Transboundary pollution in North America has received international attention for over 90 years.1 Famous, or infamous, examples from the past include the sulfur dioxide emitted by a smelter near Trail, British Columbia in the 1920s; the salinization of the Colorado River in the 1960s; and the contribution of U.S. power plants to Canadian acid rain in the 1980s. Despite a series of bilateral agreements and institutions addressing particular concerns and some notable successes, transboundary pollution continues. Indeed, every section of both borders seems to have its own notorious problem. San Diegans complain that sewage from Tijuana befouls their beaches; Texans accuse power plants in Coahuila of clouding the skies over Big Bend National Park; Mexicans protest against proposals to site waste disposal facilities in South Texas; Ontario argues that U.S. power plants cause most of its air pollution; and Alaskans worry about the downstream effects of mining in British Columbia. Moreover, thousands of sources, on both sides of the border, pollute shared bodies of water such as the Great Lakes and the Rio Grande and shared airsheds such as that over El Paso, Texas, and Ciudad Juárez, Mexico.2

What, if anything, should the North American Commission for Environmental Cooperation (CEC) do about transboundary pollution? In particular, should it coordinate the work of the bilateral institutions and fill gaps in their coverage? After evaluating how the CEC has handled issues of transboundary environmental harm, this Article concludes that the answer to this question is a qualified: “No.” The CEC should not try to oversee the work of the bilateral institutions, and it should address only one important type of transboundary pollution outside their jurisdiction: pollution that directly affects all three countries.

North American Responses to Transboundary Pollution

Responses by the federal governments (and, increasingly, subfederal governments) to transboundary pollution in North America have been similar in several ways.3 First, the governments have nearly always pursued cooperative rather than confrontational solutions. Second, their solutions have relied on international institutions, which the governments have authorized to study problems, facilitate discussion, and implement agreements. Third, these institutions and agreements were always bilateral until 1993, when the governments signed the North American Agreement on Environmental Cooperation (NAAEC) creating the CEC.

The oldest of the bilateral institutions are the International Joint Commission (IJC) and the International Boundary and Water Commission (IBWC), created, respectively, by the 1909 Boundary Waters Treaty between the United Kingdom (on behalf of Canada) and the United States, and the 1944 Water Utilization Treaty between Mexico and the United States.4 Neither of these treaties was primarily concerned with transboundary pollution, although both included provisions addressing it. The chief aims of the Boundary Waters Treaty were to establish freedom of navigation in the boundary waters along the Canadian-U.S. border (in particular, the Great Lakes and the limittrophe portion of the St. Lawrence River) and to prohibit unilateral obstruction of or diversion from the boundary waters without the approval of the IJC. The treaty prohibits pollution of the boundary waters and waters flowing across the border, but it does not give the IJC power to enforce that prohibition. It does, however, allow the Parties to ask the IJC to prepare reports on questions involving the rights, obligations, or interests of either Party in relation to the other or its inhabitants along the border, and from the inception of the agreement

The author is an Associate Professor of Law at Pennsylvania State University. From 1988 to 1994, he served as an attorney-advisor at the U.S. Department of State, where he participated in the negotiation of the North American Agreement on Environmental Cooperation. This Article is excerpted from GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION (Stanford Univ. Press, David L. Markell & John H. Knox eds., 2003), © Board of Trustees of the Leland Stanford Jr. University. All rights reserved. For further information on the book, see http://www.sup.org.

1. By “transboundary pollution,” I mean pollution arising on one side of an international border that causes harm on the other side. Although this Article focuses on transboundary pollution, transboundary environmental harm can be considered more broadly, to include harm to migratory species, for example.

2. See ENVIRONMENTAL MANAGEMENT ON NORTH AMERICA’S BORDERS (Richard Kiy & John D. Wirth eds., 1998) (describing several current transboundary problems) [hereinafter Kiy & Wirth].

3. See Roberto A. Sánchez-Rodríguez et al., The Dynamics of Transboundary Environmental Agreements in North America, in id. at 32, which describes a database of transboundary environmental agreements, including subfederal agreements, prepared for the CEC. Like other CEC documents, the database is available at http://www.cec.org (last visited Dec. 8, 2003).

the governments have used this “reference” authority to ask the IJC to examine cases of transboundary pollution.5

The primary purposes of the 1944 treaty were to allocate the water of the Colorado River and the Rio Grande between Mexico and the United States and to create dams and reservoirs in order to maximize the amount of water available. The treaty established the IBWC to develop the necessary public works and to ensure that withdrawals by each country are within the limits set by the treaty. Unlike the 1909 treaty, the 1944 treaty neither prohibits transboundary water pollution nor includes a general “reference” authority, but it does say that the governments “agree to give preferential attention to the solution of all border sanitation problems.” On the basis of this provision, in the late 1940s and early 1950s the IBWC developed a wastewater treatment plant to serve the twin cities of Nogales on the Arizona/Sonora border.6

