NAFTA AND THE ENVIRONMENTAL SIDE AGREEMENT: DISPUTE RESOLUTION IN THE COZUMEL PORT TERMINAL CONTROVERSY

BY
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I. INTRODUCTION

On December 17, 1992, Mexico, Canada, and the United States signed the North American Free Trade Agreement (NAFTA).[1] NAFTA created free trade zones between participating countries by eliminating tariffs, import licenses, and other trade barriers. The signing of the agreement engendered substantial controversy between these countries and the general public, particularly over possible environmental repercussions. In light of this controversy, the countries commenced negotiations on a separate environmental agreement. Their intent was not to reopen NAFTA, but to tailor a separate dispute resolution process for environmental review. Two primary concerns influenced the negotiation process. First, the negotiators attempted to alleviate the threat that United States industries would relocate to Mexico to avoid expensive environmental regulation in an attempt to minimize production costs.[2] Second, the discussions attempted to reduce the risk that industrial flight to Mexico might add to the environmental problems plaguing the United States-Mexico border.[3]

These negotiations resulted in the North American Agreement on Environmental Cooperation, often referred to as the Environmental Side Agreement ("Agreement").[4] The Agreement was designed to enhance compliance with

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[1] The North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289, 605 (1993) [hereinafter "NAFTA"].

[2] Mary Tiemann, *The Impact of Environmental Issues on NAFTA Implementation*, 3 MEX. TRADE & L. REP. 10 (1993).

[3] *Id.*

[4] The North American Agreement on Environmental Cooperation, Sept. 13, 1993, Can.-Mex.-U.S., at. 10(1)(a), 32 I.L.M. 1480 (1993) [hereinafter "Agreement"].

domestic environmental law in a manner that promotes economic efficiency and environmental protection.[5] This article analyzes the Agreement's resolution process with reference to a recent controversy over the Mexican government's approval of a new pier on Cozumel Island.[6] This article demonstrates that the Agreement works with respect to notice procedures but fails in other specific respects. The Agreement's successes in providing public notification and access as well as its deficiencies in failing to definitively resolve the dispute shape the following analysis.

II. Environmental Side Agreement

A. Goals and Objectives

The Environmental Side Agreement sets forth a broad array of goals and objectives in Article I. Specifically, the Agreement aims to ensure that governments properly implement their own environmental laws. The Agreement establishes mechanisms to investigate allegations of environmental wrongdoing, arbitrate environmental disputes, and occasionally to sanction countries that fail to adequately respond to corrective measures.[7] The Agreement's goals include promoting sustainable development based on cooperation, encouraging conservation, avoiding trade distortions or new trade barriers, preventing pollution, and increasing public participation.[8] The objectives emphasize the need for nations to balance environmental protection against numerous countervailing concerns, including ecology, economics, intergenerational equity, and sovereignty.

B. Structure of the Commission for Environmental Cooperation

The Environmental Side Agreement establishes the North American Commission for Environmental Cooperation (CEC) and authorizes the CEC to imple-

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[5] North American Agreement on Environmental Cooperation, Part One: Objectives, Submission No. 96-001 (Jan.. 18, 1996) [hereinafter "Objectives"] <http://wwwcec.org/english/resources>.

[6] Registry of Submissions on Enforcement Matters [hereinafter "Registry"] <http://www.cec.org/templates/regis>.

[7] *Id.*

[8] David Baron, *NAFTA and the Environment—Making the Side Agreement Work*, 12 Ariz. J. Int'l & Comp. L. 603, 604 (1995).

ment its objectives.[9] The CEC, located in Canada, is the heart of the Agreement.[10] The CEC relies on a Council, an Environmental Secretariat, and a Joint Public Advisory Committee to review allegations of environmental wrongdoing.[11]

The CEC Council (Council) is comprised of cabinet-level or comparable representatives from each of the parties to the Agreement.[12] The Council, which convenes at least once a year, implements the Agreement by establishing committees to address specific issues.[13] The Agreement specifies that all decisions of the Council are public unless otherwise dictated.[14] The Council committees deliberate environmental issues and recommend solutions to environmental disputes.[15]

The CEC Secretariat serves as an independent body subject only to the authority of the Council.[16] An Executive Director heads the Secretariat and serves for a three-year term subject to one additional renewal period.[17] The Executive Director appoints and supervises the staff of the Secretariat in accordance with general standards established by the Council.[18] The Council, by a two-thirds vote, may reject any appointment that does not meet these standards.[19] The Secretariat prepares an annual report on CEC activities and the status of Party compliance with Agreement provisions.[20] The Secretariat's basic function, in conjunction with the Council, is to provide public access to environmental information.[21]

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[9] Luke C. Hester, *President Signs Executive Order on Commission for Environmental Cooperation and NAFTA Side Agreement*, E.P.A. 94-R-120, 1994 WL 190984 (E.P.A.).

