



COMMISSION FOR ENVIRONMENTAL COOPERATION
Joint Public Advisory Committee Session No. 03-01

27 March 2003
Mexico City, Mexico

Summary Record

The Joint Public Advisory Committee (JPAC) of the Commission for Environmental Cooperation (CEC) held a regular session on 27 March 2003, in Mexico City, Mexico, in conjunction with a public workshop on Chapter 11 of the North American Free Trade Agreement (NAFTA) and the second North American Symposium on Assessing the Environmental Effects of Trade.

This Summary Record reports on each agenda item, records all decisions made by the Committee and identifies action items and responsibilities. (See Annex A for the agenda, and Annex B for the list of participants, Annex C for Advice to Council 03-01 on Seeking Balance between the Interests of the Public and Investors in the Application of Chapter 11 of the North American Free Trade Agreement (NAFTA) and Annex D for Advice to Council 03-02 on the Second North American Symposium on Assessing the Environmental Effects of Trade).

Previous summary records, advice from JPAC to Council and other JPAC-related documents may be obtained from the JPAC Liaison Officer's office or through the CEC's web site at <http://www.cec.org>.

DISCLAIMER: Although this summary was prepared with care, readers should be advised that while JPAC members have approved it, it has not been reviewed nor approved by the intervenors and therefore may not accurately reflect their statements.

Welcome and Overview by the Chair

The JPAC chair welcomed everyone to Mexico City. He first introduced the new JPAC members from the USA and noted that the new member from Canada was not able to attend. He asked all the new members to say a few words about themselves.

He reported on JPAC's meeting with the North American Agreement for Environmental Cooperation (NAAEC) Article 10(6) officials, held in the morning, where he provided an overview of the results of the public workshop on Chapter 11 of NAFTA, discussed an agenda for a potential trade and environment ministerial meeting and encouraged the Parties to add Chapter 11 of NAFTA to the agenda.

He then reported on the very successful JPAC public workshop on Chapter 11 of NAFTA, held on 24 March 2003, noting that a draft Advice to Council would be discussed later in this meeting. He also noted that he had presented the results of this workshop at the opening of the second North American Symposium on Assessing the Environmental Effects of Trade.

Finally he outlined what he planned to discuss with the Alternate Representatives during an in-camera session later that day: Advice to Council 03-01 and 03-02, the Ten-year Review of the NAAEC, plans for the 2003 Regular Session of Council, and the proposed strategic framework for the CEC.

Approval of the Provisional Agenda

Two items were added to the agenda: A discussion on the forthcoming Articles 14 and 15 review of the matter of limiting the scope of factual records and contributing to building an agenda for the trade and environmental ministerial meeting.

Report from the CEC Secretariat including the status of Articles 14 and 15 and question period

The director of programs, on behalf of the acting executive director, provided a brief overview of his written report. First he reiterated the Secretariat's commitment to working with JPAC. He also encouraged the JPAC members and the public to read the full written report that had been made available.

Environment Economy and Trade: He noted the success of the second symposium on assessing the environmental effects of trade and the wealth of information that the discussions provided. He highlighted the very useful discussions on environmentally friendly goods and services.

Conservation of Biodiversity: The country chairs have agreed upon the Biodiversity Strategy and Council will produce a final draft for consideration in June.

Pollutants and Health: Phase II of the Mercury North American Regional Action Plan (NARAP) is being implemented and considerable progress has been made in the implementation of the PCBs NARAP. The Task Force will have its final meeting in April. The 2000 *Taking Stock* report will be released on 17 April 2003. Regarding Children's Environmental Health, the Phase I report on indicators is nearing completion and the Expert Advisory Board held a recent meeting in which they focused on potential actions to promote training and education for health care professionals.

Law and Policy: A draft Secretariat report on tracking of hazardous waste will be finalized this spring and a final report will be presented at the June Council session. The Enforcement Working Group is making links with other programs and a new strategic plan is under development. This will be the focus of a public workshop during the June Council meeting.

Ten-year Review of NAAEC: The terms of reference for the independent Ten-year Review and Assessment Committee (TRAC) is awaiting approval and each country is currently selecting its representatives.

State of the Environment Report (SOE): The Secretariat is proposing the development of an SOE report that is more focused and highlights regional indicators that strongly reflect the efforts of the CEC's program areas major goals and results. This new approach will be shared with JPAC over the next few months.

The director of the Submissions on Enforcement Matters Unit then presented a status report on issues related to submissions under Articles 14 and 15 the details of which are available in the written report from the acting executive director. He noted that the Secretariat was expecting votes on two submissions today—Ontario Logging SEM-02-001 and Tarahumara SEM-00-006.

