

**STAFFORDSHIRE UNIVERSITY**

**MA Sustainable Development**

**Supra-national integration and**

**sustainable development:**

**An evaluation of NAFTA's**

**Commission for Environmental Cooperation**

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## **Abstract**

This thesis analyses the North American Agreement for Environmental Cooperation (NAAEC) and its Commission for Environmental Cooperation (CEC), with reference to the concept of sustainable development. Three research questions explore how the CEC may be made more effective in promoting sustainable development in North America and elsewhere. This thesis conducts a qualitative literature and document review and interviews CEC staff.

Some key themes are identified in the literature and the Strengths and Weaknesses of the CEC are evaluated. It concludes that there is little political commitment to its objectives. However, the dissertation ends by offering some ways in which the CEC may be made more effective and act as a role model for other intergovernmental agreements. Chief among these are that ‘soft power’ be used more effectively, the budget increased through fundraising, and that the Secretariat expand its engagement with civil society in a variety of ways.

A most important conclusion is that the CEC can *practically* enhance its effectiveness for sustainable development in North America by implementing creative solutions for engaging civil society within Secretariat operations.

# Introduction

## *Overview*

On January 1, 1994 a long dormant proposal for a hemispheric trade arrangement was created with the implementation of the *North American Free Trade Agreement* (NAFTA) between the United Mexican States (Mexico), the United States of America (USA), and Canada (with all three countries hereafter collectively referred to as the *Parties*)<sup>1</sup>. While the NAFTA is primarily a trade agreement, it was the first such agreement to accord primacy to the environment over trade in identified areas and circumstances (Mello 1994, p.26; Schuler 1996, p.371).

At the time NAFTA negotiations were being finalised, many citizen voices in the USA expressed concerns about inequities in environmental enforcement practices between the USA and Mexico (judged to be stronger in the USA)<sup>2</sup> as well as inequities between Mexican and USA labour standards and practices (considered to

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<sup>1</sup> For an attribution of a hemispheric trade proposal first being credited to the Latin American liberator Simon Bolivar, see: Fisher, Richard (1999) 'Five Years On: NAFTA and U.S. Trade Agenda in the Western Hemisphere' [online], at: <http://bogota.usembassy.gov/wwwse906.shtml> (accessed: 26 June 2006).

<sup>2</sup> See p. 364 of Schuler, Douglas A. (1996) 'The NAFTA and the Environment: Trade, Diplomacy and Limited Protection' International Trade Journal. Vol. X, No. 3: pp. 353-377. Also see: Koehl, Albert (2004) 'The Commission for Environmental Cooperation: NAFTA's environmental watchdog might actually work - if given the chance' The CCPA Monitor - Canadian Centre for Policy Alternatives. Vol. 11, No. 1: p. 20. Additionally, see Ferber, Ferretti, and Fischer cited in: Markell, David L. and Knox, John H. (2003a) 'The Innovative North American Commission for Environmental Cooperation' in Markell, David L. and Knox, John H. (eds), Greening NAFTA: The North American Commission for Environmental Cooperation, Stanford: Stanford University Press, pp. 1-21. Further, citing 1999 OECD statistics, Kevin P. Gallagher notes (on p.123) that: Mexican spending on the environment remains the lowest of all OECD countries. Specifically, that "...[i]n relation to GDP, the average OECD country spends three times more than Mexico on the environment. In per capita terms, the average OECD country spends six times more than Mexico" ((2003) 'The CEC and Environmental Quality: *Assessing the Mexican Experience*' in Markell, David L. and Knox, John H. (eds), Greening NAFTA: The North American Commission for Environmental Cooperation, Stanford: Stanford University Press, pp. 117-132).

be lower in Mexico than in the USA)<sup>3</sup>. Many voices suggested the NAFTA would result in a “race to the bottom” with companies reducing “...environmental expenditures when exposed to greater international competition in free markets” (Block 2004, p.451). Some voices expressed concern that environmental trade distortions might arise by virtue of Mexico not enforcing its own environmental laws. In response, two side agreements to the NAFTA were negotiated: *The North American Agreement for Environmental Cooperation* (NAAEC) and the *North American Agreement on Labour Cooperation* (NAALC). The NAAEC served as the implementation agreement for the Parties’ trilateral *Commission for Environmental Cooperation* (CEC). The focus of this research is the NAAEC in general and the CEC in particular.

“There is nothing like the CEC in the world...”, (Nitze quoted cited Wirth 2003, p.210). The NAAEC is called “...a possible model for ...other trade agreements...” (Joint 2001, p.2). However, “[s]urprisingly... the CEC has received relatively little scholarly attention,” and “...there are few comprehensive analyses of how it [the CEC] is fulfilling, or failing to fulfill, its mandates” (Knox and Markell 2003a, p.2).

Analyses that do exist employ narrower ‘economic’ or ‘environmental’ perspectives rather than the broader sustainable development concept. This may be a response to citizen concerns surrounding the nexus between economics and the environment. Many comment on the Commission’s *citizen submissions process* arising

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<sup>3</sup> See the NAFTA’s: Commission for Labor Cooperation web-site at: <http://www.naalc.org/> (accessed: 14 August 2006).

from Articles 14-15 of the NAAEC, a process said to be “unique” (Glicksman 2003, p.61) and even “groundbreaking” in international environmental law (Raustiala 2003, p.258).

### *General Approach and Terms*

This thesis analyses the CEC with reference to ‘sustainable development’. In 1987 the Brundtland Commission popularised sustainable development and its most popular definition “Development that meets the needs of the present without compromising the ability of future generations to meet their own needs” (UN 2006, p.1).<sup>4</sup> This thesis further understands it to be a “...concept for human social, economic and environmental progress” (Brundtland 2005, p.3). That said it is not simply a theoretical concept, but a practical *approach* to human life. It is an approach whereby humans and human societies collectively develop, - based on the best science and traditional ecological knowledge (TEK) available at a give point in time - each of the social, environmental and economic dimensions of the human experience.

This dissertation considers sustainable development as a *journey* over a *destination*, supporting the sociological perspective that “...people, groups, institutions and places are always in the process of becoming. They have never ‘become’, for, even if they appear to be ‘static’, form and habitual action must be reproduced” (Hoggart et al 2001, p.70).

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<sup>4</sup> See: World Commission on Environment and Development (1987) Our Common Future, Oxford: Oxford University Press.

TEK is defined by Abele as “knowledge and values which have been acquired through experience, observation, from the land or from spiritual teachings, and handed down from one generation to another” (1997 cited Wenzel 1999, p.1). This thesis considers TEK to be a core element of sustainable development and to include the knowledge of both indigenous peoples and other members of civil society at a given local level (i.e. farmers, women and other longer-established residents of a given area). Further, this dissertation contends that “...indigenous and western scientific systems can work successfully together...” (UN 2004, Lessons Learned para.1).

This thesis acknowledges that *sustainability* can be pursued separately in each of the economic, environmental and social spheres. Yet it adheres to the Brundtland Commission’s own understanding that *sustainable development* is in evidence only when each of the environmental, social and economic dimensions of the concept and approach are considered together. To emphasise, the key issue is whether sustainable development is applied through engagement of *all* three dimensions.

This dissertation defines “soft power” or “soft influence” as the “ability to attract others by the legitimacy of ....policies and the values that underlie them...” (Nye 2004). It considers soft influence as essential to the CEC, particularly its Secretariat, in being effective for sustainable development.

This research accessed the limited extant literature drawn from diverse disciplines and institutions. This multi-disciplinary approach reflects the holism of sustainable development as encouraged by the Brundtland Commission.

### *Research Questions*

The three research questions explored by this thesis are:

1. How might the CEC be modified to make it more effective for sustainable development?
2. How might the North American community benefit from a CEC made more effective for sustainable development?
3. What lessons might be derived from the CEC for other intergovernmental agreements?

These questions are examined by analysing the NAAEC. A variety of sources are examined to place this research in context and to identify themes. The methodology is detailed and justified. Finally, the thesis analyses both *theoretical* and *practical* aspects of the NAAEC and CEC before considering how they might promote sustainable development more effectively. The thesis concludes by offering ten (10) main conclusions.

## Literature Review

### *Overview*

This literature review identifies key themes relevant to answering this thesis' research questions. Footnotes refer readers to sources on those thoughts not specifically addressed or expanded upon. Key themes identified are ordered under the following headings: NAAEC; Precautionary Principle / Approach; CEC Strategic Directions and Operational Plans; and CEC Strengths and Weaknesses for Sustainable Development. The last these-area includes 'Strengths' sub-themes of: General Public Participation; Citizen Submissions Process; and Reporting and a Clearinghouse of Regional Environmental Information, and 'Weaknesses' sub-themes of: Political Will; and Non-cooperation between NAFTA Institutions.

### *NAAEC*

While NAFTA Article 104 details the three international and two bilateral environmental agreements that take precedence over, or have importance in, the NAFTA and for the North American regional trade area (The North 1993), it is the NAAEC which acts as a written constitution for the CEC and serves as an implementation guide for the Commission's structure, functions, operations and some procedures.<sup>5</sup> The NAAEC's articles are *entrenched* and cannot be altered

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<sup>5</sup> For an excellent overview of this NAFTA Article, see Section 1.3 of: Commission for Environmental Cooperation (1997) NAFTA's Institutions: The Environmental Potential and Performance of the NAFTA Free Trade Commission and Related Bodies. Also see Pages 363-364 of: Schuler, Douglas A. (1996) 'The NAFTA and the Environment: Trade, Diplomacy and Limited Protection' International Trade Journal. Vol. X, No. 3: pp. 353-377.

without consent of the governments of all three Parties to the NAAEC. Importantly, Schuler has noted that “[s]ustainability is not a major part of the NAAEC” (1996, p.358) and McRae has observed that, with its specific economic linkages to the NAFTA, “...the NAAEC is explicitly linked to trade” (2003, p.237).

While the environment was a beneficiary of the NAAEC, a primary purpose of the Agreement was to ensure that environmentally-related trade distortions did not occur under the NAFTA, particularly any “...race to the bottom in regulatory standards....[or] in implementation and enforcement” (Raustiala 2003, p.260). Mann expands on this trade-environment connexion by noting that when trade law, including the NAFTA, considers environmental measures, it does so “...from the perspective of preventing “non-tariff” barriers to trade”, these being “...understood as legal or other barriers to trade that might replace the tariffs that are reduced or eliminated under trade agreements” (2002, p.225). While Knox and Markell may indeed be correct that “...the NAAEC and CEC are much more than window dressing for NAFTA” (2003a, p.13), Raustiala and Mann collectively make clear that the NAAEC and its created Commission are still, nonetheless, primarily linked *to*, - although not primarily *about* - trade and economics.

The NAAEC generally reads as an environmental agreement. Beneficial to sustainable development, the three signatory Parties affirm within its *Preamble* elements of Brundtland’s definition of the concept by stating a conviction “...of the

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importance of... achieving sustainable development for the well-being of present and future generations” (North 1993, p.2). The *Preamble*’s eighth paragraph commits, respectively, to each of the environment and sustainable development through first re-affirming the 1972 Stockholm Declaration on the Human Environment and then the 1992 *Rio Declaration on Environment and Development* (North 1993, p.2). This *Rio Declaration* reference is important for later analysis in this thesis. Article 1(a) of the *Objectives* references “present and future generations”, with Article 1(b) “promoting” sustainable development but - and importantly for this thesis - specifically narrowing the concept’s definition to an understanding of it being “...based on cooperation and mutually supportive *environmental and economic* policies” (North 1993, p.3; emphasis added). Article 1(h) of the *Objectives* promotes the *public participation* (North 1993, p. 3; emphasis added) called for in the United Nation’s *Agenda 21*, the plan of action toward achieving sustainable development as agreed to by 178 governments attending the 1992 UN Conference on Environment and Development.<sup>6</sup>

However, while language throughout the NAAEC explicitly references ‘economic’ or ‘environmental’ matters, sustainable development as the three-dimensional concept envisioned by the Brundtland Commission - to also incorporate a ‘social’ dimension - is clearly absent from the Agreement. It can certainly be fairly argued that a social dimension is found within the NAAEC, as evidenced in its sections on public participation. Yet if the Brundtland Commission serves as a

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<sup>6</sup> *Agenda 21*’s specific references to public participation are found within Section III, Chapters 23 - 32, which can be viewed at <http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm> .

starting point for understanding sustainable development, public participation centred solely on the economic and environmental nexus relates only to the narrower goal of sustainability. Public participation expanded to centre on the wider intersection of economic, environmental and social inter-connexions would properly constitute engagement within the broader context of sustainable development.

