



**COMITÉ D'EXAMEN INPÉPENDANT DE L'ANACDE
COMITÉ DE REVISIÓN INDEPENDIENTE DEL ACAAN
INDEPENDENT REVIEW COMMITTEE OF THE NAAEC**

León Bendesky Barbara Bramble Stephen Owen

**FOUR-YEAR REVIEW OF THE
NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION:**

REPORT OF THE INDEPENDENT REVIEW COMMITTEE

June 1998

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Acknowledgments

A review of the operation and effectiveness of a new international organization is a difficult task. The Independent Review Committee (IRC) has been very fortunate to be able to speak directly with a large number of principals involved with the work of the Commission for Environmental Cooperation. The IRC met first with senior officials and program officers in the Secretariat. We want especially to acknowledge the fact that the interviews with the Secretariat officials took place during a period of significant internal uncertainty and stress. The professional qualities of these officials was amply demonstrated through their thoughtful and well prepared participation during our interviews, despite these circumstances.

The IRC also met with government officials from the three Parties. These included officials from both environment and trade ministries in all three countries. Their insights and perspectives have been invaluable to us, and we gratefully acknowledge their support.

Our work had the real benefit of meetings with each of the three members of the Council. Ministers Carabias and Stewart and Administrator Browner have the dual responsibilities of representing their governments and acting collectively as the Council. All three provided critical insights into these roles, and the importance they attach to the future success of the CEC. We greatly appreciate their time and commitment to our work.

Others have contributed important elements to our work. The members of the JPAC and National Advisory Committees provided extensive comments in writing that have informed our work through their experience and knowledge of the operation and effectiveness of the CEC. Their commitment is well demonstrated by their concerted effort to provide us with comments. We are particularly grateful to the fifty-plus members of the public, some individuals and some organizations, who made a special effort to ensure their views were heard during this review.

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an example of the high professional ethic and capacity of her colleagues in the Secretariat.

The input we have received has been tremendous. The results of the combined effort of all who have participated in this review, are, of course, fully our responsibility.

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Executive Summary

The North American Agreement on Environmental Cooperation (NAAEC) came into force on 1 January 1994 thereby creating the Commission for Environmental Cooperation (CEC). Article 10(1)(b) of the NAAEC requires the ministerial-level Council which governs the CEC to review its operation and effectiveness four years after its entry into force. In November, 1997, the Council appointed an Independent Review Committee (IRC) to provide it with an objective assessment for this purpose.

The present Report is intended to reflect the key issues as the IRC understands them, rather than to audit or document the details of all the CEC operations. The analysis and recommendations in this Report represent the Committee's distillation of the many discussions, interviews, documents and other sources considered by the IRC. The report is not, and is not intended to be, a legal interpretation of the NAAEC.

General Observations

The IRC believes it is important to see the NAAEC as a complete agreement in its own right, and not just as a "side agreement" to a trade deal. In the Committee's view, the NAAEC is a critically important element to achieve the goal of sustainable development in North America. Moreover, the NAAEC is not just a trade and environment agreement in the technical or legal sense. Rather, the mandate of the CEC, as the Committee understands it, is more broadly defined as the protection and enhancement of the environment in North America in the context of changing economic patterns, including the relevant trade and environment issues. The long term value of the CEC will be measured by its fulfilment of this mandate.

During the course of its work, the IRC came to understand the difficult challenges facing the CEC. The small number of Parties accentuates any disagreement among them. The breadth of the subject matter included in the NAAEC has contributed to difficulties in achieving a well defined strategic vision and annual program, while the economic and

social differences among the Parties provide a microcosm of the disparities between North and South. The conflictual history behind the negotiation of the NAAEC, and some continued disagreements in its implementation, have also led to difficulties in ensuring that all the Parties feel themselves to be equal participants in the CEC, slowing the development of a more cohesive organization.

The CEC is also a unique organization in many ways. The “special responsibilities” given to the Secretariat of the CEC comprise one aspect of this. The well developed public participation mechanisms are another. These features, plunged into the context of its broad mandate in support of sustainable development, the diversity among the three Parties and some continuing points of conflict, increase the already formidable challenges of launching any international organization.

The IRC’s Report provides a number of recommendations to address these general issues in a purposeful and operational manner. But the Committee believes it is important to recognize that the CEC has already taken significant steps toward achieving its purposes. In some important areas, such as the Sound Management of Chemicals and understanding continental air pollution pathways, CEC leadership has catalysed on-the-ground action by the three Parties. The IRC hopes its recommendations will assist the Parties to increase and expand on these early successes.

The Parties and the Council

The three Parties have dual roles within the CEC. On the one hand, they act as individual nations in an international organization, each reflecting its own national interest. On the other, the same representatives seek to identify and achieve goals of common interest. At times, the transition from self-interested Party to joint Council member has been difficult. This reflects both the history of the NAAEC, in particular the sense that it was established primarily to watch Mexico, and observations that in many instances it has been implemented in that manner. The IRC recognizes and understands these concerns. It believes that a greater effort has to be made by each Party to better understand and work with the goals of the other two Parties, and to ensure that all three feel they are equal members of the organization.

The IRC also believes that the Parties and the Council must pay greater attention to their own involvement with, and oversight of, the CEC. This involves both better coordination of the Parties’ own input into the existing liaison mechanisms between themselves and the Secretariat (i.e. the General Standing Committee and the Alternate Representatives), and more coordinated policy development among departments within their own governments. This last point is especially critical for the work of the CEC related to trade and environment.

A critical aspect of the Council's role is to establish a clear vision to guide the work of all the component elements of the CEC. To date, no such vision has emerged, leaving the void to be filled by often unlinked or uneven programs and projects. The IRC believes it is essential for the Council to use this period of review to set forth their vision for the CEC for the next several years. This strategic vision should then be implemented through the CEC's annual work program.

The Secretariat

The Secretariat, led by the Executive Director, must balance two different types of functions: the "traditional" role of providing technical, administrative and operational support and advice to the Council; and its "special responsibilities" to make, in specified circumstances, decisions in its own right to bring certain matters forward to the Council and to administer the citizen submission process on enforcement matters.

In performing its traditional functions, the Secretariat acts independently of any one of the Parties, but it also acts as an integral part of the CEC as a whole. This is consistent with most Secretariats to international organizations. In its critical "special responsibilities," the Secretariat has been given certain operational and decision-making responsibilities through a complex but reasoned relationship between itself and the Council. The IRC concluded that these special responsibilities will only function well, and at least some of the existing tensions or misunderstandings be alleviated, if the Parties, Council and Secretariat all respect the nature and the limits of their respective decision-making functions.

The special responsibility of drafting the annual work program and budget capitalizes on the Secretariat's ability to draw on a wide range of input and ideas to help further the Council's agenda. But preparation and approval of the annual programs has been of some concern, due to their lack of focus thus far. In the IRC's view, the development of a strategic vision should be accompanied by adopting a three year revolving cycle for the program and budget. This would assist the Secretariat in bringing forward annual program and budget proposals for the Council's approval that will more carefully and coherently reflect their priorities. It would also assist in planning projects and any follow-up steps that may require more than a year to complete. But this will also require consistent and timely input from the Parties, from early in the program making process to its conclusion.

The discretion of the Secretariat to initiate Article 13 reports provides it with an opportunity to identify new issue areas, to address specific events, or otherwise contribute to the work of the CEC as a whole. The discretion given the Secretariat is

important to allow a range of issues to be considered or responded to. But the public release of the final report of the Secretariat is subject to a Council decision. This balances the discretion of the Secretariat with the overall governance of the Council. The IRC believes this discretion has been used within its scope and purpose to date.

Administering the citizen submission process is the best known of the Secretariat's special responsibilities, and also the most controversial. The IRC believes it is important to recognize a critical underlying factor in this process: any adversarial aspects of the process are outside the role or control of the Secretariat, but arise from the empowerment of individual citizens or groups to initiate a submission "against" a Party. The Secretariat receives the submission, independent of the Party or other persons involved, and, as necessary, makes specific assessments of whether the initial criteria are met, whether a response from a Party is warranted and whether a submission warrants developing a factual record. Regarding the last of these, the Secretariat assessment serves to objectively inform and advise the Council, which makes the final decision on developing a factual record.

The citizen submission process is unique among international organizations, but is reflective of a trend toward increased citizen involvement in international mechanisms to address environmental issues. The purpose of the process is to provide some 350 million pairs of eyes to alert the Council of any "race to the bottom" through lax environmental enforcement. The Secretariat acts as the conduit to ensure that all appropriate cases raised by citizens are brought to the attention of the Council. In neutrally and objectively identifying these appropriate cases, the Secretariat does not act in an adversarial manner to the Party involved, but in a supportive manner to the joint responsibility of the Council. This process "belongs" not to the Secretariat, but to the citizens at large, who are empowered to initiate it and for whose benefit it was developed. The Secretariat must administer the process with this public trust in mind. And the Council must also make its final decisions with this public trust in mind. The IRC believes that much of the current tension around this process can be reduced if all the actors scrupulously apply the Agreement and the associated submission Guidelines, respecting the discretion provided to the respective decision-makers at the different points in the process, and the limits to the exercise of this discretion.

Public Participation

Public participation is a central feature of the CEC. The IRC believes that this must remain the case, and that the timeliness and effectiveness of public consultations and participation should be enhanced. Focus and preparation will be critical in this regard, and the development of Guidelines for this purpose, already begun by the Secretariat, should be of assistance. At the same time, the move to a three year program cycle will, if adopted, facilitate the public input roles of the Joint Public Advisory Committee and the

National Advisory Committees. The IRC expects this will help the JPAC refocus on its original mandate of providing advice to the Council from its unique trilateral citizen perspective. The IRC also hopes Mexico will move soon to establish a well-functioning National Advisory Committee.

The IRC recommends that another aspect of public participation, the community-based projects sponsored by the North American Fund for Environmental Cooperation, should be continued for an additional trial period. But projects should be more closely related to the program priorities of the CEC, to develop a critical mass of experience and innovation for the Council to draw upon in its own work and decision-making.

Trade and Environment

The trade and environment nexus is a critical one under the Agreement. The IRC believes there are three important areas for the CEC in this regard. First, the CEC should strive to broaden the general understanding of the term “trade and environment” beyond the controversial exercise to identify the “environmental effects of NAFTA”. To do this, the CEC should make trade and environment linkages part of the “living program” of the CEC. The work program already contains a number of projects which contribute to the constructive engagement of the Parties in the real world linkages between trade and environment, including Sound Management of Chemicals and the Technology Clearinghouse projects. This experience should be built upon.

Second, the CEC should not shy away from the difficulties associated with improving the Parties’ analytical capabilities to assess the systemic linkages between trade expansion and environmental quality in the region. This will require a balanced and evolving research program concerning the so-called NAFTA-effects, that carefully considers both the positive and potentially negative aspects of the trade and environment relationship. Based on a process that ensures the involvement of trade and environment experts, the CEC should use its position both to enhance the benefits of increased trade for the environment and to prevent possible negative effects. Accomplishing these objectives, which are two sides of the same coin, will be essential for the sustainability of development in North America.

Third, the IRC also recommends that institutional links be developed between the CEC and the NAFTA Free Trade Commission and its subsidiary bodies. This should include efforts by senior officials to plan a joint meeting of trade and environment ministers.

Developing a cohesive program

For many observers, the main impact of the CEC is through its annual program. The IRC recommends that a three year cycle should be immediately developed for this program, to be updated and adjusted yearly. Each project should be subjected to a systematic yearly review before moving to the next phase, and there should be a follow-up to completed projects to evaluate their success and learn lessons from their implementation. Synergy among projects, effective dissemination of project results, and options for funding assistance for implementation steps should be considered in developing each project.

The three year program should be designed to implement the strategic vision of the Council. Focus and priorities are required to achieve this goal, with the priorities of the CEC tied to those of the Parties. This means that not all areas included in the NAAEC will be addressed at any given time, and some may not be for several years. But the IRC is convinced that even three or four solid deliverables each year, in addition to the mandatory projects, Article 13 reports and citizen submission process, will provide stronger results than a wide range of deliverables of lesser importance. Similarly, the Secretariat and Council should not be concerned with the need to fill program categories such as “green” or “brown”, “trade and environment”, etc. What is important is the quality of the projects and their ability to form a strong, cohesive contribution to the central purpose of the CEC.

The IRC has not tried to identify the priorities of the Parties, but believes this is where the development of the three year program should begin. To translate these priorities into CEC projects, the Committee is convinced that a consistent set of criteria should be applied. These criteria fall into six major headings: focus on regional issues; building relationships between elements of different projects; promoting sustainable development; trade and environment factors; the comparative advantage of the CEC; and ensuring appropriate resources for the mandatory work program elements. The following chart provides additional detail on the factors the IRC sees as most critical in each of these areas.

In implementing the annual work program, the Secretariat acts to advise and support the Council. Thus, the development of the substance of the annual work should be subject to the oversight of the Council as a whole, but not the undue influence of any one Party. In the Committee’s view, the development of a long-term successful work program will require a sense of commitment to this relationship by all concerned, and effective two-way communications between the Secretariat and the Parties. Developing a successful program will, at times, also mean facing difficult, politically sensitive issues. But the Committee believes that these challenges cannot be overcome without addressing, and resolving, the hard issues.

SUMMARY OF CRITERIA FOR PROGRAM SELECTION

1. Regional issues
 - Common importance to all parties
 - Common transboundary or continental nature
 - Transboundary movement of hazardous wastes or products
 - Regional approaches to global issues
2. Building relationships between elements of different projects
 - Cross-fertilization of projects
 - Does a project contribute to making the whole greater than the sum of its parts?
3. Reflect certain elements of sustainable development
 - Capacity building steps to be included
 - Scientific basis of an issue to be addressed
 - Can public participation be properly incorporated
4. Trade and environment factors
 - Does a proposed project identify trade and environment issues to be addressed?
 - Does the suggested project help make trade and environment part of the “living project” of the CEC
5. Comparative advantage of the CEC
 - Does the project build on the comparative advantages of the CEC:
 - ◇ Coordinated continental actions
 - ◇ On-the-ground delivery of projects through the Parties
 - ◇ Ability to phase in capacity building
 - ◇ Potential to monitor projects
6. Mandatory programs
 - Ensure appropriate staffing and resource levels for the mandatory programs:
 - ◇ Annual reports
 - ◇ State of environment
 - ◇ Art. 13
 - ◇ Citizen submissions
 - ◇ Transboundary environmental impact assessment

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1 Introduction

Negotiations for the North American Agreement for Environmental Cooperation (NAAEC) were completed in September 1993, by Canada, Mexico and the United States, and the Agreement entered into force on 1 January 1994. The Agreement established a Commission for Environmental Cooperation (CEC), headed by a Council composed of the ministers of environment of Canada and Mexico and the administrator of the Environmental Protection Agency of the United States.

