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Great Expectations: The North American Commission on Environmental Cooperation Review of the Cozumel Pier Submission

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COMMENT

GREAT EXPECTATIONS: THE NORTH AMERICAN COMMISSION ON ENVIRONMENTAL COOPERATION REVIEW OF THE COZUMEL PIER SUBMISSION[1]

1. Recommendation of the Secretariat to Council for the development of a Factual Record in accordance with Articles 14 and 15 of the North American Agreement on Environmental Cooperation, Submission No. SEM-96-001 (Jan. 18, 1996) [hereinafter Recommendation]. Information on the Commission and its activities can be obtained on the Internet at http://www.cec.org [hereinafter Commission Web Site].

I. INTRODUCTION

The United States, Canada, and Mexico entered into the North American Agreement on Environmental Cooperation (Agreement) in response to the concerns of U.S. environmentalists that the North American Free Trade Agreement (NAFTA) would adversely impact the NAFTA member countries' environmental laws and their enforcement.[2] The Agreement created the North American Commission on Environmental Cooperation (Commission), which is responsible for ensuring that the three countries comply with the Agreement.[3] The Agreement provides individuals and nongovernmental organizations (NGOs) with the right to present submissions to the Commission Secretariat to declare that one of the NAFTA countries is failing to effectively enforce its domestic environmental laws.[4] This Comment discusses an NGO submission, the Cozumel Pier Submission (*Cozumel*). *Cozumel* is the first NGO submission in which the Commission will compile a factual record.[5] This Comment analyzes *Cozumel* with a focus on the ability of the Commission's procedural mechanisms to effectively review citizen submissions.[6]

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2. The North American Free Trade Agreement became effective on January 1, 1994. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 605 (1993) [hereinafter NAFTA].

3. North American Agreement on Environmental Cooperation, *opened for signature* Sept. 9, 1993, Can.-Mex.-U.S., art. 10(1)(a), 32 I.L.M. 1480, 1485 (1993) [hereinafter Agreement].

4. *Id.* art. 14.

5. The Secretariat, in deciding whether it would be proper to compile a factual record, reviews the submission, and, if the submission passes several procedural tests, asks the Council for approval to compile a factual record. *Id.* arts. 14 and 15.

6. *Cozumel* raises issues which are important in and of themselves. In addition, as the Commission's first major submission, the resolution of *Cozumel* should have impor-

On January 18, 1996, three Mexican citizen groups (Submitters)[7] presented the Commission with a submission which alleged that the Mexican government issued permits for construction and operation of a cruise ship dock on the Caribbean sea island of Cozumel without complying with Mexico's Ecology Law. The Ecology Law requires the construction company file an Environmental Impact Statement (EIS).[8] The Submitters were concerned that the construction could cause damage to the Paradise Coral Reef, located off Cozumel Island.[9] After requesting and receiving a response from the Mexican government, the Commission Secretariat decided to conduct an investigation and to prepare a factual record concerning the allegations that Mexico failed to enforce its environmental laws.[10]

Part I of this Comment describes the controversial history surrounding the enactment of the Agreement and the establishment of the Commission. Part II addresses the purpose and structure of the Commission and the submission process provisions. A summary of Mexican environmental laws with an emphasis on the principle law surrounding the dispute in *Cozumel*, Mexico's Ecology Law is provided in Part III. An outline of Mexico's environmental enforcement efforts appears in Part IV. Part V discusses the importance and prevalence of the EIS. Part VI reviews the procedural history of *Cozumel* to date, and Part VII analyzes the issues raised in *Cozumel*. Finally, Part VIII discusses the potential consequences of *Cozumel* impacting the future of the Commission's effectiveness.

This Comment asserts that the fears of U.S. environmentalists that the Agreement's provisions will ultimately prove unworkable have not been confirmed to date. Instead, the Agreement appears to have created workable procedural mechanisms for reviewing environmental citizen submissions. Further, while

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tant precedential value and may set the tone for future submissions to the Commission.

7. The Mexican citizens groups which presented the submission are the Mexican Center for Environmental Law (*Centro Mexicano de Derecho Ambiental, A.C.*), the International Group of 100 (*Grupo de los Cien Internacional, A.C.*), and the Natural Resources Protection Committee (*Comité para la Protección de los Recursos Naturales, A.C.*). Recommendation, *supra* note 1, at 1.

8. The Ecology Law requires that an Environmental Impact Statement (EIS) be filed with the *Secretaria de Desarollo Social* (Social Development Secretariat of Mexico or SEDESL). For a more detailed discussion on the Ecology Law's EIS requirement, see *infra* Part III.

9. Recommendation, *supra* note 1, at 3.

10. *Id.* at 4.

all of those issues that concern U.S. environmentalists did not arise in *Cozumel*,[11] and although difficult legal issues remain for the Commission to resolve, the Commission's disposition of the submission thusfar provides a substantial basis for cautious optimism regarding the effectiveness of the Agreement's procedural mechanisms and the Commission's willingness to compile factual records for deserving submissions.[12]

A. NAFTA's Historical Background

1. The Original NAFTA Proposal

NAFTA was first proposed by then-Vice President George Bush in 1988 to strengthen the American economy and to solidify North American trade relations in light of the rapid evolution of the European Economic Community. Congress granted "fast track" negotiation authority in May 1992, which enabled the Bush administration to negotiate and sign NAFTA after a ninety day period of consultation with Congress.[13]

President Bush signed NAFTA on December 17, 1992.[14] Congress' acceptance turned in large part on the drafting of the

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11. In particular, Mexico did not argue that the decision not to require the filing of an EIS was due to the reasonable allocation of its resources. *See infra* Part VII.F.

12. Victor Lichtinger, Executive Director, North American Commission for Environmental Cooperation stated:

> The Agreement and the Commission are looked to with a great sense of expectation by a wide range of communities of stakeholders within, and beyond, North America. In practice, the extent to which these opportunities are realized and the particular directions they take will ultimately be defined by the specific elements of the legal agreement itself and the work of the Commission and their governments, in elaborating and implementing the mandate of the agreement. This is particularly the case as many of the legal elements embodied in the Agreement are novel and without precedent and will therefore be subject to ongoing interpretation in the context of evolving environmental concerns of North Americans.

Victor Lichtinger, Executive Director, North American Commission for Environmental Cooperation, *Foreword* to PIERRE MARC JOHNSON & ANDRÉ BEAULIEU, THE ENVIRONMENT AND NAFTA: UNDERSTANDING AND IMPLEMENTING THE NEW CONTINENTAL LAW, at xiii (1996).

13. Nicolas Kublicki, *The Greening of Free Trade: NAFTA, Mexican Environmental Law, and Debt Exchanges for Mexican Environmental Infrastructure Development*, 19 COLUM. J. ENVTL. L. 59, 67 (1994).

14. *Id.* at 68.

environmental and labor side agreements.[15] In response to early congressional concern about the level and thoroughness of Mexican environmental regulation, the United States General Accounting Office conducted a survey of Mexican environmental law. The survey concluded that while Mexican environmental regulations were equal to U.S. regulations in form, historically, Mexico fell short in enforcement.[16] NAFTA's inevitable unregulated industrial growth in Mexico concerned U.S. environmentalists who feared that NAFTA's environmental provisions would not fully address the challenges that the industrial growth would present to Mexico's already inadequately enforced environmental laws.[17] The survey's findings focused the debate on issues of effective environmental law enforcement.[18]

2. "Pollution Havens" and "Downward Harmonization"

Primarily, U.S. environmentalists feared that NAFTA would create incentives for corporations to move environmentally-sensitive production to Mexican "pollution havens," which are the least environmentally regulated areas available.[19] By moving to the pollution havens, a company's production could continue unencumbered by U.S. environmental regulation, while NAFTA's free trade provisions would allow the company untariffed access to the U.S. market.[20]

Environmental and congressional leaders were also concerned that NAFTA would cause U.S. environmental standards to decline.[21] Environmentalists' fear of "downward harmonization" of U.S. laws and their concern about NAFTA's failure to

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15. Sandra Le Priol-Vrejan, *The NAFTA Environmental Side Agreement and the Power to Investigate Violations of Environmental Laws*, 23 HOFSTRA L. REV. 483, 488 (1994).

16. Kal Raustiala, *The Political Implications of the Enforcement Provisions of the NAFTA Environmental Side Agreement: The CEC as a Model for Future Accords*, 25 ENVTL. L. 31, 35 (1995).

17. Kublicki, *supra* note 13, at 60-61. Whereas proponents of NAFTA perceived the Agreement as a catalyst of economic growth and an indirect means to better environmental protection, NAFTA's opponents saw it as insufficient to protect the environment from the industrial growth which NAFTA was predicted to cause. *Id.*

18. Raustiala, *supra* note 16, at 35.

19. *Id.* at 34.

