International Environmental Law Project (IELP),[1]
Comments on Issues Relating to Articles 14 & 15 of the
North American Commission on Environmental Cooperation
(2 October, 2003)

Introduction

The International Environmental Law Project (IELP) applauds the Joint Public Advisory Committee (JPAC) for engaging in this discussion about the scope of factual records under Articles 14 and 15 of the North American Agreement on Environmental Cooperation (NAAEC). Further, we commend the thoughtful and comprehensive report compiled for this meeting and agree with its findings. The ability of citizens to present submissions to the Secretariat of the Council for Environmental Cooperation (CEC) alleging failures of a government to enforce environmental law provides a valuable opportunity for North Americans to address enforcement issues in the context of free trade in the region. IELP strongly supports the Citizen Submission Process and has played an active role in supporting and employing the mechanism.[2]

The importance of your advice to Council on the matters under discussion today, and of how Council responds to this advice, cannot be overstated. The Citizen Submission Process is widely regarded as the most innovative and closely-watched aspect of the NAFTA environmental side agreement. Many regard the Citizen Submission Process as a potential model of accountability and governance for a new breed of international institutions—a positive response to globalization giving citizens a voice in the often impenetrable affairs of international organizations. In the young history of the Process, it has attracted volumes of articles from scholars, and consumed most of Council's attention. The activities of the Council, however, have been widely criticized. JPAC itself has made repeated, and increasingly exasperated, attempts to convince Council that the submission mechanism needs breathing room to develop to its widely-desired potential. Citizen Submissions, in the words of JPAC's recent *Lessons Learned* report, "play a unique—and indispensable—role in fostering the vigorous environmental enforcement that is a necessary component of expanded free trade under NAFTA."[3]

Once again, the JPAC has been called upon to put a stop to Council's seeming inability to allow the process to mature and flourish. We are not crying wolf. Groups such as the IELP, who have sought to use the Citizen Submission Process in a balanced and fair way to examine government conduct in the region, will simply turn away from the process once and for all if Council does not respect the roles and boundaries so clearly articulated in the NAAEC.

We are confident that with a strong and unified voice, JPAC can help restore and maintain the integrity and legitimacy of the Citizen Submission Process.

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[1] Comments prepared by Prof. Chris Wold, Director of the International Environmental Law Project of Lewis & Clark Law School (IELP), and IELP Staff Members Matthew Clark, Lucus Ritchie, and Deborah Scott.
[2] For example, IELP drafted the Migratory Bird Submission, (SEM-99-002), on behalf of the nine groups signing on to that submission.
[3] *Lessons Learned,* JPAC report, June 6, 2001.

The Secretariat Has Processed Submissions in a Fair and Balanced Way

IELP agrees with the virtually unanimous evaluation of scholars, NAAEC review committees and members of the public, all of whom have applauded the Secretariat's rigorous review of submissions for eligibility and scrupulous determination of whether a factual record is warranted.[4] With respect to eligibility, it has denied those submissions that clearly fail to meet the requirements of Articles 14 and 15 and it has accepted those that clearly meet such requirements. Where interpretations of Article 14 were required, the Secretariat has provided thoughtful legal analysis to support its position. With respect to whether a factual record is warranted, the Secretariat's actions have also been exemplary. For example, in Migratory Birds, the Secretariat carefully reviewed the U.S. response and determined that the preparation of a factual record was warranted.[5] The Secretariat, however, has also found that five submissions, while meeting eligibility requirements under Article 14, did not warrant development of a factual record.[6] The Secretariat consistently has been evenhanded in its decisions, and has shown no bias toward or against submitters or governments.[7]

In sum, the Secretariat to date has fulfilled its role in the process in a competent and professional manner. Its decisions and legal interpretations are rigorous, not capricious.[8] As a result, the Secretariat has been instrumental in ensuring the integrity of the Article 14/15

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[4] *Accord* John H. Knox, *A New Approach to Compliance with International Environmental Law: The Submissions Procedure of the NAFTA Environmental Commission*, 28 ECOLOGY L. Q. 1, 96-97 (2001)(stating that the Secretariat "has not shown any particular deference to states' suggested interpretations of the [NAAEC]. Conversely, it has dismissed submissions—even by major environmental groups—that did not meet the requirements for eligibility. In short, the Secretariat's decisions appear to be consistently grounded on carefully reasoned legal interpretations of the [NAAEC] rather than on fear of adverse reactions by, or the desire to carry favor with, either states or submitters."). In addition, a review of the Independent Review Committee concluded that:

> The record on the submissions that have been subject to Secretariat decisions to date appears to show a consistent and well-reasoned group of decisions. While observers (and the Parties) may, and some certainly have, criticized specific decisions, this Committee has seen nothing to suggest that the decisions of the Secretariat lack proper foundation.

