The Citizen Submission Process of the North American Commission for Environmental Cooperation

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THE CITIZEN SUBMISSION PROCESS OF THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION

By

Jaime M. Carreno-Martinez

Submitted in partial fulfillment of the requirements
For the degree of Master of Laws

At

Dalhousie University
Halifax, Nova Scotia
December 2001

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A Ana Emilia, mi esposa, con quien inicie toda esta aventura por la que tanto luchamos juntos.

A mis padres, sin quienes no hubiera sido nada posible, ni siquiera vivir.

A mis hermanos y cuñadas, por su cariño y amistad.

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ABSTRACT

In order to address the environmental concerns raised by the existence of a continent-wide free trade zone, the North American Free Trade Agreement (NAFTA), Canada, United States and Mexico created an environmental side agreement, the North American Agreement for Environmental Cooperation (NAAEC)

NAAEC established the Commission for Environmental Cooperation (CEC), a trilateral body created to help the NAFTA Parties achieve the goal of free trade while at the same time avoiding or lessening environmental industrial degradation.

Although imperfect, the NAAEC embodies several processes that were innovative. The key innovation is the Citizen Submission Process that allows citizens and NGOs to make submissions asserting that a Party is failing to effectively enforce its environmental laws. This is a tremendous advance, which for the first time in the history of such agreements allows for public participation in the enforcement of environmental law.

The main focus of this thesis is a discussion and critique of the Citizen Submission Process. In order to situate the discussion in the appropriate context, the thesis has six parts.
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INTRODUCTION

The relationship between trade and the environment is an important and sometimes controversial topic. When Mexico became involved in negotiating a free trade agreement with Canada and the United States, interest in the topic grew. Of particular importance to many of those involved was to ensure that the agreement included an effective process whereby citizens would have real input and influence in the workings of the agreement, given the obvious public importance of the issues involved.

The tripartite negotiations ended in the historic agreement, the *North American Free Trade Agreement*¹ and two side agreements, one of which was the *North American Agreement For Environmental Cooperation*.² This agreement created a trilateral commission, the Commission for Environmental Cooperation (CEC), comprised of a Council, a Secretariat, and a Joint Public Advisory Committee.

The CEC established two processes for resolving environmental disputes. The Dispute Resolution Process is exclusively for the use of the Parties, and the Citizen Submission Process allows citizens and NGOs to make submissions asserting that a Party is failing to effectively enforce its environmental laws. This

is a tremendous advance, which for the first time in the history of such agreements allows for public participation in the enforcement of international environmental law.

The main focus of this thesis is a discussion and critique of the Citizen Submission Process. In order to situate the discussion in the appropriate context, the thesis has six parts. First, I will describe the origins and historical context of the NAAEC by reviewing the events that led to the creation of NAFTA. In addition, this section will describe the relevant environmental aspects or characteristics of NAFTA and attempt to discern the connection between NAFTA and the creation of an environmental side agreement, the NAAEC. Second, I will provide a review of the NAAEC itself, identifying its goals, and how the CEC is organized, followed by a critique of its effectiveness. Third, the Dispute Resolution Process is reviewed and discussed; recommendations for improvement of the process are suggested.

The next chapter provides an analysis of the Citizen Submission Process. This includes an analysis of the process itself to determine its strengths and weakness and also a review of three important decisions to provide a context for discussion. Penultimately, I put forward a critique of the Citizen Submission Process and make proposals for its modifications so it will be better able to ensure the fair and full enforcement of the environmental laws of the three
Parties. Finally, there is a brief review of all the submissions filed before the Secretariat as of October 2001.

As an environmental lawyer in Mexico, I was involved in several of these matters, two of which were significant files, namely the Cozumel Pier Project and the Abandoned Lead Smelter in Tijuana. From Mexico's north border of the Rio Bravo (or Rio Grande as it is known in Canada and the United States) to Mexico's southern border with Guatemala, Mexico faces many daunting environmental problems. It was my work for the Mexican government which initiated my interest in the role of the public in environmental matters.

This thesis is only a modest contribution to the area of environmental law. It is important to the extent that it highlights the significance of citizen involvement in environmental protection and the need for changes to existing agreements to allow greater and more meaningful public participation. The environmental problems of Mexico in particular, and North America in general, are exceptionally complex. Solutions to the thorny issues which confront these countries and their people will not be solved by the government and industry alone, but will require the active participation of the general public.
CHAPTER 1. NAFTA AND THE ENVIRONMENT.

1.1. North American Free Trade Agreement: Historical Background.

The North American Free Trade Agreement (NAFTA) came into effect on January 1, 1994. This agreement establishes a set of rules for trade between the United States, Mexico and Canada. NAFTA is another treaty arising from the change in the international environment generated since the end of World War II that established a system to regulate the growing trade and financial markets promoted by the so-called Bretton Woods System.³

This Bretton Woods System created the World Bank and the International Monetary Fund and led to the signing of the General Agreement on Tariffs and Trade (GATT).⁴ The GATT, as an "international contract" between governments, helped to create the environment necessary to promote international trade among its contracting partners.

As a result of the growing number of treaties that created trade relationships and free trade zones and agreements, in January 1989 the United States and Canada established their own regional Free Trade Agreement (FTA).⁵ The FTA was the first step that the Reagan Administration took to create a commercial

⁴ General Agreements on Tariffs and Trade, 30 October 1947, 58 U.N.T.S. 187, [hereinafter GATT]
⁵ Canada-United States Free Trade Agreement, January 1 1989, Can, T.S. 1989 3 [Hereinafter FTA]
trading zone in North America. By the spring of 1990, American President George Bush and Mexican President Carlos Salinas de Gortari started official negotiations to create another free trade zone between Mexico and the United States. Canada's Prime Minister Brian Mulroney asked to be included in the negotiation of what would become the North American Free Trade Agreement (NAFTA).

The FTA had established the framework for NAFTA, which entered into force on January 1994 Many provisions of NAFTA were almost identical to those of the FTA, such as the chapter dealing with investment and anti-dumping rules. Nevertheless, several major issues such as the environment, labour, and market disruptions surrounded the debate over the NAFTA agreement and fuelled controversy. During the FTA's negotiations the environment was not as important an issue as it was during NAFTA's negotiations.

The main concern of all environmentalists was Mexico, since Mexico faces severe environmental degradation. Years of rapid population growth and industrialization, without adequate environmental investment and enforcement,

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7 NAFTA supra note 1.
have left a legacy of polluted waters and large quantities of improperly stored waste. One concern raised by opponents of NAFTA was that increased trade would lead to further environmental degradation in Mexico, as companies would move their operations to Mexico to avoid strict environmental enforcement in the United States.

It is important to note that before the NAFTA negotiations started Mexico already was a member of the GATT and already had trade relationships with several countries around the globe. Possibly in anticipation of further free trade negotiations, Mexico had initiated under President Miguel de la Madrid an intensive transformation of Mexican legislation that included international trade, foreign investment and the environment. By March 1988, Mexico enacted its first serious environmental law, the Ley General del Equilibrio Ecologico y la Proteccion al Ambiente\textsuperscript{10} and by 1992 the Mexican environmental legislation included regulations for hazardous waste, noise pollution, air pollution, environmental impact, the National Water Law and its regulations, the regulations

\textsuperscript{10} Ley General del Equilibrio Ecologico y la Proteccion al Ambiente, published in the Diario Oficial de la Federacion January 28 1998. (Hereinafter General Law)
on the Transportation of Hazardous Materials and Waste\textsuperscript{11} and more than 52 Mexican Official Standards or NOMS.\textsuperscript{12}

Despite these efforts by Mexico to create an environmental legal framework as well as to create a bi-lateral network with the United States, many American NGO's still had reservations and the debate brought forth a range of issues including:

- Fears of pollution spilling over into the United States from increased Mexican industrial activity;
- Concerns that the high standards of environmental protection achieved in the United States after many hard fought legislative and legal battles would be compromised in the NAFTA negotiations and reduced to that of Canadian or Mexican standards;
- Distress over the perceived lack of opportunities for the environmental community to shape the trade policy development process; and

\textsuperscript{11} Mexico's principal environmental law is the General Law of Ecological Balance and Environmental Protection, which has been in effect since 1988. The law provides a general framework within which all states laws and federal regulations must comply, including regulations governing air pollution, hazardous waste and materials transport, environmental impact assessment and motor vehicle emissions. These regulations are implemented via media-specific, quantitative standards called Mexican Official Standards (NOMs). There was a major revision to the General Law in December 1996, which provided for decentralization of enforcement, increased sanctions, more citizen participation, and information dissemination on government plans and programs.

\textsuperscript{12} These standards, that are largely based on U.S. standards, establish the maximum quantities allowed for any given pollutant and/or the way such measures should be taken. Bustani, Alberto & Mackay, W.P., "NAFTA: Reflecting on Environmental Issues During the First Year", (1995) 12 Ariz. J. Int'l & Comp. L.
• Questions about the rigor of Mexico's environmental standards and enforcement program with fears of a "pollution haven" emerging south of the Rio Grande.¹³

As noted by Esty¹⁴, the above concerns were approached in several ways, especially by the U.S Environmental Protection Agency, which created a Trade and Environment Committee under its national Advisory Committee on Environmental Policy and Technology. The Environmental Protection Agency addressed concerns by performing a comprehensive environmental review of the prospective NAFTA that included an analysis of the possible environmental effects of closer trade relationships.

Esty also noted that other concerns, such as the possibility of encouraging investment by relaxing domestic health, safety or environmental measures, known as the "pollution havens". Another concern he expressed was the possibility of downward harmonization of environmental standards. Esty's position was that both concerns should be addressed in the NAFTA treaty itself¹⁵ or by creating a trilateral environmental side agreement.

In order to persuade the Congress to renew fast-track authority for the free trade agreement, the Bush Administration issued a formal response to the

¹⁴ Ibid., at 49 –51.
¹⁵ It is important to mention that many of those concerns are part of any free trade agreement between developed and developing countries and are part of the battle between trade and the environment. See especially Johnson supra note 8 at 35 –75 for an interesting discussion of this subject regarding trade and environmental issues for the 1990's.
environmental concerns that had been raised by the House of Representatives.\textsuperscript{16} President Bush committed to a final trade agreement that would address environmental issues, including measures that would permit the United States to: (1) exclude products that did not meet its environmental standards; (2) implement environmental standards that were stricter than those of the exporting country; and (3) comply with international environmental agreements, such as the \textit{Convention on International Trade in Endangered Species of Wild Fauna and Flora} and the \textit{Montreal Protocol}, regardless of the potential inconsistencies between those agreements and the trade and investment regulations established\textsuperscript{17}. With this plan, the Bush Administration tried to address the environmental concerns expressed by the Congress and NGO'S in a parallel track separate from the actual trade negotiations, and the three parties agreed to do so.\textsuperscript{18}

As a result of the commitments by President Bush, in October 1993 three institutions were created to help deal with the extensive environmental problems on the U.S.-Mexico border as part of the NAFTA implementing legislation package that was prepared for submission to Congress. Two were created under the La Paz Agreement between the United States and Mexico.\textsuperscript{19} First, the

\textsuperscript{17} Ibid.
\textsuperscript{19} Agreement between the Government of the United States and the Government of Mexico Concerning the Establishment of a Border Environment Cooperation Commission and a North
Border Environment Cooperation Commission (BECC) to coordinate the efforts of Mexico and the United States on the border region. Second, the North American Development Bank (NADBank) to provide loans and loan guarantees to projects certified by the BECC. Third, the International Water Boundary Commission (IBWC), which focuses on water rights and infrastructure serving the border region.

However, the debate over how President Bush addressed environmental concerns during the negotiations continued. As noted by Audley, many environmentalists thought that President Bush ignored environmental concerns when he developed his agenda for trade policy. His critics charged that he first resisted the link between trade and the environment, then relegated the environment to parallel tracks not tied to the trade negotiations, and finally cloaked NAFTA in “green language” in the final days of the negotiations.20

Despite the critics, by the summer of 1992 the NAFTA discussion concluded and the three countries signed the agreement that came into force on January 1, 1994. Nonetheless the debate over the environment continued to have political repercussions in the United States, and was far from over.21

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21 Ibid.

1.2 Integration of Environmental Issues within NAFTA.

1.2.1 Introduction

After the discussions between Canada, the United States and Mexico about the creation of a free trade zone were concluded, the three countries reached an agreement that not only addressed trade but also the environment. The NAFTA has been declared the "greenest" trade agreement ever. It is the first trade agreement to recognize the relationship between trade and the environment. Unlike the GATT and FTA, which contain scant reference to the environment, NAFTA recognizes the environment as a key issue in its Preamble and also in Chapters 1, 7, 9 and 20. In this section of the thesis, I will analyse the environmental issues addressed in the Preamble and various chapters of NAFTA.

1.2.2 Preamble.

The preamble establishes the intentions of the Parties in signing the agreement and three of its clauses are expressly concerned with the environment:

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23 The Preamble of the GATT is limited to economic and trade objectives and its text does not specifically refer to the environment. Nevertheless the environment is recognized indirectly in the general exceptions in GATT Article XX (b) and (g). These provisions grant exceptions from GATT obligations for measures which are "necessary to protect human, animal or plant life of health" or which are related "to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restriction on domestic production or consumption". On the other hand, the FTA is focused on economic objectives with the exception of a reference to "preserving the Parties flexibility to safeguard the public welfare" that may include environmental protection. Articles 603 and 609 refer to the environment as a legitimate domestic objective for standard related measures or procedures.

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"The Government of Canada, the Government of the United Mexican States and the Government of the United States of America, resolved to:

....

UNDERTAKE each of the preceding in a manner consistent with environmental protection and conservation...

PROMOTE sustainable development;.....24

STRENGTHEN the development and enforcement of environmental laws ....25

By explicitly recognizing the relationship between trade and the environment and promoting sustainable development, the NAFTA parties agreed that the environment is an important aspect of the trade agreement26 and that they took into consideration this relationship before entering into the agreement.

24 Despite that NAFTA mentions “sustainable development” there is no definition given in NAFTA. For that we must look in the Declaration of Principles of the United Nations Conference on Environment and Development where “sustainable development” is defined as: "development [which] must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations”


26 Despite this, some argue that talk about sustainable development is more rhetoric than a real commitment to such a principle since NAFTA does not contain any Article for setting aside funds for environmental concerns or infrastructure improvement that would assure protection of the
However, some authors suggest that the general provisions of the Preamble are not enforceable and the experience with other trade agreements has shown that dispute settlement panels rarely rely on them. Nevertheless, according to the Vienna Convention on the Law of the Treaties, preambles can be used as a legitimate basis to interpret an agreement. By mentioning the relationship between trade and the environment, NAFTA's parties took a step in the right direction.

1.2.3 NAFTA's Relationship with International Environmental Treaties.

Many environmentalists lobbied for the creation of an important exception in NAFTA regarding its relationship to other important international environmental agreements.

Neither GATT nor the FTA addresses their relationships with any other international environmental agreements. This is understandable, given the fact that the GATT was created in 1947 and at that time environmental issues were not important issues of the day. Recognizing that it was necessary to protect some international environmental agreements from trade challenges, NAFTA Article

27 Johnson supra note 8 at 67.
104 established its relationship with environmental and conservation agreements as follows:

“1. In the event of any inconsistency between this Agreement and the specific trade obligations set out in:


b) the *Montreal Protocol on Substances that Deplete the Ozone Layer*, done at Montreal, September 16, 1987, as amended June 29, 1990,

c) the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, done at Basel, March 22, 1989, on its entry into force for Canada, Mexico and the United States, or

d) the agreements set out in Annex 104.1

such obligations shall prevail to the extent of the inconsistency, provided that where a Party has a choice among equally effective

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30 However, in part 1 Objectives at Article 102 the parties establish the general objectives of this agreement but do not include or mention the environment.
and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement.

2. The Parties may agree in writing to modify Annex 104.1 to include any amendment to an agreement referred to in paragraph 1, and any other environmental or conservation agreement. 31

The agreements set out originally in Annex 104.1 are the Agreement on Cooperation for the Protection and Improvement of the Border Area (better known as the La Paz Agreement32) and the Agreement Between Canada And The United States Concerning The Transboundary Movement of Hazardous Waste33. As stated in Article 104 section 2, the Parties may agree in writing to modify Annex 104.1 to include any amendment to an agreement referred to in paragraph 1, and any other environmental or conservation agreement.

Based on Article 104 (2), the Clinton Administration was able to obtain the consent of Canada and Mexico to modify and include in Annex 104.1 the Convention on the Protection of Migratory Birds34 and the Convention Between the United States and Mexico for the Protection of Migratory Birds and Game

31 NAFTA Article 104.
33 The Agreement Between Canada And The United States Concerning The Transboundary Movement of Hazardous Waste, signed October 26, 1986, T.I.A.S. No. 1109.
Nevertheless, there is a concern from environmental groups about the possibility of including other agreements because it is necessary that all Parties agree, and apart from formal negotiations there is no other mechanism to modify annex 104.1.

It is important to keep in mind that NAFTA is an international agreement focused on trade; therefore NAFTA's main goal is to achieve the free flow of goods and investment between the three parties. Thus it is necessary to prevent the creation of any artificial barriers for trade, including those that use the environment as a pretext. One of NAFTA's great achievements is establishing a process to resolve disputes concerning trade and the environment. As established in Article 2005, in any dispute where the responding Party claims that its action is subject to the exception of Article 104 (when a Party is trying to comply with its commitments with one of the international environmental agreement established in Annex 104.1) and requests in writing that the matter be considered under NAFTA, the complaining Party may, in respect of that matter, thereafter have recourse to dispute settlement procedures solely under this Agreement.

36 Housman in FreeTrade supra note 18 at 399.
37 NAFTA Article 2005.
This Article is an advance since it is the first attempt of any trade agreement to try to avoid the problems that the infamous Tuna Case brought to international trade relationships.\(^{38}\)

Nevertheless, there are still some concerns from environmental groups and some authors\(^{39}\) that real environmental measures may be jeopardized because it is not clear what “choice among equally effective and reasonably available” or “least inconsistent” really means. There is also concern about giving to a panel of trade experts the power to determine if other international environmental agreements are well invoked or correctly interpreted.\(^{40}\)

1.2.4. Investment and the Environment.

One of the main concerns of the Canadian and American labour unions and environmentalists was that many investors would relocate their facilities to

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\(^{38}\) The US imposed an embargo on tuna fish on Mexico, Venezuela and other countries. The embargo was imposed based on the Marine Mammal Protection Act (MMPA) that prohibits the importation of tuna caught using fishing techniques resulting in the incidental killing of dolphins in excess of US standards. Mexico challenged the US embargo through the GATT, in what is known as the Tuna I case, arguing that the MMPA requirements for harvesting of tuna fish, as well as the methods used to calculate such compliance, were a violation of GATT obligations. Mexico argued that the MMPA violated the national treatment obligation of similar imported products established in Article III and Article XI that prohibits quantitative restrictions, and that there were not any environmental exemptions pursuant Article XX. The Tuna I panel determined that because the MMPA import prohibitions were targeted at protecting dolphin life and health in waters outside the US jurisdiction the exceptions to Article XX B could not be applied since the US regulations did not meet the conditions set out in the exemptions, and implied that the extraterritorial application of the law was against its GATT obligations. The decision generated several critiques from environmental NGOS since in their view trade relationships were given greater consideration than the environment and protection of animal life. Their impression was that GATT rules were not environmentally friendly. See Rueda, Andres, “Tuna, Dolphins, Shrimp & Turtles: What About Environmental Embargoes Under NAFTA?” (2000) Geo. Int'l Env. L. Rev. 647 for an interesting discussion about the Tuna I and Tuna II cases.

\(^{39}\) See generally Housman in FreeTrade supra note 18 at 10.

\(^{40}\) Ibid. at 10-12.
Mexico due to its lower environmental standards and the lack of enforcement\textsuperscript{41}, which leads to lower environmental costs. It is worth mentioning that one important aspect of this issue is not the possible differences in the levels of legislation, standards and regulations, since many of the Mexican Official Standards (NOMS) are based on American and Western European standards. The real problem is the lack of enforcement\textsuperscript{42}.

In order to avoid the possible advantage of Mexico in this issue, taking into consideration a proposal from Canada\textsuperscript{43}, the three parties created what is known as the "Pollution Haven Clause" in Article 1114 section 2 as follows:

\begin{quote}
\textbf{“Article 1114: Environmental Measures”}
\end{quote}

\textsuperscript{41} This concern is obviously more economical than environmental, which left some people with a feeling that many "so-called" environmentalists were hypocrites since they were not really worried about the environment but the loss of jobs. The perceived problem began with the creation in Mexico of the "maquiladora" program by the late 60's that opened several facilities in the U.S.-Mexican border. However, as mentioned by Moskowitz, the environment was not really an issue in the Mexico-U.S. relationships as he notes that "many maquiladoras and other industries left tons of hazardous waste in Mexico. However that was not a priority in the bi-lateral relationship. Perhaps this is because drugs and immigrants come into the United States while hazardous waste go out". Moskowitz, Adam L. "Criminal Environmental Law: Stopping the Flow of Hazardous Waste to Mexico", (1991) 22 Cal. W. Int'l. L.J. at 159.

\textsuperscript{42} As a result of my experience as an environmental lawyer in Mexico I had the opportunity to face the reality of enforcement. For example, in the State of Quintana Roo located in the Yucatan peninsula, one of the main problems the environmental authorities faced was the lack of boats that would help them to reach many areas that are covered by lakes, rivers, swamps and the sea. By March 2000 the PROFEPA state delegation had only two boats to cover the whole region. In Mexico City and its metropolitan area where there are more than 10,000 industries there are not enough environmental inspectors and some of them are not well trained. On December 1998 one of the environmental inspectors that was performing an environmental audit in one of my client's facilities was a veterinarian and he told me that he did not know the law but that working, as an inspector was the only job he could get.

\textsuperscript{43} Housman in Trade and the Environment supra note 8 at 396-397.
2. The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.  

This provision is an advance in recognizing that differences in environmental standards between trade partners can create artificial advantages to the Party with the least strict legislation, similar to a jurisdiction with low taxes. However, some authors believe that this provision still has its flaws, since the consultations between the parties are not binding and the lack of enforcement still creates an advantage to Mexico. Another critique is that this Article preserves the status quo but does not encourage addressing the actual differences in the level of protection and therefore the differences will force the parties to harmonize standards to the lowest common denominator.

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44 NAFTA supra note 1 Article 1114 (2). Emphasis added.
46 Housman in FreeTrade supra note 18 at 397.
47 Bailey supra note 26 at 849.
Despite these concerns as mentioned by Johnson and Beaulieu\textsuperscript{48}, this pressure to lower environmental norms is not possible. On the contrary, it will be an upward harmonization since NAFTA Chapters 7 and 9 include provisions related to the upward harmonization of the parties Sanitary and Phytosanitary\textsuperscript{49} (S&P) and standard related measures.\textsuperscript{50}

Section (1) of Article 1114 establishes the right of every Party to create its own level of protection and legislation stating that nothing in Chapter 11 "shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns."\textsuperscript{51} Recognizing the sovereignty and the intrinsic differences between the parties, NAFTA allows every Party to maintain and create its own legislation and level of protection.\textsuperscript{52}

1.2.5 Sanitary and Phytosanitary Measures

In NAFTA’S Chapter 7, the agreement recognizes the liberty of every Party to adopt its own Sanitary and Phytosanitary Measures.\textsuperscript{53} Article 712 establishes

\textsuperscript{48} Johnson \textit{supra} note 9 at 111-118.
\textsuperscript{49} NAFTA \textit{supra} note 1 Article 714 (1) the parties should undertake "to the greatest extent practicable" equivalence in their respective S&P measures without reducing the level of protection of human, animal or plant health or life.
\textsuperscript{50} Ibid. Article 906 (2).
\textsuperscript{51} Ibid. Article 1114 (1).
\textsuperscript{52} Mexico initiated several legislation reforms in the late 1980’s, including reforms on International Trade, Foreign Investment and the Environment.
\textsuperscript{53} S&P measures are defined in NAFTA \textit{supra} note 1 Article 724 as follow:

"sanitary or phytosanitary measure means a measure that a Party adopts, maintains or applies to:
that one of the basic rights and obligations of each Party is to establish its own S&P measures to protect human, plant and animal health or life, even measures more stringent than an international standard, guideline or recommendation.\

Despite the liberty of every Party to establish its own S&P measures, such measures are limited in several ways.

First, any S&P measures must be applied in a non-discriminatory way between its goods and like goods of another Party or goods of any Party and like goods of

(a) protect animal or plant life or health in its territory from risks arising from the introduction, establishment or spread of a pest or disease,

(b) protect human or animal life or health in its territory from risks arising from the presence of an additive, contaminant, toxin or disease-causing organism in a food, beverage or feedstuff,

(c) protect human life or health in its territory from risks arising from a disease-causing organism or pest carried by an animal or plant, or a product thereof, or

(d) prevent or limit other damage in its territory arising from the introduction, establishment or spread of a pest,

including end product criteria; a product-related processing or production method; a testing, inspection, certification or approval procedure; a relevant statistical method; a sampling procedure; a method of risk assessment; a packaging and labelling requirement directly related to food safety; and a quarantine treatment, such as a relevant requirement associated with the transportation of animals or plants or with material necessary for their survival during transportation.

NAFTA Article 712:

"1. Each Party may, in accordance with this Section, adopt, maintain or apply any sanitary or phytosanitary measure necessary for the protection of human, animal or plant life or health in its territory, including a measure more stringent than an international standard, guideline or recommendation.

2. Notwithstanding any other provision of this Section, each Party may, in protecting human, animal or plant life or health, establish its appropriate levels of protection in accordance with Article 715."
another country. This must be done in order to comply with the national treatment and most-favored nation status that are the two bases of any free trade treatment since GATT.

Second, every Party shall ensure that every S&P measure adopted or maintained is applied to the extent that such a measure does not constitute unnecessary obstacles to trade. Article 712 section 5 establishes that in order to prevent any S&P measures constituting an unnecessary obstacle, every Party shall apply the measures only to the extent necessary to achieve its appropriate level of protection and taking into consideration “technical and economic feasibility of the measures”. However, these requirements are not defined.

Also, to adopt any S&P measures, as established by Article 712 (3), all parties shall ensure that any measure that it adopts, maintains or applies is:

a) based on scientific principles, taking into account relevant factors including, where appropriate, different geographic conditions;

b) not maintained where there is no longer a scientific basis for it; and

c) based on a risk assessment, as appropriate to the circumstances.\(^{(58)}\)

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\(^{(55)}\) Ibid. section (4). "Each Party shall ensure that a sanitary or phytosanitary measure that it adopts, maintains or applies does not arbitrarily or unjustifiably discriminate between its goods and like goods of another Party, or between goods of another Party and like goods of any other country, where identical or similar conditions prevail."

\(^{(56)}\) NAFTA supra note 1 Article 712 (5).

\(^{(57)}\) Ibid.

\(^{(58)}\) Ibid.
This Article recognizes the problematic relationship between S&P measures and science, since many standards created or applied are created more as disguised protection for trade than protection of the environment or human life or plant health as established by NAFTA's Article 712.59 Nevertheless, there are still some phrases such as “scientific principles” that are not defined.60 It is important to mention that the relationship between science and environment has not always been good and in some cases the relationship has had disastrous results.61

As established by Article 715 section 1, in establishing any S&P measure all parties shall undertake a risk assessment and in conducting a risk assessment each Party shall take into account:

a) relevant risk assessment techniques and methodologies developed by international or North American standardizing organizations;

b) relevant scientific evidence;

c) relevant processes and production methods;

59 NAFTA supra note 1 Article 712 section 6:

“No Party may adopt, maintain or apply any sanitary or phytosanitary measure with a view to, or with the effect of, creating a disguised restriction on trade between the Parties.”


61 To review an important case where the relationship between science and environment resulted in several criticisms see the EC Measures Concerning Meat and Meat Products (Hormones) (Complaints by the United States and Canada) (1997) WTO Doc. WT/DS26/AB/R (Appellate Body Report). See note 65 and accompanying text.
d) relevant inspection, sampling and testing methods;

e) the prevalence of relevant diseases or pests, including the existence of pest-free or disease-free areas or areas of low pest or disease prevalence;

f) relevant ecological and other environmental conditions; and

g) relevant treatments, such as quarantines.

In undertaking risk assessment, the parties shall take into account not only the risk but also the economic factors and the need to minimize negative trade effects. If relevant information is unavailable, Article 715 section 4 allows the parties to adopt provisional S&P measures.

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62 NAFTA supra note 1 Article 715 (2) "a) loss of production or sales that may result from the pest or disease; b) costs of control or eradication of the pest or disease in its territory."

