Environmental Planning and Policy-Making Mechanisms In North America:

An Examination of Some Present Mechanisms

A Paper Prepared by

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1. Introduction

The North American environment is threatened by a host of problems including the toxic contamination of the air, water and land, the potentially harmful impacts of global warming and the loss of species diversity. It is only in fairly recent times that North America has been recognized as an identifiable ecosystem.[1] It is not surprising, therefore, that there is some discussion as to what are the appropriate mechanisms for trilateral cooperation in the environmental field. Although there is now legal and institutional regimes governing the U.S./ Mexico and the U.S./Canada relationships, the question remains as to whether there is a need for new or expanded mechanism for North America and then what is the nature and scope of that mechanism.

The purpose of this paper is to discuss the need for, and the general notion of, a trilateral environmental regime for North America. More particularly, it is argued in this paper that there should be a trilateral environmental agreement since there are genuine environmental issues between Canada, Mexico and the United States. Although the institutional issues will be mentioned, they will not be addressed in any substantial way. Institutional issues should follow the purposes and provisions of the environmental regime.

The first section of this paper briefly reviews what obligations are derived from international law with respect to the appropriate mechanisms for multilateral cooperation in the environmental field. These obligations are instructive as to what the basic or minimum components should be of a trilateral environmental regime. The next section then examines some mechanisms that have been used in the context of the U.S.-Canada border, with some emphasis on the Great Lakes mechanisms. The last section then gives some preliminary thoughts on the crucial or at least important elements of a North

American environmental planning regime.

In this paper, environmental planning is defined very widely to include any activities that attempts to anticipate and deal with adverse environmental impacts. Similarly, policy-making includes the whole range of mechanisms directed to developing agreements, policies and programs between two or more countries.

2. Environmental Planning Directives From International Law

Before one examines experiences in North America, it is important to note that the development of regional environmental regimes have a basis in international law. In fact, it may be argued that international law is evolving to encourage, if not require, countries develop these kind of regimes. The duties discussed include the duty to inform, the duty to consult and negotiate, the duty to assure equal access and the emerging duty to plan.

2.1 Duty to Inform

When a country has actual or constructive knowledge of new or increased levels of pollution that might give rise to a substantial risk of transfrontier pollution, it may be under a duty to inform the other country of such risks. Various court cases and U.N. General Assembly resolutions support the recognition of this duty,[2] suggesting many countries understand this duty to be part of international law. A growing number of international agreements confirm this international duty.[3] Indeed, there are various examples in the Canada - U.S. bilateral environmental regime that support this duty.[4]

2.2 Duty to Consult and Negotiate

Countries may be obliged to consult and negotiate with respect to transfrontier pollution issues. This duty finds support in article 33 of the U.N. Charter which obliges

states to negotiate with each other in cases where a dispute may endanger the maintenance of international peace and security. The duty to consult and negotiate is really closely associated with the duty to inform. The duty to consult is generally accepted as a customary rule of international law with respect to international river law.[5] It is now slowly being extended to other environmental fields.[6] There is an argument to be made that Canada and the U.S. have undertaken to abide by these principles in the conduct of their environmental relations.

2.3 Duty to Assure Equal Access

Another emerging duty of international law is the duty to ensure that a country that has or may cause transboundary environmental harm ensures that the citizens that may be impacted in another country have access to the courts and tribunals of the country causing or about the harm. The intent of this right is to ensure that the citizens of both countries are afforded equal rights.

The Organization for Economic Development (OECD) has furthered this concept through its work on "Equal Right of Access."[7] Similarly, the right of equal access is implied in Principle 22 of the Stockholm Declaration, which obliges states to further develop international rules regarding liability and compensation for victims of pollution. To a significant extent, barriers to cross border litigation have been dismantled with respect to the U.S./Canada border.[8]

2.4 The Emerging Duty to Plan

It may well be argued that one of the emerging international law obligations is to undertake consultative environmental planning when undertaking certain activities. For

example, the United Nations Convention on Environmental Impact Assessment in a Transboundary Context was signed in 1991.[9] This agreement, which both Canada and the United States are signatories, obliges countries to do a number of activities once the agreement is triggered.

