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## FROM “THE MEXICAN PROBLEM” TO A REGIONAL EXPERIENCE. ENVIRONMENTAL ENFORCEMENT AND COMPLIANCE IN NORTH AMERICA

AZUELA, ANTONIO<sup>1</sup> AND WARMAN, JAVIER<sup>2</sup>

<sup>1</sup> Investigador, Instituto de Investigaciones Sociales, Universidad Nacional Autónoma de México, Circuito Mario de la Cueva, Ciudad Universitaria, Coyoacan, México, D.F., México 04510.

<sup>2</sup> Massachusetts Institute of Technology, Earth, Atmosphere & Plan, 77 Massachusetts Avenue, Cambridge, MA 02139-4307, USA

### SUMMARY

One of the most interesting aspects of the institutional arrangement created by the North American Free Trade Agreement (NAFTA) is the inclusion of environmental commitments between countries that show had (and still have) a very uneven development in their environmental policies. By the early nineties, when the agreement was being negotiated, Canada and the USUSA had been enforcing their law on the move for more than two decades. Indeed, the USUSA is regarded as one of the world leaders in the enactment and implementation of environmental legislation. On the other hand, Mexico had a promising legislation but very little experience in its implementation. This asymmetric situation raised concerns on the feasibility of the treaty as a whole, and gave way to some interesting institutional innovations, as well as to some responses from both the Mexican government and NGOs throughout the region. Almost one decade later, it is interesting to reflect on the consequences of those developments. In this paper, we will argue that there is little chance that the worst predictions will materialize. On the one hand, environmental policies have been strengthened, not weakened and, at the same time, free trade has not been affected by the asymmetries of environmental performance throughout the region. To put it simply in particular, Mexico did not become the sort of environmental heaven that some feared. As we will see, this is due both to developments at regional level and within Mexico.

### 1 NAFTA NEGOTIATIONS (CONCERNS AND PREJUDICES

The North American Free Trade Agreement (NAFTA) was questioned while it was being drafted for putting in the same basket countries with such a different level of development as the USUSA and Mexico. One of the main cries for attention came from the environmental community, who saw Mexico becoming a pollution heaven in no time after signing the document. Several mem-

bers of the USUSA Congress embraced this point of view and not. Several members of the US Congress embraced this point of view and made it its own, and pushed for further negotiations within NAFTA.

Although a good deal of prejudice was the basis of that claim, there was no evidence to counteract that prejudice. As of 1992, Mexico had nothing to show regarding the enforcement of its environmental laws. Several surveys showed that Mexico's legislation was good not bad, the

problem was it did not have 'teeth'. As we will see, Mexico made an effort to change that image, but that could not be done overnight. Not surprisingly, the fear of an environmental heaven became a serious obstacle to NAFTA. Also, it gave the opportunity to the incoming Clinton administration to introduce changes that made NAFTA more acceptable to the environmental community NGOs in the USA.

It is true that within the original text of NAFTA, the Quite opposite, the fact that "parties had already committed themselves to avoid the relaxation of recognize that it is inappropriate to encourage investment by relaxing domestic health, safety and environmental standards in order to promote investmentmeasures" (see NAAEC) is more what is being followed. But that was not enough and negotiators had to produce something else, as we will see below.

To be sure, the 'environmental heaven' was not the only issue at stake. Other prejudices and fears were present in the processpublic debate. For free trade opponents, NAFTA would bring about further environmental deterioration. At the other extreme, those who believe in free trade at all cost, feared that environmental restrictions could become an obstacle for economic development. Also, some industrial groups in Mexico feared they could be put out of business with the implementation of environmental standards they would not be able to meet. Finally, nationalism, a very strong ideology in Mexico, gave rise to fears that Mexico had to adopt the American legal model – with all the 'adversarialism' that allegedly distorts environmental policies in the USA (Zamora, 1993...). A discussion of these issues would take us far from the purpose of this paper, although they will be part of the debate for many years<sup>1</sup>. Nevertheless, beyond the complexity and the density of that debate, there is an undeniable tantamount reality: T.: The outcome of the envi-

ronmental negotiations regarding the environment in the context of NAFTA - i.e. the adoption of an environmental side agreement – was, "more the product of the USUS legislative battle over NAFTA than the result of an acute environmental conscience in the governments of Canada, Mexico and the US" (Hufbauer et al, 2000).

