

Is NAFTA's Citizen Submission on Enforcement Matters (CSEM) a forum for transnational activism and politics?¹

Inger Weibust
Assistant Professor
Norman Paterson School of International Affairs
Carleton University
Ottawa ON Canada

iweibust@ccs.carleton.ca

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Abstract

Under pressure from American environmental groups, negotiators of the North American Free Trade Agreement (NAFTA) included a mechanism by which citizens from any NAFTA country could demand an investigation of any NAFTA government’s failure to enforce its own environmental legislation. The paper tests two hypotheses on the use of this mechanism: domestic civil society and transnational civil society hypotheses. The former claims that local and national environmental groups use the CSEM as an accountability tool against their own national governments, because of a lack of access to or the unresponsiveness of national political institutions. The transnational civil society hypothesis predicts that cases are brought to CSEM by transnational NGOs (or coalitions), in order to name and shame national governments before an international audience. The paper finds that CSEM is used overwhelmingly by Canadian and Mexican NGOs against their own governments. Very little transnational activism has occurred.

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In 1994, the North American Agreement on Environmental Cooperation (NAAEC) was adopted, as a concession to American activists concerned about the environmental impacts of the North American Free Trade Agreement (NAFTA). American activists feared Mexico would become a North American pollution haven because its standards were perceived to be lower and perhaps less strenuously enforced. There was also a concern that all three NAFTA parties might weaken their environmental standards, in order to prevent capital flight, attract new investment or reduce costs for exporters. Activists sought guarantees that the US, Canada and particularly Mexico would not weaken their environmental laws and regulations. What they got was a commitment by the parties to enforce the laws already on their books, because any undertaking to prevent a race to the bottom in standards would compromise national sovereignty.

A key component of the environmental side agreement NAAEC is the Citizen Submission on Enforcement Matters (CSEM). The CSEM mechanism is intended to remedy the deficit in public participation and transparency in trade and economic integration. The CSEM allows individuals, firms or NGOs from any NAFTA member country to bring a complaint against any NAFTA signatory for a persistent failure to enforce environmental legislation. This unusual process creates the possibility for cross-border claims and transnational activism. For example, an American NGO can bring a case against the government of Mexico for failure to enforce environmental legislation in Mexico. Once a case has been submitted to CSEM, the Secretariat of the Commission for Environmental Cooperation (CEC) decides if the case merits further investigation. If yes, the Secretariat may conduct an investigation and publish a Factual Record, which outlines the facts of the case, without making any recommendations. The Factual Record is then made public. To the extent the CSEM has any power, it is through sunshine enforcement, by exposing the actions of national governments to public scrutiny.¹

Because the CSEM was unprecedented in any international trade agreement, there have been high hopes for it. In particular, some predicted that it represented a watershed for the role of civil society in global governance. The lead author of a submission against the US noted that:

[m]any had regarded the Citizen Submission Process as a potential model for accountability and governance for a new breed of international institutions - a positive response to globalization that gives citizens a voice in the often impenetrable affairs of international organizations (Wold et al., 2004, p. 416).

Going further, the NAFTA environmental side agreement, including CSEM, ...points to the constructivist possibility that NAFTA might over time alter the underlying conceptions of interests and even identities of its governments, corporations, civil society and citizens in ways that enable a new trade-environment balance to emerge in North America and offer a model to the wider world (Kirton, 2002, p. 209).

Although several legal scholars and practitioners have assessed the impact of CSEM on citizen participation (for example, Markell, 2004), there has been no effort to ascertain if civil societies show evidence of transformation through this mechanism.

Stated narrowly, the research question here is: Who has used the CSEM process since its inception in 1995 and against which countries? The broader theoretical questions pertain to the interplay between new transnational governance and politics. In the North American context, the CSEM process creates an unprecedented space for contentious politics that crosses national boundaries. However, the creation of a space for cross border or transnational contention does not necessarily mean that such contention will take place.² Do we, in fact, observe that the CSEM process constitutes a truly transnational politics, where cross-border coalitions of NGOs and transnational groups use an international body as a forum for contention?

The claim made here is that the CSEM has come to be used in ways quite different from what was originally envisioned. Because the impetus for the CSEM was American fear of Mexican-led competition in low standards, this would predict many cases being brought by major American NGOs, against the government of Mexico. However, of the sixty-four cases to date, the majority involve Canadian or Mexican NGOs and individuals bringing cases against *their own governments*. (In contrast, American NGOs have made little use of the process against their own government.) The biggest surprise is that no major American NGOs have participated in any of the 33 cases brought against Mexico, although they have participated in six (out of a total of 22) submissions against Canada.

This presents a puzzle: why would national NGOs turn to a relatively weak international panel to raise environmental issues against their national governments? In theory, national governments are more transparent and directly accountable to the public than the CSEM. Without a doubt, national institutions such as the courts are far more authoritative than the CSEM, which will, at most, investigate a case and present findings, without making recommendations or requiring any remedy.

The paper will test two hypotheses explaining the use of the CSEM: the transnational civil society hypothesis and the domestic civil society hypotheses. The transnational civil society hypothesis claims that cases are brought to CSEM by transnational NGOs (or coalitions), in order to name and shame national governments before an international audience. A transnational civil society is emerging and legitimacy is becoming an international, not national, construct. Therefore, NGOs turn to the CSEM because shaming is more effective before a larger international audience. This hypothesis will be operationalized using Keck and Sikkink's model of the **Boomerang Effect**.

In contrast to the Boomerang Effect, the domestic civil society hypothesis, **Faute de Mieux**, posits that domestic activists will turn to the transnational forum "for want of anything better." Faute de mieux claims that local and national environmental groups use the CSEM as an accountability tool against their own national governments, because of a lack of access to or the unresponsiveness of national political institutions. Where activists have access to effective domestic remedies, they will not turn to the international process. The international process will be used by domestic actors for whom a toothless international forum is better than nothing.

The argument here is that the pattern of use of the CSEM process is best explained by the domestic legal or administrative remedies which are in place in each country. The small number

of cases against the US reflects the range and power of legal remedies available to American citizens and NGOs. Specifically, American environmental law is well supplied with provisions for citizens' enforcement, which are found in almost all federal environmental statutes. Conversely, the much higher rate of use by Canadian and Mexican groups reflects limited domestic recourse on issues of enforcement and environmental law in general.

