

PROTECTING COSTA RICA'S OSA PENINSULA: CAFTA'S CITIZEN SUBMISSION PROCESS AND BEYOND

INTRODUCTION

A sharp and constant shriek disturbs the quietude of the forest; the birds flutter, shout and scatter. In a second, as if in slow motion, this wooden giant falls down conquered, victim of the teeth of the saw. . . . Then the silence returns.¹

The Osa Peninsula (the Osa), located in the southwest corner of Costa Rica, is considered the “last wild frontier” of the country.² This region houses “the most significant remaining areas of lowland Pacific tropical forest in Central America,”³ and contains one of the highest concentrations of unprotected primary rainforest in all of Costa Rica.⁴ These forests are comparable in “structural complexity and wealth of species” to those of the Chocó region of South America.⁵ Encounters with otherwise rare species,

1. Vanessa Loaiza Naranjo, *Reclaman planes forestales [Residents Dissatisfied with Forest Plans]*, LA NACIÓN (Costa Rica), Aug. 21, 2000 (translation by author), available at http://www.nacion.com/In_ee/2000/agosto/21/pais2.html.

2. The Nature Conservancy, *Osa Peninsula: Protecting Costa Rica's Last “Wildland Frontier” and Its Surrounding Waters* (2006), http://www.nature.org/wherewework/centralamerica/costarica/files/cr_osapeninsula.pdf [hereinafter *Osa Peninsula Fact Sheet*].

3. Thomas T. Ankersen et al., *Towards a Bioregional Approach to Tropical Forest Conservation: Costa Rica's Greater Osa Bioregion*, 38 *FUTURES* 406, 407 (2006). See also W. M. ADAMS, *GREEN DEVELOPMENT: ENVIRONMENT AND SUSTAINABILITY IN THE THIRD WORLD* 361 (2001) (noting that the Osa contains the largest rainforest on Central America's Pacific coast).

4. See Olman Segura-Bonilla, *Forest Policy in Costa Rica*, in *SUSTAINABLE FOREST MANAGEMENT AND GLOBAL CLIMATE CHANGE: SELECTED CASE STUDIES FROM THE AMERICAS* 225, 230 (Mohammed H.I. Dore & Rubén Guevara eds., 2000) (stating that 60 percent of Costa Rica's primary forests outside of national conservation areas are concentrated in three regions, one of which is the Osa). Diversity of tree species and multiple canopy layers characterize primary or “virgin” forests. *Id.*; FUNDACIÓN TIERRAS UNIDAS VECINALES POR EL AMBIENTE [UNITED LOCAL LANDS FOR THE ENVIRONMENT FOUNDATION], *STRATEGIC PLAN: ENVIRONMENTAL MONITORING FOR THE OSA PENINSULA* (2006), http://www.tuva.org/index.asp?side=Osa&page=osa/eer/strategic_plan.htm [hereinafter *TUVA STRATEGIC PLAN*]. Secondary forests, on the other hand, are areas that are “regenerating naturally, after the disappearance of a previous forest.” Segura-Bonilla, *supra*. Secondary forests have fewer layers of canopy than do primary forests, and although secondary forests are rich in biodiversity, they lack many of the characteristic primary forest species such as the jaguar and the tapir. *TUVA STRATEGIC PLAN, supra*. The Osa also contains a third type of forest: “managed” forests where timber is removed under “management plans.” *Id.* See also discussion of “management plans” *infra* Part II.B.

5. FUNDACIÓN TIERRAS UNIDAS VECINALES POR EL AMBIENTE [UNITED LOCAL LANDS FOR THE ENVIRONMENT FOUNDATION], *EVALUACIÓN ECOLÓGICA RÁPIDA DE LA PENÍNSULA DE OSA, COSTA RICA* (1992) [RAPID ECOLOGICAL ASSESSMENT OF THE OSA PENINSULA, COSTA RICA (1992)] § 2.4(b) (2006) (translation by author), <http://www.tuva.org/index.asp?side=Osa&page=osa/eer/intro.html>

such as the jaguar, scarlet macaw, tapir, or the great curassow, are common in the Osa.⁶ Humpback whales and dolphins calve in the Osa's waters, and four species of sea turtle use its beaches as rookeries.⁷ The Osa is home to all of Costa Rica's endangered mammals,⁸ at least 375 bird species, and between 4,000 and 5,000 species of plants, including more than 700 species of trees, many of which are also endangered.⁹ Moreover, scientists estimate that "between 2 and 3 percent of the flora of the Osa exists nowhere else on Earth," and the species recorded in the Osa make up nearly fifty percent of all species in Costa Rica.¹⁰ This region, therefore, is extremely valuable to the Osa's residents, Costa Rican citizens, and conservationists worldwide.

Unfortunately, the Osa is at risk. Despite government protection of much of the area through the establishment of national parks and forest reserves,¹¹ deforestation continues to threaten the stability of the ecosystem.¹² While studies have detected very little deforestation inside the Osa's two national parks, Corcovado and Piedras Blancas, the areas surrounding the parks have undergone "significant change."¹³ According to one study, only forty-four percent of the forest remaining on the Osa is "mature" and the remaining forest outside of Corcovado has been "altered."¹⁴ Deforestation outside of the parks threatens the biodiversity

[hereinafter TUV A RAPID ECOLOGICAL ASSESSMENT].

6. Ankersen, *supra* note 3, at 415–16; Osa Peninsula Fact Sheet, *supra* note 2.

7. Ankersen, *supra* note 3, at 416; Osa Peninsula Fact Sheet, *supra* note 2.

8. Osa Peninsula Fact Sheet, *supra* note 2. Included are the jaguar, puma, ocelot, tapir, and red-backed squirrel monkey. TUV A RAPID ECOLOGICAL ASSESSMENT, *supra* note 5, § 2.4(c).

9. G. Arturo Sanchez-Azofeifa et al., *Dynamics of Tropical Deforestation Around National Parks: Remote Sensing of Forest Change on the Osa Peninsula of Costa Rica*, 22 MOUNTAIN RES. & DEV. 352, 354 (2002).

10. OSA CAMPAIGN, LANDS OF LIFE: SAVING THE NATURAL TREASURES OF COSTA RICA'S OSA REGION: BIOLOGICAL SIGNIFICANCE, available at http://www.nature.org/wherewework/centralamerica/costarica/files/osa_campaign_fact_sheets.pdf (last visited Nov. 13, 2006).

11. See Osa Peninsula Fact Sheet, *supra* note 2 ("Today, a third of the peninsula is protected under some form of management."). The protected areas in the Osa include Corcovado National Park, Piedras Blancas National Park, Golfo Dulce Forest Reserve, and Golfito Wildlife Refuge. PARKS IN PERIL 151–53 (Katrina Brandon et al. eds., 1998). In addition, Isla del Caño, a marine reserve off the coast of the Osa, is similarly protected. *Id.* at 152.

12. See generally Sanchez-Azofeifa, *supra* note 9, at 355–57 (documenting deforestation trends in the Osa Peninsula and urging an evaluation of the current conservation efforts in the region).

13. *Id.* "No deforestation was detected inside the Corcovado National Park itself Deforestation was most pronounced beyond 5 km of the National Park boundary" *Id.* at 355. See also Caroline J. Stem, *The Role of Local Development in Protected Area Management: A Comparative Case Study of Eco-Tourism in Costa Rica* (Aug. 2001) (summary of dissertation results, Cornell University), http://www.eco-index.org/search/pdfs/197report_3.pdf ("Hunting and logging are not serious problems within the park [Corcovado] itself, but represent perhaps the gravest threats to the surrounding Golfo Dulce Forest Reserve.") (citation omitted).

14. Sanchez-Azofeifa, *supra* note 9, at 356.

and ecosystem integrity within the parks by isolating key species and limiting the genetic exchanges necessary to ensure their "long-term survival."¹⁵

Scientists and local residents attribute deforestation rates in the region to both legal and illegal logging. The Osa boasts old-growth forests with extremely valuable hardwoods, such as cristobal, mahogany, and nazareno, making it attractive to loggers.¹⁶ "Legal" logging occurs when government officials in the Osa authorize timber extraction through forest "management plans" under the Forestry Law.¹⁷ Many have criticized these management plans, believing them to be "unclear" and "lacking even the minimum requirements."¹⁸ "Illegal" logging, on the other hand, occurs when government officials fail to monitor timber extraction or fail to enforce the provisions of the management plans. For example, the Ministry of the Environment and Energy (MINAE), the government agency charged with the overall enforcement of environmental laws in the Osa and other protected areas in Costa Rica, is aware of the logging abuses but claims it lacks the funding and staff to control them.¹⁹ MINAE's own estimates

15. *Id.* at 356–57. For example, habitat studies estimate that jaguars need an area of at least 1500 square kilometers to maintain a healthy population, which exceeds the available mature forest area on the Osa. *Id.* at 357.

16. Nefer Munoz, *Illegal Logging Threatens Costa Rica's Primary Forests*, INTER PRESS SERVICE, Mar. 18, 1999, available at <http://forests.org/archive/samerica/ilthrosa.htm>.

17. See discussion of "management plans" and the Forestry Law *infra* Part II.B.

18. Julio Alberto Bustos, *Dispute over the Protection of the Environment in Costa Rica*, in BIODIVERSITY CONSERVATION IN COSTA RICA: LEARNING THE LESSONS IN A SEASONAL DRY FOREST 289, 292 (Gordon W. Frankie et al. eds., 2004); Quirico Jiménez Madrigal, *Opinión, Deforestación legalizada [Legalized Deforestation]*, LA NACIÓN (Costa Rica), Dec. 14, 2000 (translation by author), available at http://www.nacion.com/ln_ee/2000/diciembre/14/opinion5.html. According to Jiménez Madrigal, a dendrologist and forest engineer of Costa Rica's National Institute of Biodiversity (INBio), trees are "vilely extracted" under forest management plans that no one has proven "support the sustainability of the forest resource." Jiménez Madrigal, *supra*; Loaiza Naranjo, *supra* note 1. Thus, says Jiménez, "[I]n Costa Rica I do not believe in management plans; actually they are plans of exploitation, a legalized deforestation." Loaiza Naranjo, *supra* note 1. See also Mario Fernández Lobo, *Opinión, Talas "irregulares" en Osa ["Irregular" Logging in Osa]*, LA NACIÓN (Costa Rica), Aug. 31, 1999 (translation by author), available at http://www.nacion.com/ln_ee/1999/agosto/31/opinion4.html ("[F]orest plans . . . in some cases, contain flagrant 'irregularities.'"); *Opinión, Nuestra Amazonia [Our Amazon]*, LA NACIÓN (Costa Rica), Mar. 3, 1999 (translation by author), available at http://www.nacion.com/ln_ee/1999/marzo/03/opinion1.html ("A uniform criterion does not even exist for the number of trees that MINAE [the government agency] has authorized to be cut.").

19. See, e.g., Elizabeth Odio [Minister of the Environment and Energy], "*Los voy a meter a la cárcel*" ["I Am Going to Put Them in Jail"], LA NACIÓN (Costa Rica), Feb. 28, 1999 (translation by author), available at http://www.nacion.com/ln_ee/1999/febrero/28/pais2.html ("We know that we should increase the presence of the [MINAE] in the [Osa], but with the officials that we have we can do more than we are doing. We need an internal reorganization."). According to Guido Chaves, promotions director of the National Areas of Conservation of MINAE, "[A]lthough there exist forest management plans and laws that control illegal logging, the Government does not have the necessary resources to face the whole situation." Loaiza Naranjo, *supra* note 1. Chaves added that a very small

reveal that twenty-five percent of the wood for commercial use in Costa Rica is extracted illegally.²⁰ Other sources blame illegal logging on the failure of government agencies in the Osa to coordinate their efforts.²¹ “MINAE’s authorization of incomplete management plans as well as its refusal to enforce them once they have been authorized”²² demonstrates that even though Costa Rica may have advanced environmental legislation,²³ the Osa region needs effective government enforcement to halt deforestation.

The Dominican Republic–Central America–United States Free Trade Agreement (CAFTA), which promises to eliminate trade barriers between its six signatories, contains a “citizen submission” mechanism that citizens could use to publicly assert that the Costa Rican government is failing to enforce its environmental laws in the Osa.²⁴ Although a similar mechanism has been in effect for twelve years under a side agreement negotiated pursuant to the North American Free Trade Agreement (NAFTA),²⁵ CAFTA’s recent incorporation of the citizen submission process calls for a reexamination of this mechanism in light of NAFTA’s lessons for free trade and the environment. The Osa provides a unique perspective from which to view the effectiveness of the citizen submission process, both because of Costa Rica’s strong environmental legislation as well as evidence of a clear lack of government enforcement in the Osa region.²⁶ If the citizen submission process cannot be of use in a country with such features, this would cast serious doubt on the effectiveness of the process in general. With the entire Western Hemisphere on the brink of establishing a Free Trade Area of the Americas between North and South American countries, the trade-environment dialogue is increasingly important, as leaders, policy makers, and environmentalists alike attempt to reconcile the often conflicting interests of free trade and the environment. The effectiveness of the current attempt to reconcile these interests through the citizen submission process bears not only on the narrow question of whether CAFTA will benefit Costa Rica but also on the larger question of how trade

number of people are responsible for controlling logging, and there are many who take advantage of the situation. *Id.*

20. Bustos, *supra* note 18, at 291.

21. *Id.*

22. *Id.* at 293.

23. See discussion *infra* Parts II.B.1–5.

24. Dominican Republic–Central America–United States Free Trade Agreement art. 17.7, Aug. 5, 2004, 119 Stat. 462, available at http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html [hereinafter CAFTA].

25. North American Free Trade Agreement art. 14, Dec. 17, 1992, 32 I.L.M. 296 [hereinafter NAFTA].

26. *Infra* Parts II.B, III.A.1.

agreements should handle environmental concerns.

This Note explores one discrete area of the trade-environment debate: What possible opportunities might CAFTA offer to individuals desiring to protect the Osa region of Costa Rica? Part I sets up the discussion by reviewing the recent history of trade agreements related to CAFTA, illuminating the debate over these agreements and outlining the environmental provisions of CAFTA, NAFTA, and their environmental side agreements. Part II, by providing a brief overview of Costa Rica's economy and an outline of its key environmental laws, supplies the necessary context for evaluating arguments that CAFTA may benefit or harm Costa Rica's economy or environment. Part III takes a closer look at the citizen submission process presented by CAFTA and traces a hypothetical submission on behalf of the Osa through the initial stages of the process. Part IV examines the nature of the remedy afforded by the citizen submission procedure and asks whether such a remedy is adequate. Part IV further discusses CAFTA's improvements on its North American Agreement on Environmental Cooperation (NAAEC) predecessor. Finally, Part V draws conclusions as to whether CAFTA does in fact offer new and meaningful opportunities for protection of Costa Rica's Osa region.

I. BACKGROUND: NAFTA, CAFTA, AND THE FTAA

Negotiations for a Free Trade Area of the Americas (FTAA) have been in process for over a decade.²⁷ Former President Ronald Reagan envisioned a free-trade area stretching from "Alaska to Tierra del Fuego," but former President Clinton was the first to "formally broach[] the idea" at the Summit of the Americas in Miami in 1994.²⁸ Since the Miami Summit, the world has witnessed the development of two smaller regional free-trade agreements: NAFTA, and more recently, CAFTA.²⁹ The fundamental

27. Negotiations began at the First Summit of the Americas in Miami in 1994, which declared that the Americas are "united in pursuing prosperity through open markets, hemispheric integration, and sustainable development." First Summit of the Americas, Declaration of Principles, Miami, Dec. 9–11, 1994, 34 I.L.M. 808, available at <http://www.summit-americas.org/miamidec.htm>. The countries resolved to "conclude the negotiation of the 'Free Trade Area of the Americas' no later than 2005." *Id.* At the Second Summit of the Americas in 1998, the countries officially directed their Ministers of Trade to begin negotiations and reaffirmed their intent to conclude the FTAA negotiations by 2005. Second Summit of the Americas, Declaration of Principles, Santiago, Apr. 18–19, 1998, 37 I.L.M. 947, available at <http://www.summit-americas.org/chiledec.htm>. Since 1998, there have been three more summits. See http://www.ftaa-alca.org/Summits_e.asp for the Declarations of Principles and Plans of Action for all five summits, including drafts of the FTAA agreement.

28. Larry Rohter & Elisabeth Bumiller, *Trade Accord Eludes Americas Summit Group*, INT'L HERALD TRIB., Nov. 7, 2005, at 4, available at <http://www.iht.com/articles/2005/11/06/news/summit.php>.

