2000

The Commission for Environmental Cooperation's Citizen Submission Process

David L. Markell

ARTICLES

The Commission for Environmental Cooperation's Citizen Submission Process

DAVID L. MARKELL*

CONTENTS

I. INTRODUCTION

The Commission for Environmental Cooperation (CEC) is an international institution with a North American focus. The CEC was created by the United States, Canada, and Mexico in the environmental side agreement they negotiated to the North American Free Trade Agreement (NAFTA).[1] This side agreement — itself known by the acronym NAAEC — is officially entitled the North American

* Director, Submissions on Enforcement Matters Unit, Commission for Environmental Cooperation. This article does not represent the views of the CEC but instead solely represents the views of the author. Professor Markell is currently on leave from his position as a Professor at Albany Law School. He would like to express his appreciation to Professors Edith Brown Weiss, John Knox, Alastair Lucas, Stephen McCaffrey, Dan Tarlock, and David Wirth, and to Carla Sbert of the CEC and Steve Charnovitz, for their insightful comments on earlier versions of this article. Any mistakes are, of course, the sole responsibility of the author. Karen Douglas, Stanford Law School, Class of 2001, provided invaluable assistance in connection with this article.

1. North American Free Trade Agreement, *opened for signature* Dec. 8, 1992, U.S.-Can.-Mex., 32 I.L.M. 296 [hereinafter NAFTA].

Agreement on Environmental Cooperation.[2] The NAAEC charges the CEC with a variety of responsibilities.

This article reviews one of the more innovative features of the CEC, its citizen submission process.[3] It begins by providing a brief overview of the origins, structure, and responsibilities of the CEC. Second, it describes the citizen submission process. Third, it provides an update on the current status of the process. Finally, the article offers a few observations concerning the future evolution of the process and it identifies several fertile areas for future research.

II. THE ORIGINS, STRUCTURE, AND RESPONSIBILITIES OF THE CEC

The NAAEC went into effect on January 1, 1994.[4] It is one of many international environmental agreements of relatively recent vintage. Two

---

2. North American Agreement on Environmental Cooperation, Sept. 14, 1993, U.S.-Can.-Mex., 32 I.L.M. 1480 [hereinafter NAAEC]. The Agreement, as well as many of the CEC-generated documents referenced in this article, are available on the CEC homepage, *Welcome to the Commission on Environmental Cooperation* (visited Apr. 5, 2000) <http://www.cec.org> [hereinafter CEC homepage]. Because the web site is periodically reorganized, this article will reference most CEC documents to the CEC homepage rather than to specific addresses in the web site. For discussions of the NAAEC, see, e.g., PIERRE MARC JOHNSON & ANDRE BEAULIEU, THE ENVIRONMENT AND NAFTA: UNDERSTANDING AND IMPLEMENTING THE NEW CONTINENTAL LAW (1996); DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 1245 (1998); Beatriz Bugeda, *Is NAFTA Up to its Green Expectations? Effective Law Enforcement Under the North American Agreement on Environmental Cooperation*, 32 U. RICH. L. REV. 1591 (1999); Naomi Gal-Or, *Multilateral Trade and Supranational Environmental Protection: The Grace Period of the CEC, or a Well-Defined Role?*, 9 GEO. INT'L ENVTL. L. REV. 53, 54 (1996); David A. Wirth, *International Trade Agreements: Vehicles for Regulatory Reform?*, U. CHI. LEGAL F. 331, 367 n.112 (1997) [hereinafter Wirth 1997]; David A. Wirth, *Reexamining Decision-Making Processes in International Environmental Law*, 79 IOWA L. REV. 769, 781 (1994) [hereinafter Wirth 1994]; Kevin W. Patton, Note, *Dispute Resolution Under the North American Commission for Environmental Cooperation*, 5 DUKE J. COMP. & INT'L L. 87, 90-102 (1994).

3. Many commentators have suggested that active citizen participation in environmental protection in the United States is an important feature of the U.S. domestic system. Citizens have the opportunity to participate through a variety of mechanisms. These include, inter alia, involvement in rulemaking proceedings under the Administrative Procedure Act; provision of comments on proposed enforcement settlements; participation in processes under the federal Superfund law, the National Environmental Policy Act, and the Endangered Species Act; and involvement in committees created under the Federal Advisory Committee Act (FACA). Many federal environmental statutes give citizens the right to bring federal court actions under various circumstances. *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Serv., 120 S. Ct. 693 (2000). *See generally* David L. Markell, *The Role of Deterrence-Based Enforcement in a "Reinvented" State/Federal Relationship: The Divide Between Theory and Reality*, 24 HARV. ENVTL. L. REV. 1 (2000); David R. Hodas, *Enforcement of Environmental Federalism: Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens*, 54 MD. L. REV. 1552, 1560-61 (1995) (suggesting that "only extensive use of citizen suits . . . can safeguard the [U.S.] enforcement system from collapse . . . .").

4. NAAEC, *supra* note 2. Several commentators have chronicled the negotiations leading to adoption of the NAAEC. *See, e.g.*, Joseph F. DiMento & Pamela M. Doughman, *Soft Teeth in the Back of the Mouth: The NAFTA Environmental Side Agreement Implemented*, 10 GEO. INT'L ENVTL. L. REV. 651 (1998); John Kirton, *The Commission for Environmental Cooperation and Canada-U.S. Environmental Governance in the NAFTA Era*, 27 AM. REV. CAN. STUD. 459 (1997). For a helpful compilation of documents relating to the negotiations as well as a summary of the discussions, see DANIEL MAGRAW, NAFTA & THE ENVIRONMENT: SUBSTANCE AND PROCESS (1995).

prominent commentators summarize the extraordinary increase in recent years in the number of international legal instruments involving environmental matters:

> At the time of the Stockholm conference [in 1972], there were only a few dozen multilateral treaties dealing with environmental issues.
>
> By 1992, when countries gathered again to deal with the global environment at the United Nations Conference on Environment and Development at Rio de Janeiro, there were more than 900 international legal instruments (mostly binding) that were either fully directed to environmental protection or had more than one important provision addressing the issue.[5]

As many commentators have observed, the price of passage of the NAFTA through the U.S. Congress was the adoption of a companion agreement intended to prevent the environment from bearing the costs of increased trade among the three signatory countries.[6] This price was demanded even though some have characterized NAFTA as "more attentive to environmentally-related concerns than are most if not all the preceding trade agreements . . . ."[7]

---

5. Harold K. Jacobson & Edith Brown Weiss, *A Framework for Analysis, in* ENGAGING COUNTRIES: STRENGTHENING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL ACCORDS 1 (Edith Brown Weiss & Harold K. Jacobson eds., 1998). *See also* Kal Raustiala, *The "Participatory Revolution" in International Environmental Law*, 21 HARV. ENVTL. L. REV. 537, 537 (1997) (noting that "the last quarter century has witnessed exponential growth in the number and complexity of multilateral legal instruments aimed at environmental protection") [hereinafter Raustiala 1997]; Oran R. Young, *The Effectiveness of International Environmental Regimes*, 10 INT'L ENVTL. AFF. 267 (1998) (noting that a "striking feature of the recent past is the sharp rise . . . in the creation of international regimes as a means of addressing [environmental] problems . . .").

6. *See, e.g.*, U.S. GAO, North American Free Trade Agreement: Assessment of Major Issues, GAO/GGD-93-137B, 114 (Sept. 1993) (noting that "[s]everal major environmental groups generally believed . . . that NAFTA was worth supporting, as long as a strong parallel environmental agreement was signed" and continuing that "[s]ome environmental groups continue to oppose NAFTA, asserting that the recent side agreement is inadequate"); HUNTER ET AL., *supra* note 2, at 1245; JOHNSON & BEAULIEU, *supra* note 3, at 123 (noting that "[w]ithout a fairly comprehensive framework for environmental cooperation strengthened with enforcement provisions, many concluded that NAFTA would have no hope for survival in the American ratification process, given the environmental concerns of the legislators, the organized opposition to NAFTA, and the promises made by two Presidents"); Kirton, *supra* note 4, at 464, 480 (stating that the "CEC . . . [was] the product less of any fundamental enduring commitment to environmental values on the part of the three governments in North American than of a temporary need of a Republican, and then Democratic, president to secure sufficient domestic support to ensure legislative passage of a historic free trade agreement"); Kal Raustiala, *International "Enforcement of Enforcement" Under the North American Agreement on Environmental Cooperation*, 36 VA. J. INT'L L. 721, 723-24 (1996) [hereinafter Raustiala 1996] (noting that a "driving factor" for the adoption of the NAAEC was the "great concern — primarily on the part of U.S. environmental groups — that Mexican environmental law . . . was inadequately implemented and enforced" and continuing that: "In return for their political support of NAFTA, several major U.S. environmental organizations, joined by similar groups in Canada and Mexico, demanded the negotiation of a companion agreement creating a North American Commission on Environmental Cooperation"); *Four-Year Review of the North American Agreement on Environmental Cooperation: Report of the Independent Review Committee* 8 (June 1998), *available at* CEC homepage, *supra* note 2 [hereinafter *IRC Report*] (noting that "[t]he negotiation of the NAAEC and the creation of the CEC were U.S. conditions for its adoption of NAFTA, a result of domestic opposition to the trade agreement alone").

7. JOHNSON & BEAULIEU, *supra* note 6, at 121. For a more skeptical view of NAFTA, see Steve Charnovitz, *The North American Free Trade Agreement: Green Law or Green Spin?*, 26 LAW & POL'Y INT'L BUS. 1, 68, 76 (1994) [hereinafter Charnovitz NAFTA] (concluding that NAFTA is not a particularly "green" trade agreement

Despite its origins as something of a palliative to those concerned about the environmental implications of enhanced trade, the NAAEC's reach extends far beyond the trade and environment arena. As a result, some observers urge that the NAAEC is far more than a "side agreement" but instead is a "complete and vital agreement in its own right."[8] Article 1 of the NAAEC lists a series of ten objectives for the agreement. Most have little on the surface to do with trade but instead focus on strengthening domestic environmental regimes. These objectives include, for example, increasing cooperation among the parties "to better conserve, protect, and enhance the environment," and strengthening cooperation in developing and improving environmental laws.[9]

The parties to the NAAEC created the CEC to advance achievement of its objectives.[10] The CEC has a tripartite structure. It is governed by a Council,

---

and indicating that "it is hard to understand how officials in both the Clinton and Bush administrations could characterize the NAFTA as the greenest trade agreement"). Mr. Charnovitz also notes that "[i]t is also hard to understand how the press could print such misinformation without any attempts at verification." Charnovitz, *supra*, at 76. He continues, "A truly green trade treaty would assure that the newly engendered trade does not abase the environment or undermine an environmental protection regime. Neither assurance is provided by the NAFTA." Charnovitz, *supra.*

See also Raymond MacCallum, Comment, *Evaluating the Citizen Submission Procedure Under the North American Agreement on Environmental Cooperation*, 8 COLO. J. INT'L ENVTL. L. & POL'Y 395, 396-97 (1997) (stating that "[a]lthough the NAFTA has been hailed as the 'greenest' trade agreement ever, this claim is largely based on the fact that sustainable development and environmental protection get a few cursory mentions in the NAFTA, where such considerations are unprecedented in the history of trade agreements. In reality, it was the perceived failure of the NAFTA to seriously address the substantial concerns of environmentally conscientious critics that forced the development and adoption of the NAAEC.").

