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**LOYOLA UNIVERSITY CHICAGO INTERNATIONAL LAW REVIEW**  
**2013-2014**

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Published semi-annually by Loyola University Chicago School of Law  
Loyola University Chicago School of Law  
Twenty-Five East Pearson Street  
Chicago, IL 60611

Cite as 11 LOY. U. CHI. INT'L L. REV. \_\_ (2013)



**LOYOLA UNIVERSITY CHICAGO INTERNATIONAL LAW REVIEW**

Loyola University Chicago School of Law  
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## INTERNATIONAL FOCUS AT LOYOLA UNIVERSITY CHICAGO SCHOOL OF LAW

### **Curriculum**

Loyola University Chicago School of Law provides an environment where a global perspective is respected and encouraged. International and Comparative Law are not studied only in theoretical, abstract terms but primarily in the context of values-based professional practice. In addition to purely international classes, courses in other disciplines – health law, child and family law, advocacy, business and tax, antitrust, intellectual property – have strong international and comparative components.

### **International Centers**

The United Nations has designated Loyola Chicago School of Law as the home of its Children's International Human Rights Initiative. The Children's International Human Rights Initiative promotes the physical, emotional, educational, spiritual, and legal rights of children around the world through a program of interdisciplinary research, teaching, outreach and service. It is part of Loyola's Civitas ChildLaw Center, a program committed to preparing lawyers and other leaders to be effective advocates for children, their families, and their communities.

### **Study Abroad**

Loyola's international curriculum is expanded by its foreign programs and field study opportunities:

#### *International Programs*

- A four-week summer program at Loyola's permanent campus in Rome, Italy, the John Felice Rome Center, focusing on international and comparative law
- A three-week summer program at Loyola's campus at the Beijing Center in Beijing, China focusing on international and comparative law

#### *International Field Study*

- A ten-day, between-semester course in London on comparative advocacy, where students observe trials at Old Bailey, then meet with judges and barristers to discuss the substantive and procedural aspects of the British trial system. Students also visit the Inns of the Court and the Law Society, as well as have the opportunity to visit the offices of barristers and solicitors.
- A comparative law seminar on *Legal Systems of the Americas*, which offers students the opportunity to travel to Chile over spring break for on-site study and research. In Santiago, participants meet with faculty and students at the Law Faculty of Universidad Alberto Hurtado.
- A one-week site visit experience in San Juan, Puerto Rico, students have the opportunity to research the island-wide health program for indigents as well as focus on Puerto Rico's managed care and regulation.
- A comparative law seminar focused on African legal systems. The seminar uses a collaborative immersion approach to learning about a particular country and its legal system, with particular emphasis on legal issues affecting children and families. The most recent trip was to Tanzania.





## **Wing-Tat Lee Lecture Series**

Mr. Wing-Tat Lee, a businessman from Hong Kong, established a lecture series with a grant to the School of Law. The lectures focus on an aspect of international or comparative law.

The Wing-Tat Lee Chair in International Law is held by Professor James Gathii. Professor Gathii received his law degree in Kenya, where he was admitted as an Advocate of the High Court, and he earned an S.J.D. at Harvard. He is a prolific author, having published over 60 articles and book chapters. He is also active in many international organizations, including organizations dealing with human rights in Africa. He teaches International Trade Law and an International Law Colloquium.

## **International Moot Court Competition**

Students hone their international skills in two moot competitions: the Phillip Jessup Competition, which involves a moot court argument on a problem of public international law, and the Willem C. Vis International Commercial Arbitration Moot, involving a problem under the United Nations Convention on Contracts for the International Sale of Goods. There are two Vis teams that participate each spring in an oral argument involving an international moot arbitration problem. One team participates in Vienna, Austria against approximately 255 law school teams from all over the world, and the other team participates in Hong Kong SAR, China, against approximately 80 law school teams.

## **Acknowledgments**

We would like to recognize friends and alumni of the law school who have contributed within the past year to our international law program at Loyola University Chicago by their support of the Willem C. Vis International Commercial Arbitration Moot Program:

Peter B. Carey	Ellen M. Carey
John H. Calhoun	Lisa Ellison
Chartered Institute Arbitrators	Edward Fluet
Chicago International Dispute Resolu-	James & Janet M. Gillespie
tion Association	Joshua N. Heffernan
The PepsiCo Foundation	Chantal Kazay
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## Symposium - Keynote Address

### TOWARDS AN AFRICAN HUMAN RIGHTS PERSPECTIVE ON THE EXTRACTIVE INDUSTRY

Pacifique Manirakiza<sup>†</sup>

#### I. Introduction

I wish to express my sincere appreciation to the organizers for the invitation extended to me to take part in this important symposium. My presence here provides me with an opportunity to promote the African Commission on Human and Peoples' Rights (ACHPR), especially the mandate of the African Commission Working Group on Extractive Industries, Human Rights and Environment (WGEI) to which a prominent faculty member of this Law School, Professor James Gathii, is an Expert member. In this forum I intend to engage with all of you in highlighting the problems and challenges the extractive industry on the continent poses for the promotion and protection of the rights of the more than 830 million Africans on the continent.

Let me begin by some preliminary remarks:

1. Although I am a member of the African Commission, I am here in my personal capacity and my presentation expresses my personal views, which do not necessarily represent the opinion of the Commission or the Working Group on Extractive Industries, Human Rights and Environment.
2. I'm not an expert in natural resources law like other speakers although this area begins to attract my interest, especially given my new responsibilities as a Chairperson of the WGEI.

In my talk, I will highlight the reasons why I think Africa needs a human rights based framework for a humane extraction of natural resources. Within this framework, I argue that local communities' interests and rights should be at the forefront. That is why I explore the legal foundations of community rights in the extractive industry after highlighting the challenges and obstacles of implementing a human rights based perspective in the extractive industry in Africa.

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<sup>†</sup> Pacifique Manirakiza is an associate professor at the University of Ottawa Faculty Of Law, Common Law Section. He teaches Canadian criminal law and international criminal law. He has also been a member of and a faculty advisor for the editorial board of the Ottawa Law Review. Prior to the University of Ottawa, he held positions at the University of Burundi and at Hope University in Kenya. Dr. Manirakiza also participated as a legal adviser in Burundi's peace negotiations held in Arusha (Tanzania). He is currently serving a four year term as a member of the African Commission on Human and People's Rights. In that capacity, he is the chairperson of the newly established Working Group on Extractive Industries, Environment and Human Rights Violations.

## II. The need for an African human rights perspective in the extractive industry

The continent of Africa is very rich in mineral and natural resources. Several African countries are blessed with some of the world's largest deposits of minerals and oil. To name a few, Angola's natural resources include diamonds, iron ore and oil; Botswana is rich in mineral deposits including diamonds, coal, copper, nickel, gold, soda ash and salt; Nigeria is Africa's largest oil producer and the world's tenth largest; South Africa is the world's largest producer of gold, platinum group metals and chromium, and is the fourth-largest producer of diamonds. The Democratic Republic of Congo (DRC) contains Africa's largest deposits of copper, cobalt and coltan, as well as significant reserves of diamonds, gold and other minerals and forest resources. This country has often been referred to as a geological scandal.

With this abundance of natural resources, the logical presumption would be that the extraction of these vast deposits of mineral and other natural resources would yield a great deal of capital, which would in turn contribute to the development of various countries. However, this is often not the case. According to the Extractive Industries Transparency Initiative (EITI), "3.5 billion people live in resource-rich countries. Still, many are not seeing results from extraction of their natural resources. And too often poor governance leaves citizens suffering from conflict and corruption".<sup>1</sup> Although this is a global reality, the situation is no better on the African continent, as was noted by one of the proud sons of the continent, Mr. Kofi Annan, in an article published in the *New York Times* highlighting Africa's 'resource curse': "Used wisely, [these] natural resource revenues could lead to sustainable economic growth, new jobs and investments in health, education and infrastructure. But sadly, history teaches us that a more destructive path is likely — conflict, spiraling inequality, corruption and environmental disasters are far more common consequences of resource bonanzas. The cliché remains true: striking oil is as much a curse as a blessing."<sup>2</sup>

The situation is commonly referred to as the "resource curse" or the "paradox of plenty," given that all too often the extraction of these mineral resources has fuelled or aggravated armed conflicts and massive human rights violations. This has been the case in the Democratic Republic of Congo with the illegal exploitation of natural resources by armed groups and, to some extent, foreign States<sup>3</sup> such as in Angola and Sierra Leone where illicit diamond smuggling fuelled conflicts, and in Côte d'Ivoire where armed groups used diamonds, cocoa, and cotton to fund their war efforts and for personal gain.

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<sup>1</sup> EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, <http://www.eiti.org/eiti> (last visited Oct. 12, 2012).

<sup>2</sup> Kofi Anan, *Momentum Rises to Lift Africa's Resource Curse*, N.Y. TIMES, Sept. 14, 2012, [http://www.nytimes.com/2012/09/14/opinion/kofi-annan-momentum-rises-to-lift-africas-resource-curse.html?\\_r=4&](http://www.nytimes.com/2012/09/14/opinion/kofi-annan-momentum-rises-to-lift-africas-resource-curse.html?_r=4&).

<sup>3</sup> Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, UN Doc. S/2003/1027.

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The pervasiveness of human rights violations committed by those involved in the extractive industries sector, including non-state actors, have negatively impacted countries at large, but more specifically the communities who live in resource-rich areas, as they experience forced evictions and relocations, land-grabbing, loss of livelihood, destruction of the environment, health hazards, and contamination of soil and water sources, to name a few. Those negative effects of extractive industry on local communities call upon the African Human Rights Monitoring body to play a corrective role. It is in this context that the WGEI has been created in order to guide the Commission on the proper course of action to alleviate the sufferings of the victims of the extractive industries. In my view, enabling and empowering local communities to assert and protect their rights and interests is undoubtedly one of the means to explore, despite systemic obstacles and challenges ahead.

### **III. Empowering local communities affected by extractive activities: obstacles and challenges**

Local communities affected by extractive activities and projects are currently in an underprivileged situation compared to the dominant and powerful position of extractive companies. Usually, the latter deals with central governments in order to be granted prospection and extractive rights without any significance to local communities. The latter face many legal challenges and obstacles, which hamper any efforts toward conceptualization of the rights of local communities affected or is likely to be affected by extractive and other development projects.

#### **A. Lack of international recognition of rights of local communities**

In international human rights law, rights of communities and/or their members are protected. In particular, those of indigenous and tribal communities and populations and minorities are relatively defined, either in human rights instruments<sup>4</sup> or in case law<sup>5</sup> This recognition is, in grand part, the result of numerous years of efforts by civil society organizations advocating for the rights of indigenous and minority peoples. Advocacy initiatives in this regard lead to the conceptualization of their rights and, subsequently, the adoption of a legal framework of rights protection.<sup>6</sup> For instance, the rights protection regime for indigenous populations and communities is founded on their particular needs, their lifestyles, and the systemic injustices they were subjected to in the past.<sup>7</sup>

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<sup>4</sup> Int'l Labor Org., *Indigenous and Tribal Peoples Convention*, No. 169, (1989)[hereinafter ILO Convention No. 169]; Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UN Doc. A/RES/47/135 (Dec. 18, 1992).

<sup>5</sup> Case of the Saramaka People v. Suriname, Judgment, Inter-Am. Ct. H. R. (Nov. 28, 2007); Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of the Endorois Welfare Council) v. Kenya, Afr. Comm'n H. and Peoples R., Communication 276/03 (Nov. 25, 2009).

<sup>6</sup> ILO Convention No. 169, *supra*, note 4.

<sup>7</sup> Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of the Endorois Welfare Council) v. Kenya, Afr. Comm'n H. and Peoples R., Communication 276/03, at para. 149 (Nov. 25, 2009).

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In the extractive industry, it is easier for indigenous peoples to use this framework and claim rights protection for themselves. One particular legal tool available to them is the free, prior and informed consent (FPIC) which entitles them to be substantially consulted on any development projects or extractive activities which may affect them. They are then given an opportunity to express their views on the prospective projects before they are actually implemented. Up to now, it is not yet clear whether or not international human rights law extends this legal tool to other non-indigenous peoples. Therefore, local communities potentially or actually affected by extractive industries are legally disempowered and lack an adequate legal protection in international law.

### B. Lack of entitlement to mineral and other natural resources and that are deemed to be state owned to the ignorance of their rights

The lack of proper legal protection of the rights of local communities as such is further complicated by the fact that they also, to some extent, lack entitlement to land and its natural resources. In postcolonial African states, some constitutions and laws provide that land belongs either to the government, the President, or the State. In Zambia, “all land in Zambia shall vest absolutely in the President and shall be held by him in perpetuity for and on behalf of the people of Zambia.”<sup>8</sup> Other legal systems recognize a clear separation of the rights of natural resources from the rights of ownership in the land. While the land belongs to persons, either natural or legal, with a title, natural resources usually belong to the State. In South Africa for instance, section 3(1) of the *Mineral and Petroleum Resources Development Act No 28 of 2002* states that ‘Mineral and petroleum resources are the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South Africans.’ In Burundi, mineral and fossil resources belong exclusively to the State.<sup>9</sup>

This post-colonial regime is in sharp contrast with pre-colonial customary land tenure systems by which the owner of land was the owner not only of the surface but of everything legally adherent thereto, and also of everything contained in the soil below the surface. This legal status of mineral resources belonging to the State disempowers local communities in the sense that the State is the only entity entitled to take critical decisions about when and how to extract and use the revenues of natural resources exploitation.

### C. Lack of homogeneity of local communities

The other challenge for conceptualizing the rights of local communities affected by extractive-related activities is their lack of homogeneity in the sense that members do not necessarily share the same ethnicity or a minority status. Also, in many cases they have not been historically marginalized or compelled to distinct treatment or injustices as such. Their victimization is purely due to the simple and fortuitous discovery of natural resources on or beneath their lands.

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<sup>8</sup> Lands (Amendment) Act of 1996, Cap. 184, LAWS OF REP. OF ZAMBIA (1996), at art. 3.

<sup>9</sup> Code minier du Burundi, 2012, at art. 7, 9.

This situation can prejudice their development in the socio-economic, political, and cultural spheres compared to the general population. Of course, under general international human rights law, each affected member of the community is protected as such and he can claim respect of his right to property, his right to a remedy, and his right to housing. However, the nature of the extractive industry has far-reaching effects that go beyond individual concerns and interests. Collective interests such as environment, development, peace, and security come into play. The real challenge here within the extractive sector is how to protect individuals as a group of victims with collective rights, including land rights.

#### **IV. Asserting the rights of local communities in the extractive industry**

Contrary to indigenous peoples, where there is a clear recognition in international law of their collective rights and their capacity to mobilize and defend them, other local communities who can face the same fate of evictions, family disruption, and other human and peoples' rights violations are not sufficiently protected. Of course each State is duty-bound to ensure respect and protection of the human rights of its citizens. But the context of the extractive industry poses its own challenges for African states to implement their legal obligations arising from international human rights law. More often, governments are parties to extractive or other investment contracts where they deal with powerful and legally well-protected multinationals. Apart from instances of corruption of government officials by or collusion with extractive industries,<sup>10</sup> governments may not be proactive or show good faith in seeking adequate protection for affected local communities. In fact, state or non-state actors' extractive rights do sometimes conflict with the land rights of communities. How can we then reconcile these competing rights from a human rights perspective? This is the big challenge the Working Group has. In my view, local communities should be empowered so that they can fight for the respect and protection of their rights, which need to be first articulated and conceptualized as such in international law. Given the relatively well-organized protection afforded to indigenous peoples and the similarities of the latter with local communities as far as the relationship to land is concerned, a question arises as to whether or not it is possible to use the indigenous rights framework to extend protection to non-indigenous communities like local communities affected by the extractive activities. In order to answer this question, two elements ought to be taken into consideration: on one hand, the level and nature of the relationship between local communities and their lands and, and on the other hand, the issue of whether local communities can qualify as a "people" in order to claim protection under the African Charter as such.

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<sup>10</sup> For instance, the Government of Nigeria has been found complicit to human rights violations perpetrated by oil companies against Ogoni people. *See* Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria, Afr. Comm'n H. and Peoples' R., Communication No. 155/96, at par. 66 (Oct. 27, 2001); SERAP (Socio-Economic Rights and Accountability Project) v. Federal Republic of Nigeria, Ct. of J. of the Econ. Cmty. of West Afr. St. (Ecowas), Judgment, No. ECW/CCJ/JUD/18/12, par. 109-111 (Oct. 27, 2009).

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### A. Relationship between land and local communities in Africa

One of the foundations for the recognition of indigenous rights in international law is their special relationship with land through which they can enjoy and exercise some of their basic rights, including the socio-economic and cultural rights. In today's Africa, mostly composed of unindustrialized or non-urbanized states, the majority of African people live off the land through subsistence farming, cattle raising, fishing, hunting, and gathering. In this context, the ownership of land is important not only for indigenous peoples but also for other communities, especially in rural areas. In the *Ogoni* case, the African Commission held that the survival of the Ogonis (a non-indigenous community) depended on their land and farms that were destroyed by the direct involvement of the government.<sup>11</sup> Land is not only essential to their survival, but also to their culture, which depends to some extent on land rights and ownership of it. In this regard, one can draw the conclusion that local communities affected or likely to be affected by extractive-related activities depend much on the land and the access to its resources for food, health, water, and culture. Simply put, land and its resources constitute supermarkets, pharmacies and ritual sites for local communities.

From this perspective, it seems that there should be no major objection to the extension to local communities of a legal protection similar to that provided to indigenous peoples in international human rights law so that they can enjoy and protect their collective rights. For instance, States and companies shouldn't proceed to signing and implementing development and extractive projects unless a free, prior and informed consent (FPIC) process has taken place in order to get the views and concerns of local communities to be affected by the projects. This will allow them an opportunity to assert their interests and needs, but also to agree on alternative areas for relocation in case of evictions.

Therefore, local communities should meaningfully and effectively participate in a way that they can substantially influence the decisions. The right to participate in the decision-making process should not be construed as a right to veto development or extractive initiatives. This is because the African Commission has reiterated at different occasions the right of African states to choose developmental paths in the national interest of their peoples.<sup>12</sup> At the same time, a mere formalistic attempt to consult does not constitute consultation. For a consultation to grant a social license to the extractive or development projects, it has to be "a genuine and effective engagement of minds between the consulting and the consulted parties."<sup>13</sup> Local communities' voices should be heard and taken seriously. A state can therefore proceed with their views in mind, which will certainly be

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<sup>11</sup> Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria, Afr. Comm'n H. and Peoples' R., Communication No. 155/96, at par. 67 (Oct. 27, 2001).

<sup>12</sup> Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of the Endorois Welfare Council) v. Kenya, Afr. Comm'n H. and Peoples R., Communication 276/03 (Nov. 25, 2009); Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria, Afr. Comm'n H. and Peoples' R., Communication No. 155/96, at par. 66 (Oct. 27, 2001).

<sup>13</sup> *S. v. Smit* 2008 (1) SA 135 at 153.



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balanced with the general interest of the nation. In this regard, there is a shared ownership of the decisions and the decision-making process. This is important for the development and success of the extractive industry as consent is an important social license and blessing to the extractive industry.

However, a question may be raised about the capacity and the expertise of the communities to bargain, given that most of the extractive projects are carried out in remote rural areas where people are totally poor, uneducated, and with less assistance from the central government. In order to help them shape their needs, public interest civil society organizations have to play a critical role in the empowerment of the local communities. In this regard, African non-governmental organizations have already set examples and demonstrated their capacity to accompany local communities in the quest for their rights. This has been the case of the *Centre for Minority Rights Development* (CEMIRIDE) with the Endorois indigenous peoples in Kenya and the *Social and Economic Rights Action Center* (SERAC) with the Ogoni people in Nigeria.

The recourse to FPIC in the extractive industry, as far as local communities are concerned, can be legally based on an emerging case law of UN human rights bodies, along with some state practice. For instance, the United Nations Committee on the Convention on the Elimination of Racial Discrimination (UNCERD) has recommended that the State of Israel should enhance its efforts to consult the Bedouin inhabitants of villages, and noted that it should in any case obtain the free and informed consent of the affected communities prior to relocation.<sup>14</sup> This was probably the first time that FPIC has been used outside the indigenous context, given the fact that the Bedouins' traditional occupation and ways of life are linked to the utilization of land and its resources.

Individual state laws also provide for FPIC. For example, according to the *Nigerian Minerals and Mining Act of 2007*, extractive companies bear some duties, *inter alia* the duty to consult (meaningful consultation) and duty to conclude Community Development Agreements.<sup>15</sup> In so doing, this state approach empowers local communities and recognizes that local communities not only have a say in the planning and execution of extractive projects, but some rights as well. It was also the same for South Africa with the *Mineral and Petroleum Resources Development Act No 28 of 2002*, which requires mining companies to formulate development plans for communities and consider social welfare of the affected people.<sup>16</sup>

In short, the consultation process to be engaged in with local communities by extractive companies and other "developers" infuses a human rights centered approach to development.<sup>17</sup> Therefore, the current justification of the extractive industry in Africa as a means to achieve economic growth should be revised in order to include the individual and community development as the end goal for

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<sup>14</sup> Concluding Observations of the Committee on the Elimination of Racial Discrimination: Israel, Feb. 19, 2007 – Mar. 9, 2007, CERD/C/ISR/CO/13, at para. 25 (June 14, 2007).

<sup>15</sup> Nigerian Minerals and Mining Act (2007) Cap. (1), §71(1)(c) (Nigeria).

<sup>16</sup> Mineral and Petroleum Resources Development Act No 28 of 2002, §23(1)(e) (S. Afr.).

<sup>17</sup> Cronjé and Chenga, 417

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extractive industries. This will be in line with the principles enshrined in the African rights charter.

B. Do “local communities” constitute a “people” in accordance with the African Charter?

The African Charter is the only human rights instrument that provides for the rights of peoples, whether indigenous or not. According to Mutua, “the idea of peoples’ rights is embodied in the African philosophy which sees men and women primarily as social beings embraced in the body of the community.”<sup>18</sup> This is exemplified by the Ubuntu philosophy, which purports that an individual is nothing without his/her community or group that he/she belongs to. Unfortunately, no African treaty body, including the Commission, has already clearly interpreted the Charter in order to offer a clear definition of the concept “people,” which of course is also linked to the context of the decolonization movement. However, an overview of the African Commission’s jurisprudence gives some tips. In *Kevin Mgwanga Gunme et al. v. Cameroon*, the concept “people” refers to persons “bound together by their historical, traditional, racial, ethnic, cultural, linguistic, religious, ideological, geographical, economic identities and affinities, or other bonds.”<sup>19</sup> So, according to these criteria, especially the territorial or geographical connection as well as other affinities, local communities can claim to be a people and seek protection of some of the collective rights enshrined in the African Charter.<sup>20</sup> These include the right to development, peace, a healthy environment, self-determination, and an equitable share of their resources, as this was decided by the Commission regarding the people of Southern Cameroon.<sup>21</sup> That was also the rationale behind the *Ogoni* case decision when the Commission decided that the destruction of land and farms, along with other brutalities, not only persecuted individuals in Ogoniland but also the Ogoni community as a whole.<sup>22</sup> Furthermore, after a careful consideration of the damaging effects of evictions on the lives of the Ogoni people, and a finding that the right to adequate housing encompasses the right to protection against forced evictions, the Commission made a determination that the right to adequate housing is a collective right.<sup>23</sup>

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<sup>18</sup> Makau W. Mutua, *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties*, 35 VA J. INT’L. L. 339 (1995), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1526730](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1526730).

<sup>19</sup> Kevin Mgwanga Gunme et al. v. Cameroon, Afr. Comm’n H. and Peoples R., Communication No. 266/03, at para. 175 (May 27, 2009).

<sup>20</sup> African Charter art. 19-24.

<sup>21</sup> Kevin Mgwanga Gunme et al. v. Cameroon, Afr. Comm’n H. and Peoples R., Communication No. 266/03, at para. 176 (May 27, 2009).

<sup>22</sup> Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria, Afr. Comm’n H. and Peoples’ R., Communication No. 155/96, at par. 67 (Oct. 27, 2001).

<sup>23</sup> *Id.* at para. 63.

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It is also worth mentioning that the Commission was seized of a communication<sup>24</sup> where the Bakweri community protested against the alienation to private investors of large parts of the lands traditionally occupied by them.<sup>25</sup> In this case, the complainant alleged numerous violations of Charter rights related to collective rights including the right to property. Unfortunately, the case failed the admissibility test, depriving the Commission of an opportunity to dispose of the issue of collective land rights of local communities within the context of its protective mandate.

Finally, the Commission has had made some important determinations as to the collective rights of local communities, such as those facing evictions in the interests of development or extractive projects. For instance, it has implicitly recognized the right of local communities to be consulted and notified prior to their evictions from their homes and lands. In its *Resolution 231 on the Right to Adequate Housing and the Protection from Forced Evictions*, the Commission emphasized its concerns saying, “that each year hundreds of thousands of people in Africa are forcibly evicted from their homes by States and other non-state actors, without prior consultation and notice, adequate compensation or appropriate alternative housing solution.”<sup>26</sup> It therefore concluded that “a minimum degree of security of tenure, including protection from forced evictions, is essential for people to realise their right of access to adequate housing to meet the basic need of a decent livelihood.”<sup>27</sup>

In conclusion, from the above analysis of the Commission’s practice, it seems that the regional human rights body is open to consider cases involving the collective rights of peoples affected by extractive-related activities, as it held in the Ogoni case, “The uniqueness of the African situation and the special qualities of the African Charter imposes upon the African Commission an important task. International law and human rights must be responsive to African circumstances. Clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa.”<sup>28</sup> Therefore, despite the notable differences between local communities and indigenous peoples, the adverse impact of extractive projects on their lifestyles warrants an adequate protection for local communities.

## V. Conclusion

While there is a consensus on the urgent necessity to protect and promote indigenous rights of indigenous communities in Africa, given the historical and

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<sup>24</sup> Bakweri Land Claims Committee v. Cameroon, Afr. Comm’n H. and Peoples R., Communication 260/02 (2004).

<sup>25</sup> *Id.* at para. 2.

<sup>26</sup> Resolution on the Right to Adequate Housing and Protection From Forced Evictions, Afr. Comm’n H. and Peoples R., Res. No. 231 (Oct. 22, 2012).

<sup>27</sup> *Id.*

<sup>28</sup> Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria, Afr. Comm’n H. and Peoples’ R., Communication No. 155/96, at par. 68 (Oct. 27, 2001).

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systemic injustices and discrimination practices they have been subjugated to, it is not clear whether or not this protection can be extended to other local communities. However, technically the latter can seek protection along the same lines as indigenous peoples. Like the latter, African local communities have a strong link to land and its resources, as their livelihoods depend on access to and productive capacity of the lands. Extractive-related activities such as mining, land-grabbing, evictions, and relocations have an impact on these people and their lifestyles. From an analogical perspective, they should therefore seek a protection similar to that other groups like minorities and indigenous peoples enjoy in international human rights law. Fortunately, legal bases for this protection exist within the African human rights system. They only need to be explored and applied to this particular situation.

CAFTA-DR's CITIZEN SUBMISSION PROCESS:  
IS IT PROTECTING THE INDIGENOUS PEOPLES RIGHTS  
AND PROMOTING THE THREE PILLARS OF  
SUSTAINABLE DEVELOPMENT?

Josephine M. Balzac<sup>†</sup>

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## I. Introduction

“In many parts of the world, lands that are rich in natural resources continue to be inhabited by peoples whose origins in the lands predate those of the states that engulf them.”<sup>1</sup> There are more than 200 million indigenous people in the world.<sup>2</sup> They are:

*indigenous* because their ancestral roots are embedded in the lands on which they live, or would like to live, much more deeply than the roots of more powerful sectors of society living on the same lands or in close proximity. And they are *peoples* in that they comprise distinct communities with a continuity of existence and identity that links them to the communities, tribes, or nations of their ancestral past.<sup>3</sup>

Imagine a world completely different than our own, where the original roots of our ancestors still exist in our identity and culture. Imagine a place where we rely on the land to live, where our basic survival requires the use of the natural resources of the land for food, shelter, and economic gain. The tie to the lands and distinct cultural identity allows indigenous peoples' rights to be recognized under the human rights doctrine. Their protected rights of self-government and self-determination were recognized as early as the 1920s.<sup>4</sup> The rights to property and traditional lands have been accepted in the Inter-American Court of Human Rights (“IACHR”)<sup>5</sup> based on the indigenous peoples' historical use and occupancy of these lands.<sup>6</sup> The recent worldwide support of the United Nations

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<sup>1</sup> HURST HANNUM ET AL., INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE, 173 (Wolters Kluwer Law and Business ed., Aspen Casebook Series 5th ed. 2011) (quoting S. James Anaya, *The Maya Petition to the Inter-American Commission on Human Rights: Indigenous Land and Resource Rights, and the Conflict over Logging and Oil in Southern Belize*, reprinted in GIVING MEANING TO ECONOMIC, SOCIAL, AND CULTURAL RIGHTS, 180-211 (Isfahan Merali & Valerie Oosterveld eds., Univ. Penn. Press, 2001).

<sup>2</sup> DONALD K. ANTON & DINAH L. SHELTON, ENVIRONMENTAL PROTECTION AND HUMAN RIGHTS, 545 (Cambridge University Press, 2011); *The IDB and Indigenous Peoples*, IDB INTER-AMERICAN DEVELOPMENT BANK, <http://www.iadb.org/en/topics/gender-indigenous-peoples-and-african-descendants/indigenous-peoples,2605.html> (last visited January 3, 2012) (“The indigenous population in Latin America is estimated at around 40 to 50 million people, or 8 percent to 10 percent of the region’s overall population. Indigenous peoples account for at least half of the population in countries such as Bolivia, Guatemala, and Peru”).

<sup>3</sup> HANNUM ET AL., *supra* note 1, at 168 (citing S. JAMES ANAYA, INTERNATIONAL HUMAN RIGHTS AND INDIGENOUS PEOPLES, 1 (Aspen Publishers, 2009).

