

**IMPROVING THE COMMISSION FOR ENVIRONMENTAL
COOPERATION'S CITIZEN SUBMISSION PROCEDURE:
RECOMMENDATIONS BASED ON HUMAN RIGHTS
COMPLAINT MECHANISMS**

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Table of Contents

Executive Summary	i
List of Acronyms	ii
1. Introduction	5
2. Background	5
2.1 <i>The Nature of International Law</i>	5
2.2 <i>Complaint Procedures in the United Nations System</i>	8
2.2.1 <i>General Complaint Procedures</i>	8
2.2.2 <i>Specific Complaint Procedures</i>	9
2.3 <i>Complaint Procedures under the NAAEC and Questions of Effectiveness</i>	10
3. Research Questions	11
4. Methodology	11
5. Analysis	13
5.1 <i>General Effectiveness</i>	13
5.2 <i>Lack of legally binding decisions</i>	15
5.3 <i>Publicity and Confidentiality</i>	15
5.4 <i>Problems with Admissibility</i>	18
5.5 <i>Investigative Power, Follow-up Comments, and Views</i>	19
5.6 <i>Inherent Problems in the Agreements that Act as Barriers to Effectiveness</i> ..	22
5.7 <i>Political Nature</i>	23
5.8 <i>Lack of Funding/Staff</i>	24
5.9 <i>Time Delays</i>	24
6. Conclusions and Recommendations	25
7. Further Research	29
8. References	30
Appendices	I
<i>Appendix A: Interview Questions, Initial Contact</i>	II
<i>Appendix B: Interview Questions, 2nd Contact</i>	IV
<i>Appendix C: International Law: Treaties</i>	VI
<i>Appendix D: Structural Features of the UN and CEC Citizen Submission Process</i> ..	VII

Executive Summary

At the request of the Submissions on Enforcement Matters Unit (SEM) of the North American Commission on Environmental Cooperation (CEC), this project looked at the following two questions to address the client's interest in obtaining information pertaining to the degree to which reporting procedures based on international agreements can successfully compel States to follow the provisions of those agreements. The first question is: "Are there ways in which collecting and publishing information under international agreements helps compel national governments to comply with the obligations set out in such agreements?" The second question follows from this. "In light of any major differences between the NAAEC citizen submission process and comparable reporting mechanisms used by other international bodies, are specific changes to any elements of the NAAEC process likely to improve environmental law enforcement in any of the NAFTA member countries?"

A study of the effectiveness of citizen reporting mechanisms and the elements that influence their effectiveness is of importance given the structure of international law. International law has a horizontal structure based on reciprocity and consensus rather than on command, obedience and enforcement. Furthermore, individuals, who are often the most influenced by the decisions of States, are excluded from the process. Citizen reporting mechanisms provide an avenue for individuals to state their grievances and become involved in the system, as well as a means to compel States to comply with their international obligations.

Of the criteria extracted from the doctrinal commentary and the interviews those which were found to be most pertinent to the CEC are as follows: lack of legally binding decisions; publicity / confidentiality; problems with admissibility, investigative power, follow-up comments and views; ambiguity of the language in the convention / problems with the convention itself; and political nature. Based on the evidence from the UN experience and the interviews, as well as the commentary on the CEC itself, we recommended that the CEC address the concerns related to these criteria in order to increase their effectiveness while at the same time recognizing that some changes are beyond the current mandate of the CEC. As such, we emphasized that the CEC should attempt to increase the amount of publicity aimed at the submission procedure and factual records produced. The beneficial ramifications of this step alone were found to be numerous and acting to increase publicity is a relatively feasible goal. In addition, we suggested that the CEC take steps towards including recommendations in the factual records and making such recommendations legally binding. This has been shown to be an important factor in affecting the effectiveness of such procedures, but may not be feasible for the CEC as it was found to require direct changes to the NAAEC document. Furthermore, the CEC was advised to maintain its investigative powers, which were depicted as enhancing the effectiveness of the CEC procedure. We also recommended that the CEC review the admissibility criteria associated with the procedure and attempt to interpret them more liberally. This would not require changes to the NAAEC document but may hinge on the level of resources allocated to the CEC. Nonetheless, it was portrayed as a feasible option. The final recommendation involved lessening the degree to which government representatives in the member countries are able to influence the outcome of the procedure. This, however, may not be easily accomplished since the political nature of the process was shown to be a central component of the NAAEC structure.

List of Acronyms

CAT:	The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEC:	North American Commission on Environmental Cooperation
CEDAW:	The Convention on the Elimination of Discrimination against Women
CEDAW-OP:	The Optional Protocol to the Convention on the Elimination of Discrimination against Women
CSW:	The Procedure of the Commission on the Status of Women
ICCPR:	The International Covenant on Civil and Political Rights
ICCPR-OP:	The Optional Protocol to the International Covenant on Civil and Political Rights
ICERD:	International Convention on the Elimination of all forms of Racial Discrimination
NAAEC:	North American Agreement on Environmental Cooperation
NAFTA:	North American Free Trade Agreement
NGO:	Nongovernmental organizations
SEM:	Submissions on Enforcement Matters Unit
UN:	United Nations
UNHCHR:	United Nations Office of the United Nations High Commissioner for Human Rights
UNECOSOC:	United Nations Economic and Social Council
1503:	The procedure for dealing with communications relating to violations of human rights and fundamental freedoms.

1. Introduction

This project is being carried out at the request of the Submissions on Enforcement Matters Unit (SEM) of the North American Commission on Environmental Cooperation (CEC). Articles 14 and 15 of the North American Agreement on Environmental Cooperation (NAAEC, concluded 14 September 1993), a side agreement to the North American Free Trade Agreement (NAFTA, concluded 17 December 1992), permit North American nongovernmental organizations and persons (Submitters) to file a written submission with the Montreal-based Secretariat of the CEC alleging that one of the parties to the NAAEC (Canada, Mexico or the U.S.) is failing to effectively enforce its environmental laws. If the submission meets certain formal and substantive criteria set out in the NAAEC, the Council of the CEC, which consists of cabinet-level or equivalent representatives from the three countries, can instruct the Secretariat to prepare a detailed factual record of the alleged failure to enforce.

The SEM would like an outside perspective on the degree to which reporting procedures based on international agreements can successfully compel States to follow the provisions of those agreements. Our project involves an assessment of the effectiveness of various comparable citizen submission processes within the United Nations (UN) system. The CEC citizen submission procedure and the complaint procedures within the UN are similar in many respects. As such, we hope to identify elements of the UN procedures that could be applied to the CEC to improve its effectiveness. The client is also interested in an application of our findings to the Submission Process under Articles 14/15 of the NAAEC, should our assessment suggest any recommendations for increasing its effectiveness in ensuring compliance with North American environmental law.

2. Background

2.1 *The Nature of International Law*

The creation and enforcement of laws at the international level requires systems that differ greatly from the sphere of domestic (or national or municipal) law (Cassese, 2001, p. 3; Currie, 2001, p. 1; Malanczuk, 1997, p. 3). International law “applies where national legal systems leave off: while the latter governs relations of persons within [S]tates, international law essentially governs relations between [S]tates themselves” (Currie, 2001, p. 1). In contrast to domestic law enforcement, international law relies on a horizontal enforcement system (Bederman, 2002, p. 189). Such horizontal structures do not depend on a centralized enforcement agent to ensure that rules are being adhered to (Bederman, 2002, p. 190), “[t]here is no international police force” (Shaw, 1997, p. 7). Rather, within a horizontal system “actors in the international legal system take it upon themselves to vindicate their rights and obligations” (Bederman, 2002, p. 189). There is virtually no “hierarchical organization” and “no formal or written constitution establishing general law-making or law enforcing institutions or otherwise distributing powers of governance” (Currie, 2001, p. 3). As such, the international legal system “is the product of diffuse, decentralized, and non-hierarchical law-making process” and therefore lacks the “certainty and structure” associated with domestic law (Currie, 2001, p. 3). In addition, there exists a sole international legal system, serving to regulate the international community as a whole (Currie, 2001, p. 2). The framework of international law is summarized by Malanczuk (1997) as:

a horizontal legal system, lacking a supreme authority, the centralization of the use of force, and a differentiation of the three basic functions of law-making, law determination, and law enforcement typically entrusted to central organs (p. 3).

Van Dervort (1998) further explains that international law “is a decentralized system of rights and duties of States rather than of individuals” and that “States have accepted responsibilities to individuals under international law” (p. 502). Recently, however, actors other than States (such as individuals) have been acknowledged in the international legal realm (Malanczuk, 1997, p. 1). Despite this development, States remain the primary subjects of international law (Cassese, 2001, p. 3; Currie, 2001, p. 1). Individuals in the international legal scene are described as “puny Davids confronted by overpowering Goliaths holding all the instruments of power” (Cassese, 2001, p. 4).

Issues of the effectiveness of sanctions in international law are also discussed, as they have been identified as possible limitations of the system (Malanczuk, 2001, p. 5). Coercive enforcement procedures cannot be imposed on States that fail to abide by international law (Currie, 2001, p. 3). Rules of organization are also portrayed as “embryonic” when compared to domestic law (Cassese, 2001, p. 6). The political nature of international law and the role of power are also identified as possible limitations to the international legal system (Malanczuk, 2001, p. 5; Cassese, 2001, p. 5). There are concerns that these conditions allow States to act such that their own interests are maintained (Cassese, 2001, p. 6). States are responsible for instituting legal norms through calculated agreements (such as treaties¹) or through customary law, which are general rules that apply to all States whether or not they have deliberately agreed to them (Cassese, 2001, p. 6). Courts are lacking in the international legal arena (Shaw, 1997, p. 3) and, as such, States are further charged with the duty of interpretation of international law (Cassese, 2001, p. 6).

It may seem that such descriptions indicate that international law is a “primitive legal system” (Malanczuk, 2001, p. 5) fraught with “relative anarchy” (Cassese, 2001, p. 6), thus promoting a “cynical” view of the system (Shaw, 1997, p. 2). However, there is much evidence to suggest that this depiction is faulty (Malanczuk, 2001, p. 5). In fact “the role of international law in international relations has always been limited, but is rarely insignificant” (Malanczuk, 1997, p. 6). In practice, States are shown to abide by the obligations of international law in most instances (Malanczuk, 1997, p. 6). “[C]onsensual dispute resolution mechanisms and political or economic pressure” are used as methods to promote adherence to international law by States (Currie, 2001, p. 4). Thus, “[a] horizontal system of law operates in a different manner from a centralized one and is based on principles of reciprocity and consensus rather than on command, obedience, and enforcement” (Malanczuk, 1997, p. 6). International laws do not simply represent moral standards, but are “accepted in practice as legally binding by [S]tates in their intercourse because they are useful to reduce complexity and uncertainty in international relations” (Malanczuk, 1997, p. 7). States refer to international law as “definitive” and “incessantly affirm through their behaviour and statements [that] the existence of legal rights and duties ... are not merely voluntary but obligatory” (Currie, 2001, p. 4). The rarity of violations confirms that States adhere to international law (Shaw, 1997, p. 6). The extent of international law is vast and includes the

¹ For details, see *International Law: Treaties*, Appendix C.

protection of human rights and the environment, among other topics of international concern and scope (Malanczuk, 1997, p. 7).

