

COMMENTS

BITING WITHOUT TEETH: THE CITIZEN SUBMISSION
PROCESS AND ENVIRONMENTAL PROTECTIONBRADLEY N. LEWIS[†]

The Dominican Republic-Central American-United States Free Trade Agreement (CAFTA-DR),¹ recently ratified by the U.S. Congress² and signed by the President,³ has been a controversial piece of the Bush administration's economic policy. The treaty is principally aimed at expanding the market for U.S. business opportunities within the region and facilitating economic development in Central America and the Dominican Republic,⁴ but its critics⁵ charge that its environ-

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¹ Dominican Republic-Central America-United States Free Trade Agreement, U.S.-Costa Rica-Dom. Rep.-El Sal.-Guat.-Hond.-Nicar., Jan. 28, 2004, 43 I.L.M. 514 (draft text) [hereinafter CAFTA-DR]. The most recent text of the Agreement, signed by the seven signatories on August 5, 2004, and to which this Comment refers, is available at http://ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html.

² See Dominican Republic-Central America-United States Free Trade Agreement Implementation Act, S. 1307, 109th Cong. § 101 (2005) (enacted) (expressing Senate approval of CAFTA-DR); Dominican Republic-Central America-United States Free Trade Agreement Implementation Act, H.R. 3045, 109th Cong. § 101 (2005) (enacted) (expressing House approval of CAFTA-DR). CAFTA-DR was negotiated and ratified under the "fast track" authority granted to the President in the Bipartisan Trade Promotion Authority Act of 2002. Pub. L. No. 107-210, div. B, tit. XXI, §§ 2101-2113, 116 Stat. 933 (codified at 19 U.S.C. §§ 3801-3813 (Supp. II 2002)); see *infra* note 130 (explaining fast track legislation).

³ Press Release, White House, President Signs CAFTA-DR (Aug. 2, 2005), available at <http://www.whitehouse.gov/news/releases/2005/08/20050802-2.html>.

⁴ See CAFTA-DR, *supra* note 1, pmbl. (identifying these among the goals of the treaty); Press Release, White House, *supra* note 3 (same).

mental chapter⁶ is toothless—that the citizen submission process⁷ lacks sufficient standards and enforcement mechanisms to avoid derogation by the treaty’s member states in the area of environmental protection.⁸ This Comment suggests that such despair is premature.

⁵ See, e.g., Sierra Club, CAFTA’s Impact on Central America’s Environment, http://www.sierraclub.org/trade/cafta/cafta_centralamerica.asp (last visited Mar. 23, 2007) (focusing on the lack of binding authority to enforce CAFTA’s “environmentally-friendly language”). Some authors also claim that the North American Agreement on Environmental Cooperation (NAAEC), the Environmental Side Agreement to the North American Free Trade Agreement (NAFTA), which provides similar dispute resolution structures to those in CAFTA-DR, compare CAFTA-DR, *supra* note 1, arts. 17.7-.8 & 20 with North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., arts. 14, 15 & pt. 5, Sept. 8-14, 1993, 32 I.L.M. 1480 [hereinafter NAAEC] (authorizing complaints to the Secretariat that a party is not enforcing its environmental laws and establishing dispute settlement procedures), includes inadequate protections for environmental and labor interests. See, e.g., Paul Stanton Kibel, *The Paper Tiger Awakens: North American Environmental Law After the Cozumel Reef Case*, 39 COLUM. J. TRANSNAT’L L. 395, 479 (2001) (proposing that North American environmental law be enforced on par with North American trade law). But see Kal Raustiala, *The Political Implications of the Enforcement Provisions of the NAFTA Environmental Side Agreement: The CFC as a Model for Future Accords*, 25 ENVTL. L. 31, 56 (1995) (arguing that the use of NAAEC-type provisions can actually reduce environmental regulation). CAFTA-DR, similar to NAFTA, arguably provides less protection to labor interests than to environmental interests. See CAFTA-DR, *supra* note 1, art. 16 (failing to provide an analog to the environmental submission procedure for labor interests); North American Agreement on Labor Cooperation, U.S.-Can.-Mex., Sept. 8-14, 1993, 32 I.L.M. 1499 (same).

⁶ See CAFTA-DR, *supra* note 1, art. 17 (affirming the importance of environmental protections and establishing enforcement processes).

⁷ See *infra* Part I.C.2 (describing the citizen submission process).

⁸ The United States, see *supra* notes 2-3, the Dominican Republic, El Salvador, Honduras, Guatemala, and Nicaragua have ratified the treaty. See Jenalia Moreno, *El Salvador on Board with CAFTA: First Central American Nation To Implement Pact*, HOUST. CHRON., Feb. 25, 2006, at D1 (“Four other nations [apart from El Salvador] involved in the trade talks—Guatemala, Honduras, Nicaragua, and the Dominican Republic—are still making legislative and regulatory changes to adhere to the agreement. However, Costa Rica’s legislature has still not ratified the deal.”). CAFTA-DR will enter into force upon the agreement of the signatories, see CAFTA-DR, *supra* note 1, arts. 22.5(1)(b), 22.5(2) (stipulating that the treaty will enter into force once the United States and another of the signatories agree on a date; remaining signatories may join enforcement ninety days after completing certain formalities), and El Salvador has become the first of the signatories to implement the agreement with the United States, see Moreno, *supra* (stating that the agreement was to take effect between the United States and El Salvador on March 1, 2006). The Bush administration has been pressuring the holdouts by making known its intent and desire to bring the treaty into force as soon as possible. See Rick Eyerdam, *U.S. Set To Act on CAFTA*, J. COM. ONLINE, Dec. 20, 2005, available at 2005 WLNR 20630366 (“The United States is prepared to implement [CAFTA-DR] once [the other signatories] ‘have taken sufficient steps to complete their commitments’ under the trade pact, says Christin Baker, spokesperson of the Office of the U.S. Trade Representative.”). CAFTA-DR has become politically divisive in

Similar protests⁹ were lodged against the analogous provisions of the North American Agreement on Environmental Cooperation (NAAEC), the side agreement to the North American Free Trade Agreement (NAFTA).¹⁰ The critics' arguments have merit; these treaties protect foreign investors¹¹ and trade interests¹² by establishing uniform international standards and binding enforcement measures without including similar environmental provisions,¹³ thus creating the possibility of a race to the bottom among member states as they erode environmental protections to compete for investment and trade. Nevertheless, despite the disequilibrium between the investment and trade provisions on the one hand, and the environmental provisions on the other, the record of environmental submissions under NAAEC demonstrates that these supposedly toothless environmental provisions can actually substantially offset the tendency toward an environmental race to the bottom that these treaties could otherwise create.

Costa Rica, which has yet to ratify the treaty. See Olga R. Rodriguez, *Arias Holds Slim Lead in Costa Rica Election*, PHILA. INQUIRER, Feb. 7, 2006, at A10 (noting that the previous frontrunner, Oscar Arias Sanchez, was down to "a razor-thin lead" partially due to his support for CAFTA-DR).

⁹ See, e.g., Jonathan Graubart, *Giving Meaning to New Trade-Linked "Soft Law" Agreements on Social Values: A Law-in-Action Analysis of NAFTA's Environmental Side Agreement*, 6 UCLA J. INT'L L. & FOREIGN AFF. 425, 426 (2001-2002) ("[A]ctivists have creatively used the nonbinding citizen submissions to place added political pressure on their home governments and thereby boost ongoing political and legal campaigns at home on such issues as protecting fish habitat and stopping the continuous dumping of toxic wastes."); Kibel, *supra* note 5, at 395 ("[NAFTA] is treated as binding and enforceable, whereas [NAAEC] is treated as non-binding and aspirational."); Kal Raustiala, *Police Patrols and Fire Alarms in the NAAEC*, 26 LOY. L.A. INT'L & COMP. L. REV. 389, 389-90 (2004) (arguing that the NAAEC citizen submission process regulates signatory compliance via "police controls" (review by a centralized bureaucracy) and "fire alarms" (investigations triggered by private actors)).

¹⁰ NAAEC, *supra* note 5, art. 1; North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA]. NAAEC was an essential addendum to the NAFTA treaty regime, and their memberships are coterminous.

¹¹ See CAFTA-DR, *supra* note 1, art. 10.5, 10.15-.27 (providing a "minimum standard of treatment" for investments and allowing for investing parties to institute arbitration proceedings against CAFTA-DR signatories); NAFTA, *supra* note 10, arts. 1105, 1115-1120 (same).

¹² See CAFTA-DR, *supra* note 1, art. 3 (stipulating the removal or reduction of various barriers to trade); NAFTA, *supra* note 10, pt. II (same).

¹³ Compare Parts I.A & I.B, *infra*, with Part I.C, *infra*. Domestic labor standards are similarly endangered by CAFTA-DR, but because the internal politics and international treatment of the issue are sufficiently dissimilar to those of environmental concerns, the labor law analysis falls outside the scope of this Comment.

To prevent such a race, it is sufficient to establish uniform international standards and an effective means for deterring states from noncompliance with those standards, but these terms need not be explicit in the treaty's text. Indeed, given the tenor of international environmental law in general,¹⁴ and the preferences of the United States in particular,¹⁵ such explicitly strong environmental terms would likely prevent ratification. The solution must instead achieve the necessary environmental protections in a politically acceptable manner, and this Comment argues that in the hands of nongovernmental organizations (NGOs) acting strategically, the regime established by NAAEC and, by extension, CAFTA-DR's environmental chapter, will do just that.

In its analysis, this Comment employs Kal Raustiala's conception of international agreements as having three conceptually distinct features, two dealing with form—*legality* and *structure*—and one addressing *substance*.¹⁶ According to Raustiala, *legality* refers to the formality with which an international agreement creates an international legal obligation, varying from legally binding *contracts* to nonlegally binding *pledges*.¹⁷ Raustiala uses *structure* to measure the effectiveness of the agreement's enforcement mechanisms; an agreement can be either *weak* or *strong* in this regard.¹⁸ Finally, the *substance* of an agreement refers to the coercive nature of its obligations and can range from *deep*

¹⁴ See Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581, 601 (2005) ("Many scholars have noted the variety in depth of international agreements. Environmental accords, for example, are often shallow. Trade agreements are generally thought to be deeper, as are many arms control accords.").

¹⁵ See *infra* notes 116-135 and accompanying text.

¹⁶ See Raustiala, *supra* note 14, at 581. Using these factors to establish a rational delineation between "hard" and "soft" law, Raustiala argues that the notion of "soft law" agreements is incoherent. Under the prevailing approach, pledges are being smuggled into the international lawyer's repertoire by dubbing them soft law. Just as frequently, scholars declare that contracts containing vague or imprecise commitments are actually soft. In so doing, these commentators are conflating the legality of agreements with structure (in particular, enforcement features) or substance (e.g., rule precision), or effects with causes (i.e., looking to behavioral effects to demonstrate international law's existence).

Id. at 582. More robust definitions of each of these three variables are addressed in the discussion of this paper's analytical framework. See *infra* notes 88-94 and accompanying text.

¹⁷ Raustiala, *supra* note 14, at 581, 583-84. Raustiala refers to nonlegally binding agreements as those to which states agree without creating a formal record of the agreement. *Id.*

¹⁸ *Id.* at 585.

to *shallow*.¹⁹ Among these variables, Raustiala notes that trade-offs occur as states negotiate agreements, such that it is unusual for each of the three characteristics to be employed in the fullest sense in the same agreement.²⁰ In environmental agreements, the trade-offs generally involve legality and substance.²¹ These trade-offs relate to *political feasibility*: the likelihood that contracting states will adopt and comply with a particular treaty provision. Agreements that reflect trade-offs are likely to enjoy political feasibility.

In these terms, this Comment argues that while the environmental provisions of NAAEC and CAFTA-DR are legally contractual and structurally strong, they cannot be substantively deep without becoming politically infeasible. Strategic NGOs, however, have the ability to effectively deepen the treaty's substance while maintaining political feasibility by exploiting CAFTA-DR's structural provisions. This thesis has value beyond the specific NAAEC/CAFTA-DR context; it offers a practical understanding of the potential effectiveness that seemingly shallow substantive treaty provisions can have if properly understood by strategic political actors.

Part I explains the identical features of NAFTA and CAFTA-DR that, without mitigating factors, could cause a race to the bottom by the signatories in enforcing their environmental standards.²² Part II establishes a framework for analysis of political feasibility, and then moves on to apply that rubric to the NAAEC/CAFTA-DR context. Part III then argues that by establishing a citizen submission process and a network of environmental regulators, the treaties' environmental provisions enable NGOs to effectively deepen the substantive environmental provisions to a level sufficient to address the race to the bottom.

¹⁹ *Id.* at 584-85.

²⁰ *See id.* at 582 (claiming that domestic politics inform the choice between form and substance, and that "the widespread preference for contracts often unduly weakens the substance and structure of multilateral agreements").