In addition to the many other functions of the Council, Article 10(1)(b) of NAAEC sets out its responsibility to review the operation and effectiveness of the Agreement, in the light of experience, four years after the Agreement's entry into force. That time has now come. As part of the review process, the Secretariat organized a panel discussion chaired by Maurice Strong in April 1997. This produced a letter to the members of the Council in May 1997. Subsequently, in November 1997, the Council appointed a three-person Independent Review Committee (IRC) to examine the operation and the effectiveness of the Agreement.¹ This report constitutes the product of that independent review and is respectfully submitted by the IRC.

1.1 Goals of the Report

From its initial meetings, the IRC established two simple, complementary objectives for its work:

- to conduct, to the best of its ability, and given the requirement to report in time for the Council meeting of June 1998, an objective review of the operation and effectiveness of the NAAEC in its first four years; and
- to provide constructive recommendations to help enhance the operation, effectiveness and relevance of the NAAEC over its next many years.

¹ The Independent Review Committee was established pursuant to Council; Resolution 97-06. The backgrounds of the members of the Independent Review Committee can be found in Annex 2 of this report.

1.2 Methodology

The IRC was initiated pursuant to Resolution 97-06 of the Council of the CEC. This originally called for each Party to appoint a senior environmental expert to serve on the Committee and provide an independent report to Council on the operation and effectiveness of the NAAEC by 15 November 1997. However, delays in the process of appointing the three IRC members led to its establishment only in November 1997. Thus, the timing was adjusted to balance two requirements: sufficient time for the IRC to conduct its review of the operation and effectiveness of the NAAEC and a time-frame that ensured the Council of the CEC could consider this report at its annual meeting in June 1998. The three members of the IRC believed this was a sufficient time period in which to effectively conduct their work.

The initial research required a review of many documents of the CEC. This included, for example, the annual program and budgets, annual reports, and minutes of Council, JPAC and other meetings. Program related documents were reviewed for greater depth on the orientation and functioning of key projects. Other reports prepared and published by or through the Secretariat were also reviewed.

The IRC considered the materials prepared by the Secretariat for the high-level panel review of the NAAEC chaired by Maurice Strong in April 1997, as well as his letter reporting on the conclusions of that panel. Two of the members of the IRC were also participants in that exercise and thus could also draw on their own notes and recollections of the discussion that took place. Other Secretariat comments relating to the review issues were also considered. The Committee has also carefully considered the comments provided by the Joint Public Advisory Committee in October and December 1997, the National Advisory Committees of Canada and the United States (Mexico has yet to constitute one), and input from the Government Advisory Committee of the United States. These bodies were specifically constituted pursuant to the provisions of NAAEC.

In addition to these documents, a literature and document review was undertaken to find external reviews of the NAAEC and the CEC. This literature review focused not on the legal interpretation of the Agreement, but on its implementation by the Secretariat, Council and the Parties. Sources here included NGO reports, academic journals and reviews, and reports from government agencies available to the public. These are listed in the Bibliography.

As part of the review process, a call for public comments was made in December 1997. Initially, the deadline for this was to be 31 January 1998, but this was ultimately extended to 1 March 1998. In addition to two mail-outs to over three thousand people in the CEC database, a special box on the CEC web site was used to draw public attention to the review and the opportunity for comment. In all, some fifty comments were received from a wide variety of individuals, organizations and business interests. A tabular breakdown of the sources of these comments is found in Annex 1 of this report.

Finally, the IRC undertook a series of interviews with senior officials and program managers at the Secretariat offices in Montréal and in the three capitals. Most critically, the three Council members—Ministers Stewart and Carabias from Canada and Mexico,

respectively, and Administrator Browner from the United States—each met with the IRC to provide their own perspectives on the operation and effectiveness of the CEC in its first four years and their hopes and goals for the future. These meetings, along with related meetings with senior officials in different ministries in each capital, clarified, elucidated and informed the views that had been developing to that point. Most of the members of the selection committee for the North American Fund for Environmental Cooperation (NAFEC) were also interviewed for their advice on the issues related to their role in the CEC. The members of the IRC also initiated discussions with contacts of their own who had an interest in the future of the CEC.

Each of these meetings was confidential, no comments or opinions were to be attributed to named individuals. This was done to ensure the highest possible level of frankness. Some additional follow-up calls were made to clarify or expand on certain points. The Committee would like to state here our unequivocal appreciation for the thoughtful and constructive way in which all its interlocutors, without exception, responded during this process.

The interviews in capitals took place over an eight day period in late April 1998. During this period, the initial drafting of this report and a preliminary identification of recommendations was begun. Final drafting was completed after these meetings. A round of editing and the subsequent translation of the report into the three languages of the CEC completed its preparation.

Toward the end of the research phase, the IRC began to consider the approach it would take to the presentation of this report. Neither time nor resources permitted a detailed review of each project, nor an audit of Secretariat operations. Given the nature of the main issues and concerns that had become evident during the review process, however, the IRC did not believe this to be critical. This report is intended to reflect the key issues as the Committee understood them at this time in the life of the CEC. Specific projects and functions of the CEC are referenced in order to illustrate our main themes and recommendations, but not as an attempt to document in totality the detailed operations of the CEC. This report, therefore, represents the distillation of the many discussions, interviews, documents and other resources considered by the IRC. The Committee hopes any errors or omissions in the details will not detract from the overall analysis and key recommendations that are presented here.

Finally, it is important to state that this report is not, and is not intended to be, a legal review or analysis of the provisions of NAAEC. While the Committee believes its understanding is consistent with the Agreement, it has directed the analysis and resulting recommendations at the operational aspects of the Commission and the NAAEC, present and future. The report should be understood in this context and not be read as a legal interpretation of the Agreement.

1.3 Organization of the Report

This report is set out in five main parts. Following this introduction, section 2 summarizes the IRC's general overview of the role and functioning of the CEC. This will help give readers a general understanding of the issues that are central to this evaluation.

This overview is followed in sections 3-5 by a detailed assessment of the operation and effectiveness of the CEC and NAAEC. Section 3 focuses on the functioning and interaction of the main components of the CEC—the Parties, Council, Secretariat, the JPAC, and other advisory bodies. Section 4 focuses on the environment and trade nexus brought forward by the NAAEC. Section 5 focuses on matters related to the annual work program. While this report does not provide a detailed review of individual projects, sections 3-5 will include references to some of the specific projects undertaken by the CEC in its first four years in order to illustrate the key points being made.

Section 6 then provides a consolidated list of our recommendations looking to the future of NAAEC and the CEC. The Committee hopes that these recommendations will provoke creative thinking by the Council, the Parties, the Secretariat, and other interested persons or stakeholders, and a furthering of the commitment to pursuing cooperative approaches to sustainable development in North America and beyond.

2 General Observations on the Overarching Context and Development of NAAEC and the CEC

The concept at the beginning of the NAFTA negotiations was to address the then emerging environmental issues relating to trade liberalization in parallel with the negotiations on the free trade agreement. Trade issues would be the focus of the NAFTA track, with environment (and labor) on a second track, emphasizing cooperative approaches. The parallel track was not, however, fully developed in 1992, leaving only the NAFTA completed in that year.²

This result proved to be politically unacceptable, at least in the United States. The presidential election of 1992 led to the United States' promise to negotiate environmental and labor side agreements to complete the NAFTA process, and these negotiations were undertaken following the election of President Clinton. The negotiations were completed in September 1993, and the North American Agreement on Environmental Cooperation entered into force on 1 January 1994.

In the Committee's view, the original conception of "parallel" processes is closer to the true role and functions of the NAAEC than the phrase "side agreement" implies. This view is based in part on the appreciation of the full history and contents of the NAAEC—an international agreement that recognizes certain rights and creates obligations, processes and institutions that are unique in many ways.³ It also sets out specific links to the NAFTA and to NAFTA bodies in support of its environmental objectives—links going beyond what was originally included in NAFTA. But the IRC also believes that this view reflects the CEC's future as a vital and central element to achieve the goals of

² Reviews of the pre-NAAEC period can be found, for example, in Johnson and Beaulieu 1996, Chapter 1; McGraw 1994, pp. 17–18; Dimento and Doughman 1997.

³ These functions will be considered in detail below. See, for example, the discussion on what the IRC has called the "special responsibilities" of the Secretariat in section 3.3.

sustainable development in North America. For all these reasons, it is recommended that the NAAEC and the CEC should be seen as more than a side deal for trade, but as a complete and vital agreement in its own right.

Recommendation 1: The NAAEC and the CEC should be seen not as just a side deal for trade, but as a complete and vital agreement in its own right.

The NAAEC gives the CEC scope for developing projects that can promote the environmental health of the region within the context of expanding trade. But the IRC concluded that the CEC is more than just an environment and trade organization, at least in the narrowly defined way that term is sometimes understood.⁴ The three Parties provided the CEC with a clear and strong mandate to develop cooperative and productive environmental programs.⁵ The IRC believes that the long-term value of NAAEC and the Commission will be measured not so much by a technically defined environment and trade “ruler,” but rather by the contribution the CEC makes to improved environmental conditions for all people in North America, in the context of changing economic patterns—in short, by its contribution to sustainable development in North America.

Yet, developing an effective and strategic environmental program has been a specific challenge for the CEC. All contributors to this review have agreed that the program was, initially, too broad and unfocused. All have also agreed that a clearer vision or strategic framework for the work program is required. The IRC agrees, and will provide specific recommendations in the analysis sections below. It is important to note here, however, that it is not uncommon for new bodies to follow a similar learning curve, especially those taking on new functions and challenges. The CEC has been developing new methods of operation and is progressing from its start-up phase to its second phase, where it will begin to achieve its true potential. Indeed, it is clear that several projects already show high levels of achievement in what is a remarkably short time span for a new international organization. The views of almost all we interviewed were consistent on this point, which bodes well for increased cooperation in the future.

While the CEC is more than an environment and trade organization, the IRC strongly believes that dealing with the complex interplay of these previously segregated areas is one of its critical functions. A better understanding of these linkages should increase the ability to capitalize on opportunities for a healthier environment created by trade liberalization, while developing the critical information needed to safeguard against any potential negative effects of increased trade. The success of the CEC in this area will be measured not by one project, but by its overall contribution to the ability of the three countries to accurately assess and manage this complex relationship in the North American region. The CEC has an absolutely vital role to play in this area and should not shy away from the difficulties associated with these issues.

⁴ We will return to the Committee’s understanding of what trade and environment ought to mean in the context of the CEC in section 4 below.

⁵ Article 1 of the NAAEC, for example, includes seven sections that relate specifically to environmental protection and sustainable development in their own right.

Environment and trade, of course, formed the critical linkage that led to the development of the NAAEC in 1993. The sharp divisions between the Parties on how to address this linkage that were reflected at the time of the negotiations have not necessarily disappeared. Nevertheless, the IRC believes that a greater understanding between the Parties has developed, and it is confident a common agenda to address these complex linkages will emerge. Part of this process will require a broad, practical approach to the environment and trade link, rather than a narrow legal, academic or technical one. This relates both to exploiting trade opportunities for environmental improvement and to ensuring that trade-related growth, particularly growth in production, does not impair the environment in any country. Again, the IRC saw an emerging understanding that both sides of this issue need to be addressed cooperatively and constructively, reflecting the broad nature of this relationship.

In the Committee's view, the importance of the CEC's work, especially in the environment and trade area, has been buttressed by the launching of the negotiations on the Free Trade Area of the Americas. Given the linkages drawn in this new process between expanding trade, environmental and social factors, there will be an increased need to examine existing models and develop new mechanisms to respond to these dimensions of the globalization of markets, investments and financial regimes. The political and policy value of the CEC will, therefore, likely increase significantly in the next few years, as the Americas move closer toward concluding the FTAA.

During the course of this review, the unique character of the CEC has been emphasized many times. It is a three-Party organization whose member nations often exhibit significant political and cultural differences between themselves, and sometimes even internally between different regions or levels of government. In addition, the very large developmental and economic disparities between Mexico, on the one hand, and Canada and the United States, on the other, provide a microcosm of the disparities between developing and developed regions worldwide. One also finds an innovative public-participation component with specific architecture for accomplishing its task⁶ and a Secretariat balancing traditional support services with new types of special responsibilities. These features, plunged into the context of its broad mandate in support of sustainable development, reflect the political, legal and policy challenges of the CEC. They also increase the already formidable challenges of launching any international organization.⁷

⁶ See the discussion in section 3.4 below.

⁷ It is worth noting, for example, that the NAFTA Free Trade Commission did not begin its full functions until 1998, despite being established in the NAFTA that came into force on 1 January 1994.

Working relationships are emerging among the various bodies established under the Agreement, but this has clearly been one of the major challenges of the organization. Given the Secretariat's special responsibility to administer the citizen submissions process on environmental law enforcement and to develop special reports on important issues,⁸ it is not surprising that stresses have developed among the Parties and between the Parties and the Secretariat. Some of these stresses relate to conceptions and misconceptions of the roles and independent nature of the CEC and its component bodies. But the IRC does not believe these differences, or the underlying functions that have given rise to them, are irreconcilable. Consequently, in the analysis below, considerable attention is paid to the relationships between the different components of the CEC.

Despite the new and unique challenges faced by the CEC, it is clear that this organization has performed some very valuable and successful work during its start-up phase. These successes foreshadow its emerging strengths and potential benefits for the entire region. The Committee hopes that its recommendations will assist in this regard.

Sound Management of Chemicals

This project began in 1995. Since then, North American Regional Action Plans (NARAPs) have been developed on PCBs, DDT and chlordane, and the first phase of a NARAP on mercury has been adopted. A process for identifying new chemicals for NARAPs has also been agreed upon. Furthermore, trade in chlordane in North America has effectively been ended. These are significant results in a project this young that addresses such complex issues. Indeed, one senior government official involved in the project called it the most successful international work in this area. He noted that the results already achieved will alone place the Parties ahead of other countries when it comes to implementing a global agreement currently being negotiated on some of these chemicals. This leading position could not have been achieved without the CEC's involvement.

3 Evaluation of the Operation and Effectiveness of the NAAEC: The Components of the CEC

The detailed analysis of the operation and effectiveness of the Agreement and the Commission begins with a review of the main components of the CEC, and then moves to the key program areas and program management. As already noted, the IRC has been struck by the importance of the roles and relationships among the Parties, the Council and the Secretariat. The role of the different public input processes is also important to understanding the value and potential of the NAAEC and the CEC. The Committee believes that a better understanding of these roles and relationships will significantly improve the operations and increase the impact of the CEC.

⁸ These areas are derived from Articles 14 and 15 of the NAAEC for citizen submissions and Article 13 for special reports.

3.1 The Parties

The Committee has quite deliberately chosen to begin this detailed analysis with the Parties themselves. This reflects the basic proposition that the CEC is an inter-governmental organization that depends, ultimately, on the commitment of its three Parties to ensure its success.