8. *See, e.g., IRC Report, supra* note 6, at 4-7. "The IRC believes that the long-term value of NAAEC and the Commission will be measured not so much by a technically defined environment and trade 'rule,' but rather by the contribution the CEC makes to improved environmental conditions for all people in North America, in the context of changing economic patterns — in short, by its contribution to sustainable development in North America." *Id.* at 5.

9. The objectives of the NAAEC include:

(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.

NAAEC, *supra* note 2, art. 1. While some of these objectives focus on the relationship between trade and the environment (e.g., Article 1(b) and (e)), others do not.

10. *See* NAAEC, *supra* note 2, art. 8.

which is comprised of the highest-level environmental officials of each member country.[11] A permanent staff known as the Secretariat is based in Montreal.[12] Finally, the Agreement creates a Joint Public Advisory Committee (JPAC),[13] comprised of fifteen citizens, five from each of the three countries.[14] JPAC's role is to, inter alia, advise the Council on any matter within the scope of the Agreement and to provide various types of information to the Secretariat.[15]

As the lengthy menu of objectives in Article 1 of the NAAEC would suggest, the CEC carries out a wide range of activities. These activities are divided into four major program areas: (1) Environment, Economy, and Trade; (2) Conservation of Biodiversity; (3) Pollutants and Health; and (4) Law and Policy.[16] The CEC also administers the North American Fund for Environmental Cooperation (NAFEC), a grant program that provides funding for community-based environmental projects in Canada, Mexico, and the United States.[17] Another significant CEC responsibility is to implement a "citizen submission" process, in which citizens may file "submissions" asserting that any of the three signatory countries is not enforcing its environmental laws effectively.[18]

---

11. *See id.* art. 9(1). Section 9(1) provides specifically that the Council is comprised of "cabinet-level or equivalent representatives of the Parties, or their designees." *Id.*

12. *See id.* art. 11.

13. *See id.* art. 16.

14. *See id.* art. 16(1). JPAC members have a range of backgrounds. For example, of the U.S. members of JPAC, Peter Berle is a lawyer, former president/CEO of the National Audubon Society, and a former Commissioner of the New York State Department of Environmental Conservation. Jonathan Plaut is the retired director of environmental quality for Allied Signal, Inc. In addition to Mr. Berle and Mr. Plaut, the other current U.S. members of JPAC are Steve Owens, an attorney in Arizona, and John Wirth, president of the North American Institute. CEC's home page provides biographical information on each JPAC member. It also contains the JPAC Vision Statement and the Rules of Procedure that govern JPAC's work. *See generally Joint Public Advisory Committee* (visited Apr. 5, 2000) <http://www.cec.org/jpac>.

15. *See* NAAEC, *supra* note 2, art. 16(4)-(5).

16. *See generally* CEC, NORTH AMERICAN AGENDA FOR ACTION 1999-2001: A THREE-YEAR PROGRAM PLAN FOR THE COMMISSION FOR ENVIRONMENTAL COOPERATION, *available at* CEC homepage, *supra* note 2 [hereinafter NORTH AMERICAN AGENDA].

17. *See* CEC, *Grants for Environmental Cooperation* (visited Apr. 8, 2000) <http://dev3.hbe.ca/grants/index.cfm?varlan=english>.

18. The CEC has various other responsibilities as well. *See, e.g.*, NORTH AMERICAN AGENDA, *supra* note 16, at 118. Some observers suggest that while the NAAEC embraces a wide array of activities and areas of focus, its primary orientation is toward enhancing enforcement of domestic environmental law. *See, e.g.*, David S. Baron, *NAFTA and the Environment — Making the Side Agreement Work*, 12 ARIZ. J. INT'L & COMP. L. 603, 607 (1995) (suggesting that "[a]lthough the Side Agreement assigns a variety of functions to the council and the Secretariat, perhaps the most important deal with proceedings to address alleged failures by Parties to adequately enforce their environmental law"); Bugeda, *supra* note 2, at 1596 (stating that the citizen submission process is "[p]erhaps the most important function of the Secretariat of the CEC, and definitely the one that has captured the most attention . . ."); A.L.C. de Mestral, *The Significance of the NAFTA Side Agreements on Environmental and Labour Cooperation*, 15 ARIZ. J. INT'L & COMP. L. 169, 176 (1998) (suggesting that "Article 14 is the core provision of the NAAEC . . ."); Raustiala 1996, *supra* note 6, at 729 (suggesting that "[t]he NAAEC, though covering a number of important trade and environmental issues, is centrally concerned with strengthening the enforcement of domestic environmental law").

With this brief overview of the CEC's origins, structure, and substantive responsibilities,[19] I now turn to a more in-depth review of the aspect of the CEC's work that is the focus of this article, the citizen submission process.[20]

III. THE CITIZEN SUBMISSION PROCESS

Articles 14 and 15 of the NAAEC establish a process through which non-governmental organizations (NGOs) or persons may file a submission alleging that a member country is not enforcing its environmental law effectively.[21] The CEC web page summarizes the process as follows:

> Under Article 14 of the NAAEC, the Secretariat may consider a submission from any nongovernmental organization or person asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. Where the Secretariat determines that the Article 14(1) criteria are met, it shall then determine whether the submission merits requesting a response from the Party named in the submission under Article 14(2). In light of any response provided by that Party, the Secretariat may recommend to the Council that a factual record be prepared, in accordance to Article 15. The Council, comprised of the environmental ministers (or their equivalent) of Canada, Mexico and the U.S., may then instruct the Secretariat to prepare a factual record on the submission. The final factual record is made publicly available upon a two-thirds vote of the Council.[22]

The Council adopted Guidelines in October 1995 in order to provide additional guidance concerning this process.[23] The Council approved revisions to these Guidelines during its June 1999 annual meeting in Banff, Canada.[24]

---

19. For a more in-depth discussion of the CEC's structure and responsibilities, see, e.g., JOHNSON & BEAULIEU, *supra* note 3, at 132-60.

20. This process is by no means completely unrelated to other CEC work. For example, one of the work projects of the Law and Policy program area involves review of compliance indicators, a topic directly related to the central issue of Article 14 and 15 submissions, notably whether a party is effectively enforcing its environmental laws. *See* JOHNSON & BEAULIEU, *supra* note 3, at 113; *see also* CEC, INDICATORS OF EFFECTIVE ENVIRONMENTAL ENFORCEMENT: PROCEEDINGS OF A NORTH AMERICAN DIALOGUE (1999), *available at* CEC homepage, *supra* note 2 [hereinafter CEC INDICATORS].

21. NAAEC, *supra* note 2, art. 14(1). Section (1)(f) of Article 14 makes clear that the person or organization filing the submission must reside or be established in the territory of a party. *See id.*

22. CEC homepage, *supra* note 2.

23. *See CEC Council Resolution 95-10* (Oct. 13, 1995), *available at* CEC homepage, *supra* note 2.

24. *See CEC Council Resolution 99-06* (June 28, 1999), *available at* CEC homepage, *supra* note 2; *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (June 28, 1999), *available at* CEC homepage, *supra* note 2 [hereinafter *Guidelines*]. The Guidelines, for example, provide details on how submissions must be submitted: in writing, in a language designated by one of the Parties, not exceeding 15 pages in length excluding supporting information, etc. *See Guidelines, supra,* Nos. 3.1-3.3.

JPAC provided an Advice to Council in which JPAC advised the Council not to revise the Guidelines. *See JPAC Advice to Council 99-01* (Mar. 25, 1999), *available at* CEC homepage, *supra* note 2. JPAC explained the three primary bases for its recommendation as follows:

A. ARTICLE 14(1)

The Secretariat of the CEC conducts an initial review of a citizen submission under Article 14(1) of the NAAEC. The opening sentence of Article 14(1) provides that "[t]he Secretariat may consider a submission . . . asserting that a Party *is failing* to *effectively enforce its environmental law* . . . ."[25] This sentence limits the scope of the Article 14 process in three ways, to submissions involving: (1) one or more "environmental law(s);" (2) further, to failures to "effectively enforce" such environmental laws; and (3) temporally, to failures fitting into the first two categories that are ongoing in nature.[26] These three concepts are reviewed briefly below.

1. "Environmental Law"

The Agreement defines "environmental law" to include laws "the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health . . . ." [27] The CEC has concluded that a wide

---

> By far the majority of those members of the public who provided written comments [on the proposed revisions to the Guidelines] and those who participated in the workshop held the view that the case had not been made to support the revision process;
>
> The proposed revisions were tested by the workshop participants against an agreed upon set of criteria namely, accessibility, transparency, independence of the Secretariat, balance/parity between party and submitter, impartiality, discretionality and conformity to the NAAEC. With a few minor exceptions it was concluded that the proposed revisions detracted from these criteria, in certain cases seriously so.
>
> The argument for change has not been made and to do so at this time would undermine public confidence in the citizen submission process. Indeed, the proposed changes would slow the process, make it more bureaucratic and less transparent.

Id. In finalizing its revisions to the Guidelines, the Council indicated that it was "[m]indful of the public comments received and of JPAC Advice 99-01." *CEC Council Resolution 99-06, supra.*

25. NAAEC, *supra* note 2, art. 14(1) (emphasis added).

26. *Id.* Article 45(1) is relevant to the scope of this clause as well, providing as follows:

> For purposes of this Agreement:
>
> A Party has not failed to "*effectively enforce its environmental law*" [emphasis added] . . . in a particular case where the action or inaction in question by agencies or officials of that Party:
>
> reflects a reasonable exercise of their discretion in respect of investigatory, prosecutorial, regulatory or compliance matters; or
>
> results from *bona fide* decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities. . . .

Id. art. 45(1).

27. *See id.* art. 45(2)(a). Article 45(2)(a) provides as follows:

> (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,
>
> (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

variety of laws fall within this definition. Examples include the Canadian Federal Fisheries[28] and Environmental Assessment Acts;[29] Mexico's General Law for Ecological Equilibrium and Environmental Protection (LGEEPA)[30] and its regulation concerning environmental impact (RIA);[31] and the National Environmental Policy,[32] Clean Air,[33] and Clean Water Acts[34] in the United States.

The Secretariat has determined that the definition excludes at least two types of provisions from treatment under Article 14 even though activities under these provisions may have significant adverse impacts on the environment. One such type of provision is that which has as its primary purpose the exploitation or harvesting of natural resources.[35] Some commentators suggest that the plain language of the Agreement seems to dictate such a result.[36]

---

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.

Id.

28. *See* Fisheries Act, R.S.C. (1985) (Can.); *see also* CEC Secretariat, *Article 14(1) Determination, B.C. Aboriginal Fisheries Commission et al.*, SEM-97-001 (May 1, 1997), *available at* CEC homepage, *supra* note 2 (concerning the Fisheries Act).

