A New Approach to Compliance with International Environmental Law: The Submissions Procedure of the NAFTA Environmental Commission

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This Article makes two contributions to the debate over how best to promote compliance with international environmental law. First, it builds a bridge between two popular models of compliance: supranational adjudication, which allows private parties to bring claims against states to international tribunals; and the managerial model, which tries to persuade states to comply by, inter alia, monitoring their actions. Proponents of both models have overlooked the way in which complaint-based monitoring—that is, monitoring by independent experts based on complaints from private parties—can be a form of evolving or quasi-supranational adjudication as well as part of a managerial regime. Second, the Article evaluates the submissions procedure created by the North American Agreement on Environmental Cooperation, a pioneering example of complaint-based monitoring in international environmental law. I conclude that the procedure

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I am very grateful to Jeff Dunoff, Larry Helfer, David Markell, Sean Murphy, Kal Raustiala, and Julie Winterich for their helpful comments on an earlier draft of this Article, and to Greg Block of the NACEC Secretariat and Mark Hughes of Earthlaw for providing me information about their experience with the NACEC submissions procedure. I also benefitted from participating in a panel on the procedure with Randy Christensen, Pierre Marc Johnson, and Howard Mann at the October 1999 meeting of the Canadian Council on International Law.
has the potential to be effective in both supranational and managerial terms and that it is an important precedent for other international environmental agreements.

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INTRODUCTION

How should the international community promote compliance with international environmental law?\(^1\) The traditional approach relies on international adjudication of state-to-state claims.\(^2\) In principle, adjudication is an attractive way to promote compliance for several reasons. Adjudication can finally and authoritatively resolve disputes as to whether a law has been violated, disputes that otherwise might continue interminably.\(^3\) Adjudication alone does not ensure compliance with the resulting decision or with the underlying law, but states often comply with decisions of international tribunals despite the absence of a clear means of enforcement.\(^4\) And when states fail

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1. By “compliance,” I mean behavior that conforms to a legal obligation. See Harold K. Jacobson & Edith Brown Weiss, A Framework for Analysis, in ENGAGING COUNTRIES: STRENGTHENING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL ACCORDS 4 (Edith Brown Weiss & Harold K. Jacobson eds., 1998) [hereinafter ENGAGING COUNTRIES]; David G. Victor et al., Introduction and Overview, in THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS: THEORY AND PRACTICE 7 (David G. Victor et al. eds., 1998) [hereinafter IMPLEMENTATION AND EFFECTIVENESS]. Compliance must be distinguished from “implementation,” which refers to the acts taken to give effect to international agreements. See IMPLEMENTATION AND EFFECTIVENESS, supra, at 4; Harold K. Jacobson & Edith Brown Weiss, A Framework for Analysis, in ENGAGING COUNTRIES, supra, at 4. High rates of compliance do not necessarily mean that an international agreement is effective—either that it causes changes in behavior that further its goals or that it has a beneficial effect on the environment. (For a discussion of the different ways in which “effectiveness” may be defined, see also THE EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL REGIMES: CAUSAL CONNECTIONS AND BEHAVIORAL MECHANISMS (Oran R. Young ed., 1999) [hereinafter ENVIRONMENTAL REGIMES].) For example, if the agreement only mirrors existing state behavior, compliance may be perfect but the agreement may have no effect at all (unless it prevents states from changing their behavior). See Kal Raustiala, Compliance and Effectiveness in International Regulatory Cooperation, 32 CASE W. RES. J. INT’L L. 387 (2000). Nevertheless, I proceed on the basis of the widespread belief that an agreement is likely to be more effective the greater the degree to which its parties comply with its obligations and that compliance with international environmental agreements is therefore worth promoting.

2. See Patricia W. Birnie & Alan E. Boyle, INTERNATIONAL LAW AND THE ENVIRONMENT 136 (1992). In this Article, I use the term “adjudication” to include arbitration by ad hoc tribunals as well as decisions by standing courts. See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 705, 707 (5th ed. 1998).


4. For example, two judges of the International Court of Justice estimated in 1995 that parties have at least partially complied with all but three or four of the 58 judgments issued by the Court since 1946. See B. A. Ajibola, Compliance with Judgments of the International Court of Justice, in COMPLIANCE WITH JUDGMENTS OF INTERNATIONAL COURTS 9, 35 (M. K. Buterman & M. Kulier eds., 1996); S. M. Schwebel, Commentary, in id. at 39, 40. Although the Security Council may enforce judgments of the Court under Article 94(2) of the U.N. Charter, the mechanism is discretionary, subject to veto, and in practice never successfully invoked. See Ajibola,
to comply, judicial decisions may provide a legitimate basis for sanctions that would be seen as partisan or unjustified if taken unilaterally. In addition to resolving specific disputes, adjudication provides impartial interpretations of the law that guide all actors subject to it, thus increasing the determinacy and legitimacy of the law and, as a result, the likelihood that those subject to the law will voluntarily comply with it.

For these reasons, adjudication is often considered essential to a comprehensive and effective system of compliance. Roger Fisher, for example, has argued that “an international law enforcement system should primarily seek to cause compliance not with the rules of law themselves but rather with decisions that apply the law to particular cases of alleged violations.”

Nevertheless, international adjudication has played a very limited role in promoting compliance with international environmental law. With a few notable exceptions, states have not brought claims against one another for transboundary environmental harm. Moreover, states almost never include

supra, at 32-33. But see Schwebel, supra, at 42 (Article 94 should not be counted out as "toothless" recourse).
5. See Bilder, supra note 3, at 147.
7. Fisher, supra note 6, at 35 (emphasis in original); see also Franck, supra note 6, at 317 ("[I]t is only when the rule-writers make provision for an institutional process to apply the rules to specific disputes that a rule takes on the gravity which distinguishes it from the verbal shields and swords of diplomatic combat. Only an international law which is subject to case-by-case interpretation via a credible third-party decision-making process is a serious norm.").
8. See Birnie & Boyle, supra note 2, at 137 ("No modern pollution disaster ... has resulted in the adjudication of an international claim against the state concerned ... ."); Philippe J. Sands, The Environment, Community and International Law, 30 Harv. Int'l L.J. 393, 401-12 (1989) (describing the failure of the more than twenty affected states to bring claims against the Soviet Union for the Chernobyl nuclear plant meltdown). Some see signs of change in states' attitude towards adjudication of environmental claims. See, e.g., A. Neil Craik, Recalcitrant Reality and Chosen Ideals: The Public Function of Dispute Settlement in International Environmental Law, 10 Geo. Int'l L. Envtl. Rev. 551, 552-53 (1998). For example, in 1993 New Zealand requested the International Court of Justice (ICJ) to consider the legality of nuclear weapons tests by France in the South Pacific, a dispute that might have raised important environmental issues had the Court not declined to hear it on jurisdictional grounds. See Nuclear Tests (N.Z. v. Fr.), 1995 I.C.J. 288 (Sept. 22). New Zealand argued that customary international law obligated France to conduct an environmental impact assessment and to provide evidence that the tests would not introduce radioactive substances into the marine environment before carrying out the nuclear tests. See Barbara Kwiatowska, New Zealand v. France Nuclear Tests: The Dismissed Case of Lasting Significance, 37 Va. J. Int'l L. 107, 139-43 (1996). And, in 1997, the ICJ issued a decision concerning a dispute between Hungary and
compulsory, binding adjudicative mechanisms in international environmental agreements. Most multilateral environmental agreements provide for resolution of a dispute only if the parties to the dispute agree, thus adding little or nothing to the states' pre-existing rights. Some agreements also provide that each party may declare in advance that it accepts compulsory settlement of disputes by the International Court of Justice (ICJ) or another specified mechanism, but very few states have made these declarations. And states do not try to invoke the


11. Clear declarations accepting compulsory settlement of disputes have only been made by Norway, Poland, and St. Kitts and Nevis under the Basel Convention; by the Solomon Islands under the Climate Change Convention; and by Austria and Latvia under the Biodiversity Convention. See Basel Convention, supra note 9; Climate Change Convention, supra note 9; Biodiversity Convention, supra note 9.
procedures that do exist. The conclusion seems inescapable that, with one or two potential exceptions, traditional adjudication does not play a significant role in inducing compliance with international environmental law.

Given its advantages, why do states not employ adjudication more often? Two important schools of thought suggest that state-to-state adjudication is fundamentally unsuited for promoting compliance with international environmental law and offer alternative approaches to compliance.

The first critique blames the absence of international adjudication on states, which (it suggests) cannot be trusted to bring environmental claims against one another. In the words of David Wirth:


Similarly, the Protocol on Environmental Protection to the Antarctic Treaty, Oct. 4, 1991, 20 I.L.M. 1461 (1991), provides that parties that do not formally accept the competence of the International Court of Justice or the arbitral tribunal established by the Protocol are deemed to have accepted the competence of the arbitral tribunal. See Jennifer Angelini & Andrew Mansfield, A Call for U.S. Ratification of the Protocol on Antarctic Environmental Protection, 21 Ecology L.Q. 163, 205-07 (1994). The United States ratified the Protocol in April 1997.

14. Of course, even unused dispute settlement procedures conceivably may serve a useful purpose as an "ultimate deterrent." Patrick Szell, The Development of Multilateral Mechanisms for Monitoring Compliance, in Sustainable Development and International Law 97, 107 (Winfried Lang ed., 1995). Since most major environmental agreements do not provide for compulsory adjudication, however, adjudication under them depends upon the willingness of a state to be sued. It is difficult to see how such procedures can have much deterrent value. See Edith Brown Weiss, The Five International Treaties: A Living History, in Engaging Countries, supra note 1, at 89, 166 (experience with five multilateral environmental agreements does not demonstrate that the mere existence of dispute settlement procedures encourages parties to settle their disputes in other ways).

15. One theoretical possibility is that no claims arise because states are generally complying with their international environmental obligations. But universal compliance seems unlikely. A recent, thorough study of compliance by eight states and the European Union with five environmental agreements found many cases of weak or "moderate" (as opposed to substantial) compliance. See Harold K. Jacobson & Edith Brown Weiss, Assessing the Record and Designing Strategies to Engage Countries, in Engaging Countries, supra note 1, at 512-20.
[A] state whose own performance of international obligations is inadequate may hesitate to proceed against others for fear of calling attention to itself or establishing undesirable precedents. Notwithstanding a meritorious legal claim on an environmental matter, one state may be reluctant to initiate a third-party dispute settlement process against another state for fear of jeopardizing other strategic or economic bilateral relationships.\(^{16}\)

To avoid state control of the adjudicative process, Philippe Sands, David Wirth, and others have proposed allowing non-governmental actors to bring environmental claims against states before international tribunals.\(^{17}\) This type of international adjudication of private parties' claims against states, which Laurence Helfer and Anne-Marie Slaughter have called "supranational adjudication," has been adopted in a few other areas of international law—notably human rights law and bilateral investment treaties.\(^{18}\)

Members of the second school of thought, led by Abram Chayes and Antonia Handler Chayes, find fault with adjudication itself rather than with the states that choose not to employ it. They argue that international adjudication is not only "costly, contentious, cumbersome, and slow— the usual defects of litigation" but that it also has "the additional unattractive features of raising the political visibility of the problem and failing to be subject to party control."\(^{19}\) They claim that

\(^{16}\) David Wirth, *Reexamining Decision-Making in International Environmental Law*, 79 Iowa L. Rev. 769, 779 (1994). Such considerations would be even more likely to dissuade a state from raising a claim for damage to the global commons, where any harm to the state would be indirect. See Philippe Sands, *Compliance with International Obligations: Existing International Legal Arrangements, in Improving Compliance with International Environmental Law* 48, 63 (James Cameron et al. eds., 1997).

\(^{17}\) See Wirth, *supra* note 16, at 780, 802; Sands, *supra* note 8, at 411-12, 417. Christopher Stone has proposed allowing private groups to act as defenders of the global commons, with the legal right to take claims on its behalf to international institutions. Christopher D. Stone, *Defending the Global Commons*, in *GREENING INTERNATIONAL LAW* 34, 41 (Philippe Sands ed., 1993). And Amadeo Postiglione has urged the creation of an International Court of the Environment, to which individuals could bring their environmental claims. Amadeo Postiglione, *An International Court for the Environment?*, 23 ENVT. POL. & L. 73 (1993).


\(^{19}\) Abram Chayes et al., *Managing Compliance: A Comparative Perspective, in Engaging Countries*, *supra* note 1, at 39, 54; see also ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 205 (1995) ("A century of experience with international adjudication leads to considerable skepticism about its suitability as an international dispute
traditional adjudication is particularly useless for promoting compliance with multilateral environmental agreements addressing global or regional problems like ozone depletion or climate change, which establish comprehensive regulatory regimes to avoid or minimize future environmental harm. In their view, adjudication based on traditional principles of state responsibility is too inflexible, backward-looking, and bilateral in its focus to successfully resolve disputes over interpretation and application of regulatory agreements. Thus, they assert, states are wise to avoid adjudication.\textsuperscript{20}

Like the proponents of supranational adjudication, the Chayeses propose an alternative to traditional adjudication. They argue that compliance with environmental and other regulatory agreements can best be promoted by non-confrontational, non-binding mechanisms that \textit{manage} compliance rather than \textit{enforce} it. The managerial model seeks to persuade states to comply by monitoring their actions, building their capacity, and resolving their disputes informally.\textsuperscript{21} The Chayeses argue that these mechanisms are more effective in large part because they are more acceptable to states. States that resist adjudication of disputes arising from regulatory agreements will agree to mechanisms to manage their compliance, as the number of agreements containing such mechanisms attests.\textsuperscript{22}

Both supranational adjudication and the managerial model are attractive approaches to compliance.\textsuperscript{23} Supranational
adjudication offers a significant role to non-state actors while managerialists point to greater acceptance of their model by states. Both models claim to be more effective than the traditional approach of state-to-state adjudication, which they persuasively criticize.\textsuperscript{24}

But each model’s criticisms of traditional interstate adjudication may also apply to the approach proposed by the other. The managerial model’s objections to intergovernmental adjudication might appear to apply with even greater force to supranational adjudication, which would presumably be at least as confrontational as traditional adjudication and even more outside state control. On the other hand, proponents of supranational adjudication might note the same potential for undue state control of managerial mechanisms that (they claim) has hamstrung traditional interstate adjudication. Every state contributes to environmental degradation to some degree, and no state is immune from the possibility of failing to comply with its international obligations. States therefore have an incentive not to use managerial tools in the face of opposition from the “managed” state for fear that the tools may later be turned against them. Proponents of supranational adjudication might ask managerialists, “Who will manage the managers?” The models may thus appear to be fundamentally incompatible.

Paradoxically, however, a form of incipient or quasi-supranational adjudication may develop within the managerial model itself, as an outgrowth from managerial mechanisms that monitor states’ compliance with their obligations. The most popular monitoring mechanism in international environmental agreements is self-reporting, a method by which states report on their own compliance. Self-reporting has obvious weaknesses, since states are usually unwilling to shine a bright light on their own shortcomings. But human rights law has developed stronger monitoring mechanisms that address those weaknesses by giving roles to private parties and independent experts. In their

most developed form, these monitoring mechanisms charge independent experts with reporting on state compliance and allow private parties to trigger the reporting procedure by claiming that states have failed to comply with their obligations. Proponents of supranational adjudication and proponents of the managerial model have overlooked the way in which this complaint-based monitoring may fit within both models of compliance at the same time. By incorporating independent expert review of private parties’ claims against states, complaint-based monitoring may be a form of evolving or quasi-supranational adjudication. And by not seeking to enforce compliance, complaint-based monitoring may be part of a persuasive, managerial regime—and thus more palatable to the states whose support is necessary for its creation.

Outside the European Union, the only example of complaint-based monitoring in international environmental law is the submissions procedure of the North American Commission for Environmental Cooperation (NACEC). The NACEC was created by the United States, Mexico, and Canada in the 1993 North American Agreement on Environmental Cooperation (NAAEC), the environmental side agreement to NAFTA. The NAAEC allows any resident of a state party to file a submission complaining that a party has failed to effectively enforce its domestic environmental law (and thus has failed to comply with a key obligation under the NAAEC). If a submission successfully passes through several screening points, it may result in a “factual record,” a non-binding report prepared by independent experts. This procedure is obviously not supranational adjudication in the strict sense. But it has key elements of supranational adjudication: it allows private parties to claim that state parties to an international environmental agreement have failed to comply with an obligation under the agreement and to have their claim reviewed by independent experts. At the same time, it is an integral part of the managerial approach to compliance established by the NAAEC, which relies on cooperation among the state parties, capacity-building, and monitoring, rather than on coercion and enforcement, to achieve its goals.

26. See id. arts. 5, 14.
27. See id. art. 15.
The NACEC submissions procedure is far too young for final conclusions about its effectiveness, but the terms of the NAAEC and the early decisions of the Secretariat indicate that the procedure has the potential to be effective both as a quasi-supranational tribunal and as part of a managerial regime. A checklist of factors relevant to effective supranational adjudication developed by Laurence Helfer and Anne-Marie Slaughter\(^{28}\) indicates that the NACEC submissions procedure has the potential to be effective in ways characteristic of a supranational tribunal. At the same time, an examination of the way in which the submissions procedure may interact with other managerial mechanisms in the NAAEC indicates that it can be successful in managerial terms as well.

That the NACEC procedure has the potential for success does not, of course, mean that it will be successful in practice. Whether it does prove to be successful is important in ways that extend beyond its contribution to the success or failure of the NAAEC. By revitalizing international adjudication of environmental disputes in a managerial context, the NACEC submissions procedure may provide an example for those seeking to promote compliance with other international environmental agreements.

Part I of this Article argues that the managerial model and supranational adjudication should be reassessed, taking into account the dual role of complaint-based monitoring. Part II reviews the monitoring mechanisms prevalent in international environmental agreements and describes the innovative NACEC submissions procedure. Part III evaluates the potential effectiveness of the NACEC procedure as a quasi-supranational tribunal and as part of a managerial regime. It concludes that the procedure has the potential to be effective both as a form of quasi-supranational adjudication and as an integral part of a managerial approach to compliance.

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SUPRANATIONAL ADJUDICATION AND THE MANAGERIAL MODEL OF COMPLIANCE

The first and second sections of this part of the Article examine supranational adjudication and the managerial model more closely. The third section uses examples from the human rights field to illustrate types of managerial monitoring and to show how complaint-based monitoring may be a form of quasi-

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\(^{28}\) See Helfer & Slaughter, supra note 18.
supranational adjudication. The final section describes how the managerial model and supranational adjudication should be adjusted to take the dual role of complaint-based monitoring into account.

A. The Case for (and Against) Supranational Adjudication

Professors Laurence Helfer and Anne-Marie Slaughter have defined supranational adjudication as

adjudication by a tribunal that was established by a group of states or the entire international community and that exercises jurisdiction over cases directly involving private parties—whether between a private party and a foreign government, a private party and her own government, private parties themselves, or, in the criminal context, a private party and a prosecutor's office.29

This Article focuses on one type of supranational adjudication: international adjudication of private claims against public actors.

This type of adjudication is a relatively recent phenomenon. Traditionally, international law recognized only state claims; private claims could be heard only if states espoused them.30 While states undoubtedly remain the primary actors on the international level and many tribunals remain limited to states,31 international law now recognizes that individuals may appear as legal persons on the international plane,32 and private parties are beginning to have access to some international tribunals. Supranational adjudication is firmly established in Europe, especially in the area of human rights. Professors Helfer and Slaughter argue that adjudication of private claims against states by the European Court of Justice and the European Court of Human Rights is as effective, with respect to matters within

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29. Id. at 289.
30. The traditional view was that only states could be “subjects” of international law. See ROSALYN HIGGINS, PROBLEMS & PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 48, 49 (1994). Only a “subject” of international law is “capable of possessing international rights and duties and ha[s] the capacity to maintain its rights by bringing international claims.” BROWNLEE, supra note 2, at 57. Judge Higgins persuasively rejects the position that only states may be subjects of international law, and indeed the entire “subject-object” dichotomy. HIGGINS, supra, at 49-50.
31. See, e.g., Statute of the International Court of Justice, art. 34(1), in THE INTERNATIONAL COURT OF JUSTICE: PROCESS, PRACTICE AND PROCEDURE 136 (D. W. Bowett et al. eds., 1997) (“Only States may be parties in cases before the Court.”).
32. See BROWNLEE, supra note 2, at 66, 585 (“[T]here is no rule that the individual cannot have some degree of legal personality, and he has such personality for certain purposes. . . . Treaties may confer procedural capacity on individuals before international tribunals.”); FRANCK, supra note 6, at 13.
their purview, as adjudication by domestic courts.\textsuperscript{33} The judicial entities of several other regional economic integration agreements also allow access by individual persons.\textsuperscript{34} Supranational adjudication may have progressed furthest in international investment agreements that allow private investors to bring claims against states to compulsory, binding adjudication.\textsuperscript{35} Commentators have also argued that private parties should be allowed to participate in international adjudication of trade disputes;\textsuperscript{36} the Appellate Body of the World Trade Organization recently took a step in that direction by ruling that WTO dispute resolution panels may accept amicus briefs from non-governmental organizations.\textsuperscript{37}

Given private parties' increasing access to international judicial bodies, it is not surprising that activists and scholars have called for international environmental law to adopt

\textsuperscript{33} See Helfer & Slaughter, supra note 18, at 276, 296.
\textsuperscript{37} World Trade Organization: Report of the Panel on United States Import Prohibition of Shrimp and Certain Shrimp Products, May 15, 1998, I (B), 37 I.L.M. 838. See David A. Wirth, Some Reflections on Turtles, Tuna, Dolphin, and Shrimp, 9 Y.B. INT'L ENV'TL L. 40, 46 (1998) (warning that "the opening presented by the Appellate Body may prove to be either illusory in practice or sufficiently variable in application that it is not predictable").
supranational adjudication. As noted above, one of the attractive features they see in supranational adjudication is its ability to consider environmental claims despite state reluctance to pursue them. But supranational adjudication has broader attractions. In theory, at least, it offers the possibility of an approach to compliance with international environmental law that is both fairer and more effective than traditional intergovernmental adjudication.

1. Fairness

One argument for supranational adjudication is that private parties harmed by breach of an international obligation by a state should, as a matter of basic justice, be able to pursue a claim against the state before an international tribunal. Limiting access to international adjudication to states seems fundamentally unfair to individuals who are thereby not allowed to protect their own interests. In theory, states may protect their nationals' interests by espousing their claims, but in practice the espousal rule does not serve the individual very well since:

[all too often his national government is not at all interested in pursuing his claim (or in rectifying the harm allegedly done to itself, to rephrase it in the classic formula). It has broader interests to concern itself with, and the instigation of litigation may not fit with these broader considerations. The individual is thus left with no effective remedy.]

38. See Postiglione, supra note 17; Wirth, supra note 16, at 780, 802; Sands, supra note 8, at 411-12, 417; Stone, supra note 17, at 41. As a model, they sometimes look to U.S. federal environmental law, which has made individuals' ability to sue their governments and one another an integral means of enforcing compliance. See Wirth, supra note 16, at 778-79; Sands, supra note 8, at 412-13. "Citizen-suit" provisions, which are contained in most federal environmental statutes, allow individuals to act as private attorneys general, bringing claims against violators. See generally Barry Boyer & Errol Meidinger, Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws, 34 BUFF. L. REV. 833 (1985). Private parties may also seek judicial review of agency action in implementing a statute, either based on specific provisions in a statute or based on the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (2000). See, e.g., Bennett v. Spear, 520 U.S. 154 (1997).

39. Thomas Franck makes this argument with respect to "the organization of global discourse" generally, saying that a "characteristic of the predominant modality in the organization of global discourse is that voice and vote are reserved exclusively for governments. This is both manifestly unfair and, ultimately, destructive of discourse." FRANCK, supra note 6, at 480.

40. HIGGINS, supra note 30, at 52; see also FISHER, supra note 6, at 201-02.
On the other hand, it might be argued that the decision as to whether to bring an international claim should take into account, or balance, "broader interests"—for example, the interests of those who oppose the claim as well as those who support it—and that this kind of balancing should be left to national governments even if some individuals' interests suffer as a result. Allowing one interested individual or group to bypass or revisit the decision by referring it to supranational adjudication seems unfair to the others concerned. The unfairness might be remedied by allowing all of the interested parties to have access to the supranational tribunal, but that would simply reproduce the national debate at a supranational level with no obvious reason to believe that the result would be any different, or if different, any fairer.41

Which of these arguments has greater force depends in large part on how the legal obligation in question is characterized. Does the obligation primarily protect the interests of the state as whole in a way that may supersede individual interests, or does it primarily protect the interests of individuals as individuals in a way that precludes their interests from being balanced away in the service of broader considerations? If the latter, then the obligation can be considered as providing legal rights to the individual, rather than just to the state.42 In that case, it seems only fair that individuals should be able to pursue vindication of those rights on the international plane directly, without depending on their government to do so for them.

Perhaps the clearest examples of international obligations primarily protecting individual rights are those comprising human rights law. By their nature, human rights are held by individuals, not by governments. Indeed, human rights law

41. See Nichols, supra note 36, at 320-21 ("[T]he international trade regime provides a buffer between the makers of trade policy and special interest groups. Having sorted out trade policy issues at the national level, bureaucrats are free to cooperate with other governments to maximize national and global welfare without the intrusion of special interests. Allowing special interest groups to have standing before dispute settlement panels would obviate that buffer and subject policymakers to another level of protectionist pressure from special interest groups."). For a criticism of Nichols' analysis, see Charnovitz, supra note 36. For Nichols' response to Charnovitz, see Philip M. Nichols, Realism, Liberalism, Values, and the World Trade Organization, 17 U. Pa. J. INT'L ECON. L. 851 (1996).

42. See Higgins, supra note 30, at 53 ("My own view is that the individual does have certain rights owed to him under international law (and not just to his state."); Helfer & Slaughter, supra note 18, at 387 ("In a growing number of areas of international law, such as human rights law and trade law, individuals have a direct interest in calling their governments to account for violation of international obligations.").
exists to protect individuals from abuse by their government. Allowing a state to decide whether its nationals may pursue claims for violations of their human rights therefore seems grossly unfair. Investment treaties may be similar, in that the beneficiaries of their protections—and those who will be directly harmed by violations—are primarily individual investors, rather than other states. It is therefore not surprising that supranational adjudication has made its greatest strides in the areas of human rights and international investment. 43

Individuals are arguably the primary beneficiaries of international environmental law in the same way that they are the primary beneficiaries of human rights law and investment treaties. 44 But this analogy is not always clear-cut, which may help to explain why supranational adjudication of environmental disputes has not yet achieved widespread support. While some environmental obligations seem to protect individual interests in a way that should preclude their being balanced away, 45 others seem only to provide general frameworks within which governments have a great deal of room to balance different considerations. 46

It is beyond the scope of this Article to try to list which obligations fall into each of these categories. But it might be useful to make two further points. First, the argument for supranational adjudication of environmental claims is obviously strengthened to the extent that environmental interests are considered human rights, and whether individuals may participate in international institutions to defend those interests is sometimes treated as a human rights issue. 47 But the ability of

43. These issues have not been conclusively resolved even in those areas, however. In particular, there is currently something of a backlash against supranational adjudication of investment disputes. Environmentalists argue that by allowing private investors access to supranational adjudication, investment agreements like Chapter 11 of NAFTA can unfairly override national environmental policymaking. See Howard Mann, NAFTA and the Environment: Lessons for the Future, 13 Tul. Envtl. L.J. 387, 402-07 (2000).

44. See Sands, supra note 8, at 400-01; Wirth, supra note 16, at 779.

45. See, e.g., Espoo Convention, supra note 9, art. 3(8) (the public of a state party likely to be affected by the transboundary impact of a proposed activity shall be informed of and given the opportunity to make comments on the proposed activity to the competent authority of the state party in which it is to take place).

46. See, e.g., Climate Change Convention, supra note 9, art. 4(2)(a) (each party “shall adopt... and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs.”).

47. See Michael Bothe, Compliance Control Beyond Diplomacy—the Role of Non-Governmental Actors, 27 Envtl. Pol'y & L. 293, 294 (1997); Postiglione, supra note 17. See generally James Cameron & Ruth MacKenzie, Access to Environmental
individuals to participate in international institutions, including tribunals, should not depend on recognition of their interests as human rights. Individuals have a far broader range of environmental interests than those that can easily be characterized as human rights. The question should be whether states' international environmental obligations protect individuals directly in a way that should not be subject to balancing away by governments, not whether the obligations create new human rights.

Second, a key factor in characterizing environmental obligations in this respect may be the relative precision of the obligation. The vaguer the obligation, the more room it may give to each party to decide how to meet it, and in the process how best to balance opposing interests. Harder obligations leave less room for such balancing. In those cases, it is more difficult to argue that a state's failure to comply is the result of balancing a broad range of considerations, and it seems fairer to allow individuals harmed by the violation to defend their interests directly on the international plane.

2. Effectiveness

Apart from considerations of fairness, proponents of supranational adjudication argue that it would be more effective than traditional intergovernmental adjudication at promoting compliance with international environmental law. First, as noted above, they argue that intergovernmental adjudication in international environmental law is dormant, if not dead, because of states' reluctance to use it. Individuals, however, "do not face the fears of a reciprocal response or diplomatic ramifications in other issue areas that often deter states from calling one another to account." Supranational adjudication holds out the promise of reinvigorating adjudication as an effective compliance mechanism by allowing private parties to bring claims to international tribunals. More generally, supranational

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48. See Wirth, supra note 16, at 779.

49. Helfer & Slaughter, supra note 18, at 387; see Wirth, supra note 16, at 780 ("Because of the numerous disincentives for governments to encourage other governments to abide by international obligations and because of the substantial impediments to initiating even informal proceedings, the international legal system presents, if anything, a greater need for private attorneys general than does municipal law.").
adjudication could bring a broader range of information regarding possible violations to tribunals, and therefore present more opportunities for tribunals to identify and review instances of non-compliance.\textsuperscript{50}

At the same time, supranational adjudication retains the benefit of traditional adjudication: impartial review of a state's compliance with its obligations by a tribunal that provides authoritative, legitimizing interpretations of the law. This process, whether intergovernmental or supranational, may promote voluntary compliance with the law.\textsuperscript{51} Indeed, it has been argued that allowing private parties to participate in adjudication would increase the legitimacy of the law in their eyes, thus making it more likely that they will voluntarily comply with the law—a particularly important effect since international environmental law often ultimately seeks to regulate the behavior of non-state actors.\textsuperscript{52}

Like intergovernmental adjudication, supranational adjudication of environmental disputes would face practical problems. Opening adjudication to private parties might swamp the resources of international tribunals; conversely, private parties might find themselves unable to participate without extensive financial and legal assistance.\textsuperscript{53} But these problems have not been insurmountable in other areas and could be overcome in international environmental law as well. Standards could be set to screen out claims that are frivolous, better handled through domestic courts, or not likely to raise issues important enough to justify the attention of a tribunal. Costs could be minimized by streamlining procedures and, if


\textsuperscript{51} See Fisher, supra note 6, at 309-14; Franck, supra note 6, at 8, 26, 103.

