An Environmental Perspective on the 'Effective Enforcement' Provisions of the North American Agreement on Environmental Cooperation

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I. Introduction

This paper provides an environmental perspective on the "effective enforcement" provisions of the North American Agreement on Environmental Cooperation (NAAEC). These provisions are discussed under three headings: context, parties, and content. No attempt is made here to repeat the content of NAAEC.

II. Context

NAAEC is different than NAFTA

NAAEC is a 'side deal' to the North American Free Trade Agreement (NAFTA) between Canada, Mexico and the United States. The purpose of NAAEC was to assuage concerns, especially in the United States, that NAFTA would adversely affect the environment. While there is a direct *political* connection between NAAEC and NAFTA, there is little direct legal, economic or environmental connection between the two agreements.

NAFTA has two main *negative* impacts on environmental protection:

a) promotion of economic activity which has undesirable environmental effects, and

b) discouragement of innovative or stringent laws aimed at protecting the environment.

Its two main *positive* impacts on environmental protection are

a) promotion of economic activity that provides the financial and technical means with which to tackle environmental problems, and

b) discouragement of the use of unusually low environmental standards to attract business.

NAAEC is *not* designed to affect directly *any* of these four factors. In particular, NAAEC's provisions regarding (non-) enforcement of domestic environmental standards are quite independent of either the environmental stringency or the trade law vulnerability of the standards in question.

This important distinction is often overlooked. The program notes for this session, for example, ask, "What impact have NAFTA and the accompanying NAAEC had on the environmental issues facing governments and the private sector?" In my view, it is wrong to lump the two agreements together. The subject of the environmental pros and cons of NAFTA is very different than the subject of the relative merits of NAAEC. In short, NAAEC will not ameliorate the environmentally negative effects of NAFTA, but it would be wrong to expect it to. NAAEC should be evaluated independently of NAFTA, even though NAAEC arose as a political consequence of NAFTA.

NAFTA is more powerful than NAAEC

To put NAAEC in context, it should be pointed out that the environmental impacts of NAFTA -- both positive and negative -- are vastly more consequential than the likely impacts of NAAEC. Again, NAFTA and NAAEC are very different sorts of agreements, so this observation should not be taken as belittling the importance of NAAEC.

Globalization

NAAEC arose in the context of NAFTA; NAFTA arose in the context of the globalization of trade. NAFTA is but one of a number of multinational trade liberalization agreements recently adopted or initiated, and these agreements are all interrelated with the replacement of the General Agreement on Tariffs and Trade (GATT) by the World Trade Organization (WTO). Not coincidentally, environmental problems also are becoming increasingly globalized. Global warming, the depletion of the stratospheric ozone layer, the widespread dispersal of persistent toxic pollutants, and the reduction of biological diversity are all problems in which the causes and effects are not exclusively local or even national. The current dramatic surge in global human population links the trade trends and the environmental trends, as people struggle to meet daily needs and perceived needs through economic activity that involves both increased trade and increased environmental pressures.

For environmentalists, and perhaps for the human species itself, this is an acute dilemma. Should trade liberalization be fostered, in a desperate attempt to keep the global economy growing as fast as the global population? Or, should trade liberalization be opposed, in an effort to slow down the economic juggernaut that has fed overpopulation and environmental degradation?

III. Content

From an environmental perspective, the content of NAAEC is long on principles, short on substance. The Preamble and Objectives are very positive. But, the Obligations are conspicuously narrow and qualified. The tone reflects caution and an apparent fear of 'opening the foodgates.' Defensiveness is explicit in at least one section: article 14 (1) (d) allows the Secretariat to consider a submission under the non-enforcement provisions only if the Secretariat finds that the submission "appears to be aimed at promoting enforcement *rather than at harassing industry*" (emphasis added).

The content of the non-enforcement provisions implicitly reflects this defensiveness. The definition of environmental law to which the remedy applies is extremely narrow, excluding laws in relation to the exploitation of natural resources that are at the root of many environmental conflicts. The test for "failing to effectively enforce its environmental law" is narrowed by two key exceptions, such as ' reasonable exercise of discretion' (Article 45 (1) (a)), 'decision to allocate enforcement resources' (Article 45 (1) (b)). In addition, the penalty provision appears to restrict the remedy to situations involving a "persistent pattern" of non-enforcement, which is defined to exclude anything before the agreement came into force. Moreover, there is a 'Catch 22.' The complainant must first pursue any available "private remedies" (Article 14 (2) (c)), even though these may be lengthy and unlikely to resolve the problem. Yet, the complaint cannot proceed if there is judicial or administrative proceeding underway" (Article 14 (3) (a)).

