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# Towards Promises Unfulfilled: Applying Sixteen Years of Trade and Environmental Lessons to the Pending U.S.–Colombia Trade Promotion Agreement

Travis A. Brooks\*

## I. INTRODUCTION

During the 2008 presidential campaign, Barack Obama expressed his opposition to the current draft of the U.S.–Colombia Trade Promotion Agreement (CTPA) saying, “whatever trade deals we negotiate while I’m President . . . will have strong labor and environmental protections that we’ll enforce.”<sup>1</sup> This shift from the fierce pro-trade stance of the prior administration is in some respects a reflection of discontent in the labor and environmental movements that has existed since the negotiation of the North American Free Trade Agreement (NAFTA) in the early 1990s.<sup>2</sup>

At the heart of concern is the idea that U.S. free trade agreements emphasize much about open markets but place too little emphasis on mitigating their social and environmental costs.<sup>3</sup> Despite these qualms, U.S. free trade agreements now reach well beyond North America, and have been signed and enacted with seventeen nations across the globe.<sup>4</sup> Until recently, all of the post-NAFTA trade agreements have been signed without significantly altering the environmental provisions included in each agreement.<sup>5</sup> In fact, those signed with far-off trading partners in Chile, Jordan, Morocco, and Australia have weaker protections than those that accompany NAFTA.<sup>6</sup>

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1. Senator Barack Obama, Remarks for Senator Barack Obama: AFL-CIO, (Apr. 02, 2008) (transcript available at [http://www.barackobama.com/2008/04/02/remarks\\_for\\_senator\\_barack\\_oba\\_3.php](http://www.barackobama.com/2008/04/02/remarks_for_senator_barack_oba_3.php)).

2. See Peter Newell, *Civil Society Participation in Trade Policy-Making in Latin America; the Case of the Environmental Movement*, in HANDBOOK ON TRADE AND THE ENVIRONMENT 171,172-75 (Kevin P. Gallagher ed., 2008); Jim Naureckas, *Happily Ever NAFTA?*, EXTRA!, (Oct. 1993), <http://www.fair.org/index.php?page=1535>.

3. See Newell, *supra* note 2, at 173 (Describing that many social and environmental groups in the period before NAFTA claimed that NAFTA would accelerate social and environmental problems in North America, and that some of these groups wanted a new set of social and environmental rules in the agreement).

4. *Free Trade Agreements*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-agreements/free-trade-agreements> (last visited Oct. 10, 2010) [hereinafter *Free Trade Agreements*].

5. See Chris Wold, *Evaluating NAFTA and the Commission for Environmental Cooperation: Lessons for Integrating Trade and Environment in Free Trade Agreements*, 28 ST. LOUIS U. PUB. L. REV. 201, 251 (2008).

6. Free trade agreements signed with Chile, Morocco, Jordan, and Australia all exclude the citizen

Since the outset of the NAFTA debate in the 1990s, free trade advocates have answered critics by predicting that open markets would bring to the developing world the same heightened environmental standards associated with wealthier countries as trade boosted standards of living.<sup>7</sup> Unfortunately, this correlation has not materialized.<sup>8</sup> Most Mexicans are worse off since NAFTA came into effect, with national income rising a modest one percent annually, along with increased poverty, falling wages, and continued levels of high income disparity.<sup>9</sup> At the same time, the cost of environmental degradation in the country has reached a troubling ten percent of Mexico's gross domestic product (GDP).<sup>10</sup> This coincides with increased pollution emissions and slow income growth since NAFTA came into effect.<sup>11</sup>

Nonetheless, dire predictions that free trade agreements would create pollution havens for multinational corporations seeking weaker environmental standards have also not materialized.<sup>12</sup> For example, data does not show movement by heavy polluters from outside countries into Mexico in search of lax environmental regulations after NAFTA was enacted.<sup>13</sup> Although there is little evidence that free trade agreements have created what are called "competition effects," which are the result of a race to reduce environmental protections to encourage foreign investment, these agreements certainly have exacerbated existing problems caused by weak environmental institutions in the developing world.<sup>14</sup> Thus, instead of causing "competition effects," free trade agreements have caused what are called negative "scale effects."<sup>15</sup>

"Scale effects" can be described as the effects of trade on the environment that result from an increased overall scale of economic activity resulting from free trade.<sup>16</sup> In countries without sufficient regulatory infrastructure to cope with the potential damaging environmental effects of increased economic activity, this

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submission process explained later in Parts V–VI as an enforcement mechanism. *Id.* at 237.

7. Kevin P. Gallagher, *Introduction: International Trade and the Environment*, in *HANDBOOK ON TRADE AND THE ENVIRONMENT* 1, 2-4 (Kevin P. Gallagher ed., 2008).

8. *Id.* at 10-11.

9. *Id.* at 12; Sandra Polanski, *Mexican Employment and Income a Decade After NAFTA*, *CARNEGIE ENDOWMENT FOR INT'L PEACE*, 169 (Feb. 25, 2004), <http://www.carnegieendowment.org/pdf/files/canadasenatebrief.pdf>.

10. Gallagher, *supra* note 7, at 12.

11. Jody W. Lipford & Bruce Yandle, *NAFTA, Environmental Kuznets Curves, and Mexico's Progress*, *GLOBAL ECONOMY JOURNAL*, 5 (2010), <http://www.bepress.com/cgi/viewcontent.cgi?article=1656&context=gej>.

12. See James K. Boyce, *Globalization and the Environment: Convergence or Divergence?*, in *HANDBOOK ON TRADE AND THE ENVIRONMENT* 97, 111 (Kevin P. Gallagher ed., 2008); Gallagher, *supra* note 7, at 11.

13. See Lipford & Yandle, *supra* note 11, at 4.

14. GALLAGHER, *supra* note 7, at 10-11.

15. Wold, *supra* note 5, at 205, 251; see Lipford & Yandle, *supra* note 11, at 4.

16. INT'L INST. FOR SUSTAINABLE DEV., *ENV'T AND TRADE: A HANDBOOK* 46-47 (2nd ed. 2005), [http://www.iisd.org/pdf/2005/envirotrade\\_handbook\\_2005.pdf](http://www.iisd.org/pdf/2005/envirotrade_handbook_2005.pdf) [hereinafter *Environment and Trade*].

leads to accelerating levels of environmental degradation.<sup>17</sup> Under existing free trade agreements, studies have shown these negative “scale effects” on the environment have been much more serious than “competition effects.”<sup>18</sup> Whatever language is included in the final version of the CTPA should address this reality.

Along with the Panama Trade Promotion Agreement and the South Korea Free Trade Agreement, the CTPA is currently under review of Congress and the Office of the U.S. Trade Representative.<sup>19</sup> This is a result of political changes in the U.S. that brought with them a re-examination of U.S. free trade policies in general.<sup>20</sup>

The pending status of the CTPA at a time when America’s approach to new trade agreements is being re-examined, make it a model of how the environmental lessons learned in the sixteen years since NAFTA went into effect can be applied to a new trade agreement. Moreover, Colombia’s extraordinarily rich but threatened biodiversity make the CTPA a potential model of how improvements can be made to new U.S. free trade agreements when the environmental and ecological stakes are especially high.<sup>21</sup>

To understand what changes should be made to the CTPA, it is helpful to look at the experiences under free trade agreements between the U.S. and other Latin American nations that are already in place. This is especially true because the environmental provisions of all of the free trade agreements signed between the U.S. and Latin America since NAFTA are based on the same basic structure as the North American Agreement on Environmental Cooperation (NAAEC), the environmental side agreement to NAFTA.<sup>22</sup> With an eye towards improving the CTPA, this comment will look at the NAAEC, (enacted in 1993 between the U.S., Canada, and Mexico), the Dominican Republic—Central America Free Trade Agreement (DR-CAFTA) (signed between the U.S., the Dominican Republic, Costa Rica, Honduras, El Salvador, Guatemala, and Nicaragua in

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17. *Id.*; Wold, *supra* note 5, at 224-25.

18. Wold, *supra* note 5, at 224-25.

19. *Free Trade Agreements*, *supra* note 4; *Panama Trade Promotion Agreement*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-agreements/free-trade-agreements/panama-tpa> (last visited Oct. 10, 2010); *Korea–U.S. Free Trade Agreement*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta> (last visited Oct. 10, 2010); *Colombia FTA*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-agreements/free-trade-agreements/colombia-fta> (last visited Oct. 29, 2010).

20. See Joseph J. Schatz, *Free Trade Returns to the Table*, CQ POLITICS (Apr. 20, 2009, 8:21 PM), <http://www.greenchange.org/article.php?id=4296>.

21. *Colombia: Environmental Profile*, MONGABAY, <http://rainforests.mongabay.com/20colombia.htm> (last updated Feb. 6, 2006) [hereinafter *Colombia Profile*] (describing Colombia’s biodiversity).

22. See Wold, *supra* note 5, at 251 (asserting that each free trade agreement enacted after NAFTA has been built on the environmental provisions of the NAAEC); North American Agreement on Environmental Cooperation, *done* Sept. 8-Sept. 14, 1993, 32 I.L.M. 1480 [hereinafter NAAEC].

2004), as well as the U.S.–Peru Trade Promotion Agreement (PTPA) (signed between the U.S. and Peru in 2007).<sup>23</sup>

Not only are these trade agreements all built on the environmental provisions of the NAAEC, but unlike trade agreements signed with more far-off trading partners, the NAAEC, DR-CAFTA, PTPA, and the current draft of the CTPA all contain the citizen submission process, which will be examined later in this comment.<sup>24</sup> Additionally, all of these agreements were signed between Latin American nations that the International Monetary Fund describes as “emerging” or “developing,” and the U.S., a major and much more advanced economy to the north.<sup>25</sup>

What is still unclear is whether any changes will be made to the environmental provisions of the CTPA. The current language of Chapter 18 in the agreement already reflects renegotiated terms laid out by the U.S. House Ways and Means Committee in 2007.<sup>26</sup> Under these terms, all of the CTPA’s environmental provisions (including seven multinational environmental treaties added to the agreement) are theoretically strengthened because they are subject to the binding dispute settlement mechanism used for all other major provisions of the trade agreement.<sup>27</sup>

The PTPA, signed in the last days of the Bush administration contains even stronger protections.<sup>28</sup> In particular, the PTPA includes an annex addressing threatened Peruvian forest sectors.<sup>29</sup> By including this annex, the PTPA breaks

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23. NAAEC, *supra* note 22, pmb1; *Cafta-DR (Dominican Republic-Central America FTA)*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta> (last visited Jan. 30, 2010) [hereinafter *Cafta-DR*]; *Peru Trade Promotion Agreement*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa> (last visited Jan. 30, 2010).

24. Wold, *supra* note 5, at 237 (explaining that only the free trade agreements with Colombia, Panama, and Peru contain the citizen submission process, and not those signed with Australia, Chile, Jordan, and Morocco).

