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FITZGERALD, ABBOTT & BEARDSLEY LLP
ATTORNEYS AT LAW
1221 BROADWAY, 21ST FLOOR
OAKLAND, CALIFORNIA 94612-1837
TELEPHONE: (510) 451-3300

PLEASE REPLY TO:
P. O. BOX 12867
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MICHAEL P. WALSH
EDWARD M. KEECH
OF COUNSEL

PHILIP E. DRYSDALE
SENIOR COUNSEL

MARY BETH TRICE
SPECIAL COUNSEL

FACSIMILE: (510) 451-1527
EMAIL: INBOX@FABLAW.COM
WEBSITE: WWW.FABLAW.COM

16 April 2002

Via First Class Mail

COPY

Manon Pepin, JPAC Liason Officer
North American Commission for Environmental Cooperation
393 St. Jacques Ouest, Bureau 200
Montreal, Quebec
Canada H2Y 1NY

Re: JPAC Call for Comments on Work Plan Issues Related to Implementation and Further Elaboration of Articles 14 and 15 of NAAEC

Dear Mr. Pepin:

I am an environmental attorney with Fitzgerald, Abbott & Beardsley, and an environmental and international law professor at Golden Gate University School of Law in San Francisco. I have recently completed a law review article on the evolution of NAAEC's citizen submission process that focuses on developments in the 2000-2002 period. This article, entitled *Awkward Evolution: Citizen Enforcement at the North American Environmental Commission*, will be published in the summer of 2002 in the Environmental Law Institutes' Environmental Law Reporter. One of the developments covered in the article (see Section V, pages 33-42) is the CEC Council's November 2001 decisions concerning Oldman River II (SEM-97-006), Aquanova (SEM-98-006), Migratory Birds (SEM-99-002), BC Mining (SEM-98-004) and BC Logging (SEM-00-004). I am submitting the enclosed pre-publication version of *Awkward Evolution* in response to JPAC's call for comments on the CEC Council's imposition of a new workplan requirement in connection with preparation of factual records for the above-referenced citizen submissions. Although the enclosed article addresses questions beyond the advisability and legality of the new workplan requirement, I hope that it proves helpful to JPAC, other CEC staff and other organizations and individuals working on this particular issue.

Very truly yours,

FITZGERALD, ABBOTT & BEARDSLEY LLP

Paul S. Kibel

FORTHCOMING IN ENVIRONMENTAL LAW REPORTER (SUMMER 2002)

AWKWARD EVOLUTION:

Citizen Enforcement at the North American Environmental Commission

Paul Stanton Kibel*

Abstract

Along with the North American Free Trade Agreement, the North American Agreement on Environmental Cooperation ("NAAEC") was adopted by Canada, Mexico and the United States in 1993. NAAEC created the North American Commission for Environmental Cooperation ("CEC" or "North American Environmental Commission") headquartered in Montreal, Quebec. NAAEC also created a new procedure for citizens to file submissions with the CEC when they believe there is a failure to enforce domestic environmental laws in Canada, Mexico or the United States. In May 2001, the Joint Public Advisory Committee of the CEC released a report on this new citizen submission process entitled *Lessons Learned*. Taking *Lessons Learned* as a focal point, this Dialogue evaluates the past performance and future prospects of citizen enforcement under NAAEC, and considers the relevance of NAAEC's citizen submission process to the emerging environmental debate over the proposed agreement to establish a Free Trade Area for the Americas ("FTAA").

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* Mr. Kibel is a lecturer at Stanford University and an Adjunct Professor at Golden Gate University School of Law. He is also an environmental attorney with Fitzgerald, Abbott & Beardsley, and the author of The Earth on Trial: Environmental Law on the International Stage (Routledge Press 1999). He holds an LL.M. from Berkeley's Boalt Hall Law School. The author thanks David Markell, Patti Goldman and Randy Christensen for their comments and suggestions. This article was completed in January 2002, and only covers developments through this date.

I. The *Lessons Learned* Report: A Time to Reassess

The debate in the early 1990s over the North American Free Trade Agreement ("NAFTA") was extremely contentious in Canada, Mexico and the United States. Citizens in all three countries voiced concerns that the proposed NAFTA would hinder and weaken protection of the environment and the rights of workers. More specifically, critics of the proposed agreement highlighted that while NAFTA established new standards and procedures to protect the economic rights of private corporations engaged in North American trade, the agreement did not establish equivalent standards and procedures to ensure that Canada, Mexico and the United States protected public health, endangered ecosystems and species, and the rights of workers and labor unions. [1] Opponents to the proposed NAFTA therefore called for revising the agreement so that the environment and workers were provided with legal protections equivalent to those provided to private corporations.[2]

In response to mounting political opposition to NAFTA from environmental groups and unions, one of the key pledges of William Clinton's 1992 campaign for the United States' presidency was that he would make environmental and labor issues an integral part of the NAFTA negotiations.[3] Clinton won the 1992 United States' presidential election, and in August 1993 Canada, Mexico and the United States completed negotiations for two new agreements: the North American Agreement on Environmental Cooperation ("NAAEC") and the North American Agreement on Labor Cooperation ("NAALC").[4] NAAEC called for the creation of a new institution to be headquartered in Montreal, Quebec – the North American Commission for Environmental Cooperation ("North American Environmental Commission" or "CEC"). NAAEC also called for the creation of a new procedure

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[1] Pierre Marc Johnson & Andre Beaulieu, The Environment and NAFTA: Understanding and Implementing the New Continental Law 32 (1996)[hereinafter Johnson & Beaulieu].

[2] See *Analysis of the North American Free Trade Agreement and the North American Agreement on Environmental Cooperation* (Sierra Club, October 6, 1993)[hereinafter Sierra Club Analysis].

[3] John R. MacArthur, The Selling of Free Trade: NAFTA, Washington, and the Subversion of American Democracy 164-166 (2000) [hereinafter MacArthur].

[4] Jack Garvey, *Trade Law and Quality of Life -- Dispute Resolution Under the NAFTA Side Accords on Labor and Environment*, 89 Am. J. Int'l L. 439, 440 (1995),

that permitted citizens and groups to file submissions with the North American Environmental Commission regarding the non-enforcement of Canadian, Mexican and United States' environmental laws.[5] This new procedure can result in the CEC's preparation and publication of a document called a factual record.[6]

The inclusion of NAAEC and NAALC in the NAFTA package dampened some of the environmental and labor opposition to NAFTA, and in late 1993 NAFTA, NAAEC and NAALC were approved by the legislatures of Canada, Mexico and the United States. All three treaties went into effect on January 1, 1994.

It has now been more than eight years since NAAEC went into effect, and more than 30 citizen submissions have been filed with the North American Environmental Commission alleging non-enforcement of environmental laws. In May 2001, the Joint Public Advisory Committee ("JPAC") of the North American Environmental Commission released *Lessons Learned*, a report evaluating the effectiveness of NAAEC's citizen submission process.[7] *Lessons Learned* reaffirmed that the citizen submission process was an integral part of the NAAEC-NAFTA environmental regime, and cautioned against weakening this process. The report also included some recommendations to improve the transparency and efficiency of the citizen submission process, and to monitor actions taken following the publication of a factual record. *Lessons Learned* did not conclude, however, that any fundamental changes to the NAAEC's citizen submission were needed or warranted.

Lessons Learned's reaffirmation of the value of NAAEC's citizen submission process and its recommendations concerning transparency, efficiency and monitoring are consistent with the views expressed by most environmental groups in North America. The report's conclusion regarding the basic sufficiency of the current NAAEC citizen submission process, however, appear to be at odds with the position of these same groups. These groups have expressed disappointment with the process and do not view it as an adequate enforcement model going forward. Perhaps the clearest indication of this disappointment was the

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[5] Articles 14 and 15, North American Agreement on Environmental Cooperation, Sept. 14, 1993, U.S.-Can.-Mex, 32 I.L.M. 1480 (1993[hereinafter NACEC].

[6] Id.

[7] *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, Submitted by the Joint Public Advisory Committee, 6 June 2001)[hereinafter Lessons Learned].

publication of a document entitled *Trade & Environment Principles* in June 2001.[8] *Trade & Environment Principles* was drafted and signed by a broad coalition of North American environmental organizations - including most of the environmental organizations that had previously supported the NAFTA-NAAEC package back in 1993 – and insisted on environmental enforcement provisions far stronger than those provided for in NAAEC.

Taking the release of *Lessons Learned* as a focal point, this article assesses the citizen submission process under NAAEC. This assessment is particularly timely given recent actions to curtail NAAEC's citizen submission process, and given current proposals to negotiate an agreement to establish a Free Trade Area for the Americas ("FTAA"). The FTAA would expand many of NAFTA's core trade provisions to other Central and South American countries. As the FTAA debate unfolds, one of the key unresolved questions is whether and to what extent environmental rights and environmental protection will be addressed in the agreement.[9] By examining the evolution and performance of NAAEC's citizen submission process, this article provides a basis for consideration of environmental issues related to the proposed FTAA.

II. Environment-Trade Debate in North America Since 1990

1. NAAEC and NAFTA Negotiations

The origins of NAAEC and NAFTA go back to June of 1990, when Mexico's President Carlos Salinas de Gotari and United States' President George Bush formally committed to the idea of a comprehensive free trade agreement between Mexico and the United States.[10] With the commitment of Canada's Prime Minister Brian Mulroney in September 1990, the proposal for a comprehensive Mexico-

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[8] *Trade & Environment Principles* (June 27, 2001 document endorsed by Center for International Environmental Law, Consumer's Choice Council, Defenders of Wildlife, Earthjustice Legal Defense Fund, Friends of the Earth, Institute for Agriculture & Trade Policy, National Wildlife Federation, Natural Resources Defense Council, Sierra Club and World Wildlife Fund).

[9] Jan Gilbreath, *Environment and Trade: Predicting a Course for the Western Hemisphere Using the North American Experience* (June 2001 report prepared by the Yale Center for Environmental Law & Policy and the Center for Strategic & International Studies) [hereinafter CSIS-Yale Report].

[10] MacArthur, *supra* note 3, at 93.

