

1999

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Recommended Citation

Beatriz Bugeda, *Is NAFTA Up To Its Green Expectations? Effective Law Enforcement Under the North American Agreement on Environmental Cooperation*, 32 U. Rich. L. Rev. 1591 (1999).

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IS NAFTA UP TO ITS GREEN EXPECTATIONS? EFFECTIVE LAW ENFORCEMENT UNDER THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION

*Beatriz Bugeda**

I. INTRODUCTION

On January 1, 1994, the North American Free Trade Agreement (NAFTA)¹ between the governments of Mexico, Canada and the United States went into effect. Together with this trade agreement, the governments of the three countries entered into a side agreement on the environment: the North American Agreement on Environmental Cooperation (NAAEC).² This agreement, also known as the Environmental Side Agreement, responded to some of the concerns of NAFTA critics.³ Some environmentalists believed NAFTA would promote environmentally insensitive and uncontrolled growth, and others thought the liberalization of trade would be used as a means to preempt stringent domestic environmental regulations.⁴

Some environmentalists also feared that in order to obtain a competitive advantage, polluting industries would move from a

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1. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289 [hereinafter NAFTA].

2. North American Agreement on Environmental Cooperation, Sept. 14, 1993, U.S.-Can.-Mex., 32 I.L.M. 1480 [hereinafter NAAEC].

3. See PHILIPPE SANDS, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* 714 (1995).

4. For a thorough treatment of this subject, see PIERRE-MARC JOHNSON & ANDRÉ BEAULIEU, *THE ENVIRONMENT AND NAFTA: UNDERSTANDING AND IMPLEMENTING THE NEW CONTINENTAL LAW* (1996).

country with more stringent environmental regulations to one with less developed environmental policies or lax enforcement.⁵ Mexico's enforcement capacities with regard to the environment were questioned in comparison to the supposedly more effective regulatory regimes of the other two countries participating in NAFTA. Critics argued that the lower cost of environmental compliance in Mexico would encourage businesses and investors to relocate there.⁶

Some environmental groups felt this situation would force the United States and Canada to lower their own environmental enforcement standards to protect employment levels and the health of their economies, thus creating a "race to the bottom" of environmental regulations.⁷ It was argued that this process of downward harmonization of environmental standards would have disastrous effects on the North American environment.⁸

In an attempt to address the criticisms of opponents to NAFTA and the concerns of environmental groups, the governments of the three countries committed themselves to both ensuring that their "laws and regulations provide for high levels of environmental protection," and striving to "continue to improve those laws and regulations."⁹ The NAFTA parties reached a compromise under the NAAEC to foster cooperation for the protection and improvement of the environment, and to enhance compliance with, and enforcement of, environmental laws and regulations.¹⁰

To increase cooperation in conserving, protecting, and enhancing the North American environment, the three governments established the Commission for Environmental Cooperation (CEC).¹¹ This institution, based in Montreal, is composed of

5. See Aradhana Kuma, Jean Milner & Annie Petsonk, *The North American Free Trade Association*, in GREENING INTERNATIONAL INSTITUTIONS 116, 119-20 (Jacob Werksman ed., 1996).

6. See Kal Raustiala, *International "Enforcement of Enforcement" Under the North American Agreement on Environmental Cooperation*, 36 VA. J. INT'L L. 721, 723 (1996).

7. See *id.*

8. See *id.*

9. NAAEC, *supra* note 2, art. 3, at 1483.

10. See *id.* art. 1(a), (g).

11. See *id.* arts. 8-19, at 1485-89. Part Three of the NAAEC establishes the CEC, and describes its structure and the functions of the three bodies that comprise it. See

three different bodies: the Council, the Secretariat, and the Joint Public Advisory Committee (JPAC).¹² The first two are typical intergovernmental bodies, while the third, composed of fifteen members from the different sectors of the three North American countries,¹³ constitutes one of the innovative aspects of the NAAEC. The JPAC is responsible for creating a link between the North American public and the other bodies of the CEC, with the objective of promoting public participation in the decision-making process of the organization.¹⁴

The Council is the governing body of the CEC and is comprised of cabinet level representatives of the three countries. Its functions are to "oversee the implementation and develop recommendations on the further elaboration of [the] Agreement," as well as to "address questions and differences that may arise between the [NAFTA countries]."¹⁵ As the CEC's executive body, the Council is in charge of approving the CEC's annual program and budget.¹⁶ It also serves as the forum for discussion of environmental matters among Mexico, Canada and the United States.¹⁷

The CEC's second body, the Secretariat, is the one that "provide[s] technical, administrative and operational support to the Council and to the committees and working groups established by the Council."¹⁸ One of the most important functions of the Secretariat is to prepare the CEC's annual report. This report must cover the actions taken by each country in connection with its obligations under the NAFTA agreement, including information on each country's environmental enforcement activities.¹⁹ After being reviewed by the Council, this document is

id.

12. *See id.* art. 8, at 1485.

13. *See id.* art. 16(1), at 1489.

14. *See id.* art. 16, at 1489. Other functions of the JPAC are to "provide advice to the Council on any matter within the scope of this Agreement . . . and on the implementation and further elaboration of this Agreement" and to "perform such other functions as the Council may direct." *Id.* art. 16(4), at 1489.

15. *Id.* art. 10, at 1485.

16. *See id.*

17. *See id.*

18. *Id.* art. 11, at 1487.

19. *See id.* arts. 11, 12, at 1487.

made public, and it must include the "relevant views and information submitted by [nongovernmental] organizations and persons."²⁰

To enhance compliance with, and enforcement of, environmental laws and regulations, and the signers' regulations, the signers promised to effectively enforce their environmental laws.²¹ The signers established two mechanisms for this purpose: the party-to-party dispute resolution process established in Part V of the NAAEC,²² and the Citizen's Submission process contained in Articles 14 and 15 of the NAAEC.²³

This article will begin with a brief examination of the dispute resolution process established in Part V of the NAAEC. The article then gives a more detailed description of the Citizen's Submission process, highlighting the aspects of this procedure that have proven to be controversial in the eyes of both nongovernmental organizations and the parties to the NAAEC. Part III of the article examines the first submission that has resulted in a factual record: the Cozumel Submission. Finally, some brief conclusions are included.