The NAAEC, through Articles 8 - 16, specifies the CEC is comprised of three separate yet interconnected institutions, these being a: Council; Secretariat; and Joint Public Advisory Committee (JPAC)<sup>7</sup>. The Council serves as the governing body of the CEC, similar in role to that performed by either of a Board of Directors for an incorporated entity or a parliamentary or congressional body. Within the context and confines of the NAAEC and its entrenched articles, the Council has *flexibility* to set the CEC's higher-level (macro) strategic policy directions and make related macro-level decisions for the Commission. Practically stated then, the Council performs a policy role similar to that of the USA's or Canada's federal politicians who, collectively amongst themselves, have flexibility to make legislative policy but *only* within the confines of their national constitutions; documents whose main articles are entrenched and can only be altered under the strictest of rules and conditions.

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<sup>7</sup> For an excellent overview of the various components of the CEC, see pages 53-57 in: Commission for Environmental Cooperation (1997) NAFTA's Institutions: The Environmental Potential and Performance of the NAFTA Free Trade Commission and Related Bodies, Montréal: Commission for Environmental Cooperation. Also see page 9 in: Knox, John H. and Markell, David L. (2003a) 'The Innovative North American Commission for Environmental Cooperation' in Markell, David L. and Knox, John H. (eds), Greening NAFTA: The North American Commission for Environmental Cooperation, Stanford: Stanford University Press, pp. 1-21. Additionally, see page 29 in: Council of the Commission for Environmental Cooperation (2004) Ten Years of North American Environmental Cooperation: Report of the Ten-year Review and Assessment Committee to the Council of the Commission for Environmental Cooperation, Montréal: Commission for Environmental Cooperation.

NAAEC Articles 9 - 10 outline the structure, procedures, and functions of the Council, including that: its membership “...comprise[s] cabinet-level or equivalent representatives of the Parties” (Article 9(1)); that it must hold public meetings at its regular sessions held at least once per year (Article 9(4)); that its decisions are to “...be taken by consensus...” except as otherwise decided by Council or provided in the NAAEC (Article 9(6)), and that all Council decisions and recommendations will be made public, except as otherwise decided by Council or the NAAEC (Article 9(7)) (North 1993, p.8). The Agreement states that the Council is to serve as the governing body of the CEC (Article 10(1)) and that the Council “...shall cooperate with the NAFTA Free Trade Commission to achieve the *environmental* goals and objectives of the NAFTA...”(Article 6) (North 1993, pp.9 &11; emphasis added).

The Secretariat serves the Council in specific, and the CEC in general, in the role similarly performed by either of a professional corporate administration or professional government civil service. The Secretariat makes lower-level (micro) decisions related to ways and means to implement the Council’s directions and decisions, as well as makes independent determinations and recommendations - within the confines of the NAAEC - on citizen submissions related to Articles 14 and 15. Articles 11 - 15 outline the structures and procedures of the Secretariat. The Secretariat reports to the Council as a whole (Article 11(4)) and exists to “...provide technical, administrative and operational support to the Council and to committees and groups established by the Council, and such other support as the Council may

direct” (Article 11(5)) (North 1993, p.13). Article 12(3) permits the Secretariat to “...*periodically* address the state of the environment in the territories of the Parties” (North 1993, p.14; emphasis added). Article 13 permits the Secretariat to proactively submit a report to Council on any matter within the scope of the Secretariat’s annual work-plan (North 1993, p.14) or “...on any other environmental matter related to the co-operative functions on this Agreement”, but with the second of the two permissions requiring Secretariat notification to Council as a means to provide Council with a 30 day period to “...object by a two-thirds vote to the preparation of the report” (North 1993, p.14)..

Article 14 relates to the citizen submissions process and permits the Secretariat to investigate submissions “...from any non-governmental organization or person asserting that a Party is failing to enforce its environmental laws...”, with the general submission process criteria outlined in Articles 14(1)(2) (North 1992, pp.15-16). If the Secretariat determines that a submission “...in the light of any response provided by the Party [being investigated], warrants developing a factual record...” then Article 15 of the NAAEC requires the Secretariat to seek Council approval before preparing a factual record (Article 15(1) and (2)) and that it have Council approval to make a factual record public (Article 15(7)) (North 1993, p16). Factual records are discussed in more detail later in this literature review.

The JPAC serves in a role akin to that of either minority shareholders of a company or congressional and parliamentary committees: it can offer advice, provide

comment and make recommendations, but the governing body (in this analogy, that being either a full Board of Directors or a parliamentary or congressional body) has sole discretion as to whether or not to act on any advice or recommendations offered. The JPAC's primary purpose is to *institutionalise* public participation within the CEC, specifically by bringing the public's perspective in the form of advice to the Council or, as requested, to the Secretariat. NAAEC Article 16 outlines the JPAC comprises fifteen members, five appointed by each Party (Article 16(1)) (North 1993, p.17). The JPAC may provide advice to Council on any matter within the scope of the NAAEC (Article 16(4)) and "...may provide relevant technical, scientific or other information to the Secretariat, including for purposes of developing a factual record under Article 15" (North 1993, p.17).

At their own discretion, any of the Parties can exercise NAAEC Article 17 to convene their own National Advisory Committees (NACs) or exercise Article 18 to convene their own Government Advisory Committees (GACs) (North 1993, p.17). Part Five of the NAAEC, incorporating Articles 22 - 36, outlines the process a Party may follow only when "...there has been a consistent pattern of failure by...[an] other Party to effectively enforce its environmental law" (North 1993, p. 19). This section of the NAAEC is of interest to many North American environmental organisations, for it is considered a potentially stronger environmental protection measure than Article 14 and 15 factual records. While the remainder of the NAAEC covers more general matters and appendices, Article 43 has significance for CEC financing, in that "[e]ach Party shall contribute an equal share of the annual budget of the

Commission... and [n]o party shall be obligated to pay more than any other party in respect of an annual budget” (North 1993, p.29). Since the CEC began formal operations in 1995, the Secretariat’s annual budget has remained at US\$9 million (Commission 2005, p.6; Council 1994a; Council 1994b). A “...minimum...” budgetary amount of US\$9 million and a ‘calendar’ fiscal year for the CEC were established by Council at a meeting held on July 26, 1994 in Washington, D.C. (Council 1994a).

### *Precautionary Principle / Approach*

One of the fundamental questions on trade and the environment is whether “trade agreements make the environment cleaner or dirtier” (Gawande and Islas-Camargo 2006, p.2). Early in its existence the CEC identified this as an important question, one expected to be explored by a Commission created by an environmental companion agreement (NAAEC) to the NAFTA trade agreement. Block has observed “[c]ausation is notoriously elusive in complex economy-trade-environment relationships, particularly where few common environmental indicators correlate closely to trade data compiled for an entirely different purpose” (2003, p.33). Mello similarly identifies that:

Measuring the effects of free trade or any trade policy on the environment is fraught with problems. Both the micro and macro components of our economy are interwoven with social and political conditions in a complex web that precludes simple segmented analysis (1994, p.18).

In one of its reports, the CEC addresses differences on this question by noting “The apparent wedge between market liberalism and some elements of civil society challenges the view that economic prosperity, environmental protection, and democracy are inseparable” (Commission 2002b, p.1).

Theory on this question is quite clear - clearly ambiguous, that is, in that it suggests that trade can either both help and/or harm the environment.<sup>8</sup> Generally speaking, however, as this matter relates to environmentalists and economists: environmentalists see trade and economic growth as intruding on the environment, while economists - with varying degrees of perspective - believe that economic growth can improve environment quality (Mello 1994, pp.18-19).

Important for this dissertation, a key phrase associated with trade and environment connexions is the “politically-charged” (Greenpeace 2004, p.1) term *precautionary principle*. This disputed phrase is familiar to many readers in sustainable development, for it is commonly connected to the concept and is extensively analysed

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<sup>8</sup> For a review of differing perspectives on this matter, see a study by: Fredriksson, Per G. 1999 cited in Mann, Howard (2002) ‘Assessing the Impact of NAFTA on Environmental Law and Management Processes’ in Commission for Environmental Cooperation of North America, The Environmental Effects of Free Trade: Papers Presented at the North American Symposium on Assessing the Linkages between Trade and Environment (October 2000), Montréal: Commission for Environmental Cooperation. Also see Pages 449-452 in: Block, Greg M. (2004) ‘The North American Commission for Environmental Cooperation and the Environmental Effects of NAFTA: A Decade of Lessons Learned and Where They Leave Us’ Loyola of Los Angeles International & Comparative Law Review. Vol. 26, pp. 445-467, at: <http://ilr.lls.edu/Block.pdf> (accessed: 26 June 2006). Further, see Mello, Jeffrey A. (1994) ‘The Environmental Cost of Free Trade’ Business & Society Review. Fall 94, No. 91: pp.18-28. Additionally, see: Kaufman, Robert and Pauly, Peter (1993) ‘The Effects of NAFTA on the Environment’ Energy Journal. Vol. 14, No. 3: p217-240. For an NGO perspective, see: Dover, Sarah (2003) ‘Breaking the Free Trade Addiction: An Intervention on Environmental Grounds’, at: <http://www-sierraclub.ca/national/programs/sustainable-economy/trade-environment/free-trade-addiction.html> (accessed: 26 June 2006).

in literature. The CEC has commissioned research papers on the term for its North American Environmental Law and Policy series.<sup>9</sup> It is a phrase for which key differences between environmentalists and economists can be highlighted.

The most common definition for the term is found in Principle 15 of the *Rio Declaration*, which speaks to a *precautionary approach* as being “Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation” (United Nations 1992). For Fraiberg and Trebilcok, the phrase relates to “[h]ow to assess the weight of scientific uncertainty against an acceptable level of risk...” (1998 cited Mann 2002, p.231). In a brief to the CEC, Greenpeace defines the term as representative of where “...in the face of serious or irreversible threats to the environment, and in situations of scientific uncertainty, we should take action to minimise or prevent those threats” (2004, p.1). The precautionary principle is generally not considered the “trial and error” approach referred to by Wiladovsky, where one “...wait[s] to see what harms occur and then regulat[es]...” (1998 cited Raustiala 2002, p.199).

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<sup>9</sup> For more information on this principle and possible interpretations of it, see: Commission for Environmental Cooperation (2003a) ‘The Precautionary Principle in North American and International Law’, *North American Environmental Law and Policy*. Vol 10, pp.197-276. Also see: Greenpeace (2004) ‘Comments to the NAFTA Commission for Environmental Cooperation Article 13 report - Maize and Biodiversity: The effects of transgenic maize in Mexico’ [online] at: [http://www.cec.org/files/PDF//Greenpeace-comments\\_en.pdf](http://www.cec.org/files/PDF//Greenpeace-comments_en.pdf) Additionally, Greenpeace itself recommends in a reference note: McIntyre, O. and Mosedale, T. (1997) ‘The precautionary principle as a norm of customary international law’ *Journal of Environmental Law*. Vol. 9, No.2, p.221-241.

In the regulatory context, the approach is said to imply *pre* (“ex ante”) over *post* (“ex post”) regulation (Raustiala 2002, p.199). Greenpeace suggests that it is this “...serious regulatory challenge...” which serves to underpin the political controversy surrounding the principle (Greenpeace 2004, p.1). Mann notes that trade law is clear that the approach should not be used for “protectionist purposes”, as a means to “invent” risks” (2002, p.231). Side-by-side, the Greenpeace and Mann understandings infer that it is not regulatory challenge itself but an invented regulatory challenge that may underpin political controversy surrounding the term.