29. *See* Canadian Environmental Assessment Act, ch. 37, S.C. (1992) (Can.); *see also* CEC Secretariat, *Article 14(1) Determination, Friends of Oldman River*, SEM-97-006 (Jan. 23, 1998), *available at* CEC homepage, *supra* note 2 (concerning the Canadian Environmental Assessment Act).

30. *See* Ley General del Equilibrio Ecologico y de Proteccion al Ambiente [LGEEPA]; *see also* CEC Secretariat, *Article 14(1) Determination*, SEM-96-001 (Feb. 6, 1996), *available at* CEC homepage, *supra* note 2 [hereinafter *Cozumel Article 14(1) Determination*] (concerning LGEEPA).

31. *See* Reglamento de la Ley General del Equilibrio Ecológico y la Protección al Ambiente en Materia de Impacto Ambiental (Mex.).

32. *See* 42 U.S.C. § 4321 et seq.; *see also* CEC Secretariat, *Article 14(1) Determination, Southwest Center for Biological Diversity et al.*, SEM-96-004 (Dec. 16, 1996), *available at* CEC homepage, *supra* note 2 (concerning NEPA).

33. *See* 42 U.S.C. § 7401 et seq.; *see also* CEC Secretariat, *Article 14(1) Determination, Dept. of the Planet Earth et al.*, SEM-98-003 (Dec. 14, 1998), *available at* CEC homepage, *supra* note 2 (concerning the U.S. Clean Air Act and Pollution Prevention Act).

34. *See* 33 U.S.C. § 1251 et seq.

35. *See* CEC Secretariat, *Determination in Accordance with Article 14(1) of the North American Agreement for Environmental Cooperation*, SEM-98-002 (June 23, 1998), *available at* CEC homepage, *supra* note 2 (finding that the submission involved a commercial forestry dispute not subject to Article 14). *Cf.* CEC Secretariat, *Determination Pursuant to Articles 14 & 15 of the North American Agreement on Environmental Cooperation*, SEM-95-002 (Dec. 8, 1995), *available at* CEC homepage, *supra* note 2 (dismissed on other grounds)(finding that submission involving U.S. statute that addressed harvesting of natural resources subject to Article 14 review).

36. *See, e.g.*, Raustiala 1996, *supra* note 6, at 746 (stating that "[n]atural resource management statutes are clearly environmental laws by any reasonable understanding of the word, yet they are expressly denied that status in the Article 45 definition"); Greg Block, *NAFTA's Environmental Provisions: Are They Working As Intended? Are They Adequate?*, 23 CAN.-U.S. L.J. 409, 412 (1997) (noting that "[t]he NAAEC has a rather unusual definition of environmental law, excluding from Articles 14 and 15 the exploitation or harvesting of

A second issue that has arisen involves whether international legal instruments qualify as "environmental law." The Secretariat has concluded that at least in some instances they do not. It recently addressed this issue in its determination in connection with the Great Lakes submission.[37] It found that neither the Great Lakes Water Quality Agreement[38] nor the 1986 Agreement Between the Government of the United States of America and the Government of Canada Concerning the Transboundary Movement of Hazardous Waste[39] should be considered an "environmental law" for purposes of Article 14, noting as follows:

> Article 45(2) of the NAAEC is the key operative provision, defining environmental law to mean "any statute or regulation of a Party . . . ." The Secretariat dismissed the Animal Alliance submission (SEM-97-005) on the ground that the Biodiversity Convention did not qualify as "environmental law" because it was an international obligation that had not been imported into domestic law by way of statute or regulation pursuant to a statute. The Animal Alliance determination is consistent with the plain language of Article 45(2) and the Secretariat follows it here. As noted concerning that submission, by making this determination, the Secretariat is not excluding the possibility that future submissions may raise questions concerning a Party's international obligations that would meet the criteria in Article 14(1).[40]

A potential third significant exclusion are laws "directly related to worker safety or health."[41] No submission to date has raised this issue. As a result, the Secretariat has not yet had occasion to apply this exclusion.

2. "Effective Enforcement"

Submissions have asserted that the parties have "failed to effectively enforce" their environmental laws on a variety of grounds. Perhaps the most common to date has been the assertion that one or more regulated parties are violating environmental requirements and the government is failing to enforce effectively

---

natural resources"); Steve Charnovitz, *The NAFTA Environmental Side Agreement: Implications for Environmental Cooperation, Trade Policy, and American Treatymaking*, 8 TEMP. INT'L & COMP. L.J. 257, 267 (1994) [hereinafter Charnovitz 1994] (asserting that "[t]he term 'environmental law' is . . . sharply circumscribed" because of this limitation, among others).

37. *See* Dept. of Planet Earth et al., *NGO Petition to the North American Commission for Environmental Cooperation for an Investigation and Creation of a Factual Record*, SEM-98-003 (May 28, 1998), *available at* CEC homepage, *supra* note 2 [hereinafter *Great Lakes Submission*]; CEC Secretariat, *Determination Pursuant to Article 14(1) and (2) of the North American Agreement on Environmental Cooperation*, SEM-98-003 (Sept. 8, 1999), *available at* CEC homepage, *supra* note 2 [hereinafter *Great Lakes Article 14(1) and (2) Determination*].

38. Great Lakes Water Quality Agreement of 1978, U.S.-Can., 30 U.S.T. 1383.

39. Agreement Between the Government of the United States of America and the Government of Canada Concerning the Transboundary Movement of Hazardous Waste, Oct. 28, 1986, *available in* 1986 WL 235022.

40. *Great Lakes Article 14(1) and (2) Determination*, *supra* note 37.

41. NAAEC, *supra* note 2, art. 45(2)(a)(iii).

the requirements because of allegedly inadequate inspection practices, prosecution-related efforts, or both. With respect to recent submissions involving the United States, some of the assertions contained in the Great Lakes submission fall into this category.[42] The BC Hydro and BC Mining submissions involving Canada do so as well.[43] The Secretariat has found that this type of assertion falls within the scope of Article 14(1).[44] Failure to enforce NEPA-type requirements has also been asserted and found to warrant a request for a response.[45]

In contrast, the Secretariat dismissed two early submissions on the ground that they challenged legislative acts and did not involve assertions of ineffective "enforcement."[46] The Secretariat dismissed the Biodiversity Legal Foundation submission, finding that a rider modifying implementation of the Endangered Species Act was not a failure to enforce environmental law.[47] The Secretariat determined that this submission, which alleged that a party's legislation did not

---

42. *See Great Lakes Article 14(1) and (2) Determination, supra* note 37.

43. *See* B.C. Aboriginal Fisheries Commission et al., *Submission to the Commission on the Environmental Cooperation Pursuant to Article 14 of the North American Agreement on Environmental Cooperation*, SEM-97-001 (Apr. 1997), *available at* CEC homepage, *supra* note 2 [hereinafter *BC Hydro Submission*]; Sierra Club of British Columbia, et al., *The Government of Canada's Failure to Enforce the Fisheries Act Against Mining Companies in British Columbia: A Submission To The Commission On Environmental Cooperation Pursuant to Article 14 of the North American Agreement on Environmental Cooperation*, SEM-98-004 (June 29, 1998), *available at* CEC homepage, *supra* note 2 [hereinafter *BC Mining Submission*]. The Council has reviewed the BC Hydro submission and agreed it met the requirements of Article 14(1). *See CEC Council Resolution 98-07* (June 24, 1998), *available at* CEC homepage, *supra* note 2.

44. *See, e.g., Great Lakes Submission, supra* note 37; *BC Hydro Submission, supra* note 43; *BC Mining Submission, supra* note 43.

45. *See, e.g.*, Comité para la Protección de los Recursos Naturales, A.C., et al., SEM-96-001 (Jan. 17, 1996), *available at* CEC homepage, *supra* note 2 [hereinafter *Cozumel Submission*]; *Great Lakes Submission, supra* note 37; JOHNSON & BEAULIEU, *supra* note 3, at 153.

46. CEC Secretariat, *Determination Under Article 14(2)*, SEM 95-001 (Sept. 21, 1995), *available at* CEC homepage, *supra* note 2 [hereinafter *Biodiversity Legal Foundation 14(2) Determination*]. For a generally positive review of the Secretariat's determination, see Raustiala 1996, *supra* note 6, at 725, 746-57. For a negative evaluation, see Jay Tutchton, *The Citizen Petition Process Under NAFTA's Environmental Side Agreement: It's Easy to Use, But Does It Work?*, 26 Envtl. L. Rep. 10,031 (Envtl. L. Inst. 1996). For a third perspective, see MacCallum, *supra* note 7, at 405-09. The Secretariat reached the same conclusion in the Sierra Club Submission. *See* CEC Secretariat, *Determination Under Article 14 & 15 of the North American Agreement on Environmental Cooperation*, SEM-95-002 (Dec. 8, 1995), *available at* CEC homepage, *supra* note 2.

Some commentators appear to agree that this limit exists in the Agreement but believe it should not. *See, e.g.*, JOHNSON & BEAULIEU, *supra* note 3, at 165 (suggesting that there was "no reason to restrict the NGO submissions . . . to 'enforcement' matters. NGOs should have been allowed to present evidence establishing that a NAFTA party is lowering environmental norms in an attempt to attract investments."). Other observers highlight the difficulty of separating enforcement from lawmaking, with one commentator characterizing the Secretariat's determinations in the two above-referenced submissions as "puzzling." Gal-Or, *supra* note 2, at 76. Professor Raustalia similarly suggests that the distinction between enforcement and lawmaking is a false one. *See, e.g.*, Kal Raustalia, *The Political Implications of the Enforcement Provisions of the NAFTA Environmental Side Agreement: The CEC as a Model for Future Accords*, 25 ENVTL. L. 131, 133, 148 (1996). The Secretariat's most recent treatment of this issue is in its Great Lakes Determination. *See* CEC Secretariat, *Determination Pursuant to Article 14(1) of the North American Agreement on Environmental Cooperation*, SEM-98-003 (Dec. 14, 1998), *available at* CEC homepage, *supra* note 2 [hereinafter *Great Lakes Article 14(1) Determination*].

47. *See Biodiversity Legal Foundation 14(2) Determination, supra* note 46.

protect the environment, was not "actionable" under the citizen submission process because its focus was on the appropriateness or effectiveness of the legislation itself.[48] The Secretariat's reasoning was as follows:

> The enactment of legislation which specifically alters the operation of pre-existing environmental law in essence becomes a part of the greater body of environmental laws and statutes on the books . . . The Secretariat therefore cannot characterize the application of a new legal regime as a failure to enforce an old one.[49]

In sum, the Secretariat strategy in this area to date has been to draw a line between government efforts to establish environmental standards and government efforts to enforce such standards once they are established. It has indicated that the former are beyond the scope of Article 14 while the latter are legitimate areas of inquiry under the Article 14 process. To quote from the Great Lakes Determination, in making such a distinction the Secretariat has noted that "drawing the line between 'standard-setting' and 'enforcement' of the law may be blurred on occasion and difficult to discern at the margins."[50] Submissions on the margins are likely to elicit additional CEC efforts to draw such lines.