II. DISPUTE RESOLUTION MECHANISMS UNDER NAAEC

A. *The Party-to-Party Dispute Resolution Mechanism*

The most extensive section of the NAAEC deals with settlement of disputes. The scheme that was agreed upon is common to most international agreements. It begins with consultations, continues with other means of conflict resolution, follows with arbitration, and ends with sanctions and the suspension of trade agreement benefits.²⁴

The noteworthy aspect of this dispute resolution mechanism is its limited scope. The mechanism is accessible only to NAAEC parties and it is related to a "persistent pattern of failure to effectively enforce environmental law."²⁵ The term

20. *Id.* art. 12, at 1487.

21. *See id.* art. 1, at 1483.

22. *See id.* arts. 22-36, at 1490-94.

23. *See id.* arts. 14-15, at 1488-89.

24. *See id.* arts. 22-36, at 1490-94.

25. *Id.* art. 22, at 1490. For NAAEC's definition of the term "environmental law,"

“persistent pattern” is defined in Article 45(1) of the NAAEC as a “sustained or recurring course of action or inaction beginning after the date of entry into force of this Agreement.”²⁶ As stated in Article 24, it is limited to “situation[s] involving workplaces, firms, companies, or sectors that produce goods or provide services”²⁷ The NAAEC specifically refers to: (a) goods or services that are traded between the territories of the governments involved; or, (b) companies that compete in the territory of the government against which the complaint has been made, with goods or services produced or provided by individuals from a different country.²⁸ This is the only section in the NAAEC in which there is a direct link between trade and the environment.

If the governments in question do not arrive at a mutually satisfactory resolution of the matter through consultations, or through a special Council session, the Council may, “by a two-thirds vote, convene an arbitral panel to consider the matter.”²⁹ The panel will present a report containing its “determination as to whether there has been a persistent pattern of failure by the government complained against to effectively enforce its environmental law[s].”³⁰ It will also present its recommendation for the resolution of the dispute. The recommendation will normally consist of an action plan for sufficiently remedying the pattern of nonenforcement.³¹ If the disputing government does not agree to the action plan, it can be subject to a monetary enforcement assessment and, ultimately, to the suspension of NAFTA benefits, except in Canada.³² In the case of Canada, a special provision requires that enforcement be provided by domestic courts.³³

As the dispute resolution mechanism has not been triggered yet by the parties to the NAAEC agreement, its efficiency in

see *infra* note 42.

26. *Id.* art. 45, at 1495.

27. *Id.* art. 24, at 1490.

28. *See id.*

29. *Id.* For more detail regarding the integration of this panel, see *id.* arts. 24-27, at 1490-91.

30. *Id.* art. 31 (2)(b), at 1492.

31. *See id.* art. 31 (2)(c), at 1492.

32. *See id.* art. 36, at 1493.

33. *See id.* Annex 36A, at 1493, 1496-97.

promoting effective enforcement of environmental law in the three countries remains untested. Nonetheless, some legal experts have already identified some of its limitations. For example, Pierre Marc Johnson and André Beaulieu point out that "the dispute settlement procedure remains lengthy, cumbersome, and full of legal uncertainties."³⁴ They also argue that

[N]either the system of fines paid by the governments nor the imposition of duties on the exports of the party complained against seem a particularly appropriate way to allocate the environmental costs of polluting activities. The costs of the fines may well never be passed on to the polluting industries who benefited from lax enforcement.³⁵

Others argue that "the scope of the disputes that can be reached . . . by the dispute resolution mechanism . . . is such that many significant environmental issues will not fall within it."³⁶

B. *The Citizen's Submission Process*

Perhaps the most important function of the Secretariat of the CEC, and definitely the one that has captured the most attention of environmental groups, the private sector, and legal specialists in North America, is the function related to reviewing submissions regarding enforcement matters, which is stipulated in NAAEC's Articles 14 and 15.³⁷

It is through these articles that Canada, Mexico and the United States established a procedure through which ordinary citizens, environmental organizations, or even corporations can complain to the Secretariat that one of the three countries is not enforcing its environmental laws. The articles also provide a mechanism for any citizen or group of citizens to make public

34. JOHNSON & BEAULIEU, *supra* note 4, at 238.

35. *Id.*

36. J. Owen Saunders, *NAFTA and the North American Agreement on Environmental Cooperation: A New Model for International Collaboration on Trade and Environment*, 5 COLO. J. INT'L ENVTL. L. & POL'Y 278, 302 (1994).

37. See NAAEC, *supra* note 2, arts. 14-15, at 1488-89.

the fact that one of the three governments is not complying with its obligations under the NAAEC.³⁸

This procedure, combined with the reports that the Secretariat can prepare pursuant to Article 13 of NAAEC,³⁹ provides the only avenue within the NAFTA/NAAEC framework for nongovernmental organizations to pursue their environmental concerns. The procedure is complemented by a series of guidelines that were proposed to the North American public through various meetings held in the three countries by the JPAC.⁴⁰

To summarize the procedure, anyone residing in or any nongovernmental group established in North America⁴¹ can bring

38. *See id.*

39. *See id.* art. 13, at 1487-88. This article enables the Secretariat of the CEC to "prepare a report for the Council on any matter within the scope of the annual program." *Id.* at 1487. One interesting aspect of this kind of report is that nongovernmental organizations or individuals can ask the Secretariat to prepare a report on any environmental matter about which they are concerned. If the environmental matter is related to the annual program, the Secretariat can prepare a report without the Council's authorization. If the issue raised is not within the scope of the program, the Council decides by a two-thirds vote if the report will be prepared. *See id.* art. 13, at 1488. An example of this type of report is the one developed by the Secretariat regarding the death of massive numbers of migratory birds which occurred in 1994 at the Silva Reservoir located in the Mexican state of Guanajuato. *See Jay Tutchtan, The Citizen Petition Process Under NAFTA's Environmental Side Agreement: It's Easy to Use, But Does It Work?*, 26 ENVTL. L. REP. 10031-32 n.13 (1996); *CEC Secretariat Report on the Death of Migratory Birds at the Silva Reservoir (1994-95)* (visited Apr. 7, 1999) <<http://www.cec.org/english/resources/publications/index.cfm>>. Three environmental groups requested the preparation of the report: the Mexican Center of Environmental Law, the International Group of One Hundred, and the National Audubon Society. *See id.*

