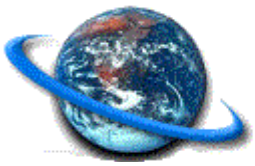

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Stormy Weather:
a reflection on the recent history of the citizen submission process under the North American Agreement on Environmental Cooperation

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Presented at the First Annual ENVIREFORM CONFERENCE
November 16-18, 2000
Munk Centre for International Studies
1 Devonshire Place
Toronto, Ontario, Canada

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Introduction

The task of rethinking global governance to more effectively take account of the ascendancy of what is now being called "global civil society" is now well underway in academic, policy and diplomatic circles.[1] Indeed one of the more encouraging outcomes of the 1999 WTO Ministerial meetings in Seattle was a heightened awareness of the need to enhance the nature and quality of the civil society engagement in the negotiation and implementation of the trade liberalization agenda and, more generally, in the conduct of international relations.

As this task is undertaken, increasing attention will no doubt focus on a modest North American experiment in citizen empowerment. A key feature of this experiment is the so-called citizen submission procedure, a cornerstone of the North American Agreement on Environmental Cooperation (NAAEC) also known as the NAFTA "Environmental Side-Agreement". Under Articles 14 and 15 of this Agreement, citizens and non-governmental organizations (NGOs) acquired the right to bring a complaint to the NAAEC Secretariat (the Secretariat) alleging that a NAFTA Party has failed "to effectively enforce" its environmental laws.[2]

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[1] . On the institutional front, one indicator of the progress NGOs have made of late is their increasing ability to secure amicus standing in international legal proceedings. An important recent illustration is the decision of the WTO Appellate Body - on its own initiative - to publish guidelines for amicus intervention in connection with the EU-Asbestos ban case: see Communication from the Appellate Body WT/DS135/9 "European Community – Measures affecting Asbestos and Asbestos-containing products" (November 8, 2000) downloaded from www.wto.org (November 11, 2000). An important NGO standing decision is also pending in the chapter 11 NAFTA claim currently being pursued by Methanex Corporation. The term "global civil society" appears to have originated in the early 1990s: see M. Shaw, Global Society and International Relations (Cambridge: Polity Press, 1994); R.D. Lipschutz, "Reconstructing world politics: the emergence of global civil society", (1992) 21 Millenium 389; M. Walzer (ed.), Towards a Global Civil Society (Oxford: Berghahn Books, 1995). See also S. Charnovitz. Two Centuries of Participation: NGOs and Global Governance, (1997) 18 Mich. J. of Int'l aw 183; D Archibugi, D. Held and M. Kohler (eds) Re-imagining Political Community: Studies in Cosmopolitan Democracy (Cambridge, UK: Polity Press, 1998) especially J. N. Rosenau's chapter "Governance and Democracy in a Globlizing World"; and M. Edwards and D. Hulme, Beyond the Magic Bullet: NGO Performance and Accountability in the Post-Cold War World, (West Hartford, Conn: Kumarian Press, 1996). .

[2] . Usually "complaints" filed under Article 14 and 15 are referred to as "submissions", although for the purposes of this paper I use the terms interchangeably.

In recent years the submissions procedure has been weathering a storm of uncertainty. This uncertainty has been created by the perception that the Parties are wavering in their support of the existing procedure and have been seriously contemplating changes that would impose significant new restrictions on the autonomy and authority of the Secretariat. It would appear that, for now, this storm has passed. At a landmark meeting held in Dallas in June 2000, under pressure from a coalition of civil society groups, the Parties committed to a more transparent process for discussing the future "elaboration and implementation" of the submissions procedure.[3] Nonetheless, the important interpretive questions and institutional tensions surrounding the submissions procedure remain.

The following paper is in three parts. Part I provides an introduction to, and short history of, the citizen submission process. Parts II and III consider the key legal and institutional issues that have emerged in the interpretation and administration of the submission process by the Secretariat. In this connection, I discuss, in particular, the challenges associated with defining the legal rights and responsibilities created by the NAAEC, and emerging tensions within the process surrounding government confidentiality and Secretariat autonomy. I conclude the paper in Part IV with some thoughts on how these legal uncertainties and institutional tensions relate to the broader question of why the CEC exists, and what purposes it might serve.

Part I: Citizen Submissions under Articles 14 & 15

1.1 Introduction

The citizen complaint procedure came into being as part of the North American Agreement on Environmental Cooperation ("NAAEC"), the environmental side agreement to NAFTA brokered in 1992-1993 by President Clinton to consolidate support for NAFTA in Congress.

NAAEC created a new institution: the Commission on Environmental Cooperation (CEC) based in Montreal. The CEC is governed by a Council composed of the Ministers of Environment from the three Parties. The affairs of the CEC are administered by a full time Secretariat located in Montreal, under the direction of an Executive Director. The CEC also receives ongoing advice and information from the Joint Public Advisory Committee (JPAC) comprised of fifteen citizens, five from each of the three NAFTA countries.[4] The NAAEC also contemplates that each Party may convene a national advisory committee (NAC) comprised of members of the public to advise it on the implementation and further elaboration of the Agreement.[5]

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[3] . See *Public Consultation on the Draft JPAC Review of Issues Concerning the Implementation and Further Elaboration of Articles 14 and 15 of the NAAEC (October 2000)* get website address...

[4] . Article 16, NAAEC.

[5] . Article 17, NAAEC.

The CEC has two key functions. The first is to foster cooperation and coordination among the Parties on hemispheric environmental issues, and trade and environment linkages through joint research and regional initiatives. The second function is to be an environmental watchdog, mandated to oversee, under the direction of the Council, the enforcement of environmental laws by the Parties. The vehicle through which it performs this latter role is the citizen complaint process, as set out in Articles 14 and 15 of the NAAEC.

