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Publication Date
2005-05-12

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Research Paper No. 05-14

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Police Patrols & Fire Alarms in the NAAEC

KAL RAUSTIALA*

The North American Free Trade Agreement (NAFTA) helped usher in the contemporary "trade and environment" era. In an effort to assuage environmental organizations that feared NAFTA's impact on the North American environment, the United States, Canada, and Mexico negotiated the North American Agreement on Environmental Cooperation (NAAEC).[1] This Article explores a key aspect of the NAAEC: its provisions for the review of domestic environmental law enforcement via citizen submissions.

Treaty review is a critical issue because collective action problems plague both trade and environmental agreements. While the parties to these accords evidently desire cooperation, they face incentives to renege or behave opportunistically with regard to their international commitments. Consequently, many contemporary treaties create a system for monitoring state performance. I call these systems *review institutions*.[2] Review institutions typically review treaty implementation, but they may also review treaty compliance or even treaty effectiveness.

Articles 14 and 15 of the NAAEC, commonly known as the Citizen Submissions Process, are an example of a review institution. The Citizen Submissions Process permits any individual or group in

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* Visiting Professor, Columbia Law School. I thank Stuart Banner, Larry Helfer, John Knox, Dave Markell, and Jody Freeman for helpful comments on earlier drafts. Kal Raustiala, *Citizen Submissions and Treaty Review in the NAAEC*, *in* GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION 256 (David L. Markell & John H. Knox eds., 2003) (providing an earlier version of this article).

1. North American Agreement on Environmental Cooperation, Sept. 14, 1993, art. 1, 32 I.L.M. 1480, 1483 [hereinafter NAAEC]; John H. Knox & David L. Markell, *The Innovative North American Commission for Environmental Cooperation*, *in* GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION 256, 256 (David L. Markell & John H. Knox eds., 2003).

2. In previous work with David Victor and Eugene Skolnikoff we use the phrase "systems for implementation review." THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS (David G. Victor et al. eds., 1998).

Canada, Mexico, or the United States to allege that one of these states is failing to effectively enforce a domestic environmental law.[3] If successful, a citizen submission can compel a response from the party in question and lead to the publication, by the NAAEC Secretariat, of a "factual record" of the situation.[4] The procedure's aim is to ensure that the NAFTA parties, and their political subunits, such as provinces and municipalities, effectively enforce their environmental laws. The political subtext that led to the procedure's creation was the fear that liberalized trade under NAFTA would produce pressures to lower domestic environmental standards and weaken enforcement.[5]

In this Article I argue that we can usefully distinguish two fundamental modes of treaty review: "police patrols" and "fire alarms."[6] Rather than rely solely on investigative "police patrols" by a centralized bureaucracy, the NAAEC creates a "fire alarm" which permits private actors to trigger an investigation by the Commission for Environmental Cooperation (CEC) when they allege that a NAFTA party is failing to uphold its treaty obligations. The police patrol-fire alarm dichotomy highlights a central issue in treaty design: the provision of compliance-relevant information. The distinction between the two modes of review is fundamentally about the source of treaty-relevant information, not about what happens after that information is gathered (such as the choice to impose sanctions or provide assistance). Most scholarly literature addressing compliance with international agreements focuses on what happens after detection of a treaty violation. This article focuses on a prior question—the method that reveals such information. The use of fire alarms in treaty review, while not unknown, is unusual; international law rarely permits private actors to challenge states.[7] As a

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3. NAAEC, *supra* note 1, art. 14, 32 I.L.M at 1488.

4. NAAEC, *supra* note 1, art. 14 & 15, at 1488-89.

5. Betty Ferber et al., *Building an Environmental Protection Framework for North America: The Role of the Non-Governmental Community, in* GREEN GLOBE YEARBOOK OF INTERNATIONAL CO-OPERATION ON ENVIRONMENT AND DEVELOPMENT 83, 83 (Helge Ole Bergesen et al., eds., 1995); PIERRE MARC JOHNSON & ANDRE BEAULIEU, THE ENVIRONMENT AND NAFTA: UNDERSTANDING AND IMPLEMENTING THE NEW CONTINENTAL LAW 111-12 (1996) (indicating that this fear was particularly salient for Mexico).

6. Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarm*, 28 AM. J. POL. SCI. 165, 165 (1984).

7. The major exception is bilateral investment treaties, which commonly permit private actors to challenge state actions. In multilateral accords of any kind, however, such access is rare. (*See* Kenneth J. Vanvelde, *US Bilateral Investment Treaties: The Second Wave*, 14 MICH. J. INT'L. L. 621, 655-59 (1993).) *See generally* THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING 16 (Philip Alston & James Crawford eds., 2000) (discussing that private actors also have standing to challenge state parties in some international human rights accords).

result, the choice to employ a fire alarm structure in the NAAEC raises two important questions. First, why, and under what conditions, do states choose to rely on fire alarms, police patrols, or some combination when designing treaty review institutions? Second, what outcomes flow from this choice?

The focus of this Article is primarily on the second question–the implications of empowering private actors in treaty review. I argue that under the NAAEC, the creation of a fire alarm yields important positive and normative benefits. However, I do not claim that the anticipation of these benefits explains the decision to create a fire alarm in this case. Prevailing rational design theories suggest that the functional benefits that flow from international institutions largely explain states' choices of treaty design.[8] In other words, rational design theorists claim that "design differences [in treaties] are not random. They are the result of rational, purposive interactions among states and other international actors to solve specific problems."[9]

This Article explores the relative strength of rational design theory. I argue that it is liberal international relations theory, rather than rational design theory, that best explains the choice of review institution in the NAAEC. Liberal theory looks to the configuration of actors and institutions at the domestic level to explain international outcomes.[10] Only by understanding the domestic actors' interests, and the institutions that aggregate and often refract those interests, can we understand the preferences of states, and hence the observed outcomes that are embodied in legal provisions. As the Article will show, the Citizen Submissions Process was created because of political pressure

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8. Barbara Koremenos et al., *The Rational Design of International Institutions*, 55 INT'L ORG. 761, 762 (2001). Functional theories evaluate causes in terms of effects. As Robert Keohane argues, "Functional explanations in social theory are generally post hoc in nature. We observe such institutions and then rationalize their existence. Rational-choice theory, as applied to social institutions, assumes that institutions can be accounted for by examining the incentives facing the actors who created and maintained them. Institutions exist because they could have reasonably been expected to increase the welfare of their creators." ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY 80 (1984).

