

Spring 2004

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3-1-2004

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Available at: <http://digitalcommons.lmu.edu/ilr/vol26/iss3/1>

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# The North American Commission for Environmental Cooperation After Ten Years: Lessons About Institutional Structure and Public Participation in Governance

DAVID L. MARKELL\*

## I. INTRODUCTION

A little more than ten years ago the three North American countries, Canada, Mexico, and the United States, adopted the North American Free Trade Agreement (NAFTA).<sup>1</sup> Supporters of "free trade"—i.e., in this context proponents of the reduced trade barriers and enhanced investment protection that NAFTA would produce—were optimistic about the benefits that liberalized trade would bring to the people of the continent.<sup>2</sup> Invigorated domestic economies (greater investment, more jobs, etc.) were among the hoped-for outcomes of this landmark regional trade agreement for North America.<sup>3</sup>

Others were concerned that reducing trade barriers would not be a panacea. They worried that, instead, it might have adverse impacts on environmental protection and on the interests of labor.<sup>4</sup> Some members

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\* Steven M. Goldstein Professor, Florida State University College of Law. Thanks are due to Professors Greg Block, John Knox, Kal Raustiala, and Chris Wold for reviewing earlier versions of this article. Thanks also to Danielle Appignani, FSU College of Law '05, and Sarah Lindquist, FSU College of Law '06, for excellent research assistance.

1. North American Free Trade Agreement, Dec. 8, 11, 14, and 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

2. NAFTA & THE ENVIRONMENT: SUBSTANCE AND PROCESS 5-6 (Daniel Magraw ed., Section of International Law and Practice, American Bar Association 1995) [hereinafter NAFTA & THE ENVIRONMENT].

3. Pierre Marc Johnson & Andre Beaulieu, THE ENVIRONMENT AND NAFTA: UNDERSTANDING AND IMPLEMENTING THE NEW CONTINENTAL LAW 9-17 (Island Press 1996).

4. See *id.* at 8, 15, 26-29; GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION 3 (David L. Markell & John H. Knox, eds., Stanford University Press 2003) [hereinafter GREENING NAFTA]; NAFTA & THE ENVIRONMENT, *supra* note 2, at 3-5.

of these constituencies no doubt also were less than sanguine about the efficacy and adequacy of existing domestic governance efforts in serving environmental protection and labor interests.<sup>5</sup>

Concerns about the adequacy of environmental and labor protection efforts, particularly in a world of liberalized trade, had a significant outcome on the NAFTA negotiations. Environmental and other interests had sufficient domestic political leverage, especially in the United States, to secure the adoption, simultaneously with the adoption of NAFTA, of two companion agreements, the North American Agreement on Environmental Cooperation (NAAEC) and the North American Agreement on Labor Cooperation (NAALC).<sup>6</sup> Without the support of these NGOs it is not clear whether any of the Agreements would have attracted enough political support to win Congressional approval.<sup>7</sup>

The debate continues today about whether the creation of these new environmental and labor institutions as part of the "NAFTA package" was a pyrrhic or real victory (or a counter-productive intrusion into the signatory Parties' domestic governance prerogatives), and concerning how best to balance the objective of liberalizing trade in North America with concerns about environmental and labor protection on the continent.<sup>8</sup> Debate similarly continues about how best to navigate trade, environment, and labor issues in the context of the multitude of trade-related agreements that have been negotiated in recent years and in the context of those that remain in negotiation. The United States alone, for example, in the past few years has negotiated "free trade"

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5. See Johnson & Beaulieu, *supra* note 3, at 15-7; GREENING NAFTA, *supra* note 4, at 4-5.

6. North American Agreement on Environmental Cooperation, Dec. 8, 11, 14, and 17, 1992, 32 I.L.M. 1480 [hereinafter NAAEC]; North American Agreement on Labor Cooperation, Sept. 14, 1993, 32 I.L.M. 1499 [hereinafter NAALC]; see GREENING NAFTA, *supra* note 4, at 7-9; Johnson & Beaulieu, *supra* note 3, at 24-34.

7. See GREENING NAFTA, *supra* note 4, at 12-3 (noting that, "[i]n at least one respect, the NAAEC was undoubtedly successful. . . . [I]t helped to attract support for NAFTA in the U.S. Congress, which approved NAFTA and its accompanying agreements in November 1993."); Johnson & Beaulieu, *supra* note 3, at 24. The governments' willingness to create these companion institutions created a schism in the environmental community. Some environmental non-governmental organizations (ENGOS) came on board to support the NAFTA package (e.g., the National Wildlife Foundation and the World Wildlife Foundation), while others maintained their role in opposition to NAFTA (e.g., the Sierra Club and many other groups from Mexico and Canada). GREENING NAFTA, *supra* note 4, at 10; Johnson & Beaulieu, *supra* note 3, at 31-34.