<sup>4</sup> Armstrong A. Wiggins, *United Nations Declaration on the Rights of Indigenous peoples: A Critical Moment in Indigenous Human Rights History*, in UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: (Indian Law Resource Center), available at [http://www.ihrfg.org/sites/default/files/Declarations\\_Booklet\\_LOWRES%20\(2\)\\_0.pdf](http://www.ihrfg.org/sites/default/files/Declarations_Booklet_LOWRES%20(2)_0.pdf). (Commentary regarding the Declaration).

<sup>5</sup> HANNUM ET AL., *supra* note 1, at 180 (citing Maya Indigenous Communities of the Toledo District of Belize, Case 12.053, Inter-Am. Comm’n H.R., Report No., 40/04, O.A.S. Doc. OEA/Ser.L/V/II/122, doc. 5 rev. 1, ¶ 143-144 (2005).

<sup>6</sup> ROBERT T. COULTER, INDIAN LAW RESOURCE CENTER, POSITION PAPER ON INDIGENOUS PEOPLE’S RIGHT OF FREE PRIOR INFORMED CONSENT WITH RESPECT TO INDIGENOUS LANDS, TERRITORIES AND RESOURCES, 1 (Indian Law Resource Center), available at [http://www.indianlaw.org/sites/default/files/resources/FPIC\\_ILRC\\_Position.pdf](http://www.indianlaw.org/sites/default/files/resources/FPIC_ILRC_Position.pdf).

## CAFTA-DR's Citizen Submission Process

("U.N.") Declaration on the Rights of Indigenous Peoples in 2010<sup>7</sup> further indicates the recognition of these rights as essential. The recognized human rights to property and traditional lands, right to consultation, right to access of information, and right to free prior informed consent are the focus of this article.

While indigenous rights are being shaped and accepted, the world is rapidly developing economically through globalization spread market-based systems, by expanding information and communication, and increasing international trade.<sup>8</sup> The utilization of natural resources for economic development occurs rapidly and, in certain situations, forces indigenous people to give up their cultures, land, and lives, in return for pure destruction of their environment and homes.<sup>9</sup> The principle of sustainable development involves the perfect balance between the three pillars of economic development, environmental protection, and social development.<sup>10</sup> In achieving the objectives of sustainable development, "public engagement is widely seen as an essential element of environmental decision making."<sup>11</sup> The United Nations General Assembly reiterates this principle and stresses that transparency, accountability, and public participation are essential for the realization of sustainable development.<sup>12</sup>

Therefore, as countries begin to utilize their natural resources and potentially threaten the property of indigenous people, and as regions begin to eliminate trade barriers by ratifying regional free trade agreements, the need to protect these human rights becomes more important. The world is developing at an increasing pace, and in order to protect these fundamental rights and sustainably develop, the indigenous people need to publicly engage in the decision-making process regarding their land. The rights of public participation, access to information, transparency, and free prior informed consent need to be a priority in free trade agreements in order to protect the environment, the indigenous peoples' rights, and their access to justice.

Recently, regional free trade agreements signed between the U.S. and Latin American have environmental provisions and contain a citizen submission pro-

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<sup>7</sup> WIGGINS, *supra* note 4 (explaining that the U.S., Canada, and New Zealand and Australia were the only parties that opposed the Declaration, since then each of these countries has reversed its position and endorsed the Declaration).

<sup>8</sup> Alberto R. Coll, *Wielding Human Rights and Constitutional Procedure to Temper the Harms of Globalization: Costa Rica's Battle Over the Central American Free Trade Agreement*, 33 U. PA. J. INT'L L. 461, 467-468 (2011).

<sup>9</sup> See generally *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶143-149 (Aug. 31, 2001); *Maya Indigenous Communities of the Toledo District of Belize*, Case 12.053, Inter-Am. Comm'n H.R., Report No. 40/04, O.A.S. Doc. OEA/Ser.L/V/II/122, doc. 5 rev. 1, ¶ 143-144 (2005).

<sup>10</sup> DAVID HUNTER ET AL., *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 200 (Foundation Press, 3rd ed. 2007).

<sup>11</sup> Leroy Paddock, *The Role of Public Engagement in Achieving Environmental Justice*, POVERTY ALLEVIATION AND ENVIRONMENTAL LAW 131 (Yves LeBouthillier et. al eds., The IUCN Academy of Environmental Law Series, 2012).

<sup>12</sup> Dinah Shelton, *Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized?\**, 35 DENV. J. INT'L L. & POL'Y 129, 170 (2006) (Revised draft, presented at the Conference on the Human Right to a Safe and Healthful Environment and the Responsibility Under International Law of Operators of Nuclear Facilities, Salzburg, October 20-23, 2005).

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cess as safeguards for environmental protection.<sup>13</sup> These agreements include the North American Free Trade Agreement (“NAFTA”) and the Dominican Republic-Central American Free Trade Agreement (“CAFTA-DR”).<sup>14</sup> The citizen submissions procedures in these environmental agreements were designed to help ensure citizen participation in the effective enforcement of environmental laws.<sup>15</sup>

However, the environmental and citizen submission provisions have been proclaimed as “pure rhetoric.”<sup>16</sup> Additionally, 92% of the parties recently surveyed were dissatisfied with the citizen submission process outcome under NAFTA.<sup>17</sup> Although the public has been able to participate in the citizen submission process, serious environmental, health, and access to justice problems are still unresolved in the member countries.<sup>18</sup> These serious limitations on how these processes function prove that reforms are necessary within the free trade agreements. Recent submissions in Guatemala under CAFTA-DR show the threat to the environment and indigenous peoples’ rights further support the need to reform the citizen submission process.<sup>19</sup>

The Central American population consists of many indigenous people and the parties to CAFTA-DR must strive to protect the culture, heritage, and rights of the region’s people.<sup>20</sup> Trade agreements must recognize the rights of the indige-

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<sup>13</sup> North American Agreement on Environmental Cooperation (“NAAEC”), Sept. 14, 1993, U.S.-Can.-Mex. 32 I.L.M. 1480 (1993), available at <http://www.cec.org/Page.asp?PageID=1226&SiteNodeID=567>; CAFTA-DR, Chapter 17 Environment, <http://www.caftadr-environment.org/index.htm>, also available at [http://www.caftadr-environment.org/left\\_menu/Chapter\\_17\\_CAFTA\\_-\\_DR.pdf](http://www.caftadr-environment.org/left_menu/Chapter_17_CAFTA_-_DR.pdf); see also Environmental Cooperation Agreement, [http://www.caftadr-environment.org/left\\_menu/Environmental\\_affairs\\_council.html](http://www.caftadr-environment.org/left_menu/Environmental_affairs_council.html); see also Travis A. Brooks, *Towards Promises Unfulfilled: Applying Sixteen Years of Trade and Environmental Lessons to the Pending U.S.-Columbia Free Trade*, 23 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 339, 341-42 (2011).

<sup>14</sup> Lauren A. Hopkins, *Protecting Costa Rica’s Osa Peninsula: CAFTA’s Citizen Submission Process and Beyond*, 31 VT. L. REV. 381, 384 (2007).

<sup>15</sup> Jonathan Dorn, *NAAEC Citizen Submissions Against Mexico: An Analysis of the Effectiveness of a Participatory Approach to Environmental Law Enforcement*, 20 GEO. INT’L ENVTL. L. REV. 129, 129-30 (2007).

<sup>16</sup> Lauren A. Hopkins, *Protecting Costa Rica’s Osa Peninsula: CAFTA’s Citizen Submission Process and Beyond*, 31 VT. L. REV. 381, 392 (2007); see also Paul Stanton Kibel, *Awkward Evolution: Citizen Enforcement at the North America Environmental Commission*, 32 ENV. L. REP. 10769, 10769 (2002).

<sup>17</sup> *Summary of Responses to the JPAC Questionnaire on Submitters’ Experience with the Citizen Submission Process under NAAEC Articles 14 and 15*, COMMISSION FOR ENVIRONMENTAL COOPERATION (2011), available at [http://www.cec.org/Page.asp?PageID=924&ContentID=25131&AA\\_SiteLanguageID=1](http://www.cec.org/Page.asp?PageID=924&ContentID=25131&AA_SiteLanguageID=1).

<sup>18</sup> *Summary of Responses to the JPAC Questionnaire on Submitters’ Experience with the Citizen Submission Process under NAAEC Articles 14 and 15*, COMMISSION FOR ENVIRONMENTAL COOPERATION (2011), available at [http://www.cec.org/Page.asp?PageID=924&ContentID=25131&AA\\_SiteLanguageID=1](http://www.cec.org/Page.asp?PageID=924&ContentID=25131&AA_SiteLanguageID=1).

<sup>19</sup> CAALA/10/006 Laguna del Tigre Fonpetrol GT, SECRETARIAT FOR ENVTL. MATTERS, [http://www.saa-sem.org/index.php?option=com\\_content&view=article&id=78%3Aacaala10006-laguna-del-tigre-fonpetrol-gt&catid=40%3A2010&Itemid=198&lang=us](http://www.saa-sem.org/index.php?option=com_content&view=article&id=78%3Aacaala10006-laguna-del-tigre-fonpetrol-gt&catid=40%3A2010&Itemid=198&lang=us); CAALA/11/008 (last visited Oct. 3, 2013); CAALA/11/008 Maya Biosphere Reserve GT, SECRETARIAT FOR ENVTL. MATTERS, [http://www.saa-sem.org/index.php?option=com\\_content&view=article&id=148%3Aacaala11008-reserva-de-la-biosfera-maya-gt&catid=46%3A2011&Itemid=203&lang=us](http://www.saa-sem.org/index.php?option=com_content&view=article&id=148%3Aacaala11008-reserva-de-la-biosfera-maya-gt&catid=46%3A2011&Itemid=203&lang=us) (last visited Oct. 3, 2013).

<sup>20</sup> Paulette Stenzel, *Free Trade and Sustainability Through the Lens of Nicaragua: How CAFTA-DR Should be Amended to Promote the Triple Bottom Line*, 34 WM. & MARY ENVTL. L. & POL’Y REV. 653, 660 (2010).



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nous peoples that are affected by environmental degradation resulting from trade activities, which can result in the forceful removal of their lands. A balance must be struck between the three pillars of sustainable development because international trade is necessary to fuel economic growth in the developed world.<sup>21</sup> Public engagement of the indigenous people through participation, information, consultation, and consent are necessary to fulfill the goals of sustainable development and protect their right to property and traditional lands.

Part one of this article will discuss the indigenous people and the special measures recognized to protect their human rights. This will include a discussion of the origins of indigenous peoples' human rights, specifically, the right to traditional lands and culture, the right to consultation, and the right to free prior informed consent. This section will emphasize the Inter-American cases on indigenous lands and the recently adopted U.N. Declaration on the Rights of Indigenous People. Part two will discuss how globalization and free trade impact the indigenous peoples, and the benefits and consequences of free trade agreements. Part three will focus on the necessity for public engagement in the achievement of sustainable development. Further discussing the origins and evolving concept of sustainable development, the concept of environmental justice as procedural justice, with a focus on the rights to access of information, public participation, and access to justice. This section will show the need to implement these social avenues into free trade agreements in order to protect the human rights of the indigenous people.

Part four will provide the history of free trade agreements, specifically CAFTA-DR, its predecessor NAFTA, the World Trade Organization and General Agreement on Tariffs and Trade. It will further discuss the environmental provisions of CAFTA-DR, the environmental side agreement, the commission, and the citizen submissions process and the strong internal opposition to the ratifying of this agreement. Part five will discuss the citizen submission process of CAFTA-DR and NAFTA and how it should incorporate the three pillars of sustainable development in order to protect the environment and the indigenous people of Central America. Additionally, it will focus on the benefits and the consequences of the provisions, specific case studies on recent submissions, its impact on the environment and the indigenous people. Part six will conclude by reiterating the urgent need for free trade agreements, specifically, NAFTA and CAFTA-DR to come under the umbrella of sustainable development's three pillars in order to protect our environment and the human rights of the indigenous peoples.

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<sup>21</sup> HUNTER ET AL., *supra* note 10, at 1235.

## II. The Human Rights of the Indigenous Peoples

Both the American Declaration of the Rights and Duties of Man<sup>22</sup> and the Universal Declaration of Human Rights were adopted in 1948.<sup>23</sup> These declarations include many of the same rights that may be considered customary international law.<sup>24</sup> Advocacy for indigenous peoples' rights is recorded as early as 1923, when the Cayuga Nation of the Haudenosaunee Confederacy, traveled to the League of Nations in Geneva because Canada violated the Haudenosaunee's right of self-government.<sup>25</sup>

In 1957, ILO Convention No. 107 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries was adopted as the first ILO multilateral treaty on indigenous rights after struggling to establish the rights since the 1920's.<sup>26</sup> In 1976, indigenous leaders from all over the world traveled to Geneva and "began to demand that the international community hold countries accountable for taking our lands, resources, children, and languages, and for violating rights of self-government and self-determination."<sup>27</sup> This is when the U.N. Declaration on the Rights of Indigenous Peoples ("Declaration") was born,<sup>28</sup> the beginnings of a draft proposal that would soon represent the recognition of rights, long overdue.

In 1991, ILO Convention No. 107 was later revised by Convention No. 169 and entered into force.<sup>29</sup> Consultation and participation constitute the cornerstone of ILO No. 169 that is currently ratified by 20 countries.<sup>30</sup> In 2007, the General Assembly adopted the Declaration, which was one of the greatest developments in international human rights law.<sup>31</sup> The United States finally gave its support in 2010 after New Zealand, Canada, and Australia gave their approval, meaning, there is "now worldwide acceptance of indigenous peoples and our governments

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<sup>22</sup> American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States, Bogota, Colombia, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V./II.82 doc. 6 rev. 1 at 17 (1948), <http://www.cidh.oas.org/Basicos/English/Basic2.american%20Declaration.htm>; *see also* HANNUM ET AL., *supra* note 1, at 166 (The American Declaration includes many of the catalogs of civil, political, social, economic, and cultural rights later found the Universal Declaration of Human Rights).

<sup>23</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/60/1 (Sept. 16, 2005) *available at* <http://www.unhcr.org/refworld/docid/3ae6b3712c.html> (last visited Nov. 15, 2012) (On December 10, 1948, the Universal Declaration of Human Rights was adopted by the General Assembly of the United Nations); *see also* HANNUM ET AL., *supra* note 1, at 166.

<sup>24</sup> *See* HANNUM ET AL., *supra* note 1, at 167.

<sup>25</sup> WIGGINS, *supra* note 4.

<sup>26</sup> HANNUM ET AL., *supra* note 1, at 169.

<sup>27</sup> WIGGINS, *supra* note 4.

<sup>28</sup> *Id.*

<sup>29</sup> HANNUM ET AL., *supra* note 1, at 170.

<sup>30</sup> International Labour Organization, Indigenous and Tribal Peoples Convention, C169, 27 June 1989, entry into force Sept. 5, 1991, *available at* <http://www.ilo.org/indigenous/Conventions/no169/lang-en/index.htm> (last visited Nov. 14, 2012) (almost all Latin American States (14 of them) have ratified the Convention).

<sup>31</sup> United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, (Sept. 13, 2007); *see also* HANNUM ET AL., *supra* note 1, at 168.

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as a permanent part of the world community and the countries where we live.”<sup>32</sup> The “Declaration is the first time in human history that indigenous people’s right to exist has been legally recognized.”<sup>33</sup>

“For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.”<sup>34</sup> These fundamental rights to property and traditional lands are based on the cultural and spiritual ties with the land, and a necessity to survive and pass on their identity to their future generations. These rights are derivative of all the other rights and are a fundamental element for sustainable development and survival of the indigenous people.<sup>35</sup>

### A. Inter-American Decisions on Traditional Indigenous Lands

The Inter-American Court of Human Rights has been faced with issues concerning indigenous peoples’ rights on numerous occasions. In 1998, the Commission in the *Awas Tingi* case “issued a confidential report finding Nicaragua in violation of the human rights of the indigenous Mayagna Community of Awas Tingni, because it failed to recognize the traditional land tenure of the community and instead authorized a major logging concession without the community’s consent.”<sup>36</sup> The court held that the general right to property articulated in Article 21 of the American Convention on Human Rights extends to the protection of traditional indigenous land tenure, even when that land is not authorized by a deed of title or otherwise specifically recognized by the state.<sup>37</sup> The Court stated, regarding the right to property, that “among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community.”<sup>38</sup> The Court further declared that:

Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element

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<sup>32</sup> WIGGINS, *supra* note 4.

<sup>33</sup> ROBERT T. COULTER, A POWERFUL AFFIRMATION OF OUR RIGHTS, UNITED NATIONS DECLARATION ON THE RIGHTS OF THE INDIGENOUS PEOPLES (Indian Law Resource Center, 2011), available at [http://www.ihrfg.org/sites/default/files/Declarations\\_Booklet\\_LOWRES%20\(2\)\\_0.pdf](http://www.ihrfg.org/sites/default/files/Declarations_Booklet_LOWRES%20(2)_0.pdf). (Commentary regarding the U.N. Declaration).

<sup>34</sup> *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶149 (Aug. 31, 2001).

<sup>35</sup> *See generally id.*

<sup>36</sup> HANNUM ET AL., *supra* note 1, at 176-77.

<sup>37</sup> *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶143 (Aug. 31, 2001).

<sup>38</sup> *Id.* at 149.

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that they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.<sup>39</sup>

In a similar case, the Maya communities of Belize petitioned to the Inter-American Commission on Human Rights in 2004 because Belize had violated the American Declaration by failing to adequately protect the traditional Maya lands when they authorized logging and oil concessions.<sup>40</sup> The Maya people depend on their lands for subsistence, the logging concessions served to damage the natural environment of the Maya people.<sup>41</sup> The state did not secure the territorial rights of the Maya people, and failed to afford them judicial protection of their rights and interests.<sup>42</sup> In connection with the Awas Tingni case and recognizing the rights of the indigenous people, the Commission found that:

The state failed to take adequate measures to consult with the Maya people regarding the logging and oil concessions that could be depleting the resources within traditional Maya lands.<sup>43</sup> Ultimately, the Commission found that the State of Belize violated the right to property in Article XXIII of the American Declaration.<sup>44</sup>

Although, both cases recognized the right to property and consultation, the Awas Tigni case was based on the rights proclaimed in the American Declaration, and the Maya case was based on customary international law because Belize was not a party to the American Convention.<sup>45</sup> Assertions have been made that the Universal Declaration on Human Rights constitutes customary international law and therefore establishes its legally binding character on states.<sup>46</sup> In order to prove a custom, general acceptance of the rule must be shown by (1) State practice, by conduct and (2) by demonstrating that States act in accordance with the rule from a sense of legal obligation to do so, referred to as *opinio juris*.<sup>47</sup>

### B. Indigenous Rights Enumerated in the Declaration

In addition to the above Inter-American jurisprudence on the indigenous peoples' rights, the Declaration further supports the right to traditional lands, right to consultation, and the right to free, prior, and informed consent. All of the CAFTA-DR countries are members of the U.N. and are therefore bound by the

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<sup>39</sup> *Id.*

<sup>40</sup> HANNUM ET AL., *supra* note 1, at 180 (referencing Maya Indigenous Communities of the Toledo District of Belize, Case 12.053, Inter-Am. Comm'n H.R., Report No. 40/04, O.A.S. Doc. OEA/Ser.L/V/II/122, doc. 5 rev. 1, ¶ 143-44 (2005)).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> HANNUM ET AL., *supra* note 1, at 186 (referencing Maya Indigenous Communities of the Toledo District of Belize, Case 12.053, Inter-Am. Comm'n H.R., Report No. 40/04, O.A.S. Doc. OEA/Ser.L/V/II/122, doc. 5 rev. 1, ¶ 144 (2005)).

<sup>44</sup> *Id.*

<sup>45</sup> Dinah Shelton, International Human Rights Course at the George Washington University Law School, (Sept. 20, 2011).

<sup>46</sup> HANNUM ET AL. *supra* note 1, at 157.

<sup>47</sup> HUNTER ET AL., *supra* note 10, at 315 (citing International Court of Justice Decision, *The Scotia*, 14 Wall. 170, 187 (1876) quoted in *The Paquete Haban*, 175 U.S. 677 (1900)).

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General Assembly's adoption of the Declaration.<sup>48</sup> The annex to the Declaration recognizes that indigenous people have suffered historic injustices through dispossession of their lands and resources, which prevents them from developing according to their own needs and interests.<sup>49</sup> The annex additionally emphasizes that "control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development."<sup>50</sup>

Article 26 directly supports the right to the lands, territories, and resources, which indigenous peoples have traditionally owned, occupied or otherwise used or acquired.<sup>51</sup> This right includes the rights to own, use, develop, and control the lands by reason of traditional ownership.<sup>52</sup> Article 8(2)(b) provides for redress if action is taken dispossessing them of their lands.<sup>53</sup> Article 10 provides that the indigenous peoples shall not be forcibly removed from their lands or territories or relocated without the free, prior, and informed consent.<sup>54</sup> Article 25 recognizes the right to their spiritual relationship with their traditional lands.<sup>55</sup> Article 31 acknowledges the rights to maintain, control, protect, and develop their cultural heritage, traditional knowledge, and traditional cultural expressions.<sup>56</sup>

The Declaration enumerates the right of consultation under various circumstances. Article 15(2) outlines that States must take effective measures in consultation and cooperation with the indigenous people.<sup>57</sup> Under Article 32, the Declaration merges the right to use of their land with the right to consultation. It states:

1. Indigenous people have the right to determine and develop priorities and strategies for the development or use of their lands, territories, and other resources.
2. States shall consult and cooperate in good faith with the indigenous people concerned through their own representative institutions, to obtain their free and informed consent prior to the approval of any project affecting their lands, territories, and other resources, particu-

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<sup>48</sup> *Member States of the United Nations*, UNITED NATIONS, <http://www.un.org/en/members/index.shtml#g> (last visited Jan. 6, 2013).

<sup>49</sup> United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 31, at Pmbl.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at art. 26.

<sup>52</sup> *Id.* ("States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.")

<sup>53</sup> *Id.* at art. 8(2)(b) ("States shall provide effective mechanisms for prevention of, and redress for: Any action which has the aim or effect of dispossessing them of their lands, territories or resources").

<sup>54</sup> *Id.* at art. 10.

<sup>55</sup> *Id.* at art. 25 ("Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands.")

<sup>56</sup> *Id.* at art. 31.

<sup>57</sup> United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 31, at art. 15(2) ("States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned. . .").

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larly in connection with the development, utilization or exploitation of mineral, water or other resources.<sup>58</sup>

Article 19 ties in the right of consultation with the long standing right amongst the indigenous peoples—the right to free, prior, and informed consent (“FPIC”).<sup>59</sup> Under Article 10, FPIC is required when indigenous peoples are removed from their lands; no relocation is allowed without it.<sup>60</sup> Under Article 11, the indigenous people have the right to “maintain, protect and develop the past, present, and future manifestations of their cultures. . .with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.”<sup>61</sup> As stated above, Article 32 merges the right to consultation with the right to receive free prior informed consent before any project is authorized on their land.<sup>62</sup>

The right to [FPIC] refers to two things: 1) the right of indigenous people to forbid, control, or authorize activities that are on their lands, territories or other resources, and 2) the right of indigenous people to forbid, control or authorize activities not on their lands, that may substantially affect their lands, territories, resources or human rights.<sup>63</sup>

Consent can only be free, if it is “given without coercion, duress, fraud, bribery, or any threat of external manipulation.”<sup>64</sup> Consent is considered prior when it is “given before any planning for the proposed activity has been completed, and before implementing each stage in the decision-making process.”<sup>65</sup> Informed consent occurs when all relevant information related to proposed activities have been provided to the affected indigenous people in appropriate languages and formats.<sup>66</sup> This information included indigenous rights under domestic and international law, the possible consequences and alternatives of the proposed activities.<sup>67</sup>

Informed consent recognizes the principle of access to information. In order for consent to be informed, the indigenous people must have access to the information concerning the impacts of proposed projects developing on their lands.<sup>68</sup> The right of indigenous communities to be fully informed requires fully and accurately informing of the nature and consequences of the process, provided with

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<sup>58</sup> *Id.* at art. 32.

<sup>59</sup> *Id.* at art. 19.

<sup>60</sup> *Id.* at art. 10.

<sup>61</sup> *Id.* at art. 11.

<sup>62</sup> *Id.* at art. 32.

<sup>63</sup> COULTER, *supra* note 6.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> HANNUM ET AL., *supra* note 1, at 185.

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an effective opportunity to participate individually or as collectives.<sup>69</sup> The rule of free, prior, informed consent needs to be implemented, especially in free trade agreements.<sup>70</sup> These mechanisms must be strengthened in order to protect the indigenous people and promote sustainable development.<sup>71</sup>

Ensuring these rights is especially important because development and other activities can permanently remove resources, make land inhabitable, and effectively destroy indigenous communities that have rightful claims to own the land and resources.<sup>72</sup> The annex to the Declaration encourages states “to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned.”<sup>73</sup> The U.N. has already recognized that human rights are universal, interdependent, and interrelated, and therefore are inevitably a part of the regime of free trade agreements.<sup>74</sup> Therefore, the member states of free trade agreements, such as NAFTA and CAFTA-DR, need to prioritize these inherent human rights of the indigenous people by strengthening the compliance mechanisms incorporated in the agreements.

These indigenous rights have been established by declarations, conventions, Inter-American Court decisions, and have been discussed by scholars for decades. The jurisprudence of the Inter-American human rights system, the provisions of its governing instruments, including the American Declaration, is consistent with the developments in the field of International Human Rights Law.<sup>75</sup> Special measures for the protection of the indigenous peoples' rights are recognized in multiple places, including the Inter-American Court of Human Rights, the U.N., the ILO Convention 169, treaties, customary International Law, and other relevant sources of International Law.<sup>76</sup> The American Declaration mimics the same rights expressed in the U.N. Declaration of Human Rights, which may be considered customary International Law.<sup>77</sup> The Inter-American Court of Human Rights stated that:

[b]y means of an authoritative interpretation, the member states of the Organization have signaled their agreement that the Declaration contains and defines the fundamental human rights referred to in the OAS Char-

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<sup>69</sup> *Id.*

<sup>70</sup> See COULTER, *supra* note 6.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 31, at Pmb1.

<sup>74</sup> World Conference on Human Rights, Vienna Declaration and Action Programme, A/CONF 157/24, Article 5, (June 25, 1993) available at <http://www.ohchr.org/en/professionalinterest/pages/vienna.aspx>; see also UNICEF, Dalee Sambo Dorrough, *State of the World's Indigenous Peoples*, Chapter 6: Human Rights, 193, available at [http://www.un.org/esa/socdev/unpfii/documents/SOWIP\\_chapter6.pdf](http://www.un.org/esa/socdev/unpfii/documents/SOWIP_chapter6.pdf).

<sup>75</sup> HANNUM ET. AL., *supra* note 1, at 182 (referencing Maya Indigenous Communities of the Toledo District of Belize, Case 12.053, Inter-Am. Comm'n H.R., Report No., 40/04, O.A.S. Doc. OEA/Ser.L/V/II/122, doc. 5 rev. 1 (2005)).

<sup>76</sup> *Id.* at 181,182.

<sup>77</sup> *Id.* at 167.

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ter. . .For the member states of the Organization, the Declaration is the text that defines the human rights referred to in the Charter.<sup>78</sup>

This further proves the need to recognize the human rights of indigenous people under CAFTA-DR, NAFTA, and all other free trade agreements, especially the right to their traditional lands, the right to full and effective consultation, and the right to free, prior, informed consent. “All human rights are universal, indivisible, interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.”<sup>79</sup> In the event of a clash between Trade Law and human rights, human rights trump free trade; the two must be consistent with each other.<sup>80</sup>

### III. Public Engagement, Sustainable Development, and Procedural Justice in Free Trade Agreements

In addition to the above rights, public engagement and participation in decision-making is a staple under the doctrine of human rights and proves necessary to the fulfillment of sustainable development and environmental justice. Article 21 of the Universal Declaration of Human Rights affirms the right of everyone to take part in the governance of his or her country.<sup>81</sup> The American Declaration of Rights and Duties of Man (Article 20),<sup>82</sup> the African Charter (Article 13),<sup>83</sup> and the International Covenant on Civil and Political Rights provide that citizens have the right, without unreasonable restriction, “to take part in the conduct of public affairs, directly or through freely chosen representatives.”<sup>84</sup> Furthermore, the U.N. Declaration on the Rights of Indigenous Peoples continues to emphasize the right to public participation, in Articles 5<sup>85</sup>, Article 18<sup>86</sup>, and Article 27.<sup>87</sup>

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<sup>78</sup> *Id.* (citing Vienna Declaration of the Rights and Duties of Man art. 64, American Convention on Human Rights, ¶ 43, 45 (1989)).

<sup>79</sup> Vienna Declaration and Programme of Action, U.N. Doc. A/CONF.157/24 (Jun. 25, 1993).

<sup>80</sup> *See* HANNUM ET. AL., *supra* note 1, at 456.

<sup>81</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), at art. 21 (Dec. 10, 1948).

<sup>82</sup> American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States, Bogota, Colom., *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V./II.82 doc. 6 rev. 1, at 17 (Dec. 10, 1948) (“Every person having legal capacity is entitled to participate in the government of his country, directly or through his representatives, and to take part in popular elections, which shall be by secret ballot, and shall be honest, periodic and free.”).

<sup>83</sup> African Charter on Human and People’s Rights, OAU Doc. CAB/LEG/67/3, at art. 13 (Dec. 21, 1996) (“Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.”).

<sup>84</sup> Int’l Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316, at art. 25 (Dec. 16, 1966) (entered into force Mar. 23, 1976).

<sup>85</sup> Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295, at art. 25 (Sept. 13, 2007).

<sup>86</sup> *Id.* at art. 18.

<sup>87</sup> *Id.* at art. 27.