9. Koremenos, *supra* note 8, at 762.

10. *See* Jose E. Alvarez, *Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory*, 12 EUR. J. INT'L L. 183, 183 (2001); Edward D. Mansfield et al., *Why Democracies Cooperate More: Electoral Control and International Trade Agreements*, 56 INT'L ORG. 477, 479 (2002); Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513, 516 (1997); Kal Raustiala, *Domestic Institutions and International Regulatory Cooperation: Comparative Responses to the Convention on Biological Diversity*, 49 WORLD POL. 482, 483-83 (1997); Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J INT'L L. 503, 508 (1995).

from U.S. environmental organizations. These organizations' power was enhanced by the fact that NAFTA was passed as a congressional-executive agreement, subject to a straight majority vote in both houses of Congress, rather than an Article II treaty.[11] Nonetheless, the benefits of a fire alarm may encourage states to employ them more often. This may occur after states learn which review institutions work best in differing contexts, and as political barriers to fire alarms, based largely on concerns about sovereignty, are weakened.

The benefits that flow from the creation of a fire alarm fall into three categories: effectiveness, efficiency, and participatory governance. Because the NAAEC citizen submissions process involves the citizenry of the NAFTA parties, it draws on the abundant private information about environmental enforcement individuals possess. This makes it more effective than a pure police patrol system. It is also likely that, in the context of the NAAEC, a fire alarm is more efficient than a police patrol model. Further, since fire alarm review directly involves individuals, it upholds, however weakly, normative values concerning participatory democracy.[12] While the Citizen Submissions Process is a small step in this regard, it does enhance participation in international economic liberalization, which is an increasingly important issue as popular protests mount over the rising role of international institutions.[13] From a domestic law perspective the NAAEC's review provisions are feeble. But in the context of international law, they are ground-breaking. By creating a direct role for individuals, the submissions process challenges the state-centric orientation of international law.

Part I of this Article elaborates the police patrol-fire alarm dichotomy. Part II describes the details of the NAAEC procedure. Part III illustrates how the police patrol-fire alarm distinction applies to the

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11. *See* U.S. CONST. art. II, § 2, cl. 2. (providing that an Article II treaty is subject to a two-thirds passage in the Senate). Made in the USA v. United States, 56 F. Supp. 2d 1126, 1228 (1999) (litigating the issue of whether NAFTA, as a treaty passed by Congress as a fast track legislation pursuant to the exercise of congressional power under the Commerce Clause, required a two-thirds vote by the Senate under the Treaty Clause); CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW: CASE AND MATERIALS 409 (2003).

12. *See* Barton Thompson Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 223-26 (arguing that the citizen suit, from which the NAAEC process is broadly derived, bolsters democratic values in a similar fashion).

13. *See* Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT'L L. 596, 597 (1999). The democratic deficit in international institutions is much lamented and commented upon. *See id.;* Symposium, *Trends in Global Governance: Do They Threaten American Sovereignty?*, 1 U. CHI. J. INT'L L. 205 (2000); David Wirth, *Reexamining Decision-Making Processes in International Environmental Law*, 79 IOWA L. REV. 769 (1994).

NAAEC. It explains the choice of a fire alarm, describes the advantages of fire alarms, and argues for its significance as a component of institutional design. Finally, Part IV concludes that review institutions play an important role in promoting treaty implementation, monitoring performance, and ensuring that states comply with their treaty obligations. Additionally, it concludes that there are compelling reasons to believe that fire alarm review institutions have significant advantages in the context of North American environmental cooperation.

I. TWO MODELS OF TREATY REVIEW

Treaty review institutions gather, assess, and take decisions based on information relevant to the implementation of, compliance with, and effectiveness of commitments in international agreements.[14] While empirical studies are few, many treaties appear to contain no review provisions whatsoever, whereas a few employ elaborate, variegated review institutions. In the study of American politics, scholars of the congressional oversight of administrative bureaucracies argue that two basic models of review exist: police patrols and fire alarms.[15] Police patrols encompass efforts by centralized authorities (in the congressional context - committees) to actively and systematically search for problems or violations through hearings, audits, and inspections. By contrast, private actors trigger fire alarms, which signal that there has been a violation or problem. Like real fire alarms, these reactive and decentralized procedures rely on individual stakeholders with economic or political incentives to pursue such claims.

The core distinction between police patrols and fire alarms is whether the system of review relies upon central authorities to search for and reveal information about performance, or whether it delegates that role to other actors. The NAAEC's review institution, which empowers private actors to question state performance, is an example of a fire alarm. The Chemical Weapons Convention, which permits a central authority to inspect and review state performance, is an example of a police patrol.[16] The central authority bears the costs of searching for noncompliance. By contrast, fire alarms shift costs away from

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14. KAL RAUSTIALA, REPORTING AND REVIEW INSTITUTIONS IN 10 MULTILATERAL ENVIRONMENT 3 (2001), *available at* http://www.unep.org/GEO/ techreports.htm.

15. *See* McCubbins & Schwartz, *supra* note 6, at 165.

16. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, S. TREATY DOC. NO. 103-21, 32 I.L.M. 800 (1993).

governments and international organizations, to individuals and other private actors.

These two models represent distinct but not mutually exclusive institutional strategies. Review institutions often blend elements of both police patrols and fire alarms.[17] Review institutions may also eschew both models; that is, the review institution may rely only on self-reporting by parties to the treaty, or there may be no reporting or review at all. In many treaties, states prefer no performance review because the treaty addresses a coordination problem (and hence is basically self-enforcing), because the agreement is largely symbolic, or because the states involved fear "relinquishing sovereignty," in the sense of relinquishing autonomy and control.[18] When states do create treaty review institutions, they often shun fire alarms. Empowering private actors unleashes processes that are difficult for governments to control.

The police patrol-fire alarm dichotomy refers to the manner in which treaty-relevant information is gathered and signaled, not the response to that information. Responses vary independently of the mode of the review. In the context of international treaties, responses to noncompliance typically range from mild shaming strategies to authorized trade sanctions. In addition, in domestic legal systems legislators create laws that apply primarily to other actors. The international system, by contrast, typically creates legal obligations through treaties, which by definition apply to States' own behavior. In this sense treaties are more like contracts than statutes. As a result, states face incentives both to review the performance of other states and to behave opportunistically. These sometimes conflicting incentives, coupled with sovereignty concerns over fire alarms, explain why treaty review is so weak compared to congressional oversight.[19]

II. THE NAAEC CITIZEN SUBMISSIONS PROCESS

The NAAEC aims to enhance environmental protection in North America and increase cooperation among the NAFTA parties. Environmental organizations, particularly in the United States, had two chief fears about NAFTA. First, they feared that the increased trade produced by NAFTA would exacerbate environmental problems in the

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17. NAAEC, *supra* note 1, art. 13, at 1487-88. Under the NAAEC, for example, the CEC Secretariat can initiate studies under its own initiative on a wide range of topics. *Id.*

18. *See* Kal Raustiala, *Rethinking the Sovereignty Debate in International Economic Law*, 6 J. INT'L ECON. L. 841 (2004) (discussing the sovereignty issue).