Any resident of a Party may file a submission with the Secretariat claiming that a Party "is failing to effectively enforce its environmental laws". Providing the submission satisfies certain procedural prerequisites,[6] the Secretariat has discretion to request a "response" to the submission from the Party against whom it is made. Upon considering that response, the Secretariat may then recommend to the Council that a "factual record" be prepared. Approval to prepare a factual record requires a two-thirds vote by Council. When completed, the factual record is delivered to the Council which, again by a two-thirds vote, may decide to release some or all of its contents to JPAC [and/or] to the public.

In preparing the factual record, the Secretariat may consider information provided by third parties including governments, NGOs and experts. The terminology "factual record" is significant. This record shall contain a summary of submissions received in relation to the complaint, a summary of other relevant factual information and the facts as found by the Secretariat relating to the matters raised in the complaint.[7] Most observers agree, however, that "given its name, it probably cannot include an evaluation or judgment by the Secretariat",[8] or any recommendations for remedial action. Nor is it necessarily contemplated that the Council will take any specified action or make recommendations following receipt, or release of the factual record.

The NAAEC was very much a product of political forces and perceptions, particularly those prevailing within the US. NAFTA had been negotiated under the Bush administration, and was opposed by many traditional supporters of then-Governor Clinton in the labour and environmental communities. In his Presidential campaign, Clinton promised to "fix the NAFTA" to address these concerns. One of the key environmental concerns with NAFTA related to the prospect that it would override domestic environmental protection law; a prospect highlighted by the 1991 GATT decision that holding that a US law protecting dolphins by banning tuna imports constituted an invalid trade restriction. A second concern was that the NAFTA would create strong incentives, particularly for Mexico, to lower environment standards and relax enforcement of environmental laws to attract trade and investment.

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[6] . This paper does not focus on the specifics of these requirements that are well canvassed in P.M. Johnson and A. Beaulieu's authoritative *The Environment and NAFTA: Understanding and Implementing the New Continental Law* (Island Press: Washington D.C., 1996). For another good overview see D. Markell "The Commission for Environmental Cooperation's Citizen Submission Process" (forthcoming Geo E.L.R. 2000)

[7] . See Article 15 and submission guideline 12.1

[8] . Johnson and Beaulieu supra note 6 at 158

The NAFTA text that had been negotiated addressed these concerns to a limited degree. Language was included in the investment chapter that exhorted the Parties not to lower waive or derogate from their environmental standards to attract investment. Other provisions recognized the right of Parties to adopt their own non-discriminatory level of environmental protection. And NAFTA was made subordinate to certain international environmental treaties.

These provisions did not mollify US environmental groups. They lobbied the newly elected Clinton administration for an international commission to oversee the enforcement of environmental laws in the NAFTA region, with the power to impose sanctions for non-compliance. The clear preference of the NAFTA Parties, including the US, was to achieve environmental objectives via suasion and cooperation. Relinquishing adjudicative authority over assessing domestic environment performance to a supra national body was strongly opposed.

In the result, Clinton secured support of the NAFTA partners to a compromise that left state sovereignty with respect to the determination of environmental standards, and environmental enforcement, largely intact. On the one hand, the NAAEC imposed a new obligation on each Party to "effectively enforce its environmental laws and regulations", an obligation that would be subject to a citizen complaint process supervised by a fact-finding body (the Secretariat) that received instructions from a tripartite Council. Ultimately, however, the "effective enforcement' obligation was left "effectively unenforceable".[9] Under this compromise, the only way a Party could face enforcement action for breaching this obligation was if, by a two-thirds vote, the Council decided to pursue a complaint against a Party to an arbitral panel, a possibility generally deemed to be highly remote.

1.2 Use of the Procedure

Since its inception, twenty-eight citizen submissions have been filed with the CEC Secretariat.[10] Each of the NAFTA Parties has been the subject of a roughly comparable number of complaints: eight have targeted the United States; eleven have been filed against Mexico and nine have been brought against Canada. The volume of submissions brought each year has been relatively constant. Of the submissions brought to date, fourteen have been dismissed by the Secretariat on jurisdictional grounds, eight cases are currently being processed by Secretariat, and in the remaining six cases the Secretariat sought permission to prepare a factual record.

So far, the Secretariat has completed two factual records that have been released to the public. The first involved an allegation that the Mexican Government had failed to comply with environmental assessment requirements in authorizing construction of a pier at Cozumel. The other factual record that has been released involved allegations that the Canadian Government has failed to enforce the *Fisheries Act* against B.C. Hydro, a provincial Crown power utility. In the Spring of 2000, the Council turned down a

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[9]. Ibid at 149

[10]. As of October 30, 2000

recommendation to prepare a factual record in one case[11] and deferred its decision in another.[12] Currently, the Secretariat is preparing a factual record in only one case,[13] and is awaiting Council's permission to proceed with a factual record in another. [14]

The subject matter of the complaints brought to date ranges broadly. It includes allegations of non-enforcement of air, land and water pollution laws, species protection laws and environmental assessment regulations.

1.3 Who may file a submission?

The standing requirements provide that "any NGO or person established or residing in the territory of a Party" may file a submission.[15] The definition of NGO is broad and includes any profit or non-profit group that is not affiliated or directed by government.[16]

Virtually all submissions have to date been filed by environmental organizations or activists. The exception is a recent complaint by Methanex, a Canadian-based fuel additive company with American operations, whose product - MTBE – was recently banned by the state of California.[17] In addition to seeking damages in connection with this ban under Chapter 11, Methanex filed a complaint that the state of California was failing to enforce its groundwater protection laws against various point source polluters.[18]

Most of the submissions have been filed by environmental NGOs (ENGOs) against their home government. In several cases, however, where the non-enforcement allegation presents transboundary implications, ENGOs from both sides of the border have collaborated in bringing the complaint.[19] In two cases, ENGOs from all three countries have jointly filed the submission.[20]