Before a country undertakes any activity listed in Appendix 1 of the Agreement, it must conduct an environmental assessment as defined in the Agreement. It then must notify affected countries and provide an opportunity to consult. Reasons must be given for the final decision. Exactly how far this duty has evolved is not clear. For example, in the Canadian Environmental Assessment Act, there are provisions pertaining to transboundary impacts. This duty overall may be better cast as one that deals with the duty to prevent transboundary pollution.

3. What Lessons Can be Gained from Existing Bilateral Mechanisms?

While international law is evolving with to certain environmental duties, some of these duties have been implemented in the Canada-U.S. relationship. The purpose of this section is to explore some of these mechanisms in order to ask what lessons can be learned from their application. The mechanisms under study in this section will focus on U.S.-Canada mechanisms. These mechanisms have been fairly effective in dealing with policy-making and conflict avoidance issues.

The binational legal regime between Canada and the U.S. has a long history. While the Boundary Waters Treaty of 1909 is thought to be the key agreement governing bilateral environmental relations, other agreements that will be reviewed including a number of Great Lakes Agreements along with agreements on the west and east coasts of

the continent.

3.1 Boundary Waters Treaty

It is probably fair to say that the Boundary Water Treaty of 1909 creates the framework for the conduct of transboundary environmental issues, at least as it applies to water resources. The Treaty really can be seen as in four distinct components. First, there is an administrative component since the Treaty outlines how certain transboundary waters will be dealt with in certain situations. Second, it establishes an approval mechanism such that all diversions of transboundary waters must be approved by a body created under it, the International Joint Commission (IJC). Third, it creates an investigative mechanism which allows governments to refer any matter "along the common frontier" to the Commission for investigation and reporting. Finally, there is an arbitral power vested in the IJC. Under this power the Commission can arbitrate on any matter referred to it. This power has never been employed.

In the most broadest fashion, it may be said that the Treaty does have environmental planning and policy making aspects to its mandate as applied to shared water resources. This environmental planning and policy-making function is derived from two general sources. First, the Treaty itself outlines a number of principles and priorities under its quasi-judicial function. Hence, under this function, the IJC both applies policy decisions outlined in the Agreement and in effect makes policy by interpreting them in various specific instances.

The second instance of environmental planning and policy-making is the exercise of the Commission's investigative mandate. Many of the references under this function

result in reports and recommendations that, in effect, impliedly or explicitly make policy for both governments. For example, an on-going dispute pertains to levels and flows of Great Lakes waters. In a 1989 report to the Commission,[10] a working group concluded that the appropriate approach is not to build structures to regulate and control the levels and flows of the Great Lakes, but to develop appropriate planning laws and measures so that there would be minimal impacts when there are fluctuations.

Even though the Commission can, at most, is make recommendations to the governments, certainly the investigative function can be seen as an important policy development process. Governments, while not having to accept the recommendations, cannot easily dismiss them in light of the thorough and expert research that underlies those recommendations.

There is a whole range of activities pertaining to the IJC investigative powers illustrate the potential of this mechanism, although it is beyond the scope of this paper to discuss in- depth.[11]

3.2 Great Lakes Water Quality Agreement

The Great Lakes Water Agreement of 1978, which first concluded in 1972, with a Protocol added in 1987, was concluded to address a number environmental issues facing the Great Lakes, most of which relate to conventional and toxic pollution. The Agreement outlines a number of General and Specific Objectives, various program directives, enhanced powers to the IJC, along with a number of annexes that outlines specific action plans for various provisions in the Agreement. The Agreement gives examples of both the potential and limits of environmental planning and policy-making regimes.

(i) Water Quality Board/ Science Advisory Board

Under the Great Lakes Quality Agreement, a number of advisory boards were created to assist the International Joint Commission in the execution of its duties. Two of these bodies, the Water Quality Board and the Science Advisory Board, have explicit or implicit policy development functions.

The Science Advisory Board, composed of experts in various fields from both countries, has the function of reviewing science in terms of the implementation of the Agreement. Although it may be said that "science" is the focus of the Board, it has very successfully ventured into the policy fields. Indeed, the Board was instrumental in identifying, and having the governments adopt, the ecosystem approach to natural resource management.[12] Other accomplishments include the development of ecosystem indicators to determine progress in cleaning-up the Great Lakes.

