



Capacitacion para Funcionarios Gubernamentales sobre Comercio y Medio Ambiente

Module IV: Enforcement of Trade-related Environmental Obligations

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Overview

- **Trade-related contexts for environmental obligations**
 - ◆ *Obligations to maintain high levels of environmental protection*
 - ◆ *Obligations to effectively enforce environmental laws*
 - ◆ *Obligations to adopt international environmental standards*
 - ◆ *Trade obligations with environmental implications*
- **Key concepts in adoption of environmental standards**
 - ◆ *Domestic environmental standards*
 - ◆ *International environmental standards*
- **Key concepts in enforcement of environmental standards**
 - ◆ *Building an effective enforcement program*
 - ◆ *Relationship to international obligations*
- **International mechanisms for promoting enforcement of environmental obligations**
- **International trade mechanisms with environmental implications**



Obligations to maintain high levels of environmental protection

- **Regional trade agreements or environmental cooperation agreements**

- ◆ *NAFTA: NAAEC Article 3*
- ◆ *DR-CAFTA: Article 17.1*

“Recognizing the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental laws and policies, each Party shall ensure that its laws and policies provide for and encourage high levels of environmental protection, and shall strive to continue to improve those laws and policies.”

- **Stockholm and Rio Declarations**

- ◆ *Rio Declaration Principle 11*

“States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and development context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.”

- **National constitutions**

- ◆ *E.g., Mexico*

Article 4: “Every person has the right to an environment suited to his development and well-being.”



Obligations to effectively enforce environmental laws

- NAFTA/NAAEC Article 5
- DR-CAFTA Chapter 17.2 and 17.3
- Others:
 - ◆ *Canada-Chile*
 - ◆ *US-Peru*
 - ◆ *US-Colombia*



Obligations to adopt international environmental standards

■ CITES

E.g. Article VIII, Section 1. "The Parties shall take appropriate measures to enforce the provisions of the present Convention and to prohibit trade in specimens in violation thereof. These shall include measures:(a) to penalize trade in, or possession of, such specimens, or both; and(b) to provide for the confiscation or return to the State of export of such specimens."

■ Montreal Protocol

E.g. Article 2.1. " Each Party shall ensure that for the twelve-month period commencing on the first day of the Seventh month following the date of entry into force of this Protocol, and in each twelve-month period thereafter, its calculated level of consumption of the controlled substances in Group I of Annex A does not exceed its calculated level of consumption in 1986. ..."

■ Basel Convention

■ Kyoto Protocol

■ US-Canada Migratory Bird Treaty



Trade obligations with environmental implications

- NAFTA Chapter 11 (Investment)
- DR-CAFTA Chapter 10 (Investment)
- WTO



Adoption of domestic environmental laws and standards

■ Key Concepts and General Framework

- ◆ *States may design environmental protection and enforcement schemes most appropriate to their legal systems and social, cultural and economic circumstances*
 - ☞ *e.g. NAAEC Article 3, CAFTA-DR Article 17.1*
- ◆ *Clear and well-developed laws and regulations*
- ◆ *Institutional framework*
- ◆ *National coordination (federal-state/province; interagency)*
- ◆ *Training*
- ◆ *Public awareness and education*
- ◆ *No “environmental dumping”*

■ Legal Tools

- ◆ *Statutes, regulations, policies, executive decrees, etc.*
- ◆ *Common law*
- ◆ *Constitutional provisions*
- ◆ *Enforcement mechanisms*



Adoption of domestic environmental laws and standards

■ Types of statutory provisions

- ◆ *Designation of responsible authorities, e.g. Environment Ministry, Forestry Department, Wildlife Service, Customs Agency, etc.*
- ◆ *Designation of what the authority can do: e.g.*
 - ☞ *Adopt regulations and set standards*
 - ☞ *Issue administrative orders*
 - ☞ *Take emergency action*
 - ☞ *Require information or reports from regulated community*
 - ☞ *Negotiate compliance agreements with regulated community*
 - ☞ *Implement market-based mechanisms and other incentive programs*
 - ☞ *Enforcement authority (inspections, warrants, access, penalties, etc.)*
- ◆ *Designation of statutory standards, criteria for regulations and market-based mechanisms and other requirements*
- ◆ *Provisions to promote pollution prevention*
- ◆ *Designation of violations*
- ◆ *Designation of fines and penalties*
- ◆ *Designation of statutes of limitations*

■ Complementary provisions

- ◆ *Constitutional provisions*
- ◆ *Administrative law and procedure*
- ◆ *Civil and criminal procedures*



Adoption of domestic environmental laws and standards

- **Command and control approaches**
 - ◆ **Basic description:** State sets and enforces mandatory standards
 - ◆ **Types of standards**
 - ☞ Technology-based standards
 - ☞ Performance-based standards
 - ◆ **Standards development (by statute, regulation or negotiation)**
 - ☞ Requires both legal and technical expertise
 - ☞ Broad stakeholder involvement beneficial, “negotiated rulemaking” = broad ownership of rules
 - ☞ Negotiated compliance agreements (e.g. Quebec)
 - ☞ Continual improvement: monitoring and adaptation
 - ☞ Administrative and judicial challenges
 - ◆ **Types of liability**
 - ☞ Administrative, civil or criminal
 - ☞ Strict liability vs. negligence (common law or statutory)
 - Proof of fault
 - Causation
 - Equitable contribution
 - Joint and several liability
 - ☞ Sanctions: fines, mandates, imprisonment, loss of contractor status, etc.



