

[Forthcoming in Columbia Journal of Transnational Law, December 2000]

**THE PAPER TIGER AWAKENS:  
NORTH AMERICAN ENVIRONMENTAL LAW AFTER  
THE COZUMEL REEF CASE**

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## Introduction

In recent years, there has been increasing attention given to, and increasing debate over, the relationship between the promotion of global trade and the protection of the natural environment. Much of this debate has focused on the particular agreements and organizations that establish the rules for regional and international trade, such as the North American Free Trade Agreement,<sup>1</sup> the European Union,<sup>2</sup> the Southern Cone Market (“MERCUSOR”) in South America,<sup>3</sup> the Caribbean Common Market (“CARICOM”),<sup>4</sup> the Economic Community of West African States (“ECOWAS”),<sup>5</sup> the Association of Southeast Asian Nations (“ASEAN”),<sup>6</sup> and globally, the General Agreement on Tariffs and Trade (“GATT”)<sup>7</sup> and the World Trade Organization (“WTO”).<sup>8</sup> Many environmentalists maintain that these agreements and organizations undermine efforts to ensure ecologically sustainable policies. As a result, they have called both for changes to existing international trade agreements and for the adoption of new international agreements to strengthen environmental protection.

This article evaluates how the debate over the trade-environment nexus has played out in the North American context, particularly in the trade and environmental agreements that Canada, Mexico and the United States signed in 1993 (“1993 North American Regime”). These agreements went into effect on January 1, 1994.<sup>9</sup> The article is divided into six sections. The first section provides an overview of the development of North American environmental law and diplomacy prior to 1993. The second section revisits the political context in which the 1993 North American Regime was negotiated, with particular attention to the role of the

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<sup>1</sup>North American Free Trade Agreement, Dec. 8, 1993, 32 I.L.M. 289 [hereinafter NAFTA].

<sup>2</sup> Treaty Establishing the European Community, Feb. 7, 1992, 1 C.M.L.R. 573.

<sup>3</sup> The Treaty of Asuncion established the South American Quadripartite Common Market, Mercado Comun del Sur (MERCUSOR). Argentina, Brazil, Paraguay and Uruguay signed the treaty on Mar. 26, 1991. *See* Treaty Establishing a Common Market, March 26, 1991, 30 I.L.M. 1041.

<sup>4</sup> The Caribbean Common Market (“CARICOM”), established in 1973, consists of Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Montserrat, St. Kitts, St. Vincent and the Grenadines, and Trinidad and Tobago. *See* Treaty Establishing the Caribbean Community, July 4, 1973, 12 I.L.M. 1033.

<sup>5</sup> Treaty of Lagos, May 1975.

<sup>6</sup> *See* Leo Tsao Yuan, *The ASEAN Free Trade Area: The Search for a Common Prosperity*, in ASIA PACIFIC REGIONALISM: READINGS IN INTERNATIONAL ECONOMIC RELATIONS 319 (1994).

<sup>7</sup> General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]; Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1995, 33 I.L.M. 1125 [hereinafter Uruguay Round Act] (making institutional and substantive changes to the GATT treaty).

<sup>8</sup> Under the Uruguay Round Act, *supra* note 7, the WTO is the organizational successor to the General Agreement on Tariffs and Trade.

<sup>9</sup> *See Implications of the International Environmental Agreement Between the U.S. and Mexico*, Int’l Env’t Daily (BNA) 1 (April 18, 1994).

trade-environment debate. The third section presents a summary of environmental law established under the 1993 North American Regime, especially the rules and institutions created by the North American Agreement on Environmental Cooperation (“NAAEC”).<sup>10</sup> The fourth section assesses the record of environmental enforcement under the 1993 North American Regime, in particular the effectiveness of enforcement actions filed by private parties. The fifth section offers a case study of a recent controversy -- involving the destruction of coral reefs in Cozumel, Mexico (“Cozumel Reef Case”) -- under the 1993 North American Regime. The Cozumel Reef Case illustrates both the potential and the limitations of the 1993 North American Regime’s environmental provisions. The sixth section compares the status of North American environmental law with the status of North American trade law. The article concludes with recommendations for strengthening the role of North American environmental law within the 1993 North American Regime.

The objective of this article is neither to condemn nor to celebrate the 1993 North American Regime. Rather, the objective is to highlight the fact that the environmental provisions of the 1993 North American Regime are part of a larger diplomatic, historical and legal process. This process is the emergence of North American environmental law as a distinct regional component of both international environmental law specifically, and international law in general. This process began long before the 1993 North American Regime was adopted, and it is certain to continue long into the future. The Cozumel Reef Case, therefore, is neither the beginning nor the culmination of North American environmental law. The case does provide us, however, with an opportunity to take stock of where we have been and where we are now, so that we can better determine where we need to go.

## **I. The Evolution of North American Environmental Law and Diplomacy Before 1993**

The origins of North American environmental law go back more than a century.<sup>11</sup> The focus of the early efforts was less on developing binding provisions than on establishing a diplomatic framework for information-gathering and cooperation. The first major attempt at

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<sup>10</sup> North American Agreement on Environmental Cooperation, Sept. 14, 1993, 32 I.L.M. 1480 [hereinafter NAAEC].

<sup>11</sup> See Catherine A. Cooper, *The Management of International Environmental Disputes in the Context of Canada-United States Relations: A Survey and Evaluation of Techniques and Mechanisms*, Canadian Yearbook of International Law 247 (1986).

international conservation in North America began in 1892, when Canada and the United States created a joint commission to investigate the problem of overfishing in boundary waters.<sup>12</sup> Sharp declines in the fishery resources of the St. Croix River/Passamaquaddy Bay region in the east, the Great Lakes in the midwest, and the Puget Sound/Fraser River region in the west prompted the commission's creation.<sup>13</sup> In 1896, the commission's investigations resulted in the publication of the *Report of the Joint Commission Relative to the Preservation of Fisheries in Waters Contiguous to Canada and the United States* ("1896 Contiguous Fisheries Report").<sup>14</sup> Following the report's publication, Canada and the United States began negotiations for an Inland Fisheries Treaty.<sup>15</sup> Although the negotiations ultimately proved unsuccessful, the collaborative scientific commission served as a model for future North American conservation efforts.<sup>16</sup>

The second major development in the field of North American environmental law took place in 1893 and involved a dispute between Canada and the United States over seal hunting in the Bering Sea. The seals in questions were born on American-owned islands, but spent most of their lives in international waters. American seal hunters claimed permanent possession of the seals due to their birthplace, while Canadian seal hunters asserted the right to capture the seals on the high seas.<sup>17</sup> As a result, both the Canadians and the Americans refused to reduce the number of seals that they could kill and, by the 1880s, only 10% of the Bering Sea seal population remained.<sup>18</sup> In 1893, in an effort to resolve the conflict, Canada and the United States agreed to submit the dispute to an arbitration panel in Paris, France.<sup>19</sup> The *1893 Bering Sea Arbitration Tribunal* rejected the rigid positions of both countries and held that a joint conservation strategy was required.<sup>20</sup> Although the tribunal's decision did not originally satisfy

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<sup>12</sup> See KURKPATRICK DORSEY, *THE DAWN OF CONSERVATION DIPLOMACY: U.S.-CANADIAN WILDLIFE PROTECTION TREATIES IN THE PROGRESSIVE ERA* 39-41 (University of Washington Press, 1998).

<sup>13</sup> See *id.* at 23-31.

<sup>14</sup> See *id.* at 42.

<sup>15</sup> See *id.* at 51-104.

<sup>16</sup> See *id.*

<sup>17</sup> See *id.* at 105.

<sup>18</sup> See *id.*

<sup>19</sup> See *id.* at 119-24.

<sup>20</sup> See *Fur Seal Arbitration: Proceedings of the Tribunal of Arbitration*, convened at Paris (Washington, 1895); see also David Starr Jordan, *Report of Fur Seal Investigations* (Washington, 1898).

either Canada or the United States, it played a critical role in helping the nations to eventually negotiate a bilateral treaty to resolve the issue.<sup>21</sup>

The third early milestone in North American environmental diplomacy occurred in 1909, when United States' President Theodore Roosevelt organized the North American Conference on the Conservation of Natural Resources.<sup>22</sup> The conference, which took place in Washington, D.C., brought together leading conservationists and scientists from Canada, Mexico and the United States, and resulted in the adoption of a Declaration of Principles.<sup>23</sup> Although the Declaration of Principles did not set forth specific obligations, the 1909 conference was still politically significant in that it helped establish conservation and environmental protection as legitimate goals for international diplomacy.<sup>24</sup> It therefore served as an important precedent for the adoption of future bilateral and trilateral environmental treaties in North America.

Between Canada and the United States, the environmental treaties signed between 1909 and 1993 include: the 1909 Boundary Waters Treaty;<sup>25</sup> the 1911 North Pacific Fur Seal Convention;<sup>26</sup> the 1937 Treaty Creating the International Pacific Salmon Fisheries Commission;<sup>27</sup> the 1972 Great Lakes Quality Agreement;<sup>28</sup> the 1978 Great Lakes Water Quality Agreement;<sup>29</sup> the 1980 Memorandum Concerning Transboundary Air Pollution;<sup>30</sup> the 1985 Pacific Salmon Treaty;<sup>31</sup> the 1987 Agreement on Caribou Conservation;<sup>32</sup> and the 1991 United States-Canada Bilateral Air Quality Agreement.<sup>33</sup>

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<sup>21</sup> DORSEY, *supra* note 12, at 122-23. "The arbitrators managed to reach a decision that annoyed the Americans and Canadians . . . . In attempting to accommodate both sides, the arbitrators had acknowledged that the status quo was unacceptable." *Id.*

<sup>22</sup> See LANE SIMONIAN, *DEFENDING THE LAND OF THE JAGUAR: A HISTORY OF CONSERVATION IN MEXICO* 76 (University of Texas Press, 1995).

<sup>23</sup> See Joseph F. Dimento and 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, 655 n.17 (1998).

<sup>24</sup> See DORSEY, *supra* note 12, at 139.

<sup>25</sup> Treaty Between Canada and the United States of America Relating to Boundary Waters and Questions Arising Along the Boundary Between the United States and Canada, Jan. 11, 1909, 36 Stat. 2448, T.S. No. 548.

<sup>26</sup> Convention on the Preservation and Protection of Fur Seals Between the United States and Canada, 1911.

<sup>27</sup> A good historical overview of the treaty is provided in JOHN ROOS, *RESTORING FRASER RIVER SALMON: A HISTORY OF THE INTERNATIONAL PACIFIC SALMON FISHERIES COMMISSION* (Vancouver 1991).

<sup>28</sup> Apr. 15, 1972, 28 U.S.T. 301, T.I.A.S. No. 7312.

<sup>29</sup> Nov. 22, 1978, 30 U.S.T. 1383, T.I.A.S. No. 9257.

<sup>30</sup> Aug. 5, 1980, 32 U.S.T. 2521, T.I.A.S. No. 9856.

<sup>31</sup> See Twitchell, *Implementing the U.S.-Canada Pacific Salmon Treaty: The Struggle to Move From Fish Wars to Cooperative Fishery Management*, 20 *OCEAN DEV. & INT'L L.* 420 (1989).

<sup>32</sup> Agreement Between the United States of America and Canada on Conservation of the Porcupine Caribou Herd, July 17, 1987, T.I.A.S. 11259.

<sup>33</sup> 1991, 30 *ILL.M.* 676.

Between Mexico and the United States, the environmental treaties signed between 1909 and 1993 include: the 1927 and 1931 Mexico-United States Agreements to Establish a Joint Fishery Commission;<sup>34</sup> the 1935 Mexico-United States Agreement to Establish an International Parks Commission;<sup>35</sup> the 1944 Mexico-United States Water Treaty;<sup>36</sup> and the 1983 La Paz Agreement.<sup>37</sup>

In addition to the bilateral diplomatic developments and treaties discussed above, Canada, Mexico and the United States also adopted two significant trilateral environmental agreements in the pre-1993 period. Those trilateral agreements are the 1986 North American Waterfowl Management Plan<sup>38</sup> and the Migratory Birds Treaty.<sup>39</sup>

In reviewing the development of North American environmental law and diplomacy prior to 1993, two important patterns can be noted. First, almost all of the treaties and diplomatic developments in this period involved transboundary natural resources. For instance, the 1972 Great Lakes Quality Agreement, the 1978 Great Lakes Water Quality Agreement, the 1980 Memorandum Concerning Transboundary Air Pollution, the 1983 La Paz Agreement and the 1991 United States-Canada Bilateral Air Quality Agreement all dealt exclusively with the problem of cross-border pollution. Similarly, the *1893 Bering Sea Arbitration Panel*, the *1896 Contiguous Fisheries Report*, the 1909 Boundary Waters Treaty, the 1911 North Pacific Fur Seal Convention, the 1937 Treaty Creating the International Pacific Salmon Fisheries Commission, the 1985 Pacific Salmon Treaty, the 1987 Agreement on Caribou Conservation, and the Migratory Birds Treaty all dealt exclusively with species that migrate across national borders. In the pre-1993 period, North American environmental law was limited primarily to environmental and natural resource issues that were *physically* transnational. Conversely, it did not attempt to deal with environmental and natural issues that were *economically or politically* transnational. For instance, in the pre-1993 period, North American environmental law did not address the

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<sup>34</sup> See SIMONIAN, *supra* note 22, at 105.

<sup>35</sup> See *id.* at 100.

<sup>36</sup> See Dimento & Doughman, *supra* note 23, at 655 n.17.

<sup>37</sup> The 1983 La Paz Agreement Between the United States and Mexico on Protection of Environment in the Border Area, Aug. 14, 1983, 22 I.L.M. 1025.

<sup>38</sup> See NORTH AMERICAN WATERFOWL AND WETLANDS OFFICE, ARLINGTON, VIRGINIA, THE NORTH AMERICAN WATERFOWL MANAGEMENT PLAN: EXPANDING THE COMMITMENT (1994).

<sup>39</sup> Convention Between the United States and Great Britain for the Protection of Migratory Birds, Dec. 8, 1916, G.B.T. 1907. Canada and the United States signed the Migratory Birds Treaty in 1916, and Mexico signed in 1936. See Convention Between the United States and Mexico for the Protection of Migratory Birds, February 7, 1936, discussed in Craig D. Sjostrom, *Of Birds and Men: The Migratory Bird Treaty Act*, 26 IDAHO L. REV. 371, 374 (1990).

ways in which foreign investment, international competitiveness, or harmonization of national standards can impact natural resource conservation or environmental protection. These economic and political issues are at the center of the current trade-environment debate, but were not part of the earlier diplomatic landscape.

The second pattern that can be noted in the pre-1993 period is the important role that non-profit environmental organizations and private scientific organizations played in the diplomatic negotiations. Political activism by environmental groups is not a new phenomenon, but rather has been a constant since the early beginnings of North American environmental law. For instance, in the late 1890s, one of the driving forces behind the negotiations for an Inland Fisheries Treaty was the American Fisheries Society, a private professional organization of scientists.<sup>40</sup> As Kurkpatrick Dorsey, Professor of environmental history at the University of New Hampshire, noted in his 1998 book *The Dawn of Conservation Diplomacy: U.S.-Canadian Wildlife Protection Treaties in the Progressive Era*, “the American Fisheries Society set a precedent by daring to offer its expertise in a field about which the negotiators knew little. For the first time, a scientific and conservation organization was attempting to influence the course of international natural resources protection.”<sup>41</sup> The National Audubon Society played a similar role in securing Canadian and American adoption of the Migratory Birds Treaty in 1916, by conducting independent research on the economic benefits of birds to agriculture and extensive public education and lobbying efforts.<sup>42</sup>

As we turn to the environmental and political context of the negotiations over the 1993 North American Regime, we see these dynamics repeated. As with the American Fisheries Society and the National Audubon a century ago, the role of non-profit environmental organizations once again proved pivotal in the 1993 negotiations.<sup>43</sup>

## II. The Environmental Context of the 1993 North American Regime Negotiations

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<sup>40</sup> See DORSEY, *supra* note 12, at 54-55, 243.

<sup>41</sup> See *id.* at 54-55.

<sup>42</sup> See *id.* at 243.

<sup>43</sup> “It may be tempting to look at this modern horse-trading and conclude that it is a new phenomenon, a post-Earth Day manifestation of the importance of the environmentalist movement. But, in fact, modern environmentalists are following in the footsteps of the conservationists of the Progressive era, who themselves learned tough lessons about placing their issues on the diplomatic agenda.” *Id.* at 3. In addition, “the leaders of the Progressive conservationists faced many of the same hurdles that loom today -- dissent in the movement, fierce economic opposition from people fearful for their livelihoods, apathy among the general public, favoritism toward certain issues and species, skepticism from diplomats, and legal challenges.” *Id.* at 18.

The origins of the 1993 North American Regime go back to the late 1980s, when United States' President George Bush proposed creating a North American free trade zone with Canada and Mexico. Bush developed his proposal in response to the trade blocks that were forming in Europe, via the European Union, and in Asia, via ASEAN. At that time, there was a perception that the global trade regime, the General Agreement on Tariffs and Trade (GATT), was becoming weaker and the United States would find itself increasingly excluded from the emerging European and Asian regional trade blocks. Bush's proposal for a North American Free Trade Agreement ("NAFTA") was viewed as a means to counter the European Union and ASEAN. President Bush and Mexico's President Carlos Salinas de Gortari formally committed to the idea of a comprehensive free trade agreement in July of 1990, and Canada's Prime Minister Brian Mulroney committed three months later.<sup>44</sup>

When the NAFTA negotiations began, the relationship between trade liberalization and environmental protection was not high on the policy agenda. In the early 1990s, however, the situation changed due to two significant developments. First, in 1991, a GATT dispute panel ruled that a United States' law to protect dolphins violated international trade rules.<sup>45</sup> This GATT ruling held that, under international trade rules, nations were not permitted to adopt laws that related to natural resources located outside national boundaries, or conditioned imports on how products were produced. The GATT's dolphin decision was intensely criticized by environmentalists, both in the U.S. and abroad.<sup>46</sup> Second, in the summer of 1992, the United Nations Conference on Environment and Development ("UNCED") took place in Rio de Janeiro, Brazil.<sup>47</sup> At UNCED, several new international agreements, which recognized the importance of integrating the goals of environmental protection and economic development, emerged.<sup>48</sup>

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<sup>44</sup> See Earl Frey, *A Continent of Free Trade: Negotiations Toward a North American Free Trade Agreement*, 64 J. STATE GOV'T 128 (1991).

<sup>45</sup> See GATT Dispute Settlement Panel on United States Restrictions on Imports of Tuna, 30 I.L.M. 1594 (1991).

<sup>46</sup> See Donald M. Goldberg, *GATT Tuna-Dolphin II: Environmental Protection Continues to Clash with Free Trade*, in REPORT BY THE CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, WASHINGTON, D.C., 2-3 (June 1994).

<sup>47</sup> See C. FORD RUNGE, *FREER TRADE, PROTECTED ENVIRONMENT: BALANCING TRADE LIBERALIZATION AND ENVIRONMENTAL INTERESTS* 88 (Council on Foreign Relations Press, 1994) ("The United Nations Conference on Environment and Development, held in Rio De Janeiro in June 1992, resulted in a broad new mandate for environmental action, Agenda 21, together with the creation of the new U.N. Commission on Sustainable Development").

<sup>48</sup> The international agreements signed at UNCED included the Convention on Biological Diversity ("Biodiversity Convention"), the United Nations Statement on Forest Principles, the Framework Convention on Climate Change, and Agenda 21.

Taken together, the GATT dolphin ruling and UNCED resulted in a new public and policy focus on the environmental impacts of international trade, and calls for those concerns to be addressed in the context of the NAFTA negotiations. President Bush resisted these calls, however, taking the position that NAFTA was not the proper forum for dealing with environmental issues. With environmental and labor issues kept off the table, the negotiations for NAFTA were completed on August 12, 1992.

President Bush's refusal to expand NAFTA's substantive negotiations beyond the goal of trade liberalization led most environmental organizations in Canada, Mexico and United States to aggressively oppose the proposed trade agreement. This grassroots opposition began to translate into political opposition, particularly in Canada and the United States. By the time the NAFTA negotiations were completed, there were increasing indications that the Canadian Senate and the United States' Congress might reject the treaty. Confronted with this opposition, on September 16, 1992 -- one month *after* the NAFTA negotiations were completed -- the Administrator of the United States' Environmental Protection Agency (EPA), and the Environment Ministers from Canada and Mexico, initiated negotiations to create a new trilateral environmental "council."<sup>49</sup> The parameters of this proposed council were vague, however, and many environmentalists viewed the proposal as an afterthought -- as a political bone thrown to environmentalists to dampen opposition to the free trade agreement. Regardless of the motivations behind the initiation of negotiations to create a North American environmental council, the mere fact that these negotiations were deemed politically necessary to secure adoption of NAFTA is significant. More specifically, the initiation of these environmental negotiations indicates that between 1990 and 1992, the public increasingly came to view trade integration and environmental protection as interrelated, rather than independent, policy issues.

When William Clinton campaigned for President of the United States in the fall of 1992, he pledged to make environmental and labor issues an integral part of the NAFTA negotiations.<sup>50</sup>

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<sup>49</sup> See Gilbert R. Winham, *Enforcement of Environmental Measures: Negotiating the NAFTA Environmental Side Agreement*, 3 J. ENV'T & DEV. 1 (1994).

<sup>50</sup> See NAFTA AND THE ENVIRONMENT 263, 265-66 (Daniel Magraw ed., 1995). "At an Oct. 4, 1992 speech at North Carolina State University, Clinton announced his intention to create an environmental commission under the proposed North American Regime to ensure effective enforcement of each nations' environmental laws. Clinton stated that the commission should have the power to provide remedies, including the power to impose penalties and assess monetary damages."

After defeating George Bush in the 1992 election, President Clinton made good on his campaign promise, by announcing that he would refuse to sign the NAFTA unless parallel agreements on the environment and labor were signed at the same time.<sup>51</sup> In March of 1993, Clinton's announcement led to the initiation of negotiations to draft two new treaties, the North American Agreement on Environmental Cooperation ("NAAEC") and the North American Agreement on Labor Cooperation ("NAALC").<sup>52</sup> Under Clinton's policy of linkage, it was envisioned that NAFTA, NAAEC and NAALC would form the elements of a new North American Regime. The NAAEC and NAALC negotiations were completed on August 12, 1993 and, in September 1993, President Clinton, President Salinas and Prime Minister Jean Chretien signed the agreements.<sup>53</sup>

Aside from the general impetus provided by the 1991 GATT dolphin ruling and the 1992 UNCED, there were other more regionally-specific environmental issues that affected the negotiations of the North American Regime. Four issues in particular served to highlight the potential for trade liberalization to undercut efforts to improve environmental protection in North America.

