DISCUSSION PAPER
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Analysis Articles 14 and 15 of the NAAEC
Council's "Emerging Conflict of Interest"
(28 April 2004)

BACKGROUND

On 17 December 2003, the Joint Public Advisory Committee (JPAC) of the Commission for Environmental Cooperation (CEC)issued its Advice to Council 03-05 on Limiting the scope of factual records and review of the operation of CEC Council Resolution 00-09 related to Articles 14 and 15 of the North American Agreement on Environmental Cooperation (NAAEC), in which it noted that the citizen submission process established under Articles 14 and 15 of the NAAEC played a unique and indispensable role in fostering vigorous environmental enforcement and expressed concern that the process was continuing to lose its relevance, placing the CEC's credibility at risk. JPAC recommended that Council refrain from limiting the scope of factual records, and from requiring that information submitted to support the preparation of a factual record meet a new, more stringent "sufficiency" standard.

In addition, JPAC noted that there was "an emerging perception of Council being in conflict of interest." This concern was clearly articulated at the JPAC public meeting held on 4 December 2003 in Montreal commentators stating: "Council is having a hard time differentiating their role—when they are acting as a Council and when they are acting individually as Parties." Because JPAC is concerned that the biases of the Parties are being reflected in Council decisions, JPAC has decided to undertake an analysis of a possible structural conflict of interest and begin to form an opinion on how best to proceed to address the matter and advise Council appropriately.

ARTICLE 14 and 15 PROCESS

Article 14(1) of the NAAEC provides that the Secretariat may consider a submission from a person or NGO alleging that a Party to the NAAEC is failing to effectively enforce its environmental law subject to certain prescribed conditions. The submission, for example, must provide sufficient information for the Secretariat to review the submission, and must appear to be aimed at promoting enforcement rather than "harassing industry".

Under the terms of Article 14(2), the Secretariat determines whether a submission that meets the criteria of Article 14(1) merits requesting a response from the Party whose actions are targeted. The terms of the Article direct the Secretariat to consider particular issues: whether the submission alleges harm to the person making the submission, whether the submission alone, or in combination with other submissions, raises matters whose further study in this process would advance the goals of this Agreement, whether private remedies available under the Party's law have been pursued, and whether the submission is drawn exclusively from mass media reports. Under the terms of Article 14(3), if the Secretariat determines that the submission merits consideration, it forwards the Party a copy and allows a period of up to 60 days for a response.

After the Party has responded, pursuant to Article 15, the Secretariat considers whether a factual record should be developed and if it determines such an action to be appropriate, informs the Council of its decision and provide its reasons. The Secretariat may unilaterally dismiss a submission at this stage if it determines that a factual record is not warranted. In either event, the Secretariat must provide a reasoned basis for its decision.

From 1995 through 2004, the Secretariat has unilaterally dismissed submissions requesting the preparation of a factual record eighteen times, thirteen times due to a submitter's failure to meet the criteria of Articles 14 (1) or 14(2), and five times because it did not find that development of a factual record was warranted under Article 15(1). In addition, the Secretariat rejected two submissions because pending judicial or administrative proceedings precluded further review, and one submission was terminated based on the submitters' withdrawal of the submission. The Secretariat has recommended the preparation of a factual record for sixteen submissions.

Once Council receives the Secretariat's recommendation to prepare a factual record, it considers whether to authorize the Secretariat to proceed. Article 15(2) states simply "the Secretariat shall prepare a factual record if the Council, by a two-thirds vote, instructs it to do so." The party that is the focus of the investigation cannot unilaterally terminate the process. Council has exercised its "veto" power on only two occasions. Far more frequent is Council's direction to limit the scope of the record or to allow a submission only if submitters provided additional information: this has been done six times.

If the Council directs the Secretariat to go forward, the Secretariat has the opportunity and responsibility to develop information relating to the allegations in the submission of a failure to effectively enforce and then to prepare a draft factual record that contains the results of its investigative work. The Secretariat is required to submit draft factual records to the Council and to allow any Party to provide comments on the accuracy of the draft. These comments are to be incorporated "as appropriate" before the final factual record is submitted to Council for its review.

