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### Evaluating NAFTA and the Commission for Environmental Cooperation: Lessons for Integrating Trade and Environment in Free Trade Agreements

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**EVALUATING NAFTA AND THE COMMISSION FOR ENVIRONMENTAL COOPERATION: LESSONS FOR INTEGRATING TRADE AND ENVIRONMENT IN FREE TRADE AGREEMENTS**

CHRIS WOLD\*

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I. INTRODUCTION

In 1991, a dispute settlement panel of the General Agreement on Tariffs and Trade (GATT)<sup>1</sup> concluded that U.S. restrictions on the importation of tuna caught by encircling dolphins<sup>2</sup> violated the GATT’s prohibition against import

1. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, reprinted in BASIC INSTRUMENTS AND SELECTED DOCUMENTS [BISD] 4th Supp. 1 (1969) [hereinafter GATT 1947]. During the negotiations that established the World Trade Organization (WTO), GATT 1947 was amended to replace the phrase “Contracting Parties” with “Members.” It is now known as GATT 1994. General Agreement on Tariffs and Trade—Multilateral Trade Negotiations (The Uruguay Round): Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Dec. 15, 1993, (The Uruguay Round) Doc. MTN/FA, 33 I.L.M. 1 (1994).

2. In the 1970s, more than 400,000 dolphins were dying in tuna nets each year in the Eastern Tropical Pacific Ocean (ETP). As a consequence, the United States took action to stop this mortality under the U.S. Marine Mammal Protection Act (MMPA). 16 U.S.C. § 1361 (2000) *et seq.* The MMPA prohibits the “taking” (harassment, hunting, capture, killing, or attempt thereof) and importation into the United States of marine mammals, except where an exception is explicitly authorized. In addition, it seeks to reduce the incidental kill or serious injury of marine mammals in the course of commercial fishing to insignificant levels approaching zero. With regard to the ETP tuna fishery, Section 101(a)(2) of the MMPA authorizes limited incidental taking of marine mammals by United States fishermen in the course of commercial fishing pursuant to a permit issued by the National Marine Fisheries Service (NMFS), in conformity with and governed by certain statutory criteria in sections 103 and 104 and implementing regulations. At the time Mexico initiated a GATT dispute over these provisions in the late 1980s, only one such permit had been issued, to the American Tuna Boat Association, covering all domestic tuna

restrictions.<sup>3</sup> Not only did the Tuna/Dolphin dispute awaken environmentalists to the GATT, but it also galvanized them to try to influence the ongoing negotiations among Canada, Mexico and the United States over the North American Free Trade Agreement (NAFTA).<sup>4</sup>

Environmentalists ultimately succeeded in shaping the debate over how NAFTA should address the impacts of trade on the environment. While Canada, Mexico and the United States did not reopen NAFTA to revise the substantive rules of trade liberalization, they did successfully negotiate and adopt an environmental side agreement formally known as the North American Agreement on Environmental Cooperation (NAAEC).<sup>5</sup> Two underlying concerns animate the NAAEC. First, environmentalists believed NAFTA would have competitiveness effects<sup>6</sup>—that Mexico's relatively weak enforcement of environmental laws would increase environmentally harmful investment in Mexico, thereby creating pollution havens. Second, environmentalists worried that trade liberalization generally might impair the environment not only in Mexico but throughout North America.

As a consequence, the NAAEC's provisions center on mitigating these two concerns. To support capacity building in Mexico specifically and to foster

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fishing operations in the ETP. Under the general permit issued to this Association, no more than 20,500 dolphins could be incidentally killed or injured each year by the U.S. fleet fishing in the ETP. Within this dolphin mortality limit, no more than 250 could be coastal spotted dolphins (*Stenella attenuata*) and no more than 2,750 could be Eastern spinner dolphins (*Stenella longirostris*). Also at the time of the dispute, Section 101(a)(2) of the MMPA banned the importation of commercial fish or fish products caught with commercial fishing technology that results in the incidental kill or incidental serious injury of ocean mammals in excess of U.S. standards. It specifically prohibited the importation of yellowfin tuna harvested with purse-seine nets in the ETP unless the Secretary of Commerce certified that (1) the government of the harvesting country has a program regulating the taking of marine mammals that is comparable to that of the United States, and (2) the average rate of incidental taking of marine mammals by vessels of the harvesting nation is comparable to, but must not exceed 1.25 times, the average rate of such taking by U.S. vessels during the same period.

3. Report of the Panel, *United States—Restrictions on Imports of Tuna*, GATT, DS21/R (Sept. 3, 1991) (unadopted), reprinted in 30 I.L.M. 1594 (1991) (*Tuna/Dolphin I*). In a later dispute, a panel ruled that U.S. restrictions on tuna imported from countries that had previously imported tuna from countries that caught tuna by encircling dolphins also violated Article XI of the GATT. Report of the Panel, *United States—Restrictions on Imports of Tuna*, GATT, DS29/R (June 16, 1994) (unadopted), reprinted in 33 I.L.M. 839 (1994) (*Tuna/Dolphin II*).

4. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 296 (1993), 32 I.L.M. 605 (1993), reprinted in *International Legal Materials* 32:296, 32:605 (1993) [hereinafter NAFTA]. NAFTA was implemented in the United States through Pub. L. No. 103-182, 107 Stat. 2057 (1993).

5. North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., Sept. 14, 1993, 32 I.L.M. 1480 [hereinafter NAAEC]. The NAAEC is not technically an international treaty, which required Senate ratification. Instead, it was enacted through an Executive Order of the President. Exec. Order No. 12,915, 59 Fed. Reg. 25,775 (May 18, 1994).

6. For a more complete discussion of competitiveness effects, see *infra* Section II.A.

protection of the entire North American environment, the NAAEC encourages cooperation among the Parties. It does so principally by creating a new international institution, the Commission for Environmental Cooperation (CEC), designed not only to address trade-environment linkages but also to coordinate environmental policy throughout North America.<sup>7</sup> It also establishes a Secretariat to help the Parties implement a cooperative environmental work program.<sup>8</sup> The Secretariat also has independent authority to prepare reports on matters within the scope of the cooperative work program without the need for governmental approval.<sup>9</sup> To prevent competitiveness effects, the NAAEC requires Parties to ensure high levels of environmental protection and to effectively enforce their environmental laws.<sup>10</sup> The Secretariat also has the duty to investigate citizen allegations that a Party is failing to effectively enforce environmental law.<sup>11</sup> The NAAEC also includes a government process that envisages sanctions against a Party for a “persistent failure” to enforce environmental law effectively.<sup>12</sup> As the first agreement to address environmental issues within the context of a trade agreement, the NAAEC has been widely hailed as innovative.<sup>13</sup>

This initial achievement to include environmental provisions as part of a free trade agreement, however, has masked the NAAEC’s relatively modest achievements and impaired the creation of more suitable institutions and mechanisms to address trade-environment linkages based on the lessons learned from the NAAEC. First, the NAAEC’s cooperative program has achieved some compelling environmental successes, such as providing substantial training to Mexican environmental officials and eliminating the use of dangerous pesticides, including chlordane and DDT.<sup>14</sup> Nonetheless, the CEC remains woefully underfunded at \$9 million per triennium, limiting cooperation among the Parties. Second, due to the focus on competitiveness effects, the NAAEC has fallen short of addressing more pressing trade-environment issues, particularly scale effects, which are the environmental

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7. NAAEC, *supra* note 5, art.10.

8. *Id.* arts. 11(5)–(6).

9. *Id.* art. 13.

10. *Id.* arts. 3, 5.

11. *Id.* arts. 14–15.

12. NAAEC, *supra* note 5, arts. 22–36.

13. *See, e.g.*, John H. Knox & David L. Markell, *The Innovative North American Commission for Environmental Cooperation*, in *GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION 2* (David L. Markell & John H. Knox, eds., 2003) (“[The NAAEC] has innovative tools and almost unlimited jurisdiction to address regional environmental problems. And it provides unprecedented opportunities for participation by civil society.”).

14. *See infra* Section III.B.

impacts resulting from trade liberalization.<sup>15</sup> In fact, whereas the work of the CEC and others subsequent to the entry into force of the NAAEC has shown relatively few competitiveness effects, it has shown scale effects, such as large increases in pollution from agricultural operations or increased use of forestry resources, from trade agreements.<sup>16</sup> In addition, the NAAEC's inherent structural flaws have limited its effectiveness in implementing both its cooperative and enforcement mandates. For example, the citizen submission process has become extremely adversarial, with governments whittling away at the Secretariat's discretion to make decisions concerning the scope and eligibility of submissions.<sup>17</sup> These flaws have led one observer to see some aspects of the NAAEC as "a cautionary tale counseling against simplistic adoption of the NAFTA environmental side agreement and its submission process as an equivalent environmental counterpart" in future trade agreements.<sup>18</sup>

Despite the lessons that could be learned from the NAAEC, the United States has negotiated subsequent free trade agreements (FTAs),<sup>19</sup> such as the Dominican Republic-Central America-United States Free Trade Agreement (DR-CAFTA)<sup>20</sup> and the free trade agreements with Colombia<sup>21</sup> and Peru,<sup>22</sup>

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15. For a more complete discussion of scale effects, see *infra* Section II(A)(2).

16. See *infra* Section III.A.

17. See Chris Wold et al., *The Inadequacy of the Citizen Submission Process of Articles 14 & 15 of the North American Agreement on Environmental Cooperation*, 26 LOY. L.A. INT'L & COMP. L. REV. 415 (2004). See also Geoff Garver, *Tooth Decay*, 25 ENVTL F. 34 (2008).

18. Tseming Yang, *The Effectiveness of the NAFTA Environmental Side Agreement's Citizen Submission Process: A Case Study of Metales y Derivados*, 76 U. COLO. L. REV. 443, 445 (2005) (making his comment in the context of the *Metales y Derivados* citizen submission process.) I have liberally embraced his comment to refer to the NAAEC more broadly.

19. Since NAFTA, the United States has completed bilateral or regional FTAs with Australia, Bahrain, Chile, Jordan, Morocco, Singapore, and, taken together under DR-CAFTA, the Dominican Republic, Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua. Two other FTAs, with Peru and Oman, have been approved by Congress but require implementing legislation. The United States previously negotiated an FTA with Israel. In addition, the United States has completed negotiations with Colombia, Panama and Korea, but is waiting for congressional approval of those agreements. The USTR is further negotiating FTAs with Malaysia, the Southern African Customs Union (Botswana, Lesotho, Namibia, South Africa and Swaziland), Thailand and the United Arab Emirates. See U.S. Trade Representative, *Bilateral Trade Agreements*, [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html) (last visited Oct. 30, 2008).

20. Central America-Dominican Republic-United States Free Trade Agreement, Aug. 5, 2004, available at [http://www.ustr.gov/Trade\\_Agreements/Regional/CAFTA/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Regional/CAFTA/Section_Index.html) [hereinafter DR-CAFTA].

21. U.S.-Colombia Trade Promotion Agreement, U.S.-Colom., Nov. 22, 2006 (not yet in force), available at [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Colombia\\_FTA/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Colombia_FTA/Section_Index.html) [hereinafter U.S.-Colombia FTA].

without having evaluated the strengths and weaknesses of the NAAEC or the valuable contributions of the CEC to understanding competitiveness effects.<sup>23</sup> In fact, these subsequent FTAs adopt the NAAEC's least relevant aspect—its enforcement focus—rather than embracing the more relevant focus on preventing scale effects. At the same time, subsequent FTAs eliminate the most useful aspects of the NAAEC. For example, instead of mending the inherent structural problems that allow the Parties to change the scope and nature of a citizen submission concerning its own enforcement failure, subsequent FTAs either eliminate the citizen submission process altogether or sharply curtail the independence of the Secretariat. In addition, no subsequent FTA grants a Secretariat the independence given the NAAEC's Secretariat to prepare reports without governmental approval. No subsequent FTA includes an advisory committee similar to the NAAEC's Joint Public Advisory Committee to provide oversight and advice to the Parties. Overall, subsequent FTAs reflect the efforts of the United States to eliminate independent assessment of trade-environment issues and oversight of the Parties' work program as is now possible through the CEC.

To successfully integrate trade liberalization with environmental protection, future FTAs must diminish the focus on enforcement and reenvision the cooperative aspects of the NAAEC. Perhaps of most importance, FTAs must individualize the environmental needs of trading partners, particularly with respect to scale effects, *before* implementing an FTA. The consideration of environmental needs, including the need to strengthen relevant institutions, must precede implementation of the FTA because trade-based economic growth and its corresponding environmental harm generally outpace any efficiency gains<sup>24</sup> or the development of appropriate and effective environmental regulations.<sup>25</sup> One FTA, the U.S.-

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22. U.S.-Peru Trade Promotion Agreement, U.S.-Peru, April 12, 2006, (not yet in force), available at [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Peru\\_TPA/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Section_Index.html) [hereinafter U.S.-Peru FTA].

23. Accord Garver, *supra* note 17, at 39 (concluding that “[i]t is clear that environmental mechanisms in the NAFTA package have not met their promise or potential, and yet they are being duplicated with little analysis or meaningful modification”).

24. CEC Secretariat, *Understanding and Anticipating Environmental Change in North America: Building Blocks for Better Public Policy* 3 (2003) (“Strong evidence now exists of some decoupling between economic growth and environmental degradation. However, the North American economy and trade flows between NAFTA partners have been growing so rapidly that the increases in scale have tended to overwhelm the efficiency gains resulting from decoupling factors.”).

25. Scott Vaughan, *The Greenest Trade Agreement Ever?: Measuring the Environmental Impacts of Agricultural Liberalization*, in CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, NAFTA'S PROMISE AND REALITY: LESSONS FROM MEXICO FOR THE HEMISPHERE 61, 67 (2004) [hereinafter NAFTA'S PROMISE AND REALITY]. Vaughan assessed the environmental impacts of NAFTA on a number of agricultural sectors in Mexico, including maize, wheat, and fruit and

Peru FTA, begins the process of reenvisioning the trade-and-environment relationship. Because it is well known that Peru has extremely valuable timber resources and woefully inadequate management and enforcement capacity in the forestry sector, the FTA specifically requires Peru to, among other things, increase the number and effectiveness of personnel devoted to managing Peru's forestry laws and enforcing Peru's laws, regulations and other measures relating to the harvest of, and trade in, timber products.<sup>26</sup> Not only do these provisions address scale effects specific to Peru, but they also attempt to address the institutional shortcomings affecting those scale effects. Until governments begin to incorporate scale effects and to individualize the environmental provisions in an FTA to the specific needs of the trading partners, FTAs will provide empty promises that trade liberalization can be successfully integrated with environmental protection.

This article assesses the failure to incorporate the lessons learned from the NAAEC in subsequent U.S. FTAs and reenvision the trade-environment relationship. Section II explores how concerns about specific trade-environment effects led to the adoption of the NAAEC's focus on enforcement. Section III analyzes the strengths and weaknesses of the NAAEC. Section IV summarizes the environmental provisions of FTAs negotiated since the NAAEC and describes why these provisions will not provide significant environmental benefits or further our understanding of trade-environment effects. Section V provides recommendations for shifting the focus from competitiveness effects to scale effects in future FTAs, reviewing in particular the unique provisions of the U.S.-Peru FTA. It also includes proposals for more positive engagement of civil society through a citizen submission process designed to deflect government hostility toward more collaborative and positive environmental outcomes. Section VI concludes that the environmental benefits of trade agreements will continue to

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vegetables, and found environmental laws and institutions inadequate to address the environmental impacts associated with increased economic growth. Moreover, studies have shown that NAFTA has increased income disparities within Mexico, particularly in rural communities, and has led to sharp reductions in employment, particularly in the agricultural sector. As a consequence, economists and others have called for policies that anticipate the adverse effects of market liberalization. Sandra Polaski, *Jobs, Wages, and Household Income, in NAFTA'S PROMISE AND REALITY*, *supra*, at 11, 12 (concluding that employment in the Mexican agriculture has "declined sharply" due to NAFTA and the "rural poor have borne the brunt of adjustment to NAFTA and have been forced to adapt without adequate government support"). See also J. EDWARD TAYLOR, *TRADE INTEGRATION AND RURAL ECONOMIES IN LESS DEVELOPED COUNTRIES: LESSONS FROM MICRO ECONOMY-WIDE MODELS WITH PARTICULAR ATTENTION TO MEXICO AND CENTRAL AMERICA 1* (2002) (concluding that "high transaction costs and lack of access to capital and new product markets exclude poor rural households from many benefits of trade liberalization and may exacerbate poverty in the wake of trade reforms").

26. U.S.-Peru FTA, *supra* note 22, Annex 18.3.4, ¶¶ 3(a), (g). For more on the environmental provisions of U.S.-Peru FTA, see *infra* Section V.B.



be small if the United States continues to use the NAAEC as a model. Nonetheless, a focus on scale effects could be fashioned from existing efforts implemented under the environmental cooperative work programs, with the important caveat that much of these efforts must occur prior to implementation of the FTA, not after it.

## II. THE DEVELOPMENT OF ENVIRONMENT PROVISIONS IN THE NAAEC

Not only did the Tuna/Dolphin dispute awaken environmentalists to the potential environmental effects of trade liberalization, but it also spawned a critical analysis of trade-environment linkages. These linkages became central to the debate over how to integrate environmental protection into NAFTA and helped to shape the institutions incorporated into the NAAEC. Section A describes the different environmental effects of trade—regulatory, competitiveness and scale effects. Section B briefly summarizes the NAFTA negotiations before Section C describes how NAFTA's anticipated effects shaped the provisions and institutions of the NAAEC.