20. *Id.*

21. Linda DuPuis, *The Environmental Side Agreement Between Mexico and the United States—An Effective Compromise?*, 8 FLA. J. INT'L L. 471, 479 (1993).

regulate industry were the primary threats to ratification of NAFTA by the United States. "Downward harmonization" generally describes a theory of NAFTA's possible effect on environmental regulations in the United States. The theory is that NAFTA's free market forces will cause the United States and Canada's environmental laws to become weaker as a consequence of Mexico's sporadic enforcement of its environmental laws.[22]

The environmentalists pointed to the *maquiladoras* to buttress their claims that NAFTA would lead to rapid environmental degradation in Mexico.[23] A *maquiladora*, also known as

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22. Kevin W. Patton, *Dispute Resolution Under the North American Commission on Environmental Cooperation*, 5 DUKE J. COMP. & INT'L L. 87, 92 (1994), *citing* Stewart Baker, *After the NAFTA*, 27 INT'L LAW. 765, 769 (1993). The opposition to NAFTA within the U.S. environmental community was so strong that several nonprofit environmental groups brought suit against the Office of the U.S. Trade Representative (OTR) alleging that the OTR violated the National Environmental Policy Act (NEPA) procedural requirements by failing to provide an EIS in connection with the ongoing NAFTA negotiations. *Public Citizen v. Office of the U.S. Trade Representative*, 970 F.2d 916, 917 (D.C. Cir. 1992). The U.S. Court of Appeals for the District of Columbia affirmed the district court's dismissal of the case. *Id.* at 923. The Court of Appeals held that the OTR's failure to prepare an EIS for NAFTA was not judicially reviewable because OTR's preparation and submission of NAFTA to the President was not a "final agency action" subject to NEPA's EIS requirement. *Id.*

Similarly, the National Association of Ecological Organizations in Mexico City filed a complaint with the Mexican federal attorney general for the environment, demanding that Mexico be required to prepare an EIS before it ratified NAFTA. *Mexican Ecology Groups File Complaint to Force Impact Statement on NAFTA Accord*, 16 Int'l Env't Rep. (BNA) 646 (1993). The complaint alleged that NAFTA will lead to industrial growth which could damage Mexico's environment. *Id.* The attorney general, however, rejected the complaint, stating that while the Ecology Law requires EISs for specific projects or activities, it does not apply to trade agreements. *Mexican Official Rejects Complaint Calling for Environmental Impact Statement*, 16 Int'l Env't Rep. (BNA) 671 (1993). The organization had the right to appeal the attorney general's decision, but apparently the organization has not successfully appealed an environmental complaint in the past and did not choose to do so. *Id.*

Two Agreement provisions which ensure each country's national sovereignty support the environmentalists' fears. The Agreement affirms the "right of each [country] to establish its own levels of domestic environmental protection" and the right of each country to "exploit their own resources pursuant to their own environmental and development policies." Agreement, *supra* note 3, art. 3. Other factors, however, may prevent this fear from becoming a reality. In particular, many members of the American public, whether impassioned "environmentalists" or not, would refuse to allow U.S. laws to sink to the level of current Mexican law enforcement. In addition, there are already economic incentives for the United States to relax its environmental (and labor) standards in order to more effectively compete in the world market, but the United States has not chosen to do so.

23. The environmental problems included "fresh water supply, industrial and municipal wastewater, air pollution, municipal solid waste, and industrial hazardous and

an in-bond export facility, is a foreign-owned manufacturing plant located somewhere along Mexico's 2000 mile border with the United States.[24] *Maquiladoras* were established in 1965 to promote growth in manufacturing[25] by taking advantage of Mexico's inexpensive labor and minimal environmental regulations.[26] In 1983, the United States and Mexico signed the Agreement on Cooperation for the Protection and Improvement in the Border Area (La Paz Agreement) which addressed the environmental problems caused by rapid industrialization and population growth around the *maquiladoras*.[27] The tentative appraisal of the La Paz Agreement is that environmental enforcement in the *maquiladoras* has improved in recent years.[28]

3. The Response to Environmentalists' Concerns

Responding to these concerns over the environment, then-Governor Bill Clinton promised in a 1992 Presidential campaign speech to pursue a supplemental agreement to NAFTA, which would require each country to be responsible for its own environmental laws and regulations.[29] President Clinton took office

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nonhazardous waste." Alberto A. Bustani & Patrick W. Mackay, *NAFTA: Reflections on Environmental Issues During the First Year*, 12 ARIZ. J. INT'L & COMP. L. 543, 545 (1995).

24. For a general discussion of the *maquiladoras*, see L. Gray Sanders, *Maquiladoras and the Yucatan*, 5 FLA. INT'L L.J. 525 (1990); Elizabeth C. Rose, *Transboundary Harm: Hazardous Waste Management Problems and Mexico's Maquiladoras*, 23 INT'L LAW. 223 (1989); *see also* Michael D. Madnick, *NAFTA: A Catalyst for Environmental Change in Mexico*, 11 PACE ENVTL. L. REV. 365, 373 (1993). The experience of the rapid growth of the *maquiladoras* and the concomitant rapid decline in environmental standards in their surroundings may be the best argument of those who fear that American jobs are being lost as a result of NAFTA. *Id.* at 374.

25. Bustani & Mackay, *supra* note 23, at 545.

26. Kublicki, *supra* note 13, at 92.

27. The Agreement on Cooperation for the Protection and Improvement in the Border Area, Aug. 14, 1983, Mex.-U.S., T.I.A.S. No. 10,827. Annexes to the Agreement on Cooperation for the Protection and Improvement in the Border Area, July 18, 1985-Oct. 3, 1989, Mex.-U.S., T.I.A.S. No. 11269.

28. In 1989, only six percent of *maquiladoras* adhere to the government license requirements. At the time, SEDUE, now replaced by the Social Development Secretariat of Mexico (SEDESOL), did not maintain a list of *maquiladoras* that produced toxic wastes, effluents, or air pollutants. By 1992, however, over sixty-seven percent of the *maquiladoras* had been inspected and over fifty-four percent of *maquiladoras* had begun to comply. In addition, twenty-two *maquiladoras* were closed permanently in 1992. Kublicki, *supra* note 13, at 91-92.

29. Remarks by Governor Bill Clinton at the Student Center at North Carolina State University (Oct. 4, 1992), *in* NAFTA & THE ENVIRONMENT 263 (Daniel Magraw ed., 1995). Clinton stated that he would establish an environmental commission to encourage the enforcement of each country's own environmental laws. Clinton also stated that

after the signing of NAFTA, but before the U.S. Congress had ratified it.[30] Negotiations between the United States and Mexico for the creation of the environmental side agreement began on March 17, 1993, and President Clinton signed the Agreement on September 14, 1993.[31] The Agreement and the Commission were thus created largely in response to concerns over the perceived limitations of the NAFTA dispute resolution process in dealing with environmental matters.[32]

B. NAFTA's Environmental Provisions

Both NAFTA and the Agreement contain provisions which protect each country's sovereignty. Like the Agreement, NAFTA allows each country to maintain its own level of environmental protection, including the continued application of EIS requirement.[33] More significantly, NAFTA permits each country to establish its own levels of environmental protection.[34]

The Agreement complements several of NAFTA's provisions concerning sovereignty. For example, Agreement Article 3 and NAFTA Article 904(2) both recognize the right of each nation to establish its own levels of environmental protection. Agreement Article 40 and NAFTA Article 104 maintain that nothing in either document will affect the nations' existing rights under current international environmental agreements.[35]

NAFTA Article 1114 recognizes that "it is inappropriate to encourage investment by relaxing domestic health, safety or en-

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the environmental commission should have the power to provide remedies, including the power to assess money damages. *Id.* at 265-66.

30. Le Priol-Vrejan, *supra* note 15, at 488.

31. *Id.*

32. It is clear from Clinton's statements that such supplemental environmental agreements were prerequisites to his approval of NAFTA. Remarks by Governor Bill Clinton, *supra* note 29, at 263.

Under the environmental and labor side agreements, each country remains free to set its own labor and environmental standards at whatever level of protection it deems necessary. Agreement, *supra* note 3, art. 3. North American Agreement on Labor Cooperation, *opened for signature* Sept. 9, 1993, Can.-Mex.-U.S., art. 2, 32 I.L.M. 1499, 1503 (1993) [hereinafter Labor Agreement]. Both supplemental agreements establish citizen submission processes. Agreement, *supra* note 3, art. 14. *See also* Labor Agreement, *supra*, art. 16(3). *See infra* Part I.D, II.C.

33. Kublicki, *supra* note 13, at 71.

34. NAFTA, *supra* note 2, art. 901.

35. *Id.* art. 104.

vironmental measures."[36] An agreement that merely recognizes the inappropriateness of a particular act does not, of course, make a violation of that act an enforceable offense. Thus, Article 1114 creates no substantive environmental obligations for NAFTA members.[37]

The Agreement's Preamble establishes environmental protection is its primary goal. Like NAFTA Article 1114, the Agreement's Preamble does not bind any of the countries to any particular standard of protection.[38] The Preamble and Article 1 establish some of the provisions that enable the Agreement to protect the environment more effectively than other international trade agreements. These sections delineate the broad general principles upon which the Agreement is founded and link the Agreement to NAFTA's goals of providing enhanced levels of environmental protection. The countries also re-affirm, in deference to state sovereignty, the right of each nation to exploit its own natural resources pursuant to its independent national environmental policy.[39] At the same time, NAFTA members acknowledge the need to maintain environmental laws and regulatory procedures without creating additional trade barriers.[40]

C. Upward Harmonization

Mexico has already enacted environmental legislation containing standards which are similar to those of the United States. The differences in the countries' domestic environmental laws, however, may present major barriers to upward harmonization of Mexico's regulation and enforcement of those environmental standards. The access to environmental information, the feasibility of bringing citizen enforcement suits, administrative

36. *Id.* art. 1114(2). NAFTA's drafters specifically included this provision to discourage the creation of "pollution havens." DuPuis, *supra* note 21, at 486.

37. DuPuis, *supra* note 21, at 486. Both environmental and congressional leaders criticized NAFTA's lack of any enforcement power. *Id.* In response to this criticism, President Clinton reiterated his commitment to the principle that the Agreement would guarantee that each country enforce its own environmental laws. *Id.*

38. Reid A. Middleton, *NAFTA & The Environmental Side Agreement: Fusing Economic Development with Ecological Responsibility*, 31 SAN DIEGO L. REV. 1025, 1043 (1994).

39. Agreement, *supra* note 3, art. 1(a), (d).

40. *Id.* art. 1(e), (f).

review, and due process procedures differ greatly among the NAFTA countries, as do the structure and terms of their laws and the roles of federal, state, and local authorities.[41] The Agreement's primary objective is "enhanced compliance with, and enforcement of, environmental laws and regulations."[42] While the Agreement allows each NAFTA country the right to set its own levels of domestic environmental protection,[43] it nonetheless urges each country to ensure that its laws provide for "high levels of environmental protection."[44]

To attain this goal of "high levels of environmental protection," the Commission can investigate complaints of a country's failure to enforce environmental laws.[45] Additionally, the Agreement enables citizens, NGOs, businesses, and government entities to request Commission investigations.[46] The Commission's Secretariat, which provides support to the Commission's Council, has the power to review a submission from any private group or person which asserts that a country "is failing to effectively enforce its environmental law."[47] The Agreement's dispute resolution process addresses circumstances in which the submitter demonstrates a "persistent pattern of failure by a country to effectively enforce its environmental law."[48] If the submission meets certain procedural and substantive criteria, the Secretariat may, subject to Council approval, propose the development of a factual record.[49]

Several other provisions of the Agreement serve to limit its application and potential impact. Perhaps most significant is Article 45, "Definitions" which creates an exception to enforcement—namely, that a party will not be deemed to have failed to "enforce its environmental laws [if] the action or inaction in question by agencies or officials" of that country "reflects a rea-

41. C. Foster Knight, *Voluntary Environmental Standards vs. Mandatory Environmental Regulations and Enforcement in the NAFTA Market*, 12 ARIZ. J. INT'L & COMP. L. 619, 634 (1995).