25. *World Economic Outlook: Database – WEO Groups and Aggregates Information*, INT’L MONETARY FUND (Apr. 2010), <http://www.imf.org/external/pubs/ft/weo/2010/01/weodata/groups.htm#oem>; see *The World Factbook: Country Comparison GDP*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2001rank.html> (last visited Mar. 6, 2011) (illustrating the much larger size of the U.S. economy in compared to all of the Latin American nations in these agreements).

26. See *Peru & Panama FTA Changes*, U.S. HOUSE OF REPRESENTATIVES COMM. ON WAYS AND MEANS (May 10, 2007), available at [http://www.cpath.org/sitebuildercontent/sitebuilderfiles/2007\\_new\\_trade\\_policy\\_details5-10-07.pdf](http://www.cpath.org/sitebuildercontent/sitebuilderfiles/2007_new_trade_policy_details5-10-07.pdf) [hereinafter *WAYS AND MEANS*]; United States-Colombia Trade Promotion Agreement, U.S.-Colom., ch. 18, art. 18.12(6), Annex 18.2, signed by Colombia and the United States Nov. 22, 2006, (pending Congressional approval), available at [http://www.ustr.gov/sites/default/files/uploads/agreements/fta/colombia/asset\\_upload\\_file644\\_10192.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/fta/colombia/asset_upload_file644_10192.pdf) [hereinafter *CTPA*] (including language making the Agreement’s environmental provisions subject to the binding dispute mechanisms used for other aspects of the agreement).

27. *WAYS AND MEANS*, *supra* note 26; *CTPA*, *supra* note 26, art. 18.12(6).

28. See United States–Peru Trade Promotion Agreement, U.S.–Peru, Apr. 12, 2006, 121 Stat. 1455, available at [http://www.ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset\\_upload\\_file953\\_9541.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file953_9541.pdf) [hereinafter *PTPA*]; Wold, *supra* note 5, at 246–47.

29. *PTPA*, *supra* note 28, Annex 18.3.4.

somewhat from the “competition effects” centered model of the NAAEC, and other post NAFTA trade agreements by laying out problem specific enforcement and institution building mechanisms.<sup>30</sup>

While the renegotiated terms of the CTPA are promising, the current draft of the CTPA still contains many of the shortcomings from DR-CAFTA without incorporating a country-specific approach like that included in the PTPA.<sup>31</sup> As in DR-CAFTA, the NAAEC, and the PTPA, the citizen submission process still functions as a core enforcement mechanism of the CTPA.<sup>32</sup> Described below, this process has had a positive impact, but a limited one.<sup>33</sup> It is also argued that the focus by the CTPA and other U.S. free trade agreements on enforcement mechanisms misses the mark by concentrating on competition effects and not on the scale effects shown to be worsened by free trade.<sup>34</sup>

Although they will not solve the host of problems facing Colombia, improvements to the environmental provisions of the CTPA are necessary to allow a correlation between liberalized trade and enhanced environmental quality initially promised by free trade advocates. This Comment will provide a brief description of the lengthy system of environmental codes and constitutional environmental rights in Colombia. It will then explain that in reality, these laws are under enforced and not guaranteed. The result is that the world’s second most biologically diverse nation faces ongoing and increasing environmental degradation, a fact to which the final version of the CTPA must be sensitive.<sup>35</sup> An analysis of the current draft of the CTPA and an examination of the citizen submission process will follow. This core provision will be assessed by looking at nine submissions that have arisen under the NAAEC and the DR-CAFTA.

Because it significantly breaks from the mold of prior free trade agreements, this Comment will then analyze the Annex on Forest Sector Governance to the PTPA. A brief analysis of the “resource curse” theory will follow because it directly challenges the idea of an automatic correlation between free trade and improved environmental standards. All of these factors will then be applied to the pending agreement with Colombia to determine where improvements might be made. Ultimately, it will be argued that the CTPA should embrace a wider application of the problem specific approach of the PTPA, and seek to enhance the institutions that can study and prevent the potential harm arising from increased trade related development and private U.S. investment. This will likely

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30. Wold, *supra* note 5, at 251.

31. *Id.* at 237-38; see CTPA, *supra* note 26, art.18.3 (adding no additional provisions particular to Colombia); PTPA, *supra* note 28, Annex 18.3.4 (setting forth additional provisions with respect to forest sector governance particular to Peru).

32. Wold, *supra* note 5, at 237.

33. See *infra* Parts V-VI.

34. See Wold, *supra* note 5, at 205-06.

35. See *Colombia Profile*, *supra* note 21.

require more investment towards environmental protection than has been allocated under prior U.S. free trade agreements with Latin America.

## II. A UNIQUE COMMITMENT UNFULFILLED: COLOMBIA'S NATIONAL ENVIRONMENTAL LAWS

With its long history of civil war and cocaine exportation, it may be surprising that Colombia has some of the most expansive and modern environmental laws in the world.<sup>36</sup> In 1974 Colombia passed the National Renewable Resources and Environmental Code, one of the first comprehensive environmental regimes to be enacted worldwide.<sup>37</sup> Decades later in 1993, the country took steps to boost enforcement of these laws by establishing a Ministry of the Environment and fifteen *Corporaciones Autonomas Regionales* singularly tasked with addressing environmental issues.<sup>38</sup> These codes coincide with the Colombian Constitution of 1991 that devotes twenty-three articles to environmental protection, including a right for all Colombian citizens to enjoy a healthy environment and a communal right to participate in decisions that affect it.<sup>39</sup> Constitutional provisions also require the government to manage natural resources in a manner that guarantees sustainable development and conservation.<sup>40</sup>

On the national level, Colombian courts have asserted themselves, enforcing these laws in the face of outside political pressure. For example, a constitutional tribunal recently struck down the controversial "General Forestry Law," a joint effort by the Uribe administration of Columbia and the U.S. Agency for International Development (USAID) to privatize Colombian forests for logging on communal indigenous lands.<sup>41</sup> Many feared the plan would allow lumber companies to coerce weakly organized indigenous communities into opening up their communal forest land to industrial-scale logging without requiring environmental permits.<sup>42</sup> By allowing this plan to go forward without establishing

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36. See Adam B. Kushner, *The Truth About Plan Colombia*, NEWSWEEK (Jan. 3, 2009), <http://www.newsweek.com/2009/01/02/the-truth-about-plan-colombia.html>; *Interim Environmental Review: U.S.-Andean Free Trade Agreement*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, 5-6 (Feb. 2005), <http://www.ustr.gov/sites/default/files/Interim-Environmental-Review.pdf> [hereinafter *Interim Review*].

37. *Id.* at 5.

38. *Id.* at 6.

39. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 79.

40. *Id.* art. 80.

41. President Alvaro Uribe Velez was the president of Colombia from 2002 until August of 2010. *Profile: Alvaro Uribe Velez*, BBC NEWS, <http://news.bbc.co.uk/2/hi/americas/3214685.stm> (last updated Mar. 29, 2010); *La Corte Constitucional Declara Inexequible la Ley Forestal* [The Constitutional Court Declared the Forest Law Unconstitutional], GRUPO SEMILLAS, <http://www.semillas.org.co/sitio.shtml?apc=I1%20-%20%20&x=20155467> (last visited Dec. 25, 2009) [hereinafter *La Corte*]; see generally Sonia Parra, *Environment-Colombia: Controversy over Forestry Law Simmers On*, INTER PRESS SERV. (Oct. 5, 2006), <http://ipsnews.net/news.asp?idnews=35002>.

42. Parra, *supra* note 41.

regulations to ensure it occurred sustainably, many worried environmental harm would intensify in areas already suffering heavily from illegal logging.<sup>43</sup>

Despite strong pressure by the Uribe government and the timber industry, the Colombian Constitutional Court deemed the plan unconstitutional because it failed to allow participation by indigenous communities in crafting the law.<sup>44</sup> Backed by various sectors of Colombian civil society, the success of this lawsuit displays the potential for effective protection of constitutional rights in the face of strong industry pressure.<sup>45</sup> More commonly however, hard realities in the country mean that the lofty ideas laid out in Colombia's codes and Constitution have not yet come to fruition.

### III. THE CURRENT ENVIRONMENTAL SITUATION IN COLOMBIA

In discussing the environmental situation in Colombia, it is important first to address the armed conflict between the national government and two groups: Revolutionary Armed Forces of Colombia (FARC) and the National Liberation Army (ENL).<sup>46</sup> An estimated 40,000 deaths have occurred since 1990 as a result of this conflict and three million people have been displaced internally.<sup>47</sup> Although former President Uribe made strides to dampen this conflict, continued rebel presence in rural areas is an obvious and substantial hindrance to the rule of law throughout the country.<sup>48</sup>

A government that does not have control over all of its territory will be unable to enforce its environmental laws in areas outside of its reach. Moreover, many of those fighting the Colombian government are heavily involved in the cocaine trade which is responsible for much of Colombia's unregulated loss of forest cover.<sup>49</sup> U.S. efforts to combat the coca trade (largely based on aerial fumigation), have had further substantially harmful effects on native vegetation without actually reducing the amount of cocaine entering the U.S.<sup>50</sup> Therefore, the environmental measures under the CTPA should coincide with continued U.S. support aimed at ending the civil conflict in Colombia so that environmental laws can be enforced and natural resources can be protected throughout the country. Ideally, the U.S. should also adjust its efforts at combating cocaine in

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43. *Id.*

44. *La Corte*, *supra* note 41.

45. *Id.*

46. *Armed Conflicts Report: Colombia*, PROJECT PLOUGHSHARES (Jan. 2010), <http://www.ploughshares.ca/libraries/ACRText/ACR-Colombia.html> [hereinafter PLOUGHSHARES].

47. *Id.*

48. *See Q&A: Colombia's Civil Conflict*, BBC NEWS (Dec. 23, 2009), <http://news.bbc.co.uk/2/hi/1738963.stm>.

49. *Id.* (indicating that many of those fighting the Colombian government are involved in the illegal drug trade); *Colombia Profile*, *supra* note 21.

50. *Colombia Profile*, *supra* note 21 (describing coca's impact on the environment, and also the U.S.' environmentally destructive but futile efforts to eradicate coca plants).



ways that are less ecologically destructive. These points are all the more important when looking to the vast ecological and natural resource wealth worth protecting in the country.