²¹ *See id.* at 596 ("In many areas of cooperation—such as the environment, [*inter alia*—the preference for contracts is pervasive. Indeed, in these areas negotiations that end in a pledge are often dubbed failures, while those that produce contracts, though subject to criticisms about substance or structure, are largely considered successes.").

²² The term "environmental standards," as used in this Comment, refers to both state laws and regulations in force, and to the enforcement of these rules by the proper state authorities.

I. THE ENVIRONMENTAL RACE TO THE BOTTOM

This Part discusses the race to the bottom in environmental protection that may result from the imbalance among the substantive²³ protections found in both NAFTA and CAFTA-DR. The danger associated with these treaties derives from their encouragement of regional trade and investment activities via substantively deep protections while employing comparatively shallow provisions in the environmental chapter. Among the explicit goals of the treaties are “[enhancing] the competitiveness of [the signatories’] firms in global markets,” “[establishing] clear and mutually advantageous rules governing . . . trade,” and “[ensuring] a predictable commercial framework for business planning and investment.”²⁴ To meet these goals, the treaties outline specific uniform standards to be observed with regard to cross-border investment²⁵ and trade,²⁶ and provide for a dispute resolution procedure to protect parties involved in these activities.²⁷ Parties seeking to make environmental claims, however do not, enjoy similar substantive protections under CAFTA-DR and NAAEC; neither treaty provides international environmental standards²⁸ nor an enforceable²⁹ private right of action³⁰ for such claims.³¹

²³ As noted above, this Comment adopts Kal Raustiala’s terminology regarding the form and substance of international agreements. Under Raustiala’s approach, the “substance” of an international agreement includes the provisions of that agreement and the extent to which they require a change in the *ex ante* member state practice. See Raustiala, *supra* note 14, at 584 (noting that substantive depth is “the extent to which [an agreement] requires states to depart from what they would have done in its absence” (quoting George W. Downs et al., *Is the Good News About Compliance Good News About Cooperation?*, 50 INT’L ORG. 379, 383 (1996) (alteration in original))).

²⁴ NAFTA, *supra* note 10, pmbl.; CAFTA-DR, *supra* note 1, pmbl. The preambles of these treaties indicate that these commercial goals are to be achieved in a context of environmental responsibility. See NAFTA, *supra* note 10, pmbl. (pledging to undertake “each of the preceding in a manner consistent with environmental protection and conservation”); CAFTA-DR, *supra* note 1, pmbl. (seeking to protect and “preserve the environment and enhance the means for doing so, including through the conservation of natural resources in their respective territories”).

²⁵ See *infra* Part I.A.

²⁶ See *infra* Part I.B.

²⁷ See *infra* Part I.A-B.

²⁸ See *infra* Part I.C.1.

²⁹ The term “enforceable” is inherently plastic, and as will be seen, identifies the substantive core of what seems to be an attack on the treaties’ structural provisions. See *infra* notes 106-107 and accompanying text.

³⁰ See *infra* Part I.C.2.

³¹ Richard Revesz identifies these as two of the obstacles to counteracting the environmental race to the bottom. See Richard L. Revesz, *Federalism and Environmental*

This Comment focuses not on the efficacy of the environmental provisions in combating the baseline environmental problems, but rather on the treaties' ability to counteract the derogative pressures introduced by the environmental race to the bottom. As an agreement involving the United States and six developing economies,³² CAFTA-DR sets the stage for such a downward race among the Central American states³³ that would multiply the impulse to discount domestic environmental protections. By increasing the cross-border mobility of investment dollars³⁴ and goods among the member states via deep substantive protections, CAFTA-DR encourages the developing

Regulation: Lessons for the European Union and the International Community, 83 VA. L. REV. 1331, 1341 (1997) (claiming that international environmental regulation can be difficult because the international community has only a "weak capacity for centralized environmental standard-setting and virtually no capacity for centralized environmental enforcement"). Revesz also identifies the pronounced wealth gap as an additional factor that complicates international environmental regulation. *Id.* ("[T]he differences in wealth and economic development are far more salient in the international community than in federal systems.").

³² See CAFTA-DR, *supra* note 1, pmb1. (identifying the signatories as the governments of the Republic of Costa Rica, the Dominican Republic, the Republic of El Salvador, the Republic of Guatemala, the Republic of Honduras, the Republic of Nicaragua, and the United States of America).

³³ For brevity, I include the Dominican Republic when I refer to "Central American states."

³⁴ Of course, these investment opportunities are currently available to domestic investors in the United States and other states, but the CAFTA-DR investor protection provisions seek to increase foreign investment by providing specific assurances to foreign investors. These provisions augment the incentive for states seeking foreign investment to ignore environmental concerns in order to secure that investment. See *infra* Part I.A (detailing the foreign investment protections afforded under CAFTA-DR and NAFTA). Only three of the CAFTA-DR signatories—El Salvador, Honduras, and Nicaragua—have negotiated bilateral investment treaties (BITs) with the United States that would afford investor protections outside of the CAFTA-DR provisions. See United Nations Conference on Trade and Development, UNCTAD Investment Instruments Online, http://www.unctadxi.org/templates/DocSearch___779.aspx (last visited Mar. 23, 2007) (cataloging all bilateral investment treaties). Of these, only the BIT with Honduras has entered into force. See Investment Treaty with Honduras, U.S.-Hond., July 1, 1995, S. TREATY DOC. NO. 106-27 (2000). Additionally, each CAFTA-DR signatory is a member of the WTO, see World Trade Organization, Understanding the WTO—Members and Observers, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Mar. 23, 2007) (listing the membership of the WTO), and the extent to which the CAFTA-DR trade provisions will have a derogative effect on environmental protection is mitigated by the trade rights secured to all members of the WTO. WTO, Understanding the WTO—Principles of the Trading System, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last visited Mar. 23, 2007) (outlining the general trading principles between member states of the WTO).

economies to compete for these newly available, but finite, sources of economic growth. The danger is that this competition may incite the Central American states to downgrade their domestic environmental protections in an attempt to decrease the costs of local economic activity, therefore attracting a greater proportion of foreign investment and trade.³⁵ The Sections below detail the specific provisions in CAFTA-DR and NAFTA that allow the possible environmental race to the bottom to occur—namely, the establishment of deep substantive protections for trade and investment, but shallow substance in the environmental provisions.

A. *Investor Protections*

NAFTA and CAFTA-DR provide deep substantive protections to investment interests by setting standards to be achieved by host states with regard to foreign investment,³⁶ and establishing a dispute resolution procedure to which private interested parties have access and from which they may seek an enforceable decision.³⁷ The scope and quality of these protections indicate the signatories' intent to assure investors that they will have the opportunity to litigate any grievances that may arise from their foreign investment, thus encouraging free-

³⁵ Cf. Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341, 2343 (1996) (arguing that in the federal context, a justification for federal environmental regulation is that it removes the temptation for states to "induce geographically mobile firms to locate within their jurisdictions" by offering "them suboptimally lax environmental standards so as to benefit from additional jobs and tax revenues").

³⁶ See CAFTA-DR, *supra* note 1, art. 10.3-14 (providing for various substantive protections for investing parties); NAFTA, *supra* note 10, pt. II (same).

³⁷ See CAFTA-DR, *supra* note 1, art. 10.15-27 (providing for arbitration procedures at the behest of foreign investors against the state of investment); NAFTA, *supra* note 10, ch. 20 (addressing institutional arrangements and dispute settlement procedures). Similar investor rights were established in the NAFTA treaty. See NAFTA, *supra* note 10, arts. 1115-1138 (allowing investors to bring arbitration proceedings against the state of investment). Some activists have seized upon this imbalance of private access to dispute resolution as grounds for opposing CAFTA-DR altogether. See, e.g., Press Release, Sierra Club, Response to the U.S.-Central American Environmental Cooperation Agreement (ECA): Statement by Margrete Strand, Senior Representative of the Sierra Club's Responsible Trade Program (Feb. 24, 2005), available at <http://www.sierraclub.org/pressroom/releases/pr2005-02-24.asp> ("CAFTA follows the failed path of NAFTA and expands the ability of multinational corporations to challenge environmental and public health measures in secret trade tribunals for cash compensation.").

dom of capital among member states.³⁸ In short, these provisions aim to promote cross-border investment by creating nonpreferential, uniform standards of protection.³⁹

Both treaties afford investors the benefits of national treatment,⁴⁰ most-favored-nation status,⁴¹ and minimum standards of treatment.⁴² Each of these provisions exemplifies the definite and binding quality of investor protections, which must be uniformly adopted and enforced against each signatory. The national treatment article ensures that foreign investors enjoy the same protections that benefit domestic investors,⁴³ and the most-favored-nation article assures signatories' investors that no other international investors will enjoy extra protections or assurances not available to investors from signatory states.⁴⁴ In addition to these comparative investor protections, the treaty also establishes minimum standards for investors, guaranteeing those protections "in accordance with customary international law, including fair and equitable treatment and full protection and security."⁴⁵

³⁸ See CAFTA-DR, *supra* note 1, pmb. (listing the overall goals of the agreement, which include the promotion of economic integration between the member states); NAFTA, *supra* note 10, art. 102 (declaring that NAFTA aims to "eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties" and to "create effective procedures" for implementing the agreement and its objectives, including procedures to resolve disputes between member states).

³⁹ For an analysis of the unequal procedural protections afforded to investors and environmental interests in the NAFTA/NAAEC context, see Chris Tollefson, *Games Without Frontiers: Investor Claims and Citizen Submissions Under the NAFTA Regime*, 27 YALE J. INT'L L. 141, 146-47 (2002).

⁴⁰ CAFTA-DR, *supra* note 1, art. 10.3; NAFTA, *supra* note 10, art. 1102.

⁴¹ CAFTA-DR, *supra* note 1, art. 10.4; NAFTA, *supra* note 10, art. 1103.

⁴² CAFTA-DR, *supra* note 1, art. 10.5; NAFTA, *supra* note 10, art. 1105.

⁴³ See CAFTA-DR, *supra* note 1, art. 10.3(1) ("Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to . . . investments in its territory."); NAFTA, *supra* note 10, art. 1102(1) (including a similar provision).

⁴⁴ See CAFTA-DR, *supra* note 1, art. 10.4(1) ("Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to . . . investments in its territory."); NAFTA, *supra* note 10, art. 1103(1) (including a similar provision).

⁴⁵ CAFTA-DR, *supra* note 1, art. 10.5(1). These terms are further defined in subsequent sections to include access to judicial proceedings and a baseline level of police protection. See CAFTA-DR, *supra* note 1, art. 10.5(2)(a)-(b). The NAFTA minimum standards are phrased differently. See NAFTA, *supra* note 10, art. 1105(1) ("Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.").

The investment provisions also give explicit procedural rights to private foreign investors,⁴⁶ allowing them to bring timely⁴⁷ claims against the host state itself⁴⁸ for a breach of a substantive duty conferred by NAFTA, CAFTA-DR, or an investment authorization or agreement.⁴⁹ Initially, disputes are to be addressed via informal “consultation and negotiation,”⁵⁰ but if these prove unsuccessful, the aggrieved investor is allowed to institute arbitration proceedings against the state under the International Centre for Settlement of Investment Disputes (ICSID) or the United Nations Commission on International Trade Law (UNCITRAL) Rules.⁵¹ These arbitration proceedings, if they yield a favorable decision for the complainant, result in a binding cash award or restitution to the private party,⁵² which can then be en-

⁴⁶ Claimants can bring an action either on their own behalf or derivatively on behalf of a corporation. CAFTA-DR, *supra* note 1, art. 10.16(1)(a)-(b); NAFTA, *supra* note 10, arts. 1115-1138. These claims must have resulted in harm to the claimant. CAFTA-DR, *supra* note 1, art. 10.16(1)(a)(ii), (b)(ii); NAFTA, *supra* note 10, art. 1116(1).

⁴⁷ See CAFTA-DR, *supra* note 1, art. 10.18(1) (stating that claims must be “submitted to arbitration” within “three years [of] the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged . . . and knowledge that the claimant . . . or the enterprise . . . has incurred loss or damage”); NAFTA, *supra* note 10, art. 1116(2) (“An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.”).

⁴⁸ In these investment cases, the substantive obligations owed to the foreign investor, see *supra* notes 40-45 and accompanying text, are assurances of *legal treatment* within the host state. Therefore, a breach of these obligations would entail a change in the laws of the host state, thus rendering the state itself the appropriate target of litigation.

⁴⁹ CAFTA-DR, *supra* note 1, art. 10.16(1)(a)(i), (1)(b)(i).

⁵⁰ *Id.* art. 10.15.