United States free trade agreement was expanded to include Canada.[11]

When NAFTA negotiations began in 1990, there was near unanimous opposition to the proposed agreement among environmentalists in Canada, Mexico and the United States.[12] Environmental opposition to NAFTA was based on numerous factors including: disappointment with the environmental record of the General Agreement on Tariffs and Trade ("GATT"), the global agreement upon which many of NAFTA's provisions were modeled[13]; increased awareness of the relationship between environmental protection and trade resulting from the international agreements negotiated at the 1992 United Nations Conference on Environment and Development held in Rio de Janeiro, Brazil[14]; reports of the dumping of untreated toxic waste by United States's owned factories (maquiladoras) operating in Mexico near the United States-Mexico border[15]; and concerns that NAFTA would provide a means for United States' companies to challenge Canadian pesticide laws, which are generally more protective of the environment and farm workers' health than pesticide laws in the United States.[16] Environmental concerns about the agreement also prompted legal challenges in Mexico and the United States regarding the adequacy of environmental assessments performed in connection with NAFTA.[17]

The completion of negotiations for NAAEC in August 1993, however, led to

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[11] Earl H. Frey, *A Continent of Free Trade: Negotiations Toward a North American Free Trade Agreement*, 64 J. State Gov't 128 (1991).

[12] Paul Stanton Kibel, *The Paper Tiger Awakens: North American Environmental Law After the Cozumel Reef Case*, 39 Columbia J. Transn'l L. 395, 406 (2001)[hereinafter Paper Tiger Awakens].

[13] See Donald M. Goldberg, *GATT Tuna-Dolphin II: Environmental Protection Continues to Clash with Free Trade* (Brief by Center for International Environmental Law, June 1994).

[14] C. Ford Runge, Freer Trade, Protected Environment: Balancing Trade Liberalization and Environmental Interests 88 (1994).

[15] Joel Simon, Endangered Mexico: An Environment on the Edge 211 (1997).

[16] Steven Shrybman, *Trading Away the Environment*, World Policy J. (Winter 1991-92) at 105.

[17] Public Citizen v. Office of the U.S. Trade Representative, 782 F. Supp. 139 (D.D.C. 1992), aff'd on other grounds, 970 F.2d 916 (D.C. Cir. 1992); *Mexican Ecology Groups File Complaint to Force Impact Statement on NAFTA Accord*, 16 Int'l Envt; Rep. (BNA) 646 (1993).

a split among North American environmentalists.

The inclusion of NAAEC in the NAFTA package led some environmental organizations, such as the Environmental Defense Fund (now Environmental Defense), World Wildlife Fund, National Wildlife Federation and Natural Resources Defense Council, to withdraw their opposition. For instance, in hearings before the United States House of Representatives, Stewart Hudson of the National Wildlife Federation argued the NAEEC-NAFTA approach stood in "stark contrast to the status quo, where environmental concerns are largely ignored in commerce between nations, where law enforcement of environmental laws goes unchecked, and where citizen input into trade and environmental issue is shut out."[18] Many of those who endorsed the NAAEC-NAFTA agreements recognized that the North American Environmental Commission and NAAEC citizen submission process would begin on a weak footing, but they maintained that the institution and the process would evolve and be strengthened over time.

Other environmental organizations, however, such as the Sierra Club, Greenpeace, Public Citizen, the Canadian Environmental Law Association and the Association de Grupo Ambientalistes (a network of Mexican environmental groups), concluded that NAAEC was more rhetoric than substance, and that support for the NAAEC-NAFTA regime could still not be justified. As a report by the Canadian Environmental Law Association stated, "nothing in the so-called NAFTA side agreement or the proposed North American Commission can fix the environmental problems that will flow from NAFTA."[19] Similarly, in its *Analysis of the North American Free Trade Agreement and the North American Agreement on Environmental Cooperation*, released in October 1993, the Sierra Club noted the limitations of the citizen submission process and concluded that the "North American Agreement on Environmental Cooperation, or NAAEC, makes only limited progress on the issue of lax enforcement of environmental laws."[20]

The division within the North American environmental community was one of the critical factors that led to legislative approval of the NAFTA-NAAEC-NAALC package in the United States. Although the vote was close, 234-200, the United

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[18] North American Free Trade Agreement (NAFTA) and Supplemental Agreement to NAFTA: Hearing Before the Subcommittee on Trade of the House Committee on ways and Means, H.R. Doc. No. 103-48 (1993)(Statement of Stewart Hudson, Legislative Representative, NWF).

[19] Johnson & Beaulieu, *supra* note 1, at 34.

[20] Sierra Club Analysis, *supra* note 2, at 1, 21-22.

States House of Representatives approved the agreements on November 17, 1993.[21] Mexico's Senate approved the agreements in November 1993,[22] and Canada's Senate followed in December of the same year.[23]

2. Seattle Protests

In December 1999, the governmental delegates of the World Trade Organization ("WTO") met in Seattle, Washington. The WTO – headquartered in Geneva, Switzerland – was established in 1994.[24] It was created to implement and enforce the GATT and other international trade agreements - such as the WTO Agreement on Sanitary and Phytosanitary Measures – signed in 1994 as a result of the Uruguay Round GATT negotiations. Most of the North American environmental groups involved in the political debate regarding adoption of NAFTA and the NAAEC were also involved in the political debate regarding the creation of the WTO and the adoption of the Uruguay Round agreements.

Since its establishment, the WTO has come under intense criticism from environmentalists in North America and worldwide. Much of this criticism has focused on claims that international trade rules serve as obstacles to strengthening domestic environmental standards and to the regulation of environmentally-destructive production processes. These claims were validated in two controversial decisions issued in 1998 by the WTO Appellate Body, a quasi-judicial forum within the WTO.

The first decision involved a challenge by the United States to the European Union's ban on the sale of beef grown with artificial hormones.[25] In this decision, the WTO Appellate Body held that the European Union's beef hormone ban violated GATT and the 1994 Agreement on Sanitary and Phytosanitary Measures because there was insufficient scientific evidence to support the link between hormones and public health. The second decision involved a challenge by India,

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[21] 139 Cong. Rec. H10, 048.

[22] *Mexican Senate Approves NAFTA*, 53 Facts on File No. 2756 (Nov. 25, 1993), at 875.

[23] *Canada Commits to NAFTA*, 53 Facts on file No. 2770 (Dec. 31, 1993), at 963.

[24] Final Act, Results of GATT Uruguay Round Multilateral Trade Negotiations (April 14, 1994).

[25] WTO - Report of the Appellate Body: EC Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R, AB-1997-4 (January 15 1998),

Pakistan and Thailand to a United States' law that prohibited the sale or importation of shrimp caught without devices or procedures to protect sea turtles.[26] Sea turtles are killed when they become trapped in shrimp nets and drown. In this decision, the WTO Appellate Body held that the United States' shrimp ban did not comply with GATT's rules because the United States did not to take into account the different conditions and circumstances in the other countries subject to the ban. Under WTO/GATT rules, the European Union and the United States could be subject to countervailing bans, sanctions and tariffs if they refuse to comply with the WTO Appellate Body rulings.

At the December 1999 WTO meeting in Seattle, environmental organizations -- along with human rights groups and labor unions -- organized massive street protests. It was estimated that upwards of 50,000 people participated in the demonstrations.[27] One of the protestors' criticisms of the WTO was that, under current international trade rules, domestic environmental laws and international environmental treaties were being undermined and ignored.[28] Although the focus of the Seattle protests was on the WTO and GATT, NAFTA and NAAEC were also subject to criticism. For many of the Seattle protestors, the rulings and broad powers of the WTO stood in stark contrast to NAFTA's and NAAEC's environmental rights and protections, discussed below.

3. FTAA Debate and Fast Track

In early 2001, trade ministers from 34 North, Central and Southern American nations completed an initial draft of an agreement to create a Free Trade Area for the Americas ("Draft FTAA"). The Draft FTAA was released to the public in July 2001.[29]

The Draft FTAA contains many of the same trade and investment provisions set forth in existing NAFTA and WTO-GATT rules. For instance, like NAFTA and the WTO, the Draft FTAA provides that private investors may compel a nation to

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[26] WTO, United States - Import Restriction of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (October 12, 1998).

[27] Michael Elliot, *The New Radicals*, Newsweek, Dec. 13, 1999, at 36-39.

[28] Jenny Bates & Debra Knopman, *After Seattle: Can Trade and Environment Support Each Other?*, The Envtl Forum, Jan-Feb. 2000, at 30, 31.

[29] Free Trade Area of the Americas, Draft Agreement (July 3, 2001)(on file with author)[hereinafter Draft FTAA].

participate in binding arbitration when they believe that a nation's domestic policies have unjustifiable devalued their investment or property.[30] Similarly, like NAFTA and the WTO, the Draft FTAA permits challenges to a nation's public health standards on the basis that such standards are more rigorous than accepted international practices or that there is insufficient scientific evidence to support such standards.[31]

Although the Draft FTAA contains most of the trade and investment provisions found in NAFTA, it contains almost none of the environmental provisions found in the NAAEC. More specifically, the FTAA does not create an institution akin to the North American Environmental Commission to help oversee environmental protection policies throughout North, Central and South America. Similarly, the Draft FTAA does not establish a procedure for governments or citizens to bring claims when they believe an FTAA-signatory nation is failing to enforce domestic environmental laws.

Given the absence of environmental protection rules, institutions and procedures in the Draft FTAA, most environmental groups currently oppose the proposed agreement. In the United States, most of the opposition to date has focused on political efforts to defeat legislation that would provide President George W. Bush with fast-track authority to finalize negotiations of the FTAA. In June 2001, Republican Congressman Phillip Crane introduced the Trade Promotion Authority Act of 2001 ("Crane bill").[32] Pursuant to the Crane bill, President Bush would be granted exclusive authority to negotiate the terms of the FTAA, which Congress must then either approve or reject in its entirety. The central feature of the Crane bill (and of the previous fast-track legislation that resulted in the United States' approval of NAFTA and the GATT Uruguay Round agreements) was that Congress relinquished its authority to make changes to the terms negotiated by the President. Significantly, the Crane bill did not require President Bush to negotiate substantive environmental provisions as part of the FTAA. In a letter dated June 27, 2001, a coalition of North American environmental groups urged Congress to reject the Crane bill.[33] This coalition

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[30] *See* Draft FTAA, Article 10 of Chapter on Investment.

[31] *See* Draft FTAA, Article 16 of Chapter on Agriculture.

[32] H.R. 2149.

[33] June 27, 2001 letter to Members of U.S. House of Representatives from American Lands Alliance, Center for International Environmental Law, Defenders of Wildlife, Earthjustice, Friends of the Earth, Institute for Agriculture & Trade Policy, National Environmental Trust,

included Natural Resources Defense Council, National Wildlife Federation and World Wildlife Fund, organizations that had earlier supported NAFTA and NAAEC.