Achieving and maintaining a high level of commitment requires, at its roots, that all the Parties feel they are welcome in the club, rather than that they are somehow captured in a system they have not sought or see no benefits from. The IRC's research provided some interesting and thoughtful readings on this point. Among them was the view that participants, particularly in a small organization such as the CEC, must believe that inputs and outputs are positively balanced, that "wins" and "losses" from a national interest perspective must be balanced at the end of the day.⁹ It is clear that this is not perceived to be the case at present, and this perception inhibits the ability of the CEC to become a stronger organization. The fact that there are only three Parties in the CEC may exacerbate this perception. With such a small number, differences become harder to hide, while perceived "wins" and "losses" can become magnified in intensity and importance.

The negotiation of the NAAEC and the creation of the CEC were US conditions for its adoption of NAFTA, a result of domestic opposition to the trade agreement alone.¹⁰ These demands were acceptable to Canada, though not sought. From the perspective of Mexican national interest, as we have come to understand it, Mexico did not ask for this agreement but was given little "choice." Combined with the facts that the first Secretariat recommendation to prepare a factual record was decided "against" Mexico and the first Article 13 Secretariat report was also "against" it,¹¹ Mexico perceives a largely losing record versus few environmental wins to date. It was noted to us, for example, that no environmental agreement was required between the United States and Canada when their first free trade agreement was completed, but one was required as soon as Mexico came to join the club.

⁹ See, in particular, the analysis of Lopez 1997; Zoller 1996; Porras 1996; Steinberg 1997.

¹⁰ Similar demands were also made on the labor side, leading to the negotiation of the North American Agreement on Labor Cooperation, 1993, and the creation of the Commission for Labor Cooperation.

¹¹ The first submission to go to the full factual record stage was the fourth one received and the first directed toward Mexican enforcement issues, *Factual Record No. 1: Final Factual Record of the Cruise Ship Pier Project in Cozumel, Quintana Roo*, CEC, 1997. The first Article 13 Secretariat report concerned the mass poisoning of migratory birds at the Silva Reservoir in Mexico. CEC Secretariat Report on the Death of Migratory Birds at the Silva Reservoir (1994–95), October 1995. Both these processes were initiated by citizen groups.

The perception that the CEC was designed mainly to watch over Mexico has not faded. Some of the factors supporting this are, in the Committee's view, outside the control of any of the bodies or actors in the CEC—for example, it is not the Secretariat or another Party that initiates a citizen submission process.¹² And, even though more citizen submissions have been directed at Canadian rather than Mexican environmental enforcement, a perception of institutional imbalance persists and is difficult to shake.¹³ This has probably been exacerbated by the feeling, expressed by some, that Mexico had to be “targeted” in order to show the Secretariat could act “independently” under its first Executive Director, a Mexican.

The Committee also understands the concern that the budget apportionment for the CEC has a significantly larger impact on meeting domestic environmental priorities in Mexico than in Canada or the United States. Although the concept of equal participation is generally agreed upon, the reality of the costs this imposes on Mexico's budget for environmental protection has helped support a sense of their disproportionate financial commitment.¹⁴ This is magnified by the view that little environmental benefit to Mexico has resulted from this use of environment ministry funds.

The IRC believes that the development of an equal stake in the CEC should have been given a higher priority from the beginning. Clearly, this would take some time to grow, given the essentially conflictual nature of the origins of the NAAEC and the CEC. The interviews conducted by the IRC, and other input, indicate that there is now a growing appreciation of this factor and the need to address it collectively. The IRC is of the view that many of the recommendations below will assist the Parties and the Council of the CEC in this regard.

Recommendation 2: The Parties should pay specific attention to the needs of the others, with a view to ensuring that CEC activities are not used “against” any one of them, or to pursue the interests of any one Party.

The IRC does not take this early lack of attention as a sign of noncommitment, though for some observers it undoubtedly had such a veneer. But the IRC did observe, in all three capitals, a reinvigorating commitment to the CEC. It was clear that at the ministerial level and at the level of senior officials, the potential for the CEC to play an important role in the achievement of sustainable development as the North American economy becomes increasingly linked is widely recognized and supported.

Building on this political support of the senior officials in the environment departments will, it is suggested, require a better process for engaging in a positive way all government agencies or departments that may be affected in discussions on the

¹² These processes are initiated by individuals or groups from the public at large, under Art. 14 of the NAAEC. This process will be returned to in §3.3.3.

¹³ The CEC web site data base on submissions, as at May 20, showed fifteen submissions filed in total. Seven concerned Canada, five Mexico and three the United States.

¹⁴ The Committee was told, for example, that the CEC allocation equals or exceeds the amount available for management of national protected areas in Mexico.

environment and trade linkages. At the moment, there is a wide perception that conflicting views within the three Parties too often hamper the CEC work program. The IRC believes that the coordination of the multiple government agencies with an interest in the subject matter of the NAAEC should be seriously addressed by each Party. This should be done with the objective of ensuring two things: that each relevant department has an opportunity to make constructive suggestions and that no one agency can stifle the work of the CEC.

Improvements in national coordination should be accomplished within the framework of the ongoing lead role of the environment ministries in overseeing the Agreement and the CEC. With this in mind, such coordination could be manifested in two main ways: through an improved interagency process in each country to inform the participation by the members of the Council and their designees; and, for specific matters within their areas of expertise, by the increased, but constructive, participation of different departments at the CEC table. In the Committee's opinion, addressing this problem must be done with a view to ensuring broader education and communication between governmental and nongovernmental agencies concerned with environment and trade linkages. A minimum requirement is for all agencies to accept the agreement and to try to make the most of it. A more optimistic hope is that all agencies will be able to actively engage in and support its work and goals.

Recommendation 3: Political support for the CEC within the three Parties should be built through stronger interagency involvement and internal communications. Relevant agencies of the Parties might also play a constructive role directly in CEC discussions, within their areas of responsibility, so as to broaden the education and communication between governmental and nongovernmental agencies concerned with environment and trade linkages. The environment ministries, however, remain the lead government agencies in the CEC.

The IRC has seen comments suggesting that a test of the political commitment of the Parties to the CEC would be an increase in its budget.¹⁵ In the Committee's view, the commitment of the Parties should not be measured by an increase in the budget of the CEC, especially when departmental budgets are declining or stagnant in all the Parties. At US\$9 million, and especially considering the large proportion the Mexican one-third share represents within the budget of its environment ministry, the IRC does not see resources as a primary constraint on the CEC to date. This could be revisited if the Council's agreed work program justifies it after the efficiencies resulting from improved strategic planning and program targeting have been fully exploited. At the same time, the IRC does believe that the budget of the organization should be maintained at the current level by the Parties. A reduction of the budget would be widely interpreted as a signal of a deteriorating political commitment at a time when the opposite is most needed.

¹⁵ For example, the letter from Maurice Strong, May 1997, para. 2, and the US National Advisory Committee comments to the IRC, 2 April 1998, section I. (Letter signed by David K. Schorr, Chairman, National Advisory Committee.)

Recommendation 4: The Parties should maintain the current level of funding of the CEC, subject to revisiting this issue if the Council's agreed upon program so justifies.

One particular "Party" issue concerns Canada. This is the participation, or rather lack thereof, of the provinces in the full range of rights and obligations under the NAAEC. Article 41 and Annex 41 of the NAAEC specify that the rights and obligations apply at federal and non-federal levels in the United States and Mexico, but only at the federal level in Canada. Annex 41 sets out a procedure for the provincial governments to join in the rights and obligations of the Agreement. This process has been further developed through a federal-provincial agreement in Canada, which a province would adhere to in order to confirm its participation in the NAAEC.¹⁶ To date, only Alberta, Québec and Manitoba have signed this accord.

The main consequence of this arrangement, made to meet federal and provincial constitutional divisions in Canada, is that the effective enforcement obligations and the obligations concerning the general standard for environmental laws do not apply to the provinces that have not signed on to NAAEC. Hence, neither the citizen submission process under Articles 14 and 15 nor the dispute resolution process in Part V of NAAEC are applicable. As well, the Secretariat can consider the non-participation of a province in deciding whether to accept a citizen submission originating from that province, thus potentially affecting the rights of citizens. Given that a very high percentage of Canadian environmental law originates at the provincial level, the first of these consequences has left a significant gap in the scope of coverage of NAAEC in Canada.

The absence of the provinces is important for more than just achieving the application of the full scope of rights and obligations. It is also important for the purpose of supporting the continent-wide objective of sustainable development. The absence of key jurisdictions having a broad authority over economic and environmental matters is not conducive to the development of continent-wide priorities and approaches to achieving this goal.

Recommendation 5: The Government of Canada, as one of the three Parties to this Agreement, should redouble its efforts to engage all the provinces in the NAAEC. This could, for example, be linked to further progress in the development of all or part of the Harmonization Agreement on the Environment between the two levels of government.

3.2 The Council

The Council is the governing body of the Commission. It is composed of cabinet or equivalent-level representatives of the three Parties, essentially the environment

¹⁶ The text of the *Canadian Intergovernmental Agreement Regarding the North American Agreement on Environmental Cooperation* is found in Johnson and Beaulieu 1996, Appendix VI.

“ministers.” The NAAEC, through Articles 9, 10, 12, 13 and 15, gives final¹⁷ decision-making powers over the operation of the CEC to the Council.

It is essential to make a distinction between the two roles the ministers play: 1) as representatives of the individual national Parties and 2) as members of the governing Council. The transition from individual Party representatives to functioning as governing Council members is a difficult one to make in many circumstances. At a minimum, one must recognize here that the Council is a different component of the CEC than the Parties acting individually. As representatives of the Parties, the ministers articulate and defend their national interests. In their second, and potentially contradictory, role they further the national interest by identifying and achieving a broader joint interest that may, at times, be somewhat at variance with the original conception of the national interest. Thus, as a Council member, each must find ways to coordinate and sometimes subsume narrower national interests into a broader continental interest.

The IRC evaluation has identified some roadblocks for the Parties in making the transition to joint Council work. Some of the reasons are seen in the preceding section. It is difficult to work aggressively on a common agenda when the Parties do not feel equally “at home,” when the Parties’ priorities for the work program seem at odds, or one Party feels particularly aggrieved. Another cause seems to have been the less than full attention paid by the Council to the operation of the organization.

In the IRC’s view, however, there has also been a deficiency of effort to focus on identifying the common goals and interests. To date, no identifiable strategic vision for the CEC as a whole has emerged. This is a primary responsibility of the Council. Some academics point to the long period of time it normally takes any organization of states to develop its own niche, internal coherence and mode of operations.¹⁸ The IRC certainly agrees with this observation. The Committee, however, believes the CEC has, in fact, shown very significant results in its formative years, despite the absence of strategic planning. Developing a strategic vision would allow the CEC to build on its early successes in an efficient and deliberate manner.

Recognizing the absence of a strategic vision will not be news to observers of the CEC. Indeed, this was noted to the IRC in all three capitals. Moreover, the IRC is aware that a process to begin developing such a vision and corresponding work program has now begun. It believes this essential process should be carefully conducted, more so than speedily conducted. What is at issue is not simply facilitating the administrative process of preparing the annual work program and budget, but the real substance of how the Council, and through its oversight, the CEC as a whole, will articulate and work toward the goal of sustainable development in North America. This will be an evolving process, one that must be based on good thinking and good will. This strategic vision should be what motivates and provides coherence to the work program, which in turn will be the

¹⁷ This does not, however, override the Secretariat’s special responsibilities for decision-making as set forth in the NAAEC. See the discussion in § 3.3.

¹⁸ For example, Zoller 1996; Mumme and Duncan 1996; Dimento and Doughman 1997, pp. 140 *et seq.*

strategy to implement the vision. In the Committee's view, the work program should be articulated on a three-year rolling basis, tied to clear priorities, and the individual projects within it must each strive for results that will assist in achieving the overall strategic vision. This report will return to the more detailed aspects of developing the work program in sections 3-5 below.

Recommendation 6: The Council of the CEC should undertake a careful process to articulate both a strategic vision of its contribution to sustainable development in North America and its process for achieving this vision. The vision should be coherent and comprehensive, and set a platform for the annual work program.

Recommendation 7: The strategic vision must be a shared one, based on the consensus of the Council. This flows directly from the first, second, and third recommendations, above.

In addition to the role of the Council in setting forth a strategic vision, it also has a general oversight function for the CEC. This includes approving the work program for each year, as well as more general management oversight issues. In order to facilitate these tasks, two levels of support to the Council have been developed. These are the Alternate Representatives, one senior official from each Party representing the Council member, and the General Standing Committee (GSC). The Alternate Representatives are foreseen in Article 9(1) of NAAEC, with the reference to the "designees" of the cabinet-level representatives. The GSC is composed of one bureaucrat from each Party and is responsible for liaison with the Secretariat in most of the day-to-day affairs of the CEC. The GSC provides the primary contact point for the Secretariat staff with each government.¹⁹

The IRC has heard from several sources about a degree of disconnection between the functioning of the GSC and the Alternate Representatives. Certain frustrations have been apparent in the amount of time spent revisiting decisions and duplicating the GSC's work in the Alternate Representatives' committee. We have also received comments suggesting that both of these processes are too intrusive into the functions of the Secretariat and seek to micro-manage its work. The time available for this review does not allow us to judge properly the reality behind these comments. But the IRC notes the need for Council to fulfill its mandate of ensuring sound management of the CEC. Most, if not all, international environmental organizations have some type of system for management oversight of the Secretariat work, and nothing in the NAAEC suggests to us that the CEC should be any different. At the same time, it is up to the Council and the Parties to ensure that these two processes work efficiently, are well coordinated internally, and do not lead to duplication of work.

Recommendation 8: The Alternate Representatives and the General Standing Committee should continue to assist the Council in its oversight of the CEC

¹⁹ The GSC was established by Resolution 95-01 of the Council, further to Article 9(5)(a).

operations, but this should be done in an efficient manner that avoids duplication and displays internally consistent direction.

3.3 The Secretariat

The provisions of NAAEC have established a Secretariat, led by an Executive Director, to provide technical, administrative and operational support to the Council,²⁰ as well as to make, in specified circumstances, decisions in its own right to bring certain matters forward to the Council. In this section, the report will consider these two tracks of Secretariat functions found in the NAAEC. For simplicity in referring to these two tracks, the Committee has identified the first as the “traditional” Secretariat role and the second as the “special responsibilities” of the Secretariat. For these purposes, the traditional Secretariat role can be understood to include all the administrative and substantive work undertaken by the Secretariat pursuant to the decisions or Resolutions of Council, including that furthering the work program adopted by the Council.

Recommendation 9: It should be recognized that the Secretariat acts independently of any one of the Parties, but that it also acts as an integral part of the CEC as a whole. In its traditional functions, the Secretariat serves to assist, advise and inform the Council.

The “special responsibilities” of the Secretariat are those operational and decision-making functions that have been specifically ascribed to the Secretariat in the NAAEC. In these key functions, the NAAEC set up a complex but reasoned relationship between the Secretariat and the Council. The critical special responsibilities are described below.

