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THE NAFTA ENVIRONMENTAL FRAMEWORK, CHAPTER 11 INVESTMENT PROVISIONS, AND THE ENVIRONMENT

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Hurt not the earth, neither the sea, nor the trees.

- Revelation 7:3

I. INTRODUCTION

In the period since 1989, international markets have become more integrated than ever before, and economic prospects of individual countries have become – more than ever before – bound up in the fate of the world economy.[1] Globalization should have a positive effect on the global and national economies according to the theory of comparative advantage, where each country produces and exports only those products that it can most efficiently produce compared to other nations. Consequently, efficient production should result in better use of national and world resources, ultimately leading to improved economies, lower prices for consumers, and overall benefits for the world in general. The

* I would like to thank three Golden Gate University School of Law professors for assisting with this paper: Professor Helen Hartnell for helping me define the scope of the paper; Professor Paul Kibel for providing me with important and timely information that was utilized extensively in the paper; and most of all, Professor Armin Rosencranz for enlightening me, guiding me, and motivating me to reach this very important personal goal - to have this paper published. Lastly, I would like to thank the entire GGU International Legal Studies department for the opportunities that they provided me and the lifelong lessons that they taught me while completing the LL.M. program and writing this paper. For these I will be forever grateful.

1. *See* Jeffrey D. Sachs & Andrew M. Warner, *Globalization and International Competitiveness: Some Broad Lessons of the Past Decade*, in GLOBAL COMPETITIVENESS REPORT 2000, CENTER FOR INTERNATIONAL DEVELOPMENT 18 (Harvard University 2000).

positive results of globalization in recent years tend to validate this theory.[2]

The North American Free Trade Agreement ("NAFTA") was established in this evolving era of global trading and developing regional trade unions, and was ratified by the United States, Mexico, and Canada to form the world's largest free trade market.[3] But more importantly, NAFTA was historically significant because it provided:

1. protections to its investors,
2. extensive intellectual property provisions, and
3. a model for integrating an economically developing country - Mexico - with two of the most developed economies in the world - the United States and Canada.[4]

While Mexico, the United States and Canada long ago realized the importance of developing a strong regional trade association, a review of NAFTA since its inception has shown that this agreement has extended beyond the boundaries of economics, and could have an increasing influence on the lives of Mexicans, Canadians, and Americans alike, partially due to the treaty's impact on the environment. These environmental problems can be traced back to two parts of the NAFTA treaty: the NAFTA Environmental Framework,[5] and NAFTA Chapter 11 Investment Provisions.[6] In particular, the effectiveness of the NAFTA

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2. NAFTA trade has also been shown to reinforce already-existing patterns of comparative advantage and specialization. (*See Part I - Final Analytic Framework for Assessing the Environmental Effects of the North American Free Trade Agreement*, at 2, Commission for Environmental Cooperation, 1999.) Interestingly enough, according to the Harvard study mentioned in footnote 1, the growth of particular national economies during the last ten years of globalization has been variable, based on critical factors such as a country's ability to implement new technologies. However, an analysis of how, why, and to what extent individual nations have benefited from globalization is outside the scope of this paper.

3. BAKER & MCKENZIE, NAFTA HANDBOOK: A PRACTICAL GUIDE FOR DOING BUSINESS UNDER NAFTA 10 (CCH Incorporated, 1994). Prior to NAFTA, the economies of the U.S., Mexico, and Canada represented the largest integrated market in the world - approximately 370 million consumers.

4. *Id.* at 26.

5. The NAFTA Environmental Framework mentioned here refers to the environmental provisions established by the NAFTA Environmental Side Agreement (i.e., the North American Agreement for Environmental Cooperation or the NAAEC).

6. At least one critic has claimed that NAFTA harmonization of standards and regulations in areas such as endangered species, pesticides, and hazardous waste transportation has been another source of environmental degradation caused by NAFTA. *See* Public Citizen Global Trade Watch - *Accountable Governance in the Era of Globalization: the WTO, NAFTA, and International Harmonization* – at 1, http://www.citizen.org/pctrade/harmonizationalert/HarmBackgrounder.htm. However, this topic is also outside the scope of this paper.

environmental side agreement has been questioned by many critics,[7] and the ability of foreign corporations to use Chapter 11's provisions in ways that can restrict or even negate governments' ability to protect human welfare and the environment has been the cause for much concern.[8]

In this paper, the author will discuss some of the environmental issues surrounding these two parts of the NAFTA machinery based on recent developments.[9] Written in seven parts, Part II provides the NAFTA historical background. Part III discusses the NAFTA Environmental Framework, and Part IV discusses the NAFTA Chapter 11 Investment Provisions. Part V reviews the Submissions of Environmental Enforcement Matters and provides recent academic criticisms of the CEC Process and NAFTA Chapter 11 based on NAFTA environmental studies. Part VI reviews critical Chapter 11 cases. Part VII provides critique and recommendations on how improvements might be made, and Part VIII concludes the paper.

II. HISTORICAL BACKGROUND OF NAFTA

Trade between Mexico and the United States has always been substantial. In the final year prior to NAFTA, U.S. trade with Mexico was US$81 billion, with Mexico being one of the few countries with which the United States has enjoyed a trade surplus.[10] In fact, Mexico ranked second as a United States trading partner in 2000, accounting for

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7. Public comments solicited by the Joint Public Advisory Committee (JPAC), which is part of the NAFTA environmental framework to be discussed later, generally referred to *transparency, timeliness*, and *effectiveness* as the main concerns surrounding NAFTA's overall environmental submission process.

8. *See* Howard Mann, *Private Rights, Public Problems, A Guide to NAFTA's Controversial Chapter On Investor Rights,* International Institute For Sustainable Development, 2001, at 1. Also according to Dr. Mann, in spite of enormous concern among many critics, NAFTA's investment rules continue to provide the working model for the proposed Free Trade Area of the Americas, and for other international agreements. See Howard Mann, *supra*, at viii. The view by many critics is that the use of NAFTA Chapter 11 as a model for other investment agreements is at this point premature for reasons that are discussed later.

9. Professor Paul Kibel suggests that prior to the current regime of North American environmental law, the pre-1993 period was limited to national issues that were physically transnational and did not deal with environmental and natural issues that were economically or politically transnational, areas which are now at the center of the current trade-environment debate. *See* CEC: JPAC: *Comments on the JPAC Public Review of Issues Concerning the Implementation and Further Elaboration of Articles 14 and 15;* Paul Stanton Kibel, *The Paper Tiger Awakens: North American Environmental Law After The Cozumel Reef Case,* March, 2000, at 7; http://www.cec.org/who_we_are/jpac/comments/Kibel.pdf.

10. *See* BAKER & MCKENZIE, *supra* note 3 at 10.

10% of U.S. trade.[11] Furthermore, in 2000, $123.2 billion in merchandise exports to Mexico dramatically surpassed U.S. exports to Japan, even though the Mexican economy is just one-tenth the size of Japan's.[12] That year, the United States was Mexico's predominant trading partner, accounting for 82% of Mexican exports and 70% of Mexican imports.[13]

The idea of establishing a free trade arena was first introduced by then Mexican President Carlos Salinas in early 1990.[14] Salinas saw NAFTA as a way of facilitating Mexico's socioeconomic development.[15] This view was supported by the evolving investment liberalization rules that emerged during the 1980's, which would be incorporated into NAFTA – that an investment agreement would be a positive element in attracting foreign investors, and that investment liberalization would lead to a higher level of economic efficiency for the host countries and businesses alike.[16] Mexican officials also believed that Mexico's future would be enhanced by closer cooperation and integration with its northern neighbor.[17] Additionally Mexico wanted to guard against resurgent U.S. protectionism by first securing market access, and then profiting from preferential access to the U.S. market, which would likely bring greater quality, innovation, and efficiencies that come with free market competition.[18]

United States officials recognized the economic value of the developing Mexican market, where U.S. exports had nearly doubled during the prior five years.[19] The U.S. also realized the need to develop regional competitiveness in light of other regional trade agreements that were being forged around the world.[20] Furthermore, the U.S. foresaw the value of having a stable and increasingly prosperous democratic southern neighbor, leading to greater political and economic stability, reduced

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11. *See* U.S. Department Of State: Bureau Of Western Hemisphere Affairs, *Background Note: Mexico, Profile*, April 2001, at 5, http://www.state.gov/r/pa/bgn/index.cfm?docid=1838.

12. *Id.*

13. *Id.*

14. *See* BAKER & MCKENZIE, *supra* note 3, at 9.

15. According to Dr. Mann, Mexico also embraced the goal of attracting new foreign investment, and saw NAFTA's Chapter 11 investment provisions as a way of advertising that Mexico was a *new and safe* place to do business. Five and six years later, Mexico became the most steadfast supporter of the NAFTA investment regime, having seen an exponential increase in investments from its NAFTA partners. *See* Mann, *supra* note 8, at 7.

16. *Id.* at 6.

17. *See* BAKER & MCKENZIE, *supra* note 3, at 10.

18. *Id.* at 11.

19. *Id.* at 10.

20. *Id.* at 11.

friction, and fewer problems.[21] This situation was also fueled by the fact that trading prior to NAFTA had resulted in an average 10 percent Mexican tariff being applied to U.S. exports, while the average U.S. tariff was only 2.07 percent.[22]

Summarizing the historical ties between Mexico and the U.S. that have had so much to do with the establishment of NAFTA, U.S. relations with Mexico are as important and complex as with any country in the world.[23] U.S. relations with Mexico have a direct impact on the lives and livelihoods of millions of Americans – whether the issue is trade and economic reform, drug control, migration, or the promotion of democracy.[24] As recognized by many, the time was ripe to abandon the various levels of trade protectionism that each country had previously utilized, and NAFTA was signed, ratified, and became effective on January 1, 1994.

Since implementation, the economic effects of NAFTA reported by both government and outside studies have been consistent. However, isolating these effects has been particularly difficult because of three significant events: 1) the strong performance of the U.S. economy, 2) Mexico's balance-of-payment crisis and recession of 1995, and 3) U.S. implementation of most favored nation ("MFN") tariff cuts mandated by the Uruguay Round agreements.[25] Several important economic effects of NAFTA reported by the United States Trade Representative are mentioned below.

> - Since NAFTA's passage in 1993, American's economy has boomed. As of this writing, we had created the longest peacetime expansion in American history. We had reduced unemployment from 7.4 percent to 4.3 percent – the lowest level in twenty-eight years, with eighteen million more Americans on the job today than at the beginning of 1993.[26]

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21. *Id.*
22. According to the General Secretariat, Organization of American States, NAFTA has reduced Mexico's average tariff to 2.9 percent (a 7.1 percent drop) and the U.S. average tariff to .65 percent (a 1.4 percent drop); see *Study On The Operation and Effect Of The North American Free Trade Agreement*, General Secretariat, Organization of American States, (1996-2000) at Chapter 1, Part 1, 1.
23. *See* U.S. Department Of State, *supra* note 11, at 7.
24. *Id.*
25. *Id.* at 9.
26. *See* USTR – *"NAFTA Works For America" NAFTA 5-Year Report Card*, July 1999, at 1.

- During NAFTA's first five years, U.S. merchandise exports to Mexico increased 90 percent. U.S. merchandise exports to Canada, our largest trading partner, increased 55 percent. Together, this meant $93 billion in export growth from 1993 to 1998 – two fifths of the growth in U.S. exports to the world.[27]

- Jobs supported by U.S. goods exports to our NAFTA partners were estimated to total 2.6 million in 1998, an increase of 31 percent (over 600,000 new jobs) from 1993, prior to NAFTA.[28] Goods export-related jobs pay an average of 16% more than non-export related jobs.[29]

- The vast bulk – over 85 percent – of our NAFTA trade is in manufactured goods. Trade in this sector grew by over 66 percent between 1993 and 1998.[30]

- U.S. agricultural exports to NAFTA partners totaled $13.2 billion in 1998, or a fourth of all U.S. agricultural exports to the world.[31]

- U.S. merchandise exports to Canada climbed nearly 66 percent since NAFTA entered into force.[32]

- U.S. merchandise exports to Mexico have more than doubled from pre-NAFTA levels (growing from $41.6 billion in 1993 to $87 billion in 1999.[33]

In contrast, in its own study, Public Citizen reported substantially different results at the NAFTA five-year mark. For example, the group claimed the loss of higher paying U.S. manufacturing jobs replaced by lower wage service jobs.[34] Public Citizen also reported a widespread job loss of over 200,000 U.S. workers certified as NAFTA casualties under just one narrow government program.[35] Other Public Citizen findings include:

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27. *Id.*
28. *Id.*
29. See USTR – World Regions – Western Hemisphere, *NAFTA Overview*, June 2001, at 1, http://www.ustr.gov/regions/whemisphere/overview.shtml.
30. *See* USTR, *supra* note 26, at 1.
31. *Id.*
32. *See The President's 1999 Annual Report on the Trade Agreements Program and 2000 Trade Policy Agenda*, at 173.
33. *Id.*
34. *See* Public Citizen Global Trade Watch - *School of Real-Life Results - Report Card - NAFTA January 1, 1994 to January 1, 1999* (December 1998), at 4.
35. *Id.* at 3.

- The replacement of high-paying manufacturing jobs with lower paying employment such as cashiers, waitresses, janitors and retail clerks,[36]

- The development of "negative bargaining power" for many American workers whose jobs have not been relocated by putting them in direct competition with skilled, educated Mexican workers who work for a dollar or two an hour – or less,[37]

- NAFTA's failure to reverse the trend of so-called U.S. "exports," where U.S. goods are shipped to Mexican maquiladora plants, and then re-imported back to the U.S. as finished products,[38]

- The development of a $8.9 billion manufacturing sector trade deficit with Mexico, from a pre-NAFTA $4.6 billion trade surplus,[39] and

- The failure of 60 of 67 companies to fulfill their promise to create new jobs after NAFTA, when they had made that promise during a February 1997 Public Citizen's Global Trade Watch investigation.[40]

In the author's view, reconciling these two contradictory positions requires the consideration of the one overriding and generally accepted economic phenomenon already mentioned – that since NAFTA's passage, America has experienced the longest peacetime expansion in American history.[41] It is clear that NAFTA has at least not derailed this economic expansion.