29. CAFTA, *supra* note 24; NAFTA, *supra* note 25.

purpose of each of these agreements is to eliminate tariffs and other trade barriers among the parties, thereby opening the markets of the signatory countries to the imported goods of other signatories.³⁰ NAFTA served as the model for CAFTA, and both are most appropriately viewed as steps toward a future FTAA.³¹ Therefore, any meaningful discussion of CAFTA must reflect on NAFTA's past performance while looking into the future of a FTAA.

A. NAFTA and the NAAEC

While NAFTA's key purpose was economic in nature, its negotiations prompted what may have been the "first major public debate on the relationship of trade to environmental issues."³² Originally a creature of the George H. W. Bush administration, NAFTA became a key campaign issue for the 1992 election year. In the United States, labor and environmental groups united to force their issues onto the NAFTA agenda.³³ As a result,

30. NAFTA's core text contains provisions on agriculture, investment, competition, and intellectual property. NAFTA, *supra* note 25, chs. 7, 11, 15, 17. CAFTA's core text similarly contains provisions on investment and intellectual property, but it also contains provisions on labor and the environment. CAFTA, *supra* note 24, chs. 10, 15, 16, 17. Both NAFTA's and CAFTA's purposes include creating an "expanded and secure market" for the goods and services of the signatory nations and establishing a "predictable commercial framework for business planning and investment." CAFTA *supra* note 24 pmb.; NAFTA, *supra* note 25 pmb.

31. Current President George W. Bush's strategy was to expand NAFTA to Latin American countries and create a FTAA. K. Subramanian, *The Difficult Road to CAFTA*, HINDU BUS. LINE, Aug. 13, 2005, available at <http://thehindubusinessline.com/2005/08/13/stories/2005081300031000.htm>. Many of the South American countries, including Brazil, Argentina, Venezuela, and Bolivia, resisted pressure to join a free trade agreement because of NAFTA's perceived adverse impact on Mexico. *Id.* Without these key countries, the FTAA was defeated. *Id.* The United States, however, was able to salvage a free trade agreement with the Central American countries. Thus, as one commentator noted, "CAFTA rose from the ashes of the FTAA." *Id.* Some, believing that the purpose of CAFTA was "to isolate . . . and engage in a game of divide and rule," see CAFTA as a step toward a future revival of the FTAA. *Id.*

32. Howard Mann, *NAFTA and the Environment: Lessons for the Future*, 13 TUL. ENVTL. L.J. 387, 387 (2000). Although initial discussions during the NAFTA negotiations contemplated environmental issues, the negotiators ultimately chose to pursue two separate agreements: one would deal completely with trade issues, and the other with environmental issues. *Id.* at 392. This is known as the "parallel tracks" approach, since the two "parallel but contemporaneous negotiations" were analogous to "parallel rails of the same train track, both beginning and ending their journey at the same time and place." *Id.* Ultimately, however, "the bigger, faster NAFTA train" moved ahead of its environmental side agreement, and "the broader notion of parallel negotiations was never realized." *Id.* at 392-93.

33. Frederick W. Mayer, *Negotiating the NAFTA: Political Lessons for the FTAA*, in GREENING THE AMERICAS: NAFTA'S LESSONS FOR HEMISPHERIC TRADE 97, 99 (Carolyn L. Deere & Daniel C. Esty eds., 2002). According to this author, neither the environmental issues nor the labor issues alone would have been "sufficient to force the hand of Congress or the Bush administration." *Id.* "[A] labor connection greatly increased the clout of environmental groups on Capitol Hill . . . [while]

NAFTA negotiations stalled, and it became clear that “it would be difficult, if not impossible, to pass the NAFTA without support from some elements of the environmental community.”³⁴ Democratic presidential candidate Bill Clinton, pressured to take a position on NAFTA, supported the agreement but criticized its deficiencies on labor and environmental protection.³⁵ Clinton, once elected, refused to sign legislation implementing NAFTA without supplemental “side agreements” on these issues.³⁶ Out of this emerged the NAAEC, which aimed to “foster the protection and improvement of the environment . . . for the well-being of present and future generations.”³⁷ Thus, negotiation of the NAAEC was the key to obtaining support for NAFTA.³⁸

A deeper understanding of the environmental debate surrounding NAFTA is needed to fully appreciate the trade-environment struggle. Environmentalists were concerned that free trade between the countries would weaken environmental protection. The U.S. environmental community believed Mexico's environmental laws to be more “permissive”³⁹ than those of the United States and Canada, and considered Mexico's enforcement of these laws to be generally “weak.”⁴⁰ As a result, NAFTA's critics feared that U.S. and Canadian industries would relocate to Mexico, creating a “pollution haven” in the country where it is the least expensive to pollute.⁴¹ This relocation would then pressure the United States and Canada to weaken their environmental policies in an attempt to equalize competitive conditions, leading to a “race to the bottom” in

[t]he environmental connection helped labor unions broaden their appeal to the media and to the general public . . .” *Id.*

34. *Id.* at 102.

35. Steve Charnovitz, *The NAFTA Environmental Side Agreement: Implications for Environmental Cooperation, Trade Policy, and American Treaty-making*, 8 TEMP. INT'L & COMP. L.J. 257, 257 (1994).

36. *Id.*; North American Agreement on Environmental Cooperation, Sept. 14, 1993, 32 I.L.M. 1480 [hereinafter NAAEC]; North American Agreement on Labor Cooperation, Sept. 14, 1993, 32 I.L.M. 1499 [hereinafter NAALC]. For further discussion of the parallels between the NAAEC and the NAALC, see John H. Knox, *Separated at Birth: The North American Agreements on Labor and the Environment*, 26 LOY. L.A. INT'L & COMP. L. REV. 359 (2004).

37. NAAEC, *supra* note 36, art. 1(a).

38. Ignacia S. Moreno et al., *Free Trade and the Environment: The NAFTA, the NAAEC, and Implications for the Future*, 12 TUL. ENVTL. L.J. 405, 422 (1999). For more on the NAFTA negotiations, see Mayer, *supra* note 33, at 97 (reflecting on the leverage used by U.S. domestic environmental groups to bring environmental issues to the forefront of NAFTA negotiations).

39. GARY C. HUFBAUER ET AL., INST. FOR INT'L ECON., NAFTA AND THE ENVIRONMENT: SEVEN YEARS LATER 51–52 (2000).

40. *Id.* at 51.

41. KEVIN P. GALLAGHER, FREE TRADE AND THE ENVIRONMENT: MEXICO, NAFTA, AND BEYOND 3–7 (2004).

environmental standards.⁴² There is extensive disagreement as to whether such predictions have materialized.⁴³

Although NAFTA's text does contain some reference to environmental protection,⁴⁴ the "teeth" of NAFTA's environmental approach are found not in the main treaty text, but in its supplemental side agreement: the NAAEC. In the NAAEC's preamble, the parties affirm that they are convinced of "the importance of the conservation, protection and enhancement of the environment," and recognize "the interrelationships of their environments."⁴⁵ Notably, each party is obligated under the NAAEC to "ensure that its laws and regulations provide for high levels of environmental protection."⁴⁶ The parties are not held to any uniform environmental standards, but rather are required to maintain and enforce the environmental standards they set individually. This affirmative obligation to provide for "high levels" of protection stands in contrast to the more permissive language in NAFTA's core text.⁴⁷

The NAAEC set up an administrative structure, the Commission for Environmental Cooperation (CEC), to handle the agreement's environmental obligations. The CEC consists of the Secretariat, the

42. *Id.* at 7. In response to these concerns, free trade proponents point to what has become known as the "Environmental Kuznets Curve." *Id.* at 4–5. According to this theory, environmental destruction increases rapidly during the early years of economic development, but once the per capita income reaches a certain amount, rates of environmental damage decelerate. *Id.*

43. Compare HUFBAUER, *supra* note 39, at 51 (discussing developments in Mexico following NAFTA's ratification, including the adoption of a new environmental law, the establishment of a national agency to handle environmental issues, and a constitutional amendment for a right to an appropriate environment), and Humberto Celis Aguilar Alvarez, *The North American Free Trade Agreement's Impact on the Development of Mexican Environmental Law*, 81 U. DET. MERCY L. REV. 411, 418 (2004) (detailing improvements in Mexican environmental law and enforcement and concluding that "NAFTA has helped upgrade Mexico's environmental 'know-how,' which has resulted in harmonizing environmental standards"), with Kevin P. Gallagher, *Industrial Pollution in Mexico: Did the NAFTA Matter?*, in GREENING THE AMERICAS: NAFTA'S LESSONS FOR HEMISPHERIC TRADE 119, 119 (Carolyn L. Deere & Daniel C. Esty eds. 2002) ("between 1994 and 2000 industrial air pollution in Mexico . . . nearly doubled"). Canada's legislative activity since NAFTA, according to one source, is "competitiveness-driven deregulation." HUFBAUER, *supra* note 39, at 50.

44. First, the objectives stated in the preamble include undertaking the objectives "in a manner consistent with environmental protection and conservation" and strengthening the "development and enforcement of environmental laws." NAFTA, *supra* note 25, pmb1. In addition, while the agreement secures parties the right to establish appropriate levels of "human, animal or plant life or health," the parties must use "relevant international standards, guidelines or recommendations" as a basis for these measures without reducing the levels of protection. *Id.* arts. 712:1, 713:1. In pursuing their objectives under the treaty, the parties must also conduct a "risk assessment," taking into account "environmental conditions," among other factors. *Id.* art. 907. Finally, NAFTA states that "it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures." *Id.* art. 1114.

45. NAAEC, *supra* note 36, pmb1.

46. *Id.* art. 3.

47. NAFTA, *supra* note 25, arts. 712, 907, 1114.

Council, and the Joint Public Advisory Committee (JPAC).⁴⁸ The Secretariat, charged with providing “technical, administrative and operational support” to the Council,⁴⁹ reviews citizen submissions alleging a party’s failure to enforce its environmental laws and decides whether to recommend to the Council that a factual record be prepared.⁵⁰ One of the Council’s primary functions is to “serve as a forum for the discussion of environmental matters,”⁵¹ and the Council makes the ultimate decisions on whether factual records are prepared and released to the public.⁵² JPAC’s charge is to advise the Council “on any matter within the scope of [the] Agreement.”⁵³ Commentators considered the CEC a “landmark institution” at the time of its creation, and projected that it would become “a powerful three-nation bureaucracy” for the purposes of addressing environmental problems.⁵⁴

The NAAEC offers two main procedures for violations of its provisions: the “Submissions on Enforcement Matters,” by citizens of a party against the government of any party, and “Consultations” between the parties themselves.⁵⁵ The citizen submission process requires the Secretariat to consider submissions from “any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law.”⁵⁶ Submissions are required, among other things, to be “in writing,” providing “sufficient information” for the Secretariat to review the submission, and must be aimed at “promoting enforcement rather than at harassing industry.”⁵⁷ If the Secretariat finds that the submission has met the minimum requirements, it may decide to request a response from the accused Party.⁵⁸ In its response, the accused party must

48. NAAEC, *supra* note 36, art. 8. The Council consists of representatives from each of the parties and functions as the Commission’s “governing body by directing its work.” Moreno, *supra* note 38, at 42. Canada’s representative is its Minister of the Environment, Mexico’s is its Secretary of the Environment, Natural Resources, and Fisheries, and the United States’ is the Administrator for the Environmental Protection Agency. *Id.* at n.97.

49. NAAEC, *supra* note 36, art. 11:5. The Secretariat is headed by an Executive Director, chosen by the Council for a three-year term and rotating among the nationals of each party. *Id.* art. 11:1.

50. *Id.* arts. 14:1, 15:1.

51. *Id.* art. 10:1(a).

52. *Id.* arts. 15:2, 15:7.

53. *Id.* art. 16:4.

54. Charnovitz, *supra* note 35, at 274 (quoting Keith Bradsher, *Side Agreements to Trade Accord Vary in Ambition*, N.Y. TIMES, Sept. 19, 1993, at A1).

55. NAAEC, *supra* note 36, arts. 14, 22. Consistent with NAFTA, NAAEC, and CAFTA, this Note uses the term “party” to refer to the member states that are signatories to these agreements.

56. *Id.* art. 14:1.

57. *Id.* art. 14:1(a), (c)–(d).

58. *Id.* art. 14:2. The NAAEC states that in making this determination, “the Secretariat shall be guided by whether: (a) the submission alleges harm . . . ; (b) the submission . . . raises matters whose further study . . . would advance the goals of [the] Agreement; (c) private remedies available under the

notify the Secretariat “whether the matter is the subject of a pending judicial or administrative proceeding, in which case the Secretariat shall proceed no further.”⁵⁹ Then, if the Secretariat decides that the submission, “in the light of any response provided by the Party,” warrants development of a factual record, it will submit this decision to the Council and provide its reasons.⁶⁰ The Secretariat will only prepare a factual record if the Council, “by a two-thirds vote, instructs it to do so.”⁶¹ Finally, the ultimate decision of whether to release the factual record to the public is made by the Council, again, by a two-thirds vote.⁶²

Consultations, on the other hand, are not available to individual citizens but must be initiated by one of the member governments.⁶³ To initiate the consultation proceedings, a party may request consultations with any other party to discuss a party’s “persistent pattern of failure” to “effectively enforce its environmental law.”⁶⁴ If they are unable to resolve the matter, either party may request “a special session of the Council.”⁶⁵ The Council may make recommendations and attempt to help the parties “reach a mutually satisfactory resolution of the dispute.”⁶⁶ A two-thirds vote of the Council determines whether the recommendations will be made public.⁶⁷ If, however, the matter is not resolved by the special session, the unsatisfied party may invoke the NAAEC’s more formal proceedings. In this case the Council “shall . . . convene an arbitral panel to consider the matter,”⁶⁸ which functions in a trial-type fashion, involving a panel and rules of procedure, and may include experts and remedies.⁶⁹ Unlike the citizen submission process, a panel determination that a party has shown a “persistent pattern of failure” may result in the imposition of a “monetary enforcement assessment” or the suspension of benefits under NAFTA.⁷⁰

Party’s law have been pursued; and (d) the submission is drawn exclusively from mass media reports.” *Id.* art. 14:2(a)–(d).

59. *Id.* art. 14:3(a). The party may also submit “any other information” that it wishes, including information regarding “whether the matter was previously the subject of a judicial or administrative proceeding” or “whether private remedies in connection with the matter are available to the person or organization making the submission and whether they have been pursued.” *Id.* art. 14:3(b).

60. *Id.* art. 15.

61. *Id.* art. 15:2.

62. *Id.* art. 15:7.

63. *Id.* art. 22:1.

64. *Id.*

65. *Id.* art. 23:1.

66. *Id.* art. 23:4.

67. *Id.*

68. *Id.* art. 24:1.

69. *Id.* arts. 24–36.

70. *Id.* arts. 34–36.

B. CAFTA

CAFTA, called “a modest agreement between a whale and six minnows,”⁷¹ provoked a response in the United States rivaling that of its predecessor. While the U.S. Senate approved the CAFTA bill without a hitch, the U.S. House of Representatives (House) nearly voted down the bill. At the final count, near midnight Washington D.C. time, twenty-seven House Republicans remained opposed to CAFTA.⁷² The normal fifteen-minute voting time was extended while President Bush and House Majority Leader Tom Delay rushed to “persuade intransigent members.”⁷³ Fifteen House Democrats “broke ranks” with their party and voted in favor of CAFTA.⁷⁴ The need to secure votes for CAFTA resulted in what some journalists called “lobbying and . . . arm twisting” by the Bush administration.⁷⁵ This last-minute rush delivered the necessary support, and the House approved CAFTA by a vote of 217 to 215.⁷⁶

In the United States, this close vote reflects the nation's polarization on the CAFTA issue. Those in favor of the agreement believe it will increase trade and employment in all the member countries.⁷⁷ Those opposed to the agreement, including a majority of House Democrats and several Republicans from textile and sugar producing states, fear that CAFTA will lead to a loss of jobs and do little to prevent the exploitation of Central American workers.⁷⁸

71. Subramanian, *supra* note 31.

72. *Cafta-DR Scrapes Through US Congress*, LATIN AM. WKLY. REP., Aug. 2, 2005.

