THE CAFTA-DR
ENVIRONMENTAL CHAPTER

The Submission Process
The main objective of this chapter is the promotion of environmental protection through the effective implementation of each party’s domestic laws.

Each Party retains the ability to establish its own level of domestic environmental protection.
What is environmental law?

Article 17.13 defines environmental law as any statute, the primary purpose of which is the protection of the environment or prevention of danger to human, animal or plant health through control of pollutants, toxic chemicals and conservation of wild flora and fauna.

The definition explicitly excludes laws relating to:

- commercial or subsistence harvest or exploitation of natural resources and
- worker health and safety.

*Does 17.2 (1) limit enforcement to environmental laws "affecting trade?“
The principle enforcement mechanism of CAFTA-DR is the citizen submission process.

The entities involved in this process are:

- The Secretariat for Environmental Matters (SEM),
- The Environmental Cooperation Commission and
- The Environmental Affairs Council (EAC).
The Secretariat for Environmental Matters

- Was created under CAFTA-DR and operates under the sole direction and supervision of the Environmental Affairs Council.
- Is a public entity that receives and considers public submissions claiming that a Party is failing to effectively enforce its environmental laws.
- Is responsible of preparing factual records regarding submissions.
- Consists of a General Coordinator and a Technical Assistant, both appointed by the Council for a two-year term.
- Is a unit within the Secretariat for Central American Economic Integration “SIECA”.
The Environmental Affairs Council

- Is a body composed of cabinet-level members or their designees.
- The Parties must have an office in the corresponding ministry that would operate as a contact point for the EAC.
- The council meets annually to oversee the implementation of Chapter 17.
Objective: This process aims to enforce domestic environmental law in the event that a Party fails to effectively implement or substantially enforce their own law.
Six Steps of the Submission Process

1. Drafting the Submission.
2. Determining if a response from the Party is needed.
3. Requesting a response from a Party.
4. Determining if a factual record is warranted.
5. Creating a factual record.
6. Publishing the factual record.
Submission Requirements:
• English or Spanish
• Identification of the submitter
• Sufficient information
• Aimed at promoting enforcement
• Previous communication to the authorities of the Party
• Filed by a person of a Party

The Secretariat requests a response from the party. The party has 45-60 days to advise the Secretariat.

- The Secretariat considers that factual record is necessary; then it informs the Environmental Affairs Council (EAC); EAC decides to prepare factual record.

- The Secretariat prepares a draft factual record, which submits to the EAC.

- Comments by parties

- The Secretariat prepares final factual record and submits it to the EAC.

- By a vote of any party, the EAC makes the factual record publicly available.

- The EAC provides recommendations to the Environmental Cooperation Commission (ECC).
Submission requirements

- The CAFTA-DR process requires that every submission meet six basic criteria:
  1. Be filed by a member (any person or entity) of a Party.
  2. Be in English or Spanish.
  3. Identify the person or entity making the submission.
  4. Provide sufficient evidence on which the submission may be based.
  5. Show that the matter has been communicated to the Party and any responses from the Party.
Drafting the submission

Key Considerations:

- The most critical requirement is that the submission must relate to **implementation** or **enforcement** of a law already in existence.
- Very low initial evidentiary standard.
- Only an attempt at communication with the Party is required.
- A longer submission is not necessarily a better submission.
- The Submitter may declare certain information confidential, marking the top of each page as **CONFIDENTIAL** in red ink.

- Notification of receipt within 7 days.
Is a response needed from the Party?

- SEM looks to four factors in assisting its determination:
  - Must not be frivolous and must allege harm to the Submitter.
  - Exhaustion of private remedies.
  - Raise matter which further the goals of CAFTA-DR.
  - Should not be based exclusively on media reports.

- These are not required, they serve only as guidelines.

- If the SEM decides not to request a response, the Submitter and the Party will be notified and the Submitter will have 60 days to revise the submission.

- If the submission is not appropriately revised, it will be dismissed without prejudice to either the Submitter or issue.
Once a response is requested:

- The Party will be forwarded copies of the submission and supporting documentation.
- Thereafter, the Party will have 45 days to respond (this can be extended to 60 days if requested).
- The response should include notice of judicial or administrative proceedings on the same issue and any supplemental information they wish to include.
- If the submission issue is also the main issue in a pending action the submission will be dismissed.
- If the submission is not dismissed then the SEM must determine if a factual record is warranted.
Determining if a factual record is warranted:

- The SEM will review the totality of the evidence received from the Submitter and Party and will then notify the Council of its decision in a written explanation.
- A vote by one Party on the Council is all that is required to create a factual record.
- Thereafter, the Council may request clarification within 21 days; otherwise they have 120 days to reach a decision; if no action is taken the submission will be dismissed.
Creating a factual record:

- The SEM has **180 days** to complete the factual record (this may be extended for another 180 days).
- The SEM is required to use all information presented to them by the Submitter or Party but may also use external sources such as:
  - Any publicly available evidence.
  - Information presented by interested persons
  - Independent experts.
  - Party advisors.
  - Information developed under the Environmental Cooperation Agreement.
Once the SEM completes its investigation it will then draft an initial factual record containing:

- An executive summary.
- Summaries of the submission and the response by the Party.
- Reasons for developing the factual record.
- Information considered.
- Factual findings.

The Party is then given 45 days to comment on the accuracy of the draft factual record.

Thereafter, the SEM has 60 days to submit the final factual record to the Council.
To publish or not to publish?

- The Council has 60 days to vote to publish the final factual record.
  - One vote is sufficient for publication.
  - There may be no votes prior to 15 days after the final factual record has been submitted to the Council.
  - If there are no votes within 60 days, the SEM will notify the Council and Submitter and the factual record will not be published.
Withdrawing a submission:

- Before a Party has responded, the SEM must terminate the submission at the Submitter's written request.
- After a Party has responded, the SEM may only terminate a submission with approval by the Party.
- After a factual record is ordered, the SEM must continue to create the factual record unless otherwise directed by the Council.
Submission successes:

- Arena Playa Las Canas (Dominican Republic)
  - Private sand mining.
  - Thanks to pressure applied through the submission process, the Dominican Republic voluntarily ceased this activity.

- Turtles case (Dominican Republic)
  - Sea turtle harvesting for use in jewelry.
  - The SEM is currently creating a factual record.
Key considerations for the NGO:

- The submission must relate to implementation or enforcement of an existing law.
- **Confidentiality** must be requested at the beginning of the process.
- The submission does not need to be evidence intensive, that is the purpose of the factual record.
- The Submitter only has the power to unilaterally withdraw a submission prior to the Party responding.
- Anticipate at least a year from submission to publication of a final factual record.
- The factual record is not binding on the offending Party and only serves to make the noncompliance issue more well known.
Questions?