Along with their June 27, 2001 letter opposing the Crane bill, the coalition of North American environmental groups released a document entitled *Trade & Environment Principles*. Among other things, *Trade & Environment Principles* maintained that trade policymakers should "provide for binding, enforceable measures in trade agreements to maintain and effectively enforce environmental laws and regulations and prohibit the lowering of environmental standards to attract investment or gain trade advantage" and that trade policymakers should "ensure that environmental provisions in trade agreements are subject to the same dispute resolution and enforcement mechanisms that apply to all other aspects of the agreements."[34] *Trade & Environment Principles* constituted a rejection not only of the Crane bill, but a revised verdict on the environmental adequacy of NAFTA and NAAEC, because NAFTA and NAAEC do not contain the provisions and procedures required by the principles.

In response to widespread criticism and opposition, the Crane bill was pulled by the Republican leadership of the House of Representative. In its place, in September 2001, Republican Congressman Bill Thomas submitted a revised bill ("Thomas bill") providing President Bush with fast track trade authority.[35] The Thomas bill did not contain any new substantive environmental provisions, but did provide that negotiators should "seek to protect and preserve the environment" in the context of the FTAA. Environmental groups in the United States responded to the Thomas bill with the same condemnation with which they had responded to the Crane bill. For instance, in October 2001, Natural Resources Defense Council, Friends of the Earth, Defenders of Wildlife, World Wildlife Fund and the Center for International Environmental Law released a document entitled *Understanding Fast Track: Key Environmental Problems with the Thomas Bill.* Among other things, this document stated: "Our organizations support trade agreements that encourage environmental progress and guard against direct attacks by trade rules on environmental laws. H.R. 3005, the Thomas bill, falls far short on both counts -- in a number of cases making no improvement on the Crane fast track bill, and in others regressing from provisions in [ ] the NAFTA environmental side agreement...The environmental negotiating objective seems

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Natural Resources Defense Council, National Wildlife Federation, Pacific Environment, and Sierra Club (on file with author).

[34] Trade & Environment Principles, *supra* note 8.

[35] H.R. 3005.

designed to undermine the environmental regimes of other countries rather than to reinforce and build sound regulatory systems to ensure environmentally sustainable trade and investment."[36]

The political debate over the Thomas bill, however, took place in the aftermath of the events of September 11, 2001. In this aftermath, many Republicans in Congress argued that support for the Thomas bill was a question of national security. For instance, Republican Congressman Dennis Hastert urged lawmakers "to support our President who is fighting a courageous war and redefining American world leadership or...undercut the President at the worst possible time."[37] Opponents to the Thomas bill resisted efforts to link fast track authority to the military situation in Afghanistan. Amidst these conflicting views, on December 6, 2001, the United State House of Representative passed the Thomas bill by a vote of 215-214. The outcome was achieved when the Republican Congressman Jim DeMint reversed his initial vote against the bill under intense pressure from the Republican House leadership.

Although the House vote on the Thomas bill is over, the divisions over the bill remain. As Lori Wallach, Director of Public Citizen's Global Trade Watch, commented on December 7, 2001: "The [Republicans] could not have passed this retrograde legislation absent the current national emergency and we will remember this for what it is –crass political profiteering...After we had won 215-214, the Speaker kept the vote open for 42 minutes and the Republican leadership prowled the floor seeking arms to break. The weakest link was Jim DeMint from the Carolinas who switched his vote. Meanwhile, before anyone could talk to any of the other members about fixing this robbery of our victory, you saw the gavel slam down closing the vote at the moment that switched vote registered."[38] The political battle over the Thomas bill, and fast-track authority, now moves on to the United States' Senate.

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[36] *Understanding Fast Track: Key Environmental Problems with the Thomas Bill* (October 2001 publication by Natural Resources Defense Council, Friends of the Earth, Defenders of Wildlife, World Wildlife Fund and the Center for International Environmental Law).

[37] Carolyn Lochhead, *Trade Bill Passes By A Vote in House, Bush Lobbied for Treaty Authority*, San Francisco Chronicle (December 7, 2001), p. A3.

[38] December 6, 2001 email from Lori Wallach to Global Trade Working Group of Alliance of Sustainable Jobs and the Environment (on file with author).

III. Citizen Enforcement under NAAEC

1. NAAEC Citizen Enforcement Provisions

Institutionally, the centerpiece of NAAEC is the North American Environmental Commission, or CEC. The North American Environmental Commission has three main institutional components: (1) the Council of Ministers ("CEC Council"), composed of the senior environmental ministers/officials from Canada, Mexico and the United States; (2) the Secretariat ("CEC Secretariat"), the administrative body of the CEC with an Executive Director appointed directly by the CEC Council; and (3) JPAC, a fifteen person advisory committee comprised of five non-governmental representatives from each of the three NAAEC nations.[39]

NAAEC contains several provisions that set forth the underlying purpose of the agreement and of the authority of the CEC Council. For instance, Article 1(g) of NAAEC provides that one of the objectives of the agreement is to "enhance compliance with, and enforcement of, environmental laws and regulations." As another example, Article 10(1)(d) of NAAEC states that the CEC Council shall "address questions and differences that may arise between the parties regarding the interpretation or application of this Agreement." Article 10(2) states that "the Council may consider, and develop recommendations regarding approaches to environmental compliance and enforcement." and Article 10(4) states that "the Council shall encourage effective enforcement by each Party or its environmental laws and regulations."

The legal basis and procedures for citizen submissions are set forth in Articles 14 and 15 of NAAEC. Article 14 provides that "The Secretariat may consider a submission from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental laws." Upon submission of an Article 14 submission, the CEC Secretariat must then determine whether or not the submission merits a response from the Party alleged to be in violation of NAAEC.[40] If the CEC Secretariat determines that no response is necessary, and the submission should not proceed further, it must set forth its position in a "determination."[41]

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[39] NAAEC, *supra* note 18, Articles 9, 11 and 16.

[40] Id., Article 14(2).

[41] Guidelines for Submission on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation, in Bringing the Facts to Light: A

If the CEC Secretariat determines that a response to a submission is merited, the Party alleged to be in violation of the NAAEC has 60 days to prepare and submit a response.[42] If the CEC Secretariat, after review of the response, determines that additional investigation is warranted, Article 15 of the NAAEC provides that the CEC Secretariat may request that the CEC Council approve, by a two-thirds vote, the CEC Secretariat's preparation of a "factual record" of the dispute. If authorized by the CEC Council, this factual record will evaluate the factual and legal basis for the Article 14 petition.[43] The final version of the CEC Secretariat's factual record must be approved by a two-thirds vote of the CEC Council.[44]

Significantly, Article 14 and 15 of the NAAEC does not provide a definition of the term "factual record," and leaves open what could or could not be included in such a document. Equally significant, beyond the publication of the factual record by the North American Environmental Commission, the NAAEC does not specify procedures, penalties or sanctions to ensure compliance with recommendations that might be set be set forth in a factual record.

Because the provisions of the NAAEC establishing the citizen submission process are somewhat general, the CEC Council adopted the *Guidelines for Submissions on Enforcement Matters Under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* ("*Citizen Submission Guidelines*") in 1995, and adopted an amended version of the guidelines in 1999.[45] Among other things, current *Citizen Submission Guidelines* provide that a factual record "will contain: (a) summary of the submission that initiated the process; (b) a summary of the response, if any, provided by the concerned Party; (c) a summary of any other relevant factual information; and (d) the facts presented by the

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Guide to Articles 14 and 15 of the North American Agreement on Environmental Cooperation (CEC 2000)[hereinafter Citizen Submission Guidelines].

[42] NAAEC, *supra* note 18, Article 14(2).

[43] Id., Article 15(3)(4)

[44] Id., Article 15(3)(7).

[45] See Citizen Submission Guidelines, *supra* note 41. See CEC Council Resolution 99-06, *Adoption of the Revised Guidelines for Submissions on Enforcement Matters Under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (adopted 28 June 1999).

Secretariat with respect to the matters raised in the submission."[46] The *Citizen Submission Guidelines* do not indicate whether this list of a factual record's contents is exhaustive, or whether it merely establishes the minimum of what must be included. Like Article 14 and 15 of the NAAEC, the *Citizen Submission Guidelines* do not set forth specific procedures to ensure compliance with recommendations that might be set forth in a factual record.

2. Submissions and Factual Records

Since 1994, more than 30 citizen submissions have been filed with the North American Environmental Commission.[47] An analysis of the claims involved in each of these submissions, and of the North American Environmental Commission's response to each of these submissions, is beyond the scope of this article. Instead, the analysis below is limited to a statistical overview of how these submissions have been handled, and a summary of the two submissions that have resulted in the release of factual records.

1. Submissions

As of the end of November 2001, 31 citizen submissions had been filed with the North American Environmental Commission.[48] 10 submissions were filed against Canada, 13 submissions were filed against Mexico, and 8 submission were filed against the United States.[49]

The CEC Secretariat terminated 17 of these 31 submissions on the grounds that they did not fall within the category of claims permitted or warranted under Articles 14 of NAAEC, or because it determined that the non-enforcement alleged in the submission was the subject of pending judicial or administrative review.[50]

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[46] Id., Guideline 12.1.

[47] Citizen Submissions on Enforcement Matters: Current Status of Filed Submissions (available on the North American Environmental Commission's website, www.cec.org) [hereinafter Status of Submissions]

[48] Id.

[49] Id.

[50] Submission SEM-97-003 (filed on 9 April 1997). This submission alleged that Canada is failing to effectively enforce certain environmental protection standards regarding agricultural pollution emanating from hog and other livestock operations.

The CEC Council terminated one of these 31 submissions notwithstanding that the CEC Secretariat recommended the preparation of a factual record. In its resolution terminating this submission, the CEC Council did not provide any explanation for why it was rejecting the CEC Secretariat's recommendation, or why the preparation of a factual record was unwarranted.[51]

The status of the 13 submissions that were not terminated by either the CEC Secretariat or the CEC Council is as follows: one of the submissions was voluntarily withdrawn by the submitter; four of the submissions are still being reviewed by the CEC Secretariat to determine whether a factual record is warranted; eight of the submissions have resulted in the CEC Council's approval of the CEC Secretariat's preparation of a factual record.[52] In four of its eight decisions approving the preparation of a factual record, the CEC Council conditioned its approval by narrowing the scope of the factual record recommended by the Secretariat.[53] The CEC Council's decision to narrow the scope of these four factual records, which occurred after the release of *Lessons Learned*, is discussed further in the Section V of this article.

As of the end of January 2002, two factual records have been completed by the CEC Secretariat, approved by the CEC Council, and made public. These two factual records are discussed below.

2. *Cozumel Reef* Factual Record

In January 1996, Centro Mexicano e Derecho Ambiental (Mexican Center for Environmental Law), Comite para la Proteccion de los Rescursos Naturales (Natural Resource Protection Committee) and Grupo de los Cien Internacional (International Group of One Hundred) filed a submission against Mexico.[54] The submission concerned the construction of a cruise ship pier on the island of Cozumel, located in the Mexican state of Quintana Roo. The submitters alleged

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[51] *See* Council Resolution 00-001 (16 May 2000).