In the 1970s, the governments moved environmental considerations from the periphery to the center of the work of the two commissions. In 1972, Canada and the United States signed a Great Lakes Water Quality Agreement setting specific objectives for water quality in the Great Lakes and mandating detailed programs to meet those objectives. The agreement authorized the IJC to assist the Parties in implementing the agreement and to report and make recommendations on the water quality of the Great Lakes and the goals of the agreement.7 The next year, under the auspices of the IBWC, Mexico and the United States resolved Mexican complaints about the salinity of the Colorado River.8 In 1979, they approved a decision of the IBWC to treat all cases of transboundary water pollution that endanger the health of the inhabitants of either side of the border or impair the uses of the border waters as “border sanitation problems” for which the IBWC would recommend specific responses, effectively enhancing its authority to plan and build wastewater treatment plants along the border.9

In 1983, Mexico and the United States signed the La Paz Agreement, which for the first time established a framework for addressing all border environmental issues.10 Rather than creating another bilateral institution with quasi-independent commissioners, like the IJC and IBWC, the La Paz Agreement provides for an ongoing dialogue between the federal governments, led by two “national coordinators,” who oversee permanent working groups, composed of government experts, with mandates to exchange information and coordinate policies on particular issues, including air pollution, water pollution, and hazardous waste. In the 1980s, the Parties added five annexes to the La Paz Agreement, through which they agreed to specific obligations on, among other things, air pollution and transboundary shipment of hazardous substances.

In the early 1990s, the North American governments reached two more bilateral agreements. Spurred by Canadian complaints over the contribution by U.S. industrial sources to acid rain in Canada, Canada and the United States signed an Air Quality Agreement in 1991. Like the Great Lakes Water Quality Agreement, it includes specific restrictions on emissions of pollutants and gives the IJC a role (albeit a minor one) in overseeing its implementation.11 Shortly thereafter, during the North American Free Trade Agreement (NAFTA) debate, it became obvious that the growth in population and industry in northern Mexico resulting from the maquiladora program had overwhelmed facilities for water, wastewater treatment, and municipal waste disposal, and that on the U.S. side of the border, unscrupulous developers had built hundreds of colonias—groups of houses with little or no access to drinking water or waste disposal. As a result, in 1993, Mexico and the United States signed an agreement creating two new organizations, the Border Environment Cooperation Commission (BECC) and the North American Development Bank, and charged them with certifying and helping to fund water, wastewater, and solid waste facilities along the border.12

The Authority of the CEC to Address Transboundary Pollution

As the brief history in the preceding section shows, the North American nations have never developed an overall plan to address transboundary environmental harm. Instead, for nearly a century the governments have responded to particular problems one by one, usually by establishing, or referring problems to, a bilateral organization. The resulting patchwork of institutions, each with its own mandate and jurisdiction, has been criticized for not addressing transboundary environmental problems comprehensively. It is tempting to see the CEC, a trilateral organization with broad mandates to address almost any type of environmental problem in the continent, as the answer to this criticism.

Could the CEC play this role? Article 10(2)(g) of the NAAEC authorizes the Council of the CEC to consider, and make recommendations regarding, “transboundary and bor-

5. In only their second reference to the IJC, in 1912, the governments asked it to investigate pollution of boundary waters on one side of the border that affected the boundary waters on the other side. The IJC recommended that the governments authorize it to regulate transboundary pollution, but the governments did not accept a convention drafted by the IJC in 1920 that would have given it broad powers to do so. Before the 1970s, the governments made nine more references asking the IJC to report on particular instances of transboundary pollution. See Richard B. Bilder, Controlling Great Lakes Pollution: A Study in United States-Canadian Environmental Cooperation, 70 Mich. L. Rev. 469, 489-501 (1972).


8. Agreement Approving IBWC Minute 242 Setting Forth a Permanent and Definitive Solution to the International Problem of the Salinity of the Colorado River, Aug. 30, 1973, 24 U.S.T. 1968. Essentially, the United States agreed to ensure that the water of the Colorado River would not exceed a specified salinity when it crossed the border into Mexico.


der environmental issues.” Articles 10(7), 10(8), and 10(9) specifically instruct the Council to consider two cross-cutting procedural issues: transboundary environmental impact assessment (EIA) and reciprocal access to domestic legal remedies for transboundary harm. Moreover, the general powers of the CEC to promote environmental protection throughout the continent do not exclude the border regions or transboundary issues. The Council and Secretariat could use the ability of the CEC to investigate, issue reports, make recommendations, and facilitate agreements to address almost any issue of transboundary harm, including those that might also fall within the jurisdiction of bilateral institutions. Although the commissioners of the IJC, the IBWC, and the BECC might object, there is little doubt that the governments could, if they chose, use the CEC to coordinate their responses to transboundary pollution in North America. In particular, the CEC could oversee the work of the bilateral institutions and fill gaps in their coverage.