These resources form an impressive part of the Colombian landscape. From an ecological standpoint, Colombia is the second most biologically diverse country in the world.<sup>51</sup> For example, a 1999 report covering only seventy percent of the country counted 26,000 species of plants.<sup>52</sup> Colombia is rich in other natural resources as well, with the fourth largest overall flow of rivers relative to its size, some of the world's most extensive deposits of oil, coal, and significant deposits of natural gas and other valuable minerals.<sup>53</sup> Although these resources are theoretically protected by comprehensive and modern environmental regulations, political realities in the country make them difficult to enforce.<sup>54</sup> This is mostly due to problems common in the developing world, with insufficient budgets from a weak tax base, the ongoing civil conflict mentioned above, and sparse governmental presence in rural areas making enforcement difficult.<sup>55</sup>

Inadequate enforcement in the face of shifting environmental pressures has contributed to a thirty percent loss in Colombia's biodiversity in recent decades.<sup>56</sup> Deforestation is especially troubling, accounting for a loss of a third of Colombia's vegetative cover since the 1960s and five percent of worldwide deforestation during the 1980s.<sup>57</sup> The scourge of water pollution in the country's many rivers is also substantial, with ninety-five percent of Colombian cities pumping untreated sewage directly into their waters.<sup>58</sup>

The role of resource development and exploitation in this situation is obvious. Every year approximately 200,000 hectares of forest are lost as a result of large and small scale farming, logging, mining, and energy and infrastructure development.<sup>59</sup> Pacific coast rainforests are especially threatened by gold mining and palm oil extraction.<sup>60</sup> According to a study from the mid-nineties, gold mining alone contributed to an estimated loss of 80,000 hectares of forest.<sup>61</sup> Government led development efforts add to the pressure on Colombia's environment. For example, in 1992 the national government laid out an ambitious plan to develop and industrialize the Pacific coastal region.<sup>62</sup> The *Plan*

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51. *Id.*

52. *Interim Review*, *supra* note 36, at 6.

53. *Id.*

54. *Id.* at 8.

55. *Id.*

56. *Id.* at 7.

57. *Id.*

58. *Id.*

59. *Colombia Profile*, *supra* note 21.

60. *Id.*

61. *Id.*

62. *Rainforest Indians Threatened*, SURVIVAL INT'L (1998), [http://assets.survivalinternational.org/static/files/related\\_material/46\\_63\\_145\\_emberabg.pdf](http://assets.survivalinternational.org/static/files/related_material/46_63_145_emberabg.pdf).

*Pacifico* sought to facilitate increased resource extraction from the area, creating a cross-country highway, oil pipeline, and canal.<sup>63</sup> Stemming from its wealth of valuable mineral, timber (accounting for sixty percent of timber in the country), and oil resources, environmental pressures will only increase along the Pacific coast as development efforts continue.<sup>64</sup>

#### IV. THE U.S.-COLOMBIA TRADE PROMOTION AGREEMENT ENTERS THE PICTURE

The potential for the CTPA to exacerbate the problems listed above is highlighted by the large role U.S. exports already play in the Colombian economy.<sup>65</sup> The U.S. is easily the largest export partner for Colombia, accounting for about thirty-two percent of gross exports in 2009<sup>66</sup> and around nine percent of the country's gross domestic product (GDP).<sup>67</sup> Reflecting this relationship, the CTPA is the culmination of twenty years of trade arrangements with the U.S.<sup>68</sup> Extending these prior agreements that allowed duty free access to U.S. markets for most Colombian exports, the CTPA will increase U.S. access to trade and investment protections in Colombia and eliminate duties on eighty percent of U.S. consumer and industrial goods.<sup>69</sup>

Following the model of DR-CAFTA, the PTPA, and other post-NAFTA trade agreements, environmental enforcement provisions of the CTPA are placed directly in the agreement in Chapter 18.<sup>70</sup> Like the language in the NAAEC and Chapter 17 of DR-CAFTA,<sup>71</sup> Chapter 18 requires both Colombia and the United States to adhere to existing national environmental regulations and laws in following the agreement.<sup>72</sup> The CTPA deems it, "inappropriate to encourage trade

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63. *Id.*

64. Lina Bentancourt, *Plan Pacifico in the Choco Region of Colombia*, THE MANDALA PROJECTS: TED CASE STUDIES (June 1998), <http://www1.american.edu/ted/TED/all.html#Jun1998> (follow "494 PACIFICO West Colombia Development: Plan Pacifico in the Choco Region of Colombia, by Lina Bentancourt").

65. See *The World Factbook: Colombia economy*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/co.html> (last updated Feb. 11, 2011).

66. *Id.*

67. *Interim Review*, *supra* note 36, at 44.

68. Daniel Griswold & Juan Carlos Hidalgo, *A U.S.-Colombia Free Trade Agreement: Strengthening Democracy and Progress in Latin America*, THE CATO INSTITUTE: CTR FOR TRADE POLICY STUDIES (Feb. 6, 2008), <http://www.freetrade.org/node/839>.

69. *Id.*

70. CTPA, *supra* note 26, art. 18.3. Article 10.11 of the agreement also includes language that none of the investment protections in the agreement should be construed to limit either government from ensuring that investment activity occurs in a manner that is "sensitive to environmental concerns. *Id.* art. 10.11.

71. Dominican Republic-Central America-United States Free Trade Agreement ch. 17, art 17.5, Aug. 2, 2005, 119 Stat. 462, [http://www.ustr.gov/sites/default/files/uploads/agreements/cafta/asset\\_upload\\_file9\\_3937.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file9_3937.pdf) [hereinafter DRCAFTA].

72. The length of Chapter 18 and the inclusion of like language in U.S. trade agreements with Latin America since NAFTA does warrant some praise. Most contemporary trade agreements such as the *Mercado Común del Sur* in South America (MERCOSUR) and other bilateral agreements rarely contain more than a brief

or investment by weakening or reducing the protections afforded in their respective environmental laws.”<sup>73</sup> This mirrors similar language in the NAAEC meant to address a fear that parties to free trade agreements will compete for foreign investment by derogating from their environmental laws.<sup>74</sup>

A country has met the enforcement requirements of the agreement so long as their course of action and discretion “reflects a reasonable, articulable, *bona fide* exercise of such discretion, or results from a reasonable, articulable, *bona fide* decision regarding the allocation of such resources.”<sup>75</sup> Each nation must also provide for “appropriate and effective” sanctions and remedies for internal violations of their environmental laws and allow citizens to request an investigation of any alleged violations of national environmental laws.<sup>76</sup>

From an institutional standpoint, Chapter 18 sets up an Environmental Affairs Council (EAC) where each party designates a senior level environmental official to oversee environmental compliance under the agreement.<sup>77</sup> Like other post-NAFTA agreements, the EAC is required to create an Environmental Cooperation Agreement (ECA) that lays out the environmental guidelines to be followed and a working plan to address environmental issues in the signing nations.<sup>78</sup>

While an ECA has yet to be drafted for the CTPA, the ECA created for DR-CAFTA suggests that the work guidelines are initially very general and do not address the particular environmental concerns for each country.<sup>79</sup> For example, the ECA under DR-CAFTA contains general language that seeks exchanges of professionals and delegations to strengthen the environmental policies under the agreement.<sup>80</sup> Under the CPTA, the Environmental Cooperation Agreement (ECA) is also required to set up an Environmental Cooperation Commission (ECC).<sup>81</sup> ECCs from prior agreements are composed of government representatives from each country and are responsible for developing cooperative environmental work programs aimed at environmental protection.<sup>82</sup>

Under DR-CAFTA, the ECC is tasked with general initiatives such as promoting each country’s environmental management systems; developing

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statement promoting sustainability and environmental protection. See Dale Colyer, *Environmental Provisions in Trade Agreements*, WEST VIRGINIA UNIVERSITY, 8-9, (2004), <http://ageconsearch.umn.edu/bitstream/19103/1/cp04co02.pdf> (analyzing the depth and efficacy of environmental provisions in contemporary trade agreements).

73. CTPA, *supra* note 26, art. 18.3(2).

74. See Wold, *supra* note 5, at 209, 215.

75. CTPA, *supra* note 26, art. 18.3(1)(b)(i).

76. *Id.* art. 18.4.

77. *Id.* art. 18.6(1).

78. DRCAFTA, *supra* note 71, art. 17.5; PTPA, *supra* note 28, art. 18.6; CTPA, *supra* note 26, art. 18.6.

79. Wold, *supra* note 5, at 241.

80. *Id.*

81. CTPA, *supra* note 26, art. 18.6(2)(d).

82. DRCAFTA, *supra* note 71, art. 17.5(1), 17.9(4); PTPA, *supra* note 28, art. 18.6(1), 18.6(2)(d).

incentives for environmental protections; conserving and managing shared, migratory and endangered species; and building capacity to promote public participation.<sup>83</sup> The EAC then oversees the implementation of the environmental provisions of the agreement, providing periodic reports to the U.S. Free Trade Commission (FTC) and allowing for public comment and participation in its work through various mechanisms.<sup>84</sup>

The language of CTPA retreats from the NAAEC by hindering the independence of its environmental institutions. First of all, like the DR-CAFTA and the PTPA, the CTPA curtails the responsibilities of the independent secretariat which is a constituent body to the CEC (the NAAEC's environmental commission) under NAFTA or the ECAs under subsequent trade agreements.<sup>85</sup> The NAAEC Secretariat has the power to initiate reports related to the environmental effects of trade, an independent capability that has proven "very valuable" to the understanding of particular environmental effects relating to the trading relationship.<sup>86</sup> Unfortunately, the CTPA, PTPA and DR-CAFTA, limit these responsibilities to investigating citizen submissions, outlined later in this comment.<sup>87</sup> This eliminates an important independent voice in understanding the effects of trade and analyzing the success of implementing the Environmental Cooperation Agreement (ECA) on a broader scale.<sup>88</sup>

Another omission in the CTPA is its failure to create a neutral and independent body to oversee environmental issues and monitor citizen complaints under the citizen submission process.<sup>89</sup> Under NAFTA, the NAAEC creates an intermediary called the Joint Public Advisory Committee (JPAC), meant to provide neutral advice to the CEC on environmental issues.<sup>90</sup> The committee is staffed by fifteen citizen volunteers selected by each country.<sup>91</sup> Through public outreach, JPAC provides various suggestions to the CEC about how to improve environmental protection under the trade agreement.<sup>92</sup>

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83. One positive development under DR-CAFTA is that the ECA is funded by a significantly higher budget than the \$9 million budget for the CEC under the NAAEC, with funding set at \$18.5 and \$19.3 for 2006 and 2007 respectively. The U.S. currently provides this funding and hopefully will continue this increased commitment to the ECA under the CTPA. Wold, *supra* note 5, at 242; *Environmental Cooperation Agreement (ECA-DR-CA-USA) Work Plan*, U.S. DEP'T OF STATE- BUREAU OF OCEANS AND INT'L ENV'T AND SCI. AFFAIRS (July 17, 2006), <http://www.state.gov/g/oes/env/trade/caftadr/81947.htm>; see *Clare Ribando, DR-CAFTA: Regional Issues*, CONG. RESEARCH SERV., 3 (July 8, 2005), <http://fpc.state.gov/documents/organization/50155.pdf>.

84. CTPA, *supra* note 26, art. 18.6(b)-(c)(i).

85. Wold, *supra* note 5, at 206.

86. *See id.* at 232-33.

87. *Id.* at 206; CTPA, *supra* note 26, art. 18.8(1), 18.9(1); PTPA, *supra* note 28, art. 18.8(1), 18.9(1).

88. Wold, *supra* note 5, at 206.

89. *Id.* at 205-06.

90. *Id.* at 216, 238.

91. *Id.* at 216.

