

# Regional environmental governance: the NAFTA case

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**Abstract:** The United Nations Conference on Environment and Development held in Rio de Janeiro in 1992 elaborated the idea of sustainable development. A comprehensive document called the Agenda 21 provided an explanation how to achieve a sustainable economic development. Along the tools presented in the document, there emerged in practice a new regionalism which is based on the preferential trade agreements. Currently, regional agreements are of a more complex nature, so that they may include environmental cooperation, too. The aim of this paper is to illustrate, on the case of the North American Free Trade Agreement (NAFTA), a possible approach of regional agreements to environmental cooperation. The paper is divided into four sections. The first one summarizes a general approach to addressing environmental issues within the integration groupings. The second tries to answer the question of whether the NAFTA confirms the general approach to the regional environmental governance. The third deals with the meaning and the failure of the regional governance for the assessment of the cross-border impact of the NAFTA/NAAEC on the environment. The fourth and last section gives an answer to whether the North American Agreement on Environmental Cooperation (NAAEC), as the environmental part of the NAFTA, is a good basis for the effective environmental governance in North America.

**Key words:** governance, integration, North American Free Trade Agreement, regionalism

The world economy develops within the system of both animate and inanimate nature, the capacity of which is limited. When fulfilling its functions – meeting the human needs at the maximum level underpinned by an optimal use of the available resources – the economic system often gets beyond the limits of the ecological system and thus leads to irreversible changes and environmental degradation. Thus, if the living conditions are to be preserved as favourable for the future human life, the development of the world economy must be sustainable. This basically means that “it meets the needs of the present without compromising the ability of future generations to meet their own needs” (UN 1987).

In the 1980s, regionalism emerged as a new tool of sustainable development. It occurred alongside the efforts of the global community to find a kind of regimes and organizations that would eliminate or at least continue to decrease the risks of the economic development together with the efforts of a number of specific countries pursuing economic policies of sustainable development. Having been inspired by a number of approaches of the authors such as L.A. Vinters, R.E. Baldwin, C. Oman, and others, it is possible to define this phenomenon as “a trade policy of

a state, which leads to the liberalization of the relationships between two or more countries and thus contributes to their closer ties and mutual integration” (Cihelková 2004: 808). Regional groupings may take the form of a non-formalized (not based on any agreement) integration or they emerged, mainly on the basis of a special type of international agreements between countries or groups of countries. After the establishment of the General Agreement on Tariffs and Trade (GATT), they mainly developed as a result of the preferential trade agreements. The GATT defines a preferential trade agreement as a voluntary agreement for a closer integration of the economies of countries that are parties to such an agreement, in order to further strengthen the freedom of trade (WTO 2003).

At the turn of the 1980s and 1990, a complex system of changes and processes was launched. The changes primarily related to the termination of the bipolar world order, which opened the way for the implementation of the liberalization processes in a broader, indeed global, scale. Due to the end of the political division of the world, the disruption of the previous allied blocks, the disintegration and the creation of new of political and economic centres

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and due to the unification of the world economy, a wider scope for regional groupings emerged. There begun talking about the new regionalism, which hit the world economy at an unprecedented pace via the rise of new types of regional agreements as well as a total change of the approach to regional integration. Regional agreements have not only their development aspects, but they also display a wide range of approaches to the cooperation in the field of environment and promoting environmental integrity.

New regionalism can have both positive and negative impacts on the economic growth and development in the world. Basically, it depends on whether the regional integration results (in the spirit of Viner's and Meade's theory studying the effects of a free trade area and customs union) to the trade creation or trade diversion. New regionalism is also bound with many other factors, such as the connection of regional agreements and economic reforms and the productivity growth of the economies of the signatory countries. One of the hallmarks of the new regionalism is a joint participation of the developed and developing countries in a single integration (regional grouping). In such a case, the regional agreement may become a part of the development strategy designed to accelerate the reform process in a given developing country. Developing countries expect from these reforms the inflows of foreign direct investment (FDI) from the developed countries and other benefits that stem out of those inflows (the technology transfer and the increased productivity of the national economy). For developing countries, it means also the competition among them for the participation in the integration with the developed countries as the integration can result in a diversion of investment from the non-member countries. However, a lack of transparency in governance and a weak judicial power in the country could dampen the confidence of investors and thus the incentives for reforms.

Regional integration that primarily creates the legal and institutional foundations for business relations secondarily represents an opportunity to address the issues related to sustainable development in the broad sense. It means not only the environmental issues but also other issues (the respect for the principles of democracy, human rights and fundamental freedoms, the fight against corruption, security, the improved functioning of the judicial system, the development of education, etc.) which may lead to the improvement of the living (and working) environment of people. Regional agreements containing provisions on cooperation in terms of environmental protection gain better effects than agreements seeking only the environmental impacts

of trade liberalization and investment. A great potential may have, in this sense, the North-South agreements. They are usually characterized by the Northern partners insisting on the inclusion of the provisions that will lead to the establishment of new environmental institutions and to the increase in the capacities of the existing ones.

The aim of this paper is not to examine more closely the development aspects of the regional agreements. Rather, the paper aims, on the example of the North American Free Trade Agreement (NAFTA), which led to the creation of an incomplete market between Canada and the United States on the one hand and Mexico on the other hand, to illustrate a possible approach of the regional agreements to the environmental cooperation and to answer three sub-questions: Does the NAFTA confirm the general approach to the regional environmental governance? Is there any sense in the North American Agreement on the Transboundary Environmental Impact Assessment and why have the so far negotiations on that agreement failed? Is the North American Agreement on Environmental cooperation, an environmental part of the NAFTA, a basis of the effective environmental governance in North America?