63 Ibid. section (3):

"a) should take into account the objective of minimizing negative trade effects; and b) shall, with the objective of achieving consistency in such levels, avoid arbitrary or unjustifiable distinctions in such levels in different circumstances, where such distinctions result in arbitrary or unjustifiable discrimination against a good of another Party or constitute a disguised restriction on trade between the Parties."

64 Ibid. section " (4) Notwithstanding paragraphs (1) through (3) and Article 712(3)(c), where a Party conducting a risk assessment determines that available relevant scientific evidence or other information is insufficient to complete the assessment, it may adopt a provisional sanitary or phytosanitary measure on the basis of available relevant information, including from international or North American standardizing organizations and from sanitary or phytosanitary measures of other Parties. The Party shall, within a reasonable period after information sufficient to complete
Finally, Article 713 recognizes that the International Standards and Standardizing Organization plays a role in the creation of new S&P measures, but that despite the standards created by international organizations, every Party has the liberty to create its own S&P measures that are even higher than those international standards. Each Party is free to use existing standards as possible guides.65

These Articles raised some concerns for environmentalists since many of the concepts are not well defined. The concern is that ambiguity in the language may

65 Article 713. International Standards and Standardizing Organizations

"1. Without reducing the level of protection of human, animal or plant life or health, each Party shall use, as a basis for its sanitary and phytosanitary measures, relevant international standards, guidelines or recommendations with the objective, among others, of making its sanitary and phytosanitary measures equivalent or, where appropriate, identical to those of the other Parties.

2. A Party's sanitary or phytosanitary measure that conforms to a relevant international standard, guideline or recommendation shall be presumed to be consistent with Article 712. A measure that results in a level of sanitary or phytosanitary protection different from that which would be achieved by a measure based on a relevant international standard, guideline or recommendation shall not for that reason alone be presumed to be inconsistent with this Section.

3. Nothing in Paragraph 1 shall be construed to prevent a Party from adopting, maintaining or applying, in accordance with the other provisions of this Section, a sanitary or phytosanitary measure that is more stringent than the relevant international standard, guideline or recommendation.

4. Where a Party has reason to believe that a sanitary or phytosanitary measure of another Party is adversely affecting or may adversely affect its exports and the measure is not based on a relevant international standard, guideline or recommendation, it may request, and the other Party shall provide in writing, the reasons for the measure.

5. Each Party shall, to the greatest extent practicable, participate in relevant international and North American standardizing organizations, including the Codex Alimentarius Commission, the International Office of Epizootics, the International Plant Protection Convention, and the North American Plant Protection Organization, with a view to promoting the development and periodic review of international standards, guidelines and recommendations."
create another disastrous result such as occurred in the Hormone Case.\footnote{In the Hormone Case a WTO Appellate Body dealt with a complaint from Canada and the United States against the European Community (EC) relating to an EC prohibition of imports of meat and meat products derived from cattle, which had been treated for growth promotion purposes with either natural hormones or synthetic hormones. This EC directive allows importation from third countries of meat and meat products from animals to which these hormones have been administered but only for therapeutic and zoo technical purposes. The Appellate Body decided that the EC import ban was inconsistent with the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) because it was not based on a risk assessment and, the level of protection compared with substances similar to hormones were inconsistent. The Appellate Body decision was criticized because it created serious obstacles to the ability of governments to establish their own appropriate level of risk. Also the possibility of establishing high levels of protection and even precautionary measures was put at risk by placing limitations on the use of "minority" scientific opinions to justify protective measures. See Report of the EC-Measures Concerning Meat and Meat Products (Hormones) (Complaint by the United States) (1997), WTO Doc WT/DS26/AB/R/USA (Appellate Body Report) See also Quick, Reinhard and Andreas Bluthner, " Has the Appellate Body Erred? An Appraisal and Criticism of the Ruling in The WTO HORMONES CASE", (1999) 2:4 J. Int'l Economic L. and Wagner, J. Martin," The WTO'S Interpretation of the SPS Agreement Has Undermined the Right of Governments to Establish Appropriate Levels of Protection Against Risk", (2000) 31:3 Law & Policy in International Business for interesting discussions about the case. Also see Vermulst, P., Mavroidis, P. & Waer, P., "The Functioning of the Appellate Body After Four Years, Towards Rule Integrity", (1999) 2:4 J. W. T. for another point of view of the WTO decision in this case and other cases.}

The ambiguous text of Article 107 does not help in determining if a Party took into consideration technical or economic feasibility concerns before creating and applying its S&P measures. This will leave to the arbitration panels to determine if a Party considered these matters and if the decisions were right or not.\footnote{Housman, Robert & Orbuch, P., " Integrating Labour and Environmental Concerns into the North American Free Trade Agreement: A Look Back and Look Ahead", (1995) 8 American U. J. Int'l. L. Pol'y. 749 at 740-741 (hereinafter Integrating Concerns) as well as Bailey supra note 26 at 852.}

Leaving this to the arbitration panels may create contradictory and inconsistent decisions among the panels.

By requesting that any S&P shall be based on a "risk assessment" NAFTA is adopting a policy of scientific proof to create proper S&P measures. Some S&P measures are based on a precautionary approach, such as the zero tolerance policy on carcinogenic pesticide residues in processed foods or drugs. However,
by recognizing that any S&P measures should have a basis in scientific proof, some zero tolerance measures may be challenged.68 Another concern is that some S&P measures can be phased in over periods of time, taking into account its partners exports interests. Before the measures come into play, people’s health and the environment may be at risk.69

1.2.6 Technical Barriers to Trade

Similar to the S&P measures, chapter 9 of NAFTA recognizes the liberty of each country to create, maintain and apply its own standards for the protection of human, animal and plant life or health and for the protection of the environment and any other measure to ensure its enforcement or implementation, including measures to prevent the importation of any good that fails to comply with such measures.70 In the creation of these measures each Party has the right to establish its own level of protection in accordance with the requirements of Article 907 (2).71

Article 907 (2) contains similar requirements to those discussed for the S&P measures. In establishing a level of protection that it considers appropriate and conducting an assessment of risk, a Party should avoid arbitrary or unjustifiable

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68 Ibid. at 741-743.
69 NAFTA supra note 1 Article 712 (5) “Where a Party is able to achieve its appropriate level of protection through the phased application of a sanitary or phytosanitary measure, it may, on the request of another Party and in accordance with this Section, allow for such a phased application, or grant specified exceptions for limited periods from the measure, taking into account the requesting Party's export interests.”
70 Ibid. Article 904 (1).
71 Ibid. Article 904 (2).
distinctions between similar goods or services\textsuperscript{72} where the distinctions: (a) result in arbitrary or unjustifiable discrimination against goods or service providers of another Party; (b) constitute a disguised restriction on trade between the Parties; or (c) discriminate between similar goods or services for the same use under the same conditions that pose the same level of risk and provide similar benefits.\textsuperscript{73}

In developing the risk assessment, Article 907 (1) establishes that a Party may in pursuing its objectives take into account: (a) available scientific evidence or technical information; (b) intended end uses; (c) processes or production, operating, inspection, sampling or testing methods; or (d) environmental conditions.\textsuperscript{74}

These provisions are also a point of concern for environmentalists\textsuperscript{75} due to the lack of clarification in determining how the “scientific evidence” will be measured and who will measure such evidence or what the definition of “environmental conditions” will be.

Finally, the parties recognize the following as legitimate objectives for protection:

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\textsuperscript{72} As recognized by the Article 904 (3) Non-Discriminatory Treatment “Each Party shall, in respect of its standards-related measures, accord to goods and service providers of another Party: (a) national treatment in accordance with Article 301 (Market Access) or Article 1202 (Cross-Border Trade in Services) and (b) treatment no less favorable than that it accords to like goods, or in like circumstances to service providers, of any other country. Unnecessary Obstacles 4. No Party may prepare, adopt, maintain or apply any standards-related measure with a view to or with the effect of creating an unnecessary obstacle to trade between the Parties. An unnecessary obstacle to trade shall not be deemed to be created where: (a) the demonstrable purpose of the measure is to achieve a legitimate objective; and (b) the measure does not operate to exclude goods of another Party that meet that legitimate objective.”

\textsuperscript{73} \textit{Ibid.} Article 907 (2).

\textsuperscript{74} \textit{Ibid.} Article 907 (1).

\textsuperscript{75} Housman “Integrating Concern” \textit{supra} note 67 at 743-745. See also Bailey \textit{supra} note 26 at 854-857.
(a) safety;

(b) protection of human, animal or plant life or health, the environment or consumers, including matters relating to quality and identifiability of goods or services; and

(c) sustainable development.

As a corollary to this section, it is worth mentioning that the parties to NAFTA establish the basic rules, not only to create S&P measures to protect human health and reach sustainable development, but also to establish the process by which such measures should be created. The main goal of such a process is to prevent the creation of false barriers to trade.

1.2.7 Dispute Settlement

Chapter 20 includes provisions relating to the avoidance or settlement of all disputes regarding the interpretation or application of the Agreement, except for matters covered in Chapter 11 (Investment), Chapter 14 (Financial Services) and Chapter 19 (Antidumping and Countervailing Duty final determinations). When general disputes concerning NAFTA are not resolved through consultation within a specified period of time, the matter may be referred at the request of either Party to a non-binding panel under Article 2008.76 According to Article 2005 paragraphs 1, 2, 3 and 4, disputes regarding any matter arising under NAFTA and

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76 Ibid. Article 2004.
GATT, any agreement negotiated thereunder, or any successor agreement, may be settled in either forum at the discretion of the complaining Party.

The dispute resolution Panel should be comprised of five members, two selected by each Party and the Chair selected by the first four panellists. The panellists are selected from a roster, however a Party may suggest a panellist that is not a member of such roster. Every Party has the right to submit written submissions within 20 days after the panels are selected. The parties also have the right to attend a hearing before the Panel and submit supplementary written submissions within 10 days after the hearing.

If the parties agreed to do so, a scientific review board may be selected to present a report on the information that seems appropriate. Ninety days after the panel selection has been completed, the panel should present to the parties an initial report of the panel's decision for their comments and review. Within 30 days of the panel presentation of the initial report, a final report should be issued.

Because of the ambiguity surrounding the precepts of the S&P and standard-related measures, the parties agreed to establish special rules for dealing with these measures. The protection of S&P and standard-related measures is an advance over GATT and previous agreements. If the parties disagree on the

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77 Ibid. Article 2011.
78 Ibid. Article 2012.
79 See Esty supra note 13 at 54.
definition of a standard, they must resolve their dispute according to the dispute resolution process established in Chapter 20.80

Another important feature of the provisions is that if any dispute arises regarding environmental, health or safety standards, the complaining Party bears the burden of proof. 81 In addition, any Party may request the panel to seek information and technical advice that it deems appropriate.82 However, the agreement is silent on the level of burden imposed by NAFTA to the challenging Party (prima facie or reasonable doubt).83

As noted by Bailey84 and Housman85, in Article 2015 the dispute settlement process recognizes the role that science may play in this type of dispute by establishing the following:

"Article 2015: Scientific Review Boards

1. On request of a disputing Party or, unless the disputing Parties disapprove, on its own initiative, the panel may request a written report of

80 Ibid. Article 2005 3. "In any dispute referred to in paragraph 1 where the responding Party claims that its action is subject to Article 104 (Relation to Environmental and Conservation Agreements) and requests in writing that the matter be considered under this Agreement, the complaining Party may, in respect of that matter, thereafter have recourse to dispute settlement procedures solely under this Agreement." [emphasis added]. See footnote 75 and accompanying text.

81 Ibid. Article 723.6.
82 Ibid. Article 2014.
83 Housman in FreeTrade supra note 18 at 409.
84 Bailey supra note 26 at 859-861.
85 Housman in "Integrating Concerns" supra note 67 at 746-748.
a scientific review board on any factual issue concerning environmental, health, safety or other scientific matters raised by a disputing Party in a proceeding, subject to such terms and conditions as such Parties may agree.

2. The board shall be selected by the panel from among highly qualified, independent experts in the scientific matters, after consultations with the disputing Parties and the scientific bodies set out in the Model Rules of Procedure established pursuant to Article 2012(1).

3. The participating Parties shall be provided:

(a) advance notice of, and an opportunity to provide comments to the panel on, the proposed factual issues to be referred to the board; and

(b) a copy of the board's report and an opportunity to provide comments on the report to the panel.

4. The panel shall take the board's report and any comments by the Parties on the report into account in the preparation of its report. 86

The only concern voiced by some authors about the dispute settlement process is the limited role of the review board. The review board can review factual questions but not give suggestions or contribute recommendations that may bring about an environmentally sound decision. Also, some feel that the panel members may not understand clearly the environmental concepts or issues in

86 NAFTA supra note 1 Article 2015 [emphasis added].
dispute, since most of them will be experts on trade or international law but not on environmental law.\textsuperscript{87}

1.3 Conclusions.

Despite many concerns, major advances have been made. NAFTA is the first major trade agreement that takes into consideration the relationship between trade and the environment, and recognizes the importance of this relationship.

Not only does NAFTA recognize the important relationship between trade and the environment, it is the first trade agreement to recognize that it is important to protect certain international environmental agreements from trade challenges. Before NAFTA, environmental agreements were often sacrificed in the name of free trade. However, in NAFTA the parties recognized that the commitments established in other environmental agreements must be protected from any dispute related to trade in order to reach the goals of these agreements.

NAFTA's dispute settlement process recognizes that some measures that a Party may take are taken to fulfill its obligations with other agreements, especially environmental agreements such as the \textit{Montreal Protocol}. This has been achieved by creating special rules and exceptions to deal with these measures and protect them and thereby ensure their effectiveness. One of the special rules permits a panel to seek information and technical advice from experts, helping

\textsuperscript{87}Housman in Integrating Concerns \textit{supra} note 67 at 748.
the panellists who are generally experts on trade but not on the environment. These advances will permit the parties to deal better with S&P measures in the case of a dispute, prevent the elimination of valid environmental measures and detect artificial and technical measures which are an unnecessary barrier to trade.

Nevertheless, the Parties agreed that additional steps needed to be taken to protect the environment and therefore created an environmental side agreement to deal with the environmental concerns raised by NAFTA.
CHAPTER 2  THE NAAEC AND THE COMMISSION FOR ENVIRONMENTAL COOPERATION.

2.1 The NAAEC: The Historical Background.

The historical background of the NAAEC is understandable only in the context of NAFTA's historical and political development in the three countries, especially the United States. American NGOs, labour unions and other groups criticized the Bush administration for not addressing more environmental issues in NAFTA. This was an important issue during President Bill Clinton's presidential campaign; he stated that in order to support NAFTA it was necessary to resolve outstanding environmental and labour issues.

The Bush plan to resolve environmental issues with the creation of the *Response of the Administration to Issues Raised in Connection With the Negotiation of a North American Free Trade Agreement* was not enough for many environmentalist groups in the United States; one, the Public Citizen, even started a lawsuit against the United States Offices of Trade Representative (USTR), because the USTR did not make an environmental impact statement. Although the District Court and the Appeal Court dismissed the case the opposition to NAFTA within some groups was clear.

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88 See *supra* note 22 and accompanying text.
Environmentalists criticized Bush for taking a minimalist approach on the environment and relegating the environmental issues in NAFTA to a "parallel track" that would not slow or even stop any trade negotiations.90 This difference in opinion between the Bush administration and the environmentalist groups involved in the NAFTA discussions left the environmentalists three options to let their voice be heard.

The first was to take a position of total opposition to the trade agreement as proposed by Bush, but this was not really viable, since the negotiations were very advanced. Second, was to use NAFTA as a vehicle to implement environmental principles. However, with the lack of real participation by environmentalists in the NAFTA negotiations, that was not possible. Finally, the third option was to try to establish a more important role in working with the government and thereby find the appropriate strategy to implement NAFTA and minimize the possible harm to the environment.91

This third option, to take a more active role in the implementation of the NAFTA legislation and to try to create an environmental side agreement that would help to make the whole NAFTA package" greener", was accomplished by the creation of a Trilateral Commission for the Environment. This was the only possible

90 Audley, supra note 20 at 193.
91 Ibid.
solution since by mid-1992 the NAFTA negotiations were almost finished\textsuperscript{92} and both Mexico and Canada were reluctant to re-open NAFTA for further discussions.\textsuperscript{93} The side agreement was a separate agreement and was considered the last opportunity to address all the environmental issues.

On September 17, 1992, the discussion started between the parties to develop a trilateral commission on the environment that would help in the implementation of the environmental side agreement\textsuperscript{94} and also help facilitate the approval of NAFTA before the U.S Congress. Pressure came from several environmentalists, NGOS, and unions, especially in the United States and Canada, and this pressure was evident during the presidential campaign. It was not until October 1992 that Governor Clinton mentioned at North Carolina University that he supported NAFTA, but only if this agreement was accompanied by two side agreements on the environment and labour matters.\textsuperscript{95} This position gave Clinton the support from several NGO's that helped him to eventually win the presidential campaign; however, the pressure from NGO's, unions and other political players continued.

A reflection of this pressure was the decision of President-elect Bill Clinton, that he would not press for the adoption of NAFTA without concluding complementary

\textsuperscript{92} Dimento \textit{supra} note 89 at 665.
\textsuperscript{93} Johnson & Beaulieu \textit{supra} 9 at 30.
\textsuperscript{94} Winham, R. G., "Enforcement of Environmental Measures: Negotiating the NAFTA Environmental Side Agreement", (1994) 3 J. Env. & Dev. 1 at 31.
\textsuperscript{95} Audley \textit{supra} note 20 at 199.
agreements to protect environmental and labour interests.96 Members of the U.S Congress who said NAFTA would not be approved unless environmental and labour side agreements were included supported him.97 However, Clinton made the decision to not reopen NAFTA and even made such promises to Mexican President Carlos Salinas de Gortari on January 199398; however, he left open the option to create a strong North American Commission on the Environment and argued that this agreement would green NAFTA from the outside, not from the inside.

The critiques from several NGO's were that despite attempts to address environmental issues in NAFTA, the green language in NAFTA was still inadequate.99 Therefore, public support in the three countries was low. Clinton was pressured in his political campaign to commit to creating an environmental protection commission with power to prevent and clean up pollution and allow citizens to challenge objectionable environmental practices by the parties.100 Clinton's position was clearly reflected in the United States' draft of the side agreement.

A draft prepared by the National Economic Council (NEC) proposed to create a trilateral environmental commission to promote environmental cooperation rather

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96 Ibid. at 30.
97 Dimento supra note 89 at 667.
98 See Johnson and Beaulieu supra note 9 at 31
99 Ibid. at 122.
100 Winham supra note 94 at 31.
than have any powers to enforce the law or establish sanctions.\textsuperscript{101} Later, in May 1993 the parties met again to discuss a new project for the proposed North American Commission on the Environment (NACE)\textsuperscript{102} that established six elements necessary to implement President Clinton’s ideas to protect the environment. These elements are the following\textsuperscript{103}:

1) Establish a tri-lateral commission composed of a ministerial council with a relatively independent director and a secretariat with fact-finding powers.

2) The members of the Commission and the Secretariat receive immunity and privileges necessary to independently perform their functions.

3) Citizens receive the power to submit complaints that a Party has failed to enforce its environmental legislation and in such cases the Secretariat would have the power to prepare reports on citizens’ submissions and to initiate dispute settlement proceedings.

4) In the case of dispute settlement proceedings, the Secretariat and any Party would need to prove that another Party had demonstrated a persistent and unjustifiable pattern of non-enforcement of its internal environmental legislation.

5) The scope of the dispute settlement process would include only the domestic environmental legislation.

\textsuperscript{101} The NEC suggestion gave powers to the Commission only to receive citizen’s complaints or report on NAFTA objectives, see Winham \textit{ibid}.


\textsuperscript{103} Winham supra note 94 at 32.
6) If the parties or the council are unable to resolve a dispute, a Party would be able to suspend an appropriate level of benefits under NAFTA.

This proposed draft reflected the common practice of the United States to impose unilateral trade sanctions on its trade partners. Sanctions were rejected by Canada and Mexico, whose trade is basically with the United States. Such an agreement would leave them eventually open to suffer trade sanctions principally generated by the American environmental NGOs. Both countries suggested a different approach for the creation of the NACE. The suggestion to impose trade sanctions was described by Canadian and Mexican negotiators as well as by U.S. critics as overly aggressive and counterproductive, because it would create more tension between the parties.104

Both Canadians and Mexicans suggested a weaker and less independent commission which involved not giving immunities to the Secretariat members and did not include the possibility for the citizens to file before the Commission any petition or concern. Mexico proposed that only the Parties, not the Secretariat, should be able to bring an allegation that a Party had unjustifiably, persistently and systematically failed to enforce its domestic legislation "in order to attract or retain investment."105 The Mexican position was clear in opposing giving power to

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104 Patton supra note 102 at 97.
105 Ibid. The Mexican proposal seemed to be aimed at any possible sanctions by American NGO's. Its proposal made it very difficult to impose possible sanctions to any Party, since it was necessary to prove an unjustifiable, persistent and systematic failure to enforce its law and that it was done with the purpose to attract or retain investment, either, which would be impossible to prove.
a supra national entity to interfere with a national government’s duty to enforce
national laws. Mexico also opposed renegotiating any NAFTA provision.106

The Canadian proposal also included the idea that the agreement should be
enforced by promoting within the Party’s jurisdiction access to administrative,
 quasi-administrative or judicial procedures. These procedures included some
 rights: to request that an investigation be initiated, to bring suit for damages, to
 pursue injunctions, to initiate private prosecutions, and to seek review of tribunal
 action.107 The Canadian draft also included a proposal on transboundary
 pollution and application of the side agreement to the sub-national level.108

Regarding the scope of the legislation covered by the agreement, the Canadian
document suggested including an annex that detailed every law affected by the
agreement. Canada suggested the creation of an enquiry committee nominated
by the Parties to investigate when the Parties were unable to resolve their
differences about the consistent pattern of violations. Mexico suggested that the
Secretariat could make public recommendations to a Party and Canada did not
support any sanction for the persistent lack of enforcement of the internal
 legislation. In conclusion, both Canadian and Mexican drafts were considerably
 weaker than that suggested by the United States.

106 Patton supra note 102 at 98,
107 Ibid. at 99.
108 Ibid. This proposal was included by Canada because most of its the environmental laws are
 handled at the provincial level.
Many environmentalist groups and business groups criticized the U.S. draft for different reasons. The environmentalists argued that the procedure to impose trade sanctions was flawed and that the necessity to obtain the vote of two parties to impose sanctions could make the imposition of such sanctions very difficult in reality.\textsuperscript{109} However, the power to impose trade sanctions was also considered counterproductive, because penalizing a Party for not enforcing its environmental legislation could result in that country not creating stricter environmental laws or standards.\textsuperscript{110}

The business coalition criticized the trade sanctions proposal. They suggested that trade sanctions could lead to harassment of private companies by governments. They also suggested reducing the powers of the Commission and not giving investigative powers to the Secretariat. They suggested that the role the Commission should play in the side agreement be more of a cooperative one rather than a role that might cause a confrontation between the parties. As a commentator mentioned, while many environmentalist groups supported the use of sanctions to enforce environmental law, much of the trade policy community and business community was opposed to the use of trade sanctions to enforce a parties' internal legislation. In addition, they believed that the supra-national enforcement of the parties' domestic laws is not an appropriate role for the

\textsuperscript{109} Ibid.
\textsuperscript{110} Ibid. at 100.
NACE. In May 1993 the Clinton Administration reversed its position on including enforcement measures in the agreement.

By June, the Canadian government called for another round of negotiations and suggested that instead of trade sanctions, fines against the governments could be a better alternative. The alternative of fines received a good response from the business community. However, this proposal started a new discussion to decide how to enforce payment of the fines. In Canada it is possible since Canadian courts have the power to enforce international orders; in Mexico and the United States, that was not possible for constitutional and political reasons. Nevertheless, Canada succeeded in establishing the imposition of fines only in the case of Canada, instead of possible trade sanctions by the Commission.

However, because of the pressure from the U.S. government and in order to avoid compromising the negotiations any further, Mexico accepted the trade sanctions proposal, but with the condition that before imposing any trade sanctions the parties should be involved first in a more cooperative process. Sanctions would only be used if there was no other solution to the dispute.

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112 Dimento supra note 89.
113 Winham supra note 94 at 34.
115 Ibid.
between the parties. It was agreed that an arbitration panel is the only way to
decide if trade sanctions should be imposed on a Party.

Further, the power of the Commission and the Secretariat was lessened
considerably, since the commission can only make public a factual record and
cannot initiate any dispute settlement or sanction process. However, the draft
agreed upon allowed citizens and NGO’s to file complaints against any Party for
lack of enforcement.

Finally, on August 13, 1993 the trade ministers of the United States, Canada, and
Mexico announced that they had completed the environmental side
agreement.\textsuperscript{116} On September 13, 1993 the environment ministers of the three
countries signed the North American Agreement on Environmental
Cooperation\textsuperscript{117} in Washington.

\section*{2.2 The North American Agreement on Environmental Cooperation.}

The North American Agreement on Environmental Cooperation\textsuperscript{118} is comprised
of a Preamble and seven parts. Part one is related to the general objectives of
the NAAEC. Part two contains the Obligations that the three parties agreed to
fulfil in order to accomplish the NAAEC objectives. Part three deals with the

\textsuperscript{116} Johnson and Beaulieu \textit{supra} note 9 at 123.
\textsuperscript{117} \textit{Supra} note 2.
\textsuperscript{118} \textit{Ibid.}
creation and organization of the Commission of Environmental Cooperation and its structure, which includes the Council, the Secretariat and the Joint Public Advisory Committee, as well as the procedures of each body of the Commission. In Part four the NAAEC establishes the obligation of the parties to cooperate for the interpretation and application of the agreement itself as well as to provide information that the Council or the Secretariat may require.

Part five establishes the Consultation and Resolution of Disputes process. In this part the parties agreed to follow the NAFTA Chapter 20 dispute resolution process which establishes several steps, such as consultations, request for arbitration panel, selection of an arbitration panel, monetary sanctions and finally trade sanctions. Part six “General Provisions” deals with enforcement principles, protection of information, funding of the Commission and general definitions. Finally, part seven “Final Provisions”, establishes the final provisions of the NAAEC such as the date of entry into force, the process of accession and amendments. There are also five annexes regarding the enforcement of the dispute settlement process and specific rules for each country.

In order to give an idea of the general content of the NAAEC, I will analyze each part of the agreement, including the Commission of Environmental Cooperation and its structure and objectives, and give some comments and critiques on each section.
2.2.1 Preamble.

In its preamble, the NAAEC establishes several of the intentions of all the parties to be accomplished with this agreement. The preamble recognizes that the agreement was created as a complement to the NAFTA or, as it is known, as a NAFTA side agreement. The agreement recognizes that the parties are convinced of the importance of the environment and its protection as a main goal in their territories, and the important role of cooperation between the Parties in achieving sustainable development.\footnote{Ibid. preamble paragraph 1.}

The agreement also recognizes the sovereignty and the environmental differences between its parties. The Parties recognize that, according to the general principles of international law\footnote{Ibid.}, every state has the sovereign right to exploit its own resources pursuant to its own environmental policies\footnote{This principle is also mentioned in several treaties such as the \textit{Stockholm Declaration adopted by the United Nations Conference on the Human Environment}, 5 June 1972, UN. Doc. A/Conf. 48/14 Rev. 1, reprinted in (1992) 11 I.L.M. 1416 hereinafter Stockholm Declaration.} and the responsibility to ensure that activities within its jurisdiction or control do not cause damage to the environment of other states or areas beyond the limits of national jurisdiction.\footnote{NAAEC \textit{supra} note 87, Preamble paragraph 2.}

\begin{quote}
\textbf{CONVINCED} of the importance of the conservation, protection and enhancement of the environment in their territories and the essential role of cooperation in these areas in achieving sustainable development for the well-being of present and future generations."
\end{quote}

\begin{quote}
\textbf{REAFFIRMING} the sovereign right of States to exploit their own resources pursuant to their own environmental and development policies and their responsibility to ensure that
\end{quote}
This intention is also connected to two other intentions as established in the Preamble. Paragraph seven establishes the following:

"NOTING the existence of differences in their respective natural endowments, climatic and geographical conditions, and economic, technological and infrastructural capabilities." 123

By recognizing the differences between the Parties, the Parties took an important step toward creating a better context for cooperation.

This precept recognizes that each Party is different, not only with respect to its environment but also in its capacity to address environmental problems that may arise. The economic differences that exist between the Parties may affect how each country solves any given environmental problem.