III. THE ENVIRONMENTAL FRAMEWORK OF NAFTA

Much of the opposition to NAFTA was based on fear that environmental standards would become so relaxed that companies would elect to

36. *Id.* at 4.
37. *Id.*
38. *Id.* According to the Public Citizen report, in 1990, 34.7 % of U.S. exports to Mexico were re-shipped to the U.S. as finished goods.
39. *Id.*
40. *Id.*
41. *See* USTR, *supra* note 26, at 1.

relocate to Mexico.[42] Concerns were also raised that additional industrial activity generated by NAFTA would exacerbate pre-existing environmental and public health problems caused by a high concentration of export manufacturing plants in the free trade zone along the U.S.-Mexico border.[43] Environmental groups were split over NAFTA, with the Audubon Society, the Environmental Defense Fund, the World Wildlife Fund, and the Natural Resources Defense Council supporting the agreement, and Friends of the Earth, Greenpeace, and the Sierra Club opposing it.[44]

The United States sought strong provisions and enforcement structures to protect the environment,[45] so a "parallel track" environmental agenda was initiated independent of the NAFTA negotiations, and on August 12, 1993, Canada, the U.S., and Mexico signed the North American Agreement on Environmental Cooperation ("NAAEC").[46]

However, within NAFTA itself, Article 104: Relation to Environmental and Conservation Agreements sets out to reiterate the prevailing obligations of three prior treaties: the Convention on International Trade in Endangered Species of Wild Fauna and Flora (done on March 3, 1973), the Montreal Protocol on Substances that Deplete the Convention on International Trade in Endangered Species of Wild Fauna and Flora Ozone Layer (done on September 16, 1987), and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (done on March 22, 1989). Furthermore, Annex 104.1; Bilateral and Other Environmental and Conservation Agreements also bound the parties to two other conservation agreements: The Agreement Between the Government of Canada and the Government of the United States Concerning the Transboundary Movement of Hazardous Waste (1986), and the Agreement Between the U.S. and Mexico on Cooperation for the Protection and Improvement of the Environment in the Border Area (1983).

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42. *See* BAKER & MCKENZIE, *supra* note 3, at 245. Furthermore, NAFTA Chapter 11 Article 1114 was included in NAFTA to minimize the relaxation of environmental standards for the purpose of attracting foreign investment. See discussion in Part III, *infra*.

43. *See* Public Citizen, *supra* note 34, at 6.

44. *See* BAKER & MCKENZIE, *supra* note 3, at 245.

45. Professor Paul Kibel suggests that the mere initiation of environmental negotiations at this time indicates that between 1990 and 1992, the public increasingly came to view trade integration and environmental protection as interrelated, rather than as independent policy issues. (*See* Kibel, *supra* note 9, at 9.)

46. *See* BAKER & MCKENZIE, *supra* note 3, at 245.

The NAAEC establishes the Commission for Environmental Cooperation ("CEC") to address regional environmental concerns, help prevent potential trade and environmental conflicts, and promote the enforcement of environmental law.[47] The Council is also responsible for further consultation and cooperation among the parties to avoid environment-related trade disputes.[48] The NAAEC also provides that any non-governmental organization, and any person, may make submissions to the CEC Secretariat asserting that one of the parties is failing to effectively enforce its environmental laws.[49]

Upon submission of an Article 14 petition, the Secretariat must then determine whether the submission merits a response from the alleged violating party under Article 14(2).[50] The Secretariat must consider whether (a) the submission alleges harm to the submitter, (b) the submission would advance the goals of the NAAEC, (c) private remedies have been pursued, and (d) the submission is drawn exclusively from mass media reports.[51] There is no time limit for the Secretariat to make this determination.[52]

If the Secretariat determines that no response is necessary and that the submission need not be considered, it must set forth its position in a "determination."[53] If the Secretariat determines that a response is merited, the alleged violating party has 60 days to prepare a response as to whether judicial proceedings are pending, and whether private remedies are available. If the Secretariat, after review of the response, determines that additional investigation is warranted, Article 15 provides that the Secretariat can request that the Council approve, by a two-thirds vote, the preparation of a "factual record" of the dispute.[54] Again, there is

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47. *Id.* at 251.
48. *Id.*
49. *Id.* at 252. However, under Article 14(1), the submitter must be a person or organization residing in or established in the territory of a party; and under Article 14(2), the Secretariat must consider whether the submission alleges harm to the submitter prior to determining whether a response is warranted. So given the effect of Article 14(1) and 14(2), the idea that *any* person or non-governmental organization can make a submission is somewhat misleading, since these "standing" requirements can render the submission invalid.
50. *See* Kibel, *supra* note 9, at 17. Prior to determining whether a response is merited, the submission must meet other formal standards set forth in Article 14(1) such as clear identification of the submitting party, and the provision of enough information to determine whether a response is warranted. (*See* CEC – *Lessons Learned – Citizen Submissions Under Articles 14 and 15 of the NAAEC, Submitted by the JPAC,* April 2001, at 3.)
51. *See* CEC, *supra* note 50, at 4.
52. *Id.*
53. *See* Kibel, *supra* note 9, at 17.
54. *Id.* Critics have also commented that there are no established standards for determining whether an investigation is warranted.

no deadline for this decision.[55] This request to the Council is set forth in a "determination."[56] If authorized by the Council, this factual record will evaluate the factual and legal basis for the Article 14 petition.[57] The final version of the Secretariat's factual record must be approved by a two-thirds vote of the CEC's Council.[58]

Beyond publication of the factual record by the CEC, there are no other penalties or sanctions available to private parties for enforcing the NAAEC's provision, nor are there procedures to ensure actual implementation of any recommendations that may be set forth in the factual record.[59] Some criticism of NAFTA has been based on this apparent lack of CEC enforcement power.[60] However, supporters emphasize that as sovereign nations, each NAFTA party has a sovereign right to control the activities within its own borders, and that this right must act as a limitation to the treaty's grant of environmental oversight authority.[61] Officials from the CEC have also pointed out that the CEC is not an enforcement agency, and that in fact, no international environmental organization has enforcement power.[62]

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55. *See* CEC, *supra* note 50, at 4.
56. *See* Kibel, *supra* note 9, at 17.
57. *Id.* at 18.
58. *Id.*
59. *Id.*
60. *See* Public Citizen, *supra* note 34, at 18.
61. The principle of national sovereignty is emphasized many times in the NAFTA instrumentation. To illustrate three examples, the NAFTA Preamble itself states that the NAFTA parties are "*RESOLVED TO . . . PRESERVE* their flexibility to safeguard the public welfare . . . ." Furthermore, the NAAEC Preamble states that the NAFTA parties have agreed to the NAAEC, while "REAFFIRMING the *SOVEREIGN RIGHT* of States to exploit their own resources pursuant to their own environmental and development policies and their responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction . . . ." Finally, in Council Resolution 00-09 which is discussed later, the CEC states that it 'FURTHER [Recognizes] that countries that are parties to international agreements are *SOLELY COMPETENT* to interpret such instruments . . . .' However, the principle of national sovereignty has become a double-edged sword that is also at the center of this debate. For example, the right of a sovereign nation to govern over its own land and protect its own people also extends to abusing its own citizens and destroying its own environment. All three NAFTA parties have expressed concern over this national sovereignty-environmental protection balancing problem, particularly as it relates to "the other" NAFTA parties. [emphasis added]
62. Scott Vaughan, the Head of the Environment, Economy and Trade Program for the CEC, responded with this footnoted answer to the request to please comment on the enforcement power of the CEC on June 12, 2001, in a questionnaire sent to him specifically for this paper. Other commentators have also responded along similar lines. For example, *see* CEC: JPAC, *Public Consultation on the Draft JPAC Public Review of Issues Concerning the Implementation and Further Elaboration of Articles 14 and 15 of the NAAEC, Executive Summary of Public Comments Received,* October 2000, at 15, where the Canadian Council for International Business (CCIB) stated that 'The function of the [CEC] is *to promote* the effective enforcement of environmental law...*it is not* the CEC's role *to set policies or mandate environmental practices* – this is the proper domain of the NAFTA governments.'

Because individual parties have raised other issues about the interpretation and application of Articles 14 and 15 under the NAAEC,[63] on June 12, 2000, the CEC established a public review process for issues concerning the "implementation and further elaboration" of those articles under Council Resolution 00-09.[64] This resolution also established the Joint Public Advisory Committee ("JPAC") to conduct the public review process, and to advise the Council on how these issues might be resolved.[65] However, the Council stated that the premier purpose of Council Resolution 00-09 was to ensure that any discussions concerning the implementation of Articles 14 and 15 of the NAAEC included a process for public involvement.[66] The Council further reiterated that this review process ". . . does not mean amendment of the NAAEC."[67]

In essence, the review process dictates that it is the responsibility of the JPAC to receive issues from the public,[68] transmit them to the Council, and provide advice to the Council on all issues referred to it by the Council no matter what the source (party, Secretariat, public or JPAC itself).[69] Any member of the public wishing to raise an issue may provide a written statement to the JPAC, but the statement may not exceed three pages.[70] If the JPAC determines that the written statement does not raise a relevant issue, the JPAC will forward the statement to the Council accompanied by a written explanation of why it considers that the issue

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63. *See* CEC: *JPAC – Who We Are – Council – COUNCIL RESOLUTION 00-09*, June 13, 2000, at 1, http://www.cec.org/who_we_are/council/resolution.

64. "Implementation and further elaboration" according to the Council means "carry into effect, as determined through a review of the policies and practices of the Council, Secretariat, and JPAC." (*See* CEC *supra* note 9, at 1.)

65. *Id.*

66. *Id.* In the Resolution's Preamble, the CEC further recognized "the need for transparency and public participation before decisions are made concerning implementation of the public submission process under Articles [14 and 15]." The JPAC released calls for comments on this review process on July 31, 2000, to 5,800 persons from various sectors including NGO's, government bodies, academic institutions, etc., and the general comments received stated that this new review process has "the potential to bring much needed *transparency*." Other notable comments received from the public overwhelmingly relate to the *timeliness* and *effectiveness* of the Article 14 and 15 submission process. The other purpose of the JPAC stated in this document is to "[review] the public history of submissions made under Articles 14 and 15, including all actions taken to implement those articles, and [to compile] a report identifying lessons learned." (*See* CEC, *supra* note 63, at 1.)

67. *Id.*

68. According to the JPAC Public Consultation Guidelines, the purpose of a public issue may be to "Establish a policy or directive; assist in the preparation of the program of the CEC; obtain views in the context of a specific project; and address a specific issue or set of issues." (*See* CEC *supra* note 63, at 1.)

69. *See* CEC: JPAC, *supra* note 62, at 8.

70. *Id.*

is not within the scope of Resolution 00-09.[71] The written explanation will also be sent to the person (or organization) who raised the issue, and the explanation will be posted on the CEC website within seven working days.[72]

When the JPAC determines that the issue raised by the public is relevant, it will transmit the issue - in writing - to the Council, and this determination will also be sent to the person who raised the issue.[73] The issue will also be posted on the CEC website within seven working days.[74] When the JPAC receives the Council's decision to address or not address the issue, this decision will be sent to the person who raised the issue, and the decision will be posted on the CEC website within seven working days.[75]

Upon receipt of an issue from the Council, the JPAC will hold a public review process in the format that it determines is necessary to provide advice to the Council.[76] This format will be posted on the CEC website.[77] Following its review, the JPAC will provide written advice, including reasoned argumentation to the Council.[78] The written advice will also be sent to the person who raised the issue, and the advice will be posted on the CEC website within seven working days.[79]

IV. NAFTA INVESTMENT PROVISIONS

NAFTA's investment provisions are covered in Chapter 11, and apply to investments by an investor of one party in the territory of another party and with the resolution of a dispute between a party and an investor of

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71. *Id.* The author believes that there also need to be published standards for the JPAC's determination of a "relevant issue" in this context.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* As with the JPAC determination of "relevant issue," the author believes the factors considered, and the process followed by the *CEC* to make a decision on whether to address or not address an issue, need to be defined and made public.

76. *Id.* at 9. It seems reasonable to assume that the public review format selected by the JPAC would also be "transparent." However, no documentation has been found to suggest that transparency will be a requirement of the public review format selected by the JPAC. Standards in this area would also be helpful, specifying the process the JPAC will follow in determining the review format, and the factors it will consider in making that determination.

77. *Id.*

78. *Id.*

79. *Id.*

another party.[80] Under these provisions, investments and investors are protected from certain types of "measures" taken by governments.[81] The definition of "measures" is broad – it includes all laws adopted by national, state or provincial legislatures; regulations that implement these laws; local or municipal laws and bylaws; and policies that affect government interaction with businesses[82] – which means that investors are protected from nearly all forms of government action.[83] Chapter 11 also applies to all "measures," including those that were adopted prior to NAFTA unless they were specifically excluded by being listed in an Annex to NAFTA.[84] However, this retroactivity does not apply to local, state, and provincial measures adopted before January 1, 1994.[85]

The foundation of NAFTA's Chapter 11 Investment Provisions lies in five binding principles, which have been the subject of considerable dispute since NAFTA's inception. These binding principles include:[86]

- National treatment (Article 1102);
- Most-favoured nation treatment (Article 1103);
- Minimum international standard of treatment (Article 1104);
- Prohibitions against certain performance requirements on investors (Article 1106); and
- Provisions governing expropriation (Article 1110).

The NAFTA parties are susceptible to attack for violation of any of these principles under the authority vested in Chapter 11, Section B of the NAFTA Agreement. Unprecedented in international law, Section B outlines provisions governing the "Settlement of Disputes between a Party and an Investor of Another Party." These provisions establish the

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80. *See* BAKER & MCKENZIE, *supra* note 3, at 123. Also see Chapter 11 Article 1101: Scope and Coverage.