3. The Temporal Requirement in Article 14(1)

Two temporal issues have emerged in the implementation of Article 14. First, there is the requirement that submitters assert that a party "is failing" to effectively enforce its environmental law.[51] In *Canadian Environmental Defence Fund*, the Submitters asserted that the Canadian government had failed to enforce a Canadian law requiring environmental assessment of federal policies and programs.[52] The submission, however, was filed three years after the program at issue came into effect. The program had since been discontinued. The Secretariat dismissed the submission on the ground that it did not satisfy the temporal requirement in Article 14 that a party to the Agreement "*is failing*" to effectively enforce its environmental law.[53] The Secretariat noted that, among other things, it was "not aware of any reason that would have prevented the Submitter from filing its submission at the time it became aware of the alleged failure to enforce."[54]

---

48. *See id.*

49. *Id.*

50. *Great Lakes Article 14(1) Determination*, *supra* note 46.

51. *See* NAAEC, *supra* note 2, art. 14(1).

52. Canadian Environmental Defence Fund, *Article 14 Submission Made Pursuant to the North American Agreement on Environmental Cooperation*, SEM 97-004 (May 26, 1997), *available at* CEC homepage, *supra* note 2 [hereinafter *Canadian Environmental Defence Fund Submission*].

53. CEC Secretariat, *Article 14(1) Determination*, SEM-97-004 (Aug. 25, 1997), *available at* CEC homepage, *supra* note 2 (emphasis added) [hereinafter *Canadian Environmental Defence Fund Determination*].

54. *Id.*

The second temporal issue involves the extent to which the Secretariat may consider events that occurred before the NAAEC became effective on January 1, 1994. The Commission's response to this issue has two parts. First, it has noted that there is no indication that the Agreement is to be given retroactive effect.[55] In addition, however, the Secretariat has concluded that "conditions or situations" that existed before January 1, 1994 may be relevant to a "present, continuing failure to enforce environmental law."[56] This issue first was considered in the Cozumel submission, the third submission to come before the Secretariat.[57] The Council's Resolution directing the Secretariat to prepare a factual record concerning the BC Hydro submission provides the Council's latest word on this issue.[58] In that Resolution the Council directed the Secretariat

> to consider whether the party concerned "is failing to effectively enforce its environmental law" since the entry into force of the NAAEC on 1 January 1994. In considering such an alleged failure to effectively enforce, relevant facts that existed prior to 1 January 1994, may be included in the factual record. . . .[59]

In sum, one submission to date has been dismissed on the basis that it did not satisfy the "temporal" requirement in Article 14 that a party to the Agreement be failing to effectively enforce its environmental law.[60] As a general matter, the Secretariat has determined that the NAAEC does not apply retroactively.[61] It also has determined, on the other hand, and the Council has agreed, that an alleged violation of an environmental law that occurred pre-1994 may be a relevant focus for a factual record if the alleged violation is relevant to whether a party effectively enforced its environmental law post-1994.[62]

---

55. *See* CEC Secretariat, *Recommendation of the Secretariat to Council for the Development of a Factual Record in Accordance with Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, SEM-96-001 (June 7, 1996), *available at* CEC homepage, *supra* note 2 [hereinafter *Cozumel Recommendation*].

56. *Id.*

57. *See Cozumel Submission*, *supra* note 45.

58. *See CEC Council Resolution 98-07* (June 24, 1998), *available at* CEC homepage, *supra* note 2.

59. *Id.*

60. *See Canadian Environmental Defence Fund Determination*, *supra* note 52. As this article was going to press, a second submission was dismissed because, inter alia, it did not satisfy the "temporal" requirement. *See* CEC Secretariat, *Determination in Accordance with Article 14(1) of the North American Agreement on Environmental Cooperation*, SEM-00-003 (Apr. 12, 2000), *available at* CEC homepage, *supra* note 2 (determining that the submission was premature because the government action that constituted the asserted failure to effectively enforce had not yet been taken).

61. *See Cozumel Recommendation, supra* note 55.

62. *See Cozumel Submission*, *supra* note 45; *BC Hydro Submission*, *supra* note 43. In connection with the Cozumel Submission, the Secretariat stated:

> Article 47 of the NAAEC indicates the Parties intended the Agreement to take effect on January 1, 1994. The Secretariat is unable to discern any intentions, express or implied, conferring retroactive effect on the operation of Article 14 of the NAAEC. Notwithstanding the above, events or acts

4. Article 14(1)'s Six Listed Threshold Criteria

In addition to the three parameters for the Article 14 citizen submission process contained in Article 14(1)'s opening sentence, this provision specifically lists six threshold criteria that submissions must meet in order to trigger further consideration. Submissions must:

> (a) [be] in writing in a language designated by that Party in a notification to the Secretariat;
>
> (b) clearly identif[y] the person or organization making the submission;
>
> (c) provide[ ] sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based;
>
> (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 indicates the Party's response, if any; and
>
> (f) [be] filed by a person or organization residing or established in the territory of a Party.[63]

These criteria are fairly straightforward. A number of substantive points, however, warrant mention. First, the Guidelines make it clear that the Article 14(1)(c) requirement that a submitter provide "sufficient information" includes the obligation to identify the applicable environmental statute or regulation allegedly not being effectively enforced.[64] The Secretariat requested that the submitters in *Rio Magdalena* further specify which laws allegedly were not being effectively enforced.[65]

Second, the Guidelines elaborate on the Article 14(1)(d) requirement that a submission "appear[ ] to be aimed at promoting enforcement rather than at harassing industry."[66] Guideline No. 5.4 provides that:

> A submission must appear to be aimed at promoting enforcement rather than at harassing industry. In making that determination, the Secretariat will consider such factors as whether or not:
>
> (a) the submission is focused on the acts or omissions of a Party rather than on compliance by a particular company or business; especially if the

---

concluded prior to January 1, 1994, may create conditions or situations that give rise to current enforcement obligations. It follows that certain aspects of these conditions or situations may be relevant when considering an allegation of a present, continuing failure to enforce environmental law.

Cozumel Recommendation, *supra* note 55.

63. NAAEC, *supra* note 2, art. 14(1).

64. *See Guidelines*, *supra* note 23, No. 5.2.

65. *See* CEC Secretariat, *Request for Additional Information from the Submitters*, SEM-97-002 (July 2, 1997), *available at* CEC homepage, *supra* note 2.

66. NAAEC, *supra* note 2, art. 14(1)(d).

> Submitter is a competitor that may stand to benefit economically from the submission;
>
> (b) the submission appears frivolous.[67]

Submitters typically have addressed Article 14(1)(d) by affirming their interest in environmental enforcement. In one submission the submitter expressly notes that it has no industry ties or commercial interest in the issue.[68] The submissions filed to date have focused on the acts or omissions of a party, not on the conduct of individual companies, though in some situations, such as state-owned companies, the distinction is a fine one. Perhaps for this reason, subsection (1)(d) of Article 14 has received relatively little attention in the Secretariat's — or the Council's — review of early submissions.

The revised Guidelines for the Article 14/15 process issued in July 1999 make one change to the process of review under Article 14(1) that warrants reference here. The revised Guidelines require the Secretariat to include its reasons in making its determination under Article 14(1).[69] Prior to these revisions, the Secretariat had only provided such reasons in determinations in which it dismissed a submission for failing to meet the criteria. In its relatively brief determinations finding that submissions met the Article 14(1) criteria, the Secretariat typically did not go into detail concerning its reasoning. Thus, this new provision is likely to result in lengthier Article 14(1) determinations than were seen in the first few years of the process.

A final issue relating to Article 14(1) concerns the appropriate level of analysis at this preliminary stage of the process. The Secretariat has discussed this issue in its recent determination concerning the Great Lakes Submission, among others.[70] The Secretariat indicates that, at least conceptually, an Article 14(1) review is not intended to be unduly searching, and the requirements contained in Article 14 are not intended to place an undue burden on submitters. In the determination concerning the Animal Alliance Submission (SEM-97-005), for example, the Secretariat states as follows:

> The Secretariat is of the view that Article 14, and Article 14(1) in particular, are not intended to be insurmountable screening devices. The Secretariat also believes that Article 14(1) should be given a large and liberal interpretation, consistent with the objectives of the NAAEC. . . .[71]

In its discussion in the Animal Alliance Determination of the burden under Article 14, the Secretariat noted that use of the word "assertion" in the opening

---

67. *Guidelines*, *supra* note 23, No. 5.4.

68. *See* Earthlaw, *Submission Pursuant to Article 14 of the North American Agreement on Environmental Cooperation*, SEM-96-004 (Nov. 14, 1996), *available at* CEC homepage, *supra* note 2.

69. *See Guidelines*, *supra* note 23, No. 7.2.

70. *See Great Lakes Article 14(1) Determination*, *supra* note 46.

71. CEC Secretariat, *Determination Pursuant to Article 14(1) of the North American Agreement on Environmental Cooperation*, SEM-97-005 (May 26, 1998), *available at* CEC homepage, *supra* note 2 [hereinafter *Animal Alliance Determination*].

sentence of Article 14(1) "supports a relatively low threshold under Article 14(1),"[72] although it also indicated that "a certain amount of substantive analysis is nonetheless required at this initial stage" because "[o]therwise, the Secretariat would be forced to consider all submissions that merely 'assert' a failure to effectively enforce environmental law."[73]

The Secretariat noted in its Great Lakes Determination that the revisions to the Guidelines implicitly recognize that a submitter's capacity to provide details to support its assertions is limited by the mechanics of the process:

> The recent revisions to the Guidelines provide further support for the notion that the Article 14(1) and (2) stages of the citizen submission process are intended as a screening mechanism. The Guidelines limit submissions to 15 pages in length. The revised Guidelines require a submitter to address a minimum of 13 criteria or factors in this limited space, indicating that a submission is not expected to contain extensive discussion of each criterion and factor in order to qualify under Article 14(1) and (2) for more in-depth consideration.[74]

The track record thus far suggests that the Secretariat is taking its initial screening responsibility under Article 14(1) seriously. Several of the twenty-six submissions made to date have been dismissed as deficient under Article 14(1).[75] It will be interesting to monitor whether the percentage of early dismissals declines over time as submitters become more comfortable with the process and as the CEC begins to establish clear parameters for the types of issues subject to Article 14 review.

B. ARTICLE 14(2)

Article 14(2) of the citizen submission process provides that when the Secretariat determines that a submission meets the Article 14(1) criteria, the Secretariat shall determine whether the submission merits a request for a response from the party. This second determination is guided by the Secretariat's consideration of whether:

> (a) the submission alleges harm to the person or organization making the submission;
>
> (b) the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of this Agreement;

---

72. The relevant part of Article 14(1) reads: "The Secretariat may consider a submission from any non governmental organization or person *asserting that* . . . ." NAAEC, *supra* note 2, art. 14(1) (emphasis added).

73. *Animal Alliance Determination*, *supra* note 71.

74. *Great Lakes Article 14(1) and 14(2) Determination*, *supra* note 37; *see also Guidelines*, *supra* note 23, No. 3.3.

75. *See infra* Part IV.

