

TRADE AGREEMENTS AND ENVIRONMENT IN LATIN AMERICA

by Dino Delgado Gutiérrez

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SUMMARY

Inspired by the work of the Secretariat for Submissions on Environmental Enforcement Matters of the United States-Peru Trade Promotion Agreement, this Article surveys other environmental submission mechanisms in Latin America, looking at similarities and differences. Beyond the criticisms made of these processes, they have value as independent international bodies to review the effective enforcement of a country's domestic environmental laws, and provide opportunities to reach out to civil society about legitimate concerns. Two decades after the first submission in the context of the North American Free Trade Agreement, more than 150 submissions have been filed with all the secretariats. The Article highlights lessons learned, and proposes recommendations that may help these mechanisms continue to grow for the benefit of civil society and governments.

At present, the link between trade and the environment is indisputable. Traditionally, rules regulating trade developed somewhat independently of those aimed at protecting the environment. Nonetheless, over the past few decades, the interaction between the two has become more evident. While some attention has been paid to examples of this relationship in international agreements, such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora, this Article analyzes some regional or bilateral trade promotion agreements (TPAs) that include environmental obligations that must be complied with by signatory States.

In particular, I discuss relatively innovative mechanisms that empower civil society and contribute to linking trade policies, investments, and project implementation with environmental policies, norms, and standards. For a little over two decades, these citizen-driven mechanisms have been included in the texts of various TPAs between the United States and countries in North, Central, and South America to contribute to the effective enforcement of environmental laws.

Despite the fact that the United States has signed several TPAs that include environmental obligations (such as those signed with Australia, Bahrain, Chile, Jordan, and

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Morocco, among others), only a few have included mechanisms that provide civil society with the possibility of filing a submission when they consider that one of the Parties to the agreement is not effectively enforcing its environmental laws. These mechanisms are intended to offer any natural person or legal entity the possibility of approaching an independent international body to address an environmental concern.

On the basis of public information on the operation of the secretariats that carry out the public submission processes, as well as the submissions filed, I examine the trends and uses of these mechanisms in the Latin America region. Specifically, the Article analyzes the following mechanisms:

- Submissions on Enforcement Matters (SEM) Unit of the United States-Mexico-Canada Agreement (USMCA)
- Secretariat for Environmental Matters under the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR)
- Secretariat for Submissions on Environmental Enforcement Matters (SEEM) under the United States-Peru TPA
- Secretariat for Environmental Enforcement Matters under the United States-Panama TPA
- Secretariat for Environmental Enforcement Matters under the United States-Colombia TPA

I. Background

In January 1994, the North American Free Trade Agreement (NAFTA) between Canada, the United States, and Mexico entered into force.¹ Immediately after NAFTA, the North American Agreement on Environmental Cooperation (NAAEC), signed by the same countries, entered into force as a parallel agreement to NAFTA.² Since the entry into force of the NAAEC, the United States has negotiated TPAs that include the creation of bodies to address submissions from natural persons or legal entities that believe that one of the countries of the agreement is not effectively enforcing its environmental laws.

In order to implement these measures in the various TPAs, bodies with different scopes and levels have been created. However, the processes they carry out have significant similarities. The following is a brief review of the agreements in the region that include secretariats that perform the public submission processes.

A. North America Region

As mentioned above, the NAAEC entered into force in 1994, thus becoming an environmental agreement with a close relationship to NAFTA. The consequent cooperation among the countries encouraged the protection and improvement of the environment, sustainable development, and strengthening and enhancement of environmental regulations, among other aspects.

The NAAEC incorporated, in its Article 14, a process called “Submissions on Enforcement Matters,” which provides any person or organization with no governmental connection, resident or based in Canada, the United States, or Mexico, a process through which they can file a submission if they believe that a Party to the agreement is failing to enforce its environmental laws.³ Therefore, “NAAEC’s three Parties created this entirely new process to give the public a voice in international environmental oversight through establishing a novel international ‘soft’ enforcement mechanism.”⁴

Article 8 of the NAAEC established the Commission for Environmental Cooperation (CEC), which is to comprise a council, a secretariat, and the Joint Public Advisory Committee. The council is the governing body of the CEC, and is composed of the highest-ranking environmental authorities (cabinet-level or equivalent representatives) of Canada, Mexico, and the United States. As a governing body, the

council oversees the implementation of the NAAEC and serves as a forum for discussing environmental issues.

The CEC Secretariat provides technical, administrative, and operational support to the council. Within the secretariat is the SEM Unit, which is responsible for receiving and processing submissions.

The first submission was filed in 1995. To date, a total of 101 submissions have been filed by way of this mechanism. Of the total number of submissions, 33 are from Canada, 13 from the United States, and 53 from Mexico. Additionally, two submissions are from Canada and the United States together. It should be noted that there are submissions involving more than one country. Of the total number of submissions, 24 factual records have been prepared.⁵

The new USMCA, which entered into force on July 1, 2020, does not produce changes in broad terms with respect to the submissions for the effective enforcement of the Parties’ environmental laws.⁶

B. Central America-Dominican Republic-United States

The free trade agreement between Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, and the United States (Dominican Republic-Central America Free Trade Agreement (CAFTA-DR)) entered into force for the countries Party to the agreement on various dates in 2006.⁷

Article 17.7 of the CAFTA-DR, “Submissions on Enforcement Matters,” sets forth in paragraph 1 that “[a]ny person of a Party may file a submission asserting that a Party is failing to effectively enforce its environmental laws. Such submissions shall be filed with a secretariat or other appropriate body (‘secretariat’) that the Parties designate.”

In order to implement Articles 17.7 and 17.8 of the CAFTA-DR, the Parties signed the “Agreement Establishing a Secretariat for Environmental Matters Under the Dominican Republic-Central America-United States Free Trade Agreement.”⁸ Through Article 1 of this agreement, the Parties established the Secretariat for Environmental Matters—the unit in charge of receiving and processing submissions—located in the Secretariat for Central American Economic Integration’s (SIECA’s) facilities, headquartered in Guatemala City.

According to Claudia Ortiz:

Submissions are not an environmental “complaint” with the purpose of sanctioning the State or a company that

1. North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289 [hereinafter NAFTA].

2. North American Agreement on Environmental Cooperation, Sept. 13, 1993, 32 I.L.M. 1480 [hereinafter NAAEC].

3. COMISIÓN PARA LA COOPERACIÓN AMBIENTAL [COMMISSION FOR ENVIRONMENTAL COOPERATION], DIRECTRICES PARA LA PRESENTACIÓN DE PETICIONES RELATIVAS A LA APLICACIÓN EFECTIVA DE LA LEGISLACIÓN AMBIENTAL [GUIDELINES FOR SUBMISSIONS ON ENFORCEMENT MATTERS UNDER ARTICLES 14 AND 15 OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION] (2013).

4. Tracy Hester, *Designed for Distrust: Revitalizing NAFTA’s Environmental Submissions Process*, 28 GEO. ENV’T L. REV. 29, 32 (2015).

5. Commission for Environmental Cooperation, *Registry of Submissions*, <https://www.cec.org/submissions-on-enforcement/registry-of-submissions/> (last visited Oct. 2021).

6. United States-Mexico-Canada Agreement, Nov. 30, 2018 (entered into force July 1, 2020) [hereinafter USMCA].

7. Dominican Republic-Central America Free Trade Agreement, May 28, 2004, 43 I.L.M. 514 [hereinafter CAFTA-DR].

8. Agreement Establishing a Secretariat for Environmental Matters Under the Dominican Republic-Central America-United States Free Trade Agreement, July 27, 2006 (entered into force Aug. 26, 2006).

Table 1. Submissions Received by All Secretariats

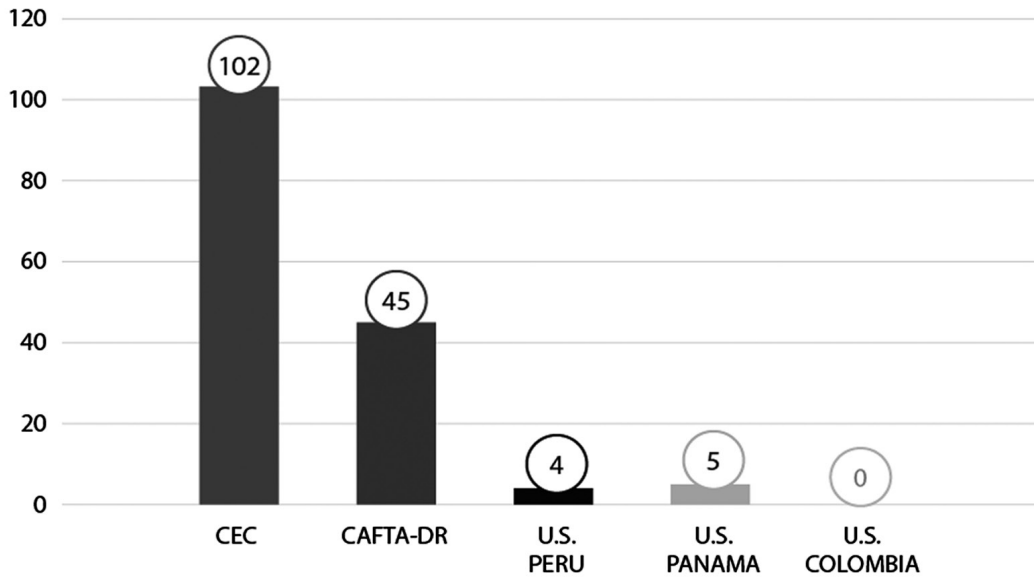
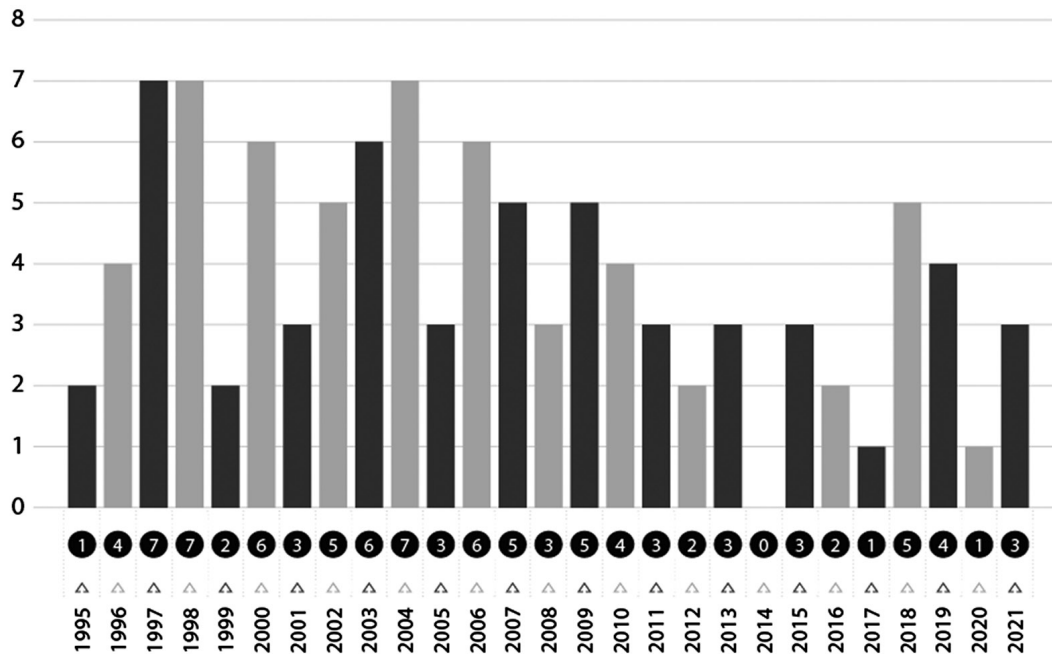


Table 2. Submissions Received by the CEC by Year



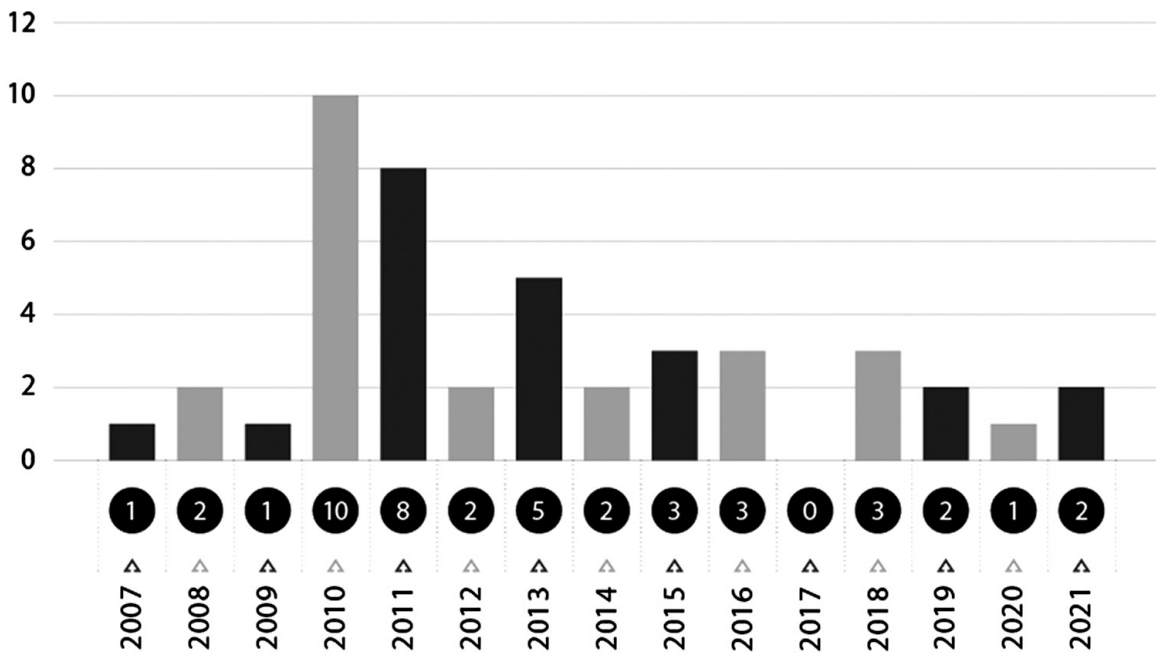
is violating environmental laws. They are, rather, an alternative way to seek a direct approach to government authorities in order to raise environmental problems that are not being addressed in a timely manner and that affect citizens.⁹

The Secretariat for Environmental Matters has received a total of 45 submissions: 2 from Costa Rica, 6 from El Salvador, 17 from Guatemala, 7 from Honduras, 2 from Nicaragua, and 11 from the Dominican Republic. Of

9. CLAUDIA ORTIZ, FUNDACIÓN NACIONAL PARA EL DESARROLLO [NATIONAL FOUNDATION FOR DEVELOPMENT], MANUAL DE MECANISMOS DE PARTICI-

PACIÓN PÚBLICA AMBIENTAL EN EL MARCO DEL DR-CAFTA [MANUAL OF MECHANISMS FOR ENVIRONMENTAL PUBLIC PARTICIPATION IN THE FRAMEWORK OF CAFTA-DR] 29 (2013).

Table 3. Submissions Received by the CAFTA-DR by Year



the total number of submissions, six factual records have been prepared.¹⁰

C. Peru-United States

The United States-Peru TPA was signed in Washington, D.C., on April 12, 2006; it entered into force on February 1, 2009.¹¹ This agreement includes the following chapters: National Treatment and Market Access for Goods, Textiles and Apparel, Rules of Origin, Customs Administration and Trade Facilitation, Sanitary and Phytosanitary Measures, Technical Barriers to Trade, Trade Remedies, Government Procurement, Investment, Cross-Border Trade in Services, Financial Services, Competition Policy, Telecommunications, Electronic Commerce, Intellectual Property Rights, Labor, Environment, Transparency, Trade Capacity Building, and Dispute Settlement.

The objectives of Chapter 18, Environment, are to contribute to the efforts of Peru and the United States to ensure that trade and environmental policies are mutually supportive, to promote the optimal use of resources in accordance with the objective of sustainable development, and to strive to strengthen the links between the Parties’ trade and environmental policies and practices, which may take place through environmental cooperation and collaboration.

In its Article 18.8, the TPA indicates the commitment of both States to implement a secretariat that will receive

and consider submissions on environmental enforcement matters, which is to operate independently under the sole direction and supervision of the Environmental Affairs Council. This council is to be composed, on the Peruvian side, of representatives from the Peruvian Ministry of Foreign Trade and Tourism and Ministry of the Environment, and on the U.S. side, representatives of the U.S. Trade Representative and the U.S. Department of State. Article 18.9—complementing Article 18.8—outlines the criteria and conditions for the preparation of the factual records.

In order to implement the SEEM, the “Understanding for Implementing Article 18.8 of the United States-Peru Trade Promotion Agreement” was signed.¹² Through this document, the secretariat was formally established, and it was specified that it would be located in the headquarters of the General Secretariat (GS) of the Organization of American States (OAS), as a separate unit within the latter. Subsequently, in June 2015, the Memorandum of Understanding Between the Government of the United States of America, the Government of the Republic of Peru, and the General Secretariat of the Organization of American States Regarding a Secretariat for Submissions on Environmental Enforcement Matters Under the United States-Peru Trade Promotion Agreement was signed.¹³ In accordance with its

10. Secretariat for Environmental Matters, *Communications*, <https://www.saa-sem.org/caso/> (last visited Oct. 2021).
 11. Peru-United States Trade Promotion Agreement, Peru-U.S., Apr. 12, 2006 (entered into force Feb. 1, 2009) [hereinafter Peru-United States TPA].

12. Understanding for Implementing Article 18.8 of the United States-Peru Trade Promotion Agreement, June 9, 2015 (entered into force Mar. 20, 2016).
 13. Memorandum of Understanding Between the Government of the United States of America, the Government of the Republic of Peru, and the General Secretariat of the Organization of American States Regarding a Secretariat for Submissions on Environmental Enforcement Matters Under the United States-Peru Trade Promotion Agreement, June 9, 2015 (entered into force Mar. 23, 2016).

Article 1, the purpose of this document is to “establish the relationship between the Parties under which the GS/OAS will house and support the Secretariat.”

Similar to the process carried out in the NAAEC and CAFTA-DR, paragraph 1 of Article 18.8 of the United States-Peru TPA establishes that “[a]ny person of a Party may file a submission asserting that a Party is failing to effectively enforce its environmental laws. Such submissions shall be filed with a secretariat or other appropriate body (secretariat) that the Parties designate.”

After a submission is filed, the secretariat determines if it meets the criteria set out in paragraph 2 of Article 18.8 of the TPA. If the submission meets those criteria, the secretariat shall determine whether the submission merits a response from the Party, for which the following shall be considered: (1) the submission is not frivolous and alleges harm to the person making the submission; (2) the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of Chapter 18 of the TPA and the environmental cooperation agreement (ECA) between Peru and the United States; (3) private remedies available under the Party’s laws have been pursued; and (4) the submission is drawn exclusively from mass media reports.¹⁴

When it receives a response from the Party, or when the deadline for receiving such a response expires, the secretariat analyzes the information received and must determine whether it warrants developing a factual record, in accordance with Article 18.9 of the TPA. A vote of one of the council members is sufficient for the secretariat to develop a draft factual record that will be submitted to the council for comments from any Party. After a period of 45 days, during which comments on the document are received, the secretariat will develop the final factual record. The latter document shall be publicly available if any member of the council so instructs. The council shall provide recommendations to the CEC related to the matters addressed in the factual record.

This secretariat received two submissions in 2018 and two in 2019.

D. Panama-United States

Panama was one of the last countries to sign a free trade agreement that included an institution for the filing of environmental submissions with regard to possible violations of the environmental laws of its Parties. The United States-Panama TPA entered into force on October 31, 2012.¹⁵ As in the case of Peru, the TPA includes the SEEM, in accordance with the provisions of its Articles 17.8 and 17.9. This body began operating in October 2018.

Specifically, the SEEM receives and considers submissions alleging that Panama or the United States is not effectively enforcing its environmental laws. The process is

relatively similar to that of the other agreements, and may result in a factual record at the instruction of either Party to the agreement. It has received a total of five submissions, two in 2019, one in 2020, and two in 2021.

E. Colombia-United States

Colombia and the United States signed a TPA in November 2006, following rounds of negotiations that concluded on February 27, 2006.¹⁶ In December 2013, both countries held the first meeting of the Environmental Affairs Council of the TPA, as well as the first meeting of the CEC of the ECA, signed by both States on April 19, 2013.¹⁷ At that meeting, the designation of a secretariat to receive and consider submissions related to environmental enforcement was discussed.

In June 2018, both Parties entered into an agreement to establish the Secretariat for Environmental Enforcement Matters, which would carry out the functions under Articles 18.8 (Submissions on Enforcement Matters) and 18.9 (Factual Records and Related Cooperation) of the TPA. In June 2019, the council by way of Decision No. 1 appointed the first executive director of the Secretariat for Environmental Enforcement Matters under the TPA between the United States and Colombia.

F. Differences Between the Mechanisms

As evidenced above, there are remarkable similarities between the processes for the filing of submissions from persons who consider that a Party (of the NAAEC, CAFTA-DR, Peru-United States TPA, Panama-United States TPA, and Colombia-United States TPA) is failing to effectively enforce its environmental laws. They are all structured in such a way that two stages stand out: (1) reception and processing of the submission filed by the submitter; and (2) the preparation of a factual record. However, there are also differences between these processes. Some are substantial and others rather subtle, although the latter could also generate different results.

The first difference that stands out is the institutional framework. In the case of the NAAEC, the CEC was created as an intergovernmental organization, which, as mentioned above, comprises a council, a secretariat, and the

14. Peru-United States TPA, *supra* note 11, art. 18.8.

15. Panama-United States Trade Promotion Agreement, Panama-U.S., June 28, 2007 (entered into force Oct. 31, 2012) [hereinafter Panama-United States TPA].

16. Colombia-United States Trade Promotion Agreement, Colombia-U.S., Nov. 22, 2006.

17. Comunicado Conjunto [Joint Commucation], Del Consejo de Asuntos Ambientales del Acuerdo de Promoción Comercial Entre Estados Unidos y Colombia; Y de la Comisión de Cooperación Ambiental del Acuerdo de Cooperación Ambiental Entre Estados Unidos y Colombia [From the Environmental Affairs Council of the Trade Promotion Agreement Between the United States and Colombia; and of the Environmental Cooperation Commission of the Environmental Cooperation Agreement Between the United States and Colombia] (Dec. 19, 2013), <https://www.tlc.gov.co/getattachment/acuerdos/vigente/acuerdo-de-promocion-comercial-estados-unidos/4-desarrollo-del-acuerdo/comites-institucionales/consejo-de-asunto-ambientales/comunicado-conjunto-primera-reunion-del-consejo-de-comunicado-conjunto-primera-reunion-del-consejo-de-asuntos-ambientales-y-comision-del-aca-espanol.pdf.aspx>.

Joint Public Advisory Committee. The SEM Unit is within the Secretariat of the CEC.

In the case of the CAFTA-DR, the Panama-United States TPA, and the Peru-United States TPA, secretariats were created as independent entities. Since they do not have their own infrastructure, they are housed in regional or international organizations such as the SIECA, the Water Center for the Humid Tropics of Latin America and the Caribbean, and the OAS.

With respect to the CAFTA-DR, the agreement for the constitution of an Environmental Affairs Secretariat (EAS) was signed on July 27, 2006. The EAS would be located in Guatemala City; it would be housed within SIECA, sharing facilities with it. In the case of the Peru-United States TPA, a memorandum of understanding was signed in March 2016, whereby both Parties agreed that the secretariat would be located in the facilities of the OAS GS, at its Washington, D.C., headquarters. In the Colombia-United States TPA, the agreement establishing the secretariat determined that the secretariat shall be housed at the Environmental Action and Children's Fund in Bogotá.

Another difference between the public submission procedures of the TPAs in the region is related to the channel to be used by U.S. natural persons or legal entities when using these mechanisms (it should be recalled that the United States is a Party to all five agreements). Both Article 17.7 of the CAFTA-DR and Article 18.8 of the Peru-United States TPA include a paragraph stating that the Parties recognize the existence of the mechanism in the USMCA¹⁸ for people or organizations residing or based in the territory of the United States, who may wish to file a submission regarding the United States. For them, the only corresponding channel is the CEC Secretariat.¹⁹

Therefore, there is a difference between the agreements, since the USMCA prevails in the event that the mechanism is used by a natural person or legal entity of the United States.²⁰ In accordance with the Panama-United States TPA, Panama may make comments on the submissions filed with the CEC regarding the United States. This is the only agreement with the United States that provides this possibility to the other Party.

Another important difference is the number of votes required to develop a factual record. In the case of the CAFTA-DR and the Peru-United States TPA, the vote of one of the council members is required. In the case of the USMCA, two-thirds of the votes of the council are required.

Finally, the CAFTA-DR, the Peru-United States TPA, and the USMCA include, in the last paragraph of the respective articles on factual records, that the council shall

provide recommendations to the CEC related to matters addressed in the factual record.

II. Submissions

The aforementioned trade agreements that have mechanisms for public submissions use different Spanish words to refer to the document that initiates the process. The Spanish terms for submissions—*solicitudes* [requests], *peticiones* [petitions], or *comunicaciones* [communications]—refer to the document describing an alleged lack of effective enforcement of the environmental laws of one of the countries that is part of each agreement; this document may be filed by a person or organization belonging to any of the Party countries. For practical purposes, here we will call these documents “submissions.”

The submission is forwarded to the body in charge of receiving and processing it, which also varies in terms of its structure and location in each agreement signed. We will refer to this body as the “secretariat.” The respective secretariat evaluates the compliance with the formal and substantive requirements of the submission, and then determines whether it merits the opinion or response from the Party to the agreement whose noncompliance is the subject of the submission.

In light of the Party's response—or if there is no response and the time to provide it has expired—the secretariat must determine whether to recommend (or not) the development of a factual record. According to the SEM, “a Factual Record is a document of a technical and scientific nature that seeks to document in an objective and impartial manner all the facts related to a particular case.”²¹ The recommendation to prepare a factual record is formulated and sent to a council established by the authorities of the countries that are part of the TPA. This dynamic is present in all the agreements analyzed in this Article.

If instructed to do so by the council, the respective secretariat shall prepare a factual record containing, as its name indicates, a chronological account of all the facts related to the submission that initiated the procedure. After submitting a draft factual record, the secretariat shall prepare the final version. With the vote of the council, the factual record is made publicly available. At this point in time, the work of the secretariat comes to an end.

As may be observed, the process lacks the tools to compel countries to act in a certain way or to correct the course of action or inaction. Nonetheless, the practice has shown positive effects by providing civil society with a tool to actively participate in environmental stewardship, promote understanding of environmental laws, and encourage transparency in environmental management. At the same time, it is an opportunity for governments to communicate in a timely manner to citizens the actions they are taking with respect to the implementation of their environmental

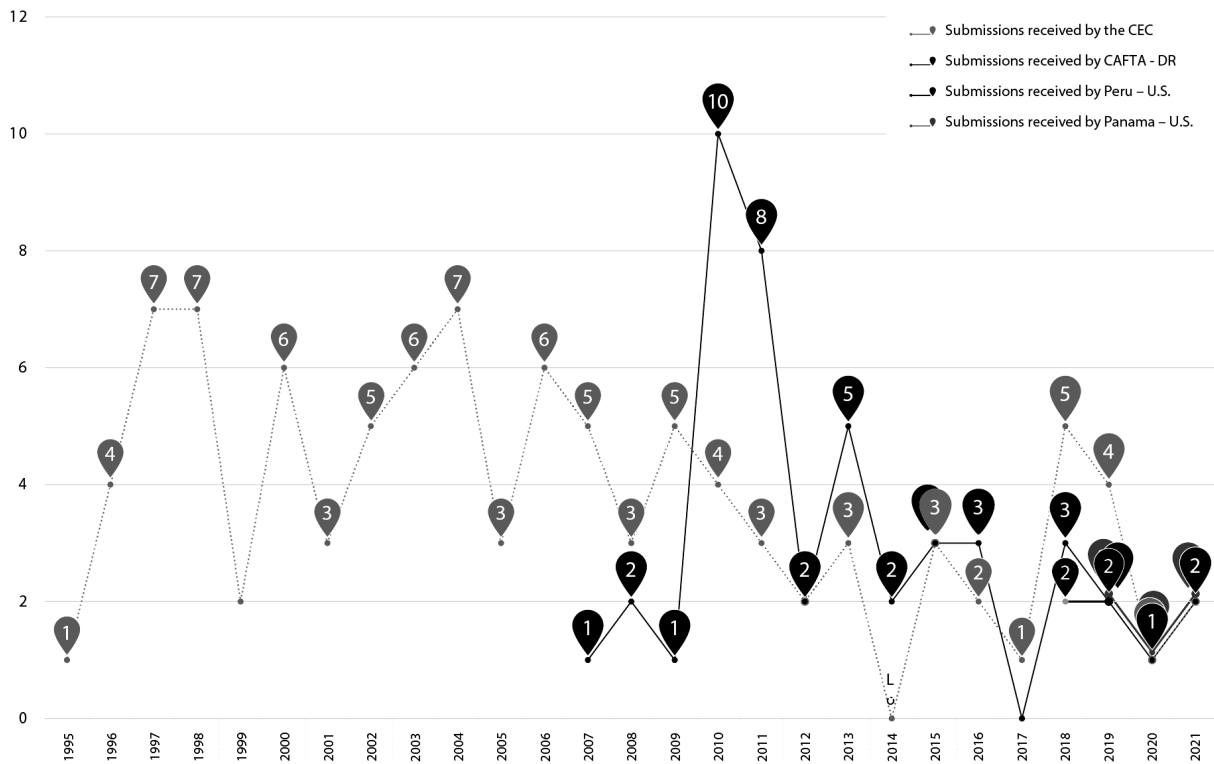
18. Called NAAEC at the time of the creation of the CEC Secretariat.

19. Peru-United States TPA, *supra* note 11, art. 18.8(3); CAFTA-DR, *supra* note 7, art. 17.7(3).

20. It is important to note that this option exists in all agreements in the region: “Arrangements will be made for the United States to make available in a timely manner to the other Parties all such submissions, U.S. written responses, and factual records developed in connection with those submissions. At the request of any Party, the Council shall discuss such documents.”

21. CAFTA-DR SECRETARIAT, FACTUAL RECORD FOR CAALA/14/001, DIXON COVE BAY (2019).

Table 4. All Submissions



laws and to generate spaces for dialogue in situations that require the State’s attention.

The sections below will analyze some data on the submissions that have been filed to date to the various secretariats in the region, with the purpose of looking for similarities and differences, and to offer some statistics that will allow us to understand the dynamics of the submissions since the first one was filed in 1995.

On August 30, 1995, one year after its establishment, the CEC Secretariat received its first submission. To date, 27 years later, the CEC Secretariat has already received 101 submissions. All the secretariats in the region have received a total of 155 submissions.²²

A. Preparation and Filing of the Submission and Compliance With Requirements

Preparation of the submission is the first fundamental step in initiating the procedure. It has been found that 68% of the submissions filed to all secretariats have been made with the assistance of civil society organizations, either by a single organization, a combination of organizations, or

organizations together with individuals. This evidences that the experience acquired by civil society organizations in the submission process is of great value, and that the secretariats should build on this experience to continue strengthening their capacity to prepare submissions correctly, supporting the process, managing the expectations of the submitters, and informing them about the benefits of preparing factual records.

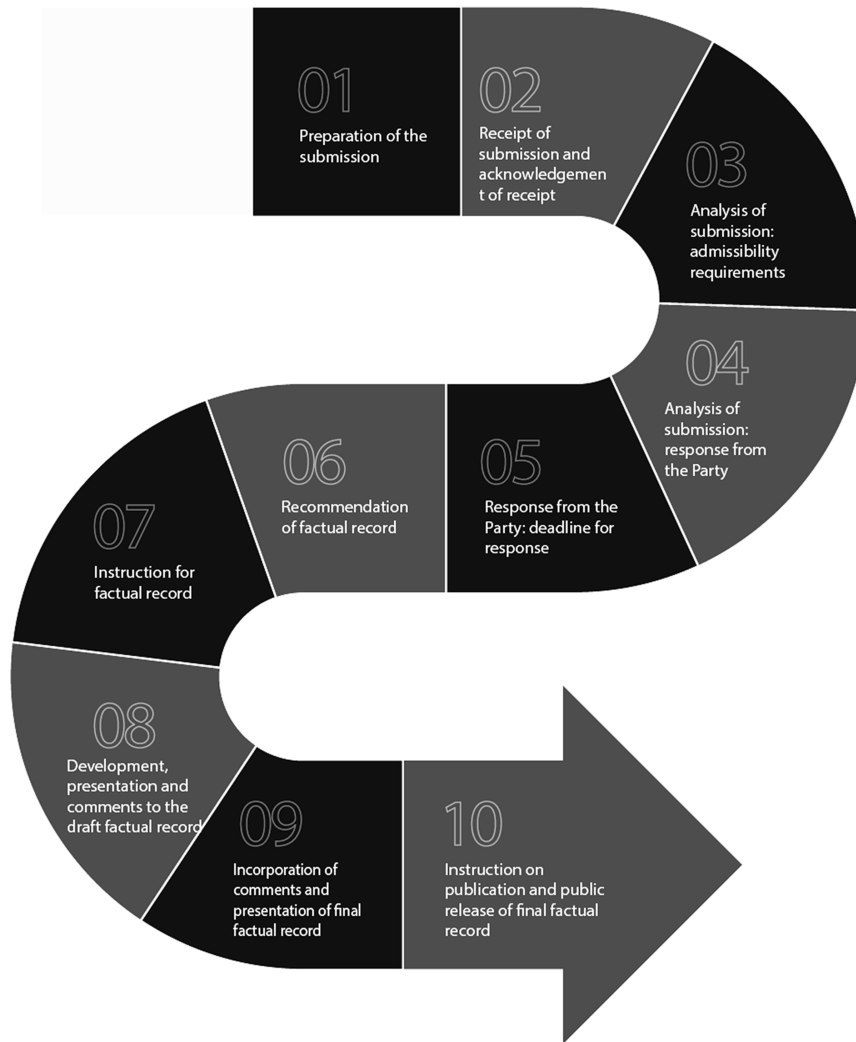
In preparing submissions, six concurrent requirements must be taken into account (see Section II.D of this Article), without which the secretariat will not be able to continue with assessment of the submission. Of the six requirements that each submission must comply with, as described in each of the trade agreements,²³ the aspects with the highest number of observations were the following: the identification of the environmental law invoked, the provision of sufficient information for the secretariat to review the submission, and the prior communication to the relevant institutions of the Party.

In relation to the “environmental law invoked,” it is important to be aware of the definition given to this term in each trade agreement. In the Peru-United States and the Colombia-United States agreements, the text is as follows (with the exception of paragraph (d), which is only applicable to Peru):

22. See Commission for Environmental Cooperation, *Home Page*, <https://www.cec.org/> (last visited Oct. 2021); Secretariat for Submissions on Environmental Enforcement Matters of the Peru-United States TPA, *Home Page*, <https://www.saca-seem.org> (last visited Oct. 2021); CAFTA-DR Secretariat for Environmental Matters, *Home Page*, <https://www.saa-sem.org> (last visited Oct. 2021); Panama-U.S. TPA Secretariat for Submissions On Environmental Enforcement Matters, *Home Page*, <https://www.sala-seem.org> (last visited Oct. 2021).

23. Five requirements in the case of the USMCA, as it eliminates the consideration to be given in the other agreements for submissions as regards the United States.

Table 5. Submission Flow Chart



[E]nvironmental law means any statute or regulation of a Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human, animal, or plant life or health, through:

- (a) the prevention, abatement, or control of the release, discharge, or emission of pollutants or environmental contaminants;
- (b) the control of environmentally hazardous or toxic chemicals, substances, materials, and wastes, and the dissemination of information related thereto;
- (c) the protection or conservation of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas²⁴; or
- (d) for Peru, the management of forest resources, in areas with respect to which a Party exercises sovereignty, sovereign rights, or jurisdiction, but does not include any

statute or regulation, or provision thereof, directly related to worker safety or health.²⁵

In the Panama-United States TPA and CAFTA-DR texts, in addition to the definition given above, the following paragraphs are added at the end:

For greater certainty, **environmental law** does not include 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;

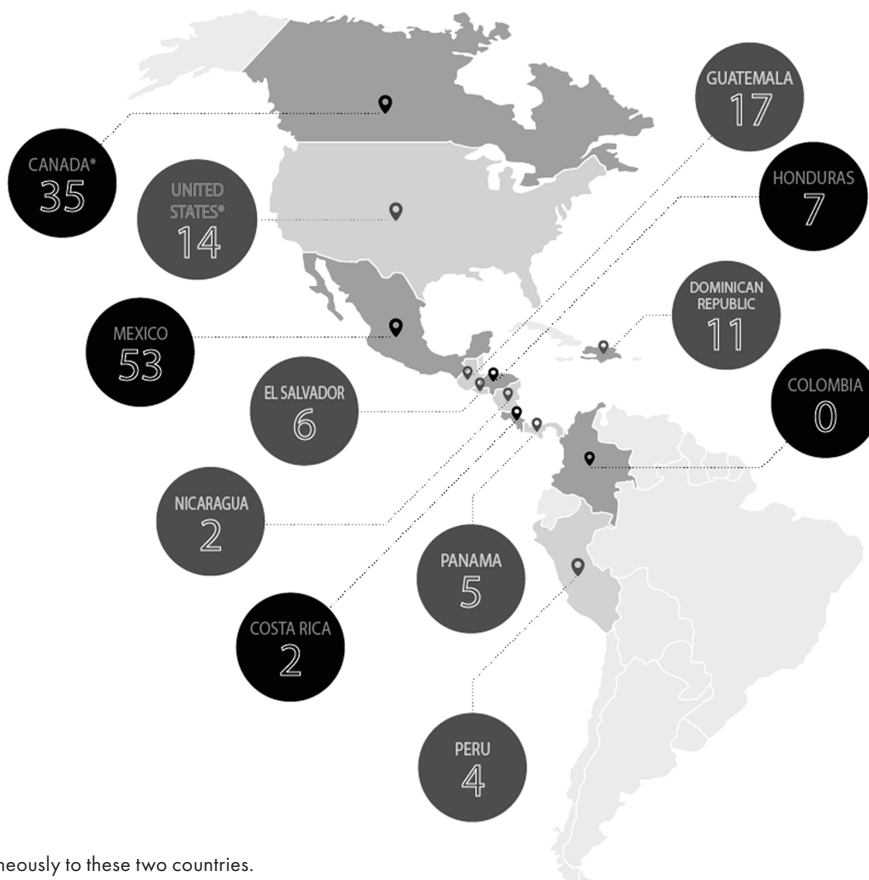
For purposes of the definition of “environmental law,” the primary purpose of a particular statutory or regulatory provision shall be determined by reference to its primary purpose, rather than to the primary purpose of the statute or regulation of which it is part.²⁶

24. The Parties recognize that such protection or conservation may include the protection or conservation of biological diversity.

25. Peru-United States TPA, *supra* note 11, art. 18.14.

26. Panama-United States TPA, *supra* note 15, art. 17.14.

Map 1: Countries Involved in the Submissions Filed to Date



* Two submissions relate simultaneously to these two countries.

In the case of the USMCA, the definition of environmental law incorporates the following elements:

[E]nvironmental law means a statute or regulation of a Party, or provision thereof, including any that implements the Party’s obligations under a multilateral environmental agreement, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health, through:

- (a) the prevention, abatement, or control of the release, discharge, or emission of pollutants or environmental contaminants;
- (b) the control of environmentally hazardous or toxic chemicals, substances, materials, or wastes, and the dissemination of information related thereto; or
- (c) the protection or conservation of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas, but does not include a statute or regulation, or provision thereof, directly related to worker safety or health, nor any statute or regulation, or provision thereof, the primary purpose of which is managing the subsistence or aboriginal harvesting of natural resources.²⁷

With respect to the definition of “environmental law,” there are some interesting aspects that have been considered by the secretariats over the years. Some of them are listed below.

The CEC Secretariat, in its determination in accordance with Articles 24.27(2) and (3), item 13, corresponding to the “Loggerhead Turtle” submission, states the following:

Historically, in the context of the NAAEC definition of environmental law, the Secretariat has accepted for review provisions contained in international treaties signed by Mexico, as long as they have been incorporated into the national legal order, and in such cases has reviewed their eligibility for inclusion in the SEM mechanism. However, the text adopted by the Parties to the USMCA establishes in its definition of environmental law that this includes a statute or regulation, or a provision thereof, “that implements the Party’s obligations under a multilateral environmental agreement”²⁸

27. USMCA, *supra* note 6, art. 24.1.

28. CEC Secretariat, *Loggerhead Turtle, Secretariat Determination in Accordance With Articles 24.27(2) and (3) of the United States-Mexico-Canada Agreement* 5, CEC Doc. A24.27(2)(3)/SEM20-001/10/DET (Feb. 8, 2021).

In the determination pursuant to Article 14(1)(2), item 9, pertaining to the “Radiation Exposure at Los Altares” submission, the CEC Secretariat states the following:

The Secretariat has maintained on previous occasions that the term “environmental law” defined in NAAEC Article 45(2)(a) should be broadly interpreted, as a restrictive vision of what constitutes a law or regulation whose primary purpose is protection of the environment or human health would be inconsistent with the NAAEC.²⁹

In the determination in accordance with Article 18.8(1) and (2), items 19-22, pertaining to the “Law 30723—Border Roads Law” submission, the Secretariat of the Peru-United States TPA specified the following:

Article 18.8 of the TPA establishes a procedure available to natural persons or legal entities who consider that the environmental laws of one of the Parties is not being effectively enforced.

The Secretariat is not competent to assess the effective enforcement of the provisions contained in the TPA itself, as established in Article 18.8 of the TPA. The mechanisms for dispute settlement over the interpretation, application and enforcement of the TPA are described in Chapter 21 of the TPA.

The Secretariat considers that the provisions of the TPA may be invoked by the Submitter as long as the subject matter is contained in the internal regulations of one of the Parties. In this case, the Secretariat will only evaluate the effective enforcement of the Party’s domestic law, in accordance with Article 18.8 of the TPA.

The above shall not be construed to preclude the Secretariat from being guided by the provisions of the TPA when evaluating the Submission.³⁰

With regard to the information to be provided by the submitter when filing the submission, the CAFTA-DR Secretariat in its determination in accordance with Article 17.7.2 corresponding to the “Motagua River Pollution—GT” submission, mentions the following:

Section 6.3 of the SEM Working Procedures states: “a submission must provide sufficient information to allow the Secretariat to review the submission. To this end, a submission must identify the statute(s) or regulation(s) falling within the scope of Article 17.13 of the CAFTA-DR that the submitter asserts the Party is failing to effectively

enforce, and should, where feasible, identify the specific provision(s) thereof.”

In addition, submissions must provide a succinct account of the facts on which the submitter bases its assertion and information in support of its assertion, including any documentary evidence on which the submission may be based.³¹

Another aspect to consider is the ease or variety of existing channels for filing a submission to the corresponding secretariat. That is, which channels are offered by the secretariat for the filing of submissions? As noted, there are usually three alternatives available to the public: filing a submission by (1) e-mail, (2) postal mail, or (3) via the web through a form. Continuing to offer the possibility of postal mail is essential for any particular situation of a submitter who does not have access to the Internet.

In addition, consideration could be given to eliminating the language barriers. All secretariats offer information in Spanish and English.³² However, consideration could be given to making information available to civil society in other languages, such as Quechua and Aymara in the case of the Peru-United States TPA. These considerations in other languages should be applied, at a minimum, to the institutional web page and basic tools to understand the submission process. Ideally, these languages should also be considered for the drafting of the submission itself.

B. Who Are the Submitters?

To date, 156 submissions have been filed to the various secretariats in the region. Based on this number, Table 6 shows who the submitters have been. For the purposes of this analysis, we classified the submitters as (1) natural persons; (2) civil society organizations (nongovernmental organizations (NGOs) and neighborhood councils, among others); (3) indigenous peoples; (4) confidential submitters; (5) companies; and (6) mixed submitters (mostly NGOs and natural persons who jointly file a submission).

Organizations, mostly NGOs, are the most common submitters. Almost 70% of the submissions were filed with the participation of civil society organizations, acting alone or through joint participation with individuals. This evidences the importance of the involvement of these organizations in the process of preparing, reviewing, and filing submissions, as well as in the follow-up of submissions that have already been filed. They thus become key allies of civil society and also of the various secretariats to publicize their existence and the work they carry out through the submission process. The continued and sustained involvement of civil society organizations in the public submission process suggests that there is confidence in the process, and that

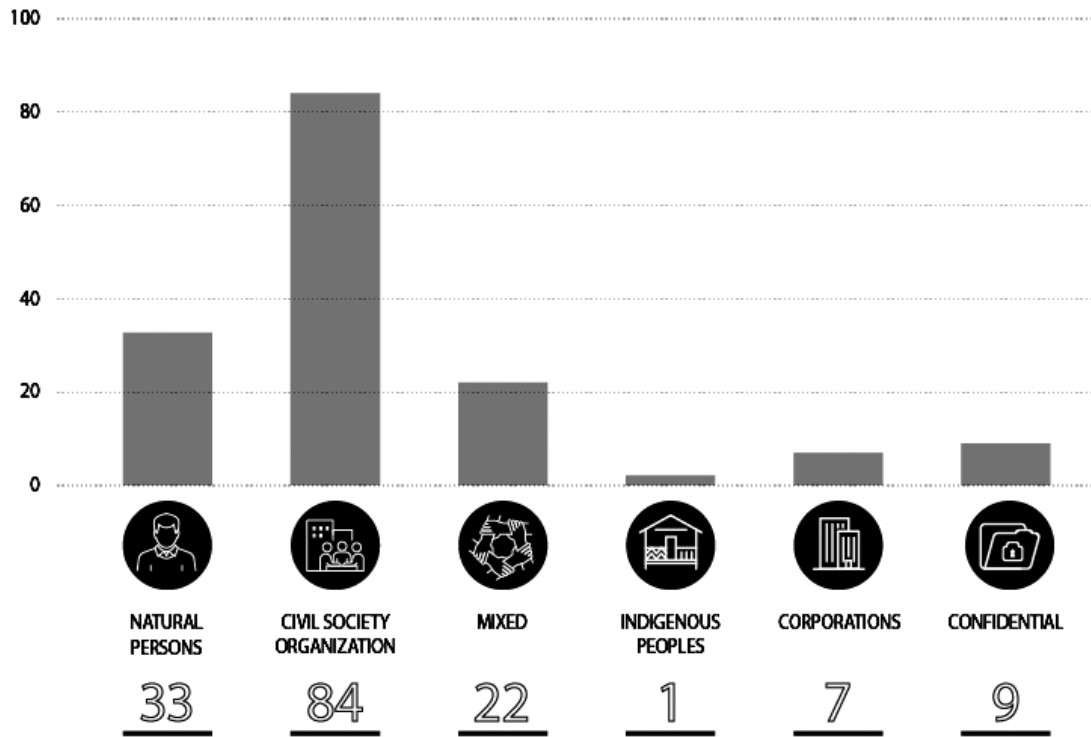
29. CEC Secretariat, *Radiation Exposure in Los Altares, Secretariat Determination Pursuant to Article 14(1)(2) of the North American Agreement on Environmental Cooperation* 3, CEC Doc. A14/SEM/19-001/07/DET_14(1)(2) (May 21, 2019).

30. Secretariat for Submissions on Environmental Enforcement Matters of the Peru-United States TPA, *supra* note 22.

31. CAFTA-DR Secretariat, *Motagua Basin GT, Determination in Accordance With Article 17.7.2 of the Free Trade Agreement Between the Dominican Republic, Central America, and the United States of America*, CAFTA-DR Doc. CAALA/20/001 (Nov. 7, 2020).

32. In the case of the CEC, it is also offered in French.

Table 6. Types of Submitters



they continue to file submissions as an alternative mechanism to address environmental concerns.

C. What Do the Submissions Address?

The submissions that have been filed to date address a wide variety of issues. However, there are a few predominant topics:

- 42 submissions have pollution as their main topic, including of water sources, air, soil, and even noise pollution. This is the topic that has resulted in the highest number of submissions.
- 38 submissions relate to the protection of wildlife species and/or habitats.
- 22 submissions were filed due to the concern of the submitters with regard to the granting of authorizations for the development of tourism, hotels, and mining projects, among others; 15 additional submissions deal with the operation of companies in these same sectors and others.
- The main topic of 8 submissions is the management of hazardous waste.

The aforementioned issues make up 72% of the total number of submissions filed. In smaller quantities, other issues such as wildlife hunting, sand extraction, and approval of standards were submitted.

D. Why Are Many of the Submissions Terminated?

From the review of the 156 submissions filed to date in all the secretariats of the region, it is possible to note that only 32 have reached the end of the process (i.e., the public release of a factual record).³³ What happened to the remaining 124 submissions? What lessons can we learn from these?

The first filter that a submission passes through is admissibility requirements. It is important to note that these requirements, in the different TPAs, are very similar, as seen below.

The initial point to note is that, to date, 16 submissions are open and, therefore, their evaluation continues.³⁴ Another four are currently in the process of preparing a factual record, after receiving the instruction to develop it from the respective Environmental Affairs Council. This leaves 113 submissions that have been terminated and have not reached the end of the procedure. Table 7 shows the reasons why these submissions were terminated.

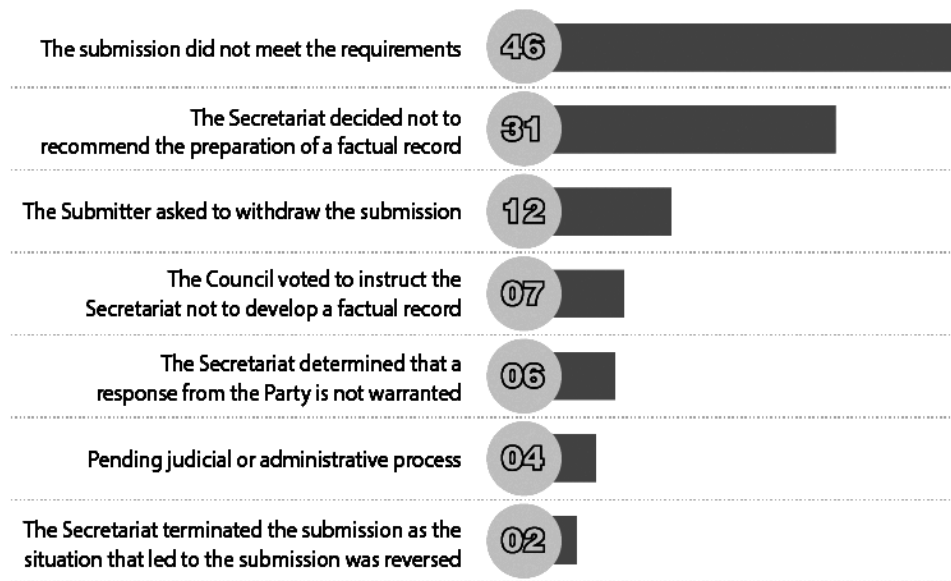
A submission must:

- Be written in Spanish or English (or French, in the case of the CEC)
- Clearly identify the submitter

33. Although 32 submissions have reached the end of the process, only 30 factual records have been published, because some submissions were merged into a single factual record.

34. See *supra* note 22.

Table 7. Causes for Which Submissions Have Been Terminated



- Offer sufficient information, through documentary evidence, to allow the secretariat to review the submission (and in the case of Peru-United States, Colombia-United States, and CEC, it must identify the environmental laws of which the failure to enforce is asserted)
- Be aimed at promoting environmental enforcement rather than at harassing industry
- Indicate that the matter has been communicated in writing to the relevant institutions of the Party and indicate the Party’s response, if any
- Be filed by a person of a Party³⁵

As shown in the table above, of the submissions terminated to date, 44% were terminated for not complying with the admissibility requirements. The four most common errors with regard to admissibility requirements are as follows:

1. Failure to clearly identify the environmental law of which the failure to enforce is asserted
2. Failure to adequately or sufficiently explain why the Party is not considered to be effectively enforcing its environmental laws
3. Failure to provide sufficient information to enable the secretariat to review the submission
4. Failure to attach evidence of prior communication to the competent authority

35. There is an explicit exception to this item: when a submission is filed by a U.S. natural person or legal entity and refers to the lack of effective enforcement of environmental laws by the United States, this submission must necessarily go to the CEC Secretariat.

It is important to highlight that although many of the submissions filed did not meet the admissibility requirements, the respective secretariat gave the submitters the opportunity to file a revised submission. In some cases, this procedure had a positive outcome. In other cases, it was a different submitter who reopened a submission that had been terminated.

It is also interesting to note that there have been nine cases in which the submitters themselves have asked to withdraw their submission; five of these cases have been before the CAFTA-DR Secretariat. It is important to underscore the willingness of the submitters to withdraw their submission since, in all of these cases, the concerns that motivated the submission were addressed and, therefore, they decided not to move forward with the public submission procedure.

E. Assessment of Criteria by the Secretariat

After assessing the admissibility requirements, the various trade agreements incorporate criteria on which the secretariat bases its assessment of whether the submission warrants a response of the Party concerned.³⁶ One of the criteria to be determined is whether the submission alleges harm to the person making the submission.

36. The criteria differ very little among all the agreements analyzed. According to Article 18.8(4) of the Peru-United States TPA, the criteria are as follows:

1. The submission is not frivolous and alleges harm to the person making the submission
2. The submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of this Chapter and the ECA, taking into account guidance regarding those goals provided by the council and the Environmental Cooperation Commission established under the ECA
3. The remedies available under the Party’s law have been pursued
4. The submission is drawn exclusively from mass media reports

With respect to harm, the CEC Secretariat in its determination in accordance with Article 24.27(2) and (3), item 13, regarding the “Loggerhead Turtle” submission, states that the “Secretariat has found that, when considering the question of harm, it must be determined whether the harm asserted is due to the alleged failure to effectively enforce the environmental law and whether the harm is related to environmental protection.”³⁷

On the other hand, the Secretariat of the Peru-United States TPA in the notification in accordance with Article 18.9(1), item 30, regarding the “Sulfur in Diesel Fuel” submission, states the following:

Sub-paragraph (a) of article 18.8.4 of the TPA does not determine that it is necessary to delimit the harm only to the applicants. Likewise, it does not establish what type of harm should be asserted. Therefore, the fact that the harm is “diffuse, general and intergenerational” does not in any way delegitimize the Submission.³⁸

III. Factual Records

As mentioned above, 156 submissions have been filed to date across all secretariats. From these submissions, 30 factual records, or 19%, have been developed and publicly released. Four other factual records are under development.

As shown in Table 8, the average time it takes to process a submission, from the time it is filed until the respective factual record is publicly released, is 4.5 years. It is important to highlight that this average time has been substantially reduced in the last three factual records that have been made public. The factual records concerning Alberta Tailings Ponds II (CEC), Agricultural Waste Burning in Sonora (CEC), and Law 30723—Roads in Border Areas (Peru-United States) have been processed, from start to finish, in less than three years.

A. Secretariat’s Recommendation for the Development of a Factual Record

The secretariat, after having admitted the submission and having determined that a response from the Party is warranted, must decide—in light of the response received or on the expiration of the deadline for receipt—whether or not to recommend the preparation of a factual record. As mentioned, of the 156 submissions filed to date in all secretariats, 30 factual records have been published corresponding to 32 submissions, while another four are in process.

Of the 120 other submissions that did not reach the publication stage of a factual record, in 30 of them the various secretariats did not recommend the preparation of a factual record. Why? The specific reasons vary accord-

ing to each submission. However, the main reason is that the response provided by the Party addresses the central issue(s) of the submission, responds to them, and clarifies them. Thus, the secretariat considers that there are no central issues to be developed in a factual record.

B. Voting and Council Instruction for the Development of a Factual Record

The secretariat, after admitting the submission, determining that the Party’s response is necessary, and informing the respective Environmental Affairs Council that it considers the development of a factual record is warranted, must await the council’s instruction to develop it. Regarding the voting and instruction of the Environmental Affairs Council, the conditions that are included in the various trade agreements in the region are listed in Table 10.

As may be noted, in the case of Peru and Colombia, at least one vote of any member of the council is required. In the case of the CAFTA-DR and Panama, at least one Party’s vote is required. Finally, in the case of the CEC, the votes of two Parties are required to instruct the secretariat to prepare a factual record. How have the different voting patterns influenced the instructions given to the secretariats?

It is important to note that, in all the instructions to the CEC Secretariat to develop a factual record, the vote in favor has been unanimous. However, it is also the only secretariat that, having recommended the development of a factual record, was instructed on six occasions not to develop one. On four of these six occasions, the instruction not to develop the factual record was taken by two-thirds of the respective council. The reasons for the votes for and against are publicly shared on its website.

It is important to note that there is a U.S. statement regarding its position when it receives from the CEC Secretariat a recommendation for the development of a factual record. This position, which has been extended to the other secretariats in the region, was established by an executive order issued in 1994. Section 2(d-1) of the aforementioned order states, “To the greatest extent practicable, pursuant to Articles 15(1) and 15(2), where the Secretariat of the Commission for Environmental Cooperation (‘Secretariat’) informs the Council that a factual record is warranted, the United States shall support the preparation of such factual record.”³⁹

In connection with the CAFTA-DR and Peru-United States secretariats, all instructions received for the development of factual records have been made solely by the United States. In no case did the instruction come from the other Party, or Parties, to the aforementioned agreements.

37. CEC Secretariat, *supra* note 28, at 14.

38. Secretariat for Submissions on Environmental Enforcement Matters of the Peru-United States TPA, *supra* note 22.

39. Exec. Order No. 12915, 59 Fed. Reg. 25775 (May 18, 1994).

Table 9. Number of Submissions and Factual Records Developed by Country*

COUNTRY	SUBMISSIONS	FACTUAL RECORDS PUBLICLY RELEASED	FACTUAL RECORDS UNDER DEVELOPMENT
Canada	35	8	0
Colombia	0	0	0
Costa Rica	2	0	0
El Salvador	6	1	0
United States	14	2	0
Guatemala	16	0	0
Honduras	7	3	0
Mexico	53	14	1
Nicaragua	2	0	0
Panama	5	0	1
Peru	4	1	1
Dominican Republic	11	1	1

* Commission for Environmental Cooperation, *Home Page*, <https://www.cec.org/> (last visited Oct. 2021); Secretariat for Submissions on Environmental Enforcement Matters of the Peru-United States TPA, *Home Page*, <https://www.saca-seem.org> (last visited Oct. 2021); CAFTA-DR Secretariat for Environmental Matters, *Home Page*, <https://www.saa-sem.org> (last visited Oct. 2021); Panama-U.S. TPA Secretariat for Submissions On Environmental Enforcement Matters, *Home Page*, <https://www.sala-seem.org> (last visited Oct. 2021).

C. Development, Presentation, and Publication of a Factual Record

Having received the instruction from one or more members of the respective Environmental Affairs Council,⁴⁰ the secretariat must prepare a draft factual record. In the case of the CEC and CAFTA-DR, the secretariat prepares a work plan that is shared with the corresponding Environmental Affairs Council, and also makes a publication so that anyone with relevant information can submit it to the secretariat.

When a draft factual record is ready, it is forwarded to the respective Environmental Affairs Council. Any Party may provide comments on the accuracy of the factual record. The deadline for the Parties to provide these comments is 45 days in all secretariats, except for the CEC, for which the deadline is 30 days. Similarly, all secretariats, with the exception of the CEC, must incorporate the comments provided by the Parties, as appropriate. The language of the USMCA differs from the others by not incorporating the “as appropriate” condition for the inclusion of comments into the final factual record.

Finally, the secretariat forwards the final factual record to the Environmental Affairs Council. In accordance with the language present in trade agreements in the region, the secretariat will make the final factual record public if instructed to do so by the council. In the case of the Peru-United States TPA and the Colombia-United States TPA, any member of the Environmental Affairs Council may

instruct the secretariat to make the final factual record public. In the case of the CAFTA-DR and the Panama-United States TPA, the vote must come from at least one of the Parties. Finally, in the case of the USMCA, the secretariat shall make the final factual record public, normally within 30 days of submitting it to the council, unless instructed not to do so by at least two members of the Environmental Affairs Council.

IV. What Happens After the Factual Record Is Publicly Released?

Once the factual record has been made public by the respective secretariat, its responsibilities are concluded. However, all agreements in the region include subsequent actions to be taken by the Environmental Affairs Council and the corresponding Environmental Cooperation Commission. As the Peru-United States TPA points out in Article 18.9(8):

The Council shall consider the final factual record in light of the objectives of this Chapter and the ECA. The Council shall, as appropriate, provide recommendations to the Environmental Cooperation Commission related to matters addressed in the factual record, including recommendations related to the further development of the Party’s mechanisms for monitoring its environmental enforcement.⁴¹

40. The number of votes required to issue a secretariat instruction varies in each of the councils, as mentioned in Section III.B.

41. Secretariat for Submissions on Environmental Enforcement Matters of the Peru-United States TPA, *supra* note 22.

Table 10. Number of Votes Required

	FACTUAL RECORD PREPARATION	FACTUAL RECORD PUBLICATION
USMCA	Two or more members of the Council (negative vote)	Two or more members of the Council
CAFTA - DR	One or more Parties	One or more Parties
Peru - U.S.	One or more members of the Council	One or more members of the Council
Panama - U.S.	One or more members of the Council	One or more Parties
Colombia - U.S.	One or more members of the Council	One or more members of the Council

The CAFTA-DR and the Peru-United States, Colombia-United States, and Panama-United States TPAs have exactly the same language in their texts with respect to the recommendations that may be provided by the respective Environmental Affairs Council based on the final factual records.⁴² In addition, the Peru-United States and Colombia-United States agreements include a section on the review of their two articles on submissions and factual records after five years: “The Council shall, after five years, review the implementation of this Article and Article 18.8 and report the results of its review, and any associated recommendations, to the Commission.”⁴³

Beyond what is established in the trade cooperation agreements of the region with respect to the recommendations that, in each case, have been given by the corresponding Environmental Affairs Council, there are some concrete actions that have been carried out when a submission has been filed, or after a factual record has been made public. These actions have been led by the submitters themselves or by some authorities of these countries. Below are some successful cases.

A. Cozumel (Mexico)

On January 17, 1996, a group of civil society organizations filed a submission to the CEC Secretariat. The submission indicated that in the project “Construction and Operation of a Public Harbor Terminal for Tourist Cruises on the Island of Cozumel, State of Quintana Roo,” there were omissions on the part of the competent authorities in the effective enforcement of current environmental laws, especially related to the environmental impact of the project’s works.

On October 25, 1997, having complied with all the stages of the process, the first factual record of the CEC Secretariat was publicly released. In this regard, the Mexican Center for Environmental Law (CEMDA), in its document “Renegociación del TLC Entre Canadá, Estados Unidos de América y los Estados Unidos Mexicanos—Comentarios y Sugerencias Ambientales” [Renegotiation of the TPA Between Canada, the United States of America, and the United Mexican States—Environmental Comments and Suggestions], states:

[A]mong many other achievements, the administration of President Ernesto Zedillo declared the Cozumel Reefs a Natural Protected Area in the summer of 1996 and published the Management Plan for the protected area in due time. Both instruments would not have come into existence if this matter had not been brought before the CEC Secretariat. Likewise, the Ecological Management Plan for the Island of Cozumel and its area of influence was successfully published.

42. In the case of the USMCA, the following is specified: “The Environment Committee shall consider the final factual record in light of the objectives of this Chapter and the ECA and may provide recommendations to the Council on whether the matter raised in the factual record could benefit from cooperative activities.”

43. Secretariat for Submissions on Environmental Enforcement Matters of the Peru-United States TPA, *supra* note 22.

A fund (trust) was created so that the Natural Protected Area would be duly preserved, as well as another trust for the ecological management of Cozumel⁴⁴

B. BC Hydro (Canada)

In April 1997, a group of civil society organizations filed a submission with the CEC Secretariat. The document alleged that the Canadian government was not effectively enforcing its environmental laws, especially the Fisheries Act, in relation to the British Columbia Hydro and Power Authority (BC Hydro), and pointed out that its actions in the construction and operation of a system of hydroelectric dams had damaged fish species and their habitats in British Columbia's rivers.

On June 11, 2000, the factual record was publicly released. Some of the facts identified were as follows:

The original construction and subsequent operations of the components of a hydroelectric system—dams, storage reservoirs, river diversions, spillways and hydroelectric turbines and generators—have significant impacts on the environment and on humans and other creatures that depend on a healthy environment. This Factual Record focuses specifically on the impact of BC Hydro hydroelectric facilities and operations on fish and fish habitat. These facilities and other operations have other impacts as well, including impacts on transportation, agriculture, industry, recreation, and consumption.⁴⁵

The discussion that led to the BC Hydro submission and the public release of the respective final factual record resulted in specific actions taken by organized civil society and also by the Canadian government.

James Mattison captures part of these efforts in his publication *Water for Power, Water for Nature: The Story of BC Hydro's Water Use Planning Program*:

The mounting public distrust of BC Hydro culminated in a 1997 citizen petition to an international institution, the secretariat of the trilateral Commission for Environmental Cooperation (CEC), alleging the failure of Canada's federal government to protect fish and fish habitat in British Columbia's rivers from ongoing and repeated environmental damage caused by hydroelectric dams. These events, along with BC Hydro's redevelopment of the Stave Falls plant, which focused on fisheries issues, were the genesis of BC Hydro's water use planning process.

. . .

The CEC submission focused the spotlight on the environmental effects of dams in British Columbia and led to other improvements in environmental enforcement related to dams. The groups that made the submission found it to be extremely valuable because of the substantive commitments made by the Canadian and BC governments, recorded in the factual record. The executive director of the BC Inter-Tribal Fisheries Commission was quoted as saying that while the water use planning process would probably have gone ahead anyway, without the factual record it would have been a "much weaker" program, and the counsel for the submitting groups said that "the filing of the submission crystallized for the government the building of public awareness; it put it in concrete terms for them".⁴⁶

C. Metales y Derivados (Mexico)

On October 23, 1998, a group of civil society organizations filed a submission with the CEC Secretariat. The submission alleged that Mexico had failed to effectively enforce its environmental law in connection with an abandoned lead smelter in Tijuana, Baja California, that posed serious threats to the health of the neighboring community, and to the environment.

In 2002, the factual record relating to this submission was publicly released. The following are some of the facts contained in the factual record:

The pollutants detected at the Metales y Derivados site, according to information provided by Mexico and developed by the Secretariat through independent experts, are antimony, arsenic and, in higher concentrations, cadmium and lead. Publicly available studies on the toxic effects of these substances have shown that exposure to these heavy metals can severely harm human health. No information has been gathered on the chemical form in which these substances are found at the site, and therefore their level of toxicity vis-à-vis known degree of hazard has not been determined.

. . .

To that effect, the Secretariat compiled information on the effective enforcement of LGEEPA [Mexico's General Law on Ecological Balance and Environmental Protection] Articles 170 and 134 with respect to Metales y Derivados: in particular, information on the Party's initiatives and actions to prevent contamination at the site, to characterize the site and to prevent dangerous repercussions on public health; information on the current conditions

44. CEMDA, RENEGOCIACIÓN DEL TLC ENTRE CANADÁ, ESTADOS UNIDOS DE AMÉRICA Y LOS ESTADOS UNIDOS MEXICANOS—COMENTARIOS Y SUGERENCIAS AMBIENTALES [RENEGOTIATION OF THE TPA BETWEEN CANADA, THE UNITED STATES OF AMERICA, AND THE UNITED MEXICAN STATES—ENVIRONMENTAL COMMENTS AND SUGGESTIONS] (2017).

45. CEC SECRETARIAT, FINAL FACTUAL RECORD FOR SUBMISSION SEM-97-001, at 31 (2000).

46. JAMES MATTISON ET AL., WWF-CANADA, WATER FOR POWER, WATER FOR NATURE: THE STORY OF BC HYDRO'S WATER USE PLANNING PROGRAM 7, 16 (2014) (citations omitted).

at the site and its vicinity; and information on the public health effects and risks of that contamination.⁴⁷

The governments of Mexico and the United States initiated, in 2004, a joint action for the cleanup of the site referred to in the submission, through the Border 2012 Program, led by the Mexican Ministry of Environment and Natural Resources and the U.S. Environmental Protection Agency. This is a collaborative program between the United States and Mexico to protect and improve the environment and the health of people living in the border region between the two countries. The cleanup was successfully completed in 2008.⁴⁸

D. *Sumidero Canyon II (Mexico)*

On November 29, 2011, the Comité Pro-Mejoras de la Ribera Cahuaré filed a submission with the CEC Secretariat. According to the document, Mexico was failing to enforce its environmental laws with respect to the operations of a limestone quarry in the Sumidero Canyon National Park, resulting in environmental damage to one of the canyon faces. The submitter further asserted that the quarry operations were impairing the air quality in the community of Ribera de Cahuaré.

In September 2015, the final factual record was made publicly available. This was then forwarded by civil society organizations to the National Human Rights Commission (CNDH) of Mexico. In April 2019, the CNDH sent recommendations to the Secretariat of Environment and Natural Resources (SEMARNAT) and the government of Chiapas. This document states the following:

In accordance with the information included in the Factual Record issued by the Commission for Environmental Cooperation, in 1995 and 2002, SEMARNAT worked on different projects for the removal of areas from the Sumidero Canyon National Park, occupied by irregular settlements and by “The Company”, or for their relocation; however, these projects did not succeed. Likewise, in 2007 CONANP [National Commission of Natural Protected Areas] published the Preliminary Justification Study to amend the Sumidero Canyon National Park Decree, in which the area occupied by “The Company” was included within the restoration and rehabilitation zone, but to date this proposal has not been implemented.

...

To you, the Secretary of the Environment and Natural Resources:

47. CEC SECRETARIAT, METALES Y DERIVADOS FINAL FACTUAL RECORD (SEM-98-007), at 8, 10 (2002).

48. U.S. ENVIRONMENTAL PROTECTION AGENCY & SECRETARIAT OF ENVIRONMENT AND NATURAL RESOURCES, BORDER 2012: U.S.-MEXICO ENVIRONMENTAL PROGRAM—STATE OF THE BORDER REGION INDICATORS REPORT 2010 (2011).

FIRST. Take the necessary steps to instruct PROFEPA [the Federal Attorney for Environmental Protection] to impose the appropriate technical corrective and urgent measures to prevent further environmental damage in the place of the events; and submit to this National Agency the evidence of compliance.

SECOND. Within a period of no more than one month after the acceptance of this Recommendation, instruct PROFEPA to issue an inspection order at the place of the events in order to verify compliance with environmental laws and to take into consideration the instruments indicated in the body of this Recommendation, and if appropriate, require SEMARNAT to revoke the Operating License of “The Company”; and submit evidence of its compliance to this National Organization.

...

FOURTH. Within a period of no more than six months after the acceptance of this Recommendation, identify the permits, licenses, resolutions, or any other administrative act in force that authorizes the development of activities inside the polygon of the Sumidero Canyon [National Park] that are not compatible with the activities permitted in National Parks; if any, instruct PROFEPA to carry out the relevant inspection visits in order to verify compliance with environmental laws and to take into consideration the instruments indicated in the body of this Recommendation, and if applicable, to promptly promote the revocation of the permits, licenses or authorizations, or the corresponding trial of harmfulness before the Federal Court of Administrative Justice, in order to modify or nullify them; and submit to this National Agency a report detailing the results of the search and the actions taken by the Secretariat to address the recommendation.⁴⁹

In 2019, the facilities of the company Cales y Morteros del Grijalva S.A., which operated in the Sumidero Canyon National Park, were definitively closed.

E. *Sea Turtles (Dominican Republic)*

The first submission received by the CAFTA-DR Secretariat was entitled “Sea Turtles.” On September 5, 2007, Humane Society International filed a submission to the secretariat asserting that the Dominican Republic was not effectively enforcing its legislation related to the protection

49. CNDH, RECOMENDACIÓN N° 12/2019—SOBRE EL INCUMPLIMIENTO DE LA CONCILIACIÓN RESPECTO A LA VIOLACIÓN AL DERECHO HUMANO A UN MEDIO AMBIENTE SANO, POR LA FALTA DE ACCIONES PARA GARANTIZAR LA PROTECCIÓN Y PRESERVACIÓN DEL PARQUE NACIONAL CAÑÓN DEL SUMIDERO Y SUS ALREDEDORES, EN AGRAVIO DE LOS HABITANTES DEL MUNICIPIO DE CHIAPA DE CORZO, ESTADO DE CHIAPAS [RECOMMENDATION N° 12/2019—ON THE FAILURE TO COMPLY WITH THE CONCILIATION REGARDING THE VIOLATION OF THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT, DUE TO THE LACK OF ACTIONS TO GUARANTEE THE PROTECTION AND PRESERVATION OF THE CAÑÓN DEL SUMIDERO NATIONAL PARK AND ITS SURROUNDINGS, TO THE DETRIMENT OF THE INHABITANTS OF THE MUNICIPALITY OF CHIAPA DE CORZO, STATE OF CHIAPAS] 40, 89-90 (2019).

of sea turtles. In this context, the submitter pointed out that, in spite of the existing ban in the Dominican Republic, sea turtles, as well as parts and products derived from them, continued to be sold.

After complying with the stages of the public submission process, the factual record for the submission was publicly released on January 1, 2011. In it, the CAFTA-DR Secretariat stated the following:

[O]n July 16, 2001 the Dominican government, through the President of the Republic, issued Decree 752-01, which establishes a total ban on the harvesting of any species of sea turtle, which took into account the need to identify the products harvested prior to the ban and the artisans who could be authorized to work on such products. Specifically, this Decree prohibits for a period of ten (10) years the capture, killing, egg collection and commercialization of sea turtle species: green turtles, hawksbills, loggerheads, leatherbacks and their by-products. This Decree has not been repealed and is currently in force.

...

The main obligation of the Dominican government is to ensure that no new products enter the market, obtained after the ban, with the sole exception of turtles that have died a natural death, which may be used under the aforementioned conditions.

On the other hand, the Decree also establishes the requirements to be met by commercial and artisanal establishments that wish to use or sell sea turtle products.⁵⁰

Based on the submission filed in September 2007, the government of the Dominican Republic initiated actions to address the situation that motivated the submission. In 2008, it submitted a document to the CAFTA-DR Secretariat in response to the submission. This document states the following:

[T]he priority for this State Secretariat, as stated in the Work Plan for the Effective Protection of Sea Turtles, is to complete the inventory of establishments that trade sea turtle by-products, parts and derivatives. We understand the importance of this, both because it is mandated by law and because it is considered the starting point for a series of actions to be carried out within the Sea Turtle Protection Plan, and we have established it as such within the regional priorities document (Road Map) that was prepared in the framework of the CAFTA-DR Regional Environmental Cooperation.

...

On the other hand, from the moment the response was sent, this State Secretariat has made progress with the implementation of the Sea Turtle Protection Plan. The Undersecretariat of Protected Areas and Biodiversity, together with the Undersecretariat of Coastal and Marine Resources are carrying out additional actions, such as:

1. Design of banners or posters with messages aimed at raising awareness among visitors about the importance of preserving endangered species, to be placed in airports and ports of the country.
2. Workshops on the regulations for environmental control, surveillance and inspection and the enforcement of administrative sanctions . . .
3. On Monday, March 31, 2008, with the support of the Jaragua Group, the United States Embassy, Humane Society International and this State Secretariat, advertisement for the protection of sea turtles was published in the media, as part of a protection campaign that we have been working on.⁵¹

F. Roads in Border Areas (Peru)

In July 2018, the Native Federation of the Madre de Dios River and Tributaries (FENAMAD) filed with the Peru-United States Secretariat a submission alleging that the Peruvian State has not effectively enforced its environmental laws in the process of drafting, deliberation, approval, and enactment of Law 30723, “Law that declares priority and national interest in the construction of roads in border areas and maintenance of truck paths in the Ucayali department.” This submission followed the process established in Articles 18.8 and 18.9 of the Peru-United States TPA. Finally, the corresponding factual record was publicly released in September 2020.

After the release of the factual record, FENAMAD initiated actions to seek the repeal of Law 30723, which had motivated the filing of the submission before the secretariat. Thus, based on some of the arguments found in the factual record, they formally requested the Congress of the Republic of Peru to prioritize the debate of a bill that would establish the regulatory conditions for the evaluation, design, construction, improvement, and implementation of road infrastructure projects, and that these would guarantee the fulfillment of the rights of indigenous peoples. Bill 1344/2016-CR, “Law for the protection of the rights of indigenous peoples and protected natural areas in the process of evaluation, design, construction, improvement, and implementation of road infrastructure projects,” includes the opinions of FENAMAD, and its decision makes references to the published factual record.

50. CAFTA-DR SECRETARIAT, FACTUAL RECORD FOR CAALA 07-001, SEA TURTLES 39-40 (2011).

51. Secretaria de Estado de Medio Ambiente y Recursos Naturales [State Secretariat for the Environment and Natural Resources], Año de la Promoción de la Salud [Year of Health Promotion] (July 29, 2008), available at https://drive.google.com/file/d/1_V0GC7pJ5bnSDJ6rXrfEwhPjyXslFVl-/view.

V. Conclusions

From the comparisons and analysis above, we can reach the following conclusions:

First, the submission processes established in the various trade agreements in the region are very similar. However, they have been implemented at different times. Each of the secretariats, located in a different country, has a different institutional framework. This variety of circumstances has allowed for different approaches to the submission process: different approaches of the Parties to the process and different dynamics of the submitters. In spite of this, we have been able to appreciate, in the analysis carried out in this Article, that there are common experiences, difficulties, strategies, and views among the secretariats.

Second, and based on the foregoing conclusion, it is clear that the relationship between the secretariats is vital. The secretariats that have been in existence for a shorter period of time can support each other and also take advantage of the experience of the more seasoned secretariats, which, in turn, can benefit from the experience of the most recent ones. The mutual relationship is an opportunity to contribute experiences and lessons learned, as well as to generate strategies for continuous improvement both in terms of management and specific knowledge.

Third, it is important to continue strengthening the functional autonomy of the secretariats. To this end, it would be advisable to provide them with an adequate, stable, and fixed budget for a prolonged period of time, which would guarantee stability for them. Likewise, the Parties should continue to support the work of the secretariat by

backing its decisions. The secretariats are the result of the trade agreements signed by the Parties, and it is, therefore, also the responsibility of all Parties that the secretariats exist, that they address submissions, and that they maintain impartiality and transparency.

Fourth, the analysis here leads to the conclusion that there are still, at present, natural persons and legal entities that trust in the public submission process to channel their concerns regarding the effective enforcement of environmental laws. Trust in the process must continue to be consolidated based on transparent actions and thoughtful, predictable, and lawful decisions. Its strength as an alternative space for dialogue beyond the national sphere is undeniable. Where else could a person go to have an international body analyze the effective enforcement of a country's domestic environmental laws?

Fifth, efforts must continue and be optimized so that civil society is aware of the submission process in all countries Party to the different trade agreements in the region. For this to take place, it is important to involve officials from the different governments so that they are cognizant of the perspectives, needs, and concerns of civil society and can channel them through the various secretariats.

Sixth, it is imperative that the deadlines established for the different stages of the submission process are met. In some processes, there are no defined deadlines for certain stages. In these cases, it is essential that the waiting time be as short as possible, so that submitters do not lose confidence in the usefulness of the process. It is also essential to keep them informed about the status of their submission and related procedures, which should be available to them through the relevant website.