Due to the decentralized nature of international law and because States are the primary actors, unique methods must be devised to incorporate individuals into the system. Reporting (or complaint or petition) systems are one such innovative method, allowing for individual participation at the international legal level. Under such methods, individual “demands and concerns” are applied at the international level (Cassese, 2001, p. 79) to help ensure that States are upholding the standards outlined in international agreements (Cassese, 2001, p. 81). Reporting systems and complaint procedures are developed in order to ensure compliance with the components of international agreements by allowing individuals to submit complaints alleging a violation of such international agreements (Cassese, 2001, p. 82). Thus, a procedural right is granted to individuals with “the purpose of ascertaining whether [a] State ... has violated the treaty to the detriment of the individuals (Cassese, 2001, p. 82). This procedural right is provided primarily by treaties and in some instances by international resolutions, and is therefore applicable to a limited variety of issues (Cassese, 2001, p. 83, Artz & Lukashuk, 1998, p. 163). Not all States are party to treaties that recognize individual procedural rights, thus further limiting the scope of individual participation in international law (Cassese, 2001, p. 83).

Despite these deficiencies, the importance of individuals in relation to the right to petition international bodies directly should not be underestimated. It is not easy for States to deprive themselves of some of their sovereign prerogatives, such as their traditional right to exercise full control over the individuals subject to their jurisdiction. Given the present structure of the world community and the fact that States are still the overlords, the limited status of individuals can be regarded as remarkable progress. (Cassese, 2001, p. 84)

Individual participation through citizen submissions are useful in the human rights field on account of there being little motivation for States to monitor human rights norms in other States and report instances where agreements are being neglected (Hathaway, 2002, p. 2007). Thus, issues of non-compliance are more likely raised by individuals, rather than States, as they have superior stakes in the issue (Artz & Lukashuk, 1998, p. 157). In addition, Cassese (2001) suggests that “[i]ndividuals have gradually come to be regarded as holders of international material interests” (p. 79). In congruence with these theories, individual participation in international law “has occurred primarily but not exclusively through human rights law” (Shaw, 1997, p. 183). As such, the integration of citizen petitioning systems is appropriate as a method of monitoring State compliance (Bederman, 2002, pp. 198-199). It can be argued that the application of citizen submissions within the NAAEC would serve the same purpose, as the lowering of environmental standards may benefit all State parties to the agreement (via economic incentives) but harm individuals.

In any case, the role of the individual in international law is not as encompassing as the role of the State, with limited opportunity and ability to participate (Artz & Lukashuk, 1998, p. 163). As described above, individual participation in international law is ascertained through the formation of treaties between States (Malanczuk, 1997, p. 1). Thus, “international law is still *predominantly* made and implemented by [S]tates” (Malanczuk, 1997, p. 2) (emphasis in original text). Optimism cannot be discounted however, as “in a great many cases where States have

accepted the authority of international bodies to consider complaints of individuals, they have eventually come to respect the decisions by which those bodies have determined violations” (Cassese, 2001, p. 84). The conclusion is thus: “Like all international instruments denoting a bold advance, treaties granting procedural rights to human beings are destined to be fruitful in the long run” (Cassese, 2001, p. 85).

The UN treaties and the NAAEC are comparable in that they are all treaties between States that specify predetermined standards that must be maintained following ratification. In the case of the UN and the NAAEC, citizen submissions (or communications) play an integral role in attempting to ensure that the State Parties to the treaties or agreements are following the outlined standards in the treaties.

2.2 Complaint Procedures in the United Nations System

Within the UN system, there exist a number of mechanisms that allow individuals or groups to submit complaints concerning human rights violations. These UN communications procedures can be divided into three categories: first, general complaint procedures open to anyone in any country; second, complaint procedures under specific treaties or agreements; and third, country- or situation-specific procedures involving ad hoc committees or Special Rapporteurs. The Special Rapporteurs mechanism includes a number of independent experts or ad hoc committees that deal with the situation in a specific country or thematic area. Due to the large number and wide variety of these situations, a survey of Special Rapporteurs is impractical for the present study.

2.2.1 General Complaint Procedures²

Two UN communications procedures are open to any person in any country. The first of these is the Procedure for dealing with communications relating to violations of human rights and fundamental freedoms, or the “1503 procedure” (opened for signature 27 May 1970) after the 1970 UN Economic and Social Council Resolution under which it was created. Under the 1503 procedure, which was revised in 2000, individuals or groups can submit communications alleging “a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms” (UNHCHR, 2000). The UN Secretariat, together with two Working Groups of independent experts, assesses in private the validity of these communications, and the Working Groups communicate with each other and with the States named in the complaints. The few communications that are deemed to be valid are referred to the Commission on Human Rights. The Commission can decide to appoint an independent expert to handle the matter; to discontinue the procedure; to take up the matter under a different, less-confidential procedure; or to make recommendations to its parent body, the UN Economic and Social Council. Prior to its revision in 2000, the 1503 procedure involved one less Working Group and had slightly different procedures for communicating with governments. The entire procedure operates on a time-frame corresponding to the annual meeting schedule of the Commission on Human Rights (UNHCHR, 2000).

The second universally accessible complaint procedure operates under the Commission on the Status of Women (established 21 June 1946). Like the 1503 procedure, this mechanism allows

² For further details, see *Structural Features of the UN and CEC Citizen Submission Process*, Appendix D.

anyone in any country to bring a communication to the attention of a UN body. It also involves a Working Group on Communications, which corresponds with the governments named in communications sent to it and can make recommendations to its parent body, the Commission on the Status of Women. The Commission can in turn report to the Economic and Social Council regarding patterns observed in the communications, and possibly recommendations for action (UNHCHR).

Both the 1503 procedure and the Procedure of the Commission on the Status of Women (CSW) are anonymous. In addition, they target patterns of violations of human rights rather than one-off violations. The purpose of both procedures is also similar, usually serving a fact- or information-finding purpose.

2.2.2 Specific Complaint Procedures³

The second group of communications mechanisms is open to individuals involved in some way with States that have ratified specific UN treaties or conventions. These treaties are the International Convention on the Elimination of all forms of Racial Discrimination (ICERD, opened for signature 21 December 1965); the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR-OP, opened for signature 16 December 1966); the Optional Protocol to the Convention on the Elimination of Discrimination against Women (CEDAW-OP, opened for signature 6 October 1999); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, opened for signature 10 December 1984); and the Procedure under the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Opened for signature 18 December 1990⁴) (Lewis-Anthony, 1999, p. 41; Opsahl, 1995, p. 420).

While there are differences, these communications mechanisms share a number of basic features. They are all limited to those States that have ratified the relevant treaty containing the mechanism (UNHCHR), and provisions exist for States to register reservations that might make certain complaints against them inadmissible (Camp Keith, 1999, p. 96; de Zayas et al., 1998, p. 2; UNHCHR, 2002). They all require that authors of communications give their names, but give those authors the opportunity to remain anonymous to the States against which their complaints have been lodged. Each procedure uses a dialogue model in which complaints are brought to the attention of the States involved, which are given an opportunity to comment (Opsahl, 1995, p. 428). Following this, the original authors of the communications have the opportunity to comment on the replies from the States (Lewis-Anthony, 1999, p. 48). A number of conditions exist for the admissibility of a communication, the specifics of which can vary between mechanisms. However, in all cases, complainants must demonstrate that they have exhausted (or have made serious attempts to exhaust) all possible domestic remedies to their complaints. Similarly, a communication is only admissible if it is not being considered under another procedure; such as with the CEDAW-OP. The final step in all of these communication procedures is the transmission by the UN body involved of its views or findings to the State party involved. Alternatively, the UN body may make a report to a different, higher body (such

³ For further details, see *Structural Features of the UN and CEC Citizen Submission Process*, Appendix D.

⁴ The International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families will come into effect when 20 countries have ratified. As of Feb 2002, 19 States have done so.

as the General Assembly) or publish a report (Lewis-Anthony, 1999, p. 49; McGoldrick, 1991, p. 101).

Depending on the terms of the treaty, the State party is usually required to respond to the views, generally with evidence that the abuses which motivated the initial complaint(s) have been rectified (Hoq, 2001). Certain treaties provide for the involvement of a Special Rapporteur on Follow-Up of Views, should the States involved fail to respond to the views of the committee. While most of the procedures operate on time-scales of one year or more, due to the annual meeting schedule of their governing Committees, some provide for the intervention of another Special Rapporteur if a particularly urgent communication is judged to warrant immediate action (Lewis-Anthony, 1999, p. 53; UNHCHR, 1997).

2.3 Complaint Procedures under the NAAEC and Questions of Effectiveness

Like the UN procedures, the NAAEC allows for citizens to voice their concerns by submitting complaints to a specified agency. The citizen submission procedure is set up under Articles 14 and 15 of the NAAEC. It permits North American nongovernmental organizations (NGOs) and submitters to send a written submission to the Secretariat of the CEC. These submissions serve to identify that Canada, the United States, or Mexico is failing to successfully enforce its environmental laws. If the submission is admissible under Article 14, the Council of the CEC, composed of government representatives of the three States, may allow the Secretariat to prepare a comprehensive factual record concerning the lacking enforcement.

There are many issues concerning the effectiveness of the CEC outlined in the literature. These issues can be summarized as relating to the complexity of the citizen submission process; the inability of the CEC to investigate State compliance itself; a shortage of publicity; and problems associated with the interpretation of the NAAEC itself. There is much debate as to the procedure's effectiveness in relation to ensuring enforcement of environmental laws under the economic conditions created by the NAFTA because assessing the effectiveness of the procedure is deemed difficult and may be only achieved using a variety of methods (Markell, 2002, p. 570). As such, we have chosen to direct our attention to UN procedures that rely on citizen complaints in order to recognize beneficial or ineffectual aspects that may be extrapolated to the CEC Submission Procedure in order to improve its effectiveness.

Various shared features of the UN and CEC mechanisms suggest that an analysis of the former will yield insight into the latter. Each procedure has strict admissibility requirements, which means that only some submissions receive consideration beyond the preliminary stages. In all of the procedures, an admissible citizen submission leads to a dialogue between the investigating body and the State named in the submission. All are considered to belong in the domain of 'soft law' and are not legally binding.

However, it must be acknowledged that there are fundamental differences between the NAAEC and the UN mechanisms. First, the SEM process differs from all of the UN reporting systems in that it concerns itself with legislation that varies between the three parties, and not with internationally consistent standards. However, since reservations to certain UN conventions exist, there is a possibility that there are inconsistencies in the agreed standards between various State parties to the conventions. Second, environmental law and human rights law are obviously different in nature and scope; moreover, the NAAEC has only three State Parties whereas all the

UN instruments operate on a global scale. Third, the NAAEC has been in force since 1 January 1994 whereas some of the UN instruments have existed for decades.

These differences, however, may be bridged due to the fact that the NAAEC and the UN treaties share common procedures that rely upon citizen submissions as a catalyst.

The UN and CEC complaints procedures are all intended to effectively enforce the goals set out in the respective agreements, whether it be women's rights, civil and political freedom, or environmental standards. They all have the potential to increase adherence by States to the terms of their international agreements by explicitly accommodating public participation in international human rights and environmental law enforcement. A forum for the airing of grievances gives injured individuals or groups an audience in the form of the various investigative bodies involved in the complaint processes. It can be postulated that this represents one of the only opportunities such individuals or groups have to formally address an internationally influential third party in order to seek redress of international law breaches by their own State.