73. Subramanian, *supra* note 31. President Bush “personally intervened” to lobby House representatives opposed to the agreement to change their votes. *Id.* Tom Delay also “stayed up past midnight twisting arms.” Daniel P. Erikson & Eric Jacobstein, *Politics' Place at the Table*, FORT WORTH STAR-TELEGRAM, Sept. 28, 2005, at B13.

74. Erikson & Jacobstein, *supra* note 73. A coalition of labor unions called “Change to Win” plans to retaliate against the “CAFTA 15,” the House Democrats that voted for CAFTA, by refusing to endorse them in the next election campaign. David M. Drucker, *CAFTA Vote Not Haunting Democrats Yet*, ROLL CALL, Oct. 20, 2005, available at 2005 WL 16993243. Nanci Pelosi, then House Minority Leader and CAFTA opponent, similarly “threatened possible punishment on ‘a case-by-case basis’ for those [Democrats] who broke with the party line.” Erikson & Jacobstein, *supra* note 73.

75. *Cafta-DR Scrapes Through US Congress*, *supra* note 72. For example, the White House got the last vote by committing to restrict Chinese imports through quotas. Subramanian, *supra* note 31.

76. Subramanian, *supra* note 31. This made CAFTA an even closer vote than its predecessor, NAFTA, which was also hotly disputed. NAFTA was approved in the House by a vote of 234 to 200. *Cafta-DR Scrapes Through US Congress*, *supra* note 72.

77. Subramanian, *supra* note 31.

78. *Id.*

CAFTA's signatory countries faced strong internal opposition to the agreement as well. In El Salvador, the first country to ratify CAFTA, protestors interfered with congressional debate, delaying the vote on CAFTA for two days.⁷⁹ Similarly, in Honduras, thousands protested the legislature's ratification of CAFTA and set up highway blockades that halted cross-country commerce.⁸⁰ Protesters invaded the national assembly in Honduras and, after the ratification passed, broke into the building and smashed up windows and chairs.⁸¹ After legislators ratified CAFTA in Guatemala, police sealed the streets surrounding the Guatemalan Congress and clashed with protestors, injuring more than fifty protestors.⁸²

Like NAFTA, much of the public debate over CAFTA centers on the extent to which CAFTA protects the environment. Proponents of CAFTA say the inclusion of an environmental chapter in the text of the agreement "is in itself a victory."⁸³ The public submissions mechanism, allowing citizens to "raise specific problems associated with enforcement of environmental laws,"⁸⁴ is the first free trade agreement of its kind to incorporate environmental and trade provisions simultaneously in one text.⁸⁵ In addition, the Environmental Cooperation Agreement (ECA) gives additional "teeth" to CAFTA by providing for benchmarks to measure environmental performance and outside monitoring of progress in meeting the benchmarks.⁸⁶

Opponents, on the other hand, complain that CAFTA's environmental provisions are "pure rhetoric,"⁸⁷ and have merely "added a bit of green sweetener to a truly toxic stew."⁸⁸ Because CAFTA does not require the

79. *Muted Protests Greet First CAFTA Signings*, CARIBBEAN & CENT. AM. REP., Mar. 21, 2005.

80. *Free Trade Heads South*, PEACE MAG., July 1, 2005, at 19.

81. *Muted Protests Greet First CAFTA Signings*, *supra* note 79.

82. *Id.*

83. Diego Cevallos, *The 'Green' Promises of CAFTA*, TIERRAMERICA, Feb. 14, 2005, available at <http://www.tierramerica.net/2005/0212/iacentos.shtml>.

84. Office of the U.S. Trade Representative, CAFTA Briefing Book, CAFTA Policy Brief: Environmental Firsts in CAFTA (Feb. 2005), available at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/Briefing_Book/asset_upload_file601_7194.pdf [hereinafter CAFTA Policy Brief].

85. Press Release, Office of the U.S. Trade Representative, U.S., CAFTA-DR Countries Sign Two Supplemental Agreements to Facilitate Implementing the FTA's Environmental Provisions (Feb. 18, 2005), available at http://www.ustr.gov/Document_Library/Press_Releases/2005/February/US_CAFTA-DR_Countries_Sign_Two_Supplemental_Agreements_to_Facilitate_Implementing_the_FTAs_Environmental_Provisions.html [hereinafter USTR Press Release].

86. *Id.*

87. Cevallos, *supra* note 83.

88. Ángel Ibarra, *Environment*, in *WHY WE SAY NO TO CAFTA: ANALYSIS OF THE OFFICIAL TEXT 27* (Raúl Moreno ed., Karen Hansen-Kuhn trans. and ed., 2004), available at

adoption or maintenance of any uniform set of environmental laws, Central American signatories will simply maintain their existing “‘poor’ environmental standards.”⁸⁹ Moreover, the formal dispute settlement procedure is unavailable to individual citizens, and member governments may only invoke it when there has been a “sustained or recurring course of action or inaction.”⁹⁰ Countries, critics fear, might also attempt to evade enforcement of environmental laws through a CAFTA provision recognizing countries’ need to allocate enforcement resources as they see fit.⁹¹ Finally, environmentalists see a potential loophole in CAFTA’s exception for laws whose “primary purpose” is natural resource management.⁹² These criticisms, though directed at CAFTA for the moment, may reflect environmentalists’ underlying dissatisfaction with NAFTA’s environmental performance.⁹³

Unlike NAFTA, CAFTA contains its key environmental provisions in the main text of the treaty itself; these provisions are modeled on the NAAEC. First, CAFTA requires each country to “ensure that its laws and policies provide for and encourage high levels of environmental protection,” and demands that each country “strive to continue to improve those laws and policies.”⁹⁴ CAFTA also establishes an Environmental Affairs Council (EAC) made up of “cabinet-level or equivalent” representatives of each country.⁹⁵ CAFTA is similar to the NAAEC in that it offers both a citizen submission and consultation mechanism.⁹⁶

Although CAFTA incorporates the NAAEC’s citizen submission procedure almost in its entirety, there are some differences. Under CAFTA, the citizen submissions mechanism is triggered when any “person” of any party files a submission with the Secretariat alleging that a party is “failing to effectively enforce its environmental laws.”⁹⁷ The NAAEC, on the other

<http://www.ssc.org/resources/pdf/WhyWeSayNOtoCAFTA.pdf>.

89. Cevallos, *supra* note 83.

90. Sierra Club & Friends of the Earth, CAFTA’s Environmental Provisions: Weak, Unenforceable, and Full of Loopholes (2005) (quoting Article 17.2:1(a) of CAFTA), available at http://www.sierraclub.org/trade/cafta/weak_provisions.pdf.

91. *Id.*; see also CAFTA, *supra* note 24, art. 17.2 (“[E]ach Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities.”).

92. Sierra Club & Friends of the Earth, *supra* note 90 (quoting Article 17.2:13 of CAFTA).

93. See discussion *supra* Part I.A.

94. CAFTA, *supra* note 24, art. 17.1.

95. *Id.* art. 17.5:1.

96. Compare *id.* arts. 17.7, 17.10, with NAAEC, *supra* note 36, arts.14, 22.

97. CAFTA, *supra* note 24, art. 17.7. Because the NAFTA citizen submission mechanism is already available to U.S. citizens asserting that the United States is failing to enforce its environmental laws, U.S. citizens cannot file a submission against the United States under CAFTA. *Id.* art. 17.7:3.

hand, allows either a “non-governmental organization or person” to file a submission.⁹⁸ Aside from this difference, the threshold criteria for submissions under CAFTA and the NAAEC are essentially identical.⁹⁹ Once the Secretariat has determined that the submission meets these criteria, it may decide to request a response from the accused party.¹⁰⁰ In doing so, the same four factors “guide” the Secretariat’s determination under both CAFTA and the NAAEC.¹⁰¹ If the Secretariat believes that the submission warrants developing a factual record, it is to “inform the Council” and provide reasons.¹⁰² One major difference between the CAFTA citizen-submission process, however, and that of the NAAEC is that a two-thirds vote of the Council is not required for development of a factual record, but rather a factual record may be developed “by a vote of any party.”¹⁰³ Moreover, the factual record may be released to the public “by a vote of any party.”¹⁰⁴

CAFTA also provides for “consultations”¹⁰⁵ between the member governments, though the provisions regarding consultations under CAFTA and the NAAEC are slightly different. While the NAAEC provides for consultations regarding whether there has been “a persistent pattern of failure” by the accused party to enforce its environmental laws, CAFTA provides consultations regarding “any matter” arising under its environmental chapter.¹⁰⁶ The subject matter available for consultations under CAFTA proceedings is therefore potentially much broader than that of the NAAEC. In addition, CAFTA’s consultations “shall begin promptly,” and the request for consultations must contain “information that is specific and sufficient to enable the Party receiving the request to

This does not, however, preclude persons of a party “other than the United States” from filing a submission asserting that the United States is failing to enforce its environmental laws. *Id.*

98. NAAEC, *supra* note 36, art. 14:1.

99. *Compare* CAFTA, *supra* note 24, art. 17.7, with NAAEC, *supra* note 36, art. 14.

100. *Compare* CAFTA, *supra* note 24, art. 17.7:4, with NAAEC, *supra* note 36, art. 14:2.

101. *Compare* CAFTA, *supra* note 24, art. 17.7:4(a)–(d), with NAAEC, *supra* note 36, art. 14:2(a)–(d). There are only two differences between the guidelines under both agreements. Under CAFTA, the first factor, in addition to requiring that the submission allege harm to the submitter, also requires that the submission “is not frivolous.” The second factor requires that the Secretariat take into account “guidance” provided by the Council and the Environmental Cooperation Commission (ECC) in considering whether the submission raises matters whose further study would advance the goals of the agreement. *Compare* CAFTA, *supra* note 24, art.17.7(4)(a)–(b), with NAAEC, *supra* note 36, art. 14:2(a)–(b).

102. CAFTA, *supra* note 24, art. 17.8:1.

103. *Id.* art. 17.8:2.

104. *Id.* art. 17.8:7.

105. CAFTA, *supra* note 24, art. 17.10.

106. *Compare* NAAEC, *supra* note 36, art. 22:1, with CAFTA, *supra* note 24, art. 17.10:1.

respond.”¹⁰⁷ The NAAEC has no guidelines on the actual content of a request for consultations, although it does set a strict time frame for consultations.¹⁰⁸ The parties, under both agreements, “shall make every attempt to arrive at a mutually satisfactory resolution,” but if they are unable to resolve the matter, the parties may request that the Council be convened to address the matter.¹⁰⁹ Interestingly, though CAFTA allows parties to initiate consultations for “any matter” arising under its environmental chapter, only matters concerning a party’s failure to enforce its environmental laws “through a sustained or recurring course of action or inaction” have recourse to the more formal dispute settlement procedures contained in CAFTA Chapter Twenty.¹¹⁰

In addition to incorporating major environmental provisions into CAFTA’s core text, the CAFTA signatories also negotiated and signed the Environmental Cooperation Agreement (ECA).¹¹¹ This environmental side agreement establishes a framework for the contracting parties’ cooperation goals.¹¹² Under the ECA, the parties agree “to cooperate to protect, improve and conserve the environment, including natural resources.”¹¹³ The ECA creates an Environmental Cooperation Commission (ECC) charged with “establishing priorities for cooperative activities,” and “examining and evaluating the cooperative activities under the Agreement.”¹¹⁴ Finally, some of the ECA’s most noteworthy provisions include the “benchmarking” and “monitoring” of “short-, medium- and long-term goals for improvements in environmental protection” by outside organizations such as the United Nations Environment Programme.¹¹⁵

II. COSTA RICA’S ECONOMY AND ENVIRONMENTAL LAWS

Costa Rica, Central America’s most prosperous country,¹¹⁶ is the only

107. CAFTA, *supra* note 24, art. 17.10:2.

108. See NAAEC, *supra* note 36, art. 23:1 (setting the default time frame for resolving matters in consultation at sixty days).

109. CAFTA, *supra* note 24, art. 17.10:3–4; NAAEC, *supra* note 36, arts. 22:4, 23:1.

110. CAFTA, *supra* note 24, arts. 17.2:1(a), 17.10:1, 6–7, ch. 20.

111. Environmental Cooperation Agreement, Feb. 18, 2005, *available at* <http://www.state.gov/g/oes/rls/or/42423.htm> [hereinafter ECA].

112. *Id.* art. II.

113. *Id.*

114. *Id.* art. IV(1)(a), (c).

115. CAFTA Policy Brief, *supra* note 84.

116. Costa Rica’s per capita gross domestic product (GDP) for 2005 ranked the highest in Central America at around \$10,000, despite the fact that Guatemala’s GDP at official exchange rates was around \$8 billion higher than that of Costa Rica. See CENT. INTELLIGENCE AGENCY, WORLD FACTBOOK 2006, 139, 236 (2006), *available at* <http://www.odci.gov/cia/publications/factbook/index.html> (documenting both per capita GDP and GDP

CAFTA signatory yet to ratify the agreement.¹¹⁷ The issue has become politically “toxic.”¹¹⁸ In fact, disagreement over CAFTA may have caused this year’s presidential election to result in a near tie.¹¹⁹ Former president and Nobel Peace Prize recipient Oscar Arias, who opinion polls predicted would win the presidential race, had taken “a strong stand” in favor of CAFTA, while Otton Solis, presidential candidate for the Citizen Action Party, wanted to renegotiate the deal.¹²⁰ Arias believes that access to the U.S. market, which CAFTA promises, is “essential” because in Costa Rica, “[w]e are condemned to be traders We produce what we do not consume and we consume what we do not produce.”¹²¹ Solis expressed doubts about the economic benefits of CAFTA for Costa Rican citizens: “The law of the jungle benefits the big beast. We are a very small beast.”¹²² The February 7, 2006 election ended with 40.5 percent of the votes in favor of Arias and 40.2 percent in favor of Solis, leading the State Electoral

at official exchange rates for Costa Rica). See also RONNIE DE CAMINO ET AL., WORLD BANK, COSTA RICA: FOREST STRATEGY AND THE EVOLUTION OF LAND USE 85 (2000) (“Unlike many other Central American nations, Costa Rica is not mired in poverty . . .”).

117. *Presidente Arias se reunirá con Bush el 6 de diciembre* [President Arias Will Meet with Bush December 6th], LA NACIÓN (Costa Rica), Nov. 22, 2006 (translation by author), available at http://www.nacion.com/In_ee/2006/noviembre/22/ultima-sr904886.html.

118. James C. McKinley Jr., *U.S. Trade Pact Divides the Central Americans, With Farmers and Others Fearful*, N.Y. TIMES, Aug. 21, 2005, at 18. Rice farmers in Costa Rica are worried that they will be forced out of business if the agreement is approved, since U.S. rice farmers are heavily subsidized and have better technology. *Id.* Manufacturers, on the other hand, say that if Costa Rica does not ratify CAFTA, they will move to another country, since access to the U.S. market “is what all the manufacturers are looking for.” *Id.* Public perception of NAFTA’s effects on Mexico has given rise to some of the concerns over CAFTA. *Id.* “Opponents . . . point to the experience of Mexico, whose 10-year experiment in free trade with the United States has depopulated much of the countryside and sent waves of migration north of the border.” *Id.*

119. See, e.g., John McPhaul, *Costa Rica Election Another Blow to US Trade Pact*, REUTERS, Feb. 7, 2006, http://www.boston.com/news/nation/washington/articles/2006/02/08/costa_rica_election_another_blow_to_us_trade_pact (noting one commentator’s remark that the presidential vote “was a vote against the [free trade] model inspired by the Washington consensus”); Michael A. Weinstein, *Costa Rica Polarizes in a Leftward Shift*, POWER & INT. NEWS REP. [PINR], Mar. 17, 2006, http://www.pinr.com/report.php?ac=view_printable&report_id=459 (“The mounting frustrations among those disadvantaged by Costa Rica’s economic conditions broke out sharply and crystallized around the issue of accession to C.A.F.T.A. during the presidential campaign.”).

120. Weinstein, *supra* note 119. Arias served as Costa Rica’s president from 1986 to 1990, and his work mediating the agreement that ended the civil wars in El Salvador, Guatemala, and Nicaragua earned him the Nobel Peace Prize. *Id.* Arias’s position on CAFTA is that “economic development [can] only come through more free-market reforms to attract outside investment.” *Id.* Solis, to the contrary, called CAFTA a “factory of poverty,” and believes that free trade would “impede rather than enhance development.” *Id.* If Solis has the opportunity to renegotiate the agreement, he promises to “put people before foreign corporations” and “protect disadvantaged interests.” *Id.*

121. McKinley, *supra* note 118.

122. *Id.*

Tribunal to order a recount.¹²³ Electoral officials ultimately declared Arias the new president-elect, though he won by a slim margin of only 18,000 votes.¹²⁴ Regardless, the country's new leader will likely need to reexamine whether CAFTA, in its totality, is beneficial to Costa Rica. Since many of the opponents and proponents of CAFTA frame the dispute in terms of a choice between economic growth and environmental protection, an evaluation of CAFTA's suitability for Costa Rica should begin with a look at the current state of affairs in the country.