The JPAC chair then opened the floor for questions or comments.

A JPAC member enquired about the status of the Secretariat's communications plan, given the stated need to improve outreach and engage a broader North American constituency.

Another JPAC member reiterated the importance of expediting decisions on Article 14 and 15 submissions, using the matter of the 60-day time period to vote on whether or not a factual record should be published.

The director of programs replied there are two aspects regarding the communications plan. First is the need to do a better job of communicating accomplishments within the CEC Program Plan. Second, a draft strategy is currently in its final stages and will be shared with JPAC, including the private sector, which has been identified as an important challenge.

Report from the National and Governmental Advisory Committee Representatives

The chair then invited the National and Governmental Advisory Committees (NACs) to make brief presentations.

The representative of the US NAC welcomed the new members from the United States. She reviewed the results of their work over the past several months and their plans to meet in early May to prepare for the Council session. She encouraged the new US members to contact her if they had specific questions. Their recent advice was on the need to strengthen the trade and environment program and to fully engage the NAAEC Article 10(6) process and develop an agenda for the trade and environment ministerial meeting. She went on to discuss the great importance the US NAC attaches to the NAFTA Chapter 11 discussions, including accepting *amicus* briefs, public access to tribunal hearings, access to documentation and the early dismissal of claims without merit. Finally, she thanked JPAC for continuing to fight on behalf of the Article 14 and 15 submissions process.

The representative of the Canadian NAC thanked JPAC for continuing its efforts to engage and inform the public on important issues. He provided an overview of how the Canadian NAC

operates. Their recent advice has concerned the Ten-year Review, the program plan, and matters related to Articles 14 and 15, urging that the perception of bias can be avoided by always approving the development of factual records. He went on to explain why the Ontario Logging submission goes to the heart of the CEC's mandate. The NAC has been meeting with Canadian government officials to discuss whether or not Articles 14 and 15 allow the Secretariat to look at systematic patterns of enforcement versus specific cases. The NAC feels that this should be the case. Its members are also discussing what constitutes sufficient evidence to support the development of a factual record, depending on the nature and circumstances of the complaint.

A JPAC member asked if either NAC had been pursuing the issue of an agreement on transboundary environmental impact assessment. Both NAC representatives replied that it is important and would be a good tool and urged JPAC to keep up the pressure.

The meeting was informed that the Mexican NAC would be established in April.

Discussion on a Potential Advice to Council on Chapter 11 of NAFTA

A member of the JPAC working group reviewed the draft advice. A very active discussion took place. The text was displayed on a large screen in the room, allowing the public to follow the discussion. Changes were brought to the text and it was approved. (See Annex C for Advice to Council 03-01.)

Action: Council

Follow up and Discussion on a Potential Advice to Council on the Second North American Symposium on Assessing the Environmental Effects of Trade

A member of the JPAC working group reviewed the draft advice. A very active discussion also took place on this draft advice. The text was displayed on a large screen in the room, allowing the public to follow the discussion. Changes were brought to the text and it was approved. (See Annex D for Advice to Council 03-02.)

Action: Council

JPAC follow-up

a) NAAEC Articles 14 and 15: Review of Council Resolution 00-09

A member of the JPAC working group on this matter suggested that they hold a conference call in the near future to begin developing recommendations for a JPAC review of the issue of limiting the scope of factual records.

Action: JPAC Working Group

b) The Ten-year Review of the NAAEC

The JPAC chair informed the meeting that the Ten-year Review and Assessment Committee (TRAC) was not yet formed. Timing was becoming an issue if Council wished to receive the TRAC report before its Regular Session in June 2004.

c) JPAC Advice 02-08, 02-11, 02-12, 02-13: Review Council's response

The JPAC chair reviewed Council's response to each of these various advice to Council.

Advice 02-08: Capacity Building and Education Opportunities within SMOC—Council provided a substantive reply. Several of the recommendations were taken up. For example, regarding the involvement of indigenous peoples, the Secretariat has hired a consultant to review how they can be better involved in all CEC programs.

Advice 02-11: CEC Proposed Program Plan and Budget 2003–2005—Council provided a substantive reply and many of the recommendations were incorporated.

Advice 02-12: Re-energizing the Transboundary Environmental Impact Assessment Negotiations (TEIA)—Council responded that in its view, the delicate trilateral negotiations would not be well served by the formation of a new negotiating group.

Advice 02-13: Continuing Innovations on Work in Financing for Sustainable Development—most of the recommendations were broadly addressed in the CEC Program Plan except the issue regarding environmental externalities where Council suggested it was too complex to address directly in this program area, given the limited budgets.