40. *See Commission for Environmental Cooperation, Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (visited Oct. 19, 1998) <<http://11209.167.49.172/search/data/english/citizen/guide08.cfm-format=1.htm>> [hereinafter *Guidelines*]. The JPAC held public hearings on its Draft Procedures for Public Submissions on July 31, 1995, in Ottawa; on August 3, 1995, in Washington, D.C.; and on August 7, 1995, in Mexico City. *See id.*

41. According to NAAEC, the term "non governmental organization" means: "any scientific, professional, business, nonprofit, or public interest organization or association which is neither affiliated with, nor under the direction of, a government." NAAEC, *supra* note 2, art. 45, at 1495. "Territory" is defined to mean

- (a) with respect to Canada, the territory to which its customs laws apply, including any areas beyond the territorial seas of Canada within which, in accordance with international law and its domestic law, Canada may exercise rights with respect to the seabed and subsoil and their natural resources;
- (b) with respect to Mexico,

a submission against any one of the three governments alleging that it is failing to effectively enforce its environmental laws.⁴²

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- (i) the states of the Federation and the Federal District;
 - (ii) the islands, including the reefs and keys, in adjacent seas;
 - (iii) the island of Guadalupe and Revillagigedo situated in the Pacific Ocean;
 - (iv) the continental shelf and the submarine shelf of those islands, keys, and reefs;
 - (v) the waters of the territorial seas, in accordance with international law, and its interior maritime waters;
 - (vi) the space located above the national territory, in accordance with international law; and
 - (vii) any areas beyond the territorial seas of Mexico within which, in accordance with international law, including the *United Nations Convention on the Law of the Sea*, and its domestic law, Mexico may exercise rights with respect to the seabed and subsoil and their natural resources; and
- (c) with respect to the United States,
- (i) the customs territory of the United States, which includes the 50 states, the District of Columbia, and Puerto Rico;
 - (ii) the foreign trade zones located in the United States and Puerto Rico; and
 - (iii) any areas beyond the territorial seas of the United States within which, in accordance with international law and its domestic law, the United States may exercise rights with respect to the seabed and subsoil and their natural resources.

Id. Annex 45, at 1498.

42. *See id.* art. 14, at 1488. The term "environmental law" is defined as:

(a) [A]ny statute or regulation of a Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health, through[.:]

- (i) the prevention, abatement, or control of the release, discharge, or emission of pollutants or environmental contaminants[.];
- (ii) the control of environmentally hazardous or toxic chemicals, substances, materials, and wastes, and the dissemination of information related thereto[.]; or
- (iii) the protection of wild flora and fauna, including endangered species, their habitat, and specifically protected natural areas in the Party's territory, but does not include any statute or regulation, or provision thereof, directly related to worker safety or health.

(b) For greater certainty, the term "environmental law" does not include any statute or regulation, or provision thereof, the primary purpose of which is managing the commercial harvest or exploitation, or subsistence or aboriginal harvesting, of natural resources.

Id. art. 45(2), at 1495.

NAAEC also establishes that:

1. For purposes of this Agreement: A Party has not failed to "effectively enforce its environmental law" or to comply with Article 5(1) in a particular case where the action or inaction in question by agencies or official of that Party:

- (a) reflects a reasonable exercise of their discretion in respect of inves-

The Secretariat may consider the submission if: (a) it is in writing;⁴³ (b) it "clearly identifies the person or organization making the submission;"⁴⁴ (c) it provides sufficient information to allow the Secretariat to review the matter;⁴⁵ (d) it "appears to be aimed at promoting enforcement rather than harassing industry;"⁴⁶ and (e) it indicates that the matter has been communicated in writing to the relevant authorities" in the country in question.⁴⁷

tigatory, prosecutorial, regulatory, or compliance matters; or
(b) results from *bona fide* decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities.

Id. art. 45(1), at 1495 (emphasis in original).

43. See *id.* art. 14(1)(a), at 1488. The languages designated for submissions are English, French, or Spanish. See also *Guidelines*, *supra* note 40, § 3.2.

44. NAAEC, *supra* note 2, art. 14(1)(b), at 1488. Article 11 of the NAAEC also provides that:

The Secretariat shall safeguard:

- (a) from disclosure information it receives that could identify a non governmental organization or person making a submission if the person or organization so requests or the Secretariat otherwise considers it appropriate; and
- (b) from public disclosure any information it receives from any non governmental organization or person where the information is designated by that non governmental organization or person as confidential or proprietary.

Id. art. 11(8), at 1487.

45. See *id.* art. 14(1)(c), at 1488. The submission guidelines provide that the submission "must contain a succinct account of the facts on which such an assertion [i.e., the non enforcement of environmental law] is based." *Guidelines*, *supra* note 40, § 5.3. "Submissions should not exceed 15 pages of typed, letter-sized paper, excluding supporting information." *Id.* § 3.3. "Any correspondence or written document(s) will be considered a submission by the Secretariat if it contains the supporting information necessary to enable the Secretariat, at the proper time, to assess the submission based on the criteria listed in Article 14(1) of the Agreement." *Id.* § 3.6.

46. NAAEC, *supra* note 2, art. 14(1)(d), at 1488.

In making that determination, the Secretariat will consider such factors as whether or not:

- a. the submission is focused on the acts or omissions of a Party rather than on compliance by a particular company or business; specifically if the Submitter is a competitor that may stand to benefit economically from the submission[;]
- b. the submission appears frivolous.

Guidelines, *supra* note 40, § 5.4.

47. NAAEC, *supra* note 2, art. 14(1)(3), at 1488. "The Submitter must include, with the submission, copies of any relevant correspondence with the relevant authorities. The relevant authorities are the agencies of the government responsible under the law of the Party for the enforcement of the environmental law in question." *Guidelines*, *supra* note 40, § 5.5.

