

Final Report:

**Inherent conflict of interest built
into the North American Agreement on Environmental Cooperation**

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Introduction

The purpose of the North American Agreement on Environmental Cooperation (NAAEC) is to foster the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generations.¹ The objective is to help strengthen Party cooperation and compliance as well as promote transparency and public participation regarding environmental improvements, regulations, procedures, and policies.² The NAAEC was innovative in linking environmental cooperation with trade relations and public concern; thus, allowing the creation of the Commission for Environmental Cooperation (CEC) to address and manage multiple environmental issues in North America.³

The drafting of this proposal necessitated reviewing and analyzing documents pertinent to the development and analyses of NAAEC. The over-arching purpose of this document is to address issues that may aid in achieving the objective purpose of the NAAEC; hence, helping the Council's expressed concern for an efficient manner to help meet public expectations, and facilitating the Council's commitment in favor of factual transparency.⁴ It is a well established principle of international law that the signature Parties and the CEC of the NAAEC must interpret the agreement in accordance with its ordinary meaning and in light of the NAAEC's object and purpose;⁵ this project proposal was impartially evaluated with that particular rationale.

The author thanks Dario Olivas, Lucero Ramirez and Roberto Torres for their helpful suggestions and useful insights in preparing this paper.

¹ The North American Agreement on Environmental Cooperation, 8 Sept. 1993,

² Id.

³ Report of the Ten-Year Review and Assessment Committee to the Council of the Commission for Environmental Cooperation, *Ten Years of North American Environmental Cooperation*, pg. ix.

⁴ Council Resolution 01-06, Guadalajara, 29 June 2001, C/01-00/RES/06/Rev. 4.

⁵ The Vienna Convention on the Law of Treaties, 1155 U.N.T.S 331, 8 I.L.M. 679 (1969).

Chapter I

Background

1. Lessons Learned: Citizen Submissions under Articles 14 and 15 of the North American Agreement of Environmental Cooperation

On June, 2001, the Joint Public Advisory Committee (“JPAC”) released its Final Report on Lessons Learned on Citizen Submissions under Articles 14 and 15 of the NAAEC. In this report, available records of citizen submissions since 1995 were reviewed; strengths and weaknesses were identified; and suggestions were made on how to make the process of Articles 14 and 15 more timely, open, equitable and effective.

The following “lessons learned” from the Final Report are relevant to the present paper:

- Citizens from NAAEC countries have repeatedly turned to Articles 14 and 15 process when they believed that domestic environmental remedies were inadequate to address their complaints.⁶
- Secretariat must have or be perceived to have independence while making decisions with respect to submissions, adequacy of Party response, recommendations to Council and development of factual records.⁷
- Council decisions not to accept Secretariat’s recommendations to develop a factual record should be reasoned, informed and open, stating substantive reasons.⁸
- Prohibition for the Secretariat to reveal reasons for recommending the development of factual records should be eliminated.⁹

2. Final Report: Issues Related to Articles 14 and 15 of the North American Agreement on Environmental Cooperation

On October 2003, the Environmental Law Institute (“ELI”) under JPAC’s instructions prepared a report analyzing legal and policy implications, regarding Council resolutions narrowing the scope of four factual records investigations.

ELI made relevant findings which are intimately bound to the inherent conflict of interest built into the NAAEC.

ELI concluded that Council resolutions narrowing the scope of Secretariat’s investigations jeopardized the ability of factual records to completely expose the concerned issues and also limited its usefulness to submitters.¹⁰ As a consequence, Council diminished the potential for factual records to evidence widespread enforcement failures, thus threatening Secretariat’s independence and the process credibility.

⁶ Page 13 *in fine*.

⁷ Page 14, second paragraph.

⁸ Page 16, first paragraph.

⁹ Page 16, second paragraph.

¹⁰ Pages iv and 37.

Furthermore, ELI found that “[...] Having the Council define the scope of the factual record effectively entitles the Party - against whom the allegations have been directed – to dictate through the Council how such allegations should be investigated.”¹¹

With respect to Council’s authority under NAAEC to narrow the scope of factual records or to require submitters to present additional information, the report concludes that even though the text of the Agreement is not decisive, the Council’s resolutions seem to contravene its spirit, as Council resolutions undermine NAAEC’s principles of public participation and transparency.¹²

In the same sense, the text of the NAAEC seems to grant Secretariat with the authority to determine the scope or to settle evidentiary threshold, not corresponding this decisions to a “[...] politically-motivated Council whose very enforcement practices are the subject of the investigation.”

3. Advice to Council No. 03-05

On December 17th, 2003, JPAC strongly recommended Council to refrain from limiting the scope of factual records presented for decision by the Secretariat. This recommendation was basically supported on JPAC’s Lessons Learned Report and ELI’s Final Report.

JPAC stated that there was an emerging perception of Council being in conflict of interest and that regarding this matter, during the public meeting held in Montreal on October 2, 2003, JPAC was specifically asked by the public to raise this issue with Council.

On that public meeting it was noticed that “[...] ‘Council is having a hard time differentiating their role – when they are acting as Council and when they are acting individually as Parties.’”

4. JPAC Analysis Articles 14/15: Council's "Emerging Conflict of Interest"

As a result of concerns regarding the biases of the Parties being reflected in Council decisions, JPAC decided to undertake an analysis of a possible structural conflict of interest within the NAAEC in order to form an opinion of how to proceed and advise the Council. As the analysis is still in a drafting process, we have reviewed a draft provided.¹³

The analysis covers Articles 14 and 15 process, noting that even though between 1995 through 2004, Council has exercised its veto power – not ordering the elaboration of a factual record despite Secretariat’s recommendation - on only two occasions, it has been more frequent for the Council to limit the scope or the record or to establish a higher standard of information to be provided by submitters. A briefing of citizen petitions that ended in factual records is provided as well.