> (c) private remedies available under the Party's law have been pursued; and
> (d) the submission is drawn exclusively from mass media reports. [76]

Perhaps the most important point is that these "guiding factors" play a different role in the Secretariat's review than do the criteria in Article 14(1). If a submitter fails to meet a single Article 14(1) criterion, the Secretariat must dismiss the submission.[77] In contrast, the Secretariat is guided by the Article 14(2) factors in determining whether to continue the process by requesting that the Party respond to the submission and in making this determination the Secretariat "may assign weight to each factor as it deems appropriate in the context of a particular submission."[78]

With respect to the specific Article 14(2) factors, the Guidelines elaborate on the type of harm contemplated in Article 14(2)(a). The Guidelines indicate that the harm should be due to the asserted failure of enforcement. Further, the harm should relate to protection of the environment or prevention of danger to human life or health. Guideline No. 7.4 provides as follows:

> In considering whether the submission alleges harm to the person or organization making the submission, the Secretariat will consider such factors as whether:
> (a) the alleged harm is due to the asserted failure to effectively enforce environmental law; and
> (b) the alleged harm relates to the protection of the environment or the prevention of danger to human life or health (but not directly related to worker safety or health), as stated in Article 45(2) of the Agreement.[79]

The Secretariat's request for a response in the Cozumel Submission treated the "harm" issue as follows:

> In considering harm, the Secretariat notes the importance and character of the resource in question — a portion of the magnificent Paradise coral reef located in the Caribbean waters of Quintana Roo. While the Secretariat recognizes that the submitters may not have alleged the particularized, individual harm required to acquire legal standing to bring suit in some civil proceedings in North America, the especially public nature of marine resources bring[s] the submitters within the spirit and intent of Article 14 of the NAAEC.[80]

A number of commentators have applauded the Secretariat's approach concerning the notion of harm as an appropriately broad interpretation for purposes of the

---

76. NAAEC, *supra* note 2, art. 14(2)(d).
77. *See id.* art. 14(1).
78. *Great Lakes Article 14(1) and 14(2) Determination*, *supra* note 37.
79. *Guidelines*, *supra* note 23, No. 7.4.
80. *Cozumel Recommendations*, *supra* note 55.

Agreement.[81] Professor Gal-Or, for example, suggests that "[b]y recognizing the public nature of environmental concerns and harms as well as the right of the public interest to legal standing, the Secretariat has met the expectations of many environmental activists."[82] It will be interesting to monitor the application of this provision. The issue of harm has proved contentious in the U.S. citizen suit context.[83]

The second Article 14(2) factor — subsection (b) — involves whether the submission raises matters whose further study in this process would advance the goals of the NAAEC.[84] This factor, among other things, provides an important context for the CEC's fulfillment of its responsibilities under Article 14. The Article 14 process charges an international institution, the CEC, with reviewing domestic enforcement practices. Consideration of Article 14(2)(b) should help the CEC to keep in mind its status as an international institution with a continental reach as the Secretariat addresses individual submissions and makes judgments as to which warrant further review under this process.

The Article 14(2)(c) factor of pursuit of private remedies is also worth mention. Guideline No. 7.5, adopted in Banff, Canada in June 1999, contains three guideposts for consideration of this factor. First, the Secretariat is to consider whether a submission may interfere with private domestic litigation pursued by the submitter.[85] Second, the Secretariat is to consider the value of pursuing a submission in light of any such litigation.[86] Finally, the Guidelines indicate that a "reasonableness" standard should be used in reviewing pursuit of private remedies.[87] The Guidelines provide as follows on this issue:

> In considering whether private remedies available under the Party's law have been pursued, the Secretariat will be guided by whether:
>
> (a) requesting a response to the submission is appropriate if 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) reasonable actions have been taken to pursue such remedies prior to initiating a submission, bearing in mind that barriers to the pursuit of such remedies may exist in some cases.[88]

---

81. *See* Gal-Or, *supra* note 2, at 89.

82. *Id.* Gal-Or also suggests that environmental activists "have seen the NAAEC as a vehicle to enhancing public participation in dispute resolution." *Id. See* Bugeda, *supra* note 2, at 1609 (discussing Cozumel and noting "[i]t is clear that the Secretariat met the expectations of many environmental groups by adopting a broad interpretation of Article 14(2)(a) . . ."); *see also* Baron, *supra* note 18, at 609 (urging an interpretation of the sort articulated in Cozumel).

83. *See generally* Craig N. Johnston, *1999 — The Year in Review*, 30 Envtl. L. Rep. 10,173, 10,180-85 (Envtl. L. Inst. 2000); JOHN D. ECHEVERRIA & JON T. ZEIDLER, BARELY STANDING: THE EROSION OF CITIZEN "STANDING" TO SUE TO ENFORCE FEDERAL ENVIRONMENTAL LAW (Environmental Policy Project, Georgetown University Law Center, 1999) (on file with GEO. INT'L ENVTL. L. REV.).

84. *See* NAAEC, *supra* note 2, art. 14(2)(b).

85. *See Guidelines*, *supra* note 23, No. 7.5.

86. *See id.*

87. *See id.*

88. *Id.*

The fourth, and final, Article 14(2) factor involves the extent to which the submission is "drawn exclusively from mass media reports."[89] This factor has received relatively little attention to date. Submissions that are drawn exclusively from mass media reports are probably less likely than others to warrant further consideration, other factors being equal.

Moving from the specific Article 14(2) factors to how Article 14(2) fits into the Article 14 process, the Secretariat has two options upon completion of its review under Article 14(2). First, it may unilaterally dismiss a submission.[90] Alternatively, the Secretariat may decide to request a response from the party. As of April 17, 2000, the Secretariat has now requested party responses for sixteen submissions.[91] In either case, the revised Guidelines require the Secretariat to explain its reasons.[92] If the Secretariat pursues the latter course, the next phase involves the Secretariat's consideration of the response, as well as the submission, under Article 15(1) to determine whether to recommend to the Council the development of a factual record.[93]

C. ARTICLE 15

If the Secretariat determines, after receiving the party's response, that a factual record is not appropriate, it dismisses the submission and provides its reasons in the dismissal.[94] If the Secretariat considers that a factual record is warranted, it so advises the Council and provides its reasons.[95] The Council then votes whether to direct the Secretariat to develop such a record.[96] While much of the Council's work is done by "consensus,"[97] the Agreement specifically provides that a two-thirds vote is sufficient to initiate development of a factual record.[98]

---

89. NAAEC, *supra* note 2, art. 14(2)(d).

90. *See infra* Part IV.

91. *See id.*

92. *See Guidelines*, *supra* note 23, No. 9.6. The Secretariat may request additional information from the party if, inter alia, the Secretariat believes such would be helpful to its completion of this stage of the process. *See* NAAEC, *supra* note 2, art. 21(1)(b).

93. *See* NAAEC, *supra* note 2, art. 15(1).

94. *See Guidelines*, *supra* note 23, No. 9.6. If the party does not provide a response within the requisite time frame, the Secretariat may nevertheless begin its consideration of whether to inform the Council that the submission warrants development of a factual record. *See id.* No. 9.5.

95. *See* NAAEC, *supra* note 2, art. 15(1).

96. A new provision in the July 1999 revised guidelines provides that the Council may seek "further explanation" when it receives a recommendation from the Secretariat to develop a factual record. *See Guidelines*, *supra* note 23, No. 10.1.

97. *See* NAAEC, art. 9(6), *supra* note 2 (providing that "[a]ll decisions and recommendations of the Council shall be taken by consensus, except as the Council may otherwise decide or as otherwise provided in this Agreement"). The term "consensus" is defined as unanimous approval. *See* Kirton, *supra* note 4, at 468 (noting that "[a]lthough the Council will normally operate by consensus, and thus empower each of the three countries with a veto, the Council moves from pure national control to *supra*national constraint in several areas [including Article 15] . . . ") (emphasis added); JOHNSON & BEAULIEU, *supra* note 3, at 133 (noting that "[t]he decision-making procedure requires unanimity, unless the agreement provides otherwise").

98. *See* NAAEC, *supra* note 2, art. 15(2).

If the Council decides not to direct development of a factual record, the Secretariat's last action on the submission is to notify the submitter and inform the submitter that the submission process is terminated.[99]

If the Council directs the Secretariat to develop a factual record, the Secretariat embarks on this task.[100] The Agreement authorizes the Secretariat to gather factual information relevant to the issues at stake in the submission. Article 15(4) of the Agreement authorizes the Secretariat to consider "any relevant technical, scientific or other information"[101] that is (a) publicly available; (b) submitted by interested non-governmental organizations or persons; (c) submitted by the Joint Public Advisory Committee; or (d) developed by the Secretariat or by independent experts. In addition, the Agreement provides that the Secretariat shall consider any information furnished by a party.

The Secretariat submits its draft factual records to the Council for review. The Guidelines specify that draft factual records shall include:

> (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
> (d) the facts presented by the Secretariat with respect to the matters raised in the submission.[102]

The Agreement provides that "[a]ny Party may provide comments on the accuracy of the draft within forty-five days thereafter."[103] The Secretariat is to incorporate, "as appropriate," any such comments in its final factual record and submit the final version to the Council.[104] The Council then determines whether to make the final factual record publicly available. Again, a two-thirds vote is sufficient to make a factual record public.[105] The issuance of a final factual record is the final phase of the Article 14/15 process.[106]

---

99. *See Guidelines*, *supra* note 23, No. 10.4.

100. *See* NAAEC, *supra* note 2, art. 15(2).

101. *Id.* art. 15(4).

102. *Guidelines*, *supra* note 23, No. 12.1.

103. NAAEC, *supra* note 2, art. 15(5).

104. *Id.* art. 15(6).

105. *See id.* art. 15(7). Guideline No. 13.1 provides:

> [A]fter receiving the final factual record, the Council may decide, by a two-thirds vote, to make it public. If it so decides, the final factual record will be made public as soon as it is available in the three official languages of the Commission and a copy will be provided to the Submitter. This should normally be within 60 days of the submission of the final factual record to the Council.

Guidelines, *supra* note 23, No. 13.1.

106. Part Five of the Agreement provides a mechanism for a party to initiate a proceeding against another party regarding "whether there has been a persistent pattern of failure by that other Party to effectively enforce its environmental law." NAAEC, *supra* note 2, art. 22(1). While it has not happened to date, there is the potential that a factual record or information produced pursuant to a factual record process, could be used as part of, or even to launch, a Part Five proceeding. *See* Bugeda, *supra* note 2, at 1603. For a discussion of the Part

IV. A STATUS UPDATE[107]

A total of twenty-six submissions have been filed since the Agreement went into effect in January 1994. Of these, nine involve Mexico, nine involve Canada, and eight involve the United States. Eleven of these submissions have been terminated in one way or another; the other fifteen are currently pending. The eleven that are no longer pending were resolved in three different ways: dismissal, withdrawal, and publication of a factual record.