42. Agreement, *supra* note 3, art. 1(g).

43. *Id.* art. 3.

44. *Id.*

45. *Id.* arts. 15 and 21.

46. *Id.* art. 14(1).

47. *Id.*

48. Agreement, *supra* note 3, art. 22(1). The Agreement defines a "persistent pattern" as a "sustained or recurring course of action or inaction beginning after the date of entry into force of this Agreement." *Id.* art. 45(1)(b).

49. *Id.* art. 15.

sonable exercise of discretion,"[50] or "results from *bona fide* decisions to allocate resources to enforcement" in respect of higher environmental priorities.[51] A "reasonable exercise of discretion" does not appear to be a difficult standard to meet. Also, due to Mexico's modest resources and underdeveloped infrastructure, it may often have to make "*bona fide* decisions to allocate resources" that would result in lax enforcement of some environmental laws. Thus, both of these exceptions could potentially eviscerate the goal of the Agreement requiring "high levels of environmental protection."

D. Citizen Access

Citizen access to the respective court systems of each NAFTA country varies greatly. While U.S. citizens have broad access to the courts to address environmental issues, Mexican and Canadian citizens do not enjoy comparable access.[52] Citizen suits are essentially nonexistent internationally.[53] "Citizen attorney general actions" against the government for nonenforcement or lax enforcement are a common occurrence in the United States.[54] U.S. laws also permit citizen suits against private parties alleged to have violated the environmental laws in circumstances where the government lacks the will or ability to provide enforcement.[55] Despite the enactment of the Ecology Law,[56]

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50. *Id.* art. 45(1)(a).

51. *Id.* art. 45(1)(b) (emphasis in original). A two-thirds vote is required for the Council to make the factual record public. *Id.* art. 15(2). "The preparation of a factual record by the Secretariat ...shall be without prejudice to any further steps that may be taken with respect to any submission." *Id.* art. 15(3).

52. Mark J. Spaulding, *Transparency of Environmental Regulations and Public Participation in the Resolution of International Environmental Disputes*, 35 SANTA CLARA L. REV. 1127, 1135 (1995).

53. *Id.*

54. Philip C. Jessup, former Judge of the International Court of Justice, noted the importance of public involvement, notification, and participation in dispute resolution. He stated that "it would be folly to provide for the settlement of disputes" in the international arena without allowing for the participation of "those entitled which will be as much concerned with enforcement of the new standards as will governments of states." Patton, *supra* note 22, at 94, *citing* Philip C. Jessup, *Do New Problems Need New Courts?*, 65 AM. SOC'Y INT'L L. PROC. 261, 265 (1971). *But see* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1976) (rejecting citizen suit against the United States on the ground that plaintiffs lacked standing because they could not show imminent injury).

55. Patton, *supra* note 22, at 94. The United States created the citizen suit in the Clean Air Act, Section 304, as amended in 1970. JEFFREY G. MILLER, ENVIRONMENTAL LAW INSTITUTE, CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL

which comprehensively covers environmental issues, Mexico has yet to developed the enforcement structure to effectively implement that law.[57] The Agreement, however, makes some provisions for public participation and public information.[58] The Agreement gives interested persons the right to request an investigation of environmental violations and provides "appropriate" access to judicial or administrative procedures.[59]

II. THE AGREEMENT AND THE COMMISSION

A. Summary of the Agreement

The Agreement consists of seven parts.[60] Most significant to the analysis and resolution of the issues raised in *Cozumel* is Part Two which includes "Obligations," among which the most important requirement is to assess environmental impact.[61]

The Agreement requires that each country "shall ensure that its laws and regulations provide for high levels of environmental protection and shall strive to continue to improve those laws and regulations."[62] The Agreement further provides that the Secretariat, in considering a submission, shall be guided by whether the submitter has pursued "private remedies available under the [country's] laws."[63]

LAWS 4 (1987). The citizen suit provisions which are contained in other U.S. environmental statutes closely follow the language of the Clean Air Act, Section 304. *Id.* at 7. These sections authorize "any person" to commence suit to enforce compliance with the acts against "any person" alleged to breach them or to require the government to execute a compulsory duty under the acts. *Id.*

56. *See infra* note 99.

57. Spaulding, *supra* note 52, at 1135.

58. Agreement, *supra* note 3, arts. 10, 21, and 39.

59. *Id.* art. 6.

60. The seven parts of the Agreement include the following: 1) Objectives, article 1; 2) Obligations, Articles. 2-7; 3) Commission, Articles 8-19; 4) Cooperation and Provision of Information, Articles 20-21; 5) Consultation and Resolution of Disputes, Articles 22-36; 6) General Provisions, Articles 37-45; 7) Final Provisions, Articles 46-51. Agreement, *supra* note 3.

61. *Id.* art. 2(1)(e).

62. *Id.* art. 3. Unfortunately, the Agreement does not define "high levels" and there is no guarantee that any of the NAFTA countries would not lower their standards. Steve Charnovitz, *The NAFTA Environmental Side Agreement: Implications for Environmental Cooperation, Trade Policy, and American Treatymaking*, 8 TEMP. INT'L & COMP. L.J. 257, 261 (1994).

63. Agreement, *supra* note 3, art. 14(2)(c).

B. Structure of the Commission

Part Three of the Agreement establishes the Commission,[64] which comprises of a Council, a Secretariat, and a Joint Advisory Committee. The Council consists of cabinet-level ministers from each country,[65] which chooses an Executive Director to head the Council for a three-year term.[66] The Council is the Commission's governing body[67] and may develop recommendations regarding strategies for environmental improvements.[68] The Secretariat is responsible for "provid[ing] technical, administrative, and operational support to the Council and groups established by the Council."[69] The Secretariat may consider citizens submissions[70] and, in compelling circumstances, compile a factual record.[71] The Joint Public Advisory Committee consists of five individuals from the member countries.[72] One function of this Committee is to advise the Council on any matter within the scope of the Agreement.[73] In addition, the Joint Public Advisory Committee "may provide relevant technical, scientific or other information to the Secretariat, including [information needed] for [the] purposes of developing a factual record."[74]

C. The Commission Citizen Submission Process

The citizen submission process begins when a citizen submits for the Secretariat's review a written request asserting that a country is "failing to effectively enforce its environmental laws."[75] The Secretariat determines whether the written request contains sufficient evidence,[76] promotes enforcement rather than harassing industry,[77] indicates that the matter was communi-

64. *Id.* art. 8(1).
65. *Id.* art. 9(1).
66. Agreement, *supra* note 3, art. 11(1).
67. *Id.* art. 10(1).
68. *Id.* art. 10(2).
69. *Id.* art. 11(5).
70. *Id.* art. 14.
71. *Id.* art. 15.
72. *Id.* art. 16(1).
73. Agreement, *supra* note 3, art. 16(4).
74. *Id.* art. 16(5).
75. *Id.* art. 14.
76. *Id.* art. 14(1)(c).
77. *Id.* art. 14(1)(d).

cated to the offending party,[78] and that the country being complained about has been informed and has responded.[79] If the submission passes these requirements, the Secretariat then decides whether to request a response from the country complained of by the submitters. In doing so, the Secretariat considers whether "the submission alleges harm to the person or organization making the submission,"[80] whether the submission raises issues which could advance the goals of the Agreement,[81] whether the submitters have pursued any available private remedies,[82] and whether the submission is drawn exclusively from mass media reports.[83] The Secretariat may then request the country to prepare a response within thirty days.[84]

If the submission meets all the criteria, the Secretariat then prepares a factual record and submits it to the Council, which may publish it after a two-thirds vote.[85] The Secretariat will not prepare a factual record, however, if the matter "is the subject of a pending judicial or administrative proceeding."[86] Finally, "the Council may, by a two-thirds vote, make the final factual record publicly available."[87]

The factual record itself does not, standing alone, trigger any legal consequences, but it could lead to formal consultation proceedings that, in turn, could ultimately lead to sanctions against the offending country.[88] The publication of a factual record that criticizes a country's enforcement may also cause the country, out of concern over consequent political fallout, to improve its enforcement.[89]

The Council appoints a panel that considers several factors in setting the amount of the fine. The fine assessed may not ex-

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78. *Id.* art. 14(2)(e).
79. Agreement, *supra* note 3, art. 14(1)(d).
80. *Id.* art. 14(2)(a).
81. *Id.* art. 14(2)(b).
82. *Id.* art. 14(2)(c).
83. *Id.* art. 14(2)(d).
84. Agreement, *supra* note 3, art. 14(3). However, in exceptional circumstances, and on notification of the Secretariat, the country may advise the Secretariat within sixty days of the delivery of the request. *Id.*
85. *Id.* art. 15(1).
86. *Id.* arts. 14(3)(a) and 45(3)(a).
87. *Id.* art. 15(7).
88. David S. Baron, *NAFTA and the Environment—Making the Side Agreement Work*, 12 ARIZ. J. INT'L & COMP. L. 603, 606 (1995).
89. *Id.*

ceed twenty million dollars for claims arising in 1994; after 1994, the fine may not exceed .007% of the total trade between the countries during the most recent year.[90]

D. Interpretation of "Failure To Enforce"

The Agreement requires each country to "effectively enforce its environmental laws and regulations through appropriate government action."[91] A complaint that a country "is failing to effectively enforce its environmental law" triggers the factual record procedure. The Secretariat then determines whether there has been "a persistent pattern of failure" by a country "to effectively enforce its environmental law."[92] Thus, it is essential to determine what "failure to effectively enforce" means.