3.3.1 The draft work program and budget

Article 11(6) provides that the Executive Director shall submit for the approval of the Council the annual program and budget. This is an important administrative function. It is also one that has substantive importance, as the program directly relates to what the CEC can accomplish. This function enhances the CEC, since the Secretariat can bring forth new initiatives and information in making proposals to the Council for the annual program, which can assist in moving the Commission’s agenda forward. At the same time, the approval of the Council is not a pro-forma exercise but a very important function for the Council, and one that should receive their serious attention. The relationship here is one of the Secretariat advising the Council on a suitable work program and performing the administrative tasks required for program and budget purposes. But the proposals of the Secretariat are not binding on the Council, and it is the Council that must ultimately take responsibility for the annual plan.²¹

²⁰ Article 11(5)

²¹ This is confirmed in Article 10(1)(e).

This report has already noted the need for a strategic vision within which the annual program would be developed. The Secretariat, in developing its proposals for the annual program and budget, should approach its work within the spirit and constraints of the Council's strategic vision, while at the same time recognizing the oversight responsibility of the Council for the annual program and its implementation.

Recommendation 10: The Secretariat, in developing its proposed annual work program and budget, should be mindful of the strategic vision to be established by the Council and work within its spirit and its constraints.

3.3.2 The development of Article 13 Secretariat reports

Article 13 allows the Secretariat to prepare a report on any matter within the scope of the annual work program of the CEC. It also allows the Secretariat to propose to the Council a report on any matter not within the annual program but within the full range of cooperative functions of the CEC. In neither case can the reports deal with effective enforcement issues.

To date, the Secretariat has completed two reports: one on the death of thousands of migratory birds at the Silva Reservoir in Mexico and one on the pathways of air pollution across North America.²² A third report is underway, with a broad public participation component, on the San Pedro River basin crossing the states of Sonora and Arizona.

In each of the above cases, the work program was seen by the Secretariat to be broad enough to include these reports within its scope. Thus, the Council was notified of the Secretariat's work, but with no expectation of the need for a Council decision on the initiation of the report. While there was some concern registered by Mexico on the use of Article 13 to initiate the study on the Silva Reservoir incident, it appears to us that the actions of the Secretariat with respect to each study have been appropriate.

²² *CEC Secretariat Report on the Death of Migratory Birds at the Silva Reservoir (1994–1995)*, October 1995; *Continental Pollutant Pathways: An Agenda for Cooperation to Address Long-Range Transport of Air Pollution in North America*, CEC, 1997.

In each case, the Secretariat applied criteria developed in-house in deciding whether to initiate the Article 13 report process. This makes it particularly interesting to note that each of these efforts has been quite different in nature. The Silva Reservoir report was reactive; it examined a major loss of migratory birds. The report was followed by a significant capacity building effort under the annual program, working with the affected state jurisdiction in Mexico. In addition, there was a clean-up of the reservoir basin with the assistance of experts from the Canadian province of Québec, one of the provincial participants in the NAAEC.

The continental pollution pathways report was pro-active in nature and provided a valuable scientific study that was the first of its kind in North America. The study has the potential to establish the technical basis for developing coordinated policy work on air pollution in North America, with project work now continuing on cooperative monitoring of air pathways.

The third study, on the San Pedro River basin, is both reactive and proactive. The issue was first raised in the narrower context of a citizen submission on the effective enforcement by the United States of certain environmental laws in that area. With the withdrawal of the submission, the Secretariat was able to initiate a broader report on land and water use in the basin, taking all users and the environment into account. Combined with its public participation component, the work for this report shows a catalytic, cooperative aspect to the Article 13 process. Each of these instances shows a positive and responsible use of the opportunity given the Secretariat to initiate this process.

The discretion granted to the Secretariat to initiate and undertake the Article 13 process is balanced by the role of the Council. First, the subject of the report must be within the

The Secretariat's criteria for Article 13 reports:

- The extent to which the matter under consideration directly relates to the annual program.
- How would the preparation of a report advance or contribute to the objectives of the Agreement and of the annual program?
- Impacts of the budget and human resources on the work of the Secretariat.
- Whether other national or international organizations are more ideally suited to report on the matter.
- The extent to which a report by the Secretariat would impact beyond the discrete issue at hand, as well as consideration of any multiplier effect produced by the report.
- Whether any controversy generated by the report would advance or retard the overall development of the issue.
- Whether the report would contribute to trilateral or continental policies, provide a model, or develop useful information for issues of trinational significance.²³

²³ Source: CEC Silva Reservoir Report, p. 12.

approved annual program (or else it must be specifically notified to the Council, which can then reject it); second, the final report must first go to Council, which can decide not to make it public. Thus, while the Secretariat must carry out its roles in this area in an impartial manner independent of the control or direction of the individual Parties, it remains subject to the collective oversight of the Council at key points.

3.3.3 Implementation of the Article 14/15 citizen submission process

The very important citizen submission process found in Articles 14 and 15 also includes a careful balance of special responsibilities of the Secretariat with specific checkpoints by the Council.

The citizen submission process provides an opportunity for individuals or groups in any of the three Parties to send a submission directly to the Secretariat. The submissions would make the assertion that a Party has failed to effectively enforce one or more of its environmental laws. As alluded to in the introductory section, the IRC has not attempted to undertake a legal review of the scope or precise details of Articles 14 and 15, or of the Guidelines prepared by the CEC to help implement them.²⁴ However, we wish to make some general observations on the process, as well as on the implementation of the Articles to date.

CEC Guidelines for Submissions on Enforcement Matters

In 1995, the CEC published guidelines for citizens or groups interested in knowing more about the citizen submission process and how it works. These guidelines describe in general terms what might be included in a submission and as well as the process a submitter can anticipate after making a submission. These guidelines are available through the CEC's web site (www.cec.org) or through the Secretariat offices in Montréal.

First, the NAAEC process for citizen participation on enforcement issues is unique among international environmental organizations. It does, however, reflect a trend toward increased citizen involvement in international mechanisms that goes beyond traditional national tools for addressing different environmental issues. This trend includes such structures as the World Bank Inspection Panel (for hearing citizen submissions alleging violations of Bank policies) and its analogies at the regional development banks, the public access to information and environmental assessment procedures of major development banks, impartial scientific input into the climate-change processes, and participatory procedures for stakeholders in many international environmental bodies.²⁵

²⁴ "Guidelines for Submissions on Enforcement matters Under Articles 14 and 15 of the North American Agreement on Environmental Cooperation," CEC, available on the web site at <http://www.cec.org>. Reviews of the process can be found in, for example, Dimento and Doughman 1997, section I.B.2., pp. 64 *et seq.*; Baron 1995; Raustilia 1996; Gal-Or 1996.

²⁵ Whether formally or informally, all of these processes provide growing recognition of the role of "civil society" in international environmental governance.

Further development of this pattern has most recently been seen in the establishment of a special process for “civil society” input into the negotiations of the Free Trade Area of the Americas agreement, with specific reference to input on environmental issues.²⁶ Thus, the citizen submission feature on effective enforcement of the NAAEC provides a new type of process on a continuum of growing recognition of the value of citizen input. Given the high level of importance attached to enforcement issues in the NAFTA context, citizen participation in this area is, in the Committee’s view, a core component of this Agreement.

The submission process is well defined. It can lead to a fact finding report that attempts to set out, in rigorous factual terms, what a government has or has not done to enforce the one or more environmental laws that are the subject of the submission. Both the Secretariat and the Council play key roles in reaching this point.

For its part, the Secretariat has the responsibility of administering the process and making specific decisions. These include whether the initial criteria for accepting a submission, as set forth in Article 14(1), are met. These are mainly procedural criteria but also include the more discretionary matter of whether a submission “appears to be aimed at promoting enforcement rather than at harassing industry.” If the Secretariat is satisfied these criteria are met, it then proceeds to a further evaluation of more substantive and discretionary criteria set out in Article 14(2). Based on this evaluation, and bearing in mind guidance provided for this purpose in the Guidelines, the Secretariat may request a response to the submission from the Party “against” whom it is directed. The Party is then provided with a period to make its response; or it may decide not to make one. Following this, the Secretariat then makes a determination whether to recommend to the Council to undertake a factual record on the matters raised in the submission.

At this point in the process, the decision-making role of the Secretariat ends. The recommendation to Council that a factual record is warranted must be approved by a two-thirds vote of Council. If instructed on this basis to go forward, the Secretariat would prepare the record in an objective and responsible manner. The record then goes to Council, and there is an opportunity for the Parties to make comments on its accuracy. The disposition of the final report—whether it should be made public or not—is then in the hands of Council.

To date, fifteen submissions have been filed. Seven have been finally disposed of, one with a factual record. Eight are still pending, with one recommendation having recently been made for a factual record on a submission concerned with enforcement of the Canadian Fisheries Act.²⁷ The record on the submissions that have been subject to Secretariat decisions to date appears to show a consistent and well reasoned group of decisions. While observers (and the Parties) may, and some certainly have, criticized

²⁶ Paragraph 17 of the “Ministerial Declaration of San José” establishes a Committee of Government Representatives to receive, analyze and present the input received from the public during the negotiation process.

²⁷ All the information and decisions are drawn from the documentation available through the CEC’s web site at <www.cec.org>.

specific decisions, this Committee has seen nothing to suggest that the decisions of the Secretariat lack proper foundation.²⁸ Indeed, the IRC generally concurs with the view expressed by some commentators that the decision-making by the Secretariat has been professional and appropriate.²⁹ Thus, the IRC sees no reason to suggest alterations to this part of the process. Further, given the general view of those that we have spoken to—that the development of the one factual record to date showed an appropriate degree of objectivity and professionalism—there appears to be no reason to suggest changes in the Secretariat role in this regard.

What appears to have set the Secretariat at odds with one or more of the Parties is not generally the substance of its decisions, but the processes of taking some of them, of informing the Council or Party, or of informing the public of pending decisions. Broadly speaking, the Committee understands the concerns of the Parties to relate either to a pattern by the Secretariat of taking decisions to notify the public of certain steps where this was not provided for in NAAEC or the Guidelines, or to a perceived failure of the Secretariat to provide sufficient reasons for its decisions to the Parties or Council.

The IRC does not intend to dwell on particular instances brought to our attention, or the reasoning behind a specific action having been taken. But the IRC understands and respects the sensitive nature of the submissions process and of the concerns raised. This is especially the case for concerns raised by Mexico, particularly when seen in the historical context of the Agreement, the observation it was meant to highlight the “Mexican problem,” and the perception that it has been implemented that way at times.

There is little doubt that the early implementation of the submission process has caused serious concerns to be raised. Some observers have gone so far as to question the ability of the CEC to house both this type of “adversarial” citizen submission process and the cooperative functions that characterize the bulk of its work program. The IRC appreciates the forthrightness and sincerity of those who have made these comments. One common suggestion in response to this concern has been to place the fact finding function in a new organization, or perhaps in an independent ombudsman. These suggestions would require amending NAAEC, and this may well be pursued in due course. But prior to taking such drastic measures, the IRC believes addressing some specific perceptions and misperceptions may provide more immediate assistance.

First, while the process has an adversarial aspect, this falls outside the role or control of the Secretariat. Rather, the adversarial element is limited to the initiation of the process by individuals or nongovernmental organizations. Clearly, a submission is directed by the submitter against one of the Parties. From this point on, the trappings of an adversarial trial process simply are not present. There is no process for repeated briefs and counter-briefs, and no judgment is reached as to whether a Party has or has not effectively enforced its environmental law(s). Rather, the Secretariat receives the submission, independent of the Party involved, and makes specific assessments of whether the initial

²⁸ For example, Tutchton 1996.

²⁹ See, for example, Gal-Or 1996, Raustiala 1996, Lopez 1997, and Dimento and Doughman 1997.

criteria are met and whether a response from a Party is warranted. It then makes the further assessment of whether a submission warrants developing a factual record, with the aim of objectively informing and advising the Council on this point.

The purpose of the process, as the IRC understands it, relates to the broader goal of sustainable development. It allows citizens to take a new course of action when their local or regional environment may, in their view, be at risk. This mechanism also provides some 350 million pairs of eyes to alert the Council of any “race to the bottom” through lax environmental enforcement. Both these aspects feed into the Council’s responsibility to promote high environmental standards and their enforcement, and to prevent a race to the bottom from occurring.³⁰ The Secretariat acts as the conduit to ensure that all appropriate cases raised by citizens are brought to the attention of the Council. In objectively identifying these appropriate cases, the Secretariat does not act in an adversarial manner to the Party involved, but rather is supportive to the responsibility of the Council. It has a wholly neutral and objective role with respect to the Parties.

In short, the submission process empowers citizens, acting individually or through representative groups, to initiate an international process. This process “belongs” not to the Secretariat but to the citizens at large, for whose ultimate benefit it is intended. The Secretariat must administer the process with this public trust in mind. And the Council must also make its final decisions with this public trust in mind.

Seen this way, the successful implementation of the submission process requires mutual respect for the process and its limits by the Secretariat, the Council and the Parties. The IRC believes that all these actors must scrupulously apply the Agreement and the Guidelines, respecting the limits of actions they contain as well as the discretion provided to the respective decision-makers at the different points in the process. The submission process is sufficiently experimental in itself not to require embellishment or additional creativity in its implementation, or unsupported expectations of a full judicial process.

Further, the fact that the process is not a complete judicial one does not, in our view, make it either useless or ineffective. Impartial fact finding is a recognized and widely accepted part of dispute avoidance and dispute resolution processes. As well, it can support both adversarial and cooperative approaches to resolving issues.³¹

³⁰ A specific reference to whether the submission “raises matters whose further study in this process would advance the goals of this Agreement” in the second set of criteria for Secretariat review supports this link back to the sustainable development goals of the NAAEC.

³¹ For example, in the NAAEC context, one Party may choose to initiate the consultation process provided for in Article 22 of the NAAEC as a result of a factual record. Or a Party may choose to use a factual record as one basis to initiate a dispute resolution process under Part V of the NAAEC, with its potential for a legal finding and sanctions against another Party. Alternatively, and more hopefully, public pressure may be sufficient to cause a minister to address deficiencies that become apparent as a result of such a record. Or, the Council may undertake a process of capacity building or

Based on the above analysis, the IRC believes that the citizen submission process should be continued, essentially in its current form. The Guidelines provide for further review of this process, which is now underway. The IRC believes this review will be more productive if it is not completed until more submissions have been fully processed and, if appropriate, more factual records have been developed, in order to have a larger body of experience available to draw on.

At the same time, the IRC recognizes some merit to the concerns over the dual role of the Secretariat in administering the cooperative work program and having the special responsibility to administer the citizen submission process and make important assessments in the course of doing so. The IRC believes this concern is particularly acute for staff that are engaged in specific work projects that may be related to the subject matter of a submission. Real or potential conflicts may arise if the project managers are also involved in the submissions process. To reduce any appearance of conflict, the Committee recommends that clear divisions be developed between the staff responsible for the submissions process and those responsible for other work. When some dual functions are required, they should be minimized and the concept of the “Chinese wall”—of maintaining strict working divisions between these issues—should be applied.