92. *See* MARK PAQUIN, KAREL MAYRAND & CARLA SBERT, UNISFERA INT'L CTR, JPAC AND PUBLIC PARTICIPATION IN THE ACTIVITIES OF THE COMMISSION FOR ENVIRONMENTAL COOPERATION OF NORTH

As an independent advisory committee, the JPAC serves an important oversight function in maintaining the independence of the CEC and the Secretariat.<sup>93</sup> This is particularly true as it develops environmental initiatives and handles reporting and enforcement under the citizen submission process.<sup>94</sup> By not including the Secretariat's independent reporting capabilities or an equivalent to the JPAC, the CTPA weakens the institutional independence of its environmental protections (including the citizen submission process) and limits the amount of public oversight it allows.<sup>95</sup>

## V. THE CITIZEN SUBMISSION PROCESS

The citizen submission process within Chapter 18 of CTPA is an important enforcement tool. This is especially true because the other types of enforcement provisions (included in the dispute settlement portion) of the CTPA have never been utilized under any prior U.S. free trade agreement.<sup>96</sup> Nonetheless, because of structural flaws mentioned above, the fact that a successful claim only creates a factual report and a recommendation that is not effectively binding, means that the usefulness of the citizen submission process is limited.

Under the citizen submission provision in Article 18.8 of the CTPA, a citizen of Colombia has the right to file a submission asserting that either the U.S. or Colombia is failing to effectively enforce its environmental laws.<sup>97</sup> U.S. citizens must file complaints against the United States under the already existing citizen submission framework created under the NAAEC.<sup>98</sup> Each country is also responsible for appointing a secretariat or other appropriate body to accept these submissions.<sup>99</sup> Various requirements must be met before the Secretariat can consider a submission.<sup>100</sup> Each submission must clearly identify the person making the submission, and must provide sufficient information to allow a review of the submission, including any documentary evidence upon which the submission is based.<sup>101</sup> The submission must also indicate specifically what law the nation is failing to enforce and must seem to promote enforcement rather than harass industry.<sup>102</sup> Before filing the submission, the filer must indicate that the

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AMERICA (CEC): DISCUSSION PAPER 5-7 (2003), [http://unisfera.org/IMG/pdf/Unisfera\\_-\\_CEC\\_Public\\_Participation.pdf](http://unisfera.org/IMG/pdf/Unisfera_-_CEC_Public_Participation.pdf).

93. Wold, *supra* note 5, at 238.

94. *Id.*

95. *See id.* at 237-38.

96. Wold, *supra* note 5, 236; CTPA, *supra* note 26, art. 18.12(6).

97. CTPA, *supra* note 26, art. 18.8(1), (3).

98. *Id.* art. 18.8(3).

99. *Id.* art. 18.8(1), 18.8(1) n. 3.

100. *Id.* art. 18.8(2).

101. *Id.* art. 18.8(2)(a)-(c).

102. *Id.* art. 18.8(2)(c)-(d).

matter has already been communicated in writing to the relevant national authorities and indicate any response he or she may have received.<sup>103</sup>

Once the Secretariat determines that the requirements are met, it determines whether the submission merits a request for a response from the nation alleged to have failed enforcing its laws.<sup>104</sup> In making this determination, the secretariat must consider enumerated guidelines.<sup>105</sup> These include: whether the submission is frivolous or alleges actual harm to the submitter; whether the submission alone or in concert with other submissions advances the goals of the Environmental Cooperation Agreement (ECA) and Chapter 18; whether private remedies under national law are available and have been pursued; and whether the submission is drawn exclusively from mass media reports.<sup>106</sup> If under these guidelines the secretariat determines that a request is warranted, it will send the submission and any corresponding documentation to the defendant nation.<sup>107</sup> Within forty-five days (or within sixty days in exceptional circumstances), the defendant must respond and describe whether the issue is subject to any national judicial or administrative proceeding; whether private remedies are available to the complainants in connection to the issue; or give any information concerning relevant capacity building activities under the ECA meant to improve its environmental enforcement.<sup>108</sup>

After a response is received from the defendant nation, the Secretariat must decide whether the submission and corresponding response warrants the development of a factual record.<sup>109</sup> The secretariat must then inform the Environmental Affairs Council (EAC) that a factual record is warranted and its reasons for so concluding.<sup>110</sup> If any member of the EAC instructs it to do so, the secretariat then prepares the factual record.<sup>111</sup> If the Secretariat prepares a factual record, the Secretariat is to review any information that has been offered by a Party, and can supplement the record with any relevant technical, scientific, or other information.<sup>112</sup> At this point, the Secretariat submits a final factual record to the EAC and either party can provide comments on the accuracy of the record that is to be incorporated.<sup>113</sup> If instructed to by any member of the EAC, the secretariat is to make the final factual record publicly available within sixty days

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103. *Id.* art. 18.8(2)(e).

104. *Id.* art. 18.8(4).

105. *Id.*

106. *Id.*

107. CTPA, *supra* note 26, art. 18.8(4).

108. *Id.* art. 18.8(5).

109. *Id.* art. 18.9(1).

110. *Id.* art. 18.9(1).

111. *Id.* art. 18.9(2). This is an area where the citizen submission process has been strengthened after the NAAEC, which requires the CEC to vote for the factual record with a two-thirds majority. *See* NAAEC, *supra* note 22, art. 15.2.

112. CTPA, *supra* note 26, art. 18.9(4).

113. *Id.* art. 18.9(5)-(6).

after its submission.<sup>114</sup> The EAC then considers the factual record in light of the environmental provisions of Chapter 18, and the yet to be agreed upon ECA.<sup>115</sup> It then provides recommendations to the Environmental Cooperation Commission (ECC), including recommendations for the improvement of a country's environmental enforcement.<sup>116</sup>

An aspect where the CTPA (and PTPA) improves upon the citizen submission process as it exists in the NAAEC is that the CTPA requires the EAC to conduct a review regarding the implementation of its recommendations five years after a factual record is completed.<sup>117</sup> Under the NAAEC, there is no language requiring recommendations or a secondary review after a successful submission.<sup>118</sup> By making recommendations and requiring a review of their implementation, the citizen submission process addresses some of the toothlessness of the process in the NAAEC explained below.

## VI. IS THE CITIZEN SUBMISSION PROCESS EFFECTIVE?: LESSONS FROM MEXICO AND THE DOMINICAN REPUBLIC

As in prior trade agreements, the process outlined above remains a core provision of the U.S.-Colombia Trade Promotion Agreement.<sup>119</sup> This section will analyze the outcome of several submissions under NAFTA and DR-CAFTA to determine their effectiveness as an enforcement tool. Out of all the developing nations whose trade agreements incorporate the citizen submission process, Mexico has the longest experience under the citizen submission provisions, therefore it is important to analyze the experience there. Likewise, because DR-CAFTA extended the citizen submission process to several Latin American nations,<sup>120</sup> it is important to analyze the submissions under that agreement.

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114. *Id.* art. 18.9(7).

115. *Id.* art. 18.9(8).

116. *Id.*

117. *Compare id.* art. 18.9(9), and PTPA, *supra* note 28, art. 18.9(9) (requiring a review of the Party's implementation of the EAC's original recommendations five years later), with NAAEC, *supra* note 22, art. 14.3 (containing no such language).

118. NAAEC, *supra* note 22, art. 14.3.

119. CTPA, *supra* note 26, art. 18.9(9); Wold, *supra* note 5, at 237.

120. *Cafta-DR*, *supra* note 23.

121. *Compare Registry of Citizen Submissions 2007*, SECRETARIAT FOR ENVTL. MATTERS [SEM], [http://www.tusaa.org/index.php?option=com\\_content&view=category&layout=blog&id=37&Itemid=96&lang=us#](http://www.tusaa.org/index.php?option=com_content&view=category&layout=blog&id=37&Itemid=96&lang=us#) (last visited Oct. 1, 2010), with *Registry of Citizen Submissions 2008*, SECRETARIAT FOR ENVTL. MATTERS [SEM], [http://www.tusaa.org/index.php?option=com\\_content&view=category&layout=blog&id=38&Itemid=196&lang=us](http://www.tusaa.org/index.php?option=com_content&view=category&layout=blog&id=38&Itemid=196&lang=us) (last visited Oct. 1, 2010) [hereinafter *Submission Registry 2008*], and *Registry of Citizen Submissions 2009*, SECRETARIAT FOR ENVTL. MATTERS [SEM], [http://www.tusaa.org/index.php?option=com\\_content&view=category&layout=blog&id=39&Itemid=197&lang=us](http://www.tusaa.org/index.php?option=com_content&view=category&layout=blog&id=39&Itemid=197&lang=us) (last visited Oct. 1, 2010), and *Registry of Citizen Submissions 2010*, SECRETARIAT FOR ENVTL. MATTERS [SEM], [http://www.tusaa.org/index.php?option=com\\_content&view=category&layout=blog&id=40&Itemid=198&lang=us](http://www.tusaa.org/index.php?option=com_content&view=category&layout=blog&id=40&Itemid=198&lang=us) (last visited Oct. 1, 2010) [hereinafter *Submission Registry 2010*] (The

Because only one submission against the Dominican Republic has reached the factual record stage at the time of writing, the experience under DR-CAFTA is difficult to analyze on a wide scale.<sup>121</sup> However, with six citizen submissions from 2010 under active review by the Secretariat, this may soon change.<sup>122</sup>

When it was incorporated into the NAAEC, the citizen submission process was heralded as a significant step towards the democratization and transparency of international trade and environmental agreements.<sup>123</sup> Under the NAAEC and DR-CAFTA, the process serves an important purpose, allowing for citizens and non-governmental organizations (NGOs) to publicize development that harms or will harm the environment in the future.<sup>124</sup> This is especially true in Mexico which has the highest number of citizen submissions but no provision under national law to challenge future environmental damage.<sup>125</sup>

From 1995 until the time of writing, thirty-eight submissions have been filed against Mexico, equal to the number of submissions filed against Canada and the United States combined.<sup>126</sup> Most of these submissions were terminated for failing to meet the submission requirements for a factual finding, as outlined above.<sup>127</sup> To date, seven Mexican submissions have led to factual records, and some are still under review.<sup>128</sup>

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current status of the 2007 citizen submission is “preparing factual record” while no submitted cases from 2008-2010 have reached that stage).

121. *Compare Registry of Citizen Submissions 2007*, SECRETARIAT FOR ENVTL. MATTERS [SEM], [http://www.tusaa.org/index.php?option=com\\_content&view=category&layout=blog&id=37&Itemid=96&lang=us#](http://www.tusaa.org/index.php?option=com_content&view=category&layout=blog&id=37&Itemid=96&lang=us#) (last visited Oct. 1, 2010), with *Registry of Citizen Submissions 2008*, SECRETARIAT FOR ENVTL. MATTERS [SEM], [http://www.tusaa.org/index.php?option=com\\_content&view=category&layout=blog&id=38&Itemid=196&lang=us](http://www.tusaa.org/index.php?option=com_content&view=category&layout=blog&id=38&Itemid=196&lang=us) (last visited Oct. 1, 2010) [hereinafter *Submission Registry 2008*], and *Registry of Citizen Submissions 2009*, SECRETARIAT FOR ENVTL. MATTERS [SEM], [http://www.tusaa.org/index.php?option=com\\_content&view=category&layout=blog&id=39&Itemid=197&lang=us](http://www.tusaa.org/index.php?option=com_content&view=category&layout=blog&id=39&Itemid=197&lang=us) (last visited Oct. 1, 2010), and *Registry of Citizen Submissions 2010*, SECRETARIAT FOR ENVTL. MATTERS [SEM], [http://www.tusaa.org/index.php?option=com\\_content&view=category&layout=blog&id=40&Itemid=198&lang=us](http://www.tusaa.org/index.php?option=com_content&view=category&layout=blog&id=40&Itemid=198&lang=us) (last visited Oct. 1, 2010) [hereinafter *Submission Registry 2010*] (The current status of the 2007 citizen submission is “preparing factual record” while no submitted cases from 2008-2010 have reached that stage).