19. *See* Andrew T. Guzman, *The Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms*, 31 J. LEGAL STUD. 303 (2002).

border regions. Second, and more importantly, they feared the effects on environmental protection. Many environmentalists believe that trade liberalization undermines environmental protection not only in terms of a race to the bottom in regulatory standards, but also in a race-to-the-bottom in implementation and enforcement.[20] This concern was particularly salient in NAFTA because Mexican environmental law, while formally strict, was poorly enforced.[21] Relatively tepid congressional support for NAFTA in the early 1990s enabled environmental groups to successfully demand that the Clinton Administration address this alleged race-to-the-bottom problem.[22] The Clinton Administration pressed for the creation of the NAAEC because it was concerned that NAFTA would not pass if environmentalists opposed it.[23] Canada and Mexico ultimately accepted this addition as the price of NAFTA.[24] As a result, the NAAEC was negotiated with the core objective of "improv[ing] environmental laws, regulations, procedures, policies, and practices" and enhancing "compliance with, and enforcement of, environmental laws and regulations."[25]

The NAAEC Citizen Submissions Process, which in many ways is the agreement's centerpiece, permits any individual or nongovernmental organization (NGO) residing in the territory of the three parties to file a submission with the Secretariat of the CEC alleging that a party is "failing to effectively enforce its environmental law[s]."[26] Citizen suit procedures found in some U.S. statutes are a loose model for the NAAEC Citizen Submissions Process.[27] This provision is unique in

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20. Richard Revesz, *Rehabilitating Interstate Competition: Rethinking the 'Race to the Bottom' Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1210 (1992); Kristin Engel, *State Environmental Standard-Setting: Is There a "Race" and Is It "to the Bottom"?*, 48 HASTINGS L.J. 271, 274 (1997) (exploring the race to the bottom notion).

21. BNA, *North American Free Trade Agreement Greeted with Suspicion by Environmental Groups*, 15 INT'L ENV'T REP. 561, 562. The U.S. General Accounting Office conducted a study of Mexican law that significantly fed this concern. *See* GAO, US-MEXICAN TRADE: INFORMATION ON ENVIRONMENTAL REGULATIONS AND ENFORCEMENT, No. GAO/NSIAD-91-227 (May 1991).

22. *Green Groups Press Kantor for Powerful NAFTA Environmental Commission*, INSIDE U.S. TRADE, Mar. 5, 1993, http://www.insidetrade.com. The U.S. Trade Representative had already been pressured into preparing a report on the environmental issues. USTR, REVIEW OF US-MEXICO ENVIRONMENTAL ISSUES (Feb. 1992).

23. *See* Keith Bradsher, *The Free Trade Accord*, N.Y. TIMES, Nov. 14, 1993, at 14.

24. *See* Steve Charnovitz, *The North American Free Trade Agreement: Green Law or Green Spin?*, 26 LAW & POL'Y INT'L BUS. 1,1 (1994).

25. NAAEC, *supra* note 1, art. 1, at 1483.

26. *Id.* art. 14, at 1488.

27. Clean Air Act, 42 U.S.C. § 7604 (2001); Clean Water Act, 33 U.S.C. § 1365 (2001); Endangered Species Act, 16 U.S.C. § 1540(g) (2001); Toxic Substances Control Act, 15 U.S.C. §

international environmental law because it focuses not on the enforcement of *international* law, but rather on that of *domestic* law. In this sense the NAAEC creates a means for the international "enforcement of enforcement."[28] There are minor threshold requirements submitters must meet but, interestingly, submitters need not reside in or be a citizen of the party whose enforcement practices they challenge.[29] Thus the process is truly transnational: Mexican NGOs can complain about enforcement failures in Nova Scotia, and, what was critical from the political perspective of securing the overall NAFTA package, U.S. NGOs can complain about enforcement failures in Tijuana.[30]

When a private individual makes a submission, the Secretariat determines whether to request a response from the challenged party.[31] After receiving the government's reply, the Secretariat then decides whether to recommend the creation of a "factual record."[32] The environment ministers of the three NAFTA parties (the Council), must approve the decision by a two-thirds vote.[33] When the factual record is complete, the Council votes again on its public release.[34] Since the inception of the process in 1995, the Secretariat has received forty-three submissions,[35] and has completed nine factual records.[36] These factual

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2619 (2001); Hazardous Liquid Pipeline Safety Act, Pub. L. No. 96-126, Title II § 215, 93 Stat. 1014 (1981) (incorporating Citizen suits into legislative acts). The Clean Air Act states:

> [A]ny person may commence a civil action on his own behalf—(1) against any person (including (i) the United States and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged. . .to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation.

42 U.S.C. § 7604.

28. *See generally* Kal Raustiala, *International 'Enforcement of Enforcement' Under the North American Agreement on Environmental Cooperation*, 36 VA. J. INT'L L. 721 (1996).

29. NAAEC, *supra* note 1, art. 14, at 1488.

30. *See* Comité Ciudadano Pro Restauración del Canon del Padre Y Servicios Comunitarios, A.C. and Environmental Health Coalition, Petition Before the Commission for Environmental Cooperation, Under Articles 13, 14 and 15 of the North American Agreement for Environmental Cooperation, Metales y Derivados, A14/SEM/98-007/01/SUB, (CEC Oct. 23, 1998) (SEM 98-007), *available at* http://www.cec.org/files /PDF/SEM/98-7-SUB-OE.pdf [hereinafter *Metales y Derivados*].

31. NAAEC, *supra* note 1, art. 14, at 1488.

32. *Id.* art. 15, at 1488-89.

33. *Id.*

34. *Id.*

35. *Citizen Submissions on Enforcement Matters*, *available at* www.cec.org/citizen/index.cfm?varlan=english (last visited Sept. 7, 2004).

36. *Id.*

records are comprehensive but generally neutral in tone; indeed, a recurring critique of the current procedure is that the Secretariat may not make any explicit recommendations, nor does it have the power to reach affirmative conclusions as to whether the party in question is in fact "failing to effectively enforce" its law.[37]

The NAAEC Citizen Submissions Process is, as a result, primarily an information-forcing mechanism. There are no direct sanctions employed; rather, the NAAEC employs a regulatory strategy of "sunshine."[38] By forcing parties to respond to complaints, and through the creation of factual records, the procedure generates information about environmental enforcement. It forces states to explain, and to give reasons for, their conduct and administrative choices.