Dismissed. Nine submissions are no longer pending because they have been dismissed by the Secretariat. Eight submissions have been dismissed under Article 14(1) or (2):

- Canadian Environmental Defence Fund (SEM-97-004),
- Animal Alliance of Canada et al. (SEM-97-005),
- Ortíz Martínez (SEM-98-002),
- Biodiversity Legal Foundation et al. (SEM-95-001),
- Sierra Club et al. (SEM-95-002),
- Aage Tottrup (SEM-96-002),
- Hudson River Audubon Society of Westchester, Inc. et al. (SEM-00-003), and
- Instituto de Derecho Ambiental, A.C., et al. (SEM-98-001).

The Secretariat dismissed this last submission twice in determinations dated September 13, 1999 and January 11, 2000. The Secretariat dismissed a ninth submission, Department of the Planet Earth et al. (SEM-98-003) in December 1998, but this submission is treated as currently pending because the submitter filed a revised submission following the dismissal. The Secretariat dismissed a tenth submission, Oldman River I (SEM-96-003) in 1996. The submitters amended the submission and the Secretariat determined that it met the requirements of Articles 14(1) and (2) but later dismissed it under Article 15(1).

Withdrawn. One submission, The Southwest Center for Biological Diversity et al. (SEM-96-004), has been withdrawn.

Completed Preparation of Factual Record. One Factual Record, Comité para la Protección de los Recursos Naturales, A.C. et al. (SEM-96-001), has been prepared and made public.

Of the fifteen submissions currently under review, one is undergoing factual record development, three are pending votes from the Council in connection with the Secretariat's recommendation for development of a factual record, seven are being reviewed to determine whether development of a factual record is

---

Five process, see, e.g., Kirton, *supra* note 4, at 469 (suggesting that it is likely that this procedure will see little if any use because the three governments will "accept an implicit mutual nonaggression pact, and be reluctant to launch enforcement investigations against one another for fear that their partners will retaliate by launching similarly embarrassing investigations against them"); Bugeda, *supra* note 2, at 1594-96.

107. This status update is current as of April 17, 2000. Additional information concerning each submission is available on the CEC website. Footnotes detailing the source of the information for each submission therefore are not included.

warranted, two are awaiting a response from a Party, and two are being reviewed under Article 14(1).

Undergoing Factual Record Development. The Secretariat is currently developing a factual record on one submission, B.C. Aboriginal Fisheries Commission et al. (SEM-97-001).

Pending Votes. Three submissions are awaiting direction from Council concerning possible development of a factual record. On July 19, 1999, the Secretariat informed the Council that the Secretariat considers that the Friends of the Oldman River submission (SEM-97-006) warrants development of a factual record. On October 29, 1999, the Secretariat informed the Council that the Secretariat considers that another submission, Centre Québécois du Droit de L'environnement et al. (SEM-97-003), also warrants developing a factual record. On March 6, 2000, the Secretariat informed the Council that the Secretariat considers that a third submission, Environmental Health Coalition, et al. (SEM-98-007), warrants developing a factual record. As indicated above, the Council may, by two-thirds vote, instruct the Secretariat to prepare a factual record on one or more of these submissions.

Awaiting Determination of Whether Development of a Factual Record is Warranted. Seven submissions are being reviewed to determine whether development of a factual record is warranted. The Secretariat is currently reviewing:

- one submission concerning Canada: Sierra Club of British Columbia, et al. (SEM-98-004);
- two concerning the United States: Department of the Planet Earth et al. (SEM-98-003), and Alliance for the Wild Rockies, et al. (SEM-99-002); and
- four concerning Mexico: Instituto de Derecho Ambiental (SEM-97-007), Grupo Ecológico Manglar A.C. (SEM-98-006), Academia Sonorense de Derecho Humanos (SEM-98-005), and Comité Pro Limpieza del Río Magadalena (SEM-97-002).

These submissions are being reviewed in light of the response to determine whether development of a factual record is warranted.

Awaiting a Response from a Party. The Secretariat has requested, and is awaiting submission of, a response for two submissions that the Secretariat has determined meet the requirements of Article 14(1) and merit a response from the Party under Article 14(2): Methanex Corporation (SEM-99-001) and Neste Canada, Inc. (SEM-00-002).

Undergoing Article 14(1) Review. One submission involving Mexico is currently being reviewed under Article 14(1), Rosa María Escalante (SEM-00-001), submitted on January 27, 2000. A submission involving Canada, David Suzuki Foundation et al. (SEM-00-004), submitted on March 15, 2000, is also currently being reviewed under Article 14(1).

The following table summarizes the work the CEC Secretariat has completed concerning submissions filed under Article 14 from 1995 through 1999.

TABLE 1
HISTORY OF ACTIONS TAKEN BY THE CEC SECRETARIAT
UNDER ARTICLES 14 AND 15[108]

Year	Total Number of Actions Taken	Undergoing Article 14(1) and 14(2) Determinations	Article 14(1) and 14(2) Dismissals	Article 21(1)(b) Requests	Dismissals Following Response	Notifications to Council	Draft Final Report	Actual Final Report
1999	16	11	2	1		2		
1998	11	6	3	1		1		
1997	10	6	1		1		1	1
1996	9	6	2			1		
1995	5	2	3					

V. CLOSING OBSERVATIONS CONCERNING THE ADMINISTRATION OF THE ARTICLE 14 PROCESS TO DATE AND PROSPECTS FOR THE FUTURE

There are a host of issues concerning the Article 14 process that merit close attention. This final part begins with two quite brief observations. It then offers some thoughts concerning areas for possible future research relating to the Article 14 process.

The first observation relates to the picture painted by the statistics of the CEC's actions to date. Of the twenty-six submissions filed to date, the Secretariat has terminated nine — that is, approximately thirty-five percent. Eight of these were dismissed at an early stage — Article 14(1) or (2) — while the Secretariat terminated one — the original Friends of the Oldman River submission — after receiving the party's response. In addition to these nine dismissals, the Secretariat has issued dismissals in other instances as well, but the dismissed submissions were re-submitted (e.g., Department of the Planet Earth et al. and Instituto de Derecho Ambiental).

I leave to the individual interested reviewer the task of taking a close look at the details of the individual submissions to decide for himself or herself whether the percentage of dismissals is too high or too low. The one point that jumps out from the superficial rendering of numbers, however, is that the Secretariat is clearly not rubber-stamping submissions on their way through the process towards development of a factual record. To paraphrase the Secretariat's relatively early determination in Animal Alliance, the record appears to reflect that

108. Article 14(1) and 14(2) determinations issued after June 1999 must include explanations of the Secretariat's reasoning, per the revised Guidelines. Previous determinations finding that a submission met the 14(1) criteria and/or warranted a response under 14(2) typically did not contain such explanations. Thus, 14(1) and 14(2) determinations issued since June 1999 tend to be more detailed and elaborate than earlier determinations.

the Secretariat is taking seriously its obligation to require more than a "bare assertion" of a failure to effectively enforce in order to continue the processing of a submission.[109] At the same time, the fact that the Secretariat has concluded the Article 14(1) and (2) stages of the process for the majority of submissions by finding that such submissions warrant continued review under the process should give some comfort to those concerned that the Secretariat's relationship with the Council would compromise the Secretariat's independence in performing its responsibilities.[110]

The second observation relates to the status of the currently pending submissions. Over the past year, the Secretariat has moved a significant number of submissions through the early stages of the process. The result of this Secretariat activity is that there are now eleven submissions at the later stages of the Article 14 process. There is a bulge of seven submissions at the Article 15(1) stage of the process. That is, the Secretariat has requested and received responses from the relevant party and it is now the Secretariat's responsibility to determine whether to dismiss the submissions or to advise the Council that the development of a factual record is warranted. In addition, the Secretariat recently took the latter course with respect to three other submissions, the Friends of the Oldman River, Centre Québécois du Droit de l'Environnement, and Environmental Health Coalition, and it is currently awaiting direction from the Council.[111] Further, at the direction of the Council, the Secretariat is currently preparing a factual record for the BC Hydro submission. Treatment of this substantial number of submissions by the Secretariat and Council in the coming months is likely to provide

---

109. CEC Secretariat, *Determination Pursuant to Article 14(1) of the North American Agreement on Environmental Cooperation*, SEM-97-005 (May 26, 1998), *available at* CEC homepage, *supra* note 2.

110. *See, e.g.*, Kirton, *supra* note 4, at 460 (identifying a critical factor in the CEC's relationship with the national government as "the independence of the CEC and its Secretariat"); Christopher N. Bolinger, *Assessing the CEC on its Record to Date*, 28 LAW & POL'Y INT'L BUS. 1107, 1125 (1997) (identifying as one criticism of the CEC that it is insufficiently independent and has to pull its punches). *See also JPAC Advice to Council 99-01* (Mar. 25, 1999), *available at* CEC homepage, *supra* note 2.

The parties are certainly aware of the issue of inappropriate influence. Article 11(4) of the Agreement is intended to insulate the Secretariat from inappropriate influence from a party:

> In the performance of their duties, the Executive Director and the staff shall not seek or receive instructions from any government or any other authority external to the Council. Each Party shall respect the international character of the responsibilities of the Executive Director and the staff and shall not seek to influence them in the discharge of their responsibilities.

NAAEC, *supra* note 2, art. 11(4).

In their June 28, 1999 Council Resolution concerning the revised Guidelines for the Article 14 process, the Ministers "[r]ecogniz[e] that the revisions are designed to improve transparency and fairness of the public submissions process and are consistent with Article 11(4) of the [Agreement] and the Council's commitment to a process that honors the Secretariat's decision-making role under Article 14 of the Agreement. . . ." *CEC Council Resolution 99-06* (June 28, 1999), *available at* CEC homepage, *supra* note 2.

111. *See Friends of the Oldman River,* SEM-97-006, *available at* CEC homepage, *supra* note 2; *Centre Québécois du Droit de l'Environnement*, SEM-97-003, *available at* CEC homepage, *supra* note 2; *Environmental Health Coalition, et. al.*, SEM-98-007, *available at* CEC homepage, *supra* note 2.

fertile soil for researchers and others interested in additional exploration of this policy tool.[112]

I now turn to some suggestions for areas of possible future research concerning the Article 14 process.[113] I offer an even ten. The first seven focus primarily on issues relating to the effectiveness of the process, an area of inquiry that is of obvious importance but also of enormous complexity.[114] The last three

---

112. The Commission, for example, will create a fairly significant track record concerning the types of situations that warrant development of factual records, as well as, potentially, the types of situations that do not. *See, e.g.*, Tutchton, *supra* note 46, at 10,033 (suggesting that there are no established criteria for making such determinations). Similarly, the Commission is also likely to develop a better understanding of the tools available to the Secretariat to develop information for inclusion in factual records and of the types of information likely to be included in such factual records.

