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# CITIZEN SUITS IN INTERNATIONAL ENVIRONMENTAL LAW: THE NORTH AMERICAN EXPERIENCE <sup>1</sup>

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## SUMMARY

This paper evaluates the effectiveness of alternative measures to promote compliance with international environmental law. A citizen directed submissions procedure that allows the public to trigger international review of states' behavior is favored over traditional methods of adjudication of claims by one state over another. The submission procedure is evaluated for performance on two separate models of compliance. The paper concludes that the submissions procedure has yet to be tested thoroughly to make substantive deductions about its efficacy. However, its record to date indicates that it has the potential to be effective both as a quasi-supranational tribunal and as a part of a managerial regime.

## 1 INTRODUCTION

The traditional way to promote compliance with international law is through adjudication of claims by one state that another state is violating its legal obligations. But state-to-state adjudication has played almost no role in promoting compliance with international environmental law. Environmental treaties usually do not provide for compulsory, binding adjudication, and states almost never invoke the voluntary procedures they do include. The question is, therefore, how should the international community best promote compliance with international environmental law? The North American Agreement on Environmental Cooperation creates an innovative submissions procedure, which allows citizen complaints to trigger international review of states' behavior. This paper first situates the procedure in the context of two models of compliance, and then evaluates the procedure's potential effectiveness.

## 2 SUPRANATIONAL ADJUDICATION, THE MANAGERIAL MODEL, AND COMPLAINT-BASED MONITORING

Some scholars argue that states do not bring environmental claims against one another because they are vulnerable to such claims themselves, and do not want to trigger retaliatory actions or establish undesirable precedents. One way to avoid this roadblock would be to allow private parties, such as environmental groups, to sue states before international tribunals (Wirth, 1994). International adjudication of private claims against states, or *supranational adjudication*, is rare, but it has been established in areas such as human rights and international investment law, and it has made inroads even in the World Trade Organization, whose arbitral panels can receive *amicus* briefs from private parties. And, of course, domestic environmental law such as that of the United States often provides private parties the ability to bring "citizen suits" as an integral means of enforcing compliance. Like traditional

state-to-state adjudication, supranational adjudication promotes compliance, by allowing impartial review of a state's behavior by a tribunal able to provide authoritative interpretations of the law. Moreover, supranational adjudication is arguably fairer than intergovernmental adjudication, because it allows private parties to pursue a claim directly, rather than waiting for their national governments to espouse – or, more likely, not espouse – their claim.

But not everyone is enamored with supranational adjudication, or adjudication at all, as a way to promote compliance with international law. In an influential book entitled *The New Sovereignty*, Abram Chayes and Antonia Handler Chayes argue that adjudication is costly, controversial, backward looking, and generally unsuitable for promoting compliance with complex environmental agreements. They urge greater use of nonbinding mechanisms that *manage* compliance rather than *enforce* it. They base their “managerial model” on two premises: (1) “as a practical matter, coercive economic — let alone military — measures to sanction violations cannot be utilized for the routine enforcement of treaties in today's international system, or in any that is likely to emerge in the foreseeable future”; and (2) states' failures to comply with their treaty obligations are usually due to limited capacity or ambiguous treaty language than to deliberate violations (Chayes, et al, 1995).

The managerial model seeks to address the underlying causes of these problems through cooperative means, such as nonbinding references to expert bodies to interpret ambiguities, conciliation to settle disputes informally, and technical or financial assistance to build states' capacity to comply. Monitoring states' behavior – systematically reviewing, assessing, and reporting on states' compliance with their obligations – may be the most important managerial tool, since it identifies obstacles

to compliance so that the proper tools may be brought to bear on them. Moreover, drawing attention to the state's behavior may itself induce the state to comply, to avoid the opprobrium that attaches to a violator of international law.

The managerial model has been criticized, but there is no doubt that states usually prefer persuasion to enforcement. International environmental agreements rely heavily on managerial mechanisms, and monitoring in particular, to promote compliance (Oran, et al, 1999). By far the most popular monitoring mechanism in international environmental law is self-reporting, which is now included in most multilateral environmental agreements. As a compliance mechanism, self-reporting has problems, however: reports are often untimely and inaccurate, and there is usually no institutional means to review and respond to them.

Some environmental agreements have established more sophisticated systems of review. The Montreal Protocol has one of the most highly developed and influential of these procedures. Like other environmental agreements, the Montreal Protocol requires each party to report annually on its implementation of the agreement. But the Protocol goes further, by incorporating a noncompliance procedure administered by an Implementation Committee of ten state parties, which can receive information on compliance from other parties and the Secretariat. The Committee reports to the Meeting of the Parties, which may provide assistance, issue cautions, or suspend specific rights under the Protocol, in order to bring the parties into compliance. Compared to other procedures in international environmental law, the Montreal Protocol Noncompliance Procedure is innovative and powerful, and it has been a model for other agreements. But it has also been criticized for being too much under the con-

trol of governments. States are unlikely to bring complaints against one another to the Implementation Committee for the same reasons that they avoid state-to-state adjudication, and the government representatives on the Implementation Committee may be unlikely to recommend tough sanctions.