A JPAC member noted that JPAC should consider what to do next regarding TEIA. There is an obligation in NAAEC to conclude such an agreement by 1997. Despite what governments are saying about complex negotiations, she expressed doubt that the original drafters of the NAAEC were unaware of the complexities of the legal systems in the three countries when this provisions was developed. It was agreed to bring it up with Ministers at the June Council Session.

Action: JPAC Chair

d) Joint Public Workshop of the CEC Enforcement Working Group and JPAC on Enforcement Cooperation Issues and the June 2003 Regular Session of Council

The JPAC chair reported on an informal in-camera session held the previous day, noting that an agenda is being developed for the joint JPAC/EWG public workshop on 23 June and that the EWG was very supportive of the document JPAC had prepared on a strategic vision for the Environmental Enforcement and Compliance Cooperation Program.

Action: JPAC, EWG

e) Nominate three JPAC members to the Selection Committee of the North American Fund for Environmental Cooperation

Three members were appointed for a term to last two granting cycles: Merrell Ann Phare, Laura Silvan and Arturo Duran.

f) The CEC Executive Director

The JPAC chair reported that a decision has not yet been made.

JPAC administrative matters

a) JPAC working groups: Member appointments and rotation

The following decisions were taken:

- Ten-year Review of the NAAEC Working Group: Gustavo Alanís-Ortega, Jane Gardner and Donna Tingley
- Agenda items for the 2003 Regular Session of Council Working Group: Mindahi Bastida, Ann Bourget and Patricia Clarey (with assistance from Gustavo Alanís-Ortega, Lorraine Brooke and Manon Pepin)
- Invasive Species Working Group: Nelly Correa, Dan Christmas and Patricia McDonald
- US member to the Article 13 Working Group: Dinkerrai Desai
- US members to the Articles 14 and 15 Working Group: Arturo Duran and Jane Gardner
- It was also decided that the NAAEC Article 10(6) Working Group will have to develop recommendations to Council for the agenda items related to a potential Environmental and Trade Ministerial Meeting

During a briefing held on 23 March, it was also decided to appoint the following members to various working groups:

- US member to the NAFTA Chapter 11 Working Group: Patricia Clarey
- Trade and Environment Symposium: Cam Avery, Nelly Correa, Dinkerrai Desai and Carlos Sandoval
- US member on the Environmental Enforcement and Compliance Cooperation Working Group: Arturo Duran
- US member on the NAAEC Article 10(6) Working Group: Jane Gardner (substitute: Dinkerrai Desai)

b) Next meetings

- Session 03-02 23–25 June in Washington, DC, in conjunction with the Regular Session of Council
- Session 03-03 Dates to be confirmed by the JPAC Liaison Officer in Halifax, Nova Scotia, in conjunction with a public workshop on invasive species and a plenary session on the CEC proposed program plan and budget for 2004–2006.
- Session 03-04 December 2003 or January 2004, Mexico, in conjunction with the CEC Symposium on Maize and Biodiversity—the Effects of Transgenic Maize in Mexico

Observers' Comments

The JPAC chair opened the floor for comments from the observers.

- A member of the public commented that she was concerned about the division of opinion among JPAC members during the discussion on the draft Advice on Chapter 11, regarding access to the panels by those affected.
- Another member noted that if panels were too open issues would never be settled.

The chair thanked the public, JPAC members, the staff and voiced special appreciation for the work of the interpreters, then adjourned the session.

Prepared by Lorraine Brooke

APPROVED BY JPAC MEMBERS ON 30 APRIL 2003



Commission for Environmental Cooperation of North America

Joint Public Advisory Committee Regular Session 03-01

27 March 2003

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PROVISIONAL AGENDA

- | | |
|-------------|---|
| 8:00–9:00 | Registration of participants |
| 9:00–9:15 | Welcome and overview by the JPAC chair, Gustavo Alanís-Ortega* |
| | a) Approval of the provisional agenda |
| 9:15–9:45 | Report from the CEC Secretariat including the status of Articles 14 and 15 and question period |
| 9:45–10:00 | Report from the National and Governmental Advisory Committee representatives* |
| 10:00–10:45 | JPAC discussion on a potential Advice to Council on Chapter 11 of NAFTA* |
| 10:45–11:45 | JPAC discussion on a potential Advice to Council on the Second North American Symposium on Assessing the Environmental Effects of Trade* |
| 11:45–12:30 | JPAC follow-up* |
| | a) NAAEC Articles 14 and 15: Review of Council Resolution 00-09 |
| | b) The Ten-Year Review of the NAAEC |
| | c) JPAC Advice 02-08, 02-11, 02-12, 02-13: Review Council's response |
| | d) Joint Public Workshop of the CEC Enforcement Working Group and JPAC on Enforcement Cooperation Issues and the June 2003 Regular Session of Council |
| | e) Nominate three JPAC members to Selection Committee of the North American Fund for Environmental Cooperation (NAFEC) of the CEC |
| | f) The CEC Executive Director |
| 12:30–12:45 | JPAC administrative matters* |
| | a) JPAC working groups: Member appointments and rotation |
| | b) Next meetings |
| 12:45–13:00 | Observers' comments |
| 13:00 | End of the session |

* Session open to the public as observers.