First, in the mid-1980s, Mexico established a program to provide incentives, namely low taxes, low export tariffs and low labor costs, for American companies to set up industrial factories in Mexico, along the United States-Mexico border. These United States' owned factories were called *maquiladoras*. In the late 1980s, reports began to surface about the dumping of untreated toxic waste and horrific health conditions caused by the *maquiladoras*.<sup>54</sup> These reports indicated that, in addition to the low taxes, low export tariffs and low labor costs, American companies were also taking advantage of the lax environmental standards and lax enforcement of environmental laws in Mexico to reduce their production costs.<sup>55</sup> The

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<sup>51</sup> See Jack Garvey, *Trade Law and Quality of Life - Dispute Resolution Under the NAFTA Side Accords on Labor and Environment*, 85 AM. J. INT'L L. 439 (1995).

<sup>52</sup> In addition to the NAAEC, a special agreement on the U.S.-Mexico border area was also negotiated, creating the Border Environment Cooperation Commission (BECC) and the North American Development Bank (NADBank). BECC/NADBank did not set forth any new substantive rules, but rather created a process to direct funds to cleaning up existing environmental problems along the border.

<sup>53</sup> See Dimento & Doughman, *supra* note 23, at 673.

<sup>54</sup> See NATIONAL TOXIC CAMPAIGN FUND, *BORDER TROUBLE: RIVERS IN PERIL* (1991); see also Elizabeth C. Rose, *Transboundary Harm: Hazardous Waste Management Problems and Mexico Maquiladoras*, 23 INT'L L. 223 (1989).

<sup>55</sup> See JOEL SIMON, *ENDANGERED MEXICO: AN ENVIRONMENT ON THE EDGE* 211 (Sierra Club Books, 1997) [hereinafter *ENDANGERED MEXICO*], ("conditions in Mexican *maquiladoras*(?), which had been the focus of a few regional activists, became a national concern and a symbol of everything that was wrong with NAFTA").

maquiladora border conditions were seen as a preview to what might happen to rest of Mexico under NAFTA.<sup>56</sup>

Second, beginning in the 1980s, the Canadian province of British Columbia (B.C.) began an aggressive push to liquidate its forests, mostly through the use of clearcut logging.<sup>57</sup> Most of the forests in B.C. are old-growth temperate rainforests, like those found in Washington, Oregon and Northern California. The provincial government in B.C. supported this liquidation by providing the B.C. logging industry with cheap access to public forests, and by refusing to impose even minimal environmental restrictions on logging.<sup>58</sup> The United States' market for paper and lumber was one of the driving market forces behind the logging in B.C.<sup>59</sup> Moreover, the low environmental standards of the B.C. logging industry were making it increasingly difficult for the United States' logging industry to compete, and hence the United States' logging industry was strongly resisting efforts to strengthen forest protection policies. The United States' controversy over the logging of forests and spotted owl habitat in the Pacific Northwest, which reached its climax in the early 1990s, was closely related to this issue.<sup>60</sup>

Third, there was concern in Canada about the use of certain agricultural pesticides in the United States.<sup>61</sup> Many pesticides that are permitted in the United States are banned in Canada, both because of their health impacts on consumers, and because of their impacts on the environment.<sup>62</sup> In Canada, there was concern that, under NAFTA, there would be political pressure on Canada to lower its pesticide standards to allow United States' agricultural firms to more easily import farm products into Canada.<sup>63</sup> There was also concern that, under NAFTA, Canada's pesticide restrictions could be directly challenged as an unjustified trade barrier.

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<sup>56</sup> See Marianne Lavelle, *Poisoned Waters Provide Early Test for NAFTA*, NAT'L L. J., March 21, 1994, at A1.

<sup>57</sup> See DRUSHKA ET AL., *TOUCHWOOD: B.C. FORESTS AT THE CROSSROADS* (1993).

<sup>58</sup> See Dinnston, *The Temperate Rainforest: Canada's Clearcut Secret*, *WORLDWATCH*, July-Aug. 1993, at 43.

<sup>59</sup> See Mark Spalding, *Trade and the Environment: The British Columbian Timber Trade Example*, in *REPORT BY THE NATURAL RESOURCES DEFENSE COUNCIL* (Dec. 1994).

<sup>60</sup> See generally STEPHEN YAFFEE, *THE WISDOM OF THE SPOTTED OWL: POLICY LESSONS FOR THE NEXT CENTURY* (Island Press 1994).

<sup>61</sup> See generally BREDAHL, *AGRICULTURE, TRADE & THE ENVIRONMENT: DISCOVERING AND MEASURING THE CRITICAL LINKAGES* (Westview, 1996).

<sup>62</sup> See Steven Shrybman, *Trading Away the Environment*, *WORLD POL'Y J.*, Winter 1991-92, at 105 ("The difference between the two [pesticide approval] approaches . . . explains why there are twenty percent more active pesticide ingredients registered for use in the United States and over seven times as many pesticide products").

<sup>63</sup> See DAVID VOGEL, *TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY* 220 (Harvard University Press, 1995) ("The [ ] commitment to the harmonizing of American and Canadian pesticide standards particularly worried Canadian environmentalists, since they considered American standards to be too lax. Pesticide approval in the United States is based on a balancing of risks and benefits, while the Canadian Pest Control Products Act only focuses on the safety of the proposed pesticide.").

Fourth, and finally, in Mexico and the United States, there were legal challenges to the environmental adequacy of the NAFTA negotiations. In 1993, the Mexico City-based National Association of Ecological Organizations filed a complaint with Mexico's federal attorney general, alleging that the national ecology law required the preparation of an environmental impact statement ("EIS") before NAFTA could be ratified.<sup>64</sup> Mexico's attorney general rejected the complaint, finding that the adoption of NAFTA did not qualify as a specific project or activity under the national ecology law and, therefore, did not require an EIS.<sup>65</sup> In August of 1991, the Washington D.C.-based organization Public Citizen filed a lawsuit against the United States Trade Representative ("USTR") in federal district court.<sup>66</sup> The Public Citizen lawsuit alleged that, under the United States' National Environmental Policy Act ("NEPA"), the USTR was required to prepare an EIS on NAFTA before submitting the treaty to Congress for approval. NEPA requires that an EIS be prepared for major federal actions that can have significant effects on the human environment. The lawsuit was initially dismissed as premature, because the NAFTA negotiations had not yet been completed. After the NAFTA negotiations were finished, however, Public Citizen refiled its lawsuit. On June 10, 1993, the federal district ruled in Public Citizen's favor, holding that the USTR was required to prepare an EIS before submitting NAFTA to the United States' Congress.<sup>67</sup> On September 24, 1993, however, the United States Court of Appeals for the District of Columbia reversed the district court's ruling.<sup>68</sup>

Although the legal challenges by the National Organization of Ecological Organizations and Public Citizen did not prove successful in the courts, they were effective in a broader sense. These legal challenges focused political and media attention on the environmental dimensions of NAFTA, particularly on the North American Agreement on Environmental Cooperation negotiations, which were taking place at the time the complaints were filed and pending.<sup>69</sup>

The concerns and events discussed above led environmentalists in North America to challenge and critique many of the proposed NAFTA provisions. As a result, North American

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<sup>64</sup> See Mexican Ecology Groups File Complaint to Force Impact Statement on NAFTA Accord, 16 Int'l Envtl. Rep. (BNA) 646 (1993).

<sup>65</sup> See *id.* at 671.

<sup>66</sup> See 782 F. Supp. 189 (D.D.C. 1991), *aff'd*, 970 F.2d 916 (D.C. Cir. 1992).

<sup>67</sup> See 822 F. Supp. 21 (D.D.C. 1993).

<sup>68</sup> See 5 F.3d 549 (D.C. Cir. 1993). For an analysis of the NEPA-NAFTA litigation, see Steve Charnovitz, *No Time for NEPA: Trade Agreements on a Fast Track*, 3 MINN. J. GLOBAL TRADE 195 (1994).

<sup>69</sup> See Dimento & Doughman, *supra* note 23, at 663.

environmentalists were able to obtain new rules and institutions in the NAAEC.<sup>70</sup> These changes led some environmental organizations, such as the Environmental Defense Fund, the World Wildlife Fund, the National Wildlife Federation, and the Natural Resources Defense Council, to withdraw their opposition to NAFTA.<sup>71</sup> For instance, in hearings before the United States House of Representatives, Stewart Hudson of the National Wildlife Federation argued that the revised North American Regime stands in “stark contrast to the status quo, where environmental concerns are largely ignored in commerce between nations, where lax enforcement of environmental laws goes unchecked, and where citizen input into trade and environment issues is shut out.”<sup>72</sup> Other environmental organizations, however, including the Sierra Club, Greenpeace, Public Citizen, the Canadian Environmental Law Association and Association de Grupo Ambientalistas (a network Mexican of environmental groups), concluded that the changes were more rhetoric than substance, and that support for the revised North American Regime could still not be justified.<sup>73</sup> As a 1992 report by the Canadian Environmental Law Association stated, “nothing in the so-called NAFTA side agreements or the proposed North American Commission can fix the environmental problems that will flow from NAFTA.”<sup>74</sup> Canadian, Mexican, and American organizations opposed to the revised North American Regime formed the Citizens Trade Campaign, to coordinate their political efforts to prevent legislative adoption of the agreements.<sup>75</sup>

The division within the environmental community, however, significantly weakened one of the interest groups that had formerly opposed approval of NAFTA.<sup>76</sup> As result, the efforts of Citizens Trade Campaign fell just short. Although the vote was close, 234 to 200, the United States’ House of Representatives approved the revised North American Regime, which included

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<sup>70</sup> See *id.* at 662-77.

<sup>71</sup> See MARY KELLY, NAFTA’ S ENVIRONMENTAL SIDE AGREEMENT : A REVIEW & ANALYSIS 1-2 (Texas Center for Policy Studies 1993).

<sup>72</sup> *North American Free Trade Agreement (NAFTA) and Supplemental Agreements to NAFTA: Hearing Before the Subcommittee on Trade of the House Committee on Ways and Means*, H.R. DOC. NO. 103-48 (1993) (Statement of Stewart Hudson, Legislative Representative, NWF).

<sup>73</sup> See PIERRE MARC JOHNSON AND ANDRE BEAULIEU, THE ENVIRONMENT UNDER NAFTA: UNDERSTANDING AND IMPLEMENTING THE NEW CONTINENTAL LAW 32 (1996).

<sup>74</sup> *Id.* at 34 (quoting CANADIAN ENVTL. L. ASS’N, NAFTA AND THE DEMOCRATIC PROCESS (1992)).

<sup>75</sup> See Keith Schneider, *Environmental Groups Are Split on Support for Free Trade Pact*, N.Y. TIMES, Sept. 15, 1993, at A1.

<sup>76</sup> VOGEL, *supra* note 63, at 237 (“ . . . the President had succeeded in splitting the environmental movement. The support of the NRDC and the WWF played a critical role in securing congressional approval . . . ”).

NAFTA, the NAAEC, and the NAALC, on November 17, 1993.<sup>77</sup> Mexico's Senate approved the revised North American Regime in November 1993.<sup>78</sup> Canada's Senate followed in December of the same year.<sup>79</sup>

### III. Environmental Law under the 1993 North American Regime

The 1993 North American Regime created many new provisions and institutions relating to environmental protection. These included environmental provisions in NAFTA's preamble and Chapter 7, the creation of the Border Environment Cooperation Commission ("BECC")<sup>80</sup> and the North American Development Bank ("NADBank")<sup>81</sup> to support cleanup projects along the United States-Mexico border. These also included the creation of the Commission on Environmental Cooperation's Council of Ministers,<sup>82</sup> Secretariat,<sup>83</sup> Joint Public Advisory Committee ("JPAC"),<sup>84</sup> and National Advisory Committees ("NACs")<sup>85</sup> in the North American Agreement on Environmental Cooperation ("NAAEC"). Although all of the above-listed provisions and institutions focused on the issue of environmental protection, most of them cannot be accurately described as *legal* provisions or institutions, in that they do not set forth new, binding environmental standards for Canada, Mexico and the United States.

For instance, NAFTA's preamble requires Canada, Mexico and the United States to undertake economic activities "in a manner consistent with environmental protection and conservation" and to "strengthen the development and enforcement of environmental laws and regulations[.]" Article 1114 of NAFTA "recognizes that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures." Although this

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<sup>77</sup> See 139 Cong. Rec. H10, 048. It is interesting to note that NAFTA, the NAAEC and the NAALC, were not formerly ratified as a treaty by the constitutionally required two-thirds vote of the U.S. Senate. Rather, they were simply approved by a Congressional majority as a "congressional-executive agreement." For a detailed analysis of the constitutionality of congressional-executive agreements such as NAFTA, see Bruce Ackerman, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 801 (1995).

<sup>78</sup> *Mexican Senate Approves NAFTA*, 53 FACTS ON FILE No. 2756 (Nov. 25, 1993), at 875.

<sup>79</sup> *Canada Commits to NAFTA*, 53 FACTS ON FILE No. 2770 (Dec. 31, 1993), at 963.

<sup>80</sup> See ENDANGERED MEXICO, *supra* note 55, at 227 ("The other environmental agency created under NAFTA was the Border Environment Cooperation Commission (BECC), a binational (the United States and Mexico) agency based in Ciudad Juarez, Mexico, and empowered to evaluate funding for environmental infrastructure projects along the border. Projects approved by the BECC are eligible to receive low-interest loans from the North American Development Bank, a lending institution also created under the free trade accord, which has its offices in San Antonio, Texas.").

<sup>81</sup> *See id.*

<sup>82</sup> *See* NAAEC, *supra* note 10, at Art. 9.

<sup>83</sup> *See id.* at Art. 11.

<sup>84</sup> *See id.* at Art. 16.

<sup>85</sup> *See id.* at Art. 17.

environmental language may be encouraging, it does not provide an appropriate legal basis for bringing a claim before the Free Trade Commission (“FTC”), created under NAFTA.<sup>86</sup> As another example, the BECC and NADBank create a means to finance border cleanup projects, but they do not set forth any new substantive obligations on Canada, Mexico or the United States. Similarly, although the JPAC and NACs can offer input to the CEC, these institutions do not have the authority to adopt or enforce any measures that would be binding on Canada, Mexico or the United States.

The fact that BECC, NADBank, JPAC and the NACs, and most of NAFTA, do not set forth binding substantive environmental standards, or that they are unenforceable, does not mean that these agreements and institutions are unimportant from an environmental policy perspective. These agreements and institutions can still establish soft norms and general principles that may help shape how Canada, Mexico and the United States approach and resolve environmental protection issues, both within their borders and within the context of the 1993 North American Regime. These agreements and institutions can also provide a means to share environmental information, and to finance border cleanup and other environmental projects.<sup>87</sup> However, the focus of this article is specifically on North American environmental law, not on the more general topic of the development of North American environmental cooperation and environmental institutions. As such, the analysis of the 1993 North American Regime will center on the development of enforceable legal standards regarding environmental protection.

NAFTA contains some substantive environmental provisions, such as Chapter 7, which provides that each nation has the right to establish its own sanitary and phytosanitary standards (public health measures) so long as these standards are based on scientific principles, and Chapter 9, which provides that each nation has the right to establish its own environmental standards provided that these standards are adopted in furtherance of a legitimate objective. Chapter 7 and Chapter 9 could be relied upon if a public health or environmental law were challenged before NAFTA’s Free Trade Commission. Aside from the NAFTA provisions

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<sup>86</sup> See David G. Schiller, *Great Expectations: The North American Commission on Environmental Cooperation Review of the Cozumel Pier Submission*, 28 U. MIAMI INTER-AM. L. REV. 437, 477 (1997) (“While NAFTA includes general references to the commitment of its members to the environment, it neither creates substantive obligations nor provides a dispute resolution process for environmental matters. Thus, the countries cannot look to NAFTA to provide guidance in resolving environmental disputes among themselves.”).

<sup>87</sup> For an analysis of BECC and NADBank’s potential role in improving border environmental conditions, see generally Lawrence J. Rowe, *NAFTA, the Border Area Environmental Program, and Mexico’s Border Area: Prescription for Sustainable Development?*, 18 SUFFOLK TRANSNAT’L L. REV. 197 (1995).

mentioned above, however, most of the substantive legal environmental provisions in the 1993 North American Regime are set forth in the NAAEC. These provisions are discussed below.

The core legal provisions of the NAAEC involve the establishment of new North American environmental institutions, the creation of new substantive environmental obligations, and the development of new enforcement procedures. Institutionally, the centerpiece of the NAAEC is the Commission for Environmental Cooperation (“CEC”), headquartered in Montreal, Quebec.<sup>88</sup> The CEC has three main institutional components: (1) the Council of Ministers, composed of the senior environmental ministers/officials from Canada, Mexico and the United States;<sup>89</sup> (2) the Secretariat, the administrative body of the CEC, with an Executive Director appointed directly by the Council of Ministers (“Council”);<sup>90</sup> and (3) JPAC, a 15-person advisory committee comprised of 5 non-governmental representatives from each of the signatories.<sup>91</sup> Because the Council meets only once a year, and because JPAC has only advisory responsibilities, most of the substantive work of the CEC, and of implementing the NAAEC, is delegated to the Secretariat.

The key substantive legal provisions in the NAAEC are set forth in Articles 5(1), 5(2), 6(1), 6(2), 7(3) and 7(4). Article 5(1) requires each Party to effectively enforce its environmental laws and regulations. Article 5(2) further requires each Party to ensure that “judicial, quasi-judicial or administrative enforcement proceedings are available under its laws to sanction or remedy violations of its environmental laws and regulations.” Article 6(1) provides that “[e]ach party shall ensure that interested persons may request the Party’s competent authorities to investigate alleged violations of its environmental law and regulations and shall give such requests due consideration in accordance with the law.” Additionally, Article (6)(2) states that “[e]ach Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial or judicial proceedings for the enforcement of the Party’s environmental laws and regulations.” Article 7(3) requires that “[e]ach Party shall provide, as appropriate, that parties to such proceedings have the right, in accordance with its law, to seek review and, where warranted, correction of final decisions issued in such proceedings.” Finally, Article 7(4) requires each Party to ensure that “tribunals

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<sup>88</sup> NAAEC, *supra* note 10, at Art. 8.

<sup>89</sup> *See id.* at Arts. 9, 10.

<sup>90</sup> *See id.* at Art. 11.

<sup>91</sup> *See id.* at Art. 16.

that conduct or review such proceedings are impartial and independent and do not have any substantial interest in the outcome of the matter.”

In terms of ensuring compliance with substantive environmental provisions, the NAAEC sets forth two separate procedures -- one for government enforcement actions and another for private enforcement actions. The procedures for government enforcement actions, meaning actions brought by Canada, Mexico or the United States, are provided in Article 24. Article 24 states that Canada, Mexico and the United States may request the Council of Ministers to convene an arbitration panel to consider whether one of the other Parties has engaged in a “persistent pattern of failure to effectively enforce its environmental laws.”<sup>92</sup> If two-thirds of the Council of Ministers votes to approve the request, then an arbitration panel is convened to consider the allegation. Under the government enforcement procedures provided in Article 24, the maximum penalty that can be imposed against a Party found in violation of the NAAEC is \$20 million (United States).<sup>93</sup>

The procedures for private enforcement actions under NAAEC are provided in Article 14. Article 14 provides that “[t]he Secretariat may consider a submission from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental laws.” Upon submission of an Article 14 petition, the Secretariat must then determine whether or not the submission merits a response from the Party alleged to be in violation of the NAAEC. If the Secretariat determines that no response is necessary, and the submission need not be considered, it must set forth its position in a “determination.”<sup>94</sup> If the Secretariat determines that a response is merited, the Party alleged to be in violation of the NAAEC has 60 days to prepare and submit a response. If the Secretariat, after review of the response, determines that additional investigation is warranted, Article 15 provides that the Secretariat can request that the Council approve, by a two-thirds vote, the preparation of a “factual record” of the dispute.<sup>95</sup> This request to the Council is set forth in a “determination.”<sup>96</sup>

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<sup>92</sup> See *id.* at Art. 24. “If the matter has not been resolved within 60 days after the Council has convened pursuant to Article 23, the Council shall, on the written request of any consulting Party and by a two-thirds vote, convene an arbitral panel to consider the matter where the alleged persistent pattern of failure by the Party to effectively enforce its environmental laws related to a situation involving workplace, firms, companies or sectors that produce good or provide services: (a) traded between the territories of the Parties; or (b) that compete, in the territory of the Party complained against, with goods and services produced or provided by persons of another Party.” *Id.* at Art. 24(1).

<sup>93</sup> See *id.* at Annex 34.

<sup>94</sup> See Sections 6.1, 8.1, and 10.1, *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* [hereinafter Article 14 and 15 Guidelines].

<sup>95</sup> See NAAEC, *supra* note 10, at Art. 15(1). “If the Secretariat considers that the submission, in light of any response provided by the Party, warrants developing a factual record, the Secretariat shall so inform the Council and

If authorized by the Council, this factual record will evaluate the factual and legal basis for the Article 14 petition. The final version of the Secretariat's factual record must be approved by a two-thirds vote of the CEC's Council.<sup>97</sup> Beyond publication of the factual record by the CEC, there are no other penalties or sanctions available to private parties for enforcing the NAAEC's provisions, nor are there procedures to ensure actual implementation of any recommendations that may be set forth in the factual record.

#### **IV. The 1993 North American Regime: Record on Environmental Enforcement**

An evaluation of enforcement of the NAAEC's substantive legal provisions is limited to an evaluation of the private enforcement submissions brought under Article 14. This is because, to date, Canada, Mexico and the United States have not filed a single arbitration panel request under Article 24.<sup>98</sup> The absence of any enforcement actions by Canada, Mexico and the United States is significant. It points to two possible conclusions, neither of which is particularly encouraging from an environmental standpoint. First, the lack of Article 24 requests could imply that the governments of Canada, Mexico and the United States do not believe that there are any significant problems with the enforcement of national environmental laws. Such a belief would also suggest that these governments probably saw little need for the NAAEC in the first place. Second, the lack of Article 24 requests could imply that, notwithstanding enforcement problems, the governments of Canada, Mexico and the United States are not politically willing to treat the NAAEC as a legally binding agreement, preferring instead to view it simply as an expression of aspirational principles.<sup>99</sup>

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provide its reasons." *Id.* at Art. 15(2). "The Secretariat shall prepare a factual record if the Council, by a two-thirds vote, instructs it to do so." *Id.*

<sup>96</sup> Article 14 Guidelines, *supra* note 95.

<sup>97</sup> *See* NAAEC, *supra* note 10, at Art. 15(7).

<sup>98</sup> *See* Daniel C. Esty & Damien Geradin, *Market Access, Competitiveness, and Harmonization: Environmental Protection in Regional Trade Agreements*, 21 HARV. ENVTL. L. REV. 265, 316 (1997) (reporting that no CEC environmental arbitration panels have been called since the 1993 North American Regime went into effect); *see also* David Lopez, *Dispute Resolution Under NAFTA: Lessons from the Early Experience*, 32 TEX. INT'L L.J. 163, 188 (1997) (stating that "[n]o NAFTA country formally has alleged that another country has engaged in a persistent pattern of failure to effectively enforce its environmental laws; thus, the elaborate dispute settlement mechanism that begins with Article 22 consultations remains untested").