In practice, the governments have not asked the CEC to oversee the bilateral institutions, and the CEC has showed little interest in addressing many issues of transboundary pollution, even those not within the jurisdiction of the bilateral organizations. Is this a mistake? Should the CEC play a more active role with respect to transboundary pollution? One way to answer these questions is to examine the record of the CEC with respect to its specific mandates to address transboundary EIA and access to domestic legal remedies for transboundary harm. These mandates are relatively narrow and do not fall within the jurisdiction of any of the bilateral institutions. They therefore provide the CEC a relatively uncomplicated opportunity to demonstrate whether it can address issues of transboundary pollution effectively. The following sections describe each mandate and the record of the CEC in fulfilling it.

Transboundary EIA

The domestic law of each of the North American nations requires potential environmental impacts of certain actions to be assessed before the actions are undertaken. The laws are similar in important respects. Each law provides opportunities for public participation in the EIA procedure. Each country uses EIA to force government decisionmakers to take environmental considerations into account in deciding whether to carry out or authorize a project; the laws do not prevent the decisionmakers from deciding that other factors outweigh the environmental costs and allowing a potentially harmful project to proceed. An important difference, however, is that Canadian and U.S. federal laws normally require EIA only for actions involving the federal government, while Mexico requires EIA for both public and private projects that fall within specified categories. Another point on which the North American laws are not in harmony is whether to require EIA of the extraterritorial effects of projects within each country’s jurisdiction, i.e., transboundary EIA. Canadian law requires EIA of federal projects to include transboundary effects, and it also provides that the federal government may assess the transboundary impacts of other, nonfederal projects. The law in Mexico and the United States is less clear. U.S. law does not specifically address transboundary EIA. Although some judicial decisions have assumed that the federal government should take into account extraterritorial effects of actions within the United States, courts have not held that federal law requires that result. Similarly, the Mexican statute requiring EIA does not say whether it must include the extraterritorial effects of actions within Mexico. A 1988 regulation implementing the statute seemed to require EIA for projects with extraterritorial effects, but it was replaced in 2000 by a regulation that does not mention transboundary EIA.

An international agreement requiring transboundary EIA could ensure that all three countries fully consider the extraterritorial effects of projects within their jurisdiction. Canada, the country with the clearest domestic authority to conduct transboundary EIA, proposed including a reference to it in the NAAEC. The proposal eventually became Article 10(7), which requires the Council to “consider and develop recommendations” regarding transboundary EIA, “with a view to agreement between the Parties pursuant to this Article within three years [that is, by January 1, 1997] on obligations.” The Council and Secretariat moved fairly quickly to prepare the groundwork for meeting this goal. In October


14. CEAA §2(1) (defining “environmental effect” that is to be assessed to include transboundary effects); §47 (authorizing ministers of environment and foreign affairs to refer projects for assessment of their transboundary effects where they are not otherwise subject to EIA under the CEAA and they may cause significant adverse environmental effects outside Canada).

15. See Swinomish Tribal Community v. Federal Energy Regulatory Comm’n, 627 F.2d 499, 10 ELR 20628 (D.C. Cir. 1980) (assuming that NEPA applies to effects in Canada of raising dam on Skagit River); Wilderness Soc’y v. Morton, 463 F.2d 1261, 2 ELR 20250 (D.C. Cir. 1972) (assuming that NEPA applies to Alaskan oil pipeline’s impacts in Canada). In Environmental Defense Fund v. Massey, 986 F.2d 528, 23 ELR 20601 (D.C. Cir. 1993), the court held that NEPA required EIA for federal decisions taken in the United States whose effects would occur in Antarctica. If extended to effects in sovereign countries, the holding would seem to require transboundary EIA. No court has so extended it, however. See NEPA Coalition of Japan v. Aspin, 837 F. Supp. 466, 24 ELR 20648 (D.D.C. 1993) (declining to require EIA for U.S. military bases in Japan).

16. See Reglamento de la LGEEPA en Materia de Impacto Ambiental, art. 5, §XIII, Diario Oficial de la Federación (June 7, 1988); Reglamento de la LGEEPA en Materia de Evaluación del Impacto Ambiental, Diario Oficial de la Federación (May 30, 2000).

17. Some North American agreements might already seem to require transboundary EIA. See La Paz Agreement, supra note 10, art. 7 (“The Parties shall assess, as appropriate in accordance with their respective national laws, regulations and policies, projects that have significant impacts on the environment of the border area, that appropriate measures may be considered to avoid or mitigate adverse environmental effects.”); Air Quality Agreement, supra note 11, art. V(1) (“[e]ach Party shall, as appropriate and as required by its laws, regulations and policies, assess those proposed actions, activities and projects within the area under its jurisdiction that, if carried out, would be likely to cause significant transboundary air pollution, including consideration of appropriate mitigation measures”). Despite the apparent meaning of these provisions, however, they seem to have been interpreted to avoid requiring the Parties to do more to assess transboundary effects than their domestic law already requires them to do.

