

Environmental and Public Interest Considerations in NAFTA Renegotiation

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As the North American Free Trade Agreement (NAFTA) renegotiation process continues—now with an extended timeline into 2018—speculation abounds as to what kind of progress has been made with respect to the environmental rights and obligations that will be tied to the renewed regional trade framework. In their official negotiating objectives, both Canada and the U.S. have signalled their desire to integrate environment-related provisions into the trade agreement itself rather than under an environmental side agreement. There remains much uncertainty regarding which aspects of the [North American Agreement on Environmental Cooperation \(NAAEC\)](#), if any, will be transposed into the revised NAFTA. On the question of indigenous rights, climate change and other trade and environment linkages, many prospective, transformative paths forward have already been proposed (notably, [Koutouki](#);¹ [Vaughan](#)²). This commentary supports and contributes to propositions on how NAFTA parties should seek to modernize the agreement for the benefit of the North American public and ecosystems.

The New NAFTA: Converge with or diverge from recent mega-regionals?

The environmental chapters of the adopted [Comprehensive Economic and Trade Agreement \(CETA\)](#) and draft [Trans-Pacific Partnership \(TTP\)](#) are often cited as reflecting progressive linkages between trade and environment. In some respects their collective environmental attributes should serve to inform the NAFTA renegotiation process in terms of clarifying the substantive normative direction for regional cooperation in areas such as ozone protection, climate change mitigation, marine pollution from ships, invasive alien species, as well as trade in fisheries, timber and environmental goods and services.

Yet a close look at these environmental chapters reveals high aspirations, soft legal obligations and modest enforcement mechanisms. Their frameworks for public participation in environmental decision making fall far behind the ambitious and inclusive standards set by the NAAEC over 20 years ago. At the same time, it should be noted that the NAAEC has not lived up to its textual promise. A comparison of the rights and obligations, institutional mandates,

¹ Konstantia Koutouki, *Canada has an Obligation to Promote Rights of Indigenous Peoples in NAFTA*, CIGI Online, 2017 available at <https://www.cigionline.org/articles/canada-has-obligation-promote-rights-indigenous-peoples-nafta>

² Scott Vaughan, *NAFTA's Environmental Record: History, outcomes, impacts and options*, June 2017, IISD, available at: <https://www.iisd.org/sites/default/files/publications/nafta-environmental-record-commentary.pdf>



mechanisms and rules set in place by the NAAEC compared to how they were actually practiced and given life over the last 23 years, shows that NAFTA Parties declined to use the environmental side agreement to its fullest extent. This, in effect, disabled the NAFTA and NAAEC from reaching their common ultimate objective of ensuring that North American trade liberalization would be synonymous with sustainable development and enhanced environmental and human health protection.

Water Rights

The issue of water rights under the renegotiated NAFTA should be regarded as a forefront concern in negotiation. In this respect, the new NAFTA could draw inspiration from the CETA in clarifying rights and obligations related to water, including the affirmation that water is not a commodity. At the same time, the new agreement should also aim significantly higher than the CETA in terms of emphasizing the parties' right to define and regulate the collection, purification and distribution of water as the provision of public services. In Article 1.9. of the CETA, the contracting parties recognize that "water in its natural state, including water in lakes, rivers, reservoirs, aquifers and water basins, is not a good or a product." The provision further affirms each party's right "to protect and preserve its natural water resources." While clarifying that the CETA does not oblige parties to "permit the commercial use of water for any purpose, including its withdrawal, extraction or diversion for export in bulk," the provision goes on to note that "if a Party permits the commercial use of a specific water source, it shall do so in a manner consistent with this Agreement."

The [Joint Interpretative Instrument \(JII\)](#), a non-legally binding interpretational guideline adopted alongside the CETA, attempts to abate fears that the CETA will lead to widespread water privatization at the expense of public health interests, by making the clarification that:

"CETA will not prevent governments from providing public services previously supplied by private service suppliers or from bringing back under public control services that governments had chosen to privatise. CETA does not mean that contracting a public service to private providers makes it irreversibly part of the commercial sector."