#### **GENERAL APPROACH TO ADDRESSING THE ENVIRONMENTAL ISSUES WITHIN INTEGRATION GROUPINGS**

Although the regional economic integration turned into regionalism already in 1980s, the environmental issues became part of regional agreements, and thus part of the activities of the regional integration groupings, only in 1990s. Authors such as Cosbey et al. (2004) analysed the selected regional groupings according to the criterion which was the approach to the cooperation on the environment and promoting environmental integrity. They found out that regional agreements in this regard represent a broad spectrum ranging from those agreements that completely ignore the environmental aspects of cooperation of the signatory parties, to those which include a number of approaches to the acceptance of the environmental issues. These approaches are chiefly those which:

- include sustainable development and environmental protection goals such as regional agreements;
- assess the impact of the agreements on the environment;
- build the ecological exemptions as a part of trade agreements;
- include regulatory measures in services and investment;

- lead to the adoption of specific provisions of agreements that explain the relation of some of the measures to the obligations arising from the multilateral environmental agreements;
- develop environmental governance when the regional groupings conclude agreements on the cooperation in the environmental field or the environmental protection respectively, as an additional agreement between the parties.

### **Inclusion of the environmental goals into regional agreements**

Let us draw on the claims brought by Cosbey et al. (2004: 10) saying that many regional agreements in their preamble declare the environmental protection and sustainable development as their goal. However, from a closer examination of some of these agreements, it follows, as the mentioned authors noted, that these goals are, in general, defined in various forms. For example, the US-Australian Free Trade Agreement provides that the parties decided to implement the agreement in a manner consistent with their obligations related to higher labour standards, sustainable development and environmental protection. There are far more agreements, which include sustainable development and environmental protection as one of their goals (e.g. ASEAN; MERCOSUR; the EU and its signed agreements with the Mediterranean countries, Africa, Caribbean and Pacific/ACP, Latin America; or the EFTA and its agreements with Singapore and other countries, respectively). Those provisions can be also found in a number of purely bilateral agreements (South Korea–Chile, Panama–Taiwan and others).

### **Assessment of the impacts of regional agreements on the environment**

A number of regional agreements were prior to their approval a subject to the assessment in terms of their impacts on the environment. For example, the EU committed to perform the evaluation of the impact of the newly concluded agreements on the regional sustainable development (Vošta 2010). Under this regime, there were assessed the association agreement with Chile, the agreements on economic partnership with the ACP countries, the agreement negotiated with the oil-producing countries of the GCC, and the interregional agreement with the MERCOSUR.

Developing countries are, in general, willing to make the evaluation only if requested from other countries. For instance, when Singapore negotiated a free trade agreement with South Korea, it claimed that no evaluation of the environmental impacts is necessary, since its environmental regime takes into account all potential impacts (Government of Singapore 2003). According to Salzman (2001: 367), in general, the assessment of the impact of the agreements on the environment is a tool that can identify and quantify the environmental impact of trade agreements as well as the awareness of the parties negotiating the agreement. A meaningful public involvement in the negotiation process is far more difficult.

### **Incorporation of the ecological exemptions into trade measures**

The General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS), as well as other agreements arising under the World Trade Organization (WTO) provide general exemptions to the liberalization measures that may also relate to environmental provisions. Among them, there is e.g. such an exemption to the GATT relating to the protection of life and health of humans and animals as well as to the protection of plants, the Article XX (b), or the exception to the conservation and exploitation of natural resources, the Article XX (g), respectively. Many regional agreements refer to those articles of multilateral agreements; however, fewer of them confirm that they agree with such exemptions as with something obvious and indisputable in the context of the WTO. For example, the majority of the agreements with Asian countries include provisions similar to the Article XX of the GATT, but they are easily reproduced. The SAFTA does not include the Article XX (g) (see more details in Cosbey et al. 2004: 11).

### **Inclusion of the regulatory measures in the field of services and investment**

The above mentioned authors (2004: 13 and the others) also stress some potential problems associated with complex agreements (second and third generation) involving the trade in services and investment. Regarding the trade in services, the most controversial parts of the measures are those that are covered by the national regulation.<sup>1</sup> The Article 6.4 of the GATS

<sup>1</sup>For example the bilateral agreements South Korea–Chile and Panama–Taiwan take into account services but not those with a national regulation. The agreement concluded between Canada and Chile includes a test, but rather in terms of issuing a license or certificate rather than a national regulation as such. This provides for a greater political space for both countries.

requires that the national regulation of services is not greater than necessary.<sup>2</sup> The public interest in this sense is represented by a number of sectors such as health, education, distribution and water treatment. The following, non-commercial policy objectives, such as the environment or human health and safety should take precedence over commercial objectives. The agreements that are older than the provisions of the GATS go beyond the provisions of the GATT (e.g. MERCOSUR). Several regional agreements simply refer to the recommendations of the GATS, which are applicable to the participating countries (Canada–Costa Rica, the Framework Agreement on Services between the ASEAN countries, the Europe–Mediterranean Agreements). There are also included agreements containing relevant investment provisions and mechanisms that allow the companies to bring states to the arbitration in case of breaching their duties related to the investment climate. There are also agreements that created a kind of arbitration for the investor countries (South Korea–Chile, Panama–Taiwan, Canada–Chile, Thailand–Australia). Only a few modern agreements reject such provisions.

#### **Adoption of specific provisions of the regional agreements that explain the relationship of some measures to the obligations stemming from the multilateral environmental agreements**

Regional agreements can overcome the deadlocks of the multilateral level by adopting the provisions concerning their relation to the obligations arising from the multilateral environmental agreements. Cosby et al. (2004: 12) came to the conclusion that these provisions could not be found in many agreements. As an example, they refer to a free trade agreement between Canada – Chile and Canada – Costa Rica. Regional agreements where one of the parties is the U.S. (U.S.–Chile, U.S.–CAFTA) either do not mention the rules of the multilateral environmental agreements or refer, in terms of the relationship between trade and the multilateral environmental rules, to the outcomes of the Doha round of the WTO.