[52] Status of Submissions, *supra* note 47.

[53] SEM-97-006, SEM-99-002, SEM-98-004 and SEM-00-004.

[54] SEM 96-001. For a detailed analysis of this submission and factual record, *see* Paper Tiger Awakens, *supra* note 12.

that the construction and operation of the cruise ship pier would have a significant adverse environmental impact on nearby coral reef ecosystems, of which the best know in Paraiso (Paradise) Reef.[55] The submitters argued that, under Mexico's national ecology law, work on the cruise ship pier must be halted until a proper environmental impact assessment was completed.[56]

The CEC Secretariat determined that the submitters had alleged a sufficient factual and legal basis to require Mexico to respond. Following a review of Mexico's response, the CEC Secretariat recommended that the CEC Council order the preparation of a factual record.[57] In August 1996, the CEC Council adopted the recommendation and instructed the CEC Secretariat to prepare a factual record.[58]

The factual record was approved by the CEC Council and released to the public in October 1997.[59] It provided a detailed account of the Mexican laws relating to protection of Cozumel's reefs, and of the competing claims regarding Mexico's disregard of those laws in an effort to approve and complete the Cozumel pier project. The factual record, however, stopped short of finding that Mexico had violated the NAAEC, and did not set forth any recommendations or obligations for Mexico going forward. Significantly, construction of the Cozumel pier continued during and after the North American Environmental Commission's preparation of the factual record. Following the release of the factual record, however, the Mexican government decided not to approve certain on-shore developments associated with the pier project.[60] Some environmentalists believe that the

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[55] Paper Tiger Awakens, *supra* note 12, at 420.

[56] Id.

[57] Id.

[58] Id.

[59] Id., 465-468.

[60] *Factual Record Helped in Cozumel Pier Case, Says Submitter*, in Trio - Newsletter of the North American Commission for Environmental Cooperation (Summer 2001) ["At a conference earlier this year, Gustavo Alanis-Ortega, president of the Mexican Center for Environmental Law, shared his conclusion that in the Cozumel case, the Commission's 'spotlight' had ultimately worked. What is the most tangible effect that Mr. Alanis attributes at least in part to the factual record? The Cozumel pier project, as finally approved and constructed, did not include much of the development that the submitters had challenged"]. *Also see* CSIS-

Cozumel Reef factual record contributed to Mexico's decision to scale-back these on-shore developments.[61]

3. *BC Hydro* Factual Record

In April 1997, the British Columbia Aboriginal Fisheries Commission and other North American environmental groups filed a submission against Canada, alleging a failure to enforce the Canadian Fisheries Act.[62] More specifically, the submitter alleged that Canada had failed to enforce §35(1) of the Canadian Fisheries Act against a British Columbia Hydro and Power ("BC Hydro"), the owner and operator or numerous hydroelectric dams located along rivers in British Columbia. Section 35(1) provides that "No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat."[63]

The CEC Secretariat determined that the submitters had alleged a sufficient factual and legal basis to require Canada to respond. In its response, Canada relied extensively on its federal No Net Loss ("NNL") policy for fish habitat. Canada asserted that the implementation of the NNL policy represented effective enforcement of §35(1) of the Canadian Fisheries Act, regardless of whether particular BC hydro dams were damaging or destroying fish habitat.[64] Following a review of Canada's response, the CEC Secretariat recommended that the CEC Council order the preparation of a factual record. In June 1998, the CEC Council adopted the recommendation and instructed the Secretariat to prepare a factual record.[65] The factual record was approved by the CEC Council and released to the

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Yale Report, *supra* note 9, at 34.

[61] *Factual Record Helped in Cozumel Pier Case, Says Submitter*, in Trio - Newsletter of the North American Commission for Environmental Cooperation (Summer 2001).

[62] SEM -97-001. The other submitters on the BC Hydro submission were British Columbia Wildlife Federation, Trail Wildlife Association, Steelhead Society, Trout Unlimited (Spokane Chapter), Sierra Club (U.S.), Pacific Coast Federation of Fisherman's Associations, and the Institute for Fisheries Resources.

[63] Factual Record for Submission SEM-97-001 (BC Aboriginal Fisheries Commission)(30 May 2000), pp. 10-13 [hereinafter BC Factual Record].

[64] Id., 13-24.

[65] Status of Submissions, *supra* note 47.

public on June 11, 2000.[66]

To evaluate the merits of Canada's response regarding the NNL policy, the CEC Secretariat adopted a creative and novel procedure. The Secretariat established an Expert Group of outside fish habitat, dam and fisheries enforcement specialists, and asked this Expert Group to provide the CEC Secretariat with an independent assessment of whether the NNL policy was consistent with the requirements of §35(1) of the Canadian Fisheries Act.[67] Throughout the *BC Hydro* factual record, the Secretariat quotes the findings of the Expert Group, which unequivocally rejected Canada's argument regarding NNL. For instance, paragraph 113 of the *BC Hydro* factual record sets forth the Expert Group's finding that all known scientific examinations of NNL have concluded that Canada's NNL policy has failed to protect fish habitat. The Secretariat, however, does not adopt the Expert Group's findings as its own, nor does the *BC Hydro* factual record make any recommendations based on the Expert Group's findings.

Although the *BC Hydro* factual record did not determine that Canada was violating the Canadian Fisheries Act and did not set forth recommendations for Canada to improve its protection of fish habitat, there are some indications that the document has helped increase public and government awareness of the issue. For instance, prior to and during the CEC's preparation of the *BC Hydro* factual record, the Canadian and British Columbia governments has been involved in developing a Water-Use Plan ("WUP") to find ways to reduce the impact of British Columbia hydroelectric facilities on fisheries. Following the release of the *BC Hydro* factual record, government officials announced that the British Columbia Aboriginal Commission and other environmental groups would be invited to participate in the future development of this WUP.[68]

It should also be noted that, prior to the release of the final version, Canada raised objections to the contents of the *BC Hydro* factual record. For instance, a May 11, 2000 letter was sent from Norine Smith, Assistant Deputy Minister of Environment Canada to Janine Ferretti, Executive Director of the CEC Secretariat. This letter stated in pertinent part: "[W]e have reviewed the draft factual record on

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[66] Id.

[67] BC Factual Record, *supra* note 63, at 32.

[68] *Citizen Submission Process Proves Valuable in BC Hydro Case,* in Trio - Newsletter of the North American Commission for Environmental Cooperation (Fall 2001) [hereinafter Trio article].

97-001 (BC Hydro) and provide the following comments. ..Canada notes that the factual record goes beyond a compilation of facts, and contains opinions, conclusions and recommendations of the Secretariat or the Expert Group. For example, paragraph 143 contains speculation regarding issues that may 'affect the effectiveness of the WUP process.' Paragraph 149 is a long list of recommendations regarding 'issues worthy of attention in monitoring the effectiveness of the WUP program.' Paragraph 233 contains a conclusion that 'setting the baseline conditions at the habitat level that exists when Water Use Plans (WUP)are initiated or in the recent past set the bar too low for habitat protection.'"[69] It in unclear whether and/or how the CEC Secretariat responded to Canada's complaint.

3. NAFTA Investor Provisions Compared

NAAEC, and the citizen submission process established under Articles 14 and 15 of the agreement, were approved as part of an integrated NAAEC-NAFTA environment and trade regime. In addition to the citizen submission process created under NAAEC, NAFTA created a private enforcement process by which private corporations and investors could file claims alleging non-compliance by Canada, Mexico or the United State's with NAFTA's trade rules. A comparison of NAAEC's citizen submission process with NAFTA's private enforcement process reveals considerable disparities between these two procedures.

When a Canadian, Mexican or United States' corporation believes that Canada, Mexico or the United States violated or is violating NAFTA's investment provisions, and if a Canadian, Mexican or United States' corporation believes that these violations have amounted to an expropriation of the corporation's assets, Chapter 11 of NAFTA authorizes the corporation to force the Canadian, Mexican or United States' government to participate in binding arbitration.[70] To initiate this binding arbitration process, the corporation is not required to first obtain any

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[69] The May 11, 2000 letter from Norine Smith to Janine Ferretti was included as an exhibit to the final *BC Hydro* factual record.

[70] For analysis of NAFTA's Chapter 11 investment expropriation provisions, see Howard Mann & Konrad Von Moltke, *NAFTA's Chapter 11 and the Environment: Addressing the Impacts of the Investor-State Process on the Environment* (October 2000 report by the International Institute for Sustainable Development)[hereinafter Mann & von Moltke]; J. Martin Wagner, *International Investment, Expropriation and Environmental Protection*, 29 Golden Gate University Law Review 465 (1999)[hereinafter Wagner]; Daniel A. Seligman, *The Treaty Itself Undermines Environmental Protection*, The Environmental Forum (March/April 2001), p. 36 [hereinafter Seligman].

approval from either the North American Free Trade Commission or the Canadian, Mexican or United States' governments. Moreover, NAFTA's arbitration panels are authorized to award the corporation monetary damages if it is determined that Canada, Mexico or the United State violated or is violating of NAFTA's investment provisions.

As of October 2000, Canadian, Mexican and United States' corporations had filed 11 separate arbitration claims seeking monetary damages for alleged violations of NAFTA's Chapter investment provisions.[71] Some of these claims have resulted in troubling environmental outcomes. For instance, in 1998 the United States-based Ethyl Corporation filed a Chapter 11 claim against Canada in response to Canada's ban of methylcyclopentadienyl mangagnese tricarbonyl ("MMT"), a gasoline additive that has been proven to cause neural damage. To settle this claim, Canada agreed to lift the MMT ban and to pay $13 million to the Ethyl Corporation.[72] As another example, in 1999 a NAFTA Chapter 11 tribunal ordered Canada to pay $50 million to S.D. Myers, a United States-based toxic waste disposal company.[73] S.D. Meyers expropriation claim was prompted by a temporary Canadian ban on the export of Canadian PCBs to the U.S. for incineration.[74] Most recently, in 2001 the Canadian corporation Methanex filed a $970 million dollar expropriation claim against the U.S. in response to California's ban of the use of the gasoline additive MTBE.[75] Methanex is a manufacturer of MTBE and claims that California failed to properly consider alternatives to banning MTBE.[76]

The experience with NAFTA Chapter 11 expropriation claims has highlighted the disparity between the strong enforcement mechanisms provided for in North

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[71] Mann & von Moltke, *supra* note 70, at 5.