[10] Sandra Le Priol-Vrejan, *The NAFTA Environmental Side Agreement and the Power to Investigate Violations of Environmental Laws*, 23 HOFSTRA L. REV. 483, 493 (1994).

[11] Martha Siefert, *The NAFTA's Environmental Side Agreement: Is the Mandatory Arbitration Procedure Fact or Fiction? A Proposal to Allow for Citizen Suits in the Greening of Mexico*, 3 SW. J.L. & TRADE AM. 467, 473 (1996).

[12] North American Agreement on Environmental Cooperation Commission for Environmental Cooperation Council Rules of Procedure [hereinafter "Rules"],<http://wwwcec.org/english/ profile/council/proced>.

[13] David Lopez, *Dispute Resolution under NAFTA: Lessons from the Early Experience*, 32 TEX. INT'L L. J. 163, 184 (1997).

[14] Priol-Vrejan, *supra* note 10, at 495.

[15] Linda DuPuis, *The Environmental Side Agreement Between Mexico and the United States—an Efective Compromise?*, 8 FLA. J. INT'L L. 471, 489 (1993).

[16] Priol-Vrejan, *supra* note 10, at 496.

[17] North American Agreement on Environmental Cooperation, Section B: The Secretariat [hereinafter "Secretariat"] <http://wwwcec.org/english/resources/agreement/eng05.cfm>.

[18] *Id.*

[19] *Id.*

[20] Priol-Vrejan, *supra* note 10, at 496.

[21] *Id.*

The Joint Public Advisory Commission ("Commission") consists of fifteen representatives selected from the public and non-governmental organizations.[22] The Commission's job is to advise both the Council and the Secretariat.[23] Specifically, the Commission ensures that the Council and Secretariat are properly apprised on technical issues and public perspectives regarding individual disputes.

C. Dispute Resolution of Non-Enforcement and Enforcement Matters

The Agreement divides disputes into enforcement and non-enforcement matters. The procedures and duties of the Council and the Secretariat differ depending on which category governs a particular dispute.

1. Enforcement Matters

The Agreement characterizes a dispute as an enforcement matter when a government is accused of failing to effectively enforce environmental laws.[24] The Agreement further divides enforcement matters according to the nature and timing of the government's alleged nonperformance. If a complaint simply alleges that a government has failed to adequately enforce environmental laws, Articles XIV and XV supply the procedures for resolving the dispute.[25] However, if a complaint also alleges that the government has established a pattern of continuous, negligent execution of environmental laws for an extensive period of time, then Articles XXII through XXXVI regulate the dispute.[26]

a. Article XIV

Under Article XIV, non-governmental organizations and individuals residing in the appropriate territory may initiate dispute resolution by petitioning the Secretariat.[27] This petition, commonly called a "submission," must not exceed

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[22] Hester, *supra* note 9.
[23] Baron, *supra* note 8, at 606.
[24] Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation [hereinafter "Guidelines"] <http://www.cec.org/english/citizen/Guide08>.
[25] *Id.*
[26] Lopez, *supra* note 13, at 185.
[27] Guidelines, *supra* note 24.

fifteen pages and must clearly identify the Submitters.[28] The Secretariat evaluates the submission to determine if it needs to prepare a response or to compile a factual record.[29] The Council reviews the Secretariat's evaluation and may instruct the Secretariat to create a factual record and/or publicly disclose the final record, if the decision is supported by a two-thirds vote. The record, which includes public comments, may influence the government's perception of the controversy. However, Article XIV does not provide any binding method for settling disputes or enforcing environmental obligations.

b. Article XXII

Article XXII of the Environmental Side Agreement governs disputes in which a party alleges that a government subject to NAFTA continuously and persistently fails to enforce environmental laws.[30] The Article XXII process begins when any party requests consultation.[31] If the parties do not settle the dispute, or settle it inappropriately, any participant may then request the Council to intervene. The Agreement requires the Council to hold a special session within twenty days of the request, unless other arrangements are made.[32] The process incorporates the expertise of CEC members, but Article XXII also allows the Council to consult non-governmental experts.

If the special session does not resolve the dispute after sixty days, Article XXII allows NAFTA parties to utilize a Council-supervised arbitration panel.[33] Any party to the allegation may request the services of an arbitration panel, but the Council must agree to use the panel by a two-thirds vote.[34] The panel is composed of five arbitrators selected from a roster of governmental and non-governmental experts. The panel's duty is to review the complaint to determine if there is a consistent pattern of non-enforcement. Article XXII mandates that submissions must be in writing to provide parties with notice. It also guarantees a hearing so that all parties have the opportunity to participate in the process.

