

August 18, 2013

jpac@cec.org

Joint Public Advisory Committee
Commission for Environmental Cooperation
Montreal, Quebec

RE: Public Review of the First Twenty Years of the NAAEC

Dear Members of the Committee:

I appreciate the opportunity to provide my comments to the JPAC. I will leave more detailed evaluations and analyses to those who are more expert in the work of the Council on Environmental Cooperation (CEC) and the Commission than I. My brief remarks are confined to two critical challenges to the implementation process, the lack of proper financial support for the CEC and the reluctance of the NAFTA Parties to support the work of the Commission and allow the NAAEC to function as originally intended and written.

1. Funding

It is highly unfortunate that the Commission's budget remains at approximately \$9 million, the same amount as was provided in 1994, without any adjustment for inflation (with a corresponding reduction in buying power of more than 55%). In contrast, the budget for the Environmental Cooperation Agreement under CAFTA-DR has been more than twice as much (\$19.3 million in 2007). This lack of resources available to the Commission has made it difficult or impossible for the Commission to carry out its mandate, from compiling factual records to providing annual reports. (The 2009 Annual Report was published in August 2013, more than three years late, perhaps because of the lack of adequate staffing.)

2. Lack of Full Cooperation by the NAFTA Parties

The members of the CEC, presumably at the direction of the NAFTA governments, have consistently refused to cooperate with and support the work of the Commission where citizen submissions are involved. In the Ecojustice petition, for example, the Council delayed acting on the citizen submission under NAAEC Article 14 for more than four years after it was submitted and more or less arbitrarily directed that the scope of the investigation of threatened species be narrowed from 197 to only 11, prompting Ecojustice to withdraw the petition in disgust. As Chris Wold has observed, the citizen complaint process is still being treated "as an adversarial, rather than a cooperative, process." So long as this attitude prevails—and it prevails among all three of the NAFTA governments—the citizen submission process will not function effectively.

Delays in responses by governments to the Commission's requests for information, in some instances outright refusals to provide information, continue to hamstring the process.

In closing, I note that the governments (and some NGOs) are fond of blaming deficiencies in NAFTA and/or the NAAEC for the shortcomings in the work of the Commission. There are undoubtedly many ways in which the text of the NAFTA and NAAEC could be improved with regard to environmental matters. For example, the Parties could agree on a more effective process for arbitration and enforcement and broader jurisdiction over the Parties' environmentally unsound measures. However, such modifications are inconceivable in the present political climate. Nor would the process likely be improved if, as President Obama and Senator Clinton both advocated during the 2008 presidential campaign, the key NAAEC environmental obligations were to be incorporated in a revised and amended NAFTA. Arbitration under NAFTA's flawed Chapter 20 procedures has not been utilized *for any issue* in more than twelve years (since *Cross-Border Trucking Services*), and there is little reason to believe it would be used more frequently if jurisdiction extended to the limited environmental obligations now provided under the NAAEC.

In my view, the problem with the NAAEC is in the implementation, or lack of same, in significant part because of the two issues discussed above. What is needed is a political decision by the Parties to provide the commission with proper funding (about \$14,200,000 simply to adjust for nineteen years of inflation) and a willingness to cooperate in the Commission's responses to citizen submissions rather than to thwart them.

Sincerely,

A handwritten signature in black ink, appearing to read "D. A. Gantz". The signature is fluid and cursive, with a large, circular flourish at the end.

David A. Gantz
Samuel M. Fegtly Professor and Director,
International Trade Law Program