81. *See* Mann, *supra* note 8, at 9.

82. *Id.*

83. The term "measures" is not the only word that has been interpreted broadly within the Chapter 11 context. For example in the *S.D. Meyers v. Canada* case (Notice of Arbitration: July 22, 1998), "investment" was interpreted to mean assets such as market share in a sector, and access to markets in the host state, whether or not the investor even owns a physical plant or retail store in that country. That is, almost any kind of business activity can constitute an "investment" that is subject to protection. (*See* Mann, *supra* note 8, at 23.)

84. *Id.* at 24.

85. *Id.*

86. *See NAFTA's Chapter 11 And The Environment: Addressing The Impacts Of The Investor-State Process On The Environment;* International Institute For Sustainable Development (IISD), at 3, http//www.iisd.ca.

most extensive set of rights and remedies ever provided to foreign investors in an international agreement.[87]

Originally included in NAFTA to protect U.S. and Canadian investors in what was considered a suspect Mexican system, the dispute settlement mechanism (via Article 1116) gives an individual investor the right to challenge host governments on their compliance with the agreement.[88] This right, in turn, has brought two central issues to the forefront. First, the process allows foreign investors to sidestep procedural or public interest safeguards in favor of a non-transparent, secretive system of arbitration with no right to appeal.[89] Secondly, given the ease of initiating these disputes (i.e., costs and preparation are minimal, and party consent is not required), the use of traditional defensive investor provisions has shifted to an offensive strategic tool.[90] (See *Ethyl Corp.* case discussed in Part VI, *infra.*)

Articles 1102 and 1103 provide for national treatment and most-favored-nation treatment of NAFTA investors. Both of these articles require that "Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances..." "to its own investors" (Article 1102) and "to investors of any other Party..." (Article 1103). The conflict in these particular provisions has arisen from the expansive interpretation of "no less favorable" and "in like circumstances" in the cases already on record.[91] (See *Ethyl Corp.* case discussed in Part VI, *infra.*)

Article 1105 sets a minimum standard of treatment of investors "in accordance with international law, including fair and equitable treatment and full protection and security." The cases on record attacking the parties for violation of this Article revolve around due process violations and the denial of justice.[92] (See the *Loewen* case discussed in Part VI, *infra.*)

Article 1106 establishes performance requirements for the NAFTA parties, and states that "No Party may impose or enforce any of the

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87. *Id.* Also of interest is that NAFTA investors may choose *either* the NAFTA *or* WTO dispute settlement procedures to resolve an issue.

88. *Id.* This mechanism has been referred to as the investor-state dispute settlement process.

89. *Id.* The dispute settlement process also gives rise to several potential constitutional problems that are discussed later in this paper.

90. *Id.*

91. *Id.* at 4.

92. *Id.*

following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory; [to export a given level...of goods, to achieve given level . . . of domestic content] . . . etc."

Subsection 6 of Article 1106 outlines exceptions "necessary to protect human, animal, and plant life," and "the conservation of living and exhaustible natural resources." Conflicts have arisen when the NAFTA parties have attempted to utilize Article 1106 (6) exceptions given the narrowly interpreted meaning of "necessary" in the environmental and international law sense.[93] Investors have also used Article 1106 to challenge bans on toxic substances, claiming that such bans essentially act as performance requirements by establishing domestic content requirements.[94] (See the *Ethyl Corp.* case discussed in Part VI, *infra.*)

Article 1106 is supplemented by the environmental language in Article 1114, which contains an unprecedented international commitment to avoid relaxing environmental laws as a means of competing for foreign investment.[95] While the language of the core commitment in this article contains the term "should" instead of "shall," any party who believes that the spirit of the commitment is being violated can require other parties to enter into consultations.[96] But perhaps the most puzzling issue surrounding the environmental language in Articles 1106 and 1114 is that the relationship between a party's right under Article 1114 to challenge another party's alleged relaxation of environmental laws and the submission process for "environmental enforcement" matters under the NAAEC has never been established.[97] Furthermore, the NAFTA governments have thus far been reluctant to allow the CEC to even explore this potential connection.[98]

Article 1110 of the NAFTA Chapter 11 investment provisions outlines expropriation and compensation protections, and has probably attracted the most public attention because of the provision's impact on environmental regulations.[99] Article 1110 states that "No Party may directly or indirectly nationalize or expropriate an investment of an

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93. *Id.*
94. *Id.*
95. Mann, *supra* note 8, at 12.
96. *Id.*
97. *Id.* at 13.
98. *Id.*
99. *Id.* at 12.

investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment except: [(a) for a public purpose; (b) on a non-discriminatory basis; (c) on payment of compensation in accordance with paragraphs 2 and 6]."

The major issues that have arisen under Article 1110 involve indirect nationalization, which has been argued in some cases to be tantamount to expropriation.[100] Under the evolving "case law," a new legal-political concept of regulatory expropriation appears to be emerging. That is:

> Any national or sub-national government regulations (laws, treaties, administrative measures, policies), which reduce or limit the value of the private commercial property can be considered a form of regulatory expropriation.[101]

In light of these cases, the fear is that environmental and safety laws arising out of a NAFTA party's "police powers" will now be attacked as expropriation, which have typically not been appropriate substantive grounds under traditional international law.[102] And given the expansive definition of the term "measures" so far interpreted under these provisions, there is a real legal question as to whether these new investor rights conflict with U.S. constitutional rights granted to the U.S. government, which seems to allow for land regulation by state and local government under a less restrictive interpretation of "regulatory takings."[103]

As discussed in the Chapter 11 cases in Part VI, the full impact of the new investor rights granted under NAFTA Chapter 11 has yet to be determined, as seen by the lack of finality of many of the current disputes. However, the investor's strategic use of these provisions to claim expropriation because of health and environmental measures instituted by host governments could unfairly shift the cost of protecting health, safety, and the environment onto the shoulders of the taxpayer. As with the evaluation of any other investment, these costs should clearly be included in an investor's own risk assessment, and the responsibility for cleaning up any environmental damage should lie squarely with the polluter and not the public. Unfortunately, what has occurred so far as a

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100. *Id.* at 5.

101. *See* WTO - *The NAFTA Ruling On MetalClad vs. Mexico*, September 2000, at 4; http://www.wtoaction.org.

102. *Id.*

103. *Id.* Article 1110 now gives investors three ways to attack Party Article 1110 violations via *expropriation, indirect expropriation,* and *measures tantamount to expropriation.*

result of the NAFTA Chapter 11 investment provisions is the granting of special international law-based rights to foreign investors – and the means to enforce them – without the commensurate, counterbalancing obligations and responsibilities.[104]

V. A REVIEW OF SUBMISSIONS OF ENVIRONMENTAL ENFORCEMENT MATTERS AND RECENT ACADEMIC CRITICISM OF THE CEC SUBMISSION PROCESS BASED ON NAFTA ENVIRONMENTAL STUDIES

Part of the purpose of the NAAEC is stated in the following quotation from Article 1 of the Agreement:

> Article 1: Objectives:
>
> The objectives of this Agreement are to: (a) foster the protection and improvement of the environment in the territories of the Parties for the well being of present and future generations . . . .

Based on Article 1, objective (a), some obvious questions arise from the inclusion of a submission process designed to promote environmental enforcement. Primarily, how can challenging the lack of enforcement be a significant and effective way to protect and improve the environment for "present and future generations?"[105] If domestic environmental laws themselves are inadequate, how can environmental enforcement be challenged when there is no environmental law to enforce?[106] Or if the

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104. Mann, *supra* note 8, at 19.

105. Professor Kibel suggests that environmental law under what he refers to as the 1993 North American Regime - which among other things includes the NAAEC, the CEC, and the JPAC, are not legal provisions or institutions, in that they do not set forth new, binding environmental standards for Canada, Mexico, and the United States. *See* Kibel, *supra* note 9, at 14. He also brings up the question of whether the NAAEC framework is flexible enough to evolve politically, and whether environmentalists should try to limit the 1993 Regime as a model for international negotiations with other Central and South American nations. *Id.* at 47.

106. To further illustrate this point, the JPAC has stated that "NGO's from the NAAEC countries have repeatedly turned to the Article 14 and 15 process when they believed that domestic environmental remedies were not adequate to address their complaint," and that the process of developing a factual record itself provides for *opportunities* and areas of *compromise* and *settlement* of environmental disputes [in the case of these potentially inadequate domestic environmental remedies]. *See* CEC, *supra* note 50, at 12. However in the author's opinion this analysis is incomplete. For example, if a domestic environmental law does not exist, or if a remedy is inadequate, domestic enforcement is not a problem. In this case, the CEC would not have jurisdiction over the environmental matter, no factual record would ever be created, and there would be no opportunity as described by the JPAC to address the inadequacies of the domestic environmental law – or its remedies.

judicial process itself is suspect, under what authority can unjust domestic judicial proceedings be challenged to enable the protection and improvement of the environment?[107] And even more importantly, given that the NAAEC submission process does uncover a clear lack of environmental enforcement as it is designed to do, what guarantees are there that the abuse will be corrected, or that the process will produce any positive results whatsoever?[108] Instead, why couldn't strong remedies,[109] provisions, or environmental standards[110] agreed upon by the NAFTA parties be used to hold NAFTA polluters accountable, since these polluters would have already voluntarily availed themselves of the benefits of NAFTA?[111] And couldn't these violators themselves be subjected to NAFTA remedies without compromising a NAFTA party's sovereign right to self-govern?[112]

These issues highlight some of the very problems inherent in trying to measure the effectiveness of the NAFTA environmental policy, since the NAAEC speaks of environmental protection but only provides for "foster[ing]" environmental enforcement. Stuck between the lines of this fuzzy NAFTA language,[113] both the environmental submissions, and the reported environmental effects caused by NAFTA are discussed below. First, a short summary of all the submissions since 1995 is provided,

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107. It seems that this situation could still occur, notwithstanding the procedural guarantees enumerated in Article 7 of the NAAEC, which calls for "fair, open, and equitable . . . [Judicial proceedings] . . . that comply with due process of law . . . ."

108. *See* CEC, *supra* note 50, at 12.

109. With regard to the inclusion of stronger remedies, some commentators have suggested that a more adequate remedy plan, including preventive and corrective programs, could be linked to the factual record via Article 13 (i.e., include these remedies in the factual report) without amending the NAAEC. *See* CEC, *supra* note 50, at 12. However, even if remedies were included in the factual record, in this case, the question would still remain as to how these recommended remedies would be enforced.

110. On the issue of standards, the author is not professing that a complete set of environmental policies should have been included in NAFTA. The point is that perhaps some level of environmental regulation could have been agreed upon to help directly address environmental violations.

111. Professor Kibel suggests that regardless of the apparent lack of enforceability, the components discussed here as the "NAFTA Environmental Provisions" are still useful in establishing soft norms and general principles that may help shape how Canada, Mexico, and the U.S. approach and resolve environmental issues within the context of the 1993 North American Regime. *See* Kibel, *supra* note 9, at 15.

112. The author is re-emphasizing the point that NAFTA (via the NAAEC) should have been structured to minimize environmental harm rather than to maximize environmental enforcement, and that this could have been accomplished without jeopardizing a NAFTA party's national sovereignty. In fact, it has been reported that President Clinton himself announced in October 4, 1992 speech at North Carolina State University that the CEC "should have the power to provide remedies, including the power to impose penalties and assess monetary damages." *See* Kibel, *supra* note 9, at 9.

113. In the author's view, the NAAEC Article 1 objective (a) amounts to little more than excess verbiage because even in the best light, the instrument does not provide adequate tools for accomplishing this goal.

followed by a more detailed discussion of the two submissions that resulted in the development of a factual record - Cozumel (submission ID SEM-96-001), and BC Hydro (submission ID SEM-97-001). Criticism of the CEC submission process based on a review of NAFTA environmental studies completes this section.

According to the CEC Secretariat, as of this writing, thirty-one submissions have been received since 1995, of which ten involve Canada, thirteen Mexico, and eight the United States.[114] Nineteen files have been closed, and twelve submissions are under review. Of the closed files, seven have been dismissed under Article 14(1), three have been dismissed under Article 14(2), two submissions have been terminated under Article 14(3), three submissions have been terminated under Article 15(1), one submission has been terminated under Article 15(2), one submission has been withdrawn, and two factual records have been prepared and made public.

Of the twelve submissions currently under review, eight involve Mexico (SEM-00-006, SEM-01-003, SEM-97-002, SEM-00-005, SEM-01-001, SEM-00-005, SEM-01-003, SEM-01-001), one involves the United States (SEM-98-003), and three involve Canada (SEM-97-006, SEM-98-004, SEM-00-04). On May 16, 2000, the Council unanimously decided to instruct the Secretariat to prepare a factual record with respect to SEM-98-007, and the Secretariat informed the Council that the Secretariat considers that SEM-98-006 warrants developing a factual record, both of which involve Mexico.[115] And on December 15, 2000, the Secretariat informed the Council that the Secretariat considers that SEM-00-002 warrants developing a factual record, which involves the U.S.[116]

In trying to assess the significance of all these submissions in light of these impressive numbers,[117] the author will reiterate some points that have already been discussed to some extent at the beginning of this section:

How do we know that all environmental enforcement abuses have been reported? And what can be done to optimize the reporting of

114. *See* North American Commission for Environmental Cooperation; Citizen Submissions on Enforcement Matters; Status, at 1, http//www.cec.org/citizen/status/index.

115. *Id.*

116. *Id.*

117. The author suggests that at first glance, the number of submissions received since 1995 (thirty-one), and the percentage of closed files (about 61%) both could be viewed as respectable statistics given the length of time that NAFTA has been in force.

enforcement abuses through NAAEC submissions? (See the summary of the Relocation of the Stonewashing Industry study in Part V where environmental abuses have not been reported.)