## 2 A UNIQUE SIDE — AGREEMENT

As we have said, NAFTA had not entirely ignored environmental concerns. Article 1114 (in Chapter 11) clearly stated that "[T]he Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety and environmental measures". However, the political process in the USA drove the negotiations into a more specific "environmental side agreement", where those issues could be directly addressed. Thus the parties signed the North American Agreement for Environmental Cooperation (NAAEC), in order to establish a framework, to facilitate effective cooperation in the conservation, protection and enhancement of the environment. One of the creations of NAAEC was the North American Commission for Environmental Cooperation (CEC)<sup>2</sup>

As we can read in the CEC web page, "one of the principal aims of the NAAEC is the promotion of effective enforcement by the Parties of their domestic environmental legislation". Of course, due to the legal nature of the Agreement, it does not make explicit the real origin of the whole initiative. But it is obvious that there was a dominant perception about one of the parties (the "Mexican problem"). No one in the negotiation process raised concerns that Canada or the USA could create problems by failing to enforce their laws. However, as we will see, the Agreement created an authentic regional dynamic, i.e. much beyond the original concern that engendered it.

Before we explain the specific mechanisms created by NAAEC in order to promote environmental enforcement in the region, it is worth mentioning one of the assumptions behind those mechanisms. In the negotiations, it was recognized (or rather, Mexico managed to establish) that common environmental standards at regional level were out of the question. It was taken for granted that Mexico would not be able to meet the allegedly much more stringent standards of its counterparts. Although nobody challenged this assumption, it was never backed by serious studies. Indeed, there are many indications that standards adopted by Mexican law are as strict as American and Canadian ones and, also that most firms in Mexico is capable of complying with them (*PRO-FEPA*, 2000). Thus, the idea of sovereignty took the place of the debate about levels of environmental protection. Each party in the Treaty retained the privilege to establish their own levels, as long as they made an effort to keep them high. This also meant that the debate shifted from strictly environmental issues to environmental *legal* issues. The question is not whether the environment is protected and how, but whether the law is complied with. For some people the difference is not irrelevant.

The agreement puts a heavy emphasis on cooperation among the member countries, fostering joint committees on different subjects, particularly a working group on enforcement issues where even regional compliance indicators have been worked at, making it a breakthrough on regional environmental policies. However, the main issue the Agreement had to address was that of lack of enforcement of environmental legislation. And it did so by establishing two kinds of *consequences* for the party that failed to enforce it. One is to be publicly exposed and the other is trade sanctions.

The mechanism to publicly expose

governments that are failing to enforce environmental law (a proceeding that leads to the elaboration of a 'factual record') is provided for in Articles 14 and 15. These provisions give a right to anyone living in any of the three countries of North America "to bring the facts to light" concerning the enforcement of environmental legislation in any of the three countries". (CEC web page). If a citizen has gone through all the national instances of an environmental demand without authorities giving him/her a convincing answer, the CEC Secretariat can take his/her denunciation and ask the national government for a response. If this fails, it is assumed that the highlighting of the government's mistakes is enough to embarrass it and force it to improve its enforcement actions.

In the design of the 'factual record' proceeding, the intentions were to avoid the creation of anything that resembles a court or any form of adjudication. Once the Council of the Commission authorizes the Secretariat to make a factual record in response to a citizen's submission, the Secretariat must undertake an investigation, gather information from all involved parties, and produce a report (the 'factual record') that outlines, in as objective a manner as possible, the history of the issue, the obligations of the Party under the law in question, the actions of the Party in fulfilling those obligations, and the facts relevant to the assertions made in the submission of a failure to enforce environmental law effectively. This outcome is not free from ambiguities. As we will see, it is even less than mere 'soft law', because the report is not formulated in normative terms, i.e. the Secretariat does not 'command' anything to the party involved. It is supposed to simply state the 'facts'. However, it would be very naive to expect that a 'mere description' does not have normative implication, when the issue is whether or not the law is being followed. As long as the facts under con-

sideration are related to laws, it is impossible to describe them without at least implying what should be done.