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The principles of environmental justice insist on the right of people to participate as equal partners at every level of the decision-making. Environmental justice has been described as procedural justice, which is defined as “. . .the right to treatment as an equal. That is, it is the right, not to an equal distribution of some good or opportunity, but to equal concern and respect in the political decision about how these goods and opportunities are to be distributed.”<sup>88</sup> Aristotle referred to procedural justice as a status in which individuals have an “. . .equal share in ruling and being ruled.”<sup>89</sup> Procedural justice requires focus on the fairness of the decision-making process, rather than on its outcome.<sup>90</sup>

Fairness requires allowing the communities affected to participate in the decision-making process. The Executive Order on environmental justice makes ensuring greater public participation and access to information for minority and low-income populations a main priority.<sup>91</sup> Environmental justice demands public policy to be based on “mutual respect and justice for all people, which is free from bias or discrimination, affirms the fundamental right to self-determination, and insists on the right to participate as equal partners at every level of decision-making.”<sup>92</sup> It is commonly observed that the environmental decision-making process “favors those with resources and political power over people of color and low-income communities.”<sup>93</sup> Disadvantaged groups need to have greater access to information and legal and technical resources to ensure equal access to decision-makers and the decision-making process.<sup>94</sup>

In order for the public to fully participate in the decision-making process, they must first have the appropriate access to information.<sup>95</sup> The people that are going to be affected need all of the information surrounding the potential project, the data collected, and the impact assessments in order to be fully informed. A significant amount of pollution, contamination, natural resource deterioration, and loss of land continues to occur long after a project is complete. This environmental damage is irreversible, which demonstrates the importance of acquiring the information prior to decision-making to ensure informed choices are made.<sup>96</sup>

### A. The Concept and Achievement of Sustainable Development

The 1972 Stockholm Conference on the Human Environment (“Stockholm Conference”) provided the opportunity to create the “right to a safe and healthy environment,” however, there was insufficient support for this text and instead

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<sup>88</sup> CLIFFORD RECHTSCHAFFEN ET AL., ENVIRONMENTAL JUSTICE: LAW, POLICY, AND REGULATION 9, (North Carolina Academic Press, 2d ed. 2009).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> Exec. Order No. 12,898, 3 C.F.R. 32 (1994); RECHTSCHAFFEN, *supra* note 88.

<sup>92</sup> RECHTSCHAFFEN, *supra* note 88.

<sup>93</sup> *Id.* at 10.

<sup>94</sup> *Id.*

<sup>95</sup> ANTON & SHELTON, *supra* note 2, at 357.

<sup>96</sup> *Id.*

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the current ambiguous language in Principle 1<sup>97</sup> was agreed upon.<sup>98</sup> The Stockholm Conference started to develop the concept of sustainable development.<sup>99</sup> After the Stockholm Conference, environmental scholars and activists began to identify the links between environmental protection and human rights, focusing on the procedural human rights.<sup>100</sup> These rights include access to information, public participation, and access to justice and remedies in the event of environmental harm.<sup>101</sup>

The concept of sustainable development came to the forefront of environmental matters at the United Nations Conference on Environment and Development meeting at Rio de Janeiro in 1992 (“Rio Declaration”).<sup>102</sup> The nations participating in the Rio Declaration formally accepted “sustainable development as the goal of a modern economy.”<sup>103</sup> Sustainable development has been described as incorporating three components: environmental protection, economic development and social development.<sup>104</sup>

The concept of sustainable development is woven throughout the Rio Declaration principles. For example, Principle 1 starts off the declaration by stating, “human beings are at the centre of concerns for sustainable development and are entitled to a healthy and productive life in harmony with nature.”<sup>105</sup> Principles 4 and 5 recognize that environmental protection and eradicating poverty are an “indispensable requirement and integral part of achieving sustainable development.”<sup>106</sup> Principle 12 affirms the aspirational goal of states cooperating “to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries.”<sup>107</sup> Further, Principle 22 specifically recognizes that “indigenous people and their communities and other local communities play a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests, and enable their effective participation in the achievement of sustainable development.”<sup>108</sup>

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<sup>97</sup> United Nations Conference on the Human Environment, Stockholm, Swed., June 5-16, 1972, *Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14/Rev. 1, at princ. 1 (1973) [hereinafter Stockholm Declaration] (“Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”).

<sup>98</sup> ANTON & SHELTON, *supra* note 2, at 356.

<sup>99</sup> Stockholm Declaration, *supra* note 97, at princ. 2.

<sup>100</sup> ANTON & SHELTON, *supra* note 2, at 356.

<sup>101</sup> *Id.*

<sup>102</sup> United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex 1, at princ. 10 (Aug. 12, 1992) [hereinafter Rio Declaration].

<sup>103</sup> HUNTER ET. AL., *supra* note 10, at 199.

<sup>104</sup> *Id.*

<sup>105</sup> Rio Declaration, *supra* note 102, at princ. 1.

<sup>106</sup> *Id.* at princ. 4, 5.

<sup>107</sup> *Id.* at princ. 12.

<sup>108</sup> *Id.* at princ. 22.

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Rio highlighted the model of public participation; Principle 10 of the Rio Declaration specifically states that, "environmental issues are best handled with the participation of all concerned citizens, at the relevant level."<sup>109</sup> The Rio Declaration not only refers to public participation in Principle 10 but also refers to it within different groups, such as women (Principle 20), youths (Principle 21), and indigenous people and local communities (Principle 22).<sup>110</sup> The Agenda 21 plan of action,<sup>111</sup> which was adopted at the Rio Conference, fully emphasized the importance of public participation in the achievement of sustainable development.<sup>112</sup> As stated above, the United Nations General Assembly reiterated this principle and stressed that public participation is essential for the realization of sustainable development.<sup>113</sup> The preamble to Section III of Agenda 21 states:

One of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making. Furthermore, in the more specific context of environment and development, the need for new forms of participation has emerged. This includes the need of individuals, groups, and organizations to participate in environmental impact assessment procedures and to know about and participate in decisions, particularly those that potentially affect the communities in which they live and work. Individuals, groups, and organizations should have access to information relevant to the environment and development held by national authorities, including information on products and activities that have or are likely to have a significant impact on the environment, and information on environmental protection measures.<sup>114</sup>

Public participation and sustainable development continued to be in the spotlight shortly after the Rio Conference. In 1997, the Inter-American Development Bank ("IDB") conducted a forum regarding the indigenous people and sustainable de-

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<sup>109</sup> *Id.* at princ. 10.

<sup>110</sup> ANTON & SHELTON, *supra* note 2, at 381; Rio Declaration, *supra* note 102, at princ. 20-22 ("Women have a vital role in environmental management and development. Their full *participation* is therefore essential to achieve sustainable development"; "The creativity, ideals and courage of the youth of the world should be mobilized to forge a global partnership in order to achieve sustainable development and ensure a better future for all"; "Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective *participation* in the achievement of sustainable development.")

<sup>111</sup> United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, Agenda 21, <http://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>; DAVID HUNTER, ET AL., *supra* note 10, at 195 ("a comprehensive and detailed blueprint for the future implementation of sustainable development, with over 40 chapters and over 800 pages. The intent was to launch a "global partnership for sustainable development.").

<sup>112</sup> ANTON & SHELTON, *supra* note 2, at 381.

<sup>113</sup> Dinah Shelton, *Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized?\**, 35 DENV. J. INT'L L. & POL'Y 129, 170 (2006) ("Revised draft, presented at the Conference on the Human Right to a Safe and Healthful Environment and the Responsibility Under International Law of Operators of Nuclear Facilities, Salzburg, Oct. 20-23, 2005").

<sup>114</sup> Agenda 21, *supra* note 111, at Agenda 21, Sec. III, 23.2.

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velopment.<sup>115</sup> This forum recognized the importance of the indigenous people for sustainable management and discussed the participation of the Indigenous People in the decision-making process as a right that assists the sustainability of indigenous people.<sup>116</sup> The IDB recognized their unique role:

Despite their difficult natural environments indigenous peoples have managed to sustain an existence in ecologically fragile areas with low population carrying capacity. Many of these peoples have an intricate knowledge of their environments and the different plant and animal species, and have developed sophisticated technologies for the sustainable management of these resources.<sup>117</sup>

The IDB also identified the right to free and prior informed consent for the achievement of sustainable development.<sup>118</sup> Sustainable development was further discussed in the First Summit of the Americas,<sup>119</sup> where the Heads of State and Government recognized that in order to achieve sustainable development they had to make a commitment to assure a balance between economic development, social development and environmental protection.<sup>120</sup> The States pledged to preserve and strengthen the community of democracies of the Americas [. . .], promote prosperity through economic integration and free trade [. . .], and guarantee sustainable development and conserve our natural environment for future generations.<sup>121</sup> In regards to sustainable development, the States acknowledged that “[s]ocial progress and economic prosperity can be sustained only if our people live in a healthy environment and our ecosystems and natural resources are managed carefully and responsibly [and] assure public engagement and commitment.”<sup>122</sup>

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<sup>115</sup> Anne Deruyttere, *Indigenous People and Sustainable Development: The Role of the Inter-American Development Bank*, IDB FORUM (Apr. 8, 1997), <http://www.iadb.org/intal/intalcdi/PE/2010/07172en.pdf>.

<sup>116</sup> *Id.* at 11-12.

<sup>117</sup> *Id.* at 4.

<sup>118</sup> *Operation Policy on Indigenous People and Strategy for Indigenous Development*, INTER-AMERICAN DEV. BANK: SECTOR STRATEGY AND POLICY PAPER SERIES 34 (July 2006), <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=35773490> (“Promote the *institutionalization of the information, timely diffusion, consultation, good-faith negotiation and participation mechanisms and processes* for indigenous peoples within each country’s government structure, with a view to fulfilling the commitments made both nationally and internationally regarding consultation with and the participation of indigenous peoples in the issues, activities, and decisions that affect them. Such mechanisms and processes must take into account the general *principle of the free informed and prior consent of indigenous peoples* as a way to exercise their rights and ‘decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development.’”).

<sup>119</sup> Declaration of Miami: First Summit of the Americas, Plan of Action, 34 I.L.M. 808 (1994), *available at* [http://www.summit-americas.org/i\\_summit/i\\_summit\\_poa\\_en.pdf](http://www.summit-americas.org/i_summit/i_summit_poa_en.pdf).

<sup>120</sup> *Trade and Sustainable Development*, DEPARTMENT OF SUSTAINABLE DEVELOPMENT, <http://www.oas.org/dsd/EnvironmentLaw/DEFAULTTRADEANDSUSTDEV.htm> (last visited Dec. 28, 2012).

<sup>121</sup> Declaration of Miami: First Summit of the Americas, Plan of Action, *supra* note 119.

<sup>122</sup> Declaration of Miami: First Summit of the Americas, Declaration of Principles, 34 I.L.M. 808 (1994), *available at* [http://www.summit-americas.org/i\\_summit/i\\_summit\\_dec\\_en.pdf](http://www.summit-americas.org/i_summit/i_summit_dec_en.pdf).

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At the Summit of the Americas on Sustainable Development participating States signed the Declaration of Santa Cruz de la Sierra, which states that “[s]ocial progress and economic prosperity can be sustained only if we live in a healthy environment and our ecosystems and natural resources are managed carefully and responsibly.”<sup>123</sup> The Declaration recognizes that environmental considerations are essential for sustainable development by stating:

Planning and decision-making for sustainable development require understanding and integrating environmental consideration, as well as social and economic factors. We will assess the environmental impact of our policies, strategies, programs, and projects nationally and in the framework of international agreements to ensure that adverse environmental effects are identified, prevented, minimized, or mitigated, as appropriate.<sup>124</sup>

Additionally the Declaration focused on public participation, stating that:

We will promote increased opportunities for the expression of ideas and the exchange of information and traditional knowledge on sustainable development between groups, organizations, businesses, and individuals, including indigenous people, as well as for their effective participation in the formulation, adoption, and execution of decisions that affect their lives.<sup>125</sup>

Further recognizing the importance of sustainable development, the General Secretariat of the Organization of American States, created the Department of Sustainable Development (“DSD”) and began efforts to enhance environmental management capacity in the context of trade, by supporting member States through different capacity building processes.<sup>126</sup> The Organization of American States (“OAS”) initiatives in the area of trade and environment include the creation of the First and Second Evaluation Reports Monitoring the CAFTA-DR Environmental Cooperation Agreement.<sup>127</sup>

In 1998, the *UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* (“Aarhus Convention”) was adopted in Aarhus, Denmark.<sup>128</sup> The Aarhus Convention “links environmental protection and human rights, acknowledges that we owe an

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<sup>123</sup> Declaration of Miami: First Summit of the Americas, *supra* note 122.

<sup>124</sup> Declaration of Santa Cruz de la Sierra: Second Summit of the Americas, *Declaration of Santa Cruz de la Sierra*, Bolivia, Dec. 7-8, 1996, at sec. c, available at [http://www.summit-americas.org/summit\\_sd/summit\\_sd\\_dec\\_en.pdf](http://www.summit-americas.org/summit_sd/summit_sd_dec_en.pdf) [hereinafter Santa Cruz Summit].

<sup>125</sup> *Id.* at sec. d.

<sup>126</sup> *Trade and Sustainable Development*, *supra* note 118.

<sup>127</sup> *Monitoring Progress of the Environmental Cooperation Agenda in the CAFTA-DR Countries*, DEP'T OF SUSTAINABLE DEV., <http://www.oas.org/dsd/EnvironmentLaw/CAFTA-DR/DefaultCLP.htm> (last visited Dec. 2010).

<sup>128</sup> DAVID HUNTER, ET AL., *supra* note 10, at 438.

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obligation to future generations, and establishes that sustainable development can be achieved only through the involvement of all stakeholders.”<sup>129</sup>

The Aarhus Convention is creating a new process for “public participation in the negotiation and implementation of international agreements, including extending public access to its compliance mechanism.”<sup>130</sup> Although it is a regional agreement, it has global significance for public participation in environmental issues, an important development of Principle 10 of the Rio Declaration.<sup>131</sup> The Aarhus Convention established minimum standards for national level decision-making, which are described as the three pillars of “environmental democracy”<sup>132</sup> and include the following: 1) public participation in environmental decision-making; 2) right to access information;<sup>133</sup> and 3) equal access to justice.<sup>134</sup> “As of April 2, 2013, there were 46 Parties to the Aarhus Convention.”<sup>135</sup>

The OAS made a monumental move by creating the Inter-American Strategy for the Promotion of Public Participation in Decision-Making for Sustainable Development, which implements Principle 10 of the Rio Convention and references the Aarhus Convention.<sup>136</sup> The Global Environmental Facility/United Nations Environment Program, U.S. Agency for International Development, United Nations Educational, Scientific, and Cultural Organization, and the OAS supported this program.<sup>137</sup> The program was intended to assist OAS member countries in

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<sup>129</sup> Introduction from UNECE: UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE, <http://www.unece.org/env/pp/introduction.html> (last visited Jan. 3, 2013); *See also What is the Aarhus Convention?*, EUROPEAN COMMISSION, <http://ec.europa.eu/environment/aarhus/> (showing that the date the Convention was put into force was Oct. 30, 2001).

<sup>130</sup> DAVID HUNTER, ET AL., *supra* note 10, at 438.

<sup>131</sup> The Regional Environmental Center, The transposition of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (The Aarhus Convention) with the legislation of Kosovo, March 2006, *available at* <http://kos.rec.org/english/pdf/ReportEng.pdf>

<sup>132</sup> United Nations, Economic Commission for Europe, The Aarhus Convention: An Implementation Guide, (2000), <http://www.unece.org/fileadmin/DAM/env/pp/implementation%20guide/english/part1.pdf>.

<sup>133</sup> *Id.* at 17; *see also* Access to Information, UNECE: United Nations Economic Commission for Europe, <http://www.unece.org/env/pp/contentai.html> (“The information pillar covers both the ‘passive’ or reactive aspect of access to information, i.e. the obligation on public authorities to respond to public requests for information, and the ‘active’ aspect dealing with other obligations relating to providing environmental information, such as collection, updating, public dissemination and so on.”).

<sup>134</sup> United Nations, Economic Commission for Europe, The Aarhus Convention: An Implementation Guide, *supra* note 132, at 17; *see also* Access to Justice, UNECE: United Nations Economic Commission for Europe, <http://www.unece.org/env/pp/contentaj.html> (“aims to provide access to justice in three contexts: review procedures with respect to information requests review procedures with respect to specific (project-type) decisions which are subject to public participation requirements, and challenges to breaches of environmental law in general.”).

<sup>135</sup> *Status of Ratification*, UNECE: UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE, <http://www.unece.org/env/pp/ratification.html>.

<sup>136</sup> INTER-AMERICAN STRATEGY FOR THE PROMOTION OF PUBLIC PARTICIPATION IN DECISION-MAKING FOR SUSTAINABLE DEVELOPMENT 2 (Organization of American States, 2001), *available at* [http://www.oas.org/dsd/PDF\\_files/ispenglish.pdf](http://www.oas.org/dsd/PDF_files/ispenglish.pdf); *see also* DAVID HUNTER, ET AL., *supra* note 10, at 438.

<sup>137</sup> INTER-AMERICAN STRATEGY FOR THE PROMOTION OF PUBLIC PARTICIPATION IN DECISION-MAKING FOR SUSTAINABLE DEVELOPMENT, *supra* note 136, at 13-14.

implementing the recommendations and using the format of Aarhus to open the modes of communication between government and civil society.<sup>138</sup>

Negotiations on a regional instrument to harmonize the interpretation and implementation of Principle 10 were to take place at the recent Rio+20 Conference, to be modeled after the Aarhus Convention.<sup>139</sup> The OAS was looking for commitments from the Latin American countries to fully implement public participation into their domestic laws.<sup>140</sup> The OAS emphasized how public participation is necessary “for the greater involvement of all sectors of society in decision-making on sustainable development.<sup>141</sup> They based their reasoning on the right of those who may be affected to have a say in determining their environment’s future.<sup>142</sup> Legitimacy of the decision-making process depends on the participation “the governed must have and perceive that they have a voice in the governance through representation, deliberation, or some other form of action.”<sup>143</sup>

The many examples of sustainable development being prioritized in our international governance proves the importance and necessity of implementing the three pillars in order to preserve our planet for present and future generations. Although the free trade agreements fuel economic growth, they need to include avenues for public participation in environmental decisions, access to information, and access to justice, because otherwise the growth of trade will not occur sustainably.

To achieve sustainable development within trade agreements, the voices of the people being affected must be heard in order to understand what the communities need to continue surviving. The indigenous communities need to be allowed to publicly participate in order to understand how development will affect their environment, their health, their community, and their economy. There needs to be a perfect balance amongst the three objectives of sustainable development. The indigenous people need a clean environment and access to their natural resources, access to environmental information, and the ability to publicly participate in the process, and therefore have access to justice for the protection of their human rights.

#### **IV. Free Trade Impacts on the Environment and the Indigenous People of Central America**

Minority communities, such as the indigenous people’s communities, can be said to have access to limited resources and political power, and therefore, little

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<sup>138</sup> *Id.* at 14.

<sup>139</sup> *OAS Dialogue Discusses Possibility of Aarhus Convention for the Americas*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT, <http://iarc.iisd.org/news/oas-dialogue-discusses-possibility-of-aarhus-convention-for-the-americas/> (last visited Nov. 15, 2012).

<sup>140</sup> *Id.*

<sup>141</sup> INTER-AMERICAN STRATEGY FOR THE PROMOTION OF PUBLIC PARTICIPATION IN DECISION-MAKING FOR SUSTAINABLE DEVELOPMENT 2 (Organization of American States, 2001), pg. X, available at [http://www.oas.org/dsd/PDF\\_files/ispenglish.pdf](http://www.oas.org/dsd/PDF_files/ispenglish.pdf).

<sup>142</sup> ANTON & SHELTON, *supra* note 2, at 381.

<sup>143</sup> *Id.*

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influence on the decision-making processes. Typically, there is “unequal bargaining power” between indigenous people and states, which requires particular care in ensuring full and fair compliance with each element of free and prior informed consent in each phase of the planning, development, implementation of development, and other activities affecting indigenous lands.<sup>144</sup> With the spread of globalization, the indigenous people have become more threatened by increased development.<sup>145</sup> Globalization can be described as “the process by which, over the last two decades, the world has become highly interconnected economically and culturally at a faster pace than any time since 1914.”<sup>146</sup> Globalization spreads market-based systems over the globe, expands information and communication, and increases international trade.<sup>147</sup>

The rising presence of the World Trade Organization (“WTO”) brings concerns about how a more liberalized economy might impact human rights.<sup>148</sup> Arguments are made for and against globalization. Proponents of globalization say these trade agreements bring “higher levels of trade, prosperity, and lift millions of people out of poverty.”<sup>149</sup> Economic growth alleviates poverty and maximizes wealth, which allows countries to have the funds needed to protect the environment and the human rights of its peoples.<sup>150</sup> It is important for developing countries to grow economically and create the resources needed to preserve and protect of the environment, fight poverty and disease, and incorporate avenues for environmental justice.<sup>151</sup>

However, globalization can also deplete natural resources, displace communities, degrade the environment, and threaten the survival of indigenous peoples.<sup>152</sup> Some people perceive globalization as an assault on their “local and national values, their sense of identity and traditional ways of life, and absorption into a larger global system dominated by impersonal economic forces and institutions

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<sup>144</sup> COULTER, *supra* note 6, at 2.

<sup>145</sup> UNICEF, Naomi Kipuri, State of the World's Indigenous' Peoples, Chapter 2: Culture, [http://www.un.org/esa/socdev/unpfii/documents/SOWIP\\_chapter2.pdf](http://www.un.org/esa/socdev/unpfii/documents/SOWIP_chapter2.pdf).

<sup>146</sup> Coll, *supra* note 8, at 467.

<sup>147</sup> *Id.* at 467-68.

<sup>148</sup> HANNUM, ET AL., *supra* note 1, at 454.

<sup>149</sup> Coll, *supra* note 8, at 464; DAVID HUNTER, ET AL., *supra* note 10, at 207-08 (citing JAMES GUSTAVE SPETH, RED SKY AT MORNING: AMERICA AND THE CRISIS OF THE GLOBAL ENVIRONMENT 142-146 (Yale Univ. Press, 2nd ed. 2005)) (“...factors that suggest globalization may help environmental quality: 1) global corporations can help spread the most advanced environmental management technology and techniques; 2) the strengthening of capacities in government to manage economic affairs can have spillover effects, strengthening environmental management; 3) globalization can lead to increased incomes, which in turn can lead to governmental revenues for environmental and social programs and to increased public demand for environmental amenity; and 4) increasing international trade in such resources as timber could lead to higher prices, more secure property rights, and larger investments in sustaining forest resources.”).

<sup>150</sup> DAVID HUNTER, ET AL., *supra* note 10, at 1236.

<sup>151</sup> *Id.* at 1237.

<sup>152</sup> See Jeanne M. Woods, *The Evolution of Corporate Accountability for Human Rights Abuses: A Human Rights Framework for Corporate Accountability*, 17 ILSA J. INT'L. & COMP. L. 321, 329 (2011) (extractive industries are one of the most notorious violators of human rights, they are inherently unsustainable).



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they do not trust and over which they have little control.”<sup>153</sup> They maintain that free trade erases individual and communal identities rooted in their cultural values and subsistence living replacing them with the U.S. capitalistic version of consumerism, making this situation one of the most disturbing aspects of globalization.<sup>154</sup> Indigenous people are a unique culture and “do not necessarily reap the benefits” of development in technology associated with globalization.<sup>155</sup>

Some critics argue that “free trade” only benefits multinational corporations and local leaders, while it harms a large number of people and their economic, social, cultural, and environmental rights.<sup>156</sup> Opponents of free trade argue that free trade threatens the environment, while some proponents of free trade assert that environmental protection threatens free trade.<sup>157</sup> Many environmentalists view trade liberalization as causing higher consumption of our natural resources and increased pollution due to the increased production of goods and services.<sup>158</sup>

At the same time, globalization has brought a wave of economic growth, reducing poverty for millions of people in countries such as China, India, and Vietnam.<sup>159</sup> Trade facilitates the transfer of technology, which improves efficiency, innovation, and can reduce negative impacts on the environment.<sup>160</sup> Additionally, it creates a higher level of “global consciousness,” which brings attention to the world’s poor communities, environmental degradation, and “exploitation of the earth’s resources beyond the point of social and environmental sustainability.”<sup>161</sup> Free trade can enhance the exchange of democratic ideas on environmentalism, which can help facilitate further protection of the environment.<sup>162</sup> However, some still say that the gap between the rich and the poor is widening and that human rights are being denied to hundreds of millions

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<sup>153</sup> Coll, *supra* note 8, at 466.

<sup>154</sup> *Id.* at 471.

<sup>155</sup> Jasmine Bruce, *Highly Affected, Rarely Considered: Indigenous Youth*, COORDINATING COMMITTEE FOR INTERNATIONAL VOLUNTARY SERVICE, 87, [http://ccivs.org/New-SiteCCSVI/institutions/jpc-youth/youth-open-forum/Section\\_for\\_Youth/Resources\\_and\\_tools/Other\\_documents\\_on\\_youth/OXFAM\\_INTERNATIONAL\\_YOUTH\\_PARLIAMENT/Chapter3\\_Indigenous\\_Youth.pdf](http://ccivs.org/New-SiteCCSVI/institutions/jpc-youth/youth-open-forum/Section_for_Youth/Resources_and_tools/Other_documents_on_youth/OXFAM_INTERNATIONAL_YOUTH_PARLIAMENT/Chapter3_Indigenous_Youth.pdf).

<sup>156</sup> Coll, *supra* note 8, at 464-65.

<sup>157</sup> HUNTER, ET AL., *supra* note 10, at 1248.

<sup>158</sup> Stephen J. Powell & Patricia C. Perez, *Global Laws, Local Lives: Impact of New Regionalism on Human Rights Compliance*, 17 BUFF. HUM. RTS. L. REV. 117, 136 (2011); HUNTER, ET AL., *supra* note 10, at 207 (citing JAMES GUSTAVE SPETH, *RED SKY AT MORNING: AMERICA AND THE CRISIS OF THE GLOBAL ENVIRONMENT* 142-146 (Yale Univ. Press, 2nd ed. 2005)) (“Nine reasons that globalization can exacerbate environmental problems: 1) an expansion of environmentally destructive growth; 2) a decrease in the ability of national governments to regulate and otherwise cope with environmental challenges; 3) an increase in corporate power and reach; 4) the stimulation of particular sectors like transportation and energy that have largely negative environmental side effects; 5) the increased likelihood of economic crises; 6) the commodification of resources such as water and the decline of traditional local controls on resource use; 7) the spatial separation of action and impact from responsibility; 8) the further ascend of the growth imperative; and 9) the rapid spread of invasive species and the resulting biological homogenization.”).

<sup>159</sup> Coll, *supra* note 8, at 468.

<sup>160</sup> HUNTER, ET AL., *supra* note 10, at 1239.

<sup>161</sup> Coll, *supra* note 8, at 469.

<sup>162</sup> HUNTER ET AL., *supra* note 10, at 1238.

of people.<sup>163</sup> Incorporating the principle of sustainable development into free trade agreements will play an integral role in protecting the environment and human rights of the indigenous peoples.

## V. History of Free Trade and the North and Central American Free Trade Agreements

Economic expansion is an effect of free trade agreements<sup>164</sup> and is one of the three pillars of sustainable development.<sup>165</sup> Evidently, eliminating tariffs and trade barriers, and boosting the profits of emerging economies, are accomplishing this pillar.<sup>166</sup> When countries become more prosperous, standards of living are raised, and this increases energy consumption and the need for raw materials.<sup>167</sup> Free trade is necessary for innovation because it opens borders and ideas and information are exchanged. Competition is the best incentive to innovate; the challenge of producing similar products and services motivates businesses to develop new technologies and better methods of production.<sup>168</sup>

### A. WTO and GATT

After World War II, there was a strong desire to get rid of protectionist trade policies so that western-based multinational corporations could penetrate and open foreign markets, and expand their global reach.<sup>169</sup> Global financial and trade reforms were implemented which lead to the creation of the International Monetary Fund, the International Bank for Reconstruction (“the World Bank”), and the General Agreement on Tariffs and Trade (“GATT”).<sup>170</sup> The GATT, a

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<sup>163</sup> HANNUM ET AL., *supra* note 1, at 455 (“According to the U.N. Human Development Report, in 1960 the income gap between the first of the world’s people living in the poorest countries and the fifth living in the richest countries was 30 to 1. . . In 2005 the gap widened to 50 to 1.”); HUNTER ET AL., *supra* note 10, at 1238.

<sup>164</sup> See Coll, *supra* note 8, at 464

<sup>165</sup> HUNTER ET AL., *supra* note 10 at 200.

<sup>166</sup> Lori Ann Loracko, *In an Increasingly Globalized Economy, Free Trade is More Important than Ever*, FORBES, <http://www.forbes.com/sites/realspin/2012/11/15/in-an-increasingly-globalized-economy-free-trade-is-more-important-than-ever/> (last visited Nov. 15, 2012) (“Austan Goolsbee, former Director of the President’s Council of Economic Advisers and an Economics Professor at the University of Chicago’s Booth School of Business, says this ‘boom in economic participation is because of the expansion of free trade. It is not only access to the U.S., but it is also arguably the single most important thing for the development of emerging economies,’ he said. ‘The ability to export on trade has been a central pillar for bringing a billion people out of poverty in the last 15 years. China and India have seen a huge boom in development, moving up from poor countries to middle-income. Historically, free trade is fundamental for innovation. Countries that trade are more open outside of their borders. They are open to new ideas, which spark innovation and economic growth.’”).

<sup>167</sup> *Id.*

<sup>168</sup> Ana I. Eiras, *Why America Needs to Support Free Trade*, THE HERITAGE FOUNDATION (May 24, 2004), <http://www.heritage.org/research/reports/2004/05/why-america-needs-to-support-free-trade>.

<sup>169</sup> Woods, *supra* note 152, at 326.

<sup>170</sup> *Id.*; HUNTER ET AL., *supra* note 10, at 1236.