#### **Agreements on cooperation in the field of environmental protection as complementary to regional agreements**

Environmental governance on the basis of agreements on the cooperation in environmental issues

among members of regional groupings refers to the mechanism used to harmonize the standards. The mechanism should contribute to the enforcement of environmental laws, the acceleration of the cooperation on environmental issues being part of the common interest, to the support of the capacity expansion in that area and to a better settlement of disputes relating to the environment. Various regional agreements offer a wide range of positions on the issues at stake. For example, the MERCOSUR signed in the year 2001, the Framework Agreement on the Environment, which came into force in 2004 and aims to promote sustainable development and environmental protection in the MERCOSUR countries. It lists fourteen types of the environmental cooperation that should be pursued, including the harmonization of national standards, the information sharing and the exchange and promotion of the research of clean technologies. A strong emphasis on environmental protection can be also found in the Euro-Mediterranean Agreements. These include an emphasis on the prevention of environmental degradation, pollution control and ensuring the rational use of natural resources with regard to sustainable development (see Cosby et al. 2004: 16 and the others).

#### **THE NAFTA: DOES IT CONFIRM A GENERAL APPROACH TO THE REGIONAL ENVIRONMENTAL GOVERNANCE?**

The NAFTA is often highlighted as a so-called green deal. This name is derived from the environmental provisions that are considered as a step towards similar provisions in the GATT, but also as a political compromise in relation to the requirements “of environmental non-governmental organizations (NGOs) and other organizations. The success of these groups created expectations that the NAFTA could lead to the development of new forms of environmental governance in North America through adjusting the balance of forces and the role of the state and corporations in shaping the economic growth” (Sanchez 2002: 1369). Based on the environmental provisions of the NAFTA (1993), these were not built in the agreement in a concentrated form in a certain part or section, rather they are dispersed and located in the agreement so as to reflect the relationship with the liberalization measures, also from the evaluation by Sanches (2002: 1370–1371), the following can be derived.

<sup>2</sup>Also the provision of the GATT to resolve mutual disputes is subject to a similar test of “necessity”. The provision has only a very narrow interpretation: a settlement defined as satisfying the interests must be as little restrictive to trade as possible.

The preamble of the agreement provides that the agreement will be implemented so as to be consistent with the environmental protection and the promotion of sustainable development. These two characteristics are excluded from the objectives set out in the Chapter 1, Article 102. This article specifies the external objectives of the NAFTA, including the elimination of trade barriers, the facilitation of the flow of goods and services across the borders, the promotion of fair competition and investment opportunities or the protection of intellectual property rights. Article 104 states that the obligations of certain international environmental and conservative agreements take the precedence over the NAFTA. Such agreements are e.g. the Convention on International Trade and Endangered Species of Wild Fauna and Flora adopted in 1973 and amended in 1979, the Montreal Protocol on Substances that Deplete the Ozone Layer (1987/1990), the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal adopted in 1989 and others. Future international environmental agreements should therefore include this clause in the defined form.

Chapter 7 concentrates, in addition to agriculture (Section A), on the sanitary and phytosanitary measures (Section B), adopted and used to protect against the abuse of animals and plants from disease, as well as the consumers from the risks caused by chemicals, contaminants or organisms in food and beverages. The purpose of the Article 712 (1) and 712 (2) is to provide each signatory party the right of their own level of protection of the life and health of humans, animals and plants, if they deem it necessary, even if such a standard is more stringent than the international standards. However, the enforcement of the sanitary and phytosanitary measures at a higher level than the international standards is challenging. Article 715 (1) requires to pay attention to the party, which takes into account the risks (scientific evidence, process and production methods, supervision, etc.). Parties must also take into account the operational approaches and minimize the negative effects of trade and suitability of the compliance.

In Chapter 9, there are measures concerning the standards at the level exceeding the international standards, which are less stringent than the sanitary and phytosanitary measures. Article 904 (2) allows the parties to create a reasonable level of protection with the intention to fulfil the legitimacy objectives defined as: the safety; the protection of human, animal or plant life; health; the environment; the consumers. The parties are requested not to seek the arbitration or an unjustifiable discrimination of goods and services of the other parties as well as to use concealed trade

restrictions. It is a proof that there is an adequate level of protection and the risk pricing is not required. These provisions thus prevent to some extent the situation that the member states could enact environmental standards with a severe restrictive impact on trade.

Chapter 11 is devoted to investment. Article 1114 (Environmental Measures) states that "it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures". Chapter 11 (Section B) also contains the rules for the disputes settlement between the states-investors through the arbitration panels. Companies and individuals who are investors in other NAFTA countries may assert claims against the governments of the host countries, if they believe their rights have been violated in accordance with these rules. This mechanism was requested, as claimed by Sanches (2002: 1371), by the U.S. and Canada in order to protect their investors in Mexico, which accepted this mechanism in order to improve the flows of foreign direct investment from those countries. The NAFTA therefore includes the most extensive set of rights and remedies that are against foreign investors promoted always through international agreements.

Chapter 12 is devoted to the cross-border trade in services. There is a sense of ecological aspects but no mention of national regulations.