At any event, the possibility of having a 'watchdog' that could investigate cases of lack of environmental enforcement was seen as a big step to make governments accountable before a new kind of constituency: those who live in the countries of North America. This was considered a very important accomplishment. However, it was not enough. More serious consequences were necessary in order to avoid the temptation of ignoring the political consequences of public exposure. Thus, the countries agreed to establish a mechanism that could lead to economic sanctions. When, even after a factual record, a country falls into a persistent pattern of failure to effectively enforce its environmental law, an arbitration panel may be created in order to examine the case. If the parties do not reach an agreement, the panel may impose a monetary enforcement assessment (a fine) of up to 0.007 percent of total trade in goods between the Parties. The sum goes to a fund and shall be expended to improve or enhance the environment or environmental law enforcement in the Party complained against. If the country fails to pay the fine, the panel can determine the withdrawal of the trade benefits derived from NAFTA.

The text of NAAEC is very cautious about this extreme possibility and establishes a proceeding that allows the parties in conflict to reach an agreement before a monetary assessment is established. Moreover, as we will see below, after almost a decade there has been no attempt from any of the three parties to initiate this procedure against another and that possibility seems unlikely. However, from a strictly legal point of view, the existence of this procedure creates a completely novel situation in the relations between the countries of North America: the obligation to

enforce environmental law is not only part of their (internal) legal systems, since NAAEC is also an international duty. This is why NAFTA and its side agreement can be said to create the obligation to protect investment and also to protect the environment. It is true that the legal mechanisms provided for the former are much stronger than those for protecting the environment. But most observers agree that this was an important step. After all, NAFTA is the first trade agreement in the world that addresses environmental issues.

### 3 MEXICO'S INTERNAL RESPONSE

Not surprisingly, the relevance that environmental issues acquired during the negotiations of NAFTA meant a lot of pressure upon the Mexican government. But its willingness to sign an environmental side agreement was not enough; it was necessary to show a serious commitment at home. This circumstance combined with a tragic event: in April 1992 more than one thousand people were killed as a result of an explosion in the sewers of Guadalajara, the second largest city in the country. The public outcry that followed forced President Salinas to make changes in the environmental organization of the Federal Government. Three months later, the *Secretaría de Desarrollo Urbano y Ecología* (Ministry for Urban Development and Ecology) was replaced by the *Secretaría de Desarrollo Social* (Ministry for Social Development). Within the new ministry, two semi autonomous agencies were created in order to develop and implement environmental policies: the *Instituto Nacional de Ecología* (National Institute of Ecology, or INE) and the *Procuraduría Federal de Protección al Ambiente* (Office of the General Attorney for Environmental Protection) or *Profepa*.

It is worth stressing the unique character of this arrangement, as Mexico is probably

the only country in the world with a two-tier environmental administration, with one agency in charge of norms and regulations and another one that specializes in enforcement. In any case, the creation of *PROFEPA* in July 1992 meant the start of an aggressive program of environmental enforcement. The agency was created with the 'teeth' that critics were signaling during the negotiations of NAFTA, although this did not mean any fundamental legal change, as the authoritarian tradition of the Mexican State has traditionally given wide discretionary powers to the administration to regulate economic activities. In fact, the environmental legislation *PROFEPA* was meant to enforce<sup>3</sup> already gave the Government powers to decide closures and impose a variety of measures, without the intervention of the Courts.