Monitoring completely under state control is likely to be ineffective, since states are often reluctant to call attention to shortcomings in their own or others' performance. Monitoring in the field of human rights has responded to this problem by allowing independent experts to assess or prepare reports on state compliance, and private parties (such as non-governmental organizations) to trigger the monitoring process. Human rights procedures illustrate four combinations of state control, independent expert review, and private party input: (1) self-reporting by monitored states to independent experts (such as reports filed under the Covenant on Civil and Political Rights); (2) reporting by independent experts that is triggered solely by states (such as the rapporteurs appointed by the UN Commission on Human Rights, a body of government representatives); (3) reporting by experts that is triggered by states but that has a role for private complaints (such as the 1503 procedure of the Human Rights Commission); and (4) complaint-based monitoring – that, is reporting by independent experts that is triggered solely by private complaints.

The most important example of complaint-based monitoring in human rights law is the Optional Protocol to the Covenant on Civil and Political Rights, which allows any individual subject to the jurisdiction of a state party to the Protocol to file a "communication" with the Human Rights Committee claiming that the state has violated a right set forth in the Covenant.<sup>2</sup> State control over the monitoring mechanism is limited to deciding

whether to be party to the Protocol. The independent experts who make up the Human Rights Committee screen the communications in accordance with set criteria, consider the admissible complaints and government replies, and publish their views on the merits. In comparison to the previous examples of monitoring, the complaint-based monitoring mechanisms created by the Optional Protocol look remarkably like supranational adjudication. In the words of Laurence Helfer and Anne-Marie Slaughter, the Committee not only acts as "a quasi-judicial monitoring body"; in many ways it "is behaving more and more like a judicial arbiter of human rights disputes" and employing "an increasingly court-like method of operation (Helfer, et al, 1997)." The similarities should not be overstated. Professors Helfer and Slaughter emphasize that the Human Rights Committee is not a supranational tribunal in the strict sense, since parties are under no legal obligation to comply with the views expressed by the Committee.

But the lack of binding decisions does not necessarily mean that the Committee is less *effective* than supranational tribunals in the strict sense. The effectiveness of a supranational tribunal cannot depend entirely on whether its decisions are legally binding, because no international court (and, for that matter, no domestic court) has the ability to *force* states to comply with legally binding decisions. That a decision is considered legally binding may increase its pull toward compliance, but no more than, and possibly less than, other factors. Professors Helfer and Slaughter compare the Human Rights Committee to the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR), the two most effective supranational tribunals, and conclude that "[a]lthough the Committee's effectiveness is nowhere near that of the ECJ and the ECHR, it is the similarities to, rather

than the differences from, its effective European neighbors that we find most striking (Helfer, et al, 1997).” They emphasize the Committee’s attempts to take steps to improve its effectiveness in many ways characteristic of supranational tribunals - ways that do not depend on whether its decisions are legally binding.

Complaint-based monitoring thus offers one of the chief benefits of supranational adjudication: the possibility that its decisions against states will be made effective even in the absence of a coercive way of enforcing them. It offers other advantages as well. It prevents states from exercising undue control over the procedure, since states cannot prevent or control either the private parties’ decisions to file complaints or the independent experts’ review of the complaints once filed. It allows claims from a great variety of sources and thereby provides the experts reviewing the claims more opportunities to identify and review instances of noncompliance. And allowing private parties to bring their complaints of violations of international law — complaints that otherwise would not be heard — to an impartial international body may better comport with the same ideas of fairness served by supranational adjudication.

Supranational adjudication and managerial monitoring are usually seen as completely different approaches to compliance. But there is no bright line between adjudication and monitoring. Both review states’ behavior in light of their obligations. The greater the degree to which a monitoring mechanism allows private parties to trigger independent expert review of allegations that states have violated international legal obligations, the more it incorporates elements of supranational adjudication. At the same time, however, the monitoring mechanism may continue to operate in a managerial context, relying on techniques of persuasion rather than enforcement.

Both the managerial model and supranational adjudication could be strengthened if their proponents recognized the way in which complaint-based monitoring can embed a form of incipient or quasi-supranational adjudication in a managerial approach to compliance.

Many commentators have suggested that the Montreal Noncompliance Protocol would be more effective if non-governmental organizations could play a role in triggering the monitoring mechanism, and if reports were reviewed or prepared by independent experts (Barrett-Brown, 1993). More generally, greater private participation in international environmental supervisory mechanisms seems necessary to make those mechanisms more effective and fair. To date, however, states have been reluctant to introduce the elements of private-party input and independent expert review into international environmental law. This is not particularly surprising. Compliance mechanisms develop slowly over time, and most environmental agreements are still in their first or second decade. States are often slow to accept private participation in any kind of compliance procedure. Nevertheless, individuals’ participation in compliance procedures is likely to increase, as part of the trend throughout international law for individuals to join states on the international plane.