8. Concerns about the merits of liberalizing trade, and the types of such liberalization that are appropriate, beyond environmental and labor issues, continue today as well, but these are for a different day and forum.

agreements with countries such as Singapore (2004),<sup>9</sup> Morocco (2004),<sup>10</sup> Chile (2003),<sup>11</sup> and Jordan (2000).<sup>12</sup> Significant free trade negotiations that are ongoing include the Free Trade of the Americas Agreement (FTAA) discussions,<sup>13</sup> and draft agreements with Central American nations in the Central American Free Trade Agreement (CAFTA)<sup>14</sup> and, more recently, with the Dominican Republic.<sup>15</sup>

With ten years of implementation experience, the respective track records of the North American Environmental and Labor Agreements, and the performance of the new, regional institutions they spawned, obviously provide fertile soil for exploring questions about the trade, environment, and labor nexus, and about how best to promote environmental and labor protection.<sup>16</sup> The decision of the Loyola International and Comparative Law Review to provide a forum for consideration of these issues is a welcome one, particularly since there have been surprisingly few initiatives to include analyses in the same setting of the different Agreements in the NAFTA package and of the institutions they established.<sup>17</sup> I am honored to have been asked to participate in this effort and am delighted to have the opportunity to do so.

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9. Free Trade Agreement, May 6, 2003, U.S.-Sing., art. 15.1, *available at* [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Singapore\\_FTA/Final\\_Texts/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/Section_Index.html) [hereinafter U.S.-Singapore Free Trade Agreement].

10. Office of the United States Trade Representative, United States-Morocco Free Trade Agreement, June 15, 2004, *at* [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Morocco\\_FTA/Final\\_Text/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Morocco_FTA/Final_Text/Section_Index.html).

11. Free Trade Agreement, June 6, 2003, U.S.-Chile, art. 10.27, *available at* [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Chile\\_FTA/Final\\_Texts/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html) [hereinafter U.S.-Chile Free Trade Agreement].

12. Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, Oct. 24, 2000, 41 I.L.M. 63 (2002).

13. Free Trade of the Americas Eighth Ministerial Meeting, Miami, Florida (Nov. 23, 2003), *available at* [http://www.ftaa-alca.org/Ministerials/Miami/Miami\\_e.asp](http://www.ftaa-alca.org/Ministerials/Miami/Miami_e.asp). The author participated in a panel during the America's Trade and Sustainable Development Forum that occurred in Miami in November 2003 during the Miami Trade Ministerial.

14. Office of the United States Trade Representatives, Draft of Central American Free Trade Agreement, Jan. 28, 2004, *available at* <http://www.natlaw.com/treaties/cafta/caftaenglish.htm>.

15. Office of the United States Trade Representatives, Central America - Dominican Republic - United States Free Trade Agreement, Aug. 5, 2004, *at* [http://www.ustr.gov/Trade\\_Agreements/Bilateral/CAFTA-DR/CAFTA-DR\\_Final\\_Texts/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA-DR/CAFTA-DR_Final_Texts/Section_Index.html).

16. For a sampling of some of the more significant questions in the environmental protection context, see David Markell, *The Commission for Environmental Cooperation's Citizen Submission Process*, 12 GEO. INT'L ENVTL. L. REV. 545, 568-574 (2000).

17. For one source that contains analyses of different NAFTA Agreements, see Linking Trade, Environment, and Social Cohesion: NAFTA Experiences, Global Challenges (John J. Kirton & Virginia W. Maclaren eds., 2002).

My focus in this article is on the North American Agreement on Environmental Cooperation and the institution it creates, the North American Commission for Environmental Cooperation (CEC). Part II provides an overview of the structure of the CEC, a feature of the institution that I believe deserves particular attention. Part III reviews, from various perspectives, the role that the CEC holds out for the public to play in environmental governance. Three of the articles in this volume, those by Professors John Knox,<sup>18</sup> Kal Raustiala,<sup>19</sup> and Chris Wold,<sup>20</sup> focus primarily on this set of issues and are discussed in this Part. Public participation in governance is currently an issue of enormous importance and interest, on the world and domestic stages.<sup>21</sup> The Knox, Raustiala, and Wold articles contain important insights that will help to inform consideration of these issues. Part IV reviews some of the issues that relate to the impacts of trade on the environment. It does so primarily through the lens that Professor Greg Block offers in his article in this issue.<sup>22</sup> Concerns about potential trade-related impacts on the environment provided an important motivating force for the creation of the NAAEC,<sup>23</sup> and continue to be the focus of substantial interest and attention throughout the world.<sup>24</sup> The Conclusion contains some final observations.

## II. AN OVERVIEW OF THE STRUCTURE OF THE CEC

The NAAEC creates, and creates important roles for, three main sets of actors. As is the case for virtually all international agreements, considerable power is given to a body that represents the signatory

18. John H. Knox, *Separated at Birth: The North American Agreements on Labor and the Environment*, 26 LOY. L.A. INT'L & COMP. L. REV. 359 (2004).

19. Kal Raustiala, *Police Patrols & Fire Alarms in the NAAEC*, 26 LOY. L.A. INT'L & COMP. L. REV. 389 (2004).

20. Chris Wold et al., *The Inadequacy of the Citizen Submission Process of Articles 14 & 15 of the North American Agreement on Environmental Cooperation*, 26 LOY. L.A. INT'L & COMP. L. REV. 415 (2004).

