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# GIVING POWER TO THE PEOPLE: COMPARING THE ENVIRONMENTAL PROVISIONS OF CHILE'S FREE TRADE AGREEMENTS WITH CANADA AND THE UNITED STATES

by Rachel T. Kirby\*

*"Trade, of course, is neither inherently good nor bad; but how it is conducted in the future is now a matter of deep concern—and unprecedented opportunity."*<sup>1</sup>

## INTRODUCTION

Sixteen years ago, a new U.S. President offered an opportunity to increase North American environmental protection with an environmental side agreement to the North American Free Trade Agreement ("NAFTA") that gave citizens a voice in enforcing environmental laws.<sup>2</sup> The side agreement, known as the North American Agreement on Environmental Cooperation ("NAAEC"), provides a mechanism for citizens to aim the international spotlight on a government's failure to enforce domestic environmental laws.<sup>3</sup> A similar agreement between Chile and Canada, the Canada-Chile Agreement on Environmental Cooperation ("CCAEC"), allows ordinary citizens to ask an international body to investigate alleged non-enforcement of environmental laws.<sup>4</sup> While these mechanisms are commonplace in a number of international trade agreements, the U.S.-Chile Free Trade Agreement ("USCFTA") includes a state-to-state dispute resolution mechanism, but does not allow for citizen submissions on enforcement.<sup>5</sup>

As the international community turns its attention to environmental crises around the world, the United States must decide how to address lax enforcement of environmental laws by its trading partners.<sup>6</sup> While a free trade agreement is only one avenue for the United States and environmental activists to pursue more effective enforcement of every country's environmental laws, this article argues that a citizen enforcement mechanism is a vital tool that must be included in future agreements. Part I outlines the enforcement mechanisms under the CCAEC, NAAEC, and the USCFTA. Part II argues that agreements without citizen enforcement mechanisms cannot effectively increase environmental enforcement, while agreements with these provisions encourage interest in environmental issues and pressure to strengthen environmental regulations. Part III recommends including citizen enforcement mechanisms in future U.S. trade agreements. Finally, Part

IV concludes that free trade agreements offer an avenue for increased enforcement of environmental laws, and that citizen enforcement procedures strengthen those agreements.

## BACKGROUND

### CCAEC & NAAEC CITIZEN ENFORCEMENT PROCEDURES

The CCAEC and NAAEC address ineffective enforcement of domestic environmental laws in two ways. The first is a state-to-state dispute resolution mechanism for a persistent failure to enforce a party's own environmental laws in a manner that interferes with free trade.<sup>7</sup> The second is a citizen submission on enforcement procedure.<sup>8</sup> This mechanism allows any citizen to send a submission to either National Secretariat asserting that a party to the CCAEC or NAAEC is "failing to effectively enforce its environmental law."<sup>9</sup>

The CCAEC established a Commission for Environmental Cooperation ("CEC") made up of a Council, a Joint Submission Committee, and a Joint Public Advisory Committee.<sup>10</sup> A citizen submission to the CEC must meet seven largely procedural criteria and be grounded in a specific incident of non-enforcement.<sup>11</sup> The Joint Submission Committee decides whether the submission merits a response from the state, then decides whether to produce a public factual record.<sup>12</sup> While the intent of the factual record is

to describe and report events without passing judgment on parties' actions, parties still resist the process.<sup>13</sup>

### USCFTA ENVIRONMENTAL STATE-TO-STATE DISPUTE RESOLUTION PROCEDURES

Like the CCAEC and NAAEC, the USCFTA obliges both parties to "effectively enforce" domestic environmental laws.<sup>14</sup> The process can only begin if a party has persistently failed to effectively enforce its environmental laws "in a manner affecting

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trade between the Parties.”<sup>15</sup> Under the CCAEC, a citizen can pursue an enforcement matter for a single failure to effectively enforce an environmental law.<sup>16</sup> The dispute settlement provisions of the USCFTA, however, are strictly between government parties, and require both a persistent pattern of non-enforcement and a showing that the failure affects trade between the parties.<sup>17</sup>

Parties first address disputes under the environmental provisions of the USCFTA with consultations.<sup>18</sup> If consultations fail to resolve the matter within sixty days, the complaining party can initiate the USCFTA dispute resolution procedures.<sup>19</sup> First, the parties convene a meeting of the Commission to resolve the issue.<sup>20</sup> Next, the parties convene an arbitral panel if the issue remains unresolved.<sup>21</sup> The panel can impose fines of up to fifteen million dollars per day on the non-enforcing party.<sup>22</sup> The complaining party can suspend USCFTA trade benefits if the party fails to pay the fine.<sup>23</sup>

### ANALYSIS

#### EFFECTIVE ENFORCEMENT OF ENVIRONMENTAL LAWS PROTECT THE ENVIRONMENT, HUMAN HEALTH, AND FOREIGN INVESTMENT STREAMS

Environmental laws do not enforce themselves; governments or private citizens must enforce those laws.<sup>24</sup> The importance of enforcement is especially true in Latin America, where many countries have an inconsistent historical relationship with the rule of law.<sup>25</sup> Effective environmental protection requires both effective environmental laws and consistent enforcement of those laws.<sup>26</sup>

Foreign and domestic investors are unlikely to comply with environmental laws if there are no consequences for violations. Because environmental compliance can be expensive, companies and investors that violate environmental regulations gain a competitive advantage against those who do comply. Effective enforcement reassures investors that competitors are not gaining a competitive advantage by avoiding environmental compliance.<sup>27</sup> Overall, trade and investment that leads to increased prosperity may strengthen effective environmental protections, but the government or citizens must enforce those protections.<sup>28</sup>

#### STATE-TO-STATE DISPUTE RESOLUTION ALONE DOES NOT INCREASE ENFORCEMENT OF ENVIRONMENTAL LAWS

While state-to-state dispute resolution theoretically provides a venue for environmental advocates to work through their governments, government action carries burdens that make action unlikely.<sup>29</sup> States have neither the capacity nor authority to effectively monitor enforcement of another state’s environmental laws.<sup>30</sup> The absence of a citizen enforcement mechanism and the requirement that the disputed pattern of non-enforcement affect trade between the parties hampers efforts to improve environmental protection through treaty provisions.<sup>31</sup>

#### State Espousal Mechanisms Lead to Mutual Non-Enforcement

Both states in a free trade agreement have non-environmental reasons to sign an agreement.<sup>32</sup> As a result, environmental disputes are unlikely because each state has an interest in not enforcing environmental provisions of the treaty.<sup>33</sup> A citizen alleging that her government has failed to enforce environmental laws has little control over the diplomatic concerns of either government party to the treaty.<sup>34</sup> Because environmental issues are not a priority, neither party has an interest in enforcing environmental treaty provisions. At the same time, the consequences of state-to-state dispute resolution are trade sanctions, which undermine the purpose of the agreement: free trade.<sup>35</sup> As a result, no party has used the NAAEC or CCAEC government arbitration provisions or the USCFTA state-to-state dispute resolution procedures.<sup>36</sup>

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*No state party has used the state-to-state dispute resolution procedures*

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#### High Burdens of Proof Make an Unused Procedure More Difficult

The USCFTA provides a dispute resolution mechanism for state parties to pursue trade sanctions.<sup>37</sup> A state party must show that there is a persistent pattern of non-enforcement and that the pattern affects trade between Chile and the United States.<sup>38</sup> These hurdles to successful sanctions are high even if a state had an incentive to pursue a dispute.<sup>39</sup>

The state must first show that there was a persistent pattern of non-enforcement.<sup>40</sup> Effective enforcement requires consistency to be effective, but enforcement in Latin America is more likely to be inconsistent, precluding proof of a consistent pattern.<sup>41</sup> Second, a state must show that the pattern of non-enforcement affected trade between the countries.<sup>42</sup> For example, the state could show that non-enforcement gives domestic facilities in the complained-against country an advantage over facilities in the complaining country.<sup>43</sup> In a complex global economy, a state is unlikely to be able to prove a specific impact on trade between the parties.<sup>44</sup> These high burdens of proof substantially limit the already unlikely state-to-state dispute resolution procedure.

#### A CITIZEN ENFORCEMENT PROCEDURE IS A BETTER MECHANISM FOR INCREASING ENFORCEMENT OF ENVIRONMENTAL LAWS AND PROMOTING PUBLIC INTEREST IN THE ENVIRONMENT

A citizen enforcement mechanism strikes a balance between state sovereignty and the public desire for a cleaner environment.<sup>45</sup> Because citizen submissions do not rely on government action, countries cannot subsume environmental issues to other diplomatic concerns.<sup>46</sup> Enforcement of domestic law preserves state interest in sovereignty because the treaty does not impose an international standard.<sup>47</sup> At the same time, a defined mechanism for action fosters civil society interest in the environment.<sup>48</sup>

## Citizen Submissions Do Not Rely on a Government to Initiate Treaty Enforcement Actions

Unlike state-to-state dispute resolution, the citizen submission process provides a venue for citizens to report instances of non-enforcement in their own neighborhoods or in a protected area used by the public.<sup>49</sup> Citizens have an interest in protecting the natural areas they use, and are more likely to report a failure to enforce than the government.<sup>50</sup> Citizens can directly observe environmental violations and a lack of state action in their neighborhoods.<sup>51</sup> In contrast, limited resources restrict state monitoring of another state's enforcement activity.<sup>52</sup> Citizens and other private actors are also better equipped to identify ineffective enforcement because they are closer to violations.<sup>53</sup>

## Citizen Submissions Balance State Sovereignty and Public Interest in Enforcement of Environmental Laws

Relying on citizen enforcement addresses the widespread concern of Latin American countries that environmental provisions in free trade agreements are an effort to restrict their sovereignty with outside standards.<sup>54</sup> The CAAEC's requirement to enforce domestic environmental laws allows a country to set a level of environmental protection it feels is appropriate.<sup>55</sup> At the same time, as an environmental community develops, that community can pressure the government to increase levels of environmental protection and enforcement.<sup>56</sup> States also see the citizen submission as a lesser threat because of the absence of trade sanctions associated with a factual record.<sup>57</sup>

Enforcement of domestic environmental law imposes lower sovereignty costs on Latin American states.<sup>58</sup> Because only citizens can initiate the submission process, the process does not raise concerns of a lack of democratic accountability.<sup>59</sup> As a community of environmental activists develops, that community can lobby for more protective environmental laws, making the government more responsive to community concerns.

In contrast to the dispute resolution proceeding under the USCFTA, the citizen submission process does not carry a direct threat of trade sanctions and instead relies on the deterrent effect of factual records.<sup>60</sup> This limitation preserves the benefits of the free trade agreement while providing consequences for non-enforcement of the terms of the agreement.<sup>61</sup> The absence of trade sanctions also prevents a state-to-state dispute resolution from punishing exporters and other private parties who might not have been involved in the state's non-enforcement.<sup>62</sup>

## Citizen Enforcement Fosters the Development of a Community of Environmental Activists

While the citizen submission process is theoretically accessible to the general public without legal assistance, this process can be more successful when there is a civil society community ready to bring claims.<sup>63</sup> At the same time, the process' concrete avenue for action provides a

mechanism for environmental organizations in more developed countries to work with growing organizations in Latin America.<sup>64</sup> These connections between environmental organizations foster the development of the environmental community, strengthening domestic environmental protections as well as the citizen submission process.<sup>65</sup> Some criticize the citizen submission process because it does not legally bind the government to take any action.<sup>66</sup>

However, even a limited citizen submission process is a valuable tool for environmental advocates to pressure government actors to pursue environmental protection.<sup>67</sup>

## RECOMMENDATIONS

As long as the United States continues to expand free trade with Latin America, free trade agreements should include a citizen enforcement mechanism. To ensure citizens have environmental laws to monitor, the United States should refrain from signing agreements with states that do not have an effective legal framework for environmental protection. While access to a citizen submission process will not immediately provide effective environmental protection, it is an important step.

### INCLUDE A CITIZEN SUBMISSION ON ENFORCEMENT MECHANISM IN FUTURE FREE TRADE AGREEMENTS

While the CCAEC citizen submission process is weak when compared to U.S. citizen suit provisions, the process is an innovative mechanism in international law.<sup>68</sup> Historically, private citizen action in the international arena was only available through state action, but citizen submissions allow governments to stay an arm's length from the proceedings. States cannot accuse other governments of manipulating the environmental dispute resolution process for other purposes because the submission process does not involve government action.

A citizen submission mechanism harnesses the collective knowledge of citizens to identify instances of environmental non-enforcement.<sup>69</sup> State interests in preserving sovereignty would likely limit any effort for states to monitor each others' domestic environmental enforcement.<sup>70</sup> A citizen enforcement mechanism balances the public interest in consistent enforcement and the state interest in sovereignty.

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*Because citizen submissions do not rely on government action, countries cannot subsume environmental issues to other diplomatic concerns*

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At the same time, the CEC governing bodies should have more freedom to prepare factual records without political interference.<sup>71</sup> The practical consequences of a factual record are limited to public disclosure of state action, and the state can blunt criticism of any absence of enforcement with future enforcement action.<sup>72</sup> Because treaties require enforcement of domestic law, not of a politically unattainable international standard, governments should be able to effectively enforce their own domestic law.<sup>73</sup> Overall, a citizen submission process within a free trade agreement can be an effective mechanism to improve enforcement of environmental laws if the CEC has the political freedom to pursue factual records.<sup>74</sup> A trading partner, however, needs a basic environmental framework before increased enforcement will increase environmental protection.

DO NOT ENACT FREE TRADE AGREEMENTS WITH STATES THAT DO NOT PROVIDE FOR ENVIRONMENTAL PROTECTION

While a citizen submission process can increase effective enforcement of environmental laws, increased enforcement of laws that do not exist cannot protect the environment. While some argue that free trade brings increased prosperity that will in turn increase environmental protections, investor protection provisions in free trade agreements are a threat to new environmental laws.<sup>75</sup> Because of these investor protection provisions, effective environmental laws must be in place before a free trade agreement can improve their enforcement.<sup>76</sup>

While the United States and Chile enacted the USCFTA after Chile had achieved a high level of environmental protection,

the recent U.S.-Peru Agreement does not increase environmental protection.<sup>77</sup> Peru has environmental laws, but those laws do not meet the “high level” of environmental protection required by the treaty.<sup>78</sup> Trade agreements can foster increased environmental enforcement, but only if the partner country has effective environmental laws. If increasing environmental protection is a goal of the United States and other developed countries, those countries should not sign trade agreements with countries that lack legal environmental protection.

CONCLUSION

While inclusion of any environmental provisions in free trade agreements is a step forward, lip service to increased enforcement of environmental laws is not sufficient. Effective enforcement of domestic environmental laws should be a standard condition of future U.S.

free trade agreements. Allowing state-to-state dispute resolution on environmental issues is not sufficient to actually increase enforcement because states tend to rely on mutual non-enforcement when there are no other consequences. A citizen submission on enforcement process is much more effective at increasing enforcement because it takes advantage of, and even increases, public awareness of non-enforcement. While a citizen enforcement process alone will not solve the world’s envi-

ronmental problems, it is an important step towards increasing government accountability for effective enforcement of environmental laws.



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## Endnotes: GIVING POWER TO THE PEOPLE: COMPARING THE ENVIRONMENTAL PROVISIONS OF CHILE’S FREE TRADE AGREEMENTS WITH CANADA AND THE UNITED STATES

<sup>1</sup> HILARY F. FRENCH, COSTLY TRADEOFFS: RECONCILING TRADE AND THE ENVIRONMENT 61 (1993) (arguing that the United States should use free trade agreements to increase global environmental protection), available at <http://www.world-watch.org/node/877>.

<sup>2</sup> North American Agreement on Environmental Cooperation, Sept. 8, 1993, Can.-Mex.-U.S., 32 I.L.M. 1480 [hereinafter NAAEC]. See also William J. Clinton, Governor of Ark., Expanding Trade and Creating American Jobs, at North Carolina State University, Raleigh, N.C. (Oct. 4, 1992) (calling for environmental and labor agreements with NAFTA), available at <http://www.ibiblio.org/pub/academic/political-science/speeches/clinton.dir/c151.txt>.

<sup>3</sup> NAAEC, *supra* note 2, art. 14, 15, 22.

<sup>4</sup> Canada-Chile Free Trade Agreement, Dec. 5, 1996, Can.-Chile, available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/chile-chili/menu.aspx?lang=en> [hereinafter CCFTA]; Canada-Chile Agreement on Environmental Cooperation, Feb. 6, 1997, Can.-Chile, available at [http://www.sice.oas.org/trade/chican\\_e/Environ.asp](http://www.sice.oas.org/trade/chican_e/Environ.asp) [hereinafter CCAEC].

Endnotes: Giving Power to the People: Comparing the Environmental Provisions of Chile’s Free Trade Agreements with Canada and the United States *continued on page 91*

<sup>5</sup> U.S.-Chile Free Trade Agreement, June 6, 2003, U.S.-Chile, art. 19, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/chile-fta> [hereinafter USCFTA].

<sup>6</sup> See, e.g., Heather Corbin, Note, *The Proposed United States-Chile Free Trade Agreement: Reconciling Free Trade and Environmental Protection*, 14 COLO. J. INT'L ENVTL. L. & POL'Y 119, 141-42 (2003) (arguing that free trade agreements should be used to advance environmental protection standards). *But see* FRENCH, *supra* note 1, at 51 (detailing the difficulties of reforming existing trade agreements to address environmental concerns).

<sup>7</sup> CCAEC, *supra* note 4, art. 23.1; NAAEC, *supra* note 2, art. 23.1.

<sup>8</sup> CCAEC, *supra* note 4, art. 14-15; NAAEC, *supra* note 2, art. 14-15.

<sup>9</sup> CCAEC, *supra* note 4, art. 14.1. A citizen is any "person or organization residing or established in the territory of a Party." *Id.* art. 14.1(f).

<sup>10</sup> CCAEC, *supra* note 4, art. 8. See generally COMMISSION FOR ENVIRONMENTAL COOPERATION, BRINGING THE FACTS TO LIGHT: A GUIDE TO ARTICLES 14 AND 15 OF THE NAAEC (2007) (providing information about the NAAEC process to the public), available at [http://www.cec.org/files/PDF/SEM/Bringing%20the%20Facts\\_en.pdf](http://www.cec.org/files/PDF/SEM/Bringing%20the%20Facts_en.pdf).

<sup>11</sup> CCAEC, *supra* note 4, art. 14.1; NAAEC, *supra* note 2, art. 14.1. The National Secretariat will forward a submission that:

- (a) is in writing . . . ; (b) clearly identifies the person or organization making the submission; (c) provides sufficient information . . . ; (d) appears to be aimed at promoting enforcement rather than at harassing industry; (e) indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response, if any; (f) is filed by a person or organization residing or established in the territory of a Party; and (g) includes, in the case of submissions [regarding] Canada, a declaration to the effect that the matter will not subsequently be submitted [under the NAAEC], with a view to avoiding duplication in the handling of submissions.

CCAEC, *supra* note 4, art. 14.1. While these criteria are largely procedural, the CCAEC Council found one of four submissions to the CCAEC governing body to be insufficient, and terminated the submissions. CCAEC Submissions Registry, <http://can-chil.gc.ca/English/Profile/JSC/Registry/Registry.cfm>.

<sup>12</sup> CCAEC, *supra* note 4, art. 14.2; NAAEC, *supra* note 2, art. 14.2. The Committee considers whether:

- (a) the submission alleges harm to the person or organization making the submission; (b) the submission . . . raises matters whose further study in this process would advance the goals of this Agreement; (c) private remedies available under the Party's law have been pursued; and (d) the submission is drawn exclusively from mass media reports.

*Id.* Of the three submissions the CCAEC Joint Submission Committee has considered, all three merited a response from the party. CCAEC Submissions Registry, <http://can-chil.gc.ca/English/Profile/JSC/Registry/Registry.cfm> (last visited Oct. 15, 2009).

<sup>13</sup> See Greg Block, *Trade and Environment in the Western Hemisphere: Expanding the North American Agreement on Environmental Cooperation to the Americas*, 33 ENVTL. L. 501, 517-18 (2003) (describing Canada's efforts to constrain the citizen submission process and defend against preparation of factual records, but also its support of the citizen submissions process as a mechanism for calling attention to environmental enforcement problems in individual provinces where the federal environmental agency does not have control).

<sup>14</sup> USCFTA, *supra* note 5, art. 19.2.

<sup>15</sup> *Id.* art. 19.2.1(a).

<sup>16</sup> CCAEC, *supra* note 4, art. 14.1; NAAEC, *supra* note 2, art. 14.1.

<sup>17</sup> USCFTA, *supra* note 5, art. 19.6. The USCFTA requires both parties to accept comments and suggestions from the public and allow for a public committee to advise the parties in their implementation of the agreement. *Id.* art. 19.4.

<sup>18</sup> *Id.* art. 19.6, 22.4. Either party can unilaterally initiate consultations. *Id.* art. 19.6.1, 22.4.

<sup>19</sup> *Id.* art. 19.6.6.

<sup>20</sup> *Id.* art. 22.5.2.

<sup>21</sup> *Id.* art. 22.6.1.

<sup>22</sup> *Id.* art. 22.15. See also Jay V. Sagar, *The Labor and Environment Chapters of the United States-Chile Free Trade Agreement: An Improvement Over the Weak Enforcement Provisions of the NAFTA Side Agreements on Labor and the Environment?*, 21 ARIZ. J. INT'L & COMP. L. 913, 928-29 (2004) (describing the USCFTA dispute resolution process in more detail). The fine goes to a fund for environmental programs, including increasing environmental enforcement. USCFTA, *supra* note 5, art. 22.16(4).

<sup>23</sup> USCFTA, *supra* note 5, art. 22.16(5).

<sup>24</sup> See JERRY L. ANDERSON & DENNIS D. HIRSCH, ENVIRONMENTAL LAW PRACTICE 71 (2d ed. 2003) (explaining the crucial roles of the U.S. Environmental Protection Agency, state environmental agencies, and environmental organizations in the effective enforcement of U.S. environmental statutes); cf. Victor B. Flatt, *Spare the Rod and Spoil the Law: Why the Clean Water Act Has Never Grown Up*, 55 ALA. L. REV. 595, 596 (2004) (blaming the failure of the Clean Water Act to bring about clean water in the United States on ineffective enforcement).

<sup>25</sup> Cf. Guillermo O'Donnell, *Polyarchies and the (Un)Rule of Law in Latin America: A Partial Conclusion*, in THE (UN)RULE OF LAW AND THE UNDER-PRIVILEGED IN LATIN AMERICA 303, 307-08 (Juan E. Méndez et al. eds. 1999) (explaining that the "rule of law" means legal rules are applied consistently without consideration of the power or status held by the subject of a proceeding). *But see* Laura C. Bickel, Note, *Baby Teeth: An Argument in Defense of the Commission for Environmental Cooperation*, 37 NEW ENG. L. REV. 815, 845-46 (2003) (arguing that the focus on enforcement is misplaced and suggesting that a focus on environmental management would better achieve the stated goals of the NAAEC).

<sup>26</sup> See, e.g., FRENCH, *supra* note 1, at 32 (describing toxic discharges into open ditches at three-quarters of the sampled factories in Mexico's border region, even though Mexico's environmental laws were comparable to those in the United States).

<sup>27</sup> E.g., Clifford Rechtschaffen, *Deterrence vs. Cooperation and the Evolving Theory of Environmental Enforcement*, 71 S. CAL. L. REV. 1181, 1223 (1998) ("In environmental law, consistent treatment is particularly crucial so that regulated entities believe they are competing on a level playing field.").

<sup>28</sup> See HAKAN NORDSTRÖM & SCOTT VAUGHAN, WORLD TRADE ORGANIZATION, SPECIAL STUDIES 4: TRADE AND ENVIRONMENT 57 (1999), [http://www.wto.org/english/tratop\\_e/envir\\_e/environment.pdf](http://www.wto.org/english/tratop_e/envir_e/environment.pdf) (concluding that income growth in developing countries is a necessary but not sufficient condition for increased environmental protection). *But see* Howard Mann & Monica Araya, *An Investment Regime for the Americas: Challenges and Opportunities for Environmental Sustainability*, in GREENING THE AMERICAS 121, 130-137 (Carolyn L. Deere & Daniel C. Esty eds., 2002) (explaining that some corporations have used NAFTA's investor protection provisions to lobby against and gain compensation for financial harm from domestic laws strengthening environmental protection).

<sup>29</sup> See USCFTA, *supra* note 5, art. 19.4 (requiring "receipt and consideration of public communications" on environmental matters that affect trade).

<sup>30</sup> E.g., *id.*, art. 19.2.3 ("Nothing in this Agreement shall be construed to empower a Party's authorities to undertake environmental law enforcement activities in the territory of the other Party.").

<sup>31</sup> See Philip M. Moremen, *Private Rights of Action to Enforce Rules of International Regimes*, 79 TEMP. L. REV. 1127, 1153 (2006) (describing pressure on the NAAEC governing body to limit the "independence and discretion" of the body to prepare factual records as more submissions have challenged state failures to enforce environmental laws).

<sup>32</sup> United States Trade Representative, Trade Agreements Home, (2009) <http://www.ustr.gov/trade-agreements> (providing the U.S. trade strategy to "create opportunities for Americans and help to grow the U.S. economy").

<sup>33</sup> See Bickel, *supra* note 25, at 847 (explaining that states do not have an interest in pursuing state-to-state dispute resolution because doing so would highlight the accusing state's own enforcement record).

<sup>34</sup> See, e.g., 22 U.S.C. § 2656 (2008) (delegating power over foreign affairs to the Secretary of State in the manner in which the President directs).

<sup>35</sup> USCFTA, *supra* note 5, preamble (providing that the United States and Chile resolved to "AVOID distortions in their reciprocal trade; [and] ESTABLISH clear and mutually advantageous rules governing their trade," among other goals).

<sup>36</sup> See Eric Miller, *Did Mexico Suffer Economically from the NAFTA's Environmental Provisions?*, in GREENING THE AMERICAS 121, 130–137 (Carolyn L. Deere & Daniel C. Esty eds., 2002) (finding no economic impact from trade sanctions because no party has ever used the sanction provisions of the NAAEC); see also Blanca Torres, *The North American Agreement on Environmental Cooperation: Rowing Upstream*, in GREENING THE AMERICAS 201, 207 (Carolyn L. Deere & Daniel C. Esty eds., 2002) (describing the “lengthy” and unlikely process of applying trade sanctions for environmental non-enforcement but saying Mexican officials still find the potential “threatening”).

<sup>37</sup> USCFTA, *supra* note 5, art. 19.

<sup>38</sup> *Id.*, art. 19.2.1(a) (providing that a state party must show that the accused party has “[failed] to effectively enforce its environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties”).

<sup>39</sup> FRENCH, *supra* note 1, at 50–51 (praising the NAFTA dispute resolution procedures for placing the burden of proof on the challenging state instead of the defending state). Placing the burden on the challenging state makes environmental regulations more likely to survive a challenge. FRENCH, *supra* note 1, at 50–51.

<sup>40</sup> USCFTA, *supra* note 5, art. 19.2.1(a).

<sup>41</sup> See, e.g., *Special Report: Environmental Laws on the Books in Latin America But Enforcement, Environmental Infrastructure Lacking*, 20 INT’L ENV’T REP. 176, 176 (1997) (describing environmental enforcement in Latin America as “uneven, sporadic, ineffectual, and sometimes, non-existent”).

<sup>42</sup> USCFTA, *supra* note 5, art. 19.2.1(a) (providing that a state party must show that the accused party has “[failed] to effectively enforce its environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties”).

<sup>43</sup> See, e.g., *Rechtschaffen*, *supra* note 27, at 1224 (explaining that companies will hesitate to invest in compliance with environmental laws without effective enforcement in fear that their competitors are not in compliance, thereby gaining a competitive advantage with lower costs).

<sup>44</sup> Cf. Moremen, *supra* note 31, at 1154 (explaining that the complicated NAFTA provisions for state-to-state dispute resolution makes the imposition of trade sanctions “unlikely”).

<sup>45</sup> See *Id.* at 1155 (speculating that developing states do not have to fear crippling numbers of submissions because there are few submissions and only real sanction is “sunshine”).

<sup>46</sup> See discussion *supra* (explaining that states generally have little incentive to bring environmental enforcement claims against other states).

<sup>47</sup> See FRENCH, *supra* note 1, at 55 (speculating that the Mexican government would not agree to a side agreement to NAFTA that included U.S. enforcement of environmental laws inside Mexico).

<sup>48</sup> See Block, *supra* note 13, at 516 (marking on the increased citizen participation in public fora in Mexico after the NAAEC); see also Torres, *supra* note 36, at 210–14 (describing the strengthening of the Mexican environmental community around the NAFTA negotiation process and rise in public interest in environmental issues as the public became more aware of environmental monitoring data).

<sup>49</sup> Cf. *Sierra Club v. Morton*, 405 U.S. 734, 734–35 (1972) (holding that a plaintiff must be a current user of a resource to have standing to bring a lawsuit protecting that resource).

<sup>50</sup> See Kal Raustiala, *Police Patrols & Fire Alarms in the NAAEC*, 26 LOY. L.A. INT’L & COMP. L. REV. 389, 404–05 (2004) (explaining that citizens and NGOs are more likely than a government to report violations because they are close to the affected environment or specialize in identifying violations).

<sup>51</sup> See generally *id.* (contrasting three citizen alert mechanisms: “police patrols,” “fire alarms,” and government monitoring of treaty compliance; and crediting the diffusion of information to the success of citizen monitoring efforts and citizen suits under U.S. environmental law).

<sup>52</sup> See *infra* (arguing that states concerned about sovereignty are also unlikely to accept foreign patrols to identify ineffective enforcement).

<sup>53</sup> See Raustiala, *supra* note 50, at 406 (explaining that private actors have various incentives to report violations; compliant facilities have an economic incentive to report violations by competitors, users of a natural resource have an interest in preventing harm, and environmental NGOs have an interest in fulfilling their common purpose).

<sup>54</sup> See Benjamin Martin, Note, *An Environmental Remedy to Paralyzed Negotiations for a Multilateral Foreign Direct Investment Agreement*, 1 GOLDEN GATE U. ENVTL. L.J. 209, 226 (2007) (explaining that developing nations have hesitated to enter into investment and trade agreements that include human rights and religious freedom conditions because they see these conditions as “an unreasonable interference with state sovereignty”).

<sup>55</sup> See CCAEC, *supra* note 4, art. 3 (allowing each party to “select its own levels of domestic environmental protection” as well as requiring a “high level” of environmental protection). But see FRENCH, *supra* note 1, at 13 (explaining that environmental regulations in one country can cause “massive degradation” in other countries in the absence of global environmental regulations).

<sup>56</sup> See FRENCH, *supra* note 1, at 57 (describing the European environmental community’s increased involvement with enforcement when European Union treaties provided for a citizen enforcement mechanism with little power to impose penalties).

<sup>57</sup> While a factual record could form the basis of a state-to-state dispute, there have been no such disputes under the NAAEC or CCAEC, which makes that possibility remote. John J. Kirton, *Winning Together: The NAFTA Trade-Environment Record*, in LINKING TRADE, ENVIRONMENT, AND SOCIAL COHESION 74, 90 (John J. Kirton & Virginia W. Maclaren eds., 2002) (contrasting the twenty-eight citizen submissions with the absence of any state-to-state disputes in the first six and a half years of the NAAEC).

<sup>58</sup> See Moremen, *supra* note 31, at 1155 (explaining that the limited nature of the NAAEC’s capacity imposes limited sovereignty costs, but any complaint-based procedure has a greater sovereignty cost than a state-dependent procedure); see also FRENCH, *supra* note 1, at 55 (describing Mexico’s concern with the powers of an international governing body).

<sup>59</sup> But see Raustiala, *supra* note 50, at 410 (arguing that relying on citizen “fire alarms” removes autonomy from the government, and may advance private interests at the expense of the collective interest).

<sup>60</sup> See Sagar, *supra* note 22, at 942 (explaining that Mexico stopped a pier project after the release of a factual record suggesting that going forward would violate Mexico’s environmental laws).

<sup>61</sup> See *id.* (finding evidence of a deterrent from the preparation of a factual record alone, although a record is not as “detrimental as monetary penalties or trade sanctions”).

<sup>62</sup> Cf. David Rieff, *Were Sanctions Right?*, N.Y. TIMES, July 27, 2003, (Magazine) at 41 (describing the effects of long-lasting trade sanctions against Iraq and concluding that sanctions had little impact on Iraqi rulers while causing much suffering among the Iraqi population).

<sup>63</sup> See Moremen, *supra* note 31, at 1177 (suggesting that the NAAEC citizen submissions mechanism is reasonably successful because of the active environmental community in North America that has the capacity and organizational incentive to monitor and challenge instances of non-enforcement).

<sup>64</sup> See Natural Resources Defense Council, NRDC’s BioGems: Save Patagonia (2009), <http://www.savebiogems.org/Patagonia> (describing the Natural Resources Defense Council’s work with Chilean activists to call for an environmental review of a dam project in Patagonia, Chile). The campaign involves a submission to the CCAEC. Along with other international and domestic pressure, the citizen submission led Chile’s environmental minister to reject the disputed environmental impact statement and request a new study from the developers. Allison Siverman, Natural Resources Defense Council, Patagonia BioGem Campaign Status Update, (2008) (on file with author).

<sup>65</sup> See Moremen, *supra* note 31, at 1177 (explaining that a system reliant on citizen complaints can only be effective if there is a “community of . . . NGOs willing to bring claims”).

<sup>66</sup> See, e.g., Avnita Lakhani, *The Role of Citizens and the Future of International Law: A Paradigm for a Changing World*, 8 CARDOZO J. CONFLICT RESOL. 160, 178–79 (2006) (criticizing the NAAEC process for insufficient independence and lack of citizen enforcement autonomy). Some commentators call for an independent arbitration process, which citizens could begin autonomously, for environmental disputes. *Id.* at 192.

<sup>67</sup> See David L. Markell, *Governance of International Institutions: A Review of the North American Commission for Environmental Cooperation’s Citizen Submissions Process*, 30 N.C. J. INT’L L. & COM. REG. 759, 790–92 (2005) (marking that environmental organizations continued to file submissions after the NAAEC governing body refused to consider patterns of non-enforcement).

<sup>68</sup> See, e.g., Raustiala, *supra* note 50, at 392 (remarking that the citizen submissions process was “ground-breaking” direct involvement of individuals in generally “state-centric” international law).

<sup>69</sup> See *id.* at 398 (noting that the NAAEC submissions process “shifts the search for noncompliance” from governments to private actors).

<sup>70</sup> See FRENCH, *supra* note 1, at 55 (speculating that the Mexican government would be hesitant to sign an agreement that delegated too much sovereignty to an international environmental body).

<sup>71</sup> See *id.* at 541–42 (decrying the requirement that the politicized Council has to vote to allow preparation and release of each factual record as an unwelcome intrusion of politics into the process); see also Geoff Garver, *Tooth Decay*, THE ENVIRONMENTAL FORUM, May-June 2008 at 34, 36 (criticizing U.S. interference with the CEC process).

<sup>72</sup> See Sagar, *supra* note 22, at 941–42 (using the Cozumel Island factual record, which prompted the Mexican government to cancel a cruise ship pier project, to argue that a factual record has some deterrent effect).

<sup>73</sup> See Torres, *supra* note 36, at 207 (explaining that Mexican non-governmental organizations recognize the risk of less effective enforcement if Mexican government institutions are overwhelmed by citizen submissions and have held back to avoid that possibility).

<sup>74</sup> See Markell, *supra* note 67, at 788–89 (reporting that many environmental advocacy groups support the NAAEC process and offer some evidence that environmental governance has improved under the NAAEC); see also Torres, *supra* note 36, at 210–14 (concluding that the NAAEC has helped Mexico improve its environmental governance by strengthening the environmental community and the capacity of government institutions charged with environmental protection).

<sup>75</sup> E.g., North American Free Trade Agreement, Dec. 8, 1992, Can.-Mex.-U.S., 32 I.L.M. 289, art. 1110; see also INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT & WORLD WILDLIFE FUND, PRIVATE RIGHTS, PUBLIC PROBLEMS: A GUIDE TO NAFTA’S CONTROVERSIAL CHAPTER ON INVESTOR RIGHTS 1 (2001), available at [http://www.iisd.org/pdf/trade\\_citizensguide.pdf](http://www.iisd.org/pdf/trade_citizensguide.pdf) (criticizing NAFTA’s Chapter 11 for allowing foreign investors to bring the host country into binding, confidential arbitration without proving for community input, and potentially requiring the host country to compensate a foreign investor for costs associated with new environmental regulations).

<sup>76</sup> See, e.g., PIERRE MARC JOHNSON & ANDRÉ BEAULIEU, THE ENVIRONMENT AND NAFTA: UNDERSTANDING AND IMPLEMENTING THE NEW CONTINENTAL LAW 69–110 (1996) (explaining that new environmental legislation must not unjustifiably restrict trade).

<sup>77</sup> U.S.-Peru Trade Promotion Agreement, Apr. 12, 2006, U.S.-Peru, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text>.

<sup>78</sup> See Aaron Cosbey, *Brave New Deal? Assessing the May 10th U.S. Bipartisan Compact on Free Trade Agreements*, IISD COMMENTARY, 3–4, Aug. 2007 (concluding that enacted changes to the USPTPA “probably [do] not” increase the effectiveness of environmental enforcement in Peru), available at <http://www.iisd.org/PUBLICATIONS/pub.aspx?id=888>.