Adoption of domestic environmental laws and standards

- **Command and control approaches (continued)**

- ◆ **Highlight:** *Water effluent discharge law in North America*

<i>Effluent from paper mills</i>	Mexico	Canada	USA
Federal law and/or regulation	LGEEPA and LAN; Water Regs; and NOMs	Fisheries Act PPER	Clean Water Act
Type of standards	Performance-based NOMs	Performance-based: No acutely lethal effluent; max limits on BOD and TSS	Technology-based (BPT, BCT, BACT) and performance-based (NPDES, SPDES) stds
Liability levels	Administrative/civil and criminal	Criminal/penal	Administrative, civil & criminal
Liability types	Strict	Negligence (due diligence defense)	Strict
Penalties/Remedies	Fines, facility closures, admin. arrest	Fines, imprisonment, injunctions	Fines, imprisonment, injunctions



Adoption of domestic environmental laws and standards

■ Economic or Market-based Approaches

- ◆ **Basic description:** State uses market forces to create incentives or disincentives to affect behavior
- ◆ **Examples**
 - ☞ Fees or taxes on emissions
 - ☞ Subsidies for environmentally preferable actions
 - ☞ Tradable permits to discharge pollutants
 - ☞ Offsets (allow flexibility within total facility)
 - ☞ Auctions of pollution rights
 - ☞ Labeling/public disclosure (e.g. U.S. TRI, Canadian NPRI, Mexican RETC)
- ◆ **With command-and-control = Cap and trade**
 - ☞ Cap = strict limit on total amount of pollution
 - ☞ Initial step = means of equitable distribution of pollution quotas (e.g. auction)
 - ☞ Trade = market-based mechanism for economically efficient allocation of pollution among polluters
 - ☞ E.g. SO₂ in United States



Adoption of domestic environmental laws and standards

■ Voluntary tools

- ◆ **Basic description:** State provides assistance or encouragement without applying strict standards
- ◆ **Examples**
 - ☞ Public education
 - ☞ Technical assistance
 - ☞ Promote or reward pollution prevention
 - ☞ Co-management of natural resources
 - ☞ Environmental leadership: beneficial treatment for those who exceed mandatory standards and meet other conditions

■ Information-based tools

- ◆ **Basic description:** State releases information so as to create incentives or disincentives
- ◆ **Examples**
 - ☞ PRTR
 - ☞ Mandatory reporting (e.g. Canadian PPER; U.S. DMRs)
 - ☞ Industry-specific bulletins
 - ☞ Information on opportunities for improvement (e.g. pollution prevention opportunities that help environment *and* save money)



Adoption of domestic environmental laws and standards

- **Customary or traditional tools**
 - ◆ ***Basic description:*** State makes reference to or uses cultural institutions or customary/traditional practices to educate communities and address environmental problems
 - ◆ ***Examples***
 - ☞ Remote or rural communities
 - ☞ Indigenous communities



Adoption of domestic environmental laws and standards

- **Incorporation of international standards**
 - ◆ ***Self-executing requirements***: automatically incorporated into domestic law
 - ☞ Mexico: treaties generally incorporated into domestic law by Constitution
 - ☞ US and Canada: case-by-case analysis required
 - ◆ ***Implementing legislation***: explicit incorporation of international requirements by national legislature or executive
 - ☞ New stand-alone implementing legislation (e.g. Canada's International Boundary Waters Treaty Act, U.S. Migratory Bird Treaty Act, St. Lucia's CITES law)
 - ☞ Amendment of existing law
 - ◆ ***Models and approaches***
 - ☞ Laws of other States
 - ☞ Model legislation (e.g.
 - ☞ Use of relevant expertise: legal, enforcement (e.g. police), technical/scientific
 - ◆ ***Enforcement***: *through incorporation into domestic law, international standards are enforced as domestic laws are*



Adoption of domestic environmental laws and standards

- **Final thoughts on domestic laws and standards**
 - ◆ *No one-size-fits-all approach*
 - ◆ *Tools and approaches should be integrated and mutually supportive and integrated, to allow the strongest possible level of environmental protection in accordance with national context*
 - ◆ *Summary of basic considerations for laws and regulations*
 - ☞ Clear laws and regulations and fair notice to regulated community and public
 - ☞ Technically, economically and socially feasible to implement, monitor and enforce
 - ☞ Comprehensive, with appropriate sanctions and penalties
 - ◆ *Iterative or adaptive regulatory process allows for continual adaptation and improvement*
 - ☞ Requires plan for monitoring performance and making iterative changes
 - ☞ Things to track:
 - Levels of compliance
 - Levels of environmental quality
 - Inspections and permitting
 - ☞ Example: U.S. TMDLs



Key concepts in implementation and enforcement of environmental standards

- **Basic enforcement mechanisms and needs**
 - ◆ *Information on regulated community and means for informing regulated community of environmental mandates*
 - ◆ *Access to facilities and information*
 - ◆ *Means for monitoring compliance and inspecting facilities*
 - ◆ *Authority to order action to prevent or remedy environmental violations*
 - ◆ *Authority to conduct investigations and gather court-ready evidence, e.g. with warrants and search-and-seizure authority,*
 - ◆ *Policies to ensure fair and consistent enforcement, set guidelines for appropriate penalties and sanctions and establish enforcement priorities based on gravity and nature of the harm and of the alleged violator, and on economic benefits of non-compliance*
 - ◆ *Full tool-box: complementary mix of compliance assistance, economic instruments, and enforcement (administrative, civil and criminal)*
 - ◆ *Use of public media to highlight violations and positive achievements*
 - ◆ *Coordination with other agencies (e.g. Justice Ministry)*
 - ◆ *Program for measuring success and making adaptive changes*