This provision should not have been left in a non-legally binding instrument, but rather integrated into the text of the CETA. Similarly, a provision of this kind should be integrated into the new NAFTA in order to minimize the possibility of contorted interpretations by arbitral panels in the context of prospective water investment disputes. There is of course, no secure way to alleviate the uncertainty of investor-state dispute processes or to guarantee a standard legal interpretation of any trade agreement. For the NAFTA investor-state dispute settlement (ISDS) mechanism to not be perceived as significantly threatening environmental and public health, it would have to be substantially reformed, most notably in terms of the diversity of environmental and indigenous knowledge systems reflected in arbitral appointments and the opportunity for civil society engagement in the dispute process.

Public Submissions on Environmental Law Enforcement

One of the NAAEC's most relevant features for civil society actors was the creation of the submissions on enforcement matters (SEM) process, a mechanism available to all North American residents for the submission of complaints regarding a NAFTA party's alleged failure to enforce environmental laws. Although legally attenuated by design, the prospective suppression of the only supranational complaint procedure available to the North American public would further reinforce the closure of the regional trade regime, an already highly exclusionary space tightly protected from civil society engagement when it comes to decision-making matters. While the SEM process may need to be redesigned to fit into the new NAFTA, the complaint mechanism needs to be strengthened and not eliminated or diluted towards the type of public participation and complaint mechanisms that appear in the CETA or the draft TPP. It is imperative to note that the consultative mechanisms required under the draft TPP and CETA environment chapters for parties to fulfill their obligations with respect to public participation, consultation and submissions, are limited to the domestic level.



While the draft TPP requires parties to accept public submissions relating to the implementation of the environment chapter, those submissions can only be examined at the plurilateral level (by the intergovernmental “Committee on Environment”) at the request of a state party. Given the historic and pervasive silence of states over their trading partners’ enforcement of environmental laws, one has to ask if the TPP drafters even considered this a serious possibility. The CETA environmental chapter also requires its parties to accept public submissions at the domestic level, with no mention of how these public submissions may be raised within the institutional mechanisms created under the CETA. If the prospective NAFTA were to adopt a similar approach and end the SEM process, the North American public stands to lose a unique tool built into the NAAEC for environmental transparency and accountability. Considering the expansive, socio-environmental unrest that has intensified in the U.S. under its current administration—and that recalls, in many aspects, the era of the civil rights and early environmental justice movements—the risks of curtailing public submissions on environmental law enforcement to the national level are profound and should not be underestimated.

If the NAFTA negotiators are looking towards the elimination of the SEM process rather than its renewal, both Mexico and Canada should reflect deeply on the potential implications of collaborating with such an environmentally regressive and divisive U.S. administration to dismantle the single mechanism available to the North American public to demand environmental accountability through the regional trade regime. Moreover, if Canada were to support the elimination of the SEM process at a time when it is facing a [SEM submission](#) in relation to the alleged contamination of the Athabaskan river from oil sands tailings ponds, the Canadian government is likely to face domestic and global criticism on the real depth of its commitment to address sustainability in the context of its fossil fuel industries, and to advance reconciliation with First Nations impacted by oil sands development.

State-to-State Dispute Settlement on Environmental Law Enforcement

The experience of the NAAEC state-to-state environmental dispute system (which has never been used) is a clear indicator that states cannot be expected to bring disputes against one another regarding their respective failures to enforce environmental laws, and thus integrating these types of dispute systems into trade agreements is essentially an important symbolic measure, but not an effective one. Unless the new NAFTA opens this dispute system to civil society actors as complainants—the same way it is to be made available to states—the mechanism could remain merely textual, as has the NAAEC state-to-state process for over the past two decades. Here, neither the adopted CETA nor the draft TPP should be followed as models. The CETA environmental chapter mechanism remains consultative, state-driven and unenforceable. As for the draft TPP, the legal enforcement mechanism outlined in its environment chapter is strictly controlled by states; the process excludes the involvement of civil society actors except as summoned by the parties in first and second-level consultations.³ The third and final level of ministerial consultations under the environment chapter (before parties can access the general dispute resolution mechanism) is confidential.⁴

If non-state actors were allowed to access dispute resolution mechanisms traditionally reserved for state parties, there are procedural mechanisms that can be set in place to avoid frivolous submissions, and the CEC’s SEM unit has extensive experience in assessing whether public submissions to a regional mechanism meet basic conditional requirements. Evidently, this knowledge and expertise can be drawn upon in crafting an environmental dispute settlement system under the new NAFTA which would be open to both state and non-state actors.