[72] *See* Order Amending the Schedule to the Manganese-Based Fuel Additives Act, SOR/98-393, Ca. Gaz. 1998.II.2265 (July 20, 1998). *See also* Government of Canada Statement on MMT (July 20, 1998).

[73] *U.S. Company Seeks Compensation for Losses Due to Canadian PCB Export Ban*, 21 International Environmental Reporter No. 18 at 848 (1998).

[74] Seligman, *supra* note 70.

[75] Council of Canadians, *NAFTA's Big Brother: The Free Trade Area of the Americas and the Threat of NAFTA-Style Investor-State Rules* (March 2000), at p. 5.

[76] Id.

American trade-investment law and the weak enforcement mechanisms provided for in North American environmental law. More specifically, this experience raises the question of why North American corporations are provided with remedies and tribunals to enforce investment rights that are not similarly available for North American environmental groups to enforce environmental rights.

IV. The *Lessons Learned* Report: What Lessons Were Learned?

A. Framework for Evaluation

In the field of international environmental law, a distinction is often made between the adjudication model and the managerial model.[77] These models can provide a useful framework for evaluating *Lessons Learned* specifically, and NAAEC's citizen submission process in general.

Under the adjudication model, implementation is achieved by providing an independent international tribunal with jurisdiction over governments and private parties, and by providing this tribunal with the authority to resolve disputes as to whether a international environmental standard has been violated.[78] International adjudication processes do not necessarily need to provide a mechanism to ensure compliance with a tribunal's ruling, although they often do.[79] The International Court of Justice in the Hague, Netherlands is an example of an adjudicatory body without enforcement powers. Nonetheless, governments often comply with decisions of international adjudicatory tribunals despite the absence of a clear means of enforcement. One of the criticisms of the adjudication model is that the authority to determine rights and the creation of effective enforcement procedures may dissuade some nations from agreeing to strong substantive environmental standards in international agreements.[80]

In contrast to the adjudicatory model, the managerial model seeks to

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[77] For a comprehensive discussion of the literature on the adjudicatory and managerial models in international environmental law, *see* John H. Knox, *A New Approach to Compliance with International Environmental Law: The Submissions Procedure of the NAFTA Environmental Commission*, 28 Ecology Law Quarterly 1 (2001)[hereinafter Knox].

[78] Id., at 13-21.

[79] Id.

[80] Id.

persuade states to comply with international environmental standards by monitoring their actions, building their capacity, and resolving their disputes informally.[81] Proponents of the managerial model maintain that compliance with international environmental agreements can best be promoted by non-binding mechanisms that manage compliance rather than enforce it.[82] The focus of these managerial activities is to develop and provide information concerning compliance rather than to provide remedies for non-compliance. Critics of the managerial model maintain that information-gathering and capacity-building should supplement rather than substitute for effective enforcement mechanisms.[83]

NAAEC's citizen submission process contains elements of both the adjudicatory model and the managerial model. On the one hand, the North American Environmental Commission has jurisdiction to require the preparation of a factual record in response to a submission alleging that Canada, Mexico, or the United States is failing to enforce its environmental laws. On the other hand, the North American Environmental Commission does not currently employ the citizen submission process to resolve disputes regarding non-compliance, but instead uses the process primarily to gather and disseminate information about non-compliance disputes.

The North American environmental groups that supported NAAEC understood that Articles 14 and 15 of the treaty lacked the specificity of a fully-developed adjudicatory process. It was recognized that NAAEC's provisions did not clearly provide for the independence of the North American Environmental Commission, for the resolution of conflicting legal interpretations in factual records, or the duty of Canada, Mexico and the United States to comply with the findings in factual records. Nonetheless, for those environmental groups who supported NAAEC, there was an expectation that the citizen submission process would evolve so that NAAEC's requirements would become increasingly enforceable. This evolutionary process was explained by Randy Christensen, an attorney with Sierra Legal Defense Fund in Vancouver, British Columbia who represented the environmental-submitters in the *BC Hydro* citizen submission: "One of the major criticisms of the process is that there are no specific means for a country to improve, if a factual record says it has not been meeting its own environmental law...There are ways it could be made stronger, but we're building

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[81] Id., 22-26.

[82] Id.

[83] Id.

something new with this mechanism. Its going to take some time to reach full potential."[84]

For the purposes of this article, we need not resolve the debate over the respective merits of the adjudicatory model and the managerial model of international environmental governance. Rather, for our present purposes, we need only acknowledge that the North American environmental groups who initially supported NAAEC back in 1993 anticipated that the citizen submission process would evolve to become an increasingly adjudicatory or quasi-adjudicatory process. At an absolute minimum, this evolution entailed that the CEC establish the requisite political independence from the Canadian, Mexican and U.S. governments such that the citizen submission process would result in objective and comprehensive factual records. The following evaluation of *Lessons Learned* centers on whether this evolution has occurred and whether environmental expectations have been met.

Lessons Learned is divided into four sections. Section 1 provides an overview of NAAEC's citizen submission process. Section 2 describes the two factual records that have been released. Section 3 summarizes the comments received by JPAC in connection with preparation of *Lessons Learned*. Section 4 presents JPAC's conclusions and recommendations for improving NAAEC's citizen submission process. The analysis below focuses on Section 4 of *Lessons Learned*, in which JPAC sets forth its conclusions and recommendations.

B. *Lessons Learned*'s Recommendations

In connection with its preparation of *Lessons Learned*, JPAC solicited public comments in the Fall of 2000 and held a public workshop in Montreal in December 2000. In April 2000, JPAC also released and solicited comments on a draft of *Lessons Learned*. The analysis below considers the final text of *Lessons Learned* in the context of the comments submitted to JPAC.

1. No Weakening of Process

At the time NAAEC was negotiated and adopted, many NAFTA proponents (including former United States President George H. Bush) opposed linking NAFTA's trade provisions with environmental provisions such as those creating

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[84] Trio article, *supra* note 68.

the citizen submission process.[85] Even after the adoption of NAAEC by Canada, Mexico and the United States, there were government efforts to scale back the citizen submission process. More specifically, in late 1999 and early 2000 Canadian, Mexican and United States's senior officials held several closed-door meetings to consider revising the *Citizen Submission Guidelines* so as to curtail and limit the NAAEC's citizen enforcement process. These secret meetings were criticized by North American environmental groups, such as the National Wildlife Federation. In an April 20, 2000 letter addressed to the CEC Council, National Wildlife Federation President Mark Van Putten stated: "It has recently come to our attention that the NAFTA parties have been engaged in an Article 14 and 15 guideline revision process without the benefit of public consultation for the last ten months...We strongly urge the Council to reconsider its current approach."[86] Van Putten urged the CEC Council to develop an "open and candid dialogue regarding the NAAEC citizen submission process" to preserve the "integrity of this vital public participation and environmental enforcement mechanism."[87] JPAC's preparation of *Lessons Learned* was prompted in part by the controversy over efforts to revise the *Citizen Enforcement Guidelines* without public input or review.

The introduction to *Lessons Learned* responded to efforts to limit the citizen submission process, stating: "We state our principal conclusions at the outset. First, citizen submissions under Articles 14 and 15 of the NAAEC play a unique -- and indispensable -- role in fostering vigorous environmental enforcement that is a necessary component of expanded free trade under NAFTA. Second, an essential component of the Articles 14 and 15 process is an independent, professionally qualified and property funded CEC Secretariat. Third, the Articles 14 and 15 process can and should be improved through the suggestions in Section 4 in order to make it more timely, open, accountable and effective. The purpose of these suggestions should be to strengthen, not dilute, the Articles 14 and 15 process..."[88]

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[85] Paper Tiger Awakens, *supra* note 12, p. 406.

[86] April 27, 2000 letter from Mark Van Putten to David Anderson (Canada's Minister of the Environment), Carol Browner (Administrator of the United States Environmental Protection Agency) and Julia Carabias Lillo (Mexico's Secretary of the Environment)(on file with author and available on NWF's website).

[87] Id.

[88] Lessons Learned, *supra* note 7, p. 1

The value of NAAEC's citizen submission procedure was also discussed in Section 4 of *Lessons Learned*: "In studying the Articles 14 and 15 process, it is easy to overlook the contributions that this new procedure has already made to environmental enforcement in North America. NGOs [non-governmental organizations] from the NAAEC countries have repeatedly turned to the Articles 14 and 15 process when they believed that domestic environmental remedies were not adequate to address their complaints...Development of a factual record has provided an opportunity for both public and impartial expert participation in the assessment of the factual (and, at least in part, the legal) basis for a Party's alleged non-enforcement of its environmental laws..."

2. Expedited Review

In Section 4(3) of *Lessons Learned*, JPAC concludes: "To be credible with the public and to increase its effectiveness, the citizen process must also be timely. There is substantial room to reduce the time periods currently required to review, respond to and process Submissions." JPAC then goes on to recommend the adoption of the following changes to expedite review of citizen submissions: a 60 day deadline for the CEC Secretariat's completion of its initial review of a submission; a 6-7 month deadline (from the date of submission) for the CEC Secretariat to make a recommendation to the CEC Council regarding the preparation of a factual record; and a 90 day deadline (from the date the CEC Secretariat forwards its recommendation) for the CEC Council to decide whether to authorize preparation of a factual record. JPAC's recommendations in Section 4(3) of *Lessons Learned* addressed numerous comments regarding the unwarranted delays in processing citizen submissions.

3. Greater Disclosure

In Section 4(4) of *Lessons Learned*, JPAC sets forth two new proposals to improve disclosure and transparency in the CEC's review of citizen submissions.

The first proposal relates to the Council of Ministers' basis for rejecting the CEC Secretariat's recommendation to develop a factual record. JPAC notes in Section 4(4) of *Lessons Learned*:

> "The current [citizen submission] Guidelines require the Secretariat staff to indicate its reasons for a decision under Article 15(1) to recommend a factual record and at certain other decision-making points within the Article 14(1) and (2) reviews. These requirements provide the Parties, the Council and the public with the requisite

> confidence that the review is being conducted both openly and on a reasoned basis. For this reason, similar considerations should govern any Council decision not to accept the Secretariat's recommendation to develop a factual record. The obligation to state substantive reasons for important governmental decisions affecting the environment should not be seen as an unreasonable burden, particularly where the Secretariat has, after investigation, indicated its reasons for recommending such a factual record."