Joint Public Advisory Committee Public Workshop on Chapter 11 of the NAFTA
Taller Público del Comité Consultivo Público Conjunto sobre el Capítulo 11 del TLCAN
Atelier public du Comité consultatif public mixte portant sur le chapitre 11 de l'ALÉNA
24 March 2003 / 24 de marzo de 2003 / 24 mars 2003

Second North American Symposium on Assessing the Environmental Effects of Trade
Segundo Simposio de América del Norte sobre Evaluación de los Efectos Ambientales del Comercio
Deuxième Symposium nord-américain sur les liens entre l'environnement et le commerce
25–26 March 2003 / 25–26 de marzo de 2003 / 25–26 mars 2003

Joint Public Advisory Committee Regular Session 03-01
Sesión regular del Comité Consultivo Público Conjunto 03-01
Session ordinaire 03-01 du Comité consultatif public mixte 03-01
27 March 2003 / 27 de marzo de 2003 / 27 mars 2003

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DISTRIBUTION: General
J/03-01/ADV 03-01/Final
ORIGINAL: English

ADVICE TO COUNCIL NO: 03-01

Re: Seeking Balance between the Interests of the Public and Investors in the Application of Chapter 11 of the North American Free Trade Agreement (NAFTA)

The Joint Public Advisory Committee (JPAC) of the Commission for Environmental Cooperation (CEC) of North America:

IN ACCORDANCE with Article 16(4) of the North American Agreement on Environmental Cooperation (NAAEC), which states that JPAC "may provide advice to Council (composed of the environment ministers of the three NAFTA countries) on any matter within the scope of this agreement [...] and on the implementation and further elaboration of this agreement, and may perform such other functions as the Council may direct";

RECALLING Council's undertaking during the June 2002 Regular Session in Ottawa, Canada, to engage civil society in understanding the complex links between trade and environment;

FURTHER RECALLING Council's undertaking to work with its trade counterparts to arrange a forum where interested parties can express their views on the operation and implementation of Chapter 11 and to facilitate public input on the work underway by the Chapter 11 Experts' Group of the NAFTA Free Trade Commission;

MINDFUL of JPAC's Advice to Council 02-04 and 02-09, providing Council with a series of recommendations as concrete steps Council might take in fulfilling its obligations under NAAEC Article 10(6) to "cooperate with the NAFTA Free Trade Commission to achieve the environmental goals and objectives of NAFTA";

ACKNOWLEDGING that transparency has been improved by Council's decision to make summaries of the Article 10(6) Environment and Trade Officials Group meetings public and to organize a joint meeting with JPAC each time that the 10(6) Group convenes;

CONSIDERING the need for greater openness in the investor dispute regime of Chapter 11 of NAFTA;

NOTING that NAFTA countries are involved in negotiating trade agreements such as US-Chile Free Trade Agreement and the Free Trade Area of the Americas (FTAA);

FURTHER NOTING that the CEC is currently engaged in a ten-year review and assessment of the NAAEC;

HAVING organized and participated in a second public workshop on Chapter 11 of NAFTA in Mexico City, on 24 March 2003;

UNDERSTANDING the challenges inherent in balancing public policy objectives with the pursuit of sustainable development in the trade context;

OBLIGED to register disappointment that representatives from the three governments were not in attendance to share their government's perspectives on Chapter 11 matters;

BASED on the high-level of exchange with the public during this workshop;

JPAC RECOMMENDS THAT COUNCIL:

1. Consistent with the CEC's mandate to increase awareness and understanding of the environment, trade, social and cultural nexus and contribute clarity to this complex topic by informing public dialogue, instruct the Secretariat to commission a series of balanced and objective research reports on Chapter 11 and its ramifications, including consideration of such topics as:
 - The potential existence of a 'chilling effect' on national laws and policies, particularly those related to human health and the environment;
 - The impacts of concentrating investment in specific geographic areas (i.e., border regions and pollution havens);
 - Lessons learned over the past ten years and how the NAFTA Chapter 11 experience might contribute to existing and future trade agreements (bilateral trade agreements, the FTAA and others);
 - The need for environmental impact and risk assessment prior to the negotiation of new trade agreements;
 - Analysis of institutional and other capacity building needs to permit all three countries to properly and equitably implement the Chapter 11 provisions;
 - How broader cultural and social issues, including understanding and respect for cultural diversity, can be integrated into the Chapter 11 process;
 - Evaluating the pros and cons of pursuing the development of interpretative statements; and
 - Assessing the opportunities that past and upcoming bilateral trade agreements might offer to advance improved versions of Chapter 11 and how they might in turn affect the way NAFTA operates.
2. Public policy concerns remain in the implementation of the Chapter 11 investor-dispute regime and Council is urged to address these concerns by pursuing improvements to NAFTA and Chapter 11 to ensure transparency, accountability and legitimacy by:
 - Engaging in and providing resources for public outreach;
 - Supporting the establishment of a structured public process, including such elements as the ability to attend tribunal hearings, enshrining the principle of *amicus* briefs, and access to information, as appropriate to and necessary for informed participation in the process;

- Encouraging that environmental, social and cultural expertise be brought into the arbitration panels; and
 - Ensuring that information concerning Chapter 11 issues be a feature in the CEC's Communication Plan.
3. Continue to work through NAAEC Article 10(6), under which there is a specific mandate to cooperate with the NAFTA Free Trade Commission (FTC) to achieve the environmental goals and objectives of NAFTA, and demonstrate governments' commitment to the sustainable development objectives of NAFTA by:
- Continuing to pursue a joint meeting between the CEC and the FTC and ensure that Chapter 11 is part of the agenda;
 - Continuing to consult with trade counterparts about facilitating public input into the NAFTA Chapter 11 Experts Group; and
 - Continuing to pursue a meeting of trade and environment ministers where space for public involvement is created and ensure that Chapter 11 is part of the agenda.

APPROVED BY JPAC
27 March 2003



DISTRIBUTION: General
J/03-01/ADV 03-02/Final
ORIGINAL: English

ADVICE TO COUNCIL NO: 03-02

Re: Second North American Symposium on Assessing the Environmental Effects of Trade

The Joint Public Advisory Committee (JPAC) of the Commission for Environmental Cooperation (CEC) of North America:

IN ACCORDANCE with Article 16(4) of the North American Agreement on Environmental Cooperation (NAAEC), which states that JPAC "may provide advice to Council (composed of the environment ministers of the three NAFTA countries) on any matter within the scope of this agreement [...] and on the implementation and further elaboration of this agreement, and may perform such other functions as the Council may direct";

HAVING participated in the second North American Symposium on Assessing the Environmental Effects of Trade organized by the CEC, in collaboration with the United Nations Environment Programme (UNEP), held on 25–26 March 2003, in Mexico City;

CONGRATULATING the CEC Secretariat for the high quality of work being conducted and plans for future initiatives;

JPAC RECOMMENDS THAT COUNCIL:

- Encourage governments to develop a baseline set of economic and environmental conditions at the outset of NAFTA in order to permit an assessment of environmental and economic impacts over the past 10 years.
- Instruct the Secretariat to identify market mechanisms that support the development of new technologies and facilitate the transfer of technology for the efficient and environmentally sound use of energy and natural resources.
- Build on the momentum from the CEC's work on trade and the environment, that Council work with their trade counterparts through NAAEC Article 10(6) to build an environmentally friendly trade regime in the Free Trade of the Americas Agreement negotiations and promote its benefits.

Understanding the need expressed by experts and the public participating in the symposium to begin integrating existing information into policy development, JPAC further recommends that:

- Council instruct the Secretariat to develop assessments of the positive and negative impacts of subsidy systems on the environment and the natural capital of North America.

Another important result of the symposium was a better understanding of the how trade agreements and trade decisions can impact indigenous peoples, their collective rights and their lands and how ill-suited trade fora are for examining and dealing with these issues. JPAC commends the Secretariat for organizing a special session during the symposium on trade and indigenous peoples and further recommends that:

- The CEC continue efforts to better understand and integrate indigenous issues in its work on trade and the environment and continue to seek the views of indigenous peoples themselves on how best to do this.

Finally, it is also important to note that discussions during the symposium again underscored the importance of concluding an agreement on transboundary environmental impact assessment to ensure that the broad range of societal interests are part of trade and development decision-making. If the common societal goals identified in the NAAEC are assumed, then mechanisms are required to promote those goals.

JPAC will continue to follow closely the evolution of this important area of work in the 2004 CEC Program Plan.

APPROVED BY JPAC
27 March 2003