How can we assess and reconcile the possibility that a NAFTA party's environmental laws are inadequate or even approach a minimum level of protection? And how can we strive to correct these judicial inadequacies without violating the sovereign rights of each NAFTA party?

How can we encourage the NAFTA parties to take the necessary steps to remedy the environmental harm caused by NAFTA?[118]

A. THE CRUISE SHIP PIER PROJECT IN COZUMEL AND BC HYDRO

The two current factual records may shed light on the existing process. The *Cozumel* case was the first submission that resulted in the development of a factual record under the NAAEC guidelines. In *Cozumel*, the submitters, consisting of the Committee For The Protection Of Natural Resources A.C., the International Group Of One Hundred, A.C., and the Mexican Center for Environmental Law, A.C., alleged that the appropriate authorities failed to effectively enforce environmental laws which in their view called for the development of a comprehensive Environmental Impact Assessment ("EIA") for the entire project, rather than simply for a single new pier - prior to initiating the project "Construction and Operation of a Public Harbor Terminal for Tourist Cruises on the Island of Cozumel, State of Quitana Roo."[119]

Cozumel is an island located in the Yucatan Peninsula about 40 miles south of Cancun.[120] The waters off the island's southwest coast contain a large coral reef zone, the reefs of which are considered among the most

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118. This question will be difficult to address because aside from the many problems discussed in this paper, all the effects of NAFTA are simply not known. According to Scott Vaughan, the head of the Environment, Economy and Trade Program at the CEC, "it is *highly unlikely* that any method or approach can capture all environmental effects [caused by NAFTA], mainly because of the absence of aggregated indicators." (*See* Scott Vaughan, *supra* note 62) In the CEC study entitled *Assessing Environmental Effects of the North American Free Trade Agreement – An Analytical Framework (Phase II) and Issues Studies* published by the CEC Secretariat in 1999, at 37, the Secretariat reiterates the view that the "cumulative [environmental] impact...on the air, water, land and living things...and the overall state of the entire ecosystem is of essential concern." The report further goes on to state that "however, at present, it is appropriate to focus individually on the major aspects of each separate component of the ambient environment .... [And] these selected indicators should cover both standard scientific measures and items of particular importance in patterns of North American environmental change."

119. *See* CEC, *supra* note 50 at 8.

120. *See* Kibel, *supra* note 9, at 47.

spectacular and biologically diverse in the world.[121] The goal of the project was to build a new cruise ship pier on Cozumel in order to increase tourism on the island.[122] However, environmentalists believed that the construction and operation of the cruise ship pier would cause serious damage to many of the reefs, including those located in the Cozumel Marine Refuge.[123]

The submitters (petitioners) asserted that allowing the presentation of a "partial" environmental impact report with respect only to the new pier would undercut the purpose of the environmental impact evaluation by creating uncertainty with respect to the subject matter of the evaluation.[124] The submitters also claimed that the environmental impact statement submitted by the developer was incomplete, and should have taken account of the projects directly related to the work or proposed activity, in order to evaluate the cumulative environmental impact these projects would have.[125]

The government of Mexico contended that the submission was improper because it challenged actions that took place before the NAAEC was in force, and that the NAAEC cannot be retroactive.[126] Therefore, Mexico asserted, the submission was outside the jurisdiction of the CEC.[127] Mexico also claimed that the submission was inadmissible under Article 14 because the submitters did not certify their legal capacity, did not specify the damages they suffered, and did not exhaust all remedies available to them under Mexican law.[128] And finally, Mexico disputed many of the factual assertions in the submission, claiming that the submitters failed to "establish a necessary relation between the alleged environmental damage to the flora and fauna ... and the alleged violation of environmental law."[129]

The government of Mexico argued that the submitters failed to provide reliable evidence demonstrating the character of the organizations they

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121. *Id.*
122. *Id.*
123. *Id.*
124. *See Final Factual Record of the Cruise Ship Pier Project in Cozumel, Quintana Roo*, Secretariat of the CEC, 1997, at 4, http//www.cec.org.
125. *Id.* at 5.
126. *See* CEC, *supra* note 50, at 8.
127. *Id.*
128. *See* North American Commission for Environmental Cooperation; Citizen Submissions on Enforcement Matters; Registry and Public Files of Submissions, Cozumel, at 2, http//ww.cec.org/citizen/guides_registry.
129. *Id.*

represented, and that they failed to demonstrate that the facts alleged constituted a direct transgression of the rights of the civil associations they purported to represent.[130] Mexico also argued that only one of the submitters (i.e., the Committee For the Protection Of Natural Resources, A.C.) availed itself of the popular complaint recourse, which itself is not an administrative recourse. In Mexico's view, this established that the submitters did not exhaust available remedies under the Mexican legislation.[131] With regard to the EIA, Mexico claimed that:

- The authority in charge of evaluating the effects of the work for strictly environmental purposes did not regard the concession to build a new cruise ship pier on Cozumel as contemplating a comprehensive or global project,[132] and that

- The applicable Mexican law did not require an EIA in this situation.[133]

The Secretariat recommended the preparation of a factual record, and by unanimous vote (Resolution 96-08), the Council asked the Secretariat to prepare one.[134] With regard to the consideration of facts prior to the enactment of the NAAEC, the Council directed that "in considering such an alleged failure to enforce effectively, relevant facts prior to January 1, 1994 may be included in the Factual Record."[135] The record included a clear summary of the contentions of the parties, which provided a record of Mexico's EIA statute.[136] However, no determination was ever made that Mexico was, in fact, in compliance with the applicable environmental laws.[137]

In this regard, some commentators have suggested that conclusions should be drawn from the factual records as to a party's effective enforcement of its environmental law.[138] As one commentator has

130. *See Final Factual Record of the Cruise Ship Pier Project in Cozumel, Quintana Roo, supra* note 124, at 7.

131. *Id.*

132. *Id.* at 8.

133. *Id.* at 9. According to the Government of Mexico, Article 28 states that "when an evaluation of the environmental impact of works or activities that are designed to develop natural resources is involved, the Ministry shall request the interested parties to include in the corresponding environmental impact report a description of possible consequences of these works or activities on the relevant ecosystem . . ." and that this project was not "designed to develop natural resources."

134. *See* CEC, *supra* note 50, at 8.

135. *Id.*

136. *Id.*

137. *Id.* at 9.

138. *Id* at 13.

argued, "[Aside from] collect[ing] and summariz[ing] the arguments presented by the different parties, the CEC Secretariat [has] made its own independent assessment of these procedural arguments, and has made [recommendations] on 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."[139] One factor to consider in accepting this determination would be the political repercussions and the public's view of a multinational trade council passing what might appear to be final judgment on a NAFTA party's domestic enforcement, and whether such political and public reactions would support or undermine the main purpose of the factual record to improve the enforcement of environmental legislation.

In *BC Hydro*, the Sierra Legal Defence Fund (of Canada) and the (U.S.) Sierra Club Legal Defense Fund (now Earthjustice) filed a submission on behalf of B.C. Aboriginal Fisheries Commission, British Columbia Wildlife Federation, Trail Wildlife Associations, Steelhead Society, Trout Unlimited, Sierra Club, Pacific Coast Federation of Fishermen's Association, and the Institute for Fisheries Resources with the CEC Secretariat alleging that Canada had failed to enforce Section 35(1) of its Fisheries Act and utilize its powers under Section 119.06 of the National Energy Board Act to ensure the protection of fish and fish habitat in British Columbia's rivers from ongoing and repeated environmental damage caused by hydro-electric dams.[140] However, the Secretariat indicated to the Council that the factual record was appropriate only in respect to the alleged failure to effectively enforce Section 35 of the Fisheries Act.[141]

Section 35 of the Fisheries Act provides that "No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat."[142] The submitters claimed that notwithstanding this provision, BC Hydro, which is a Crown corporation wholly owned by the government of the Province of British Columbia,

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139. *See* CEC - Comments on Lessons Learned: Citizen Submissions under Articles 14 and 15 of the North American Agreement on Environmental Cooperation (Draft Report to the CEC Council), Paul Kibel - *RE: Comments On Draft of JPAC's Lessons Learned Report On Effectiveness of NAAEC's Citizen Submission Process*, May 10, 2001, at 7, http://www.cec.org/who_we_are/jpac/comments/lessons.

140. *See* North American Commission for Environmental Cooperation; Citizen Submissions on Enforcement Matters; Registry and Public Files of Submissions, *BC Hydro*, at 1. http//ww.cec.org/citizen/guides_registry.

141. *Id.* at 10.

142. *See* CEC, *supra* note 50, at 5.

had only "laid two charges" against BC Hydro since 1990, even though there was clear and well-documented evidence that BC's operations had damaged fish habitat on numerous occasions.[143] Furthermore, the submitters asserted that BC Hydro had consistently and routinely violated Section 35(1), and that the regular operation of its dams caused consistent and substantial damage to fish and fish habitat.[144]

The submitters claimed that the damage caused by BC Hydro's operation of the dam included contributing to the extinction of many fish stocks, the decline of an even greater number of stocks that are at risk of extinction, and harming human populations that depend on the fisheries for their livelihoods and cultural identities.[145] This damage, according to the submitters, was done in at least seven ways, including reduced flows, rapid flow fluctuation, inadequate flushing flows, altered water quality, entrainment,[146] flow diversion, and reservoir draw down.[147]

In its response, Canada claimed that it was effectively enforcing its environmental laws, and that the submitters' definition of "effective enforcement" was much too limited in that it "[equated] enforcement directly with legal and judicial sanctions."[148] Canada claimed that under Article 5 of the NAAEC, "enforcement encompasses actions broader than just prosecution and provides a non-exhaustive list of appropriate enforcement actions,"[149] and that it had "determined that compliance activities ranging from voluntary compliance and compliance agreements to legal and judicial sanctions were the most productive in terms of

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143. *See Factual Record For Submission SEM-97-001*, Secretariat of the CEC, May 30, 2000, at 7, http/www.cec.org.

144. *Id.* at 11.

145. *Id.*

146. Entrainment is one of the three distinct processes involved in erosion. It is the process of particle lifting by an agent of erosion.

147. *Id.*

148. *Id.* at 13.

149. *Id.* The definition of "Government Enforcement Action' in Article 5 of the NAAEC includes actions 'such as (a) appointing and training inspectors; (b) monitoring compliance and investigating suspected violations, including through on-site inspections; (c) seeking assurances of voluntary compliance and compliance agreements; (d) publicly releasing non-compliance information; (e) issuing bulletins or other periodic statements on enforcement procedures; (f) promoting environmental audits; (g) requiring record keeping and reports; (h) providing or encouraging mediation and arbitration services; (i) using licenses, permits or authorizations; (j) initialing in a timely manner judicial, quasi-judicial or administrative proceedings to seek appropriate sanctions or remedies for violations of its environmental laws and regulations; (k) providing for search, seizure or detention; or (l) issuing administrative orders, including orders of a preventative, curative or emergency nature."

providing for the long-term protection of the environment with respect to fish and fish habitat."[150]

Canada asserted that its findings suggested that voluntary compliance, negotiation, publicity, and persuasion often made more compelling enforcement unnecessary, that it would continue to pursue different compliance promotion strategies, and that it would not hesitate to utilize the full power of its laws to protect fish and fish habitat where it is deemed necessary.[151] Furthermore, "enforcement through prosecutions would be a last resort after cooperation and persuasion [had] failed...[since] immediate and widespread use of prosecution would be ineffective and counter productive."[152]

The Secretariat made a recommendation to the Council to prepare a factual record since "additional information was required before an evaluation could be made that Canada was enforcing Section 35(1),"[153] and by unanimous vote (Council Resolution 98-07), the Council directed the Secretariat to prepare a factual record absent matters pending before the Court of Appeal in British Columbia.[154] In preparing the factual record, the Secretariat used the information collection methods prescribed by the NAAEC,[155] requested information from the JPAC and an established expert panel to assist in the process, conferred with stakeholders prior to submitting its report, developed a scope of injury report to focus the inquiry, requested additional information from the JPAC when an insufficiency of information was discovered, and included a history of hydroelectric projects in British Columbia and their impact on fish and habitat in the factual record.[156] However, as with the *Cozumel* case, no determination was ever made as to whether Canada was effectively enforcing its environmental laws.[157]

A review of the *Cozumel* and *BC Hydro* factual records exposes a mixed bag of substantive and procedural events driven by the NAAEC

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150. *Id.*
151. *Id.*
152. *Id.*
153. The author is somewhat befuddled by this part of the CEC's *Lessons Learned* Report. As previously discussed, the recommendation to enable the inclusion in the factual record the determination of whether a particular environmental law is actually being enforced is on the table. This statement made by the CEC suggests that the Secretariat was actually intending to make such a determination, which it never did, and likely never intended to do.
154. *See* CEC, *supra* note 50, at 6.
155. This included requesting information from the submitters and Canada in the form of written and oral testimony, and allowing the stakeholders three months to make written submissions.
156. *See* CEC, *supra* note 50, at 7.
157. *Id.*

submission process itself. Substantively, what appears to be evident in these cases is the CEC's exhaustive effort to create a complete and unbiased record of facts, arguments, law, and supportive expert and scientific evidence pertaining to each submission. However, notwithstanding these many pages of text contained within these two factual records, some critical questions continue to echo:

- To what extent does the factual record contain valuable interpretation, processing, and assessment of all the relevant data?

- Has the role of the CEC in the development of factual records become one merely of data gathering and limited information distribution?