A. The Economy

CAFTA proponents see the agreement largely as a means to enhance the economies of the region.¹²⁵ However, Costa Rica already has a relatively high standard of living for Central America¹²⁶ and is known as "[t]he Switzerland of the American Continent."¹²⁷ Costa Rica's economy is largely agricultural, its major crops being coffee, pineapples, bananas, and sugar, but it has recently expanded greatly in the tourism and technology sectors.¹²⁸ Costa Rica's gross domestic product for the year of 2005 was around \$20 billion, with an unemployment rate of around 6.6 percent.¹²⁹ Around 18 percent of the population, however, still lives below the poverty line.¹³⁰

The forest sector does not play a very large role in the national economy.¹³¹ However, as one author has pointed out, the current method of evaluating the national economy "does not reflect the interrelationship between the environment and the economy."¹³² Forests provide environmental services, including the "capture of carbon dioxide, the preservation of biodiversity, the prevention of soil erosion, scenic beauty that promotes ecotourism, the maintenance of the water cycle and other services."¹³³ These values are not reflected in Costa Rica's annual GDP yet

123. Weinstein, *supra* note 119.

124. *World Briefing Americas: Costa Rica: Free-Trade Backer Is President-Elect*, N.Y. TIMES, Mar. 8, 2006, at A14.

125. Ricardo Castillo Mireles, *CAFTA Countries Face Port Shortcomings: A Look at How CAFTA Is Being Received in Central America*, LOGISTICS TODAY, Nov. 2005, at 7.

126. See sources cited *supra* note 116 (describing Costa Rica's relatively high GDP and lack of endemic poverty).

127. Castillo Mireles, *supra* note 125, at 7.

128. CENT. INTELLIGENCE AGENCY, *supra* note 116, at 139-40.

129. *Id.* at 139.

130. *Id.*

131. DE CAMINO, *supra* note 116, at 34. According to this study, timber provided "only 0.0085 percent of the total GDP between 1990 and 1996." *Id.*

132. Segura-Bonilla, *supra* note 4, at 231.

133. *Id.* at 227.

“are very valuable ethically, biologically and economically.”¹³⁴ Just how valuable these services are remains to be seen, since “to date there is little agreement on what methodology to use to establish the value for environmental services of the forest, how much the payment should be, or how it should be made.”¹³⁵ The value of forest protection in Costa Rica, therefore, might represent a much larger component of the economy than monetary figures suggest.

B. Environmental Laws

One of CAFTA’s major flaws, according to some environmentalists, is that it does not require countries to adopt any specific standards, but rather allows countries to maintain their existing “‘poor’ environmental standards.”¹³⁶ Costa Rica, however, already has in place a comprehensive set of environmental laws.¹³⁷ Although these laws are not perfect,¹³⁸ many see Costa Rica as a model for environmental policymaking.¹³⁹ The debate over CAFTA in Costa Rica presents an interesting contrast to the NAFTA debate in Mexico, since it is unlikely that U.S. industries would relocate to Costa Rica to avoid the high costs of environmental compliance. In addition, the existence of a wide array of environmental legislation in Costa Rica could present citizens with significant opportunities to assert under CAFTA’s citizen-submission process that the government is failing to enforce its environmental laws.

1. The Political Constitution Article 50

In 1994, Costa Rica formally amended its Political Constitution of Costa Rica to include the individual right to “a healthy and ecologically balanced environment.”¹⁴⁰ Article 50 further provides that each person is

134. *Id.*

135. *Id.* at 232–33.

136. Cevallos, *supra* note 83. See also discussion *supra* Part I.B.

137. One author considers Costa Rica’s environmental laws to be “fairly complete” and “a good set of policies.” Roxana Salazar, *Environmental Law of Costa Rica: Development and Enforcement*, in BIODIVERSITY CONSERVATION IN COSTA RICA: LEARNING THE LESSONS OF A SEASONAL DRY FOREST 281, 281 (Gordon W. Frankie et al. eds., 2004).

138. According to Salazar, these problems include discrepancies between promises and action, interpretation and enforcement issues, shortcomings in the laws and policies themselves, vertical control over environmental policies by one administrative agency, and lack of ecological and environmental understanding among the judicial branch. *Id.* at 281–82.

139. *E.g.*, Anthony G. Snider et al., *Policy Innovations for Private Forest Management and Conservation in Costa Rica*, 101 J. FORESTRY 18, 23 (2003) (“Costa Rica has established a system that can be a model for other tropical countries . . .”).

140. Constitución Política de la República de Costa Rica [Constitution] art. 50, *available at*

“entitled to denounce any act that may infringe [upon that] right and claim redress for the damage caused,” and the government is charged with the affirmative duty to “guarantee, defend and preserve” this right.¹⁴¹ The Constitutional Chamber of the Supreme Court of Costa Rica has taken this right seriously, stating in a recent case that “[t]he fulfillment of this requisite is a fundamental guarantee for the protection of the public life and the health, not only of the Costa Ricans, but in addition to all the members of the world community.”¹⁴² The Court has interpreted Article 50 to provide standing for any citizen seeking to use the provision for protection of the environment:

With respect to the environmental right, the traditional narrow conception of legal rights must be abandoned. The right must be understood as universal, belonging to all people, rather than arising from limited notions of property ownership, rights or concrete actions that can be exercised under conventional rules of law. A legal action under this right can accordingly be described as an action in the “diffuse interest” (public interest). Therefore, all members of the public equally affected by any particular

http://www.costaricalaw.com/legalnet/constitutional_law/constitenglish; Patricia Madrigal Cordero, *Enforcement and Compliance Programs in Central America*, in 1 FOURTH INTERNATIONAL CONFERENCE ON ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT 169, 177 (1998), available at <http://www.inece.org/4thvol1/cordero.pdf>. Even before Costa Rica incorporated Article 50 into its Constitution, however, the Constitutional Chamber of the Supreme Court of Costa Rica recognized environmental rights as human rights. *Id.* at 180. The Court derived these rights from both Article 21, which establishes that “[h]uman life is inviolable,” and Article 89, which establishes that the protection of natural beauty, conservation, and development of the historic and artistic heritage of the nation are cultural goals of the public. Constitución Política de la República de Costa Rica arts. 21, 89.

141. Constitución Política de la República de Costa Rica art. 50. This power to denounce acts that infringe on the right to a healthy and ecologically balanced environment is known as the “environmental denunciation.” Jorge Cabrera Medaglia, *Marco Institucional para la Aplicación y Cumplimiento de la Legislación Ambiental [Institutional Framework for the Application and Execution of the Environmental Legislation]* (on file with author) (translation by author). Citizens do not need special qualifications or property rights to invoke this mechanism, and they may “denounce” an environmental problem before any and all entities that possess “some competency” on the environment. *Id.* at 2. These entities include the Constitutional Chamber of the Supreme Court, the Environmental Administrative Court, the Areas of Conservation, the Department of Health, and the Technical National Secretariat (SETENA). *Id.* at 2, 23. Because of its broad availability, Costa Rican citizens have increasingly used the denunciation mechanism. *Id.* at 2. This has in turn led to “the emergence and proliferation” of non-governmental organizations and has also led to “a greater awareness in the population of the causes and consequences of the deterioration of [Costa Rica’s] resources.” *Id.*

142. *Bogantes v. Municipalidad del Cantón de San Ramón*, Sala Constitucional de la Corte Suprema de Justicia [Constitutional Chamber of the Supreme Judicial Court], Sentencia No. 09123 (2005) (quoting *Urbina v. Alcalde Municipal*, Sala Constitucional de la Corte Suprema de Justicia, Sentencia No. 04830 (2002)) (translation by author), available at http://200.91.68.20/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=XYZ¶m2=1&nValor1=1&nValor2=316361&strTipM=T&lResultado=2.

environmental wrong are empowered to bring an action to remedy that wrong.¹⁴³

Citizens have consistently invoked Article 50 to compel the government to address environmental grievances, with some success.¹⁴⁴ This provision is therefore a potentially broad basis upon which to assert that Costa Rica is failing to enforce its environmental law under CAFTA.

2. The Forestry Law

The Forestry Law of 1996 represents a significant development in Costa Rica's approach to forestry. First, the law requires that the State, as an essential and primary function, oversee the "conservation, protection, and administration of the natural forests," as well as the "production, use, industrialization, and promotion" of these forests "in accordance with the principle of suitable and sustainable use of renewable natural resources."¹⁴⁵ Land-use changes in forested areas are expressly prohibited, with the exception of permit authorization for limited purposes, including the "national convenience" and "human safety or scientific interest."¹⁴⁶ In addition, the Forestry Law requires that forest activity in each region in Costa Rica be subject to a forest "management plan" containing the environmental impact of the activity.¹⁴⁷ These plans must be in accordance

143. Madrigal Cordero, *supra* note 140, at 181.

144. *See, e.g., Bogantes*, Sala Constitucional de la Corte Suprema de Justicia, Sentencia No. 09123 (2005) (concluding that the municipality's allowance of waste to contaminate neighboring property violated Article 50 and ordering the Mayor of the municipality to correct the environmental contamination within three months); *Acosta v. Plan Regulador Sector Costero Turístico Playa Platanares*, Sala Constitucional de la Corte Suprema de Justicia, Sentencia No. 03480 (2003) (translation by author), *available at*

http://200.91.68.20/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=XYZ¶m2=1&nValor1=1&nValor2=241772&strTipM=T&lResultado=2 (concluding that the municipality of Golfito's approval of development project in a wildlife refuge violated Articles 50 and 89 of the Political Constitution by placing the refuge in "imminent risk of deterioration"); *Stein Leihner v. Decreto Ejecutivo número 28345-MINAE*, Sala Constitucional de la Corte Suprema de Justicia, Sentencia No. 06311 (2003) (translation by author), *available at*

http://200.91.68.20/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=XYZ¶m2=1&nValor1=1&nValor2=241137&strTipM=T&lResultado=2 (concluding that MINAE's executive decree, which approved permits for forest extraction to companies without completing an environmental impact study, violated Article 50).

145. Ley Forestal, Ley No. 7575 del 13 de febrero de 1996 [Forestry Law, Law No. 7575 of Feb. 13, 1996], art. 1 (translation by author), *available at* <http://www.acto.go.cr/descargas/Ley7575.pdf> [hereinafter Forestry Law].

146. *Id.* art. 19. For an overview of the Forestry Law's provisions in English, see Brian Steed, *Completing the Mosaic: The Conservation of Private Lands in Costa Rica*, 23 J. LAND RESOURCES & ENVTL. L. 173, 181 (2003).

147. Forestry Law art. 20.

with the criteria of sustainability.¹⁴⁸

The Forestry Law distributes its responsibilities among several administrative agencies and government officials. While the Ministry of Environment and Energy (MINAE) is the overall “governing organ” for the forest sector, many of the law’s functions are carried out by the newly established Forest Administration of the State (AFE).¹⁴⁹ The AFE’s main functions in the execution of the law are “conserv[ing] the forest resources of the country” in both national and private lands and “approv[ing] forest management plans.”¹⁵⁰ A “professional in forest sciences” prepares the forest management plans while a “forest regent is responsible for executing the plans.”¹⁵¹ Finally, the Forestry Law established “natural resource inspectors” to work under the authority of MINAE in enforcement matters.¹⁵² An assertion that Costa Rica is failing to enforce its Forestry Law could potentially derive from the acts or omissions of any of these agencies or government officials.

3. The Organic Law of the Environment

In 1995, Costa Rica’s Legislative Assembly passed the Organic Law of the Environment (Organic Law), which aims to establish the “necessary instruments to obtain a healthy and ecologically balanced environment.”¹⁵³ One of the most notable provisions of this law is its requirement that an environmental impact assessment (EIA) be conducted for any activities that “alter or destroy elements of the environment or generate residues, poisons

148. *Id.*

149. *Id.* arts. 5–6.

150. *Id.* art. 6.

151. *Id.* art. 21.

152. *Id.* art. 37. In addition to its requirements and prohibitions, the Forestry Law also contains a system of incentives for landowners who use their property in environmentally sensitive ways. For example, the law provides for both income and property tax deductions to landowners who can show that they are either preserving existing forest or reforesting the land. *Id.* arts. 23–24; Steed, *supra* note 146, at 191–92. The law created Forest Conservation Certificates (CCBs) for landowners who have not cleared their land for two years prior to the granting of the CCB and who promise not to clear their land for at least twenty years. Forestry Law art. 22; Steed, *supra* note 146, at 193. These CCBs may either be sold to other landowners or be used to pay taxes or other government charges. Forestry Law art. 22. Most notable, however, is the Forestry Law’s program of Payments for Environmental Services (PSAs). The PSA program, which is financed in part through the imposition of a 15 percent fuel tax, provides for cash payments to landowners who are either conserving or reforesting their properties. Forestry Law art. 46; Steed, *supra* note 146, at 196–97. These incentives, though promising, do not pertain to CAFTA’s citizen submission process, since they involve incentives rather than government enforcement obligations.

153. Ley Orgánica del Ambiente, Ley No. 7554 del 4 de octubre, 1995 [Organic Law of the Environment, Law No. 7554 of Oct. 4, 1995] art. 1 (translation by author), available at <http://www.asamblea.go.cr/ley/leyes/7000/7554.doc> [hereinafter Organic Law].

or dangerous materials.”¹⁵⁴ EIAs are made public, and, as one author has summarized, interested parties are provided an opportunity “to know the details of the project and present their opinions for consideration before the project is authorized.”¹⁵⁵ If the project or activity does not comply with the terms the Technical National Environmental Secretary (SETENA) used to approve it, any “interested party” may denounce such activity before the National Environmental Technical Bureau.¹⁵⁶ Additionally, the Organic Law contains provisions on the establishment of “wild protected areas,” biodiversity, forest resources, air, water, soil, energy resources, contamination, and ecological production.¹⁵⁷

The Organic Law also established a number of governmental entities to carry out its mandates. First, the “Environmental Comptroller,” assigned to the office of MINAE, is charged with, among other things, denouncing violations of the Organic Law before the Environmental Counsel’s office and ensuring the correct application of the law’s policies.¹⁵⁸ Next, the law established the Environmental Administrative Court, which has the authority to hear and resolve denunciations against either the government or private individuals for violations of environmental legislation as well as to establish the remedies for such violations.¹⁵⁹ The law also established Regional Environmental Councils charged with the functions of promoting “citizen participation in the analysis and the discussion of the environmental policies that affect the region” and attending citizen “denunciations” on environmental matters.¹⁶⁰ Finally, the Organic Law established the SETENA, charged with monitoring private compliance with a project’s resolutions under the environmental impact evaluation; if a private individual violates resolutions under the environmental impact evaluation, then the SETENA has the authority to halt the project.¹⁶¹ Because each of these bodies carries special responsibilities for environmental law enforcement, their acts or omissions could be the basis for an assertion of Costa Rica’s failure to enforce its environmental law in

154. *Id.* art. 17.

155. Salazar, *supra* note 137, at 283.

156. *Id.*

157. *See generally* Organic Law chs. 7, 9–16.

158. *Id.* art. 102.

159. *Id.* art. 111. These remedies include issuing warnings or reprimands; limiting or halting the actions that gave rise to the denunciation; revoking permits; imposing compensatory obligations on the offending party to stabilize the environment or biological diversity; or other alternatives, such as mandating educational courses in environmental matters for the offender. *Id.* art. 99. For a complete discussion of these sanctions, as well as the procedure for environmental denunciations, see Cabrera Medaglia, *supra* note 141.

160. Organic Law arts. 7–8(a), 8(c).

161. *Id.* art. 20.

various respects.