Key concepts in implementation and enforcement of environmental standards

■ Complementary elements

- ◆ *Access to administrative and judicial procedures to remedy environmental harms*
- ◆ *Fair and neutral administrative and judicial processes to adjudicate enforcement cases*
- ◆ *Public access to government-held environmental information*
- ◆ *Use of other statutory authorities: fraud, misrepresentation, tax, customs*
- ◆ *Accountability mechanisms for oversight by legislature or civil society*
 - ☞ *Supreme audit institutions (e.g. US GAO; Canada Auditor-General)*
 - ☞ *Public mechanisms (e.g. Environmental Petitions at Canada's CESD; British Columbia's Forest Practices Board)*
 - ☞ *International mechanisms (e.g. CEC submissions process)*



Key concepts in implementation and enforcement of environmental standards

■ **Highlight:** NAAEC Article 5 criteria (North America)

1. *With the aim of achieving high levels of environmental protection and compliance with its environmental laws and regulations, each Party shall effectively enforce its environmental laws and regulations through appropriate governmental action, ... such as:*
 - a) *Appointing and training inspectors;*
 - b) *Monitoring compliance and investigating suspected violations, including through on-site inspections;*
 - c) *Seeking assurances of voluntary compliance and compliance agreements;*
 - d) *Publicly releasing non-compliance information;*
 - e) *Issuing bulletins or other periodic statements on enforcement procedures;*
 - f) *Promoting environmental audits;*
 - g) *Requiring record keeping and reporting;*
 - h) *Providing or encouraging mediation and arbitration services;*
 - i) *Using licenses, permits or authorizations;*
 - j) *Initiating, in a timely manner, judicial, quasi-judicial or administrative proceedings to seek appropriate sanctions or remedies for violations of its environmental laws and regulations;*
 - k) *Providing for search, seizure or detention; or*
 - l) *Issuing administrative orders, including orders of a preventative, curative or emergency nature.*



Key concepts in implementation and enforcement of environmental standards

- NAAEC Article 5 (continued)
 2. *Each Party shall ensure that judicial, quasi-judicial or administrative enforcement proceedings are available under its law to sanction or remedy violations of its environmental laws and regulations.*
 3. *Sanctions and remedies provided for a violation of a Party's environmental laws and regulations shall, as appropriate:*
 - a) *Take into consideration the nature and gravity of the violation, any economic benefit derived from the violation by the violator, the economic condition of the violator, and other relevant factors;*
 - b) *Include compliance agreements, fines, imprisonment, injunctions, the closure of facilities, and the cost of containing or cleaning up pollution.*



Key concepts in implementation and enforcement of environmental standards

■ Identifying the regulated community

- ◆ *General attributes: corporations, small business, government/public facilities, individuals*
- ◆ *Specific information for each facility*
 - ☞ *Name of facility*
 - ☞ *Location*
 - ☞ *Type of business or operation*
 - ☞ *Existing licenses, permits, product registrations, etc.*
 - ☞ *Types and quantities of regulated materials or emissions*
 - ☞ *Risk associated with facility operations*
 - ☞ *Control technologies applicable for facility*

■ Compliance posture of regulated community

- ◆ **Compliant group:** *complies without need for government intervention*
- ◆ **Reactive group:** *bases compliance on government presence*
- ◆ **Resistant group:** *complies only with enforcement action or other government intervention*

Key variable: Deterrence

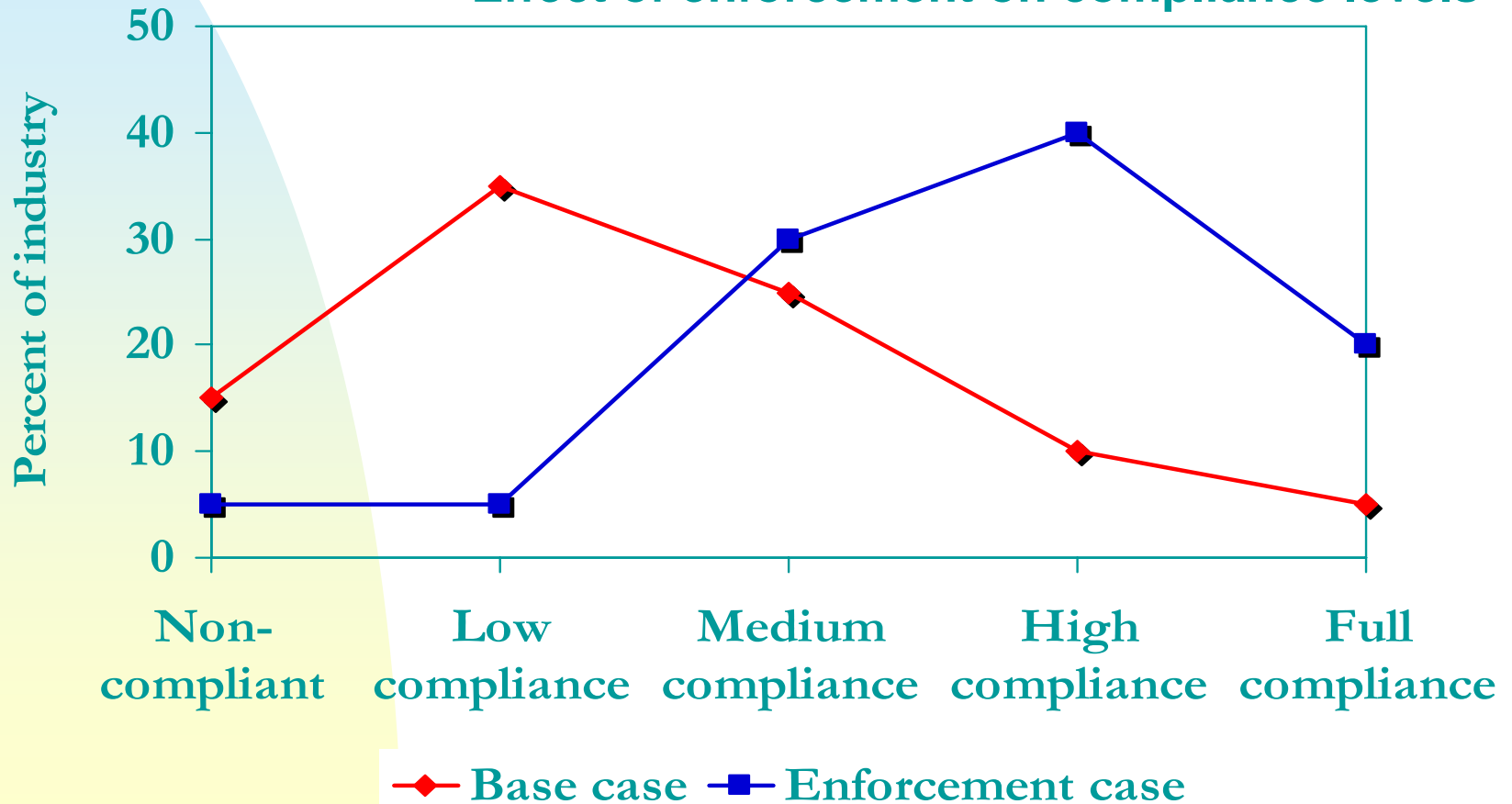
General deterrence - *government presence deters violations industry-wide*