The paper has five sections. The first section describes the origins of the CSEM process. The second section describes how the CSEM process operates. The third section analyses the data on who has filed submissions under the CSEM process. The fourth section presents two competing explanations for the use of the process: Boomerang effect and Faute de Mieux. The final section presents the conclusions.

Origins of the Citizens Submission on Enforcement Matters (CSEM) within the Commission for Environmental Cooperation of North America

The side agreements to NAFTA on labour and the environment were added at the behest of the United States. There is no evidence to suggest that they were regarded as anything other than an imposition by Canada and Mexico (Alanís Ortega and González-Lutzenkirchen, 2002). During a campaign speech on October 4, 1992, Bill Clinton pledged his support for the NAFTA agreement that George Bush had negotiated, but stated that he would not sign the necessary legislation unless side agreements were concluded (Mayer, 1998, p.168). After Clinton's election, it became apparent that side agreements would be necessary to win support from a sufficient number of Congressional Democrats.

Labour and environmental groups lobbied for the inclusion of the side agreements as the price of their acquiescence to, if not support for, NAFTA. There was a significant split within environmentalist community (Audley, 1995). The larger, more professionalized NGOs were not fundamentally opposed to NAFTA but wanted changes. A coalition of large, mainstream environmental groups (the World Wildlife Fund (WWF), the National Wildlife Federation (NWF), the Environmental Defense Fund (EDF) and the Natural Resources Defense Council (NRDC) pushed for the creation of a North American Commission on the Environment (NACE) (Mayer, 1998, p. 172). Groups which were more suspicious of or vehemently opposed to NAFTA and free trade included Sierra Club, Friends of Earth and Greenpeace (Mayer, 1998, p.175).

With regard to environmental standards, environmental groups had hoped to secure guarantees against a race to the bottom in environmental standards. Following a logic of regulatory competition, environmentalists predicted that the increased trade and investment that would follow from NAFTA would exert downward pressure on standards. Because a provision of this type would limit the right of sovereign governments to set their own standards, this approach was rejected by Mexico and Canada. One of Mexico's conditions for opening negotiations for side agreements was no compromise of Mexican sovereignty (Mayer, 1998, p.168).

Environmentalists' focus shifted to the enforcement of national standards already in place. They wanted a backstop to prevent signatories from being tempted to reduce enforcement

of their environmental laws and regulations, in the face of heightened competitive pressures due to NAFTA. In March 1993, a coalition including Defenders of Wildlife, the Sierra Club, Public Citizen and other smaller groups presented the United States Trade Representative (USTR) with their shopping list for a North American Commission on the Environment. It must have powers of investigation, monitoring and enforcement and should be able to impose trade and nontrade sanctions (Mayer, 1998, p. 177).

In May 1993, the USTR received a letter from seven of the larger, more professional environmental groups: WWF, NWF, EDF, NRDC, Audubon Society, Conservation International and Defenders of Wildlife, now calling themselves the Group of Seven. The Group of Seven proposed a NACE which could initiate investigations and make recommendations on enforcement. It would not have the power to impose sanctions but if the Commission found a failure to comply with NACE recommendations, governments could initiate dispute settlement proceedings, with the possibility of imposing trade sanctions (Mayer, 1998, p. 188). This willingness to compromise garnered scorn from more radical quarters, earning them the nickname “The Shameful Seven” (Cockburn, 1993, pp. 894-5).

Enforcement mechanisms included in the Environmental Side Agreement

The final agreement fell far short of the expectations of many environmentalists. It established two processes to encourage the enforcement of environmental regulations: a state to state process, as well as the citizen initiated CSEM. In the state to state process, one party (Canada, Mexico or the US) may bring a case against another. Part V of the North American Agreement on Environmental Cooperation established formal dispute settlement proceedings to resolve state to state disputes over failures to enforce national legislation. This process provides for eventual monetary penalties and, against Mexico and the US, the possibility of trade sanctions in the event that a party to the agreement shows “a persistent pattern of failure to enforce.” (Ten Year Review and Assessment Committee [TRAC], 2004, p. 37)

According CEC Secretariat member Carla Sbert (2004), American NGOs thought that Part V would be the important mechanism, because it provided for some degree of enforcement. Although Part V has more teeth than the Citizen Submission Enforcement Mechanism, it has never been used. After 15 years, the governments have yet to establish the necessary procedural rules or create a list of arbitrators (Garver, 2008, p. 35). The Ten Year Review and Assessment Committee which studied NAAEC at the 10 year mark concluded that the process was unlikely ever to be used because the parties show no interest in it (TRAC, 2004, p. 37). They argued that Mexico opposed penalties from the very beginning and that Canada would probably also be willing to appeal. The former Director of Submissions at the Commission for Environmental Cooperation states that the parties have a tacit agreement never to use the process (Garver, 2008, p. 35).

In contrast to the state to state process, the CSEM does not allow for any recommendations, much less penalties. An individual or NGO files a submission with the Secretariat of the Commission for Environmental Cooperation (CEC), alleging a persistent failure by government to enforce an environmental regulation or law. The citizen or NGO must be resident in one of the three member states, but not necessarily the Party against which the

submission is brought. This provision creates the possibility of cross border and transnational activism.

In deciding whether or not to proceed with the submission, the CEC Secretariat takes the following four factors into account:

- Does the submission allege harm to the submitter?
- Does it advance goals of NACEC?
- Have private remedies have been pursued?
- Is submission drawn exclusively from mass media reports?

These criteria are intended to weed out frivolous cases or those intended to harass a particular industry.

Questions of interpreting the criteria have generated friction between the Secretariat and the parties. The Ten Year Review noted “[s]ome [governments] have sought to limit its application by arguing that submitters should exhaust local remedies and demonstrate direct harm before resorting to Article 14 (TRAC, 2004, p. 43).” This would impose substantial hurdles on submitters and would almost certainly rule out cross-border NGOs bringing cases. In practice, the Secretariat has not required that private remedies be exhausted (Garver, personal communication, October 4, 2004).