¹¹ Page 18 third paragraph.

¹² Page 38.

¹³ We reviewed the April 28, 2004 draft version.

To this regard, it is mentioned that from the Secretariat's point of view, NAAEC provides with parameters for the scope of citizen submission process, which in effect do not establish that only particularized assertions of a failure to effectively enforce should be object of factual records.¹⁴

After enumerating comments received during the December 4, 2003 meeting with respect to an increasing public concern over Council's emerging role in the fact-finding process, JPAC concludes that "[...] there is an inherent appearance of a conflict of interest by having the Council determine whether one of its countries has violated its environmental laws."¹⁵

The draft paper includes several examples of other institutional models, and suggestions for possible solutions to this problem.

5. Report of the Ten-year Review and Assessment Committee ("TRAC")

Pursuant to Council Resolution 03-02, on June 2004 the TRAC Report was presented to Council, presenting a review of the implementation of the NAAEC over its first ten years, and recommending actions to assist the Council in charting the path for the CEC.

Chapter 5 of the TRAC Report reviews how well each of the main institutions created under the NAAEC are working together. With respect to the Council, it is noticed that "[...] The issues ministers bring to the CEC table reflect more their domestic agendas than North American priorities."¹⁶

It is explained that since much of the Council members' involvement in the CEC have been delegated in their alternative representatives through the General Standing Committee, and due to a lack of direction within the CEC and a vacuum leadership in the Council, alternative representatives role has mainly consisted in protecting the interests of their respective countries.¹⁷

The TRAC Report points out Parties have not favored a strong Secretariat and that former Council members saw an inverse relationship between their role and that of the Secretariat.¹⁸

It is also mentioned there is a concern about the Council exercising too much direction in the administration of articles 14 and 15, and that this issue have caused friction among the Parties, the Secretariat and JPAC.¹⁹

¹⁴ Page 5.

¹⁵ Page 7.

¹⁶ Page 30.

¹⁷ Page 31.

¹⁸ Page 32.

¹⁹ Ídem.

6. JPAC Regular Session June, 2004

During its regular session held in Puebla, Mexico, the JPAC working group agreed that the seeds of Council being in conflict of interest exist and that the issue is whether or not Council is making independent decisions.

It must be noticed that since its regular session 04-01 held in Oaxaca, Mexico, JPAC initially agreed to analyze the emerging perception of Council being in conflict of interest, but this decision was postponed until an answer to Advice to Council 03-05 was received.

It was agreed that the analysis should include proposals on how to handle the conflict of interest built into the NAAEC and cover suggestions of feasible operational changes that might improve decision making, in order to assist JPAC in making recommendations to Council precisely regarding operational changes.

Chapter II Council Conflicting Functions under the NAAEC

This section contains the analysis of Council functions under the light of an inherent conflict of interests built within the NAAEC. It must be noticed that even though the NAAEC is composed of five different bodies – Parties, Council, Secretariat, JPAC and Public -, conflict of interest has been located within the Council, where Parties have found trouble differentiating their roles, whether they are acting as Council or individually as Parties.

With this in mind, NAAEC text was reviewed in order to spot all Council functions for further analysis. A summary of Council functions under the NAAEC is herein attached as Annex 1.

Consequently, an analysis of Council functions was conducted in order to identify which may have been or could be conducive to confusion of the Parties role acting as Council members, particularly with respect to Articles 14 and 15 process determinations.

1. Article 10(1)(d)

Article 10 of the NAAEC provides with a list of Council functions. On paragraph (1)(d), Council is empowered to “address questions and differences that may arise between the Parties regarding the interpretation or application” of the NAAEC.

This way, Council is in charge of the highest and most important responsibilities, being entitled to decide the destiny of NAAEC by interpreting its text and dictating the form it will be applied.

But said responsibilities could be exercised in an inappropriate manner, as from the text of the article is not clear whether the reference to Parties is made as members of the Council or as individuals.

Considering the article is about Council functions, it could be understood the reference is made to the Parties as Council members. If so, the term “Parties” could have been used as a synonym

of “Council members”, evidencing there is no sufficient clarity on where the border is between the role of Party and the role of Council member.

On the other hand, if the term “Parties” should be understood as the NAAEC nations, then Article 10(1)(d) could be seeding a conflict of interest as interpretation or application disputes would be brought by a Party and not by a Council member, making it much more probable that the dispute will involve particular Parties interests.

In addition, this situation could be reflected in Council rulings under Article 10(1)(d), in prejudice of NAAEC’s principles and goals.

2. Article 9(5)(c)

According to this article, the Council may take any action in the exercise of its functions as long as the Parties may agree.

Just as in the case of Article 10(1)(d), confusion may be induced as the term “Parties” can be interpreted in two different senses.

If “Parties” should be understood as the members of the Council – considering that the Article is about the Councils structure and procedures –, then again confusion may arise, making it harder to distinguish between the two roles assigned to Parties under NAAEC.

Arguably, if “Parties” should be understood as the NAAEC nations, the following conclusions can be drawn from the lecture of this Article:

- a) Council actions in exercise of its functions are limited to what the Parties may agree, so, Council might not be an independent body with respect to Parties.
- b) Parties are entitled to make external agreements regarding Council actions, being mandatory for Council to comply with them.
- c) As agreements are taken outside the Council, nothing guarantees that Parties will oversee and consider NAAEC’s object and purpose.