The panel must report its conclusions within 180 days of convening. The panel's report must include specific findings and recommendations. The parties

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[28] *Id.*
[29] *Id.*
[30] Baron, *supra* note 8, at 613.
[31] Lopez, *supra* note 13, at 185.
[32] *Id.* at 186.
[33] *Id.*
[34] *Id.*

may submit written comments during a sixty-day period before the panel publishes its final report. If the final report validates the allegations, then the parties should implement the resolutions offered in the final report. The parties may resolve the dispute in three different ways.[35] First, the parties may agree to implement the panel's specific plan. Second, the parties may agree to implement certain aspects of the plan. Third, the parties may fail to agree on any plan. If the parties implement the plan partially or not at all, then Article XXII requires further enforcement procedures.[36]

If the parties do not fully resolve the dispute, the panel may reconvene upon request. If the parties agree on only certain aspects of the plan, and fail to adequately implement that plan, the panel must reconvene within sixty days of a formal request.[37] If the panel agrees that implementation is deficient, it can impose a monetary enforcement assessment against the deficient party.[38] If that party neglects to pay the assessment, the council can suspend any NAFTA benefits held by the offending party up to the assessment amount.[39] If the parties do not adopt any plan at all, then the panel, upon request, will reconvene within ninety days and impose a monetary enforcement assessment at that time.[40] If the parties continue to neglect their duty to fulfill the assessment, the Council may suspend their NAFTA benefits. The Council may impose trade sanctions as a last resort.[41]

2. Non-Enforcement Matters

The Agreement characterizes complaints that do not implicate enforcement of environmental laws as non-enforcement matters. Article XIII of the Agreement governs non-enforcement matters. This section allows the Secretariat to investigate the charges and prepare a report, which the Council supervises.[42] The Council may instruct the Secretariat not to investigate particular charges. When the Secretariat does investigate, the Council may choose to publicly dis-

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[35] *Id.*
[36] *Id.* at 187.
[37] *Id.*
[38] Siefert, *supra* note 11, at 476.
[39] *Id.*
[40] Lopez, *supra* note 13, at 187.
[41] Siefert, *supra* note 11, at 476.
[42] Lopez, *supra* note 13, at 185.

close the final report. Generally, the dispute resolution process for non-enforcement matters is less detailed than the process required for enforcement matters.

III. COMPARISON OF GENERAL TRADE THEORIES WITH SPECIFIC ENVIRONMENTAL SIDE AGREEMENT PROVISIONS

The Environmental Side Agreement establishes processes grounded in two competing trade theories—legalism and pragmatism. The Agreement reflects legalistic theory to the extent that it provides specific, predetermined procedures that are similar to adjudicatory processes.[43] On the other hand, the Agreement's flexible processes that encourage party settlement reflect a more pragmatic philosophy.[44]

A. Legalism

Legalism stems from the liberal, transactional paradigm of decision-making and thus incorporates a lawyer-like approach to dispute resolution.[45] Legalists prefer pre-established rules and formal processes. Legalists assume that by relying on reason and principle, they can build a just international system that utilizes clear, easily applied legal rules that promote both prosperity and order.

The Environmental Side Agreement applies legalistic principles in various stages of the dispute settlement process. For example, Article XIV enforcement matters allow individuals and non-governmental organizations to formally file petitions. Further, Article XXII utilizes a rule-oriented procedural system with strict time limits. Arbitration panels convened under this Article consist of predetermined representatives selected from a formal roster. The panel employs many quasi-judicial processes, including formal fact-finding, a holding that validates or dismisses allegations, and a resolution action plan. The fact finding, holding, and resolution all resemble trial court procedures which personify the goals and theories of legalism.

Legalistic procedures invest the dispute resolution process with certainty and legitimacy. In this sense, legalism promotes clear decisions, effective implementation, open processes, fair decisions, and stable trade rules. Further, it

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[43] Uri Litvak, *Regional Integration and the Dispute Resolution System of the WTO After the Uruguay Round*, 26 INTER-AM. L. REV. 561, 571(1995).

[44] *Id.*

[45] *Id.*

resolves the prisoner dilemma and theoretically gives officials an increased resistance to governmental pressure.[46]

Conversely, such formal requirements may discourage creative settlements. In some circumstances, legalistic processes promote strict temporal and response rules that may aggravate party relations.[47] Article XXII procedures can erect barriers between the parties by identifying a clear winner and loser. Such zero-sum outcomes divide parties and interfere with open dialogue. Parties who adhere to strict rules may find themselves embroiled in a lengthy resolution process that exhausts their resources without resolving the problem. More importantly, strict rules and lengthy procedures often subsume critical discussion about the reasons why a government failed to enforce environmental laws. In this sense, legalistic processes can be counter-productive.

