

## **SPEAKING DRAFT**

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### **RENEGOTIATING NAFTA: THREAT OR OPPORTUNITY FOR SUSTAINABILITY?**

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Despite earlier indications that the United States might abandon the North American Free Trade Agreement (NAFTA), the Trump Administration, on August 16, 2017, initiated discussions with Canada and Mexico to renegotiate the Agreement. After five contentious rounds of negotiation, followed by informal sessions in December, the process is in mid-flight. With political pressure to obtain ratification by the Party States before Mexico's general election on July 1, and the US Congressional elections on November 6, 2018, the negotiators reconvene in Montreal on January 23-28, 2018, for Round Six, with the, perhaps optimistic, goal of a March conclusion.

We propose to examine the potential effect of proposed changes in NAFTA and its side agreement, the North American Agreement on Environmental Cooperation (NAAEC), on sustainability—the principle that development to meet the needs of the present should not compromise the environmental quality necessary to enable future generations to meet their needs. We will cover four principal topics:

1. A brief summary of the relevant provisions of NAFTA and NAAEC.
2. Substantive issues affecting NAFTA/NAAEC's scope and coverage of sustainability.
3. Process issues and improvements.

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<sup>1</sup> This speaking draft was prepared for oral presentation but was not presented because neither author could be present. It is a work in progress at an early stage of development and is about an evolving situation. Accordingly, there are no footnotes or specific citations of sources.

#### 4. The current renegotiation process and its potential for affecting sustainability.

##### 1. NAFTA and NAAEC

NAFTA and NAAEC were adopted at a time when the principle of sustainability had attained international acceptance and was reflected in recent legislation of the United States and other developed countries designed to regulate development and growth to protect the natural environment. NAFTA and NAAEC reflect the continuing tension between that evolving régime of sustainability and the purpose of free trade to encourage economic development on a global basis.

Though NAFTA is primarily a trade agreement, its preamble states that its trade-oriented goals should be pursued in a manner consistent with environmental protection and sustainable development. Nevertheless, its general objectives, set forth in Article 102, are entirely trade-related and its specific substantive provisions regulate trade in goods, services, cross-border investment, and intellectual property. Though no single chapter of NAFTA is comprehensively devoted to the environment, Article 104 and Annex 104.1 provide that five existing international environmental agreements prevail over NAFTA in the event of inconsistency, and Article 2101 provides that environmental and conservation measures of the Party States that are nondiscriminatory and otherwise not inconsistent with NAFTA are not barred by the basic trade provisions of the Agreement. Also, Chapter 11, concerning cross-border investment, provides some recognition of states' environmental protection interests.

NAFTA provides three principal dispute resolution mechanisms—intergovernmental dispute resolution under Chapter 20, a separate procedure under Chapter 19 for disputes concerning the anti-dumping or countervailing duty laws of a Party; and a separate procedure in Chapter 11 under which an investor may obtain arbitration of a claim for damages against a Party for violation of Chapter 11 obligations by federal or state or provincial action. Article 2005(3) provides that the responding Party in an environmental dispute that could be resolved under either World Trade Organization (WTO) or NAFTA procedures may require the dispute to be brought in a NAFTA forum, but very few Chapter 20 proceedings have been completed since 1995. Chapter 19 proceedings have seen significantly greater use, primarily against the United States. Chapter 11 proceedings have been the object of continuing objections: the proceedings, in which states or provinces do not have standing, are commonly used to challenge important state or provincial regulatory measures outside traditional court systems and that they have imposed significant costs on taxpayers.

NAAEC is the principal protection for environmental values under NAFTA. It is a side agreement adopted to hasten US ratification of NAFTA in the face of fears that it would lead the Parties to weaken environmental policy and regulation in order to encourage trade in a “race to the bottom” that would result in significant environmental degradation.