In conclusion, lack of clarity in Article 9(5)(c) may conduct to a conflict of interests within Council and its members.

3. Article 15(2)

This article indicates that the Secretariat shall prepare a factual record if the Council, by a two-thirds vote, instructs it to do so.

Neither article 15 nor the complete text of the NAAEC establishes parameters or criteria which may guide Council decisions regarding a Secretariat determination warranting the development of a factual record. Council is granted with absolute discretion to decide whether or not to

instruct the Secretariat to prepare a factual record. Even more, Council is not obliged to reason or explain its determinations under Article 15(2).

In addition, apparently Council has understood that Article 15(2) entitles it to limit the scope of Secretariat's fact finding process, by narrowing scope of allegations originally submitted. Notwithstanding that Council has not issued any interpretation to this regard, it can be inferred from some of its determinations.

Even though the NAAEC is silent with respect to this issue, and no further definitive conclusions may be drawn from a literal interpretation of its text, there is a perception that Council is somehow "managing" the fact finding process.

Although it can not be affirmed that Article 15(2) encourages Parties to misuse the discretionary power granted to Council, absence of clarity, criteria and transparency makes it more difficult for Parties to distinguish their role as Council members and to act consequently.

This situation may also make it difficult for submitters, JPAC and the Public to detect when Council determinations are oriented for individual Party interests or in furtherance of the object and purpose of the NAAEC.

4. Article 10(1)(c)

The Council is defined in this Article as the governing body of the Commission for Environmental Cooperation, having in charge overseeing the Secretariat.

Secretariat is conceived in the NAAEC as an independent body with international responsibilities. While performing its duties, the Secretariat is not allowed to seek or receive instructions from anyone different from the Council; Parties shall not seek to influence Secretariat's executive director or staff members.

Considering that Council is a body comprised by Parties, that Secretariat is in charge of carrying out investigations regarding Parties failure to effectively enforce their environmental law and, that Secretariat is under the sole authority of the Council; the Parties' two roles under NAAEC might likely cause conflict with respect to the functions they should be playing in Council, making it difficult for Parties to set apart national interests on behalf of the best interest of environmental common goals set forth by the NAAEC.

Notwithstanding the legitimacy of the Council as the maximum body under the NAAEC, its powers over the Secretariat during Articles 14 and 15 processes could be questionable, as NAAEC does not provide with parameters on the limitations to these powers or with mechanisms to prevent Parties from using Council's authority to misguide factual records investigations in accordance with a Party particular interest.

The only existent mechanism could be found in Article 15(2), which prevents a Party from unilaterally taking determinations regarding a factual record development - as a two-thirds vote is required -, but do not prevent Parties from agreeing the sense of Council resolutions,

misguiding factual investigations in order to protect themselves from being publicly exposed through a full scope factual record.

5. Article 15(7)

Article 15(7) provides that the Council may, by a two-thirds vote, make the final factual record publicly available, normally within 60 days following its submission.

According to this article, it must be understood that NAAEC establishes as a general rule factual records should not be made publicly available, unless Council decides otherwise.

Development of a factual record – once certain requirements are duly accomplished - is the ultimate objective of Articles 14 and 15 process. By gathering information, an international and independent body can evidence through a factual record that a Party is failing to effectively enforce its environmental law.

So, whenever a factual record is developed but not made publicly available, the most important enforcement mechanism contained in the NAAEC loses its purpose, as its main target will not be accomplished.

Even though in every case in which the Secretariat has been instructed to develop a factual record the Council has ordered its publication, there is always the chance for Council not to do so, without being obliged to reason or explain its determination.

This way, the Council is empowered with an authority which may not only contravene NAAEC's principles and spirit, but may also provide the Parties with a tool to protect themselves – while supposedly acting as Council members - from being publicly exposed through a factual record.

Chapter III Institutional Models

Section I European Union

The European Union intends to insure impartiality and objectivity in the performance of the duties of the European Staff. These features are to be achieved regardless of the nationality of the members of the European Institutions. To this effect the Union has adopted several legal documents that will be revised throughout this section, as well as the mechanisms to enforce them.

1. Background

The Treaty of Maastricht²⁰ entitles the European Ombudsman to examine complaints by European citizens in possible cases of European maladministration²¹. Consequently the Ombudsman may start its own initiative inquiry into the matter concerned.

As a result of such an inquiry, the Ombudsman may forward recommendations to the European Parliament with a call to address practices of maladministration by European institutions and bodies.

By the end of 1998 the European Ombudsman started an own initiative inquiry following numerous complaints by European citizens on the administrative duties of Community staff towards citizens. The Ombudsman concluded that each European institution or body had its own rules and practices to be taken into account by the respective staff when dealing with questions and complaints by European citizens.

Consequently the Ombudsman recommended drafting a Code of Good Administrative Behavior²² common to all the European Union's institutions and bodies. The European Parliament welcomed very positively this proposal because of the following reasons:

Such a Code would be useful for European officials when they dealt with complaints, requests and questions from citizens. This would be the case since they would now know which common rules should be respected when dealing with citizens. Furthermore, they would know that when performing their duties as European functionaries they were expected to act independently and objectively.

On the other hand, a Code accessible to the public, would inform citizens of the standards of good administrative practices which could be expected from any European institution or body and their officials.

As proposed by the Ombudsman, the Code was adopted on September 13 2000. This Code is contained in a regulation on the basis of Article 308 of the Treaty and thus anchored into primary Community law.

The object of the Code is to be common and binding to all the institutions and bodies of the Union and their officials.