\textsuperscript{52} See Barrett-Brown, supra note 50, at 564. In many cases, however, the interests of the regulated parties and of the parties that benefit from the regulation diverge. See Kal Raustiala, The “Participatory Revolution” in International Environmental Law, 21 Harv. Envtl. L. Rev. 537, 557 (1997). The regulated community will presumably feel more inclined to comply only if adjudication is open to it, not just to the beneficiaries of regulation. Cf. Kal Raustiala & David G. Victor, Conclusions, in IMPLEMENTATION AND EFFECTIVENESS, supra note 1, at 665 (studies of participation by “target groups” in international environmental policymaking (as opposed to adjudication) suggest that such participation is a necessary but not a sufficient condition for the groups to change their behavior).

\textsuperscript{53} See Brownlie, supra note 2, at 598.
necessary, states or international organizations could provide assistance.

Finally, supranational adjudication may provide a new way to promote compliance with decisions. Laurence Helfer and Anne-Marie Slaughter persuasively argue that supranational tribunals may be more effective than traditional intergovernmental tribunals because they have ways of inducing compliance that are not available to intergovernmental tribunals:

In pure international litigation, in which states are treated as unitary actors, the government of a particular state is represented by the head of state or the foreign office. Other domestic government institutions may be involved in determining the position taken by the head of state or the foreign office, but the international tribunal has no way to interact directly with those institutions. In pure supranational adjudication, by contrast, the direct link between supranational tribunals and private parties creates opportunities for those tribunals to establish direct or indirect relationships with the different branches of domestic governments. Through these relationships, a supranational tribunal can harness the power of domestic government to enforce its rulings in the same way that the judgments and orders of a domestic court are enforced.\footnote{Helfer & Slaughter, \textit{supra} note 18, at 289-90 (footnotes omitted). For example, private parties may try to use domestic courts to enforce decisions by the supranational tribunal against the state. \textit{Id.} at 288-89; \textit{see also} Robert O. Keohane et al., \textit{The Effectiveness of International Environmental Institutions. in INSTITUTIONS FOR THE EARTH: SOURCES OF EFFECTIVE INTERNATIONAL ENVIRONMENTAL PROTECTION} 3, 24 (Peter M. Haas et al. eds., 1993) (making a similar point with respect to international institutions generally).}

3. Assessing Supranational Adjudication: the Helfer-Slaughter Model

Professors Helfer and Slaughter have created a model to measure the effectiveness of supranational adjudication. Based on their review of the two most effective supranational tribunals, the European Court of Justice and the European Court of Human Rights, they have identified a checklist of thirteen factors relevant to the effectiveness of supranational adjudication. The checklist includes factors under the control of states, such as the composition and functional capacity of the tribunal, factors under the control of the tribunal, such as its neutrality and awareness of its audience, and factors beyond the control of
either, such as the nature of the violations brought to the tribunal.\textsuperscript{55}

An important aspect of the model is that it treats the question as to whether the decisions of the tribunal are binding as only one factor to be taken into account in assessing the tribunal's effectiveness.\textsuperscript{56} Professors Helfer and Slaughter seem clearly correct in not treating the effectiveness of supranational adjudication as dependent upon whether decisions are legally binding, since even if its decisions are considered legally binding no international tribunal (and, for that matter, no domestic court) has the ability to force states to comply.\textsuperscript{57} That a decision is considered legally binding may increase its pull toward compliance,\textsuperscript{58} but no more so than (and possibly less than) other factors.

The ability to issue legally binding decisions is normally considered an essential attribute of supranational adjudication. But the Helfer-Slaughter model suggests that an adjudicative procedure may be effective even if it is not binding, and in particular may be effective in ways characteristic of supranational adjudication. For that and other reasons, the model is highly valuable and this Article analyzes and applies it in more detail below.\textsuperscript{59}

4. Managerial Criticisms of Supranational Adjudication

The most serious objections to the idea of supranational adjudication may come from the managerial approach to compliance. Its criticism of intergovernmental adjudication as too awkward a tool to manage the fine points of compliance with detailed regulatory agreements might seem to apply with at least as much force to supranational adjudication. Moreover, proponents of the managerial model point out that states find managerial mechanisms far more palatable than adjudication. States averse to intergovernmental adjudication of environmental disputes would presumably find adjudication triggered by

\textsuperscript{55} See Helfer & Slaughter, supra note 18, at 298-335.
\textsuperscript{56} See id. at 307.
\textsuperscript{57} See Roger Fisher, Bringing Law to Bear on Governments, 74 Harv. L. Rev. 1130 (1961).
\textsuperscript{58} The phrase is Thomas Franck's. Franck, supra note 23, at 24 (describing "pull toward compliance" resulting from the perceived legitimacy of a rule or rule-making institution).
\textsuperscript{59} See discussions infra Parts I.C.4, III.
individuals to have even more potential for risky confrontation. More basically, states will resist supranational adjudication because they see it as requiring them to relinquish fundamental aspects of their sovereignty.

These objections to supranational adjudication have proved to have force even in areas like trade law where intergovernmental adjudication already plays an integral role and those arguing for supranational adjudication of trade disputes are essentially arguing for existing mechanisms to be expanded. But in international environmental law, in which even intergovernmental adjudication has not been widely accepted, the quest for supranational adjudication of environmental disputes may seem doubly quixotic.

B. The Managerial Approach to Compliance

Abram Chayes and Antonia Handler Chayes are the leading proponents of the managerial approach to compliance and they explain its elements in detail in their 1995 book, The New Sovereignty. They base their “managerial model” on two premises. The first is that:

as a practical matter, coercive economic—let alone military—measures to sanction violations cannot be utilized for the routine enforcement of treaties in today’s international system, or in any that is likely to emerge in the foreseeable future. The effort to devise and incorporate such sanctions in treaties is largely a waste of time.

The second premise is that states are usually willing to comply with their treaty obligations and their failure to do so is due far more often to limited capacity, ambiguous treaty language, or delayed performance than to deliberate violations.

The managerial model seeks to address the underlying causes of these problems through cooperative means, such as interpreting ambiguities in language creating obligations, settling

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60. But see Fisher, supra note 6, at 202-05 (arguing that allowing individuals to raise international claims reduces the risk that the issue will result in a state-to-state dispute). For an interesting argument that allowing nongovernmental organizations to participate in the creation, implementation, and enforcement of international environmental law helps states expand their own regulatory power into new areas, see Raustiala, supra note 52.


63. See id. at 3-17.
disputes informally, and building states' capacity to comply. It relies primarily on persuasion rather than confrontation. Intensified, confrontational pressure to comply may be brought to bear only if states demonstrate persistent, intentional non-compliance.

Transparency—the generation and dissemination of information about the requirements of the regulatory regime and the parties' performance under it—is probably the most important managerial tool. Harold Jacobson and Edith Brown Weiss refer to mechanisms designed to provide transparency as "sunshine methods," which encourage compliance by bringing parties' behavior "into the open for appropriate scrutiny." Sunshine methods vary enormously across a wide range of factors, including scope, participants, reliability, and consequences. One particularly important type is monitoring, which may be defined broadly as systematically reviewing, assessing, and reporting on states' compliance with their obligations. Sunshine methods, and monitoring in particular, have obvious limits in inducing compliance. A report by a non-governmental organization on human rights abuses by a state, for example, does not force the state to change its ways. But the report may establish the facts objectively and draw attention to the state's behavior, thus making it more difficult for the state to credibly deny its actions. It may even induce the state to comply.

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64. Id. at 22-25; see also Chayes et al., supra note 19, at 49-58.
65. CHAYES & CHAYES, supra note 19, at 49.
66. See id. at 135.
67. See Antonia Handler Chayes et al., *Active Compliance Management in Environmental Treaties, in Sustainable Development and International Law*, supra note 14, at 75, 81.
69. The term "monitoring" may be used in many different ways. As used in this Article, it focuses on states' compliance with their obligations, but the term also commonly refers to observation of an underlying condition, such as the state of an ecosystem. See, e.g., Kamen Sachariew, *Promoting Compliance with International Environmental Legal Standards: Reflections on Monitoring and Reporting Mechanisms*, 2 Y.B. INT'L ENVTL. L. 31, 34 (1992).
70. See Oran R. Young, *The Effectiveness of International Institutions: Hard Cases and Critical Variables, in Governance Without Government: Order and Change in World Politics* 160, 176-77 (James N. Rosenau & Ernst-Otto Czempiel eds., 1992) ("[T]he prospect of being found out is often just as important, and sometimes more important, to the potential violator than the prospect of becoming the target of more or less severe sanctions of a conventional or material sort.... Policy-makers, like private individuals, are sensitive to the social opprobrium that accompanies violations of widely accepted behavioral prescriptions. They are, in short, motivated by a desire to avoid the sense of shame or social disgrace that commonly befalls those who break widely accepted rules."); LOUIS HENKIN, HOW NATIONS BEHAVE 52 (2d
Different tools in the managerial model address different sources of non-compliance. For example, technical or financial assistance may be necessary to build capacity while a non-binding method of resolving disputes may help to clarify ambiguities in legal obligations. The Chayes emphasize the importance of "bringing together all the compliance measures and instruments . . . in a single coherent compliance strategy."\textsuperscript{71} They describe a type of super-monitoring that can draw together different managerial tools in "an emerging and potentially powerful process" of:

systematic review and assessment of individual members' performance in relation to treaty obligations, with a view to defining steps to improve performance where it may be lagging . . . When questions about performance emerge, the review explores the shortfalls and problems, works with parties to understand the reasons, and develops a program for improvement. In the course of this process, the compliance instruments described [previously in the book] are deployed as necessary. Differences about the content and applicability of the governing norms are resolved. Technical and sometimes financial assistance is provided . . . States are given ample opportunity to explain and justify their conduct. The reasons advanced to excuse noncompliant conduct point to avenues for improvement and correction. The state concerned can hardly avoid undertaking to act along the indicated lines. As the review is reiterated over time, these promises of improvement contain increasingly concrete, detailed, and measurable undertakings.\textsuperscript{72}

The managerial model has been criticized as incomplete in important respects. For example, it pays little or no attention to the ways in which states translate international norms into domestic law.\textsuperscript{73} Moreover, it may underestimate the importance of enforcement through sanctions, and in particular how the

\textsuperscript{71} CHAYES \& CHAYES, supra note 19, at 135-53.

\textsuperscript{72} Id. at 229-30. The Chayes distinguish "monitoring" from mechanisms for "review and assessment," but a broad definition of monitoring would seem to include both. Id. at 183-89, 229-31.

\textsuperscript{73} See Koh, International Law, supra note 23, 2640-41 (1997).
threat of sanctions may help to make managerial methods of compliance more effective.\textsuperscript{74}

Even if the managerial model is not the final word on compliance, however, its emphasis on persuasion rather than enforcement accurately reflects states' preferred approach to compliance with regulatory agreements.\textsuperscript{75} States do not use all of the managerial mechanisms in every regulatory agreement, of course, or use them as coherently and comprehensively as proponents of the managerial model would wish.\textsuperscript{76} But when creating and using compliance mechanisms, states look first (and often only) at non-confrontational, non-binding ways to manage compliance and second (or never) at ways to enforce compliance. International environmental agreements in particular rely primarily on managerial mechanisms rather than coercive enforcement.\textsuperscript{77}

The very popularity of managerial approaches highlights a more fundamental problem with them, however. Non-confrontational, non-binding mechanisms under state control provide states more opportunities to avoid compliance. Although the managerial model contemplates the possibility of increasing confrontational pressure on recalcitrant states to comply, states that are reluctant to bring environmental claims to adjudication may also be reluctant, for the same reasons, to call attention to other states' failure to comply with managerial, persuasive mechanisms.

The Chayeses do not completely overlook this problem or the way in which non-state actors may help to address it. They say that although "[t]he states party to the treaty are, of course, the key interlocutors in [the review and assessment] dialogue," the procedure also provides "a major point of access to the compliance process for non-state actors. Indeed, in its developed forms, the review process depends heavily on the participation of NGOs and international organizations for its effectiveness."\textsuperscript{78}

\begin{footnotes}
\footnote{74. See id. at 2639; see also George W. Downs et al., Is the Good News About Compliance Good News About Cooperation?, 50 INT'L ORG. 379 (1996); George W. Downs, Enforcement and the Evolution of Cooperation, 19 MICH. J. INT'L L. 319, 328-35 (1998); Jacobson & Weiss, supra note 15, at 547-48; Raustiala & Victor, supra note 52, at 683-84.}
\footnote{75. See Martti Koskenniemi, New Institutions and Procedures for Implementation Control and Reaction, in GREENING INTERNATIONAL INSTITUTIONS 236, 237 (Jacob Werksman ed., 1996) ("It is widely accepted today that persuasion instead of enforcement is the appropriate cure to the malady of non-compliance.").}
\footnote{76. See Chayes et al., supra note 67, at 88.}
\footnote{77. See BIRNIE & BOYLE, supra note 2, at 160-79.}
\footnote{78. CHAYES & CHAYES, supra note 19, at 249.}
\end{footnotes}
More generally, they state that "[n]ongovernmental organizations perform parallel and supplementary functions at almost every step of the strategy for regime management," often providing the "basic evaluation and assessment of party performance that is the fulcrum of the compliance process" and responding to instances of state non-compliance by contributing to "public exposure, shaming, and popular political response."\(^{79}\)

But while the Chayeses give examples of NGO influence on the formulation of and compliance with international law, including environmental law,\(^{80}\) they do not discuss how monitoring procedures could or should formally provide a "major point of access" to non-state actors. Similarly, they discuss the importance of international organizations, and of their secretariats in particular,\(^{81}\) but they do not explore the ways in which independent experts working for a secretariat may provide impartial assessment of the information provided by states and non-state entities.

Providing formal roles to non-governmental actors and to independent experts may help to ensure the accuracy and effectiveness of monitoring mechanisms. Those roles may also be the seeds for the emergence of a form of supranational adjudication within the managerial model.

C. From Managerial Monitoring to Supranational Adjudication

If monitoring is completely controlled by states, it is likely to be ineffective, since states are often reluctant to call attention to shortcomings in their own or others' performance. Therefore, monitoring mechanisms often provide roles to independent experts and to non-governmental organizations and individuals. Independent experts are, by definition, knowledgeable in the obligations under review and impartial with respect to states' performance. They are thus particularly valuable in assessing states' actions in light of their obligations. The value of participation by private parties, on the other hand, arises from the fact that they are not necessarily impartial. Unlike independent experts, they bring to questions of compliance their own points of view, which are normally different from those of the states being monitored. They may provide information regarding compliance to help the monitors check the information provided by states. In addition, because private parties may have

\(^{79}\) Id. at 251.
\(^{80}\) Id. at 253-69.
\(^{81}\) See id. at 271-85.
a personal or institutional interest in state compliance, they are ideally suited to draw the attention of the monitoring process to specific instances of possible non-compliance.

Examples of monitoring mechanisms from the human rights field illustrate four different combinations of state control, independent expert review, and private party input. In order, from the least to the greatest degree of participation by non-state actors, they are: (1) self-reporting by the monitored state to independent experts; (2) reporting by independent experts that is triggered solely by states; (3) reporting by independent experts that is triggered by states but that has a limited role for private complaints; and (4) reporting by independent experts that is triggered solely by private complaints. The fourth type—complaint-based monitoring—allows private parties to file complaints that may trigger independent expert review of compliance by a state with its obligations. Complaint-based monitoring resembles, and in fact may be, a type of quasi-supranational adjudication.\footnote{One might argue that a more natural role for supranational adjudication in a managerial model is to settle disputes, rather than monitor compliance. Supranational adjudication undoubtedly does settle disputes, but it does not primarily fit into the managerial model as a dispute resolution mechanism. As noted above, managerialists reject formal adjudication as almost always inappropriate to promote compliance with regulatory agreements. They see a role for dispute resolution not to identify and act on instances of noncompliance, but rather to clarify ambiguous language. See Chayes & Chayes, supra note 19, at 201; Chayes et al., supra note 19, at 54-56. \textit{201}. To that end, managerialists are interested in less adversarial, nonbinding mechanisms like referral of questions regarding interpretation to a legal committee or the secretariat, or "compulsory conciliation," in which a conciliation committee is authorized to make a recommendatory award if the parties are unable to reach an agreement. See Chayes & Chayes, supra note 19, at 209, 223. Supranational adjudication does not appear to fit into these managerial dispute settlement mechanisms, not because of their nonbinding outcomes, or even because of their aim of resolving ambiguities rather than correcting noncompliance, but because they appear to contemplate no role for nonstate actors.

83. Article 40(1)(a) of the Covenant requires each party to make an initial report on the measures it has adopted "which give effect to the rights recognized [in the Covenant] and on the progress made in the enjoyment of those rights." International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 40(1)(a), 999 U.N.T.S. 171, available at http://het.unige.ch/humanrts/instree/b3ecpr.htm (last visited Feb. 18,
Each state presents its report to the Human Rights Committee, a body of independent experts, which reviews the report at a public session where government representatives engage in a "constructive dialogue" with the Committee about the report. The Committee then publishes a report, which, since 1992, has included the views of the Committee on the state's implementation of the Covenant and recommendations on measures that the state should adopt.

The experience of the Human Rights Committee demonstrates some of the weaknesses of self-reporting as a method of compliance. States are very often unable or unwilling to report to the Committee on time, in full, or with unfavorable information. The experience also demonstrates the importance of participation by independent experts and private parties. By themselves, the states' reports would be of little or no use. Appraisal by independent experts who can criticize states and recommend improvements is necessary for the monitoring mechanism to be reliable and useful. And since the Committee does not undertake independent fact-finding missions, "recourse to a whole range of outside information is both inevitable and essential. Indeed, the broader the range of material consulted the more likely that a reliable picture of the prevailing human rights situation will be obtained." In this respect, human rights groups and other non-governmental organizations play a crucial role.


86. See MCGOLDRICK, supra note 83, at 71-74, 79; see also Opsahl, supra note 85, at 407 (state reports "in many cases bear[] little resemblance to reality"); Caroline Dommen, The UN Human Rights Regime: Is It Effective?, 91 AM. SOC'Y INT'L L. PROC. 460, 478 (1997) (remarks of Dinah PoKempner) [typically state reports omit "anything that suggests less than a rosy picture of wholehearted compliance"]). On average, 60% of the parties to the six human rights agreements that require reports have overdue reports. Id. at 466 (remarks of Anne F. Bayefsky).

87. See ROBERTSON & MERRILLS, supra note 85, at 42-43, 45-46.

88. MCGOLDRICK, supra note 83, at 79. The Committee has discussed the possibility of sending fact-finding missions to states. See ROBERTSON & MERRILLS, supra note 85, at 45-46.
role by providing criticisms of state reports and information about state practice to members of the Committee.\textsuperscript{89}

2. \textit{Independent Reporting Triggered by States}

A second type of monitoring mechanism allows independent experts to prepare the monitoring reports and thus appraise the monitored state's conduct directly, rather than being limited to review of the monitored state's report about itself. An example is the system of rapporteurs appointed by the U.N. Commission on Human Rights, a functional commission of the U.N. Economic and Social Council. The 53 state members of the Commission decide at its annual session whether to appoint independent experts (called \textit{rapporteurs}) to prepare reports on particular countries or themes. In 1997, for example, the Commission renewed its appointments of thematic rapporteurs on torture, extrajudicial executions, and religious intolerance, and a working group on enforced or involuntary disappearances.\textsuperscript{90} In 1998, it renewed the mandates of eleven country rapporteurs.\textsuperscript{91}

Reports have varied in quality, depending on the ability and objectivity of the rapporteur.\textsuperscript{92} But the reports are not under the control of the state being monitored, as are the reports in the Human Rights Committee self-reporting mechanism. The monitored state has the opportunity to cooperate with the rapporteur, but if it chooses not to do so the rapporteur may prepare a report based on fact-finding from other sources.\textsuperscript{93} Here again, private parties may play a critical role in providing information to the rapporteur.\textsuperscript{94}

\textsuperscript{89} See Dommen, \textit{supra} note 86, at 467-68 (remarks of Anne F. Bayefsky); Opsahl, \textit{supra} note 85, at 406-07; McGoldrick, \textit{supra} note 83, at 77-79. This role was informal until 1993, when the Committee decided that information provided by nongovernmental organizations would be distributed to all members of the Committee. See ROBERTSON & MERRILLS, \textit{supra} note 85, at 46.

\textsuperscript{90} The appointments are for three-year terms. See Michael J. Dennis, \textit{The Fifty-fourth Session of the UN Commission on Human Rights}, 93 AM. J. INT'L L. 246, 249 (1999).

\textsuperscript{91} See \textit{id.} at 250.


\textsuperscript{93} See ROBERTSON & MERRILLS, \textit{supra} note 85, at 87-88 (describing "remarkably comprehensive report" of rapporteur on Afghanistan prepared in mid-1980s with no cooperation from the state itself).

One problem with the rapporteur system is that the control by states over the decision to appoint a rapporteur allows political considerations to intervene.\(^5\) The Commission decision is taken by majority vote, and states able to mobilize political support are much less likely to be targeted. This problem has decreased greatly from the 1970s, when the Commission investigated only Israel, South Africa, and Chile while ignoring massive violations of human rights in Uganda, Cambodia, East Timor, and many other states.\(^6\) From the 1980s to the present day, and particularly with the spread of democracy after 1989, the willingness of the Commission to appoint country-specific rapporteurs has gradually increased. Nevertheless, politically powerful states are still able to garner enough support to avoid appointment of a rapporteur.\(^7\) Resolutions concerning China, for example, have been repeatedly defeated in recent years.\(^8\)

3. **Reporting Triggered by States Based, in Part, on Private Party Input**

The problem of undue state control over the monitoring procedure may be reduced to the extent that private parties have the opportunity to influence the decision to trigger the mechanism. The “1503 procedure” of the Human Rights Commission provides a formal way for individuals and nongovernmental organizations to influence decisions to appoint rapporteurs by submitting complaints alleging human rights violations by a state.\(^9\) From its inception, the United Nations

\(^5\) This obstacle may arise more often with respect to country rapporteurs than thematic rapporteurs. See Robertson & Merrills, supra note 85, at 94.

\(^6\) See Alston, supra note 92, at 158-64.

\(^7\) See Dommen, supra note 86, at 462 (remarks of Markus G. Schmidt) ("regional powers or Permanent Members of the Security Council are well placed to block the creation of any mandate concerning their country or a state within their sphere of influence").


has received thousands of human rights complaints every year, even during periods when it ignored or discouraged them.\textsuperscript{100} The 1503 procedure, which was instituted in 1970, asked states for the first time to respond to complaints against them and instituted a mechanism for considering the complaints.\textsuperscript{101}

The 1503 procedure involves both the Commission and its Sub-Commission on Prevention of Discrimination and Protection of Minorities, which is composed of independent experts.\textsuperscript{102} The communications go first to the Sub-Commission, which screens them in accordance with basic criteria.\textsuperscript{103} For example, complaints may not be based on second-hand knowledge unless accompanied by "clear evidence," and they must establish that domestic remedies have been exhausted or are unavailable.\textsuperscript{104} The Sub-Commission then decides whether to refer to the Commission "particular situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights requiring consideration by the Commission."\textsuperscript{105} The Sub-Commission normally sends the Commission six to ten "situations" each year.\textsuperscript{106} The Commission reviews the situations at its annual meeting and may decide to take a wide variety of steps, which include requesting further information from the state or appointing a rapporteur.\textsuperscript{107}

The 1503 procedure has many weaknesses. It is lengthy, conducted almost entirely in secrecy unless the Commission chooses to make its decisions public, and subject to state control — and therefore political considerations— at key decisionmaking points.\textsuperscript{108} The confidentiality of the procedure makes it difficult

\textsuperscript{112-13} (1998). But these methods, while possibly more direct, are inherently informal.

\textsuperscript{100} See Robertson & Merrills, supra note 85, at 78; Alston, supra note 92, at 146.

\textsuperscript{101} See Rodley, supra note 94, at 65.

\textsuperscript{102} Despite its relatively narrow name, the Sub-Commission carries out studies and provides advice to the Commission on an extremely broad range of human rights issues. See generally Asbjørn Eide, The Sub-Commission on Prevention of Discrimination and Protection of Minorities, in The United Nations and Human Rights, supra note 85, at 211.

\textsuperscript{103} See Alston, supra note 92, at 146-47; Rodley, supra note 94, at 65-69.


\textsuperscript{105} Resolution 1503, supra note 99, ¶ 5.

\textsuperscript{106} Robertson & Merrills, supra note 85, at 80.

\textsuperscript{107} See Rodley, supra note 94, at 66; Robertson & Merrills, supra note 85, at 80.

\textsuperscript{108} See Dommen, supra note 86, at 462 (remarks of Markus G. Schmidt); Alston, supra note 92, at 152-55 (describing weaknesses and suggesting reforms).
for private parties to participate after they file a submission. The procedure is designed not to address specific complaints, but rather to identify "situations" of gross violations of human rights—a weakness from the point of view of individuals seeking relief, although perhaps not from the point of view of non-governmental organizations seeking to draw attention to widespread problems. The domestic analogy might be letters to an attorney general's office that may or may not lead to further action by prosecutors, rather than to complaints filed in court. Nevertheless, it has been defended, in essentially managerial terms, as a way to engage in a "continuing dialogue" with offending states and gradually increase pressure on them to change their behavior. And it provides a pathbreaking way for individuals to influence the decision to trigger a monitoring mechanism, rather than just provide information to the mechanism after it has been triggered.

4. **Complaint-Based Monitoring and Supranational Adjudication**

Some human rights monitoring mechanisms provide a more important role for complaints filed by private parties. The most important example is the procedure created by the Optional Protocol to the Covenant on Civil and Political Rights, which allows any individual subject to the jurisdiction of a state party to the Protocol to file a "communication" with the Human Rights Committee claiming that the state has violated a right set forth in the Covenant. As in the 1503 procedure, to be admissible

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110. See Alston, supra note 92, at 154-55; Robertson & Merrills, supra note 85, at 81-82. Although Philip Alston disagrees with these arguments, he emphasizes that "the historical value of the 1503 procedure cannot be doubted," particularly since it lays the groundwork for use of more effective procedures. Alston, supra note 92, at 152.

the communications must meet certain criteria. For example, they may not be anonymous and available domestic remedies must have been exhausted.\footnote{112} As in the 1503 procedure, the state is requested to reply to the communication.\footnote{113} But unlike the 1503 procedure, state control over the monitoring mechanism is limited to deciding whether to be party to the Protocol.\footnote{114} The independent experts who make up the Human Rights Committee screen the communications in accordance with the set criteria, consider the admissible complaints and state replies on their merits, and publish their "views."\footnote{115} In practice, the Committee "has effectively understood 'views' as meaning a decision (or determination) on the merits."\footnote{116} In particular, the Committee has:

never doubted that it should state its opinion on whether or not it considered that there had been a breach of the Covenant. . . . [and in many cases has] not only expressed its 'view' that there have been violations of specific rights, but also added what in its opinion should follow, stating as a separate conclusion a duty to provide individual reparation and take preventive measures for the future.\footnote{117}

In comparison to the previous examples of monitoring, the complaint-based monitoring mechanism created by the Optional Protocol:


\footnote{112} Optional Protocol, \textit{supra} note 111, arts. 3, 5.
\footnote{113} \textit{Id.} art. 4.
\footnote{115} Optional Protocol, \textit{supra} note 111, art. 5(4).
\footnote{116} \textit{McGoldrick, supra} note 83, at 199.
\footnote{117} Opsahl, \textit{supra} note 85, at 426-27.
(1) greatly increases the role of private parties, by allowing them to file formal complaints alleging that states have violated their obligations under the Covenant;

(2) solidifies the role of independent experts, who screen, review, and assess complaints in accordance with set criteria and issue judgments on whether states have violated their obligations; and

(3) reduces the role of states in the monitoring process to that of parties to disputes.

The result looks remarkably like supranational adjudication. In the words of Laurence Helfer and Anne-Marie Slaughter, the Committee "acts as an arbiter of contentious disputes between individuals and states, provides victims of human rights violations with an international forum for relief . . . and generates a 'specific problem-centred jurisprudence.'" The Committee not only acts as a "quasi-judicial monitoring body;" in many ways it "is behaving more and more like a judicial arbiter of human rights disputes" and employing "an increasingly court-like method of operation."

The similarity should not be overstated. As Professors Helfer and Slaughter emphasize, the Human Rights Committee "is by no means a supranational court in the strict sense." For example, the Committee bases its factual findings solely on the written submissions of the disputants. It does not take testimony, hear oral argument, or engage in independent fact-finding. But it probably could do so without amendment of the Protocol. And in any event, those distinctions alone do not seem to preclude the Committee from acting as a kind of tribunal.

A more important distinction is that parties are under no legal obligation to comply with the decisions, or "views," expressed by the Committee. This distinction precludes the Committee from being a supranational tribunal in the strict sense. But the lack of binding decisions does not necessarily

118. Helfer & Slaughter, supra note 18, at 341-42 (quoting Matthew Craven, Towards an Unofficial Petition Procedure: A Review of the Role of the UN Committee on Economic, Social and Cultural Rights, in SOCIAL RIGHTS AS HUMAN RIGHTS: A EUROPEAN CHALLENGE 91, 94 (Krzysztof Drzewicki et al. eds., 1994)).

119. Helfer & Slaughter, supra note 18, at 344; see also Opsahl, supra note 85, at 426-27 (The Committee has "applied basic principles of a judicial, or quasi-judicial nature concerning, for instance, contradictory proceedings, assessment of evidence, and reasoning in support of its results.").

120. Helfer & Slaughter, supra note 18, at 338.

121. See McGoldrick, supra note 83, at 143-45.

122. See Opsahl, supra note 85, at 427.
imply that the Committee is less effective than supranational tribunals in the strict sense, or that it cannot be effective in many of the same ways that such tribunals are effective. Professors Helfer and Slaughter apply their model of effective supranational adjudication to the Human Rights Committee, systematically comparing it to the European Court of Justice and the European Court of Human Rights. They conclude that “[a]lthough the Committee’s effectiveness is nowhere near that of the ECJ and the ECHR, it is the similarities to, rather than the differences from, its effective European neighbors that we find most striking.” They emphasize the Committee’s attempts to take steps to improve its effectiveness in many ways characteristic of supranational tribunals—ways that do not depend on whether its decisions are legally binding.

