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Continental Chill: An Introduction to the Issue

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CONTINENTAL CHILL: AN INTRODUCTION TO THE ISSUE

PAUL STANTON KIBEL* & ALLYSON L. UMBERGER**

In 1994, Canada, Mexico and the United States adopted a new set of documents to guide trade and environmental relations between each other (1994 North American Regime). Two of the cornerstones of the 1994 North American Regime were the North American Free Trade Agreement (NAFTA) and the North American Agreement on Environmental Cooperation (NAAEC).

Chapter 11 of NAFTA set forth a mechanism by which private parties could bring claims against the governments that were signatories to NAFTA if they believed such governments had taken actions “tantamount to appropriation.” Claims brought pursuant to NAFTA Chapter 11 were subject to binding arbitration and arbitration panels were authorized to award damages. In the negotiations and political debates leading up to the 1994 North American Regime, there were concerns that NAFTA Chapter 11 would encourage challenges to environmental standards on the basis that the government’s imposition of private sector costs associated with complying with such standards constituted action “tantamount to appropriation.” There were concerns that the actual filing of such NAFTA Chapter 11 claims, or even the threat of filing such claims, might have a “chilling” effect on environmental standards and environmental enforcement. That is, Canada, Mexico and the United States might refrain from enacting or enforcing (or might even weaken or rescind) environmental standards that were vulnerable to challenge under Chapter 11 or other NAFTA provisions. This consideration was noted in much of the trade-

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environment literature produced in the period when NAFTA was negotiated and went into effect.

For instance, in the 1993 book *Trade and the Environment: Law, Economics and Policy*, the opening chapter by Tom Wathen entitled “A Guide to Trade and the Environment” explained why many environmental organizations opposed free trade agreements such as NAFTA: “As companies seek to reduce production costs, many industries may shift production to countries with weak environmental laws or lax enforcement.”¹ NAFTA Chapter 11 appeared to many environmental groups as a ready-made procedure to use the dynamics identified by Wathen to press for less rigorous environmental regulation.

The potential chilling effect of NAFTA and other trade agreements on environmental standards was also discussed by author Daniel Esty in his 1994 book *Greening the GATT: Trade, Environment, and the Future*:

[W]here overseas producers gain a competitive advantage by adhering to lower (and presumably cheaper) ecological or public health standards, environmentalists fear degradation of the environment in the low standard country. They also worry that producers will use the presence of environmental compliance cost disadvantages vis-à-vis overseas competitors to lobby for more relaxed environmental standards or at least to hold off on further tightening of requirements.²

As a final example, in his 1995 book *Trading Up: Consumer and Environmental Regulation in a Global Economy*, author David Vogel recounted the widespread concern about NAFTA’s impact on United States environmental standards, noting “[m]any public interest groups feared that a free trade agreement with Mexico would result in downward harmonization of consumer health and safety standards, since America’s stricter product standards could potentially be challenged by Mexico as non-tariff barriers.”³

In response to the prospect of downward harmonization of and a continental chill on environmental standards, the negotiations over the 1994 North American Regime expanded beyond NAFTA to include a new treaty, the NAAEC (sometimes referred to as the NAFTA

¹ Tom Wathen, *A Guide to Trade and the Environment*, in TRADE AND THE ENVIRONMENT: LAW, ECONOMICS AND POLICY 10 (Durwood Zaelke et al. eds. 1993).

² Daniel C. Esty, GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE 51 (1994).

³ David Vogel, TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY 235 (1995).

environmental side agreement). Article 14 of the NAAEC created a new citizen submission process, which allowed citizens and non-governmental organizations to file claims alleging “non-enforcement of environmental laws” with the Commission for Environmental Cooperation (CEC) in Montreal, Quebec. The NAAEC Article 14 citizen submission process was presented by supporters of the 1994 North American Regime as an effective countermeasure to the potential chilling effect of NAFTA, as a mechanism to help prevent the downward harmonization of environmental standards and enforcement.⁴

In this symposium edition on *The Ecology of NAFTA: Two Decades of North America’s Trade-Environment Regime*, we assess the extent to which the NAFTA Chapter 11 investor protection and the NAAEC Article 14 citizen submission process have effectively reconciled the trade and environment objectives of the 1994 North American Regime. The first symposium article focuses on NAFTA Chapter 11 and the second and third symposium articles consider NAAEC Article 14.

In the lead symposium article, *Seeking A Regulatory Chill in Canada: The Dow AgroSciences NAFTA Chapter 11 Challenge to the Québec Pesticides Management Code*, author Kathleen Cooper of the Canadian Environmental Law Association and her colleagues Kyra Bell-Pasht, Ramani Nadarajah, and Theresa McClenaghan report on Dow AgroSciences’ challenge of Québec’s province-wide ban on cosmetic pesticide use. Citing rights of due process for investors, Dow disputed the procedural fairness of a popular law that was the culmination of more than ten years of grassroots mobilization towards public policy reforms that had also been successfully defended in all levels of the Canadian courts. Dow’s challenge was ultimately withdrawn with no compensation paid, yet with all sides declaring victory. Dow was satisfied that Québec acknowledged Health Canada’s risk assessment conclusions about continued registration of the pesticide 2,4-D, Québec retained its precautionary law and public interest organizations across Canada redoubled their efforts to pass similar provincial laws and/or local bylaws. This article captures multiple dimensions of the Dow case from the grassroots effort to pass and preserve the ban to the ongoing scientific debate about exposure, to toxic substances and how they are regulated, to the intersection of these issues with international trade law and policy.

In the second article, *Understanding Canada’s Responses to Citizen Submissions Under the NAAEC*, Professor Chris Tollefson of the University of Victoria School of Law (in British Columbia) and his

⁴ Gilbert R. Wintham, *Enforcement of Environmental Measures: Negotiating the NAFTA Environmental Side Agreement*, 3 J. ENV’T & DEV. 1 (1994).

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research colleague Anthony Ho examine how Canada has responded to citizen submissions brought under NAAEC Article 14 using a case-study approach that explores three of the most significant submissions made against Canada since the NAAEC came into force. Drawing on this analysis, Tollefson and Ho offer some conclusions about Canada's perception of the nature of and stakes associated with the NAAEC citizen submission process. They also consider the relevance of theoretical perspectives—in particular, realism, pluralism, and institutionalism—in elucidating and understanding governmental interactions with citizen-initiated processes of this kind.

In our final symposium article, *Fixing the CEC Submissions Procedure: Are the 2012 Revisions Up to the Task?*, Professor John H. Knox of Wake Forest University School of Law reflects on the successes and failures of the NAAEC citizen submissions procedure. As it enters its third decade, Knox maintains that the NAAEC citizen submissions procedure can claim some tangible achievements to its credit. By issuing independent investigative reports on alleged failures of the North American governments to effectively enforce their domestic environmental laws, the procedure has at times helped pressure the NAFTA governments into improving their environmental performance. In recent years, however, the NAFTA governments have weakened the procedure by delaying reports and limiting their scope. In partial response to criticisms of these actions, the governments revised the NAAEC citizen procedure guidelines in 2012. Knox's article evaluates the motivations behind and the substance of the recent 2012 revisions.

The articles in this symposium edition on *The Ecology of NAFTA* reveal that a proper evaluation of the environmental performance of the 1994 North American Regime requires more than a four-corners analysis of the textual provisions of NAFTA and the NAAEC. It requires a careful assessment of the ways that NAFTA Chapter 11 and NAAEC Article 14 have been actually utilized, implemented and modified by the NAFTA governments, environmental stakeholders and trade interests that have participated in the processes created by these provisions.