113. A considerable amount has already been written about the Article 14 process. A CEC official notes that the citizen submission process receives the "most media and scholarly attention" of the CEC's programs. Block, *supra* note 36, at 412. *See also IRC Report*, *supra* note 6, at x (noting that "[a]dministering the citizen submission process is the best known of the Secretariat's special responsibilities, and also the most controversial"). *See, e.g.*, Kirton, *supra* note 4, at 459 (noting with respect to the CEC generally that "[m]ore than three years after the CEC came into existence, there remains considerable disagreement about its overall potential and actual performance"). Many commentators, while identifying what they consider to be flaws in the citizen submission process, nevertheless have taken a position of qualified optimism regarding the NAAEC. *See, e.g.*, JOHNSON & BEAULIEU, *supra* note 3, at 152 (suggesting that the NGO submissions procedure "could very well become the most dynamic and innovative element of the fact-finding and information management mandate of the Secretariat"); Bolinger, *supra* note 111; Stephen L. Kass, *First Cases Before New NAFTA Forum Suggest Its Power Will Increase*, NAT'L L.J., June 10, 1996, at C5 (suggesting that "[d]espite its limitations, the CEC is on the verge of becoming a meaningful forum for the review of long-deferred regional environmental issues and challenges to inadequate enforcement of domestic environmental laws").

Professor Kirton reports that "[t]he first and largest group of observers are the skeptical critics." Kirton, *supra* note 4, at 459. *See, e.g.*, Charnovitz 1994, *supra* note 36, at 272, 313; Michael J. Kelly, *Bringing a Complaint Under the NAFTA Environmental Side Accord: Difficult Steps Under a Procedural Paper Tiger, But Movement in the Right Direction*, 24 PEPP. L. REV. 71, 97 (1996) (arguing that "[t]he NAFTA Environmental Side Accord can serve as a model for future trade agreements only in a general sense. If future agreements copy its limited substantive achievements and procedural loopholes wholesale, then little progress has been made."); Tutchton, *supra* note 46, at 10,035-36 (concluding that ". . . the NAAEC's utility as an effective enforcement tool is highly debatable. While at least facially easy to use, the NAAEC citizen submission process suffers from several dramatic flaws. With the benefit of hindsight, it does not appear that the environmental community should be pleased with the NAAEC citizen submission process as it presently operates"); Wirth 1994, *supra* note 2, at 781 (indicating that "[t]here are . . . a number of potentially insurmountable impediments to a resolution of [an Article 14] submission on the merits").

For a partial list of articles on the Article 14 process, see Raustiala 1996, *supra* note 4, at 727 n.24. *See also* US GAO, North American Free Trade Agreement: Impacts and Implementation, GAO/T-NSIAD-97-256 at 18-24 (Sept. 11, 1997) (discussing the NAAEC and concluding with respect to the NAAEC and the Labor Side Agreement that "[a]fter 3 ½ years of implementation, it is too early to say what definitive effect these side agreements will have on the environment and labor").

114. The Government Performance and Results Act (GPRA) is one example of the increasing importance attached to the issue of performance in the United States. Government Performance and Results Act of 1993, Pub. L. No. 103-62, 107 Stat. 285 (codified as amended in scattered sections of 31 U.S.C and 39 U.S.C.). Some suggest that program evaluation is not something governments include routinely in program design or necessarily do very often or particularly well. To quote two distinguished commentators from their 1998 book on the U.S. Environmental Protection Agency:

> [The] EPA has numerous management shortcomings, but none is more damaging to the regulatory system as a whole than the absence of feedback and evaluation. This absence means [the] EPA has no

suggestions for areas of research are prompted by the international character of the Article 14 process and of the CEC as a whole.

The first important issue in evaluating the effectiveness of any policy approach involves determining its primary purposes. The commentary to date suggests at least three purposes of the citizen submission process. Many observers would agree that a fundamental purpose of the process is to enhance domestic environmental enforcement by the three Parties.[115] A related purpose is to enhance environmental protection. In other words, enhancement of domestic enforcement is a means to an end, and the end is to promote compliance and thereby enhance environmental protection.[116] Article 5 of the Agreement, entitled Government Enforcement Action, supports the existence of a link between the goal of enhancing enforcement and the enhancement of compliance and environmental protection. It provides that "each Party shall effectively enforce its environmental laws and regulations . . . [w]ith the aim of achieving high levels of environmental protection and compliance with its environmental laws and regulations. . . ."[117] A third likely purpose is to promote the emergence of "civil society" in North America through creation of a new mechanism that facilitates citizens' interactions with their governments and others on the continent.[118] I offer these apparent purposes simply as possible starting points. The need to consider carefully the purposes of the process in evaluating its effectiveness is obviously a critical element in focusing future research.[119]

---

reporting system to tell whether its goals are being accomplished, whether any progress is being made, or how much work is being done.

J. Clarence Davies & Jan Mazurek, Pollution Control in the United States: Evaluating the System 35 (1998).

Article 10(1)(b) of the NAAEC required the Council to review its operation and effectiveness four years after the entry into force of the Agreement. In November, 1997, the Council appointed an Independent Review Committee (IRC) to provide this assessment, which included a review of Article 14 implementation. *See IRC Report*, *supra* note 6, pt. 1. For another substantial review, see DiMento & Doughman, *supra* note 4.

115. *See, e.g.*, Sarah Richardson, *Sovereignty Revisited: Sovereignty, Trade, and the Environment — The North American Agreement on Environmental Cooperation*, 24 CAN-U.S. L.J. 183, 190 (1998) (noting that "[t]aken together, Articles 14 and 15 . . . represent a critical institutional mechanism to encourage the effective enforcement by the Parties of their domestic environmental law"). Avoiding possible trade distortions from a lack of vigorous enforcement is part of the reason for seeking such enhancement.

116. At the same time, the Secretariat has pointed out that the focus of the Article 14 process is on enforcement, not on the underlying environmental laws themselves. *See, e.g.*, *Great Lakes Article 14(1) and 14(2) Determination*, *supra* note 37. *See also* Richardson, *supra* note 116, at 190 (noting that "in signing the NAAEC, as a matter of law, no Party has given up its sovereign right to set national environmental priorities, policies, laws, and regulations at a level that it alone determines").

117. NAAEC, *supra* note 2, art. 5.

118. *See generally* MacCallum, *supra* note 7, at 395-400 (suggesting that the "apparent purpose of Articles 14 and 15 is to enlist the participation of the North American public to help ensure that the Parties abide by their obligation to enforce their respective environmental laws").

119. *See generally* Young, *supra* note 5, at 268 (noting that "participants can and often do develop widely divergent perceptions of the nature or character of the problem to be solved, and regimes frequently come into existence in the absence of consensus in the realm of problem definition").

The logical second question involves ascertaining how best to assess the extent to which the tool is effective in accomplishing its objectives. Assuming that, for example, promoting effective enforcement is an important objective of the process, it is first necessary to define the concept of effective enforcement. The Agreement offers some general guidance in Article 5 through its reference to enhancing compliance.[120] Article 5 also provides a laundry list of activities that fit within the notion of enforcement.[121] Article 45 defines when a party has not failed to effectively enforce its environmental laws for purposes of the Agreement.[122] Nevertheless, the task of determining the scope of the concept of effective enforcement under the NAAEC is a difficult one.[123] In the United States, for example, views concerning how government enforcement efforts should be evaluated have been much in flux in recent years.[124] In 1997, the CEC initiated a project to "explore development of indicators or criteria for evaluating the performance of the Parties in implementing policies and programs for effective environmental enforcement."[125] Defining "effective enforcement," in short, appears to be a second threshold challenge for those interested in evaluating the extent to which the Article 14 process has been successful in promoting such.

A third issue to explore involves determining changes in enforcement practices in the areas that are the subject of submissions — determining whether government enforcement efforts have changed in such areas and how much more effective they have become (if any).[126] Exploration of this issue requires treatment of a related question, notably the extent to which the "squeaky wheel"

---

120. *See* NAAEC, *supra* note 2, art. 5.

121. *See id.*

122. *See id.* art. 45(1).

123. *See, e.g.*, Charnovitz 1994, *supra* note 36, at 268; Scott C. Fulton & Lawrence I. Sperling, *The Network of Environmental Enforcement and Compliance Cooperation in North America and the Western Hemisphere*, 30 INT'L LAW 111, 128-29, 138 (1996) (noting that "[r]ather than setting forth precise standards for determining the effectiveness of each country's enforcement actions, the agreement leaves this level of detail to future development"). Fulton and Sperling state that "precise guidance for measuring the effectiveness of a country's enforcement program is likely to evolve through cooperative efforts of the parties to improve their programs and to report environmental results." Fulton & Sperling, *supra*, at 138. Fulton and Sperling continue, indicating that the CEC council's cooperative enforcement activities "could include developing ideas on how to measure results of enforcement programs" and they suggest that "[a] cooperative dialogue on measures of enforcement success may lead to development of new measures that will account for the behavioral and environmental benefits that result from enforcement action." Fulton & Sperling, *supra*, at 138.

124. *See generally* Markell, *supra* note 3. The United States has identified three general types of indicators of effective enforcement: (1) environmental indicators, (2) outcome measures, and (3) input measures. *See* OFFICE OF ENFORCEMENT & COMPLIANCE ASSURANCE, U.S. EPA, MEASURING THE PERFORMANCE OF EPA'S ENFORCEMENT AND COMPLIANCE ASSURANCE PROGRAM (1997).

125. CEC INDICATORS, *supra* note 20.

126. Opportunities for empirical research concerning the impacts of Commission determinations and other Commission documents, including factual records, exist now and will increase in the future as additional documents are issued. As noted above, one factual record has been issued to date and preparation of another is in progress. The Secretariat has requested responses from parties for a significant number of submissions. One issue that would be interesting to explore is the extent to which different stages of the Article 14 process influence domestic enforcement policy.

syndrome is partially or entirely responsible for improvements in enforcement — again, if any — in areas that are the subject of submissions. At least one World Bank study of "complaint-based" enforcement strategies suggests that communities that complain thereby may "capture" more enforcement attention from government agencies than other communities.[127] This related question, therefore, involves the extent to which any enhancement of enforcement in areas that are the subject of submissions is due to a reduction in enforcement elsewhere.

A fourth issue involves determining the extent to which the parties have strengthened their domestic enforcement practices more generally. An obvious central methodological challenge here, and with respect to the preceding issue as well, is to establish a link between the Article 14 process (including its use as well as its potential for use) and any such enhancements.

A fifth issue that relates to the essential character of the citizen submission process has already received considerable attention in the literature. It is clear what the citizen submission process is and what it is not. The process offers the prospect of a "spotlight" on domestic enforcement practices. Some commentators are optimistic about the possible value of such a "spotlight."[128] The citizen submission process does not, however, provide for sanctions. Some have labeled the lack of sanctions a serious shortcoming.[129] Debate concerning the likely effectiveness of the Article 14 process in light of its essential character as a "spotlight" and in light of its lack of sanctions is being replayed on a wide variety of stages throughout the world. There is currently an enormous amount of debate about the relative merits of different compliance-oriented approaches. Some suggest that sanctions are needed,[130] while others tout the promise of spotlights

---

127. SUSMITA DASGUPTA & DAVID WHEELER, WORLD BANK POLICY RESEARCH DEPARTMENT, ENVIRONMENT, INFRASTRUCTURE, AND AGRICULTURE DIVISION, CITIZEN COMPLAINTS AS ENVIRONMENTAL INDICATORS (1997) (concluding that a strategy in China of relying in part on complaints from citizens "undoubtedly provides some useful monitoring information, and an important avenue for community participation in environmental policy. However, it also directs a major share of China's inspection resources toward areas where individuals or communities have a high propensity to complain." They conclude that "[i]f regulators respond passively to complaints, aggressive plaintiffs may capture most of the available resources. . . . Our results imply that technical risk assessments should have priority status in determining agency resource allocation."). *Id.* at 15. *Cf.* Richard J. Lazarus, *Pursuing "Environmental Justice": the Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787 (1993).