### **3 COMPLAINT-BASED MONITORING IN NORTH AMERICA**

Outside the European Union, the only current example of complaint-based monitoring in international environmental law is the submissions procedure of the Commission for Environmental Cooperation. The Commission for Environmental Cooperation is an international organization created by the United States, Mexico, and Canada in the 1993

North American Agreement on Environmental Cooperation, the environmental side agreement to the North American Free Trade Agreement (NAFTA). The North American Agreement on Environmental Cooperation and the Commission for Environmental Cooperation provide a forum for regional cooperation to address many different types of environmental problems.<sup>3</sup> But they are particularly designed to address the concern, expressed loudly during the NAFTA debate, that by removing barriers to foreign investment in Mexico, NAFTA would lure companies to move there in search of a "pollution haven," thereby contributing to the degradation of the Mexican environment and putting pressure on all three North American countries to lower their environmental standards in a "race to the bottom." A key premise underlying this concern was that *as written*, Mexico's environmental laws were essentially equivalent to those of the United States, and that the problem was inadequate compliance with those laws. The challenge was not to require Mexico to write stricter standards into its law, but to assist or induce it to improve its implementation and enforcement of its standards.

To that end, Article 5 of the North American Agreement on Environmental Cooperation requires each party to "effectively enforce its environmental laws." Other provisions in the North American Agreement on Environmental Cooperation support that obligation. In particular, Articles 14 and 15 establish a complaint-based monitoring procedure very similar to those created by human rights agreements such as the Optional Protocol to the Covenant on Civil and Political Rights. Under Articles 14 and 15, the Secretariat may receive and review complaints, or "submissions," from private parties, and prepare reports, or "factual records." To lead to a factual record, a submission must

successfully negotiate a four-hurdle obstacle course.

First, it must meet admissibility requirements set forth in Article 14(1). The most important requirement is that the submission asserts a state party "is failing to effectively enforce its environmental law." In addition, the submission must be in a designated language of the state against which it is directed; it must identify the submitter; it must provide enough background information to allow the Secretariat to review it; it must appear to be aimed at promoting enforcement rather than harassing industry; it must indicate that the matter has been communicated in writing to the state; and it must be from a person

If the Secretariat decides that a submission merits requesting a response from a state party, the submission then faces the third hurdle: whether, based on the submission and the response, the Secretariat believes that a factual record is warranted. Article 14(3) identifies one circumstance under which the Secretariat may not proceed further: if the state concerned advises the Secretariat that the matter is the subject of a domestic legal proceeding being pursued by the state, or the subject of an international dispute resolution to which the state is a party. Otherwise, the North American Agreement on Environmental Cooperation gives the Secretariat no explicit guidance on how to decide whether a factual record is warranted. Presumably, however, the Secretariat should continue to take into account the factors listed in Article 14(2). In particular, whether the submission raises matters whose further study would advance the goals of the Agreement would seem of key importance in deciding whether a factual record is warranted.

If the Secretariat decides that a factual record is warranted, the submission faces a fourth hurdle. Under Articles 15(1) and 15(2), the Secretariat must inform the

Commission for Environmental Cooperation Council – the governing body of the Commission for Environmental Cooperation, composed of the parties' environmental ministers – of the reasons why it believes a factual record is warranted, and it may proceed only if the Council instructs it to do so. The Council decision is taken by a two-thirds vote, so the state concerned may not block a factual record. Nevertheless, any two of the parties, acting through their representatives on the Council, may stop the procedure at this point. The Agreement provides no constraints on the factors the Council may take into account in making their decision. Although the spirit of the Agreement suggests that the Council may deny the Secretariat's request only if it disagrees with the request on the merits, nothing prevents the Council from acting through lower motives, to protect their states from embarrassing reports.

If the Council approves the request, the Secretariat proceeds to prepare the factual record. The Agreement does not address the contents of a factual record. In practice, the Secretariat has broad discretion to decide what facts are relevant and should be included. The state parties have a final point of control over the procedure, however. When complete, factual records are submitted first in draft to the Council, so that the states may "provide comments on the accuracy of the draft." The Council then decides by a two-thirds vote whether to make the factual record public. (Unsurprisingly, the Council has approved the publication of the only factual records prepared to date. Public outcry would result from a Council attempt to suppress a final report relevant to compliance by one of the state parties with its obligation to effectively enforce.)

Although it is too early for definitive assessments of the submission procedure's effectiveness (as of January 1,

2001, seven years after the North American Agreement on Environmental Cooperation's entry into force, 28 submissions had been filed, which had resulted in two factual records<sup>4</sup>), the way that the Commission for Environmental Cooperation has handled its first cases provide a basis for a preliminary assessment of the procedure's potential effectiveness. The following sections first examine it as a type of emerging or potential supranational tribunal, relying primarily on a checklist developed by Professors Helfer and Slaughter to assess the effectiveness of supranational tribunals. The paper then examines the ability of the Commission for Environmental Cooperation submissions procedure to take advantage of its managerial context.

#### **4 THE COMMISSION FOR ENVIRONMENTAL COOPERATION SUBMISSIONS PROCEDURE AS A SUPRANATIONAL TRIBUNAL**

The thirteen factors on the Helfer/Slaughter checklist fall into three categories: factors within the control of the states that establish the tribunal; factors within the control of the tribunal itself; and factors often beyond the control of either states or tribunals. Within each category, the checklist ranks the factors in tentative order of importance. Where the checklist overlooks or misjudges characteristics of the Commission for Environmental Cooperation procedure relevant to its potential effectiveness as a supranational tribunal, this paper modifies the checklist, adding three new factors to it.