From an administrative law perspective, the lack of a meaningful remedy and the low number of submissions (about five a year) might suggest that the significance of the NAAEC process is minimal.[39] But when viewed in the context of international law the procedure is highly unusual. It both addresses domestic legal enforcement through an international agreement, and it empowers individuals, even those from other jurisdictions, to bring claims against a sovereign state. In this sense, the NAAEC Citizen Submissions Process is an example of "complaint-based monitoring"[40] and while it is not a form of supranational adjudication, it shares some important characteristics of such adjudication.[41]

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37. NAAEC, *supra* note 1, art. 15, at 1488-89. *See generally* JOINT PUBLIC ADVISORY COMMITTEE [JPAC], 'CEC, LESSONS LEARNED: CITIZEN SUBMISSIONS UNDER ARTICLES 14 AND 15 OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION, FINAL REPORT TO THE COUNCIL OF THE COMMISSION FOR ENVIRONMENTAL COOPERATION (June 6, 2001), http://www.cec.org/files/pdf/JPAC/rep11-e-final_EN.PDF (reviewing and reporting on the lessons learned from the public history of citizen submissions under Articles 14 and 15 of the NAAEC).

38. Harold K. Jacobson & Edith Brown Weiss, *Assessing the Record and Designing Strategies to Engage Countries*, *in* ENGAGING COUNTRIES: STRENGTHENING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL ACCORDS 511, 543 (Edith Brown Weiss & Harold K. Jacobson eds., 1998) "Sunshine methods are intended to bring the behavior of parties and targeted actors into the open for appropriate scrutiny, and thereby to encourage compliance." *Id.*

39. It is clear that the rate of factual record production is going up, and indeed this year for the first time the Secretariat sought summer law interns to assist in the citizen submissions process. (Personal communication from Geoff Garver, CEC Secretariat, to author.)

40. John H. Knox, *A New Approach to Compliance with International Environmental Law: The Submissions Procedure of the NAFTA Environmental Commission*, 28 ECOLOGY L.Q. 1, 11 (2001).

41. *See* generally Laurence Helfer & Anne-Marie Slaughter, *Towards a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997) (providing additional information on supranational adjudication).

The empirical impact of the submissions process remains unclear. In the *Cozumel Pier* case, the submitters deemed their effort a success.[42] Other observers agree, arguing that due to the factual record "in Cozumel . . . the reef is now declared as a protected area, the development project was downsized, there have been legal changes[,] and a management plan is in place."[43] In the *BC Hydro* case, local NGOs claim that commitments made by Canada in response to their submission, and recorded in the factual record, have "proven extremely valuable . . . . Those commitments have become a very potent tool for us."[44] With only a few years of operation, it is too soon to convincingly gauge the effectiveness of the submissions process. Perhaps the best evidence to date on this question is the reaction of the NAFTA parties themselves. In 2000 the parties, apparently led by Canada and Mexico, considered curtailing the submissions process but backed off under NGO pressure. Nonetheless, recent actions and resolutions of the NAFTA parties circumscribe the process in potentially significant ways, ways that may go beyond the permissible bounds set by the treaty text.[45] If the NAAEC submissions process was truly toothless, these efforts, which have been the subject of considerable controversy, would not make sense.

III. TREATY REVIEW IN THE NAAEC

The NAAEC submissions process, like all fire alarms, shifts the search for noncompliance away from central actors (such as government officials or international organizations) and toward private actors. My primary argument in this Article is that the choice to create a fire alarm review institution yields certain benefits, but also creates problems and risks. My aim is to detail these benefits and costs. By highlighting the outcomes that flow from one or the other model, the police patrol-fire alarm typology also provides a potential explanation of the choice of review institution in the NAAEC: rational states designed the optimal system for gathering information about compliance with the NAAEC

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42. *See* GARY C. HUFBAUER ET AL., NAFTA AND THE ENVIRONMENT: SEVEN YEARS LATER 34 (Institute for International Economics 2000).

43. JPAC, *Summary Record*, Sess. No. 02-01, Mexico City, Mexico, Mar. 8, 2002, at 4, J/02-01/SR/Rev. 1, *at* http://www.cec.org/files/pdf/JPAC/sr02-01e-fin.pdf.

44. *Citizen Submission Proves Valuable in BC Hydro Case*, TRIO, Fall 2001, *available at* http://www.cec.org/trio/stories/index.cfm?ed=5&ID=70&varlan=english.

45. *See* David L. Markell, *The CEC Citizens Submission Process: On or Off Course?*, *in* GREENING NAFTA, *supra* note 1, at 286, 274-89.

and NAFTA's environmental standards. Is this rational design explanation persuasive?

A. Explaining the Choice of a Fire Alarm

This rational explanation, while consistent with prevailing theories of design in international relations, does not fit the empirical record well. There is little evidence that the NAFTA parties sought to create a fire alarm as the optimal institution to deter and reveal violations of international commitments. Rather, liberal international relations theory, with its focus on domestic interest groups and domestic institutions, best explains why the NAAEC featured such a novel review institution.

Consider first the differing reactions of the parties to the original NAAEC proposal. The United States, under the first Bush Administration, provided the idea of incorporating environmental concerns into NAFTA after key members of Congress, spurred by environmental groups, threatened to derail fast-track negotiating authority.[46] After NAFTA was concluded and the U.S. presidency changed, then President Clinton demanded new negotiations over a side agreement under continuing domestic pressure. While Canada and Mexico initially accepted the need for some regional environmental cooperation, they opposed the U.S. proposal to create the NAAEC and they were ultimately successful in modifying and weakening it, particularly its fire alarm feature.[47] Neither state sought this design feature and they clearly would have rejected it, but for the overwhelming economic power of the United States. Moreover, the United States' interest in creating the NAAEC was largely a function of domestic political pressure and the peculiarities of the U.S. constitutional order. But whatever the cause of the U.S. preference for a fire alarm, that preference was decisive as a bargaining matter. As the largest economy and the linchpin of the NAFTA enterprise, the United States possessed significant power with regard to NAFTA. As comparatively weak states deeply interested in accessing the U.S. market, Canada and Mexico acquiesced to the U.S. demand for the citizen submissions process because it was part of the price of securing the overall NAFTA package.

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46. Frederick W. Mayer, *Negotiating the NAFTA: Political Lessons for the FTAA*, *in* GREENING THE AMERICAS: NAFTA'S LESSONS FOR HEMISPHERIC TRADE 97, 100 (Carolyn L. Deere & Daniel C. Esty eds., 2002).

47. Personal communication from John Knox to author. John Knox was an NAAEC negotiator for the U.S. Department of State. *Id.*

But what precisely explains the content of U.S. preferences? Why did the United States want to create a fire alarm in this particular treaty—an unusual, even unprecedented feature in international environmental law? Here, the negotiating history shows that the U.S. government responded to a key interest group, which mobilized around the newly-controversial trade-environment connection. On account of the particular configuration of preferences in Congress and the U.S. process of treaty ratification, this key interest group potentially had the power to derail the domestic approval of the entire NAFTA package. The bulk of the historical evidence demonstrates that the U.S. government demanded both the negotiation of the NAAEC itself and the inclusion of a fire alarm primarily to assuage critical domestic interest groups that threatened the NAFTA bargain. Environmental organizations were familiar with citizen suits in U.S. statutes and sought a similar mechanizm in NAFTA. Since NAFTA was perceived to be a close vote in Congress, the opposition of mainstream environmental groups posed a credible threat to NAFTA's passage.[48] Moreover, these groups were key campaign supporters of then President Clinton. As part of his 1992 election campaign, Clinton had promised to make environment and labor an integral part of the NAFTA negotiations.[49] The NAAEC helped Clinton make good on that promise.