With all the legitimacy provided by both the internal and the external circumstances, and with the help of a timely World Bank loan that allowed the hiring of more than three hundred new inspectors, *PROFEPA* began its enforcement program in mid 1992. Not only did the number of inspections increase by more than ten times - from one thousand a year to one thousand a month<sup>4</sup>, the measures taken as a result of visits became more severe. In its first year, one of every four inspections ended with a (total or partial) closure, a measure that was lifted only when violations were corrected or when a clear timetable was established to correct them. Although some companies complained that this was 'environmental terrorism', it was the only way that industry would begin taking its legal obligations seriously. In two years, the proportion of the inspected facilities with 'serious violations' dropped from 24 to 4 percent. By 1996 it was less than 2 percent<sup>5</sup>. This does not mean that in such a brief period Mexican industry reached levels of 'excellence' in their environmental performance<sup>6</sup>; but it does mean that many

of the gross violations (that are not so difficult to correct) were dealt with for the first time. This should not be surprising, when one thinks that before environmental enforcement was almost non-existent in the country.

Now the scheme was not only bold; it was also smart. It combined the 'stick' of administrative inspections with the 'carrot' of voluntary environmental audits<sup>7</sup>. Obviously, it was unthinkable to close down every industrial facility with serious violations. Power plants, oil refineries and other facilities could not stop operating overnight. So *PROFEPA* established a voluntary program. Those who join the program are free from inspections (except if there is an emergency or a citizen complained) and are given the time they need to correct the problems identified by a private auditor. In exchange, the audit is comprehensive, i.e., it covers all aspects of the facilities' environmental performance. This means that apart from complying with Mexican standards where applicable, they have to adopt international standards in those areas not covered by the former. The audit results in an Action Plan, with a detailed list of corrections. Once the facility concludes that Plan, it gets a 'Clean Industry' Certificate.

At that time, there was not even a reference to environmental audits in Mexican legislation.<sup>8</sup> Interestingly enough, however, auditing was mentioned by the NAAEC as one of the means through which North American Countries could promote compliance (Article 5,1,f). So it is obvious that the adoption of this innovative instrument in Mexico was a direct product of the NAFTA negotiations. In a few years, many large facilities throughout the country joined it, mainly because it offered a 'safe harbor' against inspections. For most observers, the environmental benefits were worth the price of not imposing sanctions, for each facility spent around one million dollars in average in order to comply with

the Action Plan. Every year an average of 250 new plants joined the program and by year 2000 they reached a total of 1,700. To give an idea of the coverage of the program, it suffices to say that those plants produce over 60% of the industrial GNP in the country (*PROFEPA*, 2000).

Thus, when the Clinton Administration had to report to Congress on the effects of NAFTA, the auditing program was highlighted as a proof that Mexico was committed to take environmental compliance seriously:

"The Mexican government has instituted an innovative auditing program to promote industry leadership in voluntary compliance. As of April 1997, 617 facilities have completed environmental audits, and 404 have signed action plans to implement recommended improvements to attain, continually assure, and exceed compliance." (President of the United States of America, 1997, 125)

Later, an independent report by Harvard University confirmed that the Mexican auditing program was a sound instrument for getting beyond compliance with environmental law<sup>9</sup>. Obviously, if firms joined the 'voluntary' program, that was because they feared the possibility of being shut down. Those were clear signals that Mexico was making a real effort in the area of enforcement.

Another turning point was the creation of a new ministry at the beginning of Ernesto Zedillo's Administration (1994-2000). *Semarnap* (*Secretaría de Medio Ambiente, Recursos Naturales y Pesca*, or Ministry for the Environment, Natural Resources and Fisheries) integrated for the first time the green and the brown agendas. The enforcement branch of *Semarnap*, *Profepa* began to operate in forestry, fisheries, endangered species and coastlines, the only environmental area at federal level in which *Profepa* does not have enforcement powers refers to water pollution.