Differences of perspective between environmentalists and economic-oriented industry are captured by the JPAC in their 1996 Report to Council, which included an analysis of different understandings of ‘sustainability’ as evidenced through participants at CEC public meetings:

...industry and environmental non-governmental organizations (ENGOs) ... appeared to hold contrasting connotations of sustainability. Industry presenters emphasized balance, noting that environmental viability or "benefits" must be weighed against economic (trade) viability and possibilities for continued development.....Presenters from environmental NGOs placed greater weight on long-term ecological viability, which they view as the key factor in “sustainability” (Commission 1996).

Yet while Greenpeace states that the principle is “...widely accepted, to the point that numerous international lawyers consider it has already crystallized into a norm of international law” (2004, pp.1-2), Wirth suggests differently, that “...in customary international law, [it is] a question about which there is an apparent lack of consensus” including as this relates to “...references such as ‘precautionary principle’ as opposed to ‘precautionary approaches’ “(2002, p. 225). Raustiala supports Wirth in this view and notes that the principle is “...increasingly referred to in both international environmental law and international trade agreements” (2002, p.200).

These differing perspectives on trade and environment related to the precautionary principle / approach provide the CEC with a good-sized divide to cross - and also present an excellent opportunity to create a sustainable development bridge between - the Commission’s economic, environmental and other stakeholders.

### *CEC Strategic Directions and Operational Plans*

At its Eleventh Regular Session held on June 23, 2004 in Puebla, Mexico, the Council issued its *Puebla Declaration*. This Declaration narrowed the CEC’s work program to three priority areas: 1) Information for decision-making; 2) Capacity-building; and 3) Trade and environment (Commission 2005, p.17). Expanding on Council’s strategic directions, the CEC’s Strategic Plan for 2005-1010 identifies its long-term goals for each of these three priorities as being: for 1), to support better decision-making by providing information on key *environmental* challenges and opportunities in North America; for 2), to strengthen the capacities of the Parties to

manage *environmental* issues of common concern; and for 3), “...to promote policies and actions that provide mutual benefits for the *environment, trade, and the economy*” (Commission 2005, pp.10-12; emphasis added).

The CEC’s 2006-2008 Operational Plan, to guide the Secretariat in pursuing Council’s strategic directions, lists relatively few socially-related activities amongst its many elements and tasks. Within Council’s noted three strategic priority areas, this operational plan identifies seventy-three (73) tasks or project elements to be undertaken by the Secretariat, with only seven (7) of these having a clear or possible social focus. The vast majority of the identified tasks or elements relate to economics or the environment.

The Secretariat is presented with an opportunity to enhance sustainable development through its operational plans. It can in part do so by developing these plans fully in line with the strategic directions of the Council while also including in the programme design of these plans a sustainable development approach.

## *CEC Strengths and Weaknesses for Sustainable Development*

“The formative history of the CEC is a record of struggle, learning, success and challenge” (Plaut 2005, p.13).

### Strengths

#### *General Public Participation*

By providing the public and NGOs with formal avenues for engaging the NAFTA Parties on environmental matters, the NAAEC has set a new standard in international law. “The NAAEC is unquestionably a ground-breaking instrument as it relates to public participation... with public participation... a core component of the CEC” (Independent 1998, p. 23). Johnson and Beaulieu state “there are few precedents in international law for such formalized nongovernmental participation” (1996 cited Wirth 2003, p.199). The public sessions of the Council, the JPAC and its numerous annual public meetings, the Secretariat’s engagement of the public in NAAEC Article 13 Reports, CEC public events including Symposiums, and the NAAEC’s Article 14-15 (factual records) process serve as primary NAAEC avenues for providing the public with formal and informal access within the CEC, as well as for opportunities for civil society to comment on North American-wide environmental concerns.

The JPAC is the vehicle through which the public often directly engages with the Commission. Wirth has referred to the JPAC as “...the most innovative...” of the three components of the CEC (2003, p.199). It is the CEC’s “...public face...” and

the Commission's "...main institutional channel for public participation..." (Council 2004, pp.34-35). Comprised of political appointees, "The Canadian and Mexican JPAC members...[are] named by their Council member, while the US members are named by the President. All serve without remuneration" (Council 2004, p.34). Since their first meeting, the fifteen members of the JPAC have viewed themselves as "...representatives of the North American community at large..." over representatives of the particular national government which appointed them (Commission 2002a, p.2).<sup>10</sup> Such a perspective has helped broaden the lens of JPAC members from national political appointees to North American citizens. As of August 2006, the CEC web-site advises that, from July 1994 through to March 2006, the JPAC has held an extraordinary fifty-seven (57) public meetings (Commission 2006j).

Bloc k suggests that "[b]y conducting environmental assessment in an open, transparent, and inclusive manner, the CEC has granted citizens a voice in examining the relationship between trade liberalization and the environment" (2004, p.464). This perspective is re-enforced by Plaut, who writes that the CEC's "...transparency and public involvement, has resulted in meaningful environmental programs and projects at the intersection of trade and the stewardship of the environment at the local and regional levels" (2005, p.3).<sup>11</sup> Yet while "[m]ost observers give the CEC

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<sup>10</sup> For a general discussion on the consequences of this JPAC decision, see p.201 in: Wirth, John D. (2003) 'Perspectives on the Joint Public Advisory Committee' in Markell, David L. and Knox, John H. (eds), Greening NAFTA: The North American Commission for Environmental Cooperation, Stanford: Stanford University Press, pp. 199-215.

<sup>11</sup> For a list of CEC program and project accomplishments, see p.10 in: Plaut, Jon (2005) 'The NAFTA Environmental Agreement: The Intersection of Trade and the Environment' Paper Presented at the Third North American Symposium on Assessing the Environmental Affects of Trade:

high marks overall for its public participation practices....these same observers... agree that the CEC must make stronger efforts to reach out to business and indigenous peoples”, particularly for the purposes of sustainable development where some businesses - mostly Canadian - perceive the CEC to be “...primarily an environmental advocacy organization...”(Council 2004, p.39-40).

The CEC’s engagement of North American civil society is an area of strength for the Commission and also one for improvement, both for itself and for sustainable development.

#### *Citizen Submissions Process*

The NAAEC’s citizen submissions process provides citizens and NGOs with an opportunity to pressure a Party to enforce its own environmental laws. This process can lead to the preparation of a *factual record*, a process seen as being “...in many ways, ...the agreement’s centerpiece” for its uniqueness in international law through a focus on enforcing domestic over international law (Raustiala 2003, p.260).<sup>12</sup> With factual records, the CEC “...cannot impose sanctions; the most it can

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Investment, Growth and the Environment (November 30-December 1, 2005), at: [http://www.cec.org/files/PDF/ECONOMY/Final-Plaut-T-E-Symposium05-Paper\\_en.pdf](http://www.cec.org/files/PDF/ECONOMY/Final-Plaut-T-E-Symposium05-Paper_en.pdf) (accessed: 26 June 2006).

<sup>12</sup>, For a comprehensive review the citizen submissions process, including identified flaws, see: Kourous, George (2000) ‘UPDATER, 12 June 2000 - Citizen Enforcement Submission Process Under NAFTA’s Environmental Side Agreement’, at: [http://americas.irc-online.org/updater/2000/june12suplmt\\_body.html](http://americas.irc-online.org/updater/2000/june12suplmt_body.html) (accessed: 26 June 2006). For a thorough yet concise review of this process, see pages 245-248 in: McRae, Donald (2003) ‘Trade and the Environment: *The Issue of Transparency*’ in Markell, David L. and Knox, John H. (eds), Greening NAFTA: The North American Commission for Environmental Cooperation, Stanford: Stanford University Press, pp. 237-255. Also see: Commission for Environmental Cooperation (2002a) Bringing the Facts to Light: A Guide to Articles 14 and 15 of the North American Agreement on Environmental Cooperation, Montréal: Commission for Environmental Cooperation.

do is to chastise a country it deems is tolerating egregious environmental abuses”  
(Preston 1996, p.1).

While the NAAEC does not define factual records, the CEC explains them as follows:

A factual record outlines, in as objective a manner as possible, the history of the issue, the obligations of the Party under the law in question, the actions of the Party in fulfilling those obligations, and the facts relevant to the assertions made in the submission of a failure to enforce environmental law effectively. ... A factual record provides information regarding enforcement practices that may prove useful to governments, and to the submitters and other members of the interested public (Commission 2002a, p.1).

General submission guidelines are outlined in the NAAEC’s Articles 14(1) and (2), with expanded and complete guidelines for citizen submissions having been set by Council at meetings held in: Oaxaca, Mexico (1995), Banff, Canada (1999), and in Guadalajara, Mexico (2001) (Commission 2006a; Commission 2002a, p.15).

Aside from its uniqueness, the CEC is credited with adhering to a fair, inclusive and transparent process in its review of submissions under the procedure. McRae observes that “[t]he concept of transparency has become of increasing importance in the development of international law”, where “[i]n the field of international environmental regulation, the concept of transparency is related to

access of information and participation in the process of environmental decision-making, and it is linked to the role played by non-traditional international actors” (2003, p.238-239). McRae also notes that the CEC’s citizen submission process has “...substantial transparency” through “...the submitters’ right to bring complaints and the Secretariat’s ability to draw widely on information from non-governmental sources in the preparation of a factual record” (McRae 2003, p.249). In the JPAC’s report to Council on the citizen submission process, it stated that “[p]ublic access to the status of the Submissions and transparency of the process were characterized as the “raison d’ être” of the Article 14 and 15 process by many commentators” (Joint 2001, p.10).

Current public interest in the process includes ongoing disagreement over interpretations of the Article 14 and 15 provisions governing the process, specifically “... over how much control the Council can and should exercise over the preparation of factual records” (Block 2003, p.29; Knox and Markell 2003, p.17).<sup>13</sup> Of note is that “...the root of the controversy ha[s] been the strikingly different expectations that citizens and the governments have about the process”, whereby citizens see the process as one to benefit the environment and governments “...surprised by the

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<sup>13</sup> For a thorough discussion on the matter of differing interpretations of the language used in the NAAEC’s Article 14 and 15, see pp.280-285 in: Markell, David L. (2003) ‘The CEC Citizens Submissions Process: *On or Off Course?*’ in Markell, David L. and Knox, John H. (eds), Greening NAFTA: The North American Commission for Environmental Cooperation, Stanford: Stanford University Press, pp. 274-298. Also see: Joint Public Advisory Committee of the Commission for Environmental Cooperation (2003) ‘ADVICE TO COUNCIL NO. 03-05’, at: [http://www.cec.org/files/PDF/JPAC/Advice03-05\\_EN.pdf](http://www.cec.org/files/PDF/JPAC/Advice03-05_EN.pdf) (accessed: 26 July 2006). Additionally see: IELP - International Environmental Law Project (2003) ‘Comments on Issues Relating to Articles 14 & 15 of the North American Commission on Environmental Cooperation’, at: [http://www.cec.org/files/pdf/JPAC/IELP-comments\\_en.pdf](http://www.cec.org/files/pdf/JPAC/IELP-comments_en.pdf) (accessed: 26 July 2006).

process's intrusiveness and the Secretariat's autonomy in administering it" (Council 2004, p.43). A deeper root to this disagreement may be a CEC weakness later identified, one related to political will. Alternatively, this disagreement may also be seen as positive evidence of a healthy and functional democratic process.