3. Research Questions

We undertook to research the following two questions:

1. Are there ways in which collecting and publishing information under international agreements helps compel national governments to comply with the obligations set out in such agreements?
2. In light of any major differences between the NAAEC citizen submission process and comparable reporting mechanisms used by other international bodies, are specific changes to any elements of the NAAEC process likely to improve environmental law enforcement in any of the NAFTA member countries?

In our attempt to answer the first question, we encountered difficulties regarding use of the word "effective". Most scholars use the concept of effectiveness in their discussion of the ways in which complaint mechanisms compel State compliance. Given that this is a highly subjective evaluation, it was the intention of this study to provide a standardized definition of effectiveness based on the literature. Unfortunately, the majority of authors discuss effectiveness without first defining their criteria for effectiveness and thus this proved to be impractical. Therefore, we have chosen to define effectiveness in terms of the extent that the procedures act to promote compliance. The difficulties associated with the variable definitions of effectiveness in the literature are thus avoided because the effectiveness of the procedure is not to be quantified. Discussions of the UN procedures in the literature will be simply used to identify elements that are relevant to the CEC and can be applied to increase its effectiveness.

4. Methodology

To answer the research questions, our group first examined the existing UN human rights reporting mechanisms. These include the CSW and 1503 procedures, as well as those created under the following bodies or agreements: CERD, the ICCPR-OP, the CEDAW-OP, and the CAT.

To analyze and evaluate the outcomes of the UN reporting processes, we reviewed a substantial

body of relevant literature. These secondary sources include journals and books in the humanities, social sciences, and law. From these sources we extracted a set of criteria with which to contrast and compare the different mechanisms in order to gain familiarity with the procedures. These criteria, suggested by the client and modified by the research group, include:

- ❑ Transparency of reporting process – some of the processes named above are largely confidential, and we feel that this might influence their outcomes;
- ❑ Power to investigate complaints – some processes rely only on communication with the Submitter and the relevant State;
- ❑ Power to compel production of information – our client has identified this as significant to the investigating body's ability to determine the veracity of an allegation;
- ❑ Power to interview witnesses – as above;
- ❑ Power of international body to make recommendations – some investigating bodies are limited to general reports on the human rights situation in a country;
- ❑ Legal authority of international body to oblige compliance – this is always limited in international law, but the different processes vary in the degree to which they are supported by specific laws or conventions;
- ❑ Sufficiency/reliability of funding – this is necessarily comparative between mechanisms, as absolute criteria for adequate funding levels are beyond the scope of our study;
- ❑ Amount of media attention surrounding mechanism – since much enforcement of international law relies on exerting moral pressure on States, the publicity surrounding a mechanism or complaint could influence a State's willingness to change its practices; problematically, however, this factor may be both cause and effect of a mechanism's effectiveness.

We evaluated the strength of association between each of these criteria and the effectiveness of the mechanisms through a comprehensive review of the secondary literature discussing effectiveness.

In addition to the literature, interviews were conducted with relevant actors to identify critiques and recommendations relating to the direct application of the procedures. The telephone interviews were focused on North American NGOs familiar with the UN mechanisms as well as individuals directly involved with the UN. We limited our interviews to those NGOs in North America, so that our examination of the effectiveness of reporting mechanisms was concentrated within the geographical scope of the NAAEC. Relevant individuals at these NGOs were interviewed by telephone, with the goal of gathering a body of anecdotal evidence that the UN procedures do or do not function effectively. User impressions are thus used as a way of identifying aspects of the procedures that may influence the effectiveness of the mechanisms. Interviews were also carried out with individuals who deal with submissions once they have been

made, such as UN employees or State representatives. Their responses, together with those of the NGOs on the same question, have provided us with a body of evidence concerning the effectiveness of the procedures, in order to supplement the findings in the secondary literature.

The interviews were carried out as follows: first contact was made either by e-mail, fax, or telephone (in that order), depending on which contact information was available⁵; replies to these initial contacts were followed up with additional correspondence in which a date and time was established for a telephone interview. Once a time was set for the interview, the interviewees were provided with further information (via e-mail) that included background on the project and the intended interview questions⁶. All interviews were conducted over the telephone and were recorded in paraphrased, written form.

5. Analysis

The citizen submission process outlined by the NAAEC has been deemed “innovative” (Coatney, 1997, p. 823; Markell, 2002, p. 546) and “novel” (Raustiala, 1996, p. 722) in the literature. However, there is much debate as to the procedure’s effectiveness in improving the enforcement of environmental laws under the competitive economic conditions created by the NAFTA.

Despite the issues negatively affecting the effectiveness of the citizen submission process, there is reason to believe that improvements of the CEC will be seen with time. The Commission requires time to “build expertise, legitimacy and institutional strength” (Raustiala, 1996, p. 721). As such, recommendations drawn from the UN procedures, most of which have been evolving for decades, could be useful in ameliorating the effectiveness of the CEC when considering citizen submissions.

5.1 General Effectiveness

Many commentators have attempted a general evaluation of the effectiveness of the UN mechanisms and of complaints mechanisms in general. There are a number of problems inherent in such an endeavour, most importantly, the difficulty in defining what is meant by ‘effective’ as well as the difficulty in determining a relationship between the publication of views and State behaviour. It was the intention of this study to provide a standardized definition of effectiveness based on the literature. However, as the majority of authors discuss effectiveness without first defining their criteria for effectiveness this proved to be beyond its scope. Ultimately, in this context effectiveness is a somewhat subjective evaluation.

Within the literature, there was a divide on the issue of effectiveness, with many commentators suggesting that the procedures are ineffective for a number of reasons, which will be detailed below. However, there are those who find that the submission of a formal communication and, in particular its transmission to the government concerned may be an effective tool in itself in encouraging a government to take action (Hannum, 1992, p. 28). In the case of those who find the mechanisms to be effective, there is a tendency to point to their influence on State behaviour.

⁵For details, see *Initial contact with NGO*, *Initial contact with UN*, and *Initial contact with human rights lawyer*, Appendix A.

⁶For details, see *Interview questions for NGO (2nd contact)* and *Interview questions for UN (2nd contact)* Appendix B.

With respect to the CEDAW-OP, several authors highlighted the important caveat that the effectiveness of the Optional Protocol in achieving the ultimate goal of the Convention is only as good as the will of the States that are party to it (Bijnsdorp, 2000, p. 331; Gilchrist, 2001, p. 783; Hoq, 2001, p. 715; Martinez, 2001, p. 185). This is true of all of the complaint mechanisms. Indeed, one Special Rapporteur demonstrated the various levels of State willingness by pointing out that 40 States currently have standing invitations to him, while the rest are “on approval” (pers. comm., 11 November 2002). However authors, such as de Zayas (2001), have found that the degree of State compliance with committee decisions is encouraging. Indeed, following decisions of the relevant committees, the States concerned have taken meaningful steps to comply, such as changing their legislation, paying compensation to victims, releasing prisoners, granting stays of execution and commutation of sentence, deferring expulsion and/or extradition of aliens and granting asylum. He finds that even if the committee decisions do not possess the same binding force as judgments of the European Court of the International Court of Justice, in practice, much progress has been achieved and many victims have been helped (de Zayas, 2001, p. 71). In this same vein, Newman and Weissbrodt (1996) assert that the 1503 procedure is effective with countries sensitive to international pressure and opinion. They claim that “[a] few countries appear impervious to UN condemnation but most are not”, and say that governments have occasionally announced reforms during Commission on Human Rights meetings as concessions to prevent further criticism (p. 214). Even governments that deny allegations made by the Commission often improve their treatment of the victims of human rights violations (Newman & Weissbrodt, 1996, p. 214). Thus it is suggested that governments do change their laws and practices in response to committee observation. Some have acknowledged the direct influence of a particular committee; others, such as one NGO executive, acknowledge that “countries do shape up when they sign a treaty” (pers. comm., 14 November 2002), attributing changes in compliance with being party to a relevant treaty; while still others have adopted changes following international scrutiny without expressly acknowledging a committee’s influence (Coliver, 1992, p. 174; McGoldrick, 1991, p. 203; Ghandi, 1998, p. 401; Heynes & Villoen, 2001, p. 517).

However, compliance by the State Parties with a committee’s views has been unsatisfactory in many cases (McGoldrick, 1991, p. 202) especially as certain States refuse to implement the committee’s views (Ghandi, 1998, p. 401). Contrary to those who have found that in spite of any limitations to the mechanisms, their influence on State behaviour has proven them to be effective, there are some who find that international enforcement mechanisms used by treaty bodies appear to have limited demonstrable impact thus far (Heynes & Villoen, 2001, p. 488; Bank, 1997, p. 618; Tolley, 1984, p. 459; van Boven, 2000, p. 95). This is partly due to the fact that the system has taken decades to develop to its present level and partly the result of inefficiencies in the system (such as backlogs, overlaps, vagueness of findings). It is also true that focused and relevant concluding observations and views are still routinely ignored when domestic convenience so requires (Heynes & Villoen, 2001, p. 488). In their discussion of the effectiveness of reporting mechanisms, the authors point to a number of factors that are seen to either contribute to or detract from their effectiveness. These include: lack of binding obligations, confidentiality, publicity, lack of funding and staff, lack of investigative power, and time delays, which will be discussed below.

5.2 Lack of legally binding decisions

The CEC has interpreted its role as being limited to “monitoring government efforts to enforce [environmental] standards once they have been established” (Markell, 2002, p. 555). The lack of sanctions associated with the process is often considered a major flaw (Markell, 2002, p. 571). Despite the absence of legal consequences associated with the publication of a factual record, the factual record “could form the basis for formal consultation proceedings ... that in turn could ultimately lead to sanctions against the offending Party” (Baron, 1995, p. 606). Thus, issues of binding power within the CEC need to be addressed. As such, we look to evaluations of UN human rights mechanisms for possible recommendations to the CEC.

Lack of binding legal obligations is often cited as the major factor in the ineffectiveness of the UN human rights individual complaints procedure (Schmidt, 2001, p. 201; Hannum, 1992, p. 29; Camp Keith, 1999, p. 99). It has been said of the CAT that it lacks the ‘teeth’ necessary for real enforcement of the Convention; that it is a symbolic body charged with the administration of symbolic enforcement mechanisms without real powers (Boulesbaa, 1999, p. 293). Similarly, the non-binding nature of the Human Rights Committee’s decisions, functioning as political pressure rather than legal pressure, has been described as inadequate (Ritz, 2001, p. 212). Although committees can make recommendations (or views), these cannot be enforced because they are not “strictly binding” (Opsahl, 1994, p. 431; Ghandi, 1998, p. 395). These criticisms can be equally applied to all of the UN human rights complaints mechanisms. Indeed, it has been noted that the non-binding nature of these mechanisms may be directing victims to use other instruments to achieve redress, for example, the European Convention on Human Rights which has binding legal power, possibly compelling victims to submit a complaint to the European Commission rather than to the UN mechanisms (Lewis-Anthony, 1999, p. 57; Heynes & Villoen, 2001, pp. 514-515; Schmidt, 2001, p. 202). However, Hannum (1992) points out that the distinction between legally binding decisions and views consisting of advisory opinions may not always have a practical significance since many States are willing to take action recommended by an international body, even if the recommendation is not obligatory (p. 29).