The Agreement affords each country the discretion to prosecute its environmental laws to a "reasonable" degree.[93] To advance the Agreement's purpose of promoting high levels of environmental compliance, the Commission must be particularly judicious in evaluating the term "reasonable." If the Agreement is to be enforceable, the Commission cannot interpret "reasonable" so as to permit the country to arbitrarily and completely fail to enforce its environmental laws.

The events surrounding the enactment of the Agreement allow for two plausible but mutually-exclusive determinations of whether a particular act or omission constitutes a "failure to effectively enforce." On the one hand, presumably, Mexico would not sign an agreement which it was currently violating. If this presumption is correct, then the other NAFTA countries must not have viewed Mexico's environmental enforcement levels at the time of enactment as unjustifiable.[94] If so, in order to comply

90. Agreement, *supra* note 3, Annex 34(1). First, the panel will consider the duration and the pervasiveness of the country's pattern of nonenforcement. Second, the panel will consider whether the level of enforcement required by the environmental law could be reasonably expected given the country's resources. Third, the panel will consider the reasons that the country proffers for its failure to enforcement. Fourth, the panel will acknowledge the efforts made by the country to remedy its pattern of nonenforcement since the time when the final report was written. Finally, the panel will consider any other relevant factors. *Id.* at Annex 34(2)(a)-(e).

91. *Id.* art. 5.

92. *Id.* arts. 14(1), 22(1), and 28(3).

93. *Id.* art. 45.

94. Kublicki, *supra* note 13, at 112.

with the Agreement, Mexico need not improve its environmental enforcement, but rather merely needs to maintain its enforcement policies at the same level as they existed at the time it signed the Agreement. On the other hand, the sole reason that the United States wanted to secure Mexico's approval of the Agreement was because it believed that Mexico's levels of environmental enforcement were unacceptable.[95] Thus, a clarification of acceptable levels of enforcement is not at once discernible on the basis of the countries' expectations at the time they signed the Agreement.

Alternatively, the Commission could interpret "failure to effectively enforce" to mean that a violating country failed to meet the highest standard set by the NAFTA countries. In such a case, only a level of enforcement equivalent to that of the United States or Canada would be justified. This would require further interpretation because Canada may be more strict in some areas, while the United States may be more strict in others. Setting such a high level of environmental enforcement would also create a nearly impossible task for Mexico to achieve.[96]

In interpreting the "failure to effectively enforce" provision, it is also significant to note that the United States does not always effectively enforce its own environmental laws. For instance, both the Bush and the Clinton Administrations have failed to comply with a statutory requirement to submit a report comparing air quality standards among major U.S. trading partners.[97] Thus, it appears that the United States itself might be unable to withstand a very strict application of the "failure to effectively enforce" standard to its environmental enforcement record.

A more skeptical view of the Agreement is that the United States had no intention of procuring improvements in Mexico's environmental enforcement efforts at the time the Agreement was conceived. Under this view, the Agreement was merely a ruse to obtain Congressional approval for NAFTA. In carrying out the ruse, the NAFTA countries entered into an international agreement that was intentionally unenforceable because of its

95. *Id.* at 60-61. *See* discussion *supra* Part I.A.1. In particular, see the finding of the U.S. Accounting Office survey.

96. Kublicki, *supra* note 13, at 60-61.

97. Charnovitz, *supra* note 62, at 279.

ambiguous terms.

This author contends that while a plain reading of the Agreement precludes an objective determination of the meaning of "failure to effectively enforce," the Agreement remains feasible and meaningful. This view presupposes that neither Mexico nor the United States believed that Mexico was in compliance with the Agreement at the time that the parties enacted it, but that the NAFTA countries thereby tacitly agreed that Mexico would improve the enforcement of its environmental laws. It has been suggested that such a "just do your best" standard contradicts both the principle that the countries owe under the Agreement and the environmentally sound competitiveness underlying the dispute settlement process.[98]

However, the countries did not agree to a "just do your best" standard—such a malleable standard would preclude the establishment of any baseline of acceptable enforcement. Rather, I contend that the United States planned to use the Agreement and the Commission as tools to encourage Mexico to improve its environmental enforcement efforts. The United States planned to bring pressing issues to the attention of the Commission. The United States expected that Mexican citizens, like U.S. citizens, would also highlight other instances of their own government's failure to enforce its environmental laws. The "failure to enforce" provision, under this view, is intentionally broad. Thus, the Commission has a great deal of discretion in determining whether there has been a failure to enforce, and should consider the realities of Mexico's economic state in order to apply the standard pragmatically.

III. MEXICO'S ENVIRONMENTAL LAWS

The centerpiece of Mexico's environmental policies is embodied in the Ecology Law which took effect on March 1, 1988.[99] The

98. PIERRE MARC JOHNSON & ANDRÉ BEAULIEU, THE ENVIRONMENT AND NAFTA: UNDERSTANDING AND IMPLEMENTING THE NEW CONTINENTAL LAW 207 (1996).

99. Ley General del Equilibrio Ecológico y la Protección al Ambiente [General Law on Ecological Equilibrium and Environmental Protection], D.O., 28 de enero de 1988 (Mex.), *translated in* Doing Business in Mexico, pt. XI, app. 2 (1996) [hereinafter Ecology Law].

Mexico enacted the Ecology Law in 1988, apparently in part to prevent further environmental degradation and in part to facilitate acceptance into NAFTA. The other main sources of Mexican environmental laws are its Constitution, the Environmental

purpose of the Ecology Law is to preserve and restore the ecological balance and to provide for environmental protection.[100] The Ecology Law is supplemented by seven federal regulations.[101] The Law and its regulations require the submission of an EIS before any potential contaminating public or private project may be authorized.[102]

The Ecology Law establishes the federal government's authority to set environmental standards[103] and has delegated to the Secretariat for Urban and Ecological Development (SEDUE)[104] the authority to develop environmental policy, promulgate environmental regulations, review EISs and environmental license applications, enforce environmental regulations, and coordinate environmental protection efforts among federal, state, and local government agencies.[105] The Ecology Law requires an EIS application from anyone who wants to conduct activities within Mexican territory which may cause an environmental imbalance or may exceed the established limits or conditions.[106] EIS applications must be filed with the replacement for the SEDUE, the Social Development Secretariat of Mexico, which determines both the potential environmental impact and adequacy of the protection proposal.[107] An EIS must be

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Laws and Regulations, the Ecological Technical Norms, and the International Treaties. Hector Herrera, *Mexican Environmental Legal Framework*, 2 SAN DIEGO JUSTICE J. 31 (1994). Since 1938, Mexico has signed almost all international environmental treaties and agreements. *Id.* at 33.

100. Herrera, *supra* note 99, at 31-32. The Ecology Law contains provisions on the following matters: "protected natural areas, national exploitation of natural elements, environmental protection, community participation, and control and safety measures and penalties." *Id.* at 32.

101. *Id.* at 33.

102. Kublicki, *supra* note 13, at 85. An EIS must: describe both the proposed project and its potential environmental impact; name the drafters of the documents; list the substances used in the projects; state the emissions or effluent that the project will produce; provide corporate information; describe the natural, social, and economic environment of the area; and list any applicable local land use regulations. The SEDESOL imposes special scrutiny on several kinds of projects including: construction, water projects, bridges, federal tourism developments, and projects which impact either two or more Mexican states or Mexico and a neighboring country. *Id.*

103. *Id.*

104. *Id.* at 85.

105. *Id.* at 83-84.

106. Herrera, *supra* note 99, at 33.

107. The Mexican EIS requirement is in some respects more severe than the NEPA's EIS requirement. First, both public and private works must meet the Ecology Law's EIS requirement. The NEPA, on the other hand, requires an EIS only for federal projects. The EIS in Mexico provides the sole basis for approving or rejecting a project, whereas an American EIS is purely procedural under the NEPA—at least as interpreted by the Su-

supported by an Environmental Impact Study, which only persons or firms duly authorized by the National Institute of Ecology can perform.[108] The Ecology Law also provides for severe sanctions against environmental violators,[109] and for criminal penalties for severe environmental violations.[110]

IV. MEXICO'S ENVIRONMENTAL ENFORCEMENT HISTORY

A. The Discrepancy Between Mexico's Environmental Laws And Enforcement

Although some Mexican environmental legislation resembles U.S. laws, the Mexican government has historically failed to effectively enforce its environmental laws.[111] Recently, Mexico has exhibited a commitment to higher environmental standards and a willingness to correct pollution problems, particularly along the Texas-Mexico border.[112] In 1992, Mexico began serious efforts to enforce its environmental laws with the establishment of the federal office of the Environmental Attorney General.[113]

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preme Court. Kleppe et al v. Sierra Club et al, 427 U.S. 390 (1976).

108. Herrera, *supra* note 99, at 33-34. If the project is considered high risk, a Risk Study must be filed with the EIS. The Risk Study must state the risks that the project poses to the environment, as well as the technical security measures required to prevent, diminish, or control adverse effects on the environment. *Id.*

109. A company which violates the Ecology Law may be subject to fines of twenty to twenty thousand times the minimum daily wage and the operations may be either suspended or terminated. Once these initial sanctions have been imposed, the violator must comply within thirty days or potentially face additional sanctions up to twenty thousand times the minimum wage. Further, fines for persistent violations may reach forty thousand times the minimum wage. Kublicki, *supra* note 13, at 88-89.

110. *Id.* at 89. Criminal penalties can be imposed for crimes that endanger human health, endanger areas with dense populations, or severely damage ecosystems. Jail terms of three months to six years are available for crimes that endanger human health or severely damage ecosystems. *Id.*

111. Kublicki, *supra* note 13, at 60-61.

112. However, Mexico's primary motivation in passing environmental laws may have been for the United States to approve NAFTA. DuPuis, *supra* note 21, at 476.