If the Secretariat determines that a submission meets the requirements mentioned above, it shall then determine whether the submission merits requesting a response from the government that those making the submission allege is failing to enforce its environmental laws.⁴⁸

In deciding whether to request a response, the Secretariat shall be guided by whether:

(a) the submission alleges harm to the person or organization making the submission;⁴⁹

(b) the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of [the NAAEC];⁵⁰

(c) private remedies available under the [given country's] laws have been pursued,⁵¹ and

48. See NAAEC, *supra* note 2, art. 14(2), at 1488.

49. Section 7.3 of the submission guidelines establishes that:

In considering whether the submission alleges harm to the person or organization making the submission, the Secretariat will consider such factors as whether:

- a. the alleged harm is due to the asserted failure to effectively enforce environmental law; and
- b. the alleged harm relates to the protection of the environment or the prevention of danger to human life or health (but not related to worker safety or health).

Guidelines, *supra* note 40, § 7.3.

50. The objectives of the NAAEC are to

- (a) foster the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generations;
- (b) promote sustainable development based on cooperation and mutually supportive environmental and economic policies;
- (c) increase cooperation between the Parties to better conserve, protect, and enhance the environment, including wild flora and fauna;
- (d) support the environmental goals and objectives of NAFTA;
- (e) avoid creating trade distortions or new trade barriers;
- (f) strengthen cooperation on the development and improvement of environmental laws, regulations, procedures, policies and practices;
- (g) enhance compliance with, and enforcement of, environmental laws and regulations;
- (h) promote transparency and public participation in the development of environmental laws, regulations, and policies;
- (i) promote economically efficient and effective environmental measures; and
- (j) promote pollution prevention policies and practices.

NAAEC, *supra* note 2, art. 1, at 1483.

51. No definition of "pursuit" is provided in the *Guidelines*; they state only that "[a]s set forth in Article 14(2) of the Agreement, the Secretariat will, in making that

(d) the submission is drawn exclusively from mass media reports.⁵²

In its response, the government accused of failing to enforce its environmental laws must advise the Secretariat whether the matter raised in the submission is the "subject of a pending judicial or administrative procedure, in which case the Secretariat shall proceed no further."⁵³ The response should be provided to the Secretariat within thirty days (sixty days in exceptional circumstances) of receipt of the Secretariat's notification that the submission merits a response from the party.⁵⁴

If the Secretariat determines that, in light of the response provided by the government in question, the submission warrants development of a factual record, the Secretariat must inform the Council and provide reasons for its decision.⁵⁵ The Secretariat is required to prepare a factual record "if the Council, by a two-thirds vote, instructs it to do so."⁵⁶ For the development of the factual record, "the Secretariat shall consider any information furnished by a party and may consider . . . [other] information: (a) that is publicly available; (b) submitted by interested [nongovernmental] organizations or persons; (c) sub-

determination [of whether the submission merits requesting a response from the Party], be guided by whether . . . private remedies available under the Party's law have been pursued." *Guidelines*, *supra* note 40, § 7.2.

52. NAAEC, *supra* note 2, art. 14(2), at 1488 (footnotes added). According to section 7.4 of the *Guidelines*: "In considering whether a response from the Party concerned should be requested when the submission is drawn exclusively from mass media reports, the Secretariat will determine if other sources of information relevant to the assertion in the submission were reasonably available to the Submitter." *Guidelines*, *supra* note 40, § 7.4.

53. NAAEC, *supra* note 2, art. 14(3), at 1488. A judicial or administrative proceeding is defined under the NAAEC as

(a) a domestic judicial, quasi-judicial, or administrative action pursued by the Party in a timely fashion and in accordance with its law. Such actions comprise: mediation; arbitration; the process of issuing a license, permit or authorization; seeking an assurance of voluntary compliance or a compliance agreement; seeking sanctions or remedies in an administrative or judicial forum; or the process of issuing an administrative order; and

(b) an international dispute resolution proceeding to which the Party is party.

Id. art. 45(3), at 1495.

54. *See id.* art. 14(3), at 1488.

55. *See id.* art. 15(1), at 1488.

56. *Id.* art. 15(2), at 1488.

mitted by the Joint Public Advisory Committee; or (d) developed by the Secretariat or by independent experts."⁵⁷

The Secretariat must first submit a draft factual record to the Council. Any party then has forty-five days to provide comments on the accuracy of the draft.⁵⁸ The Secretariat may incorporate those comments and resubmit the document to the Council, which within sixty days following the submission and by a two-thirds vote, may make the final factual record available to the public.⁵⁹ All of the information regarding submissions of enforcement matters is accessible to the public and available through the Registry of Submissions kept by the Secretariat at the CEC headquarters.⁶⁰

57. *Id.* art. 15(4), at 1489.

58. *See id.* art. 15(5), at 1489.

59. *See id.* art. 15(6)-(7), at 1489.

60. The CEC Registry of Submissions on Enforcement matters is available online in English, French, and Spanish at <<http://www.cec.org>>. The registry contains the following information:

- a. [A] list of all the submissions including:
 - (i) the name of the Submitter and the name of the Party addressed in each submission;
 - (ii) a summary of the matter addressed in the submission that initiated the process, including a brief description of the asserted failure(s) to effectively enforce environmental law;
 - (iii) the name and citation of the law in question;
- b. a summary of the response provided by the Party, if any;
- c. a summary of the notifications to the Submitter, including that:
 - (i) a given submission does not meet the criteria set forth in Article 14(1) of the Agreement;
 - (ii) a response is requested from the Party concerned;
 - (iii) the Secretariat has determined that no response from the Party is merited;
 - (iv) the Council has instructed the Secretariat not to prepare a factual record;
 - (v) the final factual record has been provided to the Council;
 - (vi) the Council has decided not to make the factual record available to the public;
- d. the Council's decision on the preparation of a factual record; and
- e. the Council's decision regarding whether the factual record will be made publicly available.

Guidelines, supra note 40, § 15.1.

C. *An Evaluation of the Process*

The Citizen's Submission process has been carefully analyzed by different scholars as well as by environmental practitioners.⁶¹ There is common agreement that it represents a crucial advance for the involvement of nongovernmental organizations (NGOs) in the North American environmental dialogue.⁶² Nevertheless, the fact that the process does not provide for a judicial decision, but for an informative clarification, in the form of a factual report resulting in the absence of a direct remedy, exposes a serious shortcoming of the procedure.