⁵¹ *Id.* art. 10.16(3); NAFTA, *supra* note 10, art. 1120. If both the respondent’s and the investor’s home states are signatories to the ICSID Convention, then that Convention and the ICSID Rules of Procedures for Arbitration Proceedings govern the dispute. CAFTA-DR, *supra* note 1, art. 10.16(3)(a); NAFTA, *supra* note 10, art. 1120(1)(a). If only one of the two states involved has signed the ICSID Convention, the ICSID Additional Facility Rules will apply. CAFTA-DR, *supra* note 1, art. 10.16(3)(b); NAFTA, *supra* note 10, art. 1120(1)(b). Finally, if neither state is party to the ICSID Convention, the UNCITRAL Arbitration Rules will be used. CAFTA-DR, *supra* note 1, art. 10.16(3)(c); NAFTA, *supra* note 10, art. 1120(1)(c). ICSID and UNCITRAL are systems of ready-made arbitration rules allowing for private parties to make claims against states for breaching agreements. See generally INT’L CENTRE FOR SETTLEMENT OF INV. DISPUTES, ICSID CONVENTION, REGULATIONS, AND RULES, (Apr. 10, 2006), available at <http://www.worldbank.org/icsid/basicdoc/basicdoc.htm>; Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

⁵² CAFTA-DR, *supra* note 1, art. 10.26(1)(a)-(b); NAFTA, *supra* note 10, art. 1135.

forced under the NAFTA or CAFTA-DR dispute resolution chapters, or various other international agreements.⁵³

These investment protections indicate that all signatories—both developed and developing—find it beneficial to protect investors' rights under these treaties. U.S. investors seek valuable opportunities with minimal risk, and the protections described in the NAFTA and CAFTA-DR investment chapters allay investor worries by establishing both a uniform baseline of investor entitlements as well as a reliable enforcement procedure. Conversely, signatories with developing economies benefit from these investor protections because they help attract investment dollars and thereby spur economic stability and growth.⁵⁴

B. Trade Protections

As in the investment context, both NAFTA and CAFTA-DR provide deep substantive protection through explicit trade standards, as well as a dispute resolution process for trade grievances that may provide enforceable results. Similar to the investment provisions, these trade provisions are in the mutual interest of the signatories, encouraging broader markets for domestic goods. By agreeing to this regime, however, states with weak domestic businesses put these firms at risk of failing because of increased market competition with firms from other treaty member states.

While the treaties include situational trade rules,⁵⁵ the baseline protections are similar to those rules established in the investment context. Regarding trade in goods, each signatory must ensure that

⁵³ CAFTA-DR, *supra* note 1, art. 10.26(6), (8), (9); NAFTA, *supra* note 10, art. 1136. Once a plaintiff obtains a decision in her favor from one of these arenas, she can then enforce that decision in the defendant state's domestic court system.

⁵⁴ Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua each stand to benefit economically by providing investor protections to the United States. Foreign direct investment (FDI), the cross-border "investment by one firm in another with the intention of gaining a degree of control over that firm's operations," PETER DICKEN, *GLOBAL SHIFT: RESHAPING THE GLOBAL ECONOMIC MAP IN THE 21ST CENTURY* 51 (4th ed. 2003), is a means for enlarging a state's domestic economy via corporate mergers and asset sharing. The United States is a leading source of FDI, and the six other parties to CAFTA-DR rank among the lowest in amounts of FDI received. *See id.* at 55 fig.3.14 (depicting the global distribution of both outbound and inbound FDI).

⁵⁵ *See, e.g.*, CAFTA-DR, *supra* note 1, art. 3.5-.29 (governing various trade circumstances among the signatories); NAFTA, *supra* note 10, chs. 4-8 (same).

the others' firms will enjoy national treatment,⁵⁶ and the parties have agreed to scheduled tariff rollbacks on products originating from other member states.⁵⁷ The provision on trade in services includes assurances of national treatment,⁵⁸ most favored nation status,⁵⁹ and the guarantee that local incorporation will not be required for a service provider to do business within a signatory's borders.⁶⁰

The trade chapters of these treaties do not indicate a specific procedure for the assertion of trade rights; therefore the overall dispute resolution procedures control any trade-based controversies.⁶¹ Under the respective dispute resolution provisions, the complaining state⁶² may decide whether to bring the action under the NAFTA/CAFTA-DR procedure, the WTO Agreement, or other "free trade agreement[s] to which the disputing Parties" belong.⁶³ These choices afford the complaining state access to an arbitration process that would enable a successful plaintiff to enforce its rights through a proportionate⁶⁴ suspension in trade rights until restitution is made.⁶⁵

⁵⁶ CAFTA-DR, *supra* note 1, art. 3.2; NAFTA, *supra* note 10, art. 301.

⁵⁷ CAFTA-DR, *supra* note 1, art. 3.3; NAFTA, *supra* note 10, art. 302.

⁵⁸ CAFTA-DR, *supra* note 1, art. 11.2; NAFTA, *supra* note 10, art. 1202; *see also supra* notes 40, 43, 56 and accompanying text.

⁵⁹ CAFTA-DR, *supra* note 1, art. 11.3; NAFTA, *supra* note 10, art. 1203.

⁶⁰ CAFTA-DR, *supra* note 1, art. 11.5; NAFTA, *supra* note 10, art. 1205.

⁶¹ *See* CAFTA-DR, *supra* note 1, art. 20.2; NAFTA, *supra* note 10, art. 2004; *see also* CAFTA-DR, *supra* note 1, annex 20.2 (providing explicit recourse to the article 20 procedure for instances of "nullification" of provisions in articles 3 and 11, *inter alia*).

⁶² In this dispute resolution context, "[p]arty means any State for which this Agreement is in force." CAFTA-DR, *supra* note 1, art. 2.1. This definition is implicit in the NAFTA definitions. *See* NAFTA, *supra* note 10, art. 201 (stating, for example, that a "person of a Party means a national, or an enterprise, of a party"). Therefore, private parties—namely individuals and private organizations—have no standing under Chapter 20, and must instead rely on diplomatic protection to assert any trade-based claims. *See, e.g.,* Nottebohm Case (Liecht. v. Guat.) 1955 I.C.J. 4, 26 (Apr. 6) (requiring state espousal of individual claims as a prerequisite for litigation in international tribunals).

⁶³ CAFTA-DR, *supra* note 1, art. 20.3(1). The NAFTA agreement only references the WTO proceedings as alternatives. *See* NAFTA, *supra* note 10, art. 2005 (stating that parties have recourse to GATT settlement procedures).

⁶⁴ *See* WORLD TRADE ORG., UNDERSTANDING THE WTO 62 (2005), *available at* http://www.wto.org/English/thewto_e/whatis_e/tif_e/understanding_text_e.pdf (describing the circumstances under which an aggrieved party may institute trade sanctions against a party failing to make restitution).

⁶⁵ *See* CAFTA-DR, *supra* note 1, art. 20.16 (allowing for the proportional suspension of trade benefits by the complainant against the noncompliant party if the complainant has not received restitution); NAFTA, *supra* note 10, art. 2019 (same). For a definition of proportionality as used in this context, *see* UNDERSTANDING THE WTO, *supra* note 64, at 62 (noting that sanctions should be limited to avoid impinging on other sectors of trade).

The provisions for trade protection, though slightly different, remain indicative of a strong signatory commitment to the enforcement of trade rights. Substantively, the effect of these protections is similar to those on the investment side, guaranteeing a minimum international standard of treatment to incoming goods and services.⁶⁶ The main difference from the investment chapter is the dispute resolution process. Here, private parties must convince an eligible state to espouse the claim in order to gain access to international adjudication.⁶⁷

C. *Environmental Protections*

Unlike the investment and trade provisions, the NAAEC and CAFTA-DR environmental protection schemes seem substantively shallow: they provide neither an international standard for environmental protection, nor a dispute resolution process by which private parties seeking to enjoin or punish environmental malfeasance may sue for an order stating such events have occurred. These deficiencies give rise to specific holes in environmental protection that must be remedied if the chapter is to allay its detractors' concerns and effectively combat the pressures detrimental to the environment introduced by the deep substance of the treaties' investment and trade provisions.

1. Lacking International Environmental Standards

Neither treaty establishes hortatory environmental standards; they instead require only that the member states "effectively enforce [their own] environmental laws."⁶⁸ This stipulation is further weakened by the treaties' "recogni[tion] that each [member state] retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources."⁶⁹ CAFTA-DR does not completely ignore

⁶⁶ The trade-in-goods provisions do not secure most favored nation status among the signatories, but the rollbacks of tariffs do provide an international rule that is not subject to domestic policy choices.

⁶⁷ International adjudication, by definition, allows only states to be party to an action. See *infra* note 137 and accompanying text.

⁶⁸ CAFTA-DR, *supra* note 1, art. 17.2.1(a); see also NAAEC, *supra* note 5, art. 5.1 (stating essentially the same proposition).

⁶⁹ CAFTA-DR, *supra* note 1, art. 17.2.1(b); see also NAAEC, *supra* note 5, pmb. ("Reaffirming the sovereign right of States to exploit their own resources pursuant to their own environmental and development policies . . .").

the possibility of opportunistic behavior, reminding the signatories that

it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic environmental laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces the protections afforded in those laws as an encouragement for trade with another [signatory], or as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.⁷⁰

This precatory standard, generally referred to as “aspirational,” provides little international accountability to environmental protection. Because the signatories commit only to “strive” to enforce their own environmental standards, complete adherence is unnecessary. If the domestic government decides that its environmental laws and regulations are too stringent to allow economic growth, it retains the ability under this treaty regime to unilaterally reduce its environmental protection efforts,⁷¹ free from enforceable sanction. As compared to the treaty-based standards provided in the chapters on investment and trade, the sovereignty retained by the signatory governments in the environmental context provides a clear opportunity for each member state to sacrifice environmental protection as they pursue economic growth, thus fueling the environmental race to the bottom.

2. Lacking an Enforceable Private Right of Action

Unlike the investment and trade provisions, the environmental citizen submission process does not guarantee an enforceable right of action to private parties; the outcome of a citizen submission will have no legally binding effect on any member state.⁷² In order to make a submission under this enforcement procedure, a private party⁷³ must

⁷⁰ CAFTA-DR, *supra* note 1, art. 17.2.2.

⁷¹ Of course, the decision to reduce legal environmental protection is subject to any internal legislative and regulatory processes that may exist.

⁷² See CAFTA-DR, *supra* note 1, art. 17.8 (stipulating that “publication of the factual record is the end result of a successful submission”); NAAEC, *supra* note 5, art. 15 (same).

⁷³ Potential parties under these environmental provisions include both natural and legal persons, indicating that individuals or organizations would be able to bring submissions under this chapter, regardless of their relation to the harm alleged. See CAFTA-DR, *supra* note 1, art. 17.7(1), (2)(f) (limiting possible claimants to those who hold status as “a person of a Party”); NAAEC, *supra* note 5, art. 14.1(f) (providing for

claim against a fellow NAAEC or CAFTA-DR signatory⁷⁴ that the state has failed to “effectively enforce its environmental laws.”⁷⁵ After satisfying basic procedural requirements,⁷⁶ the party must submit its claim to the treaty’s secretariat⁷⁷ for consideration. This official has the discretion to reject the submission as frivolous, or to proceed with the inquiry by asking the state complained against for a response.⁷⁸ After receiving the response, the secretariat, if convinced that the issue is credible, may ask permission of the treaty’s Environmental Affairs Council⁷⁹ to proceed with the production of a factual record.⁸⁰ Because these Councils are composed of domestic administration officials from each signatory, the individual’s claim of environmental

claims by a “person or organization residing or established in the territory of a party”). Other signatories are allowed to instigate consultations regarding environmental nonenforcement, which could eventually lead to Chapter 20 arbitration between two member states. See CAFTA-DR, *supra* note 1, art. 17.10(1), (6), (8) (establishing the procedure for collaborative environmental consultations); NAAEC, *supra* note 5, art. 22 (same). The NAAEC consultation provision has never been used. *E.g.*, Kibel, *supra* note 5, at 416 n.104 (stating that the Article 22 mechanism “remains untested” (quoting David Lopez, *Dispute Resolution Under NAFTA: Lessons from the Early Experience*, 32 TEX. INT’L L.J. 163, 188 (1997))).

⁷⁴ CAFTA-DR, *supra* note 1, art. 17.7(3); NAAEC, *supra* note 5, art. 14.1.

⁷⁵ CAFTA-DR, *supra* note 1, art. 17.7(1), (3); NAAEC, *supra* note 5, art. 14.1.

⁷⁶ See CAFTA-DR, *supra* note 1, art. 17.7(2)(a)-(f) (requiring the complainant’s identification, a sufficient level of evidence, and a showing of genuine grievance, *inter alia*); NAAEC, *supra* note 5, art. 14.1(a)-(f) (providing essentially the same procedural requirements).

⁷⁷ CAFTA-DR, *supra* note 1, art. 17.7(1); NAAEC, *supra* note 5, art. 14. The CAFTA-DR secretariat’s powers are not explicitly delineated, but presumably the position is similar to the NAAEC secretariat. Compare CAFTA-DR *supra* note 1, art. 17.7(1) & n.1, (4) (designating a secretariat and giving it powers to determine if a submission merits a response from a party), with NAAEC, *supra* note 5, arts. 11-15 (describing the duties of the NAAEC secretariat).

⁷⁸ CAFTA-DR, *supra* note 1, art. 17.7(4); NAAEC, *supra* note 5, art. 14.2. The criteria for rejecting the submission appear in sections (a)-(d) of articles 17.7(4) and 14.2, respectively.

⁷⁹ An Environmental Affairs Council is a group comprised of “cabinet-level or equivalent representatives of the Parties, or their designees.” CAFTA-DR, *supra* note 1, art. 17.5(1); NAAEC, *supra* note 5, art. 9.1 (same). This Council is a network of high-level government officials, experienced in the area of environmental regulation, and politically accountable to the signatory government that they represent. For an expert discussion of the power of such regulatory networks, see ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 36-64 (2004) (describing regulators’ roles in the disaggregated international system).

⁸⁰ CAFTA-DR, *supra* note 1, art. 17.8(1)-(2); NAAEC, *supra* note 5, art. 15.1-2. The Environmental Affairs Council may approve the preparation of a factual record “by a vote of any Party,” CAFTA-DR, *supra* note 1, art. 17.8(2), or by a “two-thirds vote,” NAAEC, *supra* note 5, art. 15.2.

nonenforcement is vulnerable to a politically motivated refusal to allow the factual record to be produced.⁸¹

If authorized, the secretariat then commences an investigation into the events giving rise to the submission, and may consult information from a variety of sources, including “interested persons” or “independent experts.”⁸² Once completed, a draft of the factual record must be submitted for review by the Environmental Affairs Council, which will allow any signatory to comment.⁸³ Having received comments, the secretariat then prepares a final draft of the factual record, which the Environmental Affairs Council can, within sixty days, approve for publication.⁸⁴ A successful citizen submission culminates with the publication of a factual record detailing the environmental harms caused by lax or absent governmental oversight or remedy. The factual record can include no legal judgment as to whether the state failed to enforce its environmental laws or regulations.⁸⁵ There is no provision forcing the offending governmental actors to remedy the

⁸¹ CAFTA-DR, *supra* note 1, art. 17.8(2), (7) (requiring a vote of the members of the Council before ordering the production of a factual record); NAAEC, *supra* note 5, art. 15.7 (same).

⁸² CAFTA-DR, *supra* note 1, art. 17.8(4); NAAEC, *supra* note 5, art. 15.4 (similar).

⁸³ The commenter need not be a party to the issue, but these comments must be made within 45 days of the draft’s submission to the Environmental Affairs Council. CAFTA-DR, *supra* note 1, art. 17.8(5); NAAEC, *supra* note 5, art. 15.5.

⁸⁴ The Environmental Affairs Council may, for any reason, deny publication of the factual record by refusing to hold a vote. See CAFTA-DR, *supra* note 1, art. 17.8(7) (requiring a “vote of any Party” to authorize publication of a factual record); NAAEC, *supra* note 5, art. 15.7 (requiring a two-thirds vote). Under CAFTA-DR, the Environmental Affairs Council’s decision to allow publication of the Factual Record must “consider the final factual record in light of the objectives of [Article 17] and the ECA.” CAFTA-DR, *supra* note 1, art. 17.8(8). The “ECA” is the Environmental Cooperation Agreement, a side agreement to CAFTA-DR outlining a set of nonbinding environmental goals, and establishing the “Dominican Republic-Central America-United States Environmental Cooperation Commission” (Environmental Cooperation Commission). See generally Dominican Republic-Central America-United States Environmental Cooperation Agreement, available at <http://www.state.gov/g/oes/rls/or/42423.htm> (last visited Mar. 23, 2007) [hereinafter ECA]. The Environmental Cooperation Commission, like the Environmental Affairs Council, is composed of environmental officials from each signatory, but its powers are only consultative. *Id.* art. IV. Instead of, or in conjunction with, authorization of the factual record, the Environmental Affairs Council may recommend action to the Environmental Cooperation Commission to resolve the conflict. CAFTA-DR, *supra* note 1, art. 17.8(8). NAAEC does not provide for an analogous commission.

⁸⁵ *E.g.*, CAFTA-DR, *supra* note 1, art. 17.8 (3) (“The preparation of a factual record by the secretariat . . . shall be without prejudice to any further steps that may be taken with respect to any submission.”); NAAEC, *supra* note 5, art. 15(3) (same).

omission, or even requiring the provision of restitution to the parties harmed.

The substantive imbalance between these treaties' investor and trade protections and their environmental provisions is stark. By providing for both internationally established standards that are immune from unilateral change and procedural protections leading to decisions binding on the signatory governments in the context of investment and trade, the treaties confer enforceable rights to counteract those pressures that encourage a downward trend in environmental protection. On the other hand, the shallow environmental provisions fail to confer comparable rights upon those seeking to redress an environmental harm. This imbalance disadvantages environmental interests. An environmental claim against a state is undermined by the treaties' deference to the domestic policymaking procedures free from binding international sanction. This incongruence creates both the opportunity and incentive for parties to pursue economic growth by reducing environmental regulatory standards, thus creating a more attractive and profitable business environment.

II. TOWARD A SOLUTION

Having highlighted the race to the bottom that these treaty regimes introduce, the question becomes: how can international law counteract these pressures? This Part argues that a complete surrender of state sovereignty over environmental issues to an international body is both unlikely and unnecessary. Although critics of the citizen submission process claim that it is ineffectual because it lacks both the conventional provisions of binding international standards and an effective private right of action to adequately prevent state participation in an environmental race to the bottom,⁸⁶ these perceived shortcomings are not fatal, and indeed may not be shortcomings at all. As will be seen in Part III, it is not necessary to emulate the standards and dispute resolution systems provided elsewhere in the treaty in order to avert the race.

This Part considers the drawbacks of alternative regimes of environmental dispute resolution, comparing them to the theoretical ability of the citizen submission process and its concomitant regulatory

⁸⁶ See *supra* note 37 (describing dispute resolution procedures and an imbalance of private access to dispute resolution).

networks to afford protection to environmental interests in NAFTA/NAAEC and CAFTA-DR member states. Part I noted that a uniform international standard and enforceable right of action are key aspects of a regime that combats the environmental race to the bottom,⁸⁷ and that these attributes are absent in the environmental provisions of NAAEC and CAFTA-DR. I argue that, while such substantively deep provisions may indeed remedy the problem, they are not politically feasible in the context of international environmental law. More effective would be a regime that achieves functional depth in a politically acceptable manner, and I argue that in the hands of politically aware environmental NGOs, such a regime is established by both of these treaties.

A. *An Analytical Framework*

To establish an analytical framework for the relative political feasibility of alternative regimes of environmental regulation, it is helpful to begin with Raustiala's concepts of legality, structure, and substance. Raustiala argues that international agreements should be examined across these three conceptually distinct variables, two dealing with form—legality and structure—and one addressing substance.⁸⁸ Legality refers to the difference between contracts and pledges, which is essentially whether the parties intend their agreement to create a formal or informal international legal obligation.⁸⁹ Contracts are more formal agreements, usually in writing, that purport to be binding, while pledges include unofficial “[g]entlemen’s agreements” among state leaders.⁹⁰ The other variable dealing with form is the agreement’s

⁸⁷ See *supra* Part I.C.

⁸⁸ See Raustiala, *supra* note 14, at 583-85 (describing the three variables in detail).

⁸⁹ *Id.* at 581 (“Legality refers to the choice between legally binding and nonlegally binding accords (for simplicity, I term this a choice between *contracts* and *pledges*).” (footnote omitted)) Raustiala cites language in the Vienna Convention on the Law of Treaties as a definition of a legally binding (contractual) treaty. *Id.* at 583; see also Vienna Convention on the Law of Treaties, art. 2, para. 1(a), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (“‘Treaty’ means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation . . .”).

⁹⁰ Raustiala, *supra* note 14, at 583. Some scholars argue that legality is more than simply writing the provisions down in treaty form. See, e.g., C.M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT’L & COMP. L.Q. 850, 851 (1989) (“The use of a treaty form does not of itself ensure a hard obligation . . . [I]f a treaty is to be regarded as ‘hard’, it must be precisely worded and specify the exact obligations undertaken or the rights granted.”). Raustiala responds that the im-

structure—the “rules and procedures created to monitor parties’ performance”—which can be weak or strong.⁹¹ Examples of these structural provisions include both information-gathering mechanisms and systems designed to “deter and punish noncompliance.”⁹² The final characteristic, substance, determines whether these mechanisms affect compliance.⁹³ Raustiala measures the substance of an international agreement by its depth, or the extent to which the agreement requires “‘states to depart from what they would have done in its absence.’” Some accords are deep: they require states to make major changes in policy. Others are shallow: they codify what states are already doing or demand only minor changes in behavior.⁹⁴ Based on these observations, Raustiala claims that since states generally prefer⁹⁵ to comply with their international obligations—because they are “moderately risk averse” regarding uncertain future circumstances⁹⁶—they usually require shallow substantive provisions when entering into a contractual agreement dealing with environmental issues.⁹⁷ This leads to a trade-off between the legal and substantive aspects of an agreement.

With Raustiala’s insights in mind, I turn to reevaluate the purpose of the environmental provisions and the functions they must perform in order to prevent an environmental race to the bottom. It is conceivable that international institutions would directly regulate the actions of private parties in some circumstances; this happens most notably in the areas of international criminal and human rights law,

precision and flexibility of treaty terms do not affect the legality of the treaty itself, but rather speak to the treaty’s substance. Raustiala, *supra* note 14, at 588.

⁹¹ Raustiala, *supra* note 14, at 585.

⁹² *Id.*

⁹³ *Id.* at 584.

⁹⁴ *Id.* (quoting Downs, *supra* note 23, at 383).

⁹⁵ A state’s “preference” refers to the combination of “domestic preferences” (the aggregate preferences of domestic constituencies), “domestic institutions” (the branches of domestic governments that must approve an accord), and “relative state power” (the distribution of power among contracting states). Raustiala, *supra* note 14, at 595-99.

⁹⁶ *Id.* at 595.

⁹⁷ *Id.* at 601. Raustiala does not claim that every contract will result in shallow substance—only those dealing with a subject matter that is backed by a domestically weak group, which generally describes environmental interests. *Id.* at 603 (“Environment and human rights accords are generally shallower than trade, investment, and arms control accords, in part because of the differential political power of the domestic groups that demand cooperation in these areas. We generally observe a positive correlation between depth and legality when the domestic demanders of cooperation are politically privileged, and a negative correlation when they are not.”).

where individuals can be held accountable internationally for the breach of a treaty provision.⁹⁸ Other international frameworks regulate private parties indirectly instead, by binding states to implement the necessary regulations; the prominent example in this category is the WTO.⁹⁹ For reasons of political feasibility,¹⁰⁰ the NAAEC and CAFTA-DR environmental rules tend to follow the WTO model.¹⁰¹ This understanding that international environmental regimes incentivize *state* obedience, rather than directly targeting the conduct of *individuals*, informs the analysis of possible alternative mechanisms. The goal, then, is not to provide immediate relief or damage awards to the victims of specific instances of environmental malfeasance; such tort claims are generally handled by domestic courts.¹⁰² Rather, the immediate purpose of the international environmental dispute resolution mechanism is to ensure that states respect the international commitments they have made regarding environmental protection.¹⁰³

⁹⁸ See, e.g., Prosecutor v. Milosevic, Case No. IT-02-54-T, Amended Indictment, ¶ 5 (Nov. 22, 2002), available at <http://www.un.org/icty/indictment/english/mil-ai040421-e.htm> (accusing Slobodan Milosevic as an individual for the violation of international human rights law).

⁹⁹ See Agreement Establishing the World Trade Organization, annex 2, art. 3, Apr. 15, 1994, 33 I.L.M. 1125 (stipulating that this dispute governs only the enumerated agreements, all of which are signed by, and binding on, states only).

¹⁰⁰ Regimes delegating substantive discretion to an international regulatory regime are substantively deep, because doing so may require the enforcement of environmental norms that are different than those the state would choose to enforce. According to Raustiala, this is unlikely to happen in an environmental context, due to the weakness of domestic environmental groups. See *supra* notes 96-97 and accompanying text.

¹⁰¹ NAAEC and CAFTA-DR indicate that they are not meant to bind individuals as defendants, but rather to govern the actions of states. The role of individuals and groups of individuals is limited to challenging governments' compliance with the treaties. For instance, the treaties do not provide for damages to be paid by losing defendants, see CAFTA-DR, *supra* note 1, art. 17.8 (indicating that the end result of a successful submission is the publication of a factual record); NAAEC, *supra* note 5, art. 15.7 (same), and any "person of a Party" has standing irrespective of whether she suffered any harm, see CAFTA-DR, *supra* note 1, art. 17.7(1) (stating that "[a]ny person of a Party may file a submission" under the environmental chapter); NAAEC, *supra* note 5, art. 14.1(f) (providing that a submission must be "filed by a person . . . in the territory of a Party").

¹⁰² See, e.g., *Anderson v. Beatrice Foods Co.*, 129 F.R.D. 394, 395 (D. Mass. 1989) (recounting the claim by residents of Massachusetts against a corporation for negligently "causing toxic waste to infiltrate the municipal water supply"), *aff'd*, 900 F.2d 388 (1st Cir. 1990).

¹⁰³ Even though the primary goal of the environmental regime is to police state behavior with respect to environmental standards, this does not exclude a secondary, nonpreclusive goal of restitution to individuals who have been harmed by state nonen-

Toward this objective, legality explains little about environmental agreements, due to the overwhelming preference among environmentalists for the formality and perceived security found in a written treaty.¹⁰⁴ Theoretically, pledges might generate more effective environmental protection, but until more states heed Raustiala's recommendation that they more frequently employ international pledges,¹⁰⁵ or until environmental interests can gain more domestic political clout, environmental regulations, like those in the NAAEC and CAFTA-DR, are likely to operate exclusively as international contracts.

Similarly, the effect of structure on environmental agreements is limited. Critics of CAFTA-DR and NAAEC tend to obfuscate the line between structure and substance in their commentaries. Since these critics disapprove of both the environmental standards and the submission process established by the treaties, it seems that these viewpoints assess both form and substance. Nevertheless, these assertions are analytically distinct. Arguments against the submission process have little to do with its existence or effectiveness in identifying cases of environmental nonenforcement, and, rather, denounce the structure because it is not "enforceable" by sufficiently substantial enforcement provisions.¹⁰⁶ Thus, the structural arguments collapse into the substantive. What remains are charges that the environmental provisions of NAAEC and CAFTA-DR lack adequate substantive depth to protect against the race to the bottom. This trade-off between legal formality and substantive depth exactly parallels Raustiala's analysis.¹⁰⁷ The "legal-substantive trade-off" adds the political feasibility of uniform standards and deep enforcement provisions to the list of factors necessary to effectively combat the environmental race to the bottom. This term is meant to capture the current reality that environmental

forcement; it merely indicates that such recompense is not necessary to the regime's purpose.

¹⁰⁴ See *supra* note 97 and accompanying text (noting that politically weak groups (like environmental groups) often insist that shallow agreements be reinforced with legal formality).

¹⁰⁵ See Raustiala, *supra* note 14, at 614 ("Scholars, statesmen, and activists alike have too often assumed that contracts are the best choice for cooperation, and pledges a feeble substitute. But pledges can have surprising power.").

¹⁰⁶ See, e.g., Tseming Yang, *The Effectiveness of the NAFTA Environmental Side Agreement's Citizen Submission Process: A Case Study of Metales y Derivados*, 76 U. COLO. L. REV. 443, 458 (2005) (arguing that in the *Metales* case, the production of a factual record was ineffective in preventing the environmental harm); see also *supra* note 5 (discussing similar complaints by the Sierra Club).

¹⁰⁷ See *supra* notes 95-97 and accompanying text.

treaties in force are not simultaneously contractual and substantively deep; therefore, any environmental treaty (contractual by definition) must include shallow provisions to be considered politically feasible.

Revisiting the two factors identified in Part I, it is clear that to critique the lack of uniform international environmental standards and seemingly unenforceable structural provisions in NAAEC and CAFTA-DR is to attack the treaties' substance. Therefore, such arguments must be assessed in light of Raustiala's legal-substantive trade-off. First, establishing specific international environmental standards is substantive in that such standards would provide explicit benchmarks for state action. Second, the necessity of an effective private right of action is a misnomer; it is essentially a substantive requirement couched in terms of procedure. To give binding legal effect to the right of action demands deeper substantive enforcement provisions that will remedy cases of nonconformity once they are identified by the action; this can only be achieved by deepening the treaty's substance. With a grasp of the variables, their goals, and the tradeoffs involved, the inquiry now turns to whether an international environmental regime can establish these two deep substantive measures, even though they are absent from the treaties' explicit terms, while at the same time satisfying the third constraint of political feasibility.

B. *Determining Political Feasibility in the NAAEC/CAFTA-DR Context*

Determining the effect of the legal-substantive trade-off on a given international agreement requires an assessment of what levels of form and substance are politically feasible in that specific context.¹⁰⁸ To identify these preferences in the NAAEC/CAFTA-DR context, the liberal theory of international relations—a view that recognizes the international ramifications of domestic political actors' preferences¹⁰⁹—proves informative. Under this theory, the preferences expressed by parties to an international agreement reflect more than the wishes of the executive or her high-level agents and advisors, but are rather in-

¹⁰⁸ Whether the terms of the CAFTA-DR environmental chapter are politically feasible remains to be seen as the ratification process continues. Because a majority of the signatories have already ratified the treaty, *see supra* note 8 and accompanying text, this Comment will assume its political feasibility. NAAEC is already in force.

¹⁰⁹ *See generally* Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513, 513 (1997) ("Liberal [international relations] theory elaborates the insight that state-society relations—the relationship of states to the domestic and transnational social context in which they are embedded—have a fundamental impact on state behavior in world politics.").

formed by the domestic political process and the interest groups that compete therein.¹¹⁰

As previously noted, most environmentalists prefer international agreements dealing with the environment to have a contractual form,¹¹¹ and NAAEC and CAFTA-DR are no exception. Treating legality as a constant, the meaningful inquiry regarding political feasibility thus involves determining the level of substantive depth deemed acceptable by the contracting states.¹¹² Logically, the deepest substance attainable in a multilateral treaty is the greatest depth that is mutually acceptable.¹¹³ Although this lowest-common-denominator approach¹¹⁴ contemplates an analysis of each state's substantive preferences, this Comment's examination focuses solely on the United States's popular and institutional preferences because they prove dispositive.¹¹⁵

An analysis of U.S. involvement in international environmental treaties reveals a persistent rejection of international environmental standards and strong enforcement provisions—both of which are essential to inhibiting the environmental race to the bottom. Beginning in the 1990s, a U.S. aversion to international environmental standards began to surface, as indicated by the political fight over the Kyoto Pro-

¹¹⁰ *Id.* at 518.

¹¹¹ See *supra* text accompanying note 97 (noting that contracts offer “formality and perceived security”).

¹¹² See *supra* note 14 and accompanying text. Raustiala suggests that if pledges became more acceptable, it would be possible to achieve deeper substance in international environmental agreements. Raustiala, *supra* note 14, at 610 (“By minimizing concerns about legal compliance, pledges may permit states to negotiate more ambitious and deeper agreements that are tied to stricter monitoring and review provisions.”).

¹¹³ The mere fact that each state would agree to a certain level of substantive depth does not guarantee that this depth will be reflected in the agreement's provisions. The variables of negotiating skill and the relative distributions of power and interests, *inter alia*, will affect whether an agreement of the mutually preferred depth will actually be enacted.

¹¹⁴ Because no party will contract for deeper substantive measures than are preferable, the party with the most shallow preferences will dictate the level of substance that is politically feasible.

¹¹⁵ This Comment does not go so far as to assert that the United States's preferences are the shallowest among CAFTA-DR signatories, but it does claim that these preferences are dispositive because they rule out the possibility of including in CAFTA-DR explicit substantive provisions that are deep enough to counteract the race to the bottom as described in Part I, *supra*. This is not to say that there are no other politically feasible regimes possible, but it does indicate that anything approaching the substantive depth of these politically infeasible alternate provisions will not suffice.

ocol.¹¹⁶ Negotiated and signed by the Clinton administration,¹¹⁷ Kyoto includes deep substantive provisions explicitly limiting the United States's¹¹⁸ emission of greenhouse gases.¹¹⁹ In response to these terms, bipartisan protests in both the House¹²⁰ and the Senate¹²¹ assured President Clinton an embarrassing defeat if he were to send the Protocol to the Senate for ratification. These protests proved fatal to any hopes of U.S. ratification, and therefore President Clinton did not present the Protocol to the Senate; the Bush administration later rejected it as a candidate for ratification.¹²²

¹¹⁶ Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, *available at* <http://unfccc.int/resource/docs/convkp/kpeng.pdf> [hereinafter Kyoto Protocol].

¹¹⁷ *See* Kyoto Protocol Status of Ratification (last modified on Dec. 13, 2006), http://unfccc.int/files/kyoto_protocol/background/status_of_ratification/application/pdf/kp_rat_131206.pdf (listing the United States as a signatory as of December 11, 1998, but noting that as of December 13, 2006, it had not yet ratified the Protocol).

¹¹⁸ States who are party to Annex I of the United Nations Framework Convention on Climate Change, including the United States, *see* United Nations Framework Convention on Climate Change, annex I, May 9, 1992, *available at* <http://unfccc.int/resource/docs/convkp/conveng.pdf> [hereinafter UNFCCC], would be subject to more onerous standards under the Kyoto Protocol than non-Annex I states if that protocol were to be adopted, *see* Kyoto Protocol, *supra* note 116, arts. 2-8 (listing the responsibilities of Annex I members).

¹¹⁹ The standards established include specific references both to the gases covered by the Protocol and to state-specific commitment levels:

The Parties included in Annex I shall, individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A do not exceed their assigned amounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B and in accordance with the provisions of this Article, with a view to reducing their overall emissions of such gases by at least 5 per cent below 1990 levels in the commitment period 2008 to 2012.

Kyoto Protocol, *supra* note 116, art. 3(1). Annex A lists the gases covered: carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulphur hexafluoride (SF₆). *Id.* annex A. Annex B sets the U.S. “[q]uantified emission limitation or reduction commitment” at 93% of the “base year or period.” *Id.* annex B.

¹²⁰ H.R. Res. 211, 105th Cong. (1997). This bill failed to emerge from the House Committee on International Relations Subcommittee on International Economic Policy and Trade, to which it was referred on August 21, 1997. H. Res. 211, Latest Major Action, <http://thomas.loc.gov/cgi-bin/bdquery/z?d105:HE00211:@@x> (last visited Mar. 23, 2007).

¹²¹ S. Res. 98, 105th Cong. (1997) (enacted). This resolution was adopted by a vote of 95-0 on July 25, 1997. S. Res. 98, Latest Major Action, <http://thomas.loc.gov/cgi-bin/bdquery/z?d105:SE00098:@@x> (last visited Mar. 23, 2007).

¹²² *See U.S. Won't Follow Climate Treaty Provisions, Whitman Says*, N.Y. TIMES, Mar. 28, 2001, at A19 (recounting then-EPA Administrator Christine Todd Whitman's state-

Notwithstanding its avoidance of deep international environmental standards, the United States has negotiated, signed, and even ratified treaties that set up strong environmental review structures such as the citizen submission processes found in both NAAEC and CAFTA-DR.¹²³ The enforcement mechanisms attached to these structures, however, maintain the preference for a lack of explicit substantive depth.¹²⁴ NAAEC represents the first such structure to be employed in an American free trade agreement, and provides an example of the influence domestic interests can have on a state's international agreements. Mobilized by a domestic environmental group's pressure, well-placed members of Congress threatened the first President Bush's fast track authority, prompting him to support the inclusion of environmental provisions in that treaty.¹²⁵ Nevertheless, as the NAFTA negotiations drew to a close, the resultant text was

ment that the Bush administration has “no interest in implementing that treaty”). “Mrs. Whitman repeatedly noted that the Senate voted 95 to 0 against the United States’ taking any action on climate change unless developing countries also took measures to reduce their emissions of heat-trapping gases.” *Id.*

¹²³ Note that Raustiala classifies citizen submission processes, like those found in NAAEC and CAFTA-DR, as “strong structures.” See Raustiala, *supra* note 14, at 585 (“Strong structures are those in which a central body issues a specific determination about a specific party. Such determinations may concern compliance, based either on the body’s own investigations (a ‘police patrol’ system) or on claims of private actors (a ‘fire alarm’ system).” (citing Raustiala, *supra* note 9, at 391)).

¹²⁴ As can be seen in comparing the run-up to NAAEC, see *infra* notes 125-128 and accompanying text, with the provisions of the Trade Act of 2002, see *infra* notes 129-133 and accompanying text, the United States’s substantive preferences have not been stagnant. Even so, the United States has never produced a substantively deep environmental regime.

¹²⁵ Environmentalists began by transforming the heretofore routine vote on whether to grant the President “‘fast track’ authority to negotiate the NAFTA” into a debate over the agreement and its failure to address any environmental consequences. Frederick W. Mayer, *Negotiating the NAFTA: Political Lessons for the FTAA*, in *GREENING THE AMERICAS: NAFTA’S LESSONS FOR HEMISPHERIC TRADE* 97, 99 (Carolyn L. Deere & Daniel C. Esty eds., 2002).

Evidencing the environmentalists’ successes, “the two most important figures in Congress for trade legislation [at the time]—Dan Rostenkowski, chairman of the House Ways and Means Committee, and Lloyd Bentsen, chairman of the Senate Finance Committee—sent a letter to the president” notifying him that NAFTA must address the environment if the fast track bill was to pass. *Id.* at 100. Then-House majority leader Richard Gephardt also protested on behalf of both labor and environmental interests. *Id.* The Bush administration responded with an “Action Plan” that promised to address the environmental concerns in the free trade talks; this plan won over “several major environmental organizations,” but failed to convince others. *Id.* at 100-01.

bereft of any true environmental substantive depth.¹²⁶ After unseating the incumbent, President Clinton assumed office with NAFTA's ratification still uncertain, but he soon mollified the environmentalist voters who had helped elect him¹²⁷ by supporting a package deal, which included a corollary environmental side agreement that would correct NAFTA's omissions.¹²⁸

Unlike NAFTA, the negotiations of the CAFTA-DR agreement took place under a pre-existing grant of fast track authority that was not subject to imminent review,¹²⁹ thus sparing the second President Bush from the more difficult legislative check that derailed his father's push for NAFTA ratification.¹³⁰ Since the terms of the Trade Act of 2002 represent the most recent legislative statement on preferences for environmental provisions in trade agreements prior to CAFTA-DR's negotiation, it is illuminating to analyze the terms with an eye to their substantive content. While establishing no binding parameters for the substantive scope of environmental provisions, the Trade Act of 2002 lists approved objectives for consideration in the negotiation of trade agreements.¹³¹ Regarding the environment, the Trade Act's substantive recommendations regarding environmental standards track almost exactly the terms of the CAFTA-DR environmental chapter,¹³² but do not suggest a preferred structure or any sub-

¹²⁶ See *id.* at 102-03 (noting that the first Bush administration did make some concessions to the concern of environmental groups during the NAFTA negotiations, but the final NAFTA environmental standards remained fundamentally shallow and left many environmental groups far from satisfied).

¹²⁷ During the presidential campaign, environmental interests "pressed Clinton to insist on negotiating side agreements to 'fix' the NAFTA." *Id.* at 103.

¹²⁸ This side agreement is what eventually became NAAEC. The main players in weakening the substance of enforcement provisions of the NAAEC's citizen submission process were not domestic U.S. interests, but the other negotiating states, Canada and Mexico. Raustiala, *supra* note 9, at 399.

¹²⁹ The Trade Act of 2002 was the fast track provision under which CAFTA-DR was negotiated, signed, and ratified. Bipartisan Trade Promotion Authority Act of 2002 § 2105, 19 U.S.C. § 3805 (Supp. II 2002).

¹³⁰ The purpose of fast track legislation is to ease the negotiation of international treaties by temporarily relaxing the constitutional requirement that treaties are subject to a two-thirds vote of approval by the U.S. Senate. U.S. CONST. art. II, § 2, cl. 2. Usually, the terms of fast track legislation disallow amendments to a treaty under consideration and require only a simple majority vote in both houses. See, e.g., Trade Act of 2002 § 2105 (describing the procedures for congressional approval or disapproval of trade agreements).

¹³¹ See Trade Act of 2002 § 2102(b)(1)-(11) (listing congressional preferences on a variety of subjects, including labor and the environment).

¹³² Compare *id.* § 2102(b)(11)(A)-(B) (recording a legislative preference that states that are party to a trade agreement be accountable for effective enforcement of their

stantive terms of enforcement.¹³³ It is true that these provisions do not necessarily represent the views of both the House and the Senate when they ratified CAFTA-DR, and that some dissented from both the Trade Act¹³⁴ and CAFTA-DR¹³⁵ on environmental grounds, but the objectors were neither sufficiently influential nor numerous to deepen the substance of CAFTA-DR.

As evidenced by the recent history of U.S. experience with environmental and trade treaties, the tradeoff between legality and substance that Raustiala identified¹³⁶ has proven true. Each of these attempts at international environmental regulation has either produced substantively shallow provisions, or failed to gain ratification because of political infeasibility. Clearly, the United States currently prefers to deal in international environmental agreements exclusively through contractual means at the expense of substance.

C. Exemplifying Political Infeasibility

Having demonstrated the parameters of political feasibility, this Section considers an example of a regime that would likely not win acceptance in such circumstances. This discussion is meant only to

own environmental laws, but reserving to those states the “discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other . . . environmental matters determined to have higher priorities”) *with supra* Part I.C (explaining that CAFTA-DR member states are given the right to enforce their own environmental laws as well as the right to sacrifice environmental protection in the pursuit of economic growth).

¹³³ Trade Act of 2002 § 2102(b)(11).

¹³⁴ *See, e.g.*, 147 CONG. REC. H8973 (daily ed. Dec. 6, 2001) (statement of Rep. Hastings) (“Mr. Speaker, I am disappointed that the Trade Promotion Authority, formerly Fast Track, legislation completely ignores the legitimate concerns many people have raised about the negative impact of current trade policies on working families, the environment, family farmers, consumers, small- and mid-sized businesses, people of color and women here in the United States and around the world.”). *But see, e.g.*, 148 CONG. REC. S9107-08 (2002) (daily ed. Sept. 24, 2002) (statement of Sen. Grassley) (challenging the notion that the Trade Act of 2002 should require the President to accept at least parallel environmental terms to those included in the Jordan Free Trade Agreement).

¹³⁵ *See, e.g.*, 151 CONG. REC. S7728 (daily ed. June 30, 2005) (statement of Sen. Levin) (“I am disappointed by the weak labor and environmental provisions included in CAFTA. Writing labor and environmental standards into trade agreements is an important way to ensure that free trade is fair trade. But unlike the 2001 Jordan Free Trade Agreement, CAFTA fails to include internationally recognized, core labor standards.”).

¹³⁶ *See supra* notes 16-21 and accompanying text.

illustrate a politically infeasible regime, and by no means argues that every alternative to the NAAEC/CAFTA-DR environmental regime is politically infeasible. The intent here is to more concretely describe characteristics that would remove a regime from the realm of political feasibility in this context.

A simple and intuitive means of empowering the environmental interests under NAAEC or CAFTA-DR would be to grant conventional standing¹³⁷ in an international forum to those parties who are specifically harmed by an instance of environmental non-enforcement, including individuals, and allow them to make claims against the offending states for binding relief.¹³⁸ While in some exceptional international situations regimes of supranational adjudication have flourished, similar preconditions for their success are absent in most international relationships,¹³⁹ and in the NAAEC/CAFTA-DR context, this solution is politically unworkable.

The archetypal regime of supranational adjudication is the European Union's (EU) system,¹⁴⁰ headed by the European Court of Jus-

¹³⁷ Conventional notions of standing include the ability of any individual, on her own behalf, to be party to a dispute. This ability is a distinguishing factor of what is termed "supranational" adjudication. See Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 277 (1997) (defining traditional international adjudication as "the power to adjudicate state-to-state disputes," and supranational adjudication as including "cases involving private parties litigating directly against state governments or against each other").

¹³⁸ I limit the scope of consideration here to states as defendants, presuming that any cases brought against the individuals, natural or juridical, who caused the pollution would be brought in domestic court. Also, instances of environmental nonenforcement, by definition, are perpetrated by state actors.

¹³⁹ For a heated academic debate concerning the effectiveness of supranational regimes, see Helfer & Slaughter, *supra* note 137, at 276 (arguing that the European system, composed of both the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR), evidences the possible effectiveness of supranational adjudication); Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 7 (2005) (disputing the effectiveness of "independent tribunals"—those composed of jurists not beholden to state interests—and asserting that such tribunals "pose a danger to international cooperation because they can render decisions that conflict with the interests of state parties"); Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner & Yoo*, 93 CAL. L. REV. 901, 902 (2005) (arguing that independent tribunals play a legitimizing role in international relations and are also constrained by various mechanisms according to states' wishes); Eric A. Posner & John C. Yoo, *Reply to Helfer & Slaughter*, 93 CAL. L. REV. 957, 958 (2005) (criticizing Helfer and Slaughter's reliance on the ECJ and ECHR in deriving a model for a successful international tribunal and noting the general decline of the ICJ over recent years).

¹⁴⁰ Helfer & Slaughter, *supra* note 137, at 387.

tice (ECJ).¹⁴¹ Within the subject matter it addresses, the EU example typifies characteristics common to supranational regimes: legal contractuality, structural strength, and substantive depth. First, the contractual nature of the EU court system derives from its explicit establishment in the EC Treaty.¹⁴² Structurally, the ECJ is an appellate court which is able to hear cases concerning interpretation of the EC Treaty or the increasingly comprehensive body of European Union legislation. Certain EU laws have been deemed “directly effective,” thus allowing the supranational court to hear the claims of individuals concerning these provisions.¹⁴³ Demonstrating the system’s substantive depth, the ECJ issues binding decisions¹⁴⁴—which are generally well respected by member state courts—that often find against the interest of an EU member state,¹⁴⁵ thus forcing that state to change its practice in conformity with the EU legal norm.

However successful supranational adjudication has been for the EU, to assert *a fortiori* that the system will win acceptance among the CAFTA-DR states ignores the obvious gap between what is politically feasible among EU member states and among the CAFTA-DR signatories. The United States will not likely adopt binding uniform interna-

¹⁴¹ See Consolidated Version of the Treaty Establishing the European Community (Treaty of Rome), art. 7, Dec. 24, 2002, 2002 O.J. (C 325) 33 [hereinafter EC Treaty] (establishing the institutions of the European Community, including a “Court of Justice”). The ECJ has the general jurisdiction to “ensure that in the interpretation and application of [the EC] Treaty the law is observed.” *Id.* art. 220.

¹⁴² See EC Treaty, *supra* note 141, art. 7 (listing a “Court of Justice” among the community’s institutions), arts. 220, 225 (establishing the Court of First Instance).

¹⁴³ See, e.g., Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1, 7 (1962) (finding that certain articles of the EC Treaty can be directly applicable by virtue of the treaty’s establishment of a legal order that is comprised both of states and citizens).

¹⁴⁴ See EC Treaty, *supra* note 141, art. 228, § 1 (“If the Court of Justice finds that a Member State has failed to fulfill an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice.”); *id.* arts. 244, 256 (establishing the enforceability of ECJ decisions and the procedures pertaining thereto).

¹⁴⁵ See, e.g., Case 115/78, *Knoors v. Sec’y of State for Econ. Affairs*, 1979 E.C.R. 399, 406, 411 (finding in favor of a Dutch national living in Belgium who appealed the Netherlands’ decision to deny his application for a Dutch business license in contravention of a Community directive). History has shown that not every member state’s courts will wholly defer to the ECJ’s judgments. See, e.g., *Brunner v. Eur. Union Treaty*, 1 C.M.L.R. 57, 79 (1994) (exemplifying the German Federal Constitutional Court’s deference to the ECJ’s adjudication of individual fundamental rights as long as that interpretation is consistent with the German constitution).

tional environmental standards,¹⁴⁶ yet a supranational regime would by definition necessitate such a standard.¹⁴⁷ Additionally, the United States has shown through its demonstrated preferences that it is not receptive to international standards that compel action which it would not otherwise be willing to take,¹⁴⁸ as has been the practice in the paradigmatic EU example.¹⁴⁹ Clearly, a supranational system in the mode of the EU adopts substantive provisions that are far deeper than the United States would implement on its own to deal with environmental concerns.

III. ALARMS AND NETWORKS: EXPLICITLY SHALLOW, POTENTIALLY DEEP

As discussed in Part I, a satisfactory solution to the problem of environmental protection would involve both a mechanism for enforcing the citizen submission process and uniform standards of environmental protection.¹⁵⁰ Part II adds to this analysis the constraint of political feasibility—the idea that any proposed enforcement mechanisms and uniform standards must be palatable to the preferences of the contracting parties in order to enter into force.¹⁵¹ This Part argues that NAAEC and CAFTA-DR provide for systems that, in the hands of politically astute NGOs, are sufficient to counteract the environmental race to the bottom in such a way as to provide the necessary substantive protections in a politically feasible manner.¹⁵²

The NAAEC and CAFTA-DR citizen submission processes, rather than serving as court-like means for rights protection and enforcement, act as “fire alarms” that alert the public and signatory govern-

¹⁴⁶ See *supra* notes 116-122 and accompanying text.

¹⁴⁷ The act of making a dichotomous decision sets an international standard with which the court expects states to comply, whether they actually do or not. See Helfer & Slaughter, *supra* note 137, at 289-90.

¹⁴⁸ See *supra* notes 116-122 and accompanying text (describing the unwillingness of Congress to accept the Kyoto treaty as signed and negotiated by the Clinton administration).

¹⁴⁹ Whether or not the EU is representative of other supranational adjudicatory regimes on this point is up for debate. See *supra* note 139.

¹⁵⁰ See *supra* Part I.C.

¹⁵¹ See *supra* Part II.A.

¹⁵² This Comment does not claim that this is the *only* environmental regime that is sufficient to stem the race to the bottom and achieve political feasibility, but rather analyzes the treaties' terms as a vehicle for understanding a possible solution to the legal-substantive tradeoff. See *supra* note 115.

ments to the need for regulatory change.¹⁵³ It is the province of enterprising NGOs to help trip the alarm by bringing these submissions in a manner that puts the most political pressure on the member states to respond. But simply motivating national regulatory reform is only half the job; haphazard reform alone is no cure for the environmental race to the bottom. Anne-Marie Slaughter provides a theory for how regulatory networks—groups of domestic environmental ministers¹⁵⁴ such as CAFTA-DR’s Environmental Affairs Council (EAC)¹⁵⁵ and Environmental Cooperation Commission (ECC)¹⁵⁶—help harmonize international standards through the generation and dissemination of credible information among the participating government officials.¹⁵⁷ Systems such as the citizen submission process can help encourage harmonization of regulatory approaches by first producing information regarding specific regulatory failures, thus mobilizing public support for, and government interest in, addressing the issue.¹⁵⁸ Slaughter claims that international regulatory networks can then encourage the state addressing the specific failure to do so in a manner consistent with the regulatory approaches used in the other network member states.¹⁵⁹ Harmonization emerges as the regulators, conforming to the practical advice of their international peers, use their domestic authority as national-level administrators to implement the new standard international response.¹⁶⁰

¹⁵³ See Raustiala, *supra* note 9, at 389, 393, 398 (classifying the NAAEC submission procedure as a “review institution” analogous to a “fire alarm”—a decentralized system that co-opts private watchdogs to alert government institutions to the need for reform).

¹⁵⁴ See ANNE MARIE SLAUGHTER, *A NEW WORLD ORDER* 36-64 (2004) (introducing the concept of regulatory networks).

¹⁵⁵ See *supra* note 84.

¹⁵⁶ See *supra* note 84.

¹⁵⁷ See SLAUGHTER, *supra* note 154 at 177-78, 187-88 (stressing the role of regulatory networks in generating information critical to government reform); see generally *id.* at 1-35 (introducing the author’s theory of state disaggregation and establishing a taxonomy of networks).

¹⁵⁸ *Id.* at 189-91.

¹⁵⁹ *Id.* at 20, 59-61.

¹⁶⁰ *Id.* at 132, 145, 168-69, 178; see also José E. Alvarez, *The New Dispute Settlers: (Half) Truths and Consequences*, 38 TEX. INT’L L.J. 405, 421 (2003) (citing Christine Chinkin, *Normative Development in the International Legal System*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 21, 30 (Dinah Shelton ed., 2000) (discussing “soft,” or nonbinding, law that can “guide the application of hard [binding] law”)).

The following Section analyzes the NAAEC and CAFTA-DR provisions in light of Slaughter's model. It argues that the treaties incorporate Slaughter's vision by establishing environmental regimes that combat the race to the bottom by (1) relying on private entities and NGOs as a means of identifying regulatory gaps, (2) encouraging institutional change among member states, resulting in a harmonized approach with broad applicability, and (3) remaining within the bounds of political feasibility. Because the NAAEC and CAFTA-DR provisions are functionally identical, the arguments referencing NAAEC citizen submission cases demonstrate that both treaties have the capacity to meet this challenge.

A. *The Private Right of Action: A Tool for Political Pressure*

The aim of the environmental submission process is not to grant legal recourse for individuals who have suffered an environmental harm, but to provide a forum that enables private parties to help identify gaps in state environmental regulations.¹⁶¹ Both treaties use the same procedure, a key component of which grants standing to NGOs based in any member state to bring claims against member states for environmental non-enforcement.¹⁶² Two NAAEC factual records, *Metales y Derivados (Metales)*¹⁶³ and *Cruise Ship Pier Project in Cozumel, Quintana Roo (Cozumel)*,¹⁶⁴ show that NGOs can use this standing provision to gain the ear of officials capable of addressing their concerns.¹⁶⁵

¹⁶¹ CAFTA-DR and NAAEC both provide for claims based on domestic governmental nonenforcement of environmental laws and regulations on the books. CAFTA-DR, *supra* note 1, art. 17.7(1); NAAEC, *supra* note 5, art. 14(1). Criticism of the submission process based on the lack of institutional change in response to the identified environmental harm misunderstands the purpose of the submission process itself, which is merely to identify domestic nonenforcement. See Raustiala, *supra* note 9, at 389 (defining the role of review institutions in international governance).

¹⁶² See *supra* notes 73-75 and accompanying text. There is no requirement that domestic remedies be exhausted before claimants have recourse to either the NAAEC or CAFTA-DR submission process. See CAFTA-DR, *supra* note 1, art. 17.

¹⁶³ Secretariat for the N. Am. Comm. for Env'tl. Cooperation, Final Factual Record *in re* Metales y Derivados, SEM-98-007 (Feb. 7, 2002) [hereinafter *Metales*], available at <http://www.cec.org/files/pdf/sem/98-7-FFR-e.pdf>.

¹⁶⁴ Secretariat for the N. Am. Comm. for Env'tl. Cooperation, Final Factual Record *in re* Cruise Ship Pier Project in Cozumel, Quintana Roo, SEM-96-001 (Oct. 24, 1997) [hereinafter *Cozumel*], available at <http://www.cec.org/files/pdf/sem/ACF17D1.PDF>.

¹⁶⁵ Both of these cases were originally brought by NGOs. See *Metales*, *supra* note 163, at 9; *Cozumel*, *supra* note 164, at 6. It is important for NGOs motivated by political goals to instigate submissions, because any individuals who are harmed either physi-

In *Metales*, the Environmental Health Coalition and Comité Ciudadano Pro Restauración del Cañón del Padre y Servicios Comunitarios, A.C., brought a submission in response to residents' complaints of environmental contamination. They argued to the NAAEC Secretariat that Mexico had failed to "enforce its environmental law effectively in the case of [an] abandoned lead smelter . . . in Tijuana."¹⁶⁶ After an investigation, the Secretariat concluded that the waste recycling facility in question had been abandoned,¹⁶⁷ that the residual waste had not been properly sequestered or disposed of,¹⁶⁸ and that the situation endangered both the local ecosystem and human life.¹⁶⁹ Additionally, the Secretariat found that the plant's operators had fled to the United States in order to avoid prosecution under Mexican law.¹⁷⁰ Although contaminants remained at the site as of 2004, the submission process has helped to publicize the situation.¹⁷¹

Similarly, although the *Cozumel* case did not end the way the complainants would have hoped, NAAEC enabled them to bring widespread public attention to their issue. In that case, controversy arose over plans to construct a pier, a component of the larger "port terminal project," when environmental groups learned that the project endangered parts of a coral reef.¹⁷² The groups claimed that the Mexican government violated its own environmental laws when it failed to assess the environmental impact of the project prior to commencing construction of the pier.¹⁷³ In the short term, the complainants won both the public's attention and a voluntary moratorium on further construction in the area, pending the outcome of the NAAEC Secre-

cally or financially by a member state's nonenforcement of its environmental provisions have no substantive remedy available from the submission process, and therefore little incentive to bring a submission on their own behalf.

¹⁶⁶ *Metales*, *supra* note 163, at 13; *see also* Yang, *supra* note 106, at 444 (noting that residents of the area complained about the contamination for years).

¹⁶⁷ *Metales*, *supra* note 163, at 22-23.

¹⁶⁸ *Id.* at 23-24.

¹⁶⁹ *Id.* at 35-40.

¹⁷⁰ *See id.* at 14 (noting that the submission asserted that Mexico is not enforcing its criminal sanctions against the owners who had fled to the United States).

¹⁷¹ *See, e.g.*, Yang, *supra* note 106, at 456-57 (acknowledging that the NAAEC submission procedure promoted transparency in the *Metales* submission, but arguing that the submission process ultimately failed because it did not sufficiently shame the Mexican government into implementing appropriate reforms to address the problem).

¹⁷² *Cozumel*, *supra* note 164, at 8-9.

¹⁷³ *Id.* at 8-10.

tariat's investigation.¹⁷⁴ Despite the factual record's finding of evidence that the pier, if completed, would irreparably damage the coral reefs,¹⁷⁵ construction resumed after the factual record's publication.¹⁷⁶

Given the results of these cases, it is difficult to argue that the submission system is useful to domestic environmental interests and not a fruitless exercise. The liberal theory of international relations, however, makes the political value in such a process more obvious. A look at the three bases of the liberal theory suggests that any venue for issue advocacy that garners attention from both the public and officeholders will aid an advocate seeking to enhance her domestic political standing. First, the liberal theory assumes that "[t]he fundamental actors in international politics are individuals and private groups,"¹⁷⁷ who then, according to the theory's second basic assumption, shape the political preferences of the state through the domestic political process.¹⁷⁸ Finally, the theory claims that the aggregate of "interdependent state preferences" instructs the state's behavior on the international stage.¹⁷⁹ Along these lines, *Metales* and *Cozumel* show how the submission process allows environmental groups to formally protest the regulatory decisions of a state. These claims can be leveraged to advance the claimants' domestic political agenda, and therefore affect governmental preferences and international behavior through the domestic political process. In both *Metales* and *Cozumel*, the claimants, though dissatisfied with the specific outcomes, used an international venue to draw attention to their concerns, thus bringing regional and international pressures to bear on the nonenforcing state. Such international attention can be parlayed into domestic political gains through skillful public relations techniques, and these gains can be used to affect both the state's domestic and international environmental policies.

Whether or not claims of environmental nonenforcement win immediate remedy from the delinquent state in the specific circumstances giving rise to the submission matters little when compared to the political value conferred upon the complainant. Even though the submission process failed to clean up the lead smelter in *Metales* or protect the reef in *Cozumel*, the submissions' ability to capture the

¹⁷⁴ Graubart, *supra* note 9, at 437-38.

¹⁷⁵ *Cozumel*, *supra* note 164, at 37-38.

¹⁷⁶ Graubart, *supra* note 9, at 439.

¹⁷⁷ Moravcsik, *supra* note 109, at 516.

¹⁷⁸ *Id.* at 518.

¹⁷⁹ *Id.* at 520.

public eye, and to use that publicity to push for environmental policy changes, exemplifies the political pressure the submission process can afford to domestic environmental interests.

B. *Networks and the Harmonization of Environmental Standards*

The treaties' "alarm" function is not the problem critics generally cite when calling for more effective environmental protections. More common is the claim that the environmental chapter should provide binding protections similar to those given to foreign investment and trade interests.¹⁸⁰ Nevertheless, to view environmental protection as a court-like proceeding misconstrues the approach adopted in both CAFTA-DR and NAAEC. Rightly understood, these provisions establish not a forum for international adjudication of legal rights, but a means for challenging domestic political decisions by raising the issue before an international body of domestic regulators.¹⁸¹ In so doing, the process affords NGOs the opportunity to spur the harmonization of laws, producing stronger domestic regulations.

Cozumel provides an example of Slaughter's regulatory networks in action. The proceedings themselves embarrassed the Mexican government, which agreed to the factual record's publication only under heavy pressure from the NAAEC Representatives of the United States and Canada.¹⁸² Additionally, the media attention that the case won within Mexico, while failing to derail the pier's construction, pressured the government into making future environmental concessions. As Jonathan Graubart notes:

the petition brought considerable international spotlight on faulty environmental practices in Mexico, increased local debate on such matters, and forced Mexico to improve its oversight procedures with respect to future developmental projects, making them more transparent. The Mexican Government did, in fact, promise to improve its laws on pro-

¹⁸⁰ See, e.g., Kibel, *supra* note 5, at 479 (proposing that North American environmental law be enforced on par with North American trade law).

¹⁸¹ In the CAFTA-DR context, this international regulatory network would be the EAC, CAFTA-DR, *supra* note 1, art. 17.5, or the ECC, Environmental Cooperation Agreement, *supra* note 84, art. IV, both of which are composed of federal environmental regulators, or their equivalent, from each member state.

¹⁸² See Graubart, *supra* note 9, at 437-38 (noting that the issue became embarrassing for the Mexican government).

tecting endangered coral reefs and to develop a new environmental plan for the Cozumel island.¹⁸³

Thus the complainants, though unable to achieve a victory in the controversy at issue, were able to use the international submission process to force the Mexican government to adhere more closely to international norms concerning environmental regulation.