As of July 2006 and since 1995, the Secretariat received fifty-five (55) submissions under Article 14 of the NAAEC, with: twelve (12) files remaining active; Council authorisation received by the Secretariat to prepare and make public factual records on eleven (11) of the submissions; and forty-three (43) submitted files closed, including for reasons that factual records have already been prepared or that a submission did not meet the NAAEC's criteria necessary to proceed to the development of a factual record (Commission 2006b; Millan 2006).<sup>14</sup>

#### *Reporting and a Clearinghouse of Regional Environmental Information*

As observed by Wirth, "...the CEC is much less an environmental watchdog than it is a vehicle for discussing, studying, and hopefully inspiring, cooperative solutions to some very controversial issues" (2003, p.205). A review of the CEC's web-listing of cited publications, reports and other documents reveals approximately

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<sup>14</sup> For discussions on the effectiveness of the outcomes of the citizen submission process, see: Markell, David L. (2003) "The CEC Citizens Submissions Process: *On or Off Course?*" in Markell, David L. and Knox, John H. (eds), Greening NAFTA: The North American Commission for Environmental Cooperation, Stanford: Stanford University Press, pp. 274-298. Also see: Joint Public Advisory Committee of the Commission for Environmental Cooperation (2001 June) LESSONS LEARNED: Citizen Submissions under Articles 14 and 15 of the North American Agreement on Environmental Cooperation - Final Report to the Council of the Commission for Environmental Cooperation, Montréal: Joint Public Advisory Committee of the Commission for Environmental Cooperation. Additionally, see p.46 in: Council of the Commission for Environmental Cooperation (2004) Ten Years of North American Environmental Cooperation: Report of the Ten-year Review and Assessment Committee to the Council of the Commission for Environmental Cooperation, Montréal: Commission for Environmental Cooperation.

1,400 citations. Just under 1,000 citations are on the subjects of: Conservation of Biodiversity; Environment, Economy & Trade; Law and Policy; Pollutants & Health; Citizen Submissions on Enforcement Matters; and Other Publications including the CEC's *Trio* newsletter(Commission 2006c). Over 400 citations relate to the work of the: Council, JPAC, Secretariat and the CEC's *North American Environmental Law and Policy Series* (Commission 2006c). The CEC web-site also provides the public with links to approximately fifty-nine (59) web-sites; fourteen (14) links on law, treaties and agreements; and access to seven (7) databases, including ones related to: Coffee Certification Program; Electricity and Environment; Certified Office Products; Sustainable Tourism; Transboundary Agreements; and for each of the CEC's *Taking Stock* and *Environmental Law in North America* publications. The extent of information that the CEC makes available helps explain why the public has come to see the Commission "...as a credible source of information" (Council 2004, p.17).

Dover of the Sierra Club of Canada writes "[t]he CEC has evolved into a mechanism for investigation, reporting and coordination on continental environmental concerns" and acknowledges CEC successes in this regard (2003, p.5). The Commission has become "...a vital form where [environmental] issues can be studied and evaluated" (Block 2003, p.34). Block cautions, however, that for the CEC to *primarily* become "...a tool to gather and exchange information.... would be a mistake" (emphasis added)(Block 2003, p.35). Yet Gallagher supports the CEC "...as a clearinghouse for research, cooperation, and collaboration among governments and civil society" (2003, p.130).

The *Ten-year Review and Assessment Committee* (Ten-year Committee) of the CEC notes that “It is not always clear, however, which publications have been peer-reviewed or even, in some cases, the identity of the author. The absence of this information may reduce the usefulness of CEC publications for some readers” (Council 2004, p.18). In response, the Secretariat has committed in its 2006-2008 Operational Plan to “...ensure that its science and information products are of high quality” (Commission 2006g, p.10).

While the CEC’s success as a clearinghouse for environmental information seems evident, the Commission has room to improve related to reports it can rightfully develop under the NAAEC. To-date, the CEC has produced only one Article 12(3) State of the Environment (SoE) report. Additionally, over its life the Secretariat has only produced five, and is in the process of producing its sixth (6<sup>th</sup>), NAAEC Article 13 Reports within the scope of its work-plan (Commission 2006e; Commission 2006g, p.22). The CEC has the potential within each of these specified reporting areas to expand both the number of reports and to enlarge its focuses to include a sustainable development approach.

### Weaknesses

#### *Political Will*

For the CEC to realise the “...most significant component of the “NAFTA regime” [that being]... its new system of institutionalized trilateral North American

governance amongst its Parties” (Commission 1997, p.11), political will is a necessity. Yet through its short-life, the CEC has experienced varying degrees of political support from the Parties. The World Bank has said, “[t]he...partners to an international environmental agreement rarely stand to gain or lose equally from it” (1992 cited Ludema and Wooton 1997, p.607). With the NAAEC coming in to existence at the insistence of the USA, the NAFTA’s largest Party, it is understandable why the CEC experiences varying degrees of political support from its Parties, particularly Parties that perceive losses under the NAAEC.

William Kennedy, retiring Executive Director of the CEC, is quoted saying “...governments never really wanted an environmental agency and created one only because it was “the price to pay” to blunt public opposition to the trade deal” (2006 cited in Mittelstaedt 2006). He is further quoted saying that the Parties “have never really embraced the CEC nor realized its potential”, resulting in the organisation “suffer[ing] from the ambivalence of the [countries] toward it” (Kennedy 2006 cited in Mittelstaedt 2006).

A 1997 CEC report identifies the NAFTA “...was created with the *potential* to put *political will* behind a forward-looking, environmentally sensitive trade agenda” (Commission 1997, p.20; emphasis added). Yet this same report notes “...the high-level political energy required to ensure that the NAFTA economic institutions fulfill their existing environmental responsibilities, let alone expand in to new areas, has been lacking” (Commission 1997, p.21).

Kelly and Reed write that all “...NAFTA governments initially sought to block the Commission [CEC] from doing anything to examine trade and environment linkages” (2003, p.103). Wirth notes “...the Mexican trade ministry worked against the CEC during the Zedillo administration” (2003, p.210). Raustiala states that Canada and Mexico tried to curtail the NAAEC’s Article 14 & 15 citizen submission process, “...but backed off under NGO pressure” (2003, p. 261). Gustavo Alanis Ortega has stated - as a panellist at the JPAC’s Fourth Regular Public Session of 2005 and while speaking to the Cozumel Pier factual record prepared by the CEC at the request of the Mexican NGO for which he worked and other local NGOs - that the Mexican government verbally attacked his local NGO as unpatriotic and anti-Mexican, and attacked the CEC Secretariat as infringing on Mexican sovereignty (2005). Speaking specifically about the JPAC, Magraw has said “Canada didn’t much like it but it wasn’t a big deal with them; they had other issues. As for the Mexicans, they really didn’t like it...” (2002 cited in Wirth 2003, p.200).

Why the hostility? In relation to Raustiala’s distinguishing between *police patrols* and *fire alarms* as two types of treaty review, Markell notes that:

.... countries do not often embrace “fire alarm” review mechanisms such as the CEC citizen submissions process, in which they invest authority to review performance in actors they cannot control, in part

because of concerns about the implications for state sovereignty as well as the prospect for embarrassment. (2003, p.286).<sup>15</sup>

Reasons for the hostility aside, Johnson states the CEC's future is one that "...need[s] strengthened cooperation between the three countries..." (1999,p.31).

The CEC's *long-term* success for achieving North American-wide sustainable development will require strong amounts of political will on the part of all three Parties. In the interim, as is later discussed, the Secretariat can consider various *short-term* solutions to be effective for sustainable development until the time political will is evidenced.

#### *Non-cooperation between NAFTA Institutions*

"[T]he NAFTA agreements created, or inspired, the establishment of about fifty (50) new trilateral intergovernmental institutions among Canada, Mexico and the United States (Commission 1997, p.11). NAAEC Article 10(6) outlines ways the Council is to cooperate with the NAFTA's Free Trade Commission (FTC), restricted, however, to interactions to "...achieve the *environmental* goals and objectives of the NAFTA..." (North 1993, p.11; emphasis added). Notwithstanding efforts toward institutional cooperation undertaken by the CEC, cooperative engagement between the CEC and other NAFTA institutions is yet forthcoming. "[T]o-date... only... two

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<sup>15</sup> "Police patrols are efforts by centralized authorities... to search actively and systematically for problems or violations through hearings, audits, inspections, and the like. Fire alarms are procedures that private actors trigger to signal that a violation or problem has occurred." As found on p.258 in: Raustiala, Kal (2003) 'Citizen Submissions and Treaty Review in the NAAEC' in Markell, David L. and Knox, John H. (eds), Greening NAFTA: The North American Commission for Environmental Cooperation, Stanford: Stanford University Press, pp.256-273.

*pro forma* meetings... have taken place between any NAFTA working group or committee and the CEC” (Commission 2002b, p.10; original emphasis). While reasons for this non-cooperation are outlined in detail in other publications, two particular reasons are highlighted.<sup>16</sup>

One is that, while Article 10(6) obligates the CEC to operate with the NAFTA’s FTC, “NAFTA does not oblige the FTC to cooperate with the CEC”, with “the absence of a concrete obligation [having] made it more difficult to bring trade officials to the table” including occasional trade official arguments that “cooperation therefore need only go in one direction” (Council 2004, p.24)<sup>17</sup> This lack of cooperation includes the CEC not being called on to provide expert environmental advice in arbitrations under the Investor Provisions of NAFTA Chapter 11 (Gaines 2003, p.187).

A second reason relates to the structure of the FTC itself, a body that NAFTA Article 2001(1) directs is to be headed by “...cabinet-level representatives of the Parties or their designates...” (The North 1993). NAFTA Article 2002 creates the FTC Secretariat (FTCS) and outlines its role, yet as the central institution for the

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<sup>16</sup> See: Commission for Environmental Cooperation (1997) NAFTA’s Institutions: The Environmental Potential and Performance of the NAFTA Free Trade Commission and Related Bodies, Montréal:

<sup>17</sup> For explanations, see: Commission for Environmental Cooperation (1997) NAFTA’s Institutions: The Environmental Potential and Performance of the NAFTA Free Trade Commission and Related Bodies, Montréal: Commission for Environmental Cooperation. Also see Pages 24-25 of: Council of the Commission for Environmental Cooperation (2004) Ten Years of North American Environmental Cooperation: Report of the Ten-year Review and Assessment Committee to the Council of the Commission for Environmental Cooperation, Montréal: Commission for Environmental Cooperation.

NAFTA, the FTCS is given a very different role than that of the CEC Secretariat. Unlike the CEC Secretariat, the FTCS has no central location with staff nor does it perform a coordinating role for the various ministers, departments, commissions, committees and working groups that fall under the NAFTA (or under the NAAEC, as for the CEC). Instead, under NAFTA Article 2002(1) and (2), the FTC has three national sections, one each located in the national territory of each of the NAFTA Parties, and whose operations and costs are the full responsibility of the NAFTA Party in which the section is located (The North 1993). NAFTA Articles 2002(3)(a) and 2002(3)(b) identify an administrative role for the FTC, with Article 2002(3)(c) leaving open the possibility for an expanded role should the FTC so direct, including Article 2002(c)(i) enabling the FTC to direct the FTCS to “support the work of other committees and groups established under this Agreement” (The North 1993). While the establishment of a NAFTA Coordinating Secretariat was discussed after NAFTA had received legislative approval - intended to serve as both an information clearinghouse and repository for documents - such a Secretariat has still yet to be established.<sup>18</sup>

Since at least 1997, the identification of this non-cooperation and calls for co-operation have come from many quarters. Citing a 1997 study by Kirton and Fernandez de Castro, Rugman and Kirton note that “[a]t the ministerial level and elsewhere, NAFTA’s trade institution’s and the [CEC] have done little to interact to

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<sup>18</sup> For a more detail discussion on the FTC, see pp.20-26 in: Commission for Environmental Cooperation (1997) NAFTA’s Institutions: The Environmental Potential and Performance of the NAFTA Free Trade Commission and Related Bodies, Montréal: Commission for Environmental Cooperation.

produce an integrated, balanced and thus stable trade-environment regime” (1998, p.441). A 1997 study by the CEC commented that:

“[a]lthough some cross-fertilisation between the CEC and NAFTA’s institutions is evident.....on the whole there has been a striking absence of contact and cooperation between the two institutional communities, despite the many incentives for collaboration specified in the NAFTA text” (1997, p.17).

This same Report states that “...the absence of a regular dialogue between the [FTCS and CEC]... has sustained an unhealthy separation of trade and environment concerns” (Commission 1997, p.19). The 1998 Report of the Independent Review Committee of the NAAEC echoed concern when stating, “...that there should have been no contacts to this point between the two Agreements [NAFTA and NAAEC] is somewhat troubling” (Independent 1998, p.33).