Paragraph 8 of the NAAEC preamble establishes its recognition of the Stockholm Declaration and Rio Declaration as important environmental declarations. 124 By recognizing the importance of both the environment and trade some commentators 125 mention that the NAAEC expresses a commitment to inherently

...activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

123 Ibid.
125 Johnson and Beaulieu supra note 9 at 141.
conflicting principles which reflects the intrinsic difficulty of integrating environmental concerns into the law of international trade and the environment. The essence of the conflict may be that to promote industry and trade will inevitably hurt the environment.

The NAAEC's preamble takes into consideration the importance of public participation in conserving, protecting and enhancing the environment. Additionally, the NAAEC recalls the tradition of environmental cooperation between the parties\textsuperscript{126} in creating a Commission to facilitate the conservation, protection and enhancement of the environment in their territories.\textsuperscript{127} These steps are especially important. The Commission may both help the parties to reach their goals and allow the public to participate in the process.

There are a couple of important points to make with respect to the preamble. First, by recognizing in the preamble the importance of public participation to conserve and protect the environment, the parties addressed some of the main concerns many NGO's and politicians had during the discussion of the creation of the NAAEC, especially in the United States and Canada.

\textsuperscript{126} Ibid. paragraph 9 "RECALLING their tradition of environmental cooperation and expressing their desire to support and build on international environmental agreements and existing policies and laws, in order to promote cooperation between them."

\textsuperscript{127} Ibid. paragraph 10 "CONVINCED of the benefits to be derived from a framework, including a Commission, to facilitate effective cooperation on the conservation, protection and enhancement of the environment in their territories."
Second, it is important to mention that some of the intentions established in the preamble are no more than good intentions since instruments such as the Stockholm and Rio Declarations are not treaties but international declarations. Therefore, there is not any legal obligation to accomplish such intentions and declarations.

2.2.2 Part One: Objectives

In Part One, the Parties established ten objectives that they are seeking to accomplish with the NAAEC. These objectives are as follow:

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 the 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.\textsuperscript{128}

Of the ten objectives mentioned above, we can divide them into four major areas:
1) Environment, Economy and Trade; 2) Conservation of Biodiversity; 3) Pollutants and Health and; 4) Law and Policy. In my opinion, the most notable are those related to the environment and the protection of each Party's environment and the participation of the three parties in achieving sustainable development. Also significant are those related to the trade relationships between the countries, namely to support the environmental goals and objectives of the NAFTA, and avoid the creation of trade distortions or new trade barriers.

The objective of avoiding trade distortions or new trade barriers is important to note. As a side agreement of NAFTA, this agreement recognizes that the protection of the environment should not be used to create trade barriers, and this is in accordance with NAFTA chapters 7 and 9.\textsuperscript{129} This means that the scope of NAAEC's environmental protection goals are restricted by trade, economy, efficiency concerns and the sovereignty of its parties. In other words, the goals of free trade are more important than the environmental goals in the NAFTA and NAAEC legal regime.

\textsuperscript{128} NAAEC \textit{supra} note 2, Article 1.

\textsuperscript{129} \textit{Supra} notes 64 and 70 and accompanying text.
All of the mentioned objectives are in one way or another addressed in the NAAEC body itself; however, it is relevant to mention that this agreement is one of the first to recognize the importance of public participation in the development of environmental laws, regulations and policies. This is, in the author’s opinion, the main advance of this agreement. However, this public participation is not as effective as it could be, as I will discuss later.

2.2.3. Part Two: Obligations

In Part Two, the agreement establishes the general obligations that all parties have in the agreement. They are divided as follows: a) general commitments that each Party agreed to with respect to its territory; b) to establish their own high levels of protection; c) to promote the publication of their own environmental legislation; d) to effectively enforce their own environmental laws; e) to permit interested persons private access to remedies and; f) to respect certain procedural guaranties.

A) General Commitments

In Article 2, the parties established their general commitments and the activities each Party agreed to perform with respect to its territory. The general
commitments are focused in several subjects such as publicity, environmental education, environmental research and environmental policy.\(^{130}\)

In the case of publicity, each Party shall prepare and make publicly available reports of the state of the environment. This commitment is, in the opinion of the author, an advance since in this way the general public can know the environmental situation of its city or country and this may indirectly promote public participation. Related to publicity, is the commitment from the parties to promote education on environmental matters. This objective is clearly aimed at preventing pollution by creating an environmental awareness among the population.

In the case of environmental policy, each Party shall review its environmental emergency preparedness measures, assess environmental impact procedures and promote the use of economic instruments for the efficient achievement of environmental goals. This policy is directly related to environmental emergency preparedness measures that the parties may review in order to prevent, not only damages to its own environment, but also to the other parties' environment.

\(^{130}\) NAAEC supra note 117 and Article 2. However it is important to mention that according to Article 40,

"Nothing in this Agreement shall be construed to affect the existing rights and obligations of the Parties under other international environmental agreements, including conservation agreements, to which such Parties are Party."
Related to environmental policy, Article 2 (2), also establishes that the Parties agreed that each Party shall consider implementing in its law recommendations developed by the CEC’s Council as established in Article 10(5) B.\textsuperscript{131} The recommendations concern public access to information and the establishment of appropriate limits for specific pollutants. However, since every Party has the liberty to establish its own level of protection, this recommendation to establish limits for specific pollutants\textsuperscript{132} seems very unlikely to be achieved.

Besides the right to establish its own limits, the parties also agreed that each Party has the right to prohibit the export to the territories of the other Parties a pesticide or toxic substance whose use is prohibited within the Party’s territory, as established in Article 2 (3). However, in order to adopt such measures, every Party shall notify the other parties of the adoption of these measures, either directly or through an appropriate international organization. Also, parties should permit the adoption and adaptation of other measures established in other international environmental agreements.

As previously described, a key objective of the NAAEC is allowing public participation into environmental policy and law enforcement. This commitment, used in combination with the commitment of the parties to present a report on the general state of the environment, may create an environmental awareness in the public that will promote environmentally friendly industry. However, it is important

\textsuperscript{131} NAAEC \textit{supra} note 2 Article 2 section 1.
\textsuperscript{132} \textit{Ibid.} Article 10 5(B)

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to take into consideration that these reports are based on "official numbers". Will they be accurate? The information in the reports could be very different from those in reality, since much information regarding illegal activities is not available to the authorities.\textsuperscript{133}

B) Levels of Protection

Article 3 of the NAAEC recognizes the right of every Party to establish its own levels of domestic protections and environmental development policies and priorities, and to adopt or modify accordingly its environmental law and regulations. In this way, the agreement recognizes the differences of each Party as set out in the Preamble. Also, Article 3 establishes that every Party shall ensure that its laws and regulations provide for high levels of environmental protection and shall strive to continue to improve such laws and regulations.\textsuperscript{134}

This addresses one of the main concerns that the American environmentalist community had with respect to NAFTA\textsuperscript{135}: the possibility of a downward pressure on environmental laws and standards, and the creation of pollution havens.

\textsuperscript{133} The Mexican government estimates that in Mexico over 80,000 metric tons of municipal waste are generated every day, up by a factor of eight over just 15 years ago. Yet it is also estimated that only 70 percent of this waste is collected, and of this, only a small fraction is properly or adequately transported or deposited in a modern, sanitary landfill Online: SEMARNAT http://www.semarnat.gob.mx/sma/index.htm (dated accessed: December 8 2000).

\textsuperscript{134} NAAEC \textit{supra} note 117Article 3.

Nevertheless, as mentioned by some authors, the concept of “high levels” is very vague and undefined and for that reason it is possible that the goal is more to prevent a downward movement than to ensure enhancement of standards. It remains to be seen if the NAAEC will help to reach this goal.

C) Publication

In Article 4, the NAAEC establishes that each Party shall ensure that its laws, regulations, procedures and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and Parties to become acquainted with them. All parties must publish in advance any such measure that it proposes to adopt and provide to interested persons and Parties a reasonable opportunity to comment on such proposed measures.

This commitment is directly related to promoting public participation on environmental decisions, and reflects the commitment of the U.S. government that any law or regulations should be publicized, not only to the other Parties but

137 Ibid.
138 NAAEC Article 4 (1) and (2) are identical to those established in NAFTA Article 1802 (1) and (2).
also to the country's citizens, non-governmental organizations\textsuperscript{139} or investors, and that there should be opportunity to submit comments.\textsuperscript{140}

D) Government Enforcement Actions

In Article 5\textsuperscript{141}, the NAAEC establishes the obligation of each government to enforce its own legislation with the main goal of achieving high levels of environmental protection\textsuperscript{142}. The term "appropriate governmental actions" is not defined. However those actions are listed in a non-exhaustive list in Article 5. The list of appropriate governmental actions can be divided first into those intended to have a better control of information about the pollutants: in-situ inspection, record keeping and using licenses, permits or authorizations and initiating, in a timely manner, judicial, quasi-judicial or administrative proceedings to seek appropriate sanctions or remedies for violations of its environmental laws and

\begin{footnotesize}
\textsuperscript{139} NAAEC Article 45 section (1) establish the following definitions:

\begin{quote}
"1. For purposes of this Agreement:

"non-governmental organization" means any scientific, professional, business, non-profit, or public interest organization or association which is neither affiliated with, nor under the direction of, a government."
\end{quote}

\textsuperscript{140} This changes the way environmental legislation has been created in North America, and especially in Mexico, where during 1996, the Mexican Government invited NGO'S, citizens, scholars, unions, investors and the industry to discuss and make recommendations and suggestions to reform the General Law (\textit{Ley General del Equilibrio Ecologico y Proteccion al Ambiente}). Many of those recommendations were included in the new law and many of the government suggestions that were criticized by the public were not included.

\textsuperscript{141} NAAEC Article 5.

\textsuperscript{142} Nevertheless there are concerns about the real power of this obligation under the NAAEC because this Article only forces the Parties to enforce their existing environmental laws and not to establish higher standards. As mentioned by Charnovitz a country that mindlessly enforces its inadequate environmental law would maintain conformity with this obligation, and moreover a Party that lowered its law to avoid NAAEC scrutiny would also remain in conformity. Charnovitz \textit{supra} note 136.
\end{footnotesize}
regulations, and issuing administrative orders of a preventive, curative and emergency nature.

Second, are those governmental actions seeking the voluntary participation of industry: promoting environmental audits, seeking assurances of voluntary compliance and compliance agreements, publicly releasing non-compliance information and issuing bulletins or other periodic statements on enforcement procedures.

Third, are instrumental actions looking for better-trained inspectors or arbitrators. Finally, are all governmental actions related to disseminating environmental information such as publicly releasing non-compliance information, and issuing bulletins or other periodic statements on enforcement procedures.

In Article 5 section 2, the NAAEC establishes that all parties shall ensure that judicial, quasi-judicial or administrative enforcement proceedings are available under its law to sanction or remedy violations of its environmental laws and regulations\textsuperscript{143}. In addition, this Article in section 3 establishes that sanctions and remedies which provide for a violation of any Party's environmental laws\textsuperscript{144} and regulations shall, as appropriate, take into consideration the nature and gravity of the violation, any economic benefit derived from the violation by the violator, the

\textsuperscript{143} This obligation could be difficult to apply to Mexico, since the remedies under Mexican legislation could be administrative or judicial but not quasi-judicial.

\textsuperscript{144} In this case, "environmental law" should only be considered as the law established in Article 45.2 in the General Provisions, a definition that is considered too narrow.
economic condition of the violator, and other relevant factors. It also provides for compliance agreements, fines, imprisonment, injunctions and the closure of facilities, and for the cost of containing or cleaning up pollution.\textsuperscript{145}

The commitment by the parties to ensure enforcement of their own environmental law has been mentioned as the birth of a new international environmental law principle, that is, that each nation has the international obligation to each other to enforce its own internal law. However, this "new" obligation is an old principle. International treaties have always established the obligation to enforce the laws necessary to implement the treaty's commitments.\textsuperscript{146}

The way every Party addresses its commitments may vary. For example, it is difficult if not impossible to provide or encourage mediation and arbitration services within the environmental law in Mexico due to the nature of the environmental regulations. The Mexican government is responsible to apply the law of Mexico and is the only body allowed to determine any sanction or impose any remedy. The participation of arbitrators and mediators seems difficult, since the capacity to give a legal interpretation is reserved only to the environmental authorities and the judicial bodies. Moreover, since only environmental

\textsuperscript{145} NAAEC Article 5. Recognizes and gives effect to the parties internal legislation which sets at the several elements that should be taken into account to remedy any violation. For example, the Mexican Constitution established in its Articles 14,16,21 and 22 almost the same type of considerations that any authority should take before applying any administrative sanction, and the General Law of Ecological Equilibrium and Environmental Protection also recognizes these elements.

\textsuperscript{146} Charnovitz supra note 136 at 261.
authorities can determine fines, remedial actions and in some cases, criminal actions, this will not permit arbitration, because all the mentioned actions can only be legally established by government and not by private means.

Nevertheless, there are concerns about the real force of this obligation under the NAAEC, since this Article only binds the Parties to enforce its existing environmental laws and not to establish higher standards. As mentioned by Charnovitz, a country that mindlessly enforces its inadequate environmental law would maintain conformity with this obligation, and moreover, a Party that lowered its law to avoid NAAEC scrutiny would also remain in conformity.147

E) Procedural Guarantees

The parties agree to ensure that all judicial, quasi-judicial or administrative proceedings should be fair, open and equitable, and to this end shall provide that such proceedings comply with the due process of law.148 These proceedings must also be open to the public, entitle the parties to the proceedings to support or defend their respective positions, and to present information or evidence. There is also a commitment to make such proceedings the least complicated and to minimize delay149 and to have the right, in accordance with its law, to seek review and where appropriate, correction of final decisions. Also, all parties shall

147 Ibid. at 279.
148 NAAEC Article 7.
149 This obligation is more a goal than a reality. From my experience, I can confirm that many administrative and judicial proceedings in Mexico are taking more time than mandated by law, and therefore many of its resolutions are made too late to be useful.
ensure that tribunals that conduct or review such proceedings are impartial and independent and do not have any interest in the matter in dispute.

Many of the procedural guarantees established in Article 7 are generally considered to be part of the due process of law. However, this concept of due process is vague and may be different in Mexico and in the United States or Canada\(^\text{150}\) in part because of the differences between Civil and Common Law systems.

F) Private Access to Remedies

NAAEC Article 6\(^\text{151}\) establishes the obligation that each Party shall ensure that interested persons may request the Party's competent authorities to investigate alleged violations to its environmental law.\(^\text{152}\) This proposal is an advance toward the enforcement of the environmental legislation in all countries.\(^\text{153}\) However, it is


\(^{151}\) NAAEC Article 6.

"It is important to mention that according to Article 38, a private Party does not have a right of action against another Party: " No Party may provide for a right of action under its law against any other Party on the ground that another Party has acted in a manner inconsistent with this Agreement."

\(^{152}\) NAAEC Article 7 establishes the general Procedural Guarantees to do so. See supra note 165 and accompanying text.

\(^{153}\) In the case of Mexico, even before the NAAEC, in 1988 the General Law of Ecological Equilibrium and Environmental Protection established the "denuncia popular" (public denouncement) that allows any citizen to denounce before the General Attorney for the Environmental Protection (PROFEPA) any possible violation of the federal environmental legislation. In many states the local environmental law also established a similar procedure. This procedure creates the obligation for the authority to investigate the possible violation upon litigious denouncement.
limited to the persons who are legally interested under its law. It is not clear if citizens of the other two Parties may request an investigation even if not directly affected by the alleged environmental problem. It seem such remedies are restricted to those living nearby the contaminated area or only to nationals of the country that is accused of a lack of enforcement.\textsuperscript{154}

Section 2 of Article 6 also establishes that each Party shall ensure that persons with a legal interest under its law have appropriate access to information regarding the enforcement of the Party's environmental laws and regulations. This right is given only to those that are legally interested in a particular matter, and does not include every citizen, or social group or citizens from another Party, unless they have a direct legal interest in the issue, which is recognized by law or a court.\textsuperscript{155}

These remedies include rights such as the right: (a) to sue another person under that Party's jurisdiction for damages; (b) to seek sanctions or remedies such as monetary penalties, emergency closures or orders to mitigate the consequences of violations of its environmental laws and regulations; (c) to request the competent authorities to take appropriate action to enforce that Party's environmental laws and regulations in order to protect the environment or to avoid environmental harm; or (d) to seek injunctions where a person suffers, or

\begin{footnotesize}
\textsuperscript{154} For example, in the case of Mexican legislation, Article 189 of the General Law of Ecological Equilibrium and Environmental Protection allows any person, social groups, non-governmental organization or association to denounce any possible violation of the environmental legislation.  
\textsuperscript{155} In the case of Mexico, standing is given by law or recognized by a judge.
\end{footnotesize}
may suffer, loss, damage or injury as a result of conduct by another person under that Party's jurisdiction, contrary to that Party's environmental laws and regulations or from tortious conduct.\textsuperscript{156}

It is necessary to mention that in order to comply with such obligations, all parties are compelled, if they are not already fulfilling such obligations, to change not only their environmental law, but also other legislation. For example, in the case of Mexico, the environmental legislation indicates that whoever created the waste is responsible for handling and disposal of hazardous waste. The legal basis to sue the wrongdoers for any damage is contained in the Civil Code and in the Civil Procedure Code, which allows for the granting of injunctions\textsuperscript{157}, both of which were amended to comply with the NAAEC.

\textbf{2.2.4 Part Three: The Commission on Environmental Cooperation}

In NAAEC's Article 8 the parties created an international commission\textsuperscript{158}, the Commission of Environmental Cooperation (CEC). The CEC is a Commission

\textsuperscript{156} NAAEC Article 6 section 3.
\textsuperscript{157} Ley General del Equilibrio Ecologico y Proteccion al Ambiente (General Law of Ecological Equilibrium and Environmental Protection) Article 151 and 203. See also Codigo Civil para el Distrito Federal en Materia Comun y para todo el Pais en Materia Federal (Federal District Civil Code in Local Jurisdiction and in all the Country for Federal Jurisdiction) Chapter 10.
\textsuperscript{158} Professor Charnovitz mentions that the status of the CEC is not completely clear, since there is no provision stating that the Council or the Secretariat has legal personality, despite the fact that the CEC internal organization resembles an international organization. Charnovitz \textit{supra} note 136 at 265.
similar to the Free Trade Commission, and is comprised of the Council, the Secretariat and the Joint Public Advisory Committee (JPAC).  

2.2.4.1 The Council

A) Structure and Procedures

The Council shall comprise cabinet level representatives or their designees and shall establish its own rules and procedures and meet at least once a year in regular session or in special session at the request of any Party and is chaired successively by each Party.  

The Council has the power to establish and assign responsibilities to ad hoc or standing committees, working groups or expert groups; to seek the advice of non-governmental organizations or persons, including independent experts; and to take such other action in the exercise of its functions as the Parties may agree. All Council decisions and recommendations of the Council shall be taken by

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159 NAAEC Article 8:

"The Commission

1. The Parties hereby establish the Commission for Environmental Cooperation.

2. The Commission shall comprise a Council, a Secretariat and a Joint Public Advisory Committee."

160 NAAEC Article 9 (1).

161 Ibid. Article 9 (2). And section 4 establishes also that the Council shall hold public meetings in the course of all regular sessions. Other meetings held in the course of regular or special sessions shall be public where the Council so decides.
consensus, unless the agreement provides otherwise\textsuperscript{162}, and such decisions or recommendations shall be made public, except as the Council may otherwise decide or as otherwise provided in this Agreement.\textsuperscript{163}

B) Council Functions

The Council has several functions as the governing body of the CEC. It serves\textsuperscript{164} as a forum for the discussion of environmental matters within the scope of the NAAEC, oversees the implementation and develops recommendations on the further elaboration of this Agreement, and eventually reviews its operation and effectiveness in the light of experience. As well, the Council oversees the Secretariat, addresses questions and differences that may arise between the Parties regarding the interpretation or application of this Agreement, and approves the annual program and budget of the Commission.\textsuperscript{165} According to many people, the most important and successful function accomplished by the Council is to promote and facilitate cooperation between the Parties with respect to environmental matters.\textsuperscript{166}

\textsuperscript{162} NAAEC Article 9 section 6.
\textsuperscript{163} One of the important decisions that the Council may decide is to make public a Factual Record, as established in Article 15.
\textsuperscript{164} NAAEC Article 10 (1).
\textsuperscript{165} The approval by the Council of the budget may be seen as another form of political and economic control of the Secretariat's activities and thus it retains ultimate control of CEC activities. See Johnson and Beaulieu \textit{supra} 9 at 135.
\textsuperscript{166} Dimento \textit{supra} note 89 at 692-694.
The Council embodies the delicate balance the NAAEC must achieve trying to reconcile the tensions between sovereignty and supranationality. Among its functions, the Council may consider and eventually develop recommendations regarding several topics, such as: comparability of techniques and methodologies for data gathering and analysis; data management and electronic data communications on matters covered by the NAAEC; pollution prevention techniques and strategies; and the use of economic instruments for the pursuit of domestic and internationally agreed environmental objectives. A very important function is the promotion of public awareness regarding the environment, transboundary and border environmental issues, such as the long-range transport of air and marine pollutants, among others.

The Council, according to Article 10 (3), has a very important function in strengthening cooperation on the development and continuing improvement of environmental laws and regulations, including the promotion of the exchange of information on criteria and methodologies used in establishing domestic environmental standards. Without reducing levels of environmental protection, the Council shall establish a process for developing recommendations on greater compatibility of environmental technical regulations, standards and conformity assessment procedures in a manner consistent with the NAFTA. The former function addressed concerns that some environmentalists had over the possibility of reducing levels of protection to achieve for compatibility. As a result, the

167 NAAEC Article 10 (2).
Council shall look for compatibility of environmental technical regulations and standards without lowering standards.

The Council shall encourage effective enforcement by each Party of its environmental laws and regulations. This may be accomplished as result of the named citizen submission process, the dispute settlement process\textsuperscript{168} or by other means, as far as these means do not interfere with the sovereignty of the Parties. Preserving sovereignty was an important subject during the drafting of the NAAEC.\textsuperscript{169} The Council shall also encourage compliance with those laws and regulations and technical cooperation between the Parties.\textsuperscript{170} The Parties are not under any obligation to accomplish any of these recommendations, since this is only a topic for Council consideration.

The Council also shall promote and develop recommendations regarding public access to information concerning the environment held by public authorities of each Party. This activity is contradictory, since the same Council may vote to prohibit the CEC's Secretariat from publishing a factual record as established by Article 15. Another function that the Council has is promoting the establishment of limits for specific pollutants, taking into account differences in ecosystems. It is important to notice that the Parties recognize their environmental differences, since, in order to promote the establishment of limits to specific pollutants, it is

\textsuperscript{168} Both processes are an important part of internal legislation enforcement, one with the participation of NGOs and the other by the Parties.

\textsuperscript{169} See Section 2.1.

\textsuperscript{170} NAAEC Article 10 (4).
necessary for example, to observe the differences between the rain forest in Chiapas or the rain forest in British Columbia.\textsuperscript{171}

In the more trade-related matters, the Council shall cooperate with the NAFTA Free Trade Commission to achieve the environmental goals and objectives of NAFTA, acting as a point of inquiry and receipt for comments from NGO's and persons concerning those goals and objectives, providing assistance in consultations under Article 1114 of the NAFTA, and thereby contributing to the prevention or resolution of environment-related trade disputes.\textsuperscript{172}

As well, the Council shall assist the Free Trade Commission to achieve the environmental goals and objectives of NAFTA by: (a) acting as a point of inquiry and receipt for comments from non-governmental organizations and persons concerning those goals and objectives; (b) providing assistance in consultations under Article 1114 of the NAFTA when a Party considers that another Party is waiving or derogating from, or offering to waive or otherwise derogate from, an environmental measure as an encouragement to establish, acquire, expand or retain an investment of an investor, with a view to avoiding any such encouragement, considering on an ongoing basis the environmental effects of

\textsuperscript{171} Johnson and Beaulieu suggest that this function may be used in the future to allow the CEC to represent the three Parties in an international conference regarding pollution control and to present a NAFTA-NAAEC system or standard for certain pollutants, which the Parties chose as a role model, supra 9 at 145.

\textsuperscript{172} This can be reached by (i) seeking to avoid disputes between the Parties, (ii) making recommendations to the Free Trade Commission with respect to the avoidance of such disputes, and (iii) identifying experts able to provide information or technical advice to NAFTA committees, working groups and other NAFTA bodies.
the NAFTA and; (c) otherwise assisting the Free Trade Commission in environment-related matters.

In contributing to the prevention or resolution of environment-related trade disputes, the Council shall seek to avoid disputes between the Parties, make recommendations to the Free Trade Commission with respect to the avoidance of such disputes, and identify experts able to provide information or technical advice to NAFTA committees, working groups and other NAFTA bodies.

The Council also has the power to develop recommendations in the following areas: (a) transboundary environmental impacts on certain proposed projects that are “likely to cause significant adverse transboundary effects”; (b) notification, sharing of relevant information and consultation between the Parties with respect to such projects; and; (c) on measures to mitigate the adverse environmental potential effects. As a result, in June 1997, the parties resolved to complete a “legally-binding” agreement consistent with their Article 10 (7) obligations.

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173 Also Article 10 sections 8 and 9 establish other power, which allows the Council to develop recommendations on transboundary pollution. As follows:

8. The Council shall encourage the establishment by each Party of appropriate administrative procedures pursuant to its environmental laws to permit another Party to seek the reduction, elimination or mitigation of transboundary pollution on a reciprocal basis.

9. The Council shall consider and, as appropriate, develop recommendations on the provision by a Party, on a reciprocal basis, of access to and rights and remedies before its courts and administrative agencies for persons in another Party's territory who have suffered or are likely to suffer damage or injury caused by pollution originating in its territory as if the damage or injury were suffered in its territory."

174 Commission of Environmental Cooperation, *Council Resolution No. 97-03, Transboundary Environmental Impact Assessment* (June 12, 1997). The first draft was published on fall of 2000.
2.2.4.2 The Secretariat

The CEC Secretariat is the "executive arm" of the CEC, whose activities are under the control of the Council. An Executive Director, who is chosen by the Council for a three-year term, which may be renewed by the Council for one additional three-year term, heads the Secretariat. This position is supposed to rotate between the nationals of each Party, and the Council retains the power to remove the Executive Director. The Executive Director has the power to appoint and supervise the staff of the Secretariat, regulate their powers and duties and fix their remuneration in accordance with general standards established by the Council. The Council also has the power to reject potential appointments by a two-thirds vote. Despite the fact the NAAEC establishes that the Executive Director and the staff shall not seek or receive instructions from any government or any other authority external to the Council, its is clear that with the veto power that the Council has over the proposals, the Council remains

175 NAAEC Article 11 (1).
176 NAAEC Article 11 (2) establishes that "the standards shall provide that:

(a) staff shall be appointed and retained, and their conditions of employment shall be determined, strictly on the basis of efficiency, competence and integrity;

(b) in appointing staff, the Executive Director shall take into account lists of candidates prepared by the Parties and by the Joint Public Advisory Committee;

(c) due regard shall be paid to the importance of recruiting an equitable proportion of the professional staff from among the nationals of each Party; and

(d) the Executive Director shall inform the Council of all appointments."
a powerful influence over the Secretariat's personnel, and indirectly exercises control over the Secretariat.

A) Functions

The Secretariat has four major functions assigned to it under the Agreement: 1) preparation of the annual report for the Commission; 2) preparation of reports on other matters; 3) certain duties relating to submissions on enforcements matters; and 4) providing technical, administrative and operational support to the Council or any committees or groups established by the Council and such other support as the Council may direct.\textsuperscript{177}

To perform all these activities the Secretariat shall submit for approval of the Council the annual program and budget of the CEC, including provision for proposed cooperative activities and for the Secretariat to respond to contingencies.\textsuperscript{178}

B) Annual Report of the Commission

An important function of the Secretariat is to prepare an annual report of the CEC in accordance with instructions from the Council. The Council revises a draft report from the Secretariat. This is another mechanism of the Council's control

\textsuperscript{177} Article 11 (7) Also establishes that: The Secretariat shall, as appropriate, provide the Parties and the public information on where they may receive technical advice and expertise with respect to environmental matters.

\textsuperscript{178} NAAEC Article 11 (6).
over the Secretariat. This report covers not only the activities and expenses of the Commission during the previous year but also the approved program and budget. Moreover, it also covers actions taken by each Party in connection with its obligations, relevant information submitted by NGO’s and persons as well as any other recommendations made on any matter within the scope of this Agreement, and any other matter that the Council instructs the Secretariat to include.

