eliminate all policies associated with effective enforcement

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<sup>226</sup> Hymson et al., *supra* note 102, at 239.

<sup>227</sup> See generally Allen, *supra* note 15 (in countries that already have robust environmental management regimes, such as Canada, Australia, and Chile, there is no need for cooperative initiatives at all. For countries with generally weak environmental protection regimes, such as the DR-CAFTA countries, institutional capacity building must be long-term and broad-based with substantial funding for implementation to have any measurable effect.).

<sup>228</sup> A sunset provision or condition within a statute, regulation or other law designates a certain point in time when that specific law will no longer be in effect unless further legislative action is taken to extend the law. BUSINESS DICTIONARY.COM, *Sunset Provision*, <http://www.businessdictionary.com/definition/sunset-provision.html> [<https://perma.cc/L7S8-FJ28>].

of environmental laws, procedural guarantees, access to remedies, levels of protection, and the like from its trade agreements. In other words, delete the environment chapters from the trade agreements. Some of these policies address non-existent problems, and all of them are non-enforceable either in principle or in practice. In general, these environmental policies merely create a green façade for the trade agreements and provide political cover for legislative approval. As a practical matter, these policies are unlikely to ever contribute to the creation of the desired domestic environmental policies, institutions, and traditions because these are created endogenously, through political processes shaped by the particular social and economic context. A commitment within a bilateral or regional trade agreement cannot substitute for the weight of history and long-standing political traditions of a country. The only environmental policies that should be retained within the trade agreement are those embedded in other chapters and related to the privileging of trade-related measures within MEAs over trade agreement rules, the right to hear disputes related to sanitary and phytosanitary measures and other standards-related measures under the dispute resolution processes of the U.S. trade agreement rather than WTO, and right to use environmental experts in disputes that involve environmental standards or measures. Lastly, the expropriation and compensation provision in the investor rights chapter of trade agreements should be revised to reduce its potential to be used to challenge environmental laws as regulatory expropriations. This limited set of policies should serve as the core policies for integration of environmental policy into future U.S. trade policy.

C. *Address Global Environmental Issues Through Other Fora*

There is one set of environmental policies that has been included in the most recent U.S. trade agreement, TPP, and proposed for the renegotiation of NAFTA, that presents a unique challenge to rethinking the policy approach for integrating environmental considerations into U.S. trade policy. These policies are focused on global environmental problems, in particular overfishing and illegal trade of wildlife and timber, as well as fulfillment of obligations under specific MEAs.<sup>229</sup> In general,

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<sup>229</sup> Under TPP, member countries committed in general to implement multilateral agreements to which each trading partner was a party, as well as committed specifically to fulfill obligations under the Montreal Protocol on Substances that Deplete the Ozone Layer, International Convention for the Prevention of Pollution from Ships, and Convention on International Trade in Endangered Species of Wild Fauna and Flora. See TPP, *supra* note 8.

these global environmental problems have not been historically associated with trade liberalization but they have considerable merit and need urgent attention from the international community. As such, trade agreements provide a new forum for possibly addressing these issues. However, as was discussed in Part III, there are several drawbacks to including policies to address these issues within the context of a trade agreement. Most importantly, including these policies creates a parallel system for addressing global environmental problems outside of the existing multilateral system and the policies transfer oversight to non-environmental government agencies, in particular trade agencies, that may not have the expertise or inclination to ensure effective implementation of the policies.

Assuming for the moment that the United States, Mexico, and Canada intend to adopt policies to address these global environmental problems similar to those included in the final TPP environment chapter, a closer look at these policies within the North American context reveals that either the policies are not justified or there are other international fora better suited to pursue policy action. With respect to fulfilling obligations under certain MEA obligations, such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora, the TPP policies merely reaffirm the countries commitments to the MEAs and identify opportunities for cooperation that are commonplace. Given that all three countries have historically fulfilled their obligations under these MEAs,<sup>230</sup> a reaffirmation of their commitment to do so within a trade agreement would have little value and there exists other international fora to pursue cooperation.

The environmental policies related to addressing overfishing are more extensive, and the key policy is focused on reducing subsidies that contribute to overfishing and overcapacity. Although reducing subsidies does fall within the trade policy domain, it would be more appropriate to pursue reduction of these subsidies under the multilateral trading system to ensure uniformity at the global level and efforts are currently underway to improve WTO disciplines on fisheries subsidies.<sup>231</sup> Lastly,

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<sup>230</sup> The environmental review of TPP did not indicate any potential problems in the United States, Mexico, or Canada for these policy issues. For example, all three countries are ranked as Category 1, which is “the highest ranking, and indicates that a country has adequate legislation in place to meet its CITES obligations.” See OFFICE OF THE U.S. TRADE REP., *Trans-Pacific Partnership Agreement*, *supra* note 196.