Five years later in 2003, Kelly and Reed noted that cooperation was still not forthcoming:

...North American governments have yet to call on the CEC’s significant trade and environment experience to inform either the deliberations of NAFTA’s Free Trade Commission or the environmentally related disputes being played out under NAFTA Chapter 11 provisions (2003, pp. 101-102).

A renewed call for cooperation was reiterated in 2004 by the Ten-year Committee, with the observation that: “...*there has been a paucity of contact, communication, and in some*

*cases trust, let alone integrated decision-making and cooperation, between NAFTA's economic bodies with specific environmental responsibilities and the CEC itself* (Council 2004, p.25; original emphasis).

While Knox and Markell suggest, “[t]he CEC has largely failed to create an environmental voice within the NAFTA institutions” (2003, p.310), such lack of cooperation seems wrongly faulted to the CEC, for the Commission has published a detailed account of its efforts made toward cooperation. However, a failure for an environmental voice to be created within economic-oriented NAFTA institutions is certainly not positive for advancing sustainable development in North America.

## Methods

### *Introduction*

This thesis presents qualitative research, accessing a number of primary documents made available through the CEC website. Literature, documents and sources accessed and reviewed for this thesis are taken from journals covering subjects as diverse as business, economics, energy, environment, law, medicine, politics, and trade; United Nations documents and web-sites; government documents including the NAFTA and NAAEC texts; various CEC papers, documents, reports and its web-site; correspondence with CEC staff; notes taken at a 2005 JPAC public meeting; notes taken and papers distributed at the 2005 CEC Symposium; notes taken and distributed at a sustainability conference at which Dr. Gro Harlem Brundtland gave a key-note address; the primary book written on the CEC; media and NGO reports; and lecture and diplomatic speech notes.

### *General Methodology*

Relevant sources were systematically searched through what might be termed a ‘methodologically organic’ approach. First began general internet searches, including of on-line journals, using the subject-heading of “NAFTA” and then of the “North American Agreement for Environmental Cooperation” or “NAAEC” and of the “Commission for Environmental Cooperation”. These early searches, plus books and papers read during the *Understanding Sustainability Research* methodology course

required by this university programme, underpinned this thesis' early *Pro Forma* and methodology.

After this initial process, a happenstance conversation with the Executive Director of the *Canadian Institute for Environmental Law and Policy* (CIELAP) led to learning of that NGO's upcoming 2005 *Partnering for Sustainability Conference*, being held in Toronto, at which Dr. Gro Harlem Brundtland was a guest speaker. This researcher attended the Conference and, post-Conference, accessed web-based conference documents including Dr. Brundtland's speech notes.

While at the CIELAP conference, the CEC's upcoming 2005 *Third North American Symposium on Assessing the Environmental Effects of Trade*, being held in Montréal, Canada, was learned of. While registering for this same CEC conference, the researcher also learned of and registered for the JPAC's 2005 Fourth Regular Session public meeting, scheduled in Montréal for November 29<sup>th</sup>, 2005. He subsequently participated in these two CEC public events.

At these CEC public meetings, various Commission documents and reports being distributed were collected. While the name of Dr. John Knox had been 'encountered' through internet searches, it was during the JPAC public meeting that this researcher spoke with Dr. Knox during a break in proceedings. During this conversation, it was learned that Dr. Knox and David Markell had co-authored their

*Greening NAFTA* book; a publication which Dr. Knox advised was the only one then-written on the CEC.

A read of these early-collected CEC documents and Dr. Knox's co-edited book referred the researcher to other CEC documents, which served to refer to more and more CEC documents, and the process of searching for documents and reports cascaded along from there. As research progressed, this researcher conducted planned internet searches for NGO and media reports on the CEC, plus additional internet searches for non-CEC sources relevant to this research project, such as United Nations and World Bank documents and reports. Countless occasions arose to search the internet for sources to fill in information gaps. At various times, the researcher contacted CEC staff to receive clarification on matters found unclear in CEC paper or web-based materials.

A key weakness of this literature review and thesis is the paucity of academic literature available on the CEC, resulting in an over-reliance on the one academic book published on the Commission - Markell's and Knox's *Greening NAFTA* - and a heavy reliance on CEC-produced documents, reports and other materials.

### *Triangulation*

Triangulation or multi-methods approaches, "...a salient feature of research methodology..." (Denzin 1970 cited Macdonald 2001, p.208) has / have not been practically applied in this literature-based thesis engaging a sole researcher. Hogart et

al define triangulation or multi-methods approaches as “...the use of a series of complementary methods in order to gain deeper insight on a research problem” (2001, p.67). Triangulation can typically include data-triangulation, investigator triangulation, theory triangulation, and methodological triangulation (MacDonald 2001, p.208).

### *Additional Methodological Considerations*

In keeping with the importance of defining concepts, as discussed by Hoggart et al, key concepts used within this thesis are specifically defined (2001, p.57). Further, official reports reviewed and secondary data (reviewed but not formally utilised in this thesis) have been analysed as being analytical over factual (Hoggart et al 2001, p.80). Finally, in exploring and analysing a trilateral institution, the importance of not drawing geographical inferences has been realised, such as not inferring from sub-national to national levels or from national to tri-national levels or vice versa in both cases (Hoggart et al 2001, pp.86-91).

### *Documents and Discourse / Content Analysis*

Of relevance to a thesis with heavy reliance on documents produced from the very entity being examined, MacDonald cautions that all “...documents which are intended to be read as objective statements of fact are also socially produced” (2001, p.196). That being, all documents contain a worldview or paradigm. “Paradigms” is a term coined by the philosopher, Thomas Kuhn, “...to describe....broad and radically

different perspectives” (Cooper 2001, p.3). Citing Kuhn, Brown has written - and of relevance to a new field as sustainable development - that

Scientific paradigms are persuasive, but they are not permanent. As Thomas Kuhn has noted, those who work fruitfully within a particular paradigm are attached emotionally and habitually to it and do not question its correctness. Nevertheless, the paradigm changes as knowledge changes; new knowledge introduces information that cannot be accommodated in the existing model. Anomalies and paradoxes appear to contradict or question the assumptions of the paradigm. Unable sufficiently to explain new knowledge, the paradigm changes or shifts (Kuhn 1970 cited Brown 2006, para.50).

An example of a cultural paradigm is captured by Wirth when writing about differing North American approaches evidenced at JPAC public meetings:

... the different national styles of public participation: the Canadians, with their well-tuned ear for process and procedure; the Americans, impatient to obtain results, attending sporadically; and the Mexicans revelling in the opportunity to participate openly in a democratic forum with their North American counterparts (2003, p.202).

Additionally, another North American paradigm may be that identified by Liverman, who suggests that “...within the simple *neoliberal* agenda of free markets and reduced government lie fundamental shifts in the ways nature is valued and used” (emphasis added)(2004, p.3).

For embedded worldviews or paradigms to be revealed in literature and documents, an explicit process such as a “discourse analysis”, a term used by Garrison and Massam, can be undertaken (2001, p.330). Hoggart et al refer to this process as “content analysis”, defined as “[a]t its most basic... a quantitative measure of the frequency of occurrence (or salience) of an item or of its co-variation with other items” (2002, p.150). Such an analysis reflects that “... ‘[a] text only makes sense in a context’ and that ‘language is not a medium for conveying meaning but the producer of meaning” (Agnew et al 1996 cited Garrison and Massam 2001, p.330).

In a discourse analysis, two levels are distinguished for the reading of documents: the “manifest level” and “latent level”, with the manifest referring “...to structural surface aspects of discourse that are readily quantifiable...” (Garrison and Massam 2001, p.331) and latent defined by Graber as “derived from the setting in which the message was expressed, the symbols and connotations embedded in the message, and the experience of message senders and receivers” (1989 cited 2001 Garrison and Massam, p.332). Worldviews (paradigms) are identified at the latent level. Hoggart et al identify a weakness of content analysis as being that it “...lays stress on generalization rather than understanding” (Hoggart et al 2002, p.154).

If discourse or content analysis have been specifically undertaken, key or individual words used in papers and documents read would have been scored and analysed for meaning, allowing for deeper insight into the latent, sub-surface,

meanings for a given author. Worldviews would have then been more readily identified. This process was not undertaken, however, due in large measure to the vast quantity of literature and other resources accessed for this dissertation and the time-limits given for its completion. However, this researcher been minded of Glicksman's observation (specifically given in reference to CEC materials on biodiversity conservation), that "[m]any [CEC]... documents contain impenetrable bureaucratese..." (2003, p.70).

### *Value Assumptions of Researcher*

This researcher values cooperative approaches to relationships and decision-making, where co-learning is an integral aspect of relationships. The Brundtland Commission's definition of sustainable development and *Agenda 21's* approach to fostering activities related to this concept resonate with this researcher for he considers them theoretical and practical tools for achieving balanced outcomes. In a fuller sense, the researcher may be more generally drawn to sustainable development as it reflects his perceived worldview.

This researcher has undertaken both undergraduate and graduate studies in political science, and has been professionally involved over past twenty years in both the Canadian political arena and NGO sector, so writes about these related areas from a place of both theoretical knowledge and practical experience.

## Analysis and Discussion

“The CEC doesn’t have any teeth, but it does have very strong gums.”

(McRobert 2002 cited Fitz-James 2002, p.1)

### *Introduction and Approach*

Many possibilities - both theoretical and practical - exist for re-defining the role, responsibilities and operations of the CEC toward answering this dissertation’s three research questions. However, with a lack of political will specifically identified as an existing challenge for the CEC, recommendations related to altering the text of the NAFTA or NAAEC, or any restructuring of the CEC itself - all toward achieving greater effectiveness for sustainable development - would likely fall on deaf political ears. While the NAFTA is said to have been created with the *potential* for political will, such will is yet in evidence.

More theoretical conclusions, such as on the clear need for NAFTA institutions and the CEC to co-operate, simply re-iterate long and unheeded calls that also require political will for realisation. Some conclusions for achieving cooperation - if political will did exist - would include a re-negotiation of the NAFTA to require the FTCS to co-operate with the CEC AND that the FTC Secretariat adapt the CEC Secretariat’s organisational structure; that being as a co-ordinating body with a single central secretariat office and staff. Another conclusion would be for the FTC’s cabinet-level representatives to *direct* its trade Secretariat to work with the CEC (as is permitted under Article 2002(3)(c) of the NAFTA). Further, a re-negotiation of the

NAAEC would be encouraged to re-draft the Agreement to be unequivocal in its sustainable development intentions. It could do so by incorporating a sustainable development approach throughout its text, including re-wording Article 1(a) to expand the Agreement's definition of sustainable development to a concept also including a social dimension AND changing the wording of Article 6 to permit Council's engagement with the FTC beyond only the environmental to also include the social and economic dimensions of sustainable development. In these few ways a redesigned FTCS cooperatively working alongside the CEC Secretariat, each guided by a redrafted NAFTA and NAAEC, would serve to collectively coordinate among all three Parties for the greater effectiveness of sustainable development.

However, in the absence of political will for the CEC, this thesis takes the approach that for any conclusions to be of value, they must be practically achievable within the existing framework of the NAAEC and CEC. Most specifically, conclusions must be achievable by the CEC Secretariat and its staff. Practical recommendations may serve to move beyond Knox's observation, shared as a panellist at the JPAC's 2005 Fourth Regular Public Session, that, at least in relation to the CEC and particularly regarding factual records - "recommendations of academics are not likely to be followed by anyone" (2005).

### *NAAEC, the CEC Secretariat and Soft-Influence*

In the absence of political will, the flexibility to be more effective for sustainable development does exist in the NAAEC and may be partially found in the Agreement's *Preamble* and its re-affirmation of the *Rio Declaration*. 'Principle 1' of the *Declaration* states at its outset that "Human beings at the centre of concerns for sustainable development", with humans more essentially captured within the social aspect of the three-dimensioned concept. The Parties re-affirmation of this *Declaration* and its own connexion to other international environmental agreements can serve as weight for persuasive arguments on why the CEC need expand to engage a sustainable development approach. Just because the NAAEC claims to be about sustainable development does not make it so, particularly when it defines the approach only in terms of economics and the environment. The Brundtland Commission has clearly defined sustainable development as a three-dimensioned concept and approach for humans. The *Rio Declaration* makes clear that the concept must put humans at its core, thereby serving to stress the importance of the social dimension of the approach.