The Secretariat is not the only body that makes decisions about CSEM submissions. The member governments are represented on a three person Council, which can halt the process at two points: preparation of a Factual Record and release of the Factual Record (See Fig. 1 below). Based on the above criteria, the Secretariat makes a recommendation whether or not to prepare a Factual Record. The decision to prepare a Factual Record is made by the Council. If a Factual Record is prepared, the Council decides if the Factual Record should be made public. The Council makes decisions by simple majority. Thus, blocking the preparation or release of a Factual Record requires the agreement of at least two parties: the target country alone cannot prevent a Factual Record.

[Insert Fig. 1 about here]

Which countries have been the target of CSEM submissions?

Mexico accounts for the majority of the 64 cases brought between 1995 – 2008: 52%. Canada and the US account for 34% and 14% respectively. Over time, submissions against the US have declined (see below). Between 2001 and 2008, only one submission was made against the US (Coal-fired Power Plants (SEM-04-005)).

[Insert Fig. 2 about here]

Who has brought cases to date? The role of domestic actors

Although the CSEM process allows any individual or NGO resident in one of the three Parties to file submissions, in practice most cases are filed by NGOs (or individuals, in the case of Mexico) against their own governments. CEC secretariat officials indicated that, although there may be many NGOs attached to a submission, in reality the case is usually brought forward by a single NGO. Few cases represent truly collaborative efforts (Sbert and Garver, personal communication, October 4, 2004). An exception to this rule would be Coal-fired Power Plants (SEM-04-005), which appears to reflect a genuinely binational coalition, represented by EcoJustice (formerly Sierra Legal Defense Fund) (Canada) and the Waterkeeper Alliance (US).

In general, cases against Mexico have been filed by individuals or firms (35% of cases) or one or more Mexican NGOs (65% of cases). Cases against Canada have been brought by individuals (10%) and exclusively Canadian NGO coalitions (38%). Only two submissions against Canada have no participation by Canadian NGOs or individuals.³ In 52% of cases against Canada, there is foreign or transnational NGO listed among the submitters, although these groups generally do not play a leading role in the submission. The Sierra Club (US) has participated in five cases against Canada.⁴ Natural Resources Defence Council has participated in two cases.⁵ Despite its opposition to NAFTA and trade agreements in general, Greenpeace USA joined with these two American NGOs in the Ontario Power Generation (SEM-03-001) submission against Canada. The exceptionally large coalition of submitters in that case also included the Attorneys General of the states of New York, Connecticut and Rhode Island.

Within cases that have only domestic submitters, a small number of NGOs and individuals are responsible for a significant proportion of cases. In Canada, Ecojustice (formerly Sierra Legal Defense Fund) has brought a total of eight submissions, providing legal representation for the NGO coalition in all cases.⁶ Of the eight cases, seven are against Canada and one is against the US (Commission for Environmental Cooperation, 2006). In cases against Mexico, one person, Domingo Gutiérrez Mendivil, has brought six cases.⁷

Most cases against the US have been brought by domestic American NGOs, with occasional support from Canadian or Mexican NGOs. Of the nine cases, five include at least one foreign NGO. (The two cases brought by corporations both pertain to the Methanex case, which did not go to a Factual Record because it was being examined through NAFTA's Chapter 11 process for investor protections.) Somewhat surprisingly, the Group of Seven major environmental NGOs that were most supportive of the creation of a Commission for Environmental Cooperation have made few CSEM submissions. Of the Group of Seven, two participated in the Logging Rider submission against the US. The NGO coalition in this case also included Friends of Earth (US), Sierra Club (US) and the Wilderness Society. What is

more, the American NGOs who have used the process include more radical NGOs that were vehemently opposed to NAFTA, such as Friends of Earth.⁸

The role of foreign or transnational NGOs

While foreign and transnational NGOs have filed submissions against Canada and the US, they have played virtually no role in the 33 submissions filed against Mexico. American NGOs have participated in only two submissions against Mexico.⁹ In both cases, the American environmental NGOs were based in California, not Washington DC. It is notable that none of the major American environmental NGOs has ever participated in a CSEM submission against Mexico. Furthermore, only one transnational NGO, Greenpeace Mexico, has ever participated in a submission against Mexico (Coronado Islands SEM-05-002).

While binational coalitions in submissions are rare, trinational coalitions are even less common. Only two submissions have been filed by trinational coalitions, both in cases against the US. The only truly tri-national case is Migratory Birds (SEM-99-002), alleging the US government failed to effectively enforce Section 703 of the Migratory Bird Treaty Act (MBTA), 16 U.S.C. §§703-712, which prohibits the killing of migratory birds without a permit. This case had nine submitters, three from each country (Garver, personal communication, October 4, 2004). In the Logging Rider case (SEM 95-002) case, Canadian and Mexican environmental and anti-NAFTA groups were among the submitters but they were greatly outnumbered by the 24 American environmental groups in that coalition.

What explains the pattern of use? Boomerang Effect or Faute de Mieux?

A leading model of NGO behaviour at the international level is Keck and Sikkink's boomerang model. Faced with state repression at home, domestic NGO's sidestep their national government and make common cause with transnational NGOs in order to promote a norm. Sociologist Sidney Tarrow claims that at its heart, the Boomerang Effect involves *bilateral*, not multilateral relations across borders. Domestic actors are "blocked" by their own domestic states from expressing their views. He characterizes Boomerang model as one of information politics, relying upon "external allies who are prepared to diffuse information about abuses to sympathetic governments and public opinion abroad, which then boomerangs into pressure on repressive states" (Tarrow, 2005, p. 158).

[Insert Figure 3 about here]

The model was originally developed to explain human rights cases. It may not be highly applicable to environmental causes, although it has been applied to transnational activist coalitions in environmental cases.¹⁰ Among the significant differences, the contested norms in the human rights cases can be very distinct: votes for women, end to footbinding. Disputes about the environment rarely take the form of authorities claiming that the environment has no value. The disputes are questions of degree and thus are not reducible to the diffusion of a simple norm.

Secondly, in the cases under study here, the governments cannot be considered repressive. Government institutions may be regarded as unresponsive but this is not because the state itself is hostile to the norm or the state is undemocratic. A distinction needs to be made

between governments that are fundamentally hostile to the norm and institutions which are unresponsive, particularly to environmental groups. This is a function of preexisting rules and institutions.