21. See, e.g., Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT'L L. 596, 619 (1999); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 16 n.42, 17 nn.43-44 (1997); IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (1992); Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 174-75 (1997).

22. Greg Block, *The North American Commission on Environmental Cooperation and the Environmental Effects of NAFTA: A Decade of Lessons Learned and Where They Leave Us*, 26 LOY. L.A. INT'L & COMP. L. REV. 445 (2004).

23. GREENING NAFTA, *supra* note 4, at 256.

24. *Id.*

countries.<sup>25</sup> In the CEC context, this body is known as the CEC Council.<sup>26</sup> The Council is comprised of the environment ministers of the three signatory Parties – the U.S. EPA Administrator (currently Michael Leavitt) and his counterparts in Mexico and Canada.<sup>27</sup> The Council has overall responsibility for implementation of the Agreement.<sup>28</sup> Thus, for example, while the CEC Secretariat annually prepares draft program plans and budgets, the Council vets these drafts and retains final approval authority.<sup>29</sup>

The NAAEC does not vest exclusive authority in the Council, and it is here that the Agreement is quite innovative in the institutional structure it establishes.<sup>30</sup> The NAAEC also establishes as an integral part of the administration of the CEC a citizens' body known as the Joint Public Advisory Committee (JPAC).<sup>31</sup> The NAAEC gives the JPAC, comprised of fifteen citizens (five from each of the North American countries),<sup>32</sup> broad discretion to "provide advice to the Council on any matter within the scope of the Agreement."<sup>33</sup> In serving this function, JPAC is intended to operate as the representative of the North American public.

In addition to the JPAC, the NAAEC reserves a more significant role for the Secretariat than is the case for the Secretariats of many international institutions. In Article 13, the NAAEC empowers the CEC Secretariat to "prepare a report for the Council on any matter within the scope of the annual program."<sup>34</sup> Under this Article the Secretariat also may prepare a report on "any other environmental matter related to the cooperative functions of the Agreement," so long as it notifies the Council in advance and the Council does not veto preparation of such a

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25. GREENING NAFTA, *supra* note 4, at 9, 11, 25-6.

26. NAAEC Art. 8; GREENING NAFTA, *supra* note 4, at 9.

27. See NAAEC Art. 9; See GREENING NAFTA, *supra* note 4, at 9.

28. NAAEC Art. 10; GREENING NAFTA, *supra* note 4, at 10-1.

29. As is discussed in more detail *infra*, the Council's authority is less absolute in the context of the Secretariat's exercise of its responsibilities under Articles 13 and 14-15 than it is in the context of the Council's review and approval of CEC Secretariat-generated program plans.

30. NAAEC Arts. 8-16; See Greening NAFTA, *supra* note 4, at 11-12.

31. Greening NAFTA, *supra* note 4, at 21.

32. NAAEC Art. 16.

33. *Id.*; Greening NAFTA, *supra* note 4, at 199. For an in-depth review of the JPAC, see John Wirth, *Perspectives on the Joint Public Advisory Committee*, in GREENING NAFTA, *supra* note 4, at 199. The scope of the Agreement itself is virtually unlimited. As a result, the JPAC's ability to provide advice is equally uncircumscribed.

34. NAAEC Art. 13.

report.<sup>35</sup> Thus, Article 13 gives discretion to the Secretariat to tackle environmental challenges on the continent that it concludes are important and worthy of in-depth attention, even in the absence of consensus by the Parties on the propriety of studying such issues. While there are some constraints on the scope of the Secretariat's discretion, in practice, the Secretariat's flexibility to identify issues of its choosing has been considerable. To date, the Secretariat has prepared four reports under its Article 13 authority and has a fifth underway.<sup>36</sup>

Perhaps even more significantly, in Articles 14 and 15, the NAAEC empowers the Secretariat to play a central role in administering the CEC's citizen submissions process, an innovative process that allows citizens of any of the North American countries to file submissions in which they allege that any of the three countries is failing to enforce its environmental laws effectively.<sup>37</sup> As Professors Knox and Raustiala point out in their respective articles in this issue,<sup>38</sup> this authority, which includes vesting in the Secretariat considerable discretion to make judgments about implementation of the citizen

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35. NAAEC Art. 13, sec. 1. The Council must exercise its veto within thirty days. It may do so by a two-thirds vote; unanimity is not required. *Id.*

36. Chris Wold, Sanford Gaines & Greg M. Block, *Trade & Environment* (Carolina Press forthcoming 2005) (on file with the author). For an assessment of the Article 13 report concerning the San Pedro River Basin, entitled *Ribbon of Life: An Agenda for Preserving Transboundary Migratory Bird Habitat on the Upper San Pedro River* (1999), see A. Dan Tarlock & John E. Thorson, *Coordinating Land and Water Use in the San Pedro River Basin: What Role for the CEC?*, in *GREENING NAFTA*, *supra* note 4, at 1. The most recent Article 13 report, entitled *Environmental Challenges and Opportunities of the Evolving North American Electricity Market* (June 2002), involved energy issues in North America. The first Article 13 report focused on the Silva Reservoir in Mexico, and the unexplained death of approximately 40,000 migratory birds there. CEC Secretariat, *Report on the Death of Migratory Birds at the Silva Reservoir* (1995). The second such report dealt with the long-range transport of air pollution throughout the continent and was entitled *Continental Pollutant Pathways: An Agenda for Cooperation to Address Long-Range Transport of Air Pollution in North America* (1997). The Secretariat is currently undertaking an Article 13 initiative that involves the impacts of genetically modified maize on native maize strains in Mexico.