##### **4.1 Factors Within the Control of States**

The first group of factors on the checklist is those within the control of the states that establish the tribunal: (a) its composition; (b) its functional capacity; (c)

its independent fact-finding capacity; and (d) whether its decisions are legally binding. I add three factors to this list: (e) the transparency of the tribunal's procedures and decisions; (f) the ability of states to control key points in the adjudicative process; and (g) links to possible coercive enforcement mechanisms.

#### 4.1.1 Composition

Professors Helfer and Slaughter suggest that a tribunal will have greater authority if its members are chosen from respected jurists, and if its members have particular expertise in the subject matter of the tribunal. The Commission for Environmental Cooperation procedure is administered by two members of the Secretariat, who consult a Committee of Legal Experts composed of three law professors from each country, and who may hire independent experts if necessary. As a result, the Secretariat seems to have, or have access to, sufficient legal expertise. The Helfer/Slaughter model might suggest formalizing and heightening the role of the distinguished members of the Committee, however, to increase the respect accorded to the Commission for Environmental Cooperation's decisions.

#### 4.1.2 Functional Capacity

Functional capacity asks whether the tribunal can attract and resolve a steady stream of cases. Its ability to do so depends on whether its rules of procedure allow it to process its caseload effectively, and on whether it has sufficient financial resources. The Commission for Environmental Cooperation procedures seem efficient and open: they allow any resident of North America to file a claim, regarding enforcement of virtually all domestic environmental laws. But it will need additional resources. Two staff members probably cannot promptly dispose of the submissions that will be filed in

the next few years if the procedure remains fairly popular, much less the number that will be filed if its popularity grows. As the procedure starts to produce reports on state compliance, it is likely to attract additional complaints, which require more resources to resolve promptly and effectively. But at the same time, the procedure's success at reporting on state compliance may make states more uncomfortable with it. One of the challenges facing the Commission for Environmental Cooperation is whether it will continue to receive the financial support it needs.

#### 4.1.3 Independent Fact-finding Capacity

To be effective, a tribunal must be able to elicit credible information on which to base its decisions. The Secretariat does have this ability. In preparing a factual record, the Secretariat is required to consider any information provided by a state party, but it may also consider any relevant information that is submitted by interested persons or developed by the Secretariat or independent experts. Moreover, Article 21 of the North American Agreement on Environmental Cooperation requires state parties to provide the Secretariat "such information as [it] may require, including promptly making available any information in its possession required for the preparation of a report or factual record, including compliance and enforcement data."

#### 4.1.4 Legally Binding Decisions

Procedural decisions of the Commission for Environmental Cooperation Secretariat – that is, decisions that determine whether a submission meets the requirements for moving to the next stage of the procedure – are binding on submitters, since they have no choice but to respect an adverse decision. A Secretariat decision that a submission justifies requesting a response under Article 14(2) is binding on the concerned state, in

the sense that the North American Agreement on Environmental Cooperation requires the state to respond to the submission, if at all, within a set number of days after a request from the Secretariat. But the Secretariat's decision that preparation of a factual record is warranted is not binding unless the Council approves it by a two-thirds vote. Moreover, factual records are never binding. Even if a factual record establishes that a state party is failing to effectively enforce its environmental law, nothing in the Agreement suggests that the Secretariat or the Council may *order* the state to comply by effectively enforcing its law. Nor does it appear that the Secretariat can "decide" whether the state has failed to effectively enforce its environmental law.

The Helfer/Slaughter model might suggest that factual records should decide whether a state has effectively enforced its environmental law, and perhaps even explicitly decide whether a state has violated Article 5 of the Agreement. But such decisions would probably exceed the states' expectation of the scope of a factual record. Nor is it clear that such decisions would make the procedure more effective. As long as a factual record identifies the facts relevant to whether a party has effectively enforced its environmental law, it does not seem enormously important whether the Secretariat concludes the factual record by stating its view on whether the facts indicate that the law was effectively enforced. If the factual record is well prepared, its readers will be able to draw their own conclusions as to that ultimate question. If, on that basis, readers conclude for themselves that the law was not effectively enforced, they will be able to use the factual record to try to induce the state to enforce the law more effectively in the future.

#### 4.1.5 Transparency

If a procedure is not transparent to

the public – that is, if its procedures, documents, and decisions are not publicly available – then the public may not be able to obtain the knowledge necessary to oversee and support the procedure. On the whole, the Commission for Environmental Cooperation procedure receives high marks for transparency. Submissions, responses, procedural decisions, Council decisions, and factual records have generally been made available to the public promptly in accordance with the North American Agreement on Environmental Cooperation and the Guidelines.