The preamble of NAAEC recognizes the importance of cooperative environmental protection in “achieving sustainable development for the well-being of present and future generations.” The objectives set forth in Part One, Article 1 elaborate on that point and emphasize cooperation and transparency in serving NAFTA’s environmental goals and securing compliance with and

enforcement of environmental laws and regulations. In Part Two, the Parties commit to reporting, providing high levels of environmental protection, and establishing effective public and private remedies for violation of environmental laws and regulations. Part Three establishes and describes the functions of the North American Commission for Environmental Cooperation (CEC), providing for environmental cooperation and protection in the implementation of NAFTA. The CEC is a tripartite structure consisting of the Council (composed of cabinet-level representatives of the Parties) as governing body; the Secretariat, consisting of an executive director and staff; and the Joint Public Advisory Committee (JPAC). This interlocking structure of political actors, independent experts and ordinary citizens can potentially create great tensions.

The Secretariat is charged with processing citizen submissions on enforcement matters (SEM) that can lead to public findings of failure of environmental enforcement by a Party. The SEM process is governed by articles 14 and 15 of the NAAEC. According to article 14, “[t]he Secretariat may consider a submission from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law” and sets out the conditions of admissibility for a claim. Once the Secretariat has found that these are met, it “shall determine whether the submission merits requesting a response from the Party” and that inquiry is guided by a set of factors. If the Secretariat determines that a response is merited, “it shall forward to the Party a copy of the submission and any supporting information provided with the submission.” The Party must then, within a time limit, advise the Secretariat “whether the matter is the subject of a pending judicial or administrative proceeding, in which case the Secretariat shall proceed no further,” as well as “any other information that the Party wishes to submit.” If the Secretariat considers that a submission is warranted, it must “inform the Council

and provide its reasons.” If the Council, “by a two-thirds vote, instructs it to do so,” it must prepare a factual record. According to article 15(4), the Secretariat then must prepare the record, considering relevant information that “(a) is publicly available; (b) submitted by interested non-governmental organizations or persons; (c) submitted by the Joint Public Advisory Council; or (d) developed by the Secretariat or by independent experts.” Once the record is completed, the Secretariat must provide a draft copy to the Council that any Party may provide comments on. The Secretariat must then incorporate any comments that it finds appropriate and submit it to the Council, which by a two-thirds vote may be decide whether to make the report public.

Part 4 of NAAEC provides for information sharing. Part Five provides a Party-initiated consultation procedure for another Party’s “persistent pattern of failure” to enforce its environmental law. Subsequent steps are Council conciliation or mediation and arbitration to determine whether the initial failure of enforcement involves goods or services traded between Parties or competing with those of another Party, with ultimate monetary or other relief. No such arbitration proceedings have been undertaken. Part Six covers administration.

## **2. Substantive Issues**

Critics have suggested numerous ways for NAFTA and NAAEC to strike a better balance between the conflicting imperatives of trade and environmental protection—in other words to establish a régime of sustainability. For example, changes in NAAEC or the new NAFTA could address the failure of NAAEC to fulfill its potential through neglect of provisions intended to encourage the Party States to enforce their environmental laws and through failure to take a broad view of environmental law in that process by spelling out standards by which enforcement

is to be measured and by making clear that “environmental law” includes the full body of statutory and regulatory provisions and the underlying policies that they articulate.

Specific inadequacies such as inadequate treatment of farmed animal agriculture and traditional crops might be addressed by making clear the connection between international trade in the NAFTA context and these enterprises. NAAEC initiatives for addressing North American marine areas could be enhanced by specific incorporation of the results of ocean assessment efforts such as the World Ocean Assessment. Environmental and cultural benefits would flow from providing adequate recognition to indigenous peoples’ rights in NAFTA and NAAEC. Allowing NAAEC to integrate national climate change efforts would assist the Party States in combatting climate change together in a comprehensive and efficient manner. Adequate provision for public participation in foreign investment arbitration proceedings, and a requirement that the Party States use NAFTA § 1114(2) to challenge another country’s environmental rollbacks would close a serious gap in environmental protection. More general issues include lack of significant NAFTA influence on environmental policy-making in the Party States and the need to evaluate the impact of environmental NGOs on environmental policy.