Chapter 20 is the basis for the establishment of the NAFTA Free Trade Commission, which oversees the implementation of the tripartite agreement. The Commission oversees its subsequent development and decides the disputes which may arise in the interpretation or application of the agreement, oversees the work of all established committees (e.g. the Committee on Trade in Goods, the Committee on Trade in Worn Clothing, the Committee on Sanitary and Phytosanitary Measures etc.) and working groups (the Working Group on Rules of Origin, the Working Group on Agricultural Subsidies, the Working Group on Trade and Competition etc.) and has many other powers.

The environmental provisions of the NAFTA led to the stipulation of the North American Agreement on Environmental Cooperation (NAAEC). That is how the environmental part of the agreement is called. The NAAEC (1993) seeks to balance the environmental protection objectives and the state sovereignty and trade liberalization. It emphasizes the need for cooperation and the support of environmental objectives. It recommends the preparation and publication of reports on the state-of-play of the environment, promotes the environmental education and the use of economic instruments to achieve the environmental objectives. It provides each of the parties with the right to establish their own levels of the environmental protection as

well as the priorities of this protection. It brings about a list of specific activities that the signatory parties can take in order to step up and strengthen the domestic environmental law and the regulatory instruments applicable to their territories. It provides the engaged persons with the right to require the competent authority parties (e.g. the U.S. Environmental Protection Agency) to investigate the alleged offenses.

The NAAEC creates a tripartite Commission for Environmental Cooperation (CEC), consisting of the Council, Secretariat and the Joint Public Advisory Committee (see next section). It is empowered to assist the NAFTA panels in disputes settlements and to make recommendations on environmental issues. It also has a mandate to assess the environmental impacts of the NAFTA and to help the NAFTA Free Trade Commission in environmental issues.

Penalties and remedies can be considered only in cases where a party fails to effectively enforce its domestic environmental law through the economic activities covered by or affecting the North American trade. The CEC Council may create an international arbitration panel for the promulgation and implementation of the corrective action plan and for the payment of financial penalties. In the event that such penalties are not paid, the agreement gives the United States the ultimate power to impose trade sanctions on Mexico. Canada may be authorized to use such sanctions through the domestic legal processes.

Should we here therefore assess whether the NAFTA confirms the general approach to the regional environmental governance, it can be stated that:

(1) NAFTA as a regional agreement explicitly defines its environmental goals. As stated above, the preamble provides that: "The Government of Canada, the Government of the United Mexican States and the Government of the United States of America, resolved to: ... undertake each of the preceding in a manner consistent with environmental protection and conservation; ... promote sustainable development; ..." (NAFTA 1993: Preamble).

(2) NAFTA itself was before its approval a subject to the assessment in the terms of its impact on the environment. Since then, the U.S. and Canada have been legally obliged to carry out such assessment (including the preparation of the draft of the assessment, an extensive round of public consultations and the finalization of the assessment) in the phase of the completion of other regional agreements. They do so on the basis of the U.S. Executive Order No. 13141<sup>3</sup> and on the basis of the Directive of the Canadian

government from the year 1999, which envisaged a procedure for assessing trade agreements and their potential impact on the environment. As evident from the dates of the adoption of the corresponding measures, both countries started to evaluate the environmental aspects in trade agreements only in the late 1990s. The adoption of the regulation of Canada and the U.S. in the field of the assessment of trade agreements from the environmental point of view was not a much innovative act. It was rather a reaction of the governments of both countries to the public opinion on the issues of the environmental protection. Involving civil society in the process of the evaluation is also a common feature of both approaches. The United States require the environmental assessment of the impact of trade agreements from their potential contracting partners, too. For details, see e.g. (Gallagher et al. 2002: 1–33).

(3) NAFTA incorporates into its trade measures the environmental aspects of the Article XX of GATT, noting that the parties understand the meaning of the Article XX (b) referring to the environmental measures, and the Article XX (g) applying to the living exhaustible natural resources, see e.g. the Articles 315, 710 (NAFTA 1993: 3–10, 7–28b). It is interesting that Mexico, after having adopted in the context of the NAFTA the given provisions of the GATT, reflected that the approach in the agreement signed with Chile, but not in the agreements with the EU, thought in the final implementation of the agreement we find references to the Article XX (b). That is without a specification that it applies to the environmental provisions, and the appeal to the Article XX (g) is completely missing (Cosbey et al. 2004: 11).

(4) NAFTA is also one of those modern agreements that do not reject the measures on investment and services. Regarding the investment, the NAFTA contains provisions relevant to investment, as well as the mechanisms that allow companies to bring the States to the arbitration for the alleged misconduct related to investments. In the area of services, the NAFTA, that is like the MERCOSUR older than the provisions of the GATS, counts, as indicated, with environmental aspects, but not with the national regulation.

(5) As for the specific provisions, the NAFTA is a good example that regional agreements can overcome the deadlocks of the multilateral level, provided they include provisions relating to their obligations under the multilateral environmental agreements. Article 104 of the Agreement (NAFTA 1993: 1–2) provides that in case of conflict between the right of the grouping and

<sup>3</sup>The obligations contained in the Executive Order were later enshrined in the temporary permission granted the U.S. Executive to negotiate trade and investment treaties: The 2002 Trade Act.

the obligations under multilateral agreements relating to trade (Montreal Protocol, Basel Convention), there would be applied the least restrictive measures available. Herewith the letter of the law of the NAFTA is kept and at the same time, the obligations under the multilateral environmental conventions are met.

(6) NAFTA is a pioneer in concluding special agreements on the cooperation in the environmental field as a complementary arrangement relating to living and working environment. The North American agreement on the environmental cooperation co-ordinates environmental policies and practices between the three countries on the issues such as the chemical management, environmental reporting as well as the regulation of migration flows. It should lead to the adoption of more standards and to creating a greater capacity for the environmental management.<sup>4</sup> When signing regional agreements that followed, the U.S. respected the NAFTA model. Then also Canada signed, with some modifications, a supplemental agreement on the environmental protection (and work).