This report shall periodically address the state of the environment in the territories of the Parties; however, there is not any clarification of the content of the report or how often the Secretariat shall make such a report.

C) Secretariat Reports

One type of report that the Secretariat may prepare on its own initiative is a report regarding any matter within the scope of the annual program as established in Article 13. Since there are no restrictions on the matters that this report may include, as long as it is within the scope of the annual program, this could constitute an important power of investigation, and theoretically, in the event of a rejection of an Article 14 submission, the Submitter still has this

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179 The annual report may include citizen submissions or other relevant information that the public in general had submitted to the CEC for consideration.
180 NAAEC Article 12 (7).
recourse under Article 13.\textsuperscript{181} Due to the lack of explicit language and guidelines, it remains unclear when a submission may merit the preparation of a report or what should be the scope of the report if required. Nevertheless, all this will depend on the willingness and independence of the Secretariat's Executive Director.

Another type of report that the Secretariat may prepare regards any other matter related to the cooperative functions of the NAAEC. The Secretariat should report to the Council of its intention to prepare such a report and it may proceed, unless, within 30 days of such notification the Council objects by a two-thirds vote to the preparation of the report.\textsuperscript{182} This Council veto control constitutes another break in the Secretariat's power. An indirect control over this report is that the report shall not include issues related to any Party's failure in enforcing its environmental law and regulations, since such matters are addressed by way of a different process.\textsuperscript{183}

The NAAEC opens the door for the participation of NGO's, academic persons or experts in the preparation of this report, since the Secretariat shall obtain the assistance of one or more independent experts of recognized experience in the matter to assist in the preparation of the report as well as gathering any relevant technical, scientific or other information, including information that is:


\textsuperscript{182} \textit{Ibid.} Article 13 (1).

\textsuperscript{183} The so-called "Citizen Submission Process" of Article 14 and 15 is analyzed in the next chapter.
(a) publicly available;

(b) submitted by interested non-governmental organizations and persons;

(c) submitted by the Joint Public Advisory Committee;

(d) furnished by a Party;

(e) gathered through public consultations, such as conferences, seminars and symposia; or

(f) developed by the Secretariat, or by independent experts engaged pursuant to paragraph 1.

After finishing the report, the Secretariat shall submit its report to the Council, which shall make it publicly available, normally within 60 days following its submission, unless the Council otherwise decides.

As an example, under this Article, the Secretariat published a report about the deaths of tens of thousands of migratory birds at the Silva Reservoir in Mexico's Turbio River Basin, following a submission filed on June 6 1995 by an NGO.
requesting an investigation into the cause of such deaths. These reports may have some influence in the policies or decision-making within the countries, or at least bring attention to the specific environmental problems or priorities. However, there is no obligation of any kind for the parties regarding these reports.

2.2.4.3 The Joint Public Advisory Committee

The NAAEC created an interesting body, the Joint Public Advisory Committee (JPAC) that opens the door for the participation of NGO's or the public in general. This advisory group is composed of fifteen members, with equal number of members for each Party and whose members the parties appoint. However, there is not any clarification about how the members are selected or appointed.

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184 See Gal-Or supra note 181 at 74.
185 Johnson and Beaulieu supra note 9 at 152.
186 The NAAEC in its Articles 17 and 18 also establishes the creation of two other committees, the national advisory committee and the governmental committees:

"Article 17: National Advisory Committees

Each Party may convene a national advisory committee, comprising members of its public, including representatives of non-governmental organizations and persons, to advise it on the implementation and further elaboration of this Agreement.

Article 18: Governmental Committees

Each Party may convene a governmental committee, which may comprise or include representatives of federal and state or provincial governments, to advise it on the implementation and further elaboration of this Agreement."
The Council shall establish the rules of procedure for the Joint Public Advisory Committee; however, it will choose its own chair. The Joint Public Advisory Committee shall meet at least once a year at the same time as the regular session of the Council and at such other times as the Council, or the Committee's chair with the consent of a majority of its members, may decide. Since the JPAC meets at the same time that the Council meets, it gives them the opportunity to at least make the Council hear their opinion on topics that may be important.

The main role of the JPAC is to provide advice to the Council on any matter within the scope of this Agreement, including the annual program and budget of the Commission, the draft annual report, and any report the Secretariat prepares pursuant to Article 13. As well as reporting on the implementation and further elaboration of this Agreement, it may perform such other functions as the Council may direct. The JPAC also may provide relevant technical, scientific or other information to the Secretariat, including for the purposes of developing a factual record under Article 15. However, only if the Council allows will a factual record be available to JPAC.

### 2.2.4.4 Conclusions

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187 NAAEC Article 16 (2) and (3).
188 Johnson and Beaulieu *supra* note 9 at 139-140.
189 NAAEC Article 16 (4) and (6).
190 *Ibid.* (5)
In order to provide a general opinion about the CEC as an international organization, it is necessary to mention some concerns about the CEC bodies and its functions.

The Council, the body that rules and controls the CEC, has been highly criticized by many authors and environmentalists. One of the main criticisms is that the Council, which rules and controls all the CEC's decisions, is composed of political appointees rather than being an independent judicial body. However, some commentators mention that the ministerial quality of the Council is an important element for its credibility and success. The Council plays a political role within the CEC and also exercises a control over the Secretariat's activities, and in general has several instruments to control all the CEC in general and the Secretariat's activities in particular.

Some of the powers that the Council has over the Secretariat and the CEC in general are used to control their activities. For example, the Council must approve many of the Secretariat's activities, even those related to the Citizen Submission Process. Despite the fact that the budget and the annual program are prepared by the Secretariat, it is the Council who approves it. The members of the Secretariat are civil servants that are supposedly free of any influence.

192 Johnson and Beaulieu supra note 9 at 132.
external to the Council; however, the Council has the power to veto any nomination.\textsuperscript{193} Also, the Council reviews and approves the CEC Annual Report.

The way the members of the JPAC are selected is a main concern, due to the fact that each Party appoints the members, as is the lack of any basic provision about their independence and qualifications.\textsuperscript{194} For example, the Mexican appointees to the JPAC include environmentalists, business leaders, academics and representatives from the industry; however, the qualifications of some of them are not as good as one would expect, and the knowledge that some of them have regarding international environmental law or the environment is minimal at best.

The consensus on the JPAC among many commentators is that the role the JPAC may play with the Council and the Secretariat is poorly defined and such ambiguity could be used to control the JPAC's activities within the CEC. However, this same lack of definition could give the JPAC the opportunity to provide the necessary information, advice and general input to the Council and the Secretariat to help them better accomplish their goals.\textsuperscript{195}

The CEC, is not really an independent body since its Council members are members of the government, and therefore fully responsible to them. Further, \textsuperscript{193}See supra note 203 and accompanying text.\textsuperscript{194} J. Owen Saunders, "NAFTA and The North American Agreement On Environmental Cooperation: A New Model For International Collaboration On Trade And The Environment", (1994) 5 Colo. J. Int'l. Envtl. Pol'y. 273 at 296.\textsuperscript{195} As mentioned by Dimento, the opinion that the general public has about the Secretariat is, in general, better than their opinion of the Council. Dimento supra note 89 at 700.
these officials chose the Secretariat’s Executive Director and even the members of the Joint Public Advisory Committee. Therefore, many of its decisions may be more informed by politics than by the protection of the environment.

In conclusion, the CEC is not as independent as some may want, and even if the Secretariat was composed of independent civil servants and advised by an independent non-governmental Joint Public Advisory Committee, the CEC is still controlled by a Council comprised of the three environmental ministries, which will each likely follow their government’s policies.
CHAPTER 3 NAAEC: DISPUTE RESOLUTION PROCESSES

3.1 Introduction.

From the beginning of the discussions to create a NAFTA environmental side agreement\textsuperscript{196}, the Dispute Resolution Regime was a crucial part of such discussions.\textsuperscript{197}

The approach taken by the parties is a typical process to resolve controversies within an international agreement. This process includes gradual steps beginning with consultations, then moving to other attempts to resolve the controversy, and then to arbitration panels, implementation of the arbitration panel and finally, as a last resort, penalties for non-compliance. This process is, in general terms, almost identical to that used in NAFTA chapter 20 that establishes the provisions for dispute settlement between the parties. The NAAEC dispute settlement process has two main distinctions: 1) The limited scope of environmental disputes it covers, restricted to those where there has been “a persistent pattern of failure” by a Party “to enforce its environmental law”\textsuperscript{198}, and 2) Its availability only to the Parties of the NAAEC. In other words, the participation of any NGO's

\textsuperscript{196} Saunders \textit{supra} note 192 at 297
\textsuperscript{197} \textit{Ibid.} Canada suggested a different approach that was included in the final draft of the NAAEC that will include fines but not trade sanctions.
\textsuperscript{198} NAAEC Article 22 (1).
or private citizen is not allowed, a departure from the previously mentioned provisions\(^{199}\), which allow public participation within the CEC.

### 3.2 General Definitions.

The process to resolve any dispute begins with consultations between the parties. Any Party may request, in writing, consultations with another Party regarding whether there has been a persistent pattern of failure by that other Party to effectively enforce its environmental law.\(^{200}\) Such a request for consultations must be delivered not only to the Party but also to the CEC’s Secretariat.\(^{201}\) In order to understand the process it is necessary to define exactly what “persistent pattern of failure” means, and what exactly “environmental law” means and includes.

#### A) Environmental Law Enforcement

It is important to emphasize that measuring “environmental law enforcement” is extremely difficult. Many of the numbers published by the environmental

\(^{199}\) See generally sections 2.2.4 and 2.2.5.

\(^{200}\) NAAEC Part Five.

\(^{201}\) NAAEC Article 22 (1) and (2) The consultation process established in Article 22 sections 1 to 4 also permits that:

> "Unless the Council otherwise provides in its rules and procedures established under Article 9(2), a third Party that considers it has a substantial interest in the matter shall be entitled to participate in the consultations on delivery of written notice to the other Parties and to the Secretariat. The target of the consultations is to invite the consulting Parties to make every attempt to arrive at a mutually satisfactory resolution of the matter through consultations under this Article."
authorities are not accurate, since many of the violations are not detected. And sometimes a determination is quite subjective and raises certain questions. For example, if there are many fines and closings of industries due to violations of the environmental regime in one country does this indicate a lack of enforcement in that country? Or on the contrary, if there are few fines or closings does this indicate a lack of enforcement? The answer to these questions may vary from country to country and even from person to person. To avoid any misunderstanding, the NAAEC established a series of practices that constitute enforcement and describes other practices, which do not constitute lack of enforcement.

First of all, Article 5 establishes that in order for all parties to achieve high levels of environmental protection and compliance, each Party shall effectively enforce its environmental laws and regulations through appropriate governmental actions such as appointing and training inspectors, monitoring compliance and investigating suspected violations, on-site inspections and by seeking assurances of voluntary compliance and compliance agreements.

In general, the actions mentioned in Article 5 include not only governmental actions to directly enforce the law but also actions to promote voluntary

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202 For example, in Mexico City the environmental authorities estimate that there are at least 1000 illegal smelters which do not comply with any air emissions standards or any environmental regulations. SEMARNAT supra note 133.

203 See generally Johnson and Beaulieu supra note 9 at 192 for an interesting discussion about the difficulty to establish a parameter for lack of enforcement or enforcement, since such activities may be influenced by economic, social or political decisions.

204 See supra 131 and accompanying text for the entire list of actions.
compliance by the subjects of the environmental legislation. In addition, it also states that to establish the appropriate sanctions and remedies for any violations, the authorities should take into consideration the nature and gravity of the violation, any economic benefit derived from the violation by the violator, the economic condition of the violator, and other relevant factors.

In order to clearly understand the meaning of such a failure, it is necessary to relate Article 5 with Article 45 in order to clarify the dispute settlement process, and to find a definition. However, the NAAEC does not establish an exact definition of what is meant by a failure to effectively enforce environmental laws, although Article 45 (1) established a negative and indirect one, a *contrario sensus* definition. This definition is as follows:

"Article 45: Definitions

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 officials of that Party:

(a) reflects a reasonable exercise of their discretion in respect of investigatory, 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.\(^{205}\)

The first exclusion that the Secretariat and eventually any arbitration panel will face is whether any action or inaction by the authorities or agency reflects a reasonable exercise of discretion. This Article recognizes that discretion plays an important role in enforcement and compliance negotiations, in many areas of law and environmental laws in particular. As mentioned by some authors, most of the discovered infractions do not lead to legal actions by the regulating authorities\(^ {206}\), therefore the use of discretion is unavoidable. In dealing with some environmental law violations the authorities often use their discretion and sometimes negotiate with the violators in order to reach the ultimate goal of the law, the protection of the environment.

It is also important to take into consideration that many laws, environmental or non-environmental, establish some level of discretion that the authorities may use, known as *explicit discretion*.\(^ {207}\) However, there are some cases or situations in which the authorities do not have that explicit discretion but where they have an *implicit discretion*, and the authority is exercised *de facto*. Therefore, any

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\(^{205}\) NAAEC Article 45 (1)  
\(^{206}\) Johnson and Beaulieu *supra* note 9 at 199.  
arbitration panel also may take into consideration these concepts in order to establish the existence of reasonable discretion.

However, the NAAEC does not establish an exact definition of what is meant by reasonable discretion. It is necessary to analyze case by case to find if any of the appropriate governmental actions established in Article 5 to achieve high levels of environmental protection and compliance were undertaken, and if those actions really meet the goal of enforcing the environmental law and achieving high levels of protection.

On the other hand, the analysis may determine whether the discretion used by the authorities to implement or not implement an action was reasonable or not. As mentioned by Johnson and Beaulieu, the arbitration panel "will have much leeway in determining what constitutes a "reasonable exercise of discretion."\textsuperscript{208}

The second exception to the application of the NAAEC enforcement provisions is for government inaction based on "\textit{bona fide} decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities". This exception has been described not only as innovative but also as puzzling\textsuperscript{209} since it is not clear whether it means that a Party complained against can justify a poor level of enforcement activity for the following reasons: 1) that the overall level of resources that can be devoted to enforcement is

\textsuperscript{208}Ibid. at 203.
\textsuperscript{209}Ibid. at 204.
limited\textsuperscript{210}, 2) that within the environmental protection budget there is a set financial amount allocated to enforcement; or 3) that within the environmental enforcement budget the government chooses other more important priorities than the subject matter of compliance. This last justification is especially difficult to argue against, since every country has the sovereignty to determine the importance of every project and establish priorities among them.

Despite its mention as an exception, it is naturally expected that every country in determining its priorities and therefore establishing the budget to accomplish its priorities is doing that in the hope, \textit{bona fide}, to accomplish its goals and not intentionally damaging other important aspects of its obligations. In other words, it will be difficult to prove that any Party is not acting in good faith when establishing its environmental priorities. Some authors\textsuperscript{211} and environmental groups are concerned about the possibility that because of a smaller budget the Mexican government will be allowed to achieve lower levels of environmental enforcement compared to the United States or Canada.\textsuperscript{212} In the event of a

\textsuperscript{210} \textit{Ibid.} My experience as a practitioner in Mexico helped me to realize that many of the violations of the General Law of Ecological Equilibrium and Environmental Protection (\textit{Ley General del Equilibrio Ecológico y Protección al Ambiente}) and its regulations, cannot be prosecuted due to the lack of resources. I experienced such a problem especially in the Quintana Roo state in the south east of Mexico, where its landscape with tropical forest, the Caribbean sea and some small rivers and wetlands made it very difficult for the environmental authorities to verify many violations regarding flora and fauna protection. Until May 2000 the federal environmental authority in that state did not have sufficient boats to cover and reach several parts of the state as I was told "unofficially" by the delegate of the Procuraduría Federal de Protección al Ambiente (PROFEPA).

\textsuperscript{211} Nicolas Kublicki, " The Greening of Free Trade: NAFTA, Mexican Environmental Law and Debt Exchange for Mexican Environmental Infrastructure Development" (1994), 19 Columbia J. of Env. L. R. 59 at 80-100. Prof. Kublicki establishes that all three parties should be subject to a uniform standard of review of their enforcement performance.

dispute, any panel will face an almost impossible task to determine whether a particular government decision was not made in good faith.

B) Persistent Pattern

Finally, in order to initiate the dispute settlement process it is necessary to prove the existence of a “persistent pattern” of ineffective environmental enforcement, defined as a “sustained or recurring course of action or inaction beginning after the date of entry into force of this Agreement”\(^\text{213}\). This means that persistent patterns before January 1, 1994 will not be under review, although some authors believe that such acts should be considered.\(^\text{214}\) Failure by a Party to enforce its laws after January 1, 1994 or a lack of enforcement before January 1994 could both provide evidence of a persistent pattern. Overall, the word “persistent” implies an element of duration over time, the meaning of the word “pattern” is not clear.

The panel may need to review each case on an individual basis. A pattern of ineffective enforcement may be indicated by a failure to enforce a particular law throughout the country. Or a pattern may be established by evidence of a failure to enforce environmental laws or regulations in a particular region. The lack of clarity about this concept will allow the settlement panels to establish the general rules, or to establish rules on a case-by-case basis. And since this procedure can

\(^{213}\) NAAEC Article 45 (1).
\(^{214}\) Johnson and Beaulieu supra note 9 at 208.
potentially yield monetary penalties or trade sanctions, the threshold requirements to begin this process should be met without any doubt. However, because of the lack of clarity in its definitions, the standard required seems very difficult to determine.\textsuperscript{215}

C) Environmental Law

Finally, to initiate the dispute settlement procedure, it is necessary to determine the meaning of "environmental law". Environmental law is defined in Article 45 of the NAAEC as follows:

"For purposes of Article 14(l) and Part Five:

(a) "environmental law" means any 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,

\textsuperscript{215} Kelly \textit{supra} note 135 at 82.
(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 or fauna, including endangered species, their habitat, and specially 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.

(c) The primary purpose of a particular statutory or regulatory provision for purposes of subparagraphs (a) and (b) shall be determined by reference to its primary purpose, rather than to the primary purpose of the statute or regulation of which it is part”.

NAAEC Article 45. [emphasis added]
This definition merits some comments. First, the definition excludes any codes of conduct and other non-binding guidelines, which do not have the legal force of statute or regulation. Second, the definition does not include any international treaty that is not self-executed as environmental law\textsuperscript{217}, at least in the United States and Canada. On the contrary, in Mexico, according to the Mexican Constitution, any international treaty signed by the President and ratified by the Senate Chamber is considered enforced law in Mexico and therefore self-executed in Mexico.\textsuperscript{218} Third, the parties did not include any provision that regulates the managing of commercial harvest or exploitation, or subsistence or aboriginal harvesting of natural resources, despite its environmental content. The reason may be economic or political, economic independence in the case of natural resources and political concerns in the case of aboriginal people.

3.3 Initiation of Procedures.

The process is initiated by requesting consultation before the Council where the parties are obligated to make every effort to arrive at a mutually satisfactory resolution of the matter. If the consulting Parties fail to resolve the matter pursuant to Article 22 within 60 days of delivery of a request for consultations, or such other period as the consulting Parties may agree, any Party may request in writing a special session of the Council. The requesting Party shall state in the

\textsuperscript{217} Charnovitz \textit{supra} note 136 at 180.
\textsuperscript{218} \textit{Constitución Política de los Estados Unidos Mexicanos} (Mexican Constitution) Article 133. See also L. Ortiz Ahlf, \textit{Derecho Internacional Publico}, 2 Ed. (Mexico Oxford University Press, 2000) at 9.
request the matter complained of and shall deliver the request to the other
Parties and to the Secretariat. The Council has twenty days in which to
convene.\textsuperscript{219}

In this stage of the process the Council may: (a) call on such technical advisers
or create such working groups or expert groups as it deems necessary; (b) have
recourse to good offices, conciliation, mediation or such other dispute resolution
procedures; (c) assist the parties to reach a mutually satisfactory resolution of the
dispute, or ;(d) make recommendations. Such recommendations shall be made
public if the Council decides by a two-thirds vote. The Council also has the
power to decide that a matter is properly covered by another agreement or
arrangement to which the consulting Parties are Party. If so, it shall refer the
matter to the consulting parties for appropriate action under that agreement or
arrangement.\textsuperscript{220}

If the matter has not been resolved between the parties within sixty days after the
Council has convened, the complaining Party may request in writing that the
Council convene an arbitral panel. Such a decision should be made by a two-
thirds vote. This panel should consider the matter when the alleged persistent
pattern of failure to enforce environmental law relates to a situation involving
workplace, firms, companies or sectors that produce goods or provide services:
(a) traded between the territories of the Parties; or (b) that compete, in the

\textsuperscript{219} NAAEC Article 23 (1) and (2).
\textsuperscript{220} \textit{Ibid.} (3) and (4).
territory of the Party complained against, with goods or services produced or provided by persons of another Party.

3.4 The Trade Relationship

This procedure has an important characteristic—a closer relationship to trade than to the environment, despite the fact that this dispute settlement procedure was created under the umbrella of an environmental agreement. The dispute settlement process can only be initiated by a Party, and only in the case where a trade relationship exists which relates to the alleged persistent pattern of failure. In other words, only when the environmental misconduct can be related to trade. If there is no trade connection, no panel can convene and no formal dispute settlement can take place.\textsuperscript{221}

The trade connection is the main difference between the formal dispute settlement process established in Article 22 and the one mentioned in Articles 14 and 15 of this agreement, and this difference is the main reason that in the formal dispute settlement process only the Parties can participate. On the other hand, any NGO's or private persons can participate in the citizen submission process because there is no trade connection requirement.

Another important characteristic of the dispute settlement procedure is that it is not necessary to prove that because of the persistent pattern of failure in

\textsuperscript{221} Johnson and Beaulieu \textit{supra} note 9 at 178.
enforcing its environmental law one Party is actually harming the industry of another Party and therefore receiving more benefits because of its lack of internalization of the environmental cost. Some authors have defined this practice as ecological dumping, because the exports are sold below their true cost since the environmental costs are not properly internalized through adequate government enforcement.  

However, despite the fact that the dispute settlement process is aimed directly at the so-called "environmental dumping", it has an important difference from others which deal with dumping, such as those mentioned under NAFTA or WTO. It is not necessary for the complaining Party to show any injury to its producers of goods or services in the sector where the lack of enforcement by another Party is alleged, only the potential damage.

Because the dispute settlement procedure is narrowed to those cases of "environmental dumping" and not to other important environmental cases, there is the possibility of developing a double standard practice. This double standard practice consists of the creation of two types of classes under environmental laws: 1) that which includes industries or companies producing goods and services that compete with those of the NAAEC parties, and 2) that which comprises those industries or companies that do not. This unfair practice may evolve within the partners to NAFTA and that will obviously constitute not

\[222 \text{ Ibid.} \]
\[223 \text{ Ibid.} \]
only an advantage in trade with others like the European Union but also, and more importantly, have disastrous consequences to the environment in the territory of that Party.

3.5 The Panel.

A) Panel Selection

The panellists are selected from a roster established and maintained by the Council. The roster is constituted by up to 45 individuals appointed by consensus for terms of three years and they may be reappointed. In order to be appointed as a possible panellist, each individual shall have expertise or experience in environmental law or its enforcement, or in the resolution of international disputes or arbitration or other relevant scientific, technical or professional expertise or experience. Panellist are selected only on the basis of objectivity, reliability and sound judgment; they must be completely independent and not affiliated with any Party, the Secretariat or the JPAC, and shall comply with the code of conduct established for such purpose by the Council.  

In order to select the five-member panel, both parties must agree on the selection of the chairman within 15 days after the Council voted to convene the panel. If the parties do not agree within this period of time, the complaining Party shall select the chair from a list of panellists who are not citizens of that Party.  

224 NAAEC Article 25.
After the chair has been selected each Party shall select two panellists who are citizens of the other disputing Party. If a Party does not select its panellists within 15 days, such panellists shall be selected by lot from among the roster.\textsuperscript{225}

Despite the fact that there is a roster of panellists, every Party may suggest other panellists that comply with the requirements of Article 25. However, any disputing Party also has the power to challenge any individual not on the roster who is proposed as a panellist by a disputing Party within 30 days after the individual has been proposed. If a disputing Party believes that a panellist is in violation of the code of conduct, the disputing Parties shall consult and, if they agree, the panellist shall be removed and a new panellist shall be selected in accordance with this Article.\textsuperscript{226}

B) Panel Procedure

\textsuperscript{225} \textit{Ibid.} Article 27. In the case that a third Party participates, Article 27 section 2 establishes that the following procedures shall apply:

"(a) The panel shall comprise five members.

(b) The disputing Parties shall endeavour to agree on the chair of the panel within 15 days after the Council votes to convene the panel. If the disputing Parties are unable to agree on the chair within this period, the Party or Parties on the side of the dispute chosen by lot shall select within 10 days a chair who is not a citizen of such Party or Parties.

(c) Within 30 days of selection of the chair, the Party complained against shall select two panellists, one of who is a citizen of a complaining Party, and the other of whom is a citizen of another complaining Party. The complaining Parties shall select two panellists who are citizens of the Party complained against.

(d) If any disputing Party fails to select a panellist within such a period, such panellist shall be selected by lot in accordance with the citizenship criteria of subparagraph (c)."

\textsuperscript{226} \textit{Ibid.} sections 3 and 4.
Once the arbitration panel is selected, the panellists must follow the Model Rules of Procedure established by the Council. Such procedures shall provide a right to at least one hearing before the panel and the opportunity to make initial and rebuttal written submissions. No panel may disclose which panellists are associated with majority or minority opinions, although the disputing parties may agree otherwise.\textsuperscript{227}

The terms of reference for the arbitration panel shall be to examine, in light of the relevant provisions of the Agreement, including those contained in Part Five, whether there has been a persistent pattern of failure by the Party complained against to effectively enforce its environmental law, and to make findings, determinations and recommendations in accordance with Article 31(2). These terms of reference can change if the disputing Parties otherwise agree within 20 days after the Council votes to convene the panel, or if requested by a Party or if the panel decides it is necessary to seek information and technical advice from any person or body that it deems appropriate, provided that the disputing Parties so agree.\textsuperscript{228}

Unless the disputing parties otherwise agree, the panel has 180 days after the last panellist was selected to present an initial report. Such report should be based on the submissions and arguments of the parties and on any information that the experts may submit to them. The initial report may contain the finding of

\textsuperscript{227} NAAEC Article 28 sections 1 and 2.  
\textsuperscript{228} NAAEC Article 30.
facts, its determination as to whether there has been a persistent pattern of failure by the Party complained against to effectively enforce its environmental law, and any other determination requested by the terms of reference. If requested, its recommendations for the resolution of the dispute normally "shall be that the Party complained against adopt and implement an action plan sufficient to remedy the pattern of non-enforcement."\(^{229}\)

The parties have thirty days to submit written comments to the panels on its initial report, which should be taken into consideration by the panel before presenting to the disputing parties the final, report including any separate opinions on matters not unanimously agreed. The final report has to be completed within 60 days of the presentation of the initial report.\(^{230}\) The Council shall publicize the Final Report five days after receiving it.

### 3.6 Implementation and Enforcement of Final Report.

The initial objective of the dispute settlement process, where a panel determines that there has been a persistent pattern of failure by the Party complained against to effectively enforce its environmental law, is to develop a satisfactory plan to resolve the enforcement failure. The disputing Parties may agree on a mutually satisfactory action plan, which "normally shall conform with the

\(^{229}\) NAAEC Article 31.

\(^{230}\) NAAEC Article 32.
determinations and recommendations of the panel.\textsuperscript{231} The disputing Parties shall promptly notify the Secretariat and the Council of any agreed resolution of the dispute.

If the parties fail to agree on the action plan, an action plan can be designated in one of two ways. First, where a disputing Party requests that the panel be reconvened, the panel must determine whether any action plan proposed by the Party complained against is sufficient to solve the pattern of non-enforcement. If it is sufficient, then the panel must approve the plan. If not, the panel must suggest a plan according to the law of the Party complained against. The panel may, where warranted, impose a monetary enforcement assessment in accordance with Annex 34. Second, where none of the disputing parties request that the panel be reconvened, the last action plan submitted by the Party complained against is deemed to have been adopted by the panel.\textsuperscript{232}

The Parties shall agree whether the action plan is properly implemented. Either Party may reconvene the panel to determine if the action plan is being properly implemented or not within 180 days after the adoption of the final action plan.\textsuperscript{233} If the panel determines that the plan is properly implemented, the dispute is

\textsuperscript{231} NAAEC Article 33.
\textsuperscript{232} NAAEC Article 34 (1)b and (3)
\textsuperscript{233} NAAEC Article 35.
finalized. If not, the panel is required within 60 days after it has been reconvened, to impose a monetary assessment on the Party complained against.\textsuperscript{234}

The Party complained against has 180 days to pay the monetary assessment to the Council, money that the Council shall use to improve the environmental law enforcement of the Party complained against. In the event of continuing non-compliance, either with respect to paying the penalty or with respect to implementing the final action plan, a complaining Party may suspend NAFTA benefits against the offending Party\textsuperscript{235} unless that Party is Canada, where the panel decision may be filed by the CEC before a Canadian Court for enforcement. It will be treated as a court order, not subject to review or appeal.\textsuperscript{236}

In the case of trade suspension, in other words in the case of disputes between Mexico and the United States, in considering what tariff or other benefits to suspend pursuant to Article 36(l) or (2), the complaining Party shall first seek

\textsuperscript{234} The amount is equivalent to up to 0.007 percent of the total trade in goods between the parties. NAAEC Annex 34(1).