At this point, we can address a fundamental question: Is it possible to enforce environmental law in all its areas? The truth is that the difficulties of complying with the law are extremely diverse. Even if this is an over simplification, we can say that most industrial firms are capable of reaching reasonable levels of compliance. That is what the experience of *Profepa* makes clear. In contrast, there are two other areas in which it is extremely difficult for any enforcement agency to bring about compliance. Those areas are deforestation and domestic water discharges. It is worth looking at the social and political conditions under which those 'violations' take place, in order to consider whether or not they can have 'consequences' for Mexico in terms of the NAAEC.

Mexico has one of the highest deforestation rates in the hemisphere. More than one million acres of forests of different sorts are lost every year. This takes place through three different categories of practices: unsustainable forestry, the conversion of forested areas into agriculture, and the intensification of certain practices associated with traditional rural society. Although we can find situations in which these three categories occur, it is important to recognize their differences, because they are part of different economic processes.

Unsustainable forestry — i.e. the extraction of timber beyond the rate of self-renewability — is a commonly known form of deforestation. Misconceived and erratic government policies have played a mayor role in encouraging unsustainable forestry. For the most part of the twentieth century, the primary way in which the Mexican government tried to avoid the destruction of forests was by establishing *vedas* (i.e. a moratorium on logging). This of course creates a black market for forest products and prevents the development of professional skills among the owners of forests and its

resources. Moreover, when forest projects were approved, permits were given not to the owners of those forests but to private or state owned corporations. Although more than three fourths of Mexico's forests are the common property of agrarian communities (*ejidos* and *comunidades*), they were only able to collect a small rent for allowing those corporations to use their forests. In the late-eighties, government policies began to promote forestry projects conducted directly by the owners of the forests. Thus, in many regions of the country they have just begun to engage directly in the use of their own forests. The learning process is only beginning and there are still serious problems with community forestry, but most observers agree that sustainable use of the forest by the owners is a better alternative than just making all logging illegal.

The second category of practices that lead to deforestation is the conversion of forests into agricultural areas. Indeed, it has been the major cause for deforestation in Mexico. Although the data available is extremely scarce, we can agree on the fact that much more tropical forest has been lost to agriculture and cattle raising than to forestry. The causes for this 'change of land use' are multiple, including an encouragement by certain public policies that recently have been recognized as fundamentally wrong. One of the worst mistakes of agricultural policies of the last four decades refers precisely to the belief that land in the tropics would be more 'productive' without its native vegetation. 1) peasants' property rights over forests were protected only if they converted them into agricultural production. 2) colonization policies populated the tropics with peasants with no previous experience in the management of these fragile ecosystems. 3) public loans were available for cattle raising, even in natural protected areas, and 4) huge agricultural projects were intended to profit with the

supposed fertility of land in the tropics (Tudela, 1988).

By and large, those policies were still in effect during the eighties, so it is not surprising that many rural communities still now want to transform their forested areas for producing crops and/or cattle. This happens particularly where there is no timber with significant economic value (as in the seasonally dry forest type, or *selva baja caducifolia*) and residents have not developed the ability to make a sustainable use of the resources of the forested areas. In all these cases, peasants do not take advantage of the forest. They simply remove it because it is an obstacle to short-term profitable activities. In spite of recent efforts (*Semarnap*, 2000 and Giugale, et al, 2001) there is still a long way to go before the inertia of many decades of wrong policies can be offset by new policies.

The third category of practices that lead to deforestation is associated with certain activities that are traditional in rural life. The use of wood as fuel at home, the use of forested areas for grazing, as well as the use of fire in the 'slash and burn' technique, are some of these traditions that pose a threat to tropical ecosystems, when population growth make them unsustainable.

This brief account does not try to cover all the different processes that lead to deforestation. We only try to illustrate how different practices can fall into the same legal category. Cutting trees without a permit (an illegal action) can be part of very different economic activities. It can be part of the world of sustainable forestry or of agricultural production – i.e. using the forest versus just destroying it. Also, it can be related to consumption practices of poor rural societies (fuel woods) or to those of affluent urban societies - charismatic flora and wildlife species. Above all, those activities can be seen as the normal way of doing things (mainly by local communities), or as crimes (through a legalistic gaze). In

other words, violations are not seen at the local level as 'deviant' behavior, and that is why compliance with environmental law cannot be attained only through enforcement actions. Adapting human behavior to legal rules involves, in the case of deforestation, nothing less than profound changes in the cultural and economic structure of rural societies.