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[11] . SEM-97-003 *Centre quebecois du droit de l'environment*
[12] . SEM-97-006 *The Friends of Oldman River*
[13] . SEM-98-007 *Environmental Health Coalition*
[14] . SEM-98-006 *Grupo Ecologico ManglarA.C.* Despite the fact presently the Secretariat's workload is manageable, concerns have been expressed that the resources it now devotes to administering the submissions process will be inadequate to prepare the volume of factual records that are likely to be ordered in the next few years: see J. Knox, Comments on Lessons Learned from the History of the 14/15 Procedure (unpublished document submitted to JPAC, September 22, 2000)
[15] . See s. 2.1 submission guidelines
[16] . Article 45.1 definition of "non-governmental organization"
[17] . SEM-99-001 *Methanex Corporation;* another corporation later followed suit and filed a virtually identical complaint: see SEM-00-002 *Neste Canada Inc.*.
[18] . Both the Methanex and Neste submissions were dismissed by the Secretariat on June 30, 2000 due to the pendancy of other proceedings including Methanex's claim under damages under chapter 11 of NAFTA.
[19] . See, for example, SEM-95-001 *Biodiversity Legal Foundation* et al (US failure to enforce endangered species legislation due to rider on military readiness Act); SEM-97-001 *BC Aboriginal Fisheries et al* (non- enforcement of the Fisheries Act against BC Hydro; referred to herein as the "BC Hydro" case) and SEM-98-003 *Department of the Planet Earth et al* (non-enforcement of the Great Lakes Water Quality Agreement by the US government)
[20] . SEM-95-002 *Sierra Club et al* (US failure to enforce federal environmental due to disaster relief rider) and SEM-99-002 *Alliance for Wild Rockies* (US failure to enforce Migratory Birds Treaty Act)

1.4 Oversight of the submissions process by the Secretariat

In performing its oversight role over the submissions process, the Secretariat is called upon to perform two distinct types of functions: interpreting and applying the legal language of the NAAEC; and administering the process to ensure that submissions are dealt with in a timely and efficient manner. The Secretariat has received high marks on the former front. As one close observer has put it, the "Secretariat's decisions appear to be grounded on carefully reasoned legal interpretations of the Agreement rather than on fear of adverse reactions by, or the desire to curry favor with, either the Parties or the Submitters".[21]

In terms of timely and effective administration of the submission process, the assessment is more mixed. A common complaint is the process is too slow, and concerns have been raised that a very serious backlog of work with respect to the preparation of factual records is imminent.[22] One of the key reasons for these delays is what I refer to in Part III as institutional tensions. To the extent that these tensions can be lessened, therefore, one would expect that the timeliness of the process would improve.

Part II considers some of the key legal-interpretive issues the Secretariat has been grappling with under the NAAEC. This is followed in Part III with a discussion and analysis of broader, and potentially more intractable, institutional tensions and issues

Part II: Interpretive Issues

2.1. Defining "environmental law"

Before processing a complaint, the Secretariat must conclude that the complaint alleges that a "Party is failing to effectively enforce its environmental law".[23] A key threshold issue for the Secretariat, therefore, is what constitutes an "environmental law".

The NAAEC provides that "environmental law" does not include worker health and safety laws, [24]nor does it include laws governing the harvesting of natural resources whether for commercial, subsistence or aboriginal uses.[25] This latter qualification effectively exempts from review the enforcement of any law which has as its objective sustainable natural resource development, which itself is paradoxically a primary objective of the NAAEC.[26] What is covered are laws whose primary purpose is pollution prevention, abatement or control; control of hazardous substances and wastes; and protection of flora, fauna and natural areas.[27]

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[21] . See J. Knox supra note 14 at 3 See also DiMento and Doughman ,Soft Teeth in the Back of the Mouth: The NAFTA Environmental Side Agreement Implemented, 10 Geo Int'l Env.L.Rev; 651, 695-96 (1998)
[22] . Ibid, Knox
[23] . Article 14.1
[24] . Article 45.2(a); presumably, in part, because these are covered by the a parallel Labour Side Agreement (get citation etc)
[25] . Article 45.2(b), NAAEC
[26] . Art 1(b), NAAEC
[27] . Article 45 2(a), NAAEC

Notably, there is no requirement that a complaint relate to an environmental amenity that is traded among the NAFTA Parties, nor that the complaint claim that the alleged pattern of non-enforcement has trade implications or consequences.[28] Only a few complaints, to date, have explicitly tried to address this latter connection.[29]

The Parties deliberately put beyond the reach of the citizen submission process complaints pertaining to a government's decision to rewrite its environmental laws or standards in a manner that might detract from their effectiveness. Instead, it was decided that the concern about the downward pressure of trade on environmental laws, and inter-jurisdictional "pollution haven" competition, would be dealt with by way of a non-enforceable exhortation.[30]

The obligation to defer to legislative action is recognized in several decisions of the Secretariat. In two of its early cases, the Secretariat declined to proceed with complaints that were based on allegations that legislative riders, passed by the US Congress, nullified the ability of federal regulators to effectively enforce laws protecting endangered species.[31] In a similar vein the Secretariat held that it could not investigate a complaint that Canada had failed to enforce the *United Nations Convention on Biodiversity*. Although Canada had signed and ratified the Convention, the Secretariat concluded that the *Convention* was not part of the Canadian domestic law, since the federal government had not formally implemented it by way of statute or regulation.

2.2 Defining "failure to effectively enforce"

If the Secretariat concludes that a complaint relates to the enforcement of an "environmental law", it must then consider whether there is evidence that a Party is failing "to effectively enforce" the law.

It is notable that, for the purposes of a citizen complaint, there is no need to allege or establish that a pattern of non-enforcement has occurred. In this regard, the citizen submission provisions differ from the Party-to-Party dispute resolution provisions of the NAAEC, which are triggered by an allegation there is a "persistent pattern of failure" by a Party to effectively enforce its environmental laws.[32]

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[28] . The Globe and Mail, who has described the NAAEC as one of the "strangest" international treaties, has recently advocated that the CEC charter be rewritten so that environmentally linked trade violations are central to the complaint process: see "Why exactly does this NAFTA commission exist?" A-14 (May 23, 2000)

[29] . SEM –97-001 *BC Aboriginal Fisheries (aka "BC Hydro")*; SEM-98-004 *Sierra Club of BC*

[30] . Johnson and Beaulieu supra note 6 at 165 "There was no reason to restrict NGO submissions... to enforcement matters. NGOs should have been allowed to present evidence establishing that a NAFTA party is lowering environmental norms in an attempt to attract investments. The possibility of preparing a factual record based on such evidence would have been a useful addition to the NAAEC." See also the pollution haven exhortation contained in Article 3, NAAEC..