#### 4.1.6 State Control

States may establish procedures that allow them to oversee and second-guess decisions in individual cases. Professors Helfer and Slaughter do not include this factor, perhaps because it is not present in the tribunals they examine. But where it is present the factor is particularly important, since the greater the ability of states to control key points in the adjudicative process, the less effective a tribunal is likely to be. States do not control most of the decision points in the Commission for Environmental Cooperation submissions procedure. They have no control over which submissions are filed, and they cannot prevent the Secretariat from deciding that a submission is admissible, merits a response from a state party, and warrants preparation of a factual record. Nor can the states control the content of the factual record itself. But their control of two key points in the procedure – the decision to authorize the Secretariat to prepare a factual record and to make a factual record public – has the potential to undermine the effectiveness of the procedure. States could give up this control by amending the agreement or, in a less binding step, declare that they will always vote to affirm a Secretariat recommendation for a factual record and to make

all factual records public. To date, however, far from giving up this control, states have been tempted to extend it, both by refusing to authorize factual records recommended by the Secretariat and by exercising ongoing oversight of factual record preparation. Although states have generally resisted this temptation, if the Council does begin to micromanage the Secretariat and bring the procedure under *de facto* state control, that would clearly destroy the effectiveness of the procedure as any type of supranational tribunal.

#### 4.1.7 Links to Coercive Mechanisms

Even if enforcement mechanisms are unlikely to be used, as long as they have any value as a deterrent they may increase the effectiveness of the tribunal. Part Five of the North American Agreement on Environmental Cooperation allows one state party, with the approval of two-thirds of the Council, to take a claim that another state party is engaging in a persistent pattern of failure to effectively enforce its environmental law to a panel of independent experts. Part Five also provides for sanctions to induce compliance with a panel decision. It is conceivable that a factual record indicating a failure to effectively enforce environmental law might contribute to pressure on a state party to bring a complaint under Part Five. Although the possibility is remote, it may nevertheless contribute to the effectiveness of the submissions procedure.

#### 4.2 Factors Within the Control of the Tribunal

The second category on the Helfer/Slaughter checklist includes factors within the control of the tribunal itself: (a) its awareness of its “audience” — i.e., the constituency that supports its work; (b) its neutrality and autonomy from political interests — that is, whether it makes decisions on legal principles rather than seeking merely

to reconcile the parties’ competing interests; (c) whether it proceeds incrementally, aware of its political limits; (d) the quality of its legal reasoning; (e) dialogue and cross-fertilization with other tribunals; and (f) the form of its opinions.

#### 4.2.1 Awareness of Audience

The main audience for the Commission for Environmental Cooperation submissions procedure is the audience of potential submitters. In principle, this constituency is enormous, since the procedure is open to any person or nongovernmental organization in any of the three countries. In practice, the most important potential submitters are environmental groups, which have filed the great majority of submissions. A key consideration for them is whether the Secretariat is interpreting the procedural requirements broadly, to allow as many submissions as possible to be considered, or narrowly, to exclude most submissions at an early stage. The Secretariat has taken the first approach whenever possible. In the longer run, a more important test may be whether the Secretariat continues to show independence from the Council in deciding whether to recommend the preparation of factual records and in preparing the factual records once approved. This factor thus depends at least partly on the Secretariat’s neutrality, the next factor on the checklist.

Environmental groups and other potential submitters are not the only constituents of the submissions procedure. Members of the public who would never consider filing a submission may nevertheless support the procedure as a way to help improve environmental protection in North America. The Commission for Environmental Cooperation is almost unique among international organizations in incorporating a Joint Public Advisory Committee designed to give the public a forum within the organization, and each of

the state parties has a National Advisory Committee to provide interested members of the public an additional way to influence their states' policy towards the Commission for Environmental Cooperation. The Secretariat has shown a strong awareness of this public constituency. It recognizes the need for public support and has used a variety of means, including its website, to provide information about the Commission for Environmental Cooperation and to publicize Commission for Environmental Cooperation actions.

#### 4.2.2 Neutrality

The Commission for Environmental Cooperation Secretariat has been willing, even in the earliest submissions, to make decisions in politically difficult cases. It has not shown any particular deference to states' suggested interpretations of the Agreement. Conversely, it has dismissed submissions — even by major environmental groups — that did not meet the requirements for admissibility. In short, the Secretariat's decisions appear to be grounded on legal interpretations of the Agreement rather than on fear of adverse reactions by, or the desire to curry favor with, states or submitters.

#### 4.2.3 Incrementalism

Tribunals, especially infant tribunals, must not forget their limits. As tribunals neutrally interpret and apply legal rules, they should look for ways to make the rules more acceptable to states and respond to political signals that they have gone too far. The Secretariat has been careful not to cross such political boundaries. In particular, it has resisted calls to push the legal limits set by the North American Agreement on Environmental Cooperation. Those calls began in the first two submissions, which alleged that the United States was failing to effectively enforce environmental laws as the result of

Congressional action. These two submissions raised a basic question of interpretation: can a legislative decision to suspend enforcement of environmental laws through withdrawal of funding be failure to effectively enforce those laws? A positive answer would have sent a strong signal to the environmental community that the Secretariat would interpret the scope of the procedure very broadly, and that it would press the governments not to relax their environmental protections. On the other hand, the states would have seen such a decision as an unreasonable interpretation of the Agreement. In the end, the Secretariat rejected the submitters' arguments. Although this response disappointed the environmental community, it avoided a potentially disastrous confrontation with states at the outset of the Secretariat's implementation of the submissions procedure.