\textsuperscript{235} NAAEC Annex 36 B. establishes that:

"1. Where a complaining Party suspends NAFTA tariff benefits in accordance with this Agreement, the Party may increase the rates of duty on originating goods of the Party complained against to levels not to exceed the lesser of:

(a) the rate that was applicable to those goods immediately prior to the date of entry into force of the NAFTA, and

(b) the Most-Favored-Nation rate applicable to those goods on the date the Party suspends such benefits,

and such increase may be applied only for such time as is necessary to collect, through such increase, the monetary enforcement assessment."

\textsuperscript{236} NAAEC Annex 36 A.
suspended benefits in the same sector or sectors as that in respect of which there has been a persistent pattern of failure by the Party complained against to effectively enforce its environmental law. If the complaining Party considers it is not practicable or effective to suspend benefits in the same sector or sectors, benefits in other sectors may be suspended, in an amount not greater than the amount of the monetary enforcement assessment originally imposed.237 A complete diagram of the process is in Appendix 1.

3.7 Criticisms of the Dispute Resolution Process.

After reviewing the NAAEC’s dispute settlement process, some comments about the process are appropriate. It is important to mention that the process is almost identical to that established in NAFTA chapter 20, and therefore follows the same procedure to resolve any dispute that may arise between parties to an international treaty. This process starts with consultations then establishes an arbitration panel and eventually allows for the imposition of fines and trade sanctions. However, some authors have criticized the way the CEC dispute resolution process deals with the environment.

237 NAAEC Article 36.
1. Use of Sanctions

The most widely debated issue among the parties and commentators during the discussions to create NAFTA’s side agreement was whether the dispute settlement process would utilize trade sanctions. The process represents one of the first attempts to enforce environmental legislation, not only in domestic fora, but also at the international level, and establishes real sanctions for the violations in the form of fines or even trade sanctions. However, despite the fact that the possibility to trigger the dispute settlement process and to eventually impose trade sanctions is very remote, the utilization of trade sanctions to reach environmental goals has been described as potentially problematic.238

First, in the event that a Panel imposes a fine or imposes duties on exports, the price would be paid by the consumers and not by the governments, who are responsible.239 However, the fines are not really penalties since they are returned to the same Party complained against to improve the environment or the environmental law enforcement in that country. The money does not really leave the country.240

Second, the allocation of such fines will be decided by the CEC and not by the local authorities, despite the fact that those authorities are the experts in the

240 Kelly supra note 135 at 89.
application of its own law and have knowledge about the best allocation for any money. By interfering with this process, the CEC will prioritize certain domestic programs, ignoring local political and cultural concerns for the environment, thereby interfering with the nation’s free exercise of sovereignty.\textsuperscript{241} The drafters of the agreement forgot to recognize that any government is the expert on its own law, and any CEC’s interpretation and judgement of a domestic law may not be accurate.\textsuperscript{242}

Third, trade sanctions may have unequal effects between the parties, since Mexico and Canada rely more heavily on trade with the United States than vice versa\textsuperscript{243} The effects of trade sanctions would have more discouraging effects in Mexico than in the United States, since a larger part of Mexico’s economy will be affected.\textsuperscript{244}

Fourth, the Commission has very little power. Contrary to what Mr. Clinton suggested during his presidential campaign\textsuperscript{245} the Commission only has a limited power to provide remedies and does not have any power to stop pollution. The NAAEC provides for panels with the authority to impose monetary “assessments” but there is no power to stop pollution.

\textsuperscript{241} Ibid.
\textsuperscript{242} Charnovitz \textit{supra} note 136 at 268.
\textsuperscript{243} Patton, \textit{supra} note 102 at 111.
\textsuperscript{244} Johnson R. \textit{supra} note 238 at 588.
\textsuperscript{245} Charnovitz \textit{supra} note 136 at 275.
Also, not only does the CEC not have any power to stop pollution but it also does not have any power to clean up any pollution. If the CEC collects monetary assessments, it may be used to enhance environmental law enforcement, but not to pay for the clean-up of hazardous waste sites.

2. Clarity of the Process

The process has been classified as lengthy, cumbersome and full of legal uncertainties\textsuperscript{246}, for its jumble of procedural hurdles and political trap doors.\textsuperscript{247} The process is full of ambiguities in many important definitions, like “pattern”, obligations like “effectively enforce” and exceptions such as “bona fide” decisions or “reasonable exercise of discretion”. Many of those terms are left to the arbitration panel to define, and the possible determinations that such panels may reach are unpredictable, and in some cases may be different from those goals that the parties were seeking during the negotiation of the agreement.

Because the process is sharply circumscribed and only applies to domestic laws and only in those cases in which there is a trade relationship, there are several other concepts that are not defined. For instance, it is not clear if the panel’s decisions should be taken into consideration for future dispute settlements or not. Since the panels are selected case by case, there is the danger that the panels

\textsuperscript{246} Johnson and Beaulieu \textit{supra} note 9 at 238.
\textsuperscript{247} Kelly \textit{supra} note 135 at 96.
may reach different conclusions about the definitions of the same ambiguous concepts, thus creating uncertainty.

It is a protracted and cumbersome process. It will take at least 755 days from the initiation of a complaint to the eventual determination of a trade sanction, when the same procedure under NAFTA chapter 20 takes only 255 days. This long procedure may allow the Party complained against to "artificially" end the alleged violation, by imposing a major fine or closure to an industry. Some countries use this practice especially when they are accused of violating human rights; in order to avoid international criticism or trouble they liberate a political prisoner. 248

3. Panels Power

The panels do not have subpoena power to help them obtain the information necessary to resolve the controversy.249 The absence of the power to collect information on-site will leave the panels hoping that the parties involved supply the necessary information. That will depend on the good will of the parties involved, especially the Party complained against, which may not submit all the information necessary to prove the existence of a consistent pattern of lack of enforcement. That lack of power will leave the CEC and the Panels second-

248Charnovitz supra note 136 at 284
249Ibid. at 281.
guessing local decisions, raising concerns about accountability and risking harmonization to the lowest common denominator.\textsuperscript{250}

The restricted power of the panels to obtain information may be especially problematic since many of its findings may not be accurate and therefore create problems about the correct interpretation and application of any environmental law and standards. It may also prevent knowing the truth about a particular environmental problem since all the facts may not be known.

4. Public Participation

The dispute settlement process in the NAAEC is almost identical to that established in NAFTA chapter 20, including consultations, arbitration panel and eventual fines and trade sanctions. This is similar to most international dispute settlement processes. On the other hand, the main difference between the NAAEC's dispute settlement process and that established in Article 14 and 15 of the NAEEC is that it is limited only to parties and not open to the general public. On the contrary, the Citizen Submission Process established in Articles 14 and 15 is open only to the general public, including citizens and NGO's who are allowed to make submissions before the Secretariat and criticize a Party for failing to enforce its environmental law.

\textsuperscript{250} Patton \textit{supra} note 102 at 110.
Since the arbitration process is only open to parties and not citizens or NGO's, they are not allowed to submit or present before the CEC or arbitration panels any important information, proofs or other documents that may be useful to determine the truth behind the dispute.

In conclusion, it is important to mention that because of the difficulties of proving a “persistent pattern of failure by the Party complained against to effectively enforce its environmental law” as well as to establish a trade connection, it seems that it will be very difficult to initiate any dispute settlement process. Moreover, in the improbable event of a dispute settlement process being initiated, it seems unlikely that trade sanctions or fines will be imposed on any Party. As mentioned by one author, the “teeth” that were provided to the NAAEC may never bite.\footnote{Saunders \textit{supra} note 192 at 302.}
CHAPTER 4. NAAEC- CITIZEN SUBMISSION PROCESS

4.1 Introduction.

The NAAEC establishes a process that allows any citizen or NGO to participate in environmental law enforcement and indirectly to help the Parties to reach the Agreement's goals. This process permits the CEC's Secretariat to investigate when a Party is accused of failing to enforce its own environmental laws, and has captured the most attention of environmental groups, private sector and legal specialists in North America.  

First, I will describe the Article 14 and 15 process in order to determine what the requirements are to file a citizen submission before the CEC and to determine how the process develops to its final stage. Later, I will evaluate the process and give some suggestions for its improvement.

4.2 The Submission: Article 14 (1).

Pursuant to Article 14 of the NAAEC, any nongovernmental organization or person may file a submission with the Secretariat claiming that a Party to the Agreement's goals. This process permits the CEC's Secretariat to investigate when a Party is accused of failing to enforce its own environmental laws, and has captured the most attention of environmental groups, private sector and legal specialists in North America.  

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252 Bugueda supra note 239 at 1596.

253 Any non-governmental organization or person established or residing in the territory of a Party to the Agreement may make a submission on enforcement matters for consideration by the
NAAEC is “failing to effectively enforce its environmental laws.” The scope of the Article 14 process is limited in three ways: 1) it is related only to environmental laws; 2) it is related to failures to “effectively enforce” such environmental laws; 3) it applies only to failures fitting into the first two categories that are ongoing. These three concepts are reviewed only briefly below, as they were discussed earlier.254

A) Environmental Law

The agreement defines environmental law to include laws whose primary purpose is the protection of the environment or the prevention of a danger to human life or health, as established in Article 45 (2). It excludes at least two types of provisions from treatment under the citizen submission process. The first is the exploitation and harvesting of natural resources. Despite the fact that these activities may have significant adverse impact on the environment 255, they are excluded.

The second type of provision excludes consideration of whether international instruments qualify as environmental law. The Secretariat has concluded that international treaties should not be taken in consideration unless they have been

254 See chapter 3 section 3.2.
imported into domestic law by way of a statute or a regulation pursuant to a statute.256

B) Effective Enforcement

The NAAEC does not establish a definition of what is considered a “failure to effectively enforce” environmental laws. However, there is a definition a contrario sensus of what is not considered a failure to enforce environmental laws. As established in Article 45(1), these are defined as actions that reflect a reasonable exercise of discretion in respect of investigatory, prosecutorial, and regulatory or compliance matters, or actions that result from bona fide decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priority. If a Party complies with Article 45(1), they will be considered to have effectively enforced their environmental law.

C) Temporal Requirement

The submission should assert that a Party “is failing” to effectively enforce its environmental law. To prove such a requirement it is necessary to establish only those acts that occurred after January 1, 1994, since the agreement does not apply retroactively. However, if an alleged violation of an environmental law occurred pre-1994, it may be a relevant focus for a factual record if the alleged violation is relevant to whether a Party effectively enforced its environmental law.

256 See supra note 220 and accompanying text.
D) Threshold Criteria

In addition to the three limitations Article 14(1) contains in its opening sentence, it lists six threshold criteria that a submission must meet in order to trigger further consideration. A submission must:

A) be in writing in a language designated by that Party in a notification to the Secretariat;
B) clearly identify the person or organization making the submission;
C) provide sufficient information to allow the Secretariat to review the Submission;
D) appear to be aimed at promoting enforcement rather than at harassing industry;
E) indicate that the matter has been communicated in writing to the relevant authorities of the Party and indicate the Party’s response; and
F) be filed by a person or organization residing or established in the territory of a Party.\(^{257}\)

\(^{257}\) The Submission should be in English, Spanish or French and any Submission should not exceed 15 pages of typed, letter-sized paper, excluding supporting information.
The submission must assert that a Party is failing to effectively enforce its environmental law and should focus on any acts or omissions of the Party to demonstrate such failure. In doing so, the Submitter must detail a succinct account of the facts on which such an assertion is based, and must provide sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based.

As established in the Revised Guidelines for Submissions on Enforcement Matters Under Articles 14 and 15 of the North American Agreement on Environmental Cooperation (Guidelines), the Submitter must also identify the applicable statute or regulation, or provision thereof, as defined in Article 45(2) of the Agreement. A requirement of the General Ecological Equilibrium and Environmental Protection Law of Mexico, is that the Submitter must identify the applicable chapter or provision of this law as required by the Secretariat.

Any submission must "appear" to be aimed at promoting enforcement rather than at harassing industry. In determining this, the Secretariat will consider such factors as whether or not the submission is focused on the acts or omissions of a Party rather than on compliance by a particular company or

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258 For purposes of determining if a submission meets the criteria of Article 14 (1) of the Agreement, the term "Environmental Law" is defined in Article 45(2) of the agreement.
259 Council Resolution 99-06 Adoption of the Revised Guidelines for the Submission for Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation Article 5.2
260 The Secretariat even requested that the Submitters of the Rio Magadalena submission further specify which laws were allegedly not being effectively enforced. See Markell supra note 255 at 557.
business, especially if the Submitter is a competitor that may stand to benefit economically from the submission, or if the submission appears frivolous.

As established in NAAEC Article 14(1), before filing any submission before the CEC, the Submitters must indicate that the matter has been communicated in writing to the relevant authorities of the Party in question, indicate the Party’s response, if any, and if applicable present a copy of such response. The Submitter must include, with the submission, copies of any relevant correspondence with the relevant authorities.\textsuperscript{261}

If the Secretariat determines that all formal criteria have not been satisfied, it shall issue a notification to the Submitter asking for a new Submission that conforms to the formal requirements within 30 days. During this period, the Secretariat may consider new or supplemental information from the Submitter. If no new or supplemental information is received by the Secretariat within this time period, or if the Secretariat determines that no response from the Party is merited in light of the additional information provided by the Submitter, the process will be terminated and the Secretariat will so notify the Submitter. However, if the Secretariat determines that the Submission meets the formal requirements, it conducts a second review to determine whether the Submission merits a response.\textsuperscript{262}

\textsuperscript{261} The relevant authorities are those agencies of the government responsible under the law of the Party for the enforcement of the environmental law in question. Guidelines 5.5.

\textsuperscript{262} NAAEC Article 14 (2).
4.3 The Party's Response to The Submission Article 14 (2) and (3).

Under Article 14(2), the Secretariat must consider whether the Submission alleges harm to the Submitter. In determining if the submission alleges harm to any person or the organization that filed the submission, the Secretariat should take into consideration whether the alleged harm is due to the asserted failure to effectively enforce environmental law. The Secretariat should also consider whether the alleged harm relates to the protection of the environment or the prevention of danger to human life or health (but not directly related to worker safety or health), as stated in Article 45(2) of the Agreement. Some commentators have suggested that the notion of harm should be interpreted broadly for purposes of the Agreement.\textsuperscript{263}

The Secretariat should also review whether the Submission would advance the goals of the NAAEC and determine if all private remedies have been pursued. To determine this, the Secretariat will be guided by: (a) whether requesting a response to the submission is appropriate and whether the preparation of a factual record on the submission could duplicate or interfere with private remedies that are being pursued or have been pursued by the Submitter; and (b) whether reasonable actions have been taken to pursue such remedies prior to making a submission, bearing in mind that barriers to the pursuit of such remedies may exist in some cases.

\textsuperscript{263} Professor Gal-or suggests that "[B]y recognizing the public nature of the environmental concerns and harms as well as the public interest to legal standing, the Secretariat has met the expectations of many environmental activists." Supra note 181 at 89.
Finally, the Secretariat should review whether the Submission is drawn exclusively from mass media reports. If so the submission should be terminated. Again, there is no time limit for the Secretariat in making this determination.

If the Secretariat determines that no response is merited, it may consider asking for new or supplemental information during this period or terminate the process. It is important to note the large discretionary authority given to the Secretariat, since the Secretariat has the option to simply not consider a submission without justifying its decisions.264

On the other hand, if the Secretariat determines that the requirements of Article 14(2) are met, according to Article 14 (3), the Secretariat should request a response from the Party accused. It should notify the Council and the Party and forward to the Party a copy of the Submission and any supporting documents. The Party shall advise the Secretariat within 30 days, or in exceptional circumstances, within 60 days: (1) whether the matter was previously the subject of a judicial or administrative proceeding; and (2) of any other information the Party wishes to submit, such as whether private remedies in connection with the matter are available to the person or organization making the Submission and whether they have been pursued265. If the matter raised is the subject of a

264 Kelly supra note 135 at 80.
265 NAAEC Article 14 (3).
pending judicial or administrative proceeding, the Secretariat will terminate the process.

4.4 Preparation of a Factual Record.

After the Party has responded (or failed to respond within the 30-day response period), the Secretariat will then consider both the submission and the response to determine whether it will recommend to the Council the development of a factual record.\textsuperscript{266} Again, there is no deadline for this decision. There is no opportunity for the Submitter to reply to the Party’s response and no formal criteria for the Secretariat’s decision, although the Guidelines do require the Secretariat to state the reasons for its decision.\textsuperscript{267} If the Secretariat decides that no development of a factual record is warranted, it can terminate the process. However, if the Secretariat recommends the preparation of a factual record, it must seek Council approval, which must in turn be by a two-thirds majority vote.\textsuperscript{268}

If the Council approves preparation of a factual record, the Secretariat is directed to consider any information that is (a) publicly available; (b) submitted by interested nongovernmental organizations or persons; (c) submitted by the

\textsuperscript{266} Guidelines 9.5.
\textsuperscript{267} Guidelines 10.1.
\textsuperscript{268} NAAEC Article 15 (1) and (2).
JPAC; or (d) developed by the Secretariat or by independent experts as established in NAAEC.\(^{269}\)

A factual record is similar to a report on the whole situation aimed at helping the environmental community become aware of the complaint and problems submitted before the CEC. The factual record should contain: a summary of the submission that initiated the process; a summary of the response, if any, provided by the concerned Party; a summary of any other relevant factual information; and the facts presented by the Secretariat with respect to the matters raised in the submission\(^{270}\) and will incorporate, as appropriate, the comments of any Party.

After the preparation of the factual record, the Council may, by a two-thirds majority vote, make the factual record publicly available, normally within 60 days following its submission to the Council.\(^{271}\) However, if the Council decides not to make the factual record available to the public, there is no access to the factual record by any member of the public including the Submitter.

4.5 The Process.

There are two ways to evaluate the process: by evaluating the process itself or by analyzing the submissions filed before the CEC.

\(^{269}\) Ibid. Article 15(4).
\(^{270}\) Guidelines 20.
\(^{271}\) Ibid. See appendix 2 for a complete diagram of the Citizen Submission Process.
4.5.1 Evaluation of the Process

Among the formal requirements, one that is especially complicated and not defined by NAAEC is the requirement that the complaint be "aimed at promoting enforcement rather than at harassing" leaving the Secretariat to determine with all the information available if any citizen submission is "frivolous." The term frivolous is not defined and it is not clear how the Secretariat will determine whether the submission is frivolous.

There is no time limit regarding the preparation of the factual record, and no provision specifically allowing the Submitter to provide additional information. The lack of time limits is an important failure since in the case of environmental damages a quick response is critical. Many of the submissions have been waiting too long for a response from the accused Party, the Secretariat or the Council. The period of time between the dates a Submitter filed a submission and the final decision from the Council could take as long as two years.

The lack of deadlines makes the process too long and sometimes the environment will suffer if decisions or actions are not taken promptly. The period of time since the beginning of a submission and the decision of the Council on whether open or not a factual record has been increasing since 1996, from 22 months in the case of the Cozumel Reef submission to 37 months in the Quebec

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272 Guidelines 5.4. (B).
Hog Farms case. The increased time could be explained by two factors, one the increasing complexity of submissions or by the increasing number of submissions filed before the Secretariat since 1998. Whatever the case, 36 months is too long a time. It is necessary to reduce the period of time by creating deadlines to submit a response from the Party accused and also deadlines for the Secretariat's activities to review the response, to prepare a factual record and for the Council to decide whether to open a factual record or not.

Another criticism that the Submission process has received concerns its transparency and openness for participation. The Submitter participation in the process starts and finishes when a citizen submission is filed before the Secretariat. After the submission is filed the Submitter can participate only if the submission is not clear or requires more information. However, once the Secretariat decides to request a response, the Submitter is not allowed to participate any further. Only the Secretariat and the Party accused are entitled to participate in the process. However, in the last phase of the process the other Parties of NAFTA are allowed to participate, but not the Submitter or any third person that may have an interest, such as the owner of the industry or project under review.

Not only is the Submitter not allowed to participate but also most of the important decisions are made behind closed doors and without providing any reasons. For example, if the Council decides to not open a factual record despite the

\(^{273}\) Bugueda *supra* note 239.
Secretariat's suggestion, the Council is not obliged to give any particular reason for its decision. Also, the Party accused is allowed to vote on whether or not to open a factual record and whether to publicize the factual record. The lack of transparency may create suspicion about the process and make people think that the decisions are more political than environmentally oriented. It may be necessary to change the way the Council reaches its decisions or at least make them more open.

Another important concern about the process is the effectiveness of the factual record. The factual record is nothing but a simple report. The Secretariat does not make a judgement or determine if the Party accused failed to properly enforce its environmental law. The factual record is only a summary of the facts presented by the Submitter and the Party involved and the process finishes with the publication of the factual record. This is unlikely to be an effective sanction.

The only sanction that a Party may suffer from the publication of a factual record is "criticism" from the general public who become aware of the factual record. However, the possible benefit that the environment may receive is uncertain. It is not possible to stop any project pending completion of the citizen submission process. In the event that a factual record is opened it is likely that by the time the process is finished the project may also have finished, and the harm to the environment will have already occurred.
It is necessary to give a more powerful effect to a factual record since even if a factual record is opened for an alleged failure of enforcement of a country's environmental laws, the record seems difficult to use against the accused Party given the restrictions inherent in the dispute resolution process established in NAAEC's section Five. As mentioned by Bugueda274, to use a factual record in the dispute resolution process, it is necessary that one Party request its initiation; secondly, the dispute resolution process is limited to “situation[s] involving workplace, firms, companies, or sectors that produce goods or provide services”275. In other words, the factual record must be related to trade and the environment. On the other hand, the citizen submission process is open to cases where there is no trade relationship and the submission therefore should be focused on the acts or omissions of a Party rather than on compliance by a particular company or business, especially if the Submitter is a competitor that may stand to benefit economically from the submission. Therefore the possibility of using a factual record as proof in a dispute resolution process is limited and to use a factual record to start the process is likely impossible.

4.5.2 The Submissions

Another way to evaluate the Public Citizen Submission Process of Articles 14 and 15 is by reviewing the submissions submitted before the CEC. We will

274 Ibid. 1603.
275 See supra note 226 and accompanying text.
analyze the process by analyzing some of the most important submissions filed as of October 25, 2001.

Since the establishment of the CEC in 1994, 29 Submissions have been filed with the Secretariat, of which 18 have been terminated and 11 are still pending. Of the 18 terminated cases, the Secretariat terminated six Submissions because they did not satisfy the formal requirements under Article 14(1). Three Submissions were terminated under Article 14(2)\textsuperscript{276} since in the opinion of the Secretariat the submissions did not merit a response from the accused Party. In five cases the Secretariat did not recommend the preparation of a factual record. In two cases, BC Hydro and Cozumel, the Council instructed the Secretariat to prepare a factual record. While in one case (Quebec Hog Farms) the Council refused to prepare a factual record despite the fact that the Secretariat recommended that it do so. Finally, the Submitters withdrew their Submission in one case. Of the 11 pending cases, the Secretariat is currently reviewing the Submissions with respect to the Article 14(1) requirements in two cases. In five cases, the Secretariat has not yet decided whether to recommend the preparation of a factual record under Article 15(1). The Council is currently reviewing three Submissions in which the Secretariat has recommended preparation of factual records. Preparation of one factual record by the Secretariat is pending.

\textsuperscript{276} See Appendix 3 for a description of the submissions as of October 25, 2001.
In order to assess the results generated by the citizen submission process thus far we will analyze three submissions filed before the CEC and analyze the results of each submission.

4.5.2.1 Submission 96-001 on Protection of Reefs in Cozumel, Mexico

On January 18, 1996, the Centro Mexicano de Derecho Ambiental (Mexican Center for Environmental Law) and two other environmental organizations, the Comité para la Protección de los Recursos Naturales (Natural Resource Protection Committee) and the Grupo de los Cien Internacional (International Group of One Hundred), filed a submission against Mexico. The submission concerned the construction of a cruise ship pier on the island of Cozumel in the Mexican State of Quintana Roo, in the Caribbean Sea.

The Submitters alleged that the construction and operation of the cruise ship pier would have significant adverse environmental impacts on nearby coral reef ecosystems, the best known of which is the Paraiso (Paradise) Reef. As such, the Submitters argued that, under Mexico’s national ecology law, work on the cruise ship pier must be halted until a proper environmental impact assessment was completed.

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278 Ibid.
The Secretariat determined that the Submitters had alleged a sufficient factual and legal basis to require Mexico to respond. Following a review of Mexico's response, the Secretariat recommended that the Council order the preparation of a factual record. On August 2, 1996, the Council adopted the recommendation and instructed the Secretariat to prepare a factual record.

The factual record, which was completed and released to the public on October 24, 1997, provided a detailed account of the Mexican laws relating to the protection of Cozumel's reefs, and of Mexico's apparent disregard of those laws in its effort to approve and complete the Cozumel Pier Project. The factual record, however, stopped short of expressly finding that Mexico had violated the NAAEC. It also failed to set forth any specific recommendations or requirements for Mexico. As a result, there is considerable debate and uncertainty as to the meaning of the findings and the significance of the factual record.

The debate is especially important in measuring the actual value of the factual record and the response from the authorities, the owners of the pier and the

279 ibid.
280 ibid.
281 ibid.
282 ibid.
283 See Susan Ferris, "Oversight Groups Co-exist Uneasily with NAFTA Feeling Powerless, Environmentalists Grow Frustrated", ATLANTA J. AND CONST., (August 2, 1998). This Article contains a quote from Dora Uribe, an attorney from Cozumel, which states that the “only conclusion [one] can make... is that this is another bureaucracy with no power.” On the other hand Gustavo Alanis, President of the Mexican Center for Environmental Law, has declared that the Cozumel record represented “an enormous victory for international environmental rights. Public Workshop on the Public History Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation” (Commission on Environmental Cooperation, Montreal December 7 –8 2000) notes taken by the author during the workshop.
general public. Contrary to what the environmental community may think or what the Director of the Centro Mexicano de Derecho Ambiental Gustavo Alanis said\textsuperscript{284} the impact of the factual record has been minimal.

As part of the experience I had as an environmental lawyer in Mexico I was involved with the Cozumel Pier Project between November 1999 and July 2000.\textsuperscript{285} During that time, I had the opportunity to interact with the State Delegation of the PROFEPA. Until early July 2000 there were more than ten administrative files opened against the owner of the project. Of these administrative files more than eight were opened between 1995 and 1997, thus many of them were opened as a result of the factual record.

Nevertheless, the administrative files opened against the Cozumel Pier Project were still open at least until mid July 2000 because many of them were "cold files" or in other words they were inactive. It may be that they were literally "locked away" for political reasons and remerged when a new governor was elected. Neither the owner of the Pier Project or PROFEPA did anything to solve the environmental problems that were flagged by the Submitters. The inactivity of the authorities and the amount of files that were kept unfinished, leads one to believe that the effect of the factual record was almost nil. Moreover, the inactivity of PROFEPA is particularly shameful, if we take into consideration that

\textsuperscript{284} Bugueda supra note 239 at 1611.

\textsuperscript{285} This experience allowed me to find out the response the authority had to the Cozumel Pier situation. However, the author does not have the documents necessary to support all assertions made by the authority, the General Attorney of Environmental Protection (herein after PROFEPA)
many of those files were directly related to the environmental impact assessment, which was the main point of critique that the Submitters alleged against the Mexican government. Not only did the former owner of the project do nothing to improve the situation he even stopped some activities that a university laboratory was doing to prevent any harm to the coral reefs, activities that were part of the conditions established in the environmental impact authorization for the project.

As a corollary to this submission it is important to mention that when I became aware of these problems with the Cozumel Pier Project I asked why PROFEPA did nothing for two years. I was not given an answer. Nevertheless, one answer is clear: What has been the result of the factual record opened against Mexico? The answer is very little that is positive.