Environmentalists were motivated on the issue of the environmental impact of international trade for two reasons. One was the deteriorating state of the U.S.-Mexico border.[50] Additionally, U.S. environmental groups were highly motivated about trade agreements by the then recent "tuna-dolphin" controversy. The controversy involved U.S. restrictions on tuna caught in nets that also trapped dolphins. Mexico successfully challenged the U.S. restrictions as a discriminatory trade practice under the General Agreement on Tariffs and Trade.[51] The incident significantly raised awareness among environmentalists of the potential threats posed by international trade agreements, galvanizing

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48. Mayer, *Negotiating the NAFTA: Political Lessons for the FTAA*, *supra* note 46, at 106. The U.S. Trade Representative had already been pressured into preparing a report on the environmental issues. USTR, *supra* note 22.

49. JOHN MACARTHUR, THE SELLING OF "FREE TRADE": NAFTA, WASHINGTON, AND THE SUBVERSION OF AMERICAN DEMOCRACY 145-46 (2000).

50. Paul Stanton Kibel, *The Paper Tiger Awakens: North American Environmental Law After the Cozumel Reef Case*, 39 COLUM. J. TRANSNAT'L L. 395, 407-08 (2001).

51. United States – Restrictions on Imports of Tuna, Sept. 3, 1991, DS21/R - 39S/155, *available* at www.wto.org (not adopted). *See generally* David M. Driesen, *What is Free Trade?: The Real Issue Lurking Behind the Trade and Environment Debate*, 41 VA. J. INT'L L. 279 (2001) (discussing the tuna-dolphin dispute).

activists to oppose new trade accords. The NAAEC was one of a number of demands U.S. environmentalists made in exchange for their political support of NAFTA.

Environmentalists thus "played a crucial role in helping to define the U.S. bargaining position."[52] United States environmental groups were ultimately split on the NAAEC as a "solution" to the environmental threats posed by NAFTA. Nonetheless, enough major groups came on board, including the World Wildlife Fund, the National Wildlife Federation, the Environmental Defense Fund, and the Natural Resources Defense Council, to significantly ameliorate the threat to NAFTA's passage in Congress.[53] Legislation implementing NAFTA and the side agreements passed with more than 100 Democrats voting in favor.[54]

The interest of U.S. environmental groups in a side agreement containing a fire alarm is understandable. But as Frederick Mayer asks, "how were a relatively small number of environmental groups able to push the environment onto the agenda of an international trade negotiation when none of the three countries intended initially to conclude it?"[55] The success of environmental groups was highly dependent on the structure of U.S. institutions. Absent the constitutional rules governing treaty approval in the United States, the political threat posed by U.S. environmental groups would not have been credible. It is true that Clinton had promised in his campaign to incorporate an environmental side agreement into NAFTA. Yet once elected, Clinton certainly could have reneged on that campaign promise—as he did on several others. The key issue was the need for congressional approval, without which NAFTA could not come into being. Even though Congress passed NAFTA as a congressional-executive agreement, rather than an Article II treaty,[56] the executive branch still had to be much more solicitous of domestic interest groups than would an

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52. Mayer, *Negotiating the NAFTA: Political Lessons for the FTAA*, *supra* note 46, at 104.

53. FREDERICK W. MAYER, INTERPRETING NAFTA: THE SCIENCE AND ART OF POLITICAL ANALYSIS 291 (1998).

54. *Id.* at 109.

55. *Id.*

56. *See generally* BRADLEY, *supra* note 11, at 409-21 (discussing congressional-executive agreements). Article II treaties require the approval of two-thirds of the senators present and voting; congressional-executive agreements require a simple majority of both houses of Congress. Generally, the Article II process is considered to be more politically difficult, but that in turn depends on the structure of partisan control. *Id.*

executive in a Westminster-style parliamentary system or an autocracy.[57]

In short, domestic institutions, in the form of specific constitutional rules governing the treaty-making process, coupled with a particular constellation of votes in the Congress, and a motivated and powerful interest group, explain why the United States ultimately sought the negotiation of an NAAEC with a relatively strong review institution containing a fire alarm. To be sure, in the larger picture the United States, as well as Canada and Mexico, was motivated by the desire to realize joint gains through the entire NAFTA package. But the particular aspect of NAFTA at issue here—the review provisions of the NAAEC—cannot adequately be explained as an instance of rational treaty design. The United States's power explains many aspects of NAFTA, including why NAFTA has an environmental side agreement.[58] The content of U.S. preferences, however, can only be understood by studying its enduring and idiosyncratic features: the constitutional rules governing treaty approval and the U.S. political process's permeability, on the one hand, and the numerous environmentalist and free-trade resistant Democrats in Congress on the other. This story is more complex than that proposed by rational design theory, but far more accurate.

Later events bolster this liberal account. At the time of NAAEC negotiation, few knew precisely what to expect of the citizen submissions process. Now, as the impact has become clearer, the NAFTA parties have sought to alter the NAAEC's fire alarm, weakening it in various ways.[59] They can do so at the margin since green groups' political leverage is now much lower. In 1999 and 2000, the NAFTA parties held several closed meetings on the submissions process aimed at recasting some of the more troublesome provisions.[60] The resulting uproar, once the meetings became known, led to the

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57. AREND LIJPHART, DEMOCRACIES 1-21 (1984). An executive that is part of and emerges from the party that controls parliament characterizes Westminster-style parliamentary systems. Divided government is not possible. *Id.* In the period under consideration here, the U.S. Senate and House were under Democratic control. President Clinton thus faced a situation of undivided government. Nonetheless, NAFTA was a difficult vote for many Democratic legislators. The groups most concerned about NAFTA's impact—unions and environmentalists—are traditional Democratic constituencies. Mayer, *Negotiating the NAFTA: Political Lessons for the FTAA supra* note 46, at 111.

58. *See* Richard H. Steinberg, *Trade-Environment Negotiations in the EU, NAFTA, and WTO*, 91 AM. J. INT'L L. 231 (1997).

59. Markell, *supra* note 45, at 286.

60. *See id.*

parties to back off temporarily. Instead they have used resolutions to markedly circumscribe the ambit of a number of recently approved factual records, in essence reducing the scope and thus the power of the fire alarm process.[61] The parties can weaken the process significantly because green groups' political leverage in the United States is now much lower—NAFTA acts as a status quo rather than a proposal, and the U.S. system in particular demonstrates a status quo bias.