#### 4.2.4 Quality of legal reasoning

The Helfer/Slaughter model considers whether decisions are *reasoned*, i.e., whether they systematically describe the opposing legal arguments and explain why they are approved or rejected. The Commission for Environmental Cooperation Secretariat's procedural decisions present the positions of the submitter and the responding state and carefully evaluate them in accordance with the terms of the North American Agreement on Environmental Cooperation, in a manner that resembles judicial review. Although the Secretariat's early policy was to issue reasoned procedural decisions only when dismissing a submission or recommending preparation of a factual record, the trend appears to be towards more detailed legal analysis. By emphasizing the importance of issuing reasoned decisions, Professors Helfer and Slaughter may overlook a more substantive measure of legal quality: Are the decisions consistent with the agree-

ment they are construing? To be considered well-reasoned, a legal decision must reach a *principled* resolution of the issues before it — i.e., a resolution that informed observers agree is consistent with the best (or at least a permissible) reading of the applicable law. By this standard, the Secretariat has received generally high marks from outside reviewers.

#### 4.2.5 Cross-fertilization

Professors Helfer and Slaughter believe that supranational tribunals can enhance their mutual authority by referring to one another's work. To date, no decision by the Commission for Environmental Cooperation Secretariat has cited another complaint-based monitoring mechanism or supranational tribunal, perhaps because no such institution has a mandate that overlaps substantively with that of the Commission for Environmental Cooperation submissions procedure. But other bodies do face similar *procedural* issues, such as the role of pursuit and exhaustion of local remedies, and in addressing those issues the Secretariat might usefully draw on their decisions.

#### 4.2.6 Form of opinions

This factor concerns whether opinions are presented with concurring and dissenting opinions, or as if the decision were unanimous. Opinions differ on which approach better promotes compliance. To date, this factor is not relevant to the Commission for Environmental Cooperation submissions procedure, since Secretariat decisions are not made by multiple decision-makers who may formally disagree with one another.

#### 4.3 Factors Often Beyond the Control of States or Tribunals

The final group of factors on the Helfer/Slaughter checklist are those often beyond the control of states or tribunals: (a)

the nature of the violations brought to the tribunal; (b) whether the states subject to the tribunal have domestic institutions committed to the rule of law and responsive to citizens; and (c) the degree to which those states are culturally and politically homogeneous.

#### 4.3.1 Nature of Violations

Professors Helfer and Slaughter point out that tribunals are more effective at “policing modest deviations from a generally settled norm” than responding to systemic problems requiring large-scale policy changes (Helfer, et al, 1997). They suggest that an important reason for the success of the two European tribunals is the limited nature of the complaints brought to them. In contrast, the Human Rights Committee has had much less success in responding to the gross human rights abuses brought to it. It is too early to decide whether the complaints to the Commission for Environmental Cooperation are more similar to the relatively limited complaints received by the European courts or the complaints of systemic abuses received by the Human Rights Committee. Complaints of failures to effectively enforce laws might be thought to be relatively minor deviations from norms that the states themselves have written into their domestic law. Conversely, such failures might implicate problems endemic to the legal system as a whole, in which case it would be much more difficult for the submissions procedure to help to cause the systemic changes necessary.

The alleged violations brought to the submissions procedure may affect its potential effectiveness in another way. If the violations are primarily directed against only one or two of the state parties, those states will be less likely to support steps to make the procedure more effective. As of January 1, 2001, the first 28 submissions were divided almost equally, with Mexico

the subject of eleven, Canada the subject of nine, and the United States the subject of eight. But the United States has been the subject of a disproportionately small number of submissions in light of the relative size of the states' populations. And submissions against Mexico and Canada have generally proceeded farther than those against the United States. The causes of this disparity are unclear. It may be that U.S. environmental groups are waiting to see whether the procedure gives them effective remedies beyond those they already have under domestic law. The disparity may prove to be only temporary, of course. But if the procedure comes to be seen as primarily directed against Canada and Mexico, they may resist supporting the procedure and instead look for ways to increase their control over it or otherwise weaken it.

#### 4.3.2 Domestic Institutions Committed to Rule of Law

Professors Helfer and Slaughter emphasize the importance of "domestic government institutions committed to the rule of law, responsive to the claims of individual citizens, and able to formulate and pursue their interests independently from other government institutions." Such institutions are a necessary condition for "maximally effective supranational adjudication," since supranational adjudication depends on the ability of domestic government institutions to use their power on behalf of the tribunal, either on their own initiative or as a result of pressure by private parties (Helfer, et al, 1997). Each of the North American Agreement on Environmental Cooperation parties has a system of law that provides legal rights to individuals and that is interpreted by a judiciary nominally independent of control by other government institutions. But despite recent attempts at reform, the Mexican judicial system has been criticized for being ineffective and under the control of the executive branch. To the extent

these criticisms are valid, they may cast doubt on the potential effectiveness of the Commission for Environmental Cooperation submissions procedure, but they may also increase the importance of the procedure to Mexican submitters. While potential submitters may see environmental remedies under U.S. law (and, to a lesser degree, Canadian law) as so effective that the Commission for Environmental Cooperation can add little to them, it may offer avenues for relief otherwise unavailable to those concerned with Mexican issues. In addition, the procedure may demonstrate the benefits of objective examination of environmental issues at the request of private parties in ways that help would-be reformers argue for increased access by private parties to domestic courts.