In 1991, Canada and the United States, together with many European countries, signed the Espoo Convention on Environmental impact in a Transboundary Context, Feb. 25, 1991, 30 I.L.M. 800, which would clearly require transboundary EIA. Canada ratified the convention in 1998, but the United States has yet to ratify it.
1995, in one of its first resolutions, the Council adopted overarching principles to guide the implementation of Article 10(7). The Secretariat prepared background papers comparing the domestic EIA laws of the Parties and describing international precedents for transboundary EIA. 18

The Parties began their talks by convening an expert group composed of federal officials, who released a draft agreement on transboundary EIA in 1997. The draft agreement would require the “Party of origin”—that is, any Party within whose territory a proposed project would be undertaken—to take several actions: (1) notify “potentially affected Parties” of proposed projects if the projects are either: (a) located within 100 kilometers of a border and of a type listed in an annex to the agreement; or (b) determined by the Party of origin to have the potential to cause adverse transboundary environmental impacts; (2) assess the transboundary environmental impacts of proposed projects; and (3) allow the potentially affected Party and its public to participate in the assessment process. 19

In June 1997, the Council issued a resolution stating that the Parties “agree to complete a legally-binding agreement consistent with their obligations under Article 10(7) . . . by April 15, 1998.” But more than five years past that deadline, the negotiations are still not complete. The Parties are deadlocked over the scope of the agreement—specifically, which actions should be considered “proposed projects” and therefore subject to notification and assessment. Article 10(7) contemplates that the agreement will apply only to proposed projects that are “subject to decisions by a competent government authority.” This language does not clearly cover decisions by subfederal governments. As I have argued elsewhere, the general approach of the agreement is to extend the Parties’ domestic EIA laws to transboundary effects, rather than require substantive changes to them. 20 That approach might suggest that Canada and the United States would only require transboundary EIA for projects with federal involvement, since those are the projects normally subject to EIA under their federal laws. But Mexico has argued that since its law requires EIA for certain private projects with no federal involvement, Canada and the United States must ensure that projects with state and provincial government involvement are included in order to make the obligations of the Parties more closely equivalent.

Of course, the agreement could also make the obligations equivalent by requiring transboundary EIA only for projects with federal involvement and providing that Mexico need only undertake transboundary EIA for projects of a type for which EIA would be required under Canadian or U.S. law. But Mexico finds that alternative unpalatable. Its position results in large part from recent proposals to build facilities near Sierra Blanca, Texas. These facilities are not typically federal projects for the purpose of U.S. federal EIA law, and would not be covered by a transboundary EIA agreement whose scope was limited to projects with federal involvement. Although Texas eventually denied a permit to the Sierra Blanca facility, Mexican officials have made clear that they cannot accept a transboundary EIA agreement that would not apply to similar proposals in the future. 22 Legally, the United States could almost certainly extend EIA to nonfederal projects with extraterritorial effects on the basis of an international agreement requiring it do so. It is doubtful, however, that such an effort by the U.S. government would receive the necessary political support. Canada appears to face similar constraints. 23 As a result of these conflicting pressures, the negotiations for an agreement on transboundary EIA are at an impasse.

Reciprocal Access to Domestic Legal Remedies for Transboundary Pollution

Legal obstacles often restrict the ability of foreign residents to bring claims for transboundary pollution in domestic courts. A famous example is the Trail Smelter 24 dispute. If the farms affected by the pollution from the smelter had been in British Columbia, their owners could have brought a nuisance claim there. But Canadian courts had adopted the local action rule, under which a court may hear claims for damage to land only if the land is located within the jurisdiction of the court. The Washington farmers were therefore without an effective legal remedy. 25 The Trail Smelter case was eventually resolved through international arbitration of a claim brought on the farmers’ behalf by the U.S. government. 26 But international arbitration is expensive, controversial, and slow, and governments have rarely been willing to pursue it on behalf of citizens alleging transboundary harm.

In the 1970s, the Organization for Economic Cooperation and Development (OECD) encouraged its Member coun-


21. For a description of several of the proposals and the local opposition to them, written by one of the opponents, see Alfredo Gutiérrez Jr., Milagro Beanfield War Revisited: Low-Level Hazardous Waste Sites in Del Rio, Dryden, and Spofford, Texas, in Kiy & Wirth, supra note 2, at 221.


23. In ratifying the Espoo Convention, Canada attached a reservation “in respect of proposed activities (as defined in this [c]onvention) that fall outside of federal legislative jurisdiction exercised in respect of environmental assessment.” Although CEAA 47 seems to give the federal government broad authority to require transboundary EIA for projects without federal involvement, it leaves the decision to the discretion of federal officials. It has been suggested that even though the Canadian Constitution provides a strong basis for the exercise of federal jurisdiction with respect to transboundary impacts, the federal government will be reluctant for political reasons to exercise that jurisdiction. Steven A. Kennett, The Canadian Environmental Assessment Act’s Transboundary Provisions: Trojan Horse or Paper Tiger?, 5 J. ENVTL. L. & PRAC. 263 (1995).

24. 3 R.I.A.A. 1905 (1941) (U.S. v. Can.).