One of the main points raised in the analysis of the UN mechanisms is that they are non-binding and that the creation of binding obligations would greatly strengthen their ability to effectively enforce their views while perhaps giving them more credibility as agents of change. This same criticism has been raised with respect to the CEC (Markell, 2002, p. 571). However, in order for it to institute binding obligations, it would basically require the drafting of a new treaty and the creation of a new supranational enforcement body. Thus, while an important criticism and consideration, it is not a particularly useful recommendation for the CEC.

5.3 Publicity and Confidentiality

Many scholars have isolated the role of publicity as an important factor for the effectiveness of the CEC citizen submission process. The CEC citizen submission process is devised as a method of collecting information concerning the failure of Canada, the United States and Mexico to effectively enforce their environmental policy (de Mestral, 1998, p. 177). The role of complaint procedures is judged useful, as the “reports have been the source of some embarrassment of the governments involved and have allowed members of the public to highlight issues of concern ... and put pressure upon their governments” (de Mestral, 1998, p. 178). The work of the CEC places a spotlight on government action with respect to the environment and “has the potential to

focus attention upon the North American environment as a totality and to home in on individual problems...” (de Mestral, 1998, p. 178). However, there are conditions under Article 15 of the NAAEC that allow for the factual record to remain undisclosed to the public (Baron, 1995, p. 611; Le Priol-Vrejan, 1994, p. 497). Following from the principal premise of transparency associated with the NAAEC, factual records should be published whenever they are created (Baron, 1995, pp. 611-612). As such, possible remedies to the shortage of publicity regarding the CEC may be drawn from analysis of the UN procedures.

Publicity is an important consideration in the realm of reporting mechanisms for two main reasons. It has been suggested by a number of scholars and theorists that reporting as an implementation technique functions primarily through the good intentions of the States and their desire for good international reputation (Donnelly, 1998, p. 61; van Boven, 2000, p. 62). Thus, in the absence of binding obligations, drawing attention to a violation is considered to be the most important method complaint mechanisms have to incite or ensure State compliance (Donnelly, 1998, p. 58; de Zayas, 2001, p. 73; Gilchrist, 2001, p. 772; Hoq, 2001, p. 712). This is often seen as enough to encourage compliance, even in the absence of binding obligations (Bijnsdorp, 2000, p. 331). In addition, full consideration of a case may lead to much greater publicity and pressure on a government to change its practices, especially when complaints raise an issue of concern to more people than just the individual petitioner (Hannum, 1992, p. 28). However, it has been argued that publicity concerning contents of annual reports and final decisions or views is not extensive enough; especially given the important role they play (Opsahl, 1994, p. 422; McGoldrick, 1991, p. 201; Bayefsky, 2001, pp. 96-97; Ghandi, 1998, p. 403). Publicity within the UN is lacking as well. To illustrate, Special Rapporteurs receive only three minutes to report findings to the Human Rights Committee—less than at the General Assembly, leading one rapporteur to wonder how they can truly be the “ears and eyes” of the UN system (pers. comm., 11 November 2002).

Secondly, in order for the mechanisms to work, they must be used and in order for people to use them, they must be aware of their existence and how to use them. A member of the 1503 team (pers. comm, 19 November 2002) mentioned that lack of knowledge about the procedure is one of its shortcomings. Unfortunately, although human rights issues are generally covered widely in a number of countries investigated, media generally pay very little attention to the working of the system (Heynes & Villoen, 2001, p. 499). An NGO respondent (pers. comm., 11 November 2002) referencing Theo van Boven, recommended that part of the reason this is so is that institutions within States, such as Universities, are not really “plugged in” to the UN system. If they were, they would be in a position to disseminate information about the reporting mechanisms to the general public. Thus, involving local institutions could be a solution to the problem of low publicity. It is suggested that lack of publicity and visibility is responsible for the low numbers of petitions submitted to the Committee under the ICCPR-OP and is one of the key limitations to this process (Opsahl, 1994, pp. 422-437). A lack of widespread use of the ICERD and the CAT communications is also attributed to lacking publicity (Lewis-Anthony, 1999, p. 57; Heynes & Villoen, 2001, pp. 514-515). Furthermore, the effectiveness of the CSW has been called into question given the lack of attention generally paid to this Commission, both within the UN and among governments (Farrior, 1997, p. 249; Byrnes & Connors, 1996, p. 684). In order to counteract this trend, it is recommended that publicity be used as a method of increasing awareness of the procedure, thus increasing the number of communications (Ghandi, 1998, p. 404). Some forms of publicity about these procedures, however, are prohibited; for example, a

Special Rapporteur on Torture cannot hold a press conference in a country to make known the findings of his investigation (pers. comm., 11 November 2002).

Theo van Boven (2000) has stated that “it is likely that governments prefer to cooperate in procedures characterized by confidentiality rather than in public procedures” (p. 60). This preference is cited as a significant and often repeated criticism of 1503 as its confidential nature allows States that perpetrate human rights abuses to avoid meaningful public criticism by deliberately seeking inclusion in 1503 proceedings (Maher & Weissbrodt, 1990, p. 303; Tolley, 1984, pp. 455-457; van Boven, 2000, pp. 95-96). It has been suggested, however, that although the deliberations of the groups involved in the 1503 procedure are confidential, this requirement is difficult to enforce, at least within the UN Commission on Human Rights. The result is that States are in fact subject to embarrassment for their human rights abuses, and thus have more motivation to change them (Bossuyt, 1985, p. 183). Furthermore, although rarely the case, confidentiality may even be an advantage in dealing with relatively receptive governments which may be more susceptible to private than public pressure, since yielding to confidential diplomatic inquiries is less embarrassing than yielding to public pressure or condemnation (Hannum, 1992, p. 31). The benefits of confidentiality appear to be limited to this rare instance. The general consensus is that confidentiality tends to be a weakness which prevents human rights goals from being achieved as it counteracts one of the main notions behind reporting, that is, that publicity pressures States into compliance.

From the general assessment of effectiveness, the importance of the publication of views has been strongly highlighted. In the absence of binding obligations, this is often raised as one of the greatest assets of the UN reporting mechanisms. From the example of the UN, it can be seen that publicity is of utmost importance as this forms the basis of the means for State compliance as well as the means by which to inform the public about the availability of the procedure so that it is used more frequently.

Given the suggestion that complaints raising an issue of concern to more people than just the individual petitioner makes for better publicity and a greater ability to pressure governments into compliance, the position of the CEC seems to be quite strong in terms of effectively using publicity. This is because the CEC deals with environmental problems that are of concern to large groups of individuals. The principle of transparency associated with the CEC process (Baron, 1995, pp. 611-612) is also important. Indeed, given that confidentiality is considered to be such a weakness, the transparency of the CEC process can be considered one of its strengths. However, the possibility of non-publication of the factual record is problematic in this regard, as the results of the process remain confidential. Thus, there is still the concern of making the information visible and public enough. In the situation where publicity is the means of enforcement, recommending greater publicity is crucial. In addition, Heynes & Viljoen (2001) mentions the importance of having a perception of effectiveness with respect to complaints mechanisms. People are more likely to use procedures that they perceive to be effective (p. 515). Publication of any changes resulting or possibly related to the production of the factual record could benefit the CEC because to do so would increase the public perception of its effectiveness, making people more likely to submit under Article 14 and 15 of the NAAEC. However, it seems that publicity concerning the existence of the CEC is lacking. An interview with a member of a relatively large North American NGO (pers. comm., 27 November 2002) working at the interface of human rights and the environment, demonstrated this. The interviewee had

absolutely no knowledge of the SEM reporting procedure or the CEC. In other words, a resourceful U.S. based NGO concerned with addressing environmental violations has not heard of the CEC reporting process. There is an obvious need to ensure that knowledge of the CEC process is widespread in order to ensure its utilization.

5.4 Problems with Admissibility

Admissibility criteria for the CEC submission process have been both criticized and appraised in the literature. In light of decisions made by the Secretariat with respect to the admissibility of submissions, Article 14(1) of the NAAEC is being applied vigorously (Markell, 2002, p. 559). Many of the submissions received by the Secretariat thus far have been dismissed, as they are deemed inconsistent with Article 14(1) (Markell, 2002, p. 559). The broad interpretation of Article 14(2)(a) by the Secretariat has been appraised as being consistent with the aims of the NAAEC (Markell, 2002, p. 561). It is clear that the Secretariat takes its purpose and obligations seriously, by considering each submission in depth before deciding that a factual record should be produced (Markell, 2002, pp. 566-567). However, the high level of prudence used by the CEC in assessing submissions is denounced by many critics (de Mestral, 1998, p. 177). The submission process is described as “procedurally cumbersome” and “stringent” (Coatney, 1997, pp. 828-829). The “spirit” of the Agreement is often forgotten when using an “overly technical” interpretation and “formalistic approach” when making decisions regarding submissions (Coatney, 1997, p. 840).

Boulesbaa (1999) proposes that the main reason that individual complaints procedures fail to be an effective instrument in enforcing the UN CAT is that there are so many limitations imposed on the admissibility of individual communications that very few will survive to be considered on their merits (p. 287). He writes that the result of the exhaustive requirements for admissibility has been in effect to obstruct the international enforcement of both the ICCPR-OP and the CAT (Boulesbaa, 1999, p. 294). Specifically these deficiencies are the requirements of the exhaustion of domestic remedies; the inadmissibility of anonymous complaints; the rejection of complaints which are being examined under another procedure of international investigation or settlement; and the discretion given to the CAT to reject submissions it considers to be an abuse of the right of submission or incompatible with the provisions of this Convention as this discretion is open to abuse (Boulesbaa, 1999, p. 290). Furthermore, it has been suggested that the admissibility criteria of having to exhaust all local and national procedures before submitting a complaint to the Committee acts as a deterrent to the utilization of the communication procedure by many (Felice, 2002, 213).

NGO representatives in the human rights field have also criticized the criticism that the UN mechanisms as not being “user friendly”. The admissibility criteria for these procedures are deemed too complex, making them accessible only to those nongovernmental organizations that have a high level of expertise. This is ironic because the goal of these mechanisms is to increase the participation of civil society. However, participation at the grassroots level is unrealistic given the level of expertise required. Those NGOs that do have expertise are more likely to pursue different avenues (pers. comm., 27 November 2002).

While the criteria for admissibility are seen as too stringent in the case of the CAT and the ICERD, positive aspects have been highlighted with respect to the 1503 procedure, the CEDAW-OP, and the ICCPR-OP. The CEDAW-OP, unlike any of the similar UN instruments, allows a

communication to be submitted on behalf of individuals or groups of individuals without their consent where the author can justify such an action (CEDAW-OP Article 2). This measure is especially valuable because of its capacity to accept submissions “on behalf of” a victim, where the victim’s name remains confidential (Hoq, 2001, p. 696; Gilchrist, 2001, p. 769). It provides an official, formal and direct role for NGO participation in advancement of women’s rights (Hoq, 2001, p. 705). It could also provide a remedy to particular obstacles, such as low levels of (legal) literacy, danger of persecution, personal reprisal or social stigmatisation, insufficient resources to proceed alone, and intimidating nature of official procedures, that often discourage women from realizing their rights (Bijnsdorp, 2000, p. 336).