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

123. See supra Part I.A.2.
124. See Helfer & Slaughter, supra note 18, at 298-335.
125. Id. at 365.
126. Id. at 365-66.
127. See Franck, supra note 6, at 100 (“[R]eports and complaints [under the Covenant] are made not to a political body but to an independent panel of experts, increasing the likelihood that the review procedure will be perceived as fair. Since the Covenant came into force, reporting and scrutiny have been formalized, depoliticized to an extent, and welded to the process of case-by-case norm application. This adumbration is gradually imbuing the Covenant’s provisions with a perceptible aura of legitimacy which no government can ignore.”).
supranational adjudication in the strict sense, if over time its decisions take on legal force.

For all of these reasons, it seems appropriate to treat complaint-based monitoring as a kind of *incipient* or quasi-supranational adjudication, which shares many of the attributes of supranational adjudication despite its inability to produce legally binding decisions.\(^{128}\)

**D. Melding Supranational Adjudication into the Managerial Model**

Supranational adjudication and managerial monitoring are usually seen as completely different approaches to compliance. But in fact there is no bright line between adjudication and monitoring. Both review states' behavior in light of their obligations. The greater the degree to which a monitoring mechanism allows private parties to trigger independent expert review of alleged violations of international law, the more it incorporates elements of supranational adjudication. At the same time, however, the monitoring mechanism may continue to operate in a managerial context, relying on techniques of persuasion rather than enforcement. Both the managerial model and supranational adjudication could be strengthened if their proponents recognized the way in which complaint-based monitoring can embed a form of incipient or quasi-supranational adjudication in a managerial approach to compliance.

1. *Adjusting the Managerial Model*

As described above, the capstone of the managerial model is "systematic review and assessment of individual members' performance in relation to treaty obligations, with a view to defining steps to improve performance where it may be lagging."\(^ {129}\) Managerialists emphasize that this procedure provides a "major point of access to the compliance process for non-state actors" and that the procedure "depends heavily" upon their participation for its effectiveness.\(^ {130}\) But they do not describe any formal avenues through which their participation may be protected. In particular, they have overlooked the way in

\(^{128}\) I intend the prefix "quasi" to modify the term "supranational adjudication" as a whole, rather than just the word "supranational."

\(^{129}\) CHAYES & CHAYES, supra note 19, at 229; see supra Part I.B.

\(^{130}\) CHAYES & CHAYES, supra note 19, at 249.
which complaint-based monitoring may provide just such a "point of access."

For example, *The New Sovereignty*, the most comprehensive explanation of the managerial model, does not mention the Optional Protocol in its discussion of reporting and monitoring or in its separate discussion of the role human rights groups have played in calling attention to human rights violations.\(^{131}\) Nor does it mention any other complaint-based monitoring procedure. This oversight is particularly notable in its treatment of the monitoring procedures of the International Labor Organization (ILO), which it presents as its first example of a system of comprehensive review and assessment.\(^{132}\)

The ILO Constitution requires each ILO member to report on the measures it has taken to give effect to the ILO agreements to which it is a party.\(^{133}\) Based on this requirement, the ILO has developed a detailed system under which states must regularly report on their compliance with ILO agreements.\(^{134}\) Like the reporting system under the International Covenant on Civil and Political Rights,\(^{135}\) the reports (and any comments on them from employer and labor organizations) are reviewed by a body of independent experts. This body, the Committee of Experts on the Application of Conventions and Recommendations, examines whether a state is meeting the requirements of a given agreement. The Committee of Experts may seek further information from states and may make public "observations" to draw attention to the most serious or persistent cases of non-compliance. The Committee of Experts may also refer serious cases to the Conference Committee on the Application of Conventions and Recommendations, which is composed, like other ILO conference committees, of government, employer, and worker representatives. The Conference Committee may hold a "discussion" with the government concerned, on the basis of which the Committee reports to the ILO Conference as a whole, pointing out important instances of non-compliance.

\(^{131}\) See *id.* at 154-96, 253-59.
\(^{132}\) *Id.* at 231-34.
\(^{135}\) See supra Part I.C.1.
The New Sovereignty praises the managerial aspects of this system: the ways in which it attempts to persuade and assist states to comply by giving them many opportunities before the Committee of Experts and the Conference Committee to work out their problems.\textsuperscript{136} The process "weed[s] out cases of misunderstanding, differences of interpretation, or feasibility problems," thus exposing only "willful and deliberate violator[s]" to more confrontational sanctions.\textsuperscript{137}

But The New Sovereignty overlooks the way in which the ILO system incorporates complaint-based monitoring procedures. The most commonly used of these procedures allows unions or employers' organizations to file complaints alleging that any ILO member state has violated its obligations concerning freedom of association.\textsuperscript{138} The complaints are considered by the Committee on Freedom of Association (CFA), a nine-member committee composed equally of representatives of governments, unions, and employers. The CFA examines complaints "in a quasi-judicial manner,"\textsuperscript{139} requesting responses from the state concerned and obtaining additional information where necessary. If it finds "anomalies" with respect to the state's behavior in light of its obligations, it may recommend actions that the state should take. It submits its recommendations to the ILO Governing Body, which "normally rubber-stamps the Committee decisions."\textsuperscript{140} The CFA may also call the attention of the Committee of Experts to its recommendations, so that the Committee of Experts may continue to monitor the state's compliance with them as part of its supervision of the state's regular reports. Another complaint-based monitoring procedure allows unions or employers' organizations to make "representations" to the Governing Body that a member state has failed to comply with an ILO convention to which the state is party.\textsuperscript{141} Representations concerning freedom of association are referred to the CFA; other representations are considered by another special committee of the ILO Governing Body, also composed equally of government, employer, and union representatives. Like the CFA, the special

\begin{itemize}
  \item \textsuperscript{136} Chayes \& Chayes, supra note 19, at 233.
  \item \textsuperscript{137} Id.
  \item \textsuperscript{138} See de la Cruz et al., supra note 134, at 99-108; Leary, supra note 134, at 602-09; Lee Sweeney, Human Rights Complaint Procedures of the International Labor Organization, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE, supra note 94, at 85, 95-98.
  \item \textsuperscript{139} Leary, supra note 134, at 603.
  \item \textsuperscript{140} Id.
  \item \textsuperscript{141} See de la Cruz et al., supra note 134, at 89-91; Leary, supra note 134, at 610-11; Sweeney, supra note 138, at 90-92.
\end{itemize}
committee considers information from the complainant and the
government and makes a recommendation to the Governing
Body, which decides whether it is satisfied with the government's
explanation. "The decision of the Governing Body that it is or is
not satisfied with the government's explanations amounts to a
finding of violation of or compliance with the Convention." 142 A
third procedure, based on Article 26 of the ILO Constitution,
allows delegates to the ILO Conference, who include
representatives of unions and employers' organizations, to file
"complaints" that an ILO member has violated an ILO
convention. Complaints are normally referred to a Commission of
Inquiry composed of three independent experts, which
investigates and reports back to the Governing Body. Finally, the
Committee of Experts also monitors issues raised in
representations and complaints as part of its regular supervision
of states' reports. 143

The ILO's system of review and assessment integrates these
complaint-based monitoring procedures. The procedures do not
take the ILO system outside the managerial model; the ILO
continues to be primarily persuasive and cooperative instead of
coercive and confrontational. 144 Rather, complaint-based
monitoring strengthens the ILO system by providing it additional
sources of information about compliance and activating
additional sources of pressure on governments to comply.
Indeed, it seems very probable that the widely acknowledged
effectiveness of the ILO system in managerial terms depends in
large part upon its incorporation of complaint-based monitoring.

Similarly, members of the Human Rights Committee have
emphasized that its complaint-based monitoring procedure
works with its self-reporting procedure to monitor and improve
states' compliance with the obligations of the Covenant. As Rein
Myullerson, a former member of the Committee, has said:

Consideration of states' reports gives the Committee an
overall picture of the situation with regard to civil and
political rights in a given country. This panorama is
indispensable to the evaluation of a state's compliance with
international human rights standards . . .

142. Swepston, supra note 138, at 92.
143. See de la Cruz et al., supra note 134, at 93-97; Swepston, supra note 138,
at 92-95.
144. See Leary, supra note 134, at 595 (the ILO system of supervision "is a
cohesive system which employs a wide array of measures all designed to exercise
persistent tactful pressure on States to comply with conventions and trade union
rights").
But frequently details are lost (and I would like to emphasize that in the protection of basic human rights and freedoms all details are very important). Very often, it is only through the consideration of individual communications that complete conformity of national legislation and practice with the requirements of international law can be assessed.\textsuperscript{145}

The ILO and the Human Rights Committee thus show how complaint-based monitoring can play a valuable, perhaps indispensable, part in a managerial system of comprehensive review and assessment by providing "a major point of access to the compliance process for nonstate actors."\textsuperscript{146}

I do not mean to suggest that states will therefore accept complaint-based monitoring as easily as they accept other types of managerial mechanisms. Complaint-based monitoring is obviously more confrontational and less within states' control than other forms of monitoring such as self-reporting,\textsuperscript{147} and many states will continue to resist giving any significant role in an international compliance mechanism to individuals or non-governmental organizations.\textsuperscript{148} Nevertheless, its managerial aspects make it much more palatable to states than a full-blown system of strict supranational adjudication.

2. Rethinking Supranational Adjudication

Just as proponents of the managerial approach to compliance should recognize that a form of supranational adjudication may fit within the managerial model, proponents of supranational adjudication should recognize that it may often develop within a managerial context. As a result, they should

\textsuperscript{145} Rein A. Myullerson, Monitoring Compliance with International Human Rights Standards: Experience of the UN Human Rights Committee, 1991-1992 CAN. HUM. RTS. Y.B. 105, 107. For similar comments by other former members of the Committee, see Higgins, supra note 30, at 108 ("it has been found that monitoring is best achieved through a combination of state-reporting and the bringing of applications by individual claimants"); Opsahl, supra note 85, at 437 ("there is already ample evidence that the reporting and communications procedures may benefit each other"); id. at 440 ("[C]omplaints procedures, more than abstract inquiries, may throw specific light even over matters of general interest. Case law can also be more specific than general comments on how provisions ought to be understood.").

\textsuperscript{146} See Chayes & Chayes, supra note 19, at 249.

\textsuperscript{147} See Developments in the Law, supra note 50, at 1607 ("By far the most severe form of 'jawboning' is the investigation of complaints charging noncompliance with recommended standards.").

\textsuperscript{148} See Brownlie, supra note 2, at 598 ("A significant number of governments are reluctant to assent to any arrangement which might seem to confer international personality on individuals, even if the capacity involved is very restricted and specialized.").
adjust their conceptions of supranational adjudication, and of the factors relevant to its effectiveness, to take into account the ways in which supranational adjudication may interact with managerial mechanisms.

In particular, the model of effective supranational adjudication developed by Laurence Helfer and Anne-Marie Slaughter should be expanded. Professors Helfer and Slaughter modestly present their model "as a first step toward the development of a more rigorous model of supranational adjudication, one that will ultimately be informed by data from a wider range of tribunals and dispute resolution bodies." Even as a first step, however, the model is extraordinarily valuable. By providing a basis for a systematic discussion of the attributes of supranational tribunals relevant to their effectiveness, the model allows comparisons among supranational tribunals working in different regions of the world and areas of the law and identifies ways in which such tribunals may become more effective. It also provides a way to assess the effectiveness and stage of development of complaint-based monitoring mechanisms, which have at least some of the characteristics of supranational tribunals but are not necessarily supranational tribunals in the strict sense.

But the model ignores the managerial context in which such mechanisms may develop, and the way in which that context is relevant to the mechanisms' effectiveness. For example, Professors Helfer and Slaughter state that the fact that the Human Rights Committee has taken steps to increase its effectiveness according to the factors highlighted by the model "demonstrate[s] a commitment to making [its] petition system more like a court and as effective a court as possible." They thus focus on assessing the effectiveness of the institution as a court. But becoming more like a court is not the only way for an institution like the Human Rights Committee to become more effective. The Human Rights Committee also acts in a managerial context; for example, it oversees a paradigmatically managerial system of self-reporting. The Helfer-Slaughter model does not examine ways in which the effectiveness of an institution like the

149. See Helfer & Slaughter, supra note 18.
150. Id. at 298.
151. For example, as described above, Professors Helfer and Slaughter apply the model to the complaint-based monitoring mechanism created by the Optional Protocol to the International Covenant on Civil and Political Rights. See id. at 345-66.
152. Id. at 365-66.
153. See supra Parts I.C.1, I.D.1.
Human Rights Committee may be affected by this context. In particular, it overlooks ways in which the Committee's two primary functions—hearing individual complaints and reviewing state reports—can work together to increase the effectiveness of each.\(^{154}\)

For example, Torkel Opsahl, a former member of the Human Rights Committee, has suggested ways in which the Committee might increase the interaction between its roles as reviewer of state reports and arbiter of individual complaints:

The interaction between the two procedures, reporting and communications, should go further. The submission of communications is an indicator of the situation in a country whose reliability depends on how well known this remedy is. The Committee . . . might consider that a need for requesting subsequent reports could be revealed by an upsurge in the number of communications. Conversely, subsequent and even periodic reports may be less necessary if the absence of communications confirms that the Covenant is being observed.\(^{155}\)

These suggestions are consistent with the general goal of the managerial model: to develop a system of review and assessment that combines different managerial mechanisms to create an integrated approach to compliance. Kamen Sachariew has called this type of integrated approach to compliance a "supervision package."\(^{156}\) Compliance-based monitoring is likely to play a more effective role in promoting compliance when employed in conjunction with other mechanisms in such a supervision package.

Improving the effectiveness of an institution like the Human Rights Committee by increasing its interaction with other managerial mechanisms does not conflict with increasing its effectiveness along the lines suggested by the Helfer-Slaughter model. Certainly there is nothing in that model's reliance on inducing compliance by penetrating the surface of the state that is inherently contradictory with the "sunshine" effects of

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154. See supra note 145 (citing HIGGINS, supra note 30, at 108; Opsahl, supra note 85, at 437, 440; Myullerson, supra note 145, at 107).
155. See Opsahl, supra note 85, at 442.
156. See Sachariew, supra note 69, at 50-51 ("There is an obvious need for more effective and better organized supervision of international environmental rules at all stages of the supervision process and throughout the life of the international obligations. . . . What is needed is a firmer organizational link between the different supervision techniques applied in a given treaty system in order to get what may be called a 'supervision package' composed of several techniques connected logically with each other and combining the advantages of each.").
monitoring. Nor are the great majority of the specific factors in the model inconsistent with increasing the effectiveness of the mechanism along managerial lines. For example, Professors Helfer and Slaughter explain how the Human Rights Committee has increased its effectiveness as a supranational tribunal by: (1) showing autonomy from political interests by adopting interpretations of the Covenant "at odds with the positions espoused by states parties;" (2) demonstrating an awareness of the political limits of its decisions; (3) improving the quality of its legal reasoning; and (4) engaging in a dialogue with other supranational tribunals.157 None of these steps conflicts with the possibility that the Committee might improve its effectiveness along managerial lines by employing managerial mechanisms. On the contrary, many of the steps would increase the Committee's effectiveness in managerial terms as well.

In short, these ways of assessing and improving the effectiveness of the Human Rights Committee may point in different directions, but they are not inconsistent with one another. The Committee could seek to evolve in both directions at the same time, becoming a more effective supranational tribunal while at the same time strengthening its ties to other compliance mechanisms as part of a supervision package.

Of course, at some point supranational adjudication and managerialism diverge. A supranational tribunal in the strict sense, which issues legally binding decisions and relies on coercive means to enforce them, cannot be considered managerial. For example, private investors may take claims against states parties directly to binding arbitration under Chapter 11 of the North American Free Trade Agreement.158 NAFTA requires each party to the dispute to "abide by and comply with an award."159 Each NAFTA party must provide for the enforcement of awards in its territory and has the right to take non-complying parties to state-to-state arbitration, which may result in trade sanctions.160 This system of supranational adjudication is adversarial and coercive and relies on binding decisions enforced by sanctions rather than on persuasion. It is clearly not managerial.

But the type of complaint-based monitoring exemplified by the ILO and the Optional Protocol is very different. It is primarily

157. See Helfer & Slaughter, supra note 18, at 353-61.
158. See NAFTA, supra note 35, ch. 11, sec. B, art. 1120.
159. Id. ch. 11, sec. B, art. 1136(2).
160. Id. ch. 11, sec. B, art. 1136(4)-(5); ch. 20, arts. 2007-2019.
persuasive, not coercive. The "views" expressed by the Human Rights Committee, for example, are not binding, and the Optional Protocol provides no way for private litigants or states to enforce them. 161 Instead, the Human Rights Committee decisions, like the reports of the ILO Committee on Freedom of Association, provide a basis for pressure by the public and by other states to be brought to bear on a recalcitrant state, including through the opprobrium that attaches to a state that is considered to be in violation of its obligations. 162

At the same time, complaint-based monitoring may increase its effectiveness by working with other managerial mechanisms around it. As noted above, members of the Human Rights Committee have emphasized the way in which their complaint-based monitoring procedures supplement and strengthen the Committee's system of self-reporting. And the Optional Protocol may be unusual in the relatively small number of opportunities it provides the Human Rights Committee's complaint-monitoring mechanism to interact with other managerial mechanisms. The more detailed ILO system provides a greater variety of opportunities for interaction between its complaint mechanisms and other monitoring systems. Lee Swepston emphasizes that the ILO complaint procedures "are but one part of a comprehensive and active system of regular supervision" and "would not be nearly as effective if they did not form part of the ILO's overall machinery for supervising the implementation of ILO principles and instruments."163

The innovative and important model developed by Professors Helfer and Slaughter might therefore be usefully supplemented. When the institution under review is (or may be evolving from) a complaint-based monitoring mechanism, a comprehensive assessment of its current and potential effectiveness should include an assessment of the ways in which it may take

161. See Dommen, supra note 86, at 463 (remarks of Markus G. Schmidt); Helfer & Slaughter, supra note 18, at 351.
162. See Opsahl, supra note 85, at 431 ("There are no means of enforcement, apart from the [Human Rights] Committee's moral authority and the potential pressure of public opinion."); Leary, supra note 134, at 608 ("As the [Committee on Freedom of Association] has pointed out, its influence is primarily a moral one. 'Objectivity, perseverance and the weight of public opinion are the most valuable means at its disposal.'" (quoting Caire, Freedom of Association and Economic Development ¶ 35 (1977)).
163. Swepston, supra note 138, at 100-01. Mr. Swepston is Chief of the Equality and Human Rights Coordination Branch of the ILO. See GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE, supra note 94, at 326.
advantage of its managerial context by interacting with the managerial mechanisms around it.

II
MECHANISMS TO MONITOR COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL LAW

Outside the European Union, the submissions procedure of the North American Commission for Environmental Cooperation is the only complaint-based monitoring procedure in international environmental law that allows private parties to seek review of state actions. The first section of this part of the Article establishes the context for the procedure by briefly describing monitoring mechanisms normally included in international environmental agreements. The second section describes the North American Agreement on Environmental Cooperation in general terms and its submissions procedure in detail.

A. Self-Reporting and the Montreal Protocol
Non-Compliance Procedure

International environmental agreements rely heavily on monitoring mechanisms to promote compliance.\textsuperscript{164} By far the most popular monitoring mechanism in international environmental law is self-reporting, which is now included in most multilateral environmental agreements.\textsuperscript{165} As a compliance mechanism, self-reporting has two primary problems: (1) reports are often untimely and inaccurate, and (2) there is usually no institutional means to review and respond to them.

States often do not file reports at all, and the reports they do file are often unreliable.\textsuperscript{166} A recent, thorough study of

\textsuperscript{164} Scholars have recently produced several valuable studies of the procedures that monitor and promote implementation of and compliance with international environmental agreements. See ENVIRONMENTAL REGIMES, supra note 1; IMPLEMENTATION AND EFFECTIVENESS, supra note 1; ENGAGING COUNTRIES, supra note 1.

\textsuperscript{165} See PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW I 147 (1995); BIRNIE & BOYLE, supra note 2, at 166. In addition, the Commission for Sustainable Development has instituted a system through which states self-report on their implementation of Agenda 21. See HUNTER ET AL., supra note 24, at 477.

\textsuperscript{166} See Jacobson & Brown Weiss, supra note 15, at 543; Michael Bothe, The Evaluation of Enforcement Mechanisms in International Environmental Law, in ENFORCING ENVIRONMENTAL STANDARDS: ECONOMIC MECHANISMS AS VIABLE MEANS? 13, 26 (Rüdiger Wolfrum ed., 1996) [hereinafter ENFORCING ENVIRONMENTAL STANDARDS]. The failure to submit a report may be due to states' (especially developing states') lack of technical capacity, not just their lack of will. See CHAYES & CHAYES, supra note 19, at 159. But see Ronald B. Mitchell, Sources of Transparency: Information
compliance with five international environmental agreements finds serious problems in the timeliness and quality of the reports filed under each.167 The study also finds, however, that steps have been taken under some agreements to address these problems,168 and that most of the important parties to some agreements, at least, do file relatively timely and accurate reports.169 Another recent study of compliance with international environmental agreements agrees that reporting rates have improved, but it emphasizes that “a more intractable problem of data quality remains: national data often are not comparable, and their accuracy is often low or unknown.”170

When states do report on their implementation of and compliance with their international environmental obligations, the reports are of little or no value unless they are subject to some type of review.171 But, as Kamen Sachariew has said, “it is precisely at this point that most difficulties arise.”172 Some environmental agreements do not provide any mechanism to review and assess the reports.173 Other agreements provide only that states’ reports will be collated into a consolidated report, which is then provided to the parties to the agreement, thus “render[ing] the assessment of the situation in specific countries

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167. See Brown Weiss, supra note 14, at 104, 112, 124, 132, 153. An earlier study of eight agreements also found that many reports are late, incomplete, or not submitted at all. See General Accounting Office, International Environment: International Agreements Are Not Well Monitored, RCED-92-13 (Jan. 1992); see also Hilary F. French, Partnership for the Planet: An Environmental Agenda for the United Nations, Worldwatch Paper 32-34 (July 1995), excerpted in HUNTER ET AL., supra note 24, at 402 (“[T]he official reporting process [of the Commission for Sustainable Development] has not worked well. Many governments do not submit the required reports on national action plans to implement Agenda 21. Those that do comply with this requirement tend to deliver documents that are long on self-congratulation and short on substantive analysis of remaining challenges.”).

168. For example, after compliance with reporting requirements under CITES dropped to under 30% in 1990, the parties adopted a resolution stating that failure to file the required report on time is an infraction of CITES, and took other measures to publicize failure to file reports. As a result, the number and quality of reports improved. See Brown Weiss, supra note 14, at 112.

169. See id. at 168; see also id. at 133 (“the majority of countries [but not Russia] that are the most important for the dumping problem report as required under the [1972 London] Convention”).


171. See ENGAGING COUNTRIES, supra note 1, at 545; Chayes et al., supra note 19, at 83-84; see also supra note 70.

172. Sachariew, supra note 69, at 45.

173. See SZELL, supra note 14, at 98; Sachariew, supra note 69, at 45.
more difficult."\textsuperscript{174} Such procedures seem to provide significantly less opportunity for meaningful review than even the first human rights procedure described in Part I, the system of self-reporting under the Covenant on Civil and Political Rights administered by the Human Rights Committee.\textsuperscript{175}

Some environmental agreements have procedures that provide for the possibility of more thorough review and assessment of parties' compliance, and the trend appears to be toward more sophisticated systems of review.\textsuperscript{176} The Montreal Protocol has one of the most highly developed and influential of these procedures. Like other environmental agreements, the Montreal Protocol requires each state party to report annually on its implementation of the agreement—specifically, on its production, import, and export of substances controlled by the Protocol.\textsuperscript{177} The Secretariat for the Protocol receives the reports and prepares a comprehensive report to the parties based on them.\textsuperscript{178}

The Montreal Protocol goes beyond this basic monitoring system, however. It has a "noncompliance procedure," or NCP, administered by an Implementation Committee composed of ten state parties.\textsuperscript{179} The Implementation Committee may receive information on compliance from three sources in addition to the parties' self-reporting: any party may submit "reservations" to the Committee concerning compliance with the Protocol by another party; the Secretariat may submit information about non-compliance of which it becomes aware while preparing its report; and a party that concludes, "despite having made its best, bona fide efforts, it is unable to comply fully with its obligations under the Protocol," may file a submission explaining the cause of its noncompliance.\textsuperscript{180} The Committee may obtain additional information through the Secretariat or, upon the invitation of that party, by gathering information in the territory

\textsuperscript{174} Sachariew, supra note 69, at 47.
\textsuperscript{175} See supra Part I.C.1.
\textsuperscript{176} See Victor et al., Systems for Implementation Review, in IMPLEMENTATION AND EFFECTIVENESS, supra note 1, at 48.
\textsuperscript{178} Id. art. 12.
\textsuperscript{180} Id. Annex IV, ¶¶ 1-4.
of the party concerned. The Committee considers the submissions, information, and observations received, "with a view to securing an amicable solution of the matter on the basis of respect for the provisions of the Protocol." The Committee reports to the Meeting of the Parties as a whole, which may "decide upon and call for steps to bring about full compliance with the Protocol." The Meeting of the Parties may provide assistance, issue cautions, or suspend specific rights under the Protocol.

Several other mechanisms also promote compliance with the Montreal Protocol. Owen Greene has described the critical role played by the Global Environment Facility (GEF), the Montreal Protocol's Multilateral Fund, and the Protocol's Technology and Economic Assessment Panel (TEAP) in reviewing implementation of the Protocol's obligations and providing states assistance and incentives to carry out their obligations. Unlike the NCP, these mechanisms are not formally dedicated to reviewing compliance. The Multilateral Fund and the GEF provide financial assistance to developing countries and countries in transition to help them meet their obligations under the Protocol; the TEAP and its working groups provide scientific and technical advice to the parties. But these mechanisms have evolved to consider compliance issues more broadly, and have developed links with one another and with the NCP. The result is a much more effective compliance system than that established by the NCP alone. Indeed, David Victor has said that the NCP's successes have depended on its ability "to connect a country's performance with rewards and penalties provided by other institutions," such as the GEF and the Multilateral Fund. "By itself," he concludes, "the NCP is relatively powerless."

Commentators have praised the Montreal Protocol compliance procedures, and the NCP has been suggested as a

181. Id. Annex IV, ¶ 7(d).
182. Id. Annex IV, ¶ 8.
184. See id. Annex V.
185. See Owen Greene, The System for Implementation Review in the Ozone Regime, in IMPLEMENTATION AND EFFECTIVENESS, supra note 1, at 89, 94.
186. See id. at 95-106.
187. Id. at 118-24.
189. See, e.g., O. Yoshida, Soft Enforcement of Treaties: The Montreal Protocol's Noncompliance Procedure and the Functions of Internal International Institutions, 10 COLO. J. INT'L ENVTL. L. & POLY 95, 139 (1999); Gunther Handl, Compliance Control
model for other international environmental agreements. But it has also been criticized for failing to provide a formal role for private parties to seek independent expert review of states' compliance with their obligations. In comparison with monitoring mechanisms from other areas, such as the human rights mechanisms described in Part I, a notable aspect of the NCP, as well as the GEF and the Multilateral Fund, is that they remain under the control of the state parties.

These limitations give rise to the same potential problems in international environmental agreements as in other areas. Elizabeth Barrett-Brown has spelled out the potential for abuse, stating that government representatives on the Montreal Protocol compliance mechanisms "may be more hesitant to put forth tough recommendations for fear that their own countries' programs will be made the subject of the next review." Moreover, states will be unlikely to bring complaints against one another to the Implementation Committee for the same reasons that they avoid intergovernmental adjudication.

Human rights mechanisms illustrate ways in which monitoring mechanisms may respond to these concerns by providing roles to independent experts and private parties. The Montreal Protocol TEAP and its expert working groups, which

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190. The Montreal Protocol NCP was a model for the 1994 Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Further Reduction of Sulphur Emissions, June 19, 1994, 33 I.L.M. 1540, and it has "inspired agreement on, or calls for, the establishment of similar noncompliance mechanisms or procedures" pursuant to the 1991 Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution Concerning the Control of Emissions of Volatile Organic Compounds or Their Transboundary Fluxes, Nov. 18, 1991, art. 3, 31 I.L.M. 573, 577-78; the Climate Change Convention, supra note 9, art. 10, the Desertification Convention, supra note 9, art. 27, and the Basel Convention, supra note 9, art. 19. Handl. supra note 189, at 33-34.

191. See Gerhard Loibl, Comment on the Paper by Androntco Adele, in SUSTAINABLE DEVELOPMENT AND INTERNATIONAL LAW, supra note 14, at 125, 128 (the Montreal and LRTAP NCPS "remain mechanisms that are controlled by the state parties to the particular treaty. It should be noted that by setting up these procedures, the secretariats have not been given more power, nor have they been assigned independent fact-finding or adjudicatory roles.").

192. Barrett-Brown, supra note 50, at 543. See Yoshida, supra note 189, at 140 (questioning "whether such political institutions consisting of governmental representatives can always act impartially").


194. See supra Part I.C.
include independent as well as government experts, may help to address some of these concerns. 195 But while these experts can help to identify and address problems, they have no formal link to the responses available through the NCP. In particular, the TEAP may not trigger consideration by the Implementation Committee of compliance issues.

The NCP does allow the Montreal Protocol Secretariat to identify cases of non-compliance to the Implementation Committee. 196 While in principle this may seem no less effective than allowing private parties to trigger a review procedure, experience with the NCP "suggests that the [Secretariat] might not always be able or willing to follow through on evidence suggestive of non-compliance and formally submit the 'case' for review by the implementation committee." 197 A secretariat may be reluctant to trigger a process in which it acts as an adversary to states. 198 Secretariats and other independent experts may act more easily in an impartial assessment, adjudicative, or conciliatory role. Private parties such as non-governmental organizations are inherently more likely to be partial, and as a result, are better suited to trigger and provide information to monitoring mechanisms. 199

195. See Greene, supra note 185, at 95-101, 119-124. The TEAP and its working groups are primarily composed of experts from industry, rather than government. See TEAP member listing, at http://www.teap.org/html/teap_members.html (last visited Feb. 22, 2001). While this increases the committees' independence from government, it may give rise to concerns that their advice is not completely impartial. See Int'l Inst. for Sustainable Development, Summary of the Eleventh Meeting of the Parties to the Montreal Protocol and the Fifth Conference of the Parties to the Vienna Convention, 19 EARTH NEGOTIATIONS BULL. No. 6, (1999), at www.isld.ca/linkages/vol19/enb1906e.html (last visited Feb. 22, 2001) ("Both Switzerland and Greenpeace expressed their concern that the [TEAP] was not entirely impartial in its work.... Concerns were voiced both inside and outside the formal discussions that industry groups were over-represented on this Panel, leading to less than neutral statements in their reports.").