<sup>99</sup> *See* Schiller, *supra* note 86, at 453. "A more skeptical view of the Agreement is that the United States had no intention of procuring improvements in [ ] environmental enforcement at the time the Agreement was conceived. Under this view, the Agreement was merely a ruse to obtain congressional approval for NAFTA." *Id.* "When Clinton was touting the side agreement as a milestone in transnational environmental enforcement, a number of U.S. trade journals were quietly explaining why the CEC would have little authority. A background paper published by the conservative Heritage Foundation noted: 'The U.S. negotiating team had to settle for a face-making agreement that contained little or no power of enforcement. The side agreements are largely meaningless.'" *Endangered Mexico*, *supra* note 55, at 227.

Regardless of which explanation one accepts, the absence of any attempts at enforcement by Canada, Mexico and the United States lends credence to some of the arguments made by the environmental groups that initially opposed adoption of the 1993 North American Regime. To recall, these groups maintained that the NAAEC's provisions were more rhetoric than substance, and that the primary political objective of these provisions was to facilitate the legislative adoption of NAFTA, not to improve environmental protection.<sup>100</sup>

As of March 2000, non-governmental organizations (NGOs) have filed 23 separate private enforcement submissions.<sup>101</sup> The Secretariat terminated six of these submissions, on the grounds that they did not fall within the category of claims permitted under Article 14. The Secretariat terminated an additional two because the issues contained within were the subject of pending administrative or judicial review. The other 15 submissions survived Article 14(1) and 14(2) determinations. One of the 15 was then voluntarily withdrawn. The Secretariat is still reviewing two of the 15 to determine whether responses from the Parties are warranted. Another is presently awaiting a response from the Party. Seven more are awaiting the Secretariat's determination regarding whether they warrant development of a factual record. In the remaining four cases, the Secretariat recommended preparation of a factual record. The Council ordered that such a record be prepared in two of the four cases. The Council has finalized and adopted one of the factual records. Another is currently being prepared. The remaining two are awaiting a decision from the Council. These Article 14 submissions are summarized below.

**(A) Submission 95-001 on the United States' Endangered Species Act**

On June 30, 1995, the Biodiversity Legal Foundation, along with four other NGOs, including Mexico's *Consejo Asesor Sierra Madre*, filed a submission against the United States. The Submitters alleged that the enactment of the 1995 Rescissions Act resulted in a failure to effectively enforce the Endangered Species Act (ESA) because the new law expressly prohibited the United States Fish and Wildlife Service from listing new endangered species under the Act during the 1995 fiscal year.<sup>102</sup> The Secretariat noted that although the 1995 Rescissions Act

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<sup>100</sup> See *supra* notes 73-75 and accompanying text.

<sup>101</sup> See *North American Environmental Law and Policy: CEC SECRETARIAT SUBMISSION DOCUMENTS* (Commission for Environmental Cooperation, Montreal) Winter 1998, at 66-139 [hereinafter SUBMISSION DOCUMENTS]; *Citizen Submissions on Enforcement Matters: Registry and Public File of Submissions* <[http://www.cec.org/citizen/guides\\_registry/index.cfm?varlan=english](http://www.cec.org/citizen/guides_registry/index.cfm?varlan=english)> [hereinafter *Registry*].

<sup>102</sup> See SUBMISSION DOCUMENTS, *supra* note 101, at 67, 69-71.

may have amounted to a breach of the obligation to maintain high levels of environmental protection, this breach did not provide an appropriate basis for an Article 14 submission, which must be based on a “failure to effectively enforce” environmental laws.<sup>103</sup> The Secretariat held that the phrase “failure to effectively enforce ” referred only to action or inaction by agencies or agency officials, and not to legislative decisions to limit or suspend enforcement.<sup>104</sup> Accordingly, on December 11, 1995, the Secretariat terminated the process, concluding that “Article 14 was not intended to create an alternate forum for legislative debate.”<sup>105</sup>

**(B) Submission 95-002 on the United States’ Salvage Logging Rider**

On August 30, 1995, the Sierra Club, together with 27 other NGOs, filed a submission against the United States.<sup>106</sup> The Submitters alleged that passage of the 1995 Salvage Logging Rider (the Rider) resulted in a failure to enforce all environmental laws mentioned within by eliminating private enforcement remedies for salvage timber sales.<sup>107</sup> Specifically, the Rider provided that salvage timber sales would not be subject to administrative review and would automatically satisfy all federal environmental and natural resource laws.<sup>108</sup> The Submitters asserted that the Rider’s language erected potentially “insurmountable obstacles to citizen enforcement of these environmental laws”<sup>109</sup> and essentially eliminated “the most effective (and often only) judicial remedies for [such] violations . . . .”<sup>110</sup> In a ruling similar to that in the previous submission, the Secretariat held that “the enactment of legislation which specifically alters the [operation] of pre-existing environmental laws in essence becomes a part of the greater body of laws and statutes on the books. This is true even if pre-existing law is not amended or

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<sup>103</sup> *See id.* at 74.

<sup>104</sup> *See id.* at 72-73.

<sup>105</sup> *See id.* at 73

<sup>106</sup> *See id.* at 77, 79. The other co-submitters were Alaska Center for the Environment, Ancient Forest Rescue, Friends of the Earth, Headwaters, Hells Canyon Preservation Council, Idaho Conservation League, Inland Empire Public Lands Council, Institute for Fisheries Resources, Klamath Forest Alliance, National Audubon Society, Natural Resources defense Council, Northcoast Environmental Center, Northwest Ecosystem Alliance, Oregon Natural Resources Council, Pacific Coast Federation of Fishermen’s Associations, Pacific Rivers Council, Pilchuck Audubon Society, Portland Audubon Society, Seattle Audubon Society, Southern Rockies Ecosystem Project, Western Ancient Forest Campaign, The Wilderness Society, Earthlife Canada Foundation operating as BC Wild, Environmental Resource Centre of Alberta, Centro Mexicano de Derecho Ambiental, Grupo de los Cien, and Red Mexicana de Acción Frente al Libre Comercio. *See id.*

<sup>107</sup> *See id.* at 77, 79-80.

<sup>108</sup> *See id.* at 80.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 82.

rescinded.”<sup>111</sup> The Secretariat concluded that the “deemed to satisfy” language in the Rider did not constitute a “failure to enforce” under Article 14 of NAAEC. Thus, the Secretariat terminated the process on December 8, 1995.<sup>112</sup>

**(C) Submission 96-001 on Protection of Reefs in Cozumel, Mexico**

On January 18, 1996, the *Centro Mexicano de Derecho Ambiental* (Mexican Center for Environmental Law) and two other environmental organizations, the *Comité para la Protección de los Recursos Naturales* (Natural Resource Protection Committee) and the *Grupo de los Cien Internacional* (International Group of One Hundred), filed a submission against Mexico.<sup>113</sup> The submission concerned the construction of a cruise ship pier on the island of Cozumel, located in the Mexican State of Quintana Roo. The Submitters alleged that the construction and operation of the cruise ship pier would have significant adverse environmental impacts on nearby coral reef ecosystems, the best known of which is the Paraiso (Paradise) Reef. As such, the Submitters argued that, under Mexico’s national ecology law, work on the cruise ship pier must be halted until a proper environmental impact assessment was completed.<sup>114</sup>

The Secretariat determined that the Submitters had alleged a sufficient factual and legal basis to require Mexico to respond. Following a review of Mexico’s response, the Secretariat recommended that the Council ordered the preparation of a factual record.<sup>115</sup> On August 2, 1996, the Council adopted the recommendation and instructed the Secretariat to prepare a factual record.<sup>116</sup>

The factual record, which was completed and released to the public on October 24, 1997, provided a detailed account of the Mexican laws relating to the protection of Cozumel’s reefs, and of Mexico’s apparent disregard of those laws in its effort to approve and complete the Cozumel pier project.<sup>117</sup> The factual record, however, stopped short of expressly finding that Mexico had violated the NAAEC. It also failed to set forth any specific recommendations or requirements for Mexico.<sup>118</sup> As a result, there is considerable debate and uncertainty as to the

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<sup>111</sup> *Id.*

<sup>112</sup> *See id.* at 78, 84-85.

<sup>113</sup> *See id.* at 87, 91.

<sup>114</sup> *See id.* at 87-88, 91-93.

<sup>115</sup> *See id.* at 97.

<sup>116</sup> *See id.* at 89.

<sup>117</sup> *See id.* at 141-90.

<sup>118</sup> *See id.* at 89.

meaning of the findings and the significance of the factual record.<sup>119</sup> A more detailed analysis of the CEC's response to the Cozumel reef dispute is provided below in Section V.

**(D) Submission 96-002 on Wetlands Protection in Alberta, Canada**

On March 20, 1996, Mr. Aage Tottrup, a Canadian citizen, filed a submission against Canada and the province of Alberta, alleging that they had failed to effectively enforce water pollution laws in wetland areas.<sup>120</sup> Tottrup asserted that this non-enforcement had resulted in significant adverse impacts on the habitat of fish and migratory birds.<sup>121</sup>

In considering whether the submission merited a response from Canada or Alberta, the Secretariat reviewed Article 14(2) of the NAAEC.<sup>122</sup> Article 14(2) provides, in relevant part, that "in deciding whether to request a response, the Secretariat shall be guided by whether . . . private remedies available under the Party's law have been pursued . . . ."<sup>123</sup> The Secretariat pointed out that Mr. Tottrup had already initiated proceedings against the Canadian federal government in Court of Queen's Bench of Alberta, Judicial District of Edmonton, and that the outcome of that suit was still pending.<sup>124</sup> Accordingly, the Secretariat determined that, pursuant to Article 14(2), it would not proceed any further with the submission until the suit in the Court of Queen's Bench was resolved.<sup>125</sup>

**(E) Submission 96-003 on Environmental Assessment of Fisheries in Canada**

On September 9, 1996, the Friends of the Oldman River (FOR), a Canadian organization, filed a submission against Canada.<sup>126</sup> FOR alleged that the Government of Canada was failing to enforce the Canadian Fisheries Act (CFA) and the Canadian Environmental Assessment Act (CEAA). Specifically, FOR stated that "[t]here are very few prosecutions under the habitat

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<sup>119</sup> See Susan Ferriss, *Oversight Groups Coexist Uneasily with NAFTA Feeling Powerless, Environmentalists Grow Frustrated*, ATLANTA J. AND CONST., August 2, 1998. This article contains a quote from Dora Uribe, an attorney from Cozumel, which states that the "only conclusion [one] can make...is that this is another bureaucracy with no power." *Id.* Ms. Uribe's quote notwithstanding, the article also has Gustava Alanis, President of the Mexican Center for Environmental Law, declaring that the Cozumel record represented "an enormous victory for international environmental rights." *Id.* (quoting Brandon, *supra* note 107, at 1).

<sup>120</sup> See SUBMISSION DOCUMENTS, *supra* note 101, at 99, 101.

<sup>121</sup> See *id.*

<sup>122</sup> See *id.* at 101-02.

<sup>123</sup> NAAEC, *supra* note 10, Art. 14(2).

<sup>124</sup> See SUBMISSION DOCUMENTS, *supra* note 101, at 102.

<sup>125</sup> See *id.*

<sup>126</sup> See *id.* at 103, 109.

provisions of the Fisheries Act, and the prosecutions that do occur are very unevenly distributed across the country. In fact, there has been a *de facto* abdication of legal responsibilities by the Government of Canada to the inland provinces, and the provinces have not done a good job of ensuring compliance with or enforcing the Fisheries Act.”<sup>127</sup>

The Secretariat determined that FOR’s submission satisfied the criteria under Article 14(1) of the NAAEC, and requested a response from Canada.<sup>128</sup> In its response, Canada asserted that a second environmental organization, Friends of the West Country Association (FWCA), had filed suit in the Trial Division of the Federal Court of Canada in Alberta on November 7, 1996 – two months after the filing date of the submission at issue. According to Canada, the allegations contained in FOR’s submission were essentially the same as those raised FWCA’s lawsuit. As such, Canada contended that the Secretariat was required to terminate the review process until FWCA’s case was resolved.<sup>129</sup>

In evaluating Canada’s response, the Secretariat began by noting that, pursuant to Article 45(3) of the NAAEC, the term “judicial or administrative proceeding” only refers to actions brought by the Government, not by private parties such as FWCA.<sup>130</sup> Accordingly, the Secretariat rejected Canada’s argument that Article 14(3) *mandated* that the review process be terminated.<sup>131</sup> Nonetheless, the Secretariat determined that Article 14(2) did provide *discretionary authority* to terminate the review process in a case such as this, even if an organization separate and distinct from a submitter had filed the pending lawsuit. The Secretariat concluded that the matters raised in the submission bore a close resemblance to the issues then before the Federal Court of Canada.<sup>132</sup> As such, the Secretariat was “reluctant to embark on a process which might unwittingly intrude on one or more of the litigant’s strategic considerations -- considerations which weigh in favor of allowing the domestic proceeding to

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<sup>127</sup> See *id.* at 103.

<sup>128</sup> See *id.* at 109.

<sup>129</sup> See *id.* Canada based its argument on Articles 14(2) and 14(3) of the NAAEC. As discussed above in the summary of Mr. Aage Tottrup’s submission, Article 14(2) provides, in relevant part, that “in deciding whether to request a response, the Secretariat shall be guided by whether . . . private remedies available under the Party’s law have been pursued . . .” Article 14(3) provides that if “the matter is the subject of pending judicial or administrative proceeding, [ ] the Secretariat shall proceed no further.”

<sup>130</sup> See NAAEC, *supra* note 10, Art. 45(3). Specifically, Article 45(3) provides that “judicial or administrative proceeding” means “a domestic judicial, quasi-judicial or administrative action pursued by the Party in a timely fashion and in accordance with its law. Such actions comprise: mediation; arbitration, the process of issuing a license, permit or authorization; seeking an assurance of voluntary compliance or a compliance agreement; seeking sanctions or remedies in an administrative or judicial forum; and the process of issuing an administrative order.”

<sup>131</sup> See SUBMISSION DOCUMENTS, *supra* note 101, at 112.

<sup>132</sup> See *id.* at 113.

advance without risking duplication or interference by considering parallel issues under the [NAAEC].”<sup>133</sup> Accordingly, the Secretariat terminated the review process on April 2, 1997.<sup>134</sup>

**(F) Submission 96-004 on Military Base Expansion by the United States Army**

On November 14, 1996, the Southwest Center for Biological Diversity (SCBD), a United States-based NGO, filed a submission against the United States.<sup>135</sup> The submission concerned the United States Army’s expansion of Fort Huachuca in the state of Arizona. SCBD alleged that expanding the base would significantly increase demand for the limited water resources of the San Pedro River basin, and increased pumping from San Pedro River’s aquifer would damage the unique ecosystem that is dependent on the river’s flow.<sup>136</sup> The Army prepared an environmental impact assessment in connection with the proposed base expansion, but it did not address “cumulative impacts,” such as the effect of the expansion on regional water resources and the San Pedro River basin ecosystem.<sup>137</sup> SCBD contended that the Army’s failure to assess these cumulative impacts constituted a failure to enforce and comply with the National Environmental Policy Act (NEPA).<sup>138</sup> Two years earlier SCBD had filed a lawsuit against the Army alleging NEPA violations. A federal judge dismissed that lawsuit, however, holding that the statute of limitation for SCBD’s NEPA claim had expired.<sup>139</sup> The Secretariat determined that the submission satisfied the criteria of Article 14(1) of the NAAEC and, therefore, requested a response from the United States.<sup>140</sup>

The United States responded with several arguments. First, the United States argued that the alleged non-enforcement of NEPA occurred before the NAAEC entered into force and, thus, was not subject to an Article 14 challenge because the NAAEC was not intended to apply retroactively.<sup>141</sup> Second, the United States maintained that the Army’s environmental impact assessment was consistent with the requirements of NEPA.<sup>142</sup> Third, the United States

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<sup>133</sup> *Id.* at 114.

<sup>134</sup> *See id.* at 105, 114.

<sup>135</sup> *See id.* at 66, 115.

<sup>136</sup> *See id.* at 115.

<sup>137</sup> *See id.*

<sup>138</sup> *See id.*

<sup>139</sup> *See id.*

<sup>140</sup> *See id.* at 117.

<sup>141</sup> *See id.* at 116.

<sup>142</sup> *See id.*

contended that SCBD had failed to pursue private remedies under domestic law because the NEPA lawsuit had been untimely.<sup>143</sup> Finally, the United States responded that the development of a factual record by the CEC could adversely affect SCBD's pending judicial appeal of the dismissal of a suit brought under the Endangered Species Act (ESA).<sup>144</sup> According to the United States, the ESA lawsuit was based on facts that were then the subject of its Article 14 submission.<sup>145</sup>

The Secretariat did not address the arguments raised by the United States, however, because SCBD filed a notice to withdraw its submission pursuant to Section 14.1 of the *Guidelines for Submission on Enforcement Matters under Articles 14 or 15* on June 6, 1997.<sup>146</sup> Apparently, SCBD determined that its limited resources would be better spent pursuing the domestic appeal, rather than the submission. As a result of SCBD's request, the Secretariat terminated the review process on June 5, 1997.

**(G) Submission 97-001 on Impact of Canadian Hydroelectric Dams on Fish in British Columbia**

On April 2, 1997, the British Columbia Aboriginal Fisheries Commission (AFC), a Canadian NGO, filed a submission against the Government of Canada, alleging a failure to enforce the Canadian Fisheries Act and the National Energy Board Act.<sup>147</sup> According to the AFC, the Canadian Department of Fisheries and Oceans ("DFO") and the National Energy Board ("NEB") had failed to protect the fish and fish habitat on British Columbia's rivers from ongoing environmental damage caused by hydroelectric dams.<sup>148</sup> Specifically, the AFC alleged that the DFO had refused to impose fines against private hydropower companies for damage to fish habitat and the NEB had refused to investigate the environmental impacts of hydropower generation.<sup>149</sup> On May 15, 1997, the Secretariat determined that AFC's submission satisfied the criteria of Article 14(2) and requested a response from Canada.<sup>150</sup>

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<sup>143</sup> *See id.*

<sup>144</sup> *See id.*

<sup>145</sup> *See id.*

<sup>146</sup> *See id.* at 117. Section 14.1 provides that "[i]f a Submitter informs the Secretariat in writing that it no longer wishes to have the submission process continue with respect to its submission, the Secretariat will proceed no further with the submission . . . ." Article 14 and 15 Guidelines, *supra* note 94.

<sup>147</sup> *See* SUBMISSION DOCUMENTS, *supra* note 101, at 66, 119.

<sup>148</sup> *See id.* 119.

<sup>149</sup> *See id.*

<sup>150</sup> *See id.* at 121.

On July 21, 1997, Canada filed its response with the CEC.<sup>151</sup> In its response, Canada argued that a factual record should not be prepared for the following reasons: (1) the enforcement of the Fisheries Act was the subject of pending judicial and administrative proceedings; (2) the DFO's and NEB's actions were consistent with the agencies' discretionary authority under Canadian environmental law; and (3) the non-enforcement alleged by the AFC took place before the NAAEC went into effect.<sup>152</sup> The Secretariat concluded that Canada's arguments did not warrant terminating the Article 14 review process because the pending administrative and judicial proceedings did not deal with the same underlying facts, the DFO's and NEB's enforcement discretion was not unlimited, and the alleged non-enforcement had continued after the NAAEC took effect. Accordingly, the Secretariat recommended that the Council order the preparation of a factual record. On June 24, 1998, the Council adopted the recommendation and instructed the Secretariat to prepare a draft factual record.<sup>153</sup>

In conformance with the procedures for developing a factual record, the CEC developed a timeline, which included deadlines for the receipt of comments by interested stakeholders.<sup>154</sup> The CEC extended those deadlines several times, but eventually the Secretariat received comments from the following sources: (1) the AFC; (2) the government of Canada; (3) the government of British Columbia; (4) B.C. Hydro; and (5) the Athabasca Chipewyan First Nation.<sup>155</sup> The Secretariat is currently reviewing the information and "will conduct the appropriate follow up."<sup>156</sup> It is not known when the factual record will be completed or whether the Council will authorize publication of that record.

#### **(H) Submission 97-002 on Water Pollution in Sonora, Mexico**

On March 15, 1997, the *Comité Pro Limpieza del Río Magdalena* (CPLRM) filed a submission against Mexico. The submission alleged that the municipalities of Imuris,

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<sup>151</sup> *See id.*

<sup>152</sup> *See id.* at 120.

<sup>153</sup> *See Registry, supra* note 101, at SEM-97-001.

<sup>154</sup> *See* The Commission for Environmental Cooperation Draft Factual Record Under Articles 14 and 15 SEM-97-001, Synopsis,

<http://www.cec.org/templates/registrytext.cfm?&varlan=english&documentid=186&format=2>.

<sup>155</sup> *See Registry, supra* note 101, at SEM-97-001.

<sup>156</sup> *See id.*

Magdalena de Kino, and Santa Ana, located in the Mexican State of Sonora, were discharging untreated wastewater into the Magdalena River.<sup>157</sup> The CPLRM maintained that these discharges violated the federal General Ecology Law, as well as Sonora's Ecology Law and Sonora's Water Law.<sup>158</sup> On July 2, 1997, the Secretariat asked the CPLRM to provide additional information regarding claims that Mexico and the State of Sonora had "failed to enforce" the above mentioned laws.<sup>159</sup>

On October 6, 1997, the Secretariat determined that the submission complied with Article 14(1) of the NAAEC.<sup>160</sup> Seven months later, the Secretariat issued an Article 14(2) determination and requested a response from Mexico.<sup>161</sup>

Mexico filed its response on July 29, 1998.<sup>162</sup> Mexico argued that most of the facts contained within the submission occurred prior to the date the NAAEC came into force. According to Mexico, the Secretariat could not legally consider such facts. Mexico also contended that CPLRM failed to exhaust available legal remedies prior to filing its submission. Mexico maintained that, in cooperation with the State of Sonora, it was working to improve the state of the Magdalena River despite budgetary constraints. In response to the statutory violations alleged by CPLRM, Mexico asserts that it is effectively enforcing its environmental laws.<sup>163</sup>

On December 16, 1999, the Secretariat requested additional information from the Submitters under Article 21.<sup>164</sup> The Secretariat is still awaiting a response from CPLRM.

#### **(I) Submission 97-003 on Pollution from Hog Farms in Quebec, Canada**

On April 9, 1997, the *Centre Québécois Du Droit de L'Environnement* (CQDE) filed a submission against Canada and the Province of Quebec alleging non-enforcement of Quebec's Environmental Quality Act and Quebec's Regulation Respecting the Prevention of Water Pollution in Livestock Operations.<sup>165</sup> Seventeen other organizations, mostly from Quebec,

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<sup>157</sup> See SUBMISSION DOCUMENTS, *supra* note 101, at 123.

<sup>158</sup> *See id.*

<sup>159</sup> *See id.*

<sup>160</sup> *See Registry, supra* note 101, at SEM-97-002.

<sup>161</sup> *See id.*

<sup>162</sup> *See id.*

<sup>163</sup> *See id.*

<sup>164</sup> *See id.*

<sup>165</sup> *See id.*

joined the CQDE as co-submitters.<sup>166</sup> The Submitters alleged that the government of Quebec had failed to enforce certain environmental protection standards regarding agricultural pollution originating from animal production facilities, mainly from hog farms.<sup>167</sup>

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

On September 9, 1997, Canada filed a response in which it set forth two main arguments.<sup>168</sup> First, Canada asserted that Quebec was effectively enforcing its Environmental Quality Act and the Regulation Respecting the Prevention of Water Pollution in Livestock Operations.<sup>169</sup> Second, Canada maintained that the preparation of a factual record by the CEC would be inappropriate because Quebec had just adopted new regulations with respect to agricultural pollution and new measures to improve enforcement of the Environmental Quality Act.<sup>170</sup> As such, even if there was a problem of non-enforcement in the past, Quebec had since taken action to address the problem, and hence there was no current “failure to enforce” and no basis for the Secretariat to proceed.

On October 29, 1999, the Secretariat recommended that the Council order the preparation of a factual record.<sup>171</sup> The Council has yet to adopt the Secretariat’s recommendation.

#### **(J) Submission 97-004 on Canada’s East Coast Fisheries**

On May 26, 1997, the Canadian Environmental Defense Fund (EDF) filed a submission against Canada, alleging that the Canadian government was not enforcing its laws requiring

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<sup>166</sup> See SUBMISSION DOCUMENTS, *supra* note 101, at 125. The CQDE’s co-submitters were Centre de Recherche et d’Intervention Environnementale du Grant-Portage, Comité de Citoyens À Bon Parte, Comité de Citoyens de Grande-Piles, Comité de Citoyens de Saint-André de Kamouraska, Comité de Citoyens de Sainte-Luce, Comité de Citoyens de St-Roch-de-Mékinac, Comité de Protection de la Santé et de l’Environnement de Gaspé, Comité de Protection Panmassawipi, Comité de Santé Public et de l’Environnement, Comité de Qualité de Vie de Saint-Jean-de-Dieu, Les Ami-e-s de la Terre de Québec, Mouvement Vert Mauricie, Regroupement Écologique de Val d’Or et de ses Environs, Réseau Québécois des Groupes Écologistes, Union Québécoise pour la Conservation de la Nature, and Union Saint-Laurent Grands Lacs.

<sup>167</sup> See *id.* at 126.

<sup>168</sup> See *id.* at 127.

<sup>169</sup> See *id.* at 126.

<sup>170</sup> See *id.*

<sup>171</sup> See *Registry, supra* note 101, at SEM-97-003.

environmental assessment of federal initiatives, policies and programs.<sup>172</sup> Specifically, the EDF asserted that the Canadian government violated the Environmental Assessment and Review Process Guidelines Order (EARPGO) when it approved and implemented The Atlantic Groundfish Strategy (TAGS) without first performing an environmental assessment.<sup>173</sup> The EDF argued that the implementation of TAGS would “jeopardize the future of Canada’s east coast fisheries.”<sup>174</sup> According to the EDF, at the time that TAGS was introduced in May 1994, EARPGO was the governing federal law for environmental assessment. Therefore, TAGS was subject to EARPGO’s requirements and Canada had no discretionary authority to avoid an environmental assessment.<sup>175</sup>

In evaluating the EDF submission, the Secretariat looked to the language in Article 14(1) of the NAAEC.<sup>176</sup> The Secretariat found significant the fact that the language in Article 14(1) only refers to situations in which a party “*is failing to effectively enforce its environmental law.*”<sup>177</sup> As such, the Secretariat concluded that the Article 14(1) submission procedures are not available to private parties alleging non-enforcement that occurred wholly in the past.

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

The submission refers to an action, inaction or decision, which has already been completely acted upon over three years ago, with nothing about the decision left open or unfinished. The submission, filed three years after the decision on, and the entry into force of, the government’s strategy, provides no indication that the Party’s failure is continuing or recent. The Secretariat is not aware of any reason that would have prevented the Submitter from filing its submission at the time it became aware of the government’s alleged failure to enforce.<sup>178</sup>

The Secretariat went on to conclude that “[u]nder the circumstances, the submission does not appear to have raised the issue of non-enforcement in a timely manner in light of the

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<sup>172</sup> *See id.* at 129.

<sup>173</sup> *See id.* at 132.

<sup>174</sup> *Id.*

<sup>175</sup> *See id.*

<sup>176</sup> *See id.* at 133-34.

<sup>177</sup> *Id.* at 134.

<sup>178</sup> *Id.*

temporal requirement of Article 14(1) . . . .”<sup>179</sup> Accordingly, the Secretariat terminated the review process on August 25, 1997.<sup>180</sup>

The Secretariat’s determination in this matter thus appears to establish two new requirements for Article 14 submissions that seem somewhat akin to the common law concepts of mootness<sup>181</sup> and laches.<sup>182</sup> First, an Article submission cannot solely allege a past failure to enforce environmental law; rather it must allege an ongoing and present failure to enforce environmental law. Second, if a submitter does not file a submission in a “timely manner” (a phrase not defined in the CEC’s determination), the submission may be deemed inconsistent with the “temporal requirements” (also not defined) of Article 14(1).

**(K) Submission 97-005 on the Biodiversity Convention under Canadian Law**

On July 21, 1997, three Canadian organizations, the Animal Alliance of Canada, the Council of Canadians, and Greenpeace of Canada, filed a submission against the government of Canada.<sup>183</sup> The Submitters alleged that Canada had failed to enforce its regulation ratifying the Convention on Biological Diversity signed at the Rio Earth Summit on June 11, 1992 and subsequently ratified by Canada pursuant to an Order-in-Council on December 4, 1992.<sup>184</sup> According to the Submitters, pursuant to the Order-in-Council, the Convention on Biological Diversity (Biodiversity Convention) is now a legally binding regulation under Canadian law.<sup>185</sup> Specifically, the Submitters asserted that Canada had failed to enforce Article 8(k) of the Biodiversity Convention, which requires that each country must “develop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species and

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<sup>179</sup> *Id.*

<sup>180</sup> *See id.* at 130.

<sup>181</sup> *See* BLACK’S LAW DICTIONARY 1008 (6th Edition, 1990) (stating that “an action is considered ‘moot’ when it no longer presents a justiciable controversy because issues involved have become academic or dead”).

<sup>182</sup> *See* BLACK’S LAW DICTIONARY 876 (6th Edition, 1990) (stating that the “‘Doctrine of laches’ is based upon the maxim that equity aids the vigilant and not those who slumber on their rights. It is defined as neglect to assert a right or claim which, taken together with the lapse of time and other circumstances causing prejudice to the adverse party, operates as a bar in court . . .”).

<sup>183</sup> *See* SUBMISSION DOCUMENTS, *supra* note 101, at 137.

<sup>184</sup> *See id.*

<sup>185</sup> *See id.*

populations.”<sup>186</sup> This submission represented the first time that the Article 14 process was used to seek enforcement of an international environmental treaty.

On May 26, 1998, the Secretariat issued the Article 14(1) determination.<sup>187</sup> The Secretariat began by addressing the issue of whether the Ratification Instrument constituted “environmental law” for purposes of the NAAEC.<sup>188</sup> The Secretariat acknowledged that the term “environmental law” should be interpreted expansively.<sup>189</sup> Nonetheless, the Secretariat found that the Submitters failed to make “a critical distinction between ‘international’ and ‘domestic’ legal obligations.”<sup>190</sup> Based on Canada’s long-standing constitutional principle that the ratification process does not import international obligations into domestic law absent implementation by way of statute and/or regulation, the Secretariat concluded that the Ratification Instrument could not be considered an “environmental law” of Canada for purposes of Article 14(1).<sup>191</sup> Instead, the Ratification Instrument simply evidenced and constituted “a one time administrative act by a representative of the executive branch of the Canadian government . . . .”<sup>192</sup> Holding that any further review of the submission at issue was precluded, the Secretariat terminated the process on May 26, 1998.<sup>193</sup>

A question left unanswered by the Secretariat’s determination is whether an NGO that was not an original submitter, may be added as a co-submitter after the Secretariat has begun the review process. In this case, two NGOs, the *Centro Mexicano de Derecho Ambiental* and the Northwest Ecosystem Alliance, requested that the Secretariat add them as co-submitters four and five months respectively after the submission had been filed.<sup>194</sup> The Secretariat responded to

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<sup>186</sup> *Id.*

<sup>187</sup> *See Registry, supra* note 101, at SEM-97-004.

<sup>188</sup> *See* Determination Pursuant to Article 14(1) of the North American Agreement on Environmental Cooperation, <<http://www.cec.org/templates/registrytext.cfm?&varlan=english&documentid=159&format=2>>.

<sup>189</sup> *See id.*

<sup>190</sup> *See id.*

<sup>191</sup> *See id.*

<sup>192</sup> *See id.*

<sup>193</sup> *See id.*

<sup>194</sup> *See* Acknowledgment of Receipt of the Request from Centro Mexicano de Derecho Ambiental (December 19, 1997) <<http://www.cec.org/templates/registrytext.cfm?&varlan=english&documentid=128&format=2>>; Acknowledgment of Receipt of the Request from Northwest Ecosystem Alliance (December 19, 1997) <<http://www.cec.org/templates/registrytext.cfm?&varlan=english&documentid=129&format=2>>.

both parties that neither the NAAEC nor *the Guidelines for Submissions on Enforcement Matters under Articles 14 and 15* contemplated the addition of co-submitters. The Secretariat indicated that the requests would be evaluated, however, the *Registry of Submission on Enforcement Matters* does not indicate that such an evaluation ever took place. The requests were mooted when the Secretariat terminated the process.

**(L) Submission on Environmental Assessment of Fisheries in Canada<sup>195</sup>**

On October 4, 1997, The Friends of the Oldman River (“FOR”), a non-profit society incorporated under Canadian law, began anew the Article 14 process on its previous submission.<sup>196</sup> Six months earlier, the Secretariat had determined that FOR’s submission did not warrant developing a factual record because legal issues similar to those raised in the submission were pending before the Federal Court of Canada.<sup>197</sup> That case, brought by The Friends of the West Country Association (“FWCA”) against the Minister of Fisheries and Oceans and the Attorney General of Canada, was apparently dismissed in September of 1997.<sup>198</sup> FOR stated that FWCA had abandoned its application based on information it received post filing.<sup>199</sup>

On May 8, 1998, the Secretariat requested a response to FOR’s submission from the Government of Canada.<sup>200</sup> Canada submitted its response on July 13, 1998.<sup>201</sup> Canada maintained that the matter continued to be the subject of active litigation because appeals could still be considered.<sup>202</sup> Canada also argued that it was effectively enforcing its environmental laws and that the method by which it enforced Section 35 of the Fisheries Act and its implementing Directives was “a legitimate exercise of its regulatory and compliance

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<sup>195</sup> See *supra* Section IV(E) and accompanying footnotes.

<sup>196</sup> See Letter from Martha Kostuch, Vice President, The Friends of the Oldman River to Victor Lichtinger, Executive Director, Commission for Environmental Cooperation, dated Oct. 4, 1997 <<http://www.cec.org/templates/registrytext.cfm?&varlan=english&documentid=145&format=2>> [hereinafter FOR Re-Submission Letter].

<sup>197</sup> See *id.*; see Article 15(1) Determination (April 2, 1997).

<sup>198</sup> See FOR Re-Submission Letter, *supra* note 134.

<sup>199</sup> See *id.* The information indicated that of the 21 stream crossings contemplated by the project-in-question, 19 had never been the subject of authorizations or letters of advice and the remaining two would undergo an environmental assessment pursuant to the Navigable Waters Protection Act.

<sup>200</sup> See Article 14(2) Determination, May 8, 1998, <<http://www.cec.org/templates/registrytext.cfm?&varlan=english&documentid=153&format=2>>.

<sup>201</sup> See Response of the Government of Canada to Submission on Enforcement Matters Under Articles 14 and 15 of the North American Agreement on Environmental Co-Operation (NAAEC), Submission No. SEM-97-006, October 4, 1997 By Friends of the Old Man (sic) River [hereinafter Canada’s Response], <<http://www.cec.org/templates/registrytext.cfm?&varlan=english&documentid=163&format=2>>.

<sup>202</sup> *Id.*

discretion.”<sup>203</sup> Canada further noted that the offending Directive “operates within the law and possesses administrative integrity.”<sup>204</sup> Canada stated that the pattern of program implementation and enforcement across the country was appropriate and that cooperation with provinces increased enforcement resources and allowed for more effective enforcement.<sup>205</sup>

On July 19, 1999, the Secretariat recommended that the Council order the preparation of a factual record.<sup>206</sup> The Council has not yet voted on whether to adopt the Secretariat’s recommendation.<sup>207</sup>

**(M) Submission 97-007 on the Hydrological Basin of the Lerma Santiago River, Lake Chapala, Mexico**

On October 10, 1997, the *Instituto de Derecho Ambiental* (the Institute for Environmental Law) (“IDA”) filed a submission against the Government of Mexico, alleging that authorities had failed to handle properly an administrative citizen complaint by IDA.<sup>208</sup> IDA filed the complaint, which sought a declaration of a state of emergency in the Lake Chapala ecosystem, on September 23, 1996.<sup>209</sup> According to IDA, the *Procuraduría Federal de Protección al Ambiente* (the Federal Attorney for Environmental Protection or “PROFEPA”) failed to follow the procedure required by the General Law on Ecological Balance and Environmental Protection (LGEEPA) with respect to IDA’s complaint.<sup>210</sup>

On October 2, 1998, the Secretariat requested a response from Mexico.<sup>211</sup> Mexico filed its response on December 16, 1998.<sup>212</sup> Mexico responded that it processed the citizen complaint at issue in accordance with the LGEEPA.<sup>213</sup> Mexico also took the position that the function of the complaint is merely to inform an environmental authority of potential issues that

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<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *See id.*

<sup>206</sup> *See Registry, supra* note 101, at SEM-97-006.

<sup>207</sup> *See id.*

<sup>208</sup> *See id.* at SEM-97-007.

<sup>209</sup> *See id.*

<sup>210</sup> *See id.*

<sup>211</sup> *See id.* The Secretariat’s Determination under Article 14(2) is not available for public viewing.

<sup>212</sup> *See id.* Mexico’s response is not for public viewing, but it is summarized in the registry.

<sup>213</sup> *See id.*

might be investigated by that authority.<sup>214</sup> Mexico further asserted that IDA's petition was not properly before the Secretariat because IDA had failed to exhaust its recourses under Mexican law.<sup>215</sup> In addition, IDA failed to state how the government's alleged omissions affected or endangered the environment.<sup>216</sup> Mexico contended that IDA's submission dealt purely with procedure and not the environmental state of Lake Chapala, which was the focus of the citizens' complaint.<sup>217</sup> The Secretariat is still reviewing the submission in light of the response provided by Mexico.<sup>218</sup>

**(N) Submission 98-001 on Explosions in the Reforma Sector of the City of Guadalajara, Jalisco, Mexico**

On January 9, 1998, IDA, together with some of the citizens affected by a series of explosions in Guadalajara, Mexico on April 2, 1992, filed a submission alleging that the Federal Attorney General and the Federal Judiciary failed to duly enforce the LGEEPA in relation to the explosions.<sup>219</sup> The explosions, which occurred as a result of the presence of hydrocarbons and other highly explosive substances in the underground sewer, killed 204 people, injured 1,460 people, and destroyed or damaged roughly 1100 buildings.<sup>220</sup> The Federal Attorney initiated criminal proceedings against nine individuals, but subsequently stayed those proceedings – an act that IDA believed effectively impeded any further investigation of the incident.<sup>221</sup>

On September 13, 1999, the Secretariat rejected the initial submission in part because it failed to connect the incident with a violation of environmental law.<sup>222</sup> The Secretariat found that the dismissal of the criminal proceedings did not constitute a failure to enforce

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<sup>214</sup> *See id.*

<sup>215</sup> *See id.*

<sup>216</sup> *See id.*

<sup>217</sup> *See id.*

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

<sup>219</sup> *See* Secretariat's Determination under Article 14(1), September 13, 1999, accessible through the *Registry*, *supra* note 101, at SEM-98-001.

<sup>220</sup> *See id.*

<sup>221</sup> *See id.*

<sup>222</sup> *See id.*

environmental law.<sup>223</sup> The Secretariat granted IDA 30 days to file a new submission that would meet the criteria of Article 14(1).<sup>224</sup> IDA resubmitted its petition on October 15, 1999.<sup>225</sup> The Secretariat reached the same conclusion regarding the second submission and terminated the process on January 11, 2000.<sup>226</sup>

Although the submission was ineffective, the Secretariat reached two conclusions worth noting. The first is temporal. The Secretariat began by noting that the explosions at issue had occurred in 1992, nearly two years prior to the NAAEC's effective date of January 1, 1994.<sup>227</sup> The Secretariat then reasoned that the NAAEC does not require that *events* referenced by a submitter in its allegations must have occurred after the NAAEC entered into force, so long as the *alleged failure to enforce* environmental law occurred after the NAAEC's effective date.<sup>228</sup>

The second conclusion relates to the application of certain NAAEC provisions. In its submission, IDA alleged that Articles 5(1)(j)(1), 6 and 7 of the NAAEC had not been enforced effectively.<sup>229</sup> The Secretariat pointed out, however, that Article 14 of the NAAEC provides the *exclusive* process for NGOs and individuals alleging that a party is not effectively enforcing its environmental laws.<sup>230</sup> Thus, NGOs and individuals cannot seek enforcement of Articles 5(1)(j)(1), 6 and 7 via a submission under Article 14.<sup>231</sup>

**(O) Submission 98-002 on Forestry Operations in El Taray, Jalisco, Mexico**

On October 14, 1997, Hector Gregorio Ortiz Martinez (Martinez) filed a submission against the *Secretaría de Medio Ambiente, Recursos Naturales y Pesca* (the Secretary of Environment, Natural Resources and Fisheries or "SEMARNAP") and the PROFEPA, alleging various procedural violations in processes relating to forestry operations in El Taray.<sup>232</sup> This submission, like the previous one, found its origin in the filing of a *denuncia popular* (a citizen

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<sup>223</sup> *See id.* Interestingly enough, however, the Secretariat did not reach the issue of whether the dismissal constituted a failure to enforce against the nine defendants, nor whether failing to prosecute others constituted a failure to enforce. *See id.*

<sup>224</sup> *See id.*

<sup>225</sup> *See id.*

<sup>226</sup> *See id.*

<sup>227</sup> *See id.*

<sup>228</sup> *See id.*

<sup>229</sup> *See id.*

<sup>230</sup> *See id.*

<sup>231</sup> *See id.*

<sup>232</sup> *See Registry, supra* note 101, at SEM-98-002.

complaint).<sup>233</sup> As such, Martinez' submission dealt largely with the Party's internal administrative proceedings and not the enforcement of environmental law.<sup>234</sup> The Secretariat found that there were several grounds on which to reject Martinez' submission, including the fact that Martinez' complaint centered around the management of commercial natural resources -- a subject that, under Article 45(2)(b) of the NAAEC, is excluded from the definition of "environmental law."<sup>235</sup> The Secretariat concluded that the submission failed to meet the requirements established in Article 14(1).<sup>236</sup>

Having so determined, the Secretariat was not required to reach the Submitter's remaining allegations.<sup>237</sup> Nonetheless, the Secretariat believed it necessary to address "a type of allegation which in [his/her] opinion . . . is not within [the Secretariat's] jurisdiction nor contemplated by the objectives listed in Article 1 of NAAEC."<sup>238</sup> The submission at issue contained accusations against various government officials in different agencies and at different levels of government.<sup>239</sup> According to the Secretariat, such accusations are inappropriate because the process established by the NAAEC in Articles 14 was not intended as a mechanism to review the performance of individual public officials.<sup>240</sup> Rather, the process solely addresses the actions of the authorities as institutions.<sup>241</sup>

Mr. Martinez resubmitted his petition on August 4, 1998 to no avail.<sup>242</sup> The Secretariat issued a final determination and terminated the process on March 18, 1999.<sup>243</sup>

**(P) Submission 98-003 on Solid Waste and Medical Waste Incinerator Air Pollution and the Great Lakes**

On May 27, 1998, the Department of the Planet Earth, together with eight other NGOs, filed a submission against the United States.<sup>244</sup> The Submitters alleged that certain EPA regulations and programs to control airborne emissions of dioxin, mercury and other toxic

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<sup>233</sup> See *id.*; Determination in Accordance with Article 14(1) of the North American Agreement for Environmental Cooperation (June 23, 1998)

<http://www.cec.org/templates/registrytext.cfm?&varlan=english&documentid=165&format=2>.

<sup>234</sup> See Determination in Accordance with Article 14(1) of the North American Agreement for Environmental Cooperation (June 23, 1998)

<http://www.cec.org/templates/registrytext.cfm?&varlan=english&documentid=165&format=2>.

<sup>235</sup> See *id.*

<sup>236</sup> See *id.*

<sup>237</sup> See *id.*

<sup>238</sup> *Id.*

<sup>239</sup> See *id.*

<sup>240</sup> See *id.*

<sup>241</sup> See *id.*

<sup>242</sup> See *Registry*, *supra* note 101, at SEM-98-002.

<sup>243</sup> See *id.*

<sup>244</sup> See *Registry*, *supra* note 101, at SEM-98-003. The other NGOs were: Sierra Club of Canada; Friends of the Earth; Washington Toxics Coalition; National Coalition Against the

substances from solid waste and medical waste incinerators violated and failed to enforce various domestic laws and treaties with Canada.<sup>245</sup> Specifically, the regulations conflicted with the “virtual elimination of persistent toxic substances” and “zero emission” standards contained in the Great Lakes Water Quality Agreement between Canada and the United States.<sup>246</sup> According to the submitters, the regulations also violated provisions of the Clean Air Act.<sup>247</sup>

On December 14, 1998 the Secretariat determined that the issues raised in the submission could not be reviewed under the Article 14 process because the Party’s conduct did not qualify as “enforcement.”<sup>248</sup> The Secretariat determined that enforcement does not include government standard setting because the NAAEC’s purpose is not to set environmental standards for the Parties.<sup>249</sup> The Secretariat found support for this determination in Article 3, which recognizes the right of each Party to establish its own levels of domestic environmental protection.<sup>250</sup> Article 5 also supports the determination because it contains an illustrative list of government actions that constitute enforcement activity.<sup>251</sup> When viewed as a whole, the list is geared toward promoting compliance with such standards.<sup>252</sup> Article 14 focuses on whether, once established, such standards are effectively enforced.<sup>253</sup> The Secretariat’s determination includes a discussion of where the line should be drawn between standard setting and enforcement in the context of a Party’s promulgation of regulations that establish substantive emission or discharge standards.<sup>254</sup> Ultimately, the Secretariat concluded that the issues in the submission merely

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Misuse of Pesticides; WASHPIRG; International Inst. Of Concern for Public Health; Dr. J. Cummins, Genetics, U. of Western Ontario; and Reach for Unbleached. *See id.*

<sup>245</sup> *See* Submission,

<http://www.cec.org/templates/registrytext.cfm?&varlan=english&documentid=166&format=2>.

<sup>246</sup> *Id.*

<sup>247</sup> *See id.*

<sup>248</sup> *See* Article 14(1) Determination (December 14, 1998),

<http://www.cec.org/templates/registrytext.cfm?&varlan=english&documentid=188&format=2>.

<sup>249</sup> *See id.*

<sup>250</sup> *See id.*

<sup>251</sup> *See id.*

<sup>252</sup> *See id.*

<sup>253</sup> *See id.*

<sup>254</sup> *See id.*

represented an inconsistency in governing legal standards -- an issue beyond the scope of Article 14.<sup>255</sup>

On January 14, 1999, the Submitters amended their petition.<sup>256</sup> The thrust of their argument was that the International Joint Committee (IJC) had “taken the point of view that ‘standard-setting’ approaches for persistent toxic substances are inappropriate and unworkable.”<sup>257</sup> The Submitters maintained that although end-of-the-pipe emission controls and best available technologies for such controls are standard-setting methods, none of the alternative programs contemplated by their submission involved standard setting.<sup>258</sup> Accordingly, the CEC should not be precluded from considering their submission.

In its second Article 14(1) and 14(2) determination, the Secretariat reminded the Submitters that both Article 45(2) and the Secretariat’s previous determination in the Animal Alliance submission (97-005) dictated against a finding that the Great Lakes Water Quality Agreement, or any other similar agreement, is not “environmental law” for purposes of NAAEC.<sup>259</sup> An international obligation must be imported into domestic law by way of statute or regulation before the Secretariat may consider it.<sup>260</sup> The Secretariat ultimately determined, however, that two of the Submitters’ three issues warranted a response from the United States. First, the Submitters’ assertion that the United States was failing to adequately inspect and monitor incinerator emissions warranted a response because “maintaining an adequate inspection/compliance-monitoring scheme is an inherent part of enforcement.”<sup>261</sup> Second, the Submitters’ allegation that the United States was failing to enforce a specific section of the Clean Air Act that required the EPA Administrator to notify state governors in certain instances warranted a response from the United States.<sup>262</sup> The Secretariat was not convinced, however,

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<sup>255</sup> *See id.*

<sup>256</sup> *See* Revised Submission (January 5, 1999), <http://www.cec.org/templates/registrytext.cfm?&varlan=english&documentid=201&format=2>.

<sup>257</sup> *Id.*

<sup>258</sup> *See id.*

<sup>259</sup> *See* Secretariat’s Determination under Article 14(2) (September 8, 1999), <http://www.cec.org/templates/registrytext.cfm?&varlan=english&documentid=207&format=2>.

<sup>260</sup> *See id.*

<sup>261</sup> *Id.*

<sup>262</sup> *See id.*

that the Submitters' assertion that the EPA had failed to follow a legislatively-charted path constituted "enforcement" under the NAAEC.<sup>263</sup> Accordingly, the Secretariat requested that United States respond only to the first two issues.

In its voluminous response, the United States asserted that the Submitters' allegation concerning EPA's inspection and monitoring activities did not meet the NAAEC's requirements because the Submitters failed to: (1) identify which law the United States was failing to enforce; (2) give the United States an opportunity to respond to the allegations; and (3) pursue available domestic remedies.<sup>264</sup> The United States also asserted that the Submitters' allegation concerning Section 115 of the Clean Air Act misstates the law's requirements.<sup>265</sup> In each instance the United States contended that it was effectively enforcing its environmental laws.<sup>266</sup>

The Secretariat is currently reviewing the Submission in light of the United States' response to determine whether it warrants developing a factual record.<sup>267</sup>

**(Q) Submission 98-004 on the Impact of the Mining Industry on Fisheries in British Columbia**

On June 29, 1998, the Sierra Legal Defense Fund, on behalf of the Sierra Club of British Columbia, the Environmental Mining Council of British Columbia and the Taku Wilderness Association, filed a submission against the government of Canada.<sup>268</sup> The Submitters alleged that the Canadian government had systematically failed to enforce a law that protects fish and fish habitat from the environmental impacts of the mining industry in British Columbia.<sup>269</sup>

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<sup>263</sup> *See id.*

<sup>264</sup> *See* Response of the United States of America to Submission on Enforcement Matters 98-003 Made by the Department of the Planet Earth, Inc., et al. under Article 14 of the North American Agreement on Environmental Cooperation, accessible from the *Registry*, *supra* note 101, at SEM-98-003.

<sup>265</sup> *See id.*

<sup>266</sup> *See id.*

<sup>267</sup> *See id.*

<sup>268</sup> *See Registry*, *supra* note 101, at SEM-98-004.

<sup>269</sup> *See* Submission (June 29, 1998)

<http://www.cec.org/templates/registrytext.cfm?&varlan=english&documentid=157&format=2>.

On November 30, 1998, the Secretariat deemed the submission to have satisfied Article 14(1).<sup>270</sup> Seven months later, the Secretariat determined that the submission merited a response from the Canadian government.<sup>271</sup> Canada filed its response on September 8, 1999.<sup>272</sup>

Canada contended that it was effectively enforcing its environmental laws and was in full compliance with its NAAEC obligations.<sup>273</sup> Canada also alleged that: (1) the assertions in the submission were the subject of pending administrative proceedings; (2) the Submitters failed to provide Canada with a reasonable opportunity to respond to the claims raised in the submission; (3) the Submitters were attempting to apply the NAAEC retroactively; and (4) the Submitters failed to pursue private remedies.<sup>274</sup>

The Secretariat is currently reviewing the submission in light of Canada's response to determine whether it warrants developing a factual record.<sup>275</sup>

**(R) Submission 98-005 on Hazardous Waste Landfills in Hermosillo, Sonora, Mexico**

On July 23, 1998, Domingo Gutiérrez Mendivil, President of the *Academia Sonorense de Derechos Humanos, A.C.*, filed a submission against the government of Mexico.<sup>276</sup> The Submitter alleged that Mexico, through its authorization of the operation of a hazardous waste landfill less than six kilometers away from Hermosillo, had failed to effectively enforce Mexico's environmental laws.<sup>277</sup> Specifically, Official Mexican Standard NOM-CPR-004ECOL/1993 set the appropriate distance at a minimum of 25 kilometers.<sup>278</sup>

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<sup>270</sup> See Determination under Article 14(1) (November 30, 1998)

<http://www.cec.org/templates/registrytext.cfm?&varlan=english&documentid=182&format=2> .

<sup>271</sup> See Determination under Article 14(2) (June 25, 1999)

<http://www.cec.org/templates/registrytext.cfm?&varlan=english&Documentid=202&format=2> .

<sup>272</sup> See *Registry*, *supra* note 101, at SEM-98-004.

<sup>273</sup> See Response of the Government of Canada to a Submission on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation, <http://www.cec.org/templates/06-res.cfm?format=2> .

<sup>274</sup> See *id.*

<sup>275</sup> See *Registry*, *supra* note 101, at SEM-98-004.

<sup>276</sup> See *id.* at SEM-98-005.

<sup>277</sup> See *id.*

<sup>278</sup> See *id.*

The Submitter alleged that the authorities intended to close the current landfill and build a new one within the territory of Sonora.<sup>279</sup> Moreover, the Submitter asserted that the authorities would simply abandon the current landfill without addressing potential contamination issues.<sup>280</sup> Finally, the Submitter contended that the SEMARNAP, the State of Sonora, and the Municipality of Hermosillo were denying the public an opportunity to comment on the location of the new landfill in violation of the LGEEPA.<sup>281</sup>

The Secretariat requested a response from Mexico on April 9, 1999.<sup>282</sup> Mexico filed its response, part of which it designated as confidential, on July 12, 1999.<sup>283</sup> In its response, Mexico countered that the Submitter failed to exhaust all available legal remedies before filing his submission.<sup>284</sup> Mexico also asserted that the allegations in the submission were the subject of pending judicial or administrative action.<sup>285</sup> Mexico maintained that the environmental laws at issue did not apply to the offending landfill, which predated those laws.<sup>286</sup> Assuming that they did apply, however, Mexico argued that the minimum distance of 25 kilometers was not an absolute requirement.<sup>287</sup> Mexico took the position that remediation at the current landfill was “not congruent with the purpose of a landfill as a site for the final disposal of wastes.”<sup>288</sup> Finally, Mexico stated that it had not yet determined the location of the new site.<sup>289</sup>

The Secretariat is currently reviewing the submission in light of Mexico’s response to determine if it warrants development of a factual record.<sup>290</sup>

**(S) Submission 98-006 on Shrimp Farms in Isla del Conde, Municipality of San Blas, Nayarit, Mexico**

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<sup>279</sup> *See id.*

<sup>280</sup> *See id.*

<sup>281</sup> *See id.*

<sup>282</sup> *See id.*

<sup>283</sup> *See id.*

<sup>284</sup> *See id.*

<sup>285</sup> *See id.*

<sup>286</sup> *See id.*

<sup>287</sup> *See id.*

<sup>288</sup> *Id.*

<sup>289</sup> *See id.*

<sup>290</sup> *See id.*

On October 20, 1998, the *Grupo Ecológico Manglar, A.C.* filed a submission alleging that Mexico was failing to effectively enforce its environmental laws with respect to the establishment and operation of Granjas Aquanova S.A., a shrimp farm in Isla del Conde.<sup>291</sup> Specifically, Mexican authorities failed to enforce provisions (1) protecting jungles and tropical rainforests, (2) regulating waste water discharge, (3) preventing and controlling water pollution and use, and (4) relating to fisheries and the introduction of non-native species.<sup>292</sup> The Submitter further alleged that Mexican authorities failed to prosecute Granjas for its environmental offenses – possibly forcing the Secretariat to address an issue left open in the determination in submission 98-001.<sup>293</sup> In addition, the Submitter asserted that Mexico failed to follow up on administrative procedures contained within an agreement between authorities and Granjas to access damages and remediation measures.<sup>294</sup> Lastly, the Submitter contended that Mexico failed to protect migratory species and wetlands as mandated by three international conventions.<sup>295</sup>

On March 17, 1999, the Secretariat made the requisite Article 14(1) and 14(2) determinations and requested a response from Mexico.<sup>296</sup> Mexico filed its response on June 15, 1999.<sup>297</sup>

In its response, Mexico argued that the Submitter failed to exhaust all available legal remedies.<sup>298</sup> Mexico reiterated that a citizen complaint is not a remedy and, at any rate, Mexico had not yet completed its review of the one filed by the Submitter.<sup>299</sup> Mexico maintained that it was effectively enforcing its environmental laws and that some of the provisions invoked by the submitter were not applicable because they were not in effect at the time of Granjas’

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<sup>291</sup> See *Registry, supra* note 101, at SEM-98-006.

<sup>292</sup> See *id.*

<sup>293</sup> See *id.*; see also Section IV(N) and accompanying footnotes.

<sup>294</sup> See *Registry, supra* note 101, at SEM-98-006.

<sup>295</sup> See *id.*

<sup>296</sup> See *id.*

<sup>297</sup> See *id.*

<sup>298</sup> See *id.*

<sup>299</sup> See *id.*

offenses.<sup>300</sup> Mexico also argued that the Submitter failed to cite the precise treaty provisions with which Mexico had failed to comply.<sup>301</sup>

As of February 2000, the Secretariat is still reviewing the submission in light of Mexico's response to determine whether it warrants developing a factual record.<sup>302</sup>

**(T) Submission 98-007 on an Abandoned Lead Smelter in Tijuana, Baja California, Mexico**

On October 23, 1998, the Environmental Health Coalition, together with the *Comité Ciudadano Pro Restauración del Cañón del Padre y Servicios Comunitarios, A.C.*, filed a submission against Mexico, alleging that the government failed to enforce its environmental laws with respect to an abandoned lead smelter in Tijuana.<sup>303</sup> Specifically the Submitters stated that *Metales y Derivados*, a subsidiary of New Frontier Trading Corporation, failed to repatriate to the United States the hazardous waste that it generated in Tijuana.<sup>304</sup> Instead, the owners and operators abandoned their company and left behind approximately 6000 metric tons of lead slag, by-product waste piles, sulfuric acid and heavy metals from battery recycling operations.<sup>305</sup> The Submitters asserted that Mexico had failed to enforce its environmental laws through its failure to criminally prosecute the owner and its lack of efforts to contain or neutralize the hazardous waste.<sup>306</sup>

On March 5, 1999, the Secretariat issued determinations under Articles 14(1) and 14(2) and requested a response from Mexico.<sup>307</sup> Mexico filed its response, but designated it as confidential.<sup>308</sup> Although Mexico is encouraged by Guideline 17.3 to provide the CEC with a summary of its response and an explanation of its claim of confidentiality, it does not appear that

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<sup>300</sup> *See id.*

<sup>301</sup> *See id.*

<sup>302</sup> *See id.*

<sup>303</sup> *See Registry, supra* note 101, at SEM-98-007.

<sup>304</sup> *See* Submission (October 23, 1998)

<http://www.cec.org/templates/registrytext.cfm?&varlan=english&documentid=181&format=2>.

<sup>305</sup> *See id.*

<sup>306</sup> *See id.*

<sup>307</sup> *See Registry, supra* note 101, at SEM-98-007.

<sup>308</sup> *See id.*

Mexico has done so. The Secretariat is currently reviewing the submission in light of Mexico's confidential response to determine whether it warrants preparation of a factual record.<sup>309</sup>

**(U) Submission 99-001 on Underground Storage Tanks in the State of California**

On October 18, 1999, the Methanex Corporation (Methanex), a Canadian methanol manufacturer incorporated under the laws of the province of Alberta, filed a submission against the State of California and the United States.<sup>310</sup> Methanex alleged that the state and federal governments failed to enforce California's environmental laws and regulations relating to underground storage tanks (USTs) and water resource protection.<sup>311</sup> Methanex acknowledged, however, that not all USTs are regulated.<sup>312</sup> Methanex asserted that California had failed to properly enforce its environmental laws related to environmental and water resource protection through its failure to regulate all USTs.<sup>313</sup>

Methanex's submission relied largely on a report issued by the California State Auditor on December 17, 1998.<sup>314</sup> The report heavily criticized state officials for failing to adequately protect California groundwater and address contamination from leaking storage tanks.<sup>315</sup>

The Secretariat is currently reviewing the submission to determine whether it meets Article 14(1) criteria.<sup>316</sup> It bears noting that Methanex's submission is the first to focus solely on a *state's* failure to effectively enforce its environmental laws. Although Methanex included allegations of Clean Air Act and Safe Drinking Water Act violations, and generally referenced the federal government several times, Methanex's submission focused on California.<sup>317</sup> This raises the question of whether a submission must specifically allege an independent failure to effectively enforce environmental law by a *federal* government that is one of the three NAAEC signatories.

**(V) Submission 99-002 on Migratory Birds in the United States**

On November 11, 1999, the Alliance for the Wild Rockies, together with eight other NGOs from Canada, Mexico and the United States, filed a submission against the United States alleging that the government is failing to effectively enforce Section 703 of the Migratory Bird Treaty Act (MBTA), which prohibits the killing of migratory birds without a permit.<sup>318</sup>

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<sup>309</sup> *See id.*

<sup>310</sup> *See Registry, supra* note 101, at SEM-99-001.

<sup>311</sup> *See* Submission (October 14, 1999), accessible through the *Registry, supra* note 101, at SEM-99-001.

<sup>312</sup> *See id.*

<sup>313</sup> *See id.*

<sup>314</sup> *See id.*

<sup>315</sup> *See id.*

<sup>316</sup> *See id.*

<sup>317</sup> *See id.* For instance, the submission does not indicate which provisions of the Clean Air Act or the Safe Drinking Water Act the United States is failing to effectively enforce, nor does it contain any specific allegations against the United States.

<sup>318</sup> *See Registry, supra* note 101, at SEM-99-002. The other eight NGOs are: the Center for International Environmental Law; the Centro de Derecho Ambiental del Noreste de Mexico; the Centro Mexicano de Derecho Ambiental; the Friends of the Earth; the Instituto de Derecho Ambiental; the Pacific Environment and Resources Center; the Sierra Club of Canada; and the West Coast Environmental Law Association.

Specifically, the Submitters alleged that the United States has refused to enforce Section 703 as it relates to loggers, logging companies, and logging contractors.<sup>319</sup> According to the submitters, the Fish and Wildlife Service (FWS), the agency obligated to enforce the MBTA, has a “longstanding, unwritten policy relative to the MBTA that no enforcement or investigative action should be taken in incidents involving logging operations . . . .”<sup>320</sup> The Submitters contended that the relevant statutes and regulations do not contemplate such an exemption.<sup>321</sup>

The Secretariat made the requisite determinations under Article 14(1) and 14(2), and requested a response from the United States on December 23, 1999.<sup>322</sup> At this time, the Secretariat is still awaiting the United States’ response.

**(W) Submission 00-001 on Air Pollution in Cumpas, Sonora, Mexico**

Rosa María Escalante de Fernández filed the first submission of the year 2000 in February.<sup>323</sup> She alleges that the government of Mexico has failed to effectively enforce the LGEEPA and certain Official Mexican Standards for environmental health in relation to air pollution from the Molymex, S.A. de C.V. plant in Campus.<sup>324</sup> The Molymex plant produces molybdenum trioxide from molybdenum sulfide.<sup>325</sup> The Submitter asserts that pollution emitted by the plant causes “irreversible and irreparable damage to the residents’ health and the environment by increasing mortality rates and affecting crops in Campus.”<sup>326</sup>

The Secretariat is reviewing the submission to determine whether it meets the

**V. The Cozumel Reef Case: The Limits of the 1993 North American Regime**

As discussed above, as of March 2000, only one Article 14 submission has so far resulted in the publication of a factual record by the CEC -- the submission involving damage to coral reefs in Cozumel, Mexico (“Cozumel Reef Case”).<sup>328</sup> All of the other Article 14 submissions were terminated or withdrawn, or are still being reviewed and processed by the CEC.

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<sup>319</sup> See Submission to the Commission on Environmental Cooperation Pursuant to Article 14 of the North American Agreement on Environmental Cooperation (November 17, 1999), accessible through the *Registry*, *supra* note 101, at SEM-99-002.

<sup>320</sup> *Id.*

<sup>321</sup> *See id.*

<sup>322</sup> See Secretariat of the Commission on Environmental Cooperation Determination pursuant to Article 14(1) and 14(2) of the North American Agreement on Environmental Cooperation (December 23, 1999), accessible through the *Registry*, *supra* note 101, at SEM-99-002.

<sup>323</sup> See *Registry*, *supra* note 101, at SEM-00-001.

<sup>324</sup> *See id.*

<sup>325</sup> *See id.*

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

<sup>328</sup> See *supra* notes 106, 121-27 and accompanying text.

In the submissions that were terminated, the CEC set forth several important interpretations of the NAAEC. Among other things, the submissions terminated by the CEC appear to establish the following nine conditions on the availability of Article 14 procedures to private parties: (1) Article 14 does not apply to legislation that suspends or prevents enforcement of environmental laws;<sup>329</sup> (2) Article 14 does not apply to legislation that alters or weakens the operation of pre-existing environmental laws;<sup>330</sup> (3) Article 14 does not cover matters that are currently the subject of a pending administrative challenge or lawsuit, even if the administrative challenge or lawsuit was filed by someone other than the party that filed the Article 14 submission;<sup>331</sup> (4) Article 14 submissions cannot allege a past failure to enforce environmental law, but rather must allege an ongoing and present failure to enforce environmental law;<sup>332</sup> (5) Article 14 submissions may be terminated if they are not filed in a timely manner;<sup>333</sup> (6) Article 14 does not apply to violations of international environmental treaties unless such treaties were enacted as domestic law;<sup>334</sup> (7) Article 14 does not apply to the commercial development of natural resources;<sup>335</sup> (8) Article 14 cannot be used to reconcile inconsistencies between governing domestic environmental standards;<sup>336</sup> and (9) Article 14 does not cover violations of Articles 5, 6 and 7 of the NAAEC.<sup>337</sup>

An assessment of the CEC's interpretation of Article 14 of the NAAEC will be provided in the following section, which evaluates the present role of North American environmental law in the context of the 1993 North American Regime. Before turning to this larger question, however, we will first undertake a more detailed examination of the Cozumel Reef Case, the first dispute to work its way fully through the Article 14 process. The Cozumel Reef Case is significant, in that it represents the CEC's fullest flexing of its enforcement muscle to date. As such, the case serves to illustrate both the potential, and the limitations, of North American environmental law as it is set forth in the 1993 North American Regime.

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<sup>329</sup> See *supra* notes 111, 119 and accompanying text.

<sup>330</sup> See *supra* note 119 and accompanying text.

<sup>331</sup> See *supra* notes 133-35, 144-46 and accompanying text.

<sup>332</sup> See *supra* notes 188-93 and accompanying text.

**<sup>333</sup> See *supra* note 192 and accompanying text.**

<sup>334</sup> See *supra* notes 190-193, 259-260.

<sup>335</sup> See *supra* note 235.

<sup>336</sup> See *supra* note 255.

<sup>337</sup> See *supra* notes 229-231.

An examination of the Cozumel Reef Case raises several questions. Has the NAAEC been legally enforced? If the NAAEC has not been legally enforced, is this due to the political timidity of the CEC, or to the weak substantive provisions of the NAAEC itself? Is the NAAEC framework flexible enough to evolve politically, so that over time the agreement's aspirational provisions could eventually be treated as binding and enforceable? Does the NAAEC need to be substantively revised to increase the enforcement authority of the CEC? Should North American environmentalists seek to limit the extension of the 1993 North American Regime as a model for international negotiations with other Central and South American nations? These questions should be kept in mind during the discussion below.

### **(A) The Reefs of Cozumel**

Coral reefs represent one of the world's most fragile and endangered ecosystems. The reefs are formed by colonies of tiny single-celled animals that secrete calcium carbonate to form a hard outer skeleton.<sup>338</sup> New colonies grow on the skeletons of dead corals in a process that builds vast reef structures over thousands of years.<sup>339</sup> In this temporal sense, coral reefs can be compared with the ancient forests found on land, in that the timeframe for their development is often measured in centuries and millennia.<sup>340</sup> As Craig Quirolo, President of the Key West-based group Reef Relief, stated in a 1994 position paper on the Cozumel situation, "The coral reef ecosystem is the most diverse marine habitat in the world, and harbors a bounty of life, color and motion that is rivaled only by the tropical rainforests."<sup>341</sup>

The Island of Cozumel ("Cozumel") is located south of the Yucatan Peninsula in the state of Quintana Roo in Mexico, about 40 miles, or 18 kilometers, offshore from the city of Cancun.<sup>342</sup> The waters off the southwest coast of Cozumel are a large coral reef zone. This zone contains (north to south) Paraiso Reef, Dzulha Reef, Chan-Kanaab Reef, Yucab Reef, Tunich Reef, San Francisco Reef, Santa Rosa Reef, Cedral Reef, Palancar Reef, Colombia Reef,

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<sup>338</sup> See Amanda Marx, *The Cozumel Controversy - Pier Construction and Coral* 8 (May 4, 1997) <<http://gurukul.ucc.american.edu/TED/COZUMEL.HTM>> [hereinafter Marx Report].

<sup>339</sup> See *id.* at 8-9.

<sup>340</sup> See *id.*

<sup>341</sup> October 20, 1994 Paper Regarding Reef Relief's Position on the Proposed Cozumel Pier (on file with the author)[hereinafter Reef Relief Position Paper]. at 2.

<sup>342</sup> See Nancy Nusser, *Pier in Cozumel Clashes with Concern over Coral*, DAYTON DAILY NEWS, March 17, 1996, at 12A.

Chunchacab Reef and Maracaibo Reef.<sup>343</sup> The coral reefs off of Cozumel's southwest coast -- a wall of exploding colors and formations perched on top of a sea trench that drops down 3,000 feet<sup>344</sup> -- are considered among the most spectacular and biologically diverse in the world.<sup>345</sup> For this reason, Cozumel's reefs have become a mecca for marine biologists and scuba divers alike. Cozumel's reefs first began to receive broad attention in the 1970s, after the release of several underwater documentaries by Jacques Cousteau, the most famous of which was *Sleeping Sharks of the Yucatan*.<sup>346</sup> Today, there are over 70 independent dive operators on the island<sup>347</sup> and, in a 1996 article, The Washington Post reported that scuba diving magazines rate Cozumel's reefs second in popularity only to Australia's Great Barrier Reef.<sup>348</sup> One of the most well-known of Cozumel's reefs is Paraiso (or Paradise) Reef, which is home to spotted eels, toadfish, lobsters, Atlantic octopus, crabs, filefish, angels and other nocturnal fish.<sup>349</sup>

Recognizing that its coral reefs are one of the primary reason people visit the island, Cozumel has so far adopted a much different tourism strategy than nearby Cancun. Instead of the luxury hotels, mega-resorts, and souvenir shopping malls one finds in Cancun, Cozumel has chosen to cater to the more outdoorsy, diver types that come to explore the nearby reefs.<sup>350</sup> To date, the focus of Cozumel's tourism development has been on preserving the small-scale relaxed atmosphere, and the pristineness of its natural environment, so that the island remains an international destination spot for scuba divers and others interested in experiencing nature undisturbed.<sup>351</sup> Cozumel's strategy has, in many ways, been a response to the experience of other Mexican resorts, such as Acapulco and Cancun, where large-scale development resulted in

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<sup>343</sup> See SUBMISSION DOCUMENTS, *supra* note 101.

<sup>344</sup> See ENDANGERED MEXICO, *supra* note 55, at 197.

<sup>345</sup> See Reef Relief Position Paper, *supra* note 341, at 2. For additional information on the biological diversity of Cozumel's reefs, see Fenner, *Leeward Reefs and Coral of Cozumel, Mexico*, 42 BULL. OF MARINE SCI. 1, 133-34 (1988), and G. MUCKELBAUE, *THE SHELF OF COZUMEL, MEXICO: TOPOGRAPHY AND ORGANISMS* 185-240 (University of Erlangen-Nurnberg 1990).

<sup>346</sup> See Molly Moore, *Divers and Cruise Ships Battle Over Cozumel's Coral Reefs*, WASH. POST, May 25, 1996, at A01.

<sup>347</sup> See Hayes Ferguson, *Paradise May Be Lost with Cruise Ship Pier - NAFTA Queries Mexico's Actions*, TIMES-PICAYUNE, May 26, 1996, at A1.

<sup>348</sup> See Moore, *supra* note 346, at A01.

<sup>349</sup> See Marx Report, *supra* note 338, at 2.

<sup>350</sup> See Moore, *supra* note 346, at A01.

<sup>351</sup> See *Paving of Mexican Reef Tests NAFTA's Environmental Clout*, ARIZ. REPUBLIC, May 18, 1996, at A20.

the destruction of surrounding forests and coastal dunes, degradation of scenic beaches, and increased water pollution.<sup>352</sup> The Cozumel strategy also sought to tap into growing international tourist demand for destinations unspoiled by “Acapulcoization”, an apt term coined by author and journalist Joel Simon.<sup>353</sup> As Simon observes in his 1997 book Endangered Mexico: An Environment on the Edge, “[b]y the 1980s a specialized but growing section of the [tourism] market began demanding less luxury and more authenticity.”<sup>354</sup> Simon notes that “[b]ecause it is used to thinking big, Mexico has had a hard time adapting to the new trends in travel, such as nature tourism and adventure tourism, the fastest-growing segments of the market.”<sup>355</sup> In Mexico, Cozumel was one of the few places to capitalize on this expanding ecotourism market.

The unique ecology of Cozumel’s reefs, and the tourism industry dependent on these reefs, has also prompted some action by the government of Mexico. In 1980, Mexico created the Cozumel Marine Refuge,<sup>356</sup> and in 1996, Mexico’s President Ernest Zedillo created the Cozumel National Marine Park.<sup>357</sup> The marine refuge and national marine park, which include the island’s southwest reefs, were created in response to domestic and international concerns about development expanding south from the city of San Miguel de Cozumel, located just north of the reef zone. The creation of the marine refuge and the national marine park, although supported by environmentalists, marine biologists and private diving operators, is more symbolic than substantive.<sup>358</sup> This is because, under Mexican law, the marine refuge and national marine park designations do not prohibit the development of projects with adverse environmental impacts on the reefs.<sup>359</sup>

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<sup>352</sup> See Bob Shacochis, *In Deepest Gringolandia*, HARPER’S, July 1989; see also FERNANDO MARTI, *CANCUN: A FANTASY OF BANKERS* (1990).

<sup>353</sup> See *ENDANGERED MEXICO*, *supra* note 55, at 198.

<sup>354</sup> *Id.* at 188.

<sup>355</sup> *Id.* at 195.

<sup>356</sup> See *Protection Zone for the Marine Fauna and Flora of the Western Coast of the Island of Cozumel in the State of Quintana Roo* (“Zona de Regugio Para la Proteccion dle la Flora y Fauna Marinas de la Costa Occidental del la Isla Cozumel, Estado de Quintana Roo”) Decree Published in Official Gazette of the Mexican Federation, June 11, 1980.

<sup>357</sup> See Aviva Freudmann, *NAFTA Agency Probes Cozumel Port Project*, J. OF COM., Aug. 5, 1996, at 5A.

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

<sup>359</sup> See *id.* “That decision [to create national marine park] has mislead many observers to conclude a park would limit commercial development of the area, said John Garrison, a legal consultant to the Mexican Environmental Law Center. ‘It’s a big misconception that a park would stop development . . . [h]ere you can build in a natural protected area.’” *Id.*

## **(B) The Consorcio Pier Project**

With the goal of increasing tourism to the island, in the late 1980s the Mexican government began negotiating with Consorcio H (“Consorcio”), a Mexico-based company, regarding the construction of a new cruise ship pier on Cozumel.<sup>360</sup> The new pier was to be located near the port city of San Miguel de Cozumel. The Mexican government and Consorcio offered several reasons for building and operating a new pier at this location. First, there was a preexisting customs pier located near San Miguel de Cozumel and the City had developed infrastructure and facilities to service it. The customs pier began accepting cruise ships in the late 1970s.<sup>361</sup> Second, as the largest city on the island, the shops, restaurants and hotels in San Miguel de Cozumel were in a position to benefit from the tourists that would arrive at the new pier. Consorcio’s plans included the development of a \$230 million (United States) complex of hotels, resorts, restaurants, shops, and a golf course in the area surrounding the new pier.<sup>362</sup> The expanded complex was referred to as the “Puerto Maya Project.”<sup>363</sup> Consorcio estimated that the Puerto Maya Project would create 3,600 new jobs on Cozumel.<sup>364</sup>

Notwithstanding the reasons offered by the Mexican government and Consorcio, there was widespread concern, both in Cozumel and elsewhere, about the impacts of the proposed pier. Part of this concern focused on the path of development that the proposed pier represented. The development plans put forth by the Mexican government and Consorcio seemed to be based on the Acapulco and Cancun model, a model that Cozumel had so far resisted.<sup>365</sup> Much of the concern, however, related to the specific location that had been selected for the proposed pier.

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<sup>360</sup> See Marx Report, *supra* note 338, at 2.

<sup>361</sup> See Nusser, *supra* note 342, at 12A.

<sup>362</sup> See ENDANGERED MEXICO, *supra* note 55, at 197; *see also* Marx Report, *supra* note 338, at 11. “Current project plans include the construction of a terminal building for passengers, pier terminal access, parking facilities, a golf course, a shopping center, and a Club Resort. The estimated cost for the tourist complex is \$230 million.” Marx Report, *supra* note 336, at 11.

<sup>363</sup> See Tim Duffy, *Coalition Wants Cozumel Pier Stopped*, NEWS, Oct. 31, 1997.

<sup>364</sup> See Ferguson, *supra* note 347, at A1.

<sup>365</sup> See Reef Relief Position Paper, *supra* note 341, at 1, 2 (“Yet, as it seems now, short-term tourism investment has again prevailed over long-term growth based on a healthy marine environment . . . . It is a dangerous practice to exploit the natural resources upon which tourism depends to near exhaustion. And the construction of yet another cruise ship in Cozumel is simply one more step along this precarious path. We urge you to plan development with generations in mind, not simply fiscal years.”).

Although the coastal waters north of San Miguel de Cozumel do not contain coral reefs,<sup>366</sup> the plan was to build the Consorcio pier south of the city, within the northern boundary of the Cozumel Marine Refuge and a mere 150 meters from the ridge of Paraiso Reef.<sup>367</sup> The main reason for selecting this site was its close proximity to the preexisting pier, which was located near the southern end of the city. Environmentalists, diving operators and marine biologists believed that the construction and operation of the cruise ship pier at this particular site would seriously damage Paraiso Reef, as well as other coral reefs in the Cozumel Marine Refuge.<sup>368</sup> These critics also maintained that the area north of San Miguel de Cozumel provided a suitable alternative location for the pier.<sup>369</sup>

The plans for the Consorcio pier called for the construction of two separate sections. The first section would extend out 260 meters perpendicular from the shore. The second section, containing the actual ship docks, would extend out 324 meters at a 45-degree angle from the pier's first section.<sup>370</sup> Construction of the pier called for it to be supported by 94 concrete pillions, which would be erected on a base layer of gravel rocks. Each of the 94 pillions would be set in place by a barge crane using 4-point anchor positioning.<sup>371</sup>

In terms of operation, the Consorcio pier was designed to accommodate cruise ships up to 320 meters in length and 12 meters in draft (the hull's extension down into the water).<sup>372</sup> As the sea bottom depth at the site of the cruise ship docks is only 15 meters in depth, this left a mere 3 meters between hull bottoms and the sea floor.<sup>373</sup> The preexisting pier did not provide tugs to assist ships in docking, and all ships that docked there were required to do so under their own propeller power.<sup>374</sup> It was expected that ships at the Consorcio pier would also dock under their own power.<sup>375</sup>

After the specifics of the construction and operation plans for the Consorcio pier were revealed, the plans came under attack from environmentalists, diving operators and marine

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<sup>366</sup> See Marx Report, *supra* note 338, at 2.

<sup>367</sup> See *Paraiso - A Living Reef at Risk: Habitat Survey & Environmental Assessment, Paraiso Reef, Cozumel*, in REPORT BY REEFKEEPER 9 (Jan. 1995) [hereinafter *ReefKeeper Assessment*].

<sup>368</sup> See *id.* at 1-3.

<sup>369</sup> See Nusser, *supra* note 342, at 12A.

<sup>370</sup> See *ReefKeeper Assessment*, *supra* note 367, at 9.

<sup>371</sup> See *id.*

<sup>372</sup> See *id.*

<sup>373</sup> See *id.*

<sup>374</sup> See *id.*

<sup>375</sup> See *id.*

biologists. In 1994, ReefKeeper funded an environmental impact assessment of the proposed project to help focus public and scientific attention on its environmental impacts. ReefKeeper is a private international organization with offices in Florida, Puerto Rico, Hawaii and Mexico. ReefKeeper works with more than 300 local groups to protect coral reefs.<sup>376</sup> In January of 1995, ReefKeeper published a 40-page report entitled *Paraiso: A Living Reef at Risk - Habitat Survey and Environmental Assessment of Paraiso Reef, Cozumel* (“*Paraiso Environmental Assessment*”).<sup>377</sup> The *Paraiso Environmental Assessment* involved several prominent coral reef experts, including Dr. Pamela Hallock-Muller of the University of South Florida’s Marine Science Department, Dr. Douglas Fenner of Coral Clay Conservation, and Dr. Stephen Cofer-Shabia, Oceanographer with the United States National Biological Survey.<sup>378</sup>

The *Paraiso Environmental Assessment* contained an analysis of the potential impacts of the proposed construction and operation of the Consorcio pier on the Paraiso Reef, as well as other reefs in the Cozumel Marine Refuge. Dr. Hallock-Muller indicated that environmental damage would not be restricted just to Paraiso Reef, because “in aquatic systems the need for buffer zones is particularly acute, since pollutants and sediments are readily carried from unprotected areas into protected areas.”<sup>379</sup> Dr. Fenner expressed grave concerns about the impacts resulting from operation of the pier, particularly the foreseeability of damage from trailing anchors and anchor chains. Dr. Fenner warned that “[t]he effects of the anchor chain of just one cruise ship anchored on the south side of Grand Cayman Island was to devastate an area of living reef the size of a football field.”<sup>380</sup>

Dr. Stephen Cofer-Shabica offered the most severe and comprehensive critique in the *Paraiso Environmental Assessment*. According to Dr. Cofer-Shabica, the impacts of the construction phase “would include the direct burial of corals and other livebottom from gravel, the smothering of corals and other livebottom by silt and sediments suspended during pier construction, and the potential grounding of vessels and subsequent crushing of livebottom and coral.”<sup>381</sup> In terms of pier operation, Dr. Cofer-Shabica found that the following impacts would likely occur: “prop-wash scour [barren sea bottom caused by churning of underwater propellers]

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<sup>376</sup> See *id.* at inside front cover.

<sup>377</sup> See generally *ReefKeeper Assessment*, *supra* note 367.

<sup>378</sup> See *id.* at 1.

<sup>379</sup> *Id.* at S5.

<sup>380</sup> *Id.* at S4.

<sup>381</sup> *Id.* at S2.

from cruise ships, burial of coral and livebottom by siltation from suspended sediments, shading of the bottom due to decreased water clarity, chronic siltation and the consequences of this sub-lethal impact on the growth and survivorship of hard and soft corals, accidental groundings and anchor damage, and the potential for decreased water quality from oil spills, cruise ship effluents, and physical shading of the bottom by ship hulls.”<sup>382</sup>

Based on these findings, the ReefKeeper’s *Paraiso Environmental Assessment* reached the following determination: “Particularly taking into account that these reef areas lie within the boundaries of the Cozumel Marine Refuge, and that the Refuge’s purpose is to protect marine flora and fauna, it must be considered that the proposed site for the Consorcio H Pier is unacceptably close to viable, functional and valuable coral communities that would be placed at unacceptable risk from pier construction and operation.”<sup>383</sup>

In response to the criticisms from environmentalists, divers and marine biologists, in 1995, a referendum was held to determine whether the citizens of Cozumel supported or opposed the Consorcio pier project. In this referendum 60% of the citizens of Cozumel voted against the project.<sup>384</sup> The results of this referendum led the Governor of the state of Quintana Roo, Mario Villanueva Madrid, to declare his opposition to the project as well.<sup>385</sup> This local and state opposition did not prevent the Consorcio project from moving forward, however, because the Mexican government was handling the permits for the project.<sup>386</sup>

### **(C) Environmental Assessment Required by the Mexican Government**

In 1988, the federal government of Mexico adopted the General Law of Ecological Equilibrium and Environmental Protection (“Federal Ecology Law”).<sup>387</sup> This law is similar to the National Environmental Policy Act (“NEPA”) in the United States.<sup>388</sup> Under Article 28 of Mexico’s Federal Ecology Law, an environmental impact statement (“EIS”) must be prepared

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<sup>382</sup> *Id.*

<sup>383</sup> *Id.* at 31.

<sup>384</sup> *See* Ferguson, *supra* note 347, at A1.

<sup>385</sup> *See* Marx Report, *supra* note 338, at 3.

<sup>386</sup> *See id.*

<sup>387</sup> Ley General del Equilibrio Ecológico y la Protección al Ambiente (1988).

<sup>388</sup> For discussion of NEPA, see *supra* notes 67-69 and accompanying text.

before construction or site modification potentially affecting the environment are undertaken.<sup>389</sup> Enforcement and implementation of the Federal Ecology Law is the joint responsibility of the Secretariat for Urban Development and Ecology (“SEDUE”) and the National Institute for Ecology (“INE”).<sup>390</sup>

In 1988, Mexico also adopted Regulations on Impact Assessment (“RIA”) to clarify the legal obligations of the government and private parties under the Federal Ecology Law.<sup>391</sup> Article 10 of the RIA sets forth the minimum information which an EIS must contain with respect to description of a project. Under Article 10, an EIS must include a “description of the work or planned activity, starting with the selection of the site for the work and the development of the activity; the surface area required; the construction project; the erection and operation of the installations to be developed; the type of activity; the anticipated volume of production; necessary investments; the type and quantity of natural resources to be developed at the construction stage and during the performance of the work or development of the activity; a waste management program, both during the construction and installations phases as well as during the operation or development of the activity; and a program for abandoning the works or ceasing activity.”<sup>392</sup>

The RIA also contains directives aimed at “Related Projects” and “Future Growth Policies.” The RIA directive on “Related Projects” requires that the project proponent must “explain if other projects will be required in the development of the work or activity.”<sup>393</sup> The RIA directive on “Future Growth Policies” requires that the project proponent must explain “the strategy to be adopted by the company, indicating the extension, future works, or activities that are planned for the area.”<sup>394</sup>

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<sup>389</sup> See John J. Lormon, *Free Trade with Mexico: Environmental Implications and Opportunities*, Address at the American Bar Association’s Conference on the “Practical Implications of International Environmental Law”, 5 (Nov. 12, 1991).

<sup>390</sup> See Anne Rowley, *Mexico’s Legal System of Environmental Protection*, 24 ENVTL. L. REP. 10431, 10433 (1994); Hector Herrera, *Mexican Environmental Legal Framework*, 2 San Diego Just. J. 31, 33-34 (1994).

<sup>391</sup> See Reglamento de la Ley General del Equilibrio Ecológico y la Protección al Ambiente en Materia de Impacto Ambiental, in SUBMISSION DOCUMENTS, *supra* note 101, at 144, 148, 151 & 159.

<sup>392</sup> SUBMISSION DOCUMENTS, *supra* note 101, at 159.

<sup>393</sup> *Id.* at 160.

<sup>394</sup> *Id.*

In September 1989, the Mexican Port Authority (“Pumex”), an agency of the Mexican federal government, published new guidelines entitled *Concessions for Piers for Tourist Cruise Ships and Specialized Cargo Terminals* (“Pumex Guidelines”).<sup>395</sup> The Pumex Guidelines defined “tourist cruise ship piers” to include “*land areas* designated for construction and installations necessary to attend to the cruise ship passengers and for locating services to ensure their comfort” and “*parking areas* for public and private vehicles used to transport passengers.”<sup>396</sup> Pursuant to the new Pumex Guidelines, in November of 1989, Consorcio submitted a proposal for the construction and operation of a new pier in Cozumel. Consorcio submitted its proposal to the Secretariat of Communication and Transportation (“SCT”), a federal Mexican agency.<sup>397</sup> In October 1990, in addition to its pier concession proposal, Consorcio submitted a document entitled *General Environmental Impact Statement for the Construction of Cruise Ship Pier in Cozumel, Quintana Roo* (“Consorcio EIS”).<sup>398</sup>

The Consorcio EIS defined the proposed “project” as the pier, but omitted mention of any adjacent on-shore facilities.<sup>399</sup> There were no discussions in the document of parking facilities, land-based terminals, or any other commercial developments, such as hotels, restaurants or shops.<sup>400</sup> The “Related Projects” section of the Consorcio EIS stated that the plan was “to reorganize the service presently offered to vessels by modifying the terminal installations currently operated by the Port Services of Cozumel, including relocating the Ferry Terminal and the related services necessary to attend to tourists’ needs efficiently.”<sup>401</sup> No additional information was provided about the modification or relocation of installations or services. The “Future Growth Policies” section of the EIS estimated that by 2010, eight vessels per day would arrive in Cozumel. The implication was that four of those vessels would be without pier space and would have to be serviced by tenders. The EIS further stated that such a condition would be an inconvenience for elderly tourists, who may be unwilling to disembark without fixed installations. It is estimated that part of this traffic could be channeled toward installations to be

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

<sup>396</sup> *See id.* at 160-61 (emphasis added).

<sup>397</sup> *See id.* at 194.

<sup>398</sup> *See id.* at 161.

<sup>399</sup> *See id.*

<sup>400</sup> *See id.*

<sup>401</sup> *Id.*

developed on the mainland.”<sup>402</sup> No additional information was provided about the scope or location of these mainland installations.

The scope of the Consorcio EIS was thus limited to the proposed pier. The Consorcio EIS found that construction and operation of the pier would result in damage to 3% of the Paraiso Reef, but it proposed mitigation provisions for the removal and relocation of these threatened reef portions prior to the initiation of pier construction.<sup>403</sup> As such, the Consorcio EIS indicated that the adverse environmental impacts of the project would be fairly minimal, and that appropriate preliminary measures would be taken to avoid, or at least mitigate, these impacts. The findings of the Consorcio EIS were reinforced by a report released by the National Institute of Ecology (“INE”).<sup>404</sup> The INE report determined that Paraiso Reef was “biologically dead”, therefore suggesting that there was nothing that could be biologically damaged by the construction or operation of the pier.<sup>405</sup> The INE report, however, appeared to conflict with the findings of Mexico’s other environmental agency, SEDUE. In April of 1990, SEDUE had issued a report in which the agency stated that the proposed Consorcio pier would be “situated within the Protected Natural Coral Reef Area of Cozumel and [would] have negative impacts on various threatened coral species.”<sup>406</sup> As a result, SEDUE “recommended that the project not be authorized.”<sup>407</sup> Notwithstanding SEDUE’s previous findings, the INE approved the Consorcio pier proposal in December 1990. The INE’s approval was subject to certain environmental conditions, including the removal and relocation of certain portions of Paraiso Reef.<sup>408</sup>

More than two years after the INE approved the pier project, Consorcio requested the SCT’s approval for a project to develop a land-based terminal adjacent to the pier.<sup>409</sup> The SCT granted Consorcio a concession for the construction, operation and development of a public port terminal, and declared that this new project would be performed subject to the environmental authorization issued by SEDUE back in 1990.<sup>410</sup> In this concession, the SCT also promised to

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<sup>402</sup> *Id.*

<sup>403</sup> *See Marx Report, supra* note 338, at 2-3.

<sup>404</sup> *See id.* at 3.

<sup>405</sup> *See id.*

<sup>406</sup> SUBMISSION DOCUMENTS, *supra* note 101, at 194.

<sup>407</sup> *Id.*

<sup>408</sup> *See id.* at 195.

<sup>409</sup> *See id.* at 196.

<sup>410</sup> *See id.* at 197.

“contribute” 430,352 square meters of federal land to Consorcio for “real estate tourist development.”<sup>411</sup> In August 1994, the INE endorsed the SCT’s position, and informed Consorcio that work on the terminal project could proceed so long as the work was carried out in compliance with the conditions of the 1990 EIS.<sup>412</sup> No new EIS was required for the land-based terminal project, or for the donation of federal land (for real estate tourist development).

In November of 1994, the Government of Quintana Roo requested in writing that the INE “reconsider its authorization with regard to the site proposed [ ] for the construction of the Pier.”<sup>413</sup> In its request, the Government of Quintana Roo stated that after conducting its own inspection of the area in which construction was planned, the state had determined that “Paraiso Coral Reef would be seriously damaged by both construction activity and the operation of the Pier.”<sup>414</sup> In February 1995, the INE responded to the Government’s written request. The INE stated that “due to a lack of arguments showing the existence of supervening environmental impacts not foreseen during the project evaluation procedure, [the INE] lacks technical and legal grounds for any reconsideration of the [1990] resolution.”<sup>415</sup>

In April 1995, the Committee for the Protection of Natural Resources (“CPNR”), an environmental organization based in Mexico, filed an administrative public complaint (*denuncia popular*) with the Federal Attorney’s Office for Environmental Protection (“PROFEPA”).<sup>416</sup> The CPNR filed an administrative complaint because non-governmental organizations do not have standing to sue the government under Mexican law unless they can demonstrate *direct injury* resulting from the alleged violation.<sup>417</sup> “Direct injury” has been interpreted very narrowly by the Mexican courts.<sup>418</sup> The CPNR alleged that the INE had failed to enforce the environmental conditions set forth in its 1990 resolution approving the pier project. Most of CPNR’s allegations concerned Consorcio’s failure to properly remove and relocate the portions of Paraiso Reef that would be damaged by the pier construction and operation. In July 1995, the

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<sup>411</sup> See *id.* at 194. See Antecedent VII of the 1991 concession.

<sup>412</sup> See SUBMISSION DOCUMENTS, *supra* note 101, at 198.

<sup>413</sup> See *id.* at 198-99.

<sup>414</sup> *Id.* at 199.

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

<sup>416</sup> See *id.* at 200.

<sup>417</sup> See Schiller, *supra* note 86, at 468; Rowley, *supra* note 388, at 10435.

<sup>418</sup> See Carl E. Koller Lucio, *The Regulation of Hazardous Substances in Mexican Law*, 5 DUKE ENVTL. L. & POL’Y F. 95, 115.

PROFEPA concluded that there was insufficient evidence to support CPNR's assertion that the INE was not enforcing the environmental conditions related to Consorcio's project.<sup>419</sup>

#### **(D) The Submission**

The three environmental organizations filed their Article 14 submission with the CEC on January 18, 1996. The primary allegation in the submission concerned violations of Article 28 of the Federal Ecology Law, and the implementing RIA. According to the Submitters, the Consorcio pier in Cozumel formed an indivisible part of a larger-scale project, which included a passenger terminal building, a means of access from the terminal to the cruise ship pier, a parking lot, and a public access road leading to the Chan-Kanaab highway.<sup>420</sup> The Submitters alleged that Consorcio knew the full scope of this project in 1990, and that the government knew no later than 1993, when Consorcio applied to the SCT for approval of the pier terminal project.<sup>421</sup> The submitters further asserted that the port terminal project was related to an adjacent real estate tourist development project (the Puerto Maya Project), which was also impliedly approved in the terminal project concession through the donation of federal land to Consorcio.<sup>422</sup>

According to the submitters, "the Environmental Impact Statement presented by [Consorcio] in August 1990 was incomplete, and should have taken account of the project directly related to the work or proposed activity, in order to evaluate the cumulative environmental impacts that these projects together will have."<sup>423</sup> The Submitters also alleged that Mexican authorities had violated Article 13 of the RIA, which required that the Consorcio EIS evaluate the adjacent land-use impacts of operation of the proposed off-shore pier.<sup>424</sup>

The Submitters maintained that the above actions "undercut the purpose of the environmental impact evaluation procedure by creating uncertainty as to the subject matter of the evaluation (i.e. allowing any proponent to present partial reports with respect to a single project)"<sup>425</sup> and by "preventing an adequate evaluation of the environmental impacts produced

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<sup>419</sup> See SUBMISSION DOCUMENTS, *supra* note 101, at 201(citing Document PFPA-D.E-PSQ-032/95 (July 3, 1995)).

<sup>420</sup> See *id.* at 147.

<sup>421</sup> See *id.*

<sup>422</sup> See *id.* at 149.

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

<sup>424</sup> See *id.* at 150-51.

<sup>425</sup> *Id.* at 148.

by the project.”<sup>426</sup> The Submitters concluded, therefore, that the government of Mexico was “failing to enforce environmental law by authorizing the construction of the pier, which represent[ed] only part of the entire project, without evaluating as a whole the construction and operation of all the works that constitute the Port Terminal.”<sup>427</sup>

### **(E) Mexico’s Response**

In its response, Mexico objected to the Article 14 submission on a number of grounds, both procedural and substantive. The purpose of Mexico’s response was to persuade the CEC that the preparation of a factual record in the Cozumel Reef Case was either expressly prohibited by the NAAEC provisions, or was not warranted in this particular instance.

Procedurally, Mexico presented three main arguments. First, Mexico asserted that all of the incidents of alleged non-enforcement occurred prior to January 1, 1994, the date the NAAEC became effective.<sup>428</sup> Article 14(1) of NAAEC limits the scope of the CEC’s inquiry to allegations that a party “is failing” to effectively enforce its environmental laws, and therefore prohibits retroactive application of NAAEC to incidents that took place before the treaty was in force.<sup>429</sup> The Article 14 submissions on *Military Base Expansion by the United States Army*<sup>430</sup> and *Canada’s East Coast Fisheries*<sup>431</sup> provided some support for Mexico’s argument. Although the submission on *Military Base Expansion by the United States Army* was withdrawn by the submitter before the CEC issued a determination, the United States had argued in its response that the alleged non-enforcement was not subject to an Article 14 challenge because it had taken place before the NAAEC entered into force.<sup>432</sup> In its determination on *Canada’s East Coast Fisheries*, the CEC terminated the review process because it found that the submission “provided no indication that the Party’s failure [was] continuing or recent.”<sup>433</sup>

Mexico’s second procedural argument concerned the standing of the Submitters. According to Mexico, the Submitters had not suffered any *direct* injury as a result of the alleged

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<sup>426</sup> *Id.* at 149.

<sup>427</sup> *Id.* at 148.

<sup>428</sup> *See id.* at 93, 151.

<sup>429</sup> *See* NAAEC, *supra* note 10, at Article 14(1).

<sup>430</sup> *See supra* notes 135-46 and accompanying text.

<sup>431</sup> *See supra* notes 172-82 and accompanying text.

<sup>432</sup> *See supra* note 141 and accompanying text.

<sup>433</sup> *See supra* notes 176-80 and accompanying text.

failure to enforce the EIS provisions of the Federal Ecology Law.<sup>434</sup> As already discussed, under Mexican law, citizens and organizations cannot sue the government unless they can demonstrate direct injury -- a term that has been interpreted very narrowly by the Mexican courts. Article 6(a) of the NAAEC states that each nation “shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial or judicial proceedings for the enforcement of the Party’s environmental law and regulations.”<sup>435</sup> Article 6(a), when read alongside Article 14, could be interpreted to mean that only those persons with legally recognized interest under Mexico’s laws have standing to file a submission with the CEC.<sup>436</sup>

In its third procedural argument, Mexico argued that the Submitters had failed to exhaust all remedies available under Mexican law because they did not file suit in the Mexican courts.<sup>437</sup> Article 14(3) requires that, before requesting the preparation of a factual record, the CEC must consider “whether private remedies in connection with the matter are available to the person or organization making the submission and whether they have been pursued.”<sup>438</sup> This argument was in many ways inconsistent and contrary to Mexico’s position on the issue of standing, in which Mexico alleged that the submitters lacked a recognizable legal interest under Mexican law.<sup>439</sup> Under Mexico’s reasoning, even though the Submitters lacked the standing to file a suit under Mexican law, Article 14(3) nonetheless required them to bring such a suit before filing a submission with the CEC.

Substantively, Mexico offered two primary arguments. First, Mexico alleged that Consorcio pier and the port terminal project were not subject to the EIS requirements of Article 28 of the Federal Ecology Law because the language of Article 28 refers only to “those works or activities which utilize animals, forest resources, aquifers or the subsurface as necessary raw materials, or which propose to directly extract such resources.”<sup>440</sup> Under Mexico’s interpretation of Article 28, the consequential damage to coral reefs, or to fish that depend on

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<sup>434</sup> See SUBMISSION DOCUMENTS, *supra* note 101, at 89, 93.

<sup>435</sup> See NAAEC, *supra* note 10, at Article 6(a).

<sup>436</sup> See Schiller, *supra* note 86, at 466.

<sup>437</sup> See SUBMISSION DOCUMENTS, *supra* note 101, at 89, 93.

<sup>438</sup> NAAEC, *supra* note 10, at Article 14(3).

<sup>439</sup> *Supra* notes 434-37 and accompanying text.

<sup>440</sup> Article 28, Federal Ecology Law, *supra* note 385, at Article 28.

coral reefs, is insufficient by itself to trigger the EIS requirements of the Federal Ecology Law.<sup>441</sup>

Second, Mexico disagreed with the Submitters' position that the pier and terminal were indivisible parts of one larger project, and that the donation of federal land in the 1993 concession amounted to approval of the larger Puerta Maya Project. In terms of the connection between the pier and the terminal, Mexico maintained that the on-shore facilities represented distinct projects that did not need to be evaluated contemporaneously with the pier's construction.<sup>442</sup> In terms of the adjacent Puerta Maya Project, Mexico responded that "there [was] no real estate development as suggested by the Submitters, and that the on-shore works referred to be the Submitters constitute[d] only complementary elements of the pier described in the 1993 Concession."<sup>443</sup> As such, the donation of federal land in the 1993 Concession was for the pier-related terminal project, not for a new, unspecified real estate development.

#### **(F) The Secretariat's Determination**

In its determination on the submission and Mexico's response, the Secretariat was not required to find that the allegations in the submission were true, nor was the Secretariat required to find that Mexico was in fact failing to effectively enforce its environmental laws. Rather, under the provisions of the NAAEC, the Secretariat was only required to answer two, more limited questions. First, the Secretariat had to determine whether the submission satisfied all of the procedural requirements of Article 14(1).<sup>444</sup> Second, the Secretariat had to determine whether, in light of the facts alleged and the response provide, the submission "warrant[ed] developing a factual record."<sup>445</sup> In the Cozumel Reef Case, and for the first time since the NAAEC went into effect, the Secretariat answered both of these questions in the affirmative.

Procedurally, in regards to Mexico's retroactive application argument, the CEC found that "events or acts concluded prior to January 1, 1994 may create conditions or situations which give rise to current enforcement obligations. It follows that certain aspects of these conditions or situation may be relevant when considering an allegation of a present, continuing failure to

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<sup>441</sup> See SUBMISSION DOCUMENTS, *supra* note 101, at 94, 154.

<sup>442</sup> See *id.* at 153.

<sup>443</sup> See *id.* at 154-55.

<sup>444</sup> See NAAEC, *supra* note 10, at Article 14(1).

<sup>445</sup> See *id.* at Article 15(1).

enforce environmental law.”<sup>446</sup> In reviewing Mexico’s argument concerning standing and direct injury, the Secretariat noted “the importance and character of the resource in question -- a portion of the magnificent Paradise coral reef . . . .” The Secretariat concluded that while “the submitters may not have alleged the particularized, individual harm required to acquire legal standing to bring a suit in some civil proceedings in North America, the especially public nature of marine resources [brought] the submitters with the spirit and intent of Article 14 of the NAAEC.”<sup>447</sup> On the requirement of exhaustion of remedies, the Secretariat concluded that “under the circumstances the submitters attempted to pursue local remedies, primarily by availing themselves of the *denuncia popular* administrative procedure.”<sup>448</sup>

Substantively, the CEC did not respond to each of the specific arguments presented by Mexico. Instead, the CEC simply determined that “despite the complexity of the issues raised in the submission, the further study of this matter would substantially promote the objectives of the NAAEC.”<sup>449</sup> It therefore recommended that the Council authorize the preparation of a factual record.<sup>450</sup> On August 2, 1996, the Council adopted the Secretariat’s recommendation.<sup>451</sup>

### **(G) The Factual Record**

As discussed earlier, the preparation of a factual record pursuant to the NAAEC is not equivalent to a judicial-type ruling.<sup>452</sup> In preparing a factual record, the CEC is not required to determine whether a party is failing to effectively enforce its environmental laws, nor must it make any recommendations. The objective and scope of the factual record is simply to investigate and summarize the relevant information regarding the submission. As Article 15(4) of the NAAEC states, “In preparing a factual record, the Secretariat shall consider any information furnished by a Party and may consider any relevant technical, scientific or other information: (a) that is 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.”<sup>453</sup>

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<sup>446</sup> SUBMISSION DOCUMENTS, *supra* note 101, at 94.

<sup>447</sup> *Id.* at 95-96.

<sup>448</sup> *Id.* at 96.

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

<sup>450</sup> *See id.*

<sup>451</sup> *See id.* at 89.

<sup>452</sup> *See supra* notes 96-98 and accompanying text.

<sup>453</sup> NAAEC, *supra* note 10, at Article 15(4).

The focus of the factual record was on the substantive, rather than the procedural, issues in the Cozumel Reef Case. This was because the main procedural issues, such as standing, direct injury and exhaustion of domestic remedies, had been resolved in the CEC's earlier determination.<sup>454</sup> After summarizing the arguments set forth in the submission and the response, the factual record sets forth the evidence supporting each sides' interpretation of the dispute. Two of the key issues that the CEC addressed were the ecological risks to Cozumel's reefs and whether the Consorcio pier comprised an integral part of Puerta Maya Project.

In terms of the ecological risks posed by construction and operation of the Consorcio pier, the factual record included the findings of three technical experts: Gustavo de la Cruz Arguero ("Arguero"), Mauricio Garduno Andrade ("Andrade"), and Dr. Eric Jordan ("Dr. Jordan").<sup>455</sup> These experts are all affiliated with the Research and Advanced Studies Center of the National Engineering Institute in Mexico. In 1994, Consorcio hired these three consultants to prepare professional opinions for submission to the INE.<sup>456</sup> According to the factual record, the technical opinions offered contrasting views of the project's environmental impact.

Arguero concluded that the selection of the site was optimal and represented the lowest ecological burden for the area in question as there is no coral reef growth within the site."<sup>457</sup> Andrade offered a more cautious, but nonetheless optimistic review of the project. Although Andrade conceded that reef structures would suffer some impact due to the pier construction, he maintained that "given the type of construction intended to be built, the generation of sediments [would] not be substantial enough to harm the reef."<sup>458</sup> The factual record does not indicate whether the technical opinions of Arguero or Andrade addressed the ecological impacts of the *operation* of the pier.

Dr. Eric Jordan ("Dr. Jordan") provided a very different assessment. Dr. Jordan's study indicated that "in terms of the damage that may be caused to the coral community in the study area, the costs of construction of the new pier [were] very high."<sup>459</sup> As a result, Dr. Jordan recommended that the Consorcio pier be built "in another location, in an area where no coral

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<sup>454</sup> See *supra* notes 315-22 and accompanying text.

<sup>455</sup> See SUBMISSION DOCUMENTS, *supra* note 101, at 182-86.

<sup>456</sup> See *id.* at 182.

<sup>457</sup> See *id.* at 183.

<sup>458</sup> *Id.* at 184.

<sup>459</sup> *Id.* at 185.

reefs exist.”<sup>460</sup> As with the opinions provided by and Arguero and Andrade, there is no indication that Dr. Jordan actually addressed the ecological impact of the pier’s operation.

In addition to the less than thorough opinions from the three experts, it is also significant that the factual record failed to mention the findings of the *ReefKeeper Environmental Assessment*, prepared in 1994 by Dr. Pamela Hallock-Muller, Dr. Douglas Fenner and Dr. Stephen Cofer-Shabia.<sup>461</sup> Article 15(4) of the NAAEC expressly permits the CEC to consider scientific information from interested non-governmental organizations and/or independent experts in the preparation of its factual record.<sup>462</sup> As discussed earlier in this paper, the *ReefKeeper Environmental Assessment* provided extensive analysis of pier operation, as well as pier construction, and concluded that functional and valuable communities would be placed at an unacceptable risk.<sup>463</sup> In light of the international prominence of the technical experts that conducted the *ReefKeeper Environmental Assessment*, it is surprising that the CEC did not mention the study’s results in the factual record.

In terms of whether the Consorcio pier comprised an integral part of Puerta Maya Project, the CEC set forth the factual basis for the contrasting interpretations held by Mexico and the Submitters. In support of Mexico’s position, the factual record noted that, in the 1993 Concession, donation of the federal land for “real estate tourism development” was expressly contingent on the completion of an EIS.<sup>464</sup> The factual record also noted that on December 20, 1996, the INE expressly notified Consorcio that it had not authorized the construction of works for Tourist-Commercial use in the 1993 Concession.<sup>465</sup> Interestingly, the factual record did not mention that the INE sent this clarification letter to Consorcio *after* the Article 14 submission was filed with the CEC. The CEC summarized Mexico’s position that the real estate tourism development had not been previously approved, and that the environmental impacts of the Puerta Maya Project were still being reviewed by the government.<sup>466</sup>

In support of the Submitters’ position, the factual record noted evidence that suggested that both Consorcio and the Mexican government perceived the pier as an integrated part of the

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

<sup>461</sup> *See supra* notes 377-383 and accompanying text.

<sup>462</sup> *See* NAAEC, *supra* note 10, at Article 15(4).

<sup>463</sup> *See supra* notes 377-383 and accompanying text.

<sup>464</sup> *See* SUBMISSION DOCUMENTS, *supra* note 101, at 167.

<sup>465</sup> *See id.* at 202.

<sup>466</sup> *See id.* at 167.

Puerta Maya Project. This evidence included the SCT's 1990 document approving the Consorcio pier, which stated that the project was complemented by 43.3 hectares of real estate and tourist development,<sup>467</sup> and a 1993 letter from Consorcio to the SCT, which stated that the pier was only the "first stage of the Puerta Maya Project."<sup>468</sup> The factual record also quoted extensively from a 1994 television news story, in which the Consorcio's Director of Project and Construction discussed his company's plans in Cozumel. According to Consorcio's Director, construction of the Project would take place in four stages: the first included construction of the cruise ship pier, a means of access to it and its port area, a maritime federal zone on land, with infrastructure, and a village, including shops, restaurants, bars, and a hotel zone; the second included a golf club with villas and a clubhouse; the third included a high-rise luxury hotel; and the fourth included a world-class spa.<sup>469</sup>

The factual record did not attempt to reconcile or integrate the evidence concerning the ecological risks to Cozumel's reefs, nor did it answer the question of whether the Consorcio pier constituted an integral part of the larger Puerta Maya Project. The CEC merely presented the evidence it deemed significant, and left Mexico, the Submitters and the public to draw their own conclusions.<sup>470</sup> No conclusory findings or recommendations were made by the CEC.

#### **(H) The Factual Record's Effect**

Although the CEC's factual record did not set forth conclusive findings or specific recommendations, the document did establish two points that call Mexico's actions, or more accurately Mexico's non-actions, into serious question. First, the factual record confirmed that there was credible scientific evidence indicating that the Consorcio pier would severely damage

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<sup>467</sup> See *id.* at 162.

<sup>468</sup> *Id.* at 163.

<sup>469</sup> *Id.*

<sup>470</sup> In its October 24, 1997 press release announcing the publication of the factual record, the CEC stated "The factual record does not reach legal conclusions or determinations. The purpose of the factual record is to clarify the facts as they pertain to allegations raised by the submitters and information provided by the Parties and public." *NAFTA Environment Ministers Release Cozumel Factual Record to the Public*, on file with the author and available at <http://www.cec.org>; Beatriz Bugada, *Is NAFTA Up To Its Green Expectations? Effective Law Enforcement Under the North American Agreement on Environmental Cooperation*, 32 U. RICH. L. REV. 1591, 1611 ("the report does not include an evaluation or judgment by the Secretariat with respect to those facts and allegations made by the submitters. The reader of the factual record must draw his or her own conclusions as to whether the Mexican environmental authorities effectively enforced their environmental laws.").

Cozumel's reefs.<sup>471</sup> The existence of such evidence casts doubt on the technical validity of the 1990 EIS. Second, the factual record confirmed that there were numerous documents and statements indicating that the Consorcio and the Mexican government envisioned the proposed pier as the first stage in a larger on-shore tourist development.<sup>472</sup> These documents and statements cast doubt on the credibility of Mexico's claim that the pier and the on-shore projects were "distinct" projects, and that the proposed on-shore tourism development plan was still undergoing meaningful substantive review.

While the CEC's factual record falls short of a determination that Mexico is failing to enforce its environmental laws, the findings above nonetheless strongly suggest that the government's approval process was of questionable scientific and legal legitimacy. Regardless of whether one accepts Mexico's argument that the Cozumel scenario was technically consistent with Mexican environmental law, it is difficult to read the factual record without concluding that Mexico's actions were and are inconsistent with Mexican environmental law and the underlying objectives and obligations of the NAAEC.

Because the text of the record confirmed many of the Submitters' allegations, some environmentalists hailed the preparation and release of the factual record as a triumph. For instance, Gustavo Alanis, President of the Mexican Center for Environmental Law stated that "[w]e proved that the Mexican government violated the law . . . . It's an enormous victory for international environmental rights."<sup>473</sup> Similarly, Mark Spalding, an environmental attorney and lecturer at the University of California at San Diego's Graduate School of International Relations, stated that media coverage of the CEC's probe into the Cozumel project embarrassed Mexico, and paved the way for more transparent reviews of other controversial projects.<sup>474</sup> The Mexican government has taken some preliminary steps that support the hopeful views of Alanis and Spalding regarding the impact of the factual record. For instance, following the release of the factual record, Mexico pledged that it would implement a new management study for Cozumel Island, and that it would improve laws protecting endangered coral reefs.<sup>475</sup>

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<sup>471</sup> See *supra* notes 459-460 and accompanying text.

<sup>472</sup> See *supra* notes 467-469 and accompanying text.

<sup>473</sup> Brandon, *supra* note 119, at 1.

<sup>474</sup> See Susan Ferriss, *Environment Lost in NAFTA Translations; Lawbreakers Face No Penalty*, TIME-PICAYUNE, Aug. 2, 1998, at A28.

<sup>475</sup> See *Prepared Testimony of Ambassador Richard Fisher Deputy United States Trade Representative Before the Senate Committee on Foreign Relation, Subject - Economic Effects of NAFTA*, Fed. News Serv. (Apr. 13, 1999).

Other environmentalists, however, do not perceive the CEC's factual record as a triumph. Rather, they perceive it as proof that the CEC is an ineffective institution. Dora Uribe, one of the environmental attorneys who drafted the Cozumel submission to the CEC, points out that "there was not one recommendation [in the factual record]" and that "[t]he only conclusion you can make is that this is another bureaucracy with no power."<sup>476</sup> Similarly, Dan Seligman of the Sierra Club stated: "The public was sold a bill of goods with the NAFTA environmental side agreement. As a general matter, there was more promised than could possibly be delivered."<sup>477</sup> The views expressed by Uribe and Seligman find support in the fact that, notwithstanding the factual record and Mexico's pledges to conduct a new study and improve its laws, the Consorcio pier was completed.<sup>478</sup> As the *Chicago Tribune* reported in November 1998, the victory was only a paper one. The pier was built, and tourists now disembark from cruise ships to stroll its walkway, which is lined with liquor, perfume and souvenir shops.<sup>479</sup>

In addition to the CEC's inability to halt the completion of the Consorcio pier, the political fallout from the Cozumel Reef Case also suggests that the factual record was something less than a victory. Victor Lichtinger was the CEC's Executive Director during the period when the Cozumel dispute was under review.<sup>480</sup> Lichtinger's decision to press forward with the Cozumel Reef Case did not endear him to the government of Mexico.<sup>481</sup> Lichtinger also publicly criticized U.S. EPA Administrator Carol Browner, for failing to attend the CEC's annual meeting of the Council of Ministers, and for refusing to insist that the NAAEC be included in the extension of NAFTA to other countries, such as Chile.<sup>482</sup> In February of 1998,

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<sup>476</sup> Ferriss, *supra* note 474, at A28 ("The CEC's attention to the pier . . . forced Mexico to improve its laws to protect endangered reefs and prompted an environmental plan for the island.")  
<sup>477</sup> *Id.*

<sup>478</sup> See Brandon, *supra* note 119, at 1; Bugada, *supra* note 470, at 1616 ("The truth is that the procedure had very little impact on the environment community, and none whatsoever on the tourist project in Cozumel that led to the submission . . . the critics of the CEC who claimed that it was born with no teeth seem to have scored a point").

<sup>479</sup> *Id.*

<sup>480</sup> See Kevin G. Hall, *Controversial NAFTA Official Resigns, Was Criticized for Environmental Focus*, J. COM., Feb. 12, 1998, at 1A.

<sup>481</sup> See *id.*

<sup>482</sup> See *id.* ("[Lichtinger] did not shy away from criticizing the lack of public support from U.S. Environmental Protection Agency Administrator Carol Browner, who he and others felt failed to lobby on behalf of environmental inclusion in trade pacts during congressional debate over the broad trade pact negotiating authority known as fast track."); Kevin G. Hall, *Resignation Casts Shadow Over NAFTA*, J. COM., Feb. 13, 1993, at 1A ("[Lichtinger] and his U.S. director Greg Block were not afraid to take on the U.S. Environmental Protection Agency for not being more

Lichtinger resigned his position as the CEC's Executive Director.<sup>483</sup> Although Mexico and United States have taken the official position that his resignation was voluntary, other sources maintain that Lichtinger was essentially forced out because he was deemed "too environmental."<sup>484</sup> Lichtinger's departure was not an encouraging sign for North American environmentalists.

## **VI. North American Environmental Law: Unequal Status with Trade**

In reviewing the record of environmental enforcement under the 1993 North American Regime, at least three basic observations can be made. First, the governments of Canada, Mexico and the United States have not attempted to directly enforce the provisions of the NAAEC, which require that each country effectively enforce its environmental laws. Second, although twenty-three private enforcement submissions have been filed under the NAAEC, the CEC has so far only authorized the release of one factual record. Third, the one factual record issued by the CEC did not set forth any conclusions or recommendations, and did not stop the completion of the project complained of in the submission.

Taken together, these observations suggest that the environmental provisions of the 1993 North American Regime have not been interpreted as binding international obligations. Rather, they are currently treated primarily as aspirational principles. In the field of international law, the distinction between "enforceable" and "aspirational" law is often discussed in terms of "hard" versus "soft" international law.<sup>485</sup> These distinctions do not represent separate categories of international law, but rather represent the end points of an enforceability spectrum. In terms of enforceability, the NAAEC is clearly near the "soft" end of the spectrum. This status is due to a number of factors.

In part, it is due to the textual provisions of the NAAEC. The NAAEC does not provide the CEC with independent authority to bring enforcement actions. It does not provide the CEC or private parties with a means to enforce the findings in an Article 14 factual record, and it does not provide meaningful remedies for Article 24 enforcement actions brought by the national

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publicly supportive of the new NAFTA institution. They took EPA chief Carol Browner to task for failing to attend a CEC meeting in Pittsburgh last year.").

<sup>483</sup> See Hall, *supra* note 482, at A1.

<sup>484</sup> *Id.*

<sup>485</sup> Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment*, 12 MICH. J. INT'L L. 420, 420-35 (1991).

governments of Canada, Mexico and the United States. These textual limitations suggest that the NAAEC may not have been designed to serve as an enforceable international document.

In part, however the NAAEC's status as soft international law is due to the political conditions in Canada, Mexico and the United States since the 1993 North American Regime was adopted. Putting aside the question of whether the NAAEC was initially intended as soft international law, Canada, Mexico and the United States have made little if any attempt to "harden" the treaty since it was adopted. Seven years after the NAAEC went into effect, Article 24 remains untested, the national governments have been successful in dismissing many of the private submissions filed with the CEC, the findings of the only factual record released by the CEC have been largely ignored, and the CEC's first Executive Director has resigned amid criticism that he was too environmental. Although the textual provisions of the NAAEC are arguably vague, these provisions do not require that Canada, Mexico and the United States take deliberate steps to weaken the treaty. The NAAEC is worded broadly and is therefore legally amenable to a variety of interpretations. Canada, Mexico and the United States must bear responsibility for their political decision to adopt a restrictive interpretation of the NAAEC, and for their political decision not to utilize the enforcement provisions in the agreement. They had the option to make the NAAEC a political priority and take its obligations seriously, and they chose not to do so.

In evaluating the effectiveness of the NAAEC, some have argued that international law is inherently cooperative rather than coercive, and thus there is no reason to expect or demand that the NAAEC be enforced in the traditional legal sense. For instance, Professors Joseph Dimento and Pamela Doughman of the University of California at Irvine recently published a comprehensive law review article evaluating implementation of the NAAEC.<sup>486</sup> In this article, Dimento and Doughman comment that "Perhaps the biggest problem is that enforcement, if it is to be included in an international agreement, appears inherently contrary to the spirit of cooperation that is an essential part of international agreements."<sup>487</sup> On the one hand, this comment correctly points out that, under the current international framework, nations voluntarily choose to be bound by treaties, and are often wary of delegating enforcement authority to international institutions. On the other hand, this comment fails to note that back in 1993, the governments of Canada, Mexico and the United States represented to the North American public

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<sup>486</sup> See Dimento & Doughman, *supra* note 23.

<sup>487</sup> *Id.* at 97.

that the NAAEC established meaningful legal obligations.<sup>488</sup> It also misses the point that in many areas of international law, nations in fact do voluntarily delegate enforcement powers to international institutions, creating treaties much “harder” than the NAAEC. The most noteworthy example of hard international law is international trade law.<sup>489</sup>

To appreciate the difference between hard and soft international law, it is useful to compare enforcement under NAFTA with enforcement under the NAAEC. For instance, when Canada, Mexico and the United States (or corporations from these countries) have reason to suspect that another nation is violating NAFTA’s trade rules, they can seek redress through two dispute resolution mechanisms. They can initiate the arbitration process under Chapter 19 of NAFTA, or they can file a submission with the Free Trade Commission under Chapter 20 of NAFTA.<sup>490</sup> As of March 2000, 54 claims had been filed under Chapter 19,<sup>491</sup> and four had been claims under Chapter 20.<sup>492</sup> In several cases, the resolution of these claims resulted in the imposition and/or rescission of hundreds of millions of dollars of duties and tariffs.<sup>493</sup> In the case of NAFTA, it is thus clear that Canada, Mexico and the United States created effective enforcement remedies in the treaty, and have demonstrated the political resolve to invoke and comply with the treaty’s provisions.<sup>494</sup>

In the case of the NAAEC, however, the treaty itself contains virtually no remedies or sanctions. Moreover, notwithstanding the lack of remedies or sanctions, Canada, Mexico and the United States have not yet filed a single claim alleging non-enforcement under the NAAEC. To date, the only NAAEC enforcement activity has been under the Article 14 citizen submission

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<sup>488</sup> *Supra* note 52.

<sup>489</sup> See Michael J. Kelly, *Bringing a Complaint Under the NAFTA Environmental Side Accord: Difficult Steps Under a Procedural Paper Tiger*, 24 PEPP. L. REV. 71 (1996) (“International trade regimes have been institutionalized and have grown strong over the past century. Conversely, international environmental law reflects only a patchwork of treaties and customs between states. It is a relatively new field of law, and there are no global institutions, like the World Trade Organization, to present guidance for the enforcement of policies embodied in the side accord.”).

<sup>490</sup> NAFTA, *supra* note 1, at Chapters 19, 20.

<sup>491</sup> *Completed NAFTA Panel Reviews* ([http://www.nafta-sec-alena.org/english/status/c\\_stat.htm](http://www.nafta-sec-alena.org/english/status/c_stat.htm)); *Active NAFTA Panel Reviews* ([http://www.nafta-sec.alena.org/english/status/a\\_stat.htm](http://www.nafta-sec.alena.org/english/status/a_stat.htm)).

<sup>492</sup> See *id.*

<sup>493</sup> See Lopez, *supra* note 98, at 172-84.

<sup>494</sup> See EDITH BROWN WEISS & HAROLD K. JACOBSON, *ENGAGING COUNTRIES: STRENGTHENING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL ACCORDS* 547 (1998) [hereinafter *ENGAGING COUNTRIES*] (“In some areas of international law, such as trade law or national security, sanctions have been regarded as essential to achieving compliance.”).

process. Because Article 14 does not provide for sanctions, compliance with the NAAEC has so far relied on the “public shame factor”<sup>495</sup> or the “reputation factor.”<sup>496</sup>

As another example, NAFTA permits a private corporation to bring a direct claim if said corporation believes that a domestic environmental law resulted in the expropriation of said corporation’s investment.<sup>497</sup> Under NAFTA, a private corporation alleging expropriation can force a government into binding arbitration.<sup>498</sup> To trigger the binding arbitration process for expropriation claims, a private corporation need not obtain approval of any national government or international council.<sup>499</sup> Since NAFTA went into effect, several expropriation claims have been filed by private corporations.<sup>500</sup>

In the case of the NAAEC, however, private environmental organizations are denied the rights and remedies afforded to private corporations under NAFTA. Unlike private corporations under NAFTA, private environmental groups under the NAAEC must secure approval of two-thirds of the CEC’s Council of Ministers before an Article 14 can proceed. Unlike private corporations under NAFTA, private environmental organizations under the NAAEC cannot force national governments into binding arbitration.

In comparing NAFTA and the NAAEC, it becomes clear that not all North American law is treated equally. North American trade law is treated as binding and enforceable, whereas North American environmental law is treated as non-binding and aspirational. This is why the NAAEC is commonly referred to as NAFTA’s environmental side agreement, and this is why NAFTA is never referred to as the NAAEC’s trade side agreement. For environmental advocates, therefore, the task ahead will be to work on upgrading the legal status of the NAAEC, to raise North American environmental law to the same level as North American trade law.

As environmental advocates in North America work to strengthen North American environmental law, they might seek guidance from another regional regime -- the European Union. Geographically, the situation in Europe is somewhat different from that in North America. The close proximity of the European nations means that virtually every environmental

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<sup>495</sup> See ENDANGERED MEXICO, *supra* note 55, at 227.

<sup>496</sup> See ENGAGING COUNTRIES, *supra* note 492, at 543.

<sup>497</sup> NAFTA, *supra* note 1, Article 1110.

<sup>498</sup> *Id.*, Articles 1115-38.

<sup>499</sup> *Id.*

<sup>500</sup> J. Martin Wagner, *International Investment, Expropriate and Environmental Protection*, 29 Golden Gate University Law Review 465, 487-501 (1999).

issue in Europe is a transborder issue. In the European context, issues such as contamination of the Danube and the Rhine, or air pollution, simply cannot be resolved without international governance. In light of these geographic realities, it therefore not surprising that European environmental law is more advanced and enforceable than North American environmental law. Notwithstanding these geographic differences, it is nonetheless instructive to examine the legal process by which European environmental law evolved.

The European Union began with a trade focus quite similar to that of the 1993 North American Regime. In 1957, the Treaty of Rome created the European Economic Community (“EC”) to help reduce trade barriers and encourage regional economic development.<sup>501</sup> Unlike the 1993 North American Regime, however, the Treaty of Rome also created four autonomous political institutions: the European Commission, the European Parliament, the European Council of Ministers, and the European Court of Justice.<sup>502</sup> Collectively, these institutions possessed the power not only to determine violations, but to adopt new all-European laws.

Although the EC institutions initially focused on regulating trade and competition, they soon expanded into other related areas such as environmental protection. In 1986, the EC adopted the Single European Act,<sup>503</sup> and in 1992 it adopted the Maastricht Treaty.<sup>504</sup> These agreements expanded the EC’s law-making powers in the environmental field, and transformed the EC into the European Union (“EU”). As a result of this expansion and evolution, European environmental law has managed to secure legal status close to, if not equal to, the status of European trade law. As C. Ford Runge, Professor of Economics at the University of Minnesota, noted in his 1994 book *Freer Trade, Protected Environment*, “the EU has achieved a level of integration of [trade and environment] that merits careful attention. Its experience offers evidence to support the possibility of balancing the forces of trade integration and environmental protection.”<sup>505</sup> Swiss legal scholar Andreas Ziegler reached a similar conclusion in his 1996 book *Trade and Environmental Law in the European Community*. Ziegler observes that although the European Court of Justice initially legitimized environmental measures on the basis of

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<sup>501</sup> See Treaty Establishing the European Economic Community (Rome), Mar. 25, 1957, 298 U.N.T.S. 11.

<sup>502</sup> See ALEXANDER KISS & DINAH SHELTON, *MANUAL OF EUROPEAN ENVIRONMENTAL LAW* 19 (Oxford University Press, 1993).

<sup>503</sup> Single European Act, Feb. 17, 1986, 25 I.L.M. 506.

<sup>504</sup> Treaty on the European Union (Maastricht), Feb. 7, 1992.

<sup>505</sup> Runge, *supra* note 47, at 35.

preserving free trade, the Court eventually came to consider environmental protection as an appropriate and independent basis for restricting trade.<sup>506</sup>

Although the experience of the European Union cannot be grafted on to North America, the development of European environmental law does provide some relevant lessons. Most significantly, by expanding the types of issues it can regulate, and by creating institutions capable of creating and enforcing environmental provisions, the EU evolved into something much more than a mere free trade agreement. It now has the power and means to integrate environmental protection into Europe's larger political and economic framework.

To achieve a similar evolution in North America, environmental advocates need to press for legal and political change. Legally, the enforcement and sanction provisions of the NAAEC need to be strengthened, so that they are comparable to the enforcement and sanction provisions set forth in NAFTA. Politically, the governments of Canada, Mexico and the United States need to be held accountable for their disregard of the NAAEC over the past seven years. To secure the adoption of NAFTA back in 1993, political commitments were made to environmentalists, and these commitments have largely been forgotten.<sup>507</sup> Environmental advocates in North America need to bring this point home. Politicians who abandoned the NAAEC after securing adoption of NAFTA need to understand that there are electoral consequences for this abandonment. The political costs of disregarding North American environmental law, and the political advantages of enforcing North American environmental law, must be increased.

## **Conclusion**

The 1993 North American Regime and the Cozumel Reef Case are part of a larger process in international law and environmental law -- the evolution of North American environmental law. This process has its origins in the transboundary resource conflicts of the late nineteenth century, and is certain to continue well into the twenty-first century.

The Cozumel Reef Case provided the CEC with its first real opportunity to exercise its authority. In some respects, the case was encouraging. It demonstrated the CEC's willingness to press forward with its environmental work, even in the face of neglect and resistance from the

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<sup>506</sup> See ANDREAS ZIEGLER, *TRADE AND ENVIRONMENTAL LAW IN THE EUROPEAN COMMUNITY* 138 (Oxford University Press, 1996).

<sup>507</sup> See *supra* notes 50-53 and accompanying text.

national governments that created and fund the commission. In other respects, however, the case was a disappointment. Although the CEC published a factual record that strongly suggested Mexico was violating North American environmental law, this publication did not stop the Consorcio pier from being built.

The ultimate significance of the Cozumel Reef Case, however, cannot be judged simply by its short-term impact. By revealing the shortcomings of the NAAEC, the case has prompted a reevaluation of the environmental record of the 1993 North American Regime. This reevaluation has led many environmentalists to question whether the NAAEC, in its current form, is an adequate model going forward. Many of the environmental groups that lobbied on behalf of the 1993 North American Regime are now taking a step back.<sup>508</sup>

The erosion of environmental support for the 1993 North American Regime has far-reaching political consequences. For example, in September of 1998, the United States' Congress refused to grant President Clinton fast track authority to negotiate a trade agreement with Chile.<sup>509</sup> Dissatisfaction with the environmental performance of the 1993 North American Regime was one of the factors that led to this refusal.<sup>510</sup>

As another example, at the December 1999 meeting of the World Trade Organization (WTO) in Seattle, environmental organizations – along with human rights groups and labor unions -- organized massive street protests.<sup>511</sup> One of protestors' fundamental criticisms of the WTO was that, under current international trade rules, domestic environmental laws and

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<sup>508</sup> See *Slow Road to Fast-Track*, ECONOMIST, Oct. 3, 1998, at S32 [hereinafter *Slow Road*].

“Paradoxically, this lack of trust [for Clinton] has its roots in the president’s success in building a pro-NAFTA coalition in 1993. At the time, most Democrats were opposed to the agreement. They worried that American workers would be hurt by freer trade with Mexico because Mexico’s looser labor and environmental standards would give it an unfair advantage. Mr. Clinton put their minds at rest by adding side accords on labor and the environment. That brought enough Democrats on board . . . . Four years on, however, those Democrats felt short-changed. The labor and environment side accords never amounted to much.” *Id.*

<sup>509</sup> See Lake Sagaris, *Not Now, NAFTA: Chile and the North American Free Trade Agreement*, SIERRA MAG., Jan. 1999, at 14.

<sup>510</sup> See *Slow Road*, *supra* note 508. “Given the rude health of the American economy over the past few years, the administration’s failure to win fast-track authority seems remarkable. It is more surprising still in view of Mr. Clinton’s success, in his first year in office, in squeezing NAFTA through Congress by forging a coalition between Democrats and Republicans. So why has he failed? In essence, because Congress is deeply divided over what a fast-track bill should say about labor standards and the environment.” *Id.*

<sup>511</sup> Michael Elliot, *The New Radicals*, Newsweek (December 13, 1999), pp. 36-39.

international environmental treaties were being undermined and ignored.<sup>512</sup> The protestors in Seattle were successful in derailing the WTO talks.<sup>513</sup> After the street protests at the WTO meeting in Seattle, a poll by *Business Week* magazine found that a majority of Americans favored globalization, but were concerned about the impacts of free trade.<sup>514</sup> According to the same *Business Week* poll, by a 52-39 percent margin, these Americans said they were sympathetic to the Seattle protestors.<sup>515</sup>

Congress' denial of fast track authority and the Seattle protests are telling for at least two reasons. First, they provide political confirmation that the 1993 North American Regime has not met public expectations.<sup>516</sup> Second, these events evidence the evolving diplomatic linkage between environmental policy and trade policy.<sup>517</sup>

This diplomatic linkage may represent the best strategy to strengthen North American environmental law. In short, this strategy insists that North American environmental law be accorded equal status with North American trade law. It is a straightforward goal, but one that will take great perseverance to achieve.

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<sup>512</sup> Jenny Bates & Debra S. Knopman, *After Seattle: Can Trade and Environmental Support Each Other?*, *The Environmental Forum* (January/February 2000) p. 30, 31.

<sup>513</sup> David E. Sanger, *The Shipwreck in Seattle*, *New York Time* (December 5, 1999), p. 14.

<sup>514</sup> R.C. Longworth, *Seeking Access to World Trade Debate: Protestors Insist That More Ideas Than Those of Global Elite Must Shape Decisions*, *San Francisco Examiner* (April 16, 2000), p. A-9.

<sup>515</sup> *Id.*

<sup>516</sup> *See Trade Outlook: NAFTA Slouches Toward FTAA*, *Inter Press Service* (December 21, 1998). "Statistics aside, U.S. public opinion has given NAFTA a resounding thumbs down . . . . Side agreements on labor and the environment, added by the Clinton administration under public pressure, are widely viewed by both supporters and opponents as toothless. Seventy-three percents of respondents to one U.S. poll agreed that in the future labor and environmental issues should be negotiated as part of trade agreements, not on the side." *Id.*

<sup>517</sup> Representative Sandra Levin (D-Michigan), *Getting Past Deep Divisions on U.S. Trade Policy*, *THE HILL*, Jan. 20, 1999, at 29. "In order to forge a new consensus on trade in Congress and in the country at large, we must confront more squarely the set of issues in this changing nature of international trade . . . . Fast-track has failed twice because the administration tried to finesse the underlying issue of increased trade . . . . At issue with regard to environmental standards is not simply that air and water move without regard to national borders, but that foreign exploitation of the environment impacts our ability to compete with them economically." *See also* Robert Collier, *Clinton Urges Fairer Trade: He Says WTO Should Hear Out Demonstrators*, *San Francisco Chronicle* (December 2, 1999), front page.