Another weakness in the Citizen's Submission process is the fact that the factual record "cannot include an evaluation or judgment by the Secretariat despite the numerous NAAEC references to the necessity of effective enforcement of environmental laws."⁶³ It is clear that the only value of a factual record "lies in its impact on public opinion and the indirect pressure it puts on parties both to comply with their own environmental laws and to initiate new legislation."⁶⁴ In some cases, a factual record may prompt a party to the agreement "to initiate procedures for formal dispute settlement."⁶⁵

In other words, in order to actually force a party to abide by its own environmental law, the dispute resolution process provided for in Part V of the NAAEC must be initiated.⁶⁶ However, as mentioned in Part II.A, this mechanism is limited to "situation[s] involving workplaces, firms, companies, or sectors that produce goods or provide services" that are traded, produced, or provided between the territories of the parties.⁶⁷ Therefore, in those cases where an Article 14 submission is not related to a trade and environmental issue, which, for example,

61. See, e.g., Kuma, Milner & Petsonk, *supra* note 5, at 123.

62. See JOHNSON & BEAULIEU, *supra* note 4, at 165.

63. *Id.* at 158.

64. Noemi Gal-Or, *Multilateral Trade and Supranational Environmental Protection: The Grace Period of the CEC, or a Well Defined Role*, 9 GEO. INT'L ENVTL. L. REV. 53, 92 (1996).

65. JOHNSON & BEAULIEU; *supra* note 4, at 158.

66. See NAAEC, *supra* note 2, arts. 22-23, at 1490.

67. *Id.* art. 24, at 1490.

was the case in the "Cozumel Submission,"⁶⁸ the possibility that the factual record can provide probative value in the proceedings of a party-to-party dispute resolution case would be very limited. Also, as mentioned earlier, to initiate the party-to-party dispute resolution mechanism, it is necessary to allege a persistent pattern of nonenforcement.⁶⁹

The involvement of the different parties during the process has also captured the attention of those interested in the Citizen's Submission procedure. Critics note that the involvement of the submitter ends at the second stage of the process when the Secretariat decides whether to request a party's response. The submitter is not allowed to see or comment on the party's response, and does not have access to the draft factual record.⁷⁰ This situation puts the submitter in an inferior position in which he must rely on the Secretariat to pursue the case.⁷¹ In cases where a submission involves a third party, such as in the "Cozumel Submission" where many of the allegations made by the submitters affected a company developing a cruise ship pier project,⁷² these "affected parties" do not have any involvement at all during the process. They can only provide information to the Secretariat for the development of the factual record.⁷³

The absence of time limits for the Secretariat throughout the submission process, in contrast to the time limits imposed on the submitter and on the responding party, has also been criticized by some legal specialists.⁷⁴ However, because the Secretariat's compilation process may be complicated in some cases, the imposition of time limits might prove counterproductive. Only by future amendments to NAAEC can the above limitations on the Citizen's Submission process be corrected.

68. See *infra* Part III.

69. See NAAEC, *supra* note 2, art. 22, at 1490.

70. See NAAEC, *supra* note 2, arts. 14-15, at 1488-89; *Guidelines*, *supra* note 40.

71. See Gal-Or, *supra* note 64, at 75.

72. See *infra* Part III.

73. See *Guidelines*, *supra* note 40, §§ 11, 12. Regarding notification of individual firms that have been named in a submission, the *Guidelines* state that: "[w]hen a submission received by the Secretariat names an individual or entity, the Party concerned may notify that individual or entity of the existence of that submission." *Id.* § 16.3.

74. See Gal-Or, *supra* note 64, at 75.

III. THE COZUMEL SUBMISSION

The Cozumel submission represents a good example of both the potential that Article 14 has as a means to promote environmental law enforcement in North America, as well as the loopholes and limitations that the mechanism suffers from in practice.

The submission dealt with an alleged failure of enforcement of environmental laws in Mexico. Three Mexican nongovernmental organizations, the Mexican Center for Environmental Law, the Committee for the Protection of Natural Resources, and the International Group of One Hundred presented the submission to the Secretariat of the CEC on January 18, 1996.⁷⁵ These organizations alleged failure on the part of the Mexican environmental authorities to effectively enforce environmental impact assessment law with regard to a port terminal project on the island of Cozumel.⁷⁶

According to the submitters, the failure to enforce environmental laws was harming the Paraíso coral reef. The Secretariat of the CEC requested a response to the submission from the Government of Mexico, and in light of this response, informed the Council that the submission warranted developing a factual record. The *Final Factual Record of the Cruise Ship Pier Project in Cozumel, Quintana Roo* was released to the public on October 24, 1997.⁷⁷

The Cozumel submission resulted in the first factual record prepared and released to the public by the Secretariat of the CEC. The following analysis examines the way the Cozumel submission was processed by the Secretariat, the significant issues raised by the parties during the process, and the relevant facts presented by the Secretariat with respect to the main

75. *Submission*, CEC Registry of Submissions on Enforcement Matters SEM-96-001 (Jan. 18, 1996).

76. All quotations related to the submission, the Mexican government's response, and the facts presented by the Secretariat have been drawn from the English version of the *Final Factual Record of the Cruise Ship Pier Project in Cozumel, Quintana Roo*, Secretariat of the CEC, Factual Record No. 1 (1997) [hereinafter *Cozumel Factual Record*].

77. *See id.*

allegations made by both the submitters and the Mexican environmental authorities.

A. The Submission and the Response of the Mexican Environmental Authorities

The central issue raised by the three Mexican environmental groups related to the scope and magnitude of the port terminal project.⁷⁸ The submitters alleged that the Environmental Impact Statement (EIS) presented by the project's developer was incomplete because the "Cruise Ship Pier Project" being built on the island formed an indivisible part of a port terminal, which constituted a larger-scale project than what was addressed in the EIS.⁷⁹ In other words, the submitters alleged that the project was being "segmented," and that this segmentation constituted a failure to enforce Article 28 of the General Law of Ecological Equilibrium and Environmental Protection (LGEE)⁸⁰ and Article 42 of the Law of Ports.⁸¹ The Law of Ports defines "terminal" as: "a unit inside or outside a [p]ort, comprising works, installations, and surface areas, including a water zone, which permits the relevant port operation to be fully performed."⁸²

The Mexican authorities claimed that "the port terminal comprises distinct projects; the project which involve[d] the construction and operation of the pier complie[d] with environmental impact requirements pursuant to the Environmental Impact Statement for the "Cruise Ship Pier in Cozumel, Quintana Roo" project, presented in August 1990."⁸³ Mexico also argued that competent authorities evaluated the environmental impact of the works planned, and that the Ministry of Communications and Transportation authorized the cruise ship pier.⁸⁴

78. *See id.* at 3-4.