North American Comm'n for Envtl. Cooperation, Four-Year Review of the North American Agreement on Environmental Cooperation: Report of the Independent Review Committee, §3.3.3 (1998)

[5] Article 15(1) Notification to Council that Development of a Factual Record Is Warranted, SEM-99-002 (Dec. 15, 2000).

[6] Oldman River I, SEM-96-003; Lake Chapala, SEM-97-007; Cytrar, SEM-98-005; Great Lakes, SEM-98-003; Mexico City Airport, SEM-02-002.

[7] For example, many environmental groups opposed the Secretariat's interpretation of "environmental law" when it ruled that a legislative act repealing the applicability of environmental laws for logging projects did not constitute an "environmental law" within the meaning of Article 45 of the NAAEC. *See, e.g.*, Spotted Owl, Secretariat, Determination Pursuant to Article 14(2), SEM-95-001 (Sept. 21, 1995); Logging Rider, Secretariat, Determination Under Article 14 & 15, SEM-95-002 (Dec. 8, 1995). As John Knox concludes, "There is room for reasonable minds to disagree on the correct legal outcome of the first two submissions, since the Agreement does not clearly address the issues involved. The key point, however, is that the Secretariat reached a plausible, principled interpretation." Knox, *supra* note 4, at 102, n.439.

[8] *Accord* David L. Markell, *The Commission for Environmental Cooperation's Citizen Submission Process*, 12 GEO. INT'L ENVTL. L. REV. 545 (2000).

process.[9]

Critical Background: Council's Reluctance to Examine Allegations of a Broad Pattern of Ineffective Enforcement Is the Driving Force Behind Limiting the Scope of Factual Records and Questioning the Sufficiency of Information

After gaining some experience with Citizen Submissions, Submitters quickly recognized that the process was especially useful when examining a broader pattern of government conduct, which, if not adequately justified or explained, might reveal a systematic failure to enforce environmental law. While telescoping in on isolated, fact-specific cases might be appropriate from time-to-time, broader patterns of conduct are more likely to elevate the concerns to a regional level and more directly advance the goals and objectives of the NAAEC, including the effective enforcement of environmental law in North America. Such widespread failures would almost certainly levy an important environmental toll, and shining a spotlight on systematic enforcement deficiencies would help ensure that the NAFTA countries were upholding their part of the bargain not to relax environmental enforcement due to competitive pressures.

The Secretariat has consistently provided clear and well-reasoned analysis of the so-called "pattern" issue. The Secretariat has stated in compelling terms how these broader claims were consistent with, and furthered the goals of, the NAAEC.[10] In many important respects, narrow, highly specific fact patterns often shift the focus from government conduct to the acts or omissions of a single industry, business or other entity. Single events may also mask the aggregate effects of policies or practices, and single events are much more easily sidestepped by governments asserting enforcement discretion.

Over time, it has become abundantly clear that some Council members are uncomfortable defending government enforcement *practices and policies*, and would rather mount highly technical and legal defenses to specific, isolated cases. Council demonstrated its hostility to the pattern issue by first attempting to quietly renegotiate the *Guidelines on Enforcement Matters* ("*Guidelines"*), an approach that was halted by strong JPAC and public opposition at the June 2000 Council meeting in Dallas, Texas. In response to JPAC and public concerns expressed at that meeting, Council Resolution 00-09 established the JPAC-led process for addressing concerns about the implementation of the Citizen Submission Process. Soon, however, Council

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[9] S*ee id*. (describing further details on the decisions of the Secretariat).