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free trade regime, was created to eliminate trade barriers and protectionist policies.<sup>171</sup>

The GATT was established during the United Nations Conference on Trade and operated between 1948 and 1994, prior to the creation of the WTO in 1995.<sup>172</sup> The underlying diplomatic objective of the GATT was to enhance international security and foster political ties.<sup>173</sup> In addition, the GATT focused “reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce.”<sup>174</sup>

As a result of a series of trade negotiations between the 125 countries that participated in the “Uruguay Round” in December 1993, the WTO became the legal and institutional framework for the multilateral trading system.<sup>175</sup> It is the only “international organization dealing with global rules of trade between nations. Its main function is to ensure that trade flows as smoothly, predictably, and freely as possible.”<sup>176</sup> The WTO was established by the Marrakesh Agreement and consists *inter alia* of the GATT 1994, the Uruguay Round Protocol to the GATT 1947, and various separate Uruguay Round Agreements, such as the sanitary and phytosanitary measures and the technical barriers to trade.<sup>177</sup> The revised GATT now serves as the principal agreement on trade in goods.<sup>178</sup>

The Preamble to the Marrakesh Agreement recognizes that the promotion of trade and economic growth should adhere to the principle of sustainable development by seeking to preserve and protect the environment and improve living standards for all people.<sup>179</sup> “The objective of trade system is not free trade as such, but rather ensuring full employment, optimal use of the world’s resources, and sustainable development.”<sup>180</sup> In an effort to expand trade by eliminating barriers, free trade agreements began to flourish as part of the process of globalization.<sup>181</sup>

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<sup>171</sup> See General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 188 [hereinafter GATT].

<sup>172</sup> Woods, *supra* note 152, at 326; see Marrakesh Agreement Establishing the World Trade Organization April 15, 1994, 1867 U.N.T.S. 154-86, available at [http://www.wto.org/english/docs\\_e/legal\\_e/04-wto\\_e.htm](http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm).

<sup>173</sup> HUNTER ET AL., *supra* note 10, at 1256.

<sup>174</sup> GATT, *supra* note 171, at 196.

<sup>175</sup> HUNTER ET AL., *supra* note 10, at 1257.

<sup>176</sup> World Trade Organization, *WTO-In Brief*, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/thewto\\_e/whatis\\_e/inbrief\\_e/inbr00\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr00_e.htm) (last visited Apr. 12, 2012).

<sup>177</sup> HUNTER ET AL., *supra* note 10, at 1259; *Understanding the WTO*, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact4\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm) (last visited Apr. 12, 2012).

<sup>178</sup> *WTO-In Brief*, *supra* note 176.

<sup>179</sup> See Marrakesh Agreement Establishing the World Trade Organization April 15, 1994, 1867 U.N.T.S. 154, available at [http://www.wto.org/english/docs\\_e/legal\\_e/04-wto\\_e.htm](http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm) [hereinafter Marrakesh].

<sup>180</sup> HANNUM ET AL., *supra* note 1, at 457.

<sup>181</sup> See Coll, *supra* note 8, at 461.

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This expansion of trade caused the Americas to discuss a free trade agreement that would eliminate barriers across all the countries of the Americas.<sup>182</sup> Former U.S. President Ronald Reagan pictured a free trade agreement that stretched from “Alaska to Tierra del Fuego,” but the first to “formally broach the idea” was former U.S. President Bill Clinton at the First Summit of the Americas.<sup>183</sup> A Free Trade Agreement of the Americas (“FTAA”) has been in negotiations for over a decade.<sup>184</sup> Throughout this negotiation process, two smaller regional free trade agreements were developed: NAFTA and CAFTA-DR.<sup>185</sup> The purpose of these agreements is to eliminate tariffs and other trade barriers among the parties by opening the markets of the signatory countries.<sup>186</sup> “NAFTA served as the model for CAFTA-DR,” and both are viewed as steps toward a future FTAA.<sup>187</sup> Therefore, in order to discuss CAFTA-DR, we must have a thorough understanding of how NAFTA developed and the main provisions that were created.

### B. NAFTA

Although main goals of Free Trade Agreement (“FTA”) are economic in nature, NAFTA negotiations prompted what may be the “first major public debate on the relationship of trade to environmental issues.”<sup>188</sup> Environmentalists were concerned that free trade would weaken environmental protection and lead to a “race to the bottom” in environmental standards.<sup>189</sup> The U.S. environmental community recognized that Mexico’s environmental enforcement was weak and their laws were more permissive.<sup>190</sup> There was fear that U.S. and Canadian industries would relocate to Mexico, creating a “pollution haven” in a country that would be the easiest to pollute and where they could get away with it.<sup>191</sup>

NAFTA became a key campaign issue for the 1992 presidential election but negotiations stalled because it became clear that NAFTA would not pass “without support from some elements of the environmental community.”<sup>192</sup> “[Bill] Clinton, once elected, refused to sign legislation implementing NAFTA without [a] supplemental environmental ‘side agreement. . .’”<sup>193</sup> Therefore, the North American Agreement for Environmental Cooperation (“NAAEC”) surfaced as

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<sup>182</sup> Hopkins, *supra* note 14, at 385.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *See id.* at 385-86.

<sup>187</sup> Hopkins, *supra* note 14, at 386.

<sup>188</sup> Howard Mann, *NAFTA and the Environment: Lessons for the Future*, 13 TUL. ENVTL. L.J. 387, 387 (2000); Hopkins, *supra* note 14, at 386.

<sup>189</sup> Hopkins, *supra* note 14, at 387.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* (quoting KEVIN GALLAGHER, *FREE TRADE AND THE ENVIRONMENT: MEXICO, NAFTA, AND BEYOND*, 3-7 (Stanford Law and Politics, 2004)).

<sup>192</sup> *Id.* at 386-87.

<sup>193</sup> *Id.* at 387.

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the environmental side agreement created to complement NAFTA.<sup>194</sup> It was designed to “counteract the potential adverse environmental effects of liberalized trade.”<sup>195</sup> The preamble of the NAAEC affirms that the parties recognize “the importance of the conservation, protection and enhancement of the environment” and “the interrelationships of their environments.”<sup>196</sup> Additionally, the parties are obligated to “ensure that its laws and regulations provide for high levels of environmental protection.”<sup>197</sup>

One of the main purposes of the NAAEC is to “promote transparency and public participation in the development of environmental laws, regulations, and policies.”<sup>198</sup> This agreement is seen as a highly sophisticated institutional mechanism targeting environmental problems related to globalization and the liberalization of trade.<sup>199</sup> The parties to the NAAEC created an international organization, the Commission for Environmental Cooperation of North America (“CEC”), with the objective to “facilitate cooperation and public participation and foster conservation, protection, and enhancement of the North American environment.”<sup>200</sup>

One of the NAAEC's most visible features has been the citizens' submissions process, entitled Submission for Enforcement Matters, which is provided for in Articles 14 and 15. This process allows any person or non-governmental organization to “bring the facts to light” by filling out a petition with the Secretariat of the CEC concerning an NAAEC party's failure to enforce environmental laws.<sup>201</sup>

The Submission for Enforcement Matters process has been controversial since its inception. Environmental groups have stated that the citizen submission provisions under the process are “pure rhetoric.”<sup>202</sup> At the same time, others have described the process as a useful tool in bringing attention to the non-enforcement of environmental laws and giving citizens the opportunity to help remedy the situation.<sup>203</sup> A significant amount of literature has been produced on this topic since the late 1990s, suggesting the process needs improvement. The identified flaws are still present over a decade after the initial criticism. The flaws will be discussed in greater detail under the CAFTA-DR and NAFTA submissions below.

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<sup>194</sup> See North American Agreement on Environmental Cooperation U.S.-Can.-Mex., Sept. 14, 1993, 32 I.L.M. 1482-83 [hereinafter NAAEC].

<sup>195</sup> Tseming Yang, *The Effectiveness of the NAFTA Environmental Side Agreement's Citizen Submission Process: A Case Study of Metales Y Derivados*, 76 U. COLO. L. REV. 443, 443 (2005).

<sup>196</sup> NAAEC, *supra* note 194, at 1483; Hopkins, *supra* note 14, at 388.

<sup>197</sup> NAAEC, *supra* note 194, at 1483.

<sup>198</sup> NAAEC, *supra* note 194, at 1482.

<sup>199</sup> Yang, *supra* note 195.

<sup>200</sup> NAAEC, *supra* note 194 at 1485.

<sup>201</sup> *Bringing the Facts to Light: A Guide to Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, COMMISSION FOR ENVIRONMENTAL COOPERATION, 1 (2000), available at [http://www.cec.org/Storage/41/3331\\_Bringing%20the%20Facts\\_en.pdf](http://www.cec.org/Storage/41/3331_Bringing%20the%20Facts_en.pdf).

<sup>202</sup> Hopkins, *supra* note 14, at 392.

<sup>203</sup> See Paul Stanton Kibel, *Awkward Evolution: Citizen Enforcement at the North America Environmental Commission*, 32 ENV. L. REP. 10769, 10770 (2002).

## C. CAFTA-DR

On January 1, 2006 CAFTA-DR took effect for all signatories except Costa Rica.<sup>204</sup> All of the “signatory countries faced strong internal opposition to the agreement.”<sup>205</sup> In El Salvador, the protestors interfered with the congressional debate and delayed the vote on CAFTA-DR for two days.<sup>206</sup> In Honduras, thousands of protestors set up highway blockades that stopped cross-country commerce.<sup>207</sup> “The protesters invaded the national assembly and, once the agreement was ratified, broke into the building, vandalizing, looting, and smashing the windows.”<sup>208</sup> In Guatemala, after CAFTA-DR was ratified, police clashed with protestors on the streets surrounding the Guatemalan Congress, injuring more than fifty protestors.<sup>209</sup> In Costa Rica, protestors throughout the country marched on San Jose in front of the Assembly trying to persuade their representatives not to ratify CAFTA-DR due to the harmful effects of free trade agreements on other countries, especially NAFTA's effects on Mexican agriculture.<sup>210</sup> The strong opposition to CAFTA-DR demonstrated the continuing resistance to free trade among the various sectors of society.<sup>211</sup> After much disagreement, the Costa Rican legislature officially ratified CAFTA-DR and it entered into force for Costa Rica on January 1, 2009.<sup>212</sup>

The seven members of this agreement include six developing countries: Nicaragua, El Salvador, Costa Rica, Guatemala, Honduras, and the Dominican Republic, and one economic giant, the U.S.<sup>213</sup> It is referred to as “a modest agreement between a whale and six minnows.”<sup>214</sup> The objectives of CAFTA-DR are to eliminate tariffs and trade barriers, open markets, promote transparency, and expand regional opportunities for the member countries' workers, manufacturers, consumers, farmers, ranchers, and service providers.<sup>215</sup> By establishing the agreement, trade and investments are facilitated among the seven countries

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<sup>204</sup> Paulette Stenzel, *Free Trade and Sustainability Through the Lens of Nicaragua: How CAFTA-DR Should be Amended to Promote the Triple Bottom Line*, 34 WM. & MARY ENVTL. L. & POL'Y REV. 653, 656-57 (2010).

<sup>205</sup> Hopkins, *supra* note 14, at 391.

<sup>206</sup> *Id.* at 391-92.

<sup>207</sup> *Id.* at 392.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> Coll, *supra* note 8, at 488.

<sup>211</sup> *Id.* at 465.

<sup>212</sup> *Id.* at 462-63.

<sup>213</sup> *Id.* at 461.

<sup>214</sup> Hopkins, *supra* note 14, at 391.

<sup>215</sup> Dominican Republic-Central America Free Trade Agreement, U.S.-Guat.-El Sal.-Hond.-Nicar.-Costa Rica-Dom. Rep., Preamble, Aug. 5, 2004, 19 U.S.C. § 4001 et seq., available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text> [hereinafter CAFTA-DR].

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and furthering integration amongst the region.<sup>216</sup> Central America and the Dominican Republic represent the third largest U.S. export market in Latin America, behind Mexico and Brazil.<sup>217</sup> In 2009, U.S. exports to CAFTA-DR countries were valued at \$19.5 billion.<sup>218</sup> Combined total two-way trade in 2009 between CAFTA-DR countries was \$37.9 billion.<sup>219</sup>

Similar to NAFTA, much of the public debate focused on how CAFTA-DR would affect the environment.<sup>220</sup> To some extent, CAFTA-DR was a victory for the environment because it is the first free trade agreement to include an environmental chapter within its text under Article 17.<sup>221</sup> CAFTA-DR took NAFTA's public submissions mechanism allowing citizens of CAFTA-DR countries to "file a submission *asserting* that a Party is *failing to effectively enforce its environmental laws*," a step further by incorporating both environmental and trade provisions simultaneously in one text.<sup>222</sup>

CAFTA-DR provisions do not require countries to maintain and effectively enforce minimum environmental standards; the environmental requirements are merely aspirational.<sup>223</sup> Various groups that opposed CAFTA-DR suggested that U.S. companies should have been required to abide by U.S. environmental laws when operating in other CAFTA-DR countries.<sup>224</sup> Central America faces serious environmental challenges that jeopardize sustainable development.<sup>225</sup> Article 17.1 of CAFTA-DR leaves environmental protection at the discretion of each individual party.<sup>226</sup> Each party has the right "to establish its *own* levels of domestic environmental protection and environmental development policies. . . each [p]arty shall ensure that its laws and policies provide for and encourage high levels of environmental protection, and shall strive to continue to improve those laws and policies."<sup>227</sup>

On February 18th, 2005, at the OAS, the Environmental Cooperation Agreement ("ECA") and the Agreement Establishing the Secretariat for Environmental

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<sup>216</sup> CAFTA-DR (*Dominican Republic-Central America FTA*), OFF. OF THE U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-agreements/free-trade-agreements/CAFTA-DR-dominican-republic-central-america-fta> (last visited Oct. 2, 2013).

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> Hopkins, *supra* note 14, at 392.

<sup>221</sup> Hopkins, *supra* note 14, at 392.

<sup>222</sup> Hopkins, *supra* note 14, at 393, 406.

<sup>223</sup> Paulette Stenzel, *CAFTA: Its Origins and Its Provisions*, GLOBAL EDGE BUSINESS REVIEW, vol. 2, no. 2, 2008, at 1, 2.

<sup>224</sup> *Id.*

<sup>225</sup> Center for International Environmental Law, *Oppose the Central American Free Trade Agreement (CAFTA) – Recently Released Text Falls Short on Environment*, PUBLIC CITIZEN 1 (2004), <https://www.citizen.org/documents/EnviroCAFTACongLetter1.pdf>.

<sup>226</sup> CAFTA-DR, *supra* note 215, at art. 17.1.

<sup>227</sup> *Id.* (emphasis added).

## CAFTA-DR's Citizen Submission Process

Matters were signed by the Parties to CAFTA-DR.<sup>228</sup> The OAS exists as the Inter-American System, and consists of all of the parties to CAFTA-DR.<sup>229</sup> The American Declaration on the Rights and Duties of Man gave definition to the OAS proclaiming the commitment to human rights as one of its basic principles.<sup>230</sup>

The Parties to CAFTA-DR recognized the importance of identifying and enumerating environmental provisions in order to further promote sustainable development. The preamble provides that the Parties are to “implement this [a]greement in a manner consistent with environmental protection and conservation, promote sustainable development, and strengthen their cooperation on environmental matters; protect and preserve the environment and enhance the means for doing so, including through the conservation of natural resources in their respective territories.”<sup>231</sup>

## VI. Citizen Submission Process of NAFTA and CAFTA-DR

Recent free trade agreements, specifically NAFTA and CAFTA-DR, have incorporated a “citizen submission” mechanism, which allows for public participation.<sup>232</sup> Since NAFTA's enactment, all free trade agreements signed between the U.S. and Latin America have environmental provisions based on the NAAEC and contain a citizen submission process.<sup>233</sup> These agreements include CAFTA-DR, PTPA, and the current draft of the CTPA.<sup>234</sup> Additionally, all of these agreements were signed between Latin American nations that the International Monetary Fund describes as “emerging” or “developing,” and the U.S., a major and much more advanced economy to the north.<sup>235</sup> The environmental chapters are designed to help ensure effective enforcement of environmental laws.<sup>236</sup> The parties agree that “[w]ith the aim of achieving high levels of environmental protection and compliance with its environmental laws and regulations, each Party

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<sup>228</sup> *Agreement Establishing A Secretariat for Environmental Matters Under the Dominican Republic – Central America – United States Free Trade Agreement*, SECRETARIAT FOR ENVIRONMENTAL MATTERS, 1 [http://www.saa-sem.org/images/agreement\\_establishing\\_sem.pdf](http://www.saa-sem.org/images/agreement_establishing_sem.pdf) (last visited Sept., 21, 2013) [hereinafter SEM].

<sup>229</sup> ANTON & SHELTON, *supra* note 2, at 253.

<sup>230</sup> *Id.* (Later, the OAS created the Inter-American Commission of Human Rights with a “mandate to furthering respect for human rights among member states.” When the American Convention of Human Rights entered into force, it added duties to the Commission to monitor compliance with the Convention. The Convention also created the Inter-American Court of Human Rights).

<sup>231</sup> CAFTA-DR, *supra* note 215, at pmb1.

<sup>232</sup> Hopkins, *supra* note 14, at 384.

<sup>233</sup> Travis A. Brooks, Comment, *Towards Promises Unfulfilled: Applying Sixteen Years of Trade and Environmental Lessons to the Pending U.S.- Columbia Trade Promotion Agreement*, 23 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 339, 341-42 (2011).

<sup>234</sup> *Id.* at 342.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*



## CAFTA-DR's Citizen Submission Process

shall effectively enforce its environmental laws and regulations through appropriate governmental action. . . .”<sup>237</sup>

The agreement's main objectives are to “foster the protection and improvement of the environment in the territories of Parties for the well-being of present and future generations” and to “promote transparency and public participation in the development of environmental laws, regulations, and policies.”<sup>238</sup> The NAAEC is the first environmental agreement that establishes a procedure which allows individuals, organizations, and businesses to file a complaint about a “state's failure to enforce its environmental law.”<sup>239</sup> It contains institutional provisions for public participation by creating the Commission for Environmental Cooperation (“CEC”).<sup>240</sup> The citizen submission process recognizes the importance of public participation to enhance the legitimacy of the NAAEC and CAFTA-DR.<sup>241</sup> The citizen submission process has been characterized as a “fire alarm” review institution because 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>242</sup> By allowing the public to directly participate in the process, it gives them an effective voice in the outcome; but the citizen submission process has some identified flaws, which are discussed further below.

### A. NAFTA Citizen Submission Framework

In order to carry out the objectives of the NAAEC, the parties created an international organization, the CEC, to “facilitate cooperation and public participation and foster conservation, protection, and enhancement of the North American environment, in the context of increasing economic, trade, and social links among Canada, Mexico and the United States.”<sup>243</sup> The CEC accomplishes its work through three principal components: the Council, the Secretariat, and the Joint Public Advisory Committee (“JPAC”).<sup>244</sup>

The Council is the governing body of the CEC and is composed of environmental ministers from its three signatory parties: the U.S. Environmental Protection Agency (“EPA”) and the environmental ministers of Canada and Mexico.<sup>245</sup> Overall responsibility for implementation of the Agreement is given to the Coun-

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<sup>237</sup> NAAEC, *supra* note 194, at art. 5(1).

<sup>238</sup> *Id.* at art. 1(a), (h).

<sup>239</sup> Anton & Shelton, *supra* note 2, at 382; NAAEC, *supra* note 194, at pt. 3.

<sup>240</sup> NAAEC, *supra* note 194.

<sup>241</sup> David L. Markell, *The North American Commission for Environmental Cooperation After Ten Years: Lessons About Institutional Structure and Public Participation in Governance*, 26 LOY. L.A. INT'L & COMP. L. REV. 341, 351 (2004); Kal Raustiala, *Police Patrols & Fire Alarms in the NAAEC*, 26 LOY. L.A. INT'L & COMP. L. REV. 389, 409 (2004).

<sup>242</sup> Markell, *supra* note 241, at 350.

<sup>243</sup> NAAEC, *supra* note 194, at pt. 3; *Bringing the Facts to Light: A Guide to Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, COMM'N FOR ENVTL. COOPERATION (2000), [http://www.cec.org/Storage/41/3331\\_Bringing%20the%20Facts\\_en.pdf](http://www.cec.org/Storage/41/3331_Bringing%20the%20Facts_en.pdf).

<sup>244</sup> COMM'N FOR ENVTL. COOPERATION, *supra* note 243, at 2; NAAEC, *supra* note 194, at art. 8(2).

<sup>245</sup> COMM'N FOR ENVTL. COOPERATION, *supra* note 243, at 2; Markell, *supra* note 241, at 345.

## CAFTA-DR's Citizen Submission Process

cil.<sup>246</sup> It oversees the Secretariat and retains final approval authority of Secretariat generated program plans and recommendations.<sup>247</sup>

The Secretariat provides technical and operational support to the Council and is empowered to prepare reports “for the Council on any matter within the scope of the annual program. . .and on any other environmental matter related to the cooperative functions of this Agreement. . .”<sup>248</sup> As long as the Secretariat notifies the Council, it may proceed within thirty days of such notification, unless the Council objects by a two-thirds vote to the preparation of the report.<sup>249</sup>

JPAC is composed of fifteen members, five of which are appointed by the government of each country.<sup>250</sup> The members of JPAC are given the authority to “provide *advice* to the Council on any matter within the scope of this Agreement.”<sup>251</sup> Also, they may assist the Secretariat by providing “relevant technical, scientific or other information. . .for purposes of developing a factual record under Article 15.”<sup>252</sup> JPAC represents the North American Community by helping ensure that public concerns are communicated to the Council.<sup>253</sup>

Under Articles 14 and 15, the NAAEC provides a Submission on Enforcement Matters process in order to promote effective enforcement of domestic environmental legislation on behalf of the parties.<sup>254</sup> This allows citizens of the North American countries to “bring the facts to light” by allowing any person or non-governmental organization to submit to the Secretariat written assertions that a party to the NAAEC is failing to enforce environmental laws.<sup>255</sup> The Secretariat is vested with considerable discretion in implementing the Submission for Enforcement Matters process.<sup>256</sup> The submission must satisfy the criteria under Article 14(1) in order to qualify for consideration by the Secretariat.<sup>257</sup> The Secretariat is required to find that the submission:

“a) is in writing in a language designated by that Party in a notification to the Secretariat; b) clearly identifies the person or organization making the submission; c) provides sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based; d) appears to be aimed at promoting enforcement rather than at harassing industry; e) indicates that the matter has

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<sup>246</sup> Markell, *supra* note 241, at 345.

<sup>247</sup> NAAEC, *supra* note 194, at art. 10, 15(2); Markell, *supra* note 241, at 345.

<sup>248</sup> NAAEC, *supra* note 194, at art. 13(1).

<sup>249</sup> *Id.*

<sup>250</sup> COMM'N FOR ENVTL. COOPERATION, Joint Public Advisory Committee (JPAC), [http://www.cec.org/Page.asp?PageID=1226&SiteNodeID=208&BL\\_ExpandID=567](http://www.cec.org/Page.asp?PageID=1226&SiteNodeID=208&BL_ExpandID=567) (last visited December 15, 2013)

<sup>251</sup> *Id.* at art. 16(4) (emphasis added).

<sup>252</sup> *Id.* at art. 16(5).

<sup>253</sup> COMM'N FOR ENVTL. COOPERATION, *supra* note 243, at 2; Markell, *supra* note 241, at 345.

<sup>254</sup> COMM'N FOR ENVTL. COOPERATION, *supra* note 243, at 1.

<sup>255</sup> NAAEC, *supra* note 194, at art. 14, 15; COMM'N FOR ENVTL. COOPERATION, *supra* note 243, at 1.

<sup>256</sup> Markell, *supra* note 241, at 346-47.

<sup>257</sup> NAAEC, *supra* note 194, at art. 14(1).

## CAFTA-DR's Citizen Submission Process

been communicated in writing to the relevant authorities of the Party and indicates the Party's response, if any; and f) is filed by a person or organization residing or established in the territory of a Party."<sup>258</sup>

If the Secretariat decides the submission does not meet the 14(1) requirements then it must dismiss it and allow thirty days to resubmit more information.<sup>259</sup>

Where the Secretariat determines that a submission does meet the criteria of Article 14(1), a determination must be made under Article 14(2) on whether the submission merits requesting a response from the Party.<sup>260</sup> The Secretariat is guided by whether: a) the submission alleges harm to the submitter; b) raises matters that, if studied, would further the goals of the Agreement; c) private remedies under the Party's law have been pursued; and d) the submission is drawn from mass media reports exclusively.<sup>261</sup> If a response is merited, the Secretariat will make a request to the Party by forwarding a copy of the submission and any supporting information.<sup>262</sup> The Party must respond within thirty days or in exceptional circumstances by notifying the Secretariat within sixty days indicating "whether the matter is the subject of a pending judicial or administrative proceeding, in which case the Secretariat shall proceed no further."<sup>263</sup> The Party is also encouraged to provide other information, such as whether there have been previous judicial or administrative proceedings and whether private remedies are available and have been pursued.<sup>264</sup>

Under Article 15(1), if the Secretariat finds the submission warrants developing a factual record, it must make a recommendation to the Council and provide reasoning.<sup>265</sup> The Secretariat must prepare a factual record if the Council instructs it to do so by a two-thirds vote.<sup>266</sup> In preparing the factual record, the Secretariat must consider information from the Party, and any other information that is publicly available, developed by experts, or submitted by the JPAC, any nongovernmental organization or person.<sup>267</sup> The Secretariat then submits the draft factual record to the Council and any Party may provide comments on its accuracy within 45 days, and these comments must be incorporated as appropriate.<sup>268</sup> Under Article 21(1)(a) the Secretariat may request additional information from the Party, which is necessary for the preparation of the factual record.<sup>269</sup> The factual record may be made public by a two-thirds vote of the Council.<sup>270</sup>

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<sup>258</sup> *Id.*

<sup>259</sup> COMM'N FOR ENVTL. COOPERATION, *supra* note 243, at 14.

<sup>260</sup> NAAEC, *supra* note 194, at art. 14(2).

<sup>261</sup> *Id.*; CAFTA-DR, *supra* note 215, at art. 17.7(2).

<sup>262</sup> NAAEC, *supra* note 194, at art. 14(2).

<sup>263</sup> *Id.* at art. 14(3).

<sup>264</sup> *Id.* at art. 14(3)(b).

<sup>265</sup> *Id.* at art. 15(1).

<sup>266</sup> *Id.* at art. 15(2).

<sup>267</sup> *Id.* at art. 15(4).

<sup>268</sup> *Id.* at art. 15(5), (6).

<sup>269</sup> *Id.* at art. 21(1)(a).

<sup>270</sup> *Id.* at art. 15(7).

## CAFTA-DR's Citizen Submission Process

### B. CAFTA-DR Citizen Submission Framework

Following NAFTA's lead, CAFTA-DR incorporated the same environmental provisions allowing citizens to bring a complaint if "environmental laws" are not being enforced.<sup>271</sup> Under the ECA of CAFTA-DR, the Parties agreed to "cooperate to protect, improve and conserve the environment, including natural resources."<sup>272</sup> In the ECA, the Parties recognized that "economic development, social development and environmental protection are interdependent, mutually-reinforcing factors in achieving sustainable development for the well-being of present and future generations."<sup>273</sup> The parties to CAFTA-DR recognized the importance of sustainable development and made sure to incorporate this principle into the ECA.

The provisions of the ECA established the Environmental Cooperation Commission ("ECC"), comprised of "high-level representatives from the relevant ministries or departments of each CAFTA-DR country".<sup>274</sup> Their duties include, "supervis[ing] the development, implementation and evaluation of the CAFTA-DR Environmental Cooperation Program."<sup>275</sup> They are responsible for "developing, and periodically revising and updating, a work program that reflects each Party's priorities for cooperative environmental programs, projects, and activities."<sup>276</sup> The ECC can provide guidance to the Secretariat on the goals of the agreement; the Secretariat can look to this guidance when considering a submission.<sup>277</sup>

The Environmental Affairs Council ("EAC") is also created by the ECA, and is comprised of cabinet-level or equivalent government officials.<sup>278</sup> The EAC meets annually to oversee and review the progress that is being made under Chapter 17 of CAFTA-DR.<sup>279</sup> A requirement of their annual meeting is that it includes a session devoted for members of the Council to meet with the public to discuss matters related to the ECA.<sup>280</sup> The Council is also required to "ensure a process for promoting public participation in its work, including by engaging in a dialogue with the public on those issues,"<sup>281</sup> and to "seek appropriate opportuni-

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<sup>271</sup> Hopkins, *supra* note 14, at 384.

<sup>272</sup> DEP'T OF SUSTAINABLE DEV., *Monitoring Progress of the Environmental Cooperation Agenda in the CAFTA-DR Countries*, ORG. OF AM. STATES, <http://www.oas.org/dsd/EnvironmentLaw/CAFTA-DR/DefaultCLP.htm> (last visited Oct. 2, 2013).

<sup>273</sup> *Environmental Cooperation Commission*, CAFTA-DR ENVTL. COOP., [http://www.caftadr-environment.org/left\\_menu/Environmental\\_cooperation\\_c.html](http://www.caftadr-environment.org/left_menu/Environmental_cooperation_c.html) (last visited Jan. 6, 2013).

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> CAFTA-DR, *supra* note 215, at art. 17.9(4).

<sup>277</sup> *Working Procedures for Submissions on Environmental Law Enforcement Matters under Chapter 17 of the Dominican Republic - Central America - United States Free Trade Agreement*, U.S. DEP'T OF STATE, 9.1(c), <http://www.state.gov/e/oes/eq/trade/caftadr/142684.htm> (last visited Dec. 3, 2013).

<sup>278</sup> CAFTA-DR, *supra* note 215, at art. 17.5(1).

<sup>279</sup> *Id.* at art. 17.5(2).

<sup>280</sup> *Id.*

<sup>281</sup> *Id.* at art. 17.5(4).