The NAAEC grants Council the power to withhold the factual record from publication. As is the case with Article 15(2), Article 15(7) provides that "Council may, by a two-thirds vote, make the final factual record available."

Part Five of the NAAEC allows one country to seek a finding from an arbitral tribunal that another country has engaged in a persistent pattern of failure to effectively enforce its environmental laws. A "persistent pattern" refers to a sustained or recurring course of action or inaction beginning after the date of entry into force of this Agreement. The arbitration process is initiated by a request from a Party to the Council, which must approve going forward by a two-thirds vote**.**

THE ISSUE

What is the division of responsibility, boundaries of responsibilities and roles, of the Council, Secretariat, and citizen submitters? Is there a structural tension?

A. The Evolution of the Process from Council perspective: Factual Records 1995-2004

1. BC Mining: Submitters alleged the "systematic failure of the Government of Canada to enforce Section 36(a) of the Fisheries Act to protect fish and fish habitat from the impact of the mining industry in British Columbia. The submission focused on three abandoned mine sites as examples of ongoing non-compliance but also referenced an additional 39 mines where violations "may have occurred or may be occurring" without enforcement action being taken. The Secretariat recommended preparation of a factual record as to all mining sites; *Council instructed the Secretariat to develop a factual record with regard to only one of the three mines highlighted as examples in the submission.*

2. BC Logging: Submitters alleged that Canada was failing to enforce sections 35(1) and 36(3) of the Fisheries Act in connection with logging operations on public and private lands throughout British Columbia. The submission alleged a systemic pattern of non-enforcement and focused on the logging operations on private land in the Sooke watershed as an example of Canada's failure to enforce the Fisheries Act. The Secretariat recommended preparation of a factual record including an examination of those formal or informal policies Canada has in place for enforcing the Fisheries Act on public and private lands in British Columbia. *The Council directed that the factual record be limited to two alleged violations in the Sooke watershed.*

3. Migratory Birds: Submitters alleged that the United States was failing to effectively enforce section 703 of the Migratory Bird Treaty Act against the logging industry throughout the United States. Submitters produced a draft Fish and Wildlife Service policy memorandum stating that no enforcement action was to be taken under the MBTA for logging incidents involving the non-endangered or non-threatened migratory birds. Again, the Secretariat recommended that a factual record be developed on "the full scope of the submitters' assertions that logging operations have violated and are continuing to violate the MBTA on a nationwide basis and in particular identified situations, and that the complete lack of any enforcement by the MBTA in regard to logging operations indicates that the United States is failing to effectively enforce the MBTA throughout the United States." *Council limited the scope of the factual record to two specific cases identified as examples in the submission.*

4. Oldman River II: Submitters alleged as a matter of nationwide policy, Canada was failing to effectively enforce sections 35, 37, and 40 of the Fisheries Act and related provisions of the Canadian Environmental Assessment Act. The submitters asserted that Canada's use of informal letters of advice in reviewing projects and the decreasing and uneven distribution of prosecutions for Fisheries Act violations amounted to a systematic failure of the Canadian government to effectively enforce its environmental laws. The submitters cited the Sunpine Forest Products Access Road as an example of this widespread, systemic failure. *The Secretariat recommended the development of a broad factual record; the Council limited the scope of the factual record to Canada's enforcement of those provisions with respect to the Sunpine Forest Products Access Road.*

5. Ontario Logging: Submitters alleged widespread failure to enforce section 6(a) of the Migratory Birds Regulations against the logging industry in Ontario. The submission estimated the number of specific violations that had resulted or would result from Canada's non-enforcement of these regulations. *The Secretariat accepted these estimates and recommended that a factual record to develop more concrete information. The Council found that the submission did not contain "sufficient information" and delayed its decision until submitters provided additional information to support their allegations*. Council noted that the submission was "based in large part on an estimation derived from the application of a descriptive model, and does not provide facts related to cases of asserted failures to enforce environmental law." Submitters filed additional information and after receiving an additional response from Canada, *the Secretariat again recommended that a factual record be developed. Council limited the scope of the record to exclude five FMU's included in the original submission.*