25. See John E. Read, The Trail Smelter Dispute, CANADIAN Y.B. INT’L L. 213, 222 (1963). The farmers could have tried to sue the smelter in Washington, but jurisdiction over foreign polluters is not always clear and enforcing judgments against them is usually problematic.

tries to adopt the principle of equal access. Equal access would allow a resident of a country who is or may be harmed by transboundary harm to seek relief through legal proceedings in the country in which the harm originates. It would not require the creation of new substantive standards for transboundary pollution; it would only allow foreign residents to pursue whatever remedies the country of origin would provide to its own residents if the harm occurred there. The concept is also limited to allowing the victims of transboundary harm to sue the polluter in the country where the pollution originates; it does not speak to whether victims may sue the polluter in their country. The appeal of equal access is that opening domestic courts to claims of transboundary pollution would allow international disputes to be resolved through existing courts, on the basis of existing law, without the involvement of the federal governments.

Some domestic laws in North America provide for equal access on a reciprocal basis with respect to particular types of harm. For example, U.S. laws allow foreign residents to recover response costs and damages resulting from discharges of oil or hazardous waste in their territorial sea or navigable waters from vessels or facilities under U.S. jurisdiction, as long as the claimants’ country provides a comparable remedy for U.S. claimants. But these laws obviously do not apply to most instances of transboundary pollution. More generally, the U.S. and Canadian governments have adopted laws giving foreign governments limited rights to participate in administrative hearings designed to address whether domestic air and water pollution standards should be tightened to regulate transboundary pollution. In practice, however, these provisions seem to have been of little or no value. The country of origin has been unwilling to invoke the provisions, and the country affected by the transboundary pollution has been unable to force it to do so.

In 1979, a joint working group of the American and Canadian Bar Associations incorporated the OECD proposal into a draft treaty, which would require each country in which transboundary pollution originates to ensure that any victim of the pollution residing in the other country would receive treatment at least equivalent to that afforded in the country of origin. Despite the endorsement of the bar associations, the governments did not pursue adoption of the draft treaty. The bar associations next proposed reciprocal legislation. At their suggestion, a liaison committee of the U.S. National Conference of Commissioners on Uniform State Laws and the Canadian Uniform Law Conference drafted a Uniform Transboundary Pollution Reciprocal Access Act in 1982. Its key provision states:

> A person who suffers, or is threatened with, injury to his person or property in a reciprocating jurisdiction caused by pollution originating, or that may originate, in this jurisdiction has the same rights to relief with respect to the injury or threatened injury, and may enforce those rights in this jurisdiction as if the injury or threatened injury occurred in this jurisdiction.

If adopted by federal and subfederal governments, this language would provide equal access on a reciprocal basis throughout North America. It has not been widely adopted, however, for several reasons. First, it excludes Mexico. It defines “reciprocating jurisdiction” as a Canadian province or U.S. state or territory that has either enacted the Act or that “provides substantially equivalent access to its courts and administrative agencies,” and its commentary makes clear that it “does not apply to U.S./Mexico transboundary pollution or to pollution from any other nation.” Second, the Canadian and U.S. governments have shown no interest in adopting the Uniform Act at the federal level. Third, the initial interest in the Act by Canadian provinces and U.S. states has waned. In the first 10 years after its adoption by the uniform-law conferences, 7 states and 4 provinces enacted it, but none has done so since 1992.

Against this backdrop, the inclusion of two provisions in the NAAEC on reciprocal access appeared to indicate that the Parties would renew efforts to obtain reciprocal access throughout North America. Article 10(8) of the NAAEC calls on the Council to “encourage the establishment by each Party of appropriate administrative procedures pursuant to its environmental laws to permit another Party to seek the reduction, elimination[,] or mitigation of transboundary pollution on a reciprocal basis,” and Article 10(9) requires the Council to consider and, as appropriate, develop recommendations on the provision by a Party, on a reciprocal basis, of access to and rights and remedies before its courts and administrative agencies for persons in another Party’s territory who have suffered or are likely to suffer damage or injury caused by pollution originating in its territory as if the damage or injury were suffered in its territory.

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30. See Her Majesty v. EPA, 912 F.2d 1525, 20 ELR 21354 (D.C. Cir. 1990) (refusing to overturn U.S. Environmental Protection Agency’s (EPA’s) rejection of a petition by Ontario seeking to trigger §115 of the CAA). See also Thomas W. Merrill, Golden Rules for Transboundary Pollution, 46 Duke L.J. 931, 959 (1997) (concluding that §115 has “proven to be a dead letter”).

31. See Report of the Joint Working Group to the 1979 Annual Meeting of the Canadian Bar Association, in Settlement of International Disputes Between Canada and the USA: Resolutions Adopted by the American Bar Association on 15 August 1979 and by the Canadian Bar Association on 30 August 1979 With Accompanying Reports and Recommendations (American Bar Ass’n & Canadian Bar Ass’n eds., 1979).