37. NAAEC Arts 14-15. See generally Markell, *supra* note 16, at 568-574. Some commentators have characterized the citizen submissions process as the "centerpiece" of the CEC and as its most important feature. See, e.g., Chris Wold, *International Environmental Law Project (IELP), Comments on Issues Relating to Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (Oct. 2, 2003), in *Environmental Law Institute Research Report, ISSUES RELATING TO ARTICLES 14 AND 15 OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION* (Oct. 31, 2003) [hereinafter *Environmental Law Institute Research Report*]; Letter from Paul S. Kibel to Gustavo Alanis-Ortega & Manon Pepin (Sept. 8, 2003), in *Environmental Law Institute Research Report*.

38. See Knox, *supra* note 18, at 372-75; see also Raustiala, *supra* note 19, at 395-398.



submissions process, carries particular potential significance because the signatory Parties are the "targets" of this submissions process.<sup>39</sup>

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39. In addition to its authority and responsibilities under Articles 13, 14, and 15, the Secretariat has significant programmatic responsibilities, including responsibility for the development of proposed program plans and budgets, and the implementation of the approved programs. For a review of some of the CEC Secretariat's programmatic initiatives, see GREENING NAFTA, *supra* note 4, at chapters 2-4. While some have characterized the NAAEC and NAALC as "side agreements" to NAFTA, others have urged that they are far more than that, and instead represent important steps toward bolstering environmental and labor governance and protection in their own right. One evaluation of the Environmental Agreement, for example, observed that "it is important to see the NAAEC as a complete agreement in its own right, and not just as a 'side agreement' to a trade deal. . . .

[T]he NAAEC is not just a trade and environment agreement . . . . Rather, the mandate of the CEC . . . is more broadly defined as the protection and enhancement of the environment in North America . . . . The long term value of the CEC will be measured by its fulfil[ment] of this mandate.

IRC Report at vii.

The broad scope that the NAAEC establishes for the operations of the CEC itself is another innovative feature of the Agreement. The signatory countries might have set a modest agenda for the CEC, the first regional environmental institution in North America. But in many ways they did not. Instead, in several respects in creating this new institution the countries gave it a broad, virtually unlimited mandate. As John Knox and I have suggested elsewhere, the CEC is the "first regional environmental organization in North America, with broad mandates to address almost any environmental issue arising anywhere on the continent." GREENING NAFTA, *supra* note 4, at 10. Thus, the NAAEC includes a long list of issues involving environmental protection that it empowered the newly-constituted CEC to tackle, ranging from "natural resource-type work" such as protection of endangered species; to pollution control-related issues such as promoting pollution prevention and emergency response preparedness and response activities; to environmental reporting; to market-based approaches such as eco-labeling; and including issues relating to environmental compliance and enforcement. NAAEC, Art. 10, sec. 2. Reflecting the breadth of the charge the countries gave to the CEC is their decision to empower the CEC also to consider "other matters as it may decide." *Id.* The CEC has three main roles: 1) as an institution that facilitates citizen involvement in international policy making; 2) as a mechanism to address trade/environment issues; and 3) as a regional environmental organization. GREENING NAFTA, *supra* note 4. The primary focus of the four articles in this issue is on the former two aspects of the CEC, its role as an institution that facilitates citizen involvement in international policy making, and its role as a mechanism to address trade/environment issues.

The broad discretion of the CEC to act is limited by the size of the CEC and the resources it is provided to do its work. The CEC's entire annual budget is \$9 million. EPA Budget Authority, EPA Budget Division, at <http://www.epa.gov/history/org/resources/budget.htm> (last visited May 4, 2004). This is obviously a very limited sum to take on the environmental challenges of North America in a meaningful way. This is clear from a quick comparison with EPA's annual budget. In fiscal year 1994, EPA's budget (not including the environmental protection budgets of the fifty states) was \$6.6 billion. *Id.* By 2003 EPA's budget had grown to \$7.6 billion. EPA's number of employees similarly dwarfs the CEC's. As of May 2004, the CEC had well under 100 employees, while there were 17,280 EPA employees in 1993 and 17,648 such employees in 2003. *Id.* Compounding the CEC's financial constraints is the fact that its budget has remained at the \$9 million level since the Commission's inception a decade ago, despite periodic efforts, primarily by the United States, to increase it. Thus, in real dollar terms the Commission's resources actually have declined substantially. The CEC's budgetary constraints obviously were of considerable importance in terms of the strategic choices available