4. The Wildlife Conservation Law

Costa Rica's Wildlife Conservation Law set up a closed regulatory scheme prohibiting the appropriation of flora and fauna living in "natural conditions" in the country except as authorized by international agreement and by the Wildlife Conservation Law or its regulation.¹⁶² Wildlife is considered part of the "public domain" and constitutes a "natural renewable resource, which is part of the national heritage."¹⁶³ The law prohibits the hunting, fishing, or extraction of "species in routes of extinction," but plants may be extracted pursuant to a forest management plan.¹⁶⁴ Species threatened with extinction are given special status under this law and have a "right to exist," which is to be protected by "wildlife inspection officers" under the supervision of MINAE.¹⁶⁵ Violations involving endangered species can lead to the imposition of fines between \$200 and \$400 with the possibility of up to two years of jail time.¹⁶⁶

The Wildlife Conservation Law established several administrative bodies to oversee its enforcement. First, the General Address of Wildlife, housed under MINAE, is charged with establishing the technical guidelines for the conservation of wildlife, recommending the establishment of national wildlife refuges, granting or refusing hunting permits, and requesting the detention of persons who invade wildlife refuges.¹⁶⁷ Second, the wildlife inspection officers, charged with the application and fulfillment of the law, have the authority to detain, examine, and seize "the products and by-products of prohibited activities" under the law.¹⁶⁸ Thus, the Wildlife Conservation Law imposes a number of responsibilities on government officials, each potentially subject to an assertion of a failure to

162. Ley de Conservación de la Vida Silvestre, Ley No. 7317 del 30 de octubre, 1992 [Wildlife Conservation Law, Law No. 7317 of Oct. 30, 1992] art. 1 (translation by author), available at <http://www.asamblea.go.cr/ley/leyes/7000/7317.doc> [hereinafter Wildlife Conservation Law].

163. *Id.* art. 3.

164. *Id.* art. 14.

165. Steed, *supra* note 146, at 185.

166. *Id.* at 186; Wildlife Conservation Law arts. 90–97.

167. Wildlife Conservation Law art. 7. The General Address of Wildlife has a Committee Adviser of Wildlife consisting of various representatives from different sectors, including the Director of the General Address, a representative of an environmental non-governmental organization, the University of Costa Rica, the National University, and the Department of Agriculture and Cattle. *Id.* art. 8. The Committee advises the General Address on resource conservation, suggests projects for the administration of wildlife, and coordinates the work schedule of the General Address with that of other public and private entities. *Id.* art. 10.

168. *Id.* art. 16.

effectively enforce under CAFTA.

5. The Biodiversity Law

Costa Rica's Biodiversity Law has the objective of "conservation of biodiversity and the sustainable use of the resources as well as to distribute in an equitable manner the benefits and derived costs."¹⁶⁹ The law set up a series of affirmative environmental guarantees, including the obligation of the state to "avoid and prevent damage or destruction, present or future, to human, animal, or plant health, or to integrity of the ecosystems," and to "avoid any risk or danger which threatens the permanence of ecosystems."¹⁷⁰ In addition, the state should "prevent, reduce, or restore environmental damage which threatens life or deteriorates its quality."¹⁷¹ Finally, the Biodiversity Law incorporates the "precautionary principle" into its legal obligations by stating that "the absence of scientific certainty should not be used as a reason to disregard the adoption of effective measures of protection."¹⁷²

The Biodiversity Law also set up a series of new administrative organs. First, the law established the National Commission for the Management of Biodiversity, charged with "creat[ing] the national strategy for biodiversity," and composed of various administrative representatives.¹⁷³ Second, the law established a National System of Conservation Areas with its own legal identity headed by the National Council with the responsibility for "execution of the strategies and policies of the consolidation and development of the National System of Conservation Areas."¹⁷⁴ The National Council is also charged with supervising the management of national protected areas, as well as carrying out technical and administrative audits for the supervision of "good management" of the Conservation Areas

169. Ley de Biodiversidad, Ley No. 7788 del 30 de abril, 1998 [Biodiversity Law, Law No. 7788 of Apr. 30, 1998] art. 1, <http://www.asamblea.go.cr/ley/leyes/7000/7788.doc> [hereinafter Biodiversity Law]. For an unofficial translation of the act, see Biodiversity Law (7788), available at <http://eelink.net/~asilwildlife/costa.pdf>.

170. *Id.* arts. 44–45.

171. *Id.* art. 45.

172. *Id.* art. 11(2); *see also* Salazar, *supra* note 137, at 282 ([T]he precautionary principle was formally adopted in Costa Rica's Biodiversity Law . . .).

173. Biodiversity Law arts. 14–15. The Commission consists of representatives from the MINAE; the Ministries of Agriculture, Health, and Foreign Trade; the Costa Rican Institute of Fishing and Agriculture; the National Small Farmer's Board; the National Indigenous People's Board; the National Council of Reactors; the Costa Rican Federation for the Conservation of the Environment; the Costa Rican Union of Chambers of Commerce; and the Executive Director of the National System of Conservation Areas. *Id.* art. 15.

174. *Id.* arts. 22, 25(1).

and other protected areas.¹⁷⁵ Third, the law created the office of the Executive Director, who is responsible for executing the guidelines and decisions of the National Council.¹⁷⁶ Finally, the law set up the Regional Council for Conservation Areas, and public meetings decide the members of each area's regional council.¹⁷⁷ The regional councils of each area in turn establish their own regulations, subject to approval by the National Council, and are also charged with the responsibilities of defining "specific matters for the management of their protected areas" as well as recommending to the National Council "the creation, modification, or change of category of the protected wild areas."¹⁷⁸ In sum, the Biodiversity Law offers yet another basis upon which to build a submission that Costa Rica is failing to enforce its environmental law.

III. THE CITIZEN SUBMISSION PROCESS: A SUBMISSION ON BEHALF OF THE OSA

The environmental problems in the Osa Peninsula present an interesting case study of CAFTA's citizen submission process. On the surface, the Osa situation is a prototype for the problems CAFTA's drafters intended the citizen submission process to address; namely, government failures to enforce specific legislative environmental mandates. How well or poorly CAFTA is able to handle such problems, therefore, reflects more broadly on the efficacy of CAFTA's citizen submission process in general. Since no submissions have yet been filed under CAFTA, this section will evaluate a submission under CAFTA by analogy to the Secretariat's treatment of submissions under the NAAEC regime.¹⁷⁹ This section will follow the hypothetical "Osa Submission" through the intricacies of the citizen submission process, exposing the strengths and weaknesses of the process in its practical application.

A. *Costa Rica's Failure to Effectively Enforce Its Environmental Laws*

The initial submission "asserting that a Party is failing to effectively

175. *Id.* art. 25(7).

176. *Id.* art. 26.

177. *Id.* art. 29.

178. *Id.* arts. 29–30. Each conservation area will have a Director in charge of implementing national policies and carrying out the directives of the regional Council; a scientific technical committee, whose function will be to assess the technical aspects of the management of the area; and a Commissioner, in charge of supervising the "good operation of the area." *Id.* arts. 31, 32, 34.

179. Although the provisions of CAFTA and the NAAEC are similar with respect to citizen submissions, existing differences will be noted and discussed.

enforce its environmental laws”¹⁸⁰ is the most important stage in the process for citizens, and is the only part of the process for which the citizen is responsible. As such, citizens must carefully craft their submissions to satisfy the express requirements in the citizen submission process. Under the NAAEC, both the Secretariat, through determinations, as well as commentators, through scholarly articles, have discussed these requirements at length, providing guidance to individual submitters under the CAFTA regime. For clarity, the requirements of the first sentence under CAFTA’s citizen submission provision, that “[a]ny person of a Party may file a submission *asserting* that a Party is *failing to effectively enforce its environmental laws,*” are discussed separately.¹⁸¹ In addition, this section will briefly discuss several of the threshold requirements for submissions. Specifically, it will discuss the requirements that the submission “provide[] sufficient information to allow the Secretariat to review the submission[,] . . . be aimed at promoting enforcement rather than at harassing industry[,] . . . [and] indicate[] that the matter has been communicated in writing to the relevant authorities of the Party.”¹⁸² These requirements are relatively straightforward, and the Osa Submission should be able to successfully complete the submission requirements at this stage.

1. The Assertions

The first stage in the citizen submission process is the filing of the submission with the Secretariat. At the outset, this requires the submitter to identify the environmental laws a country is failing to enforce and articulate the facts constituting the failure.¹⁸³ While the Secretariat has recognized that the language “assertion” supports a “relatively low threshold” under the NAAEC, “a certain amount of substantive analysis is nonetheless required

180. CAFTA, *supra* note 24, art. 17.7:1. For the purposes of this Note, “Party” refers to the contracting parties of either the CAFTA, NAFTA, or NAAEC agreements, rather than to one of the parties to the dispute. “Submitters,” on the other hand, refers to the individual citizens filing the submission.

181. *Id.* art. 17.7:1 (emphasis added). For examinations of the NAAEC citizen submission procedure that are similarly organized, see David L. Markell, *The Commission for Environmental Cooperation’s Citizen Submission Process*, 12 GEO. INT’L ENVTL. REV. 545, 554–57 (2000), and Chris Tollefson, *Games Without Frontiers: Investor Claims and Citizen Submissions Under the NAFTA Regime*, 27 YALE J. INT’L L. 141, 170–74 (2002).

182. CAFTA, *supra* note 24, art. 17.7:2(c)–(e).

183. See Comm’n on Env’tl. Cooperation, Adoption of the Revised Guidelines for Submissions on Enforcement Matters Under Articles 14 and 15 of the North American Agreement on Environmental Cooperation, para. 5.2–5.3, June 28, 1999 (adopted by Council Resolution, June 29, 2001) (explaining that the submitter must “identify the applicable statute or regulation” and that the submission must “contain a succinct account of the facts on which such an assertion is based”), available at www.cec.org/citizen/guide_submit/index.cfm?varlan=English [hereinafter CEC Guidelines].

at this initial stage.”¹⁸⁴ Thus, the submission should set out the full array of potential environmental laws upon which there may be factual support for an allegation of a failure to enforce.

First, the Osa Submission could assert that Costa Rica is failing to enforce Article 50 of the Political Constitution by failing to prevent environmental problems in the Osa. The Supreme Constitutional Court has affirmed, with respect to Article 50, that “[t]he Costa Rican State has the obligation to act preventatively avoiding—through the inspection and the direct intervention—the achievement of acts that injure the environment”¹⁸⁵ One could argue that the government’s failure to prevent illegal logging in the Osa constitutes a failure to meet this obligation “to act preventatively,” since logging is an act that injures the environment.

Second, the Osa Submission could assert that Costa Rica is failing to enforce Article 20 of the Forestry Law by both failing to ensure that forest management plans are approved according to the criteria of sustainability and failing to ensure compliance with the plans once they have been issued. The results of MINAE’s own forestry audits in the Osa and two other regions, which were conducted to evaluate forest management plans, revealed that the “mechanisms and technical guidelines supporting forestry management have, for the most part, been entirely ignored by those companies that submitted plans and by MINAE itself.”¹⁸⁶ For example, many of the forestry files in these regions were incomplete, and others had not observed the “‘60/40 logging criterion,’ whereby 60 percent or fewer of the inventoried trees in a given management plan may be cut but at least 40 percent must be left.”¹⁸⁷ Moreover, the maps that accompany forest management plans “often did not agree with the field reality;” extra roads had been cut into forested areas, trails were poorly sketched, and soils were eroded “due to excessive access routes” that were wider than permitted.¹⁸⁸ The abuses found in the management plans have been called “legalized deforestation,”¹⁸⁹ because the government agency responsible for protecting

184. Comm’n on Env’tl. Cooperation, Biodiversity, *Determination Pursuant to Article 14(1)*, at 3, SEM-97-005 (May 26, 1998), available at <http://www.ccc.org/files/pdf/sem/97-5-DET-E.pdf>.

185. *Acosta v. Plan Regulador Sector Costero Turístico Playa Platanares*, Sala Constitucional de la Corte Suprema de Justicia, Sentencia No. 03480 (2003) (translation by author), available at http://200.91.68.20/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=XYZ¶m2=1&nValor1=1&nValor2=241772&strTipM=T&lResultado=4 (quoting *Urbina v. Alcalde Municipal*, Sala Constitucional de la Corte Suprema de Justicia, Sentencia No. 04830 (2002), available at http://200.91.68.20/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=XYZ¶m2=1&nValor1=1&nValor2=212419&strTipM=T&lResultado=5).

186. Bustos, *supra* note 18, at 292.

187. *Id.*

188. *Id.* at 292–93.

189. Jiménez Madrigal, *supra* note 18, at 1.

the country's forests is perceived to have instead sanctioned their destruction.

Third, the Osa Submission could assert that Costa Rica is failing to enforce the Organic Law of the Environment by failing to ensure that EIAs are conducted for every forest activity in the Osa. The Organic Law of the Environment states that EIAs are an "indispensable prerequisite" for activities that "alter or destroy" the environment.¹⁹⁰ Yet, according to one source, "95 percent of the management plans at present [in the forest reserve Golfo Dulce] work without environmental impact assessments."¹⁹¹ The Technical National Environmental Secretary (SETENA), one might argue, has therefore failed to carry out its enforcement duties under the Organic Law of the Environment.

Fourth, the Osa Submission could assert that Costa Rica is failing to enforce the Wildlife Conservation Law by failing to protect species on the brink of extinction in the Osa. While all wild cats in the Osa region are in danger of extinction, the jaguar and the puma are said to be the species in "serious risk."¹⁹² A recent study revealed that decreased forest area and hunting were the main causes of the species loss.¹⁹³ The loss of these big predators is a sign that there is a "serious impact" on the environment.¹⁹⁴ Thus, it could be said, MINAE and the wildlife inspection officers charged with protecting these species have failed to ensure their protection and survival.

Finally, the Osa Submission could assert that Costa Rica is failing to enforce the Biodiversity Law by failing to "avoid and prevent" damage to the integrity of ecosystems and damage "which threatens life or deteriorates its quality."¹⁹⁵ One might argue that MINAE and SINAC, the agencies responsible for monitoring the extraction of wood in the country, have been unable to stop the illegal extraction of mahogany in the Osa. Loggers reportedly extract mahogany by claiming it is cedar, which is not prohibited.¹⁹⁶ As a result, mahogany is found only in small isolated

190. Organic Law art. 17.

191. Vanessa Loaiza Naranjo, *Bosque en Osa sigue vulnerable* [Forest in Osa Is Still Vulnerable], LA NACIÓN, Jan. 7, 2001 (translation by author), available at http://www.nacion.com/ln_ee/2001/enero/07/pais1.html.

192. Alejandra Vargas M., *Rugidos de alerta resuenan en la península de Osa* [Roars of Alert Resound in the Osa Peninsula], LA NACIÓN, Mar. 13, 2005 (translation by author), available at http://www.nacion.com/ln_ee/2005/marzo/13/aldea0.html.

193. *Id.*

194. *Id.*

195. Biodiversity Law arts. 44–45.

196. Alejandra Zúñiga V., *Agonizantes!* [The Dying!], LA NACIÓN, Mar. 12, 2000 (translation by author), available at <http://www.nacion.com/dominical/2000/marzo/12/dominical3.html>.

patches, which is leading to “genetic degeneration” of the population.¹⁹⁷ Moreover, it is estimated that for every one mahogany tree extracted, “1450 square meters of forest is destroyed.”¹⁹⁸ One could therefore make a strong argument that the government’s failure to prevent mahogany extraction is causing damage to the integrity of the Osa’s ecosystem in violation of the Biodiversity Law. Although there is some factual support for an assertion of the government’s failure to enforce with respect to each of these laws, assertions must fit CAFTA’s requirements in order to proceed in the citizen submission process.

2. Environmental Law

Regardless of the manner in which individual countries characterize “environmental law” domestically, assertions under CAFTA’s citizen submission process must be based on laws that fit within CAFTA’s definition of “environmental law” in order to proceed. CAFTA defines “environmental law” as “any statute or regulation of a Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human, animal, or plant life or health”¹⁹⁹ Expressly excluded from this definition are laws “directly related to worker safety or health” and laws “the primary purpose of which is managing the commercial harvest or exploitation, or subsistence or aboriginal harvesting, of natural resources.”²⁰⁰ Moreover, “the primary purpose of a particular statutory or regulatory provision shall be determined by reference to its primary purpose, rather than to the primary purpose of the statute or regulation of which it is a part.”²⁰¹ CAFTA further defines “statute or regulation,” with respect to Costa Rica, as “a law of its legislative body or a regulation promulgated pursuant to an act of its legislative body that is enforceable by the executive body.”²⁰²

In light of these definitions, the Secretariat might exclude several of the assertions in the Osa Submission. First, because the definition of

197. *Id.*

198. Bethany Lukitsch Hicks, *Treaty Congestion in International Environmental Law: The Need for Greater International Coordination*, 32 U. RICH. L. REV. 1643, 1652 (1999) (citing *The Case Against Mahogany*, <http://www-green.cusu.cam.ac.uk/archive/earthfirst/case.html> (last visited Nov. 13, 2006)).