The above environmental objectives of the NAFTA, the environmental impact assessment of the agreements, the incorporation of the environmental exemptions into the NAFTA trade measures, the inclusion of regulatory measures in services and investments as well as other measures under the scope of the agreement, and finally the existence of the NAAEC – if we compare these attributes with the general approach (i.e. with the selected regional agreements), we are then capable of saying that the NAFTA goes beyond a general approach to the regional environmental governance and thus it can be correctly described as “a green deal”.

**NAATEIA: Does it make any sense to establish a trilateral agreement and why have the negotiations failed so far?**

The USA are the only country that shares common borders with the two other members of the NAFTA. Both border areas differ in their natural resources as well as in specific issues sensitive for the individual countries. The Transboundary Environmental

Impact Assessment (TEIA), from the perspective of this country, includes cross-border issues of two types: those that have a cross border effect of only a bilateral character, and those that have tripartite effects. A kind of problem concerning the bilateral cross-border influence is a problem of the division of population and economic interactions in the border areas. Specifically, it is valid for the territory of Southern Canada and Northern Mexico with a high density of population. The NAFTA ultimately led to a sharp increase in the intra-regional trade, which has its environmental consequences in the border areas, be it the pollution from the growth of traffic or the increased production. Regarding the trilateral transboundary effects, one in general speaks about the common natural resources and the migratory species. Garver and Podhora (2008: 254–255) name, *inter alia*, an example of the humpback whale, which inhabits the oceans of all three countries. Each project and activity that affects these species has also a cross-border impact, since they influence all three countries.

The Transboundary Environmental Impact Assessment is carried out in all the three NAFTA countries, where corresponding legislative basis was created for this purpose (see e.g. Garver and Podhora 2008: 254). All three parties declare their interest in the joint action, which has been for instance applied since 1991 in the United Nations Economic Commission for Europe (UNECE).<sup>5</sup> The regulations relevant to the TEIA and its components contain, according to Craik (2007: 12), also some bilateral agreements between the NAFTA members of the NAFTA (the US-Canada Air Quality Agreement, the US-Mexican La Paz Agreement).

The commitment to the implementation of the TEIA was enshrined in the Article 10 (7) of the NAAEC, which in this context requires the CEC Council to create conditions for the adoption of the North American Agreement on the TEIA (NAATEIA). In other words, this article seeks to legally integrate the TEIA instrument into the NAAEC and seeks for such and activity in the CEC Council, which will also lead to the implementation of the article and promote the trilateral TEIA.<sup>6</sup> The Transboundary Environmental

<sup>4</sup>In addition to the NACEC, the NAFTA countries concluded another voluntary agreement in the area of labour. This was the North American Agreement on Labor Cooperation (NAALC). The agreement is out of the scope of this paper.

<sup>5</sup>The UNECE Convention on Environmental Impact Assessment in a Transboundary Context, done at Espoo (Finland), on 25 February 1991. Out of the NAFTA countries, only Canada ratified the Convention.

<sup>6</sup>The Council had three years throughout which it was due to consider and make recommendations concerning: assessing the impact of the proposed projects on the environment, including the evaluation of comments provided by the interested parties and persons; the projects are subject to the decision of the competent government body and it can cause significant adverse transboundary effects; advising and providing the relevant information and consultation between the parties; to mitigate the potential adverse effects of the projects (NAAEC 1993: 9).

Impact Assessment is, on one hand, important so that the environmental aspects are taken into account in the early stages of the project or activity, and these aspects are communicated to all stakeholders. On the other hand, the trilateral TEIA would shift the NAFTA member states towards the environmental harmonization, which would deepen in parallel with the economic integration within the group and the policy initiatives in North America, such as the below listed Security and Prosperity Partnership (SPP). The NAATEIA would then create a common basis for the future bilateral specification at the national or sub-national level eventually.

Since the NAFTA and the NAAEC came into force, eighteen years have passed. However, the NAATEIA has not seen the light of the world yet. What is really holding back the potential, which conceals in the regional TEIA? This happens despite the existing law of the three member countries on the environmental impact assessment, as well as the existence of the international principles and prototypes for the evaluation of the transboundary environmental impact assessment (see for example the already mentioned Espoo Convention).

The basis for the establishment of the NAATEIA is a creation of “reciprocal obligations among the countries while relying as much as possible on the existing domestic processes and mechanisms for conducting environmental assessments” (Garver and Podhora 2008: 256). However, for doing so, there are no formal consultative processes in the NAFTA. From the NAAEC (1993), we can derive that the CEC Council has no mandate to develop activities leading to the harmonization of standards. The absence of this mandate was fully reflected in the negotiation process of the NAATEIA that was described in detail by Garver and Podhora (2008: 256–261).

Those negotiations taking part since 1995 have been several times interrupted and stopped. In March 2005, the negotiations were restarted again, but not on the platform of the CEC, but on the political grounds of the Security and Prosperity Partnership (SPP 2005). The SPP was adopted as a policy framework to identify the security and development issues outside the NAFTA, the NAAEC and the NACEC. However, even within the SPP the negotiations on the NAATEIA have progressed only a little. Already in 2007, there was for the first time, announced only a small progress in the implementation of the TEIA regional project.