Specific deterrence - *government intervention deters specific actor from violations*



Key concepts in implementation and enforcement of environmental standards

Effect of enforcement on compliance levels





Key concepts in implementation and enforcement of environmental standards

■ Basic enforcement authorities

- ◆ *Return violators to compliance as soon as possible*
- ◆ *Impose sanctions*
- ◆ *Remove economic benefit of non-compliance*
- ◆ *Order action to test, monitor or provide information*
- ◆ *Order action to correct or prevent environmental harm*
- ◆ *Address violator's internal management problems*

■ Considerations on enforcement personnel

- ◆ *Establish job qualifications and hiring criteria*
- ◆ *Establish roles for technical and legal staff*
- ◆ *Establish roles for compliance-related and enforcement-related staff*
- ◆ *Provide job protection for politically unpopular decisions*
- ◆ *Adequate compensation*
- ◆ *Bonuses or other incentives for superior performance*
- ◆ *Clear and objective criteria for promotions*
- ◆ *Introductory and ongoing training and professional development*



Key concepts in implementation and enforcement of environmental standards

- **Highlight:** *Canada's Fisheries Act Compliance and Enforcement Policy*
 - ◆ **Enforcement measures**
 - ☞ *Site inspections*
 - ☞ *Investigations*
 - ☞ *Warnings*
 - ☞ *Directions by inspectors*
 - ☞ *Authorizations and ministerial orders*
 - ☞ *Court actions (injunctions, prosecutions, court orders upon conviction, cost recovery)*
 - ◆ **Compliance measures**
 - ☞ *Review of works and issuance of authorizations*
 - ☞ *Education and information dissemination*
 - ☞ *Promotion of technology development and evaluation*
 - ☞ *Technology transfer*
 - ☞ *Public consultation on regulation development and amendment*
 - ☞ *Development of guidelines and codes of practice*
 - ☞ *Promotion of environmental audits*
 - ☞ *Compliance monitoring*



Key concepts in implementation and enforcement of environmental standards

- **Highlight:** *Canada's Fisheries Act Compliance and Enforcement Policy (cont'd)*
 - ◆ **Guiding Principles**
 - ☞ *Compliance with Fisheries Act and regulations is mandatory*
 - ☞ *Enforcement will be fair, predictable and consistent*
 - ☞ *Emphasis of enforcement personnel is on preventing harm to fish, fish habitat or human use of fish*
 - ☞ *Priority for action will be guided by degree of harm or risk of harm to fish, fish habitat or human health; and whether offense is a repeat occurrence*
 - ☞ *Enforcement action will be consistent with the policy and the public will be encouraged to report suspected violations*
 - ☞ *Compliance will be promoted through communication with stakeholders*
 - ◆ **Response to alleged violations**
 - ☞ *Enforcement measures are directed toward ensuring compliance within the shortest possible time and that violations are not repeated*
 - ☞ *Enforcement response to be based on 1) nature of the violation (both environmental harm and intent and attitude of the violator), 2) effectiveness in achieving desired result, and 3) consistency in enforcement (e.g. how similar situations were handled)*
 - ☞ *Appropriate recommendation of sanctions and penalties*



Key concepts in implementation and enforcement of environmental standards

- **Establishing Enforcement Priorities and Strategies**
 - ◆ *Protecting or restoring environmental quality or human health*
 - ☞ Focus on significant violators
 - ☞ Target problem industries, processes or sectors
 - ☞ Focus on geographic hotspots
 - ☞ Target specific contaminants, waste streams or emissions
 - ◆ *Protecting the integrity of enforcement programs*
 - ☞ Targeting violations of reporting or recordkeeping requirements
 - ◆ *Protecting the integrity of the the public image of enforcement*
 - ☞ Target less significant violators or low-risk violations to indicate enforcement presence
 - ☞ Establish priorities based on compliance history, targeting repeat violators
 - ☞ Focus on follow-up inspections and enforcement
 - ☞ Provide beneficial treatment for environmental leaders that go beyond compliance



Key concepts in implementation and enforcement of environmental standards

- **Measuring Success of Enforcement and Compliance Programs**
 - ◆ *Potential program measures*
 - ☞ Environmental results
 - ☞ Compliance rates
 - ☞ Return of significant violators to compliance
 - ☞ Measures of compliance monitoring
 - ☞ Number of enforcement responses
 - ☞ Timeliness of enforcement responses
 - ☞ Monetary penalties assessed
 - ☞ Measures of technical or other compliance assistance

 - ◆ *Assessing the effectiveness and value of measures*
 - ☞ Is the measure accurate and comprehensive?
 - ☞ What data must be collected, and how?
 - ☞ How should data be reported to be meaningful?
 - ☞ How will data be analyzed?
 - ☞ How will data be stored?