Renewing the Commission for Environmental Cooperation (CEC)

As the U.S. administration forges ahead with its agenda to unravel environmental protection rules, to [erase climate science](#) and to distance climate discourse and engagement from the mandate of the U.S. Environmental Protection Agency (EPA), the need to maintain strong regional institutional mechanisms for the protection and health of North American ecosystems and peoples becomes increasingly evident. The interrelationship between the ecosystems

³ Arts. 20.20.5; 20.21.2; draft TPP.

⁴ Id., Art. 20.22.3.



of the three countries requires consistent cooperation at the regional scale. During its existence, the CEC has brought the NAFTA closer to society, generating scientific knowledge, enabling public transparency mechanisms on pollutant releases and transfers, engaging in species conservation efforts, fostering local innovation and education including the dissemination of traditional ecological knowledge, and essentially assuming, from multiple dimensions, implementation of the parties' common commitment to environmental protection and enhancement. The renegotiation of the NAFTA presents an ideal opportunity to renew the purpose and mandate of the CEC and to anchor its relevance and contribution to a post-Paris and post-Agenda 2030 NAFTA.

While the CEC's focus on trade and environment linkages may have been minimal in the past, these matters should be prioritized in the new NAFTA. The CEC could be updated, with its strengths harnessed and objectives renewed so that it becomes, in part, a forum for regulatory cooperation. Environmental and human health protection objectives should play a leading role in guiding regulatory cooperation efforts. The CETA's chapter on regulatory cooperation does not place emphasis on environmental principles or human health considerations, beyond including a commitment "to ensure high levels of protection for human, animal and plant life or health, and the environment" in accordance with the CETA and relevant WTO Agreements. In this way, the unclear status of environmental principles in WTO law can be viewed as extending to the CETA as well.

The renewed NAFTA could take a more progressive approach through an updated CEC, which would leverage its resources towards advancing research, open science, environmental and emissions data sharing, and supporting other forms of knowledge-generation on key environmental aspects of trade liberalization. This should include identifying and categorizing environmental goods and services, climate change mitigation technologies as well as tracking implementation, enforcement and reporting measures on sustainable trade in fisheries and timber, ozone protection, marine pollution, conservation of biological diversity and the sustainable use and management of other natural resources. The renewed CEC could also be mandated to collect data on, and develop methodologies for, the calculation of carbon border adjustments. It could monitor regional black carbon and methane sources and emissions, undertake cooperative work on environmental and public health risk identification and assessment, as well as on North American disaster risk preparedness including climate adaptation and resilience of coastal and marine transport infrastructures, and other areas of regional environmental significance and concern. In this way, the CEC could contribute substantially to ensuring that a renewed NAFTA is not simply a trade liberalization agreement, but an active and practical commitment to sustainable trade liberalization across the region, in conformity with broader global goals such as Agenda 2030 and objectives embodied in multilateral environmental agreements. Without dedicated funding or a permanent institution mandated to undertake these type of regulatory cooperation activities at the regional level, it is reasonable to assume that the NAFTA parties' commitments in this area will be imbalanced and highly unpredictable.

While it is true that administrations pass and agreements live on, the contours of agreements are evidently heavily shaped by their negotiators. In assessing their trade objectives and leeway for compromise with a U.S. administration that is so threateningly out of touch with contemporary environmental and atmospheric science and the lived human experience of climate change, Canada and Mexico face difficult limitations and decisions. Geographically and environmentally, North America cannot be divided, and thus regulatory measures in one NAFTA party will profoundly impact human health and ecosystems across all. In these negotiations, Mexico and Canada should find strength and courage in the fact that they also belong to a much broader international community of states with whom they have embarked on the most important multilateral commitment of the 21st century—that is, to respond effectively and progressively to the greatest "irreversible threat to human societies and the planet."⁵ In this respect they have, at the very least, a moral obligation to ensure that a renewed NAFTA will not stand in the way.

⁵ Adoption of the Paris Agreement, UN Doc. FCCC/CP/2015/L.9/Rev.1.

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