6. Pulp and Paper: While noting that pollution from pulp mills has dropped since adoption of the PPER in 1992, the Submitters have documented over 2,400 documented violations of the PPER at mills in central and eastern Canada from 1995 to 2000 and claim very few were prosecuted. They claim that low numbers of prosecutions correlate with continuing high numbers of violations in Quebec and the Atlantic Provinces, and they cite ten mills of particular concern. The Secretariat determined that the submission warranted the development of a factual record. *Council*, reasoning that it would be inappropriate to direct the preparation of a factual record for matters that are subject to ongoing investigation, *limited the inquiry to activities undertaken at ten mills, mainly during the year 2000. Council noted in its resolution that ongoing investigations were underway for two mills that the Submitters had identified as mills of particular concern, and those mills were excluded from the factual record.*

Additional indications of Council's perspective:

In a letter dated, 13 January 13 2003 to the Director of the CEC Secretariat's Submissions on Enforcement Unit, the Council stated:

> "Although the U.S. agrees that explaining the scope of the factual record for purposes of providing context is appropriate, we do not believe it is appropriate for the Secretariat to include commentary regarding its view of the Council's decision. Rather, a factual record scope discussion should be limited to providing information relevant to the Council's actual instruction to the Secretariat, not on whether the Secretariat agrees with the Council's decision." (p. 8 Appendix to ELI Report, Letter from Paul S. Kibel to JPAC re: Comments to JPAC on CEC Council Actions Limiting Scope of Factual Records Prepared Pursuant to Articles 14 & 15 of NAAEC.)

In a letter dated, 3 June 2003 to the Executive Director of the CEC Secretariat, the Council further stated:

> "Section 4 [of the BC Logging factual record] includes a summary of the comments provided by the submitters, which were in reaction to Council's instruction to the

Secretariat. The NAAEC is very clear that the Council is the ultimate authority for determining the scope of a Factual Record, and the treaty does not, either explicitly or implicitly, contemplate providing submitters with an opportunity for a rebuttal on this issue. Therefore, Canada requests that this information be removed." (p. 10 Appendix to ELI Report, Letter from Paul S. Kibel to JPAC re: Comments to JPAC on CEC Council Actions Limiting Scope of Factual Records Prepared Pursuant to Articles 14 & 15 of NAAEC.)

B. Secretariat Perspective

In its notification to Council to recommend the development of a factual record in Migratory Birds, the Secretariat articulated its perspective as to the roles of the participants in the process and particularly the propriety of Council's action in limiting the scope of inquiry in factual records investigations. The Secretariat's view was that the NAAEC established parameters for the scope of the citizen submission process and they do not reflect an intention only to allow "particularized" assertions of a failure to effectively enforce and to exclude assertions that allege a widespread failure to enforce.

C. JPAC and Public Perception of the Evolution of the Process

In June 2000, Council issued Resolution 00-09 in which it committed to the importance of the citizen submission process and to JPAC's central role in reviewing ongoing issues related to the process.

In June 2001, JPAC issued its report on "Lessons Learned: Citizen Submissions under Articles 14 and 15 of the NAAEC". The report emphasized the importance of the citizen submission process, the need for transparent, expeditious, open and informed decision making and noted that "the professional independence and competence of the Secretariat is indispensable to a credible and properly functioning Articles 14 and 15 process. The Secretariat must also have (and be perceived to have) the independence to exercise its best professional judgment with respect to Submissions, the adequacy of Party responses, recommendations to Council, and development of factual records." (p. 8 to 10: Conclusions Section, Item 2 to 6)

After Council issued four resolutions limiting the scope of factual records in the cases summarized above, JPAC requested that Council authorize public review of the practice/matter of limiting the scope of factual records and has stated that review would be delayed until the four factual records (in which the scope had been narrowed) were completed. Council has recently begun a review of Resolution 00-09.

In its Advice to Council 02-03, JPAC recommended that Council reverse its decision; Council denied the request.

JPAC Actions:

- Notified Council of its intent to conduct a public review in accordance with Council's Resolution 00-09, in which Council committed to reviewing the operation of the resolution after two years,

- Commissioned the Environmental Law Institute (ELI) to develop a background report on particular aspects of the Articles 14 and 15 process (limiting scope of factual records, imposing a new "sufficiency of information" pleading requirement, and a review of Council Resolution 00-09).