There is another area in which we can observe a massive lack of compliance with environmental law: Domestic water discharges. Certainly, several industrial sectors are responsible for the contamination of lakes and rivers. But that can be dealt with through instruments like those *Profepa* has used for air emissions, hazardous waste, and so on.<sup>10</sup> Nevertheless, domestic water discharges are a far more difficult problem. As a recent report by the North American Environmental Cooperation Commission states, "in Mexico only a small proportion of municipal...discharges is adequately treated" (CCA, 2001, 37). Here, a 'small proportion' means just around 10 percent (Giugale et. al. 2001, 121). For a country with more than seventy million people in urban areas, this represents an enormous challenge. The problem, of course, is the extremely weak financial situation of local authorities in Mexico. Compliance involves the building and operation of treatment facilities for which there are not enough public resources. If collecting taxes from urban dwellers for the provision of water is difficult, when it comes to charging for the treatment of their waters, most local politicians consider that as an impossible task. According to the law, local authorities should pay penalties to the Federal Government for discharging untreated water. But this law has been systematically ignored. Last December, President Fox issued a Decree absolving municipalities from all the debts they had accumulated for not treating their discharges. The justification, explicitly stated in the Decree, was

that local authorities just do not have the resources to comply with the law.

We have gone to some length regarding two particular areas in which there is a 'persistent pattern' of violations of environmental law; and the pattern is persistent because there are structural limits to what can be attained through enforcement actions. Also, these areas are important because they represent extremely severe environmental problems. Now the interesting thing is that none of them can lead to the imposition of the economic sanctions established in the NAAEC. The fear that created those sanctions referred to the use of a country as an 'environmental heaven' (i.e. to the economic consequences of certain behaviors against the environment, not to environmental degradation as such). Activities of practices that do not produce such economic consequences are not sanctioned. Some observers have taken this point too far. For example, for Barbara Hogenboom, "[t]he enforcement provisions of the supplemental agreement concern environmental laws and are explicitly non-applicable to domestic regulations that primarily regulate exploitation and harvesting of natural resources, and to environmental matters that are not connected with trade" (Hogenboom, 1998, 218). The truth is that this exclusion applies only to the economic sanctions established by the agreement, and it is still possible to promote a factual record for lack of enforcement even if this does not have trade implications. To be sure, the possibility of embarrassing a government is still there for environmental violations in all areas. Nevertheless, it remains a fact that the worst consequences that the NAAEC established for those countries that do not enforce their laws will only apply when economic interests are at stake. This means that Mexico will not have to bear an economic cost for the most serious and generalized forms of non-compliance of its environmental laws.

It is important to stress that in those areas directly related to international trade, compliance is not a problem for those responsible for industrial facilities. After all, most environmental standards in industrialized countries adapt to what industry can actually do. Thus, fears from all sides proved wrong, mainly because the widespread violations of environmental law we have just described do not have an impact in international trade. By the same token, no one was put out of business due to the economic cost of attaining compliance. Far from the dark scenarios that some observers depicted ten years ago, NAFTA and its environmental side agreement have benefited the region by putting the environment in the emerging regional agenda.

#### 4 NAAEC NINE YEARS LATER

A clear indication that fears around environmental issues in the negotiation of NAFTA were basically wrong is the fact that, almost a decade later, no party in the treaty has threatened to use economic sanctions against another party for some persistent pattern of lack of enforcement of environmental law. On the other hand, there has been an important number of citizens' submissions. As of May 2002, 33 submissions had been received: 14 against Mexico, 11 against Canada and 8 against the USA. However, the consequences of these procedures have been perfectly tolerable. In fact, even if Mexico has had to respond to more submissions than Canada and the USA, this has not meant a major problem for authorities or for investors in the country.