From the above mentioned, an answer to the second question emerges: a tripartite TEIA and the harmonization of rules and procedures would considerably enhance and make more efficient the environmental co-operation of the signatory parties on the issues of

the common interest, especially as regards the common natural resources and migratory species. The commitments arising from the NAAEC, particularly from the process of the negotiation and adopting the North American Agreement on Transboundary Environmental Impact Assessment, have not been properly fulfilled yet. The problem remains mainly the complexity of reaching a compromise, which is hampered by numerous factors, including the difference that exists there between Canada, Mexico and the USA regarding to the domestic authorities who are responsible for the national assessment of the environmental impacts (see e.g. Craik 2007: 258), and a different focus of the content of the projects in the individual countries. The CEC JPAC conclusions also point out that “appropriately developed framework has the potential to address not only the environmental, but also other issues, such as the social ones. The TEIA extends these benefits across boundaries and meets a generally accepted principle that the state should not undertake activities which cause damage to the environment outside its borders” (JPAC 2010).

#### **NAAEC: IS THAT A BASIS FOR EFFICIENT ENVIRONMENTAL GOVERNANCE IN NORTH AMERICA?**

As shown above, the NAAEC began to be applied at the same point in time, when the NAFTA came into effect. It was intended as an instrument related to trade and having a potential to promote both the environmental cooperation in the region as well as the effective enforcement of the law adopted to protect the environment.

In order to strengthen the national obligations of each engaged country in the area of the protection of their own environment, the NAAEC (1993: 7) enshrined within its provisions one establishing the Commission for Environmental Cooperation. That commission ought to facilitate the effective cooperation in preserving, protecting and improving the North American environment. The partnership within the CEC provides conditions for the Government of Canada, Mexico and the United States together with North American civil society to reach within the partnership what cannot be achieved by them alone. In this wider context, the NAAEC defines the mission defined by the CEC. Among other things, it is a preparation of the activity program in a wide range of environmental issues; an efficiency analysis of the NAFTA in the field of ecology and a settlement of trade disputes with the environmental nature; a periodic assessment of the state of the North American

environment, and reporting on environmental issues of a regional importance; a support for the enforcement of the environmental law (CEC 2005: 4).

As it stems from the NAAEC (1993: 6–15), the CEC fulfils its mission via three main institutions: the Council, the Secretariat and the Joint Public Advisory Committee.

The CEC Council is made up of the environmental ministers of the three Member States and it is a governing body of the CEC. It meets at least once a year and it is responsible for setting the general rules and procedures, including the budgetary ones and also for monitoring the progress towards the objectives in the CEC implementation of the individual projects. The Council namely:

- issues directives on specific environmental environment issues,
- makes directives on the public access to environmental information,
- defines limits for specific pollutants, taking into account the differences in ecosystems,
- oversees both the implementation of its recommendations and a further deepening of the NAAEC,
- aims to strengthen the cooperation among the States as well as to improve the legislation,
- supports the law enforcement in the field of the environment,
- cooperates with the NAFTA Free Trade Commission to prevent and analyse disputes pertaining to trade.

An important duty of the CEC Council lies also in its responsibility to evaluate the functionality of the CEC. According to the Article 10, 1 (b), it was committed to “within four years after the date of entry into force of this Agreement, review effectiveness and operation of it in the light of experience” and to oversee the Secretariat (NAAEC 1993: 7).

The CEC Secretariat is chaired by the Executive Director and in accordance with the rules; it submits to the Council for its approval the CEC program and the budget, including the provisions on the proposed activities and on the possibility of the Secretariat to respond to an unpredictable reality. It also supports the Council in terms of the administrative, technical and operational activities and it is responsible for preparing the reports. It also has a special responsibility in the process of the Submissions on Enforcement

Matters. In case of a request made by a public entity or a non-governmental organization, it may propose, under the defined circumstances, a procedure against a party that is unable to effectively enforce its rights in the environmental matters.

The CEC Joint Public Advisory Committee (JPAC), composed of fifteen citizens (five from each country), is an advisory body to the Council in all matters of the North American Agreement on Environmental Cooperation and it is also a source of information for the Secretariat. The JPAC’s position is the basis for the development of the cooperation in the subcontinent relating to the protection of ecosystems and sustainable economic development and to ensuring the active participation of civil society as well as the transparency of the NACEC events.

Each signatory party may also convene the so-called National Advisory Committee, where the representatives together with other persons form the NGOs are represented. It can also convene so-called Governmental Committee, which brings together the representatives of the federal, state or the provincial governments. The National Advisory Committees, together with the governmental committees, were formed by Canada<sup>7</sup> and the USA. These committees provide a general and specific advice to their governments on the implementation and further development of the NAAEC and the CEC.

Based on the periodic assessment of the state of the North American environment (the CEC Ministerial Statements) as well as the adopted strategic plans, it is possible to highlight the main achievements as well as some problematic issues that characterize the current regional environmental governance in North America.

The CEC was expected to become a key link between the business and environmental communities in North America. However, the fulfilment of this objective is perceived as very controversial and as one can say, sometimes even negative. The fundamental question is the effectiveness of the CEC in the above mentioned environmental standards and their application. One of the main causes why the negotiations on a tripartite agreement on the assessment of the cross-border impact on the environment have failed so far, is, except for the above reasons (mainly a lacking mandate of the CEC Council to continue its activi-

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<sup>7</sup>As the CEC (2005: 5) states, in Canada the decisions relating to the CEC matters are coordinated by the Governmental Committee, which includes the federal minister and the ministers of environment of three provinces (Alberta, Manitoba, Quebec). These provinces signed the Canadian intergovernmental agreement, which was negotiated in order to create a mechanism for their participation in the NAAEC. The provinces also adopted, in accordance with their jurisdiction, the obligations codified in the NAAEC and they play a key role in the approach of Canada to the management and implementation of the agreement.

ties in the field of the harmonization of standards), a lack of the dialogue between the NAFTA Free Trade Commission and the CEC. As Sanchez (2006) states, both committees met only a few times, which significantly complicates the cooperation between the two institutions. The NAFTA is not obliged to the collaboration with the CEC Free Trade Commission. Thus, if the communication between the two parties takes place, then it is done mainly between the CEC Council and the Standing Committees/Working Groups NAFTA (CEC 2004: 30).