Key concepts in implementation and enforcement of environmental standards

- **Relationship of Environmental Enforcement to International Obligations**
 - ◆ *Obligations to effectively enforce environmental laws*
 - ◆ *Commitments to meet international environmental obligations under CITES, Montreal Protocol, etc.*
 - ◆ *Trade obligations*

- **International Cooperation on Environmental Enforcement**
 - ◆ *OAS – Environmental Law and Enforcement Network*
 - ◆ *INECE - www.inece.org*
 - ◆ *NAFTA/NAAEC - CEC Enforcement Working Group*



International mechanisms for promoting enforcement of environmental obligations

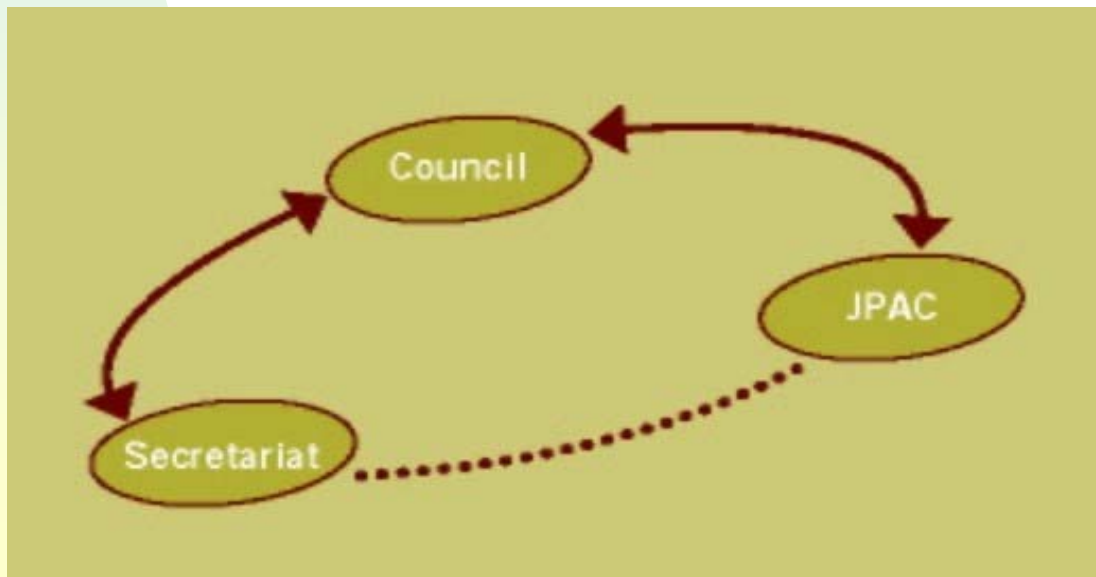
- **Citizen submissions processes**
 - ◆ NAFTA/NAAEC Articles 14 & 15- Commission for Environmental Cooperation
 - ◆ Canada-Chile FTA
 - ◆ DR-CAFTA Chapter 17.7

- **State-to-State dispute resolution mechanisms**
 - ◆ NAFTA/NAAEC Part V
 - ◆ DR-CAFTA dispute resolution



International mechanisms for promoting enforcement of environmental obligations

- CEC Structure** ■ **Highlight:** Commission for Environmental Cooperation
- **Council:** governing body; 3 top environmental officials
 - **Secretariat:** ~55 professional and support staff; “international character”
 - **JPAC:** 15 members, 5 appointed by each country





International mechanisms for promoting enforcement of environmental obligations

■ CEC: Mechanisms and Areas of Work

◆ *Party Obligations:*

- ☞ High levels of environmental protection (Article 3)
- ☞ Effective environmental enforcement (Article 5)
- ☞ Access to remedies and due process (Articles 6 & 7)

◆ *Council, JPAC and Secretariat functions:*

- ☞ e.g. Council mandate in Article 10(7)

◆ *Enhanced public participation*

- ☞ Submissions on enforcement matters (Articles 14 & 15)
- ☞ JPAC and national advisory committees
- ☞ Access to environmental information and participation in regulatory process

◆ *Tri-partite environmental cooperation*

◆ *Independent Secretariat Reports (Article 13)*

◆ *Party-to-party dispute resolution (Part V)*



International mechanisms for promoting enforcement of environmental obligations

■ **CEC: Submissions on Enforcement Matters**

How it works

- ◆ Submission asserts a Party is failing to effectively enforce its environmental law
- ◆ Secretariat determines if submission meets requirements and whether to ask the Party to respond
- ◆ Secretariat recommends to Council that a factual record be prepared
- ◆ Council votes whether to instruct secretariat to prepare a factual record
- ◆ Secretariat develops factual record per instructions
- ◆ Parties have 45 days to comment on draft factual record
- ◆ Secretariat incorporates Parties' comments as appropriate and provides Council with final factual record
- ◆ Council votes on release of final factual record