2. The European Commission

The Treaty of Maastricht makes special allusion to the requirement of the Members of the Commission to perform their duties in the general interest of the Community. That is, the members of the Commission “shall be chosen on the grounds of their general competence and

²⁰ The Treaty of the European Union, adopted in Maastricht on February 7th 1992.

²¹ Maladministration means poor or failed administration. This occurs if an institution fails to do something it should have done, if it does it in the wrong way or if it does something that ought not to be done.

²² The Code of Good Administrative Behaviour: Relations with the public, adopted on September 13 2000.

their independence shall be beyond doubt”. Moreover, in performing their duties “they must neither seek nor take instructions from any government or from any other body”. This is, in other words, an obligation to act independently, objectively and impartially, disregarding their country of origin.

In this order of ideas, the Code of Conduct of Commissioners was reformed. The intention of this reform was to insure the impartiality of the Commissioners by codifying certain provisions referred to the performance of their duties. The provisions on former and current officials' rights and obligations were intended to be clearer and avoid conflicts of interest.

Serving officials are intended to be prevented from dealing with any matter in which they have a direct or indirect personal interest, and particularly a family or financial interest. More specifically, the following aspects were clarified: outside activities, political office and business interests.

In addition, for two years after their retirement, former officials are not to be permitted to engage in any activity with which they were actively involved in an official capacity during their last three years of service, whereupon a conflict of interest may arise.

More specifically, the referred Code of Conduct establishes that:

- a) Commissioners may not hold any public office of whatever kind.
- b) In performing their duties, Members must have only the interest of the institution in mind.
- c) Finally, it prescribes that the Members are subject to the same rules of professional ethics as all Commission staff.

This being the case, it is evident that the Code of Conduct of Commissioners is parallel to the Staff Regulations of Officials of the European Communities²³ and to the Code of Good Administrative Behaviour²⁴ also based on article 283 of the Treaty. These two texts insist on the importance of the objectivity and impartiality of all Staff. Even more, the Code determines that:

“Staff shall always act objectively and impartially, in the Community interest and for the public good. They shall act independently within the framework of the policy fixed by the Commission and their conduct shall never be guided by personal or national interest or political pressure”. (Added emphasis)

2.1. Complaints before the Secretary-General of the Commission

In order to ensure these precepts, the referred Code of Good Administrative Behaviour contains the possibility for the public to lodge complaints concerning a possible breach of the principles set out in the Code.

²³ Staff Regulations of Officials of the European Communities, adopted on March 22nd 2004.

²⁴ At first the Commission was reluctant to adopt the Code of Good Administrative Behaviour because it already had a Code of its own. Nevertheless the Commission finally included in the present Commissioners Code of Conduct the reference to the general Code of Administrative Behaviour.

This complaint must be filed before the Secretary-General of the Commission. A complaint can be filed by ordinary letter or on a special form, electronically or on paper. The form is not compulsory but it has been designed so as to help complainants make their complaints in a structured way.

The complaint will then be forwarded to the official responsible for coordinating the handling of complaints in the various Commission departments. Finally, the relevant Director-General or Head of Department will investigate the substance of the complaint and answer the plaintive in writing within two months.

2.2. Complaints before the European Ombudsman

Citizens of a Member State of the Union or living in a Member State are also entitled to lodge complaints before the European Ombudsman. Businesses, associations or other bodies with a registered office in the Union may also complain to the Ombudsman. These complaints can be motivated by maladministration in the activities of the institutions and bodies of the European Union in accordance with Article 195 of the above said Treaty and the Statute of the European Ombudsman.

For an official complaint, it is necessary to write to the Ombudsman in any of the Treaty languages, setting out clearly who the plaintive is, which institution or body of the European Union the plaintive is complaining against and the grounds for the complaint.

The referred complaint must be made within two years of the date of acknowledgement of the facts that motivated it. Nevertheless it is not compulsory that the complaining party be individually affected by the maladministration.

The Ombudsman does not deal with matters that are currently before a court or that have already been settled by a court. However, in order to properly bring a complaint before the Ombudsman, it is mandatory that the complaining party have already contacted the institution or body concerned by any means.

Finally, the Ombudsman will examine the complaint, and the plaintive will be informed of the outcome of his investigation. The complaint can be made by writing a simple letter to the European Ombudsman or by using a special form.

3. The Draft Treaty establishing a Constitution for Europe²⁵

The Draft Treaty establishing a Constitution for Europe is not yet enforceable but it constitutes the newest provisions relating the possible future Union's Institutional framework.

Two of the institutions that are included in this Draft Treaty have legal provisions that intend to promote an impartial discharge of their member's duties. These institutions are both the European Council and the European Commission.

²⁵ The Draft Treaty establishing a Constitution for Europe, signed in Brussels on July 18 2003.

3.1. The European Council

The Draft Treaty in article 21 section 3 indicates that the “President of the European Council may not hold a national mandate”. The latter is intended to avoid that the President of the council be bound by a nationalistic bias while dealing with his European duties.

The sanction of disregarding this stipulation is that the European Council could end the President’s mandate. Such is the case because the violation would constitute a “serious misconduct” on the President’s behalf.

3.2. The European Commission

In article 25 section 4 the Draft restrains the members of the commission to “neither seek nor take instructions from any government or other body”. Furthermore it expresses that “in carrying out its responsibilities, the Commission shall be completely independent”. These precepts are consistent with the Treaty of Maastricht now in force.

Section II International Accreditation Requirements for Certification Bodies

Certification bodies are private or governmental entities²⁶ in charge of determining compliance of third parties products, services or systems with technical regulations. Whenever compliance is met, a compliance certification is issued by the certification body.

A compliance certificate may be used by such third parties to legally demonstrate conformity of their products, services or systems with pertinent mandatory technical regulations.