The Secretariat, as the professional administrative arm of the CEC, can take an important lead in bringing the Commission to integrity in its claims to be pursuing sustainable development. It can utilise a "soft power" or "soft influence" approach in this regard; one identified as being grounded in values and policies. One key value to be considered in a soft influence effort of the Secretariat is integrity. There is ample and persuasive evidence available on why the CEC cannot claim to be pursuing

sustainable development with its current two-pronged approach. This evidence can be respectfully presented by the Secretariat to Council and, only as appropriate, also to civil society. Through the Secretariat referencing the values and *policies* (ie. the *Rio Declaration*) underpinning its arguments, this soft influence effort would be aimed not at *convincing* Council but in *persuading* Council over time of the benefits to the CEC of pursuing a three-dimensional sustainable development approach. That being, to be in integrity and consistent with policy, the NAAEC and CEC can not claim to be pursuing, nor claim to be effective for, sustainable development *if* they do not include in their strategic and operational plans the social dimension inherent in the concept.

Only time will reveal the Secretariat's levels of success in this regard. Yet with sustainable development being a journey, there is no time like the present for the Secretariat to begin a soft influence effort, fully undertaken with a strong amount of patience and the expectation that while engaged on this particular path of the journey, time will be on their side.

### *NAAEC and Financing of the CEC*

Since the CEC began formal operations in 1995, it has been noted that Council has set the Commission's annual minimum revenue budget at US\$9 million. While various perspectives, mostly con, have been written about the impact of a static budget on the CEC - a budget not adjusted for inflation in almost 12 years time, resulting in a suggested real dollar inflationary decline in value of twenty (20) per cent over that same period (Council 2004, p.19) - this thesis did not explicitly review

literature on this matter as arguments about the actual dollars needed to adequately operate a trilateral Commission are considered endless and un-resolvable. As well, an obvious reason for the Secretariat's budget remaining static for over one decade relates to the absence of political will to increase funding. However, at a practical level, the CEC cannot be asked to add to its responsibilities - such as fully pursuing sustainable development - without the funds for doing so. As the Ten-year Committee has identified, "Given its limited resources, the CEC cannot afford to take on new projects..." (Council 2004, p.11).

In this regard, while NAAEC Article 43 requires the Parties to make equal contributions to the CEC, it does not limit CEC funding only to the Parties. This creates the possibility for the CEC to engage in North American-style active fundraising to enhance its general operations and to fund clear sustainable development activities.

In the recent past, the CEC has claimed it is engaged in fundraising. The CEC's Executive Director, William V. Kennedy, noted at a JPAC meeting held in March 2004 in Oaxaca, Mexico, that the CEC has been trying to "...strengthen partnerships particularly in regard to leveraging new funds for the CEC, given that the CEC's budget remains static" (Commission 2004c, p.2). At this meeting, Kennedy also advised that the CEC was focussing on partnerships with "...multilateral financial institutions and the private sector" (Commission 2004c, p.2).

In a personal e-mail exchange with Rolando Ibarra Rodriguez, *Program Manager, Partnerships Development*, with the CEC, he advises that “...the partnerships the CEC explores do not relate entirely to seeking leverage of new funds” (10 August 2006). In another personal exchange with Ibarra, he advises that the “...CEC does not engage [in] any fundraising activity of any sort” (16 August 2006). His last point is re-iterated in an e-mail when he states “About the CEC’s 2006-2008 Op Plan, I’m afraid you won’t find any reference about f/r [fundraising] there. Again, because of the fact that CEC does not engage [in] any fundraising activity of any sort” (16 August 2006).

A review of the CEC’s Financial Rules, specifically Section 5.6, permit the Secretariat to “...receive [acquire] funding or in-kind contributions [donations] in excess of the annual budget to support or enhance programs approved by Council in the three-year program plan...” (Commission 2002c, p.3). A review of the CEC staff directory as of 16 August 2006 confirms that the CEC does not have any fundraising personnel on staff (Commission 2006k). A review of the CEC’s budget for 2006, as found in its 2006-2008 Operational Plan, lists the Commission’s only revenues as the US\$9 million in total the Commission receives each year from the Parties, plus a small sum of CDN \$30 in interest and a pre-2005 surplus carry-over of CDN \$1,031.9 (Commission 2006g, p.6). The CEC’s Ibarra has advised that the:

CEC has been able to obtain certain grants from international financial institutions and from different stakeholders for some of the projects it carries out. However, such grants were applied directly to

specific projects and therefore are not considered part of the CEC budget which continues to be entirely funded by the three North American countries each year (10 August 2006).

*Talking* about engaging in fundraising is quite different from *actively* fundraising. To this end, a conclusion is that the CEC hire a professional fundraiser on staff, to actively assist in securing philanthropic and other funding from sources beyond the three Parties. Alternatively, the CEC can consider “outsourcing” fundraising to one of North America’s many private sector professional fundraising firms. Such outsourcing could be in the form of the “P3s” (Public-Private Partnerships) that are currently popular in North America and also encouraged by the World Bank for infrastructure projects, potentially aiding the CEC’s Kennedy’s desire for partnerships with multilateral financial institutions and the private sector.<sup>19</sup> P3s are defined as:

[A] co-operative venture for the provision of infrastructure or services, built on the expertise of each partner that best meets clearly defined public needs, through the most appropriate allocation of resources, risks, and rewards.

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<sup>19</sup> For more on P3s, see: World Bank (2006) ‘Public-Private Partnership in Infrastructure’ [online], at: <http://web.worldbank.org/WBSITE/EXTERNAL/WBI/WBIPROGRAMS/PPPILP/0,,menuPK:461139~pagePK:64156143~piPK:64154155~theSitePK:461102,00.html> . Also see: World Bank (2006) ‘Initiating a Global Network of Public-Private Partnerships for Infrastructure’ [online], at: <http://web.worldbank.org/WBSITE/EXTERNAL/WBI/0,,contentMDK:21012181~pagePK:209023~piPK:207535~theSitePK:213799,00.html> . Additionally, see: Commonwealth Competition Council (1998) ‘...and more on Public Private Partnerships’. *Competition Watch*, Vol. 3, No. 2, June [online], at: <http://state.vipnet.org/ccp/watchj98.htm#6> (accessed: 09 August 2006).

In a public private partnership, the public sector maintains an oversight and quality assessment role while the private sector is more closely involved in actually delivery of the service or project. (Industry 2003).

Whether the CEC undertakes fundraising specifically for either sustaining existing activities or for pursuing sustainable development, pro-active fundraising seems a necessity for the future success of the Commission.

### *NAAEC and Enhancing Public Participation in Decision-making*

The existing public participation sections of the NAAEC all provide to-date unprecedented opportunities for civil society involvement in environmental decision-making in the North America region. While engaging civil society in its affairs may be unique and groundbreaking, it is unclear how far and wide the CEC's net of public participation has been flung. Some commentators suggest the CEC's net has not been flung so far as to more fully include other stakeholders such as the private sector and indigenous peoples. It is important to be as inclusive as possible when engaging the public in sustainable development, for as Raustiala observes "[c]itizen participation is a mantra of many advocates of good global governance" (2003, p.267).

The *Rio Declaration* might again be kept in mind for it singles out women (Principle 20), youth (Principle 21), and indigenous people (Principle 22) as being essential to achieving sustainable development. Related, Chapter 23.2 of *Agenda 21* identifies that: “One of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making”, with Section III of *Agenda 21* specifically calling for the engagement of: women, children and youth, indigenous peoples, NGOs, workers and trade unions, business and industry, the scientific and technological community, and farmers (UN 2005). *Agenda 21* also addresses the value of TEK in decision-making, specifically-referred to as “holistic traditional scientific knowledge”, as this relates to engaging indigenous peoples (UN 2004a, s.26.1 and s.26.5). The knowledge that can be acquired from such a broad-based engagement of civil society enhances the effectiveness of any sustainable development approach.

It is clear that the scientific and technological community is involved in the Commission through the various research reports, factual records, and Article 13 Reports published by the CEC. However, the literature is unclear as to the extent the CEC has achieved levels of success in also fostering the engagement of women, children and youth, workers and trade unions, and farmers. At the JPAC’s 2005 Fourth Session and CEC’s 2005 Symposium, there was little evidence of the participation of children and youth, or any noticeable participation of workers and trade unions, indigenous peoples, and farmers. Women, academics, a representation of NGOs, and business people (the former often identified as participants, panellists

or questioners) were in clear evidence. While the CEC has provided civil society with opportunities to engage in environmental decision-making, for this civil society engagement process to be more representative of an exercise of sustainable development the CEC must actively reach out to the broader North American community. Such broad engagement can also help the CEC move beyond noted perceptions held by some stakeholders that it is an environmental organisation.

This need for broader community engagement has been understood by Council, which in their June 2004 Puebla Declaration stated that:

We seek to grow the constituencies engaged in the work of the CEC by including a broad and balanced spectrum of other levels of government, including local governments, environmental groups, academics, the private sector, indigenous and local communities, civil society, and others. We envision a strong role for the CEC in promoting partnerships across this spectrum (Commission 2005, p.19).

Opportunities for such broader engagement of civil society can be found in the NAAEC related to NACs (Article 17) and GACs (Article 18). The importance of these Committees for a broader engagement of North American civil society was identified by the JPAC, which in an Advice to Council dated September 2004 specifically called on the Council to systematically appoint indigenous persons to the JPAC, NACs and GACs, and that the Secretariat create a new permanent position staffed by and to work with indigenous peoples (Commission 2004d, pp.1-2).

As of Fall 2005, all three parties to the NAFTA have collectively established fully operational NACs (with Mexico only re-establishing their NAC in the Fall of 2005, as this researcher heard publicly announced at the CEC's earlier noted 2005 Symposium)(Plaut 2005, p.10; Government 2004; and U.S. 2006a). Only the USA has a fully functional and broadly representative GAC (Wirth 2003, p.202), one which contains representation from indigenous peoples (U.S. 2006b). The membership of Canada's GAC reflects the federal government and those provincial governments (these being Alberta, Manitoba, and Quebec) which have signed on to the Canadian Intergovernmental Agreement (CIA) and committed themselves through that Agreement to the NAAEC. Mexico has yet to establish a GAC. A review of the CEC's staff directory as of August 16<sup>th</sup>, 2006 does not reveal any staff position created for indigenous peoples (Commission 2006k) and the Commission's 2005-10 Strategic Plan, and the Secretariat's 2006-2008 Operational Plan, do not address this specific JPAC advice.

With broad-based representation from the diversity of society, JPAC, NACs and GACs could provide valuable involvement, support and TEK toward strengthening the NAAEC and CEC toward a sustainable development approach. Yet these bodies are comprised of political appointees and, while their attaining to broad-based community representation would be beneficial for sustainable development, the very act of ensuring that they contain such representation requires political will. This then leads to another practical recommendation for the Secretariat

- that it establish Secretariat *operational* advisory committees or working groups containing representation from the broad-spectrum of society. Using Secretariat language related to the establishment of CEC committees, it might establish its own Secretariat-appointed, operational, “ad-hoc task groups” (Commission 2006g, p.21). Block addresses this similar possibility when he calls on the Council to empower “...the Secretariat to commission blue ribbon panels to prepare comprehensive reports...” (Block 2004, p.464).