#### 4.3.3 Homogeneity

Professors Helfer and Slaughter say that many observers of the European supranational tribunals conclude that their success is due in part to the relative homogeneity of the states subject to those regimes, as opposed to the wide range of states that participate in global agreements like the Covenant on Civil and Political Rights. To the extent that homogeneity is a factor, it probably cuts against the potential effectiveness of the Commission for Environmental Cooperation submissions procedure. The three North American states have many environmental concerns in common, but they also have many differences in language, culture, and history. One result of these disparities is that superficially equal burdens weigh on the parties differently. For example, the parties pay an equal share of the expenses of the Commission for Environmental Cooperation, but Mexico's share is a far higher percentage of its budget for environmental protection than is that of the United States or Canada.

## **5 THE COMMISSION FOR ENVIRONMENTAL COOPERATION SUBMISSIONS PROCEDURE AS A MANAGERIAL COMPLIANCE MECHANISM**

At the same time the submissions procedure is a type of quasi-supranational tribunal, it remains an integral part of a managerial approach to compliance. Like other monitoring mechanisms, it produces reports on state behavior that rely on the effect of “sunshine” to induce compliance. Like other complaint-based monitoring mechanisms, it avoids many of the problems associated with excessive state control by giving key roles to private parties and independent experts. Most of the factors discussed above with respect to supranational adjudication are also relevant to the sunshine effect on which monitoring mechanisms rely for their effectiveness. In particular, the procedure’s ability to obtain facts, to take into account the complaints of private actors against states, to act in a transparent way, and to issue neutral, well-reasoned reports all make it more effective in managerial as well as supranational terms.

A complaint-based monitoring mechanism may also increase its effectiveness through its connections with other managerial mechanisms. The following sections examine the potential connections between the submissions procedure and two other mechanisms: Secretariat reports under Article 13 of the North American Agreement on Environmental Cooperation, and Commission for Environmental Cooperation cooperative programs.

### **5.1 Article 13 Reports**

Article 13 of the North American Agreement on Environmental Cooperation authorizes the Secretariat to prepare a report “on any matter within the scope of the annual program” without Council

approval, and a report on “any other matter related to the cooperative functions of the Agreement” unless the Council objects by a two-thirds vote. Since the cooperative functions of the North American Agreement on Environmental Cooperation include virtually every aspect of environmental law and policy, the potential scope of Article 13 is enormous. The only issues excepted from that scope are “issues related to whether a Party has failed to enforce its environmental laws and regulations” — in other words, issues subject to consideration under the Article 14/15 submissions procedure.

Article 13 is strong in some areas where Articles 14 and 15 are weak. Article 13 allows the Secretariat to examine environmental problems arising from inadequate domestic laws, problems that the submissions procedure has been criticized for ignoring. Moreover, Article 13 is almost entirely within the discretion of the Secretariat. And Article 13 is less inherently adversarial, since it does not require the Secretariat to decide between a submitter and a state with respect to a series of procedural questions, or issue reports that (at least conceivably) could help to trigger dispute resolution and trade sanctions under Part Five of the Agreement.

Article 13 reports will not be superior to Article 15 factual records in every case, of course. When the key issue is whether a law has been effectively enforced, it may be examined only through the Article 14/15 procedure. Submitters may also choose that procedure because it guarantees that the Secretariat will consider their submissions if they meet the requirements for admissibility. Article 13 reports and the citizen submissions procedure should therefore be seen as alternatives, which complement one another as part of an integrated approach to compliance with the North American Agreement on Environmental Cooperation. Which is

better suited for examining a particular problem depends on the nature of the issues to be studied.

Should the procedures be more closely integrated? At present, their connection primarily depends on the decision by a submitter to invoke one or the other, or both. The parties could amend the North American Agreement on Environmental Cooperation to give the Secretariat, the Council, or some combination thereof the authority to transfer submissions from one procedure to another. The dangers of such a course are obvious, however. Increasing the power of the Council would increase the ability of the state parties to micromanage the procedures to avoid embarrassing reports. Increasing the power of the Secretariat would decrease the power of the submitters to decide which procedure they prefer and would provide an avenue for state parties to pressure the Secretariat to transfer undesirable Article 14 submissions to the possibly less confrontational Article 13 procedure. On the whole, allowing the submitters to decide which procedure to invoke seems preferable.

Nevertheless, the Secretariat could take several steps to make the Article 13 procedure more accessible to submitters and to others interested in Article 13 reports. The Secretariat could institute on its website an Article 13 counterpart to the Article 14-15 Registry of Submissions, which might include: (1) Article 13 submissions, including any requests for Article 13 reports from state parties or the Joint Public Advisory Committee; (2) responses from the Secretariat to the submitters, including any explanations of why the submission did or did not contribute to a decision to prepare an Article 13 report; (3) decisions by the Secretariat to prepare an Article 13 report, including decisions not based on any outside request; (4) Article 13 reports and documents accompanying them; and (5) any general guidelines prepared by the

Secretariat explaining the factors it takes into account in deciding whether to prepare an Article 13 report. An Article 13 Registry would disseminate information about the Article 13 procedure and as a result facilitate more useful suggestions to the Secretariat about how it might be used. More generally, it would contribute to the effective use of Article 13 and its interaction with the Article 14-15 submissions procedure.