Along the same lines, a positive feature of admission to the 1503 is that the Secretariat, which receives submissions, does not require the submissions to be formal or drafted by lawyers, thus reducing the difficulty of submitting (Tolley, 1984, p. 434). In the case of the Human Rights Committee, in general, the procedure used to attain a decision concerning the admissibility of a communication is described as “cumbersome” (Opsahl, 1994, p. 424). However, the rules for admissibility as formulated by the Human Rights Committee are deemed generous, as the percentage of submissions rejected is much lower than in similar procedures under other human rights organs (Ghandi, 1998, pp. 399-400). A large proportion of communications received have been deemed admissible due to the “serious facts of many of the cases” and the “legal conditions and procedures” adopted by the Committee (Opsahl, 1994, p. 423). By maintaining rights of access to the Committee by individuals and distributing the burden of proof between the individual and the State party concerned, the Committee ensures that individual rights are prioritized (Ghandi, 1998, p. 400).

The concern with the strictness of admission criteria in the case of the UN highlights an issue raised when assessing the effectiveness of the CEC. The CEC may have less strict criteria for admissibility, but, according to certain authors, admissibility requirements could be simplified (de Mestral, 1998; Coatney, 1997). This might benefit the procedure and increase its effectiveness as complaints must be admitted and considered in order for such procedures to be effective. By simplifying its admissibility criteria, more cases would be considered and, assuming that the number of factual records is proportionally related to the number of submissions, a greater volume of factual records would be produced. As such, States have a greater incentive to enforce their environmental legislation, as there is a greater probability that a failure to do so will be recognized by the CEC.

5.5 Investigative Power, Follow-up Comments, and Views

The lack of investigative power contracted to the CEC under the NAAEC is cited as a main obstacle for the success of the side agreement (Le Priol-Vrejan, 1994, p. 486). The limited investigative scope of the CEC is associated with the poorly defined specifications as to the information-gathering abilities of the Commission (Le Priol-Vrejan, 1994, p. 500). The publication of factual records as a sole remedy is also problematic, as Submitters are less likely to feel that their efforts will bring about improved enforcement (Le Priol-Vrejan, 1994, p. 503). “In light of the arduous validation process, this lack of remedies may quell the public’s desire to bring a valid complaint”, further limiting the effectiveness of the CEC procedure (Le Priol-Vrejan, 1994, p. 503). Thus, independent investigation by the CEC becomes of even greater importance. The conclusion of Le Priol-Vrejan’s (1994) commentary is thus:

The power to investigate independently is the foundation on which the enforcement of the environmental laws of the three Parties is based, without which the goals of the NAAEC cannot be achieved. If the CEC is unable to conduct an adequate investigation despite cause to believe that a Party is not enforcing its environmental laws, it may be unable to develop proof to substantiate the allegations (p. 504).

It has been stated that the use of general comments is an important means of clarifying the State's obligations (Barret, 2001, p. 10). The importance of views in the mechanisms' findings is highlighted in the critiques that one of the major weaknesses of the CSW, like the CEC, is that it is not authorized to make recommendations to governments based on those communications (Farrior, 1997, p. 254). It has been argued that the effectiveness of the Human Rights Committee is enhanced by the final views, which are composed of "clear and specific obligations" intended for the State in question, leaving "little or no doubt as to the necessary remedial action" (McGoldrick, 1991, p. 199). However, as they are not binding, the State parties may selectively adopt the views such that unfavourable suggestions are ignored (Opsahl, 1994, p. 431). In practice the State parties to the Optional Protocol have been willing to act in accordance with the Committee's opinions (Opsahl, 1994, p. 431). The authority of the Human Rights Committee under the ICCPR, along with the other mechanisms, is said to be heightened when it is "acting in a manner which approximates, as nearly as possible to the way in which a court of law acts..." (Ghandi, 1998, p. 395).

In order to glean further insight into the issue of non-binding recommendations, we looked at three decisions of three different national courts in relation to UN mechanisms. In the case of *Ahani v. Canada (Attorney General)*, (Court of Appeal for Ontario, 2002), the recommendation by the Human Rights Committee that Canada not deport Ahani was rejected by the Supreme Court on the basis that the Committee's recommendation had no binding authority. The findings of the judges demonstrate that one of the reasons States fail to comply with non-binding recommendations is that they do not want to set a precedent of enforcing non-binding international commitments in a domestic court, that is:

[t]o give effect to the appellant's position would have the untenable effect of converting a non-binding request in a Protocol which has never been part of Canadian law into a binding obligation enforceable in Canada by a Canadian court, and more, into a constitutional principle of fundamental justice (Court of Appeal for Ontario, 2002).

In *Thomas and Another v Baptiste and Others* (Trinidad & Tobago Privy Council, 2000), a case in Trinidad and Tobago, members of the Privy Council held that because the recommendations of the UN human rights mechanisms are not legally binding, domestic courts are under no obligation to comply. This principle has found practical expression in Trinidad and Tobago's decision to continue carrying out death sentences while those cases are under review by UN mechanisms (Trinidad & Tobago Privy Council, 2000). In the case of *Ahani v. Canada (Attorney General)*, (Court of Appeal for Ontario, 2002), Judge Rosenberg points out that ratification of the ICCPR-OP by Canada represented an agreement to "respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant" according to Article 2 of the Treaty (Court of Appeal for Ontario, 2002). Therefore, because

States have agreed to the texts of the treaties, they are morally, if not legally, bound by those treaties.

A case from New Zealand involving a complainant to the UN Human Rights Committee under the ICCPR-OP, *Tangiara v Wellington District Legal Services Committee*, contains the comment that, while the recommendations of the Human Rights Committee are not legally binding, “a State party may find it hard to reject such findings when they are based on orderly proceedings during which the State party has had a proper opportunity to present its case” (New Zealand Judicial Committee, 1999). Furthermore,

[b]y signing the Optional Protocol New Zealand submitted to its jurisdiction, and can be said to have conferred jurisdiction upon it. But it did not cede to it its own sovereign power of adjudication over the inhabitants of New Zealand. The Human Rights Committee does not exercise the adjudicative functions of New Zealand, but its own independent jurisdiction derived from an international instrument and the submission of [S]tate [P]arties (New Zealand Judicial Committee, 1999).

From these cases, it can be seen that the views of agencies like the Human Rights Committee, while definitely legally non-binding, can be highly persuasive to receptive States.

Compliance with recommendations is promoted by the follow-up procedures under the Optional Protocol along with the presence of a Special Rapporteur (Opsahl, 1994, p. 431). The follow-up procedure has been credited as being an important element in the success of the Human Rights Committee as it promotes the application of the final views and also plays a role in cultivating the credibility of the Committee and acts to strengthen public views regarding the importance of Committee decisions (de Zayas, 2001, p. 120). However, the follow-up process is not without its problems. According to one Special Rapporteur (pers. comm., 11 November 2002), it seems that States may not read the treaties they sign, because they often feel that they are not obligated to let the Special Rapporteurs enter at all. The Committee’s ability to see whether its recommendations are being followed (CEDAW-OP Article 9) is a valuable element in the CEDAW-OP procedure (Gilchrist, 2001, p. 771). The importance of follow-up procedures is rooted in the generation of effective publicity designed to pressure a government to abide by international findings, views or recommendations. Systematic supervision is more likely to encourage compliance than the mere issuance of “views” (Hannum, 1992).

A member of the 1503 team has identified the lack of investigative power of the mechanism as one of the negative elements of the procedure (pers. comm., 19 November 2002). One of the major problems raised with respect to the CSW is the lack of authority to act on reports it receives. The Commission is authorized neither to investigate reports, nor to make recommendations to governments based on the communications. The only direct product of this mechanism is a brief annual report on the confidential and non-confidential communications submitted to the Commission (Farrior, 1997, p. 254). This criticism applies to the CEC as well.

Furthermore, it is suggested that the publication of views enhances State compliance by giving the State parties specific recommendations for change that can be followed, as opposed to simply providing information about the situation. It has been demonstrated that the publication of views is greatly supported by follow-up procedures. Therefore, initiating the publication of views and

recommendations as well as provisions for follow-up procedures would be a tremendous asset to the CEC in assisting them to achieve their goal of holding the NAFTA countries to their environmental laws.

5.6 *Inherent Problems in the Agreements that Act as Barriers to Effectiveness*

Inconsistencies within the NAAEC are cited as impeding the ability of the treaty to preserve environmental standards through the maintenance of law enforcement (Coatney 1997, p. 824). The application of the “innovative language” contained in the document is described as “less than effective” (Coatney, 1997, p. 826). Problems of interpretation arise due to the contradictions found within the NAAEC (Coatney, 1997, p. 827). The failure of the CEC to consider “new statutes and regulations” when assessing effective enforcement is a severe limitation to the submission process (Coatney, 1997, p. 827). The effectiveness of the procedure is severely hampered if the agreement is not interpreted *in toto* because an overly strict interpretation allows countries the option to create new laws and circumvent issues of adequate enforcement (Coatney, 1997, p. 831). It is argued that “[i]n order to satisfy the intent of the Agreement, the CEC will have to reformulate its reasoning” and that “inconsistent language within the document weakens its usefulness” (Coatney, 1997, p. 841). Important terms of the agreement are ambiguous and unclear, thus causing difficulties in interpretation and hindering implementation (Baron, 1995, p. 605). Thus, the interpretation of the procedure is sure to have an impact on its success (Baron, 1995, p. 607). As mentioned earlier, the specifications as to the information-gathering abilities of the Commission are unclear (Le Priol-Vrejan, 1994, p. 500).

The ambiguous nature of the agreement also raises questions regarding State requirements to furnish information to the CEC (Le Priol-Vrejan, 1994, p. 501). In contrast, the broad interpretation of Article 14(2)(a) by the Secretariat has been appraised as being consistent with the aims of the NAAEC (Markell, 2002, p. 561). Also, the number of places where the process can be terminated is a shortcoming of the NAAEC (Coatney, 1997, p. 827). Such issues of interpretation and faulty clauses within the treaties themselves also exist within the UN procedures; therefore recommendations pertaining to the UN mechanisms may also apply to the CEC.

Some have pointed to the ambiguities in the conventions themselves as being problematic. For example, it has been stated that ambiguities in the language contained in Article 2 weaken the position of the CAT as these ambiguities influence interpretation of the convention, permitting an overly specific interpretation that may not be consistent with the spirit of the convention (Boulesbaa, 1990, p. 92). In the case of the ICERD, the very definitions contained in the treaty are considered problematic. For example, definitions within the treaty do not indicate how an action on racial grounds can be distinguished from an action on political grounds, nor does it specify criteria for identifying discrimination (Banton, 1996, p. 89). Moreover, there are only two possible causes of racial discrimination mentioned in the preambular paragraphs: those caused by colonialism and those caused by “scientifically false, morally condemnable, socially unjust and dangerous” doctrine of superiority (Banton, 1996, p. 87). The ICERD definition is based on the International Labour Organisation’s (ILO) Convention on Discrimination in Occupation and Employment and the applicability in situations other than in workplace relations is questionable (Banton, 2000, p. 76). Overall, the ICERD is said to suffer from “a lack of textual clarity” (Meron, 1985, p. 315) and from “deficient drafting” (Meron, 1985, p. 316). The

“perceived vagueness of the issues” and the difficulty in defining, but especially proving, racial discrimination have been raised as the reasons why only a few States have signed on (Felice, 2002, p. 213).

There are similar concerns regarding the lack of clarity and openness in relation to interpretation of the ICCPR-OP. Opsahl (1994) attributes the “haste in which the optional protocol was drafted” to its “ambiguity and brevity on essential points” (p. 426). Ambiguities in the treaties themselves are especially problematic as they influence how these treaties are interpreted and implemented. Furthermore, ambiguous language weakens these mechanisms in their ability to operate effectively.

Ambiguity of language is a concern that has also been raised with respect to the CEC. Perhaps a re-evaluation of the NAAEC would benefit the CEC. The CEC must interpret the NAAEC such that the strength of the treaty is maintained.

One way of doing this is the ‘step-wise’ approach, utilized in the 1503 procedure. Bossuyt (1985) highlights the benefits of the step-wise process of the 1503 procedure, as a result of which, States can escape further scrutiny by changing their human rights practices at any step (p. 183). He claims that the succession of steps is more influential than any single step in the process, and that keeping consideration of a country situation pending for a year can be more effective than moving it along quickly (Bossuyt, 1985, p. 183). This step-wise nature may in fact benefit the CEC, as it also proceeds with a series of specified steps. However, the possibility for termination of the procedure at any one of these steps has been raised as an impediment to the effectiveness of the CEC citizen submission procedure.

5.7 Political Nature

The inability to investigate and the reliance on a Council composed of government representatives may impose political biases to the functioning of the CEC. For example, without the ability to investigate, the CEC is forced to depend on outside sources to function, which “makes the CEC susceptible to personal and political agendas” (Le Priol-Vrejan, 1994, p. 503). This flaw can also be seen in some of the UN mechanisms.

The major procedural flaw of the 1503 procedure and the CAT is said to be its “political” nature (Pitts, 1991, p. 157; Maher & Weissbrodt, 1990, p. 303; Tolley, 1984, p. 433-455; Nagaan, 2001, p. 104). In the case of the 1503, since the Working Groups and Commission on Human Rights involved in assessing communications and situations are made up of UN country representatives, they are said to focus more on political expediency than on the merits of individual communications (Tolley, 1984, p. 453). This means that serious violations in some countries are often overlooked in favour of comparatively minor situations in other countries, and that nations without powerful allies are unable to escape scrutiny under 1503 (Tolley, 1984, pp. 453-454). Furthermore, Tolley (1984) points out that “[d]espite the potential conflict of interest, government officials frequently serve on the Working Group and may even constitute a majority” (p. 437). He goes on to point out that Commission members (from, for example, Argentina, Ethiopia, Uganda and Uruguay) frequently discuss and vote on situations in their own countries (Tolley, 1984, p. 445). The end result, therefore, is that many deserving situations fail to break through the majority requirement of the procedure’s Working Groups (Bossuyt, 1985, p. 184-5). A member of the 1503 team has stated that “the composition of the Working Groups

affect how cases are considered”, and pointed that this is one of the negative elements of the procedure (pers. comm., 19 November 2002). A similar criticism is raised with respect to the Commission on the Status of Women. It has been said that the Commission’s lack of effectiveness in promoting women’s rights to its inception in remarking that it “was created as an instrument of negotiation among governments, not as an agent of change” (Reanda, 1992, 265).

The issue of the overly political nature of the UN mechanisms may be something to be guarded against in the CEC procedure, especially given the highly political nature of the NAAEC and the room within its procedures (for example the voting to publish the factual record) for the potential to use this as a political tool.

5.8 Lack of Funding/Staff

Lack of funding and staff have not been raised as concerns in the literature about the CEC. However, given the importance placed on these two elements in the literature on the UN as well as the importance of adequate funding and staff in ensuring the effective functioning of any organization, this impediment to effectiveness is presented as a precautionary reminder to the CEC.

While lack of funding and inadequate staffing plagues all of the committees, the positions of the CERD and the CAT are particularly precarious, given that their meetings and activities are funded wholly by parties to each treaty rather than, as is the case for the other treaty bodies, from the UN’s regular budget. Since 1986, several ICERD sessions have been cancelled and more than half of the parties to the CAT were in arrears in 1990 (Coliver, 1992, p. 179). De Zayas (2001) suggests that a lack of staff, especially specialized staff (such as lawyers) results in a decline in quality of research, analysis and drafting by the secretariat, as well as a growing backlog in the processing of communications and in attending to correspondence, to the detriment of the whole procedure (p. 76). Increased funding has been identified as the most important step in improving the quality of work and results of the CAT as a shortage of funds has resulted in postponed trips and short staffing (Bank, 1997, p. 623). Indeed, budgetary constraints can be considered one of the critical weaknesses of complaints mechanisms (Nagaan, 2001, p. 104). One NGO representative quoted Theo van Boven as saying that the annual budget of the entire UNHCHR is only 1.5% of the UN general budget (which is approximately US\$25 million) (pers. comm., 11 November 2002). Lack of funding is not only a concern in possibly impeding the effective functioning of the mechanisms by lowering their ability to operate; it has, in fact, led to voluntary payments by State Parties. Presently these donations at least double the UN funds, this leads to questions of the appropriateness of allowing the majority of funding to come from parties to the treaties (pers. comm., 11 November 2002).

5.9 Time Delays

One NGO source expressed that the 1503 procedure is “utterly useless” in great part because, besides taking an “enormous amount of money”, it uses up an “enormous amount of time” (pers. comm., 27 November 2002). Echoing this second point, a member of the 1503 team stated that time delays are one of the biggest problems with the procedure: the process, in its entirety, can be very slow. Even under the best scenario, a submission would take one year to run its course. Usually, however, submissions are kept pending for about two years (pers. comm., 19 November 2002). Associated with this negative aspect is the “12 Weeks Rule” which sets the deadline for government responses to be accepted for consideration. For example, this year’s deadline for

governments was May 24, 2002 for communications to be considered in the August 19, 2002 meeting of the Working Group on Communications (pers. comm., 19 November 2002). Other procedural criticisms of the 1503 process concur, with accusations that it is “too slow and overly formalized” (Maher & Weissbrodt, 1990, p. 303), and lacks the ability to react quickly to human rights violations (Bossuyt, 1985, pp. 184-5). The issue of time is found to be of consistent concern across all of the mechanisms. That the Commission of the Status of Women considers women’s rights only every other year and that its record of action to date is minimal suggests that serious violations of rights involving women are better addressed, where possible, by the commission on Human Rights (Rodely, 1992, p. 76).

However, time delays are cited as acting to reduce the Human Rights Committee’s effectiveness under the ICCPR-OP due to “a lack of resources” (Joseph et al., 2000, pp. 28-29). Many delays in the proceedings of the Committee are due to overdue State responses (Bayefsky, 2001, p. 24). It is suggested that strict time frames should be created for information to be provided by State Parties and that failure to present information within the specified time should not be tolerated without consequences to the State party (Bayefsky, 2001, p. 24). Non-cooperation by States is only one factor presently limiting the functionality of the Committee. A backlog of correspondence and language issues also act as barriers by increasing the time taken to process communications (Bayefsky, 2001, p. 25). As such, the Committee requires from two to four years to address a communication (Bayefsky, 2001, p. 25). Indeed, all international procedures share serious problem of delay, it is not uncommon for it to take three to four years for the production of final decision (Hannum, 1992, p. 28), as such, delays in the process can act to prevent these mechanisms from being effective enforcement procedures (Boulesbaa, 1999, p. 291; Nagaan, 2001, p. 105; Sorenson, 2001, p. 179; Banton, 2000, p. 60).

The problem raised with time delays in the case of the UN mechanisms is also applicable to the CEC. Although time has not been mentioned as a current limitation within the CEC, it is important that it strive to process submissions in a timely manner. Otherwise, the environmental degradation will continue and irreversible damage may have already occurred by the time the CEC published a factual record. In recognition of this problem and the comparable time sensitivity of human rights violations, many of the UN Mechanisms have provisions for interim measures. Given the possibility for delays in the CEC procedure and the time sensitivity of environmental problems, perhaps the institution of interim measure would be useful to consider for the future. At this stage, however, the CEC does not require the implementation of such measures.

6. Conclusions and Recommendations

From the UN citizen submission procedures, we were able to derive a set of criteria that influences the effectiveness of enforcing compliance with international agreements. These criteria are as follows:

- ❑ Lack of legally binding decisions
- ❑ Publicity / confidentiality
- ❑ Problems with admissibility

- ❑ Investigative Power, Follow-up Comments, and Views
- ❑ Inherent Problems in the Agreements that Act as Barriers to Effectiveness
- ❑ Political Nature
- ❑ Lack of Funding/Staff
- ❑ Time Delays

As the UN experiences highlighted, the non-binding nature of the decisions allows States to ignore the decisions made by the UN bodies. As such, compliance is hindered as States feel no legal pressure to comply with the results of the submission process. The UN bodies have no enforcement power, thus their credibility is adversely affected.

Publicity is essential for the effectiveness of the processes for several reasons. First, citizens must be aware that the processes exist in order to make submissions. Second, the views of the UN bodies must be publicized. The reasons for this are two-fold: publicity acts to pressure States into compliance and citizens must feel that their efforts will yield results in order to participate at the international legal level.

Overly stringent and excessive admissibility requirements may prevent submissions from being heard on their merits. As such, important issues may not be addressed and possible submitters are discouraged from using the mechanisms as a means of redress.

Recommendations, although they are non-binding, give direction to States involved. In many cases, these views have in fact influenced State behaviour. Furthermore, follow-up procedures have been identified as helpful in assuring that the States take action to remedy the situation addressed in the submission. However, there is criticism regarding the investigative ability of the UN bodies; it has been suggested that they should be able to obtain information independent of the State.

The clarity of the language in the documents themselves influences how they are understood and applied. As such, it is important that the UN bodies interpret the documents in a manner that is consistent with the goals of the agreements.

When the States being evaluated under the agreements are involved in the monitoring and assessment procedures, conflicts of interest often arise. This can have an effect on what is concluded and disclosed to the public. Thus it is essential that the States party to the agreements have limited influence on the analysis and outcomes of citizen submissions.

Lack of adequate funding and staff has posed problems for the UN mechanisms. As such, it is important to ensure that the UN bodies receive enough funding and are well-staffed in order to assure the proper processing and assessment of the submissions. This is directly linked to the effectiveness of the mechanisms.

Given the nature of human rights abuses, it is important that the submissions be dealt with in a timely manner. In the UN, time delays have proved to be problematic. For individuals to feel that

the process can address their immediate concerns, improvements in this area are of extreme importance.

Many of these criteria are also applicable to the CEC; we isolated those that were most appropriate for the CEC. Those most pertinent to the CEC are:

- ❑ Lack of legally binding decisions
- ❑ Publicity / confidentiality
- ❑ Problems with admissibility
- ❑ Investigative Power, Follow-up Comments, and Views
- ❑ Inherent Problems in the Agreements that Act as Barriers to Effectiveness (such as Ambiguity of the Language in the Convention)
- ❑ Political Nature

As with the UN mechanisms, the CEC's lacking ability to issue legally binding decisions has been criticized as being an obstacle to ensuring effective actions to issues addressed in the submissions. However, seeing as such a change would necessitate a redrafting of the NAAEC document, such a modification in the process is not a particularly useful recommendation to the CEC. Therefore, it can be concluded that it is neither practical nor wise to focus efforts for improvements on devising a sanctioning procedure to the CEC citizen submission process. However, if the NAAEC document were ever to be revamped in the future, a clause for legally binding decisions would likely remedy the problem of 'toothlessness' associated with the procedure.

In the absence of legally binding decisions, publicity becomes the most important component for ensuring that the goals of the NAAEC are met. The very basis of the theory behind soft-laws is that States would be pressured to comply with international obligations in order to avoid embarrassment to the States involved. The risk of having their misdeeds exposed by the media is likely to prevent breaches of the international agreements. Thus when such a breach does take place, publicizing the situation is crucial. All factual records produced should be disclosed to the public whenever they are created. In addition, the public is more likely to utilize the procedure if they are aware that their efforts will be rewarded by public knowledge of the issue and a chance that action will be taken by others, placing further pressure of the States in question. Lastly, a more fundamental need for publicity exists; in order for the process to be used the public must be aware of its existence. Unless there is a realization that such an arena is available in the environmental sphere, no amount of improvements to the citizen submission procedure can effectively aid in assuring the goals of the NAAEC. Public knowledge of the existence of CEC's procedure appears to be quite low indicating that it has not been adequately publicized. As such, we recommend that the publicity of the process be the foremost priority in improving the citizen submission procedure. This may be achieved through publicity campaigns and press conferences when factual records are produced. It is further suggested that environmental advocacy groups and lawyers be targeted in such publicity campaigns, as they will then be able to suggest the option of citizen submissions to the CEC for those that contact them in seeking advice.

It has been the practice of the Secretariat to interpret the admission criteria as set out in Article 14 of the NAAEC to the strictest sense of the word. It has been suggested that such a stringent application of the admissibility criteria prevents issues deserving of the CEC's attention from being considered. If the admissibility criteria are overly strict, the mechanism may not be viewed as user-friendly since time and labour investments may not be rewarded with the admission of the submission. The admissibility criteria, however, are interpreted by the Secretariat; the admission requirements can be relaxed without changing the original wording in the document. The admission criteria are flexible enough to be subject to broad interpretation. Thus, small adjustments may make the procedure more accessible. It is noted, however, that increasing the volume of admitted submissions requires more resources, such as time and funding.

The CEC's investigative powers for gaining information necessary for the processing of submissions and preparations of factual records are far reaching and are a major advantage to the CEC procedure. However, investigative powers in the context of follow-up measures are lacking. Not only is there no provision for the CEC to carry out follow-up inquiries, but the CEC also fails to make recommendations to the State parties involved. The CEC should be able to incorporate views and recommendations within the factual record and have follow-up procedures in order to ensure that the recommendations are followed by the State in question.

The ambiguity of the NAAEC document has been noted as being disadvantageous as well as advantageous. On one hand, the language is inconsistent and vague. On the other hand, however, this ambiguity allows room for interpretations that support of the goals of the Agreement. As with the issue of the lack of enforcement measures, any changes in this area would require reopening of the NAAEC text. Changes to the NAAEC document itself may improve the ability of the citizen submission procedure to result in better environmental law enforcement. An adoption of a step-wise approach in which States are allowed to respond and remedy the situation in intermediate steps may be beneficial to the CEC.

The powers given to the Council also need to be considered and re-evaluated. The composition of the Council makes its influence inherently political. The effectiveness of the citizen submission procedure is obviously affected by such politicization since, at practically every step of the process, the Council can stop any further investigation by a two-thirds vote. Such political involvement should be minimized so that the CEC citizen submission procedure can be as independent of States politics as possible. Thus, conflicts of interests may be avoided and the possibility that laws are enforced due to submissions received by the CEC is increased.

As with all similar UN mechanisms, submissions by citizens have the ability to be a very effective method in promoting the goals of the Agreements. The CEC procedure is particularly advantaged in that there are only three State parties to the Agreement. This favours the CEC since there is inherently less confusion involved when dealing with three States, as compared to the dozens of States involved in the UN. As such, the implementation of follow-up procedures and the enforcement of legally binding decisions is facilitated. Furthermore, the youth of the procedure indicates that the possibility for evolution exists, as demonstrated by the histories of many of the UN mechanisms, which span decades. The degree of effectiveness ultimately relies on the will of the State parties to uphold their international agreements. As the prime objective of the NAAEC is to "the conservation, protection and enhancement of the environment" (NAAEC

Preamble), the interpretations of the NAAEC document should be consistent with this goal and States should strive to act in accordance with this purpose.

There are various features that have the possibility of influencing the effectiveness of citizen submission procedures in improving compliance, as discussed above. However, some of these possible changes, such as increasing legal power, decreasing the amount of political involvement, and removing the ambiguities in the language of the NAAEC text, require re-examination of the NAAEC text. Thus, we recommend, that efforts on the part of the CEC would be more fruitful if they focused on increasing the public profile of the CEC and the citizen submission process.

7. Further Research

The nature of the project did not permit us to evaluate all the avenues that we would have liked to, given the time constraints and the scope of the project. During our research, numerous possible further research topics were raised:

- The role of NGOs in these citizen submission processes
- A quantitative analysis of the results of the UN citizen submission procedures
- Examination of North American environmental laws to see if they would, in fact, uphold the environmental norms outlined in the NAAEC if they were perfectly enforced.
- Analysis of the following question: Is promoting cooperative mechanisms to help States attain their own objectives more or less productive than using adversarial techniques to force States to comply?
- Research to determine the possible utility of citizen reporting procedures for environmental law enforcements globally.

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Appendices

Appendix A: Interview Questions, Initial Contact

Initial Contact with a Human Rights Lawyer

I am conducting research with a team at McGill University (Montreal, Quebec) for The Commission for Environmental Cooperation (CEC), a body created under the North American Free Trade Agreement (NAFTA). The project involves an assessment of the effectiveness of their citizen submission process in addressing concerns of the public related to environmental law enforcement.

In order to learn more about the procedural issues involved with citizen reporting in international law enforcement, the CEC has suggested that our team study the well-established UN human rights reporting mechanisms. In light of this suggestion, we have undertaken a study of the UN's six human rights reporting procedures, which include:

- 1) The Procedure for the Commission on the Status of Women (CSW)
- 2) The 1503 Procedure (aka The Procedure for Dealing with Communications Relating to Violations of Human Rights and Fundamental Freedoms)
- 3) Article 22 of the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT)
- 4) Article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)
- 5) The Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR-OP)
- 6) The Optional Protocol to the Convention on the Elimination of Discrimination Against Women (CEDAW-OP)

In addition to studying the structures of these mechanisms, we are also looking to the academic literature as well as to the human rights legal community for support in developing our understanding of effective citizen reporting. It is my understanding that you have dedicated your career to public international law and international human rights litigation and thus, may have experience with these procedures. If so, your input would be invaluable to our research.

If you would be willing to help us with our study by answering a few questions, please respond via e-mail or telephone and I will follow up with a telephone call. If you do not have time to answer our questions, please direct this request as you see fit.

Thank you for your consideration. I look forward to hearing from you.

Initial Contact with UN

Name of committee

Name of division

Name of department

To Whom It May Concern:

I am conducting research with a team at McGill University (Montreal, Quebec) for the Commission for Environmental Cooperation (CEC), a body created under the North American Free Trade Agreement (NAFTA). The project involves an assessment of the effectiveness of their citizen submission process in addressing concerns of the public related to environmental law enforcement.

In order to learn more about the procedural issues involved with citizen reporting in international law enforcement, the CEC has suggested that our team study the well-established UN human rights reporting mechanisms. In light of this suggestion, we have undertaken a study of the *name of UN reporting procedure*, as well as *names of the other procedures*.

As you have detailed knowledge and experience regarding the *name of UN reporting procedure*, your input would be invaluable to our research. If you would be willing to help us with our study by answering a few questions, please respond via e-mail or telephone and I will follow-up with a telephone call. If you do not have time to answer our questions, or if you think our questions would be better directed to someone else in your office, please direct this request as you see fit.

Thank you for your consideration. I look forward to hearing from you.

Sincerely,

Jessica White

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Appendix B: Interview Questions, 2nd Contact

Interview Question for NGOs (second contact)

Background

My client, the Commission on Environmental Cooperation (CEC), is charged with assessing adherence to member-state environmental law under the North American Free Trade Agreement (NAFTA). In order to enhance their effectiveness in this role, the Submissions on Enforcement Matters (SEM) unit of the CEC has requested from our research team a step-wise comparison between their relatively new reporting system and the well-established UN human rights reporting mechanisms. Results of the comparison will highlight ways in which the CEC might improve their reporting system (or methods they may want to avoid) in order to better compel compliance with the NAFTA. If you are interested in reading more about the CEC and the SEM reporting procedure, please visit <http://www.cec.org/citizen/index.cfm?varlan=english>

Interview Questions

- 1) Has *name of NGO* ever filed a communication with any UN organization concerning human rights abuses?
- 2) Which UN commission(s) has *name of NGO* sent communications to concerning human rights abuses?
- 3) Which UN mechanisms have you, personally, had experience with?
- 4) Have you found any stages of these processes particularly problematic? If yes, which ones? How? Etc.
- 5) Can you suggest changes that could be made to any features of these reporting mechanisms to make them more effective?
- 6) On a scale from 1-5 how would you rate your satisfaction with each of these processes? (with 1 being not at all satisfied and 5 being very satisfied)
- 7) Given your experience with these processes, do you intend to use them again? Why?/Why not?
- 8) Could you describe any alternatives to UN reporting mechanisms that you consider to be more effective in inducing changes in State behaviour?
- 9) What external factors, beyond the structures of the processes themselves, may impact the outcome of communications under these UN procedures?
- 10) Is there anything else you wish to add concerning your experience with these communications procedures?

Interview Questions for UN (second contact)

Background

My client, the Commission on Environmental Cooperation (CEC), is charged with assessing adherence to member-state environmental law under the North American Free Trade Agreement (NAFTA). In order to enhance their effectiveness in this role, the Submissions on Enforcement Matters (SEM) unit of the CEC has requested from our research team a step-wise comparison between their relatively new reporting system and the well-established UN human rights reporting mechanisms. Results of the comparison will highlight ways in which the CEC might improve their reporting system (or methods they may want to avoid) in order to better compel compliance with the NAFTA. If you are interested in reading more about the CEC and the SEM reporting procedure, please visit <http://www.cec.org/citizen/index.cfm?varlan=english>).

Interview Questions

- 1) In your opinion, do communications filed under the *name of procedure* induce changes in State behaviour?
- 2) If yes, how?
- 3) What (structural) elements of the *name of procedure* are especially helpful in persuading States to comply with international law?
- 4) Which aspects of the *name of procedure* impede and/or inhibit its ability to alter State behaviour?
- 5) What external factors, beyond the structure of the process itself, may impact the outcome of communications under the procedure?
- 6) Is there anything else you would like to add concerning the effectiveness of the *name of procedure* in promoting the enforcement of international human rights standards?