122. *Submission Registry 2010*, *supra* note 121.

123. Jonathan G. Dorn, *NAAEC Citizen Submissions Against Mexico: An Analysis of the Effectiveness of a Participatory Approach to Environmental Law Enforcement*, 20 GEO. INT’L ENVTL. L. REV. 129, 145 (2007); *see* Wold, *supra* note 5, at 237.

124. Dorn, *supra* note 123, at 143.

125. *Id.* at 130, 142.

126. *Submission on Enforcement Matters: Mexico*, COMM’N ON ENVTL. COOPERATION, [http://www.cec.org/Page.asp?PageID=1226&ContentID=&SiteNodeID=547&BL\\_ExpandID=](http://www.cec.org/Page.asp?PageID=1226&ContentID=&SiteNodeID=547&BL_ExpandID=) (last visited Oct. 1, 2010); *Submission on Enforcement Matters: Canada*, COMM’N ON ENVTL. COOPERATION, [http://www.cec.org/Page.asp?PageID=1226&ContentID=&SiteNodeID=546&BL\\_ExpandID=](http://www.cec.org/Page.asp?PageID=1226&ContentID=&SiteNodeID=546&BL_ExpandID=) (last visited Oct. 2, 2010); *Submission on Enforcement Matters: United States*, COMM’N ON ENVTL. COOPERATION, [http://www.cec.org/Page.asp?PageID=1226&ContentID=&SiteNodeID=548&BL\\_ExpandID=](http://www.cec.org/Page.asp?PageID=1226&ContentID=&SiteNodeID=548&BL_ExpandID=) (last visited Oct. 1, 2010) (Showing that during this period there were twenty-five submissions filed against Canada and ten filed against the United States).

127. Dorn, *supra* note 123, at 138.

128. *Factual Records*, COMM’N ON ENVTL. COOPERATION, <http://www.ted.cec.org/Page.asp?>



It is hard to label the submission process in Mexico as a full success. Although the factual records produced have had some influence in pushing government and private actors to publicly support strengthening environmental laws, the results are not uniformly promising.<sup>129</sup> Based on a submission filed in 1996, the first Mexican factual record is indicative of shortcomings of the process, particularly under the NAAEC model.<sup>130</sup> Filed on behalf of three NGOs, the submission challenged Mexico's approval of a pier to be built off of Cozumel Island.<sup>131</sup> The pier was widely criticized by the local government and islanders because of the severe damage it was expected to cause to two local reefs, the *Arrecife Paraiso* and *Cadena Arrecifal del Gran Caribe*.<sup>132</sup> Although the factual record indicated the Mexican government ignored scientific findings that the reefs would be damaged in contravention of national environmental laws, it made no conclusion as to whether Mexico violated the NAAEC or Mexican law.<sup>133</sup>

Nonetheless, some environmentalists claimed that the record was a validation of the NGOs' claims and that the corresponding embarrassment to the Mexican government was in itself a victory.<sup>134</sup> In support of this view, the Mexican government did undertake a new management study for Cozumel Island and vowed to improve laws protecting coral reefs.<sup>135</sup> However, no subsequent laws have been enacted to prevent development in protected coral reef areas.<sup>136</sup> Many also viewed the failure of the factual record to make binding recommendations or halt eventual construction of the pier (used for large cruise ships) as proof that the submission process was merely an arm of a toothless and powerless bureaucracy.<sup>137</sup>

Despite the mixed success of the Cozumel case, two factual records clearly pushed private and government actors to mitigate their activities affecting the

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PageID=924&SiteNodeID=543 (last visited Oct. 1, 2010) (Lists factual records to date); *Environmental Pollution in Hermosillo II*, COMM'N ON ENVTL. COOPERATION, [http://www.cec.org/Page.asp?PageID=2001&ContentID=2395&SiteNodeID=559&BL\\_ExpandID=](http://www.cec.org/Page.asp?PageID=2001&ContentID=2395&SiteNodeID=559&BL_ExpandID=) (last visited Oct. 10, 2010); *Ex Hacienda El Hospital II*, COMM'N ON ENVTL. COOPERATION, [http://www.cec.org/Page.asp?PageID=2001&ContentID=2400&SiteNodeID=560&BL\\_ExpandID=](http://www.cec.org/Page.asp?PageID=2001&ContentID=2400&SiteNodeID=560&BL_ExpandID=) (last visited Oct. 10, 2010); *Ex Hacienda El Hospital III*, COMM'N ON ENVTL. COOPERATION, [http://www.cec.org/Page.asp?PageID=2001&ContentID=2400&SiteNodeID=547&BL\\_ExpandID=](http://www.cec.org/Page.asp?PageID=2001&ContentID=2400&SiteNodeID=547&BL_ExpandID=) (last visited Oct. 10, 2010); *Transgenic Maize in Chihuahua*, COMM'N ON ENVTL. COOPERATION, [http://www.cec.org/Page.asp?PageID=2001&ContentID=2411&SiteNodeID=563&BL\\_ExpandID=](http://www.cec.org/Page.asp?PageID=2001&ContentID=2411&SiteNodeID=563&BL_ExpandID=) (last visited Oct. 10, 2010); *Wetlands in Manzanillo*, COMM'N ON ENVTL. COOPERATION, [http://www.cec.org/Page.asp?PageID=2001&ContentID=2412&SiteNodeID=563&BL\\_ExpandID=](http://www.cec.org/Page.asp?PageID=2001&ContentID=2412&SiteNodeID=563&BL_ExpandID=) (last visited Oct. 10, 2010).

129. See Dorn, *supra* note 123, at 130-39 (outlining six factual records—some that have been quite successful and some that have—not in Mexico).

130. Paul Stanton Kibel, *The Paper Tiger Awakens: North American Environmental Law After the Cozumel Reef Case*, 39 COLUM. J. TRANSNAT'L L. 395, 420 (2001).

131. *Id.*

132. *Id.*

133. *Id.* at 469.

134. *Id.* at 469-70.

135. *Id.* at 470.

136. See *id.*

137. *Id.* at 470-71.

environment.<sup>138</sup> The factual record and corresponding publicity related to the Aquanova shrimp farm in San Blas (1996) prompted that company to take numerous steps to reverse its destruction of mangrove ecosystems in the area.<sup>139</sup> The factual record in the case arose after the company diverted water from by mangrove swamps for use in nearby shrimp farms, which diverted navigation routes used by local fishermen and polluted the surrounding water.<sup>140</sup> While Aquanova has not stopped pumping wastewater directly into the ocean, it has taken measures to reforest damaged mangrove wetlands and limited its scale of development in response to the factual record.<sup>141</sup> The local government has also become more receptive to environmental concerns in the area, with the municipal government of San Blas using tax revenues to fund local environmental projects.<sup>142</sup>

In 1998, another submission was made in relation to a failed government cleanup of a lead smelter in Tijuana.<sup>143</sup> The results that followed also demonstrate the capabilities of the citizen submission process.<sup>144</sup> When a factual record was made public in 2002, the Mexican government was initially slow to address findings outlining its failed cleanup of hazardous industrial waste left by a U.S. battery company.<sup>145</sup> However, by 2004 an agreement was reached with local and national authorities establishing a comprehensive five-year cleanup of the site in question.<sup>146</sup> This plan involves various tests of the site, the creation of a technical workgroup to assist in the cleanup process, a guarantee of accountability to the community, and cooperation with the U.S. Environmental Protection Agency.<sup>147</sup>

Beyond these two successes, three additional factual records have had more ambiguous results. For example, after the 1996 Cozumel submission, a factual record resulted from a submission alleging that the Mexican government failed to regulate dumping of wastewater into the Magdalena River.<sup>148</sup> Despite a record establishing that the Mexican government permitted violations of national and Sonora state environmental laws, no information has been released showing that

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138. See COMM'N FOR ENVTL. COOPERATION OF N. AM., FACTUAL RECORD: AQUANOVA SUBMISSION (SEM-98-006) (2003), <http://www.cec.org/files/PDF/SEM/98-6-FR-E.pdf>; *Mega Tourism and Shrimp Farming, MANGROVE ENVTL. PROT. GRP.*, <http://elmanglarsanblas.com/history.html> (last visited Jan. 3, 2010) [hereinafter MANGROVE]; see *Rio Magdalena*, COMM'N ON ENVTL. COOPERATION, [http://www.cec.org/Page.asp?PageID=2001&ContentID=2350&SiteNodeID=543&BL\\_ExpandID=](http://www.cec.org/Page.asp?PageID=2001&ContentID=2350&SiteNodeID=543&BL_ExpandID=) (last visited Mar. 6, 2011) [hereinafter *Rio Magdalena*].

139. MANGROVE, *supra* note 138.

140. *Id.*

141. *Id.*

142. Dorn, *supra* note 123, at 134; *id.*

143. *Id.*

144. *Id.*

145. *Id.* at 135.

146. *Id.*

147. *Id.*

148. *Rio Magdalena*, *supra* note 138.

the company has taken any steps to come into compliance with those laws.<sup>149</sup> Two remaining factual records, one relating to the release of sulfur dioxide from a factory in Sonora and another related to the failure to protect resources in the Sierra Tarahumara Mountains in Chihuahua, are also difficult to gauge in terms of effectiveness.<sup>150</sup>

The fact that only a few overall submissions have been developed into factual records is one source of concern about the effectiveness of the process, indicating that the procedure is tilted against the submitter.<sup>151</sup> Also, the fact that all but one of the Mexican submissions leading to a factual record were filed by NGOs may indicate that the submission process is too complicated, time consuming, and expensive for average citizens in the developing world.<sup>152</sup>

Despite these limitations, the initial experience under DR-CAFTA has been promising. Originally filed on May 9, 2007, on behalf of the Humane Society International against the Dominican Republic,<sup>153</sup> the first DR-CAFTA submission alleged a failure by the Dominican government to enforce its domestic laws protecting endangered sea turtles.<sup>154</sup> As a result, various ornaments, jewelry and other products made from the turtles were sold in open markets.<sup>155</sup> After the Humane Society initially failed to meet the submission requirements calling for a response from the government, a revised submission was eventually found to be sufficient.<sup>156</sup> Strikingly, in response to this request the Dominican government took decisive action before a factual record was required.<sup>157</sup> After a widespread government effort aimed at educating consumers and encouraging use of alternate materials, there was a ninety-nine percent reduction in the amount of these goods being sold.<sup>158</sup>

Two DR-CAFTA submissions from 2008 also filed against the Dominican

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149. Dorn, *supra* note 123, at 133.