It is true that Mexico had problems in accepting the first factual record (Construction and Operation of a Public Harbor Terminal for Tourist Cruises on the Island of Cozumel). But the reason was that the government actions that were being put into question in that case had taken place before NAFTA entered into force. So Mexico had to allow a retroactive application of the new mechanisms, so as not to appear as 'boycotting' them.<sup>11</sup> Thereafter, Mexico, as much as the other two countries, has responded to citizens' submissions as one more of the various tasks of environmental administration, i.e., as a matter of routine. Unfortunately, for too many observers, it is very important that a government accepts a factual record 'grudgingly' or 'willingly', as if human emotions (the mood of politicians and civil servants) were a relevant issue in international relations. If we look at the 'facts' – and we will see this is a tricky question – factual records have not recorded any 'persistent pattern' of lack of environmental enforcement. They is a new arena for the debate of environmental issues, and its consequences have been very similar throughout the region: raising the intensity of the environmental debate.

Moreover, the Commission for Environmental Cooperation has become an institutional space in which cooperation has been far more important than conflict. The environmental authorities of the three countries have had an opportunity to share their views on policy options, to develop common indicators and, above all, to foster debates about environmental problems at a regional level. This is apparent with a quick view to the list of publications of the CEC

Citizens' Submissions before the CEC: May 2002

Country	Active Files (11)	Closed Files (22)	TOTAL (33)
Mexico	6	8	14
Canada	4	7	11
USA	1	7	8

web page.

One example of cooperation is the Resolution adopted by the Council in its 1998 meeting at Pittsburgh, regarding environmental management systems (EMS) and compliance certification. For some years, the ISO 14001 series had become a fashionable way for corporations to display environmental excellence. For the Mexican authorities this presented a problem, because some big corporations that were still far from full compliance of their legal obligations began to announce that their ISO certification was proof that they were going beyond the law<sup>12</sup>. Some of them were in the process of a voluntary audit but they had not completed their Action Plans. After months of consultation in the context of CEC, it was clear that the USEPA faced the same problem. Thus these two countries used the CEC as a forum for a strong policy statement: ISO 14001 and other EMS were recognized as useful tools for improving environmental performance, but they did not guarantee full compliance with legal obligations. That was recognized jointly by the three environmental ministries as the Council of the CEC.

Now the fact that the NAAEC has not created the sort of problems that worried some people ten years ago does not mean that the results of its operation are unproblematic. There is one aspect of the factual record proceeding that should be critically considered: the profound ambiguity of the very notion of a factual record in the context of a legal debate. It is logically impossible to produce a neutral (i.e., a non-normative) description of a fact, when that fact is seen from the perspective of the law, because law is a normative form of discourse. If one tries to make a description of a (legal) situation without clearly stating that it is legal or illegal, the result can be extremely ambiguous. In fact, many of the factual records that have been issued by the Commission, fail to declare explicitly

whether the law has been broken or not in the case in point. Thus, everyone will draw his or her own conclusions. Traditional rulings of a court system are interpretations – that one can always put into question – but they must be of a conclusive nature. In contrast, a factual record may be a text that has to be interpreted.

Let us take as an example the final report on the *Metales y Derivados* case. As in many legal cases, the applicability of certain legal rules was at stake. But the authors of the report decided that they were not going to deal with the issue. Thus the report 'concludes' that

'Without aiming to reach conclusions of law on whether Mexico is failing to enforce LGEEPA Articles 170 and 134 effectively, the information presented by the Secretariat in this factual record reveals that, as a matter of fact, the site abandoned by Metales y Derivados is a case of soil contamination by hazardous waste in relation to which measures have been taken to date have not prevented the dispersal of pollutants or prevented access to the site, which relates to the issue of whether Mexico is effectively enforcing LGEEPA Article 170. It also reveals that, as a matter of fact, no actions have been taken to restore the soil to a condition in which it can be used in the industrial activities corresponding to the zoning of the area, i.e., the Mesa de Otay Industrial Park in the city of Tijuana, Baja California, in order to enforce effectively LGEEPA Article 134. (CEC, 2002, 59/60)

How can one understand this? Although there is a clear implication that something is wrong, a reluctance to making a legal interpretation is seen in this paragraph. The text lacks a fitting conclusion, making it difficult for the common citizen to understand if a country is enforcing its environmental law or not, or even more, if the environment is being damaged or not. In this scenario, the results of factual records

like this one can be quite disappointing.