32. Uniform Transboundary Pollution Reciprocal Access Act §3.

33. See id. §(1) and accompanying text.


The implementation of Articles 10(8) and 10(9) has been disappointing, however. The Council has made no effort to encourage reciprocal access, either by governments to administrative relief or by citizens to legal remedies. The only step toward implementation of either of the provisions is a Secretariat report, published in 1999, which describes potential legal barriers in each country to equal access and concludes that serious obstacles still exist. 30 For example, most Canadian provinces continue to apply a strict version of the local action rule, which would prevent transboundary suits based in nuisance. 31 In the United States, the local action rule appears unlikely to be a barrier in many cases, but some courts have denied standing to Canadian plaintiffs under U.S. statutes on the basis of a presumption that the statutes are not concerned with the environment beyond U.S. borders. 32 More generally, while few statutes in Canada and the United States explicitly bar foreign residents from bringing suit, few statutes explicitly provide that they may have standing. As a result, their right to participate in domestic legal proceedings is often uncertain. As for Mexico, the report concludes that the problem is not that domestic remedies for environmental harm “do not have the same scope as the remedies available in Canada and the United States.” 33

The joint working group of the bar associations, which has included representatives from the Mexican bar since the early 1990s, reviewed the Secretariat report on reciprocal access in draft in 1997. It noted that the North American countries could provide for equal access through a treaty, but that a treaty would face political and legal difficulties and the Canadian and U.S. governments had shown no interest in a treaty in the past. The joint working group recommended that the NAAEC Parties instead build on the Uniform Act by amending it to apply to Mexico and by pursuing wider adoption of it by federal and subfederal governments throughout North America. 34 The Council has not taken any action in response to these recommendations or the Secretariat report.

When Should the CEC Address Transboundary Pollution?

Why has the CEC failed to fulfill its specific mandates on transboundary environmental harm? And what lessons does its failure have with respect to its ability to address transboundary pollution in other ways?

Although many factors may have contributed to the failure of the CEC to facilitate agreement on transboundary EIA and to promote reciprocal access to domestic legal remedies, one obvious problem is that the CEC is a trilateral organization and these issues are essentially bilateral. A common theme among theorists and diplomats is that international agreements become more difficult as more countries are added to the mix. Richard Williamson, a former U.S. diplomat, says: “The preponderant fraction of environmental issues with international implications is bilateral and should be handled as such. With few exceptions, bilateral negotiations are far more efficient than multilateral diplomacy.” He says that this point “should seem so obvious as to merit mention not...” 35 There are strong pressures to regionalize or globalize problems which are inherently national or bilateral in scope, in the mistaken belief that doing so will accelerate progress.” 36

Seeking a uniform trilateral agreement on transboundary EIA has prevented the Parties from seeking more attainable bilateral agreements. If Canada and the United States were not enmeshed in the stalled trilateral negotiation, they could reach a bilateral agreement tomorrow. But that potential agreement is blocked by the deadlock between Mexico and the United States over how to address EIA along their border. Similarly, the Council’s lack of interest in reciprocal access may be due in part to the fact that the obstacles to access are quite different along the two borders. For example, Canada is still grappling with the local action rule, while in Mexico, according to the Secretariat report, the problem is generally inadequate remedies for environmental claims. Moreover, some state and provincial laws already provide for reciprocal access along the Canada-U.S. border. Pushing that legislation further or extending it to the federal government raises different issues than introducing equivalent legislation for the first time along the U.S.-Mexico border. Attempting to find continentwide solutions for the lack of reciprocal access thus may obscure the problems rather than shed light on them. 37


37. Id. at 229-30. The provinces that appear to have done away with the rule are Manitoba, Nova Scotia, Ontario, and Prince Edward Island. Quebec never adopted the local action rule, an artifact of common law, but it did have a civil-law equivalent, which it has now repealed. Id.

38. See id. at 232-36. See also, e.g., Corrosion Proof Fittings v. EPA, 947 F.2d 1201, 22 ELR 20304 (5th Cir. 1991) (holding that the governments of Canada and Quebec did not have standing to contest an EPA rule banning asbestos because the statute on which the rule was based did not require EPA to consider extraterritorial effects); Detroit Audubon Soc’y v. City of Detroit, 696 F. Supp. 249, 19 ELR 20170 (E.D. Mich. 1988) (holding that Ontario lacked standing to bring suit under the Michigan EPA because the CAA was concerned with protecting Michigan’s natural resources), rev’d on other grounds sub nom. Her Majesty v. City of Detroit, 874 F.2d 332, 19 ELR 20888 (6th Cir. 1989).


40. See Recommendations of the Joint Working Group of the American Bar Association, Barra Mexicana, and Canadian Bar Association (1997) (on file with author). Members of the joint working group participated in drafting the CEC report on reciprocal access. I have been a member of the joint working group since 1994 and helped to draft and review the report.