113. Knight, *supra* note 41, at 629. From June 1992 through April 1995, the Environmental Attorney General inspected 35,831 plants, ordered the closure of 348 plants, 1758 partial closures, and either fined or ordered remedial action at 25,570 facilities for minor infractions. *Id.* In addition, in 1992, SEDESOL conducted seventy-two environmental audits and reviewed thousands of citizen environmental complaints. Between July and December of 1992 alone, SEDESOL examined 795 citizen complaints, nearly half (forty-eight percent) of which originated in Mexico City. *Id.* at 92-93, citing Office of Representation, SEDESOL, Mexican Embassy, Activities of the Office of the Attorney General for the Protection of the Environment During 1992 (1)(1993) (unpaginated photo-duplicated memorandum available from Embassy of Mexico, Wash., D.C.).

Notwithstanding the improving Mexican enforcement record and the new Secretariat of the Environment's continuing commitment to enforcement, the effectiveness and quality of Mexican enforcement effort significantly lags behind that of Canada and the United States.[114]

Mexico's lack of financial resources significantly inhibits enforcement of its environmental laws.[115] Government inspectors are few, and their salaries and morale are low. However, recent plant closings, the hiring of additional inspectors, and joint Mexican-U.S. enforcement efforts demonstrate Mexico's recent resolve to enforce its environmental law.[116]

Although the Mexican government has established over 5000 health, safety, and environmental standards pursuant to the Ecology Law, limited public notification and lack of procedure to ensure private sector participation have resulted in a vague system of establishing standards and technical regulations.[117] Unfortunately, the Ecology Law appears to have done little to improve Mexico's environmental law enforcement or to protect the environment.

Thus, if the Commission proves to be accessible to private groups and effectively processes citizen submissions and enforces its determinations, the Commission may be the institutional force which ensures that Mexico improves its environmental law enforcement and minimizes the detrimental impact on North America's environment by NAFTA-induced economic growth.

B. Federalism's Effect on Environmental Enforcement

The Ecology Law is the catalyst for the current trend towards the decentralization of environmental authority from the Mexican federal government to state and local governments.[118]

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114. Kublicki, *supra* note 13, at 90.

115. Lawrence J. Rowe, *NAFTA, The Border Area Environmental Program, and Mexico's Border Area: Prescription for Sustainable Development?* 18 SUFFOLK TRANSNAT'L L. REV. 197, 220-21 (1995).

116. *Id.*

117. *Id.*

118. Bustani & Mackay, *supra* note 23, at 546. For instance, environmental areas such as risk assessments, environmental emergencies, and hazardous materials and wastes generally fall under federal responsibility. The states, on the other hand, gen-

In particular, state and local governments are gaining greater responsibility concerning environmental policymaking and enforcement. The Ecology Law covers matters of national but not strictly federal nature, so they are subject to state and local governments' jurisdiction.[119] The Mexican Congress has provided that the rules governing enforcement mechanisms are to be uniform among the states.[120]

This dissipation of the power to enforce the environmental laws may make it more difficult for the Commission to determine an objective standard for "failure to effectively enforce." Whether the laws are being "effectively enforced" may turn on whether the Commission examines the enforcement policy as a whole or the enforcement policy in a particular region.

V. THE ENVIRONMENTAL IMPACT STATEMENT

The EIS supporters claim the EIS is a proven technique which provides a process for institutionalizing foresight that avoids or, at least, minimizes the unanticipated adverse effects of industrial growth.[121] In any event, the EIS is a common approach both in the United States and internationally.[122] While its essential structure is substantially the same throughout the world, the EIS is flexible and has been adopted successfully to operate within many different cultural, political, and socio-economic arenas.[123] The EIS is increasingly gaining acceptance as a decisionmaking technique.[124]

The EIS provides citizens with an opportunity to be heard and to participate in decisionmaking that affects their environment.[125] Supporters of the EIS process claim it is demonstrably effective in compiling environmental data for decisionmakers.[126]

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erally regulate water pollution and vehicle emissions, monitor air emissions, oversee the compliance with water pollution regulations, municipal sewage systems, solid waste disposal and state wildlife reserves.

119. Ecology Law, *supra* note 99, art. 4.

120. *Id.* art. 160.

121. For an extensive analysis on the EIS in the international context, see Nicholas A. Robinson, *The 1991 Bellagio Conference on U.S.-U.S.S.R. Environmental Protection Institution: International Trends in Environmental Impacts Assessment*, 19 B.C. ENVTL. AFF. L. REV. 591 (1992).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

The EIS works best when an independent authority is available to oversee the process.[127] Under the National Environmental Policy Act (NEPA), for example, the U.S. courts provide this oversight through judicial review.[128] Environmental issues that were unanticipated in the process of project preparation are often identified during the preparation of an EIS before unintended damage occurs.[129] In sum, the EIS is a potentially useful mechanism for preventing industrial environmental damage which both the Agreement and the Ecology Law respect.[130]

VI. THE COZUMEL PIER SUBMISSION

A. Procedural History

On January 18, 1996, three Mexican NGOs presented the Secretariat with a submission under Article 14 of the Agreement.[131] On February 8, 1996, the Secretariat requested a response from Mexico,[132] and the Mexican government responded to the submission on March 27, 1996.[133]

B. The Submission

The Submitters allege that Mexican environmental authorities are failing to effectively enforce environmental law by ignoring the EIS requirement in connection with the construction and operation of a port terminal and related works located in Cozumel, Quintana Roo.[134] The Submitters contend that the project contravenes the language and intent of the 1988 Ecology Law.[135] They further assert that the concessionaire failed to

127. Robinson, *supra* note 121, at 594.

128. *Id.*

129. *Id.* As stated above at note 22, the response of the U.S. environmental community, fearing that Mexico would continue to be a "pollution haven" because of NAFTA, was to sue on the basis that the U.S. failed to file an EIS concerning NAFTA. It is thus ironic that the first case to reach the stage in which the Commission will compile a factual record concerns Mexico's failure to require the filing of an EIS.

130. *See* Kublicki, *supra* note 13, at 71.

131. Recommendation, *supra* note 1, at 1.

132. *Id.*

133. *Id.*

134. *Id.*

135. The Ecology Law provides that "performance of public or private works or activities which may cause ecological imbalance or exceed the limits and conditions pro-

comply with Subpart (e) of Condition Five contained in the Port Terminal Concession issued by the Secretary of Communication and Transportation on July 22, 1993. Condition Five provides that the concessionaire "must present to the Secretary the Executive Project for undertaking the works, containing the following information: (e) the departmentally-reviewed [EIS] respecting the construction and operation of the terminal."[136] The Submitters note that Article 2, Part IV of the *Ley de Puertos* (Law of Ports) governing the concession defines the terminal as: "the facilities established in or outside of a port, consisting of works, installations and surfaces, including off-shore, which allow for the integral operation of the port in accordance with its intended uses."[137] The Submitters conclude that Mexican environmental authorities have required the concessionaire only to submit an EIS for the construction of the pier at Cozumel rather than requiring for the totality of related on-shore port terminal facilities, including a passenger building, access road, and parking lot.[138]

C. Summary of Mexico's Response

Mexico responded by raising procedural issues concerning the Secretariat's decision both to accept the submission and to request a response from Mexico. In addition, it also disputes the Submitters' other legal contentions.[139] Mexico began by asserting that the matters raised in the submission are based on acts which took place prior to the enactment of the Agreement.[140] Mexico then contended that Article 14(1) limits the scope of inquiry to allegations that a Party "is failing" to effectively enforce its environmental law.[141] Because the statutory language is phrased in present tense, Mexico asserts that the Agreement does not apply to any instances of failure to enforce environmental laws that occurred in the past. In sum, Mexico considers the matters which the Submitters raise to be beyond the scope of

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vided for in the [Federal Government's] technical ecological standards and regulations must be subject to a prior authorization from the Federal Government or the state and local agencies." Ecology Law, *supra* note 99, art. 28.

136. Recommendation, *supra* note 1, at 2.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

Article 14 and that the language of Article 14 does not permit the Agreement to be applied retroactively.[142]

Mexico also argues that the Submitters failed to provide reliable evidence that demonstrates the character of the organizations they purport to represent.[143] Mexico further contends that the Submitters failed to demonstrate that their organizations have suffered direct harm as a consequence of the acts alleged in the submission.[144] Mexico additionally asserts the Submitters have not exhausted remedies available under Mexican law and that the submission does not further the objectives of the Agreement.

In considering the allegations raised in the submission, Mexico states that the on-shore activities represent distinct projects which need not be evaluated contemporaneously with the construction of the pier, and that the construction and operation of the pier meets all applicable EIS requirements.[145] Mexico asserts that in August of 1990, the authorities reviewed an EIS denominated *Muelle de Cruceros en Cozumel, Quintana Roo* (Cruise Ship Pier, Cozumel, Quintana Roo).[146] Additionally, Mexico notes that the Secretary of Communication and Transportation (SCT) "only has authorized the initiation of works relating to the pier, and that the other works referenced in the Concession will be reviewed by environmental authorities upon authorization by the SCT."[147] Mexico maintains that the Concession is not integral, or multi-activity based, in character and that the environmental authorities will review the EISs for any additional works only after these initial works are authorized by SCT.[148]

Mexico also responds that the requirement for the approval of an EIS in the Concession for the port terminal is "subject to various conditions established in the same Concession, and that some of these conditions are conditions precedent to the EIS re-

142. *Id.*
143. *Id.*
144. Article 14(2)(a) states that the Secretariat shall be guided by whether the Submitters show direct harm as a consequence of the acts alleged in the submission. Agreement, *supra* note 3, art. 14(2)(a).
145. Recommendation, *supra* note 1, at 2 (addressing Mexico's Response).
146. *Id.*
147. *Id.*
148. *Id.*

quirement, as in the case of Condition One."[149] In other words, Mexico asserts that Condition Five is subject to the prior fulfillment of Condition One of the concession and that Condition One has not yet been fulfilled.

