
NAFTA's Legacy: An Explanation of Why the Free Trade Area of the Americas is Good for International Environmental Law

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I. INTRODUCTION

Multilateral trade agreements will never be the same in the wake of the North American Free Trade Agreement (NAFTA). The trilateral agreement between the United States, Canada, and Mexico is innovative in many ways. Principal is the notion that NAFTA is perhaps the first environmentally conscious multilateral trade agreement. No trade agreement has tackled environmental concerns or incorporated environmental and economic considerations the way NAFTA does.¹ The so-called “greening” of NAFTA appeased a number of the ever-present and vociferous opponents of trade liberalization, but the agreement still has not gained universal acceptance.

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¹ Peter Behr, *For Environmental Groups, Biggest NAFTA Fight is Intramural*, WASH. POST, Sept. 16, 1993, at D10.

Although many continue to criticize NAFTA, the anti-NAFTA fervor is noticeably less voluminous than it was over a decade ago prior to the signing of the agreement.² As NAFTA celebrated its ten-year anniversary in 2004, some say the best news about the trade covenant is the lack of news.³ Opponents have been quieted somewhat because the environmental catastrophes many of them predicted would accompany the integration of the three North American markets have failed to materialize.⁴ In truth, from an environmental standpoint NAFTA was innovative and in its brief history has been influential in increasing environmental awareness, cooperation, and protection.

But what will become of NAFTA's legacy? Will NAFTA be remembered as a great anomaly in international environmental law or as a pioneering trendsetter for future eco-conscious trade agreements? Such a question may be answered shortly, as those bent on further integration of the world's markets are in negotiations to expand NAFTA and form the Free Trade Area of the Americas (FTAA). An ambitious undertaking, the FTAA seeks to combine the economies of thirty-four nations in North, South, and Central America as well as the Caribbean.⁵ If negotiations are successful, the FTAA will constitute the largest, and arguably the most powerful, economic bloc in the world.⁶

In spite of its vast economic potential, FTAA proponents find themselves face-to-face with the pressures of a budding international environmental legal system. In the early 1990s, the drafters of NAFTA were subjected to similar pressure from environmentalists and non-governmental organizations, which led the negotiators to "seek[] specific language in the NAFTA to ensure increased public participation and oversight, improved enforcement of environmental laws, increased funding for environmental programs, and . . . standards intended to protect the environment."⁷ Since NAFTA's signing, the United States has finalized several free trade agreements,⁸ issued an executive order,⁹ and passed legislation¹⁰ that demonstrates

² Andres Rozental, *It's Time to Expand NAFTA*, SAN DIEGO UNION-TRIBUNE, Mar. 21, 2002, at B11.

³ *Id.*

⁴ John Audley & Scott Vaughan, *Time for the NAFTA Environmental Watchdog to Get Some Teeth*, CARNEGIE ENDOWMENT, June 24, 2003, <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=1300>.

⁵ Cuba is the only Latin American country not participating in the FTAA negotiations. FREE TRADE FOR THE AMERICAS? THE UNITED STATES' PUSH FOR THE FTAA AGREEMENT 214-15 (Paulo Vizentini & Marianne Wiesebron eds., Zed Books 2004).

⁶ *Id.* at 1.

⁷ GREENING NAFTA 4 (David L. Markell & John H. Knox eds., Stanford University Press 2003).

⁸ Since NAFTA, the United States has signed free trade agreements with Jordan, Australia, Singapore, Bahrain, Panama, Morocco, and Chile, and has expanded NAFTA to include some Central American countries and the Dominican Republic. Furthermore, the United States has expressed its intent to open negotiations for a US-Andean free trade agreement to include Colombia, Peru, Ecuador and Bolivia. *Id.* In each of these cases, the agreement includes provisions that express member nation's commitment to protecting the environment. Interestingly, the one free trade agreement inked before the NAFTA, the U.S.-Israel Free Trade Agreement, contains no provisions for protection of the environment. See Agreement on the Establishment of a Free Trade Area Between the Government of the United States and the Government of Israel, <http://www.tcc.mac.doc.gov/cgi-bin/doi.cgi?218:54:1:5> (last visited Jan. 7, 2006).

⁹ See Exec. Order No. 13,141, 64 Fed. Reg. 63,169 (Nov. 18, 1999).

¹⁰ See 19 U.S.C. § 3802(a)(5),(7) (2004) (providing that environmental considerations be a part of trade agreement negotiations). It is also noteworthy that the Bipartisan Trade Promotion Authority Act of 2002, 19 U.S.C.S § 3801 *et seq.* (2004), renewed trade promotion authority, or fast track, to give the

how international trade can no longer disregard the demands of international environmental responsibility.

In this article, I attempt to make clear that the proposed FTAA presents an incredible opportunity. In the aftermath of NAFTA, the FTAA has a unique chance to further solidify the merger of international trade with environmental awareness particularly in reference to multilateral trade agreements. Commentators have been dogged in their criticism of NAFTA and its performance¹¹ and equally determined to voice their skepticism towards FTAA implementation.¹² I do not intend to contribute to that rhetoric. Instead, I propose that there are lessons to be learned from what is overtly the first “green” multilateral trade agreement. If the FTAA can follow, expand, and improve upon what was done in NAFTA, international environmental law can legitimize its position at the negotiating table in a world committed to trade liberalization.

In Part II of this article, I will establish the context in which the formation of NAFTA and its environmental side agreement, the North American Agreement on Environmental Cooperation (NAAEC), should be analyzed.¹³ NAFTA, and the NAAEC particularly, are a byproduct of international environmental concern regarding the need for sustainable development and environmental protection as well as domestic environmental pressure from citizenry and activist non-governmental organizations. Even the United States judiciary played a role in the formation of NAFTA's environmental provisions by adjudicating disputes between environmental advocacy groups and government agencies negotiating NAFTA.¹⁴ This environmental pressure exerted upon NAFTA's framers climaxed in Rio de Janeiro in 1992, where the Earth Summit brought together organizations and environment ministers from across the globe.¹⁵ An examination of the climate in which NAFTA was created should help explain why conditions are ripe for the FTAA to build upon the environmental groundwork laid by NAFTA.

In Part III, I will discuss the mechanism the NAAEC employs to identify and handle environmental issues under NAFTA. The NAAEC created a unique structure of organizations committed to environmental protection, forming the Commission for Environmental Cooperation (CEC) to ensure that NAFTA does not result in

executive branch bargaining leverage in the negotiation of trade agreements. 19 U.S.C. §3803(a). The fact that Congress has stipulated that negotiations must include environmental provisions evinces Congressional skepticism towards trade agreements that are not environmentally conscious.

¹¹ See, e.g. Howard Mann, *NAFTA and the Environment: Lessons for the Future*, 13 TUL. ENVTL. L.J. 387, 388 (2000) (concluding that the creation of separate environmental organizations under NAFTA has slowed the harmonization of trade and environment issues); GlobalExchange.org, Top Ten Reasons to Oppose the Central American Free Trade Agreement, http://www.globalexchange.org/campaigns/ftaa/cafta/topten_cafta.html (last visited Nov. 24, 2005) (arguing that NAFTA is an environmental failure and should not be expanded to include Central American countries).

¹² See, e.g. Jessica M. Johnson, *The Free Trade in the Americas Agreement: Free Trade or Export of Environmental Problems*, 2001 COLO. J. INT'L ENVTL. L. & POL'Y 71, 72-77 (2001) (highlighting some of the alleged environmental deficiencies of the current FTAA agreement).

¹³ North American Agreement on Environmental Cooperation, Sept. 13, 1993, U.S.-Can.-Mex., 32 I.L.M. 1480 [hereinafter NAAEC].

¹⁴ See, e.g. *Public Citizen v. United States Trade Representative*, 5 F.3d 549, 551 (D.C. Cir. 1993) (arguing that the National Environmental Policy Act requires government agencies to prepare environmental impact statements for international trade agreements).

¹⁵ See *infra*, Part I at 11.

degradation of the environment.¹⁶ The CEC is comprised of three bodies that help fulfill its mandate: the Council, Secretariat, and Joint Public Advisory Committee (JPAC). The JPAC is responsible for facilitating public participation in the NAAEC and environmental enforcement,¹⁷ arguably the most valuable aspect of the agreement. Under the NAAEC, the public serves as environmental whistle-blowers, providing the NAAEC with a viable and sustainable manner to stay abreast of ecological concerns.¹⁸

In Part IV, I argue that the NAAEC/NAFTA model for environmental awareness has been influential in the formation of subsequent multilateral trade agreements. Its standards are already proving to be significant in the formation of other free trade agreements (FTAs) signed by the U.S. and its NAFTA partners, particularly those FTAs inked between the U.S. and Singapore, Jordan, and the Central American nations. Each agreement in some ways mimics and builds upon the environmental provisions first implemented by NAFTA. The NAFTA model is also a paradigm that should be included in the discussions of the proposed FTAA, where “at present, environmental issues do not feature as a subject” in the bargaining agenda.¹⁹

Finally, in Part V I will take a closer look at the FTAA. After describing the current status of the negotiations, I will highlight the environmental weaknesses of the current FTAA negotiations. I will consider which provisions of the NAFTA agreement should be incorporated into the FTAA, and proffer some suggestions of other available measures that would allow the FTAA to build upon the foundation established by NAFTA.

It is important to note that this article is not an attempt to elucidate any significant impact that NAFTA and its environmental provisions have had in solving ecological ills faced by NAFTA’s members. In actuality, many of the problems that existed pre-NAFTA have seen little improvement and in some cases have gotten worse.²⁰ An attempt to show otherwise would not only be daunting, but also misleading. For purposes of this article, I will set aside the tangible environmental impacts (positive or negative) of NAFTA and the NAAEC, and instead analyze on a normative level what the multilateral agreement has been able to contribute to international environmental law. Ultimately, I will seek perspective on how the post-NAFTA regime can influence the Free Trade Area of the Americas.

II. THE MARRIAGE OF TRADE AND THE ENVIRONMENT

NAFTA was the first international trade agreement to take a serious look at the environmental repercussions of such an accord.²¹ Why all of a sudden were

¹⁶ NAAEC, *supra* note 13 part III.

¹⁷ John D. Wirth, *Perspectives on the Joint Public Advisory Committee*, in GREENING NAFTA 199, 201-02 (David L. Markell & John H. Knox eds., Stanford University Press 2003).

¹⁸ See Noemi Gal-Or, *Multilateral Trade and Supranational Environmental Protection: The Grace Period of the CEC, or a Well-Defined Role?*, 9 GEO. INT’L ENVTL. L. REV. 53 (Fall 1996) (explaining the submission process for private parties under Articles 14 and 15 of the NAAEC).

¹⁹ Eduardo Gitli & Carlos Murillo, *A Latin American Agenda for a Trade and Environment Link in the FTAA*, in GREENING THE AMERICAS 273 (Carolyn L. Deere & Daniel C. Esty eds., 2002).

²⁰ Greg Block, *Trade and Environment in the Western Hemisphere: Expanding the North American Agreement on Environmental Cooperation into the Americas*, 33 ENVTL. L. 501, 513 (2003).

²¹ Joseph F. DiMento & Pamela M. Doughman, *Soft Teeth in the Back of the Mouth: The NAFTA Environmental Side Agreement Implemented*, 10 GEO. INT’L ENVTL. L. REV. 651, 653 (1998)

advocates of trade integration listening to objections voiced by the environmental community? In this part of the article, I will highlight some of the environmental forces pressing upon NAFTA's negotiators.²² Environmentally friendly provisions in the General Agreement on Tariffs and Trade (GATT), domestic pressures in the United States, and the blossoming norm of international environmental protection all contributed to the "greening" of NAFTA.

A. GATT

Starting in the early 1990s, environmental concerns began coming to the surface of international trade and development discussions. One of the first documents to address environmental issues surrounding international trade was GATT. GATT was signed shortly after the conclusion of World War II with the specific objective of increasing security by increasing trade and fostering political ties.²³ Given that objective, GATT's substantive rules ignore the environment altogether, and instead are quite "narrowly focused on the commercial benefits of trade facilitation."²⁴

It was not the absence of environmental provisions in the agreement itself, but rather the GATT dispute resolution panel's infamous *Tuna-Dolphin* decision that acted as a spark and ignited an environmental firestorm.²⁵ The dispute leading to the landmark decision began when the U.S. Congress passed the Marine Mammal Protection Act (MMPA).²⁶ The MMPA stipulated that the U.S. would not receive imports from countries where the fishing technologies lead to a high rate of marine mammal deaths.²⁷ As a result of the MMPA, in 1990, the United States imposed an embargo on the importation of certain kinds of Mexican tuna.²⁸ Mexico responded by asking the GATT dispute resolution panel to determine whether the import constraints violated the provisions of the GATT agreement.²⁹ In 1991, the panel decided that the actions taken by the Americans violated GATT and urged the U.S. to bring its policies back into conformity with the General Agreement.³⁰

The environmental community seized upon the decision and protested the

(characterizing NAFTA as "an impressive example of an innovative initiative in international environmental cooperation").