Appendix C: International Law: Treaties

The formation of international law occurs through “consensus” or “expressed consent” whereby States create and agree to treaty obligations that are considered legally binding (van Dervort, 1998, p. 503). Treaties comprise a large part of the international legal system, where two or more States agree to uphold the elements outlined in the treaty (van Dervort, 1998, p. 375). Treaties may be referred to as, among others, conventions, protocols, and covenants (van Dervort, 1998, p. 376). Many of the international agreements outlined by the UN are considered treaties. States may sign, accede to and/or ratify a treaty (van Dervort, 1998, p. 378). The signature refers to “the official fixing of names to the treaty by the representative of the negotiating States either as a means of expressing consent of a State to be bound by a treaty or as an expression of provisional consent subject to ratification, acceptance, or approval” (van Dervort, 1998, p. 378). The signature indicates that the States involved agree with the official phrasing of the articles within the treaty (van Dervort, 1998, p. 378). Accession is defined as the “formal acceptance of a treaty by a State that did not take part in negotiating and signing it” (van Dervort, 1998, p. 378). In most cases, a treaty is effective only following the ratification of the treaty by a minimum number of States (van Dervort, 1998, p. 378). Ratification is “an international act whereby a State establishes on the international plane its definitive consent to be bound by a treaty” (van Dervort, 1998, p. 379). A treaty is thus approved by a State through signing, accession or ratification. However, reservations to a treaty may exist whereby a State “purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State” (van Dervort, 1998, p. 379).

Appendix D: Structural Features of the UN and CEC Citizen Submission Process

All information is taken from the relevant UN Resolutions and Treaties, the NAAEC, and Bringing the Facts to Light (see list of references).

	1503	CSW	ICCPR-OP	CEDAW-OP	ICERD	CAT	CEC SEM
Name	Procedure for dealing with communications relating to violations of human rights and fundamental freedoms (the 1503 Procedure)	The Procedure of the Commission on the Status of Women	Procedure under the Optional Protocol to the International Covenant on Civil and Political Rights	Communications procedure of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women	Individual complaint procedure of the Committee on the Elimination of Racial Discrimination	Procedure of the Committee Against Torture	Articles 14 and 15 Submissions on Enforcement Matters (SEM) Procedure
International Organization	UN Economic and Social Council (UNECOSOC) Commission on Human Rights	UN Commission on the Status of Women	UN Human Rights Committee	UN Committee on the Elimination of All Forms of Discrimination Against Women	UN Committee on the Elimination of Racial Discrimination	UN Committee Against Torture	Commission for Environmental Cooperation (CEC) Secretariat
Treaty / Original Documents	UNECOSOC Resolutions 1503 (1970), 1990/41 (1990), and 2000/3 (2000)	UNECOSOC Resolutions 76(V) (1947), 304 I(XI) (1950), 1983/27 (1983), 1992/19 (1992) and 1993/11 (1993).	International Covenant on Civil and Political Rights (ICCPR)	International Covenant on the Elimination of All Forms of Discrimination Against Women (CEDAW)	International Covenant on the Elimination of All Forms of Racial Discrimination (ICERD)	UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)	North American Agreement on Environmental Cooperation (NAAEC)
Available to...	Anyone	Any woman or group of women	Citizens of countries party to ICCPR-OP	Citizens of countries party to CEDAW-OP	Citizens of countries which have signed Article 14 of the ICERD	Anyone	Citizens of Canada, Mexico, and the USA

	1503	CSW	ICCPR-OP	CEDAW-OP	ICERD	CAT	CEC SEM
Reservations	Not applicable.	Not applicable.	Reservations are allowed as long as the objectives of the OP are not compromised.	State parties must recognize the competence of the Committee to investigate; no other reservations are permitted.	State parties must recognize the competence of the Committee to accept communications; reservations are allowed as long as the OP's objectives are not compromised.	State parties must recognize the competence of the Committee to accept communications.	The ability of the Council to block preparation or publication of a factual record is equivalent to a reservation.
Groups involved in accepting and assessing the merits of communications	The UN Secretariat and the Working Group (WG) on Communications screen out "ill-founded" communications; WGs on Situations and Communications evaluate the validity of communications; the Commission examines situations referred to it by the WG on Situations.	The UN Secretariat assesses admissibility; a Working Group (WG) on Communications examines communications and refers them to the Commission.	The Human Rights Committee rules on admissibility and evaluations the validity of communications.	The Committee decides on admissibility and evaluates the validity of communications; it may appoint 5-member Working Groups (WG) to assist it.	The Committee rules on admissibility and evaluates the merits of communications; it may appoint a Working Group (WG) to assist it or be assisted by a Special Rapporteur.	The Committee assesses admissibility and assesses the validity of communications.	The SEM Unit of the CEC Secretariat receives communications and corresponds with states; the Council votes for or against publication of a factual record.

	1503	CSW	ICCPR-OP	CEDAW-OP	ICERD	CAT	CEC SEM
Admissibility Criteria	See UNECOSOC Sub-Commission on the Prevention of Discrimination and Protection of Minorities Res. 1 (1971) p.2; UNECOSOC Res. 1503 (1970) p.6; UNECOSOC Res. 2000/3 (2000) p. 2.	See UNECOSOC Res. 1992/19 (1992), p. 6.	See ICCPR-OP Articles 3, 5.	See CEDAW-OP Articles 3, 4.	See ICERD Rule 91.	See CAT Article 22.	See NAAEC Article 14.2; <u>Bringing...</u> , p9-12.
Composition of assessment bodies	Commission: consists of country representatives to the UN; each WG consists of 5 Commission members, appointed by the Chairman.	Members of the Commission are appointed by Governments and elected by the UNECOSOC; WG on Communications consists of 5 members of the Commission.	Members of the Committee are elected by State Parties to the Covenant; candidates are selected by the State Parties.	Committee: 23 experts elected by State Parties from among their nationals; WG: established by Committee, comprised of 5 of its members; Special Rapporteur: designated by the Committee.	Committee: 18 experts, elected by State Parties to the Convention from among their nationals; WGs: 5 members of the committee, selected by it; Special Rapporteur: designated by the Committee from among its members.	10 experts, elected by State Parties to the Convention, who also select the candidates.	Council: environment ministers of Canada, Mexico, the USA (or their representatives); Secretariat: appointed by the Secretariat Chair, who is elected by the Council.

	1503	CSW	ICCPR-OP	CEDAW-OP	ICERD	CAT	CEC SEM
Decision-making procedures	Majority.	Majority.	Majority.	Majority.	Majority.	Majority.	2/3 majority by the Council
Timeframe for assessment of complaints	See UNECOSOC Res. 2000/3 (2000), UNHCHR (undated) part 2.	Based on the WG, Commission annual meeting schedules.	Possibly several years.	See CEDAW Rules 59(1), 69(1,5,9), CEDAW-OP Articles 6(1,2), 7(4).	See ICERD Rules 94(2), 92(5), 86(1).	Months.	See NAAEC Articles 14.3, 15.5, 15.7; <u>Bringing...</u> p12,14; Council Res. 01-06.
Role of authors of communications	None, beyond the initial submission.	None, beyond the initial submission.	None, beyond the initial submission.	Authors can be contacted for clarification by the Secretariat or the Committee and are given the chance to comment on submissions made by the State Party in question.	Authors can be contacted by the Secretariat, the Committee, or the WG for clarification and can be invited by the Committee to appear in person to answer questions or provide additional information.	Authors can be called upon to clarify the communication; invited to comment on communications in person at closed meetings of the Committee; and are notified of the final views of the Committee.	Authors sometimes are asked to revise their submissions to meet admissibility criteria.
Confidentiality	Almost all aspects of the procedure are confidential. See UNECOSOC Res. 2000/3 (2000) p3,5,7,8,9.	Some aspects of the procedure are confidential. See UNECOSOC Res. 76 (V) (1947), 304 I(XI) (1950).	Some aspects of the procedure are confidential. See ICCPR-OP Articles 6,45.	Some aspects of the procedure are confidential. See CEDAW Rules 74(1,2,3,6,8,10,11), 75.	Some aspects of the procedure are confidential. See ICERD Rules 88, 95(3,4),96,97.	Almost all aspects of the procedure are confidential.	Largely transparent; the Council can suppress publication of a factual record. See <u>Bringing...</u> p12,13,16,19-20.

	1503	CSW	ICCPR-OP	CEDAW-OP	ICERD	CAT	CEC SEM
Investigative Functions of Assessing Group(s)	Decisions are made based on communications and state replies. See UNECOSOC Res. 2000/3 (2000) p3,5,7,8; Sub-Commission on the Prevention of Discrimination and Protection of Minorities Res. 2 (1971) p4.	Decisions are made based on communications and state replies.	Decisions are made based on communications and information obtained from State Parties (ICCPR-OP Article 4). No other investigations take place.	See CEDAW Rule 72(2).	The Committee and WG can contact individuals and States for clarification, and obtain documents from other UN bodies. See ICERD Rules 84(1), 92(1), 94(5), 95(2).	The Committee considers information provided by the State and the complainant, and can visit the country in question. Special Rapporteurs and some well-known NGOs can also be consulted.	See NAAEC Article 21; <u>Bringing...</u> p16-17.
Built-in Limits on Investigative Functions	<i>Ad hoc</i> investigations require the “express consent” of the State concerned, and should be carried out cooperatively and with the goal of achieving “friendly solutions”. See ECOSOC Res. 1503 (1970) p6.	See UN Economic and Social Council Resolutions 76(V) (1947), 304 I(XI) (1950), 1983/27 (1983), 1992/19 (1992) and 1993/11 (1993).	Reliance on State Parties for information means that they may delay the functioning of the OP by withholding information.	None.	None.	The Committee requires State permission before it conducts a visit, and has no means of forcing the State to provide information.	If the Council votes against the preparation of a factual record, the Secretariat is prevented from investigating the matter further. See NAAEC Articles 15.2, 15.7.
Funding Source	UN	UN	UN	UN	UN	State Parties to the Convention.	CEC funders:US, Canada, Mexico,

	1503	CSW	ICCPR-OP	CEDAW-OP	ICERD	CAT	CEC SEM
Possible outcomes / Final products	Possible outcomes: discontinuation of the matter; holding the matter under review for a year; appointment of an independent expert; consideration of the matter under the public 1235 procedure; recommendations to the UNECOSOC.	The Committee's written report to the Economic and Social Council. This may include recommendations for action.	Views (ICCPR-OP Article 5).	Views and recommendations from the Committee, individual opinions of members who wish to comment. See CEDAW-OP Article 7(3,4,5); CEDAW Rule 72(6), 73(4,5).	Opinions, suggestions, and recommendations; any member of the Committee may have his/her own opinion appended to the views of the Committee.	Views formulated by the Committee; any member may express an individual opinion. States are requested for information about remedies to transgressions of the Convention; a summary of the matter is included in the Committee's annual report.	Discontinuation of the matter; publication of a factual record.
Method by which output is produced and publicized	See UNECOSOC Res. 2000/3 (2000) p8,9.	Reports of the Sessional Meetings of the Commission on the Status of Women.	Annual report, press releases. See ICCPR-OP Article 6.	See CEDAW-OP Article 13.	Views forwarded to the petitioner and the State Party concerned; a summary of the communications examined included in the Committee's annual report; communiqués may also be issued by the Commission.	Annual report.	A registry exists in which most documents are filed. See <u>Bringing...</u> , p19.