199. CAFTA, *supra* note 24, art. 17.13(1).

200. *Id.*

201. *Id.* Because of this instruction, it is possible for a law whose overall purpose is “managing the commercial harvest of natural resources” to contain provisions that nonetheless fall within CAFTA’s definition of “environmental law,” as long as the “primary purpose” of those individual provisions is environmental protection.

202. *Id.*

“environmental law” is limited to “statute[s] or regulation[s]” by the legislative body “enforceable by the executive body,” the Secretariat might question whether constitutional provisions are “statute[s] or regulation[s].”²⁰³ On the other hand, there is a strong argument that the “primary purpose” of Article 50 is environmental protection. Also, legislatures often draft constitutional amendments, and although Article 50 is triggered by an individual environmental denunciation, a judgment in favor of a complainant could require government agencies or officials to take enforcement actions. This could bring Article 50 within CAFTA’s requirement that the law be “enforceable by the executive body.” In one submission under the NAAEC, the Secretariat determined that it was not authorized to review a submission based on a failure to enforce criminal procedure provisions of the Mexican Constitution because the primary purpose of such provisions was “to establish due process requirements and to regulate criminal procedure.”²⁰⁴ The fact that the Secretariat focused on the primary purpose requirement, rather than on whether the provision was part of the Constitution or other legislation, indicates that Article 50 will likely qualify as “environmental law” under the NAAEC approach.

Second, there is a possibility that the Secretariat would consider a submission based on Article 20 of the Forestry Law as falling within the exception for laws whose primary purpose is “managing the commercial harvest or exploitation . . . of natural resources.”²⁰⁵ Since the provision regulates forest “use,” the Secretariat could characterize the primary purpose of this provision as the management of the forest’s “exploitation.” On the other hand, the fact that Article 20 requires the AFE to approve forest management plans in accordance with the “criteria of sustainability” might indicate that at least part of this provision’s purpose was environmental protection.²⁰⁶ Although the Secretariat under the NAAEC stated that the term “‘environmental law’ should be interpreted expansively,”²⁰⁷ it has previously rejected submissions “related to the management of commercial forestry resources” that also did not “relate to

203. *Id.*

204. Comm’n on Env’tl. Cooperation, Guadalajara, *Determination Pursuant to Article 14(1) of the North American Agreement on Environmental Cooperation*, at 4, SEM-98-001 (Sept. 13, 1999), available at <http://www.cec.org/files/pdf/sem/98-1-DET-E.pdf>.

205. Comm’n on Env’tl. Cooperation, Logging Rider, *Determination Pursuant to Articles 14 & 15 of the North American Agreement on Environmental Cooperation*, at 3, SEM-95-002 (Dec. 8, 1995), available at <http://www.cec.org/files/pdf/sem/95-2-DET-OE.pdf>.

206. Forestry Law art. 20.

207. Comm’n on Env’tl. Cooperation, Biodiversity, *Determination Pursuant to Article 14(1)*, at 4, SEM-97-005 (May 26, 1998), available at <http://www.cec.org/files/pdf/sem/97-5-DET-E.pdf>.

environmental protection.”²⁰⁸ Therefore, though the Forestry Law includes elements of environmental protection as well as forest use, there is a chance that the Secretariat would conclude that the primary purpose of the provision at issue is “managing the commercial harvest or exploitation . . . of natural resources” and therefore not “environmental law” for the purposes of a citizen submission.²⁰⁹

The assertions based on the Organic Law, the Wildlife Conservation Law, and the Biodiversity Law, on the other hand, stand a good chance of meeting CAFTA’s definition of “environmental law.” This definition expressly contemplates laws whose primary purpose is “the prevention of a danger to human, animal, or plant life or health, through . . . the protection or conservation of wild flora and fauna, including endangered species, their habitat, and specially protected natural areas.”²¹⁰ In the Organic Law of the Environment, the overarching purpose is to provide citizens with “the necessary instruments to obtain a healthy and ecologically balanced environment.”²¹¹ Similarly, the purpose of the Wildlife Conservation Law is “to establish regulations about wildlife.”²¹² Finally, the purpose of the Biodiversity Law is “the conservation of biodiversity and the sustainable use of the resources.”²¹³ Therefore, the primary purpose of these laws brings them within the definition of “environmental law.”

3. Failure

While neither CAFTA nor the NAAEC explicitly defines what constitutes a “failure” to enforce, the NAAEC offers some guidance as to what does *not* constitute such failure. The NAAEC provides that a party has not “failed to ‘effectively enforce its environmental law’” where government action or inaction: (a) reflects a reasonable exercise of discretion in respect of investigatory, prosecutorial, regulatory, or

208. Comm’n on Env’tl. Cooperation, Ortiz Martínez, *Determination in Accordance with Article 14(1) of the North American Agreement on Environmental Cooperation*, at 4, SEM-98-002 (June 23, 1998), available at http://www.cec.org/files/pdf/sem/98-2-DET_en.pdf.

209. Forestry Law art. 1.

210. CAFTA, *supra* note 24, art. 17.13:1.

211. Organic Law art. 1.

212. Wildlife Conservation Law art. 1.

213. Biodiversity Law art. 1. However, the language “sustainable *use*” might cause the Biodiversity Law to run into the same complication as the Forestry Law, namely, that the Secretariat could characterize it as relating to the management of commercial use and exploitation of natural resources. This would lead the Secretariat to consider the primary purpose of the specific provision the government is allegedly failing to enforce. Since the crux of the Osa Submission’s assertion under this law is Article 45, which states that the government “has the obligation to avoid any risk or danger which threatens the permanence of ecosystems,” the Secretariat will likely conclude that this provision is “environmental law.” Biodiversity Law art. 45.

compliance matters; or (b) results from *bona fide* decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities.²¹⁴ According to one commentator, this provision expressly contemplates government action or inaction as a basis for a failure to enforce.²¹⁵ Although this provision is completely absent from CAFTA's text, permitting submissions based on assertions of government action or inaction is desirable from a policy perspective, since otherwise government officials might attempt to evade enforcement responsibilities by taking no action at all. This would in turn create a negative incentive for government enforcement actions because only action, rather than inaction, could be the subject of a citizen submission. Assuming that the term "failure" applies to both government action and inaction, all of the assertions will likely satisfy this requirement.

The NAAEC jurisprudence, however, has also interpreted the language "failing" in the agreement to contain a temporal requirement. For example, in one NAAEC case, the Secretariat determined that the submission did not satisfy this temporal requirement because there was "significant delay" between the time of the alleged failure and the filing of the submission.²¹⁶ The submitters did not file the submission until three years after the alleged failure and did not provide any evidence that the failure was "continuing or recent."²¹⁷ If the CAFTA Secretariat interprets the term "failure" as containing a temporal requirement, this might prove problematic for some of the assertions, since most accounts of deforestation occurred between the years of 1999 and 2000. However, the Osa Submission should be able to use evidence of a past failure to enforce as long as it links the past failure with more recent evidence indicating an ongoing failure to enforce.²¹⁸

214. NAAEC, *supra* note 36, art. 45:1.

215. Tollefson, *supra* note 181, at 173.

216. Comm'n on Env'tl. Cooperation, Canadian Environmental Defense Fund, *Determination Pursuant to Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, at 3, SEM-97-004 (Aug. 25, 1997), available at <http://www.cec.org/files/pdf/sem/97-4-DET-E.pdf> [hereinafter *Canadian Environmental Defense Fund*]; see also Markell, *supra* note 181, at 555-56 (discussing the two "temporal issues" arising in the context of NAAEC Article 14: whether there is an ongoing government failure to enforce and whether the NAAEC applies retroactively).

217. Canadian Environmental Defense Fund, *supra* note 216, at 3. Similarly, in another case, the Secretariat applied the temporal requirement to reject a submission that was based on a prospective rather than an ongoing failure. Comm'n on Env'tl. Cooperation, Jamaica Bay, *Determination in Accordance with Article 14(1) of the North American Agreement on Environmental Cooperation*, at 3-5, SEM-00-003 (Apr. 12, 2000), available at <http://www.cec.org/files/pdf/sem/00-3-DET-E.pdf>.

218. See also Comm'n on Env'tl. Cooperation, Rio Magdalena, *Article 15(1) Notification to the Council That Development of a Factual Record Is Warranted*, at 9, SEM-97-002 (Feb. 5, 2002) (noting that the submitters satisfied the temporal requirement even though they asserted that the failures dated six years prior to the entry into force of the NAAEC, since the submission indicated that the failures continued up until the date of the submission's filing), available at <http://www.cec.org/files/pdf/sem/97->

Another aspect of the temporal requirement as the Secretariat has interpreted it under the NAAEC involves the retroactivity of the agreement. The Secretariat's examination of this issue revealed no evidence of intent that the agreement be applied retroactively.²¹⁹ Thus, failures occurring before the execution date of the NAAEC were not covered. Notwithstanding this determination, however, the Secretariat stated that events prior to the effectuation of the agreement "may create conditions or situations which give rise to current enforcement obligations."²²⁰ The Secretariat added "[i]t follows that certain aspects of these conditions or situations may be relevant when considering an allegation of a present, continuing failure to enforce environmental law."²²¹ If CAFTA is interpreted in this manner, the Osa Submission will need to link prior failures to failures occurring after the execution date of the agreement.

4. Effective Enforcement

The NAAEC jurisprudence has established a clear distinction between government standard-setting and effective enforcement: the latter is a permissible basis for a submission, while the former is not. According to one case, the "paradigmatic" submission involving enforcement would include: (1) an environmental law establishing specific environmental standards; (2) violations of the standards by regulated entities; and (3) a party's allowance of these violations by failing to use available enforcement mechanisms.²²² The majority of cases failing to fit this paradigm have involved submissions based on legislative acts altering or undermining environmental standards.²²³ The Osa Submission, to the contrary, fits the

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219. *Id.* at 9.

220. Comm'n on Env'tl. Cooperation, Cozumel, *Recommendation of the Secretariat to the Council for Development of a Factual Record in Accordance with Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, at 4, SEM-96-001 (June 7, 1996), available at <http://www.cec.org/files/pdf/SEM/96-1-ADV-E.pdf>.

221. *Id.*

222. Comm'n on Env'tl. Cooperation, Great Lakes, *Determination Pursuant to Article 14(1) of the North American Agreement on Environmental Cooperation*, at 4, SEM-98-003 (Dec. 14, 1998), available at <http://www.cec.org/files/pdf/SEM/98-3-DET-e.PDF>.

223. *See, e.g., id.* ("Perhaps the paradigmatic case for the sort of standard-setting that is beyond the purview of Article 14 involves a Party's enacting legislation that establishes specific environmental standards."); Comm'n on Env'tl. Cooperation, Spotted Owl, *Determination Pursuant to Article 14(2)*, at 5, SEM-95-001 (Sept. 21, 1995) ("While not conclusive, the provisions of Article 14 are most logically triggered when a failure to enforce is brought about by administrative shortcomings rather than legislative mandates."), available at <http://www.cec.org/files/pdf/sem/95-1-DET-E1.PDF>; Comm'n on Env'tl. Cooperation, Logging Rider, *Determination Pursuant to Articles 14 & 15 of the North American Agreement on Environmental Cooperation*, at 4, SEM-95-002 (Dec. 8, 1995) ("The Secretariat therefore

paradigm by basing its assertions of failure to effectively enforce environmental laws with specific environmental standards to be carried out by government officials. Because the submission asserts private violations of the standards as well as government acquiescence, the submission should easily meet this requirement.

5. Other Requirements

CAFTA also contains a list of threshold requirements for submissions. The Secretariat will consider only those submissions meeting the criteria set out in Article 17.7. Specifically, the submission must: (a) be in writing; (b) clearly identify the person making the submission; (c) provide sufficient information to allow for the Secretariat's review; (d) be aimed at promoting enforcement rather than at harassing industry; (e) indicate that the matter has been communicated in writing to the party; and (f) be filed by a person of a party.²²⁴ While provisions (a), (b), and (f) are relatively straightforward, provisions (c) through (e) require some explanation.

First, the Secretariat has rejected several submissions for failure to provide "sufficient information" to allow for the Secretariat's review.²²⁵ In one such case, the submission presented a legal argument, but the entire submission was fewer than three pages and included no appendices to support the argument.²²⁶ Second, submitters under the NAAEC have typically satisfied the requirement that the submission be "aimed at promoting enforcement rather than at harassing industry" by focusing the submission on the "acts or omissions of a Party rather than on compliance by a particular company or business," and by stating that they are "not competitors standing to benefit economically from the submission."²²⁷ Third, according to another NAAEC determination, submitters do not

cannot characterize the application of a new legal regime as a failure to enforce an old one."), available at <http://www.cec.org/files/pdf/sem/95-2-DET-OE.pdf>.

224. CAFTA, *supra* note 24, art. 17.7:2(a)-(f). According to the Guidelines for Submissions established under the NAAEC, if the submission fails to meet these criteria, the submitter has thirty days to correct the deficiencies and provide the Secretariat with a revised submission. CEC Guidelines, *supra* note 183, at 6.2.

225. CEC Guidelines, *supra* note 183, at 5.4.

226. Comm'n on Envtl. Cooperation, Oldman River III, *Determination Pursuant to Article 14(1) of the North American Agreement on Environmental Cooperation*, at 4, SEM-04-004 (Oct. 14, 2004), available at http://www.cec.org/files/pdf/sem/04-4-DET_en.pdf.

227. *Id.* at 4. As one commentator noted, this interpretation "withhold[s] standing from those whose only interest, or harm suffered, is competitive" and "keeps the focus of the procedure on the actions of the state parties, rather than on particular companies within the states." John H. Knox, *A New Approach to Compliance with International Environmental Law: The Submissions Procedure of the NAFTA Environmental Commission*, 28 *ECOLOGY L.Q.* 1, 61 (2001) [hereinafter Knox, *A New Approach*].

satisfy the requirement of communication of the matter to government authorities through newspaper publicity alone.²²⁸ Instead, submitters need to show that the matter addressed in the submission has been communicated to the government authorities in writing.²²⁹ The Osa Submission should have no trouble meeting these requirements. If, however, the submission does not meet these requirements, the Secretariat will terminate the process and “promptly” inform the submitter of its reasons.²³⁰ If, on the other hand, the submission satisfies the initial requirements, the Secretariat will move on to the next phase of the submissions process and will “determine whether the submission merits requesting a response from [] the Party.”²³¹

B. Determination of Whether to Request a Response

Once the submission has been filed, the participation of the individual submitter is essentially complete. The Secretariat must then “determine whether the submission merits requesting a response” from the accused party.²³² The following factors guide the Secretariat in making this determination:

- (a) the submission . . . is not frivolous and alleges harm to the person making the submission;
- (b) the submission raises matters whose further study . . . would advance the goals of [the environmental] chapter and the ECA;
- (c) private remedies available under the party's law have been pursued; and
- (d) the submission is drawn exclusively from mass media reports.²³³

According to one commentator, although the Secretariat must take these factors into account, it “has discretion as to what weight to give them.”²³⁴ However, because termination of the process results from a determination that no response is merited, the factors guiding the Secretariat's determination under this provision are best understood as additional requirements for submissions.²³⁵ To ensure success, therefore, the Osa

228. Comm'n on Env'tl. Cooperation, AAA Packaging, *Determination in Accordance with Article 14(1) of the North American Agreement on Environmental Cooperation*, at 4, SEM-01-002 (Apr. 24, 2001), available at <http://www.cec.org/files/pdf/sem/ACF155.pdf>.

229. *Id.*

230. CEC Guidelines, *supra* note 183, at 6.3.

231. *Id.* at 7.1.

232. CAFTA, *supra* note 24, art. 17.7:4.

233. *Id.*

234. Knox, *A New Approach*, *supra* note 227, at 61.

235. In fact, the Guidelines for Submissions on Enforcement Matters under the NAAEC state that submissions should include information on these factors “to assist the Secretariat in its review under

Submission should anticipate these guidelines and inform the Secretariat of its position on each factor.