<sup>231</sup> See WTO, *WTO fisheries negotiations take a step forward with compilation text and chair's assessment* (Oct. 12 & 13, 2017), [https://www.wto.org/english/news\\_e/news17\\_e/fish\\_17oct17\\_e.htm](https://www.wto.org/english/news_e/news17_e/fish_17oct17_e.htm) [<https://perma.cc/8H5C-MDM8>]. Negotiations to improve WTO disciplines

the TPP policies also set forth some general commitments to strengthen fisheries management systems and “promote the long-term conservation of sharks, marine turtles, seabirds, and marine mammals, through the implementation and effective enforcement of conservation and management measures.”<sup>232</sup> Along similar lines, it would be more appropriate to pursue these policies within a new multilateral environmental agreement, or in the near term, through a standalone trilateral environmental agreement unrelated to the trade agreement.

#### D. *The Way Forward*

The debate over the environmental effect of trade liberalization emerged during the negotiation of NAFTA and it has cast a long shadow over U.S. trade policy. NAFTA was the first trade agreement to explicitly link trade policy with environmental protection goals to ensure that liberalized trade did not result in increased environmental degradation and the environmental policies developed for NAFTA have endured and served as the template for subsequent U.S. trade agreements. Twenty-five years on, however, research has shown that the effects of free trade on the environment are not as drastic or far-reaching as originally thought. Thus, the inclusion of extensive environmental policies within trade agreements in general, and NAFTA in particular, is no longer justified. The U.S. trade policy domain, however, marches on oblivious to these findings and environmentalists and policymakers alike continue to advocate for the retention and strengthening of environmental policies in NAFTA.

This Article provided a long overdue assessment of the arguments in support of these policies in light of existing research, and overwhelmingly the findings indicate that the majority of environmental policies are not needed. The dominant environmental concern for NAFTA was the

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on fisheries subsidies were launched under the Doha Ministerial, and at the Hong Kong Ministerial Conference in 2005, member states agreed to pursue a prohibition of certain forms of fisheries subsidies that contribute to overcapacity and overfishing. See WTO, *Negotiation on fisheries subsidies*, [https://www.wto.org/english/tratop\\_e/rulesneg\\_e/fish\\_e/fish\\_e.htm](https://www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_e.htm) [<https://perma.cc/C9T6-D4J5>] (last visited Apr. 4, 2018); see also Press Release, Office of the U.S. Trade Rep., Obama Administration Undertaking Global Initiative to Prohibit Harmful Fishing Subsidies (Sept. 2016), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2016/september/obama-administration-undertaking> [<https://perma.cc/2ZJJ-E2MJ>]; OFFICE OF THE U.S. TRADE REPRESENTATIVE, *Fisheries Subsidies: Proposed new Disciplines*, <https://ustr.gov/sites/default/files/fisherie-subsidie.pdf> [<https://perma.cc/3QWG-U26M>] (last visited Apr. 4, 2018).

<sup>232</sup> See TPP, *supra* note 8.

potential for differing levels of environmental protection in the NAFTA countries to give rise to pollution havens, dirty industry migration, and downward harmonization of environmental standards and foster worse environmental conditions in all countries, but this has not occurred. Other concerns related to a conflict between trade rules and environmental policies has similarly not materialized, although as a practical matter, the inclusion of a small set of environmental policies is justified in case a conflict does ever occur.<sup>233</sup> More recent concerns related to global environmental issues and MEAs obligations are either not justified or can be better resolved in other multilateral trade or environmental policy fora or through a comprehensive program to build institutional capacity of trading partners. Thus, the environmental policies currently included in environment chapters of U.S. free trade agreements could be eliminated.

Liberalized trade does have the potential to exacerbate unmitigated market or government failures, and thereby indirectly contribute to environmental degradation in a country. However, the *sine qua non* for ensuring that this environmental degradation does not occur is strengthening institutional capacity of trading partners to protect the environment. In general, the U.S. has many long-standing bilateral and multilateral programs to build institutional capacity of less developed countries, and these programs can easily be expanded. To identify instances where additional capacity is needed, the United States should complete a comprehensive *ex ante* assessment of the institutional capacity of its trading partners, and then provide broad-based and long-term assistance to strengthen the capacity. This assessment, along with a small set of core environmental policies focused on a conflict of rules, should be the focus of the new policy approach for addressing potential environmental effects of trade liberalization.

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<sup>233</sup> It would be preferable if the conflict of rules was resolved at the multilateral level, under the WTO Committee on Trade and Environment. See WTO, *The Committee on Trade and Environment*, *supra* note 169.