International mechanisms for promoting enforcement of environmental obligations

- **CEC: History and status of submissions (October 2007)**
 - ◆ **63 submissions** so far: 21 *re* **Canada**, 32 *re* **Mexico**, 9 *re* **United States**, 1 *re* **US & Canada**
 - ◆ **13 active submissions**, with 3 factual records in progress
 - ◆ **13 published factual records**: **Cozumel**, **BC Hydro**, **Metales y Derivados**, **Migratory Birds**, **Aquanova**, **BC Mining**, **BC Logging**, **Oldman River II**, **Rio Magdalena**, **Molymex II**, **Tarahumara**, **Ontario Logging**, **Pulp & Paper**
 - ◆ Secretariat has recommended 22 factual records: 16 Council instructions to prepare factual records, 2 Council votes against preparation of a factual record, 3 pending

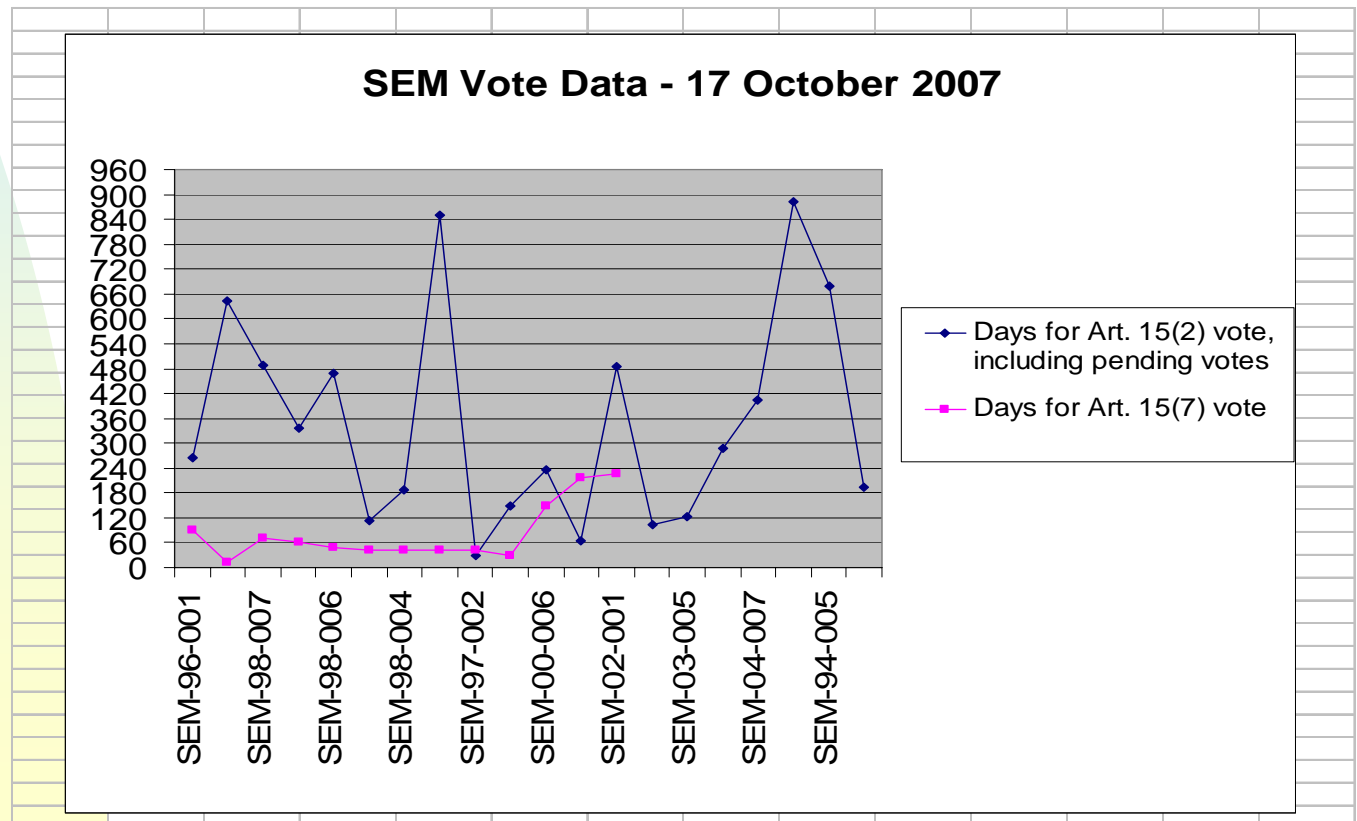


International mechanisms for promoting enforcement of environmental obligations

- **CEC: Submissions on Enforcement Matters**
 - ◆ ***Secretariat administration***
 - ☞ SEM Unit: SEM Director, 2 Legal Officers, 2 assistants
 - ☞ Special Legal Advisors: 3 from each country
 - ☞ Contracts: legal and technical expertise as needed
 - ◆ ***Key issues***
 - ☞ Sensitivities: enforcement and sovereignty
 - ☞ Scope and sufficiency of information
 - ☞ Pursuit of remedies
 - ☞ Pending proceedings
 - ☞ Factual record follow-up
 - ☞ Timeliness

International mechanisms for promoting enforcement of environmental obligations

■ CEC: Submissions on Enforcement Matters





International mechanisms for promoting enforcement of environmental obligations

■ CEC: Effect of submissions and factual records

- ◆ **Cozumel:** *The submitters found the submission led to additional protection of coral reefs, improvements to Mexican environmental impact assessment law and a trust fund for reef protection.*
- ◆ **BC Hydro:** *Submitters found that government commitments recorded in the factual record have helped keep on track a water use planning process addressing the submitters' environmental concerns.*
- ◆ **BC Logging:** *The Secretariat's investigation uncovered deficiencies in the procedures of Fisheries and Oceans Canada that the Department subsequently addressed.*
- ◆ **Oldman River II:** *Fisheries and Oceans Canada increased its presence in the prairie provinces.*
- ◆ **BC Mining:** *In a letter to BC government authorities, Environment Canada cited the BC Mining submission when it rejected a proposal to adopt a less costly, but less effective, effluent treatment method at the Britannia Mine.*
- ◆ **Aquanova:** *The submission led to negotiations among the submitters, local and environmental authorities and the developer that led to actions to reduce the impact of the shrimp farm's waste water discharge and a mangrove replanting program.*



International mechanisms for promoting enforcement of environmental obligations

- **CEC: Impact of SEM process**

Observations of the Ten-Year Review Committee on the impact of citizen submissions:

Anecdotal evidence indicates that the process has helped protect environmental quality. However, because there is no mandatory follow-up to factual records, these benefits have not been documented systematically. In general, one would expect the process to raise the profile of the issue within the responding government and encourage it to review its enforcement strategy. Notwithstanding the problems described [in the TRAC report], ... examples of the process's positive impact can be offered....