This recommendation was developed in response to comments expressing dissatisfaction with the CEC Council's handling of citizen submission SEM-97-003, in which more than 15 Canadian and Quebecois environmental groups alleged a failure to enforce laws regulating livestock waste from hogfarm operations in Quebec. In October 1999 the Secretariat recommended that SEM-97-003 warranted the preparation of a factual record, but in January 2000 the CEC Council disregarded the Secretariat's recommendation and terminated the submission. Beyond its instruction to the CEC Secretariat to not prepare a factual record, the CEC Council provided no explanation or justification for its decision to terminate SEM-97-003.[89]

The second proposal relates to the appropriateness of the current citizen submission provision which provides that the CEC Secretariat's recommendation to the CEC Council (regarding preparation of a factual record) shall not be disclosed to the submitter until 30 days after the recommendation is made. According to JPAC: "The Secretariat should inform a submitter when the Secretariat has referred a matter to the Council with a recommendation for a factual record. The current 30–day 'blackout' period should be either abolished or reduced...[this procedural change] would go far to alleviate concerns that were widely voiced by the public during our *Lessons Learned* Workshop."[90]

These recommendations, if adopted, would improve the accountability and credibility of the North American Environmental Commission's review process.

4. Increased Secretariat Resources

In Section 3(a) of *Lessons Learned*, JPAC observes: "It was noted by commentators that the efficiency of the Secretariat is greatly diminished because

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[89] *See* Council Resolution 00-001 (16 May 2000).

[90] Lessons Learned, *supra* note 7, §4(4).

of a lack of human and financial resources...[W]ith the increasing number of Submissions, the time for review and processing became longer, leading to the current backlog of Submissions.... Only two staff members in the Secretariat are assigned to the submissions unit. Two people probably cannot promptly dispose of the stream of Submissions that will be filed in the next few years...[T]he current resources of the Secretariat are insufficient." In Section 4(2) of *Lessons Learned*, JPAC then goes on to conclude that "The Secretariat must [ ] have adequate resources to attract and retain consistently high-quality staff and, where needed, specialized consultants." In light of concerns raised during the public comment period and workshop, JPAC's general recommendation here seems warranted. This recommendation, however, would have benefitted from greater specificity regarding the increases in CEC Secretariat staffing and funding that are needed.

5. Remedying Non-Enforcement

Section 3(c) of *Lessons Learned* summarizes the following concern raised in comments submitted to JPAC:

> A citizen submitter has no direct ability to force a Party to effectively enforce its environmental laws. A citizen submitter must hope that another party chooses to act on the factual record and pursue the claim under the NAAEC dispute resolution and enforcement provisions. Even though a citizen Submission may prove that a Party is failing to effectively enforce its environmental laws, the violation may never be redressed.

Section 3(c) of *Lessons Learned* also noted that several commentators "agreed that there was a need for a more adequate remedy plan, and argued that such a plan should be based on the factual record and contain both preventative and corrective programs." This section also noted that "Another suggestion was that a Party found not to effectively enforce its environmental laws should commit to do so under monetary penalty." It was also suggested that there should be a mechanism to effectively suspend a project when the CEC Council has instructed the CEC Secretariat to prepare the factual record.[91]

The criticisms and suggestions discussed above were prompted in part by the experience with the Cozumel Reef factual record. In this case, construction of the Consorcio pier continued throughout the North American Environmental

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[91] Id., §3(c).

Commission's preparation of the factual record, and the pier was completed notwithstanding the release of a final factual record which provided strong evidence that Mexico was failing to enforce its environmental laws.

The issue of the need for procedures to remedy non-enforcement identified in factual records was addressed by JPAC in Section 4(5) of *Lessons Learned*. Disappointingly, this section did not provide meaningful conclusions or recommendations. Instead, Section 4(5) provided the following analysis:

> The Articles 14 and 15 process does not currently include provisions for enforcement or follow-up of a completed factual record, even when a Party's failure to enforce its environmental laws is clearly established by the factual record. While we received a number of comments addressed to this issue, many of the suggestions went beyond the scope of our study or suggested significant amendments to the NAAEC itself. We believe that the present Articles 14 and 15 procedure can comfortably lend itself to increased oversight, by both the public and the CEC, of the steps that a Party takes (or fails to take) to remedy any enforcement failures identified in a factual record...
>
> It is clear that 'enforcement' of environmental laws cannot be left to private citizens or NGOs. To respond to the concern regarding monitoring, one option would be for the party involved to report to the CEC within a reasonable period of time (for example, not exceeding 12 months) after the release of a factual record pursuant Council authorization on the actions, if any, that it has taken to address the matters set forth in that factual record.

Lessons Learned"s recommendation regarding the submission of post-factual record reports was responsive to some of the concerns raised about remedying non-enforcement identified in factual records. It is unclear, however, why JPAC determined that other suggestions for remedying non-enforcement were "beyond the scope" of *Lessons Learned*. For instance, *Lessons Learned* did not evaluate suggestions to amend NAAEC to provide for the imposition of monetary damages or the suspension of projects during the period of factual record preparation. It is unclear whether the JPAC considered and rejected these proposed suggestions, or whether JPAC was simply unwilling to evaluate suggestions in *Lessons Learned* that entailed revisions to NAAEC.

6. CEC Council's Response to Recommendations

On June 29, 2001, the CEC Council adopted Resolution 01-06, entitled *Response to Joint Public Advisory Committee (JPAC) Report on Lessons Learned Regarding the Articles 14 and 15 Process*. Resolution 01-06 resulted in three decisions by the CEC Council.

First, pursuant to Resolution 01-06, the CEC Council amended "section 10.2 of the Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation (Guidelines) to provide that five working days after the Secretariat has notified the Council that it considers a submission warrants developing a factual record, both the notification and the Secretariat's reasoning as to why it considers that a factual record is warranted will be placed in the registry referred to in section 15 of the Guidelines and in the public file referred to in section 16 of the Guidelines."[92] This amendment responded to some of *Lessons Learned*'s recommendations regarding the need for greater transparency.

Second, Resolution 01-06 provides that the CEC Council "commits to providing a public statement of its reasons whenever it votes not to instruct the Secretariat to prepare a factual record."[93] Although this commitment provides a response of sorts to some of *Lessons Learned*'s recommendation regarding the need for greater transparency, it is unclear why the CEC Council chose not to codify this commitment as an amendment to the *Citizen Submission Guidelines*.

Third, Resolution 01-06 states that the CEC Council "commits to take best efforts, and to encourage the Secretariat to make best efforts, to ensure that submissions are processed in as timely a manner as is practicable, such that ordinarily the submission process will be completed in not more than two years following the Secretariats receipt of a submission."[94] Once again, although this commitment provides a response of sorts to some of *Lessons Learned*'s recommendation concerning the need for more expedited review, it is uncertain why the CEC Council did not codify this commitment as a more specified amendment to the *Citizen Submission Guidelines*.

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[92] CEC Council Resolution 01-06 (adopted 29 June 2001).

[93] Id.

[94] Id.

Beyond the one amendment and two commitments set forth in Resolution 01-06, the CEC Council has not taken any other actions to incorporate into NAAEC's citizen submission process the recommendations in *Lessons Learned*.

C. *Lessons Learned*'s Omissions

The weaknesses of *Lessons Learned* have less to do with the substance of what was recommended, than with the omission of recommendations regarding critical issues. Of particular importance, JPAC did not provide any findings or recommendations which consider whether there are changes to the provisions of Article 14 and 15 of the NAAEC that would increase the effectiveness and integrity of the citizen submission process. This point was repeatedly voiced in oral and written comments. For instance, at the December 2000 workshop in Montreal, former JPAC member Michael Cloghesy stated that the widespread frustration with the citizen submission process indicated that a redrafting of Articles 14 and 15 of the NAAEC is required.[95] Similarly, at this same workshop Gustavo Alanis of the Mexican Center for Environmental Law (now a member of JPAC) stated that Articles 14 and 15 needed to be amended since the current citizen submission process established by these provisions is inequitable.[96]

1. Contents of Factual Records

Section 3(c) of *Lessons Learned* notes: "[Many] commentators believed that factual records should be able to reach conclusions where the facts warrant, as to a Party's 'effective enforcement of its environmental law' in the matter under consideration and should also include recommendations for further actions by a Party to impose the effectiveness of such enforcement. Others, however, believed that JPAC should not support such an approach since the Parties believe that the purpose of factual records is not to reach 'conclusions of law' and will resist these proposals."

This issue of whether findings and recommendations should be included in factual records was raised and discussed in numerous comments submitted to JPAC. For instance, at the December 2000 workshop in Montreal, the Chair of the United States National Advisory Committee to the CEC, John Knox, clarified

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[95] *CEC Summary of Workshop on the History of Citizen Submissions Pursuant to Articles 14 and 15 of the North American Agreement on Environmental Cooperation* [hereinafter CEC Workshop Summary), p. 3.

[96] Id., p. 5.

that the decision whether to include recommendations in factual records is a political rather than a legal question, because the contents of factual records are not identified in the NAAEC.[97] Martha Kostuch, Vice President of The Friends of Oldman River, a Canadian environmental NGO, suggested that factual records should contain conclusions of law as well as recommendations.[98] Carl Bruch, Senior Attorney with the Washington DC-based Environmental Law Institute, noted: "The decision not to require final findings in the factual record is another key area of concern. As exemplified in both the *BC Hydro* and *Cozumel Pier* cases, the current process does not encourage a determination in the factual record of whether a party was in violation of domestic environmental law. We believe that a new requirement should be placed on the Secretariat to come to a conclusion in the factual record. This would enhance the goal of the agreement by specifically identifying Parties that are in violation of domestic standards."[99] Similarly, another comment (submitted by the author) to JPAC maintained:

> "[I[n evaluating whether these previous submissions satisfied the procedural requirements of Article 14, the CEC Secretariat did not merely collect and summarize the arguments presented by the different parties. Rather, the CEC Secretariat made its own independent assessment of these procedural arguments, and made a specific recommendation to the CEC Council regarding whether a factual record should be prepared. There is every reason to presume that the CEC Secretariat would demonstrate similar sound judgment and impartiality when providing an independent assessment of substantive allegations and responses.[100]

The case for inclusion of such findings and recommendations in NAAEC factual records is further supported by the fact that such findings and recommendations are already included in written decisions issued by the North American Free Trade Commission and Arbitration Panels established under NAFTA.[101] If such findings and recommendations are appropriate in decisions

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[97] Id., p. 4.

[98] Id., p. 8.

[99] Letter from Carl Bruch of Environmental Law Institute to JPAC (May 11, 2001), p. 3.

[100] Comment Letter from author to JPAC (December 27, 2000).

[101] Mann & von Moltke, *supra* note 70.

involving application of North American trade law, it is unclear why they are inappropriate in decisions involving application of North American environmental law. Moreover, there is nothing in the text of the NAAEC or of the CEC's citizen submission guidelines that prohibits the inclusion of findings or recommendations in factual records.