Mexico questions the relevance of the second paragraph of Article 28 of the Ecology Law, since the works at the Concession site do not consider the "use of natural resources" as those terms are employed in the law.[150] Mexico observes that the reference to "natural resources" in the second paragraph of Article 28 refers to "those works or activities which utilize animals, forest resources, acquifers or the subsurface as necessary raw materials, or which propose to directly extract such resources."[151]

D. Secretariat Observations

1. Jurisdiction and Scope of Article 14

The Secretariat agreed in principle with the Mexican government that the Agreement did not have a retroactive effect.[152] The Agreement Article 47 indicates that the countries intended the Agreement to take effect on January 1, 1994.[153] The Secretariat could not discern any intentions, express or implied, conferring retroactive effect on the operation of the Agreement's Article 14.[154] In any case, the events or acts concluded prior to January 1, 1994, may create conditions or situations that give rise to current enforcement obligations.[155] 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.[156] The Vienna Convention on the Law of Treaties provides some basis for Mexico's assertion that the

149. *Id.*

150. Recommendation, *supra* note 1, at 2 (addressing Mexico's Response).

151. *Id.*

152. Indeed, finding otherwise would have contradicted the language of the Agreement. Further, it would produce an absurd result. The reason the United States wanted the Agreement was because the United States believed that Mexico was not effectively enforcing its environmental laws. Thus, it was assumed that prior to the enactment of the Agreement that Mexico was in violation. *See* Raustalia, *supra* note 16.

153. Agreement, *supra* note 3, art. 47.

154. Recommendation, *supra* note 1, at 3.

155. *Id.*

156. *Id.*

Agreement should not have retroactive effect.[157] Documents provided by the Submitters and Mexico make reference to acts and events occurring both before and after the execution of the Agreement in 1994.[158] The materials provided regarding actions taken after January 1, 1994, may help to identify relevant facts and clarify whether a present failure to enforce environmental law has occurred.[159]

In light of the possibility that a present duty to enforce may originate from, in the language of the Vienna Convention, a situation which has not ceased to exist, the Secretariat found that the further study of this matter does not constitute retroactive application of the Agreement, nor would such study contravene the language of Article 14 of the Agreement.[160]

2. Articles 14(1) and 14(2)

Article 14(1) of the Agreement establishes threshold requirements for consideration of a submission by the Secretariat.[161] Article 14(2) sets forth criteria to guide the Secretariat in determining whether the submission merits requesting a response from the Party.[162] The Secretariat concluded that the Submitters complied with the procedural requirements of Article 14(1).[163] The Secretariat considered that under the circumstances the Submitters attempted to pursue local remedies, primarily by availing themselves of the *denuncia popular* (public

157. Article 28 of the Vienna Convention on the Law of Treaties states that "unless a different intention appears from the Treaty or is otherwise established, its provisions do not bind the party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the Treaty with respect to that party." Vienna Convention on the Law of Treaties, Jan. 27, 1980, art. 28, 1155 U.N.T.S. 331, 339 (1980).

158. Recommendation, *supra* note 1, at 3.

159. *Id.*

160. *Id.*

161. Agreement, *supra* note 3, art. 14.1(a), (f).

162. In deciding whether to request a response by the country, the Secretariat looks to whether the submission alleged harm to the person or organization making the submission; whether the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of the Agreement; whether private remedies available under the country's law have been pursued; and whether the submission was drawn exclusively from mass media reports. Agreement, *supra* note 3, art. 14(2)(a)-(d).

163. Recommendation, *supra* note 1, at 3.

denunciation) administrative procedure.[164]

In considering harm, the Secretariat noted the importance and character of the resource in question—a portion of the magnificent Paradise Coral Reef located in the Caribbean waters of Quintana Roo.[165] While the Secretariat recognized that the Submitters may not have alleged the particularized, individual harm required to acquire legal standing to bring suit in some civil proceedings in North America, the especially public nature of marine resources brings the Submitters within the spirit and intent of Article 14 of the Agreement.[166] The Secretariat concluded, despite the complexity of the issues raised in the submission, that the further study of this matter would substantially promote the objectives of the Agreement.[167]

E. Secretariat's Recommendations to Council

In accordance with Article 15(1), and considering the possibility of a present failure to effectively enforce environmental law, the Secretariat recommended to Council that a factual record be prepared.[168] The preparation of a factual record will shed light on both the Submitters' allegations of nonenforcement and the government of Mexico's important contentions in this matter.[169] The Secretariat states that the preparation of a factual record in this matter will promote the objectives stated in Article 1(g) and (f) of the Agreement.[170]

A factual record will consider all of the information relevant to the issue of whether the Mexican environmental authorities'

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164. *Id.*

165. *Id.*

166. *Id.*

167. Specifically, Article 1(a), (d), (f) and (g) are applicable. Article I provides that it is the objective of the Agreement to "foster the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generations ... support the environmental goals and objectives of the NAFTA ... strengthen cooperation on the development and improvement of environmental laws, regulations, procedures, policies and practices ... [and] enhance compliance with, and enforcement of, environmental laws and regulations." Agreement, *supra* note 3, art. 1(a), (d), (f), (g).

168. Recommendation, *supra* note 1, at 3.

169. *Id.*

170. These objectives include "enhanc[ing] compliance with, and enforcement of, environmental laws and regulations [and] strengthen[ing] cooperation on the development and improvement of environmental laws, regulations, procedures, policies and practices." Agreement, *supra* note 3, art. 1(g), (f).

conduct in not requiring the submission of an EIS on the totality of works contemplated in the Cozumel Port Terminal project constitutes a failure to enforce existing law.[171] These considerations, for the most part, turn on facts relating to the definition of a "port terminal" under the Law of Ports and the relevance of this issue to the matter under consideration, the extent to which the project or projects have been "authorized," and the facts relative to the documentation generated after January 1, 1994.[172]

The Secretariat does not recommend that the Commission examine acts or conduct, which occurred prior to the entering into force of the Agreement, for the purposes of evaluating any alleged failures to enforce law at that time, including, for example, the EIS prepared in 1990 for the Cozumel pier.[173]

VII. ANALYSIS OF THE SECRETARIAT'S DECISION

A. Standing

One of Mexico's principle defenses is that the Submitters do not have standing because they have not demonstrated that they have suffered any direct injury as a result of the act about which they have made a submission—namely, the failure to file an EIS in conjunction with the construction on the Cozumel pier.[174] The Agreement does not use the term "standing," but rather establishes two principles for the Secretariat to employ in determining whether to compile a factual record. First, the Agreement allows citizens who reside in the offending nation's territory to institute an action with the Secretariat.[175] In addition, the Agreement states that the Secretariat should be guided by whether the submission alleges harm and furthers the goals of the Agreement.[176] In *Cozumel*, the Submitters are organizations in Mexico and have alleged harm to the Paradise Coral Reef as a result of the construction on Cozumel,[177] and thus, the Submitters appear to have satisfied these requirements. The Agreement, however,

171. Recommendation, *supra* note 1, at 3.
172. *Id.*
173. *Id.*
174. *Id.* (addressing Mexico's Response).
175. Agreement, *supra* note 3, art. 14(1)(f).
176. *Id.* art. 14(2)(a), (b).
177. Recommendation, *supra* note 1, at 1.

provides Mexican citizens with the amount of access to the courts which Mexico's domestic law provides.[178] Hence, only those persons with a legally recognized interest under Mexico's laws have standing to make a submission against Mexico to the Commission. Since Mexican citizens cannot bring a suit unless they can prove direct injury and the Agreement only gives citizens the access that they would have in their native court systems, the Agreement does not appear to give Mexican citizens standing to file citizen submission if they cannot show direct injury to themselves.

The Mexican Constitution itself appears to present legal obstacles to the ability of NGOs to sustain citizen suits. The Mexican Constitution uses the term "injured party" in cases in which an individual sues the government.[179] Mexican cases define an "injured party" as one "who suffers a direct lesion in their legal interest, in their person or in their patrimony, by any law or act of authority."[180] The Mexican Supreme Court of Justice has stated that its country's legal system "does not accept a citizen suit system," where the individual has not suffered a direct injury.[181] In sum, both Mexican case law and Constitution appear to prohibit citizen suits due to the requirement that private parties bringing actions against the government must demonstrate that they have been directly injured.[182]

The public denunciation may prove to be a more successful method for the Submitters, and NGOs generally, to establish standing. The public denunciation, which the Ecology Law introduced into the Mexican legal system, is similar to the U.S. environmental citizen suit in that it provides Mexican citizens with the opportunity to inform the appropriate governmental authority of any act or omission which violates provisions of the Ecology Law or other environmental regulations.[183] The power to inform

178. Agreement, *supra* note 3, art. 6(2). "Each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial or judicial proceedings for the enforcement of the Party's environmental laws and regulations." *Id.*

179. THE MEXICAN CONSTITUTION OF 1917 COMPARED WITH THE CONSTITUTION OF 1857, at 81 (H.N. Branch trans., 1926). The Mexican Constitution makes this prosecutorial requirement in article 107(I). *Id.*

180. Carl E. Koller Lucio, *The Regulation of Hazardous Substances in Mexican Law*, 5 DUKE ENVTL. L. & POL'Y F. 95, 115 (1995).

181. *Id.*

182. *Id.*

183. Ecology Law, *supra* note 99, art. 189.

the government is, of course, not equivalent to the right to sue because the government can simply ignore the citizen's information. The right to make a public denunciation, however, may be sufficient to create standing for the Submitters and NGOs. The structure of the citizen access provision of the Agreement may actually share more procedural similarities with the Mexican public denunciation than with the U.S. citizen suits. The essence of the Agreement is that citizens may make submissions, but not obtain damages. Both proceedings address failure to enforce, but do not appear to require that the citizens show a direct injury in order to have standing. Thus, the public denunciation appears to satisfy the Agreement's requirement that the submitters reside in the offending nation's territory and alleges harm while furthering the Agreement's goals, thus creating standing for Mexican citizens who wish to present submissions to the Commission.

In *Cozumel*, the Mexican government argues that the NGOs have not alleged any particularized harm.[184] If the Commission accepts this argument, and summarily dismisses the case on the procedural ground of standing, it will deal a deadly blow to future citizens' submissions under the Agreement. The Agreement provides for neither attorney's fees nor damages for the injured party. Indeed, while the Commission may assess fines, the value of the fines would be primarily symbolic. Thus, the Agreement's citizen submission process may discourage private citizen claims because the process allows citizens to make submissions, but does not provide citizens with any incentive to make them because neither attorney fees nor damages will be awarded. Therefore, unless the injured party is wealthy and willing to pursue the claim on principle alone, no one except a citizen's group (which would probably have no direct injury) could present a submission to the Commission.[185]

184. Recommendation, *supra* note 1, at 2.

185. The citizen suit sections of the U.S. environmental legislation of the 1970s, including the Clean Air Act, were developed to remedy the government's failure to enforce. MILLER, *supra* note 55, at 4. Congress believed that citizens suits would either encourage government enforcement or would, at least, provide an alternative means of enforcement. *Id.* To further this end, the citizen suit sections allow the court to award costs, including reasonable attorney's fees, to any party. *Id.* at 9.