- Called for written comments on 21 July 2003 and held a public meeting 2 October 2003. The comments received during these meetings as well as JPAC's analysis were used by ELI to produce a final report.

- Based on the report findings, issued Advice to Council 03-05 (21 December 2003) that Council's resolutions limiting the scope of factual records and ruling on the sufficiency of information provided in submissions, and Council's decision to delay public review of its decision to define the scope of factual records and subsequent delays in conducting a review of this resolution, appeared to jeopardize the commitment expressed in Council Resolution 00-09 to increase transparency and public participation in the citizen submission process, and violated the object and purpose or "spirit" of Council Resolution 00-09, a compromise designed to allow the process to move forward and re-establish public confidence.

The following comments from the 4 December 2003 public meeting reflect an increasing public concern over Council's emerging role in the fact-finding process:

- The public is losing confidence in the process; rather than helping citizens protect the environment, it is having the opposite effect. It is the role of the Secretariat to determine the scope of a submission. Secretariat needs more resources to accomplish this.
- "We need to better understand why governments are making these decisions to limit the scope of their factual records. Council is the steward of the NAAEC and should not behave as defendants in the fact-finding process."
- "It is morally dishonest to interfere in this way with the Secretariat."
- Re: Oldman River submission, it should be up to the Secretariat to determine the sufficiency of information; all evidence does not have to be submitted at the start of the process, this holds true even in a judicial process. JPAC should be clear and forceful; if this continues, the process will be nullified.
- In some instances, people have no access to information and it is unfair to ask them to provide additional information. The Secretariat is there to weigh all these factors and make a recommendation.
- One of the key provisions is Article 14(2)(b) which looks at whether a submission, alone or in combination with other submissions, raises matters whose further study would advance the goals of the NAAEC. The presumption is not that the submitter has the resources for further study. The onus is on the Secretariat.
- Council is having a hard time differentiating their role—when they are acting as a Council and when they are acting individually as Parties. JPAC should remind them they need to keep their roles separate.

Moreover, JPAC believes that robust public participation is essential to the success of the NAAEC, and the issue of the Council's unilateral decision to narrow the scope of factual records is a serious determination. It could have significant impact on the Council's understanding of, and ability to determine properly, whether an individual claim is evidence of a "widespread" failure of the Party concerned to effectively enforce its environmental laws. Further, the Council's decision to review all four (4) factual records before making its decision on the scope of the factual record impacts those four (4) factual records and has delayed discussion of this matter. By limiting the scope of the record, the Council has limited information on which to base its determination of weakened enforcement.

CONCLUSION

A fair reading of the NAAEC seems to establish that the Council does not have plenary authority to make the decisions required under the citizen submissions process. Rather, they have given the Secretariat certain responsibilities and a significant degree of independence in the implementation of the process. In addition, in light of the issue describes above JPAC concludes that there is an inherent appearance of a conflict of interest by having the Council determine whether one of its countries has violated its environmental laws.

EXAMPLES OF OTHERS INSTITUTIONAL MODELS AND SUGGESTIONS FOR POSSIBLE SOLUTIONS

1) The World Bank Inspection Panel process

The need for clear boundaries and clear delineation of the parties' roles was recognized in order to "restore legitimacy and confidence in their process and alleviate tension between Board, Panel, and citizens."

The Inspection Panel is a quasi-independent body created in 1994 by the Bank as mechanism for holding the Bank accountable for violations of its policies and procedures. The three-member **Panel** investigates **claims** brought by **affected citizens**, provided that the claim meets certain standards [1]and assuming the **Board of Executive Directors** agrees to an investigation. The Panel's focus in its investigation is on the Bank's role in a project and whether or not the Bank is in compliance with its policies and procedures.