B. Pragmatism

Pragmatism stems from principles of conservatism and realism, and encourages a flexible settlement process.[48] Pragmatic theory formally advocates diplomatic processes that allow parties to negotiate on their own terms. However, pragmatism may encourage "power politics," in which states assert their power through threats of physical and commercial force.[49] Pragmatic processes also tend to discourage public participation.

The Environmental Side Agreement embodies pragmatic principles encouraging parties to negotiate and settle. The Article XXX consultation period precedes the panel process and encourages parties to settle if they can resolve their differences through an acceptable agreement. If their resolutions are not completely implemented, then the panel reconvenes to consider monetary assessment or benefit suspension. This procedure provides additional time during which the parties may settle on their own accord.

Pragmatism offers the parties a flexible dispute resolution system that encourages frank discussions and creative solutions. Pragmatism allows the parties to dispense with unnecessary rules and procedures, and thus may give them more time and energy to really analyze and address the reasons why a govern-

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[46] *Id.* at 572.
[47] *Id.*
[48] John H. Jackson, *The Crumbling Institutions of the Liberal Trade System*, 12 J. WORLD TRADE L. 93, 99 (1978).
[49] *Id.*

ment has failed to comply with environmental laws. Pragmatic theory recognizes the political reality and the costs involved in free trade agreements. These practical processes ensure that accountable, informed, elected officials instead of judges decide trade policy. However, such processes provide these benefits at the expense of public involvement, and thus may encourage anti-democratic principles.[50] In addition, these informal processes may unfairly disadvantage countries with relatively fewer resources for gathering information and bargaining.[51]

IV. THE COZUMEL PIER CASE

A. The Submission

On January 18, 1996, three Mexican environmental groups presented a submission under Article XIV of the Environmental Side Agreement. This submission alleged that the Mexican government failed to properly evaluate the environmental impacts of constructing a public harbor terminal. The terminal was designed to serve tourist cruises on the Island of Cozumel in the State of Quitana Roo, Mexico.[52] The protesting environmental groups feared that construction of the pier would adversely affect the Paradise Coral Reef and the Caribbean Barrier Reef, both located near Cozumel Island, off the Yucatan Coast.[53] The coral reefs embody sensitive ecosystems protected by a special legal regime, under which the construction of a port terminal for international cruisers requires government approval.[54]

The submission alleged that the Mexican government had violated several environmental regulations. First, the submission alleged that the Mexican government violated the intent of the 1988 General Law on Ecological Equilibrium and Environmental Protection ("Ecology Law").[55] Article 28 of the Ecology Law

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[50] *Id.*

[51] *Id.* at 100.

[52] Recommendation of the Secretariat to Council for the Development of a Factual Record in Conformity with Articles 14 and 15 of the North American Agreement on Environmental Cooperation [hereinafter "Recommendation"] Submission No. SEM-96-001 (January 18, 1996) <http://wwwcec.org.>. The protesting environmental groups included the Grupo de los Cien, the Mexican Center for Environmental Law, and the Natural Resources Protection Committee. Environment: Groups File NAFTA Petition over Port Project in Mexico [hereinafter "Petition"] 13 ITR 4 d21 (1996).

[53] Registry, *supra* note 6.

[54] Petition, *supra* note 52.

[55] Ley General del Equilibrio Ecologico y la Proteccion al Ambiente, D.O., 28 de enero de 1988, *translated in* Doing Business in Mexico, pt. XI, app. 2 (1996).

and the relevant Environmental Impact Assessment regulation ("EIA") require that an approved EIA precede any public or private works or activities that may produce ecological imbalances.[56] These laws define an ecological imbalance as "the alteration of the interdependent relationship between the natural elements that make up the environment, which may have a negative effect upon the existence, transformation and development of human populations."[57] The EIA must disclose the possible adverse effects of the works or activities on the ecosystem in general; it may not simply recite a list of resources utilized in a particular project.[58]

The Cozumel Port submission also contended that the Mexican government failed to comply with subpart (c) of Condition Five in the Port Terminal Concession as issued by the Secretary of Communication and Transportation on July 22, 1993. Condition Five states that within three months, the concessionaire is required to present a department-reviewed EIA on the construction and operation of the port terminal to the Secretary of the Executive Project.[59] The "Law of Ports" that governs the concession defines "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."[60]

Finally, the Cozumel Port submission alleged that the Mexican environmental authorities disregarded the related on-shore port terminal facilities, including a passenger building, access road and parking lot, causing a possible adverse impact on the specific and general vicinity and sensitive ecosystems.[61] The allegations asserted that adverse repercussions of the construction threatened the specific site and general ecosystem.