[10] For example, the Secretariat stated in Migratory Birds:

> In other words, the larger the scale of the asserted failure, the more likely it may be to warrant developing a factual record, other things being equal. If the citizen submission process were construed to bar consideration of alleged widespread enforcement failures, the failures that potentially pose the greatest threats to accomplishment of the Agreement's objectives, and the most serious and far-reaching threats of harm to the environmental, would be beyond the scope of that process. This limitation in scope would seem to be counter to the objects and purposes of the NAAEC.

Article 15(1) Notification to Council that Development of a Factual Record Is Warranted, SEM-99-002 (Dec. 15, 2000) at 10.

found it could attack the pattern issue and circumvent the JPAC consultation process by simply reshaping the scope of factual records when deciding whether to instruct the Secretariat to prepare a factual record. Most recently, Council has identified a new line of attack—questioning the "sufficiency" of the information upon which the submission is based.

Council Continues to Undermine the Integrity of the Citizen Submission Process by Impermissibly Narrowing the Scope of Factual Records

The Council's actions to narrow the scope of factual records and interpret provisions of the NAAEC clearly within the purview of the Secretariat are not only troubling, but are also *ultra vires,* beyond its authority in the NAAEC. Council's actions have eroded support for the NAAEC,[11] as well as for the use of provisions similar to the Article 14/15 process in other free trade agreements.[12] Council's refusal to respect the boundaries delineated in the NAAEC has led to repeated calls from the JPAC, NAC and independent review committees for Council to step back and allow the process to operate independently, as intended. Recently, for example, the U.S. Governmental Advisory Committee declared that the Council's decisions to narrow the scope of factual records had "eviserate[d]" the autonomy of the Secretariat to define the scope of the factual record.[13] JPAC has raised similar concerns, even charging that Council was narrowing factual records and taking other action on a case-by-case basis—through its Article 14/15 votes—as a means of circumventing the JPAC-led public consultation procedure for considering revisions to the Article 14 and 15 Submission Guidelines.[14]

The NAAEC carefully establishes a system of "checks and balances" by granting the Council and Secretariat distinct roles and clear boundaries. In this case, the Secretariat has the duty to decide what the scope of the factual record should be. By its own terms, Article 15 of the NAAEC confers on Council the power to approve or reject the Secretariat's recommendation to prepare a factual record. Through substituting its own judgment of what constitutes "sufficient information" and the appropriate scope of a factual record, the Council is denying the Secretariat its proper role set out in the NAAEC. In so doing, Council is further undermining public confidence that the process will be allowed to operate as designed, even if that occasionally shines an embarrassing spotlight on government conduct.

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[11] The Sierra Legal Defense Fund, in a letter to the Canadian NAC, stated that the Council's actions are a "clear infringement on the independence of the Secretariat" that could "threaten to strip the citizen submission process of its integrity, utility and legitimacy." Letter from Sierra Legal Defense Fund to Council (Mar. 6, 2002). Also, the Center for International Environmental Law wrote to the JPAC that the Council's narrowing of the Migratory Bird Submission "limit[s] the utility of the citizen submission process." Letter from the Center for International Environmental Law to the Joint Public Advisory Committee (Oct. 17, 2001).

[12] For example, a citizen submission process was not included in the recent U.S./Chile free trade agreement.

[13] Letter of Advice to the EPA Administrator Christine Whitman from the Chair of the Governmental Advisory Committee to the U.S. Representative to the CEC, 1-2 (Oct. 19, 2001).

[14] *See, e.g.*, JPAC Advice to Council No. 01-07 (Oct. 23, 2001)("[JPAC] is compelled to express its frustration at being forced once again to advice on issues related to Articles 14 and 15, because past-agreed upon procedures are being ignored or circumvented."); JPAC Advice to Council No. 02-03 (Mar. 8, 2002)(stating Council's narrowing actions are "effectively eliminating an opportunity for public input into this very important issue; and…is considered by JPAC as a *de facto* change to the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the NAAEC*."

Narrowing the scope of factual records beyond the Secretariat's specific recommendations has already radically altered the balance between Secretariat and Council functions. In the Migratory Birds submission, it is highly doubtful the Submitters ever would have employed the process had they known that Council would, in an arbitrary and unexplained fashion, limit the record to two specific instances cited only as examples of widespread government conduct. Moreover, it is highly doubtful whether the Secretariat would have recommended the development of a factual record to Council if the Secretariat had known that the scope of the submission would be narrowed in this manner.[15] The absurdity of the result is patent: Council directed the Secretariat to develop a factual record that resembled neither the issues presented by the Submitter nor those recommended for study by the Secretariat. Indeed, it is the factual record that nobody wanted.