### A. *The Environmental Effects of Trade Liberalization*

*Regulatory effects* “concern the way international trade law restrains government policy choices and substantially impairs the regulatory authority of governments to protect national health and the environment and to secure effective protection of the global environment.”<sup>27</sup> In the absence of environmental provisions in an FTA, international trade rules may, in fact, limit national, or even international, regulatory options for protection of the national environment.<sup>28</sup> The Tuna/Dolphin dispute, in which a GATT panel ruled that U.S. efforts to limit its market to tuna caught using specific “dolphin-friendly” techniques violated GATT rules, is an example of regulatory effects. According to environmentalists, such regulatory effects undermine environmental protection because trade restrictions should be available as a regulatory policy tool “as leverage to promote worldwide environmental protection, particularly to address global or transboundary environmental problems and to reinforce environmental agreements.”<sup>29</sup> Environmentalists have been able to use the Tuna/Dolphin dispute and a small number of other high profile international trade challenges to environmental

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27. CHRIS WOLD, SANFORD GAINES & GREG BLOCK, *TRADE AND THE ENVIRONMENT: LAW AND POLICY* 7 (2005).

28. *Id.* See also, DANIEL C. ESTY, *GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE* 42 (1992) (stating that trade agreements “can be used to override environmental regulations unless appropriate environmental provisions are built into the structure of the trade system”).

29. ESTY, *supra* note 28, at 42.

laws to press for provisions in FTAs to reduce regulatory effects.<sup>30</sup> On the other hand, free trade proponents argue that trade agreements have a positive regulatory effect “by helping eliminate environmentally harmful subsidies and by facilitating transfer of pollution control technology.”<sup>31</sup> Moreover, trade restrictions, especially unilateral ones, “often impose unfair economic burdens for environmental protection on developing countries.”<sup>32</sup>

While regulatory effects played an important role in triggering the NAAEC negotiations, the NAAEC is actually silent on the issue. In contrast, *competitiveness effects* have a much more prominent role in the NAAEC. Competitiveness effects “concern differences across countries in their national environmental standards and whether those differences impair the ability of firms in high-standards countries to compete with firms in low-standard countries.”<sup>33</sup> According to some environmentalists, “[e]ven if the pollution they cause does not spill over onto other nations, countries with lax environmental standards may have a competitive advantage in the global marketplace and put pressure on countries with high environmental standards to reduce the rigor of their environmental requirements.”<sup>34</sup> This is known as the “race to the bottom.” In addition, environmentalists worry that investment will flow to areas with low environmental standards or weak enforcement of environmental standards, creating “pollution havens.” For trade proponents, however, competitiveness effects are not a legitimate argument against liberalized trade because differences in national environmental standards are

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30. A review of these cases yields decidedly mixed results as to whether trade law prevented the accomplishment of the environmental objective. In *Tuna/Dolphin*, for example, the United States did in fact impose discriminatory measures on Mexican fishermen that were unnecessary from an environmental perspective. Although Mexican fishermen could kill 25% more dolphins than U.S. fishermen in the Eastern Tropical Pacific yellowfin tuna fishery, they could kill only 25% more than the number of dolphins actually killed by U.S. fishermen. Thus, the fishermen cannot know until the end of the season whether their dolphin mortality was consistent with U.S. restrictions. Imposing a quota would have been a much more sensible approach from a trade perspective and an environmental perspective, provided that the quota bore some relationship to dolphin needs. In *United States—Reformulated Gasoline*, the U.S. Congress prevented the EPA from implementing nondiscriminatory rules for ascertaining pollutant levels in domestic and foreign gasoline. Congress directed the EPA to impose stricter requirements on foreign producers. Naturally, a WTO panel found these discriminatory requirements inconsistent with Article III of the General Agreement on Tariffs and Trade, which requires WTO members to treat imported products “no less favorably” than domestic products. Panel Report, *United States—Standards for Reformulated and Conventional Gasoline Report of the Panel*, WT/DS2/R (Jan. 29, 1996), (adopted May 20, 1996), reprinted in 35 I.L.M. 276 (1996).

31. See Jagdish Bhagwati, *Trade and Environment: The False Conflict?*, in *TRADE AND THE ENVIRONMENT: LAW, ECONOMICS, AND POLICY* 159, 162–163 (Durwood Zaelke et al., eds., 1993).

32. *Id.*

33. WOLD, GAINES & BLOCK, *supra* note 27, at 7.

34. *Id.*

justified as an expression of a country's environmental conditions and its priorities and preferences.<sup>35</sup> For example, while Americans may prefer conservation of dolphins and other marine mammals, regardless of their conservation status, others may view them as a culturally important food source.

Despite the arguments of free trade proponents, competitiveness and enforcement concerns played a central role in framing the NAFTA and NAAEC negotiations because of the presence of *maquiladoras* along the U.S.-Mexico border. At the time of these negotiations, it was widely acknowledged that *maquiladoras*<sup>36</sup> on the Mexican side of the U.S.-Mexico border had caused extraordinary pollution. While it cannot be said that *maquiladoras* polluted the *entire* border region,<sup>37</sup> they had turned some areas into “a virtual cesspool and breeding ground for infectious diseases.”<sup>38</sup> Because the *maquiladoras* operated consistently with free trade principles—they are allowed to import tariff-free raw materials and export finished products without paying export tariffs<sup>39</sup>—

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35. Bhagwati, *supra* note 31, at 166–67.

36. “*Maquiladoras*” are a creation of Mexican law. They may be jointly owned by foreign and Mexican corporations, wholly-owned Mexican firms, or wholly-owned subsidiaries of foreign firms—Japanese, Korean, Dutch, etc., as well as U.S. or Canadian companies. Originally, *maquiladoras* needed to be located along the 2,000-mile United States-Mexico border, but that requirement was eliminated many years ago. *Maquiladoras* can now be found in many interior locations in Mexico. Under Mexican law, these factories may import raw materials or components tariff-free from U.S. and other suppliers. In many cases, these semi-finished products may be shipped back to other countries, such as the United States, for sale, again tariff-free. One Mexican business website describes a *maquiladora* as follows:

A maquila program entitles the company, first, to foreign investment participation in the capital—and in management—of up to 100% without need of any special authorization; second, it entitles the company to special customs treatment, allowing duty free temporary import of machinery, equipment, parts and materials, and administrative equipment such as computers, and communications devices, subject only to posting a bond guaranteeing that such goods will not remain in Mexico permanently.

Mexico Data On-Line, *What is a Maquiladora? Manufacturing In Mexico: The Mexican In-Bond (Maquila) Program*, Feb. 16, 2007, <http://www.mexconnect.com/business/mex2000maquiladora2.html>.

37. That *maquiladoras* have created substantial local air and water pollution and contamination of soil with hazardous wastes is undisputed, but this pollution has occurred largely in urban areas. It is inaccurate to say, as some have, that the *maquiladoras* have contaminated the entire border region. After all, the border region includes Big Bend National Park (in Texas) in addition to many state parks and vast, unpopulated areas of desert and mountains.

38. Michael Satchell, *Poisoning the Border*, U.S. NEWS & WORLD REPORT, May 6, 1991, at 32, 34 (quoting American Medical Association report). See also Knox & Markell, *supra* note 13, at 3 (noting that “the *maquiladoras* had overwhelmed local facilities for providing clean water and treating waste”).

39. For example, wastes generated by *maquiladora* facilities from raw materials imported in-bond from the United States are considered to be U.S.-generated and must be “exported” back to the United States for disposal. Agreement Between the United States of America and the

these serious environmental impacts became a central NAFTA negotiation issue. Indeed, environmentalists capitalized on this point to argue that NAFTA would lead to additional pollution havens in Mexico, that Mexico already had weak environmental laws and would use those laws to attract businesses from Canada and the United States, and, more generally, that NAFTA's trade liberalizing effects would increase the depletion of natural resources in North America by reducing costs of production.<sup>40</sup>

Due to this criticism, the United States undertook an analysis of Mexico's environmental laws. On closer inspection, Mexico, it was learned, had environmental standards equivalent to, and in some circumstances stricter than, U.S. standards.<sup>41</sup> What accounted then for the deplorable conditions near many *maquiladoras*? According to another analysis, Mexico's enforcement of environmental laws was weak and crippled by inadequate allocation of resources.<sup>42</sup> As a consequence, environmental enforcement became a major focus of the NAAEC.

The allure of the high-profile Tuna/Dolphin and *maquiladora* issues caused *scale and composition effects* to receive much less attention in the NAFTA/NAAEC negotiations.<sup>43</sup> Scale and composition effects "concern the growing scale of international trade and the composition of that trade, that is,

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United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area, U.S.-Mex., Annex III, Aug. 14, 1983 [hereinafter La Paz Agreement], available at <http://www.epa.gov/Border2012/docs/LaPazAgreement.pdf>. See also Sanford Gaines, *Bridges to a Better Environment: Building Cross-Border Institutions for Environmental Improvement in the U.S.-Mexico Border Area*, 12 ARIZ. J. INT'L & COMP. L. 429, 443 n.55 (1995).

40. For a history of the involvement of nongovernmental organizations in the negotiation of NAFTA and the NAAEC, including criticisms of trade liberalization, see PIERRE MARC JOHNSON & ANDRÉ BEAULIEU, *THE ENVIRONMENT AND NAFTA: UNDERSTANDING AND IMPLEMENTING THE NEW CONTINENTAL LAW* 24-34 (1996). See also Kal Raustiala, *The Political Implications of the Enforcement Provisions of the NAFTA Environmental Side Agreement: The CEC as a Model for Future Accords*, 25 ENVTL. L. 31 (1995).

41. The U.S. Government Accounting Office concluded that "Mexico's laws and regulations are in many respects comparable to U.S. laws and regulations and in some cases are even stricter." U.S. GOVT ACCOUNTING OFFICE, GAO/GGD-93-137, *NORTH AMERICAN FREE TRADE AGREEMENT: ASSESSMENT OF MAJOR ISSUES*, 115 (1993). See also U.S. GOVT ACCOUNTING OFFICE, GAO/NSIAD-91-227, *U.S.-MEXICO TRADE: INFORMATION ON ENVIRONMENTAL REGULATIONS AND ENFORCEMENT* (1991) (finding enforcement of Mexican environmental laws to be weak).

42. U.S. GOVT ACCOUNTING OFFICE, GAO/GGD-92-113, *U.S.-MEXICO TRADE: ASSESSMENT OF MEXICO'S ENVIRONMENTAL CONTROLS FOR NEW COMPANIES* (1992).

43. Scale and compositional effects were by no means ignored. The environmental review of NAFTA, for example, identified species loss and other possible effects of NAFTA. INTERAGENCY TASK FORCE COORDINATED BY THE OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, *REVIEW OF U.S.-MEXICO ENVIRONMENTAL ISSUES* (1992) (analyzing the effects of the potential NAFTA on the environment in both Mexico and the United States).

the particular mix of goods being traded.”<sup>44</sup> Although economists often consider scale and composition as two separate factors, each raises the question of sustainability and the size of the economy or specific economic sectors:

The overall scale of world economic activity raises significant challenges for all elements of environmental protection, from resource conservation to pollution control, and a substantial and growing fraction of that activity involves international trade. By the same token, the composition of trade significantly determines its environmental consequences. For example, trade in fish and in agricultural products has a bearing on fishing effort and land-use practices around the world. Trade in lumber and pulp and paper affects forest conservation and forest management in many countries. As two prominent economists once remarked, “While many nice things can be said about liberalizing and thus increasing trade, the structure of trade, as we know it at present, is a curse from the perspective of sustainable development.”<sup>45</sup>

For environmentalists, “[w]ithout environmental safeguards, trade may cause environmental harm by promoting economic growth that results in the unsustainable consumption of natural resources and waste production.”<sup>46</sup> While this criticism could apply to any kind of growth, not just trade-related growth, trade-based economic growth poses unique problems. As described more fully in Section IV.A.2, lowering trade barriers allows a rush of economic activity and quick exploitation of natural resources before ill-equipped regulatory bodies can adapt regulations and other infrastructure to the new circumstances. In such circumstances, any benefits from trade-led economic growth are outweighed by environmental harm.<sup>47</sup> For free trade proponents, such as Jagdish Bhagwati,<sup>48</sup> even though freer trade may lead to economic growth, growth can improve environmental conditions by altering social preferences for environmental protection and increasing economic resources available to spend on environmental enhancement measures.

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44. WOLD, GAINES & BLOCK, *supra* note 27, at 6.

45. *Id.* at 6–7. (citing T. Haavelmo & S. Hansen, *On the Strategy of Trying to Reduce Economic Inequality by Expanding the Scale of Human Activity*, in ENVIRONMENTALLY SUSTAINABLE ECONOMIC DEVELOPMENT: BUILDING ON BRUNDTLAND at 27, 34. (R. Goodland et al., eds., World Bank, 1991).

46. ESTY, *supra* note 28, at 42. Professor Esty did not necessarily advocate this point of view, but he was perhaps the first to analyze trade-environment linkages in a sophisticated way. As part of that analysis, he succinctly summarized the main arguments of environmentalists and free trade proponents. *See also* WOLD, GAINES & BLOCK, *supra* note 27, at 5–8; Greg Block, *Trade and Environment in the Western Hemisphere: Expanding the North American Agreement on Environmental Cooperation into the Americas*, 33 ENVTL. L. 501, 511–12 (2003).

47. *See infra* notes 114–123 and accompanying text.

48. Bhagwati, *supra* note 31, at 159.

### B. *The NAFTA/NAAEC Negotiations*

The negotiations to incorporate environmental provisions in NAFTA began with President George H. W. Bush. After reports concluded that Mexico allocated inadequate funds toward enforcement of its environmental standards, environmentalists and the U.S. government made a number of proposals to address enforcement concerns. Consistent with the standard remedy in trade disputes, most of these proposals included some form of trade sanctions for failures to enforce environmental law.<sup>49</sup> Many environmentalists also advocated for a powerful commission that could monitor and enforce environmental regulations of all three Parties and investigate allegations of noncompliance with environmental law brought to the commission's attention by governments or citizens.<sup>50</sup> Others sought a less robust commission that would instead provide a neutral forum for cooperation and coordination of environmental issues by the three Parties, facilitating implementation of NAFTA's environmental provisions and ensuring public participation.<sup>51</sup> These differences of opinion deeply split the environmental community, with a coalition of twenty-three environmental groups ultimately criticizing the approach of President Bush.<sup>52</sup> When Bill Clinton became president, the NAFTA negotiations had already been completed, but Congress had not yet adopted it. To win the support of environmentalists, he embarked on a more aggressive approach than the Bush administration.

Nevertheless, Mexico and Canada were not willing partners in these negotiations, and they certainly did not embrace reopening NAFTA itself or any of the options that included trade restrictions.<sup>53</sup> That left the U.S.

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49. For a thorough history of the NAFTA and NAAEC negotiations, see Robert F. Housman & Paul M. Orbuch, *Integrating Labor and Environmental Concerns into the North American Free Trade Agreement: A Look Back and a Look Ahead*, 8 AM. U. J. INT'L L. & POL'Y 719 (1993). See also Steve Charnovitz, *The NAFTA Environmental Side Agreement: Implications for Environmental Cooperation, Trade Policy, and American Treaty-making*, 8 TEMP. INT'L & COMP. L.J. 257, 257-259 (1994); Knox & Markell, *supra* note 13, at 3-9.

50. Letter from CIEL to Assistant Secretary of State for Oceans, International Environment & Scientific Affairs, Curtis Bohlen, (Nov. 18, 1992); Housman & Orbuch, *supra* note 49, at 791 (citing Letter from John Audley, Sierra Club, to Sanford Gaines, the Assistant U.S. Trade Representative (Oct. 16, 1992)). The Housman and Orbuch article provides an excellent history of the environmental negotiations.

51. Housman & Orbuch, *supra* note 49, 791-92 (citing Letter from USTR Carla Hills to Jay Hair, President, National Wildlife Federation (Sept. 29, 1992)).

52. *Id.* at 792 (noting that the organizations complained that the Administration's proposed Commission, as summarized by Housman and Orbuch, "would have too limited a scope, no enforcement powers, inadequate funding, and few, if any avenues for public participation either in the negotiations or in the procedures of the [commission] itself").

53. See, e.g., Robert Housman, Paul Orbuch, & William Snape, *Enforcement of Environmental Laws Under a Supplemental Agreement to the North American Free Trade*

administration in the middle, trying to appease U.S. environmental organizations while also trying to reach agreement with its NAFTA partners. In the end, Mexico and Canada conceded that some agreement relating to the environment was necessary to bring NAFTA's trade-liberalizing provisions into force. Similarly, the United States realized that it could not push Mexico and Canada too far and that some middle ground was necessary. These tensions gave rise to the NAAEC, a freestanding agreement separate from NAFTA.