B. The Mexican Government's Response

In response to the submission, the Secretariat requested a formal response from the Mexican government on February 8, 1996.[62] The response submitted

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[56] 7.1 Screening or Determining When an EIA is Required [hereinafter "7.1 Screening"] <http://wwwcec.org/infobases/law/d.>.
[57] *Id.*
[58] Recommendation, *supra* note 52, at 1.
[59] *Id.* at 2.
[60] *Id.*
[61] *Id.*
[62] *Id.* at 1.

by the Mexican government ("Mexico") on March 27, 1996 questioned both the Secretariat's decision to accept the submission and the allegations of the environmental groups.

First, Mexico asserted that the activities challenged in the submission were based on acts which took place before the Agreement was enacted or the CEC was established.[63] Article XIV(1) of the Agreement limits the scope of inquiry to allegations that a Party "is failing" to effectively enforce its environmental law.[64] Mexico argued that the actively present tense of the statutory language excluded retroactive application to activities predating Article XIV. Thus, Mexico concluded, the Secretariat should neither have accepted the submission nor requested the Mexican government to respond.

Second, Mexico contested the standing of the environmental groups. It alleged that the groups had not sufficiently established that any direct harm or injury would flow from construction of the pier.[65] Specifically, Mexico maintained that the Submitters failed to "establish a necessary relation between the alleged environmental damage to the flora and fauna of Paraiso's reef and the alleged violations of environmental law."[66] On a related note, Mexico asserted that the domestic remedies available under Mexican law were not exhausted.[67]

Third, the Mexican government's response also argued that it did not need to evaluate the impacts of the on-shore facilities and the impacts of pier construction in a single document. Instead, Mexico insisted, the Construction Site met all applicable EIA requirements via a document called Muelle de Cruceros en Cozumel, Quintana Roo ("Cruise Ship Pier, Cozumel, Quintana Roo").[68] Mexico noted that the Secretary of Communication and Transportation had authorized the construction of the Pier, not the separate transportation facilities, and thus the latter could be reviewed separately.[69] The Mexican response highlighted the separable nature of the activities in an effort to prove that an overall project analysis was not necessary.

Fourth, Mexico rejected the allegation that the construction stage under review was subject to Condition Five of the Ecology Law. Instead, Mexico as-

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[63] Recommendation, *supra* note 52, at 2.
[64] *Id.*
[65] *Id.* at 1.
[66] Registry, *supra* note 6, at 2.
[67] David G. Schiller, *Great Expectations: The North American Commission on Environmental Cooperation Review of the Cozumel Pier Submission*, 28 U. MIAMI INTER-AM. L. REV. 437, 461. (1997).
[68] Recommendation, *supra* note 52, at 2.
[69] *Id.*

serted that the project had to meet Condition One before it became subject to Condition Five.[70] The government argued that since the Condition One prerequisite remained unfulfilled, construction activity—at least at this stage—was not subject to Condition Five.

Finally, Mexico argued that Article XXVIII of the Ecology law did not apply to the pier construction because the project did not utilize the "natural resources" protected by that law. Article XXVIII defines activities involving natural resources as "activities which utilize animals, forest resources, aquifers of the subsurface as necessary raw materials, or which propose to directly extract such resources."[71] Noting that the pier construction would not affect any of these resources, Mexico maintained that the Article XXVIII provision invoked in the environmental groups' submission was inapplicable to the project.

C. Secretariat Observations

1. Jurisdiction and Scope of Article XIV

The Secretariat supported the Mexican government's basic presumption that the Agreement does not authorize retroactive application of Article XIV. However, it recognized limited situations in which the continual non-enforcement of environmental laws falls under the Agreement.[72] The systematic failure to enforce environmental regulations presents current enforcement obligation problems. According to the Vienna Convention of the Law of Treaties, a Treaty's provisions relating to any act taking place or any situation ceasing to exist, related to a party and before the Treaty's date of entry, are not binding on that party.[73] The environmental organizations and Mexico, in their arguments, both refer to actions that occurred before and after the execution of the Agreement in 1994. According to the Vienna Convention, a present duty to enforce may originate from a situation which has not ceased to exist. Accordingly, the Secretariat found that further study of this matter does not constitute retroactive application of the Agreement, nor would such a study contravene Article XIV.[74]

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[70] *Id.*
[71] *Id.*
[72] *Id.* at 3.
[73] *Id.*
[74] *Id.*