128. *See, e.g.*, JOHNSON & BEAULIEU, *supra* note 3, at 166 (suggesting that "one of the CEC's most useful functions will be to cast the spotlight on public authorities that fail to fulfill their obligations — in particular, the obligation to effectively enforce domestic environmental laws"). Johnson and Beaulieu also urge that "there is essential value in independent verification of information supplied by the member states and their national bureaucracies." *Id.* at 138. *See also IRC Report*, *supra* note 6, at 5 (noting that the process makes it possible for "some 350 million pairs of eyes to alert the Council of any 'race to the bottom' through lax environmental enforcement").

129. *See* Bugeda, *supra* note 2, at 1603 (characterizing the absence of a direct remedy as a "serious shortcoming of the procedure"). The lack of sanctions has led one commentator to label the process a "procedural dead end" because the ultimate action is issuance of a factual record. *See* Charnovitz 1994, *supra* note 36, at 266.

130. For a discussion of sanctions in the international arena, see ABRAM CHAYES & ANTONIA HANDLER

and other creative approaches.[131] The nature of the Article 14 process may make it a profitable topic for research concerning the relative effectiveness of different policy tools.[132]

A sixth issue involves the possible impacts of the process on environmental protection. As noted above,[133] the Article 14 process focuses on the effectiveness of enforcement practices, not on the effectiveness of environmental regimes writ large. Yet, as also noted above, an important goal of the process appears to be the enhancement of environmental protection through the enhancement of enforcement.[134] At least one commentator has argued in several articles that there is a possibility that the prospect of international scrutiny of domestic enforcement practices may lead to a reduction in environmental protection.[135] Professor

---

CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995). *See also* Harold K. Jacobson & Edith Brown Weiss, *Assessing the Record and Designing Strategies to Engage Countries, in* ENGAGING COUNTRIES, *supra* note 5, at 547 (noting that "[i]n some areas of international law, such as trade law or national security, sanctions have been regarded as essential to achieving compliance."). Professors Jacobson and Brown Weiss include an interesting discussion of strategies for strengthening compliance in their book. *See id.* at 542-54. They group such strategies into three primary categories: (1) sunshine methods, (2) positive incentives, and (3) coercive measures. *See id.* Professors Brown Weiss and Jacobson suggest that "different mixes of strategies will work better in different circumstances." *Id.* at 542-43. They also offer the important insight that contexts are dynamic and, as a result, "[w]hat mix will be most effective for a particular accord or country will likely change over time." *Id.* at 543. *See also* Daniel A. Farber, *Environmental Protection As a Learning Experience*, 27 LOY. L.A. L. REV. 791 (1994) (containing an insightful discussion of the need to design strategies that are adaptable in recognition of such dynamism).

131. "Spotlighting" strategies are receiving increasing attention generally, much of it positive. *See, e.g., IRC Report*, *supra* note 6; Cass R. Sunstein, *Informational Regulation and the Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 613, 616-17 (1999) (noting that "informational regulation, or regulation through disclosure, has become one of the most striking developments in the last generation of American law;" that disclosure of information "has become a central part of the American regulatory state — as central, in its way, as command-and-control regulation and economic incentives;" and applauding this development, concluding that informational strategies "have significant advantages" over command-and-control approaches, though noting that the former are not appropriate in all contexts); Tom Tietenberg & David Wheeler, *Empowering the Community: Information Strategies for Pollution Control* (1998) (visited Apr. 18, 2000) <http://www.worldbank.org/nipr/workpaper/ecoenv/index.htm> (labeling such strategies as the "third wave" of pollution control policy and concluding that such strategies are "effective in improving environmental results"); Markell, *supra* note 3, at 99-108.

132. The unusual nature of this policy tool obviously lends itself to research in far more ways than those described in the text. As one commentator has observed, the process "appears unique in its attention to international scrutiny of the implementation of domestic [environmental] rules." Raustiala 1996, *supra* note 4, at 725 n.15; *see also* Bugeda, *supra* note 2, at 1603 (indicating that "[t]here is common agreement that it represents a critical advance for the involvement of nongovernmental organizations (NGOs) in the North American environmental dialogue"); Gal-Or, *supra* note 2, at 56. Several other mechanisms exist for NGO involvement in international fora. *See, e.g.*, Wirth 1994, *supra* note 2; Raustiala 1997, *supra* note 5, at 549 (noting that the NAAEC is certainly not unique in incorporating NGO's in an international legal regime but asserting that the NAAEC "goes further than most multilateral treaties in terms of NGO access and participation," in part because it provides for citizen submissions).

133. *See* NAAEC, *supra* note 2, art. 14.

134. *See id.* art. 1.

135. *See* Kal Raustiala, *The Political Implications of the Enforcement Provisions of the NAFTA Environmental Side Agreement: The CEC as a Model for Future Accords*, 25 ENVTL. L. 31, 50-54 (1995) [hereinafter Raustiala 1995]; Raustiala 1996, *supra* note 4, at 760-62 (suggesting the impossibility of separating lawmaking from enforcement and indicating that many laws are intended to be regularly unenforced).

Raustiala suggests that such scrutiny may lessen the substantive scope of environmental legislation in the United States, particularly because of the technology-forcing and agency-forcing nature of some laws.[136] The argument is that scrutinizing enforcement will lead countries to want to "look better" on that front and that one strategy they may follow is to lower standards in order to improve compliance rates. Future Commission actions on submissions may provide information that is useful in examining the validity of this hypothesis.

The final issue I raise relating to the question of "effectiveness" involves the impact of the process on "civil society."[137] A number of commentators have applauded the potential emergence of a "global civil society."[138] The Article 14 process is cited as a vehicle that may contribute to the development of such a society.[139] There are a variety of issues of interest concerning the extent to which the process is fulfilling its potential on this front and the reasons why it is (or is not) doing so.[140]

I will close by listing three other categories of issues that are of importance. First, there are issues relating to the behavior of national governments in international regimes. Commentators have observed that the parties to the Agreement have dual roles. They represent their national interests and also serve as "custodians" of the Agreement.[141] The Article 14 process may offer interesting insights into how Parties perform these multiple roles and into the types of variables that may affect their behavior.[142] Second, and related, there is the issue

---

136. *See* Raustiala 1995, *supra* note 136.

137. "'Civil society' has been defined by one observer as the ensemble of non-state organizations and relations that constitute associational life." Jesse C. Ribot, *Representation and Accountability in Decentralized Sahelian Forestry: Legal Instruments of Political-Administrative Control*, 12 GEO. INT'L ENVTL. L. REV. 447 (2000).

138. Raustiala 1997, *supra* note 5, at 573 (suggesting that "NGO activity within international environmental law is therefore an important practical manifestation of global civil society").

139. *IRC Report*, *supra* note 6, at 18 (noting that the citizen submission process "provide[s] growing recognition of the role of 'civil society' in international environmental governance"); Richardson, *supra* note 116, at 194 (indicating that "for the purpose of promoting the effective enforcement of environmental law, the NAAEC allows for the citizens of the three countries to behave as though they are North American environmental citizens").

140. *See, e.g.*, Bugeda, *supra* note 2, at 1616-17 (asking about, for example, the extent to which "civil society" thinks the process is worth the investment of time and resources needed to pursue submissions).

141. *IRC Report*, *supra* note 6, at viii (noting that "[t]he three Parties have dual roles within the CEC. On the one hand, they act as individual nations in international organizations, each reflecting its own national interest. On the other, the same representatives seek to identify and achieve goals of common interest. At times, the transition from self-interested Party to joint Council member has been difficult."). *See also* Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, 99 COLUM. L. REV. 628, 631 (1999) (raising the issue of the extent to which the Parties will cede some measure of control to the Commission in noting that "[t]he identifying characteristic of the emerging legal order is the formal role given to non-national decisionmakers in the elaboration and/or control of regulatory norms that apply within national borders").

142. For example, the Independent Review Committee discusses briefly the impact that the number of Parties to an Agreement may have on party behavior. *See IRC Report*, *supra* note 6. Another aspect of this issue concerns the impact of a "spotlighting" procedure on the sustainability of the process and on party buy-in. *See* discussion *supra* note 132.

of the relationship between national governments and secretariats — the level of autonomy/independence given to the latter, the evolution of such arrangements over time, and the workability of such arrangements.[143] Finally, there is the impact that international regimes can have on domestic politics.[144] This impact may be felt in many contexts. For example, international regimes can impact federalism — in the United States, they might impact the relationship between the federal government and the states.[145] As the Article 14 process evolves, careful study is likely to reveal interesting insights about each of these issues.[146]

In sum, the existing body of work about the Article 14 process contains numerous useful insights. Researchers have the opportunity, however, to mine many more nuggets of important insight through future work on the process. This is a process of quite recent vintage. Further, the near term is likely to produce a relatively substantial body of work. Finally, because of the relatively transparent nature of the process, much of this work is likely to be quite easily accessible.[147] Those of us involved in the citizen submission process look forward to continuing to implement it and to the insights of others interested in its operation.

---

143. *See also* Kirton, *supra* note 4, at 460; Block, *supra* note 36, at 412 (observing that "Articles 14 and 15 present a special challenge because of inherent tension between evaluating allegations against a Party under these articles in our watchdog capacity and implementing consensus-based programs at the same time"). Related to this issue, as well as several of the others, is the significance of cultural and other differences among the three parties, such as availability of resources and technical capacity.

144. *See, e.g.*, Stephen Zamora, *NAFTA and the Harmonization of Domestic Legal Systems: The Side Effects of Free Trade*, 12 ARIZ. J. INT'L & COMP. L. 401 (1995).

145. *See, e.g.*, Thomas W. Merrill, *Panel III: International Law, Global Environmentalism, and the Future of American Environmental Policy*, 21 ECOL. L.Q. 485 (1994); DAVIES & MAZUREK, *supra* note 115, at 14 (noting that "[i]nternational actions are increasingly likely to affect the directions and policies of EPA"); Science Advisory Board, United States Environmental Protection Agency, Pub. No. EPA-SAB-EC-95-007, *Beyond the Horizon: Using Foresight to Protect the Environmental Future* 17 (1995); Raustiala 1997, *supra* note 5, at 582-83. The Article 14 process, as noted above, is an international mechanism focused on domestic environmental enforcement performance. *See generally*, Charnovitz NAFTA, *supra* note 7. Some commentators question the appropriateness of making domestic standards the targets for international review. *See* Charnovitz 1994, *supra* note 36, at 278-99.

146. *See, e.g.*, Zamora, *supra* note 144, at 405 (noting that "[t]he interplay between national laws and international law is now a favorite topic of scholarly inquiry").

147. *See* CEC homepage, *supra* note 2. Most CEC documents are available for public access on the CEC web page.