

# Weighing up the Environmental Cooperation Agreement under the Canada–United States–Mexico Agreement

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Trade agreements can have important environmental effects. We take a look at what's old, what's new and what's noteworthy in the Canada–United States–Mexico Agreement (in Canada, CUSMA; in United States, [USMCA](#); in Mexico, [T-MEC](#)) when it comes to the environment.

### Key Messages

- There is a great deal of potential in the cooperation activities of the new side agreement and the new commitments of the environment chapter, but for now they are potential only: **time and experience will judge their ultimate utility.**
- **The Commission for Environmental Cooperation retains most of its previous responsibilities**, with the notable exception of the ability to produce unsolicited (so-called Article 13) reports.
- **The CUSMA defines “affecting trade or investment” in a novel way**, significantly strengthening the standard commitments not to fail to enforce environmental laws, and to respect existing provisions in multilateral environmental agreements on ozone depletion, marine pollution and trade in endangered species.

### Background

On November 30, 2018, Canada, Mexico and the United States adopted an Agreement on Environmental Cooperation (ECA)<sup>1</sup> that will take effect when the CUSMA enters into force. The ECA will supersede the North American Agreement on Environmental Cooperation (NAAEC), a side agreement that existed under the North American Free Trade Agreement (NAFTA). Unlike NAFTA, which dealt with environment only in the side agreement, the CUSMA also has an environmental chapter. The interplay of the CUSMA environment chapter (Chapter 24)<sup>2</sup> and the ECA formalizes how the three countries will cooperate on environmental protection and conservation.

<sup>1</sup> Agreement on Environmental Cooperation among the governments of Canada, the United States of America and the United Mexican States. Retrieved from [www.international.gc.ca/trade-commerce/assets/pdfs/agreements-accords/cusma-aceum/cusma-ECA.pdf](http://www.international.gc.ca/trade-commerce/assets/pdfs/agreements-accords/cusma-aceum/cusma-ECA.pdf).

<sup>2</sup> The Canada-United States-Mexico Agreement, Chapter 24: Environment. Retrieved from <https://international.gc.ca/trade-commerce/assets/pdfs/agreements-accords/cusma-aceum/cusma-24.pdf>.



## What's old?

The ECA preserves the Commission for Environmental Cooperation (CEC), an international environmental organization set up under NAFTA. As under NAFTA, the CEC consists of three bodies:

- A Council, made up of ministers of environment from Canada and Mexico and the Environmental Protection Agency Administrator from the United States
- A Secretariat, which provides support to the Council and implements activities
- A Joint Public Advisory Committee, which engages stakeholders in North America and provides advice to the Council

The budget for the CEC has yet to be decided, as it is the job of the Council, but it is likely to be lower than it was under NAFTA.

The ECA has a close relationship with Chapter 24 of the CUSMA:

- Citizens can still make submissions alleging failure of the parties to enforce existing environmental laws, and these can result in a factual record being prepared that explores the infraction. The procedures for these are spelled out in CUSMA's Chapter 24, but receiving and acting on submissions is the job of the CEC.
- Chapter 24 also establishes an Environment Committee and mandates it to inform the CEC on the implementation of the its many environmental commitments.
- The CEC is named in CUSMA Chapter 24 as responsible for environmental cooperation activities among the parties, maintaining the CEC's current role.

## What's new? What's changed since NAFTA?

Whereas under the NAAEC an arbitral panel would be convened to cover any state-to-state environmental disputes, though there never was one, the CUSMA adopts the modern "ladder" practice: if consultations do not work, the next rung in the ladder is consideration by the CUSMA Environment Committee, followed by, if necessary, ministerial consultations, followed by the CUSMA's general dispute settlement regime.

The ECA has no provision for so-called "Article 13 reports"—reports undertaken on the CEC Secretariat's authority and at their discretion. Some of these reports had been controversial for the parties, like [the report on the impacts in Mexico of imported transgenic maize](#).<sup>3</sup> However, they represented the CEC's only direct analysis of trade's impacts on the environment.

The ECA sets out a raft of potential activities for cooperation. Nothing of this sort featured in the NAAEC. Cooperation was arguably one of the CEC's most important functions though, so this update just reflects actual practice.

## What's noteworthy?

Like the NAAEC, the CUSMA includes the commitment not to fail to enforce parties' environmental laws in ways that affect trade or investment between the parties (Article 24.4). This standard commitment has two new noteworthy features. Unlike the NAAEC, it includes the modern caveat about the sovereign right to exercise discretion in environmental enforcement, in terms of priority-setting, resource-allocation, etc. And it has a pioneering broad definition of "affecting trade or investment between the parties" that makes this provision much more meaningful (Article 24.4, footnote 4). The footnote clarifies that this simply involves: "(i) a person or industry that produces a good or supplies a service traded between the Parties or has an investment in the territory of the Party that has failed to comply with this obligation; or (ii) a person or industry that produces a good or supplies a service that competes in the territory of a Party with a good or a service of another Party."

<sup>3</sup> Commission for Environmental Cooperation. (2004). *Maize and biodiversity: The effects of transgenic maize in Mexico*. Retrieved from <http://www3.cec.org/islandora/en/item/2152-maize-and-biodiversity-effects-transgenic-maize-in-mexico-key-findings-and-en.pdf>.



In the absence of any clarifying definition, it was hard to see how failing to enforce any environmental measure could be found to be affecting trade or investment, but this definition covers a broad range of circumstances.

The same broad definition is used in the context of commitments to enforce existing laws related to multilateral environmental agreements in the areas of ozone depletion, marine pollution and trade in endangered species, making these provisions similarly more meaningful than they are under, for example, the Comprehensive and Progressive Trans-Pacific Partnership.

The ECA has a pioneering provision on gender (Article 10.4), giving the Council the ability to “instruct the Secretariat to develop recommendations on how best to consider gender and diversity effects and opportunities in the implementation of the Work Program.” This is not a hard commitment, and it dovetails with other text on gender in the agreement, so time and experience will tell whether it has positive impacts.

The ECA work program (Article 10), to be developed by the Council, has a comprehensive list of 27 potential activities in the areas of:

- Strengthening environmental governance
- Reducing pollution and supporting strong, low-emission, resilient economies
- Conserving and protecting biodiversity and habitats
- Promoting the sustainable management and use of natural resources
- Supporting green growth and sustainable development

These are only potential activities. It would be impressive if even a small number of them were actively pursued, so final judgment will have to wait on these. Given the U.S. administration’s position, it is not surprising that climate change is absent from this list, but some will count it as a minor victory that the work program does include low-emission economies and renewable energy sources.

CUSMA’s Chapter 24 goes beyond existing commitments in multilateral environmental agreements in a number of areas, with hard (though sometimes vague) commitments on:

- Reducing fisheries subsidies and targeting illegal, unreported and unregulated fisheries
- Stopping illegal shipments of endangered species of flora and fauna
- Prohibiting shark finning and the commercial killing of great whales
- Reducing marine litter

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