2. Article XIV(1) and XIV(2)

Article XIV delineates threshold requirements essential for a party submission and establishes criteria to guide the Secretariat's analysis of the submission's merits.[75] Article XIV(1) requires that written submissions clearly identify the person or organization alleging specific violations of environmental law, provide sufficient information and documentary evidence to be subject to review, and indicate proper notification of the relevant authorities.[76] In addition, the submission must aim to promote enforcement, rather than harass industry.[77] The Secretariat concluded that the Submitters complied with the procedural requirements of Article XIV(1) and satisfied the threshold requirements.[78]

Article XIV(2) delineates specific criteria for the Secretariat to determine the merits of the submission. Based on the criteria, the Secretariat decides whether to formally request a response from the Party allegedly in violation of the environmental laws. Article XIV(2) inquires whether the submission alleges harm to the individual or organization making the submission; whether further investigation advances the goals of the Agreement; whether private remedies already available under domestic law were pursued initially, and; whether the submission was drawn exclusively from mass media reports.[79] In this case, the Secretariat indicated that the Party's legal standing might be lacking because the particularized level of individual harm might not have been sufficiently asserted in the submission.[80] However, Paradise Coral Reef's unique character and the public nature of marine resources fulfill the spirit and intent of Article XIV.[81] The parties adequately pursued local remedies by availing themselves of the administrative procedures. Furthermore, additional study of the matter would substantially promote the objectives of the Agreement.[82] Although the level of particularized individual harm is questionable, the activity's nature and threat to natural resources justified further review.

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[75] *Id.*
[76] Guidelines, *supra* note 24, at 2.
[77] Secretariat, *supra* note 17, at 3.
[78] Schiller, *supra* note 67, at 463.
[79] Secretariat, *supra* note 17, at 3.
[80] Recommendation, *supra* note 52, at 3.
[81] *Id.*
[82] *Id.*

3. Secretariat's Recommendations to the Council Following Initial Determination

On June 7, 1996, the Secretariat, in accordance with Article XV(1), recommended to Council that a factual record be prepared citing possible failure to adequately enforce environmental law.[83] A factual record would consider all relevant information regarding Mexico's reasons for not requiring an EIA on the Cozumel Port Terminal project. Furthermore, a factual record would provide clarification of the environmental laws at issue, most notably the definition of a port terminal under the Law of Ports.[84] The recommendation suggested an analysis of conduct or acts, occurring after the entry into force of the Agreement, advancing the Agreement's objectives to "enhance compliance with, and enforcement of, environmental laws and regulations."[85]

D. Status of the Submission Following the Secretariat's Observations and Recommendations

On August 2, 1996, two months after receiving the Secretariat's recommendation, the Council instructed the Secretariat to develop a factual record.[86] In the unanimous decision, the Council recognized Mexican initiatives recently declaring the Cozumel Reef area a national marine park and Mexico's intent to implement a park management plan.[87] The Secretariat notified the Submitters that Council received the final factual record three days earlier on July 25, 1997.[88] On October 24, 1997, the Council instructed the CEC Secretariat to release the final factual record to the public.[89] The factual record did not reach legal conclusions or determinations, but clarified the facts as they pertained to the submission's allegations.[90] The Agreement process terminated on October 24, 1997, following the Secretariat's release of the final factual record to the public.[91]

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[83] *Id.* at 4.
[84] *Id.*
[85] *Id.*
[86] Registry, *supra* note 6, at 2.
[87] North American Environment Ministers Take Next Step on Cozumel [hereinafter Ministers], <http://www.cec.org/new/Data>.
[88] *Id.* at 2.
[89] *Id.*
[90] *Id.*
[91] *Id.*

V. ANALYSIS OF THE SUCCESSES AND FAILURES OF THE ENVIRONMENTAL SIDE AGREEMENT IN THE DISPUTE RESOLUTION PROCESS OF THE COZUMEL PORT TERMINAL CONTROVERSY

NAFTA's inception met with resistance from broad sectors of the public, including environmentalists. The Agreement alleviated some of the environmental concerns; however, many deliberate and unintended weaknesses remain. Many scholars revere the Agreement as the "greenest free trade agreement ever negotiated anywhere" because of the innovative strides to recognize environmental threats within the international arena.[92] Still, the Article XIV dispute process reveals problems with the Agreement's goals, structure, and enforcement measures. These problems surface in the noteworthy Cozumel Port Terminal Submission under Article XIV.