Finally, the IRC has noted the slow pace of administering the submissions process by the Secretariat over the past nine months or so. The IRC understands that personnel shifts and other difficulties have caused delays that are perhaps beyond anyone’s control, but we suggest this excuse can take one only so far. The delays at this point not only inconvenience the Parties and other persons who may be involved, but also place at risk the public credibility of the process. The IRC urges the Secretariat to move as expeditiously as possible to address this problem.

Recommendation 11: The citizen submission process should continue as presently designed, based on a scrupulous application of the Agreement and the Guidelines, respecting the limits of actions they contain as well as the discretion provided to the respective decision-makers at the different points in the process. The existing review of the operation of this process should be completed after more submissions have been processed, including factual records when appropriate, in order to provide a greater body of experience to draw upon. The Secretariat should be expeditious in dealing with the public submissions.

Recommendation 12: Clear divisions should be developed between the staff responsible for the submissions process and those responsible for other work. When some dual functions are required, they should be minimized, using the concept of “Chinese walls”—maintaining strict working divisions between these functions.

information sharing to assist a Party or all the Parties in addressing a given area of weakness. Any of these outcomes can be a beneficial result of the factual record process.

3.3.4 Staffing the Secretariat: senior staff issues

Beyond these critical issues, the Committee also wishes to note a Secretariat-related factor that it strongly believes has now become debilitating to the CEC as a whole. This is the practice of appointing director-level staff specifically from the two Parties whose nationals do not hold the Executive Director’s position. The IRC understands the political attractiveness of such a tripartite senior-level structure, but it has come to the view that the negative consequences of this approach—essentially that each Party would be “represented” in the senior echelon of the Secretariat—have all too quickly overridden the benefits.

The Committee is aware that both the directors who have most recently held these positions have asserted that in their Secretariat functions they always acted not as Canadian or American directors, but as independent staff. The IRC has absolutely no reason to doubt or question them on this approach. Indeed, it is most appropriate. Nevertheless, a perception has developed that these positions are intended to provide avenues for national input into the Secretariat, resulting in considerable politicization of the positions. This politicization also supports a misconception that the Secretariat is a counterbalance to the Council, thereby distorting its function as a support to the Council.

In short, the identification of two specific posts at the senior-staff level as having the appearance of being “representative” positions has led to the claiming of national directors in a more political way than should, and probably can, be tolerated by the Secretariat or the CEC. This is contrary to the clear intent of the NAAEC, as well as the operation of most other secretariats. Under the NAAEC, the Executive Director is the only person appointed by Council. While this position rotates among nationals of the three Parties, the holder at any given time acts solely as a non-partisan director of the professional staff she or he engages and is responsible to the Council for the overall performance of the Secretariat. The IRC sees no compelling reason to politicize the positions of any of the staff reporting to the Executive Director. Thus, while the staff as a whole must, quite rightly, be composed of an equitable proportion of nationals of the three Parties, the IRC does not believe this should be translated into a tripartite senior level. Rather, the overall balance can be maintained through the appointment of well qualified senior-level staff on a functional basis. Such functional positions could include, for example, senior legal, scientific, capacity building, enforcement, environment and trade or administrative staff. Maintaining an equitable proportion of senior staff from the three countries will ensure the range of perspective needed to prevent one particular national bias from dampening the objective role of the Secretariat in all its work, without risking the politicization of critical positions within the Secretariat.

While a transition period may be required to move away from the two director system after a new Executive Director is appointed, we believe this change should be made at the earliest possible opportunity.

Recommendation 13: The practice of having two “national” director positions should be ended as soon as possible after the new Executive Director is selected, in

favor of a more broadly based approach to equitable representation of senior-level functional staff.

3.3.5 An administrative note

The IRC also wishes to note here its concern with some general administrative difficulties within the Secretariat. These relate to, in particular, a lack of transparency in the procurement process and the need to promote a general sense of budgetary restraint. The IRC is aware that a specific audit of these types of administrative issues has been called for and does not feel the need to duplicate this work.

3.4 Public Participation as a Component of the CEC

NAAEC is unquestionably a ground-breaking instrument as it relates to public participation. Its key features include:

- the requirement for one Council meeting every session to be open to the public (Article 9(4));
- the establishment of a trilateral Joint Public Advisory Committee (JPAC) of five independent individuals from each Party specifically to advise the Council as a whole (Article 16);
- recognizing the value of a National Advisory Committee (NAC) of independent citizens to advise each Party (Article 17); and
- recognizing the value of a Governmental Advisory Committee (GAC) to bring in advice from different levels of government to advise the Party. (Article 18)

In addition, the citizen submission process already discussed established a significant avenue for public involvement in this international organization. Furthermore, stakeholder participation has been designed into many of the projects, though it has been executed better on some occasions than others. In short, the IRC sees public participation not just as a value to be paid lip-service to, but as a core component of the CEC.

In this section, we will briefly discuss the different participatory mechanisms, and the Committee's recommendations for this component.

3.4.1 The Joint Public Advisory Committee (JPAC)

The JPAC is a unique policy advisory mechanism. It is formed of independent persons from each country, but is designed to provide collective advice to the Council as a whole. The review has revealed some degree of unevenness in the functioning of JPAC, partly due to the time spent organizing public consultations. Part of it may be reflective of the growing pains of the body itself. The IRC suggests that the JPAC be given the opportunity to refocus its efforts on its original mandate: to provide trilateral independent advice to the Council. The IRC also believes that this advice should be concentrated primarily on what the Council requires to do its work effectively. The Committee has seen sound advice emerge when these conditions have been present.

In meeting this mandate, the IRC believes that contact with the public at large is important. The development of a strategic vision and three-year program by the Council should assist both the JPAC and the public in this respect. This period of time will allow the JPAC to identify Council priorities, to time its advice to assist the Council in meeting these priorities, and to make a valuable contribution to the resulting deliverables. This will require some degree of coordination between the JPAC, the Secretariat, and the Council. The IRC has observed that improving this coordination may already be underway.

At the end of the day, however, the main requirement is for the JPAC members to be committed to this process. Attendance and participation in the JPAC meetings is critical, and the JPAC, with the Council and Parties, should have the ability to address situations of repeated non-attendance. Further, the independent nature of the JPAC requires a large degree of self-management and direction in order to ensure consistent and high-quality advice to Council. The IRC hopes that working within a longer-term strategic vision and work program will assist in this regard.

Recommendation 14: The JPAC should refocus its efforts on its original mandate: to provide trilateral independent advice to the Council. This advice should concentrate on what the Council requires to do its work effectively. Achieving this goal should be facilitated by the establishment of a strategic vision and three-year work program by the Council, which should provide a substantive focus for any JPAC public consultations.

3.4.2 The National and Governmental Advisory Committees

The NAAEC sets out the possibility, but not the requirement, for National Advisory Committees (NACs) and Governmental Advisory Committees (GACs) to be established by each Party. These committees are to advise each Party on its own positions on CEC matters. To date, the United States has established an NAC and a GAC. In Canada, there is an active NAC. Participation in the GAC is limited to those provinces that have signed on to NAAEC under the federal-provincial agreement, and hence the committee remains less than fully functional at this time. If the recommendation to bring other provinces on board is successful, then a stronger GAC will appear.

In Mexico, there does not appear to be either institution at this time directly focused on NAAEC issues. While the NAAEC does not require these bodies to be established, the IRC believes that their inclusion in the Agreement is a recognition of the positive contribution they can make. What the IRC has seen of the advice from the Canadian and US bodies supports this view.³² Thus, the Committee recommends that Mexico advance its development of these bodies. Cognizant of the budgetary constraints on all governments and the need to avoid duplication, the Committee suggests investigating

³² The IRC was provided with copies of most of the advice provided by the two NACs and the US GAC. We have also benefited from their direct input into this review process.

whether a focused sub-group or special session of the Mexican Sustainable Development Council could assist with these functions.

Beyond this, the IRC has heard suggestions that the NACs in particular should focus their efforts on implementing the Agreement, rather than seeking to change or expand it, or on arguing issues of compliance or noncompliance with the Agreement. The object of the NACs, as the IRC sees it, is to provide the advice they believe is most relevant from their citizen and stakeholder perspectives. If this makes the Parties uncomfortable at times, so be it. At the same time, the Committee hopes that the establishment of a longer-term CEC planning process, along with timely access to necessary information, will provide an opportunity for the NACs to provide timely advice on matters that will be most relevant to the agenda of the Council and the work program of the CEC. In short, the IRC suggests that the subjects for NAC advice be linked to the CEC program, but expects that the best way to ensure the quality and appropriateness of the advice is to rely on the self-regulating discipline of a multi-stakeholder consensus process.

Recommendation 15: Considering the quality of the contributions from the existing NACs and GACs that the Committee has seen, the IRC recommends that Mexico advance its development of these bodies, perhaps working through the Mexican Sustainable Development Council for its NAC. Without restricting the discretion of the NACs, the IRC hopes that a longer planning cycle for the CEC will help their assessments of the CEC work program and of other matters on the Council's agenda.

3.4.3 Public Participation as a CEC component

Beyond the institutional mechanisms that are part of NAAEC architecture, stakeholder and public participation has been encouraged in many aspects of the CEC work program. However, the IRC has observed a growing frustration, on the part of both the public and CEC bodies, with the ineffectiveness of much of this input.

The chief reason for this, in the Committee's view, has been too many unstructured public input sessions. The Committee has found this to be a particular problem for the public sessions of the annual Council meeting. While these events apparently provide a useful opportunity for some public venting, that in itself does not justify the time and expense of the process. The responsibility for focused and effective public input in these sessions rests with all the participants: the public, the Secretariat and the Council. Specific attention should, in the IRC's view, be paid to this part of planning the annual Council meeting.

Other processes for public participation have, however, been more productive, especially at the project level. The Committee has, for example, been impressed by the stakeholder consultation process developed through the Sound Management of Chemicals project. The early days of that consultation process were rocky indeed, but that appears to have provided a learning experience for the CEC. The process as it functions today appears to the Committee to be well regarded and effective. Critical to this, of course, is the focused subject matter and the commitment of the participants to a constructive process.

What this experience suggests is the need for regular, well understood consultation practices. Some trial and error has been inevitable, but the IRC believes that the experience to date can be consolidated and built upon in the public consultation guidelines being developed within the Secretariat. Key factors for success appear to be focus and preparation.

The IRC also believes that there is an emerging opportunity for the CEC to initiate or conduct facilitated forums or negotiations among stakeholders on issues of regional significance. This type of opportunity could, for example, be used in developing Council decisions on specific project items. Seen as part of a three-year program cycle, a focused trinational stakeholder process could be a useful tool in overcoming national political differences. To some extent, this has already been shown in the context of the Sound Management of Chemicals project.

**Sound Management of Chemicals:
Public Consultations**

The Sound Management of Chemicals Working Group has institutionalized its public consultation process. Typically, it now holds two-day meetings for each of its sessions. The first is used for public consultations on the full range of agenda items. The second day is then reserved for the Working Group, which can factor in the information and opinions developed the first day. Industry and other stakeholders appear to have accepted this process as timely and productive.

This section ends on a note of caution: public or stakeholder participation has become something of a mantra. The IRC is concerned that it not be made into a symbolic exercise, but that it be used to improve the results of the work under NAAEC. This takes commitment on all sides. The Committee also wishes to stress that while the public consultation process should inform all the participants of differing views and concerns, assist the development of a consensus where possible, and help inform the decision-makers, the process does not imply or give a veto to any participants.

Recommendation 16: The resources and energy devoted to public consultation should be efficiently used and productive. This requires focused and well prepared consultation processes, on concrete matters. If a three-year work program is adopted, public consultations can be better timed to provide the most support to informed decision-making.

3.5 North American Fund for Environmental Cooperation (NAFEC)

The North American Fund for Environmental Cooperation was not established by the NAAEC itself. Rather, it was established by a resolution of the Council in 1995.³³ In creating the Fund, the Council sought to engage the “energy and imagination of the people of North America” by funding community-based projects relating to the objectives of the CEC. The Fund received a C\$2 million budget for each of its first two years (1996 and 1997), and has been given C\$1.4 million for 1998. There is a staff

³³ Council Resolution 95–09, Creation of the North American Environment Fund.

coordinator working from the CEC offices in Montréal, and an independent board of two persons from each Party to decide which project applications to support.

The creation of NAFEC resulted in a reduction of the CEC program budget by the allocated yearly amount. The Parties did not provide additional funds for this purpose. Hence, it is legitimate to ask what is the value-added of the Fund compared to how those resources might be used in the core programming of the CEC. In general, the IRC remains skeptical of the value-added of the Fund in the manner it is presently structured. In particular, the funds are very limited, so few projects can be supported, and these are spread across three countries with no single topical focus. The end result is a list of fairly scattered NAFEC projects. In addition, NAFEC does not have the funds to enter seriously into the field of environment/development funding. Compared with other foundations, NAFEC does not even provide sufficient levels of seed money to leverage significant support from other sources.

On the positive side, feedback to the IRC indicates that NAFEC projects are engaging and encouraging genuine community involvement in specific places to address local environmental issues and identify responses to community problems. In addition, several of the projects have developed local community connections to international trade, opening new possibilities for communities to seize sustainable development opportunities generated by trade liberalization, especially with regard to “green” products. In a sense, the fund embodies a North American regional version of the axiom to “think globally, act locally.” The IRC has been especially impressed with the ability to use the resources to good advantage in Mexican communities, often in partnership with NGOs from the other Parties. This last element has added an important layer of capacity building that might not otherwise be fostered.

On balance, the IRC agrees with those who have suggested that it is still too early to conclude NAFEC does not work as intended. The Committee suggests that NAFEC continue for an additional period of time, but with a more focused mandate for funding projects in areas related to the three-year work program to be developed by the Council. In particular, NAFEC should design its request for proposals with this longer time-frame in mind so projects can be completed in time to help inform the program managers and participants of the results. This will allow a broader cross-fertilization of ideas and approaches—tapping into the energy and imagination of the community—while at the same time creating a critical mass of projects and ideas for the Secretariat and Council to draw on to inform and complete their work. In this way, one can envisage a true value-added from NAFEC to the CEC, and to the environment of North America. The value-added of NAFEC should be carefully evaluated after a two- to three-year trial period of projects being undertaken on this basis.

Recommendation 17: NAFEC should continue to be a source of community funding, but with a mandate more related to the programs of the CEC. Building on the three-year program cycle, NAFEC should seek to fund projects so as to develop a critical mass of community-based experience on key topics in the CEC work program, in order to help inform the Secretariat and Council in their respective program and decision-making functions.

4 Evaluation of the Operation and Effectiveness of the NAAEC: The Environment and Trade Nexus

Environment and trade linkages were at the heart of the negotiations of NAAEC, yet the nature and scope of these linkages are very difficult to define. For some observers, narrow definitions based on specific points of contact between environmental law and trade law are seen as the main subject area. Others see the environment and trade link as relating to how trade liberalization will affect corporate and governmental decision-making for environmental protection, with the law being one aspect of this. Still others see “environment and trade” as a euphemism for the broader linking of environment and economy, which is the underpinning of sustainable development.