4.5.2.2 Submission 97-003 on Pollution from Hog Farms in Quebec, Canada

On April 9, 1997, the Centre Québécois Du Droit de L' Environment (CQDE) and other NGOS filed a submission against Canada and the Province of Quebec alleging non-enforcement of Quebec's Environmental Quality Act and Quebec's Regulation Respecting the Prevention of Water Pollution in Livestock Operations.\textsuperscript{286} The Submitters alleged that the government of Quebec had failed

\textsuperscript{286} Ibid.
to enforce certain environmental protection standards regarding agricultural pollution originating from animal production facilities, mainly hog farms.  

On May 8, 1997, the Secretariat determined that the submission complied with Article 14(1) of the NAAEC. On July 9, 1997, the Secretariat made the Article 14(2) determination and requested that Canada file a response. Canada's response included two main arguments.

First, Canada asserted that Quebec was effectively enforcing its *Environmental Quality Act* and the *Regulation Respecting the Prevention of Water Pollution in Livestock Operations*. Second, Canada maintained that the preparation of a factual record by the CEC would be inappropriate because: Canada, particularly Quebec, effectively enforces the *Environmental Quality Act* and the *Regulation Respecting the Prevention Of Water Pollution In Livestock Operations*; all the environmental measures put forward in the agricultural sector met the objectives and obligations contained in the NAAEC, particularly Articles 2, 4 and 5; the government of Quebec had just adopted new regulations with respect to agricultural pollution and new measures to improve the enforcement of the *Environmental Quality Act*. In this context Canada argued that, it is not appropriate to prepare a factual record since the new measures were part of the process to improve the Act and the regulations in accordance with Article 3 of the Agreement. Finally, preparing a factual record would not produce any new

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287 Ibid.
288 Ibid.
289 Ibid.
information nor would it shed any new light in view of the information provided in the response.

On October 29, 1999, the Secretariat recommended that the Council order the preparation of a factual record. On May 16, 2000 the Council decided by a two-thirds vote against preparing a factual record regarding this submission. This decision was highly criticized during the JPAC meeting on December 2000 because the Council did not give any particular reasons for the decision.

This decision to not open a factual record despite the Secretariat's recommendation can be considered a step back for the NAAEC's credibility. Previous commentators had thought that the possibility of not opening a factual record after a Secretariat's recommendation would be "highly unlikely in practice, given the voting procedure and the expectations raised by previous public input into the process." However, contrary to what many authors and environmentalist opined, the Council decided to not open a factual record and opened the door to suspicion of political deals and cover-ups.

In order to prevent the public losing confidence in the citizen submission process all the decisions should be made as open as possible. This can be achieved by permitting the public to known the reasons behind any decisions to open or not

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290 Ibid.
291 Ibid.

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open a factual record or by allowing them to request clarification of the Secretariat's or the Council's activities or decisions.

Another important lesson learned form this submission is that it is necessary to establish deadlines for the Secretariat, the Party accused and especially the Council to reach its decisions or perform its activities. The Council took almost seven months to reach a controversial decision in this case. Seven months is too long to reach any given decision, especially regarding environmental matters. It is necessary to establish strict deadlines for such decisions.

4.5.2.3 Submission 98-007 on an Abandoned Lead Smelter in Tijuana, Baja California, Mexico.

On October 23, 1998, the Comite Ciudadano pro Restauracion del Canon del Padre y Servicios Comunitarios, A.C., filed a submission against Mexico, alleging that the government failed to enforce its environmental laws with respect to an abandoned lead smelter in Tijuana in the State of Baja California. The Submitters stated that Metales y Derivados, failed to repatriate to the United States the hazardous waste that it generated in Tijuana and that its owners and operators abandoned their company and left behind approximately 6000 metric tons of lead slag, by-product waste piles, sulphuric acid and heavy metals from...
battery recycling operations.\textsuperscript{293} The Submitters asserted that Mexico had failed to enforce its environmental laws through its failure to criminally prosecute the owner and through its lack of efforts to contain or neutralize the hazardous waste.\textsuperscript{294}

On March 5, 1999 the Secretariat issued determinations under Articles 14(1) and 14(2) and requested a response from Mexico\textsuperscript{295}. On June 1, 1999 Mexico filed its response. However its response was submitted as confidential. Although Mexico is encouraged by Guideline 17.3 to provide the CEC with a summary of its response and an explanation of its claim of confidentiality, it does not appear that Mexico did so.

The Secretariat on March 6, 2000 recommended to the Council to elaborate a factual record, and on May 16, 2000 the Council decided in a unanimous decision to instruct the Secretariat to elaborate a factual record regarding the submission.\textsuperscript{296} However as of October 25, 2001 the Secretariat has not elaborated the factual record. Again the lack of deadlines is evident.

Between November 1999 and July 2000, as an environmental lawyer in Mexico I had the opportunity to advise a company that had a facility where \textit{Metales y Derivados} had a facility during the late 70's early 80's. While preparing to vacate

\textsuperscript{293} Ibid.
\textsuperscript{294} Ibid.
\textsuperscript{295} Ibid.
\textsuperscript{296} Ibid.
the property, the company performed a phase I and II analysis of the soil, and they found after digging down through one concrete layer, through more soil and then through a second concrete layer, waste that included lead slag and residues of piles and sulphuric acid.

When they unofficially reported their findings, the Mexican authority said that the company must clean up the land despite the fact that they did not generate the waste. It was clear at that moment that the authority knew that _Metales y Derivados_ was responsible but they were trying to avoid further involvement with _Metales y Derivados_. Not only did the Mexican authorities fail to enforce its environmental law but also the American authorities failed to notify _Metales y Derivados_ that the hazardous materials temporarily exported to Mexico must be returned to the United States for its final disposal, nor did the United States do any follow up. It remains to be seen if the American authorities will be accused in the future.

4.6 Conclusion.

The citizen submission process marks an advance in the protection of the environment because it allows citizen participation, albeit limited. Chapter 5 will discuss further criticisms of the process and suggest changes to improve it.
CHAPTER 5: SUGGESTIONS FOR A NEW CITIZEN SUBMISSION PROCESS.

5.1 Introduction.

The NAAEC is an important step toward achieving a balance between free trade and the protection of the environment. However, finding the appropriate balance between sometimes contradictory matters is not easy. Nevertheless, the drafters of the agreement tried to find a balance by allowing some limited participation of the general public in the protection of the environment in North America and by creating a special dispute resolution process where environmental matters can be considered. Neither approach is perfect and both can be improved.

The NAAEC as an international agreement was negotiated by governments, and therefore is not easy to modify, since the parties and their respective legislative bodies must approve any modifications. Nevertheless, as part of this thesis the author suggests several ways to improve the citizen submission process.

First, it is necessary to perform an analysis and critique of the process.

5.2 The Lack of Deadlines in the Citizen Submission Process.

The citizen submission process timeline has been too long. The process lacks deadlines to move the process forward or deadlines for providing a final decision
at each of the mandatory stages set out in Articles 14 and 15. This problem is particularly significant because time plays an important role in the protection of the environment and the enforcement of environmental legislation.

In the case of Article 14 (1) the agreement states that the Secretariat may consider a submission from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law if the Secretariat finds that the submission meets all the criteria established in paragraph 1. However, there is no specific deadline that the Secretariat must comply with to verify the relevant criteria. It is clear that given the complexity of the submissions the Secretariat may need a significant period of time to study it. However, that period should be limited.

For example, in the case of the submission SEM-01-001 filed on February 14, 2001 by the Academia Sonorense de Derecho Ambiental A.C. (submission known as Cytar I), the Secretariat determined that the submission met the criteria established by Article 14 (1) on April 24 2001. It took only two months to make this decision. However in the case of the submission SEM-00-01 filed by the Maria Rosa Escalante de Fernandez (submission known as Molymex I), filed on January 27, 2000 the Secretariat took more than two months to determine that the submission did not fulfill the criteria established in Article 14. The Secretariat did not reach its decision until April 25, 2000. However, in the
Cozumel Pier submission the Secretariat only took 20 days to reach a decision about Article 14 (1).\textsuperscript{297} The timeline is entirely different in each case.

As a result of this review, it is clear that the time to reach a decision about Article 14 (1) was between 20 to 60 days. It is important to mention that it is to be expected that some decisions would take more time than others due to complexity or the amount of information available. Nevertheless, it is important to establish a deadline for the Secretariat to determine whether a submission fulfills the Article 14(1) criteria.

Further, as established in Article 14 (2), where the Secretariat determines that a submission meets the criteria set out in paragraph 1, the Secretariat shall determine whether the submission merits requesting a response from the Party. Again, there is no deadline for the Secretariat to reach such a decision. Similarly, there is no time limit on the Secretariat's internal review of any response received from a Party. For example, in the case of the Great Lakes submission SEM-98-003 the Secretariat received the response from the United States on November 15, 2000 and took almost eleven months to decide to not open a factual record.\textsuperscript{298}

Even when the Secretariat has reached the decision to recommend opening a factual record, the Council can take up to six months to decide on the

\textsuperscript{297} A complete review of the status of the submission can be seen at www.cec.org, visited on September 2, 2001.
\textsuperscript{298} The Secretariat reached its decision on October 5 2001.
recommendation, as in the case of the Quebec Hog Farms where the Secretariat suggested opening a factual record on October 29, 1999, and the Council did not reach its decision until May 16, 2000. That is more than six months. The time to reach a decision of this importance should not be that long, because of the significant ramifications.

The procedure can only be effective if it resolves all submissions without delay. The results of the CEC’s activities regarding the citizen submission process have been mixed. The Secretariat resolved the first six submissions, filed in 1995 and 1996, promptly within a few months. In the only case in which the Secretariat recommended the preparation of a factual record, SEM-96-01, the Cozumel Pier case, it did so only five months after the submission was filed. During 1995-1996, only six submissions were filed. That may be the reason why these cases were dealt with relatively promptly.

Nevertheless, during 1997 and 1998 fourteen submissions were filed and the pace of processing the submissions slowed considerably. On September 1998 the Secretariat created a separate unit on submissions and in 1999 only two submissions were received, allowing the Secretariat to work on those previously submitted. By September 2000, the Secretariat’s decision on whether to

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299 As mentioned by Gustavo Alanis-Ortega and Ana Karina Gonzalez on Comentarios del Centro Mexicano de Derecho Ambiental, A.C. (CEMDA) sobre las Lecciones Aprendidas en Relacion con las Peticiones Ciudadanas Contenidas en los Articulos 14 y 15 del Acuerdo de Cooperacion Ambiental de America del Norte,(Written Comments on the Public History of Submissions made under Articles 14 and 15 of the North Agreement on Environmental Agreement on Environmental Cooperation, Montreal Canada, December 6, 2000)
recommend a factual record on submissions SEM Nos. 97-02, 98-04 and 98-05 was still pending.\textsuperscript{300}

It is important to mention that the delay is not only because of Secretariat inactivity, but also because of delay by the parties and Council. In the case of SEM-97-02, Mexico delayed its response to submit additional information for more than one year. It is clear that one reason for the delays is that the defendant Party is often slow in submitting its response and stricter deadlines should therefore be imposed to accelerate the process. However in the case of SEM nos. 97-03 and 97-06, the Council delayed its decision to open a factual record seven and ten months respectively, after the Secretariat had made the request. It is essential to establish deadlines for the Council’s activities also.

As mentioned, there is no time limit for the Secretariat to prepare a factual record.\textsuperscript{301} The lack of a deadline and the eventual delay may have severe consequences on the environment. For example, in the Cozumel Pier case, the Secretariat’s delay in elaborating a factual record allowed the owner of the pier to finish its construction, and eventually harming the coral reef. By the time the factual record was published, the project was already finished.\textsuperscript{302} As mentioned

\textsuperscript{300} As mentioned by Carla Sbert Legal Officer Submissions on Enforcement Matters Unit during the Public Workshop held on Montreal on December 6 and 7 2000. In the case of the submission SEM-98-03 as of September 2001, the decision to whether to open a factual record is still pending. See the CEC web page at: \url{http://www.cec.org/citizen/guides_registry/registryview.cfm?varlan=espanol&submissionID=41} (as visited on September 2, 2001).

\textsuperscript{301} NAAEC Article 15 (1).

\textsuperscript{302} The Cozumel Project’s first phase was finished by mid summer 1996 and is still functioning.
by some commentators, over half of the active submissions remained pending for approximately two years\(^{303}\) or more. In the case of submission SEM-97-003, three years elapsed between the time the submission was filed and Council's decision not to develop a factual record.\(^{304}\)

Moreover, there is a requirement that a Secretariat recommendation to the Council and the information that it is based upon be withheld from the public for 30 days after its submission to the Council.\(^{305}\) However, this provision is impractical and there is not a good reason for its existence, except to delay even more the preparation of a factual record.

In order to prevent more delays in the submission process and to maintain credibility with the public and to increase its effectiveness, the process must be more timely. Reducing the timing required for reviewing, responding to and processing a submission, and eventually for preparing a factual record is essential. To accomplish this goal, the suggestions of this author are twofold.

First, it is necessary to establish a 45- or 60- day deadline for the Secretariat to decide if the submission complies with the criteria established in Article 14, (1)


\(^{304}\) Herve Pegot, "Comments on the Mechanism for Citizen Submissions on Enforcement Matters, A Report by the Quebec Environmental Law Centre, (Written Comments on the Public History of Submissions made under Articles 14 and 15 of the North Agreement on Environmental Agreement on Environmental Cooperation, Montreal Canada, December 6, 2000)

\(^{305}\) Guidelines 10.2.
and (2). There should also be a stricter deadline for a defending Party's response to the Secretariat about a submission. Although Article 14 (3) establishes a 30-day and 60-day deadline in some cases, that deadline is not always respected. If a Party does not respond within the deadline, the Secretariat should be able to continue with the next step of the process. In other words, the Secretariat should be able to suggest to the Council the preparation of a factual record. This will force the Party accused to submit its response promptly in order to avoid the opening of a factual record.

It is also necessary to establish a strict deadline for the Council for voting on whether or not to open a factual record or to make the final factual record public. In general, the Council should be able to authorize or decline to develop a factual record within 60 days and in exceptional circumstances within 90 days. This will give the Secretariat nine months from the decision to open a factual record to prepare and develop it. This deadline will permit the reduction of the timeline from between 18 and 38 months to an average of between 14 and 18 months.

Second, it is necessary not only to establish such deadlines but also to give more resources to the Secretariat to comply with these deadlines. Two staff members in the Secretariat assigned to the submissions unit are not enough, and if the popularity of the process continues to grow, two persons will not be able to handle the process expeditiously. It is clear that the human and financial resources assigned to the Secretariat must increase. The Secretariat must have
adequate resources to attract and retain consistently high-quality staff and specialized consultants. With enough resources the Secretariat will be able to fulfill its responsibility and be able to meet its deadlines.

Reducing the timelines will create an expedited citizen submission process and will maintain the CEC's high level of credibility in the international community, since the international community will believe that the Secretariat is doing its activities in a prompt and diligent way.

5.3 Transparency and Openness of the Process.

The citizen submission process is not characterized by its transparency and access to the public. Once the submission is filed, all the activities, decisions and votes are kept behind closed doors and secret from the Submitter and other citizens that may be interested. The lack of transparency and openness in the process may harm the credibility of the process and therefore its future.

Once the submission is filed, during its development to the eventual publication of a factual record, it is not open either to the general public or the Submitter. Only the Secretariat, the Council, and the Party accused have access to the information. Moreover, the Party accused has access to a draft factual record and may even provide comments on the accuracy of the draft. Even if the submission involves a third Party, as in the case of submission SEM-96-001

306 NAAEC Article 15 (5).
where the allegations involved the developer of the Cozumel Pier, the third Party is not allowed to submit any allegations to the Secretariat.\textsuperscript{307}

Article 15 (7) establishes that the Council may, by a two-thirds vote, make the final factual record publicly available, normally within 60 days following its submission. However one question arises: What are the possible reasons that a factual record will be kept secret? The factual record might contain confidential information, such as industrial secrets or information related to national security. However even if that were the case this confidential information could be omitted and the balance of the factual record made public. Apart from concerns about confidentiality, it is difficult to suggest any persuasive reasons for not making a factual record public. If not made public, the factual record has no purpose. Once a factual record is elaborated, all the records should be public. If this not done, the record has little or no purpose.

Another part of the NAAEC that is directed more to keeping the process behind closed doors than to promoting its transparency is the Council's power to not give any particular reason for not opening a factual record. Many of those involved and other interested persons, are concerned about this lack of transparency.

For example, during the Public Workshop on the Public History Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation held in Montreal, on December 7 and 8, 2000, \textsuperscript{307} Bugueda \textit{supra} note 239 at 1604.
members of the Quebec Environmental Law Centre requested several times to be given a reason why the Council decided not to open a factual record\textsuperscript{308} on the submission SEM-97-003 filed before the CEC.

The Council's power to not open a factual record, a power that appears absolute, is one of the major criticisms that the citizen submission procedure received during the Montreal workshop. As mentioned by the Quebec Environmental Law Centre, this absolute power raises several questions\textsuperscript{309}: Should the Council have the last word? While Council does direct NAEEC, should it be permitted to disregard the Secretariat's conclusions? Is not the Secretariat, which examines and analyzes submissions, better placed to decide whether a factual record should be developed? It seems difficult to find any good reason to not open a factual record. However, I would amend the agreement to make it mandatory for the Council to give reasons for not opening a factual record. This would prevent the suspicion of cover ups.

It is clear that any decision from the Council to not open a factual record or certain other decision-making points within Article 14(1) and (2) should be open to the public and all its decisions should be reasoned and informed. In order to maintain the confidence in the process, the parties, the Council and the


\textsuperscript{309} Quebec Law Centre supra note 28 at 11.
Secretariat must act openly and on a reasoned basis. During the submission process the Secretariat should allow the Submitters to submit rebuttal or additional information, and permit the submitting of information or comments on the preparation of a factual record. All Secretariat recommendations to open a factual record should be made public as soon as the recommendations are made.

Moreover, it is especially important to avoid any complex or intricate requirements that make it difficult to file submissions. The Guidelines should be reformed to simplify and clarify the process. They should not be reformed with the intention to require additional information or create additional conditions to filing a submission. An example of such additional and unnecessary conditions is the creation of a page limit on a submission or creating a 30-day period after the Secretariat submits a recommendation to the Council to open a factual record. These requirements should be eliminated.\textsuperscript{310}

It is also important to mention that the Secretariat, its members and the Council should try to work in a more independent manner without looking for guidance from the parties. An independent Secretariat is necessary for the credibility of the process and especially so that it will not be perceived as biased in favour of either Submitters or Parties. All Secretariat decisions should be based on carefully reasoned legal interpretations of the Agreement or any Party's environmental law rather than the fear of possible adverse reactions or

\textsuperscript{310} Alanis \textit{supra} note 299.
favouritism by one side or the other. The Secretariat must continue to be independent and work to improve the independence of its staff.

5.4 Effectiveness of the Factual Record.

When the Council authorizes the Secretariat to open a factual record, the Secretariat shall consider any information furnished by a Party and may consider any relevant technical, scientific or other information that is publicly available, submitted by the interested non-governmental organizations or persons, by the JPAC, or developed by the Secretariat. After gathering all the information submitted, the Secretariat shall submit a draft factual record to the Council and any Party may provide comments on the accuracy of the draft within 45 days thereafter.\textsuperscript{311}

According to Article 12 of the Guidelines a draft and final factual records prepared by the Secretariat will contain:

(a) a summary of the submission that initiated the process;

(b) a summary of the response, if any, provided by the concerned Party;

(c) a summary of any other relevant factual information; and

\textsuperscript{311} NAAEC Article 15 (4) and (5).
(d) the facts presented by the Secretariat with respect to the matters raised in the submission.

The final factual record will incorporate, as appropriate, the comments of any Party. The final factual record may be public if the Council instructs the Secretariat to make it public.312

The Agreement and the Guidelines can be criticized on several grounds. First, it is important to mention that during the Public Workshop313 many commentators criticized how the decision to open a factual record is reached, and the content of the factual record. The decision to open a factual record has been highly criticized314 because the fact that the Party accused of not enforcing its environmental law can vote in such decisions is contrary to the principles of natural justice. As mentioned by Baron "a decision to not open a factual record will invariably lead to suspicion of cover-ups and political deal-making that could seriously undermine the Commission's credibility"315. By allowing the Party accused to vote on whether or not to prepare a factual record, the Agreement is allowing possible political cover-ups or the appearance of a cover-up.

312 Ibid.
313 See generally Written Comments supra note 283.
314 See supra note 278 and accompanying text.
315 Baron supra 191 at 611.
The content and how the information is gathered have also been criticized. Although the Secretariat can prepare the factual record only from the information submitted by the parties, the JAPAC, NGO'S or interested persons, it does not have subpoena power to obtain information. There is no obligation to submit any information and the Secretariat depends on the good will of the Party or Parties and others to cooperate with them.

The Party involved in the investigation is not compelled to respond to the Secretary's request for more information needed for the preparation of a factual record. Any information submitted is voluntary. Since much of the information gathered by the Secretariat is submitted voluntarily this could prevent the Secretariat from determining whether a violation had occurred. As mentioned by some authors316, the Party accused could submit information of a vague and unsatisfactory nature in order to complicate the investigation and make it impossible to evaluate the facts alleged in a submission. Even worse, Article 21 provides that a Party may notify the Council that any request for information from the Secretariat is excessive or otherwise unduly burdensome or can even refuse to submit information by simply providing to the Secretariat written reasons.

On the other hand, the Submitter and third parties involved, such as the owner of the project involved in the submission, are not allowed to participate or submit information unless the Secretariat requests it. Neither have they the opportunity

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to comment on the Party’s response or the draft of the factual record. The lack of power to initiate its own investigation does not allow the Secretariat to ensure that the Parties are enforcing their environmental laws. Since the Secretariat depends on the information submitted by the public and relies only on the information publicly available or submitted voluntarily by the Parties or the public, it is susceptible to personal and political agendas.\(^{317}\)

Another criticism of the process has been the content of the factual record. As mentioned by NAAEC Article 15 and Guidelines Article 12, the factual record will contain only summaries of the submission, and the response, if any of the Party and also a summary of other relevant information and the facts presented by the Secretariat with respect to the matter. However, the factual record cannot include an evaluation or judgment by the Secretariat. There is no recourse to an arbitration panel or the imposition of any fines.\(^{318}\) The elaboration of a summary of the submission can hardly be considered a true sanction.

Once the factual record is prepared, the Council must decide whether to make the factual record public. Even if the factual record is made available to the public there is no requirement to actually publish the factual record in a newspaper or anywhere else. The Council’s obligation is to make the factual record available to the public. However, since the only “sanction” to a Party for not enforcing its

\(^{317}\) Ibid. at 511.

environmental law is to attract the attention of the general public, how can this be accomplished if the factual record is not published? If the factual record is not published it seems very unlikely to generate the public pressure necessary to force a Party to properly enforce its environmental legislation.

The effectiveness of the factual record was also criticized during the Public Workshop. The factual record is only effective because of the impact that this record may have on the public and the pressure that the public may have on the Party responsible to enforce its environmental legislation or to change its policy. Even more, the possible use of a factual record to initiate the formal dispute resolution process also seems difficult, if not impossible, since this mechanism is limited to situations involving a trade relationship. Therefore the factual record appears to be only a symbolic sanction.

Many suggestions have been submitted to the CEC to modify the process. Some have suggested that the Council should consider a factual record in light of the CEC's environmental cooperation programs in order to address possible solutions to the factual record as established by NAAEC's Article 10 section 2. Another suggestion is to create a mechanism that will permit the Council to suspend a project at the time the Council instructs the Secretariat to prepare a factual record. Another more aggressive suggestion is the imposition of

\footnotesize
319 Public Workshop supra note 283.
320 See Chapter 2 section 2.2.3.1 and accompanying text.
321 Alanis supra note 283.
monetary penalties\textsuperscript{322}, but this will require a modification to the Agreement, something that the Parties are unlikely to do. Monetary penalties would create a hostile and confrontational process, which is not desirable.\textsuperscript{323}

The suggestion of this author is the creation of a follow-up program after the publication of the factual record. In other words, after the Council has decided to open a factual record, the Council should invite the Party accused to submit within six months or a year after the publication of the factual record a program to address the problem or periodical information on how the problems are being addressed. This will permit the Council to follow up the case and avoid any possible restriction on the sovereignty of the parties or interference by the CEC.

Since the Council will invite the Party involved in the factual record to participate, the decision to participate or not will be voluntary. This will avoid any interference by the CEC on any internal environmental decisions or policies. After this invitation, the general public and NGOS need to create the necessary pressure on the Party to submit a solution plan or to submit annual or bi-annual reports of the situation. This modification will allow a more active participation from the general public.

\textsuperscript{322} Ibid.
\textsuperscript{323} As mentioned by Hector Sepulveda of the Confederacion Patronal de la Republica Mexicana (COPARMEX) at the Montreal Public Workshop which was attended by the author.
In order to permit such follow up, it will be necessary to modify Article 15 of the NAAEC to permit the Council to invite the Party involved to participate in the factual record. This modification is not as difficult as some have suggested since it leaves the enforcement of environmental laws to the Parties and not to the private citizens or NGOS. It also respects the sovereignty of every Party to decide how to address problems of lack of enforcement and whether they want to participate with the CEC. At the same time it will permit private citizens and NGOS to play their roles by bringing social pressure to bear within their own territory.

Another important modification that should be made is to allow the use of a factual record in the Parties Dispute Resolution Process established in NAAEC's section Five. As it stands now, to start the Parties Dispute Resolution Process, first it is necessary that one Party request its initiation. However, this process is limited to "situation[s] involving workplace, firms, companies, or sectors that produce goods or provide services." 324 It is therefore limited to disputes related to trade and the environment. However, the citizen submission process is open only to cases where there is no trade relationship. Therefore, the use of a factual record in the parties dispute resolution process is difficult since the two processes are based on divergent principles.

This should be modified. The NAAEC and its guidelines should permit the use of a factual record as proof in a dispute resolution process or even to initiate the

324 See supra note 224 and accompanying text.
process itself. Any Party that decides to start the dispute resolution process should be able use a factual record in order to prove that the Party accused is failing to effectively enforce its environmental law. This will give the factual record a real and tangible effect, rather than simply affording temporary public exposure and perhaps bringing pressure to bear on a government.
CONCLUSIONS

In order to address the environmental concerns raised by the existence of a continent-wide free trade zone, Canada, United States and Mexico created an environmental side agreement, the NAAEC. Although imperfect, the NAAEC embodies several processes which were innovative and which have the potential to resolve difficult conflicts that arise when countries try to maximize trade without sacrificing the environment. The key innovation is the Citizen Submission Process, a process that allows citizens and NGOs to make submissions to the Secretariat asserting that a Party is failing to effectively enforce its environmental laws. This is a tremendous advance, which for the first time in the history of such agreements allows public participation in the enforcement of international environmental law.

In general, the process has been well received and praised by environmentalists, academics and others. However, as discussed in the previous chapter, the process has several important flaws. First the participation of the Submitter is limited to the presentation of the submissions, not allowing any further involvement. Only the Secretariat and the Party accused are entitled to participate during the first phase of the process and in the last phase of the process the other Parties of NAFTA are allowed to participate, but not the Submitter or any third person that may have an interest, such as the owner of the industry or project under review.
Second, the process is not sufficiently transparent. All the proceedings and decisions are made behind closed doors. The lack of openness and transparency in the process fosters distrust and suspicion of political deal-making and cover-ups. Also, since the Council has several ways to control the Secretariat's activities and in general to control and direct the CEC, the decisions of the CEC could be subject to political and economic influences brought to bear by the Council.

Third, the process takes too long. There are not strict deadlines for the Secretariat, the Party accused or the Council's activities. Given that time is often of the essence when dealing with the environment, this is a significant flaw. Decisions should be made quickly in order to prevent further damage to the environment. Another flaw is the lack of effectiveness of the factual record. After the publication of the factual record, which temporally creates social pressure on the Party accused, there is no other significant effect. The factual record itself does not bring with it any legal consequences, and it can't be used in the Dispute Resolution Process.

It is necessary to improve the process in order to reach NAAEC 's goals and fulfill the Parties' commitment to the environment. First, it is important to increase the participation of the Submitter. During the submission process, the Secretariat should allow the Submitter to submit rebuttals or additional information, as well
as to permit the submitting of information or comments on the preparation of a factual record.

Second, it is necessary to improve the transparency of the process. All the Secretariat's and Council's activities and decisions must be made openly. Reasons should always be given and made public. Third, the Secretariat, its staff and the Council must try to work more independently and base their decisions on the facts and the Agreement and avoid any political or economic influences in favour of any Party or Submitter.