B. Exhausting Domestic Legal Options

In *Cozumel,* the Mexican government also argues that the Submitters' claim—that the Mexican government is not enforcing the Ecology Law's EIS requirement—is one which the Submitters have the legal right to bring in the Mexican courts to raise the same issues and attempt to obtain a remedy.[186] However, by presenting the submission to the Commission, the Submitters have already brought the matter to the Mexican government's attention. The Mexican government presumably reviewed the matter in the process of responding to the Commission. The Mexican government to date, however, has chosen not to remedy the situation. Thus, it is difficult to perceive any justification for the view that the Mexican government's reaction would be any different if the matter were processed in the Mexican court system.[187] One rationale for including the "failure to enforce" provision in the Agreement is to encourage citizens to spotlight a country's practice of failure to enforce environmental laws which are prevalent throughout that country. Further, it is far from clear that the Submitters could bring a case in a Mexican court which would address the legal issues which arise in *Cozumel.* Indeed, Mexico asserts that the Submitters do not have standing to sue under Mexican law. Thus, the Mexican government's argument that the Submitters do not have standing is a strong refutation to the argument that Submitters should file a claim in Mexican court.[188]

C. Sovereignty

The Agreement's critics suggest that an international body which scrutinizes a country's performance in enforcing its own laws leads to some potentially perplexing problems. First, an in-

186. Recommendation, *supra* note 1, at 2.

187. In addition, no provision in the Agreement requires that the matter be brought in the country's court prior to filing with the Commission. If the matter went through the domestic courts, it is likely that the Commission would never handle any cases because, by the time the submitters exhaust their domestic remedies, the case would be moot.

188. It is noteworthy that the Commission has previously rejected cases which were pending in domestic courts. The Secretariat, pursuant to Article 14(3)(a), recently declined to review a petition because the case was pending in the courts of another country. The Aage Tottrup Submission, Submission No. SEM-69-002 (Mar. 28, 1996), available on the Commission Web Site, *supra* note 1.

ternational entity which attempts to evaluate another country's laws and determine whether they are being sufficiently enforced may encounter difficulty in interpretation and judgment; however, this argument is not particularly powerful. Since most of Mexico's environmental laws were patterned after U.S. laws that now have some precedent behind them, the Commission's task to evaluate failure to effectively enforce will be easier than these critics suggest.

Second, the critics suggest that the country's representative, from whom the other Commission members may seek guidance, may have a strong political interest in the outcome and will not necessarily contribute impartial legal input. An alternative explanation is that, by putting the Commission on a short political leash, the countries have made themselves fully accountable for the successes and the failures of the Commission.[189]

Third, the Agreement provision that bestows NGOs with the right to present submissions against a country which is failing to enforce its laws was apparently drafted in part with the assumption that it would be less intrusive to national sovereignty if the focus was on the country's own laws instead of an agreed upon international standard. Instead, the countries have created an international entity which examines the enforcement and the laws of the country in question to determine whether the country is effectively enforcing its environmental laws. The critics argue that in practice this may prove to be more intrusive than establishing a standard for all of the countries to maintain. By creating a system which appears desirable because of its flexibility, the countries have chosen to defer the task of setting environmental standards to a later time. The results of submissions to the Commission may shape Mexico's enforcement priorities.[190] This fear will probably not be actualized. *Cozumel* is the first of only two submissions regarding Mexico to date.[191] Unless there is an enormous change in this trend, there will not be enough

189. JOHNSON & BEAULIEU, *supra* note 98, at 161.

190. The Mexican government may capitulate to United States demands for improved enforcement of particular environmental laws. In this scenario, a foreign government would be shaping Mexico's domestic environmental policy. The Agreement would be the impetus for undermining the very sovereignty it was drafted to protect. *See* Agreement, *supra* note 3, art. 3.

191. The reason for the lack of Mexican submissions may be that potential submitters are awaiting the outcome of *Cozumel* before they invest the resources necessary to file a submission with the Commission.

Commission decisions to impact Mexico's overall environmental enforcement. Further, the problem of defining and evaluating "effective enforcement" has not arisen in *Cozumel* thus far, rather, the Secretariat in its recommendation adroitly addressed the few issues involving Mexican law which have arisen, principally in its review of the Ecology Law.

D. Procedural Obstacles

Some commentators have stated that the Agreement's dispute resolution structure contains many procedural obstacles for the private citizen or NGO that brings a claim that a country is failing to enforce its environmental laws.[192] As in all NGO submissions to the Commission, the Submitters had to overcome several procedural impediments to get a record submitted to the Council. First, the Submitters had to persuade the Secretariat that the submission deserved to be investigated.[193] Second, the submission had to appear to be aimed at promoting enforcement rather than harassing industry.[194] Third, the Submitters had to first seek domestic remedies.[195] Fourth, the Submitters had to convince at least two-thirds of the Council to direct the Secretariat to compile a Factual Record on the submission.[196] In *Cozumel,* the Submitters successfully cleared all of these hurdles.

Another hurdle can be found in the fact that a submitter's right to present a submission to the Secretariat is limited in that the best possible result is that the Secretariat will compile and submit a factual record to the Council. The Secretariat has demonstrated in its disposition of *Cozumel* that it is willing, in compelling circumstances, to compile a factual record to submit to the Council. In addition, a two-thirds vote of the Council is required to make the factual record public. Without this vote, not even the submitter will have access to the factual record. The Council was intended to be an independent entity which serves an important duty to the NAFTA countries. Thus, it stands to reason that in instances where the Secretariat finds that a

192. Patton, *supra* note 22, at 112.
193. Agreement, *supra* note 3, art. 14(2).
194. *Id.* art. 14(1)(d).
195. *Id.* art. 14(2)(b).
196. *Id.* art. 15(2).

Submitter's claims are sufficiently important to compel the compilation of a factual record, that the Council will make its evaluation public, or proffer some very good reasons to explain its decision not to do so.

E. Retroactivity

The retroactivity issue is one which may become more easily resolved with the passage of time and as fewer citizen submissions are presented which involve events that occurred prior to the enactment of the Agreement. In the interim, however, the retroactivity issue may arise in many citizen submissions. Retroactivity appears to be an issue which is relatively easy to resolve. As the Secretariat correctly observes, events or acts that occurred "prior to January 1, 1994, may create conditions for situation...which give rise to current enforcement obligations."[197]

The Secretariat's resolution of the retroactivity issue demonstrates a sensitivity to the particular facts of *Cozumel*. The retroactivity issue could have provided the Secretariat with a convenient way to resolve the matter in favor of the Mexican government. The Secretariat chose not to follow this path, but rather, permitted review of the submission and compilation of the factual record with reference to the events that occurred after January 1, 1994, without unfairly penalizing the Mexican government for any events which occurred prior to January 1, 1994.

F. Deferring to the Country's Rational Allocation Of Resources

The Commission can grant an exception for a country's failure to "effectively enforce" if the failure to comply "reflects a reasonable exercise of discretion or results from bona fide decisions to allocate resources...determined to have higher priorities."[198] If a country asserts that its failure to enforce is a reasonable exercise of its discretion, then a challenge may be inappropriate. Furthermore, the offending country may avoid a challenge if it demonstrates that its resources are better used for other inter-

197. Recommendation, *supra* note 1, at 3.
198. Agreement, *supra* note 3, art. 45(1)(a).

ests. This exception for a "*bona fide* resource allocation decision"[199] was seen as one of Mexico's strongest arguments for failing to enforce its environmental laws.[200] To date, however, Mexico has not raised this exception as a defense in *Cozumel.*

Another important nuance in the "failure to effectively enforce" determination involves recent changes in the severity of the Ecology Law's EIS requirement. Mexico's Environmental Ministry published new rules, appearing on October 23, 1995, in the *Diario Oficial,* which allow construction companies to file simplified "preventive reports" rather than an EIS in an effort to eliminate bureaucratic obstacles to economic growth.[201] This change is apparently in response to companies which have complained that the EIS requirement tends to punish those companies which comply with the requirement, while companies which do not comply run only a minimal risk of sanctions because enforcement is so remiss.[202] The Mexican government acknowledged the previous policy's failure by stating that the rule changes were part of "a program of deregulation and administrative simplification" which was designed to improve efficiency.[203] According to official estimates, an average of 1200 EISs are submitted each year, creating a backlog of projects and year-long delays in the approval process.[204]

It clearly appears from these facts that the Mexican government is failing to effectively enforce the Ecology Law's EIS requirement. First, the Mexican government has acknowledged that the EIS program is a failure.[205] Second, the official estimates that a mere 1200 EISs are filed each year indicate that many companies which should be filing EISs are not doing so. The perception of the companies that comply with the EIS requirement also compel this conclusion.

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199. *Id.* art 45(1)(b).

200. *See supra* text accompanying notes 50-51.

201. These preventive reports can be as brief as a few pages and contain a much smaller range of information than the EIS which can reach more than 100 pages. *Requirement for Complete Impact Studies Lifted for Companies Doing Construction,* 18 Int'l Env't Rep. (BNA) 832 (1995) [hereinafter *Requirement for Complete Impact Studies*].

202. *Id. But see Compliance with Environmental Regulations Gaining Importance For Mexican Government,* 18 Int'l Env't Rep. (BNA) 729 (1995).

203. *Requirement for Complete Impact Studies, supra* note 201.

204. *Draft Standards Would Allow Some Projects to Bypass EIS if Certain Criteria are Met,* 19 Int'l Env't Rep. (BNA) 962 (1996).

205. *Requirement for Complete Impact Studies, supra* note 201.