150. *Id.* at 135-37 (describing that in the submission relating to sulfur dioxide in Sonora the polluter is “likely” to take “corrective action,” and that in the Chihuahua factual record, it is difficult to determine the effectiveness of that factual record because of widespread publicity unrelated to the factual record).

151. Dorn, *supra* note 123, at 138-39 (noting that, in addition to a disappointing amount of factual records, the average time between submission and publication of factual record in Mexico is a lengthy fifty-three months, and indicating that the submitter is kept in the dark as to the accuracy of the “challenged Party’s response”).

152. *Id.* The most recent factual record was filed by an individual submitter. *ALCA-Iztapalapa II*, COMM’N ON ENVTL. COOPERATION, [http://www.cec.org/Page.asp?PageID=2001&ContentID=2383&SiteNodeID=557&BL\\_ExpandID=](http://www.cec.org/Page.asp?PageID=2001&ContentID=2383&SiteNodeID=557&BL_ExpandID=) (last visited Sept. 15, 2010).

153. CAFTA-DR Secretariat for Environmental Matters [SEM], *Sea Turtles – Determination Article 17.7.2 & 17.7.4*, at 1, SAA/CAALA07001 (Dec. 5, 2007), [http://cabrera-verde.org/files/Determinacion\\_OriginalEng.pdf](http://cabrera-verde.org/files/Determinacion_OriginalEng.pdf) [hereinafter *Sea Turtles*].

154. *Id.* at 1-2.

155. *Id.* at 2.

156. *Id.* at 1.

157. *Processes and Education*, CAFTA-DR ENVTL. COOPERATION, [http://www.caftadr-environment.org/top\\_menu/activities/A/Public\\_Participation/Processes\\_&\\_Education.html](http://www.caftadr-environment.org/top_menu/activities/A/Public_Participation/Processes_&_Education.html) (last visited Feb. 22, 2010).

158. Press Release, Lee Poston, World Wildlife Federation, Turtles no Longer Turn to Souvenirs in Dom. Rep., (Mar. 25, 2009), <http://www.worldwildlife.org/who/media/press/2009/WWFPresitem11966.html>.

Republic<sup>159</sup> had similarly promising results. Both alleged a failure by the government to stop illegal sand removal from the north coast of the country in contravention of domestic environmental law.<sup>160</sup> Within months after the submissions were filed, with cooperation from various government officials towards putting an end to the illegal practice, the two submitters were able to end the sand extractions.<sup>161</sup> As a result of this success, both submissions were withdrawn in 2009.<sup>162</sup>

These successes in the Dominican Republic along with the mixed success of the Mexican factual records highlight both the positive impact that submissions have had but also their limitations. A successful record or submission can lead to a significant change of course by government and private actors. Nonetheless, as the Mexican experience highlights, a minority of submissions overall have developed into factual records.<sup>163</sup> In a number of these cases, the results have not been universally strong.<sup>164</sup>

Until more submissions play out in the remaining DR-CAFTA countries, it is difficult to fully assess the process under that agreement. Whether the five year follow up required by both the CTPA and PTPA will make the process more effective has yet to be seen. The cumbersome submission process also fails to proactively address the scale effects that have been shown to overcome weak environmental institutions in the developing world. The increased environmental costs that arose in Mexico after NAFTA seem to indicate that a more aggressive approach that addresses known shortcomings in environmental infrastructure may be necessary. The PTPA Annex on Forest Sector Governance represents a move to such an approach.<sup>165</sup>

## VII. A PROMISING DEVELOPMENT : THE U.S.-PERU TPA AND THE FOREST SECTOR ANNEX

As the most recent free trade agreement ratified between the U.S. and Latin America, the U.S.–Peru Trade Promotion Agreement (PTPA) makes strides towards mitigating scale effects, and tailoring the agreement to address the unique environmental issues facing Peru.<sup>166</sup> Peru’s wealth of mahogany and weak

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159. *Submission Registry* 2008, *supra* note 121.

160. Letter from Jorge Mauricio Guzman Valdez, Gen. Coordinator, CAFTA-DR Secretariat for Env'tl. Matters, to Members of the Env'tl. Affairs Council (June 4, 2009), [http://www.tusaa.org/images/stories/pdf/anio2008/caala\\_08\\_01\\_y\\_caala\\_08\\_02\\_extraccion\\_de\\_arena\\_en\\_rd/web/Nota%20de%20Informe%20al%20Consejo/Nota%20CAA%20Retiro%20de%20Comunicacion.pdf](http://www.tusaa.org/images/stories/pdf/anio2008/caala_08_01_y_caala_08_02_extraccion_de_arena_en_rd/web/Nota%20de%20Informe%20al%20Consejo/Nota%20CAA%20Retiro%20de%20Comunicacion.pdf).

161. *Id.*

162. *Id.*

163. Dorn, *supra* note 123, at 138.

164. *See id.* at 132–39 (outlining the mixed results of the factual records laid out above, particularly in the Rio Magdalena and Cozumel pier cases).

165. Wold, *supra* note 5, at 247–48.

166. *See id.* Scale effects refer to the causal relationships between economic growth and development

enforcement of its environmental laws subjects its forest ecosystems to largely unmitigated environmental pressures.<sup>167</sup> The problem has reached such an extent that ninety-five percent of mahogany logging in the country now occurs illegally.<sup>168</sup> Despite rampant illegality in the timber industry, not a single commercial logger has been imprisoned as of 2006.<sup>169</sup> Flagrant and obvious violations are common, with many loggers cutting trees in rainforest preserves and parks designed to protect local ecosystems.<sup>170</sup>

Although these facts are troubling, Peru still has relatively low deforestation rates of 0.035 to 0.5 percent annually.<sup>171</sup> However, along with increasing development comes increasing pressure. Increased investment in gold mining, energy development (including a massive coal deal with China), road building, cocoa farming, and cattle grazing all serve to heighten the level of deforestation in Peru.<sup>172</sup>

Seeking to address the enforcement problems mentioned above, the PTPA breaks from the mold of the NAAEC and DR-CAFTA and addresses the Peruvian situation uniquely.<sup>173</sup> By including more of the 2007 recommendations by the U.S. House Ways and Means Committee,<sup>174</sup> the Annex on Forest Sector Governance (the Annex) implements several binding requirements on the Peruvian government.<sup>175</sup>

Within eighteen months after the PTPA came into effect on February 1, 2009, the Annex requires that Peru take various steps to improve enforcement of its forestry laws.<sup>176</sup> These steps include an increase in the number of personnel devoted to forest law enforcement, an anti-corruption plan for officials dealing with forest administration, and an increase in criminal penalties related to the harvest of forest products.<sup>177</sup>

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and environmental impacts. *Environment and Trade*, *supra* note 16. The agreement is in part intended to safeguard against negative environmental impacts resulting from economic growth in Peru. *See* PTPA, *supra* note 28, art. 18.1.

167. FILLIPO DEL GATTO ET. AL., TRADE LIBERALIZATION AND FOREST VERIFICATION: LEARNING FROM THE U.S.-PERU TRADE PROMOTION AGREEMENT 2 (2009), <http://www.verifor.org/RESOURCES/briefing-papers/9-perutradeliberisation.pdf>.

168. *Peru*, MONGABAY, <http://rainforests.mongabay.com/20peru.htm> (last updated Feb. 6 2006) [hereinafter *Peru Profile*].

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. Wold, *supra* note 5, at 247–48; *see U.S.–Peru Trade Promotion Agreement: Benefiting the Environment Through Improved Forest Sector Governance*, OFFICE OF THE U.S. TRADE REPRESENTATIVE (July 2007), [http://www.ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset\\_upload\\_file20\\_13228.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file20_13228.pdf).

174. *See* WAYS AND MEANS, *supra* note 26 (laying out the recommendations to strengthen the environmental provisions in the PTPA to be included in the Annex).

175. DEL GATTO ET AL., *supra* note 167, at 1.

176. PTPA, *supra* note 28, Annex 18.3.4 para. 3.

177. *Id.* Annex 18.3.4 para. 3(a)-(b).

In failing to enforce its own forestry laws, Peru also failed to meet its obligations under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), a multilateral treaty that seeks to protect endangered species from extinction due to trade.<sup>178</sup> In response, the Annex requires that Peru implement policies to monitor tree species listed under CITES.<sup>179</sup> Peru must also physically inspect areas designated for extraction of trees listed under CITES before approving an annual operating plan, and produce a public report with the results.<sup>180</sup> The country is also required to “[d]evelop and implement timber-tracking systems to verify the legal origin and chain of custody of all CITES-listed timber species.”<sup>181</sup> Peru is also obligated to improve the management of its forest concessions, take into account the views of NGOs and indigenous communities, establish an agency to verify timber concessions, identify a government agency as a focal point to investigate violations of laws and regulations, support community-based forest management, and appropriately identify protected areas and concessions.<sup>182</sup>

While Peru’s duties are highly proactive, the U.S.’ responsibilities are mostly cooperative and focus on institution building.<sup>183</sup> For example, the United States commits to work with Peru to strengthen the legal, policy, and institutional framework of the forest sector; build institutional capacity for forest law enforcement; improve performance of the forest concession system; and increase public participation in forest resource planning and management decision-making.<sup>184</sup> To ensure that Peru is meeting its responsibilities under the agreement, Peru is to conduct both periodic and randomly requested audits by the United States.<sup>185</sup> After receiving a written request from the U.S., Peru must conduct an audit of the specifically listed producer or exporter to ensure it is following Peru’s forestry laws.<sup>186</sup>

The agreement also allows the U.S. to seek verification that particular shipments of timber into the U.S. have complied with timber laws.<sup>187</sup> In response to such a request, Peruvian officials are required to visit the exporter or producer, and if requested, allow a U.S. official to accompany them.<sup>188</sup> The officials must

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178. DEL GATTO ET AL., *supra* note 167, at 2-4; see *Discover CITES: What is CITES?*, CONVENTION ON INT’L TRADE IN ENDANGERED SPECIES OF WILD FLORA AND FAUNA, <http://www.cites.org/eng/disc/what.shtml> (last visited Mar. 6, 2011).

179. DEL GATTO ET AL., *supra* note 167, at 3.

180. *Id.*

181. *Id.*

182. PTPA, *supra* note 28, Annex 18.3.4, para. 3(a)(i), 3(h)(i)-(iv), 3(j).

183. See *id.* Annex 18.3.4, paras. 7-15 (laying out the Peru’s responsibilities ensuring that Peru is enforcing timber laws, as well as measures the U.S. will take to strengthen Peru’s environmental enforcement).

184. *Id.* Annex 18.3.4, para. 4.

185. *Id.* Annex 18.3.4, para. 6(a) n.16.

186. *Id.* Annex 18.3.4, para. 6(b).