## CAFTA-DR's Citizen Submission Process

ties for the public to participate in the development and implementation of cooperative environmental activities, including through the ECA.”<sup>282</sup>

The EAC has the authority to issue decisions appointing additional assistance to the Secretariat.<sup>283</sup> The EAC has issued ten decisions appointing positions such as Environmental Experts, Legal Officer, Professional Staff, General Coordinator, and Technical Assistant.<sup>284</sup> These appointments suggest that the EAC understands and is budgeting the needs of the Secretariat in order to have an effective and efficient citizen submission process to protect the environment of Central America.

Under the ECA, the Secretariat for Environmental Matters (“SEM”) was created to carry out the functions set forth in CAFTA-DR articles 17.7 and 17.8.<sup>285</sup> The Secretariat operates under Chapter 17 of CAFTA-DR and the Agreement Establishing the Secretariat for Environmental Matters, which defines the Secretariat’s location, personnel structure, functions, and everything else related to the Secretariat’s institutional operations as specified in CAFTA-DR Chapter 17.<sup>286</sup>

The Secretariat’s guidance document, the “Secretariat for Environmental Matters Working Procedures,” is designed to “assist and orient citizens in regards to presenting submissions related to the enforcement of environmental laws in CAFTA-DR signature countries as well as to provide details on the different steps in the submission process and their corresponding timeframes.”<sup>287</sup> The SEM is required under articles 17.7 and 17.8 to consider public submissions on environmental law enforcement.<sup>288</sup> The Secretariat operates under the sole direction and supervision of the EAC.<sup>289</sup> The SEM consists of “a General Coordinator and his/her Technical Assistant, both of who are appointed by the EAC for a two-year term.”<sup>290</sup>

The citizen submission process under CAFTA-DR’s Chapter 17.7 and 17.8 allows “any person of a Party to file a submission asserting that a Party is failing to effectively enforce its environmental laws.<sup>291</sup> Such submissions shall be filed with a secretariat or other appropriate body that the Parties designate.”<sup>292</sup> A CAFTA-DR Submission must follow strict criteria in order to be considered by

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<sup>282</sup> *Id.* at art. 17.5(5).

<sup>283</sup> *Secretariat for Environmental Affairs*, CAFTA-DR ENVTL. COOP., [http://www.caftadr-environment.org/left\\_menu/secretariat.html](http://www.caftadr-environment.org/left_menu/secretariat.html) (last visited Jan. 6, 2013).

<sup>284</sup> *Environmental Affairs Council*, CAFTA-DR ENVTL. COOP., [http://www.caftadr-environment.org/left\\_menu/Environmental\\_affairs\\_council.html](http://www.caftadr-environment.org/left_menu/Environmental_affairs_council.html) (last visited Jan. 6, 2013).

<sup>285</sup> *What is the SEM?*, SECRETARIAT FOR ENVTL. MATTERS, [http://www.saa-sem.org/index.php?option=com\\_content&view=article&id=50&Itemid=97&lang=us](http://www.saa-sem.org/index.php?option=com_content&view=article&id=50&Itemid=97&lang=us) (last visited Nov. 17, 2012); see SECRETARIAT FOR ENVTL. MATTERS, *supra* note 228.

<sup>286</sup> *Legal Basis*, SECRETARIAT FOR ENVTL. MATTERS, [http://www.saa-sem.org/index.php?option=com\\_content&view=article&id=52&Itemid=61&lang=us](http://www.saa-sem.org/index.php?option=com_content&view=article&id=52&Itemid=61&lang=us) (last visited Nov. 17, 2012).

<sup>287</sup> *Id.*

<sup>288</sup> CAFTA-DR, *supra* note 215, at art. 17.7, 17.8; see also *What is the SEM?*, *supra* note 285.

<sup>289</sup> CAFTA-DR ENVTL. COOP., *Secretariat for Environmental Affairs*, *supra* note 283.

<sup>290</sup> *Id.*

<sup>291</sup> CAFTA-DR, *supra* note 215, at 17.7(1).

<sup>292</sup> *Id.*

### CAFTA-DR's Citizen Submission Process

the Secretariat and garner a response from the Party state and eventually reach the final goal of publishing a factual record.<sup>293</sup>

The requirements for a submission under CAFTA-DR are the same as those required by the NAAEC:

“a) Is in writing in a language designated by that Party in a notification to the Secretariat; b) clearly identifies the person or organization making the submission; c) provides sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based; d) appears to be aimed at promoting enforcement rather than at harassing industry; e) indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response, if any; and f) is filed by a person or organization residing or established in the territory of a Party.”<sup>294</sup>

If the Secretariat decides the submission does not meet the Chapter 17.7.2 requirement, then it must suspend review and allow time for resubmission, typically 30 days.<sup>295</sup>

Where the Secretariat determines that a submission meets the criteria of Chapter 17.7.2, a determination must be made under Chapter 17.7.4 on whether the submission merits requesting a response from the Party.<sup>296</sup> The Secretariat is guided by whether: a) the submission alleges harm to the submitter; b) raises matters that, if studied, would further the goals of the Agreement; c) private remedies under the Party's law have been pursued; and d) the submission is drawn from mass media reports exclusively.<sup>297</sup> If a response is merited, the Secretariat will make a request to the Party by forwarding a copy of the submissions and any supporting information.<sup>298</sup> The Party must respond within 45 days,<sup>299</sup> or, in exceptional circumstances, by notifying the Secretariat within 60 days indicating “whether the matter is the subject of a pending judicial or administrative proceeding, in which case the Secretariat shall proceed no further,” and provide any other information the Party wishes to submit.<sup>300</sup>

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<sup>293</sup> CAFTA-DR, *supra* note 215, at art. 17.7(2); U.S. DEP'T OF STATE, *supra* note 277, at 6.1-6.8.

<sup>294</sup> CAFTA-DR, *supra* note 215, at art. 17.7(2); NAAEC, *supra* note 194, at art. 14(1).

<sup>295</sup> CAFTA-DR, *supra* note 215, at art. 17.7(2) (Unlike NAFTA which has a specific provision for resubmitting, Chapter 17, does not contain this provision, however, this is the customary practice in the submissions that have occurred at SEM); U.S. DEP'T OF STATE, *supra* note 277, at 6.1-6.8.

<sup>296</sup> CAFTA-DR, *supra* note 215, at art. 17.7(4).

<sup>297</sup> *Id.* at art. 17.7(4)(a)-(d); NAAEC, *supra* note 194, at art. 14(2).

<sup>298</sup> *Id.* at art. 17.7(4); NAAEC, *supra* note 194, at art. 14(2).

<sup>299</sup> This is unlike NAAEC, which initially requires 30 days.

<sup>300</sup> CAFTA-DR, *supra* note 215, at art. 17.7(5)(a), (b) (i.e., “(i) whether the matter was previously the subject of a judicial or administrative proceeding; (ii) whether private remedies in connection with the matter are available to the person making the submission and whether they have been pursued; or (iii) information concerning relevant capacity-building activities under the ECA”); NAAEC, *supra* note 194, at art. 14(3).

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Chapter 17.8 governs the development of a factual record.<sup>301</sup> Under this chapter, if the Secretariat determines that the submission warrants the development of a factual record, it must make a recommendation to the Council and provide its reasons.<sup>302</sup> The Secretariat shall “prepare a factual record if the Council, by a vote of any Party, instructs it to do so.”<sup>303</sup> In preparing the factual record, the Secretariat shall consider information from the Party, and may consider other information that is “(a) publicly available; (b) submitted by interested persons; (c) submitted by national advisory or consultative committees; (d) developed by independent experts; or (e) developed under the EAC.”<sup>304</sup> The Secretariat then submits the draft factual record to the Council, any Party may provide comments within 45 days, and these comments must be incorporated as appropriate.<sup>305</sup> The Council may, “by a vote of any Party, make the final factual record publicly available, normally within 60 days following its submission.”<sup>306</sup>

Furthermore, provision 17.8.8 allows the Secretariat to provide recommendations to the ECC related to matters addressed in the factual record, including the “further development of the Party’s mechanisms for monitoring its environmental enforcement.”<sup>307</sup> Allowing recommendations for monitoring environmental enforcement after a factual record has been drafted is a new provision that is not seen under the NAAEC.<sup>308</sup> This is an important progression for creating effective remedies for environmental protection by assuring enforcement of environmental laws after the release of the factual record; otherwise there is a lack of a meaningful remedy.<sup>309</sup> These recommendations could be extremely useful and helpful in providing solutions for the submitter, especially since under NAAEC the Secretariat cannot provide any recommendations and there is no follow up actions.<sup>310</sup> This should be a practice that is undertaken by the Secretariat as often as possible. Environmental groups have agreed that this provision provides modest progress in procedural areas regarding the environment, but that ultimately

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<sup>301</sup> CAFTA-DR, *supra* note 215, at art. 17.8.

<sup>302</sup> CAFTA-DR, *supra* note 215, at art. 17.8(2); NAAEC, *supra* note 194, at art. 15(4).

<sup>303</sup> NAAEC, *supra* note 194, at art. 15(2) (The NAAEC is distinguished from CAFTA-DR in this regard because it allows the preparation of a factual record, only if the Council by a two-thirds vote instructs it to do so).

<sup>304</sup> CAFTA-DR, *supra* note 215, at art. 17.8(4).

<sup>305</sup> *Id.* at art. 17.8(5); NAAEC, *supra* note 194, at art. 15(5), (6).

<sup>306</sup> CAFTA-DR, *supra* note 215, at art. 17.8(7); NAAEC, *supra* note 194, at art. 15(7) (This provision is different from NAFTA which only allows the factual record to be publicly available by the Council’s 2/3 vote).

<sup>307</sup> CAFTA-DR, *supra* note 215, at art. 17.8(8).

<sup>308</sup> Raustiala, *supra* note 241, at 397; *Lessons Learned: Citizen Submissions Under Article 14 and 15 of the North American Agreement on Environmental Cooperation*, JOINT PUB. ADVISORY COMM., 12, 16, (June 6, 2001), [http://www.cec.org/Storage/40/3253\\_rep11-e-final\\_EN.pdf](http://www.cec.org/Storage/40/3253_rep11-e-final_EN.pdf).

<sup>309</sup> Raustiala, *supra* note 241, at 397.

<sup>310</sup> Pierre Marc Johnson, Robert Page, Jennifer A. Haverkamp, John F. Mizroch, Daniel Basurto and Blanca Torres, *Ten Years of North American Environmental Cooperation: Report of the Ten-year Review and Assessment Committee to the Council of the Commission for Environmental Cooperation* 42 (June 15, 2004) [http://www.cec.org/Storage/54/4690\\_TRAC-Report2004\\_en.pdf](http://www.cec.org/Storage/54/4690_TRAC-Report2004_en.pdf).

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the process does not offer any defined outcomes or actions ensuring environmental enforcement.<sup>311</sup>

### C. Comparative Analysis of CAFTA-DR and NAFTA Submissions

Under the citizen submission process of CAFTA-DR and NAFTA, the only available remedy for individual citizens is the development of a factual record.<sup>312</sup> However, since not every submission results in a factual record, the question is whether the citizen submission process is effective at all?<sup>313</sup> Although the public has been able to participate in the SEM process, a number of concerns have been raised about the process itself.<sup>314</sup> The citizen submission process could be an important tool to help resolve the effectiveness of the enforcement mechanisms by empowering private individuals to publicly challenge governments failing to enforce environmental laws.<sup>315</sup>

The creation of the citizens submission process created high hopes, and was viewed as a “potential model for accountability and governance,” and as a “positive response to globalization that gives citizens a voice in the often impenetrable affairs of international organizations.”<sup>316</sup> Free trade agreements focus on economic interest.<sup>317</sup> However, CAFTA-DR and NAFTA have attempted to merge goals of free trade with environmental standards.<sup>318</sup> The submissions process within these two free trade agreements was designed to help assure that environmental protections will be maintained.<sup>319</sup> It is important that this mechanism provides an effective method for citizens to raise issues concerning enforcement.

#### 1. Transparency

One of the objectives under the NAAEC and CAFTA-DR is to promote transparency in the development of environmental laws, regulations, and policies.<sup>320</sup> The Open Government Partnership (“OGP”) was created to address issues of government transparency and accountability in the international arena.<sup>321</sup> As asserted by U.S. President Barack Obama, “Government should be transparent. Transparency promotes accountability and provides information for citizens

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<sup>311</sup> CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 225.

<sup>312</sup> Raustiala, *supra* note 241, at 397; JOINT PUB. ADVISORY COMM., *supra* note 308.

<sup>313</sup> Hopkins, *supra* note 14, at 391.

<sup>314</sup> JPAC *Questionnaire*, *supra* note 17.

<sup>315</sup> Hopkins, *supra* note 14, at 384.

<sup>316</sup> Markell, *supra* note 241, at 352.

<sup>317</sup> Marina Medved, *Potential Environmental Impacts of Central America Free Trade Agreement-Dominican Republic*, 13 NEW. ENG. INT'L & COMP. L. ANN. 74, 79 (2006).

<sup>318</sup> *Id.* at 88.

<sup>319</sup> Hopkins, *supra* note 14, at 384.

<sup>320</sup> NAAEC, *supra* note 194, at art. 1(h); CAFTA-DR, *supra* note 215.

<sup>321</sup> Transparency Accountability Initiative, *Opening Government: A Guide to Best Practice in Transparency, Accountability, and Civic Engagement Across the Public Sector*, 3 (2011), <http://www.transparency-initiative.org/wp-content/uploads/2011/09/Opening-Government.pdf>.



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about what their Government is doing.”<sup>322</sup> The CEC recognizes the importance of transparency and their website states it is a key feature of the organization.<sup>323</sup> A section of the CEC website is specifically designated for Public Participation and Transparency.<sup>324</sup> For the ECA, one of the main objectives is institutional strengthening, which includes public participation and transparency to support informed decision-making:<sup>325</sup>

“To foster a civil society that is actively engaged in environmental decision-making and helping to enforce environmental laws—a crucial factor in ensuring the sustainability of the Environment Cooperation Program’s work, ensuring that governments are effectively enforcing their environmental laws, and creating a general culture of environmental protection and sustainable development. Easy access to reliable environmental information is a first step in engaging society. Creating forums and other institutionalized processes for public involvement is another step. A third critical step is educating the public about opportunities and methods for engaging in environmental decision-making.”<sup>326</sup>

Overall, the CEC and ECA value transparency and have done a good job at making most of the SEM process visible on the CEC website under the Registry of Submissions and the SEM’ website Registry of Submissions.<sup>327</sup> This Registry allows a person to view all the submissions to date either by country or year and whether it is active or closed.<sup>328</sup> However, the CEC registry is more user-friendly, as it contains a separate section that compiles all of the factual records that have been approved and made public.<sup>329</sup> In both registries, the users are able to click on each submission which directs them to a page with all the relevant documents in the SEM process including the initial submission, party responses, requests for information, any dismissals or determinations not to request a party response, the Secretariat’s work plan and the final factual records.<sup>330</sup> Making this information publicly available promotes awareness on environmental matters

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<sup>322</sup> Memorandum from President Barack Obama on Transparency and Open Gov’t (Jan. 21, 2009) (on file with the White House).

<sup>323</sup> *Public Engagement and Transparency*, COMM’N FOR ENVTL. COOPERATION, [http://www.cec.org/Page.asp?PageID=751&SiteNodeID=466&BL\\_ExpandID=157](http://www.cec.org/Page.asp?PageID=751&SiteNodeID=466&BL_ExpandID=157) (last visited Dec. 12, 2012); *Theme A Institutional Strengthening Effective Implementation & Enforcement of Environmental Laws*, CAFTA-DR Env’tl. Cooperation, [http://www.caftadr-environment.org/top\\_menu/themes/theme\\_a.html](http://www.caftadr-environment.org/top_menu/themes/theme_a.html) (last visited Jan. 6, 2013).

<sup>324</sup> *Public Engagement and Transparency*, *supra* note 323.

<sup>325</sup> *Theme A Institutional Strengthening Effective Implementation & Enforcement of Environmental Laws*, *supra* note 323.

<sup>326</sup> *Id.*

<sup>327</sup> See generally *Registry of Submissions*, COMM’N FOR ENVTL. COOPERATION, <http://www.cec.org/Page.asp?PageID=751&SiteNodeID=250> (last visited Jan. 6, 2013); *Registry of Citizen Submissions*, SECRETARIAT FOR ENVTL.MATTERS, [http://www.saa-sem.org/index.php?option=com\\_content&view=article&id=52&Itemid=61&lang=us](http://www.saa-sem.org/index.php?option=com_content&view=article&id=52&Itemid=61&lang=us) (last visited Jan. 6, 2012).

<sup>328</sup> *Registry of Submissions*, *supra* note 327.

<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

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occurring within the parties to CAFTA-DR, the status of submissions throughout the process, and furthers the goal of transparency and access to information.<sup>331</sup>

However, there continues to be a need for substantive disclosure as to why the Council approves or fails to approve the factual record. Under Article 15(1) and Chapter 17.8.1 the Secretariat must disclose why it recommends the factual record to the Council.<sup>332</sup> These requirements “provide the Parties, the Council, and the public with confidence that the review is being conducted both openly and on a reasoned basis.”<sup>333</sup> However, the Council does not have to disclose its reasoning why it determined to prepare or not prepare a factual record; the Resolution it drafts simply directs the Secretariat to prepare the factual record.<sup>334</sup> It is not an unreasonable burden for the Party governments to provide substantive reasons for their decisions and make them public to increase transparency.<sup>335</sup>

Additionally, in cases where a factual record is not produced, the timing varies in regards to the Secretariat advising of insufficient information to meet the criteria of a submission.<sup>336</sup> Under Article 6.1, the Secretariat is required to promptly notify why the requirements were not met.<sup>337</sup> However, the time requirement ranged from thirty days to as long as seven months, to advise that the submission was insufficient under Article 14(1) or did not warrant a response from the Party under Article 14(2).<sup>338</sup> The Secretariat shall make a determination on whether the submission meets the criteria under CAFTA-DR Article 17.7.2, within 45 days, to the extent possible.<sup>339</sup> Thus, the Secretariat under CAFTA-DR is more efficient in advising whether the submission contains sufficient information to meet the criteria and move the process along faster. Under NAFTA there is a lack of transparency because the length of time to inform the submitter that the submissions meets or fails to meet the requirements, leaves them in the dark too long and allows the environmental harm to continue.<sup>340</sup> In addition, the JPAC survey revealed that 77% of the submitters agreed that the CEC's response time did not seem appropriate.<sup>341</sup>

Furthermore, there is a lack of transparency as to the reasons the Secretariat, after receiving a Party response, determines not to recommend a factual record. There is no requirement under the NAAEC or CAFTA-DR for disclosing the

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<sup>331</sup> *Id.*

<sup>332</sup> OFFICE OF U.S. TRADE REP., *supra* note 216, at 17-8(1); NAAEC, *supra* note 194, at art. 15(1).

<sup>333</sup> JOINT PUB. ADVISORY COMM., *supra* note 308; Kibel, *supra* note 16, at 10777.

<sup>334</sup> JOINT PUB. ADVISORY COMM., *supra* note 308; Kibel, *supra* note 16, at 10777.

<sup>335</sup> JOINT PUB. ADVISORY COMM., *supra* note 308; Kibel, *supra* note 16, at 10777.

<sup>336</sup> See generally *Registry of Submissions*, COMM'N FOR ENVTL. COOPERATION, <http://www.cec.org/Page.asp?PageID=751&SiteNodeID=250> (last visited Dec. 3, 2013).

<sup>337</sup> *Bringing the Facts to Light*, *supra* note 201, at 14.

<sup>338</sup> *Registry of Submissions*, *supra* note 336.

<sup>339</sup> *Working Procedures for Submissions on Environmental Law Enforcement Matters under Chapter 17 of the Dominican Republic-Central America-United States Free Trade Agreement*, *supra* note 277, at 5.1(1).

<sup>340</sup> *Webcast: JPAC Regular Session (11-03)*, COMM'N FOR ENVTL. COOPERATION, [http://www.cec.org/Page.asp?PageID=25131&AA\\_SiteLanguageID=1](http://www.cec.org/Page.asp?PageID=25131&AA_SiteLanguageID=1) (last visited Oct 3, 2013).

<sup>341</sup> JPAC Questionnaire, *supra* note 17.

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reasoning not to recommend the factual record. Under CAFTA-DR, eight of the submissions met the requirements of 17.7.2, these submissions went to the next step and the Secretariat requested a response from the Party.<sup>342</sup> However, when the Secretariat received the response from the Party, in five of the cases a factual record was not recommended.<sup>343</sup> Since there is no requirement for disclosure, the reasoning behind not recommending a factual record in five out of eight submissions is unknown. Therefore, the way the Secretariat operates in regards to a factual record is not transparent and there is a lack of information available for the public to understand why the Secretariat decides to recommend a factual record.

### 2. *Public Participation and Access to Information*

Another key issue is public participation and access to information. Information allows members of the public to participate in the decision making process of developing better laws, regulation, and compliance. Information gives communities the tools so they can use their voices while publicly participating in creating a better environment to live in.

As noted above, one of the objectives of the NAAEC and CAFTA-DR is to promote transparency and public participation in the development of environmental laws, regulations, and policies.<sup>344</sup> The citizen submission process is an essential tool in allowing the public to take action when environmental laws are

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<sup>342</sup> CAALA/07/001 *Tortugas Marinas RD*, SECRETARIAT FOR ENVTL.MATTERS, [http://www.saa-sem.org/index.php?option=com\\_content&view=article&id=83%3Aacaala07001-tortugas-marinas-rd&catid=37%3A2007&Itemid=96&lang=us](http://www.saa-sem.org/index.php?option=com_content&view=article&id=83%3Aacaala07001-tortugas-marinas-rd&catid=37%3A2007&Itemid=96&lang=us) (see docket dated 5/12/2007); CALAA/10/010 *Contaminacion Auditiva Antigua Guatemala GT*, SECRETARIAT FOR ENVTL.MATTERS, [http://www.saa-sem.org/index.php?option=com\\_content&view=article&id=105%3Aacaala10010-contaminacion-auditiva-antigua-guatemala-gt&catid=40%3A2010&Itemid=198&lang=us](http://www.saa-sem.org/index.php?option=com_content&view=article&id=105%3Aacaala10010-contaminacion-auditiva-antigua-guatemala-gt&catid=40%3A2010&Itemid=198&lang=us) (see docket dated 11/23/2010, 1/23/2011); CAALA/10/007 *OMOA HN*, SECRETARIAT FOR ENVTL. MATTERS, [http://www.saa-sem.org/index.php?option=com\\_content&view=article&id=88%3Aacaala10007-omoa-hn&catid=40%3A2010&Itemid=198&lang=us](http://www.saa-sem.org/index.php?option=com_content&view=article&id=88%3Aacaala10007-omoa-hn&catid=40%3A2010&Itemid=198&lang=us) (see docket dated 5/19/2010, 6/4/2010); CAALA/10/006 *Laguna Del Tigre Fonpetrol GT*, SECRETARIAT FOR ENVTL.MATTERS, [http://www.saa-sem.org/index.php?option=com\\_content&view=article&id=78%3Aacaala10006-laguna-del-tigre-fonpetrol-gt&catid=40%3A2010&Itemid=198&lang=us](http://www.saa-sem.org/index.php?option=com_content&view=article&id=78%3Aacaala10006-laguna-del-tigre-fonpetrol-gt&catid=40%3A2010&Itemid=198&lang=us) (see docket dated 5/3/2010, 7/8/2010); CAALA/10/004 *Lachua GT*, SECRETARIAT FOR ENVTL. MATTERS, [http://www.saa-sem.org/index.php?option=com\\_content&view=article&id=82%3Aacaala10004-lachua-gt&catid=40%3A2010&Itemid=198&lang=us](http://www.saa-sem.org/index.php?option=com_content&view=article&id=82%3Aacaala10004-lachua-gt&catid=40%3A2010&Itemid=198&lang=us) (see docket 5/17/2010, 7/8/2010); CAALA/10/003 *Los Cobanos Fundarrecife Es*, SECRETARIAT FOR ENVTL. MATTERS, [http://www.saa-sem.org/index.php?option=com\\_content&view=article&id=81%3Aacaala10003-los-cobanos-fundarrecife-es&catid=40%3A2010&Itemid=198&lang=us](http://www.saa-sem.org/index.php?option=com_content&view=article&id=81%3Aacaala10003-los-cobanos-fundarrecife-es&catid=40%3A2010&Itemid=198&lang=us) (see docket 5/3/2010, 7/15/2010); CAALA/10/001 *Residencial Villa Veranda Es*, SECRETARIAT FOR ENVTL. MATTERS, [http://www.saa-sem.org/index.php?option=com\\_content&view=article&id=79%3Aacaala10001-residencial-villa-veranda-es&catid=40%3A2010&Itemid=198&lang=us](http://www.saa-sem.org/index.php?option=com_content&view=article&id=79%3Aacaala10001-residencial-villa-veranda-es&catid=40%3A2010&Itemid=198&lang=us) (see docket dated 3/27/2010, 6/10/2010); CALAA/11/006 *OMOA II-HN*, SECRETARIAT FOR ENVTL.MATTERS, [http://www.saa-sem.org/index.php?option=com\\_content&view=article&id=145%3Aacaala11006-omoa-ii-hn&catid=46%3A2011&Itemid=203&lang=us](http://www.saa-sem.org/index.php?option=com_content&view=article&id=145%3Aacaala11006-omoa-ii-hn&catid=46%3A2011&Itemid=203&lang=us) (see docket dated 11/10/2011, 2/3/2012); CAALA/11/005 *Sea Turtles TED II-CR*, SECRETARIAT FOR ENVTL. MATTERS, [http://www.saa-sem.org/index.php?option=com\\_content&view=article&id=142%3Aacaala11005-caala11005-tortugas-marinas-det-ii-cr&catid=46%3A2011&Itemid=203&lang=us](http://www.saa-sem.org/index.php?option=com_content&view=article&id=142%3Aacaala11005-caala11005-tortugas-marinas-det-ii-cr&catid=46%3A2011&Itemid=203&lang=us) (see docket dated 8/27/2011); CAALA/11/004 *West Bay Roatan HN*, SECRETARIAT FOR ENVTL. MATTERS, [http://www.saa-sem.org/index.php?option=com\\_content&view=article&id=137%3Aacaala11004-west-bay-roatan-hn&catid=46%3A2011&Itemid=203&lang=us](http://www.saa-sem.org/index.php?option=com_content&view=article&id=137%3Aacaala11004-west-bay-roatan-hn&catid=46%3A2011&Itemid=203&lang=us) (see docket dated 6/20/2011).

<sup>343</sup> JPAC Questionnaire, *supra* note 17.

<sup>344</sup> NAAEC, *supra* note 194, at art. 1(a) & (h); CAFTA-DR, *supra* note 215, at pmb., art. 17.

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not being enforced. However, in assessing the process, a fundamental question is left to be answered: Is this mechanism designed to be accessible by any member of the public? Or is the process only for large organizations that have a significant amount of money, access to legal counsel, and a considerable amount of time to devote to the submissions process? The fact that most people are not able to participate in the Secretariat for Environmental Matters' process because of these constraints causes a lot of dissatisfaction with the system and prevents it from being used for its fullest potential. The main concerns seem to be the burden of proof, the necessity for lawyers, inability to participate, and the cost for participating in the submissions process.

The Registry of Submissions is a step in the right direction, because it allows access to a significant amount of information. Simply filing a submission promotes awareness and can have an indirect benefit, such as public pressure, admonishment, and bringing issues to light, which can increase help from nongovernmental organizations.<sup>345</sup> The process gives citizens the opportunity to participate in bringing awareness to situation in hopes that someone will help. A goal under the OAS CAFTA-DR evaluation report is to "improve quality and accessibility of environmental information to the population in accordance with international standards."<sup>346</sup> The widespread availability of information promotes awareness amongst countries of the importance of public participation and transparency.<sup>347</sup>

During the citizen submission process there is almost no opportunity to participate in the review process once the submitter files the petition, because they are unable to reply to the Party's response, making it difficult to determine if a response is truthful or accurate.<sup>348</sup> In order to facilitate further cooperation and participation, the Secretariat should at the very least allow the citizen submitter to respond to the Party's arguments and submit it for the Secretariat's consideration in preparing the factual record. This would foster greater participation and help reduce the cynicism amongst the submitters and acknowledge them as part of the progression.

### 3. *Burden of Proof, Legal Counsel, and Costs*

Submitters have found it difficult to understand what constitutes an adequate filing for a submission. Under the two-prong test, set by 17.7.2 and 17.7.4, to obtain a Party response, nine dismissals occurred by failing to comply with 17.7.2.<sup>349</sup> Specifically, the provisions that were repeatedly cited as a reason for the dismissing the submission, were (c) "provides sufficient information to allow the secretariat to review the submission, including any documentary evidence on which the submission may be based and (e) "indicates that the matter has been

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<sup>345</sup> JOINT PUB. ADVISORY COMM., *supra* note 308, at 14.

<sup>346</sup> DEP'T OF SUSTAINABLE DEV., *supra* note 127.

<sup>347</sup> *Id.* at 64.

<sup>348</sup> See generally Hunter et al., *supra* note 10.

<sup>349</sup> *What is the SEM?*, *supra* note 285.

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communicated in writing to the relevant authorities of the Party and indicates the Party's response, if any.”<sup>350</sup> Only one submission that complied with 17.7.2 did not meet the requirements of 17.7.4.<sup>351</sup>

Almost half of the submissions are dismissed at the first stage either because they did not provide enough information or because they had never communicated the matter to the proper authorities of the party.<sup>352</sup> This indicates that the submitters appear not to be meeting the burden of proof required under Chapter 17.7.2. The evidence of numerous submissions being dismissed at the first stage allows an inference that the burden is, in fact, a difficult threshold to meet.

Due to the complications in meeting the burden of proof, the requirements need to be clearer so the submitters know the specific information necessary to pass the first stage of the submission process. In the JPAC Survey, the submitters requested that the CEC needed to be “clearer up front about the information that was required rather than asking for it later and delaying the process.”<sup>353</sup> The language needed to be simplified and less technical.<sup>354</sup> Further, the survey re-

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<sup>350</sup> *Id.*; CAFTA-DR, *supra* note 215, at art. 17.