### C. *The NAAEC's Environmental Provisions*

Despite the compromises needed to resolve tensions between the negotiating Parties, the NAAEC had the potential to transform the way we think about trade-environment issues. Its provisions and institutions were deemed "innovative"<sup>54</sup> and even "revolutionary."<sup>55</sup> Rather than focus solely on the effects of trade liberalization on the environment, the NAAEC includes a broader environmental mandate within the context of trade negotiations.<sup>56</sup> It pairs U.S. concerns about economic competitiveness with the broader goal of fostering the improvement of the North American environment.<sup>57</sup> It twines these two goals by seeking to protect and enhance the North American environment, including in the context of trade,<sup>58</sup> through cooperation and

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*Agreement*, 5 GEO. INT'L ENVTL. L. REV. 593, 613–619 (1993) (proposing a sanctions-based model proposed by the Center for International Environmental Law and Defenders of Wildlife).

54. Chris Wold et al., *supra* note 17, at 416. See Knox & Markell, *supra* note 13, at 2.

55. John J. Kirton, *Winning Together: The NAFTA Trade-Environment Record*, in LINKING TRADE, ENVIRONMENT, AND SOCIAL COHESION: NAFTA EXPERIENCES, GLOBAL CHALLENGES 73, 74 (John J. Kirton & Virginia W. MacLaren eds., 2002).

56. The NAAEC is almost entirely divorced from trade-related aspects of environmentalism. Article 10(6) requires the Council to "contribut[e] to the prevention or resolution of environment-related trade disputes" and "consider[] on an ongoing basis the environmental effects of the NAFTA." NAAEC, *supra* note 5, art. 10(6).

57. One assessment of the NAAEC, known as the Independent Review Committee (IRC), described the NAAEC as follows:

The IRC believes it is important to see the NAAEC as a complete agreement in its own right, and not just as a "side agreement" to a trade deal. In the Committee's view, the NAAEC is a critically important element to achieve the goal of sustainable development in North America. Moreover, the NAAEC is not just a trade and environment agreement in the technical or legal sense. Rather, the mandate of the CEC, as the Committee understands it, is more broadly defined as the protection and enhancement of the environment in North America in the context of changing economic patterns, including the relevant trade and environment issues. The long term value of the CEC will be measured by its fulfilment of this mandate.

Independent Review Committee, *Four-Year Review of the North American Agreement on Environmental Cooperation*, vii (1998), available at <http://www.cec.org>.

58. An early review of the NAAEC and the Commission for Environmental Cooperation specifically called on the CEC to make "trade and environment linkages part of the 'living

cooperative environmental programs. The NAAEC identifies a diverse array of potential cooperation,<sup>59</sup> “bound loosely by a broad conception of environment and, more practically, by the ability of the three countries to reach consensus on priorities and lines of action in its annual program of work.”<sup>60</sup>

The NAAEC’s origins in competitiveness concerns arising from weak enforcement are readily apparent, with each Party committing to ensure that its laws and regulations provide for “high levels” of environmental protection<sup>61</sup> and to “effectively enforce” its environmental laws through appropriate government action.<sup>62</sup> The NAAEC also requires Parties to ensure that administrative and judicial proceedings are transparent and available<sup>63</sup> and that appropriate sanctions and remedies are provided to compel enforcement with environmental law.<sup>64</sup> It further commits the Parties to ensure that its citizens have private access to remedies for violations of its environmental laws and regulations, and that persons with a “legally recognized interest” have access to courts and administrative bodies for the enforcement of a Party’s

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program’ of the CEC” by defining its trade-environment mandate to include “exploiting trade opportunities for environmental improvement and to ensuring that trade-related growth, particularly growth in production, does not impair the environment of any country.” *Id.* at xi, 6.

59. Article 10(2), for example, sets forth a nonexhaustive list of nineteen possible areas for the Parties to consider and develop recommendations, including: comparability of techniques and methodologies for data gathering and analysis; pollution prevention techniques and strategies; approaches and common indicators for reporting on the state of the environment; transboundary and border environmental issues; exotic species that may be harmful; the protection of threatened and endangered species; environmental matters as they relate to economic development; ecologically sensitive national accounts; ecolabeling; and “other matters as it may decide.” NAAEC, *supra* note 5, art. 10(2).

60. WOLD, GAINES & BLOCK, *supra* note 27, at 793. The overall tone of the NAAEC has been described as follows:

The NAAEC includes an odd mix of mandatory language (“shalls”) followed by words that often negate or weaken the obligation. For example, Article 3 requires that each Party “shall ensure that its laws and regulations provide for high levels of environmental protection and shall strive to continue to improve those laws and regulations.” Yet, Article 3 also grants each Party the right to establish its own levels of domestic environmental protection, and nowhere do the Parties define or establish threshold limits for “high levels.” Similarly, commitments are often qualified by “appropriate” or are framed in aspirational language such as “strive for,” “promote,” or “seek to.”

*Id.*

61. NAAEC, *supra* note 5, art. 3.

62. *Id.* art. 5 (noting that “appropriate governmental action” includes, among other things, appointing and training inspectors, publicly disclosing non-compliance information, promoting environmental audits, and initiating enforcement proceedings for violations of environmental law).

63. *Id.* art. 5(2).

64. *Id.* art. 5(3).



environmental laws and regulations.<sup>65</sup> Parties must also ensure that such proceedings are “fair, open, and equitable.”<sup>66</sup>

### 1. The NAAEC’s Institutions

To achieve its objectives and help the Parties implement its provisions, the NAAEC creates the CEC, a trilateral international institution, comprising a Council, Secretariat and Joint Public Advisory Committee (JPAC). The Council is the governing body of the CEC, headed by the cabinet-level environmental official of each country. As part of its duty to serve as a forum for promoting and facilitating cooperation between the Parties on environmental matters, the Council adopts a cooperative work program on a range of issues concerning the North American environment. Except for a few important exceptions, Council decisions are taken by consensus.<sup>67</sup> With an equal voice in governing its affairs, each NAFTA Party contributes an equal share to the CEC budget.<sup>68</sup>

The CEC Secretariat provides technical, administrative and operational support to the Council. It also possesses some autonomous investigatory and reporting authority, including the authority to prepare reports on matters within the scope of the work program.<sup>69</sup> The Secretariat’s unit on Submissions on Enforcement Matters processes citizen submissions on failures to effectively enforce environmental law and develop “factual records,” when approved by the Parties.<sup>70</sup>

The JPAC consists of fifteen individuals—five members from each country—appointed by the head of state in each country to advise the Parties on any matter within the scope of the NAAEC, to comment on the Secretariat’s work plan and to consult with the public in open meetings on aspects of the

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65. *Id.* art. 6.

66. NAAEC, *supra* note 5, art. 7.

67. The Council meets at least once a year in regular sessions which must include a public meeting. *Id.* art. 9(3).

In practice, these meetings routinely draw hundreds of stakeholders from the region and provide, among other things, an important opportunity for NGOs to establish and fortify regional networks on issues of regional concern. Council-appointed “alternative representatives,” government working groups, and several committees meet much more frequently throughout the year to address a wide array of issues ranging from implementation plans to voting on factual records.

WOLD, GAINES & BLOCK, *supra* note 27, at 794.

68. NAAEC, *supra* note 5, art. 43.

69. *Id.* art. 13(1). The Secretariat may also prepare reports on other matters, but it must notify the Council, which must approve the request by a two-thirds vote. *Id.*

70. *Id.* arts. 14–15. The Council must approve the preparation of a factual record by a two-thirds vote. *Id.* art. 15(2).

CEC=s program.<sup>71</sup> As noted by Professor John Wirth, a former JPAC member:

Not surprisingly, there has been friction at times between nongovernmental JPAC members and the deputy ministers and other federal officials who staff the Council, particularly over the rules and procedures for addressing citizen complaints over nonenforcement of environmental laws. In fact, a certain creative tension is built right into the JPAC's role. In the nearly eight years since it was constituted in 1994, JPAC has become an effective, visible and respected branch of the CEC. It continues to evolve as the CEC itself evolves as an institution.<sup>72</sup>

According to Professor Wirth, the JPAC has been successful, in part, due to its early decision to eschew national identities, instead choosing "to interact as North Americans rather than . . . as advocates or defenders of national positions or as representatives of any particular private voluntary organization or interest group."<sup>73</sup> This comment has particular resonance given the trend in subsequent FTAs to consolidate decisionmaking within governments.

## 2. The NAAEC's Enforcement Provisions

Two mechanisms underscore the NAAEC's emphasis on enforcement and competitiveness concerns. The NAAEC creates a procedure that allows a complaining Party to seek the imposition of a monetary assessment if a Party is found by a tribunal to have engaged in a "persistent pattern" of failure to enforce environmental law with potential competitiveness effects in the NAFTA region.<sup>74</sup> In addition, it establishes a citizen submission process that provides an avenue for groups or individuals to allege that a Party is failing to effectively enforce its environmental laws.<sup>75</sup> These mechanisms constitute the NAAEC's "teeth" in what otherwise would be solely a forum for regional environmental cooperation.

### a. The Government Sanctions Process

A Party initiates the "sanctions" process by requesting consultation to determine whether another Party is engaging in a "persistent pattern of failure to effectively enforce its environmental law,"<sup>76</sup> defined as "a sustained or recurring course of action or inaction beginning after the date of entry into

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71. *Id.* art. 16.

72. John D. Wirth, *Perspectives on the Joint Public Advisory Committee*, in GREENING NAFTA, *supra* note 13, at 199.

73. *Id.* at 201.

74. NAAEC, *supra* note 5, arts. 22–36.

75. *Id.* arts. 14–15.

76. *Id.* art. 22.

force of this agreement.”<sup>77</sup> When these consultations fail to resolve the matter and the dispute concerns trade between the Parties, the Council may upon a two-thirds vote convene an arbitral panel to prepare a report with recommendations for better enforcement.<sup>78</sup> If the panel finds a persistent failure to enforce environmental law by a Party, the disputing Parties “may” agree on a “mutually satisfactory action plan, which normally shall conform to the determinations and recommendations of the panel.”<sup>79</sup> If the Parties cannot agree on a plan or there is disagreement over implementation of a plan, any disputing Party may petition to reconvene the panel, which may impose a plan on the Parties.<sup>80</sup> If the panel concludes that a Party is not fully implementing the plan, it may impose a monetary penalty not to exceed .007% of total trade between the Parties.<sup>81</sup> If a Party fails to pay, the other Party in the dispute may suspend NAFTA benefits in an amount not to exceed the monetary assessment.<sup>82</sup>

The process includes an odd twist: instead of paying damages to the Party harmed by the failure to enforce, the Party failing to enforce its environmental law ultimately receives the penalty money. After the Party pays the penalty to CEC,<sup>83</sup> the Council expends the money “to improve or enhance the environment or environmental law enforcement in the Party complained against.”<sup>84</sup>

To date, no Party has initiated consultations or even threatened to do so. Nonetheless:

[T]he sanctions provisions cast a long shadow over the cooperative nature of the NAAEC and arguably have made the Parties hypersensitive to the citizen submission procedure for fear that an issue raised by a citizen could later become the subject of the more consequential governmental sanctions process. Ironically, this has become the most visible provision in the U.S. government’s FTAA negotiations, even as many of the NGOs who supported the idea have quietly distanced themselves from sanctions, instead calling for greater incentive-based mechanisms to improve environmental protection and enforcement in developing countries.<sup>85</sup>

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77. *Id.* art. 45.

78. *Id.* art. 24.

79. NAAEC, *supra* note 5, art. 33.

80. *Id.* art. 34.

81. *Id.* art. 34(5), Annex 34.

82. *Id.* art. 36.

83. *Id.* Annex 34.3.

84. NAAEC, *supra* note 5, Annex 34.3.

85. WOLD, GAINES & BLOCK, *supra* note 27, at 796.

b. The Citizen Submission Process

The NAAEC allows nongovernmental organizations or individuals to file submissions with the Secretariat alleging that Canada, Mexico or the United States “is failing to effectively enforce its environmental law.”<sup>86</sup> Assuming that the submitter meets some basic eligibility requirements,<sup>87</sup> the Secretariat has discretion to request a response to the submission from the Party “against” whom the submission is directed. If the Secretariat believes that a response is unnecessary, the matter is closed; the submitter cannot appeal this decision. In deciding whether a Party should prepare a response, the Secretariat considers whether the submission alleges harm to the person or organization making the submission; whether the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of the NAAEC; whether private remedies available under the Party’s law have been pursued,<sup>88</sup> and whether the submission is drawn exclusively from mass media reports.<sup>89</sup>

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86. NAAEC, *supra* note 5, art. 14(1).

87. The submitter, who must be a person or organization from one of the three NAAEC Parties, must provide sufficient information to allow the Secretariat to review the submission, demonstrate that it has communicated in writing with the relevant authorities concerning the matter of the petition, indicate the Party’s response, if any, write the submission in the language specified by that Party, clearly identify the organization or person submitting the petition, and aim the submission at enforcement—not at harassment—of industry. The Secretariat has discretion to reject the submission for failing to meet any of these requirements. The submitter has no mechanism to appeal the decision of the Secretariat. *Id.*

88. The NAAEC does not explicitly require a submitter to first pursue private remedies before a petition might be accepted for purposes of Article 14; it is merely something about which the defending Party may advise the Secretariat. The Secretariat, however, has refused to consider a submission because the submitters had not “diligently pursu[ed] local remedies between the time of the government’s adoption and implementation of [the law] and the date the submission was filed.” Commission for Environmental Cooperation, *Determination pursuant to Articles 14 & 15 of the North American Agreement on Environmental Cooperation*, at 3, A14/SEM/97-004/03/14(1) (May 26, 1997), available at <http://www.cec.org/files/pdf/sem/97-4-DET-E.pdf>.

89. NAAEC, *supra* note 5, art. 14(2), at 1488. In one of the first Article 14 petitions, the Secretariat concluded that the burden to show harm is substantially less for Article 14 petitions than for civil actions in many countries. Mexico, the responding Party, argued that submitters did not adequately allege harm to the members of their organizations. Nonetheless, the Secretariat ruled that the submitters met their burden:

In considering harm, the Secretariat notes the importance and character of the resource in question—a portion of the magnificent Paradise corral reef located in the Caribbean waters of Quintana Roo. While the Secretariat recognizes that the submitters may not have alleged the particularized, individual harm required to acquire legal standing to bring suit in some civil proceedings in North America, the especially public nature of marine resources bring the submitters within the spirit and intent of Article 14 of the NAAEC.

Commission for Environmental Cooperation, *Recommendation of the Secretariat to Council for the Development of a Factual Record in accordance with Articles 14 and 15 of the North*

If the Secretariat determines that a response from the “defendant” Party is necessary, the Party has thirty days to respond.<sup>90</sup> If the Party chooses to respond, it should state whether the matter is or was the subject of pending judicial or administrative proceedings, and whether private remedies are available.<sup>91</sup> Although the NAAEC only requires termination of a submission when a pending judicial or administrative proceeding has been initiated by the government, the Secretariat has refused to request permission from the Council to develop a factual record even when nongovernmental organizations have initiated proceedings concerning the same subject matter as the submission.<sup>92</sup>

The Secretariat has discretion to request authorization from the Council to prepare a factual record upon receiving a response from the Party.<sup>93</sup> Again, the Secretariat may determine that the response is sufficient and end the matter with no chance for the submitter to appeal. Nonetheless, if the Secretariat recommends to the Council that a factual record is warranted, the Council must approve the Secretariat’s recommendation by a two-thirds vote.<sup>94</sup> If the Council approves the recommendation to develop a factual record, the Secretariat may consider information that is publicly available or information submitted to it by interested persons, NGOs or the JPAC.<sup>95</sup> The Secretariat does not have the authority, however, to subpoena documents.<sup>96</sup> The factual

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*American Agreement on Environmental Cooperation (Cozumel)*, at 5, A14/SEM/96-001/07/ADV (June 7, 1996), available at <http://www.cec.org/files/pdf/sem/96-1-ADV-E.pdf>.

90. NAAEC, *supra* note 5, art. 14(3).

91. *Id.* The NAAEC defines “judicial or administrative proceeding” as “a domestic judicial, quasi-judicial or administrative action *pursued by the Party.*” *Id.* art. 45(3) (emphasis added).

92. See Commission for Environmental Cooperation, *Determination pursuant to Articles 14 & 15 of the North American Agreement on Environmental Cooperation (Oldman River I)*, A14/SEM/96-003/12/15(1) (Apr. 2, 1997), available at <http://www.cec.org/files/pdf/sem/96-3-DET-OE3.pdf> [hereinafter *Oldman River I—Article 15(1) Determination*]. Submitters in this case eventually abandoned the judicial proceedings and re-petitioned to the Secretariat a year later. The Friends of the Oldman River, *North American Agreement on Environmental Cooperation Article 14 Submission*, A14/SEM-97-006/01/SUB (Oct. 4, 1997) available at <http://www.cec.org/files/pdf/sem/97-6-SUB-E.pdf>. After reviewing the new submission, this petition, the Secretariat determined that a response from the Party was warranted. Commission for Environmental Cooperation, *Article 15(1) Notification to Council that Development of a Factual Record is Warranted (Oldman River II)*, A14/SEM-97-006/15/ADV (July 19, 1999), available at <http://www.cec.org/files/pdf/sem/97-6-ADV-E.pdf>.

93. NAAEC, *supra* note 5, art. 15(1).

94. *Id.* art. 15(2).

95. *Id.* art. 15(4).