International mechanisms for promoting enforcement of environmental obligations



Figure 1. Map of Ten Mills of Concern

Paper factual record



Figure 10. Overview of Irving Pulp and Paper Mill (photo courtesy of Irving)

International mechanisms for promoting enforcement of environmental obligations

- Highlight: Pulp and Paper factual record (2007)**

Table 3. Summary of Pulp and Paper Effluent Regulation limits

Parameter		Maximum any day	Maximum monthly average	Test margin of accuracy
Suspended solids (TSS)*	kg/ton	18.75	11.25	15%
BOD ₅ *	kg/ton	12.5	7.5	20%
Acute lethality to trout**	96 hour LC50	100% on monthly or follow-up test		None
Acute lethality to <i>Daphnia</i> **	48 hour LC50	100% on weekly or follow-up test		None
Effluent flow	Must be measured to calculate other discharges			10%

- * The actual effluent limits for BOD and TSS for a mill are expressed in terms of kg/day, and must be calculated by formulae that account for the concentration of BOD matter or TSS and the mill's reference production rate, and the effluent flow. Less stringent limits for BOD and suspended solids discharges apply to dissolving pulp mills.
- ** 100% (full strength) represents the concentration of effluent at which at least 50% of the test organisms must survive after exposure to the effluent at full strength for the prescribed amount of time. A concentration of less than 100% indicates that the effluent had to be diluted in order for 50% of the organisms to survive, and hence a failure of the test. Because the PPER do not require the determination of the LC50 concentration, failure of the test may also be indicated simply when more than 50% of the test organisms fail to survive at the end of the test time period.



International mechanisms for promoting enforcement of environmental obligations

- **Highlight: Pulp and Paper factual record (2007)**
 - ◆ **Contextual facts**
 - ☞ Federal - provincial dynamics
 - Considerable variation among provincial approaches and federal presence within provinces or regions
 - ☞ *Fisheries Act* contains only penal provisions
 - Criminal burden of proof - “beyond a reasonable doubt”
 - Due diligence required under constitutional ruling
 - Industry focuses on establishing “due diligence” and “doubt”
 - ☞ Regulations require mills to report compliance data
 - Inconsistency on use of self-reported data in enforcement
 - ◆ **Enforcement facts**
 - ☞ Atlantic region - industry adept at building due diligence and doubt
 - Abitibi Consolidated mill - enforcement led to replacement of treatment system
 - Irving mill - federal enforcement investigation from 1996-2000 contributed to significant process changes and innovative pollution prevention technology
 - For some mills, no on-site inspections were done during periods with frequent mill reports of non-compliance
 - ☞ Quebec - federal enforcers deferential to province, with systematic inability to build enforcement cases; no on-site inspections done at any of the mills of concern; no federal enforcement despite lax provincial response
 - ☞ Ontario - strong federal enforcement presence and good coordination with provincial enforcement authorities



International mechanisms for promoting enforcement of environmental obligations

- ***Other submissions on enforcement matters mechanisms***
 - ◆ Canada-Chile
 - ◆ US-DR-CAFTA
 - ◆ US-Colombia
 - ◆ US-Peru
 - ◆ (*but not* US-Chile or Canada-Costa Rica, e.g., which use other mechanisms)

- ***Other similar international accountability mechanisms***
 - ◆ World Bank Inspection Panel
 - ◆ Asian Development Bank Compliance Review Panel
 - ◆ EBRD Independent Recourse Mechanism
 - ◆ IADB mechanism
 - ◆ African Development Bank mechanism
 - ◆ IFC/MIGA Compliance Advisor/Ombudsman
 - ◆ OPIC, JBIC, NEXI mechanisms



International mechanisms for promoting enforcement of environmental obligations

■ **CEC: Part V Dispute Resolution**

Government-to-government disputes over alleged *persistent patterns* to effectively enforce environmental law

- ◆ Complex process involves several steps, with possibility for arbitration
- ◆ No formal connection to Articles 14 & 15
- ◆ Possibility of loss of NAFTA benefits or “monetary enforcement sanction” which is placed in CEC fund to support environmental protection or environmental enforcement in country complained of, or loss of NAFTA benefits in amount of the sanction
- ◆ Considered the “teeth” of the NAAEC
- ◆ Model rules of procedure called for in NAAEC have not been adopted and roster of arbitrators has not been created
- ◆ No cases brought to date - or even threatened or hinted at
- ◆ Ten-year review advisory committee recommended moratorium
- ◆ Recent US FTAs have included similar provision (e.g. DR-CAFTA, US-Peru, US-Chile)



International trade mechanisms with environmental implications

- NAFTA Chapter 11 and DR-CAFTA Chapter 10 (investor-state)
 - ◆ Post-NAFTA agreements have attempted to address concerns, e.g. regulatory expropriation (e.g. Metalclad)
- NAFTA Chapter 20 and similar chapters in other agreements (state-state)
- WTO Cases (state-state)
- Issues:
 - ◆ Potential barrier to environmental protection and regulation?
 - ◆ Timeliness
 - ◆ Qualifications of arbitrators and selection of rosters
 - ◆ Transparency and involvement of third parties
 - ◆ Need for clear process and guidelines