196. See Montreal Protocol Fourth Meeting, supra note 179, Annex IV, ¶ 3, 7(b). See also Yoshida, supra note 189, at 113 ("This is the first case in which the secretariat of a Multilateral Environment Agreement (MEA) has been empowered to invoke a formal dispute avoidance/settlement procedure in international law.").

197. Handl, supra note 189, at 38-39: see also Yoshida, supra note 189, at 113-14 ("Until now, however, the UNEP Ozone Secretariat has been rather reluctant to invoke the NCP in this way [i.e., based on information from NGOs]."); Jacobson & Brown Weiss, supra note 15, at 545 (Secretariats, like state parties, "can be reluctant to call particular countries to account for inaccurate reports.").

198. See Victor, supra note 193, at 70 (the secretariat is "small and powerless in comparison with member states and wisely avoids such conflict"); see also Helfer & Slaughter, supra note 18, at 292-93 (describing initial reluctance of EC Commission to bring complaints against EC members before European Court of Justice, because of Commission's "need to establish its own political legitimacy").

In practice, Owen Greene says that environmental groups "have been surprisingly uninvolved" in monitoring implementation of Montreal Protocol obligations, at least at the international level, despite their having "good access to most international bodies associated with the Montreal Protocol."\textsuperscript{200} But, in fact, environmental groups have no formal, assured access to the Protocol's compliance mechanisms; therefore, they have to rely on informal, indirect access—trying to persuade parties or the Secretariat to represent their concerns.\textsuperscript{201} It is not surprising that this type of access does not encourage, or even allow, them to take a more active role.

One of the recent studies of compliance with environmental agreements concludes that environmental groups monitor compliance "relatively rarely."\textsuperscript{202} David Victor and Kal Raustiala attribute this result to several factors, including the groups' lack of access to necessary information.\textsuperscript{203} But they also recognize that rules allowing access to compliance mechanisms are necessary conditions for non-governmental participation.\textsuperscript{204}

Many commentators have suggested that the Montreal NCP would be more effective if non-governmental organizations could play a role in triggering the monitoring mechanism,\textsuperscript{205} and if reports were at least reviewed, if not prepared, by independent experts.\textsuperscript{206} More generally, commentators have argued

\begin{itemize}
\item \textsuperscript{200} Greene, supra note 185, at 110.
\item \textsuperscript{201} See Victor, supra note 188, at 142 (Although environmental groups may not attend meetings of the Implementation Committee, "in principle, NGOs can raise issues for discussion by working through the Secretariat or sympathetic members of the Committee: so far, however, this has never happened.").
\item \textsuperscript{202} Raustiala & Victor, supra note 170, at 667. The primary exceptions are wildlife agreements, in which "[d]ecades of engagement" by environmental groups have led to their extensive involvement in implementation as well as negotiation. \textit{Id.;} see John Lanchbery, \textit{Long-Term Trends in Systems for Implementation Review of International Agreements on Fauna and Flora}, in \textit{IMPLEMENTATION AND EFFECTIVENESS}, supra note 1, at 57.
\item \textsuperscript{203} Raustiala & Victor, supra note 170, at 668.
\item \textsuperscript{204} \textit{Id}. They emphasize that permissive rules are not sufficient by themselves to ensure participation; access allows, rather than causes, more private participation. \textit{Id}. at 668-69.
\item \textsuperscript{205} Elizabeth Barrett-Brown's early article remains the most thorough argument for increasing the role of nongovernmental organizations in promoting compliance with the Montreal Protocol, based on the experience of human rights and other international legal regimes. See Barrett-Brown, supra note 50; see also Yoshida, supra note 189, at 113; Handl, supra note 189, at 43. \textit{But see} Victor, supra note 193, at 78-79 (arguing that an increased role for NGOs would probably not help the effectiveness of the Montreal Protocol NCP, although it might deserve more attention with respect to other international environmental regimes).
\item \textsuperscript{206} See Barrett-Brown, supra note 50, at 568; Széll, supra note 14, at 108; Sachariew, supra note 69, at 50-51. Again, the evolving role of the TEAP and its
\end{itemize}
persuasively that private participation in international environmental supervisory mechanisms is necessary to make those mechanisms more effective and fair. 207

To date, however, states have been reluctant to introduce the elements of private-party input and independent expert review into international environmental law. 208 This is not particularly surprising. Compliance mechanisms develop slowly over time and most environmental agreements are still in their first or second decade. States will continue to resist the participation of individuals in any kind of compliance procedure and will particularly resist procedures with adjudicative overtones. Nevertheless, individuals' participation in compliance procedures has gradually increased as part of the trend throughout international law for individuals to join states on the international plane. 209 Further, individual participation is likely to continue to increase as an inevitable result of efforts to improve the effectiveness and fairness of processes to review and assess compliance.

These efforts have borne fruit in three procedures that allow private parties to trigger review by independent experts of compliance with international environmental obligations. As compliance procedures continue to evolve, and as pressure grows for private parties to be able to participate in them, these three procedures may become increasingly important models.

The first procedure allows individuals within the European Union to complain to the European Commission that an EU member state is failing to comply with EU environmental law. 210 The Commission may bring possible infringements to the attention of the state concerned, and if the state does not comply, the Commission may bring a formal complaint to the European Court of Justice. 211 Individuals cannot, however,

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207. See, e.g., Wirth, supra note 16, at 778-86; Sachariew, supra note 69, at 34; see also Koskenniemi, supra note 75, at 240.
208. See Szell, supra note 14, at 100, 107, 108.
211. Id. at 407.
compel the Commission to institute infringement proceedings. The second procedure is a three-member Inspection Panel, created by the World Bank but independent of Bank control, with a mandate to investigate complaints from private groups alleging that they have been harmed by a failure of the World Bank to follow its internal standards. The third procedure allows private parties in any of the three North American countries to bring certain types of complaints to an independent secretariat for review, pursuant to the North American Agreement on Environmental Cooperation. The third procedure is described in the following sections.

B. Complaint-Based Monitoring by the Commission for Environmental Cooperation

1. The North American Agreement on Environmental Cooperation

The North American Agreement on Environmental Cooperation resulted from efforts by the Clinton Administration to address environmental criticisms of the North American Free Trade Agreement. The chief concerns of U.S. environmental groups about NAFTA were that: (1) increased trade and investment would cause industrial development to overwhelm environmental infrastructure, especially along the U.S.-Mexico border; (2) NAFTA would override domestic U.S. environmental laws; (3) NAFTA would override trade provisions in international

212. Id. at 408. In principle, individuals may bring an environmental action to the European Court of Justice under Articles 173 and 175 of Treaty on European Union and Final Act, Feb. 7, 1992, O.J. (C 224) 1 (1992), reprinted in 31 I.L.M. 247. However, the jurisdictional rules of the EU make it "difficult for persons to seek enforcement of environmental measures under either Article 173 or 175 because such measures are not addressed to them as individuals." See Visek, supra note 210, at 414 (citing LUDWIG KRAMER, FOCUS ON EUROPEAN ENVIRONMENTAL LAW 229-30 (1992)); see also Ann M. Lininger, Comment, Liberalizing Standing for Environmental Plaintiffs in the European Union, 4 N.Y.U. ENVTL. L.J. 90 (1995).


environmental agreements; (4) members of the public would not have access to information about NAFTA or be able to influence its implementation; and (5) by removing barriers to foreign investment in Mexico, NAFTA would lure companies to move there in search of a "pollution haven," and thereby contribute to the pollution of the Mexican environment, take jobs from U.S. workers, and put pressure on all three North American countries to lower their environmental standards in a "race to the bottom." \(^{215}\)

The pollution-haven concern particularly influenced the creation of the NAAEC.\(^{216}\) A key premise underlying the concern was that as written, Mexico's environmental laws were essentially equivalent to those of the United States and that the problem was inadequate compliance with those laws.\(^{217}\) The challenge, therefore, was not to require Mexico to write stricter standards into its law, but rather to assist or induce it to improve the implementation and enforcement of its environmental laws.

After the Clinton Administration took office in 1993, some important environmental groups promised to support NAFTA in return for a satisfactory "side agreement" addressing their

\(^{215}\) See Daniel Magraw, NAFTA & the Environment: Substance and Process, in NAFTA & THE ENVIRONMENT: SUBSTANCE AND PROCESS 3-6 (Daniel Magraw ed., 1995). NAFTA itself includes a provision designed to address the pollution-haven concern, which states that "[t]he Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor." NAFTA, supra note 35, art. 1114(2) (emphasis added). The provision is obviously nonbinding, however, and did little to placate critics.

\(^{216}\) See Kal Raustiala, International "Enforcement of Enforcement" Under the North American Agreement on Environmental Cooperation, 36 Va. J. Int'l L. 721, 723, 728-29 (1996). The NAAEC does address, to widely varying degrees, some of the other concerns, and some of those concerns were also addressed in NAFTA itself or in other agreements. They are beyond the scope of this Article.

\(^{217}\) In 1991 and 1993, EPA led "missions" of U.S. government attorneys to Mexico to gather information about the status, implementation, and enforcement of Mexican environmental law. The missions concluded that "with certain important exceptions, the Mexican laws and many of the regulations and standards promulgated thereunder in the principal media areas of air, water, waste, and pesticides are broadly comparable to their counterparts in the United States. The Mexican and U.S. environmental protection regimes as a whole are designed to achieve, when implemented and enforced, comparable levels of environmental protection." Office of the General Counsel, U.S. Envtl. Prot. Agency, Evaluation of Mexico's Environmental Laws, Regulations, and Standards (Nov. 5, 1993), reprinted in NAFTA & THE ENVIRONMENT: SUBSTANCE AND PROCESS, supra note 215, at 583, 615; see also Anne Rowley, Mexico's Legal System of Environmental Protection, 24 ENVTL. L. REP. 10431 (1994) (describing the EPA reports resulting from the missions).
concerns. They told the Administration in detail what they wanted in the agreement, emphasizing the need for a “North American Commission on the Environment” with “the power to play an important role in helping ensure that the [NAFTA parties] enforce their environmental laws.”\textsuperscript{218} The NAAEC was negotiated in the spring and summer of 1993 and entered into force on January 1, 1994.\textsuperscript{219}

The NAAEC has two central commitments, both of which address the pollution-haven concern. First, it requires each party to “effectively enforce its environmental laws.”\textsuperscript{220} Second, it requires each party to ensure that its environmental laws provide high standards and that it continues to strive to improve those laws.\textsuperscript{221} Much of the rest of the NAAEC is designed to facilitate attainment of these two commitments, in essentially managerial ways.

Although these commitments may seem too vast for any mechanisms to “manage” compliance with them, the NAAEC has already had some success in promoting compliance, at least. For example, it is credited with helping to create “an international environmental enforcement and compliance cooperation network” among the three countries, which builds on their past experience “to develop increasingly sophisticated and effective cooperative environmental enforcement and compliance.”\textsuperscript{222} More

\begin{itemize}
\item \textsuperscript{218} Letter from Seven NGOs to Ambassador Michael Kantor Regarding NAFTA Supplemental Agreements (May 4, 1993), \textit{reprinted in NAFTA \& THE ENVIRONMENT: SUBSTANCE AND PROCESS}, supra note 215, at 714.
\item \textsuperscript{219} See Dimento & Doughman, \textit{supra} note 214, at 667-74.
\item \textsuperscript{220} NAAEC. \textit{supra} note 25, art. 5(1). The Agreement hedges this requirement in two ways. First, it includes a long list of the types of actions that might satisfy the requirement, to make clear that no particular type of enforcement measure is necessarily required. \textit{Id.} Second, it provides that a party's failure to enforce its environmental law does not violate the Agreement if it results from the reasonable exercise of discretion in enforcement matters or from a decision in good faith to allocate enforcement resources to other environmental matters determined to have higher priorities. \textit{Id.} art. 45(1).
\item \textsuperscript{221} \textit{Id.} art. 3. Consistent with the premise underlying the pollution-haven concern—that is, that the problem is primarily inadequate enforcement, not inadequate laws—the Agreement does not set specific new international standards that the domestic laws must meet. It does require each country to publish its laws and to allow opportunities for public notice and comment on proposed laws, and includes specific requirements to ensure that the proceedings for the enforcement of laws are fair and open. \textit{Id.} art. 4. It also provides that persons “with a legally recognized interest” shall have “appropriate access” to domestic agencies or courts for the enforcement of domestic environmental laws, and it provides for various procedural guarantees in legal proceedings. \textit{Id.} arts. 6, 7.
\end{itemize}
generally, Richard Steinberg concludes that Mexico’s increased number of inspectors, environmental inspections of firms, closures of violating facilities, and expenditures on environmental controls “suggest a stunning improvement in Mexico’s enforcement of its environmental laws since the deepening of North American integration began” in 1992.223

Like all agreements that rely on managerial mechanisms, the NAAEC emphasizes the importance of cooperation among the parties. The NAAEC creates and assigns various managerial functions to an international organization, the North American Commission for Environmental Cooperation (NACEC). The NACEC is composed of a Council of representatives of the parties,224 a Secretariat of international civil servants, and a Joint Public Advisory Committee (JPAC).225 The Council appoints an Executive Director, who is responsible for appointing and supervising the staff of the Secretariat.226 With very few

223. Richard H. Steinberg, Trade-Environment Negotiations in the EU, NAFTA, and WTO: Regional Trajectories of Rule Development, 91 AM. J. INT’L L. 231, 251-52 (1997). Of course, there is no authoritative way to determine the extent to which enhanced environmental enforcement in Mexico (or any other country) results from the NAAEC or from other causes. See Frederick M. Abbott, From Theory to Practice: The Second Phase of the NAFTA Environmental Regime, in Enforcing Environmental Standards, supra note 166, at 451, 476.

224. See NAAEC, supra note 25, art. 8(2). Each party has named its highest-ranking environmental official to represent it on the Council. See, e.g., Federal Implementation of the North American Agreement on Environmental Cooperation, Exec. Order No. 12,915 § 2(b), 59 Fed. Reg. 25,775 (May 13, 1994), (naming the Administrator of the Environmental Protection Agency to be the U.S. representative on the Council). The Council meets only once annually, but designees of the representatives (known as Alternate Representatives) meet more frequently. A General Standing Committee composed of one official from each party is responsible for liaison with the Secretariat on a day-to-day basis. See N. AM. COMM’N FOR ENVT’L. COOPERATION, FOUR-YEAR REVIEW OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION: REPORT OF THE INDEPENDENT REVIEW COMMITTEE (1998), available at http://www.ccc.org/pubs_info_resources/law_treat_agreee/cfp3.cfm (last visited Feb. 25, 2001) [hereinafter REPORT OF THE INDEPENDENT REVIEW COMMITTEE]. (The NAAEC requires the Council to review the operation and effectiveness of the Agreement four years after its entry into force. NAAEC, supra note 25, art. 10(1)(b).

To that end, the Council appointed an Independent Review Committee, composed of nongovernmental experts, which produced a report in June 1998. The members of the Committee were León Bendesky, Barbara Bramble, and Stephen Owen. See REPORT OF THE INDEPENDENT REVIEW COMMITTEE, supra, annex 2.)

225. Each party appoints five members of the JPAC. See NAAEC, supra note 25, art. 16(1). The JPAC may provide advice to the Council on: (1) any matter within the scope of the Agreement, including the proposed program, budget, and Secretariat reports; and (2) the implementation and further elaboration of the Agreement. It may also provide technical, scientific, or other information to the Secretariat. Id. arts. 16(4), 16(5).

226. See id. art. 11. The current Executive Director is Janine Ferretti, of Canada, who was appointed by the Council in June 1999.
exceptions, the Council makes decisions by consensus,\footnote{See id. art. 9(6).} and the NAAEC generally authorizes it only to make recommendations to the parties.\footnote{See, e.g., id. arts. 10(2), 10(5), 10(7), 10(9).} Many of the mandates of the NAAEC involve strengthening cooperation among the parties. In particular, the Agreement instructs the Council to strengthen cooperation in improving domestic environmental standards and enforcement of domestic laws.\footnote{See id. arts. 10(3), 10(4).}

The NAAEC also creates three monitoring mechanisms. Each of the mechanisms is unusual, compared to those found in other international environmental agreements, because of the significant roles provided to private parties and independent experts—that is, the Secretariat. The Secretariat is partially independent in the limited but important sense that, like the secretariats of other international organizations, the Executive Director and the staff are charged with receiving instructions only from the Council, and each party is required not to “seek to influence them [the Secretariat officials] in the discharge of their responsibilities.”\footnote{Id. art. 11(4). Many charters of international organizations contain virtually identical language. See, e.g., U.N. Charter, art. 100, available at http://www.hamun.org/handbook/unc_toc.html (last visited Feb. 25, 2001).} But the NAAEC also gives the Secretariat specific mandates in the monitoring mechanisms which, to varying degrees, are independent of even Council control.

The first monitoring mechanism is an annual report prepared by the Secretariat, which must cover, \textit{inter alia}, “the actions taken by each Party in connection with its obligations under this Agreement, including data on the Party’s environmental enforcement activities.”\footnote{NAAEC, supra note 25, art. 12(2)(c).} The annual report must also include “relevant views and information submitted by non-governmental organizations and persons.”\footnote{Id. art. 12(2)(d).}

Second, Article 13 authorizes the Secretariat to prepare a report without Council approval “on any matter within the scope of the annual program.”\footnote{Id. art. 13(1).} The annual program always organizes its work into four main areas (Environment, Economy and Trade; Conservation of Biodiversity; Pollutants and Health; and Law and Policy) which, construed broadly, cover the vast majority of environmental topics.\footnote{See North American Agenda for Action: 2001-2003, A Three Year Program Plan for the North American Commission for Environmental Cooperation, August 2001, available at http://www.nacamex.org/naca/naca2001/program.htm.} For matters that fall outside the scope of

\begin{footnotesize}
\begin{enumerate}
\item See id. art. 9(6).
\item See, e.g., id. arts. 10(2), 10(5), 10(7), 10(9).
\item See id. arts. 10(3), 10(4).
\item NAAEC, supra note 25, art. 12(2)(c).
\item Id. art. 12(2)(d).
\item Id. art. 13(1).
\end{enumerate}
\end{footnotesize}
the annual program, the Secretariat may still prepare a report as long as the matter is "related to the cooperative functions of this Agreement," unless the Council objects by a two-thirds vote.235 The effect of the provision is to give the Secretariat independent discretion to prepare reports on its own initiative on virtually any environmental matter it chooses except a party's enforcement of its laws. Nothing prevents the Secretariat from taking into account suggestions from private parties in deciding whether to prepare an Article 13 report, and in preparing the report the Secretariat may draw on information submitted by "interested nongovernmental organizations and persons."236

The third monitoring mechanism is the submissions procedure, under which the Secretariat receives and reviews submissions from private parties alleging a failure by a state party to effectively enforce its environmental law.237 I discuss the submissions procedure in detail in the next section and assess its effectiveness in Part III.

In its reliance on cooperation and monitoring to induce compliance with its commitments, the NAAEC is a typical international environmental agreement. Like other environmental agreements, the NAAEC is premised on the assumption that the parties will normally try to comply with their obligations in good faith, although cooperative efforts may sometimes be necessary to encourage full compliance. Like other international environmental agreements, the NAAEC attempts to persuade rather than coerce the parties into compliance.238

Emphasis on the cooperative aspects of the Agreement may seem strange in light of Part Five of the Agreement, which received great attention during the NAFTA debate as the "teeth" necessary to ensure effective enforcement of environmental laws. Part Five creates an intergovernmental dispute resolution procedure, under which any party that believes another party is engaging in a persistent pattern of failure to effectively enforce its environmental law may request the Council to attempt to

235. NAAEC, supra note 25, art. 13(1).
236. Id. art. 13(2)(b). For further discussion of Article 13, see infra Part III.B.1.
237. NAAEC, supra note 25, arts. 14, 15.
238. See J. Owen Saunders, NAFTA and the North American Agreement on Environmental Cooperation: A New Model for International Collaboration on Trade and the Environment, 5 Colo. J. Int'l Envtl. L. & Pol'y 273, 303 (1994) (stressing the importance of "the cooperative aspects of the agreement, which, if the [NAAEC] is to prove successful, will be its true strength.").
resolve the dispute.\textsuperscript{239} If the Council does not resolve the dispute, it may decide by a two-thirds vote to convene an arbitral panel to consider the parties' arguments and issue a report.\textsuperscript{240} After receiving the report, the disputing parties may agree on an action plan to remedy the problem. If they do not agree, or if one party believes the other is not implementing an action plan, the panel may impose an action plan and/or fines on the recalcitrant party. If the party does not pay the fine, the other party may suspend NAFTA benefits.\textsuperscript{241}

This procedure is adversarial and coercive in ways that are inconsistent with the managerial model. But Part Five does not change the nature of the Agreement as a whole because it is—and almost certainly will remain—a dead letter. It is a dead letter not because it is limited in scope or impossibly difficult to use, but rather because the parties will be extremely averse to invoking it against one another, for all of the reasons that states are generally reluctant to invoke adjudication to resolve international environmental disputes. Doing so would undermine the many areas in which the parties cooperate with one another, as well as provoke possible backlash complaints. Moreover, because complaints may only be referred to arbitration by a two-thirds vote of the Council, a complaining party would have to convince another party to approve the reference—an extremely unlikely possibility. The parties' view of the likelihood that the procedure will ever be used may be indicated by the fact that as of January 1, 2001, seven years after the entry into force of the Agreement, they have yet to negotiate the model rules of procedure necessary for dispute resolution under Part Five to take place.\textsuperscript{242}

2. The NACEC Submissions Procedure

The most interesting and important of the NAAEC monitoring procedures is its system of complaint-based monitoring. Under Articles 14 and 15, the Secretariat may receive and review complaints, or "submissions," from private

\textsuperscript{239} See NAAEC, supra note 25, art. 23.

\textsuperscript{240} See id. art. 24.

\textsuperscript{241} Id. arts. 33-36. Canada, however, did not agree to suspension of trade benefits against it; instead, the Agreement provides that decisions of arbitral panels may be enforced directly in Canadian court. Id. Annex 36A.

\textsuperscript{242} For a draft of the model rules prepared by a joint working group of the three North American bar associations and recommended to the Council by the American Bar Association, see Dispute Resolution Under the North American Agreement on Environmental Cooperation, 30 Int'l Law. 198 (1996).
parties and prepare reports, or "factual records." This submissions procedure is similar to complaint-based monitoring procedures in human rights agreements, such as the procedure established by the Optional Protocol to the International Covenant on Civil and Political Rights.

The following sections describe the NACEC procedure in detail, to provide a basis for the analysis of its effectiveness in Part III. The sections first describe the four-hurdle obstacle course that a submission must negotiate successfully in order to lead to a factual record, and then give a brief history of the procedure since its inception.

a. The First Hurdle: Admissibility

A submission must first meet admissibility requirements set forth in Article 14(1). The most important requirement is that the submission assert that a state party "is failing to effectively enforce its environmental law." The terms "is failing," "effectively enforce," and "environmental law" raise difficult questions of interpretation. Most of the other admissibility requirements are relatively straightforward: the submission must be in a designated language of the state against which it is directed; it must identify the submitter; it must provide enough background information to allow the Secretariat to review it; it must indicate that the matter has been communicated in writing to the state; and it must be from a person or organization residing or established in the territory of a state party.

One admissibility requirement whose meaning may be somewhat obscure is the requirement that the submission "appears to be aimed at promoting enforcement rather than at harassing industry." The Council has adopted Guidelines to

243. See NAAEC, supra note 25, arts. 14, 15.
244. See supra Part I.C.4.
245. NAAEC, supra note 25, art. 14(1).
246. See David L. Markell, The Commission for Environmental Cooperation’s Citizen Submission Process, 12 GEO. INT’L ENVTL. L. REV. 545, 551-56 (2000) (describing the Secretariat’s treatment of those terms). Professor Markell’s article provides a very useful overview of the procedure from his point of view as the (then) Director of the NACEC Submissions Unit.
247. NAAEC, supra note 25, arts. 14(1)(a), (b), (c), (d), (e), (f). Similar criteria appear in other complaint-based monitoring procedures. For example, both the Optional Protocol to the Covenant on Civil and Political Rights and the 1503 procedure of the Human Rights Commission prohibit anonymous complaints. See Optional Protocol, supra note 111, art. 3: Res. 1 (XXIV), supra note 104, ¶ 2(b).
248. NAAEC, supra note 25, art. 14(1)(d), (e). This requirement echoes provisions in human rights complaints procedures that prohibit "abusive" complaints. See Res. 1 (XXIV), supra note 104, ¶ 3(b); Optional Protocol, supra note 111, art. 3.
clarify the procedure, which instruct the Secretariat, as it
construes this requirement, to consider "such factors as whether
or not the submission is focused on the acts or omissions of a
Party rather than on compliance by a particular company or
business; especially if the submitter is a competitor that may
stand to benefit economically from the submission." 249 This
instruction thus appears to interpret the requirement, at least in
part, as withholding standing from those whose only interest, or
harm suffered, is competitive. 250 More generally, it keeps the
focus of the procedure on the actions of the state parties, rather
than on particular companies within the states.

b. The Second Hurdle: Requesting a Response

The second hurdle a submission must cross is to convince
the Secretariat that it merits requesting a response from the
state party concerned. Article 14(2) states that "[i]n deciding
whether to request a response, the Secretariat shall be guided
by" four factors. 251 These factors are therefore not absolute
requirements, as are the threshold criteria in Article 14(1). The
Secretariat must take the considerations into account but has
discretion as to what weight to give them.

The first consideration is whether "the submission alleges
harm to the person or organization making the submission." 252
The requirement that a complainant be harmed by the action of
which he or she complains is, of course, a common rule of
standing in domestic law, 253 and is found in other complaint-
based monitoring mechanisms as well. 254

A second consideration is whether "the submission is drawn
exclusively from mass media reports." 255 The 1503 procedure
contains a virtually identical requirement. 256 The 1503 procedure
is unusual among complaint-based monitoring procedures in

249. See N. Am. Comm'n for Envtl. Cooperation, Guidelines for Submissions on
Enforcement Matters Under Articles 14 and 15 of the North American Agreement
on Environmental Protection § 5.4, available at
250. In this way, it is similar to the test of prudential standing in U.S.
jurisprudence that denies standing to would-be plaintiffs if their harm does not fall
within the "zone of interests" of a statute. See, e.g., Bennett v. Spear, 520 U.S. 154
(1997).
251. NAAEC, supra note 25, art. 14(2).
252. Id. art. 14(2)(a).
254. See, e.g., Optional Protocol, supra note 111, art. 1.
255. NAAEC, supra note 25, art. 14(2)(d).
256. See Res. 1 (XXIV), supra note 104, § 3(d).
that it does not require that complainants have suffered harm themselves; persons or groups who are not themselves harmed by the violations of which they complain, but who have "direct and reliable knowledge of those violations" may also bring a complaint.\textsuperscript{257} Restricting reliance on media reports may be sensible in a procedure open to complainants with second-hand knowledge. The provision may seem of less relevance in the NACEC procedure, which takes into account whether submitters have suffered harm. Submitters harmed by an action would rarely if ever need to rely "exclusively" on mass media reports to prepare a submission complaining of their harm. On the other hand, the NACEC procedure does not require a showing of harm, so some submitters might be in the position of relying entirely on second-hand knowledge.

Another consideration at this stage is whether "the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of this Agreement."\textsuperscript{258} This consideration may seem anodyne, but it broadens the Secretariat's discretion in an important way. By taking this factor into account, the Secretariat may filter out complaints that meet all other procedural requirements, but whose examination would not further the goals of the Agreement. This provision may be necessary in light of the limited resources of the Secretariat, but the increase in the Secretariat's discretion comes at the expense of submitters, who will not be able to second-guess the Secretariat's view of the importance of their submissions.

The final consideration to be taken into account by the Secretariat in deciding whether to request a response from the state party is whether "private remedies available under the Party's law have been pursued."\textsuperscript{259} This consideration echoes the exhaustion-of-remedies requirement—traditionally one of the greatest obstacles to the consideration of individuals' claims on the international plane. Under customary international law, a state may espouse a claim of one of its nationals against another state only if the national has exhausted any legal remedies available in the state complained of.\textsuperscript{260} The exhaustion-of-remedies requirement has also been adopted by complaint-based

\textsuperscript{257} See id. § 2(a).
\textsuperscript{258} NAAEC, supra note 25, art. 14(2)(b).
\textsuperscript{259} Id. art. 14(2)(c).
\textsuperscript{260} See BROWNIE, supra note 2, at 496-97.
monitoring mechanisms.\textsuperscript{261} Ian Brownlie has described the rule as based not on "any logical necessity deriving from international law as a whole," but rather on practical considerations such as "the greater suitability and convenience of national courts as forums for the claims of individuals and corporations," and "the utility of a procedure which may lead to classification of the facts and liquidation of the damages."\textsuperscript{262} The rule "dispenses States from answering before an international body for their acts before they have had an opportunity to put matters right through their own system."\textsuperscript{263} But the rule may also preclude a valid claim from being heard at the international level for years while the complainant makes his or her way through domestic procedures that eventually prove fruitless.

The NAAEC softens the traditional rule that remedies be exhausted in two ways. First, it changes the rule from a requirement that must be met to a factor to be taken into account by the Secretariat. Second, it asks not whether remedies have been exhausted, but only whether they have been pursued. This provision has the potential to remove the great delay often associated with the exhaustion-of-remedies rule, since a claim may be exhausted only after all conceivable appellate review is completed, but is arguably pursued as soon as it is filed. The justification for the different treatment of the rule may arise from the unusual nature of the obligation under review in the NAAEC procedure—that is, that the parties should effectively enforce their own environmental laws. The exhaustion-of-remedies rule does not require claimants to pursue futile remedies.\textsuperscript{264} Private remedies may often be futile as a way to force the parties to comply with the obligation to effectively enforce their laws, since


\textsuperscript{262} See Brownlie, supra note 2, at 497.