79. *See id.*

80. LEY GENERAL DEL EQUILIBRIO ECOLÓGICO Y DE PROTECCIÓN AL AMBIENTE [L.G.E.E.] art. 28 (Mex.), available in LEXIS, Envirm Library, Mxenv File (General Law of Ecological Equilibrium and Environmental Protection).

81. LEY DE PUERTOS, Diario Oficial de la Federación (1993) (Mex.).

82. *Cozumel Factual Record*, supra note 76, at 3 n.3.

83. *Id.* at 8.

84. *See id.* at 8-9.

Submitters further alleged that the "Port Terminal" was "related to an adjacent "Real Estate Tourist Development Project"" that would be built by the company and that the EIS presented did not take into account the cumulative environmental impact of this development.⁸⁵ With respect to this allegation, the environmental authorities responded that "there is no real estate development as suggested by the Submitters, and that the onshore works referred to by the Submitters constitute only complementary elements of the pier described in the 1993 Concession."⁸⁶

Regarding the authorizations of the project, the submitters alleged a breach of subsection (e) of the Fifth Condition of the Port Terminal Concession (the Concession) that was granted to the company. Subsection (e) of the Concession stated that "within a period of no more than three months from the date of the granting of [the] Concession (July 22, 1993) [the developer] must present . . . [a] Report on environmental impact of the construction and operation of the Terminal."⁸⁷

When the environmental groups presented their submission to the CEC on January 18, 1996, there was no EIS for the construction and operation of the terminal.⁸⁸ The Mexican government argued that the Concession granted to the developer by the Ministry of Communications and Transportation only authorized the works of the pier, and that the Fifth Condition of the Concession was subject to the fulfillment of other conditions, particularly the First Condition (requiring the donation of land by the developer of the project to the Federal Government).⁸⁹

With respect to the location of the cruise ship pier, the submitters alleged that it was located "within a protected natural area . . . subject to special legal protection," known as the "Refuge for the protection of marine flora and fauna of the western coast of Cozumel."⁹⁰ The submitters argued that the

85. *Id.* at 5.

86. *Id.* at 10.

87. *Id.* at 5.

88. *See id.* at 5, 10.

89. *See id.* at 10.

90. *Id.* at 6.

location of the pier within the protected natural area constituted a failure to enforce the decree that established the refuge, as well as a failure to enforce Articles 38, 54 and 83 of the LGEE.⁹¹ The Mexican authorities responded that “the pier construction project has nothing to do with the subject matter of the [d]ecree,” and that the purpose of the decree was limited to prohibit commercial and sport fishing.⁹²

The submitters also alleged “that the land on which the Project [would] be constructed and operate[d did] not lie within a zone designated for “port use.””⁹³ This, they argued, constituted a failure to enforce the Declaration of Uses and Reserves of the Municipality of Cozumel, Quintana Roo.⁹⁴ The Mexican government responded that: “the authority’s acts do not contravene . . . [the Declaration of Uses and Reserves of the Municipality of Cozumel], since . . . the project’s land development falls within . . . a lot designated for high-density tourist use.”⁹⁵

Furthermore, the response of the Mexican environmental authorities questioned the decision made by the Secretariat of the CEC to accept the submission and request their response.⁹⁶ They rejected the competence of the CEC to deal with the case, alleging that the issues raised in the submission were based on acts which “took place prior to the NAAEC entering into force.”⁹⁷ In other words, they alleged that NAAEC was being applied retroactively.

The Secretariat recognized before the Council of the CEC that NAAEC’s Article 47 (Entry into Force) contained no “intentions, explicit or implied, conferring retroactive effect on the operation of Article 14.”⁹⁸ Nevertheless, the Secretariat argued

91. *See id.*

92. *Id.* at 11.

93. *Id.* at 6.

94. *See id.*

95. *Id.* at 11.

96. *See id.* at 7.

97. *Id.* at 7.

98. *Recommendation of the Secretariat to Council for the development of a Factual Record in accordance with Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, CEC Registry of Submissions on Enforcement Matters SEM-96-001 (June 7, 1996) (visited Nov. 27, 1998) <<http://www.cec.org/templates/registrytext.cfm?&varlan=english&documentid=15&format=1>> [hereinafter *Cozumel Rec-*

that events occurring prior to the entry into force of NAAEC may have created "conditions or situations which give rise to current enforcement obligations . . . [and which] may be relevant when considering an allegation of a present, continuing failure to enforce environmental law."⁹⁹ The Secretariat quoted Article 28 of the Vienna Convention on the Law of Treaties, which provides that:

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.¹⁰⁰

The Secretariat believed that subsection (e) of the Fifth Condition of the Concession created a situation "that had not ceased" to exist.¹⁰¹

In their response to the submission, the Mexican authorities also alleged that the submitters lacked proof of direct harm and that they failed to meet the requirements of Article 14(2)(a) of the NAAEC.¹⁰² The Secretariat argued that:

In considering harm, the Secretariat notes the importance and character of the resource in question While the Secretariat recognizes that the submitters may not have alleged the particularized, individual harm required to acquire legal standing to bring suit in some civil proceedings in North America, the especially public nature of marine resources bring the submitters within the spirit and intent of Article 14 of NAAEC.¹⁰³

It is clear that the Secretariat met the expectations of many environmental groups by adopting a broad interpretation of Article 14(2)(a), and "by recognizing the public nature of envi-

ommendation].

99. *Id.*

100. Vienna Convention on the Law of Treaties, concluded on May 23, 1969, 1155 U.N.T.S. 331, 339 (entered into force Jan. 27, 1980).

101. *Cozumel Recommendation*, supra note 98, § IV.A.

102. *Cozumel Factual Record*, supra note 76, at 7.