96. The Secretariat must submit a draft factual record to the Council. Any Party has forty-five days to comment on the accuracy of the draft. Neither the Council nor the Secretariat is under an obligation to make the draft public, and the NAAEC does not expressly grant interested persons or NGOs the right to comment on the draft. The Secretariat must incorporate any comments of the Parties in the final factual record and submit it to the Council. The Council, by a two-thirds vote, may make public the factual record. *Id.* arts. 15(5) and (6).

record does not indicate whether there has been a failure to enforce environmental law or suggest ways that enforcement could be improved. Instead, by describing the facts of a submission and the government's response, the factual record shines a light on government action, which readers are free to interpret.

### 3. The Secretariat's Independent Functions

In addition to managing the citizen submission process, including the discretion to make various findings without Council oversight, the Secretariat also has independent authority to prepare reports—known as Article 13 reports—on environmental matters unrelated to enforcement issues.<sup>97</sup> If the report is included within the annual work program of the CEC, then the Secretariat does not need to seek Council approval before initiating its report. The Secretariat may also prepare reports “related to the cooperative functions” of the NAAEC unless the Council objects by a two-thirds vote.<sup>98</sup> At the time of the NAAEC negotiations, the Parties understood Article 13 as granting the Secretariat authority “to exercise its own professional judgment independent of the Council and the Parties.”<sup>99</sup>

## III. THE SUCCESSES AND FAILURES OF THE NAAEC

The CEC and its constituent bodies—the Council, JPAC and Secretariat—present an interesting and unique model for international institutions in areas touching on governance, accountability and transparency. While a governmental decisionmaking body is the norm in international institutions, a secretariat with limited independent authority and a citizen advisory body is unusual—convention secretariats generally provide only administrative support to governments. An international agreement with a citizen advisory

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97. *Id.* art. 13.

98. NAAEC, *supra* note 5, art. 13(1).

99. David A. Wirth, *The North American Commission for Environmental Cooperation's Implementation of Article 13 of the North American Agreement on Environmental Cooperation* (2005) (report prepared for North American Commission for Environmental Cooperation). John Knox, who was involved in the negotiations as an official with the Department of State, has written that the NAAEC “requires the Secretariat” to implement Article 13 “with little Council oversight.” Knox & Markell, *supra* note 13, at 12. Another person involved in the negotiations with the Environmental Protection Agency, Dan Magraw, concurred, noting that the “secretariat will have strong elements of independence” and that Article 13 involves “reporting on different types of topics . . . by the independent secretariat. Daniel Magraw, *NAFTA's Repercussions: Is Green Trade Possible?*, 36 ENVIRONMENT 14, 20 (Mar. 1994).

body like the JPAC<sup>100</sup> and a citizen submission process<sup>101</sup> are clearly the exception, not the rule.

Because of these innovations and its birth within the context of the NAFTA negotiations, the NAAEC has been subject to a number of reviews, including two contracted by the Parties themselves.<sup>102</sup> There is little doubt that the CEC has helped create a North American environmental agenda. At the same time, it is clear that the structural flaws of the NAAEC have prevented it from achieving a number of its goals. As a consequence, the CEC has struggled to meet the expectations arising from its unique structure and high-profile origins while also balancing its roles as regional facilitator, convener, statistician and watchdog.<sup>103</sup>

#### A. *The Environmental Effects of Trade*

The NAAEC has been particularly important for improving our understanding of the effects of trade on the environment. Not only has the CEC developed models for assessing those effects,<sup>104</sup> but it also has broadened our understanding of how to pursue trade-environment linkages. Nonetheless, the full scope of effects could not be ascertained because, the CEC concluded, the “lack of high-quality environmental data hampers analysis of trade-environment linkages.”<sup>105</sup> Significantly, this data is needed prior to adoption of an FTA in order to accurately assess the impacts of trade on the environment.

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100. While international environmental agreements usually allow citizens to attend meetings of the parties as “observers” and may make interventions during the course of the meeting, they do not have a formal advisory capacity as the JPAC does.

101. The World Bank and other multilateral development banks also have citizen submission processes.

102. The two reviews commissioned by the Parties are Ten-Year Review Committee, *Ten Years of the North American Agreement on Environmental Cooperation* (June 15, 2004) [hereinafter TRAC] and Independent Review Committee, *supra* note 57. Among the other reviews, see Greg Block, *supra* note 46 and Mary E. Kelly & Cyrus Reed, *The CEC's Trade and Environment Program: Cutting-Edge Analysis but Untapped Potential*, in GREENING NAFTA, *supra* note 13, at 101. See generally GREENING NAFTA, *supra* note 13.

103. See WOLD, GAINES & BLOCK, *supra* note 27, at 795.

104. The CEC has concluded that “no single or ‘best’ assessment method exists, and that a range of different approaches, models, indicators and means of building meaningful correlations between free trade and environmental change ought to be pursued simultaneously. Work thus far shows a sufficient empirical basis to suggest causality between trade liberalization and trade expansion, and changes in both environmental quality, and environmental policies.” Scott Vaughan & Greg Block, CEC Secretariat, *Free Trade and the Environment: The Picture Becomes Clearer* 31 (2002).

105. *Id.* at 26.

### 1. Competitiveness Effects

Despite the widespread belief that environmental conditions would worsen in Mexico as a result of NAFTA, the work of the CEC and others has shown that trade liberalization does not generally result in competitiveness effects; that is, liberalized trade does not lead to lax environmental standards, a race to the bottom, pollution havens or the migration of businesses to countries with lax environmental standards. In one study of competitiveness effects in the NAFTA region, researchers used three measures of environmental quality (per capita sulfur dioxide emissions, per capita toxic chemical releases and state compliance costs) and found “no evidence that border states altered the manner in which they determined their levels of environmental protection during the 1990s.”<sup>106</sup> In fact, they concluded that environmental conditions in North America actually improved in the run up to NAFTA’s adoption and continued thereafter.<sup>107</sup> Other studies of the effects of trade liberalization on particular sectors have also concluded that although differences in environmental standards “may have been a factor” leading some U.S. companies to relocate to Mexico, “in general, there is little evidence that large-scale shifts in industrial investment and relocation to pollution havens have occurred.”<sup>108</sup> As these studies have shown, companies do not migrate to take advantage of lax environmental standards because environmental compliance costs are, as a general rule, a small percentage of total operating costs.<sup>109</sup>

Companies do, in fact, relocate. However, they generally relocate for non-environmental reasons, such as market access and lower labor costs. With respect to relocation to Mexico, the U.S. Office of Technology Assessment concluded that “the border area, with its low labor costs, proximity to the

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106. G. Fredriksson & Daniel L. Millimet, *Is There a Race to the Bottom in Environmental Policies?: The Effects of NAFTA*, in CEC, *THE ENVIRONMENTAL EFFECTS OF FREE TRADE* 241, 245 (2002). See Claudia Schatan, *The Environmental Impact of Mexican Manufacturing Exports under NAFTA*, in GREENING NAFTA, *supra* note 13, at 147 (noting that Mexico increased foreign trade after NAFTA, but that [t]his increase in foreign trade . . . is not attributable to Mexico’s becoming a pollution haven” and that “Mexican trade trends do not suggest a shift of export specialization toward more polluting sectors after 1994”).

107. Fredriksson & Millimet, *supra* note 106, at 260.

108. U.S. CONGRESSIONAL OFFICE FOR TECHNOLOGY ASSESSMENT, *TRADE AND ENVIRONMENT: CONFLICTS AND OPPORTUNITIES*, OTA-BP-ITE-94, 40 (1992) (studying data concerning the manufacturing sector).

109. In the United States, pollution abatement costs are generally small compared to total operating costs. For example, pollution abatement costs for the tobacco products industry were just 0.12% of total costs; for the fabricated metals products, 0.42%; for petroleum and coal products, 1.93%; and for all industries evaluated, an average of 0.62%. Håkan Nordström & Scott Vaughan, *TRADE AND ENVIRONMENT* 37 (WTO Publications 1999), available at [http://www.wto.org/english/news\\_e/pres99\\_e/environment.pdf](http://www.wto.org/english/news_e/pres99_e/environment.pdf).



United States, and duty-free export processing zones, has attracted many U.S. firms over the years.”<sup>110</sup>

## 2. Scale Effects

As with competitiveness effects, the CEC has helped to improve our knowledge of scale effects. Not only has the CEC’s work focused attention on the type of information needed to evaluate scale effects, but it has also shown, along with others, important connections between trade and scale effects.

Concerning the type of information needed to evaluate scale effects, the CEC Secretariat has noted that large-scale, or “macro,” studies of the environmental effects of trade “are only partially useful.”<sup>111</sup> Although they may show “marginal” overall levels of environmental change at a global, continental or national level, they are unlikely to identify (and more likely to mask) environmental impacts in specific geographic locations. As a consequence, such macro studies must be “supported by more targeted and disaggregated indicators, including region-specific, environmental-media-specific, and sector-specific analysis.”<sup>112</sup>

These conclusions are extremely significant because even if trade liberalization has an overall positive environmental impact, it may result in substantial depletion of specific natural resources, such as fish or timber, or increases in air or water pollution in particular localities or in specific economic sectors. For example, NAFTA has led to increased water pollution from nitrogen loading in areas of intensive farming.<sup>113</sup>

Concerning actual scale effects, the work of the CEC has shown that the increased production, resource exploitation, transportation and energy needs that result from increased trade “pose serious challenges to environmental infrastructures and policy implementation.”<sup>114</sup> Studies have shown, for example, that in Mexico’s agricultural sector, “scale effects of trade-related shifts to large-scale agri-business operations have not been offset by improved technologies or stronger regulations.”<sup>115</sup> Overall, data show that in Mexico “environmental degradation has overwhelmed any benefits from trade-led economic growth.”<sup>116</sup>

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110. TRADE AND ENVIRONMENT: CONFLICTS AND OPPORTUNITIES, *supra* note 108, at 8.

111. Vaughan & Block, *supra* note 104, at 25–26.

112. *Id.* at 26.

113. Vaughan, *supra* note 25, at 73.

114. Vaughan & Block, *supra* note 104, at 26.

115. *Id.* See Vaughan, *supra* note 25, at 69–80.

116. Kevin P. Gallagher, *Free Trade and the Environment: Mexico, NAFTA, and Beyond*, 2 (Interhemispheric Resource Center, Sept. 17, 2004). See CEC Secretariat, *supra* note 24, at 21–22, 36 (describing the huge changes in demographics due to liberalization of the agricultural sector).

Moreover, contrary to the claims of trade proponents that trade will increase the demand for higher environmental standards, the CEC has found “little evidence to support the notion that greater revenues arising from trade expansion will be moved to bolster the resources of environmental authorities in order to address trade-related scale effects.”<sup>117</sup> In fact, the CEC found that “the speed with which trade and other kinds of liberalization are proceeding appear to be overwhelming the capacity of domestic regulators generally (in the financial as well as environmental spheres) to ensure robust oversight of the course and consequences of changes markets.”<sup>118</sup> Between 1988 and 1999, the period just before NAFTA when Mexico was liberalizing its markets and through the early years of NAFTA, Mexico’s GDP grew by thirty-eight percent.<sup>119</sup> Nonetheless:

rural soil erosion grew by 89 percent, municipal waste solid waste by 108 percent, water pollution by 29 percent, and air pollution by 97 percent. Disaggregating air pollution, sulfur dioxide grew by 42 percent, nitrous oxides by 65 percent, hydrocarbons by 104 percent, carbon monoxide by 105 percent, and particulate matter by 43 percent.<sup>120</sup>

These conclusions do not appear to be unique to NAFTA. Instead, a consensus is building that “increased trade and growth without appropriate environmental policies in place may have unwanted effects on the environment.”<sup>121</sup>

The importance of these conclusions from the NAFTA and NAAEC experience for future FTAs is clear: comprehensive and far-reaching environmental and development objectives “must be conceived of, and implemented, *before* agreeing to” liberalize trade.<sup>122</sup> Moreover, without substantial assistance, developing countries are unlikely to “develop the necessary environmental policies to steer trade-led growth in a sustainable manner.”<sup>123</sup>

### 3. Failures to Integrate Trade and Environmental Policies

The CEC has made clear progress in assessing the scale effects of free trade and articulating the rationale for ensuring that adequate policies are in place for anticipating and preventing such impacts. Nevertheless, governments

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117. Vaughan & Block, *supra* note 104, at 26.

118. *Id.*

119. Kevin P. Gallagher, *The CEC and Environmental Quality: Assessing the Mexican Experience*, in GREENING NAFTA, *supra* note 13, at 117, 119.

120. *Id.*

121. PER FREDRIKSSON, TRADE, GLOBAL POLICY, AND THE ENVIRONMENT 1 (1999).

122. Block, *supra* note 46, at 526.

123. Gallagher, *supra* note 119, at 125.

do not appear to be integrating trade and environmental policies as a result of such assessments.<sup>124</sup> According to the CEC:

To date, growth in trade has not been matched by a comparable growth in environmental protection policies. In some instances, evidence to the contrary (that environmental expenditures have been reduced in tandem with trade liberalization) has led to increased environmental stress. This is especially true in specific instances, such as absolute increases in economic scale and lagging investments in infrastructure, as well as in monitoring and enforcement. Among the most important challenges to the trade-environment debate is that of building opportunities for policy integration.<sup>125</sup>

*B. The Cooperative Work Program*

The incorporation of environmental considerations into NAFTA and NAAEC has clearly benefited the environment in both abstract and concrete ways. Some argue that NAFTA is partially responsible for “the spread of mass public environmental concern in the three NAFTA countries [which] has generated a growing demand for and thus a governmental supply of such regulations.”<sup>126</sup> While the United States has not seen more than relatively minor amendments to environmental law since the entry into force of NAFTA and NAAEC, Mexican environmentalists report that a citizen submission alleging the failure to enforce Mexico’s environmental impact assessment law in the construction of a pier in Cozumel had several environmental benefits, including the reform of Mexico’s environmental law.<sup>127</sup> In addition, the NAAEC has elevated issues typically thought of as strictly domestic matters, such as enforcement, to international matters.<sup>128</sup>

Moreover, the cooperative work program of the CEC has produced a number of strong environmental outcomes. The CEC’s work on toxic chemicals has perhaps been the most successful program. Through its North American Regional Action Plans (NARAPs), the three governments agree on strategies for managing chemicals. These NARAPs have successfully eliminated the use of chlordane and DDT,<sup>129</sup> two potent pesticides, throughout

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124. *Id.* at 27.

125. *Id.*

126. John J. Kirton, *supra* note 55, at 79.

127. Gustavo Alanís Ortega, *Public Participation within NAFTA’s Environmental Agreement: The Mexican Experienced*, in LINKING TRADE, ENVIRONMENT, AND SOCIAL COHESION: NAFTA EXPERIENCES, GLOBAL CHALLENGES 183, 184–185 (John J. Kirton & Virginia W. MacLaren eds., 2002).

128. John J. Kirton, *supra* note 55, at 79.

129. CEC North American Working Group for the Sound Management of Chemicals Task Force on DDT and Chlordane, *North American Regional Plan on DDT* (June 1997), available at [http://www.cec.org/programs\\_projects/pollutants\\_health/smoc/ddt.cfm?varlan=english](http://www.cec.org/programs_projects/pollutants_health/smoc/ddt.cfm?varlan=english).

North America. The CEC is developing other NARAPS to reduce the impact of mercury<sup>130</sup> and PCBs<sup>131</sup> on the environment.

In addition, the CEC has been instrumental in compiling comparable data from the Canadian, Mexican and U.S. Pollutant Release and Transfer Registries (PRTR) “to give a North American perspective of the amounts of chemicals released to the air, water, and land, and transferred off-site for recycling or other management.”<sup>132</sup> While the United States and Canada have had PRTRs for some time (the Toxics Release Inventory under the U.S. Emergency Planning and Community Right-to-Know Act<sup>133</sup>), only recently did Mexico finally mandate reporting of chemicals stored and released at specified facilities.

The CEC has also produced the North American Atlas, an online information tool with maps, data and interactive map layers that allows users to view environmental issues on a continental scale.<sup>134</sup> The atlas offers a consistent mapping framework for studying environmental issues, such as conservation planning, renewable energy capacity, pollution and other issues.

Despite these notable successes, the cooperative work program is currently hampered by a shortage of funds; the CEC’s budget has been locked at \$9 million (although declining in real dollars due to inflation and currency exchange rates) since the CEC’s inception. In fact, a properly funded CEC could be an important aspect of any effort to address scale effects from trade-based growth or growth more generally.<sup>135</sup> Nonetheless, the CEC has developed an impressive array of successes on a shoestring budget.

### C. *Enforcement Matters*

The citizen submission process, in many ways, was the centerpiece of the NAAEC. Citizens of any of the three Parties could allege that one of the three

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130. CEC North American Implementation Task Force on Mercury, *North American Action Plan on Mercury: Phase II* (Mar. 16, 2000), available at [http://www.cec.org/programs\\_projects/pollutants\\_health/smoc/pdfs/Hgnarap.pdf](http://www.cec.org/programs_projects/pollutants_health/smoc/pdfs/Hgnarap.pdf)

131. CEC PCB Task Force, *PCB Regional Action Plan* (Dec. 1996), available at [http://www.cec.org/programs\\_projects/pollutants\\_health/smoc/pcb.cfm?varlan=english](http://www.cec.org/programs_projects/pollutants_health/smoc/pcb.cfm?varlan=english).

132. CEC, *Taking Stock: 2004*, <http://www.cec.org/takingstock/takingstock.cfm?activityId=11&varlan=English> (last visited Oct. 30, 2008).