## 5.2 Interaction with Cooperative Programs

Much of the work of the Commission for Environmental Cooperation takes place in cooperative programs, approved by the Council and carried out by the state parties, the Secretariat, and working groups. The programs fall within one of four general areas: Environment, Economy and Trade; Conservation of Biodiversity; Pollutants and Health; and Law and Policy. Since 1995, the Law and Policy area has included an ongoing program on "Enforcement Cooperation," whose purpose is to promote more effective enforcement in the North American countries. In 1996, the Council established a North American Working Group on Environmental Enforcement and Compliance Cooperation, composed of "senior level environmental enforcement officials designated by the Parties," which assists in the development and fulfillment of the Enforcement Cooperation Program.

Currently, the Enforcement Cooperation Program has no connection with the submissions procedure. But the Council could expand the program to provide closer ties with the submissions procedure. In particular, the program could address possible enforcement problems identified through the submissions procedure. Not every factual record will necessarily benefit from follow-up. But factual records may identify two types of problems

that seem particularly well suited for further attention by the Commission for Environmental Cooperation. First, some factual records may concern more than one state party. Submissions may allege ineffective enforcement by more than one state, for example, or may concern a problem requiring the participation of more than one state to address. Indeed, one of the best uses of the submissions procedure may be to call attention to problems that require multilateral attention. And when such attention is needed, the obvious way to provide it is through the Enforcement Cooperation Program, which already provides a forum for addressing trinational enforcement issues. Second, while some failures to effectively enforce may be due to lack of will, it seems likely that many result in whole or part from lack of financial or technical capacity. The managerial model emphasizes that an effective system of promoting compliance includes ways to identify lack of capacity and to build capacity where necessary. By linking the submissions procedure with the Enforcement Cooperation Program, the Commission for Environmental Cooperation would be able to identify such cases and ways in which such capacity might be added.

## 6 CONCLUSIONS

The Commission for Environmental Cooperation submissions procedure is far too young for final conclusions about its effectiveness, but its record to date indicates that it has the potential to be effective both as a quasi-supranational tribunal and as part of a managerial regime. The most notable aspect of the procedure in practice may be the seriousness with which the Secretariat has taken its quasi-judicial role. By making well-reasoned, neutral decisions based on careful interpretations of the North American Agreement on Environmental Cooperation, the Secretariat has avoided alienating either states or submitters. The great challenge

facing the Secretariat is to find a way for factual records to be useful evaluations of disputed issues (so that submitters find the procedure worthwhile), without making factual records legal judgments rather than factual reports (so that states do not withdraw their support). The states face challenges as well. For the submissions procedure to be successful, they must provide adequate resources, and must resist the temptation to micromanage the Secretariat. If the Secretariat continues to merit the trust of the state parties and its public audience, and if the states continue to let the Secretariat work independently, the submissions procedure should continue to develop as a valuable way to promote compliance. That the Commission for Environmental Cooperation procedure has the potential for success does not, of course, mean that it will be successful in practice. Whether it does prove to be successful is important in ways that extend beyond its contribution to the success or failure of the North American Agreement on Environmental Cooperation. By revitalizing international adjudication of environmental disputes in a managerial context, the Commission for Environmental Cooperation submissions procedure may provide an example for those seeking to promote compliance with other international environmental agreements.

## NOTES & REFERENCES

- 1 A longer version of this paper was published as *A New Approach to Compliance with International Environmental Law: The Submissions Procedure of the NAFTA Environmental Commission*, 28 Ecology L.Q. 1 (2001).
- 2 Similar complaint procedures are attached to many other human rights agreements, including the Convention on the Elimination of All Forms of Racial Discrimination, the Convention Against Torture, and regional human agreements

in Europe, the Americas, and Africa.  
See *generally* Guide to International Human Rights Practice (Hurst Hannum ed., 1999).

- 3 Information about the Commission for Environmental Cooperation is available at its website, [www.cec.org](http://www.cec.org).
- 4 See Registry of Submissions on Enforcement Matters, <http://www.cec.org> (compiling the public documents in each case under the submissions procedure).
- 5 Barrett-Brown, Elizabeth, *Building a Monitoring and Compliance Regime Under the Montreal Protocol*, Yale J. Int'l L. 519 (1991).
- 6 Chayes, Abram & Handler Chayes, Antonia, *The New Sovereignty: Compliance with International Regulatory Agreements* 205 (1995).
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- 8 Wirth, David, *Reexamining Decision-Making in International Environmental Law*, 79 Iowa L. Rev. 769 (1994)
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- 11 Victor, David G. et al. eds, *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* (1998)
- 12 Brown Weiss, Edith and Jacobson, Harold K. eds. *Engaging Countries: Strengthening Compliance with International Environmental Accords*