Process:

Key problems with the process arose at the point where the Board of Executive Directors was required to grant or withhold approval for investigation. The lack of time limit allowed the Board to delay consideration of and decision on the Panel's recommendation. In addition, the process became highly politicized at this stage. The country where the project is located has objected to an investigation; the borrowing countries generally resist investigations by the Panel. Management has created "Action Plans" as an alternative to an investigation. These action plans have been

[1] Brought by 2 or more people with common interests or concerns living in a country or an area affected by a Bank-financed project; alleges that Bank has violated its policies and procedures and they have or are likely to suffer material adverse effects as a result of those policy violations; claimants have attempted to raise their concerns with Bank Management and are not satisfied with the response; and the project is under consideration or has been approved by the Bank, and the loan has not yet been substantially disbursed)

developed in a non-participatory manner and have had the tendency to exclude claimants from further role in the process. They avoid the scrutiny of the Panel into the alleged policy violations and the Bank's role in these violations. By accepting Management Action Plans in lieu of an investigation, the Board has in many cases relegated the Panel merely to a role as an advisor to the Board.

Second Review of the Inspection Panel (April 1999)
Board attempted to solve some of these political issues:

- Committed to authorize the Panel's recommendation for investigation without questioning the merits of the claim and without discussion, except with regard to certain eligibility criteria.
- Management is strictly forbidden from interfering with the Panel process by proposing Action Plans until after the Panel has finished investigation and issued its report.

2) Administrative Law Judge Model

Many US regulatory disputes are resolved through an Administrative Law Judges Panel, which, although it often "sits" within the Agency to which disputes are directed, is independent and not accountable to the Agency. These panels are fixed appointments that review Agency decisions either in lieu of judicial action or as a mandated precursor to such action. An ALJ panel could be created here to review decisions by the Council on procedural and substantive issues relating to the scope and sufficiency of the factual record. Legal opinion needs to be sought as to whether the CEC can create such a panel within current statutory requirements.

3) Ethical Rules

JPAC and Council could work together on developing Ethical Rules for avoiding potential conflicts of interest, or appearance of impropriety, in Council decision-making. These rules would require a commitment of impartiality in decision-making.

4) Advice to Council

JPAC can do a specific "Advice to Council" cautioning them against any appearance of impropriety and spelling out the situations in which this would arise.

5) Deferential standard for reviewing the Secretariat's factual record recommendations

Another option that has been raised is for the Council to establish for itself a more deferential standard for reviewing the Secretariat's factual record recommendations. According to Article 11(4) of the NAAEC, the Secretariat, unlike the Parties, has an "international character," which in terms of Articles 14 and 15 means a degree of independence and neutrality that the Parties do not have. Council could rely more on this independence and neutrality to avoid any appearance of conflict of interest by adopting a more deferential standard for reviewing factual record recommendations. Already, the United States government is subject to Executive Order 12915 (13 May 1994)[2] which provides in section 2(d)(1):

[2] Available at http://www.archives.gov/federal_register/executive_orders/pdf/12915.pdf

> "To the greatest extent practicable, pursuant to Articles 15(1) and 15(2), where the Secretariat of the Commission for Environmental Cooperation (''Secretariat'') informs the Council that a factual record is warranted, the United States shall support the preparation of such factual record."

Note also the following excerpt from the Canadian NAC on the NAAEC to the Canadian government in a letter dated, 13 March 2003

"The Article 14 and 15 process puts the members of the Council in a difficult position, as was noted by the independent committee that conducted the four year review of the NAAEC. They must vote on whether to support an investigation into the actions of their own country or a fellow Council member's country. This creates the potential for an apparent conflict of interest. It was the reason the Honourable Sergio Marchi, Canada's former Minister of the Environment, recommended at the 1996 Council meeting in a public statement that he wanted to make a practice of unanimously accepting recommendations by the Secretariat for factual records because to do so otherwise could create the appearance of a conflict of interest, or create animosity among parties. This stance paralleled a similar thrust in the United States of America as described in an Executive Order concerning voting on factual records."

This option was presented in public comments for JPAC's review on limiting the scope of factual records. For example, the Summary Record of JPAC's 2 October 2003 session notes the following public remarks:

"What is the standard of review that should apply to a recommendation by the Secretariat? One extreme is total deference—the Council always says yes. This has problems in the sense that it presumes the Secretariat can never make a mistake. It would be useful for the report to look at standards for deferential review..."

and

"Regarding standard of review, in Canada, the test is 'patently unreasonable.' That falls somewhere between total deference and no deference."[3]

[3] Available at http://www.naaec.gc.ca/eng/nac/adv032_e.htm