[31] . See SEM-95-001 *Biodiversity Legal Foundation* (military rider) and SEM-95-002 *Sierra Club* (emergency aid rider case)

[32] . Article 22.1, NAAEC

2.2.1 Deemed exemptions to the obligation to effectively enforce

The NAAEC specifically provides that a Party shall be deemed *not* to have failed in this obligation in two situations. The first is where the alleged failure "reflects a reasonable exercise of their discretion in respect of investigatory, prosecutorial, regulatory or compliance matters". The second arises where the alleged failure "results from *bona fide* decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities".[33]

While determining whether a complaint properly relates to a domestic environmental law will usually require a relatively straightforward legal analysis, determining as a threshold matter whether either of these exceptions applies is a considerably more challenging task. Invariably, it would seem, the first step would be to request a response from the Party in question. On the basis of this response, the Secretariat can begin to tackle the task of applying the relevant facts to the two legal tests enunciated above. To make this determination, the Secretariat must presumably take steps to inform itself of the context within which the alleged non-enforcement took place. This will require some familiarity with the Party's record of enforcement in like cases and/or familiarity with the Party's environmental budgeting and priority identification processes.

To decide if a Party has exercised its discretion reasonably, the Secretariat must identify and assess the reasons why the Party chose to exercise its discretion as it did. This will require considering of a variety of factors including: whether the Party fettered its discretion, acted or failed to act for improper reasons, or took into account irrelevant considerations.

On the fettering issue, a complainant may seek to pre-empt a Party's reliance on this exemption by advancing evidence of a persistent pattern of non-enforcement, in order to rebut the argument that the failure was the product of a reasoned, case-specific exercise of discretion. The *BC Hydro* complaint appears to be an illustration of this strategy. In this case, the complaint identifies thirty-seven instances where Canada's fisheries law was violated without prosecutorial action being taken, noting that, since 1990, only two prosecutions have been pursued.[34]

The budget priority exemption also presents interesting legal issues. To meet the literal test prescribed by this exemption, it will not be enough for a Party to claim that its budgetary resources limit its enforcement capabilities. Rather, a Party must show that it has deliberately chosen to allocate funds that would otherwise be available to enforcement to other environmental priorities. This may be a deceptively difficult test for a government to satisfy. The usual reason why environmental enforcement goes underfunded, many would argue, is *not* due to precedence being given to other *environmental priorities*, but rather to precedence being given to other *non-environmental priorities.* This said, the Secretariat may well feel constrained, due to

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[33] . Article 45.1(a) and (b), NAAEC

[34]. Note this strategy also at work in SEM-98-004 *Sierra Club of BC* et al (aka the "BC mining" case) and SEM-97-003 supra note 11.

national sovereignty sensitivity, from applying this exemption with the rigour its plain language implies.

In summary, in applying these exemptions the Secretariat will be called upon to assess a relatively complex set of facts against the legal test set out in the exemption language. To successfully invoke the exemption, it would appear that a Party would need to show that its alleged failure to enforce the law represented a reasonable exercise of its regulatory or budgetary discretion.

2.2.2 what constitutes a "failure" to effectively enforce?

The exemption provisions just discussed deem specified government conduct not to constitute "failures" to effectively enforce. This leaves unsettled the broader question of what does constitute such a failure. This is a vexed and controversial issue. The Secretariat has offered its tentative views on this subject in *Biodiversity Legal Foundation.*[35] In this decision, the Secretariat suggests that failure to effectively enforce "primarily envisage[s] administrative breakdowns (failures) resulting from acts or omissions of an agency or official charged with implementing environmental laws".[36]

The term "breakdown" has problematic connotations. Such an approach appears to narrow the Secretariat's jurisdiction to situations in which enforcement fails due to government inadvertence: for instance, poor internal communication, lack of agency coordination, or regulatory negligence. This would seemingly exclude, therefore, consideration of instances where the failure to enforce is attributable to deliberate government action (i.e. allocating inadequate resources, adopting policies that are inconsistent with the requirements of an environmental law or pursuing a practice of non-adversarial, "sympathetic" regulation). There is no reason, in principle, that enforcement failures attributable to government choice should be treated any differently than those explicable by inadvertence. This is particularly so, having regard to obligation undertaken by Parties under NAAEC "to effectively enforce [their] laws and regulations through appropriate government action".[37]

2.2.3 what constitutes "effective enforcement"?

A closely related issue of considerable contention, which has arisen in the context of the *BC Hydro* case, concerns how to define "effective enforcement". An interpretation apparently favoured by some Parties is to measure the effectiveness of enforcement exclusively in terms of whether the efforts undertaken have actually protected the environment from harm.[38] Under this approach, the factual record would not address the level of compliance with the law in question, *nor* address the effectiveness of the law in meeting its environmental purpose.[39]

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[35]. SEM 98-004 *Sierra Club of BC*

[36]. See Secretariat's determination under Article 14(2) issued Sept 21, 1995

[37]. Article 5(1), NAAEC

[38]. See letter of advice from NAC Canada dated June 18, 1999 at pp 2-3 available at www.naaec.gc.ca/english/nac/advice/adv991.htm (downloaded 03/02/00). note

[39]. See Environment Canada Discussion Paper dated October 13, 1999 (on file with author)

Canada's National Advisory Committee (NAC) has come out strongly against this narrowing of the Secretariat's interpretive mandate.[40] It contends that environmental harm is but one indicia of effective enforcement, just as is the question of whether the law has met its environmental purpose. In its view, the ultimate issue to be addressed by a factual record is whether government has secured *compliance* with the law in question.