187. *Id.* Annex 18.3.4, para. 7.

188. *Id.* Annex 18.3.4, para. 10.

then prepare a report within forty-five days based on their visit to the enterprise and its inspection of the business' documentation of compliance.<sup>189</sup> Based on this report, the U.S. can choose to deny entry of the shipment involved, or if an enterprise has knowingly provided false information to either country's officials, the U.S. can reject all timber products of that enterprise listed in CITES.<sup>190</sup>

There are also new institutional creations under the Annex. The parties are to create a Sub-Committee on Forest Sector Governance under the Committee on Trade in Goods and the Environmental Affairs Council created by the agreement.<sup>191</sup> The parties are to "consult regularly . . . and shall exchange appropriate, non-confidential information on bilateral trade in timber products,"<sup>192</sup> such as information on efforts to fight illegal logging associated with trade, implementation of requirements under CITES, and other relevant information.<sup>193</sup>

In addressing the unique environmental pressures likely to result from increased foreign access to Peru's mahogany forests, the PTPA takes an important step away from the one-size-fits-all approach of prior trade agreements.<sup>194</sup> Although the current share of foreign investment in Peru's timber industry is low,<sup>195</sup> the fact that Mexico experienced a fourfold increase in exports and imports with America after NAFTA would seem to foreshadow an upward trend in Peru.<sup>196</sup> The U.S. is currently the largest trading partner with Peru, accounting for twenty percent of all trade there,<sup>197</sup> and the increased freedom and protection for U.S. investors will surely bolster this relationship.

The PTPA Forest Sector Annex represents an important step towards mitigating the overwhelming effect that the rush of trade and investment can have on regulatory mechanisms within developing countries.<sup>198</sup> The capability of U.S. authorities to call for an inspection and bar the entry of individual timber shipments and the firms that send them serves to hit companies directly at their bottom line. Also, the Annex calls for better enforcement of its environmental laws in general, and therefore holds the promise of improving environmental

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189. *Id.* Annex 18.3.4, para. 12.

190. *Id.* at Annex 18.3.4, para. 13(a)(ii). The U.S. must correspondingly drop these restrictions at the end of a period it specifies or if Peru submits proof that the enterprise is complying with all of the nation's environmental laws. *Id.* Annex 18.3.4, para. 13(a)(ii).

191. *Id.* Annex 18.3.4, para. 16.

192. *Id.* Annex 18.3.4, para. 17.

193. *Id.*

194. See Wold, *supra* note 5, at 234–35.

195. *Peru Profile*, *supra* note 168.

196. See Press Release, Office of the U.S. Trading Representative, U.S.-Mexican Officials Meet to Discuss NAFTA (Jan. 1, 2008), <http://www.ustr.gov/about-us/press-office/press-releases/2008/january/us-8211-mexican-officials-meet-discuss-nafta>.

197. See *The World Factbook: Peru Economy*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/pe.html> (last visited Feb. 12, 2009).

198. Wold, *supra* note 5, at 247–48; SCOTT VAUGHN & GREG BLOCK, COMM'N FOR ENVTL. COOPERATION OF N. AM., FREE TRADE AND THE ENVIRONMENT: THE PICTURE BECOMES CLEARER 4 (2002), <http://www.ccc.org/files/PDF/ECONOMY/FreeTrade-en-fin.pdf> [hereinafter VAUGHN & BLOCK].

protection against all illegal logging, not just that related to U.S. trade. The focus on strengthening environmental institutions in Peru is also promising. To a certain extent, this may help fill the void left by the empty promise of an automatic improvement in environmental quality as trade barriers are reduced and supposedly improve standards of living.<sup>199</sup>

However, the scope of improvements in the PTPA is also limited. The Annex's focus on the harvesting and trade of timber products fails to address other industries that are likely to cause environmental harm in Peru.<sup>200</sup> For example, Peru recently granted the China National Petroleum Corporation rights to search for oil in 3.7 million acres of Peru's most ecologically sensitive areas.<sup>201</sup> The Annex' focus on tree exports fails to address the mining industry that is heavily reliant on environmentally destructive procedures, such as blasting and use of heavy machinery, which leads to increased mercury contamination of Peru's rivers as the byproducts of these operations are carried downstream.<sup>202</sup>

Like Colombia, Peru has shown some capability in enforcing its national laws against the pressures exerted by trade related industries. For example, the government of Peru recently expelled the U.S. mining company Doe Run for failing to clean up its La Oroya mining operation, listed in 2007 as the sixth most polluted site in the world.<sup>203</sup> However, the extent of pollution that was allowed to occur before the company was expelled is staggering. Before the plant was shut down, air quality in the town of La Oroya was measured to have eighty-five times more arsenic, forty-one percent more cadmium, and thirteen times more lead than is safe.<sup>204</sup> The water supply to the town contains fifty percent more lead than recommended by the World Health Organization.<sup>205</sup> The nearby Mantaro River has been contaminated with various other pollutants such as copper, iron, manganese, lead, and zinc, making it unsuitable for irrigation or consumption by animals.<sup>206</sup>

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199. VAUGHN & BLOCK, *supra* note 198, at 2-4.

200. *Peru Profiling*, *supra* note 168 (describing environmental degradation from sources like oil development and gold mining in addition to logging).

201. *Id.*

202. *Id.*

203. *U.S. Firm Kicked Out of Peru Mining Group for Pollution*, FRANCE 24, (Jan. 30, 2010), <http://www.france24.com/en/20100130-us-firm-kicked-out-peru-mining-group-pollution> [hereinafter *Kicked Out*].

204. Hugh O'Shaughnessy, *Poisoned City Fights to Save its Children: Families in a Peruvian Valley Choked by Toxic Gas from a Smelter are Taking on a U.S. Metals Giant*, THE OBSERVER (Aug. 12, 2007), <http://www.guardian.co.uk/world/2007/aug/12/environment.pollution> [hereinafter O'Shaughnessy].

205. *Id.*

206. *Id.*



Unsurprisingly, there are heightened mental and physical disabilities among the children of La Oroya.<sup>207</sup> Children are born with dangerously high levels of lead in their blood, inherited from their mothers.<sup>208</sup> The situation has reached the point where ninety-nine percent of children in the town have unhealthy levels of lead in their blood.<sup>209</sup> While some of this pollution occurred before Doe Run purchased the mines in La Oroya, the company repeatedly failed to meet clean-up benchmarks set by Peru that were required with its purchase of the mines.<sup>210</sup> The company was able to do so by manipulating the townspeople to side with it for several years to prevent the country from forcing compliance with its environmental laws.<sup>211</sup> Doe Run did this using threats that the local people would lose their jobs and livelihoods if efforts to reduce pollution were made which might force the company to leave.<sup>212</sup>

The fact that the pollution was already well-known and documented by various NGOs shows that the embarrassment caused to the Peruvian government and Doe Run was not enough to force them to comply with environmental laws in the face of the company's manipulations.<sup>213</sup> An extension of the same type of concrete oversight measures in the Annex could mitigate harm caused in industries like Doe Run's, at least for businesses participating in trade with the U.S. Another potential problem with the PTPA and the Annex on Forest Sector Governance is that while the Annex calls for wide measures for improving Peru's environmental law enforcement, the burden of paying for these improvements falls solely on Peru.<sup>214</sup>

On its face, this hurts the reciprocal nature of the trade agreement (by placing the financial onus on Peru), an attribute said to be an important element of effective internationally binding agreements.<sup>215</sup> A sense of reciprocity can lead to reduced sensitivity about external interference and encourage compliance with the Annex.<sup>216</sup> It is argued that reciprocity is implicit in the agreement, with the corresponding increase in national revenues resulting from the agreement

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207. *Id.*

208. *Id.*

209. *The World's Worst Polluted Places: The Top Ten of the Dirty Thirty*, THE BLACKSMITH INSTIT., 20 (Sept. 2007), <http://www.blacksmithinstitute.org/wwpp2007/finalReport2007.pdf> [hereinafter *The Dirty Thirty*].

210. *Kicked Out*, *supra* note 203 (describing the Doe Run's failure to adhere to the benchmarks set by Peru, and that it acquired the mine in 1997); *see id.* at 20–21 (noting the struggles that Doe Run has had meeting environmental guidelines and that pollution has occurred at the facility since 1992).

211. *See* O'Shaughnessy, *supra* note 204.

212. *Id.*

213. *Id.* (indicating that the Blacksmith Institute and the World Health Organization have documented the pollution).

214. *See* PTPA, *supra* note 28, Annex 18.3.4 paras. 3–4; *see also* DEL GATTO ET AL., *supra* note 167, at 4.

215. DEL GATTO ET AL., *supra* note 167, at 4.

216. *Id.*

sufficient to offset the cost of these measures.<sup>217</sup> However, as the Mexican experience shows, the increase in national revenues may not be substantial enough to warrant these expenditures. In fact the Commission on Environmental Cooperation (CEC) under NAFTA has documented little indication to support the idea that increased revenues from trade will boost environmental enforcement resources.<sup>218</sup>

#### VIII. THE EFFECTS OF FREE TRADE AND THE “RESOURCE CURSE” THEORY

Free trade agreements can exacerbate structural social and environmental problems in developing nations. This assertion is supported by looking at Mexico, where after NAFTA, poverty has deepened in the years since it was drafted.<sup>219</sup> As already mentioned, this has occurred while the cost of environmental degradation has reached a significant percentage of Mexico’s GDP.<sup>220</sup> To some extent this may be due to a lack of institutional funding to study and develop plans to address the environmental effects of trade.<sup>221</sup>

Despite a gross trade value of \$305.5 billion in 2009 between the U.S. and Mexico, NAFTA’s Commission on Environmental Cooperation (CEC) has had a budget of only \$9 million.<sup>222</sup> Therefore, it is not altogether surprising that the CEC has been unable to reduce environmental damage more effectively.<sup>223</sup> This also highlights the need for greater proportional funding for the Environmental Affairs Council (EAC) and the Environmental Cooperation Commission (ECC) under the CTPA than was afforded the CEC under NAFTA. The fact that under DR-CAFTA, environmental projects are funded by a significantly higher budget, with funding set at \$18.5 million and \$19.3 million for 2006 and 2007, respectively, is a promising trend that should be continued.<sup>224</sup> The potential impact of increased investment directed at specific environmental issues was made evident in 2008, when Peru’s environmental minister stated that for \$20 million in foreign aid per year, Peru could reach zero deforestation within a decade.<sup>225</sup>

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217. *Id.*

218. Wold, *supra* note 5, at 225.

219. Gallagher, *supra* note 7, at 12.

220. *Id.*

221. *See* Wold, *supra* note 5, at 244-46.

222. *Trade with Mexico: 2009*, U.S. CENSUS BUREAU, <http://www.census.gov/foreign-trade/balance/c2010.html#2009> (last visited Feb. 12, 2010); Wold, *supra* note 5, at 243; *see also* David L. Markell, *The North American Commission for Environmental Cooperation After Ten Years: Lessons About Institutional Structure and Public Participation in Governance*, 26 *LOY. L.A. INT’L & COMP. L. REV.* 341, 347 n.39 (2004).