Notwithstanding the comments and considerations discussed above, *Lessons Learned* did not contain any conclusions regarding whether the effectiveness of NAAEC's citizen submission process would be strengthened by the inclusion of findings and recommendation in factual records.

2. CEC Council Conflicts of Interest

Section 3(c) of *Lessons Learned* notes that "Some commentators criticized the role of the Council because it has absolute discretion to decide whether or not to instruct the Secretariat to prepare a factual record" and that "Another issue regarding Council accountability was the absence of any appeal when the Secretariat or the Council has decided not to proceed with the preparation of a factual record."

The above-quoted statement in Section 3(c) of *Lessons Learned* is supported by comments submitted to JPAC. Former JPAC Member Michael Cloghesy expressed concern about the increasing "politicization" of the citizen submission process by the three national governments, which are represented on the CEC Council.[102] Gustavo Alanis of the Mexican Center for Environmental Law remarked that Article 15 permits a Party to vote on whether to prepare a factual record even though a Party is a respondent in the citizen submission proceeding, and that this presents an inherent conflict of interest.[103] Martha Kostuch, Vice-President of The Friends of Oldman River commented "The Governments have a conflict of interest. The Governments should separate their responsibilities as members of the CEC Council from their interests as Parties subject to review...The Council is undermining the integrity of the public submission process."[104]

The commentors above raised serious concerns about the integrity of the

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[102] CEC Workshop Summary, *supra* note 92, p. 3.

[103] Id., p. 9.

[104] Kostuch Letter to JPAC, dated June 12, 2000, included in *Written Comments on the Public History of Submissions Made Under Articles 14 and 15 of the North American Agreement on Environmental Cooperation.*

current citizens submission process wherein a government alleged to be violating its own environmental law is entitled to vote on whether the North American Environmental Commission should prepare and/or release a factual record. This problem has also been noted by the former Director of the CEC Secretariat's Submissions on Enforcement Matters Unit, David Markell, who noted in an April 2001 article that "the dual roles the countries play -- as the party whose enforcement practices are being challenged and as custodians of the [NAAEC] -- is a source of potential tension."[105]

Concerns about the inappropriateness of this arrangement also find support by comparison with the investor claims process established under Chapter 11 of NAFTA. Under NAFTA, when a complaint is filed by a private corporation with an Arbitration Panel, the private party is not required to secure approval from 2 out of the 3 NAFTA signatory nations before its claim can go forward. Under NAFTA, private corporations are entitled to unilaterally initiate binding dispute resolution procedures. There is not apparent basis for the disparate treatment of the environmental rights of environmental organizations and the investment rights of private corporations.

Notwithstanding the comments and considerations discussed above, JPAC does not directly address this issue in Section 4 of *Lessons Learned*. It should be noted that, in Section 4, JPAC does recommend that the CEC Council should disclose the basis for its decision to not prepare a factual record. This recommendation, however, does not address structural and conflict of interest concerns related to the CEC Council's discretion to authorize the preparation and release of factual records. As discussed in the next section, these concerns have been validated by the CEC Council's recent actions.

V. De-Evolution and the CEC Council's November 2001 Actions

Although many North American environmental groups are disappointed with the pace and extent of its evolution, there are nonetheless indications that the NAAEC citizen enforcement process is slowly evolving. The innovative use of the expert group in the *BC Hydro* factual record and the findings and recommendations in *Lessons Learned* all signal a growing commitment to strengthen the Article 14 procedures. However, alongside these signs of progress, there are also signs of de-evolution, of efforts to limit the scope of NAAEC citizen

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[105] David L. Markell, *The Citizen Spotlight Process*, The Environmental Forum (March/April 2001), p. 41.

enforcement. One such sign is the CEC Council's failure to date to adopt substantive changes to the NAAEC's citizen submission process that are responsive the most of the recommendations presented in *Lessons Learned*. However, perhaps the most significant and troubling of these signs of de-evolution are the November 2001 actions by the CEC Council.

On November 16, 2001, the CEC Council voted on whether to adopt the CEC Secretariat's recommendation that factual records be prepared for the following five citizen submissions: *Oldman River II*,[106] *Aquanova*,[107] *Migratory Birds*,[108] *BC Mining*,[109] and *BC Logging*.[110] The CEC Council approved the preparation of factual records for all five of these citizen submissions. This approval, however, was subject to two important conditions. First, in the case of four of these citizen submissions (*Oldman River II*, *Migratory Birds*, *BC Mining*, and *BC Mining*), the CEC Council ordered the preparation of factual records far more limited that what had been recommended by the CEC Secretariat. Second, for all five of these citizen submissions, the CEC Council required that the CEC Secretariat prepare (and submit for the CEC Council's review) a workplan detailing how each factual record will be prepared. These conditions are the first time that the CEC Council has used its approval authority under the NAAEC to narrow the substantive scope of factual records.

Below is a summary of the four citizen submissions that were substantively narrowed by the CEC Council's November 2001 actions.

In *Oldman II*, the citizen submitters cited the approval of Sunpine Forest Products Forest Access Road as an example of Canada's widespread failure to effective enforce the Canadian Environmental Assessment Act and sections 35, 37 and 40 of the federal Fisheries Act.[111] The CEC Secretariat recommended that a

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[106] SEM-97-006.

[107] SEM-98-006.

[108] SEM-99-002.

[109] SEM-98-004.

[110] SEM-00-004.

[111] *CEC Council Votes on Five Factual Record Recommendations* (November 19, 2001 press release from the CEC)(on record with author and available on CEC website)[hereinafter CEC Press Release].

factual record be prepared regarding the full scope of the submission. In its November 2001 decision, however, the CEC Council disregarded the CEC Secretariat's recommendation and instead ordered the preparation of a factual record only with respect to the Sunpine case.[112]

In *Migratory Birds*, the citizen submitters cited two examples in support of the United States' widespread failure to effectively enforce section 703 of the Migratory Bird Treaty Act in connection with logging operations.[113] The CEC Secretariat recommended that a factual record be prepared regarding the full scope of the submission. In its November 2001 decision, however, the CEC Council disregarded the CEC Secretariat's recommendation and instead ordered the preparation of a factual record only with respect to the examples cited in the initial submission.[114]

In *BC Mining*, the citizen submitters cited the Britania Tulsequah and Mt. Washington mines as examples of Canada's widespread failure to effectively enforce section 36(3) of the federal Fisheries Act in connection with mining operations.[115] The CEC Secretariat recommended that a factual record be prepared regarding the full scope of the submission. In its November 2001 decision, however, the CEC Council disregarded the CEC Secretariat's recommendation and instead ordered the preparation of a factual record only with respect to the Britania Tulsequah mine.[116]

In *BC Logging*, the citizen submitters cited TimberWest's logging operations in the Sooke watershed as an example of Canada's failure to enforce sections 35 and 36 of the federal Fisheries Act in connection with TimberWest's logging operations throughout British Columbia.[117] The CEC Secretariat recommended that a factual record be prepared regarding the full scope of the submission. In its November 2001 decision, however, the CEC Council disregarded the CEC Secretariat's recommendation and instead ordered the preparation of a factual

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[112] Council Resolution 01-08; CEC Press Release, *supra* note 111..

[113] SEM-99-002.

[114] Council Resolution 01-10; CEC Press Release, *supra* note 111.

[115] SEM-98-004.

[116] Council Resolution 01-11; CEC Press Release, *supra* note 111.

[117] SEM-00-004.

record only with respect to TimberWest's logging operations in the Sooke watershed.[118]

Although the NAAEC and the *Citizen Submission Guidelines* provide the CEC Council with authority to accept or reject the CEC Secretariat's recommendation to prepare a factual record, it is questionable whether these documents also provide the CEC Council with authority to unilaterally limit the substantive scope of a factual record, or to prohibit the CEC Secretariat from preparing a factual record until the CEC Council first reviews and approves a workplan detailing how a factual record will be prepared. Article 15(2) of NAAEC and *Citizen Submission Guideline* 10.4 both provide in pertinent part "The Secretariat shall prepare a factual record if the Council, by a two-thirds vote, instructs it to do so." There is nothing in this language that provides or suggests that CEC Council may use its authority to approve a factual record as a means to narrow the substantive scope of the factual record recommended by the CEC Secretariat. There is also nothing in this language that provides or suggests that the CEC Council may use its authority to either compel the preparation of or to disapprove a pre-factual record workplan. Because NAAEC does not provide a mechanism to review whether the CEC Council has exceeded its authority, however, the CEC Council's November 2001 actions will probably not be subject to any formal legal challenge.

Notwithstanding the absence of a forum to directly challenge whether the CEC Council's November 2001 actions were ultra-vires, these actions have been subject to intense criticism. This criticism has come not only from North American environmental groups, but from other institutions with or associated with the North American Environmental Commission, including JPAC, the United States' Government Advisory Committee to United States Representative to the CEC ("U.S. Government Advisory Committee"), and the United States' National Advisory Committee to the United States' Representative to the CEC ("U.S. National Advisory Committee"). This criticism, discussed below, was voiced both prior to and after the CEC Council's imposition of new conditions on the scope and preparation of the *Oldman River II*, *Aquanova*, *Migratory Birds*, *BC Mining* and *BC Logging* factual records.

On October 23, 2001 JPAC adopted Advice to Council No. 01-07, which began by noting that JPAC had been "apprised that Council will be asked to consider...a limit on the Secretariat's discretion to determine the scope of pending submission as a condition for a vote to proceed with the development of the

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[118] Council Resolution 01-12; SEC Press Release, *supra* note 111.

factual record."[119] JPAC's Advice to Council then went on to state:

> [JPAC] is compelled to express its frustration at being forced once again to advise on issues related to Articles 14 and 15, because past-agreed upon procedures are being ignored or circumvented...
>
> [JPAC] registers its strong and considered objection to such a proposal on the basis that this would:
> - violate Council's reaffirmation in Council Resolution 00-09 of its commitment to improve transparency;
> - circumvent the process established in Council Resolution 00-09 concerning the implementation and elaboration of the Articles 14 and 15 of the NAAEC;
> - constitute a constructive amendment to the guidelines and, therefore, should first be submitted to JPAC and public review;
> - constitute a flagrant disregard for one of the recommendations of JPAC's Lessons Learned Report with respect to supporting the independence of the Secretariat in the Articles 14 and 15 process...[120]

On November 30, 2001, JPAC adopted Advice to Council No. 01-09. In this document, JPAC asserted that CEC Council's November 2001 actions were taken "without sufficient background and consideration of the public interest" and requested that the CEC Council authorize JPAC to conduct a public review on "(1) the matter of limiting the scope of factual records; and (2) the requirement for the Secretariat to provide the Parties with its work plan and the opportunity to comment on it."[121]

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[119] JPAC Advice to Council: No. 01-07, *Re: Citizen Submissions on Enforcement Matters under Articles 14 & 15 of NAAEC* (23 October 2001)(document on file with author and available on CEC's website).