International trade mechanisms with environmental implications

- **NAFTA Chapter 11:** cases with significant environmental issues
 - ◆ ***Metalclad v. Mexico (filed 1997):*** U.S. hazardous waste management company won US\$16.7 million after local government denied municipal construction permit for a landfill and the state government created a natural protected area after the landfill was already constructed. The British Columbia Supreme Court upheld the arbitrators' award.
 - ◆ ***Ethyl Corporation v. Canada (filed 1997):*** U.S. producer of gasoline additive MMT sought compensation due to Canadian ban on importation of manganese-based products, which was imposed because of public health concerns. Canada rescinded the ban and reportedly settled the claim for US\$13 million.
 - ◆ ***S.D. Myers v. Canada (filed 1998):*** A U.S. waste PCB incineration company sought compensation for losses caused by a one-year Canadian ban on the export of PCB wastes. The arbitral panel issued SD Myers a partial award of CDN\$6 million, finding that the export ban was done to favor Canadian businesses and not for environmental reasons. A Canadian federal court of appeal dismissed an appeal of the award.



International trade mechanisms with environmental implications

- **NAFTA Chapter 11:** cases with significant environmental issues
 - ◆ **Methanex v. U.S.:** *Canadian methanol producer seeks nearly US\$1 billion in compensation for California's ban on MTBE, a gasoline additive made from methanol. California claims the ban is to protect drinking water supplies from MTBE contamination from leaking underground storage tanks. The arbitral panel dismissed portions of the claim, but allowed Methanex to proceed with its claim that California issued the MTBE ban with the intent to benefit the U.S. ethanol industry and penalize foreign producers of methanol and MTBE. In August 2005, the arbitral panel ruled against Methanex and ordered Methanex to pay the US \$3 million in arbitration costs.*
 - ◆ **Glamis Gold Ltd. V. U.S. (filed 2003):** *Canadian gold mining company claims U.S. federal and state actions completely destroyed the economic value of a gold mine project that threatened Quechan Indian cultural resources east of San Diego. Evidentiary hearing on jurisdiction and merits held in August and September 2007.*

More information: www.naftaclaims.com



International trade mechanisms with environmental implications

	SEM Process	Chapter 11
Who can file?	Non-governmental organizations of persons residing in a NAFTA country, asserting failure to effectively enforce environmental law	Investors of another Party, seeking compensation for expropriation of investment or other losses due to violation of NAFTA rules
Description of process	Submission filed with Secretariat; Council must approve detailed investigation and release of results	Investor submits claim to arbitration; NAFTA includes Parties' consent to arbitration; arbitration pursuant to ICSID or UNCITRAL rules
Role of complainant	Files submission; may provide information during factual record development	Selects one arbitrator and may object to third arbitrator; full party to arbitration; may submit evidence and argument and respond to government
Authority of tribunal	Secretariat recommends factual record, for Council vote; no subpoena power or authority to take testimony under oath	Arbitral panel has authority to hold evidentiary hearings, issue orders, allow <i>amicus curiae</i> briefs and make binding awards
Remedy	Factual record, with no conclusion on whether country failed to effectively enforce and no formal follow-up	Binding arbitration award compensating investment loss, typically multi-million dollar awards where successful



International trade mechanisms with environmental implications

- NAFTA Chapter 20 and similar chapters in other FTAs (state-state)
 - ◆ Disputes over interpretation or enforcement of all NAFTA provisions, except Chapters 11, 14 (in part) & 19
 - ◆ Steps
 - ☞ Consultations
 - ☞ Meetings with Free Trade Commission
 - ☞ Arbitration
 - ◆ Preference for mutually agreed resolutions
 - ◆ Concurrent WTO case: first filed prevails
 - ◆ Mandatory and expedited process
 - ◆ Automatic suspension of benefits
 - ◆ Only 4 cases to date:
 - ☞ Roster of arbitrators only finalized in 2006
 - ☞ WTO may have greater impact, and is more open & transparent



International trade mechanisms with environmental implications

- WTO Cases (state-state)
 - ◆ Key features
 - ☞ Protects and clarifies member States' rights and obligations
 - ☞ Preference for mutually agreed solutions
 - ☞ Prohibits unilateral measures - consensus
 - ☞ Mandatory and expedited procedures
 - ◆ Steps
 - ☞ Consultations
 - ☞ Special group investigates and reports
 - ☞ Appellate body
 - ☞ Compliance step
 - Arbitration over compliance schedule
 - Arbitration over extent of compliance
 - Arbitration over remedies



International trade mechanisms with environmental implications

Highlight: WTO decision on Brazil Tires (September 2007)

- ◆ Panel held Brazil ban on import of re-tread tires was permissible to protect health and the environment. However, it was inconsistent with WTO rules because Brazil failed to enforce a similar ban on used tires. Brazil could comply by implement the ban on used tires.
 - ☞ Panel found import ban was “necessary” and no less trade-restrictive alternatives were reasonably available
 - ☞ But, since import of used tires undermined environmental/health objectives of retread ban, ban was disguised restriction on international trade
- ◆ Environmental and health issues:
 - ☞ Waste tires are breeding ground for mosquitoes
 - ☞ Tire fires are environmentally harmful
 - ☞ Collection and proper disposal of waste tires impracticable
 - ☞ Commentators note consistency of ruling with Basel Convention rules
- ◆ European Community is appealing.
- ◆ *Cf.* Tuna-Dolphin and Shrimp-Turtle



Muchas gracias!

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