223. *See* Markell, *supra* note 222 (comparing the CEC’s \$9 million budget to protect the environment across North America to the much larger budget of the U.S. Environmental Protection Agency).

224. *See* Wold, *supra* note 5, at 243.

225. James Painter, *Peru Aims for Zero Deforestation*, *BBC NEWS* (Dec. 7, 2008), <http://news.bbc.co.uk/2/hi/7768226.stm>.

Although it calls for a much more expansive relationship with newly incorporated nations, the European Union spends about ten times more in its development funds than the United States spends on grants to Latin America.<sup>226</sup> The effectiveness of pairing this commitment along with lowered trade barriers is supported by experiences in Spain, Ireland, and Greece, all of which saw better social and environmental conditions after entering the European Union.<sup>227</sup> Assisting developing nations to invest in improved enforcement and institutions is especially important when new trade agreements first come into effect.<sup>228</sup> According to NAFTA's CEC, the "effectiveness of environmental regulations is of pivotal importance, especially during transitional periods when countries open markets to international competition, streamline regulations and standards to reduce administrative costs, and move to restructure markets through the deregulation of competition policies."<sup>229</sup>

Experience has shown that resource rich nations with poor environmental institutions and enforcement are often harmed in the long run when trade liberalization leads to increased focus on natural resource exports.<sup>230</sup> This experience, coined the "resource curse," creates a situation whereby focusing on natural resource exports instead of developing more advanced industries such as manufacturing, these developing countries do not advance technologically.<sup>231</sup> This is particularly true in tropical nations like Colombia that are rich in oil and mineral resources.<sup>232</sup> As what are called "point resources" such as minerals and energy become more profitable, they account for greater percentages of the national economy at the expense of growth in non-resource intensive industries.<sup>233</sup> Eventually, as specialization in the resource sector grows in conjunction with higher interest rates, this leads to lower levels of capital and production in non-tradable sectors of the economy, causing a severe reduction in overall welfare in the country.<sup>234</sup> Acknowledging the structural economic causes of the "resource curse" model above, many argue that declining development and welfare in resource rich countries cannot be explained without also looking to weak institutional and political infrastructures in those countries.<sup>235</sup>

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226. Gallagher, *supra* note 7, at 12.

227. *Id.*

228. VAUGHN & BLOCK, *supra* note 198, at 3-4.

229. *Id.* at 3.

230. Edward B. Barbier, *Trade, Natural Resources and Developing Countries*, in HANDBOOK ON TRADE AND THE ENVIRONMENT 71, 71-74 (Kevin P. Gallagher ed., 2008).

231. *Id.* at 73-74.

232. *See id.*; *see also* Colombia Profile, *supra* note 21 (discussing Colombia's gold mining industry on the pacific coast); *see also* Chris Kraul, *Colombia's Oil Production is Gushing*, LOS ANGELES TIMES (May 12, 2010), available at <http://articles.latimes.com/2010/may/12/business/la-fi-colombia-oil-20100512> (establishing Colombia's status as an oil-producing country).

233. Barbier, *supra* note 230, at 74.

234. *Id.*

235. *Id.*

These political and institutional shortcomings are problematic when abundance in mineral, energy and timber sectors, along with windfall commodity booms and discovery of valuable new reserves of these resources encourage fierce private competition.<sup>236</sup> This increased competition leads to greater pressure on policy-makers.<sup>237</sup> In states with weak political and legal institutions, governments are susceptible to being overrun, allowing distorted natural resource management and economic policies that favor the companies vying for natural resources.<sup>238</sup> Thus, any new approach in the CTPA should accompany the already existing provisions making sure that environmental laws are enforced and upheld.<sup>239</sup>

The impact of increased national focus on resource intensive trade can also be linked to another major environmental problem in developing countries: the widespread conversion of rainforest to subsistence agricultural land.<sup>240</sup> Conversion of sensitive forest areas into subsistence agricultural land has been found to correlate with decreasing GDP per capita and poverty.<sup>241</sup> Thus, as unregulated and unsustainable growth in resource-dependent industries leads to a decrease in overall welfare, an increase in poverty occurs, and the impoverished increasingly turn to subsistence farming as a last resort.<sup>242</sup>

Whether or not it occurs in all instances, the “resource curse” theory marks a total contrast to the idea promoted by some free trade advocates that open markets will automatically bring improved living standards and improved environmental standards.<sup>243</sup> It also reinforces the idea that the limited enforcement based approach of the NAAEC and DR-CAFTA, and CTPA fails to cope with a reality that requires a more proactive approach to deeper environmental threats.<sup>244</sup> For these reasons, enhanced commitments to environmental infrastructure and focused enforcement objectives like those included in the Annex on Forest Sector Governance to the PTPA should be added to the CTPA.

## IX. APPLYING THESE LESSONS TO THE CTPA

After taking into account that the most pressing environmental harm caused by liberalized trade results from increased resource exploitation overrunning

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236. *Id.* at 75.

237. *Id.*

238. *Id.*

239. *See* Wold, *supra* note 5, at 244.

240. *Id.* at 76.

241. *Id.*

242. *Id.*

243. *Compare* Gallagher, *supra* note 7, at 2-4 (discussing the argument made by some trade advocates that trade liberalization will lead to economic growth and environmental protection in developing countries), *with* Barbier, *supra* note 230 (discussing “the resource curse” theory where increased trade in natural resources harms developing countries).

244. Wold, *supra* note 5, at 234.

lacking environmental institutions, the CTPA should focus on remedying existing institutional shortcomings. This seems particularly important considering the civil conflict in Colombia, along with the difficulties the country already faces in enforcing its environmental laws. While the citizen submission process was a positive addition when it was inserted into the NAAEC and other subsequent agreements, it is insufficient to mitigate the environmental effects of trade liberalization with the United States.<sup>245</sup> The 2007 extension of dispute mechanisms available for other essential parts of the PTPA and CTPA was promising but it is hard to see how this will address the more deeply rooted structural environmental problems in Colombia.<sup>246</sup> This seems especially true considering that similar dispute settlement measures have never been invoked under the NAAEC or any other free trade agreements with the United States.<sup>247</sup>

USAID has already bolstered sustainable development through a bilateral debt reduction agreement creating the *Fondo Para la Acción Ambiental* (FPAA) funded by \$41.6 million in interest accrued through USAID debt.<sup>248</sup> The FPAA seeks to boost sustainable development at the community level by funding non-governmental organizations.<sup>249</sup> To mitigate the environmental pressures that will likely grow due to increased trade and investment under the CTPA, the roles of the EAC and ECC in studying and addressing the effects of trade should be enhanced. Their insight can be integral in understanding how the export focused development of the Pacific region can be implemented and regulated in a more sustainable way, just as the Commission for Environmental Cooperation (CEC) has been an important (albeit limited) factor in mitigating environmental harm under NAFTA.<sup>250</sup>

Like Peru, Colombia faces deforestation driven by trade related industries, including logging and illegal deforestation.<sup>251</sup> Therefore, the CTPA should incorporate a similarly tailored and country specific approach to promote protection of endangered tree species and avoidance of illegal deforestation as that incorporated in the Peruvian agreement. Since illegal logging is not the only significant threat to forests and environmental quality, an effort should be made to address mining and other heavy industries taking part in U.S.-bound trade as well.

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245. *Id.* at 232, 237-38.

246. *See id.* at 234, 236.

247. In fact, the use of a similar government sanctions provisions under the NAAEC has been discouraged in formal recommendations to the Parties to the agreement. *Id.* at 236.

248. *Enterprise for the Americas Initiative (EAI) Program Description*, U.S. AGENCY FOR INT'L DEV., [http://www.usaid.gov/our\\_work/environment/forestry/eai\\_descs.html](http://www.usaid.gov/our_work/environment/forestry/eai_descs.html) (last updated Aug. 15, 2006).

249. *Id.*

250. Wold, *supra* note 5, at 216, 225-27.

251. *Colombia Profile*, *supra* note 21 (describing various trade related industries as being responsible for deforestation); *Peru Profile*, *supra* note 168 (indicating that Peru faces increasing deforestation from economic development).

Through *Plan Colombia*, USAID has already invested \$1.3 billion largely in anti-narcotics measures and efforts to end civil conflict.<sup>252</sup> As already mentioned, some of these measures have added to deforestation levels while having little effect on cocaine exportation.<sup>253</sup> Because of the correlation between deforestation and climate change,<sup>254</sup> the U.S. national interest in preventing climate change and its potentially devastating effects also presents an argument for increased investment to combat deforestation under the CTPA. Improvements to the environmental provisions of the CTPA might thus be an effective way to promote another important American interest comparable to combating drugs.

## X. CONCLUSION

Experience has proven some free trade advocates incorrect in their prediction that increased trade would automatically correlate with increased prosperity and increased environmental standards. Instead of applying the same basic language from prior agreements, the final draft of the CTPA should include strengthened environmental provisions. Recent changes to the CTPA subjecting its environmental provisions to the binding dispute resolution portion of the agreement were a step in the right direction, but the fact that similar provisions in prior trade agreements have never been used creates doubts as to their effectiveness. To address known and existing environmental threats, the CTPA should also adopt a nuanced country and issue specific approach with binding enforcement measures exemplified by the PTPA Forest Sector Annex. Efforts should also be made to extend these measures beyond the logging industry alone. To enhance the effectiveness of the citizen submission process, an effort should be made to make the citizen submission process more fair and accessible to average citizens and also to re-incorporate the independent oversight originally allowed for under the NAAEC through the secretariat and the JPAC.

Lastly, to address scale effects from trade, the trend of increased investment in environmental projects for the ECC and EAC under the CTPA should continue, and should be accompanied by increased investment in environmental institutions and protections in Colombia. These institutions play a vital role in the study and implementation of plans to reduce the harmful environmental impacts of reduced trade and investment barriers with the United States. They are also needed to counterbalance weaknesses in the domestic Colombian environmental enforcement infrastructure.

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252. *Colombia*, U.S. AGENCY FOR INT'L. DEV., <http://www.usaid.gov/pubs/cbj2002/lac/co/> (last updated Feb. 12, 2003).

253. *See supra* Part III; *Colombia Profile*, *supra* note 21.

254. *See* Rhett A. Butler, *Atmospheric Role of Forests*, MONGABAY, <http://rainforests.mongabay.com/0907.htm> (last updated Mar. 07, 2011).

More than a decade of experience in Mexico indicates that even with increased revenues from trade, little of this revenue will likely be put towards environmental protection.<sup>255</sup> In a modern age where environmental problems like climate change and species extinction have global causes and implications, it seems short-sighted and injurious not to adopt new approaches in a trade agreement with one of the world's most biologically diverse nations. Economic development is important, but so too is a balance of interests sufficient to protect vital natural resources and a safe environment for future generations. These two interests can go hand in hand. The NAAEC model upon which the CTPA, and the other post NAFTA agreements have been built is too limited an approach towards that goal.

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255. Wold, *supra* note 5, at 225.