With regard to cross national coalition building or activism by transnational environmental NGOs, the Boomerang model is thought to have particular relevance in developing countries. The access of domestic NGOs to their national governments is blocked, perhaps because the regime is repressive and undemocratic, or merely unresponsive. According to the model, Southern NGOs build bridges to Northern NGOs, who then lobby on behalf of the cause of the Southern NGO. This pressure from Northern NGOs is then predicted to have an impact on the behaviour of the target Southern state, because of the state's concerns about its reputation internationally.

Thirteen years of experience with the CSEM process finds no evidence of this dynamic. Although the 33 cases against Mexico account for 52% of all cases, foreign or transnational NGOs participated in only two of these. None of the major American environmental NGOs has participated in a CSEM submission against Mexico. This does not rule out the possibility of informal help from Northern NGOs but it cannot be characterized as a robust process of transnational activism or cross-border coalition building. While Mexican environmental activists may consider themselves blocked from domestic channels, such as the courts, they are using the CSEM process on their own, to influence the Mexican government.

The absence of transnational coalitions in submissions against Mexico is surprising for several reasons. First, as noted early, the demand for the CSEM originated entirely from American environmental groups concerned about Mexican enforcement. American NGOs have worked with Canadian NGOs on submissions against both the US and Canada countries but no such cooperation has emerged in cases against Mexico. Secondly, because the environmental movement in Mexico is far less developed and less sophisticated than the American environmental movement, it would stand to benefit from the expertise and professionalism of the American movement. Thus there would seem to be clear benefits to Mexican NGOs from cooperating with American groups. Lastly, NGOs from all three countries appeared to have built extensive transnational linkages while opposing the NAFTA negotiations and also those opposing the Free Trade Area of the Americas. This has not, however, translated into transnational coalitions for enforcement of Mexican environmental legislation, nor subsequent cooperation on labour issues (Bowles et al. 2006).

Faute de Mieux: Explaining CSEM use by reference to domestic remedies

If we find no evidence of transnational contention in use of the CSEM process, what explains the use of this process? Why do domestic groups turn to an international process, and a very weak one at that, to fight domestic political fights? The Faute de Mieux model hypothesizes that recourse to CSEM is determined by the availability of domestic remedies. Where environmental NGOs have access to domestic remedies to prevent environmental harm, and are able to use those successfully, they will not use CSEM. Conversely, where environmental groups have little recourse, or have had little success with the remedies available to them, they will make submissions to CSEM.

Domestic remedies in the US

It is evident that the CSEM process is used far less often against the United States, than against the other two parties to the agreement. One possible explanation is that failure to enforce is less of a problem in the US. However, the most common explanation offered by American environmental lawyers is that American citizens and NGOs have access to a much wider and more powerful range of remedies through domestic law. This view is echoed by Randy Christensen, a Canadian environmental lawyer who has participated in several CSEM submissions and written extensively on NAFTA and the environment (Christensen 2004, 171).

Americans have the right to bring citizen suits, both against individual polluters for violating regulations and legislation, as well as against the federal government (and some state governments) for failure to enforce legislation. Those with standing to bring suits include individuals, corporations, associations, and governments. Citizen suits provisions originated in the Clean Air Act of 1970. These rights are granted explicitly in most American environmental statutes passed since 1970.¹¹ The statutes differ somewhat in the relief that can be obtained but they generally provide citizens with an action for prospective injunctive relief (that is, the court can order the violators to stop). The statutes generally do not authorize compensation (Breggin and van Heuvelen, 1992). The burden of proof in these cases is quite low : “[i]n most cases, citizens need only show primarily that the law was violated, not that there was fault or causation linked to actual or threatened harm (Casey-Lefkowitz et al., 1996, p. 9).” One of the few limitations on citizens’ suits is that a suit may not proceed if the government has already initiated legal proceedings (Breggin and van Heuvelen, 1992).

Some American scholars have attempted to determine what factors affect the choice NGOs make between citizen enforcement through US courts and the NAFTA CSEM. Professors Tom Tyler and David Markell contacted environmental activists and lawyers who had participated in citizen suits between 2004 and 2006, as well as all groups that had participated in CSEM submissions. A total of 30 individuals responded to their web survey, of whom two had made CSEM submissions. This is a fairly low response rate but this is the most systematic survey that has been attempted of those American activists and lawyers most likely to turn to the CSEM procedure (Tyler and Markell 2008, p. 16).

When these respondents were asked about their preferred response to environmental violations by a single party (such as a firm), they indicated they preferred to file a citizen suit against the violator, informally contact the government or to publicly shame the violator. When asked about their preferred response to a widespread pattern of violations (by several parties in several locations), the respondents’ first preference was public shaming, closely followed by citizen lawsuit against the violators and citizen lawsuit against the government. In both cases, the respondents indicated they were least likely to pursue a CSEM submission, of the eleven possible options they were presented with. Thus, even though the CSEM process offers the possibility of public censure and sunshine enforcement, those surveyed preferred public shaming, which offers no guarantee of compliance whatsoever (Tyler and Markell 2008, p. 34).

It is somewhat surprising to find lawyers preferring the court of public opinion to a formal, quasi-judicial process.

In 2004, John Knox, a Pennsylvania State University law professor, conducted a less systematic assessment by emailing twenty five US environmental lawyers who shared a scholarly or practical interest in the CSEM. Knox was concerned that the low level of US participation (only 9 cases by 2004) would undermine the support of Canada and Mexico for the mechanism. He asked the group why they thought the US participation was so low.¹² The consensus was that the CSEM was markedly inferior to existing domestic channels, both legal and administrative. Mary Kelley of Environmental Defense wrote “I completely agree that the process provides little, if any, benefit for U.S. NGOs as compared to the binding effect of domestic remedies. It is only in an unusual case (often where publicity is the main goal or some fluke that prevents a clear U.S. remedy) that the CEC submissions process is useful.” Several respondents indicated that, in terms of a cost benefit analysis, a CSEM submission was simply not a good use of scarce resources.

One respondent suggested that the outcome of the only US submission to result in a Factual Record (**Migratory Birds** / SEM-99-002) was considered highly unsatisfactory and may have discouraged US NGOs from using the process again (Wold et al., 2004). The Council (consisting of one representative from each government) overrode the recommendations of the Secretariat of the Commission on Environmental Cooperation with regard to the preparation of the Factual Record. The resulting Factual Record interpreted the complaint much more narrowly than the NGOs bringing the case had hoped for. Geoff Garver, who was Director of Submissions for the CEC at that time, has subsequently concurred with this assessment (Garver 2008, p. 36).