133. 42 U.S.C. §§ 11001–11050, §§ 311–312. For more on the toxics release inventory, see Environmental Protection Agency, *What Is the Toxics Release Inventory (TRI) Program?*, <http://www.epa.gov/tri/triprogram/whatis.htm> (last visited Oct. 30, 2008).

134. Commission for Environmental Cooperation, Mapping North American Environmental Issues, [www.cec.org/naatlas](http://www.cec.org/naatlas) (last visited Oct. 30, 2008).

135. Professor John Knox, for example, has called the CEC, with its “broad scope, cooperative programs, objective reporting, and reliance on public participation,” as an “important precedent[] for other national and international institutions devoted to sustainable development.” John H. Knox, *The Judicial Resolution of Conflicts Between Trade and the Environment*, 28 HARV. ENVTL. L. REV. 1, 78 (2004).

governments was failing to enforce environmental law effectively. For Mexican citizens, where options for redress of environmental matters are rare, the citizen submission process provided the possibility for bringing environmental issues to the attention of an international institution.<sup>136</sup>

The rigorous and professional manner in which the Secretariat has reviewed submissions<sup>137</sup> has been instrumental in ensuring the integrity of the process. Nonetheless, actions and decisions of the Council have eroded public confidence in the process,<sup>138</sup> leading the former director of the CEC's unit on Submissions on Enforcement Matters to declare that the submissions process—frequently referred to as the “teeth” of the NAAEC—suffers from “tooth decay.”<sup>139</sup> The Council has sought to whittle away at the independence of the Secretariat by determining the scope of proposed factual records, a role designated to the Secretariat. In the case of the *Migratory Birds* submission, submitters requested that the Secretariat prepare a factual record concerning the nationwide failure of the United States to enforce the Migratory Bird Treaty Act (MBTA) against loggers,<sup>140</sup> and the Secretariat agreed that such a

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136. For a review of actual use of the citizen submission process by citizens, see David L. Markell, *Understanding Citizen Perspectives on Government Decision Making Processes as a Way to Improve the Administrative State*, 36 ENVTL. L. 651 (2006).

137. Wold et al., *supra* note 17, at 421 (“Scholars, NAAEC review committees, and members of the public are virtually unanimous in applauding the Secretariat’s rigorous review of submissions for eligibility and for determination on whether a factual record is warranted.”). Accord John H. Knox, *A New Approach to Compliance with International Environmental Law: The Submissions Procedure of the NAFTA Environmental Commission*, 28 ECOLOGY L. Q. 1, 96–97 (2001) (stating that the Secretariat “has not shown any particular deference to states’ suggested interpretations of the [NAAEC] Agreement. Conversely, it has dismissed submissions—even by major environmental groups—that did not meet the requirements for admissibility. In short, the Secretariat’s decisions appear to be consistently grounded on carefully reasoned legal interpretations of the [NAAEC] Agreement rather than on fear of adverse reactions by, or the desire to carry favor with, either states or submitters.”); Markell, *supra* note 136, at 693–694 (noting that, although the Secretariat has served as a “vigilant filter,” anecdotal evidence “reflects confidence in the Secretariat’s neutrality and trust in its performance”). In addition, a review of the Independent Review Committee concluded that:

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

Independent Review Committee, *supra* note 57, § 3.3.3.

138. See Letter from Randy L. Christensen, Sierra Legal Defense Fund, to CEC Council (Mar. 6, 2002), available at [http://www.cec.org/files/pdf/JPAC/Sierra\\_to\\_Council-BCMining.pdf](http://www.cec.org/files/pdf/JPAC/Sierra_to_Council-BCMining.pdf) (stating that the Council’s actions could “threaten to strip the citizen submission process of its integrity, utility and legitimacy”).

139. Garver, *supra* note 17.

140. Migratory Bird Treaty Act (MBTA), 16 U.S.C. §§ 703–712 (2000). The MBTA implements four international treaties, including agreements with Canada and Mexico, aimed at protecting migratory birds. Section 703 of the MBTA prohibits any person from killing or

factual record was warranted.<sup>141</sup> The Council, in an arbitrary and unexplained fashion, decided that the Secretariat could only investigate the failure to enforce the MBTA with respect to two minor examples (but not examples provided in which thousands of birds were likely taken) provided by submitters merely to illustrate a pattern of widespread government conduct. Because the *Migratory Birds* submitters found the citizen submission process attractive “only because of its capacity to investigate the United State’s broad pattern of nonenforcement of the MBTA,”<sup>142</sup> the Council’s decision effectively neutered the submission.

Further evidence of the Council’s effort to undermine the citizen submission process and erode the Secretariat’s independence can be found in the *Ontario Logging* submission.<sup>143</sup> After the Secretariat determined that the submission contained sufficient information to warrant the development of a factual record, the Council remanded the submission to the submitters by deeming the submission as containing insufficient information.<sup>144</sup> Submitters had presented data from computer models estimating that more than 85,000 bird nests would be destroyed by logging operations in violation of Canada’s

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“taking” migratory birds, including the destruction of nests, the crushing of eggs and the killing of nestlings and fledglings, “by any means or in any manner,” unless the U.S. Fish and Wildlife Service (FWS) issues a valid permit. The United States has never prosecuted a logger or logging company for a violation of the MBTA, even though it acknowledges that the MBTA has consistently been violated by persons logging on federal and non-federal land. In fact, the Director of the FWS has stated that the FWS, the agency responsible for enforcement of the MBTA, “has had a longstanding, unwritten policy relative to the MBTA that no enforcement or investigative action should be taken in incidents involving logging operations, that result in the taking of non-endangered, non-threatened, migratory birds and/or their nests.” Memorandum from U.S. Fish and Wildlife Service to Service Enforcement Officers, MBTA Enforcement Policy (Mar. 7, 1996), available at <http://www.cec.org>.

141. CEC Secretariat, *Article 15(1) Notification to Council that Development of a Factual Record is Warranted*, A14/SEM/99-002/11/ADV (Dec. 15, 2000) (SEM 99-002), available at <http://www.cec.org/files/pdf/sem/ACFA30.pdf> [hereinafter *Migratory Birds—Notification to Council*].

142. Wold et al., *supra* note 17, at 426. For a discussion of how the factual record might have differed based on the scope requested by submitters and recommended by the Secretariat, see *id.* at 427–429.

143. *Submission to the Commission on Environmental Cooperation (Ontario Logging)*, A14/SEM/02-001/01/SUB (Feb. 6, 2002) (SEM-02-001) [hereinafter *Ontario Logging Submission*].

144. CEC, *Council Res. 03-05*, CEC, C/C.01/03-02/RES/05/final (Apr. 22, 2003), available at <http://www.cec.org/files/pdf/sem/02-1-RES-E.pdf>. The Council questioned the sufficiency with the use of a statistical model that submitters contend provides the best available information precisely because the government of Canada has abdicated its enforcement responsibilities by, among other things, failing to collect the kind of information required to assess the impact of commercial logging on bird populations protected by the Migratory Bird Treaty Act.

migratory bird regulations.<sup>145</sup> Yet, Council, at Canada's behest, demanded that submitters provide data that logging actually destroyed bird nests.<sup>146</sup>

Even where the Council's actions do not undermine the Secretariat, they undermine the citizen submission process. For example, Council has ignored the advice of the JPAC concerning implementation of the submission process.<sup>147</sup> In perhaps the "most serious current threat to the CEC submission process,"<sup>148</sup> Council has long delayed votes on the preparation of factual records. For example, more than two and a half years passed before Council approved the Secretariat's recommendation to prepare a factual record in *Coal-Fired Power Plants*.<sup>149</sup> More than three years passed before Council approved the preparation of a factual record in *Lake Chapala II*.<sup>150</sup> Delays of this nature obviously dampen public enthusiasm for the submission process<sup>151</sup> by eliminating any possibility to meaningfully redress nonenforcement problems

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145. *Ontario Logging Submission*, *supra* note 143, at 4–5.

146. See Canada, *Response to Submission SEM-02-01*, A14/SEM/02-001/12/RSP, 5 (Apr. 11, 2002); *Council Resolution 03-05*, *supra* note 144. After the submitters provided additional data, the Secretariat again determined that the preparation of a factual record was warranted, the Council agreed, and the Secretariat prepared a factual record. For a history of this dispute, as well as all decisional documents, including the factual record, see CEC.org, Ontario Logging, <http://www.cec.org/citizen/submissions/details/index.cfm?varlan=english&ID=70>.

147. JPAC "may provide advice to the Council on any matter within the scope of this agreement . . . and on the implementation and further elaboration of this agreement, and may perform such other functions as the Council may direct." NAAEC, *supra* note 5, art. 16(4). For an example of JPAC advice to the Council on the citizen submission process, see Joint Public Advisory Committee, *Advice to Council No. 03-05*, Dec. 17, 2003, Re: Limiting the Scope of Factual Records and Review of the Operation of CEC Council Resolution 00-09 related to Articles 14 and 15 of the North American Agreement on Environmental Cooperation, *available at* [http://www.cec.org/files/pdf/ABOUTUS/Advice03-05\\_EN.pdf](http://www.cec.org/files/pdf/ABOUTUS/Advice03-05_EN.pdf)

148. Garver, *supra* note 17, at 38.

149. Friends of the Earth Canada et al., *Coal-fired Power Plants—Submission*, SEM-04-005 (Sept. 20, 2004). The submitters asserted that the United States is failing to effectively enforce the U.S. Clean Water Act against coal-fired power plants for mercury emissions that are allegedly degrading thousands of rivers, lakes and other waterbodies across the United States. The Secretariat determined that a factual record was warranted on December 5, 2005. Secretariat, *Article 15(1) Notification to Council that Development of a Factual Record is Warranted, Coal-fired Power Plants*, A14/SEM/04-005/48/ADV (Dec. 5, 2005). On June 23, the Council finally recommended the preparation of a factual record. Council Resolution 08-03, C/C.01/08/RES/03/Final (June 23, 2008). For all the documents relating to this submission, see CEC.org, *Coal-fired Power Plants*, <http://www.cec.org/citizen/submissions/details/index.cfm?varlan=english&ID=103> (last visited Oct. 30, 2008).

150. The Secretariat recommended the preparation of a factual record on May 18, 2005. Council voted to instruct the Secretariat to develop a factual record on May 30, 2008. For a timeline for this submission, SEM-03-003, see CEC.org, *Lake Chapala II*, <http://www.cec.org/citizen/submissions/details/index.cfm?varlan=english&ID=90> (last visited Oct. 30, 2008).

151. Garver, *supra* note 17, at 38.

as well as by underscoring the Council's unwillingness to take the process and the submitters seriously.

In another case, *BC-Mining*, Canada initiated administrative actions after the submission was filed in order to quash it.<sup>152</sup> While the initiation of an administrative action would normally be a positive outcome of the submission process, it was clear from the beginning that the administrative actions were a sham; Canada has not taken action to compel compliance with the relevant fisheries laws.<sup>153</sup>

Lastly, the factual records culminate in nothing more than the factual record—the NAAEC does not require governments to address issues raised in the factual record. Thus, the factual record is a dead end. In the United States, the *Migratory Birds* submission has resulted in no changes in the way the Fish and Wildlife Service implements the Migratory Bird Treaty Act.<sup>154</sup> Council

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152. Article 14(3)(a) of the NAAEC directs the Secretariat to halt a factual inquiry when the matter is subject to pending judicial *or* administrative proceedings NAAEC, *supra* note 5, art. 14(3)(a).

153. *BC Mining* was submitted in June 1998. Sierra Club of British Columbia, et al., *A Submission to the Commission on Environmental Cooperation Pursuant to Article 14 of the North American Agreement on Environmental Cooperation, BC Mining—Submission*, SEM/98-004/06, CEC, (June 1998) (SEM 98-004), available at <http://www.cec.org/files/pdf/sem/98-4-SUB-E.pdf>. Canada sent letters to the owners of the Mt. Washington mine, used as an example of Canada's widespread failure to enforce the Fisheries Act, on July 30, 1999. See Canada, *BC Mining—Party Response*, SEM/98-004/06/RSP, CEC, (Sept. 8, 1999) (SEM 98-004), available at <http://www.cec.org/files/pdf/sem/98-4-RSP-E.pdf>. On September 28, 1998, Canada sent a "warning letter" to the owner of the Tulsequah Chief Mine, also used by submitters to illustrate Canada's pattern of non-enforcement. *Id.* at 5–6, 24. Canada claimed that the warning letter constituted a "pending judicial or administrative proceeding." *Id.* at 25. Because of Canada's action, the two mines were removed from consideration in the factual record. *Council Res. 01-11*, CEC, C/C.01/01-06/RES/05/Final (Nov. 16, 2001), available at <http://www.cec.org/files/PDF/COUNCIL/res01-11e.pdf>. The transparent nature of these sham administrative actions, however, is manifest; the two-year limitation under Canadian law to bring summary conventions had already expired and Canada failed to respond to this concern of submitters. Moreover, a conservation group reports that Canada has made no progress to eliminate acid mine drainage at the Tulsequah mine, one of the mine sites eliminated from consideration due to Canada's administrative action. Environmental Law Institute, *Final Report: Issues Related to Articles 14 and 15 of the North American Agreement on Environmental Cooperation* 17 (2003) (citing Letter from Transboundary Watershed Alliance to Joint Public Advisory Committee (Sept. 16, 2003)) [hereinafter ELI Report], available at [http://www.cec.org/files/pdf/ABOUTUS/ELI-Art14-15-Report-Final-5\\_en.pdf](http://www.cec.org/files/pdf/ABOUTUS/ELI-Art14-15-Report-Final-5_en.pdf).

154. The International Environmental Law Project (IELP) submitted requests for information concerning any actions following up on the *Migratory Birds* submission. The Forest Service responded that they had no records responsive to the request. See, e.g., Letter from Corbin L. Newman, Jr., Director of Forest Management, U.S. Department of Agriculture, to Erica J. Thorson, IELP (Nov. 8, 2007) (on file with author). The Fish & Wildlife Service provided one record of enforcement of the MBTA against a person who cut down a tree with one red-tailed hawk in it but no information relating to changes in policy to enforce the MBTA against loggers.



has also indicated its unwillingness to evaluate implementation of factual records. When the JPAC recently indicated that it would undertake a review of “progress made in addressing the enforcement issues identified in a factual record,”<sup>155</sup> Council admonished the JPAC by “clarify[ing]” that the NAAEC submissions process “does not contemplate any action by the Secretariat or the Council after the publication of a factual record.”<sup>156</sup> Concerning JPAC’s desire to undertake a yearly initiative to review published factual records, Council added that “any such action would be beyond the scope of the NAAEC.”

In sum, the member governments, individually or through the Council, have chosen to treat the citizen submission process as an adversarial, rather than a cooperative, process. The manner in which the Parties and the Council have eroded the credibility of the process indicates that it may not be the most appropriate model for future FTAs.

#### D. *The Secretariat’s Independent Reports*

Article 13 reports are intended to highlight some aspect of the North American environment worthy of review. The Secretariat has used this authority judiciously, preparing only six Article 13 reports. These have included the investigation of site-specific problems, such as the investigation into the deaths of 40,000 migratory birds in Guanajuato, Mexico,<sup>157</sup> border issues, such as the report on threats to migratory bird habitat in the San Pedro River Basin,<sup>158</sup> and continent-wide concerns, such as the study to assess long-range transport of atmospheric pollutants<sup>159</sup> and environmental challenges posed by the North American electricity market.<sup>160</sup>

The authority of the Secretariat to develop these reports has proved to be very valuable.<sup>161</sup> The report on long-range pollutants helped facilitate negotiations by the NAAEC Parties for the Stockholm Convention on

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Letter from Kevin R. Adams, Chief, Office of Law Enforcement, Fish & Wildlife Service, to Erica J. Thorson, IELP (July 10, 2006) (on file with author).

155. JPAC, *Advice to Council No.: 08-01*, Re: Submissions on Enforcement Matters: Lessons Learned to Following up Factual Records (Feb. 27, 2008).

156. Letter from David McGovern, Alternative Representative for Canada (on behalf of Council), to Ms. Jane Gardner, JPAC Chair (Apr. 16, 2008).

157. CEC Secretariat, *Report on the Death of Migratory Birds at the Silva Reservoir* (1995).

158. CEC Secretariat, *Ribbon of Life: An Agenda for Preserving Transboundary Bird Habitat on the Upper San Pedro River* (1999).

159. CEC Secretariat, *Continental Pollutant Pathways: An Agenda for Cooperation to Address Long-Range Transport of Air Pollution in North America* (1997).

160. CEC Secretariat, *Environmental Challenges and Opportunities of the Evolving North American Electricity Market* (June 2002).

161. For a report-by-report assessment of the beneficial outcomes of the Article 13 reports, see David A. Wirth, *supra* note 99.