The Water Quality Board, until the early 1990s, had the function of evaluating the performance of governments in complying with the requirements of the Great Lakes Water Quality Agreement. The Board, composed of governmental agency officials from jurisdictions within the Great Lakes, revised its role from one of "evaluator" of government action to meet the obligations under the Great Lakes Water Quality Agreement to a "policy advisor" to the Commission. In this process, however, there seems to be a correspondingly less emphasis on joint policy development and more emphasis on national policy development.

One example of the consequence of this loss of capacity pertains to the development of the Great Lakes Initiative (GLI).[13] In the early 1990s, the U.S. Environmental

Protection Agency wanted to develop uniform water quality criteria for all eight Great Lakes states. By developing common criteria, there would be greater uniformity by the states in the development of their individual water quality standards under the Clean Water Act.

The controversy is that, historically, the development of Great Lakes water quality objectives would be undertaken jointly to arrive at common objectives. Having agreed to common objectives, it would then be possible to reform national law to accommodate the common objectives. The U.S. EPA has stated that the GLI will become the negotiating position for the development of the joint objectives. The issue is whether EPA will have any flexibility in its negotiations with Canada with respect to the GLI since it will be very difficult to go back and renegotiate the GLI in light of the negotiations with Canada.

(ii) Remedial Action Plans

While the various advisory boards under the Great Lakes Water Quality Agreement can be seen to be as policy development mechanisms, remedial action plans (RAPS) can be seen to an environmental planning mechanism. RAPS, mandated under Annex 2 of the Agreement, require all levels of government as well as other interested members of public, develop action plans to remediate the 43 toxic hotspots in the Great Lakes. It is an environmental planning regime at a local level. It should be noted that there are five binational RAPS.

It is fair to say that it is hard to generalize on the effectiveness of RAPS. While some have demonstrated some modest progress, others have made only limited progress. Nevertheless, the RAPs do demonstrate a model of inclusive, inter-jurisdictional and

comprehensive environmental planning exercises.[14]

(iii) Lake Wide Management Plan

Lake-wide management plans (LWMPS) are similar to RAPs except they are designed to apply to an entire lake rather than a particular or local hotspot. As with RAPS, LWMPs are intended to be inter-jurisdictional, inclusive and a comprehensive planning mechanism at least to the extent that it applies to the reduction of toxic chemicals. However, again like RAPS, LWMPs has also had a checkered history. Progress has been slow in many areas.

3.3 Great Lakes Charter

Apart from the Great Lakes Water Quality Agreement, the 1985 Great Lakes Charter is an example of cooperative policy making by subnational entities on a specific issue. This agreement obliges all states and provinces in the Great Lakes to give prior notice and consult with respect to diversions of waters outside of the basin.

This mechanism has proved to be fairly effective flowing perhaps not from the precise obligations in the agreement but the general principles found in it. One example of this was in 1991 where a city in Indiana requested permission to divert 3.8 million gallons per day from Lake Michigan to the Mississippi River. Michigan, Ontario and Quebec opposed the diversion.[15]

3.4 Other Initiatives

Two other mechanisms will be briefly mentioned.

(a) Gulf of Maine Agreement

In 1989, the Gulf of Maine Agreement was signed by the states and provinces

bordering the area.[16] The parties agreed to minimize actions that would degrade the marine environment or deplete resources to the extent that it could lead to the loss of sustainable use of those resources. The Gulf of Maine Council on the Marine Environment was established to serve as a forum for both discussion and action on "environmental issues of common concern."

In 1990, a draft Action Plan was released by the Gulf of Maine Council on the Marine Environment. The action plan includes specific objectives and actions for five issues areas: coastal and marine pollution; monitoring and research; wildlife, fish, and habitat protection; protection of public health; and public education and participation.

(b) Environmental Cooperation Agreement

In May of 1992, British Columbia and the State of Washington signed an Environmental Cooperation Agreement committing the state and province to "mutual efforts to ensure the protection, preservation and enhancement of our shared environment."[17] An Environmental Cooperation Council was created to give policy direction and oversee progress on joint activities initiated under the Agreement. Interim reports have been submitted in areas of flood management; groundwater; water quality; air quality; environmental reporting; and various institutional issues.