Several considerations strongly support the more liberal interpretation urged by the NACs. First of all, the NAAEC does not require Parties to protect the environment from harm. Parties are allowed to freely choose their own preferred level of environmental protection. What the NAAEC does require is that Parties "effectively enforce" environmental laws they enact, which we presume are designed to achieve a Party's chosen level of environmental protection. In short, the citizen submission process is not about preventing environment harm *per se,* but rather holding governments responsible for enforcing environmental laws. Focussing on environmental harm also presents substantial informational challenges. Environmental harm is not always easy to document or assess; typically, documenting and assessing compliance is much more straightforward. Finally, preventing environmental harm is not the only goal of environmental regulation. To focus narrowly on whether environmental harm has occurred means ignoring the broader question of whether and to what extent the environment has been put at risk by non-compliance.

Part III: Institutional Issues and Tensions

3.1 The institutional history

Almost from its inception, the citizen submission process has provoked questions about the role of the Secretariat and the nature of its relationship to the Parties and with the Council. In addition to administering the citizen complaint process, the Secretariat is vested with more "traditional" responsibilities of providing technical, administrative and operational support and advice to the Council. This has led some to question whether it is desirable or even possible to house within the CEC both a "watchdog" role and these more traditional, cooperative functions that form the bulk of its work program.[41] In particular, one or more of the Parties has raised the concern that, in discharging this former function, the Secretariat has acted in manner that is adversarial to the Party being investigated.

On the fourth anniversary of the NAAEC, the Council commissioned an independent review committee (the IRC) to report on, and advise with respect to these and other issues. In general, the IRC strongly supported the concept and design of the citizen complaint process. In their view, "any adversarial aspects of the process are outside the

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[40] . NAC letter of advise dated June 18, 1999 supra note 38. The position of NAC Canada is consistent with the position taken by the US government: see Position of the Government of the United States of America on Legal Issues Relating to Submissions on Enforcement Matters and Preparation of Factual Records under Articles 14 and 15 of the NAAEC (March 27, 2000) (on file with author)

[41] . Report of the Independent Review Committee (CEC, 1998) at 22

role or control of the Secretariat, but arise from the empowerment of individual citizens or groups to initiate a submission 'against' a Party."[42] The IRC recommended strongly that it would be premature to significantly reform the citizen submission process, as apparently one or more parties favoured. According to the IRC, the process reflected a laudable "trend toward increased citizen involvement in international mechanisms to address environmental issues".[43] In its words, the process "belongs" to the 350 million citizens of North America "who are empowered to initiate it, and for whose benefit it was developed."[44]

The IRC concluded its review by expressing the hope that the "current tension" around the citizen complaint process would be reduced if the parties - instead of seeking to reform the process - worked hard to "scrupulously apply the NAAEC", and "respected the discretion provided to the respective decision-makers at different points in the process".[45]

Subsequent experience has proven this hope somewhat wishful. If anything, in the years following the IRC review institutional tensions surrounding the submissions procedure escalated.

In the lead-up to the Council/JPAC summer meeting in 1999, the Council sought public input on a package of amendments to the submission guidelines aimed at clarifying and in many respects circumscribing the powers of the Secretariat. Ultimately, under pressure from the NGOs, JPAC and the NACs, significant changes to the guidelines were postponed. However, virtually as soon as this decision was made, the Parties engaged in a second "confidential" round of discussions with respect to a proposed new set of guideline amendments. The changes being proposed in this process were more far-reaching than those advanced in the preceding round, and included the creation of a Council-appointed working group with responsibility to oversee the Secretariat's preparation of factual records.

When these discussions came to light a few months before the Council/JPAC meeting to be held in Dallas in June of 2000, civil society groups organized a continental coalition to lobby against the contemplated changes. The coalition emerged from the Dallas meeting claiming victory. At the meeting, the Council not only deferred amending the guidelines but also passed a resolution that has the potential for making future discussions about the design and implementation of the submissions process considerably more transparent and inclusive.

This resolution tasks JPAC with the ongoing role of providing advise to the Council on issues relating to "implementation and elaboration" of the submissions process. Under the resolution, any Party, the Secretariat, or member of the public may raise issues "concerning the implementation or elaboration" of the submissions process with the

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[42] . Ibid at 5
[43] . Ibid
[44] . Ibid at 5
[45] Ibid at 54-5

Council who may then refer the matter to JPAC for its consideration. It also requires the Council to provide written reasons with respect to any decision made "following advice received by JPAC". Finally, the resolution mandates JPAC to conduct a public review of the history of the submissions process, with a view to submitting a report to the Parties on the "lessons learned".

While Council's decision to enhance the role of JPAC is a welcome development, the issues and uncertainties that precipitated the showdown in Dallas linger and seem likely to resurface.

3.2 Institutional Tensions

3.2.1 The ability of the Secretariat to access information

One area of continuing tension concerns the ability of the Secretariat to carry out its fact-finding function. The NAAEC imposes a general obligation on the Parties to provide the Secretariat with such information as is necessary to administer the submissions process. In reality, however, the Secretariat must rely on the co-operation of the party whose actions are being investigated to disclose this information voluntarily. As Johnson and Beaulieu wryly observe, "depending on the circumstances, there might ... be a temptation for the party complained against to procrastinate or to be lax in collecting damning evidence."[46] Moreover, if a party deems a request for information to be "excessive or unduly burdensome", it may notify the Council who, by a majority vote, can impose restrictions on scope of the request.[47]

In a significant gesture of deference to state sovereignty, a party is also entitled to decline to disclose information if it would not be required to disclose such information under its own laws pertaining to business or proprietary information, personal privacy or confidentiality in government decision making.[48] If a party chooses to provide such information to the Secretariat, it may require the Secretariat to keep the information confidential.[49]