Fourth, the process should have strict deadlines for all the parties involved, the Submitter, the Party accused, the Secretariat and especially the Council. Fifth, it is important to improve the effectiveness of a factual record. The mere publication of a factual record is not enough. It is necessary to create a follow-up plan in order to verify the actions taken by the Party accused to address the environmental problems set out in the factual record.

Despite its flaws, the Citizen Submission Process was a groundbreaking innovation and is a model for public participation in any environmental agreement. The participation of the public in general and the NGO's in particular could help the Parties to identify its flaws and improve their enforcement activities as well as to create a stronger environmental conscience among the citizens of the three countries.
The Citizen Submission Process in the NAAEC is likely to remain the same as it is for the next few years. However, with the discussions of a new Free Trade Agreement of the Americas, and the concerns about the environment these discussions have raised, a new agreement may contain a better and more effective citizen submission process.
Appendix 1: CONSULTATION AND RESOLUTION OF DISPUTES

(a) Consultations

(b) Consultation and Resolution of Disputes—Burden of Proof
(c) Consultation and Resolution of Disputes—Initiation of Procedures
(d) Consultation and Resolution of Disputes—Request for an Arbitral Panel
(e) Consultation and Resolution of Disputes—Implementation of Final Report
(f) Consultation and Resolution of Disputes—Review of Implementation
(g) Consultation and Resolution of Disputes—Further Proceeding

(a) Consultations

Step 1
art.22

Deliverance to other Parties and Secretariat Art. 22:3

End

Yes

Request of consultation Art.22:1

Step 1 60 days
art.22

Request of consultation Art.22:1

No

Step 1 60 days
art.22
## Appendix 1 (b)

### Table 2. Criteria for Request of Consultation and Resolution of Disputes

<table>
<thead>
<tr>
<th>Burden of proof</th>
<th>Means</th>
</tr>
</thead>
<tbody>
<tr>
<td>Persistent pattern of failure</td>
<td>The complaining Party must establish that the ineffective enforcement began after January 1st, 1994, and that it formed a consistent pattern over a certain period of time.</td>
</tr>
<tr>
<td>by other Party</td>
<td>The complaining Party must demonstrate, if the legislation in question allows for discretion as to compliance matters, that such discretion was exercised unreasonably by the public authorities of the Party complained against.</td>
</tr>
<tr>
<td>to effectively enforce</td>
<td>If the defense it to the effect that non-enforcement is due to allocation of resources, then the complaining Party must prove that such allocation does not follow from a bona fide decision by the public authorities of the Party complained against.</td>
</tr>
<tr>
<td>its environmental laws</td>
<td>The complaining Party must establish that the primary purpose of the law, regulation, or provision is the protection of the environment.</td>
</tr>
</tbody>
</table>
CONSULTATION AND RESOLUTION OF DISPUTES
Initiation of Procedures

Step 2
Art. 23

Request of special session of Council
Art. 23:1

20 days

Deliverance to other parties and Secretariat

Council convenes to try to resolve matter
Art. 23:3

3 possibilities

Council refers the matter to other Agreement
Art. 23:5

60 days

Council makes recommendations
Art. 23:4

2/3 vote of Council

Yes

No resolution

Recommendation is made public art. 23:4

End

See step 3

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CONSULTATION AND RESOLUTION OF DISPUTES
Request for an Arbitral Panel

Step 3
Art. 24

End

No

Request for Arbitral Panel
Art. 24:1

Need a 2/3 vote of Council
Matter relate to trade of goods or services
Art. 24:1

Vote of the parties for chairing of panel
Art. 27:1 (b)

Yes

15 days

20 days
The parties may establish panel's term of reference

No

Yes

15 days if two parties
30 days if more than two parties

Each party selects 2 panelists
Art. 27:1 (c)

180 days

60 days

Presentation of panel's Initial report
Art. 31:2

Parties may submit written comments...

15 days

Presentation of panel's Final report
Art. 32:1

Transmission to Council by Parties of Final report + written views
Art. 32:2

Publication of Final report
Art. 32:3

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CONSULTATION AND RESOLUTION OF DISPUTES
Implementation of Final Report

Step 4
Art. 33

Following Final report, Parties try to agree on an action plan
Art. 33

Shall the panel be reconvened?
See Step 5

Shall there be review of implementation?
See Step 5

60 days

Yes

No
Appendix 1 (f)

CONSULTATION AND RESOLUTION OF DISPUTES
Review of Implementation

Step 5
Art. 34

Request that the panel be reconvened because:
Art. 34:1

3 possibilities

Panel is reconvened under (a)

- Determination of appropriate action plan
- Panel may assess monetary enforcement

Complaining Party may suspend the application of NAFTA benefits (36:1)

or

If alleged Party is CANADA Commission shall file in Court the panel's determination

Panel is reconvened under (b)

- Determination as to whether the Party is enforcing action plan
- If not, panel may impose monetary enforcement assessment

Complaining party may suspend the application of NAFTA benefits (36:1)

or

If alleged Party is CANADA Commission shall file in Court the panel's determination

Further proceeding see step 6

A request under (a) shall be made within 60 to 120 days after Final report. A request under (b) may be made no earlier than 180 days after action plan.

(a) Parties did not agree on action plan
(b) Parties can't agree on whether the plan is fully implemented

If Party fails to pay within 180 days
If Party fails to pay within 180 days
CONSULTATION AND RESOLUTION OF DISPUTES
Further Proceeding

Step 6
Art. 35

Following panel's determination by virtue of 34:5(b)

no earlier than 180 days

Request that the panel be reconvened to determine whether the party complained against is fully implementing the action plan.

on delivery of the request

Council shall reconvene the panel

60 days

Panel's determination

Party is fully implementing the action plan

Party is not fully implementing the action plan

Legend

Canadian domestic enforcement and collection process

The complaining party may suspend the application to that party of the NAFTA benefits (36:2)

At the request of a party, Commission may file a copy of panel's determination in Court - Annex 36 A

180 days

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Appendix 2: THE CITIZEN SUBMISSION PROCESS

(h) Submissions on Enforcement Matters and Factual Records
(i) Requirements for Article 14 Private Submissions

Appendix 2 (a)

PRIVATE SUBMISSIONS ON ENFORCEMENT MATTERS AND FACTUAL RECORDS

[Diagram of the submission process]

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Table 1. Requirements for Private Submissions

Requirements as to form

1. RESIDENCE (14:1 (f))

Submitter must be a person or an organization residing or established in the territory\textsuperscript{325} of any Party.

2. LANGUAGES (14:1 (a))

Submitter must have notified the Secretariat of the language to be used in the submission.

3. IDENTIFICATION (14:1 (b))

The submission must "clearly identify" the person or organization making the submission. Requirements as to content.

4. COMMUNICATION TO PARTY (14:1 (e))

The submission must contain proof that the matter has been communicated to the relevant authorities of the Party complained against and indicate its response if any.

5. INFORMATION (14:1 (c))

\textsuperscript{325} For a definition of territory see NAAEC's Annex 45 regarding country-specific definitions.
The submission must provide sufficient information including documentary evidence to “allow the Secretariat to review the submission.”

6. INDUSTRIAL HARASSMENT (14:1 (d))

The submission must appear to be aimed to promote enforcement rather than at harassment of industry.

7. HARM (14:2 (a))

The Secretariat will consider whether the Submitter alleges harm to itself.

8. PURSUING PRIVATE REMEDIES (14:2(c))

The Secretariat will consider whether the Submitter pursued private remedies available in the Party’s domestic forum.

9. MASS MEDIA REPORT (14:2 (d))

Another factor considered is whether the submission is “drawn exclusively from mass media reports.”

Objectives

10. ADVANCING THE GOALS OF THE AGREEMENT (14:2 (b) )

The Secretariat will consider whether the submission alone or combined with other submissions “raises matters whose further study in this process would advance the goals of the Agreement.” N.B. The objectives pursued by the Agreement are set out in Article 1 (a-j).
APPENDIX 3: COMPLAINTS SUBMITTED TO THE NAAEC

3.1 Submission 95-001 on the United States' Endangered Species Act.

The Biodiversity Legal Foundation, along with four other NGOs, including Mexico's Consejo Asesor Sierra Madre, filed before the Secretariat the first submission on June 30, 1995 against the United States.\(^{326}\)

The Submitters alleged that the enactment of the 1995 Rescissions Act resulted in a failure to effectively enforce the Endangered Species Act (ESA) because the new law expressly prohibited the United States Fish and Wildlife Service from listing new endangered species under the Act during the 1995 fiscal year.\(^{327}\) The Submitters alleged that the Act contained an unrelated amendment known as the "Hutchinson Rider" or "ESA Moratorium" and because of that the Fish and Wildlife Service determined that the Rider affected its enforcement of the ESA's listing provision in two ways.

First the Rider prohibited the agency from making final determinations for species or critical habitat designations for the remainder of fiscal year 1995. Second, the Rider rescinded $1.5 million from the budget allocated to the program and

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\(^{326}\) It is ironic that the first complaint was made against the United States and not against Mexico, as many NGO's thought would happen.

\(^{327}\) See CEC webpage SEM-95-001 at: http://www.cec.org/citizen/guides_registry/registryview.cfm?&varlan=english&submissionID=1

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prevented it from offsetting the loss from other programs. The Submitters alleged that the Rider should not be constructed as an amendment to the ESA, but as a suspension of the ESA's enforcement provision, thus violating the NAAEC provision requiring each party to effectively enforce its environmental laws and regulations.

The Secretariat noted that although the 1995 Rescissions Act may have amounted to a breach of the obligation to maintain high levels of environmental protection, this breach did not provide an appropriate basis for an Article 14 submission, which must be based on a "failure to effectively enforce" environmental laws.\(^{328}\) The Secretariat held that the phrase "failure to effectively enforce" referred only to action or inaction by agencies or agency officials, and not to legislative decisions to limit or suspend enforcement.\(^{329}\) Accordingly, on December 11, 1995, the Secretariat terminated the process, concluding: "Article 14 was not intended to create an alternate forum for legislative debate."\(^{330}\)

By determining that a Party can diminish environmental legislation through a legislative decision, the CEC failed to take into consideration Article 3 which recognizes the right of each Party to set its own level of environmental protection but also establishes that the Parties should further commit to maintaining high levels of environmental protection and strive to continue to improve those laws and regulations. The Secretariat decision in this case is seen by some authors as

\(^{328}\) Ibid.
\(^{329}\) Ibid.
\(^{330}\) Ibid.
a setback in the environmental movement and a rejection of the spirit of the NAAEC.331

3.2 Submission 95-002 on the United States' Salvage Logging Rider.

On August 30, 1995, the Sierra Club, together with 27 other NGOs, filed a submission against the United States.332 The Submitters alleged that passage of the 1995 Salvage Logging Rider (the Rider) resulted in a failure to enforce all environmental laws mentioned within by eliminating private enforcement remedies for salvage timber sales.333 Specifically, the Rider provided that salvage timber sales would not be subject to administrative review and would automatically satisfy all federal environmental and natural resource laws.334 The Submitters asserted that the Rider's language erected potentially "insurmountable obstacles to citizen enforcement of these environmental laws."335

332 See CEC webpage SEM-95-002 at:
http://www.cec.org/citizen/guides_registry/registryview.cfm?&varlan=english&submissionID=2
333 Ibid.
334 Ibid.
335 Ibid.
and essentially eliminated "the most effective (and often only) judicial remedies for [such] violations ..."  

In a decision similar to that regarding the *Endangered Species Act* discussed above, the Secretariat held that "the enactment of legislation which specifically alters the [operation] of pre-existing environmental laws in essence becomes a part of the greater body of laws and statutes on the books, This is true even if pre-existing law is not amended or rescinded." The Secretariat concluded that the "deemed to satisfy" language in the Rider did not constitute a "failure to enforce" under Article 14 of NAAEC. Thus, the Secretariat terminated the process on December 8, 1995.

3.3 Submission 96-002 on Wetlands Protection in Alberta, Canada.

On March 20, 1996, Mr. Aage Tottrup, a Canadian citizen, filed a submission against Canada and the province of Alberta, alleging that they had failed to effectively enforce water pollution laws in wetland areas. Tottrup asserted that this non-enforcement had resulted in significant adverse impacts on the habitat of fish and migratory birds.

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336 Ibid.
337 Ibid.
338 Ibid.
339 See CEC webpage SEM-96-002 at: http://www.cec.org/citizen/guides_registry/registryview.cfm?&varlan=english&submissionID=4
340 Ibid.
In considering whether the submission merited a response from Canada or Alberta, the Secretariat reviewed Article 14(2) of the NAAEC. Article 14(2) provides, in relevant part, that "in deciding whether to request a response, the Secretariat shall be guided by whether...private remedies available under the Party's law have been pursued." The Secretariat pointed out that Mr. Tottrup had already initiated proceedings against the Canadian federal government in the Court of Queen's Bench of Alberta, Judicial District of Edmonton, and that the outcome of that suit was still pending. Accordingly, the Secretariat determined, pursuant to Article 14(2), to take no further action in this matter, pending outcome the judicial proceeding in Canada.

3.4 Submission 96-003 on Environmental Assessment of Fisheries in Canada.

The Friends of the Oldman River (FOR) a Canadian organization filed the fifth complaint on September 9, 1996, a submission against Canada. The Submitter alleged that the Government of Canada was failing to enforce the *Canadian Fisheries Act* (CFA) and the *Canadian Environmental Assessment Act* (CEAA). Specifically, the Submitter stated that there are very few prosecutions under the habitat provisions of the *Fisheries Act*, and the prosecutions that do

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341 Ibid.
342 NAAEC Article 14(2).
343 Ibid.
344 Ibid.
345 See CEC webpage SEM-96-003 at: http://www.cec.org/citizen/guides_registry/registryview.cfm?&varlan=english&submissionID=5

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occur are very unevenly distributed across the country. In fact, the Submitter alleged that there has been a *de facto* abdication of legal responsibilities by the Government of Canada to the inland provinces, and that the provinces have not done a good job of ensuring compliance with or enforcing the *Fisheries Act*.346

The Secretariat determined that the FOR submission satisfied the criteria under Article 14(1) of the NAAEC, and requested a response from Canada.347 In its response, Canada asserted that a second environmental organization, Friends of the West Country Association (FWCA), had filed suit in the Trial Division of the Federal Court of Canada in Alberta on November 7, 1996 sixty days after the filing date of the submission at issue. According to Canada, the allegations contained in FOR’s submission were essentially the same as those raised in FWCA’s lawsuit. As such, Canada contended that the Secretariat was required to terminate the review process until FWCA’s case was resolved.348

The Secretariat began evaluating Canada’s response by noting that, pursuant to Article 45(3) of the NAAEC, the term “judicial or administrative proceeding” only refers to actions brought by the Government, not by private parties such as

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346 Ibid.
347 Ibid.
348 Ibid. Canada based its argument on Articles 14(2) and 14(3) of the NAAEC. As discussed above in the summary of Mr. Aage Tottrup’s submission, Article 14(2) provides, in relevant part, that “in deciding whether to request a response, the Secretariat shall be guided by whether...private remedies available under the Party’s law have been pursued...” Article 14(3) provides that if “the matter is the subject of pending judicial or administrative proceeding, [ ] the Secretariat shall proceed no further.”
Accordingly, the Secretariat rejected Canada’s argument that Article 14(3) mandated that the review process be terminated. Nonetheless, the Secretariat determined that Article 14(2) did provide discretionary authority to terminate the review process in a case such as this, even if an organization separate and distinct from a Submitter had filed the pending lawsuit. The Secretariat concluded that the matters raised in the submission bore a close resemblance to the issues then before the Federal Court of Canada. As such, the Secretariat was “reluctant to embark on a process which might unwittingly intrude on one or more of the litigant’s strategic considerations – considerations which weigh in favour of allowing the domestic proceeding to advance without risking duplication or interference by considering parallel issues under the [NAAEC].” Accordingly, the Secretariat terminated the review process on April 2, 1997.

3.5 Submission 96-004 on Military Base Expansion by the United States Army.

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See NAAEC Article 45(3). Specifically, Article 45(3) provides that “judicial or administrative proceeding” means “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 sanctions or remedies in an administrative or judicial forum; the process of issuing an administrative order.”

Ibid.

Ibid.

Ibid.

Ibid.
On November 14, 1996, the Southwest Centre for Biological Diversity (SCBD), an American NGO, filed a submission against the United States. The submissions concerned the United States Army's expansion of Fort Huahuca in the state of Arizona. The Army prepared an environmental impact assessment in connection with the proposed base expansion, but it did not address "cumulative impacts", such as the effect of the expansion on regional water resources and the San Pedro River basin ecosystem. SCBD contended that the Army's failure to assess these cumulative impacts constituted a failure to enforce and comply with the National Environmental Policy Act "NEPA". SCBD originally filed a claim in a domestic court, but were barred by the statute of limitations under the Defense Base Closure and Realignment Act of 1990.

The Secretariat found that the petition met the requirements of Article 14 (1) and Article 14 (2) and merited a response from the United States. The United States responded with several arguments. First, the United States argued that the alleged non-enforcement of NEPA occurred before the NAAEC entered into force and, thus, was not subject to an Article 14 challenge because the NAAEC was not intended to apply retroactively. Second, the United States maintained that the Army's environmental impact assessment was consistent with the requirements of NEPA. Third, the United States contended that SCBD had

354 See CEC webpage SEM-96-004 at: http://www.cec.org/citizen/guides_registry/registryview.cfm?varlan=english&submissionID=8
355 Ibid.
356 Ibid.
357 Ibid.
358 Ibid.
359 Ibid.
failed to pursue private remedies under domestic law because the NEPA lawsuit had been untimely. Finally, the United States responded that the development of a factual record by the CEC could adversely affect SCBD’s pending judicial appeal of the dismissal of a suit brought under the Endangered Species Act (ESA). According to the United States, the ESA lawsuit was based on facts that were then the subject of its Article 14 submission.

In its response the United States also cited the Secretariat’s determination in SEM-95-001, stating that the Article 14 process is not intended to be a forum for challenging legislative changes to the nature and scope of a Party’s environmental laws. Due to the United States response the SCBD withdrew their petition on June 6, 1997.

3.6 Submission 97-001 on Impact of Canadian Hydroelectric Dams on Fish in British Columbia.

On April 2, 1997, the British Columbia Aboriginal Fisheries Commission (AFC), filed a submission against the Government of Canada, alleging a failure to enforce the Canadian Fisheries Act and National Energy Board Act. According to the AFC, the Canadian Department of Fisheries and Oceans (DFO) and the

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360 Ibid.
361 Ibid.
362 Ibid.
363 Article 14.1 provides that "[i]f a Submitter informs the Secretariat in writing that it no longer wishes to have the submission process continue with respect to its submission, the Secretariat will proceed no further with the submission ...." Articles 14 and 15 Guidelines.
364 See CEC webpage SEM 97-001 at: http://www.cec.org/citizen/guides_registry/registryview.cfm?&varlan=english&submissionID=9
National Energy Board (NEB) had failed to protect the fish and fish habitat on British Columbia’s rivers from ongoing environmental damage caused by hydroelectric dams.\(^{365}\) The AFC alleged that the DFO had refused to impose fines against private hydropower companies for damage to fish habitat and the NEB had refused to investigate the environmental impacts of hydropower generation.\(^{366}\) On May 15, 1997, the Secretariat determined that AFC’s submission satisfied the criteria of Article 14(2) and requested a response from the Canadian Government.\(^{367}\)

On July 21, 1997, the Canadian Government filed its response with the CEC\(^{368}\), and in its response, Canada argued that a factual record should not be prepared for the following reasons: (1) the enforcement of the *Fisheries Act* was the subject of pending judicial and administrative proceedings; (2) the DFO’S and NEB’S actions were consistent with the agencies discretionary authority under Canadian environmental law; and (3) the non-enforcement alleged by the AFC took place before the NAAEC went into effect.

The Secretariat concluded that Canada’s arguments did not warrant terminating the Article 14 review process. Accordingly, the Secretariat recommended that the Council order the preparation of a factual record. On June 24, 1998, the Council adopted the recommendation and instructed the Secretariat to prepare a draft

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\(^{365}\) Ibid. at 119.  
\(^{366}\) Ibid.  
\(^{367}\) Ibid.  
\(^{368}\) Ibid.
factual record\textsuperscript{369} and on June 11, 2000 the Council authorized the publication of the factual record.

\subsection*{3.7 Submission 97-002 on Water Pollution in Sonora, Mexico.}

On March 15, 1997, the \textit{Comite Pro Limpieza del Rio Magdalena} (PLRM) filed a submission against Mexico. The submission alleged that the municipalities of Imuris, Magdalena de Kino, and Santa Ana, located in the Mexican State of Sonora, were discharging untreated wastewater into the Magadalena River.\textsuperscript{370} The CPLRM maintained that these discharges violated the Federal General Ecology Law, as well as Sonora’s Ecology Law and Sonora’s Water Law.\textsuperscript{371} On June 2, 1997, the Secretariat asked the CPLRM to provide additional information regarding claims that Mexico and the State of Sonora had “failed to enforce” the mentioned laws.\textsuperscript{372}

On October 6, 1997, the Secretariat determined that the submission complied with Article 14(1) of the NAAEC.\textsuperscript{373} Seven months later, the Secretariat issued an Article 14(2) determination and requested a response from Mexico.\textsuperscript{374}

\begin{thebibliography}{99}
\bibitem{369} Ibid.
\bibitem{370} See CEC webpage SEM-97-002 at: http://www.cec.org/citizen/guides_registry/registryview.cfm?&varlan=english&submissionID=14
\bibitem{371} Ibid.
\bibitem{372} Ibid.
\bibitem{373} Ibid.
\bibitem{374} Ibid.
\end{thebibliography}
Mexico filed its response on July 29, 1998. Mexico argued that most of the facts contained within the submission occurred prior to the date the NAAEC came into force and therefore the Secretariat could not legally consider such facts. Mexico also contended that CPLR failed to exhaust available legal remedies prior to filing its submission. In response to the statutory violations alleged by CPLRM, Mexico asserted that it is effectively enforcing its environmental laws.

On 13 September 1999, the Secretariat requested additional information from Mexico under Article 21(1)(b), concerning SEM-97-002. The Secretariat has not received a response. Pursuant to Article 15(1), the Secretariat is reviewing the submission in light of the Party's response of 29 July 1998 to determine whether a factual record is warranted.

3.8 Submission 97-004 on Canada's East Coast Fisheries.

On May 26, 1997, the Canadian Environmental Defense Fund (EDF) filed a submission against Canada, the Submitter alleges that the Canadian government has failed to enforce its law requiring environmental assessment of federal initiatives, policies and programs. In particular, the Canadian government failed to conduct an environmental assessment of The Atlantic Groundfish Strategy.

Ibid.

376 See CEC webpage SEM-97-003 at: http://www.cec.org/citizen/guides_registry/registryview.cfm?&varlan=english&submissionID=15
(TAGS), as required under Canadian law. By its failure to do so, it is alleged that the Canadian government has jeopardized the future of Canada's East Coast fisheries. Specifically, the EDF asserted that the Canadian government violated the *Environmental Assessment and Review Process Guidelines Order* (EARPGO) when it approved and implemented TAGS without first performing an environmental assessment.\(^{377}\) According to the EDF, at the time that TAGS was introduced in May 1994, EARPGO was the governing federal law for environmental assessment. Therefore, TAGS was subject to EARPGO's requirements and Canada had no discretionary authority to avoid an environmental assessment.\(^{378}\)

In evaluating the EDF submission, the Secretariat looked to the language in Article 14(1) of the NAAEC.\(^{379}\) The Secretariat found significant the fact that the language in Article 14(1) only refers to situations in which a Party "is failing to effectively enforce its environmental law."\(^{380}\) As such, the Secretariat concluded that the Article 14(1) submission procedures are not available to private parties alleging non-enforcement that occurred wholly in the past.

In the written determination on the matter, published on August 11, 1997, the Secretariat stated that:

\(^{377}\) See CEC webpage SEM-97-004 at: http://www.cec.org/citizen/guides_registry/registryview.cfm?&varlan=english&submissionID=16

\(^{378}\) Ibid.

\(^{379}\) Ibid.

\(^{380}\) Ibid.
"The submission refers to an action, inaction or decision, which has already been completely acted upon over three years ago, with nothing about the decision left open or unfinished. The submission, filed three years after the decision on, and the entry into force of, the government's strategy, provides no indication that the Party's failure is continuing or recent. The Secretariat is not aware of any reason that would have prevented the Submitter from filing its submission at the time it became aware of the government's alleged failure to enforce."381

Therefore the Secretariat stated that the submission couldn't solely allege a past failure to enforce environmental law; rather it must allege an ongoing and present failure to enforce environmental law. Second, if a Submitter does not file a submission in a "timely manner", the submission may be deemed inconsistent with the "temporal requirements" of Article 14(1). Accordingly, the Secretariat terminated the review process on August 25, 1997. 382

3.9 Submission 97-005 on the Biodiversity Convention under Canadian Law.

On July 21, 1997, three Canadian organizations, the Animal Alliance of Canada, the Council of Canadians, and Greenpeace of Canada, filed a submission against the government of Canada. The Submitters alleged that Canada had a

381 Ibid.
382 Ibid.
serious and growing endangered species problem, and that it has failed to enact
to federal legislation designed to protect endangered species. It also alleges that
Canada's failure to enact such legislation has implications for the other signatory
countries to the NAAEC. Specially by failing to enforce its regulations in ratifying
the Convention on Biological Diversity signed at the Rio Earth Summit on June
11, 1992 and subsequently ratified by Canada pursuant to an Order-in-Council
on December 4, 1992.383

According to the Submitters, pursuant to an Order-in-Council, the Convention on
Biological Diversity (Biodiversity Convention) is now a legally binding regulation
under Canadian law.384 However, the Submitters alleged that Canada had failed
to enforce Article 8 (k) of the Biodiversity Convention, which requires that each
country must "develop or maintain necessary legislation and/or other regulatory
provisions for the protection of threatened species and populations.385

On May 26, 1998, the Secretariat issued the Article 14(1) determination.386 The
Secretariat began by addressing the issue of whether the Ratification Instrument
constituted "environmental law" for purposes of the NAAEC.387 The Secretariat
acknowledged that the term "environmental law" should be interpreted

383 See CEC webpage SEM-97-005 at: http://www.cec.org/citizen/guides registry/registryview.cfm?&varlan=english&submissionID=17
384 Ibid.
385 This submission represented the first time that the Article 14 process was used to seek
enforcement of an international environmental treaty
386 Ibid.
387 See Determination Pursuant to Article 14(1) of the North American Agreement on
Environmental Cooperation for the SEM-97-005 dated May 26, 1998. Visibly at:
expansively. Nevertheless, the Secretariat found that the Submitters failed to make a critical distinction between 'international' and 'domestic' legal obligations.\textsuperscript{388}

Based on Canada's long-standing constitutional principle that the ratification process does not import international obligations into domestic law absent implementation by way of statute and/or regulation, the Secretariat concluded that the Ratification Instrument could not be considered an "environmental law" of Canada for purposes of Article 14(1). Instead the Ratification Instrument simply evidenced and constituted "a one time administrative act by a representative of the executive branch of the Canadian government...." \textsuperscript{389} Therefore the submission was precluded and the Secretariat terminated the process on May 26, 1998.\textsuperscript{390}

\textbf{3.10 Submission 97-006 on Environmental Assessment of Fisheries in Canada.}

On October 4, 1997, The Friends of the Oldman River (FOR), a Canadian organization began anew the Article 14 process on its previous submission. \textsuperscript{391}

\textsuperscript{388} Ibid.
\textsuperscript{389} Ibid.
\textsuperscript{390} Ibid.
Six months earlier, the Secretariat had determined that FOR's submission did not warrant developing a factual record because legal issues similar to those rose in the submission were pending before the Federal Court of Canada. That case, brought by The Friends of the West Country Association (FWCAO against the Minister of Fisheries and Oceans and the Attorney General of Canada, was apparently dismissed in September of 1997. FOR stated that FWCA had abandoned its application based on information it received post filing.