4. Lessons from Past Experience: Toward a North American Environmental Planning and Policy Making Regime

4.1 General Findings

What then can be said about experience about environmental planning and policy mechanisms in the U.S.-Canada relationship which would have relevance to the North

American context? There are a number of findings.

(i) **Dictates of International Law:** It is interesting to note that all countries have certain duties under international law to inform and consult in certain instances. It may be argued that there is an emerging norm to assess transboundary impacts of potentially environmentally harmful activities. These norms should be used both as a benchmark to judge progress to developing multilateral planning and policy-making mechanisms but also as a rationale to further develop them.

(ii) **Lack of Comprehensive Mechanisms:** From a review of the Canada-U.S. relationship, it is quite clear that there remains a lack of a comprehensive environmental planning and policy making regime.[18] Certainly there are some mechanisms for some problems in some areas. However, there is a lack of an overall regime which would coordinate and make more effective existing regimes.

(iii) **Legal Regimes Outlining Principles and Obligations:** One of the most clear lessons from the Canada-U.S. relationships is that international planning and policy-making regimes work best where there clearly enunciated principles laid out to guide the activities. At present, there are no agreed upon principles to govern the use and allocation of shared continental resources and other related environmental issues. While all three countries have been quick to develop trilateral trade regimes, there has been at best only limited progress in trilateral environmental regimes.

4.2 Prospects for the Future

Despite the need for them, whether there will be the development of multi-lateral mechanisms for environmental planning and policy formulation remains uncertain. The

recent North American Agreement on Environmental Cooperation will be briefly examined followed by elements needed in a comprehensive policy development regime.

(a) North American Agreement on Environmental Cooperation

The North American Agreement on Environmental Cooperation (NAAEC) was concluded in September of 1993 between U.S., Canada and Mexico. It is a side agreement to the North America Free Trade Agreement.

Under **NAAEC,** Parts I and II outline various objectives and obligations of the governments. Part II creates a Commission for Environmental Cooperation (CEC). This Commission is comprised of a Council, Secretariat and a Joint Public Advisory Committee. Part IV outlines obligations with respect to the exchange of information while Part V pertains to the consultation and resolution of disputes. Part IV is then the general provisions.

There is no intention to provide an in-depth critical analysis at the side agreements at this point in time. The novelty of the agreement along with the lack of knowledge of how and to what extent it will be implemented makes any detailed analysis difficult.

It may be said there is some potential for the Agreement to further the development of a environmental planning and policy making regime. For example, article 10(7) states that the Council shall develop recommendations on an environmental assessment regime with a view to furthering an agreement between the parties within three years. Further, there are a number of mechanisms both within the Agreement and the CEC to further policy development opportunities.

While there is potential, there are also limits. These include:

* the lack of any environmental objectives, goals or state principles to guide work under the Agreement;

* the generality of the obligations;

* the high degree of discretion on various bodies and in particular, the Council, for virtually every aspect of the agreement ranging from the release of information to public participation;

* the probability that the Canadian provinces may not be bound by the terms of the Agreement.[19]

* the agreement is really tied to the implementation of NAFTA rather than a general environmental cooperation agreement.

* there is a lack of timetables and schedules to develop concrete action steps.

(b) Toward a North American Environmental Planning and Protection Regime

It has been argued that there is a need for some sort of a North American environmental agreement. It would, at minimum, address those issues which are continental in scope and not covered adequately by binational regimes. It would also provide a counterbalance to the emerging free trade regimes to ensure that natural resources are used and allocated in a sustainable way. Further, it may add some context and substance to developing trilateral institutions. However, other or different institutions may also be needed.

What then should be on the agenda for a more detailed discussion of a trilateral

environmental agreement? Some of the proposed elements would include:

* **Development of Clear Environmental Objectives and Guiding Principles:** As mentioned above, the successful attempts at policy making in regional contexts seem to have started with an agreed set of principles and policies upon which to build from and to expand. These principles could be based on resource conservation and equitable use doctrines.