Governments have not been timid to invoke the benefits of these provisions. In two recent cases, still at the initial screening stage, the government of Mexico has designated as "confidential" material it has provided the Secretariat in response to the complaint.[50] In one of these cases, Mexico has asserted confidentiality over its entire response. Pursuant to newly enacted Submission Guidelines, the Secretariat has requested, in these instances, that Mexico provide a summary of the information designated "confidential" and an explanation of its confidentiality claim.[51] Without this information, the Secretariat

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[46] . Supra note 156
[47] . Article 21(2), NAAEC
[48] . Article 39(1), NAAEC
[49] . Argicle 39(2), NAAEC
[50] . SEM-98-004 *Academia Sonoreuse*; SEM-98-007 *Environmental Health Coalition*
[51] . See Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the NAAEC (approved by JPAC on 28 June 1999): see Guideline 17.3

will find itself in the unenviable position of having to provide reasons for dismissing the complaint or, alternatively, ordering production of a factual record, without being able to make reference to the contents of the government's response. Accordingly, it is hoped in the interests of transparency that parties will normally see fit to provide summaries of this kind to the Secretariat when requested.

Confidentiality has also become a concern during the factual record preparation process. In preparing a factual record in the *BC Hydro* case, the Secretariat convened an expert panel to assist it in its investigation. The panel established a procedure under which it solicited submissions from the complainants, BC Hydro and finally the Government of Canada in three successive meetings. Parties were invited to attend as observers at the meetings when their counterparts where scheduled to make submissions.

While the complainants and BC Hydro cooperated fully in this arrangement, Canada Canada refused to meet with the panel either alone, or in the presence of the other parties.[52] Although it eventually agreed to answer questions in writing, due to the vague and incomplete nature of the answers provided, a protracted process of "follow-up questions" ensued.[53]

One of the apparent reasons for Canada's objection to this procedure was a concern that about disclosing sensitive information.[54] Consequently, Canada has proposed that the submission guidelines be amended to require that information submitted to the Secretariat (or its independent experts) in connection with preparation of a factual record, be kept secret until Council has made a decision on whether to make the factual record public.[55]

To sequester all information – confidential, "sensitive" or otherwise -- tendered by parties as part of the factual record process would be a significant and troubling departure from the NAAEC and current submission guidelines. The present regime is one that emphasizes transparency. Subject only to confidentiality claims allowed under the NAAEC or Guidelines, the Secretariat is required to place all information it considers in preparing a factual record (including submissions from the complainant and Party) in an open public file.[56] Under this regime, the touchstone for non-disclosure is confidentiality; that a Party might deem disclosure of the information embarrassing or sensitive is not a justification for secrecy.

An important implication of this approach is that it would mean that whenever Council exercises its discretion not to make a factual record public all of the information gathered

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[52]. See H. Scoffield, "Ottawa stifling hearings, groups say: environmentalists claim NAFTA side agreement undermined by secrecy in BC Hydro case" *Globe and* Mail (March 8, 1999) B-3

[53]. For further see BC Hydro factual record. Globe and Mail op ed; and R. Christensen, "The CEC Citizen Submission Process: Citizen Empowerment or Failed Experiment?" (unpublished, 1999) at 8

[54]. Interview with R. Christensen counsel for the submitters on BC Hydro (March 10, 2000)

[55]. Discussion Paper supra note 39.

[56]. Submission Guidelines s. 16(1)(d) "The Secretariat will maintain a file on each submission at its headquarters in a manner suitable for public access, inspection and photocopying...subject to confidentiality provisions in this Agreement and of the guidelines, the file will contain...any other information considered by the Secretariat under Article 15(4) of this Agreement"

and considered by the Secretariat in preparing the record would be permanently sequestered.

Whether or not the Council will ultimately adopt the sequestration proposal is not certain, particularly since the outcome of the Dallas meeting. However, there are grounds to be worried that it might well choose secrecy over transparency. Notable in this regard is its decision in June 1999 to amend the submission guidelines to impose a new requirement that the Secretariat keep secret the fact that it has recommended to the Council that a factual record be prepared until thirty days until after it has so notified the Council.[57] The only reason for such a change would seem to be to shield the Parties from potentially embarrassing public scrutiny and pressure on the question of whether they will support or reject the recommendation, until after they have decided the question.[58]

3.2.2 The Secretariat's discretion over preparation of factual records

The *BC Hydro* process has also prompted Canada to raise concerns about the Secretariat's authority to determine the process by which the factual record is prepared. In particular, it suggests that the Secretariat and independent experts working on its behalf are not, and should not be, empowered to "engage in an interactive public meeting process to gather information during the factual record process".[59]

This suggestion is motivated in part, as discussed in the preceding section, by its apparent desire to avoid being forced to publicly disclose sensitive or embarrassing information. It also appears to be motivated by another consideration: the potential that a "public" factual record preparation process will shine an unwanted spotlight on the allegations being investigated. In Canada's view, this is an undesirable result that undermines the "integrity of the Council's decision on whether or not to make the final factual record public".[60] This is because, according to Canada, such a process encourages "the public, submitters, governments and other stakeholders to draw conclusions on, or debate the merits of, the assertions that are the subject of the factual record" before the Council decides whether to make the record public.[61] In the run-up to the Dallas meeting, this concern crystallized into a proposal that the Council appoint a working group to oversee the manner in which the Secretariat has carried out its factual record preparation duties.

Canada's apparent aversion to the spotlight is somewhat paradoxical in that it is precisely this spotlighting attribute that many observers suggest is the CEC's most useful and

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[57] . See s. 10.2 of the submission guidelines as amended in 1999

[58] . J. Knox, Comments on Lessons Learned from the History of the 14/15 Procedure (unpublished document submitted to JPAC, September 22, 2000) at 7

[59] . The quoted passage is taken from a letter by Norine Smith ADM Environment Canada, sent to the Chair of NAC Canada dated May 11, 1999 and referred to in a subsequent letter of advise from NAC Canada dated June 18, 1999NAC June 18, 1999

[60] . Discussion Paper supra note 39

[61] . Ibid

important function.[62] It would also appear to be inconsistent with Article 1(h) of the NAAEC that underscores that an objective of the Agreement is to "promote transparency and public participation in the development of environmental laws, regulations and policies".