42. I do not mean to suggest the difficulty of addressing reciprocal access on a trilateral basis is the main reason that the federal governments have not pursued the issue. Other reasons may include disinclination among the governments, especially in Canada and the United States, to take action on an issue that would require changes in state and provincial laws, and a lack of pressure from environmental groups to clarify the rules concerning reciprocal access. This lack of pressure is somewhat puzzling, but it may result from a belief that despite the legal obstacles, foreign residents do have some access to domestic courts for transboundary pollution claims. See, e.g., United States v. Hooker Chems. & Plastics Corp., 101 F.R.D. 444 (W.D.N.Y. 1984) (allowing Ontario to intervene in a case involving transboundary pollution to protect its nuisance claim); Michel v. Great Lakes Steel, 495 F.2d 213, 4 ELR 20324 (6th Cir. 1974) (allowing Ontario residents to bring nuisance action under Michigan
A bilateral agreement may be easier to obtain, but it may also be less comprehensive than a trilateral agreement. As Kenneth Oye has said: “[R]eductions in the number of actors can usually only be purchased at the expense of the magnitude of gains from cooperation.” The attainable Canadian-U.S. agreement on transboundary EIA would be limited to federal projects and to effects across the Canadian-U.S. border. These limitations are undesirable from an environmental point of view, since they would exclude many North American projects that might have significant transboundary effects. But a limited agreement would be far better than nothing. In particular, it would clearly establish for the first time that the United States must require EIA for federal projects within its territory that have effects in Canada. Moreover, it would not foreclose an agreement between Mexico and the United States, which those governments could continue to pursue. Indeed, the fear of being left behind might spur those interested in transboundary EIA along the Mexican-U.S. border to greater efforts to reach an agreement.

Of course, if an agreement must be uniform among all three Parties for reasons of effectiveness or fairness, then any delay necessary to obtain the consent of all three countries would be unavoidable. But most cases of transboundary pollution do not directly concern all three North American countries. Article 10(7) of the NAAEC recognizes “the significant bilateral nature of many transboundary environmental issues.” Issues arising along one border may well be similar, or parallel, to those arising on the other, but a uniform approach to parallel bilateral issues is not necessary. There is no reason why Canada and the United States must have the same type of arrangement regarding transboundary EIA or reciprocal access as Mexico and the United States do, any more than it is necessary for the IJC and the IBWC to have identical powers. The border regions are different in many ways, as are the bilateral relations between the countries. The countries can reasonably seek to reach different solutions to parallel problems.

What role does this leave for the CEC with respect to transboundary pollution? In theory, the CEC might try to oversee the negotiation of separate bilateral agreements. The CEC could, for example, host simultaneous negotiations aimed at two transboundary EIA agreements or serve as a conduit for public participation with respect to particular cases of bilateral transboundary pollution. But it is hard to see how a trilateral institution would be better than a bilateral institution at hosting bilateral negotiations or facilitating public participation concerning bilateral issues. Representatives of the third Party would be superfluous to any serious bilateral negotiations. And it seems self-evident that a bilateral institution like the BECC, with a binational Secretariat based in Ciudad Juárez, Mexico, would be better at organizing a public meeting on an issue of Mexican-U.S. pollution than would the trinational, Montreal-based CEC Secretariat.

For all of these reasons, the CEC is ill-suited to addressing issues of transboundary harm that are primarily bilateral. The Parties should continue to use bilateral institutions such as the IJC, the La Paz mechanisms, the IBWC, and the BECC to address these issues, and refrain from using the CEC to supervise them.

What about gaps in the coverage of the bilateral institutions? One argument for referring issues of transboundary harm to the CEC is that there may not be a bilateral institution capable of addressing the issues. Along the Canadian-U.S. border, the IJC has the power under the 1909 Boundary Waters Treaty to receive references and produce objective reports on almost any issue of transboundary harm, but in recent years the governments have only rarely referred such issues to it. Moreover, the IJC may not initiate studies on its own or at the request of anyone other than the federal governments. Along the Mexican-U.S. border, neither the IBWC nor the BECC has a mandate to address transboundary pollution generally. The La Paz consultative mechanism can address almost any border issue, but it has no independent commissioners or Secretariat able to produce objective, professional reports like those of the CEC or IJC.

The response to these gaps in the jurisdiction of the bilateral institutions should not be to give the CEC mandates for which it is poorly suited but rather to add the necessary functions at the bilateral level. For example, the governments could establish a professional, binational Secretariat able to support the work of the La Paz national coordinators and working groups and give it the power to investigate, report on, and facilitate agreement between the concerned Parties with respect to border and transboundary issues. With respect to Canadian-U.S. issues, the obvious solution is to take greater advantage of the IJC’s reference authority. One possibility would be to allow the IJC, subfederal governments, and private Parties to initiate references, although the federal governments would presumably resist this diminution in their control. To address government concerns, Jutta Brunnee and Stephen Toope have suggested that the IJC look to Article 13 of the NAAEC, which authorizes the CEC Secretariat to report on issues on its own initiative or based on requests from any source but also gives the Council the power to block the Secretariat from preparing or publishing reports under certain conditions. They suggest that “[efforts should be made to adapt this balancing of legitimate interests in independence and control so as to suit the role of the IJC as it has evolved over the decades.”