In order to operate as a certification body, an accreditation should be previously obtained from an accreditation entity. Such accreditations are only granted after certification bodies meet several requirements.

Certification bodies are basically composed of management and technical areas with potential conflicting interests (commercial or business interests vs. technical objectivity), so conflict between them is likely to arise. Accreditation requirements are intended to prevent this conflict, assuring technical objectivity prevails over any other interest.

Accreditation requirements have been standardized by international organizations – as the International Organization for Standardization or the International Accreditation Forum – and compiled in non mandatory international regulations such as ISO/IEC Guide 62:1996 (“**ISO Guide 62**”)²⁷ or IAF Guidance on the Application of ISO/IEC Guide 62:1996 (“**IAF Guidance**”).

²⁶ Further references to certification bodies are limited to those comprised by private entities.

²⁷ This Guide provides general requirements for bodies operating assessment and certification/registration of quality systems.

For the purpose of this paper, international impartiality and independence accreditation requirements are relevant as they illustrate how potential conflict of interest within certification bodies is prevented.

According to ISO Guide 62 and IAF Guidance, certification bodies should be constituted as legal entities and must assure impartiality and independence in its internal organization while taking decisions on certification or auditing.

To this end, the following conditions should be achieved:

- a) All significantly concerned parties should formally participate within the structure of the certification body – for example, by creating an internal committee -, as this is considered a safeguard of impartiality. This should be evidenced in the organization bylaws or in any other form which may prevent the structure modification in any way impartiality could be compromised.

A balance of interests should be preserved within the committee so no particular interest may predominate.

- b) The certification committee should be separate from management in order to prevent commercial, financial or any kind of pressure from the certification body owners, shareholders, board of directors or any other particular interests which may jeopardize objectivity of technical decisions.

This requirement is particularly relevant when financial support of the certification body was provided by a shareholder, a chairman or a related third party.

- c) If the certification body is part of a larger organization, it must be demonstrated that no conflict of interest exists by clearly defining their links.
- d) Certification bodies should have policies and procedures to solve appeals, complaints and disputes, not allowing personnel involved to participate in the investigations in order to assure its impartiality.

In conclusion, international accreditation requirements could bring light in preventing and solving inherent conflict of interests built within the NAAEC if analog impartiality and independence conditions were applied to Council (if compared with the internal certification committee) and Parties (if compared with certification body's management) functions and relations.

Section III NAFTA'S Chapter Eleven

Reports have been made concerning the performance of the CEC Council in the citizen submission process of Articles 14 and 15 of the NAAEC. These documents have stated that the

Council has failed to comply with the NAAEC principles of public participation and transparency²⁸.

It is openly observed by these documents that the members of the Council have a conflict of interest in their role as part of an impartial entity warrant of the enforcement of the NAAEC, which is different from their roles as individual Parties of the latter agreement. This has been evidenced due to the fact that the Council has repeatedly narrowed the scope of factual records that the Secretariat submitted to the Council's consideration. The consequence of this fact has been that the Council has jeopardized the ability of the factual records to fully expose the controversy at issue. Specifically, those records were not able to address "evidence of widespread enforcement failures, cumulative effects that stem such widespread patterns, or the border concerns of submitters about implementation of enforcement policies"²⁹.

The following quote supports this statement:

"The Council's resolutions undermine these objectives by diminishing the usefulness of the factual record to submitters, imposing prohibitively high 'pleading' requirements that discourage citizen submission, threaten the independence of the Secretariat and thus its credibility with the public, minimize the amount and focus of the 'sunshine' that is intended to enhance transparency and improve environmental governance³⁰."

On the other hand, the Free Trade Commission (FTC), constituted by the very same Parties of the NAAEC, has adopted interpretations of certain provisions of Chapter Eleven of NAFTA³¹. The purpose of these declarations has been to clarify and reaffirm the meaning of certain articles in order to increase transparency in the arbitration mechanism included in the referred Chapter.

On July 31st 2001, the FTC declared that nothing in the NAFTA precludes the Parties from providing public access to documents submitted or issued by a Chapter Eleven tribunal. This interpretation aims to enhance the public participation in this arbitration, and consequently further transparency.

On October 7th 2003, the FTC pronounced that nothing in NAFTA limits the discretion of a Chapter Eleven tribunal to accept written communications from a non contending Party or any of the Party's nationals. The Party or person interested in submitting a statement to the tribunal may

²⁸ 1. Lessons Learned: Citizen Submissions under Articles 14 and 15 of the North American Agreement on Environmental Cooperation, Final Report to the Council of the Commission for Environmental Cooperation, Joint Public Advisory Committee, 6 June 2001.

2. Advice to Council No. 03-05: Limiting the Scope of factual records and review of the operation of CEC Council Resolution 00-09 related to Articles 14 and 15 of the North American Agreement on Environmental Cooperation.

3. Ten Years of North American Environmental Cooperation: Report of the ten-year review and Assessment Committee to the Council of the Commission for Environmental Cooperation, 15 June 2004.

²⁹ Final Report: Issues Related to Articles 14 and 15 of the North American Agreement on Environmental Cooperation, Environmental Law Institute, Washington D.C., 31st of October 2003.

³⁰ Idem.

³¹ 1. Joint Declaration of the Free Trade Commission concerning the Access to Documents provision and the Minimum Standard of Treatment in Accordance with International Law, 31st of July 2001.

2. Joint Declaration of the Free Trade Commission concerning the Participation of non Contending Parties, 7th of October 2003.

ask the latter to authorize him to do so. Furthermore, the FTC declaration advises tribunals to accept this participation of the public and of a non contending Party.