This paradox aside, of arguably even greater concern is a proposition implicit in Canada's position: namely that the Secretariat lacks the discretion to determine its own procedure. The NAAEC neither explicitly authorizes nor prevents the Secretariat from embarking on the quasi-public investigative process adopted in *BC Hydro*. Ordinarily, in matters of procedure, tribunals are entitled to establish their own rules and practices as long as they do not conflict with the objectives of the general authority they have been granted. This approach is also consistent with the IRC's admonition that those involved in the complaint process respect the "discretion provided to decision-makers at different points in the process".[63]

The positive developments in Dallas notwithstanding, it is fair to say that the Parties have not heeded this admonition particularly well in the past, and there is reason to worry that this pattern may be difficult to break. As one longtime NAAEC observer has put it, as the caseload of the Secretariat increases, there will be an increasing incentive "for the Parties to take control of the procedure away from the Secretariat by micromanaging the Secretariat's discretion in considering submissions and preparing factual records".[64]

3.2.3 The authority of the Secretariat to interpret and apply the NAAEC and submission guidelines

A final area of controversy has concerned the scope of the Secretariat's authority to interpret the NAAEC and the submission guidelines. Neither the Agreement nor the guidelines specifically elaborate the Secretariat's authority in this regard, particularly in a situation where a party disagrees with the interpretation adopted by the Secretariat, as occurred in *BC Hydro.*

Two principles provide a starting point for considering this question. First of all, under the tripartite relationship contemplated by the NAAEC, the Secretariat answers to the Council, *not* to the Parties. Thus, for example, if a party is concerned about a request for information made by the Secretariat during preparation of a factual record, the party is instructed to raise the issue with the Council. If Council decides the party's concern is well founded, by a two-thirds vote the Council may issue a binding directive to the

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[62] . Johnson and Beaulieu supra note 6 at 166 (noting that "one of the CEC's most useful functions will be to cast the spotlight on public authorities that fail to fulfill their obligations – in particular, their obligations to effectively enforce their domestic environmental laws. These NAAEC provisions constitute a formal and permanent instrument enabling NGOs to direct the spotlight themselves.) See also the IRC Report supra note ___at 5 (noting that the complaint process "for some 350 million pairs of eyes to alert the Council to any `race to the bottom`". See also D. Markell's discussion of the increasing popularity of "spotlighting" strategies supra note 6 at note 93

[63] . IRC at 22

[64] . John Knox at 9

Secretariat. Secondly, it is the job of the Council to resolve "questions or differences that arise *between the Parties* regarding the interpretation or application of the Agreement".[65] (emphasis added) The NAAEC specifically forbids the Parties from seeking to influence or direct the actions of the Secretariat.[66]

In the lead-up to the Dallas meetings, it came to light that the Council was considering several proposals aimed at fettering the authority of the Secretariat to interpret and apply the Agreement. One proposal would have required the Secretariat to seek direction from Council, even if no party has raised an objection, whenever it "encountered an issue of interpretation".[67] The Council was also asked to consider imposing a requirement that the Secretariat halt its work and seek a Council ruling *whenever* a disagreement arose between the Secretariat and a Party in the interpretation or application of the NAAEC.[68]

The former proposal as drafted is clearly unworkable. Dealing with issues of interpretation is a central and inescapable feature of the Secretariat's current mandate. It is responsible for making interpretive judgments on a broad range of questions.[69] With well over a dozen complaints on its docket at any one time, imposing on the Secretariat an obligation to routinely seek the advise of the Council whenever it encounters an interpretive issue presents obvious logistical difficulties. Logistics aside, such a proposal would have serious detrimental impacts on the Secretariat's independence and perceived legitimacy.

The obvious danger with the second proposal is that it could be used by a Party as a delaying tactic, seriously impairing the ability of the Secretariat to process submissions in a timely and efficient manner.

At the Dallas meeting, the Council decided against issuing specific guidelines that would govern when a disagreement arose between a Party and the Secretariat. Instead, it opted to create a formal "troubleshooting" role for the JPAC in such situations. As a result, the Dallas resolution invites "any Party, the Secretariat, members of the public, or the JPAC itself" to bring issues of "implementation and elaboration" relating to the submission process to the Council. On receipt, the Council *may* refer the matter to JPAC which, in turn, is empowered to "conduct a public review to provide advice to the Council as to how those issues might be addressed". Significantly, the resolution provides that pending the completion of such a process, the Secretariat is mandated to continue to process any pending submissions.

Part III: Why exactly does the citizen submission procedure exist anyway?

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[65] . Article 10(1)(c)
[66] . Article 11(4) as noted in Jure 18, 1999 NAC letter
[67] . Discussion Paper supra note 39
[68] . Discussion Paper supra note 39
[69] . These include: whether the complaint relates to an "environmental law"; whether it alleges a "failure to effectively enforce" such a law; whether a complaint meets the six listed threshold criteria under Article 14(1); whether the complaint merits a response from a Party having regard to the four criteria listed in Article 14(2); and, finally, whether complaint justifies a recommendation that a factual record be prepared.

In the run-up to the Dallas meeting, as the storms clouds around the citizen submission process were darkening, a lead editorial in one of Canada's national newspapers posed the question "*Why exactly does this NAFTA commission exist?"*[70]

In terms of *realpolitik,* the answer to this question is relatively straightforward and increasingly only of historical interest. The genesis of the citizen submission procedure lies in a political compromise between what U.S.-based environmental groups wanted (a supra-national body vested with powers to adjudicate complaints about domestic environmental law enforcement) and what the Clinton administration and the Parties were prepared to offer (Articles 14 and 15) as a *quid pro quo* for environmentalist support (or acquiescence to) the NAFTA package in Congress.

But the question of why citizen submission process was conceived can be separated from the question of what purposes and functions it now and in the future may serve. Assistance may be can be gleaned from "objectives" statement contained in Article 1 of the NAAEC.