\textsuperscript{263} DeWilde, Ooms and Versyp Case (Vagrancy' Cases), 12 Eur. Ct. H.R. (ser. A) (1971); see also Velásquez Rodríguez Case, 1988 Y.B. INTER-AM. CT. ON H.R. 914, 960 ¶ 61 ("The rule of prior exhaustion of domestic remedies allows the State to resolve the problem under its internal law before being confronted with an international proceeding.").

\textsuperscript{264} See Brownlie, supra note 2, at 499.
courts will generally not order a government to enforce its own law. That domestic law may allow private parties to seek enforcement directly, through private-attorney-general actions, is laudable, but such private suits should not excuse a government from its obligation under the NAAEC to effectively enforce its own laws. On the other hand, if the submitter is already pursuing an action that may resolve the underlying problem, it is reasonable for the Secretariat to consider whether a submission to the NACEC might interfere with that action. The Agreement gives the Secretariat the flexibility to decide on that basis not to proceed further.

A fainter echo of the exhaustion-of-remedies rule may be heard in the admissibility requirement that requires a submitter to have notified the state concerned of the matter of which the submission complains. Like the traditional exhaustion-of-remedies rule, the notification requirement gives the state concerned a chance to address the problem before being forced to defend itself in an international forum.

c. The Third Hurdle: Recommending a Factual Record

If the Secretariat decides that a submission merits requesting a response from a state party, the submission then faces the third hurdle: whether, based on the submission and the response, the Secretariat believes that a factual record is warranted.

The Agreement identifies one circumstance under which the Secretariat may not proceed further: if the state concerned advises the Secretariat that "the matter is the subject of a pending judicial or administrative proceeding." The Agreement defines "judicial or administrative proceeding" as "a domestic

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265. See Heckler v. Chaney, 470 U.S. 821 (1985) (a federal agency decision not to institute enforcement action is not reviewable unless Congress expressly provides otherwise).

266. See David S. Baron, NAFTA and the Environment—Making the Side Agreement Work, 12 ARIZ. J. INT’L & COMP. L. 603, 610 n.37 (1995) ("The purpose of the NAAEC is to promote effective enforcement by the Parties. Private actions do not attack the root problem of lax official enforcement.").

267. See also GUIDELINES, supra note 249, § 7.5 (In considering whether private remedies have been pursued, the Secretariat will be guided by whether preparation of a factual record could duplicate or interfere with private remedies pursued by the submitter, and by whether "reasonable actions have been taken to pursue such remedies . . . bearing in mind that barriers to the pursuit of such remedies may exist in some cases.").

268. See NAAEC, supra note 25, art. 14(1)(e).

269. See id. art. 15(1).

270. Id. art. 14(3)(a).
judicial, quasi-judicial or administrative action pursued by the Party in a timely fashion and in accordance with its law,” or “an international dispute resolution proceeding to which the Party is party.” 271 Since the provision limits domestic judicial or administrative proceedings to actions pursued by the state party, not the submitter, it does not reinstate an exhaustion-of-remedies requirement.

Other than this provision, the Agreement gives the Secretariat no explicit guidance on how to decide whether a factual record is warranted. The Agreement appears to contemplate, however, that the Secretariat should continue to take into account the factors listed in Article 14(2). For example, Article 14(3)(b) invites the state to submit information concerning whether private domestic remedies are available and have been pursued, thus assuming that the Secretariat could revisit that consideration. There appears to be no reason why the Secretariat could not take into account the other Article 14(2) factors again at this stage, in light of the state’s response. In particular, whether the submission raises matters whose further study would advance the goals of the Agreement would seem to be of key importance in deciding whether a factual record is warranted.

d. The Fourth Hurdle: Council Approval

If the Secretariat decides that a factual record is warranted, a submission faces a fourth hurdle. The Secretariat must inform the Council of the reasons why it believes a factual record is warranted and may proceed only if the Council instructs it to do so. 272 The Council decision is taken by a two-thirds vote, 273 so the state party concerned may not block a factual record by itself. Nevertheless, any two of the state parties, acting through their representatives on the Council, may decide to stop the procedure at this point. The Agreement provides no constraints on the factors the Council may take into account in making its decision. Although the spirit of the Agreement suggests that the Council may deny the Secretariat’s request only if it disagrees with the request on the merits, nothing prevents the Council from acting

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271. Id. art. 45(3). The provision goes on to list the specific types of domestic actions covered, such as mediation, arbitration, and seeking sanctions or remedies in an administrative or judicial forum. See id.
272. See id. arts. 15(1), 15(2).
273. See id. art. 15(2).
through lower motives, such as protecting states from embarrassing reports.

As of January 1, 2001, the Council has reviewed five Secretariat requests to prepare factual records; it has approved three, denied one, and deferred one indefinitely.\textsuperscript{274} The Council has not explained any of these decisions, so the standard it applies to such requests remains unclear. Its record does indicate, however, that it is sensitive to the possibility that factual records might interfere with domestic litigation. One of its decisions to approve a factual record instructed the Secretariat not to consider issues within the scope of a specific judicial proceeding in British Columbia.\textsuperscript{275} And language in its decision to defer consideration of a request suggests that the Council believed the factual record might interfere with a pending domestic case.\textsuperscript{276}

e. Preparing the Factual Record

If the Council approves the request, the Secretariat proceeds to prepare the factual record. The Agreement does not address the contents of a factual record,\textsuperscript{277} but provides the Secretariat the ability to receive information from a wide range of sources, including the parties, the JPAC, and the public, and to develop its own information.\textsuperscript{278} In practice, the Secretariat has broad discretion to decide what facts are relevant and should be included.

The state parties have a final point of control over the procedure. When complete, factual records are submitted first in draft to the Council so that the states may "provide comments on the accuracy of the draft."\textsuperscript{279} The Secretariat may (but is not required to) incorporate the comments into the draft.\textsuperscript{280} The

\begin{itemize}
\item \textsuperscript{275} See Res. 98-7 (June 24, 1998), available at Council Resolutions Registry, \textit{supra} note 274.
\item \textsuperscript{276} See Res. 00-02 (May 16, 2000), available at Council Resolutions Registry, \textit{supra} note 274.
\item \textsuperscript{277} The Guidelines only require the factual record to include summaries of the submission and the response, "a summary of any other relevant factual information," and "the facts presented by the Secretariat with respect to the matters raised in the submission." GUIDELINES, \textit{supra} note 249, § 12.1.
\item \textsuperscript{278} NAAEC, \textit{supra} note 25, art. 15(4); see \textit{infra} Part III.A.1.c.
\item \textsuperscript{279} NAAEC, \textit{supra} note 25, art. 15(5).
\item \textsuperscript{280} \textit{Id.} art. 15(6).
\end{itemize}
Council then decides by a two-thirds vote whether to make the factual record public. 281

Unsurprisingly, the Council has approved the publication of the only two factual records prepared to date. Public outcry would result from a Council attempt to suppress a final report relevant to compliance by one of the state parties with its obligation to effectively enforce. And given the number of people who would have knowledge of the report in and out of the three governments, it would be extraordinarily difficult in any event to keep a factual record truly confidential. As a result, it seems unlikely that the Council would ever decline to make a factual record public. 282

f. A Brief History of the Submissions Procedure

The NACEC submissions procedure has flirted with controversy throughout its history. The first two submissions, filed in 1995, concerned riders enacted by the newly elected Republican Congress preventing the U.S. government from listing species under the Endangered Species Act and suspending enforcement of environmental laws with respect to logging in U.S. national forests. 283 Environmentalists had strongly criticized both riders 284 and some of the leading environmental groups in the United States filed the

281. Id. art. 15(7).
282. Other commentators have reached the same conclusion. See Johnson & Beaulieu, supra note 214, at 153; Saunders, supra note 238, at 295.

A note on the NACEC citation form: the Secretariat assigns each "Submission on Enforcement Matters" (or SEM) a number, which it uses to identify all documents filed with the Secretariat concerning that submission. The first part of the number is the last two digits of the year in which the submission was filed, and the second part refers to its sequence within that year. SEM 96-001, for example, is the number assigned to the first submission filed in 1996. Submissions are often identified by their subject or submitter, rather than by the submitter's name versus a state. SEM 96-001 concerned a proposed pier in Cozumel, and is therefore known as the Cozumel Pier case.

When this Article cites to a submission generally, it will refer only to its two-part SEM number and the date on which the submission was filed. When citing to a specific document in the Registry of Submissions, the Article will refer to the document's name, its SEM number, and the date on which the document was filed.

submissions. The submissions may have been test cases for the U.S. environmental community. If so, they were disappointments. The Secretariat dismissed the submissions without even requesting a response from the U.S. government, on the ground that the riders altered U.S. environmental law and could not therefore be a failure to enforce the law.

In the next three years (1996 through 1998), the Secretariat received 18 submissions, eight of which concerned Canada and eight Mexico. Only two concerned the United States, a sign that the failure of the two 1995 submissions may have discouraged U.S. environmental groups from using the procedure.

The growing number of submissions strained the Secretariat's resources. The Secretariat resolved the first six submissions it received—those filed in 1995 and 1996—promptly, usually within a few months of the filing. In the Cozumel Pier case, the one case of the six in which the Secretariat recommended preparation of a factual record, it did

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285. The Southwest Center for Biological Diversity was the principal submitter of SEM 95-001, which concerned the moratorium on listing endangered species. See SEM 95-001 (June 30, 1995), available in Registry of Submissions, supra note 283. The submitters of SEM 95-002 included Sierra Club, National Audubon Society, Natural Resources Defense Council, The Wilderness Society, a variety of smaller U.S. environmental groups from the Pacific Northwest, and environmental groups from Canada and Mexico. See SEM 95-002 (Aug. 30, 1995), available in Registry of Submissions, supra note 283.

286. For a discussion of these submissions, see infra Part III.A.2.c; Raustiala, International "Enforcement of Enforcement," supra note 216.

287. See Registry of Submissions, supra note 283.

288. The two submissions concerning the United States were SEM 96-004, which was later withdrawn, and SEM 98-003, which is still pending as of January 1, 2001. See SEM 96-004 (Nov. 14, 1996), SEM 98-003 (May 27, 1998), available in Registry of Submissions, supra note 283.

289. The Secretariat dismissed three at the Article 14(2) stage, in each case making the decision within a few months after the complaint was filed. See Letter from Victor Lichtinger to Earthlaw, SEM 95-001 (Sept. 21, 1995), Determination Pursuant to Arts. 14 &15, SEM 95-002 (Dec. 8, 1995), Determination Pursuant to Arts. 14 & 15, SEM 96-002 (May 28, 1996), available in Registry of Submissions, supra note 283. Of the other three, one was denied, one was withdrawn, and one was recommended for a factual record, each within three months after the state filed a response. See Determination Pursuant to Arts. 14 & 15, SEM 96-003 (Apr. 2, 1997), Notice to Council Concerning Withdrawal of the Submission, SEM 96-004 (June 6, 1997), Recommendation for the Development of a Factual Record, SEM 96-001 (June 7, 1996), available in Registry of Submissions, supra note 283; see also David Lopez, Dispute Resolution Under NAFTA: Lessons from the Early Experience, 32 Tex. Int'l L.J. 163, 205-06 (1997) [reviewing early submissions and concluding that “[a]s of December 1996, the Environmental Secretariat has developed an enviable record for expeditiously handling controversies . . . despite the fact that the Environmental Side Agreement does not bind the Secretariat to meet any specific deadlines in acting on such matters”).
so five months after the submission was filed. The factual record was published in October 1997, a little more than one year after the Council authorized it. In 1997 and 1998, however, the pace of processing the submissions slowed considerably and a large backlog accumulated. As of January 1999, the Secretariat had dismissed only two of the 14 submissions filed in 1997 and 1998, and was preparing a factual record based on one other submission. The other eleven remained pending at earlier points in the procedure.

In September 1998, the Secretariat created a separate unit to handle submissions, which began to work through the backlog. The fact that the NACEC received only two submissions in 1999 and six in 2000 gave it time to reach decisions on those pending from earlier years. As a result, the number of its requests for authority to prepare factual records (as well as the number of dismissals) began to increase. After recommending preparation of only one factual record in 1996, none in 1997, and one in 1998, the Secretariat recommended preparation of two in 1999 and three more in 2000. More recommendations are likely in the near future, as the last of the 1997-98 submissions finish working their way through the procedure and as the Secretariat processes more recent submissions more quickly. As of January 1, 2001, four submissions have cleared

290. See Recommendation for the Development of a Factual Record, SEM 96-001 (June 7, 1996), available in Registry of Submissions, supra note 283.

291. See Final Factual Record of the Cruise Ship Pier Project in Cozumel, Quintana Roo, SEM 96-001 (Oct. 24, 1997), available in Registry of Submissions, supra note 283.


293. See Registry of Submissions, supra note 283.

294. See Art. 15(1) Notifications to Council that Development of a Factual Record is Warranted, SEM 97-003 (Oct. 29, 1999), SEM 97-006 (July 19, 1999), SEM 98-007 (Mar. 6, 2000), available in Registry of Submissions, supra note 283. The Secretariat has announced but not yet published its recommendations in SEM 98-006 and SEM 99-002. See Registry of Submissions, supra. Under the Guidelines, the text of a recommendation for a factual record is confidential until the Council has acted upon it. See GUIDELINES, supra note 283, § 10.2.
the procedure's first two hurdles and are waiting for the Secretariat to decide whether to recommend a factual record.\textsuperscript{295} Only two others—the two most recently filed—are pending at earlier stages in the procedure.\textsuperscript{296}

As the Secretariat worked through the backlog and began to make more recommendations for factual records, the Council began to treat the recommendations less favorably and to consider significant changes to the submissions procedure. In June 1998, the Council released for public review draft revisions to the Guidelines that would have restricted the Secretariat's discretion in administering the procedure.\textsuperscript{297} After receiving public comments on the revisions, the Joint Public Advisory Committee advised the Council not to amend the Guidelines.\textsuperscript{298} At its annual meeting in June 1999, the Council made a few changes, but it did not adopt most of the revisions under consideration.\textsuperscript{299}

After June 1999, however, representatives of the state parties continued to discuss the procedure. In particular, they discussed issues concerning preparation of factual records, a topic on which the Guidelines are largely silent. Canada raised many of the issues, and many observers of the NACEC believed that Canada's concerns resulted at least in part from disagreements between it and the Secretariat over how the Secretariat was preparing the \textit{BC Hydro} factual record, the first factual record concerning Canada.\textsuperscript{300} At the same time, the Council delayed acting on the Secretariat's two 1999

\textsuperscript{295} See SEM 97-002 (Mar. 15, 1997), SEM 98-003 (May 27, 1998), SEM 98-004 (June 19, 1998), SEM 00-004 (Mar. 15, 2000), available in Registry of Submissions, supra note 283.

\textsuperscript{296} See SEM 00-005 (Apr. 6, 2000), SEM 00-006 (Sept. 6, 2000), available in Registry of Submissions, supra note 283.

\textsuperscript{297} For example, Section 13.2 of the draft revisions would have restricted the Secretariat's discretion with respect to consulting independent experts by requiring it to consult experts named by the submitter and by the state party whenever it decided to consult experts of its own choosing (manuscript on file with author).


\textsuperscript{299} See Res. 99-06 (June 28, 1999), available in Council Resolutions Registry, supra note 274. For a description of some of the changes, see infra Part III.A.1.e.

\textsuperscript{300} For example, Canada had opposed Secretariat requests to have joint meetings with a panel of experts, the submitters, and officials from the governments of Canada and British Columbia, and had disagreed with the Secretariat over what types of information could be made public. See Paul Knox, \textit{Canada Refuses Meeting Before NAFTA Panel}, \textit{Globe & Mail} (Toronto, Can.), Apr. 28, 2000; Heather Scoffield, \textit{Ottawa Stifling Hearings, Groups Say}, \textit{Globe & Mail} (Toronto, Can.), Mar. 8, 1999, at B3.
recommendations for factual records, both of which concerned Canada.  

When news of these discussions became widely known in the spring of 2000, they attracted the most attention the submissions procedure had received since the NAAEC's entry into force. On April 27, 2000, more than 90 environmental groups from Canada, Mexico, and the United States jointly sent a letter to the three members of the Council complaining that the governments were holding their discussions in secret and that they appeared to be "further restricting the citizen submission process to avoid embarrassment and public attention from pending submissions." The environmental groups urged the Council to halt the discussions. The U.S. National Advisory Committee, which includes representatives from business and academia as well as environmental groups, also recommended that the U.S. government not agree to Council interpretations of issues concerning preparation of factual records on the ground that doing so would restrict the discretion the NAAEC provides the Secretariat.

The parties did not stop their discussions, which culminated at a meeting of the Alternate Representatives to the Council on May 16, 2000. The Alternate Representatives proposed that the Council ministers consider establishing a governmental working group, which would examine issues concerning the submissions procedure and make recommendations to the Council. In particular, the working group would "examine and present to the Council a typical procedure for the preparation of a factual

301. See Article 15(1) Notifications to Council that Development of a Factual Record is Warranted, for SEM 97-003 (Oct. 29, 1999), SEM 97-006 (July 19, 1999), available in Registry of Submissions, supra note 283. In contrast, the Council had unanimously approved the first two Secretariat recommendations in 1996 and 1998 shortly after receiving them. See Res. 98-7 (June 24, 1998) (authorizing preparation of factual record in BC Hydro, SEM 97-001). Res. 96-8 (Aug. 2, 1996) (authorizing preparation of factual record in Cozumel Pier, SEM 96-001), available in Council Resolutions Registry, supra note 274.


305. See Letter from William A. Nitze, Assistant Administrator of EPA for International Activities and the U.S. Alternate Representative to the NACEC, to the Chairs and Members of the U.S. National Advisory Committee and Governmental Advisory Committee (May 22, 2000) (on file with author).
record by the Secretariat." At the same meeting, the Alternate
Representatives finally acted on the two 1999 Secretariat
proposals to prepare factual records, as well as a third proposal
for a factual record made in March 2000. They denied one of the
requests concerning Canada, deferred indefinitely another
concerning Canada, and approved the third request, which
concerned Mexico.\textsuperscript{307} The Alternate Representatives gave no
explanation for any of their decisions.

The Alternate Representatives' actions greatly increased the
concerns of the environmental groups and the U.S. National
Advisory Committee. The decisions raised the possibility that the
parties might be restricting the submissions procedure in two
fundamentally important ways: first, by refusing without
explanation to grant apparently reasonable Secretariat requests
for factual records; second, by creating a governmental body to
oversee preparation of factual records that the Council did
authorize. The environmental groups and the U.S. National
Advisory Committee believed that if the Council took control of
the procedure in these ways, it would effectively end the
independent role of the Secretariat and destroy the usefulness of
the procedure. Their protests increased. Even editorialists began
to weigh in against the governments' discussions.\textsuperscript{308}

The crisis came to a head on June 11-13, 2000, at a hotel in
Irving, Texas, at the annual public session of the Council
ministers—Carol Browner of the United States, Julia Carabias
of Mexico, and David Anderson of Canada. Many of the groups
that had expressed their opposition to the Alternate
Representatives' decisions attended the meetings. Perhaps at
least partly in response to this opposition, the Council ministers
took two steps that helped to defuse the crisis. First, they
approved publication of the \textit{BC Hydro} factual record.\textsuperscript{309} Although
publishing a factual record was usually considered routine,
under the circumstances a decision not to do so would have

\textsuperscript{306} Id. at attachment (Elements of an Experts Working Group).

\textsuperscript{307} See Res. 00-01 (May 16, 2000) (instructing Secretariat not to prepare factual
record in SEM 97-003), Res. 00-02 (May 16, 2000) (deferring consideration of SEM
97-006), Res. 00-03 (May 16, 2000) (authorizing preparation of a factual record in
98-008), available in Council Resolutions Registry, \textit{supra} note 274. The decision to
deny the factual record in SEM 97-003 was split: Canada and Mexico voted to deny
and the United States voted to approve the request. The other decisions were
unanimous.

\textsuperscript{308} See, e.g., Editorial, \textit{How to Wreck Trade}, \textit{WASH. POST}, June 10, 2000, at A22;
Elisabeth Malkin, \textit{Taking the Green out of NAFTA}, \textit{BUS. WEEK}, May 29, 2000, at 40.

\textsuperscript{309} See Res. 00-04 (June 11, 2000), available in Council Resolutions Registry,
\textit{supra} note 274.
been taken as a sign that the governments were withdrawing all support for the procedure. Second, the Council did not approve the proposal drafted by the Alternate Representatives to create a governmental working group to oversee the submissions procedure. Instead, it adopted a resolution that gave an important new role in the procedure to the Joint Public Advisory Committee.310

Specifically, the Council agreed that it would refer issues concerning the submissions procedure to the JPAC "so that [the JPAC] may conduct a public review with a view to providing advice to the Council as to how those issues might be addressed."311 The Council decided that such issues may be proposed not only by members of the Council, but also by the Secretariat, members of the public, and the JPAC itself.312 Finally, the Council promised to consider the resulting advice from JPAC in making its decisions respecting those issues, and to make its decisions and its explanations for them public.313 Environmental groups praised the decision as a creative way to ensure public participation in future government discussions of the submissions procedure.314 Giving the JPAC a key role in advising the Council on issues concerning the submissions procedure helps to address concerns that the governments might discuss changes to the procedure in secret. And the decision to back away from the idea of a standing governmental body to oversee the procedure makes it less likely that the governments will micromanage the Secretariat's procedural decisions and its preparation of factual records.

Nevertheless, the Council's decision does not ensure that the governments will resist the temptation to exert greater control over the procedure in the future. That temptation is likely to

310. See Res. 00-09 (June 13, 2000), available in Council Resolutions Registry, supra note 274.
311. Id. ¶ 1.
312. Id. ¶ 2.
313. Id. ¶ 4.
314. See Press Release, Centre Quebecois du Droit de l'Environment, World Wildlife Fund, National Wildlife Federation, Sierra Legal Defense Fund, Defenders of Wildlife, Environmental Health Coalition, Centro Mexicano de Derecho Ambiental, Texas Center for Policy Studies, Center for International Environmental Law, Environment Ministers Respond to Demands of Public (June 13, 2000) (on file with author) ("Environmental organizations from Mexico, Canada, and the United States are claiming a victory today in ending a crisis that threatened to undermine a key environmental provision of the NAFTA regime. In a joint resolution issued today, the environment ministers have agreed to end secret negotiations on environmental enforcement matters throughout North America and created a mechanism to ensure public involvement in any future discussions.").
increase as the Secretariat continues to recommend and prepare new factual records, until the governments become more comfortable with the prospect of factual records concerning them. The procedure therefore continues to be at an important moment in its history.

III

ASSESSING THE EFFECTIVENESS OF THE NACEC SUBMISSIONS PROCEDURE

From its inception, the NACEC submissions procedure has been praised for being an innovative means of allowing the public to participate in review of government compliance and has been criticized as likely to prove completely ineffective. But neither its proponents nor its critics have systematically analyzed its potential effectiveness. Of course, it is too early for definitive assessments; as of January 1, 2001, seven years after the NAAEC’s entry into force, 28 submissions have been filed, resulting in only two factual records. Nevertheless, the terms of the NAAEC and the way in which the NACEC has handled its first cases provide a basis for a preliminary assessment of the procedure’s potential effectiveness.

315. Compare A. L. C. de Mestral, The Significance of the NAFTA Side Agreements on Environmental and Labour Cooperation, 15 ARIZ. J. INT’L & COMP. L. 169, 178 (1998) (“The complaint process can be seen as both something of a novelty and something of a success.”), and Saunders, supra note 238, at 297 (“[T]he procedure for the development of a factual record at the initiation of nongovernmental bodies is an interesting and innovative means of allowing citizens and NGOs a role as watchdogs on government in an international forum.”), with Jay Tutchton, The Citizen Petition Process Under NAFTA’s Environmental Side Agreement: It’s Easy to Use, but Does It Work?, 26 ENVTL. L. REP. 10018 (1996) (“While at least facially easily to use, the NAAEC citizen submission process suffers from several dramatic flaws. With the benefit of hindsight, it does not appear that the environmental community should be pleased with the NAAEC citizen submission process as it presently operates.”), and MARY E. KELLY, NAFTA’S ENVIRONMENTAL SIDE AGREEMENT: A REVIEW AND ANALYSIS 8 (Texas Center for Policy Studies, Sept. 1993), at http://www.ciesin.org/docs/008-099/toc.html (last visited Mar. 13, 2001) (The procedure “is apparently designed to discourage citizen submissions by severely limiting their scope and sending them off into an oblivion of secret decision-making.”). See also Kai Raustiala, The Political Implications of the Enforcement Provisions of the NAFTA Environmental Side Agreement: The CEC as a Model for Future Accords, 25 ENVTL. L. 31 (1995) (arguing that the NACEC would be harmful to domestic environmental law if it were too effective at examining and sanctioning persistent nonenforcement).

316. The Secretariat has dismissed 14 submissions and recommended preparation of seven factual records. Six submissions have not yet resulted in Secretariat decisions either to dismiss or recommend preparation of a factual record, and one was withdrawn by the submitter. Of the seven recommendations for preparation of factual records, the Council has authorized three (one of which is still being prepared), denied one, and deferred one. It has yet to act on the remaining two. See Registry of Submissions, supra note 283.
To assess the procedure, it is necessary to place it in context. Like other complaint-based monitoring procedures, it allows private parties to bring complaints against states to independent experts for their review. It may be assessed as a form of quasi-supranational tribunal according to the model developed by Professors Helfer and Slaughter. It may also be considered as a managerial mechanism; its reports are not binding and it must rely primarily on the effect of "sunshine" to induce compliance with them. Moreover, it is embedded in an agreement that takes a predominantly managerial approach to compliance.\textsuperscript{317} As a result, analyzing the procedure solely according to the Helfer-Slaughter model of supranational adjudication seems incomplete, since that model overlooks the way in which a complaint-based monitoring mechanism contained in a managerial regime may increase its effectiveness by interacting with other managerial mechanisms in the regime.\textsuperscript{318}

Therefore, I examine the potential effectiveness of the NACEC procedure first as a type of emerging or potential supranational tribunal, relying primarily on the Helfer-Slaughter model of effective supranational adjudication (and modifying that model to take into account factors particularly relevant to the NACEC). I then supplement that analysis by examining the ability of the procedure to take advantage of its managerial context. I conclude that the procedure has the potential to be effective and to increase its effectiveness both as a form of quasi-supranational tribunal and as an integral part of a managerial regime.

\section*{A. Assessing the Procedure as a Form of Supranational Adjudication}

As described above, Professors Laurence Helfer and Anne-Marie Slaughter have developed a model of effective supranational adjudication with a checklist of thirteen factors.\textsuperscript{319} The factors fall into three categories: (1) factors within the control of the states that establish the tribunal; (2) factors within the control of the tribunal itself; and (3) factors often beyond the control of either states or tribunals. Within each category, the checklist ranks the factors in tentative order of importance.

\begin{itemize}
\item \textsuperscript{317} See supra Part II.B.1.
\item \textsuperscript{318} See supra Part I.D.2.
\item \textsuperscript{319} See Helfer & Slaughter, supra note 18; see also supra Parts I.A.3, I.C.4, I.D.2.
\end{itemize}
Below, I apply this checklist to the NACEC submissions procedure. Where the factors seem to overlook or misjudge characteristics of the procedure relevant to its potential effectiveness as a supranational tribunal, I elaborate on the checklist, modify it, and (in three cases) add new factors to it.

1. Factors Within the Control of States

The first group of factors on the checklist are those within the control of the states that establish the tribunal: (a) the composition of the tribunal—the background and expertise of its members; (b) its functional capacity; (c) its independent fact-finding capacity; and (d) whether the instrument interpreted and the decisions themselves are seen as legally binding. I add three factors to this list: (e) the transparency of the tribunal's procedures and decisions; (f) the ability of states to control key points in the adjudicative process; and (g) links to possible coercive enforcement mechanisms.

a. Composition

Professors Helfer and Slaughter suggest that the background and experience of the members of a supranational tribunal may increase its authority in two ways. First, a tribunal may have greater authority if its members are chosen from jurists and lawyers already known to and respected by the relevant domestic audiences. "Consider, for example," they propose, "the increased domestic attention that might be paid to World Trade Organization (WTO) or NAFTA panel rulings if one of the panel members were a widely respected retired Justice of the U.S. Supreme Court." Second, particular expertise in the subject matter of the tribunal "undoubtedly carries its own authority." Since it may not be possible to find jurists who combine both qualities, Professors Helfer and Slaughter suggest that the ideal may be a mix of experts and respected national practitioners.

The NAAEC leaves the administration of the procedure to the Secretariat, without further specification. In practice, the NACEC

320. See Helfer & Slaughter, supra note 18, at 300-07.
321. Specifically, they say that "where a supranational tribunal depends on acceptance of its judgments by national tribunals, it will wield greater authority if its members are known and respected by national judges." Id. at 300. The point appears to be relevant to all potential domestic audiences, however, not just national judges.
322. Id. at 300 n.104.
323. Id. at 301.
324. Id.
complaint procedure is administered by two members of the Secretariat staff who make up the Submissions on Enforcement Matters Unit.\textsuperscript{325} They consult a Committee of Legal Experts, composed of three law professors from each country, and may hire independent experts to assist them in researching specific issues. As a result, the Secretariat seems to have, or have access to, sufficient legal expertise. Certainly the Secretariat has proved to be quite capable of handling the legal issues that have arisen in the first submissions.\textsuperscript{326} The procedure thus appears to satisfy the need for specialized expertise recognized by the Helfer-Slaughter model.

The Helfer-Slaughter model might suggest formalizing and heightening the role of the Committee to draw attention to its members' expertise and experience. The Committee could even be given the primary role in decisionmaking, rather than serving in only a consultative capacity to the Secretariat. In the long run, the submissions procedure might be more effective if administered by a committee of experts appointed on a long-term basis, as are other complaint-based monitoring mechanisms such as that created by the Optional Protocol.\textsuperscript{327} Certainly, the procedure would have more independence from government influence as a result. But I am hesitant to recommend such a major change in the procedure so early in its history.\textsuperscript{328} The Secretariat might want to consider, however, the significantly smaller step of heightening the consultative role of the Committee and publicizing its role and its membership.

\textit{b. Functional Capacity}

The second factor under the control of state parties is the functional capacity of the tribunal— that is, its ability to attract and effectively resolve a steady stream of cases. Professors Helfer and Slaughter describe two ways in which states may affect a tribunal's functional capacity. First, a tribunal will only be effective if it has the necessary financial resources to publicize

\begin{small}
\begin{itemize}
\item \textsuperscript{325} See Secretariat Professional Staff Directory (Apr. 15. 2001), http://www.cec.org/who_we_are/secretariat/staff/index (listing as the only members of the unit a director and a legal officer).
\item \textsuperscript{326} See infra Part III.A.2.d.
\item \textsuperscript{327} See supra Part I.C.4.
\item \textsuperscript{328} See Helfer & Slaughter, supra note 18, at 367 ("One of the most important lessons from the European experience is that supranational courts and tribunals must move cautiously in their early years . . . . Only after states develop a level of comfort with these mechanisms . . . will it be feasible to enhance and extend the architecture of the system itself.").
\end{itemize}
\end{small}
its work and to resolve complaints without undue delay. Since the financial resources of a tribunal are under state control, states may increase or decrease its effectiveness by providing sufficient or insufficient resources.\textsuperscript{329} The importance of this factor can hardly be overstated, since without resources the tribunal will be unable to carry out its functions at all. Second, a tribunal’s functional capacity depends in part on its rules of procedure, which are normally established by its member states. “Cumbersome” rules of procedure will hamper the ability of the tribunal to handle its caseload effectively and discourage potential claimants from using the procedure.\textsuperscript{330}

(1) Resources

The NACEC has had sufficient resources to publicize its work, including through a website that provides basic information about the submissions procedure and includes a “public registry” of the publicly filed documents for each submission.\textsuperscript{331} Moreover, many North American environmental groups (presumably groups particularly likely to consider using the procedure) already know about the NAAEC and its submissions procedure.\textsuperscript{332}

The number of cases filed in the first few years indicated growing use of the procedure. The number of submissions filed annually increased from two in 1995, to four in 1996, to seven in 1997 and 1998.\textsuperscript{333} Twenty submissions in the first five years after the entry into force of the NAAEC is not a low total for a complaint-based monitoring procedure to receive in its first years of operation.\textsuperscript{334} But the pace dropped considerably in 1999, when only two new submissions were filed.\textsuperscript{335} It seems possible that the drop in new filings may have resulted at least in part from a decrease in the speed with which the Secretariat resolved the submissions filed in 1997 and 1998.\textsuperscript{336} Potential submitters may have been waiting for the results of the pending cases before

\textsuperscript{329.} See id. at 301-03.
\textsuperscript{330.} See id. at 303.
\textsuperscript{331.} See Registry of Submissions, supra note 283.
\textsuperscript{332.} For example, in April 2000, more than 90 North American environmental groups signed a letter protesting government discussions regarding the procedure. See supra Part II.B.2.f.
\textsuperscript{333.} See Registry of Submissions, supra note 283.
\textsuperscript{334.} The Human Rights Committee, for example, with a far larger number of state parties, reached only five to ten decisions on the merits annually in the 1980s. See Helfer & Slaughter, supra note 18, at 347.
\textsuperscript{335.} See Registry of Submissions, supra note 283.
\textsuperscript{336.} See id.
deciding whether to invest their time and effort in filing more submissions.

Since September 1998, when the Secretariat created a separate unit on submissions, it has taken significant steps to reduce the large backlog that had accumulated, and the number of submissions has again increased, rising to six in 2000. But the submissions unit will need additional resources, either from the Secretariat’s existing budget or from an increase in it. Two staff members in the Secretariat probably cannot promptly dispose of the stream of submissions that will be filed in the next few years if the procedure remains fairly popular, much less the number that will be filed if its popularity grows. Moreover, they probably cannot oversee an increased number of factual records. To date, the NACEC has never had more than one factual record in preparation at one time, but that is likely to change. As of January 1, 2001, the Secretariat is preparing one factual record, it has proposed preparation of two more, and it is considering whether to recommend another four.

This need for additional resources highlights a challenge that all infant complaint-based monitoring procedures and supranational tribunals face. As a procedure starts to produce reports on state compliance, it is likely to attract additional complaints, which require more resources to resolve promptly and effectively. But at the same time, the procedure’s success at reporting on state compliance may make states more uncomfortable with it. States may thus be less inclined to support the procedure at exactly the point at which the procedure demands increased support to be successful. One of the challenges facing the NACEC procedure over the next two to five years is whether it will continue to receive the financial support it needs.

(2) Procedures

The NACEC procedures for filing submissions, contained in Articles 14 and 15 and amplified in the Guidelines adopted by the Council, are not cumbersome. The Guidelines in particular are written in a readable, question-and-answer style. But the procedures have received criticism in other respects, two of which are particularly relevant to this factor. First, some writers have suggested that the procedures unduly limit access to the

337. See id.
338. See supra Part II.B.2.f.
339. See NAAEC, supra note 25, arts. 14 & 15; GUIDELINES, supra note 249.
submissions procedure.\footnote{See Michael J. Kelly, Bringing a Complaint Under the NAFTA Environmental Side Accord: Difficult Steps Under a Procedural Paper Tiger, but Movement in the Right Direction, 24 PEPP. L. REV. 71, 79-82 (1996); KELLY, supra note 315, at 8-10.} Second, some have argued that they limit its scope so drastically as to make it irrelevant to most environmental problems.\footnote{See Richard J. Anson, Jr., The North American Agreement on Environmental Protection and the Arctic Council Agreement: Will These Multilateral Agreements Adequately Protect the Environment?, 29 CAL. W. INT'L L.J. 101, 125 (1998); Steve Charnovitz, The NAFTA Environmental Side Agreement: Implications for Environmental Cooperation, Trade Policy, and American Treatymaking, 8 TEMP. INT'L & COMP. L.J. 257, 278-83 (1994). The procedures have also been criticized on grounds less relevant to functional capacity—for example, that they are subject to too much government control. See infra Part III.A.1.f.} Although limits on access and scope are not included in the Helfer-Slaughter checklist, they are highly relevant to a tribunal’s functional capacity and effectiveness. A tribunal closed to most plaintiffs, or closed to most important issues plaintiffs want to raise, will not be useful or effective.

(i) Access. In general, the requirements a submission must meet to be considered under the NACEC procedure are no more stringent than those of any other complaint-based monitoring mechanism, and in some important respects the NACEC procedure provides much broader access. The procedure is open to “any non-governmental organization or person” residing or established in the territory of any of the state parties.\footnote{NAAEC, supra note 25, art. 14(1). The Agreement defines “non-governmental organization” very broadly, as “any scientific, professional, business, non-profit, or public interest organization or association that is neither affiliated with, nor under the direction of, a government.” Id. art. 45(1).} It does not require submissions against a state to be from residents of that state; a resident of one state can file a submission complaining about another.\footnote{Some critics state that a submission may concern only the government of the country where the submitter resides. See Michael J. Kelly, supra note 340, at 80; KELLY, supra note 315, at 8 n.18. This reading seems clearly mistaken in light of the plain language of Article 14(1)(f), which states that the submission must be from “a person or organization residing or established in the territory of a Party,” and does not require that the submitter reside or be established in the territory of the Party which is the subject of the submission. See JOHNSON & BEAULIEU, supra note 214, at 157-58.} On this point it provides significantly broader access than the Optional Protocol, which requires each complaint to be from an individual subject to the jurisdiction of the state that is the subject of the complaint.\footnote{See Optional Protocol, supra note 111, art. 2.}

The submissions procedure also compares favorably to other complaint-based monitoring mechanisms in other respects. For example, as discussed above, Article 14(2) of the Agreement
instructs the Secretariat to consider whether domestic remedies have been pursued, rather than requiring, as most complaint-based monitoring procedures do, that they be exhausted. In this respect and many others, the Secretariat has a great deal of discretion in interpreting the requirements of the procedure, and in practice the degree of access depends in part on how the Secretariat exercises that discretion. Some early critics of the procedure assumed that the Secretariat would interpret its provisions restrictively, but to date the Secretariat has not done so. On the whole, even some of those critical of the procedure on other grounds concede that it is fairly easily accessible.

(ii) Scope. A more basic criticism of the functional capacity of the procedure is that its scope is too limited. Some critics have concluded that the procedure is likely to prove useless because it is limited to submissions alleging a failure to effectively enforce environmental laws. Of course, in this respect the procedure reflects the emphasis of the NAAEC, and the NAAEC as a whole has been criticized on the same ground. Steve Charnovitz, for example, has argued that focusing on enforcement of domestic standards rather than requiring new, higher standards in all three countries is "retrogressive" and "the weakest conceivable form of international agreement." This criticism would have merit only if: (1) as written, the state parties' domestic standards were weak; or (2) the state parties were already effectively enforcing their domestic standards. The premise underlying the Agreement is that neither of these statements is correct. When states have strong, wide-ranging domestic environmental standards on paper but fail to obtain compliance with them in practice, an agreement designed to promote that compliance seems far more useful than an agreement that strengthens the standards even more—on paper—but leaves compliance to lag even farther behind. Moreover, by focusing on enforcement of and compliance with domestic environmental laws, the Agreement incorporates standards that cover many more areas and provide for much higher levels of environmental protection.

345. See supra Part II.B.2.b.
346. See Michael J. Kelly, supra note 340, at 80; KELLY, supra note 315, at 8.
347. See infra Part III.A.2.a.
348. See Tutchten, supra note 315.
349. See id.
350. See Charnovitz, supra note 341, at 278, 281. As applied to the Agreement as a whole, this criticism ignores the ways in which the Agreement does provide for cooperative efforts to raise environmental standards.
than do current international standards.\textsuperscript{351} Inducing the three state parties to enforce their domestic environmental standards more effectively would help to address all aspects of environmental protection, not just the transboundary harms that are usually the only subject of international environmental agreements.

Commentators have also suggested that the scope is too narrow because it excludes natural resource management statutes.\textsuperscript{352} This criticism has often been overstated, however. The NAAEC’s definition of “environmental law” includes laws whose:

primary purpose . . . is the protection of the environment, or the prevention of a danger to human life or health, through

(i) the prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants,

(ii) the control of environmentally hazardous or toxic chemicals, substances, materials and wastes, and the dissemination of information related thereto, or

(iii) the protection of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas . . . . \textsuperscript{353}

It is true that the definition excludes “any statute or regulation, or provision thereof, the primary purpose of which is managing the commercial harvest or exploitation, or subsistence or aboriginal harvesting, of natural resources.”\textsuperscript{354} but crucially, the definition provides that “[t]he 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 part.”\textsuperscript{355}

It is therefore incorrect to conclude that every provision of a mining or agricultural law, for example, would be exempt from scrutiny under the submissions procedure because the law as a whole would primarily concern the management or the

\textsuperscript{351} See Jack I. Garvey, Trade Law and Quality of Life—Dispute Resolution Under the NAFTA Side Accords on Labor and the Environment, 89 Am. J. Int’l L. 439, 451 (1995) (“By focusing on national regulation and the enforcement of national laws, a much higher level of protection may be achieved . . . . The reality is that [environmental and labor] standards, as they currently exist, are largely national, not international.”).

\textsuperscript{352} See Raustiala, supra note 216, at 746; Charnovitz, supra note 341, at 267; Wirth, supra note 16, at 782.

\textsuperscript{353} NAAEC, supra note 25, art. 45(2)(a).

\textsuperscript{354} Id. art. 45(2)(b).

\textsuperscript{355} Id. art. 45(2)(c) (emphasis added).
exploitation of natural resources. Any specific provision whose primary purpose was protection of the environment or human health would be included within the definition of "environmental law." For example, a provision in a mining law that prohibits mining operations from dumping refuse in streams in order to protect water quality would almost certainly be covered, even though the mining law as a whole would probably not be.

On the whole, the submissions procedure's provisions on access and scope are remarkably strong. The submissions procedure is open to all residents of the three North American parties, and it allows them to raise issues concerning enforcement of virtually all domestic laws designed to protect the environment.

c. Independent Fact-finding Capacity

The third factor under state control in the Helfer-Slaughter model is the degree to which the tribunal has the "ability to elicit credible factual information on which to base the tribunal's decisions."356 The NAAEC does provide the Secretariat this ability. In preparing a factual record, the Secretariat is required to consider any information provided by a state party, but it may also consider:

any relevant technical, scientific or other information:
(a) that is publicly available;
(b) submitted by interested non-governmental organizations or persons;
(c) submitted by the Joint Public Advisory Committee; or
(d) developed by the Secretariat or by independent experts.357

This provision allows the Secretariat to examine any information it considers relevant, from virtually any source. In particular, it may receive information from individuals and organizations in addition to those directly involved in the submission, and may acquire information on its own, either through its own resources or by hiring independent experts. Moreover, the NAAEC requires state parties to provide the Secretariat "such information as [it] may require, including... promptly making available any information in its possession.

356. See Helfer & Slaughter, supra note 18, at 303.
357. NAAEC, supra note 25, art. 15(4).
required for the preparation of a report or factual record, including compliance and enforcement data.\textsuperscript{358}

The fact-finding powers of the Secretariat in this respect compare favorably with those of other complaint-based monitoring mechanisms.\textsuperscript{359} This factor weighs in favor of the effectiveness of the NACEC procedure.

d. **Legal Status of the Agreement and of Tribunal Decisions**

Based on their analysis of the European Court of Justice and the European Court of Human Rights, Professors Helfer and Slaughter conclude that "the effectiveness of a supranational tribunal is enhanced where states make its decisions legally binding on the parties to the dispute before it."\textsuperscript{360} They also discuss the importance of whether the agreement the tribunal is charged with interpreting is considered binding and, in particular, whether the agreement has been incorporated into domestic law.\textsuperscript{361}

(1) **Decisions of the Tribunal**

Decisions of the Secretariat in the NACEC submissions procedure fall into two categories: (1) procedural decisions, which determine whether a submission meets the requirements for moving to the next stage of the procedure; and (2) the factual record itself.

Procedural decisions are binding on submitters, since submitters have no choice but to respect an adverse decision. If the Secretariat decides that a submission does not meet the threshold requirements set forth in Article 14(1), for example, the submitter cannot appeal the decision to a higher authority. The effect of procedural decisions on a state party is more complicated. A Secretariat decision that a submission meets the threshold requirements of Article 14(1) and justifies requesting a response under Article 14(2) is binding in the sense that the NAAEC requires the state party in question to respond to the

\textsuperscript{358} Id. art. 21(1)(a). The Agreement also requires state parties to take "all reasonable steps" to make available any information requested that is not in their possession (such as information possessed by private parties within their territory). Id. art. 21(1)(b). A state party that believes that a Secretariat request is "excessive or otherwise unduly burdensome" may appeal to the Council, which may decide (but only by a two-thirds vote) to limit the scope of the Secretariat's request. Id. art. 21(2).

\textsuperscript{359} See Helfer & Slaughter, supra note 18, at 349-51 (describing limited ability of Human Rights Committee to obtain factual information on its own).

\textsuperscript{360} See id. at 307.

\textsuperscript{361} See id. at 305-07.
submission within a set number of days after a request from the Secretariat. Supra. But the Secretariat’s decision that preparation of a factual record is warranted is not binding unless the Council approves it by a two-thirds vote.

Unlike procedural decisions, factual records are never binding. Even if a factual record establishes that a state party is failing to effectively enforce its environmental law, nothing in the Agreement suggests that either the Secretariat or the Council may order the state to comply by effectively enforcing its law. Some commentators have criticized the procedure on this basis. But given the rarity of binding supranational adjudication in international law generally and international environmental law in particular, it is unsurprising that the NAAEC procedure does not result in binding decisions.

A more basic problem may arise from the fact that factual records are not clearly “decisions” at all. The very term “factual record” suggests that the Secretariat is limited to finding facts rather than deciding a legal dispute between the submitter and the state. The Guidelines may be read to support this interpretation. They state that the factual record will contain, in addition to summaries of the submission, party’s response, and “any other relevant factual information,” only “the facts presented by the Secretariat with respect to the matters raised in the submission.”

But the focus on facts is less of a limitation than it might first appear because most issues likely to arise in a dispute over an alleged failure to effectively enforce an environmental law will be factual. If, for example, a submitter alleges that a state has failed to effectively enforce a law prohibiting industrial emissions of a toxic pollutant into a river, issues might arise concerning the actions of the state (what steps has it taken to enforce the

362. See NAAEC, supra note 25, art. 14(3) [requiring state party to advise Secretariat within 30 days or, in exceptional circumstances, within 60 days, on whether the matter is the subject of a pending proceeding, and of any other information that the party wishes to submit].
363. See id. art. 15(2).
364. See Beatriz Bugeda, Is NAFTA up to Its Green Expectations? Effective Law Enforcement Under the North American Agreement on Environmental Cooperation, 32 U. Rich. L. Rev. 1591, 1603 (1999) (“the fact that the process does not provide for a judicial decision... exposes a serious shortcoming of the procedure”); Tutcheon, supra note 315 (“The glaring substantive flaw in the citizen submission process is the lack of a guaranteed remedy.... A citizen submitter has no direct ability to force a Party to effectively enforce its environmental laws.”).
365. See JOHNSON & BEAULIEU, supra note 214, at 158 (“Given its name, [a factual record] probably cannot include an evaluation or judgment by the Secretariat.”).
366. GUIDELINES, supra note 249, § 12.1.
law, with what result?) and the regulated industry (has it complied with the law?). Issues might also arise concerning the state of the ecosystem. For example, the degree to which the river is polluted with the toxic substance might be evidence of the degree of compliance with the law. All of these issues would be essentially factual in nature. The dispute might also implicate issues concerning the domestic law, such as the scope of its application (for example, does the law prohibit emissions that substance by that industry?). But even such issues would be factual, in the sense that they would require a determination as a factual matter of the scope or state of the domestic law. The Secretariat could, for example, determine as a factual matter how domestic courts had interpreted the law, but the Secretariat could neither second-guess those interpretations nor determine what the domestic law should be, if the law were unclear.  

But, given the nature of the inquiry, such a determination should never be needed anyway. If it is truly unclear whether the domestic law even applies to a particular situation, it is difficult to see how a state could have failed to effectively enforce the law. The above discussion indicates that the Secretariat can decide factual issues that arise in the course of preparing a factual record. But can it decide the ultimate question in dispute—whether the state party has failed to effectively enforce its environmental law? This question might appear to be no less factual than those described above; either a party’s enforcement of a law has been “effective,” in that it has led to compliance with the law, or not. On the other hand, one might argue that the term “effectively enforce” refers to a legal standard established by Article 5 of the NAAEC, which obligates each party to “effectively enforce its environmental laws.”  

Therefore, a decision by the Secretariat that a party has failed to effectively enforce an environmental law would in effect be a decision that the party has violated the Agreement—that is, a legal decision. Although this distinction may seem important in principle, it may be irrelevant to the effectiveness of the procedure. The Helffer-Slaughter model of effective supranational adjudication might suggest that factual records should decide whether a state has effectively enforced its environmental law, and perhaps even explicitly decide whether a state has violated Article 5 of the

367. In this respect, the Secretariat would act in accordance with the usual practice of international tribunals when determining domestic law. See BROWNIE, supra note 2, at 39-41.

368. See NAAEC, supra note 25, art. 5(1).
Agreement. But such decisions would probably exceed the states' expectation of the scope of a factual record, and might even cause the states to exert more control over the procedure.\textsuperscript{369} Moreover, it is not clear that such decisions, if allowed by the state parties, would make the procedure more effective. As long as a factual record identifies the facts relevant to whether a party has effectively enforced its environmental law ("deciding" the subsidiary factual issues that arise along the way), it does not seem enormously important whether the Secretariat concludes the factual record by stating its view on whether the facts indicate that the law was effectively enforced. If the factual record is well-prepared, its readers will be able to draw their own conclusions as to that ultimate question. If, on that basis, readers conclude for themselves that the law was not effectively enforced, they will be able to use the factual record to help them try to induce the state to enforce the law more effectively in the future.

Conversely, a factual record that does not provide enough information for readers to draw their own conclusions on whether the state effectively enforced the law in question is unlikely to be useful. For example, the first factual record, in the Cozumel Pier case, did little more than state the factual allegations of the submitter and of the state in chronological form, and has been criticized as a result.\textsuperscript{370} The second factual record, in the BC Hydro case, addresses factual issues in more detail and with more confidence, reflecting the Secretariat's increasing experience with the procedure.\textsuperscript{371}

\textsuperscript{369} In its comments on the BC Hydro factual record in draft, the U.S. government stated that the Secretariat should "refrain from offering comments in a factual record that appear to provide the Secretariat's own views about whether or not there has been effective enforcement of the law with respect to the assertions in a particular submission." Letter from William A. Nitze, U.S. Alternate Representative to the Council, to Janine Ferretti, Executive Director of the Secretariat (May 11, 2000), attached to Res. 00-04 (June 11, 2000), at http://www.cec.org/files/english/usa-comm.pdf (last visited Mar. 9, 2001).

\textsuperscript{370} See Final Factual Record of the Cruise Ship Pier Project in Cozumel, Quintana Roo, SEM 96-001 (Oct. 24, 1997), available in Registry of Submissions, supra note 283. For criticisms of the factual record, see Bugeda, supra note 364, at 1611-13. But see id. at 1616 (reporting that the submitters held a press conference to explain that the factual record proved that Mexico failed to effectively enforce its environmental law). For a more recent analysis of this factual record, including its background and possible effects, see Paul Stanton Kibel, The Paper Tiger Awakens: North American Environmental Law After the Cozumel Reef Case, 39 COLUM. J. TRANSNAT'L L. 395 (forthcoming 2001).

\textsuperscript{371} See Final Factual Record for Submission (BC Aboriginal Fisheries Commission et al.), SEM 97-001 (June 11, 2000), available in Registry of Submissions, supra note 283.
(2) The Agreement

Under this factor, Professors Helfer and Slaughter focus not just on whether the agreement applied by the tribunal is legally binding, but also on whether it is incorporated into domestic laws. They assign relatively little importance to incorporation, however, concluding that although incorporation "appears to have some positive impact on enhancing a tribunal's effectiveness," its ultimate effect depends on many other factors.\(^{372}\)

As an international agreement, the NAAEC is binding on the three state parties under international law, but it explicitly limits the degree to which courts may ensure that it is incorporated into domestic law. Article 38 states: "No Party may provide for a right of action under its law against any other Party on the ground that another Party has acted in a manner inconsistent with this Agreement."\(^{373}\) Although this provision does not prohibit domestic courts of a state party from hearing claims against that party arising under the NAAEC, U.S. law forecloses that possibility with respect to U.S. courts.\(^{374}\)

e. Transparency

The ability of private parties to use a supranational tribunal and to try to induce compliance with its decisions depends in large part on whether the procedures and decisions of the tribunal are transparent. If a procedure is not transparent to the public—that is, if its procedures, documents, and decisions are not publicly available—then the public may not be able to obtain the knowledge necessary to oversee and support the procedure.

On the whole, the NACEC submissions procedure receives high marks for transparency. Submissions, Secretariat procedural decisions, party responses, Council decisions, and factual records have generally been made available to the public promptly in accordance with the NAAEC and the Guidelines. Nevertheless, there are several signs that the state parties may

\(^{372}\) Helfer & Slaughter, supra note 18, at 307.

\(^{373}\) NAAEC, supra note 25, art. 38.

\(^{374}\) See NAFTA Implementation Act, Pub. L. No. 103-182 § 102(c), 107 Stat. 2057 (codified at 19 U.S.C. § 3312(c) (2000)) (providing that no person other than the United States may have a cause of action or defense under the NAAEC or may challenge any federal or state government action or inaction on the ground that it is inconsistent with the NAAEC).
be reducing the transparency of the procedure in important ways.

First, the Council amended the Guidelines in June 1999 to require the Secretariat: (a) to keep confidential the text of a recommendation that a factual record is warranted until the Council decides whether to authorize preparation of the factual record; and (b) to delay public announcement of its recommendation until thirty days after it has provided the recommendation to the Council. The purpose of the amendment appears to be to shield the state parties from public scrutiny until it is too late for public pressure to affect the Council's decision whether to approve preparation of a factual record. The amendment is particularly troubling because the Council adopted it despite strong advice from the Joint Public Advisory Committee (on the basis of extensive public consultations) not to amend the Guidelines and because the amendment was not circulated for public comment first.

Second, Mexico has designated as confidential all or a significant part of its response to some submissions. The Guidelines encourage a submitter or party that submits confidential information to provide a summary of the information or a general explanation of why the information is confidential, but Mexico has not done so.

Third, the Council gave no reasons for its May 2000 decision to deny the Secretariat's recommendation to prepare a factual record. The public cannot understand and debate the merits of a decision to overrule the Secretariat's judgment without an explanation of the reasoning behind it.

f. Ability of States to Control Key Points in the Process

By determining a tribunal's composition, resources, procedures, fact-finding ability, the legal status of its decisions, and the transparency of its work—the five factors discussed

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375. See Res. 99-06 (June 28, 1999), available in Council Resolutions Registry, supra note 274; GUIDELINES, supra note 249, § 10.2.
376. See JPAC Advice to Council No. 99-01 (Mar. 25, 1999), at http://www.cec.org/who_we_are/jpac/advice/disp_adv.cfm?varian=english&documentId=43 (last visited Feb. 24, 2001). The public opposition does seem to have helped convince the Council not to make other amendments to the Guidelines that would have reduced the discretion of the Secretariat. See supra Part II.B.2.f.
378. See GUIDELINES, supra note 249, § 17.3.
379. See Res. 00-01 (May 16, 2000), available in Council Resolutions Registry, supra note 274; see also supra Part II.B.2.f.
above — states may affect the adjudicative procedure as a whole. But states may also establish procedures that allow them to oversee and second-guess decisions in individual cases. Professors Helfer and Slaughter do not include this factor in their model, perhaps because it is not present in the tribunals they examine. But where it is present, this factor is particularly important since the greater the ability of states to control key points in the adjudicative process, the less effective a tribunal is likely to be. The touchstone of utility and integrity of a tribunal is its neutrality between the parties before it.\textsuperscript{380} A tribunal that is subject to control by parties at key points is not an effective tribunal, and perhaps not even a tribunal at all.\textsuperscript{381}

States do not control most of the decision points in the NACEC submissions procedure. They have no control over which submissions are filed, and they cannot prevent the Secretariat from deciding that a submission is admissible, merits a response from a state party, and warrants preparation of a factual record.\textsuperscript{382} Nor can the states control the content of the factual record itself. But they do control two key points in the procedure: by a two-thirds vote of the Council, they decide whether to allow the Secretariat to prepare a factual record and whether to make a factual record public.\textsuperscript{383}

These points of control have the potential to undermine the effectiveness of the procedure. States could give up this control by amending the agreement or, in a less binding step, declare that they will always vote to affirm a Secretariat recommendation for a factual record and to make all factual records public. The United States has taken a partial step toward this position by stating in an Executive Order that “[t]o the greatest extent practicable, pursuant to Articles 15(1) and 15(2), where the Secretariat . . . informs the Council that a factual record is

\textsuperscript{380} See infra Part III.A.2.b; Helfer & Slaughter, supra note 18, at 312-14.

\textsuperscript{381} Unlike tribunals, most managerial compliance mechanisms contain some type of state control. There might therefore appear to be some tension between the effectiveness of a complaint-based monitoring procedure as a form of quasi-supranational tribunal and its effectiveness as a managerial monitoring mechanism. But the tension is illusory, since the premise of complaint-based monitoring is that private parties and experts play roles that are largely independent of state control and that the monitoring is more effective as a result. See supra Part I.C.4.

\textsuperscript{382} Jack Garvey’s prediction that a submission from a nongovernmental organization would not be able to enter the procedure without support from a state party has not proven to be the case. See Garvey, supra note 351, at 446.

\textsuperscript{383} See NAAEC, supra note 25, arts. 15(2), 15(7). See generally supra Part II.B.2.
warranted, the United States shall support the preparation of such factual record."\textsuperscript{384}

In the spring of 2000, states appeared to be planning to extend their control over the procedure, both by refusing to authorize factual records recommended by the Secretariat and by creating a working group to exercise ongoing oversight of factual record preparation.\textsuperscript{385} The Council's decision in June 2000 not to create such a working group is a hopeful sign that the state parties will resist the urge to micromanage the procedure.\textsuperscript{386}

If the Council does begin to micromanage the Secretariat and thus bring the procedure under \textit{de facto} state control, the procedure will lose its potential effectiveness. State control would clearly destroy the effectiveness of the procedure as any type of supranational tribunal. Moreover, the procedure would lose its effectiveness as part of a managerial regime since potential submitters will not file the submissions on which the procedure depends if they believe that the procedure is skewed towards states. Apart from these concerns, it is hard to imagine that the three states could agree on decisions (which would presumably need to be by consensus) promptly enough to manage the process effectively.

\textit{g. Links to Possible Coercive Enforcement Mechanisms}

Another factor under state control but not included in the Helfer-Slaughter model is whether the tribunal has a connection to possible coercive enforcement mechanisms. Even if enforcement mechanisms are unlikely ever to be used, as long as they have any value as an "ultimate deterrent"\textsuperscript{387} they may increase the effectiveness of the tribunal.

The Secretariat and the Council may not enforce compliance with factual records. But Part Five of the NAAEC provides a dispute resolution mechanism that allows one state party, with the approval of two-thirds of the Council, to take a claim that another state party is engaging in a persistent pattern of failure to effectively enforce its environmental law to a panel of independent experts. Part Five also provides for the possibility of

\textsuperscript{384} Federal Implementation of the North American Agreement on Environmental Cooperation, \textit{supra} note 224, \S 2(d) (1) (May 13, 1994).
\textsuperscript{385} See \textit{supra} Part II.B.2.f.
\textsuperscript{386} See \textit{id.}
\textsuperscript{387} See Széll, \textit{supra} note 14, at 107.
sanctions to induce compliance with a panel decision. It is conceivable that a factual record indicating a failure to effectively enforce environmental law might contribute to pressure on a state party to bring a complaint under Part Five. Although the possibility is remote, it may nevertheless contribute to the effectiveness of the submissions procedure.

2. Factors Within the Control of the Tribunal

The second category includes factors within the control of the tribunal itself: (1) its awareness of its "audience"—that is, the constituency that supports its work; (2) its neutrality and autonomy from political interests—that is, whether it makes decisions on legal principles rather than seeking merely to reconcile the parties' competing interests; (3) whether it proceeds incrementally, aware of its political limits; (4) the quality of its legal reasoning; (5) dialogue and cross-fertilization with other tribunals; and (6) the form of its opinions. Although I do not add new factors to this list, I do elaborate on some of these factors.

More important, I disagree with the relative importance assigned to the factors by their order on the checklist. Professors Helfer and Slaughter suggest that the most important factor under the control of supranational tribunals is an awareness of potential audiences for their decisions besides the "monolithic 'states' that are their apparent creators and subjects." By cultivating constituencies among those interested in the tribunal's work, a tribunal can encourage potential plaintiffs to bring claims to it and can simultaneously "penetrate the surface of the state" by connecting with domestic actors that can help promote compliance with the tribunal's decisions. I agree that an audience, or constituency, other than states is crucially important for the success of a supranational tribunal. But an audience's interest in, and commitment to, a tribunal depends on its perception of the effectiveness of the tribunal as a whole. The tribunal's ability to cultivate an audience is severely limited by its need to act in accordance with the terms of the legal

388. See supra Part II.B.1.
389. See JOHNSON & BEAULIEU, supra note 214, at 158.
390. See Saunders, supra note 238, at 302 ("[T]he very fact that [the Part Five arbitral provisions] exist should serve as a strong inducement towards compliance.").
392. Id. at 309.
393. Id.
instrument it is interpreting and by the need to be neutral between the parties to disputes. A supranational tribunal perceived as favoring private complainants in ways that exceed the scope of its authority or that unfairly prejudice state "defendants" will quickly lose the confidence of the states whose support is necessary for its existence, just as a tribunal seen as favoring states will lose the confidence of potential complainants.

I believe that "awareness of audience" is therefore less important to a tribunal's effectiveness than the tribunal's neutrality and the quality of its legal reasoning, and is no more important than "incrementalism." That is, awareness of the interests of the state parties. Nevertheless, I will discuss the factors in the order presented by the Helfer-Slaughter checklist.

a. Awareness of Audience

The most obvious audience for the NACEC submissions procedure is the audience of potential submitters. In principle, this constituency is enormous, since the procedure is open to any person or non-governmental organization in any of the three countries.394 In practice, however, the most important potential submitters are environmental groups, which have filed the great majority of submissions.395 And the importance of environmental groups to the NACEC goes far beyond the submissions procedure. In a real sense, environmental groups called the NAAEC and the NACEC into existence.396 If they decide that the submissions procedure is not worth using, their loss of confidence in the NACEC would undermine not only the procedure, but also NACEC programs in other areas.

A key consideration for the audience of potential submitters is whether the Secretariat is interpreting the procedural requirements broadly, to allow as many submissions as possible to be considered, or narrowly, to exclude most submissions at an early stage. The Secretariat has taken the first approach

394. See NAAEC, supra note 25, art. 14(1)(l).
395. Of the 28 submissions filed as of January 1, 2001, environmental groups filed all but eight. See SEM 96-002 (Mar. 20, 1996), SEM 98-002 (Oct. 14, 1997), SEM 00-001 (Jan. 27, 2000) (each filed by an individual), available in Registry of Submissions, supra note 283; SEM 98-005 (Aug. 11, 1998), SEM 00-005 (Apr. 6, 2000), SEM 00-006 (Sept. 6, 2000) (filed by Mexican human rights organizations), available in Registry of Submissions, supra note 283; SEM 99-001 (Oct. 18, 1999), SEM 00-002 (Jan. 21, 2000) (filed by Canadian companies), available in Registry of Submissions, supra note 283. Some submissions were filed by an environmental group together with one or more individuals. See, e.g., SEM 96-004 (Nov. 14, 1996), available in Registry of Submissions, supra note 283.
396. See supra Part II.B.1. See generally supra authorities cited in note 214.
whenever possible. It has stated, for example, that "Article 14(1) [which contains the threshold requirements a submission must meet to be admissible] should be given a large and liberal interpretation, consistent with the objectives of the NAAEC and the provisions of the Vienna Convention on the Law of Treaties." 397 An important early test of the Secretariat's interpretation of the admissibility requirements came in the Cozumel Pier case, in which three Mexican environmental groups complained that Mexican environmental authorities had failed to effectively enforce Mexican environmental law by not requiring an environmental impact assessment for the construction and operation of a port terminal in Cozumel. 398 Mexico argued that the plaintiffs did not have standing to raise the complaint because they had not shown that they had suffered direct harm as a result of the acts of which they complained. 399 Mexico thus invited the Secretariat to require submitters to show particularized harm, a requirement that has restricted standing in domestic cases brought by environmental groups. 400 The Secretariat declined the invitation, saying:

> In considering harm, the Secretariat notes the importance and character of the resource in question—a portion of the magnificent Paradise coral reef located in the Caribbean waters of Quintana Roo. While the Secretariat recognizes that the submitters may not have alleged the particularized, individual harm required to acquire legal standing to bring suit in some civil proceedings in North America, the especially

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397. Determination Pursuant to Article 14(1). SEM 97-005 (May 26, 1998), available in Registry of Submissions, supra note 283; see also Determination Pursuant to Article 14(1) & (2). SEM 98-003 (Sept. 8, 1999), available in Registry of Submissions, supra note 283.

398. See SEM 96-001 (Jan. 17, 1996), available in Registry of Submissions, supra note 283.

399. See Recommendation of the Secretariat to the Council for the Development of a Factual Record, SEM 96-001 (June 7, 1996), available in Registry of Submissions, supra note 283. Under Article 14(2)(a), the Secretariat must consider whether a submission alleges harm to the submitter in deciding whether to request a response from the state party. See supra Part II.B.2.b.

400. See Baron, supra note 266, at 609 (urging Commission to avoid the "formalistic and complex standing requirements" applied to environmental plaintiffs under U.S. law); David G. Schiller, Comment, Great Expectations: The North American Commission on Environmental Cooperation Review of the Cozumel Pier Submission, 28 U. MIAI INTER-AM. L. REV. 437, 466 (1997) (describing limits to standing under Mexican law).
public nature of marine resources bring[s] the submitters within the spirit and intent of Article 14 of the NAAEC.401

By ensuring that the procedure is open to those claiming general environmental harm, the Secretariat makes it easier for environmental groups to file submissions and avoids deflating environmental groups' expectations of the procedure.402 In the longer run, however, a more important test for environmental groups and other potential submitters may be whether the Secretariat continues to show independence from the Council in deciding whether to recommend the preparation of factual records and in preparing the factual records once they are approved. In that sense, this factor depends at least partly on the Secretariat’s neutrality, the next factor on the checklist.

Environmental groups and other potential submitters are not the only constituents of the submissions procedure. Members of the public who would never consider filing a submission may nevertheless support the procedure as a way to help improve environmental protection in North America. The NACEC is almost unique among international organizations in incorporating a Joint Public Advisory Committee designed to give the public a forum within the organization, and each of the state parties has a National Advisory Committee to provide interested members of the public an additional way to influence their state’s policy towards the NACEC.403 The Secretariat has shown a strong awareness of this public constituency. It has used a variety of means, including its website, to provide information about the NACEC and to publicize NACEC actions.404

As described above, this broader constituency for the submissions procedure has played an important role in discussions over whether and how to change the procedure. The way in which the constituency responded in the spring of 2000 to perceived threats to the submissions procedure indicates that

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401. Recommendation of the Secretariat to Council for the Development of a Factual Record, SEM 96-001 (June 7, 1996), available in Registry of Submissions, supra note 283.


403. See NAAEC, supra note 25, arts. 16 (establishing JPAC), 17 (providing for creation of National Advisory Committees). For more information about the JPAC and the NACs, see the NACEC home page, at http://www.cec.org (last visited Mar. 9, 2001).

404. See DiMento & Doughman, supra note 214, at 731 (citing Secretariat’s “aggressive use of its website to publicize CEC actions” as evidence that Secretariat officials “recognize the need for public support”).
a public constituency is aware of the procedure, supports it, and is prepared to defend its independence.405

b. Neutrality and Autonomy from Political Interests

The second factor under tribunal control that Professors Helfer and Slaughter identify is whether the tribunal can "demonstrate its independence from both political authorities and political modes of dispute resolution."406 This factor asks whether the tribunal has shown that it makes its decisions independently from the states on which it relies for support, and whether it bases its decisions on "generally applicable legal principles," as opposed to seeking "above all to satisfy or reconcile the parties' competing interests."407

The NACEC Secretariat fares well in these respects. The Secretariat has been willing, even in the earliest submissions, to make decisions in politically difficult cases.408 It has not shown any particular deference to states' suggested interpretations of the Agreement.409 Conversely, it has dismissed submissions—even by major environmental groups—that did not meet the requirements for admissibility.410 In short, the Secretariat's decisions appear to be consistently grounded on carefully

405. See supra Part II.B.2.f.
406. Helfer & Slaughter, supra note 18, at 313.
407. Id. at 312-13.
408. David Lopez reviewed the dispute resolution mechanisms in NAFTA and its side agreements to determine whether they "produce conclusive results, regardless of the substance or political effect of those results. In short, do the NAFTA dispute settlement systems generate final outcomes?" Lopez, supra note 289, at 200. He concluded that "[t]he biggest success story for dispute resolution during NAFTA's first three years is found in the environmental sector. Although the Environmental Secretariat undertook to resolve only seven controversies (one under Article 13 and six under Article 14) as of December 1996, it did so confidently and aggressively." Id. at 201.
409. An important early example was the Cozumel Pier case, in which the Secretariat rejected Mexican interpretations of the NAAEC concerning retroactivity, harm, and pursuit of local remedies. See Recommendation of the Secretariat to Council for the Development of a Factual Record, SEM 96-001 (June 7, 1996), available in Registry of Submissions, supra note 283; see also Recommendation of the Secretariat to Council for the Development of a Factual Record, SEM 97-001 (Apr. 27, 1998), available in Registry of Submissions, supra note 283 (rejecting Canada's interpretation of "pending judicial or administrative proceeding" under Articles 14(3) and 45(3) of the NAAEC).
410. See, e.g., infra Part III.A.2.c (discussing the Secretariat's decisions to dismiss the first two submissions); see also Markell, supra note 246, at 566 (noting that as of April 2000, the Secretariat had dismissed over one-third of the submissions presented to it and concluding that "the Secretariat is clearly not rubber-stamping submissions on their way through the process toward development of a factual record").
reasoned legal interpretations of the Agreement rather than on fear of adverse reactions by, or the desire to curry favor with, either states or submitters.

The result has been a generally high level of belief that the Secretariat is handling submissions appropriately and in accordance with the terms of the Agreement. Joseph DiMento and Pamela Doughman conducted a survey of participants in and observers of the NACEC, and stated:

In general, respondents concluded that the response of the Secretariat to each of the submissions was appropriate. This did not mean that respondents were pleased with the Secretariat's response in all cases. Some respondents felt that while results were undesirable from the perspective of environmental protection, the Secretariat was constrained by the terms of the Agreement to process the submissions as it did.411

Similarly, the report of the Independent Review Committee established to review the NACEC after its first four years of operation concludes that "the decision-making by the Secretariat [in the submissions procedure] has been professional and appropriate."412

c. Incrementalism

Tribunals, especially infant tribunals, must not forget their limits. Professors Helfer and Slaughter say, "Bold demonstrations of judicial autonomy by judgments against state interests and appeals to constituencies of individuals must be tempered by incrementalism and awareness of political boundaries."413 As tribunals neutrally interpret and apply legal rules, they should look for ways to make the rules more acceptable to states and respond to political signals that they have gone too far.414

The NACEC Secretariat has been careful not to cross such political boundaries. In particular, it has resisted calls to push

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411. DiMento & Doughman, supra note 214, at 695-96. The survey was of "members of the Council, the Secretariat, the JPAC, advisory groups in each of the participating countries, observers in each of the countries, business people, environmental activists, academics and others (including people who support Commission efforts and performance as well as those who remain skeptical)." Id. at 690.
412. REPORT OF THE INDEPENDENT REVIEW COMMITTEE, supra note 224, § 3.3.3.
413. Helfer & Slaughter, supra note 18, at 314.
414. Id. at 314, 315; see also DiMento & Doughman, supra note 214, at 731 ("Outcomes that foster support from NGOs that initiated submissions may well dampen enthusiasm by governments targeted by the submissions.").
the legal limits set by the NAAEC. Those calls began in the first
two submissions, which alleged that the United States was
failing to effectively enforce environmental laws as the result of
Congressional action. The first submission, filed in June 1995,
concerned a rider to a 1995 rescissions act, which rescinded
$1.5 million from the budget of the U.S. Fish and Wildlife Service
and prohibited the Service from using any of its other funds to
list species or critical habitat under the Endangered Species
Act.415 The environmental groups filing the submission claimed
that as a result of the rider, the United States was failing to
effectively enforce the Endangered Species Act.416 They
acknowledged that a decision to amend the Endangered Species
Act would not violate Article 5 of the NAAEC, but they argued
that Congress' decision to prohibit use of the funds was a
“refusal to enforce an existing environmental law,” which violated
Article 5 even though it resulted from legislative rather than
executive action.417 The second submission was filed two months
later by Sierra Club Legal Defense Fund on behalf of Sierra Club,
National Audubon Society, National Resources Defense Council,
and a large number of other environmental groups.418 It made a
similar claim about a rider in another 1995 rescissions act,
which had the effect of suspending enforcement of U.S.
environmental laws with respect to a logging program in U.S.
national forests.419

415. 16 U.S.C. §§ 1531-1544 (2000). The full name of the rescissions act is the
Emergency Supplemental Appropriations and Rescissions for the Department of
Defense to Preserve and Enhance Military Readiness Act of 1995, Pub. L. No. 104-6,
109 Stat. 73, 86 (Apr. 10, 1995).

416. See Submission, SEM 95-001 (June 30, 1995), available in Registry of
Submissions, supra note 283. Earthlaw filed the submission on behalf of the
Southwest Center for Biological Diversity and other environmental groups.

417. Id. Although the President had signed the rescissions act, which might have
been thought to implicate executive action, the submitters apparently excused him
from blame, stating that the suspension was buried in an appropriations bill that he
“was forced to sign for other reasons.” Id.

418. See Submission, SEM 95-002 (Aug. 30, 1995), available in Registry of
Submissions, supra note 283. National Audubon Society and Natural Resources
Defense Council had been among the environmental groups that supported NAFTA in
exchange for the NAAEC; Sierra Club had been among those environmental groups
most actively opposed. See DiMento & Doughman, supra note 214, at 676-78.

419. The full name of the rescissions act was the Fiscal Year 1995 Supplemental
Appropriations, Disaster Assistance and Rescissions Act, Pub. L. No. 104-19, 109
 Expediency, 26 ENVTL. L. 613 (1996) (criticizing the rider); Slade Gorton & Julie Kays,
Legislative History of the Timber and Salvage Amendments Enacted in the 104th
Congress: A Small Victory for Timber Communities in the Pacific Northwest, 26 ENVTL.
These two submissions raised a basic question of interpretation: can a legislative decision to suspend enforcement of environmental laws through withdrawal of funding be considered a failure to effectively enforce those laws? A positive answer would have sent a strong signal to important members of the environmental community that the Secretariat would interpret the scope of the submissions procedure very broadly, and that it would use the procedure to press the governments not to relax their environmental protections. On the other hand, the state parties would probably have seen a Secretariat decision that legislative decisions were within the scope of the submissions procedure as an unreasonable interpretation of the Agreement and might have taken action to rein in the Secretariat.

In the end, the Secretariat rejected the submitters' arguments, concluding:

[T]he enactment of legislation which specifically alters the operation of pre-existing environmental law in essence becomes a part of the greater body of laws and statutes on the books. This is true even if pre-existing law is not amended or rescinded and the new legislation is limited in time. The Secretariat therefore cannot characterize the application of a new legal regime as a failure to enforce an old one. 420

Although this response disappointed the environmental community, 421 it avoided a potentially disastrous confrontation with states at the outset of the Secretariat's implementation of the submissions procedure. 422

Another way in which the Secretariat has been conscious of political boundaries is in its reluctance to push its powers as far as they might extend when doing so would interfere with domestic judicial proceedings. In Oldman River I, a Canadian environmental group alleged that Canada was failing to enforce two of its environmental laws providing for protection of fish habitat. 423 Canada pointed out that a pending suit brought by

420. Determination Pursuant to Arts. 14 & 15 of the NAAEC, SEM 95-002 (Dec. 8, 1995), available in Registry of Submissions, supra note 283; see also Letter from Victor Lichtinger to Earthlaw, SEM 95-001 (Sept. 21, 1995), available in id. (reaching similar conclusion on basis of more detailed analysis).
421. See DiMento & Doughman, supra note 214, at 730; see also Tutchton, supra note 315 (calling on environmental community to reconsider its support for the submissions procedure because of the Secretariat's decision).
422. See Raustala, supra note 216, at 747, 761-63.
423. See SEM 96-003 (Sept. 9, 1996), available in Registry of Submissions, supra note 283.
another environmental group in Canadian federal court involved the same issues raised by the submission and argued that under Article 14(3) of the Agreement, the existence of this "pending judicial . . . proceeding" required the Secretariat to "proceed no further." 424 The Secretariat disagreed. It noted that the NAAEC defines "judicial or administrative proceeding" to include only actions "pursued by the Party." 425 Since the domestic action in question was being pursued by a private party, Article 14(3) did not require the Secretariat to terminate the submission process. 426

The Secretariat's interpretation of the Agreement is undoubtedly correct in light of the unambiguous definition of "pending proceeding." But instead of recommending preparation of a factual record, the Secretariat took a less obvious step. It agreed with Canada that the issues being considered in the domestic case closely resembled the matters raised in the submission, and it concluded that "the preparation of a factual record at this time presents a substantial risk of interfering with the pending litigation." 427 It decided that the submission therefore did not justify developing a factual record. 428 The Secretariat thus established a helpful precedent on the scope of Article 14(3), at the same time it used its discretion not to act in a way that might interfere with a domestic case. 429

d. Quality of Legal Reasoning

Professors Helfer and Slaughter's model considers whether decisions are reasoned, that is, whether they "explain why and how a particular conclusion was reached." 430 They acknowledge

424. Response from Canada, SEM 96-003 (Jan. 10, 1997), available in Registry of Submissions, supra note 283; NAAEC, supra note 25, art. 14(3)(a).

425. Id.

426. Determination Pursuant to Arts. 14 & 15 of the NAAEC, SEM 96-003 (Apr. 2, 1997), available in Registry of Submissions, supra note 283.

427. Id.

428. Id.

429. This decision is akin to Professors Helfer and Slaughter's characterization of the European Court of Justice as "edging principles forward while deciding for those most likely to oppose them in practice." Helfer & Slaughter, supra note 18, at 314-15. As they note, this technique has precedents far back in U.S. constitutional history. See, e.g., McCulloch v. Maryland, 17 U.S. 316, 421 (1819). The NACEC Secretariat has followed this approach in other cases. See Determination Pursuant to Art. 14(1) of the NAAEC, SEM 97-005 (May 26, 1998), available in Registry of Submissions, supra note 283 (stating that the Agreement's definition of "environmental law" should be interpreted expansively," but deciding that it did not include the law involved in the submission before it).

430. Helfer & Slaughter, supra note 18, at 320.
that there are many ways in which reasons may be presented, but argue that the method most likely to be persuasive is one that recognizes the competing arguments and systematically explains why they are approved or rejected.431

The NACEC submissions procedure receives mixed marks here. On the positive side, its published procedural decisions usually do present the positions of the submitter and the responding state and carefully evaluate them in accordance with the terms of the NAAEC, in a manner that resembles judicial review.432 On the other hand, the Secretariat’s early policy was to issue reasoned procedural decisions only when dismissing a submission or recommending preparation of a factual record. Decisions that a submission met the admissibility requirements and warranted a response from a state party often included little or no explanation of the Secretariat’s reasoning.433 And even in decisions dismissing a submission, its legal analysis was sometimes quite brief.434 The current trend, however, appears to be towards more detailed legal analysis. In particular, the Council amended the Guidelines in June 1999 to require the Secretariat to explain its decision that a submission meets the admissibility requirements of Article 14(1) and that it merits requesting a state response under Article 14(2).435

By emphasizing the importance of issuing reasoned decisions, Professors Helfer and Slaughter may overlook a more substantive measure of legal quality: are the decisions consistent with the agreement they are construing?436 To be considered

431. Id. at 321.
432. See Gal-Or, supra note 402, at 91 (“[T]he reasoning applied in the Secretariat’s determinations conveys the subtle tone of a judicial review, exceeding what is to be only a preliminary screening process.”).
433. A typical example is the Secretariat’s determination in SEM 97-001 (BC Hydro) that a response from the government of Canada was warranted, which includes no explanation of the decision. See Determination Pursuant to Arts. 14(2) of the NAAEC, SEM 97-001 (May 15, 1997), available in Registry of Submissions, supra note 283.
434. See, e.g., Determination Pursuant to Art. 14(2) of the NAAEC, SEM 96-002 (May 28, 1996), available in Registry of Submissions, supra note 283 (explaining a decision to dismiss a submission with a four-sentence section of “analysis”).
435. See GUIDELINES, supra note 249, § 7.2. For an example of a post-amendment decision providing such an explanation, see Determination Pursuant to Arts. 14(1) & (2) of the NAAEC (Sept. 8, 1999), available in Registry of Submissions, supra note 283.
436. Professors Helfer and Slaughter do acknowledge the potential importance of what Thomas Franck has called “coherence.” See Helfer & Slaughter, supra note 18, at 319 (quoting FRANCK, supra note 23, at 147-48). But they discuss coherence only in the sense of precedent—that is, consistency among decisions, or adherence to
well-reasoned, a legal decision must reach a *principled* resolution of the issues before it—that is, a resolution that informed observers agree is consistent with the best (or at least a permissible) reading of the applicable law.437

By this standard, the Secretariat has received generally high marks. After thoroughly analyzing its first two decisions (that is, those concerning the U.S. Congress' riders suspending application of various environmental laws), Kal Raustiala concluded that the decisions to dismiss the submissions were legally correct.438 Based on a more general review, the Independent Review Committee concluded that:

The record on the submissions that have been subject to Secretariat decisions to date appears to show a consistent and well-reasoned group of decisions. While observers (and the Parties) may, and some certainly have, criticized specific decisions, this Committee has seen nothing to suggest that the decisions of the Secretariat lack proper foundation.439

e. **Dialogue with Other Tribunals**

The tribunals on which the Helfer-Slaughter model is based— the European Court of Justice and the European Court of Human Rights— often refer to one another's jurisprudence. Professors Helfer and Slaughter believe that the courts thereby enhance their mutual authority, by increasing the "legitimation of the very act of adjudication above the level of the nation-state."440

To date, no decision by the NACEC Secretariat has cited another complaint-based monitoring mechanism or supranational tribunal, perhaps because no such institution has a mandate that overlaps substantively with that of the NACEC

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437. *Cf.* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 372 (1978) ("adjudication is institutionally committed to a 'reasoned' decision, to a decision based on 'principle'."). Although, as Fuller notes, there may often be a fundamental difference of opinion on the source of the "principle" on the basis of which a case is to be argued and decided, the relevant law for the Secretariat's decisions is clearly the NAAEC.

438. *See* Raustiala, *supra* note 216, at 757. Unsurprisingly, the submitters disagree. *See* Tutchton, *supra* note 315 (Mr. Tutchton represented the submitters in SEM 95-001). There is room for reasonable minds to disagree on the correct legal outcome of the first two submissions, since the Agreement does not clearly address the issues involved. The key point, however, is that the Secretariat reached a plausible, principled interpretation.


submissions procedure. But other bodies do face similar procedural issues, and in addressing those issues the Secretariat might usefully draw on their decisions. For example, the Secretariat might look to decisions construing the exhaustion of local remedies. In deciding whether to request a response from a state, the Secretariat must take into account whether "private remedies available under the Party's law have been pursued." As noted above, this is a softened version of the common requirement in supranational adjudication that the claimant must have exhausted domestic remedies before the claim may be heard on the international plane. In the context of espousal, international law has long recognized that remedies need not be exhausted if no effective remedies exist. The NAAEC does not contain an explicit futility exception. Neither do many human rights agreements, but human rights tribunals have adopted the exception anyway, as a necessary corollary to the exhaustion-of-remedies requirement. The NACEC Secretariat might draw on these precedents to read a similar futility exception into its interpretation of the NAAEC.

f. Form of Opinions

This factor concerns whether opinions are presented with concurring and dissenting opinions, or as if the decision was

441. NAAEC, supra note 25, art. 14(2)(c).
442. See supra Part II.B.2.b.
443. See BROWN v., supra note 2, at 499; Case of Certain Norwegian Loans (France v. Norway), I.C.J. Reports, at 39 (1957) (Lauterpacht, J., separate opinion).
444. See Decision on Communication No. 4/1977, Human Rights Committee (1978), reprinted in SELECTED DECISIONS UNDER THE OPTIONAL PROTOCOL 4 (1985); Velásquez Rodríguez Case, Preliminary Objections, at ¶ 88, 1987 Annual Report of the IACHR, app. IV-A; Johnston and Others Judgment, at ¶ 45, ECHR ser. A, no. 112 (1987). Unlike other human rights agreements, the American Convention on Human Rights is not completely silent on this point; it states that the local remedies rule shall not apply when "the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated" or "the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them." American Convention on Human Rights, supra note 261, art. 46(2).
445. The NAAEC almost certainly contemplates such an exception. See NAAEC, supra note 25, art. 14(3)(b) (responding party may submit information on "whether private remedies in connection with the matter are available to the [submitter] and whether they have been pursued") (emphasis added); see also GUIDELINES, supra note 249, § 7.5 ("In considering whether private remedies under the Party's law have been pursued, the Secretariat will be guided by whether . . . reasonable actions have been taken to pursue such remedies prior to initiating a submission, bearing in mind that barriers to the pursuit of such remedies may exist in some cases.").
unanimous. Opinions differ on which approach better promotes compliance. To date, this factor is not relevant to the NACEC submissions procedure since Secretariat decisions are not made by multiple decisionmakers who may formally disagree with one another. If the procedure moves toward greater reliance on a committee of experts, rather than an office of the Secretariat, the question may arise as to which form of opinions is preferable.

3. Factors Often Beyond the Control of States or Tribunals

The final group of factors on the Helfer-Slaughter checklist are those often beyond the control of states or tribunals: (1) the nature of the violations brought to the tribunal; (2) whether the states subject to the tribunal have domestic institutions committed to the rule of law and responsive to citizens; and (3) the degree to which those states are culturally and politically homogeneous. Professors Helfer and Slaughter suggest that these factors "may limit how far along the spectrum toward fully effective supranational adjudication a particular tribunal is likely to move." They also note that these factors have received relatively little attention from commentators, and that "the causal mechanisms by which they affect supranational adjudication remain relatively uncharted."

a. Nature of the Violations Brought to the Tribunal

Professors Helfer and Slaughter point out that tribunals are more effective at "policing modest deviations from a generally settled norm" than responding to systemic problems requiring large-scale policy changes. They suggest that an important reason for the success of the two European tribunals is the limited nature of the complaints brought to them. In contrast, the Human Rights Committee has had much less success in responding to the gross human rights abuses often brought to it.

The NACEC submissions procedure is still too young for judgments as to whether complaints brought to it are more

446. See Helfer & Slaughter, supra note 18, at 326.
447. See id. at 326-28.
448. id. at 328-36.
449. id. at 328-29.
450. id. at 329.
451. id. at 330.
452. id. at 330, 362.
similar to the relatively limited complaints received by the European courts or the complaints of systemic abuses received by the Human Rights Committee. On the one hand, complaints of failures to effectively enforce existing laws might be thought to be relatively minor deviations from norms that the states themselves have written into their domestic law. In that case, one would expect that calling attention to those deviations might prove to be an effective way of helping to correct them. On the other hand, such failures might implicate problems that are endemic to the legal system as a whole, in which case it would be much more difficult for the submissions procedure to help instigate the systemic changes necessary.

The alleged violations brought to the submissions procedure may affect its potential effectiveness in another way that is not discussed by Professors Helfer and Slaughter. If the violations are predominantly directed against only one (or perhaps two) of the state parties, the procedure will likely come to be seen as unbalanced. The state singled out will be less likely to support steps to make the procedure more effective if it believes that it bears more than its share of adverse publicity and efforts to comply.

As of January 1, 2001, the first 28 submissions were divided almost equally among the state parties, with Mexico the subject of eleven, Canada the subject of nine, and the United States the subject of eight.\textsuperscript{453} But the United States has been the subject of a disproportionately small number of submissions in light of the relative size of the states' populations. And submissions against Mexico and Canada have generally proceeded farther than those against the United States. The Secretariat has recommended preparation of seven factual records—three concerning Canada, three concerning Mexico, and only one concerning the United States.\textsuperscript{454} It has published one factual record on Canada and one on Mexico\textsuperscript{455} and is currently preparing another on an abandoned lead smelter in Tijuana, Baja California.\textsuperscript{456} The Council is considering Secretariat requests to prepare a third

\textsuperscript{453} See Registry of Submissions, supra note 283.
\textsuperscript{454} See supra Part II.B.2.f.
\textsuperscript{455} See Final Factual Record of Submission, SEM 97-001 (B.C. Aboriginal Fisheries Commission et al.), SEM 97-001 (June 1, 2000), Final Factual Record of the Cruise Ship Pier Project in Cozumel, Quintana Roo. SEM 96-001 (Oct. 24, 1997). available in Registry of Submissions, supra note 283.
\textsuperscript{456} See SEM 98-007 (Oct. 23, 1998), available in Registry of Submissions, supra note 283.
factual record concerning Mexico and the first factual record on
the United States.\textsuperscript{457}

The causes of this disparity in the number of submissions and factual records are unclear. It may be that some U.S. environmental groups are still waiting to see whether the procedure gives them any effective remedies beyond those they already have under domestic law. The disparity may prove to be only temporary, of course. But if the procedure comes to be seen as primarily directed against Canada and Mexico, they may resist supporting the procedure and instead look for ways to increase their control over it or otherwise weaken it.\textsuperscript{458}

Because of the concern over possible imbalance in the costs and benefits of the NACEC generally (not just the submissions procedure), the Independent Review Committee has urged the Council and the Secretariat to do more to ensure that the NACEC as a whole benefits all of the state parties. The Independent Review Committee report states that:

\begin{quote}
participants, particularly in a small organization such as the NACEC, must believe that inputs and outputs are positively balanced, that 'wins' and 'losses' from a national interest perspective must be balanced at the end of the day. It is clear that this is not perceived to be the case at present, and this perception inhibits the ability of the NACEC to become a stronger organization.\textsuperscript{459}
\end{quote}

\textbf{b. Autonomous Domestic Institutions Committed to the Rule of Law and Responsive to Citizen Interests}

Professors Helfer and Slaughter emphasize the importance to their model of the presence of "domestic government institutions committed to the rule of law, responsive to the claims of individual citizens, and able to formulate and pursue their

\textsuperscript{457} The Mexican submission alleges failure to effectively enforce environmental laws concerning a shrimp farm. See \textit{SEM} 98-006 (Oct. 20, 1998), \textit{available in Registry of Submissions}, \textit{supra} note 283. The U.S. Submission alleges that the United States is failing to effectively enforce the Migratory Bird Treaty Act, 16 U.S.C. § 703 (2000). See \textit{SEM} 99-002 (Nov. 19, 1999), \textit{available in Registry of Submissions}, \textit{supra} note 283. With respect to the other two recommendations, both concerning Canada, the Council refused to authorize a factual record for SEM 97-003 and deferred consideration of SEM 97-006 indefinitely. See \textit{supra} Part II.B.2.f.

\textsuperscript{458} Mexico may be particularly sensitive to the possibility of an imbalance in the procedure because of the widespread perception that the NACEC as a whole was designed primarily to oversee Mexico's enforcement of its environmental laws. See \textit{REPORT OF THE INDEPENDENT REVIEW COMMITTEE}, \textit{supra} note 224, § 3.1.

\textsuperscript{459} \textit{Id.} at § 3.1.
interests independently from other government institutions."\(^{460}\) Such institutions are a necessary condition for "maximally effective supranational adjudication," since supranational adjudication depends on the ability of domestic government institutions to use their power on behalf of the tribunal, either on their own initiative or as a result of pressure by private parties.\(^{461}\)

A complete comparison of the domestic government institutions of the three NAAEC state parties is beyond the scope of this Article. As a general matter, it may be noted that in principle, each of the state parties has a system of law that provides legal rights and protections to individuals and that is interpreted by a judiciary nominally independent of control by other government institutions. In particular, each of the states provides for some degree of public participation in the judicial enforcement of domestic environmental law, although the degree of potential participation varies greatly.\(^{462}\) The United States provides for "citizen suits" to enforce almost every federal environmental statute,\(^{463}\) and allows private parties to seek judicial review of federal agency actions implementing those statutes.\(^{464}\) Canada allows private parties to initiate criminal proceedings through a "private prosecution," which may be employed to enforce criminal sanctions in federal environmental statutes.\(^{465}\) Some Canadian environmental statutes also allow private parties to bring civil actions for loss or injury.\(^{466}\) In addition, some Canadian provincial laws establish environmental "bills of rights" and allow private parties to bring actions to enforce them.\(^{467}\) Although Mexican environmental law does not

\(^{460}\) Heller & Slaughter, supra note 18, at 333.

\(^{461}\) Id. at 334.


\(^{463}\) See Boyer & Meidinger, supra note 38.

\(^{464}\) Some environmental statutes, such as the Clean Air Act, provide for judicial review directly. See 42 U.S.C. § 7607 (2000). Otherwise, such review is available pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (2000).


\(^{466}\) See Summary of Environmental Law, supra note 462, ch. 6.

provide for citizen suits, it does provide other mechanisms, including in particular the right to bring an *amparo* proceeding, that is, a legal action by an aggrieved party seeking damages for or annulment of an act by a government agency, which in principle may be used in environmental cases. In practice, however, plaintiffs in *amparo* proceedings have difficulty in establishing standing to complain about environmental harm.

More fundamentally, despite recent attempts at reform, the Mexican judicial system has been criticized for being ineffective, corrupt, and under the control of the executive branch. To the extent that these criticisms are valid, they may cast doubt on the potential effectiveness of the NACEC submissions procedure, but they may also increase the importance of the procedure to Mexican submitters in two ways. First, while potential submitters may see environmental remedies under U.S. law (and, to a lesser degree, Canadian law) as so effective that the submissions procedure can add little to them, the procedure may offer avenues for relief otherwise unavailable to potential submitters concerned with Mexican environmental issues. Second, the use of the submissions procedure as a device to bring sunshine to bear on particular issues may be particularly important in the context of ongoing attempts to reform the Mexican judicial system. The submissions procedure may demonstrate the benefits of objective examination of environmental issues at the request of private parties in ways that help would-be reformers argue for increased access by private parties to domestic courts.

c. Relative Cultural and Political Homogeneity of States Subject to the Tribunal

Finally, Professors Helfer and Slaughter state that many observers of the European supranational tribunals conclude that their success is due, in part, to the relative homogeneity of the states subject to those regimes, as opposed to the wide range of

468. See *Summary of Environmental Law*, supra note 462, ch. 6.
states that participate in global agreements like the Optional Protocol to the Covenant on Civil and Political Rights. The observers suggest that tribunals whose members come from one geographic region, with a common history and legal traditions, have an advantage in reaching agreement with one another and in receiving the trust of the state parties.

To the extent that homogeneity is a factor, it probably cuts against the potential effectiveness of the NACEC submissions procedure. The three North American states are in one geographic region and have many environmental concerns in common, but they also have significant linguistic, cultural, and historical differences. Although their histories have intersected, they have not always done so in ways that have brought them closer together. On the contrary, the United States' relative economic and military strength has historically given Canada and Mexico reason for concerns about U.S. domination. If they see the NACEC submissions procedure as being an instrument of U.S. policy, they will naturally resist it. Moreover, "the very large developmental and economic disparities between Mexico, on the one hand, and Canada and the United States, on the other, provide a microcosm of the disparities between developing and developed regions worldwide." One result of these disparities is that burdens that appear equal weigh on the parties differently. For example, the parties pay an equal share of the expenses of the NACEC, but Mexico's share constitutes a far higher percentage of its budget for environmental protection than does the United States or Canada's share.

While these differences are important, they are not enough to undermine the NACEC as a whole. On the contrary, the record of the NACEC to date indicates that the countries are genuinely committed to working together to address their shared environmental concerns. But their differences may make it particularly difficult for them to reach agreement with one another, or to give up any of their sovereignty, in controversial areas such as the submissions procedure.

B. Assessing the Procedure as Part of a Managerial Regime

At the same time the submissions procedure is a type of quasi-supranational tribunal, it remains an integral part of a managerial approach to compliance. Like other monitoring

471. See Helfer & Slaughter, supra note 18, at 335.
472. REPORT OF THE INDEPENDENT REVIEW COMMITTEE, supra note 224, § 2.
mechanisms, it produces reports on state behavior that rely on the effect of "sunshine" to induce compliance. Like other complaint-based monitoring mechanisms, it avoids many of the problems associated with excessive state control by giving key roles to private parties and independent experts.

How effective is the procedure likely to be and how may it be improved in managerial terms? Most of the factors discussed above with respect to supranational adjudication are also relevant to the sunshine effect on which monitoring mechanisms rely for their effectiveness. In particular, the procedure's ability to obtain facts, to take into account the complaints of private actors against states, to act in a transparent way, and to issue neutral, well-reasoned reports all make it more effective in managerial as well as supranational terms.

A complaint-based monitoring mechanism may increase its effectiveness through its connections with other managerial mechanisms. The proponents of the managerial model emphasize the importance of bringing together different compliance measures into an integrated approach. One important element of such an integrated approach to compliance is the strengthening of links among different compliance mechanisms so that they may act effectively toward shared goals. One way to assess the potential effectiveness of the NACEC submissions procedure in managerial terms, therefore, is to evaluate the degree to which it does or could take advantage of possible connections with other managerial mechanisms within the NAAEC. The following sections examine the potential connections between the submissions procedure and two other mechanisms: Secretariat reports under Article 13 of the NAAEC, and NACEC cooperative programs.

1. Secretariat Reports Under Article 13

Article 13 of the NAAEC authorizes the Secretariat to prepare a report "on any matter within the scope of the annual program" without Council approval, and a report on "any other environmental matter related to the cooperative functions of this Agreement" unless the Council objects by a two-thirds vote. Since "the cooperative functions of [the] Agreement" include virtually every aspect of environmental law and policy, the

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473. See supra Part I.B.
475. See Chayes & Chayes, supra note 19, at 229-30; see also supra Part I.B.
476. NAAEC, supra note 25, art. 13(1).
potential scope of Article 13 is enormous. The only issues excepted from that scope are “issues related to whether a Party has failed to enforce its environmental laws and regulations”\(^{477}\)—in other words, issues subject to consideration under the Article 14-15 submissions procedure.

The NAAEC does not establish a mechanism for the Secretariat to receive requests for Article 13 reports. Nevertheless, the Secretariat’s broad discretion to decide whether to prepare an Article 13 report clearly includes the ability to consider suggestions from individuals and non-governmental organizations. Any doubt on this score was laid to rest with the first Article 13 report, which resulted from a submission by the National Audubon Society, Grupo de los Cien Internacional, and Centro Mexicano de Derecho Ambiental urging the Secretariat to study the death of thousands of waterfowl at the Silva Reservoir in the state of Guanajuato, in December 1994.\(^{478}\)

Together, the two reporting procedures created by Articles 13, 14, and 15 create a system under which virtually any environmental issue arising in North America may become the subject of either a factual record (if it concerns effective enforcement of environmental laws by a party) or an Article 13 report (if it concerns any other issue). Moreover, the procedures complement one another. In particular, the strengths of the Article 13 reporting procedure address several of the weaknesses of the Article 14-15 submissions procedure.

First, under Article 13 the Secretariat may examine environmental problems arising from or implicating inadequate domestic laws, problems that the Article 14-15 submissions procedure has been criticized for ignoring.\(^{479}\) For example, an Article 13 report could have addressed the decision by the U.S. Congress to withdraw funding for enforcement of environmental statutes, a decision that fell outside the scope of Article 14.\(^{480}\) The Secretariat could have taken the position that the decision concerned a cooperative function of the Agreement, specifically, “cooperation on the development and continuing improvement of

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477. Id.
479. See supra Part II.A.1.b.
480. See supra Part III.A.2.c (discussing Secretariat decisions in SEM 95-001 and 95-002).
environmental laws," which the Agreement requires the Council to strengthen.\footnote{See NAAEC, supra note 25, art. 10(3).} Article 13 thus provides a way to focus attention on the state parties' compliance with Article 3 of the NAAEC (which requires the parties to ensure high levels of environmental protection and try to improve their environmental laws), complementing the attention the submissions procedure may bring to compliance with Article 5 (which requires the parties to effectively enforce their environmental laws).\footnote{See id. arts. 3 & 5(1).} Second, the Article 13 procedure is almost entirely within the discretion of the Secretariat and outside the control of the state parties. In preparing a report under Article 13, the Secretariat has even broader discretion than it has in preparing an Article 15 factual record to draw upon any information it believes is relevant.\footnote{Compare id. art. 13(2), with id. art. 15(4). Both Article 13(2) and Article 15(4) allow the Secretariat to draw upon "any relevant technical, scientific or other information," and both articles provide largely identical lists of possible sources of such information, but the Article 13 list includes information "gathered through public consultations," see id. art. 13(2)(e), which the Article 15 list does not. More important, the Article 13 list is illustrative ("the Secretariat may draw upon any relevant . . . information, including information" from the listed sources) and the Article 15 list is exhaustive (the Secretariat "may consider any relevant . . . information" from the listed sources).} In contrast to the Article 14-15 submissions procedure, which requires Council approval by a two-thirds vote before the Secretariat may prepare and publish factual records,\footnote{See id. arts. 15(2), 15(7).} Article 13 gives the Council no power to veto a Secretariat decision to prepare an Article 13 report on an issue within the scope of the annual program (which is normally quite broad), and allows the Council to veto a report on any other topic only within thirty days of the Secretariat notification.\footnote{See id. art. 13(1).} Moreover, Article 13 reports must be publicly released unless the Council decides otherwise.\footnote{See id. art. 13(3).} The Article 13 procedure is thus less susceptible than the submissions procedure to concerns that state parties could veto or shelve controversial reports in order to protect themselves.

Third, the Article 13 reporting procedure is less inherently adversarial than the Article 14-15 submissions procedure. Unlike the submissions procedure, Article 13 does not require the Secretariat to decide between a submitter and a state with respect to a series of procedural questions, or issue reports that
(at least conceivable) could help to trigger dispute resolution and trade sanctions under Part Five of the Agreement.

On the other hand, the Article 13 procedure has limitations not present in the Article 14-15 submissions procedure. Most important, while suggestions from individuals and non-governmental organizations are not limited by procedural requirements, as they are under Article 14, neither is the Secretariat bound to review their suggestions at all. The procedure therefore gives a less significant role to private parties than does the submissions procedure.

Two related submissions illustrate the relative benefits of the procedures and the factors submitters may take into account in deciding which of the procedures to invoke. In November 1996, Earthlaw (a non-profit environmental organization that runs clinical programs at Stanford Law School and the University of Denver) filed an Article 13 submission and an Article 14 submission with the Secretariat, each concerning the San Pedro River in Arizona. The submissions are similar. Each explains the importance of the river ecosystem as a home for endangered species and a stopping point for migratory birds, describes the threat to the river posed by groundwater pumping in the area (including pumping by Fort Huachuca, a U.S. Army base), and urges the Secretariat to prepare a report examining environmental issues concerning the river. But each submission also includes elements designed to satisfy the particular concerns of the article under which it was filed.

For example, the Article 14 submission argues that the U.S. Army has failed to comply with the National Environmental Policy Act of 1970 (NEPA) by not assessing the environmental impacts of expanding Fort Huachuca, and that the United States

487. See Submissions SEM 96-004 (Nov. 14, 1996), available in Registry of Submissions, supra note 283 [hereinafter San Pedro Article 14 Submission]; Submission Pursuant to Article 13 of the NAAEC (Nov. 1996) [on file with Ecology Law Quarterly] [hereinafter San Pedro Article 13 Submission]. Earthlaw filed both petitions on behalf of the Southwest Center for Biological Diversity, a nonprofit environmental group based in Tucson, Arizona, and Dr. Robin Silver, an Arizona environmentalist. See San Pedro Article 14 Submission, supra; San Pedro Art. 13 Submission, supra, at 7. Earthlaw had earlier filed SEM 95-001, the first Article 14 submission received by the Secretariat, on behalf of the Southwest Center for Biological Diversity and other environmental groups. See SEM 95-001 (June 30, 1995), available in Registry of Submissions, supra note 283. In June 2000, Earthlaw merged with Earthjustice Legal Defense Fund.

488. See San Pedro Article 13 Submission, supra note 487, at 1-5; San Pedro Article 14 Submission, supra note 487.

has thereby failed to effectively enforce its environmental law.  

The submission argues that it meets the requirements of Articles 14(1) and 14(2) and urges the Secretariat to request Council approval to prepare a factual record under Article 15.  

The Article 13 submission takes a much broader approach. It urges the Secretariat to prepare a report that examines the effects of all human activities on the San Pedro ecosystem (including the effects of grazing and mining in Mexico as well as groundwater pumping in the United States) and that identifies and promotes "national or multilateral conservation strategies" to protect the ecosystem. The submission argues that such a report would fall within the scope of the NACEC annual program, which has a specific program on bird conservation whose goals include identifying important bird areas (IBAs) and working toward the development of a North American strategy for conserving birds. The submission notes that the NACEC had already identified the San Pedro Riparian National Conservation Area as one of three pilot IBAs. The submission argues that even if the San Pedro did not fall within the scope of the annual program, the Secretariat could nevertheless proceed pursuant to its authority under Article 13 to prepare a report on "any other environmental matter related to the cooperative functions" of the NAAEC, since cooperative functions specifically listed in Article 10 of the Agreement include "the conservation and protection of wild flora and fauna and their habitat," "the protection of endangered and threatened species," and "transboundary and border environmental issues."

Earthlaw thus fashioned the submissions to try to trigger review under either, or perhaps both, of the articles. Interestingly, Earthlaw withdrew its Article 14 submission after the United States had filed its response but before the Secretariat had announced whether it would recommend

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490. See San Pedro Article 14 Submission, supra note 487.
491. See id.
492. San Pedro Article 13 Submission, supra note 487, at 5-6, 8.
493. See id. at 6 (citing NACEC 1996 Annual Program, sub-program 96-01.01).
495. See San Pedro Article 13 Submission, supra note 487, at 7 (citing NAAEC, supra note 25, arts. 10(2)(l), 10(2)(j), 10(2)(g)).
preparation of a factual record. Earthlaw did not explain its reasons, but if its goal was to facilitate preparation of an Article 13 report, it succeeded. In May 1997, the Secretariat announced that under Article 13 it would convene both an interdisciplinary team of six experts to prepare a status report on the San Pedro River and evaluate conservation strategies to protect it and an advisory panel to develop policy recommendations in light of the experts' work and public input. Of course, the Secretariat was free to ignore the request for an Article 13 report. Conversely, it might have decided to prepare a report even in the absence of a request. But it seems possible that the submission helped to convince the Secretariat that a study of the San Pedro River ecosystem would be worthwhile, just as the submission concerning the Silva Reservoir birds led to the first Article 13 report.

In June 1999, the NACEC published its final Article 13 report on the San Pedro River, entitled Ribbon of Life: An Agenda for Preserving Transboundary Migratory Bird Habitat on the Upper San Pedro River. The report provides a far broader and more comprehensive analysis of the effects of human actions on the river ecosystem than an inquiry under Article 15 into whether the U.S. Army violated NEPA could possibly have done. The

496. See Notice to Council Concerning Withdrawal of the Submission, SEM 96-004 (June 6, 1997), available in Registry of Submissions, supra note 283 (Informing Council that the submitters withdrew the Article 14 submission). The United States had filed its response in March 1997, arguing that the submission did not warrant a factual record for various, mainly procedural, reasons. See Response from the Government of the United States of America, SEM 96-004 (Mar. 3, 1997), available in Registry of Submissions, supra note 283.


499. The experts' study, which was released for public comment in the summer of 1998, was praised by one local commentator as confirming that excessive groundwater pumping is killing the San Pedro River and calling for prompt, aggressive actions to limit agricultural water use and promote water conservation, but at the same time bringing a "fair-minded pragmatism and respect for local economic needs to its analysis." The commentator concludes that "[b]y establishing an unassailable picture of what is going on in the valley the study provides an excellent starting place for stewardship talks." Editorial, Killing the San Pedro, ARIZ. DAILY STAR, June 22, 1998.
report thus demonstrates the way in which Article 13 allows the Secretariat to examine a wider range of issues than those subject to examination under the Article 14-15 submissions procedure.

Article 13 reports will not be superior to Article 15 factual records in every case, of course. When the key issue is whether a law has been effectively enforced, it may be examined only through the Article 14-15 procedure. Submitters may also choose that procedure because it guarantees that the Secretariat will consider their submissions if they meet the requirements for admissibility. Article 13 reports and the Article 14-15 submissions procedure should therefore be seen as alternatives that complement one another as part of an integrated approach to compliance with the NAAEC. Which mechanism is better suited for examining a particular problem depends on the nature of the issues to be studied. 500

Should the procedures be more closely integrated? At present, their connection primarily depends on the decision by a submitter such as Earthlaw to invoke one or the other, or both. In theory, the parties could amend the NAAEC to give the Secretariat, the Council, or some combination thereof the authority to transfer submissions from one procedure to another, or even to suspend the operation of one procedure (for example, the preparation of an Article 15 factual record) in deference to the other. The dangers of such a course are obvious, however. Increasing the power of the Council would increase the ability of the state parties to micromanage the procedures to avoid embarrassing reports. Increasing the power of the Secretariat—by allowing it to transfer submissions from one procedure to another, for example—would decrease the power of the submitters to decide which procedure they prefer and would provide an avenue for state parties to pressure the Secretariat to transfer undesirable Article 14 submissions to the possibly less confrontational Article 13 procedure. On the whole, allowing the submitters to decide which procedure to invoke seems preferable. 501

500. I therefore disagree with the suggestion by Pierre Marc Johnson and André Beaulieu that the Article 14-15 submissions procedure might be a "last resort," to be used only if Article 13 and other cooperative approaches have failed. See JOHNSON & BEAULIEU, supra note 214, at 167.

501. If a single submission requests both an Article 13 report and an Article 15 factual record, the Secretariat has indicated that it will wait to consider the Article 13 request until after the conclusion of the Article 14-15 procedure. See Secretariat's Notification to Council under Article 15(1), SEM 98-007 (Mar. 6, 2000), available at Registry of Submissions, supra note 283.

Nevertheless, the procedures could be strengthened in ways that would enable them to work more effectively together. In particular, the Secretariat could take several steps to make the Article 13 procedure more accessible to submitters and to others interested in Article 13 reports. Specifically, the Secretariat could institute on its website an Article 13 counterpart to the Article 14-15 Registry of Submissions that might include: (1) Article 13 submissions, including any requests for Article 13 reports from state parties or the Joint Public Advisory Committee; (2) responses from the Secretariat to the submitters, including any explanations of why the submission did or did not contribute to a decision to prepare an Article 13 report; (3) decisions by the Secretariat to prepare an Article 13 report, including decisions not based on any outside request; (4) Article 13 reports and documents accompanying them; and (5) any general guidelines prepared by the Secretariat explaining the factors it takes into account in deciding whether to prepare an Article 13 report.\footnote{502}

An “Article 13 Registry” should not be viewed as a first step toward the institution of a detailed procedure, such as the Article 14-15 submissions procedure; imposing detailed procedural requirements on the Secretariat would undermine the flexibility of Article 13. The Secretariat should keep its discretion to decline Article 13 submissions without being required to explain its reasoning in any detail. Moreover, the Secretariat must continue to be able to prepare Article 13 reports on its own initiative, without having to wait for a request from any outside source. Nevertheless, an Article 13 Registry would disseminate information about the Article 13 procedure and as a result facilitate more useful suggestions to the Secretariat about how it might be used. More generally, it would

\footnote{502. In the \textit{Silva Reservoir} report, the Secretariat announced that it had developed criteria with which to assess the merits of proposed Article 13 reports, which include: (1) the extent to which the matter directly relates to the annual program; (2) how the report would advance the objectives of the NAAEC and the annual program; (3) available budgetary and human resources of the Secretariat; (4) whether other national or international organizations are better suited to report on the matter; (5) the extent to which a report might "impact beyond the discrete issue at hand"; (6) whether any controversy generated by the report would advance or retard development of the issue; and (7) whether the report would contribute to trilateral or continental policies or develop useful information for issues of trinational significance. \textit{See NACEC Secretariat Report on the Death of Migratory Birds at the Silva Reservoir} (1994-95) (Oct. 1995), available at http://www.cec.org/pubs_info_resources/publications/pdfs/english/silvae.pdf (last visited Mar. 10, 2001). The Secretariat has not separately published or elaborated on the criteria.}
contribute to the effective use of Article 13 and its interaction with the Article 14-15 submissions procedure.

2. Interaction with Cooperative Programs

Much of the work of the NACEC takes place in cooperative programs, approved by the Council and carried out by the state parties, the Secretariat, and working groups. The programs fall within one of four general areas: (1) Environment, Economy and Trade; (2) Conservation of Biodiversity; (3) Pollutants and Health; and (4) Law and Policy.\textsuperscript{503} Since 1995, the Law and Policy area has included an ongoing program on “Enforcement Cooperation,” whose general goals include providing a forum for North American cooperation in environmental enforcement and compliance, supporting capacity building in effective enforcement, and facilitating specific trilateral enforcement cooperation programs.\textsuperscript{504} In 1996, the Council established a North American Working Group on Environmental Enforcement and Compliance Cooperation (EWG), composed of “senior level environmental officials designated by the Parties,” which assists in the development and fulfillment of the Enforcement Cooperation Program.\textsuperscript{505}

Projects within the Enforcement Cooperation Program include: (1) providing a “continuing forum for regional exchange of information, expertise and strategies for effective enforcement and enhanced compliance” through the EWG; (2) building the parties’ capacity and expertise through cooperation by, for example, providing support for participation by wildlife enforcement officials in each others’ training programs and enhancing the state parties’ ability to track and regulate transboundary movement of hazardous waste; and (3) developing indicators for measuring and evaluating the effectiveness of each state party’s enforcement and compliance strategies.\textsuperscript{506}

Currently, the Enforcement Cooperation Program has no connection with the submissions procedure, except in the sense that by supporting more effective enforcement it may reduce the number of Article 14 submissions alleging ineffective enforcement. But the Council could expand the mandate of the program to provide for closer ties with the submissions

\textsuperscript{503} See Proposed NACEC Program, supra note 234.
\textsuperscript{504} See id. at 94.
\textsuperscript{505} Res. 96-06 (Aug. 2, 1996), available in Council Resolutions Registry, supra note 274.
\textsuperscript{506} Proposed NACEC Program, supra note 234, at 97-111.
procedure. In particular, the program could address possible enforcement problems identified through the submissions procedure.

Not every factual record will necessarily benefit from follow-up by a cooperative program. But factual records may identify two types of problems that seem particularly well-suited for further attention by the NACEC. First, some factual records may concern more than one state party. Submissions may allege ineffective enforcement by more than one state, for example, or may concern a problem requiring the participation of more than one state to address.\(^{507}\) Indeed, one of the best uses of the submissions procedure may be to call attention to problems that require multilateral attention. And when such attention is needed, the obvious way to provide it is through the Enforcement Cooperation Program, which already provides a forum for addressing trinational enforcement issues.

Second, while some failures to effectively enforce may be due to lack of will, it seems likely that many result in whole or part from lack of financial or technical capacity. The managerial model emphasizes that an effective system of promoting compliance includes ways to identify lack of capacity and to build capacity where necessary. By linking the NACEC submissions procedure with the Enforcement Cooperation Program, the NACEC would be able to identify cases in which such capacity might be added.\(^ {508}\)

One way for the Council to involve the Enforcement Cooperation Program would be to provide a role to the Enforcement Working Group in following up factual records. For example, the EWG could examine every factual record to see whether cooperative action might be appropriate and to recommend possible solutions to any problems identified. Alternatively, the decision to refer a particular situation to the EWG might be left to the submitter or the state (or states)

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507. As of January 1, 2001, no submission has alleged ineffective enforcement by more than one state party. Submissions have raised issues involving more than one state, however. For example, a 1999 submission jointly filed by Canadian, Mexican, and U.S. environmental groups argues that the U.S. government has failed to effectively enforce the Migratory Bird Treaty Act's prohibition against killing or "taking" migratory birds, contained in 16 U.S.C. § 703 (2000). See SEM 99-002 (Nov. 19, 1999), available in Registry of Submissions, supra note 283.

508. In its 1998 report, the Independent Review Committee anticipated that the Council might "undertake a process of capacity building or information sharing to assist a Party or all the Parties in addressing a given area of weakness" identified as a result of the submissions procedure. See REPORT OF THE INDEPENDENT REVIEW COMMITTEE, supra note 224, n.31.
involved. To avoid any concern that consideration of a situation by the EWG might become confrontational or contribute to a decision to invoke state-to-state arbitration under Part Five of the NAAEC, the Council could provide that situations referred to the EWG would not be eligible for referral to a panel under Part Five. The EWG could create a sub-working group on a standing or ad hoc basis to follow up factual records. Under any of these approaches, it would be critically important to ensure that the EWG allow meaningful participation by non-governmental actors.

Referring problems identified by factual records to a working group appointed by the Council would not have the aim of enforcing compliance. On the contrary, such referrals would provide, in paradigmatic managerial terms, for a cooperative means of promoting compliance. For just that reason, environmental groups and other potential submitters might distrust it. But following up factual records with a working group would not detract from the independence and effectiveness of the submissions procedure as long as the group carried out its work in public view and with public input. In particular, it would not do away with the sunshine effect resulting from identification of cases of ineffective enforcement or with the utility of the submissions procedure as a form of quasi-supranational adjudication. Instead, it would add a new dimension to the procedure, a new way to use factual records to promote more effective enforcement. Moreover, states might be more likely to see the procedure as one that benefits them, rather than one designed only to cast a spotlight on their failures.\(^{509}\) Increasing the commitment of the state parties to the procedure would place the procedure on firmer ground and thus make it even more useful to submitters.

C. Conclusion: A Quasi-Supranational Tribunal in a Managerial Regime

Like any international institution, the NACEC submissions procedure will grow and evolve in unpredictable ways. Assessing its potential effectiveness so early in its life is therefore dangerously prone to error. With that caveat, the procedure appears to have the potential to be an effective quasi-

\(^{509}\) In that respect, it might help to address the concern over imbalance in the costs and benefits of the NACEC. See supra Part III.A.3.a.
supranational tribunal and an effective part of a supervision package that includes managerial compliance mechanisms.

Like the Human Rights Committee, the NACEC Secretariat is clearly not a supranational tribunal in the strict sense, in that its reports are not legally binding. Moreover, it has limits beyond those of the Human Rights Committee, which arise from the control state parties may exercise over it. Nevertheless, key elements of supranational adjudication are present: the opportunity for private parties to claim that states are not complying with their international obligations (here, their obligation to effectively enforce their environmental law), and a procedure through which independent experts screen such claims for admissibility according to set criteria, review the reasoned arguments of the complainants and the state respondents, find facts, and issue reports that impartially address the disputes.

Taken as a whole, the factors on the Helfer-Slaughter checklist indicate that the submissions procedure can be effective as a quasi-supranational tribunal. The most notable aspect of the procedure in practice may be the seriousness with which the Secretariat has taken its quasi-judicial role. With respect to the most important factors under its control (that is, neutrality, quality of legal reasoning, awareness of audience, and incrementalism), it consistently has scored high marks. By making well-reasoned, neutral decisions based on careful interpretations of the NAAEC, the Secretariat has avoided alienating either states or submitters. The great challenge facing the Secretariat is to find a way for factual records to be useful evaluations of disputed issues (so that submitters find the procedure worthwhile) without making factual records legal judgments rather than factual reports (so that states do not withdraw their support). The states face challenges as well. For the submissions procedure to be successful, the NAAEC state parties must provide adequate resources and must continue to resist the temptation to micromanage the Secretariat’s discretion. If the Secretariat continues to merit the trust of the state parties and its public audience, and if the states continue to let the Secretariat work independently, the submissions procedure should continue to develop as a valuable type of quasi-supranational adjudication.

At the same time, the procedure has the opportunity to improve its effectiveness in managerial terms. The reporting procedure created by Article 13 of the Agreement complements the Article 14-15 submissions procedure by addressing several
of its weaknesses. In particular, Article 13 allows private parties to request and the Secretariat to prepare reports in areas that fall outside the purview of the submissions procedure, and allows those reports to be more comprehensive and less confrontational than the factual records the submissions procedure produces. Moreover, the NACEC cooperative programs could strengthen the effectiveness of the submissions procedure by providing a means to follow up problems identified in factual records.

What lessons does the NACEC regime have for other efforts to promote compliance with international environmental law? International environmental law will rely on the managerial model for the foreseeable future. States are not likely to give up managerial mechanisms like monitoring and capacity building in favor of mandatory, binding intergovernmental dispute resolution or full-scale supranational adjudication. The experience of the NACEC shows, however, that quasi-supranational adjudication can play an important part in a supervision package that takes an essentially managerial approach to compliance. More generally, it shows that procedures can be created that provide private parties a key role in promoting compliance with international environmental law.