A critical and very contentious issue for the CEC since its inception has been whether to address the environment and trade relationship, and if so, how. Some of the officials and others that the IRC spoke with or received comments from suggested this is not a proper focal area for the CEC. This is even more so in assessing the specific relationship between the NAFTA itself and the environment. With respect to those who have sincerely and carefully articulated those views, the Committee must express its disagreement with them.

In light of the political context surrounding the negotiations leading to the Agreement, the resulting specified relationship of the NAAEC to the NAFTA,³⁴ and the specific references to potential CEC involvement in environmental and trade matters in the functions of the Council,³⁵ among other factors, the IRC believes that environment and trade issues fit squarely in the agenda of the CEC. What is key to success in this area, however, is developing a clearer understanding of what aspects of the relationship between environment and trade the CEC can productively address.

The IRC has observed a strong impression among many of the officials we interviewed that the development of this part of the program has been approached as a largely adversarial matter—trade versus environment—particularly the need to “prove” that trade has had bad environmental effects. There appears to the IRC to be at least some justification for this impression. More important than dwelling on this problem, however, is to try to answer, from a practical CEC perspective, the question stated above: what aspects of the relationship between environment and trade should the CEC be addressing in its work program?

³⁴ These include Articles 1(d), 10(3)(a), and 10(6)(a)–(e) of the NAAEC.

³⁵ These include Articles 1(b), 1(e), 10(2)(d), 10(2)(m), 10(2)(r), 10(3)(b) and 10(6)(d).

4.1 The “Living Program”

The IRC believes that the debate on the role of the CEC in this area has been too highly influenced by the mostly theoretical, and at this time still largely unknown, aspects of the environment and trade relationship that are specifically the subject of NAFTA effects studies. This masks the fact that, in reality, the CEC has already begun to deal with several very interesting and useful environment and trade relationships under other program headings. In doing so, the CEC has made addressing environment and trade issues part of its living program, not just a research exercise. Some key examples will illustrate this.

The export of banned or severely restricted chemicals from a producing country to another, usually developing, country has been a core environment and trade issue for over twenty years. The Sound Management of Chemicals project is addressing this issue through its own work program, pursuant to Articles 2(3) and 10(2) of NAAEC, and is having as much or more success than all other international processes have had in this area since 1979.³⁶ Work already done or planned will put the North American region ahead of almost all other countries as new international negotiations begin this year on a United Nations convention on persistent organic pollutants. In another area, the Environmental Enforcement program is daily addressing one of the key issues of the 1993 NAFTA debate—the impact of different levels of enforcement on trade and investment patterns—through its cooperative and capacity building approaches.

The North American Working Group on Environmental Enforcement and Compliance Cooperation

This Working Group, composed of senior enforcement officials of the Parties, is coordinated by the Secretariat of the CEC. It was formally constituted by the Council in 1995. To date, the Group has assisted in coordinating over twelve projects, from hazardous waste to CFCs to wildlife and CITES enforcement issues. The Working Group focuses on cooperation and capacity building to improve enforcement across the region. There are at least eleven different enforcement-related agencies—representing environmental and wildlife enforcement at the federal and sub-federal levels in the three Parties—participating in the projects.

³⁶ The first international agreement on this was the 1979 UNEP London Guidelines for the Exchange of Information on Chemicals in International Trade. Under the NAAEC process, for example, the US manufacturer of chlordane has voluntarily agreed to stop manufacturing the product, and hence to stop shipping it to Mexico.

The IRC believes these types of on-the-ground approaches can become a more common feature of other CEC projects. We have noted, for example, that the technology clearinghouse and verification project being undertaken by the Secretariat has not included capacity building to develop a Mexican equivalent to the US and Canadian environmental-technology verification systems. While some Mexican vendors may already have access to Canadian or US certification bodies that verify the claims of environmental technologies, there is surely an opportunity to use the project to promote the development of environmental technology verification in Mexico. This type of capacity building would help prevent the Mexican environmental industry sector from being disadvantaged in the technology clearinghouse part of the project. This would also be a positive environment and trade linkage.

The technology clearinghouse project is a commercial database of environmental technologies initiated with seed money from the CEC; it is operated by partners from each of the three Parties. It is targeted at informing small and medium-size businesses about available environmental technologies.

The technology verification project is earlier in its developmental stages. It is pursuing discussions among technology-verification agencies with a view to mutual recognition over a three to five year time period.

In addition, we are aware that specific items have been developed for the current work program to deal with “green” products, such as shade coffee. These niche projects can be useful both as pilot projects, showing the opportunities trade liberalization provides for new environmentally friendly products, and as benefits to local communities in a very direct commercial way.

These existing projects demonstrate the ability of the CEC to address the environment and trade relationship in a way that is constructive for trade and economic growth and for environmental protection. This experience should be creatively built upon, when possible, in other projects.

Recommendation 18: The CEC should deal with the relationship between environment and trade in an open and constructive manner. Existing projects confirm the ability of the CEC to address practical aspects of this relationship in a manner that demonstrates the positive links between them. This should be creatively built upon, when possible, in other projects.

4.2 NAFTA Effects Research Program

The “living program” approach to the environment and trade relationship is an important part of the CEC’s work as seen by the Committee. The IRC is also aware that NAAEC specifically directs the CEC to consider more systemic links between NAFTA and its potentially associated environmental opportunities or impacts. These issues could include: changing production or investment patterns due to trade liberalization and any resulting environmental benefits or impacts; promoting increased access to environmental technologies; eco-labeling and other approaches to marketing environmentally friendly products in a new trading environment; and others. The

Committee believes that a complete environment and trade program should tackle such broader, more systemic issues. This is where the NAFTA effects program, in the Committee's view, has its real potential.

Trade liberalization is a dynamic process. The growing roles of NAFTA, the World Trade Organization, the Free Trade Area of the Americas, and other trade-development organizations is ample testimony to this. There is also ample testimony that the expansion of trade and the production that feeds it has generated increased concern about environmental protection and some social issues. The Committee believes that looking at both the opportunities to maximize the positive relationships between the environment and trade regimes and the need to ensure that trade growth does not generate negative environmental impacts are two sides of the same coin.

Flowing from this, the IRC believes that a major part of the CEC's role lies in helping to develop a constructive relationship between different governmental and nongovernmental (business and others) actors that are involved in the debate on environment and trade. Part of a constructive relationship is being mutually informative. Of necessity, a mutually informative dialogue requires that participants from different perspectives be active in the process and that no one group be able to disrupt it. A pre-condition for this to take place is the shared sense that neither the convenor nor the participants have predetermined the outcome. Based on what the IRC has seen and heard, it appears that most participants will have to re-establish their credibility in this regard.

The Committee firmly endorses the view that the CEC should examine how NAFTA can make, or already has made, a positive contribution to environmental protection. This could include, for example, studies on improved environmental performance by industry due to the increased dissemination of environmental technologies, or the adoption of environmental management practices linked with the more efficient use of resources. A balanced agenda should certainly investigate possible trends in these areas.

But the CEC, as a body headed by environment ministers, is charged, in part, with ensuring that trade growth does not have untoward environmental consequences. Without the ability to carefully develop studies that may reveal potential negative impacts, this goal cannot be met. Further, the CEC was not designed to simply "greenwash" trade growth.³⁷ The IRC does not believe any of our interlocutors have suggested it should or would expect it to do so. Thus, the Committee is compelled to return to the basic view that balance and objectivity are the critical requirements for studies on NAFTA effects.

In this context, the IRC does not believe that frankness in addressing both the positive and negative consequences of trade liberalization would make the CEC an enemy of NAFTA or of trade liberalization. Indeed, it seems that such an argument is itself counterproductive: is it not better to develop a capacity to identify and address any negative consequences as this dynamic and growing force evolves, in time for them to be dealt with in a constructive way, rather than wait until it is too cumbersome or expensive to do so?

³⁷ "Greenwash" is the environmental equivalent of "whitewashing" elements in a report or other process.

Accomplishing a balanced review of the effects of NAFTA will, in the IRC's view, require both substantive and process conditions to be met. On the substantive side, a very carefully constructed research program is required that reflects, in particular, the complexities of dealing with one or a few components of a broader, dynamic process. In looking at the effects of NAFTA on the environment, it is clear that the process of identifying the incremental effect of NAFTA itself will be a difficult one from an economic standpoint, and an equally difficult one from the environmental standpoint. Yet it may be that some issues are more measurable than others. For example, would it be possible to determine whether investment in Mexico since NAFTA came into force has been into facilities with lower or higher environmental performance standards than prior to NAFTA coming into force?³⁸

The Committee is not well placed to assess whether it is possible to address factually such questions at this time, but it does believe the CEC should be able to make informed judgments on them. Again, what the IRC sees as most critical is a balanced, objective approach and process for this purpose.

4.2.1 Balanced input on NAFTA effects research

In terms of process, the Committee believes, as already noted, that the engagement and "buy-in" of both environmental and trade officials in all three Parties is needed for a constructive dialogue to take place, especially on such sensitive issues as NAFTA effects studies. Outside consultative processes that remove or isolate the decisions on the environment and trade program from the Parties, or from particular departments inside them, will not likely bear fruit. Again, this places the burden on the participants themselves to pursue a constructive approach to the issues. This will be a longer-term effort that will evolve as the ability to assess issues increases and as trust in an objective process is gained.

Recommendation 19: The CEC should continue to pursue its NAFTA effects work. This should be done in an inclusive manner, bringing in experts from environmental and trade backgrounds, and looking at both the positive contributions of trade liberalization to environmental protection and potential negative impacts. This will be an evolving process as the ability to assess these impacts is developed and mutual trust is gained.

4.3 Constructing Links to NAFTA

The final element of the environment and trade nexus the Committee wishes to address is the relationship between the CEC and the NAFTA Free Trade Commission and other

³⁸ The IRC was told during one interview that a recent OECD study concluded that trade liberalization agreements have generally produced higher levels of environmental performance in new investments than in the period prior to the agreement. The source of this view is an OECD publication entitled, *Open Markets Matter: The Benefits of Trade and Investment Liberalization*, 1998, pp. 71–74.

bodies. The objectives of NAAEC include support of the environmental goals and objectives of NAFTA.³⁹ Article 10(6), in the section on Council functions, provides for cooperation between the CEC and NAFTA Free Trade Commission (NAFTA ministerial body) for this purpose.⁴⁰ The CEC is also empowered to serve as a point of contact for nongovernmental organizations or persons on environment-related NAFTA matters and to provide assistance to NAFTA when needed. There is also an opportunity to identify experts to provide technical advice to NAFTA working groups or other bodies.

The Committee is unaware that any of these linkages have been acted upon since 1994, but does not know the precise reasons for this.⁴¹ In the end, however, that there should have been no contacts to this point between the two Agreements is somewhat troubling. In the IRC's view, the establishment of routine contacts for information purposes should be pursued immediately. Where a NAFTA body is undertaking work with an environmental dimension or impact, appropriate Secretariat liaison should be developed as a conduit to the Council. The goal here should be to ensure an understanding of potential impacts at an early stage of the NAFTA body's work. This should facilitate the ability to consider them fully in a coordinated and effective manner.

Finally, the Committee also believes that an early opportunity should be taken to organize a meeting between the three environment and three trade ministers. In addition to the symbolic importance, the meeting should be the occasion to establish a formal process for communication between NAFTA and NAAEC bodies and a high-level commitment to early consultation on emerging issues. Meetings at senior levels to prepare this ministerial meeting should be undertaken at the earliest possible opportunity.

Recommendation 20: The CEC should immediately initiate contacts with the NAFTA Free Trade Commission and its subsidiary bodies, with a view to establishing routine contacts for information purposes. Where a NAFTA body is undertaking work with an environmental dimension or impact, appropriate Secretariat liaison should be developed as a conduit to the Council. The goal should be to facilitate a full consideration of the potential impacts in a coordinated and

³⁹ NAAEC, Article 1(d).

⁴⁰ Under the North American Free Trade Agreement, Article 2001, the NAFTA Free Trade Commission is composed of cabinet-level representatives or their designees, as is the CEC. It has general oversight responsibilities for the NAFTA, including supervising the work of the committees and working groups established under that Agreement. The original Secretariat structure was composed of three national sections. It is anticipated that at least some of the Secretariat functions will devolve to the central NAFTA Secretariat office expected to be opened in Mexico City in 1998.

⁴¹ A review of the range of possible linkages from an institutional perspective is found in *NAFTA's Institutions: The Environmental Potential and Performance of the NAFTA Free Trade Commission and Related Bodies*, CEC Environment and Trade Series #5, 1997. Another interesting discussion of opportunities for dispute avoidance is found in *Dispute Avoidance: Weighing the Values of Trade and the Environment Under the NAFTA and the NAAEC*, CEC Environment and Trade Series #3, 1996.

effective manner. In addition, senior environment and trade officials should plan a meeting of the environment and trade ministers as early as possible in order to confirm this relationship.

5 Evaluation of the Operation and Effectiveness of the NAAEC: The CEC Work Program

The core of the CEC's public image is developed through its substantive programs. This section of the report looks at the program of the CEC as it has evolved since 1994. Chief among the issues is the need to attain greater focus and coherence in the program. This section includes a number of recommendations aimed at assisting the Council and the Secretariat to achieve this goal.

5.1 Program Development and the Budget Cycle

That there have been problems in the development, review and approval of the annual work program and budget is obvious. In each of the last three years, there has been a longer and longer delay before the Council approved the program and budget, extending in 1998 into April, the fourth month of the operating year. One major cause of this problem has been the absence of a strategic vision within which to articulate yearly activities. Related to this is the lack of clarity over how to identify and work on key issues, and even identifying whose key issues to address. Another significant problem has been the use of a one-year budget and program cycle.

5.1.1 Strategic vision

This report has already noted the need to develop a sound strategic vision. The essence of this, in the Committee's view, should be the promotion of sustainable development on a continent-wide basis, with an emphasis on the environmental dimensions.

Clearly, articulating a broadly stated strategic vision is not sufficient. That vision must be supported through a carefully developed program of work for the Commission. The IRC believes the starting point for this should be the development of a three-year rolling program and budget.

5.1.2 Three-year program and budget cycle

The IRC has come to the view that the one-year cycle of programming should be replaced with a three-year cycle. This period of time will allow for the proper development of important project initiatives, while the one-year cycle does not. Although phasing-in this three-year process will require some transition time for completed projects to emerge, this can be adjusted to reflect projects already in progress and whose deliverables can be completed over the next two years.

The principle advantages of the three-year cycle would be to: promote the setting of clear, forward-looking priorities; allow planning for the dissemination of expected deliverables by the Council and Secretariat; ensure the efficient completion of projects

lasting more than one year; and support the inclusion of implementation steps as part of project design.

The three-year cycle would also create more opportunities to capitalize on the CEC's potential for improving scientific input into different projects. Common approaches to data gathering and evaluation can provide a basis for regional policy development. The Committee believes that the CEC's potential to develop sound scientific data has been underutilized to date and could be improved, especially early in the life of a project. (This will be returned to shortly.)