Trade-related working groups already exist within the framework of the NAFTA.<sup>20</sup> Article 9(5)(a) of the NAAEC empowers the Council to “establish, and assign responsibilities to, ad hoc or standing committees, working groups or expert groups” (North 1993, p.8). A thorough review of the NAAEC’s articles pertaining to the Secretariat suggest the Agreement neither permits nor disallows the Secretariat to establish its own operational advisory committees or working groups; it is silent in this regard. The only related references are found in Article 11(5) where the Secretariat is directed to “...provide technical, administrative and operational support to the Council and *committees and groups established by the Council...*” (North 1993, p.13; emphasis added). In NAAEC Article 13(2) relating to Secretariat Reports, the Agreement is clear that the Secretariat “...may draw upon any relevant technical, scientific or other information...” from the community at large, suggesting that

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<sup>20</sup> For a thorough review of all institutions, including working groups, associated with the NAFTA, see: Commission for Environmental Cooperation (1997) NAFTA’s Institutions: The Environmental Potential and Performance of the NAFTA Free Trade Commission and Related Bodies, Montréal: Commission for Environmental Cooperation.

Secretariat working groups can be established, at least as they relate to the development of these reports.

As outlined in *Agenda 21*'s Preamble to Section 23.2 on 'Strengthening the Role of Major Groups', "...in the more specific context of environment and development, the need for new forms of [public] participation has emerged" (UN 2005). This fuller discussion leaves open at least three recognisable and practical "new forms" or possibilities for expanding public participation in decision-making within the operations of the Secretariat,:

One, that the Secretariat establish its own community-based operational advisory committees and/or working groups and/or "ad-hoc task groups" to offer it as-needed advice and support in specific areas of its operational work-plan;

and/or

Two; that the Secretariat establish its own standing operational advisory committees and/or working groups and/or ad-hoc task groups in relation to NAAEC Article 13 Secretariat Reports related to its annual work-plan, with such committees or groups both helping the Secretariat to decide on what matters to report on and/or to also assist the Secretariat in the development and preparation of these reports;

and/or

Three, that the Secretariat establish operational advisory committees and/or working groups and/or ad-hoc task groups within the context of assisting it in the collection of data for, the development of, and also to simply ensure it completes, annual or bi-annual Article 12(3) state of the environment reports on the territories of the NAFTA Parties.

Such operational committees or groups can assist the Secretariat in fulfilling Principle 1 of the *Rio Declaration* and responding to those *Agenda 21* identified communities that require strengthening under a sustainable development approach. While it is common for Boards of Directors to have their own committees, it is also not uncommon for professional administrations - particularly in the North American NGO sector - to establish advisory bodies to guide them in their own operational work. Such an action is complimentary to, not competitive with, the work of a Board. It represents an administration identifying the best means possible for fulfilling the strategic directions of their Board. For the CEC, these best means would include the broader engagement of civil society by the Secretariat toward strengthening the sustainable development effectiveness of the CEC in general and the operations of the Secretariat in particular.

### *Factual Records*

The literature review identified a tension existing between the Council and Secretariat on NAAEC Article 14-15 Factual Records. This tension reads more like a classical struggle on power-sharing, ones fully envisioned in *Agenda 21* where expected tensions in the environmental, economic and social spheres are intended to be alleviated through mutually-agreed and fostered cooperative engagement activities, such as those offered through the CEC.

This dynamic at the CEC should be seen as positive. This can be interpreted as an amicable struggle related to civil society, through the Secretariat, and government, through the Council and their Alt-Reps (“...deputies at the subministerial level who meet regularly during the year to oversee the work of the Commission when Council is not in session...” (Wirth 2003, p.204)) - simply learning how to share and re-allocate power amongst one another. It is a fine example of democracy in action, with those from whom power derives (the people of North America as represented through the Secretariat) redefining with their political leaders (as represented through the Council) the powers that they will entrust to them and those powers that the people wish to retain or re-acquire for themselves. Such general tension may, not unexpectedly, be seen as part and parcel of the process of citizens and government officials learning how to better understand and work alongside one another under a new approach called sustainable development.

While this dynamic as it pertains to the CEC is discussed in the literature as a controversial matter, the Secretariat and Commission must agree that the current factual record process is generally valuable, for the Commission committed in its most recent five (5)-year strategic plan to “...continue to process citizen submissions in an objective, rigorous and transparent manner...” (Commission 2005, p.14).

An anticipation is that the submissions process and any new tensions that may arise will lead to a greater understanding and stronger working relationship between each of the Secretariat, the JPAC and the political-level participants on Council (as well as with their bureaucratic AltReps). Additionally, it is considered that all these same stakeholders will be encouraged to learn how to play in this new game of sustainable development politics, where civil society becomes an active participant in decision-making alongside traditional political and bureaucratic actors. A sustainable development approach at the CEC and in North America can only be enhanced by such a process.

### *Precautionary Principle / Approach*

The precautionary principle / approach is a term whose understanding is clearly important for complimentary trade and environmental agreements such as the NAFTA and NAAEC, as well as for sustainable development and its association with the term. The precautionary principle / approach represents a further area where the role of the CEC can be enhanced to making the Commission more effective for sustainable development.

Using Principle 15 of the *Rio Declaration* as a starting point for a definition of the precautionary principle / approach, a Secretariat Article 13 Report developed on the term would help the Commission make strides toward increased regional and global understandings of sustainable development as an approach. Such increased understandings related to the term and its application would serve to help bridge current divides in perspectives related to the environment and economy, thereby creating some level of increased commonality in the theory and practice of sustainable development.

If the preparation of an Article 13 Report on the precautionary principle / approach can be justified within the confines of the Secretariat's annual work-plan, the Secretariat is then directly permitted by Article 13 to prepare such a report. If for some reason the preparation of an Article 13 report on the precautionary principle / approach cannot be justified within this context, then this Article does permit the Secretariat to submit a report to Council "...on any other environmental matter related to the co-operative functions on this Agreement", but with Council provided with a 30 day period to veto the report (North 1993, p.14). With the Parties having already committed to the precautionary principle / approach through their re-affirmation of the *Rio Declaration*, it would certainly seem consistent for the Secretariat to consider its examination as a cooperative function of the NAAEC and, thus, within the confines of this second allowed area for these Reports. If such a report is undertaken under this second area, the Secretariat may be wise to first engage in a

values- and policies- based soft influence effort with Council. This approach could include that, if the earlier proposed CEC operational committees or groups were used to develop an Article 13 Report on this principle / approach, then sustainable development principles and a sustainable development approach would be in full and clear evidence. Civil society would be engaged in the very process of the development of an Article 13 Report on the precautionary principle / approach whose very nature itself is seen by many as being essential to the furtherance of sustainable development as a concept and practice (UN 2005).

### *CEC Strategic Directions and Operational Plans*

The CEC's Strategic Plan, a document establishing its longer-term objectives, is an obvious place to outline sustainable development goals and approaches. Obvious except that the entrenched environmental and economic directions found in the CEC's constitutional document, the NAAEC, can only be expanded upon through the political will of all of the Parties. And obvious except that the flexible strategic policy directions of the CEC, as set by the Council within the context and confines of the NAAEC, also require political will, but that of the Council. As has been noted, the Council's current strategic directions and five (5) year strategic plan reflect those of a trade-environmental organisation. Thus, until the political will exists at the Council level, the most that can be asked for is perseverance by the Secretariat. That being, that the Secretariat takes it on as a matter of course and practice to use soft influence to constantly advise the Council about the holistic nature of sustainable development and its inclusion of a social dimension, and to also

encourage the Council to develop future CEC strategic plans that are reflective of a three-dimensioned sustainable development approach.

That, however, is not the end of the story. The Secretariat has within its power to develop its own operational plans (which still must be approved by Council) and within these plans the Secretariat can actively incorporate a sustainable development approach in the pursuit of Council's strategic directions. The Secretariat can ensure that each and every one of the project tasks and elements of its operational plans do, by necessity and design, include each of the economic, environmental and social dimensions essential to sustainable development. Here the Secretariat need only demonstrate its own will and intention to do so in line with the Council's strategic directions. The Secretariat is encouraged to explore this possibility and strive to make a sustainable development approach an integral and consistent part of its annual operational plans.

### *Article 13 Reports*

The CEC has been given stellar reviews on its role as a Clearinghouse of Regional Environmental Information in North America and is encouraged to continue in its impressive progress in this regard. For the purposes of being more effective for sustainable development, one area where the CEC can improve is with Article 13 Reports. In its lifetime, the Secretariat has produced or is near completing a total of six NAAEC Article 13 reports within the scope of its work-plan. As already noted, the NAAEC permits the Secretariat to decide the Article 13 Reports it will

develop in relation to its work-plan. The Secretariat is only required to seek Council approval for these reports outside of the scope of its annual plan.

Article 13 Reports have been described as serving "... as an example of postmodern, "soft" or "reflexive" international law because [the CEC] seeks to influence public and private behaviour without the threat of the enforcement of traditional, sanctioned-based, "hard" law" (Tarlock and Thorson 2003, p.218)<sup>21</sup>. Article 13 reports are akin to Raustiala's fire alarms in that they are based on "shaming", which is suggested to work "...well with pollution....because it draws on deep, perhaps irrational, fears of exposure to the risk of serious illness and an innate abhorrence of bodily impurity" (Tarlock and Thorson 2003, p.231).

A further conclusion is that the Secretariat prepare at least one annual, and if staff-capacity allows even more, Article 13 Reports, and that the scope of these Reports be expanded to also include all three dimensions of sustainable development. These reports have a North American wide audience and so can influence sustainable development in the continental community.

As earlier suggested, one of these reports could be developed to create greater clarity on the matter of the precautionary principle / approach. Additionally,

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<sup>21</sup> For more detailed information on 'reflexive law', also see p.231 and 'Endnote 5' on p.233 in this same Tarlock and Thorson citation. Also see a related discussion on "sunshine" strategies as found on p.261 and in 'Endnote 20' on p.272 in: Raustiala, Kal (2003) 'Citizen Submissions and Treaty Review in the NAAEC' in Markell, David L. and Knox, John H. (eds), Greening NAFTA: The North American Commission for Environmental Cooperation, Stanford: Stanford University Press, pp.256-273.

expanded involvement of civil society in the identification of the Article 13 Reports to be prepared by the CEC and in their actual development can be achieved through the suggestion for the Secretariat to establish operational advisory committees or groups. Aside from NAAEC permissions outlined in Article 13(2) enabling the Secretariat to solicit external advice in the preparation of Article 13 Reports, the Secretariat has precedence for expanded civil society involvement in their preparation with a number of these reports having already been independently produced (Plaut 2005, p.10). A regular production of these reports, their expansion to include all three dimensions of sustainable development, and the greater inclusion of civil society in identifying the reports to prepare and in their development would all serve to enhance the CEC's effectiveness for sustainable development in North America.

### *Article 12(3) State of the Environment Reports*

A second area where the CEC can improve in its role as a Clearinghouse of Regional Environmental Information is with Article 12(3) SoE reports. As noted, to date and over its life the CEC has produced only one SoE report. Functionally, this may be due to the word "periodically" being used in NAAEC Article 12(3) to denote how often the CEC need prepare these reports, a word that does not suggest any sense of urgency (North 1993, p.14). The Ten-year Committee specifically noted that "the CEC's limited work in state of the environment (SoE) reporting...has not been received as favourably" (Council 2004, p.18). It also suggested, however, that "This requirement presents quite a challenge, as the Parties do not collect environmental information either in a consistent or comprehensive fashion" (Council 2004, p.18).

The CEC has faced similar challenges in the past with a “data deficit” (Block 2004 p.456), particularly as this relates to biodiversity mapping and its Pollutant Release and Transfer Registry (PRTR). Notwithstanding, the CEC has found ways to overcome obstacles, even to the extent of producing results of its PRTR in its annual *Taking Stock* report. The Secretariat has directly responded to data-deficit challenges within its 2006-2008 Operational Plan by committing to “...strive to increase the comparability, reliability and compatibility of national and subregional information and has begun to develop and link multinational databases and information networks in [identified] areas...” (Commission 2006g, p.10).

The CEC’s first and only SoE was published in 2002.<sup>22</sup> While this SoE report would likely be more effective for sustainable development in North America through utilisation of a lens with all three dimensions of the concept, it does provide an excellent base-line for future SoE reports undertaken by the CEC. SoEs in general, and one’s that specifically included identifiable human impacts on the environment and identifiable affects on humans from environmental change, can have great benefit for sustainable development.