Persistent Organic Pollutants,<sup>162</sup> now a major multilateral environmental agreement that protects human health and the environment from persistent organic pollutants.<sup>163</sup> The San Pedro Report galvanized public support for the watershed and led the United States and Mexico to develop a Memorandum of Understanding to work together to protect the Upper San Pedro watershed.<sup>164</sup>

Nonetheless, Mexico viewed the first Article 13 report, an analysis of why 40,000 birds died at the La Silva Reservoir in Mexico (they died of bacterial infections resulting from agricultural runoff), as being decided “against” it.<sup>165</sup> (In fact, Mexico considered the entire environmental side agreement as adversarial because no equivalent agreement was negotiated for NAFTA’s precursor, the U.S.-Canada FTA.<sup>166</sup>) Similarly, the United States viewed the Article 13 report on genetically modified maize, which found genetically modified maize in Mexico despite a Mexican import ban on it, as an indictment of U.S. policies that promote genetically modified agricultural crops. The United States called the report “methodologically ‘fundamentally flawed and unscientific.’”<sup>167</sup> Mexico disagreed with the report’s conclusions.<sup>168</sup>

While acknowledging the Secretariat’s independence on Article 13 matters, particularly those relating to the annual program and not subject to Council approval, the Parties have resisted that independence. In a review of the implementation of Article 13, Professor David Wirth reports that “[c]onsultations with the Parties have tended over time to become more extensive and more formal . . . perhaps even inconsistent with the structure and intent of Article 13.”<sup>169</sup> Nonetheless, the Parties have come to expect such consultation. Recognizing the backlash against the Secretariat, Wirth recommends that to preserve the Secretariat’s independence on Article 13 matters, “the Secretariat should—as it has—conduct consultations with the Parties on the express understanding that this is a courtesy on the part of the Secretariat.”<sup>170</sup>

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162. WOLD, GAINES & BLOCK, *supra* note 27, at 823.

163. Stockholm Convention on Persistent Organic Pollutants, May 22, 2001, 40 I.L.M. 532 (2001), *available at* <http://www.pops.int>.

164. WOLD, GAINES & BLOCK, *supra* note 27, at 824.

165. Independent Review Committee, *supra* note 57, at 8.

166. *Id.* at 8–9.

167. United States, *U.S. Government Comments to the Secretariat’s Draft Article 13 Report Maize and Biodiversity: The Effects of Transgenic Maize in Mexico* (July 23, 2004), in CEC Secretariat, *Maize & Biodiversity: The Effects of Transgenic Maize in Mexico, Key Findings and Recommendations*, Attachment (2004) [hereinafter *Maize & Biodiversity*].

168. David A. Wirth, *supra* note 99, at 18–19.

169. *Id.* at 29.

170. *Id.*

## IV. AFTER THE NAAEC: DR-CAFTA AND BEYOND

The development of an international institution, complete with processes for citizen participation in enforcement matters, provides a tantalizing model for replication in other trade regimes. While some elements of the NAAEC regime could provide “inspiration to integrate nontrade issues”<sup>171</sup> in trade regimes, it is not clear that the NAAEC model can or should be replicated. As noted above, the NAAEC focuses on competitiveness and enforcement concerns even though the empirical evidence does not suggest these are major worries. Where the NAAEC has proved to be most innovative and where it could produce significant and positive environmental outcomes, the NAAEC Parties have used flawed institutional structures to mitigate those benefits. For example, the Parties have taken a dim view to citizens shining a light on their failures to enforce environmental law and reduced the importance of the citizen submission process. They have also tired of the Secretariat’s independence and have formalized structures to limit that independence.

Nonetheless, with few models to choose from, the United States has latched onto the basic NAAEC model without evaluating its strengths and weaknesses<sup>172</sup> for post-NAAEC FTAs. Not only is the competitiveness/enforcement focus less relevant than a focus on scale, but the environmental, political, institutional and social circumstances of many of the countries with which the United States has negotiated FTAs do not lend themselves to some aspects of the NAAEC model.

To the extent that the United States has negotiated changes to NAAEC-inspired provisions, it has done so largely to retain greater political control rather than improve trade-environment linkages. For example, many FTAs have eliminated the Secretariat, thereby eliminating any possibility for independent reports to be produced on environmental issues within the scope of the FTA. Not all changes have weakened trade-environment linkages, however. As described more fully in Section V, the U.S.-Peru FTA acknowledges the specific environmental and social contexts of Peru—particularly in the forest sector—and attempts to address the problems through detailed forest-specific provisions. While that FTA does not require any

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171. Pierre Marc Johnson, *From Trade Liberalisation to Sustainable Development: The Challenges of Integrated Global Governance*, in LINKING TRADE, ENVIRONMENT, AND SOCIAL COHESION: NAFTA EXPERIENCES, GLOBAL CHALLENGES *supra* note 127, at 34.

172. See Block, *supra* note 46, at 514 (noting that in the context of a Free Trade Area of the Americas (FTAA), policy makers must “attempt to evaluate the strengths and weaknesses of the NAAEC as one of the few models potentially applicable to the greater hemisphere in the FTAA”). Negotiations over the hemisphere-wide FTAA have since floundered for reasons largely relating to agricultural subsidies. See Garver, *supra* note 17, at 39 (concluding that “[i]t is clear that environmental mechanisms in the NAFTA package have not met their promise or potential, and yet they are being duplicated with little analysis or meaningful modification”).

changes before the FTA comes into force, it is at least a step towards rethinking the environment in the context of trade.

#### A. *Embracing the NAAEC's Enforcement Model*

##### 1. Enforcement of Environmental Laws

All of the FTAs negotiated subsequent to NAFTA and the NAAEC start, like the NAAEC, by committing the Parties to ensure that their domestic environmental laws provide for high levels of environmental protection and to strive to continue to improve such laws.<sup>173</sup> In these FTAs, the Parties also recognize that it is “inappropriate to encourage trade and investment by weakening or reducing the protections afforded in domestic environmental laws.”<sup>174</sup> Most of these FTAs make these obligations enforceable through dispute settlement procedures<sup>175</sup> or through consultations, as under DR-CAFTA.<sup>176</sup> The FTAs also provide that a Party “shall not fail to effectively enforce its environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties.”<sup>177</sup> These obligations are also subject to dispute settlement.<sup>178</sup>

173. *See, e.g.*, U.S.-Peru FTA, *supra* note 22, art. 18.1:

Recognizing the sovereign right of each Party to establish its own levels of domestic environmental protection and environmental development priorities, and to adopt or modify accordingly its environmental laws and policies, each Party shall strive to ensure that those laws and policies provide for and encourage high levels of environmental protection and shall strive to continue to improve its respective levels of environmental protection.

Almost identical language is found in other FTAs. *See, e.g.*, United States-Australia Free Trade Agreement, U.S.-Austl., art. 19.1, May 19, 2004, 43 I.L.M. 1248 [hereinafter U.S.-Australia FTA], *available at* [http://www.ustr.gov/assets/Trade\\_Agreements/Bilateral/Australia\\_FTA/Final\\_Text/asset\\_upload\\_file148\\_5168.pdf](http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/asset_upload_file148_5168.pdf); United States-Chile Free Trade Agreement, U.S.-Chile, art. 19.1, June 6, 2003, 42 I.L.M. 1026 [hereinafter U.S.-Chile FTA], *available at* [http://www.ustr.gov/assets/Trade\\_Agreements/Bilateral/Chile\\_FTA/Final\\_Texts/asset\\_upload\\_file535\\_3989.pdf](http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/asset_upload_file535_3989.pdf); Agreement between the Government of the United States and the Government of the Kingdom of Bahrain on the Establishment of a Free Trade Agreement, U.S.-Bahr., art. 16.1, Sept. 14, 2004, 44 I.L.M. 544 (2005) [hereinafter U.S.-Bahrain FTA], *available at* [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Bahrain\\_FTA/final\\_texts/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Bahrain_FTA/final_texts/Section_Index.html); DR-CAFTA, *supra* note 20, art. 17.1.

174. U.S.-Chile FTA, *supra* note 173, art. 19.2(2). *See also* U.S.-Peru FTA, *supra* note 22, art. 18.3(2); DR-CAFTA, *supra* note 20, art. 17.2(2); U.S.-Australia FTA, *supra* note 173 art. 19.2; U.S.-Bahrain FTA, *supra* note 173, art. 16.2(2).

175. U.S.-Chile FTA, *supra* note 173, art. 19.6. *See also* U.S.-Australia FTA, *supra* note 173, art. 19.7.

176. DR-CAFTA, *supra* note 20, art. 17.10. *See also* U.S.-Bahrain FTA, *supra* note 173, art. 16.8.

177. U.S.-Chile FTA, *supra* note 173, art. 19.2(1)(a). *See also* DR-CAFTA, *supra* note 20, art. 18.2(1)(a); U.S.-Peru FTA, *supra* note 22, art. 18.3(1)(a). In the case of Australia, where

Because these provisions are included in the FTA itself, rather than a “side agreement,” the United States has championed such provisions as further integration of trade and the environment.<sup>179</sup> Because there is no legal difference between placing the environmental provisions in a side agreement or in the FTA itself, this benefit is more imagined than real. More fundamentally, there is, of course, nothing inherently wrong with guarding against efforts to weaken environmental law to attract investment and encourage trade. However, these provisions are unlikely to yield benefits. As noted above, little, if any, evidence suggests that *companies* move to countries with weak environmental laws or that *countries* weaken their environmental laws to increase trade or attract investment.<sup>180</sup>

In addition, because these provisions have never been invoked in the NAAEC or in an FTA, it is questionable whether a government sanctions process to address environmental matters would encourage cooperation on environmental matters. Indeed, fearing that a sanctions process would be counterproductive, a high-level expert group formally recommended in 2004 that “the [NAAEC] Parties publicly commit to refrain from invoking [the dispute settlement provisions] for a period of 10 years.”<sup>181</sup> Nevertheless, the United States claims that the “mere existence of this enforcement tool helps to ensure full implementation of FTA environmental obligations even if no disputes have been brought to date.”<sup>182</sup>

If the government sanctions processes in the NAAEC and subsequent FTAs are any indication, the dispute settlement provisions to address environmental matters will remain dormant. Unless real and measurable competitiveness issues arise from a failure to enforce environmental law, a Party to an FTA is unlikely to view that failure as raising vital interests worth litigating.<sup>183</sup> The potential harm to relations with trading partners and fears of retaliation make litigation over the “amorphous benefits of enforcement” unattractive.<sup>184</sup>

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many environmental matters are the responsibility of the States, these obligations extend to relevant federal and state laws. U.S.-Australia FTA, *supra* note 173, art. 19.2(1)(a).

178. U.S.-Chile FTA, *supra* note 173, art. 19.6. See U.S.-Australia FTA, *supra* note 173, art. 19.7; U.S.-Peru FTA, *supra* note 22, art. 18.12; DR-CAFTA, *supra* note 20, art. 17.10(7).

179. Mark Linscott, *Demonstrable Benefits*, 25 ENVIRONMENTAL F. 39, 39 (2008). The author is the Assistant United States Trade Representative for Environment and Natural Resources and has responsibility for all U.S. trade and environment matters.

180. See *supra* Section II.A.

181. TRAC, *supra* note 102, at 55.

182. Linscott, *supra* note 179, at 39.

183. See Yang, *supra* note 18, at 482 (noting that the failure to use the NAAEC’s sanctions process is consistent with the public choice of enforcement).

184. *Id.*

## 2. Citizen Submissions on Failures to Enforce Environmental Laws

Although the United States has negotiated general enforcement provisions similar to the NAAEC's, it has altered course with respect to the citizen submission process. The citizen submission process has been characterized as "the unprecedented commitment by the three [NAAEC] governments to account internationally for the enforcement of their environmental laws,"<sup>185</sup> and it thus could be considered the centerpiece of any effort to prevent competitiveness effects. Nonetheless, FTAs with Australia, Chile, Jordan and Morocco, among others, do not include a citizen submission process. Only the DR-CAFTA,<sup>186</sup> Colombia,<sup>187</sup> Panama<sup>188</sup> and Peru<sup>189</sup> FTAs include a citizen submission process.

Even where these FTAs have included a submissions process, they have largely incorporated all the institutional flaws of the NAAEC model. As a consequence, as in the NAAEC, there are no checks on the Council's powers to overrule the decisions of the Secretariat. Similarly, the FTAs do not impose deadlines for Council to act on recommendations of the Secretariat. They do, however, require preparation of a factual record with the assent of a single Party, unlike the supermajority the NAAEC requires.<sup>190</sup>

Perhaps most important, the citizen submission processes of FTAs are likely to be adversarial rather than cooperative, just as in the NAAEC. In the context of DR-CAFTA, with its history of violence and repressive regimes, this characteristic is likely to stifle use of the citizen submission process.<sup>191</sup> To date, only one submission has been brought, and that was by the Humane Society of the United States,<sup>192</sup> a U.S.-based nongovernmental organization with a U.S. government contract to perform DR-CAFTA-related activities.

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185. TRAC, *supra* note 102, at 4.

186. DR-CAFTA, *supra* note 20, arts. 17.7–17.8.

187. U.S.-Colombia FTA, *supra* note 21, arts. 18.8–18.9.

188. United States-Panama Trade Promotion Agreement, U.S.-Pan., arts. 17.8–17.9, Jun. 28, 2007 [hereinafter U.S.-Panama FTA], available at [http://ustr.gov/Trade\\_Agreements/Bilateral/Panama\\_FTA/Final\\_Text/Section\\_Index.html](http://ustr.gov/Trade_Agreements/Bilateral/Panama_FTA/Final_Text/Section_Index.html).

189. U.S.-Peru FTA, *supra* note 22, arts. 18.8–18.9.

190. See, e.g., DR-CAFTA, *supra* note 20, art. 17.8.2; U.S.-Peru FTA, *supra* note 22, art. 18.9.2

191. In September 2008, for example, Yuri Melini, the Director General of the Center for Environmental, Social and Environmental Action (CALAS) in Guatemala, was shot outside the home of a relative as he was getting out of his car. The attack was not random. Prior to opening fire, the gunman called out Mr. Melini's name. Mr. Melini is a well-known environmental advocate in Guatemala who, in the week before the attack, published a column calling attention to threats against human rights and environmental advocates. See Jim Loughran, *Guatemala: Assassination Attempt Against Human Rights Defender Yuri Melini*, Sept. 11, 2008, <http://www.frontlinedefenders.org/node/1565>.

192. Secretaria de Integración Económica Centroamericana, DR-CAFTA, available at <http://www.sieca.org.gt/site/Enlaces.aspx?ID=003008> (last visited Oct. 30, 2008).

The U.S. State Department is currently seeking organizations to work with Central American organizations to prepare enforcement submissions.

The more recent FTAs also eliminate some of the NAAEC's more important elements. For example, none of the FTAs establish a JPAC or similar independent voice authorized by the FTA itself to provide advice to the Council and the Secretariat. That independent voice has been essential for highlighting Council proposals to limit the independence of the CEC Secretariat. In a formal review of the NAAEC, the review committee noted:

More so than any NGO could, JPAC can observe and remain up-to-date on CEC issues. Its direct access to the Council and the Secretariat helps keep the Parties and executive director responsive to their constituencies in a way that a broader, more generalized public discourse could not.<sup>193</sup>

The failure of FTAs to include an independent body like the JPAC acting as the "intermediary between the Council and the concerned public"<sup>194</sup> and the "public conscience"<sup>195</sup> of the CEC is a real loss for subsequent FTAs. The absence of anything similar to the JPAC in subsequent FTAs suggests that the United States and its trading partners want as little public oversight as possible.

#### B. *New Institutional Arrangements*

Although the substantive provisions of post-NAAEC FTAs mirror those of the NAAEC, the institutional structures have changed. The independence of a Secretariat has been eliminated or sharply limited, and much more government-centered commissions have emerged.

##### 1. The Elimination of a Quasi-Independent Secretariat

Despite the widespread view that the NAAEC was innovative and revolutionary (in large part due to the quasi-independent role of the Secretariat), none of the post-NAAEC FTAs creates a quasi-independent Secretariat to address or coordinate environmental issues among the Parties. DR-CAFTA<sup>196</sup> and the other Latin American FTAs<sup>197</sup> that include a citizen submission process establish Secretariats, but their mandates are limited solely to reviewing citizen submissions alleging failures to enforce environmental law

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193. TRAC, *supra* note 102, at 34.

194. *Id.*

195. *Id.*

196. See Agreement Establishing a Secretariat for Environmental Matters under the Dominican Republic-Central America-United States Free Trade Agreement (2006), available at [http://www.ustr.gov/Trade\\_Agreements/Regional/CAFTA/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Regional/CAFTA/Section_Index.html).

197. U.S.-Colombia FTA, *supra* note 21, art. 18.8; U.S.-Panama FTA, *supra* note 188, art. 17.8; U.S.-Peru FTA, *supra* note 22, art. 18.8. In each case, the Parties will designate the Secretariat through an exchange of letters or other agreement.

effectively.<sup>198</sup> As under DR-CAFTA, where the Parties requested that the Secretariat de Integración Económica Centroamericana (SIECA)<sup>199</sup> establish the Secretariat, the other FTAs will likely establish a Secretariat within an existing organization.

The failure to include a quasi-independent Secretariat rests in large part with the lack of trust that the United States has in the CEC's Secretariat. Ironically, that mistrust developed as the Secretariat assumed greater responsibility and independence due to a vacuum created by the Council and the NAAEC Parties. Initially, the NAAEC's Council was not organized. Indeed, because of low interest or other events that required greater attention, the Secretariat prepared the initial work program with almost no input from the governments.<sup>200</sup> With little guidance from the Council, the Secretariat "spent the first several years deliberately testing various areas of activity listed in the NAAEC," eventually choosing the work program and its main themes.<sup>201</sup> As a consequence of this inattention, the Council encouraged a very independent Secretariat.