With respect to both points, the *ad hoc* nature of the Council's decision-making creates great uncertainty for both the Secretariat and Submitters. Without clear rules, neither the Secretariat nor Submitters know whether Council decisions constitute a type of "precedent" or whether the Council will establish a different rule in future cases. Even if we accept that the Council can override decisions of the Secretariat, a system must have clear rules that establish boundaries and definitions, and thus expectations, for all participants. The NAAEC Articles 14 and 15 establish such clear rules: Council votes "yes" or "no" on whether to instruct the Secretariat to prepare a factual record on the issues recommended for further study by the Secretariat.

Council Has Appropriated The Secretariat Function Of Assessing "*Sufficient Information*" And Has Defined It In A Manner Inconsistent With The Clear Language Of Article 14 Of The NAAEC

Council recently opened a new line of attack on the pattern issue by deciding in Ontario Logging (SEM-02-001) that the Submission did not contain sufficient information to warrant the development of a factual record.[16]

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[15] For example, if the Migratory Birds Submission only related to the two California non-enforcement examples that became the focus of the factual record, the Secretariat may have answered several key eligibility requirements differently and decided to reject the Submission. Questions relating to the pursuit of private remedies, harassment of industry, or reasonable use of prosecutorial discretion may all have different answers depending on whether Submitters allege general non-enforcement behavior or non-enforcement in a specific instance. As a result, the Secretariat may have determined that such a submission did not warrant a factual record. The Secretariat implied such a result in the context of Oldman River II's narrowed scope:

> It should not be assumed that the Secretariat Article 15(1) Notification to Council recommending a factual record for [Oldman River II] was intended to include a recommendation to prepare a factual record of the scope set out [in the Council's limiting Resolution], or that the Secretariat would have recommended a factual record of this scope.

Factual Record, SEM-97-006 at 90.

[16] Council Resolution 03-05 (Apr. 22, 2003). Council questioned the sufficiency with the use of a statistical model which Submitters contend provides the best available information precisely because the government of Canada has abdicated its enforcement responsibilities by, among other things, failing to collect the kind of information required

Article 14 explicitly states that the Secretariat alone has authority to determine whether a submission provides "sufficient information." It unambiguously commands that "[t]he Secretariat may consider a submission . . . if *the Secretariat* finds that the submission . . . provides sufficient information to allow *the Secretariat* to review the submission. . . . ." (emphasis added).

Instead of simply terminating the Ontario Logging submission with a thumbs up or down vote, Council impermissibly remanded the submission, allowing the Submitters to resubmit by supplementing the information upon which the submission was based. While innocent in form, this approach actually usurps the Secretariat function of reviewing the sufficiency of submissions by laying out markers the Secretariat must presumably follow in its reconsideration of the matter.[17] In other words, Council appears to be signaling to the Secretariat that it expects the "sufficiency" element to be applied in a much more restrictive and limiting way. Faced with a Secretariat that refuses to adopt a cramped definition of "sufficiency," Council may attempt to simply revise the *Guidelines*, defining "sufficiency" in a way that shuts down efforts to examine patterns of government conduct. Following this path will lead to the virtual extinction of the Citizen Submission Process, since it will have terminated its most useful applications.

Impacts of Council's Actions

The manner in which the Council has narrowed the scope of factual records—by rejecting investigations of general policy failures—allows Parties to disrupt the factual inquiry process, dictates where future claims will be brought and sidesteps the Council's commitment to ensure that JPAC and the public are involved in any process to amend the Article 14/15 *Guidelines*.

Derailment of the Factual Inquiry Process

Allowing council to narrow factual records to isolated examples will enable governments to more easily derail factual inquiries by asserting that specific cases are the subject of ongoing proceedings or reflect a reasonable exercise of investigatory, prosecutorial, regulatory or compliance discretion. In Oldman River II, the factual record certification and development process was slowed because the example case selected by Council was the subject of a pending judicial proceeding.[18] In the future, a case with multiple appeals could be subject to significant delays in the factual record review process. Further, Article 45(3)(a) contemplates halting factual inquiry for cases subject to judicial *or* administrative proceedings. Alarmingly, the definition of "administrative proceeding" encompasses a laundry list of terms, including the loose wording, "seeking an assurance of voluntary compliance." Limiting broad policy claims to specific examples subject to such proceedings could bar important matters from being addressed for indefinite periods.