1. Harm

The NAAEC jurisprudence has interpreted harm very broadly. Harm need not be “individual” and “particularized,” but instead may be harm of a “public nature.”²³⁶ Most submissions have satisfied this requirement by asserting the “importance and character of the resource” threatened,²³⁷ asserting an “interest” in protecting the resource,²³⁸ or asserting a “strong concern” about a failure to enforce.²³⁹ First, the Osa Submission should have ample support for the importance and character of the forest resources threatened, since the Osa’s forests are biologically and ecologically invaluable.²⁴⁰ Second, anyone filing a submission on behalf of the Osa should have no trouble asserting an interest in protecting the forest resources, since a broad range of interests will suffice.²⁴¹ Lastly, the news reports from the Osa indicate that many of the Osa’s residents have strong concerns that the government is not enforcing its environmental laws in the region.²⁴² Therefore, the Osa Submission should be able to easily demonstrate harm to the submitter.

2. The Goals of the Agreement

this provision.” CEC Guidelines, *supra* note 183, at 5.

236. Comm’n on Env’tl. Cooperation, Cozumel, *Recommendation of the Secretariat to the Council for Development of a Factual Record in Accordance with Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, at 5, SEM-96-001 (June 7, 1996), available at <http://www.cec.org/files/pdf/SEM/96-1-ADV-E.pdf>. Many environmental activists approve of this broad interpretation of harm, since the interpretation recognizes “the public nature of environmental concerns and harms as well as the right of the public interest to legal standing.” Markell, *supra* note 181, at 561 (quoting Naomi Gal-Or, *Multilateral Trade and Supranational Environmental Protection: The Grace Period of the CEC, or a Well-Defined Role?*, 9 GEO. INT’L ENVTL. L. REV. 53, 54 (1996)).

237. Cozumel, *supra* note 236, at 5.

238. Comm’n on Env’tl. Cooperation, Migratory Birds, *Determination Pursuant to Article 14(1) and (2) of the North American Agreement on Environmental Cooperation*, at 6, SEM-99-002 (Dec. 23, 1999), available at <http://www.cec.org/files/pdf/sem/ACF183D.PDF>.

239. Comm’n on Env’tl. Cooperation, BC Mining, *Article 15(1) Notification to Council That Development of a Factual Record Is Warranted*, at 14, SEM-98-004 (May 11, 2001), available at <http://www.cec.org/files/pdf/sem/ACF11.PDF>.

240. See discussion *supra* pp. 1–2.

241. See, e.g., BC Mining, *supra* note 239, at 13–14 (determining that the submitters demonstrated harm by asserting a common interest in protecting British Columbia’s threatened wild salmon); Migratory Birds, *supra* note 238, at 6 (determining that the submitters demonstrated harm by asserting a “common interest in protecting migratory bird populations”).

242. See sources cited *supra* note 19.

While the CAFTA and NAAEC texts provide little guidance on what subjects might raise “matters whose further study . . . would advance the goals” of the agreement,²⁴³ several Secretariat determinations under the NAAEC offer helpful insight. First, in the *Migratory Birds* determination, the Secretariat stated that “assertions of [a] . . . widespread pattern of ineffectual enforcement are particularly strong candidates” for consideration under the citizen submission process.²⁴⁴ Although the Osa Submission limits its assertions to government enforcement problems in the Osa, such problems are nevertheless widespread in this particular region. Moreover, some of the evidence in the Osa Submission indicates that there are other regions within Costa Rica where similar enforcement problems exist. Second, the Secretariat cited “grave risks to human health and the environment” as a matter whose further study would contribute to the goals of the agreement in the *Metales y Derivados* determination.²⁴⁵ Although the logging and deforestation in the Osa may present a “grave” biological risk, this may not amount to the “grave risks to human health and the environment” that toxic contamination presented in *Metales y Derivados*.²⁴⁶ Finally, an assertion that a blanket government failure to enforce against a particular industry, which results in a distortion of trade “by permitting some producers to externalise environmental costs,”²⁴⁷ also qualifies as a matter whose further study “would advance the goals of the Agreement.”²⁴⁸ This could prove useful in the context of the Osa Submission, because evidence suggests that the logging industry in particular benefits from the government’s failure to enforce environmental laws in the Osa.²⁴⁹ Although the Secretariat ultimately has the discretion to determine which matters would further the goals of the agreement,²⁵⁰ the Osa Submission

243. NAAEC, *supra* note 36, art. 14:2(b). There is a slight textual difference between the NAAEC and CAFTA provisions on this issue: the NAAEC limits its inquiry to the goals of the NAAEC agreement itself, while CAFTA’s inquiry includes the goals of both CAFTA and its side agreement, the Environmental Cooperation Agreement. *Compare id.*, with CAFTA, *supra* note 24, art. 17.7:4(b) (“taking into account guidance regarding [the] goals provided by the Council and the Environmental Cooperation Commission”).

244. *Migratory Birds*, *supra* note 238, at 7.

245. Comm’n on Env’tl. Cooperation, *Metales y Derivados, Article 15(1) Notification to Council That Development of a Factual Record Is Warranted*, at 8, SEM-98-007 (Mar. 6, 2000), available at <http://www.cec.org/files/pdf/sem/ACFBF5.PDF>.

246. *Id.*

247. Comm’n on Env’tl. Cooperation, *Ontario Logging, Determination in Accordance with Article 14(1) and (2) of the North American Agreement for Environmental Cooperation*, at 8, SEM-02-001 (Feb. 25, 2002) (internal quotations omitted), available at <http://www.cec.org/files/pdf/sem/02-1-det-e.pdf>.

248. *Id.* (citing NAAEC, *supra* note 36, art. 14(2)(b)).

249. See sources cited *supra* note 19 and discussion *supra* Part III.A.1.

250. As one commentator stated, “[b]y taking this factor into account, the Secretariat may filter

stands a good chance of meeting this guideline.

3. Pursuance of Private Remedies

While the submitters' attempts to pursue private remedies, such as domestic civil or criminal suits, are to guide the Secretariat in its determination of whether to request a response, several submitters have satisfied this under the NAAEC by stating that private remedies were not available domestically. For example, in *Ontario Logging*, the submitters convinced the Secretariat that pursuing private remedies under Canadian law would be futile because: the courts employed stringent standing requirements; the logging operations complained of occurred in remote locations where access by individual citizens was restricted, making it difficult for individuals to witness violations; individuals often lacked the financial resources and expertise to prosecute charges in court; "the Crown could intervene to withdraw or stay the charge"; and prosecutions were only "after-the-fact events that [did] not remedy the harm done."²⁵¹ From this, the Secretariat concluded that "private remedies may in effect not be available."²⁵²

The Osa submitters could make similar arguments. First, although Costa Rican citizens do not face stringent standing requirements, since Article 50 allows anyone to make environmental denunciations, prosecutors and judges often disregard "serious claims of destruction of specific natural resources."²⁵³ Although there is a judicial school in Costa Rica to instruct judges in specific fields, many judges "do not understand the damage caused by cutting down trees or pouring toxic residues into a river."²⁵⁴ Furthermore, MINAE has the initial responsibility of investigating environmental crimes and often "does not conduct a thorough collection of field evidence in the vicinity of the alleged crime . . . [,] does not present the evidence at a trial[,] and commonly has little follow-up contact with the Public Ministry."²⁵⁵ The situation in the Osa is also factually similar to that of the *Ontario Logging* case, since it is difficult for individual citizens to

out complaints that meet all other procedural requirements, but whose examination would not further the goals of the Agreement." Knox, *A New Approach*, *supra* note 227, at 62. The policy reason this commentator offered for the Secretariat's discretion is the Secretariat's ability to conserve its limited resources. *Id.*

251. *Ontario Logging*, *supra* note 247, at 9.

252. *Id.*

253. Bustos, *supra* note 18, at 290.

254. *Id.*

255. *Id.* at 291. The Public Ministry is "the entity of the judicial power in Costa Rica that exercises the duties of [the] plaintiff in the penal justice field." *Id.* Ultimately, the Public Ministry determines whether there has been an environmental crime. *Id.* at 292.

detect logging violations, and citizens may lack the expertise and financial resources to pursue environmental denunciations. Though the Osa submitters could make arguments that, in effect, no private remedy is available, the relative success of some cases through environmental denunciations pursuant to Article 50 of the Constitution might undermine such arguments. Thus, this factor could potentially weigh against the Osa submitters.

4. Reliance on Mass Media Reports

Submissions based entirely on mass media reports would weigh against a determination that the submission merits requesting a response from the accused party. Under the NAAEC, however, submissions relying on some media reports passed muster under this guideline as long as they also relied on other sources, such as government documents, research reports, or caselaw.²⁵⁶ This guideline usually does not place too onerous a burden on submitters, since, as one commentator noted, “[s]ubmitters harmed by an action would rarely if ever need to rely ‘exclusively’ on mass media reports to prepare a submission complaining of their harm.”²⁵⁷ The Secretariat’s determination pursuant to this guideline should weigh in favor of requesting a response, since the Osa Submission is based on a combination of scholarly literature, scientific studies, and mass media reports.

C. The Automatic Termination Provision

After the completion of these preliminary steps, the focus of the process shifts from the submitter to the accused party. The Secretariat will provide the party with a copy of the submission, and the party must respond within 45 days, or, in exceptional circumstances, within 60 days.²⁵⁸ In its response, the party is to notify the Secretariat “whether the precise matter at issue [in the submission] is the subject of a pending judicial or administrative proceeding.”²⁵⁹ If this is the case, the Secretariat will “proceed no further,” and the process will be terminated.²⁶⁰

256. See, e.g., Ontario Logging, *supra* note 247, at 9 (determining that the submission was not based exclusively on mass media reports because it included “research, government information available on the Internet, caselaw and information obtained pursuant to an access to information request”); Migratory Birds, *supra* note 238, at 7 (determining that the submission was not based exclusively on mass media reports because it included several government documents).

257. Knox, *A New Approach*, *supra* note 227, at 62.

258. CAFTA, *supra* note 24, art. 17.7:5.

259. *Id.*

260. *Id.* NAAEC determinations have termed this provision the “automatic termination clause.” Comm’n on Env’tl. Cooperation, BC Hydro, *Recommendation of the Secretariat to the Council for the*

This so-called “automatic termination clause” could potentially pose a significant obstacle to citizen submission proceedings, since governments could delay prosecutions of environmental crimes in order to avoid citizen submission proceedings.²⁶¹ Under the NAAEC, however, the Secretariat has mitigated this danger by establishing limits on parties’ ability to invoke this provision. First, only proceedings “designed to culminate in a specific decision, ruling or agreement within a definable period of time” fall within this provision.²⁶² Second, if an ongoing proceeding does not implicate the policy concerns behind the automatic termination provision, namely “the need to avoid a duplication of effort” and “to refrain from interfering with pending litigation,” then application of this provision is unwarranted.²⁶³ Although it is impossible to evaluate how the Osa Submission would fare under this provision, since this depends on who the individual submitters are and what proceedings they have instituted, this provision should not pose a significant obstacle as long as the Secretariat under CAFTA follows the NAAEC Secretariat’s approach.

D. *The Factual Record*

Once the Secretariat has received and reviewed the party’s response, it begins its assessment of whether the matter warrants the development of a factual record. While the CAFTA and NAAEC texts do not specify what the Secretariat should consider in making this determination, one commentator has suggested that the Secretariat is to continue taking into account the factors listed under the Secretariat’s determination of whether to request a response from the accused party.²⁶⁴ The only difference is that the Secretariat would then have information both from the submitter and the accused party, perhaps providing a more complete understanding of the facts and arguments involved.

The Secretariat’s determination that a factual record is warranted, however, does not end the process. The Secretariat must then inform the

Development of a Factual Record in Accordance with Article 14 and 15 of the North American Agreement on Environmental Cooperation, at 2, SEM-97-001 (Apr. 27, 1998), available at <http://www.cec.org/files/pdf/sem/97-1-adv-e.pdf>. In its response, the party may also include information such as whether the matter was previously the subject of a judicial or administrative proceeding, whether private remedies are available to the submitter, and whether they have been pursued, or “information concerning relevant capacity-building activities under the ECA.” CAFTA, *supra* note 24, art. 17.7:5.

261. See BC Hydro, *supra* note 260, at 9 (citing NAAEC, *supra* note 36, art. 45:3).

262. *Id.*

263. *Id.* at 10.

264. See Knox, *A New Approach*, *supra* note 227, at 65 (discussing the NAAEC procedure).

Council of its decision and provide reasons.²⁶⁵ The Council, by vote of any party, will instruct the Secretariat to prepare the factual record.²⁶⁶ The Secretariat will then submit a “draft factual record” to the Council, and any party has the opportunity to comment on the draft within forty-five days.²⁶⁷ After the Secretariat submits the final factual record, incorporating “as appropriate” any comments from the parties to the Council, the Council may decide “by vote of any Party” to make the final factual record publicly available.²⁶⁸ Finally, the Council may make recommendations to the ECC relating to the factual record, including recommendations for development of the party’s “mechanisms for monitoring its environmental enforcement.”²⁶⁹ Even if the Osa Submission proceeds to this stage, however, the potential impact of the factual record on Costa Rica’s enforcement of its environmental laws in the Osa is uncertain.

IV. ANALYSIS OF CAFTA’S CITIZEN SUBMISSION PROCESS

The factual record represents the culmination of the citizen submission process and is the only remedy available under the agreement for individual citizens. However, since not every submission results in the development of a factual record, the initial inquiry is whether this remedy is, in effect, available to most citizens. Evaluation of this remedy logically proceeds with a review of the NAAEC’s environmental performance. The similarity of CAFTA’s and the NAAEC’s citizen submission procedure indicates that one can expect similar results under CAFTA. On the other hand, where the agreements differ, one can hope that such differences are improvements and that these improvements will lead to greater environmental protection.

A. The Likelihood of Obtaining Development of a Factual Record

Very few submissions under the NAAEC citizen submission mechanism have fully completed the process. To date, fifty-eight

265. CAFTA, *supra* note 24, art. 17.8:1.

266. *Id.* art. 17.8:2. In preparing the factual record, the Secretariat considers “any information furnished by a Party and . . . any relevant technical, scientific information, or other information that is: (a) publicly available; (b) submitted by interested persons; (c) submitted by national advisory or consultative committees; (d) developed by independent experts; or (e) developed under the ECA.” *Id.* art. 17.8:4.

267. *Id.* art. 17.8:5.

268. *Id.* art. 17.8:6–7.

269. *Id.* art. 17.8:8. This provision, absent from the NAAEC, is touted as a significant improvement in the citizen submission process. See CAFTA Policy Brief, *supra* note 84 (citing “provisions for following through on the ‘factual record’ findings” as one of CAFTA’s “environmental firsts”).

submissions have been received since 1995, but only eleven have resulted in publicly released factual records.²⁷⁰ While this number may seem small, it is important to recall that CAFTA's threshold for development of a factual record is significantly lower than that of its predecessor. The ability of any party to request the development of a factual record and then to unilaterally decide to release it to the public increases the chances of obtaining the factual record "remedy." In addition, more countries are party to the CAFTA agreement, thereby increasing the chances that at least one will decide that development of a factual record is warranted. Ultimately, however, this may be a political question, since neither CAFTA nor the NAAEC places any restrictions or conditions on the Council's ability to grant or deny the factual record remedy, and the Council need not explain its decision.