A. Successes and Failures of the Agreement, in General

According to the EPA, NAFTA's success stems from the fact that it is the first trade agreement to require enforcement of environmental laws.[93] NAFTA, particularly the Agreement, encourages environmental cooperation among nations on a scale not previously witnessed throughout human history.[94] The EPA proclaims NAFTA as the "most environmentally sensitive trade package in history" as well as the best chance to rectify the problems vexing the U.S.-Mexico border.[95] The objectives encourage a high level of domestic enforcement of domestic environmental laws. Article XXII threatens sanctions for systematic failures of required compliance. The objectives also encourage public participation and allow citizen suits to the CEC to compel adherence to domestic laws. The new Agreement pushes all three countries to meet the highest environmental standards, not simply for cleanup, but also for prevention of pollution.[96] The Agreement represents an important mark in international concern for environmental problems within multiparty trade agreements.

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[92] Carol M. Browner, *Environmental News: Statement on the Environmental Side Agreement to NAFTA* [hereinafter "E.P.A. Review"], EPA 93-R-176, 1993 SL 316678 (E.P.A.).

[93] Carol M. Browner, Environmental News: Statement on Richey Appeal [hereinafter "E.P.A. Statement"], EPA 93-R0199, 1993 SL 375572 (E.P.A.).

[94] *Id.*

[95] *Id.*

[96] E.P.A. Review, *supra* note 92.

Although the environmental footholds secured by the Agreement are important, numerous deficiencies persist by design and through inaccurate foresight. The Agreement attempts to encourage enforcement of domestic laws that vary with each country. This composition produces infinite problems for environmental regulation and trade. The Agreement, by design, does not establish any international standards to regulate environmental management. To the contrary, NAFTA operates as a new experiment in regional organization.[97] However, at both the international and national levels, the Agreement neither establishes a specific level of environmental quality nor any regulatory environmental standards.[98] Therefore, the Agreement's objectives are too narrowly focused to enable any effective standards or structures to function appropriately.

The Agreement's focus on national enforcement of the environmental laws of each sovereign poses problems for the general free trade objectives of NAFTA. NAFTA calls upon each party to "provide high levels of environmental protection."[99] However, critics indicate that NAFTA provisions should explicitly state that lax environmental regulation and enforcement practices may constitute unfair trade practices, which should permit partner countries to apply for appropriate trade remedies.[100] Without such a provision, NAFTA might not advance high levels of environmental protection; rather, it might foster lower regulation requirements. Thus, the Agreement might implement trade practices encouraging very low standards for environmental compliance, provided that countries comply with whatever standards have been set in each region. The problem with NAFTA's objectives is that a party cannot relax its standards, while the issue of better enforcement is ignored in those objectives.[101] NAFTA countries currently have many environmental regulations. In fact, Mexico strengthened its laws with the 1988 Ecology Law to provide for better protection. Yet, no notable incentive exists to further strengthen environmental laws after NAFTA because those laws might interfere with economic trade costs. Therefore, lax enforcement and differential levels of environmental regulation might effectuate unfair trade practices.

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[97] Jeffery Atik, *Environmental Standards within NAFTA: Difference by Design and the Retreat from Harmonization*, 3 IND. J. GLOBAL LEGAL STUD. 81, 102 (1995).
[98] *Id.* at 82.
[99] *Id.* at 93.
[100] GARY CLYDE HUFBAUER & JEFFREY J. SCHOTT, NAFTA: AN ASSESSMENT 95 (Institute for International Economics 1993).
[101] *Id.* at 96.

B. Successes and Failures of the Cozumel Pier Dispute in Particular

The Cozumel Pier dispute process illuminates the successes and failures of the Agreement. The successes and failures exist interdependently throughout the Agreement process, yet are most notable in four areas of the dispute. These areas include public notice of the dispute, direct public involvement, the Mexican government's response, and the enforcement level of the factual record. The analysis will show the Agreement process improves upon prior free trade agreements, especially in relation to public involvement, but fundamental problems persist because Article XIV does not provide closure for the dispute.

First, the Agreement provides public notice through the release of the final factual record. The factual record notifies the public of all factual findings summarized by the Secretariat. The CEC releases updates on the Internet to allow for greater public access to current information. However, problems remain with the method and configuration of the information that the CEC releases to the public. The factual release on the Internet is limited as some of the information on the Cozumel Pier case is presented only in Spanish. The information released contains only factual findings and does not provide the public with concrete analysis. Overall, though, the release of the factual finding is beneficial because it provides notification to the public.

Second, the Agreement's citizen suit provisions allow the public to become more directly involved; however, environmental organizations still encounter standing problems. In this dispute, local and national environmental organizations filed the submission to present their concerns regarding Mexico's noncompliance with the Ecology Law and inadequate preparation of the EIA.[102] The environmental organizations initiated the entire Agreement process and prompted the response by the Secretariat and Council, leading to the final factual report on October 24, 1997. However, Mexico challenged the Submitters' standing, especially the ability to assert a direct injury related to the alleged damage of flora and fauna in Paraiso's reed and to demonstrate retroactive application of the Agreement to the 1988 Ecology Law.[103] The Cozumel Pier dispute demonstrates environmental organizations' ability to challenge compliance with environmental regulations, yet displays the standing problems that may discourage organizational involvement. Also, environmental organizations might not utilize

[102] Petition, *supra* note 52.
[103] Registry, *supra* note 6, at 2.