The three-year time-frame can also be used effectively to plan and incorporate public input into a project. This report has already noted, for example, the opportunities to better coordinate JPAC and public consultation with a longer project period, as well as the potential for NAFEC projects to be developed with the longer-term program in mind.

It should be emphasized here that what the IRC means by a three-year program cycle is not a solid block that is set in stone each three-year period. What is envisaged is a rolling three-year plan that is reviewed and adjusted as needed each year. This annual review would also allow the addition of the next third year of the plan. In this way, the Council will have the opportunity to consider emerging issues, identify areas where some preliminary work may be useful to better define or rule out a problem, and so on. It can then adjust priorities in a forward-looking way.

In some cases, of course, projects will not require three years to execute, while others may take more, and still others may be ongoing. The three-year cycle will allow for the planning of both larger and smaller projects, with the benefit of ensuring that they are all assessed in a broader program context and for their ability to work together to add value to each other.

A three-year program cycle can also be used to schedule and refine project deliverables. Good project and policy work will often require more than one year to produce a result. A longer program cycle will allow a number of projects to mature properly, while still providing the opportunity for the CEC to generate clear and significant results from a few of the projects each year. In the Committee's view, it would be wise to concentrate on two or three well-developed deliverables each year, in addition to the mandatory annual reports, State of Environment reporting, Article 13 reports and citizen submissions. Such a plan, allowing for the ability to respond to some discretionary events that may arise, would comprise a more useful contribution than attempting to create many reports each year from the full range of projects, which would of necessity be less significant and have less impact.

In a similar vein, the IRC believes that what is important is simply selecting good projects, not necessarily covering the full range of program categories. Moreover, the labeling of projects as "green" or "brown," "trade" or "environment", "ecosystem" or "enforcement" should not be important. The substance of the project and its ability to reflect the criteria suggested below are, in the Committee's view, the most important factors.

Recommendation 21: The CEC should adopt a rolling three-year program and budget cycle, updated each year and revised as necessary. The overall program

should focus upon a smaller number of clear and meaningful deliverables rather than a large number of less significant ones. Project quality, not coverage of project categories, should be the key factor in program development.

5.1.3 Program review and assessment

To be successful, a longer program cycle will have to include specific milestones for projects and an internal mechanism to measure their achievement. To date, neither the Secretariat nor the Council has instituted a consistent method of project review and assessment. The IRC recommends such a process be put in place in time for the end of the first year of the longer project period. An important component of this should be a section on “lessons learned,” where the specific reasons for successes and failures are documented to the extent possible.

Flowing from this, the IRC also believes that there should be regular project evaluation and follow-up after a project is completed. Some shorter-term projects—for example, the capacity building effort in the Mexican State of Guanajuato that followed the Article 13 report by the Secretariat on the Silva Reservoir—could already have been the subject of a follow-up report to allow constructive lessons to be drawn for all concerned with similar efforts. The annual report of the Commission provides an opportune occasion to highlight the actual outcomes of projects after they have been completed, while at the same time using the evaluations to build a stronger base for future projects.

Recommendation 22: The IRC recommends that a process be put in place, in time for the end of the first year of the longer program period, to provide systematic measurement and evaluation of the annual results of each project. This should include a “lessons learned” analysis for both successes and failures in the project. A similar review process following the conclusion of a project should be undertaken.

5.1.4 Setting program priorities

Virtually every interview, discussion and written comment that has informed the Committee’s work has remarked on the lack of focus and coherence of the CEC’s work program. By focus, the IRC means the ability to identify key issues or concerns the CEC is addressing as a priority. By coherence, the IRC means the internal logic of the program, and the ability of the individual projects to work together and to build on each other.

As a result of this review process, the IRC has identified some key principles that might usefully be applied to improve program relevance and consistency. First, the scope of matters that the CEC may include in its work program, as set out in Article 10 of NAAEC, is a broad shopping list. Not everything in this list must be worked on, and most of it will not be, at any given time. Indeed, some elements may not be considered for many years.

Second, this means priorities must be chosen rigorously. The early budgets showed little sense of what the priorities of the CEC were. Rather, they indicated an effort to try to do a little of everything. Some have suggested to us that this was a reflection of the

Secretariat attempting to please a broad range of stakeholders, or “clients.” Others have suggested this showed a lack of direction from the Parties. The Committee suspects both these explanations have some validity, but believes it is more important to look forward now than backwards at the causes.

In the Committee’s view, the CEC priorities should reflect the priorities of the Parties. The Secretariat’s role is to provide Council with a draft of the budget and work program. This allows the Secretariat to include emerging issues and information from a broad range of experts and sources, and this can be productive in advancing the general agenda. Nevertheless, it is to the Council that the Secretariat addresses itself for approval of the budget. The Secretariat serves the Council, and through it the Parties, for this purpose. For the Secretariat to be able to serve the Council effectively, however, the Council and the Parties must take an active part in the program-drafting process before the drafting work is undertaken, and not just after. This requires the Parties to be forthcoming about their priorities. The lack of an effective and interactive process has resulted in the extreme budget delays seen in the last two or three years. The development of a three-year rolling budget process will alleviate some of these concerns, but without the continued interest of all the participants, this alone will not be sufficient.

Finally, we recommend that the budget development process begin with an informal meeting between the Secretariat and the Parties in the summer before the next budget is due, in order to consider the Parties’ priorities. This should be coordinated with the annual Council meeting to ensure proper time is available to complete the program and budget for the forthcoming year. The IRC also recommends that the Council establish specific milestones in a program and budget timetable to ensure its completion prior to the end of the year before the budget comes into effect.

Recommendation 23: The program contents should reflect the key priorities of the Parties, based on the three-year rolling program already recommended. This will be facilitated through discussions between the Secretariat and the Council prior to drafting the budget, a summer meeting of the Parties and the Secretariat to consider the Parties’ priorities, and a clear timetable established by the Council for completion of the process.

5.1.5 Program substance: criteria for program choices

The Committee does not intend to recommend specific program choices. Rather, it believes that by using a more consistent process of priority setting, based on specific criteria, the Council and Secretariat will be able to set out a more focused and coherent program. (Projects noted in the text below are illustrative only.)

1. Focus on regional issues

First, the program should be focused on regional issues for North America. Regional issues should have a common significance for the three Parties; they should be “issues” in a real sense for each Party. They should also be either common transboundary issues or continental in scope. Further development of the Continental Pollutant Pathways study would clearly fit such a criterion.

Regional issues might relate to products or wastes moving among the countries with potential environmental effects as a result. Elements of the Sound Management of Chemicals project and the Environmental Enforcement program respond to this criterion, for example. Regional approaches to solving global environmental problems can also fulfill this criterion. The work presently being done to investigate how emissions-trading for greenhouse gases might work in North America reflects an approach that the IRC sees as particularly useful.

2. Building relationships between elements of different projects

Second, the projects should attempt to build on elements of each other. To date, there does not appear to be any systematic linking of projects, even, in many cases, within the same project area. The Committee has noted from the documentation and our interviews that this failure has become more recognized in the last year or so, and efforts are being made to develop such links. For example, we were told of a growing interaction between the Sound Management of Chemicals project and the cooperative Environmental Enforcement program area in order to increase the inclusion of enforcement issues in the development of the chemical specific Regional Action Plans. But this *ad hoc* cross-fertilization still falls short of a more systematic effort to build a program specifically so as to yield a product greater than the sum of its parts. One reason why this approach was ignored in the past may have been the lack of clear deliverables in some projects.

3. Promoting sustainable development

Third, the projects should reflect some key elements of sustainable development in the regional context of the CEC. Within its mandate and strategic vision, certain key elements of sound sustainable development policy can be promoted in the project development process. Three leading categories of elements will be focused on here:

- capacity building;
- building scientific data; and
- public participation.

Capacity building remains a general term. In some ways, it is simply not possible to define it well: capacity building, by its nature, needs to respond to the specific lack of capacity to address a problem in a given circumstance with the necessary support. This support can be in the form of information, it can be technical training, it might be new technologies or technological processes for monitoring environmental emissions, it could be increased industry awareness of new or substitute production processes or technologies. Several CEC projects to date have shown elements of this. The Sound Management of Chemicals is, again, a good example here. Through this project, capacity building support has been given, notably to Mexico, on substitute technologies for DDT and chlordane and on establishing an inventory of mercury sources and their possible environmental impacts in Mexico. The

project continues to work on establishing a mercury monitoring system in Mexico, in support of the Regional Action Plan on Mercury. The Environmental Enforcement program has also yielded an impressive technical-training element and data sharing among enforcement officials in all three countries. These projects have received relatively little public attention to date but are providing real improvements in their areas of operation, including in Mexico.

In some, but not all cases, capacity building could require significant funds. The CEC is not itself a development organization; it is not structured or financed as a donor or a development bank. However, the IRC believes a more concerted effort to work with funding institutions, such as the World Bank and Inter-American Development Bank, in order to marry the policy development and project delivery capabilities of the CEC with the financial resources of the other institutions would be very productive. In the Committee's view, this type of relationship needs to be developed at the senior level of the Secretariat with the support of Council, from the inception of specific projects if possible. This could

North American Pollutant Release and Transfer Inventory

This project is an example of the CEC's ability to assist the Parties to collect and compare important data, and to make the information available to the public in a meaningful way. Under the project, the CEC publishes data on annual releases by major industrial sources of specified categories of pollutants. The information is collected through national data gathering programs. The CEC publishes the data in a comparative format in annual reports, entitled *Taking Stock*. The first two of these reports show some of the difficulties involved in data comparisons, and the Secretariat is working with the Parties and stakeholders to overcome these problems. The CEC is uniquely placed to undertake this type of work.

extend the capacity building role of the CEC and its value-added to Mexico as well as the regional environment.

Another aspect of the sustainable development features could be **building a common base of scientific data and information**. In the Committee's view, this can be an important contribution of the CEC, and is especially appropriate given the neutral role of the Secretariat in performing its functions. Many political differences arise from the lack of sound information or conflicting analyses of the information. When a de-politicized (to the extent possible) process can be applied to developing a common scientific understanding of a problem, opportunities for cooperative policy development are usually improved. The CEC has the potential to combine neutral facilitation of scientific work with a focused policy development process to resolve issues in a cost-effective way. In the Committee's view, moving to a three-year program cycle will allow more opportunities to consider using this opportunity early in the life of a project. Further, in some cases, as the Report on Continental Air Pollutant Pathways has shown, simply bringing the scientific experts together can produce important first steps in understanding issues of growing significance and can reveal early warnings of issues to come. For example, it was suggested to the IRC that a research project on identifying alien invasive species and their sources may be useful at this time. Such a report would seem to fit the criteria set out here.⁴²

Public participation is also an important feature of sustainable development processes. This report has already noted that moving to a three-year program period will significantly increase the opportunities for meaningful, timely and informative public participation. This should be designed into projects from the beginning by the key officials from the Secretariat and the Parties, rather than injected as a ritualistic exercise at some arbitrary point during the project. Whether this leads to some form of facilitated stakeholder process or a more traditional exchange of information should be decided based on the circumstances of the specific project. What is more important at this point is ensuring that the appropriate opportunities are included early in a project's life. The IRC understands that a manual on public participation processes is currently being developed by the Secretariat. The IRC encourages this work to continue.

⁴² Alien invasive species are plants or organisms that are not indigenous to the country or region, but which arrive on ships, trucks, planes or traded products. Hence their arrival can be directly associated with trade, and in some cases trade barriers are erected to prevent their entering a country. Alien invasive species can, in some cases, have significant impacts on the fauna and flora of the environment they invade. Recent examples of invasive species include the gypsy moth on some forest products and the zebra mussel in ship ballast water.

4. Environment and trade factors

Certain environment and trade linkages will be the core of the NAFTA effects program. But this report has also noted the need for environment and trade to be part of the “living program” of the CEC. Consequently, the criteria should promote opportunities for specific projects in any program area to develop constructive linkages between environment and trade. A “screening” criterion should also be included to ensure that projects are developed so as not to indirectly or inadvertently disadvantage any Party.

5. The comparative advantage of the CEC

The fifth general criterion recommended by the IRC is that projects should build on the particular comparative advantage of the CEC, as compared to other institutions or bilateral programs. All our interlocutors were concerned with duplication, either of domestic agency functions or existing bilateral agreements of the Parties. Given the breadth of the mandate of some other organizations and programs, such as the International Boundary Waters Commission, International Joint Commission, trilateral waterfowl management programs, etc., the overlap of jurisdictions is almost inevitable, so particular care must be taken to avoid the duplication of programs. For example, CEC projects in the Mexico–United States border area need to be formulated to complement the scope and mandate of work of the International Boundary Waters Commission, the North American Development Bank and Border Environmental Cooperation Commission, and the Border XXI program, as well as ongoing cross-border work between states in both countries.⁴³ This reinforces the need to answer the question: what

⁴³ In assessing the effectiveness of the CEC, some have used the state of the environment in the United States–Mexico border region as a measure. This Committee does not see that approach as appropriate. As mentioned above, the CEC is one of several agencies with responsibilities in this area; furthermore, the problems in the region have accumulated over several decades. Expectations that an agency with the current budget levels could tackle the infrastructure and capacity building needs of the region are clearly off the mark. In addition, it must be remembered that the CEC is a trinational body; its projects must be seen as useful by all three nations.

This report has not made a detailed analysis of all the work of the CEC that may pertain to the cross-border areas and in particular to the border shared by the United States and Mexico. Nor do we have sufficient information to make any judgments about whether the environmental indicators in the area are improving or deteriorating. But we have learned about several projects that are contributing to solutions over the long term. For example, as part of a program being replicated on both US borders, the CEC has assisted the governments of the United States and Mexico to develop methodologies and to begin co-locating and jointly calibrating air pollution monitors. The CEC has also demonstrated an ability to engage local communities to formulate recommendations on the multiple use of the resources in shared water basins and to work with partners on land-based sources of marine pollution affecting different border regions. This report has already noted that one

specifically will the CEC add to the program of work in a given area or on a given subject?

Some of the comparative advantages of the CEC are already implied from the preceding discussions: the ability to facilitate a common and coordinated response throughout the region to specific problems; experience in identifying and phasing-in capacity building elements when required to ensure a successful regional solution; and the potential to monitor project results and impacts. In the Committee's view, the key comparative advantage is the ability of the CEC, through its three Parties, to deliver on-the-ground results. This has already been seen in several projects—for example, the Important Bird Areas project—where new conservation areas have been

The Important Bird Areas project

With over 250 species of migratory song-birds (i.e., not waterfowl) in North America, their effective conservation is dependent on coordinated action. Habitat protection is an increasing part of the conservation effort. A trilateral working group, in coordination with other relevant bodies, developed criteria that led to more than 150 Important Bird Areas (IBAs) being identified. Three such areas have now been selected as pilot projects for the development of conservation strategies in cooperation with local community groups. The identification of the IBAs will also lead to a broad North American Strategy for bird conservation, being developed with nongovernmental input, to be adopted by Council.

designated in an integrated manner by the Parties.⁴⁴ It has also been seen in the Sound Management of Chemicals project, with the creation of plans to remove chlordane and DDT from the market in Mexico and from US–Mexican trade. (There has been no Canadian trade in these products for some time.) The area of enforcement work has also seen noticeable success in developing trilateral enforcement projects on key transboundary issues, such as movements of CFCs, hazardous waste and endangered species. In the Committee's view, this ability to deliver significant on-the-ground progress on a specific issue in a fairly limited time period is a key element of the comparative advantage of the CEC.