In sum, liberal international relations theory better accounts for the creation of the NAAEC Citizen Submissions Process. Liberal theory is similar to rational design theory in that it is also rationalist in orientation. Generally, rational design arguments in international relations takes states as unitary actors, while liberal international relations theory treat individuals (and groups) as the primary actors, and understands state choices as a product of these actors' preferences refracted through domestic institutions. The latter approach is more consistent with the actual history of the NAAEC design.

The Citizen Submissions Process is unusual in its formal role for private actors, but it is not unique. The World Bank Inspection Panel, and even NAFTA's Chapter 11 investor protection provisions, demonstrates the growing access private actors have within international law.[62] Where the NAAEC is most distinctive is in its substantive focus on *domestic* environmental law enforcement. By providing private actors with a formalized role in the international regulation of domestic enforcement, the NAAEC breaks new ground in international environmental law.[63] The remainder of this Article explores the advantages of fire alarm review in the NAFTA-environment context.

B. The Advantages of Fire Alarms

Under the NAAEC submissions process, the CEC Secretariat, a centralized body, prepares factual records. Private actors, however,

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61. *Id.*

62. *See generally* Vicki Been & Joel C. Beauvais, *A Global Fifth Amendment? Nafta's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30, 41 (2003) ("Individual investors from one of the NAFTA countries can seek to enforce the investor protections by initiating a claim against a host-country government under Chapter 11's 'investor-state dispute mechanism'."); Sanford Gaines, *Protecting Investors, Protecting the Environment, in* GREENING NAFTA, *supra* note 1, at 173 (discussing NAFTA Chapter 11).

63. *See* Wirth, *supra* note 13, at 781-83. Investor protection provisions in the NAFTA provide even greater access. *See* Symposium: *NAFTA Chapter 11*, 2 U. CHI. J. INT'L L. 183-252 (2001).

trigger the search for treaty violations and initiation of the submissions process. This fire alarm structure yields several important benefits—I group these into three categories: efficiency, effectiveness, and participatory benefits. The first two categories relate to the structure and distribution of compliance-relevant information. The last advantage relies on a particular normative vision of liberal democracy, which one can defend directly or, more strategically, as a means to blunt opposition to free trade expansion. There are also countervailing disadvantages to the fire alarm approach, which is discussed later in this Article.

C. Effectiveness and Efficiency

Enforcement is a perennial challenge in environmental regulation. Difficulty in obtaining information about violations makes enforcement difficult.[64] In theory, members of the CEC Secretariat could simply ask governments about their enforcement patterns, or could even patrol around the United States, Canada, and Mexico seeking to uncover failures to effectively enforce domestic laws. By creating a fire alarm, the NAAEC instead accesses private information about both legal violations and enforcement efforts. This reliance on private information is beneficial because of the structure of information in this issue area. Information about environmental enforcement and its failure is often widely diffused, in the sense that numerous actors may possess it, though it may be costly to collect in many instances.

To be sure, governments often possess the best information about their own enforcement efforts and those of related entities (such as municipalities that share a watershed). Nonetheless, in their normal activities private actors can discover instances of environmental violations that governments may miss or may not choose to act upon. They may also detect patterns of enforcement or nonenforcement that government officials do not. The diffusion of information about environmental enforcement is one reason citizen suit provisions and private monitoring efforts—such as the many bay and river-keeper organizations now popular in the U.S.—have been so successful in U.S. environmental law.[65]

While some NGOs and even some individuals may make special efforts to search for and uncover enforcement failures for the express

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64. *See* Clifford Rechtschaffen, *Deterrence vs. Cooperation and the Evolving Theory of Environmental Enforcement*, 71 S. CAL. L. REV. 1181, 1226 (1998).

65. *See* Thompson, *supra* note 12, at 217-18.

purpose of drafting a citizen submission, it is reasonable to assume that at least *some* of these search efforts would occur in the absence of the NAAEC process. Private parties may search for relevant information on environmental enforcement for economic reasons, such as a firm concerned about competitors. Information can also arise as the by-product of other activities, rather than as the product of an explicit search. For example, those who live near or fish on a river directly observe water quality, fish catches, development changes, and the like while engaging in their normal routines. Particular domestic statutes may further enhance the diffusion of environmental information. For example, the U.S. Clean Water Act, which, by allowing individuals to access information relevant to enforcement, is explicitly information forcing.[66] In short, the structure of information about environmental enforcement is one in which information is relatively dispersed and is sometimes a collateral benefit of other, exogenous activities that private actors engage in. A fire alarm provides a pathway for this wealth of private information to flow to decision-makers.

Even for completely additional private search efforts (searches that would not have occurred but for the NAAEC), centralized international authorities, such as the CEC Secretariat, will not always provide lower-cost information. Private actors may have the ability to discover relevant information about environmental enforcement at a lower cost than official actors because of proximity or because of specialization.[67] By *proximity* I mean that individuals and NGOs reside in places and situations where violations occur. This is particularly true for environmental violations. This proximity to environmental sites (e.g. a protected forest or a hazardous waste dump) should permit these actors to readily discover at least some types of enforcement failures. By *specialization* I mean that some private actors focus on the issue of monitoring environmental amenities and enforcement. A good example is a private actor such as a bay-keeper.

This view of private actors as possessors of significant compliance-relevant information is not novel. As Professor Steven Shavell argues:

> [I]t is often true that potential or actual victims of harm or third parties are easily able to identify those to whom the law should

66. *See* 33 U.S.C. § 1251(e).

67. While governments may discern patterns of enforcement more readily than can private actors, even this claim is not always true: some private groups, such as the Sierra Club, can marshal considerable resources across many jurisdictions.

> apply. If so, then it is socially desirable for such parties with information relevant for enforcement to supply it to a social authority, rather than have the state spend its resources on enforcement activity."[68]

A recent overview of the literature on environmental enforcement concurs, adding:

> There are several reasons why governments might [create citizen suit provisions]. Private citizens who are directly affected by pollution might be better situated to detect environmental violations in their neighborhoods and can be a good judge of whether or not they are concerned enough about this pollution to take some action.[69]

The dispersed nature of environmental information is one reason private attorney general provisions have been so successful in U.S. environmental law.[70]

Reasonable persons may quibble over whether private actors actually possess better information about environmental compliance than do government actors. But at a minimum, private actors are clearly privy to *different* information than governments. Again, it is important to underscore that governments possess significant information about enforcement failures, and will be motivated to act on that information under some conditions. I claim only that private actors possess relevant information as well, and sometimes possess information that governments do not, and perhaps can only acquire at a high cost.