A certain problem represents also the steering architecture of the CEC itself. In particular, the relationship between the Council and the Secretariat is criticized because of the ineffective communication of the ministers and the Executive Director, which fails in many issues. As problematic can be also regarded the diversity of the approach of Mexico to its more developed partners – the United States and Canada. Until now, the Council has not reached a position that would enable it to bring environmental issues to the state when they would have real solutions.

An important event regarding the development of the shape of the regional environmental governance within NAFTA was the CEC Council Session in Puebla (Mexico) in 2004. Here, on the occasion of the 10<sup>th</sup> anniversary of the implementation of the NAAEC, the countries adopted the Puebla Declaration for 2005–2010. Despite the above criticism, the participating states confirmed in this document their interest to coordinate and continue to address the issues related to the North American environment. According to the Strategic Plan of the CEC, the declaration emphasizes in particular the following functions, which should have the greatest significance in the terms of a further evolution of the CEC (CEC 2005: 8):

- the CEC as a catalyst: As an institution with a broad mandate, it should develop, within the partnership, its activities at various levels of the government and other interested parties and it should, through its activities, promote and facilitate the actions of the parties and stakeholders.
- the CEC as a forum to facilitate the regional action: It should focus on the issues that have a regional scope and a high priority for each of the parties involved. Canada, Mexico and the United States face many environmental problems and in some cases, solutions to these problems result from the international commitments. The NAAEC can help those countries to coordinate their national approaches to these issues, leading to more effective negotiations.
- the CEC as a provider of concrete results: It should provide timely and politically relevant recommen-

dations in order to achieve the concrete results in the areas defined by the Council.

- the CEC as a provider of the scientifically substantiated information: It will support a greater comparability, compatibility and availability of the high quality information in the North American area that should aim at promoting the environmentally sustainable decisions based on reliable scientific sources.

Another milestone in the development of the regional environmental governance in the framework of the NAFTA was the Denver Council Session in June 2009, which was held on the occasion of the 15<sup>th</sup> anniversary of the NAAEC. At this meeting, the member countries identified a new vision for their environmental governance based on the experience resulting from the implementation of the Puebla Declaration.

As for the progress achieved in the environmental cooperation within the NAAEC, the CEC Council noted in particular a step ahead in the issues, such as ensuring sustainable development in the region, the enforcement of the environmental law, deepening linkages between trade and environment, and strengthening the public participation in addressing the regional environmental questions (CEC 2009c: 4). A significant success was achieved, especially in some specific issues such as improving the air quality management, the risk reduction associated with the use of mercury, the provision of environmental conditions in areas protected by the Navy, the completion of the North American Industrial Pollution Monitoring System, strengthening of the reliable regionally integrated supply chains, elaborating a program for transport for the customs and border officials in order to help them to fight against the illegal deployment of hazardous wastes and the ozone-absorbing components. When having taken those steps, the Council worked closely with the JPAC, which organized a workshop on the climate policy coherence of the NAFTA countries. Its representatives participated in public meetings and opinion exchanges on the environmental issues, discussing with many personalities coming from all three countries (CEC 2009a).

For the time being, the work of the CEC and the NAFTA is influenced by one of the most serious economic crises, which they faced within their entire existence. This means that also the environmental challenges are different today from those in the previous years. However, Canada, Mexico and the USA, even under these new conditions, confirmed their commitments under the NAAEC. Those have to be met, provided on the partnership with all stakeholders and the public in all signatory countries and on the

application of the principle of shared responsibility and the supervision of the environment in North America. They also committed to restoring, revitalising and re-focusing the work of the CEC, which should better facilitate the implementation of the cooperation under the new circumstances. The ministers invited the officials of their countries, to examine the CEC governance with a view to enhance the accountability and the competence of the Council to deal with different objectives, to increase the transparency of the actions of the Secretariat and to ensure their compliance with the priorities of the Council. They agreed on the adoption of new policy guidelines for the CEC, which should provide key environmental priorities in the North America in the context of free trade and more integrated economies.

The CEC Council adopted the Strategic Plan of the Commission for Environmental Cooperation 2010–2015, which stressed three new priorities: (1) Healthy Communities and Ecosystems, (2) Climate Change – Low-Carbon Economy, (3) Greening the Economy in North America (CEC 2009b: 1). It also adopted a number of operational changes that should ensure that the CEC works as a model of the transparent, accountable, effective and relevant organization within the NAAEC. These changes mainly relate to the regulation of its annual work plans, the modernization of public participation in this program, putting the emphasis on meeting the identified priorities and enhancing transparency in the use of funds. There was also adopted a directive concerning the execution of the position of the Executive Director and strengthening the backup functions of the Secretariat. For details, see the CEC (2009a, b, c).

One of the important measures aimed at strengthening the NAAEC and the CEC is the measure to “develop recommendations regarding the environmental transboundary impact assessment, notification, consultation and mitigation”. In this context, the Council could direct the officials to consider and develop recommendations with respect to the assessment of the environmental impact of projects likely to cause significant adverse transboundary effects; the notification, provision of the relevant information and consultation among the countries with respect to such projects; and the mitigation of the potential adverse effects of such projects, in accordance with the Article 10 (7) of the NAAEC (1993).

Is thus the NAAEC a basis for the effective environmental governance in North America? There are authors (e.g. Gallagher 2009) who consider the NAFTA to be a very important comprehensive trade agreement with the significant environmental provisions contained in particular in the additional NAAEC.