43. Oye, supra note 41, at 21.
46. The governments reacted unfavorably to efforts in the 1970s to expand the authority of the IJC. See David Lemарquand, The International Joint Commission and Changing Canada-United States Boundary Relations, 33 NAT. RESOURCES J. 59, 74-77 (1993); Don Munton, Paradoxes and Prospects, in The International Joint Commission Seventy Years On 60, 75-81 (Robert Spencer et al. eds., 1981).
Despite the importance of the bilateral institutions in addressing transboundary pollution, the CEC has at least two important roles to play. First, it can facilitate the exchange of information. There is no reason why the countries must reach uniform trilateral solutions to similar bilateral problems, but understanding how parallel issues have been addressed along the other border might often help the Parties reach an effective bilateral agreement. The CEC reports on reciprocal access and transboundary EIA show that the Secretariat is capable of providing a high-quality comparative study on a trilateral basis.

Second, the CEC can play an indispensable role in addressing transboundary pollution that is trilateral in nature. Some issues of transboundary harm do concern all three countries directly. When the ecosystem affected by transboundary pollution is continental in scope, then the CEC is perfectly situated to address the problem, and no bilateral institution can address it as well.

The CEC has begun to address air pollution on such a continental basis. In 1997, the Secretariat prepared a report under Article 13 on “continental pollutant pathways,” which examined long-range transport of air pollution throughout North America.48 The report focused on five types of pollutants—acid deposition, mercury, ground-level ozone, particulate matter, and persistent organic pollutants—and concluded that such “continental pollutants” are “affecting human health and the environment throughout North America.”49 It identified major sources of the pollutants and techniques to reduce emissions, and it emphasized the necessity for trilateral collaboration to address the problem on the basis of an integrated ecosystem approach. The report made several specific recommendations to the Council, including that it assume a lead responsibility for promoting and coordinating trilateral action to reduce the exposure of humans and the environment to continental pollutants and that it establish a high-level working group composed of experts responsible for regulating air pollution, to advise the Council on priorities for action, air quality objectives, cooperative measures, and so forth.50 At its June 2002 annual meeting, the Council established such a working group, to be called the North American Air Working Group, and gave it a mandate to provide advice to the Council on the development and implementation of CEC activities involving air issues.51

Of course, the line between transboundary harm that is primarily bilateral and harm that is primarily trilateral will often be difficult to draw. Many instances of transboundary harm may have continental implications, even if they appear to be primarily bilateral or even national. Indeed, the NAAEC is founded upon the idea that after NAFTA the residents of North America all have an interest in ensuring that all three countries improve and effectively enforce their environmental laws, even concerning matters that appear purely domestic. Even though in a sense everything is connected, however, some connections are stronger than others. Using bilateral institutions to address transboundary harm that is primarily bilateral and the CEC to address issues of transboundary harm that are primarily trilateral is the best way to use the available institutional resources most effectively.

In sum, the lesson of the failed implementation of Articles 10(7), 10(8), and 10(9) is that the CEC should focus on areas in which it has a comparative advantage. Environmental harm that affects the continental ecosystem, such as long-range air pollution, certainly qualifies. With respect to issues that are primarily bilateral, the CEC should do no more than prepare a comparative report. If more specific solutions are sought, the CEC should refer the issue to the appropriate bilateral institution.52 Moreover, it should encourage the governments to strengthen the capability of the bilateral institutions to receive such references, from private parties as well as governments, so that they can produce objective, professional reports and facilitate agreement on transboundary issues. The best way the CEC can help to solve issues of bilateral transboundary harm is to encourage and facilitate their bilateral resolution.


49. Id. at 8.

50. Id. at 36-38. The CEC Secretariat has since followed up that report with a more detailed study of the pollutant pathways of dioxin, which indicates that dioxin from specific sources in Mexico and the United States is traveling thousands of kilometers to Nunavut in the Canadian Arctic. CEC, Long-Range Air Transport of Dioxin From North American Sources to Ecologically Vulnerable Receptors in Nunavut, Arctic Canada (2000).

51. CEC Council Resolution 02-04 (June 19, 2002). Current CEC activities concerning air quality include programs to improve coordination between the Parties’ air quality management agencies and support the development of an association of Mexican air quality professionals, to develop comparable information about air pollution emissions in the three countries in order to facilitate effective cooperative efforts to reduce those emissions, and to study air pollution caused by freight transport along highways used as “trade corridors” throughout the continent. See CEC, NORTH AMERICAN AGENDA FOR ACTION: 2002-2004, at 55-67 (2002), available at http://www.cecc.org/files/pdf/PUBLICATIONS/3yrplan02-04_en.pdf (last visited Dec. 9, 2003).

52. A CEC Council reference to the IJC would provide a legal basis for the IJC to prepare a comprehensive report on the referred issue. Under Article 9 of the Boundary Waters Treaty, either the Canadian or the U.S. government may refer an issue to the IJC unilaterally, but in practice the referrals have always been joint. A unanimous request by the ministers sitting in Council would meet either standard.