Finally, in addition to establishing JPAC as an internal voice for the North American public, the Agreement, through its creation of the citizen submissions process, also creates a significant role for the public by allowing the public to trigger the process and to contribute information to it.<sup>40</sup> As Professor Raustiala suggests,<sup>41</sup> this has important implications for the effectiveness and legitimacy of the monitoring and spotlighting function the process is intended to serve.<sup>42</sup>

### III. THE CEC EXPERIENCE AND THE ROLE OF THE PUBLIC

The institutional structure of the CEC, discussed in Part II above, raises important questions about public participation in international as well as domestic environmental governance. Three of the articles in this issue, those by Professors Knox, Raustiala, and Wold, address several of these questions.<sup>43</sup>

In his article, *Separated at Birth: The North American Commissions on Labor and the Environment*,<sup>44</sup> Professor John Knox concludes that the Environmental and Labor Agreements are part of an evolution from a "Westphalian world."<sup>45</sup> He characterizes this world to be one that takes as a fundamental precept that international law should not concern itself with domestic government, and that national governments are the only legitimate actors on the international stage.<sup>46</sup> He suggests that the NAAEC in particular is two steps away from Westphalia.<sup>47</sup> It recognizes and supports what he characterizes as liberal democratic values in domestic governance, such as the provision in the NAAEC that requires the domestic governments of each of the signatory Parties to provide individuals access to their domestic

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to it to take on different environmental protection challenges, and in terms of the strategic choices for taking on such challenges. For example, a common refrain from CEC personnel has involved the importance of pursuing collaborations that would enable the CEC to leverage its limited resources if it hoped to accomplish much of import in enhancing North America's environment. Janine Ferretti, *Speech: Innovations in Managing Globalization: Lessons from the North American Experience*, 15 GEO. INT'L ENVTL. L. REV. 367, 377-78 (2003).

40. NAAEC Arts. 14, 15.

41. Raustiala, *supra* note 19, at 397-398.

42. *Id.*

43. See Knox, *supra* note 18; see also Raustiala, *supra* note 19 and Wold, *supra* note 20.

44. Knox, *supra* note 18.

45. *Id.* at 359-60. Professor Knox explains that the phrase "Westphalian" is derived from the Treaty of Westphalia, adopted in 1648, which established a model of international relations that is state-centered. *Id.* at 360.

46. *Id.*

47. *Id.* at 362-66.

courts.<sup>48</sup> It also offers NGOs a role at the international level.<sup>49</sup> Concerning the latter, Professor Knox points in particular to two of the features of the CEC's structure described in Part I, notably the NAAEC's creation of the JPAC, and its citizen submissions process.<sup>50</sup> He notes that the JPAC has significant autonomy, including the ability of JPAC members to elect their own chair and to call their own meetings.<sup>51</sup> Perhaps most significantly, JPAC has the authority to "provide advice to the Council on any matter within the scope of [the NAAEC]. . . ."<sup>52</sup> Professor Knox cites the citizen submissions process as a CEC mechanism that allows NGOs to "participate in monitoring the Parties' implementation of their commitments under the [NAAEC], especially their obligation to effectively enforce their environmental laws."<sup>53</sup>

Professor Knox offers two primary conclusions based on the experience of the CEC and CLC. First, he concludes that

public participation may be more important to the success of an international institution than the theoretical possibility of government-triggered sanctions for failure to comply. In the areas of labor and environment, governments will rarely if ever bring claims against one another. Procedures that depend on such claims are worse than useless, no matter how apparently strong their sanctions, since they distract attention from more effective compliance mechanisms and opportunities for cooperation.<sup>54</sup>

As a result, he recommends that in future negotiations, labor and environmental NGOs pursue approaches based on the CEC model that create opportunities for public participation. He suggests that this model is

far more likely than the chimera of government-triggered sanctions to induce governments to enforce high labor and environmental standards. Governments are increasingly willing to provide for such Westphalian sanctions, secure in the knowledge that they will never

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48. *Id.* at 366. For a discussion of the term "democracy," see Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U. PENN. L. REV. 801, 879 (1993).

49. Knox, *supra* note 18, at 362. Professor Knox suggests that the Labor Agreement represents one step away from Westphalia because the Agreement supports what he characterizes to be liberal democratic values in domestic governance (such as the provision in the NAALC that requires the domestic governments of each of the signatory Parties to provide individuals access to their domestic courts). *Id.* at 366.

50. *Id.* at 369-75.

51. *Id.* at 371.

52. NAAEC Art. 16.

53. Knox, *supra* note 18, at 372-73.

54. *Id.* at 386.

be triggered. Meanwhile, labor and environmental advocates are missing opportunities to extend the far more useful post-Westphalian procedures pioneered by the CEC.<sup>55</sup>

Next, Professor Knox speculates that "[i]t seems probable that the relative success of the CEC procedure is largely due to its administration by an independent secretariat and its oversight by an international advisory committee, which have supported it against governments' attempts to undermine it."<sup>56</sup> He therefore highlights the importance of building in institutional support for public participation if such participation is a goal:

[T]he battle to ensure effective public participation in an international institution does not end when public participation mechanisms are included in the institution; rather, it is just beginning. Governments that agree to submissions procedures only reluctantly, under the pressure of temporary public attention, may be expected to look for ways to undermine them after they begin to operate, especially when the procedures threaten to embarrass the governments. Therefore, institutional support for the procedures, such as an independent secretariat and a committee of experts that can serve as a watchdog over the process, is critically important to their success.<sup>57</sup>

Professor Kal Raustiala's article, *Police Patrols & Fire Alarms in the NAAEC*,<sup>58</sup> similarly suggests that including opportunities for citizen involvement has potential as an element of treaty design. Professor Raustiala focuses his review on the CEC citizen submissions process. Professor Raustiala characterizes the process as a "fire alarm" type of "review institution" in that it provides for review of the countries' commitments to enforce their environmental laws effectively by "empower[ing] private actors to bring forward claims about state performance. . . ."<sup>59</sup> Professor Raustiala contrasts this "fire alarm" approach with "police patrols," which he describes as review mechanisms that permit a central authority to "inspect and review state performance. . . ."<sup>60</sup>

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55. *Id.* at 387.

56. *Id.* at 386.

57. *Id.* at 386-87.

58. Raustiala, *supra* note 19, at 389.

59. *Id.* at 393-94.

60. *Id.* Professor Raustiala draws the distinction between "fire alarms" and "police patrols" from the domestic political science literature. *Id.*

Professor Raustiala concludes that a fire alarm approach has important benefits. In particular, he suggests that such an approach may be more effective and efficient than a "pure police patrol system" because, *inter alia*, fire alarm approaches "shift search costs away from governments and international organizations to individuals and other private actors"<sup>61</sup> and facilitate use of the "abundant private information about environmental enforcement that individuals possess."<sup>62</sup> Professor Raustiala also suggests that a fire alarm model "upholds . . . normative values concerning participatory democracy" because it directly involves individuals.<sup>63</sup> Furthermore, with respect to the citizen submissions process in particular, by enhancing public participation, the process may "enhance the legitimacy of the NAAEC. . . ."<sup>64</sup>

Professor Raustiala suggests that the use of fire alarms such as the CEC process is unusual despite their potential benefits, noting that international law "rarely permits private actors to challenge states."<sup>65</sup> He reasons that "fire alarms are often shunned, seemingly because by empowering private actors they threaten state sovereignty and have the potential to embarrass governments sufficiently to offset the gains in compliance."<sup>66</sup> Echoing a point that Professor Knox makes, Professor Raustiala suggests that "[b]y creating a direct role for individuals, the submissions process challenges the state-centric orientation and sovereignty focus of international law."<sup>67</sup>

Professor Raustiala posits that the potential benefits of fire alarm approaches may persuade countries to overcome their apprehensions about them. He suggests that in the future, states increasingly may employ fire alarms as they learn more about what works best, and as impediments to creation of such mechanisms (notably, concerns about loss of sovereignty) diminish.<sup>68</sup> Professor Raustiala concludes that while some have criticized the CEC citizen submissions process for its

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61. *Id.*

62. *Id.* at 392.

63. Raustiala, *supra* note 19, at 392.

64. *Id.* at 409.

65. *Id.* at 390-91.

66. *Id.* at 394.

67. *Id.* at 392.

68. Professor Raustiala also reviews shortcomings in "fire alarm" approaches, including problems with the CEC's variation of such an approach (e.g., they may "skew" allocation of resources by government by "promot[ing] goals that are not in the collective interest of the broader cooperative community" or by yielding over or under enforcement). Raustiala, *supra* note 19, at 410.

weaknesses (e.g., its lack of sanctions),<sup>69</sup> the process, "when viewed against the backdrop of other international environmental treaties . . . by further involving private actors in public regulation, represents an innovative step in the design of international institutions."<sup>70</sup>

*The Inadequacy of the Citizen Submission Process of Articles 14 & 15 of the North American Agreement on Environmental Cooperation*,<sup>71</sup> co-authored by Professor Chris Wold, the principal author of the Migratory Birds submission,<sup>72</sup> offers important insights concerning the views of the ENGO community about the operation of the CEC and its citizen submissions process. As its title suggests, Professor Wold's article is far from a sugar-coated take on the CEC process. He appears to be less sanguine than either Professor Knox or Professor Raustiala about prospects for the process. While Professor Knox suggests that building institutional support for a complaint-driven accountability process, such as an independent secretariat and a committee of JPAC-like experts that can serve as a watchdog over the process, is critically important to the success of such a process,<sup>73</sup> and while Professor Raustiala focuses on the innovative nature of the process and its potential to add efficiency, effectiveness, and legitimacy to treaty review,<sup>74</sup> Professor Wold appears to be skeptical that even the "watchdog" measures that Professor Knox alludes to or the benefits that Professor Raustiala identifies will turn out to be enough to protect the process from the tendency of governments to undermine it.

Professor Wold begins by highlighting, among other things, the NAAEC's goal of encouraging public participation in environmental governance as a strategy to enhance environmental protection and its creation of innovative mechanisms such as the citizen submissions process as strategies to achieve this goal. He indicates that some ENGOs had high hopes for the citizen submissions process.<sup>75</sup> In fact, some viewed it as a "potential model for accountability and governance," as a "positive response to globalization that gives citizens a voice in the often impenetrable affairs of international organizations."<sup>76</sup>

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69. *Id.* at 397, 413.