In view of the impulse towards transparency and public participation that the FTC has given to the arbitration mechanism included in Chapter Eleven of NAFTA, it comes to our attention that a similar treatment to the factual records included in Articles 14 and 15 of the NAAEC, can help solve the conflict of interest that apparently the CEC Council has in performing its duties. A solution to this conflict would protect the integrity of the process of citizen submissions under NAAEC. What is more, the credibility of the latter mechanism is being undermined with the evidence of lack of transparency of the Council. Therefore adapting the mechanism now in place in Chapter Eleven to the citizen submission process under NAAEC can be a viable solution to the above mentioned emerging perception of the conflict of interest suffered by the Council.

Conclusion

Having explored the NAAEC's text in accordance with its underlying object and purpose- taking into consideration all existing analyses, documents³² and examining other institutional models; it is fair to conclude that there is an inherent conflict of interest built into the NAAEC.

In drawing this conclusion, it is important for the Council to understand where within the NAAEC and its process the conflict of interest arises. Ultimately, understanding the conflict of interest will assist the Council in facilitating a way to approach and help alleviate the conflict.

In accordance with the above set principle in mind, this document will further recommend suggestions that may be approached to help reduce the conflict of interest found within the NAAEC.

Recommendations

1. Clarifying the roles afforded to the Council and the Parties by issuing an interpretation of several articles of the NAAEC

The object and purpose of the NAAEC is to promote and foster environmental consistency within the Parties for future generations. Within this objective, the Council is afforded the most important obligations to oversee, interpret, and assure that all Parties are abiding by set agreement. In examining the text of the NAAEC, particularly Articles 9 and 10, it is arguably concluded that much confusion has risen regarding the interchanging use of the terms-Council and Parties. Articles 9 and 10 have shown some inconsistency when addressing the terms individually or collectively. In their current language Articles 9 and 10 are detrimental to the NAAEC because they identify the Councils' structure, procedure, and function. The confusion inherent in these articles is whether the Council is acting as a representative of the Parties or as an independent entity overseeing the Parties. In examining the use of the terms, it is difficult to understand how the Council and Parties are completely independent from each other. Moreover, this ambiguity results with an impression stemming a conflict of interest.

³² See Chapter I. Background.

The conflict may be alleviated if the council exercises its' interpretative function contained in Article 10(1)(d) of the NAAEC. It is recommended that the Council clarifies the confusion and ambiguity particularly by interpreting Articles 9 and 10. Such interpretation should establish Councils role *vis a vis* the Parties. The interpretation of these articles will benefit the Council by identifying and clarifying the confusion of its duties as a dependent or independent entity from the Parties. Further, it is foreseeable that this will assist the Council in establishing a foundational ground of accountability whereupon each of the interested bodies (Parties, Council, Secretariat, JPAC and the Public) better conforms to its agreed obligation and acts independently, objectively and impartially-disregarding national allegiance.

2. Deference to the Secretariat

The Council, on 29 June 2001, in Guadalajara Mexico, expressed support for an efficient submissions process. Along the same lines, it is recommended that the Council voluntarily allow more deference to the Secretariats decision in addressing submissions and requesting the Council to warrant a factual record. Deference to the Secretariat will benefit the Council, as it will help address the Councils concern in facilitating an efficient submission process. It will also help rid of the integral conflict of interest with the double investigative procedure. The double investigative procedure gives rise to an arguable conflict of interest within the NAAEC and thus will consequently result in the slow diminishing of the CEC as a tri-part governing system.

3. Needed Guidelines

Guidelines are recommended to help minimize the conflict of interest underlined in the submission process and in the absence of reasoned denials. Public involvement is a fundamental aspect of the NAAEC. Loosing the public's faith in the structural process is likely to result in a frustrated agreement. Guidelines may foresee ably help the public avoid the argued conception of being deceived by a hidden process, which in return establishes overall improvement to public participation.

a. Submissions

It is proposed that Council establish clear guidelines as to when and how it may exercise its criteria regarding public disclosure of submissions.

b. Reasoned denials

It is further proposed that the Council publicly state the reasons for denying or limiting the scope of the preparation and investigation of a factual record. One way to publicize and increase transparency is by addressing them in a Council meeting. Another form of publication is to specifically design a Council session/forum where the reasons for denials are explained. Furthermore, denials may be published in written form to increase accessibility.

However, the caveat is that publishing the reasoned denial is not a way for establishing precedential value. Rather, it is to assist researches in various aspects of their profession and to further help future submitters better educate themselves with the process.

4. Impartiality

It is recommended that the Council assume an impartial role within the structure of the CEC. The Council should promote the CEC to govern as a tri-part system. As previously stated, the ambiguous interchangeable use of the terms Council and Parties has created an unavoidable conflict of interest. Even if the Council is acting within the CEC as a strictly independent authority, unknowingly- its' actions favor an opposing view.