Possessing information, however, is not the same as revealing it. What are the incentives for private actors to reveal information—in other words, to pull the fire alarm? Some private actors will face economic incentives to reveal relevant information. For example, shellfish harvesters working in an estuary have an economic incentive to reveal information about illegal water discharges from an upstream factory; so do rule-compliant competitor factories. Hikers and boaters similarly have incentives to reveal relevant information because of the potential harm to their leisure activities. Environmental NGOs, which often specialize in such monitoring, are organizationally motivated to reveal information they possess. Collective action problems will surely restrict the gathering and revelation of information, but there is no

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68. Steven Shavell, *The Optimal Structure of Law Enforcement*, 36 J.L. & ECON. 255, 267 (1993).

69. Mark A. Cohen, *Empirical Research on the Deterrent Effect of Environmental Monitoring and Enforcement*, 30 ENVTL. L. REP. 10245, 10249 (2000).

70. *See* Thompson, *supra* note 12 (discussing the monitoring and informant roles of private citizens and NGOs in the citizen suit context in U.S. environmental law).

reason to think such dilemmas will completely stem the flow of information.[71]

Consequently, in the context of environmental protection, this analysis suggests that a treaty review institution incorporating a fire alarm may be more efficient than a pure police patrol system in at least two ways. First, the fire alarm taps into information already possessed by private actors, and therefore entails no or low additional search costs. Second, a fire alarm capitalizes on the ability of low-cost private information providers to uncover new, additional compliance-relevant information. The question of whether a fire alarm or police patrol is more efficient in a given treaty turns on the relative marginal cost of government actors supplying the information private actors possess or obtain as a by-product of their normal activities. The relative efficiency calculus is complex and beyond the scope of this Article. Here, I claim only that there is a plausible theoretical case that fire alarms are relatively more efficient than police patrols in uncovering environmental enforcement failures. It is important to underscore that I am not arguing that fire alarms are efficient in the sense of yielding the optimal amount of enforcement. In fact, as I discuss below, fire alarms may be structurally disposed to *not* yield the optimal amount of enforcement.

From a social welfare perspective, fire alarms can create a collective cost savings: more violations uncovered for the same aggregate expenditure. But fire alarms may also be cost-saving from an individual state perspective. Fire alarms transfer search costs off-budget. While states must collectively supply the institutional structure of the "alarm" (in the NAAEC, the unit in the CEC Secretariat that receives citizen submissions), and must bear the costs of responding to alarms (the expense of responding to submissions and preparing factual records), the direct costs of discovering enforcement failures are borne by private actors. The costs of translating facts into legal claims and the preparation of a submission that alleges enforcement failures are also borne by the submitters.

Finally, the same structure of information—wide dispersal among many private actors—that I suggest may make fire alarms *efficient*, in a cost-per-violation-detected sense in the NAAEC context, is also likely

71. Indeed, the environmental movement itself is a testament to the capacity of actors to overcome, at least intermittently, even severe collective action problems.

to make them more *effective* than pure reliance on police patrols.[72] All else equal, fire alarm systems can be much more comprehensive than police patrols. As Professors McCubbins and Schwartz argue, fire alarms involve private actors who can cover more territory than centralized authorities.[73] Centralized agencies engaged in police patrol monitoring inevitably spend considerable time monitoring actions, actors, and places which do not yield violations; in other words, they engage in wasted search efforts. Fire alarms minimize the likelihood of wasted search efforts.[74] Private actors do not incur the substantial search costs that centralized monitors do because their information is often a by-product of other activities. Additionally, they are able to monitor a wide range of government enforcement efforts, a much wider range than even a tremendously expanded CEC Secretariat.

The wasteful search effort problem is rendered more complex when one considers that police patrols, even when they fail to uncover violations, have deterrent value. Consequently, police patrols yield some benefits even when they fail to uncover violations. Similarly, the threat of private actors pulling fire alarms also has deterrent value. The key question, is under what conditions is the deterrence produced by one model more effective, or cheaper, than that of the other model? One plausible hypothesis is that the deterrent value of a police patrol is likely highest where noncompliant actors can escape attention and/or readily hide the evidence of their malfeasance ex post. This is consistent with the fact that real police typically patrol for crime rather than merely responding to calls. By contrast, fire departments do not generally patrol because fires do not run away or burn out without a trace. The relevant information about fires is physically fixed. Because the failures to enforce environmental laws that are at issue in the NAAEC are often ongoing,[75] and because these failures are readily documented and the actors relatively easily identified, the relevant information is better thought of as fixed rather than mobile. If this analysis is correct, it suggests that (in the context of the NAAEC) fire alarms are likely to be more effective at the margin than are police patrols.

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72. Effectiveness here refers to the ability to meet the goal of deterring and redressing violation.

73. McCubbins & Schwartz, *supra* note 6, at 165.

74. *Id.* at 168.

75. *See Article 15(1) Notification to Council that Development of a Factual Record is Warranted*, BC Mining, A14/SEM/98-004/10/ADV (CEC May 11, 2001) (SEM-98-004), *available at* http://www.cec.org/files/pdf/sem/ACF11.PDF, (noting the inherent temporal element to the legal standard of failing to effectively enforce).

D. Enhancing Participation in International Law

When employed in international treaties fire alarms can also provide greater legitimacy and perceived political accountability than pure police patrols. Indeed, this may be their most important impact. In contemporary debates over global governance and international institutions, critics have focused on accountability and public participation. As international institutions have increasingly encroached on traditionally domestic policy spheres, many individuals have questioned their democratic pedigree and lack of access for the public.

The NAAEC submissions process is a partial response to these critiques. Private actors concerned about environmental protection now need not rely solely on domestic law to ensure that environmental laws are adequately enforced. The Citizen Submissions Process thus enhances political responsiveness, and this enhancement goes beyond NAFTA's potential impact on environmental enforcement. Submitters need not prove or even allege that an enforcement failure has resulted from NAFTA.[76] Any failure to effectively enforce environmental laws, whether putatively NAFTA-driven or not, is a permissible focus of a submission under the NAAEC.

The use of a fire alarm may also enhance the legitimacy of the NAAEC by enhancing public participation. Citizen participation is a mantra of many advocates of good global governance. It is also a central component of contemporary administrative law in the United States, the chief architect of the NAAEC.[77] A key facet of fire alarms is that they permit individuals to direct the substantive caseload of the review institution—a potentially critical and influential role. By engaging in the citizen submissions process, private actors can at the margin both influence the actions of the Secretariat and of the parties. To be sure, this influence is not large: many critics of the NAAEC procedure argue that it lacks teeth, addresses peripheral issues, and creates obstacles to effective participation.[78] But for all its weaknesses, the NAAEC is an important step in the democratization of international environmental law. However small the current scope for citizen participation in the NAAEC, it is a major advance over most environmental treaties, in

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76. NAAEC, *supra* note 1, art. 1, at 1483.

77. *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1760 (1975); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 592 (2000).