- And if so, what then can we expect of the significance and impact of a factual record given the modest level of substantive interpretation and evaluation so far included in these factual records?[158]

The *Cozumel* and *BC Hydro* cases also emphasize several procedural issues worth mentioning. In BC Hydro, the confidentiality provisions of Article 39 and 42 were asserted, relating to the confidentiality of proprietary information or concerns about national security.[159] BC Hydro has become typical of the increasing number of responses asserting similar confidentiality claims, and many commentators have expressed some concern over the abuse of these provisions.[160] Opportunities to assert the confidentiality privilege should be clearly and narrowly defined.[161]

Secondly, in both the *Cozumel* and *BC Hydro* cases, the Council had the authority under the NAAEC Article 15(7) to decide by a two-thirds majority vote whether to make the factual record available to the public.[162] The power to withhold submission information from the public has been criticized as being in direct conflict with established

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158. The author strongly agrees with Professor Kibel's recommendation to allow for conclusions to be drawn by the CEC. If for nothing else, the CEC's level of information gathering, analysis, and expertise exhibited in these two factual records demonstrate clearly that the CEC's conclusions would add much value to the factual record, and could be used as the NAFTA parties saw fit. As has already been mentioned, the factual record has no binding legal effect, unlike the arbitration panels' decisions in the Chapter 11 cases discussed later.

159. *Id.* at 11.

160. *Id.*

161. *Id.*

162. *Id.*

international principles of transparency and undermines efforts to build public confidence in the NAAEC submission process. In the author's view, provisions should be made within the NAAEC to allow for the publication of some version of every factual record, absent any sensitive and confidential information.

In the *Cozumel* case, the CEC found that ". . . events or acts concluded prior to January 1, 1994 may create conditions or situations which give rise to current enforcement obligations. It follows that certain aspects of these conditions or situations may be relevant when considering an allegation of a present, continuing failure to enforce environmental law."[163] On the issue of standing and direct injury, the Secretariat noted the "[importance] of the resource in question" and concluded that the "public nature of the marine resources [brought] the submitters within the spirit and intent of Article 14 of the NAAEC."[164] And on the requirement of exhaustion of remedies, the Secretariat concluded that "under the circumstances the submitters attempted to pursue local remedies, primarily by availing themselves of the denuncia popular[165] administrative procedure."[166]

Now left with a discussion of how successful the NAFTA Environmental Framework has been based on the review of recent environmental studies, for at least two years, environmentalists and other NGO's demanded that NAFTA should have included requirements for extensive environmental impact studies before development, and for the imposition of trade sanctions against companies that failed to comply with environmental laws.[167] On the one hand, economic studies were performed prior to NAFTA ratification in an effort to assess the economic benefits to be gained by the treaty.[168] However, in contrast, many critical inquiries over the potential environmental effects of NAFTA were never addressed, contributing to many concerns that remain unsettled to this day.[169] Consequently, most of the NAFTA

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163. *See* Kibel, *supra* note 9, at 62.

164. *Id.*

165. *Denuncia popular* is a "complaint of the people."

166. *Id.*

167. *See* Baker and McKenzie, *supra* note 3, at 248.

168. Along with studies already cited, at least one government study by the ITC, "Economy-Wide Modeling of the Economic Implications of a FTA with Mexico and a NAFTA with Canada and Mexico," is mentioned by the General Secretariat, *supra* note 22, Ch. 1, Pt. 2, at 9.

169. A few environmental studies were conducted prior to NAFTA. (For example, *see* G.M. Grossman and A.B. Krueger, *Environmental Impacts of a North American Free Trade Agreement, in* THE MEXICO-U.S. FREE TRADE AGREEMENT (P. Barder ed., Cambridge MIT Press 1993); however, none were ever required by NAFTA.

environmental studies are now being performed in hindsight, perhaps after some irreversible damage has already been done.[170]

In the words of the CEC Secretariat, "changes in human health can serve as an indicator of change in the ambient environment."[171] Following this line of reasoning, the author will therefore start the discussion on NAFTA environmental effects with a public citizen report, which among other things alleges that the high NAFTA price tag regrettably includes human casualties. The public citizen report is also offered first simply because analysis on the human element of the NAFTA/environment connection is missing from almost all of the reports that were reviewed for this paper.[172] While the author will not try to guess the reason as to why this dimension was seemingly overlooked, it is not hard to argue that human concerns are also important when attempting to assess the post-NAFTA state of the environment. A short discussion on the CEC's "Analytical Framework For Assessing Environmental Effects" also

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170. The issue of the insufficiency of environmental studies was brought up at the NACEC First North American Symposium on Understanding the Linkages between Trade and Environment held on October 11 and 12, 2000 in Washington D.C. In the Closing Session, Konrad von Moltke, Senior Advisor for the International Institute for Sustainable Development commented that the NACEC needed to find better incentives to promote more and better studies by the academic community on this subject so that the NACEC could "draw on them." However, one academic commentator suggested that the political responsibility and burden is on the CEC to initiate and produce these studies. This finger pointing tends to support the view that NAFTA should have required environmental impact studies. In addition, one of the studies to be discussed later was very critical of CEC environmental testing "after the fact." *See* Christine Elwell, LL.B., LL. M., Sierra Club of Canada, *NAFTA Effects on Water: Testing for NAFTA Effects in the Great Lakes Basin*, CEC – First North American Symposium on Understanding the Linkages Between Trade and Environment – Papers, at http;://www.cec.org/symposium. According to the study, "if trade liberalization is truly to progress without significant damage to the environment, it is not enough to create a CEC Framework for testing NAFTA effects that can identify and perhaps even mitigate damaging processes that are *already* underway. The environmental impact assessment process should incorporate models of testing a process *prior to initiation*, and it should have standards by which to judge actions *that will have an effect* on the environment. Given that no detailed indicators are in place six years after the acceptance of NAFTA indicate that the general statements of desire for sustainable development in NAFTA are an accession to a minority of concern."

171. *See Assessing Environmental Effects of the North American Free Trade Agreement – An Analytical Framework (Phase II) and Issues Studies, supra* note 118, at 37.

172. The CEC website has a whole section devoted to *Pollutants and Health* at http://www.cec.org/programs_projects/pollutants_health. My point concerns whether environmental harm and human harm can and should be completely separated and reported in this manner, since they too are linked. Some inconsistencies were encountered as a result of this health/environment division. For example, one environmental report concludes *that no environmental harm has been caused by NAFTA in the U.S.* Yet this whole CEC section deals with health problems caused by NAFTA environmental pollution. At a minimum, shouldn't environmental reports comment on, or try to reconcile the results of their studies with any applicable findings related to health? Or does the precise nature of academic studies provide justification for not reporting on this connection when human health is not the topic?

follows the public citizen report,[173] since the framework has provided a sound methodology for the development of some recent environmental studies. And finally, an analysis and summary of these important environmental studies concludes this section.

Public Citizen alleges NAFTA failures in protecting the environment, public health, and enforcing the NAFTA environmental provisions.[174] Not entirely inconsistent with the studies to be discussed later, Public Citizen further alleges:

- A 37 % increase in border maquiladoras at the NAFTA five-year mark, leading to increased air and water pollution, and devastating population growth not sustainable under the current infrastructure;

- A 50 % increase in hazardous waste transports into the United States since 1996, expected to increase as the number of maquiladoras continues to climb under NAFTA;

- Increased toxic waste dumping, much of which is maquiladora waste still unaccounted for;

- Lack of promised clean up of 6,000 metric tons of lead remaining at the Metales y Derivados cite in Tijuana, owned by San Diego-based New Frontier Trading Corp.:

- Lack of sewage treatment to handle a 54 % increase in the population of the city of Juarez, based on NAFTA growth;

- Increased air pollution on the U.S.-Mexican border due to a surge in truck traffic with a 19 % increase in traffic at the Texas border, and doubling of the number of trucks entering the U.S. at San Diego.

But perhaps more importantly, the public citizen report alleges that NAFTA has also caused large increases in Hepatitis A outbreaks due to contamination of the Rio Grande River, border birth defect clusters which are almost twice the national average in Cameron County, Texas, and an increase in birth defects at the Cameron County/Matamoros

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173. In all fairness, it appears that the Public Citizen Report did not follow the standards set forth in the CEC Analytical Framework. For one reason, the CEC Analytical Framework was not available when this study was done. Secondly, it is likely that the authors of the study were not concerned about waiting for a framework that was six-plus years in the making in order to perform a study on NAFTA environmental effects that could have been performed at any time.

174. *See* Public Citizen, *supra* note 34, at 1, 2.

border correlated to increased industrial activity under NAFTA.[175] By the Secretariat's own threshold standard, these human health problems lend credence to the view that the NAFTA environmental record is not entirely without blemish, and that these problems need to be remedied, especially because of their dangerous effects on human health.

In an effort "to contribute to an increased understanding of the possible effects of trade and related economic and institutional developments in North America," the CEC established a trilateral team of independent representatives from the three countries to develop an analytical framework for considering the environmental effects of NAFTA.[176] The Council reported that "it is very important to note that any effort to determine the linkages between a trade agreement's provisions and environmental effects is an extremely difficult challenge."[177] In Phase I of the project beginning in 1995, the team focused on understanding the NAFTA trade and investment regime, and developing a preliminary analytic approach.[178] Phase II, the latest published report, builds on Phase I, "refined through extensive review and consultation."[179]

The CEC study first examines four major areas that can affect the natural environment, including the environmental context, the economic context, the social context, and the geographic context.[180] In the "NAFTA Connection" the study then examines the NAFTA components that relate to a particular issue, including NAFTA changes, NAFTA institutions, trade flows, transborder investment flows, and other economic conditioning factors.[181] The CEC study also examines "linkages to the environment," including production, management and technology, physical infrastructure, social organization, and government policy.[182]

The CEC study then recommends the identification of specific indicators that would be most useful in measuring NAFTA-induced effects.[183] These indicators should include atmospheric quality indicators measuring urban air quality, acid rain, climate change and ozone depletion. Water quality indicators measuring water quality and quantity

175. *Id.* at 10.
176. *See Assessing Environmental Effects of the North American Free Trade Agreement – An Analytical Framework (Phase II) and Issues Studies, supra* note 118, at iv.
177. *Id.*
178. *Id.* at v.
179. *Id.*
180. *Id.* at 5.
181. *Id.* at 16.
182. *Id.* at 27.
183. *Id.* at 37.

in water ranging from irrigation to drinking water, and the measurement of pesticides and fertilizers, should also be included. Soil indicators should include those that measure soil erosion, soil runoff, fertilizer and pesticide buildup, and land overuse.[184] But perhaps the most important indicators suggested by the CEC study are those that measure biota, including species depletion, number of species at risk, rural to urban conversion of land, and forest indicators.

The author's assessment of the CEC Analytic Framework is that there is little question that the study is comprehensive, based on work performed by a cross-national selection of experts and world-renowned authorities. The issues examined in the study are important to the understanding and development of a thorough process for measuring environmental harm.[185] The study will be helpful in many ways, not only for use in the evaluation of the NAFTA environment, but for future trade agreements that can utilize all or parts of the environmental framework as a model for their own assessments. But more importantly, one of the most valuable parts of the CEC study is the recommendations for improvement, which offer immediate and future recommendations to help preserve the environment.

The North American Commission of Environmental Cooperation put the CEC Analytical Framework to work when it released its study in 1999, and solicited a public call for papers that resulted in the "First North American Symposium on Understanding the Linkages between Trade and Environment." The call for papers yielded 14 studies that were selected from 50 responses, and were presented at this symposium on October 11 and 12, 2000, at the World Bank in Washington D.C.[186] These papers highlight many important issues that are discussed below.

B. RECENT ACADEMIC CRITICISM OF THE CEC PROCESS AND NAFTA CHAPTER 11 BASED ON NAFTA ENVIRONMENTAL STUDIES

In the short time that the CEC analytical framework has been available, the environmental studies submitted to the CEC have already shed light on the overall NAAEC submission process and Chapter 11, and provide

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184. *Id.* at 39.

185. Some commentators have recommended changes to the CEC Analytical Framework. A few of these recommendations are discussed in Part VII. One area of concern is the addition of environmental indices that better reflect the overall condition of the environment.

186. *See* CEC – First North American Symposium on Understanding the Linkages between Trade and Environment – *Highlights from the Symposium*, at http://www.cec.org/symposium/index.cfm.

some insight into the next generation of NAFTA/environment issues that need to be addressed. Of little surprise to many, most of the questions highlighted by the CEC studies have begged for answers since NAFTA's inception. That is, for the most part, these studies validate concerns that have been on record for quite some time. Likely, the next steps taken by the NAFTA governments to mitigate the environmental impact of NAFTA will include monitoring the extent of these problems, and hopefully taking immediate action against those problems that are more severe.

A review of the studies presented at the CEC's first symposium has revealed (1) the existence of more evidence concerning the current difficulties encountered when developing environmental measures within the context of NAFTA and WTO trade law,[187] (2) the constraints that NAFTA has placed on the ability of countries to adopt higher standards to protect human health and the environment because of Chapter 11,[188] (3) the non-enforcement of environmental regulations in Mexico in at least one case study, supporting the pre-NAFTA predictions of many NAFTA critics,[189] and (4) the existence of a loophole that has already been stated many times in this paper - that environmentally necessary legislation may not exist,[190] thereby rendering the NAAEC submission process useless against these types of environmental abuses.

With regard to Chapter 11, one study suggests that broader disciplines and wider interpretations of the NAFTA parties' investment obligations under Chapter 11 have increased the risk that environmental regulations

187. *See* Howard Mann, International and Environmental Law and Policy, Ottawa, Canada, and Associate, International Institute for Sustainable Development, Trade and Investment Program, *Assessing the Impact of NAFTA on Environmental Law and Management Processes,* CEC – First North American Symposium on Understanding the Linkages between Trade and Environment – Papers, at http://www.cec.org/symposium.

188. *See* Marisa Jacott, La Neta; Proyecto Emisiones, Cyrus Reed, Texas Center for Policy Studies, and Mark Winfield, Canadian Institute for Environmental Law and Policy, *The Generation and Management of Hazardous Wastes and Transboundary Hazardous Waste Shipments between Mexico, Canada, and the United States, 1990-2000,* CEC – First North American Symposium on Understanding the Linkages between Trade and Environment – Papers, at http://www.cec.org/symposium.

189. *See* Andrea Abel, National Zwildlife Federation, and Travis Philips, The University of Texas at Austin, *The Relocation of El Paso's Garment Stonewashing Industry and its Implications for Trade and Environment,* CEC – First North American Symposium on Understanding the Linkages between Trade and Environment – Papers, at http://www.cec.org/symposium.