To achieve an impartial role, it is advised that an objective approach be pursued. Such approach is beneficial to understand comparable functioning institutional models, their codes, and guidelines. An objective perspective will help the Council illuminate how other institutions deal with underline conflicts of interest within their internal structure.

a. European Union (EU)

The EU has addressed potential conflicts of interest by establishing codes binding all the institutions, bodies of the Union, and their officials. The Council may benefit from reviewing and analyzing the EU approach as an exemplary representation of how internal agreements help fulfill objectives. These objectives help insure impartiality and establish independent structures, rules, and codes. This assists the Council by allowing it to encounter and assess the issue indirectly from an outside perspective.

b. Certification and Accreditation

Council may consider the creation of an internal committee to help regulate actions within the Council. It is proposed that Council considers adopting a procedure to formulate the body of an internal committee. This committee will be a measure designed to help routinely standardize the Council's object and purpose under the NAAEC, and help assure that the Council is acting to its' highest regard. The internal committee will act similar to that of an accreditation body. Thus, in effect, helps alleviate the conflicting influence of the Parties.

c. NAFTA Chapter 11

We urge that special consideration be directed to Chapter 11 NAFTA and the Free Trade Commission. NAFTA and the FTC is a comparable functioning model, which in particularity within Chapter 11 has dealt with issues regarding:

- 1) Conflict of interest;
- 2) Article Clarification; and
- 3) Transparency

It is recommended that the Council investigate and analyze the FTC and how it worked to effectuate its' changes. Further, the Council should attempt to deduce how the FTC rationalized, reasoning, and resolved similar objectives. It is also recommended that the Council consider how conflicts of interest within the NAAEC affect the environmental goals of NAFTA.

Annex 1

Council Functions under the North America Agreement on Environmental Cooperation

Article 9: Council Structure and Procedures

1. The Council shall comprise cabinet-level or equivalent representatives of the Parties, or their designees.
2. The Council shall establish its rules and procedures.
3. The Council shall convene:
 - (a) at least once a year in regular session; and
 - (b) in special session at the request of any Party.

Regular sessions shall be chaired successively by each Party.

4. The Council shall hold public meetings in the course of all regular sessions. Other meetings held in the course of regular or special sessions shall be public where the Council so decides.
5. The Council may:
 - (a) establish, and assign responsibilities to, *ad hoc* or standing committees, working groups or expert groups;
 - (b) seek the advice of non-governmental organizations or persons, including independent experts; and
 - (c) take such other action in the exercise of its functions as the Parties may agree.
6. All decisions and recommendations of the Council shall be taken by consensus, except as the Council may otherwise decide or as otherwise provided in this Agreement.
7. All decisions and recommendations of the Council shall be made public, except as the Council may otherwise decide or as otherwise provided in this Agreement.

Article 10: Council Functions

1. The Council shall be the governing body of the Commission and shall:
 - (a) serve as a forum for the discussion of environmental matters within the scope of this Agreement;

- (b) oversee the implementation and develop recommendations on the further elaboration of this Agreement and, to this end, the Council shall, within four years after the date of entry into force of this Agreement, review its operation and effectiveness in the light of experience;
 - (c) oversee the Secretariat;
 - (d) address questions and differences that may arise between the Parties regarding the interpretation or application of this Agreement;
 - (e) approve the annual program and budget of the Commission; and
 - (f) promote and facilitate cooperation between the Parties with respect to environmental matters.
2. The Council may consider, and develop recommendations regarding:
- (a) comparability of techniques and methodologies for data gathering and analysis, data management and electronic data communications on matters covered by this Agreement;
 - (b) pollution prevention techniques and strategies;
 - (c) approaches and common indicators for reporting on the state of the environment;
 - (d) the use of economic instruments for the pursuit of domestic and internationally agreed environmental objectives;
 - (e) scientific research and technology development in respect of environmental matters;
 - (f) promotion of public awareness regarding the environment;
 - (g) transboundary and border environmental issues, such as the long-range transport of air and marine pollutants;
 - (h) exotic species that may be harmful;
 - (i) the conservation and protection of wild flora and fauna and their habitat, and specially protected natural areas;
 - (j) the protection of endangered and threatened species;
 - (k) environmental emergency preparedness and response activities;
 - (l) environmental matters as they relate to economic development;
 - (m) the environmental implications of goods throughout their life cycles;

- (n) human resource training and development in the environmental field;
 - (o) the exchange of environmental scientists and officials;
 - (p) approaches to environmental compliance and enforcement;
 - (q) ecologically sensitive national accounts;
 - (r) eco-labelling; and
 - (s) other matters as it may decide.
3. The Council shall strengthen cooperation on the development and continuing improvement of environmental laws and regulations, including by:
- (a) promoting the exchange of information on criteria and methodologies used in establishing domestic environmental standards; and
 - (b) without reducing levels of environmental protection, establishing a process for developing recommendations on greater compatibility of environmental technical regulations, standards and conformity assessment procedures in a manner consistent with the NAFTA.
4. The Council shall encourage:
- (a) effective enforcement by each Party of its environmental laws and regulations;
 - (b) compliance with those laws and regulations; and
 - (c) technical cooperation between the Parties.
5. The Council shall promote and, as appropriate, develop recommendations regarding:
- (a) public access to information concerning the environment that is held by public authorities of each Party, including information on hazardous materials and activities in its communities, and opportunity to participate in decision-making processes related to such public access; and
 - (b) appropriate limits for specific pollutants, taking into account differences in ecosystems.
6. The Council shall cooperate with the NAFTA Free Trade Commission to achieve the environmental goals and objectives of the NAFTA by:
- (a) acting as a point of inquiry and receipt for comments from non-governmental organizations and persons concerning those goals and objectives;