The *BC Aboriginal Fisheries Commission et al. (BC Hydro)* factual record¹⁸⁴ also shows how the submission process can achieve international harmonization in environmental regulatory procedures. In this case, the submission claimed that Canada failed to enforce the Canadian Fisheries Act by allowing BC Hydro to build dams that disrupted protected species' habitats.¹⁸⁵ In coordination with this submission, the claimants publicized the case internationally, and added U.S. cosponsors to the complaint.¹⁸⁶ In the end, the factual record favored the complainants, questioning the effectiveness of Canada's enforcement measures embodied in the Water Use Planning Initiative (WUP).¹⁸⁷ On top of this, the complainants, with the help of diplomatic pressure from the United States, secured assurances from the Canadian government that would accelerate the WUP's introduction into force and strengthen its "sanctioning authority."¹⁸⁸

From these cases, it is clear that a politically aware environmentalist group can use the submission process as a coercive lobbying tool to bring an unwanted spotlight upon government officials. By harnessing peer pressure from other environmental regulators, the process can produce a uniform international standard for environmental pro-

¹⁸³ *Id.* at 439 (internal citations omitted).

¹⁸⁴ Secretariat for the N. Am. Comm. for Env'tl. Cooperation, Final Factual Record *in re* BC Aboriginal Fisheries Comm. et al., SEM-97-001, at 4 (May 30, 2000) [hereinafter *BC Hydro*], available at http://www.cec.org/files/pdf/sem/BC-Hydr-Fact-record_en.pdf (recounting the submission's allegation that BC Hydro "consistently and routinely violated [federal *Fisheries Act*] section 35(1)").

¹⁸⁵ *Id.* at 1 (recording a submission brought on behalf of NGOs, including the Trail Wildlife Association, the Sierra Club, and the Pacific Coast Federation of Fishermen's Association, *inter alia*).

¹⁸⁶ See Graubart, *supra* note 9, at 440-41 (describing the use of American cosubmitters "including the national Sierra Club in hopes of attracting greater international attention").

¹⁸⁷ *BC Hydro*, *supra* note 184, at 111-12; see also Graubart, *supra* note 9, at 442. The WUP is a Canadian regulatory instrument dealing with water use and fish habitats. *BC Hydro*, *supra* note 184, at 11-12.

¹⁸⁸ See Graubart, *supra* note 9, at 443 (noting that the public attention "helped spur the government into instituting the WUP process and in giving it more sanctioning authority").

tection. Furthermore, it is dangerous to view environmental regulation as a “product” rather than a “process” because regulation “is not fully contained in the statutory text; it is the complex outcome of the interaction between agency implementation, private-party challenges, judicial interpretation, and legislative reaction.”¹⁸⁹ To impose court-like enforcement powers against states for failing to prosecute every instance of environmental noncompliance is to be ignorant of the iterative regulatory process. Indeed, even within the United States, nonenforcement routinely prevails in the name of practical expediency and optimistic legislative goal setting.¹⁹⁰ A powerful supranational agency, wielding powerful investigative and sanctioning abilities, will not induce compliance by the states subject to its oversight. Rather, it will encourage those states to shrink the scope of their domestic environmental regulations in order to prevent liability, resulting in an overall decrease in substantive environmental protection.¹⁹¹

In sum, the environmental submission processes found in the NAAEC and CAFTA-DR treaties establish a means of giving effect to domestic regulation in a political atmosphere. The tools available to potential claimants have the power to instigate harmonization by challenging domestic practices that operate below the international norm. Once secured, these reforms will affect not only the complainants themselves, but will apply throughout the legal regime.

C. *Networks and Political Feasibility*

The innovation of the “alarms and networks” system of environmental enforcement is one of political feasibility. As noted in Part II, the legal-substantive tradeoff indicates that environmental treaties usually have substantively shallow provisions. Given that the NAAEC and CAFTA-DR signatories¹⁹² have already chosen to implement explicitly shallow provisions, the question then becomes whether the post-ratification deepening of the treaties’ substance remains politically feasible. This Section argues that the networked system and its

¹⁸⁹ Kal Raustiala, *The Political Implications of the Enforcement Provisions of the NAFTA Environmental Side Agreement: The CEC as a Model for Future Accords*, 25 ENVTL. L. 31, 48-49 (1995).

¹⁹⁰ *See id.* at 51 (citing the persistent nonattainment of emissions standards in Los Angeles).

¹⁹¹ *See id.* at 52 (arguing that the use of a supranational agency like the CEC would encourage Congress to reduce the scope of its environmental laws).

¹⁹² Recall that not all signatories have ratified CAFTA-DR, *see supra* note 8.

use of domestically accountable officials, combined with the NAAEC/CAFTA-DR Secretariats' respect for state sovereignty, ensure that the regulatory changes the system produces will be domestically legitimate.

The beauty of regulatory networks is that their composition provides democratic accountability: these networks are composed of state officials who already control a specific sector of the domestic government.¹⁹³ By treating agency heads and cabinet-level officials as the chief diplomatic officers within their substantive policy areas, Slaughter argues, states can “ensur[e] that transgovernmental networks are subject to at least the same checks and balances as national officials acting within national territory.”¹⁹⁴ In the same way that the networks co-opt regulators' authority to implement regulatory harmonization, they benefit from the accountability that those same regulators owe to their state governments.¹⁹⁵ A complicating factor in the case of CAFTA-DR is the possibility that not all member states may have sufficient regulatory infrastructures to be represented in such networks in the first place.¹⁹⁶ Answering this deficiency, the CAFTA-DR talks themselves have produced regulatory advancement among the negotiating parties, such that Central American states lacking the equivalent of a cabinet-level environmental minister have established interim regimes through which Slaughter's networked governance can operate.¹⁹⁷

¹⁹³ See SLAUGHTER, *supra* note 154, at 231 (arguing that if governments send their own appointed or elected officials to serve on these transnational networks, then they will be accepting of the networks' output because of the retention of state accountability). Such is the case with both the EAC and the ECC. See CAFTA-DR, *supra* note 1, art. 17.5; Environmental Cooperation Agreement, *supra* note 84, art. IV.

¹⁹⁴ SLAUGHTER, *supra* note 154, at 231.

¹⁹⁵ See *id.* at 232-33 (“[O]ne set of government officials operates at both the national and global-regional levels performing a set of interrelated functions, but these officials would have to represent both national and global interests . . .”). Kenneth Anderson challenges Slaughter's conception of accountability in the context of transgovernmental regulatory networks. See Kenneth Anderson, *Squaring the Circle? Reconciling Sovereignty and Global Governance Through Global Government Networks*, 118 HARV. L. REV. 1255, 1303 (2005) (book review) (“But plainly the argument of *A New World Order* depends crucially on judges and bureaucrats—unelected and, at best, only partially democratically accountable actors—relying on their own perception of their authority in order to bind the states of which they are nominally a part.”).

¹⁹⁶ See Graubert, *supra* note 9, at 437-38 (giving an example of Mexico's insufficient regulatory infrastructure).

¹⁹⁷ See *Implementation of the Dominican Republic-Central America Free Trade Agreement: Hearing Before the H. Comm. on Ways & Means*, 109th Cong. 14, 21 (2005) (statement of the Hon. Peter F. Allgeier, Acting U.S. Trade Rep., Off. of the U.S. Trade Rep.)

In addition to the network's accountability, the Secretariat's use of discretion has demonstrated, in the context of NAAEC, that the submission process can operate in a manner respectful of state sovereignty. Raustiala argues that, in refusing to investigate two specific submissions, the Secretariat made "sound" decisions that evinced a "politically astute" understanding of the submission process's relation to domestic regulatory methods.¹⁹⁸ Both the *Biodiversity Submission*¹⁹⁹ and the *Sierra Club Submission*²⁰⁰ challenged legislative amendments to U.S. environmental laws as, in effect, failures to enforce the preexisting environmental standards.²⁰¹ In each instance, the Secretariat decided to forego investigation of these rollbacks, noting that subsequent environmental legislation that diminishes the effectiveness of existing environmental law will not be considered a failure to enforce.²⁰² Raustiala points out that these decisions rightly interpret the

("Nicaragua has created a new office on trade and environment within its environment ministry as the result of the CAFTA, while El Salvador has established a new advisory committee on trade and environment issues, with NGOs on the committee, very much like our own Trade and Environment Policy Advisory Committee (TEPAC). In fact, the Environment Chapter requires all of the CAFTA-DR countries to establish such advisory committees."). The terms to which the signatories have agreed include the assurance that there will be meetings among cabinet-level environmental regulators, and that each state will establish an environmental consultative or advisory committee to implement environmental regulations. CAFTA-DR *supra* note 1, art. 17.5, 17.6(3).

¹⁹⁸ See Kal Raustiala, *International "Enforcement of Enforcement" Under the North American Agreement on Environmental Cooperation*, 36 VA. J. INT'L L. 721, 722-23 (1996) ("The analysis herein supports the [CEC] Secretariat's responses, arguing that the decisions are sound, both under the terms of the Agreement and under the separation of powers doctrine of the United States. Moreover, as this Article argues, the decisions handed down by the Secretariat are politically astute . . .").

¹⁹⁹ Secretariat for the N. Am. Comm. for Env'tl. Cooperation, *Petition Pursuant to Article 14 of the North American Agreement on Environmental Cooperation*, at 6, SEM-95-001 (June 30, 1995) (submitted by Jay Tutchton, Earthlaw), available at <http://www.cec.org/files/pdf/sem/95-1-SUB-EO.pdf> [hereinafter *Biodiversity Submission*] (claiming that the United States "cannot simply halt enforcement of the ESA . . . without violating its obligations under the NAAEC").

²⁰⁰ Secretariat for the N. Am. Comm. for Env'tl. Cooperation, *Submission Pursuant to Article 14 of the North American Agreement on Environmental Cooperation on the U.S. Logging Rider*, at 1, SEM-95-002 (Aug. 30, 1995) (submitted by Patti A. Goldman, Sierra Club Legal Defense Fund), available at <http://www.cec.org/files/pdf/sem/ACF151.pdf> [hereinafter *Sierra Club Submission*] (arguing that the U.S. government failed to enforce its environmental laws governing logging on federal lands).

²⁰¹ *Biodiversity Submission*, *supra* note 199, at 4; *Sierra Club Submission*, *supra* note 200, at 3.

²⁰² See Secretariat for the N. Am. Comm. for Env'tl. Cooperation, *Secretariat's Determination Pursuant to Articles 14 & 15 of the North American Agreement on Environmental Cooperation*, at 4-5, SEM-95-002 (Dec. 8, 1995), available at www.cec.org/files/pdf/

terms of NAAEC,²⁰³ and also reflect the correct understanding of environmental regulation as an iterative process that cannot be easily separated from legislative action.²⁰⁴ In this way, both the submission process and the officials managing the process respect the sovereignty of the signatory states. Such respect does not weaken the process, but rather strengthens it, because the international regime cannot function without the cooperation of its constituent governments.

As the NAAEC process demonstrates, the submission procedure, in upholding standards of environmental protection, must rely on both the internal legitimacy of networking officials as well as the self-limiting discretion of the institutions.

CONCLUSION

CAFTA-DR provides for a networked solution to the international environmental regulatory problem. The treaty's provisions have the potential to combat the diminution of environmental standards that might otherwise occur as a result of the increased international investment and trade that NAFTA and CAFTA-DR intend to achieve. In doing so, the submission process and regulatory network provide a system of international accountability that can use private actors to instigate proceedings, which produces the harmonization of standards in a politically acceptable manner. This system provides shrewd environmentalists an instrument for enhancing their domestic political status as a means to effect regulatory change.

sem/95-2-DET-OE.pdf ("Where the new law explicitly exempts, modifies, or waives provisions of an earlier law—enacted law will prevail."); Letter from Victor Lichtinger, Executive Director, Comm. For Env'tl. Cooperation, to Jay Tutchton, Staff Attorney, Earthlaw 4-6 (Sept. 21, 1995), available at <http://www.ccc.org/files/pdf/sem/95-1-DET-E1.PDF> ("[T]he provisions of Article 14 are most logically triggered when a failure to enforce is brought about by administrative shortcomings rather than legislative mandates.").

²⁰³ See Raustiala, *supra* note 198, at 757 (arguing that in rejecting these submissions, the Secretariat rightly read NAAEC to exclude claims against congressional "re-scissions bills and their attendant riders" despite the danger this legislation poses to the environment).

²⁰⁴ See *id.* at 758 ("In the complex regulatory system, enforcement cannot be readily separated from lawmaking in practice. In the United States, administrative agencies engage in both lawmaking and enforcement as part and parcel of the modern administrative state.").