### **3. Process Issues**

A range of criticisms has been directed against the SEM process. Two are especially pertinent to our current discussion. First, it is argued that the Council is put in an apparent conflict of interest. It has the authority to determine whether a factual record will be prepared, but since the Council is comprised of the member states, the target of any potential record will play a role in the deliberations about whether a record should go forward. Second, critics claim that the procedure

is toothless, either because it includes no possibility of enforcement or because there is no continuing monitoring.

Observers have noted that in several prominent instances, the Council, in instructing the Secretariat to prepare a factual record, has in addition narrowed the scope of the inquiry that was proposed in the submission and recommended by the Secretariat. This narrowing of the factual record has transformed claims about systemic failures to enforce state law into inquiries over a few specific instances of non-enforcement, thus trivializing the exercise. In one instance, such an authorization resulted in the submitter withdrawing a submission. Narrowing of records is a problem because it undermines the faith that civil society has in the CEC and the citizen submission process. The impact is potentially particularly grave insofar as it is unauthorized by the plain meaning of article 15, which only gives the Council the power to approve the record that the Secretariat has recommended. Whenever Council narrows a record, it would seem likely to cause actors to doubt the impartiality and good faith of the institutions of the CEC. The doubt created by narrowing the records also puts into doubt the citizen submissions process as a site of contestation and accountability. It is difficult to see how the process can be understood to hold to account a state whose representatives can change, without justification, the terms under which it is being challenged.

Consider now the claim that the process is toothless, because it neither provides enforcement mechanisms, nor offers continuing oversight after the production of a factual record. The responses to this claim will allow us to address a lingering doubt about the citizen submission process, namely that because it is soft-law, it should not be considered to be law at all. The first

thing to note is that what scholarship we have on the effectiveness of the process suggests that the spotlight function works in some instances. Scholars have described discrete policy changes that were responses to factual records, such as in the very first *Cozumel* case, which reduced the size of the proposed project, reduced the impacts of commercial shrimp farming in Nayarit, led to the cleanup of a lead smelter in Tijuana, and led to greater efforts to reduce illegal logging in Sierra Tarahumara. This example demonstrates that at least in some circumstances, the process has the effect of altering state behavior, even if it does not achieve this end through direct enforcement mechanisms. In such cases, the SEM has effects on state behavior, therefore, we claim, its status as a legal instrument should not be discounted.

Even with this qualification in place, it would seem that the citizen submissions process could be altered in order to increase the likelihood that governments will be answerable to citizens. As it stands, if a government, in the face of a factual record, makes the political calculation that it will not suffer political repercussions from ignoring the record, it will do so. It has been argued that this was what happened in the *Migratory Bird Treaty Act* case, where the relevant U.S. agency did not change its actions after the publication of the factual record. A solution to this problem, which respects the parties' choice to adopt a soft law instrument, would aim to increase the accountability of states, without subjecting them to formal compliance mechanisms. Along these lines, scholars have advocated for ongoing monitoring of the problems identified in the factual records and that a model can be found in article 17.8(8) of the Dominican Republic-Central American-United States Free Trade Agreement (DR-CAFTA), which empowers a transnational body to issue recommendations for how a government that fails to enforce its environmental laws can monitor its enforcement activities.

This brings us to a set of process recommendations that are more modest and perhaps more appropriately so, in light of the negotiating stance of the United States. Let us assume that there is no political desire to amend the NAAEC in order either to limit the ability of political actors to control the SEM process or to institute ongoing monitoring after a factual record. The response we propose lies within the existing structure of the CEC.

Consider first the challenge relating to the parties' undue influence over the SEM process. One response is to rely on the persuasive powers of the JPAC. The actions of the Council have been subject to pointed criticism by the JPAC, including by means of an "advice letter", and in response to the attention drawn to the practice, the Council refrained from continuing to engage in it. Moreover, as a result of a recently concluded consultation process, interpretive guidelines were developed that expressly rejected a proposal to codify the practice of narrowing factual records. Finally, the SEM unit itself might engage in outreach activities in order to make these changes known to civil society organizations and to invite feedback about how the SEM process might itself be made more open, accessible and inviting to civil society groups and the general public. This, indeed, was one of the objectives of a recent workshop held at the University of British Columbia's Allard School of Law, partially sponsored by the SEM Unit and supported by a Social Sciences and Humanities Research Council grant held by my co-author Hoi Kong.