²² I do not mean to suggest that environmental pressures were the predominating force influencing the negotiations. In fact, political and economic concerns probably presented the most daunting obstacle. See RALPH H. FOLSOM, *NAFTA AND FREE TRADE IN THE AMERICAS* 17 (West 1999) (citing concerns over the Mexican maquiladora industry and what products will qualify for free trade); Michael Robins, Comment, *The North American Free Trade Agreement: The Integration of Free Trade and the Environment*, 7 TEMP. INT'L & COMP. L.J. 123, 127-28 (1993) (discussing the economic motivations behind Mexico and Canada's accession to the agreement). Furthermore, who could forget Ross Perot and the "great sucking sound" in reference to the economic fallout that would result from NAFTA?

²³ DAVID HUNTER, JAMES SALZMAN, & DURWOOD ZAELEKE, *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY*, 1147 (2d ed. 2002).

²⁴ DANIEL ESTY, *GREENING THE GATT* 53 (1994).

²⁵ International Legal Materials, *GATT: Dispute Settlement Panel Report on U.S. Restrictions on Imports of Tuna*, 30 I.L.M. 1594 (1991) [hereinafter *Panel Report*].

²⁶ 16 U.S.C. § 1361 (2004).

²⁷ 16 U.S.C. § 1372 (2004).

²⁸ *Panel Report*, *supra* note 25, at 1599.

²⁹ *Id.* at 1601.

³⁰ *Id.* at 1623.

ecological insensitivity of global trade.³¹ Environmental activists responded resoundingly, plastering Washington D.C. with posters of “GATTzilla” destroying the U.S. Capitol and pictures of trade bureaucrats killing Flipper the dolphin.³² This response was fueled by fears that the panel’s decision would set a dangerous precedent for future trade agreements and reduce America’s capacity to push for environmental protection in the context of global trade agenda.³³

Due to the backlash³⁴ of the *Tuna-Dolphin* decision, the nations that were a party to GATT attempted to integrate talks about the global ecosystem into their Uruguay Round negotiations.³⁵ The attempt to press a discussion of global environmental concerns into the waning moments of a tedious seven-year negotiation proved difficult though, and the negotiations did little more than create a committee responsible for investigating the emerging trade-environment relationship.³⁶ Although this approach sidestepped environmental issues somewhat, the committee’s formation was a substantial step forward given that the word “environment” never once appeared in the original GATT agreement.³⁷

Ironically, the ecologically disappointing *Tuna-Dolphin* decision helped to permanently place environmental accountability on the multilateral trade agenda. As one commentator noted, “there is little question that this was the controversy that brought trade and environment issues to the attention of the public.”³⁸ The decision and its aftermath were most likely on the minds of NAFTA negotiators who at the time were working to finalize the agreement in the early 1990s.

³¹ See, e.g., Michael B. Smith, *Trade and the Environment: GATT, Trade, and the Environment*, 23 ENVTL. L. 533, 535 (1992) (stating that American environmentalists were outraged by the GATT panel decision), Stanley M. Spracker & David C. Lundsgaard, *Dolphins and Tuna: Renewed Attention on the Future of Free Trade and Protection of the Environment*, 18 COLUM. J. ENVTL. L. 385, 386 (1993) (stating that the decision sparked ferocious assault from members of environmental community).

³² Smith, *supra* note 31, at 536.

³³ *Id.*

³⁴ See Frances Williams, *GATT shuts door on environmentalists*, FIN. TIMES, July 21, 1994, at 6 (discussing the rejection of the US proposal to make GATT a more open institution); Dianne Dumanoski, *Free-trade laws could undo pacts on environment*, BOSTON GLOBE, Oct. 7, 1991, at 25 (discussing the negative implications of the ruling); Jessica Mathews, Editorial, *The Great Greenless GATT*, WASH. POST, April 11, 1994, at A19 (opining that GATT ignores the environment); Charlie Arden-Clarke, *The Cruel Trade-Off*, GUARDIAN (London), Sept. 13, 1991, (no page) (explaining that only a rejection or modification of the panel’s ruling can prevent the GATT from being used to destroy existing domestic and international environmental legislation).

³⁵ The Uruguay Round ministerial conference took place in 1994 and resulted in the signing of a declaration that formed the World Trade Organization, of which the Committee on Trade and Environment (CTE) is a part. The World Trade Organization became the main institutional and administrative framework for international trade. GATT’s patchwork of agreements remains in existence under the auspices of the WTO. DAVID HUNTER, JAMES SALZMAN & DURWOOD ZAELEKE, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY, 1148-49 (2d ed. 2002).

³⁶ The signing of the Final Act of the Uruguay Round created the Committee on Trade and the Environment (CTE). The CTE was given a mandate to consider various trade-environment issues and report their findings to the newly-formed World Trade Organization at the 1996 ministerial conference in Singapore. See Richard H. Steinberg, *Trade-Environment Negotiations in the EU, NAFTA, and WTO: Regional Trajectories of Rule Development*, 91 AM. J. OF INT’L L. 231, 239 (1997).

³⁷ *NAFTA and the Environment*, N.Y. TIMES, Sept. 27, 1993, at A16.

³⁸ GREENING THE AMERICAS, *supra* note 19, at n. 1.

B. Domestic Pressure in the United States

In the United States, environmentalists and non-governmental organizations (NGOs) exerted a great deal of pressure with the hope that NAFTA would have a robust environmental posture. Environmental groups wanted better environmental law enforcement, greater transparency and funding, and a commitment to democratic processes to be included in the agreement.³⁹ Some advocates wanted the U.S. government to prepare an environmental impact statement pursuant to the National Environmental Policy Act (NEPA).⁴⁰ This led to a line of cases that posed the question of whether NEPA should apply to international trade agreements that could have an adverse effect on the global (not just the U.S.) environment.

In 1991, three environmental groups filed a complaint against the Office of the United States Trade Representative (USTR), claiming that the government agency had failed to prepare an environmental impact statement on NAFTA as required by NEPA.⁴¹ The case, *Public Citizen v. OTR*, came before the court on two separate occasions. In the first instance, the case was dismissed by the D.C. Circuit Court of Appeals on jurisdictional grounds because, "NAFTA was still in the negotiating stages, [therefore] there was no 'final action' upon which to base jurisdiction under the Administrative Procedures Act."⁴² On the second occasion, adjudicated *after* the signing of NAFTA, the D.C. District Court held that the government was required to perform an environmental impact statement under NEPA.⁴³ The court found that NEPA "clearly require[s] that a federal agency prepare an environmental impact statement on every proposal for legislation significantly affecting the quality of the human environment."⁴⁴ The appellate court reversed the decision, holding that the president is not an "agency" and therefore his actions regarding NAFTA are not subject to review under the Administrative Procedures Act.⁴⁵

In spite of the appellate court reversal, the *Public Citizen* cases can be considered a victory for environmental groups. As a result of the pressure from those groups, the USTR voluntarily prepared a review of the environmental issues presented by NAFTA, an unparalleled act in the context of trade agreements.⁴⁶ The cases affected an "important watershed in U.S. trade policy by pressuring the USTR into doing an independent review that significantly influenced the shape of the final agreements."⁴⁷ The *Public Citizen* cases created a powerful environmental lobby for NAFTA and a powerful procedural precedent for the creation of future trade agreements.

³⁹ *Soft Teeth*, *supra* note 21, at 666-67.

⁴⁰ NEPA requires federal agencies proposing substantial federal projects to prepare an environmental impact statement. 42 U.S.C. § 4332 (2002).

⁴¹ *Public Citizen v. OTR*, 782 F. Supp. 139 (D.D.C. 1992).

⁴² *Public Citizen v. OTR*, 5 F.3d 549, 551 (D.C. Cir. 1993). *See also* Administrative Procedures Act, 5 U.S.C. § 701 (2002) (providing for judicial review of a final agency action by a party adversely affected by the agency action).

⁴³ *Public Citizen v. OTR*, 822 F. Supp. 21 (D.D.C. 1993).

⁴⁴ *Id.* at 30.

⁴⁵ *Public Citizen*, 5 F.3d at 553.

⁴⁶ Emily Harwood, *The Jordan Free Trade Agreement: Free Trade and the Environment*, 27 WM. & MARY ENVTL. L. & POL'Y REV. 509, 521-22 (2002).

⁴⁷ *Id.* at 522 (internal quotation marks omitted).

C. Global Environmental Norms and Earth Summit

The *Public Citizen* cases and the environmental fallout from the GATT panel's decision illustrate that nations were beginning to recognize their duties to protect and preserve the global environment. Environmental law was quickly becoming a legitimate player at the world level. Protection of the environment had been a recognized goal of international law, but as one commentator noted, "state responsibility for environmental damage [had] been ineffective in inspiring world leaders to fully consider environmental consequences in their decision making."⁴⁸ By the early 1990s, environmental consciousness was becoming more widespread and developed, enough so that NAFTA negotiators could not overlook the agreement's environmental ramifications.

The norm of environmental awareness developed over time and a number of cases decided in the international arena helped develop environmental protection as an international legal norm. One such case involved a conflict between the United States and Canada that was submitted to an international arbiter in 1930.⁴⁹ The United States complained that air pollution from a smelter in Canada was drifting across the border into Washington State causing acid rain and, consequently, property damage.⁵⁰ The arbitration went on for nearly ten years, and after considering other pollution cases, the arbitration panel decided that "no state has the right to use or permit the use of its territory in such a manner as to cause injury . . . to the territory of another [state] . . . or persons therein."⁵¹ This rule is now a widely accepted principle in international law.⁵²

Another important case was the Corfu Channel litigation, decided by the International Court of Justice (ICJ) in 1949.⁵³ The court found that Albania was responsible for damage to British ships that had collided with mines in the North Corfu Channel.⁵⁴ The ICJ underscored the ideal that every nation is obligated "not to allow knowingly its territory to be used contrary to the rights of other states."⁵⁵ Scholars have inferred from the language of the case a standard that states are responsible for transboundary pollution.⁵⁶

A final example of international litigation promoting environmental protection as the norm is the Nuclear Tests case between Australia and France.⁵⁷ Australia and other Pacific nations argued based upon the principle announced in *Trail Smelter* that they would unjustly bear the burden of radioactive pollution resulting from French nuclear testing.⁵⁸ Australia was granted temporary relief as France was

⁴⁸ Robins, *supra* note 22, at 131.

⁴⁹ Trail Smelter Arbitration (U.S. v. Can.), 3 R. Int'l. Arb. Awards 1905 (1941).

⁵⁰ Jeffrey L. Dunoff, *Reconciling International Trade with Preservation of the Global Commons: Can We Prosper and Protect?*, 49 WASH. & LEE L. REV. 1407, 1433-34 (1992).

⁵¹ *Id.* at 1434.

⁵² DAVID HUNTER, JAMES SALZMAN & DURWOOD ZAELEKE, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY, 499 (2d ed., 2002).

⁵³ Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9).

⁵⁴ Dunoff, *supra* note 50 at 1433.

⁵⁵ *Id.* (quoting Corfu Channel, 1949 I.C.J. at 4).

⁵⁶ *Id.*

⁵⁷ Nuclear Tests (Austl. V. Fr.), 1973 I.C.J. 99 (June 22).

⁵⁸ Dunoff, *supra* note 50, at 1434.

ordered to cease their nuclear testing.⁵⁹ More importantly, Australia advanced the notion that protection of the global environment was emerging as a genuine claim and duty under international law.⁶⁰

A trend toward environmental protection in international case law was becoming evident throughout the industrialized world. In addition, many countries passed environmental laws and established environmental institutions in the latter part of the 1960s.⁶¹ The United Nations sponsored the Conference on the Human Environment in Stockholm, its main purpose being:

[T]o serve as a practical means to encourage, and to provide guidelines for, action by Governments and international organizations designed to protect and improve the human environment, and to remedy and prevent its impairment, by means of international cooperation, bearing in mind the particular importance of enabling developing countries to forestall occurrence of such problems.⁶²

With that purpose in mind, the ministers at Stockholm produced legitimate environmental results. First, they created the Stockholm Action Plan, a comprehensive effort to identify environmental issues worthy of international attention.⁶³ Second, they formed the United Nations Environment Programme (UNEP), the primary UN organ with authority over issues pertaining to the environment.⁶⁴ Finally, they issued the Stockholm Declaration, which recognized a human right to a healthy environment and emphasized the importance of integrating the environment and development.⁶⁵

In the United States, President Carter issued Executive Order 12114 in the early 1970s that required federal agencies to prepare environmental analyses of major federal actions significantly affecting the environment of the global commons.⁶⁶ In 1987, the American Law Institute released the Restatement (Third) of Foreign Relations Law. Sections 601 and 602 discuss state rights and remedies for violations of international environmental obligations.⁶⁷ While the Restatement was by no

⁵⁹ Nuclear Tests, 1973 I.C.J. 99. *But see* 1974 I.C.J. 253, 272 (deciding that the international court did not have jurisdiction to adjudicate the dispute, and that the temporary protections afforded to Australia no longer applied).

⁶⁰ As mentioned above, the I.C.J. ultimately dismissed the case, finding that they did not have jurisdiction to make a decision on the matter. The decision to dismiss the case was based in part upon France's declaration that they would only conduct *underground* testing and cease nuclear testing in the atmosphere. 1974 I.C.J. at 261-262. In spite of the dismissal, the final opinion does give merit to the Australian claim. One justice noted that atmospheric nuclear tests pose a serious risk of environmental pollution, and therefore it is only natural that steps should be taken to erect legal barriers to the practice. *Id.* at 303 (Petren, J., separate opinion).

⁶¹ HUNTER, *supra* note 52 at 170.

⁶² G.A. Res. 2581(XXIV), ¶ 2, U.N. Doc. A/RES/2581 (Dec. 15, 1969).

⁶³ HUNTER, *supra* note 52, at 174.

⁶⁴ *Id.*

⁶⁵ *Id.* at 176. The Stockholm Declaration helped to lay the foundation for the acceptance of the ideal later known as sustainable development.

⁶⁶ Exec. Order No. 12,114, 3 C.F.R. 356 (1971-1975).

⁶⁷ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, §§ 601-602 (1987).

means binding law, it reflected the growth of the idea that all states should strive to protect the global environment.

For NAFTA, proliferation of environmental protection as the international norm climaxed in 1992 when world ministers gathered in Rio de Janeiro for the renowned "Earth Summit," or United Nations Conference on Environment and Development.⁶⁸ At the summit, 170 nations met to try to build upon the achievements of the Stockholm Conference of 1972⁶⁹ and to galvanize their commitment to "protect the integrity of the global environment and developmental system."⁷⁰ Broadcasts from the summit focused the world's attention on the environment, while inside thousands of non-governmental organizations discussed how to pursue economic development without disregarding environmental safeguards.⁷¹ Indeed, environmental hopes were high as the world descended upon the "mother of all summits."⁷²

The Rio Conference, held six months prior to the signing of NAFTA, addressed many issues facing both the developed and developing world. From the perspective of the underdeveloped countries, it was a conference about development and ensuring that environmental law did not impede a state's right to develop.⁷³ For the developed nations, Rio was about issues plaguing the global environment like climate change, forest conservation, and biodiversity.⁷⁴ Ultimately, the two sides were able to reach an agreement on how best to cooperate in the protection of the environment. The Conference concluded in June 1992 with, among other things, the signing of the Rio Declaration on the Environment and Development and the adoption of Agenda 21.⁷⁵

The Conference sought to harmonize economic development and environmental preservation, and the resulting Declaration called upon all nations to seek more effective agreements and organizations to address environmental problems.⁷⁶ Principle 12 of the Rio Declaration stipulates:

⁶⁸ United Nations, United Nations Conference on Environment and Development, <http://www.Johannesburgsummit.org> (last visited Feb. 4, 2006).

⁶⁹ The Stockholm Conference, also known as the United Nations Conference on the Human Environment, resulted in the signing of the *Stockholm Declaration*. The conference was one of the first institutional attempts to create a mechanism for the development and enforcement of international environmental law. Principle 21 and 22 were the most significant provisions of the *Declaration*, providing that states have a responsibility to ensure that their activities do not cause damage to the environment of other states and that states should cooperate to further develop international law relating to compensation and liability for victims of environmental damage. Robins, *supra* note 22, at 131. See generally Conference on the Human Environment, Stockholm, Swed., June 5-16, 1972, *Report of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14/Rev.1 (reporting the actions of the Stockholm Conference, including Principles 21 and 22).

⁷⁰ United Nations, Rio Declaration on Environment and Development, <http://www.unep.org/Documents/Default.asp?DocumentID=78&ArticleID=1163> (last visited Sept. 28, 2004).

⁷¹ Markell & Knox, *supra* note 7, at 2.

⁷² PHILLIP SHABECOFF, A NEW NAME FOR PEACE: INTERNATIONAL ENVIRONMENTALISM, SUSTAINABLE DEVELOPMENT, AND DEMOCRACY 160 (University Press of New England 1996).

⁷³ HUNTER, *supra* note 52, at 188.

⁷⁴ *Id.*

⁷⁵ United Nations, *Agenda 21*, available at

<http://www.un.org/esa/sustdev/documents/agenda21/index.htm> (Last accessed Oct. 20, 2004). Agenda 21 is a comprehensive blueprint for the implementation of sustainable development. Its 40 chapters and 800 pages outline a framework for charting the progress of governments in the quest to integrate the environment and development. HUNTER, *supra* note 52, at 202-03.

⁷⁶ Markell & Knox, *supra* note 7, at 2.

[S]tates should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.⁷⁷

This declaration represents global concern for the trade-environment issue and global consensus of the need to advance environmentally conscious trade policies. As one commentator noted, the Rio Declaration reflected “the current consensus of values and priorities in environment and development.”⁷⁸ The consensus of environmental values emanating from the Rio Conference would be put to the test not long after the Rio Declaration was signed. NAFTA presented the first significant opportunity to chart the progress of international environmental ideals and effectuate international environmental progress in a tangible way.⁷⁹

III. ENVIRONMENTAL PROGRESS UNDER NAFTA

NAFTA was environmentally groundbreaking in and of itself, as demonstrated by the text of the agreement, which contains several environment-friendly provisions.⁸⁰ However, the real manifestation of environmental progress came by way of an environmental side-agreement, the North American Agreement on Environmental Cooperation (NAAEC).⁸¹ This parallel agreement established a new trilateral organization called the North American Commission for Environmental Cooperation (CEC), which is the organization responsible for implementing NAAEC's environmental objectives.⁸² This organization presumably gives NAFTA the environmental “teeth” that critics demanded and President Clinton worked for during the agreement's negotiating process.⁸³

The NAAEC is innovative in the realm of international trade agreements,

⁷⁷ United Nations, *Agenda 21*, at <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm> (last visited Oct. 2, 2004).

⁷⁸ Ileana Porras, *The Rio Declaration: A New Basis for International Cooperation*, in GREENING INTERNATIONAL LAW 21 (Phillipe Sands, ed., 1994).

⁷⁹ Markell & Knox, *supra* note 7, at 2.

⁸⁰ See Joseph F. DiMento & Pamela M. Doughman, *Soft Teeth in the Back of the Mouth: The NAFTA Environmental Side Agreement Implemented* 10 GEO. INT'L ENVTL. L. REV. 651, 660-62 (1998).

⁸¹ Joseph H. Knox & David L. Markell, *The Innovative North American Commission for Environmental Cooperation*, in GREENING NAFTA 1 (Joseph H. Knox & David L. Markells eds., 2003).

⁸² Noemi Gal-Or, *Multilateral Trade and Supranational Environmental Protection: The Grace Period of the CEC, or a Well-Defined Role?*, 9 GEO. INT'L ENVTL. L. REV. 53 (1996).

⁸³ See Gustavo Alanis-Ortega & Anna Karina Gonzalez-Lutzenkirchen, *No Room for the Environment: The NAFTA Negotiations and the Mexican Perspective on Trade and the Environment*, in GREENING THE AMERICAS 51 (Carolyn L. Deere & Daniel C. Esty eds., 2002).

establishing a “broad, comprehensive framework for regional environmental cooperation.”⁸⁴ In the trade context, the NAAEC has made contributions to the growth of international environmental law by establishing a unique structure dedicated to the improvement and enforcement of environmental laws, compliance with NAFTA’s environmental goals, and public participation.⁸⁵ A closer look at some specific provisions of the NAAEC reveals some distinctive and exemplary institutions.

A. The Commission for Environmental Cooperation (CEC)

The CEC, created under Part III of the NAAEC, is composed of a Council, Secretariat, and the Joint Public Advisory Committee (JPAC).⁸⁶ The Council is made up of cabinet-level environmental ministers of each country and is the governing body of the institution.⁸⁷ An Executive Director, who is appointed by the Council, heads the Secretariat.⁸⁸ The NAAEC provides that the Secretariat must render “technical, administrative, and operational” support to the Council,⁸⁹ and should oversee citizen submissions that come before the Commission.⁹⁰ Meanwhile the JPAC, arguably the most novel aspect of the CEC, consists of fifteen government appointed citizens, five each from Mexico, the U.S., and Canada.⁹¹ The citizens are tasked by their respective governments to “give advice to the CEC Council, to comment on the Secretariat’s work plan, and to consult with the public in open meetings on aspects of the CEC’s program.”⁹²

As part of its mandate under the NAAEC, the Commission is the organization responsible for making sure that NAFTA does not contribute to the degradation of the environment. Article 1114 of NAFTA discourages parties from sacrificing their environmental protections in order to attract trade and foreign investment.⁹³ The NAAEC, on the other hand, requires that each party “ensure that its laws and regulations provide for high levels of environmental protection and . . . strive to continue to improve those laws and regulations.”⁹⁴ The CEC and its component

⁸⁴ Greg Block, *Trade and Environment in the Western Hemisphere: Expanding the North American Agreement on Environmental Cooperation into the Americas*, 33 ENVTL. L. 501, 508 (2003).

⁸⁵ North American Agreement on Environmental Cooperation, September 13, 1993, art. 1, 32 I.L.M. 1480.

⁸⁶ *Id.* at art. 8.

⁸⁷ Markell & Knox, *supra* note 7, at 11.

⁸⁸ *Id.*

⁸⁹ North American Agreement on Environmental Cooperation, September 13, 1993, art. 11(5), 32 I.L.M. 1480.

⁹⁰ Under Articles 14 and 15 of the agreement, the Secretariat participates in the citizen submission process, whereby citizens in the member countries can submit complaints when the member countries are not fulfilling their environmental obligations under the NAAEC. For more on Articles 14 and 15 of the NAAEC, see *infra* Part IIB. See David Markell, *The CEC Citizen Submission Process: On of Off Course?*, in GREENING NAFTA 274, 281-2 (David L. Markell & John H. Knox, eds. 2003).

⁹¹ John D. Wirth, *Perspectives on the Joint Public Advisory Committee*, in GREENING NAFTA 199 (David L. Markell & John H. Knox eds., 2003).

⁹² *Id.*

⁹³ North American Free Trade Agreement, U.S.-Can.-Mex., art. 1114, Dec. 17, 1992, 32 I.L.M. 642 [hereinafter NAFTA].

⁹⁴ North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., art. 3, Sept. 13, 1993, 32 I.L.M. 1480 [hereinafter NAAEC].

parts enforce the environmental requirements put forth in the NAAEC.

Enforcing the provisions of the NAAEC is a daunting assignment, but it is here that the CEC's originality becomes evident. No precedent exists for the CEC, so an environmental organization formed on the fringes of a major free trade agreement needed an inventive apparatus to deal with ecological issues. Articles 14 and 15 of the NAAEC provide a mechanism whereby "any non-governmental organization or person" can alert the Commission when "a Party is failing to effectively enforce its environmental law."⁹⁵ Provided the complaint satisfies certain procedural and administrative requirements, citizens can assume the role of environmental enforcers and promote environmental accountability. In addition, the JPAC provides a unique forum where appointed citizen-experts of the three member nations serve as "individual citizens of the North American continent, joined in a commitment to preserving and enhancing [the] common environment."⁹⁶ The CEC's commitment to transparency is a crucial aspect, especially in light of an international community dedicated to environmental awareness.

B. The Article 14 and 15 Citizen Submission Process

Among the many promising aspects of the NAAEC is the citizen submission process highlighted in Articles 14 and 15 of the agreement. These articles take public participation to another level by making the transnational environmental institution accessible and answerable to public opinion.⁹⁷ As a result, the CEC is able to solicit public participation in "matters of environmental law compliance and enforcement."⁹⁸

Article 14, entitled "Submissions on Enforcement Matters," illuminates the first steps in the petitioning process. It establishes several procedural requirements, and also delineates the role of the Secretariat in determining whether a submission merits a response from the alleged offending party.⁹⁹ As noted previously, the Secretariat may consider submissions from any party, but the submission must meet certain requirements to warrant review. The Secretariat will review only those submissions that: (1) clearly identify the submitting party; (2) provide sufficient information and evidence; (3) are made in good faith to promote enforcement; (4) give notice first to the offender; or (5) are from a person or organization residing in a member country.¹⁰⁰

Provided that all the conditions are met, the Secretariat can then determine whether the submission warrants a response from the state accused of violating its environmental laws.¹⁰¹ The Secretariat is not granted unlimited discretion in making this determination, as the Agreement gives some guidance as to what submissions

⁹⁵ *Id.* at art. 14(1).

⁹⁶ North American Commission for Environmental Cooperation, *Joint Public Advisory Committee, Vision Statement*, http://www.cec.org/who_we_are/jpac/vision/index.cfm?varlan=english (last visited Nov. 22, 2005) [hereinafter JPAC].

⁹⁷ Gal-Or, *supra* note 82, at 70.

⁹⁸ *Id.*

⁹⁹ NAAEC, *supra* note 94, art. 14.

¹⁰⁰ *Id.* at art. 14(1)(a)-(f).

¹⁰¹ *Id.* at art. 14(2)

demand a response.¹⁰² If the Secretariat determines that a response is merited, it will forward the submission and any supplementary materials on to the alleged offending party.¹⁰³ The party then has thirty days to provide a response or up to sixty days if there are exceptional circumstances.

At this point in the process Article 15 comes into play, and the Secretariat is called upon to make another decision. As a result of any response received from the alleged offending party, the Secretariat may recommend the development of a factual record, which is a formal documentation highlighting where the party is said to be failing to fulfill its environmental commitments. The Council then becomes involved, receiving the recommendation of the Secretariat and voting to decide whether a factual record should be prepared.¹⁰⁴ A two-thirds vote allows the Secretariat to go forward with the preparation of the factual record. Additionally, a second two-thirds vote by the Council allows the factual record to be made publicly available, so it may serve as an open rebuke of a party whose environmental practices are inconsistent with the goals of the NAAEC.¹⁰⁵

From a participation standpoint, the citizen submission process has enjoyed modest success. To date, citizens have been active in raising challenges to inadequate environmental enforcement on forty-eight different occasions since 1995.¹⁰⁶ Eleven of the submitted files are currently active, with five against Mexico, five against Canada, and one against the United States.¹⁰⁷ Of those submissions, ten have resulted in the publication of factual records, all of which have been released to the public.¹⁰⁸ Such participation demonstrates that enhancing the rights of the citizens can be an effective tool in the quest to expand environmental monitoring and to ensure that environmental norms are being respected.

To some degree, citizen submissions have been influential in strengthening the international environmental legal regime. On at least one occasion, involving the construction of a pier in Mexico, the publication of a factual record resulted in “improvements in environmental impact assessment and the eventual establishment of a fund for reef protection.”¹⁰⁹ The Canadian government has received “a surprising number of citizen submissions” that it is shirking its environmental

¹⁰² *Id.* at art. 14(2)(a)-(d). In making this determination, the Secretariat may take into consideration whether there was harm to the person or organization making the submission, whether there were issues raised that could further the goals of the NAAEC, whether there are private remedies available to the submitter, and whether the submission comes exclusively from media reports.

¹⁰³ *Id.* at art. 14(2).

¹⁰⁴ *Id.* at art. 15.

¹⁰⁵ *Id.* at art. 15(7).

¹⁰⁶ North American Commission for Environmental Cooperation, *Citizen Submissions on Enforcement Matters*, <http://www.cec.org/citizen/status/index.cfm?varlan=english> (last visited Aug. 28, 2005).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Kevin P. Gallagher, *The CEC and Environmental Quality: Assessing the Mexican Experience*, in GREENING NAFTA 117, 128 (David L. Markell & John H. Knox eds., 2003) (referencing the submission made against the construction of the Cozumel Pier in Mexico). The submitters alleged that the Mexican environmental authorities failed to properly assess the environmental impact of the project. See North American Commission for Environmental Cooperation, *Citizen Submission on Enforcement Matters – Cozumel*, <http://www.cec.org/citizen/submissions/details/index.cfm?varlan=english&ID=32> (last visited Oct. 26, 2004).

responsibilities,¹¹⁰ and, although the “government has responded defensively to the allegations,” they have made a “conscientious effort” to genuinely respond to the claims.¹¹¹ In fact, the ability of citizens to affect the progress of environmental law is potentially boundless, as citizen submissions are justified for *any* violation of a state’s environmental laws, not necessarily a violation resulting from the NAFTA regime specifically.¹¹²

In spite of the moderate successes of the citizen submission process, criticism of the process is much more abundant. For example, the citizen submission process can expose environmental shortcomings but can impose no actual legal consequences.¹¹³ The citizen submission process ignores the realities of the environmental lawmaking process, where legislation, enforcement, and interpretation should not be separated between a multinational (the CEC) and domestic (U.S. Congress) body.¹¹⁴ Moreover, critics point to the absence of a time frame in which the Secretariat should or must take action, the exclusion of the submitter from the remainder of their complaint’s progression,¹¹⁵ and the subordinate status of the NAAEC as compared to NAFTA, as further weaknesses in the submission procedure.¹¹⁶

Criticisms aside though, the existence of the CEC and the citizen submission process is a victory for the international environmental regime. Citizen involvement in the enforcement of environmental law means more eyes watching the environment. The CEC is the neighborhood watch system applied on a global scale. One commentator notes that, “public participation . . . is expected to enhance the Commission’s own credibility, and although the submission process requires more refinement, the end result lies in the promotion of the environment through wider monitoring of environmental compliance.”¹¹⁷ In spite of its shortcomings, the submission process under Articles 14 and 15 is a step forward for environmental law and a persuasive model for future trade agreements.

C. The Joint Public Advisory Committee

Only a few lines of the NAAEC are devoted to the creation of the Joint Public Advisory Committee (JPAC). The language of the agreement suggests that the JPAC occupies a substantially subservient role to the Secretariat and Council.¹¹⁸

¹¹⁰ Block, *supra* note 84, at 518.

¹¹¹ *Id.*

¹¹² Kal Raustiala, *Citizen Submissions and Treaty Review in the NAAEC*, in *GREENING NAFTA* 256, 267 (David L. Markell & John H. Knox eds., 2003).

¹¹³ Gal-Or, *supra* note 82, at 75.

¹¹⁴ *Id.* at 75-76. (The author here finds that the chasm between statutory and regulatory processes has not been addressed effectively by the NAAEC. This creates a tension between “national and supranational lawmaking” which is foreign to the “political realities of each country.” This argument, however, is a domestic institutional critique that ignores the value of “soft law” in the international environmental regime. *See infra*, part IV.)

¹¹⁵ *See id.* (Essentially, after the initial submission of the complaint, the submitter is no longer invited to participate in the process. The Secretariat takes control of the complaint and its resolution becomes a matter internal to the CEC.)

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 77-78 (footnotes omitted).

¹¹⁸ NAAEC, *supra* note 94, art. 16 (Not only will the Council “establish” the rules of procedure for the JPAC, but also the Council can “direct” the JPAC to perform functions, whereas the JPAC “may provide advice” to the Council).

Institutionalists will most likely agree with that interpretation of the agreement, but a more forgiving and nuanced examination reveals that the JPAC is one of the most unique and influential aspects of the CEC.

The JPAC is created under Article 16 of the NAAEC.¹¹⁹ It is composed of five government-appointed representatives from each of the CEC's member nations. The representatives are drawn from corporations, the legal field, government offices, non-governmental organizations, and academia.¹²⁰ The mandate given to the representatives in the JPAC is broad and relatively vague, providing only that it shall meet at least once a year, give advice to the Council, and provide information to the Secretariat.¹²¹ Nonetheless, the scope of the JPAC is purposefully expansive, giving it the flexibility to carry out its role, which is "to facilitate public participation in the CEC."¹²²

One of the principle ways that the Committee has facilitated participation of civil society is through direct meetings with the public.¹²³ Public meetings are held four times a year, usually in conjunction with CEC Council meetings. At the meetings the JPAC is able to engage the public on matters of immediate concern to the CEC.¹²⁴ As a result of these meetings, the public has been able to participate in discussions on freshwater issues, transboundary air pollution, the impact of invasive species, and even a discussion on the future direction of the NAAEC.¹²⁵ The JPAC takes the public views expressed at these meetings directly to the ministers of the Council,¹²⁶ an accessibility that has contributed to the legitimacy and effectiveness of the Committee.

In spite of the difficulty of accessing the citizenry of three distinct countries, the JPAC is distinct and novel in its approach to the task. It is a public, nongovernmental group that acts independently and traverses the rift between the public and the multinational organization it represents.¹²⁷ One commentator noted, "There is nothing like the CEC in the world."¹²⁸ Perhaps as a result of the NAFTA/CEC model, there will be other organizations that build upon what the CEC has accomplished.

¹¹⁹ *Id.*

¹²⁰ North American Commission for Environmental Cooperation, *Who We Are – Joint Public Advisory Commission*, http://www.cec.org/who_we_are/jpac/member_bio/index.cfm?varlan=english (last visited Oct. 27, 2004).

¹²¹ NAAEC, *supra* note 94, art. 16.

¹²² Wirth, *supra* note 91, at 199.

¹²³ *Id.* at 202.

¹²⁴ *Id.*; JOINT PUBLIC ADVISORY COMMITTEE, NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION, ASSURING PUBLIC PARTICIPATION, http://www.cec.org/files/PDF/JPAC/FactSheet_EN%20fin.pdf (last visited Oct. 27, 2004).

¹²⁵ North American Commission for Environmental Cooperation, *Joint Public Advisory Committee – Records of Discussion*, http://www.cec.org/who_we_are/jpac/discussions/index.cfm?varlan=english (last visited Oct. 27, 2004).

¹²⁶ Wirth, *supra* note 91, at 210.

¹²⁷ North American Commission for Environmental Cooperation, *Joint Public Advisory Committee*, http://www.cec.org/files/PDF/JPAC/FactSheet_EN%20fin.pdf (last visited Oct. 27, 2004).

¹²⁸ Wirth, *supra* note 91, at 210 (quoting Bill Nitze, the former U.S. Alt. Rep.).

D. Transparency

The citizen submission process and the JPAC are innovative institutions, but it is their commitment to transparency that makes them important to the development of international environmental law. No other major international organizations have adopted a position of openness, structurally speaking, quite as carefully as the NAAEC,¹²⁹ which is surprising because international organizations are increasingly assuming a more quasi-legislative posture in the international arena and the creation of international law.¹³⁰ As one commentator noted, “[i]nstitutions that govern public conduct must be accountable to the public.”¹³¹

As discussed above, the environmental institutions created by the NAAEC are accountable to the public, but they are also committed to transparency in other ways. The participation of non-governmental organizations (NGOs) greatly increases transparency.¹³² NGOs are active participants in the CEC infrastructure. As discussed earlier,¹³³ NGOs, still riding the wave of environmentalism from the Earth Summit of 1992, were instrumental in finalizing the NAAEC.¹³⁴ Now that the Agreement has been implemented, NGOs are allowed to participate as whistle-blowers under Article 14¹³⁵ and also as consultants in the regular meetings of the JPAC.¹³⁶ NGOs help ensure the enforcement of environmental laws and also play a vital role in gathering and disseminating information to the public when such laws are not being enforced.

The CEC's commitment to transparency is evidenced by the amount of public participation in the organization. I have highlighted citizen participation in the Article 14 submission process, in the preparation of factual records, and in the JPAC deliberations. Beyond that, Article 13 encourages citizen participation, where the Secretariat has the unique power to prepare informational reports for the Council “on any matter within the scope of the annual program . . . [or] on any other environmental matter related to the cooperative functions of [the NAAEC].”¹³⁷ Though truthfully a weaker alternative to the Article 14 and 15 enforcement process,

¹²⁹ Ignacia S. Moreno, James W. Rubin, Russell F. Smith III, & Tseming Yang, *Free Trade and the Environment: the NAFTA, the NAAEC, and Implications for the Future*, 12 TUL. ENVTL. L.J. 405, 441-48 (1999) (discussing some of the specific examples of transparency safeguards of the NAAEC).

¹³⁰ See e.g., Paul Stephen Dempsey, *Compliance and Enforcement in International Law: Oil Pollution of the Marine Environment by Ocean Vessels*, 6 NW J. INTL. L. & BUS. 459, 478, n. 70 (1984) (pointing out that international organizations can make law in one of two ways: proposing a draft treaty for consideration, or promulgating law in a quasi-legislative manner).

¹³¹ Douglas Jake Caldwell, *Civil Society and the Environment: An Environmentalist's Agenda for Sustainable Trade and Investment in the Americas*, in GREENING THE AMERICAS 291, 296 (Carolyn L. Deere & Daniel C. Esty eds., 2002).

¹³² See Alexander Gillespie, *Transparency in International Environmental Law: A Case Study of the International Whaling Commission*, 14 GEO. INT'L. ENVTL. L. REV. 333, 338-42 (2001) (discussing how NGOs have helped increase the transparency of the International Whaling Commission).

¹³³ See *supra*, Part II(C).

¹³⁴ See DiMento & Doughman, *supra* note 21, at 666-67 (discussing how pressure from environmental groups led President-elect Clinton to negotiate environmental side agreements to NAFTA).

¹³⁵ See *supra*, Part III(B).

¹³⁶ See e.g., Lorraine Brooke, Joint Public Advisory Committee, Commission for Environmental Cooperation of North America, Joint Public Advisory Committee Session No. 03-04 Summary Record 10-15 (Dec. 22, 2003), http://www.cec.org/files/pdf/JPAC/SR-03-04_en.pdf (demonstrating the diversity of NGOs in attendance at a JPAC meeting in 2003).

¹³⁷ NAAEC, *supra* note 94, art. 13.

these reports do welcome information gathered from the public through conferences, seminars, or other interested parties.¹³⁸

An organization's transparency, though, is not only a matter of whether citizens can participate in its functions. Transparency is also a procedural issue, measuring the level of openness of a given process or regulation.¹³⁹ In other words, it has been noted, "A regulation or law is to be transparent if the process and the effects of the regulation or law can be seen through easily, just as one can see easily through a clean window."¹⁴⁰ In the case of the CEC, not only is participation in the organization available and encouraged, but records of proceedings, rulings, and meetings are all open to the public. The organization has truly made a concerted effort to set a precedent of transparency.

IV. NAFTA'S INFLUENCE ON SUBSEQUENT FREE TRADE AGREEMENTS

Since NAFTA was executed in 1994, the United States has signed a number of agreements with other countries.¹⁴¹ Though empirically difficult to demonstrate, there is a strong basis for the inference that the environmental fervor surrounding NAFTA, combined with the development of the CEC, has influenced environmental policy and subsequent trade agreements. A more exacting look into some of those agreements lends support to that inference.

A. Singapore FTA

The U.S. - Singapore Free Trade Agreement was finalized in January 2003. The trade agreement is significant on a number of different levels. Primarily, it is the first free trade agreement with an Asian nation.¹⁴² This is significant because the agreement is presumably the foundation for other Asian FTAs forthcoming under President Bush's Enterprise for ASEAN Initiative.¹⁴³ As the first in a potential string of FTAs with Asian countries, it is important that the agreement does in fact address environmental issues. That sends the message that the environment will not be surrendered for the sake of free trade in any future trade agreements in the region.¹⁴⁴

¹³⁸ *Id.* at art. 13, ¶ 2.

¹³⁹ William B. T. Mock, *An Interdisciplinary Introduction to Legal Transparency: A Tool for Rational Development*, 18 DICK. J. INT'L. L. 293, 295 (2000).

¹⁴⁰ *Id.*

¹⁴¹ *See supra* note 8.

¹⁴² Office of the United States Trade Representative, Quick Facts: U.S. - Singapore Free Trade Agreement, http://www.ustr.gov/Trade_Agreements/Bilateral/Singapore_FTA/Section_Index.html (follow "05/06/03 Singapore FTA: Quick Facts" hyperlink) (last visited Jan. 7, 2006).

¹⁴³ *Id.* The initiative, announced in October 2002, is an agreement with the Association of Southeast Asian Nations (ASEAN) that seeks to form bilateral free trade agreements between the U.S. and ASEAN members. The goal of the initiative is to "encourage both bilateral and regional liberalization . . . for achieving free and open trade and investment in the Asia Pacific region." The White House, Enterprise for ASEAN Initiative, <http://www.whitehouse.gov/infocus/internationaltrade/aseaninitiative.html> (last visited Nov. 21, 2005).

¹⁴⁴ No other FTAs have yet been signed under the ASEAN Initiative. However, the U.S. has Trade and Investment Framework Agreements (precursor agreements to a formal FTA) with Malaysia, Thailand, and Brunei. It is important to note that each of the Framework Agreements contains a clause stating that a commitment to the expansion of trade and protection of the environment must be mutually supportive. Office of United States Trade Representative, Enterprise for Asian Initiative - Trade and Investment

The Singapore FTA is an environmentally conscious trade agreement,¹⁴⁵ and was subjected to an environmental review conducted by the Office of the United States Trade Representative (USTR).¹⁴⁶ As required by Executive Order 13141, the USTR performed an environmental assessment of the agreement and found that “the increase in trade in this sector attributable to the FTA would have a negligible environmental impact within the United States, and a . . . *positive* environmental impact in Singapore and the surrounding Southeast Asia region.”¹⁴⁷ Aside from the environmental assessment, Chapter 18 of the agreement details the environmental provisions in the agreement.¹⁴⁸ Much like the NAAEC, the agreement requires parties to enforce and develop environmental laws,¹⁴⁹ maintain openness in measures taken to remedy environmental disputes,¹⁵⁰ allow for public participation,¹⁵¹ and form a subcommittee devoted to the discussion and preparation of reports of environmental matters.¹⁵² The Singapore FTA even takes the NAAEC one step further dedicating an entire chapter to transparency guarantees.¹⁵³

Though the Singapore agreement has much in common with the NAAEC, it is noteworthy that the Singapore agreement, to a certain extent, codifies what the NAAEC envisioned. The NAAEC made a commitment to public participation and the Singapore FTA dedicated an entire article to that ideal.¹⁵⁴ The NAAEC wants to be transparent and the Singapore FTA has an entire chapter dedicated to that goal.¹⁵⁵ Finally, unlike the NAAEC, which was born as a side agreement to NAFTA, the environmental structure of the Singapore FTA is contained within the original text of the trade agreement signed by the two nations.

B. Jordan FTA

The U.S.- Jordan Free Trade Agreement, much like the Singapore agreement, is also a significant achievement for free trade and the environment. The Jordan agreement marked a first in its region, as the first FTA between the U.S. and an Arab nation.¹⁵⁶ The Jordan FTA, however, was groundbreaking on another level because

Framework Agreements, http://www.ustr.gov/Trade_Agreements/Regional/Section_Index.html (follow “Enterprise for ASEAN Initiative” hyperlink) (last visited Nov. 21, 2005).

¹⁴⁵ President Bush said the agreement “safeguards . . . protections for [the] environment.” White House Press Release, President Signed U.S.-Singapore Free Trade Agreement, <http://www.whitehouse.gov/news/releases/2003/05/20030506-11.html> (last visited Nov. 21, 2005).

¹⁴⁶ Office of the United States Trade Representative, Final Environmental Review of the U.S.-Singapore Free Trade Agreement,

http://www.ustr.gov/Trade_Agreements/Bilateral/Singapore_FTA/Section_Index.html (follow “Finale Environmental Review” hyperlink) (last visited Jan. 7, 2006).

¹⁴⁷ *Id.* at 4-5 (emphasis added).

¹⁴⁸ United States-Singapore Free Trade Agreement, May 6, 2003, Ch. 18,

http://www.ustr.gov/Trade_Agreements/Bilateral/Singapore_FTA/Section_Index.html (follow “Final Text” hyperlink) (last visited Jan. 7, 2006).

¹⁴⁹ *Id.* at art. 18.1.

¹⁵⁰ *Id.* at art. 18.3.1(a).

¹⁵¹ *Id.* at art. 18.5.

¹⁵² *Id.* at art. 18.4.

¹⁵³ *Id.* at Ch. 19.

¹⁵⁴ *Id.* at art. 18.5.

¹⁵⁵ *Id.* at Ch. 19.

¹⁵⁶ Agreement Between the U.S. and the Hashemite Kingdom of Jordan on the Establishment of a Free

it marked the first time an environmental impact statement (EIS) was prepared for a free trade agreement.¹⁵⁷

The environmental regime created by NAFTA heavily influenced the Jordan FTA. This is vibrantly reflected in the language of the agreement.¹⁵⁸ The Jordan FTA begins with eco-friendly language, recognizing in the preamble, “the objective of sustainable development, and seeking both to protect and preserve the environment and to enhance the means for doing so.”¹⁵⁹ The goal of environmental preservation identified in the preamble is then detailed in Article 5 of the Agreement. Each party makes a commitment not to weaken its domestic environmental laws to increase trade and to also actively enforce those laws.¹⁶⁰ Furthermore, paralleling regulation under the NAAEC, Article 15 of the Jordan FTA establishes a Joint Committee to oversee the implementation of the agreement, discuss environmental matters, and “recognizing the importance of transparency and openness,” consider viewpoints given by interested public citizens.¹⁶¹

Article 5 represents the environmental backbone of the Jordan FTA. It is illuminating to compare Article 5 of the Jordan FTA to Chapter 18 of the U.S. agreement with Singapore. The Jordan FTA was signed in October 2000, while the Singapore agreement was finalized in 2003. A closer look at the environmental provisions contained in the agreements reveals that the environmental safeguards of the Singapore agreement are more developed and demanding than its predecessor. The Singapore agreement is much more detailed with regard to procedural matters dealing with redress for environmental wrongs, highlighting opportunities for public participation, and establishing a framework for environmental cooperation and consultation.¹⁶² Moreover, the Singapore agreement includes a specific article creating an institution to address environmental matters,¹⁶³ while Jordan and the U.S. provided for an environmental cooperation initiative on the fringes of their FTA, not in the agreement itself.¹⁶⁴

Both the Singapore and Jordan FTAs have much in common with the NAAEC. However, the differences between the two agreements show that in the three years separating them, environmental law was able to expand upon what the NAAEC started. In the current context, environmental provisions in FTAs are achieving a “boilerplate” language status.¹⁶⁵ Although the categorization as “boilerplate

Trade Area, Oct. 24, 2000, 41 I.L.M. 63 (2002), available at http://www.ustr.gov/Trade_Agreements/Bilateral/Jordan/Section_Index.html (follow “Jordan FTA Text of Agreement” hyperlink) [hereinafter *Jordan FTA*].

¹⁵⁷ Harwood, *supra* note 46, at 522.

¹⁵⁸ See *id.* at 519 (arguing that NAFTA led the way for the inclusion of environmental specifications in the Jordan Free Trade Agreement).

¹⁵⁹ See Jordan FTA, *supra* note 155.

¹⁶⁰ *Id.* at arts. 5(1), (3).

¹⁶¹ *Id.* at arts. 15(2)(f), (5).

¹⁶² *Id.* at art. 5.

¹⁶³ U.S.-Sing. FTA, *supra* note 147, at arts. 18.4, 20.1.

¹⁶⁴ OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, FINAL ENVIRONMENTAL REVIEW OF THE AGREEMENT ON THE ESTABLISHMENT OF A FREE TRADE AREA BETWEEN THE GOVERNMENT OF THE UNITED STATES AND THE GOVERNMENT OF THE HASHIMITE KINGDOM OF JORDAN 11, http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Jordan/asset_upload_file64_5111.pdf (last visited Nov. 21, 2005).

¹⁶⁵ Boilerplate language is defined as ready-made, fixed, or standardized all-purpose language that will

language” may not bode well for the enforcement of environmental laws,¹⁶⁶ it does speak well of the normative growth of international environmental standards.

C. CAFTA-DR

In addition to the Singapore and Jordan FTAs, several other agreements manifest a strengthening of the “trade and environment” agenda on the international level.¹⁶⁷ The Central American Free Trade Agreement is one of the most recent multilateral trade agreements, and it both echoes and advances environmental norms established in preceding agreements.

The Central American Free Trade Agreement, or CAFTA-DR, was signed by the trade ministers of the United States and five Central American countries in May 2004,¹⁶⁸ and signed into law by President Bush in August 2005.¹⁶⁹ It builds upon other FTAs and creates an Environmental Affairs Council that mirrors the Council of the CEC.¹⁷⁰ The Environmental Affairs Council employs cabinet-level ministers or representatives, meets regularly, and promotes public participation.¹⁷¹ In addition to building upon those strong points of the CEC model, CAFTA-DR also has an innovative approach to enhancing environmental performance by focusing on incentives meant to “encourage conservation, restoration, and protection of natural resources and the environment.”¹⁷² Some examples of such incentives are tax breaks granted for the use of new and environmentally friendly technologies, or disincentives for the use of older, environmentally damaging ones.¹⁷³ CAFTA-DR

fit in a variety of documents. BLACK'S LAW DICTIONARY 185 (Bryan A. Garner ed., 8th ed. 2004). Since 2000, the U.S. has entered into seven bilateral free trade agreements. These include FTAs with Bahrain, Chile, Dominican Republic, Jordan, Australia, Singapore, and Morocco. In every agreement, there is an article dedicated to the protection of the environment. In addition, the U.S. has initiated talks with Panama and with the Andean nations of Colombia, Peru, Ecuador, and Bolivia. In the case of Panama, a preliminary environmental assessment has already been performed. For the Andean FTA, protection of the environment was stated as one of the objectives of a free trade agreement in a letter sent from USTR to Congress. See Office of the U.S. Trade Representative, <http://www.ustr.gov> (last visited Jan. 7, 2006) (providing text and information of U.S. trade agreements).

¹⁶⁶ If the environmental provisions have achieved boilerplate status, the provisions may become so commonplace as to strip them of their significance and bite. It remains to be seen whether environmental provisions in recent FTAs will result in vibrant implementation and enforcement. The mere presence of environmental provisions in trade agreements represents significant progress.

¹⁶⁷ See Office of the U.S. Trade Representative, *supra* note 164 (providing information on U.S. trade agreements).

¹⁶⁸ Press Release, Office of the United States Trade Representative, United States and Central America Sign Historic Free Trade Agreement (May 28, 2004),

http://www.ustr.gov/Document_Library/Press_Releases/2004/May/United_States_Central_America_Sign_Historic_Free_Trade_Agreement.html.

¹⁶⁹ Press Release, Office of the Press Secretary, President Signs CAFTA-DR (Aug. 2, 2005),

<http://www.whitehouse.gov/news/releases/2005/08/20050802-2.html>.

¹⁷⁰ Cent. America-Dom. Rep.-U.S. Free Trade Agreement art. 17.5, Aug. 5, 2004,

http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA-DR/CAFTA-DR_Final_Texts/asset_upload_file9_3937.pdf [hereinafter CAFTA-DR].

¹⁷¹ *Id.*

¹⁷² *Id.* at art. 17.4(1)(b).

¹⁷³ See Robert Sukol, *Some Clues to the Future of Environmental Regulation: Reviewing: Earth in the Balance: Ecology and the Human Spirit. By Senator Al Gore* 25 RUTGERS L.J. 243, 250 (1993) (discussing proposed Strategic Environmental Initiatives designed to discourage and phase out older environmentally damaging technology and support the development and use of environmentally neutral substitutes); see also Robert W. Hahn & Robert N. Stavins, *Incentive-Based Environmental Regulation:*

seeks to employ incentives and any other “mechanisms that facilitate voluntary action to protect or enhance the environment.”¹⁷⁴ Such mechanisms incorporate communities, NGOs, businesses, scientific agencies, and market-based incentives into the environmental enforcement regime, a notion absent in previous free trade agreements.¹⁷⁵

The Trade and Environment Policy Committee of the USTR assessed the environmental provisions of CAFTA-DR and found that “environmental issues in this agreement . . . obtained a higher profile than in last years’ [sic] agreements with Chile and Singapore.”¹⁷⁶ The committee also found that the opportunity for public participation initiated by the NAAEC is enhanced under CAFTA-DR.¹⁷⁷ CAFTA-DR, according to the committee, has set the highest environmental standard yet for a free trade agreement.¹⁷⁸ A press release issued by the Office of the USTR not only serves as evidence of the high standard set by the CAFTA-DR agreement, but also of the environmental progress made in trade accords since NAFTA. The press release states:

Previous FTAs – including those with Australia, Chile, Jordan, Morocco, Bahrain, and Singapore – all have strong environmental provisions that fully meet Congress’ objectives in TPA [Trade Promotion Authority] and are accompanied by environmental cooperation mechanisms. The CAFTA-DR goes beyond these FTAs, however, by establishing a ground-breaking and robust public submissions process that will allow members of the public to raise concerns if they believe that a Party is not effectively enforcing its environmental laws. It is the first free trade agreement to contain such a mechanism in the agreement itself. The ECA [Environmental Cooperation Agreement] is innovative because it includes first-time provisions for establishing benchmarks for measuring environmental performance and outside monitoring of progress in meeting those benchmarks.¹⁷⁹

Thus, CAFTA-DR establishes a first with regard to trade agreements and the environment, namely that the public submissions process is enumerated in the agreement itself. In many aspects, CAFTA-DR builds upon what has been done in FTAs that have steadily evolved in the wake of NAFTA, and it appears that in the aftermath of such positive progress in CAFTA-DR, the stage is set for further development of environmental law in the FTAA.

In sum, it is noteworthy that the overall posture of the Singapore, Jordan, and CAFTA-DR agreements is more environmentally aware. Nevertheless, they are still lacking in environmental bite. Unlike the NAAEC, each of the aforementioned

A New Era from an Old Idea? 18 *ECOLOGY L.Q.* 1 (1991) (discussing incentive based policies used to address environmental issues).

¹⁷⁴ CAFTA-DR, *supra* note 169, at art. 17.4(1)(a).

¹⁷⁵ *Id.*

¹⁷⁶ Press Release, Office of the United States Trade Representative, Trade Advisory Groups Report on U.S.-Central America FTA (Mar. 22, 2004), http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/Section_Index.html (follow “Press Releases” hyperlink).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ Press Release, Office of the United States Trade Representative, U.S., CAFTA-DR Countries Sign Two Supplemental Agreements to Facilitate Implementing the FTA’s Environmental Provisions, Feb. 18, 2005.

agreements fails to establish legitimate mechanisms to deal with environmental shortcomings of the member nations. Although the agreements speak the language of public participation, all three fail to establish legitimate procedures by which the public can participate or genuine mechanisms to handle submissions from citizens or other non-governmental actors. Furthermore, none of the agreements establish an entity as comprehensive as the CEC and thus may fall short in their efforts to ensure that the environmental aspirations enumerated in their pages generate real environmental cooperation. Although much progress has been made toward the adoption of environmental policy into the language and goals of the agreements, there is room for more tangible progress in the FTAA.

V. FREE TRADE AREA OF THE AMERICAS

The Free Trade Area of the Americas is a product of the 1994 Miami Summit of the Americas.¹⁸⁰ Ministers from nations throughout the western hemisphere met to formulate an agreement to create a free trade area stretching from Canada, through the Caribbean, and to the southernmost point of South America.¹⁸¹ The FTAA, dubbed an "extraordinarily ambitious, complicated, and important initiative," would unite the economies of thirty-four nations and serve over 800 million people.¹⁸² Such an ambitious integration of nations and economies faces significant obstacles, and one of the most pressing questions is how to build appropriate environmental sensitivities into the agreement.¹⁸³

In light of the aforementioned developments in the area of international environmental law, it is not unreasonable to assume that legitimate ecological considerations are being factored into the FTAA negotiations. The negotiating process has taken the environment into account, but a more exacting scrutiny reveals that currently the FTAA agreement is poised to take a giant step backwards in environmental protection.¹⁸⁴ This would be unfortunate, given the environmental developments discussed above, as there now appears to be a more developed pro-environment climate around the world comparable to the fervor surrounding NAFTA after the Earth Summit in 1992.¹⁸⁵ Given what NAFTA established (NAAEC and CEC) and what has transpired since (a plethora of environmental-friendly FTAs), framers of the FTAA agreement can ill afford to take a weak stance on the environment, lest they undo decades of progress in the areas of environment and trade.

A. Current Status of Negotiations

It appears that the deadlines associated with the FTAA negotiations are about to

¹⁸⁰ Richard Fisher, *Trade and Environment in the FTAA: Learning from the NAFTA*, in GREENING THE AMERICAS 183, 183 (Carolyn L. Deere & Daniel C. Esty eds., 2002).

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 184.

¹⁸⁴ Suzanne Elmlady, *A Step in the Right Direction: How to Make the Free Trade Agreement of the Americas a Cohesive Agreement that will Better Serve Integration of Free Trade in the Western Hemisphere*, 11 CURRENTS: INT'L TRADE L.J. 70, 71 (2002) (asking why the FTAA negotiators are "taking a step backwards by snubbing environmental provisions.").

¹⁸⁵ See *supra*, Part II(C).

come and go without a great deal of fanfare. Negotiators had pinned January 2005 as the deadline for the completion of FTAA negotiations and December 2005 as the date the agreement would enter into force.¹⁸⁶ It was universally recognized that those deadlines would not be met, and they have not been.¹⁸⁷ In fact, no significant action has been taken since the Eighth Ministerial Meeting was held in Miami in November 2003.¹⁸⁸ It is possible that discussions have been shelved because economic integration has taken a back seat to terrorism and security on the U.S. foreign policy agenda. Some contend that less globalization-minded regimes in Venezuela and Brazil with leaders less sympathetic to U.S. interests have effectively hamstrung the process.¹⁸⁹ Whatever the reasons, the progress has not been as smooth as economic integrationists envisioned when the negotiations began in Miami in 1994.¹⁹⁰

In spite of what could be labeled a breakdown in the negotiation process, the freeze is an opportunity for environmentalists. It is an open door for environmental concerns that have yet to demand the attention of those guiding the FTAA consultations. Certainly the environment was on the minds of state ministers in 1994 in Miami,¹⁹¹ and, to their credit, the environment most likely still troubles ministers as a matter that needs to be addressed. Unfortunately, it has yet to manifest itself as a viable element in the FTAA discourse. Notwithstanding the inaction on the environmental front, it is unlikely that the environment will remain an outsider to the FTAA process when one considers the current atmosphere surrounding free trade agreements.

B. The FTAA Timing is Right

As it was when NAFTA was born,¹⁹² it appears the timing is right for environmental progress in the international arena. The international community continues to demonstrate their commitment to environmental protection in the wake of the Earth Summit and the Rio Declaration. Since then, there have been several ministerial meetings affirming and building upon the ideals proliferated by the Summit.¹⁹³ Additionally, U.S. legislation has been passed seeking to increase U.S.

¹⁸⁶ GREENING THE AMERICAS 365 (Carolyn L. Deere & Daniel C. Esty eds., 2002).

¹⁸⁷ See Guy De Jonquieres, *US business lobby groups unhappy at 'low-quality' FTAA compromise Trade Agreement*, FIN. TIMES (London), November 20, 2003, at 13; No author, *Expanded Trade, Fresh Impetus for Doha Round, FTAA*, SAN DIEGO UNION TRIBUNE, Nov. 21, 2004, at G2; *Much Wind and Little Light*, ECONOMIST, Oct. 18, 2003.

¹⁸⁸ See Free Trade Area of the Americas, *Ministerial Declaration of Miami*, http://www.ftaa-alca.org/Ministerials/Miami/Miami_e.asp (last visited Nov. 11, 2004) (setting forth the Eighth Ministerial Meeting in order to provide guidance during the final phase of the FTAA negotiations).

¹⁸⁹ Interview with Steven Wolfson, Environmental Protection Agency (Oct. 11, 2004). When President Hugo Chavez of Venezuela attended the Summit of the Americas in November 2005, he announced he came with a shovel to bury the FTAA. see Dan Rosenheck, *Trade Show*, NEW REPUBLIC, Nov. 21, 2005, at p. 12.

¹⁹⁰ David Brunelle, *The U.S., the FTAA, and the Parameters of Global Governance*, in FREE TRADE FOR THE AMERICAS? 23, 23 (Paulo Vinentini & Marianne Weisebron, eds., 2004).

¹⁹¹ Michel Duquette & Maxime Rondeau, *The Puzzle of Institutionalizing a Free Market Continental Zone*, in FREE TRADE FOR THE AMERICAS? 59, 60 (Paulo Vinentini & Marianne Weisebron, eds., 2004).

¹⁹² See *supra*, Part II.

¹⁹³ United Nations Environment Programme, *Environment for Development*, <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=287> (last visited Feb. 7, 2006).

ecological responsibility abroad by uniting trade objectives with environmental assessments.¹⁹⁴ Such developments suggest that the linkage of trade to environmental issues has accelerated since NAFTA's implementation, and that a more demanding environmental regime is poised to confront the formation of the FTAA.

Since the Earth Summit of 1992, there has been a great deal of international environmental activity as the United Nations and non-governmental organizations seek to cash in on the summit's environmental capital. For the purposes of this discussion, there were three major international environmental declarations addressing the concept of sustainable development, a concept where trade and the environmental concerns play a significant role:¹⁹⁵ the 1997 Nairobi Declaration; the 2000 Malmö Declaration; and the Johannesburg Declaration on Sustainable Development from 2002.¹⁹⁶ All three seek to build upon the Rio Declaration adopted at the end of Earth Summit in 1992.

The Nairobi Declaration primarily addresses the role of the United Nations Environment Programme (UNEP). In Nairobi, environmental ministers pledged their commitment to the work of the UNEP and also their determination to "play a stronger role in the implementation of the goals and objectives" of the UNEP.¹⁹⁷ The role of the UNEP is to "be the leading global environmental authority that sets the global environmental agenda, [and to] promote[] the coherent implementation of the environmental dimension of sustainable development."¹⁹⁸ The Declaration reaffirms the relevance of Agenda 21 and seeks to develop "interlinkages" among existing environmental institutions, to advance the realization of agreed international norms, and to "promote international cooperation and action" in enforcing environmental norms.¹⁹⁹ Though not demonstrative of a specific mandate on trade and the environment, the declaration clearly reaffirms commitment to and advance acceptance of international environmental protection.

Furthering the objectives of the Rio and Nairobi Declarations, the Malmö Ministerial Declaration takes a more urgent stance with regard to sustainable development and the environment.²⁰⁰ The ministers involved, fully aware that a ten-year review of the execution of Agenda 21 was fast approaching, sought to mobilize the environmental will of the international community.²⁰¹ With an eye toward the international environmental climate and recent advances towards globalization, the ministers at Malmö declared:

¹⁹⁴ See *infra* Part IVB. President Clinton signed Executive Order 13,141 in 1999, requiring environmental assessments of trade agreements. Subsequently, the Bipartisan Trade Promotion Authority of 2002, or "fast track" as it is more commonly known, requires that environmental considerations be satisfied when negotiating free trade agreements. See *infra* Part IVB.

¹⁹⁵ United Nations Environment Programme, *supra* note 192.

¹⁹⁶ *Id.*

¹⁹⁷ United Nations Environment Programme, *Nairobi Declaration*, <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=287&ArticleID=1728&l=en> (last visited Feb. 7, 2006).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ United Nations Environment Programme, *Malmö Ministerial Declaration*, http://www.unep.org/malmo/malmo_ministerial.htm (last visited Feb. 7, 2006).

²⁰¹ *Id.*

The trends of globalization in the world economy, with the attendant environmental risks and opportunities, require international institutions to adopt new approaches and to engage the major actors involved in globalization in new ways. We should encourage a balanced and integrated approach to trade and environment policies in pursuit of sustainable development.²⁰²

The declaration also highlights the role of civil society in the protection of the environment, a concept espoused in the NAAEC and solidified in subsequent free trade agreements signed by the U.S.²⁰³ It closes with a forward-looking plea to consider in the course of the 2002 review of agreements reached at the Earth Summit the issue of poverty as one of the major challenges to sustainable development and subsequently a more robust environmental focus for the FTAA.

After the Malmö Ministerial meeting, world and environmental leaders gathered in Johannesburg at the World Summit on Sustainable Development to perform a ten-year assessment of Agenda 21.²⁰⁴ Once again, the connection between trade and the environment was on the forefront. Summit participants worked to strengthen a trade and environment task force created in 2000 that aims to help poorer nations deal with challenges related to trade's effect on the environment.²⁰⁵ As part of a fifty-four page action plan, they pledged to continue giving each other support to deal with issues involving trade and the environment by encouraging participation of the World Trade Organization's Committee on Trade and Environment. Technical assistance between nations was also increased, and voluntary environmental assessments of trade agreements were agreed to.²⁰⁶

Looking backward from Johannesburg to Rio, and even back to Stockholm in 1972, global attention has been increasingly fixed on the environment. The summits, ministerials, and declarations all recognize the importance of the environment and the need for a vigorous international regime of norms and environmental regulations. Though the focus of many of these meetings has been on sustainable development, trade's effect on the environment is an inseparable part of the sustainable development discussion. It has become ever clearer over the course of more than thirty years that the international environmental community is committed to ensuring that free trade and the environment are two mutually reinforcing institutions.

Nowhere has the growth been more evident than in the United States. It was here that the steady drumbeat of environmentalism influenced President Clinton in his quest to strengthen NAFTA's environmental elements.²⁰⁷ Since NAFTA and the

²⁰² *Id.*

²⁰³ *Id.* For example, point number 16 of the Declaration states, "The role of civil society at all levels should be strengthened through freedom of access to environmental information to all, broad participation in environmental decision-making, as well as access to justice on environmental issues. *Id.* Governments should promote conditions to facilitate the ability of all parts of society to have a voice and to play an active role in creating a sustainable future." *Id.*; See also *infra*, Part III.

²⁰⁴ United Nations Environment Programme, *World Summit on Sustainable Development*, <http://www.unep.org/wssd/> (last visited Feb. 7, 2006).

²⁰⁵ Press Release, United Nations Environment Programme, Trade and Environment Task Force Strengthened in Johannesburg, Sept. 3, 2002, http://www.unep.org/wssd/Documents/UNCTAD_PR.doc.

²⁰⁶ Sustainable development has been defined as development that meets the needs of the present without compromising the ability of future generations to meet their own needs. See J.B. Ruhl, *The Seven Degrees of Relevance: Why Should Real World Environmental Attorneys Care Now About Sustainable Development Policy*, 8 DUKE ENVTL. L. & POL'Y F. 273, 278 (1998).

²⁰⁷ Markell & Knox, *supra* note 7, at 7-8.

NAAEC, the legislative and the executive branches have taken actions to ensure that the principle behind the NAAEC (i.e. environmentally responsible free trade agreements) becomes a permanent fixture of U.S. trade and environmental policy. For example, in November 1999 President Clinton issued Executive Order (E.O.) 13,141, requiring the U.S. government “for the first time to conduct environmental reviews of trade agreements.”²⁰⁸ The Order echoes the attitude of the international community, stating, “Trade agreements should contribute to the broader goal of sustainable development. Environmental reviews are an important tool to help identify potential environmental effects of trade agreements.”²⁰⁹ The order then goes on to highlight what trade agreements necessitate an environmental assessment and how such an assessment should be conducted and presented.²¹⁰ In considering the FTAs mentioned above, it is evident that E.O. 13,141 is already bearing fruit.²¹¹

After the issuance of E.O. 13,141, the George W. Bush administration took yet another step to unify trade and environment issues when it signed into law the Bipartisan Trade Promotion Authority Act of 2002 (TPA).²¹² TPA, also known as “fast track,” permits the Executive branch to negotiate trade deals and submit one final agreement to Congress for a single ye or nay vote.²¹³ Such authority gives the Executive branch greater bargaining power with other nations and alleviates concerns that Congress will alter and amend an agreement.²¹⁴ Negotiating agreements under this new authority requires ministers to adhere to certain trade guidelines and objectives.²¹⁵ One of the first objectives listed is to “ensure that trade and environmental policies are mutually supportive and to seek to protect and preserve the environment and enhance the international means of doing so.”²¹⁶ Section 3802(a)(7) of the TPA, echoing NAAEC language, encourages negotiators to seek provisions in trade agreements to ensure parties are not weakening environmental laws to encourage trade.²¹⁷ The provisions also strive to “eliminate government practices or policies that unduly threaten sustainable development.”²¹⁸

Much of the language in the TPA is drawn from the NAAEC, the U.S.-Jordan FTA, the U.S.-Chile FTA, and some of the major international conventions mentioned earlier.²¹⁹ The fact that earlier language is getting so much use is evidence of the proliferation of environmental ideals in the area of trade on an

²⁰⁸ James Salzman, *Seattle's Legal Legacy and Environmental Reviews of Trade Agreements*, 31 ENVTL. L. 501, 503 (2001).

²⁰⁹ Environmental Review of Trade Agreements, 64 Fed. Reg. 63, 169 (Nov. 16, 1999).

²¹⁰ *Id.*

²¹¹ See http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html (Every free trade agreement that has been signed since 1999 has performed an environmental assessment and each assessment was performed pursuant to E.O. 13,141).

²¹² 19 U.S.C. § 3801 (2002).

²¹³ Block, *supra* note 20, at 530.

²¹⁴ *Id.*

²¹⁵ *Id.* at 531. The author points out that the Executive Branch is given some degree of latitude in fulfilling these objectives. Nevertheless, they must be cognizant of the fact that Congress will ultimately determine whether the objectives have been sufficiently satisfied when voting to ratify or deny the negotiated trade agreement. *Id.*

²¹⁶ 19 U.S.C.S § 3802(a)(5).

²¹⁷ *Id.* at § 3802(a)(7).

²¹⁸ *Id.* at § 3802(b)(11)(E).

²¹⁹ Block, *supra* note 20, at 531.

international and national level. The international community has demonstrated their commitment to an environmentally sound trade agenda, and the fact that the United States, arguably the most influential trading partner in the world, has followed suit bodes well for international environmental law. It remains to be seen whether the United States, armed with their pledge of greener trade policies, can take advantage of the current atmosphere and convince the rest of Latin America that the FTAA must sustain and build upon the relationship that trade now has with environmental consciousness.

C. Weaknesses in the Current FTAA Framework

Much to the dismay of environmentalists, the current FTAA framework is not creating an atmosphere conducive to environmental success.²²⁰ This can be seen in the three FTAA draft agreements that have been issued thus far. Not only have the agreements proven to be facially weak on the environment, but they also lack reinforcement in any way in the aggregate FTAA structure. Outside of the agreement itself, many developing nations have failed to keep environmental considerations on the short end of their list of priorities.

A cursory examination of the FTAA deliberations reveals that the environment is having a hard time making its way in from the periphery. The first FTAA draft agreement from 2001 contains no provisions on environmental protections,²²¹ a frighteningly similar characteristic to the “GATTzilla” agreement²²² that was so unpopular among environmentalists. The second draft agreement from 2002 does little to improve upon the first and contains only a sheepish provision encouraging member nations not to relax their environmental laws to garner investment from abroad.²²³ Even that commitment is made conditional upon developing nations gaining greater access to environmental technology.²²⁴ These drafts run contrary to what the ministers agreed to in 1994 in Miami when they decreed, “[w]e will advance our social well-being and economic prosperity in ways that are fully cognizant of our impact on the environment.”²²⁵ It would appear in this case that in spite of the ambitious rhetoric of the Miami meeting, FTAA negotiators have yet to substantiate their commitment to environmental protection.

Perhaps the ministers realized the error of their ways when they made a third attempt at the FTAA draft agreement. The current draft, released in November 2003 on the fringe of the Miami ministerial, contains much of the same language found in other free trade agreements.²²⁶ The references to environmental cooperation and

²²⁰ An examination of the FTAA draft agreements reveals that there has been little explicit commitment to protection of the environment. All of the draft agreements can be found on the FTAA website, at <http://www.ftaa-alca.org>.

²²¹ Free Trade Area of the Americas, *First Draft FTAA Agreement*, http://www.ftaa-alca.org/FTAADraft/draft_e.asp (last accessed February 7, 2006).

²²² See *supra* Part IA.

²²³ Free Trade Area of the Americas, *Second Draft FTAA Agreement, Article 19 of Draft Chapter on Investment*, at http://www.ftaa-alca.org/ftaadraft02/ngin1_e.asp#art19 (last accessed February 7, 2006).

²²⁴ *Id.*

²²⁵ Summit of the Americas, *Declaration of Principles and Plan of Action*, 34 I.L.M. 808, 813 (May 1995).

²²⁶ Free Trade Area of the Americas, *Draft Agreement, Chapter VI*, available at http://www.ftaa-alca.org/FTAADraft03/ChapterVI_e.asp (Last accessed February 7, 2006).

public participation are promising, but remain as yet unsubstantiated in the overall FTAA scheme. No part of the FTAA plan gives credence to the environmental commitments made in the language of the draft agreement. For example, the FTAA negotiations have been divided into nine categories governed by negotiating groups with specific mandates.²²⁷ Not one of these groups is devoted specifically to environmental protections. Neither are the four technical or special committees that were formed to oversee other issues.²²⁸ Among those special committees, only the committee for the participation of civil society even mentions the environment, and does so only in its invitation to business, labor, academic, and environmental groups to participate by voicing their interests and concerns.²²⁹

Contrast that with NAFTA, which contains environmental provisions that are legitimated by the creation of the NAAEC.²³⁰ The NAAEC is an organization that was given a specific mandate to ensure that NAFTA's environmental specifications are properly implemented.²³¹ Similarly, the CAFTA agreement with Central America and the Dominican Republic created a council to "oversee the implementation . . . and review progress" of the environmental portions of the agreement.²³² These free trade agreements have more environmental muscle because they can exercise oversight and take measures to ensure that the environmental goals inscribed in the agreement are actually realized. Developing committees dedicated to transparency creates a culture of compliance and incentivizes parties to deliver on their promises. Such incentives are lacking in the current FTAA structure.

To some degree, the United States, Canada, and Chile have all pushed for greater development of environmental dialogue in the FTAA negotiations.²³³ Even so, other Latin American nations have been reluctant to make environmental commitments out of fear that such commitments could be used against them in the future.²³⁴ Brazil and Mexico, for example, have been open in their desire to keep environmental issues off the agenda.²³⁵ For their part, the Brazilians felt that unfettered access to

²²⁷ See Carolyn L. Deere & Daniel C. Esty, *Trade and Environment: Reflections on the NAFTA and Recommendations for the Americas*, in GREENING THE AMERICAS 329, 347 n.2 (Carolyn L. Deere & Daniel C. Esty, eds., 2002) (noting nine negotiating groups devoted to market access, investment, services, government procurement, dispute settlement, agriculture, intellectual property rights, subsidies, antidumping and countervailing duties, and competition policy. Since the publication of their work, four more groups have been added: smaller economies, civil society, institutional issues, and electronic commerce.) See also FTAA website at www.ftaa-alca.org.

²²⁸ Free Trade Area of the Americas, *Special Committees*, at http://www.ftaa-alca.org/Scomm_e.asp (last accessed February 7, 2006).

²²⁹ Free Trade Area of the Americas, *Participation of Civil Society*, at http://www.ftaa-alca.org/SPCOMM/COMMCS_E.ASP (last accessed February 7, 2006).

²³⁰ See *supra*, Part III.

²³¹ *Id.*

²³² Office of the United States Trade Representative, *CAFTA-DR Final Text, Article 17.5, Environment*, at para. 2. available at http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html (last visited Feb. 7, 2006).

²³³ Mario Matus & Edda Rossi, *Trade and the Environment in the FTAA: A Chilean Perspective*, in GREENING THE AMERICAS 259, 267-69 (Carolyn L. Deere & Daniel C. Esty eds., 2002).

²³⁴ *Id.* at 269-70 (arguing that policy links between trade and the environment would allow developed nations to block imports from smaller countries accused of not fulfilling environmental commitments. Such regulations in the FTAA framework could also serve as "disguised protectionism aimed at undermining an important competitive advantage of developing countries: less burdensome regulatory regimes.").

²³⁵ Jonathan S. Blum, Comment, *The FTAA and the Fast Track to Forgetting the Environment: A*

free trade would accelerate economic growth, which would consequently reduce poverty, increase environmental protections, and thus obviate the need for explicit environmental provisions in the FTAA.²³⁶

Developing nations like Brazil also feel unfairly prejudiced by the gulf that separates the global North and South in environmental affairs.²³⁷ The North's sense of urgency in addressing environmental maladies is counterbalanced by the South's drive for prosperity for its people struggling to survive at or below the poverty level.²³⁸ These competing interests create a divide, often adversely affecting the developing countries. Influential lobbies in the United States and other developed countries advocate that products from poorer nations be denied market access until they have attained "developed country industrial, environmental, and labor standards."²³⁹ Moreover, the developing world feels there is a trend of protectionism running against them as developed nations seek methods to protect their markets from the competition of developing nations.²⁴⁰ For these reasons, it is perhaps understandable that Mexico, Brazil, and other developing nations are disinclined to view environmental concerns as equal to prevailing economic concerns. To many in the developing world, environmental protection is a luxury to be addressed later, and a drag on economic growth and the alleviation of poverty.²⁴¹

This argument is popular among developing nations, but it may be losing its luster elsewhere in a world committed to linking trade and environmental protection.²⁴² This is especially true in the United States, where no regional trade agreement omitting environmental elements would ever obtain Congressional ratification.²⁴³ The powerful environmental lobby that exists in the U.S. is easily as discernible in other nations and across the globe. The pressures working against developing nations is felt by all, and is more demonstrative of widespread abhorrence to environmental irresponsibility than any potential discrimination against lesser-developed nations. Pressure from civil society reflects a growing international norm of environmental responsibility, one that applies particularly to trade

Comparison of the NAFTA and the MERCOSUR Environmental Models as Examples for the Hemisphere, 35 TEX. INT'L L.J. 435, 440 (2000).

²³⁶ *Id.*

²³⁷ See David Hunter, James Salzman, & Durwood Zaelke, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY, 2D ED., 166-67 (2002) (explaining how the industrialized countries of the world constitute the "global North," while the lesser developed nations of the world represent the "global South.").

²³⁸ *Id.*

²³⁹ Javier Mancera, *A Mexican View on Trade and Environment*, in GREENING THE AMERICAS 31, 37 (Carolyn L. Deere & Daniel C. Esty eds., 2002).

²⁴⁰ *Id.* See also Johnson, *supra* note 12, at 75 (highlighting another concern of the Southern hemisphere, namely that the FTAA puts the interests of the North ahead of the interests of the South, resulting in a trade agreement that is far from "free").

²⁴¹ Hunter, Salzman, & Zaelke, at 167.

²⁴² See generally Mancera, *supra* note 238 at 35 (Mancera explains the reasoning of many developing nations in leaving environmental concerns off the bargaining agenda. He explains that developed nations operate under the faulty premise that economic growth is a threat to environmental protection. In actuality, the empirical evidence establishes the contrary to be true, that "increased trade and investment between developed and less developed countries can actually strengthen environmental performance.").

²⁴³ Carolyn L. Deere & Daniel C. Esty, *Trade and Environment: Reflections on the NAFTA and Recommendations for the Americas*, in GREENING THE AMERICAS 329, 330 (Carolyn L. Deere & Daniel C. Esty eds., 2002).

liberalization.²⁴⁴ It is highly unlikely that after GATT, the Earth Summit, NAFTA, several domestic and international adjudications, and a series of environmentally progressive FTAs, the norm could be ignored.

D. Suggestions

Having noted some of the weaknesses in the existing FTAA framework, it is useful to consider some suggestions for moving forward. Given the current environmental atmosphere, the following are some of the most salient issues that should garner greater consideration in the FTAA negotiations.

The first issue is an increased commitment to public participation during the negotiating process and thereafter. One of the overarching lessons of NAFTA and its environmental side agreement speaks to the benefits of working closely with nongovernmental organizations, environmental agencies, and other interested parties in reaching an environmentally acceptable agreement.²⁴⁵ It is widely accepted that NAFTA demonstrated how an informed and transparent public dialogue can (and does) raise critical issues, foster accountability, and build public support for often-controversial free trade initiatives.²⁴⁶

Public participation in the FTAA after its proposed formation would be an encouraging development for the environment. Such participation would help enhance the legitimacy of the organization, as viewpoints not necessarily represented by government ministers would be reflected and hopefully addressed. Allowing the public to contribute would help keep the FTAA alive and vibrant, avoiding a detachment from civil society that could prove harmful from a public relations or policy perspective.²⁴⁷ Additionally, public participants like NGOs often possess a passion for advocating their cause that may otherwise be absent from the FTAA regime. One commentator, discussing public participation in the WTO, said, "as volunteer groups, NGOs consist of individuals who care enough about an issue to work for or against it. The [FTAA] will stand a better chance of reaching enlightened decisions . . . if governments welcome competing views."²⁴⁸

Secondly, environmental assessments need to be a part of the FTAA process. The United States has taken measures to ensure that environmental reviews of the FTAA will be performed. They must be if Congress is to find that the agreement meets the objectives of the TPA.²⁴⁹ Even so, environmental reviews are beneficial to governments seeking to learn what issues may arise upon implementing a new multilateral free trade agreement.²⁵⁰ Unfortunately, many developing nations have neither the means nor the capabilities to perform environmental reviews, which is where the FTAA could demonstrate a genuine commitment to the environment. Many free trade agreements provide for government cooperation and technical

²⁴⁴ See *supra*, Part II.

²⁴⁵ See *supra*, Part III.

²⁴⁶ E.g., Fisher *supra* note 179, at 191.

²⁴⁷ As one commentator wisely noted, "[I]nviting NGOs into the [FTAA] would keep them off the streets." Steve Charnovitz, *Opening the WTO to Nongovernmental Interests*, 24 *FORDHAM INT'L. L.J.* 173, 216 (2000).

²⁴⁸ *Id.*

²⁴⁹ 19 U.S.C. § 3802(a)(5).

²⁵⁰ *Id.*

assistance so that environmental laws are upheld and protected in all party nations, even by those nations without the means to do so.²⁵¹ The FTAA should build upon that trend and ensure that developing nations establish a precedent of considering the environmental impacts of their trade policies.

Certain capable FTAA members (U.S., Canada, Mexico, and Chile) could assist lesser-developed nations in the environmental assessment process. Such measures would have several positive side effects. To some extent those actions could bridge the North-South divide that often plagues the FTAA negotiations. Developing nations of the South, ever-suspicious that U.S. actions are economically exploitive, would gain access to Northern resources and expertise to help build their environmental infrastructure. And in addition, such actions would assuage environmental criticism of the FTAA process, as states demonstrate their concern for the environmental impact of such agreements both inside and outside their borders. One of the chief concerns of free trade agreements between developed and developing nations is that economically weaker ones will become pollution havens as businesses and corporations seek profits in a less rigid and demanding environmental market. Environmental reviews could help expose weaknesses and demonstrate nations are conscious of where environmental improvement is necessary.

Third, the FTAA negotiators need to establish a political body to ensure that the environment is part of the bargaining process. The absence of legitimate mechanisms is also where the free trade agreements with Jordan, Singapore, and the Central American nations fell short. As mentioned earlier, of the four technical committees overseeing FTAA implementation, only one is even vaguely associated with environmental protection.²⁵² This is unacceptable given the post-NAFTA progress of free trade agreements. Although the establishment of such a committee would be unprecedented, it is necessary because the FTAA, much like NAFTA, is being negotiated under the philosophy that environmental concerns are secondary to economic ones.²⁵³ In spite of that philosophy, developed nations involved in the process will continue to make environmental demands. However, the establishment of some body internal to the FTAA framework would be a significant step for environmental law. It would not only set precedent for future agreements, but it would take NAFTA one step further by creating an organization to advocate for environmental protection prior to the actual completion of the agreement.²⁵⁴ Such an organization would allow for the greater participation of civil society, an ideal promoted by NAFTA and all subsequent free trade agreements.

²⁵¹ E.g. Office of the United States Trade Representative, *Chile FTA Final Text, Chapter Nineteen*, Annex 19.3, http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/asset_upload_file482_4013.pdf (last visited Feb. 7, 2006).

²⁵² See *supra*, note 227 (indicating that only the Committee of Government Representatives on the Participation of Civil Society has any semblance of affiliation with environmental protection).

²⁵³ Robins, *supra* note 22, at 143.

²⁵⁴ This would be different from NAFTA because the NAAEC was created primarily as a result of a storm of criticism from environmentalists when NAFTA was being finalized. The creation of an environmental committee during the negotiating process would help resolve environmental shortcomings before the agreement is signed. See Raymond B. Ludwizewski & Peter E. Seley, "Green" Language in the NAFTA: Reconciling Free Trade and Environmental Protection, in *NAFTA AND THE ENVIRONMENT*, at 12 (explaining how NAAEC was created as a result of environmental criticism).

VI. CONCLUSION

There were abundant criticisms and apocalyptic predictions associated with NAFTA when it was being finalized in the early 90s. After a decade of NAFTA, it is becoming apparent that many of those criticisms were erroneous. Mexico has not suffered increased environmental degradation, and has by no means become the pollution haven many feared it would. There has not been a great sucking sound from jobs leaving the U.S. market.²⁵⁵ And the environmental laws of the United States have not been weakened as a result of the agreement. By no measure has NAFTA been an overwhelming success, but the doomsday forecasts were far from accurate.

NAFTA has been successful in establishing an environmental legal regime that has seen positive developments in the proliferation of environmental norms and practices. The NAAEC and the CEC set standards for free trade agreements that are seeing reproduction in many subsequent trade accords. Ideals like public participation, transparency, and sustainable development are finding themselves duplicated in a myriad of bilateral and multilateral situations.²⁵⁶ The international community is increasingly more aware of the environment, sustainable development, and the increasing responsibility of ecologically sound free trade policies.

It is in this context that the FTAA finds itself. As potentially one of the largest free trade areas in the world, there is no doubt that the critical stare of environmentalists is fixed upon every play of the FTAA negotiators. So the question remains: what will become of NAFTA's legacy? The FTAA stands poised to effectuate one of two possible scenarios. It can build upon NAFTA and environmental legal developments by outlining explicit environmental provisions to strengthen and supplement a necessary and crucial environmental structure. On the other hand, it can undo decades of progress in the same area by leaving the environment on the outside of FTAA negotiations, thus putting the trade and environment issue right back where it was after the *Tuna-Dolphin* decision.²⁵⁷

Fortunately, the normative momentum favors progress and growth for international environmental law. Given the increased international awareness regarding environmental protection and the proliferation of environmentally friendly trade agreements, the FTAA is poised for progress and growth. Progress can occur by making the FTAA more environmentally robust than its predecessors. Growth will occur as environmental norms are solidified and reiterated in the FTAA framework. Environmental progress and growth in the free trade agreement context; perhaps this is what is to become of NAFTA's legacy.

²⁵⁵ Donald Lambro, *Embargo Needed on CAFTA Myths*, WASH. TIMES, June 27, 2005, at A20; Thomas J. Schoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, 91 A.J.I.L. 268, 298 (1997) (arguing that there is little empirical evidence to show that job loss has resulted from the NAFTA agreement).

²⁵⁶ See *supra*, note 8 (demonstrating similar concerns related to environmental protection have been incorporated into nearly all subsequent bilateral trade agreements).

²⁵⁷ See *supra*, note 31.