103. *Cozumel Recommendation*, supra note 98 § IV.B.

ronmental concerns and harms as well as the right of the public interest to legal standing."¹⁰⁴

The Mexican government also claimed "that the submitters did not exhaust [local] remedies available under the Mexican legislation."¹⁰⁵ The Secretariat, however, concluded that "the submitters attempted to pursue local remedies, primarily by availing themselves of the 'denuncia popular' administrative procedure."¹⁰⁶

Article 14(2)(c) is also prone to controversy. In general terms, NAAEC allows citizens of any of the three countries to present a submission under Article 14(1)(f), alleging that any of the three governments is not effectively enforcing its environmental laws.¹⁰⁷ This raises the unprecedented possibility that a citizen of Canada or the United States, for example, may allege before the CEC that the Mexican government is not enforcing its own environmental laws.

To request a response from the government in question, however, the Secretariat must establish that the submitters "pursued local remedies" before presenting their submission.¹⁰⁸ The first ambiguity lies in the term "pursue," which, as opposed to "exhaust," does not have a clear and established legal definition. Neither the NAAEC nor the *Guidelines* provide any help in this matter, thereby leaving the responsibility placed flatly on the shoulders of the Secretariat.

Furthermore, it would be extremely difficult, if not impossible, for a foreign citizen to acquire legal standing in the jurisdiction where the alleged failure to enforce is taking place. In our example, how could a Canadian NGO "pursue local remedies" in Mexico? Again, the NAAEC and the *Guidelines* provide no answer.

104. Gal-Or, *supra* note 64, at 89.

105. *Cozumel Factual Record*, *supra* note 76, at 7.

106. *Cozumel Recommendation*, *supra* note 98, § IV.B. On June 22, 1995, the submitters filed a "denuncia popular" to the relevant authorities, stating all the issues mentioned in the submission. The "denuncia popular" is an administrative procedure to request the competent authorities to take appropriate action to enforce environmental laws to avoid environmental harm.

107. See NAAEC, *supra* note 2, art. 14(1)(f), at 1488.

108. See *id.* art. 14(2), at 1488.

B. *Facts Presented by the Secretariat*

The facts presented by the Secretariat in the final factual record help clarify the controversial issues regarding the Cozumel Submission. However, the report does not include an evaluation or judgment by the Secretariat with respect to those facts and allegations made by the submitters. The reader of the factual record must draw his or her own conclusions as to whether the Mexican environmental authorities effectively enforced their environmental laws.

This lack of evaluation or judgment on the part of the Secretariat is a serious flaw in the NAAEC. Even if the Secretariat finds facts that point to possible failures to enforce, or even blatant contradictions in the responses submitted by a government, the Secretariat cannot take a side, allowing it to do little more than quote the position of each Party. For example, with respect to the controversial issue of the scope and magnitude of the Cozumel project, the factual record prepared by the Secretariat presents a definition of "pier for tourist cruise ships" contained in the Instructions for the Concession of Piers for Tourist Cruise Ships and Specialized Cargo Terminals published by the Mexican Port Authority in September 1989.¹⁰⁹ This definition establishes that "[p]iers for tourist cruise ships are defined as a grouping of maritime and land installations intended for the mooring of vessels and for the provision of passenger services to tourist cruise ships."¹¹⁰ Was this definition legally binding? The Secretariat cannot make this decision.

Regarding the existence of related projects and the lack of assessment of cumulative impacts, the Secretariat presented the following fact in the *Cozumel Factual Record*:

[O]n August 10, 1990, in a . . . document signed by the Minister of Communications and Transport, the [Ministry of Communications and Transportation] approved a request to [the developer] to build and operate a passenger terminal

109. See *Cozumel Factual Record*, *supra* note 76, at 15.

110. *Id.*

and cruise ship pier. The document states that "the project is complemented by a 43.3 hectares real estate tourist development."¹¹¹

This fact clearly contradicts the Mexican government's response that there was no real estate development related to the project.¹¹²

With respect to authorizations, the Secretariat states in the *Cozumel Factual Record* that "[a]s of February 10, 1997, according to information presented by [the developer] . . . the [F]irst [C]ondition of the Concession granted by . . . [the Ministry of Communications and Transportation] had not been fulfilled. Consequently, the donation of the land had not taken place, the last requirement for fulfilling this First Condition."¹¹³ This is relevant because the Mexican environmental authorities argued in their response that the Concession granted by the Ministry of Communications and Transportation only authorized the works of the pier.¹¹⁴ They also argued that the Fifth Condition of the Concession¹¹⁵ was subject to the fulfillment of other conditions, particularly the First Condition, requiring donation of land by the developer of the project to the federal government.¹¹⁶

Nevertheless, in accordance with the *Cozumel Factual Record*, on December 20, 1996, the environmental authorities "authorized . . . [the company] to construct and operate the works" comprising the Port Terminal (inland works).¹¹⁷ In other words, the First Condition, which in accordance with the Mexican government's response conditioned the environmental approval of the project, was not fulfilled before the Mexican environmental authorities approved the EIS of the inland works of the project.

111. *Id.* at 17.

112. *See id.* at 10.

113. *Id.* at 25.

114. *See id.* at 10.

115. The Fifth Condition stated that, within a period of no more than "three months from the date of the granting of [the Concession (July 22, 1993), the developer] must present . . . [a] report on environmental impact of the construction and operation of the Terminal." *Id.* at 20.

116. *See id.* at 10.

117. *Id.* at 24.

With respect to the controversy related to the location of the project, the Secretariat discovered two interesting and apparently contradictory facts. First, on May 11, 1990, the environmental authorities informed the developer that the Cruise Ship Pier Project could not be authorized because it was "situated within the Protected Natural Coral Reef area of Cozumel" and that construction would negatively impact various threatened coral species.¹¹⁸ Second, seven months later on December 19, 1990, the same environmental authorities authorized the Project without making any reference to the fact that the project was located in a protected natural area.¹¹⁹

Finally, regarding the land use controversy, the Secretariat also found relevant facts that would warrant a closer legal opinion.¹²⁰ According to the Declaration of Uses and Reserves of the Municipality of Cozumel, "maritime installations that could affect coral reefs" are prohibited in areas designated for "High-Density Tourist Use."¹²¹ In its response, the Government acknowledged that the zone in which the construction of the project (the cruise ship pier) was being carried out, was designated for "High-Density Tourism."¹²² The EIS presented by the company estimated that "potentially the most significant damage during construction [of the pier] would be neighboring coral reef communities"¹²³ Nevertheless, the environmental authorities validated the authorization of the project, claiming that its relocation "would allow a reduction in the impacts [to the coral reef] so that no more than [three] percent of the group is affected."¹²⁴ Once again, the Secretariat was not allowed to ponder if the municipal prohibition was total and absolute, or if affecting "[three] percent of the group"¹²⁵ did not entail a violation of the aforementioned Declaration.