They recognize the eighteen-year progress made by the member countries in their implementation. At the same time, they assess rather negatively its internal institutional architecture and conclude that if the NAFTA wants to strengthen environmental sustainability in North America, it will have to revise some of the key components of the agreement on which it is based. They also bring in a range of ideas how to reform the individual areas, mechanisms as well as the steering bodies and the whole governance. (These ideas are not a subject of this paper). Based on the above findings, I agree with this view. At the same time, however, I am aware of the fact that the progress on environmental issues through the NAAEC NAFTA is quite evident but also limiting.

#### **CONCLUSIONS: REGIONALISM – AN OPPORTUNITY TO STRENGTHEN THE CAPACITIES NOT ONLY IN TRADE BUT ALSO IN ECOLOGICAL AREAS**

New regionalism as one of the attributes of the current world economy is characterized not only by its commercial aspects, but also by a variety of approaches to the cooperation in the field of environment and to the promotion of the environmental integrity. A compliance of the approaches of regional agreements in the trade area is conditional on a common goal – trade liberalization intended to achieve growth and development, as well as the framework of multilateral arrangements. That framework is also respected when the exemptions from the most favoured nations treatment or the national treatment to the regional framework (regional groupings) are provided. As for the environmental issues in regional agreements, we find no single model. The difference in attitudes of integration groupings to environmental issues, comes from, inter alia, different economic levels of the participants in the integration process, the unequal comparative advantages, a different history and culture, dissimilar approaches to the regulation, from various domestic policies and institutions, different perceptions of the importance of the environment and from other determinants. It is this very differentiation of regional agreements that creates a suitable platform for the approaches to sustainable development via trade. The approaches of regional agreements, however, do not differ much from the multilateral trade rules.

One of the key features of the regional (multilateral and bilateral) agreements is their ability to improve what is not possible to be improved at the multilateral level. These agreements are generally more flexible

and therefore able to find a suitable solution to meet the interests of the whole group. They form the basis for progress in the future, if new needs arise. The most successful examples of the impact of regionalism on strengthening the institutional capacities in the environmental field regard the agreements between neighbouring countries. A great potential in this sense have especially the North-South agreements. They are usually characterized by the fact that the Northern partner insists on the inclusion of provisions that will lead to the establishment of new environmental institutions and to the increase the capacity of the existing ones. The NAFTA belongs among those regional integrations.

Does the NAFTA confirm the general approach to the regional environmental governance? Regarding this question, we can say that in the early 1990s, the NAFTA led to the creation of an innovative institutional structure to examine the regional issues in North America. Unlike many other regional integrations reported in the first section of this paper, it did not seek solely the environmental impacts of the trade liberalization and investment, but it also included strict provisions for the cooperation and environmental protection. These provisions have their basis in a clear codification of the goals of this grouping – to be consistent with the protection of the environment and to promote sustainable development. The NAFTA was also scrutinized in the terms of the assessment of the impact on the environment, and although it was not the first regional agreement in this regard and though the assessments undertaken by the EU were deeper and wider than those in North America, it laid the basis for the evaluation of other regional agreements being prepared by the United States and Canada. It incorporates into its trade measures the environmental exceptions stemming from the WTO agreements. The NAFTA is also one of the little regional integrations, which include provisions on investment and services. It is also one of few agreements that include provisions for their relation to the obligations arising from the multilateral agreements regarding trade. The NAAEC, which amended the NAFTA as a pillar of the environmental governance was, as stated by the CEC (2005: 4), “the first international agreement that linked environmental cooperation with trade relations and also the first to engage the public sector in its operations.” From that it follows that the NAFTA goes beyond a general approach to the regional environmental governance and it can be rightfully described as “a green deal”.

Is there any sense in the North American Agreement on Transboundary Environmental Impact Assessment and why have the so far negotiations on that agreement

failed? The assessment of the cross-border impact on the environment is a specific question dealt in the NAAEC. The shift from the national to the regional approach should ensure a common identification of the environmental effects which would be taken into account both in the preparation and the implementation of any project and activities of the NAFTA member states with the cross-border environmental impacts. It should also ensure the information spreading within all the stakeholders. Thus, in line with the economic integration, the environmental harmonization should deepen. The absence of reciprocal obligations between the countries in the terms of the TEIA, as well as lacking procedures leading to the establishment of environmental standards and their use, is probably the main cause of the failure of the so far negotiations on the NAATEIA.

Is the North American Agreement on Environmental Cooperation, an environmental part of the NAFTA, a basis of the effective environmental governance in North America? Regional and complementary agreements containing strict provisions in terms of the cooperation in the field of environmental protection have better effects than the agreements seeking only the environmental impacts of the liberalization of trade and investment. In the case of the NAFTA, this means that the goals of the accompanying agreements concerning the environment also include a strong mandate to both prevent trade disputes with the impact on the environment, or to address them. A real progress on this issue is still small in effect. On the other hand, it comes to empowering of the environmental management institutions in a way that the countries get a legal basis for managing the impact of liberalization on the environment. That held true for Mexico, too. It experienced, on the basis of the priorities of developed countries, a significant progress in the field of environmental pollution. During the decade in the NAFTA, new environmental NGOs emerged and the existing ones were strengthened, which gradually became a holder of the public opinion. The public attitude was of course shaped – in addition to regional agreements – by the effect of considerable environmental damages and poor working conditions associated with the growing industry in the Mexican-American border areas. Therefore, it holds true that regional integrations creating primarily legal and institutional foundations for business affairs represent secondarily an opportunity to address the issues related to sustainable development in the broad sense. Thus not only environmental issues, but also other issues which may lead to the improvement of the living and working environment of human beings were tackled by them.

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