<sup>351</sup> CAALA/10/003 *Los Cobanos Fundarrecife ES*, SECRETARIAT FOR ENVTL.MATTERS, [http://www.saa-sem.org/index.php?option=com\\_content&view=article&id=81%3Aacaala10003-los-cobanos-fundarrecife-es&catid=40%3A2010&Itemid=198&lang=us](http://www.saa-sem.org/index.php?option=com_content&view=article&id=81%3Aacaala10003-los-cobanos-fundarrecife-es&catid=40%3A2010&Itemid=198&lang=us) (last visited Jan. 3, 2013).

<sup>352</sup> CAALA/07/001 *Tortugas Marinas Rd.*, SECRETARIAT FOR ENVTL.MATTERS, [http://www.saa-sem.org/index.php?option=com\\_content&view=article&id=83%3Aacaala07001-tortugas-marin-as-rd&catid=37%3A2007&Itemid=96&lang=us](http://www.saa-sem.org/index.php?option=com_content&view=article&id=83%3Aacaala07001-tortugas-marin-as-rd&catid=37%3A2007&Itemid=96&lang=us) (*see* docket dated 8/30/2007); CAALA/09/001 *Urbanizacion El Espino Es*, SECRETARIAT FOR ENVTL. MATTERS, [http://www.saa-sem.org/index.php?option=com\\_content&view=article&id=77%3Aacaala09001-urbanizacion-el-espino-es&catid=39%3A2009&Itemid=197&lang=us](http://www.saa-sem.org/index.php?option=com_content&view=article&id=77%3Aacaala09001-urbanizacion-el-espino-es&catid=39%3A2009&Itemid=197&lang=us) (*see* docket dated 2/26/2010); CAALA/10/009 *Jardines De Tikal II GT*, SECRETARIAT FOR ENVTL. MATTERS, [http://www.saa-sem.org/index.php?option=com\\_content&view=article&id=96%3Aacaala10009-jardines-de-tikal-gt&catid=40%3A2010&Itemid=198&lang=us](http://www.saa-sem.org/index.php?option=com_content&view=article&id=96%3Aacaala10009-jardines-de-tikal-gt&catid=40%3A2010&Itemid=198&lang=us) (*see* docket dated 11/26/2010); CAALA/10/008 *Hospital Nacional De Mixco – Monte Real GT*, SECRETARIAT FOR ENVTL. MATTERS [http://www.saa-sem.org/index.php?option=com\\_content&view=article&id=94%3Aacaala10008-hospital-nacional-de-mixco-monte-real-gt&catid=40%3A2010&Itemid=198&lang=us](http://www.saa-sem.org/index.php?option=com_content&view=article&id=94%3Aacaala10008-hospital-nacional-de-mixco-monte-real-gt&catid=40%3A2010&Itemid=198&lang=us) (*see* docket dated 9/09/2010); CAALA/10/008 *Atitlan GT*, SECRETARIAT FOR ENVTL. MATTERS, [http://www.saa-sem.org/index.php?option=com\\_content&view=article&id=84%3Aacaala10008-atitlan-gt&catid=40%3A2010&Itemid=198&lang=us](http://www.saa-sem.org/index.php?option=com_content&view=article&id=84%3Aacaala10008-atitlan-gt&catid=40%3A2010&Itemid=198&lang=us) (*see* docket dated 5/19/2010); CALAA/10/002 *Incumplimiento De La Ley De Caza Calas*, SECRETARIAT FOR ENVTL. MATTERS, [http://www.saa-sem.org/index.php?option=com\\_content&view=article&id=80%3Aacaala10002-incumplimiento-de-la-ley-de-caza-calas-gt&catid=40%3A2010&Itemid=198&lang=us](http://www.saa-sem.org/index.php?option=com_content&view=article&id=80%3Aacaala10002-incumplimiento-de-la-ley-de-caza-calas-gt&catid=40%3A2010&Itemid=198&lang=us) (*see* docket dated 4/27/2010); CAALA/11/008 *Maya Biosphere Reserve GT*, SECRETARIAT FOR ENVTL. MATTERS, [http://www.saa-sem.org/index.php?option=com\\_content&view=article&id=148%3Aacaala11008-reserva-de-la-biosfera-maya-gt&catid=46%3A2011&Itemid=203&lang=us](http://www.saa-sem.org/index.php?option=com_content&view=article&id=148%3Aacaala11008-reserva-de-la-biosfera-maya-gt&catid=46%3A2011&Itemid=203&lang=us) (*see* docket dated 12/05/2012); CAALA/11/007 *Agua Caliente River Es*, SECRETARIAT FOR ENVTL. MATTERS, [http://www.saa-sem.org/index.php?option=com\\_content&view=article&id=146%3Aacaala11007-rio-agua-caliente-es&catid=46%3A2011&Itemid=203&lang=us](http://www.saa-sem.org/index.php?option=com_content&view=article&id=146%3Aacaala11007-rio-agua-caliente-es&catid=46%3A2011&Itemid=203&lang=us) (*see* docket dated 12/14/2011); CAALA/11/003 *Deforestation Los Amates GT*, SECRETARIAT FOR ENVTL. MATTERS, [http://www.saa-sem.org/index.php?option=com\\_content&view=article&id=136%3Aacaala11003-deforestacion-los-amates-gt&catid=46%3A2011&Itemid=203&lang=us](http://www.saa-sem.org/index.php?option=com_content&view=article&id=136%3Aacaala11003-deforestacion-los-amates-gt&catid=46%3A2011&Itemid=203&lang=us) (*see* docket dated 5/26/2011); CAALA/11/002 *National Mixco Hospital II GT*, SECRETARIAT FOR ENVTL. MATTERS, [http://www.saa-sem.org/index.php?option=com\\_content&view=article&id=132%3Aacaala11002-hospital-nacional-de-mixco-ii-gt&catid=46%3A2011&Itemid=203&lang=us](http://www.saa-sem.org/index.php?option=com_content&view=article&id=132%3Aacaala11002-hospital-nacional-de-mixco-ii-gt&catid=46%3A2011&Itemid=203&lang=us) (*see* docket dated 5/16/2011); CAALA/11/001 *Sea Turtles Ted CR*, SECRETARIAT FOR ENVTL. MATTERS, [http://www.saa-sem.org/index.php?option=com\\_content&view=article&id=116%3Aacaala11001-tortugas-marin-as-cr&catid=46%3A2011&Itemid=203&lang=us](http://www.saa-sem.org/index.php?option=com_content&view=article&id=116%3Aacaala11001-tortugas-marin-as-cr&catid=46%3A2011&Itemid=203&lang=us) (*see* docket dated 2/25/2011).

<sup>353</sup> JPAC *Questionnaire*, *supra* note 17.

<sup>354</sup> *Id.*

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spondents suggested annotating the “various sections of the Guidelines with references to relevant previous decisions.”<sup>355</sup>

The citizen submission process is an essential tool in allowing the public to take action when environmental laws are not being enforced. However, in assessing the process, a fundamental question is left to be answered: Is this mechanism designed to be accessible by any member of the public or only for large organizations that have a significant amount of money, access to legal counsel, and a considerable amount of time to devote to the submissions process? Reviewing the registry of submissions reveals that a lawyer is necessary to get further along in the process and become successful in obtaining a factual record.<sup>356</sup> When submitters were asked what type of assistance was received in preparing the submission, legal assistance was mentioned most often.<sup>357</sup> Another concern is the significant amount of money invested in preparing and following up on a petition.<sup>358</sup> The JPAC Survey found that it cost on average \$56,643.00 for submissions to be processed completely and \$13,500.00 for petitions that are ongoing.<sup>359</sup> Some submissions incurred costs in the hundreds of thousands of dollars.<sup>360</sup> These types of costs make the submissions process inaccessible for smaller organizations and citizens. In the JPAC Survey, 68% of the submitters agreed that the costs were not in line with the benefits received from the process.<sup>361</sup> The high cost of the submissions process is yet another reason the citizen submission process of both NAFTA and CAFTA-DR should look for ways to simplify the process to make it more accessible to the public, perhaps using various tiers of review for different types of submissions to control costs.

CAFTA-DR submissions have increased through the years while NAFTA's U.S. submissions have fallen off, as will be explained in the section below.<sup>362</sup> The SEM recognized this high number of public submissions as a positive demonstration of increased public participation and awareness.<sup>363</sup> The decrease in NAFTA's U.S. submissions proves that the public is not participating in the process and must be utilizing other avenues to protect the environment.

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<sup>355</sup> *Id.*

<sup>356</sup> *Id.*

<sup>357</sup> *See generally id.*

<sup>358</sup> *See generally id.*

<sup>359</sup> *See generally id.*

<sup>360</sup> *See generally id.*

<sup>361</sup> *See generally id.*

<sup>362</sup> *Submissions on Enforcement Matters*, COMM'N FOR ENVTL. COOPERATION, [http://www.cec.org/Page.asp?PageID=1226&SiteNodeID=548&BL\\_ExpandID=502](http://www.cec.org/Page.asp?PageID=1226&SiteNodeID=548&BL_ExpandID=502) (last visited Dec. 3, 2013) (Only twelve U.S. submissions filed since 1995.).

<sup>363</sup> U.S. DEP'T OF STATE, *Joint Communique*, CAFTA-DR ENVTL. AFFAIRS COUNCIL (Apr. 15, 2012), <http://iipdigital.usembassy.gov/st/english/texttrans/2012/04/201204153897.html?CP.rss=true#ixzz2C3WuDier>.

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### D. U.S. NAFTA Submissions

In the U.S., twelve submissions have been filed since 1995.<sup>364</sup> However in Canada there are thirty submissions, and in Mexico there are forty, which is a huge distinction from the U.S.<sup>365</sup> This difference raises questions regarding why there is such a disparity. A conclusion can be made that it is not because of a lack of environmental problems. However, the theory is that since in the U.S. there are a number of citizen suit provisions under the various environmental statutes, it is easier for a citizen to bring a suit under these laws and have access to courts and justice.<sup>366</sup> These same provisions are not applicable under Mexican and Canadian law.<sup>367</sup> The CEC submissions process may be one of the few avenues for the public to participate in those countries.

Out of the U.S. submissions, the Migratory Birds petition was the first factual record to be adopted,<sup>368</sup> a process that took almost four years to complete.<sup>369</sup> In 2004, a petition on the Coal-Fired Power Plants was submitted, and four years later the council finally approved a factual record.<sup>370</sup> Nevertheless, a factual record has not yet been released and is being further delayed.<sup>371</sup> Several complaints were raised about this lack of transparency at the El Paso JPAC meeting.<sup>372</sup> This period of time has been labeled the “black hole” due to the lack of information on why a factual record has not been produced.<sup>373</sup>

Additionally, until recently a submission had not been filed in the U.S. since 2006; over six years passed without the public utilizing the process.<sup>374</sup> Due to the lack of submissions being filed, it seems as if citizens are finding other avenues to address the harm and the government's failure to enforce the environmental laws. Has faith been lost in the system to the point where citizens do not believe they have a voice anymore? The recent JPAC Survey sheds light as to why citizens are not utilizing the submission process. People are unable to participate in the process because it does not allow for meaningful participation, the

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<sup>364</sup> U.S. DEP'T OF STATE, *supra* note 364.

<sup>365</sup> *Canada*, COMM'N FOR ENVTL. COOPERATION, [http://www.cec.org/Page.asp?PageID=1212&SiteNodeID=210&BL\\_ExpandID=156](http://www.cec.org/Page.asp?PageID=1212&SiteNodeID=210&BL_ExpandID=156) (last visited Oct. 2, 2013).

<sup>366</sup> *Webcast: JPAC Regular Session*, *supra* note 340.

<sup>367</sup> *Id.*

<sup>368</sup> HUNTER ET AL., *supra* note 10, at 1328.

<sup>369</sup> *Migratory Birds*, COMM'N FOR ENVTL. COOPERATION, [http://www.cec.org/Page.asp?PageID=2001&ContentID=2370&SiteNodeID=250&BL\\_ExpandID=](http://www.cec.org/Page.asp?PageID=2001&ContentID=2370&SiteNodeID=250&BL_ExpandID=) (last visited Dec. 3, 2013) (Submission filed in 1999 and factual record released in 2003.); *see generally Final Factual Record for Submission SEM-99-002 (Migratory Birds)*, COMM'N FOR ENVTL. COOPERATION, (2003), [http://www.cec.org/Storage/71/6478\\_MigratoryBirds-FFR\\_EN.pdf](http://www.cec.org/Storage/71/6478_MigratoryBirds-FFR_EN.pdf).

<sup>370</sup> *See generally* COMM'N FOR ENVTL. COOPERATION, *Coal-Fired Power Plants SEM-04-005* (Sept. 20, 2004), [http://www.cec.org/Page.asp?PageID=2001&ContentID=2390&SiteNodeID=548&BL\\_ExpandID=](http://www.cec.org/Page.asp?PageID=2001&ContentID=2390&SiteNodeID=548&BL_ExpandID=).

<sup>371</sup> *Webcast: JPAC Regular Session*, *supra* note 340.

<sup>372</sup> *Id.*

<sup>373</sup> *Id.*

<sup>374</sup> U.S. DEP'T OF STATE, *supra* note 364 (Earlier in 2013, two submissions were filed under the NAAEC in the U.S., prior to that only twelve submissions were filed since 1995.).

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process is too expensive, and the process has little impact on the situation, which causes a lot of dissatisfaction with the system and prevents it from being used for its fullest potential.<sup>375</sup>

The remedy for the citizens' submission process is publicizing the fact that a Party is failing to enforce their environmental laws in a factual record.<sup>376</sup> The preparation and publication of the factual record is, for all practical purposes, the end of the SEM process.<sup>377</sup> Nothing happens after the council votes to make a factual record public.<sup>378</sup> However, the impact of the record is intended to "trigger internal reviews, raise the profile of issues, force greater interdepartmental or inter-jurisdictional cooperation where required, and perhaps bring public embarrassment to the Party."<sup>379</sup> Unfortunately, no recommendations are included in a factual record, and the NAAEC does not require the affected Party to monitor the situation.<sup>380</sup> There does not seem to be much of a benefit in drafting a factual record if no review action is taken to hold the governments accountable. In actuality, it seems the production of a factual record does not do much for the situation.

The JPAC survey shows that 58.3% of the respondents believed the submission had no affect or impact on the situation and 8.3% said it actually negatively affected the situation.<sup>381</sup> Ultimately, the CEC process, including the development of a factual record, does not directly compel changes in the parties' behavior other than "naming and shaming."<sup>382</sup> Therefore, if the publication of the factual record is to be effective, it needs to be more widely publicized. The CEC needs to do more community outreach to reveal the factual record and the citizen submission process in general. It must promote public awareness through mass media reports and contacting nongovernmental organizations. If the purpose is admonishment, then more of the public needs to be aware in order for the governments to feel pressure to respond sooner to the environmental harm and effectively enforce the environmental laws that are being violated. In the JPAC meeting, the public revealed the fact that in cases where a factual record was produced years later the same, if not more, environmental harm continues.<sup>383</sup>

Although the NAAEC contains a provision allowing citizens to file a submission when environmental laws are not being forced, the concerns expressed above prove the theory that the SEM process has no teeth and can be considered pure rhetoric.<sup>384</sup> Further proof of the need for reforms to protect the environment and human rights is that only certain members of the public are able to partici-

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<sup>375</sup> See generally, *JPAC Questionnaire*, *supra* note 17.

<sup>376</sup> JOINT PUB. ADVISORY COMM., *supra* note 308.

<sup>377</sup> *Id.*

<sup>378</sup> *Id.*

<sup>379</sup> JOHNSON, ET AL., *supra* note 310.

<sup>380</sup> *Id.*

<sup>381</sup> See generally *JPAC Questionnaire*, *supra* note 17.

<sup>382</sup> HUNTER ET AL., *supra* note 10, at 1328.

<sup>383</sup> *Webcast: JPAC Regular Session*, *supra* note 340.

<sup>384</sup> Hopkins, *supra* note 14 at 392.



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pate, and when they do, the submission is not very effective in resolving the environmental harms.

### E. CAFTA-DR Submissions and Case Study: Oil Exploitation in the Guatemalan Maya Biosphere Reserve

Since the SEM started in 2007, 24 submissions have been filed amongst the CAFTA-DR countries.<sup>385</sup> Guatemala leads with eleven submissions; at almost half of Guatemala's total, five have been submitted from El Salvador, three from Dominican Republic, three from Honduras, and two from Costa Rica.<sup>386</sup> Out of 24 submissions, only two factual records have been published with an additional one under development, totaling three in five years.<sup>387</sup> The first factual record took over three years to complete.<sup>388</sup> Currently there are four active submissions, one of which resulted in an instruction to the Secretariat to prepare a factual record.<sup>389</sup> There have been three voluntary withdrawals by submitters.<sup>390</sup> In fact, when the Secretariat received a response from the Party, a factual record was not recommended in five of the cases.<sup>391</sup> In one case, a factual record was

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<sup>385</sup> See generally *What is the SEM?*, *supra* note 285.

<sup>386</sup> *Id.*

<sup>387</sup> *Id.*

<sup>388</sup> CAALA/07/001 *Tortugas Marinas Rd*, SECRETARIAT FOR ENVTL. MATTERS, [http://www.saa-sem.org/index.php?option=com\\_content&view=article&id=83%3Aacaala07001-tortugas-marinas-rd&catid=37%3A2007&Itemid=96&lang=us](http://www.saa-sem.org/index.php?option=com_content&view=article&id=83%3Aacaala07001-tortugas-marinas-rd&catid=37%3A2007&Itemid=96&lang=us) (last visited Oct. 3, 2013).

<sup>389</sup> CAALA/12/002 *Noise Pollution II-Antigua GT*, SECRETARIAT FOR ENVTL. MATTERS, [http://www.saa-sem.org/index.php?option=com\\_content&view=article&id=173%3Aacaala12002-contaminacion-auditiva-ii-antigua-gt&catid=51%3A2012&Itemid=209&lang=us](http://www.saa-sem.org/index.php?option=com_content&view=article&id=173%3Aacaala12002-contaminacion-auditiva-ii-antigua-gt&catid=51%3A2012&Itemid=209&lang=us) (last visited Oct. 3, 2013); CAALA/12/001 *OMOA III-HN*, SECRETARIAT FOR ENVTL. MATTERS, [http://www.saa-sem.org/index.php?option=com\\_content&view=article&id=166%3Aacaala12001-qomoa-iii-hnq&catid=51%3A2012&Itemid=209&lang=us](http://www.saa-sem.org/index.php?option=com_content&view=article&id=166%3Aacaala12001-qomoa-iii-hnq&catid=51%3A2012&Itemid=209&lang=us) (last visited Oct. 3, 2013); CAALA/11/004 *West Bay Roatan HN*, SECRETARIAT FOR ENVTL. MATTERS, [http://www.saa-sem.org/index.php?option=com\\_content&view=article&id=137%3Aacaala11004-west-bay-roatan-hn&catid=46%3A2011&Itemid=203&lang=us](http://www.saa-sem.org/index.php?option=com_content&view=article&id=137%3Aacaala11004-west-bay-roatan-hn&catid=46%3A2011&Itemid=203&lang=us) (last visited Oct. 3, 2013) (Instructed to prepare a factual record on Sept. 17, 2012); CAALA/10/001 *Residencial Villa Veranda ES*, SECRETARIAT FOR ENVTL. MATTERS, [http://www.saa-sem.org/index.php?option=com\\_content&view=article&id=79%3Aacaala10001-residencial-villa-veranda-es&catid=40%3A2010&Itemid=198&lang=us](http://www.saa-sem.org/index.php?option=com_content&view=article&id=79%3Aacaala10001-residencial-villa-veranda-es&catid=40%3A2010&Itemid=198&lang=us) (last visited Oct. 3, 2013) (Factual record made public on Aug. 13, 2012).

<sup>390</sup> *What is the SEM?*, *supra* note 285; CAALA/08/001 *Extraccion de Arena de las Canas RD Herritz*, SECRETARIAT FOR ENVTL. MATTERS, [http://www.saa-sem.org/index.php?option=com\\_content&view=article&id=76%3Aacaala08001-extraccion-de-arena-de-las-canas-rd-herritz&catid=38%3A2008&Itemid=196&lang=us](http://www.saa-sem.org/index.php?option=com_content&view=article&id=76%3Aacaala08001-extraccion-de-arena-de-las-canas-rd-herritz&catid=38%3A2008&Itemid=196&lang=us) (last visited Oct. 3, 2013); CAALA/08/002 *Extraccion de Arena en las Canas RD Yellen*, SECRETARIAT FOR ENVTL. MATTERS, [http://www.saa-sem.org/index.php?option=com\\_content&view=article&id=75%3Aacaala08002-extraccion-de-arena-en-las-canas-rd-yellen-&catid=38%3A2008&Itemid=196&lang=us](http://www.saa-sem.org/index.php?option=com_content&view=article&id=75%3Aacaala08002-extraccion-de-arena-en-las-canas-rd-yellen-&catid=38%3A2008&Itemid=196&lang=us) (last visited Oct. 3, 2013); CAALA/10/010 *Contaminacion Auditiva- Antigua Guatemala GT*, SECRETARIAT FOR ENVTL. MATTERS, [http://www.saa-sem.org/index.php?option=com\\_content&view=article&id=105%3Aacaala10010-contaminacion-auditiva-antigua-guatemala-gt&catid=40%3A2010&Itemid=198&lang=us](http://www.saa-sem.org/index.php?option=com_content&view=article&id=105%3Aacaala10010-contaminacion-auditiva-antigua-guatemala-gt&catid=40%3A2010&Itemid=198&lang=us) (last visited Oct. 3, 2013) (Submitter withdraws after Guatemala responds).

<sup>391</sup> CAALA/10/007 *OMOA HN*, SECRETARIAT FOR ENVTL. MATTERS, [http://www.saa-sem.org/index.php?option=com\\_content&view=article&id=88%3Aacaala10007-omoa-hn&catid=40%3A2010&Itemid=198&lang=us](http://www.saa-sem.org/index.php?option=com_content&view=article&id=88%3Aacaala10007-omoa-hn&catid=40%3A2010&Itemid=198&lang=us); CAALA/10/006 *Laguna Del Tigre Fonpetrol GT*, SECRETARIAT FOR ENVTL. MATTERS, [http://www.saa-sem.org/index.php?option=com\\_content&view=article&id=78%3Aacaala10006-laguna-del-tigre-fonpetrol-gt&catid=40%3A2010&Itemid=198&lang=us](http://www.saa-sem.org/index.php?option=com_content&view=article&id=78%3Aacaala10006-laguna-del-tigre-fonpetrol-gt&catid=40%3A2010&Itemid=198&lang=us); CAALA/10/004 *Lachua GT*, SECRETARIAT FOR ENVTL. MATTERS, [http://www.saa-sem.org/index.php?option=com\\_content&view=article&id=82%3Aacaala10004-lachua-gt&catid=40%3A2010&Itemid=198&lang=us](http://www.saa-sem.org/index.php?option=com_content&view=article&id=82%3Aacaala10004-lachua-gt&catid=40%3A2010&Itemid=198&lang=us); CALAA/11/006 *OMOA II-HN*, SECRETARIAT FOR ENVTL. MATTERS, [http://www.saa-sem.org/index.php?option=com\\_content&view=arti](http://www.saa-sem.org/index.php?option=com_content&view=arti)

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recommended but was later suspended after receiving a subsequent response from the Attorney General and Party.<sup>392</sup>

Guatemala has submitted almost half of the submissions under the Secretariat for Environmental Matters, totaling 11 out of 24.<sup>393</sup> Guatemala is a multicultural country in which four distinct peoples live together: the Mayas, Garifunas, Xinkas and Ladinos.<sup>394</sup> Indigenous people make up 66% of the Guatemalan population.<sup>395</sup> Article 117 of Guatemala's Constitution states: "It is the duty of the State to protect its natural resources as well as the diversity and integrity of the environment in order to guarantee sustainable development. . ."<sup>396</sup> The Maya tropical forest stretches from the Mexican state of the Chiapas into Northern Guatemala and Belize.<sup>397</sup> After the Amazon, it is the greatest stretch of tropical forest in Latin America.<sup>398</sup> The Maya Biosphere Reserve of Guatemala is one of the largest protected areas at nearly 2.11 million hectares and was established in 1990.<sup>399</sup> The Guatemalan government and UNESCO established the Maya Biosphere Reserve in 1990 to "safeguard the region's outstanding biological and cultural diversity."<sup>400</sup> It covers 19% of Guatemala's territory; the core area amounts to 747,800 ha. and the multiple-use zone to some 864,440 ha.<sup>401</sup> It has been internationally recognized as part of the Mesoamerican biodiversity "Hot-spot," and as a "Last Wild Place."<sup>402</sup> Still buried under these forests are many of the Mayan civilization's remnants and relics.<sup>403</sup>

The Maya Biosphere Reserve ("MBR") is home to lush rainforests, rivers and lakes, and a number of sacred Mayan monuments, the best known being the

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cle&id=145%3Acaala11006-omoa-ii-hn&catid=46%3A2011&Itemid=203&lang=us; CALAA/11/005 Sea Turtles TED II -CR, SECRETARIAT FOR ENVTL. MATTERS, [http://www.saa-sem.org/index.php?option=com\\_content&view=article&id=142%3Acaala11005-caala11005-tortugas-marinas-det-ii-cr&catid=46%3A2011&Itemid=203&lang=us](http://www.saa-sem.org/index.php?option=com_content&view=article&id=142%3Acaala11005-caala11005-tortugas-marinas-det-ii-cr&catid=46%3A2011&Itemid=203&lang=us).

<sup>392</sup> See *infra* Part 5.5.1 and note 426.

<sup>393</sup> See generally *What is the SEM?*, *supra* note 285.

<sup>394</sup> Ramiro Batzin, *Guatemala: Indigenous Peoples and Protected Areas in Guatemala: Assessment of the State's compliance with commitments under the CBD Programme of Work on Protected Areas*, 1 (June 2008), <http://www.forestpeoples.org/sites/fpp/files/publication/2011/02/guatemalacbdpareviewjun08lowreseng.pdf>.

<sup>395</sup> *Id.*

<sup>396</sup> *Translation of Submission CAALA 09-001, Original in Spanish*, SECRETARIAT FOR ENVTL. MATTERS, [http://www.saa-sem.org/images/stories/pdf/anio2009/caala\\_09\\_001\\_urbanizacion%20el\\_espino\\_es/comunicacion\\_original/comunicacion\\_original\\_caala\\_09\\_01\\_urbanizacion\\_el\\_espino\\_eng.pdf](http://www.saa-sem.org/images/stories/pdf/anio2009/caala_09_001_urbanizacion%20el_espino_es/comunicacion_original/comunicacion_original_caala_09_01_urbanizacion_el_espino_eng.pdf) (last visited Dec. 3, 2013); see also *CAALA/09/001 URBANIZACION EL ESPINO ES*, SECRETARIAT FOR ENVTL. MATTERS, [http://www.saa-sem.org/index.php?option=com\\_content&view=article&id=77%3Acaala09001-urbanizacion-el-espino-es&catid=39%3A2009&Itemid=197&lang=us](http://www.saa-sem.org/index.php?option=com_content&view=article&id=77%3Acaala09001-urbanizacion-el-espino-es&catid=39%3A2009&Itemid=197&lang=us) (last visited Oct. 3, 2013).

<sup>397</sup> RICHARD B. PRIMACK ET AL., *TIMBER, TOURISTS, AND TEMPLES: CONSERVATION AND DEVELOPMENT IN THE MAYA FOREST OF BELIZE, GUATEMALA, AND MEXICO*, xiii (1998).

<sup>398</sup> *Id.*

<sup>399</sup> *Id.*; *Protected Areas and Human Displacement: A Conservation Perspective 20* (Wildlife Conservation Soc'y, Paper No. 29, 2007), available at <http://archive.wcs.org/media/file/wcswp292.pdf>.

<sup>400</sup> *Guatemala: Maya Biosphere Reserve*, THE NATURE CONSERVANCY (Feb. 28, 2011), <http://www.nature.org/ourinitiatives/regions/centralamerica/guatemala/placesweprotect/maya-biosphere-reserve.xml>.

<sup>401</sup> FINGER-STICH, *supra* note 398, at 166.

<sup>402</sup> *Protected Areas and Human Displacement: A Conservation Perspective*, *supra* note 400.

<sup>403</sup> FINGER-STITCH, *supra* note 398, at 165.

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temples of Tikal, Yaxha, Ceibal, and Mirador.<sup>404</sup> Beyond its cultural riches, the MBR in Guatemala harbors a wealth of biodiversity, containing within its borders 17 natural ecosystems, more than 40 species of mammals, 256 species of birds, 97 species of reptiles, 32 species of amphibians, and 55 species of fish, as well as cedars, pines, bread-nut trees, gum trees, relict mangroves (the most inland occurrences of mangrove in the Yucatan Peninsula), rare mollusk-based reefs, caves, and cenotes.<sup>405</sup>

The MBR is home to indigenous Maya cultures, such as the Lancandonos, Choles, Tzeltales, Yucatecs, Itzaa, Kekchis, and Mopans.<sup>406</sup> The Reserve is a protected area that was established to allow people and nature to coexist and benefit from each other.<sup>407</sup> All reserves have designated areas that can only be visited by scientists, and occasionally ecotourists.<sup>408</sup> Many reserves have multiple-use areas inhabited by indigenous peoples who practice sustainable harvesting of natural resources.<sup>409</sup> These multiple-use areas allow for natural resource extraction and oil exploration and therefore significantly affect the indigenous peoples' homes.<sup>410</sup>

The forests of the (Reserve) contain roads built for logging operations and oil explorations.<sup>411</sup> The threat of petroleum extraction is grave for the Reserve.<sup>412</sup> In addition to the environmental impact, the high level of investment required for drilling would presumably create infrastructure, heavy flows of traffic, workers, settlers, and more roads, all which disrupt the indigenous peoples' way of life.<sup>413</sup> Oil companies make large investments without conducting environmental impact studies because they see it as an unnecessary expense.<sup>414</sup> Those who do conduct the environmental assessments know that once the project is approved, the government will rarely monitor for compliance.<sup>415</sup> Even though petroleum extraction negatively impacts the environment and indigenous peoples' human rights, it

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<sup>404</sup> *Managing the Global Heritage of the Guatemalan*, GLOBAL ENVTL. FACILITY (2010), <http://www.thegef.org/gef/node/2912>.