In addition to this lack of attention within the CEC, the NAAEC Parties were not organized internally. This came to a head when the Secretariat released the "Maize Report," which looked into the impacts of genetically modified corn on native varieties of maize in Mexico.<sup>202</sup> In criticizing the Secretariat, the United States claimed that "[t]he process used to prepare this draft report would have benefited from greater transparency and communication to the Parties as to the intended scope, timeline and peer review procedures of the draft report."<sup>203</sup> In truth, the Secretariat had been consulting with many members of the U.S. government—those with relevant expertise—but those communications were apparently not known to EPA decisionmakers. A report of the implementation of Article 13 details the many communications between the Secretariat and the Parties, including the refusal by the United States to have the Secretariat brief it on the process, draft report, and the report's recommendations.<sup>204</sup>

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198. Agreement Establishing a Secretariat for Environmental Matters, *supra* note 196, art. 5.

199. SIECA is a regional institution based in Guatemala that provides advice on technical and administrative aspects of economic integration within Central America. SIECA, "Que es SIECA?", <http://www.sieca.org.gt/site/VisorDocs.aspx?IDDOC=Cache/17990000000002/17990000000002.swf> (last visited Oct. 30, 2008).

200. TRAC, *supra* note 102, at 10.

201. *Id.*

202. Maize & Biodiversity, *supra* note 167.

203. United States, U.S. Government Comments to the Secretariat's Draft Article 13 Report Maize and Biodiversity: The Effects of Transgenic Maize in Mexico (July 23, 2004), *in* Maize & Biodiversity, *supra* note 167, at Attachment.

204. David A. Wirth, *supra* note 99, at 16.



In the ensuing backlash, a great mistrust has developed between the Parties and the Secretariat. The United States has responded by seeking to micro-manage the CEC Secretariat. It has also reacted by omitting any Secretariat in many subsequent FTAs and, where a Secretariat is contemplated, eliminating much of the independence that the CEC Secretariat has. As a consequence, the great strength of the Secretariat to act as a neutral forum for the discussion of issues has been lost.<sup>205</sup>

## 2. Two New Institutional Approaches

In the absence of a Secretariat to propose a work program and undertake other substantive and administrative tasks, as under the NAAEC, the United States has adopted two different institutional models. With distant trading partners, such as Australia and Bahrain, the FTAs do not include any commission at all to coordinate environmental activities. Instead, these FTAs create a “joint committee” composed of governmental trade officials to oversee implementation of the FTA.<sup>206</sup> The joint committee may, if it so chooses, create a subcommittee on environmental matters.<sup>207</sup> They also call for separate agreements or joint statements on environmental cooperation through which the Parties will explore ways to cooperate on environmental matters and strengthen their capacity to protect the environment.<sup>208</sup>

While the distance between two trading partners may eliminate transboundary effects from trade, such as increased pollution along the U.S.-Mexico border from additional cross-border trucking,<sup>209</sup> distance itself does not insulate a country from the environmental effects of trade. Even at

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205. Janine Ferretti, *Innovations in Managing Globalization: Lessons from the North American Experience*, 15 GEO. INT'L ENVTL. L. REV. 367 (2003) (describing the value of the CEC Secretariat as a neutral forum for discussing trade-environment issues).

206. See, e.g., U.S.-Australia FTA, *supra* note 173, art. 19.5; U.S.-Bahrain FTA, *supra* note 173, art. 16.5. Some FTAs, such as the U.S.-Jordan FTA, do not expressly state that the Joint Committee may wish to establish a subcommittee on environmental matters, but such authority is inherent in the Joint Committee's authority to “establish and delegate responsibilities to ad hoc and standing committees or working groups.” United States-Jordan Free Trade Agreement, U.S.-Jordan FTA, art. 15.3.b, Oct. 24, 2000, available at [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Jordan/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Jordan/Section_Index.html).

207. U.S.-Australia FTA, *supra* note 173, art. 19.5.1; U.S.-Bahrain FTA, *supra* note 173, art. 16.5.1.

208. See, e.g., U.S.-Australia FTA, art. 19.5.1; United States-Morocco Free Trade Agreement, U.S.-Morocco, art. 17.3.3, June 15, 2004, 44 I.L.M. 544 [hereinafter U.S.-Morocco FTA], available at [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Morocco\\_FTA/Final\\_Text-Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Morocco_FTA/Final_Text-Section_Index.html).

209. INDUSTRIAL ECONOMICS, INCORPORATED, ANALYSIS OF DIESEL EMISSIONS IN THE U.S.-MEXICO BORDER REGION (Mar. 9, 2007). This report, prepared for the U.S. Environmental Protection Agency, documents the rise in truck emissions along the border resulting from NAFTA and other factors.

relatively low volumes of trade, trade in certain products may have a disproportionate environmental impact. For example, increased trade in timber products from a country with few or small forests could generate environmental impacts greater than the volume of trade would suggest. As such, these FTAs would benefit from a standing commission that identifies and evaluates environmental impacts resulting from the trade agreement.

The second approach, used exclusively with the U.S.'s Latin American trading partners,<sup>210</sup> establishes an Environment Affairs Council. These Councils are composed of cabinet level officials, although they do not need to be environment ministers. In addition to providing opportunities for public participation, each Council is charged with overseeing implementation of the environmental provisions of the FTA, such as those on enforcement.<sup>211</sup> In addition, they are responsible for developing an Environmental Cooperation Agreement (ECA), to elaborate on the role of environmental matters in the FTAs and create processes for the Parties to establish joint work programs to address conservation and other matters.

The ECAs remain quite general and extremely similar concerning the types of projects to be undertaken, suggesting that little thought went into tailoring the ECAs to the specific environmental and institutional needs of the Parties. The ECA for DR-CAFTA, for example, calls for exchanges of delegations, professionals and others to strengthen environmental policies, as well as conferences and joint programs, the exchange of information, and the development and transfer of knowledge and technologies, among other things.<sup>212</sup>

Each ECA also establishes an Environmental Cooperation Commission, composed of government representatives,<sup>213</sup> responsible for developing cooperative environmental work programs.<sup>214</sup> The provisions of the ECA get

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210. DR-CAFTA, *supra* note 20, art. 17.5; U.S.-Chile FTA, art. 19.3; U.S.-Colombia FTA, *supra* note 21, art. 18.6; U.S.-Panama FTA, *supra* note 188, art. 17.6; U.S.-Peru FTA, *supra* note 22, art. 18.6.

211. DR-CAFTA, *supra* note 20, art. 17.5.2; U.S.-Chile FTA, *supra* note 173, art. 19.3.1; U.S.-Colombia FTA, *supra* note 21, art. 18.6.2; U.S.-Panama FTA, *supra* note 188, art. 17.6.2; U.S.-Peru FTA, *supra* note 22, art. 18.6.2.

212. Agreement among the Governments of Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, and the United States of America on Environmental Cooperation, art. III, Feb. 18, 2005, *available at* <http://www.state.gov/g/oes/rls/or/42423.htm> [hereinafter DR-CAFTA ECA]. *See* U.S.-Chile Environmental Cooperation Agreement, June 17, 2003, *available at* <http://www.state.gov/g/oes/rls/or/43756.htm> [hereinafter U.S.-Chile ECA].

213. The DR-CAFTA and U.S.-Chile ECAs designate "high-level officials" from the Department of State as the U.S. representative. The DR-CAFTA ECA designates officials from the party's environmental ministry, whereas the U.S.-Chile ECA designates Chile's Ministry of Foreign Affairs as the commission representatives. DR-CAFTA ECA, *supra* note 212, arts. IV.2, IV.3.a; U.S.-Chile ECA, *supra* note 212, art. II.1.

214. DR-CAFTA ECA, *supra* note 212, art. V; U.S.-Chile ECA, *supra* note 212, art. II.2.

slightly more specific concerning the goals of the work programs. The DR-CAFTA ECA directs its Commission to create a work program designed to, among other things: (1) strengthen each Party's environmental management systems, (2) develop and promote incentives for environmental protection, (3) conserve and manage shared, migratory and endangered species, and (4) build capacity to promote public participation.<sup>215</sup> The U.S.-Chile ECA is even more general, providing that a subsequent work program must include activities to (1) collect and publish comparable information on each Party's environmental legislation, indicators and enforcement activities, (2) exchange information on environmental laws and policies and implementation of multilateral environmental agreements, and (3) promote sustainable management practices.<sup>216</sup>

At last, the work plans to implement the ECAs get specific. For example, the 2006 DR-CAFTA work plan<sup>217</sup> provided \$250,000 for technical assistance to harmonize environmental regulations, implementing procedures and enforcement policies. The Parties allocated another \$275,000 to improve implementation and enforcement of environmental law and \$200,000 to strengthen environmental impact assessment of projects.<sup>218</sup> Other projects are designed to improve natural resources management through ecotourism by eliminating barriers that prevent funds from reaching protected areas and promoting water conservation within the tourism industry, among other things.<sup>219</sup> A project to encourage market and income incentives to promote sustainable development investigates the adoption of sustainable coffee and agricultural production practices.<sup>220</sup> The 2005–2006 U.S.-Chile work program also provided for sharing best practices to promote and ensure compliance with environmental laws and regulations and capacity building for ecotourism, as well as consultations and exchanges concerning a range of topics within the scope of the ECA.<sup>221</sup>

The DR-CAFTA ECA and work program bear one substantial improvement over the NAAEC. Whereas the CEC's budget has been forever

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215. DR-CAFTA ECA, *supra* note 212, art. V.1.

216. U.S.-Chile ECA, *supra* note 212, art. III.2.

217. 2006 DR-CAFTA Environmental Cooperation Agreement Work Plan, *available at* <http://www.marn.gob.gt/documentos/ccad/environmental.pdf>. See U.S. Department of State, DR-CAFTA Labor and Environment Projects, (Sept. 28, 2006), *available at* <http://www.state.gov/r/pa/prs/ps/2006/73328.htm> (describing 2006 projects); U.S. Department of State, DR-CAFTA Environmental Projects (Jan. 30, 2008), *available at* <http://www.state.gov/r/pa/prs/ps/2008/jan/99875.htm> (describing 2007 projects).

218. *Id.* at 2–5.

219. *Id.* at 7.

220. *Id.* at 9–10.

221. U.S.-Chile Work Program 2005–2006, *available at* <http://www.state.gov/g/oes/rls/or43756.htm>.

locked at \$9 million,<sup>222</sup> the DR-CAFTA budget for environmental projects was \$18.5 million for 2006 and \$19.3 million for 2007.<sup>223</sup> However, the ECAs do not commit Parties to provide funding for the cooperative work program and instead make the work programs subject to availability of resources.<sup>224</sup> To date, the United States has paid for activities under the cooperative work programs.<sup>225</sup>

### 3. The Environmental Cooperation Agreements are Inadequate

Despite increases in funding for environmental activities relative to the NAAEC's budget, at least under DR-CAFTA, and projects designed to improve implementation and enforcement of environmental law, the ECAs are inadequate to address scale issues and the institutional needs of trading partners to cope with the environmental effects of trade-led growth. As described above in Section III.A.2, perhaps the most important lesson from the NAFTA and NAAEC experience is that comprehensive and far-reaching environmental and development objectives must be established and implemented *before* liberalizing trade. As explained, while NAFTA has increased trade among the Parties, increased growth—particularly in Mexico—and promoted efficiencies in many natural resource-based economic sectors, those efficiency gains have not prevented pollution and resource use from increasing quite dramatically. Had institutions been prepared before liberalization, some of these problems could have been prevented. By waiting until after the effects have occurred, the damage can only be controlled, not prevented. The work plans of the ECAs are not being adopted, much less implemented, until well after the FTA requires trade barriers to be lowered or removed. The DR-CAFTA Parties, for example, did not agree on a work plan until July 19, 2006, more than one year after DR-CAFTA entered into force for most Parties.<sup>226</sup>

Moreover, without an independent Secretariat, no institution is charged with developing information about the environmental effects of trade. As the

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222. The NAAEC does not set the budget at \$9 million. Despite inflation and currency fluctuations, the CEC's budget has remained at \$9 million since the NAAEC's entry into force.

223. See Press Release U.S. Department of State, U.S. Commits Funding For Labor and Environmental Protection for Central America-Dominican Republic Free Trade Agreement Countries (Jan. 30, 2008), available at [usembassy.or.cr/CAFTADR%20labor%20fact%20sheet%20CLEAN.pdf](http://usembassy.or.cr/CAFTADR%20labor%20fact%20sheet%20CLEAN.pdf).

224. DR-CAFTA ECA, *supra* note 212, art. VIII.1 (providing that "All cooperative activities under the Agreement shall be subject to the availability of funds and of human and other resources, and to the applicable laws and regulations of the appropriate Parties."). See U.S.-Chile ECA, *supra* note 212, art. VII.1.

225. See U.S. Commits Funding for Labor and Environmental Protection, *supra* note 223.

226. U.S. Department of State, Supporting Free Trade and Environmental Protection, <http://www.state.gov/g/oes/env/trade/index.htm> (last visited Oct. 30, 2008).

history of the CEC shows, governments are all too willing to control information. With an independent Secretariat, not only could such information be developed and published, but the independence of the Secretariat can shield controversial results from hostile governments. This situation occurred when the CEC's Secretariat initiated its study of the environmental effects of NAFTA<sup>227</sup> and when it assessed the possible impacts of genetically modified corn on maize in Mexico.<sup>228</sup>

## V. NEW DIRECTIONS FOR TRADE-ENVIRONMENT LINKAGES

Before the United States and other countries negotiate new FTAs, they need to step back and learn the lessons of NAFTA and NAAEC for the design of environmental linkages in FTAs. Because they are not doing that, they are failing to develop more effective ideas and institutions for improving trade-environment linkages. Building on the lessons of NAFTA and NAAEC, FTAs should concentrate on scale effects from trade-based growth, identify the institutional needs of trading partners both for addressing scale effects and in the larger environmental context, and commit to effective public participation and public oversight of trade-environment linkages.

### A. *Focus on Scale Effects*

While future FTAs should continue to include provisions that prevent competitiveness effects, such as requirements to enforce environmental law effectively, they should make efforts to identify, prevent and mitigate scale effects. As discussed in Section III.A, the work of the CEC and others has shown that scale effects are far more serious than competitiveness effects. In particular, much more work is needed before an FTA enters into force to assess the impact of trade liberalization caused by specific economic sectors and, to the extent possible, in particular regions. Moreover, once the FTA enters into

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227. Block, *supra* note 46, at 522. The CEC's study of the environmental effects of trade provides one cogent example. Although Article 10(6) of the NAAEC requires the Parties to consider the environmental effects of NAFTA "on an ongoing basis," the Secretariat has undertaken this work without the full support of the Parties. As Greg Block writes:

In furtherance of [Article 10(6)], the CEC Secretariat developed a framework for assessing the environmental impacts of free trade in the NAFTA region, held two public symposia to apply and refine the approach, and published numerous working papers and monographs on the subject. The project, initially clothed as an academic exercise focused on methodological issues, quietly evolved into a potent source of information on a diverse range of important issues. To date, the Secretariat has been able to pursue its publicly-driven research agenda despite the reluctance and, earlier, outright hostility of some officials from trade and other departments.

*Id.* at 521–522.

228. See *Maize & Biodiversity*, *supra* note 167, and accompanying text.

force, processes must be in place to monitor impacts and strategies (or obligations) agreed upon to mitigate them.

A focus on scale will require a corresponding commitment to capacity building and obtaining relevant environmental data prior to entry into force of the FTA.<sup>229</sup> Depending on the circumstances, capacity building may include information, technical training, technology or substitute products.<sup>230</sup> Again, the CEC's work shows that FTAs must invest far more in capacity building within regulatory agencies likely to be impacted by trade agreements to ensure that those agencies are able to monitor, assess, inspect, enforce and remediate environmental problems from increased trade.<sup>231</sup>

This focus seems particularly relevant as FTAs reach areas of greater economic and other development needs.<sup>232</sup> In fact, as the USTR said regarding DR-CAFTA, the Central American governments' ability "to effectively implement and enforce environmental laws has been limited by the lack of fiscal and human resources."<sup>233</sup> We also know that the economies of

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229. Capacity building "respond[s] to the specific lack of capacity to address a problem in a given circumstance with the necessary support." INDEPENDENT REVIEW COMMITTEE, *supra* note 57, at 39.

230. *Id.*

231. A number of commentators have observed that the NAAEC should focus on capacity building. *See, e.g., id.* at 38–40; Block, *supra* note 46, at 535. It has begun to do so. In the *Puebla Declaration*, which established the CEC Council's vision for the CEC after the first decade of operations, the Council committed to capacity building, particularly in Mexico:

We recognize the different capacities of the Parties and the continuing, urgent need to focus on institutional capacity building in order to sustain targeted results. We acknowledge that this is especially important for Mexico, and want the CEC to assist those concerned in the three countries—governments, the private sector, environmental organizations, academia, indigenous and local communities, and others—in gradually strengthening the capacity for sound environmental management across North America.

CEC Council, *Puebla Declaration* (June 23, 2004), available at [www.cec.org/files/PDF/COUNCIL/Puebla-Declaration-2004\\_en.pdf](http://www.cec.org/files/PDF/COUNCIL/Puebla-Declaration-2004_en.pdf).