IV. Parties

The parties to NAAEC (and NAFTA) are the governments of the countries. While this in itself is self-evident, it raises a number of important points. First, it requires the three governments to interact with each other regarding environmental laws and regulations. Such interaction has been strikingly absent in the past. This also means that the domestic politics of each country -- to the extent that they affect environmental laws and regulations in that country -- become more relevant to the other countries than they had been in the past.

Second, the involvement of each government as a party has raised *within* each government what might be called 'sub-parties' reflecting various relevant interests, such as environmental protection, trade liberalization, trade protectionism, and (at least in Canada) federal-provincial relations. In some cases, there is a stronger affinity between sub-parties within different governments than there is between sub-parties within the

same government. It will be interesting to see how this affects the development of environmental and trade policies in the future.

Third, the parties to the agreements do *not* include other groups that could be considered stakeholders: industry associations, environmental groups, labour unions, and aboriginal organizations. Even so, these non-party stakeholders are increasingly obliged by the existence of both agreements to join the three-country focus of the agreements, and to interact with the governments and non-party stakeholders of the other two countries. Similarly, governments are now having to contend with non-party stakeholders from other countries.

Fourth, the enhanced need for contact between the governments and non-party stakeholders of the three countries has highlighted the weaknesses in the current communications systems among the various players. One of the Commission's first steps has been to sponsor the development of a computerized summary of environmental law in the three countries, available on the Internet. In a sense, it is surprising that this information was not already available. In any event, this information resource will undoubtedly serve as the starting point for much more sophisticated exchange of information regarding environmental law between the three countries, and likely among other countries and trading blocks as well.

Conclusion

NAAEC is in one sense a minor aspect of NAFTA and the worldwide liberalization of trade. NAAEC cannot be seen as an effective antidote to the potentially negative environmental consequences of that trend. However, it important step in the development of environmental law. It foreshadows increasing interaction between Canada, Mexico and the United States, both among governments and among non-party stateholders.

Summary

We have attempted in these submissions to address one particular aspect of this proposed investment treaty - the investor-state procedures that it would establish. Our Department of Foreign Affairs and International Trade has taken the position that there is nothing unique of untoward about these dispute resolution rules (see correspondence attached) and points to a number of precedential agreements. However, as our submissions indicate, the advent of such investor-state suit provisions is a very recent phenomenon in Canadian law. In fact, it was only in 1985 that Canadian governments even decided to adhere to the norms of international commercial dispute arbitration. Of course the advent of investor-state suit procedures under multi-lateral investment agreements such as are being proposed in the MAI date only from the implementation of NAFTA - a scant half decade ago.

We believe that it is irresponsible and misleading to suggest that there regimes are either tried or true. We have discovered in the years since NAFTA was implemented that

foreign corporations will make ready use of the new rights they have acquired under these investment regimes. In Canada, US based corporations have enlisted NAFTA's investment rules in support of claims and lobbying efforts intended to frustrate, or challenge Canadian initiatives on issues as diverse as restricting the trade of a toxic fuel additive, mandating plain packaging for cigarettes, terminating leases to the terminals at the Toronto International Airport, and establishing a public auto insurance system.

While much has been made of Ethyl Corporation's claim for compensation under the expropriation rules of NAFTA, often overlooked is the fact that it is also claiming breaches by Canada of the national treatment and performance requirement rules of NAFTA. Indeed its claims on these grounds may be stronger than the one it has founded on the expropriation rule.

What has made the arguments of these investors so powerful is the direct recourse that each enjoys to the dispute resolution apparatus of international arbitration. Simply the resource demands that such claims impose on scarce government resources is more than sufficient cause for governments to think very carefully about proceeding in the face of such complaints, no matter how compelling the public policy rationale for doing so.

These cases of have brought to light just how far reaching these investment regimes may be in constraining the policy and legislative authority of democratically elected governments. We believe that they represent the tip of a much larger iceberg, the full dimensions of which will only become clear after it is too late to change course if we continue to proceed full speed ahead.

ENDNOTES

1. Organisation for Economic Co-operation and Development, Directorate for Financial, Fiscal and Enterprise Affairs, Multilateral Agreement on Investment: Consolidated Text and Commentary (Paris: OECD, 1997) at 62.
2. John E.C. Brierly, Canadian Acceptance of International Commercial Arbitration, in Maine Law Review, Vol. 40:263 (1988) at 287.
3. According to a trade lawyer, who represents large corporations, Canadians should regard the Ethyl suit as a harbinger of things to come, as corporations make more frequent use of investment treaties to "harass" governments contemplating regulatory initiatives those corporations oppose - see "Ethyl sues Canada over MMT law," Globe and Mail, April 15, 1997.