In light of the extensive avenues Americans have for citizen enforcement, the low rate of CSEM submissions against the US, by American NGOs, is not surprising. The remedies offered by American environmental statutes are very powerful and groups have enjoyed some measure of success in filing such suits. The results of Tyler and Markell’s survey are consistent with the observed low rate of use. If their conclusions are correct, that those who have filed suits in the past prefer public censure to the CSEM, then it is not surprising that there has only been one American submission since 2000. It does, however, confirm that contentious politics in this area is overwhelmingly about domestic groups, seeking to pressure their own governments. If they chose to do so by shaming, the preferred avenue for shaming is the national media, not an international forum.

Domestic remedies in Canada

In an authoritative overview of Canadian environmental practice, lawyer David R. Boyd identified lack of meaningful public participation, including enforcement as one of the fundamental flaws of Canadian environmental law and policy (Boyd, 2003, p. 245). He has surveyed the possibilities for and use of citizen enforcement provisions under Canadian law. There are two possible avenues for citizen action on enforcement under Canadian environmental law: private prosecution and citizen suits. Under private prosecutions, citizens may bring suit against a person or firm breaking the law. The process is subject to supervision by the Attorney General of the province in question. The Attorney General can allow the prosecution to take

place or can take it over. If the Attorney General chooses to take over the private prosecution, he or she can proceed with the case or drop the charges.

Citizen enforcement suits are rare and relatively new in Canadian environmental law. The first provision is found in the federal *Canadian Environmental Protection Act* 1999, which authorized the public to bring suit if the government is unable or unwilling to enforce the law (Boyd, 2003, p. 189). Despite the title, this statute has a relatively narrow ambit, applying only to the regulation of toxic substances. Furthermore, the citizen enforcement provisions in the act are quite circumscribed (Valiante 2002b).

The precedent from CEPA has not been incorporated into subsequent federal environmental legislation. Bill 65, federal legislation on endangered species introduced in 1996, contained limited provisions for citizen enforcement, but it died on the order paper in 1997. In 2002, the federal government passed the *Species at Risk Act*, which contained no provisions for citizen enforcement. Mary Illical and Kathryn Harrison have documented how Canadian businesses groups fought successfully against proposed citizen suit provisions in the federal Species at Risk legislation, by pointing to what they saw as the harmful consequences of citizen suits under the US Endangered Species Act (Illical and Harrison 2007, p. 377).

At the provincial level, only Ontario, Quebec, the Yukon and Northwest Territories have any citizen enforcement provisions in their environmental statutes (Boyd, 2003, p. 390). Boyd argues that determined opposition of business, raising the spectre of frivolous lawsuits, has limited the scope of these mechanisms in Canada. Illical and Harrison state that provincial governments have also generally been very wary of citizen suits (Illical and Harrison 2007, p. 377).

Marcia Valiante (2002a), who practices and teaches environmental law in Canada, notes that Canadian citizen enforcement suits face much higher hurdles to get an action into court and reach a decision than corresponding American measures do (p. 16). The first step is to file a complaint with the Minister of the Environment for an investigation of an alleged offence. For the case to proceed, the Minister must either have failed to conduct an investigation or the Minister's response to the investigation must have been 'unreasonable.' The suit also has to allege significant environmental harm. Valiante found that in the first six years of its existence, the citizens' enforcement mechanism of the Ontario's Environmental Bill of Rights had never been successfully used (Valiante, 2002a, p. 16).

The CSEM is not supposed to be the first stop for NGOs seeking remedies. Groups are supposed to have at least tried, if not exhausted, domestic avenues of redress. In practice, the Secretariat of the CEC has accepted the argument that certain avenues would be futile. CSEM takes feasibility into account as well as the history of remedies. In an interview, Geoff Garver, Director of the CSEM noted that private prosecutions in Canada are taken over by the Crown and the results have not been satisfying (Garver, personal communication, October 4, 2004). Thus the CEC Secretariat has been amenable to Canadian submissions.

Canadian submissions have been the most successful in leading to Factual Records. Of the thirteen Factual Records that have been made public, Canada and Mexico have been the

target of six each. However, there have been 22 CSEM submissions against Canada, compared to 33 against Mexico. Thus Canadian submissions have been relative successfully, leading to the release of a Factual Record 27% of the time, compared to 18% for Mexican submissions and 11% for US submissions. Thus, given the very limited avenues for citizen enforcement under Canadian federal and provincial law, as well as the relative success of Canadian CSEM submissions, it is not surprising that Canadian groups have made and continue to make CSEM submissions.

Domestic remedies in Mexico

On paper, Mexican citizens would seem to have opportunities for activism on enforcement matters. Citizens have access to the *denuncia* process, as well as the *amparo* process. Despite these options, Mexican groups and individuals remain the heaviest users of the CSEM process. In an email exchange about CSEM, Mary Kelly, a environmental lawyer who was worked on Mexican border issues, judged these Mexican remedies inadequate. In her opinion, “remedies in Mexico are much less satisfactory [than in the US]. There is the *denuncia* process and in some limited cases, an *amparo* procedure in court. But, the processes are not necessarily, should we say, as reliable as U.S. citizen suits or even appeals of administrative decisions. The CEC presents a good option in many instances, as much for the "elevation" effect, as for the non-binding remedy.”¹³

The *denuncia* is a citizens’ complaint process, granting the right to lodge a complaint with the Environmental Attorney General’s Office (PROFEPA) under the General Law on Ecological Equilibrium and Environmental Protection. Citizens may file for any incident, act, or omission that falls within the jurisdiction of the Federal Government and produces an ecological imbalance or environmental damage, or which violates any environmental law provisions (Environmental Law Institute [ELI], 1998, p. 10).

Upon receiving a complaint, the Mexican government is obliged to investigate and respond to the citizens’ claim. It is obliged to inform the petitioner of results of the investigation, and to do so within specific time limits (ELI). Similar provisions exist in Mexican state environmental laws.

The *amparo* process, a legal remedy originating in the 19th century, has been described thus:

Its purpose is to protect persons from any official act (broadly construed) which causes harm to a person's legal interests and which is deemed to violate the rights enshrined in the Constitution. *Amparo* proceedings seek to invalidate the act in question or to render it without effect on the grounds of unconstitutionality or illegality in the specific circumstances in which it occurred. (Interamerican Commission on Human Rights).

Environmental economist Tom Tietenberg reviewed mechanisms for private environmental enforcement in Latin America and concluded that the requirements for standing in Mexico’s *amparo* process were very restrictive. He stated that:

[p]rivate enforcers must demonstrate to the court, not only a legal interest in the wrong being adjudicated, but also personal and direct causation (*agravio personal y directo*) between the allegedly illegal act and the resulting harm. In practice this tends to be a difficult condition to meet and it has eliminated class action proceedings (Tietenberg 1996, p. 17)

These requirements for standing are far more restrictive than those for a CSEM submission, which does not require the submitter to have been directly harmed.

A closer look at the Cozumel submission (SEM-96-001), to block the construction of a pier and mega-project, sheds light on why Mexican groups find domestic remedies insufficient and turn to the CSEM. A coalition of three local NGOs argued that, although an Environmental Impact Assessment had been carried out, it was incorrect because it only assessed the pier, without the construction on land associated with it (Alanís Ortega 2002, p. 184). In 1995, the group had filed a *denuncia* with PROFEPA, which subsequently declared that the project was legal (Bolinger 1997, 1115). Gustavo Alanís Ortega, a Mexican law professor and environmental lawyer, concluded that:

[a]fter this response, the group had only three options. The first was to submit a legal recourse before PROFEPA arguing that it was wrong in its decision...However, this route was not taken because although such legal recourse is contemplated in Mexico's environmental law, in practice the authority tends to confirm its previous resolution (Alanís Ortega 2002, p. 184).

Furthermore, Alanís Ortega stated that, while the group could have turned to the *amparo* process, a judge would almost certainly have ruled that the NGOs lacked standing, because they would be unable to prove personal harm. Thus, he concludes "the third, and only promising, option" was to use the CSEM (Alanís Ortega 2002, p. 184). Although the pier was constructed, observers consider that the Cozumel Factual Record was instrumental in stopping the construction of the megaproject (with hotel, golf course, shopping center, spa etc) and the declaration of a Natural Protected Area for the Cozumel Reefs (Alanís Ortega 2005).

In their assessment of the Commission for Environmental Cooperation (CEC), the Ten Year Review and Assessment Committee (TRAC) concluded that the CEC played a much more important role for Mexico than the other parties, because the Mexican environmental movement is relatively undeveloped compared to its American and Canadian counterparts. TRAC claimed that the CEC has played a role in fostering NGO participation and developing Mexican environmental policy (TRAC 2004, p. 39).

Although the CSEM process cannot lead to any penalties, Mexican NGOs and individuals have made 33 submissions since 2004, resulting in six Factual Records being released to the public. Mexico law provides for citizen enforcement but there are barriers to their use. Furthermore, NGOs may judge that they have little chance of success with the *denuncia* and *amparo* processes. Thus for Mexican environmental activists, the CSEM offers the possibility of publicizing the Mexican government's shortcomings, to a domestic audience.

Conclusions

The observed pattern of CSEM use is consistent with the domestic civil society hypothesis. Where domestic remedies are unavailable or difficult to use, domestic NGOs use the CSEM process in order to put pressure on their own governments. The availability of robust domestic legal remedies explains why American environmental NGOs have made so little use of the process against the American government. The fact that American ENGOs have made even less use of the process against the Mexican government is also consistent with this hypothesis, which sees politics as being constituted along national lines, with groups appealing to their national governments and domestic policy audiences.

There is weak support for the transnational civil society hypothesis in the existence of cross-border coalitions and the participation of transnational NGOs (such as Friends of Earth) in cases brought against Canada, and to a lesser extent, the US. Even here however, cases are primarily being brought by domestic groups, with some support from cross-border partners. The Boomerang Effect would predict that cross-border coalitions and transnational NGOs would be most active in the less developed partner, Mexico. There is strikingly little evidence that this is occurring. The use of the CSEM process against Mexico is the most domestically focused of the three member states, with the lowest participation by foreign and transnational NGOs.

Thus while the NAFTA environmental side agreement created unique possibilities for civil society groups to make claims across borders and to form transnational coalitions, those possibilities have not yet been realized. Although the citizen enforcement mechanism was created at the behest of US environmental groups, as a check on Mexico, no national NGO has participated in a submission against Mexico. There is remarkably little participation by any foreign or transnational (e.g. Greenpeace Mexico) in the cases brought against Mexico. Canada is the only country that has been the target of submissions (two) brought by coalitions of foreign groups acting without any domestic partners. Thus far, citizen enforcement through NAFTA has been a domestic story. Cases are brought by domestic activists, against their own governments, because of the absence of or lack of success with domestic avenues for recourse.

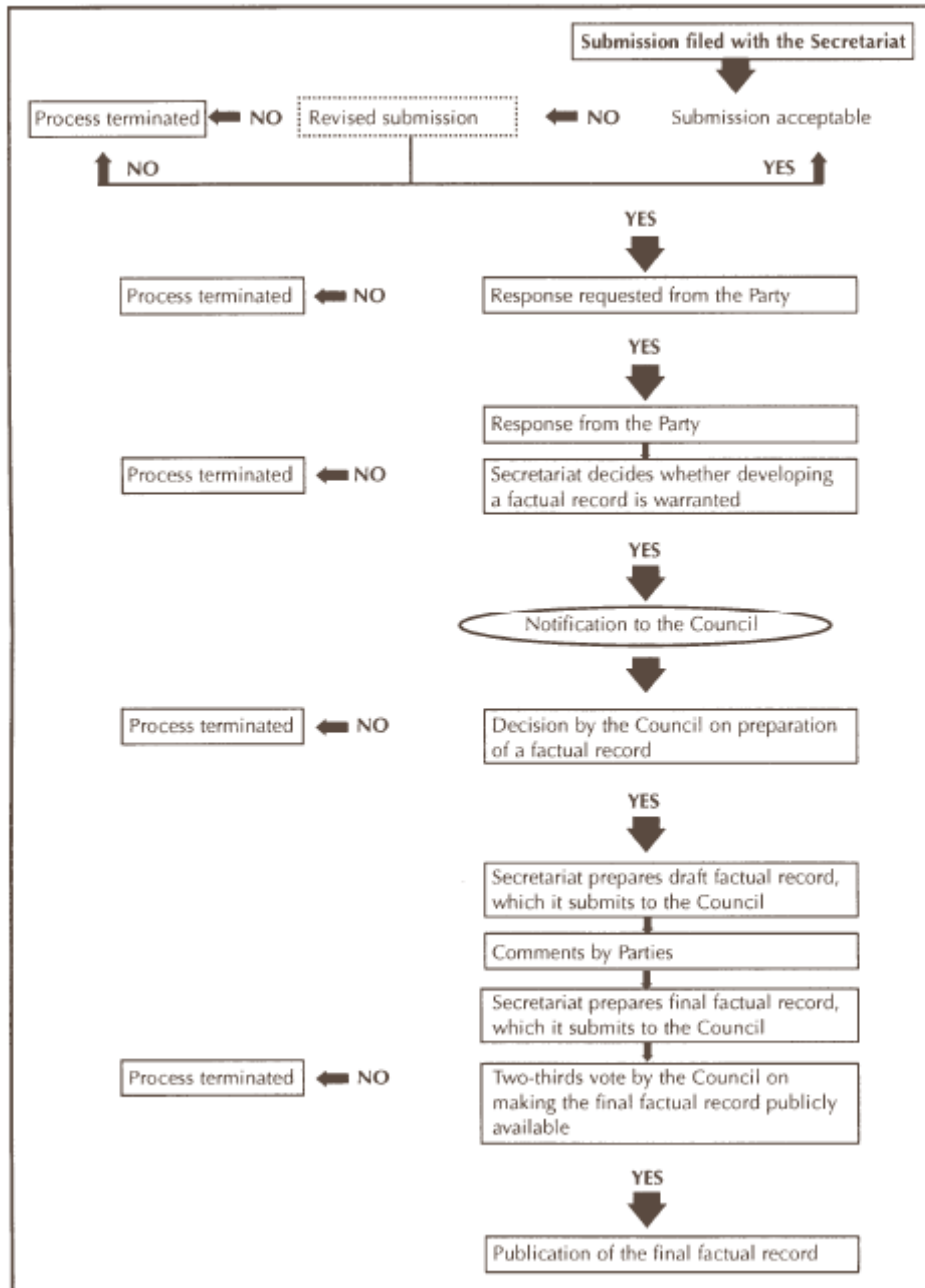
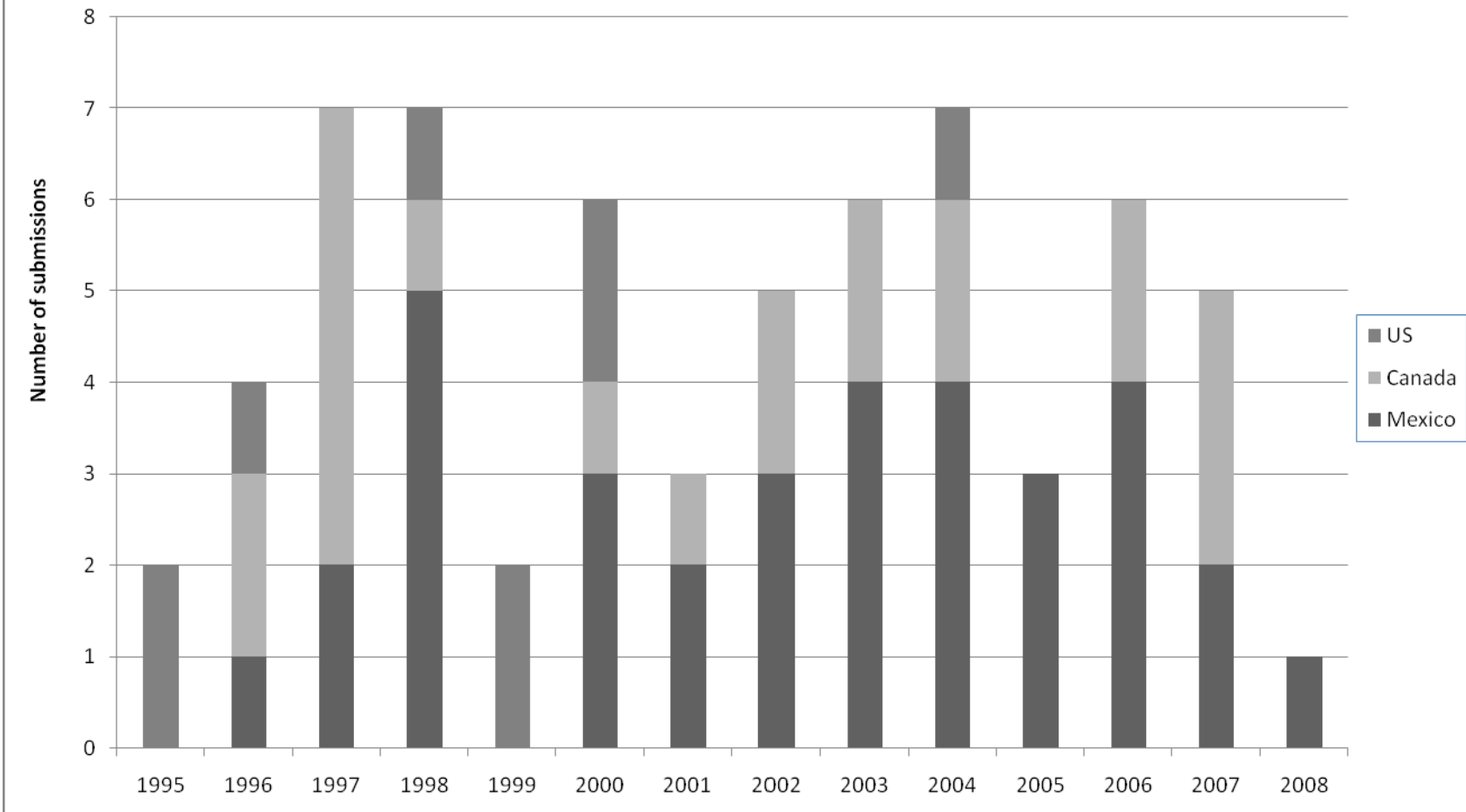


Fig. 1. The Process for the Citizen Submission Enforcement Mechanism (CSEM) under Articles 14 and 15 of the North American Agreement on Environmental Cooperation
 *Source: CEC. (2000). *Bringing the Facts to Light*, p. 9.

Fig. 2 CSEM Submissions by Year and Country
64 Cases 1995 - 2008



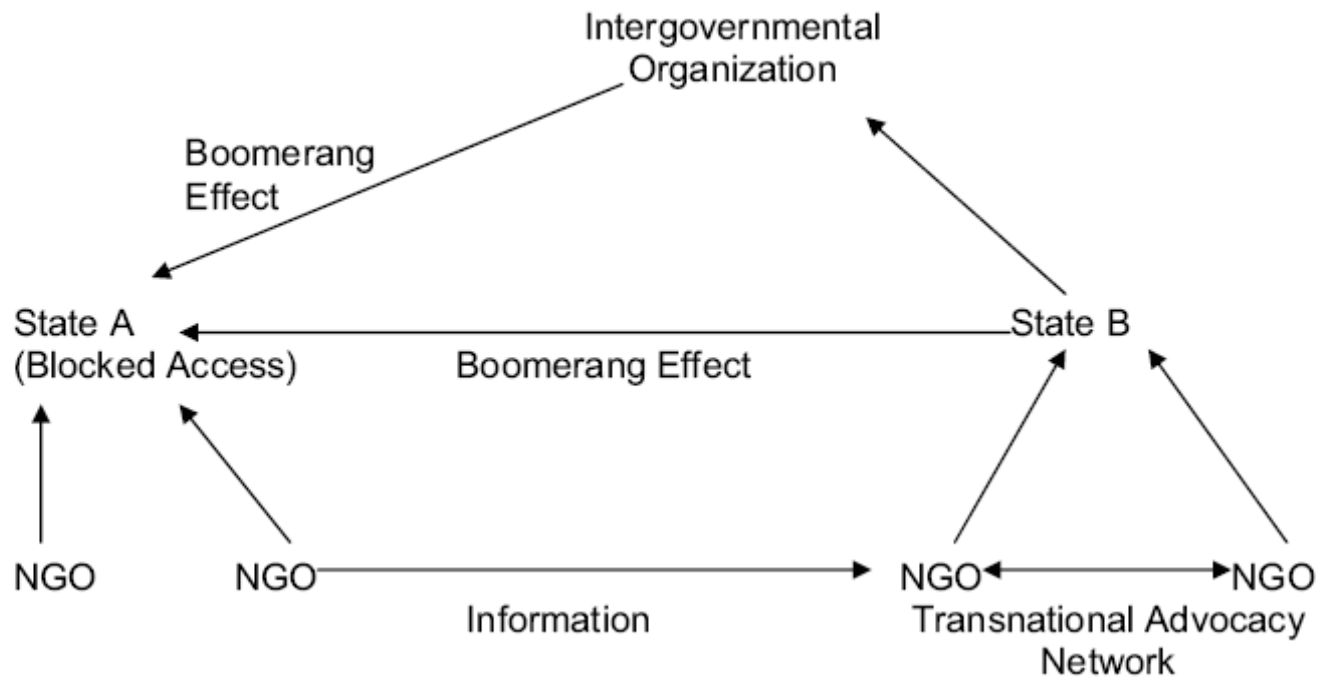


Fig. 3. Boomerang Effect.

*Source: Keck and Sikkink, (1998), p.13.

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¹ Because the focus of this paper is the *pattern of submissions* made, not the *outcomes* of the process, the paper will not distinguish between those cases resulting in Factual Records and those that do not.

² In this paper, 'transnational' will refer to coalitions or NGOs with representation from more than one country. Thus, transnational NGOs are those international NGOs, like Greenpeace or Friends of Earth, that have affiliates in several countries. In contrast, 'cross-border' contention pertains to groups from one country making claims against the government of a different country, such as a Mexican and American animal welfare groups submitting a claim against Canada, without any support from Canadian groups.

³ Seal Hunting (SEM-07-003), St. Clair River (SEM-07-004).

⁴ BC Hydro (SEM-97-001), Ontario Power Generation (SEM-03-001), Ontario Logging (SEM-02-001), Ontario Logging II (SEM-04-006), Species at Risk (SEM-06-005).

⁵ BC Logging (SEM-00-004) and Ontario Power Generation (SEM-03-001).

⁶ BC Hydro (SEM-97-001), BC Mining (SEM-98-004), BC Logging (SEM-00-004) Ontario Logging (SEM-02-001), Pulp and Paper (SEM-02-003), Coal-fired Power Plants (SEM-04-005), Ontario Logging II (SEM-04-006), Species at Risk (SEM-06-005).

⁷ Molymex I (SEM-00-001), Molymex II (SEM-00-005), Cytrar I (SEM-98-005), Cytrar II (SEM-01-001), Cytrar III (SEM-03-006), Environmental Pollution in Hermosillo I (SEM-04-002), Environmental Pollution in Hermosillo II (SEM-05-003).

⁸ Great Lakes (SEM-98-003).

⁹ Metales y Derivados (SEM 98-007), Coronado Islands (SEM-05-002).

¹⁰ One application of the boomerang model to an environmental case is Kathryn Hochstetler. (2002). After the Boomerang: Environmental Movements and Politics in the La Plata River Basin. *Global Environmental Politics* 2(4).

¹¹ Clean Air Act, 42 U.S.C. Section 7604; Federal Water Pollution Control Act, 33 U.S.C. Section 1365; Marine Protection, Research and Sanctuaries Act (Ocean Dumping Act), 33 U.S.C. Section 1415(g); Noise Control Act, 42 U.S.C. 491 1; Endangered Species Act, 16 U.S.C. Section 1540(g); Safe Drinking Water Act, 42 U.S.C. Section 300j-8; Solid Waste Disposal Act (as amended by the Resource Conservation and Recovery Act), 42 U.S.C. Section 6972; Toxic Substances Control Act, 15 U.S.C. Section 2619; Surface Mining Control and Reclamation Act, 30 U.S.C. Section 1270; Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. Section 9659; Emergency Planning and Community Right to Know Act, 42 U.S.C. Section 11046.

¹² Thanks to Geoff Garver, formerly of the Commission on Environmental Cooperation for sharing this email exchange.

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