190. *See* Maria Teresa Guerrero and Francisco de Villa, Comision de Solidaridad y Defensa de los Derechos Humanos, A.C. and Mary Kelly, Cyrus Reed, and Brandon Vegter, Texas Center for Policy Studies, Austin Texas, *The Forestry Industry in the State of Chihuahua; Economic, Ecological and Social Impacts post-NAFTA,* CEC – First North American Symposium on Understanding the Linkages between Trade and Environment – Papers, at http;//www.cec.org/symposium.

will not survive NAFTA and WTO trade law challenges.[191] However, this study optimistically suggests that developing environmental regulations that are valid under evolving trade law is possible, since there are no inherent inconsistencies between the two requirements.[192] Lastly, this study recommends that NAFTA Chapter 11 does not have to be changed to address the increasing scope and negative effect on environmental law of many of these investment provisions.[193] Rather, interpretive language could be inserted to clarify the meaning of these terms (i.e., expropriation, performance requirements, etc.).[194] Along these same lines, the author would further recommend investigating the possibility of using interpretive language to clarify other parts of the NAFTA instrument so that other necessary environmental regulations can more easily be implemented under those provisions.[195]

Another study provides more evidence that Chapter 11 is stifling the development of environmentally necessary legislation.[196] By examining the movement of hazardous waste between the NAFTA parties, this study suggests that U.S. waste exports to Canada and Quebec have dramatically increased (partially because of a weakened regulatory

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191. *See* Mann, supra note 187, at 1.
192. *Id.*
193. *Id.*
194. *Id.*
195. Using a constitutional law term to make this point, domestic environmental measures in the backdrop of international agreements have often been ruled invalid because of "strict scrutiny" interpretations made by trade tribunals. That is, in most cases, the purpose of the environmental regulation and the method of addressing that particular purpose is so "strictly scrutinized" that the environmental regulation is almost never found consistent with trade law. For example, see NAFTA Chapter Twenty-One: Exceptions, Article 2101(2), which states that "such [environmental measures and those measures outlined in Article 2101(1)] [are General Exceptions to the NAFTA Agreement] provided that such measures are not applied in a manner that would constitute a means of ARBITRARY or UNJUSTIFIABLE discrimination . . . ." In the author's view, trade tribunals should take more into consideration the need for an environmental regulation when evaluating the alleged violator's method of addressing that need (i.e., when balancing interests). For instance, an environmental regulation instituted to protect the lives of citizens against an extremely dangerous chemical should not first and foremost be viewed as potentially discriminatory against foreign countries under Article 2101(2), and therefore invalid when determining whether the environmental or health regulation is justified under NAFTA trade law. The lives of citizens (i.e., the need for the regulation), and not the rights of foreign corporations should clearly carry more weight (or at least some weight) in this determination. In another example, NAFTA Article 1207 describes the use of "Quantitative Restrictions" between the parties. Quantitative restrictions are clearly discriminatory, yet the need to protect particular industries was considered important enough by the NAFTA parties to warrant discrimination in some cases. Protection of human life and the environment should also be considered important enough to balance in favor of environmental protection against some limited, and warranted discrimination. Therefore, perhaps an agreed-upon, more environmentally conscious interpretation of "ARBITRARY or JUSTIFIABLE discrimination" could be included in NAFTA to allow for the implementation of these types of necessary environmental and health-regulated regulations.
196. *See* Jacott et al., *supra* note 188, at 1.

environment in those provinces) and that the development of higher standards to protect human health and the environment has been constrained because of the Chapter 11 *Ethyl* and *Metalclad* cases.[197] This study supports the conclusions of many critics based on recent developments in the Chapter 11 cases discussed in Part VI.

Other CEC studies reveal at least three NAAEC submission process weaknesses. One study of the relocation of El Paso's Garment Stonewashing Industry found that the existence of lower labor costs in Mexico was the overriding factor influencing relocation.[198] However, the lack of industrial pretreatment regulatory enforcement in Mexico has clouded this issue, since the amount of influence that this lack of enforcement had in the relocation decision is not known. While of greater concern is determining the scope of industry relocation attracted by the lack of environmental enforcement in Mexico, this study verifies one NAAEC submission process problem that has already been stated many times in this paper – that not all environmental enforcement violations are being reported and submitted to the CEC.

Another study done on the Forestry Industry in the State of Chihuahua found that increases in U.S. imports of pulp and paper exerted pressure on the Chihuahua producers to keep prices low to maintain market share, and to oppose environmental regulations that increase the cost of doing business.[199] This study is important because it identifies two more conditions that the NAAEC submission process will not remedy; (1) the exertion of political pressure NOT to establish environmentally necessary legislation; and (2) the CEC's inability to address environmental abuses based on environmental legislation that does not exist.

In summary, a review of the first round of CEC studies has uncovered some evidence of potential CEC submission process and NAFTA Chapter 11 shortcomings that have long been voiced. In the author's view, more studies are required to discover the extent of the environmental non-enforcement problem occurring in Mexico, the amount and severity of environmental abuses taking place due to the lack of adequate environmental regulations, and the level of economic and/or political pressures being exerted to suppress environmentally necessary legislation. However, the CEC studies are more conclusive in showing

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197. *Id.*
198. *See* Abel & Philips, *supra* note 189, at 1.
199. *Id.*

that immediate action needs to be taken to remedy the effects of recent Chapter 11 cases to allow for the development of stronger environmental regulations in the shipment of hazardous wastes, and in other areas concerning human health and the environment.

VI. SUMMARY AND REVIEW OF CRITICAL NAFTA CHAPTER 11 CASES

Given the right to directly challenge a NAFTA party, an investor may request binding investor-to-state dispute resolution for monetary damages. Under NAFTA's dispute settlement provisions (contained in NAFTA Chapter 11, Section B), each disputing party may select an arbitrator from the tribunal membership, and a third arbitrator is selected by an arbitration body. However, since arbitration proceedings under Chapter 11 do not follow the established international norms of transparency, proceedings may secretly be withheld from the public, even though domestic taxpayers are ultimately held responsible for paying out any damages awarded.[200] Therefore, except for cases made available by unofficial publication, it is unclear as to who and how many Chapter 11 challenges have actually been initiated and/or settled.[201]

What is clear about the known cases is that they have stirred Chapter 11 critics to become increasingly concerned about two major problems:[202]

- That Chapter 11 can undermine efforts to enact new laws and regulations in the public interest, in particular to protect the environment and human health; and

200. Konrad von Moltke, Senior Advisor of the International Institute for Sustainable Development, most accurately described this situation in the closing session of the CEC First Annual Symposium cited earlier: "[with regard to Chapter11] we don't know how to know what we need to know . . . ." Furthermore under the Chapter 11 Dispute Settlement Process, there are limited opportunities to appeal or review a decision. *See* Mann, *supra* note 8, at 11.

201. *See* The Council Of Canadians, NAFTA's *Big Brother: The Free Trade Area of the Americas and the Threat Of NAFTA-style 'Investor-State' Rules*, March 20, 2001, at 2. This source also claims that only fifteen Chapter 11 cases have been made public.

202. *See* Mann, *supra* note 8, at 1. At least one participant of the CEC's First Annual Symposium somewhat disagreed with some of the current concerns over NAFTA Chapter 11. Jeffrey Schott, Senior Fellow at the International Institute for Economics, stated at the Symposium's closing session that he believes that a more thorough and complete understanding of the decisions in the Chapter 11 cases is required, and that anecdotal evidence such as provisions that have a "chilling effect on environmental regulations" is persuasive in nature, but not hard evidence appropriate for academic studies.

- That Chapter 11 can require governments to pay compensation to polluters to stop polluting, even if their activities have an adverse impact on public health and welfare.

In fact, as of March 2001, there have been ten cases brought against environmental and natural resource management measures, including cases involving hazardous waste management decisions, maintenance of clean drinking water, and gasoline additives barred in other jurisdictions.[203] The NAFTA parties recognized these concerns earlier, and by June 1999, efforts were being made to discuss NAFTA Chapter 11 among the NAFTA environment ministers (i.e., the governing council to the CEC).[204] And by the end of 2000, trade ministers and trade-focused observers were recognizing the problems as well.[205] But as of this writing, nothing has been made available on the CEC website explaining the status or content of any current talks on possible Chapter 11 modifications, or the prospects for making any of these recommended changes.[206]

Available data was reviewed for five cases, and a synopsis of each case is included here to illustrate the extensive rights of NAFTA investors and their overreaching effect on the NAFTA parties. Two disputes involve the United States, one dispute involves Mexico, and two disputes involve Canada. Among these cases, three investors attacked domestic environmental regulations (Ethyl, Metalclad, and Methanex), one investor attacked a public agency (UPS), and one investor attacked a Party's sovereign domestic judicial system (the Loewen Group). Both U.S. cases bring up U.S. constitutionality issues, which are discussed in Part VII.

The two non-environment cases (Loewen and UPS) are included here to illustrate their effects on public health and safety. The decisions in these two cases may provide more ammunition for foreign investors to attack even more environmental regulations in the years to come.

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203. *Id.* at 15.

204. *Id.* at 16.

205. *Id.* In his response to questions submitted to him specifically for this paper on June 12, 2001, Scott Vaughan, the head of the Environment, Economy and Trade Program at the CEC has verified that recommendations to revise Chapter 11 have come from all three NAFTA parties, and from various NGO's including the Sierra Club of Canada, and the Institute of Sustainable Development.

206. The CEC website is located at http://www.cec.org, although it is unclear whether Chapter 11 issues/events would be posted there based on the NAFTA parties' stance on keeping Chapter 11 and NAAEC environmental issues separate. (See discussion on page 19.)

In *Ethyl Corporation v. Canada* (Notice of Arbitration: April 14, 1997), the first suit initiated under NAFTA Chapter 11,[207] Ethyl, a Virginia corporation, filed a claim against Canada for $250 million in damages. Ethyl produces a toxic gasoline additive called methylcyclopentadienyl manganese tricarbonyl ("MMT"), and then ships the substance to Canada, where it is mixed and sold to Canadian gas refiners. In April 1997, Canada imposed a ban on the import and inter-provincial trade of MMT, which was intended to protect public health, since MMT contains manganese, a known human neurotoxin.[208] The law did not directly ban the sale or use of MMT in Canada, urging some to argue that the law was discriminatory.[209]

Under the NAFTA provisions, Ethyl claimed that Canada's ban on MMT amounted to "expropriation" under Article 110 because it would eliminate profits Ethyl expected to earn through Canadian sales of the additive.[210] Ethyl further alleged that the ban was an illegal "performance requirement" under Article 1106 because it would force the company to build a factory in every Canadian province since the regulation made importation of MMT illegal.[211] And finally, Ethyl alleged that Canada's ban on MMT in the absence of a ban on internal production and sale was a breach of its obligation to treat foreign and domestic investors in a no less favorable manner under Article 1102.[212]

In July 1998, Canada settled with Ethyl,[213] agreeing to several troubling conditions. Under the settlement decree, Canada ended up paying Ethyl Corporation $13 million for lost costs and profits, removed the ban on MMT, and made a public apology to Ethyl for implying that Ethyl's product was hazardous.[214] In essence, Ethyl was able to intimidate Canadian lawmakers into rescinding a valid environmental regulation, which resulted in the Canadian taxpayer "paying off the polluter" for importing a dangerous chemical.[215] The use of Chapter 11 to lobby

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207. *See* Public Citizen Global Trade Watch – *Another Broken NAFTA Promise: Challenge by U.S. Corporation Leads Canada to Repeal Public Health Law*, at 2, http//www.citizen.org/pctrade/nafta/cases/ethyl.htm.

208. *See NAFTA's Corporate Lawsuits, A Briefing Paper*, Friends Of The Earth and Public Citizen, April 1999, at 2; http//:www.tradewatch.org/NAFTA/Cases/fancy.pdf. This source further states that both the EPA and the State of California have also banned the use of MMT, lending credence to the view that the Canadian ban on MMT was legitimate.

209. *See* Mann, *supra* note 8, at 71.

210. *See* Public Citizen, *supra* note 207, at 2.

211. *See* Friends Of The Earth and Public Citizen, *supra* note 208, at 2.

212. *See* Mann, *supra* note 8, at 71.

213. *Id.*

214. *See* The Council Of Canadians, *supra* note 201, at 2.

215. *See* Friends Of The Earth and Public Citizen, *supra* note 208, at 2.

against valid environmental legislation in this case set a major precedent for the cases to follow.[216]

In *Metalclad v. Mexico* (Notice of Arbitration: January 13, 1997), an American corporation filed a Chapter 11 claim against Mexico for $90 million.[217] Metalclad took over a waste disposal plant facility in San Luis Potosi, which had a history of contaminating local groundwater.[218] The company had hopes of building and operating a full hazardous waste landfill facility, for which municipal permits for that purpose had been previously denied.[219] The federal government in Mexico issued the required permits from that level, without prejudice to other authorizations that might be required at the local level, and promised the company that all permits were either issued or would be issued without a problem.[220]

Local citizens, concerned about the government's failure to impose environmental laws and regulations, opposed Metalclad's plans to re-open and continue running the disposal plant.[221] The required municipal permits were finally denied in December 1995, thus ending the final construction and preventing any operation of the landfill.[222] Because of the locals' involvement and concern, the state governor then declared the site part of an ecological zone.[223]

Metalclad, claiming that the governor's declaration amounted to "expropriation" under Article 1110,[224] sued Mexico for $90 million, an amount that is more than the combined annual income of all the residents in the surrounding area.[225] The company also alleged that Article 1105 was violated.[226] The Tribunal decided in favor of Metalclad (awarding

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216. *See* Mann, *supra* note 8, at 74.

217. *See* Public Citizen Global Trade Watch – *Our Future Under the Multilateral Agreement on Investment*, at 2, http://www.citizen.org/pctrade/nafta/cases/metalcla.htm.