78. Jay Tutchton, *The Citizen Petition Process under NAFTA's Environmental Side Agreement: It's Easy to Use, But Does It Work?*, 26 ENVTL. L. REP. 10031, 10034 (1996).

which direct public participation is nonexistent. This advance in participation is both normatively preferable on its own terms, as well as instrumentally useful from the perspective of gaining support for economic liberalization. As NAFTA history illustrates, the negotiation of the NAAEC substantially smoothed NAFTA's prospects within a key domestic interest group.

E. The Disadvantages of Fire Alarms

Fire alarms are not a panacea. The disadvantages and advantages of fire alarm systems are closely related. This Article emphasizes that structure of information is an important determinant of whether a fire alarm is likely to be effective as a tool of treaty review in a particular case. I hypothesized that fire alarms are ill suited to situations where information is not widely dispersed among many actors or where information is not "fixed": where violators can readily hide evidence or move quickly. That is one reason fire alarms are unlikely to be effective in a treaty such as the Chemical Weapons Convention, whose aim is the hidden development of chemical weapons by governments.

Other serious shortcomings exist. Decentralized citizen participation, because it is fundamentally driven by disconnected individual choices, can entail unfocused, reactive compliance management. Fire alarms may also systematically skew responses by centralized review bodies because actors with particularistic preferences monopolize the fire alarms.[79] Ultimately, the fire alarm model depends crucially on the interests and behavior of private actors. These interests may be particularistic and/or promote goals that are not in the collective interest of the broader cooperative community. Fire alarms, by definition, delegate the power to trigger investigations to private actors. This delegation entails a loss of autonomy and control, sometimes referred to as "sovereignty costs."[80] Such delegation "introduces new actors and new forms of politics into interstate relations . . . actors with delegated legal authority have their own interests, the pursuit of which

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79. *See* Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 74-75 (1997) (discussing citizen suits and shifting agency policy choices). One might view this as a variant on capture. Here, a special interest(s) captures a process which centralized bureaucrats administer.

80. Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 436-37 (2000).

may be more or less successfully constrained by conditions on the grant of authority and concomitant surveillance by member states."[81]

This is one reason that *citizen* triggered fire alarms have been avoided in the World Trade Organization, despite repeated calls for access by private actors. Since trade liberalization entails so many particularized economic interests, the state must engage in a large degree of interest aggregation. Permitting individuals to bring claims directly would disrupt the often delicate political balances that trade liberalization demands. In addition, fire alarms may pressure governments to enforce the law beyond optimal levels. This issue goes beyond the reflexive sovereignty costs that governments fear. Even when governments welcome public oversight in principle, enforcement is not free. The fire alarm driven diversion of funds toward particular enforcement efforts, enforcement that the government has explicitly or implicitly chosen to ignore, risks misallocating scarce resources. In sum, providing private actors with a means to pressure officials creates risks of both overenforcement and poorly targeted enforcement.

Fire alarms may also yield underenforcement. Procedure is the primary throttle on the fire alarms use, and procedures can be incorrectly set. The cost-benefit ratio for potential users is critical; if the benefit gained from pulling the fire alarm is too low relative to the costs of doing so, the system will not work optimally. Many commentators have argued that the NAAEC submissions process, resulting in at best the release of a factual record, is too weak to make a meaningful difference in behavior.[82] This weakness may undermine the system's effectiveness both for submissions brought and submissions *not* brought. In other words, the remedy's weakness, in conjunction with the cost of preparing a submission, may discourage otherwise worthy submissions.

This issue of underenforcement is worth a brief detour. The relative weakness of the remedy in the NAAEC suggests one possible interpretation of the low number of citizen submissions so far. As of February 2004, forty-seven submissions in ten years, with ten factual records finalized.[83] There is no objective way to determine whether this

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81. Kenneth W. Abbott et al., *The Concept of Legalization*, *in* LEGALIZATION AND WORLD POLITICS 17, 34 (Judith Goldstein et al. eds., 2001). While focused on the delegation to courts or other international bodies, this statement applies equally well to private actors empowered with the legal right to bring a claim. *Id.*

82. Tutchton, *supra* note 78, at 10031.

83. *Current Status of Filed Submissions*, www.cec.org/citizen/index.cfm?varlan=english (last visited Sept. 7, 2004).

is a high or a low number. But I would submit that, given the size and population of North America, this is not a high figure. The preceding analysis also suggests an explanation for the great disparity in the number of challenges to each NAFTA state. On a per capita basis, complaints against Canada are more than 1400 percent higher and complaints against Mexico more than 700 percent higher than complaints against the United States.[84] The United States, with nearly ten times the population of Canada, has had fewer submissions filed against it than Canada has even in absolute terms.

One plausible explanation for this marked disparity is differences in domestic remedies across North America. Domestic measures obviously act as substitutes for the Citizen Submissions Process, and are often more attractive because they are more comprehensive and involve stronger remedies. Since the U.S. legal system provides a wealth of access for aggrieved citizens, in particular via the many citizen suit provisions contained in environmental statutes, the disparity in citizen submissions probably reflects the existence of better alternatives in U.S. domestic law.[85] The interesting question, still unanswered, is why Canada has a much higher per capita rate of submissions than does Mexico.

IV. CONCLUSION

Review institutions play an important role in promoting treaty implementation, monitoring performance, and ensuring that states comply with their treaty obligations. The NAAEC Citizen Submissions Process is one example of a growing set of treaty review institutions. The police patrol and fire alarm dichotomy, used here to delineate two models of treaty review, helps to illuminate the core of the NAAEC procedure and to underscore its distinctive features.

I have argued that there are compelling deductive reasons to believe that fire alarm review institutions have some efficiency, effectiveness, and normative advantages in the context of North American environmental cooperation. These advantages largely flow from the fact that information about environmental enforcement and environmental violations is widely dispersed. These advantages are not

84. Knox, *supra* note 40, at 105-06.

85. *See id.* at 107-08 (noting that "while potential submitters may see environmental remedies under U.S. law (and, to a lesser degree, Canadian law) as so effective that the Citizen Submissions Process can add little to them, the procedure may offer avenues for relief otherwise unavailable to potential submitters concerned with Mexican environmental issues.").

overwhelming, but they are significant. I have also argued, however, that there is little evidence that the NAAEC submissions process was created in a functional manner, to capture these benefits explicitly. Rather, the causal relationship is more indirect: powerful environmental interests in the United States demanded the NAAEC Citizen Submissions Process as a tool and a political statement, and their leverage in the NAFTA debate led to its negotiation.

Critics have disparaged the Citizen Submissions Process for its weaknesses, in particular with regard to the outcome—a factual record, rather than a legal ruling or authoritative recommendation. Strengthening the remedy would likely increase the number of submissions. At the moment, however, the United States, Canada, and Mexico seem more inclined to weaken the procedure than to strengthen it. Nonetheless, when viewed against the backdrop of other international environmental treaties, the NAAEC, by further involving private actors in public regulation, represents an innovative step in the design of international institutions.