[120] Id.

[121] JPAC Advice to Council: No. 01-09, *Re: Request to Conduct a Public Review of Two Issues Concerning the Implementation and Further Elaboration of Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (30 November 2001)(on file with

On October 15, 2001, the U.S. National Advisory Committee sent a letter to Christine Todd Whitman, Administrator for the United States Environmental Protection Agency. This committee was established pursuant to Article 17 of NAAEC. This letter states:

> The Committee was most disturbed to learn that the United States is proposing a conditional approval of the MBTA submission that would confine the CEC Secretariat to investigating the particular events that were identified in the submission as illustrative examples...
>
> We have considered the integrity of the citizen submission process extensively in our previous meetings, and our earlier advice reflects the Committee's commitment to maintaining the consistency and transparency of the process. The Committee's advice of May 24, 2001 stated that we recommend that the U.S. government maintain its position to support the preparation of factual records "to the greatest extent possible" when the Secretariat finds that a factual records is warranted.
>
> Consistent with that advice, we strongly recommend that the United States approve the development of a factual record of the MBTA submission without conditions...
>
> [A] condition approval of a Secretariat proposal for preparing a factual record would set a highly undesirable precedent for future actions by other NAAEC parties. We understand that, legally, actions taken by the Council in response to a particular Secretariat recommendation do not bind future Council decisions. Nonetheless, if the United States responds with conditions in this case, it will undoubtedly substantially increase the likelihood that the other NAAEC parties will also do so in the future, thereby undermining the integrity of the Article

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author and available on CEC's website).

14.15 process.[122]

On October 19, 2001, the U.S. Governmental Advisory Committee also sent a letter to Christine Todd Whitman. This committee was established pursuant to Article 18 of NAAEC. This letter states:

> [T]he GAC has been a staunch and ardent supporter of the Articles 14 and 15 submission process given its uniqueness as the first mechanism of its type in any international treaty. The GAC believes that it is a cornerstone of the North American Agreement on Environmental Cooperation (NAAEC) and provides an extraordinary measure of transparency which benefits the citizens of the North American continent. Any action that would impede the efficacy of this process would not only undermine public support for the North American Free Trade Agreement (NAFTA), but could thwart any active expansion of NAFTA or the possible adoption of a Free Trade Agreement of the Americas (FTAA)...
>
> The *Migratory Bird* submission alleges that the U.S. has failed to effectively enforce U.S. environmental laws by historically failing to pursue any criminal prosecutions of the Migratory Bird Treaty Act for non-threatened or non-endangered species. It is our understanding that the U.S. intends to vote yes on the Secretariat proceeding with a factual record for this submission, but only if it is limited to a review of the facts associated with the two anecdotal violations identified in the submission...
>
> We are concerned that, by allowing a Party to a submission the latitude to define the scope of the factual record, as currently advocated by the U.S., the independence historically exercised by the Secretariat in the submission process will be eviscerated. The U.S. would undercut this independence by limiting the factual record to the two examples provides in the

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[122] October 15, 2001 Letter from Adam Greene (Chair, U.S. National Advisory Committee) to Christine Todd Whitman (on file with author).

> submission, where a broader pattern was adequately alleged. If the Secretariat's independence is undercut in the manner proposed by the U.S., there will be no future credibility to the submission process...
>
> There is no affirmative requirement in the Agreement that a petitioner lists all instances of a Party's failure to effectively enforce an environmental law to consider these events within the scope of factual record. And such an interpretation flies in the face of the plain language of the NAAEC, which contemplated a submission where a pattern and practice of ineffective enforcement exists, as opposed to an isolated failure by a Party to the Agreement...
>
> The most troublesome point in the current U.S. position is the requirement that the U.S. be allowed to negotiated the Secretariat workplan for development of the Migratory Bird factual record. Such an approach would undoubtedly infringe upon the Secretariat's independent factual investigation. It does so by giving the Party which has the most at stake in the process the opportunity to control the development of the factual record and, as a result, the outcome...Beyond the serious conflict of interest that such an approach would involve, there is no clear mechanism to resolve disagreements between the Secretariat and the U.S. involving the factual record workplan...[123]

Although this article only covers developments through January 2002, the March 6, 2002 response by the Sierra Legal Defence Fund (in Vancouver, British Columbia) should also be noted. Sierra Legal Defence Fund served as legal counsel for the submitters in the *BC Hydro* factual record and now serves as legal counsel for the submitters in the *BC Logging* submission. In a letter to the Canadian, Mexican and United States environmental ministers serving on the CEC Council, Sierra Legal Defence Fund states:

> What is particularly troubling about the Council's

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[123] October 19, 2001 Letter from Denise Ferguson-Southard (Chair, U.S. Governmental Advisory Committee) to Christine Todd Whitman (on file with author).

> decision [re: the *BC Logging* submission] is that the Secretariat had directly considered Canada's Response and indicated that the "other matters" could and should be part of any factual record. Despite the findings of the Secretariat -- and the Council's promise to respect the independence of the Secretariat -- the Council rejected the Secretariat's recommendation without so much as an explanation...
>
> The Submitters' second concern relates to what appears to be a de facto revision of Article 15 of the North American Agreement on Environmental Cooperation. Specifically, the Council in several of the November 16, 2001 resolutions restricts the Secretariats' ability to examine the failure to enforce environmental laws on a systematic basis. This occurred despite the fact that there is no basis for such a limitation in the NAAEC or in the Guidelines for Citizens Submissions, and despite the fact that the Secretariat has previously considered such issues in the context of citizen submissions such as BC Hydro (SEM-97-001). In effect, the Council has changed the rules of citizen submissions, mid-process, without any public consultation or input...[124]

As the responses from JPAC, the U.S. National Advisory Committee, the U.S. Governmental Advisory Committee and Sierra Legal Defence Fund all observe, there are several troubling aspects to the CEC Council's November 2001 actions. Three aspects, in particular, should be noted. First, these actions reveal the CEC Council's willingness to disregard the findings of JPAC's *Lessons Learned* and to disregard the CEC's Secretariat's recommendations regarding the preparation of factual records. Second, these actions highlight the absence of mechanisms to ensure that the CEC Council complies with NAAEC. Third, and perhaps most importantly, these actions provide the clearest evidence to date of the underlying structural and conflict of interest problems with the current Article 14 citizen enforcement process, a process in which a party alleged of violating NAAEC can determine the scope of the CEC Secretariat's investigation of this

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[124] March 6, 2002 letter from Randy Christensen of Sierra Legal Defence Fund to David Anderson (Minister for the Environment, Canada), Victor Lichtinger (Secretary for the Environment, Mexico) and Christine Todd Whitman (Administrator, United States Environmental Protection Agency)(on file with author).

alleged violation.

The CEC Council's November 2001 actions suggest that the NAAEC citizen enforcement procedure is a process moving forwards and backwards simultaneously. The commitment to strengthen the process is gaining broader public and governmental support at the same time that the current national representatives on the CEC Council are seeking to limit the process' scope.

VI. Conclusion: Lessons for the Hemisphere

In the United States, the environmental debate over the FTAA is taking place in the shadow of the experience with NAAEC and NAFTA. The environmental positions of the participants in the FTAA debate are shaped to a considerable degree by how these participants assess the performance of NAAEC's citizen enforcement process and NAFTA's investor protection provisions.

Those who perceive NAAEC's citizen enforcement as environmentally adequate are likely to seek the inclusion of similar procedures in the FTAA. Those who view NAAEC's citizen enforcement as environmentally inadequate are likely to call for the inclusion of stronger environmental enforcement procedures in the FTAA. Those who view NAAEC's citizen enforcement process as too intrusive are likely to oppose the inclusion of similar or strengthened environmental procedures in the FTAA.

The same type of assessment is taking place in regard to NAFTA's investor protection provisions. Those who perceive NAFTA's investor protection provisions as an appropriate check on environmental regulation are likely to seek the inclusion of similar provisions in the FTAA. Those who view NAFTA's investor protection provisions as undermining environmental protection are likely to call for the removal or weakening of such provisions in the FTAA.

The interplay between the performance of NAAEC and the emerging FTAA environmental debate was highlighted in a June 2001 report prepared by the Center for Strategic & International Studies and the Yale Center for Law and Environmental Policy ("CSIS-Yale Report"). The CSIS-Yale Report, entitled *Environment and Trade: Predicting a Course for the Western Hemisphere Using the North American Experience*, was based on interviews with government officials and environmental groups in Canada, Mexico and the United States, as well as interviews with CEC staff. The CSIS-Yale Report concluded that the prospects for inclusion of a NAAEC-type citizen enforcement provision in the FTAA were slim:

> Many governmental and CEC officials also were skeptical

> about the applicability of certain other provisions for transparency and citizens' participation to the entire hemisphere. The most often cited example was the citizens' submission process under Articles 14 and 15 of the NAAEC -- a process that allows individuals and NGOs to lodge complaints about their governments' failure to enforcement environmental laws. These NACEC provisions have been both praised and criticized, but many officials fear that vastly differing levels of democracy and traditions of citizen participation in decisionmaking would make it nearly impossible to implement such a program for the entire Western Hemisphere.[125]

If the observations in the CSIS-Yale Report are an accurate forecast of the provisions that will be left out of the final version of the FTAA, the road ahead for the proposed agreement looks increasingly stormy. To recall, in June 2001 a coalition of leading North American environmental groups released a document entitled *Trade & Environment Principles*.[126] This document provided that trade agreements should include "binding, enforceable measures...to maintain and effectively enforce environmental laws" and to ensure that "environmental provisions in trade agreements are subject to the same dispute resolution and enforcement mechanisms that apply to all other aspects of the agreements."[127] The FTAA's omission of mechanisms to ensure the enforcement of environmental laws would constitute a rejection of the *Trade & Environment Principles*, and this rejection would likely catalyze environmental opposition to the agreement. Under this scenario, the battle over the FTAA could prove even more contentious than the battle over NAFTA, because unlike with NAFTA, the FTAA's promoters would face a united environmental front.

The performance of NAAEC's citizen enforcement process has hemispheric implications. The assessment of the North American experience will influence the course of trade and environmental policies throughout the Americas. In undertaking this assessment, it is critical that the right questions are posed so that the right lessons can be learned.

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[125] CSIS-Yale Report, *supra* note 9, at 15.

[126] Trade & Environment Principles, *supra* note 8.

[127] Id.