218. *Id.*

219. *See* Mann, *supra* note 8, at 74.

220. *Id.*

221. *See* The Council Of Canadians, *supra* note 201, *at* 5.

222. *See* Mann, *supra* note 8, at 75.

223. *See* WTO - *The NAFTA Ruling On MetalClad vs. Mexico*, at 4.

224. The NAFTA Tribunal ruled that Article 1110 was violated because no compensation was paid; expropriation could include "covert or incidental interference with the use of property;" and the purpose of the government measure need not be considered in this regard. *See* Mann, *supra* note 8, at 77.

225. *See* Friends Of The Earth and Public Citizen, *supra* note 208, at 3.

226. The Tribunal ruled that Article 1105 was breached in several ways including not living up to federal and state official representations; not clarifying understandings of Mexican law; not having procedures for investors to easily know the rules on permits - breaching the transparency obligations in non-Chapter 11 parts of NAFTA; ruling that environmental factors were a federal and

them $16.7 million in damages on August 30, 2000) citing three NAFTA objectives that needed to be adhered to[227], and even went so far as to proclaim that environmental impact considerations, public opinions, and the past record of performance of the proponent were matters outside the jurisdiction of Mexican local government.[228]

The Tribunal further ruled that Mexican officials told Metalclad that municipal permits were not necessary to build or operate the landfill, despite Mexican submissions that no such assurances were offered, and that the company relied upon and acted on these representations.[229] Furthermore, the NAFTA Tribunal held this proceeding in secrecy, did not allow testimony from local people or environmental experts, and did not even allow the concerned parties to review the original arguments filed by Metalclad.[230]

The Tribunal's ruling in Metalclad has brought several critical Chapter 11 issues to the forefront. In particular,[231]

- What is the extent of the transparency and other procedural requirements to be accorded an investor under Article 1105?
- Do the decisions of government officials at one level have a binding effect on officials at another level with regard to NAFTA investors?
- What is the scope of the Tribunal's ability to rule on domestic law?
- What effect does the need to consider the purpose of a measure have on the determination of "expropriation"?

The answers to these questions will likely impact future NAFTA Chapter 11 cases for years to come.

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not a local issue; and not notifying Metalclad of the relevant town meeting concerning its permit. (*See* Howard Mann, *supra* note, 8 at 75.) Also, these types of Chapter 11 decisions can be contrasted with the CEC's reluctance to make determinations on environmental enforcement.

227. The three NAFTA objectives on which the Tribunal based its opinion are transparency in government regulations and activity; the substantial increase in investment opportunities; and the assurance of a predictable commercial framework for investors. *See* Mann, *supra* note 8, at 75.

228. *See* The Council Of Canadians, *supra* note 201, at 4.

229. *See* Mann, *supra* note 8, at 75.

230. *See* Friends Of The Earth and Public Citizen, *supra* note 208, at 4. The Tribunal justified this secrecy citing the need for effective operation of the proceedings. *See* Mann, *supra* note 8, at 77.

231. *See* Mann, *supra* note 8, at 78.

In *UPS v. Canada* (Notice of Arbitration: April 19, 2000), UPS, the giant U.S. courier company, accused the Canada Post of giving preferential access to its national network, and alleged $156 million in damages.[232] UPS is alleging an Article 1102 violation because Canada Post does not provide UPS with access to its retail and service infrastructure that is equal to what it provides its own courier operations.[233] UPS is also alleging an Article 1105 violation because the government is using its courier monopoly to engage in anti-competitive practices towards its competitors.[234] Furthermore, UPS is alleging that Canada itself has violated NAFTA Article 1503 by failing to effectively control its own government monopolies.[235]

According to trade lawyer Steven Shrybman, UPS is using NAFTA to expand its corporate empire by eliminating public sector competition for mail and courier services.[236] UPS is claiming that the Canada Post has taken unfair advantage of its mail service monopoly to support its competitive parcel and courier delivery business, which occurs today in most areas of public sector service delivery.[237] In fact, most private sector corporations have been complaining for decades about "unfair competition" from public service providers.[238]

However, if UPS succeeds in having one public sector monopoly declared invalid under NAFTA Chapter 11, this would provide ample ammunition for other investors to attack a wide range of public infrastructures including Medicare, education, transportation, sewer and water services, and dozens of other public services.[239] Consequently, UPS's efforts could dramatically expand the ambit of the investor-state apparatus to include NAFTA requirements that should not be subject to foreign investor claims.[240]

The environmental link between the UPS case and the topic of this paper is that the increased exposure of public monopolies to Chapter 11 claims may limit the very use of these public infrastructures by their NAFTA party owners, thereby leading to less controlled and less standardized public services. The potential development of a more chaotic, lower-

232. *See* The Council Of Canadians, *supra* note 201, at 5.
233. *See* Mann, *supra* note 8, at 107.
234. *Id.*
235. *Id.*
236. *See* The Council Of Canadians, *supra* note 201, at 5.
237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.*

quality, foreign-investor infested public service sector could lead to disastrous environmental, public health, and public welfare consequences.

Canadian companies have not excluded themselves from attempting to exploit NAFTA investor protections. In *Methanex v. U.S.* (Notice of Arbitration: December 3, 1999), Methanex, a Vancouver-based company that produces methanol, is suing the U.S. for $970 million over a California decision to phase out the use of MTBE, one of the company's products, by 2002.[241] California issued its phase-out decision after discovering that MTBE was leaking into the ground water of Santa Monica and Lake Tahoe, and into 10,000 wells throughout California.[242] California also cited an EPA report that MTBE causes tumors in rats.[243]

Methanex is now claiming that the California phase-out amounts to expropriation under Article 1110 due to the company's loss of expected future business profits, and the $150 million loss of Methanex stock value in the ten days following California's announcement.[244] The Methanex case falls in line with other NAFTA disputes attempting to capitalize on the expanded meaning of "expropriation" within the NAFTA legal sense.

Methanex is also claiming the U.S. violated Article 1102 based on the assertions that Archer-Daniels-Midland, a competitor that manufactures ethanol, a product that now stands to gain from the MTBE ban, contributed to the campaign of the current California Governor. This led to Governor Gray Davis' successful advocacy of the MTBE ban, and thus created a discriminatory process and outcome.[245]

Furthermore, Methanex is claiming that the U.S. violated Article 1105, stating that: [246]

- The MTBE ban was the result of a flawed process in which it was denied due process leading to a failure to consider alternatives on banning MTBE;

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241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.*
245. *See* Mann, *supra* note 8, at 97.
246. *Id.*

- Unfair and non-transparent lobbying determined the decision; and

- The measure was a disguised restriction on trade that was not the least trade-restrictive option available.

A NAFTA Tribunal hearing on an amended Methanex claim, and the U.S.'s objection to jurisdiction, was anticipated for June 2001,[247] the results of which are not known at the time of this writing.

Finally in *Loewen Group, Inc. v. U.S.* (Notice of Arbitration: October 30, 1998), Loewen, a Canadian-based funeral conglomerate, is suing the U.S. for $725 million claiming that a Mississippi trial judge, verdict, bond requirement, and trial decision upheld by the Mississippi Supreme Court has violated the company's new investor rights guaranteed under NAFTA Chapter 11.[248] Loewen was sued by a small Mississippi funeral home owner for gross business misconduct.[249] The Mississippi jury found Loewen liable for fraud, malicious business practices, and other misconduct, and imposed heavy punitive damages. Loewen settled the case for $150 million and promptly filed a $725 million suit against the U.S. in the International Center for Settlement of Investment Disputes ("ICSID"), claiming NAFTA Chapter 11 violations.[250]

Loewen alleges that the civil justice system in Mississippi violated international legal norms of "fairness," discriminating against the Canadian-based corporation. This amounts to "expropriation" (Article 1110) and the "denial of justice" (Article 1102), both NAFTA Chapter 11 violations.[251] Loewen further claims that the Mississippi Supreme Court requirement for Loewen to post a 125% bond as applicable under state law also violated NAFTA by not specially exempting the company from the law.[252] In essence, Loewen is claiming that the very civil justice

247. *See* Mann, *supra* note 8, at 96. The Methanex Chapter 11 case should not be confused with the Methanex CEC Submission (99-001), which has an entirely different disposition.

248. *See* Friends Of The Earth and Public Citizen, *supra* note 208, at 5.

249. *Id.*

250. *See* Public Citizen Global Trade Watch – *Briefing Paper, Canadian Corporation Found Liable in Mississippi Courts Uses NAFTA to Claim Legal System Violated Its Rights;* at 1, http://www.citizen.org/pctrade/nafta/cases/Loewen.htm.

251. *Id.* at 2.

252. *Id.* This bond requirement has been implemented in at least 20 other states so that the lengthy appeal process is not abused, and violating parties are not given the opportunity to hide assets. Loewen further claimed that the court's refusal to exempt the company from the bond, or even lower the bond amount, violated Article 1105, Minimum National Standards of Treatment. *See* Mann, *supra* note 8, at 104.

system itself – allowing jury trials – is violating the company's NAFTA-guaranteed rights to fair and equal treatment and non-discrimination.[253]

If Loewen is successful in its claim against the United States, investors would be encouraged to try to circumvent domestic law by filing NAFTA claims challenging the state, local, and federal court systems, where U.S. citizens and businesses must abide by U.S. court rulings.[254] Additionally, the Loewen case could effectively put an end to punitive damages against NAFTA investors[255], while foreign investors and their political allies could use NAFTA rights to fuel efforts to enact tort "reform" that further restricts citizens' access to the court systems.[256]

These consequences could have a major impact on both NAFTA and domestic environmental litigation. Domestically, under one scenario, a NAFTA foreign investor could try to use Chapter 11 to shield itself from punitive damages assessed for severe environmental pollution. And within the NAFTA framework, using Chapter 11, a foreign investor might try to circumvent punitive damages sought by a NAFTA party through the domestic enforcement of environmental violations brought about by NAAEC submissions, which could render the NAAEC submission process ineffective in these cases.

The determinations in all of the five cases described above challenge the effectiveness and fairness of the NAFTA investment provisions, and draw attention to special issues that need to be addressed in order to make NAFTA most beneficial to all stakeholders. While the Chapter 11 investment protections have acted as an effective catalyst fostering many investment opportunities throughout the NAFTA territories, these protections should not be extended so far as to destroy necessary health, environmental, and judicial policies that protect the NAFTA citizens themselves. Part VII summarizes these problems and describes some possible solutions.

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253. *Id.* The author believes it is more accurate that some *jury determinations* – not jury trials themselves – could violate an investor's NAFTA guaranteed rights. However, even with this qualification, this result seems unacceptable. (I.e., NAFTA rights should not exempt foreign investors from the U.S. legal process.)

254. *See* Friends Of The Earth and Public Citizen, *supra* note 208, at 5. Also note that NAFTA creates a special right of appeal outside the U.S. legal system for any corporation that can define itself as foreign.

255. *See* Public Citizen Global Trade Watch – *Briefing Paper, Canadian Corporation Found Liable in Mississippi Courts Uses NAFTA to Claim Legal System Violated Its Rights,* at 3.

256. *See* Friends of The Earth and Public Citizen, *supra* note 208, at 5.

VII. CRITIQUE AND RECOMMENDATIONS

The constitutional validity of the NAFTA dispute resolution, especially under Chapter 11, Section B, is still open for debate. One concern is the extended meaning of "expropriation" in the NAFTA sense, and whether this interpretation can withstand U.S. constitutional scrutiny, where the meaning of "expropriation" (i.e., "takings" under the Fifth Amendment) is far more limited. Secondly, an issue arises as to whether a multinational review panel can replace ordinary judicial review, the decisions of which are never appealable to a U.S. court.[257] Since members of the arbitration panel are chosen by the involved nations, the transfer of appellate jurisdiction to this arbitration panel from Article III courts raises serious questions about whether this process deprives litigants of judicial review by an Article III court,[258] as dictated by the Constitution.

Thirdly, the mandatory nature of NAFTA arbitration coupled with the secrecy of the proceedings and lack of transparency raises potential due process violations based on lack of "notice" and "opportunity to be heard," and the deprivation of a "full" and "fair" trial. In particular, there are no requirements to provide the public with information at various stages of the process, such as the notice of intent to litigate, the consultation process, or the initiation of litigation.[259] In addition, governments are not required to make public the pleadings of the parties, and can even maintain secrecy of final awards.[260]

In essence, negotiation of commercial disputes under NAFTA has extended into public policy negotiations, which take place solely between the government and foreign investors in a privileged and secret context.[261] This gives foreign private interests an unhealthy privileged access to the policy-making process, without the accountability that comes from public release of the pleadings.[262]

Aside from the constitutional issues specific to the U.S. that will be determined in their own due course, cross-national recommendations have been proposed by several critics that are surprisingly similar in

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257. *See* JACKSON, DAVEY, & SYKES, JR., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 493 (West Publishing Company 1995).
258. *Id.*
259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.*

content and nature, perhaps due to the equal opportunity effort on record of companies from all three NAFTA parties seeking to maximize and exploit the benefits of NAFTA purely for their own personal gain. These recommendations along with some comments are summarized below:

Eliminate the investor-state mechanism, which enables investors to bypass domestic court systems. Limit international commercial arbitration procedures to their intended purpose – to the adjudication of contract disputes, where the parties expressly consent to the specific dispute to arbitration.[263]

Comments: This suggestion amounts to "throwing the baby out with the bath water." The author's view is that there are less destructive steps that can be taken to preserve the positive effects of this mechanism, such as the ones mentioned below.