232. Mexico, for example, is relatively wealthy compared with the countries in Central America. In 2005, Mexico's Gross Domestic Product (GDP) (based on purchasing power parity (PPP)) of \$1,094.3 billion, ranked twelfth among 180 countries. Among DR-CAFTA countries, Guatemala, whose GDP (PPP) was \$56.7 billion, is the wealthiest, ranked 72nd. Costa Rica ranked 78th at \$46.6 billion. On a per capita basis, only Costa Rica compares favorably with Mexico. Among 180 countries, the United States ranked fourth with a per capita income (PPP) in 2005 of \$41,197. Mexico and the DR-CAFTA countries had per capita incomes as follows: Mexico \$10,615 (64), Costa Rica \$10,773 (63), El Salvador \$ 5,270 (101), Guatemala 4,133 (114). Nicaragua \$3,685 (118), Honduras \$2,983 (123). International Monetary Fund, *World Economic Outlook* (2007), <http://www.imf.org/external/pubs/ft/weo/2007/01/data/index.aspx> (last visited Oct. 30, 2008). *See also* Economic & Social Data Rankings, <http://www.data-ranking.com/table.cgi?LG=e&TP=ne03-2&RG=&FL=> (last visited Oct. 30, 2008) (compiling the IMF's data in an easy-to-use format).

233. OFFICE OF THE U.S. TRADE REPRESENTATIVE, FINAL REVIEW OF THE DOMINICAN REPUBLIC-CENTRAL AMERICA-UNITED STATES FREE TRADE AGREEMENT 10 (Feb. 22, 2005),

developing countries generally, and Latin American countries specifically, are resource based.<sup>234</sup> Thus, we should expect effects in these countries similar to those in Mexico. Much greater funding and energy must be accorded to improving environmental infrastructure, including technical and legal capacities.<sup>235</sup>

In addition, a greater emphasis must be placed on obtaining relevant environmental data before the FTA comes into force. This is one area where the United States has clearly learned from the CEC, which has concluded that the “lack of high-quality environmental data hampers analysis of trade-environment linkages.” While some FTAs, including those in Latin America, are addressing the need for comparative environmental data in their ECAs or cooperative work programs, that information is coming *after* the impacts of FTAs come into force, thus eliminating the ability to gather baseline data for identifying the effects of trade. Without the relevant information prior to adoption of an FTA, it will be impossible to accurately assess the impacts of trade on the environment. Future FTAs should ascertain the need for common units of measurement for environmental factors, such as reporting on releases of toxic chemicals.

#### B. *Identify Institutional and Other Needs*

If FTAs focus on anticipating scale effects *prior to* liberalizing trade, then they will be better able to anticipate and “either improve environmental laws, policies, infrastructure, and capacities, as a bulwark against unsustainable trade patterns, or intervene directly by promoting environmental measures that may affect trade.”<sup>236</sup> While not necessarily adopting a focus on scale effects, the U.S.-Peru FTA does attempt to identify some of the legal, institutional and capacity building needs of Peru. As such, it represents what is hopefully a new approach to trade and environment.

The U.S.-Peru FTA is in many respects very similar to other FTAs. It adopts the basic NAAEC approach, which focuses on competitiveness effects and potential enforcement problems.<sup>237</sup> However, it diverges significantly from the NAAEC approach by requiring substantial changes in Peru’s forestry

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available at [www.ustr.gov/assets/Trade\\_Agreements/Regional/CAFTA/asset\\_upload\\_file953\\_7901.pdf](http://www.ustr.gov/assets/Trade_Agreements/Regional/CAFTA/asset_upload_file953_7901.pdf). See also, Block, *supra* note 46, at 534.

234. See Block, *supra* note 46, at 532–535.

235. *Id.* at 535.

236. *Id.* at 520.

237. For example, it commits the Parties to “strive to ensure” that its environmental laws encourage high levels of environmental protection, to not fail to enforce its environmental laws, and to avoid weakening or reducing environmental protections to increase trade or attract investment. U.S.-Peru FTA, *supra* note 22, art. 18.1–18.3.

sector. It does so principally because of the high levels of illegal logging and trade, particularly in mahogany, in Peru.<sup>238</sup>

As a result, environmental organizations successfully urged U.S. negotiators to include provisions in the U.S.-Peru FTA concerning forest management and trade in timber species. In an “Annex on Forest Sector Governance,” Peru is required to “increase the number and effectiveness of personnel” devoted to enforcing laws relating to timber harvesting and timber trade, including within national parks legislation and indigenous lands.<sup>239</sup> Peru must also develop and implement an anti-corruption plan for officials charged with the administration of forest resources<sup>240</sup> and increase criminal and civil penalties to levels that deter illegal activity.<sup>241</sup> Moreover, Peru must improve implementation of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) by conducting comprehensive surveys of species protected by CITES, such as mahogany,<sup>242</sup> establish export quotas for mahogany<sup>243</sup> and improve the administration and management of forest concessions by, among other things, physically inspecting areas designated for harvest of any CITES-listed tree species (i.e., mahogany);<sup>244</sup> and develop systems to verify the legal chain of origin of CITES-listed tree species.<sup>245</sup>

The demands on Peru do not stop here. For shipments of mahogany destined for the United States, the United States may ask Peru to investigate whether a particular Peruvian producer or exporter is in compliance with applicable laws; Peru is required to provide a written summary of its findings to the United States.<sup>246</sup> With the consent of Peru, U.S. officials may participate in a site visit to determine a particular producer’s or exporter’s compliance with applicable law.<sup>247</sup>

Beyond the provisions specific to the forestry sector, the U.S.-Peru FTA also establishes a Trade Capacity Building Committee to help the Parties, particularly Peru, make appropriate reforms to “foster trade-driven economic

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238. Several organizations have documented illegal logging, inside national parks and indigenous reserves within Peru, logging in excess of harvest quotas, and trade in violation of Peru’s obligations under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). *See, e.g.,* Asociación Interétnica de Desarrollo de la Selva Peruana (The National Association of Amazon Indians in Peru), *Illegal Logging and International Trade in Mahogany (Swietenia macrophylla) from the Peruvian Amazon* (May 2007).

239. U.S.-Peru FTA, *supra* note 22, Annex 18.3.4, ¶ 3(a).

240. *Id.* Annex 18.3.4, ¶ 3(a)(ii).

241. *Id.* Annex 18.3.4, ¶¶ (3)(b)–(c).

242. *Id.* Annex 18.3.4, ¶ 3(d).

243. *Id.* Annex 18.3.4, ¶ 3(f).

244. U.S.-Peru FTA, *supra* note 22, Annex 18.3.4, ¶ 3(g).

245. *Id.* Annex 18.3.4, ¶ 3(h).

246. *Id.* Annex 18.3.4, ¶¶ 6, 7.

247. *Id.* Annex 18.3.4, ¶ 10.



growth, poverty reduction, and adjustment to liberalized trade.”<sup>248</sup> This committee will, among other things, prioritize trade capacity building projects and monitor and assess progress in implementing trade capacity building projects.<sup>249</sup> While this committee has no authority to make adjustments to the FTA where it identifies problems deriving from a lack of capacity, a permanent committee designed to assess capacity building needs is surely an important aspect of this FTA.

These provisions are quite extraordinary and “groundbreaking”<sup>250</sup>—at least in the context of previous FTAs. In breaking the mold of FTAs, they point the way forward for future trade agreements by focusing the environmental provisions of trade agreements on problems likely to emerge or be exacerbated by liberalized trade. To the extent that these requirements fall short, it is that they must be adopted within eighteen months *after*, not at some time *prior to*, the date of entry into force of the FTA.<sup>251</sup> Moreover, the FTA itself does not include any funding to help Peru implement these provisions. While the United States initially committed to funding implementation of the Annex on Forest Sector Governance, it now appears to be backing away from that pledge.<sup>252</sup> In addition, it is not clear where the fund for the Trade Capacity Building Committee will come from.<sup>253</sup> Without committed funding, these provisions may become nothing more than potential and promises unfilled, not unlike the NAAEC.

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248. *Id.* ¶ 20.4.1.

249. U.S.-Peru FTA, *supra* note 22, ¶ 20.4.3.

250. Office of the U.S. Trade Representative, *Free Trade with Peru: Brief Summary of the United States-Peru Trade Promotion Agreement*, at 2 (June 2007) (describing the environmental provisions of the U.S.-Peru FTA), available at [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Peru\\_TPA/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Section_Index.html).

251. U.S.-Peru FTA, *supra* note 22, Annex 18.3.4, ¶ 3.

252. Personal Interview with Kris Genovese, Attorney, Center for International Environmental Law (July 15, 2008). Ms. Genovese has been very active in efforts to reform Peru’s mahogany trade.

253. In a summary of the U.S.-Peru FTA, the United States acknowledged that it had provided substantial resources for capacity building in the past and that future funds “could” come from the World Bank and other sources:

The U.S. Government provided a total of approximately \$58 million in trade capacity building (TCB) assistance to Peru in fiscal years 2004 through 2006. Peru also has benefited from U.S. government provided trade capacity building assistance to Andean regional programs, totaling more than \$8.5 million for the same period. Over the next five years, trade-related assistance to Peru that is under consideration by the Inter-American Development Bank and the World Bank could total over \$600 million in support of the agreement.

Office of the U.S. Trade Representative, *Free Trade with Peru: Detailed Brief Summary of the United States-Peru Trade Promotion Agreement*, 10 (June 2007), available at [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Peru\\_TPA/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Section_Index.html).

### C. Public Participation

Whereas FTAs were once—and in some respects still remain—the province of secretive governmental meetings and dispute resolution processes, they have become much more open to public participation. Indeed, regional FTAs have become essential promoters of public participation with all of the U.S. post-NAFTA FTAs, providing opportunities for public participation in environmental decisionmaking. How they promote public participation can encourage an understanding of the environmental effects of FTAs.

#### 1. Environmental Review of FTAs

As the CEC declared, “One of the strongest lessons of the CEC’s work in the area of environmental assessments of trade is that outcomes are stronger when the public is involved early, and involved often, in such assessments. Transparency in the process of debating trade-environment linkages invariably leads to stronger public policy outcomes.”<sup>254</sup> Nevertheless, it is clear that a lack of transparency pervaded the DR-CAFTA negotiations in Central America, where, with the exception of Costa Rica, governments failed to make information on the FTA publicly available and excluded members of civil society from the negotiation process.<sup>255</sup> FTAs should embrace a participatory and transparent approach to evaluating trade-and-environment linkages.

#### 2. Citizen Submission Process

The citizen submission process must be rethought. As many have proposed, the easiest way to transform the citizen submission process would be to eliminate the governments’ role in determining whether a factual record is warranted.<sup>256</sup> That simple change would help to ensure that process provides a valuable avenue for citizens of some countries to voice concerns about failures to enforce environmental law effectively. However, it is clear that governments view the process as adversarial and litigation-based<sup>257</sup> and are “more inclined to weaken the procedure rather than strengthen it.”<sup>258</sup> As a consequence, they have made every effort to thwart its effectiveness; the

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254. Vaughan & Block, *supra* note 104, at 27.

255. Claire Ribando, *DR-CAFTA: Regional Issues* 4 (CRS Report, Updated July 8, 2005).

256. See, e.g., Wold et al., *supra* note 17, at 40; Randy Christensen & Albert Koehl, *NAFTA Needs Environmental Credibility*, WINDSOR STAR, Mar. 8, 2008, available at <http://www.ecojustice.ca/media-centre/press-clips/nafta-needs-environmental-credibility>; JPAC, Advice to Council: No. 01-07, *Citizen Submissions on Enforcement Matters under Articles 14 & 15 of NAAEC*, J/01-03/ADV/01-07/Rev.3 (Oct. 23, 2001); TRAC, *supra* note 102, at 54 (recommending that Council “respect the role and authority of the executive director, in line with a strict interpretation of the [NAAEC]”).

257. See *supra* Section III.C.

258. Kal Raustiala, *Citizens Submissions and Treaty Review in the NAAEC*, in *GREENING NAFTA*, *supra* note 13, at 269.

process has clearly not lived up to expectations. Given the history of repression in Central America, it is entirely predictable that no Central American person or organization has used the citizen submission process of DR-CAFTA.<sup>259</sup> The entire model is wrong.

Instead, future FTAs should design an approach that facilitates cooperation rather than encourages an adversarial process. The members of the U.S. National Advisory Committee, which provides advice to the Environmental Protection Agency on issues relating to the NAAEC, recently proposed a non-adversarial, cooperative mechanism for the resolution of environmental problems identified by citizens.<sup>260</sup> This “problem-solving” process would allow citizens to approach an independent Secretariat with issues unrelated to enforcement failures and would not seek to assign blame for the specified environmental concern. Instead, the process would help resolve environmental problems:

[T]he Secretariat would work with the requestors and the Party or Parties concerned to resolve the issue. The Secretariat’s functions would vary depending on the nature of the issue. It would seek to identify technology, information, financing, or other resources and catalyze resolution of the problem. (Those resources could be available through governments, businesses, academic institutions, non-profit institutions, international organizations, etc.) In some cases, it might simply pass on such information to the requestors; in others, it might facilitate direct contacts between the requestors and other interested parties; in still others, it might prepare a short report outlining an approach that all interested parties might consider taking. Finally, in some cases it might determine after further consideration that it cannot assist with resolution of the problem.<sup>261</sup>

At its core, this proposal attempts to address the central issues that matter to citizens: that their voices are heard and that officials respond to their concerns in a meaningful way. The proposal upends the nature of the citizen submission process by altering the nature of the process. Instead of an allegation that the government has failed to enforce environmental law, the process seeks ways to resolve specific environmental concerns. As such, the proposal would help renew the spirit of cooperation that has been lost in the NAAEC.

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259. *See supra* Section IV.A.2.

260. Advice 2007-1, (May 24, 2007): Response to EPA’s request on potential projects for consideration by the CEC with emphasis on their relevance to U.S. audiences, *in* Letter from M. Dolores Wesson, Chair, National Advisory Committee, to Stephen Johnson, Administrator, U.S. EPA, at 13 (May 24, 2007), *available at* [http://www.epa.gov/ocem/nac/pdf/2007\\_may24\\_nac\\_letter.pdf](http://www.epa.gov/ocem/nac/pdf/2007_may24_nac_letter.pdf). This idea originated with Anne Perrault, Senior Attorney with the Center for International Environmental Law.

261. *Id.*

Another possible approach would focus the submission process on scale effects. Under this approach, citizens could seek review of the effects of trade liberalization on the environment. As with Article 13 reports under the NAAEC, the Secretariat could assemble experts to ascertain whether the environmental impacts were, in fact, caused by trade. If they were, then the Secretariat could propose measures, including recommendations for capacity building and technology, to mitigate those impacts. As with the previous proposal, this proposal seeks to eliminate the hostility that pervades the current submissions process by changing the focus of the process. This proposal does not cast blame on any particular agency, official or company for environmental wrongdoing. Rather, it asks whether a particular policy or measure is adversely affecting the environment.

Whether either of these processes can transform a valuable avenue for citizen participation in environmental decisionmaking is unknown. An opportunity for citizens to focus on scale effects in a way that suggests trade may not be beneficial could in fact be more controversial than the current mechanism. In any event, because the current process is clearly not working as intended, and with governments unwilling to let it work as intended, a new model should be tested.

## VI. CONCLUSION

FTAs now promise more than economic growth derived from trade liberalization. The public has come to expect that FTAs will also produce environmental benefits. Since the NAFTA negotiations culminated in the adoption of an environmental side agreement—the NAAEC—each subsequent FTA has adopted environmental provisions built on the NAAEC. Yet, the NAAEC itself has sputtered, a victim of the very independence that Canada, Mexico and the United States expressly and tacitly gave it. As a consequence, the United States has withdrawn many of the NAAEC's essential aspects from subsequent FTAs. Some FTAs, such as the FTAs with Australia, Morocco and Oman, do not include an environmental commission to coordinate environmental activities. Many do not include a citizen submissions process. None includes a quasi-independent Secretariat to evaluate issues within the scope of the work program. Even where the post-NAAEC FTAs do not fundamentally alter the framework included in the NAAEC—such as focusing on competitiveness effects and enforcement issues—the model itself is flawed and must be revisited. Without reorienting the environmental provisions of FTAs to focus on scale effects of trade liberalization, the post-NAAEC FTAs are unlikely to yield the environmental benefits many expect.

The U.S.-Peru FTA provides a glimmer of the environmental benefits that FTAs could bring. In that FTA, negotiators assessed key weaknesses in Peru's environmental institutions. Finding significant illegal logging and illegal trade in valuable timber species, particularly mahogany, the United States and Peru

negotiated provisions that require Peru to undertake substantial reforms in its forestry sector. These provisions are quite specific, calling on Peru to add enforcement personnel to its forest sector, increase sanctions for violations of relevant laws and even undertake surveys of timber species.<sup>262</sup>

Still more needs to be done. To adequately take into account scale effects, provisions such as those included in the U.S.-Peru FTA should be implemented prior to the entry into force of the FTA, not after it.<sup>263</sup> To encourage public participation so that citizens cannot only comment on potential environmental effects of trade agreements but also better understand the benefits of trade liberalization, governments must include citizens early in the process of assessing the environmental effects of trade. Moreover, any citizen submission process should be rethought.<sup>264</sup> Because the NAAEC's focus on enforcement failures has put governments on the defensive, a process that encourages collaboration may provide more positive environmental outcomes than the NAAEC's and DR-CAFTA's citizen submission processes have.

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262. *See supra* Section V.B.

263. *See supra* Section III.A.2.

264. *See supra* Section V.C.2.