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to assess the impact of commercial logging on bird populations protected by the Migratory Bird Treaty Act.

[17] The Secretariat promptly found that the new Submission, which continues to employ the statistical model objected to by Canada, met the sufficiency threshold and the Secretariat requested a response from Canada.

[18] Council Resolution 00-02 (May 16, 2000).

Additionally, governments will be able to inequitably employ Article 45(1)(a)'s reasonable enforcement discretion defense in narrowed claims. In practice, it is unquestionably easier to show such discretion when the scope of a factual record is limited to one or two illustrative cases, rather than a Party's countrywide failure to enforce its environmental laws. That is, governments can almost always point to one example that is more, or equally, in need of resource allocation as another discrete example. Allowing such defenses in the limited scope context, when they would not have been effective in Submitter's original policy claim, deflects Party responsibility for enforcement of environmental law on a broad scale.

Eliminating Allegations of Widespread Failures to Enforce Environmental Law Will Dramatically Reduce the Amount of Submissions Filed against the United States

Limiting factual records to isolated, individualized instances will increase the relative number of Submissions against Mexico and Canada by wiping out most of the claims for widespread noncompliance brought against the United States. Citizens in the United States often have recourse to citizen suit provisions in domestic law. In practice, specific claims of government action or inaction of the type Council suggests are necessary to meet the "sufficiency" or scoping tests will be pursued in a court of law where a binding remedy can be sought. Broad, widespread policy failures, conversely, are not usually the subject of citizen suits in the United States. Canada and Mexico, while conferring some access to administrative bodies or courts for environmental harm, do not feature citizen suits as widely as the United States. Thus, Council may effectively be cutting off the last practical avenue for citizens to allege that the United States is failing to effectively enforce its law by shutting the only window for evaluating widespread conduct.

Sidestepping the JPAC-Led Public Consultation Mechanism for Changing the Guidelines for Submissions on Enforcement Matters

In June 2000, Council met amidst widespread concerns that the Parties were engaged in backroom negotiations to revise the *Guidelines* in a manner that further restricted public access to the mechanism.[19] In particular, Council was entertaining proposals to narrow the scope of factual records and to limit the Secretariat's fact-gathering powers. Public concern over these potential revisions as transmitted by an energized JPAC halted the discussions and led to Council Resolution 00-09. The Resolution assured that JPAC would play a central role in facilitating public input and formulating advice for any proposed guideline revisions, in addition to permitting the JPAC to hold public consultations on the implementation and operation of the Citizen Submission Process.

Since Resolution 00-09, Council has repeatedly, and disturbingly achieved some of the very rule changes under consideration in 2000 by simply narrowing the scope of factual records or cramping definitions of terms like "sufficient information" in specific decisions. Council is

[19] The concerns were conveyed by JPAC, NAC and NGO advice and letters, in addition to a lead Editorial in the *Washington Post* entitled "How to Wreck Trade" (June 10, 2000). The *Pos*t editorial warned the NAFTA Parties against weakening the fragile but valuable Citizen Submission Process.

simply making an end-run around Resolution 00-09 by circumventing JPAC input and the JPAC–led public consultation procedure, thereby accomplishing the same objective in secret, without providing its rationale or reasoning.

Comparison with the World Bank Inspection Panel

The World Bank Inspection Panel presents a helpful analogy to the CEC Submission Process. Both the Inspection Panel and the CEC Secretariat started operations in 1994.[20] The Inspection Panel responds to citizen requests for investigation of the failure of the World Bank Management to enforce its policies.[21] Quite frequently, the Requests are based on region-wide environmental destruction resulting from or threatened by a World Bank project. The Panel, like the Secretariat, determines the eligibility of a Submitter's claim and decides whether to recommend an investigation. The Board, like the Council, then decides whether to approve the recommendation. The Panel investigates the situation and prepares a factual record.