A fundamental objective identified in this list is "to enhance ...enforcement of environmental laws and regulations" within the territories of the parties.[71] Presumably, however, this objective is not intended to be an end in itself but rather a means to the broader end of promoting compliance with environmental laws and thereby protecting and improving the environment in the territories of the Parties.[72] The linkage between effective enforcement and the goals of enhancing compliance and environmental protection is explicitly articulated in Article 5 which states:

> "each Party shall effectively enforce its laws and regulations..[with] the aim of achieving high levels of environmental protection and compliance with its environmental laws and regulations".[73]

Several authors would add a third objective to this list: to better inform and involve citizens in the process by which environmental laws and regulations are developed, implemented and enforced.[74] In the words of the recently departed head of the CEC's citizen submission unit, this purpose could be conceived of as being "to promote the

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[70] . Globe and Mail supra note 28

[71] . Article 1(g)

[72] . See Articles 1(g) noting the reference to "compliance" and Article 1 (a) to foster the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generations."

[73] . This linkage is pointed out by D. Markell supra note . It is also a linkage that is present in the language of Article 3.

[74] . Article 1(h) "to promote transparency and public participation in the development of environmental laws, regulations and policies": other provisions that are relevant in this regard are Articles 2(1),4, 5, 7(1)(b) , 7(2) and 10(5). (See also Markell ibid at notes 53 and 83 and also R. MacCallum, Evaluating the Citizen Submission Procedure under the NAAEC, 8 Colo. J.Int'l. Envtl.L. & Policy 395-400 (suggesting that the "apparent purpose of Articles 14 and 15 is to enlist the participation of the North American public to help ensure that the Parties abide by their obligation to enforce their respective environmental laws".)

emergence of "civil society" in North America through the creation of a mechanism that facilitates citizens' interactions with their governments and others on the continent."[75]

Just how well has the citizen submission process been achieving these three objectives? Although these are still early days, this research challenge is beginning to attract interest. Clearly, there are some threshold methodological issues. One set of issues concerns defining and measuring "effective enforcement", an issue with which the CEC will be grappling for the foreseeable future. Already, the CEC has initiated a project that tries to lay some of the groundwork on this front by developing indicators for evaluating the performance of the Parties in implementing effective environmental enforcement.[76]

Then there is the empirical task of determining whether and to what extent the Parties' enforcement practices and environmental protection records have been influenced by the existence of the citizen submission process. This, once again, is an area in which little work has been done. [77]

Finally, there is the question of how effectively the process has managed to empower civil society; how well has it served the 350 million citizens of North America to whom, as the IRC review contends, the process belongs? This, perhaps, is a more straightforward matter to address.

We can safely surmise that for the many groups and individuals that have participated in the process of filing submissions, the ongoing consultations around the guidelines amendments, and the work of the JPAC, the process has some utility and benefit. In particular, for many within the civil society sector, the submission process will continue to have real value -- even though it does not yield binding recommendations or results let alone entail the imposition of sanctions -- as long as the process offers the prospect of spotlighting deficient domestic enforcement practices. But the corollary of this is also worth bearing in mind. Were the process to lose its ability to credibly and neutrally perform this spotlighting function, civil society support for the submissions process would dissipate rapidly. In all likelihood, a coordinated strategy of retracting all pending complaints and boycotting the institution would ensue.

In summary, with respect to two of the key goals objectives of the citizen submission process – its contribution to effective enforcement of environmental laws and its longer term impact on environmental protection and enhancement – the evidence needed to evaluate how effectively the process is working is not readily available. However, in terms of the objective of providing civil society with the means to participate more

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[75] . Markell ibid in text accompanying note 83

[76] . CEC, Indicators of Effective Environmental Enforcement: A North American Dialogue (1999); see reference to the work on this front of the North American Working Group on Environmental Enforcement and Compliance Cooperation (EWG) described in the *BC Hydro* factual record at 43.

[77] . To date, the principal academic contribution to this literature has offered a highly skeptical view of the benefit, in terms of environmental outcomes, of the citizen submission process: reference here the work of Professor Raustalia. See especially K. Raustalia, International "Enforcement of Enforcement" under the North American Agreement on Environmental Cooperation, 36 Va. J.of In'l. Law 721; 25 Envtl. L. 31, 50-54.

effectively in government environmental decision-making, we can tentatively conclude that the process is working and enjoys a conditional legitimacy within the sector that is its intended beneficiary.

The resolution passed by the Council in Dallas should help to restore the faith of civil society organizations that the Parties remain committed to making the submissions process work. At the same time, the resolution reposes in the hands of JPAC a challenging and significant new role. It is likely, for instance, that JPAC will be called upon to make recommendations with respect to the process by which the Secretariat prepares factual records; an area that is not elaborated in the NAAEC or the guidelines and which remains unsettled in the wake of the BC Hydro controversy. Another area of continuing concern is the effective ability of the Parties to thwart the process by frustrating the Secretariat's fact-finding efforts through delay, selective disclosure or non-disclosure. Here too there would appear to be a need to further elaborate the existing provisions of the Agreement with a view to vesting the Secretariat with more effective means to ensure that relevant, non-confidential documents are produced in a timely and complete fashion.

Perhaps most significantly JPAC may be able to use its new role to provide leadership in responding to the key question of "why does this submissions process exist anyway?" Over the last few years, considerable energy has been expended in battles over proposed changes to the submission guidelines. This has had at least two important implications. A first is that these battles have tended to divert attention and resources away from reflecting on larger, longer-term questions of institutional purpose and outcome measurement. Secondly, it has contributed to a generalized feeling of battle fatigue. This sense of weariness is especially evident within the civil society sector; a sector that perceives it has been forced to spend most of the last three years defending the submissions process instead of working to enhance it. One hopes that JPAC will succeed in building on the lessons learned from these battles; in reviving interest in and support for the citizen submission process and the broader mission of the CEC; and perhaps too in reminding us what the final "C" in this acronym represents.