118. *Id.* at 31.

119. *See id.*

120. *See id.*

121. *Id.* at 33.

122. *See id.* at 11.

123. *Id.* at 33.

124. *Id.* at 37.

125. *Id.*

IV. CONCLUSIONS

The mechanisms created under NAFTA, in particular NAAEC, constitute an important effort by Canada, Mexico, and the United States to address the old dilemma of how to make development, in this case the increase of trade flow, compatible with protection of the environment. NAFTA—which was considered to be a strictly commercial matter when negotiations began—was extended to include the legitimate environmental concerns expressed by different sectors of the three North American societies. The NAAEC, one of the outcomes of this complex process, has become an important example of regional cooperation and has helped make NAFTA what some have described as the “greenest” trade agreement in history.

Moreover, the trilateral character of these new mechanisms, including the CEC, creates great opportunities for regional cooperation. Also, it contributes to increasing public participation in environmental decisions through the JPAC. This alone can be considered a step forward in the parties’ efforts towards achieving sustainable development in North America.

The NAAEC can be considered unique in the sense that it establishes links and commitments for the protection of a shared regional environment. This cooperation is noteworthy because it occurs between two highly industrialized countries, the United States and Canada, and a developing country, Mexico.

Undoubtedly, one of the major aspects of the NAAEC is the opportunity it creates, through Articles 14 and 15, for nongovernmental organizations and individual citizens with no specific affiliation, to demand that their respective governments effectively enforce environmental laws, and to publicly denounce those governments when such enforcement does not occur. Through this procedure, the Secretariat of the CEC is empowered, within significant limits, to investigate the diligence of the parties in enforcing domestic environmental legislation. The Citizen’s Submission process is undoubtedly an interesting and innovative procedure that allows citizens, NGOs, and even residents of North America to perform a role as watchdogs of the environmental performance of the three governments. However, this procedure suffers from many of the flaws emphasized by

its critics. Because it does not provide for any private direct action and entails no actual enforcement, its efficiency is limited to the political pressure generated by the press and the public. Its role may be to embarrass governments into compliance.

The Cozumel Submission, the first such submission that resulted in a factual record, is a good example for measuring the practical impact of the Citizen's Submission process. When the submission was presented, and particularly when the Secretariat requested a response from the Mexican government, it captured the attention of the media in the three countries. The media attention may have been due to two facts: it was the first submission to generate a factual record, and it dealt with an alleged failure of enforcement by Mexico. During the negotiations of the NAFTA and the NAAEC, different parties severely questioned both Mexican environmental laws and their enforcement by the government.

Later, Mexico's thirty-six page response to the submission captured the attention of environmental groups, legal specialists, and the media. This created a spirited debate over Mexico's allegations that the agreement could not be applied "retroactively," that the submission exceeded the jurisdiction of the CEC, and that the submitters did not certify the damages they suffered nor exhaust local remedies.

In fact, some environmental groups believe that the declaration of the Cozumel Reef as a protected natural area¹²⁶ was a direct result of the submission.¹²⁷ The Mexican government severely questioned the role of the Secretariat, both in its response to the submission and in press conferences held by environmental authorities, including the Minister.¹²⁸ When the three members of the Council cast the official vote, however, the Mexican government declared that it would act in a spirit of solidarity and cooperation, and joined the United States and

126. The reef was officially designated a National Marine Park on July 19, 1990.

127. Gustavo Alanis, President of the Mexican Center for Environmental Law and one of the submitters of the Cozumel Submission, has made such a statement on several occasions.

128. See *Cozumel Factual Record*, *supra* note 76, at 7.

Canada in instructing the Secretariat to develop a factual record.

The submission was presented in January of 1996, and almost two years passed before the final *Cozumel Factual Record* was released to the public on October of 1997. By then, the initial interest of environmental groups and the media had all but vanished. Very few newspapers in North America covered the release of the report or the reaction by the parties involved. In Mexico, it practically went unnoticed.

The submitters held a press conference and distributed a document with their interpretation of the *Cozumel Factual Record*, alleging that "it proved failure by the part of the Mexican environmental authorities to effectively enforce environmental law."¹²⁹ On the other hand, some Mexican officials have said off-the-record that they are "pleased" with the *Cozumel Factual Record* because they believe that, even if it reaches no conclusions, it supports their position. Meanwhile, the JPAC has said nothing, and the Council remains silent to this day. For the CEC, with the release of the *Cozumel Factual Record*, the process is terminated.

One might wonder whether the procedure served its purpose and if the public is better informed as a result. The truth is that the procedure had very little impact on the environmental community, and none whatsoever on the tourist project in Cozumel that led to the submission.

The fact that the record does not provide any judgment or evaluation regarding the allegations made by the submitters might have disappointed the public. Indeed, the efficiency of the procedure was compromised as the political momentum faded during the long process. In any case, the critics of the CEC who claimed that it was born with no teeth seem to have scored a point.

If the NAAEC is to fulfill its potential as a model for promoting international solutions to environmental and developmental problems, and as a mechanism for fostering law enforcement in

129. The Mexican Center for Environmental Law, The International Group of One Hundred & The Committee for the Protection of Natural Resources, Press Release (Oct. 30, 1997) (Mex.).

this field, it will be essential to encourage and to improve the involvement of civil society in the three countries.

One first step may be to revise the Citizen's Submission process to eliminate loopholes and to redefine its purpose and scope. These changes would help convince concerned parties that it will be worth their time and resources to pursue a submission on enforcement matters under Articles 14 and 15 of the NAAEC.