6. Ensuring appropriate resources for mandatory work program elements

The sixth criterion recommended for program and budget decisions is to ensure an adequate allocation of human and financial resources so as to ensure

of the important contributions of the CEC to improving environmental management in North America has been facilitating arrangements for capacity building where needed. This will continue to be true in the border region.

⁴⁴ See CEC Council Resolution 96–02, for example.

implementation of the CEC's mandatory program items, as derived from the Agreement itself. These include, for example, the annual report with its enforcement component, state-of-the-environment reporting, and the Article 14 and 15 citizen submission process. This report has already noted that the credibility of the CEC and the Secretariat can be negatively affected when sufficient resources are not available. This was particularly true with regard to the citizen submission process, in which delays in responding to the submissions received have lengthened considerably in the last ten months or so.

The IRC has also noted the difficulties being experienced in completing the work on Transboundary Environmental Impact Assessment, pursuant to Article 10(7) of NAAEC. The commitment of the Council to conclude a binding international agreement based on the initial work of the CEC on this issue was reflected in the Council resolution that initiated specific negotiations for this purpose.⁴⁵ The IRC believes that it is important to conclude such an agreement, with the aim of identifying and eliminating or mitigating the transboundary effects of planned projects, as the circumstances require. The IRC believes that the passing of the initial deadline for completing these negotiations should be cause to redouble the efforts being made, with the support of outside assistance if the Council believes this could be useful.

Recommendation 24: Program decisions should be based on criteria that reflect the strategic vision and purpose of the CEC. The range of criteria include: the regional nature of the issue being addressed; the ability of projects to build on elements of other projects; the incorporation of key features of sustainable development in the program (e.g., capacity building, scientific information and public participation); the ability to make environment and trade part of the living program; the comparative advantage of the CEC to address the issue; and the need to ensure adequate resources for the CEC's mandatory program items.

Recommendation 25: The CEC should seek to develop funding links with donors as well as the major development banks, such as the World Bank and Inter-American Development Bank, in order to better develop the capacity building elements of its projects.

⁴⁵ Council Resolution 97-03.

SUMMARY OF CRITERIA FOR PROGRAM SELECTION

1. Regional issues
 - Common importance to all parties
 - Common transboundary or continental nature
 - Transboundary movement of hazardous wastes or products
 - Regional approaches to global issues
2. Building relationships between elements of different projects
 - Cross-fertilization of projects
 - Does a project contribute to making the whole greater than the sum of its parts?
3. Reflect certain elements of sustainable development
 - Capacity building steps to be included
 - Scientific basis of an issue to be addressed
 - Can public participation be properly incorporated
4. Trade and environment factors
 - Does a proposed project identify trade and environment issues to be addressed?
 - Does the suggested project help make trade and environment part of the “living program” of the CEC
5. Comparative advantage of the CEC
 - Does the project build on the comparative advantages of the CEC:
 - ◇ Coordinated continental actions
 - ◇ On-the-ground delivery of projects through the Parties
 - ◇ Ability to phase in capacity building
 - ◇ Potential to monitor projects
6. Mandatory programs
 - Ensure appropriate staffing and resource levels for the mandatory programs:
 - ◇ Annual reports
 - ◇ State of environment
 - ◇ Art. 13
 - ◇ Citizen submissions
 - ◇ Transboundary environmental impact assessment

5.2 A concluding note

The starting point, once again, is that the Secretariat acts to support and advise the Council. Thus, the development of the substance of the annual work program (outside of the special responsibilities assigned to the Secretariat) should be subject to the general oversight of the Council as a whole. At the same time, the Secretariat must act independently of the control of any one Party in its program-management capacity. This may seem like an artificial division at times, especially to the Secretariat staff, and the IRC recognizes that difficulties can arise. Still the division remains a fundamental one for the CEC.

Overcoming some of the potential difficulties in operationalizing this division requires both a sense of commitment to this relationship by the Parties and the Secretariat, and effective and positive two-way communication between them. Thus, both the Parties and the Secretariat must work cooperatively on the programs that have been mandated by the Council.

A second factor may also be of some importance. In a large intergovernmental organization, the materials produced by a Secretariat are well understood not to represent the views of any individual Party. In a very small organization, it is harder to make this distinction, and fears that the public would associate a CEC or Secretariat document with the views of one Party can lead to excessive involvement of a Party in drafting details. The IRC notes, in this regard, that CEC or Secretariat reports or documents do not necessarily reflect the views of any one Party. This is inherent in the structure of the CEC, in which no one Party has the ability to exercise undue influence on the Secretariat.

Finally, we turn again to the basic role of the Secretariat: to advise, inform and support the Council. At times, doing this effectively may cause some discomfort for one Party or another and may create some political problems. However, the Committee also recognizes that progress in meeting the objectives of the CEC will not be made without pinpointing problems or challenging certain thinking. This cannot always be done painlessly.

Recommendation 26: The development of the substantive elements of the work program (outside of the special responsibilities of the Secretariat) are subject to the general oversight of the Council as a whole. At the same time, the Secretariat must act independently of the control of any one Party. This requires a two-way commitment to the neutral position of the Secretariat in its role of supporting, advising and informing the Council. It should also be understood that the reports of the Secretariat or the CEC do not necessarily represent the views of any individual Party.

6 Consolidated List of Recommendations

Recommendation 1: The NAAEC and the CEC should be seen not as just a side deal for trade, but as a complete and vital agreement in its own right.

Recommendation 2: The Parties should pay specific attention to the needs of the others, with a view to ensuring that CEC activities are not used “against” any one of them, or to pursue the interests of any one Party.

Recommendation 3: Political support for the CEC within the three Parties should be built through stronger interagency involvement and internal communications. Relevant agencies of the Parties might also play a constructive role directly in CEC discussions, within their areas of responsibility, so as to broaden the education and communication between governmental and nongovernmental agencies concerned with environment and trade linkages. The environment ministries, however, remain the lead government agencies in the CEC.

Recommendation 4: The Parties should maintain the current level of funding of the CEC, subject to revisiting this issue if the Council’s agreed upon program so justifies.

Recommendation 5: The Government of Canada, as one of the three Parties to this Agreement, should redouble its efforts to engage all the provinces in the NAAEC. This could, for example, be linked to further progress in the development of all or part of the Harmonization Agreement on the Environment between the two levels of government.

Recommendation 6: The Council of the CEC should undertake a careful process to articulate both a strategic vision of its contribution to sustainable development in North America and its process for achieving this vision. The vision should be coherent and comprehensive, and set a platform for the annual work program.

Recommendation 7: The strategic vision must be a shared one, based on the consensus of the Council. This flows directly from the first, second, and third recommendations, above.

Recommendation 8: The Alternate Representatives and the General Standing Committee should continue to assist the Council in its oversight of the CEC operations, but this should be done in an efficient manner that avoids duplication and displays internally consistent direction.

Recommendation 9: It should be recognized that the Secretariat acts independently of any one of the Parties, but that it also acts as an integral part of the CEC as a whole. In its traditional functions, the Secretariat serves to assist, advise and inform the Council.

Recommendation 10: The Secretariat, in developing its proposed annual work program and budget, should be mindful of the strategic vision to be established by the Council and work within its spirit and its constraints.

Recommendation 11: The citizen submission process should continue as presently designed, based on a scrupulous application of the Agreement and the Guidelines, respecting the limits of actions they contain as well as the discretion provided to the respective decision-makers at the different points in the process. The existing review of the operation of this process should be completed after more submissions have been processed, including factual records when appropriate, in order to provide a greater body of experience to draw upon. The Secretariat should be expeditious in dealing with the public submissions.

Recommendation 12: Clear divisions should be developed between the staff responsible for the submissions process and those responsible for other work. When some dual functions are required, they should be minimized, using the concept of “Chinese walls”—maintaining strict working divisions between these functions.

Recommendation 13: The practice of having two “national” director positions should be ended as soon as possible after the new Executive Director is selected, in favor of a more broadly based approach to equitable representation of senior-level functional staff.

Recommendation 14: The JPAC should refocus its efforts on its original mandate: to provide trilateral independent advice to the Council. This advice should concentrate on what the Council requires to do its work effectively. Achieving this goal should be facilitated by the establishment of a strategic vision and three-year work program by the Council, which should provide a substantive focus for any JPAC public consultations.

Recommendation 15: Considering the quality of the contributions from the existing NACs and GACs that the Committee has seen, the IRC recommends that Mexico advance its development of these bodies, perhaps working through the Mexican Sustainable Development Council for its NAC. Without restricting the discretion of the NACs, the IRC hopes that a longer planning cycle for the CEC will help their assessments of the CEC work program and of other matters on the Council’s agenda.

Recommendation 16: The resources and energy devoted to public consultation should be efficiently used and productive. This requires focused and well prepared consultation processes, on concrete matters. If a three-year work program is adopted, public consultations can be better timed to provide the most support to informed decision-making.

Recommendation 17: NAFEC should continue to be a source of community funding, but with a mandate more related to the programs of the CEC. Building on the three-year program cycle, NAFEC should seek to fund projects so as to develop a critical mass of community-based experience on key topics in the CEC work program, in order to help inform the Secretariat and Council in their respective program and decision-making functions.

Recommendation 18: The CEC should deal with the relationship between environment and trade in an open and constructive manner. Existing projects confirm the ability of the CEC to address practical aspects of this relationship in a manner that demonstrates the positive links between them. This should be creatively built upon, when possible, in other projects.

Recommendation 19: The CEC should continue to pursue its NAFTA effects work. This should be done in an inclusive manner, bringing in experts from environmental and trade backgrounds, and looking at both the positive contributions of trade liberalization to environmental protection and potential negative impacts. This will be an evolving process as the ability to assess these impacts is developed and mutual trust is gained.

Recommendation 20: The CEC should immediately initiate contacts with the NAFTA Free Trade Commission and its subsidiary bodies, with a view to establishing routine contacts for information purposes. Where a NAFTA body is undertaking work with an environmental dimension or impact, appropriate Secretariat liaison should be developed as a conduit to the Council. The goal should be to facilitate a full consideration of the potential impacts in a coordinated and effective manner. In addition, senior environment and trade officials should plan a meeting of the environment and trade ministers as early as possible in order to confirm this relationship.

Recommendation 21: The CEC should adopt a rolling three-year program and budget cycle, updated each year and revised as necessary. The overall program should focus upon a smaller number of clear and meaningful deliverables rather than a large number of less significant ones. Project quality, not coverage of project categories, should be the key factor in program development.

Recommendation 22: The IRC recommends that a process be put in place, in time for the end of the first year of the longer program period, to provide systematic measurement and evaluation of the annual results of each project. This should include a “lessons learned” analysis for both successes and failures in the project. A similar review process following the conclusion of a project should be undertaken.

Recommendation 23: The program contents should reflect the key priorities of the Parties, based on the three-year rolling program already recommended. This will be facilitated through discussions between the Secretariat and the Council prior to drafting the budget, a summer meeting of the Parties and the Secretariat to consider the Parties’ priorities, and a clear timetable established by the Council for completion of the process.

Recommendation 24: Program decisions should be based on criteria that reflect the strategic vision and purpose of the CEC. The range of criteria include: the regional nature of the issue being addressed; the ability of projects to build on elements of other projects; the incorporation of key features of sustainable development in the project (e.g., capacity building, scientific information and public participation); the ability to make environment and trade part of the living program; the comparative advantage of the CEC to address the issue; and the need to ensure adequate resources for the CEC’s mandatory program items.

Recommendation 25: The CEC should seek to develop funding links with donors as well as the major development banks, such as the World Bank and Inter-American Development Bank, in order to better develop the capacity building elements of its projects.

Recommendation 26: The development of the substantive elements of the work program (outside of the special responsibilities of the Secretariat) are subject to the general oversight of the Council as a whole. At the same time, the Secretariat must act independently of the control of any one Party. This requires a two-way commitment to the neutral position of the Secretariat in its role of supporting, advising and informing the Council. It should also be understood that the reports of the Secretariat or the CEC do not necessarily represent the views of any individual Party.

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Annex 1: Sources of Public Comments for the Review Process

Sources of Comments as of 20 April 1998 (56 comments)

	GAC	NAC	Government Agencies	NGOs	Businesses/ Bus. NGOs	Individuals	Academic
Total	1	2	14 (includes one aboriginal government)	6 3 local 3 national	14	16	3
Canada		1	6	1 local 1 national	8	8 (I.M.P.)	1
Mexico		(does not exist)	3	2 local 1 national	3	3	1
United States	1	1	5	1	3	5 (1 JPAC member)	1

N.B.: JPAC comments were submitted outside this exercise in the form of two Advice to Council, 97-01; 97-03. This is not reflected in the above table.

Annex 2: Members of the Review Committee

León Bendesky is a partner and director of ERI economic consultants in Mexico City. He has been a professor at the Centro de Investigación y Docencia Económicas (CIDE) and economist at the Centro de Estudios Monetarios Latinoamericanos. Dr. Bendesky has lectured in several Mexican academic institutions as well as in the United States under a Fulbright grant. He has done consulting work in Mexico, Central and South America for international organizations such as the UN, IDB and the World Bank. Dr. Bendesky also writes a weekly column for a national newspaper and contributes to several other publications.

Barbara J. Bramble is Senior Director, International Affairs, for the National Wildlife Federation in Washington, DC. Ms. Bramble's work involves a wide range of connections between economics and environment, or sustainable development. The international issues she addresses include the environmental aspects of international development funding and of international trade agreements, climate change and global forest issues. M. Bramble served on the Steering Committee of the International NGO Forum at the 1992 Rio Conference. Prior to joining NWF as the founding director of the International Affairs office, Ms. Bramble was a legal advisor to the Council on Environmental Quality in the Executive Office of the President, as well as an environmental lawyer in private practice.

Stephen Owen is the Lam Professor of Law and Public Policy and the Director of the Institute for Dispute Resolution at the University of Victoria. He is also a Commissioner of the Law Commission of Canada. Professor Owen has previously been the Deputy Attorney General, Commissioner of Resources and Environment, Ombudsman, and Executive Director of the Legal Services Society of British Columbia. He has been an advisor to numerous international agencies on environmental, human rights and conflict resolution issues in Africa, Southeast Asia, Latin America and Eastern Europe; and was President of the International Ombudsman Institute from 1988 to 1992, representing Ombuds offices in more than 60 countries..