The strikingly similar processes have faced strikingly similar challenges. The Bank Management was often in close contact with the Board while the Panel was still determining eligibility. The Board often debated the substance of requests in the beginning stages of the process and narrowed the scope of investigations, sending the Panel back to get more information. In 1999, the World Bank recognized that those problems were "undermining the independence and authority of the Panel."[22] To a large extent, the 1999 Clarifications rectified those problems. The Board reaffirmed the Panel's functions and independence by clearly stating that the Panel, not the Board, had the authority to judge the merits of a claimant's petition, including whether or not eligibility criteria had been met.[23] Now, the Board basically votes "yes" or "no" on the development of a factual record, just as the clear language of the NAAEC suggests is the role of the Council.

By delineating clear boundaries between the Panel and Board, the World Bank was able to restore legitimacy and confidence in their process and alleviate tension between Board, Panel, and citizens. Instead of constantly struggling with each other for power, each component now has a concrete role. From the World Bank's experience, the CEC can gain not only a model for its citizen submission process, but also the lesson that institutional legitimacy is ultimately dependent upon public perception.

IELP Findings and Recommendations to Council and JPAC

Findings

[20] World Bank Inspection Panel, *Accountability at the World Bank—The Inspection Panel 10 Years On,* at xv (2003); CEC, *Milestones, available at* http://www.cec.org/fles/pdf //CEC_timeline_en.pdf.
[21] *See* IBRD Resolution 93019/IDA 93-06, Resolution Establishing the Inspection Panel, para. 12 (September 22, 1993); Inspection Panel Operating Procedures, as adopted by the Panel on August 19, 1994, *available at* http://wbln0019.worldbank.org/IPN/ipnweb.nsf/WoperatingProcedures/CS50E3080622C169385256874005E3490.
[22] World Bank Inspection Panel, *supra* note 21, at 32.
[23] 1999 Clarifications, Conclusions of the Board's Second Review of the Inspection Panel (April 20, 1999), *available at* http://wbln0018.worldbank.org/ipn/ipnweb.nsf/WResolution?openview&count=500000.

1. The Citizen Submission Procedure is an innovative means of giving a voice to citizens in an era of globalization and free trade. The mechanism must be strengthened, and the NAFTA Parties must avoid even the perception that they are restricting the ability of citizens to raise concerns about the effective enforcement of environmental law in North America.

2. Civil groups such as IELP who have supported the development and implementation of the Citizen Submission process are growing increasingly frustrated over Council's unwillingness to respect the boundaries established in the process. If this perception continues, many of the groups who support and defend the CEC may simply abandon the process and declare it (and the CEC) unworkable.

3. The spirit and letter of the NAFTA side agreement support the development of factual records on broad patterns of government conduct that may reveal systematic deficiencies in environmental enforcement. Conversely, narrowing factual inquiries to highly localized and specific acts or omissions will (1) frustrate the objectives of the NAAEC by reducing the importance of the matters at issue, (2) focus inquiries on specific companies and enterprises, rather than on widespread government practices and conduct, and (3) enable governments to more easily derail factual inquiries by asserting that the matter is the subject of an ongoing judicial or administrative hearing or reflects a reasonable exercise of investigatory, prosecutorial, regulatory or compliance discretion (Article 45(1)(a)).

4. By modifying the scope of factual records and attempting to limit the kind of information the Secretariat can consider, Council is calling for the preparation of factual records that no one (except Council) wants. Surely the Citizen Submission Process was not designed to achieve this absurd outcome.

5. Council has usurped the role of the Secretariat by attempting to constrain the definition of "sufficiency of information".

Recommendations

1. Council should implement the clear and direct language of the NAAEC by conducting a straightforward "yes" or "no" vote on the development of a factual record as recommended by the Secretariat.

2. Council should not revise the *Guidelines*, remand Submissions, or take any other action to narrow the definition of "sufficient information" to exclude broad patterns of conduct under NAAEC Article 14(1)(c).

3. Parties should recall their role as a steward of the NAAEC, and not solely as a defendant in a fact-gathering process. Accordingly, Parties should respect the roles and boundaries delineated in the NAAEC.

4. Council should fully implement Council Resolution 00-09, including respecting JPAC's central role in consulting with the public and formulating advice to Council on issues concerning the implementation and further elaboration of Articles 14 and 15.