* **Detailed Environmental Information:** This information would include both qualitative and quantitative information. One of the most obvious places to start in this regard is the develop a trilateral toxic release inventory. This inventory could provide a baseline to determine relative emission releases and progress on reductions on a year by year basis. This is only one of many kinds of information requirements.

* **Formalized Environmental Assessment Regime:** It would seem appropriate that there should be a more detailed regime for environmental assessment. Perhaps implementation and the refinement of the United Nations Convention would be a starting point in this regard.

* **Regime for Access to Each other Courts and Tribunals:** Any comprehensive regime should ensure that citizens of all countries have equal access to the courts and tribunals of other countries.

* **Series of Implementation Agreements:** Once there has been agreement on specific issues, these should be formalized specific agreements which in turn can better detail the respective obligations with respect to the matter under consideration.

5. Summary

It is clear that the debate of how to better plan and make policy on a continental basis is now well engaged. It is hoped that this paper provided some perspectives and contributions to that debate.

ENDNOTES

1. For example, see: A. Szekely, "Emerging Boundary Environmental Challenges and Institutional Issues: Mexico and the United States" (1993) 33 Natural Resources Journal 33.

2. See generally: Report of the Environment Committee, "Application of Information and Consultation Practices for Preventing Transfrontier Pollution" in OECD, Transfrontier Pollute of States (Paris: 1981), at 8-34; Cooperation Between States in the Field Environment, Res. 2995 (XXVII), (Dec. 12, 1972).

3. Ibid., Annex II.

4. See below. Perhaps the most direct example is the Great Lakes Charter of 1985, an agreement by 8 U.S. states and Canadian provinces that require the parties to consult prior to an diversion of water outside of the Great Lakes basin.

5. C.B. Bourne, "Procedure in the Development of International Drainage Basin: The Duty to Consult and Negotiate" (1972) Can. Yb. of Int'l 212, at 234.

6. For a discussion of this duty, see: I. Van Lier, Acid Precipitation and International Law (Toronto: Burnsel Environmental Consultants and the Netherlands: Sijthoff and Noordhoff/ Alphen Aan Den Rijn, 1981) at 122-124.

7. For discussion, see: R.E. Stein, "The OECD Guiding Principles on Transfrontier Pollution" (1976) 6 Ga. J. of Int'l and Comp. L. 245.

8. For a review, see: Paul Muldoon, Cross Border Litigation: Environmental Rights in the Great Lakes Ecosystem (Toronto: Carswell, 1986).

9. (1991) 30 I.L.M. 800.

10. A Progress Report to the International Joint Commission, Living with the Lakes: Challenges and Opportunities July, 1989.

11. For further discussion, see: J. E. Carroll, Environmental Diplomacy: An Examination and a Prospective of Canadian-U.S. Transboundary Environmental Relations (Ann Arbor: The University of Michigan Press, 1983).

12. Great Lakes Science Advisory Board, The Ecosystem Approach Special Report to the International Joint Commission, presented July 1978, Windsor, Ontario.

13. See generally for background: National Wildlife Federation, A Citizens Guide to the Great Lakes Water Quality Initiative: A Giant Step Forward (May, 1993).

14. See: M.L. Becker, "The International Joint Commission and Public Participation: Past Experiences, Present Challenges, Future Tasks" (1993) 33 Natural Resources Journal 235.

15. For a discussion of these proposals, see: Carrie Fleming, "Diverting the Great Lakes: NAFTA and Water" in Great Lakes United, NAFTA and the Great Lakes A Preliminary Survey of Environmental Implications (November, 1993), at 54-62.

16. Agreement on Conservation of the Marine of the Gulf of Maine Between the Governments of the Bordering States and Provinces signed by the Governors and Premiers of Maine, New Hampshire, Massachusetts, Nova Scotia and New Brunswick, 1989.

17. Environmental Cooperation Agreement Between the Province of British Columbia and the State of Washington, dated May 7, 1992.

18. This was the finding in an exhaustive study on the topic, see: J. E. Carroll, Environmental Diplomacy: An Examination and a Prospective of Canadian-U.S. Transboundary Environmental Relations (Ann Arbor: The University of Michigan Press, 1983), chapter 12.

19. Drew Fagan, **"NAFTA** Deals May Exempt Canada", Globe and Mail, p. 8, September 15, 1993.