- (b) providing assistance in consultations under Article 1114 of the NAFTA where a Party considers that another Party is waiving or derogating from, or offering to waive or otherwise derogate from, an environmental measure as an encouragement to establish, acquire, expand or retain an investment of an investor, with a view to avoiding any such encouragement;
 - (c) contributing to the prevention or resolution of environment-related trade disputes by:
 - (i) seeking to avoid disputes between the Parties,
 - (ii) making recommendations to the Free Trade Commission with respect to the avoidance of such disputes, and
 - (iii) identifying experts able to provide information or technical advice to NAFTA committees, working groups and other NAFTA bodies;
 - (d) considering on an ongoing basis the environmental effects of the NAFTA; and
 - (e) otherwise assisting the Free Trade Commission in environment-related matters.
7. Recognizing the significant bilateral nature of many transboundary environmental issues, the Council shall, with a view to agreement between the Parties pursuant to this Article within three years on obligations, consider and develop recommendations with respect to:
- (a) assessing the environmental impact of proposed projects subject to decisions by a competent government authority and likely to cause significant adverse transboundary effects, including a full evaluation of comments provided by other Parties and persons of other Parties;
 - (b) notification, provision of relevant information and consultation between Parties with respect to such projects; and
 - (c) mitigation of the potential adverse effects of such projects.
8. The Council shall encourage the establishment by each Party of appropriate administrative procedures pursuant to its environmental laws to permit another Party to seek the reduction, elimination or mitigation of transboundary pollution on a reciprocal basis.
9. The Council shall consider and, as appropriate, develop recommendations on the provision by a Party, on a reciprocal basis, of access to and rights and remedies before its courts and administrative agencies for persons in another Party's territory who have suffered or are likely to suffer damage or injury caused by pollution originating in its territory as if the damage or injury were suffered in its territory.

Article 11: Secretariat Structure and Procedures

1. The Secretariat shall be headed by an Executive Director, who shall be chosen by the Council for a three-year term, which may be renewed by the Council for one additional three-year term. The position of Executive Director shall rotate consecutively between nationals of each Party. The Council may remove the Executive Director solely for cause.
3. The Council may decide, by a two-thirds vote, to reject any appointment that does not meet the general standards. Any such decision shall be made and held in confidence.
4. In the performance of their duties, the Executive Director and the staff shall not seek or receive instructions from any government or any other authority external to the Council. Each Party shall respect the international character of the responsibilities of the Executive Director and the staff and shall not seek to influence them in the discharge of their responsibilities.
5. The Secretariat shall provide technical, administrative and operational support to the Council and to committees and groups established by the Council, and such other support as the Council may direct.
6. The Executive Director shall submit for the approval of the Council the annual program and budget of the Commission, including provision for proposed cooperative activities and for the Secretariat to respond to contingencies.

Article 12: Annual Report of the Commission

1. The Secretariat shall prepare an annual report of the Commission in accordance with instructions from the Council. The Secretariat shall submit a draft of the report for review by the Council. The final report shall be released publicly.

Article 13: Secretariat Reports

3. The Secretariat shall submit its report to the Council, which shall make it publicly available, normally within 60 days following its submission, unless the Council otherwise decides.

Article 15: Factual Record

2. The Secretariat shall prepare a factual record if the Council, by a two-thirds vote, instructs it to do so.
5. The Secretariat shall submit a draft factual record to the Council. Any Party may provide comments on the accuracy of the draft within 45 days thereafter.
7. The Council may, by a two-thirds vote, make the final factual record publicly available, normally within 60 days following its submission.

Article 16: Joint Public Advisory Committee

1. The Joint Public Advisory Committee shall comprise 15 members, unless the Council otherwise decides. Each Party or, if the Party so decides, its National Advisory Committee convened under Article 17, shall appoint an equal number of members.
2. The Council shall establish the rules of procedure for the Joint Public Advisory Committee, which shall choose its own chair.
3. The Joint Public Advisory Committee shall convene at least once a year at the time of the regular session of the Council and at such other times as the Council, or the Committee's chair with the consent of a majority of its members, may decide.
4. The Joint Public Advisory Committee may provide advice to the Council on any matter within the scope of this Agreement, including on any documents provided to it under paragraph 6, and on the implementation and further elaboration of this Agreement, and may perform such other functions as the Council may direct.
7. The Council may, by a two-thirds vote, make a factual record available to the Joint Public Advisory Committee.

Article 21: Provision of Information

1. On request of the Council or the Secretariat, each Party shall, in accordance with its law, provide such information as the Council or the Secretariat may require, including:
 - (a) promptly making available any information in its possession required for the preparation of a report or factual record, including compliance and enforcement data; and
 - (b) taking all reasonable steps to make available any other such information requested.
2. If a Party considers that a request for information from the Secretariat is excessive or otherwise unduly burdensome, it may so notify the Council. The Secretariat shall revise the scope of its request to comply with any limitations established by the Council by a two-thirds vote.
3. If a Party does not make available information requested by the Secretariat, as may be limited pursuant to paragraph 2, it shall promptly advise the Secretariat of its reasons in writing.

Article 23: Initiation of Procedures

3. Unless it decides otherwise, the Council shall convene within 20 days of delivery of the request and shall endeavor to resolve the dispute promptly.

4. The Council may:
 - (a) call on such technical advisers or create such working groups or expert groups as it deems necessary,
 - (b) have recourse to good offices, conciliation, mediation or such other dispute resolution procedures, or
 - (c) make recommendations,as may assist the consulting Parties to reach a mutually satisfactory resolution of the dispute. Any such recommendations shall be made public if the Council, by a two-thirds vote, so decides.
5. Where the Council decides that a matter is more properly covered by another agreement or arrangement to which the consulting Parties are party, it shall refer the matter to those Parties for appropriate action in accordance with such other agreement or arrangement.

Article 24: Request for an Arbitral Panel

1. If the matter has not been resolved within 60 days after the Council has convened pursuant to Article 23, the Council shall, on the written request of any consulting Party and by a two-thirds vote, convene an arbitral panel to consider the matter where the alleged persistent pattern of failure by the Party complained against to effectively enforce its environmental law relates to a situation involving workplaces, firms, companies or sectors that produce goods or provide services: