PUBLIC PARTICIPATION IN THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION

MALGOSIA FITZMAURICE*

I. INTRODUCTION AND THE SCOPE OF THIS ARTICLE

The subject of this article is public participation in the NAAEC. It will be analysed against the background of certain other international conventions that make provision, in one way or another, for public participation in relation to environmental protection, in particular, the 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the 'Aarhus Convention') and the 1974 Convention on the Protection of the Environment between Denmark, Finland and Sweden (the 'Nordic Convention'). The 1950 European Convention of Human Rights will also be referred to in so far as it secures public participation and from the point of view of its effectiveness in assisting in the enforcement of national environmental law. Reference to these instruments will, however, be limited to that which is relevant to the present essay.

The role of the secretariat of the NAAEC in relation to public participation will be examined against the background of certain other institutions set up by international conventions having, at least to some extent, analogous objectives to those of the NAAEC and that may be said to have been to some extent an inspiration and a blueprint for the NAAEC. These institutions are the International Boundary and Water Commission ('the IBWC'—Mexico and the United States) and the International Joint Commission ('the IJC'—Canada and the United States).

The question of public participation in relation to these conventions and institutions is part and parcel of a broader issue, namely, public participation in environmental matters as a procedural human right to a clean environment, including the right to environmental information and transparency, and the right of equal access to justice in environmental matters, that in itself includes the right to effective remedies for enforcing national environmental law.[1] It

* Professor of Public International Law, Department of Law, Queen Mary, University of London. The author wishes to thank Sally Spenser from International Boundary and Water Commission (United States and Mexico) for assistance in preparation of this article.

[1] See, eg, on the general subject of the human right to clean environment: A Boyle and M Anderson, (eds), *Human Rights Approaches to Environmental Protection: An Overview* (Oxford: Oxford University Press, 1996); A Boyle and P Birnie, 'The Structure of International Environmental Law III: Environmental Rights and Crimes', in *International Law and The Environment*, 2nd edn (Oxford: Oxford University Press, 2002), 250–86; G Handl, 'Human

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has been said that such rights (informational, participatory and remedial) of individuals and groups, internationally guaranteed, 'could be understood as a refinement of established political or civil human rights or as novel human rights'.[2] A similar view expressed in favour of the existence of such a right holds that the approach based on participatory rights 'rests on the view that environmental protection and sustainable development cannot be left to governments alone but require and benefit from notions of civic participation in public affairs already reflected in existing and civil rights.'[3] Such a right is based on the wide participation of civil society in environmental affairs and on the premise of the balancing of interests between government and society. This right is based on three pillars: public participation in environmental decision making; the provision of environmental information; and access to environmental justice. This right has found its expression and is already well established in the field of civil and political human rights, as is evidenced by numerous treaties and non-binding documents.

II. THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION

A. General Framework—Substantive Provisions

The main reason for the conclusion of the NAAEC was that the North American Free Trade Agreement ('the NAFTA') had been strongly criticised for its insufficient and superficial treatment of the environment.[4] It was

Rights and Protection of the Environment: A Mildly 'Revisionist View', in AA Cançado Trindade (ed), *Human Rights, Sustainable Development and the Environment* (38 Instituto Interamericano des Derechos Humanos, San Jose, 1992), 117–42; id, 'Human Rights and Protection of the Environment', in A Eide, C Krause, and A Rosas (eds) *Economic, Social and Cultural Rights* (The Hague/London: Kluwer Law International, 2001), 303–28; Ph Sands, 'Human Rights, Environment and the Lopez-Ostra Case, Context and Consequences' (1996), *European Human Rights Law Review* 597–618.

[2] Handl, in Eide, n 1, 318.

[3] Boyle, 'The Role of International Human Rights Law in the Protection of the Environment', in Boyle and Anderson, n 1, 60; see also Birnie and Boyle, n 1, 261–4.

[4] North American Agreement on Environmental Cooperation (the NAAEC, or the Side Agreement), the United States, Mexico, Canada, signed 14 Sept 1993, entered into force 1 Jan 1994, 32 *ILM* 1480; North American trade Agreement (the NAFTA), the United States, Mexico, Canada, signed 17 Dec 1992, entered into force 1 Jan 1994, 32 *ILM* 605. On the subject of the NAAEC, see in particular: R McCallum, 'Evaluating the Citizens Submission Procedure Under the North American Agreement on Environmental Cooperation' (1997) *Colo J Int'l L & Pol'y*, vol 8, 395–422; D Markell, 'The Commission for Environmental Cooperation's Citizen's Submission Process' (2000) *The Georgetown Int'L Envtl. Law Review*, vol 12, 545–74; J Di Mento and PM Doughman, 'Soft Teeth in the Back of the Mouth: The NAFTA Environmental Side Agreement Implemented' (1998), The *Georgetown Int'l Envl. Law Review*, vol 10, 651–743. The website of the Commission for Environmental Cooperation for NAAEC: <http://www.cec.org> on the subject of NAFTA and the environment see in: J Owen Saunders , 'NAFTA and the North American Agreement on Environmental Cooperation: A New Model for International Collaboration on Trade and the Environment' (1994) *Colo.J.Int'l L & l'y*, vol 5, 273–304; A Rueda, 'Tuna, Dolphins, Shrimp & Turtles: What About Environmental Embargoes Under NAFTA (2000) *Georgetown Int'l Envtl Law Review*, vol 12, 647–92.

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also recognised that the NAFTA agreement, as negotiated under the Bush administration, did not provide a satisfactory answer to the lax enforcement of Mexican environmental legislation, a fact that posed a danger to the environment not only in Mexico but also in the United States.[5] It may even be said that the NAAEC Agreement was 'one of the prices Mexico paid for admission to the North American free trade zone'.[6]

Although the NAAEC is often referred to as a side agreement, it is in fact an independent treaty.[7] It belongs, however, to the NAFTA package, along with the North American Agreement on Labour Cooperation.[8] The provisions of the Agreement maybe divided into two main groups: one dealing with the mutual obligations of the Parties (Parts 2, 4 and 5 of the Agreement) and the second one dealing with setting up and functioning of the Commission for Environmental Cooperation (Part 3 of the Agreement). One of the main objectives of the NAAEC is to foster the protection and improvement of the environment for the well being of present and future generations. (Part One: Objectives, Article paragraph 1 (a)). The Agreement refers to the promotion of sustainable development based on cooperation and mutually supportive environmental and economic policies (Article 1 (b)). As further objectives the NAAEC lists the following: cooperation for environmental protection and conservation (Article 1 (c), (d), (f)), enhanced compliance with and enforcement of environmental requirements (Article 1 (g)), the promotion of transparency and public participation in developing environmental norms (Article 1(h)), and the promotion of pollution prevention polices and practices (Article 1 (j)). The NAAEC also mentions free trade policy as one of its objectives, in connection with which it pledges the avoidance of the creation of trade distortions or new trade barriers (Article 1 (e)) and the promotion of economically effective environmental measures (Article 1 (i)). The overall allegiance to the principle of free trade may be inferred from the provision expressing support for the environmental goals and objectives of the NAFTA, though it is only a minority of the objectives of the NAAEC that have an actual bearing on trade.

The obligations of states under the Agreement fall into two categories: the first one is connected with domestic environmental law (Part Two: Obligations, Articles 2–7) and the second one with international obligations (Part Four: Cooperation and Provision of Information, Articles 20–21).[9] The

[5] Rueda, n 4, 682; see also for the NAAEC S Charnovitz, 'The NAAEC and the Implication for Environmental Cooperation, Trade Policy, and American Treaty-Making', in *NAFTA and the Environment* (J Rubin and D Alexander, eds) NAFTA Law and Policy Series, 3 (The Hague/London: Kluwer Law International, 1996), 25 and 27.

[6] Saunders, n 4, 284.

[7] This was stressed in Four-Year Review of the North American Agreement on Environmental Cooperation, Report of the Independent Review Panel (1998), available on the NAAEC website.

[8] It was said that '[I]f NAFTA can be characterised as a trade agreement with some environmental provisions, then the AEC can be characterised as an environmental agreement with some trade implications', Saunders, n 1, 284.

[9] See Saunders, n 4, 285.

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general obligations of the Parties are procedural in nature and are based on the principle of transparency (Article 2, paragraph 1). But there are also obligations concerned with more specific matters such as the prohibition of pesticides or toxic substances (Article 2 paragraph 3) and the implementation in domestic law on recommendations adopted by the Council in relation to specific pollutants (Article 2 paragraph 2). Other obligations of the Parties relate to governmental enforcement action (Article 5), effective private access to remedies (Article 6) and procedural guarantees (Article 7).

It may be observed that in many of its provisions the language of the NAAEC is not couched in absolute terms—for example Article 2 paragraph 1 (e)) sets the rule that '[e]ach Party shall, with respect to its territory: assess, *as appropriate* (emphasis added), environmental impacts . . .' Again, Article 3, which is fundamental for the reconciliation of state sovereignty with environmental obligations, states as follows: '[r]ecognising the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental laws and regulations, each Party shall ensure that its laws and regulations provide for a high level of environmental protection and shall strive to continue and improve those laws and regulations.' It is, however, an exception to the general approach adopted in the Agreement that the level of environmental protection is within the sovereignty of states.

The second type of obligations under the NAAEC (as stated above) comprises those that relate to cooperation and the provision of information that is contained in Part Four of the Agreement. The basic obligation is for the Parties to 'endeavour to agree on the interpretation and application of this Agreement, . . . to make every attempt through cooperation and consultation to resolve any matter that might affect its operation' (Article 20 paragraph 1). The Parties are also under an obligation to provide notification to 'any other Party with the interest in the matter of any proposed or actual environmental measure that the Party considers might materially affect the operation of this Agreement or otherwise substantially affect that other Party's interests under this Agreement.' (Article 20 paragraph 2). An important obligation is contained in Article 20 paragraph 4 that provides that ' [a]ny Party may notify any other Party of, and provide to that Party, any credible information regarding, possible violation of its environmental law, specific and sufficient to allow the other Party to inquire into the matter. The notified Party shall take appropriate steps in accordance with its law to so inquire and respond to the other Party.' The obligation to provide information is not only limited to other Parties (including as well the Council and the Secretariat—the organs of the NAAEC, see below), but is also subject to the requirement of reasonableness (Article 21 paras 1 and 2).

This short outline indicates that the basis of cooperation set up by the NAAEC is founded on the principles of transparency, effective private access to remedies, effective enforcement and information.

B. Institutional Structure

The only organ set up by the Agreement is the Commission for Environmental Cooperation ('the CEC'). It is comprised of three sub-organs: the Council, the Secretariat and the Joint Public Advisory Committee ('the JPAC')[10].

The Council, which has very broad functions, is the governing body of the Commission (Section A: Articles 9–10); but, in relation to public participation, it is the Secretariat, the executive organ of the Commission, which is the most important organ (Section B: Articles 11–15). It provides technical, administrative and operational support to the Council and to committees and groups established by the Council, and such support as the Council may direct (Article 11 paragraph 5). The Council may also seek the advice of non-governmental organisations or persons, including independent experts (Article 9, 5 (b)). The NAAEC defines NGOs in the following manner: 'non-governmental organisation means any scientific, professional, business, non-profit, or public interest organisation or association which is neither affiliated with, nor under the direction of, a government'(Article 45 paragraph 1). The Secretariat is headed by an Executive Director, who is appointed by the Council for a period of three years, renewable for one more term (Article 11 paragraph 2). The executive Director and the staff are independent from the influence of any government in discharging of their duties (Article 11 paragraph 4).

The Secretariat fulfils three main functions. The first of these consists of preparation of the annual report of the Commission, in accordance with instructions from the Council. The Secretariat submits a draft report for review by the Council. The final report is released publicly (Article 12 paragraph 1). The report covers a wide range of matters, such as activities and expenses of the Commission during the previous year; the approved programme and budget of the Commission for the subsequent year; the actions taken by each Party in connection with its obligations under the Agreement, including Party's environment enforcement activities (Article 12 paragraph 2a–f). Of particular interest is the part of the report which deals with relevant views and information submitted by non-governmental organisations and persons, including summary data regarding submissions, and any other relevant information the Council deems appropriate (Article 12 paragraph 2d). The report also includes recommendations made under the Agreement and any other matter that the Council instructs the Secretariat to include (Article 12 paragraph 2e–f). Finally, the report addresses periodically the state of the environment in the territories of the Parties (Article 12 paragraph 3).

The Secretariat, as a second main function, has the power to submit a report, on its own initiative, on any matter within the scope of the annual report (Article 13 paragraph 1). In preparation of such a report, the Secretariat may

[10] Part Three: Commission for Environmental Cooperation.

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draw upon any relevant technical, scientific or other information, including, *inter alia*, information submitted by interested non-governmental organisations and persons (Article 13 paragraph 2b), gathered through public consultations, such as conferences, seminars and symposia (Article 13 paragraph 2e), and submitted by the Joint Public Advisory Committee (see below, Article 13 paragraph 2c).

By far the most important function of the Secretariat, however, and the one that is of most interest for the present study, is the third of its main functions, namely, its role in relation to the effective enforcement of environmental law through the Citizens' Submission Procedure (Articles 14 and 15, section 4 below).

Finally, there is the Joint Public Advisory Committee (Section C: 'the JPAC').[11] The JPAC consists of fifteen members, unless the Council decides otherwise. Each Party or, if the Party so decides, its National Advisory Committee, is to appoint an equal number of members (Article 16). The JPAC may provide advice to the Council on any matter within the scope of the Agreement, including advice on any documents provided to it, and may perform such other functions as the Council may direct (Article 16 paragraph 4). This function includes development of factual records (as a part of the enforcement function, see below). The JPAC may also perform such other functions as the Council may direct. The JPAC may also submit relevant technical, scientific or other information to the Secretariat, including for the purposes of developing a factual record under Article 15 (Article 16 paragraph 5). Finally, as part of the general structure of the NAAEC, one may note that the settlement of disputes procedure in the NAAEC is similar to that of the NAFTA.

C. Public Participation within the NAAEC

Within this structure of the NAAEC, the issue of public participation arises in several different ways. First, a number of the mutual obligations undertaken by the Parties relate to public participation; secondly, the Council has a number of functions and powers that relate to public participation in relation to its general function to consider and develop recommendations to the Parties; and finally there is the important Citizens' Submission procedure under Articles 14 and 15, referred to above.

[11] On 13 June 2000 the Council adopted a Resolution concerning the role of the JPAC. It stipulated that the Council may refer issues concerning the implementation and further elaboration of Arts 14 and 15 of the Agreement to the JPAC to enable it to conduct a public review with a view to providing advice to the Council and how these issues might be addressed (Art 2 of the Resolution). The Parties acting through the Council, shall consider the JPAC's advice in making decisions concerning the issues in question relating to Arts 14 and 15, and shall make public its reasons for such decisions, bringing the process to conclusion (Art 3 of the Resolution). Further, the resolution stipulated that any decision adopted by the Council following the advice received by the JPAC shall be explained in writing by the Parties and such explanations shall be made public (Art 7 of the Resolution).

Generally, in considering the treatment of public participation in relation to environmental protection in environmental conventions and in particular in making comparisons between the NAAEC and other conventions, and between the CEC and other similar commissions, one may bear in mind that there are four ways in which the issue of public participation arises.

First, there is the issue of public participation in environmental policy and law making, and secondly, ancillary to that, is the right to information and to be heard during the course of policy and law making. Thirdly, there is the question of access to environmental justice, which includes both the right to seek judicial remedies in relation to environmental harm and to seek judicial remedies in relation to particular breaches of environmental regulations, both at a public and private level. These constitute the three pillars, referred to above, which form the basis of a procedural human right to a clean environment. Fourthly, there is the issue of the right of individuals to call for a more general review of a government's performance in enforcing its environmental laws.

The first of these forms of public participation may be said to be the main subject matter of the Aarhus Convention (Section 3.1 below) and to some extent exists within the framework of the NAAEC. It is not really covered at all by the Nordic Convention, which, on the other hand, is, in relation to public participation, principally concerned with the provision of remedies for transboundary environmental harm, which falls within the third of the issues referred to above (Section III.B below). The Aarhus Convention, in its Article 9, also contains provisions relating to access to justice, which would appear to be principally intended to back up the rights provided for in other provisions of the Convention relating to participation referred to above, but which may (see further in Section III.A below) be broad enough to cover access to justice in relation to environmental harm, and which could also be construed as going some way to providing for broader review of government policy which falls into the fourth form of public participation referred to above. This fourth form is the main form of participation set up under the NAAEC under Articles 14 and 15 (Citizens Submission) procedure (which is considered in detail in Section IV below).

With respect to all of these forms of participation, when they are considered at the international level the important additional issue arises of equality of access to the rights, procedures and remedies involved. Here, the question is whether, for instance, the right to information, or to a judicial remedy, is equally available to both nationals and affected non-nationals, of the State concerned, without discrimination. There is, also, a further dimension to be considered in relation to access to justice, namely, whether the rights, procedures or remedies available exist (even if available to non-nationals) only at the national level, or whether they exist at an international level—ie is the forum to which the public have access in seeking justice, in whatever form, a national one only, or an international one. In this respect, the Nordic and Aarhus Conventions relate only to access to justice in national forums,

whereas the Citizens Submission procedure of the NAAEC involves public access to an international forum, though, as we shall see, not strictly a judicial one. Comparatively, one may mention at this stage also the system under the European Convention on Human Rights (as to which see further in Section III.D below), which is, of course, substantially about the public's access to justice, and which involves access to an international forum.

III. COMPARATIVE REVIEW OF PUBLIC PARTICIPATION IN OTHER CONVENTIONS

A. The 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the 'Aarhus Convention')[12]

The Aarhus Convention is undoubtedly the most important treaty instrument concerning the procedural environment right. The Convention incorporates the three pillars referred to above: the provision of information; public participation in policy and law making and the access to environmental justice. In the words of Kofi Annan:

> [a]lthough regional in scope, the significance of the Aarhus Convention is global. It is by far the most impressive elaboration of principle 10 of the Rio Declaration that stresses the need for citizen's participation in environmental issues and access to information on the environment held by public authorities. As such it is the most ambitious venture in the area of 'environmental democracy' undertaken under the auspices of the United Nations.[13]

This Convention is a unique instrument that acknowledges the existence of the human right to a clean environment. The Convention operates by requiring the Parties to make provisions implementing its major principles in their respective domestic laws. These principles are set out in Article 1, which states as follows:

> [i]n order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention,

and the manner in which they are to be implemented are set out in Article 3, which states as follows:

> [e]ach Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions of this Convention, as well as proper enforcement measures, to establish and maintain a

[12] Signed on 25 June 1998; entered into force on 30 Oct 2001. On this Convention see in particular: Birnie and Boyle, n 1, 263–71.

[13] <http://www.unece.org/en/pp>.

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> clear, transparent and consistent framework to implement the provisions of this Conventions.

Although revolutionary in nature, the provisions of the Convention, on close reading, clearly indicate that the participatory human right incorporated is somewhat limited, in particular in relation to the general provision of information. Thus, while Article 3 imposes on the Parties a broad obligation to make environmental information available to the public, this obligation is subject to extensive exclusions. In particular, a public authority may refuse a request to provide information if it does not hold the environmental information requested, or if the request is manifestly unreasonable or formulated in too general a manner, or if the request concerns material in the course of completion or concerns internal communications of public authorities where an exemption is provided for under national law or customary practice, taking into account the public interest served by disclosure (Article 4, paragraph 3 (a)–(c)). Furthermore, a request for environmental information may be refused if the disclosure would have an adverse affect on any of the following: the confidentiality of the proceedings of public authorities, where such confidentiality is provided under national law; international relations, national defence or public security; the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature; the confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest; intellectual property rights; the confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for in national law; the interests of a third party which has supplied information requested without that party being under or capable of being put under a legal obligation to do so, and where that party does not consent to the release of the material; or the environment to which the information relates, such as the breeding sites of rare species (Article 4, paragraph 4(a)-(h)). In order to narrow the wide scope of the grounds for refusal of information, the Convention provides that

> [t]he aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment (Article 4).

In contrast to the general provision of information, provision for public participation is understood rather more extensively under the Convention. In the first place, it includes very detailed provisions concerning public participation in decisions on whether to permit certain activities. The activities concerned are listed in detail in an extensive Annex 1, and include almost any activity which might adversely impact on the environment (Article 6, paragraph 1(a))—and indeed, in paragraph 1(b) of the Article, the provisions as to

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public participation, are extended to apply to 'decisions on proposed activities not listed in annex I which may have a significant effect on the environment'. Crucial provisions concerning this issue are contained in Article 6, in particular paragraph 2.[14] Other provisions relating to public participation are contained in Articles 7 (public participation concerning plans, programmes and policies relating to the environment); and 8 (public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments).

Access to justice is provided for in the Aarhus Convention in Article 9 ('Access to Justice') and is based principally on access to a review procedure. Article 9, paragraph 1 outlines the main futures of such a procedure in relation to failures to provide information by providing that:

> [e]ach party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under Article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of this article, has access to a review procedure before a court of law or another independent an impartial body established by law . . . Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.

Article 9, paragraph 2 makes similar provision in relation to matters covered by Article 6 of the Convention (broadly, public participation in decision making, see above). While the detailed terms of these provisions and their placement in Article 9 as a whole might suggest that the provisions of the Convention relating to access to justice are principally concerned with backing up the procedural rights expressly covered in the Convention, Article 9, paragraph 3, coupled with Article 9, paragraph 4, appears to amount to something of a 'catch all' provision, which it is suggested, is wide enough to cover, even if not principally aimed at, justice in relation to the suffering of environmental harm. Thus, Article 9, paragraph 3 provides as follows:

> In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, . . . [the provisions just referred to] . . . each Party shall ensure that, where they meet the criteria, if any, laid down in its national law,

[14] It reads as follows: '[t]he public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in adequate, timely and effective manner, *inter alia*, of: (a) The proposed activity and the application on which a decision will be taken; (b) The nature of possible decision or the draft decision; (c) The public authority responsible for making the decision; (d) The envisaged procedure, including, as and when this information can be provided: (i) The commencement of the procedure; (ii) The opportunities for the public to participate; (iii) The time and venue of any envisaged public hearing; (iv) An indication of the public authority from where the relevant information has been obtained and where the relevant information has been deposited; (v) An indication of the relevant public authority or any other official body to which comments or questions can be submitted and of the time schedule for transmittal of comments or questions; and (vi) An indication of what environmental information relevant to the proposed activity is available; and (e) The fact that the activity is subject to a national or transboundary environment impact assessment procedure.'

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> members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment;

and Article 9, paragraph 4, continues:

> In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair.

Whatever the precise rights that these provisions are intended to provide may be, the provisions of Article 3, paragraph 9, apply the principle of equality of access to them by providing as follows:

> Within the scope of the relevant provisions of this Convention, the public shall have access to information, have the possibility to participate in decision-making and have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile. . . .

It has to be emphasised, however, that this broad provision is limited, by its opening words—'within the scope of the relevant provisions of this Convention'—to matters which are provided for in other particular provisions of the Convention. There would seem to be no doubt that this is inclusive of the procedural rights under Articles 4, 5, and 6 (with related access to justice provided under Article 9, paragraphs 1 and 2). It is less clear to what extent it would cover access to justice in relation to rights which are not actually provided for in the Convention, even though the right to access to justice in relation to such rights, if they exist in national law, *is* provided for in Article 9, paragraph 3.

B. The 1974 Convention on the Protection of the Environment between Denmark, Finland, and Sweden (the 'Nordic Convention')[15]

The fundamental rule of the Convention, in relation to equal access to justice in environmental matters, is that 'in considering the permissibility of environmentally harmful activities, the nuisance which such activities entail or might entail in another Contracting State shall be equated with a nuisance in the States where the activities are carried out' (Article 2). Another basic feature of this Convention is that it is applicable to any person affected or who may be affected by a nuisance caused by environmentally harmful activities in another contracting State. These persons shall have the right to institute proceedings before the appropriate court or administrative authority of

[15] Signed on 19 Feb 1974, entered into force on 5 Oct 1976 (Finland, Norway, Sweden); see also, Boyle, 'Making the Polluter Pay? Alternatives to State Responsibility in the Allocation of Transboundary Environmental Costs', in *International Responsibility for Environmental Harm* F Franzioni and T Scovazzi, eds (The Hague/London/Boston: Graham Trotmann/Martinus Nijhoff Publishers, 1993), 363–79, in particular, 371.

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that State concerning the permissibility of the activities, including proceedings on measures necessary to prevent damage, and to lodge an appeal against the decision of the court of the administrative authority to the same extent and to the same terms as a legal entity of the State in which the activity in underway. These rules also apply to compensation (Article 3). Thus, citizens of the Parties to the Convention enjoy equal status as regards the right to institute proceedings concerning the permissibility of environmentally harmful activities in any of these countries.

C. Some Comparisons

Comparing the three conventions, NAAEC, the Aarhus Convention, and the Nordic Convention, one may first observe that of the three, it is only the Aarhus Convention which provides for all three pillars of the procedural right to a clean environment referred to above in the introduction. The Nordic Convention provides only for the third of the pillars, namely, equal access to justice in environmental matters, while the NAAEC principally covers only the first, namely, public participation. There are, furthermore, important distinctions even where there are apparent areas of overlap between the conventions. Thus, with regard to equal access to justice, all three conventions make some provision under this heading. But it is in fact only the Nordic Convention that attempts to set up a detailed system under which nationals of all parties have full and equal access to the judicial remedies for environmental damage in the Courts of all other parties (though this principle is also embodied, though in a less specific manner, in Article II of the 1909 Boundary Waters Treaty, as to which see further below). Again, though furthering the right to information and the right to participate in policy and decision-making in relation to environmental matters are important objectives of the NAAEC, as well as of the Aarhus Agreement, their treatment in the two conventions differs widely. As we have seen above, the Aarhus Conventions sets out numerous, very detailed, requirements that are imposed upon the parties in these respect. By comparison, the relevant provisions of the NAAEC are largely aspirational, setting up mechanisms under which a regime embodying at least some of the specific provisions of the Aarhus Convention could come into being, if the Parties are minded to bring this about. Thus, the general objective of the NAAEC in relation to public participation is set out in Article 1 (Objectives) (h), which states that one of the objectives of the Convention is to 'promote transparency and public participation in the development of environmental laws, regulations and policies'. This is somewhat similar to the objectives that are set out (a good deal more elaborately) in the preamble to the Aarhus Convention. But in the body of the NAAEC, there is nothing equivalent to the rather detailed provisions of Articles 4, 6, and 7 of the Aarhus Convention which have been described above. Thus, Article 4, concerning publication, provides only that

> 1. Each Party shall ensure that its laws, regulations, procedures and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and Parties to become acquainted with them;

and, further, that

> 2. *To the extent possible*, each Party shall: (a) publish in advance any such measure that it proposes to adopt; and (b) provide interested persons and Parties a *reasonable opportunity to comment* on such proposed measures. (Italics added)

Again, under the provisions concerning the functions of the NAAEC Council, Article 10 paragraph 5 provides that the Council

> shall promote and, as appropriate, develop recommendations regarding . . . public access to information concerning the environment that is held by public authorities of each Party, including information on hazardous materials and activities in its communities, and opportunity to participate in decision-making processes related to such access

But there is no provision that requires the Parties to take any action based on recommendations under this provision.

A further important comparison lies between the provisions of the various Conventions referred to in relation to access to justice. The provisions of the Nordic Convention are essentially aimed at the internationalisation of equal access—that is, in particular, with the provision of rights of equal access in relation to transboundary environmental damage. By contrast, the provisions of the NAAEC relating to access to justice are really concerned with the access to justice in relation to environmental matters at a national level. In this respect, the Aarhus Convention embodies something of both principles. Its main thrust, generally, is in relation to the provision in national laws for the procedural rights relating to participation in decision-making and provision of information coupled with the requirement that Parties provide access to administrative and judicial review procedures in relation to failures in respect of these rights. But it would seem that its provisions as to access to justice are wide enough to cover access to justice in relation to rights which are not expressly covered by other provisions of the Convention, including rights to remedies for the suffering of environmental harm, and that the equality of access provisions of Article 3, paragraph 9, apply to these wider rights also. However, it is arguable that, in this particular respect (equal access to remedies for environmental harm), the provisions of Article 9, paragraph 3 coupled with Article 3, paragraph 9 are less satisfactory than the provisions of the Nordic Convention. To achieve complete equality of access, at least two things need to be covered. First, the plaintiff must be accorded access, procedurally, without discrimination as to citizenship, nationality, etc. But, secondly, the substantive law must recognise damage arising outside the jurisdiction of the national Court as giving rise to a cause of action on an equal

footing with damage arising within the jurisdiction. The provisions of the Aarhus Convention apply very plainly to the first of these factors. It is much less clear that the provisions of Article 9, paragraph 3, which refers simply to 'acts or omissions . . . which contravene provisions of . . . national law relating to the environment', cover the second; whereas the Nordic Convention plainly covers both, as, in slightly different terms, does the Boundary Waters Treaty between the United States of America and Canada, which provides that

> any interference with or diversion from their natural channel of [cross border waters] on either side of the boundary, resulting in any injury on the other side of the boundary, shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs. (Article II)

In fact, this full internationalisation of access to justice, including substantive aspects of rights existing under general law, as contained in the Nordic Convention, is unusual, and capable of working only really among States with very similar levels of environmental protection and of legal protection of the individual in relation to environmental damage; a situation which exists among the Nordic States (and between the United States and Canada), but to a somewhat lesser extent among the more disparate membership of the Aarhus Convention.

D. European Convention on Human Rights ('the ECHR')

Although on the face of it, there is a similarity between the ECHR and the provisions of the NAAEC in relation to citizens' submissions, namely, that both provide an international forum in which an individual can challenge the conduct of its own government. There are, however, plainly at least four fundamental distinctions. In the first place, under the ECHR the government's conduct is judged by reference to an international system of human rights law, whilst under the citizen submission system under NAAEC, a government's conduct is considered by reference to its own purely national laws. Secondly, under the ECHR, the individual's complaint is made to a judicial body, whilst under the NAAEC, the body concerned is not a judicial body and cannot provide a specific remedy for the failure complained about, but can only provide a formal factual report that may have a persuasive effect on the government concerned. The third distinction is that the provisions of the ECHR have to be applied in the national legal systems of the member States, whilst under the NAAEC, substantive aspects of the laws relating to the environment are left entirely to each Party. In substantive matters, the NAAEC is aspirational, its only requirements relating to certain minimum procedural standards. Fourthly, the Court under the ECHR system, through interpretation of the existing provisions of the Convention, which do not in themselves include a specific human right to a clean environment, in effect is able to

create law that becomes binding on States. This is illustrated by two cases of particular importance in relation to the recourse to environmental justice: the *Lopez-Ostra* case[16] and *Guerra and Others v Italy*.[17]

The decision in the *Lopez-Ostra* case was of a ground-breaking character. The applicant in this case claimed unlawful interference with her abode and impairment of her family's physical and mental health and safety. National Courts at all instances, including the Constitutional Court, found the applicant's clam manifestly ill-founded and dismissed it. After thus exhausting local remedies, Lopez-Ostra brought the case before the ECHR. In that instance, the applicant based her claim on Articles 3 and 8 (1) of the ECHR. The Commission in Strasbourg considered the claim admissible under Article 8 but not under Article 3. The Commission found a causal link between the emission and the illness of the applicant's daughter. Subsequently, the Court decided in connection with Article 8 that severe environmental pollution, even without causing severe damage to health, can affect the well-being of individuals and impede their enjoyment of their homes in such a manner as to have an adverse effect on their private and family life. The Court made several other important pronouncements in this issue. For example, it decided to apply a test, based on paragraphs 1 and 2 of Article 8, which would balance competing interests of individuals against those of the community as a whole. The Court stated that the payment of the rent for the substitute apartment did not completely compensate for the nuisance suffered by the family for 3 years and that the State did not make a proper balance as between the individual and public interests, ie, between private well-being and general economic concern. It also found that, although the plant was privately owned, the nuisance was attributable to the State since the plant was erected on public grounds, subsidised by the municipality and that public authorities had knowledge of the harm caused by the plant. The Court's opinion contains several interesting legal points in relation to the environment, including the finding that pollution does not have to cause serious damage to health, but rather need only be 'severe', in order to give a cause of action; and that nuisance caused by a privately owned facility may be attributable to the State. However, the most significant aspect of the judgment is the fact that the Court saw environmental issues as lying within the human rights structure, even in the absence of an explicit environmental right in the ECHR. It found in Article 8 a proper and sufficient link to connect the two. It should be emphasised that this was the first time the Court had given a slant to one of its decisions while weighing the interests of public and economic nature against the environmental complaint of an individual. In summary, it may be said the Court made the following important statements: first, serious effects of environmental degradation may

[16] *Lopez-Ostra*, 20 Eur.HR Rep (Ser A) 277, 279 (1994).

[17] C Miller, 'The European Convention on Human Rights: Another Weapon in the Environmentalist's Armoury' (1999) *Journal of Environmental Law*, vol 11, 157–76.

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affect an individual's well-being, since they may have adverse consequences for the enjoyment of the individual's private and family life. Secondly, public authorities have a duty to protect family and private life and home. Finally, the conditions suffered by the family of the applicant did not amount to degrading treatment according to Article 3 of the ECHR.

The right to receive information was interpreted by the European Court of Human Rights in the 1998 case *Guerra and Others v Italy*. The application was triggered by an accident that occurred on 26 September 1976 and involved the escape of poisonous substances. Before the Commission, the applicants made two complaints. First, that the authorities had not taken appropriate measures to reduce the risk of pollution by the chemical factory and to avoid the risk of major accidents; and secondly that the Italian State had failed to take steps to provide information about the risks and how to act in the event of a major accident, as required by the Presidential Decree of 1988 (breach of Article 10 of the ECHR).[18] The case was based on two Articles of the ECHR: Articles 8[19] and 10. As to the applicability of Article 8, the Court stated that in this case the grounds based on Article 8, paragraph 2 were not expressly set out in the application or the applicants' initial memorials lodged in the proceedings before the Commission. The Court was of the view, however, that those grounds were closely connected with the one pleaded, namely that giving information to the applicants, all of whom lived in the vicinity of the factory, could have had a bearing on their private and family life and physical integrity. As to the ground specified in Article 8 paragraph 2, the Court reiterated that severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, as stated in the *Lopez-Ostra* case (see above). In this case, the applicant waited, right up until the production of fertilisers ceased in 1994, for essential information that would have enabled them to assess the risks they and their families might run if they continued to live in Manfredonia, which was specially exposed to danger in the event of an accident in the factory. The Court, held, therefore that the respondent State did

[18] Art 10 of the ECHR provides as follows: '1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with its duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or right of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

[19] Art 8 of the ECHR provides as follows: '1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or in the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights or freedoms of others'.

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not fulfil its obligation to secure the applicants' right to respect for their private and family life. For that reason, the Respondent State has breached Article 8 of the ECHR (paragraph 60 of the judgment). As to the applicability of Article 10 of the Convention, the Court reiterated that freedom to receive information, referred to in Article 10 paragraph 2 of the Convention, 'basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him' as stated in the 1987 *Leander v Sweden* case. That freedom, however, cannot be construed as imposing on a State, in circumstances such as those of the case at hand, a positive obligation to collect and disseminate information of its own motion (paragraph 53 of the judgment). The Court thus interpreted Article 10 in a rather restrictive manner. The Court's jurisprudence as to Article 10 indicates that it had been applied in the majority of cases in relation to attempts by the governments to restrict the freedom of individuals, in particular journalists, to publish or broadcast politically controversial views.[20] It was the first case in which this Article was connected with the issue of environmental risk. Therefore, some doubts may be raised as to the correctness of such a restrictive interpretation in circumstances that were substantially different.[21]

The nature of the issues with which the European Court of Human Rights was concerned in these cases, and the manner in which it pronounced on the legal issues based on the provisions of the ECHR and its own interpretative jurisprudence, and applied that law in relation to the conduct of the governments concerned, may be contrasted with the nature of the issues, and powers, of the Secretariat under the Citizens' Submission procedure of the NAAEC, as described below.

IV. CITIZEN SUBMISSION PROCEDURE UNDER ARTICLES 14 AND 15 OF THE NAAEC

A. The Legal Framework

1. General Principles of the Procedure

The purpose of the inclusion of Articles 14 and 15 in the Agreement was 'to enlist the participation of the general North American public to help to ensure that the Parties abide by their obligations to enforce their respective environmental laws'.[22] As mentioned above, the enforcement of environmental regulations is the core and one of the main principles of the whole system on which the NAAEC is founded (see Article 1, paragraphs 9 and 5). Article 14 creates

[20] Miller, above n 17, 171–2.

[21] The Judges, Mrs Palm, Mr R Bernhard, Mr Russo, Mr Mcdonald, Mr Makarczyk, and Mr Van Dijk, stated that 'under different circumstances the State may have positive obligation to make available information to public and disseminate such information which by its nature could not otherwise come to the knowledge to the public.' The Judges, however, did not explain what these 'other circumstances' are which merit a different interpretation.

[22] MacCallum, n 4, 400.

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the only system under which NGOs or other public groups or a member of the public can bring environmental issues to the forum of NAFTA–NAAEC. The main principle of Article 14 is that the Secretariat may consider a submission from a non-governmental organisation or person asserting that a Party is failing to effectively enforce its environmental law. This general rule is, however, subject to several conditions. The Secretariat has to ascertain that the submission:

> (a) is in writing in a language designated by that Party in a notification to the Secretariat; (b) clearly identifies the person or organisation making the submission; (c) provides sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based; (d) appears to be aimed at promoting of enforcement rather than harassing of industry; (e) indicates the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response; (f) is filed by a person or organisation residing or established in the territory of a Party. (Article 15(a–f))

To allow for better understanding of this complicated procedure, the Council has adopted *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* in 1995 and revised them in 1999.[23] They provide a more detailed description of the requirements. The Guidelines require that the submission must contain in addition to the above-mentioned requirements a succinct account of the facts on which the assertion is based (paragraph 5.3 of the Guidelines). Further, the Guidelines specify that the submission's focus is required to be on the acts or omissions of a Party rather than on compliance by a particular company or business; especially if the Submitter is a competitor that may stand to benefit from the submission. The Secretariat will also determine whether the submission is not frivolous (paragraph 5.4 of the Guidelines).

2. Compliance of the Submission with Article 14 Criteria

The first stage is the determination by the Secretariat that a submission meets the above-mentioned criteria. Guidelines in paragraph 7.2 specify that the notification to the Council and the Submitter of the Secretariat's determination concerning whether or not a submission meets the criteria of Article 14 paragraph 1, will include, as appropriate, an explanation of how the submission meets or fails to meet each of those criteria. The notification to the Council and to the Submitter of the determination concerning whether or not the submission merits requesting a response from the Party concerned will include an explanation of factors that guided the Secretariat in making the determination, including each consideration set forth in Article 14, paragraph 2, if

[23] CEC Resolution 99–6 (28 June 1999). Available on the CEC website.

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applicable. This notification will be available on the registry and in the public file and at the same time provided to the Council and the Submitter. In the *Great Lake* and *Animal Alliance* cases, the Secretariat explained the level of scrutiny that is required under Article 14, paragraph 1 procedure. In general, it may be noted that the Secretariat does not expect an extensive, in-depth submission under this Article.[24] The Secretariat stated that Article 14 paragraph 1 is not intended to be an 'insurmountable procedural screening device. Rather, Article 14 paragraph 1 should be given a large and liberal interpretation, consistent with the objectives of the *NAAEC*'. [25] Finally, it may be noted that the submission has to meet the criteria of Article 14 laid down in Article 14 paragraph 1(e) to be admitted.[26] In the *AAA Packaging* case, the only indication that the Government of Canada was aware generally of issues related to the matters raised in the submission was the newspaper article attached to the submission reporting that Health Canada was investigating the Canadian company that allegedly produced and marketed isbutyl nitrite to customers in the USA and elsewhere. However, nothing in the submission indicated that the specific issues addressed in the submission had been communicated in writing to the other relevant Canadian authorities and no copies of relevant correspondence was attached to the submission.[27] Nor did the submission indicate or attach copies of the response, if any, of relevant Canadian authorities.

[24] In *Great Lake Determination*, the Secretariat stated as follows: '[t]he recent revisions to the Guidelines provide further support for the notion that Art 14 (1) and 2 stages of the citizen submissions process are intended as a screening mechanism. The Guidelines limit submissions to fifteen pages in length. The revised Guidelines require a submitter to address a minimum of thirteen criteria of factors in this limited space, indicating that a submission is not expected to contain extensive discussion of each criterion and factor in order to qualify under Article 14 (1) and (2) for more in-depth consideration.'

The Guidelines, para 3 (3): '[s]ubmission should not exceed 15 pages of typed, letter-sized paper, excluding supporting information. Submissions will not be accepted by fax or any other electronic means. Where possible, a copy of the submission on computer diskette should also be provided.' The same approach was adopted in the *Animal Alliance* case, see note 25. The Secretariat stated as follows: '[t]he Secretariat is of the view that Article 14, and article 14 (1) in particular, are not intended to be insurmountable screening devices. The Secretariat also believes that Article 14 (1) should be given a large and liberal interpretation; consistent with the objectives of the NAAEC . . . and further in the same case, it interpreted the word "assertion" as used in Article 14 (1), see above, as supporting "a relatively low threshold under article 14 (1)." However (in the same case), it explained that 'a certain amount of substantive analyses is nonetheless required at this initial stage', because '[o]therwise, the Secretariat would be forced to consider all submissions that merely "assert" a failure to effectively enforce environmental law.'

[25] *AAA Packaging case*, 12 Apr 2001, Determination in Accordance with Art 14 (1) of the NAAEC, available on the website of the CEC, see, also, eg, *Animal Alliance* case, SEM-97–005, Determination Pursuant to Art 14(1), 26 May 1998.

[26] According to Art 14 (1e), the submission has to indicate that 'the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response, if any . . .'

[27] In contravention of para 5 (5) of the Guidelines.

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3. Consideration of the Merits of the Submission

In the second stage, the Secretariat determines whether the submission merits requesting a response from the Party (Article 14 paragraph 2). In doing this, the Secretariat is guided by whether: (a) the submission alleges harm to a person or organisation making the submission; (b) the submission, alone or in combination with other submissions, raises matters whose further study in the process would advance the goals of the Agreement; (c) private remedies available under the Party's law have been pursued; and (d) the submission is drawn exclusively from mass media reports. The Guidelines provide the same requirements (paragraph 7–3 of the Guidelines). In the *Aquanova* submission the Secretariat explained that as provided by Article 14 paragraph 2, the factors listed there should guide the Secretariat in deciding whether submission warrants a response from the Party, as opposed to Article 14 paragraph 1, that establishes the criteria that a submission must meet for the Secretariat to consider it further.[28]

Where the Secretariat makes such a request of a response from a Party, it forwards to the Party a copy of the submission and any supporting information provided with the submission. The party concerned has an obligation to advise the Secretariat within thirty days, or in exceptional circumstances and on notification to the Secretariat, within 60 days of delivery of the request: (a) whether the matter is the subject of pending judicial or administrative proceedings, in which case the Secretariat will stop the proceedings; and (b)(i) whether the matter was previously the subject of judicial or administrative proceedings; (ii) whether private remedies in connection with the matter are available to the person making the submission and whether they have been pursued (Article 14, paragraphs 1–3). In consideration of whether the submission alleges harm to the person or organisation making the submission, the Secretariat will consider such factors as whether: (a) the alleged harm is due to the asserted failure to effectively enforce the environmental law; and (b) the alleged harm relates to the protection of the environment or the prevention of danger to human life (but not directly related to worker safety or health, as stated in Article 45, paragraph 2) of the Agreement and paragraph 7.4 of the Guidelines). The issue of harm was further considered in the *Cozumel* case. The Secretariat stated as follows:

> [i]n considering harm, the Secretariat notes the importance and character of the resource in question—a portion of magnificent Paradise coral reef located in the Caribbean waters Quintana Roo. While the Secretariat recognises that the submitters may not have alleged the particularised, individual harm required to acquire legal standing to bring suit in some civil proceedings in North America, the especially public nature of marine resources bring the submitters within the spirit and intent of Article 14 of the NAAEC.'[29]

[28] *Aquanova* (SEM-98–006), 20 Oct 1998, Art 15 (1) Notification to Council that Development of a Factual Record is Warranted, 4 Aug 2000.

[29] *Cozumel Recommendation* to develop Factual Record, 7 June 1996, Resolution 96–08, the Council instructed Secretariat to prepare the Factual Record. SEM-96–001. Factual Record presented to the Council on 23 Apr 1997.

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As to the pursuit of private remedies, the Secretariat will analyse whether: (a) requesting a response to the submission is appropriate if preparation of a factual record on the submission could duplicate or interfere with private remedies that are being pursued or have been pursued by the Submitter; and (b) reasonable actions have been taken to pursue such remedies prior to making a submission, bearing in mind that barriers to the pursuit of such remedies may exist in some cases (paragraph 7.5 of the Guidelines). Note should also be taken of the requirement that pertains to the advancement of the goals of the NAAEC. This is assessed as having great importance for development of the work of the Commission itself.[30]

In the *Aquanova* case, Mexico alleged that the Submitter failed to exhaust all the possible remedies. It claimed that the citizen's complaint (in this case *denuncia popular*) is not a private remedy contemplated in the Party's law and available for submitters to seek a remedy with that Party prior to making a submission. Mexico claimed that this means it was not a private remedy, but a mechanism to inform the government on environmental matters. The citizen complaint allows any person to denounce to the environmental authorities, alleged violations of environmental laws and regulations or harm to environment. It requires the government to consider the complaint, take action if applicable and inform the petitioner of any resolution of the matter.[31]

At the conclusion of the second stage of the proceedings, the Secretariat may either dismiss the submission or advance to the third stage, ie, to consider the development of a factual record. The Secretariat explained that '[t]he larger the scale of the asserted failure, the more likely it may be to warrant developing a factual record, other things being equal.' If the Citizens' Submission process were construed to bar consideration of alleged widespread enforcement failures, the failures which potentially pose the greatest threats to accomplishment of the Agreement's objectives, and the most serious and far-reaching threats to the environment, would be beyond the scope of this process. This limitation in scope would seem to be counter to the objects and purposes of the NAAEC. The Secretariat refused to adopt a reading of the Agreement that would yield such a result—therefore:

> these parameters [of Article 14, paragraph 1] limit the scope of the process in several ways but they do not reflect an intention only to allow 'particularised' assertions of a failure to effectively enforce and to exclude such assertions as those made here that there is a widespread failure to effectively enforce. Article 14 paragraph 2 provides further support for the notion that the citizen submission process may include either type of assertion.[32]

If the Secretariat considers that the submission, in light of any response from the Party, does not warrant development of a factual record, the Secretariat

[30] Markell, n 4, 561.
[31] *Aquanova*, Notification to the Council for the Development of Factual Report.
[32] *Migratory Birds* case (SEM-99–00).

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will notify the Submitter and the Council of its reason(s), and that submission process is terminated with respect of that submission (paragraph 9–6 of the Guidelines).

4. Development of a Factual Record

The third stage of the proceedings occurs when the Secretariat considers that the submission, in the light of any response provided by the Party, warrants developing a factual record. The Secretariat informs the Council of such a decision and provides its reason. The second step in the preparation of a factual record is the instruction by the Council to do so, a decision that is taken by consensus (Article 9, paragraph 6), though a two-thirds vote is sufficient (Article 15, paragraphs 1–2). If, however, the Council votes to instruct the Secretariat not to prepare a factual record, the Secretariat will inform the Submitter that the submission process is terminated. Unless the Council decides otherwise, any such decision will be noted in the registry and in the public file described in the guidelines (paragraph 12.1 of the Guidelines). The preparation of a factual record by the Secretariat is without prejudice to any further steps that may be taken with respect to any submission (Article 15, paragraph 3). In preparation of a factual record, the Secretariat considers information furnished by the Party and may consider any relevant technical, scientific or other information (paragraph 12.1 of the Guidelines): (a) that is publicly available; (b) submitted by interested non-governmental organisations or persons; (c) submitted by the Joint Public Advisory Committee; (d) developed by the Secretariat or by independent experts (Article 15 paragraph (4 a-d)). Draft and final factual records prepared by the Secretariat will contain: (a) a summary of the submission that initiated the process; (b) a summary of a response, if any, provided by a concern party; (c) a summary of any other relevant factual information; and (d) the facts presented by the Secretariat with respect to the matters raised in the submission.

The Secretariat submits a draft factual record to the Council. Any Party may provide comments on the accuracy of the draft within 45 days thereafter. The Secretariat has the duty to incorporate, as appropriate, any such comments in the final record and submit to the Council. The Council may make, by two-thirds vote, the final factual record publicly available, normally within 60 days following its publication (Article 15 paragraphs 5–7). The Guidelines envisage the possibility of the withdrawal of the submission. If a Submitter informs the Secretariat in writing before the response from the Party is received by the Secretariat, that it no longer wishes to have the submission process continue with respect to its submission, the Secretariat will terminate the proceedings and so inform the Council. If two or more submitters have made a joint submission, all of the submitters must inform the Secretariat in writing that they no longer wish to have the submission process continue, before the submission may be withdrawn (paragraph 15.1

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of the Guidelines). The information on cases is public. The Secretary will establish a registry to provide summary information, in order for any interested non-governmental organisation or person, as well as the JPAC, to follow the status of any given submission during the whole process under Articles 14 and 15 of the Agreement. The registry will be accessible to the public. The Secretariat will provide periodically a copy of the registry to the Council (paragraph 15–1 of the Guidelines).

B. Analysis of the Legal Requirements for Citizen Submissions

Analysis of the opening sentence of Article 14 paragraph 1: '[t]he Secretariat may consider a submission . . . asserting that a Party is failing to effectively enforce its environmental laws . . .' indicates that the process within the NAAEC is subject to three requirements. Thus, it can be invoked only in relation to submissions which involve: (i) one or more environmental law(s); (ii) a failure 'to effectively enforce' such environmental law(s); and (iii) such a failure which is ongoing in nature.[33] Article 45 of the Agreement defines what is understood under 'environmental law'. It includes within the scope of environmental law for the purposes of Article 14 the following types of acts: any statute or regulation of a Party, or provision thereof, the primary purpose of which is the protection of the environment or the prevention of danger to human life or health.[34] The meaning of the term 'environmental law' is further narrowed so as to exclude any statute or regulation, or provision thereof, the primary purpose of which is managing the commercial harvest or exploitation or subsistence or aboriginal harvesting, of natural resources. Another limitation is the exclusion of a statute or regulation or provision thereof directly related to workers' safety or health (Article 45(2) *in fine*). The Guidelines specify that the Submitter must identify the applicable statute or regulation or provision, as defined in Article 45 of the Agreement (paragraph 5–2 of the Guidelines).[35] The law in question has to be well defined to fulfil the conditions prescribed in this Article.

[33] Markell, n 4, 551. Confirmed by the Secretariat in several cases, eg, *Migratory Birds* case (SEM-99–002), Art 15(1) Notification to Council that Development of Factual Record is Warranted, (15 Dec 2000). The Secretariat stated as follows: '[t]he opening sentence of Article 14 establishes three parameters for the citizen submission process. It thereby limits assertions of failures to effectively enforce to those meeting these three elements. First, the assertion must involve an "environmental law". Next, they must involve an asserted failure to "effectively enforce" that law (the assertion may not focus on purported deficiencies in the law itself). Third, assertions must meet the temporal requirement of claiming that there *is* a failure to effectively enforce.'

[34] This is achieved through the prevention, abatement or control of the release, discharge or emission of pollutants or environmental contaminants, the control of environmentally hazardous or toxic chemicals, substances, materials, and wastes and dissemination of information related to the protection of wild flora and fauna, including endangered species, their habitat, and specially protected natural areas. Art 45(2) (i–iii).

[35] In the case of *Rio Magdalena* the Secretariat requested that the submitters supply details of the laws that were not enforced. CEC Secretariat, Request For Additional Information from Submitters, SEM-97–002, (2 July 1997) available at the CEC website.

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The Secretariat has dismissed allegations of ineffective enforcement of a Party's international obligations on the ground that the international obligations at issue, including these set forth in the NAAEC, had not been incorporated into a Party's domestic law and therefore did not meet the Article 45, paragraph 2 definition of environmental law.[36] As the Secretariat noted in the *BC Logging* submission, Canada did not appear to have taken action to incorporate the NAAEC into its domestic law, as distinct from its purely international obligations. Further, the Secretariat concluded, with regard to the *BC Logging* submission, that in general the remedy for a NAAEC Party's alleged failure to fulfil its obligations under Articles 6 and 7 (Private Access to Remedies and Procedural Guarantees) lies with the other NAAEC Parties. The same holds for any obligations contained in Article 2, paragraph 3 of the Agreement.[37]

In the *Migratory Birds* case, the Secretariat further considered the nature of effective enforcement when a Party alleges the exercise of its 'reasonable discretion' in the enforcement of the relevant statutes.[38] The Secretariat explained that this assertion gives rise to at least two questions: first, to what extent has the Party explained how it has exercised its discretion; and second, to what extent has the Party explained why its exercise of discretion is reasonable under the circumstances. If the Party has submitted a persuasive explanation of how it exercised its discretion, and why its exercise of discretion is reasonable, then under the requirements on Article 45 paragraph 1 (a), the Party would not have failed to effectively enforce its law and the case may be terminated. If, on the other hand, the Party has not explained how it exercised its discretion or why its exercise of discretion is reasonable, the case would proceed to a further stage. In the same case, the Secretariat considered enforcement practices of a Party that allegedly involved '*bona fide* decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities'. In this case, the Secretariat, while reviewing the Party's assertions, takes into consideration three issues: (1) its allocation of resources; (2) its priorities; and (3) the reasons why the Party's allocation of resources constitutes a *bona fide* allocation given the Party's priorities. Again, if a Party has explained its allocation of resources and has provided a persuasive argument of why its allocation of resources is *bona fide* in light of these priorities, then again under Article 45, paragraph 1(b), there

[36] *AAA Packaging*, SEM-01–002, Determination in Accordance with Art 14 (1), (24 Apr 2001); *B C Logging*, SEM-00–04, Determination Pursuant to Art 14 (1) and 14 (2), (8 May 2000), *Great Lakes*, SEM-98–003, Determination Pursuant to Arts 14 (1) and 14 (2), (4 Jan 1999); *Animal Alliance*, SEM-97–005, Determination Pursuant 14 (1), (26 May 1988).

[37] Art 2 (3) reads as follows: '[e]ach Party shall consider prohibiting the export to the territories of the other Parties of a pesticide or toxic substance whose use is prohibited within the Party's territory. When a Party adopts a measure prohibiting or severely restricting the use of pesticide or toxic substance in its territory, it shall notify the other Parties of the measure, either directly or through an appropriate international organisation.'

[38] *Migratory Birds*, case, n 32.

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has not been a failure to effectively enforce and the case will not be continued. In the same case, the Secretariat, stated that:

> [t]he NAAEC is silent on the type of showing a Party should make in claiming under Article 45 paragraph 1 that is not failing effectively enforce its environmental law. The NAAEC similarly is silent on how the Secretariat should review such a claim in deciding whether to dismiss a submission or advice the Council that development of a factual record is warranted.[39]

The formulation of 'primary purpose' of a particular or regulatory provision is determined by reference to the primary purpose of that particular provision, rather than to primary purpose of the statute or regulation of which it is part (Article 45b–c). Finally, the Secretariat has interpreted the term 'environmental law' as sometimes excluding international legal instruments.[40] On the basis of this interpretation, the Secretariat dismissed as 'environmental law' the 1978 Great Lakes Water Quality Agreement and the 1986 Agreement between the Government of the United States of America and the Government of Canada Concerning the Transboundary Movement of Hazardous Waste.[41]

The principle of effective enforcement has a territorial limitation that stipulates that 'nothing in this Agreement shall be construed to empower a Party's authorities to undertake environmental law enforcement activities in the territory of another Party' (Article 37). Substantively, this principle is not applicable in those instances where the action or inaction in question by agencies or officials of the Party: (a) reflects a reasonable exercise of their discretion in respect of investigatory, prosecutorial, regulatory, or compliance matters; or (b) results from *bona fide* decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities. Further, the Secretariat appears to interpret the 'effective enforcement' condition as relating to *implementation* of an enforcement provision, not to the effectiveness of that provision in itself. On these grounds the Secretariat dismissed the submission of the Biodiversity Legal Foundation, finding that

[39] Above, 18.

[40] See Department of Planet Earth *et al*., *NGO Petition to the North American Commission for Environmental Cooperationfor an Investigation and Creation of Factual Record*, SEM-98–003 (28 May 1998), CEC website; *CEC Secretariat, Determination Pursuant to Article 14(1) and (2) of the North American Agreement on Environmental Cooperation*, SEM-98–003 (8 Sept 1999), CEC website; also Markell, n 4, 553. The Secretariat said as follows in the *Great Lakes* case: '[A]rticle 45 (2) of the NAAEC is the key operative provision, defining environmental law to mean 'any statute or regulation of a Party . . .'

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

[41] Great Lakes Water Quality Agreement of 1978, US–Can., 30 UST 1383; Agreement between the Government of the United States of America and the Government of Canada Concerning the Transboundary Movement of Hazardous Waste, 28 Oct 1986.

creation of a rider modifying implementation of the Endangered Species Act did not, as was alleged, constitute a failure to enforce environmental law.[42] The Secretariat found that this submission was not actionable under the Article 14 procedure because its focus was on effectiveness of the law itself.[43]

Another aspect of the failure to enforce environmental law relates to the scope of this failure, ie, whether the broad assertion of a general nation-wide failure to effectively enforce environmental law falls under the requirements of Article 14, paragraph 1. Another possible view is that the Citizens' Submission process is reserved for assertions of particular failures to effectively enforce such a law. According to this view, a factual record would be warranted only when a submitter asserts that a Party is failing to effectively enforce with respect to one or more particular facilities or projects. This eliminates assertions of a wide-ranging failure to effectively enforce which do not focus on individual facilities of projects. Therefore such a view would result in the exclusion from the workings of Article 14 (ie, from the Citizens' Submission process), a wide-ranging failure to effectively enforce. The Secretariat is of the view that Article 14 does not appear to support such a limiting interpretation. The Secretariat reiterated that Article 14 established three parameters for citizens' submissions: assertions must involve 'environmental law'; they must involve an asserted failure to 'effectively enforce' (the assertion must not focus on alleged deficiencies in the law itself); and assertions must meet the temporal requirement of claiming that there is a continuing failure to effectively enforce.[44] However, there are several instances where the Secretariat found that the failure to enforce environmental law has occurred. For example in the *Great Lakes* case (see above), the Secretariat has found out that the submission was well founded.[45]

Finally, there are temporal issues connected with Article 14 paragraph 1. The first issue relates to interpretation of the term 'is failing' to effectively enforce Party's environmental law—ie, the requirement that there must be an

[42] Determination Under Art 14 (2), SEM 95–001 (21 Sept 1995). This distinction has been criticised as artificially separating the law making from enforcement. K Raustila, 'The Political Implications of the Enforcement provision of the NAFTA Environmental Side Agreement: the CEC as Model for Future Accords' (1996) 25 *Envtl L* 131.

[43] '[t]he enactment of legislation which specifically alters the operation of pre-existing environmental law in essence becomes a part of the greater body of environmental laws and statues on the books . . . The Secretariat therefore cannot characterise the application of anew legal regime as a failure to enforce a new one.'

[44] *Migratory Birds*, n 32, Art 15 (1) Notification to Council that Development of a Factual Record is Warranted, 15 Dec 2000.

[45] Another example is the BC Hydro and BC Mining submission involving Canada, BC. Aboriginal Fisheries Commission *et al*. Submission to the Commission on the Environmental Cooperation Pursuant to Art 14 of the North American Agreement on Environmental Cooperation, SEM-97–001 (Apr 1997), available on the CEC website: Sierra Club of British Columbia, *et al*, The Government's of Canada Failure to Enforce the Fisheries Act Against Mining Companies in British Columbia: A Submission to the Commission on Environmental Cooperation Pursuant to Art 14 of the North American Agreement on Environmental Cooperation, Council Resolution 98–07 (24 June 1998), available on the CEC website.

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on-going failure which has been referred to above. For example in *Canadian Environmental Defence Fund*, it was asserted that the Canadian Government had failed to enforce a Canadian law requiring environmental assessment of federal policies and programmes.[46] The submission was filed three years after the programme at issue came into effect. The programme since was terminated. The Secretariat dismissed the submission on the ground that it did not satisfy the temporal requirement in Article 14 that a party to the Agreement is failing effectively to enforce its environmental law.[47] The second temporal limitation (so-called the *Cozumel Recommendation*) refers to the extent to which the Secretariat may admit cases that consider events that occurred before the NAAEC entered into force, ie, before 1 January 1994. The Secretariat observed that the Agreement is not meant to be applicable retroactively. However, the Secretariat further explained that 'conditions and situations' that existed before 1 January 1994, might have been relevant to a 'present, continuing failure to enforce environmental law'. The Secretariat said, as follows in the *Cozumel* case:

> [a]rticle 47 of the NAAEC indicates the Parties intended the Agreement to take effect on January 1, 1994. The Secretariat is unable to discern any intentions, express or implied, conferring retroactive effect on the operation of Article 14 of the NAAEC. Notwithstanding the above, events or acts concluded prior to January 1, 1994, may create conditions or situations that give rise to current enforcement obligations. It follows that certain aspects of these conditions or situations may be relevant when considering an allegation of a present, continuing failure to enforce environmental law.[48]

The Government of Mexico in fact asserted that the acts on which the submission were based took place prior to the NAAEC entering into force, pre-dating the creation and the establishment of the NAAEC. In 1998, the Council Resolution directing the Secretariat to prepare a factual record concerning the *BC Hydro* submission provided the further clarification on this subject. The Secretariat was instructed as follows by the Council:

> [t]o consider whether the party concerned 'is failing to effectively enforce its environmental law' since the entry into force of the NAAEC on 1 January 1994.

[46] *Canadian Environmental Defence Fund, Article 14 Submission Made Pursuant to the North American Agreement on Environmental Cooperation*, SEM-97–004 (25 Aug 1997), available on the CEC website.

[47] The Secretariat observed that it was not aware of any reason that would have prevented the Submitter from filing its submission at the time it became aware of the alleged failure to enforce.

[48] See CEC Secretariat. Recommendation of the Secretariat to Council for the Development of a Factual Record in Accordance with Art 14 and 15 of the North American Agreement on Environmental Cooperation, SEM-96–001 (7 June 1996), A/14/SEM/96–001/07/ADV. Available on the CEC website. See also: PS Kibel, 'The Paper Tiger Awakens: North American Environmental Law After the *Cozumel Reef* Case' (2001) *Columbia Journal of Transanational Law*, vol 39, 403–82. Factual Record submitted to the Council 23 Apr 1997.

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> In considering such an alleged failure to effectively enforce, relevant facts that existed prior to 1 January 1994, may be included in the factual record. . . .[49]

C. Practice of the NAAEC

By the end of 2001, non-governmental organisations filed in excess of 28 separate private enforcement submissions. The Secretariat terminated eight of these submissions on the grounds that they did not fall into the category of claims permitted under Article 14. The Secretariat terminated three other submissions, in the *Cytar II* and the *Methanex and Neste* cases, because the issues contained therein were the subject of pending administrative or judicial review on the basis of Article, 14 paragraph 3 (a) of the Agreement. On 31 July 2001, the Commission had received a request from the Government of Mexico to terminate the proceedings in the *Cytar II* case.[50] In this case, the Government of Mexico claimed that there was a connection between the submission and an international dispute that was the subject of arbitration proceedings pending before the International Centre for Settlement of Investment Disputes. The Government of Mexico asserted, therefore, that due to this it had has been proved that

> the matter (*Cytar II*) is the subject of a pending judicial or administrative proceedings . . . and since the proceeding was officially instituted prior to the *Cytar II* submission . . . the United Mexican States consider that the submission should be totally and absolutely terminated.[51]

A similar decision was reached in the *Methanex*[52] and *Neste Canada* cases.[53] In these cases, the Secretariat determined that under Article 14(3)(a), on the basis of its review of these submissions, it would not proceed further because they were subjects of pending judicial and administrative proceedings. The matter raised in the *Methanex* and the *Neste* submissions is the subject of pending arbitration proceedings initiated by *Methanex* under Chapter 11 of the NAFTA.

Two submissions thus far resulted in the production of a Final Factual Record: the *Cozumel* submission,[54] *BC Aboriginal Fisheries Commission*

[49] *BC Hydro*, SEM-97–001, Recommended by the Council for Factual Record 24 June 1998, Council Resolution 98–07, C/C.01/98–00/RES./03/Rev 3 available on the CEC website.

[50] The Submitters in this case assert that Mexico is failing to effectively enforce its environmental law in relation to the establishment and operation of the Cytar hazardous waste landfill near the city of Hermosillo, Sonora (SEM-01–001).

[51] Commission for Environmental *Cooperation*, website.

[52] *Methanex* case (SEM-99–001), 18 Oct 1999, available on the CEE website.

[53] *Neste Canada* case (SEM-00–002),21 Jan 2001, available on the website.

[54] On 18 Jan 1996, three non-governmental organisations (NGOs), the Committee for the Protection of Natural Resources A C, the International Group of One Hundred A C and the Mexican Centre for Environmental Law (Submitters), presented a submission to the Secretariat of the CEC alleging a 'failure on the part of Mexican authorities to enforce environmental law effectively with regard to the totality of the works of the port terminal project in Playa Paradiso, Cozumel, Quintana Roo' (available on the CEC website) (SEM-96–001). The Final Factual Record was issued to public on 24 Oct 1997.

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submission.[55] In the *Metales y Derivados* and the *Molymex II* cases the Council on 16 May 2000 and on 22 May 2002 respectively directed the Secretariat, by a unanimous resolution, to draft the Factual Record.[56]

The pending submissions in which a factual record[57] was warranted by Secretariat, and the notification to that effect given to the Council (on the basis of Article 15 paragraph 1) are the following: the *Migratory Birds*,[58] the *BC Logging*,[59] and the *Aquanova*.[60]

V. PUBLIC PARTICIPATION IN PREDECESSORS OF THE NAAEC: THE INTERNATIONAL BOUNDARY AND WATER COMMISSION ('THE IBWC'—UNITED STATES AND MEXICO)[61] AND THE INTERNATIONAL JOINT COMMISSION (THE 'IJC'—UNITED STATES AND CANADA)[62]

These bodies will be assessed in this article from the point of view of public participation and for comparative purposes only. Public participation in the

[55] On 2 Apr 1997 the Sierra Legal Defence Fund and the Sierra Club Legal Defence Fund (now Eathjustice) jointly filed a submission. The submission was filed on behalf of the following organisations: the BC Aboriginal Fisheries Commission, the British Columbia Wildlife Federation, the Steelhead Society, the Trail Wildlife Unlimited (Spokane Chapter), the Pacific Coast Federation of Fishermen Associations, the Sierra Club (Washington, DC), and the Institute for Fishing Resources (collectively, the 'Submitters') (SEM-98–001). The Final Factual Record was released to Parties on 11 June 2000.

[56] On 20 Oct 1998, the Environmental Health Coalition and the Comité Ciudadano Restauración del Canon de Padre y Servicios Comunitarios, AC (SEM-98-006).

[57] There were eight Secretariat Notifications to Council that the Secretariat considered development of factual record to be warranted for submission. The Council has directed the Secretariat to develop the factual in three cases (see above), two are finished: the *Cozumel* and the *BC Aboriginal Fisheries*, and one is pending: the *Metales Derivados*. The Council deferred its decision on one: *Oldman River II* (SEM-97–006), rejected the *Quebec Hoc Farms* (SEM-97–003) and is currently considering the *BC Logging* (SEM-00–004).

[58] On 19 Nov 1999, Alliance for the Wild Rockies, Centre for International Environmental Law, Centro de Derecho Ambiental del Norestre de Mexico, Cwentro Mexicano de Derecho Ambiental, pacific Environment and Resources Center, Sierra Club of Canada, West Coast Environmental Law Association (Submitters) filed a submission (SEM-99–002). Date of Determination: 15 Dec 2000.

[59] On 15 Mar 2000 David Suzuki Foundation, Greenpeace Canada, Sierra Club British Columbia, Northwest Ecosystem Alliance, National Resources Defence Council (Submitters) represented by Sierra legal Defence Fund, Earthjustice Legal Defence Fund (Submitters) filed a submission. Date of Determination: 27 July 2001 (SEM-00–004).

[60] On 20 Oct 1998, Groupo Ecologico 'Manglar' (Submitter) AC filed a submission (SEM-98–006). Date of Determination: 4 Aug 2000.

[61] The International Boundary and Water Commission was established by the 1 March 1889 Treaty (the name was International Water Commission) and later the treaty of 3 Feb 1944 established the International Boundary and Water Commission (entered into force 8 Nov 1945) text: <http://www.ibwc.state.gov>.

[62] The International Joint Commission was established by 1909 by the Boundary Waters Treaty. It consists of six members. The Commission has set up more than twenty boards, made up of experts from the United States and Canada. Also relevant are the 1972 Great Lakes Water Quality Agreement (renewed 1978) and the 1987 Protocol amending the 1978 Agreement; the 1991 Air Quality Agreement (renewed 28 Jan 2002). Website <http://www.jic.org>.

above-mentioned bodies is conditioned by their functions. Whilst the NAAEC is of a general environmental importance (having functions such as the raising of general environmental standards) for the United States, Canada and Mexico, the two Commissions under consideration in the present section were established to accomplish, with the assistance of substantial budgets, certain specific practical and concrete tasks. The NAAEC, it may be said, acts as a general overseer of the environmental conduct of the three Parties, whilst the two commissions under consideration here act in concrete geographical conditions in the context of specifically delimited aspects of environmental protection.

In fact, close scrutiny of the IBWC and the IJC shows that they also differ in the way their functions were set out. The IBWC consists of two fairly independent sections: the US and the Mexican. The IBWC as a main task has the application of rights and obligations that the Governments of the United States and Mexico assume under the great number of boundary and water treaties in a way that benefits people living on two sides of the boundary and enhances the cooperation between two states. In practical terms the rights and obligations stemming from these treaties include: distribution between the two countries of the waters of the Rio Grande and the Colorado River; regulation and conservation of the waters of the Rio Grande for their use by the two countries by joint construction, operation and maintenance of international storage dams and reservoirs and plants for generating hydroelectric energy at the dams; regulation of the Colorado River waters allocated to Mexico; protection of land along the river from floods by levee and floodway projects; solution of border sanitation and other border water quality problems; preservation of the Rio Grande and Colorado River as an international boundary; and demarcation of the land boundary. In general it may said this area of the activities of the Commission is based on cooperative projects undertaken in implementation of the existing treaties between two Governments. Another field of activities of the IBWC is the origination of new projects. Early detection and evaluation of the project and the need for such a joint project also belong to the functions of the IJC. The role of the IBWC in such instances is to examine the project, endorse it and recommend it to the two Governments. In this particular respect, the functions of the IBWC are purely recommendatory. But in general, as referred to above, its duties are characterised by a 'hands on' practical approach rather than a regulatory one. This Commission does not have any judicial or quasi-judicial functions.

The IJC has a different legal character from the IWBC. This body has unique legal powers in that it can act as a quasi-judicial organ, acting through public hearings and rendering binding decisions, adopted by majority vote (Articles 7, 8, 12, 3 and 4 of the 1909 Boundary Treaty).[63] The IJC is an

[63] Cohen 'The Regime of Boundary Waters—The Canadian–US Experience' (1977) *RCADI*, vol III, 219; Birnie and Boyle, *International Law and the Environment*, n 3, 326–8.

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independent body of an administrative character. However, recommendations adopted under the Water Quality Agreement are not binding. Under this agreement the IJC has the duty to collect data, conducts research and reports on the effectiveness of measures taken under the agreement (Article VII). It also approves the construction of dams and hydroelectric power stations such as in St. Mary's and St Lawrence rivers and sets conditions for their operation. The functions of the Commission under the Air Quality Agreement are based on the Article IX of the 1909 Boundary Waters Treaty and limited to: inviting comments, including public hearings as appropriate, on each progress report prepared by the Air Quality Committee (established under Article VIII of the Air Quality Agreement); the submission to the Parties of a synthesis of the views presented, as well as a record of such views if either Party so requests; and the release of the synthesis of views to the public after its submission to the Parties (Article IX of the Air Quality Agreement). The parties may also refer to the Commission such joint references as may be appropriate for the effective implementation of the Agreement (Article IX(2) of the Air Quality Agreement). Finally, Article II of the 1909 Boundary Waters Treaty accords certain limited equal access to national remedies in seeking redress for damage caused by transboundary water pollution, excluding cases already existing and cases expressly covered by special agreements between the Parties.

It will be evident that the degree and the nature of public participation in the three Commissions are different as regards the form. It may be that the NAAEC was in some measure inspired by the legal set up of two other above described Commissions, however, public participation in the NAAEC does not resemble either of them. The differences in public participation reflect and are linked to the differences in functions in these Commissions. In the IBWC, the both sections, the US and the Mexican pursue their own policy on public participation. For instance, the USIBWC has instituted a system of citizens' Committees or forums. The Mexican section of the Commission did not establish such a programme. In 1999, for example, the United States section of the IBWC established the Rio Grande Citizens' Forum ('the RGCF') in order to facilitate the exchange of information between the Commission and members of the public about the Commission's activities in the area.[64] 'The RGCF is intended to bring together community members enabling the early and continued two-way flow of information, concerns, values and needs between the USIBWC and the general public, environmentalists, government agencies, irrigation districts, municipalities and other interested parties.' The RGCF's duties and responsibilities include reviewing and commenting on technical documents and activities associated with the USIBWC projects in the area. Each forum has a board of active members that conducts regular public meetings to discuss plans and issues related to ongoing and future USIBWC

[64] <http://www.ibwc.state.gov>.

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projects. Members of the public who do not serve directly may still participate in activities of the forum. Interested members of the community will be included on the mailing list and will be invited to attend all forum meetings, which are open to the public. The public will be able to comment at the forum meeting during the time set aside for public comments and input. The Citizens' Forum Programme is a relatively new programme of the USIBWC. It has no formal advisory powers, it is rather the discussion forum.

The IJC has a variety of forms of public participation. Under the 1909 Boundary Waters Treaty the Commission has the capacity to seek the views of interested parties or groups as well as of the general public before reaching the decision on matters referred to it under the Treaty. It is a matter of policy of the IJC to look for ways to work with the various levels of government, individuals, research organisations, environmental organisations, unions, business sectors and groups of indigenous peoples. Under the 1978 Water Quality Agreement, the Great Lakes Regional Office has the duty to assist the IJC and the two Boards (Water Quality Board and the Science Advisory Board) established pursuant to the Agreement, in discharging their function, *inter alia*, to provide a public information service for the programmes, including public hearings, undertaken by the Commission and its Boards. In practice, the Commission has developed a massive programme of consultations with interested groups, taking many forms, such as consultations, 'conversations,' focus group meetings and public hearings, including all of the above mentioned groups. In contrast to the IBWC, which has a standing Citizens' Forum, the IJC has *ad hoc* consultations etc depending on circumstances. Only under the Water Quality Agreement the meetings are held regularly every two years to discuss progress in cleaning up the Great Lakes. It also sponsors conferences, meetings and round table discussions where members of the public and representatives community groups and other organisations can take part. The nature of public participation is similar but is only informative.

Although the NAAEC fulfils a certain role in the provision of the environmental information and of the raising of the level of the environmental awareness, it is undisputed that its main role in relation to public participation is included in Articles 14 and 15, which may be seen as supportive of the Council's duty to encourage effective enforcement by each Party of its environmental laws and regulations (Article 10–4a). By comparison therefore, it acts as an overseer of the Parties' enforcement of their own environmental laws and regulations generally, which is not a function under the provisions of either of the other Commissions.

VI. CONCLUSION

The question arises of how effective is the civil participation procedure under the NAAEC. The Secretariat has terminated approximately 40 per cent of

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submissions, either at the early stages or having received the Party's response. Some of the submissions were withdrawn. Even more pertinent questions, perhaps, are whether the whole procedure, as designed in the Agreement, is effective and what is the effect of the Final Factual Report. As evidenced by the *Cozumel* case, the Factual Report is not meant to present conclusive findings or specific recommendations. It did not

> attempt to reconcile or integrate the evidence concerning the ecological risks to Cozumel's reefs, not did it address 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.[65]

In the press release of 24 October 1997, concerning the Factual Record, the CRC made the following statement:

> [t]he factual record does not reach legal conclusions or determination. The purpose of factual record is to clarify the facts as they pertain to allegations raised by the submitters and information provided by the Parties to public.[66]

However, it would be an over-simplification to state that the Factual Record is completely devoid of importance. By establishing certain facts, this document evidenced the shortcomings of Mexico's policy and indicated that the Consorcio Pier would damage Cozumel reefs and that the pier was only one step in the further tourist development of the area,[67] thus putting in doubt the assertions of Mexico that the pier and other off-shore projects were distinct projects that were still under review. Therefore,

> [w]hile the CEC's factual record falls short of determination that Mexico is failing to enforce its environmental laws, the findings . . . nonetheless strongly suggest that the government's approval process was of questionable scientific and legal legitimacy.[68]

The lack of clarity of the Factual Report in this case caused mixed reactions. Some environmentalists assessed the report as a victory, since according to them, the report proved that Mexico violated environmental laws and that the report contributed to transparency in environmental decision-making. Mexico, as a result of the report, announced that it would implement a new management study for Cozumel Island and that it would improve legislation concerning endangered coral reefs. Others, however, were not so enthusiastic and saw the report as an evidence of the CEC's lack of effectiveness. It was observed by some lawyers that the report did not contain any recommendations and that that the CEC's procedure is just another bureaucracy without

[65] Kibel, n 48, 468.

[66] Press Release, North American Commission for Environmental *Cooperation*, NAFTA Environmental Ministers Release Cozumel Factual Record to the Public (24 Oct 24, 1997), cited in Kibel, in n 478, 469.

[67] The Factual Record, 162.

[68] Kibel, n 48, 469.

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power. In fact, despite the assurances given by Mexico as to the revision of its policy as regards Cozumel, and the improvement of its legislation protecting coral reefs, the pier was erected. Therefore the victory was at best only a paper one.[69]

It is almost a uniform assessment of the CEC that it is 'a largely toothless, cosmetic organisation'. Further the same author states that the environmental dispute settlement process is virtually meaningless under CEC 'at least under the present climate of good relations between the United States and Mexico'.[70] The CEC that we know at present is not an organisation with any enforcement powers.[71]

The CEC represents really a 'soft' approach to environmental problems. In fact, it sees itself as a 'soft' tool. According to its Mission Statement,

> [t]he CEC facilitates co-operation and public participation to foster conservation, protection and enhancement of the North American environment for the benefit of present and future generations, in the context of increasing economic, trade and social links between Canada, Mexico and the United States[72]

and further:

> [t]he North American Commission for Environmental Cooperation (CEC) is the only intergovernmental organisation that has its roots in expanded economic integration brought about by trade liberalisation agreement. Thus, among the core objectives of the CEC is to advance the understanding of the relationship between the three parties in promoting an integrated approach to environmental protection.[73]

Victor Lichtinger, the former CEC's Executive Director said as follows:

> [t]he side agreement is not an attempt to harass industry or put up barriers to trade but is aimed at making free trade compatible with economic development . . . This objective is to find a solution to the environmental problem at hand, not

[69] Ibid, 469–70.

[70] Rueda, n 4, 688.

[71] In 1998 the total value of goods traded between the US and Mexico exceeded US$170 billion. The projected budget for the CEC for the year 2000 was only US$9.3 million. At present the CEC has three projects pending: 'The North American Regional Enforcement Building Forum' (budget: US$90.000); The Enforcement and Compliance Capacity Building (budget: US$130.000); and a project 'to explore and develop indicators for measuring and evaluating the effectiveness of the enforcement and compliance strategies of each party' (budget: US$50.000): '[t]hese three projects have one thing in common—although they assist in the development of policing efforts by national authorities, they are not policing efforts per se. These projects lay a road map that the parties can follow or disregard at their discretion. It could be no other way, because the CEC is too weak to confront a party determined not to conduct activities in an environmentally friendly manner. Only the other parties of NAFTA can pressure a delinquent party to mend its ways. Under such circumstances, the CEC's participation would be beside the point, except perhaps as one voice among a side chorus of condemnatory voices', Rueda, n 4, 690.

[72] CEC Mission Statement, <http://www.cec.org/english/profle/>.

[73] North American Agenda for Environmental *Cooperation*, North American Agenda for Action:2000–2002; A Three-Year Programme Plan for the Commission for Environmental *Cooperation* (Feb 2000), available at the CEC website.

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> punish the offending party . . . a solution should be found without the imposition of sanctions.[74]

Kibel is the most severe judge of the NAEEC. He says that

> [t]hey [Canada, Mexico and the United States] had the option to make the NAAEC a political priority and take its obligations seriously, and they chose not to do so.

The same author presents a useful comparison between the enforcement system of the NAAEC and the NAFTA.

The NAFTA has an effective system of dispute resolution. In cases of the violation of the provisions of the Agreement, the Parties have the choice of two mechanisms. They have recourse to arbitration under Chapters 19 and 20 of the Agreement, or they can file a submission with the Free Trade Commission under Chapter 20 of the NAFTA. These mechanisms proved to be effective and successful, resulting in substantial payments. Under the NAAEC, however, the only available enforcement is the mechanism of citizens' submissions under Article 14. Another point that is brought forward by Kibel is the rights of private corporations. Under Articles 1110 and 1131–1138, private corporations can bring a direct claim if the corporation believes that a domestic environmental law resulted in the expropriation of the corporation investment. Further, under Articles 1115 and 1138, a private corporation alleging expropriation, can force a government into binding arbitration without any approval from any national government or international council. Private environmental groups under the NAAEC, however, must obtain the approval of two-thirds of the CEC's Council of Ministers before an Article 14 claim is able to proceed and do not have the benefit of forcing the government into binding arbitration.

In conclusion, Kibel asserts that:

> [i]n 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 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.[75]

However, despite this rather brutal criticism of the NAAEC, the present author is of the view that there are some positive features of this Agreement. Although it is undoubtedly true that the NAAEC is far less effective than NAFTA, from the point of view the enforcement mechanism it must be

[74] Lichtinger Sees Expansion of NAFTA Environmental Accord, *Int'l Envt. Daily* (BNA) d 3, 16 Dec 1994 (quoted in DiMento & Doughman, n 4, 735).

[75] Kibel, n 48, 475.

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acknowledged the NAAEC plays a positive role in the building of an environmental awareness and contributing to the development of transparency in environmental matters. The Article 14 mechanism also influences the strengthening of civil society and the participatory element of environmental protection.

As pointed out elsewhere in this article, the effectiveness of the NAAEC as to public participation may be compared with that of the IBWC and of the IJC only to a certain limited degree considering their different functions. It appears that these two Commissions are, within the scope of their functions, very effective, although public participation is mostly, broadly speaking, limited to the exchange of information between the public and the Commissions. The provisions enabling them to obtain the views of the public allow public input in the way they discharge their practical, executive functions in relation to specific problems. The NAAEC formulates and makes recommendations on general environmental policy and has the ability to gain public input by holding public meetings as referred to above, but does not appear to have developed as yet any significant practice in this respect. The only way in which public participation is regularly effected is on the basis of the Citizens' Submission Procedure under Articles 14 and 15, which, broadly speaking, serves to influence the proper implementation of national environmental laws, the effectiveness of which may, as pointed out above, be questioned.