<sup>405</sup> *Id.*

<sup>406</sup> JOHN BEAVERS, *COMMUNITY BASED ECO-TOURISM IN THE MAYA FOREST: SIX CASE STUDIES FROM COMMUNITIES IN MEXICO, GUATEMALA, AND BELIZE 7* (The Nature Conservancy ed., 1995); *TIMBER, TOURISTS, AND TEMPLES: CONSERVATION AND DEVELOPMENT IN THE MAYA FOREST OF BELIZE, GUATEMALA, AND MEXICO 330* (Richard B. Primack, David Bray, Hugo A. Galletti, and Ismael Ponciano eds., 1998).

<sup>407</sup> *TIMBER, TOURISTS, AND TEMPLES*, *supra* note 407, at xvii.

<sup>408</sup> *Id.*

<sup>409</sup> *Id.*

<sup>410</sup> *Id.*

<sup>411</sup> *Id.* at 161.

<sup>412</sup> *Id.*

<sup>413</sup> *Id.*

<sup>414</sup> *Id.*

<sup>415</sup> *Id.*

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also provides Guatemala with development opportunities.<sup>416</sup> Guatemala contains oil reserves comparable to those of Alaska.<sup>417</sup>

The Guatemalan Protected Areas System, *Sistema Guatemalteco de Areas Protegidas* ("SIGAP"), is administered by the National Council for Protected Areas, an office of the Presidency.<sup>418</sup> The largest unit within SIGAP is the MBR, located in the northern Peten.<sup>419</sup> Currently, SIGAP has no mechanisms that recognize indigenous communities' unalienable rights of territory.<sup>420</sup> SIGAP does not allow for free, prior informed consultations and therefore, indigenous people are not able to contribute their proposals and approaches to their affected lands.<sup>421</sup> The IDB has ongoing programs in the MBR, which are financed by a \$30 million loan approved in 2006 and by a \$3.6 million grant from the Global Environment Facility approved in 2008.<sup>422</sup> The IDB is helping Guatemala advance in its efforts to protect and sustainably develop the MBR, Central America's largest protected area.<sup>423</sup>

### 1. Laguna del Tigre Submission

The First Submission on the issue of oil exploitation in the MBR within Laguna del Tigre National Park was filed in 2010 under CAFTA-DR's citizen submission process.<sup>424</sup> The Submitter claims that the Government of Guatemala failed to enforce environmental legislation related to the country's protected areas, specifically the Laguna del Tigre National Park, by modifying, expanding and extending oil exploitation contract number 2-85 signed between the Ministry of Energy and Mines and the Perenco Guatemala company.<sup>425</sup> Laguna del Tigre National Park is one of Central America's most important wetlands and the 15-year extension of an oil-drilling contract has triggered a legal fight against the

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<sup>416</sup> *Id.*

<sup>417</sup> Manz Beatriz, *Refugees-Guatemalan Troops Clear Peten for Oil Exploration* (Feb. 4, 2010), <http://www.culturalsurvival.org/ourpublications/csq/article/refugees-guatemalan-troops-clear-peten-oil-exploration>.

<sup>418</sup> *Management and Protection of Laguna del Tigre National Park and Biotope*, CONSERVATION INTERNATIONAL (May 1999), [http://www.thegef.org/gef/sites/thegef.org/files/gef\\_prj\\_docs/GEFProjectDocuments/Biodiversity/Guatemala%20%20Management%20and%20Protection%20of%20Laguna%20del%20Tigre%20National%20Park/MSP%20Project%20Brief.pdf](http://www.thegef.org/gef/sites/thegef.org/files/gef_prj_docs/GEFProjectDocuments/Biodiversity/Guatemala%20%20Management%20and%20Protection%20of%20Laguna%20del%20Tigre%20National%20Park/MSP%20Project%20Brief.pdf).

<sup>419</sup> *Id.*

<sup>420</sup> BATZIN, *supra* note 395.

<sup>421</sup> *Id.*

<sup>422</sup> *Guatemala makes strides in protecting Maya Biosphere Reserve with IDB support*, INTER-AMERICAN DEV. BANK (May 21, 2010), <http://www.iadb.org/en/news/webstories/2010-05-21/maya-biosphere-reserve-deforestation-idb,7148.html>.

<sup>423</sup> *Id.*

<sup>424</sup> *Submission Regarding the Enforcement of Environmental Legislation Within the Framework of the Dominican Republic-Central America United States of America Free Trade Agreement*, SECRETARIAT FOR ENVTL. MATTERS, [http://www.saa-sem.org/images/10\\_006\\_comunicacion\\_eng.pdf](http://www.saa-sem.org/images/10_006_comunicacion_eng.pdf) (last visited Oct. 3, 2013); *see also* CAALA/10/006 Laguna del Tigre Fonpetrol GT, SECRETARIAT FOR ENVTL. MATTERS, [http://www.saa-sem.org/index.php?option=com\\_content&view=article&id=78%3Aacaala10006-laguna-del-tigre-fonpetrol-gt&catid=40%3A2010&Itemid=198&lang=us](http://www.saa-sem.org/index.php?option=com_content&view=article&id=78%3Aacaala10006-laguna-del-tigre-fonpetrol-gt&catid=40%3A2010&Itemid=198&lang=us) (last visited Dec. 3, 2013).

<sup>425</sup> *See Submission Regarding the Enforcement of Environmental Legislation*, *supra* note 425.

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Guatemalan government on charges establishing an oil company in violation of CAFTA-DR.<sup>426</sup>

The Laguna del Tigre National Park in Guatemala is on the list of internationally important wetlands and has been defined as one of the largest “core zones” of the Maya Biosphere Reserve.<sup>427</sup> On July 22, 2010 Guatemala’s President Álvaro Colom and his Cabinet extended the petroleum contract of the Anglo-French Perenco Guatemala Limited, which was to expire August 12, 2010 for the Xan oil field located in Laguna del Tigre.<sup>428</sup> The extension of the contract, that the President approved, expires on August 13, 2025, however Guatemala’s Ministries of Environment, Interior and Culture have not approved the contract reasoning that it is harmful to national interests and will lead to another series of lawsuits.<sup>429</sup> Rafael Maldonado, from the Legal, Environmental, Social, Action Centre (“CALAS”), claims that the extension of the contract violates “various legal statutes: the law on protected areas, the law on fossil fuels, and the law that declares the Maya Biosphere a protected area.”<sup>430</sup>

The government’s own National Council for Protected Areas filed a lawsuit because the extension contract “not only violated Guatemalan laws, but also international laws, like the Ramsar Convention on Wetlands and the region’s Free Trade Agreement with the U.S. and Dominican Republic.”<sup>431</sup>

The submission under CAFTA-DR passed muster under 17.7.2 and 17.7.4 and the Secretariat requested a response from the party.<sup>432</sup> Upon receiving a response from the Party, the Secretariat recommended the preparation of factual record.<sup>433</sup> The U.S. instructed preparation of the factual record.<sup>434</sup> The Attorney General sent a request and in response to this request, the Secretariat requested additional information from Guatemala.<sup>435</sup> The Secretariat even requested an extension of time for 180 days to prepare the factual record.<sup>436</sup> The Ministry of Environment in Guatemala advised of all of the pending proceedings, and Guatemala sent additional information advising the same.<sup>437</sup> Based on this information, even after

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<sup>426</sup> Danilo Valladares, *Guatemala: Legal Battle Over Wetland Oil Drilling*, INTER PRESS SERVICE: NEWS AGENCY (Nov. 28, 2010), <http://www.ipsnews.net/2010/11/guatemala-legal-battle-over-wetland-oil-drilling/>.

<sup>427</sup> Danilo Valladares, *Guatemala: Legal Battle Over Wetland Oil Drilling*, INTER PRESS SERVICE: NEWS AGENCY (Nov. 28, 2010), <http://www.ipsnews.net/2010/11/guatemala-legal-battle-over-wetland-oil-drilling/>.

<sup>428</sup> *Id.*

<sup>429</sup> *Id.*

<sup>430</sup> *Id.*

<sup>431</sup> *Id.*

<sup>432</sup> CAALA/10/006 *Laguna del Tigre Fonpetrol GT*, *supra* note 425.

<sup>433</sup> *Id.*

<sup>434</sup> *Id.*

<sup>435</sup> *Id.*

<sup>436</sup> *Id.*

<sup>437</sup> *Id.*

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the factual record had already been recommended and instructed to be drafted, the Secretariat suspended the preparation of the factual record.<sup>438</sup>

Although this submission did not specify the indigenous people, it is dealing with protected areas that have been determined to be traditional land of the Mayans.<sup>439</sup> The submitter was able to participate in the submissions process and almost achieved the end goal of a factual record. Unfortunately, this remedy was suspended because the exact subject matter was already the issue of current judicial proceedings.<sup>440</sup> The oil-extension contract could be devastating to this region, the protected lands, protected species, and ultimately the indigenous people.<sup>441</sup> Even though the Laguna del Tigre Submission did not develop into a factual record,<sup>442</sup> it nevertheless allowed a petition to be submitted raising awareness that environmental laws were not being enforced and of the potential environmental harm to take place on indigenous lands.

### 2. *Maya Biosphere Reserve Submission*

This submission is the first submission under CAFTA-DR that clearly identifies and impacts the indigenous people.<sup>443</sup> The Submitter claims that the State of Guatemala is not effectively enforcing certain domestic environmental legislation in regards to hydrocarbon exploration and exploitation within the perimeter of the Maya Biosphere Reserve and adjacent areas.<sup>444</sup> The submission was filed on November 14, 2011, and the Secretariat suspended review and dismissed it under 17.7.2(e) because it did not fall under a violation of the law but was seen as a political move.<sup>445</sup>

The submission claimed that because Block C-1-08 is located in an unprotected zone, there is a lack of public participation in the approval process, which is an essential and compulsory part of the process, in accordance with international State commitments acquired by Guatemala, especially ILO Convention 169 on Indigenous Community Consultations.<sup>446</sup> It claims that this area is cited by Governmental Decree and establishes that Indigenous Communities must be consulted if they will be affected by development on their land.<sup>447</sup> The submission cites the ILO Convention 169 on Indigenous and Tribal Peoples in Indepen-

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<sup>438</sup> CAALA/10/006 *Laguna del Tigre Fonpetrol GT*, *supra* note 425.

<sup>439</sup> *See generally id.*

<sup>440</sup> CAALA/10/006 *Laguna del Tigre Fonpetrol GT*, *supra* note 425.

<sup>441</sup> CAALA/10/004 *Lachua GT*, SECRETARIAT FOR ENVTL. MATTERS, [http://www.saa-sem.org/images/10\\_004\\_comunicacion\\_eng.pdf](http://www.saa-sem.org/images/10_004_comunicacion_eng.pdf) (last visited Oct. 3, 2013); *see also Translation of Submission*, SECRETARIAT FOR ENVTL. MATTERS, [http://www.saa-sem.org/index.php?option=com\\_content&view=article&id=82%3Acaala10004-lachua-gt&catid=40%3A2010&Itemid=198&lang=us](http://www.saa-sem.org/index.php?option=com_content&view=article&id=82%3Acaala10004-lachua-gt&catid=40%3A2010&Itemid=198&lang=us) (last visited Dec. 3, 2013) (Another submission under the Protected Areas, another National Park (a highway being constructed)).

<sup>442</sup> CAALA/10/006 *Laguna del Tigre Fonpetrol GT*, *supra* note 425.

<sup>443</sup> CAALA/11/008 *Maya Biosphere Reserve GT*, *supra* note 19.

<sup>444</sup> *Id.*

<sup>445</sup> *Id.*; *Translation of Determination 17.7.2 – CAALA/11/107*, SECRETARIAT FOR ENVTL. MATTERS 7, (Dec. 5, 2011) [http://www.saa-sem.org/determinaciones/det\\_17\\_7\\_2\\_rbm\\_english.pdf](http://www.saa-sem.org/determinaciones/det_17_7_2_rbm_english.pdf).

<sup>446</sup> *Translation of Determination 17.7.2 – CAALA/11/107*, *supra* note 446, at 13.

<sup>447</sup> *Id.*

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dent Countries and states that such a consultation is obligatory.<sup>448</sup> Additionally, the submitter states that an Environmental Impact Evaluation Study was not carried out prior to approving the petroleum exploration and claims that Guatemalan environmental laws are being weakened and the Environmental Chapter of the FTA-DR-CA-USA is not being complied with.<sup>449</sup>

Recent articles by Central American Data have discussed the practice of awarding a concession for oil explorations in Yalcanix, part of the Maya Biosphere Reserve.<sup>450</sup> The concession was awarded on September 28, 2011, and the submission was filed under CAFTA-DR the next day.<sup>451</sup> This is a clear indication that the submitter wanted to utilize this avenue as a way to bring attention to the issue, and allow people to have access to information and publicly participate. However, the submission was dismissed at the first stage, which could mean the submitter was unaware of the requirements necessary to meet, once again the issue of an ambiguous burden of proof.<sup>452</sup> The submitter did not re-file, and the Maya Biosphere Submission was stopped dead in its tracks.<sup>453</sup>

The Mayan culture remains alive 3,500 years later.<sup>454</sup> The land is necessary for the survival of animals including the flora and fauna, which must be protected as they are part of the Mayan's culture, traditions, and resources.<sup>455</sup> The birds are one of the most religious symbols and treated as gods because they can fly to heaven.<sup>456</sup> The Mayan Biosphere Reserve is home to 256 species of birds alone.<sup>457</sup> Exploration and the exploitation of resources should not be allowed on their lands because it will strip them of their ancestral territories and culture. Protecting the Mayans needs to be a priority amongst the Guatemala government. The government can protect the Mayans by allowing them to participate in the decisions and have access to information prior to any development on their lands.

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<sup>448</sup> *Id.* at 21.

<sup>449</sup> *Id.*

<sup>450</sup> See generally *The Interested Parties in Guatemala Oil*, CENT. AM. BUS.NETWORK (Nov. 7, 2012), [http://en.centralamericadata.com/en/search?q1=content\\_en\\_le%3A%22Perenco+Guatemala+Inc.%22&q2=mattersInCountry\\_es\\_le%3A%22Guatemala%22](http://en.centralamericadata.com/en/search?q1=content_en_le%3A%22Perenco+Guatemala+Inc.%22&q2=mattersInCountry_es_le%3A%22Guatemala%22).

<sup>451</sup> *City Peten to Explore Oil in Yalcanix*, CENT. AM. BUS. NETWORK (Sept. 28, 2011), [http://en.centralamericadata.com/en/article/home/City\\_Petn\\_to\\_Explore\\_Oil\\_in\\_Yalcanix](http://en.centralamericadata.com/en/article/home/City_Petn_to_Explore_Oil_in_Yalcanix); *Translation of Submission CAALA/11/008*, SECRETARIAT FOR ENVTL. MATTERS (September 29, 2011), [http://www.saa-sem.org/comunicaciones/submission\\_11\\_008\\_english.pdf](http://www.saa-sem.org/comunicaciones/submission_11_008_english.pdf).

<sup>452</sup> *CAALA/11/008 Maya Biosphere Reserve GT*, *supra* note 19; see also *Translation of Submission CAALA/11/008*, *supra* note 452.

<sup>453</sup> *CAALA/11/008 Maya Biosphere Reserve GT*, *supra* note 19.

<sup>454</sup> *Mayas, The Flight Through Time*, INTER-AMERICAN DEV. BANK (Dec. 19, 2012), <http://www.iadb.org/en/news/webstories/2012-12-19/mayan-culture-in-mesoamerica,10268.html>.

<sup>455</sup> *Id.*

<sup>456</sup> *Id.*

<sup>457</sup> GLOBAL ENVIRONMENT FACILITY: MANAGING THE NATURAL HERITAGE OF GUATEMALA, <http://www.thegef.org/gef/node/2912> (last visited Dec. 15, 2013).

## VII. Conclusion

Indigenous people have a strong attachment to their lands and natural resources that form the basis of their subsistence as well as their cultural integrity.<sup>458</sup> Even though the indigenous peoples have battled trade and development for centuries, their culture remains true to their ancestors, while the rest of the world continues to change and grow. With the challenges of globalization, sustainable development needs to become a priority in free trade agreements, specifically CAFTA-DR and NAFTA. The pillars of environmental protection and social rights need to be incorporated into free trade agreements in order to provide a procedural justice framework which includes: the right to access environmental information, the right to publicly participate in the decision-making process, and the right to access justice. These procedural justice rights serve to protect the recognized rights of the indigenous people, such as the right to traditional lands and property, the right to culture, the right to consultation, and the right to free, prior, and informed consent. Indigenous peoples are extremely vulnerable populations, who need to be protected at all levels of the planning, development, and implementation phases of free trade activities that affect their land, and inevitably their lives.

It is important to understand the complex interdependencies between trade liberalization, environmental protection, and human rights.<sup>459</sup> The goal is to strike a balance between these objectives, which are often conflicting.<sup>460</sup> Human rights are inalienable, universal, interrelated, and indivisible. Economic incentive and free trade agreement provisions do not trump the rights that are inherent in our basic humanity. Simply because we are opening markets, eliminating barriers to trade, and developing new products and ideas does not mean that the core of our identity, our culture, and our basic humanity, disappears. We are still rooted and grounded from the same seed.

The recent free trade agreements, CAFTA-DR and NAFTA, incorporated a citizen submission process to safeguard the issues of environmental protection and human rights. The environmental provisions through the citizen submission process are a positive step because it allows public participation and access to information. However, the process is reactive, not proactive and therefore does not provide the adequate protections of indigenous peoples rights. The lack of public participation, the heavy burden of proof, the significant costs and ineffective remedy, prove that the process has flaws and needs improvement. The recommendations present four ways to provide clearer requirements and guidelines to lessen the burden of proof, limit costs, and incorporate ways for all members of the public to participate, specifically the indigenous people.

The recent CAFTA-DR submissions in Guatemala identify the violations of the Maya's right to consultation and free, prior informed consent involving the environmental harms caused by the recent approval by the Guatemalan govern-

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<sup>458</sup> *Id.*

<sup>459</sup> HUNTER ET. AL., *supra* note 10, at 1239.

<sup>460</sup> *Id.*



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ment of exploration and exploitation of natural resources in protected lands of the Maya Biosphere Reserve.<sup>461</sup> The Laguna del Tigre submission and the Maya Biosphere Reserve submission did not move very far in the CAFTA-DR process and did not result in factual records.<sup>462</sup> The submissions did very little to resolve the infringement of the indigenous peoples rights. Even though the submissions brought the benefit of promoting awareness, the very fact that the Guatemalan government approved the oil concessions without consulting or informing the Mayas, indicates that indigenous rights and environmental protection are not a priority in trade agreements. If safeguards are not incorporated to protect human rights and the environment, a culture and people will become extinct. The Mayan population comes to around 7 million people who live in Mexico, Guatemala, Belize, Honduras, and El Salvador.<sup>463</sup> We cannot afford to displace these peoples from their land; we have to implement ways for the indigenous peoples to achieve sustainable development according to their ideas, decisions, and way of life. Actually, sustainability can be taught from a culture that has survived through the connection with the land for thousands of years. We have to continue to incorporate the objectives of sustainable development in free trade agreements in order to preserve the global environment for future generations.

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<sup>461</sup> CAALA/10/006 Laguna del Tigre Fonpetrol GT, SECRETERIAT FOR ENVTL. MATTERS, [http://www.saa-sem.org/index.php?option=com\\_content&view=article&id=78%3Aacaala10006-laguna-del-tigre-fonpetrol-gt&catid=40%3A2010&Itemid=198&lang=us](http://www.saa-sem.org/index.php?option=com_content&view=article&id=78%3Aacaala10006-laguna-del-tigre-fonpetrol-gt&catid=40%3A2010&Itemid=198&lang=us) (last visited Dec. 3, 2013); CAALA/11/008 *Maya Biosphere Reserve GT*, SECRETERIAT FOR ENVTL. MATTERS, [http://www.saa-sem.org/index.php?option=com\\_content&view=article&id=148%3Aacaala11008-reserva-de-la-biosfera-maya-gt&catid=46%3A2011&Itemid=203&lang=us](http://www.saa-sem.org/index.php?option=com_content&view=article&id=148%3Aacaala11008-reserva-de-la-biosfera-maya-gt&catid=46%3A2011&Itemid=203&lang=us) (last visited Oct. 3, 2013).

<sup>462</sup> CAALA/10/006 Laguna del Tigre Fonpetrol GT, SECRETERIAT FOR ENVTL. MATTERS, [http://www.saa-sem.org/index.php?option=com\\_content&view=article&id=78%3Aacaala10006-laguna-del-tigre-fonpetrol-gt&catid=40%3A2010&Itemid=198&lang=us](http://www.saa-sem.org/index.php?option=com_content&view=article&id=78%3Aacaala10006-laguna-del-tigre-fonpetrol-gt&catid=40%3A2010&Itemid=198&lang=us) (last visited Dec. 3, 2013); CAALA/11/008 *Maya Biosphere Reserve GT*, SECRETERIAT FOR ENVTL. MATTERS, [http://www.saa-sem.org/index.php?option=com\\_content&view=article&id=148%3Aacaala11008-reserva-de-la-biosfera-maya-gt&catid=46%3A2011&Itemid=203&lang=us](http://www.saa-sem.org/index.php?option=com_content&view=article&id=148%3Aacaala11008-reserva-de-la-biosfera-maya-gt&catid=46%3A2011&Itemid=203&lang=us) (last visited Oct. 3, 2013).

<sup>463</sup> *Mayas, The Flight Through Time*, INTER-AMERICAN DEV. BANK (Dec. 19, 2012), <http://www.iadb.org/en/videos/watch,2173.html?videoID=9744>; see also INTERCONTINENTAL CRY MAGAZINE, <http://intercontinentalcry.org/peoples/maya/> (last visited Dec. 15, 2013).



# THE FIGHT AGAINST THE EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE

Eric Fortineaux<sup>†</sup>

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## I. Introduction

On September 20, 2011, President Obama declared that the United States would implement the Extractive Industries Transparency Initiative (“EITI”).<sup>1</sup> The purpose behind the initiative is to illuminate and curb corruption within the international resource extraction sector and, therefore, in passing the Dodd-Frank Wall Street Reform and Consumer Protection Act, Congress provided the Securities Exchange Commission (“SEC”) with the authority to promulgate a disclosure rule.<sup>2</sup> At the heart of Dodd-Frank is the United States’ attempt at curbing corrupt business practices, and with the addition of section 13(q) of the congressional statute, it has become clear that the U.S. intends to not only combat corruption on U.S. soil but corruption abroad as well.<sup>3</sup> Therefore, the disclosure rule crafted by the SEC would require companies engaged in resource extraction to report to the federal government any payments made to foreign governments, or any payments made to the United States government, for the purpose of the mining and/or drilling of oil, natural gas, or minerals.<sup>4</sup>

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<sup>†</sup> B.A., Lake Forest College, 2010; J.D., Loyola University Chicago School of Law, 2013; Former Associate Editor of the Lake Forest College International Law Review.

<sup>1</sup> Press Release, Extractive Industries Transparency Initiative, President Obama: The US will Implement the EITI (Sept. 20, 2011), <http://eiti.org/news-events/president-obama-us-will-implement-eiti> (last visited Oct. 9, 2013).

<sup>2</sup> See Barry Russell, *Disclosure Rules May Have Adverse Effect on Energy Firms*, THE HOUSTON CHRONICLE (Oct. 12, 2012, 8:04 PM), [www.chron.com/Disclosure-rules-may-have-adverse-effect-on-3944068.php](http://www.chron.com/Disclosure-rules-may-have-adverse-effect-on-3944068.php). (“The SEC approved on Aug. 22 the rule implementing Section 1504 of the Dodd-Frank Wall Street reform bill, requiring disclosure of certain payments for resource extraction by U.S. public companies to the federal government.”); see also *Disclosure of Payments by Resource Extraction Issuers*, 77 Fed. Reg. 177, 56,365 (Sept. 12, 2012) (“Section 1504 added Section 13(q) to the Securities Exchange Act of 1934, which requires the Commission to issue rules requiring resource extraction issuers to include in an annual report information relating to any payment made by the issuer, a subsidiary of the issuer, or an entity under the control of the issuer, to a foreign government or the Federal Government for the purpose of the commercial development of oil, natural gas, or minerals.”).

<sup>3</sup> Daniel M. Firger, *Transparency and the Natural Resource Curse: Examining the New Extraterritorial Information Forcing Rules in the Dodd-Frank Wall Street Reform Act of 2010*, 41 GEO. J. INT’L L. 1043, 1070-71 (2010).

<sup>4</sup> *Id.*

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The SEC therefore required within this rule that U.S. companies file annual reports with the SEC, detailing any non “de minimis” payments made, which include any payments that are equal to or exceeds \$100,000.<sup>5</sup> The SEC rule also clearly states that “the size of the company or the extent of business operations” will not limit the reporting obligation and that there are no exemptions to the final rule.<sup>6</sup> This reporting requirement was slated to take effect after September 30, 2013.<sup>7</sup>

This provision has been vehemently opposed by several U.S. corporations engaged in international resource extraction; these corporations argue that such a rule has the potential to damage U.S. corporate interests and ultimately urge the SEC to develop an exemption to the final rule.<sup>8</sup> These arguments, when made unsuccessfully to the SEC, ultimately prompted a lawsuit brought by the American Petroleum Institute (“API”) against the SEC; in this suit, API argues the rule financially damages U.S. corporations, is a violation of the First Amendment, exceeds the SEC’s rule making authority, and was drafted based on a misinterpretation of section 13(q); these are not the only claims made by API but the ones most compelling for purposes of this comment.<sup>9</sup> Nonetheless, API requested the federal district court in its’ suit against the SEC to invalidate the rule on the basis of unconstitutionality.<sup>10</sup>

In its decision published in July 2013, the District Court ultimately held that (1) the decision of the SEC to disallow an exemption when foreign law prohibits disclosure was arbitrary and capricious and (2) that the public disclosure requirements drafted by the SEC were not consistent with rule 13(q) as drafted by Congress.<sup>11</sup> The Court also determined that it need not address the First Amendment argument brought by the plaintiff because such a decision would be unnecessary due to a finding that the above errors were so grave that the rule could not be applied as written.<sup>12</sup>

By failing to address the First Amendment argument, the District Court failed to resolve the deeper issue as to whether the law is valid in the first place; therefore, charging the SEC to rewrite a rule that may later be determined to be an unconstitutional exercise of congressional power by a federal court. This comment, after addressing the global benefits to the rule, will maintain that the district court’s ruling was deficient as it failed to address the most crucial charge against the SEC rule.

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<sup>5</sup> Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. at 56, 366.

<sup>6</sup> *Id.* at 56, 368.

<sup>7</sup> *Id.* at 56, 365, 56, 368-69.

<sup>8</sup> See Complaint, Am. Petroleum Inst. v. Sec. and Exch. Comm’n. (No. 12-1668), 2013 WL 3307114 (D.D.C. 2012).

<sup>9</sup> See *id.* at 37.

<sup>10</sup> *Id.* at 37.

<sup>11</sup> Am. Petroleum Ins. v. SEC, Civil Action No. 12-1668 (D.D.C. July 2013).

<sup>12</sup> *Id.*

## II. The Lawsuit

The greatest concern with transparency is that corporations in nations that have not adopted transparency laws may have an advantage over those who have.<sup>13</sup> Therefore, some United States corporations have argued in favor of the need for an exemption to the rule when foreign law prohibits disclosure, and, thereby, hoped in filing a complaint against the SEC that a federal court would invalidate the newly drafted disclosure rule.<sup>14</sup>

API thereby initiated proceedings against the SEC in a federal district court.<sup>15</sup> In its complaint, API argued “disclosure. . . would cause competitive injury by providing other market participants with commercially sensitive information to the benefit of foreign state-owned oil companies that would not be subject to the disclosure regime.”<sup>16</sup> The plaintiff thus argued that by revealing “extensive data about what they pay in licenses, taxes, royalties and other fees,” its competitors would gain an unfair advantage over such companies who are required by law to report.<sup>17</sup> In support of its argument, the plaintiff, in an attempt to make its argument more compelling, cited the dissenting opinion of an SEC member.<sup>18</sup> This member, SEC Commissioner Gallagher, heavily criticized the rule, arguing that it would cause a detrimental amount of competition against U.S. interests.<sup>19</sup>

Another argument maintained by the plaintiff in this case was that the SEC failed to properly consider the costs placed upon companies required to adhere to the rule.<sup>20</sup> Therefore, as stated in the complaint, “By the Commission’s own reckoning, the Rule will cost U.S. public companies at least \$1 billion in initial compliance costs and \$200 to \$400 million in ongoing compliance costs, and ‘could add billions of dollars of [additional] costs’ though the loss of trade secrets and business opportunities.”<sup>21</sup> The complaint also alleges that costs could

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<sup>13</sup> See Complaint, *Am. Petroleum Inst. v. Sec. and Exch. Comm’n.* (No. 12-1668), 2013 WL 3307114 (D.D.C. 2012); Disclosure of Payments by Resource Extraction Issuers at 56371.

<sup>14</sup> See Complaint at 22, *Am. Petroleum Inst. v. Sec. and Exch. Comm’n.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 15.

<sup>17</sup> Carlton Carroll, *API Argues Against SEC’s Anti-Competitive Regulations*, AMERICAN PETROLEUM INSTITUTE, <http://www.api.org/news-and-media/news/newstems/2013/june-2013/api-argues-against-sec-anti-competitive-regulations> (last visited Nov. 27, 2013).