Article XXII because the Secretariat employs a multi-factored test to determine party standing.[104] If organizations can elicit governmental cooperation, as opposed to attacking government failure to systematically enforce environmental laws, the Secretariat might be more receptive to the organizations and find that further study would substantially promote the Agreement's objectives. Citizen suits, standing issues, and procedural challenges act as legalistic vehicles for resolution.

Third, the Secretariat does not mandate, but merely requests a response, from the Mexican government.[105] This pragmatic approach recognizes the sovereignty of the Mexican government, but fails to provide an adequate response to the Submitters' concerns. Although a response was merely requested, Mexico submitted the response questioning the Secretariat's decision to accept the submission and the environmental organizations' ability to assert a direct injury to the reef.[106] Even though the Secretariat's request does not mandate a governmental response, the Cozumel Pier dispute shows that a government acting under its own volition or influenced by public pressure might, in its self-interest, adequately respond to the allegations. However, the environmental organizations might encounter temporal and financial burdens during the submission process without receiving a governmental response.

Finally, the Article XIV process releases a final factual record to the public, but does not provide the parties with any binding resolution. The process does not furnish any guidelines to help direct dispute settlement. However, the Secretariat's release of the factual record might generate public pressure and effectively encourage party settlement of the dispute. This pragmatic aspect of Article XIV's dispute resolution process protects Mexico's sovereignty and autonomy in the international sector, yet fails to adequately address the environmental concerns over the port terminal construction. The organizations are financially burdened by the process and can only speculate about the effect that public pressures will have on the dispute.

The analysis of the Cozumel Pier submission reveals some benefits of the Article XIV dispute resolution process, including improved public notice and increased public consciousness over the possible environmental effects to the coral reefs. The release of the Secretariat's final factual record provides vital public notice. The CEC posted the release date of the final factual record on the

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[104] Recommendation, *supra* note 52, at 3.
[105] *Id.* at 2.

Internet in an attempt to increase access to the public. The environmental organizations also raised the level of public consciousness for environmental concerns within Mexico's borders in general, and increased awareness for the coral reefs in particular. The submission forced Mexico to reevaluate construction of the Cozumel Pier. As a result, on June 5, 1996, the government announced that the Cozumel Reef area would be a national marine park and declared its intent to implement a management study and plan for the park.[107] While Mexico improved upon its treatment of the Cozumel area, declaration of the park does not preclude construction of a pier, passenger terminal, and other infrastructure for international tourist cruises.[108] Nevertheless, the agreement's innovative process for free trade agreements provided public notice of the dispute while preserving the autonomy of NAFTA parties.

This analysis also reveals the inherent failures of the Article XIV dispute resolution process, most notably the lack of any binding concrete results. The CEC gathers information and presents a public factual record but fails to provide any analysis of the findings. The Secretariat in the Cozumel Pier case failed to settle the dispute or issue any conclusions or proposals for resolution. The CEC's role terminated once the final factual findings were released to the public. At the time of termination, the CEC process did not bind the parties to any settlement agreement. Although the submission raised international environmental awareness, the process instituted no effective solution to the dispute. The environmental organizations encountered financial expenses, yet received no definite solution.

VI. CONCLUSION

Although the Environmental Side Agreement strengthens NAFTA's environmental protection provisions, serious regulatory problems persist. First, the Agreement does not seek to regulate domestic substantive law, but merely encourages a heightened application of that law. Second, unless the submissions are filed under Article XXII, the dispute resolution process does not bind NAFTA parties. Third, even if submission allegations are accepted, the Submitters face numerous enforcement problems. The Agreement unsuccessfully attempts to

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[106] *Id.* at 1.
[107] *See* Minister, *supra* note 87.
[108] *Id.*

blend various trade practices. The different enforcement and non-enforcement measures raise environmental awareness if Submitters proceed carefully; however, awareness is but a step to effective environmental regulation and enforcement. The Cozumel Pier dispute demonstrates some of the benefits of Article XIV's processes such as public notification and increased awareness. The Cozumel Pier dispute also exemplifies the numerous failures of the resolution process because the parties failed to come to any agreement or settlement. Although the Agreement improves upon former treatment of environmental protection in free trade agreements, the Agreement fails to adequately resolve environmental concerns.