## 5 CONCLUSIONS

We have tried to show that none of the fears that the NAFTA negotiations generated on environmental issues have materialized. Almost one decade later, there are no significant social or political actors that press for a change in the statu quo and the CEC has become an important space for cooperation between the three countries.

For Mexico, NAAEC has also created a favorable atmosphere for the development and consolidation of enforcement activities within the country. Although it is difficult to assess the specific weight of internal vis á vis international factors, it is undeniable that, nowadays, Mexican authorities recognize they have a regional responsibility regarding the environment. Even if some extreme nationalists regret this as a loss of sovereignty, the fact remains that environmental policies are not responding only to developments within the country.

At the same time, there has been no indication that the worst consequences of a poor environmental performance (economic sanctions) can be suffered. Not because there is a generalized compliance with environmental law, but because the areas in which there is widespread lack of compliance are exempted from those consequences. In this respect, both the text and the operation of NAAEC are loyal to their origins: the fear of the economic consequences of environmental heavens, not environmental concerns as such. This also means that, even if NAAEC represents some interesting legal innovations, we cannot expect those innovations to play a significant role in addressing some of the most pressing environmental problems in countries like Mexico – i.e., deforestation and water pollution. The consolidation of national law (with all its socio political pre-

requisites) is a condition for addressing those problems.

## REFERENCES

1. For an excellent discussion on the process, see Hogenboom, 1998.
2. The Commission comprises a Council (with representatives of the three governments) a Secretariat and an Public Advisory Committee.
3. The *Ley General del Equilibrio Ecológico y la Protección al Ambiente* (or Ecological Balance and Environmental Protection General Act) was in force since 1988.
4. This means the Mexican Government has the capacity to inspect all the facilities within federal jurisdiction every two and a half years.
5. These gross indicators were replaced years later with the a system of indicators of compliance. By 1999, the ICNAs (*Indíces de Cumplimiento de la Normatividad Ambiental*) provided detailed information about the level of compliance of more than eight thousand plants throughout the country.
6. Indeed, there are indicators that around one third of the corporations under inspection processes do not comply with the technical measures ordered by *Profepa. Profepa*, 2000<sup>a</sup>.
7. The merit of the original institutional design of *Profepa* rests on the first Attorney General, Santiago Onate and the deputy Attorneys (engineers, by the way) Francisco Bahamonde and José Luis Calderón.
8. They were recognized as instruments of environmental policies in 1996 with the reform of the General Ecological Balance and Environmental Protection Act .
9. One of the major findings of that survey

was that "[t]he Voluntary Audit Program in Mexico is unique because it is much more than a system for verifying compliance.... risks that are not specifically regulated under Mexican federal law are also targeted for identification and correction.... We could find no other program in the world that offers all the features of the Voluntary Audit Program to its participants" (Harvard.... 2000, 39)

10. If that has not happened it is because the agency responsible for this (the National Water Commission) has neglected its enforcement program.
11. In the end, the final report in the Cozumel case did not show anything like a persistent pattern of lack of enforcement of Mexican environmental law.
12. An embarrassing situation emerged in Mexico when the first ISO 14001 certificate was issued to AHMSA, a big metallurgic compound. After the company proudly announced this as a great achievement, *Profepa* had to publicly deny that the facility in question was in compliance. That company had to wait for two more years before getting the 'clean industry' certificate for completing the Action Plan of its environmental audit.

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