The *maquiladoras* are another example of the Mexican government's failure to require the filing of EISs. Despite awareness of the pollution problem which the *maquiladoras* are causing, none of the six U.S.-owned *maquiladoras* that were investigated had prepared an EIS as required by Mexican law.[206] In sum, both the lack of EIS filings for construction projects and the *maquiladoras* tend to demonstrate that Mexico is not effectively enforcing the Ecology Law's EIS requirement.

An important aspect of *Cozumel* as it will shape future submissions is the evolving definition of "failure to effectively enforce." The Submitters, the Mexican government, nor the Secretariat have indicated that the phrase should be interpreted in a narrow sense so as to require the Submitters to demonstrate a pattern of enforcement violations.[207] Indeed, the Submission, Response, and Recommendation make reference to the particular facts in *Cozumel*. It is more difficult to prove the occurrence of a single event than it is to prove a pattern of events. Thus, if *Cozumel* stands for the proposition that the submitter merely needs to prove the occurrence of a single event, NGOs in Mexico will have acquired a considerable amount of influence over Mexican environmental enforcement. If used in a constructive way, Mexican NGOs will be able to highlight Mexico's most pressing problems and may be able to receive some relief.

VIII. A VIEW TOWARD THE FUTURE

A. Is The Focus on Enforcement Proper?

Some critics of the Agreement make a two-fold argument that the Agreement places undue emphasis on the enforcement of environmental laws. First, the critics claim that it is unrealistic to expect Mexico to be able to implement an environmental enforcement program comparable to that of the United States

206. James E. Bailey, *Free Trade and the Environment—Can NAFTA Reconcile The Irreconcilable?* 8 AM. U. J. INT'L L. & POL'Y 839, 865 (1993).

207. This issue is not, however, completely resolved. It remains to be seen how the Secretariat will construe "failure to effectively enforce" in its compilation of the factual record.

due to the disparities in wealth between the two countries.[208] Second, the critics assert that a powerful environmental enforcement program like that in the United States may not be the most advantageous allocation of Mexico's modest resources[209] because environmental enforcement is expensive and will not, in and of itself, improve Mexico's environment or human health.[210] Instead, enforcement only indirectly improves the environment and human health if enforcement fosters compliance.[211] The critics contend that overly emphasizing enforcement may lead to the misallocation of Mexico's scarce environmental resources.[212] The critics also argue that Mexico must first develop a basic environmental infrastructure before environmental enforcement expenditures can yield marginal environmental benefits.

First, this argument presupposes that enforcement is expensive, but does not lead to improvement. This argument ignores the deterrent value of enforcement. If environmental laws are rigorously enforced to the extent that they deter environmental damage, emphasizing enforcement may prove to be more effective than emphasizing infrastructure.

Second, the Agreement's enforcement provisions provide a strong refutation to these arguments. The Agreement gives the Council the power to spend any imposed fine "to improve the environment or environmental law enforcement" in the punished country.[213] At first glance this appears to be a peculiar form of punishment because the money never leaves the borders of the punished country. However, this provision may work to allow the Commission to highlight enforcement problems but not infringe on the country's sovereignty. Provided that the Commission directs the money to be spent in a rational manner, this provision may advance environmental improvement first, in principle, by embarrassing both the country that does not enforce its laws and the private party which breaks the laws and, second, in deed, by directing funds towards improving the environment in the punished country.

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208. For a general discussion on the rational allocation of Mexico's resources toward the improvement of environmental performance, see Knight, *supra* note 41; Kublicki, *supra* note 13.

209. Knight, *supra* note 41, at 629.

210. Kublicki, *supra* note 13, at 115.

211. *Id.*

212. Knight, *supra* note 41, at 620.

213. Agreement, *supra* note 3, Annex 34(3).

B. Potential Consequences Following the Resolution of Cozumel

Cozumel will prove to be important because, if the Commission finds that Mexico is failing to effectively enforce the EIS requirement and decides to assess a fine, the principle of abiding by the Agreement will be the sole motivation for the United States and Canada to support the Commission's decision. The issues raised in *Cozumel* have little to do with NAFTA's primary subject—free trade among the United States, Canada, and Mexico. The subject of *Cozumel* is also local in nature. There is little indication that any occurrences complained of in *Cozumel* will result in any adverse environmental impact outside of Mexico. In addition, the conduct about which the Submitters are complaining—the construction—may not be sufficient to outrage the United States or Canada so as to compel either country to take decisive action, diplomatic or otherwise. The Submitters do not contend that the construction is creating any health or safety hazards. Instead, the complaint is essentially that in constructing the port to develop its tourism industry, Mexico is destroying one natural resource that makes the area attractive to tourism in the first place—namely, the Paradise Coral Reef. In this light, it appears unlikely that the United States or Canada would impose sanctions upon Mexico as a result of *Cozumel*. Thus, the United States and Canada will be acting primarily on principle if either country takes any action in procuring Mexico's obedience to the terms of the Agreement should Mexico prove to be recalcitrant.

If the Commission finds that Mexico is not enforcing its own regulations, Mexico has three options. One option is for Mexico to do nothing; another is for Mexico to change or repeal its current laws so that businesses can more easily comply with them. Exercising these options may lead to domestic political fallout and possibly a response by the other two NAFTA countries. These are extreme options, and Mexico will probably be hesitant to choose either of these options because they could cause an equally extreme reaction from the United States and Canada.

Another option is for Mexico to attempt to enforce its own laws and regulations more vigorously. Mexico may be reluctant to pursue such enforcement out of fear that international businesses may decide against investing or locating in Mexico. How-

ever, access to the U.S. market and the other benefits of NAFTA membership will probably prove to be more important to investment decisions, and, in the end, improvements in environmental enforcement will not deter a great deal of foreign investment.

IX. CONCLUSION

The critics may be setting unrealistic standards for the Agreement and the Commission. The NAFTA countries could not have enacted any international agreement that would lead to Mexico's becoming an environmental panacea immediately. The environmentalists' fears of industrial flight from the United States to Mexican pollution havens demonstrate that a primary purpose of the Agreement was to ensure that NAFTA-induced growth would not cause an equivalent decline in the Mexican environment. If the Agreement is effective in preventing or eliminating the decline in the Mexican environment that accompanies NAFTA's industrial growth, then the Agreement is serving this purpose. In other words, the Agreement need not lead to a Mexican environmental panacea, but rather it merely needs to lead to environmental improvements that correspond to the industrial growth NAFTA caused in order to be declared a success under the standard that the environmentalists set forth.

The critics' argument that the phrase "failure to effectively enforce" will prove to be ineffective solely because of its imprecision is also unpersuasive. In U.S. jurisprudence there are many legal standards that preclude a precise meaning.[214] The Agreement was enacted with the knowledge that changing conditions will often render ineffective laws that contain overly-specific language. The NAFTA countries chose to postpone the resolution of some difficult decisions and to defer these decisions to the Commission for its evaluation. This choice merely underscores the importance of the Commission's function as both factfinder and legal analyst, but does not necessarily preclude the Commission from evaluating submissions effectively. The Commission in *Cozumel* thoughtfully analyzed the procedural matters, which should give observers a basis for cautious optimism.

214. For instance, determining whether an act is reasonable is the lifeblood of torts law. Similarly, U.S. Constitutional case law has developed intricate systems for evaluating the constitutionality of certain acts even where the Constitution provides only general guidance in making such a determination.

While NAFTA includes general references to the commitment of its members to the environment, it neither creates substantive obligations nor provides a dispute resolution process for environmental matters. Thus, the countries cannot look to NAFTA to provide guidance in resolving environmental disputes among themselves. Instead, the Agreement addresses such disputes. The fact that a violation of the Agreement does not lead to expulsion from NAFTA may not prove to be particularly important. The Agreement also contains a monetary assessment provision that is significant because of its symbolic power and because it promotes environmental improvements. While the threat that NAFTA membership could be taken away could have been useful in giving the Agreement greater strength in enforcement, it is not necessary and, indeed, would contradict NAFTA's primary importance of promoting free trade as taking away NAFTA's benefits would be tantamount to re-instituting the trade barriers which existed prior to its enactment.

The Commission's analysis of the standing and retroactivity issues is of primary importance in its disposition of *Cozumel*. Mexican citizens do not enjoy considerable access to the Mexican courts to challenge government actions and numerous obstacles exist for Mexico's NGOs. In spite of these legal obstacles, the Commission did not require the Submitters to show direct injury to acquire standing. Thus, it appears that the Commission broadened the scope of standing for the Submitters and gave the Submitters even more leeway than the U.S. courts have afforded U.S. NGOs. The Commission's standing decision is encouraging for the prospects of NGOs' future submission to the Commission. The Commission's refusal to dismiss the submission on the ground of failure to allege direct injury will probably encourage other Mexican NGOs to file submissions.

The Commission's treatment of the retroactivity issue is also very encouraging for future NGO submissions. Because the Agreement's enactment is still part of the recent past, the retroactivity issue may present itself in other submissions in the near future. It was, therefore, extremely important that the Commission resolve the issue in a manner which did not unnecessarily discourage future submissions. The Commission should not allow a country to be excused from punishment for lax enforcement solely because some events occurred prior to the Agree-

ment's enactment. Additionally, the Vienna Convention on the Law of Treaties dictates that the Commission should not evaluate events that occurred prior to the enactment of the Agreement. The Commission was conscious of this dilemma and allowed the submission to proceed without evaluating any events that occurred prior to the Agreement's enactment. In so doing, the Commission was able to satisfy both concerns.

Since *Cozumel* has not yet been decided in its entirety, a final analysis is impossible at this point. However, it is apparent at this preliminary stage of the proceeding that many of the concerns of environmentalists and other critics of the Agreement[215] have not been actualized in this particular case. In particular, the Commission has not given the Agreement a self-defeating, draconian interpretation, precluding objective substantive analysis for serious citizens' environmental claims. Instead, the nature of the proceedings to date indicate that the Agreement's citizen petition process will prove to be a workable mechanism. None of the environmentalists and critics' concerns and fears have precluded the Commission from proceeding to a conclusion on the merits despite the difficult legal and political setting in which *Cozumel* arose.

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215. In particular, Mexico did not argue that the decision not to require the filing of an EIS was due to the reasonable allocation of its resources. *See supra* Part VII.F.

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