70. *Id.*

71. Wold, *supra* note 20, at 415.

72. *Id.* This Submission, filed with the CEC in November 1999, is referred to as SEM-99-002. The CEC issued a factual record for this submission in April 2003. See [www.cec.org](http://www.cec.org).

73. Knox, *supra* note 18, at 360.

74. Raustiala, *supra* note 19, at 392.

75. Wold, *supra* note 20, at 416.

76. *Id.*

Professor Wold suggests that citizen enthusiasm for the submissions process has "waned" significantly in recent years, and that support for the process in the United States currently is quite low.<sup>77</sup> He attributes this souring of citizens' views primarily to the decisions of the CEC Council. In Professor Wold's view, the Council's decisions concerning the process have "eroded public confidence"<sup>78</sup> in the mechanism in several ways. First, the Council has reduced the independence of the CEC Secretariat.<sup>79</sup> Second, the Council has "ignored" the criticisms and advice of JPAC, the National Advisory Committees (NACs) that the countries constituted as domestic advice-giving bodies,<sup>80</sup> and of interested citizens.<sup>81</sup> Third, countries have treated the process as an adversarial rather than cooperative one.<sup>82</sup> Fourth, Professor Wold criticizes the substantive decisions the Council has reached, including its decisions not to allow factual records concerning patterns of ineffective enforcement; and its decision that a submission was not acceptable because it lacked sufficient information to support development of a factual record (a decision that Professor Wold claims is for the Secretariat alone to make).<sup>83</sup>

Professor Wold suggests that, in addition to actions by the CEC Council that have undermined the credibility and value of the citizen submissions process, countries in their individual capacities have been obstructionist as well, and thereby jeopardized environmental benefits from the process. Professor Wold points to his experience with the United States on the Migratory Birds submission as illustrative.<sup>84</sup> He suggests that, despite the significant environmental concerns that were the subject of the submission and the submitters' suggested strategies for addressing these concerns, the United States "never sought to engage submitters in a constructive dialogue about solutions to a vast failure to enforce an important environmental law."<sup>85</sup> Professor Wold similarly points to what he characterizes as "sham administrative actions" that Canada initiated in order to undermine a submission that alleged failure to enforce various environmental laws that govern mining operations.<sup>86</sup>

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77. *Id.* at 416-17.

78. *Id.* at 417.

79. Wold, *supra* note 20, at 417.

80. *Id.*; NAAEC Art. 17.

81. Wold, *supra* note 20, at 417.

82. *Id.*

83. *Id.* at 423.

84. *Id.* at 431.

85. *Id.* at 433.

86. Wold, *supra* note 20, at 435.

Having discussed the early high hopes that citizens had for the citizen submissions process, and the marked loss of citizen confidence in the process because of frustration concerning its implementation, particularly by the CEC Council, over the past decade, Professor Wold offers a series of recommendations for improving the citizen submissions process that he believes would help to restore public confidence. First, and in his view "[m]ost important," the Council "must relinquish its grip on the Citizen Submission Process."<sup>87</sup> That is, among other things, the Council must give the Secretariat greater autonomy to perform its functions under the process.<sup>88</sup> Second, Professor Wold suggests that Parties need to serve their function as "stewards" of the NAAEC and treat the citizen submissions process as the "collaborative process the drafters intended."<sup>89</sup> Third, creating a monitoring capacity to evaluate follow-up to the issuance of factual records (the end point of the citizen submissions process) is likely to prove beneficial in realizing the NAAEC's objective of improving enforcement policies and practices.<sup>90</sup> Professor Wold concludes by noting that the Council "certainly knows what it must do to restore public confidence in the process and to ensure its effectiveness," notably that it "must release its grip on the process and embrace the NAAEC's cooperative spirit."<sup>91</sup> The outstanding issue, in his view, is whether the Council has the "political will" to do so.<sup>92</sup>

#### IV. INSIGHTS FROM THE CEC EXPERIENCE CONCERNING THE TRADE/ENVIRONMENT INTERFACE

Professor Greg Block's article, *The North American Commission for Environmental Cooperation and the Environmental Effects of NAFTA: A Decade of Lessons Learned and Where They Leave Us*,<sup>93</sup> focuses on the impacts of trade on the environment, a concern that was an important driving force for the creation of the Environmental Agreement<sup>94</sup> and that remains a significant issue today.<sup>95</sup> Professor

87. *Id.* at 440.

88. *Id.*

89. *Id.* at 441.

90. *Id.* at 442.