This cooperative effort between a unit within the CEC and academia suggests another change that would increase the efficacy of the SEM process, without relying on a treaty amendment. During the aforementioned workshop, it was suggested that although the parties may not

themselves sanction monitoring by the CEC, nothing would prevent university researchers from collaborating with the JPAC to undertake such a monitoring effort. We could imagine a joint research project under the SSHRC Partnership program through which researchers could select factual records and undertake ongoing monitoring of state action regarding the underlying issue. Reports could be presented at the JPAC's annual meeting for feedback, before publication.

These recommendations would not require changes to the relevant treaties and side-agreements, but would likely result in appreciable gains in the efficacy of the SEM process. The recommendations are offered in a spirit of political realism that involves a healthy skepticism about the willingness of the Parties to negotiate changes that would cede their control over the SEM process or increase resources for monitoring.

#### **4. The NAFTA Negotiations**

A "Summary of Objectives for the NAFTA Renegotiation," issued on July 17, 2017, by the Office of the United States Trade Representative, was issued in revised form in November as a step in the Round 5 negotiations. In both versions, "Environment" is one of 22 general categories. The "Environment" category contains 13 specific objectives. Most notable is the first—to put environmental provisions into the basic agreement rather than in a side agreement like NAAEC. In this and other respects, the "Environment" category contains objectives that echo the structure and provisions of the Trans-Pacific Partnership (TPP), which was developed during the Obama Administration and initially rejected by President Trump in favor of bilateral agreements, and the recently adopted Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union. Other Environmental objectives include requirements

that, for environmental issues, the Party States use the simplified dispute settlement process applicable to other categories, do not use non-enforcement of their environmental laws to encourage trade or investment, comply with applicable existing international agreements, provide for stakeholder and public participation, provide fair enforcement proceedings with appropriate remedies, provide a framework for environmental cooperation with public participation, and establish an Environmental Committee to oversee implementation of environmental commitments, also with public participation. There are no specific objectives comparable to TPP provisions for ozone layer protection, prevention of marine ship pollution, sustainable use of biodiversity, protection against invasive alien species, or transition to a low emissions and resilient economy. However, provisions to combat illegal fishing, prohibit harmful fishing subsidies, promote sustainable fisheries management, and protect flora and fauna and ecosystems are included.

Because the Parties signed an ironclad confidentiality agreement at the outset of the negotiations, there is no specific information available on their status. Generally, the five rounds of negotiations in the summer and fall were reported to have made some progress on customs procedures, food-safety measures, digital trade, regulatory practices and telecommunications but appeared at odds over automotive rules of origin, government procurement, and dispute settlement. Little is known about the present status of the Environment category, though there was speculation that, as one of the previously non-controversial categories, it may have been considered in the informal December sessions.

In fact, numerous objections that have been made to the Environment category of the Summary may surface in Round Six. In particular, NAAEC features would be eliminated or simplified: The Council would be replaced by “a senior-level Environment Committee; the CEC would be replaced by an ill-defined “framework” for addressing environmental cooperation; the SEM process would become a state-level proceeding, with only the state able to seek further review by the Environment Committee. The Investment category of the Summary does not address environmental impacts or dispute settlement, and the Dispute Settlement category, which calls for a mechanism intended to do away with Chapter 19 proceedings that would presumably also be applicable to investment and environmental disputes, is in general terms that emphasize efficiency and timeliness. These objectives would lead to provisions similar to the more streamlined structure of the TPP and CETA, which has been described by one critic as having “high aspirations, soft legal obligations and modest enforcement mechanisms” compared to those of NAAEC.

At this point, considering the opacity of the proceedings, prediction of the outcome of negotiations on the Environmental objectives seems fruitless. The most that can be said is that, given the actions of the Trump administration in limiting regulation under US environmental law, the survival, not to mention the improvement, of the present environmental elements of NAFTA and NAAEC, seems dependent on the degree of importance that Canada and Mexico attach to them and the resultant success of their negotiating efforts in that behalf.