B. Adequacy of the Remedy

Even assuming the development and public release of a factual record, the question remains as to whether this is an adequate remedy or, in reality, even a remedy at all. Views on the adequacy of the factual record remedy differ widely,²⁷¹ but almost all agree that conclusions about the citizen

270. Comm'n on Env'tl. Cooperation, <http://www.cec.org/citizen/status/> (last visited Nov. 18, 2006).

271. See, e.g., Aguilar Alvarez, *supra* note 43, at 417 (noting that citizen submission procedures are "a means to apply diplomatic pressure on another Party" and that "this pressure has worked"); Beatriz Bugada, *Is NAFTA up to Its Green Expectations?: Effective Law Enforcement Under the North American Agreement on Environmental Cooperation*, 32 U. RICH. L. REV. 1591, 1614-15 (1999) (concluding that while the process is "undoubtedly an interesting and innovative procedure[,] . . . its efficiency is limited to the political pressure generated by the press and the public"); Charnovitz, *supra* note 35, at 313 ("The NAAEC is a rather shallow agreement, and adds little to the La Paz Accord enacted ten years earlier."); Chris Dove, Comment, *Can Voluntary Compliance Protect the Environment?: The North American Agreement on Environmental Cooperation*, 50 U. KAN. L. REV. 867, 899 (2002) ("The value of the NAAEC to the environment cannot be conclusively judged at this point because it is a young treaty."); Malgosia Fitzmaurice, *Public Participation in the North American Agreement on Environmental Cooperation*, 52 INT'L & COMP. L.Q. 333, 366 (2003) (noting that many consider the CEC "a largely toothless, cosmetic organisation"); Knox, *A New Approach*, *supra* note 227, at 120-21 ("[T]he procedure appears to have the potential to be an effective quasi-supranational tribunal and an effective part of a supervision package that includes managerial compliance mechanisms."); Margaret Wilder, *Border Farmers, Water Contamination, and the NAAEC Environmental Side Accord to NAFTA*, 40 NAT. RESOURCES J. 873, 890 (2000) ("The CEC Citizen Submittal process has changed the geography of discourse between the Mexican state and society."); Chris Wold et al., *The Inadequacy of the Citizen Submission Process of Articles 14 & 15 of the North American Agreement on Environmental Cooperation*, 26 LOY. L.A. INT'L & COMP. L. REV. 415, 425-26 (2004) (discussing the difficulties the Council's "narrow[ing] the scope of factual records" poses to the integrity of the citizen submission procedure); Tseming Yang, *The Effectiveness of the NAFTA Environmental Side Agreement's Citizen Submission Process: A Case Study of Metales y Derivados*, 76 U. COLO. L. REV. 443, 477 (2005) ("[T]he citizen submission process has managed to increase regulatory enforcement

submission's efficacy depend on one's views about what the process should accomplish. A review of the scholarly literature on the NAAEC's environmental performance reveals a host of different assessments of the NAAEC's achievements. These assessments, in turn, inform the debate over whether CAFTA and free trade agreements in general can adequately offset the damaging effects of increased economic activity.

1. The Factual Record as a Means to Remedy Environmental Harm

If the goal of the citizen submission process is to remedy the environmental harm complained of, then, some critics argue, the process comes up far short. As one commentator stated, the process "provides no substantive environmental remedy for enforcement failures."²⁷² The factual record does not draw legal conclusions²⁷³ and does not order the accused government to remedy the environmental problems in its territory.²⁷⁴ For example, after the release of a factual record concluding that the Mexican government was failing to enforce its environmental law with respect to a toxic contamination problem, the government merely "put up new warning signs and covered up the wastes again with plastic tarps."²⁷⁵ In the absence of an internationally binding mandate, governments are under no obligation to heed the determinations in the factual record.

Defenders of the process respond that although the process does not provide a direct remedy for environmental harm, it nonetheless might lead indirectly to such a remedy. As one commentator noted, "To the extent that the factual record documents a violation of the NAAEC requirements, specifically with regard to the effective enforcement requirement, it may serve as the basis for (informal) bilateral processes between the NAAEC parties seeking compliance."²⁷⁶ As long as the factual record reveals a party's "persistent failure" to enforce its environmental laws, any other party may trigger the consultation mechanism and begin trial-type proceedings. Thus, it is possible for the development of a factual record to lead to more concrete penalties for the offending government.²⁷⁷ Although

transparency without accomplishing the underlying triple goal of improved environmental quality, enhanced enforcement, and broadened environmental governance. To those who held out hope that the process would address the expected environmental ills of NAFTA, its failures are surprising and disheartening.").

272. Yang, *supra* note 271, at 458.

273. *Id.* at 463.

274. *Id.* at 458.

275. *Id.* at 455.

276. *Id.* at 457 (footnote omitted).

277. Interestingly, the consultations mechanism has never been used under the NAAEC. The broadening of the subject matter that a consultation may address under CAFTA, namely, that parties

the remedy would not flow directly to the submitters, it may provide an incentive for governments to heed the Secretariat's findings in the factual record and remediate the environmental harm.

2. The Factual Record as a Means to Promote Transparency

If the goal of the citizen submission process is to promote transparency in government enforcement of environmental laws, defenders of the process argue that it has succeeded. As one scholar noted, "With greater public awareness, public pressure might even shame . . . government officials into acting."²⁷⁸ Moreover, "[a] credible account of the events can 'promote . . . public participation in the development of environmental laws,'" and "[i]nformation about enforcement failures may also be used by private citizens, NGOs, politicians, and others to trigger domestic mechanisms . . . to change the behavior of enforcement authorities."²⁷⁹ In other words, when the public becomes aware of the government's failure to enforce its environmental laws, the public will either pressure the government to improve its enforcement practices or, in democratic countries, elect new representatives.

Critics, however, respond that the citizen submission process fails to accomplish even its goals of transparency. As one scholar stated, "In order for the 'mobilization of shame' to have any persuasive effect on countries it must garner widespread public attention."²⁸⁰ The public, however, cannot "react to every cause that arises and is reported in the media . . . [and] might not respond when the facts do not clearly identify a wrongdoer."²⁸¹ The nature of the factual record, which "does not reach legal conclusions or determination," means that often the facts will not identify a wrongdoer.²⁸² This was the case, for example, in the *Cozumel* factual record, where "[t]he CEC merely presented the evidence it deemed significant, and left Mexico, the Submitters, and the public to draw their own conclusions."²⁸³

may initiate consultations for "any matter" arising under the environmental chapter, may indicate that there will be increased use of this mechanism under the CAFTA regime. Compare NAAEC, *supra* note 35, art. 22:1, with CAFTA, *supra* note 24, art. 17.10:1.

278. Yang, *supra* note 271, at 457.

279. *Id.* at 456-57 (quoting NAAEC, *supra* note 36, art. 1(h)).

280. Dove, *supra* note 271, at 888.

281. *Id.*

282. Fitzmaurice, *supra* note 271, at 365 (quoting Press Release, Comm'n for Env'tl. Cooperation, NAFTA Environment Ministers Release Cozumel Factual Record to the Public (Oct. 24, 1997)).

283. *Id.* at 365 (quoting Paul Stanton Kibel, *The Paper Tiger Awakens: North American Environmental Law After the Cozumel Reef Case*, 39 COLUM. J. TRANSNAT'L L. 395, 468 (2001)).

3. The Factual Record as a Means to Strengthen Civic Participation in Environmental Matters

If the purpose of the citizen submission process is to strengthen civic participation in environmental matters, then defenders say the mechanism has been largely successful. For instance, as one commentator noted with respect to Mexican border farmers' submission on contamination of the Rio Magdalena, the citizen submission process "changed the geography of discourse between the Mexican state and society."²⁸⁴ As a result, the farmers were able to "supersede local government officials and involve top agency officials from the capital, including the environment minister herself."²⁸⁵ Thus, publication of the factual record has the potential to "create enhanced interest in the CEC process" among individuals in society.²⁸⁶

On the other hand, critics note that civic participation in environmental governance is limited, since "the involvement of the submitter ends at the second stage of the process when the Secretariat decides whether to request a party's response."²⁸⁷ Because of this, critics say, submitters are in "an inferior position in which [they] must rely on the Secretariat to pursue the case."²⁸⁸ In fact, the agreement gives no indication that the submitter will be updated on the progress of the submission or be allowed to contribute or even to read the draft factual record before the Council determines whether to approve the factual record's public release. Therefore, although the citizen submission process affords citizens an opportunity to partake in international environmental governance, this opportunity is severely limited.

C. CAFTA's Improvements on the NAFTA Model

While CAFTA may have its flaws,²⁸⁹ it has without doubt made

284. Wilder, *supra* note 271, at 890.

285. *Id.* at 891.

286. *Id.* at 894.

287. Bugada, *supra* note 271, at 1604.

288. *Id.*

289. One change in the CAFTA text that may be of great future significance is the deletion of "non-governmental organization[s]" from the statement of who may file a submission. Compare NAAEC, *supra* note 36, art. 14:1, with CAFTA, *supra* note 24, art. 17.7. Instead of allowing either a "non-governmental organization or person" to file a submission, as the NAAEC did, CAFTA allows only a "person" of a party to file a submission. CAFTA, *supra* note 24, art. 17.7. The importance of the deleted language becomes especially clear when comparing the numbers of submissions by "persons" (including corporations) with those by "non-governmental organizations." Of the fifty-eight submissions filed to date, forty-three were filed by non-governmental organizations, while only fifteen

advances with respect to its predecessor, the NAAEC. First, and most obviously, CAFTA is the first free trade agreement to include a public submissions mechanism in the “core text.”²⁹⁰ Although the location of the submissions mechanism does not change the way it functions, placing the mechanism in the core text yields some advantages. As one author noted, “There are several reasons to fold environmental provisions into the text of a trade agreement,” including: avoidance of disputes down the road about how to balance competing trade and environmental policies; recognition that environmental protection “must be respected in the pursuit of trade goals”; and clarification of expectations.²⁹¹ Moreover, the inclusion of the submissions mechanism in the core text has symbolic value. Placing this mechanism in the core text of the agreement indicates an equality of trade and environmental goals that is not accomplished when key environmental provisions are relegated to a side agreement.²⁹² CAFTA has therefore made important advances in this respect.

Second, CAFTA goes beyond what the NAAEC previously offered by lowering the threshold for submissions to move forward in the development of a factual record and for submissions to be released to the public. Instead of the two-party veto in place under the NAAEC, CAFTA allows any party to unilaterally decide that a factual record is warranted and that it should be released to the public.²⁹³ With more countries as parties to CAFTA, and

were filed by individuals. See Comm’n on Env’tl. Cooperation, <http://www.cec.org/citizen/status>. In addition, all eleven of the submissions that resulted in the development of a factual record were filed by non-governmental organizations. *Id.*

290. CAFTA Policy Brief, *supra* note 84.

291. Carolyn L. Deere & Daniel C. Esty, *Trade and Environment: Reflections on the NAFTA and Recommendations for the Americas*, in GREENING THE AMERICAS: NAFTA’S LESSONS FOR HEMISPHERIC TRADE 329, 334–35 (Carolyn L. Deere & Daniel C. Esty eds., 2002) [hereinafter Deere & Esty, *Reflections*].

292. One commentator remarked:

In comparing NAFTA and the NAAEC, it becomes clear that not all North American law is treated equally. North American trade law is treated as binding and enforceable, whereas North American environmental law is treated as non-binding and aspirational. This is why the NAAEC is commonly referred to as NAFTA’s environmental side agreement, and this is why NAFTA is never referred to as the NAAEC’s trade side agreement. For environmental advocates, therefore, the task ahead will be to work on upgrading the legal status of the NAAEC to raise North American environmental law to the same level as North American trade law.

Paul Stanton Kibel, *The Paper Tiger Awakens: North American Environmental Law After the Cozumel Reef Case*, 39 COLUM. J. TRANSNAT’L L. 395, 475 (2001)).

293. Compare NAAEC, *supra* note 36, arts. 15:2, 15:7 (requiring a “two-thirds vote” for both the preparation of a factual record as well as the public release of a factual record), with CAFTA, *supra* note 24, arts. 17.8:2, 17.8:7 (allowing the preparation and public release of a factual record “by a vote of any Party”).

potentially more submissions from individual citizens, this mechanism has the potential to become extremely active under the CAFTA regime. In addition, once a factual record has been prepared, the EAC may make recommendations “to build the capacity of countries to enforce their environmental laws.”²⁹⁴ While this does not go so far as to provide a substantive remedy for environmental harm, it does at least offer parties follow-up support on improving environmental enforcement in their territories.

CAFTA's environmental side agreement, the ECA, also sets out new and innovative techniques for cooperation on environmental enforcement and policymaking. Unlike the NAAEC, the ECA provides for “benchmarking” and “monitoring” of environmental goals.²⁹⁵ The Parties are obligated to “develop benchmarks or other types of performance measures to assist the Commission in its ability to examine and evaluate . . . the progress of specific cooperative programs.”²⁹⁶ In addition, the ECA promotes bilateral cooperation and encourages the development of “priority areas” designed to reinforce the “capacity” of the party governments to enforce their environmental laws and international agreements.²⁹⁷ Finally, the ECA, unlike the NAAEC, provides for recommendations by the public through the public submissions mechanism “on appropriate capacity building activities.”²⁹⁸ The ECA provisions reflect one commentator's recommendation that “a ‘parallel track’ of *environmental activities* [be incorporated] to promote hemispheric cooperation on pollution control and management of shared natural resources,” with “clear points of intersection with . . . the ultimate trade agreements.”²⁹⁹

CONCLUSION

This Note began by asking whether CAFTA might offer new opportunities for citizens desiring to protect the Osa Peninsula. Since reports indicate that government failures to enforce environmental laws in the Osa are widespread and longstanding, the Osa situation fits the goals of the citizen submission process almost perfectly. The primary forests of the Osa and its biodiversity are in jeopardy despite clear legislative mandates from Costa Rica's General Assembly, and Costa Rica's numerous

294. CAFTA Policy Brief, *supra* note 84.

295. *Id.*

296. ECA, *supra* note 111, art. V(2).

297. *Id.* arts. V(1)(a), VII.

298. USTR Press Release, *supra* note 85.

299. Deere & Esty, *Reflections*, *supra* note 291, at 340.

environmental laws provide a range of possibilities upon which to base an assertion of non-enforcement. However, even if Osa residents could obtain the development of a factual record, it is far from certain that stronger environmental protection in the Osa would follow. For instance, a factual record prepared on behalf of the Osa would likely document Costa Rica's reasons for its failure to enforce, including a "lack of technical and economic resources."³⁰⁰ In addition, Costa Rica would likely submit evidence indicating that it has made efforts to control deforestation in the Osa, such as MINAE's recent appointment of sixty-eight new park wardens for the Osa area,³⁰¹ and its participation in the "Osa Conservation Dialogues" to improve conservation projects in the region.³⁰² Public release of a factual record, therefore, may leave the question unanswered of whether Costa Rica has enforced its environmental laws in the Osa and may not lead to political pressure for a change in enforcement practices. Nonetheless, Osa residents could view the citizen submission procedure "as one channel among a number of courses it is pursuing" to resolve the deforestation problem.³⁰³ Clearly, CAFTA's citizen submission procedure, even with its flaws, offers an extraordinary new opportunity for citizens to draw public attention to the Osa's ecological crisis. Thus, CAFTA, if utilized, may provide a valuable legal tool for protection of the Osa.

CAFTA also carries significant implications for future free trade agreements. As one author noted, negotiators of the FTAA "have not even tried" to "simultaneously pursue both international trade policy objectives and environmental protection."³⁰⁴ Yet the links between increased trade and environmental problems "are real and cannot be avoided."³⁰⁵ CAFTA makes what may be the most significant attempt in free trade agreements to

300. Ernesto Rivera, *Debíl control en delitos ambientales* [*Weak Control of Environmental Crimes*], LA NACIÓN, Dec. 31, 2000 (translation by author), available at http://www.nacion.com/In_ee/2000/diciembre/31/pais2.html; see also Freddy Parrales, "Aqui hay tala ilegal" [*Here We Have Illegal Logging*], LA NACIÓN, Jan. 7, 2001 ("We [ACOSA] are not provided with sufficient persons, vehicles, and budget. This allows people to take advantage of our problems.") (translation by author), available at http://www.nacion.com/In_ee/2001/enero/07/pais2.html.

301. *Ministry Appoints 68 New Park Wardens for Osa Conservation Area in Costa Rica*, LA NACIÓN, Mar. 24, 2005, available at 2005 WLNR 4915988.

302. Rainforest Alliance, *Osa Conservation Dialogues*: Nov. 20–21, 2003 (2003), http://www.eco-index.org/search/pdfs/Osa_dialogues.pdf.

303. Wilder, *supra* note 271, at 894. This was the approach of the Mexican border farmers in the Rio Magdalena case. They "had not placed all their eggs in the basket of international adjudication" and believed that "despite the international trappings of the case, the problem remain[ed] fundamentally local." *Id.* However, initiating legal proceedings aside from the citizen submission could trigger the "automatic termination" provision under CAFTA. CAFTA, *supra* note 24, art. 17.7:5(a); BC Hydro, *supra* note 260, at 4; see also discussion *supra* Part III.C.

304. Deere & Esty, *Reflections*, *supra* note 291, at 1 (footnote omitted).

305. *Id.* at 3.

date to mitigate some of the environmental damages associated with increased economic development, and FTAA negotiators, environmentalists, and the public should monitor CAFTA's environmental performance closely. In the trade context, it is difficult to avoid the something-is-better-than-nothing conclusion with respect to environmental provisions in free trade agreements. Therefore, both the NAAEC and CAFTA agreements are promising models for the interplay between trade and the environment. The value of public participation through the citizen submission process in keeping governments "on their environmental toes" should not be discounted.³⁰⁶

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306. *Id.* at 6-7.

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