91. Wold, *supra* note 20, at 442.

92. *Id.*

93. Block, *supra* note 22, at 445.

94. NAAEC Article 10:6(d) requires the CEC to "consider[ ] on an ongoing basis the environmental effects of the NAFTA." Professor Block includes a short review of the theoretical literature concerning the supposed benefits and costs of free trade (e.g., on the plus side, it will produce welfare gains that will ultimately promote enhanced levels of environmental protection,



Block's take on this issue is of the "half empty, half full" variety. Professor Block is relatively positive about the CEC's efforts to develop and implement methodological approaches for examining the impacts of trade on the environment.<sup>96</sup> He notes, for example, that "increasingly the work of the CEC in this area has begun to yield real world policy results and to stimulate others outside the institution to pursue related research and analysis."<sup>97</sup> He also is supportive of the inclusive approach the CEC has followed in assessing the effects of trade and suggests that the CEC has provided meaningful opportunities in this arena that others interested in fostering public engagement might consider as a possible model (a theme that Professor Knox covers with respect to the CEC's submissions process and its inclusion of JPAC as an integral part of the CEC's structure).<sup>98</sup> Concerning this latter point, Professor Block suggests that the CEC has helped to "democratize" trade and environment impact assessment work by making the work accessible.<sup>99</sup>

On the other hand, Professor Block is less than optimistic on several fronts. First, even with respect to the assessment work referenced in the preceding paragraph, he notes that the "scale of the work has been quite modest . . . and many relevant stakeholders remain unaware of the CEC's efforts . . ."<sup>100</sup> He also paints a pessimistic picture of the actual use of the CEC's work involving trade impacts on the environment to shape more recently adopted trade agreements,<sup>101</sup> concluding that "[p]aradoxically, the "big-picture" issues revealed by [the CEC's body of trade/environment work] does not appear to be influencing the content of recent trade agreements in any appreciable way."<sup>102</sup>

lead to greater efficiencies in resource allocation, and accelerate technological advances and, on the down side, free trade will cause increased adverse environmental effects because of increased exploitation of natural resources, and increased levels of pollution, due to "scale," "composition," and "race-to-the-bottom" effects). See, e.g., Block, *supra* note 22, at 450-51.

95. *Id.* at 464.

96. As Professor Block notes, much of this work, though not all of it, has been undertaken under the auspices of the CEC's Trade and Environment Program, now called "Environment, Economy and Trade." Professor Block notes the limitations in the CEC's work to date and also highlights some of the difficulties in assessing the impacts of trade given the numerous other factors that can affect economic and environmental conditions. *Id.* at 448-52.

97. Professor Block qualifies his generally positive view of the methodological process by noting a variety of deficiencies in this area as well, such as the "modest scope" of the CEC's efforts and limits in its follow-up. *Id.* at 446.

98. *Id.*; Knox, *supra* note 18, at 370-85.

99. Block, *supra* note 22, at 461.

100. *Id.*

101. *Id.* at 445.

102. *Id.*

Professor Block suggests that lessons from the CEC research and complementary efforts ought to inform future trade/ environment negotiations such as the Free Trade Area of the Americas (FTAA) discussions. In particular he argues that one of the lessons is that increased trade may have scale and other effects that should lead societies to increase their commitment to the "nuts-and-bolts infrastructure" of environmental policy implementation.<sup>103</sup> He also suggests that "[t]he clear trend towards convergence of trade, investment and competition policies in major sectors liberalized in NAFTA has yet to trigger parallel efforts to harmonize environmental policies and standards in these same areas."<sup>104</sup> He urges progress towards upwards harmonization in the environmental policy arena, noting one area in particular in which this has occurred, notably Canada's making its hazardous waste disposal restrictions as stringent as those in the United States.<sup>105</sup>

#### V. CONCLUSION

The number of international agreements and institutions has climbed dramatically in recent years. The NAAEC and NAALC, and the CEC and CLC, are part of this phenomenon. As this article and several others in this volume reflect, the NAAEC and CEC in particular are innovative in the ways in which they depart from Westphalian notions of international governance and cede important roles and responsibilities to NGOs and to a quasi-independent Secretariat. These innovations situate the CEC as a form of what Professor Lester Salamon has termed the "new governance," that is, a form of governance that relies on collaborative problem-solving rather than relying primarily or exclusively on government capacity and performance.<sup>106</sup>

Principles of adaptive management,<sup>107</sup> as well as common sense, suggest that we would be well-served by studying the performance of

103. *Id.* at 452. Professor Block defines "scale" effects to be the potentially adverse environmental effects resulting from increased economic activity generated by greater levels of trade, especially through increased inputs from natural resources and increased emissions arising from the production of goods and services. *Id.* at 450

104. Block, *supra* note 22, at 457.

105. *Id.* at 462.

106. LESTER SALAMON, THE NEW GOVERNANCE AND THE TOOLS OF PUBLIC ACTION: AN INTRODUCTION, in THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE (Lester M. Salamon, ed., 2002).

107. See, e.g., J.B. Ruhl, *A Manifesto for the Radical Middle*, 38 IDAHO L. REV. 385, 402-03 (2002). (supporting an "adaptive management framework" that relies on "iterative cycles of goal determination, performance standard setting, outcome monitoring, and standard recalibration" or,

these new forms of governance. The experience of the CEC over the past decade provides much fertile ground for such study. Hopefully the articles in this issue will make a contribution to this important enterprise.

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put another way, “put[s] a premium on collecting information, establishing measurements of success, monitoring outcomes, using new information to adjust existing approaches, and a willingness to change.”).