"Carve-out" (reserve an exception) for environmental protection, natural resource management, and conservation measures, by specifying "Notwithstanding any other provisions of the Agreement, a contracting party shall not be prevented from taking prudential measures with respect to environmental protection, resource management and conservation, and related health protection matters."[264]

Comments: Since Article 1106 and 1110 already contain some of these exceptions, the recommendation is to re-interpret and extend the use of these exceptions, and develop better and more specific language (perhaps with the language stated above) to allow for the proper exercise of these exceptions. Interpretive language to clarify: National treatment in the environmental context, the relationship between environmental trade measures and performance requirements prohibited by NAFTA, and the scope of expropriation is likely a better alternative, since this would not require modifying Chapter 11.[265]

"Carve-out" (reserve an exception) for measures related to health, education, and social services, to the effect that "Notwithstanding any other provisions of the agreement, a contracting party shall not be prevented from taking any measure with respect to the protection of

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263. *See* MAI – First Report – Summary of Recommendations, at 2, http://www.legis.gov.bc.ca/cmt/mai/1998/1report/recomm.htm.
264. *Id.* at 4.
265. *See* IISD, *supra* note 86, at 8. Also See Part V of this paper.

health and the provision of health, education, child care, and other social services."[266]

Comments: This recommendation represents a new exception, elevating the priority of health, education, and social services above investor economic benefit. The author's view is that this exception will likely never be implemented primarily because of the parties' fear of its use in implementing hidden protectionist measures.

Modified provisions to exempt sanctions that are genuinely intended to promote respect for and enforcement of human rights must be effectively exempted, at all levels of government, from national treatment, most-favored nation and any special provisions developed to deal with the issues of "extraterritoriality" or "secondary investment boycotts."[267]

Comments: While this exemption is admirable from the human rights perspective, the author's view is that this exemption has virtually no chance of being implemented into NAFTA or any other trade agreement any time soon. This assessment is based on the presence of the generally narrow economic purpose for most trade agreements, national sovereignty issues that are continuing to arise with every trade agreement, and the difficulty in developing a minimum level of human rights that all parties could agree on. The use of these exceptions to implement hidden protectionist measures, and the difficulties in establishing an overseeing and/or enforcement mechanism would also likely cause major problems.

The government of Canada and all NAFTA parties should ensure the incorporation of a narrowly defined concept of expropriation in any future negotiations with the WTO.[268]

Comments: This suggestion doesn't address the current Chapter 11 problems. One recommendation to do this might be to modify NAFTA Chapter 11 to include stricter language for expropriation, as the recommendation suggests for future negotiations. The author's view is that revising NAFTA Chapter 11 would be very difficult based on the events leading up to NAFTA's previous ratification.

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266. *Id.*
267. *Id.*
268. *See Investment And Competition Policy Issues: What Canadians Are Saying,* at 8; http://www.parl.gc.ca/InfoComDoc/3...IT/Studies/Reports/Faitrp09/23.htm.

While much of the concern over NAFTA Chapter 11 has revolved around its effect on environmental regulations, most of the squabble over the NAAEC has been over the submission process itself, and whether the process has actually worked over the last seven years. But a lack of environmental emphasis seems evident. For example, Article 102 outlines the NAFTA objectives, including the elimination of trade barriers, the protection of intellectual property rights, and promoting the increase of "investment opportunities in the territories of the Parties" – all of which may be considered worthy free-trade policies. But no mention of any environmental objective is made in this provision. Perhaps Article 1 (a) of the NAAEC should have been included in Article 102 to promote the importance of environmental protection in the treaty.[269]

Furthermore, given the slow and after-the-fact progress of the CEC studies assessing the environmental effects of NAFTA, in retrospect, perhaps NAFTA should have required impact and environmental effects studies, as many have already suggested. And lastly, including provisions in NAFTA to assess penalties to companies violating domestic environmental law may have curbed some corporate temptation to circumvent these laws for economic reasons.[270]

With regard to the NAAEC submission process, the CEC solicited and received many public responses on how the submission process itself could be improved. The public call resulted in the development of the CEC Lessons Learned Report in April 2001, which recommended:[271]

Expedited review of Article 14 and 15 submissions – striving for a 60 day Article 14(1) and 14(2) review and a review of party responses within an additional 60 – 90 days; allowing up to 60 days for party responses; council authorization of the development of a factual record within 90 days; and completion of the entire process within two years from filing; and

269. Article 1 (a) of the NAAEC reads: "[to] foster the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generations."

270. The possibility of trade sanctions has also been explored for environmental and labor abuses. However, the concern here is that trade sanctions might be used as protectionist measures. *See* First North American Symposium, Closing Session, Jeffrey Schott, Senior Fellow, International Institute for Economics, at http://www.cec.org/symposium/index.cfm. But the possibility of assessing penalties and/or fines against abusers still appears to be on the table.

271. *See* CEC, *supra* note 50, at 13-16.

Open, informed and reasoned decision-making – including access to the reasons why the Council decides not to accept the Secretariat's recommendation to develop a factual record; additional time for the submitter to respond to any additional information referred to by a party that is not on the original submission; and the reduction or removal of the 30-day blackout period, which currently allows the responding party to become aware of a factual record recommendation before press inquiries begin.

Professor Kibel has identified other important weaknesses in the NAAEC submission process that were not addressed by the CEC Lessons Learned Report.[272] In particular, the JPAC did not include recommendations as to (a) the need to include findings and recommendations in factual records; (b) the need for procedures to remedy non-enforcement identified in factual records; and (c) the absence of conclusions regarding the CEC Council's unchecked authority to refuse to prepare or release factual records.[273]

The author proposes that the CEC specifically address the recommendations dealing with preparation and release of factual records as follows:

- Develop, establish, and publicize standards outlining the factors the CEC will consider when determining whether or not to produce a factual record (see *supra* footnote 54): and

- Allow for the publication of some version of every factual record, balancing a NAFTA party's need for confidentiality and the public's right to be informed.

The author also proposes three recommendations that have already been mentioned concerning the JPAC public review process:

- Develop, establish, and publicize standards outlining the process and factors the JPAC will consider when determining the public review process it will follow when investigating a "public issue" (see *supra* footnote 76);

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272. *See* CEC - Comments on Lessons Learned: Citizen Submissions under Articles 14 and 15 of the North American Agreement on Environmental Cooperation (Draft Report to the CEC Council), Paul Kibel – *RE: Comments On Draft of JPAC's Lessons Learned Report On Effectiveness of NAAEC's Citizen Submission Process, supra* note 139, at 6.

273. *Id.*

- Develop, establish, and publicize standards outlining the process and factors the JPAC will consider when determining whether or not a public issue is "relevant" to the CEC submission process prior to submitting the issue to the CEC (see *supra* footnote 71): and

- Develop, establish, and publicize standards outlining the process and factors that the CEC will consider when determining whether or not to address a public issue (see *infra* footnote 75).

Finally, since the CEC only has authority to review violations of domestic law, a party could circumvent CEC review simply by modifying or temporarily suspending their own domestic law.[274] Therefore, one recommendation might be to 1) add time constraints to Article 14 (3) (a) to allow the violating party a finite amount of time to domestically resolve the matter,[275] and 2) allow the continuance of CEC review authority regardless of suspensions in domestic law, once initial CEC review authority has already been properly established.[276]

VIII. CONCLUSION

As already described, the argument over NAFTA has continued to be vigorous. There is little question about the NAFTA parties' economic intent, particularly from the standpoint of trade barrier elimination and investor protections, and there is ample economic evidence supported by many academic studies suggesting that NAFTA has been beneficial to the economies of all three NAFTA parties.

The NAFTA parties addressed environmental concerns by establishing the NAAEC, which provides for the CEC, the NAAEC submission process, and the JPAC public review process. In addition, the NAFTA parties granted strong investor provisions in NAFTA Chapter 11, in hopes of encouraging foreign investment for the purpose of fostering economic efficiency and development.

However, the overall impact of NAFTA has not been without flaws. The NAFTA environmental provisions, which includes the NAAEC and its

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274. *See* HUNTER, SALZMAN & ZAELKE, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 1261 (Foundation Press 1998).

275. The author is sure this recommendation would not fly because of the NAFTA parties' commitment to preserving national sovereignty -- something that this requirement could likely upset.

276. Given that the factual record is non-binding, the CEC's assessment of the suspension as part of the factors evaluated in the factual record would be extremely valuable.

submission process, have been the subject of much concern. A review of over seven years of citizen submissions on enforcement matters and two factual records (i.e., the Cozumel Reef and BC Hydro factual records) has resulted in recommendations for procedural improvements. Academic studies on NAFTA environmental effects have also spawned recent criticism, while providing initial evidence of both new and long-suspected NAFTA/NAAEC weaknesses. In addition, unprecedented investor provisions interpreted in the Chapter 11 cases have thus far proven to be overly protective of corporate investment, extending corporate power into the realm of public policy and national sovereignty, without the safeguards afforded by exposure to public scrutiny and public accountability.

In the meantime, more and more NAFTA citizens and organizations are being galvanized by the secret and infrequent publications of NAFTA Chapter 11 litigation, which have so far resulted in skewed results favoring corporate actors over valid state interests. Furthermore, evidence on the environmental effects of NAFTA - and the effectiveness of the methods being used to address those effects - continues to mount, sending stronger and stronger signals to the NAFTA parties on improvements that need to be made and problems that need to be watched.

The author believes that while economic progress sparked and maintained by corporate investment and free trade are important to achieving continued national growth and development, money and factories are not the only ingredients of an equitable society prospering in a sustainable environment. To move most effectively in this direction, the NAFTA parties need to re-evaluate the goals of NAFTA to somehow provide more than mushy rhetoric to each party's right and responsibility to protect the environment, manage and conserve its resources, initiate and establish health protection measures, and educate and provide health care and other social services for its citizens.

From the standpoint of Chapter 11, the NAFTA instrumentation should provide explicit, interpreted, and enumerated rights to enable the development of these critical responsibilities, so that a NAFTA party is not punished for aspiring to better serve its own people. NAFTA renegotiation and/or insertion of interpretive provisions that fulfill a more balanced NAFTA objective with more reasonable and realistic priorities would serve the NAFTA parties well, and would make way for a longer lasting, more beneficial, and socially viable agreement that

substantively improves the conditions of many more NAFTA stakeholders.

With regard to the NAFTA environmental provisions, perhaps the obvious questions to ask now are "Where do we go from here?" and "What can be done with what have we learned?" Certainly environmental studies are underway, and questions are being asked about efficiency, effectiveness, and openness from the standpoint of past, present and future events. Some critics have argued that the CEC is no longer the institution to deal with NAFTA environmental issues, now that the "race to the bottom" is no longer the primary concern.[277] Yet other commentators have suggested that even though NAFTA and the CEC have not been perfect, much has already been accomplished – so that these institutions should now become the starting point for a bigger and better economically productive and environmentally sensitive agreement.

As brought up by the environmental experts at the Next Steps Session of the First North American Symposium on Understanding the Linkages between Trade and Environment, there are many important issues that have yet to be explored. While many critical questions remain unanswered, two key issues are discussed below.[278]

1. Is process enough to protect the environment?

Comments: In the author's view, process is not enough to protect the environment. A reliable process may lead to a consistent level of environmental protection, given that the necessary tools are in place to make needed process corrections. In terms of NAFTA, it seems clear that a platform has now been established to identify and measure the actual environmental effects of NAFTA (via the CEC Symposium and the CEC Environmental Framework). Tools are also in place to improve the overall CEC submission process and address issues arising from NAAEC Articles 14 and 15 (via the JPAC public review process).

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277. One commentator has suggested that a "blue sky" (less constrained?) organization might now be needed.

278. Other Symposium "Next Step" questions included (1)What kind of CEC focus is required to work within its own budget constraints? (2) What can be done to provide more funding for the infrastructure upgrades that are necessary to protect the environment? (3) How do we better balance public and private interests? (4) Can we focus on "Why the CEC is working?" rather than "Why the CEC is not working?" and (5) how can we parse economic and environmental protectionism?

Given that reviews could be implemented to determine whether this process itself is being followed (perhaps this type of review could be done at the newly-formed CEC Symposium or some other meeting done at appropriate frequencies), this could lead to a consistent level of environmental protection constrained by at least two major limitations.

One limitation discussed previously is that the primary objective of the NAAEC is not to protect the environment, but to maximize the enforcement of environmental regulations. This objective creates an inherent discrepancy between the CEC's quest posed by this question to protect the environment, and the NAAEC's fundamental design.

Secondly, the weak enforcement tools established by the NAAEC available to the CEC are misaligned to handle environmental harm because of this discrepancy. Therefore, in summary, the overall CEC process could be optimized to identify NAFTA effects on the environment, and to set in place a process improvement mechanism that would protect the environment only so far. However, the CEC does not have adequate powers to initiate the changes within the domain of the NAFTA parties that could most effectively be used to protect the environment.

2. How do we move from studies to policy?

Comments: The CEC was not established to create policy. Therefore, perhaps the better question is "How can we move from studies to influencing policy?" One school of thought is that since the NAFTA studies provide some evidence of environmental damage, policy changes must be made now to stop future harm that could be irreversible.

Alternatively, another school of thought is that this first round of CEC studies is not conclusive enough, and provides little evidence of the extent of many of these environmental problems. Therefore, it is best to wait until more conclusive evidence is gathered.

Since the CEC has no policy-making authority, it must play the role of an effective advocate. In the author's view, the CEC needs to continue to produce consistent, scientific, and reliable environmental studies, along with objective, environmentally sensitive, non-political, and conclusion-drawing factual records, to most effectively influence the NAFTA parties to make the necessary environmental policy changes identified by the CEC in order to optimize the protection of the environment.

The complexity of the issues discussed in this paper illustrates more than anything else that perhaps the most important ingredient required to solve the NAFTA environmental dilemma will be the continued cooperation and support of the NAFTA parties and citizens themselves. But even more importantly, environmentally focused regional and global cooperation will be required to save this earth for the living creatures and human beings yet to be born.

Some wise words still resonate to this day from Job 12:8, even though they were written thousands of years ago – that we must forever "Speak to the earth, and it will teach thee." With the destiny of the environment in our hands, man continues to speak loudly and profoundly with positive and negative deeds that reflect upon our environment. But regardless of which avenue of respect for Mother Nature we choose to take, the earth will ultimately teach us all lessons that we, as human beings, may or may not be able to endure.