<sup>18</sup> See Complaint at 15, *Am. Petroleum Inst. v. Sec. and Exch. Comm’n.* Commissioner Gallagher stated in his dissent, “Let’s be clear; we’re talking about real competition. Although it would be natural to assume that our large and familiar domestic oil and gas companies fill the list of the world’s top ten, that isn’t the case. State-owned oil companies, some of them truly huge even by reference to our largest domestic publicly held oil and gas companies are major competitors. I am talking about national oil companies in Russia, China, Iran, and Venezuela among others. These companies do not operate in the highly transparent, intensely regulated world of U.S. Issuers. And, they will reap competitive advantages through today’s rules.” Daniel M. Gallagher, Commissioner, Sec. and Exch. Comm’n, Statement at SEC Open Meeting: Proposed Rules to Implement Section 1504 of the Dodd-Frank Act (Aug. 22, 2012).

<sup>19</sup> See Gallagher, *supra* note 18.

<sup>20</sup> Complaint at 24-25, *Am. Petroleum Inst. v. Sec. and Exch. Comm’n.*; Carroll, *supra* note 17.

<sup>21</sup> Complaint at 2, *Am. Petroleum Inst. v. Sec. and Exch. Comm’n.*; see also ENERGY GLOBAL, SEC Rule Challenged (November 10, 2012), [http://www.energyglobal.com/sectors/processing/articles/SEC\\_anti\\_competitive\\_rule.aspx](http://www.energyglobal.com/sectors/processing/articles/SEC_anti_competitive_rule.aspx) (“The SEC believe [sic] that developing and operating the systems to gather, validate and report this detailed information will cost the industry US\$ 1 billion initially.”).

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be even greater than the above cited figures when a company has to abandon attempted purchases in nations that forbid disclosure or when companies are forced to sell at drastically reduced prices.<sup>22</sup>

API made other arguments but the ones most notable were that an exemption should have been written into the rule when foreign law prohibits disclosure, and that the SEC wrongly interpreted the congressional statute when it maintained that it was required to publicly disclose all information it acquired from U.S. corporate entities.<sup>23</sup> The SEC refused to allow corporate entities to submit information confidentially on the basis that the congressional statute did not allow such a procedure.<sup>24</sup>

Not within the complaint, but similar in argument, involves the notion that the US economy could be damaged due to a loss in American jobs when corporate earnings are reduced.<sup>25</sup> These same critics also argued that a loss in contractual agreements would damage the energy sector by making it “difficult for U.S. firms to gain access to resources abroad.”<sup>26</sup> Other arguments not within the complaint but still relevant for purposes of determining whether the SEC rule can accomplish its purported goal provided by Congress, involved whether the SEC could properly police companies subject to the rule, and whether transparency could truly curtail corruption. The argument, therefore, is that “the SEC’s inability to inspect foreign government bookkeeping. . . makes it far too easy for firms to falsify or underreport natural resource payments when it is in their interest to do so.”<sup>27</sup>

A number of significant questions are raised in the SEC’s inability to evaluate foreign government bookkeeping practices. For example, without the ability to even second-guess a corporation’s annual report, how will the SEC achieve the stated goal? Secondly, as indicated by the EITI, the goal of the reporting requirement is to empower citizens of the resource rich nations, but how would public disclosure in the U.S. do so? Does the SEC plan on presenting this information to special interest groups in resource rich countries? If so, how will the SEC do so, and who will the SEC contact? Ultimately, “without actors who are willing or able to use disclosed information to hold corrupt leaders accountable,” the goal created by Congress may never be attained.<sup>28</sup>

Therefore, the plaintiff in this lawsuit sought to invalidate the rule by arguing the rule violated the First Amendment by forcing U.S. corporations to “engage in speech that they do not wish to make, in violation of their contractual and legal

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<sup>22</sup> See Complaint at 2, *Am. Petroleum Inst. v. Sec. and Exch. Comm’n.*

<sup>23</sup> *Id.* at 30-31.

<sup>24</sup> *Id.*

<sup>25</sup> See ENERGY GLOBAL, *supra* note 21 (“The rule as written would impose enormous costs on US firms and put them at a competitive disadvantage against government owned oil giants not subject to the rule. . . Not only will the rule hurt the millions of Americans who own shares in oil and natural gas companies, it will also cost jobs and damage America’s energy security by making it more difficult for US firms to gain access to resources abroad.”).

<sup>26</sup> *Id.*

<sup>27</sup> Firger, *supra* note 3, at 1083.

<sup>28</sup> *Id.* at 1050.

commitments.”<sup>29</sup> The plaintiff also argued that an exemption must be made to the rule in order to prevent the loss of contractual opportunities when disclosure is against a nation’s laws.

### III. Holding of the District Court

Although API made many arguments against the SEC rule, the District Court responded to two before ruling vacating was the appropriate remedy.<sup>30</sup> The court first addressed the public disclosure argument. As noted above, API argued that the SEC erroneously determined that section 13(q) required that all information submitted to the SEC be disclosed to the public.<sup>31</sup> According to the complaint, API suggested that some annual reports be filed confidentially so that the SEC could determine what information should be publicly disseminated, especially when public disclosure could financially harm corporate interests.<sup>32</sup> The SEC, however, would not incorporate such a suggestion.<sup>33</sup>

Nonetheless, the court agreed with API, finding that 13(q) did not require that all annual reports submitted to the SEC be publicly disclosed.<sup>34</sup> Further, through a close statutory reading, the court held that it was clear that the SEC may selectively omit information when considering the financial burdens.<sup>35</sup> This is the case because the statute made no mention of making every annual report publicly accessible, and the court, therefore, deemed such omission as the intent of Congress to provide the SEC with discretion.<sup>36</sup> Therefore, the court held that the SEC misinterpreted the congressional statute.<sup>37</sup>

The district court also addressed the exemption argument and found in API’s favor.<sup>38</sup> In finding in API’s favor, the court determined that the failure to provide exemptions was arbitrary and capricious.<sup>39</sup> The court disagreed with the SEC’s argument that an exemption would undermine the goal of Congress and also looked to the congressional mandate upon the SEC that required the SEC in drafting any rules to do so in a way not to impose burdens by way of excessive competition.<sup>40</sup> The court also reasoned that Congress’s addition of the phrase “to the extent practical,” when addressing the compilation of information disseminated to the public, illuminated the intent of Congress to allow the SEC leeway

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<sup>29</sup> See Complaint at 4, *Am. Petroleum Inst. v. Sec. and Exch. Comm’n.* (No. 12-1668).

<sup>30</sup> See *Am. Petroleum Ins. V. SEC*, Civil Action No. 12-1668.

<sup>31</sup> *Id.* at 6-7; see also Complaint at 30-31, *Am. Petroleum Inst. v. Sec. and Exch. Comm’n.* (No. 12-1668).

<sup>32</sup> See Complaint at 30-31, *Am. Petroleum Inst. v. Sec. and Exch. Comm’n.*

<sup>33</sup> See *Am. Petroleum Ins. v. SEC*, Civil Action No. 12-1668 at 7-8.

<sup>34</sup> *Id.* at 12-13.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 14.

<sup>38</sup> *Id.* at 13-14.

<sup>39</sup> *Id.* at 14.

<sup>40</sup> *Id.* at 13.

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when imposing the rule upon business entities.<sup>41</sup> In all, the court found API's competition argument to be compelling and, therefore, held that the SEC should have written into an exemption into the final rule.<sup>42</sup>

### IV. The Arguments for Transparency

In analyzing the district court decision, this comment will first look to the arguments for transparency before addressing the First Amendment argument made by API, which this comment maintains is most important to successfully incorporating transparency into U.S. law. The comment will then conclude without an examination of the constitutional argument the court's decision was deficient and will only cause further problems with the implementation of the rule.

To begin with, the EITI is the driving force behind convincing nations to adopt transparency laws in order to battle the issue of global corruption. The EITI's global campaign, therefore, sought to encourage nation states to adopt laws that would "promote and support improved governance in resource-rich countries through the full publication and verification of company payments and government revenues from oil, gas, and mining."<sup>43</sup> The EITI believed that by encouraging nation states to adopt laws requiring transparency, citizens of reporting countries could more easily hold their governments "accountable for how revenues are used in public expenditure programs."<sup>44</sup> The reasoning behind the EITI was that transparency would "reduce the risk of conflict and promote stability" and would improve the reporting country's creditworthiness by keeping information in the public domain.<sup>45</sup> Ultimately, according to the EITI, an improvement to a country's credit worthiness would "enhance a country's likelihood of attracting loan and equity finance, and . . . lower the cost of such finance."<sup>46</sup> Such a credit rating allows an investor to assess the cost of potential investments and, in turn, clearly enhances a country's economy by encouraging further investment opportunities.<sup>47</sup> In addition to the credit rating, the EITI maintains transparency would encourage long-term sustainable development by promoting "good corporate risk management benefits," which, in turn, would have positive effects on resource extraction companies by lowering corporate costs and to reporting countries by attracting investors.<sup>48</sup> As of November 23, 2013, the EITI reports

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<sup>41</sup> *Id.* at 14.

<sup>42</sup> *See id.* ("The Commission could have limited the exemption to the four countries cited by the commentators or to all countries that prohibited disclosure as of a certain date, fully addressing this concern.").

<sup>43</sup> THE WORLD BANK & EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, IMPLEMENTING THE EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE (2008), available at [http://siteresources.worldbank.org/INTOGMC/Resources/Implementing\\_eiti\\_final.pdf](http://siteresources.worldbank.org/INTOGMC/Resources/Implementing_eiti_final.pdf).

<sup>44</sup> *Id.* at 8.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *See e.g.* Carsten Thomas Ebenroth & Thomas J. Dillon, Jr., *The International Rating Game: An Analysis of the Liability of Rating Agencies in Europe, England, and the United States*, 24 *LAW & POL'Y INT'L BUS.* 783, 784-85 (1992-93).

<sup>48</sup> THE WORLD BANK & EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, *supra* note 43, at 7-8.



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twenty-five (25) compliant countries and sixteen (16) candidate countries.<sup>49</sup> A nation becomes compliant by fully adhering to the seven steps outlined by the EITI organization, while those who have committed to require transparency are candidates.<sup>50</sup> A major step towards compliance requires nations to establish an entity to supervise extractive industries located within the nation's jurisdiction.<sup>51</sup>

Combating corruption is the EITI's main purpose behind encouraging nation states to develop disclosure laws.<sup>52</sup> In fact, according to one scholar, "[t]he framers of the EITI. . . hoped not just to increase transparency per se but also to lift the resource curse by countering corruption, one of its root causes."<sup>53</sup> Furthermore, supporters of transparency argue that without transparency laws, the potential for fund misappropriation by governmental officials is increased because of confidential payments.<sup>54</sup> Also confidentiality "makes it less likely that voters punish bad government as bad politicians or policies are less likely to be identified and therefore replaced."<sup>55</sup> Moreover, "[i]n recent years, researchers have found evidence that resource-rich states not only develop more slowly than others, but also tend to be less democratic, more corrupt, and more likely to experience civil conflict."<sup>56</sup>

In an effort to illustrate the need for global transparency, the EITI published a case study on Nigeria.<sup>57</sup> In the Nigerian case study, the EITI claims that Nigeria suffers from widespread government corruption. The EITI's position is that a country as rich in natural resources as Nigeria would substantially benefit from disclosure.<sup>58</sup>

Nigeria is one of the world's greatest producers of oil. The country reported approximately \$50 billion in oil revenue in 2011.<sup>59</sup> Oil accounts for 90% of the government's revenue, however, the country is also rich in aluminum, gold, tin, iron ore, coal, niobium, lead, and zinc.<sup>60</sup> Although Nigeria possesses abundant resources and that "the Nigerian economy continues to grow, the proportion of

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<sup>49</sup> *EITI Countries*, EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, <http://eiti.org/countries> (last visited Oct. 9, 2013).

<sup>50</sup> EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, Frequently Asked Questions for countries considering to Implement the EITI Standard, <http://www.eiti.org/eiti/faq-countries-considering-eiti> (last visited Oct 28, 2013); Firger, *supra* note 3, at 1066.

<sup>51</sup> EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, Frequently Asked Questions, *supra*, note 50.

<sup>52</sup> See EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, NIGERIA EITI: MAKING TRANSPARENCY COUNT, UNCOVERING BILLIONS (2012), available at <http://eiti.org/files/Case%20Study%20-%20EITI%20in%20Nigeria.pdf>.

<sup>53</sup> Firger, *supra* note 3, at 1064. (The "resource curse" refers to the phenomena where "resource abundance is inversely correlated with economic growth, good governance, and political stability."); *Id.* at 1048.

<sup>54</sup> See Firger, *supra* note 3, at 1064.

<sup>55</sup> Ivar Kolstad & Arne Wiig, *Is Transparency the Key to Reducing Corruption in Resource-Rich Countries?* 37 *WORLD DEV.* 521, 524 (2008).

<sup>56</sup> Firger, *supra* note 3, at 1052-53.

<sup>57</sup> *But see* EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, *supra* note 52.

<sup>58</sup> See generally *id.* at 1.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

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the population living in poverty increases every year.”<sup>61</sup> In fact, the National Bureau of Statistics determined about “60.9% of Nigerians in 2010 were living in ‘absolute poverty’ - this figure had risen from 54.7% in 2004.”<sup>62</sup> Not surprisingly, it has been discovered that almost 100 million people are living on less than a \$1 a day in Nigeria.<sup>63</sup> With such abysmal figures, Nigerians have a strong need to ensure their government uses accumulated wealth from global trade for the public’s benefit. Natural resource abundance, governmental corruption, and national poverty, led former Nigerian President Olusegun Obasanjo to implement the EITI initiative because it would benefit Nigeria.<sup>64</sup> In 2004, the Nigerian Government developed the Nigerian Extractive Industries Transparency Initiative (“NEITI”).<sup>65</sup>

After development of the NEITI, Nigeria proceeded to enforce the transparency laws.<sup>66</sup> After formation, the NEITI began initiating several audits. These audits strengthened the EITI’s argument for global transparency when Nigeria discovered a great deal of fund misappropriation.<sup>67</sup> In 2009, the NEITI “identified unprecedented financial discrepancies, unpaid taxes, and system inefficiencies.”<sup>68</sup> Nigeria discovered over \$800 million U.S. dollars was unaccounted for.<sup>69</sup> Through NEITI, the Nigerian government discovered corruption by application of the transparency requirements and could therefore attempt to curtail these issues.<sup>70</sup> Using the Nigeria study the EITI’s boasts that Nigeria is now in a better position to force societal change.<sup>71</sup>

Like Nigeria, many countries have an abundance of natural resources.<sup>72</sup> These natural resources are extremely valuable commodities.<sup>73</sup> Exporting and importing raw materials from resource rich countries is on the rise. China and India

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<sup>61</sup> *Nigeria Poverty Profile*, NAT’L BUREAU OF STATISTICS, <http://www.tucrivs.org/tucpublications/Nigeria%20Poverty%20Profile%202010.pdf> (last visited Dec. 1, 2013).

<sup>62</sup> *Nigerians Living in Poverty Rise to Nearly 61%*, BBC NEWS, Feb. 13, 2013, <http://www.bbc.co.uk/news/world-africa-17015873> (quoting the National Bureau of Statistics of Nigeria).

<sup>63</sup> *Id.*

<sup>64</sup> *See* EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, *supra* note 52, at 1.

<sup>65</sup> *Id.*

<sup>66</sup> *See id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 2.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 4.

<sup>72</sup> *See* Ernst & Young, *Disclosing Government Payments*, (2012), [http://www.ey.com/Publication/vwLUAssets/Disclosing\\_government\\_payments/\\$FILE/Disclosing-government\\_ER0036.pdf](http://www.ey.com/Publication/vwLUAssets/Disclosing_government_payments/$FILE/Disclosing-government_ER0036.pdf) (“It is estimated that more than 3.5 billion people live in countries with extensive oil, natural gas and mineral resources.”).

<sup>73</sup> *See* Michael B. Sauter, Charles B. Stockdale, & Paul Ausick, *The World’s Most Resource-Rich Countries*, 24/7 WALL ST (Apr. 18, 2012, 6:48 AM), <http://247wallst.com/2012/04/18/the-worlds-most-resource-rich-countries/> (“[I]n the cases of oil, natural gas, timber and coal, reserves can be worth tens of trillions of dollars in some countries, because demand is high and resources are relatively plentiful.”).

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have recently increased natural resource imports from African countries.<sup>74</sup> China has increased these exports “at an annual rate of 48 percent between 2000 and 2005,”<sup>75</sup> and the U.S. has recently discovered that Afghanistan has nearly \$1 trillion in untapped mineral deposits. This makes the country a very desirable for mining and drilling.<sup>76</sup> Because of the resource wealth in the country “officials and industry experts say the potential resource boom [in Afghanistan] seems increasingly imperiled by corruption, violence and intrigue, and has put the Afghan government’s vulnerabilities on display.”<sup>77</sup>

The findings in Afghanistan and Nigeria demonstrate the need for transparency. Still, there exists opposition to transparency initiatives in the United States. At the forefront remains the question whether U.S. corporations will be damaged by transparency laws because of released trade secrets to the public, and the possible forgoing of contractual agreements due to foreign law prohibiting disclosure. However, the SEC responded to the above argument when it published the rule. The SEC determined that, although a corporation may be faced with such a law, “an exemption would be inconsistent with the structure and language of Section 13(q) and. . . could undermine the statute by encouraging countries to adopt laws, or interpret existing laws, specifically prohibiting the disclosure required under the final rules.”<sup>78</sup> The SEC also found the contractual argument unavailing, finding resolution of such an issue in the contract negotiation process.<sup>79</sup>

Further, other proponents of transparency aside from the SEC are not persuaded by these criticisms. For instance, one proponent argued that the United States would benefit by adopting and encouraging global transparency because doing so would assist the global market toward moving to a “more honest business environment.”<sup>80</sup> This author also suggested that a corporation can often shift its business elsewhere if a contract is lost due to unfair trade practices. This means that although the contract is lost, the corporation would not be damaged by the failure to acquire the contract because the goods could be acquired else-

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<sup>74</sup> See Harry G. Broadman, *China and India Go to Africa: New Deals in the Developing World*, 87 FOREIGN AFF. 95, 95 (2008).

<sup>75</sup> *Id.*

<sup>76</sup> See James Risen, *U.S. Identifies Vast Mineral Riches in Afghanistan*, N.Y. TIMES, (June 14, 2010), <http://www.nytimes.com/2010/06/14/world/asia/14minerals.html?pagewanted=all> (“The United States has discovered nearly \$1 trillion in untapped mineral deposits in Afghanistan, far beyond any previously known reserves and enough to fundamentally alter the Afghan economy and perhaps the Afghan war itself, according to senior American government officials.”).

<sup>77</sup> Graham Bowley, *Potential for a Mining Boom Splits Factions in Afghanistan*, N.Y. TIMES, (Sept. 8, 2012), [http://www.nytimes.com/2012/09/09/world/asia/afghans-wary-as-efforts-pick-up-to-tap-mineral-riches.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/09/09/world/asia/afghans-wary-as-efforts-pick-up-to-tap-mineral-riches.html?pagewanted=all&_r=0).

<sup>78</sup> Disclosure of Payments by Resource Extraction Issuers, *supra* note 5, at 53, 672.

<sup>79</sup> *Id.* at 53, 373.

<sup>80</sup> See Susan Rose-Ackerman & Sinead Hunt, *Transparency and Business Advantage: The Impact of International Anti-Corruption Policies on the United States National Interest*, 67 N.Y.U ANN. SURV. AM. L. 433, 435-436 (2012) (“A strong U.S. policy against international corruption can encourage other countries to follow suit, with positive effects on the efficiency and fairness of global trade and investment, and can help support government reform efforts in host countries.”).

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where.<sup>81</sup> Proponents also note that although transparency may provide bribers with the key players who may be bribed, corruption is better battled as transparency improves.

The fight against corruption is global concern. It has the potential to affect the global market by making nations less democratic or simply discouraging trade with corrupt countries.<sup>82</sup> Additionally, many nations with abundant natural resource wealth have a great deal of citizens struggling with poverty. By implementing EITI, Congress hoped that transparency would encourage more governmental assistance programs. Therefore, Congress ostensibly had reason for developing laws related to international trade.

### V. The Constitutional Challenge

As indicated above, API's main argument against the SEC rule is that disclosure is damaging to U.S. corporate interests. Such a law violates the First Amendment by requiring companies to engage in speech that the corporations do not want to engage in because the speech may violate foreign law or contractual agreements with foreign governments.<sup>83</sup> Other concerns are that the disclosure would place competitors in an advantageous position in the bidding process, especially when competitors are not subject to the same disclosure requirements. This argument is unavailing.

The SEC has dismissed arguments that many nations have adopted foreign laws prohibiting disclosure as unsupported.<sup>84</sup> Likewise, the complaint itself fails to provide any evidence supporting its contention that the nations stated within the complaint (China, Qatar, and Cameroon) actually prohibit disclosure.<sup>85</sup> The complaint simply cites as support a letter drafted by a fellow extraction corporation.<sup>86</sup> This corporation maintains the above nations have laws in the books against disclosure without providing any convincing proof of such claims.<sup>87</sup> Therefore, such an argument is wholly unconvincing and a court should dismiss the argument as unsubstantiated. However, as noted above, the district court in this case failed to render a decision on the First Amendment argument.<sup>88</sup>

When analyzing the First Amendment claim, it is important to note the U.S. Supreme Court has held that "just as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views. . . or from compelling cer-

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<sup>81</sup> *Id.* at 435 ("We defend a more sophisticated view of the loss that recognizes both the firm can usually shift its business elsewhere and that, even if the lost contract involves a resource at fixed location, that resource will generally enter into international trade where it can be purchased by American customers.").

<sup>82</sup> THE WORLD BANK & EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, *supra* note 43, at 7-8.

<sup>83</sup> *See* Complaint, Am. Petroleum Inst. V. Sec. and Exch. Comm'n. (No. 12-1668), *supra* note 8.

<sup>84</sup> Disclosure of Payments by Resource Extraction Issuers, *supra* note 5, at 56,402.

<sup>85</sup> *See* Complaint, Am. Petroleum Inst. V. Sec. and Exch. Comm'n. (No. 12-1668), *supra* note 8.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> Disclosure of Payments by Resource Extraction Issuers, *supra* note 5, at 56,402.

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tain individuals to pay subsidies for speech to which they object.”<sup>89</sup> Consequently, API is correct when maintaining the federal government cannot compel certain speech. Neither the U.S. Supreme Court, nor any federal appellate court, has dealt with the issue, where a corporation or other organization has argued that mandated disclosure violates the First Amendment. However, United States courts have held that commercial speech is analyzed under the intermediate level of scrutiny when determining whether it is permissible to restrict or mandate this type of speech.<sup>90</sup> Courts have ultimately defined commercial speech as the type that “does no more than propose a commercial transaction.”<sup>91</sup> The most common form of commercial speech is advertising. When analyzing cases involving commercial speech, courts note that it is a matter of public policy when a profit is made by individuals failing to disclose relevant information that could influence the decision of the listener.<sup>92</sup> For example, in *U.S. v. Wenger*, the tenth circuit determined that it was valid for the SEC to promulgate rules requiring the disclosure of any personal benefit derived from a public corporation when a radio announcer suggested to his listeners that a specific company’s stock should be purchased.<sup>93</sup> When coming to this conclusion, the Court highlighted that the state has an interest in protecting its’ consumers from being misled.<sup>94</sup>

In contrast, here we have corporations engaging in the international exchange of goods subject to a requirement to disclose the amount of payments they have made to foreign governments for mining or drilling activities. Therefore, it is likely a federal court might find this commercial speech as defined by the federal law and may subject it to an intermediate level of scrutiny. Similar to *Wenger*, a court should balance U.S. interests against the First Amendment right when dealing with the transparency issue.

Again, U.S. corporations would benefit from the law based on EITI’s the positive impact on international trade. Therefore, the federal governments’ reasoning behind implementing the law, and the decision to provide the SEC with the task of developing rules, was an exercise of Congress’s commerce powers. The issue involving whether the rule violates the First Amendment was not addressed and the SEC will have to restructure its rule, as the rule cannot now be applied as written. Whether the rule will survive judicial scrutiny under the First Amendment remains to be seen. However, the exemption that the court is requiring the SEC to draft into the rule may be enough to curtail further efforts to find the law unconstitutional.

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<sup>89</sup> *U.S. v. United Foods, Inc.*, 533 U.S. 405, 410 (2001).

<sup>90</sup> *U.S. v. Wenger*, 427 F.3d 840, 846 (10th Cir. 2005); *See also Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 563 (1980) (“The Constitution therefore affords a lesser protection to commercial speech than to other constitutionally guaranteed expression.”).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 850; *See also Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-772 (1976) (“We foresee no obstacle to a State’s dealing effectively with this problem. The First Amendment as we construe it today does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.”).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

## VI. Conclusion

The district court failed in striking the heart of the issue and instead invalidated the rule without giving the SEC clear guidance on the future of the law. Nonetheless, API's constitutional argument remains unsupported by law and unconvincing. Since the U.S. has an interest in improving global trade for economic purposes, the law should withstand a First Amendment attack if API attempts to mount another suit after Congress redrafts the law. An exemption to the rule, if warranted, would be enough to dissuade a further attempt to invalidate the rule. However, since API initially mounted an attack without providing sufficient evidence whether resource rich nations actually prohibit disclosure, the decision to attack the law most likely stems from a desire to prevent the law from taking effect. Furthermore, while the SEC concedes the rule will be expensive to maintain, such expenses are spread across at least 500 corporations (this figure encompasses only those in the oil and gas sector) and are only initial costs.<sup>95</sup> Consequently, the expense to an individual corporation such as API is unclear. Ultimately, API fails to deliver any evidence to support its claim that an exemption is necessary.

Transparency is necessary for the global market. Although the U.S. is not a nation targeted for implementation of the EITI, the U.S. has a very strong presence in the global community. Because of its influential abilities, the U.S. can convince others nations to develop disclosure laws. One can see EITI's success through trade practices with China. Ultimately, the U.S. has proved its ability to influence China. The U.S. has convinced China to develop better intellectual property laws.<sup>96</sup> It is no secret that doing business in China puts a corporation's intellectual property at risk.<sup>97</sup> For instance, recently China has been criticized for fraudulent Apple stores found within the country.<sup>98</sup> However, through extreme pressure from the U.S. government, China has attempted to become more vigilant in protecting intellectual property rights.<sup>99</sup> After negotiations with the U.S. over the Sino-U.S.A. High Energy Physics Agreement and the Sino-U.S. Trade Agreement, "China has made a revolutionary transformation with respect to [Intellectual Property Rights]". They are now a country that initially had no intellectual property laws in place to one with "a broad and systematic system."<sup>100</sup>

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<sup>95</sup> See Complaint at 7, *Am. Petroleum Inst. V. Sec. and Exch. Comm'n.* (No. 12-1668).

<sup>96</sup> DELI YANG, *INTELLECTUAL PROPERTY AND DOING BUSINESS IN CHINA* 26 (Pervez N. Ghauri series ed., Pergamon 2003).

<sup>97</sup> See Gordon C. K. Cheung, *Intellectual Property Rights in China: Politics of Piracy, trade and protection* 1 (Routledge 2009) ("In China, apart from the counterfeit production of computers, machine parts, garments, golf equipment and so on, fake products also include food, medicine and infant formula milk powder.").

<sup>98</sup> BBC News, *Chinese authorities find 22 fake Apple stores* (Aug. 12, 2011, 6:21 AM) <http://www.bbc.co.uk/news/technology-14503724>.

<sup>99</sup> YANG, *supra* note 96.

<sup>100</sup> *Id.*

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China has recognized the necessity of succumbing to global pressure to remain a key player in the international trade system.<sup>101</sup>

Some have also criticized China for failing to enforce international obligations, and have argued that China will continue to fail to enforce such obligations, only if international trading is unaffected.<sup>102</sup> However, this increases the likelihood of convincing China to implement the EITI. When influencing nations to adopt certain international agreements, market pressure can prove a useful tool. For example, market pressure has been credited for the adoption of the Sullivan principles. A civil rights activist who worked with corporate entities introduced the Sullivan principles.<sup>103</sup> These principles ultimately encourage “de-segregating workspaces, promoting non-whites to positions of authority, and donating local education and health charities.”<sup>104</sup> Using these principles, U.S. corporations in South Africa would be rated on corporate behavior and attempts at becoming more inclusive to historically oppressed racial and ethnic groups.<sup>105</sup> Findings from the Sullivan principles support the proposition that transparency<sup>106</sup> can create economic pressure and further “suggests that a stronger, more revealing transparency mechanism might have had even more coercive effects on U.S. corporations in South Africa.”<sup>107</sup> Although the U.S. economy is extremely important to the American society, the benefits of transparency far outweigh any harm that may arise from transparency.

Ultimately, the rule must be held as a constitutional exercise of congressional authority for purposes of strengthening a world market. The district court should have ruled the statute constitutional in order to inform adversarial corporate entities that the rule will withstand any constitutional attacks. Without such a decision, the rule remains open to further attack even after the required redrafting.

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<sup>101</sup> See *id.* at 27 (“Without proper IPP, nobody would transfer technology into China. On the other hand, developed countries, particularly the US, have been very active in advocating the need for secure protection of IP, particularly in developing countries, such as China”).

<sup>102</sup> See CHEUNG, *supra* note 97 at 16 (“Ever since the 1978 economic reforms, one observer noticed that ‘China had undertaken a broad range of international legal obligations and participated in international organizations to an extent unthinkable before the death of Mao. . . with regard to the deficiency of China in adhering to international obligations, the country is more likely to abide by the international legal framework in relation to trade an investment, due to the fact that it falls in the domain of national interest where economic development is given the highest priority.’”).

<sup>103</sup> Thomas N. Hale & Anne-Marie Slaughter, *Transparency: Possibilities and Limitations*, 30 FLETCHER F. WORLD AFF. 153, 155 (2006).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> Although this article by Hale and Slaughter is not speaking of transparency in terms of resource extraction, the author defines transparency “to denote any kind of measure that publicizes information about an institution’s behavior, such as monitoring, reporting, or simply responding to inquires;” thereby making this author’s analysis relevant to this paper’s thesis.

<sup>107</sup> Hale & Slaughter, *supra* note 103, at 156.