On May 8, 1998, the Secretariat requested a response to FOR's submission from the Government of Canada. Canada submitted its response on July 13, 1998. Canada maintained that the matter continued to be the subject of active litigation because appeals could still be considered and also argued that it was effectively enforcing its environmental laws and that the method by which it enforced Section 35 of the *Fisheries Act* and its implementing Directives was “a legitimate exercise of its regulatory and compliance discretion.” Canada stated that the pattern of program implementation and enforcement across the

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392 *Ibid.* Also see NAAEC Article 15(1)).
393 See FOR Re-Submission Letter, at the CEC webpage at: http://www.cec.org/citizen/guides_registry/registryview.cfm?&varlan=english&submissionID=5
394 *Ibid.* The information indicated that of the 21 stream crossings contemplated by the project-in-question, 19 had never been the subject of authorizations or letters of advice and the remaining two would undergo an environmental assessment pursuant to the *Navigable Waters Protection Act*.
country was appropriate and that cooperation with provinces increased enforcement resources and allowed for more effective enforcement.\textsuperscript{399}

On July 19, 1999, the Secretariat recommended that the Council order the preparation of a factual record.\textsuperscript{400} However, almost one year later, on 16 May 2000, the Council decided to defer consideration of the Secretariat's notification with respect to SEM-97-006, and to direct the Secretariat to review expeditiously any relevant assertions of facts about other cases that the Submitter may provide, after having given Canada an opportunity to provide a response to those assertions and to convey its recommendation to Council for a decision. The Council has not yet voted on whether to adopt the Secretariat's recommendation\textsuperscript{401} and there are not any reasons for the two year delay in this submission.

3.11 Submission 97-007 on the Hydrological Basin of the Lerma Santiago River, Lake Chapala, Mexico.

On October 10, 1997, the Instituto de Derecho Ambiental (the Institute for Environmental Law or IDA) filed a submission against the Government of Mexico, alleging that authorities had failed to handle properly an administrative citizen

\textsuperscript{399} Ibid.
\textsuperscript{400} Ibid.
\textsuperscript{401} Ibid.
complaint by IDA. According to IDA, the Procuraduría Federal de Protección al Ambiente (the Federal Attorney for Environmental Protection or "PROFEPA") failed to follow the procedure required by the General Law on Environmental Equilibrium and Environmental Protection (LGEEPA) with respect to IDA's popular denounce.

On October 2, 1998, the Secretariat requested a response from Mexico. Mexico filed its response on December 16, 1998. Mexico responded that it processed the citizen complaint at issue in accordance with the LGEEPA. Mexico also took the position that the function of the complaint is merely to inform an environmental authority of potential issues that might be investigated by that authority. Mexico further asserted that IDA's petition was not properly before the Secretariat because IDA had failed to exhaust the administrative recourse provided under Mexican law. In addition, Mexico stated that since IDA failed to state how the government's alleged omissions affected or endangered the environment the submission dealt purely with procedure and

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402 See CEC webpage SEM-97-007 at: http://www.cec.org/citizen/guides_registry/registryview.cfm?&varlan=english&submissionID=19
403 Ibid.
404 Ibid.
405 Ibid. The Secretariat's Determination under Article 14(2) is not available for public viewing.
406 Ibid. Mexico's response is not for public viewing, but it is summarized in the registry.
407 Ibid.
408 Ibid.
409 Ibid.
410 Ibid.
not the environmental state of Lake Chapala, which was the focus of the citizens' complaint.\textsuperscript{411}

On July 14, 2001 the Secretariat determined that because Mexico had notified the Submitter of the existence of an internal decision regarding its popular denounce two years after they filed the submission the case was still open before the Mexican environmental authorities, and therefore the Secretariat cannot review the submission, and decided to terminate the submission.

### 3.12 Submission 98-001 on Explosions in the Reforma Sector of the City of Guadalajara, Jalisco, Mexico.

On January 9, 1998, IDA, together with some of the citizens affected by a series of explosions in Guadalajara, Mexico on April 2, 1992, filed a submission alleging that the Federal Attorney General and the Federal Judiciary failed to duly enforce the LGEEPA in relation to the explosions.\textsuperscript{412} The explosions, which occurred as a result of the presence of hydrocarbons and other highly explosive substances in the underground sewer, killed 204 people, injured 1,460 people, and destroyed or damaged roughly 1100 buildings.\textsuperscript{413} The submission is based on a resolution dated 28 January 1994, which stayed the proceedings, and on a decision dated 8 February 1994, through which the 6th district criminal court magistrate ruled that

\textsuperscript{411} Ibid.
\textsuperscript{413} Ibid.
the resolution, against which there is no recourse, had definitively ended the case.

On September 13, 1999, the Secretariat rejected the initial submission in part because it failed to connect the incident with a violation of environmental law.\textsuperscript{414} The Secretariat found that the dismissal of the criminal proceedings did not constitute a failure to enforce environmental law.\textsuperscript{415} As provided by Guideline 6.2, the Submitters filed a revised submission on 15 October 1999. The revised submission again failed to meet the requirements of Article 14(1) for the same reasons the original submission did not meet such requirements. The Secretariat pointed out that Article 14 of the NAAEC provides the "exclusive" process for NGOs and individuals alleging that a Party is not effectively enforcing its environmental laws.\textsuperscript{416} Thus, NGOs and individuals cannot seek enforcement of Articles 5(1)(j)(1), 6 and 7 via a submission under Article 14\textsuperscript{417} and reached the same conclusion regarding the second submission and terminated the process on January 11, 2000.\textsuperscript{418}


\textsuperscript{414} Ibid.
\textsuperscript{415} Ibid. Interestingly enough, however, the Secretariat did not reach the issue of whether the dismissal constituted a failure to enforce against the nine defendants, nor whether failing to prosecute others constituted a failure to enforce.
\textsuperscript{416} Ibid.
\textsuperscript{417} Ibid.
\textsuperscript{418} Ibid.
On October 14, 1997, Hector Gregorio Ortiz Martinez (Martinez) filed a submission against the Secretaria de Medio Ambiente, Recursos Naturales y Pesca (the Secretary of Environment, Natural Resources and Fisheries or "SEMARNAP") and the PROFEPA, alleging various procedural violations in processes relating to forestry operations in El Taray. This submission, like the previous one, found its origin in the filing of a denuncia popular (a popular denounce).

The Submission noted that further to the order of a "technical audit" to be carried out at the above-mentioned site, an "inspection visit" was performed, from which there arose penalties imposed on both the respondent named in the citizens' complaint and the Submitter, who was found to be jointly responsible. The Submitter alleged that neither the technical audit nor the inspection visit constitute an adequate response to the citizens' complaint filed.

The Secretariat found that Martinez' complaint was more focused on the management of commercial natural resources – a subject that, under Article 45(2)(b) of the NAAEC, is excluded from the definition of "environmental law."

The Secretariat concluded that the submission failed to meet the requirements.

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422 Ibid.
established in Article 14(1). The Secretariat issued a final determination and terminated the process on March 18, 1999.

3.14 Submission 98-003 on Solid Waste and Medical Waste Incinerator Air Pollution and the Great Lakes.

On May 27, 1998, the Department of the Planet Earth, together with eight other NGOs, filed a submission against the United States. The Submitters alleged that certain EPA regulations and programs to control airborne emissions of dioxin, mercury and other toxic substances from solid waste and medical waste incinerators violated and failed to enforce various domestic laws and treaties with Canada. They jointly alleged that the US EPA incinerator regulations specifically conflict with the 'virtual elimination of persistent toxic substances' and 'zero emission' standards for Great Lakes pollution control of the Great Lakes Water Quality Agreement. The Submitter argued that ratified treaties also constitute laws of the land by virtue of ratification by the US Senate. According to the Submitters, the regulations also violated provisions of the Clean Air Act.

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423 Ibid.
424 Ibid.
425 See CEC webpage SEM-98-003 at: http://www.cec.org/citizen/registry/registryview.cfm?&varlan=english&submissionID=41. The other NGOs were: Sierra Club of Canada; Friends of the Earth; Washington Toxics Coalition; National Coalition Against the Misuse of Pesticides; WASHPIRG; International Inst. Of Concern for Public Health; Dr. J. Cummins, Genetics, U. of Western Ontario; and Reach for Unbleached.
426 Ibid.
427 Ibid.
On December 14, 1998 the Secretariat determined that the issues raised in the submission could not be reviewed under the Article 14 process because the Party's conduct did not qualify as "enforcement." 428 The Secretariat determined that enforcement does not include government standard setting because the NAAEC's purpose is not to set environmental standards for the Parties. 429 The Secretariat found support for this determination in Article 3, which recognizes the right of each Party to establish its own levels of domestic environmental protection 430 and Article 5, which contains an illustrative list of government actions that constitute enforcement activities.431

On January 14, 1999, the Submitters amended their petition.432 The thrust of their argument was that the International Joint Committee (IJC) had "taken the point of view that 'standard – setting' approaches for persistent toxic substances are inappropriate and unworkable."433 The Submitters maintained that although end-of-the-pipe emission controls and best available technologies for such controls are standard-setting methods, none of the alternative programs contemplated by their submission involved standard setting. 434 Accordingly, the CEC should not be precluded from considering their submission.


429 Ibid.
430 Ibid.
431 Ibid.
433 Ibid.
434 Ibid.
In its second Article 14(1) and 14(2) determination, the Secretariat reminded the Submitters that according to both Article 45(2), and the Secretariat's previous determination, an international obligation must be imported into domestic law by way of statute or regulation before the Secretariat may consider it. The Secretariat ultimately determined, however, that two of the Submitters' three issues warranted a response from the United States. Accordingly, the Secretariat requested that United States respond only to the first two issues.

In its response, the United States asserted that the Submitters' allegation concerning the EPA's inspection and monitoring activities did not meet the NAAEC's requirements because the Submitters failed to: (1) identify which law the United States was failing to enforce; (2) give the United States an opportunity to respond to the allegations; and (3) pursue available domestic remedies. The United States also asserted that the Submitters' allegation concerning Section 115 of the Clean Air Act misstates the law's requirements. The response states, finally that the United States is taking significant action to reduce atmospheric deposition of dioxins and mercury from municipal waste combustors and medical waste incinerators, including deposition to the Great Lakes ecosystem.

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435 Ibid.
436 See Response of the United States of America to Submission on Enforcement Matters 98-003 Made by the Department of the Planet Earth, Inc., et al. under Article 14 of the North American Agreement on Environmental Cooperation, accessible from the SEM-98-003.
437 Ibid.
438 Ibid.
On October 15, 2001 the Secretariat decided to conclude this submission since in the opinion of the Secretariat there was not any sign of lack of enforcement, since all the incinerators had been visited and tested by the EPA and the EPA exercised its discretionary powers in a legal manner, and because there were not signs of any significant or repeated violations to the Clean Air Act.

3.15 Submission 98-004 on the Impact of the Mining Industry on Fisheries in British Columbia.

On June 29, 1998, the Sierra legal Defence Fund, on behalf of the Sierra Club of British Columbia, the Environmental Mining Council of British Columbia and the Taku Wilderness Association, filed a submission against the Government of Canada.\textsuperscript{439} The Submitters alleged that the Canadian government had systematically failed to enforce a law that protects fish and fish habitat from the environmental impacts of the mining industry in British Columbia.\textsuperscript{440}

On November 30, 1998 the Secretariat deemed the submission to have satisfied Article 14(1).\textsuperscript{441} Seven months later on June 25 1999, the Secretariat determined that the submission merited a response from the Canadian government.\textsuperscript{442} Canada filed its response on September 8, 1999.\textsuperscript{443}

\textsuperscript{439} See CEC webpage SEM-98-004 at: http://www.cec.org/citizen/guides_registry/registryview.cfm?&varlan=english&submissionID=42.
\textsuperscript{440} See submission dated June 29, 1998.
\textsuperscript{441} See determination under Article 14 (1) November 30 1998.
\textsuperscript{442} See determination under Article 14 (2) June 25 1999.
\textsuperscript{443} \textit{Ibid.}
Canada contended that it was effectively enforcing its environmental laws and was in full compliance with its NAAEC obligations. Canada also alleged that:

1) the assertions in the submission were the subject of pending administrative proceedings; 2) the Submitters failed to provide Canada with a reasonable opportunity to respond to the claims raised in the submissions; 3) the Submitters were attempting to apply the NAAEC retroactively; 4) the Submitters failed to pursue private remedies; and, 5) that the development of a factual record would not further the objectives of the NAAEC.

On May 11, 2001 the Secretariat submitted to the Council its recommendation to elaborate a factual record. However as October 2001, the Council has not reached a decision on whether to open a factual record for this submission.

3.16 Submission 98-005 on Hazardous Waste Landfills in Hermosillo Sonora, Mexico.

On July 23, 1998, Domingo Gutierrez Mendevil, President of the Academia Sonorense de Derechos Humanos, A.C., filed a submission against the government of Mexico in which he alleged that Mexico, through its authorization of the operation of a hazardous waste landfill less than six


445 Ibid.

446 See CEC webpage SEM-98-005 at: http://www.cec.org/citizen/guides_registry/registryview.cfm?&varlan=english&submissionID=43
kilometres away from Hermosillo Sonora, had failed to effectively enforce Mexico's environmental laws and specifically Mexican Official Standard NOM-CPR-004ECOL/1993 that set the appropriate distance at a minimum of 25 kilometres.\footnote{447}

The Submitter alleged that the authorities intended to close the current landfill and build a new one, known as Cytrar in the territory of Sonora\footnote{448}, Moreover, the Submitter asserted that the authorities would simply abandon the current landfill without any remedies or clean-up actions required for contaminated areas.\footnote{449} Finally, the Submitter contended that the SEMARNAP, the State of Sonora, and the Municipality of Hermosillo had gotten approval without previously consulting the public in violation of the LGEEPA\footnote{450}

The Secretariat requested a response from Mexico on April 9, 1999.\footnote{451} Mexico filed its response, part of which it designated as confidential, on July 12 1999.\footnote{452} In its response, Mexico countered that the Submitter failed to exhaust all the administrative procedures available before filing his submission, and also asserted that the allegations in the submission were the subject of pending judicial or administrative action.\footnote{453} Mexico also maintained that the environmental laws were issued after the establishment of the landfill, and cannot

\footnotesize{\begin{itemize}
\item \footnote{447} Ibid.
\item \footnote{448} Ibid.
\item \footnote{449} Ibid.
\item \footnote{450} Ibid.
\item \footnote{451} Ibid.
\item \footnote{452} Ibid.
\item \footnote{453} Ibid.
\end{itemize}}
be applied retroactively and they also asserted that the Mexican government had not yet determined the location of a new site.\footnote{Ibid.}

On October 26, 2000\footnote{Ibid.⁵⁵}, the Secretariat determined that in light of the response of the Party, it was clear that the legal provision on which the Submitter founded his petition concerning the alleged lack of enforcement by the Mexican government was not in force when the site was authorized. Principally in view of that fact, in accordance with Article 15(1) of the NAAEC, the Secretariat found that Submission SEM-98-005 does not warrant the development of a factual record, and terminated the process in accordance with paragraph 9.6 of the Guidelines.

However on February 14, 2001, the Petitioners submitted a new revised submission regarding the same Cytrar landfill.\footnote{Submission SEM-01-001 visible at: http://www.cec.org/citizen/guides_registry/registryview.cfm?varlan=english&submissionID=63.} In this submission known as Cytrar II, the Submitter alleged the landfill was established without an environmental impact authorization, does not comply with the regulations for the construction of this type of confinements and received hazardous waste from an American company, activity that is prohibited by the LGEEPA. On June 4, 2001 Mexico submitted a response to the petition requesting to terminate the petition since this landfill is part of an international arbitration between the Mexican...
government and a Spanish company regarding an international agreement between Mexico and Spain.

As a result of Mexico's response, the Secretariat decided on June 13, 2001 to give Mexico 30 days more to submit additional information to prove whether the submission is the same case as the alleged international arbitration.

3.17 Submission 98-006 on Shrimp Farms in Isla del Conde, Municipality of San Blas, Nayarit, Mexico.

On October 20, 1998, the Grupo Ecologico Manglar, A.C. filed a submission alleging that Mexico was failing to effectively enforce its environmental laws with respect to the establishment and operation of Granjas Aquanova S.A., a shrimp farm in Isla del Conde in the Mexican State of Nayarit. Specifically, the Submitter alleged that the Mexican authorities failed to enforce provisions regarding: (1) protecting jungles and tropical rainforests; (2) regulating wastewater discharge; (3) preventing and controlling water use and pollution; (4) relating to fisheries and the introduction of non-native species; and (5) environmental impact assessments requirements. The Submitter further alleged that Mexican authorities failed to prosecute Granjas for its environmental offences and did not follow up the administrative procedures contained within an agreement between the authorities and Granjas to access damages and

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458 Ibid.
remediation measures.^{459} Lastly, the Submitter contended that Mexico failed to protect migratory species and wetlands as mandated by three international conventions.^{460}

On March 17, 1999, the Secretariat made the requisite Article 14 (10) and 14 (2) determinations and requested a response from Mexico.^{461} Mexico filed its response on June 15, 1999. In its response Mexico argued that the Submitter failed to exhaust all available legal remedies.^{462} Mexico reiterated that a popular denounce is not a remedy and, at any rate, Mexico had not yet completed its review of the one filed by the Submitter^{463} against Aquanova. Mexico maintained that it was effectively enforcing its environmental laws and that some of the provisions invoked by the Submitter were not applicable because they were not in effect at the time of Granjas' offences. Mexico also alleged that the Submitter failed to cite the precise treaty provisions with which Mexico had failed to comply.^{464}

Despite the response made by Mexico to the submission, on August 4, 2000 the Secretariat decided to recommend to the Council the elaboration of a factual record in response to this submission. As of October 2001, more than a year after the Secretariat's recommendation, the Council has not decided whether to open a factual record.

^{459} Ibid.  
^{460} Ibid.  
^{461} Ibid.  
^{462} Ibid.  
^{463} Ibid.  
^{464} Ibid.
3.18 Submission 99-001 on Underground Storage Tanks in the State of California.

On October 18, 1999, the Methanex Corporation (Methanex), a Canadian methanol manufacturer, filed a submission against the State of California and the United States. Methanex alleged that the state and the federal government failed to enforce California's environmental laws and regulations relating to underground storage tanks or "USTs" and water resource protection. Methanex acknowledged, however, that not all USTs are regulated. Methanex asserted that California had failed to properly enforce its environmental laws related to environmental and water resource protection through its failure to regulate all USTs.

Methanex's submission relied largely on a report issued by the California State Auditor on December 17, 1998. The report heavily criticized state officials for failing to adequately protect California groundwater and address contamination from leaking storage tanks.

On March 30, 2000 the Secretariat determined that the submission met Article 14(1) and (2) and requested a response from the United States. On May 30, 465 See CEC webpage for SEM-98-007 at: http://www.cec.org/citizen/guides_registry/registryview.cfm?&varlan=english&submissionID=55
466 Ibid.
467 Ibid.
468 Ibid.
2000 the United States submitted its response before the Secretariat. In its response to the consolidated Methanex (SEM-99-001) and Neste (SEM-00-002) Submissions, the American government argued that the matter alleged in both submissions is subject to a pending arbitration decision. Methanex is already challenging California’s enforcement of its Underground Storage Tanks regulations as part of its arbitration claim against the United States under NAFTA Chapter 11. The U.S.A. claimed that, in accordance with Article 14.3(a) of the NAAEC, the Secretariat should proceed no further with the consideration of the submission. The Secretariat decided on June 30, 2000 not to proceed further and concluded submissions SEM-99-001 and SEM-00-002 because they are subject of a pending judicial or administrative proceeding under NAFTA chapter 11.469


On November 11, 1999 the Alliance for the Wild Rockies, together with eight other NGO’s from Canada, Mexico and the United States470, filed a submission against the United States alleging that the government is failing to effectively enforce Section 703 of the Migratory Bird Treaty Act (MBTA), which prohibits the killing of migratory birds without a permit.471

469 Ibid.
470 See CEC webpage for SEM-99-02 at: http://www.cec.org/citizen/guides_registry/registryview.cfm?&varlan=english&submissionID=56
The other eight NGO’s are: The Centre of International Environmental Law, Centro Mexicano de Derecho Ambiental del Noreste de Mexico, the Centro Mexicano de Derecho Ambiental, The Friends of the Earth, The Instituto de Derecho Ambiental, The Pacific Environment and Resources Centre; the Sierra Club of Canada and the West Coast Environmental Law Association.
471 Ibid.
Specifically the Submitters alleged that the United States has refused to enforce Section 703 as it relates to loggers, logging companies and logging contractors. According to the Submitters the Fish and Wildlife Services “FWS”, the agency in charge enforcing the MBTA has a longstanding, unwritten policy relative to the MBTA that no enforcement or investigative action should be taken in incidents involving logging operations. The Submitters contended that the relevant statutes and regulations do not contemplate such exemption.

The Secretariat made the requisite determinations under Article 14(1) and 14(2), and requested a response from the United States on December 23, 1999. The United States submitted its response on February 29, 2000. On December 15, 2000, almost a year after the Secretariat requested a response by the United States the Secretariat recommended to the Council the elaboration of a factual record regarding this submission. The Council has not yet reached a decision.

3.20 Submission 00-001 on Air Pollution in Cumpas, Sonora, Mexico.

Rosa Maria Escalante de Feranandez filed the first submission of the year 2000 in January 27. She alleged that the government of Mexico has failed to effectively enforce the Ley General del Equilibrio Ecologico y la Proteccion al

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472 Ibid.
473 See CEC webpage SEM-00-001 at: http://www.cec.org/citizen/guides_registry/registryview.cfm?&varlan=english&submissionID=57.
Ambiente (LGEEPA) and certain Official Mexican Standards concerning environmental health in relation to air pollution from the Molymex S.A de C.V. plant in Campus in the Mexican State of Sonora. The Molymex plant produces molybdenum trioxide from molybdenum sulphide. The Submitter asserted that the pollution emitted by the plant causes irreversible and irreparable damage to the residents' health and the environment by increasing mortality rates and affecting crops in Cumpas.474

On April 25, 2000 the Secretariat determined that the submission did not meet the criteria of Article 14(1) and terminated the submission. The Submitters filed in April 6, 2000 a new submission SEM-00-005 regarding the same matter. The Submitters allege that Mexico has failed to effectively enforce the LGEEPA with respect to: (i) operating without environmental impact authorization, (ii) land use which is incompatible with the cattle raising and use in the area; (iii) preservation and sustainable use of the land; (iv) zoning for contaminating industries in Cumpas; (v) the return to the country of origin of hazardous waste generated under the rules of temporary importation; and (vi) the importation of dangerous materials without ensuring compliance with the LGEEPA.

On October 19, 2000 the Secretariat decided that the submission met Article 14 (1) and (2) criteria and requested a response from the Mexican government. Mexico submitted its response on January 18, 2000 and alleged that since the Molymex plant was established before the enforcement of the environmental

474 Ibid.
legislation it therefore did not need to execute an environmental impact assessment. Also Mexico stated Molymex obtained and renewed several times its functioning licenses and that they met all the air pollution standards. The Secretariat is still reviewing Mexico's response.

3.21 Submission 00-003 on Migratory Birds in Jamaica Bay.

On March 2, 2000 the Hudson River Audubon Society of Westchester, Inc. and the Save Our Sanctuary Committee, submitted before the Secretariat a submission alleging that the United States National Park Service475, is failing to enforce, and proposing to violate the Migratory Bird Treaty Act, which prohibits the killing of migratory birds without a permit from the U.S. Fish and Wildlife Service. In addition they submitted that the U.S. is failing to enforce and proposing to violate of the Endangered Species Act of 1973, which prohibits the taking endangered and threatened species by proposing to construct a paved, multi-purpose bicycle path through the Jamaica Bay Wildlife Refuge, which is part of the Gateway National Recreational Area, located in Queens, New York. The Submitters alleged the construction would create an important risk to the habitat of several migratory birds.

On 12 April 2000, the Secretariat determined that SEM-00-003 does not meet the criteria of Article 14(1) of the NAAEC and therefore concluded the process.

475 See CEC webpage SEM-00-003 at:
3.22 Submission 00-004 BC Logging.

On March 27, 2000 the David Suzuki Foundation, Greenpeace Canada, Sierra Club of British Columbia, Northwest Ecosystem Alliance and the National Resources Defence Council submitted before the Secretariat a submission alleging that Canada is failing to effectively enforce its environmental laws and to provide high levels of environmental protection. They allege that the *Fisheries Act* is "routinely and systematically violated by logging activities undertaken in British Columbia." Also, the Submitters alleged that the Canadian environmental authority has been denied the right to bring private prosecutions against violators of the *Fisheries Act* in violation of the obligation established in Article 7 of the NAAEC.

The Secretariat decided that the submission met Article 14 (1) and (2) criteria and requested a response from Canada on May 8, 2000. The Canadian response was filed before the Secretariat on July 6, 2000 and recognized only three documented assertions of alleged failures to effectively enforce the *Fisheries Act*. In light of Canada's response, the Secretariat recommended on July 27, 2001 that the submission warranted the developing of a factual record. The Council has not yet reached a decision.

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476 See CEC webpage SEM-00-004 at: http://www.cec.org/citizen/guides_registry/registryview.cfm?&varlan=english&submissionID=60.
3.23 Submission 00-006 in the Indigenous Communities in the Sierra Tarahumara.

The Comisión de Derechos de Solidaridad y Defensa de los Derechos Humanos submitted on June 19, 2000 a submission alleging a failure by Mexico to effectively enforce its environmental law by denying access to environmental justice to Indigenous communities in the Sierra Tarahumara in the State of Chihuahua. In particular, they assert failures to effectively enforce environmental law relative to the citizen complaint process, to alleged environmental crimes and alleged violations with respect to forest resources and the environment in the Sierra Tarahumara. The Secretariat is still reviewing whether the submission meets the criteria of Article 14 (1).

3.24 Submission 01-002 the AAA Packaging Company.

On April 18, 2001 the Submitters, who asked to remain anonymous as established in Article 11 (8) section (a) of the NAAEC, alleged that the Canadian government is allowing the exportation to the territories of the other Parties a pesticide or toxic substance whose use is prohibited within its territory pursuant to Article 23(3) of the NAAEC. The Submitters assert that Canada has failed to issue a prohibitory and/or injunctive order halting the export to the United States,


by AAA Packaging, of products containing “isobutyl nitrite” which the Submitters claim is a “banned hazardous substance”. The Secretariat requested more information and when the Submitters did not submit additional information, the Secretariat on May 25, 2001 decided to terminate the submission.

3.25 Submission 01-003 on ground water contamination by the company DERMET in Guadalajara, Mexico.

On June 14, 2001 a Mexican company called Mercerizados y Tenidos de Guadalajara S.A de C.V submitted that in a civil trial Mexico refused to recognize and give effect to a technical opinion issued by PROFEPA related to damages caused to Mercerizados. By doing so it was alleged that Mexico failed to effectively enforce Article 194 of the General Law of Ecological Equilibrium and Environmental Protection “LGEEPA”, and keep its commitments concerning procedural guarantees and private access to remedies under Articles 5, 6 and 7 of the NAAEC.479

On September 19, 2001 the Secretariat decided that the submission did not meet the criteria of Article 14 (1), since the final decision by the courts regarding the civil suit did recognize and give effect to the technical opinion issued by PROFEPA. Therefore the submission was terminated.

479 See CEC webpage SEM-01-003 at:
BIBLIOGRAPHY

Articles


V. United States Trade Representative, 5 F.3d 549 (D.C. Cir. 1993), (1995) 18 Suffolk L. Rev.


**Thesis**


**Books**


**Books in Spanish**


**Newspaper**


**Primary Materials**

**International treaties**

*Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, 15 April 1995, 33 I.L.M.1125


North American Agreement on Environmental Cooperation, Canada, Mexico, United States, 14 September 1993, 32 I.L.M. 480. (entered into force 1 January 1994)


Mexican Legislation

Constitución Política de los Estados Unidos Mexicanos

Ley de Aguas Nacionales

Ley General del Equilibrio Ecologico y la Proteccion al Ambiente

Ley de Metrologia y Normalizacion.

Reglamento de Ley de Aguas Nacionales

Reglamento a la Ley General del Equilibrio Ecologico y la Proteccion al Ambiente en Materia de Impacto Ambiental

Reglamento a la Ley General del Equilibrio Ecologico y la Proteccion al Ambiente en Materia de Residuos Peligrosos

International Cases


Other Sources

CEC, Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation.

“Public Workshop on the Public History Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation” (Commission on Environmental Cooperation, Montreal December 7 –8 2000) [unpublished]

“Written Comments on the Public History of Submissions made under Articles 14 and 15 of the North American Agreement on Environmental Cooperation” (as 14 November 2000) (Commission on Environmental Cooperation, Montreal December 7 2000) [unpublished]

Documents in Spanish


H. Sepulveda, “Opinión de la COPARMEX sobre el Resultado de las Peticiones Ciudadanas ante la CEC”, (Public Workshop on the Public History Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation” (Commission on Environmental Cooperation, Montreal December 7 –8 2000)