A Secretariat goal of one annual SoE of the territories in North America would be ideal, but a bi-annual SoE would seem a realistic start. While the

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<sup>22</sup> The full report citation and its web-site location are: Commission for Environmental Cooperation (2002d) ‘The North American Mosaic - A State of the Environment Report’ [online], at: <http://www.cec.org/soe/> (accessed: 10 August 2006).

Secretariat's current 2006-2008 Operating Plan discusses SoE's, it makes no commitment to complete an SoE during the life of this plan, but does commit to a project to '...integrat[e] the information products of other projects within the Information for Decision-making priority" at the CEC, all toward the end of "...the completion of CEC reports on continental environmental conditions on a *regular* basis (Commission 2006g, p.13; emphasis added). SoEs may represent another area where political will is lacking at the Council level for the Secretariat to proceed. If so, the Secretariat may again be required to exercise soft influence as a means to produce at least a bi-annual SoE of North America.

The CEC's engagement of civil society in data collection and review, possibly through the establishment of the suggested operational advisory committees or groups, may be a means for the CEC to strive to collect the data it needs for the regular development of these reports. A potential model the CEC can consider in the development of protocols for civil society involvement is that of *The Canadian Community Monitoring Network* (TCCMN), a program of Environment Canada, the environmental department of Canada's federal government.<sup>23</sup> This Network, launched in 2001, is the responsibility of the EMAN (Ecological Monitoring and Assessment Network) Co-ordinating Office of Environment Canada. Working alongside and benefiting from the engagement of civil society, EMAN offers the

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<sup>23</sup> For more information, see: The Canadian Community Monitoring Network (2006) [online], at: <http://www.ccmn.ca/english/> (accessed: 10 August 2006).

following guidance to TCCMN participants, which also provides an example of how the Secretariat might engage civil society in data-collection:

[EMAN] [R]ecommends that the groups who are involved in monitoring activities should coordinate their efforts through the use of standard protocols in study design, sampling procedures, sample and data analysis and reporting methods. This ensures that information gathered in Canada is as useful as possible at the national and international scale.

Working with its partners, EMAN both endorses standard protocols and develops them in areas where either consolidation is required, or no work has been done (Environment 2006).

If there is the will, creative solutions can be found to address any challenges the CEC encounters with inconsistent or incomprehensive environmental information required for the Commission to produce regular SoEs effective for sustainable development in North America. Such creative solutions may again point to civil society engagement and involvement.

### *CEC: Benefiting the North American Community*

After an over decade-long and still ongoing engagement of civil society related to the continental nexus between environment and trade / economics, the CEC can be said to be benefiting the North American community. The Commission's environmental capacity-building is expected to have long-term positive impacts for the environment of this continent and to be of *benefit* to sustainable development. The challenge that arises, however, is with how society may come to perceive sustainable development over the longer term if the CEC continues presenting it as a concept and approach incorporating only environmental and economic dimensions. If the social dimension is left out of the public capacity-building process at the front end of sustainable development's broader introduction to the North American community, this equally important dimension may well fade from memory over the longer-term. A result could be the citizen's of this continent pursuing either environmental or economic sustainability, but not journeying toward sustainable development. Implicit evidence that this may already be occurring was provided by the Ten-year Committee, when it noted that some Canadian businesses perceive the CEC (which itself claims to be engaged in sustainable development) as an environmental organisation.

A CEC made more effective for sustainable development has obvious benefits for the North American community. It would introduce sustainable development to the continental community as the three-dimensioned concept and approach it is as developed by Brundtland - one possessing each of a social,

environmental and economic dimension. In this way, North American society can begin developing its capacity related to fostering a sustainable development approach in the individual and collective lives of its citizens. It is an approach in which humans are placed at the centre, yet by being so located each individual human being is encouraged to understand that it is in their self-interest to consider the consequences on and benefits for all humans of their social, environmental and economic actions.

The information-sharing and capacity-building that the CEC is currently engaged in on environment and economics will help create more aware North American human beings, but only in the areas of the environment and economics. By the CEC sharing information and capacity-building in sustainable development, it will importantly help create more aware North American human beings in the area of sustainable development. This will help these people develop concrete approaches to living the sustainable development journey in North America over each of the short, medium and longer terms. And that would be of clear benefit to the North American community.

### *CEC: An Example for Sustainable Development*

With or without political will, the NAAEC and CEC have already been an influence in North America and elsewhere in the world. For as Mello states, the “NAFTA represents the first time environmental issues have been considered simultaneously with trade policies and clearly establishes a very important precedent for future trade negotiations” (Mello 1994, p.26). The NAAEC’s identified

‘uniqueness’ and ‘groundbreaking’ nature themselves have resulted in an important engagement of North American civil society in a discourse surrounding the trade and environmental nexus, as well having made the CEC an entity for international spectators to observe.

The NAAEC has already served as the basis for the Canada-Chile Agreement on Environmental Cooperation (CCAEC), a companion agreement to the Canada-Chile Free Trade Agreement which came into force on July 7, 1997 (Environment 2002). While Gallagher argues that the CEC is a model for the Free Trade Area of the Americas (FTAA) negotiations (2003, p.130), Wirth states that the FTAA negotiations offer nothing to resemble the CEC and that, in his view “...most Latin American officials want nothing to do with this model, based as it is on transparency and public participation” (2003, p.210).<sup>24</sup> With the FTAA’s Trade Negotiations Committee in suspension since February 2004 (Foreign 2005), and both Venezuela and Cuba advocating for the Bolivian Alternative for the Americas (ALBA), the FTAA is still a long way off to any finalisation if ever at all.<sup>25</sup>

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<sup>24</sup> For more information on the FTAA, see: Free Trade Area of the Americas (2005) ‘Welcome to the Official Website of the Free Trade Area of the Americas (FTAA)’ [online], at: [http://www.ftaa-alca.org/alca\\_e.asp](http://www.ftaa-alca.org/alca_e.asp) (accessed: 10 August 2006). Also see: Foreign Affairs and International Trade Canada (2006) ‘Free Trade Area of the Americas (FTAA)’ [online], at: <http://www.dfait-maeci.gc.ca/tna-nac/ftaa1-en.asp> (accessed: 10 August 2006). Additionally see: Office of the United States Trade Representative (no date given) ‘Free Trade Area of the Americas’ [online], at: [http://www.ustr.gov/Trade\\_Agreements/Regional/FTAA/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Regional/FTAA/Section_Index.html) (accessed: 10 August 2006).

<sup>25</sup> For information on the ALBA, see: ‘Agreement between the President of the Bolivian Republic of Venezuela and the President of the Council of State of Cuba, for the Application of the Bolivian Alternative for the Americas ‘ (2004) [online], at: <http://www.mltoday.com/Pages/NLiberation/Cuba-VenezPact.html> (accessed: 10 August 2006). Also see: Arreaza, Teresa (2004) ‘ALBA: Bolivian Alternative for Latin America and the Caribbean’. *Venezuelananalysis.com* [online], at: <http://www.venezuelananalysis.com/docs.php?dno=1010> (accessed:

Yet Wirth's analysis that the CEC model is politically unpoular with the majority of governments on the two continets involved in FTAA negotiations seems to confirm the CEC's current experience with the three governmentst of North America. It suggests that the CEC's potential to be emulated elsewhere may be minimal only due to - once again - a lack of political will. Yet notwithstanding that a lack of political will for the CEC has been attributed to Canada, that country still chose to use the NAAEC as a model for its CCAEC companion environmental agreement to its trade agreement with Chile, including the creation of an institution modelled on the CEC. Unfortunately, the CCAEC has noticeably weakened the factual record elements found in the NAAEC and available through the CEC Secretariat, having done so through the creation of a new *Joint Submission Committee* directly appointed by the CCAEC's Council of politicians and whose role, in part, is to make its own determinations on the need for the preparation of factual records. Thus, in the CCAEC modelled on the NAAEC, the determination of the need for the development of a factual record is taken away from the professional Secretraiat and given to a special board of political appointees.

So the record of the NAAEC and CEC as a global model to-date is mixed, as might be expected at this early juncture in the life of such a new institution. As Bill Nitze was quoted at the outset of this thesis, "There is nothing like the CEC in the world...". For this reason alone the NAAEC and CEC will likely serve to encourage

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10 August 2006). NOTE: This author's same written analysis is found throughout the Internet at numerous other website addresses.

other new or existing trade agreements and their institutional bodies to consider them as a model, even if a slightly watered-down version of the model as found in the CCAEC. And that cannot be a bad thing for other global regions as they begin or even further their own effective journeys toward sustainable development.

## Conclusions

At their implementation over 12 years ago, the NAAEC and CEC - with their narrower economic and environmental focuses - can be said to have then been appropriate for the North American journey to sustainable development. There is a time and place for everything. The journey to sustainable development is just that - a journey. It has a starting point but no final destination, and is an ever changing process based on time and place and newness of available information. In the early 1990's and the entry into force of the NAFTA, a continental focus on the environment and trade nexus was right for the time. And just as they did for North America at that time, the NAAEC and CEC would today serve as an excellent sustainable development model for those jurisdictions that currently do not have the benefit of such an agreement and companion institution.

Yet today, in 2006, the NAAEC and CEC can now do more to be effective for sustainable development in North America. Their appearance as environmental and economic companions to the NAFTA is no longer sufficient or necessary. At this juncture of time and space and human knowledge, while the NAAEC and CEC serve as excellent models for other jurisdictions, for North America they need to adapt to this continent's own unique and continuing journey toward sustainable development. While the CEC has been identified as having "strong gums", after twelve years of growth the Commission has reached a stage of maturity where it can begin to develop its teeth. To this end, the conclusions of this dissertation, practically

identified as ways for the CEC and its Secretariat to assist North America on its sustainable development path, are encapsulated as follows, that:

1. The CEC Secretariat exercise “soft influence” to persuade the Commission of the value of pursuing a three-dimensional sustainable development;
2. The Secretariat expand its budget, including for sustainable development, by either hiring professional fundraising staff or outsourcing fundraising under a variant of a P3 model;
3. The CEC expand civil society engagement through the Secretariat establishing its own community-based operational advisory committees, working groups, or ad-hoc task groups;
4. Any power struggle evidenced within the Commission related to Article 14 and 15 factual records be welcomed as amicable and representative of North American civil society and their governments collectively learning how to share power under a new sustainable development concept and approach;
5. The Secretariat develop an NAAEC Article 13 Report on the precautionary principle / approach and engage civil society in its preparation;
6. The Secretariat actively incorporate, within its annual operational plan, activities with a three-dimensional sustainable development approach in the pursuit of CEC Council’s strategic directions;

7. The Secretariat engage civil society in the annual identification and development of an NAAEC Article 13 Report;
8. The Secretariat explore a Canadian government community monitoring initiative as a model to engage civil society in, and ensure the bi-annual development of, NAAEC Article 12(3) State of the Environment reports utilising a sustainable development lens;
9. To appropriately capacity-build the North American community in sustainable development for the long-term, the CEC specifically introduce the concept as the three-dimensioned approach developed by the Brundtland Commission; and
10. That the NAAEC and CEC have already been an influence in North America and an example to elsewhere in the world.

The analyses offered in this thesis have one particular common thread; this being the CEC can practically enhance its effectiveness - its teeth - for sustainable development in North America through developing and utilising creative solutions for engaging civil society. To do so will require patience, flexibility, and a high degree of both willingness and acceptance of the need to *delegate* power, authority and responsibility. It will require the CEC and its Secretariat to 'let go' of traditional ideas of power and control, and to adopt North American-specific versions of *Agenda 21's* encouraged "new forms" of collective decision-making.

By doing so, the NAAEC as a tripartite agreement and the CEC as its created institution can achieve more for and with the citizen's of North America. This would enable the CEC to continue to be at the forefront of our continent's and planet's necessary journey toward sustainable development. That, in and of itself, would be good for North America and good for humanity elsewhere on our planet. Let's hope that the CEC is up to this exciting challenge.

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